EVIDENCE

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As usual, during the survey period the appellate courts of Georgia have decided well over a hundred cases where one or more questions of evidence were considered. Most of these cases involved only a statement of existing law as applied in the particular case and would not be of general interest. Only those cases that seemed to be of general interest have been considered.

DISCOVERY

The new Civil Practice Act[1] has greatly increased the use of discovery in Georgia, resulting in considerable interest by the appellate courts. Questions arising from the discovery process will be considered in increasing number in the next few years. This was true during the survey period. Some of the cases applied only existing rules, but at least fourteen of them should be mentioned.

The problems of discovery in administrative proceedings is still a troublesome area. *National Biscuit Co. v. Martin*,[2] held that the only statutory authority for taking depositions in workmen's compensation cases without direction from the Board was for discovery and not for the purpose of evidence.[3] This holding would seem to have been changed by statute, as GA. CODE ANN. § 114-706 (Rev. 1956) has now been amended by an Act of 1969[4] which provides for the taking of testimony of any person by deposition for the purpose of discovery or to procure evidence for admission at a hearing.

The use of depositions in evidence at trial presents many problems. In *Wells v. Alderman*,[5] the plaintiff used a statement from a deposition to impeach a witness. The defendant objected to this partial introduction, requesting that the plaintiff also introduce other relevant portions of the deposition explanatory of the statement.[6] The objection

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1. GA. CODE ANN. tit. 81A (1967).
2. 225 Ga. 198, 167 S.E.2d 140 (1969).
3. GA. CODE ANN. § 114-706 (Rev. 1956); GA. CODE ANN. § 81A-126 (1967) governing the taking of depositions was not made applicable to workmen's compensation claims by § 114-706.
4. Ga. Laws, 1968, p. 206, *amending* GA. CODE ANN. § 114-706 (Rev. 1956).
5. 117 Ga. App. 724, 735, 162 S.E.2d 18, 26 (1968).
6. GA. CODE ANN. § 81A-126(d)(3) (1967) provides the defendant was not only entitled to introduce the other portion of the deposition, but could require the plaintiff to introduce it along with the statement of the witness.

was overruled, and this was held to be error. Two other cases[7] held that while the deposition of an adverse party would be admissible, it was still subject to the harmful error rule and that in each case it had not been harmful error under the facts to exclude the deposition. *Milholland v. Neal*[8] also considered the admissibility of a deposition at trial. In this case, the deposition of the defendant had been taken as a witness in another case growing out of the same transaction involved in the case on trial. The plaintiff offered the deposition in evidence, without calling the defendant, who was present in court. The court ruled that the plaintiff could use the deposition only after he had called the defendant as a witness. Under GA. CODE ANN. § 81A-126(d)(4) (1967), the deposition of a witness could "be used in the discretion of the trial judge, even though the witness is available to testify in person at the trial." It was held that this ruling was not an abuse of discretion by the trial judge. The fact that it had been stipulated in the prior case that the deposition could be used in evidence in any case growing out of the same transaction did not restrict the discretion of the trial judge.

On a motion for summary judgment, much of the material involved in discovery is available to the court without being introduced in evidence. *Milam v. Miss Georgia Dairies, Inc.*,[9] followed the rule that a deposition on file may be incorporated in a motion for summary judgment without being introduced into evidence. In *Moore v. Hanson*,[10] plaintiff, having been served by defendant with requests for admission of certain facts under GA. CODE ANN. § 81A-136 (1967), failed to properly answer the requests. The court held that the trial judge could properly treat the matters covered in the requests as admitted in considering a motion for summary judgment. It was also held that objections to the requests could not be raised for the first time on appeal.

The imposition of sanctions for failure to make disclosure rests in the discretion of the trial judge. *Hohlstein v. White*[11] suggested that there might be circumstances where it would be an abuse of discretion for the trial judge to refuse to take punitive action, but not under the facts of that case. In *Williamson v. Lunsford*,[12] the defendant served

7. Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448 (1968); N. Ga. Feed and Poultry Co. v. Ultra-Life Laboratories, 118 Ga. App. 149, 162 S.E.2d 803 (1968).
8. 118 Ga. App. 566, 164 S.E.2d 451 (1968).
9. 118 Ga. App. 791, 165 S.E.2d 463 (1968).
10. 224 Ga. 482, 162 S.E.2d 429 (1968).
11. 117 Ga. App. 207, 160 S.E.2d 232 (1968).
12. 119 Ga. App. 240, 166 S.E.2d 622 (1969).

interrogatories on the plaintiff. The plaintiff did not answer the interrogatories and did not appear at a hearing ordered by the trial judge to determine why he had not answered. The trial judge ordered answers in thirty days. There was no compliance with the order. It was held that the trial judge did not abuse his discretion by entering a default judgment and assessing costs.

