CRIMINAL LAW

By HARDY GREGORY, JR.*

An attempt has been made to classify the cases considered in the field of criminal law into a number of subdivisions. No attempt has been made to treat the large amount of legislation which was enacted during the survey period. This is a day of sweeping change in several areas of Georgia law and in particular is this true in crminal law. The vast majority of this change has been legislative and it is pointed out that a careful study of this legislation is called for. It is omitted here because of its magnitude and because it will probably be covered in a later issue in considerable depth.

MIRANDA

During the survey period there were numerous decisions rendered in the area of the *Miranda*[1] decision. The approach has generally been one of limiting the requirements of *Miranda* to as narrow confines as possible. In order to better illustrate the significance of the decisions commented on below, the requirements of *Miranda* are set out at this point. Where an individual is subjected to interrogation while in police custody and makes a statement, it is a constitutional prerequisite to the admissibility of the statement that the individual first have been warned that he has a right to remain silent, that his statement may be used against him, and that he has a right to have an attorney present. The attorney may either be one the individual has retained or he may be appointed by the court if the individual is unable to employ an attorney.[2]

In one Georgia case[3] the defendant's confession was introduced into evidence against him and he objected to its introduction on the basis that he had not been accorded all his rights under *Miranda*. There was evidence before the trial court that the defendant had been advised that he did not have to make any statement, that he had a right to have an attorney with him and that anything he said might be used against him. There was no evidence that he was advised that he had a right to have counsel appointed if he was indigent. There was no evidence or contention that the defendant was, in fact, indigent. The court of appeals certified a question to the Supreme Court of Georgia. The essence of this question was to ask

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1. Miranda v. State of Arizona, 384 U. S. 436 (1966).
2. *Id.*
3. Griffith v. State, 116 Ga. App. 429, 157 S.E.2d 894 (1967).

whether or not it is necessary to advise a defendant of his right to appointed counsel where it is not shown that the defendant is indigent and the answer handed down by the Supreme Court of Georgia was that he need not be so advised.[4] There is a warning here for both law enforcement officers and for defense counsel. Officers must advise the defendant of all the requirements of *Miranda,* including the right to appointed counsel, or else assume the risk that the defendant might be indigent. Defense counsel must make some claim of indigency for the defendant or else assume the risk that the Georgia courts will consider that he was not indigent.

It has been made clear that the requirements of *Miranda* apply only to action taken by the state and do not proscribe the action of private citizens.[5] In the case in question the defendant was convicted of the offense of receiving stolen goods. During the course of the trial certain invoices were introduced into evidence which listed the stolen articles and contained a statement tending to incriminate the defendant. Invoices were signed by the defendant. It was shown that the invoices were prepared by representatives of the owner of the property and there was no showing of any kind that any law enforcement personnel participated in the preparation of the invoices, nor in procuring the defendant's signature. It was further shown that at the time of signing the defendant was not in custody, he was not restrained and was not under compulsion to affix his signature. The case carries a caveat to the effect that private investigation may be so conjunct with that of government as to be inseparable,[6] but under the above facts a clear separation was declared and the statement was admissible.

The attitude of the Georgia courts to the *Miranda* decision has been rather clearly expressed in considering its retroactiveness.[7] It is observed that the United States Supreme Court has not required retroactive application of *Miranda.*[8] This is more than enthusiastically embraced in Georgia. In the case being considered, the court of appeals first observed that retroactivity is permitted but not required by the U.S. Supreme Court and then adds the following:

> Although in a proper case we are bound to follow the *Escobedo, Miranda,* and *Johnson* cases, we are not compelled to extend their regressive effect on law enforcement beyond requirements. It is for this reason, as authorized by the *Johnson* case, that we decline to apply retroactively to this case the holdings and numerous implications of the prolix *Miranda* case.[9]

4. Griffith v. State, 223 Ga. 543, 156 S.E.2d 903 (1967).
5. Carnes v. State, 115 Ga. App. 387, 154 S.E.2d 781 (1967).
6. *Id.* at 392, 154 S.E.2d at 786.
7. Bass v. State, 115 Ga. App. 461, 154 S.E.2d 770 (1967).
8. Johnson v. State of New Jersey, 384 U.S. 719 (1964).
9. Bass v. State, 115 Ga. App. 461, 154 S.E.2d 770 (1967).

