Evidence

By Hardy Gregory, Jr.*

I. Opinion Evidence

There is no rule of evidence more difficult to apply in the courtroom than the opinion rule. This troublesome problem exists because trial judges are regularly called upon to distinguish between fact and opinion, when the distinction is no more than a matter of degree. Opinion evidence is not a subject which can be precisely measured and delineated with all facts on the one side and all opinions on the other.[1] The witness often is admonished not to give his opinion, but rather to state what he observed. But the more deeply the problem is analyzed, the less likely it seems that the admonition can be heeded. Even if the witness simply states that "the car was blue," does this not call for his conclusion on that subject based upon his past experience? Practically any fact stated by the witness calls for the witness' interpretation or opinion to some degree. Because of this difficulty in applying the opinion rule, there have been suggestions that the rule be abruptly modified and even that it be abolished altogether.[2] Such abrupt change is probably not likely or desirable. A more gradual evolution is likely. The best service a survey article on this subject might be expected to render is to point out those cases which may indicate a trend or at least state the present status of one or more of the aspects of the opinion rule. With these thoughts in mind, the following opinions are noted.

In *Dual S. Enterprises, Inc. v. Webb*,[3] the court of appeals said that Georgia is among those jurisdictions involved in a trend away from that sub-part of the opinion rule which holds that a witness may not give an opinion on the ultimate fact in issue. The frequent cry of alarm in the courtroom is that the witness is about to "invade" or "usurp" the province of the jury. In *Webb* a collision occurred when one or both vehicles involved crossed the centerline of the road while rounding a curve. A witness was

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1. C. McCormick, Evidence, §11, at 24 (2d ed. 1972) (hereinafter cited as McCormick). "The difference between so-called 'fact,' then, and 'opinion,' is not a difference between opposites or contrasting absolutes, but a mere difference in degree with no recognizable line to mark the boundary."

2. 7 J. Wigmore, Evidence, §1929, at 28 (1940). Bozeman, *Suggested Reforms of the Opinion Rule*, 13 Temple U.L.Q. 296 (1939).

3. 138 Ga. App. 810, 227 S.E.2d 418 (1976).

asked to state his opinion of the maximum safe speed that one of the vehicles involved might travel around the curve. The contention on appeal was that this question called for the witness to express an opinion on the ultimate issue. Judge Clark, writing for the court, disagreed that this question presented the ultimate issue, for the ultimate issue was whose negligence was the proximate cause of the injury. But, even if the ultimate issue was the subject of the opinion, the objection was considered not well taken. "A witness may testify as to his opinion where the question is a proper one for opinion evidence, even though it is the ultimate issue for the jury in the case . . . ."[4] Judge Clark further noted, however, that if the opinion calls for a legal conclusion, it will not be permitted. Therefore, it is suggested that if the witness in *Webb* had been asked for his opinion of whether the defendant's acts were negligent and the proximate cause of the plaintiff's injuries, his answer would have been disallowed because it called for a legal conclusion by the witness and not because it reached the ultimate issue. Some writers suggest that this aspect of the original rule against usurping the province of the jury should be retained. If, for instance, the witness is called upon to state which party should prevail in the case, his statement should be rejected as being of no help to the jury and as creating a danger of undue prejudice.[5]

The proposition that a witness' opinion may not invade the province of the jury is so thoroughly ingrained into the fabric of trial work in Georgia it will undoubtedly be stated in courtrooms for decades to come and will be set forth in appellate opinions as it was in *Evans v. Batchelor.*[6] A lay witness was allowed to give his opinion, after stating the facts upon which it was based, that the speed of the defendant's vehicle was 50 or 60 miles per hour and also that it "wasn't excessive." The trial court allowed this opinion and this conclusion was upheld on appeal. The court recognized that the expression of whether the speed was excessive was closely related to the ultimate issue of negligence and was a matter for the jury to determine. However, the court permitted the expression because the witness revealed the facts upon which his opinion was based. But does that not miss the mark? After all, the requirement that the witness state the facts upon which he based his opinion is a rule relating to the distinction between opinions of lay witnesses as opposed to opinions of expert witnesses. If a lay witness lacked firsthand knowledge, he would be without any basis for his opinion. Assuming the result of the opinion to be correct, would it not have been better to acknowledge that such statements as the vehicle was traveling "50 miles per hour" or "very fast" or "very slow" or "excessively fast" or at a "moderate speed" are all expressions of opinions which are of some help to the jury in determining the issue of negligence.

