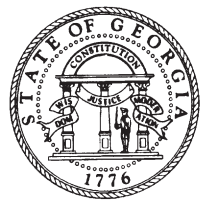
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With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
The Office of Legislative Counsel
and
The Editorial Staff of LexisNexis®



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2023 Edition

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(Chapters 8 through 14)

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and Annotations taken from the Georgia Reports
and the Georgia Appeals Reports

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THE STATE OF GEORGIA

OFFICE OF SECRETARY OF STATE

I, Brad Raffensperger, Secretary of State of the State of Georgia, do hereby certify that

the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as the same appear on file and record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 1st day of July, in the year of our Lord Two Thousand and Twenty-three and of the Independence of the United States of America the Two Hundred and Forty-Seventh.

Brad Raffensperger

Brad Raffensperger, Secretary of State

Preface

This volume, along with the 2023 edition of Volume 20, replaces the 2013 edition of Volume 20 of the Official Code of Georgia Annotated, as supplemented by the 2022 Cumulative Supplement. The 2013 Volume 20 and its 2022 Supplement may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Title 24, Chapters 8 through 14, by the General Assembly through the 2023 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through May 19, 2023. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; John Marshall Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice; American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2021, 2022, and 2023 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2021 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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Editor's notes.

Ga. L. 2011, p. 99, § 1/HB 24, not codified by the General Assembly, provides that: "It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013, to the extent that such interpretation is con-

sistent with the Constitution of Georgia. Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the federal rules of evidence, the General Assembly considered the decisions of the 11th Circuit Court of Appeals. It is the intent of the General Assembly to revise, modernize, and reenact the general laws of this state relating to evidence while adopting, in large measure, the Federal Rules of Evidence. The General Assembly is cognizant that there are many issues regarding evidence that are not covered by the Federal Rules of Evidence and in those situations the former provisions of Title 24 have been retained. Unless displaced by the particular provisions of this Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012, be retained."

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Ga. L. 2011, p. 99, § 2/HB 24, and Ga. L. 2012, p. 651, § 2-1/HB 46, effective January 1, 2013, repealed the Code sections formerly codified at this title and enacted the current title. The former title consisted of §§ 24-1-1 through 24-1-5 (Chapter 1); 24-2-1 through 24-2-4 (Chapter 2); 24-3-1 through 24-3-18 (Article 1 of Chapter 3); 24-3-30 through 24-3-38 (Article 2 of Chapter 3); 24-3-50 through 24-3-53 (Article 3 of Chapter 3); 24-4-1 through 24-4-9 (Article 1 of Chapter 4); 24-4-20 through 24-4-27 (Article 2 of Chapter 4); 24-4-40 through 24-4-48 (Article 3 of Chapter 4); 24-4-60 through 24-4-65 (Article 4 of Chapter 4); 24-5-1 through 24-5-5 (Article 1 of Chapter 5); 24-5-20 through 24-5-33 (Article 2 of Chapter 5); 24-6-1 through 24-6-10 (Chapter 6); 24-7-1 through 24-7-9 (Article 1 of Chapter 7); 24-7-20 though 24-7-27 (Article 2 of Chapter 7); 24-8-1 through 24-8-6 (Article 1 of Chapter 8); 24-8-20 through 24-8-30 (Article 2 of Chapter 8); 24-9-1 through 24-9-7 (Article 1 of Chapter 9); 24-9-20 through 24-9-30 (Part 1, Article 2 of Chapter 9); 24-9-40 through 24-9-47 (Part 2, Article 2 of Chapter 9); 24-9-60 through 24-9-70 (Article 3 of Chapter 9); 24-9-80 through 24-9-85 (Article 4 of Chapter 9); 24-9-100 through 24-9-108 (Article 5 of Chapter 9); 24-10-1 through 24-10-7 (Article 1 of Chapter 10); 24-10-20 through 24-1-29 (Part 1, Article 2 of Chapter 10); 24-10-40 through 24-10-45 (Part 2, Article 2 of Chapter 10); 24-10-60 through 24-10-62 (Article 3 of Chapter 10); 24-10-70 through 24-10-76 (Article 4 of Chapter 10); 24-10-90 through 24-10-97 (Article 5 of Chapter 10); 24-10-110 through 24-10-116 (Article 6 of Chapter 10); 24-10-130 through 24-10-139 (Article 7 of Chapter 10); 24-10-150 through 24-10-154 (Article 8 of Chapter 10) and was based on Laws 1792, Cobb's 1851 Digest, p. 353; Laws 1799, Cobb's 1851 Digest, p. 276; Laws 1799, Cobb's 1851 Digest, p. 277; Laws 1799, Cobb's 1851 Digest, p. 463; Laws 1819, Cobb's 1851 Digest, p. 272; Laws 1829, Cobb's 1851 Digest, p. 278; Laws 1830, Cobb's 1851 Digest, p. 273; Laws 1836, Cobb's 1851 Digest, p. 273; Ga. L. 1841, p. 144, § 1; Laws 1841, Cobb's 1851 Digest, p. 465; Laws 1842, Cobb's 1851 Digest, p. 280; Laws 1850, Cobb's 1851 Digest, p. 280; Ga. L. 1855-56, p. 138, § 2; Ga. L. 1855-56, p. 143, § 1; Ga. L. 1855-56, p. 238, §§ 1 — 8; Ga. L. 1855-56, p. 255, § 1; Ga. L. 1858, p. 53, § 1; Ga. L. 1859, p. 18, § 1; Orig. Code 1863, §§ 3035, 3041 — 3044, 3051, 3437 — 3442, 3444, 3446, 3447, 3670 — 3699, 3701 — 3717, 3719, 3720, 3723 — 3731, 3737 — 3740, 3742 — 3745, 3747, 3749, 3753 — 3755, 3757 — 3766, 3768 — 3776, 3784 — 3800, 3888 — 3891, 3894, 3928, 4094; Code 1863, §§ 3721, 3741, 3744, 3745, 3765, 3767, 3768, 3772; 3884 — 3888, 3890, 3891; Ga. L. 1866, p. 138, §§ 1 — 4; Ga. L. 1866, p. 139, § 1; Ga. L. 1868, p. 24, § 1; Code 1868, §§ 3047, 3053 — 3056, 3063, 3446, 3457 — 3464, 3467, 3694 — 3723, 3725 — 3741, 3743 — 3745, 3747 — 3755, 3761 — 3769, 3771 — 3773, 3777 — 3779, 3781 — 3820, 3887, 3901, 3904 — 3911, 3914, 3916, 3951, 4123; Ga. L. 1873, p. 25, § 1; Ga. L. 1873, p. 35, § 1; Code 1873, §§ 3102, 3108, 3109, 3111, 3118, 3508 — 3515, 3517, 3518, 3747 — 3776, 3778 — 3794, 3796 — 3798, 3800 — 3808, 3814 — 3822, 3824, 3826, 3829 — 3833, 3835 — 3845, 3849 — 3876, 3980 — 3987, 3990, 3992, 4027, 4182, 4637; Ga. L. 1874, p. 22, § 1; Ga. L. 1876, p. 101, §§ 1,

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Former Code Sections to New Code Sections

This table lists each Code section of former Title 24 (as effective prior to January 1, 2013) and comparable provisions in current Title 24 (as effective on January 1, 2013).

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24-9-85	none
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24-10-40	none
24-10-41	none
24-10-42	none
24-10-43	none
24-10-44	none
24-10-45	none
Article 3	
24-10-60	24-13-60
24-10-61	24-13-61
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24-10-70	none
24-10-71	none
24-10-72	none
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24-10-74	none
24-10-75	none
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24-10-90	24-13-90
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24-10-112	none
24-10-113	none
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24-10-116	none
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New Code Sections to Former Code Sections

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24-5-504	24-9-26
24-5-505	24-9-27
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24-13-111	none
24-13-112	none
24-13-113	none
24-13-114	none
24-13-115	none
24-13-116	none
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24-13-132	24-10-132
24-13-133	24-10-133
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Law reviews.

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For annual survey on evidence law, see 64 Mercer L. Rev. 137 (2012).

For article, "Georgia's New Evidence Code: After the Celebration, a Serious Review of Anticipated Subjects of Litigation to be Brought on by the New Legislation," see 64 Mercer L. Rev. 1 (2012).

For article, "The Best Evidence Rule Made Better: A Glimpse into Georgia's New Evidence Code," see 19 Ga. St. B.J. 12 (Aug. 2013).

For article, "Williams v. Illinois: Confronting Experts, Science, and the Constitution," see 64 Mercer L. Rev. 805 (2013).

For annual survey on evidence law, see 64 Mercer L. Rev. 929 (2013).

For article, "Eleventh Circuit Survey: January 1, 2013 — December 31, 2013: Article: Evidence," see 65 Emory L.J. 945 (2014).

For article, "Eleventh Circuit Survey: January 1, 2014 — December 31, 2014: Evidence," see 66 Mercer L. Rev. 965 (2015).

For annual survey of evidence law, see 67 Mercer L. Rev. 907 (2016).

For annual survey on evidence law, see 68 Mercer L. Rev. 121 (2016).

For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

For annual survey on evidence law, see 69 Mercer L. Rev. 1149 (2018).

For annual survey on evidence law, see 70 Mercer L. Rev. 97 (2018).

For article, "Where Do We Go From Here? Transformation and Acceleration of Legal Analytics in Practice," see 35 Ga. St. U.L. Rev. 1245 (2019).

For annual survey on evidence, see 70 Mercer L. Rev. 1023 (2019).

For annual survey on evidence, see 71 Mercer L. Rev. 103 (2019).

For article, "An Overview of Ultimate Issue Evidence," see 25 Ga. St. B.J. 19 (June 2020).

For annual survey of criminal law, see 71 Mercer L. Rev. 967 (2020).

For comment, "The Reasonableness and Unreasonableness of Delays in Obtaining Search Warrants," see 71 Mercer L. Rev. 1149 (2020).

For annual survey on evidence, see 73 Mercer L. Rev. 111 (2021).

For article with Eleventh Circuit survey, see 73 Mercer L. Rev. 1215 (2022).

CHAPTER 8

HEARSAY

Article 1

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24-8-802. Hearsay rule.
24-8-803. Hearsay rule exceptions; availability of declarant immaterial.
24-8-804. Hearsay rule exceptions; declarant unavailable.
24-8-805. Hearsay within hearsay.
24-8-806. Attacking and supporting credibility of a declarant.
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Article 2

Admissions and Confessions

Sec.

24-8-820. Testimony as to child's description of sexual contact or physical abuse.
24-8-821. Admissions in pleadings.
24-8-822. Right to have whole conversation heard.
24-8-823. Admissions and confessions received with care; no conviction on uncorroborated confession.
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24-8-825. Confessions under spiritual exhortation, promise of secrecy, or collateral benefit admissible.
24-8-826. Medical reports in narrative form.

Cross references.

Use of hearsay evidence in child welfare cases, §§ 15-11-145, 15-11-215, 15-11-216, 15-11-230, 15-11-321, 15-11-322.

Law reviews.

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

For annual survey on evidence, see 71 Mercer L. Rev. 1021 (2020).

ARTICLE 1

GENERAL PROVISIONS

Law reviews.

For article, "Evidence," see 53 Mercer L. Rev. 281 (2001).

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-8-801. Definitions.

As used in this chapter, the term:

(a) "Statement" means:

(1) An oral or written assertion; or

(2) Nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) "Declarant" means a person who makes a statement.

(c) "Hearsay" means a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) "Hearsay" shall be subject to the following exclusions and conditions:

(1) **Prior statement by witness.**

(A) An out-of-court statement shall not be hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior inconsistent statement or a prior consistent statement under Code Section 24-6-613 or is otherwise admissible under this chapter.

(B) If a hearsay statement is admitted and the declarant does not testify at the trial or hearing, other out-of-court statements of the declarant shall be admissible for the limited use of impeaching or rehabilitating the credibility of the declarant, and not as substantive evidence, if the other statements qualify as prior inconsistent statements or prior consistent statements under Code Section 24-6-613.

(C) A statement shall not be hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person; and

(2) **Admissions by party-opponent.** Admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is:

(A) The party's own statement, in either an individual or representative capacity;

(B) A statement of which the party has manifested an adoption or belief in its truth;

(C) A statement by a person authorized by the party to make a statement concerning the subject;

(D) A statement by the party's agent or employee, but not including any agent of the state in a criminal proceeding, concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy. A conspiracy need not be charged in order to make a statement admissible under this subparagraph.

The contents of the statement shall be considered but shall not alone be sufficient to establish the declarant's authority under subparagraph (C) of this paragraph, the agency or employment relationship and scope thereof under subparagraph (D) of this paragraph, or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subparagraph (E) of this paragraph.

(e) "Public office" means:

(1) Every state department, agency, board, bureau, commission, division, public corporation, and authority;

(2) Every county, municipal corporation, school district, or other political subdivision of this state;

(3) Every department, agency, board, bureau, commission, authority, or similar body of each such county, municipal corporation, or other political subdivision of this state; and

(4) Every city, county, regional, or other authority established pursuant to the laws of this state.

(f) "Public official" means an elected or appointed official.

(g) "Public record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form and created in the course of the operation of a public office.

History.

Code 1981, § 24-8-801, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Failure to deny averments in pleading as constituting admission, § 9-11-8(d).

Definitions that apply to this article; exclusions from hearsay, Fed. R. Evid. 801.

Law reviews.

For article discussing exceptions to the hearsay rule and advocating elimination of the res gestae exception, see 5 Mercer L. Rev. 257 (1954).

For comment on Brewer v. Henson, 96 Ga. App. 501, 100 S.E.2d 661 (1957), holding that statements made by patient to physician which are not equivalent to spontaneous and voluntary expressions of present pain and suffering are not admissible as evidence, see 21 Ga. B.J. 97 (1958).

For comment on Moore v. Atlanta Transit Sys., 105 Ga. App. 70, 123 S.E.2d 693 (1961), see 14 Mercer L. Rev. 445 (1963).

For comment as to admissibility of evidence of a criminal conviction in a civil action arising out of the same factual situation, in light of Hurtt v. Stirone, 416 Pa. 493, 206 A.2d 624 (1965), see 16 Mercer L. Rev. 464 (1965).

For comment on Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), and Georgia's coconspirator exception to the hearsay rule, see 22 Mercer L. Rev. 791 (1971).

For comment on Argonaut Ins. Co. v. Allen, 123 Ga. App. 741, 182 S.E.2d 508 (1971), upholding admission of psychiatric opinion based on subjective declarations of patient, see 8 Ga. St. B.J. 554 (1972).

For article, "Evidence from Computers," see 8 Ga. L. Rev. 562 (1974).

For comment, "24-3-2: Evidence to Explain Conduct and Ascertain Motive Gets Disciplined," see 36 Mercer L. Rev. 733 (1985).

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For article, "The New 'Necessity Exception' to the Hearsay Rule in Georgia: A New Rule of Inclusion?," see 16 Ga. St. U.L. Rev. 573 (2000).

For note, "Lilly v. Virginia: Answering the Williamson Question — Is the Statement Against Penal Interest Exception 'Firmly Rooted' Under Confrontation Clause Analysis?," see 51 Mercer L. Rev. 1343 (2000).

For article, "Evidence," see 53 Mercer L. Rev. 281 (2001).

For article, "Wills, Trusts & Administration of Estates," see 53 Mercer L. Rev. 499 (2001).

For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

For annual survey on criminal law, see 70 Mercer L. Rev. 63 (2018).

For article, "Parallel Proceedings," see 25 Ga. St. B.J. 20 (Feb. 2020).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, §§ 2206, 3784, 3790, former Code 1882, §§ 2206, 3771, 3774, 3790, former Civil Code 1895, §§ 3034, 5176, 5189, 5195, former Penal Code 1895, §§ 997, 1002, 1003, former Civil Code 1910, §§ 3606, 5762, 5763, 5766, 5776, 5782, former Penal Code 1910, §§ 1023, 1025, 1028, 1029, former Code 1933, §§ 4-315, 38-302, 38-306, 38-401, 38-403, 38-409, and former O.C.G.A. §§ 10-6-64, 24-3-1, 24-3-2, 24-3-5, 24-3-15, 24-3-31, and 24-3-36 are included in the annotations for this Code section.

Evidence not offered to prove truth of matter asserted. — Challenged testimony was not inadmissible hearsay because: (1) neither the identification testimony by the victim, nor a detective regarding the alleged hearsay in obtaining the defendant's name, violated the defendant's rights to confrontation and cross-examination as neither witness actually repeated any alleged hearsay; (2) the evidence did not create a credibility problem that could only be cured by cross-examination, and the state did not offer the evidence to establish the truth of the matter asserted; and (3) the testimony explained why the police included the defendant's photograph in the line-up. Jennings v. State, 285 Ga. App. 774, 648 S.E.2d 105, 2007 Ga. App. LEXIS 646 (2007), cert. denied, No. S07C1576, 2007 Ga. LEXIS 667 (Ga. Sept. 10, 2007) (decided under former O.C.G.A. § 24-3-1).

Homeowner countersued a contractor for fraud. Testimony by a subcontractor that the contractor's project supervisor told the subcontractor to increase the bid because the homeowner was "loaded" was not hearsay, because the testimony was not admitted to show the truth of the matters asserted, and the testimony was a circumstance relevant to the fraud claim. Lumpkin v. Deventer N. Am., Inc., 295 Ga. App. 312, 672 S.E.2d 405, 2008 Ga. App. LEXIS 1338 (2008), cert. denied, No. S09C0643, 2009 Ga. LEXIS 115 (Ga. Mar. 9, 2009) (decided under former O.C.G.A. § 24-3-1).

Locksmith receipt indicating that defendant had a key made for a vehicle was not inadmissible hearsay evidence in the defendant's prosecution for, inter alia, trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1) because the receipt was not offered as proof of what was asserted therein but as evidence that a piece of paper with the defendant's name on it was found in the same residence where cocaine and firearms were located, thereby linking the defendant circumstantially to the residence and the contraband; thus, the receipt was original evidence. Weems v. State, 295 Ga. App. 680, 673 S.E.2d 50, 2009 Ga. App. LEXIS 420 (decided under former O.C.G.A. § 24-3-1).

As an officer's testimony about a dispatcher's statement that two Hispanic males were involved in a firearm discharge was not offered for the truth of the dispatcher's statement, but to explain the officer's subsequent conduct, the testimony was not hearsay. Herieia v. State, 297 Ga. App. 872, 678 S.E.2d 548, 2009 Ga. App. LEXIS 602 (2009) (decided under former O.C.G.A. § 24-3-1).

Probate court did not abuse the court's discretion by admitting double hearsay from a witness who, when asked what the testator told the witness that the propounder had said about the caveator, responded, "that the caveator had taken his money and went to Florida and was not coming back" because the second level of alleged hearsay, what the propounder said to the testator about the caveator, was not hearsay, since it was not introduced for the truth of the matter asserted but rather for the effect it had on the testator; the caveator's theory of the case was that the statement by the propounder to the testator was not true, and the evidence was introduced to show where the testator got the misinformation. McDaniel v. McDaniel, 288 Ga. 711, 707 S.E.2d 60,

2011 Ga. LEXIS 183 (2011) (decided under former O.C.G.A. § 24-3-1).

In a felony murder while in the commission of aggravated battery in connection with the death of a child conviction, the detective's testimony about the communication with the pediatric hospital doctors regarding their beliefs that the child's injuries were not the result of an accident was not improperly admitted into evidence because the testimony was not offered for its truth that the fatal injuries were not the result of accident; because the cause of death was not the ultimate issue for the jury to determine; and because, even assuming that the testimony was hearsay and improperly admitted, the testimony was merely cumulative of other properly admitted evidence, and, thus, it was highly probable that the testimony's admission did not affect the outcome at trial. Dyer v. State, 295 Ga. 173, 758 S.E.2d 301, 2014 Ga. LEXIS 353 (2014) (decided under former O.C.G.A. § 24-3-1(a)).

Because the co-defendant's statement was not offered for the truth of the matter asserted as the statement was not offered to show that the co-defendant intended to shoot the defendant if the defendant did not shoot the victim, and, instead, the testimony was admitted as the testimony was relevant to show the effect of the co-defendant's statement on the defendant and the defendant's possible motive for shooting the victim. Garner v. State, 342 Ga. App. 824, 805 S.E.2d 464, 2017 Ga. App. LEXIS 419 (2017), cert. denied, No. S18C0273, 2018 Ga. LEXIS 265 (Ga. Apr. 16, 2018).

Where the defendant was convicted of child molestation, rape, incest, and aggravated sexual battery concerning the victim, the defendant's daughter, the examining nurse's testimony that the mother told the nurse that the victim had been raped was not hearsay as it was not offered to prove that the victim had been raped, but to explain why the nurse performed a specific type of examination. Sarmiento-Naranjo v. State, 365 Ga. App. 34, 877 S.E.2d 284, 2022 Ga. App. LEXIS 373 (2022).

Trial court did not err in admitting a witness's testimony regarding hearsay that the co-indictee had said to the witness's mother that the co-indictee was going to go to hell because the co-indictee and the defendant had buried a man outside the shed as the trial court accepted the state's proffer that the statement was being offered to explain why the witness called the police and not to prove the truth of the matter asserted. Downer v. State, 314 Ga. 617, 878 S.E.2d 537, 2022 Ga. LEXIS 254 (2022).

Prior consistent statement. — Because the veracity of a witness's trial testimony was placed in issue, the witness's prior testimony was properly admitted as a prior consistent statement. Jackson v. State, 271 Ga. App. 278, 609 S.E.2d 207, 2005 Ga. App. LEXIS 26 (2005) (decided under former O.C.G.A. § 24-3-1).

Victim's statement to a doctor was properly admitted as a prior consistent statement as the victim testified at trial and was cross-examined by the defendant; the defendant had asserted in opening statement and the defendant implied during cross-examination that because the victim's parent would have been upset if the parent believed the victim were having consensual sex, the victim falsely testified that the defendant forced the victim to engage in sex, which testimony was designed to preserve the victim's relationship with the parent, and to continue the victim's receipt of food and shelter from the parent. Smith v. State, 282 Ga. App. 339, 638 S.E.2d 791, 2006 Ga. App. LEXIS 1384 (2006), overruled, Middleton v. State, 309 Ga. 337, 846 S.E.2d 73, 2020 Ga. LEXIS 476 (2020) (decided under former O.C.G.A. § 24-3-1).

When a victim testified that the victim could not remember all of the details of a robbery, which occurred six years before the trial, it was not error to introduce the victim's prior consistent statement. The victim was a forgetful witness who testified at trial and who was cross-examined by the defendant. Williams v. State, 291 Ga. App. 279, 661 S.E.2d 658, 2008 Ga. App. LEXIS 471 (2008), cert. denied, No. S08C1497, 2008 Ga. LEXIS 707 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-3-1).

After the victim's mother testified that the defendant admitted to the mother that

General Consideration (Cont'd)

the defendant molested the victim, the trial court did not err in allowing an investigator to testify that the mother had told the investigator the same thing because the mother testified at trial and was cross-examined, and the defendant placed the mother's veracity in issue during cross-examination by attempting to show that the mother had an improper motive for testifying against the defendant, a motive that developed after the mother made the prior consistent statement to the investigator. Davis v. State, 303 Ga. App. 799, 694 S.E.2d 381, 2010 Ga. App. LEXIS 403 (2010) (decided under former O.C.G.A. § 24-3-1).

Admission of an investigator's summary of a victim's prior consistent statement was not reversible error because the record contained other unchallenged testimony by witnesses other than the victim conveying the content of the victim's prior statement and that the victim's prior statement was consistent with the victim's trial testimony; it was not likely that the subsequent admission of the victim's statement itself contributed to the guilty verdict, and by the time the statement was read, any bolstering effect of the repetitive nature of the prior statement had occurred without objection. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77, 2010 Ga. App. LEXIS 650 (2010), cert. denied, No. S10C1898, 2011 Ga. LEXIS 84 (Ga. Jan. 13, 2011) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err by admitting prior consistent statements of the victim and the defendant's son in videotaped interviews that also included comments by the interviewer because nothing in the record demonstrated that the portion of the videotape that the trial court ruled would not be presented for the jury was played for the jury, and the defendant's counsel made no objection after the videotape was played. Wade v. State, 305 Ga. App. 382, 700 S.E.2d 827, 2010 Ga. App. LEXIS 663 (2010), cert. denied, No. S10C1993, 2011 Ga. LEXIS 61 (Ga. Jan. 24, 2011), cert. denied, 564 U.S. 1041, 131 S. Ct. 3066, 180 L. Ed. 2d 893, 2011 U.S. LEXIS 4911 (2011) (decided under former O.C.G.A. § 24-3-1).

Witness's recorded statement to a detective was admissible as a prior consistent statement because the witness, who was an inmate in the jail, was present at trial and was cross-examined, during which defense counsel endeavored to show that the witness had a motive to fabricate — as the witness was facing serious criminal charges — that arose subsequent to the time the witness made a statement to the detective. Franklin v. State, 298 Ga. 636, 784 S.E.2d 359, 2016 Ga. LEXIS 237 (2016).

Trial court did not err in admitting a witness's prior consistent statements because the defendant attacked the witness's veracity by suggesting there were inconsistencies between the witness's trial testimony and the witness's written statement, and that the witness fabricated the witness's testimony after giving the written statement; furthermore, because the thrust of the defendant's cross-examination was a charge that the witness fabricated a different version of events after giving the witness's written statement, the trial court did not err in admitting the witness's videotaped interview with the police. Dorsey v. State, 303 Ga. 597, 814 S.E.2d 378, 2018 Ga. LEXIS 293 (2018).

Even if the statements of the defendant's family members regarding the victim's abuse of the defendant could have served to rebut a detective's testimony that the defendant's pretrial account of the victim's behavior prior to the shooting was not consistent with the physical evidence and that the detective was unable to gain access to photos showing that the victim, the defendant's husband, had abused the defendant on a prior occasion, those statements were not admissible as prior consistent statements because the family members did not testify at trial; thus, the trial court did not plainly err in not admitting those statements. Smith v. State, 309 Ga. 240, 845 S.E.2d 598, 2020 Ga. LEXIS 463 (2020).

Prior statement by testifying witness. — Since the informant testified at the defendant's trial for sale of methamphetamine and was subject to cross-examination about a prior consistent statement, evidence concerning that statement was not hearsay. Hagan v. State, 353 Ga.

App. 534, 839 S.E.2d 1, 2020 Ga. App. LEXIS 40 (2020).

When testimony considered hearsay. — Testimony is considered hearsay only if the witness is testifying to another party's statement in order to prove or demonstrate the truth of that statement. Otherwise it is a verbal act and thus original evidence rather than hearsay. Hurston v. State, 194 Ga. App. 226, 390 S.E.2d 119, 1990 Ga. App. LEXIS 6 (1990) (decided under former O.C.G.A. § 24-3-1).

Evidence of violent acts committed by the victim against either the defendant or against third parties may be introduced by a criminal defendant claiming justification, and that is so because the key showing must be that the victim was the aggressor in the fatal encounter. State v. Hodges, 291 Ga. 413, 728 S.E.2d 582, 2012 Ga. LEXIS 569 (2012) (decided under former O.C.G.A. § 24-3-2).

Statements made by the declarants themselves are not hearsay. C & R Fin. Lenders, LLC v. State Bank & Trust Co., 320 Ga. App. 660, 740 S.E.2d 371, 2013 Ga. App. LEXIS 251.

Latent fingerprint card not hearsay. — Trial court did not err in overruling defendant's hearsay objection to the entry into evidence of a latent fingerprint card, which was identified by an officer other than the one who took the impression, because the card at issue simply showed an image of part of a window with fingerprints thereon, and it did not contain any representations or conclusions of a third party; thus, neither the testimony of the officer, nor the latent fingerprint card, was hearsay. Bates v. State, 322 Ga. App. 319, 744 S.E.2d 841, 2013 Ga. App. LEXIS 505 (2013), overruled in part, Willis v. State, 304 Ga. 686, 820 S.E.2d 640, 2018 Ga. LEXIS 685 (2018).

Testimony as to another feelings not a "statement" and not hearsay. — In the defendant's trial for armed bank robbery, defendant's counsel was not ineffective for failing to object to a bank customer's testimony that the customer felt not free to leave the bank and the customer's spouse "felt the same way," because the testimony was not hearsay under O.C.G.A. § 24-8-801(c) in that the customer did not testify to any statement allegedly made by the spouse. Odle v. State, 331 Ga. App. 146, 770 S.E.2d 256, 2015 Ga. App. LEXIS 114 (2015).

Insurance letters stating date of loss. — Plaintiff failed to show that insurance letters stating the date of loss were anything other than unauthenticated documents containing inadmissible hearsay, which could not be considered on summary judgment. DirecTV, LLC v. White, 355 Ga. App. 404, 844 S.E.2d 289, 2020 Ga. App. LEXIS 323 (2020), cert. denied, No. S20C1567, 2021 Ga. LEXIS 111 (Ga. Mar. 1, 2021).

Admission of text messages not error. — Defendant failed to show prejudice due to trial counsel's failure to ask the trial court to instruct the jury that one victim's text messages were not evidence and that it was for the jury to determine who authored each of the text messages because the text messages were not admitted to establish the truth of the incoming messages, but rather to show that the author of the outgoing messages did not deny the allegations of misconduct in the incoming messages. McClure v. State, 361 Ga. App. 399, 864 S.E.2d 601, 2021 Ga. App. LEXIS 495 (2021).

Prior inconsistent statement of witness admissible. — Even if a witness's out-of-court statement to a detective was hearsay under former O.C.G.A. § 24-3-1(a), it was admissible as a prior inconsistent statement under former O.C.G.A. § 24-9-83 because the witness testified the witness did not remember meeting with the detective and the witness did not tell the detective that the witness's previous statement was incomplete. Welch v. State, 298 Ga. 320, 781 S.E.2d 768, 2016 Ga. LEXIS 67 (2016).

Upon review of a witness's testimony and prior statement, trial counsel was not ineffective in failing to object to the detective's testimony about the witness's statement as hearsay because the trial court likely would have exercised the court's discretion to admit the evidence as a prior inconsistent statement as the defendant admitted that the witness's statement to the detective was a little bit contradictory to what the witness testified to. Faust v. State, 302 Ga. 211, 805 S.E.2d 826, 2017 Ga. LEXIS 827 (2017).

General Consideration (Cont'd)

Given a witness's inconsistent testimony at trial and the witness's convenient memory lapses about the portions of the witness's conversation with the police that implicated the defendant, the witness's earlier statements were not hearsay but rather were properly admitted as prior inconsistent statements as the witness was given an opportunity to explain or deny the witness's prior inconsistent statements to the police, and the defendant had the opportunity to cross-examine the witness about those statements. Thompson v. State, 304 Ga. 146, 816 S.E.2d 646, 2018 Ga. LEXIS 459 (2018).

Trial court did not err in admitting the defendant's mother's prior statement to police concerning the defendant's involvement in another robbery because the state sought to introduce the mother's recorded statement in which the mother volunteered certain incriminating information about the defendant's role in the other robbery in direct response to the mother's testimony at trial, in which the mother alleged the statements were not true and the mother had been coerced into making the statements by police. Leslie v. State, 355 Ga. App. 244, 842 S.E.2d 550, 2020 Ga. App. LEXIS 262 (2020), cert. denied, No. S20C1345, 2021 Ga. LEXIS 38 (Ga. Jan. 11, 2021).

Testimony as to identification. — Trial court's exclusion of testimony from one of the investigating officers that one person had failed to identify the defendant from a photographic line-up was proper because it was clear that the individual in question was not going to be called to testify; thus, the trial court properly sustained the state's hearsay objection to the detective's testimony. Dailey v. State, 297 Ga. 442, 774 S.E.2d 672, 2015 Ga. LEXIS 498 (2015).

Counsel ineffective for failing to object to testimony. — Evidence was sufficient to convict the defendant of theft by shoplifting as the officers testified that the defendant matched the description of one of the females shoplifting in the store; and the manager identified the clothing found in the defendant's vehicle as the clothing that was stolen; however, trial counsel was ineffective for failing to object to hearsay evidence because there was no reason why a reasonable attorney would have decided not to object to the hearsay testimony that provided the only evidentiary basis for a conviction of theft by shoplifting; and the defendant was prejudiced as the hearsay testimony was the only evidence offered to prove the elements of the theft by shoplifting offense. Harris v. State, 359 Ga. App. 356, 857 S.E.2d 815, 2021 Ga. App. LEXIS 198 (2021).

Counsel not ineffective for failing to object to testimony. — Trial counsel was not ineffective for failing to object to the detective's testimony regarding the mother's statements that the mother knew that the defendant killed the child because the testimony was cumulative of properly admitted evidence already presented to the jury regarding the mother accusing the defendant of killing the child as both the paramedic and the social worker had already testified to the mother accusing the defendant of killing the child when the mother found out the child was deceased, and the defendant's subsequent reaction to the mother's accusation. Sawyer v. State, 308 Ga. 375, 839 S.E.2d 582, 2020 Ga. LEXIS 130 (2020).

Failure to preserve issue for appeal. — Defendant's claim that the trial court erred in permitting into evidence three instances of inaccurate and prejudicial hearsay testimony that the defendant was involved in two murders were not properly reviewed on appeal because the defendant did not make any contemporaneous objection to the cited testimony on the basis of hearsay or otherwise. Bailey v. State, 291 Ga. 144, 728 S.E.2d 214, 2012 Ga. LEXIS 494 (2012) (decided under former O.C.G.A. § 24-3-5).

Appellant never argued at trial that the statements at issue were admissible to impeach the witness's hearsay statements to the witness's friend (which would have allowed the jury to consider them only to impeach the witness as a hearsay declarant), nor did the appellant argue that the witness's plea bargain was admissible to impeach the witness's statements to the friend. Accordingly, the appellant forfeited review of this claim. Cross v. State, 309 Ga. 705, 848 S.E.2d 455, 2020 Ga. LEXIS

614 (2020) (decided under former O.C.G.A. § 24-3-5).

Admissibility

1. In General

Trial court must be vested with considerable discretion in determining admissibility of testimony of collateral matters. Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 164 S.E.2d 318, 1968 Ga. App. LEXIS 1436 (1968) (decided under former Code 1933, § 38-302).

Hearsay when admissible derives its competency from necessity of case. Todd v. State, 200 Ga. 582, 37 S.E.2d 779, 1946 Ga. LEXIS 301 (1946) (decided under former Code 1933, § 38-302); Price v. Whitley Constr. Co., 91 Ga. App. 257, 85 S.E.2d 528, 1954 Ga. App. LEXIS 907 (1954) (decided under former Code 1933, § 38-302).

When evidence not admissible. — While hearsay evidence is admissible under some circumstances to show motive, it is not admissible to evidence the truth of the matters contained in the hearsay testimony. Rogers v. State, 224 Ga. 436, 162 S.E.2d 411, 1968 Ga. LEXIS 812 (1968) (decided under former Code 1933, § 38-302).

Relevancy. — When, in a legal investigation, conduct and motives of an actor are matters concerning which the truth must be found (i.e., are relevant to issues on trial), then information, conversations, letters, and replies, and similar evidence known to the actor are admissible to explain the actor's conduct; but if conduct and motives of actor are not matters concerning which the truth must be found (i.e., are irrelevant to the issues of trial) then the information, etc., on which the actor acted shall not be admissible under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801). Momon v. State, 249 Ga. 865, 294 S.E.2d 482, 1982 Ga. LEXIS 929 (1982) (decided under former O.C.G.A. § 24-3-2); Teague v. State, 252 Ga. 534, 314 S.E.2d 910, 1984 Ga. LEXIS 756 (1984) (decided under former O.C.G.A. § 24-3-2); Bryant v. Carver State Bank, 207 Ga. App. 659, 428 S.E.2d 621, 1993 Ga. App. LEXIS 307 (1993), cert. denied, No. S93C0963, 1993 Ga. LEXIS 391 (Ga. May 6, 1993) (decided under former O.C.G.A. § 24-3-2); Jackson v. Dunkin' Donuts, Inc., 211 Ga. App. 596, 440 S.E.2d 56 (1994) (decided under former O.C.G.A. § 24-3-2).

Admissibility of evidence under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) is not a determination based only on the evidence's relevancy to explain conduct: the conduct to be explained must itself be a relevant issue in the case. Noles v. State, 172 Ga. App. 228, 322 S.E.2d 910, 1984 Ga. App. LEXIS 2466 (1984) (decided under former O.C.G.A. § 24-3-2).

When testimony regarding whether any of the plaintiff's healthcare providers had instructed plaintiff not to work after plaintiff's injuries was offered to explain why plaintiff did not return to work, it was relevant to whether plaintiff's lost income was attributable to plaintiff's injuries, and therefore admissible as original evidence, not hearsay. Harrison v. Jenkins, 235 Ga. App. 665, 510 S.E.2d 345 (decided under former O.C.G.A. § 24-3-2).

Trial court did not abuse the court's discretion in excluding a letter offered as evidence by the defendant as the appeals court could not see how the defendant's reliance on the letter could have justified or explained the defendant's evasiveness towards an officer lawfully investigating a loud noise complaint at the defendant's residence. Williams v. State, 289 Ga. App. 402, 657 S.E.2d 556, 2008 Ga. App. LEXIS 96 (2008) (decided under former O.C.G.A. § 24-3-2).

Prior inconsistent statement of detective. — In a claim that the employer procured the employee's false imprisonment when the employee was arrested by a detective, although the employee offered the employee's report of the detective's question to a loss prevention officer for the employer about what to do with the employee after the employee arrived at the police station to show the truth of the matter asserted — that was, that the employer had some substantial control over the police investigation — the detective's question as reported by the employee was admissible at trial as an inconsistent statement made prior to the detective's later testimony that the detective never asked the question at all. Smith

In General (Cont'd)

v. Wal-Mart Stores East, LP, 330 Ga. App. 340, 765 S.E.2d 518, 2014 Ga. App. LEXIS 812 (2014).

Testimony from narcotics investigator. — Defendant's counsel was not ineffective for failing to object to hearsay evidence because the testimony of the narcotics investigator concerning the statements the defendant made to the narcotics investigator about the information on a phone would be admissible as an admission by a party opponent; and the evidence was merely cumulative of properly admitted evidence. Hill v. State, 351 Ga. App. 58, 830 S.E.2d 478, 2019 Ga. App. LEXIS 391 (2019).

Explanation of officer's motive. — Defendant was not entitled to present testimony under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) of an investigating officer, which indicated that an acquaintance of the victim said that the acquaintance was not present at the scene of the crime but that a third person told the acquaintance what happened, to explain the officer's conduct and motives with regard to the officer's lack of further investigation into potentially exculpatory evidence as the motives of the officer were not relevant to any issue in the defendant's prosecution for felony murder based on arson in the first degree. Vega v. State, 285 Ga. 32, 673 S.E.2d 223, 2009 Ga. LEXIS 52 (2009) (decided under former O.C.G.A. § 24-3-2).