In *Irwin v. Arrendale*,[13] it was held that it was error to enter an ex parte order extending the time to answer interrogatories, but that the error was not harmful under the facts.

Most orders in discovery are not subject to direct appeal without a certificate from the trial judge.[14] Due to the novelty of many questions concerning the discovery process in Georgia, it would be helpful if the trial judges would grant certificates for appeal more freely, as was done in *Wilson v. McLendon*.[15]

In *White v. Gulf States Paper Corp.*,[16] the plaintiff, proceeding under GA. CODE ANN. § 38-801 (Supp. 1968) served the defendant with a notice to produce 24 items of written evidence at the taking of his deposition. The court held that the notice to produce did not apply to depositions and that the only provisions for production of documents at the deposition of a party was GA. CODE ANN. § 81A-134 (1967).[17]

In *Daniel v. State*,[18] the court followed many cases holding that there was no way an accused could force the prosecution to permit him to examine the statement of a witness in possession of the prosecution. This follows the idea that there is no provision for discovery generally in criminal cases in Georgia. However, discovery may have been forced by the outcome of *Williams v. Dutton*.[19]

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13. 117 Ga. App. 1, 159 S.E.2d 719 (1967).

14. GA. CODE ANN. § 6-701 (Supp. 1968). Application of this general rule was made in Wells v. Johnson, 118 Ga. App. 168, 162 S.E.2d 743 (1968).

15. 225 Ga. 119, 166 S.E.2d 345 (1969).

16. 119 Ga. App. 271, 166 S.E.2d 910 (1969).

17. This code section provides for production of documents at a deposition hearing in response to a notice to produce for the purpose of inspection, copying or photographing.

18. 118 Ga. App. 370, 163 S.E.2d 863 (1968).

19. 400 F.2d 797 (5th Cir. 1968), *cert. denied*, 393 U.S. 1141 (1969) the court relying on the decision in Brady v. Maryland, 373 U.S. 83 (1963), held the prosecution had an affirmative duty to produce requested evidence which is materially favorable to the defendant either as direct or impeaching evidence. If defendant has been denied the production of evidence in the possession of the prosecution, then he must be given a new trial by the state court after the latter has made an (in camera) examination of such evidence and has determined that favorable evidence, material to either guilt or punishment, has been suppressed.

RELEVANCY

A number of cases considered problems of relevancy by applying long recognized rules. In *Patten v. Smith*[20] the court restated the rule that: "When the relevance of evidence is in doubt, the Georgia rule favors its admission and submission to the jury with any needed instructions."[21] That case also considered the admissibility of evidence of pre-trial experiments, holding that this is largely within the discretion of the trial judge. Here the trial judge had properly admitted the testimony of a witness as to his ability to see a man on the street at the scene of the fatal collision, at night and at distances of 260 feet and 180 feet. In *Brown v. State*,[22] the district attorney had asked the defendant on cross-examination where he had been employed during a 12 year period, knowing that the defendant had been in the federal penitentiary during this period. This improperly put the defendant's character in issue and it was held error not to grant a mistrial. In *Johnson v. Myers*,[23] the general rule was followed that in negligence actions, evidence of similar acts or omissions on the part of the defendant on other and different occasions is not admissible.

LIABILITY INSURANCE

Evidence as to liability insurance is not considered relevant on the issue of negligence. However, the prospective jurors may be qualified as to an insurance company. In *Thomas Milling Co. v. Branch*,[24] the jury had been qualified as to the defendant's liability insurance carrier. Plaintiff's counsel, in his opening statement, said: "We have kept this under—the suit, for our own reasons, we are suing for $99,995. We kept it under the $100,000 for our own reasons."[25] The trial judge was in error in denying defendant's motion for a mistrial.

