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Evidence

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More cases than usual concerning one or more points of evidence were decided during this survey period. Only those cases that seemed significant or of general interest have been discussed here.

I. Hearsay

The Georgia cases remain rather traditional in refusing to expand the exceptions to the hearsay rule. A witness's prior inconsistent statements used for the purpose of impeaching his testimony are still not substantive evidence.[1] Georgia Code §38-309 was applied in two cases to admit declarations against interest.[2]

In the first appearance of the *Lingerfelt* case,[3] it was held that a co-indictee's testimony given at a commitment hearing was improperly admitted under the hearsay exception for testimony given at a former trial. The witness was not accessible, since he had claimed his privilege against self-incrimination; neither the accused nor his counsel had been present at the commitment hearing, however, so the accused had been denied his right of confrontation. The testimony therefore did not satisfy the exception. At the second trial, the prosecutor read the witness portions of the former testimony in leading questions that suggested the answers. This was error.[4] The prosecutor could not do indirectly what could not be done directly.

Hewell v. State[5] was a case where the state failed to show due diligence in the search for an absent witness who had testified at a former trial.

A. Res Gestae

Declarations to "explain conduct" are said not to be hearsay[6] and are often held admissible without discussion.[7] However, this is really an excep-

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1. Woodall v. State, 235 Ga. 525, 221 S.E.2d 794 (1975).
2. Martin v. Turner, 235 Ga. 35, 218 S.E.2d 789 (1975); Lewis v. Williford, 235 Ga. 558, 221 S.E.2d 14 (1975).
3. Lingerfelt v. State, 231 Ga. 354, 201 S.E.2d 445 (1973).
4. Lingerfelt v. State, 235 Ga. 139, 218 S.E.2d 752 (1975).
5. 136 Ga. App. 420, 221 S.E.2d 219 (1975).
6. Ga. Code Ann. §38-302 (1974).
7. Teal v. State, 234 Ga. 159, 214 S.E.2d 888 (1975); Floyd v. State, 137 Ga. App. 181, 223 S.E.2d 230 (1976).

tion to the hearsay rule and is often so treated.[8] It is much like the res gestae exception. In *Stamper v. State*[9] the same declaration was considered under both exceptions and was held to have been improperly admitted, since it satisfied neither.

The res gestae exception continues to be one of the most useful exceptions to the hearsay rule and is specifically approved by statute in Georgia.[10] It received an unusual amount of attention during the past year. The time element between the event and the declaration is especially important to remove the idea of afterthought; where the declaration is part of a continuous transaction, it is part of the res gestae.[11] Two or three minutes after the event[12] and ten to fifteen minutes[13] have been held to make declarations admissible as part of the res gestae. Statements made twelve hours after the event were too late.[14] Also, a complaint about a rape made to a girl friend the next day and 40 days later to an officer were too remote to be part of the res gestae.[15]

Whitley v. State[16] considered whether a declaration by a bystander was part of the res gestae. The defendant was tried for taking a wallet from the victim by force. Two detectives from the decoy squad were watching from a distance, one with the aid of field glasses. The one with the field glasses said: "They are getting his wallet." The other detective repeated this at the trial. It is difficult to understand why the detective who was using the field glasses was not called as a witness to properly testify as to what he saw, but this was not done. The court held that admitting this declaration as part of the res gestae had been proper. Three judges dissented and seem to have said that the declaration of a bystander could never be part of the res gestae. This would be contrary to the usual rule.

Fountain v. State[17] seems to hold that only oral declarations, not conduct, could be admissible as part of the res gestae. The result seems proper, since the conduct was too remote, but it is not likely that res gestae is limited to oral declarations. The opinion is not in Judge Clark's customary style; there is not a single alliteration. In an excellent discussion of res gestae in *Townsend v. State*,[18] more in Judge Clark's customary style, it was clearly stated that res gestae was not limited to oral declarations but included the "circumstances, facts and declarations which grow out of the

8. *See*, e.g., Boggus v. State, 136 Ga. App. 917, 222 S.E.2d 686 (1975).
9. 235 Ga. 165, 219 S.E.2d 140 (1975).
10. GA. CODE ANN. §38-305 (1974).
11. Haralson v. State, 234 Ga. 406, 216 S.E.2d 304 (1975).
12. Larkin v. State, 137 Ga. App. 164, 223 S.E.2d 215 (1976).
13. Littler v. State, 236 Ga. 651, 224 S.E.2d 918 (1976). The fact that these declarations were replies to questions did not remove them from the res gestae.
14. Peebles v. State, 236 Ga. 93, 222 S.E.2d 376 (1976).
15. Watson v. State, 235 Ga. 461, 219 S.E.2d 763 (1975).
16. 137 Ga. App. 68, 223 S.E.2d 17 (1975).
17. 136 Ga. App. 229, 220 S.E.2d 705 (1975).
18. 127 Ga. App. 797, 195 S.E.2d 474 (1972).

