Dalhousie Law Journal

Volume 3 | Issue 2 Article 25

10-1-1976

Doyle v. Doyle

Michael T. Hertz

Michael T. Hertz*

Doyle v. Doyle

In *Doyle* v. *Doyle,*[1] the defendant in a civil action moved to set aside the service of a writ of summons on the grounds of want of jurisdiction of the Newfoundland Supreme Court. The defendant, resident and domiciled in Montreal, was arrested there on December 7, 1973, and taken under police escort to St. John's. He was released on bail on December 11 but was required to remain in Newfoundland until final disposition of the fraud case for which he had been arrested. On December 17 a writ was issued against him from the Newfoundland Court and on December 18 it was served on him in Newfoundland. This action was one for arrears of maintenance under a Quebec judgment.[2] The defendant asked that the writ and service thereof "be set aside . . . on grounds that he was only found within the jurisdiction of the Court where service could legally be effected because he was brought into Newfoundland compulsorily by the police".[3]

The Court rejected the defendant's contentions. It distinguished situations where civil process has been set aside where a defendant was induced to enter the jurisdiction by fraud,[4] such decisions being founded on the principle that service in such instances amounts to an abuse of process of the Court.[5] Where no such fraud existed,[6] or even where a defendant was compelled by military obligations to be

---

*Michael T. Hertz, Associate Professor of Law, Dalhousie University.

1. (1975), 52 D.L.R. (3d) 143 (Nfld. S.C.).

2. *Doyle* v. *Doyle (No. 2)* (1975), 53 D.L.R. (3d) 315 (Nfld. S.C.). The Quebec Court had ordered *interim* payments of alimony pending hearing and determination of the divorce petition in Quebec, under s.10(a) of the *Divorce Act,* R.S.C. 1970, c. D-8. The plaintiff asked for recognition of this *interim* order as a foreign judgment by the Newfoundland Court, although in fact, as the latter noted, the action should have been one for registration under s. 15 of the *Divorce Act.* The result would have been the same, though, because in fact the Quebec judgment was intended to have no effect after determination of the divorce petition, which had been already decided against the plaintiff: (1975), 53 D.L.R. (3d) 315 at 318 (Nfld. S.C.).

3. (1975), 52 D.L.R. (3d) 143 at 144.

4. *E.g., Watkins* v. *North American Land & Timber Co.* (1904), 20 T.L.R. 534 (H.L.).

5. (1975), 52 D.L.R. (3d) 143 at 145.

6. *Colt Industries, Inc.* v. *Sarlie,* [1966] 1 W.L.R. 440; [1966] 1 All E.R. 673 (C.A.).

within the jurisdiction,[7] service could be made properly. "I can find no precedent," the Court concluded, "for saying that an involuntary or accidental entry into the jurisdiction renders a person safe from service of process . . . . The general position seems to me to be perfectly clear and that is that once a person comes within the jurisdiction of Her Majesty's Court then he is liable to such directions as those Courts on behalf of the Sovereign direct".[8]

The Court's position seems supportable under English authority, notably the case of *Pooley* v. *Whetham*.[9] Pooley was brought to England from Paris under extradition on a charge of offences against the bankruptcy laws. While Pooley was in prison awaiting trial, the defendants obtained an order to lodge a writ of attachment with the governor of the prison, so that when Pooley was released he should be handed over to a second prison. Pooley was acquitted of the charges under the bankruptcy laws and then transferred to another prison on the writ of attachment. He applied for discharge to the Vice-Chancellor, who refused to release him. On appeal, the order was affirmed. The Court of Appeal was of the opinion that nothing prevented the service of the writ of attachment while Pooley was in prison, even though he was there under the Extradition Act, as the Act itself did not require such a privilege, and the criminal charges against Pooley had been laid *bona fide* and not merely to bring him to England for the purposes of serving the civil writ of attachment.[10] There being, therefore, no abuse of the Court's process, the attachment would remain.

