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Evidence

Hardy Gregory Jr.

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By Hardy Gregory, Jr.*

I. Evidence Producers

There are a number of devices and techniques commonly used for the purpose of producing information to be used as evidence. These devices and techniques are the tools of investigators. The appellate courts of Georgia dealt in an interesting way with several of these tools in the past year, namely, polygraph tests, bloodhounds and blood alcohol tests.

A. Polygraph Tests

Our courts have recently recognized a limited admissibility of the results of polygraph tests.[1] From observations made on the trial bench, and from reading the appellate opinions, it appears that the use of polygraph machines has become very common and that evidence of the results of the tests is gradually being admitted in more and more cases. One typical set of facts calling for the use of the polygraph test appears in *Smith v. State*.[2] The defendant was accused of murder and burglary. His accomplice told the investigating officers that she and the defendant went to the scene of the burglary and that, while they were in the process of committing burglary, a deputy sheriff appeared on the scene. The accomplice said the defendant and the deputy struggled, that the defendant took a weapon from the deputy and used it to shoot and kill him. The defendant denied he was present at the scene. He claimed to have been at a motel with the accomplice on the date in question. However, registration cards from the motel indicated the defendant and accomplice were present at the motel on a date different from the date of the crime. After both defendant and accomplice took polygraph tests, the polygraph examiner was of the opinion that the accomplice was telling the truth and the defen-

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* Judge, Cordele Judicial Circuit, Cordele, Georgia. U.S. Naval Academy (B.S., 1959); Mercer University (LL.B., 1967).

1. State v. Chambers, 240 Ga. 76, 239 S.E.2d 324 (1977). Only when both the State and the defense stipulate that the test results shall be admissible may they come into evidence.

2. 245 Ga. 168, 263 S.E.2d 910 (1980).

dant was not.

After conviction, defendant raised as an issue in his appeal the contention that his conviction rested solely upon the uncorroborated testimony of an accomplice.[3] He contended that the only evidence arguably corroborative was the result of the polygraph test. He said this was nothing more than another way of putting forth the testimony of the accomplice and, thus, the results could not be considered as independent evidence. There was other evidence which the court found corroborative of the accomplice's testimony, so the defendant's contention on lack of corroboration by the polygraph test was not reached in the appellate court.[4]

The question of keen interest to prosecutors is whether they will be able to corroborate an accomplice's testimony with a polygraph test administered to the accomplice. Considering *State v. Chambers*,[5] in which a rape victim's testimony was sufficiently corroborated by polygraph tests of the victim and the defendant, the same result might be expected under the facts present in *Smith*. However, the defendant's argument in *Smith*, that an accomplice's testimony cannot be corroborated solely by a polygraph test of the accomplice, was not presented in *Chambers*. What the results will be when the only polygraph test at issue is that of the accomplice remains to be seen. Another interesting polygraph test opinion is found in *Porterfield v. State*.[6] Even where there is an agreement between the State and the defense to admit the test results, there may be additional reasons why the court will not receive the evidence. In this case the reason was that the test results were inconclusive and therefore had no probative value. Obviously we are in the early stages of development of the law in the area of polygraph testing.

B. Hypnosis

Hypnosis as a method of producing evidence is in an even more embryonic stage, and less trusted by the courts, than is polygraph testing. Georgia courts are of the opinion that the reliability of hypnosis has not yet been established.[7] Of interest because of the peculiar aspect of the issue raised, is *Collier v. State*.[8] The defendant drove to Georgia from Tennessee and robbed a florist and bakery in the town of Fort Oglethorpe. He

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3. The well known rule in this regard is that the testimony of an accomplice must be corroborated by independent evidence. West v. State, 232 Ga. 861, 209 S.E.2d 195 (1974).

4. That other corroborative evidence was the defendant's attempt to create an alibi concerning his presence at the motel in the face of other evidence tending to show this was not true.

5. 240 Ga. 76, 239 S.E.2d 324 (1977).

6. 150 Ga. App. 303, 257 S.E.2d 372 (1979).

7. Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978).