4. *Id.* at 811, 227 S.E.2d at 420.
5. McCormick §12, at 27.
6. 137 Ga. App. 629, 224 S.E.2d 752 (1976).

None of the expressions call upon the witness to reach a legal conclusion concerning the doctrine of negligence, nor are any of them a mere statement of which party should prevail.

The opinions demonstrate a range of application of the rule. In *Harper v. Georgia Southern & Florida Ry. Co.*,[7] a crewman on a train involved in a crossing collision was allowed to give his opinion that no collision would have occurred if the truck had not traveled down the track toward the train. In *Benefield v. State*,[8] an expert was allowed to give an opinion of why drug sellers use a procedure of handing drugs to a third party for delivery to the purchaser. (The answer is that sellers believe mistakenly that they cannot be charged with a crime under these circumstances.) In *Hagin v. Powers*,[9] a party's estimate of the value of his personal property was excluded because no basis or reason for the values was shown. In *Dix v. State*,[10] an opinion of the state of a person's mind was held admissible, provided the facts upon which the opinion rested were given. The witness was allowed to give his opinion that the defendant was "putting on an act" when he expressed grief. The witness based his opinion upon a rather lengthy observation of the defendant during which his behavior was erratic and he shed no tears.

There is discussion about the validity of the use of the hypothetical question to elicit the opinion of expert witnesses. There are evils associated with its use, principal among which is the rule allowing a party to select from among all the facts in evidence only those facts he wishes to use in his question and thereby alter the results.[11] Even if this rule creates problems, it does have the distinction of being approved by the majority of jurisdictions today. (The other view is that one must use all the facts in evidence or at least a fair summary thereof in posing his hypothetical question.) Nonetheless, the view in Georgia, at least since 1922,[12] has been to allow the party to select his facts. This rule was again acknowledged in Georgia during the survey period in *Dix v. State*.[13]

II. RELEVANCY

It would be interesting indeed to find cases altering the meaning of such a fundamental concept as relevancy. This has not been done during the survey period, but there were several cases in which the courts stated and applied the rule of relevancy in Georgia to rather unusual factual circumstances. Surely it is a worthy exercise to review these cases to reaffirm the

7. 140 Ga. App. 802, 232 S.E.2d 118 (1976).
8. 140 Ga. App. 727, 232 S.E.2d 89 (1976).
9. 140 Ga. App. 300, 231 S.E.2d 780 (1976).
10. 238 Ga. 209, 232 S.E.2d 47 (1977).
11. MCCORMICK, §16 at 36.
12. Davis v. State, 153 Ga. 669, 113 S.E. 11 (1922).
13. 238 Ga. 209, 232 S.E.2d 47 (1977).

rule and again touch base with so basic a proposition in our judicial system. Thayer's pronouncement that our system forbids receiving in evidence matter not relevant and, conversely, forbids the refusal of matter which is relevant unless there is a definite assignable reason for exclusion, stands the tests of logic, of reason, and of time.[14] The rule of relevancy, or better stated, the test of relevancy, announced by the U.S. Supreme Court[15] and approved in *McCormick*[16] is: "Does the evidence offered render the desired inference more probable than it would be without the evidence." The rule has been stated by the Georgia courts to be: "Any evidence is relevant which logically tends to prove or to disprove a material fact which is at issue in the case and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant."[17] Some might point out that this Georgia statement of the rule tends to combine the matter of materiality with that of relevancy. That is, whether a matter is material relates to whether such matter is in issue. For instance, some facts are established in the pleadings and hence are not in issue. Certain evidence might well render an inference more probable and hence fall within the *McCormick* definition of relevancy and still relate to a matter not in issue because it was not disputed. Perhaps it is not very important to keep the distinction between materiality and relevancy so long as a rule which combines the two clearly points out that one must first ask if the fact sought to be proved is a fact that may be proved in the case (materiality) and then ask if the evidence offered renders the desired inference more probable than it would be without the evidence (relevancy). There is an amplification of the Georgia rule which might resolve many close cases involving distinctions, by providing that when relevancy is in doubt the evidence should be admitted.[18]

Johnson v. Jackson[19] was a wrongful death action. The defendant, an agent of the G.B.I., arrived home from work earlier than usual and discovered two men sitting in a car with the engine idling. The defendant noticed that the garage door which he had left closed was partially open. He questioned the two men, and while he talked to them, they attempted to drive away. The defendant fired two shots from his pistol, one of which killed the driver and gave rise to the action for wrongful death. During the trial, the defendant's counsel offered evidence of a footprint, found inside the garage, that matched the shoes worn by the deceased and evidence of pry marks at the back door which could have been produced by tools found in

