EVIDENCE

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As usual, several hundred cases were decided during the survey period where one or more questions concerning a point of evidence law were considered. Most of them involved only a statement of existing law as applied in the particular factual situation and would not be of general interest. Only those cases that seemed significant have been considered.

I. JUDICIAL NOTICE

In *Marger v. Miller*[1] the court considered the effect of Ga. Code Ann. §81A-143(c) (Rev. 1972) on the earlier decisions, and held that Florida law could be considered as cited in the briefs and record. However, in *Ryle v. Ryle*[2] the court held that it would take judicial notice of the law of Ohio, citing only Ga. Code Ann. §38-112 (Rev. 1974). It would be better practice to utilize Ga. Code Ann. §81A-143(c) (Supp. 1974), in view of the judicial history of this problem.[3]

In *Cullers v. Home Credit Co.*[4] the court took judicial notice of the Comptroller General's Industrial Loan Regulations, as required by the Administrative Procedure Act.[5]

II. HEARSAY

The hearsay rule received only limited consideration this year. *Res gestae* as an exception still appears in a few cases.[6] Hearsay contained in a business record is not admissible.[7] In *Herrin v. State*,[8] the rule was again stated that a confession by a third person that he and not the defendant had committed the offense would be inadmissible hearsay. In *Harrison v. Lawhorne*[9] the court held that the record of a guilty plea was properly admitted in a civil action as an admission against interest. The court rejected the contention that the plea was the result of "plea bargaining" for a lesser charge and came within the ban of Ga. Code Ann. §38-408 (Rev. 1974) which forbids admission made with a view toward compromise.

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1. 129 Ga. App. 44, 198 S.E.2d 709 (1973).
2. 130 Ga. App. 680, 204 S.E.2d 339 (1974).
3. Agnor, *Judicial Notice of the Law of Another State*, 12 GA. B.J. 379 (1950).
4. 130 Ga. App. 441, 203 S.E.2d 544 (1973).
5. GA. CODE ANN. §3A-108 (Supp. 1973).
6. Pierce v. State, 230 Ga. 766, 199 S.E.2d 235 (1973); Durham v. State, 129 Ga. App. 5, 198 S.E.2d 387 (1973).
7. Wallis v. Odom, 130 Ga. App. 437, 203 S.E.2d 613 (1973).
8. 230 Ga. 476, 197 S.E.2d 734 (1973).
9. 130 Ga. App. 314, 203 S.E.2d 292 (1973).

The *Bennett* case[10] and three others in the same area gave consideration to three important exceptions to the hearsay rule in the criminal law area. These were testimony given at a former trial, admissions of a co-conspirator, and tacit admissions.

In *Whatley v. State*,[11] testimony of a witness given at the preliminary hearing was introduced over the objection of the defendant. The district attorney stated that the witness had been served with a subpoena; that he had previously responded to subpoenas; that he had not responded to this one; that an attachment had been issued that day for him; that the sheriff had been asked to find the witness; and that the witness was working somewhere in an adjoining county. With two justices dissenting, the court reversed on the ground that the state had not made a showing of due diligence in seeking to produce the witness.

Morgan v. State[12] involved the confessions of co-conspirators. The majority of the court held that whether they were admissible or not, under the circumstances of the case their admission was harmless error. The dissent contended that the confessions were not admissible because the state had failed to show the unavailability of the declarants. The dissent stated: "In order to introduce any hearsay statements of an absent declarant, the State must first show his *bona fide* unavailability as a witness,"[13] citing *Mancusi v. Stubbs*.[14] That case involved testimony at a former trial where a showing of unavailability is necessary. This confusion of the two exceptions will be considered with the *Bennett* case.

Lingerfelt v. State[15] was a companion case to the *Bennett* case, both involving the murder of two law enforcement officers of Forsyth County. In that case at the trial of the defendant a co-indictee was called as a witness by the state. The witness claimed his privilege against self-incrimination. The prosecution was permitted to read into evidence the testimony given by the witness in a committal hearing of a third co-indictee where neither the defendant nor his counsel was present. This was clearly not a proper former trial within the hearsay exception, so the court reversed.