The American position has diverged in important respects from the English and Canadian, to such an extent that one can fairly say

---

7. *Lawrence* v. *Ward*, [1944] O.W.N. 199; [1944] 2 D.L.R. 724 (H.C.).
8. (1975), 52 D.L.R. (3d) 143 at 145-6.
9. (1880), 15 Ch. D. 435 (C.A.).
10. *Id.* at 444. The American view is otherwise. See, *e.g.*, *Smith* v. *Canal Zone* (1918), 249 F. 273 (5th Cir.) and *Re Reinitz* (1889), 39 F. 204 (C.C.N.Y.). The rule has been enacted into statute in many states so that a person brought into the state by extradition could not be subject to service of process in a civil action arising out of the same facts as the criminal prosecution. The reason for this rule was that, in its absence, many state governors were reluctant to sign extradition papers on the grounds that such extradition was often used solely as a means of getting a debtor within the borders of a state where his creditors resided. See *Thermoid Company* v. *Fabel* (1958), 4 N.Y. 2d 494 at 500-501; 176 N.Y. S.2d 331 at 335-336. Some states extended the rule to cover even civil causes unrelated to the criminal action. See, *e.g.*, *Murray* v. *Wilcox* (1904), 122 Iowa 188; 97 N.W. 1087 (defendant extradited on felony charges immune from suit for breach of promise to marry).

that there is substantial American authority for the proposition that involuntary entry of a non-resident to face criminal charges does not subject him to civil service of process. Furthermore, the use of service of process within the territory of the Court as the sole justification for taking jurisdiction over a non-resident defendant has been under attack. In this light it is worth commenting on the American divergence from the English common law and the American experience in this area.

Under English law, witnesses, jurymen, and prosecutors are protected *eundo, morando, et redeundo*[11] from civil arrest whether in attendance on a civil or criminal matter,[12] the latter being where they are free on recognizance.[13] The privilege does not extend to arrest for criminal offences,[14] nor does it extend to service of process as opposed to civil arrest.[15] The latter distinction appears to be uncontradicted by the scanty Canadian authority.[16]

Some early American cases clung to the distinction between allowing a privilege from civil arrest but not with respect to a summons.[17] But other courts, particularly in Pennsylvania[18] and New York,[19] extended the privilege to service of summonses, the reason being given generally that, without a privilege, necessary witnesses would be discouraged from giving evidence[20] and parties would be subject to inconvenience in attending court in distant places.[21]

---

11. *The King* v. *Hall* (1776), 2 Bl.W. 1110; 96 E.R. 655 (K.B.). The privilege has existed from the earliest times. Note (1920), 33 Harv. L. Rev. 721 at 722 n. 4; Note (1910), 23 Harv. L. Rev. 474 at n. 1.
12. *Gilpin* v. *Cohen* (1869), L.R. 4 Exch. 131 at 134.
13. *Id.*
14. *Quebec Liquor Comm'n* v. *Bastien,* [1933] 1 D.L.R. 514 (Que. K.B.). *Accord, United States* v. *Conley* (1948), 80 F. Supp. 700 (D. Mass.).
15. *Poole* v. *Gould* (1856), 25 L.J. Ex. 250 (Ex.). *Accord, Parker* v. *Hotchkiss* (1849), 18 Fed. Cas. (No. 10,739) 1137 (comparing English and Pennsylvania law).
16. *Quebec Liquor Comm'n* v. *Bastien,* [1933] 1 D.L.R. 514 (Que. K.B.); *Gibbons* v. *Tuttle* (1906), 9 Nfld. L.R. 186; *Burke* v. *Sutherland* (1840), 1 Kerr. 166 (N.B.).
17. See, *e.g., Page* v. *Randall* (1856), 6 Cal. 32; *Legrand* v. *Bedinger* (1827), 20 Ky. (4 T.B. Mon.) 539; *Hunter* v. *Cleveland* (1802), 1 Brev. 167 (S.C.).
18. *Hayes* v. *Shields* (1797), 2 Yeates 222 (Pa.), citing *Bolton* v. *Martin* (1788), 1 Dall. 296 (Pa. Comm. Pl.) (member of legislature privileged from service of summons).
19. *Person* v. *Grier* (1876), 66 N.Y. 124.
20. *Atchison* v. *Morris* (1882), 11 F. 582 at 585 (C.C.N.D. Ill.).
21. *Hayes* v. *Shields* (1797), 2 Yeates 222 (Pa.).