8. 244 Ga. 553, 261 S.E.2d 364 (1979).

was seen by a witness just before the robbery and by others during the robbery. After leaving the scene, the defendant was pursued and stopped by sheriff's deputies. He shot and killed a deputy and then fled. To obtain more identifying information to help locate the defendant, the witness who saw the defendant before the robbery was hypnotized by a psychiatrist. The trial court entered a pretrial order prohibiting evidence of any kind disclosing the fact of hypnosis. The defendant objected and made an offer of proof which indicated that the psychiatrist, if permitted, would testify that there was great potential for abuse in hypnosis. The defendant maintained that the psychiatrist would have testified that suggestions can be planted while a person is in a hypnotic trance which suggestions the subject will later perceive as true, even if they are actually false. During the trial the court rescinded the pretrial order and permitted cross-examination by the defendant to test the credibility of any witness who had undergone hypnosis.[9] The opinion can be cited for the following rules relating to hypnosis: (1) Reliability of hypnosis has not yet been established; (2) statements made by one under hypnosis are inadmissable; and (3) when a witness has undergone hypnosis and then testifies at trial, the right of cross-examination includes the right to show the fact of hypnosis to impeach the credibility of the witness. As the law of evidence exists under these rules, the state will have to consider which investigations warrant the use of hypnosis in light of the possibility that, even if the results lead to the apprehension of a suspect, the usefulness of a witness may be destroyed in the process.

C. Testimony Regarding the Use of Bloodhounds

There is something comical about the thought of bloodhounds, but there is nothing funny about using their conduct as evidence in criminal cases. As set forth in *O'Quinn v. State*,[10] a definite checklist of elements must be satisfied before such evidence is admissible. According to the version of the facts given in the opinion regarding this burglary case, the sheriff brought a bloodhound to the scene of the crime. Apparently, some effort was made to get the hounds on the trail of the suspects, but before this was done the defendants were apprehended elsewhere and put into a patrol car. The hounds were taken to the car. One of the hounds sniffed one of the defendants when the car door was opened. What this sequence amounted to was something on the order of the witness on the stand testifying that the hound had said, "That's your man." What is required to get the conduct of the dog admitted into evidence is: (1) The witness

9. The opinion then addressed the question of whether the defendant was entitled to a continuance.

10. 153 Ga. App. 467, 265 S.E.2d 824 (1980).

himself must be shown to be reliable; (2) the dog must be shown to be able to scent a track under the circumstances; and (3) the dog must have followed such scent to the location of the defendant. This foundation should first be laid outside the presence of the jury. When properly admitted into evidence, the effect of such testimony is not proof of guilt, but merely some evidence that the person tracked had been at the scene of the crime where the tracking commenced.

D. Blood Tests

Blood alcohol test results are subject to a special statutory exclusionary rule.[11] Unless a person who undergoes such a test at the request of the police is advised of his right to have his own test performed, the result of the state-administered test may not be used to raise the various statutory presumptions relating to driving under the influence. *Ensley v. Jordan*[12] was a civil case in which the arresting officer failed to inform the defendant of her rights before administering a blood alcohol test. The test results revealed that her blood alcohol content at the time of the test was .10 percent.[13] Prior to trial the test results were ruled inadmissible. During trial, the defendant admitted the consumption of a limited amount of alcohol which, according to expert testimony, would not have produced a .10 percent test result. In order to impeach defendant regarding the amount of alcohol consumed, the State offered the test results. The trial court permitted the test results to be admitted and the court of appeals affirmed the trial court.[14] The supreme court also affirmed and stated the following rule:

> [E]ven though breach of the notice requirement of Georgia Code Ann. Section 68A-902.1 (a) renders evidence of the blood test administered by the state inadmissible to establish a presumption that the allegedly drunken driver was driving under the influence, such evidence should be admitted for impeachment purposes in the trial of a civil action . . . .[15]

II. Procedure And Evidence

The common aspect of each opinion discussed in this section is that the admissiblity of evidence was controlled by a rule of procedure, or the evidence rule arose in relation to a specific procedure of interest to those

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11. Ga. Code Ann. § 68A-902.1(a)(4) (1980).
12. 244 Ga. 435, 260 S.E.2d 480 (1979).
13. Under the statute a .10 percent alcohol content raises the presumption that the person tested was under the influence of alcohol.
14. Jordan v. Ensley, 149 Ga. App. 67, 253 S.E.2d 414 (1979).
15. Ensley v. Jordan, 244 Ga. at 437, 260 S.E.2d at 481 (1979).

concerned with the rules of evidence.