The *Bennett* case involved all three exceptions. Again, there seems to have been some confusion of the exceptions as to testimony given at a former trial and the admissions of a co-conspirator. The exception as to testimony given at a former trial is one of the few exceptions to the hearsay rule that requires a showing of the unavilability of the declarant before the hearsay declaration is admissible. The exception for admissions of a party opponent has never required any showing of unavilability. In the *Bennett*

10. Bennett v. State, 231 Ga. 458, 202 S.E.2d 99 (1973).
11. 230 Ga. 523, 198 S.E.2d 176 (1973).
12. 231 Ga. 280, 201 S.E.2d 468 (1973).
13. *Id.* at 283, 201 S.E.2d at 470 (emphasis added).
14. 408 U.S. 204 (1972).
15. 231 Ga. 354, 201 S.E.2d 445 (1973).

case the majority approved the admission of a statement by a co-conspirator, citing *Dutton v. Evans*.[16] Also, a witness was called to the stand and claimed his privilege against self-incrimination. His testimony given at the defendant's commitment hearing was properly admitted. The dissenting opinion would have excluded both based on violation of the defendant's right of confrontation. It has been stated that: "A discussion of constitutional limitations upon the use of hearsay might well commence with the observation that their outline is somewhat less than clear."[17] The majority opinion seems to follow the present state of the federal decisions.

There was another admission by a co-conspirator that the majority held should not have been admitted, but that its admission was harmless error. The court held that it was not admissible since the unavilability of the declarant had not been shown. *Park v. State*[18] was cited as authority, but that case does not reach such a result. The dissenting opinion also states that the co-conspirator must be genuinely unavailable, citing *Mancusi v. Stubbs*,[19] a case considering the exception for testimony given at a former trial. The dissenting opinion also cites *Hoover v. Beto*.[20] That case is a good consideration of the area and makes it clear that availability is not a factor. It is hoped that the requirement of the unavilability of the declarant will not be carried over to the exception for admissions of a party opponent.

The *Bennett* case also involved the matter of a tacit admission or admissions by silence. The majority opinion approved a charge on a tacit admission that followed Ga. Code Ann. §38-409 (Rev. 1974). This was clearly proper under the present status of the law. The dissenting opinion thought that this compromised the defendant's fifth amendment right to remain silent, citing a number of recent cases in the constitutional area. This prediction may well be correct. There has been a trend in this direction in some cases,[21] but there is not as yet a decision to that effect binding on the Georgia courts.

III. RELEVANCY

A. Character

Where character is in issue it cannot be established by specific acts.[22] A witness may testify only as to general reputation, but on cross-examination the witness' basis for his opinion may be tested by inquiry as to whether

16. 400 U.S. 74 (1970).
17. E. CLEARY, MCCORMICK ON EVIDENCE §252, at 604 (2d ed. 1972).
18. 225 Ga. 618, 170 S.E.2d 687 (1969).
19. 408 U.S. 204 (1972).
20. 467 F.2d 516 (5th Cir. 1972).
21. *E.g.*, Fowle v. United States, 410 F.2d 48 (9th Cir. 1969); Commonwealth v. Dravecz, 424 Pa. 582, 227 A.2d 904 (1967).
22. Black v. State, 230 Ga. 614, 198 S.E.2d 314 (1973).

or not he had heard of specific acts allegedly done by the individual whose character is in issue.[23] When a criminal defendant puts his character in issue by his own testimony, once the "character door" is opened, he may be cross-examined as to "conviction of crimes, guilty and *nolo contendere* pleas, juvenile offense, and incidents which illustrate the defendant's character."[24] In this area, *Lynn v. State*[25] seems to have answered a question on which there had been conflicting decisions of that court. The question was whether or not the victim of an alleged rape may be cross-examined as to specific acts of prior sexual intercourse with men other than the defendant. Her character is in issue to the extent that her bad reputation for chastity, or lack thereof, is admissible on the issue of consent. The court adopted the majority rule that such evidence of specific acts is inadmissible for either impeachment purposes or on the issue of consent and, therefore, can not be inquired into on cross-examination. In adopting this rule the court apparently overruled the case of *Frady v. State*.[26]

Evidence of other crimes or offenses by the defendant is generally not admissible where his character has not been placed in issue by him. The exceptions are almost as numerous as the general rule. The other offense is admissible to show motive or intent.[27] Also, if the other offense is connected with the crime charged or is a part of the *res gestae* of that crime, it will be admissible.[28] Other offenses are most often admitted in regard to sexual offenses. Two rape cases are interesting enough to consider in detail.

In *Larkins v. State*[29] a witness testified, over objection, to an alleged rape upon the witness by the defendant which occurred some seven months prior to the occurrence for which the defendant was on trial. The witness stated that she did not report it because she was afraid of the defendant. The points of similarity were that both took place in the same neighborhood, each victim knew the defendant, who did not seek to hide his identity, and in both the victim was approached from the rear and overpowered by the attacker by choking her with his hands. The defendant had claimed consent. The court reviewed the cases in this area and reversed, holding that the evidence of the other rape was not admissible. One justice dissented on the ground that the evidence was properly admitted.