The uninsured motorist cases have presented the problems from a different viewpoint. *Holland v. Watson*[26] involved two questions concerning the issue of insurance. Here the plaintiff was suing a defendant who was uninsured. Although the plaintiff's insurer had not chosen to intervene in the case, it was held error to deny the plaintiff's

20. 119 Ga. App. 664, 168 S.E.2d 627 (1969).
21. *Id.* at 665, 168 S.E.2d at 628.
22. 118 Ga. App. 617, 165 S.E.2d 185 (1968).
23. 118 Ga. App. 773, 165 S.E.2d 739 (1968).
24. 118 Ga. App. 857, 165 S.E.2d 907 (1968).
25. *Id.* at 858, 165 S.E.2d at 908.
26. 118 Ga. App. 468, 164 S.E.2d 343 (1968).

motion to have prospective jurors qualified as to the insured. The court also held that the disclosure of the defendant, upon cross-examination that she was uninsured was not a ground for a mistrial, although the trial judge should have instructed the jury to disregard the remark. In *Jiles v. Smith*,[27] the plaintiff's uninsured motorist insurer had intervened. At the beginning of the trial the pleadings of the intervening insurance company were mentioned in opening argument to the jury and the court declared a mistrial. The court entered an order that no mention of insurance should be made at the trial and certified the order for appeal. In reversing the order, the Court of Appeals held that where the insurance company was a party to the proceeding, as in this case, evidence of insurance was proper.

PHOTOGRAPHS

The Supreme Court of Georgia considered questions concerning photographs in three cases of interest. *Hubert v. City of Marietta*[28] seems to be the first consideration in Georgia of aerial photographs. Here a witness testified that he was familiar with the area and that the aerial photographs were fair and accurate representations of what existed on the date the photographs were taken. The court held that this testimony was sufficient to authorize their admission in evidence, stating that it saw no reason to apply a rule different from the one used to admit other types of photographs. *Cash v. State*[29] restated the rule that: "Photographs are admissible whenever relevant, and such evidence is not subject to an objection that it would inflame the minds of the jury." The court followed this rule in *Curtis v. State*[30] even though the photograph, showing the presence of blood, was in color. No objection was raised or considered as to the photograph being in color. Also, the fact that immaterial changes in the scene depicted did not render the photograph objectionable.

HEARSAY

In *Horton v. Nichols*,[31] the Court of Appeals followed the case of *Moore v. Atlanta Transit System*[32] by holding that the declaration of

27. 118 Ga. App. 569, 164 S.E.2d 730 (1968).
28. 224 Ga. 706, 163 S.E.2d 914 (1968).
29. 224 Ga. 798, 799, 164 S.E.2d 558, 559 (1968).
30. 224 Ga. 870, 165 S.E.2d 150 (1968).
31. 117 Ga. App. 748, 162 S.E.2d 208 (1968).
32. 105 Ga. App. 70, 123 S.E.2d 693 (1961).

a deceased individual as to the cause of her injury, where there were no other witnesses to the fall, would be admissible under the exception to the hearsay rule of necessity. Consideration was given to GA. CODE ANN. § 38-311 (Rev. 1954) in *City of Marietta v. Glover*[33] when the court held that general repute in the community could not be used as an exception to the hearsay rule to establish title to land. In *Southern Ry. v. Allen*,[34] the Court of Appeals continued to confuse two sections of the Georgia Code[35] as to the admissibility of admissions of agents as an exception to the hearsay rule when it held a declaration of the railway's engineer which, in effect was adverse to the agents employer, was not a part of the res gestae and therefore inadmissible.

REGULAR ENTRIES

The exception to the hearsay rule for regular entries made in due course of business[36] continues to reach the appellate courts. In *Smith v. Smith*,[37] a financial statement prepared without audit by certified public accountants from the records of a corporation was held not to be a regular entry admissible under the statute. *Franco v. Bank of Forest Park*[38] held the records of the bank showing deposits of premiums on policies of insurance for credit life insurance were admissible as regular entries.

Before a regular entry is admissible, some witness must testify as to the nature of the entry, or must authenticate it as being a regular entry.[39] A written certificate by the keeper of the record is not enough.[40]

Calhoun v. Chappell[41] presents the first full consideration of police reports of accidents as regular entries. It holds that such accident reports are properly admissible after the foundation is laid, but that hearsay, opinions and conclusions contained in such reports should be deleted before they are admitted. This same requirement has caused

33. 225 Ga. 265, 167 S.E.2d 649 (1969).

34. 118 Ga. App. 645, 165 S.E.2d 194 (1968).