What would otherwise be hearsay testimony was properly elicited by the state to explain a narcotics investigator's conduct and to ascertain the investigator's motives because the defendant was challenging the motives of the narcotics investigator and arguing that the investigator was not acting in good faith as part of defendant's entrapment defense. Martinez v. State, 303 Ga. App. 166, 692 S.E.2d 766, 2010 Ga. App. LEXIS 316 (2010) (decided under former O.C.G.A. § 24-3-2).

Testimony admissible to explain conduct. See Athena Prods., Ltd. v. Geographics, Inc., 168 Ga. App. 828, 310 S.E.2d 547, 1983 Ga. App. LEXIS 2933 (1983) (decided under former O.C.G.A. § 24-3-2); Thomas v. State, 169 Ga. App. 119, 312 S.E.2d 373, 1983 Ga. App. LEXIS 2999 (1983) (decided under former O.C.G.A. § 24-3-2).

In a sexual molestation case, testimony that the victim's grandmother had learned in the past that the victim's aunt had been sexually molested was not hearsay since the testimony was not used to establish the truth of the matter asserted, that the aunt had been sexually molested, but was offered to show that the grandmother had a history of tolerating the sexual abuse of young children. Walker v. State, 308 Ga. App. 176, 707 S.E.2d 122, 2011 Ga. App. LEXIS 148 (2011) (decided under former O.C.G.A. § 24-3-2).

Because an individual's statement to the state's key witness that the defendant had been looking for the witness on the night of the shooting coupled with the neighbor's statement that the neighbor had seen the defendant running away after the shooting led the witness to decide that the witness should leave immediately as the witness was likely the defendant's target, and because the trial court instructed the jury that the statement was being allowed in not because of the fact the statement might be true, but to explain the witness's conduct of leaving the scene, the trial court did not abuse the court's discretion in admitting the neighbor's statement to explain the witness's reason for leaving. Gomillion v. State, 298 Ga. 505, 783 S.E.2d 103, 2016 Ga. LEXIS 166, cert. denied, 580 U.S. 921, 137 S. Ct. 302, 196 L. Ed. 2d 223, 2016 U.S. LEXIS 6184 (2016) (decided under former O.C.G.A. § 24-3-2).

Testimony admitted for limited purpose of explaining witness's conduct. — See Davis v. State, 168 Ga. App. 272, 308 S.E.2d 602, 1983 Ga. App. LEXIS 3389 (1983) (decided under former O.C.G.A. § 24-3-2); Hampton v. State, 272 Ga. 284, 527 S.E.2d 872, 2000 Ga. LEXIS 286 (2000) (decided under former O.C.G.A. § 24-3-2).

Family statements were prior consistent statement. — Defendant's trial counsel was not ineffective as counsel did not perform deficiently by failing to object on the grounds of hearsay and improper bolstering when two witnesses testified that the co-defendant told them within

days of the shooting that the defendant shot the victim because the co-defendant's statements to the co-defendant's sister and to the mother of the co-defendant's two children were prior consistent statements, not hearsay, and were admissible to rehabilitate, rather than improperly bolster, the co-defendant's credibility. Brown v. State, 302 Ga. 454, 807 S.E.2d 369, 2017 Ga. LEXIS 935 (2017).

Trial counsel was not ineffective for failing to object to hearsay testimony because a witness's testimony that the mother told the witness about the fight with the defendant before the child's death rebutted the attack made by trial counsel on the mother's credibility, and the statements were therefore prior consistent statements, not hearsay. Sawyer v. State, 308 Ga. 375, 839 S.E.2d 582, 2020 Ga. LEXIS 130 (2020).

2. Evidence Not Hearsay.

Admission of mother's comments about paying victim. — Because statements by the defendant's brother about their mother's offer to pay the victim to tell the police that the brothers were not involved in the assault was nonhearsay, the trial court did not err in admitting the testimony over the defendant's objection. Brown v. State, 332 Ga. App. 635, 774 S.E.2d 708, 2015 Ga. App. LEXIS 374 (2015).

Evidence not offered to prove truth of matter asserted. — In a vehicle collision that resulted in the death of the plaintiffs' four-year-old child, the trial court did not abuse the court's discretion in admitting evidence of the National Highway Traffic Safety Administration Office of Defect Investigation's recall request letter because, inter alia, the recall request letter was offered, at least in part, not for the substance of the finding of defect, but to support an inference that a meeting between the defendant's chief executive officer with the head of the National Highway Traffic Safety Administration and the Secretary of the U. S. Department of Transportation led the Office of Defect Investigation (ODI) to change the opinion regarding the defect to that expressed in the ODI resume. Chrysler Group, LLC v. Walden, 339 Ga. App. 733, 792 S.E.2d 754, 2016 Ga. App. LEXIS 646 (2016), aff'd, 303 Ga. 358, 812 S.E.2d 244, 2018 Ga. LEXIS 154 (2018).

Fact that a statement may be properly admitted under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) does not overcome other objections such as impermissibly placing character in evidence. Echols v. State, 174 Ga. App. 829, 331 S.E.2d 619, 1985 Ga. App. LEXIS 2756 (1985) (decided under former O.C.G.A. § 24-3-2).

Admission of cumulative hearsay testimony is not harmful error. — Although certain portions of a police officer's testimony were erroneously admitted as being within the purview of former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801), when the hearsay testimony is merely cumulative, the admission of the testimony does not constitute harmful error requiring the reversal of the defendant's convictions. Simmons v. State, 174 Ga. App. 906, 331 S.E.2d 923, 1985 Ga. App. LEXIS 1995 (1985) (decided under former O.C.G.A. § 24-3-2).

Trial court did not abuse its discretion in allowing a witness to testify about the victim's statement regarding threats the victim received a few days before the shooting as the requirements of the necessity exception to the hearsay rule were met; the victim was deceased and unavailable to testify, the witness testified that the victim and the witness were friends, and the defendant identified no alternative source of the information revealed in the statement. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661, 2012 Ga. LEXIS 625 (2012) (decided under former O.C.G.A. § 24-3-1).

Admission of statement made after crime not hearsay. — Trial court did not abuse the court's discretion by admitting statements that the victim allegedly made to the victim's niece, who discovered the victim on the morning after the beating, as exceptions to the rule against hearsay as present sense impressions, excited utterances, and to impeach the niece's trial testimony as, under the totality of the circumstances, the victim was still suffering under the stress of the all-night beating such that the victim's statements were admissible. Robbins v. State, 300 Ga. 387,

Evidence Not Hearsay. (Cont'd)

793 S.E.2d 62, 2016 Ga. LEXIS 790 (2016).

Prior inconsistent statement by testifying detective. — Both the defendant's trial and appellate counsel rendered ineffective assistance in failing to call a detective to testify that, contrary to the testimony another detective gave at trial, the testifying detective stated that the defendant had mentioned the defendant's alibi in the defendant's first post-arrest interview; a habeas court erred in denying the defendant's petition. Cartwright v. Caldwell, 305 Ga. 371, 825 S.E.2d 168, 2019 Ga. LEXIS 128 (2019).

Physical evidence not hearsay. — Trial court did not abuse the court's discretion by admitting evidence that a rifle and shell casings were stolen from a police officer's apartment, which the state alleged were used in the victim's murder, because the admission of the physical evidence was not hearsay and because the evidence was relevant and probative, as the weapon and ammunition were stolen four months before the murder, they were the same caliber used in the murder, the exact number of branded cartridges stolen were found at the murder scene, and the defendant's known associate lived next door to where the burglary occurred. Jordan v. State, 313 Ga. 841, 874 S.E.2d 67, 2022 Ga. LEXIS 161 (2022).

3. Original Evidence

Proof of statements that are merely part of surrounding circumstances of an occurrence, not offered to prove the fact asserted in the statement, is original evidence, not an exception to hearsay. Atlanta Gas Light Co. v. Slaton, 117 Ga. App. 317, 160 S.E.2d 414, 1968 Ga. App. LEXIS 1076 (1968) (decided under former Code 1933, § 38-302).

Because the circumstances of the defendant's arrest would have been virtually inexplicable without the investigating officer's testimony regarding the arrest, and the officer's testimony concerned narcotics activity in the area and not the defendant's role in the activity, admission of the testimony was not erroneous, and if any error resulted by the trial court's admission, it was highly improbable that the error contributed to the verdict. Fortson v. State, 283 Ga. App. 120, 640 S.E.2d 693, 2006 Ga. App. LEXIS 1571 (2006), overruled in part, Langley v. State, 313 Ga. 141, 868 S.E.2d 759, 2022 Ga. LEXIS 14 (2022) (decided under former O.C.G.A. § 24-3-2).

When evidence is part of res gestae and admissible as original evidence to fix the locus or explain the conduct of parties in reference to an occurrence under investigation it should not be excluded under the hearsay rule. Ellis v. Southern Ry., 96 Ga. App. 687, 101 S.E.2d 230, 1957 Ga. App. LEXIS 970 (1957) (decided under former Code 1933, § 38-302).

Evidence of a victim's statement to the police, although not properly admitted as a prior inconsistent statement due to the failure to lay a proper foundation under former O.C.G.A. § 24-9-83 (see now O.C.G.A. § 24-6-613), was properly admitted as part of the res gestae under former O.C.G.A. § 24-3-3 (see now O.C.G.A. § 24-8-803) because the victim's description of a distinctive jacket worn by one of the individuals who took a pickup truck was used by the police to search the defendant's residence; because the statement was used to explain the police's conduct, it could also be admitted as original evidence under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801). Stubbs v. State, 293 Ga. App. 692, 667 S.E.2d 905, 2008 Ga. App. LEXIS 1045 (2008) (decided under former O.C.G.A. § 24-3-2).

Fact within witness's personal knowledge. — Questions to a witness as to whether witness had been indicted by a grand jury for the shooting for which defendant was being tried and whether the grand jury had declined to indict witness did not elicit hearsay because the questions asked for facts that were within the witness's personal knowledge. Bell v. State, 294 Ga. 443, 754 S.E.2d 327, 2014 Ga. LEXIS 100 (2014).

Testimony as to identification. — Testimony by police officer that another officer in the officer's unit knew defendant by a nickname was not hearsay but was original evidence explaining the circumstances that led to an undercover operation involving defendant. Kendrick v.

State, 224 Ga. App. 72, 479 S.E.2d 464 (decided under former O.C.G.A. § 24-3-2).

Even if one officer's testimony that a witness identified the defendant as the person who had burglarized the shop where the witness worked six days earlier was hearsay under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801), it was admissible, as the witness testified and was cross-examined about the identification of the defendant as the shop's burglar. Williams v. State, 327 Ga. App. 283, 758 S.E.2d 620, 2014 Ga. App. LEXIS 319 (2014) (decided under former O.C.G.A. § 24-3-2).

Method of proving general reputation, reputed ownership, public rumor, general notoriety, and the like is by testimony of known facts which becomes original evidence and is not hearsay. Caldwell v. Gregory, 120 Ga. App. 536, 171 S.E.2d 571, 1969 Ga. App. LEXIS 852 (1969) (decided under former Code 1933, § 38-302).

For purpose of identifying location of time or as explanatory of conduct, hearsay is admissible. Ellis v. Southern Ry., 96 Ga. App. 687, 101 S.E.2d 230, 1957 Ga. App. LEXIS 970 (1957) (decided under former Code 1933, § 38-302).

Conduct of investigating officers. — In a trial for keeping a place of prostitution, in violation of O.C.G.A. § 16-6-10, a search warrant affidavit, which contained hearsay statements from a neighborhood group purportedly linking defendant's residence to prostitution, was not admissible as original evidence to explain to the jury why the officers were investigating defendant's residence. Smoot v. State, 316 Ga. App. 102, 729 S.E.2d 416, 2012 Ga. App. LEXIS 494 (2012), overruled on other grounds, Hill v. State, 360 Ga. App. 143, 860 S.E.2d 893, 2021 Ga. App. LEXIS 318 (2021) (decided under former O.C.G.A. § 24-3-2).

Text message offered to show defendant's motive. — Text message that a victim sent the defendant's girlfriend, along with naked pictures of the victim, that, "yu eva lonely yu can call me;)))))," was not hearsay because the text message was not offered to prove that the defendant's girlfriend could in fact call if she were lonely, but to show the message's effect on the defendant and the defendant's motive for committing the murder. Gates v. State, 298 Ga. 324, 781 S.E.2d 772, 2016 Ga. LEXIS 68 (2016).

Hearsay issue critical in medical malpractice case. — In a medical malpractice case, the trial court committed reversible error by finding that the patient waived a hearsay objection as to a defense pathologist's deposition testimony because the patient had the right to object to the testimony at trial and the testimony was inadmissible hearsay entitling the patient to a new trial since it was not harmless error in that it was critical in the case because the evidence directly addressed the core disputed issue of whether the clinic's neurosurgeon left an excessive amount of cotton in the patient's brain. Thomas v. Emory Clinic, Inc., 321 Ga. App. 457, 739 S.E.2d 138, 2013 Ga. App. LEXIS 282 (2013), cert. denied, No. S13C1268, 2013 Ga. LEXIS 739 (Ga. Sept. 23, 2013).

4. Self-Serving Declarations

Taint of self-serving declarations not removed by former statute. — Former statute provided for the admissibility of certain types of hearsay evidence, in certain situations, and did not remove the taint of self-serving declarations. Smith v. State, 144 Ga. App. 294, 241 S.E.2d 14, 1977 Ga. App. LEXIS 2679 (1977) (decided under former Code 1933, § 38-302).

Self-serving declarations are admissible if part of conversation. — Hearsay rule as to self-serving declarations does not apply when: (1) made in the presence of the opposite party; or (2) the declaration are part of a conversation of which some other part has already been permitted in evidence. Rozier v. State, 124 Ga. App. 481, 184 S.E.2d 203, 1971 Ga. App. LEXIS 977 (1971) (decided under former Code 1933, § 38-302).

Inadmissible self-serving declarations. — Self-serving declarations, when made by the accused either before or after the time of the commission of the alleged offense, are not admissible. Phipps v. State, 203 Ga. App. 128, 416 S.E.2d 319, 1992 Ga. App. LEXIS 387 (1992), cert. denied, No. S92C0740, 1992 Ga. LEXIS

Self-Serving Declarations (Cont'd)

291 (Ga. Apr. 9, 1992) (decided under former O.C.G.A. § 24-3-2).

Unsupported assertions of defendant utilizing justification defense. — Court of appeals erred in reversing the trial court's order refusing to allow the defendant to testify about a previous incident of violence the victim allegedly committed against third parties in support of a justification defense under O.C.G.A. § 16-3-21(a) because the defendant sought to introduce alleged evidence in the form of unsupported assertions by the defendant as to what was in the defendant's mind at the time the defendant killed the victim. State v. Hodges, 291 Ga. 413, 728 S.E.2d 582, 2012 Ga. LEXIS 569 (2012) (decided under former O.C.G.A. § 24-3-2).

5. Evidentiary Value

Evidentiary value of testimony admitted depends not on the credibility of the out-of-court declarant, but on the credibility of the witness on the stand who is reporting the statement for the purpose of explaining the witness's conduct and who is under oath, subject to full cross-examination, and present for the jury to observe the witness's demeanor while testifying in regard to the statement. Harrell v. State, 241 Ga. 181, 243 S.E.2d 890, 1978 Ga. LEXIS 915 (1978) (decided under former Code 1933, § 38-302).

Investigator's testimony not original evidence of alibi. — Investigator's testimony that defendant gave a purported alibi was not original evidence as to the fact of alibi and insofar as the testimony established the fact of alibi, the evidence did not derive any value from the witness, but derived value solely on the veracity and competency of the defendant who never testified. Therefore, although such evidence was not hearsay, it nevertheless did not qualify as even "slight" evidence of an affirmative defense so as to require a charge on alibi. Hartley v. State, 207 Ga. App. 683, 428 S.E.2d 683, 1993 Ga. App. LEXIS 289 (1993) (decided under former O.C.G.A. § 24-3-2).

Investigator's testimony did not bolster. — Trial court did not err in admitting testimony by the investigator because even though the state relied heavily on the co-defendant's testimony, the investigator's testimony did not give critical weight to that testimony and there was other evidence linking the defendant to the two burglaries. Silvey v. State, 335 Ga. App. 383, 780 S.E.2d 708, 2015 Ga. App. LEXIS 774 (2015).

Unredacted recording of a telephone conversation. — Trial court committed harmful error when the court prevented the defendant from playing to the jury an unredacted recording of a phone conversation between a witness and a friend because the witness was essentially acting as an informant, or at least an agent of police investigators, at the time of the phone conversation, and thus, the witness's recorded statements were admissible as original evidence pursuant to former O.C.G.A. § 24-3-2; the exclusion of the evidence was not harmless because there was no physical evidence tying the defendant to the crime or the murder weapon. Redinburg v. State, 315 Ga. App. 413, 727 S.E.2d 201, 2012 Ga. App. LEXIS 382 (2012) (decided under former O.C.G.A. § 24-3-2).

Appellant's affidavit not subject to Confrontation Clause. — Counsel did not perform deficiently by not making an objection to the affidavit of the appellant because the affidavit, written by the appellant, was hearsay, but it was nevertheless admissible as an admission by a party-opponent and such an admission by a defendant generally was not subject to the Confrontation Clause. Reed v. State, 307 Ga. 527, 837 S.E.2d 272, 2019 Ga. LEXIS 837 (2019).

Admissions and Confessions

1. Admissions and Confessions Distinguished

a. In General

No clear dividing line. — Admissions may be of such character as to render it difficult to say whether the admissions amount to confessions or to mere incriminating statements. The dividing line is not always clear, though the legal distinction is apparent. Covington v. State, 79 Ga. 687, 7 S.E. 153, 1887 Ga. LEXIS 286 (1887) (decided under former Code 1882,

§ 3783); Weaver v. State, 135 Ga. 317, 69 S.E. 488, 1910 Ga. LEXIS 517 (1910) (decided under former Penal Code 1895, § 1002).

Terms "admissions" and "confessions" are interchangeable and the probative value of a declaration that the defendant did the main fact charged is the same whether called a confession or an admission. Lumpkin v. American Sur. Co., 69 Ga. App. 887, 27 S.E.2d 412, 1943 Ga. App. LEXIS 210 (1943) (decided under former Code 1933, § 38-401).

Inference of guilt. — A confession is direct evidence of guilt, while an admission is circumstantial evidence from which guilt can be inferred. Riley v. State, 1 Ga. App. 651, 57 S.E. 1031, 1907 Ga. App. LEXIS 63 (1907) (decided under former Penal Code 1895, § 1002); Thomas v. State, 18 Ga. App. 101, 88 S.E. 917, 1916 Ga. App. LEXIS 140 (1916) (decided under former Penal Code 1910, § 1028); Kinard v. State, 19 Ga. App. 624, 91 S.E. 941, 1917 Ga. App. LEXIS 269 (1917) (decided under former Penal Code 1910, § 1028); Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870, 1972 Ga. App. LEXIS 905 (1972) (decided under former Code 1933, § 38-401).

Effect of admission of main fact. — An admission of the main fact, from which the essential elements of the criminal act may be inferred, amounts to an admission of the crime itself. Powers v. State, 172 Ga. 1, 157 S.E. 195, 1931 Ga. LEXIS 22 (1931) (decided under former Penal Code 1910, § 1028); Secrist v. State, 145 Ga. App. 391, 243 S.E.2d 599, 1978 Ga. App. LEXIS 1995, cert. dismissed, 242 Ga. 69, 248 S.E.2d 157, 1978 Ga. LEXIS 1094 (1978).

If a person only admits certain facts from which the jury may or may not infer guilt, there is no confession. Chappell v. State, 71 Ga. App. 147, 30 S.E.2d 289, 1944 Ga. App. LEXIS 300 (1944) (decided under former Code 1933, § 38-401); Braswell v. State, 87 Ga. App. 430, 74 S.E.2d 106, 1953 Ga. App. LEXIS 761 (1953) (decided under former Code 1933, § 38-401).

b. Admissions

An admission in the law of evidence is a statement by a party of the existence of a fact which is relevant to the cause of the party's adversary. Brooks v. Sessoms, 47 Ga. App. 554, 171 S.E. 222, 1933 Ga. App. LEXIS 560 (1933) (decided under former Code 1933, § 38-401).

An admission, as applied to a criminal case, is the statement by the defendant of a fact or facts pertinent to the issues, and tending, in connection with proof of other facts or circumstances, to prove the guilt of the accused, but which is of itself insufficient to authorize conviction. Ranson v. State, 2 Ga. App. 826, 59 S.E. 101, 1907 Ga. App. LEXIS 528 (1907) (decided under former Penal Code 1895, § 1002); Easterling v. State, 24 Ga. App. 424, 100 S.E. 727, 1919 Ga. App. LEXIS 700 (1919) (decided under former Penal Code 1910, § 1028); Morris v. State, 176 Ga. 243, 167 S.E. 509, 1933 Ga. LEXIS 56 (1933) (decided under former Code 1933, § 38-401); Teague v. State, 48 Ga. App. 225, 172 S.E. 571, 1934 Ga. App. LEXIS 22 (1934) (decided under former Code 1933, § 38-401); Roberts v. State, 59 Ga. App. 192, 200 S.E. 233, 1938 Ga. App. LEXIS 472 (1938) (decided under former Code 1933, § 38-401); Timbs v. State, 71 Ga. App. 141, 30 S.E.2d 290, 1944 Ga. App. LEXIS 299 (1944) (decided under former Code 1933, § 38-401); Braswell v. State, 87 Ga. App. 430, 74 S.E.2d 106, 1953 Ga. App. LEXIS 761 (1953) (decided under former Code 1933, § 38-401); Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870, 1972 Ga. App. LEXIS 905 (1972) (decided under former Code 1933, § 38-401); Pendergrass v. State, 245 Ga. 626, 266 S.E.2d 225, 1980 Ga. LEXIS 878 (1980) (decided under former Code 1933, § 38-401).

An admission is to be scanned with care, but it is evidence which, with other evidence, may and often does justify a conviction. Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870, 1972 Ga. App. LEXIS 905 (1972) (decided under former Code 1933, § 38-401).

An admission of a fact not in itself involving criminal intent is not a confession. Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868, 1954 Ga. App. LEXIS 629 (1954) (decided under former Code 1933, § 38-401).

Statements as to prior wrongs relevant to crimes committed. — Trial court properly admitted certain state-

Admissions (Cont'd)

ments made by the defendant during telephone conversations while in custody at a jail because while the statements related to a prior wrong or act which would generally be irrelevant character evidence, the statements indicated the defendant's disdain for law enforcement intervention and a desire to seek revenge; thus, the statements were relevant to show motive and intent in committing the crimes. Summerlin v. State, 339 Ga. App. 148, 793 S.E.2d 477, 2016 Ga. App. LEXIS 596 (2016), cert. denied, No. S17C0595, 2017 Ga. LEXIS 407 (Ga. May 15, 2017).

c. Confessions

Confession defined. — A confession is a voluntary statement made by a person charged with the commission of a crime, wherein the person acknowledges personally to be guilty of the offense charged. Owens v. State, 120 Ga. 296, 48 S.E. 21, 1904 Ga. LEXIS 530 (1904) (decided under former Penal Code 1895, § 1002); Ranson v. State, 2 Ga. App. 826, 59 S.E. 101, 1907 Ga. App. LEXIS 528 (1907) (decided under former Penal Code 1895, § 1002); Reed v. State, 15 Ga. App. 435, 83 S.E. 674, 1914 Ga. App. LEXIS 139 (1914) (decided under former Penal Code 1910, § 1028); Easterling v. State, 24 Ga. App. 424, 100 S.E. 727, 1919 Ga. App. LEXIS 700 (1919) (decided under former Penal Code 1910, § 1028); Teague v. State, 48 Ga. App. 225, 172 S.E. 571, 1934 Ga. App. LEXIS 22 (1934) (decided under former Code 1933, § 38-401); Grubbs v. State, 53 Ga. App. 377, 186 S.E. 140, 1936 Ga. App. LEXIS 126 (1936) (decided under former Code 1933, § 38-401); Braswell v. State, 87 Ga. App. 430, 74 S.E.2d 106, 1953 Ga. App. LEXIS 761 (1953) (decided under former Code 1933, § 38-401); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868, 1954 Ga. App. LEXIS 629 (1954) (decided under former Code 1933, § 38-401); Reece v. State, 212 Ga. 609, 94 S.E.2d 723, 1956 Ga. LEXIS 462 (1956) (decided under former Code 1933, § 38-401); Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870, 1972 Ga. App. LEXIS 905 (1972) (decided under former Code 1933, § 38-401).

Confession is rather a fact to be proved by evidence, than evidence to prove a fact. Powers v. State, 172 Ga. 1, 157 S.E. 195, 1931 Ga. LEXIS 22 (1931) (decided under former Penal Code 1910, § 1028).

Waiver of technical proof. — Confession is not so much proof that a particular thing took place as it is a waiver by the party charged of the party's right to have certain facts alleged against that party technically proven. Powers v. State, 172 Ga. 1, 157 S.E. 195, 1931 Ga. LEXIS 22 (1931) (decided under former Penal Code 1910, § 1028).

Entire criminal act must be confessed to find a confession. Owens v. State, 120 Ga. 296, 48 S.E. 21 (1904) (decided under former Penal Code 1895, § 1002); Goolsby v. State, 133 Ga. 427, 66 S.E. 159 (1909) (decided under former Penal Code 1895, § 1002); Hart v. State, 14 Ga. App. 714, 82 S.E. 164 (1914) (decided under former Penal Code 1910, § 1028); Neal v. State, 24 Ga. App. 148, 100 S.E. 12 (1919) , cert. denied, 24 Ga. App. 817 (1920).Powers v. State, 172 Ga. 1, 157 S.E. 195, 1931 Ga. LEXIS 22 (1931) (decided under former Penal Code 1910, § 1028); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868, 1954 Ga. App. LEXIS 629 (1954) (decided under former Code 1933, § 38-401).

True determinant of whether the defendant has made a confession or merely has given a statement is whether the statement is offered by the accused as exculpatory or inculpatory. Kennedy v. State, 156 Ga. App. 792, 275 S.E.2d 339, 1980 Ga. App. LEXIS 3202 (1980) (decided under former Code 1933, § 38-401); Wells v. State, 247 Ga. 792, 279 S.E.2d 213, 1981 Ga. LEXIS 839 (1981) (decided under former Code 1933, § 38-401).

Justification not confession. — Statement which admits the commission of an act, but which also gives legal excuse or justification, is not a confession. Owens v. State, 120 Ga. 296, 48 S.E. 21, 1904 Ga. LEXIS 530 (1904) (decided under former Penal Code 1895, § 1002); Reed v. State, 15 Ga. App. 435, 83 S.E. 674, 1914 Ga. App. LEXIS 139 (1914) (decided under former Penal Code 1910, § 1028); Powers v. State, 172 Ga. 1, 157 S.E. 195, 1931 Ga. LEXIS 22 (1931) (decided under former Penal Code 1910, § 1028); Logue v. State,

149 Ga. App. 797, 256 S.E.2d 31, 1979 Ga. App. LEXIS 2038 (1979) (decided under former Code 1933, § 38-401); Kennedy v. State, 156 Ga. App. 792, 275 S.E.2d 339, 1980 Ga. App. LEXIS 3202 (1980) (decided under former Code 1933, § 38-401); Wells v. State, 247 Ga. 792, 279 S.E.2d 213, 1981 Ga. LEXIS 839 (1981) (decided under former O.C.G.A. § 24-3-15).

Incriminating statements distinguished. — There is a difference between an incriminating statement and a confession of guilt, since in the former only one or more facts entering into the criminal act is admitted, while in the latter the entire criminal act is confessed. Owens v. State, 120 Ga. 296, 48 S.E. 21, 1904 Ga. LEXIS 530 (1904) (decided under former Penal Code 1895, § 1002); Goolsby v. State, 133 Ga. 427, 66 S.E. 159, 1909 Ga. LEXIS 232 (1909) (decided under former Penal Code 1895, § 1002); Powers v. State, 172 Ga. 1, 157 S.E. 195, 1931 Ga. LEXIS 22 (1931) (decided under former Penal Code 1910, § 1028); Cumberlander v. State, 53 Ga. App. 276, 185 S.E. 379, 1936 Ga. App. LEXIS 65 (1936) (decided under former Code 1933, § 38-401); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868, 1954 Ga. App. LEXIS 629 (1954) (decided under former Code 1933, § 38-401); Logue v. State, 149 Ga. App. 797, 256 S.E.2d 31, 1979 Ga. App. LEXIS 2038 (1979) (decided under former Code 1933, § 38-401).

Testimony of arresting officer as to statements made to the officer by a cab driver, in the presence of the accused, regarding the activities of the accused, while a passenger during the night after the crime was committed, was hearsay, not being original evidence, nor an exception to the hearsay rule. Rosborough v. State, 209 Ga. 362, 72 S.E.2d 717, 1952 Ga. LEXIS 501 (1952) (decided under former Code 1933, § 38-302).

d. Guilty Pleas

Confessions distinguished. — Plea of guilty differs from a full and voluntary confession in that while the latter is merely evidence of guilt, the former is a formal confession before the court on which judgment may be rendered. Lumpkin v. American Sur. Co., 69 Ga. App. 887, 27 S.E.2d 412, 1943 Ga. App. LEXIS 210 (1943) (decided under former Code 1933, § 38-401).

Use in civil actions. — Plea of guilty in a federal court is competent as an admission in a civil action in a state court. Lumpkin v. American Sur. Co., 69 Ga. App. 887, 27 S.E.2d 412, 1943 Ga. App. LEXIS 210 (1943) (decided under former Code 1933, § 38-401).

When a civil action was instituted for damages on the grounds of negligence for the violation of penal ordinances or statutes, and the defendant had previously confessed or pleaded guilty to the violation of such penal statutes whether it was in or out of court, these confessions were competent evidence as admissions against the defendant in the civil action with reference to the same transaction; and on cross-examination it was competent for the opposite party to inquire of the defendant if the defendant made such confessions. Because the defendant admitted in the civil action having made such confessions, it was unnecessary to produce an authenticated copy of the proceedings in the criminal case and such admissions were considered in determining the civil action. Roper v. Scott, 77 Ga. App. 120, 48 S.E.2d 118, 1948 Ga. App. LEXIS 506 (1948) (decided under former Code 1933, § 38-401).

e. Instructions

Failure to charge on a confession, in the absence of a request, is no cause for a new trial. Wilson v. State, 74 Ga. App. 42, 38 S.E.2d 750, 1946 Ga. App. LEXIS 453 (1946) (decided under former Code 1933, § 38-401).

Reversible error. — If a defendant has made only incriminating statements and not a confession, it is reversible error to charge the law of confession. Logue v. State, 149 Ga. App. 797, 256 S.E.2d 31, 1979 Ga. App. LEXIS 2038 (1979) (decided under former Code 1933, § 38-401).

Proper instruction. — Charge that "admissions usually refer to civil cases and confessions to criminal cases, all admissions should be scanned with care, and confessions of guilt received with great caution," was not confusing and misleading to the jury and unsound as an abstract

Instructions (Cont'd)

principle of law. Reece v. State, 212 Ga. 609, 94 S.E.2d 723, 1956 Ga. LEXIS 462 (1956) (decided under former Code 1933, § 38-401).

Evidence sufficient to authorize instructions on law of confessions in the following cases. — See Harris v. State, 207 Ga. 287, 61 S.E.2d 135, 1950 Ga. LEXIS 452 (1950) (decided under former Code 1933, § 38-401); Patrick v. State, 209 Ga. 645, 74 S.E.2d 848, 1953 Ga. LEXIS 333 (1953) (decided under former Code 1933, § 38-401); Reece v. State, 212 Ga. 609, 94 S.E.2d 723, 1956 Ga. LEXIS 462 (1956) (decided under former Code 1933, § 38-401); Kennedy v. State, 156 Ga. App. 792, 275 S.E.2d 339, 1980 Ga. App. LEXIS 3202 (1980) (decided under former Code 1933, § 38-401).

Evidence sufficient to authorize instructions on law of admissions in the following case. — See Morris v. State, 176 Ga. 243, 167 S.E. 509, 1933 Ga. LEXIS 56 (1933) (decided under former Code 1933, § 38-401).

Evidence insufficient to authorize instructions in the following cases. — See Reed v. State, 15 Ga. App. 435, 83 S.E. 674, 1914 Ga. App. LEXIS 139 (1914) (decided under former Penal Code 1910, § 1028); Chappell v. State, 71 Ga. App. 147, 30 S.E.2d 289, 1944 Ga. App. LEXIS 300 (1944) (decided under former Code 1933, § 38-401); Braswell v. State, 87 Ga. App. 430, 74 S.E.2d 106, 1953 Ga. App. LEXIS 761 (1953) (decided under former Code 1933, § 38-401).

2. Admissions of Parties to Record

a. In General

Nature of evidence. — Admissions by parties as to a matter relevant to the case on trial are not to be regarded as inferior evidence, but when satisfactorily proven they constitute grounds of belief on which the mind justly reposes with strong confidence. Mayo v. Owen, 208 Ga. 483, 67 S.E.2d 709, 1951 Ga. LEXIS 421 (1951) (decided under former Code 1933, § 38-403).

Admission in judicio. — Claimant's admissions in judicio against the claimant's own interests were binding upon the claimant since a solemn admission in judicio is conclusive as a matter of law on the matter stated and cannot be contradicted by other evidence unless it is withdrawn or amended on formal motion. Piedmont Aviation, Inc. v. Washington, 181 Ga. App. 730, 353 S.E.2d 847, 1987 Ga. App. LEXIS 1545 (1987) (decided under former O.C.G.A. § 24-3-31).

Admissions in judicio as to matters of fact against one party's interest are binding on another party when the interests of the two are joint but not when their interests are adverse. Batchelor v. State Farm Mut. Auto. Ins. Co., 240 Ga. App. 366, 526 S.E.2d 68 (decided under former O.C.G.A. § 24-3-31).

Personal knowledge not required. — To be admissible in evidence, admissions do not necessarily have to be founded on the personal knowledge of the party making the admissions. Brooks v. Sessoms, 47 Ga. App. 554, 171 S.E. 222, 1933 Ga. App. LEXIS 560 (1933) (decided under former Code 1933, § 38-403).

Admissions do not come in, on the ground that the party making the admissions is speaking from the party's personal knowledge, but upon the ground that a party will not make admissions against oneself unless the admissions are true; the fact that the party makes the admissions against the party's interest can be reasonably explained only on the supposition that the party is constrained to do so by the force of the evidence. Mayo v. Owen, 208 Ga. 483, 67 S.E.2d 709, 1951 Ga. LEXIS 421 (1951) (decided under former Code 1933, § 38-403).

What party told third party admissible. — Defendant's proffered testimony about the details of a conversation with an individual, who claimed to be good friends with the property owners and who told the defendant that the owners had said anyone was welcome to what was left on the property, was not hearsay because the testimony was offered to prove what the individual told the defendant, not what the property owners told the individual.

Lynn v. State, 345 Ga. App. 258, 812 S.E.2d 786, 2018 Ga. App. LEXIS 194 (2018) (decided under former O.C.G.A. § 24-3-1).

Murder defendant's statements in confrontations with victim's mother. — In the murder trial of the defendants, husband and wife, for the killing of a 13-month-old girl, the wife's statements to the child's mother regarding the child's death were admissions by a party-opponent under O.C.G.A. § 24-8-801(d)(2)(A), and their physical confrontations were indicative of the feelings between the mother and the wife under O.C.G.A. § 24-6-622. Virger v. State, 305 Ga. 281, 824 S.E.2d 346, 2019 Ga. LEXIS 111 (2019).

Prior admissions of a party to an action may be offered in evidence although not against interest when made and, if believed by the jury, may be considered as substantive evidence of the fact sought to be proved. W.T. Harvey Lumber Co. v. J.M. Wells Lumber Co., 104 Ga. App. 498, 122 S.E.2d 143, 1961 Ga. App. LEXIS 729 (1961) (decided under former Code 1933, § 38-403).

Introduction of admissions contained in a stricken plea. — Such admissions when thus made are to be taken as true, because the admissions are asserted by the party personally; and while the party may withdraw the admissions formally from the pleadings, the party cannot by a mere withdrawal avoid the effect of the admissions since the admissions may still be used as evidence against the party. Stallings v. Britt, 204 Ga. 250, 49 S.E.2d 517, 1948 Ga. LEXIS 405 (1948) (decided under former Code 1933, § 38-403).

While one may withdraw admissions formally from the pleadings, one cannot by a mere withdrawal avoid the effect of the admissions made as the admissions remain admissible into evidence. Richmond County v. Sibert, 218 Ga. 209, 126 S.E.2d 761, 1962 Ga. LEXIS 466 (1962) (decided under former Code 1933, § 38-403).

Estimates. — An admission in the testimony of a party is not, as a matter of law, to be taken as conclusively true, when the admission is in the nature of an estimate or guess; in such case it may be overcome by evidence of the facts and circumstances which form the basis of the admission. Hansberger Motor Transp. Co. v. Pate, 51 Ga. App. 877, 181 S.E. 796, 1935 Ga. App. LEXIS 489 (1935) (decided under former Code 1933, § 38-403).

Charge by court. — Court is not required to charge on the effect of admissions without a special request to that effect. Hawkins v. Kermode, 85 Ga. 116, 11 S.E. 560, 1890 Ga. LEXIS 6 (1890) (decided under former Code 1882, § 3784); Wrightsville & Tennille R.R. v. Lattimore, 118 Ga. 581, 45 S.E. 453, 1903 Ga. LEXIS 625 (1903) (decided under former Civil Code 1895, § 5189).

b. Parties

Joint parties. — Admissions of one of two or more parties to the record are not admissible to bind the others, until a joint interest is proven by other testimony. Boswell v. Blackman, 12 Ga. 591, 1853 Ga. LEXIS 33 (1853) (decided under former law); Kirk v. Barnes, 147 Ga. App. 423, 249 S.E.2d 140, 1978 Ga. App. LEXIS 2707 (1978) (decided under former Code 1933, § 38-403).

Because no joint interest existed between an LLC and its sole managing member, but instead the evidence showed that the two had separate and distinct positions in a lawsuit, the interest of both were not so joint and coextensive so as to justify treating the judicial admissions of the LLC as binding on the managing member. Milk v. Total Pay & HR Solutions, Inc., 280 Ga. App. 449, 634 S.E.2d 208, 2006 Ga. App. LEXIS 876 (2006) (decided under former O.C.G.A. § 24-3-31).

Rapist's admission to entering an apartment building through a broken gate was admissible evidence that could be used against the rapist's codefendants, a landlord and a security company, in the victim's premises liability action against the landlord and security company. The admission could be used to establish the rapist's conduct even though the conduct could not be imputed to the landlord and security company. Walker v. Aderhold Props., 303 Ga. App. 710, 694 S.E.2d 119, 2010 Ga. App. LEXIS 304 (2010), cert. denied, No. S10C1351, 2010 Ga. LEXIS

Parties (Cont'd)

733 (Ga. Sept. 7, 2010) (decided under former O.C.G.A. § 24-3-31).

