CRIMINAL LAW

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For the course of another year the administration of the criminal law has followed the conservative tradition of centuries past. It has not permitted itself to be greatly altered by the vacillations of legislative whim or the occasional rasp of public hysteria. With the protection of society and the guardianship of individual liberties as its dual, and oftimes inconsistent, objectives, this great body of jurisprudence stands with the firmness of an iron rampart. It appears that many of the great law schools, and indeed the Bench and Bar themselves, have developed a tendency to view this field with something less than affection. Let it not be forgotten that a great percentage of the grandest figures of our ancient and proud profession have risen to their eminence through this instrumentality. If we continue to place emphasis and to direct all of our best talent to the more commercialized, and therefore more mercenary, aspects of the law, we may well find that we have brought down about our own house a plague that will not be easily lifted.

CRIMINAL PRACTICE AND PROCEDURE

In these days when there seems to be a tendency on the part of some courts to become slightly legislative in nature, it is gratifying for our own supreme court to re-declare itself a court existing solely for the correction of errors of law. In the case of *Calhoun v. State*,[1] Mr. Justice Mobley, in holding that the supreme court would not consider passing upon any matter which was not first raised before and passed upon by the trial judge, necessarily held that the Georgia appellate courts are not instruments for the general suppression of evils or injustices. This is as it should be.

Bowman v. State[2] illustrates the fact that both wit and ingenuity are still very much alive in the Georgia courts. It appears that in this case, during the argument of the solicitor general to the jury, defense counsel made some sort of objection. The trial judge remarked that he was not in position to pass on the point because he was taking a nap when it occurred. Counsel for defense, apparently unable to pre-

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1. 211 Ga. 112, 84 S.E.2d 198 (1954).
2. 91 Ga. App. 52, 85 S.E.2d 66 (1954).

vail upon the jury as to the righteousness of the cause of their client, sought succor in the court of appeals. The principal ground of appeal was that they had been robbed of a fair trial while the judge was asleep. The court refused to lend its approval to this proposition, and sided with a note which the judge attached to the amended motion for new trial stating that he had only meant that he was inadvertently daydreaming and at no time had he actually drifted into the land of nod.

A case[3] has been decided which again upholds the right of a judge to inject the issue of the Pardon and Parole Board into the trial of a criminal case. It has upheld the right of a trial judge to charge a jury that such Board does have the right to deal ultimately with their verdict. Repeated efforts, many in very recent times, have been made by members of the bar of this state to have the courts strike down this practice. In each of these instances[4] the courts have turned aside these entreaties by the use of high-sounding phrases to the effect that it is imperative that juries know the effect of their verdicts, and that the courts ought not to hold juries back in their search for truth, but should try to keep up with them. The legislature, however, has made an attempt to correct this matter. An act[5] is now on the books which authorizes an automatic mistrial if counsel even mention a clemency-granting agency during the course of a trial. This includes the Parole Board, Governor, or any other agency. It appears that this statute is broad enough and is sufficiently positive in its approach to the problem that it gives a most persuasive inference that in the future a judge will inject this issue into a trial at his peril. There have been two principal evils in permitting the Parole Board issue to creep into a criminal trial. It greatly impairs and diminishes the sense of responsibility of a jury in fixing a sentence. It also does frightful violence to long-settled rules of evidence by letting into a trial various rules and regulations of boards and authorities which have never been either pleaded or proved as required by law. It is hoped that this statute will write an end to this whole affair.

A very useful principle has been announced in the case of *Jackson v. State*.[6] In this case the defendant was sentenced to serve three consecutive one-year sentences on probation. A short time after passage of the sentence, the defendant was again brought before the court

3. Bland v. State, 211 Ga. 178, 84 S.E.2d 369 (1954).
4. Jones v. State, 88 Ga. App. 330, 76 S.E.2d 629 (1952); Balkcom v. State, 86 Ga. App. 513, 71 S.E.2d 554 (1952); McLendon v. State, 205 Ga. 55, 52 S.E.2d 294 (1949); Strickland v. State, 209 Ga. 675, 75 S.E.2d 6 (1953).
5. Ga. Laws Jan.-Feb. Sess. 1955, p. 191.
6. 91 Ga. App. 291, 85 S.E.2d 444 (1954).

and charged with a violation of the terms of his probation. His entire sentence was revoked and he was ordered to serve three years. The court of appeals held that only the first of the three sentences could be legally revoked because a defendant could not possibly violate a suspended or probation sentence that he was not yet even serving. While it is probably true that many courts, and perhaps most courts, have already been following the rule which this case finally spelled out, it is nevertheless a valuable concept to have upon the books.