35. GA. CODE ANN. § 4-315 (Rev. 1962) states that declarations of the agent as to business transacted by him shall not be admissible against his principal unless they were part of the negotiation constituting the res gestae. GA. CODE ANN. § 38-406 (Rev. 1954) simply provides that admissions by an agent during the existence and in pursuance of his agency are admissible against the principal.

36. GA. CODE ANN. § 38-711 (Rev. 1954).

37. 224 Ga. 689, 164 S.E.2d 225 (1968).

38. 118 Ga. App. 700, 165 S.E.2d 593 (1968).

39. Hirsch's v. Adams, 117 Ga. App. 847, 162 S.E.2d 243 (1968).

40. Cassano v. Pilgreen's Inc., 117 Ga. App. 260, 160 S.E.2d 439 (1968).

41. 117 Ga. App. 865, 162 S.E.2d 300 (1968).

difficulty in regard to hospital and medical records. The courts have had considerable trouble in determining just what is a recorded "act, transaction, occurrence or event" within the meaning of GA. CODE ANN. § 38-711 (Supp. 1968). In *Cassano v. Pilgreen's Inc.*,[42] the court said: "If a hospital record contains diagnostic opinions and conclusions, it cannot, upon proper objection, be admitted into evidence unless and until the proper foundation is laid, i.e., the person who entered such diagnostic opinions and conclusions upon the record must qualify as an expert and relate the facts upon which the entry was based."[43] However, if testimony of the expert is available there is no need for admission of the entry. *Norman v. Allen*[44] applied the same rule to an autopsy report. It was admissible as a regular entry as to any matters of fact contained therein, but not opinions or diagnoses of others than the witness who testified by deposition as to the report.

Ever since the attempt by the General Assembly to declare the legislative intent of the regular entry statute in 1958,[45] as rejected in *Martin v. Baldwin*,[46] the Supreme Court has restricted the admissibility of hospital records under the regular exception to the hearsay rule. *Wesley v. State*[47] presented an even more restrictive rule. The case involved a conviction for the crime of statutory rape. The medical doctor who gave the child a vaginal examination testified that in his opinion she had had sexual intercourse. He stated that he could not form this opinion without the laboratory report that had been admitted in evidence. The laboratory report stated that certain fluids sent for examination contained sperm cells. The court reversed the conviction, holding that the laboratory report was not admissible under GA. CODE ANN. § 38-711 (Rev. 1954). The presence of sperm cells was called both an opinion and a conclusion. In *Grossett v. State*,[48] the testimony of a biochemist as to the presence of arsenic in the organs of a deceased person was held to be a fact that could be used in a hypothetical question asked of an expert witness. It is difficult to see how the presence of arsenic could be a fact, while the presence of sperm cells is an opinion or conclusion. It would appear from these recent cases that no entry made in hospital records by an expert will be admissible as a regular entry. The expert must be called as a witness.

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42. 117 Ga. App. 260, 160 S.E.2d 439 (1968).
43. *Id.* at 261, 160 S.E.2d at 440.
44. 118 Ga. App. 394, 163 S.E.2d 859 (1968).
45. Ga. Laws, 1958, p. 542; Editorial Note GA. CODE ANN. § 38-711 (Supp. 1968).
46. 215 Ga. 294, 110 S.E.2d 344 (1959).
47. 225 Ga. 22, 165 S.E.2d 719 (1969).
48. 203 Ga. 692, 48 S.E.2d 71 (1948).

JUDICIAL NOTICE

The problem of judicial notice of the law of another state has caused a difference of opinion between the Supreme Court and the Court of Appeals.[49] In *Duncan Cleaners, Inc. v. Shuman Co.*,[50] the Court of Appeals stated that they would follow GA. CODE ANN. § 38-112 (Rev. 1954) and take judicial notice of the Session Laws of North Carolina. The court did not consider the 1968 amendment to the Civil Practice Act[51] which would seem to make the law of another state a question of law and subject to judicial notice.

PRESUMPTIONS

The presumption continues to have the force of evidence in Georgia. In *Carter v. State*,[52] the defendant presented positive evidence to show insanity. The state offered no positive evidence of sanity. The court, relying on its earlier decision in *Fields v. State*,[53] held that the jury is entitled to reject the evidence offered by the defendant and rely entirely on the presumption of sanity. The real effect is to shift the burden of persuasion on the issue of insanity to the defendant. It will be interesting to see the constitutional questions that are involved considered by the Supreme Court of the United States.