In 1809, Justice Washington of the United States Supreme Court, sitting on circuit, decided that the extension of the privilege to summonses need not be made by the federal courts,[22] preferring the English to the Pennsylvanian approach. Forty years later, and despite a practice "which has been acquiesced in and acted upon by the whole profession,"[23] Justice Washington's decision was overruled in a decision which had the support of then Chief Justice Taney of the Supreme Court. The Court said:

> It is said that the practice of this court, since the decision in *Blight* v. *Fisher* . . . , has been uniform to discharge in such cases as this, from arrests under capias, but not to set aside the service of a summons. I confess that I have never apprehended the reason of this distinction, and when it was pressed upon me by the counsel for the plaintiff, I did not disguise my reluctance to accede to it . . . .
>
> The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending to testify. Witnesses would be chary of coming within our jurisdiction, and would be exposed to dangerous influences, if they might be punished with a lawsuit for displeasing parties by their testimony; and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defence, if they were liable to be visited on the instant with writs from the defeated party.
>
> As the privilege of the court, this incidental immunity to the party can scarcely be the subject of abuse. It can be exercised or not in each particular case, as the purposes of substantial justice may seem to require. [Citation omitted]. The suitor or the witness from another jurisdiction may be relieved: he who is at home here amongst us, suffering no inconvenience from the service, may be refused his discharge . . . .[24]

This reasoning took firm root in the United States, and it has been applied generally to protect witnesses, suitors, and attorneys in attendance on a civil cause of action from service of process in another.[25] In criminal matters, witnesses, attorneys and jurymen are likewise protected, but the position of criminal defendants is less clear.

---

22. *Blight* v. *Fisher* (1809), 3 Fed. Cas. (No. 1542) 704 (C.C.N.J.).
23. *Parker* v. *Hotchkiss*, 18 Fed. Cas. (No. 10,739) 1137 (C.C.E.D. Pa.).
24. *Id.* at 1138.
25. *Lamb* v. *Schmitt* (1931), 285 U.S. 222 at 225; 52 S. Ct. 317 at 318.

There is a split of authority with regard to non-resident criminal defendants[26] in situations where a non-resident defendant in a criminal action has voluntarily entered the state, where he has returned after being released on bail, and where the defendant has come involuntarily into the state to stand trial.

Where there is a voluntary submission by the defendant to criminal trial, most American courts will grant immunity from civil service of process. The leading New York case of *Thermoid Company* v. *Fabel*[27] is indicative of the approach taken here. Fabel was indicted in a New York Federal Court for defrauding the government of the United States. A warrant could have been issued out of the New York Federal Court and executed upon Fabel to remove him from North Carolina to New York. Fabel obviated this procedure by surrendering to the New York Court, posting bail, and returning to North Carolina. After standing trial and receiving a fine and suspended jail sentence, Fabel was served on the courthouse steps in a civil suit connected to the fraud case.

The privilege was upheld. The purpose of the privilege "is to encourage voluntary attendance upon courts and to expedite the administration of justice".[28] Where the attendance was not voluntary the suitor or witness would not be protected as he would have no choice but to attend and could not influence the expeditious handling of the case.[29] The fact that Fabel could have been forced to come to New York by execution of the warrant was not compelling because he had obviated the necessity of putting legal machinery in motion.[30]

Some courts have gone further, however, and have held that even one involuntarily present in the state can be given immunity. In *Feuster* v. *Redshaw*,[31] the Maryland Court of Appeals adopted this view where the defendant was free on bail and

> . . .he might possibly have obviated the necessity for his return for the trials by remaining away and forfeiting the collateral

---

26. *United States* v. *Conley* (1948), 80 F.Supp. 700 at 702 (D.Mass.) (*per* Wyzanski J.).
27. (1958), 4 N.Y. 2d 494; 176 N.Y.S. 2d 331.
28. *Id.* at 499; 176 N.Y.S. 2d at 334, citing *Netograph Mfg. Co.* v. *Scrugham* (1910), 197 N.Y. 377 at 380; 90 N.E. 962 at 963.
29. *Id.*
30. The court distinguished this situation from one involving extradition as none was needed: (1958), 4 N.Y. 2d at 500-501; 176 N.Y.S. 2d at 335-336.
31. (1929), 157 Md. 302; 145 A. 560.