CRIMINAL EVIDENCE

Oddly enough, it is a civil case, *Solomon v. Edgar*,[7] which has had the most pronounced impact on criminal practices of any decision this year. It was a damage suit arising in Jones County, Georgia; and in deciding it, the court of appeals has really gone modern. It permits the playing of a dictaphone recording in evidence in the trial of a case. It is vitally important not only for its own far-reaching rule, but as being strongly indicative of a possible attitude of the courts in going further and giving sanction to other modern devices. The trial record of the case which is on file in the court of appeals reveals that defense counsel in an action for damages sought to impeach a witness called by the plaintiff by playing back to the witness a dictaphone recording which contained a previous statement of the witness exactly contrary to the testimony given by the witness on the stand. Numerous objections were interposed by counsel for the plaintiff, and the trial judge rejected the proffered evidence on two basic theories: first, that no proper foundation had been laid for its admission into evidence; and, secondly, that it was a radical practice which he did not care to initiate unless and until it had first been sanctioned by the legislature or the appellate courts. The matter was subsequently presented to the court of appeals via writ of error. Counsel who had sought to use the dictaphone contended that the device would serve as a tremendous boon to the court in all future legal investigations. Opposing counsel took the position that the practice of using recording devices was inherently evil in that recordings are the most easily fabricated of any known modern device. In support of this, counsel urged to the court the fact that a certain well known modern singer was able to sing into a record a given part or version of a a song, and into other records different parts or versions of the same song, and, by playing each of such records simultaneously into one master record, produce a recording which will sound exactly like an entire choir; this, in spite of the fact that such simulated choir is, in

7. 92 Ga. App. 207, 88 S.E.2d 167 (1955).

fact, only one human voice. Such a contraption, it was contended, is in its very nature unreliable. The court, in a carefully studied opinion, apparently accepted parts of both of these conflicting theories. It sanctioned the use of such a machine in future trials; but, realizing the possible evils which could so easily flow from the thing, it laid down seven rules which must be complied with before a recording can be played into evidence. The opinion in this case is deserving of the most careful and painstaking study; but, generally speaking, the foundation prescribed for the use of these machines provides for proof of the pedigree of the machine; proof that a qualified person was in control of it; and absolute proof of the authenticity of the record itself by showing the manner of its preservation from the time the recording was taken until it was delivered into the courtroom. The impact of this case upon the trial of criminal matters could be tremendous; and it will be if law enforcement and prosecuting authorities throughout the state are awake to its potentialities. It can hardly be doubted that in the future, confessions of guilt will be taken down on these devices. Nor can it be doubted that the effect of a defendant's voice speaking calm and soothing words of his guilt will be momentous upon a jury. Confessions are certain to acquire a decisive importance in future trials, and the foundation for their admission into evidence can probably be played right into evidence along with the confession. The use of recording devices should also greatly simplify and expedite the trial of various types of racket cases. These cases, principally liquor, bug lottery, and prostitution cases, wherein crime is highly organized and syndicated, have always been difficult to prosecute because witneses who at one time were willing to testify can be subjected to such unbearable pressures that they frequently repudiate written statements long before a trial can be had. Now, with the use of recording machines, it appears that they will be much more likely to adhere to a statement which has been recorded, and, if such a statement is repudiated, the record played for the purpose of showing an entrampment will be about as effective as the original testimony of the witness would have been. All the ramifications of this decision are not yet even apparent.

Three important cases dealing with attacks upon the character of a defendant have been decided. Two of these, *Pilcher v. State*[8] and *Strickland v. State*[9] expressly stand upon the authority of *Bacon v. State*;[10] and it will be recalled that the decision in the Bacon case

8. 91 Ga. App. 428, 85 S.E.2d 618 (1955).
9. 91 Ga. App. 843, 87 S.E.2d 363 (1955).
10. 209 Ga. 261, 71 S.E.2d 615 (1952).