A defendant need not expect any assistance from *Miranda* in cases tried in Georgia on or before June 13, 1966.[10]

SEARCH AND SEIZURE

Anyone connected with or interested in the field of criminal law will agree that the area of search and seizure has been one of the more active areas of that field for several years. The number of cases reaching the appellate courts of this state during the survey period indicate that this activity has not yet decreased. A few of the principles illuminated in some of these cases, though generally not for the first time, will be mentioned.

In order for a defendant to avail himself of the machinery to suppress evidence gathered in violation of his constitutional right against unreasonable searches and seizures, he must be a "person aggrieved"[11] by such unlawful search and seizure. It will not suffice to raise the objection that such a search and seizure was directed against some other person. As an example the case of *Norrell v. State*[12] is cited. The facts of this case are rather bizarre. A doctor in Fulton County had operated a medical clinic on a wooded tract of land for a number of years until his death in 1958. There were rumors that the premises had been used as an insane asylum and that the house was haunted. It was also rumored that hydrocephalics or "waterheads" wandered around the woods. The deceased had lived on the grounds for a number of years in a portion of the residence which he rented. Intruders frequently came to the premises at night and would sometimes drive around the residence screaming and cursing and in general behaving in a wild and reckless fashion. On a particular night in 1966 a group of young boys including the defendant went to the premises to see some of the "waterheaded people." They rode in a car belonging to one of the boys other than the defendant. When they arrived they encountered the deceased who threw a board with nails in it under the car giving them a flat tire. They returned the next night with a 22 rifle. Again the deceased tried to frighten them away and he threw a rock at their car and fired a shotgun. The defendant stuck the rifle out of the rear of the car and fired it wildly. Later a police officer found the body of the deceased near the driveway with 22 caliber bullets lodged therein. The police later seized the car the boys had been riding in and the rifle which fired the 22 caliber bullets. Upon the trial of the case the defendant was found guilty of involuntary manslaughter in the commission of an unlawful act. He appealed and among other grounds contended that the evidence obtained as a result of the seizure of the vehicle was subject to a motion to suppress.

10. Williams v. State, 115 Ga. App. 754, 156 S.E.2d 198 (1967).
11. GA. CODE ANN. §27-313 (Supp. 1967).
12. 116 Ga. App. 479, 157 S.E.2d 784 (1967).

The court held that this evidence was not subject to a motion to suppress for the reason that no facts were stated "showing that the property was taken from any house or place *owned, occupied* or used by the defendant or that the defendant had any *proprietary interest in* or *right to possession* of the property seized."[13] A clear statement of the rule is thereafter set out as follows:

> In order to qualify as a person aggrieved by an unlawful search and seizure one must have been a victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

The quote above was based on language in the United States Supreme Court decision of *Jones v. United States.*[14]

Another example of a defendant who was not a "person aggrieved" and therefore not entitled to the granting of a motion to suppress was *Marsh v. State.*[15] The Superior Court of Emanuel County found the defendant guilty of murder. Part of the evidence against the defendant was a pistol which came from the house of a relative of the defendant. The sheriff had gone to that relative's home where the relative's daughter told the sheriff she knew where the gun was. She accompanied the sheriff into the house and pointed out the gun which the sheriff seized. The simple rule of the case is that "[i]mmunity from unreasonable searches and seizure is a privilege personal to those whose rights have been infringed."[16]

Akin to the above two cases in principle is *Gugliotta v. State.*[17] The defendant was arrested for the offense of cheating and swindling. He had in his possession at the time of his arrest a Cadillac automobile. When asked about the vehicle by the police officers he disclaimed ownership nor would he otherwise identify the automobile. The car was seized and later searched revealing information indicating that it had been stolen. The defendant was later convicted for the offense of larceny of an automobile and the above information was introduced into evidence against him. The defendant was denied any right to object to the search of the automobile for the reason that he made no claim to the ownership or possession thereof.