A. *Motion in Limine*

The first procedure discussed is the motion *in limine* which has seen extensive use in this state in the last several years. From the viewpoint of a trial judge, the motion is a welcome device because it is helpful to have counsel focus attention on anticipated difficult problems of evidence in advance of the trial. The opportunity to study these evidence problems in advance of a trial results in less likelihood of error than if the trial judge were interrupted or if the judge had to rule from the hip. Some would say the motion is extra baggage in litigation because the same purpose can be accomplished in a pretrial conference. The experience is that counsel will sooner and more readily bring a motion *in limine* than request a pretrial conference.

In a very enlightened opinion on the purpose and effect of a motion *in limine* the supreme court both defined the motion itself and determined a crucial aspect of its effect. *Harley-Davidson Motor Co., Inc. v. Daniel*[16] began as a products liability action alleging defective brakes on a motorcycle. The manufacturer had issued a recall letter as required by federal statute. By use of a motion *in limine* the defendant sought to have the trial court rule the recall letter inadmissible. The motion was denied and the letter was introduced without objection. After verdict and judgment the defendant appealed to the court of appeals[17] contending that error was committed by the trial court in admitting the letter. The court of appeals held that the failure of counsel to object to the evidence at trial was a waive of the overruling of the motion *in limine*. Therefore, the substantive question was not reached by the court of appeals.

The supreme court affirmed the court of appeals, but only because the court, on reaching the substantive issue, found the recall letter to be admissible. The supreme court took issue with the court of appeals and stated that an objection at trial was not necessary where a motion *in limine* was made.[18] The court felt that the motion itself was sufficient to bring the matter to the trial court's attention and that, since the trial court had already ruled, there was no need for another ruling. The court also considered it unfair to require counsel who has already made his objection known to make the objection again in the presence of the jury, thereby highlighting the evidence.[19] The rule in Georgia, as set forth in

16. 244 Ga. 284, 260 S.E.2d 20 (1979).

17. Harley-Davidson Motor Co. v. Daniel, 149 Ga. App. 120, 253 S.E.2d 783 (1979).

18. "We find this theory highly technical and the objection superfluous and disagree with the Court of Appeals." 244 Ga. at 285, 260 S.E.2d at 22 (1979).

19. A counter-argument is that in complex litigation evidence can sometimes be better

Daniel, is that counsel is not required to make objection at trial where the issue was properly presented and ruled upon on a motion *in limine.*

B. Questions Asked by Jurors

Should jurors be permitted to pose questions to witnesses during the trial? Meritorious arguments can be made supporting both sides of the issue. There are probably few trials where jurors would not like to ask questions. The problem is that they are not schooled in the rules which govern the posing of questions in a trial and therefore, without exception, errors result. Any attorney who has participated in a trial in which his opponent was a layman unrepresented by counsel understands the problem. Every trial judge recognizes the considerably more difficult task of conducting a trial without counsel. The problem exists because laymen simply cannot govern their questioning of witnesses by rules with which they are not familiar.

An opinion was rendered in *Stinson v. State*[20] from facts showing the danger inherent in allowing jurors to ask questions of witnesses. The rule, derived from a previous supreme court decision[21] and clarified here, is that jurors are not permitted to question witnesses. In *Stinson* a juror was permitted to question a witness. The answer given was a conclusion which was not admissible in evidence. The trial court tried to correct the situation, but in so doing an opinion was intimated by the judge. Matters got out of hand and error resulted.

The present rule does not seem to be a very good way to deal with the matter because, at the least, it will frustrate jurors. Perhaps it would be practical to permit jurors to hand up a limited number of written questions to the judge. The trial judge could then disclose the questions to both counsel. If neither counsel saw fit to elicit the desired facts, the court might do so. There is no denying the circumstance that judges and jurors, who have not prepared the case for trial as counsel should have, are not in a position to ask questions to conform with the model being created by counsel in the courtroom. Someone must be the director of the actors on the stage and that role is best left to those who know the script. This is accomplished with the present rule in Georgia.

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understood and analyzed by a trial court in conjunction with the other evidence at trial. Why not give the trial court a chance to save error?

20. 151 Ga. App. 533, 265 S.E.2d 862 (1979).

21. Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978). In this case the complaint was that the trial court declined, upon request, to inform the jurors that they have the right to pose questions. The supreme court could find no rule in Georgia permitting jurors to ask questions and concluded that they are not permitted to do so. These two opinions together make it clear that juror questions are not even a discretionary matter for the court; they are simply precluded.

C. *Use of Treatises on Cross-Examination*

The procedure of using a treatise to cross-examine a witness was dealt with in *Wooten v. Department of Human Resources.*[22] In the trial court, counsel attempted to question an opposing expert witness concerning a book written on the subject in question. Counsel was stopped, apparently on the theory that cross-examination from a treatise can only be done where the treatise has first been proven to be a standard in the field. While this is true, there is no reason this foundation may not be proven by cross-examination of the opposing expert witness. The court of appeals in *Wooten* referred to a 1977 opinion[23] in which the court held that a sufficient foundation is laid to use a particular book if it is shown that the expert is familiar with the book, has studied under the authors of the book, has used it during his study, and that the book is accepted as one of the books in the field.

D. *Sentencing in Capital Felony Trials*

A special statutory procedure where the usual rules of evidence may not be applied without further consideration is employed in the sentencing phase of a capital felony trial.[24] When the defendant is offering mitigating evidence which may mean the difference between life and death, application of the customary evidentiary rules is not enough. This point has been in the forefront since the 1979 United States Supreme Court opinion rendered in *Green v. Georgia.*[25] In that case, the omission of a hearsay statement offered in mitigation was found to be error. In *Collier v. State*[26] the Georgia Supreme Court considered *Green* and another U.S. Supreme Court opinion[27] to have molded the following rule:

> [T]he Constitution requires that evidence which would be inadmissible under an evidentiary rule must not automatically be excluded if tendered in a capital case in mitigation of punishment. Rather, the potentially mitigating influence of the testimony must be weighed against the harm resulting from the violation of the evidentiary rule.[28]

The difficulty with the test is that it demands a result in favor of admissibility even before the test is applied. After all, who has much hesitancy predicting the outcome where life versus death is at stake on one

22. 152 Ga. App. 304, 262 S.E.2d 583 (1979).
23. Mize v. State, 240 Ga. 197, 240 S.E.2d 11 (1977).
24. GA. CODE ANN. § 27-2534.1(a) (1978).
25. 442 U.S. 95 (1979).
26. 244 Ga. 553, 261 S.E.2d 364 (1979).
27. Lockett v. Ohio, 438 U.S. 586 (1978).
28. 244 Ga. at 567, 261 S.E.2d at 376.

side and vindication of the rules of evidence is at stake on the other? Surprisingly, the result reached in this case was in favor of the rules of evidence.

There are two opinions relating to the harmless error rule which show the tendency of the appellate courts in Georgia regarding that rule. The rule is that even though a trial court might commit error in ruling on the admissibility of evidence (or in any other matter), the case will not be reversed if the error can be counted as harmless. The rule becomes a matter of the application of good judgment or common sense by the appellate court. The difficulty is that one can seldom be sure what will ultimately be counted as harmless. A good example is *Gunter v. State*,[29] in which the majority used the harmless error rule to affirm even though the trial court committed error as to rules of evidence and otherwise. The dissent felt the majority went too far in "indiscriminate application of the harmless error rule."[30]

Another opinion made the same point but reached the opposite result. In *Posey v. State*[31] the court of appeals could very well have used the harmless error rule but declined to do so. The sheriff testified as to the defendant's reputation for truthfulness before the defendant put his character in issue. This was error. The trial court denied a motion for mistrial but gave cautionary instructions to the jury. This was not sufficient to erase the harm done. The court of appeals determined the error to be so harmful that only another trial would suffice. Until *Boyd v. State*,[32] the appellate courts had been most liberal in permitting a trial court to use cautionary instructions rather than declare a mistrial. It is now clear that this procedure will no longer suffice, at least not in criminal cases in which the witness for the State is a peace officer and the circumstances in any way indicate some desire on the officer's part to inject facts knowing they are inadmissible. The only real solution is for prosecutors to exercise close control over the officer's testimony.