14. J. THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898).
15. Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892).
16. MCCORMICK, §185, at 437.
17. McNabb v. State, 70 Ga. App. 798, 799, 29 S.E.2d 643, 644 (1944).
18. Patton v. Smith, 119 Ga. App. 664, 168 S.E.2d 627 (1969).
19. 140 Ga. App. 252, 230 S.E.2d 756 (1976).

the getaway vehicle. This evidence was offered as proof that the defendant had reason to believe the two men were burglars. The plaintiff objected that the evidence was irrelevant since the defendant was not aware of either the footprint or the marks at the door until after he had fired the shots. This case is a good example of the distinction between materiality and relevance. There were several issues before the court. One issue was the state of mind or knowledge of the defendant. Another was whether a burglary was in fact in progress. Another way to state the same issue is, what was the status of the deceased? Was he a mere trespasser, an invitee, a burglar or what? So, the evidence of the footprint is material to the case if it bears upon either of these issues. If it was undisputed that the defendant had no knowledge of these things, which appears to be the case, then proof of these facts can hardly be said to make the inference sought (that defendant had reason to suspect a burglary) more probable. But it is certain that proof of these facts does tend to make the inference of the burglary more probable. Therefore, the evidence ought to be allowed over a relevancy objection as the court did in this case.

Pollock v. Georgia Power Co.[20] was a suit by some Mitchell County pecan farmers for damages against Georgia Power for crop loss which they contended was the result of sulfur dioxide emissions from the defendant's plant. Actual and exemplary damages were sought. The farmers offered to prove that another of the defendant's plants located elsewhere burned a type coal with less sulfur content which would have caused less crop damage than the type coal burned at the Mitchell County plant. The trial court sustained an objection to this offer of proof on the ground of relevancy and was reversed on appeal. The matter was found to be relevant to the issue of exemplary damages because it tended to show that the defendant acted arbitrarily. If there had been no question of exemplary damages involved, the objection might have been good. However, it can be seen that the proof offered indicated that the company could have used the same type coal in Mitchell County, thereby decreasing the loss. All of this goes to the question of exemplary damages.

In *Citizens & Southern National Bank v. Hodnett,*[21] the plaintiff sought to establish a lost deed from her deceased husband to the plaintiff conveying land valued at approximately $530,000.00. Of course, if the deed had been established, this land would pass to the plaintiff and not fall within her deceased husband's estate to be shared with other beneficiaries. The defendant sought to prove facts showing that the plaintiff first sought year's support which would have awarded her $100,000.00, and that the plaintiff then dismissed this proceeding and elected to take under the will. The defendant further offered to prove that, if the land were included in the plaintiff's husband's estate (hence, there effectively having been no

20. 141 Ga. App. 678, 234 S.E.2d 107 (1977).
21. 139 Ga. App. 839, 229 S.E.2d 792 (1976).

deed), the plaintiff's share of the estate would exceed $100,000.00. If the land were not included in the estate (hence, the deed be considered established) the plaintiff's share of the estate would be less than $100,000.00. By this the defendant sought to show that the plaintiff would, for the obvious financial advantage, have taken the year's support if she truly believed the land was previously deeded to her. Thus the defendant sought to raise an inference that there was no lost deed. The trial court excluded the evidence as irrelevant, but the court of appeals quite correctly reversed. Of course, the evidence offered is far from conclusive on the question, but that is not the test. The operative question is, does the evidence offered render the desired inference more probable than it would be without the evidence? It does.

III. Hearsay to Explain Conduct

In nearly every criminal trial and in the vast majority of civil trials ever seen by the writer, evidence of one sort or another is offered which at first would appear to be hearsay but is admitted for the purpose of explaining conduct. The typical example is where a police officer testifies that a voice on the telephone told him that the defendant just shot the deceased. This statement is allowed into evidence to explain the conduct of the officer in going to the scene and making an arrest of the defendant. It is not allowed to prove that the defendant shot the deceased. The frequency of the appearance of this kind of evidence is also attested to by the large number of appellate opinions dealing with the issue. There were more than a dozen during the survey period. Before taking a brief look at some of them, it is well to review first the hearsay rule itself. It is advisable to review the rule before considering exceptions because so often the evidence is not within the rule and exceptions need not be considered.[22] All versions of the hearsay rule make it clear that the rule only applies to those out of court statements or writings offered in court to prove the truth of the matter asserted therein. The Georgia statute[23] provides that when offered and admitted for the purpose of explaining conduct and to ascertain motives, evidence which is otherwise hearsay becomes original evidence for that purpose. It is obvious that the statute does not deal with an exception to hearsay but