was inspired, indirectly, by the magnificent dissenting opinion of the case of *Hodges v. State.*[11] This writer pointed out at the time the dissent in the *Hodges* case was written (containing 127 sound authorities) that it was destined someday to become a landmark along the road back to sound character law.[12] The doctrine expounded by these authorities is simply that no more attacks will be tolerated against the character of a defendant unless that character has first been put in evidence by the defendant's own election. The previous well-defined exceptions to the rule were, of course, properly left intact. The reversal of the *Pilcher* case, *supra,* for admission into evidence of prior lottery convictions, and the reversal of the *Strickland* case, *supra,* for admission of previous larcenies, appear to fully justify this prediction made at an earlier time. Another reversal[13] has occurred because of the admission in evidence in a homicide case of evidence of a drunken party, unconnected with the slaying, in which the defendant had indulged. In *Mosley v. State*[14] evidence of another and different rape from that for which the defendant was on trial was admitted in evidence, and was upheld by the supreme court. It must be conceded that this case is not a retrogression from the above doctrine because it did clearly appear that the evidence did tend to show not only *modus operandi* but to establish idenity as well. This has always been recognized as an exception to the rule protecting character.

Some "confession" law has also been written during this year, part of which is sound and some, it is submitted, thoroughly unsound. In the case of *Green v. State,*[15] the supreme court held that a statement admitting a homicide did not amount to a plenary confession of guilt when it contained an assertion by the defendant that he knew the deceased carried a "cutter" in her bosom and he was not going to let her kill him. This, said the court, amounted to an exculpatory claim and prevented the statement from being a confession of murder. In doing this, the court merely recognized a sound rule which has long existed. Then, in the very face of this, the court, in *Fields v. State,*[16] upheld a death verdict based upon an alleged confession whch affirmatively contended that the firing of the fatal shot was a pure accident in a justifiable scuffle over a pistol. This is wrong. Justices Duckworth, Wyatt, and Mobley, who dissented, apparently think

11. 85 Ga. App. 617, 70 S.E.2d 48 (1952).
12. O'Neal, *Criminal Law,* 4 MERCER L. REV. 48 (1952).
13. Rooker v. State, 211 Ga. 361, 86 S.E.2d 307 (1955).
14. 211 Ga. 611, 87 S.E.2d 314 (1955).
15. 210 Ga. 745, 82 S.E.2d 703 (1954).
16. 211 Ga. 335, 85 S.E.2d 753 (1955).

likewise. *Tucker v. State*[17] is a sound confession case, and one which it would profit every practioner of the criminal law to have at his immediate disposal. It appeared in that case that the defendant originated a contact wtih a police officer, and during the course of their conversation made certain statements which amounted to a confession of guilt of a crime which was then under investigation by the department of which the officer was a member. The trial judge, ruling that the transaction showed upon its face that it was defendant-induced, overruled the timely objection of the defense that, irrespective of this, a confession could not be received into evidence without a formal showing of its voluntary character. The court of appeals, in reversing this ruling, held that a defendant was entitled to a preliminary showing on the confession, and it could not be dispensed with by some subsequent showing that it might have been voluntary in nature. This was a most important holding because any other ruling would necessarily have seriously impaired or destroyed the right of a defendant to have the background of an alleged confession inquired into *before* it is ever placed in the minds of a jury. It sometimes seems that courts will recognize a rule for little purpose other than to find exceptions to it. *In Ivey v. State*,[18] the court of appeals held, as it often has before that "there must be corroborative circumstances which in and of themselves and independently of the testimony of an accomplice directly connect the defendant to the crime, or lead to the inference he is guilty." It would seem, therefore, that unless the corroboration met these requirements as a pure matter of law, there should not be anything to go to a jury in a case depending on an accomplice. Yet in *Evans v. State*[19] the court of appeals held that the question of *sufficiency* of the corroboration was for the jury after the state had shown that a car similar to the one owned by the defendant had at some time been seen in the vicinity of the crime, that it left tire marks similar to those of defendant's car, and that the defendant was away from home for two months after the crime was committed. This hardly meets the standard which the court himself had set only two months earlier.

Substantive Criminal Law

While it is believed that the case of *Mangum v. State*[20] is a case of first import, it announces a doctrine which trial courts have long followed from logic rather than stare decisis. It holds that the crime

17. 91 Ga. App. 609, 86 S.E.2d 634 (1955).
18. 91 Ga. App. 455, 85 S.E.2d 829 (1955).
19. 91 Ga. App. 819, 87 S.E2d 228 (1955).
20. 91 Ga. App. 520, 86 S.E.2d 365 (1955).

of abandonment cannot be committed against an illegitimate child, but that the proper remedy to apply to a transgressor against an illegitimate child is a bastardy proceeding.