main fact, are contemporaneous with it, and serve to illustrate its character."[19]

B. Regular Entries

The business-records statute, Code §38-711, was applied without much problem in a number of cases. Only a few cases need to be mentioned. In *Whitehead v. Joiner*[20] certain adding machine tapes, receipts and notations were admitted under the regular-entry exception. The court held that to admit these records was proper under the statute and that their physical appearance and the self-serving nature of the entries went to the weight of the evidence and not to its admissibility. In *P. & M. Masonry v. J. Black Co.*[21] some ledger sheets and canceled checks were introduced to show payments made for some masonry work. The defendant contended that since the plaintiff had not segregated the irrelevant material on the ledger sheets, they were not admissible. The court held that since the plaintiff had explained the coding on the ledger sheets so that the relevant entries could be identified, it was proper to admit the entire ledger sheets.

The question of computer printouts as regular entries under the business records statute was considered in *Cotton v. John W. Eshelman & Sons, Inc.*,[22] a case of first impression in Georgia. The court considered the existing authorities in other jurisdictions, all in agreement in favor of admissibility, and held that computer printouts would be regular entries and admissible on the same basis as any other business records. The court then considered the issue of the lack of personal knowledge of the entries by the witnesses authenticating the business records. As the statute states,[23] any lack of personal knowledge would affect weight and not admissibility.

II. Relevancy

In *Glo-Ann Plastic Industries, Inc. v. Peak Textiles, Inc.*[24] the court set out the basic test of relevancy and held that in each of eight enumerations of error the trial judge had properly found the evidence relevant. In *Carver v. State*[25] the court found that evidence of escape from jail was properly relevant on the issue of guilt. In *Cross v. State*[26] evidence of the course of dealings with others by two witnesses was not relevant to prove their course of dealings with the defendant in that case.

19. *Id.* at 802, 195 S.E.2d at 478.
20. 234 Ga. 457, 216 S.E.2d 317 (1975).
21. 136 Ga. App. 646, 222 S.E.2d 152 (1975).
22. 137 Ga. App. 360, 223 S.E.2d 757 (1976).
23. Ga. Code Ann. §38-711 (1974).
24. 134 Ga. App. 924, 216 S.E.2d 715 (1975).
25. 137 Ga. App. 240, 223 S.E.2d 275 (1976).
26. 136 Ga. App. 400, 221 S.E.2d 615 (1975).

A. Character

Generally, the character of the parties is not in issue. In a criminal case, the defendant may always "put his character in issue" by introducing evidence of his good character. In *Edwards v. State*[27] it was held that where a defendant has introduced evidence of good character, the trial judge need not give a proper instruction on character in the absence of a timely request except in exceptional cases. An exceptional case would be one where the defendant had relied on good character as his sole defense.[28]

When character is in issue, proof is limited to general reputation. *Henderson v. State*[29] contains a good discussion of the problem and may have relaxed the Georgia rule to some extent. In that case the defendant claimed self-defense and sought to show, by his own testimony, the violent, turbulent character of the murder victim. He was limited to testimony as to the deceased's general reputation for violence. The court held that it had been error to exclude his testimony about the deceased's general reputation for shooting people, but his testimony that the deceased had shot one man was properly excluded. Character cannot be shown by proof of specific acts.

In the sentencing phase of the trial under Code §27-2503, the character of the defendant is in issue. This pre-sentence hearing has presented problems. Under the rule of *Argersinger v. Hamlin*,[30] even misdemeanor convictions cannot be considered by the judge unless they show on their face that the defendant was represented by counsel or had properly waived counsel.[31] The Georgia Supreme Court, in a 4-3 decision, has held that *Argersinger v. Hamlin* is retroactive and applies to misdemeanor convictions before 1971.[32] Naturally, the same rule would apply to felony convictions. There has been a troublesome question about the use of the reports of probation officers by the judqe at the pre-sentence hearing. *Munsford v. State*[33] may have resolved the problem. The probation report is not "evidence" to be used at the pre-sentence hearing. It cannot be considered by the judge in fixing the length of the sentence, but it can be used by him for the purpose of deciding whether to suspend or probate all or some of the sentence. *Munsford* says that if the probation report contains matter adverse to the defendant in that regard, it should be revealed to defense counsel in advance of the pre-sentence hearing. The better practice would be for the judge to have no knowledge of the probation report until he has fixed the length of the sentence and then to consider it on the issue of probation or suspension.