III. Opinion Evidence

It is unlikely that anyone will come up with a distinction between opinion and fact that will meet every test. A decision from the court of appeals which may be very helpful is *Gage v. Tiffin Motors Homes*.[33] From a factual standpoint it is enough to know that the defendant was a seller of motor homes. Plaintiff's attorney asked defendant the question, "At

29. 243 Ga. 651, 256 S.E.2d 341 (1979).
30. *Id.* at 663, 256 S.E.2d at 349.
31. 152 Ga. App. 216, 262 S.E.2d 541 (1979).
32. 146 Ga. App. 359, 246 S.E.2d 801 (1978).
33. 153 Ga. App. 704, 266 S.E.2d 345 (1980).

that time were you under a security agreement with anyone as to your inventory . . .?" An objection was made that the question called for a legal conclusion. Many times a question will contain a term which carries a particular legal significance, and thereby bring on the legal conclusion objection, even though the term is used only as a way to direct the witness's attention to the area of inquiry. The use of a different term will often eliminate the objection and still allow the same information to be elicited. But even when the inquiry does contain legal terminology, this decision can be cited for the following rules: (1) while a witness may not give a legal conclusion, testimony which in the main is a mere statement of fact is admissible even though it rests to a certain extent on the application of legal principles; and (2) the issue of whether a question calls for a legal conclusion or mainly a fact and incidently involves a legal phrase is a matter for the sound discretion of a trial court.

In *Calloway v. Rossman*,[34] which involved facts showing an automobile collision, an important issue was which of the two occupants of one vehicle was the driver of that vehicle, since both occupants denied being the driver. A witness was called who had considerable expertise relating to vehicle collisions in his capacity as a civil defense director. The witness testified fully as to the facts he observed at the scene and was then asked his opinion as to which of the two had been the driver. An objection was made that a conclusion was elicited, and that the witness was not qualified as an expert who could give such an opinion. The trial court sustained the objection. The appellate court affirmed. The trial court seemingly could have allowed the opinion either because the witness was a qualified expert or because, as a lay witness, he gave the facts upon which his opinion was based. Either ruling probably would have been affirmed. The interesting thing is that the action taken by the trial court was affirmed on the theory that the witness had given the pertinent facts and that the jury was capable of drawing its own conclusion or inference. The opinion of the witness was therefore superfluous according to that theory. But, is it not always the case that a lay witness must first state the facts before giving his opinion? And, the jury always draws its own conclusion. Possibly the whole matter of lay witness opinions needs reconsideration.

IV. PRIVILEGE

A. *Self-Incrimination*

Casper v. State[35] is a significant decision on the subject of the privilege against self-incrimination. The first of five defendants charged with mur-

34. 150 Ga. App. 381, 257 S.E.2d 913 (1979).
35. 244 Ga. 689, 261 S.E.2d 629 (1979).

der was tried separately and found guilty. Then the other four were tried jointly and at their trial the State called the first defendant to the stand. In the presence of the jury the district attorney asked the witness several questions relating to the crime. The witness responded that he was invoking the fifth amendment. The defendants' motion for a mistrial was denied. During the trial and on motion for new trial, there was evidence from which one could conclude that the district attorney did not know in advance the first defendant would invoke the fifth amendment. (There was also evidence that the district attorney *did* or should have known the defendant would take the fifth.) The issue then is whether the State may put a codefendant on the stand in the presence of the jury to plead the fifth amendment over the objection of the defendant on trial. The answer varies among different jurisdictions, but this opinion is authority in Georgia that the State may do so, at least as long as the district attorney does not have advance notice that the witness will invoke the fifth amendment. It should be noted that the supreme court cited a decision from the Fifth Circuit Court of Appeals[36] holding it to be error for the witness to be called if the prosecutor knows in advance the witness will take the fifth. That is probably what Georgia courts would hold. The answer, of course, is to hear the witness first outside the presence of the jury any time there is a likely prospect he will plead the fifth amendment rather than answer questions.

B. Attorney-Client Privilege

Felts v. State[37] deals with the attorney-client privilege. The defendant during a previous trial testified that he lied to his attorney when telling him what happened at the scene of the homicide. At the second trial defendant was called upon on cross-examination to admit he lied to his attorney, but this time the defendant claimed that the communication was privileged. However, the supreme court was of the opinion that once the appellant had testified to the matter at the first trial, the communication ceased to be privileged.

