

12-1975

Evidence

William H. Agnor

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Recommended Citation

Agnor, William H. (1975) "Evidence," *Mercer Law Review*. Vol. 27 : No. 1 , Article 9.
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol27/iss1/9

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EVIDENCE

By WILLIAM H. AGNOR*

The usual number of cases concerning one or more points of evidence were decided during the survey period. Only those cases that seemed significant or of general interest have been discussed herein.

I. HEARSAY

The *res gestae* exception to the hearsay rule continues to be popular with the courts, if not with the writers. It is a convenient exception.¹ In *Salleywhite v. State*² it was held that a statement made by the victim of an assault to a doctor in the emergency room an hour after the assault was a part of the *res gestae*. In *Robinson v. State*³ the statement of the victim of a rape was admissible as part of the *res gestae*, even though the six-year-old child might not have been competent as a witness.

The Civil Practice Act did not affect the rule that admissions in pleadings are conclusive.⁴ In *Hill v. State*⁵ the conduct of the defendant while in custody did not amount to a tacit admission. A denial in general terms by the accused of the statement made to her will prevent such a statement from being a tacit admission.

Records prepared in the regular course of business are admissible, even though they are not signed by anyone.⁶ Hospital records containing large amounts of hearsay other than regular entries continue to cause a problem.⁷ This was clearly pointed out in *Bowen v. Sentry Insurance Co.*⁸ In that case the superior court judge had correctly held that the hospital records admitted in toto by the deputy director in a workman's compensation case were inadmissible. They consisted of 166 pages of hospital records from two hospitals introduced in toto and without discrimination. Judge Clark's admonition in that case is worth repeating:

In calling this "paper chase" to the attention of the bar we do not intend to be critical of the lawyers involved in the instant case. They have done only what has become common usage in today's Xerox world. It is our prayer that mention of this Xeroxmania will remind our attorneys that as

* Simmons Professor of Law, Emory University. Emory University (Ph.B., 1935; J.D., 1937); University of Virginia (S.J.D., 1956).

1. See *Gaines v. State*, 232 Ga. 727, 208 S.E.2d 798 (1974); *Scott v. State*, 131 Ga. App. 655, 206 S.E.2d 558 (1974).

2. 133 Ga. App. 170, 210 S.E.2d 334 (1974).

3. 232 Ga. 123, 205 S.E.2d 210 (1974).

4. *Anderson v. Oakley*, 133 Ga. App. 758, 212 S.E.2d 875 (1975).

5. 232 Ga. 800, 209 S.E.2d 153 (1974).

6. *F. N. Roberts Corp. v. Southern Bell Tel. & Tel. Co.*, 132 Ga. App. 800, 209 S.E.2d 138 (1974).

7. See *Emmett v. State*, 232 Ga. 110, 205 S.E.2d 231 (1974).

8. 134 Ga. App. 88, 213 S.E.2d 185 (1975).

officers of the court they should remember they have the duty to assist the judiciary. Georgia advocates aid immeasurably through well-argued briefs presenting their extensive research. When undertaking to provide appeal records which advocates wish to be read and studied by the appellate courts, they should be selective and apply the litmus test of relevancy. So mote it be.⁹

II. RELEVANCY

A. Generally

The inadmissibility of admissions made with a view to compromise was considered in several cases.¹⁰ In one of the "rocking chair" cases, a list of other items missing from the house but not involved in that burglary charge was not relevant and its admission was prejudicial.¹¹ Evidence of the general competency of the driver of an automobile involved in a collision is usually not relevant. However, the situation in *Carter v. Tatum*¹² was unusual. There the defendant testified at the trial some four years after the occurrence. Counsel sought to show that there had been a deterioration in the defendant's health of considerable magnitude during the four-year period. It was held that evidence of the defendant's condition at the time of the collision was admissible and relevant and that it was error to exclude such evidence.

B. Character

In *Price v. State*¹³ the court followed the ruling in *Lynn v. State*¹⁴ which held that the victim of an alleged rape may not be cross-examined as to specific acts of prior sexual intercourse with men other than the accused.