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27. 235 Ga. 603, 221 S.E.2d 28 (1975).
28. Seymour v. State, 102 Ga. 203, 30 S.E. 263 (1897).
29. 234 Ga. 827, 218 S.E.2d 612 (1975).
30. 407 U.S. 25 (1971).
31. Dent v. State, 136 Ga. App. 366, 221 S.E.2d 228 (1975).
32. Morgan v. State, 235 Ga. 632, 221 S.E.2d 47 (1975).
33. 235 Ga. 38, 218 S.E.2d 792 (1975).

Evidence of other offenses committed by a criminal defendant would be a showing of character by specific acts and would be inadmissible. However, if the other offense has some logical connection with the offense charged at the trial so that it tends to prove the offense on trial by showing something other than the mere bad character of the defendant, it is relevant and admissible. Both prior and subsequent offenses may be shown. The trend has been to admit evidence of the other offenses, especially in cases involving sexual offenses[34] or robbery.[35]

B. Scientific Evidence

One of the problems in regard to scientific evidence has been in identifying material by showing the proper chain of custody. In one case, a blood sample was not identified as having been taken from the deceased, so the result of a blood alcohol test was properly rejected.[36] In another case, the chain of custody of a blood sample was properly shown.[37] This case includes a good discussion of the chain of custody problem. In two other cases the chain of custody was properly shown as to marijuana[38] and cocaine.[39] Also, the chain of custody was properly shown as to a fingerprint card.[40] However, in *Roland v. State*,[41] the court held that fingerprints were the type of evidence that could be properly identified by a witness and that it was not necessary to show the chain of custody.

In the *Roland* case the court also held that it was not necessary to show that the fingerprints found at the place where the crime was committed could only have been impressed at the time when the crime was committed. This was a matter going to weight of the evidence and not admissibility. The rule of *Anthony v. State*[42] applied only where the fingerprints were the sole evidence against the defendant. Although not cited in the *Roland* case, this is in accord with the supreme court decision in *Turner v. State*.[43]

Polygraph tests continue to cause trouble. In *Cross v. State*[44] the judge had signed a consent order directing the state's two main witnesses to undergo polygraph and truth-serum tests. When they refused to sign a release from liability in regard to the truth-serum tests, the judge vacated

34. *See, e.g.*, Atkins v. State, 236 Ga. 624, 225 S.E.2d 7 (1975); Burnett v. State, 236 Ga. 597, 225 S.E.2d 28 (1975); Burnett v. State, 137 Ga. App. 183, 223 S.E.2d 232 (1976).

35. Fears v. State, 236 Ga. 660, 225 S.E.2d 4 (1976); Joiner v. State, 236 Ga. 580, 224 S.E.2d 414 (1976); Bell v. State, 234 Ga. 473, 216 S.E.2d 279 (1975).

36. Unigard Ins. Co. v. Elmore, 137 Ga. App. 665, 224 S.E.2d 762 (1976).

37. Campbell v. State, 136 Ga. App. 338, 221 S.E.2d 212 (1975).

38. Epps v. State, 134 Ga. App. 429, 214 S.E.2d 703 (1975).

39. Baker v. State, 137 Ga. App. 33, 222 S.E.2d 865 (1975).

40. Meadows v. State, 135 Ga. App. 758, 219 S.E.2d 174 (1975).

41. 137 Ga. App. 796, 224 S.E.2d 846 (1976).

42. 85 Ga. App. 119, 68 S.E.2d 150 (1951).

43. 235 Ga. 826, 221 S.E.2d 590 (1975).

44. 136 Ga. App. 400, 221 S.E.2d 615 (1975).

the order. The defendant moved for a judgment of acquittal, which was properly denied. The court said the results of neither of the tests would have been admissible in evidence. In *Watson v. State*[45] the prosecutor in his opening statement made reference to a polygraph test given to a witness. Even though the judge ruled that this was improper, it was error. The court stated that: "that under no circumstances would he be allowed to prove the polygraph or lie-detector test in the Courts of Georgia."[46] In *Herlong v. State*[47] a police officer stated that a witness was given a lie-detector test and immediately thereafter arrest warrants were obtained. The court held that this evidence was admissible to explain the conduct of the officers under Code §38-302. Three justices dissented. One stated: "Heretofore the Georgia law in this area has been uncomplicated, to wit: evidence regarding lie detector examination is inadmissible."[48] This dissenting view should prevail.