The Georgia law against disposal of mortgaged property has also been construed. In a case[21] in which the bill of sale to secure debt covering a stock of whiskey provided that "any whiskey sold must be replaced in kind or revenue from sale thereof placed in position for payment on the note this mortgage secures," and where the mortgagor disposed of the entire stock without complying with either of the quoted provisions, no crime had been committed. Any permission of any nature whatsoever to sell or dispose of mortgaged goods will nullify a criminal proceeding based on such disposal and leave the matter merely one of a broken contract. The above bill of sale showed on its very face that any disposal of the goods in question was a permissive one.

Tanner v. State[22] is a bad decision. The defendant was indicted for manufacture of liquor in Washington County *without first having obtained a license.* Washington county is a dry county. The court of appeals held that the idictment was sound because the portion "without first having obtained a license" could be treated as mere surplusage. This decision simply defies the long line of decisions headed by *Schuman v. State*[23] which holds that a person can never be convicted of the doing of an act without a license when the act was done in a jurisdiction that lacked the power to issue such a license. Since Washington County is a dry county, and could not, therefore issue a whiskey license of any kind, it is difficult to see how a person could be lawfully convicted of dealing with liquor without having *obtained a license.*

Mash v. State[24] was a burglary case. The indictment alleged that the defendant had committed a felony for that he "did break and enter, with intent to commit a larceny, the Home of the Thomasville Moose Club where valuable goods and wares were contained and stored." This indictment, said the court, failed to charge a crime. The statute[25] prescribes that the buildings against which burglary may be committed are the "dwelling, mansion, storehouse, or other place of business of another . . ." It was held that the description "Moose Club" did not suffice to describe the existence of a place of business, although the indictment could have simply alleged that the clubhouse

21. Carter v. State, 90 Ga. App. 417, 83 S.E.2d 246 (1954).
22. 90 Ga. App. 789, 84 S.E.2d 600 (1954).
23. 82 Ga. App. 130, 60 S.E.2d 521 (1950).
24. 90 Ga. App. 322, 82 S.E.2d 881 (1954).
25. GA. CODE § 26-2401 (1933).

was a storehouse or it could have alleged enough facts about the club to give the inference that it was in fact a place of business. By inference, one might even conclude that it would be sufficient to allege that a given structure was dedicated tothe pursuit of monkey-business, since that would seem to be a business within the meaning of the statute.

One concrete standard has finally been evolved for measuring the degree of intoxication necessary to convict a person for driving a vehicle while under the influence of drugs or intoxicants. This was done in the case of *Harper v. State*.[26] The case admits the fact that for many years there have been two inconsistent doctrines on the subject in full operation within the courts of this state. One has been known as the "to any extent whatsoever" test, and this appears to have originated in the case of *Chapman v. State*.[27] It has been upheld at least a dozen times. The other test is known as "less safe to drive test," and it has been upheld eight different times. This appears to be the older of the two standards and seems to have originated in the case of *Hart v. State*.[28] In the case under discussion the court has struck down the "any extent" of intoxication test; and henceforth the rule in Georgia will be that a person cannot be convicted of driving while under the influence of intoxicants unless he is so affected by intoxicants (or drugs) that it is less safe for him to drive than if he had not taken the intoxicants.

The *Garland* cases[29] are noteworthy only because of the extreme rarity of the crime with which they deal: criminal libel. The cases were a prosecution of the Solicitor General of the Flint Judicial Circuit arising from a tremendous disturbance in Monroe County, Georgia, in which the Solicitor General found himself one one side and the entire county on the other. He was prosecuted for making this statement about a Monroe County trial jury: "The jury, composed of fine men, did not even deliberate the case—the verdict was already made." He was likewise prosecuted for making the following general statement which the indictment alleged by innuendo as referring to Honorable Frank Willingham, Judge of the Circuit who presided over the jury above mentioned: "I know who is masterminding this attack. I can't [name him] or I would be held in contempt of Court. I'd hate to be tried for anything in Monroe County right now. If I was, I'd surely request a change of venue and a change of Judges." In

26. 91 Ga. App. 456. 86 S.E.2d 7 (1955).
27. 40 Ga. App. 725, 151 S.E. 410 (1929).
28. 26 Ga. App. 64, 105 S.E. 383 (1920).
29. 211 Ga. 48, 84 S.E.2d 13 (1954); 211 Ga. 44, 84 S.E.2d 9 (1954).