Overton v. State[30] was a rape case where the facts were somewhat out of the ordinary. In that case the wife solicited the 15-year-old victim for what

23. Upton v. State, 128 Ga. App. 547, 197 S.E.2d 478 (1973).

24. Scarver v. State, 130 Ga. App. 297, 202 S.E.2d 850 (1974).

25. 231 Ga. 559, 203 S.E.2d 221 (1974).

26. 212 Ga. 84, 90 S.E.2d 664 (1955).

27. Foster v. State, 230 Ga. 666, 198 S.E.2d 847 (1973).

28. King v. State, 230 Ga. 581, 198 S.E.2d 305 (1973); Davis v. State, 230 Ga. 902, 199 S.E.2d 779 (1973); Reid v. State, 129 Ga. App. 41, 198 S.E.2d 358 (1973); Holbrook v. State, 129 Ga. App. 129, 199 S.E.2d 105 (1973).

29. 230 Ga. 418, 197 S.E.2d 367 (1973).

30. 230 Ga. 830, 199 S.E.2d 205 (1973).

turned out to be a "three in the bed" operation. Both husband and wife were convicted of rape. The evidence in question related to conduct in other transactions rather than offenses, but one of the transactions would have been a sexual offense. Three female witnesses testified. One witness testified to a solicitation by the wife to get the witness to go to bed with the husband. Another witness testified to a solicitation by both husband and wife for the witness to come to their house. Another witness testified to taking part in a "three in the bed" operation with the husband and wife, but with the consent of the witness. The court held that this evidence had been properly admitted, since it was relevant to show plan, scheme, bent of mind, and course of conduct, which would corroborate the prosecutrix. The two solicitations had actually taken place earlier in the day of the alleged crime, so were closely connected.

B. Scientific Evidence

The "chain of custody" test as to the proper identification of various substances that have been the subject matter of scientific tests still causes problems. In one case the chain of custody as to a bullet had not been properly shown.[31] The missing link was the failure to show that the bullet involved was in fact the one taken from the back of the defendant. In another case the chain of custody as to some drugs had been properly established.

In *Harrison v. Lawhorne*[33] an expert witness testified as to the results that would follow from a blood alcohol test, even though the statutory presumption did not apply.

IV. Burdens and Presumptions

In *Smith v. Smith*[34] the court considered the effect of the 1957 amendment[35] to Ga. Code Ann. §53-102 (Rev. 1974) relating to the presumption of the validity of a second marriage. The court agreed with a previous ruling of the court of appeals.[36] Plaintiff proved a ceremonial marriage to the deceased in 1955. Defendant showed two prior ceremonial marriages of the deceased, but did not show that his former spouses were living. This fact was necessary in order to take advantage of the 1957 act, so the presumption in favor of the validity of the 1955 marriage controlled and plaintiff had no further burden.

It appears that another installment on alibi is not necessary. As noted

31. Terry v. State, 130 Ga. App. 655, 204 S.E.2d 372 (1974).
32. Craig v. State, 130 Ga. App. 689, 204 S.E.2d 307 (1974).
33. 130 Ga. App. 314, 203 S.E.2d 292 (1973).
34. 230 Ga. 616, 198 S.E.2d 307 (1973).
35. Ga. Laws, 1957, p. 83.
36. Zurich Ins. Co. v. Craft, 103 Ga. App. 889, 120 S.E.2d 922 (1961).

last year,[37] trial judges have simply quit giving the *Thornton*[38] charge. In a number of cases the court has approved a charge on alibi that properly did not place any burden on the criminal defendant and may have cured the evil.[39] However, the trouble has spread into the entire area of affirmative defenses in criminal cases.

The Supreme Court of Georgia has gradually worked up to the point of placing the burden of persuasion on the defendant to prove his insanity when he pleads not guilty by reason of insanity. The state has no burden of proving his sanity and may travel entirely on the presumption of sanity. In *Grace v. State*[40] the approved charge made insanity an affirmative defense. In his dissenting opinion, Justice Ingram raises the question as to whether it is constitutionally permissible to place this burden on an accused. He concludes that it is not permissible. His dissenting opinion is a good review of the problem. The writer's crystal ball is cloudy, but it may well be that the Supreme Court of the United States would agree with Justice Ingram.

In *Chandle v. State*[41] the court stated the usual rule as to affirmative defenses in a criminal case and held that accident was an affirmative defense. There is no doubt that when a criminal defendant enters a true affirmative defense he has all of the burdens in regard to the defense. The difficulty is in regard to what is a true affirmative defense. In other words, can a statute make something an affirmative defense in a criminal case that is not a true affirmative defense. The difficulty arises from the 1968 Criminal Code of Georgia, Ga. Code Ann., tit. 26 (Rev. 1972). Chapter 26-9 of the code lists a number of defenses and section 26-907 states that: "A defense based upon any of the provisions of this Chapter is an affirmative defense." The case of *Reed v. State*[42] considered this problem. In this case the defendant raised the defense of entrapment. Section 26-905 sets out the defense of entrapment and section 26-907 makes it an affirmative defense. Nevertheless, the court held that the state had the burden of proof on the question of entrapment. The defenses of alibi and insanity were distinguished, since the court of appeals was bound in these areas by decisions of the supreme court. The court reviewed the federal cases. There will be much future judicial consideration of the matter of affirmative defenses in criminal cases, including alibi and insanity. It will probably require final determination by the Supreme Court of the United States.