III. Burdens and Presumptions

The presumption of the sanity of a criminal defendant continues even after evidence is offered in rebuttal and goes to the jury as evidence.[49] *Gilbert v. State*[50] was an interesting case in which there were conflicting presumptions. The presumption of the sanity of the criminal defendant was in conflict with a presumption of insanity that arose from a showing by the defendant that he had been adjudged insane and committed to the Central State Hospital. Before a change in the mental health statutes in 1969, the presumption of insanity from the adjudication would have been the stronger and would have prevailed in the absence of a subsequent adjudication that he had been restored to sanity. However, the defendant had received an administrative release under the present mental health laws,[51] and this removed the presumption of insanity. The fact of the adjudication could be considered as evidence, but the presumption was gone; the presumption of sanity continued in the case.

The question of when a matter of defense in a criminal case can be made an affirmative defense so as to place the burden of persuasion on the criminal defendant continues to cause trouble.[52] This is especially true after the decision in *Mullaney v. Wilbur*.[53] Abandonment of a criminal

45. 137 Ga. App. 530, 224 S.E.2d 446 (1976).
46. *Id.* at 532, 224 S.E.2d at 449.
47. 236 Ga. 326, 223 S.E.2d 672 (1976).
48. *Id.* at 330, 223 S.E.2d at 674.
49. Johnson v. State, 235 Ga. 486, 220 S.E.2d 448 (1975).
50. 235 Ga. 501, 220 S.E.2d 262 (1975).
51. Ga. Code Ann. §88-506.1 (1971).
52. See W. Agnor, Georgia Evidence §17-6 (1976).
53. 421 U.S. 684 (1975).

attempt has been held to be an affirmative defense.[54] Accident has been held to be an affirmative defense.[55] A plea of present insanity under Code §27-1502 is properly an affirmative defense.[56] Citing *Mullaney, Henderson v. State*[57] held that it was error to charge self-defense so as to make it an affirmative defense. Because of the effect of *Mullaney v. Wilbur*, some doubt has been expressed as to the earlier cases, including some cited above, in two recent decisions of the Court of Appeals. *Moore v. State*[58] was a 6-3 decision on the defense of coercion. The majority held that the defendant had no real "burden" of any kind as to the usual "affirmative defense;" the defendant need offer evidence only to "raise" the issue, and then the burden would be on the state to disprove it beyond a reasonable doubt. The dissenting judges wanted the old "alibi charge," placing the burden on the defendant but adding that if his evidence raised a reasonable doubt of his guilt he should be acquitted. In *Johnson v. State*[59] a three-judge panel, including one of the dissenting judges in *Moore v. State*, considered the issue of self-defense raised by the defendant. In an excellent opinion, the court considered that the problems could best be answered with the test whether the truth of a defense negates an essential element of the crime charged. If so, the defendant has only the "burden of production" to raise the issue with evidence. Once the defendant raises the factual issue as to self-defense, the state has the burden of persuasion to establish beyond a reasonable doubt unlawfulness or the absence of justification for the act. If this test is followed, it probably will help to clear the confusion in the area.

IV. Demonstrative Evidence

In *Butler v. State*[60] the court followed the usual rule that it is proper to admit a color photograph of a murder victim over an objection that it would inflame the jury. The two dissenting justices raise an interesting point. In that case, three individuals were involved in an armed robbery, during which the victim was killed. One of them pled guilty to the murder and was sentenced to death. The other two were indicted only for armed robbery, and the photograph was admitted at their trial. The dissenting justices agreed that the photograph would be admissible if they had been

54. Cowart v. State, 136 Ga. App. 528, 221 S.E.2d 649 (1975); Gibbons v. State, 136 Ga. App. 609, 222 S.E.2d 55 (1975).

55. Rogers v. State, 137 Ga. App. 319, 223 S.E.2d 456 (1976); Lofton v. State, 137 Ga. App. 323, 223 S.E.2d 727 (1976).

56. Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975); Spencer v. State, 236 Ga. 697, 224 S.E.2d 910 (1976).

57. 234 Ga. 827, 218 S.E.2d 612 (1975).

58. 137 Ga. App. 735, 224 S.E.2d 856 (1976). After this article was written, the Georgia Supreme Court reversed the court of appeals decision. 237 Ga. 269, ___ S.E.2d ___ (1976).

59. 137 Ga. App. 740, 224 S.E.2d 859 (1976).

60. 235 Ga. 95, 218 S.E.2d 835 (1975).

charged with felony murder, but they could not approve its admission in the armed robbery case.

In *Proctor v. State*[61] three written statements of witnesses and a written statement of the defendant were permitted to go to the jury room. The court sought to distinguish *Royals v. State*[62] and other cases and held that since the statements were generally favorable to the defendant, the error was harmless.