Generally, evidence of other offenses committed by a defendant in a criminal case is not admissible and would be prejudicial as an attack on his character.¹⁵ Where the other offense or offenses are relevant to show intent, motive, plan, scheme or bent of mind and not general bad character, the evidence is admissible.¹⁶ The problem frequently arises in rape cases where evidence of other rapes or sexual offenses by the defendant is presented. In *Larkins v. State*¹⁷ it had been held that evidence of other rapes was not admissible where identification of the perpetrator was not

9. *Id.* at 91, 213 S.E.2d at 188.

10. *Jester v. State*, 133 Ga. App. 652, 211 S.E.2d 909 (1975); *White v. The Front Page, Inc.*, 133 Ga. App. 749, 213 S.E.2d 32 (1975).

11. *Hess v. State*, 132 Ga. App. 26, 207 S.E.2d 580 (1974), *petition for cert. pending*.

12. 134 Ga. App. 345, 212 S.E.2d 439 (1975).

13. 233 Ga. 332, 211 S.E.2d 290 (1974).

14. 231 Ga. 559, 203 S.E.2d 221 (1974).

15. *See Nooner v. State*, 131 Ga. App. 563, 206 S.E.2d 660 (1974); *Casey v. State*, 133 Ga. App. 161, 210 S.E.2d 375 (1974).

16. *Bloodworth v. State*, 233 Ga. 589, 212 S.E.2d 774 (1975).

17. 230 Ga. 418, 197 S.E.2d 367 (1973).

involved and the issue was whether there had been consent. In *Hunt v. State*,¹⁸ a four to three decision, the majority of the court disapproved *Larkins* and held that evidence of another offense of rape and sodomy was properly received in evidence where the issue was consent.

In *Luke v. State*¹⁹ the defendant was arrested at the scene of a burglary. At the time of his arrest, a pistol and a bottle of pills were found on him. They were admitted in evidence at his trial for burglary. The court of appeals held that since the articles had no logical connection to the crime of burglary, their admission was error. In *State v. Luke*²⁰ the supreme court reversed and held that all the circumstances connected with the arrest were admissible as part of the *res gestae*.

C. Scientific Evidence

In the most recent appearances of *Emmett v. State*²¹ and *Creamer v. State*²² it was held that the reliability of hypnosis had not been established and that statements made while a witness was in a trance were inadmissible. However, the hypnotic sessions did not taint the testimony of the witness on the stand and render it inadmissible.

Problems with regard to the polygraph or lie detector continue to arise. In *Cagle v. State*²³ it was error to admit the results of a polygraph test given to the defendant. The court said that this was true in this absence of an express stipulation as to its admissibility. This was probably based on language in *Harrell v. State*.²⁴ Although *Harrell* was not cited, it seems to indicate that the results of a polygraph test would be admissible based on an advance agreement between the solicitor and counsel for the defendant. In *Famber v. State*²⁵ the court seems to have rejected this view, again without citing the *Harrell* case. In the *Famber* case the court said that even where the defendant had consented to a polygraph test of a co-conspirator and agreed that the results of the test would be admitted in evidence, the results of the polygraph test were not only inadmissible but also had no probative value. Thus, the testimony of the co-conspirator was uncorroborated. The ruling in the *Famber* case seems proper.

Even though the results of a polygraph test are not admissible, the question remains as to statements made by a subject to the polygraph operator before, during, and after the test. This problem was considered in *Stack v. State*²⁶ at some length. In that case the polygraph operator was permitted to testify to statements made to him by the defendant during

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18. 233 Ga. 329, 211 S.E.2d 288 (1974).
 19. 131 Ga. App. 799, 207 S.E.2d 213 (1974).
 20. 232 Ga. 815, 209 S.E.2d 165 (1974).
 21. 232 Ga. 110, 205 S.E. 2d 231 (1974).
 22. 232 Ga. 136, 205 S.E.2d 240 (1974).
 23. 132 Ga. App. 227, 207 S.E. 2d 703 (1974).
 24. 108 Ga. App. 295, 132 S.E.2d 787 (1963).
 25. 134 Ga. App. 112, 213 S.E.2d 525 (1975).
 26. 234 Ga. 19, 214 S.E.2d 514 (1975).