37. Agnor, *Annual Survey of Georgia Law: Evidence*, 25 MERCER L. REV. 133 (1974).

38. Thornton v. State, 226 Ga. 837, 178 S.E.2d 193 (1970).

39. Paschal v. State, 230 Ga. 859, 199 S.E.2d 803 (1973); White v. State, 231 Ga. 290, 201 S.E.2d 436 (1973); Payne v. State, 231 Ga. 755, 204 S.E.2d 128 (1974).

40. 231 Ga. 113, 200 S.E.2d 248 (1973).

41. 230 Ga. 574, 198 S.E.2d 289 (1973).

42. 130 Ga. App. 659, 204 S.E.2d 335 (1974).

V. Demonstrative Evidence

In *Woodring v. State*[43] the skull of the deceased was introduced in evidence, displayed in front of the jury and taken to the jury room. This was proper. The defendant contended that he offered to stipulate sufficient facts to relieve the state of the necessity of introducing this character of evidence. The court stated that a party cannot by such a stipulation prohibit the opposing party from introducing proper evidence. Also, the courts in Georgia have continued to hold that photographs of victims are admissible over objections that they are inflammatory and prejudicial.[44]

Eiland v. State[45] is a rather unusual case involving a video tape. The court seems to have assumed that in general video tapes would be admissible. In Georgia, posed photographs are admissible if there are no material variations between the picture and the scene. This case involved a situation where two unmarked police cars manned by ununiformed detectives had attempted to stop the defendant's automobile at about 11:30 P.M. The tape was made in daylight with a marked police car and all contested facts were depicted as contended by the state. The court found that there were too many material variations so that it was error to have admitted the tape. The court also stated that there had been no need to use a film in the first place.

VI. Writings

In *Hutcheson v. American Machine & Foundry Co.*[46] the court applied the usual rule and permitted a witness to testify as to an "audit report" which resulted from the examination of a large number of detailed entries on invoice records. The records themselves were accessible to the court and to the parties.

In *Strickland v. Foundation Life Insurance Co.*[47] the court applied Ga. Code Ann. §38-710 (Rev. 1974), and held that Xerox copies of duplicate originals, made in the ordinary course of business, were admissible without accounting for the originals. The best evidence rule was also considered in *Builders Homes of Georgia, Inc. v. Wallace Pump & Supply Co.*[48] Here a witness testified as to the scope of his authority for his principal. There was in existence a written list of his responsibilities. The court held that where there was both written and oral evidence of an independent fact, the best evidence rule did not apply. The court also applied the usual rule that

43. 130 Ga. App. 247, 202 S.E.2d 696 (1973).
44. Allen v. State, 231 Ga. 17, 200 S.E.2d 106 (1973); Dixon v. State, 231 Ga. 33, 200 S.E.2d 138 (1973).
45. 130 Ga. App. 428, 203 S.E.2d 619 (1973).
46. 129 Ga. App. 602, 200 S.E.2d 371 (1973).
47. 129 Ga. App. 614, 200 S.E.2d 306 (1973).
48. 128 Ga. App. 779, 197 S.E.2d 839 (1973).

carbon copies of letters were duplicate originals and admissible as primary evidence.

VII. WITNESSES

A. *Generally*

The courts still have difficulty in regard to a witness refreshing his memory due to the fact that Ga. Code Ann. §38-1707 (Rev. 1974), includes the hearsay exception for records of past recollection recorded with the matter of refreshing the recollection of the witness.[49] In *Wallis v. Odom*[50] the court held that it was not error to refuse to allow a police officer to refresh his memory from a police report since it had been prepared by another. This would be correct as to the hearsay exception, but not as to refreshing the recollection of the witness.

Childers v. State[51] contains a good discussion of the judge's discretion in regard to the sequestration of witnesses where the sheriff was properly permitted to remain in the courtroom.

The case of *Geiger v. State*[52] needs to be mentioned. In that case the record on appeal comprised a total of 3,411 pages, which the court considered to be the lengthiest in the 67-year existence of the court of appeals. The defendant's unsworn statement covered 727 pages of the transcript. Two judges dissented from the judgment affirming the conviction. Many points were considered, but most of them would not require comment in this survey. The court did point out that the scope of cross-examination is not unlimited and discussed the discretion of the judge in keeping cross-examination within reasonable bounds.