deposited.[32]

Still, he could be said to be involuntarily before the Court. Nor, added the Court, could it be said that a non-resident defendant in a civil suit was in "voluntary" attendance, yet he was granted a privilege from service in other actions. The Court also emphasized the need to prevent the party defendant from being harassed, distracted or intimidated by the prospect of other litigation. *Church* v. *Church*[33] likewise rejected the notion that only voluntary appearances would be protected, saying that

> [i]t would border on an abuse of process to force a person to come within the jurisdiction for one purpose, say that he may be prosecuted for a crime, and then subjected to other litigation, for which he could not have been compelled to leave the state of his home.[34]

The case has been overruled, however, on the grounds that, where the defendant was within the jurisdiction "in response to his obligation under a bond in a criminal proceeding growing out of alleged offences committed [here] . . . the principal reason for the immunity, namely, to encourage voluntary cooperation with judicial administration, is absent".[35]

Sentiments similar to those expressed in the *Church* case may, though, be found in other judgments. In *United States* v. *Bridgman,*[36] almost on all fours with the situation in *Thermoid Co.* v. *Fabel,* the Court said that the non-resident defendant, voluntarily appearing to a federal indictment, was in reality compelled to do so, and yet would be privileged from service with any civil process. In *Kaufman* v. *Garner,*[37] the Court rejected a distinction between a civil defendant and a criminal accused, stating that such a distinction would, in the main, appear to be based on the notion of treating the criminal harshly and, in the light of the presumption of innocence, should not be condoned.[38] The Court felt that the privilege in the two cases

> . . .is based upon considerations alike of public policy and the dignity and independence of the court first acquiring jurisdiction,

---

32. *Id.* at 304; 145 A. at 562.
33. (1921), 270 F. 361 (D.C. Cir.).
34. *Id.* at 363.
35. *Greene* v. *Weatherington* (1962), 301 F. 2d 565 at 568 (D.C. Cir.).
36. (1879), 24 Fed. Cas. (No. 14, 645) 1230 (C.C. E.D. Wis.).
37. (1909), 173 F. 550 (C.C. Ky.).
38. *Id.* at 554.

as well as the idea that such attendance is under compulsion . . . .[39]

In *Dwelle* v. *Allen,*[40] Judge Learned Hand dealt with the distinction between voluntary and involuntary appearances. In that case, the non-resident defendant was in New York to plead to a federal indictment. After paying his fine, he was served with a summons to appear before a grand jury. After appearing to the summons, he was served with civil process. Judge Hand decided that no distinction should be made between a witness voluntarily appearing and one under *subpoena.*

> . . .[T]he proper test is not . . . whether the appearance be voluntary or not, but whether the privilege will promote the purposes of justice. It would certainly be a strain upon one's confidence in the sanctions of process to say that the privilege would not conduce obedience.[41]

Judge Hand examined the leading New York case at the time, *Netograph Mfg. Co.* v. *Scrugham.*[42] In *Netograph,* the defendant was served with process after being acquitted in a New York criminal trial. The defendant had, after his indictment, gone back to Ohio on recognizance and returned. The New York Court of Appeals "declined to vacate the process, on the ground that his release from custody on recognizance still left him in the custody of his bail, and that his subsequent appearance was not voluntary."[43] While recognizing that the privilege has a lesser impact in persuading criminal defendants to return to court when they are out on bail, Judge Hand thought that "there is at least an argument that the custody of bail is not such that it will surmount the possible deterrent which might arise from liability to civil suit".[44]

Commenting on the tendency of federal courts to grant a criminal defendant immunity from civil process, Judge Charles Wyzanski