In *Durrett v. State*[63] the court held that since the defendant was not present when the jury viewed an automobile and had not waived his right to be present, there was harmful error. This case would have been a good chance to get rid of an earlier holding that a view of personal property could not be granted,[64] but this point was not considered.

V. WRITINGS

There were very few cases involving writings during the survey period. In two cases the rule was stated that the best-evidence rule is restricted to writings alone and has nothing to do with evidence generally.[65]

VI. WITNESSES

The trial judge has a broad discretion in controlling the conduct of the trial and the examination of witnesses. Most attempts to assign error in this regard are not successful. The judge may permit a witness to testify in narrative form.[66] He may permit the party calling a witness to use leading questions in the examination of the witness.[67] He may permit or deny the recall of witnesses, even after both sides have closed.[68] He may exclude unnecessarily repetitious questions on cross-examination.[69]

Stamper v. State[70] applied Code §38-1713 and held that the introduction of other evidence on the same subject matter had not waived the first objection.

Where the witnesses have been sequestered or "put under the rule," it is not error for counsel to interview a witness before placing him on the stand, as long as he does not inform the witness of what other witnesses

61. 235 Ga. 720, 221 S.E.2d 556 (1975).
62. 208 Ga. 78, 65 S.E.2d 158 (1951).
63. 135 Ga. App. 749, 219 S.E.2d 9 (1975).
64. Leverett v. Awnings, Inc., 97 Ga. App. 811, 104 S.E.2d 686 (1958).
65. Munsford v. State, 235 Ga. 38, 218 S.E.2d 792 (1975); Summers v. State, 137 Ga. App. 493, 224 S.E.2d 126 (1976).
66. Baker v. State, 137 Ga. App. 33, 222 S.E.2d 865 (1975).
67. Haralson v. State, 234 Ga. 406, 216 S.E.2d 304 (1975); Boggus v. State, 136 Ga. App. 917, 222 S.E.2d 686 (1975).
68. Hartman v. Gresham, 137 Ga. App. 253, 223 S.E.2d 285 (1976).
69. Johnson v. State, 137 Ga. App. 308, 223 S.E.2d 500 (1976).
70. 235 Ga. 165, 219 S.E.2d 140 (1975).

have testified or how he is expected to testify.[71] *Bell v. State*[72] was a case where the key state's witness was in the district attorney's office after the witnesses had been sequestered. A monitoring system conveyed testimony of the trial to certain rooms in the district attorney's office. However, it appeared that the witness was in the reception area and had heard nothing on the system and no one had discussed the case in her presence, so there was no violation of the sequestration rule. *D.C.A. v. State*[73] held that in juvenile court trials the parents are parties and are not subject to sequestration.

The "Dead Man Rule," Code §38-1603, continues to cause problems. It now seems that the rule deals with competency of witnesses, which may, however, be waived, and not with the admissibility of other evidence.[74] The rule is strictly applied. Where a plaintiff institutes a suit and dies pendente lite and his executor is made a party in his stead, the rule does not apply.[75]

A. Impeachment

The interest of a witness may always be considered by the jury in passing upon the credibility of a witness. In *Ayers v. Nichols*[76] the judge properly permitted the defendant to ask a witness who was the husband of the plaintiff about a separate pending lawsuit by him against the defendant. Generally, a witness may not be impeached by a prior inconsistent statement as to a collateral matter, but if the collateral issue is indirectly material to the issue in the case, then impeachment is proper.[77] Actually, the issue then is no longer collateral. Where an attempt is made to impeach a witness by proof of conviction of a crime involving moral turpitude, the competent proof is the record of the witness's conviction or plea of guilty.[78] It is not proper to ask the witness about the conviction.

Under Code §38-1801, a party may not impeach a witness voluntarily called by him unless he has been "entrapped" by a previous contradictory statement of the witness. The word "entrapped" received new consideration in *Wilson v. State*.[79] The court held that it would no longer follow some of the earlier cases that had given a strict interpretation to the entrapment test. The district attorney knew that the witness was "backing up" and

