NOTES

CIVIL PROCEDURE—SERVICE OF PROCESS—IMMUNITY FOR NONRESIDENT CRIMINAL DEFENDANT WHO APPEARS VOLUNTARILY

In *White v. Henry*[1] the Supreme Court of Georgia fulfilled a prediction made by this Law Review nine years ago[2] when the court held that a nonresident criminal defendant who appears voluntarily to answer the charge against him is immune from service of civil process.

Appellant White, a Florida resident, was served with a criminal warrant for abandonment while he was in Georgia. The warrant was issued pursuant to proceedings instituted by the appellant's former wife, a resident of Georgia. White made bond for the next term of superior court and left the state; nine days later his former wife filed a petition for contempt against him. The petition alleged that the appellant had failed to comply with the child support provisions of their divorce decree and requested that a writ of *ne exeat* issue to prevent him from leaving the jurisdiction of the court. Since the appellant had already returned to Florida, service of process was not perfected.

When White failed to appear at the next term of court, his bond was forfeited and a bench warrant was issued for his arrest. Five months later, he appeared voluntarily to answer the abandonment charge; he was tried, found guilty, and placed on probation. Before he left the courthouse, White was served with the contempt petition, which had been resubmitted, and was taken into custody under the writ of *ne exeat*.

White challenged the jurisdiction of the court by special plea, claiming that at the time service was made, he was immune from such service. The trial court overruled the special plea, and White appealed to the Georgia Supreme Court.

Although the general rule in Georgia is that a resident or nonresident may be sued in any county in which he is found,[3] an exception has long been made for suitors[4] and witnesses[5] who are traveling to, attending, or

1. 232 Ga. 64, 205 S.E.2d 206 (1974).

2. Note, *Civil Procedure—Service of Process—Immunity of the Accused Not Recognized*, 17 MERCER L. REV. 309 (1965).

3. GA. CODE ANN. §15-202 (Rev. 1971) provides: "The jurisdiction of this State and its laws extend to all persons while within its limits, whether as citizens, denizens, or temporary sojourners." GA. CODE ANN. §3-206 (Rev. 1962) provides: "A person not a citizen of this State, passing through or sojourning temporarily in the State, may be sued in any county thereof in which he may be at the time when sued."

4. Heneger v. Spangler, 29 Ga. 217 (1859).

5. GA. CODE ANN. §38-1506 (Rev. 1974) provides: "A witness shall not be arrested on any civil process while going to or returning from and attending on any court . . . ." *See also*

returning from court. Such persons have been held immune from service of civil process on the theory that immunity is necessary to obtain the presence of nonresident witnesses in the courts[6] and to help insure a "fair and uninterrupted trial."[7]

However, the immunity granted to suitors and witnesses has been withheld from nonresident criminal defendants who appear voluntarily.[8] While the great weight of authority in other jurisdictions favors immunity from civil process for suitors and witnesses,[9] there is considerable division of opinion as to when, if ever, a defendant in a criminal action is immune from service of civil process.[10] Many jurisdictions which withhold immunity from nonresident criminal defendants do so on the grounds that the reasons for granting the privilege to parties and witnesses do not apply in the case of a criminal defendant.[11] Georgia, however, prior to *White*, based its rejection of immunity for the nonresident criminal defendant who appeared voluntarily on a since amended incompetency statute.[12]

In *Rogers v. Rogers*,[13] decided in 1912, the Georgia Supreme Court was faced with the same question that was raised in *White*. The court stated that because a criminal defendant could not give evidence in his own case,[14] he was not a witness within the meaning of Georgia's immunity statute. Although the basis for the holding in *Rogers* was promptly questioned,[15] the holding and reasoning of the case were reaffirmed in *Cox v. Cox*,[16] decided in 1955.

Ferguson v. Georgia,[17] decided by the United States Supreme Court in

Watson v. Kvaternik, 33 Ga. App. 415, 126 S.E. 522 (1924); Fidelity & Cas. Co. v. Everett, 97 Ga. 787, 25 S.E. 734 (1895); Thornton v. American Writing Machine Co., 83 Ga. 288, 9 S.E. 679 (1889).

6. *See* 97 Ga. at 789, 25 S.E. at 734.

7. 232 Ga. at 68, 205 S.E.2d at 209, quoting from Vaughn v. Boyd, 142 Ga. 230, 235, 82 S.E. 576, 578 (1914).

8. Warren v. Hiers, 105 Ga. App. 202, 124 S.E.2d 445 (1962); Cox v. Cox, 211 Ga. 530, 87 S.E.2d 181 (1955); Rogers v. Rogers, 138 Ga. 803, 76 S.E. 48 (1912).

9. 62 AM. JUR.2d *Process* §§141-43 (1972).

10. *See* Annot., 20 A.L.R.2d 163, 180 (1951).

11. *See* Note, *Jurisdiction—Immunity of Non-Resident to Civil Suit—Voluntary Appearance in Criminal Procedings*, 25 BROOKLYN L. REV. 343, 345 n.8 (1959).

12. *See* 211 Ga. 530, 87 S.E.2d 181 (1955); 138 Ga. 803, 76 S.E. 48 (1912).

13. 138 Ga. 803, 76 S.E. 48 (1912).