When the personal representative of a deceased person is a substantial party to a suit, the testimony of a witness as to statements made by the deceased to the witness, concerning the vital issue in the cause, adverse to the contention of such personal representative, when offered by the opposite party, the witness not being incompetent to testify, is admissible in evidence as admissions. Ferrell v. Wight, 187 Ga. 360, 200 S.E. 271, 1938 Ga. LEXIS 778 (1938) (decided under former Code 1933, § 38-403); Fuller v. Fuller, 107 Ga. App. 429, 130 S.E.2d 520, 1963 Ga. App. LEXIS 868 (1963) (decided under former Code 1933, § 38-403).

Wills. — Admission of an executor before qualification, or of a legatee, unless the sole legatee, shall not be admissible in evidence to impeach the will. To this general rule there is an exception: if the admission be in reference to the conduct or the acts of the executor or legatee personally as to some matter relevant to the issue on trial, the same will be admitted to impeach the will, although made by the executor before qualification, or by a legatee who is not the sole legatee. Brown v. Kendrick, 163 Ga. 149, 135 S.E. 721, 1926 Ga. LEXIS 44 (1926) (decided under former Civil Code 1910, § 5776).

Admissions of nominal defendant as error. — Although the reception in evidence of the admissions of a nominal defendant was error, in view of former Civil Code 1910, §§ 5776 and 6083 (see O.C.G.A. §§ 5-5-22 and 24-8-801), it will not work the grant of a new trial, since the judge below, in the exercise of the judge's discretion, refused to grant a new trial on this ground. Jenkins v. Lane, 154 Ga. 454, 115 S.E. 126, 1922 Ga. LEXIS 393 (1922) (decided under former Civil Code 1910, § 5776).

Statement of employee nurse of defendant. — Trial court did not abuse the court's discretion in admitting the testimony of the plaintiff's daughter over the defendant's objection as an admission by a party opponent because the statement was made by a nurse employed by the defendant and was relevant to the slip and fall case. Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 760 S.E.2d 674, 2014 Ga. App. LEXIS 566 (2014).

When admission by person not party to action is admissible. — Rule, as to parties to a suit is that a plea of guilty may be shown as an admission against interest; admissions by persons not a party to an action, however, are admissible in evidence only when the party making the admission is the real party in interest, although not a party to the record, or when a party to the record refers another to such third party for information, or when there is an admission by a third person against that person's interest as to a fact collateral to the main issue between the litigants but essential to the adjudication of the cause. Cobb v. Garner, 158 Ga. App. 110, 279 S.E.2d 280, 1981 Ga. App. LEXIS 2333 (1981) (decided under former Code 1933, § 38-403).

Not party opponent. — There was no merit to the defendant's contention that the other driver's statements to his cellmate should have been treated as an admission by a party opponent and thus admissible because the state, not the other driver, was the party opponent in the case, and because the other driver pled guilty and was not tried with the defendant, the other driver was not a party to the case at all. Anderson v. State, 360 Ga. App. 291, 861 S.E.2d 151, 2021 Ga. App. LEXIS 334 (2021).

Owner's statement on marshlands boundary. — In a dispute between the owner of riverfront property and the Coastal Resources Division (CRD) of the Department of Natural Resources, the owner did not waive the owner's argument that the CRD had improperly placed a marshlands boundary in 2008 because the owner's conduct in building a noncompliant bulkhead and attempting to get an after-the-fact permit was consistent with the owner's statement that the 2008 boundary was incorrect. C&M Enters. of Ga., LLC v. Williams, 346 Ga. App. 79, 816 S.E.2d 44, 2018 Ga. App. LEXIS 321 (2018), cert. denied, No. S18C1407, 2019 Ga. LEXIS 52 (Ga. Jan. 7, 2019).

c. Defendants in Execution in Claim Cases

Term "litigation," as employed in statute, is not confined merely to the determination of a possible issue which may arise after levy, between the plaintiff in fi. fa. and some possible claimant, but the term includes also the previous suit in which the fi. fa. had its origin. Smith v. Johnson, 13 Ga. App. 837, 80 S.E. 1051, 1913 Ga. App. LEXIS 373 (1913) (decided under former Civil Code 1910, § 5776).

Not relevant to competency. — Provision upon the subject of the admissibility of admissions of defendants in fi. fa. in claim cases has no reference to the competency of a defendant in fi. fa. as a witness in the trial of such a case, and would be no authority for excluding one's testimony on objection of the plaintiff in fi. fa. when offered by the claimant. Cornelia Bank v. Taylor, 37 Ga. App. 538, 140 S.E. 901, 1927 Ga. App. LEXIS 399 (1927) (decided under former Civil Code 1910, § 5776).

Admissions before litigation pending. — Admissions of a defendant in execution against the defendant's interest, before the pendency of litigation, are admissible in evidence in favor of either the claimant or the plaintiff in execution. Smith v. Cox, 20 Ga. 240, 1856 Ga. LEXIS 44 (1856). See also Horn v. Ross Leitch, 20 Ga. 210, 1856 Ga. LEXIS 39 (1856); James v. Taylor, 93 Ga. 275, 20 S.E. 309, 1893 Ga. LEXIS 419 (1893) (decided under former Code 1882, § 3784); Rountree v. Gaulden, 128 Ga. 737, 58 S.E. 346, 1907 Ga. LEXIS 198 (1907) (decided under former Civil Code 1895, § 5189).

Admission for impeachment purposes. — Extrajudicial statement respecting the title to the property levied on, made by the defendant in fi. fa. in a claim case, is not inadmissible as being an admission, when the statement is offered and admitted in evidence solely for the purpose of impeaching the testimony of such defendant. Nesmith v. Nesmith, 37 Ga. App. 779, 142 S.E. 176, 1928 Ga. App. LEXIS 613 (1928) (decided under former Civil Code 1910, § 5776).

Declarations as to title. — Declarations by a defendant in fi. fa. against the defendant's title to property in the defendant's possession are not admissible in behalf of a claimant, if made after the judgment was obtained or while the litigation was pending and with reference thereto. James v. Taylor, 93 Ga. 275, 20 S.E. 309, 1893 Ga. LEXIS 419 (1893) (decided under former Code 1882, § 3784).

Declarations of the defendant in fi. fa. as to the ownership of the property levied on, made after the filing of the suit which resulted in the rendition of the judgment against the defendant, were admissions after the pendency of the litigation, and were excluded by the terms of the former statute. Smith v. Johnson, 13 Ga. App. 837, 80 S.E. 1051, 1913 Ga. App. LEXIS 373 (1913) (decided under former Civil Code 1910, § 5776).

Evidence as to a declaration made by the defendant in fi. fa. after the levy that the property levied on belonged to the claimant and that the defendant in fi. fa. bought the property merely as the claimant's agent, was improperly admitted, since it was a declaration made by the defendant in fi. fa. after the pendency of the litigation. Alford v. Sharber, 41 Ga. App. 707, 154 S.E. 463, 1930 Ga. App. LEXIS 1062 (1930) (decided under former Civil Code 1910, § 5776).

Possession. — In the trial of a claim case, declarations of a defendant in execution made after the pendency of litigation and prior to the time of levy, but at a time when the defendant was not in possession of the property levied on, that the defendant owned such property, are not admissible as evidence and of no probative value even if admitted without objection. Nelson v. Brannon, 32 Ga. App. 455, 123 S.E. 735, 1924 Ga. App. LEXIS 461 (1924) (decided under former Civil Code 1910, § 5776); McSwain v. Estroff, 34 Ga. App. 183, 129 S.E. 16, 1925 Ga. App. LEXIS 131 (1925) (decided under former Civil Code 1910, § 5776).

Sale of property. — Declarations of the defendant in fi. fa. made after the suit was brought which resulted in the judgment the plaintiff was then seeking to enforce, and shortly before that judgment was rendered, to the effect that the defendant had sold the lands in question to the claimant, were not admissible in the lat-

Defendants in Execution in Claim Cases (Cont'd)

ter's favor. Tillman v. Fontaine, 98 Ga. 672, 27 S.E. 149, 1896 Ga. LEXIS 119 (1896) (decided under former Civil Code 1895, § 5189).

Recital in deed as to payment of purchase money. — While, in a deed from defendant in fi. fa. to claimant, the receipt or recital of the payment of purchase money may be evidence of payment, when the deed was made before the suit in which the judgment was obtained, was commenced, yet it is but prima facie evidence, and a charge that it is not evidence will not necessitate the grant of a new trial, if the other facts of the case required the verdict as found. Bonner v. Metcalf, 58 Ga. 236, 1877 Ga. LEXIS 66 (1877) (decided under former Code 1873, § 3784).

d. Examples

Tax digest as evidence. — In a claim case, the tax digest, showing the returns of the defendant in execution before the pendency of litigation, is admissible in evidence as an admission of the defendant. It is competent also to show that the claimant did not make any return of property for taxation during the year in which the judgment was rendered. McLendon v. Dunlap Hdwe. Co., 3 Ga. App. 206, 59 S.E. 718, 1907 Ga. App. LEXIS 597 (1907) (decided under former Civil Code 1895, § 5189).

Letters as evidence. — Letters written by the defendant in execution during the year in which the judgment was rendered, both before and after its date, to an overseer, giving directions as to the cultivation of the crop subsequently under levy and as to the management of the farm during that year, and relating to other like matters, were admissible in evidence for the plaintiff as acts of the defendant tending to show possession and control by the defendant. Tillman v. Fontaine, 98 Ga. 672, 27 S.E. 149, 1896 Ga. LEXIS 119 (1896) (decided under former Civil Code 1895, § 5189). ; See also Mixon v. Lacey, 26 Ga. App. 542, 107 S.E. 259, 1921 Ga. App. LEXIS 519 (1921).

In an action by a customer who ate a muffin, which allegedly contained an industrial staple, against the franchisor of the restaurant and the company which allegedly manufactured the muffin mix, a letter from the franchisee's insurer to the customer's attorney, in which the attorney identified the alleged manufacturer of the muffin mix, was inadmissible hearsay as the franchisee's insurer was neither a party nor a privy of a party. Jackson v. Dunkin' Donuts, Inc., 211 Ga. App. 596, 440 S.E.2d 56 (1994) (decided under former O.C.G.A. § 24-3-31).

Text messages from defendant to victim's parent. — Trial court did not err when the court allowed the victim's parent to testify about text messages that the parent had received from the defendant during the time that the victim's whereabouts were unknown because, according to the victim's parent, the defendant's text messages invited the parent on dates and explained why the defendant was not participating in the search for the victim, and that testimony was properly admitted under the admissions by a real party in interest exception to the hearsay rule under the former evidence code; and the parent provided evidence that identified the defendant as the person who sent the text messages. Carter v. State, 302 Ga. 685, 808 S.E.2d 704, 2017 Ga. LEXIS 970 (2017) (decided under former O.C.G.A. § 24-3-34).

Telephone messages. — As telephone messages made following conversations between a party opponent and a testifying witness noted the contents of a conversation, not an act, transaction, occurrence, or event, the business records exception to the hearsay rule was inapplicable; for the contents of the party's telephone conversations to be admissible, the party would have to be given the opportunity to cross-examine the employees to whom the witness spoke with in regard to the potential for misrepresenting the statements. Bailey v. Edmundson, 280 Ga. 528, 630 S.E.2d 396, 2006 Ga. LEXIS 355 (2006) (decided under former O.C.G.A. § 24-3-31).

Video interview and voicemail. — Trial counsel was not ineffective for failing to object to the admission of the video-recorded interview of the defendant's ex-girlfriend as the defendant's statements

in a voicemail to the ex-girlfriend were admissions of a party opponent; and the defendant did not show that had trial counsel objected to a lack of foundation as to the voicemail instead of to the video interview, such an objection would have been meritorious because the ex-girlfriend testified that the ex-girlfriend had previously been in a relationship with the defendant and that it was the defendant's voice in the voice message. Lyons v. State, 309 Ga. 15, 843 S.E.2d 825, 2020 Ga. LEXIS 361 (2020).

Audio recording of jail telephone conversation. — Trial counsel was not ineffective for failing to object to the introduction of an audio recording of a telephone conversation between the second defendant and the second defendant's girlfriend, which included the second defendant telling the girlfriend that the girlfriend did not have to allow police to search the home, and the girlfriend could be heard describing the substance of a news report about the murder, because the second defendant's statements on the recording were admissions of a party opponent. Haney v. State, 305 Ga. 785, 827 S.E.2d 843, 2019 Ga. LEXIS 322 (2019).

Defendant's statements in the jail call were admissible as admissions of a party opponent. Williams v. State, 313 Ga. 325, 869 S.E.2d 389, 2022 Ga. LEXIS 35 (2022).

Testifying witness need not be co-conspirator. — Nothing in the text of O.C.G.A. § 24-8-801(d)(2)(E) requires that the testifying witness also be a co-conspirator for the exception to apply; in fact, § 24-8-801(d)(2)(E) does not necessitate that the witness testifying to a co-conspirator statement be a co-conspirator, instead only requiring that the declarant be a co-conspirator. Lawrence v. State, 342 Ga. App. 396, 802 S.E.2d 859, 2017 Ga. App. LEXIS 348 (2017), cert. denied, No. S18C0094, 2018 Ga. LEXIS 322 (Ga. May 7, 2018).

Admission of statement of party opponent. — Witness's testimony that the defendant told the witness that the defendant shot the victim was not inadmissible hearsay because the state elicited it as an admission of a party opponent, which was admissible as an exception to the hearsay rule. Dawson v. State, 308 Ga. 613, 842 S.E.2d 875, 2020 Ga. LEXIS 332 (2020).

Recorded telephone conversations with an informant. — There was circumstantial evidence that a defendant was the participant in recorded phone conversations with an informant; therefore the conversations were admissible as admissions of a party opponent under former O.C.G.A. § 24-3-31, and the entirety of the calls were admissible under former O.C.G.A. § 24-3-38 (see now O.C.G.A. § 24-8-822). Kimble v. State, 301 Ga. App. 237, 687 S.E.2d 242, 2009 Ga. App. LEXIS 1358 (2009), cert. denied, No. S10C0570, 2010 Ga. LEXIS 464 (Ga. May 17, 2010), cert. denied, No. S10C0569, 2010 Ga. LEXIS 466 (Ga. May 17, 2010) (decided under former O.C.G.A. § 24-3-31).

Because the informant's recorded statements provided context for the defendant's portion of the telephone conversation, the informant's statements were not hearsay as the statements entailed admissions of a party opponent, and the Confrontation Clause did not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted; therefore, the trial court did not err in admitting the recording. Jones v. State, 339 Ga. App. 95, 791 S.E.2d 625, 2016 Ga. App. LEXIS 559 (2016), cert. denied, No. S17C0590, 2017 Ga. LEXIS 411 (Ga. May 15, 2017).

Admission of liability. — Upon the trial of a suit in which the plaintiff alleged that the plaintiff suffered personal injuries as a result of the negligent operation by the defendant of an automobile in which the plaintiff was traveling, which caused a collision between plaintiff's vehicle and another automobile, a statement afterwards made by the defendant to the plaintiff that the defendant wanted the plaintiff to have all the treatment and attention necessary and would pay for such, and would probably pay something extra to the plaintiff on account of the plaintiff's suffering, was relevant and admissible as tending to show admission of liability. Rentz v. Collins, 51 Ga. App. 782, 181 S.E. 678, 1935 Ga. App. LEXIS 472 (1935) (decided under former Code 1933, § 38-403).

Statements against interest. — Plaintiff's statement to the police officer at

Examples (Cont'd)

the scene of an accident that the plaintiff did not see the truck before the collision was admissible as a statement against interest. Cleveland v. Bryant, 236 Ga. App. 459, 512 S.E.2d 360 (decided under former O.C.G.A. § 24-3-31).

Because the injured party admitted, after the fact, to the coworker that the injured party did not place the hot coffee, that later spilled on the injured party's lap, on the floor because the injured party did not want anything to get on the coworker's new car, the statement was admissible under former O.C.G.A. § 24-3-31 as a party's admission. Bernath v. People Success, Inc., 274 Ga. App. 880, 619 S.E.2d 378, 2005 Ga. App. LEXIS 862 (2005) (decided under former O.C.G.A. § 24-3-31).

Undercover detective's testimony regarding a conversation the detective overheard between a defendant and a confidential informant (CI) as to a drug transaction was not inadmissible hearsay as the detective could identify both parties to the conversation and the statement by the defendant fell within the hearsay exception for a statement against interest. Escobar v. State, 296 Ga. App. 898, 676 S.E.2d 291, 2009 Ga. App. LEXIS 376 (2009) (decided under former O.C.G.A. § 24-3-31).

Trial court did not err in admitting the testimony of the defendant's mother that the defendant told the mother approximately two hours after the murder that the defendant would re-enlist in the army rather than killing people for free because the defendant's statement was readily admissible as an admission by a party under former O.C.G.A. § 24-3-31. Dukes v. State, 290 Ga. 486, 722 S.E.2d 701, 2012 Ga. LEXIS 140 (2012) (decided under former O.C.G.A. § 24-3-31).

Admissions against penal interest. — In a prosecution for burglary, evidence of defendant's admission that defendant had broken into a house on another occasion was admissible as an admission by defendant against the defendant's penal interest. Howard v. State, 227 Ga. App. 5, 488 S.E.2d 489 (decided under former O.C.G.A. § 24-3-31).

Defendant's adoption of statements in a probation officer's disciplinary reports that defendant violated Diversion Center rules was sufficient to render the documents competent proof of the facts recited as an admission against interest by a party. Kendrick v. State, 240 Ga. App. 530, 523 S.E.2d 414 (decided under former O.C.G.A. § 24-3-31).

Insurance. — Admissions against interest are such even though the admissions may contain a suggestion that the party making the admissions carry insurance, and the mere fact that insurance, or an insurance company, is mentioned as an inextricable part of the statement made by such party or conversation in which the party indulged, does not make the evidence inadmissible when offered by the opposite party, as the party making such statement has only the party to blame in referring to insurance, or to the insurance company, in making the admission against one's interest. Wade v. Drinkard, 76 Ga. App. 159, 45 S.E.2d 231, 1947 Ga. App. LEXIS 397 (1947) (decided under former Code 1933, § 38-403).

Admissions as to gift. — Evidence of admissions by the defendant as to gift of certain property, which was involved in controversy, to the defendant's children and grandchildren, was admissible. Poullain v. Poullain, 76 Ga. 420, 4 S.E. 92, 1886 Ga. LEXIS 47 (1886) (decided under former Code 1882, § 3784).

Statements by a property owner against the owner's interest as to the location of a line in dispute are admissible in evidence. Seaboard Air Line R.R. v. Taylor, 214 Ga. 212, 104 S.E.2d 106, 1958 Ga. LEXIS 374 (1958) (decided under former Code 1933, § 38-403).

Statement as to ownership of a colt. — Horse trainer's offered testimony that another trainer spoke with possessors of a colt, who admitted that the colt belonged to the trainer, was a hearsay statement that was admissible under former O.C.G.A. § 24-3-31 as an admission of a party-opponent in the trainer's claim to possession and ownership of the colt; accordingly, a question of fact was raised on the trainer's claim which should have precluded summary judgment pursuant to O.C.G.A. § 9-11-56. Medlin v. Morgan-

stern, 268 Ga. App. 116, 601 S.E.2d 359, 2004 Ga. App. LEXIS 737 (2004) (decided under former O.C.G.A. § 24-3-31).

Statements by a dog's owner. — Affidavit by the mother of a dog-bite victim that the dog's owner told her that "she knew something like this would happen" was admissible and was evidence sufficient to preclude summary judgment for defendants. Johnson v. Kvasny, 230 Ga. App. 162, 495 S.E.2d 651, 1998 Ga. App. LEXIS 80 (1998) (decided under former O.C.G.A. § 24-3-31).

Suit on insurance policy. — In a suit brought by a widow and child on a life insurance policy, insuring the life of the husband and father, and the plaintiffs were the joint beneficiaries under the policy, the admissions of the widow were competent evidence for the defendant on the question of misrepresentation made in the application for insurance. Southern Life Ins. Co. v. Wilkinson, 53 Ga. 535, 1874 Ga. LEXIS 522 (1874) (decided under former Code 1873, § 3784).

Employee's statement to an insurance adjuster was not admissible against employer as an admission of a party opponent because the individual was a "mere employee," and as such had no authority to bind the employer by the employee's statement. HCP III Woodstock, Inc. v. Healthcare Servs. Group, Inc., 254 Ga. App. 242, 562 S.E.2d 225, 2002 Ga. App. LEXIS 340 (2002) (decided under former O.C.G.A. § 24-3-31).

Advisory study prepared by private citizens together with public employees is not necessarily admissible as being a statement against the interest of the public entity authorizing the study. To be so considered, the entity must have been constrained by the force of the evidence to issue the report, rather than issuing the report as a result of mere deliberative recognition of the problems addressed in the report. United Waste, Ltd. v. Fulton County, 184 Ga. App. 694, 362 S.E.2d 476, 1987 Ga. App. LEXIS 2348 (1987) (decided under former O.C.G.A. § 24-3-31).

3. Acquiescence or Silence as Admission

a. In General

Former statute was a principle founded on common sense and common honesty, and administered day by day in courts of justice, not only in settling questions of property, but in deciding upon matters involving liberty and life. Markham v. O'Connor, 52 Ga. 183, 1874 Ga. LEXIS 259 (1874) (decided under former Code 1873, § 3790).

Comment on silence not permitted. — In criminal cases, a comment upon a defendant's silence or failure to come forward is far more prejudicial than probative. Thus, after December 12, 1991, such a comment will not be allowed even if the defendant has not received Miranda warnings and when the defendant takes the stand in the defendant's own defense. State v. Mallory, 261 Ga. 625, 409 S.E.2d 839 (1991), overruled on other grounds by State v. Lane, 2020 Ga. LEXIS 98 (Ga. 2020), overruling Fraley v. State, 256 Ga. 178, 345 S.E.2d 590 (1986) (decided under former O.C.G.A. § 24-3-36); but see Clark v. State, 271 Ga. 6, 515 S.E.2d 155.

In a case in which ineffective assistance of counsel was claimed due to counsel's failure to object to a comment in the prosecutor's closing argument that the defendant could have given the defendant's version of the facts of a domestic dispute to the police, the appellate court improperly relied on exclusions to comments on a defendant's silence in Morrison v. State, 554 S.E.2d 190 (2001); the court overruled Morrison based on the bright-line rule in Mallory v. State, 409 S.E.2d 839 (1991), that, with reference to former O.C.G.A. § 24-3-36, that comment upon a defendant's silence or failure to come forward was far more prejudicial than probative. Reynolds v. State, 285 Ga. 70, 673 S.E.2d 854, 2009 Ga. LEXIS 60 (2009) (decided under former O.C.G.A. § 24-3-36).

Mallory did not apply. — As the interpretation of former O.C.G.A. § 24-3-36 in Mallory v. State, 409 S.E.2d 839 (1991), had only prospective application, it did not apply to the defendant's case, which was tried before Mallory was decided. Therefore, defense counsel's strategic decision not to object to the prosecutor's comment on the defendant's request for counsel was not prejudicial as a matter of law; in view of the overwhelming evidence of the defendant's guilt, the defendant did

In General (Cont'd)

not establish a violation of the right to effective assistance of counsel. Patterson v. State, 285 Ga. 597, 679 S.E.2d 716, 2009 Ga. LEXIS 396 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892, 2010 U.S. LEXIS 296 (2010) (decided under former O.C.G.A. § 24-3-36).

Reason of admission. — Ground for admission of the statement of a third person in the presence of the accused is that the omission to controvert the statement affords a basis for an inference of the statement's truth. Such statement is admissible in evidence, to show that it calls for a reply, and to show the acquiescence of the accused. Thomas v. State, 143 Ga. 268, 84 S.E. 587, 1915 Ga. LEXIS 383 (1915) (decided under former Penal Code 1910, § 1029).

Estoppel. — When one under a duty to speak, fails to do so, one is thereafter estopped to deny what one's silence imports. Cheek v. J. Allen Couch & Son Funeral Home, 125 Ga. App. 438, 187 S.E.2d 907, 1972 Ga. App. LEXIS 1365 (1972) (decided under former Code 1933, § 38-409).

Proof must be affirmative. — Saying of other persons are admissible against a party when it affirmatively appears that the party assented to the statements by the party's silence, or in some other way. Drumwright v. State, 29 Ga. 430, 1859 Ga. LEXIS 359 (1859) (decided under former law); Williamson v. State, 29 Ga. App. 283, 114 S.E. 919, 1922 Ga. App. LEXIS 247 (1922) (decided under former Penal Code 1910, § 1029); Ball v. State, 47 Ga. App. 844, 171 S.E. 726 (1933) (decided under former Code 1933, § 38-409).

b. Circumstances Requiring Response

Circumstances must require an answer. — It is only when the circumstances require an answer or denial that silence may amount to an admission. Graham v. State, 118 Ga. 807, 45 S.E. 616, 1903 Ga. LEXIS 717 (1903) (decided under former Penal Code 1895, § 1003).

Trial court did not err in granting summary judgment to manufacturer on the purchaser's breach of warranty claim regarding a copier that made more poor, unusable copies; although the purchaser wrote a letter to the manufacturer about the problems, the letter did not reference either express or implied warranties, or request any specific relief, and, thus, the manufacturer's lack of a reply could not be construed as an admission. McQueen v. Minolta Bus. Solutions, Inc., 275 Ga. App. 297, 620 S.E.2d 391, 2005 Ga. App. LEXIS 801 (2005) (decided under former O.C.G.A. § 24-3-36).

Accused must hear statements. — When it is sought to charge a prisoner by reason of sayings of the prisoner's spouse in regard to the crime for which the prisoner is tried, and acquiesced in by the prisoner's silence, such sayings must have been in the prisoner's immediate presence, where the prisoner could hear distinctly all that was said; otherwise the statements would be inadmissible. Jones v. State, 65 Ga. 147, 1880 Ga. LEXIS 125 (1880) (decided under former Code 1873, § 3790).

Before evidence can be admitted in a criminal case to show acquiescence of the accused, by silence, in statements made by the officer who arrested the accused to another officer, as to the sayings and conduct of the accused when arrested, it must affirmatively appear that the accused was present and heard the inculpatory statements made against the accused, and by silence, acquiesced in the statements. Simmons v. State, 115 Ga. 574, 41 S.E. 983, 1902 Ga. LEXIS 476 (1902) (decided under former Penal Code 1895, § 1003).

Admissions should be direct and call for contradiction. — Admissions of a party, which are to be inferred from the party's acquiescence in the verbal statements of others, made in the party's presence, ought to be regarded with great caution, and unless the evidence be of such direct declarations, and of that kind which naturally call for a contradiction, or some assertions made to the party with respect to the party's right, which by the party's silence the party acquiesces in, it ought not to be received at all. Rolfe v. Rolfe, 10 Ga. 143, 1851 Ga. LEXIS 148 (1851) (decided under former law).

Proof of circumstances. — Before the sayings of a third person, made in the

presence of one who is subsequently charged with the commission of a criminal offense, should be admitted in evidence against the accused, there should be proof affirmatively disclosing that the circumstances were such as to call upon the accused to make some response to what was said in the accused's presence. The circumstances must require an answer or denial, or other conduct, before silence will amount to an implied admission. Lumpkin v. State, 125 Ga. 24, 53 S.E. 810, 1906 Ga. LEXIS 18 (1906) (decided under former Penal Code 1895, § 1003).

Person under arrest. — If a statement tending to incriminate a person was made in the person's presence and the person remains silent, the mere fact that the person was under arrest or was in custody at the time will not render evidence of such statement and silence inadmissible as an implied admission. Creel v. State, 216 Ga. 233, 115 S.E.2d 552, 1960 Ga. LEXIS 435 (1960) (decided under former Code 1933, § 38-409).

Police interrogation was not such a circumstance as required an answer or denial so as to authorize charging the former statute in a criminal case. Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976) (decided under former Code 1933, § 38-409).

c. Procedural Considerations

Value of admission as evidence. — Failure to controvert an accusation is not an affirmative act on the part of the accused expressive of guilt of the crime charged. Its evidentiary value is that of an incriminating admission to be considered along with the other circumstances in inferring the guilt of the accused. Thomas v. State, 143 Ga. 268, 84 S.E. 587, 1915 Ga. LEXIS 383 (1915) (decided under former Penal Code 1910, § 1029).

Question for jury. — Question of whether the defendant in fact heard the statement in question was for the jury; and if the jury found under the fact that the defendant did hear the statement, it would be a further question for them to determine whether under the circumstances an answer or a denial or other conduct was required, and also whether the defendant's acquiescence or silence under such circumstances amounted to an admission. Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709, 1948 Ga. App. LEXIS 729 (1948) (decided under former Code 1933, § 38-409).

It is allowable to repeat an entire conversation, which occurred between the witness and a party, which consisted, amongst other things, of distinct charges made by the witness, and which were silently acquiesced in, or answered and justified. Morris v. Stokes, 21 Ga. 552, 1857 Ga. LEXIS 95 (1857) (decided under former law); Dixon v. Edwards, 48 Ga. 142, 1873 Ga. LEXIS 35 (1873) (decided under former Code 1873, § 3790).

Since it was not the statement of a third person which was admitted as substantive evidence, but only the fact of the accused's failure to deny the statement, the admissibility of such testimony was in no way affected by the fact that the incriminating statement was uttered by one who was incompetent to testify against defendant as a witness in a criminal prosecution. Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709, 1948 Ga. App. LEXIS 729 (1948) (decided under former Code 1933, § 38-409).

Scope of instructions. — In charging a jury the rule contained in the former statute, the court should not fail to instruct the jury, in connection with that rule, that the jury was to determine whether or not, under all the circumstances, an answer or denial was required. Hammond v. State, 156 Ga. 880, 120 S.E. 539, 1923 Ga. LEXIS 352 (1923) (decided under former Penal Code 1910, § 1029).

Trial court properly charged a jury regarding the former O.C.G.A. § 24-3-36 evidentiary presumption arising from a limited liability company's (LLC's) agent's failure to reply to a corporation's invoices because the LLC admitted receiving some of the corporation's goods and services, only disputing the amount due, and the failure to respond to an invoice was not a declaration against the LLC's interest pursuant to O.C.G.A. § 10-6-64; in addition, the charge was supported by former O.C.G.A. § 24-4-23 (see now O.C.G.A. § 24-14-25). Forrest Cambridge Apts., LLC v. Redi-Floors, Inc., 295 Ga.

Procedural Considerations (Cont'd)

App. 840, 673 S.E.2d 318, 2009 Ga. App. LEXIS 99 (2009) (decided under former O.C.G.A. § 24-3-31).

It was reversible error to instruct the jury in a criminal case according to the former statute that silence or acquiescence by a person in police custody may amount to an admission of guilt. Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976) (decided under former Code 1933, § 38-409).

Evidence was sufficient to authorize instruction based on former O.C.G.A. § 24-3-36 in the following cases. — See Eberhart v. State, 88 Ga. App. 501, 76 S.E.2d 832, 1953 Ga. App. LEXIS 1121 (1953) (decided under former Code 1933, § 38-409); Bloodworth v. State, 216 Ga. 572, 118 S.E.2d 374, 1961 Ga. LEXIS 282 (1961) (decided under former Code 1933, § 38-409).

Ineffective counsel not shown. — Although, under former O.C.G.A. § 24-3-36, the state's witness's testimony that a defendant did not respond to a detective's questions was more prejudicial to defendant than it was probative of defendant's guilt, defendant did not show how that testimony affected the outcome of the trial such that defense counsel was ineffective for not objecting to the testimony or requesting a special instruction. Bruce v. State, 268 Ga. App. 677, 603 S.E.2d 33, 2004 Ga. App. LEXIS 930 (2004), cert. denied, No. S04C2046, 2004 Ga. LEXIS 976 (Ga. Oct. 25, 2004) (decided under former O.C.G.A. § 24-3-36).

d. Illustrations and Applications

General denial by accused. — A prisoner's flat denial of any knowledge of or complicity in the offense is a disavowal of the act as the prisoner's act; and though the prisoner may not in detail deny each minor incriminating circumstance which may be charged against the prisoner, the prisoner's general denial is sufficient to exclude the idea of an implied admission. Ware v. State, 96 Ga. 349, 23 S.E. 410, 1895 Ga. LEXIS 79 (1895) (decided under former Penal Code 1895, § 1003).

Principle that acquiescence or silence, when the circumstances require an answer or denial, may amount to an admission, has no application to a criminal cause when a person accused by another with the commission of an offense, immediately denies all knowledge of, or complicity in, its commission, even though such denial be in general terms and does not in detail extend to each of the minor incriminating circumstances charged against the person. Westberry v. State, 174 Ga. 646, 163 S.E. 729, 1932 Ga. LEXIS 114 (1932) (decided under former Penal Code 1910, § 1029).

Witness's comment on defendant's pre-arrest silence not prejudicial. — With regard to convictions for aggravated assault and related crimes, defendant failed to show that trial counsel was ineffective for failing to object or move for a mistrial when a security officer commented on defendant's pre-arrest silence, namely that defendant did not speak up as to owning the type of vehicle used to perpetrate the crimes; even if testimony on defendant's pre-arrest silence had been objectionable, defendant failed to show any prejudice since other evidence showed that defendant drove to the police station in defendant's truck and consented to a search of that vehicle. Gibson v. State, 291 Ga. App. 183, 661 S.E.2d 850, 2008 Ga. App. LEXIS 436 (2008), cert. denied, No. S08C1442, 2008 Ga. LEXIS 677 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-3-36).

Admission of agents or attorneys. — Admission by agents or attorneys are not admissible in criminal cases in the sense in which the admissions are admissible in civil cases. The admissions should not be treated as evidence against the accused, unless shown to have been authorized by the accused. Farmer v. State, 190 Ga. 41, 28 S.E. 26 (1896) (decided under former Penal Code 1895, § 1003).

Misstatement of opposing counsel. — Silence is estopped when attorney failed to deny misstatement of opposing counsel, in reply to a question of court, as to whether a certain allegation was denied by plea. Cuthbert Ice Co. v. York Mfg. Co., 20 Ga. App. 695, 93 S.E. 279, 1917 Ga. App. LEXIS 1033 (1917) (decided under former Penal Code 1910, § 1029).

Acquiescence by agent. — Where a son informs his father that his employer

would prosecute unless the father signed a mortgage to secure the son's shortage, silence of the employer's agent, who was present, adopted the threat, and was duress. Small v. Williams, 87 Ga. 681, 13 S.E. 589, 1891 Ga. LEXIS 261 (1891) (decided under former Code 1882, § 3790).

Entries in bank pass book. — In a suit by a decedent's administrator against a bank for the recovery of a deposit claimed to be due the estate, a failure of the depositor to make objection to entries of the bank in the depositor's pass book could be accounted as an admission on the depositor's part as to the correctness of the statement. Cheney v. Bank of Bremen, 25 Ga. App. 114, 102 S.E. 903, 1920 Ga. App. LEXIS 630 (1920) (decided under former Civil Code 1910, § 5782).

Silence regarding terms of agreement. — Physician had a duty and obligation to respond to limitations on the physician's privileges set forth in an agreement with a hospital, and when the physician silently exercised the privileges for several years, the physician waived the physician's right to insist on compliance with other procedural requirements pertaining to the physician's termination. St. Mary's Hosp. v. Cohen, 216 Ga. App. 761, 456 S.E.2d 79, 1995 Ga. App. LEXIS 278 (1995), cert. denied, No. S95C1086, 1995 Ga. LEXIS 746 (Ga. May 25, 1995) (decided under former O.C.G.A. § 24-3-36).

Silence regarding lease renewal. — Rule of estoppel by silence was not applicable with respect to a commercial tenant's exercise of an option to renew the lease for another term under former O.C.G.A. §§ 24-3-36 and 24-4-23 (see now O.C.G.A. §§ 24-8-801 and 24-14-423) since the tenant did not respond to the landlord's email which contained an offer to renew on different terms; such constituted a counteroffer. Pargar, LLC v. CP Summit Retail, LLC, 316 Ga. App. 668, 730 S.E.2d 136, 2012 Ga. App. LEXIS 630 (2012), cert. denied, No. S12C1848, 2012 Ga. LEXIS 874 (Ga. Nov. 5, 2012) (decided under former O.C.G.A. §§ 24-3-36 and 24-4-23).

Advertising person as partner. — An advertisement in a local newspaper, which contained the statement that a certain person was a member of a named partnership and which was paid for by such person, was admissible to show an ostensible partnership, though such person did not authorize the statement in the advertisement that the person was a partner. English v. Moore, 28 Ga. App. 265, 110 S.E. 737, 1922 Ga. App. LEXIS 439 (1922) (decided under former Civil Code 1910, § 5782).

Admitting responsibility for personal injuries. — Statements made by one person in the presence of another to the effect that the latter was alone responsible for injuries the person had received, may, if silently acquiesced in by the person amount to an admission on the person's part, that such statements are true. Holston v. Southern Ry., 116 Ga. 656, 43 S.E. 29, 1902 Ga. LEXIS 216 (1902) (decided under former Civil Code 1895, § 5195).

Admission of coconspirator. — Evidence as to admissions of guilt involving the defendant, made by a coconspirator after the termination of the conspiracy, is admissible when it appears that the admissions were made in the presence of the defendant personally and were then freely and voluntarily declared by the defendant to be true. Gunter v. State, 19 Ga. App. 772, 92 S.E. 314, 1917 Ga. App. LEXIS 353 (1917) (decided under former Penal Code 1910, § 1029).

When the evidence is sufficient on the trial of a criminal case to authorize a finding that the defendant and another were engaged in a criminal conspiracy, and the alleged codefendant thereafter makes a confession in the presence of the defendant which involves both parties, the silence of the defendant under such circumstances may amount to an implied admission. Brown v. State, 121 Ga. App. 228, 173 S.E.2d 470, 1970 Ga. App. LEXIS 1180 (1970) (decided under former Code 1933, § 38-409).

Codefendants. — When a joint statement was made and signed by all three defendants in the presence of each other, the statement of each was the statement of all, and so far as the writing contained statements by others than the defendant on trial, proof of such statements, together with the defendant's assent, constituted

Illustrations and Applications (Cont'd)

evidence of an admission by the defendant. Morris v. State, 177 Ga. 106, 169 S.E. 495, 1933 Ga. LEXIS 128 (1933) (decided under former Code 1933, § 38-409).

When the state shows affirmatively that one jointly indicted with a defendant made statements in the presence of the defendant charging the defendant with the commission of the crime, and the defendant either stood mute or failed to deny the charge, the evidence would change in character from hearsay to that of an implied admission by the defendant. Long v. State, 205 Ga. 257, 53 S.E.2d 365, 1949 Ga. LEXIS 352 (1949) (decided under former Code 1933, § 38-409).

Statement by accomplice. — Trial court did not abuse the court's discretion in determining that an accomplice's statement that "This is the t-shirt we used to wipe the blood and our prints off the gun" was admissible as an adoptive admission because the defendant was looking at and within earshot of the accomplice when the accomplice made the incriminating statement. Wilkins v. State, 308 Ga. 131, 839 S.E.2d 525, 2020 Ga. LEXIS 125 (2020).

Statements of wife. — Evidence of a third party as to statements of a wife that her husband had just beaten her, made in the presence of the husband without denial on his part and under such circumstances that his silence amounted to an admission, is admissible on the trial of the husband for wife-beating, although the wife declines to testify at the trial against her husband. Joiner v. State, 119 Ga. 315, 46 S.E. 412, 1904 Ga. LEXIS 822 (1904) (decided under former Penal Code 1895, § 1003).