the progress of the test. The identity of the witness was made known to the jury, as well as the fact that the defendant had taken a polygraph test. An accomplice of the defendant had also taken a polygraph test and this was made known to the jury. The majority of the court held that the jury would draw an inference as to the results of the test and thus the state had indirectly injected into the case evidence which was otherwise inadmissible. This operated to the prejudice of the defendant and required a reversal. The case of *Johnson v. Aetna Insurance Co.*²⁷ was distinguished, since in that case the admissions were made to the operator after the test and the jury had not been informed that the witness who testified to the admissions was an operator. One justice concurred specially, with doubt as to whether or not the proper rule had been followed as to the defendant's statements. Another justice concurred in the judgment only. Two justices dissented, stating that the issue was whether or not the statements of the defendant were freely and voluntarily made.

III. BURDENS

Under Ga. Code Ann. §79A-1105 (Rev. 1973), the authority of the defendant to possess and sell certain narcotic drugs is made a matter of defense and not an element of the offense. In *Woods v. State*²⁸ the defendant contended that this shifted the burden of proof to him and was an unconstitutional deprivation of due process. The court held that this was a proper affirmative defense and sustained the statute. This problem of affirmative defenses in criminal cases may well be an area of future problems.²⁹ The case of *Smith v. State*³⁰ considered the matter of insanity as a defense and may have cast some doubt on *Grace v. State*,³¹ but it clearly was not error to fail to give the charge requested by the defendant. *Abner v. State*³² considered a charge concerning accident as a defense in a murder case. The court approved the charge given over the defendant's objection that it shifted the burden of proof to the defendant on the issue of accident. Three justices concurred on the ground that the charge, as given, only placed the burden of producing evidence on the defendant. Justice Gunter dissented on the ground that the charge, as given, improperly shifted the burden of persuasion on the issue of accident to the defendant.

The problem of the charge on alibi has finally been laid to rest and the headstone erected; may it rest in peace. The problem was considered at length in *Patterson v. State*.³³ In this case the trial judge had given a charge

27. 124 Ga. App. 112, 183 S.E.2d 85 (1971).

28. 233 Ga. 347, 211 S.E.2d 300 (1974); see also *Lyle v. State*, 131 Ga. App. 8, 205 S.E.2d 126 (1974).

29. See Agnor, *Annual Survey of Georgia Law: Evidence*, 26 MERCER L. REV. 93, 98 (1974).

30. 232 Ga. 99, 205 S.E.2d 188 (1974).

31. 231 Ga. 113, 200 S.E.2d 248 (1973).

32. 233 Ga. 922, 213 S.E.2d 851 (1975).

33. 233 Ga. 724, 213 S.E.2d 612 (1975).

on alibi that placed the burden of persuasion on the defendant as to alibi. Justice Hall, citing Judge Hall's opinion in *Parham v. State*,³⁴ held the charge to be erroneous. However, since the counsel for the defendant had requested the charge, it was not error to give it. Although there were some dissents from the opinion with regard to the charge, the entire court has now approved the following charge on alibi, much like the charge suggested in the *Parham* case:

All seven Justices of this court approve the following charge on "alibi" based upon Special Charge 6, Pattern Jury Instructions — Criminal, prepared by Committee on Pattern Jury Instruction, Council of Superior Court Judges of Georgia: "Now, the defendant in this case contends that he was not present at the scene of the offense at the time of its commission. In that connection I charge you that alibi as a defense involves the impossibility of the accused's presence at the scene of the offense at the time of its commission. Presence of the defendant at the scene of the crime(s) alleged or his involvement as a co-conspirator is an essential element of the crime(s) set forth in this indictment, and the burden of proof as to such issue rests upon the State as I have instructed you already. Any evidence in the nature of an alibi should be considered by the jury in connection with all other facts in the case, and if, in doing so, the jury should entertain a reasonable doubt as to the guilt of the accused, they should acquit."³⁵