71. Jackson v. State, 235 Ga. 857, 221 S.E.2d 605 (1976).
72. 234 Ga. 473, 216 S.E.2d 279 (1975).
73. 135 Ga. App. 234, 217 S.E.2d 470 (1975).
74. Martin v. Turner, 235 Ga. 35, 218 S.E.2d 789 (1975); Glo-Ann Plastic Industries, Inc. v. Peak Textiles, Inc., 134 Ga. App. 924, 216 S.E.2d 715 (1975).
75. McKoy v. Downs, 135 Ga. App. 912, 219 S.E.2d 625 (1975).
76. 136 Ga. App. 532, 221 S.E.2d 835 (1975).
77. Glo-Ann Plastic Industries, Inc. v. Peak Textiles, Inc., 134 Ga. App. 924, 216 S.E.2d 715 (1975).
78. Rolland v. State, 235 Ga. 808, 221 S.E.2d 582 (1975); Cross v. State, 136 Ga. App. 400, 221 S.E.2d 615 (1975).
79. 235 Ga. 470, 219 S.E.2d 756 (1975).

might not adhere to all of his earlier statements, and the testimony as given by the witness at trial did not prejudice the state but merely failed to bolster its case. The court held that it would no longer require that the testimony of the witness at the trial be a total "surprise" nor that it be affirmatively damaging. It need only be inconsistent with the previous statement. *Wilson* was followed in *McNeese v. State*.[80]

B. *Opinion Evidence and Expert Witnesses*

Where opinion evidence is introduced, the judge need not charge as to the weight of such evidence unless there is a timely written request.[81] In *Willingham v. State*[82] the court considered the issue of voice-identification testimony. Recognizing that this generally is considered to be direct evidence, the court followed the Georgia view that this is opinion evidence. Thus, the witness must disclose the basis for his opinion. However, the witness may testify to voice recognition based on hearing the voice after the event in question.

Any witness may testify about facts observed at the scene of a wreck. *Hixson v. Barrow*[83] seems to hold that for a witness to give his opinion as to speed of a vehicle based on facts observed at the scene of the wreck, such as skidmarks, he must be qualified as an expert. However, the witness in this case had been qualified as an expert. There were two questions concerning speed in *Gibbs v. Gianaris*.[84] First, the court applied the usual rule that the questions about the sufficiency of opportunity to observe the vehicle and the experience of the witness go to the weight of the evidence and not to its admissibility, as long as the witness is willing to state his opinion as to speed. The second question arises where the witness goes beyond the opinion about speed and seeks to classify the speed in a way other than in miles per hour. Here another witness was asked, "Was there any evidence of excessive speed?" and answered, "No, sir." The trial judge excluded this testimony as a conclusion. The court held that it had been properly excluded under the ultimate-issue rule as an invasion of the province of the jury. Regardless of the problems of the ultimate-issue rule, this seems not to be a proper issue for opinion; it calls for an application of law to the facts to reach a conclusion. However, the opposite view of the question was taken in *Evans v. Batchelor*,[85] a 6-3 decision. There the court held that a witness could testify that the speed "wasn't excessive." The testimony related to the speed of a vehicle a short time before the impact. The court said that the jury was to determine speed at the time of impact, so

80. 236 Ga. 26, 222 S.E.2d 318 (1976).
81. Johnson v. State, 136 Ga. App. 629, 222 S.E.2d 146 (1975).
82. 134 Ga. App. 603, 215 S.E.2d 521 (1975).
83. 135 Ga. App. 519, 218 S.E.2d 253 (1975).
84. 137 Ga. App. 18, 223 S.E.2d 4 (1975).
85. 137 Ga. App. 629, 224 S.E.2d 752 (1976).

there was no invasion of the province of the jury. The three dissenting judges did not agree. *Gibbs v. Gianaris* was not cited or considered.

Expert witnesses are examined usually by the use of hypothetical questions. In *National Trailer Convoy, Inc. v. Sutton*[86] the court recognized the established custom at trials to place expert witnesses, especially doctors, on the stand as soon as they are available, even out of turn. The hypothetical question may properly include facts not yet presented in evidence at that time, if they are to be presented later. The trial judge stated to the jurors, in overruling the objection, that they were not to consider the question and answer unless they found that each fact assumed in the hypothetical question to be supported by evidence to the satisfaction of the jury. It also appears from this case that if the facts were not supported by any evidence, at a proper request the judge should instruct the jury to disregard the question and answer.

Altamaha Convalescent Center, Inc. v. Godwin[87] was an interesting case involving attorneys' fees. An expert witness gave his opinion as to the value of attorneys' fees based on a hypothetical question. The court held that a hypothetical question need not be based on testimony alone but could be based on competent evidence of any nature. The hypothetical question consisted of the history of the case at issue, but had not been limited to work for which attorneys' fees would be recoverable, so it was improper. It had included elements outside the "present suit," so it was error to overrule the defendant's objection to the question.