Incriminating statements by intoxicated person. — When a witness made certain incriminating statements as to defendants in their presence and which defendants did not deny, and it was shown that this man was drunk and maudlin, and that the defendants were greatly frightened by the man's conduct, such statements of the witness did not measure up to the requirements of the law necessary to show an implied confession by silence or acquiescence and it was error to admit such statements in evidence. Jones v. State, 2 Ga. App. 433, 58 S.E. 559, 1907 Ga. App. LEXIS 413 (1907) (decided under former Penal Code 1895, § 1003).

Ratification of paper. — Mere silence of a party when a paper is handed to that party is no evidence of the ratification of the transaction evidenced by the paper, when the person handling the paper is not one to whom dissent would be appropriately expressed. Berry v. Cooper, 33 Ga. 155 (1864) (decided under former law).

Silence during trial. — When a plaintiff or defendant introduces a witness in court, the acquiescence or silence of the party during the progress of the trial would not amount to an admission, the circumstances at that time not requiring an answer or denial. McElmurray v. Turner, 86 Ga. 215, 12 S.E. 359, 1890 Ga. LEXIS 216 (1890) (decided under former Code 1882, § 3790).

Declarations of bystanders. — Evidence as to a declaration of a bystander, accusing one then present of the commission of a criminal act, which declaration the accused person heard but failed to deny or explain, may tend to establish the accused's guilt, and is admissible on the accused's trial for such offense. Thurman v. State, 14 Ga. App. 534, 81 S.E. 796 (1914) (decided under former Penal Code 1910, § 1029); Love v. State, 69 Ga. App. 411, 25 S.E.2d 827, 1943 Ga. App. LEXIS 99 (1943) (decided under former Code 1933, § 38-409).

Doctor's conversation with a patient was not an admission by silence as the patient did not ask the doctor why the doctor failed to biopsy a breast lesion and no explanation was required; that the doctor stated that they should discuss the patient's concerns at a later time could not be construed as silence or acquiescence in the face of the patient's concerns. Davis v. Reid, 272 Ga. App. 312, 612 S.E.2d 112, 2005 Ga. App. LEXIS 282 (2005) (decided under former O.C.G.A. § 24-3-36).

Failure to deny inculpatory statements was held admissible in the following cases. — See Moye v. State, 66 Ga. 740, 1881 Ga. LEXIS 103 (1881) (decided under former Code 1873, § 3790); Davis v. State, 114 Ga. 104, 39 S.E. 906,

1901 Ga. LEXIS 588 (1901) (decided under former Penal Code 1895, § 1003); Clark v. State, 117 Ga. 254, 43 S.E. 853, 1903 Ga. LEXIS 206 (1903) (decided under former Penal Code 1895, § 1003); Watson v. State, 136 Ga. 236, 71 S.E. 122, 1911 Ga. LEXIS 496 (1911) (decided under former Penal Code 1910, § 1029); Nunn v. State, 143 Ga. 451, 85 S.E. 346, 1915 Ga. LEXIS 480 (1915) (decided under former Penal Code 1910, § 1029); Gates v. State, 20 Ga. App. 171, 92 S.E. 974, 1917 Ga. App. LEXIS 777 (1917) (decided under former Penal Code 1910, § 1029); Holt v. State, 28 Ga. App. 758, 113 S.E. 49, 1922 Ga. App. LEXIS 840 (1922) (decided under former Penal Code 1910, § 1029); Smiley v. State, 156 Ga. 60, 118 S.E. 713, 1923 Ga. LEXIS 201 (1923) (decided under former Penal Code 1910, § 1029); Walker v. State, 197 Ga. 221, 28 S.E.2d 656, 1944 Ga. LEXIS 236 (1944) (decided under former Code 1933, § 38-409); Clarke v. Woodward, 76 Ga. App. 181, 45 S.E.2d 473, 1947 Ga. App. LEXIS 401 (1947) (decided under former Code 1933, § 38-409).

Letter memorializing a conversation, to which recipient failed to respond, was admissible as an admission by silence. — Trial court did not err in allowing an attorney to read a letter memorializing a conversation between him and a decedent because the out-of-court statement of the decedent referenced in the letter was admissible as an admission by silence of the executor when the attorney mailed a package containing closing documents to the executor, including a receipt the decedent had executed, and the executor mailed a check to the attorney based on the erroneous assumption that the executor needed to do so in order to pay off the advance that had been received and was referenced in the receipt; the attorney mailed the letter to the executor, returned the check, and set forth the conversation with the decedent concerning the intent behind the receipt, and the executor's failure to respond could be construed as an acquiescence to the construction of the receipt set forth in the letter. Jerkins v. Jerkins, 300 Ga. App. 703, 686 S.E.2d 324, 2009 Ga. App. LEXIS 1251 (2009) (decided under former O.C.G.A. § 24-3-36).

Settlement agreement. — Trial court erred in granting the insureds' motion to enforce a settlement agreement a parent and an administrator allegedly reached with an insurer because the insurer's tender was not sufficient to constitute acceptance of the settlement offer; the attorney for the mother and the administrator was not silent but stated the intent to consult with the parent and the administrator, the attorney committed to no deadline for responding, and the terms of the offer were in writing and equally known to all parties. Kitchens v. Ezell, 315 Ga. App. 444, 726 S.E.2d 461, 2012 Ga. App. LEXIS 290 (2012), cert. denied, No. S12C1386, 2012 Ga. LEXIS 805 (Ga. Oct. 15, 2012) (decided under former O.C.G.A. § 24-3-36).

Statement was not an adoptive admission. — Police officer's testimony that the defendant's brother stated that the defendant was involved was hearsay and was not admissible as an adoptive admission as there was no evidence permitting an inference the defendant was present when the brother made the statement. In the Interest of E. B., 343 Ga. App. 823, 806 S.E.2d 272, 2017 Ga. App. LEXIS 484 (2017).

Trial court acted within the court's discretion in concluding that accusations of sexual abuse and the defendant's failure to respond to the accusations were admissible as adoptive admissions because the accusation that the defendant had sexual intercourse with the girlfriend's daughter was the type of statement that an innocent defendant would normally be induced to respond and there were sufficient facts from which the jury could infer that the defendant heard, understood, and acquiesced in the accusations, given that the accusations were made in the apartment in the defendant's presence. Neal v. State, 355 Ga. App. 125, 843 S.E.2d 11, 2020 Ga. App. LEXIS 269 (2020).

Statement admissible as adoptive admission. — Trial court did not abuse the court's discretion in admitting an audio recording of a phone call that the defendant made from jail as an adoptive admission because the trial court was authorized to conclude that the other person was implicating the defendant in the

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shooting of the victim by saying that the other person recognized the defendant in the video of the shooting. Westbrook v. State, 308 Ga. 92, 839 S.E.2d 620, 2020 Ga. LEXIS 135 (2020).

In the defendant's trial for incest, the defendant's flight from Georgia to Texas and the defendant's failure to meet with the investigator as the defendant promised, although not admissible under the adoptive-admission theory under O.C.G.A. § 24-8-801, was admissible as circumstantial evidence of consciousness of guilt. Torres v. State, 353 Ga. App. 470, 838 S.E.2d 137, 2020 Ga. App. LEXIS 25 (2020).

Evidence was properly held inadmissible in the following case. — See Chedel v. Mooney, 158 Ga. 297, 123 S.E. 300, 1924 Ga. LEXIS 135 (1924) (decided under former Penal Code 1910, § 1029).

Trial court improperly instructed the jury that acquiescence or silence, when the circumstances required an answer, a denial, or other conduct, could amount to an admission because a charge in the language of former O.C.G.A. § 24-3-36 could be construed as a comment on the defendant's constitutional right to remain silent; however, the improper jury instruction was harmless beyond a reasonable doubt because the charge as a whole contained sufficient clarity so as not to mislead the jury concerning the exercise of the right to remain silent, there was no reference at trial that could be construed as a comment on the defendant's exercise of his right to remain silent, the evidence of guilt was overwhelming, and the erroneous charge in no way pointed directly at the substance of the defendant's defense. Ruiz v. State, 286 Ga. 146, 686 S.E.2d 253, 2009 Ga. LEXIS 702 (2009) (decided under former O.C.G.A. § 24-3-36).

4. Admissions of Agents

a. In General

General rule originated in necessity of case. — The well-settled rule of law, which makes an agent a competent witness either for or against the agent's principal, originated in the necessity of the case. Lowrys v. Candler, 64 Ga. 236, 1879 Ga. LEXIS 39 (1879) (decided under former Code 1873, § 2206).

Former Code 1933, § 4-315 had reference only to the admissibility of declarations as evidence. Grant v. Hart, 197 Ga. 662, 30 S.E.2d 271, 1944 Ga. LEXIS 315 (1944) (decided under former Code 1933, § 4-315).

Established rules as to declarations of deceased agents. — Words "or else the agent is dead" referred to entries made by an agent since deceased in the regular course of the business of the principal, or declarations made by a person since deceased against interest, or other instances when, under the established rules of evidence, the declarations of a deceased person might be admitted in evidence. Turner v. Turner, 123 Ga. 5, 50 S.E. 969, 1905 Ga. LEXIS 359 (1905) (decided under former Civil Code 1895, § 3034).

Admission by agent must come within one of exceptions. — Admission on the part of the agent which had the effect of imputing negligence to the principal when not coming within one of the exceptions stated in former Code 1933, §§ 4-315 and 38-406 and not made by authority of the principal and was erroneously admitted in evidence. Southern Ry. v. Allen, 118 Ga. App. 645, 165 S.E.2d 194, 1968 Ga. App. LEXIS 1486 (1968) (decided under former Code 1933, § 4-315).

Trial court's exclusion of a report by an emergency vehicle operator's supervisor regarding a collision that occurred between the emergency vehicle and a driver's vehicle was proper in the driver's personal injury action arising therefrom pursuant to former O.C.G.A. §§ 10-6-64 and 24-3-33, as even if the statements contained in the report were part of the res gestae, the statements were inadmissible as admissions against interest because neither declarant was a party to the litigation; further, as the statements at issue were cumulative of other testimony that was admitted, the driver could not show prejudice by the trial court's exclusion thereof. Wynn v. City of Warner Robins, 279 Ga. App. 42, 630 S.E.2d 574, 2006

Ga. App. LEXIS 443 (2006), cert. denied, No. S06C1502, 2006 Ga. LEXIS 753 (Ga. Sept. 18, 2006) (decided under former O.C.G.A. § 10-6-64).

Declaration of an agent, to be admissible, must be a part of the res gestae. Turner v. Turner, 123 Ga. 5, 50 S.E. 969, 1905 Ga. LEXIS 359 (1905) (decided under former Civil Code 1895, § 3034).

If the admission is made dum fervet opus and accompanies the agent's act, or is so nearly connected therewith in time as to be free from all suspicion of device or afterthought, it is admissible in evidence as part of the res gestae. National Bldg. Ass'n v. Quin, 120 Ga. 358, 47 S.E. 962 (1904) (decided under former Civil Code 1895, § 3034); Southern Express Co. v. Cohen, 13 Ga. App. 174, 78 S.E. 1111 (1913) (decided under former Civil Code 1910, § 3606); Atlantic Coast Line R.R. v. Williams, 21 Ga. App. 453, 94 S.E. 584 (1917), overruled on other grounds, Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965). William-Hester Marble Co. v. Walton, 22 Ga. App. 433, 96 S.E. 269, 1918 Ga. App. LEXIS 377 (1918) (decided under former Civil Code 1910, § 3606); Willingham v. Benton, 25 Ga. App. 412, 103 S.E. 497, 1920 Ga. App. LEXIS 845 (1920) (decided under former Civil Code 1910, § 3606); Jolly v. Chattahoochee Fertilizer Co., 28 Ga. App. 194, 110 S.E. 639, 1922 Ga. App. LEXIS 381 (1922) (decided under former Civil Code 1910, § 3606).

Under former Code 1933, §§ 4-315 and 38-406, declarations of an agent as to business transacted by the agent, in order to be admissible against the principal, must have been made by the agent while representing the principal in the transaction in controversy, and must also have been a part of the negotiation, and constituting the res gestae. National Bldg. Ass'n v. Quin, 120 Ga. 358, 47 S.E. 962, 1904 Ga. LEXIS 554 (1904) (decided under former Civil Code 1895, § 3034).

Declarations of an agent, to affect the agent's principal, must be a part of the res gestae. Robert R. Sizer & Co. v. G. T. Melton & Sons, 129 Ga. 143, 58 S.E. 1055, 1907 Ga. LEXIS 323 (1907) (decided under former Civil Code 1895, § 3034).

To allow the introduction of an extrajudicial statement made by employee in evidence for the purpose of charging an employer with the plaintiff's damage, the statement must have been made as a part of the res gestae. A.K. Adams & Co. v. Homeyer, 87 Ga. App. 301, 73 S.E.2d 581, 1952 Ga. App. LEXIS 672 (1952) (decided under former Code 1933, § 4-315).

In a premises liability action, the declaration of an employee tending to admit negligence that would be imputable to the employer made four years after the fact was not a part of the res gestae and was not admissible in evidence as an admission against interest inasmuch as the employee was not a party to the litigation. Harris v. Inn of Lake City, 285 Ga. App. 521, 647 S.E.2d 277, 2007 Ga. App. LEXIS 519 (2007) (decided under former O.C.G.A. § 10-6-64).

Statements of one agent to another. — Statements of an agent of one company to the agent of another, exchanged in the course of the agent's employment, regarding the business of the two, was admissible pursuant to former O.C.G.A. §§ 10-6-64 and 24-3-33. Coffee Butler Serv., Inc. v. Sacha, 208 Ga. App. 4, 430 S.E.2d 149, 1993 Ga. App. LEXIS 441 (1993) (decided under former O.C.G.A. § 10-6-64).

Declarations of general agent and manager concerning business. — Declarations made by one shown by some testimony to have been a general agent and manager of a particular business institution, concerning matters relating to that business, are admissible to bind the agent's principal during the continuance of the agency, though made in reference to a particular act of negotiation previously completed and not constituting a part of the res gestae thereof. Citizens Bank v. Timmons, 15 Ga. App. 815, 84 S.E. 232, 1915 Ga. App. LEXIS 67 (1915) (decided under former Civil Code 1910, § 3606).

Letter written by general agent. — Letter written by a general agent relating to matters apparently within the scope of the agent's agency is, when pertinent to the issue under investigation, competent evidence in the trial of an action against the principal. Louisville & Nashville R.R. v. Tift, 100 Ga. 86, 27 S.E. 765, 1896 Ga. LEXIS 562 (1896) (decided under former

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Civil Code 1895, § 3034); Chero-Cola Bottling Co. v. Southern Express Co., 29 Ga. App. 656, 116 S.E. 325, 1923 Ga. App. LEXIS 153 (1923) (decided under former Civil Code 1910, § 3606).

Memorandum for suit of general freight agent. — Defendant may introduce in evidence a memorandum made by the general freight agent of the plaintiff for the purpose of instituting suit against a third party, indicating the agent's understanding of a contract, the agent who made the memorandum having been authorized to do so in the prosecution of the plaintiff's claim and having acted within the scope of the agent's authority in making it. In this transaction, the agent was the alter ego of the plaintiff. Georgia R.R. v. Smith, 76 Ga. 634, 1886 Ga. LEXIS 75 (1886) (decided under former Code 1882, § 2206).

Proof of agency required. — Before the declarations of an agent are admissible, some proof of the agency should be submitted. J.B. Colt Co. v. Wheeler, 31 Ga. App. 427, 120 S.E. 792, 1923 Ga. App. LEXIS 971 (1923) (decided under former Civil Code 1910, § 3606); Waddington v. Stores Mut. Protective Ass'n, 52 Ga. App. 331, 183 S.E. 143, 1935 Ga. App. LEXIS 161 (1935) (decided under former Code 1933, § 4-315).

Declaration in scope of employment is declaration of principal. — Admission or declaration of an agent, when acting within the scope of the agent's authority, is to be considered as the admission or declaration of the agent's principal. Williams v. C. G.H. Kelsey Halsted, 6 Ga. 365, 1849 Ga. LEXIS 47 (1849) (decided under former law); Krogg v. Atlanta & W. Point R.R., 77 Ga. 202, 1886 Ga. LEXIS 323 (1886) (decided under former Code 1882, § 2206); Cable Co. v. Walker, 127 Ga. 65, 56 S.E. 108, 1906 Ga. LEXIS 738 (1906) (decided under former Civil Code 1895, § 3034); Chero-Cola Bottling Co. v. Southern Express Co., 29 Ga. App. 656, 116 S.E. 325, 1923 Ga. App. LEXIS 153 (1923) (decided under former Civil Code 1910, § 3606); Waddington v. Stores Mut. Protective Ass'n, 52 Ga. App. 331, 183 S.E. 143, 1935 Ga. App. LEXIS 161 (1935) (decided under former Code 1933, § 4-315).

Admission made through an agent during the existence and in pursuance of the agent's power is no less evidence against the principal than if made by the principal in person. William-Hester Marble Co. v. Walton, 22 Ga. App. 433, 96 S.E. 269, 1918 Ga. App. LEXIS 377 (1918) (decided under former Civil Code 1910, § 3606).

Declaration is inadmissible if not made in business of principal. — Declaration of an agent was not competent evidence against the agent's principal if it did not appear that such declaration was made while engaged in the business of the master or principal. Newton Mfg. Co. v. White, 53 Ga. 396 (1874) (decided under former Code 1873, § 2206); Evans & Ragland v. Atlanta & W. Point R.R., 56 Ga. 498 (1876) (decided under former Code 1873, § 2206); National Bldg. Ass'n v. Quin, 120 Ga. 358, 47 S.E. 962 (1904) (decided under former Civil Code 1895, § 3034); Gainesville Midland Ry. v. Jackson, 1 Ga. App. 632, 57 S.E. 1007 (1907), overruled on other grounds, Seaboard A.L. Ry. v. Brewton, 25 Ga. App. 168, 102 S.E. 920 (1920) decided under former Civil Code 1985, § 3034; Lott v. Banks, 21 Ga. App. 246, 94 S.E. 322, 1917 Ga. App. LEXIS 541 (1917) (decided under former Civil Code 1910, § 3606).

Under former Civil Code 1895, §§ 3034 and 5192, as declarations made by a shipping agent of a railroad company, to the effect that certain goods had been delivered at the point of destination, were not within the scope of such an agent's employment and relate to a past transaction, those declarations were not admissible in evidence against the company. The more especially was this true when it was apparent that the agent's information as to the matter of delivery must necessarily have been derived from hearsay. Southern Ry. v. Kinchen & Co., 103 Ga. 186, 29 S.E. 816, 1897 Ga. LEXIS 387 (1897) (decided under former Civil Code 1895, § 3034).

If, although it appeared that the person whose admissions were introduced was the agent of the defendant "from 1917 to 1924," there was nothing to show when such admissions were made or that the admissions were made during the exis-

tence of the agency and within the scope of the agent's authority, a verdict in the plaintiff's favor was without evidence to support the verdict as to such items. Ninth Dist. Agrl. & Mechanical School v. Wofford Power Co., 37 Ga. App. 271, 139 S.E. 916, 1927 Ga. App. LEXIS 622 (1927) (decided under former Civil Code 1910, § 3606).

Answers in another case by "vice-president and southern manager" were not admissible. — Mere fact that a lumber company sued out interrogatories for its "vice-president and southern manager" in one case would not render the answers admissible in another case as admissions of the company; testifying as a witness was not such a normal part of the lumber business that testimony given by "the vice-president and southern manager" as a witness was impliedly an admission of the lumber company. Robert R. Sizer & Co. v. G. T. Melton & Sons, 129 Ga. 143, 58 S.E. 1055, 1907 Ga. LEXIS 323 (1907) (decided under former Civil Code 1895, § 3034).

Only declaration by agent against principal was excluded. — There was nothing in the evidence rejected to make the evidence objectionable since the evidence was not in the nature of a declaration of an agent "against his principal." The agent was the party to the suit, and not the principal. Shippey Bros. & White v. Owens, 17 Ga. App. 127, 86 S.E. 407, 1915 Ga. App. LEXIS 294 (1915) (decided under former Civil Code 1910, § 3606).

Admission of past wrongful act by employee may not be used against employer. — Admission of a past wrongful act by a servant or employee, while evidence against the servant or employee, may not be used to charge the master or employer. A.K. Adams & Co. v. Homeyer, 87 Ga. App. 301, 73 S.E.2d 581, 1952 Ga. App. LEXIS 672 (1952) (decided under former Code 1933, § 4-315).

Rules apply to corporations. — Corporation can only make admissions through the corporation's agents, and the admissions of such agents, acting within the scope of the agent's powers and about the business of the agency, are admissible. Timeplan Loan & Inv. Corp. v. Moorehead, 221 Ga. 648, 146 S.E.2d 748, 1966 Ga. LEXIS 660 (1966) (decided under former Code 1933, § 4-315); White v. Front Page, Inc., 133 Ga. App. 749, 213 S.E.2d 32, 1975 Ga. App. LEXIS 2270 (1975) (decided under former Code 1933, § 4-315).

Agency must be shown. — Admissions of the alleged agent of a corporation are not admissible to bind the corporation unless the agency is shown. Ninth Dist. Agrl. & Mechanical School v. Wofford Power Co., 37 Ga. App. 271, 139 S.E. 916, 1927 Ga. App. LEXIS 622 (1927) (decided under former Civil Code 1910, § 3606).

Declarations as to injury made after accident held inadmissible. — On the trial of a suit against a railroad company for damages to the plaintiff (who was an employee of the company) caused by the negligence of the coemployees, it was error in the court to permit the plaintiff to testify before the jury that an assistant supervisor had told the plaintiff, after the injury was done, that the company felt itself under obligations to support the plaintiff and the plaintiff's family during the plaintiff's life. East Tenn., Va. & Ga. R.R. v. Duggan, 51 Ga. 212, 1874 Ga. LEXIS 91 (1874) (decided under former Code 1873, § 2206).

Reports to the general manager of a company touching a railway accident, and who was to blame therefor, made several days after the event, by the superintendent and the conductor, supported by the affidavit of the latter and of several other employees, are not admissible in evidence to affect the company, whether such reports were exacted and made under standing rules requiring them or under special orders for the particular occasion, no question of notice to the company being involved in the controversy. Carroll v. East Tenn., Va. & Ga. Ry., 82 Ga. 452, 10 S.E. 163, 1889 Ga. LEXIS 282 (1889) (decided under former Code 1882, § 2206).

Statements of the engineer three days after plaintiff was hurt as to the condition of the plaintiff's engine, not being part of the res gestae, were clearly inadmissible as declarations or admissions against the railroad company. Central R.R. & Banking Co. v. Maltsby, 90 Ga. 630, 16 S.E. 953, 1892 Ga. LEXIS 226 (1892) (decided under former Code 1882, § 2206).

Adjuster's affidavit relied on hearsay and unauthenticated documents. — Vacancy exclusion did not bar coverage

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for the vandalism loss to an insured as a matter of law, and the trial court erred in failing to grant summary judgment to it on that issue because the senior field adjuster's affidavit did not include any admissible evidence regarding the status of the renovation work as the affidavit relied on hearsay and unauthenticated documents. R&G Invs. & Holdings, LLC v. Am. Family Ins. Co., 337 Ga. App. 588, 787 S.E.2d 765, 2016 Ga. App. LEXIS 331 (2016), cert. denied, No. S16C1830, 2017 Ga. LEXIS 144 (Ga. Feb. 27, 2017).

Declaration of insurance agent as to notice of insured's condition held inadmissible. — Declaration of an insurance agent that the agent knew the insured had a heart condition and notified the company was not admissible because the admission covered a transaction which did not constitute a part of the res gestae of the negotiation of the sale of insurance to the insured. National Life & Accident Ins. Co. v. Hullender, 86 Ga. App. 438, 71 S.E.2d 754, 1952 Ga. App. LEXIS 969 (1952) (decided under former Code 1933, § 4-315).

Impeachment of absent accountant. — Because the defendant's accountant had authored a chart regarding billing and finance for two disabled men in the defendant's unlicensed personal care home and the accountant did not testify, the information in the chart was hearsay under O.C.G.A. § 24-8-801(c), and the state was entitled to impeach the accountant's credibility with a former conviction, O.C.G.A. § 24-8-806. Hawkins v. State, 350 Ga. App. 862, 830 S.E.2d 301, 2019 Ga. App. LEXIS 377 (2019).

Court decides whether declaration part of res gestae. — It is for the trial court to determine whether a given declaration constitutes a part of the res gestae, and nothing more appearing, it is not an abuse of the court's discretion to exclude a declaration by defendant's employee made some 15 or 20 minutes after the event to which it is alleged to relate. A.K. Adams & Co. v. Homeyer, 87 Ga. App. 301, 73 S.E.2d 581, 1952 Ga. App. LEXIS 672 (1952) (decided under former Code 1933, § 4-315).

Instruction held not erroneous. — Charge of the court that "if in the prosecution of the master's business, the agent makes any representation with reference to the master's business, then such statements are imputable to the master," reasonably construed, restricted the statements of the agent to such portions of the master's business as came within the scope of the agency, and was not error for the assigned reason that the charge did not contain such a restriction. Grant v. Hart, 197 Ga. 662, 30 S.E.2d 271, 1944 Ga. LEXIS 315 (1944) (decided under former Code 1933, § 4-315).

b. Proving Agency

Agent may testify as to agency despite death of principal. — Agent not a party to a suit is a competent witness to show the agent's agency, not disclosed at the time of the transaction in controversy, although the agent's principal may be dead, and although the effect of establishing the agency may be to make the estate liable instead of the agent individually. Lowrys v. Candler, 64 Ga. 236, 1879 Ga. LEXIS 39 (1879) (decided under former Code 1873, § 2206).

Agent's mere declarations as to agency are inadmissible. — While the sworn testimony of an agent is competent evidence of such agency, the mere declarations of such a person are not admissible to prove such agency. Augusta Roofing & Metalworks, Inc. v. Clemmons, 97 Ga. App. 576, 103 S.E.2d 583, 1958 Ga. App. LEXIS 830 (1958) (decided under former Code 1933, § 4-315).

Agent certainly cannot confer authority upon the agent, and evidence of the agent's own statements or admissions, therefore, is not admissible against the agent's principal for the purpose of establishing, enlarging, or renewing the agent's authority, nor can the agent's authority be established by showing that the agent acted as agent, or that the agent claimed to have the powers which the agent assumed to exercise. Waddington v. Stores Mut. Protective Ass'n, 52 Ga. App. 331,

183 S.E. 143, 1935 Ga. App. LEXIS 161 (1935) (decided under former Code 1933, § 4-315).

Other evidence tending to establish agency required. — When extraneous circumstances, independently of and without regard to the declarations of the alleged agent personally, clearly tend to establish the fact of an agency, the agent's declarations may be admitted and considered as a part of the res gestae of the transaction; but the declarations of an alleged agent, when standing alone, are never admissible to prove the agent's agency. Waddington v. Stores Mut. Protective Ass'n, 52 Ga. App. 331, 183 S.E. 143, 1935 Ga. App. LEXIS 161 (1935) (decided under former Code 1933, § 4-315).

Evidence of alleged agent's conduct as agent and benefit to principal. — Declarations of one alleged to be an agent or one assuming to be an agent would not, by themselves, be admissible to prove agency, yet when such declarations of the alleged agent are accompanied by other evidence as to the conduct of the person in the character of agent and an acceptance by the alleged principal of the fruits of the agency, such declarations are admissible in evidence as a part of the res gestae, and as such may be considered in the establishment of the agency. Lawhon v. Henshaw, 63 Ga. App. 683, 11 S.E.2d 846, 1940 Ga. App. LEXIS 528 (1940) (decided under former Code 1933, § 4-315).

Agent's declarations are part of res gestae. — Declaration of an agent is not competent to prove the agency unless the declaration accompanies the transaction or is a part of the res gestae and there is other evidence, direct or circumstantial, which tends to prove the agency, in which event such declaration is admissible in corroboration. King v. Bonnerman, 93 Ga. App. 210, 91 S.E.2d 196, 1956 Ga. App. LEXIS 682 (1956).

Declaration held not part of res gestae. — Statement of a city clerk that the city accepted responsibility for an accident on a sidewalk was not part of the res gestae and was not admissible evidence creating a genuine issue of material fact as to the city's duty to maintain the sidewalk. Williams v. City of Social Circle, 225 Ga. App. 746, 484 S.E.2d 687 (decided under former O.C.G.A. § 10-6-64).

Declarations of Conspirators

1. In General

Coconspirator's exception to the hearsay rule was codified at former O.C.G.A. § 24-3-5. Hunter v. State, 179 Ga. App. 368, 347 S.E.2d 2, 1986 Ga. App. LEXIS 2631 (1986) (decided under former O.C.G.A. § 24-3-5).

Defendant responsible for incidental, but unanticipated, acts. — Because there was evidence that two or more individuals had conspired to accomplish a common design and one or more of the conspirators had done an act which was an incidental and probable consequence of the original design and which the acting conspirator(s) deemed to be expedient to the accomplishment of the common design, the intent and act of the acting conspirator(s) could be imputed to the other active conspirators even though the act may not have been a part of the original design. Therefore, when the common design was to burglarize the victim's house, that the defendant may not have anticipated defendant's coconspirators committing the burglary on the day in question did not remove defendant from the conspiracy, nor did it relieve defendant from responsibility for the incidental and probable acts that defendant's coconspirators felt were expedient to the accomplishment of the common design. Thus, it was not error to present evidence concerning acts of murder committed by the coconspirators that occurred after the coconspirators entered the victim's home. Bruce v. State, 263 Ga. 273, 430 S.E.2d 745, 1993 Ga. LEXIS 502 (1993) (decided under former O.C.G.A. § 24-3-5).

Statement must be that of defendant. — If a hearsay statement was not made by the defendant and could not be imputed to defendant, it could not be admitted to show defendant's motive or intent. Hart v. State, 174 Ga. App. 134, 329 S.E.2d 178, 1985 Ga. App. LEXIS 1763 (1985) (decided under former O.C.G.A. § 24-3-5).

Use of translator. — Use of a translator between the defendant and a witness did not render the witness's testimony about the substance of the translation inadmissible, pursuant to the language

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conduit rule, as no evidence was presented to the trial court to show that the translator had a motive to distort the translation; moreover, since the translator was a coconspirator, to the extent statements were made directly to the witness in English to further the conspiracy, the witness could testify regarding those statements under the coconspirator exception to the hearsay rule, former O.C.G.A. § 24-3-5. Lopez v. State, 281 Ga. App. 623, 636 S.E.2d 770, 2006 Ga. App. LEXIS 1179 (2006) (decided under former O.C.G.A. § 24-3-5).

Intercepted conversation between coconspirators in the back seat of a patrol car was admissible in the trial of one of the coconspirators because the other took the stand and was subject to cross-examination, and because the conversation took place when the coconspirators were actively attempting concealment. Burgeson v. State, 267 Ga. 102, 475 S.E.2d 580 (decided under former O.C.G.A. § 24-3-5).

Coconspirator not available for cross-examination. — Testimony by an undercover police officer as to a statement made by a coconspirator during the pendency of the criminal project was not inadmissible simply because the coconspirator was not available for cross-examination since, after the fact of conspiracy is proved, the declarations of any one of the conspirators during the pendency of the project is admissible against all. Clark v. State, 236 Ga. App. 153, 510 S.E.2d 907 (decided under former O.C.G.A. § 24-3-5).

2. Application

Former statute was applicable in civil as well as criminal cases. Hames v. Shaver, 229 Ga. 412, 191 S.E.2d 861, 1972 Ga. LEXIS 628 (1972) (decided under former Code 1933, § 38-306).

Former statute did not render a conspirator incompetent to testify as to facts until the fact of the conspiracy be proved by independent evidence; it simply prohibited a conspirator from testifying as to declarations made by one conspirator outside the presence of, and upon the trial of, another conspirator. Birt v. State, 236 Ga. 815, 225 S.E.2d 248, 1976 Ga. LEXIS 1040, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632, 1976 U.S. LEXIS 3967 (1976); Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32, 1983 Ga. App. LEXIS 2041 (1983) (decided under former O.C.G.A. § 24-3-5); Whitton v. State, 178 Ga. App. 862, 344 S.E.2d 703, 1986 Ga. App. LEXIS 2579 (1986) (decided under former O.C.G.A. § 24-3-5).

Former O.C.G.A. § 24-3-5 did not exclude the testimony of a coconspirator, only the admission of coconspirator's declarations to third persons. Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32, 1983 Ga. App. LEXIS 2041 (1983) (decided under former O.C.G.A. § 24-3-5).

Declarations of coconspirator admissible. — Codefendant's incriminating statements made shortly after the crime occurred, made prior to arrest, and which were noncustodial statements made to acquaintances of codefendant and defendant rather than to police officers, can be characterized as the declaration of a conspirator rather than as a confession and would be admissible against defendant when the requirements of former O.C.G.A. § 24-3-5 have been met. Brown v. State, 262 Ga. 223, 416 S.E.2d 508, 1992 Ga. LEXIS 508 (1992) (decided under former O.C.G.A. § 24-3-5).

Because the defendant admitted entry into a home, the defendant's statement to a witness, and the victim's in-court identification of the defendant supported the defendant's conviction of armed robbery and burglary under O.C.G.A. §§ 16-7-1(a) and 16-8-41(a), the jury could find that a conspiracy existed without regard to a coconspirator's statements under former O.C.G.A. § 24-3-5. Lewis v. State, 311 Ga. App. 54, 714 S.E.2d 732, 2011 Ga. App. LEXIS 693 (2011) (decided under former O.C.G.A. § 24-3-5).

Unidentified coconspirators' statement admissible. — Testimony by officers regarding an incriminating statement made by one of three coconspirators was admissible even though the officers could not identify the speaker and the admission of the statement did not mandate severance of the parties for trial nor a limiting instruction to the jury that such a

"confession" by one codefendant could not be considered against the others. Reid v. State, 210 Ga. App. 783, 437 S.E.2d 646, 1993 Ga. App. LEXIS 1349 (1993) (decided under former O.C.G.A. § 24-3-5).

Conspiracy made coconspirator's statement admissible. — Coconspirator's statement's were admissible against defendant since circumstantial evidence established a conspiracy to kill defendant's wife. Walker v. State, 213 Ga. App. 407, 444 S.E.2d 824, 1994 Ga. App. LEXIS 634 (1994), cert. denied, No. S94C1439, 1994 Ga. LEXIS 1012 (Ga. Sept. 16, 1994) (decided under former O.C.G.A. § 24-3-5).

Even though a coconspirator may have terminated participation in the conspiracy when, at the request of the police, the coconspirator voluntarily placed a recorded call to another coconspirator, statements made by the latter implicating the defendant in murder and armed robbery were admissible since the second coconspirator was still conspiring to conceal the crime, and statements of the former, offered for the limited purpose of putting the second coconspirator's responses in context, were admissible as original evidence under former O.C.G.A. § 24-3-2. Bundrage v. State, 265 Ga. 813, 462 S.E.2d 719, 1995 Ga. LEXIS 839 (1995) (decided under former O.C.G.A. § 24-3-5).

After finding that the evidence was sufficient to establish a prima facie case of conspiracy, the trial court properly ruled that a coconspirator's statements were admissible against defendant. Robertson v. State, 268 Ga. 772, 493 S.E.2d 697 (decided under former O.C.G.A. § 24-3-5).

When the evidence established a prima facie case of conspiracy, codefendant's surreptitiously recorded statements, in which the codefendant implicated defendant in the charged offenses, were admissible. Avery v. State, 269 Ga. 584, 502 S.E.2d 230 (decided under former O.C.G.A. § 24-3-5).

Court of Appeals of Georgia held that the coconspirators' testimony was properly allowed by the trial court as most of the testimony at issue was admissible on grounds other than as declarations of coconspirators, and the state made a prima facie showing of the existence of a conspiracy without relying on the coconspirators' declarations. English v. State, 288 Ga. App. 436, 654 S.E.2d 150, 2007 Ga. App. LEXIS 1143 (2007) (decided under former O.C.G.A. § 24-3-5).

Since there was evidence that the defendant and the co-indictees engaged in a conspiracy to rob the victim, the trial court did not abuse the court's discretion in admitting the co-conspirator's statement. Foster v. State, 290 Ga. 599, 723 S.E.2d 663, 2012 Ga. LEXIS 198 (2012) (decided under former O.C.G.A. § 24-3-5).

Trial court's admission of a coconspirator's statements that were made in the presence of an accomplice's mother before the state proved the fact of the conspiracy did not constitute reversible error because inasmuch as a conspiracy could be shown by proof of an agreement between two or more persons to commit a crime, the accomplice's testimony was sufficient to make a prima facie case of conspiracy. James v. State, 316 Ga. App. 406, 730 S.E.2d 20, 2012 Ga. App. LEXIS 577 (2012) (decided under former O.C.G.A. § 24-3-5).

Recorded call during conspiracy admissible. — Statements made by the codefendant to an informant in a recorded call were admissible under former O.C.G.A. § 24-3-5 because at the time of the call the conspiracy was still pending between defendant and the coconspirator to commit the trafficking offense for which they were eventually arrested. Perez v. State, 254 Ga. App. 872, 564 S.E.2d 208, 2002 Ga. App. LEXIS 408 (2002), cert. denied, No. S02C1272, 2002 Ga. LEXIS 1103 (Ga. Nov. 25, 2002) (decided under former O.C.G.A. § 24-3-5).

Coconspirator's statements were admissible under former O.C.G.A. § 24-3-5 as the statements contained sufficient indicia of reliability to ensure that defendant's Sixth Amendment rights were not violated and afforded the jury a satisfactory basis for evaluating the truth of the statements. Duckett v. State, 259 Ga. App. 814, 578 S.E.2d 524, 2003 Ga. App. LEXIS 275 (2003) (decided under former O.C.G.A. § 24-3-5).