Braswell v. Owen of Georgia, Inc.[53] involved some improper hypothetical questions that included facts that had not been placed in evidence by other witnesses.

Geter v. State[54] involved a rather unusual question of competency. The witness had been admitted to a hospital two days prior to his appearance in court for treatment for drug addiction. He was brought to the courtroom under medication and on a stretcher. The court conducted a hearing out of the presence of the jury and found the witness to be competent. The court had properly exercised its discretion under Ga. Code Ann. §38-1610 (Rev. 1974).

In *Moore v. State*[55] the trial judge charged on impeachment and stated

49. Shouse v. State, 231 Ga. 716, 203 S.E.2d 537 (1974).
50. 130 Ga. App. 437, 203 S.E.2d 613 (1973).
51. 130 Ga. App. 555, 203 S.E.2d 874 (1974).
52. 129 Ga. App. 488, 199 S.E.2d 861 (1973).
53. 128 Ga. App. 528, 197 S.E.2d 463 (1973).
54. 231 Ga. 615, 203 S.E.2d 195 (1974).
55. 231 Ga. 301, 302, 201 S.E.2d 432, 433 (1973).

that a witness "stands impeached." The court stated that "stands attacked" would have been a better choice of words, but that when the complete charge was considered it was not error. Two justices dissented. *Wooster v. Boles*[56] contains a good discussion of the general rule that credibility of a witness is entirely a matter for the jury.

B. Opinion Evidence And Expert Witnesses

In a number of cases the court applied the general rule that the qualification of a witness as an expert is entirely within the discretion of the court.[57] This is true even where the witness himself may question his own expertise.[58]

The problem of the ultimate issue invading the province of the jury still arises in regard to opinion testimony. It is always difficult to try to reconcile the cases.

In *Fishman v. State*[59] an investigator for the district attorney's office stated that various photographs involved in the case were obscene. He had not been qualified as an expert and did not attempt to state his opinion as a non-expert because he stated no basis for an opinion. Thus, his stating a mere conclusory opinion as to the ultimate fact the jury was to decide was error. In *Tittle v. McCombs*[60] the trial judge had properly rejected a question asked of an eyewitness seeking his opinion whether the speed of the motorcycle was "excessive for the time, place and conditions." This related to the ultimate question of negligence and would have invaded the province of the jury. Also, in *Wallis v. Odom*,[61] a similar question as to negligence was properly rejected.

The case of *Steverson v. Hospital Authority of Ware County*[62] raises a problem. It was a 5-3-1 decision and involved a number of questions. This was a wrongful death action against a hospital and doctor. The defendant doctor testified as an expert. He was asked to state his opinion as to whether or not the hospital personnel had exercised a reasonable degree of care and skill in this case. His answer was: "Oh yes, I can testify that in my opinion the hospital personnel exercised a reasonable degree of care in this case."[63] The court held this question and answer proper over an objection that it invaded the province of the jury. It is not clear whether the

56. 130 Ga. App. 542, 203 S.E.2d 745 (1974).

57. Martin v. Newton, 129 Ga. App. 735, 201 S.E.2d 31 (1973); Oak Ridge Village, Inc. v. LaSiesta Mobile Home Park, Inc., 130 Ga. App. 539, 203 S.E.2d 748 (1974); Johnson v. State, 130 Ga. App. 704, 204 S.E.2d 302 (1974).

58. Braswell v. Owen of Georgia, Inc., 128 Ga. App. 528, 197 S.E.2d 463 (1973); Merrill v. State, 130 Ga. App. 745, 204 S.E.2d 632 (1974).

59. 128 Ga. App. 505, 197 S.E.2d 467 (1973).

60. 129 Ga. App. 148, 149, 199 S.E.2d 363, 365 (1973).

61. 130 Ga. App. 437, 203 S.E.2d 613 (1973).

62. 129 Ga. App. 510, 513, 199 S.E.2d 881, 885 (1973).

63. *Id.*

court intended to create a special rule to apply to medical experts in malpractice cases. Generally, expert witnesses should state a standard of care and leave the question of whether that standard was complied with in the specific case for the jury.

C. *Privilege*

In *Welch v. State*[64] the court again points out the distinction drawn in Georgia between an "informer" and a "decoy" and sustained the claim of the informer privilege.

The psychiatrist-patient privilege was again considered in *Thadd v. State*.[65] The court held that a psychiatrist who makes an examination of an accused under court order is a witness for the court and that the requisite psychiatrist-patient relationship does not exist so as to create the privilege. Thus, the witness may testify as to statements made by the defendant during the examination.