WITNESSES

Pippins v. State[54] and *McKeever v. State*[55] reaffirmed the rule that witnesses who do not obey a sequestration order[56] and remain in the courtroom, are not incompetent to testify. However, this fact may be considered as to their credibility.

Anderson v. Department of Family and Children Services[57] involved an unusual factual situation. After the death of a recipient of old age assistance, $6,000 in cash was found in her living quarters and was held by the administrators of her estate. The Department of Family and

49. *See* Agnor, *Judicial Notice of the Law of Another State*. 12 GA. B.J. 379 (1950).
50. 119 Ga. App. 128, 166 S.E.2d 387 (1969).
51. GA. CODE ANN. § 81A-143(c) (Rev. 1967).
52. 225 Ga. 310, 168 S.E.2d 158 (1969).
53. 221 Ga. 307, 144 S.E.2d 339 (1965).
54. 224 Ga. 462, 162 S.E.2d 338 (1968).
55. 118 Ga. App. 386, 163 S.E.2d 919 (1968).
56. GA. CODE ANN. § 38-1703 (Rev. 1954).
57. 118 Ga. App. 318, 163 S.E.2d 328 (1968).

Children Services, for the State of Georgia, claimed this cash, alleging that each year the recipient signed false statements showing that she had no property or income. The trial judge denied the defendant's motion for summary judgment and certified the ruling for review by direct appeal. The sole question considered on appeal was the admissibility of these statements in evidence. To authenticate these statements for their admission in evidence, the case worker who witnessed them would have to testify as a witness. The administrators contended that this witness could not testify to this transaction with the deceased because of the "dead man's statute."[58] The court held that the State of Georgia, and thus the Department of Family and Children Services, was not subject to the exceptions precluding testimony against a dead man. Thus the statements were admissible in evidence. The court held that they were admissible when properly identified and authenticated by direct proof, as official records or as business records. The hearsay question was not considered, but the statements would seem to fit both the official records and the business records exceptions.

Woodward v. Augusta[59] held that memoranda used by a witness to refresh his recollection were not admissible in evidence. However, *State Highway Department v. Godfrey*[60] held that the opposite party could introduce such memoranda in an attempt to weaken the testimony of the witness.

A party may call an agent of the opposite party as a hostile witness, subject to cross-examination and impeachment.[61] This presents a question as to the time of the existence of the agency. In *Mullis v. Chaika*,[62] the witness, Williams, was an attendant at the service station of one of the defendants at the time of the occurrence, but had left his employment and was serving in the armed forces at the time of trial. The plaintiff was permitted to call Williams as a witness for cross-examination. The appellate court held this to be harmful error, stating that the agency must exist at the time of trial. The court agreed with the rule in *Atlanta Americana Motor Hotel Corp. v. Sika Chemical Corp.*,[63] decided by another division of the court.

Williams v. Mayor & C. of Atlanta[64] considered a novel question in regard to the informer privilege. As a general rule, the government may

58. GA. CODE ANN. § 38-1603 (Rev. 1954).
59. 117 Ga. App. 857, 162 S.E.2d 304 (1968).
60. 118 Ga. App. 560, 164 S.E.2d 560 (1968).
61. GA. CODE ANN. § 38-1801 (Rev. 1954).
62. 118 Ga. App. 11, 162 S.E.2d 448 (1968).
63. 117 Ga. App. 707, 161 S.E.2d 342 (1968).
64. 118 Ga. App. 271, 163 S.E.2d 239 (1968).

be privileged to refuse to make public the identity of the informers. Appellant, an Atlanta policeman, was tried before the police committee on charges of violating rules and regulations of the police department. He had previously advised a superior officer of information received from an informer of wrongdoing on the part of certain police officers. Under Rule 5 of the Internal Security Division, he was called on to furnish the name of the informer and refused to do so, claiming the informer privilege. The court held that he was not entitled to claim the informer privilege under this factual situation.

The case of *Park v. State*,[65] although it received wide publicity, did not add a great deal to the law. Only one point that could be considered in any way novel was involved. While making an unsworn statement, the defendant exhibited several documents to the jury. The trial court held that these documents had been introduced in evidence and denied the right to open and conclude to the jury to the defendant. The Supreme Court held that these documents had only been exhibited to the jury during the unsworn statement and had not been introduced in evidence. Thus the denial of the right to open and conclude to the jury was reversible error. The novel feature is the apparent assumption that a criminal defendant during his unsworn statement could authenticate a document so that it could be introduced in evidence. This is not believed to be the law. If the prosecutor did not object, the document might be received in evidence, but only because his failure to object waived proper authentication.