Witness statement on conspiracy. — Witness's statement regarding conversations between defendant and an accomplice were admissible as a conspiracy between defendant and the accomplice

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because: (1) two masked bandits committed three armed robberies; (2) defendant and the accomplice attempted to use the credit and debit cards obtained in the robberies immediately after the robberies; (3) masks and a gun used in the robberies were found in defendant's car; and (4) defendant told defendant's half-sister that the defendant and the accomplice had committed the robberies. Dillard v. State, 272 Ga. App. 523, 612 S.E.2d 804, 2005 Ga. App. LEXIS 198 (2005), cert. denied, No. S05C1272, 2005 Ga. LEXIS 476 (Ga. July 8, 2005) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err in admitting a witness's testimony as to out-of-court declarations by a coconspirator under the exception to the hearsay rule codified at former O.C.G.A. § 24-3-5 because the evidence was sufficient to authorize the jury to find that there was a conspiracy between the defendant and the coconspirator to rob the victim and the victim's companions; evidence independent of the coconspirator's declarations to the witness authorized the jury to infer that the defendant and the coconspirator had entered into a conspiracy to rob the victim because there was evidence that the defendant and the coconspirator were companions, and the defendant and coconspirator were together at the scene on the day of the shooting. White v. State, 308 Ga. App. 38, 706 S.E.2d 570, 2011 Ga. App. LEXIS 116 (2011) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err in admitting the testimony of a state's witness regarding statements made by a codefendant because the testimony was admissible under the conspiracy exception contained in former O.C.G.A. § 24-3-5 since the witness heard the coconspirators' incriminating statements about the crimes during the pendency of the conspiracy, the witness could testify as to what the coconspirators said; the defendant's own admissions and confessions introduced in evidence showed that the defendant had committed the armed robberies and provided the details regarding the defendant's participation in the crimes. Edwards v. State, 312 Ga. App. 141, 717 S.E.2d 722, 2011 Ga. App. LEXIS 910 (2011), cert. denied, No. S12C0363, 2012 Ga. LEXIS 221 (Ga. Feb. 27, 2012) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err in allowing a witness to testify that a coindictee told the witness that the defendant and the coindictee had committed robberies because even without evidence of an express agreement between the defendant and the coindictee, there was sufficient evidence of the coindictee's involvement in a conspiracy with the defendant to commit the robberies so as to authorize the admission of the witness's evidence. Lewis v. State, 291 Ga. 273, 731 S.E.2d 51, 2012 Ga. LEXIS 629 (2012), superseded by statute as stated in Williams v. State, 347 Ga. App. 6, 815 S.E.2d 590, 2018 Ga. App. LEXIS 455 (2018) (decided under former O.C.G.A. § 24-3-5).

Because the conspiracy set forth in the indictment involved traveling between two apartment complexes for criminal purposes, a co-conspirator's statement to a witness that the co-conspirator saw the defendant walking out of the woods just after hearing a gun shot was admissible. Grissom v. State, 296 Ga. 406, 768 S.E.2d 494, 2015 Ga. LEXIS 5 (2015).

Conspirator's declaration admissible. — After defendant and defendant's brother agreed on a plan to murder a victim, and after the crime occurred but before defendant's arrest, the brother told a girlfriend that the brother had "taken care" of the victim, the statement was properly admitted as a declaration of a coconspirator, rather than as a confession. Copprue v. State, 279 Ga. 771, 621 S.E.2d 457, 2005 Ga. LEXIS 723 (2005) (decided under former O.C.G.A. § 24-3-5).

Hearsay exception allowed coconspirator's testimony. — Testimony by the second defendant's girlfriend that the second defendant told the girlfriend that the first defendant had shot a man while the defendants were breaking into cars was admissible under the co-conspirator exception to the hearsay rule. Billings v. State, 293 Ga. 99, 745 S.E.2d 583, 2013 Ga. LEXIS 486 (2013).

Trial court did not err in allowing into evidence a co-conspirator's hearsay testi-

mony regarding the statement that the defendant made about having to do something just before the murder because the statement was properly admitted into evidence as a declaration against the defendant from a co-conspirator involved in the murder. Folston v. State, 294 Ga. 778, 755 S.E.2d 803, 2014 Ga. LEXIS 194 (2014).

Overheard statement of a defendant's coconspirator as the two planned to "hit a lick" and, later, the coconspirator's statement to a girlfriend that the "lick went bad" were both properly admitted under the coconspirator exception to the hearsay rule, former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801(d)(2)(E)); furthermore, because the statements were not testimonial, the confrontation clause was not violated. Favors v. State, 296 Ga. 842, 770 S.E.2d 851 (2015).

Because the state established by a preponderance of the evidence that the defendant and others conspired to rob the victim, the testimony of two witnesses was admissible under the co-conspirator exception. Dublin v. State, 302 Ga. 60, 805 S.E.2d 27, 2017 Ga. LEXIS 765 (2017).

Fact that the other man's conviction subsequently was reversed based on the doctrines of issue preclusion and collateral estoppel did not negate the evidence presented at the defendant's trial establishing that a conspiracy existed for purposes of the hearsay exception. Womack v. State, 353 Ga. App. 801, 840 S.E.2d 41, 2020 Ga. App. LEXIS 89 (2020).

Recorded conversation to nonparty admissible. — Statements coindictee made to another person in an audiotaped conversation were admissible under former O.C.G.A. § 24-3-5 because the statements were made after the shooting and while the identity of those complicit therein were still being concealed. Hassel v. State, 284 Ga. 861, 672 S.E.2d 627, 2009 Ga. LEXIS 28 (2009) (decided under former O.C.G.A. § 24-3-5).

Admission of fellow gang member's testimony. — Defendants' murder convictions were upheld on appeal because the trial court did not err by admitting or refusing to strike a fellow gang member's testimony since the statements were admissible as co-conspirator statements under O.C.G.A. § 24-8-801(d)(2)(E) as the statements were found to have been made in the course of and in furtherance of a conspiracy of being a part of a criminal street gang. Kemp v. State, 303 Ga. 385, 810 S.E.2d 515, 2018 Ga. LEXIS 107 (2018).

Recorded statement of coconspirator properly admitted. — Trial court did not err by allowing the state to introduce a coconspirator's recorded statement against a defendant, which the defendant claimed incriminated the defendant, as the coconspirator testified and was subject to cross-examination. Overton v. State, 295 Ga. App. 223, 671 S.E.2d 507, 2008 Ga. App. LEXIS 1358 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. Apr. 20, 2009) (decided under former O.C.G.A. § 24-3-5).

Codefendant's statements that were recorded in telephone calls between the codefendant and an accomplice were admissible against the defendant as statements of a coconspirator. Moon v. State, 288 Ga. 508, 705 S.E.2d 649, 2011 Ga. LEXIS 97 (2011) (decided under former O.C.G.A. § 24-3-5).

When the state is proceeding on a theory of conspiracy, acts and statements of one conspirator in furtherance of the conspiracy are admissible against all other conspirators. Knowles v. State, 159 Ga. App. 239, 283 S.E.2d 51, 1981 Ga. App. LEXIS 2563 (1981) (decided under former Code 1933, § 38-306).

Qualification of rule. — Statutory rule is qualified by the fact that each is responsible for the acts of the others only insofar as such acts are naturally or necessarily done pursuant to or in furtherance of the conspiracy. Handley v. State, 115 Ga. 584, 41 S.E. 992, 1902 Ga. LEXIS 485 (1902) (decided under former Penal Code 1895, § 999); Hill v. Reynolds, 19 Ga. App. 334, 91 S.E. 434, 1917 Ga. App. LEXIS 113 (1917) (decided under former Penal Code 1910, § 1025).

Exculpatory evidence of conspirator not admissible. — Under former O.C.G.A. § 24-3-5, the declaration of a coconspirator during the pendency of a criminal project is admissible against all coconspirators; however, it may only be used against a conspirator and is not a means by which a conspirator may intro-

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duce exculpatory evidence. Dunbar v. State, 205 Ga. App. 867, 424 S.E.2d 43, 1992 Ga. App. LEXIS 1525 (1992), cert. denied, No. S93C0228, 1993 Ga. LEXIS 280 (Ga. Feb. 25, 1993) (decided under former O.C.G.A. § 24-3-5).

Applies to acts. — Former statute applied to the acts of the conspirators as well as to the conspirators' declarations. Thompson v. State, 58 Ga. App. 593, 199 S.E. 568, 1938 Ga. App. LEXIS 63 (1938) (decided under former Code 1933, § 38-306).

Agency theory. — Conspirator's declaration in furtherance of the conspiracy may be used against another conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both. Park v. Huff, 506 F.2d 849, 1975 U.S. App. LEXIS 16511 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40, 1975 U.S. LEXIS 2328 (1975) (decided under former Code 1933, § 38-306).

Not applicable to direct testimony. — It was the declarations of coconspirators related by another witness that are dealt with in the former statute, and not the direct testimony of an alleged coconspirator on the trial. Sutton v. State, 237 Ga. 423, 228 S.E.2d 820, 1976 Ga. LEXIS 1254 (1976) (decided under former Code 1933, § 38-306).

Indictment not required. — Former statute did not include any condition precedent of indictment of a coconspirator before the former statute became applicable. 17 Ga. App. 279, 86 S.E. 530, 1915 Ga. App. LEXIS 342 (decided under former Penal Code 1910, § 1025); Cook v. State, 22 Ga. App. 770, 97 S.E. 264, 1918 Ga. App. LEXIS 744 (1918) (decided under former Penal Code 1910, § 1025); 137 Ga. App. 449, 224 S.E.2d 94, 1976 Ga. App. LEXIS 2482 (decided under former Code 1933, § 38-306); Baugher v. State, 212 Ga. App. 7, 440 S.E.2d 768, 1994 Ga. App. LEXIS 114 (1994), overruled on other grounds, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-3-5).

Membership in conspiratorial unit required. — When the statements of a defendant were recounted to a third person by an individual who was part of the conspiratorial unit, the statements were admissible. Mullins v. State, 147 Ga. App. 337, 248 S.E.2d 706, 1978 Ga. App. LEXIS 2681 (1978), aff'd, Mullins v. Lavoie, 249 Ga. 411, 290 S.E.2d 472, 1982 Ga. LEXIS 825 (1982); Knox v. State, 156 Ga. App. 777, 275 S.E.2d 371, 1980 Ga. App. LEXIS 3197 (1980) (decided under former Code 1933, § 38-306).

Undisclosed conspirators. — Acts and declarations of undisclosed conspirators, looking to the concealment of identity and the suppression of evidence, are admissible against other conspirators. Mitchell v. State, 86 Ga. App. 292, 71 S.E.2d 756, 1952 Ga. App. LEXIS 939 (1952) (decided under former Code 1933, § 38-306).

Statements out of defendant's presence. — Conversation overheard between coindictees out of the presence of the defendant is admissible. Hutchins v. State, 229 Ga. 804, 194 S.E.2d 442, 1972 Ga. LEXIS 780 (1972) (decided under former Code 1933, § 38-306).

Once some evidence of a joint criminal undertaking has been presented, the out-of-court statements of one wrongdoer, are admissible against the other even though that other is separately tried, and even though the statements were made outside the other's presence. Davis v. State, 129 Ga. App. 796, 201 S.E.2d 345, 1973 Ga. App. LEXIS 1161 (1973) (decided under former Code 1933, § 38-306).

Indicia of reliability required for admissibility are that the statements be non-narrative, that the declarant is shown by the evidence to know whereof the declarant speaks, that the witness is not apt to be proceeding on faulty recollection, and that the circumstances show that the declarant had no apparent reason to lie to the witness; it is not required that all of the indicia be present for the statement to be admissible. Timberlake v. State, 158 Ga. App. 125, 279 S.E.2d 283, 1981 Ga. App. LEXIS 2102 (1981) (decided under former O.C.G.A. § 24-3-5).

When statement inadmissible. — Statement was inadmissible under former O.C.G.A. § 24-3-5 when the statement implicates the defendant and when the statement was not accompanied by an

indicia of reliability such as the spontaneity of the statement and the fact that the statement was against the speaker's penal interest. Boswell v. State, 158 Ga. App. 727, 282 S.E.2d 196, 1981 Ga. App. LEXIS 2391 (1981) (decided under former O.C.G.A. § 24-3-5).

Admission of a coconspirator's hearsay statement that defendant was the "triggerman" in a robbery violated the confrontation clause, and could not be deemed harmless error since the hearsay lacked sufficient indicia of reliability; the statement was not res gestae, was not given under oath, was not against penal interest, and was exculpatory. Horton v. Zant, 941 F.2d 1449, 1991 U.S. App. LEXIS 20577 (11th Cir. 1991), cert. denied, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652, 1992 U.S. LEXIS 1943 (1992) (decided under former O.C.G.A. § 24-3-5).

Codefendant's statement was not admissible as there was no indication that the codefendant was sharing details of the completed crimes to advance the interests of an alleged conspiracy when the codefendant spoke to two federal prison inmates in West Virginia who had no other apparent connection to the codefendant, the defendant, their criminal scheme, or even the State of Georgia. Finney v. State, 311 Ga. 1, 855 S.E.2d 578, 2021 Ga. LEXIS 82 (2021).

Trial court erred when it admitted hearsay statements from an accomplice to a detective because they did not advance any object of the conspiracy and were more akin to spilling the beans; the error was harmless given the other strong evidence of defendant's guilt. Stafford v. State, 312 Ga. 811, 865 S.E.2d 116, 2021 Ga. LEXIS 685 (2021).

Statement made five months before crime. — Witness's testimony as to coconspirator's statement offering money for the killing of coconspirator's ex-husband made some five months prior to the killing was admissible even though witness/coconspirator expressed disinterest in the offer at that time. Blalock v. State, 250 Ga. 441, 298 S.E.2d 477, 1983 Ga. LEXIS 537 (1983) (decided under former O.C.G.A. § 24-3-5).

Wire tap conversations of other conspirators to which appellants had not been parties were admissible under former O.C.G.A. § 24-3-5. Gilstrap v. State, 162 Ga. App. 841, 292 S.E.2d 495, 1982 Ga. App. LEXIS 3175 (1982), overruled on other grounds, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-3-5).

Telephone conversations. — Witness's hearsay testimony about the defendant's statements to the witness on the telephone shortly after a robbery and shooting in the witness's front yard was admissible against the co-defendant in their joint trial under the co-conspirator exception; however, the defendant's statements exonerating the co-defendant during the defendant's plea hearing were not admissible to impeach the telephone statements. Esprit v. State, 305 Ga. 429, 826 S.E.2d 7, 2019 Ga. LEXIS 159 (2019).

Tapes and transcripts admissible when testimony admissible. — Trial court did not err in admitting in evidence two tapes of a coconspirator's conversations with defendants and the transcripts thereof because the transcripts were the result of a confession made by the coconspirator, after one coconspirator heard defendants' statements and could have testified to what they said. The coconspirator's voluntary participation in the recording of the conversations does not alter their basic admissibility as the lawful electronic interception of the conversations only created a recording of what the coconspirator could have related as a witness. Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32, 1983 Ga. App. LEXIS 2041 (1983) (decided under former O.C.G.A. § 24-3-5).

Statements attributable to coconspirator who refused to testify properly admitted as declarations of coconspirator during course of conspiracy. Owens v. State, 251 Ga. 313, 305 S.E.2d 102, 1983 Ga. LEXIS 766 (1983) (decided under former O.C.G.A. § 24-3-5).

Incriminating statements admissible even if trial severed. — When defendant and the codefendant were charged with murder and related offenses, the denial of defendant's motion to sever defendant's trial from that of the codefendant was not an abuse of discretion because, inter alia, incriminating state-

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ments that the codefendant made to police would have been admissible against defendant in a separate trial as the statements of a coconspirator under former O.C.G.A. § 24-3-5. Styles v. State, 279 Ga. 134, 610 S.E.2d 23, 2005 Ga. LEXIS 145 (2005) (decided under former O.C.G.A. § 24-3-5).

Denial of defendant's severance motion was not an abuse of discretion because there was no likelihood of confusion as the defendant and the codefendant acted in concert and their defenses were not antagonistic, substantially similar evidence was presented against them, and the codefendant's statements would have been admissible in a separate trial as statements of a coconspirator. Shelton v. State, 279 Ga. 161, 611 S.E.2d 11, 2005 Ga. LEXIS 232 (2005) (decided under former O.C.G.A. § 24-3-5).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever because there was no danger of confusion when only two defendants were on trial in connection with the same occurrence, and there was no evidence admissible against the defendant that was not admissible against the codefendant; the fact that the codefendant elicited a witness's testimony concerning a coconspirator's out-of-court declarations as coconspirator did not show prejudice, and the witness's testimony was admissible under former O.C.G.A. § 24-3-5. White v. State, 308 Ga. App. 38, 706 S.E.2d 570, 2011 Ga. App. LEXIS 116 (2011) (decided under former O.C.G.A. § 24-3-5).

Separate trials. — Statutory rule is true even though the person against whom the declaration is introduced is being tried separately from the person making the declaration. Coleman v. State, 141 Ga. 731, 82 S.E. 228, 1914 Ga. LEXIS 129 (1914) (decided under former Penal Code 1910, § 1025); Tate v. State, 41 Ga. App. 300, 152 S.E. 609, 1930 Ga. App. LEXIS 552 (1930) (decided under former Penal Code 1910, § 1025); Driggers v. State, 51 Ga. App. 370, 180 S.E. 619, 1935 Ga. App. LEXIS 698 (1935) (decided under former Code 1933, § 38-306); Wortham v. State, 184 Ga. 674, 192 S.E. 720, 1937 Ga. LEXIS 610 (1937) (decided under former Code 1933, § 38-306); West v. State, 85 Ga. App. 220, 68 S.E.2d 611, 1952 Ga. App. LEXIS 695 (1952) (decided under former Code 1933, § 38-306).

Declarations were properly admitted in the following cases. — See Campbell v. State, 202 Ga. 705, 44 S.E.2d 903, 1947 Ga. LEXIS 540 (1947) (decided under former Code 1933, § 38-306); Gay v. State, 249 Ga. 747, 294 S.E.2d 476, 1982 Ga. LEXIS 1186 (1982) (decided under former O.C.G.A. § 24-3-5); Manuel v. State, 245 Ga. App. 565, 538 S.E.2d 472, 2000 Ga. App. LEXIS 1005 (2000) (decided under former O.C.G.A. § 24-3-5).

Note-passing inmate was properly permitted to relate to the jury statements made by other inmates when the inmates were discussing what to do about the possibility the victim was going to tell the authorities about their effort to escape as the coconspiratorial statements were made during the pendency of the conspiracy and the statements were presumed to be sufficiently reliable to satisfy the confrontation clause's requirement of trustworthiness; the admission of the statements was not at odds with Crawford v. Washington, 541 U.S. 36 (2004), because statements admissible pursuant to the hearsay exception permitting the use of statements made in furtherance of a conspiracy were not testimonial. McKinney v. State, 281 Ga. 92, 635 S.E.2d 153, 2006 Ga. LEXIS 582 (2006) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err by admitting the recorded statement of a witness under circumstances in which, at trial, the witness recanted the statement, claiming the statement was fabricated under pressure from police; in the statement, the witness stated that the defendant bragged about the crime, reporting that the defendant shot the victim and predicting that the eyewitnesses were too intoxicated to be able to identify them. The statement corroborated other details, related to the witness by the codefendants regarding the crime itself and the subsequent attempts to dispose of instrumentalities of the crime, and the statement was properly admitted as evidence of statements made by coconspirators during the pendency of

the criminal project. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913, 2009 Ga. LEXIS 390 (2009) (decided under former O.C.G.A. § 24-3-5).

Witness's hearsay testimony about the defendant's statements to the witness on the telephone shortly after a robbery and shooting in the witness's front yard was admissible against a co-defendant, the witness's cousin, under the co-conspirator exception to the hearsay rule. Esprit v. State, 305 Ga. 429, 826 S.E.2d 7, 2019 Ga. LEXIS 159 (2019).

Writings were admissible. — See Bragg v. State, 52 Ga. App. 69, 182 S.E. 403, 1935 Ga. App. LEXIS 37 (1935) (letter written by one coconspirator to other relating to crime) (decided under former Code 1933, § 38-306); Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, 1979 Ga. LEXIS 910, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, 1979 U.S. LEXIS 3232 (1979) (written directions to witness from coconspirator) (decided under former Code 1933, § 38-306); Farley v. State, 155 Ga. App. 188, 270 S.E.2d 361, 1980 Ga. App. LEXIS 2515 (1980) (trial transcript) (decided under former Code 1933, § 38-306).

Error to allow into deliberations. — All writings introduced in evidence in lieu of testimony from the witness stand, such as interrogatories, depositions, dying declarations, and confessions of guilt of a defendant or of an alleged coconspirator, which depend entirely for their value on the credibility of the maker, should not be in the possession of the jury during their deliberations, thus, when defendants' and alleged coconspirators' signed statements are delivered to the jury, over timely objections, a new trial must be granted. Royals v. State, 208 Ga. 78, 65 S.E.2d 158, 1951 Ga. LEXIS 284 (1951) (decided under former Code 1933, § 38-306).

No ineffective counsel since statements by coconspirator admissible. — Defendant failed to show that trial counsel was ineffective in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV, as statements made by a coconspirator were admissible under former O.C.G.A. § 24-3-5, and the failure of counsel to raise a non-meritorious hearsay objection did not constitute ineffective legal representation. Jones v. State, 279 Ga. 854, 622 S.E.2d 1, 2005 Ga. LEXIS 771 (2005) (decided under former O.C.G.A. § 24-3-5).

In a murder case, trial counsel did not render ineffective assistance in failing to object on confrontation grounds to the admission of a witness's testimony regarding the jailhouse statement of the co-defendant, who did not testify at trial, because the witness's testimony regarding the co-defendant's statement was admissible under the hearsay exception for statements of co-conspirators because the state clearly presented evidence of an agreement to kill the victim; an eyewitness positively identified the co-defendant as the person that the eyewitness had seen commit the shooting; and the statement was made during the pendency of the conspiracy. Franklin v. State, 298 Ga. 636, 784 S.E.2d 359, 2016 Ga. LEXIS 237 (2016) (decided under former O.C.G.A. § 24-3-5).

No ineffective assistance of counsel. — Defendant did not receive ineffective assistance of counsel due to counsel's failure to object to hearsay testimony of a note-passing inmate as the hearsay statements fell within the exception permitting hearsay statements made by coconspirators during the pendency of the conspiracy; the failure to object did not constitute deficient performance. McKinney v. State, 281 Ga. 92, 635 S.E.2d 153, 2006 Ga. LEXIS 582 (2006) (decided under former O.C.G.A. § 24-3-5).

Contrary to the defendant's contention, the record did show that the defendant's trial lawyer offered a hearsay objection to some of the women's hearsay testimony at trial, and to the extent that the trial lawyer failed to object, it would have been reasonable for the trial lawyer to conclude that the testimony was admissible under the co-conspirator exception and, therefore, unobjectionable on hearsay grounds. Jordan v. State, 307 Ga. 450, 836 S.E.2d 86, 2019 Ga. LEXIS 801 (2019).

3. Conspiracy Defined

a. In General

Conspiracy consists in a corrupt agreement between two or more persons to do an unlawful act, the exis-

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tence of which agreement may be established by direct proof, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose. Kennemore v. State, 222 Ga. 362, 149 S.E.2d 791, 1966 Ga. LEXIS 486 (1966) (decided under former Code 1933, § 38-306).

Conspiracy is a corrupt agreement between two or more persons to do an unlawful act. Park v. State, 224 Ga. 467, 162 S.E.2d 359, 1968 Ga. LEXIS 825 (1968), cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441, 1968 U.S. LEXIS 119 (1968), superseded by statute as stated in Warren v. State, 281 Ga. App. 490, 636 S.E.2d 671, 2006 Ga. App. LEXIS 1085 (2006), superseded by statute as stated in Lewis v. State, 283 Ga. 191, 657 S.E.2d 854, 2008 Ga. LEXIS 199 (2008) (decided under former Code 1933, § 38-306).

To have a conspiracy, there must be an agreement between two or more persons to commit a crime. Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82, 1983 Ga. LEXIS 754 (1983) (decided under former O.C.G.A. § 24-3-5).

Motive to commit crime. — Criminal project referred to in former statute included the creation of the original motive to commit the crime, the plan to commit the crime and the carrying out of the plan. The motive and the plan could be created first in the mind of only one of the coconspirators and prior to the formation of the conspiracy itself. Knight v. State, 239 Ga. 594, 238 S.E.2d 390, 1977 Ga. LEXIS 1264 (1977) (decided under former Code 1933, § 38-306).

Common design. — Common design which is the essence of conspiracy may be made to appear when the parties steadily pursue the same object, whether acting separately or together by common or different means, ever leading to the same unlawful result. Park v. Huff, 506 F.2d 849, 1975 U.S. App. LEXIS 16511 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40, 1975 U.S. LEXIS 2328 (1975) (decided under former Code 1933, § 38-306).

b. Proof of Conspiracy

Conspiracy may be proved by circumstantial as well as by direct evidence. Darden v. State, 172 Ga. 590, 158 S.E. 414 (1931) (decided under former Penal Code 1910, § 1025); Wortham v. State, 184 Ga. 674, 192 S.E. 720 (1937) (decided under former Code 1933, § 38-306); Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968).Sentell v. State, 227 Ga. 153, 179 S.E.2d 234, 1971 Ga. LEXIS 623 (1971) (decided under former Code 1933, § 38-306).

Existence of a conspiracy may be established by direct proof, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose. Park v. State, 224 Ga. 467, 162 S.E.2d 359, 1968 Ga. LEXIS 825 (1968), cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441, 1968 U.S. LEXIS 119 (1968), superseded by statute as stated in Warren v. State, 281 Ga. App. 490, 636 S.E.2d 671, 2006 Ga. App. LEXIS 1085 (2006), superseded by statute as stated in Lewis v. State, 283 Ga. 191, 657 S.E.2d 854, 2008 Ga. LEXIS 199 (2008); Weatherington v. State, 139 Ga. App. 795, 229 S.E.2d 676, 1976 Ga. App. LEXIS 1997 (1976) (decided under former Code 1933, § 38-306).

Existence of a common design or purpose between two or more persons to commit an unlawful act may be shown by direct or circumstantial evidence. Harris v. State, 255 Ga. 500, 340 S.E.2d 4, 1986 Ga. LEXIS 577 (1986) (decided under former O.C.G.A. § 24-3-5).

State must make a prima facie showing of a conspiracy by aliunde proof. Weatherington v. State, 139 Ga. App. 795, 229 S.E.2d 676, 1976 Ga. App. LEXIS 1997 (1976) (decided under former Code 1933, § 38-306).

Conspiracy itself must be proved by evidence aliunde such declarations, and the declarations are not admissible unless the conspiracy is prima facie shown by such aliunde evidence. Park v. State, 224 Ga. 467, 162 S.E.2d 359, 1968 Ga. LEXIS 825 (1968), cert. denied, 393 U.S. 980, 89

S. Ct. 449, 21 L. Ed. 2d 441, 1968 U.S. LEXIS 119 (1968), superseded by statute as stated in Warren v. State, 281 Ga. App. 490, 636 S.E.2d 671, 2006 Ga. App. LEXIS 1085 (2006), superseded by statute as stated in Lewis v. State, 283 Ga. 191, 657 S.E.2d 854, 2008 Ga. LEXIS 199 (2008); Sentell v. State, 227 Ga. 153, 179 S.E.2d 234, 1971 Ga. LEXIS 623 (1971) (decided under former Code 1933, § 38-306); Park v. Huff, 506 F.2d 849, 1975 U.S. App. LEXIS 16511 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40, 1975 U.S. LEXIS 2328 (1975).

In order to establish a conspiracy it is not necessary that the aliunde proof shall itself warrant a verdict, slight evidence connecting the defendant with the crime will be sufficient. Weatherington v. State, 139 Ga. App. 795, 229 S.E.2d 676, 1976 Ga. App. LEXIS 1997 (1976) (decided under former Code 1933, § 38-306).

Must prove conspiracy beyond a reasonable doubt. — In order to properly admit the declaration of an alleged coconspirator made during a criminal project, there must be sufficient evidence aliunde the declaration to establish the conspiracy at least prima facie and prove the declaration's existence beyond a reasonable doubt. Wortham v. State, 184 Ga. 674, 192 S.E. 720, 1937 Ga. LEXIS 610 (1937) (decided under former Code 1933, § 38-306); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341, 1979 Ga. LEXIS 1020 (1979) (decided under former Code 1933, § 38-306).

While the rule is well established that the conspiracy itself cannot be shown from the acts and declarations of one coconspirator in the absence of the others (this rule being necessary to prevent the finding of the fact of the conspiracy from such acts and declarations alone), yet the acts and declarations made in carrying out the conspiracy are relevant. Bragg v. State, 52 Ga. App. 69, 182 S.E. 403, 1935 Ga. App. LEXIS 37 (1935) (decided under former Code 1933, § 38-306).

Participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence. Park v. Huff, 506 F.2d 849, 1975 U.S. App. LEXIS 16511 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40, 1975 U.S. LEXIS 2328 (1975) (decided under former Code 1933, § 38-306).

Declarations of coconspirator admissible. — State had to make a prima facie showing of the existence of a conspiracy, without regard to the declarations of the coconspirators, in order to admit their out-of-court declarations; trial judge could admit testimony by coconspirators before the conspiracy had been proved, provided the conspiracy's existence was ultimately shown at trial. Belmar v. State, 252 Ga. App. 264, 555 S.E.2d 902, 2001 Ga. App. LEXIS 1263 (2001) (decided under former O.C.G.A. § 24-3-5).

Hearsay statements made by each defendant implicating their coconspirators in the crimes were properly admitted against all the defendants as coconspirator's statements under former O.C.G.A. § 24-3-5; a conspiracy among the defendants was shown to have existed, as the evidence indicated that the victim's house was a drug house, that the first defendant's car was seen on the scene around the time of the murder, and that the second defendant later possessed drugs and money in a hotel room shortly after the crimes, and although the defendants all made incriminating statements in jail, the statements were made during the concealment phase as the defendants were still hiding their identities from the police. Brooks v. State, 281 Ga. 14, 635 S.E.2d 723, 2006 Ga. LEXIS 603 (2006), cert. denied, 549 U.S. 1215, 127 S. Ct. 1266, 167 L. Ed. 2d 91, 2007 U.S. LEXIS 2212 (2007) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err by permitting a witness to testify regarding a conversation the witness participated in which took place on the day after the crime in which the defendant and the codefendants made certain admissions concerning the crimes at issue; hearsay statements of coconspirators were admissible when the state at some point before the close of evidence established a prima facie case of conspiracy independent of the coconspirator statement. The state presented ample evidence in the form of testimony from two witnesses present with the defendant and the codefendants in the hours imme-

Proof of Conspiracy (Cont'd)

diately prior to the crimes that the three, together with one of the witnesses, planned to commit a robbery that night, and the statement was clearly within the concealment phase of the conspiracy. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913, 2009 Ga. LEXIS 390 (2009) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err by admitting incriminating statements a codefendant made to witnesses because the codefendant's statements were made during the pendency of the conspiracy and were admissible against the defendant under the coconspirator exception to the hearsay rule, former O.C.G.A. § 24-3-5; the admission of the codefendant's statements to lay witnesses during the concealment phase of the conspiracy did not violate the confrontation clause because the codefendant's statements were not testimonial. Allen v. State, 288 Ga. 263, 702 S.E.2d 869, 2010 Ga. LEXIS 891 (2010), cert. denied, 563 U.S. 1038, 131 S. Ct. 2973, 180 L. Ed. 2d 256, 2011 U.S. LEXIS 4254 (2011) (decided under former O.C.G.A. § 24-3-5).

Statements made by defendant's nephew during the time the nephew, defendant, and another man conspired to traffic in cocaine were admissible against the defendant in defendant's trial for trafficking in cocaine as the state first proved the existence of the conspiracy and defendant's involvement in the conspiracy. Smith v. State, 253 Ga. App. 131, 558 S.E.2d 455, 2001 Ga. App. LEXIS 1426 (2001) (decided under former O.C.G.A. § 24-3-5).

When evidence independent of the testimony of the coconspirators is not sufficient to show a conspiracy, it was error to admit in evidence testimony as to declarations of the alleged conspirators to charge the jury upon the subject of conspiracy and to overrule the grounds of those motions for new trial involving conspiracy. Caldwell v. State, 227 Ga. 703, 182 S.E.2d 789, 1971 Ga. LEXIS 821 (1971) (decided under former Code 1933, § 38-306).

Evidence insufficient. — Evidence of conspiracy between the defendant and a codefendant was not sufficient to render admissible against the former evidence of declarations by the latter. Johnson v. State, 186 Ga. 324, 197 S.E. 786, 1938 Ga. LEXIS 598 (1938) (decided under former Code 1933, § 38-306).

Trial court did not err by denying a defendant's motion for a new trial with regard to the defendant's convictions for armed robbery and possession of a firearm based on the trial court erroneously admitting the testimony of a witness, who was a long-time acquaintance of the co-indictee that the co-indictee had bragged about committing the robbery with the defendant as, although the state failed to establish a prima facie case of conspiracy, the admission was harmless in view of the victims' consistent eyewitness testimony implicating the defendant in the robbery and defendant's admission of the intention to rob the store. Fisher v. State, 295 Ga. App. 501, 672 S.E.2d 476, 2009 Ga. App. LEXIS 20 (2009) (decided under former O.C.G.A. § 24-3-5).

Evidence was sufficient to show conspiracy in the following cases. — See Patterson v. State, 199 Ga. 773, 35 S.E.2d 504 (1945) (decided under former Code 1933, § 38-306); Cowart v. State, 92 Ga. App. 253, 88 S.E.2d 208 (1955) (decided under former Code 1933, § 38-306); Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983) , aff'd, 252 Ga. 418, 314 S.E.2d 210 (1984) , cert. denied, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984).Dalton v. State, 237 Ga. App. 217, 513 S.E.2d 745 (decided under former O.C.G.A. § 24-3-5); Freeman v. State, 273 Ga. 137, 539 S.E.2d 127, 2000 Ga. LEXIS 853 (2000) (decided under former O.C.G.A. § 24-3-5).

Because the state proved that two masked bandits committed three armed robberies, that defendant and an accomplice attempted to use the credit and debit cards obtained in the robberies immediately after the robberies, that masks and a gun used in the robberies were found in defendant's car, and that defendant told defendant's half-sister that defendant and the accomplice had committed the robberies, the evidence was sufficient to establish the fact of a conspiracy between defendant and the accomplice sufficient to admit declarations by the accomplice at

defendant's criminal trial. Dillard v. State, 272 Ga. App. 523, 612 S.E.2d 804, 2005 Ga. App. LEXIS 198 (2005), cert. denied, No. S05C1272, 2005 Ga. LEXIS 476 (Ga. July 8, 2005) (decided under former O.C.G.A. § 24-3-5).

Testimony of two witnesses as to statements made by coconspirators was evidence independent of statements made to an inmate witness, and was sufficient to support a jury's finding of a conspiracy; therefore, a trial court did not err in allowing the inmate witness to testify as to statements made by one of the perpetrators of the crime to the inmate witness while both were incarcerated. Dickerson v. State, 280 Ga. App. 29, 633 S.E.2d 367, 2006 Ga. App. LEXIS 739 (2006), cert. denied, No. S06C1876, 2006 Ga. LEXIS 860 (Ga. Oct. 16, 2006) (decided under former O.C.G.A. § 24-3-5).

Evidence adduced at trial provided sufficient circumstantial evidence of a conspiracy to possess methamphetamine with intent to distribute such that it was proper to allow a coconspirator's hearsay statements implicating the defendant in a conspiracy to distribute methamphetamine and other narcotics, including evidence that the parties lived in the same house and that the coconspirator put narcotics in the defendant's pocket as police raided the house. Dockery v. State, 308 Ga. App. 502, 707 S.E.2d 889, 2011 Ga. App. LEXIS 224 (2011), cert. denied, No. S11C1080, 2011 Ga. LEXIS 577 (Ga. July 11, 2011) (decided under former O.C.G.A. § 24-3-5).

4. Pendency of Criminal Project

a. In General

Statements made in furtherance of conspiracy. — Because a codefendant's statements were non-custodial and were made in furtherance of a conspiracy, the trial court did not abuse the court's discretion in finding that the statements were admissible under former O.C.G.A. § 24-3-5 and did not violate Bruton; consequently, defendant failed to demonstrate that counsel's failure to request a severance constituted ineffective assistance. Hankerson v. State, 275 Ga. App. 545, 621 S.E.2d 772, 2005 Ga. App. LEXIS 1026 (2005) (decided under former O.C.G.A. § 24-3-5).

Statement made prior to formation of conspiracy. — Trial court did not err in admitting testimony of a coconspirator about a second coconspirator's statements to another regarding a plan to steal money from a house with the help of friends, including the defendant, as the statement was admissible under former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801(d)(2)(E)), even if the statement was made prior to the formation of the conspiracy. Peoples v. State, 295 Ga. 44, 757 S.E.2d 646, 2014 Ga. LEXIS 287 (2014) (decided under former O.C.G.A. § 24-3-5).

Statements during concealment phase of conspiracy. — O.C.G.A. § 24-8-801(d)(2)(E) specifically provides that statements made during and in furtherance of the conspiracy are admissible, including statements made during the concealment phase; the Georgia Supreme Court has held that for purposes of the hearsay exception, a conspiracy is deemed to endure so long as the parties thereto attempt to conceal either the crime or the identity of the perpetrators. Lawrence v. State, 342 Ga. App. 396, 802 S.E.2d 859, 2017 Ga. App. LEXIS 348 (2017), cert. denied, No. S18C0094, 2018 Ga. LEXIS 322 (Ga. May 7, 2018).

Statements made during concealment phase of conspiracy admissible. — Statements made by a coconspirator to police were admissible as made during the concealment phase of the conspiracy, even though made before evidence establishing conspiracy had been introduced. Morgan v. State, 206 Ga. App. 132, 424 S.E.2d 92, 1992 Ga. App. LEXIS 1418 (1992) (decided under former O.C.G.A. § 24-3-5).

Properly authenticated letters written by one of the three defendants charged in a conspiracy involving an armed robbery and related offense were properly admitted under the exception to the rule against hearsay evidence that statements made by a coconspirator during the concealment phase of the conspiracy were admissible against all other coconspirators. Williamson v. State, 285 Ga. App. 779, 648 S.E.2d 118, 2007 Ga. App. LEXIS 642 (2007) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err in denying the defendant's motion to exclude testimony

In General (Cont'd)

recounting the out-of-court statements of the codefendant, which were made to friends during the concealment phase of the conspiracy between the defendant and the codefendant, because, on balance, the statements bore sufficient indicia of reliability to be admissible; although the trial court erred by applying a presumption of reliability, its decision to admit the statements was not erroneous because the statements were admissible since they were not testimonial in nature, many of the statements were made in the defendant's presence, and none of the statements sought to deny the codefendant's guilt. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, 2010 Ga. LEXIS 186, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385, 2010 U.S. LEXIS 8606 (2010) (decided under former O.C.G.A. § 24-3-5).

Testimony admissible as coconspirator's statement made during pendency of conspiracy. Lawrence v. State, 187 Ga. App. 211, 369 S.E.2d 531, 1988 Ga. App. LEXIS 557 (1988) (decided under former O.C.G.A. § 24-3-5).

When objected-to statements were made during the pendency of and in furtherance of a conspiracy, they were not admitted as similar transactions or for the sole purpose of showing bad character, but were relevant and material to the issues in the case. Kitchens v. State, 235 Ga. App. 349, 509 S.E.2d 391 (decided under former O.C.G.A. § 24-3-5).

Statements made during course of conspiracy. — Trial court did not err in permitting into evidence testimony that the defendant was involved in two murders because the crux of the testimony was a co-indictee's inculpation of the defendant; as such statements were made to the defendant's cousin shortly after the murders but before the criminal enterprise was at an end, the co-indictee's declarations were admissible into evidence against the defendant under former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801). Bailey v. State, 291 Ga. 144, 728 S.E.2d 214, 2012 Ga. LEXIS 494 (2012) (decided under former O.C.G.A. § 24-3-5).