V. CHARACTER EVIDENCE

The one case included in this article on the subject of character evidence could be discussed without any reference to the facts. But to do so would be to miss an episode so classic in its portrayal of encounters between police and a certain type citizen as to be worthy of a permanent place in the hall of fame of fascinating facts. The case was *Simpkins v.*

36. San Fratello v. United States, 340 F.2d 560 (5th Cir. 1965).
37. 244 Ga. 503, 260 S.E.2d 887 (1979).

State,[38] and the facts in the words of the opinion were:

> Defendant's husband's automobile was involved in an accident with another vehicle. When she arrived at the scene of the accident there were 25 to 30 other people at the site. The sheriff, chief of police, and a Georgia State Trooper were present. The sheriff asked the crowd to move back from the vehicles and to clear the road. All moved except defendant's mother. She said she did not hear him tell her to move. The sheriff grabbed her by the arm to remove her and immediately found himself involved in an altercation with the mother, her two daughters, and her two sons. The chief of police saw all five persons hitting the sheriff and the sheriff fighting back. He pulled his blackjack and tried to help the sheriff. After striking a couple of participants with his blackjack he was struck from behind. The state trooper saw the melee, pulled his weapon and approached. The sheriff had gone to his vehicle, secured a blackjack, and was returning to the fray. The trooper said he holstered his weapon at that time.
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> The defendant testified that she was six months pregnant and the sheriff hit her with his blackjack and kicked her in the stomach. When she saw the trooper draw his gun, she drew hers, and, 'I just closed my eyes and shot.' Of the six shots fired, three hit the sheriff, one hit the trooper, and another disabled the chief of police. She was convicted of three counts of aggravated assault.[39]

Part of her defense was good character. Six witnesses testified they had known the defendant most of her life and that the defendant had a good reputation in the community for peacefulness. On cross-examination they all said they based their testimony on their own knowledge of the defendant, not on hearsay or the opinions of others. The trial court struck the testimony because the witnesses did not show a knowledge of the defendant's reputation, but merely their own knowledge of the defendant. As professor Irving Younger would put it, they did not know the "gossip". The gossip makes up the reputation and it is the reputation which is admissible. The opinion of the witness, no matter how well acquainted he may be with the defendant, is not admissible. The court of appeals upheld the trial court only because it felt bound by prior supreme court opinions.

The writers on evidence and the modern evidence codes almost universally prefer opinion to gossip. Many of these views are cited in this decision. The time seems right for a case to arise and make the change from gossip to opinion in Georgia. Until such a case does appear, however, lawyers must remember to explain carefully to witnesses the questions being asked and to use only witnesses who do know the gossip.

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38. 149 Ga. App. 763, 256 S.E.2d 63 (1979).
39. *Id.*, 256 S.E.2d at 64.

VI. HEARSAY EXCEPTIONS

A. *Hearsay to Explain Conduct*

The hearsay to explain conduct rule[40] is susceptible of much abuse. The rule admits testimony which is hearsay except when the testimony is offered only to explain the conduct of the witness and not to prove the truth of what was said in an out of court declaration. Of course, that renders the evidence nonhearsay. However, such testimony is seldom necessary to explain anyone's conduct; the real purpose is to get the hearsay before the jury. Georgia courts have been most liberal in recent years in applying the rule, but the outer limit was reached in *Cawthorn Motor Co. v. Sceufler.*[41] The suit arose over the purchase of a used car. The purchaser claimed that the odometer reading was not correct and that the seller had made fraudulent representations. Prior to the suit, the purchaser had made a claim with the Office of Consumer Affairs (OCA). An investigation was conducted by that agency and an unsuccessful attempt to settle was made. At trial the OCA investigator was permitted to recite virtually his entire investigation including various hearsay statements. This was permitted on the theory that he was explaining his conduct. The appellate court reversed, finding that the conduct of the investigator was irrelevant and did not need explanation. What he had done in his investigation produced no evidence which was not hearsay.

Perhaps this opinion signals a less liberal view of the hearsay to explain conduct rule. The best guide for the application of the rule was written by Justice Bleckley in 1889.[42] As he pointed out, the only reason to admit what would otherwise be hearsay is to explain someone's conduct. In order to do that the proponent need only state, in most cases, that a conversation took place. The contents of the conversation are seldom necessary to explain the conduct that followed. Sometimes that is necessary but usually not, and when it is not, the fact of the occurrence of a conversation is all that is necessary.