---

39. *Id.* See also *Adamy* v. *Parkhurst* (1932), 61 F. 2d 517 (6th Cir.); *Alla* v. *Kornfeld* (1949), 84 F. Supp. 823 (N.D. Ill.); *Martin* v. *Bacon* (1905), 76 Ark. 158; 88 S.W. 863.
40. (1912), 193 F. 546 (S.D.N.Y.).
41. *Id.* at 548-49.
42. (1910), 197 N.Y. 377; 90 N.E. 962.
43. (1912), 193 F. 546 at 547. Compare E. W. Hinton, Note (1925), 20 Ill. L. Rev. 172 at 177 (criticizing technical holding that release on bail left defendant in "custody"), with A. Keeffe & J. Roscia, *Immunity and Sentimentality* (1947), 32 Corn. L.Q. 471 at 488 (viewing rule as logically necessary and desirable) [hereinafter "Keeffe"].
44. (1912), 193 F. 546 at 548.

has written that there is some reason to doubt that the Supreme Court would follow this trend.[45]

> The Court might conclude that neither the dignity of attendance upon a federal court, or the desire to conduce a criminal defendant to obedience, or the purpose of encouraging a criminal defendant to vindicate himself, or the policy of not interfering with or embarassing federal court proceedings required the allowance of any such protection against civil litigation.[46]

The policies listed by Judge Wyzanski in support of the privilege are not of equal importance, and some are not particularly compelling.[47] Yet before concluding that no privilege should be accorded to the criminal defendant involuntarily within the jurisdiction, one should ask: Who is hurt by the immunity from civil service of process which such defendants might enjoy? The persons affected by such immunity granted to civil defendants are third parties who wish to bring an action against the immunized defendant *and who cannot bring an action against the defendant without serving him within the court's territory.*[48]

Solicitousness for the plight of the resident plaintiff as opposed to the nonresident defendant was doubtless not misplaced when courts had limited power to serve such defendants extra-territorially. In the United States, that limitation was cast in constitutional terms in the 1877 case of *Pennoyer* v. *Neff,*[49] which removed from the states the power to pass Order XI rules for service *ex juris* on the model of those established by the English Common Law Procedure Act, 1852.[50] The American constitutional impediment was destroyed in 1945 with *International Shoe Co.* v. *State of Washington,*[51] and the development of "long-arm" statutes has since led to broad local power in American states to subject nonresident defendants to their jurisdiction.

The privilege from service of process does not protect nonresident defendants against service *ex juris*. Whatever the

---

45. *United States* v. *Conley* (1948), 80 F. Supp. 700 at 702 (D. Mass), noting the approving citation of *Netograph Mfg. Co.* v. *Scrugham* in *Lamb* v. *Schmitt* (1932), 285 U.S. 222 at 226; 52 S. Ct. 317 at 318.
46. *Id.* at 703.
47. See generally, Keeffe, *supra*, note 43 at 473-81 (criticizing the immunity doctrine generally).
48. *Id.*
49. (1877), 95 U.S. 714; 24 L. Ed. 565.
50. 15 and 16 Vict., c. 76.
51. (1945), 326 U.S. 310; 66 S. Ct. 154.

reasons for having the privilege, all courts have agreed that it applies to nonresidents only. The policy behind the privilege is to limit the nonresident's burden when he comes within the territory of the court and thereby loses an advantage which residents do not have. But when entry into the state is no longer a *sine qua non* for service in a civil suit, the protection is no longer relevant. Those American courts faced with the issue have agreed that

> [a] nondomiciliary who could be served outside the state cannot claim immunity from service if he is served [within the state], even if he is here voluntarily and in the aid of justice.[52]

The development of efficient extraterritorial jurisdiction has, on the other hand, increased the tempo of attacks upon mere presence of the defendant and service of process upon him on that basis as a functionally acceptable means of obtaining jurisdiction over him.