deciding these cases the supreme court observed that a statement is not scandalous, and therefore not libelous, when it amounts only to a statement of a thing that one has a legal right or duty to do. Concerning the statement made about the jury, the court held that the statement was not libelous because it only stated something that the jury had a right to do: that is, to make a quick decision if it desired to do so. A jury is not required to deliberate if its members are already of one mind; and to charge them with availing themselves of this right is not charging them with anything defamatory. As to the matter of charging the judge with masterminding an "attack," this only had reference to his being the guiding influence in conducting the grand jury investigation, and this the judge had not only the right but the solemn legal duty to do. The statement of the defendant that he would request a change of venue and a change of judges if he were about to be tried in Monroe County is nothing but a statement of a legal right inherent in any person on trial; and it was no crime for the defendant to say that he would avail himself of such a right. No crime was committed by the utterance of any of these words.

Guthrie v. State[30] is a homicide case which should not escape attention. All of the evidence showed that the defendant was driving an automobile on Moreland Avenue in Atlanta at a high rate of speed when he turned over into the wrong lane of traffic and killed the deceased who was riding in an automobile traveling in the opposite direction. A verdict was returned finding the defendant guilty of involuntary manslaughter in the commission of a lawful act without due caution and circumspection. This conviction was reversed on the grounds that, since every act of the defendant was unlawful, he could not be convicted of a crime which was predicated upon the doing of some *lawful act.* No contention is made that this decision is unsound but it does give every indication of being a real judicial curiosity.

Another important homicide case is *Corbin v. State.*[31] In this case the judge charged the jury on the right of the court to mitigate the death penalty to life imprisonment in cases depending entirely upon circumstantial evidence. The supreme court reversed the conviction and thereby overruled three previous decisions[32] on this subject. The court noted that each of the prior decisions had stated that the trial courts should not give any such charge, but had held the error not to be a reversible one. The court made it plain that it was not merely sitting as an advisory body for trial courts, but would without

30. Guthrie v. State, 92 Ga. App. 62, 87 S.E.2d 648 (1955).
31. Corbin v. State, 211 Ga. 400, 86 S.E.2d 221 (1955).
32. Blackman v. State, 78 Ga. 592, 3 S.E. 418 (1887). Blackman v. State, 80 Ga. 785, 7 S.E. 626 (1888). Johns v. State, 178 Ga. 676, 173 S.E. 917 (1934).

hesitation reverse a conviction when errors of law had helped to bring it about. The vice of the charge is readily apparent inasmuch as it is an open invitation to a trial jury to shirk a responsibility.

In deciding the case of *Howard v. State*[33] the supreme court missed the best imaginable opportunity to erect a real monument of constitutional law; and this was recognized by Mr. Chief Justice Duckworth in a special concurring opinion. The case involved, among other things, an attack upon the principal Georgia embezzlement statute through the medium of a demurrer to an indictment. This statute,[34] so far as germane to this point, reads as follows: "Any officer, servant, or other person employed in any public department, station, or office of government of this State . . . who shall embezzle, steal, secrete, or fraudulently take and carry away any money, paper, book, or other property or effects, shall be punished . . ." This statute was attacked as being unconstitutional in that it denied equal protection of the laws to persons employed by the government. It should be noticed that it does not merely make it criminal for these people to steal government property, but it is a violation of the statute for them to steal *any* property. It was urged and contended that this unreasonably subjected this particular class of people to prosecution because of their *employment alone*. It certainly appears that this position is much more tenable than that taken by the court in upholding the law. The concurring opinion asserted that it was just as much the duty of the court to strike down old laws that are unconstitutional as it is to kill new ones repugnant to the constitution; and the fact that over a long number of years many people have been convicted under a defective law should not be persuasive upon the court in upholding such a law.

The case of *Bibb County v. Hancock*[35] upholds the constitutionality of payment of certain limited sums of money to counsel appointed by the court to represent indigent defendants. The court, in a very well-reasoned opinion, held that such payments are "court costs" and, as such, are payments sanctioned by the constitution.

Conclusion

The foregoing does not purport to be a recital of all cases decided during the past year. It is, rather, an addition or accretion to a composite of the previous articles on criminal law written in the survey issue of the *Mercer Law Review*. This procedure is motivated by the hope and belief that, within a reasonable number of years, a complete statement of the Georgia criminal law might be evolved.

33. 211 Ga. 186, 84 S.E.2d 455 (1954).
34. Ga. Code § 26-2801 (1933).
35. Bibb Co. v. Hancock, 211 Ga. 429, 86 S.E.2d 511 (1955).