IV. DEMONSTRATIVE EVIDENCE

*Central of Georgia R.R. v. Collins*³⁶ was an action to enjoin a nuisance resulting from the noise of a railroad car weighing operation. One issue involved the admission, over defendants' objection, of a cassette recording of the noise made by the wife of the plaintiff. Stating that it was a question of first impression in Georgia, the court held there was no reason not to admit a sound recording of something other than the human voice. The sound recording had been properly authenticated, so it was properly admitted. With reference to laying the proper foundation for admissibility, the court adopted the requirements of *Steve M. Solomon, Jr., Inc. v. Edgar*.³⁷ The *Solomon* case had set out the requirements for laying the foundation for admissibility of a sound recording of a human voice. Here the court varied these requirements slightly as follows:

We hold that the requirements of the *Solomon* case are adequate to determine admissibility of sound recordings such as this. *Solomon* required as a proper foundation for admissibility of a recording, that (1) it must be shown that the device was capable of taking testimony (for which

34. 120 Ga. App. 723, 171 S.E.2d 911 (1969).

35. 233 Ga. at 730 n. 2, 213 S.E.2d at 617 n. 2.

36. 232 Ga. 790, 209 S.E.2d 1 (1974).

37. 92 Ga. App. 207, 88 S.E.2d 167 (1955), followed in *State v. Williams*, 49 Wash. 2d 354, 301 P.2d 769 (1956); see also Annot., *Sound Recordings In Evidence*, 58 A.L.R.2d 1024 (1958).

we interpolate here 'noise of the type attempted to be recorded'); (2) it must be shown that the operation was competent; (3) the authenticity and correctness of the recording must be established; (4) changes, additions or deletions must be ruled out; (5) the manner of preservation of the record must be shown; (6) speakers must be identified; (7) it must be shown that the testimony was elicited freely and without duress. Naturally, 6 may be and 7 clearly is irrelevant to a noise transcription.³⁸

V. WRITINGS

*Smith v. Hatgimisios*³⁹ involved an attempt to authenticate some letters by circumstantial evidence that failed. Ga. Code Ann. §38-706.1 (Rev. 1974) was enacted to permit a patient, and certain others for him, to identify certain medical bills without other authentication. *Glover v. Southern Bell Telephone & Telegraph Co.*⁴⁰ raised the question as to whether or not a chiropractor's bill would be admissible under this section. The answer was negative.

*Pugh v. Jones*⁴¹ involved the application of the best evidence rule to an affidavit filed in regard to a motion hearing. Plaintiff's attorney had submitted an affidavit reciting his findings and conclusions with reference to certain tax returns allegedly made by defendant. The court correctly stated that the so-called "best evidence rule" was the "original document rule" and that it was violated here by this affidavit as the tax returns themselves, or certified copies thereof, were primary evidence.

VI. WITNESSES

A. Generally

After the rule of sequestration of the witnesses has been invoked, the trial judge still has a broad discretion in permitting a witness to remain at the counsel table. It is better practice to require that the witness who has remained in the courtroom should be first examined, but this, too, is a matter of discretion.⁴² However, the court can abuse its discretion. In *Walker v. State*⁴³ the trial judge permitted a police officer and the mother of the victim in a murder case to remain at the counsel table. Since there was no showing that the presence of the mother of the victim was necessary for an orderly presentation of the case, this was an abuse of discretion and error.

38. 233 Ga. at 794, 209 S.E.2d at 5.

39. 233 Ga. 354, 211 S.E.2d 306 (1974).

40. 132 Ga. App. 74, 207 S.E.2d 584 (1974), *petition for cert. pending*.

41. 131 Ga. App. 600, 206 S.E.2d 650 (1974).

42. *Jackson v. State*, 233 Ga. 529, 212 S.E.2d 366 (1975); *Prevatte v. State*, 233 Ga. 929, 214 S.E.2d 365 (1975); *Walker v. State*, 132 Ga. App. 274, 208 S.E.2d 5 (1974), *petition for cert. pending*.