VIII. Constitutional Privileges

Cases involving constitutional privilege are considered more at length in other articles of this survey. However, there are a few areas that involve specific evidence questions that might be considered.

A. *Self-Incrimination*

In *Jones v. State*[66] a ten-year-old boy was called as a witness by the state. He invoked the fifth amendment, but was required to testify. Since he was exempt from criminal prosecution by virtue of his age, he was not entitled to claim a privilege against self-incrimination. Although not mentioned by the court, the defendant could not have assigned error on such a ruling in any event since he had no connection with the claimed privilege.

The practice of granting immunity to a witness in order to require him to testify over his claim of the privilege against self-incrimination has appeared in recent years.[67] In an addendum to *Carter v. State*,[68] Judges Evans and Clark raise the question as to whether any general grants of immunity would be valid in Georgia. The question was not reached in that case.

Two recent cases involving tests to show the alcohol content of blood may indicate a trend away from a long established view in regard to the privilege against self-incrimination in Georgia. The Georgia courts have

64. 130 Ga. App. 18, 202 S.E.2d 223 (1973).
65. 231 Ga. 623, 203 S.E.2d 230 (1974).
66. 128 Ga. App. 885, 198 S.E.2d 336 (1973).
67. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).
68. 129 Ga. App. 536, 199 S.E.2d 925 (1973).

generally extended the privilege to include a number of areas of activity in regard to an accused other than testimony. The trend in the federal courts has been to limit the privilege to testimony and documents. Georgia seems to be changing its view. In *Strong v. State*[69] the defendant had been convicted of murder that resulted from a wreck caused by his negligence. After the wreck the defendant was taken to a hospital. While he was unconscious a blood sample was withdrawn and an analysis showed .20% alcohol content. Defendant claimed his privilege and also relied on the warning provision of Ga. Code Ann. §68-1625.1 (Supp. 1973). The court held that the statutory provision related only to driver license suspensions and was not involved in this case. The court then held that there had been no violation of the privilege against self-incrimination, relying on *Schmerber*[70] and *Breithaupt.*[71] The dissenting opinion notes that this is a change from the Georgia position and would limit the privilege against self-incrimination to testimony and documents. In *Purvis v. State*[72] the defendant had taken an intoximeter test and objected to the admission of the results of the test since he had not been warned under Ga. Code Ann. §68-1625.1 (Supp. 1973). The court held that the warning only applied to driver license suspensions and not to a charge of driving under the influence under Ga. Code Ann. §68-1625 (Rev. 1967). The court also held that the privilege against self-incrimination did not apply to non-communicative acts such as intoximeter tests.

B. Confessions

In *Jones v. State*[73] the defendant was arrested and later given a proper warning before any questions were asked of him. He contended that he should have been warned of his rights immediately after being arrested. The court rejected that contention.

In *Moore v. State*[74] the defendant made a statement after he had been falsely told that the murder weapon had been found. He contended that the statement had been obtained by fraud and was not admissible under Ga. Code Ann. §38-408 (Rev. 1974). The court held that that section applied only to admissions in civil cases.

In *Echols v. State*[75] the court again held that the so-called *McNabb-Mallory* rule[76] did not apply to the state and the statement of the defendant was properly admitted.

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69. 231 Ga. 514, 202 S.E.2d 428 (1973).
70. Schmerber v. California, 384 U.S. 757 (1966).
71. Breithaupt v. Abram, 352 U.S. 432 (1957).
72. 129 Ga. App. 208, 199 S.E.2d 366 (1973).
73. 128 Ga. App. 885, 198 S.E.2d 336 (1973).
74. 230 Ga. 839, 199 S.E.2d 243 (1973).
75. 231 Ga. 633, 203 S.E.2d 165 (1974).
76. McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957).

In *Williams v. State*[77] the defendant had testified outside the presence of the jury at the hearing on the admissibility of his statement. He contended that he should be able to testify before the jury on this issue without subjecting himself to the usual cross-examination. The court rejected this contention.

C. *Search And Electronic Surveillance*

The motion to suppress as provided in Ga. Code Ann. §27-313 (Rev. 1972) is the method for testing the lawfulness of a search and seizure. As pointed out in *Childers v. State*,[78] if a motion to suppress is denied, the defendant must still object to the evidence involved when it is offered at trial or the failure to object will constitute a waiver of any error made in overruling his motion to suppress.