Trial counsel was not ineffective in failing to object to the co-indictee's statements because those statements were properly admitted as statements in furtherance of a conspiracy because the co-indictee, the defendant, and the other conspirators conspired to shoot the victim; and all of the co-indictee's statements were made either in an effort to direct the defendant to carry out the shooting or to inform the other conspirators of the status of the conspiracy. Thorpe v. State, 304 Ga. 266, 818 S.E.2d 547, 2018 Ga. LEXIS 545 (2018).

In the defendant's murder and robbery trial, the defendant's girlfriend's statements to her cousin as she sought refuge in her cousin's house and in letters to the defendant giving the defendant advice and comfort were admissible as statements of a coconspirator in furtherance of the conspiracy under O.C.G.A. § 24-8-801(d)(2)(E). Mosley v. State, 307 Ga. 711, 838 S.E.2d 289, 2020 Ga. LEXIS 56 (2020).

Though crime previously committed. — Statement by the defendant coconspirator made after the actual commission of the crime, but while the conspiracy continued is admissible. Evans v. State, 222 Ga. 392, 150 S.E.2d 240, 1966 Ga. LEXIS 494 (1966), cert. denied, 385 U.S. 953, 87 S. Ct. 336, 17 L. Ed. 2d 231, 1966 U.S. LEXIS 305 (1966), overruled in part, Harris v. State, 255 Ga. 464, 339 S.E.2d 712, 1986 Ga. LEXIS 586 (1986); Scott v. State, 151 Ga. App. 495, 260 S.E.2d 401, 1979 Ga. App. LEXIS 2582 (1979) (decided under former Code 1933, § 38-306).

Conspiracy must not have ended. — "Acts, doings and sayings of the coconspirators" made before or after the crime are admissible as original evidence against all defendants so long as they are made before the evidence shows that the conspiracy has ended. Price v. State, 239 Ga. 439, 238 S.E.2d 24, 1977 Ga. LEXIS 1199 (1977) (decided under former Code 1933, § 38-306).

Pendency of the criminal project includes the accomplishment of the crime itself plus concealment of the crime or the identity of the perpetrators. Crowder v. State, 237 Ga. 141, 227 S.E.2d 230, 1976 Ga. LEXIS 1177 (1976) (decided

under former Code 1933, § 38-306); Welch v. State, 237 Ga. 665, 229 S.E.2d 390, 1976 Ga. LEXIS 1351 (1976) (decided under former Code 1933, § 38-306); Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, 1979 Ga. LEXIS 910, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, 1979 U.S. LEXIS 3232 (1979) (decided under former Code 1933, § 38-306); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341, 1979 Ga. LEXIS 1020 (1979) (decided under former Code 1933, § 38-306); Scott v. State, 151 Ga. App. 495, 260 S.E.2d 401, 1979 Ga. App. LEXIS 2582 (1979) (decided under former Code 1933, § 38-306); Smith v. State, 244 Ga. 814, 262 S.E.2d 116, 1979 Ga. LEXIS 1428 (1979) (decided under former Code 1933, § 38-306).

Rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other. Evans v. State, 222 Ga. 392, 150 S.E.2d 240, cert. denied, 385 U.S. 953, 87 S. Ct. 336, 17 L. Ed. 2d 231 (1966); Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (decided under former Code 1933, § 38-306); Munsford v. State, 235 Ga. 38, 218 S.E.2d 792 (1975) (decided under former Code 1933, § 38-306); Mills v. State, 236 Ga. 365, 223 S.E.2d 725 (1976) (decided under former Code 1933, § 38-306); Moore v. State, 240 Ga. 807, 243 S.E.2d 1, cert. denied, 439 U.S. 903, 99 S. Ct. 268, 58 L. Ed. 2d 249 (1978).

Declarations during concealment admissible. — So long as the concealment phase of the conspiracy continues, declarations of either of the conspirators are admissible against the other. Timberlake v. State, 158 Ga. App. 125, 279 S.E.2d 283, 1981 Ga. App. LEXIS 2102 (1981) (decided under former O.C.G.A. § 24-3-5).

Statements made by the person with whom the defendant conspired to commit murder, made during the concealment phase of that conspiracy, were admissible against the defendant. Cromer v. State, 253 Ga. 352, 320 S.E.2d 751, 1984 Ga. LEXIS 950 (1984) (decided under former O.C.G.A. § 24-3-5).

Argument that the co-indictee's statements to a cell mate were not made during the concealment phase of the conspiracy was without merit as the concealment phase was ongoing because the co-indictee's statements were not made to police, the investigation was ongoing, and the other conspirators were still at-large; thus, the co-indictee's statements to the cell mate were admissible. Grimes v. State, 296 Ga. 337, 766 S.E.2d 72, 2014 Ga. LEXIS 922 (2014).

In the defendant's trial for malice murder, because the state made a prima facie showing of conspiracy among the defendant and four others to rob and kill the three victims, which was ongoing for purposes of concealing the crime at the time one conspirator divulged details of the crime scene to the conspirator's spouse, the spouse's statements to police were admissible. Lord v. State, 304 Ga. 532, 820 S.E.2d 16, 2018 Ga. LEXIS 652 (2018).

Declarations made in furtherance of conspiracy admissible. — Based on the detective's testimony that the co-indictee's cell mate never told the police that the co-indictee had sent the cell mate to talk to the police, it was not clearly erroneous for the trial court to conclude that the cell mate was not sent by the co-indictee to talk to the police; the argument that the co-indictee's statements were not in the furtherance of a conspiracy because they were made with the intent that they be communicated to authorities was without merit; and the co-indictee's statements to the cell mate were admissible. Grimes v. State, 296 Ga. 337, 766 S.E.2d 72, 2014 Ga. LEXIS 922 (2014).

Because, at the time a witness testified, the state had already established the sequence of events and provided direct testimony from the co-indictee that the defendant was involved in a conspiracy to rob and murder the victim, the witness's testimony that the co-indictee lied and stated that the co-indictee was leaving to meet the defendant at the store was made in furtherance of the conspiracy that ultimately culminated in the victim's murder. Downer v. State, 314 Ga. 617, 878 S.E.2d 537, 2022 Ga. LEXIS 254 (2022).

Agreement not to discuss case ever again. — Conspiracy continues during the concealment phase, after crime has been committed, and when evidence was

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presented that defendants agreed not to discuss case ever again and crime went unsolved for over two years, concealment phase lasted throughout that time. Fortner v. State, 248 Ga. 107, 281 S.E.2d 533, 1981 Ga. LEXIS 912 (1981) (decided under former O.C.G.A. § 24-3-5).

Co-conspirator's statement not made in furtherance of conspiracy. — Trial court's determination that certain of the statements by the co-defendant were not made "in furtherance of the conspiracy" was supported by the evidence and was not clearly erroneous and, thus, the trial court did not abuse the court's discretion in partially granting the defendant's motion in limine to exclude statements that were made implicating a coconspirator but not in furtherance of the conspiracy. State v. Wilkins, 302 Ga. 156, 805 S.E.2d 868, 2017 Ga. LEXIS 820 (2017).

Hit man's statement not made in furtherance of conspiracy. — Statements the hit man made to the hit man's girlfriend should not have been admitted into evidence because the statements did not further the conspiracy but were the hit man telling the girlfriend what the hit man planned to do and then telling the girlfriend about the crime the hit man committed. State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020).

Statement made during concealment phase of conspiracy. — Trial court did not err by allowing the testimony of the defendant's girlfriend pursuant to O.C.G.A. § 24-8-801(d)(2)(E) because the statement defendant made to the girlfriend was made during the concealment phase of the conspiracy and was admissible even if the girlfriend who testified about the statement was not part of the conspiracy. Lawrence v. State, 342 Ga. App. 396, 802 S.E.2d 859, 2017 Ga. App. LEXIS 348 (2017), cert. denied, No. S18C0094, 2018 Ga. LEXIS 322 (Ga. May 7, 2018).

Declarations made during conspiracy, including concealment stage, admissible. — Under former O.C.G.A. § 24-3-5, the declarations of a conspirator, made during the course of a conspiracy, including the concealment stage, are admissible against coconspirators. Wilbanks v. State, 251 Ga. App. 248, 554 S.E.2d 248, 2001 Ga. App. LEXIS 982 (2001) (decided under former O.C.G.A. § 24-3-5).

Statements by defendant's coconspirator to a third person regarding defendant's actions during the criminal project and during the concealment phase bore sufficient indicia of reliability to be admissible in defendant's criminal trial, pursuant to former O.C.G.A. § 24-3-5, and any objection on the grounds of the confrontation clause under U.S. Const., amend. 6 or on hearsay grounds would have lacked merit; accordingly, defendant's counsel was not ineffective for failing to object to the admission thereof. Redwine v. State, 280 Ga. 58, 623 S.E.2d 485, 2005 Ga. LEXIS 863 (2005) (decided under former O.C.G.A. § 24-3-5).

At the time a coconspirator made statements to friends, the coconspirator had not confessed to police or been arrested, and in those statements, was concealing the coconspirator's role in the conspiracy. The trial court therefore did not abuse the court's discretion by allowing the coconspirator's statements into evidence against the defendant. Keating v. State, 309 Ga. App. 804, 711 S.E.2d 327, 2011 Ga. App. LEXIS 410 (2011) (decided under former O.C.G.A. § 24-3-5).

Indicia of reliability which are determinative of whether a statement may be placed before the jury require that the statement by the declarant be non-narrative; that the declarant is shown by the evidence to know whereof the declarant speaks; that the witness is not apt to be proceeding on faulty recollection; and that the circumstances show that the declarant had no apparent reason to lie to the witness. Not all of the indicia need be present to support admissibility of the statement. Waters v. State, 174 Ga. App. 916, 331 S.E.2d 893, 1985 Ga. App. LEXIS 2765 (1985) (decided under former O.C.G.A. § 24-3-5).

Coconspirator's offer to share theft proceeds. — Trial court properly admitted the testimony of coconspirator's sister recounting another coconspirator's offer to share the theft proceeds with her if she would keep silent about the matter. Truitt

v. State, 174 Ga. App. 687, 331 S.E.2d 64, 1985 Ga. App. LEXIS 2741 (1985) (decided under former O.C.G.A. § 24-3-5).

Admission throughout all stages of conspiracy. — Acts, sayings, and conduct of one accomplice during the pendency of a conspiracy, not alone in its perpetration but also in its subsequent concealment, are admissible against another accomplice. Carter v. State, 106 Ga. 372, 32 S.E. 345, 1899 Ga. LEXIS 684 (1899) (decided under former Penal Code 1895, § 999); Bragg v. State, 52 Ga. App. 69, 182 S.E. 403, 1935 Ga. App. LEXIS 37 (1935) (decided under former Code 1933, § 38-306); Thompson v. State, 58 Ga. App. 593, 199 S.E. 568, 1938 Ga. App. LEXIS 63 (1938) (decided under former Code 1933, § 38-306); Mitchell v. State, 86 Ga. App. 292, 71 S.E.2d 756, 1952 Ga. App. LEXIS 939 (1952) (decided under former Code 1933, § 38-306); Hutchins v. State, 229 Ga. 804, 194 S.E.2d 442, 1972 Ga. LEXIS 780 (1972) (decided under former Code 1933, § 38-306).

Telephone calls in furtherance of conspiracy. — Trial court did not err when the court admitted the transcripts of phone calls between the defendant and the co-conspirators because such evidence did not constitute hearsay as the statements fell under the exception to the hearsay rule under O.C.G.A. § 24-8-801(d)(2)(E) given that the statements over the telephone were made in furtherance of the conspiracy. Hernandez-Garcia v. State, 322 Ga. App. 455, 745 S.E.2d 706, 2013 Ga. App. LEXIS 542 (2013).

b. Termination of Conspiracy

Only the admissions made pending the conspiracy or fraudulent scheme should be considered, and not those made after the conspiracy was terminated or the fraudulent scheme executed. Turner v. State, 43 Ga. App. 799, 160 S.E. 509, 1931 Ga. App. LEXIS 566 (1931) (decided under former Penal Code 1910, § 1025).

Whether conspiracy ended crucial question. — Crucial question in determining whether the statement of one conspirator may be used as evidence of guilt against another conspirator is whether the conspiracy had ended at the time the statement was made. Munsford v. State, 235 Ga. 38, 218 S.E.2d 792, 1975 Ga. LEXIS 773 (1975) (decided under former Code 1933, § 38-306).

Conspiracy deemed continuing until ultimate purpose accomplished. — If the conspiracy contemplates actions beyond an initial criminal act such as concealment, the conspiracy is deemed in progress until its ultimate purpose is accomplished, and admissions made by one conspirator while attempting to conceal the case may be admissible against the other conspirators. Knight v. State, 239 Ga. 594, 238 S.E.2d 390, 1977 Ga. LEXIS 1264 (1977) (decided under former Code 1933, § 38-306).

In legal contemplation, the enterprise may not be at an end so long as the concealment of the crime or the identity of all the conspirators has not been disclosed. Mitchell v. State, 86 Ga. App. 292, 71 S.E.2d 756, 1952 Ga. App. LEXIS 939 (1952) (decided under former Code 1933, § 38-306).

Arrest alone does not necessarily end. — Conspiracy or the concealment phase of the conspiracy does not necessarily end just because one or more participants have been arrested and jailed. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, 1979 Ga. LEXIS 910, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, 1979 U.S. LEXIS 3232 (1979) (decided under former Code 1933, § 38-306).

Conspiracy does not necessarily end simply because one or more of the conspirators have been arrested. Chews v. State, 187 Ga. App. 600, 371 S.E.2d 124, 1988 Ga. App. LEXIS 836 (1988) (decided under former O.C.G.A. § 24-3-5).

Even though one codefendant had been arrested when a tape recording of a conversation between that codefendant and another was made, the tape was admissible since the arrest did not end the conspiracy and the substance of the recorded conversation indicated that the concealment phase of the conspiracy was ongoing. Cromwell v. State, 218 Ga. App. 481, 462 S.E.2d 388, 1995 Ga. App. LEXIS 766 (1995), cert. denied, No. S96C0008, 1995 Ga. LEXIS 1233 (Ga. Dec. 1, 1995) (decided under former O.C.G.A. § 24-3-5).

Pre-arrest threat to coconspirator was in furtherance of conspiracy. — In the defendant's murder trial, evidence

Termination of Conspiracy (Cont'd)

that the defendant had threatened a coconspirator if the coconspirator cooperated in the investigation a few months after the murders but before any arrests were made was in furtherance of the conspiracy because it was designed to keep law enforcement from discovering the murder and was, therefore, admissible under O.C.G.A. § 24-8-801(d)(2)(E). Jones v. State, 305 Ga. 750, 827 S.E.2d 879, 2019 Ga. LEXIS 316 (2019).

Evidence admissible from concealment phase. — As the conspiracy between the two brothers to conceal their roles in two murders had not terminated when one brother wrote a letter incriminating the other, that letter was clearly admissible against the second brother because the letter concerned the murders and was written during the concealment phase of their conspiracy as to those crimes. Arevalo v. State, 275 Ga. 392, 567 S.E.2d 303, 2002 Ga. LEXIS 571 (2002), cert. denied, 538 U.S. 962, 123 S. Ct. 1749, 155 L. Ed. 2d 515, 2003 U.S. LEXIS 2761 (2003) (decided under former O.C.G.A. § 24-3-5).

Statements made by a defendant's accomplice that implicated the defendant in crimes that included a murder and an armed robbery were admissible against the defendant under the coconspirator exception to the hearsay rule because the statements were made during the concealment phase of the conspiracy prior to the accomplice making a confession that the accomplice had committed the murder. Jackson v. State, 292 Ga. App. 312, 665 S.E.2d 20, 2008 Ga. App. LEXIS 765 (2008) (decided under former O.C.G.A. § 24-3-5).

Incriminating statements to police end conspiracy. — Statement made to police by a conspirator, whether inculpatory or exculpatory as to the declarant, which statement incriminates the other conspirator as a party to the crime, constitutes termination of the conspiracy. Thus, such statement by a conspirator is not made during the pendency of the criminal project and is not admissible. Crowder v. State, 237 Ga. 141, 227 S.E.2d 230, 1976 Ga. LEXIS 1177 (1976) (decided under former Code 1933, § 38-306); Hannah v. State, 144 Ga. App. 677, 242 S.E.2d 334, 1978 Ga. App. LEXIS 1743 (1978) (decided under former Code 1933, § 38-306).

When first defendant made a statement to police and implicated second defendant, defendants' conspiracy ended and the statement was only admissible against first defendant; thus, the statement's admission as against a second defendant constituted a Bruton violation and under the circumstances warranted a reversal of the second defendant's convictions. Meadows v. State, 264 Ga. App. 160, 590 S.E.2d 173, 2003 Ga. App. LEXIS 1426 (2003) (decided under former O.C.G.A. § 24-3-5).

Statement to an investigator by the defendant's alleged coconspirator that the coconspirator drove the defendant to a restaurant that the defendant robbed was not admissible against the defendant under former O.C.G.A. § 24-3-5, as it was not made during the pendency of the conspiracy, but in fact constituted a termination of the conspiracy. Verdree v. State, 299 Ga. App. 673, 683 S.E.2d 632, 2009 Ga. App. LEXIS 924 (2009) (decided under former O.C.G.A. § 24-3-5).

Confession made to police by a conspirator, in which other conspirators were identified and their participation was described, was not made during the pendency of the criminal project but was made after the enterprise was ended. Such confession therefore was not admissible under former Code 1933, § 38-306 and was inadmissible at the trial of conspirator under former Code 1933, § 38-414. Crowder v. State, 237 Ga. 141, 227 S.E.2d 230, 1976 Ga. LEXIS 1177 (1976) (decided under former Code 1933, § 38-306); Welch v. State, 237 Ga. 665, 229 S.E.2d 390, 1976 Ga. LEXIS 1351 (1976) (decided under former Code 1933, § 38-306); Corson v. State, 144 Ga. App. 559, 241 S.E.2d 454, 1978 Ga. App. LEXIS 1684 (1978) (decided under former Code 1933, § 38-306); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341, 1979 Ga. LEXIS 1020 (1979) (decided under former Code 1933, § 38-306); Livingston v. State, 268 Ga. 205, 486 S.E.2d 845 (decided under former O.C.G.A. § 24-3-5).

Statements after conspiracy terminated admissible only against declarant. — Declarations or conduct of one

joint conspirator, made after the enterprise is ended, are inadmissible except against the person making them, and against others must be rejected as narrative merely of past occurrence. Hicks v. State, 11 Ga. App. 265, 75 S.E. 12, 1912 Ga. App. LEXIS 363 (1912) (decided under former Penal Code 1910, § 1025); Wall v. State, 153 Ga. 309, 112 S.E. 142, 1922 Ga. LEXIS 75 (1922) (decided under former Penal Code 1910, § 1025).

Evidence as to admissions of guilt involving the defendant, made by a coconspirator after the termination of the conspiracy, was admissible since it appeared that the admissions were made in the presence of the defendant personally and were then freely and voluntarily declared by the defendant to be true. Gunter v. State, 19 Ga. App. 772, 92 S.E. 314, 1917 Ga. App. LEXIS 353 (1917) (decided under former Penal Code 1910, § 1025).

Conspiracy was found to be terminated in the following case. — See Green v. State, 115 Ga. App. 685, 155 S.E.2d 655, 1967 Ga. App. LEXIS 1208 (1967) (arrest) (decided under former Code 1933, § 38-306).

Admission of codefendant's statement to investigator was reversible error because the statement was not made during the pendency of the criminal project, the conspiracy terminated when the statement was made to the investigator and thus, the statement was inadmissible as an exception to the hearsay rule. Sharber v. State, 268 Ga. App. 365, 601 S.E.2d 732, 2004 Ga. App. LEXIS 849 (2004) (decided under former O.C.G.A. § 24-3-5).

5. Procedure

a. Order of Proof

Conspiracy must be proved first. — Only after the fact of the conspiracy has been proven may the declarations by any one of the conspirators during the pendency of the criminal project be admissible against all. Stinson v. State, 151 Ga. App. 533, 260 S.E.2d 407, 1979 Ga. App. LEXIS 2625 (1979) (decided under former Code 1933, § 38-306).

When there was sufficient evidence introduced prior to disputed testimony to make out prima facie case of conspiracy, court did not err in admitting declarations of coconspirator. Salmon v. State, 249 Ga. 785, 294 S.E.2d 500, 1982 Ga. LEXIS 1197 (1982) (decided under former O.C.G.A. § 24-3-5); Blue v. State, 212 Ga. App. 847, 433 S.E.2d 635 (1994) (decided under former O.C.G.A. § 24-3-5).

Admission of evidence pending showing conspiracy. — While it may generally be the better practice to require a prima facie case of conspiracy first to be made, before admitting evidence of the acts and declarations of one of the alleged conspirators, there is no inflexible rule to that effect. Coleman v. State, 141 Ga. 731, 82 S.E. 228, 1914 Ga. LEXIS 129 (1914) (decided under former Penal Code 1910, § 1029); Hutchins v. State, 229 Ga. 804, 194 S.E.2d 442, 1972 Ga. LEXIS 780 (1972) (decided under former Code 1933, § 38-306); Fallings v. State, 232 Ga. 798, 209 S.E.2d 151, 1974 Ga. LEXIS 1091 (1974) (decided under former Code 1933, § 38-306).

Coconspirator's statement allowed into evidence, notwithstanding the contention that the fact of conspiracy was not proved before the admission of the statement, since the evidence adduced at trial, independent of the coconspirator's statement, was sufficient to prove a conspiracy. Isaac v. State, 269 Ga. 875, 505 S.E.2d 480 (decided under former O.C.G.A. § 24-3-5).

Evidence admitted conditioned on proof of conspiracy. — Incriminating statements of coconspirator were properly admitted since it was allowed on the condition that a conspiracy be shown by all of the evidence, since order of proof is in the discretion of the judge and there is no error in admitting such declarations if a prima facie case of conspiracy is proved by the state. Blalock v. State, 250 Ga. 441, 298 S.E.2d 477, 1983 Ga. LEXIS 537 (1983) (decided under former O.C.G.A. § 24-3-5).

Evidence becomes competent after showing of conspiracy. — Though evidence is objectionable because conspiracy was not proved, if it be afterwards shown, it renders the evidence competent. Barrow v. State, 121 Ga. 187, 48 S.E. 905 (1904) (decided under former Penal Code 1895, § 999); Tate v. State, 41 Ga. App. 300, 152 S.E. 609, 1930 Ga. App. LEXIS 552 (1930)

Order of Proof (Cont'd)

(decided under former Penal Code 1910, § 1025).

Hearsay evidence admissible. — Admission of hearsay testimony by coconspirators was proper based on the prosecutor's representation that the state would introduce defendant's statement, which had been ruled admissible and which revealed that coindictees were together prior to and participated in the murder. The statement satisfied the requirement of a prima facie case without regard to the hearsay testimony itself. Waldrip v. State, 267 Ga. 739, 482 S.E.2d 299 (decided under former O.C.G.A. § 24-3-5).

Trial counsel was not ineffective for failing to make a hearsay objection to certain testimony by a witness about statements that the co-conspirator made to the appellant on the night of the murder because trial counsel's testimony at the motion for new trial hearing revealed that failure to object was strategic as testimony supported counsel's strategy of incriminating a co-conspirator by showing that a co-conspirator was angry at the victim and had motive to kill. Chavers v. State, 304 Ga. 887, 823 S.E.2d 283, 2019 Ga. LEXIS 21 (2019).

It is within the discretion of the trial judge to allow the admission of testimony by coconspirators before the existence of the conspiracy is disclosed, provided that such existence is afterwards shown during the trial. Tate v. State, 41 Ga. App. 300, 152 S.E. 609, 1930 Ga. App. LEXIS 552 (1930) (decided under former Penal Code 1910, § 1025); Jenkins v. State, 73 Ga. App. 515, 37 S.E.2d 230, 1946 Ga. App. LEXIS 350 (1946) (decided under former Code 1933, § 38-306); Denison v. State, 258 Ga. 690, 373 S.E.2d 503, 1988 Ga. LEXIS 477 (1988) (decided under former O.C.G.A. § 24-3-5).

Trial judge has sound discretion as to the order of proof, and if a prima facie case of conspiracy is shown from the whole evidence, the admitting of a declaration by an alleged coconspirator is not error. Wortham v. State, 184 Ga. 674, 192 S.E. 720, 1937 Ga. LEXIS 610 (1937) (decided under former Code 1933, § 38-306); Hutchins v. State, 229 Ga. 804, 194 S.E.2d 442, 1972 Ga. LEXIS 780 (1972) (decided under former Code 1933, § 38-306); Fallings v. State, 232 Ga. 798, 209 S.E.2d 151, 1974 Ga. LEXIS 1091 (1974) (decided under former Code 1933, § 38-306); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341, 1979 Ga. LEXIS 1020 (1979) (decided under former Code 1933, § 38-306).

Error is harmless. — While it is error to admit declarations of coconspirators before the fact of conspiracy is proved, the error becomes harmless when subsequently during the trial the conspiracy is clearly established by the direct and circumstantial evidence adduced. Driggers v. State, 51 Ga. App. 370, 180 S.E. 619, 1935 Ga. App. LEXIS 698 (1935) (decided under former Code 1933, § 38-306).

Early admission of declarations not grounds for new trial. — While it is the better practice to require proof of the conspiracy before admitting such declarations, the admission of the evidence in a different order will not be ground for a new trial. McDaniel v. State, 103 Ga. 268, 30 S.E. 29, 1898 Ga. LEXIS 107 (1898) (decided under former Penal Code 1895, § 999); Tate v. State, 41 Ga. App. 300, 152 S.E. 609, 1930 Ga. App. LEXIS 552 (1930) (decided under former Penal Code 1910, § 1025).

No error shown by reference to conspiracy during opening statement. — With regard to a defendant's trial and conviction for malice murder arising from the severe physical abuse of the defendant's five-year-old nephew, the defendant failed to meet the burden of proving that trial counsel was ineffective for failing to object to the comments made by the state during open statements with regard to the defendant and the defendant's mother beating the victim all the time and that the pair carried out the actions together. Peterson v. State, 282 Ga. 286, 647 S.E.2d 592, 2007 Ga. LEXIS 532 (2007) (decided under former O.C.G.A. § 24-3-5).

b. Duty of Jury

Determination of conspiracy. — It is for the jury to determine from the whole evidence whether a conspiracy has been shown, and if they find that none has been established, it is their duty not to consider

the acts and declarations of the supposed coconspirator. Coleman v. State, 141 Ga. 731, 82 S.E. 228, 1914 Ga. LEXIS 129 (1914) (decided under former Penal Code 1910, § 1025); Nelson v. State, 51 Ga. App. 207, 180 S.E. 16, 1935 Ga. App. LEXIS 632 (1935) (decided under former Code 1933, § 38-306); Wortham v. State, 184 Ga. 674, 192 S.E. 720, 1937 Ga. LEXIS 610 (1937) (decided under former Code 1933, § 38-306); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341, 1979 Ga. LEXIS 1020 (1979) (decided under former Code 1933, § 38-306).

Question of existence of a conspiracy is ultimately for the jury to determine. Harris v. State, 255 Ga. 500, 340 S.E.2d 4, 1986 Ga. LEXIS 577 (1986) (decided under former O.C.G.A. § 24-3-5).

Necessary findings. — Before the jury can consider such declaration, it must find (1) that a conspiracy was in existence (2) when the statement was made. Parker v. State, 145 Ga. App. 205, 243 S.E.2d 580, 1978 Ga. App. LEXIS 1920 (1978) (decided under former Code 1933, § 38-306).

c. Instructions

Erroneous instructions. — It was error, likely to have been very prejudicial, to charge a jury in effect that the state's contention of conspiracy would be established if the jury believed beyond a reasonable doubt that there was a conspiracy or common purpose between "any two" of the three defendants, not necessarily including the defendant on trial. Wortham v. State, 184 Ga. 674, 192 S.E. 720, 1937 Ga. LEXIS 610 (1937) (decided under former Code 1933, § 38-306).

Proper instruction. — Trial court did not err when the court gave the instruction to the jury that informed the jury of the circumstances under which the alleged declarations of an alleged coconspirator made out of the presence of the defendant are to be disregarded, and the instruction immediately followed the trial court's instruction that any admissions made by one or more of the conspirators during and in furtherance of the alleged conspiracy could be considered by the jury against all the conspirators if the existence of the conspiracy had been shown beyond a reasonable doubt by evidence other than the declarations of alleged coconspirators; the instruction correctly stated the law and did not impermissibly shift the burden of proof to the defendant by failing to include "not" in the pattern charge, so as to read "not satisfied beyond a reasonable doubt that a conspiracy exists." Castillo v. State, 281 Ga. 579, 642 S.E.2d 8, 2007 Ga. LEXIS 127 (2007) (decided under former O.C.G.A. § 24-3-5).

Trial court properly refused to give the defendant's request to charge that, in determining whether a conspiracy existed, the jury could not consider the declarations of the alleged accomplice. Castell v. State, 250 Ga. 776, 301 S.E.2d 234, 1983 Ga. LEXIS 1026 (1983) (decided under former O.C.G.A. § 24-3-5).

6. Unavailability of Declarant

State need not prove declarant's unavailability as a prerequisite to admission of the declarant's declarations made during pendency of criminal project. Gay v. State, 249 Ga. 747, 294 S.E.2d 476, 1982 Ga. LEXIS 1186 (1982) (decided under former O.C.G.A. § 24-3-5).

Non-testifying codefendant's admission properly admitted. — Admission of incriminating statements made by the defendant's coconspirator to an informant to the effect that defendant agreed to sell methamphetamine to the informant, and arranging details of the transaction, was proper, despite the fact that the coconspirator did not appear at trial and was not available for cross-examination, because the statements were made during the pendency of the criminal project, the coconspirator was not asserting past facts and had personal knowledge of the identities and roles of the participants, the possibility that the statements were founded on faulty memory was decidedly remote in that the referenced occurrences were taking place almost simultaneously with the statements, and, believing that the coconspirator was setting up a lucrative drug deal with a sympathetic customer, the coconspirator had no reason to lie about the defendant's involvement in the crime. Bowden v. State, 279 Ga. App. 173, 630 S.E.2d 792, 2006 Ga. App. LEXIS 494 (2006) (decided under former O.C.G.A. § 24-3-5).

Inadmissible Hearsay

Indictment charging unrelated defendants not admissible. — Federal indictment charging unrelated defendants with crimes and racketeering activities in association with a gang operating in Virginia was not admissible in the defendants' trial as the indictment was hearsay. State v. Brown, 298 Ga. 878, 785 S.E.2d 510, 2016 Ga. LEXIS 308 (2016).

Questions propounded by counsel were not proper under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) since the questions simply did not constitute an attempt to ascertain an explanation of the witness's course of conduct. Jones v. State, 247 Ga. 268, 275 S.E.2d 67, 1981 Ga. LEXIS 690, cert. denied, 454 U.S. 817, 102 S. Ct. 94, 70 L. Ed. 2d 86, 1981 U.S. LEXIS 3120 (1981) (decided under former O.C.G.A. § 24-3-2).

Evidence of defendant's character. — Testimony which places defendant's character in evidence without defendant having first done so personally cannot be admitted under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801). Anderson v. State, 252 Ga. 103, 312 S.E.2d 113, 1984 Ga. LEXIS 612 (1984) (decided under former O.C.G.A. § 24-3-2).

Victim's reputation for violence. — Murder victim's reputation for violence may be offered by the accused upon making a prima facie showing that the victim was the aggressor and was assaulting the accused, who acted to defend oneself. Woods v. State, 269 Ga. 60, 495 S.E.2d 282 (decided under former O.C.G.A. § 24-3-2).

Evidence that a murder charge against a witness had been dropped after the witness took a lie detector test was inadmissible since the defense did not place the state's conduct in dismissing the murder charge in issue. Furthermore, the admission constituted harmful error because it created an inference that the witness had passed the polygraph examination and bolstered the credibility of the witness. Wilson v. State, 254 Ga. 473, 330 S.E.2d 364, 1985 Ga. LEXIS 738 (1985) (decided under former O.C.G.A. § 24-3-2).

Murder defendant's testimony that victim had knifed another person. — Although murder defendant's testimony that the victim had knifed another person would have been admissible under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) as an attempt to explain the murder as the result of the defendant's reasonable fear of the victim, the testimony was properly excluded as an attempt to prove the victim's character by a specific act. Echols v. State, 174 Ga. App. 829, 331 S.E.2d 619, 1985 Ga. App. LEXIS 2756 (1985) (decided under former O.C.G.A. § 24-3-2).

Affidavits of conversations from third parties. — In an action by lessors against guarantors, the affidavit of an attorney representing the guarantors, recalling a conversation the attorney had with an officer of the lessee, was not admissible because the affidavit's evidentiary value depended on the credibility of the affiant, not on the credibility of the attorney. Athens Int'l, Inc. v. Venture Capital Properties, Inc., 230 Ga. App. 286, 495 S.E.2d 900 (decided under former O.C.G.A. § 24-3-2).

Uncommunicated threat of victim. — Although evidence of a death threat against a defendant may fall within the exception under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) when offered, not for the truth of the matter asserted, but to show the victim's state of mind, this hearsay exception did not apply since the evidence did not support defendant's contention that the uncommunicated threat showed the victim's state of mind. Massey v. State, 272 Ga. 50, 525 S.E.2d 694, 2000 Ga. LEXIS 16 (2000) (decided under former O.C.G.A. § 24-3-2).

Evidence of a death threat against a defendant. — Exception under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) may have allowed evidence of a death threat against a defendant when the evidence was offered, not for the truth of the matter asserted, but rather to show the victim's state of mind. However, such evidence was admissible only in the circumstances in which there was a conflict in the evidence as to who instigated a fight, to corroborate evidence of communicated threats, or to establish the attitude of the deceased. Render v. State, 288 Ga. 420, 704 S.E.2d 767, 2011 Ga. LEXIS 9 (2011) (decided under former O.C.G.A. § 24-3-2).

Information from online backup hearsay. — Defendant's motion for new

trial was improperly denied as to the computer invasion of privacy charge because counsel was ineffective for failing to object to the first victim's hearsay testimony as the victim's statement about what the victim learned from an online backup system was introduced to prove that the defendant used the victim's computer to access the victim's financial information and constituted hearsay; counsel provided no reason for not objecting to that testimony; the defendant was prejudiced by counsel's deficiency as that testimony was the only evidence offered to prove the charge; and, but for counsel's deficient performance, a more than reasonable probability existed that the trial's outcome would have been different. Entwisle v. State, 340 Ga. App. 122, 796 S.E.2d 743, 2017 Ga. App. LEXIS 25 (2017), cert. denied, No. S17C1084, 2017 Ga. LEXIS 581 (Ga. June 30, 2017).

Prior difficulty evidence. — Supreme Court of Georgia overruled Perry v. State, 255 Ga. 490, 339 S.E.2d 922 (1986), to the extent it held that a victim's conversations with a witness were admissible to explain the defendant's conduct under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801), even if they were unknown to the defendant. Moreover, to the extent Perry held that the victim's conduct was a matter concerning which the truth had to be found and that the victim's statements were admissible to explain that conduct, it was also overruled. Character v. State, 285 Ga. 112, 674 S.E.2d 280, 2009 Ga. LEXIS 81 (2009) (decided under former O.C.G.A. § 24-3-2).

With regard to two defendants' convictions for malice murder, aggravated assault, and other crimes, the trial court did not abuse the court's discretion by allowing the admission of prior difficulty evidence and concluding that those statements were admissible under the necessity exception to the hearsay rule because the statements, which involved the aggravated assault victim testifying about one defendant robbing one of the murder victims of money won in a dice game and that the same defendant had tried to start an argument with the aggravated assault victim at a nightclub the same night the crimes took place, were not testimonial since the statements were not offered for the truth of the matter asserted. Further, even if the statements were not admissible under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801), the trial court properly admitted the statements under the necessity exception to the hearsay rule as the aggravated assault victim and the murder victim at issue were long-time friends who placed great confidence in each other and it was established that the murder victim confided in the aggravated assault victim in times of trouble. Character v. State, 285 Ga. 112, 674 S.E.2d 280, 2009 Ga. LEXIS 81 (2009) (decided under former O.C.G.A. § 24-3-2).

Harmless error in admission of jewelry store custodian's testimony. — While the trial court erred in admitting a jewelry store custodian's hearsay testimony about a mark on a wedding ring sold to the defendant because the custodian only knew about the mark through information provided by another employee, the error was harmless in light of the other evidence of the defendant's guilt. Kirby v. State, 304 Ga. 472, 819 S.E.2d 468, 2018 Ga. LEXIS 631 (2018).

Opinion testimony from a deposition in an unrelated case inadmissible. — In a dispute between registered representatives (RRs) and the RRs former firm after the RRs quit and went to a competing firm, the trial court erred in interpreting the Protocol for Broker Recruiting to mean that notice of termination provisions in the RRs' contracts were invalid, based in part on hearsay testimony in a deposition in an unrelated case interpreting the protocol. HA&W Capital Partners, LLC v. Bhandari, 346 Ga. App. 598, 816 S.E.2d 804, 2018 Ga. App. LEXIS 426 (2018), overruled in part, SRM Group, Inc. v. Travelers Prop. Cas. Co. of Am., 308 Ga. 404, 841 S.E.2d 729, 2020 Ga. LEXIS 235 (2020).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions

under former Code 1933, § 38-301 are included in the annotations for this Code section.

Computer print-outs. — Although computer print-out sheets are generally classified as hearsay and to be admissible into evidence, computer print-outs must fall within an exception to the well-known hearsay rule, subject to the discretion of the court, computer print-out sheets or records stored in an electronic computer may be admissible into evidence when such are permanent records made in the regular course of business. 1973 Op. Att'y Gen. No. 73-91 (decided under former Code 1933, § 38-301).

RESEARCH REFERENCES

Am. Jur. 2d.

3 Am. Jur. 2d, Agency, § 347. 29 Am. Jur. 2d, Evidence, §§ 668, 671. 29A Am. Jur. 2d, Evidence, §§ 715 et seq., 767, 769, 770, 814, 819 et seq., 828, 871 et seq.

C.J.S.

3 C.J.S., Agency, § 550 et seq. 31A C.J.S., Evidence, §§ 282 et seq., 376 et seq., 405 et seq., 439 et seq., 476.

ALR.

Competency of agent, with whom transaction by person since deceased was had, to testify adversely to estate, 21 A.L.R. 928; 54 A.L.R. 264.

Confession by one who has been subjected to or threatened with physical suffering, 24 A.L.R. 703.

Character and sufficiency of evidence to show that letter was mailed, 25 A.L.R. 9; 86 A.L.R. 541.

Admissibility in favor of writer of unanswered letter not part of mutual correspondence, 55 A.L.R. 460.

Extrajudicial admissions by principal as evidence against surety, 60 A.L.R. 1500.

Evidence as to threats made to keep witness away from criminal trial, 62 A.L.R. 136.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 A.L.R. 77.

Admissibility of declarations by one involved in an accident in relation to his employment by or agency for other person, 67 A.L.R. 170; 150 A.L.R. 623.