The establishment of a procedure to object to inadmissible evidence, *i.e.,* the motion to suppress, is not without hazards for the defendant. In *Brannen v. State*[18] defense counsel interposed an oral objection to certain evidence allegedly obtained by unlawful search and seizure. Since there had been no prior motion in writing, as required, the oral motion was insuf-

13. *Id.* at 488 (Emphasis added), 157 S.E.2d at 792.
14. 362 U.S. 257 (1960).
15. 223 Ga. 590, 157 S.E.2d 273 (1967).
16. *Id.* at 591, 157 S.E.2d at 274.
17. 117 Ga. App. 212, 160 S.E.2d 266 (1968).
18. 117 Ga. App. 69, 159 S.E.2d 476 (1967).

ficient. It has been held that the failure to interpose a timely written motion to suppress amounts to a waiver of the constitutional guaranty in respect to search and seizure.[19] Thus the evidence, otherwise competent, is admissible.[20] There are hazards on appeal even where a timely motion is properly made. In *Bass v. State*[21] the motion was overruled and a conviction followed from which an appeal was made. Regardless of the merits of the motion, the court held that its overruling was at worst harmless error since the transcript of the evidence produced at the trial of the case was omitted on appeal and it would be necessary to examine the transcript of that evidence in order to determine whether or not the objected to evidence was actually introduced before the jury.

JURY COMPOSITION

Of intense interest in the field of criminal law at the present time is the attack upon the composition of jury panels and the system of jury selection. We here consider two areas in this overall field. First the exclusion of jurors who are opposed to capital punishment is discussed and next the systematic exclusion of Negroes from grand juries is considered.

On June 3, 1968 *Witherspoon v. State of Illinois*[22] was decided by the United States Supreme Court. The jury which tried the case was selected pursuant to an Illinois statute[23] which permitted the striking for cause of any juror who stated that he had "conscientious scruples against capital punishment" or stated that he was "opposed to the same." By this authority nearly half of the prospective jurors were stricken for cause. Such a process was held to deny to the defendant a jury of the impartiality demanded under the sixth and fourteenth amendments. The case warrants close scrutiny however, because it does not absolutely prohibit questions on voir dire regarding jurors' attitude on capital punishment and their subsequent elimination for cause. It is more narrow than such an approach as is evident in the following language:

> If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable

19. Gilmore v. State, 117 Ga. App. 67, 159 S.E.2d 474 (1967).
20. *Id.* at 68, 159 S.E.2d at 475.
21. 117 Ga. App. 89, 159 S.E.2d 299 (1968).
22. 391 U.S. — (1968).
23. ILL. REV. STAT. 1959, c. 38, §743. Ed. Note: This statute was re-enacted in 1961 but not expressly repealed by the Code of Criminal Procedure in 1963. ILL. REV. STAT. 1967, c. 38, §115-4(d) provides that "[e]ach party may challenge jurors for cause," and the Illinois Supreme Court has held that §115-4(d) incorporates former §743. People v. Hobbs, 35 Ill.2d 263, 274, 220 N.E.2d 469, 475 (1966). Witherspoon v. Illinois, 391 U.S. — (1968).

> of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.

One other reference to the *Witherspoon* case should be made at this point and before any Georgia cases are discussed. In a footnote[24] the court considered the fact that the administration of justice would necessarily be affected by its decision but that such should not warrant a decision against the fully retroactive application of the holding. This is mentioned because all of the Georgia decisions herein noted were decided prior to June 3, 1968.

In *Manor v. State*[25] the opinion gives very skimpy facts surrounding the exact voir dire questions asked but enough is given to indicate that this decision might stand even in the light of *Witherspoon*. The defendant was convicted on a murder charge without a recommendation for mercy. The case was reversed on another ground but it was held proper to have excluded all jurors who were opposed to capital punishment. Apparently all these jurors stated on voir dire that they would never consider giving the supreme penalty even if they found the defendant guilty. In contrast *Arkwright v. State*[26] affirmed the death sentence in a rape case wherein persons conscientiously opposed to capital punishment were excluded from the jury without determining whether these persons would never vote to impose the death penalty or that their reservations would prevent them from making an impartial decision as to the defendant's guilt. It was held that their opposition to capital punishment made them impartial jurors who were properly excluded. A slightly different circumstance was presented in *Clarke v. Grimes*,[27] a case going up from a judgment denying relief in a petition for the writ of habeas corpus. Attack was made in the petition contending that conscientious objectors to capital punishment were excluded from the jury. Failure to interpose a timely objection at the time the jury was selected was a waiver of the right to object and furthermore the court held that such an attack would not have been meritorious even if timely made. The exclusion of those conscientiously opposed to capital punishment was upheld in *Abrams v. State*[28] but without any elaboration.