A problem is developing with a possible misconstruction of the motion to suppress. Ga. Code Ann. §27-313 (Rev. 1972) states in part: "A defendant aggrieved by an unlawful search and seizure may move the court for the return of property the possession of which is not otherwise unlawful and to suppress as evidence anything so obtained . . . ." Naturally, only "property" could be returned, but "anything" can be suppressed. There must have been a search and seizure that is claimed to be unlawful. In *Baker v. State*[79] the defendant sought to suppress the testimony of two policemen, eyewitnesses and victims of the crime. No search was involved. The court properly held that this testimony was outside the scope of the motion to suppress under Ga. Code Ann. §27-313 (Rev. 1972). This case was construed in *Reid v. State*[80] to mean that the motion to suppress could only be applied to "property" and not "testimony." In that case the sheriff searched the premises of the defendant and found more than two quarts of liquor in a dry county. Due to a defect in the search warrant, the court stated that the liquor should have been suppressed, but not the testimony of the sheriff as to finding the liquor. Since no objection was made to this testimony at trial, it was not error to admit the testimony. The liquor was not introduced at trial. In a special concurrence to *Childers v. State*,[81] Judge Evans raised the point that the testimony respecting the property should be suppressed as well, but still followed the view that the motion to suppress could not be used for mere testimony.

This misconception carried over into *Cauley v. State*.[82] In that case the defendant moved to suppress "all testimony" that resulted from police interception of telephone conversations to which the defendant was a

77. 231 Ga. 508, 202 S.E.2d 433 (1973).

78. 130 Ga. App. 555, 203 S.E.2d 874 (1974). *See also* Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973).

79. 230 Ga. 741, 199 S.E.2d 252 (1973).

80. 129 Ga. App. 660, 200 S.E.2d 456 (1973).

81. 130 Ga. App. 555, 203 S.E.2d 874 (1974).

82. 130 Ga. App. 278, 203 S.E.2d 239 (1973).

party. The court held that since the motion to suppress was directed at anticipated testimony rather than "property," the motion to suppress would not lie. Other points in this case will be discussed below, but this point seems to have been incorrectly decided. The court cited the *Baker* and *Reid* cases as authority and compounded the difficulty. Clearly under *Katz v. United States*[83] the interception without authority of a telephone conversation is a search and seizure. The resulting testimony would be "anything so obtained" under Ga. Code Ann. §27-313 (Rev. 1972) and should be suppressed.

Problems concerning electronic surveillance continue to arise. *Humphrey v. State*[84] involved a charge of bribery. Some conversations of the defendant with another councilman were recorded without the knowledge or consent of the defendant but with the consent of the other party. Ga. Code Ann. §26-3006 (Rev. 1972) sets out an exception permitting the "interception, recording and divulging of a message sent by telephone, telegraph, letter or any other means of communication" where the message constitutes the commission of a crime or is directly in the furtherance of a crime and one party thereto consents. The defendant contended that this exception did not apply to face-to-face conversations. The court did not agree and held that face-to-face conversations were included within the exception of Ga. Code Ann. §26-3006 (Rev. 1972).

Cross v. State[85] was another bribery case. Here a police officer had a concealed electronic transmitting device on his body while he had a conversation with the defendant in which the defendant allegedly offered money to the officer in return for intelligence-type information on police activities. Two other officers received and recorded the conversation. The case involved an appeal by the defendant from the denial of his motion to suppress the recording and the testimony. The majority of the court held that Ga. Code Ann. §26-3001 (Rev. 1972) prohibiting the interception of private conversations did not apply to a party to the conversation, largely on the authority of *United States v. White*.[86] The court also stated that the conversation here would come under the exception of Ga. Code Ann. §26-3006 (Rev. 1972). The rationale usually given for the *White* case and *Hoffa v. United States*[87] is that since a party to the conversation could testify to the conversation, it should not matter that the conversation has been recorded and the record should be admissible. Judge Evans concurred specially on the ground that the conversation involved would come under the exception of Ga. Code Ann. §26-3006 (Rev. 1972). Two other cases also applied this exception.[88] Judge Evans raises an interesting point that does

83. 389 U.S. 347 (1967).
84. 231 Ga. 855, 204 S.E.2d 603 (1974).
85. 128 Ga. App. 837, 198 S.E.2d 338 (1973).
86. 401 U.S. 745 (1971).
87. 385 U.S. 293 (1966).
88. Cauley v. State, 130 Ga. App. 278, 203 S.E.2d 239 (1973); Adams v. State, 130 Ga. App. 362, 203 S.E.2d 314 (1973).