C. Privilege

Under the cases in Georgia, a distinction was drawn between a decoy and an informer. The identity of an informer was privileged, but the state was required to disclose the identity of a decoy. This distinction was drawn clearly in the *Crosby* case.[88] In *Taylor v. State*,[89] an en banc decision, the court of appeals overruled the *Crosby* case and held that there was no absolute requirement to disclose the identity of a decoy. Instead, the trial judge would apply the *Roviaro*[90] test in each case and determine whether disclosure of identity was necessary for the defendant to properly prepare his defense. In *Roviaro* the U.S. Supreme Court had held that the trial judge had acted properly when he refused to order the disclosure of a decoy's identity. It is interesting that a month before the decision in the *Taylor* case the supreme court had cited with approval the *Crosby* case and the other decisions overruled in *Taylor* and held that the state had fulfilled its obligation in disclosing the identity of a decoy, who was not called as a

86. 136 Ga. App. 760, 222 S.E.2d 98 (1975).
87. 137 Ga. App. 394, 224 S.E.2d 76 (1975).
88. 90 Ga. App. 63, 82 S.E.2d 38 (1954).
89. 136 Ga. App. 31, 220 S.E.2d 49 (1975).
90. Roviaro v. United States, 353 U.S. 53 (1957).

witness.[91] The exact status of the decoy rule will have to be determined in the future.

VII. Constitutional Privileges

A. *Self-Incrimination*

Attempts to use against an accused his silence while he is in police custody continue to raise questions. In *Lowe v. State*[92] the court followed *United States v. Hale*[93] and held that the silence of the defendant during police interrogation could not be used to impeach him when he testified at his trial. However, in *Howard v. State*[94] the defendant was identified as the burglar by the prosecutrix, and he did not answer or deny the fact. The judge charged on tacit admissions. The court of appeals held that even though the defendant was in police custody, the identification was not a part of any police interrogation and the charge was proper. The result of this case is questionable.

The Georgia Supreme Court continues to follow the federal trend restricting the privilege against self-incrimination to testimonial evidence. In *English v. State*,[95] giving a nitric-acid test to determine whether the defendant had fired a gun did not violate his privilege, even though he was required to turn his hands for the swabbings. The court said that this was nontestimonial evidence.

Page v. Page[96] is an interesting case raising a question of first impression. The defendant husband was called to testify at a contempt hearing for failure to pay alimony. His attorney stated that "he has a myriad of problems with Internal Revenue" and wanted to advise him on a question-by-question basis while he testified. The court held that it was proper for the trial judge to refuse to permit such a procedure. After he had consulted with his attorney and had been advised of the scope of his privilege against self-incrimination, he had to decide for himself when to invoke it.

B. *Search and Electronic Surveillance*

In *Epps v. State*[97] some marijuana was found in a covered hole in an open field. Through police surveillance of the area, the defendant was caught adding to his supply in the hole. As to the defendant, the hole was not a constitutionally protected area, since he was neither owner nor tenant nor invitee and was not even present when the premises were searched.

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91. Wilson v. Hopper, 234 Ga. 859, 218 S.E.2d 573 (1975).
92. 136 Ga. App. 631, 222 S.E.2d 148 (1975).
93. 422 U.S. 171 (1975).
94. 137 Ga. App. 352, 223 S.E.2d 745 (1976).
95. 234 Ga. 602, 216 S.E.2d 851 (1975).
96. 235 Ga. 131, 218 S.E.2d 859 (1975).
97. 134 Ga. App. 429, 214 S.E.2d 703 (1975).

In *Cook v. State*[98] the court indicated that the rule of the *Rowland* case[99] is still effective. That rule was that officers could not search the trunk of an automobile as an incident to an arrest for a traffic violation. However, in *Cook* there was sufficient probable cause for the search. Some cases presently in litigation cast doubt as to the rule of the *Rowland* case.

In two cases the court applied the rule of the *Young* case[100] and refused to apply the exclusionary rule to evidence secured by private parties. In *State v. Lamb*[101] a dormitory supervisor at a state college, violating a dormitory rule, entered a student's room and found some marijuana plants. He turned the plants over to the campus police, who in turn gave them to law enforcement officers. The court held that the supervisor and the campus police were not "state law enforcement officers" within the exclusionary rule and, even though the seizure was unlawful, the trial judge erred in granting the motion to suppress. *Gasaway v. State*[102] applied the same rule. There a defendant who was involved in various land-purchasing ventures was convicted of 26 counts of theft by taking. The defendant's secretary and bookkeeper had become worried and had removed certain business records from the defendant's office. With those records in her car, she complained to the district attorney's office. She then turned the records over to an investigator for the district attorney. The court held that the "removal" had taken place before there was any governmental intrusion, so it was correct for the trial judge to deny the motion to suppress the records.