22. Three statements of the hearsay rule are: "Hearsay evidence is that which does not derive its value solely from the credit of the witnesses, but rests mainly on the veracity and competency of other persons. The very nature of the evidence shows its weakness, and it is admitted only in specified cases from necessity." Ga. Code Ann. §38-301 (1974); "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." McCormick, §246, at 584; "'Hearsay' is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

23. Ga. Code Ann. §38-302 (1974).

merely limits the use of the evidence. It is not hearsay because it is not admitted as evidence of the truth of the matter asserted. The question is whether a jury is able to make such a fine distinction even in the face of a charge from the court about how the evidence is to be received by them.

To illustrate the use of the rule, the following cases are noted: In *Lloyd v. State*,[24] a witness for the State testified to certain information given him by an informant in a drug case. This testimony was allowed to explain the witness' conduct in discovering other facts which related to the crime with which the defendant was charged. *Decker v. State*[25] was a child molestation case. The father was asked why he took out the arrest warrant. He testified about a conversation with his wife in which she had related to him statements made by the child concerning molestation incidents. The father's conduct in taking out the warrant was thereby explained. In *Carpenter v. State*,[26] the defendant was convicted of theft for taking an automobile. The arresting officer testified that he found a checkbook in the car with a name printed thereon which was not the defendant's name. The testimony was allowed over a hearsay objection to explain the officer's conduct in verifying that the car belonged to the person whose name was on the checkbook. *Burrell v. State*[27] was a burglary case in which a police officer was asked why he had searched the vehicle. He testified that the employee of the burglarized store told him there were eight guns missing. This statement was offered to explain the officer's conduct in continuing to search the vehicle after seven guns were found. Apparently the eighth gun was not found and may not even have been stolen in the burglary. In *Sherrell v. State*,[28] the witness testified that he found, in a plastic garbage bag, a machine stolen from the premises burglarized. To explain the act of looking into the garbage bag, the witness was allowed to testify about a conversation he had with the defendant's sister in which she indicated where the machine could be found. In *Painter v. State*,[29] a GBI agent testified that Mr. Williams had picked out a picture of one of the defendants from a number of photographs. This statement was allowed to explain the officer's conduct in arresting that defendant. In *Quick v. State*,[30] the defendant was accused of selling a controlled substance to Smarr. The sheriff was permitted to testify about the contents of a conversation he had with Smarr in which Smarr volunteered to act as an undercover agent for making drug purchases. This statement was allowed to explain the subsequent conduct of Smarr and of the sheriff. In *Hall v. State*,[31] the defendant

24. 139 Ga. App. 625, 229 S.E.2d 106 (1976).
25. 139 Ga. App. 707, 229 S.E.2d 520 (1976).
26. 140 Ga. App. 368, 231 S.E.2d 97 (1976).
27. 140 Ga. App. 900, 232 S.E.2d 172 (1977).
28. 141 Ga. App. 502, 233 S.E.2d 869 (1977).
29. 237 Ga. 30, 226 S.E.2d 578 (1976).
30. 139 Ga. App. 440, 228 S.E.2d 592 (1976).
31. 141 Ga. App. 289, 233 S.E.2d 262 (1977).

testified at his trial that the Municipal Court Judge who presided over his preliminary hearing cut him off without allowing him to explain his version of what had happened. In rebuttal, a police officer testified that the reason the defendant had been cut off was, "Judge Matthews kept continually calling him down . . . finally Judge Matthews ordered both subjects out of the courtroom and into the back." The court of appeals found a hearsay objection insufficient because: (1) The statement was made in the presence of the defendant (this rule is discussed later in this article); (2) the statements of the Municipal Judge were admissible to explain the judge's conduct in not permitting the defendant to explain his point of view; and (3) the testimony was not an out of court statement but concerned the action of the Municipal Judge.