CONSTITUTIONAL PRIVILEGES

Cases involving constitutional privileges will naturally be considered at length in other parts of this survey. A few of them might be mentioned here due to the evidence features involved. In *Dempsey v. State*[66] the admissibility of a confession was involved. The defendant was in custody and had employed counsel. His lawyer contacted the investigator handling the case and advised him that the defendant wanted to make a statement. The court held that the warning required by *Miranda v. Arizona*[67] need not be given under these facts. The court also approved the so called "Massachusetts" procedure for considering the voluntariness of the confession. This procedure as required by

65. 224 Ga. 467, 162 S.E.2d 359 (1968).
66. 225 Ga. 208, 166 S.E.2d 884 (1969).
67. 384 U.S. 436 (1966).

Jackson v. Denno[68] had previously been approved in *Moody v. State*.[69] However, in *Day v. Mills*,[70] the court held that for the procedure requirement of *Jackson* to apply, there must be an objection made as to voluntariness. In this case, the court also assumed that all of the procedural requirements as to confessions would apply equally to incriminating statements. *Clark v. Smith*[71] refused to apply the *Miranda* rule since *Miranda* had been decided only one day before the *Clark* trial began. In *Freeman v. Wilcox*,[72] the court considered the question of the confession of a juvenile, and held that the juvenile and the parents must be given the *Miranda* warning in order for the confession to be admissible. The court also stated that since the jurisdiction of the juvenile court had attached, permission of the court was necessary before any interrogation of the juvenile would be permitted.

A few cases dealing with the privilege against self-incrimination might be mentioned. In *Curtis v. State*,[73] the court refused to reverse the conviction of the accused on the basis of *United States v. Wade*[74] since the lineup identification of the defendant had occurred some four months prior to the *Wade* decision. The defendant in *Bradford v. State*[75] was identified by the victim of obscene telephone calls when he was requested to speak over a telephone. Citing *Wade* the court said that: "The mere use of a defendant's voice as an identifying physical characteristic did not . . . amount to compelling of defendant to give evidence against himself . . ."[76] Under the *Wade* case, this seems to be true, but it is suggested that it would be a violation of the Georgia privilege against self-incrimination.[77] In *Sark v. State*,[78] the defendant had driven his truck on weighing scales at the request of a State Highway Department employee. Because he was not advised of his right not to drive on to the scales, his action was construed to be involuntary.[79] The court held that the State's employee's testimony as

68. 378 U.S. 368 (1964).
69. 224 Ga. 301, 161 S.E.2d 856 (1968).
70. 224 Ga. 741, 164 S.E.2d 828 (1968).
71. 224 Ga. 766, 164 S.E.2d 790 (1968).
72. 119 Ga. App. 325, 167 S.E.2d 163 (1969).
73. 224 Ga. 870, 165 S.E.2d 150 (1968).
74. 388 U.S. 218 (1967).
75. 118 Ga. App. 457, 164 S.E.2d 264 (1968).
76. *Id.* at 459, 164 S.E.2d at 265.
77. GA. CODE ANN. § 38-416 (Supp. 1968); GA. CODE ANN. § 2-106 (Rev. 1948).
78. 118 Ga. App. 529, 164 S.E.2d 266 (1968).
79. GA. CODE ANN. § 68-406.2 (Supp. 1968) gives authority to certain state employees to stop and weigh any motor vehicle thought to be operated in violation of the lawful weight and size.

to the weight of the truck was illegally obtained evidence and therefore inadmissible.

Several of the procedural problems in regard to search and seizure might be considered. *Strauss v. Stynchcombe*[80] reviews the showing of facts necessary to constitute probable cause for the issuance of a search warrant and holds that some of the facts recited in an affidavit may come to the affiant from informers and need not be within his personal knowledge. *Burns v. State*,[81] however, provides that the affidavit must state what these facts are. It is insufficient to simply make reference to an informer. Thus there was no showing of probable cause, the warrant was illegally issued, and the fruits thereof should have been suppressed. It was held in *Taylor v. State*[82] that the motion to suppress under GA. CODE ANN. § 27-313(b) (Supp. 1968) must be made in writing. The motion to suppress the fruits of an unreasonable search must be timely made or it is waived. *Thomas v. State*[83] followed the federal rule[84] that the motion to suppress should normally be made before trial, but that the trial judge in his discretion may entertain the motion at trial.