43. 132 Ga. App. 476, 208 S.E.2d 350 (1974), *petition for cert. pending*.

The competency of a person called as a witness is an issue to be decided by the court, including the determination of any question of fact. In one case, the court found that the woman called as a witness was not the common law wife of the defendant.⁴⁴ In two cases, the court had properly found young children competent as witnesses.⁴⁵ The mere fact that the child does not know the meaning of the word "oath" is not definitive. *Daniels v. State*⁴⁶ considered the general area of the removal of the incompetency of parties and persons interested in litigation and the continued incompetency under Ga. Code Ann. §38-1606 (Rev. 1974) to actions "instituted in consequence of adultery." In *Daniels* the defendant was charged with abandonment of his illegitimate child. The mother of the child testified as to its conception as thus to her adultery since she was married to one other than the defendant at the time. The court held that the words "in consequence" apply to the initiatory as well as to the approximate cause of the suit. Since she was directly interested in the outcome of the case, she was incompetent to testify to her adultery with the defendant. In a brief opinion, the supreme court affirmed but emphasized the burden placed on the state and called for amending legislation.⁴⁷

In *Finley v. Franklin Aluminum Co.*⁴⁸ a state trooper was properly permitted to testify as an expert witness and give his opinion as to the location of the point of impact in a crash based on his observations at the scene.

B. Impeachment

As stated in *Bentley v. State*⁴⁹ the court need not charge on impeachment in the absence of a request. There are several interesting features in the *Bentley* case. The judge who dissented on another issue has a first, second and third addendum to his dissent. The defendant sought to call a prosecution witness who had not testified for cross-examination. The witness was called as an agent of the state or as a party for whom the suit was being prosecuted under Ga. Code Ann. §38-1801 (Rev. 1974). The court held that he was not an agent of the state under that section. The court seems to have overlooked the fact that the section clearly states "in the trial of all civil cases" and would not apply in a criminal case.

A witness may be impeached by proof of conviction of a crime involving moral turpitude, but not by proof of arrest alone.⁵⁰ In *Favors v. State*⁵¹ the court considered as a question of first impression whether or not a witness could be impeached by proof of a conviction under the "first offender"

44. *Johnson v. State*, 232 Ga. 61, 205 S.E.2d 190 (1974).

45. *Lashley v. State*, 132 Ga. App. 427, 208 S.E.2d 200 (1974); *Stonaker v. State*, 134 Ga. App. 123, 213 S.E.2d 506 (1975), *petition for cert. pending*.

46. 132 Ga. App. 673, 209 S.E.2d 72 (1974).

47. *State v. Daniels*, 233 Ga. 614, 615, 212 S.E.2d 794, 795 (1975) (per curiam).

48. 132 Ga. App. 70, 207 S.E.2d 543 (1974).

49. 131 Ga. App. 425, 205 S.E.2d 904 (1974), *petition for cert. pending*.

50. *Scott v. State*, 131 Ga. App. 655, 206 S.E.2d 558 (1974).

51. 234 Ga. 80, 214 S.E.2d 645 (1975).

act.⁵² After balancing the right of a first offender against the right of the defendant in a criminal case, the court held that this was a proper method of impeachment.

In *Walker v. State*,⁵³ after the defendant had testified, the court charged that in regard to his testimony the jury had "the right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct on the witness stand." This charge was proper. When a criminal defendant elects to testify, his credibility is subject to the same attack as that of any other witness, except for the statutory exclusions of prior convictions and general bad character.⁵⁴

The use of expert testimony by psychiatrists and psychologists to attack the credibility of a witness has received extensive consideration in recent years.⁵⁵ This problem was reviewed in the case of *Jones v. State*.⁵⁶ The defendant had been indicted on six counts, including two counts of rape. The defendant sought to have a psychiatrist answer a hypothetical question as to whether a positive identification could have been made by the victims under the circumstances of the crimes. The court held that the trial judge had properly sustained the state's objection to this testimony.