Following in the wake of *Whitus v. Georgia*[29] numerous attacks were made on the composition of grand juries alleging the systematic exclusion of Negroes therefrom. Without exception these attacks were unsuccessful. Retroactive application of *Whitus* was refused in a number of decisions beginning with *Strauss v. Grimes*,[30] in which a white male petitioner in a habeas corpus proceeding contended that the grand jury which indicted

24. 391 U.S. at ___ (1968).
25. 223 Ga. 594, 157 S.E.2d 431 (1967).
26. 223 Ga. 768, 158 S.E.2d 370 (1967).
27. 223 Ga. 461, 156 S.E.2d 91 (1967).
28. 223 Ga. 216, 154 S.E.2d 443 (1967).
29. 385 U.S. 545 (1967).
30. 223 Ga. 834, 158 S.E.2d 404 (1967).

him in 1964 was not representative of a cross section of the community because of exclusion of Negroes. The same situation was presented in *Ramirez v. State*[31] and the same result was obtained.

In *Wooten v. State*[32] an objection that the grand jury was chosen from the county digest rather than from the voters list was raised by way of a plea in abatement. This was unsuccessful because no reason was alleged as to why the defendant had not made his objection before the indictment was found and the objection was therefore held to be untimely. The case was reversed on other grounds. *Salisbury v. Grimes*[33] was a case in which it was sought by a habeas corpus proceeding to release the defendant because of systematic exclusion of Negroes from the grand jury. This failed because no sufficient facts were presented to substantiate the bare allegation. The case illustrates the difficulty of a defendant showing the population figure and the other figures necessary to prove a systematic exclusion of Negroes.

Commitment Hearing

The Georgia courts have continued to recognize that a commitment hearing is a valuable right on the one hand, but they have found reasons of questionable weight with which to deny this right on the other hand. It appears that any whittling away at this right is almost inexcusable in the face of the overwhelming advantages the state possesses in the area of investigation as compared with a defendant's abilities in this area. Without any other means of discovery, certainly the scales would be tipped adversely to a defendant who had been denied an effective commitment hearing for any reason.

In *Prather v. State*[34] the defendant was found guilty of the offense of receiving stolen property. It appears that he was shot by the arresting officer during the arrest and was therefore taken directly to the hospital. The duration of defendant's stay in the hospital does not appear in the decision. However, it does appear that he was indicted before his release from the hospital and further that no commitment hearing was ever held. Citing a recent Georgia Supreme Court case[35] the court simply holds that no commitment hearing is necessary under these circumstances. *Smith v. Fuller*[36] is more accurately a right to counsel case but it does involve a situation where an effective commitment hearing was certainly denied. The case came up from a habeas corpus hearing. The defendant had entered a plea of guilty to the offense of murder for which he received a sentence to life imprisonment. At the time of his plea the defendant was represented

31. 117 Ga. App. 226, 160 S.E.2d 234 (1968).
32. 224 Ga. 106, 160 S.E.2d 403 (1968).
33. 223 Ga. 776, 158 S.E.2d 412 (1967).
34. 116 Ga. App. 696, 158 S.E.2d 291 (1967).
35. Cannon v. Grimes, 223 Ga. 35, 135 S.E.2d 445 (1967).
36. 223 Ga. 673, 157 S.E.2d 447 (1967).