> The inadequacy of this rule, and its contrast with the law prevailing elsewhere in the world, has often been stressed. A rule compelling the traveller "to run the gauntlet of such litigation under treat of snap judgment" offers "premiums to scavengers of sham and stale claims at every center of travel". The rule "may result in trying the suit in a State in which no part of the operative facts occurred and in which neither of the parties lives," so that "the defendant may be called upon to defend in a place with which he is unfamiliar", and the forum may not be "in a favourable position to deal intelligently either with the facts or with the law".[53]

In sum, in the era of the "long-arm" statute, the plaintiff who argues for a narrower immunity from service of process is in a far less appealing position than before. If the plaintiff *must* rely on service of process within the territory of the court in order to obtain jurisdiction over the defendant, this means that neither the defendant nor the cause of action has a sufficient nexus to the territory to permit service *ex juris*. In turn, this means that the invocation of local jurisdiction rests on a tenuous basis, and consequently attention should be paid to any interest which the defendant can advance to show that he should be immunized from such service.

---

52. *Gardner* v. *United States* (1965), 246 F. Supp. 1014 at 1015 (S.D.N.Y.). *Accord, Chauvin* v. *Dayon* (1961), 14 App. Div. 2d 146; 217 N.Y.S. 2d 795; *Silfin* v. *Rose* (1959), 17 Misc. 2d 243; 185 N.Y.S. 2d 90 (Sup. Ct.). *Cf. Christian* v. *Williams* (1892), 111 Mo. 429; 20 S.W. 96. See also *Severn* v. *Adidas Sportschuhfabriken* (1973), 33 Cal. App. 3d 754; 109 Cal. Rptr. 328.

53. A.A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power"*

Two American Courts have recently moved to abolish the privilege generally.[54] Commentators reviewing these decisions have found them laudable to the extent that they restrict an indisciminate application of the privilege, but a significant number have criticized the flat elimination of the privilege, on the basis noted here: that physical presence should be de-emphasized as a jurisdictional basis and "the litigant's immunity be kept intact . . . to provide nonresidents with a fair opportunity to protect their interests in the forum state."[55]

With the American experience in mind, we can now turn to the situation in Canada. Only three reported Canadian cases[56] even touched on this area prior to the *Doyle* decision, so it can hardly be said that there is settled Canadian precedent on the matter. The historical influence of English law should not deter examination. The need for the privilege increases in a multi-jurisdictional setting, and the English experience could be easily disregarded as unsuitable to a federal country like Canada.[57] Why, though, has the issue not arisen before this?

Aside from the closer ties between Canadian and English law, two differences between the Canadian and American situations may be suggested as suppressing the development of the privilege in Canada. First, since the days immediately following Confederation, criminal law has been a federal matter and defendants and witnesses in criminal trials have been subject to nationwide summonses and warrants.[58] Compared to the United States, where one state could prevent the extradition of fugitives to another state and in which

---

Myth and Forum Conveniens (1956), 65 Yale L.J. 289 at 289-90. See also P.M. North, *Cheshire's Private International Law* (9th ed. London: Butterworths, 1974) at 81; H.E. Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (Cambridge: Harvard University Press, 1938) at 150-51.

54. *Severn* v. *Adidas Sportschuhfabriken* (1973), 33 Cal. App. 3d 754; 109 Cal. Rptr. 328; *Wangler* v. *Harvey* (1963), 41 N.J. 277; 196 A.2d 513.

55. Note (1964), 77 Harv. L. Rev. 1346 at 1349. *Accord,* S. Thompson, Note (1974), 10 Cal. West. L. Rev. 646 at 651-652; L.C. Schubert, Note (1974), 26 Hastings L.J. 512 at 534; Note (1964), 64 Colum L. Rev. 1157 at 1161-62.

56. *Supra,* note 16.

57. Canadian courts have, of course, found English statutes and common law to be inapplicable to local conditions. *E.g., Re G., G.* v. *C.,* [1951] 3 D.L.R. 138; 2 W.W.R. 271 (B.C.S.C.); *R.* v. *Cyr* (1918), 38 D.L.R. 601; [1917] 3 W.W.R. 849 (Alta. S.C., A.D.).

58. An Act respecting Procedure in Criminal Cases, 32 & 33 Vict., c. 29, ss. 23, 25-26. Compare the *Criminal Code,* R.S.C. 1970, C-34, ss. 461, 631-32.

criminal law was largely state controlled, there was little impetus in Canada to encourage voluntary submission by defendants and witnesses to courts trying criminal actions. Voluntary submission, as in *Thermoid Co.* v. *Fabel,*[59] was perhaps desirable, but the critical need for immunity was lacking. This does not, however, explain why the privilege failed to develop to protect participants in civil actions.