C. Privilege

*Young v. State*⁵⁷ again shated the rule that the spouse of a criminal defendant has a privilege not to testify in the criminal case, but that the privilege belongs entirely to the witness spouse. Where the witness voluntarily takes the stand and testifies, it will be presumed that the privilege is waived.

There is still a problem in Georgia in regard to whether the attorney-client privilege is a true privilege or a matter of incompetency.⁵⁸ In recent habeas corpus cases involving attacks on guilty pleas, attorneys who had represented the petitioners at the trials have been permitted to testify as to information given the petitioners regarding their guilty pleas.⁵⁹ The attorney-client privilege claimed was treated as a true privilege that had been waived by the habeas corpus claims.

The governmental privilege not to reveal the name or identity of an informer continues to appear in the cases.⁶⁰ The distinction drawn in Georgia between an informer, whose identity is privileged, and a decoy, whose

52. GA. CODE ANN. § 27-2727 *et. seq.* (Rev. 1972).

53. 132 Ga. App. 274, 278, 208 S.E.2d 5, 8 (1974), *petition for cert. pending.*

54. GA. CODE ANN. §38-415 (Rev. 1974).

55. *See Annot., Witness — Credibility — Expert Testimony*, 20 A.L.R.3d 684 (1968).

56. 232 Ga. 762, 209 S.E.2d 6 (1974).

57. 232 Ga. 285, 206 S.E.2d 439 (1974).

58. *See* 29 ENCYCLOPEDIA OF GEORGIA LAW, *Witnesses*, §44.

59. *Bailey v. Baker*, 232 Ga. 84, 205 S.E.2d 278 (1974); *Roberts v. Greenway*, 233 Ga. 473, 211 S.E.2d 764 (1975).

60. *Thomas v. State*, 134 Ga. App. 18, 213 S.E.2d 129 (1975), *petition for cert. pending*; *Kitchens v. State*, 134 Ga. App. 81, 213 S.E.2d 180 (1975).

identity must be disclosed, has prevented some of the problems that have arisen elsewhere.⁶¹ That distinction was approved by the supreme court in *Chancey v. Hancock*.⁶² *Chancey* involved an action to abate a business establishment as a public nuisance; the business was "padlocked" as a result. The court held that even though the individual involved was a decoy, the case was not a criminal prosecution and his identity did not have to be disclosed.

VII. CONSTITUTIONAL PRIVILEGES

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

A. *Self-Incrimination*

Although the unsworn statement has been dead in Georgia for more than two years, it still raises problems. In *Pittman v. State*⁶³ the trial took place at a time when the defendant could remain silent, be sworn as a witness, or make an unsworn statement. He elected to make an unsworn statement. At the conclusion of the unsworn statement, his counsel sought to have him make a sworn statement, which the trial judge refused to permit. The court approved this action since his rights were in the alternative and by electing to make an unsworn statement he had waived the right to make a sworn statement. The question arises as to whether or not the statute abolishing the unsworn statement is procedural in nature so as to apply in trials after the effective date of the statute where the crime was committed before that date. In *Walker v. State*⁶⁴ the statute was held to be procedural in nature and to apply in all trials after its effective date. There was a strong dissent. However, the question seems to have been settled in *Eades v. State*⁶⁵ where the supreme court held that it was procedural only.

The scope of the privilege against self-incrimination under the Georgia statute appears to be broader than the general rule.⁶⁶ However, this scope was somewhat restricted in *Brooks v. State*.⁶⁷ In that case, a witness was married to the sister of the defendant. He tried to claim the privilege since his testimony would bring infamy, disgrace, or public contempt upon his

61. The distinction was clearly drawn in *Crosby v. State*, 90 Ga. App. 63, 82 S.E.2d 38 (1954).

62. 233 Ga. 734, 213 S.E.2d 633 (1975).

63. 133 Ga. App. 902, 212 S.E.2d 505 (1975).