B. *Business Records*

Minnich v. First National Bank of Atlanta[43] was a noteworthy case on the business records exception to the hearsay rule. One of the elements of the exception is that the record be made at the time of the transaction or

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40. GA. CODE ANN. § 38-302 (1974). "When, in a legal investigation, information, conversations, letters and replies, and similar evidence are facts to explain conduct and ascertain motives, they shall be admitted in evidence, not as hearsay, but as original evidence." *Id.*

41. 153 Ga. App. 282, 265 S.E.2d 96 (1980).

42. Kelly v. State, 82 Ga. 441, 9 S.E.2d 171 (1889).

43. 152 Ga. App. 833, 264 S.E.2d 287 (1979).

within a reasonable time thereafter. One must remember to identify the particular transaction in question, and to relate the record-making to that time. In this opinion a rather liberal application of the element of time permitted certain bank accounts to be admitted, but it is questionable whether the attorney properly focused on the time element at trial.

What is to be learned from this case, and from a great deal of observation in the courtroom, is that attorneys generally need to plan more carefully for the use of the business records statute. An attorney should never proceed without first reading the statute, listing all the elements, and preparing to support each element with testimony.

C. *Death Certificates*

Death certificates are admissible as evidence by statute.[44] In *King v. State*[45] the rule was given as to precisely what portions of the certificate are admissible. On the face of the statute one might conclude that any facts stated on the certificate are admissible. This is not correct, however. The certificate is evidence only of the death itself and of the immediate agency of the death. Other events leading up to the death and conclusions as to whether the death was intentional or accidental are not admissible.

D. *Excited Utterances*

Res gestae is such an unpopular term today that one is embarrassed to use it. The problem is that it has been carved into an evidence code section[46] so that to avoid its use is cumbersome. The exception to the rule against hearsay mentioned here is called an excited utterance by modern writers.[47] It arose in *Wallace v. State*[48] in a situation common in a number of recent decisions. The defendant was accused of molesting his nine-year-old daughter. The mother was allowed to testify as to what the child told her concerning the molestation by the father. The conversation took place some one to two hours after the event, but on the first occasion after the event when the child was with her mother outside the father's presence. The length of time seemed considerable but the court used the test, not of time alone, but of whether the declaration appeared to spring out of the event, and whether the declaration was made at least near enough in time so as to preclude the idea of deliberate design.[49] McCormick puts forth two tests for this exception. There must be an occurrence

44. 1964 Ga. Laws 499, 595.
45. 151 Ga. App. 762, 261 S.E.2d 485 (1979).
46. GA. CODE ANN. § 38-305 (1974).
47. C. MCCORMICK, EVIDENCE, § 297 at 704 (2d ed. 1972).
48. 151 Ga. App. 171, 259 S.E.2d 172 (1979).
49. *Id.* at 172, 259 S.E.2d at 174.

of a startling nature so as to render the observer's normal reflective thought process inoperative, and the statement must be a spontaneous reaction and not the result of reflective thought.[50] Probably the peculiar occurrence in child molestation cases causes the courts to be liberal in finding the absence of reflective thought. There is a danger, however. Having seen one child molestation case where it later developed that there had been reflective thought resulting in great harm to the defendant, caution ought to be the watchword in such cases.

VII. Relevancy

There have been few, if any, jury trials where no objection as to relevancy was made. Everyone believes he can recognize a relevancy issue but few are able, in the heat of battle, to state a workable definition. The most concise definition is that stated in *Brooks v. State*.[51] "Relevancy is the tendency to establish any material fact."[52] Of course, one must know the meaning of materiality to use this definition. To be material the evidence must be probative of a matter in issue.[53] One of the most useful definitions of relevancy is given in McCormick[54] in the form of a test which asks whether the evidence offered renders the desired inference more probable than it would be without the evidence. If so, the evidence is relevant. One may still have a question of the materiality of the evidence to resolve, but this test will at least determine relevancy.