The second factor may have been the early development of service *ex juris* in Canada, following closely on the 1852 English legislation. With such power in the courts' hands, the need to encourage attendance by non-residents appeared to be lessened. In fact, of course, judgments rendered on the basis of service *ex juris* were not recognisable in other provinces unless the defendant actually submitted to the jurisdiction of the court.[60] That in turn should have encouraged the growth of the privilege. Yet perhaps it would have been too contradictory for a court to encourage submission through the grant of a privilege to a person over whom the court already claimed *in personam* jurisdiction.

While service *ex juris* is not sufficient to render a judgment recognisable in other provinces, an *in personam* judgment based on the defendant's mere presence within the jurisdiction will be enforced in Canada.[61] It could be argued on this basis that unencumbered[62] use of the transient rule of jurisdiction should be continued. Yet the fact that some judgments should be recognized but are not does not mean that a court should take jurisdiction in other cases where recognition will for historical reasons be accorded but the basis for jurisdiction is inappropriate.

There are some instances when use of presence alone is appropriate. A good example is *MacAulay* v. *O'Brien,*[63] where a British Columbia court took jurisdiction over a temporarily present Yukon resident. At the time of the case, there were no courts in the Yukon, and British Columbia was the closest place where jurisdiction could be had over the defendant. Similarly, in *Doyle's* case, if the husband removed all of his assets from Quebec when he

---

59. (1958), 4 N.Y. 2d 494; 176 N.Y.S. 2d 331. See text accompanying notes 27-30, *supra.*
60. *E.g., Deacon* v. *Chadwick* (1901), 1 O.L.R. 346 (D.C.).
61. *Forbes* v. *Simmons* (1914), 20 D.L.R. 100; 7 W.W.R. 97 (Alta. S.C.).
62. Except for the convenience doctrine. *E.g., Sittler* v. *Conwest Exploration Co.* (1971), 18 D.L.R. (3d) 631 (N.W.T. C.A.).
63. (1897), 5 B.C.R. 510 at 515 (S.C.).

was arrested in order to leave nothing there for his wife, it would be defensible to take jurisdiction in Newfoundland. The position is strengthened because the Newfoundland action was merely for the enforcement of a Quebec judgment. Newfoundland was surely no less convenient for Doyle than would be any jurisdiction outside Quebec.

In conclusion, there is probably good reason in Canada to look closely at the development of a limited privilege, if not by judicial action at least by legislation. Where the mere presence of witnesses, suitors, attorneys, and other persons is their sole connection with a particular jurisdiction, they should be granted immunity from local service of process in the interest of encouraging their full and free attendance on the court matters in which they are initially concerned, of eliminating possible disruption in the first proceedings, and, in general, of leaving the fairness of the first action unprejudiced by the threat of service of process in the second. Where the person being served in the second action can be served *ex juris,* or where there are other factors which would make the local forum convenient to him, the privilege should not be invocable.[64] However, the burden of showing that the privilege should not apply should rest upon the plaintiff, who is attempting to utilize mere presence as his jurisdictional basis.

---

64. In *Wangler* v. *Harvey* (1963), 4 N.J. 277; 196 A.2d 513, the Court abolished the privilege in favour of using a *forum non conveniens* test under which the defendant would be exempted from local jurisdiction if he affirmatively showed that it was unfair to subject him to that jurisdiction. Compare *Logan* v. *Bank of Scotland (No. 2),* [1906] 1 K.B. 141 (C.A.); *Sittler* v. *Conwest Exploration Co.* (1971), 18 D.L.R. (3d) 631 (N.W.T. C.A.). The *forum non conveniens* doctrine, however, does not account for the need to induce certain non-residents to come into the forum's territory. Note (1964), 64 Colum. L. Rev. 1157 at 1161. Nor does it focus on the fairness of requiring defence in the second action as a cost of participating in the first. For these reasons, the *Wangler* approach is an unsatisfactory substitute for the privilege.