64. 132 Ga. App. 274, 208 S.E.2d 5 (1974), *petition for cert. pending*.

65. 232 Ga. 735, 208 S.E.2d 791 (1974).

66. GA. CODE ANN. §38-1205 (Rev. 1974) states the scope as including any matter which may criminate or tend to criminate himself, or which may tend to work a forfeiture of his estate, or which shall tend to bring infamy or disgrace or public contempt upon himself or any member of his family.

67. 233 Ga. 524, 212 S.E.2d 355 (1975).

wife. His claim or privilege was denied. The court affirmed, relying primarily on a treatise and an encyclopedia statement of the general rule. Other Georgia cases in this area were not considered.⁶⁸

*Lawson v. State*⁶⁹ involved an unusual factual situation. Two victims were robbed, at different times, by black persons dressed as females. The two defendants were spotted, dressed as females, in an automobile that had been described by an informant. They were photographed in their female disguise before a warrant was obtained. These photographs were held to be admissible over a claim of the privilege against self-incrimination.

*Simpson v. Simpson*⁷⁰ was a custody case. The father's case for a change in custody was based largely on proof of conduct of the mother and a third-party witness. The mother and the witness declined to answer questions as to their conduct based on claims of the privilege against self-incrimination. As a question of first impression, the court considered the issue as to whether or not an inference could be drawn against the mother from the claim of privilege. The court reviewed the rule that no inference could be drawn in a criminal case against a defendant based on his claim of the privilege in that case or in any other proceedings. However, that rule did not control in a civil case. The court held that an inference against the mother could be drawn by the fact finder, here the trial judge, because of the claim of privilege.

B. Confessions

*High v. State*⁷¹ followed the rule promulgated by the United States Supreme Court in *Lego v. Twomey*⁷² that on a hearing to test the voluntariness of a confession, the state need only show voluntariness by a preponderance of the evidence. In the absence of a request, it is not error to fail to charge on voluntariness.⁷³

C. Search And Electronic Surveillance

There were the usual number of cases involving the validity of search warrants and attempts to suppress evidence. Following the lead of the federal cases, it is now much easier to search automobiles without a search warrant.⁷⁴ A roadblock search at Jekyll Island was sustained.⁷⁵ The occu-

68. See, e.g., *Bass v. Bass*, 222 Ga. 378, 149 S.E.2d 818 (1966).

69. 234 Ga. 136, 214 S.E.2d 559 (1975).

70. 233 Ga. 17, 209 S.E.2d 611 (1974).

71. 233 Ga. 153, 210 S.E.2d 673 (1974).

72. 404 U.S. 477 (1972).

73. See *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974). The facts of this case are unusual, to say the least.

74. *Woodruff v. State*, 233 Ga. 840, 213 S.E.2d 689 (1975); *Howe v. State*, 132 Ga. App. 840, 209 S.E.2d 258 (1974); *Cunningham v. State*, 133 Ga. App. 305, 211 S.E.2d 198 (1974).

75. *State v. Swift*, 232 Ga. 535, 207 S.E.2d 459 (1974), *rev'g Swift v. State*, 131 Ga. App. 231, 206 S.E.2d 51 (1974).

pants of a stolen automobile do not have standing to object to a search of the stolen automobile.⁷⁶ Standing to object may be lost by abandonment of premises or articles.⁷⁷

Georgia agrees with the view that the prohibition against unreasonable search and seizure contained in the fourth amendment to the Constitution of the United States does not apply to actions of private individuals.⁷⁸ The situation involved in *Young v. State*⁷⁹ presented a variation of this problem. In that case an assistant principal of a public high school directed the defendant, a 17-year-old student at the school, to empty his pockets in the principal's office. The defendant had less than an ounce of marijuana in his pocket, for which he was charged and convicted. The court of appeals held that the school official was a governmental official subject to the restraints of the fourth amendment and that the evidence should have been suppressed. The Supreme Court of Georgia recently reversed the case.⁸⁰ The court took the approach that a "reasonable suspicion" standard was enough for such a search and that the standard of probable cause would not apply. Also, that the assistant principal was not the kind of law enforcement agent of the state to which the exclusionary rule would apply.