The best use of the rule of evidence allowing out of court statements into evidence to explain conduct was long ago laid down by the Georgia Supreme Court. "Where a conversation is referred to by a witness, and is relevant only as a matter of inducement to explain why he entered upon a certain investigation, it is better to admit the fact of the conversation, but to exclude all the details and particulars of the same."[32] Several aspects of the rule are to be considered. First, it is unrealistic to believe that the jury can in truth disabuse their minds of the out of court statement when considering the guilt or innocence of the defendant and consider that statement only to explain the conduct of the witness. If the preceding statement is true, and if the hearsay rule itself is well founded, then a trial court ought to consider the prejudicial effect of the testimony. If that effect is very slight, then little harm is done in repeating the entire out of court statement. If is is highly prejudicial, the trial court ought to consider the necessity of explaining the conduct of the witness. If there is no real necessity, the conversation should be ruled out. The trial court should balance the two considerations. Alternatively, the witness may be limited to testifying about the occurrence of a conversation without stating what was said, which will often suffice to explain the conduct. Further, the witness may be permitted to testify only to so much of the conversation as may be necessary to explain the conduct while omitting the rest.

IV. Hearsay in the Presence of the Defendant

Two cases are mentioned not because they announce any change or development in the law, but because they state a rule of evidence which is not a rule of evidence. The facts of the two cases are unimportant to the

32. Kelly v. State, 82 Ga. 441, 441, 9 S.E. 171, 171 (1889). For a detailed analysis of the proper use of the rule, *see* Todd v. State, 200 Ga. 582, 588, 37 S.E.2d 779, 783 (1946). For a recent acknowledgement that the substance of the conversation can often be omitted by merely stating that there was a conversation, *see* Lundy v. State, 130 Ga. App. 171, 174, 202 S.E.2d 536, 539 (1973).

matter under consideration here. The rule stated in both *Hall v. State*[33] and in *Broome v. State*[34] is that hearsay statements made in the presence of the party against whom they are offered are admissible. One should first examine such a statement to determine if it is actually hearsay. If it is a statement made out of court offered to show the truth of what is asserted in the statement, it is hearsay. How can it be that the presence or absence of the defendant (the term defendant is used because it is most often in criminal cases and against the defendant that the purported rule is stated) somehow keeps the statement from being hearsay or carves out any exception to the hearsay rule? The point is that the mere presence of the defendant does not work any such result.[35] It is most likely that the erroneous statement of such a rule came to be made because of the recognized exception that silence may amount to an admission by the defendant. If a statement is made in the presence of the party that would naturally call for a denial by that party, but the party fails to deny the same and remains silent, then there may be inferred an admission by the party of the matter asserted. Of course, there are limitations on such a rule. For instance, there are an infinite number of statements which might be made in such circumstances that in no way naturally call for a denial. It would be a most unwarranted broadening of the admission by silence exception to the hearsay rule to hold that any statement made in the defendant's presence is admissible. Another likely source of the erroneous statement of the rule is a situation in which a statement is made in the defendant's presence and is offered in court not to prove the truth of what was asserted in the out of court statement but to show knowledge or notice on the part of the defendant. Such a statement is not hearsay at all since it is not offered to prove the truth of the matter asserted.

V. POLYGRAPH TESTS

Much debate and considerable confusion exists upon the issues of whether the results of a polygraph test are admissible in evidence, and whether such results even have any probative value. If they have no probative value, then a judgment dependent thereon cannot stand if challenged on appeal. If they do have probative value but are not admissible over objection, then a judgment based thereon is valid unless a timely objection was interposed.

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33. 141 Ga. App. 289, 233 S.E.2d 262 (1977).

34. 141 Ga. App. 538, 233 S.E.2d 883 (1977).

35. "A remarkably persistent bit of courthouse folklore is the practice of objecting to out-of-court statements because not made in the presence of the party against whom offered . . . . The presence or absence of the party against whom an out-of-court statement is offered has significance only in a few situations, e.g., when a statement spoken in his presence is relied upon to charge him with notice, or when failure to deny statements spoken in his presence is the basis for claiming that he acquiesced in or adopted the statement." MCCORMICK, §246, at 586.