Concession, admission, or statement by defendant's attorney in criminal case as obviating necessity of introducing evidence on the point, 70 A.L.R. 94.

Admissions of partner as to past transactions or events as evidence against firm or other partner, 73 A.L.R. 447.

Admissibility of statements of alleged agent for the purpose of showing that other party dealt with him as agent and not as principal, as distinguished from the purpose of showing the existence or extent of agency, 80 A.L.R. 604.

Admissibility of inculpatory statements made in the presence of accused, and not denied or contradicted by him, 80 A.L.R. 1235; 115 A.L.R. 1510.

Admissibility of statements or declarations of plaintiff's spouse in an action for alienation of affections for the purpose of showing his or her mental state, 82 A.L.R. 825.

Admissibility of declarations of grantor or transferrer on issue as to whether conveyance or transfer was in fraud of creditors, 83 A.L.R. 1446.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 A.L.R. 1310.

Admissibility of admissions against title to tangible personal property made by one subsequent to executing chattel mortgage thereon, 106 A.L.R. 1296.

Admissibility on issue of negligence or contributory negligence of statements warning one of danger, 125 A.L.R. 645.

Extrajudicial statements by witness who is subject to cross-examination as evidence of facts to which they relate, 133 A.L.R. 1454.

Admissibility of oral or written statement by deceased as to fact or terms of an antenuptial or postnuptial agreement which cannot be found, 140 A.L.R. 1133.

Extrajudicial declarations of agent as admissible in action against principal for personal injuries for purpose of showing knowledge of relevant fact or condition at or prior to time of injury, 141 A.L.R. 704.

Admissibility of evidence of complaint or details of complaint by alleged victim of rape or other similar offense as affected by fact that she is not a witness or is incom-

petent to testify because of age or other reason, 157 A.L.R. 1359.

Silence upon hearing statement by spouse as evidence of admission in civil case, 158 A.L.R. 465.

Extrajudicial declaration of commission of criminal act as admissible in evidence where declarant is a witness or available to testify, 167 A.L.R. 394.

Binding effect of party's own unfavorable testimony, 169 A.L.R. 798.

Competence, as against principal, of statements by agent to prove scope, as distinguished from fact, of agency, 3 A.L.R.2d 598.

Admissibility of evidence that defendant in negligence action has paid third persons on claims arising from the same transaction or incident as plaintiff's claim, 20 A.L.R.2d 304.

Admissibility, in prosecution for bribery or accepting bribes, of evidence tending to show the commission of other bribery or acceptance of bribe, 20 A.L.R.2d 1012.

Admissibility and probative value of admissions of fault by agent on issue of principal's secondary liability, where both are sued, 27 A.L.R.3d 966.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary, 28 A.L.R.2d 857.

Admissibility, in prosecution for illegal sale of intoxicating liquor, of other sales, 40 A.L.R.2d 817.

Admissibility of records or report of welfare department or agency relating to payment to or financial condition of particular person, 42 A.L.R.2d 752.

Admissibility of advertisements, brochures, catalogs, and the like as containing admissions by a litigant contrary to a position taken by him, 44 A.L.R.2d 1027.

Admissibility of subsequent declarations of settlor to aid interpretation of trust, 51 A.L.R.2d 820.

Admissibility and weight of party's admissions as to tort occurring during his absence, 54 A.L.R.2d 1069.

Admissibility of evidence of reputation or declaration as to matter of public interest, 58 A.L.R.2d 615.

Admissibility of evidence of party's silence, as implied or tacit admission, when a statement is made by another in his presence regarding circumstances of an accident, 70 A.L.R.2d 1099.

Admissibility on behalf of accused in homicide case of evidence that killing was committed at victim's request, 71 A.L.R.2d 617.

Admissibility, on behalf of one of multiple defendants in accident case, of admission against interest made out of plaintiff's presence by another defendant to a fourth person, 73 A.L.R.2d 1180.

Admissibility and weight of surveys or polls of public or consumers' opinion, recognition, preference, or the like, 76 A.L.R.2d 619; 98 A.L.R. Fed. 20.

Admissibility of inculpatory statements made in presence of accused to which he refuses to reply on advice of counsel, 77 A.L.R.2d 463.

Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection, 79 A.L.R.2d 890.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 A.L.R.2d 1224.

Nonverbal reaction to accusation, other than silence alone, as constituting adoptive admission under hearsay rule, 87 A.L.R.3d 706.

Admissibility on behalf of accused of evidence of similar acts or transactions tending to rebut fraudulent intent, 90 A.L.R.2d 903.

Admissibility in civil action, apart from res gestae, of lay testimony as to another's expressions of pain, 90 A.L.R.2d 1071.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 A.L.R.3d 671.

Impeachment of witness with respect to intoxication, 8 A.L.R.3d 749.

Admissibility in evidence, in automobile negligence action, of charts showing braking distance, reaction times, etc., 9 A.L.R.3d 976.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant, 10 A.L.R.3d 359.

Admissibility of hearsay evidence as to comparable sales of other land as basis for

expert's opinion as to land value, 12 A.L.R.3d 1064.

Admissibility of evidence of habit, customary behavior, or reputation as to care of pedestrian on question of his care at time of collision with motor vehicle giving rise to his injury or death, 28 A.L.R.3d 1293.

Grand jury: admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or conviction, 37 A.L.R.3d 612.

Admissibility of physician's testimony as to patients' statements or declaration, other than res gestae, during medical examination, 37 A.L.R.3d 778.

Necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of coconspirators, 46 A.L.R.3d 1148.

Admissibility of newspaper article as evidence of the truth of the facts stated therein, 55 A.L.R.3d 663.

Sufficiency of identification of participants as prerequisite to admissibility of telephone conversation in evidence, 79 A.L.R.3d 79.

Admissibility of evidence to establish oral antenuptial agreement, 81 A.L.R.3d 453.

Admissibility of hypnotic evidence at criminal trial, 92 A.L.R.3d 442; 77 A.L.R.4th 927.

Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege, 92 A.L.R.3d 1138.

Evidence: admissibility of memorandum of telephone conversation, 94 A.L.R.3d 975.

Denial of recollection as inconsistent with prior statement so as to render statement admissible, 99 A.L.R.3d 934.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludible as hearsay—state cases, 89 A.L.R.4th 456.

Admissibility of tape recording or transcript of "911" emergency telephone call, 3 A.L.R.5th 784.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 A.L.R.5th 672.

Sufficiency of hearsay evidence in probation revocation hearings, 21 A.L.R.6th 771.

Construction and application of uniform rule of evidence 803(17), providing hearsay exception for market reports, and commercial publications, 54 A.L.R.6th 593.

What constitutes similar motive for purposes of Rule 804(b)(1) of Federal Rules of Evidence, excepting such testimony from hearsay rule if party against whom such testimony is offered had opportunity and "similar motive" to develop testimony, 138 A.L.R. Fed 367.

When is witness "unavailable" for purposes of admission of evidence under Rule 804 of Federal Rules of Evidence, providing hearsay exception where declarant is unavailable, 174 A.L.R. Fed. 1.

Admissibility of party's own statement under Rule 801(d)(2)(a) of the Federal Rules of Evidence, 191 A.L.R. Fed. 27.

Construction and application of Fed. Rules Evid. Rule 804(b)(6), 28 U.S.C.A., hearsay exception based on unavailable witness's wrongfully procured absence, 193 A.L.R. Fed. 703.

Hearsay objections to admission of text messages or testimony thereof, 10 A.L.R.7th 4.

24-8-802. Hearsay rule.

Hearsay shall not be admissible except as provided by this article; provided, however, that if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible.

History.

Code 1981, § 24-8-802, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

The rule against hearsay, Fed. R. Evid. 802.

Law reviews.

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For annual survey on evidence, see 73 Mercer L. Rev. 111 (2021).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-301, and former O.C.G.A. § 24-3-1 are included in the annotations for this Code section. The reader is advised to also consult the annotations following Code Section 24-8-801, which may also be applicable to this Code section.

Determining admissibility of hearsay evidence. — Superior court erred in concluding that all hearsay evidence presented by the County Zoning Board of Appeals, without objection, was not competent evidence because the interpretation clearly conflicted with O.C.G.A. § 24-8-802. Forsyth County v. Mommies Props. LLC Four Cases, 359 Ga. App. 175, 855 S.E.2d 126, 2021 Ga. App. LEXIS 145 (2021).

Underlying reasons for rule. — Chief reasons for the exclusion of hearsay evidence are the want of a sanction of an oath, and of any opportunity to cross-examine the witness. Foster v. Brooks, 6 Ga. 287, 1849 Ga. LEXIS 41 (1849) (decided under former law); Bennett v. State, 49 Ga. App. 804, 176 S.E. 148, 1934 Ga. App. LEXIS 564 (1934) (decided under former Code 1933, § 38-301); Peacon v. Peacon, 197 Ga. 748, 30 S.E.2d 640, 1944 Ga. LEXIS 340 (1944), superseded by statute as stated in Brown v. Hauser, 249 Ga. 513, 292 S.E.2d 1, 1982 Ga. LEXIS 862 (1982) (decided under former Code 1933, § 38-301).

There is a distinction between illegal testimony and secondary evidence in that hearsay testimony (illegal testimony) has no probative force whatsoever, and its only effect is to prejudice the minds of the jury against the party against whom such hearsay evidence is introduced, while the only objection to secondary evidence is that it is received without first laying the preliminary foundation; such evidence stands on a different footing, and if admitted without objection it is nevertheless competent, for by allowing such evidence without objecting at the time it is sought to be introduced the party waives the party's right to have the best evidence of such fact sought to be proved, and cannot subsequently insist that the court should withdraw such secondary evidence from the consideration of the jury. Rushin v. State, 63 Ga. App. 646, 11 S.E.2d 844, 1940 Ga. App. LEXIS 515 (1940) (decided under former Code 1933, § 38-301).

Hearsay testimony is wholly without probative value, and its introduc-

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tion without objection does not give it any weight or force whatever in establishing a fact. Higgins v. Trentham, 186 Ga. 264, 197 S.E. 862, 1938 Ga. LEXIS 614 (1938) (decided under former Code 1933, § 38-301); Crawley v. Selby, 208 Ga. 503, 67 S.E.2d 775 (1951) (decided under former Code 1933, § 38-301); Collins v. State, 146 Ga. App. 857, 247 S.E.2d 602, 1978 Ga. App. LEXIS 2572 (1978) (decided under former Code 1933, § 38-301); Finch v. Caldwell, 155 Ga. App. 813, 273 S.E.2d 216, 1980 Ga. App. LEXIS 2803 (1980), superseded by statute as stated in Forsyth County v. Mommies Props., 359 Ga. App. 175, 855 S.E.2d 126, 2021 Ga. App. LEXIS 145 (2021) (decided under former Code 1933, § 38-301).

Any error in admitting a hearsay statement was harmless by defendant's subsequently being called as a witness. Hufstetler v. State, 171 Ga. App. 106, 319 S.E.2d 869, 1984 Ga. App. LEXIS 2948 (1984) (decided under former O.C.G.A. § 24-3-1).

Assuming that the trial court erred in excluding a witness's testimony that the witness observed an interaction between the defendant and the victim's mother, there was no ground for reversal because any such error was harmless; aside from the fact that the meaning of the mother's response was unclear, other evidence was presented that on a prior occasion the mother had harmed the victim. Amador v. State, 310 Ga. App. 280, 713 S.E.2d 423, 2011 Ga. App. LEXIS 541 (2011), cert. denied, No. S11C1648, 2012 Ga. LEXIS 127 (Ga. Jan. 23, 2012) (decided under former O.C.G.A. § 24-3-1).

Hearsay was inadmissible, but harmless error. — Testimony was inadmissible hearsay because the former police detective did not actually test the blood but was simply repeating information the detective read in the lab report, and while the court may have abused the court's discretion by allowing the detective to testify as to the results of the blood test, any error was harmless given the overwhelming evidence of defendant's guilt. Green v. State, 249 Ga. App. 546, 547 S.E.2d 569, 2001 Ga. App. LEXIS 203 (2001), cert. denied, No. S01C1285, 2001 Ga. LEXIS 817 (Ga. Oct. 1, 2001) (decided under former O.C.G.A. § 24-3-1).

Trial court erred in admitting testimony of a police officer about what the murder victim told the officer shortly after defendant shot into the bedroom in which the victim was sleeping, which was one of defendant's prior bad acts that the state tried to get admitted under the necessity exception to the hearsay rule. Such testimonial hearsay in a criminal prosecution was admissible when the declarant was unavailable only if the defendant had a prior opportunity to cross-examine the declarant about the hearsay statement, and defendant had no such opportunity, but because the statement did not contribute to defendant's conviction, admission of it was harmless error. Moody v. State, 277 Ga. 676, 594 S.E.2d 350, 2004 Ga. LEXIS 267 (2004) (decided under former O.C.G.A. § 24-3-1).

Jury instructions. — If there was no request to charge the purpose for which testimony could be considered under former O.C.G.A. § 24-3-2 (see now O.C.G.A. §§ 24-8-801 and 24-8-802), failure to so instruct the jury did not constitute reversible error. Payne v. State, 163 Ga. App. 276, 293 S.E.2d 483, 1982 Ga. App. LEXIS 3198 (1982) (decided under former O.C.G.A. § 24-3-1).

Defendant failed to preserve for review the argument that the trial court erred in allowing a witness to testify about the victim's statement because although the codefendant's counsel vigorously opposed the state's request to elicit the hearsay statements, the defendant's counsel failed to object, join in the codefendant's objection, or argue in any way regarding the issue. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661, 2012 Ga. LEXIS 625 (2012) (decided under former O.C.G.A. § 24-3-1).

Application

1. Admissible Hearsay

Indicia of reliability required for admissibility are that the statements be nonnarrative, that the declarant is shown by the evidence to know whereof the declarant speaks, that the witness is not apt to be proceeding on faulty recollection,

and that the circumstances show that the declarant had no apparent reason to lie to the witness; it is not required that all of the indicia be present for the statement to be admissible. Timberlake v. State, 158 Ga. App. 125, 279 S.E.2d 283, 1981 Ga. App. LEXIS 2102 (1981) (decided under former O.C.G.A. § 24-3-1).

"Spontaneous declaration" is admissible hearsay testimony. — Statement which is a spontaneous reaction to a startling event is admissible hearsay testimony. House v. State, 252 Ga. 409, 314 S.E.2d 195, 1984 Ga. LEXIS 699 (1984) (decided under former O.C.G.A. § 24-3-1); Daker v. State, 243 Ga. App. 848, 533 S.E.2d 393, 2000 Ga. App. LEXIS 480 (2000), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717, 2002 U.S. LEXIS 30 (2002), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717, 2002 U.S. LEXIS 31 (2002).

Trial court did not abuse the court's discretion by admitting statements that the victim allegedly made to the victim's niece, who discovered the victim on the morning after the beating, as exceptions to the rule against hearsay as present sense impressions, excited utterances, and to impeach the niece's trial testimony as, under the totality of the circumstances, the victim was still suffering under the stress of the all-night beating such that the victim's statements were admissible. Robbins v. State, 300 Ga. 387, 793 S.E.2d 62, 2016 Ga. LEXIS 790 (2016).

Hearsay evidence is admissible for impeachment, though inadmissible for other purposes. Seaboard Coast Line R.R. v. Smalley, 127 Ga. App. 652, 194 S.E.2d 612, 1972 Ga. App. LEXIS 988 (1972) (decided under former Code 1933, § 38-301).

Hearsay testimony is admissible to prove the location of a county line. Poulos v. State, 49 Ga. App. 20, 174 S.E. 253, 1934 Ga. App. LEXIS 241 (1934) (decided under former Code 1933, § 38-301).

Market price can be shown by hearsay. McKenzie v. Perdue, 67 Ga. App. 202, 19 S.E.2d 765, 1942 Ga. App. LEXIS 353, rev'd, 194 Ga. 356, 21 S.E.2d 705, 1942 Ga. LEXIS 587 (1942) (decided under former Code 1933, § 38-301).

Double hearsay proper. — Double hearsay was properly admitted about what a witness heard an individual say because the individual's credibility had been placed at issue by way of an attack on the witness's motive. Dillard v. State, 272 Ga. App. 523, 612 S.E.2d 804, 2005 Ga. App. LEXIS 198 (2005), cert. denied, No. S05C1272, 2005 Ga. LEXIS 476 (Ga. July 8, 2005) (decided under former O.C.G.A. § 24-3-1).

Hearsay evidence admissible at transfer hearing in juvenile cases. — Given that the right of confrontation was a trial right, there was no reason to apply that right to a transfer hearing involving a juvenile; therefore, hearsay evidence was admissible at such hearings. In the Interest of T. F., 295 Ga. App. 417, 671 S.E.2d 887, 2008 Ga. App. LEXIS 1408 (2008) (decided under former O.C.G.A. § 24-3-1).

2. Hearsay Found

a. Civil

Opinion as to reason for death. — In an action seeking to prevent a husband from receiving benefits under his wife's life insurance policy and from inheriting her estate on grounds that he allegedly killed his wife, the detective's testimony that an IRS agent said that in the agent's opinion her death was related to a federal tax fraud investigation and attorney's testimony that the IRS agent told the detective that the federal government was concerned that her death was linked to the investigation, were inadmissible hearsay. A memorandum in which the detective wrote that IRS agents stated it was their opinion that she died as a result of a conspiracy involving two corporations was also hearsay. Krause v. Vance, 207 Ga. App. 615, 428 S.E.2d 595, 1993 Ga. App. LEXIS 317 (1993), cert. denied, No. S93C0935, 1993 Ga. LEXIS 390 (Ga. May 6, 1993) (decided under former O.C.G.A. § 24-3-1).

Contract issues. — Partial summary judgment pursuant to O.C.G.A. § 9-11-56 was properly granted to a labor supplier in a construction company's counterclaim alleging tortuous interference with its contractual relations, based on an alleg-

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edly illegal lien filed by the supplier against a property, since no factual basis was found for the counterclaim and, accordingly, it was dismissed; it was noted that the affidavit of the administrative manager of the company contained irrelevant matter which was properly excluded under former O.C.G.A. § 24-2-1 (see now O.C.G.A. § 24-4-401), as it related to the supplier's failure to sign a lien waiver and it had no logical bearing to the material fact in issue and, further, it was found to be inadmissible hearsay under former O.C.G.A. § 24-3-1(a) (see now O.C.G.A. §§ 24-8-801 and 24-8-802). Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418, 2003 Ga. App. LEXIS 1002 (2003) (decided under former O.C.G.A. § 24-3-1).

Trial court properly struck a paragraph in an estate executrix's affidavit in opposition to the decedent's nephew's motion for summary judgment, arising from an action regarding estate assets and joint venture agreements, as the executrix's assertions regarding a handwritten note by the husband constituted parol evidence which could not be used to alter the meaning of the unambiguous language of the agreements, and necessity was not shown for admission of the hearsay evidence, pursuant to O.C.G.A. §§ 13-2-2(1), 24-3-1(b) (see now O.C.G.A. § 24-8-807), 24-6-1 (see now O.C.G.A. § 24-3-1), and 24-6-2 (see now O.C.G.A. § 24-3-2); accordingly, the handwritten notation that the properties at issue were to be sold for "market value" could not change the contractual language that indicated that the properties would be sold for a predetermined price. Zaglin v. Atlanta Army Navy Store, Inc., 275 Ga. App. 855, 622 S.E.2d 73, 2005 Ga. App. LEXIS 1124 (2005) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in granting a homeowners' association summary judgment on a resident's promissory estoppel claim because the resident failed to come forward with any evidence creating an issue of fact on the resident's claim; the resident stated that a member of the association promised the resident that the association would store the resident's airboat but that claim rested on statements allegedly made to the resident by the member, which were hearsay. Campbell v. Landings Ass'n, 311 Ga. App. 476, 716 S.E.2d 543, 2011 Ga. App. LEXIS 765 (2011) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in granting a homeowners' association summary judgment on a resident's breach of contract claim because the resident failed to show the elements of an enforceable contract pursuant to O.C.G.A. § 13-3-1; any oral contract between the resident and a member of the association depended upon the statements of the member, who was not deposed and did not offer any affidavit, those statements, therefore, were hearsay proving nothing for the purposes of summary judgment. Campbell v. Landings Ass'n, 311 Ga. App. 476, 716 S.E.2d 543, 2011 Ga. App. LEXIS 765 (2011) (decided under former O.C.G.A. § 24-3-1).

Trial court erred by granting a creditor summary judgment in the creditor's action against a debtor to recover the balance due on a credit card account because the actual amount due the creditor was not sufficiently proved; an employee's statement in an affidavit that the creditor's predecessor indicated to the creditor that the balance was $10,029 was not sufficient to show the actual balance due the creditor because the statement was mere hearsay under former O.C.G.A. § 24-3-1(a) (see now O.C.G.A. §§ 24-8-801 and 24-8-802) and not subject to an exception, and the employee's statement that it was the creditor's understanding from the creditor's attorney that no payments had been made since the account was turned over and the principal sum of $10,029 was due was also inadmissible because such hearsay had no probative value whatsoever. Jackson v. Cavalry Portfolio Services, LLC, 314 Ga. App. 175, 723 S.E.2d 475, 2012 Ga. App. LEXIS 142 (2012) (decided under former O.C.G.A. § 24-3-1).

Statement from insured on critical issues. — In an insurance case in which a jury found in favor of an insurer, which had denied property insurance coverage after a house fire to two insureds based on suspected arson, for retrial purposes, it

was error to allow the insurer to elicit hearsay testimony from one of the insureds on the critical issue of whether the exterior doors of the insureds' home were locked when the firefighters arrived because the testimony was elicited to prove that the exterior doors were locked at the time of the fire. Bantz v. Allstate Ins. Co., 263 Ga. App. 855, 589 S.E.2d 621, 2003 Ga. App. LEXIS 1351 (2003), cert. denied, No. S04C0481, 2004 Ga. LEXIS 146 (Ga. Feb. 16, 2004) (decided under former O.C.G.A. § 24-3-1).

When an account statement summarized the invoices therein, but also listed a fee for which no supporting business record was presented, that entry was hearsay and could not be considered in determining the amount owed by the defendant. Walter R. Thomas Assocs. v. Media Dynamite, Inc., 284 Ga. App. 413, 643 S.E.2d 883, 2007 Ga. App. LEXIS 342 (2007) (decided under former O.C.G.A. § 24-3-1).

Accident reconstruction expert report. — In a negligence action, based on a husband's visit to the accident scene where the wife was injured, despite having no formal training in accident reconstruction, the husband could testify as to the personal knowledge gained from that excursion; but, an accident reconstruction expert's report, which both parties referred to in the narrative portion of the police report, was inadmissible hearsay under the circumstances presented. Morton v. Horace Mann Ins. Co., 282 Ga. App. 734, 639 S.E.2d 352, 2006 Ga. App. LEXIS 1403 (2006), cert. denied, No. S07C0570, 2007 Ga. LEXIS 201 (Ga. Feb. 26, 2007) (decided under former O.C.G.A. § 24-3-1).

Summary of a summary of a detailed report regarding a pesticide chemical was hearsay evidence and should not have been admitted in a trial filed by a personal injury plaintiff as portions of a laboratory report that contained the opinions or conclusions of a third party not before the court were inadmissible until a proper foundation was laid from the person who entered such opinions or conclusions and that person had to qualify as an expert and relate the facts upon which the entry was based; hence, the trial court also erred in allowing a defense witness to testify as to the report who was not qualified as an expert by the court. Chancey v. Peachtree Pest Control Co., 288 Ga. App. 767, 655 S.E.2d 228, 2007 Ga. App. LEXIS 1191 (2007), cert. denied, No. S08C0642, 2008 Ga. LEXIS 459 (Ga. May 19, 2008) (decided under former O.C.G.A. § 24-3-1).

Summary of terminated caseworker's files was hearsay evidence and should not have been introduced into evidence; without the summary, the state lacked clear and convincing evidence to show that parental rights should be terminated. In the Interest of A.A., 252 Ga. App. 167, 555 S.E.2d 827, 2001 Ga. App. LEXIS 1227 (2001) (decided under former O.C.G.A. § 24-3-1).

Proof of agency. — Because there was no evidence that a principal authorized someone to act as the principal's agent, agency could not have been proven by declarations of the alleged agent, and a summary judgment affidavit describing statements made by a payee's attorney which had allegedly accelerated a note was properly excluded since the only evidence that the attorney was the payee's agent was the affidavit itself. McManus v. Turner, 266 Ga. App. 5, 596 S.E.2d 201, 2004 Ga. App. LEXIS 287 (2004) (decided under former O.C.G.A. § 24-3-1).

Double hearsay inadmissible in property action. — Trial court did not err in granting a property owner's motion in limine to exclude evidence that a father of a record title holder's descendant told the descendant that the father told the owner's brother that the brother could not build a house on property because the evidence was double hearsay and inadmissible. DeFoor v. DeFoor, 290 Ga. 540, 722 S.E.2d 697, 2012 Ga. LEXIS 88 (2012) (decided under former O.C.G.A. § 24-3-1).

Approval of construction plan hearsay and inadmissible. — When defendant's statement that plans for dock construction were submitted was based on defendant's own personal knowledge, but defendant's statement regarding approval was hearsay, based on information from a source who told defendant about such approval, the trial court erred in considering this evidence. Clauss v. Plantation Equity Group, Inc., 236 Ga. App. 522, 512

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S.E.2d 10 (decided under former O.C.G.A. § 24-3-1).

Parol evidence rule prevented establishment of a trust based on communications that occurred prior to the agreements. — With respect to a Chapter 11 bankruptcy in which the debtor, a business that served as an intermediary for clients desiring to effect exchanges of real property qualifying for tax-deferred treatment under 26 U.S.C. § 1031, held funds in bank accounts that resulted from certain real estate sales, two real estate exchange investors were not entitled to turnover of proceeds from sales of their real estate, as opposed to having their claims payable on the same basis as the other unpaid exchangers, because the written agreements between the investors and the debtor specifically and unequivocally defined the circumstances under which the debtor acquired cash proceeds and the use and disposition of the proceeds, but did not create an express trust under O.C.G.A. § 53-12-20. The parol evidence rule prevented the investors from trying to establish a trust based on communications that occurred prior to the agreements, which contained merger clauses. McCamy v. Kerr (In re Real Estate Exch. Servs.), No. 08-85871-PWB, 2009 Bankr. LEXIS 3731 (Bankr. N.D. Ga. Oct. 9, 2009) (decided under former O.C.G.A. § 24-3-1).

b. Criminal

Anonymous statement. — Trial court erred in admitting the testimony of a witness who stated that after the shooting and while talking to police officers investigating the crimes, the witness heard a member of the crowd which had gathered around the victim's residence yell at the witness to tell police that defendant was the shooter. Lindsey v. State, 271 Ga. 657, 522 S.E.2d 459 (decided under former O.C.G.A. § 24-3-1).

While the trial court erred in admitting hearsay testimony regarding: (1) "leaders of the community" informing police that defendant had been selling drugs; (2) people fearing defendant and being unwilling to cooperate with police; (3) police using a drug dog to search defendant's car based on information they received about defendant transporting drugs; and (4) one of the confidential informants being unable to testify due to the informant's being sick on the day of trial, this error was harmless in light of the overwhelming evidence of defendant's guilt. Banks v. State, 270 Ga. App. 221, 606 S.E.2d 34, 2004 Ga. App. LEXIS 1326 (2004) (decided under former O.C.G.A. § 24-3-1).

Investigating officer's statement inadmissible. — In a prosecution for simple battery, the testimony of the investigating officer as to a statement by one codefendant was not admissible when two additional adult eyewitnesses were present at the defendants' home on the night of the incident. Harrison v. State, 238 Ga. App. 485, 518 S.E.2d 755 (decided under former O.C.G.A. § 24-3-1).

In a juvenile's adjudication as delinquent for theft by taking the juvenile's sister's car, although the juvenile admitted taking the car, the state failed to prove venue and failed to prove that the taking was unlawful as required by O.C.G.A. § 16-8-2. The officer's testimony that the sister said the taking was without the sister's permission was inadmissible hearsay and was insufficient to support the adjudication even though the evidence was admitted without objection. In the Interest of E.C., 311 Ga. App. 549, 716 S.E.2d 601, 2011 Ga. App. LEXIS 784 (2011) (decided under former O.C.G.A. § 24-3-1).

Police investigator's hearsay statements admissible. — Because defendant was provided a full opportunity for confrontation regarding the victim's prior out-of-court statements, the trial court did not err in admitting a police investigator's hearsay evidence. Gartrell v. State, 272 Ga. App. 726, 613 S.E.2d 226, 2005 Ga. App. LEXIS 376 (2005) (decided under former O.C.G.A. § 24-3-1).

Detective's statement meant to bolster witness testimony. — Trial court erred in permitting the detective to testify about what five witnesses told the detective, after the five witnesses testified against defendant, and in then comparing their statements to what defendant had said on the same subject in defendant's

statements to police, which demonstrated inconsistencies between defendant's statements and those made by the five witnesses; the statements of the five witnesses were prior consistent statements that were inadmissible hearsay because they were offered solely to bolster their testimony in the eyes of the jury since the veracity of their testimony had not been challenged when they testified earlier in the case before the detective testified. Baugh v. State, 276 Ga. 736, 585 S.E.2d 616, 2003 Ga. LEXIS 632 (2003) (decided under former O.C.G.A. § 24-3-1).

Trial court erred in overruling the defendant's hearsay objection because an officer's testimony about what the victim's motel neighbor said to the officer, which came before that witness took the stand, was not a prior consistent statement but was hearsay; however, the error was harmless because any improper bolstering of the victim's neighbor's testimony by the officer's hearsay testimony had no real effect on the defendant's convictions since the victim's neighbor did testify, and that testimony repeated and expanded on the prior statements the officer had recounted. Johnson v. State, 289 Ga. 498, 713 S.E.2d 376, 2011 Ga. LEXIS 541 (2011) (decided under former O.C.G.A. § 24-3-1).

Exclusion of videotape of defendant's statement. — Trial court did not err in excluding a videotape of a statement defendant gave to a detective at the time of defendant's arrest as the statement was not offered to rebut a charge of recent fabrication, improper influence, or improper motive and was pure hearsay. Watson v. State, 278 Ga. 763, 604 S.E.2d 804, 2004 Ga. LEXIS 999 (2004), overruled on other grounds, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-3-1).

Evidence of 9-1-1 call. — In a DUI case, it was error for the trial court to overrule the defendant's objection to a police officer's testimony as to what a 9-1-1 caller had said to the officer, but the error was harmless; the hearsay was cumulative because the officer's testimony that the defendant was asleep behind the wheel mirrored that of the caller. Hopkins v. State, 283 Ga. App. 654, 642 S.E.2d 356, 2007 Ga. App. LEXIS 150 (2007) (decided under former O.C.G.A. § 24-3-1).

Victim's statements hours after crime. — Statements to a police officer by the victim in a prosecution for battery which were made three-and-one-half hours after the incident and which bore no mark of spontaneity or other such state of mind, undeniably free of conscious device or afterthought, were not part of the res gestae; as pure hearsay, the statements were inadmissible since the state did not show "necessity," to wit, that the declarant was unavailable and that the state made reasonable efforts to secure the presence of the declarant. Wilbourne v. State, 214 Ga. App. 371, 448 S.E.2d 37, 1994 Ga. App. LEXIS 884 (1994) (decided under former O.C.G.A. § 24-3-1).

Testimony on content of record. — When the defendant did not tender the copies of the convictions which the defendant desired to have introduced to impeach the witnesses, but only made a proffer of the testimony of the clerk's representative, the state's objection based on the failure to produce the best evidence was properly sustained. The testimony of the deputy clerk as to the content of the records was not only not the best evidence, it was also hearsay. Lipscomb v. State, 194 Ga. App. 657, 391 S.E.2d 773, 1990 Ga. App. LEXIS 282 (1990), cert. denied, No. S90C0799, 1990 Ga. LEXIS 774 (Ga. Apr. 5, 1990), overruled in part, Southall v. State, 300 Ga. 462, 796 S.E.2d 261, 2017 Ga. LEXIS 33 (2017) (decided under former O.C.G.A. § 24-3-1).

Even assuming that the trial court erred in refusing to admit an employee of a power company to testify that she saw on her computer screen a particular entry reflecting that a work order had issued for the defendant's address because there had been a disruption in electrical service to the defendant's home the night before the victims were killed and that it had been reported to the power company that the electric meter had been disconnected, it did not constitute reversible error since there was other evidence that the electric meter had been removed from the house the night before the victims were killed, and the power company's data did not

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identify the persons who had removed the meter. Coleman v. State, 286 Ga. 291, 687 S.E.2d 427, 2009 Ga. LEXIS 703 (2009) (decided under former O.C.G.A. § 24-3-1).

3. Hearsay Not Found

a. Civil

That portion of the birth certificate which relates to the date of birth and the sex of the child, and certain facts concerning the name, race, place of residence, and other facts concerning the child's mother, is not obtained by the physician through hearsay and is clearly admissible. Posey v. State, 46 Ga. App. 290, 167 S.E. 340, 1932 Ga. App. LEXIS 128 (1932) (decided under former Civil Code 1910, § 5762).

Homeowner's suit for fraud. — Homeowner countersued a contractor for fraud. Testimony by a subcontractor that the contractor's project supervisor told the subcontractor to increase the bid because the homeowner was "loaded" was not hearsay, because the testimony was not admitted to show the truth of the matters asserted, and the testimony was a circumstance relevant to the fraud claim. Lumpkin v. Deventer N. Am., Inc., 295 Ga. App. 312, 672 S.E.2d 405, 2008 Ga. App. LEXIS 1338 (2008), cert. denied, No. S09C0643, 2009 Ga. LEXIS 115 (Ga. Mar. 9, 2009) (decided under former O.C.G.A. § 24-3-1).

Evidence not offered to prove truth of matter asserted. — Probate court did not abuse the court's discretion by admitting double hearsay from a witness who, when asked what the testator told the witness that the propounder had said about the caveator, responded, "that the caveator had taken his money and went to Florida and was not coming back" because the second level of alleged hearsay, what the propounder said to the testator about the caveator, was not hearsay, since it was not introduced for the truth of the matter asserted but rather for the effect it had on the testator; the caveator's theory of the case was that the statement by the propounder to the testator was not true, and the evidence was introduced to show where the testator got the misinformation. McDaniel v. McDaniel, 288 Ga. 711, 707 S.E.2d 60, 2011 Ga. LEXIS 183 (2011) (decided under former O.C.G.A. § 24-3-1).

Cumulative evidence of properly admitted proof of title. — In a dispute over two subdivision lots, the trial court did not err in admitting evidence that was cumulative to properly admitted evidence showing a legal property owner's record title, and the evidence was not hearsay, as alleged by a claimant who sought title to the property by prescription; further, the evidence was relevant to the issue of whether a claimant's adverse possession ripened into title by prescription. Smith v. Stacey, 281 Ga. 601, 642 S.E.2d 28, 2007 Ga. LEXIS 132 (2007) (decided under former O.C.G.A. § 24-3-1).

Testimony of caseworker in parental termination case. — In a termination of parental rights case, a parent failed to show that the testimony of the sole witness, a caseworker, was hearsay; although another employee worked on the case before the witness, the witness was the caseworker at the time of the hearing, and the record did not show that the witness lacked personal knowledge of the facts the witness testified to, most of which were memorialized in the trial court's previous orders, which were admitted without objection at the termination hearing. In the Interest of M.D.L., 285 Ga. App. 357, 646 S.E.2d 331, 2007 Ga. App. LEXIS 520 (2007) (decided under former O.C.G.A. § 24-3-1).

Debtor's opinion testimony as to value. — Debtor's testimony, standing alone, was insufficient under O.C.G.A. § 24-9-66 to establish the fair and reasonable value of the debtor's car at the time the car was repossessed because the trial court was authorized to conclude that the debtor's "opinion" testimony about the value of the car two years earlier was based entirely upon hearsay and that, absent any evidence to show that the hearsay was reliable, the debtor failed to demonstrate a sufficient foundation for the debtor's conclusions; the debtor had no education or experience in the value of vehicles and the debtor presented no evidence of the price the debtor paid for the car, the condition of the car at the time the car was repossessed, the potential market for such cars, or other relevant factors to

be considered in reaching a conclusion about the car's value. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878, 2011 Ga. App. LEXIS 32 (2011) (decided under former O.C.G.A. § 24-3-1).

Deposition testimony of driver and passenger involved in traffic accident was not hearsay in a suit wherein occupants of another vehicle sought damages from the driver of a truck parked in the emergency lane of a highway. Reid v. Midwest Transp., 270 Ga. App. 557, 607 S.E.2d 170, 2004 Ga. App. LEXIS 1519 (2004), cert. denied, No. S05C0599, 2005 Ga. LEXIS 266 (Ga. Mar. 28, 2005) (decided under former O.C.G.A. § 24-3-1).

An official publication of the New York Stock Exchange, purporting to show the monthly average prices of cotton, which was introduced without objection in a hearing before an auditor and acted on by the auditor and the parties as if the quotations were correct, cannot, on a hearing by the judge of exceptions of fact to the auditor's report, be excluded on the ground that it was hearsay evidence. McKenzie v. Perdue, 67 Ga. App. 202, 19 S.E.2d 765, 1942 Ga. App. LEXIS 353, rev'd, 194 Ga. 356, 21 S.E.2d 705, 1942 Ga. LEXIS 587 (1942) (decided under former Code 1933, § 38-301).

b. Criminal

Evidence not offered to prove truth of matter asserted. — Challenged testimony was not inadmissible hearsay because: (1) neither the identification testimony by the victim, nor a detective regarding the alleged hearsay in obtaining the defendant's name, violated the defendant's rights to confrontation and cross-examination as neither witness actually repeated any alleged hearsay; (2) the evidence did not create a credibility problem that could only be cured by cross-examination, and the state did not offer the evidence to establish the truth of the matter asserted; and (3) the testimony explained why the police included the defendant's photograph in the line-up. Jennings v. State, 285 Ga. App. 774, 648 S.E.2d 105, 2007 Ga. App. LEXIS 646 (2007), cert. denied, No. S07C1576, 2007 Ga. LEXIS 667 (Ga. Sept. 10, 2007) (decided under former O.C.G.A. § 24-3-1).

Testimony of locksmith. — Locksmith receipt indicating that defendant had a key made for a vehicle was not inadmissible hearsay evidence in the defendant's prosecution for, inter alia, trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1) because the receipt was not offered as proof of what was asserted therein but as evidence that a piece of paper with the defendant's name on it was found in the same residence where cocaine and firearms were located, thereby linking the defendant circumstantially to the residence and the contraband; thus, the receipt was original evidence. Weems v. State, 295 Ga. App. 680, 673 S.E.2d 50, 2009 Ga. App. LEXIS 420 (decided under former O.C.G.A. § 24-3-1).

Officer's testimony about dispatcher's statement. — As an officer's testimony about a dispatcher's statement that two Hispanic males were involved in a firearm discharge was not offered for the truth of the dispatcher's statement, but to explain the officer's subsequent conduct, the testimony was not hearsay. Herieia v. State, 297 Ga. App. 872, 678 S.E.2d 548, 2009 Ga. App. LEXIS 602 (2009) (decided under former O.C.G.A. § 24-3-1).