VIII. Character of Deceased—Specific Acts

A case in which it was deliberately sought to clarify confusion about a rule of evidence was *Milton v. State*.[55] The defendant was accused of the murder of his former wife. The State made a motion *in limine* to bring to the trial court's attention the fact that the defendant and one of the defendant's witnesses intended to testify to previous specific acts of violence by the deceased toward the defendant. The motion was sustained. The supreme court reversed. In doing so it recognized the rule that the general reputation of the deceased for violence cannot be established by proof of prior specific acts of violence. But in a case in which there is evidence that the defendant reasonably believed that he was being assailed and acted in self-defense, the specific acts may come in. The statement of the

50. C. McCormick, *supra* note 47, § 297 at 704.
51. 244 Ga. 574, 261 S.E.2d 379 (1979).
52. *Id.* at 583, 261 S.E.2d at 379.
53. C. McCormick, *supra* note 47, § 185 at 434.
54. *Id.* at 437.
55. 245 Ga. 20, 262 S.E.2d 789 (1980).

rule is:

> The rule of the present case is that where the defendant has made a prima facie showing of the basis for a reasonable belief that the deceased was reaching for a firearm with the present intention of using it to carry out a death threat recently communicated by the deceased to the defendant, the defendant is entitled to introduce in evidence his own testimony and that of his witnesses to prove specific instances in which the deceased had used a firearm or other weapons or objects to assail him. The lapse of time between the prior occurrences and the homicide, the conduct of the parties toward each other during the intervals between the occurrences, and other such matters go to the weight and credit to be afforded the testimony by the jury and not to its admissibility. In cases of doubt, the testimony should be admitted.[56]

IX. Evidence of Compromise Offers

By statute[57] the law encourages parties to negotiate settlements in declaring that these negotiations which may well contain admissions are not proper evidence. The application of the rule can be very tricky, as indicated in the five-to-four decision in *Campbell v. Mutual Service Corp.*[58] The plaintiff alleged that an oral contract existed regarding a sales commission, but the defendant denied there was a contract. The defendant sold the property in disregard of the alleged contract so that plaintiff lost his commission. Before litigation began, there occurred a conversation between the plaintiff and the defendant's agent in which plaintiff referred to the oral contract and asked what defendant was going to do. The agent said he would do what was right. When asked what that would be, he said he thought he would give plaintiff five thousand dollars. Defendant complained that that amount would be insufficient. This conversation was allowed into evidence over an objection that it was an effort to reach a compromise settlement. The majority did not find any effort of the parties to reach a settlement and therefore held the testimony to be admissible. The opinion relied on *Williams v. Smith,*[59] an earlier court of appeals decision.

The somewhat intricate distinction which the dissent pointed out as the basis upon which *Williams* rested was that *Williams* was a suit in which the existence of the contract was not disputed. In *Campbell,* the

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56. *Id.* at 26, 262 S.E.2d at 793.

57. GA. CODE ANN. § 38-408 (1974). "Admissions obtained by constraint or by fraud, or by drunkenness induced for the purpose, or admissions or propositions made with a view to a compromise, are not proper evidence."

58. 152 Ga. App. 493, 263 S.E.2d 202 (1979).

59. 71 Ga. App. 632, 31 S.E.2d 873 (1944).

very existence of the contract was in dispute. So if the defendant makes an offer, it is an admission of the existence of the contract as well as something he is not going to do if he knows it can be used against him at trial. On the other hand, in situations like *Williams,* in which there is no dispute as to the existence of the contract, there is merely a demand to settle a claim. Unless the existence of the claim itself is in dispute, there is no attempt to compromise. The distinction is too intricate to be used as a practical rule. If the policy of encouraging settlement negotiation is important, the distinction ought to be dropped and the evidence excluded in either circumstance.

X. STATUTES

The Georgia General Assembly passed two bills amending the evidence title which became law on February 15, 1980 and July 1, 1980. These statutes deal with witness fees and other matters found in Georgia Code Ann. Section 38-801. The section as amended extends the subpoena range of the courts from within 150 miles of the place of trial to any place within the state.[60] The section is also amended with regard to mileage rates witnesses are entitled to receive.[61] The new rate is twenty cents per mile.

Effective March 20, 1980, a new chapter in the evidence title, designated Georgia Code Ann. Section 38-13A, exists.[62] Its purpose is to allow the taking of a deposition in a criminal case in the special circumstances in which a witness is in imminent danger of death, or when his life has been threatened or a threat of great bodily harm has been made because he is a witness.

60. GA. CODE ANN. § 38-801(e) (Supp. 1980).
61. *Id.* § 38-801(d) (Supp. 1980).
62. *Id.* ch. 38-13A (Supp. 1980).