COMPETENCE OF CRIMINAL DEFENDANT

A criminal defendant can be a competent witness, and may make either a sworn or unsworn statement.[85] Careless language in the charge to the jury or in argument in regard to a defendant's unsworn statement might amount to a comment on his failure to be sworn, and many problems have resulted from the use of such statements. The cases of *Crowe v. State*[86] illustrate these resulting problems. In these two cases the defendant was tried for assault with intent to murder and for possessing and transporting non-tax paid liquor. The identical charge was given in each case. In his charge the judge gave the substance of the statute,[87] but added the following: "In doing so, he is not under oath and is not subject to cross examination except by his

80. 224 Ga. 859, 165 S.E.2d 302 (1968).
81. 119 Ga. App. 678, 168 S.E.2d 786 (1969).
82. 118 Ga. App. 605, 164 S.E.2d 876 (1968).
83. 118 Ga. App. 359, 163 S.E.2d 850 (1968).
84. FED. R. CRIM. P. 4(e).
85. GA. CODE ANN. § 38-415 (Supp. 1968).
86. 117 Ga. App. 598, 161 S.E.2d 512 (1968); 117 Ga. App. 648, 161 S.E.2d 514 (1968).
87. "In all criminal trials, the prisoner shall have the right to make to the court and jury such statement as he may deem proper in his defense. It shall not be under oath and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case." GA. CODE ANN. § 38-415 (Supp. 1968).

own consent. He incurs no penalty by failure to tell you the truth." This addition had been approved by the appellate courts many times before 1962. However, in this instance, the court held that it was "tantamount to a direct comment on his failure to submit to the compulsion of an oath" and thus was a prohibited comment under the 1962 statute.

The first three sentences of the statute[88] do make reference to the fact that the statement is not under oath, but this is not a prohibited comment. A charge in the exact language of these three sentences has been approved.[89] In *Dye v. State*,[90] the addition of "if you believe it to be the truth" was approved, but the court made it clear that where the criminal defendant makes an unsworn statement, the charge of the court should be confined to the first three sentences of the statute. Naturally, any additional instructions requested by the defendant could be given without reversible error. In *Harris v. State*,[91] as the defendant took the stand, the trial judge stated to the jury that "the defendant will make an unsworn statement." This was held not to be a prohibited comment. In *Smith v. State*,[92] the defendant's attorney first made reference to the fact that the defendant had made an unsworn statement. Thus this fact was properly open to comment by the district attorney.

The fourth sentence of the statute[93] states that: "The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer." This sentence has been misconstrued in practice. It was apparently assumed that the defendant would be cross-examined unless he saw fit to decline. In practice, the idea arose that the defendant could not be cross-examined. This was finally clarified to show that the defendant could submit himself to cross-examination, but could not force the district attorney to in fact cross-examine him.[94] In *Pennington v. State*,[95] after the defendant had completed his unsworn statement, the solicitor inquired of the court: "Do we get to cross-examine?" and the court replied in the negative.

88. GA. CODE ANN. § 38-415 (Supp. 1968).

89. Driver v. State, 118 Ga. App. 559, 164 S.E.2d 360 (1968); Harris v. State, 118 Ga. App. 848, 166 S.E.2d 94 (1968).

90. 118 Ga. App. 570, 165 S.E.2d 183 (1968).

91. 118 Ga. App. 769, 165 S.E.2d 462 (1968).

92. 224 Ga. 750, 164 S.E.2d 784 (1968).

93. GA. CODE ANN. § 38-415 (Supp. 1968).

94. Porch v. State, 207 Ga. 645, 63 S.E.2d 902 (1951); McKibben v. State, 90 Ga. App. 8, 82 S.E.2d 148 (1954).

95. 117 Ga. App. 701, 161 S.E.2d 327 (1968).

The Court of Appeals said: "While this is a practice to be avoided, and should be disapproved, it did not amount to a comment to or before the jury that the defendant had elected not to testify under oath" and therefore it was not error to refuse a mistrial. This language seems questionable. There would appear to be no reason why inquiry should not be made as to whether or not the defendant declines to answer questions on cross-examination.