Ga. Code Ann. §25-3004 (Rev. 1971) of the Criminal Code of Georgia provides the authority for and the details of issuing investigation warrants for electronic surveillance. This section was considered at length in *Granese v. State*;⁸¹ it was held valid and not subject to the constitutional attacks made. The investigation warrants involved in the case complied in every way with the federal requirements.⁸² The court continued by holding that a superior court judge could grant the application in any county of his circuit in which he was present at the time the warrant was signed. In *Quaid v. State*⁸³ it was held that the exception in Ga. Code Ann. §26-3006 (Rev. 1972) as to conversations that constitute the commission of a crime or are directly in furtherance of a crime with the consent of one party was not limited to law enforcement officers. In *State v. Toomey*⁸⁴ an investigator of the sheriff's department was called in because some unauthorized person was tied into the telephone number assigned to an industrial concern. The investigator listened to some telephone calls made by the defendant and, as a result of information obtained from the calls, acquired a search warrant that resulted in the seizure of some drugs. The court of appeals affirmed the granting of a motion to suppress this evidence. The

76. *Brinks v. State*, 232 Ga. 13, 205 S.E.2d 247 (1974); *Brisbane v. State*, 233 Ga. 339, 211 S.E.2d 294 (1974).

77. *Bloodworth v. State*, 233 Ga. 589, 212 S.E.2d 774 (1975); *Anderson v. State*, 133 Ga. App. 45, 209 S.E.2d 665 (1974).

78. *Moye v. Hopper*, 234 Ga. 230, 214 S.E.2d 920 (1975).

79. 132 Ga. App. 790, 209 S.E.2d 96 (1974).

80. *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (1975).

81. 232 Ga. 193, 206 S.E.2d 26 (1974).

82. 18 U.S.C.A. §2518 (Rev. 1970).

83. 132 Ga. App. 478, 208 S.E.2d 336 (1974), *petition for cert. pending*.

84. 134 Ga. App. 343, 214 S.E.2d 421 (1975).

listening by the investigator without an investigation warrant was a clear violation of Ga. Code Ann. §26-3001 (Rev. 1972).

VIII. STATUTES

The regular 1975 session of the General Assembly produced only a few statutes in the area of evidence of general interest.

After several attempts to pass such a statute in recent years, a witness immunity statute was enacted.⁸⁵ This statute would grant immunity to a witness in a criminal proceeding or before a grand jury and require him to testify or produce evidence without being able to claim the privilege against self-incrimination. The attorney general or the district attorney may request an order from the judge of the superior court and this order is entered in the minutes of the court. The test is "necessary to the public interest," but the court does not seem to have a discretion in issuing the order. The immunity granted is "use" and "derivative use," so this would seem to fit the federal test.⁸⁶

Another statute makes records concerning reports of child abuse and neglect privileged under a governmental privilege.⁸⁷

Under another statute, influencing or attempting to influence witnesses is made a felony.⁸⁸

By an amendment to the Georgia Health Code,⁸⁹ provision was made for inspection warrants. The procedure is much like that for a search warrant, but for some unexplained reason, it is provided that no facts discovered or evidence obtained in an inspection would be admissible in any criminal proceeding against any party. Quere as to a few kilograms of heroin?

IX. FEDERAL RULES OF EVIDENCE

Under Public Law 93-595 of the 93rd Congress, enacted January 2, 1975, the Federal Rules of Evidence became effective on July 1, 1975. This, of course, is not the place for a consideration of these rules. This opportunity is taken, however, to emphasize that they are now in effect.

85. Ga. Laws 1975, p. 727.

86. *Kastigar v. U.S.*, 406 U.S. 441 (1972); see also Annot., *Self-Incrimination — Immunity*, 32 L. Ed.2d 869 (1973).

87. Ga. Laws 1975, p. 1135.

88. GA. CODE ANN. §26-2313 (Supp. 1975).

89. Ga. Laws 1975, p. 693.