At the September 1976 Term, the Georgia Supreme Court decided *Scott v. State*[36] in which Scott and a co-defendant, Light, were convicted of the offense of rape. Before trial Scott, his attorney, and the state agreed to Scott's taking a polygraph test and that the results would be admissible in evidence at his trial. The results, which indicated Scott's guilt, were then placed in evidence without objection. Light did not take a test but he failed to make any objection to the admission of the Scott test results. In *Scott* two justices would reverse Scott's conviction because of the admission of the results of the test. Two other justices would reverse Light's conviction but not Scott's. Three of these four justices would reverse both Scott's and Light's convictions because of a separate ground based on the trial judge entering the jury room. The net result of the entire opinion is a reversal of both convictions, but the bench and bar are left with unclear directions about the status of polygraph tests. Justice Hall's dissenting opinion states: "The rule is that polygraph results are not inherently inadmissible or without probative value; and here, where a stipulation was claimed and no objection was made, this evidence was properly admitted."[37] However, this cannot be considered the rule in Georgia until the General Assembly enacts appropriate legislation or a majority of the Georgia Supreme Court reaches that conclusion. To further illustrate the situation, consider the Georgia Court of Appeals decision in *Chambers v. State,*[38] in which the court undertook an indepth study of the background of polygraph testing and the approach by courts across the nation to the use of these results as evidence. The court of appeals considered its previous decision in *Famber v. State*[39] which had pronounced the rule in Georgia to be that results of polygraph tests, "are not only inadmissible but also have no probative value." Acknowledging that this former decision is now in jeopardy because of *Scott,* the court concluded that the polygraph test must be considered to be without probative value. There is a substantial need for a legislative formulation of guidelines for the courts. Perhaps the 1978 General Assembly will produce such an act.[40]

VI. Tape Recordings

Since Watergate, erasures on tapes have caused people to question their accuracy. There were two notable tape cases during the survey period and

36. 238 Ga. 30, 230 S.E.2d 857 (1976).

37. *Id.* at 36, 230 S.E.2d at 861.

38. 141 Ga. App. 438, 233 S.E.2d 818 (1977).

39. 134 Ga. App. 112, 213 S.E.2d 525 (1975).

40. For a reasonably complete background in the Georgia development of the issues surrounding polygraph tests, *see:* Salisbury v.State, 221 Ga. 718, 146 S.E.2d 776 (1966); Cagle v. State, 132 Ga. App. 227, 207 S.E.2d 703 (1974); Cross v. State, 136 Ga. App. 400, 221 S.E.2d 615 (1975); Watson v. State, 137 Ga. App. 530, 224 S.E.2d 446 (1976); Herlong v. State, 236 Ga. 326, 223 S.E.2d 672 (1976); Scott v. State, 238 Ga. 30, 230 S.E.2d 857 (1976); Chambers v. State, 141 Ga. App. 438, 233 S.E.2d 818 (1977).

both of them involved an erasure which had to be accounted for. In 1955 the Georgia Court of Appeals first considered the admissibility of tape recordings as evidence in *Solomon, Inc. v. Edgar*[41] and said that to lay the proper foundation for admission "it must be shown that changes, additions, or deletions have not been made." *Brooks v. State*[42] was a prosecution of an attorney for criminal attempt to commit theft by extortion. He had approached another attorney and offered to swear to a false affidavit in exchange for a sum of money, which false affidavit he proposed that the other attorney use to prevent a default judgment from being entered. His offer was recorded on a small tape recorder inside the coat pocket of the other attorney. When the tapes were turned over to an investigator for the District Attorney's office, the investigator made copies and transcripts of the tapes. Later the investigator was again making transcriptions when he inadvertently erased 12 words from one of the original tapes. Naturally, the defendant contended at the trial that the foundation required by *Solomon* was not met because there was a deletion. To circumvent this objection, the court of appeals relied on the proposition that secondary evidence may be used if the absence of the primary evidence is satifactorily accounted for. Here there was a tape copy and a transcription of the original and witnesses testified to the accuracy of the tape copy and transcript. Therefore, the admission of the tapes, even with the erasure, was not error.

In *Harris v. State*,[43] the defendant's confession to a murder committed under most brutal circumstances was recorded on tape. The tape was admitted into evidence and played to the jury. There was evidence of a gap in the tape caused by an officer's attempt to duplicate the tape. However, there was no allegation by the defendant that there was anything favorable to him on the missing part of the tape. Therefore, the supreme court held that he was not harmed.

In *Brooks* there was a further contention that it was error to admit the transcripts of the tapes to be read by the jurors as the tapes were played. The only question was whether the transcripts accurately reflected the tapes. If they did, they may be used in such a manner. However, *Brooks* should not be read as holding generally that transcripts admitted into evidence are to go out with the jury to be read during deliberations.

41. 92 Ga. App. 207, 211, 88 S.E.2d 167, 171 (1955).
42. 141 Ga. App. 725, 234 S.E.2d 541 (1977).
43. 237 Ga. 718, 230 S.E.2d 1 (1976).