not appear to have been decided in Georgia. It is interesting to note that in the *Humphrey* case mentioned above, the supreme court made reference to this concurring opinion,[89] apparently with approval. The questions is whether a party to a conversation may surreptitiously record the conversation without violating the Georgia statute, where the conversation does not come under the exception of Ga. Code Ann. §26-3006 (Rev. 1972) and no warrant has been obtained. Tape recordings of this kind have been much in the news lately, although they were not subject to the Georgia statute. Even though the party to the conversation could testify to the conversation, the questions remain as to the admissibility of the recordings in evidence and as to the possible commission of a criminal offense. The majority in the *Cross* case says that there would be no violaion of the statute and the recording would be admissible. Judge Evans does not agree. The question of a criminal offense by the recording was not involved. Judge Evans properly points out the completely different language in the federal statute[90] that would support the *White* case and other federal cases. It is necessary to consider the exact language of the Georgia statute, which is entitled "Invasions of Privacy." Ga. Code Ann. §26-3001 (Rev. 1972) states in part: "It shall be unlawful for: (a) any person in a clandestine manner to intentionally overhear, transmit, or record . . . the private conversation of another which shall originate in any private place . . . ." Exceptions are provided in Ga. Code Ann. §26-3004 (Rev. 1972) for a warrant and in Ga. Code Ann. §26-3006 (Rev. 1972) where one party to the conversation consents and the conversation constitutes the commission of a crime or is directly in furtherance of a crime. Ga. Code Ann. §26-3007 (Rev. 1972) excludes any evidence obtained through a violation of the statute and Ga. Code Ann. §26-3010 (Rev. 1972) makes a violation of the statute a felony. Ga. Code Ann. §26-3009 (Rev. 1972) defines "private place" to mean "a place where one is entitled to reasonably expect to be safe from casual or hostile intrusion or surveillance." Suppose that *A* goes to *B*'s office and has a conversation with *B*. (An office is a "private place.")[91] Unknown to *A* and without his consent, *B* has his tape recorder running. The conversation does not come under any exception in the statute. It would appear that *B* could testify to the conversation, but the recording would not be admissible in evidence under the Georgia statute and that *B* has committed a felony. Judge Evans seems to be correct.

There were a number of other miscellaneous search cases. A few might be mentioned. *Guest v. State*[92] involved a search valid because of the consent of the defendant. The court held that there was no requirement for any warning as to his constitutional rights before the consent was given.

89. 231 Ga. at 863, ___ S.E.2d at ___.
90. 18 U.S.C. §2511(2)(c), (d) (1970).
91. Nixdorf v. State, 226 Ga. 615, 176 S.E.2d 701 (1970).
92. 230 Ga. 569, 198 S.E.2d 158 (1973).

Allison v. State[93] was another case where a search warrant was properly issued to remove a bullet from the body of the defendant.

In *Morrison v. State*[94] the claim was made that a shotgun, bush-axe, and shovel were "tainted fruit from the poisoned tree" since they had been obtained as a result of an illegal confession. The court found that there was a sufficient independent and lawful source of the objects.

In *Brand v. State*[95] the court held that the search of an automobile was valid under facts very similar to *Schneckloth v. Bustamonte.*[96] *Cato v. State*[97] involved the search of the driver of an automobile after he had been arrested for speeding. The search was held valid on authority of *Robinson* and *Gustafsen.*[98]

State v. David[99] involved a search at the Atlanta airport. The defendant, who did not have a ticket, was accompanying a ticketed passenger to the loading ramps. As he walked through the entranceway he set off the magnetometer. The security officers stopped him and asked him to remove his hand from his jacket. He informed them that he had a weapon, which they removed. The defendant's motion to suppress this evidence was sustained and the state appealed. The court reviewed some federal cases and held that the "search" by the magnetometer was lawful and that when it was set off this justified the "frisk."

IX. STATUTES

The 1974 session of the General Assembly of Georgia produced only a few new statutes in the field of evidence. It could really be called de minimis, but a few statutes might be mentioned.

Ga. Code Ann. §26-2510[100] provides a new misdemeanor offense of tampering with evidence. Although not clearly stated, it seems to apply only to criminal cases and includes the preparation of false evidence.

Another statute[101] provides for the use of deaf sign language interpreters in certain administrative and judicial proceedings.

A third[102] grants authority to medical examiners to take blood samples to be tested for intoxicating substances on request of a peace officer when the individual is dead or unable to give consent.

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93. 129 Ga. App. 364, 199 S.E.2d 587 (1973).
94. 129 Ga. App. 558, 200 S.E.2d 286 (1973).
95. 129 Ga. App. 747, 201 S.E.2d 180 (1973).
96. 412 U.S. 218 (1973).
97. 130 Ga. App. 831, 204 S.E.2d 765 (1974).
98. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973).
99. 130 Ga. App. 872, 204 S.E.2d 773 (1974).
100. Ga. Laws, 1974, p. 423.
101. Ga. Laws, 1974, p. 484.
102. Ga. Laws, 1974, p. 561.

The last[103] relates to the disclosure of certain medical records. It seems to provide for the disclosure of certain "confidential or privileged" medical records under certain circumstances. It would be interesting to know the purpose of this statute, since there is no general privilege for medical records.

103. Ga. Laws, 1974, p. 595.