by counsel but at the time of his commitment hearing he was not represented by counsel. On the habeas corpus hearing the trial court ordered defendant's release from the warden who held him, requiring that he be remanded to the authorities in the county where the indictment was brought to be tried again for the offense of murder. On appeal that judgment was reversed for the reason that it did not appear from any testimony in the record that the defendant's lack of counsel at his commitment hearing had in any way prejudiced him at the time a plea was entered. The final case to be considered in this section is *Whitfield v. State*[37] wherein the consequences of a failure to conduct a commitment hearing are spelled out but not allowed this defendant. The rule is that failure to grant a commitment hearing where there is no intelligent waiver thereof may result, depending on the circumstances, in voiding all subsequent proceedings, including indictment, trial and conviction. The familiar 72 hour rule is also explained in that this means only that the defendant must be brought before a magistrate within this time and notified when and where a commitment hearing will be held and does not mean that a commitment hearing must be held within that time period. The facts of this case indicate that the defendant was arrested and made a confession. He was brought before a magistrate within 72 hours where he was represented by counsel and where he repudiated his confession. A continuance of the commitment hearing was granted the state once and another continuance was granted to defendant's counsel. Before the hearing was finally held the defendant was indicted and no commitment hearing was held thereafter. On appeal the failure to conduct a commitment hearing was included in a general claim of a denial of due process along with other elements. All the relief sought by the defendant was denied because of the lack of evidence and for failure to raise the constitutional questions in the trial court.

Appellate Procedure

As was to be expected, the area of Appellate Procedure brought on numerous decisions during this survey period, only some of which will be considered here.

Of considerable interest was *Joiner v. State*[38] where an amendment to the Appellate Practice Act of 1965 was struck down. Under the provisions of the Appellate Practice Act[39] as originally enacted in 1965, filing of the transcript was required to be done within 30 days after the filing of the notice of appeal. Failure to meet this requirement, regardless of the reason, resulted in dismissal of the appeal. The amendment herein referred to was designed to require dismissal under these circumstances only where the failure of the clerk to timely file the transcript affirmitively appeared

37. 115 Ga. App. 231, 154 S.E.2d 294 (1967).
38. 223 Ga. 367, 155 S.E.2d 8 (1967).
39. Ga. Laws 1965, p. 18, 21, 26.

from the record to have been caused by the appellee. The amendment was passed without an enacting clause and for that reason was invalidated. The case contains some interesting comments on the origin and historical significance of the enacting clause.

What is an appealable order, or more accurately what is not an appealable order, was considered in three cases. Those things from which an appeal may not be taken because they are not final orders included the following situations: a judgment reciting that no motion for a new trial had been filed and disallowing an amended motion for a new trial;[40] an adverse ruling on defendant's challenge to the array of grand jurors;[41] and an order denying a motion to suppress evidence.[42]

The element of time caused the dismissal of several appeals. In *Lippitt v. State*[43] and *Strauss v. State*[44] the transcripts were filed subsequent to thirty days after filing of notice of appeal. In *Kurtz v. State*[45] notice of appeal was filed while a motion for a new trial was pending. It was therefore premature and was dismissed. For the same results see *Graves v. State*.[46] Where part of the transcript is filed late it may not be considered. Whether or not the entire appear should be dismissed because part of the transcript was filed late was the question considered but not decided.[47]

One appeal was dismissed for the reason that the fine which was imposed upon conviction was paid by the defendant thereby rendering moot all questions raised by the enumeration of errors.[48]

Where no exceptions to the charge of the court is timely made an error must be substantial and appear harmful to the defendant as a matter of law to be considered on appeal. The meaning of this phrase was again considered during the survey period and held to be "that the error must be such as to be blatantly apparent and prejudicial to the extent that it raises the question of whether [the defendant], to some extent at least, has been deprived of a fair trial."[49]

MISCELLANEOUS

There are several other decisions which were noteworthy and which will be considered in this final section rather than making an attempt to place them in various subheadings.

The distinction between admissions and confessions was delved into con-

40. Graves v. State, 116 Ga. App. 494, 157 S.E.2d 801 (1967).
41. Whitus v. State, 117 Ga. App. 359, 160 S.E.2d 839 (1968).
42. Cody v. State, 116 Ga. App. 331, 157 S.E.2d 496 (1967).
43. 116 Ga. App. 20, 156 S.E.2d 199 (1967).
44. 116 Ga. App. 154, 156 S.E.2d 543 (1967).
45. 115 Ga. App. 665, 155 S.E.2d 735 (1967).
46. 116 Ga. App. 19, 156 S.E.2d 205 (1967).
47. Cook v. State, 116 Ga. App. 304, 157 S.E.2d 160 (1967).
48. Hayes v. State, 116 Ga. App. 260, 157 S.E.2d 30 (1967).
49. Foskey v. State, 116 Ga. App. 334, 157 S.E.2d 314 (1967).