14. GA. CODE ANN. §38-416 (Rev. 1974).

15. In Vaughn v. Boyd, 142 Ga. 230, 82 S.E. 576 (1914), the court rejected extension of the immunity where a nonresident came into the state to confer with his attorney on preparing a defense to a civil action which was not ready for immediate trial. Speaking for the court, Justice Lumpkin commented on the court's prior holdings on immunity:

> We need not stop to discuss whether the decision in *Rogers v. Rogers* can be reconciled with former decisions, or whether the distinction there drawn on the ground that the defendant in a criminal case can not, under the laws of this State, testify in his own case, was well grounded . . . .

16. 211 Ga. 530, 87 S.E.2d 181 (1955).

17. 365 U.S. 570 (1961).

1961, held that in light of the existence of the Georgia statute which made a criminal defendant incompetent to give evidence about himself,[18] there was a violation of the fourteenth amendment in denying a criminal defendant who elects to make an unsworn statement the opportunity to have his counsel question him. Although the court refused to pass upon the question of the constitutionality of the statute,[19] Mr. Justice Clark, in a concurring opinion, expressed his conviction that the Georgia incompetency statute was unconstitutional.[20] The decision prompted action by the Georgia legislature, and in 1962 the statutes dealing with a criminal defendant's right to give evidence at his trial were amended to allow him to be sworn and examined as any other witness.[21] This action by the legislature eliminated the only expressed basis for denying a nonresident criminal defendant who appears voluntarily the same immunity from civil process granted witnesses.[22]

In *White*, the Georgia Supreme Court faced the question of civil immunity for criminal defendants appearing voluntarily for the first time since the passage of the 1962 amendments which allowed a criminal defendant to be a witness at his own trial. The court, noting that the earlier cases in the area were grounded upon the incompetency statutes, held that the precedent established by those cases no longer applied.[23] The court observed that the question of immunity for nonresident criminal defendants returned to the state by or after waiver of extradition proceedings was resolved by Ga. Code Ann. §44-425 (Rev. 1957),[24] but it held that where a nonresident criminal defendant appears voluntarily, there is immunity for him from service of civil process.[25]

The court stated that "a majority of American courts have made a distinction between the criminal defendant who voluntarily appears . . . and one who does not . . . ."[26] It remarked that the distinction is recognized because "a defendant who voluntarily appears, or who appears in

18. *See* GA. CODE ANN. §38-416 (Rev. 1974).

19. 365 U.S. at 572 n.1.

20. *Id.* at 602.

21. GA. CODE ANN. §27-405 (Rev. 1972); GA. CODE ANN. §§38-415-16 (Rev. 1974); Note, *Georgia Criminal Procedure Statutes Amended to Conform to U.S. Supreme Court Decision*, 13 MERCER L. REV. 450 (1962).

22. *See* Note, *Civil Procedure—Service of Process—Immunity of the Accused Not Recognized*, 17 MERCER L. REV. 309 (1965).

23. 232 Ga. at 67, 205 S.E.2d at 209.

24. This code section, a provision of the Uniform Criminal Extradition Act, provides:
> A person brought into this State by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is being or has been returned, until he has been convicted in the criminal proceedings, or, if acquitted, until he has had reasonable opportunity to return to the State from which he was extradited.

25. 232 Ga. at 69, 205 S.E.2d at 210.

26. 232 Ga. at 68, 205 S.E.2d at 209 (emphasis in the original).

compliance with a bail bond . . . saves the State the expense, delay and uncertainty or extradition and promotes the orderly, expeditious and unobstructed administration of justice."[27]

Cases from other jurisdictions were cited in support of this statement; however, the cases cited are not uniform in their support. One case specifically rejected the proposition that voluntariness of appearance is controlling.[29] Two others, while holding that the immunity exists, failed to discuss even briefly the underlying reasons for the immunity.[30] The lack of correlation between the statement of the court and the content of the cases cited as authority may be the result of a burdened court cutting corners.[31]

The question before the court in *White* provided it an opportunity to explore and reexamine in light of present long arm statutes and extradition procedures the justifications traditionally given for extending immunity to, or withholding it from, a nonresident criminal defendant who appears voluntarily. Instead of seizing this opportunity, the court reached a conclusion based upon the general statements of cases decided long before the advent of the Georgia Long Arm Statute.[32] Although the decision in *White* changed the law in Georgia, the court's reasoning failed to break any new ground on a question over which jurisdictions remain sharply divided.

JEFFREY WARD BELL

27. *Id.*

28. The cases cited were: Thermoid Co. v. Fabel, 4 N.Y.2d 494, 151 N.E.2d 883 (1958); Michaelson v. Goldfarb, 94 N.J.L. 352, 110 A. 710 (Sup. Ct. 1920); Jacobson v. Hosmer, 76 Mich. 234, 42 N.W. 1110 (1889); Cummins' Adm'r v. Scherer, 231 Ky. 518, 21 S.W.2d 836 (1929); Benesch v. Foss, 31 F.2d 118 (D.C. Mass. 1929).

29. "However, the rationale of the rule does not depend upon the voluntary nature of the nonresident's appearance, but . . . upon broad grounds of public policy and individual rights." 231 Ky. at ___, 21 S.W.2d at 837.

30. *See Benesch* and *Jacobson*, note 28, *supra*.

31. Four of the five cases cited by the court were cited in Note, *Courts—Process—Immunity of Non-Resident Defendants in Federal Criminal Actions from Service of State Civil Process*, 12 VAND. L. REV. 487, 488-89 (1959) in support of the following statement: "By the weight of authority, a defendant voluntarily appearing to answer a criminal charge, or in compliance with a bail bond, is exempt, since such appearance saves the state the expense and uncertainty of extradition."

32. GA. CODE ANN. §24-113.1 (Rev. 1971).