The opinion in *Orkin v. State*[103] is over 20 pages long and considers 27 enumerated errors. There are two main features relating to electronic surveillance. The defendant moved to suppress wiretap evidence on the ground that the investigation warrant was invalid. The court reviewed most of the details in regard to surveillance warrants and held that it was correct to issue the warrant in this case and to deny the motion to suppress. At the trial the defendant, claiming a prohibited publication under Code §26-3004(k), objected to the admission of a cassette tape. The interpretation of the Code section was a matter of first impression for the Georgia court, and there is no equivalent to this section in the federal statute.[104] Code §26-3004(k) provides that any publication of the information or evidence obtained under a warrant for surveillance "other than that necessary and essential to the preparation of and actual prosecution for the crime" would make the information and evidence inadmissible. Before the trial, brief portions of the tape had been played to two witnesses for voice identi-

98. 136 Ga. App. 908, 222 S.E.2d 656 (1975).
99. Rowland v. State, 117 Ga. App. 577, 161 S.E.2d 422 (1968).
100. State v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975).
101. 137 Ga. App. 437, 224 S.E.2d 51 (1976).
102. 137 Ga. App. 653, 224 S.E.2d 772 (1976).
103. 236 Ga. 176, 223 S.E.2d 61 (1976).
104. *Compare* 18 U.S.C.A. §2517(3) (Supp. 1976).

fication purposes; the tape had been played at the hearing on the motion to suppress; and some staff members of the district attorney's office, with no one else present, had played portions of the tape in the courtroom to test amplification equipment. The court held that "necessary and essential" did not mean "indispensable" and that the issue would be determined by "a balancing of the opposing interests involved." Under the facts of this case, the publications were "reasonably necessary and essential," so it was proper to admit the tape.

VIII. STATUTES

The 1976 General Assembly enacted a number of statutes that made minor changes in the evidence area. For example, Code §26-3001 was amended to permit the use of electronic surveillance equipment in regard to the activities of incarcerated persons except where the prisoner is discussing his case with his attorney.[105] However, there were only three statutes that seem of sufficient general interest to be considered here.

The Uniform Act to Secure the Attendance of Witnesses From Without the State was adopted.[106] This Act is restricted to criminal proceedings and provides for summoning witnesses in this state to testify in another state, as well as summoning witnesses from another state to testify in Georgia. It also includes provisions relating to prisoners.

Another statute relates to evidence of past sexual behavior of the prosecutrix in a rape case.[107] Past sexual behavior includes the complaining witness' marital history, mode of dress, general reputation for promiscuity, non-chastity or sexual mores contrary to the community standards, but it is not limited to these matters. Before any such evidence can be introduced, the court must conduct an in-camera hearing to examine the defendant's offer of proof. If the judge finds that the offer of proof shows that the past sexual behavior directly involves the accused or that it supports an inference that the accused could have reasonably believed in consent, the judge may permit the introduction of such evidence. His order must state what evidence may be introduced and "in what manner the evidence may be introduced." Like many statutes enacted with fine intentions, this statute may have created more problems than it solved. It may permit a judge to admit evidence that was not previously admissible against the prosecutrix in a rape case. In *Lynn v. State*[108] the rule in Georgia was finally settled: Evidence of specific acts of lewdness with men other than the defendant by the prosecutrix in a rape case would not be allowed, and she could not be cross-examined about such acts. This may not be true under

105. Ga. Laws, 1976, p. 1100; *see* GA. CODE ANN. §26-3001(b) (1972).
106. Ga. Laws, 1976, p. 1366; *see* GA. CODE ANN. ch. 38-20a (1974).
107. Ga. Laws, 1976, p. 741; *see* GA. CODE ANN. §38-202.1 (1974).
108. 231 Ga. 559, 203 S.E.2d 221 (1974).

the new statute, although the courts might continue to follow the *Lynn* case.

Last year the court held that a woman could not testify about the paternity of a child in a charge of abandonment if she was married to one other than the defendant at the time of conception; that would be testimony about her adultery and would be prohibited by Code §38-1606. The supreme court called for amending legislation,[109] and it was enacted in 1976.[110] Now in any criminal case involving the crime of child abandonment, both the mother and the alleged father of the child, either legitimate or illegitimate, may testify, notwithstanding the fact that the testimony may relate to adultery.

109. State v. Daniels, 233 Ga. 614, 21 S.E.2d 794 (1975).

110. Ga. Laws, 1976, p. 1014; *see* GA. CODE ANN. §§38-1606 (1974), 74-9902 (1973).