siderably by *Norrell v. State*.[50] It will be noted that this case has been considered in a previous section of this article. Here the defendant had made a statement to the officers in which he sought to establish that the shots which he fired did not strike the deceased. He also made statements indicating that he was acting justifiably in shooting in the general direction of the deceased. Based on this statement the trial court charged the jury in regard to confessions. This was held to be error for the reason that this statement was not a confession but was at most an admission. A confession is a voluntary statement acknowledging guilt of a criminal offense. The term admission ordinarily signifies acknowledgement of a fact or a circumstance in which guilt may be inferred and it only tends to prove the offense charged and it does not amount to a confession of guilt. In order for a statement to amount to a confession it must be comprehensive enough to include every essential element of the offense charged. The principal case noted a prior decision[51] in which it was held that an acknowledgment of the main fact from which the essential elements of the offense can be inferred amounts to a confession of guilt if the statement is not coupled with some qualifying exclusion of a necessary ingredient of the crime charged. A case is also cited which declares that a statement which includes facts or circumstances which show excuse or justification is not a confession of guilt even if it admits the main fact.[52] It was held in this case that the defendant did not admit the main fact, the homicide itself, in as much as his statement contended that his shots did not strike the deceased. Furthermore his statement contended that even if his shots did strike the deceased he was justified in shooting in the direction of the deceased. Thus, the main fact was missing and there were qualifications to the statement.

It would seem that the circumstances of the times we live in would always leave some footprints in the decisions handed down during any survey period. The military activity underway in Vietnam has furnished the basis for some such footprints during the present period. In *Wilson v. State*[53] the defendant was one of a group of people who picketed the building in which the Twelfth Corps Headquarters for the United States Army was located. They were carrying signs expressing opposition to the war in Vietnam. A group of inductees arrived at the building and these people began to block the door to prevent them from entering. They were asked to leave but refused. There was evidence to show that the defendant in this case committed assault and battery on two police officers and that he used opprobrious language. He was convicted for assault and

50. 116 Ga. App. 479, 157 S.E.2d 784 (1967).
51. Owens v. State, 120 Ga. 296, 48 S.E.21 (1904).
52. Harris v. State, 152 Ga. 193, 108 S.E.777 (1921).
53. 223 Ga. 531, 156 S.E.2d 446 (1967).

battery and for the use of opprobrious words. In *Martin v. State*[54] the defendant was convicted for the offense of murder. In his argument to the jury the solicitor referred to the Vietnam conflict. He compared the defendant with the Viet Cong, saying that his possible return to society would be a greater damage than the threat of world communism and the Viet Cong. This language was objected to and made a point on appeal. The appellate court notes that this was a brutal slaying by a husband of a defenseless wife through the use of a knife. The court holds that the objected to reference to the Viet Cong was a permissible inference from the evidence and its logic was for the jury to determine. It did not introduce, by way of argument, facts not in the record.

Constitutional rights have recently been guaranteed by the Supreme Court of the United States to juveniles in proceedings before juvenile courts.[55] An almost perfect set of facts in which to assure the same guaranty under the Georgia law arose during the survey period in *Dutton v. Mims*.[56] The case arose from a hearing in which the defendant sought post conviction relief. The decision does not indicate for what the defendant had been convicted. It does indicate that at the time of his conviction he was fifteen years old and an orphan. He was unaware of his constitutional rights and he made no expressed waiver of them. He was not represented by counsel and he had not pleaded guilty. He was unaware of his right to counsel. The court held that it was proper for this defendant to be remanded for a new trial with counsel.

A very interesting case in regard to a defendant's right to a speedy trial appeared during the survey period. *Reid v. State*[57] was a case in which a prisoner at Reidsville was indicted in Hall County during his term at Reidsville. A detainer was placed on him at Reidsville which required that upon his release he be returned to Hall County for trial on the indictments which had been returned there. Counsel for the defendant entered a motion and a demand for a speedy trial in Hall Superior Court. The trial court refused to bring the defendant to Hall County but provided that if he would pay the expenses of his transportation back to Hall County he would be tried; otherwise, the detainer would remain in effect and he would be tried at his release. Counsel for defendant based his motion upon the Georgia Demand Statute.[58] The Georgia constitutional provisions in regard to the right to a speedy trial were not cited but the federal constitutional provisions were. The court held that the demand statute in Georgia was in aid of the Georgia constitutional provision only and therefore considered the case strictly in light of the federal constitu-

54. 223 Ga. 649, 157 S.E.2d 458 (1967).
55. 387 U.S. 1 (1967).
56. 223 Ga. 423, 156 S.E.2d 93 (1967).
57. 116 Ga. App. 640, 158 S.E.2d 461 (1967).
58. GA. CODE ANN. §27-1901 (Rev. 1953).

tion. *United States v. Ewell*[59] is cited in this decision for the proposition that the right to a speedy trial is designed to prevent undue and oppressive incarceration prior to trial and to minimize anxiety and concern accompanying public accusation and also to limit the possibility that long delay will impair the ability of an accused to defend himself. It emphasizes however that the right to a speedy trial and exactly what that means depends upon the circumstances of each case. It secures rights to a defendant but it does not preclude the rights of public justice. The essential ingredient of this right is an orderly expedition to trial and not mere speed. Recognizing that the courts of this state have the inherent power to cause a prisoner to be produced before it the court here holds that the defendant must be brought back to Hall County for trial from Reidsville at the expense of the county. This is to be done by the next regular term of court barring a legal continuance. Finally the case of *Grimes v. Burch*[60] deserves some consideration here. Alcoholism has created a considerable amount of attention in criminal matters throughout the nation in recent months. This is a Georgia decision in regard thereto. The case arises from a petition for the writ of habeas corpus in which the petitioner contended that her conviction for escape from the custody of municipal authorities was invalid on the ground that she was a chronic alcoholic and therefore was not guilty of the crime and that it would amount to cruel and unusual punishment to punish her for violating the law. The Georgia Code is cited for the proposition that drunkeness shall not be an excuse for any crime.[61] The court goes as far back as Blackstone in regard to that proposition. The decision is filled with emotional language. In his brief, counsel for the petitioner contended that it would be cruel and unusual punishment to punish her and that she should "not be crucified on a cross of public indifference to her condition." Pointing out its sympathy but holding that sympathy should not control the judgment of the court the following eloquent and equally emotional language of Justice Lumpkin is quoted:

> Whether anyone is born with an irresistible desire to drink or whether such thirst may be the result of accidental injury done to the brain, is a theory not yet satisfactorily established. For myself, I capitally doubt whether it can ever be. And if it were, how far this crazy desire for liquor would excuse from crime, it is not for me to say. . . . Upon this proposition, however, I plant myself immovably; and from it nothing can dislodge me but an Act of the Legislature, namely: that neither moral nor legal responsibility can be avoided in this way. This is a new principle sought to be ingrafted upon criminal jurisprudence. It is neither more nor less than this, that a want of will and conscience to do right, will constitute an excuse for the commission of crime; and that, too, where

59. 383 U.S. 116 (1966).
60. 223 Ga. 856, 159 S.E.2d 69 (1968).
61. GA. CODE ANN. §26-403 (Rev. 1953).

> this deficiency in will and conscience is the result of a long and preserving course of wrongdoing . . . . nor does the most desperate drunkard lose the power to control his will, but he loses the desire to control it. No matter how deep his degradation, the drunkard uses his will whenever he takes his cup. It is for the pleasure of the relief of the draught, that he takes it. His intellect, his appetite, and his will, all work rationally, if not wisely, in his guilty indulgence. And were you to exonerate the inebriate from responsibiity, you would do violence both to his consciousness and to his conscience; for he not only feels the self prompted use of every rational power involved in the countability, but he feels, also, precisely what this new philosophy denies—his solemn and actual wrongdoing, in the very act of indulgence . . . . a creature made responsible by God, never loses his responsibility, save by some sort of insanity.[62]

Certain it is that a judicial decision should not be based upon emotion. We can only hope that the problem of the chronic alcoholic in the area of criminal law can be solved in the near future based upon scientific facts.

62. Choice v. State, 31 Ga. 424, 473-474 (1860).