Evidence that defendant was told age of victims. — Counsel was not ineffective for failing to object to testimony that defendant was told that the declarant "didn't want any guy to take off with [the declarant's] 16-year-old daughter"; the testimony was not hearsay as the testimony was admitted to show that defendant was told that the girls were only 16. Ford v. State, 274 Ga. App. 695, 617 S.E.2d 262, 2005 Ga. App. LEXIS 763 (2005), cert. denied, No. S05C1921, 2005 Ga. LEXIS 789 (Ga. Nov. 7, 2005) (decided under former O.C.G.A. § 24-3-1).

Anything seen or heard by a witness in the presence of a defendant is admissible and does not constitute hearsay. Grindle v. State, 151 Ga. App. 164, 259 S.E.2d 166, 1979 Ga. App. LEXIS 2484 (1979) (decided under former Code 1933, § 38-301).

Receipt removed from burglarized house. — In a burglary case, the trial court did not err in allowing a receipt from one of the burglarized homes to be admitted into evidence and in allowing the

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occupant of the home to testify about the receipt; the receipt and the testimony were not offered to demonstrate who purchased the item or any of the circumstances surrounding that purchase, but to show that the defendant removed the receipt from the home, and the testimony did not constitute hearsay. Perez v. State, 284 Ga. App. 212, 643 S.E.2d 792, 2007 Ga. App. LEXIS 289 (2007) (decided under former O.C.G.A. § 24-3-1).

When a witness testified as to what the witness told another person, the statement was not hearsay. Holloman v. State, 167 Ga. App. 683, 307 S.E.2d 266, 1983 Ga. App. LEXIS 2576 (1983) (decided under former O.C.G.A. § 24-3-1).

When facts testified to are proved without contravention by witness whose knowledge of the facts is immediate and personal, this is not hearsay, and the admission of like statements made by another, even if hearsay, does not under these circumstances constitute reversible error. Johnson v. State, 158 Ga. App. 183, 279 S.E.2d 483, 1981 Ga. App. LEXIS 2118 (1981) (decided under former O.C.G.A. § 24-3-1).

Testimony of phone conversation with officer. — Trial court did not admit hearsay testimony by allowing a police officer to testify as to a conversation the officer had with defendant over the phone and to authenticate defendant's voice as being the voice of the person defendant talked to over the phone; voluntary, noncustodial, incriminating statements of defendants are admissible through the testimony of anyone who heard them. Ingram v. State, 268 Ga. App. 149, 601 S.E.2d 736, 2004 Ga. App. LEXIS 873 (2004) (decided under former O.C.G.A. § 24-3-1).

Testimony not hearsay that was based on officer's observation of cell phone calls. — Testimony by an investigating officer that after confiscating a codefendant's cell phone, the officer used the recently called function and discovered that the phone had been used to call a taxi service just prior to the robbery of a taxi driver was properly admitted as the evidence was not hearsay under former O.C.G.A. § 24-3-1 (see now O.C.G.A. §§ 24-8-801 and 24-8-802) because the evidence was based on the officer's own veracity and competence. Troutman v. State, 297 Ga. App. 196, 676 S.E.2d 836, 2009 Ga. App. LEXIS 397 (2009) (decided under former O.C.G.A. § 24-3-1).

Testimony of police sergeant's own actions was not hearsay. — With regard to a defendant's murder conviction, the trial court did not err by overruling a hearsay objection to testimony by a police sergeant regarding investigative work performed on the case since the sergeant participated in the investigation through desk work; using information gained by the police obtained telephone records and subscriber information to identify potential suspects; and testified on the stand to the steps the sergeant personally took that led to the identification of the defendant as a suspect. The testimony of the sergeant was not hearsay as the sergeant did not relay information told by other persons and the testimony was nothing more than a recitation of the sergeant's own actions. Henley v. State, 285 Ga. 500, 678 S.E.2d 884, 2009 Ga. LEXIS 301, cert. denied, 558 U.S. 1076, 130 S. Ct. 800, 175 L. Ed. 2d 559, 2009 U.S. LEXIS 8805 (2009) (decided under former O.C.G.A. § 24-3-1).

Investigator's testimony was original evidence. — Although defendant contended that the waiver certificate was hearsay under former O.C.G.A. § 24-3-1 (see now O.C.G.A. §§ 24-8-801 and 24-8-802) and improperly placed the defendant's character in issue, testimony was considered hearsay only if the witness was testifying to another party's statement in order to prove or demonstrate the truth of that statement; otherwise it was a verbal act and thus original evidence rather than hearsay. Therefore, defendant's hearsay objection was meritless because the investigator wrote the statement as well as read the statement into evidence, and thus, the statement was original evidence. Bynum v. State, 300 Ga. App. 163, 684 S.E.2d 330, 2009 Ga. App. LEXIS 1111 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. Mar. 29, 2010), overruled in part, Martin v. McLaughlin, 298 Ga. 44, 779 S.E.2d 294, 2015 Ga. LEXIS

793 (2015) (decided under former O.C.G.A. § 24-3-1).

Testimony of security agent as to value of shoplifted items. — Defendant was properly convicted of felony theft by shoplifting because a jury was permitted to consider a security agent's testimony regarding the value of the items stolen since the agent had personal knowledge of the prices of the subject merchandise from a cash register readout. Bell v. State, 262 Ga. App. 788, 586 S.E.2d 455, 2003 Ga. App. LEXIS 1023 (2003) (decided under former O.C.G.A. § 24-3-1).

Testimony of investigating officer that "co-indictee's name is Lawrence" was not hearsay, but was a statement of undisputed fact, identifying for the jury that person to whom the officer was then talking. Jackson v. State, 209 Ga. App. 53, 432 S.E.2d 649, 1993 Ga. App. LEXIS 755 (1993) (decided under former O.C.G.A. § 24-3-1).

Investigating officer's testimony about original lead. — Investigating officer's testimony that the officer investigated defendant based on information the officer received from an unnamed source did not constitute hearsay because the officer did not divulge the content of that information. Jenkins v. State, 268 Ga. 468, 491 S.E.2d 54 (decided under former O.C.G.A. § 24-3-1).

Questions summarizing prior testimony. — Prosecution's questioning of a state's witness, summarizing incriminating testimony of previous state's witnesses for the witness, who was then asked whether that witness had, in fact, heard that testimony, was not objectionable on the ground that it sought to elicit hearsay, where the previous witnesses' testimony was offered under oath and was subject to cross-examination. King v. State, 185 Ga. App. 698, 365 S.E.2d 852, 1988 Ga. App. LEXIS 260 (1988) (decided under former O.C.G.A. § 24-3-1).

Admission of transcript from earlier conviction. — When defendant in a prosecution for rape and aggravated sodomy pled guilty to a prior charge of aggravated sexual assault, admission of a transcript of the prior victim's testimony given at a hearing to compel the witness to testify was proper under the necessity exception to hearsay evidence. McBee v. State, 228 Ga. App. 16, 491 S.E.2d 97 (decided under former O.C.G.A. § 24-3-1).

Prior consistent statement. — Because the veracity of a witness's trial testimony was placed in issue, the witness's prior testimony was properly admitted as a prior consistent statement. Jackson v. State, 271 Ga. App. 278, 609 S.E.2d 207, 2005 Ga. App. LEXIS 26 (2005) (decided under former O.C.G.A. § 24-3-1).

Victim's statement to a doctor was properly admitted as a prior consistent statement as the victim testified at trial and was cross-examined by the defendant; the defendant had asserted in opening statement and the defendant implied during cross-examination that because the victim's parent would have been upset if the parent believed the victim were having consensual sex, the victim falsely testified that the defendant forced the victim to engage in sex, which testimony was designed to preserve the victim's relationship with the parent, and to continue the victim's receipt of food and shelter from the parent. Smith v. State, 282 Ga. App. 339, 638 S.E.2d 791, 2006 Ga. App. LEXIS 1384 (2006), overruled, Middleton v. State, 309 Ga. 337, 846 S.E.2d 73, 2020 Ga. LEXIS 476 (2020) (decided under former O.C.G.A. § 24-3-1).

When a victim testified that the victim could not remember all of the details of a robbery, which occurred six years before the trial, it was not error to introduce the victim's prior consistent statement. The victim was a forgetful witness who testified at trial and who was cross-examined by the defendant. Williams v. State, 291 Ga. App. 279, 661 S.E.2d 658, 2008 Ga. App. LEXIS 471 (2008), cert. denied, No. S08C1497, 2008 Ga. LEXIS 707 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-3-1).

After the victim's mother testified that the defendant admitted to the mother that the defendant molested the victim, the trial court did not err in allowing an investigator to testify that the mother had told the investigator the same thing because the mother testified at trial and was cross-examined, and the defendant placed the mother's veracity in issue during

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cross-examination by attempting to show that the mother had an improper motive for testifying against the defendant, a motive that developed after the mother made the prior consistent statement to the investigator. Davis v. State, 303 Ga. App. 799, 694 S.E.2d 381, 2010 Ga. App. LEXIS 403 (2010) (decided under former O.C.G.A. § 24-3-1).

Admission of an investigator's summary of a victim's prior consistent statement was not reversible error because the record contained other unchallenged testimony by witnesses other than the victim conveying the content of the victim's prior statement and that the victim's prior statement was consistent with the victim's trial testimony; it was not likely that the subsequent admission of the victim's statement itself contributed to the guilty verdict, and by the time the statement was read, any bolstering effect of the repetitive nature of the prior statement had occurred without objection. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77, 2010 Ga. App. LEXIS 650 (2010), cert. denied, No. S10C1898, 2011 Ga. LEXIS 84 (Ga. Jan. 13, 2011) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err by admitting prior consistent statements of the victim and the defendant's son in videotaped interviews that also included comments by the interviewer because nothing in the record demonstrated that the portion of the videotape that the trial court ruled would not be presented for the jury was played for the jury, and the defendant's counsel made no objection after the videotape was played. Wade v. State, 305 Ga. App. 382, 700 S.E.2d 827, 2010 Ga. App. LEXIS 663 (2010), cert. denied, No. S10C1993, 2011 Ga. LEXIS 61 (Ga. Jan. 24, 2011), cert. denied, 564 U.S. 1041, 131 S. Ct. 3066, 180 L. Ed. 2d 893, 2011 U.S. LEXIS 4911 (2011) (decided under former O.C.G.A. § 24-3-1).

Testimony concerning surveillance videotape. — To the extent that In re C.G., 261 Ga. App. 814 (2003) finds that a surveillance videotape merely depicting nonverbal conduct constitutes a hearsay statement, it is hereby disapproved. Hammock v. State, 311 Ga. App. 344, 715 S.E.2d 709, 2011 Ga. App. LEXIS 653 (2011), writ denied, No. S11C1888, 2012 Ga. LEXIS 68 (Ga. Jan. 9, 2012) (decided under former O.C.G.A. § 24-3-1).

Testimony concerning a surveillance videotape was not hearsay because the witnesses did not offer any testimony about what someone else said or wrote outside of court, but rather, the witnesses testified about the witnesses' personal observations of the conduct that appeared on the videotape; because the testimony did not ask the jury to assume the truth of out-of-court statements made by others, and instead, the value of the testimony rested on the witnesses' own veracity and competence, the testimony was not hearsay. Hammock v. State, 311 Ga. App. 344, 715 S.E.2d 709, 2011 Ga. App. LEXIS 653 (2011), writ denied, No. S11C1888, 2012 Ga. LEXIS 68 (Ga. Jan. 9, 2012) (decided under former O.C.G.A. § 24-3-1).

Identification of defendant in photo array. — In a prosecution for armed robbery and related offenses, the trial court properly allowed hearsay evidence of identification. It was not error to allow a police officer to testify as to who the victims identified in the photo arrays as a law enforcement officer could testify to a pretrial identification if the person who actually made the identification testified at trial and was subject to cross-examination. Monfort v. State, 281 Ga. App. 29, 635 S.E.2d 336, 2006 Ga. App. LEXIS 992 (2006) (decided under former O.C.G.A. § 24-3-1).

Recorded telephone conversation with informant. — Because the informant's recorded statements provided context for the defendant's portion of the telephone conversation, the informant's statements were not hearsay as the statements entailed admissions of a party opponent, and the Confrontation Clause did not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted, the trial court did not err in admitting the recording. Jones v. State, 339 Ga. App. 95, 791 S.E.2d 625, 2016 Ga. App. LEXIS 559 (2016), cert. denied, No. S17C0590, 2017 Ga. LEXIS 411 (Ga. May 15, 2017).

Evidence rested upon veracity of witness, not other person. — In a trial for theft by taking, it was error to preclude

a witness from giving testimony that potentially would have corroborated the defendant's explanation for the defendant's possession of a stolen trailer on the ground that the testimony was hearsay under former O.C.G.A. § 24-3-1(a) (see now O.C.G.A. §§ 24-8-801 and 24-8-802). The value of the evidence rested upon the veracity of the witness, not the veracity of the person referred to by the witness; furthermore, the error was not harmless, as the unsatisfactoriness of the defendant's explanation for possessing the trailer was central to the conviction. Boivin v. State, 298 Ga. App. 411, 680 S.E.2d 415, 2009 Ga. App. LEXIS 560 (2009), cert. denied, No. S09C1768, 2009 Ga. LEXIS 533 (Ga. Sept. 8, 2009) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in refusing to grant a mistrial on the ground that an eyewitness's testimony was based on hearsay because to the extent the testimony exposed prior difficulties between the codefendants and the victim, the testimony was cumulative of other testimony that the defendant and the codefendant threatened the victim the day before the shooting; the other evidence implicating the defendant in the shooting made it highly probable that the hearsay testimony did not contribute to the verdict. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661, 2012 Ga. LEXIS 625 (2012) (decided under former O.C.G.A. § 24-3-1).

4. Examples Not Within Rule

Ownership of clothing. — If a person testifies that certain articles of clothing exhibited to the person are similar to those worn by a suspect in a murder case, whom the accused is attempting to identify as the guilty party, it is proper to exclude hearsay testimony identifying the ownership of the clothing as being that of the suspect; this evidence does not come within the exception to the hearsay evidence rule. Bryant v. State, 197 Ga. 641, 30 S.E.2d 259, 1944 Ga. LEXIS 314 (1944) (decided under former Code 1933, § 38-301).

Objections

1. Specificity of Objections

General rule requires that an objection to testimony point out in detail why the testimony is subject to the objection made. Jones v. State, 154 Ga. App. 806, 270 S.E.2d 201, 1980 Ga. App. LEXIS 2398 (1980) (decided under former Code 1933, § 38-301).

When general objection fails. — When an objection is made to evidence as a whole or en bloc, a part of which is not subject to the objection, the entire general objection fails. Jones v. State, 154 Ga. App. 806, 270 S.E.2d 201, 1980 Ga. App. LEXIS 2398 (1980) (decided under former Code 1933, § 38-301).

2. Admission over Objection

Illegal admission over objection requires new trial. — If, by the introduction of hearsay evidence, it is probable that the jury might have been led to believe that the jury could consider it as sufficient to establish the fact stated, then if that fact be material, and timely objection be urged, a new trial should result. Glisson v. State, 57 Ga. App. 169, 194 S.E. 877, 1938 Ga. App. LEXIS 509 (1938) (decided under former Code 1933, § 38-301).

Illegal admission over proper objection of hearsay evidence not embraced within any of the exceptions, relating to a vital issue, as to which the other evidence is in conflict, which admission is prejudicial to the losing party, is cause for a new trial. Fuller v. State, 196 Ga. 237, 26 S.E.2d 281, 1943 Ga. LEXIS 319 (1943) (decided under former Code 1933, § 38-301).

Inadmissible hearsay which is received over objection does not require a new trial if it appears that the evidence could not have affected the verdict because other evidence by a witness with immediate and personal knowledge is sufficient to establish the fact in question. Glass v. State, 235 Ga. 17, 218 S.E.2d 776, 1975 Ga. LEXIS 768 (1975) (decided under former Code 1933, § 38-301).

Necessity exception satisfied to warrant admission of hearsay. — With regard to a defendant's convictions for malice murder and other crimes, the trial court did not err in admitting hearsay testimony of a witness who testified about prior difficulties between the defendant and the victim, over the hearsay objection of trial counsel, under the necessity excep-

Admission over Objection (Cont'd)

tion to the hearsay rule; considering the totality of the circumstances, the trial court did not abuse the court's discretion in permitting the testimony under the necessity exception since the witness in question testified that the victim and the witness were roommates for a while, were teammates on a college track team, and had become close enough in the course of their friendship to have shared intimate details of their lives and relationships, including the witness's observations of bruises on the victim, which the victim told the witness were inflicted by the defendant. Culmer v. State, 282 Ga. 330, 647 S.E.2d 30, 2007 Ga. LEXIS 469 (2007) (decided under former O.C.G.A. § 24-3-1).

Failure to object to hearsay. — In a plumbing company's action to recover for septic services performed, the company failed to object to the homeowners' affidavits supporting the homeowners' defense of fraud by the company and, therefore, the company waived any objection to any alleged hearsay under O.C.G.A. § 24-8-802. Shuford v. Aames Plumbing & Heating, Inc., 327 Ga. App. 844, 761 S.E.2d 395, 2014 Ga. App. LEXIS 438 (2014).

Under the new rules of evidence, an objection to hearsay evidence not raised at the summary judgment stage until a party's brief on appeal is not the required contemporaneous objection. Patterson v. Kevon, LLC, 304 Ga. 232, 818 S.E.2d 575, 2018 Ga. LEXIS 536 (2018).

Any error as to alleged hearsay waived by failure to object. — In a dispute between the buyer and seller of a gas station, the seller failed to preserve the seller's argument regarding alleged hearsay evidence by failing to object at trial. The court rejected the seller's contention that the old evidence code applied because the document in question was generated in 2012, and the trial occurred in 2018. Spirits, Inc. v. Patel, 350 Ga. App. 153, 828 S.E.2d 381, 2019 Ga. App. LEXIS 258 (2019).

RESEARCH REFERENCES

ALR.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through interpreter — state cases, 97 A.L.R.6th 567.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter — federal cases, 91 A.L.R. Fed. 2d 187.

24-8-803. Hearsay rule exceptions; availability of declarant immaterial.

The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter;

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless such statements relate to the execution, revocation, identification, or

terms of the declarant's will and not including a statement of belief as to the intent of another person;

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but shall not itself be received as an exhibit unless offered by an adverse party;

(6) **Records of regularly conducted activity.** Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with paragraph (11) or (12) of Code Section 24-9-902 or by any other statute permitting certification. The term "business" as used in this paragraph includes any business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports shall be admissible under paragraph (8) of this Code section and shall not be admissible under this paragraph;

(7) **Absence of entry in records kept in accordance with paragraph (6) of this Code section.** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) of this Code section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness;

(8) **Public records and reports.** Except as otherwise provided by law, public records, reports, statements, or data compilations, in any form, of public offices, setting forth:

(A) The activities of the public office;

(B) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, against the accused in criminal proceedings, matters observed by police officers and other law enforcement personnel in connection with an investigation; or

(C) In civil proceedings and against the state in criminal proceedings, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness;

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law;

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office, evidence in the form of a certification in accordance with Code Section 24-9-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry;

(11) **Records of religious organizations.** Statements of birth, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization;

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified and purporting to have been issued at the time of the act or within a reasonable time thereafter;

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like;

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an

interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable law authorizes the recording of documents of that kind in such office;

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document;

(16) **Statements in ancient documents.** Statements in a document in existence 20 years or more the authenticity of which is established;

(17) **Market reports and commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in the witness's particular occupation;

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits;

(19) **Reputation concerning personal or family history.** Reputation among members of a person's family by blood, adoption, or marriage or among a person's associates or in the community concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person's personal or family history;

(20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community and reputation as to events of general history important to the community or state or nation in which such lands are located;

(21) **Reputation as to character.** Reputation of a person's character among associates or in the community;

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty but not upon

a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but shall not affect admissibility; or

(23) **Judgment as to personal, family, or general history or boundaries.** Judgments as proof of matters of personal, family, or general history or boundaries essential to the judgment, if the same would be provable by evidence of reputation.

History.

Code 1981, § 24-8-803, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Classification of confidential and privileged materials from department and county boards of health, § 31-5-5.

Certified copies of vital records, § 31-10-26.

Acquiescence as establishing dividing line in real property, § 44-4-6.

Transmittal of copy of exempted real property to other counties and recordation, § 44-13-11.

Exceptions to the rule against hearsay —regardless of whether the declarant is available as a witness, Fed. R. Evid. 803.

Law reviews.

For note discussing res gestae, see 3 Ga. B.J. 69 (1940).

For article advocating admissibility of business entries, see 14 Ga. B.J. 7 (1951).

For article analyzing Georgia business entries provisions, see 4 Mercer L. Rev. 313 (1953).

For article discussing exceptions to the hearsay rule and advocating elimination of the res gestae exception, see 5 Mercer L. Rev. 257 (1954).

For article, "Business Entries as Evidence," see 16 Ga. B.J. 383 (1954).

For comment on Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370, 374 (1957), holding that the Georgia business records as evidence statute does not authorize the introduction into evidence of papers containing the opinion of experts or physicians when the party in whose interest the papers are offered is not allowed to examine their author, see 20 Ga. B.J. 381 (1958).

For article, "Decisions Under the Georgia Business Records Act of 1952," see 21 Ga. B.J. 211 (1958).

For comment on Yarbrough v. Cantex Mfg. Co., 97 Ga. App. 392, 103 S.E.2d 130 (1958), see 22 Ga. B.J. 100 (1959).

For comment on Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639 (1959), see 22 Ga. B.J. 380 (1960).

For note, "Hypnosis in Court: A Memory Aid for Witnesses," see 1 Ga. L. Rev. 268 (1967).

For comment on Argonaut Ins. Co. v. Allen, 123 Ga. App. 741, 182 S.E.2d 508 (1971), upholding admission of psychiatric opinion based on subjective declarations of patient, see 8 Ga. St. B.J. 554 (1972).

For article, "Evidence from Computers," see 8 Ga. L. Rev. 562 (1974).

For article, "The Demise of the Corroboration Requirement — Its History in Georgia Rape Law," see 26 Emory L.J. 805 (1977).

For article, "The Admissibility of Computer-Generated Evidence in Georgia," see 18 Ga. St. B.J. 137 (1982).

For article, "The Need For a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984).

For article, "An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception," see 33 Ga. L. Rev. 353 (1999).

For article, "Evidence," see 53 Mercer L. Rev. 281 (2001).

For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

For article, "Georgia's New Evidence Code: After the Celebration, a Serious Review of Anticipated Subjects of Litigation to be Brought on by the New Legislation," see 64 Mercer L. Rev. 1 (2012).

For annual survey on evidence law, see 64 Mercer L. Rev. 137 (2012).

For annual survey on insurance law, see 64 Mercer L. Rev. 151 (2012).

For article, "Symposium on Evidence Reform: The Curious Case of Differing Literary Emphases: The Contrast Between the Use of Scientific Publications at Pretrial Daubert Hearings and at Trial," see 47 Ga. L. Rev. 837 (2013).

For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

For annual survey of evidence law, see 67 Mercer L. Rev. 63 (2015).

For article, "2014 Georgia Corporation and Business Organization Case Law Developments," see 20 Ga. St. Bar. J. 26 (April 2015).

For annual survey on evidence law, see 71 Mercer L. Rev. 103 (2019).

For article, "Confronting Memory Loss," see 55 Ga. L. Rev. 95 (2020).

For annual survey on evidence, see 73 Mercer L. Rev. 111 (2021).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1812, Cobb's 1851 Digest, p. 167, former Laws 1827, Cobb's 1851 Digest, p. 172, former Laws 1841, Cobb's 1851 Digest, p. 178, former Ga. L. 1855-56, p. 143, § 1, former Code 1863, §§ 1960, 2659, 2674, 3696, 3702, 3773, 3790, former Code 1868, §§ 1948, 2658, 2670, 3720, 3726, 3810, former Code 1873, §§ 1958, 2700, 2712, 3773, 3779, 3866, former Code 1882, §§ 1958, 2712, 3772, 3773, 3779, 3866, former Civil Code 1895, §§ 998, 2782, 3610, 3628, 5177, 5179, 5184, 5185, 5284, 5766, former Penal Code 1895, §§ 998, 1020, former Civil Code 1910, §§ 3261, 4190, 4210, 5764, 5766, 5771, 5772, 5873, former Penal Code 1910, §§ 1024, 1046, former Code 1933, §§ 29-112, 29-415, 38-303, 38-305, 38-311, 38-312, 38-313, 38-315, 38-1707, 67-110, 85-1602, 93-504, Ga. L. 1952, p. 177, §§ 1, 2, 3, Ga. L. 1953, Jan.-Feb. Sess., p. 602, § 19, and former O.C.G.A. §§ 24-3-3, 24-3-4, 24-3-9, 24-3-11, 24-3-12, 24-3-13, 24-3-14, 24-9-69, 44-2-23, 44-5-45, 44-14-38, 45-16-43, and 46-2-53 are included in the annotations for this Code section.

In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-9-924, which may also be applicable to this Code section.

Prerequisites to admission. — To bring a declaration within the exception of the res gestae, the declaration must grow out of the main fact; the declaration must serve to illustrate the fact, and the declaration must be made contemporaneously with the fact. When these things are true of declarations, the declarations are provable, not as the testimony of the declarant, but as partaking of the nature of facts. Mitchum v. State, 11 Ga. 615, 1852 Ga. LEXIS 72 (1852) (decided under former law).

Declarations of a party to be admitted as part of the res gestae must be at the time of the transaction the declarations are intended to explain, must be calculated to unfold its nature and quality, and must harmonize with it. Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69, 1915 Ga. App. LEXIS 2 (1915) (decided under Penal Code 1910, § 1024); Wallace v. State, 151 Ga. App. 177, 259 S.E.2d 172 (1979) (decided under former Code 1933, § 38-305).

To satisfy the standards of the former statute, the exclamation must be contemporaneous, voluntary, and made at a time which indicated the lack of deliberation

and deception. Gaines v. State, 232 Ga. 727, 208 S.E.2d 798, 1974 Ga. LEXIS 1072 (1974) (decided under former Code 1933, § 38-305).

Construction with Ga. Unif. Super. Ct. R. 31.3. — Proper res gestae evidence was admissible without having to follow the rules regarding prior similar transactions, as nothing in Ga. Unif. Super. Ct. R. 31.3(E) was intended to prohibit the state from introducing evidence of similar transactions or occurrences which were immediately related in time and place to the charge being tried, as part of a single, continuous transaction. White v. State, 282 Ga. App. 286, 638 S.E.2d 426, 2006 Ga. App. LEXIS 1368 (2006) (decided under former O.C.G.A. § 24-3-3).

When an act is material, declarations accompanying the act are admissible as part of the res gestae. Atlanta & W. Point R.R. v. Truitt, 65 Ga. App. 320, 16 S.E.2d 273, 1941 Ga. App. LEXIS 317 (1941) (decided under former Code 1933, § 38-305).

Admitted as material facts. — Declarations as parts of the res gestae, made at the time of the transaction, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like any other material facts. Jones v. State, 62 Ga. App. 734, 9 S.E.2d 707, 1940 Ga. App. LEXIS 424 (1940) (decided under former Code 1933, § 38-305).

Self-serving declarations. — Declarations made by a party in the party's own favor, to be admissible as part of the res gestae, must be such as were contemplated by former statute. Rutland v. Hathorn, 36 Ga. 380, 1867 Ga. LEXIS 50 (1867), superseded by statute as stated in Ballard v. Frey, 179 Ga. App. 455, 346 S.E.2d 893, 1984 Ga. App. LEXIS 2765 (1984) (decided under former Code 1863, § 3696).

Burden on person seeking to introduce res gestae evidence. — It was incumbent on a party seeking to introduce hearsay evidence, as part of the res gestae to prove that the declarations testified to were so nearly connected with the transaction under investigation, in point of time, as to be free from any suspicion of device or afterthought. Taylor v. State, 120 Ga. 857, 48 S.E. 361, 1904 Ga. LEXIS 721 (1904) (decided under former Penal Code 1895, § 998); Pool v. Warren County, 123 Ga. 205, 51 S.E. 328, 1905 Ga. LEXIS 414 (1905) (decided under former Penal Code 1895, § 998); Smith v. State, 10 Ga. App. 840, 74 S.E. 447, 1912 Ga. App. LEXIS 725 (1912) (decided under former Penal Code 1910, § 1024).

Four current generally prevalent exceptions that used to fall under the label "res gestae" are declarations of present bodily condition, declarations of present mental state or emotion, excited utterances, and present sense impressions. Collins v. Francis, 728 F.2d 1322, 1984 U.S. App. LEXIS 24501 (11th Cir.), cert. denied, 469 U.S. 963, 105 S. Ct. 361, 83 L. Ed. 2d 297, 1984 U.S. LEXIS 392 (1984) (decided under former O.C.G.A. § 24-3-3).

Denying defendant opportunity to impeach statements of child sodomy victim was harmless error since the child's declaration was not the sole evidence of the crime and the evidence did not show that the child had any measure of dealings with members of the community at large which would subject the child to the formation of public opinion about the child's veracity. Brantley v. State, 177 Ga. App. 13, 338 S.E.2d 694, 1985 Ga. App. LEXIS 2472 (1985) (decided under former O.C.G.A. § 24-3-3).

Learned treatise exception. — In a medical malpractice action, there was no basis to find that the Katz Committee Findings fell within the scope of the learned treatise exception to the hearsay rule because that exception did not expressly reference that type of document. Moore v. Wellstar Health Sys., 349 Ga. App. 834, 824 S.E.2d 787, 2019 Ga. App. LEXIS 170 (2019).

Admission of product label harmless error. — In an action for furnishing a vapor product to a minor, any error in the admission of the product label under the market reports and commercial publications exception was harmless because there was other evidence showing that the defendant furnished a vapor product to a minor, including a sergeant's testimony regarding the underage operatives' purchases. Childers v. State, 358 Ga. App. 568, 855 S.E.2d 766, 2021 Ga. App. LEXIS 96 (2021).

Res Gestae; Present Sense Impression and Excited Utterance

1. Res Gestae Defined

It is impossible to define res gestae so as to adequately cover all the various and different uses to which it is put. Walker v. State, 137 Ga. 397, 137 Ga. 398, 73 S.E. 368, 1911 Ga. LEXIS 393 (1911) (decided under former Civil Code 1910, § 5766).

Idea of res gestae presupposes a main fact, or principal transaction. Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474, 1972 Ga. App. LEXIS 1023 (1972) (decided under former Code 1933, § 38-305).

What is res gestae of a given transaction must depend upon its own peculiarities of character and circumstances. Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69, 1915 Ga. App. LEXIS 2 (1915) (decided under former Civil Code 1910, § 5766); Wallace v. State, 151 Ga. App. 171, 259 S.E.2d 172, 1979 Ga. App. LEXIS 2489 (1979) (decided under former Code 1933, § 38-305).

Res gestae are events speaking for themselves, through the instinctive words and acts of participants, but are not the words and acts of participants when narrating the events. Jones v. State, 62 Ga. App. 734, 9 S.E.2d 707, 1940 Ga. App. LEXIS 424 (1940) (decided under former Code 1933, § 38-305).

Res gestae refers to oral declarations of a spontaneous nature which would otherwise be inadmissible hearsay evidence. Fountain v. State, 136 Ga. App. 229, 220 S.E.2d 705, 1975 Ga. App. LEXIS 1305 (1975) (decided under former Code 1933, § 38-305).

Witnesses' testimony regarding what the girls said defendant told the girls to do was not impermissible "double hearsay", as defendant's directions to the girls about what the defendant wanted the girls to do were an integral part of the defendant's offenses and were thus admissible as part of res gestae. Gibby v. State, 213 Ga. App. 20, 443 S.E.2d 852, 1994 Ga. App. LEXIS 473 (1994), cert. denied, No. S94C1205, 1994 Ga. LEXIS 848 (Ga. July 7, 1994) (decided under former O.C.G.A. § 24-3-3).

Res gestae is not limited to the codal restriction of "declarations." Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474, 1972 Ga. App. LEXIS 1023 (1972) (decided under former Code 1933, § 38-305).

Res gestae also includes circumstances and acts. — Acts and circumstances forming a part of the continuation of the main transaction are admissible as res gestae. Floyd v. State, 143 Ga. 286, 84 S.E. 971, 1915 Ga. LEXIS 396 (1915) (decided under former Penal Code 1910, § 1024); Black v. State, 154 Ga. App. 441, 268 S.E.2d 724, 1980 Ga. App. LEXIS 2216 (1980) (decided under former Code 1933, § 38-305).

Circumstances, acts, and declarations growing out of main fact, and contemporaneous with the main fact, and which serve to illustrate its character, are part of res gestae. Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69, 1915 Ga. App. LEXIS 2 (1915) (decided under former Civil Code 1910, § 5766); Waller v. State, 80 Ga. App. 488, 56 S.E.2d 491, 1949 Ga. App. LEXIS 867 (1949) (decided under former Code 1933, § 38-305); Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474, 1972 Ga. App. LEXIS 1023 (1972) (decided under former Code 1933, § 38-305).

Rape conviction was upheld on appeal as the defendant was not entitled to a new trial based on defense counsel's failure to object to certain testimony from the victim about the defendant's history of selling drugs and failure to subpoena certain medical records; moreover, the defendant was properly denied a mistrial as the trial court issued a curative instruction regarding the alleged improper character evidence admitted, and thereafter polled the jury to ensure that jurors would in fact disregard that evidence. Mitchell v. State, 287 Ga. App. 517, 651 S.E.2d 821, 2007 Ga. App. LEXIS 1000 (2007) (decided under former O.C.G.A. § 24-3-3).

Because the state was entitled to present evidence of the entire res gestae of the crime, other criminal acts committed by defendant on the same night as a robbery were relevant under former O.C.G.A. § 24-3-3 to show defendant's frame of mind in the time period immediately preceding and following the crimes. Waters v.

State, 294 Ga. App. 442, 669 S.E.2d 450, 2008 Ga. App. LEXIS 1213 (2008) (decided under former O.C.G.A. § 24-3-3).

2. Time Requirements

Verbal act doctrine. — Part of former statute which admitted "declarations accompanying an act" in evidence as a part of the res gestae was but a codification of the principal of the "verbal act doctrine." Glens Falls Indem. Co. v. Gottlieb, 80 Ga. App. 634, 56 S.E.2d 799, 1949 Ga. App. LEXIS 892 (1949) (decided under former Code 1933, § 38-305).

Statements must be part of occurrence. — Test of determining whether statements are a part of the res gestae is: were the declarations a part of the occurrence to which they relate, or were the declarations a mere narrative concerning something which had fully taken place, and had therefore become a thing of the past. Hunter v. State, 147 Ga. 823, 95 S.E. 668, 1918 Ga. LEXIS 160 (1918) (decided under former Civil Code 1910, § 5766); Hodge v. American Mut. Liab. Ins. Co., 57 Ga. App. 403, 195 S.E. 765, 1938 Ga. App. LEXIS 613 (1938) (decided under former Code 1933, § 38-305); Berry v. Dinsmore, 115 Ga. App. 256, 154 S.E.2d 653, 1967 Ga. App. LEXIS 1075 (1967) (decided under former Code 1933, § 38-305); Augusta Coach Co. v. Lee, 115 Ga. App. 511, 154 S.E.2d 680 (1967) (decided under former Code 1933, § 38-305); Clark v. State, 142 Ga. App. 851, 237 S.E.2d 459, 1977 Ga. App. LEXIS 2149 (1977) (decided under former Code 1933, § 38-305); Wallace v. State, 151 Ga. App. 171, 259 S.E.2d 172, 1979 Ga. App. LEXIS 2489 (1979) (decided under former Code 1933, § 38-305); Doughty v. State, 175 Ga. App. 317, 333 S.E.2d 402, 1985 Ga. App. LEXIS 2090 (1985) (decided under former O.C.G.A. § 24-3-3).

Trial court did not err in admitting, pursuant to the res gestae exception to the hearsay rule, the testimony of a police officer about the victim's oral statement to the officer and the victim's written statement that the victim made a few moments after making the oral statement, as both statements by the victim were made at a time when the victim was still under the influence of defendant's kidnapping of the victim and the victim's children; indeed, at the time the victim made the statements, the victim was still visibly shaken, and the victim's face was red, puffy, and swollen. White v. State, 265 Ga. App. 117, 592 S.E.2d 905, 2004 Ga. App. LEXIS 27 (2004) (decided under former O.C.G.A. § 24-3-3).

Res gestae must be contemporaneous with main transaction. — Declarations to be a part of the res gestae must be contemporaneous with the main fact the declarations are intended to explain. If the declarations are made after the transaction, and therefore not contemporaneous with it, such declarations are a mere narrative of the past occurrence. Thomas v. State, 67 Ga. 460, 1881 Ga. LEXIS 204 (1881) (decided under former Code 1873, § 3773); Sullivan v. State, 101 Ga. 800, 29 S.E. 16, 1897 Ga. LEXIS 331 (1897) (decided under former Civil Code 1895, § 998).

Res gestae of a transaction is what is done during the progress of the transaction, or so nearly upon the actual occurrence as fairly to be treated as contemporaneous with the transaction. Hall v. State, 48 Ga. 607, 1873 Ga. LEXIS 132 (1873) (decided under former Code 1873, § 3773); Lyles v. State, 130 Ga. 294, 60 S.E. 578, 1908 Ga. LEXIS 263 (1908) (decided under former Penal Code 1895, § 998); Walker v. State, 137 Ga. 397, 137 Ga. 398, 73 S.E. 368, 1911 Ga. LEXIS 393 (1911) (decided under former Penal Code 1910, § 998); Hunter v. State, 147 Ga. 823, 95 S.E. 668, 1918 Ga. LEXIS 160 (1918) (decided under former Penal Code 1910, § 998).

Testimony of a police officer regarding an eyewitness statement to the police at the scene that the defendant was driving in the left lane and that the plaintiff drove into the side of the truck after "not really stopping" in the median was admissible as part of the res gestae exception to the hearsay rule. Cleveland v. Bryant, 236 Ga. App. 459, 512 S.E.2d 360 (decided under former O.C.G.A. § 24-3-3).

Res gestae need not be precisely concurrent in time. — Declarations, to be a part of the res gestae must be contemporaneous with the main fact, but to be contemporaneous, the declarations are

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not required to be precisely concurrent in point of time. Mitchum v. State, 11 Ga. 615, 1852 Ga. LEXIS 72 (1852) (decided under former law).

Declarations to be part of the res gestae need not be precisely concurrent in point of time, if the declarations spring out of the transaction and are made so near to it as to preclude reasonably the idea of deliberation. Walker v. State, 139 Ga. 398, 73 S.E. 368 (1912) (decided under former Penal Code 1910, § 1024).

Declarations, to be a part of the res gestae, must be contemporaneous with the main fact but need not be precisely concurrent in point of time; it is sufficient if such declarations spring out of the transaction, if the declarations elucidate the transaction, if voluntary and if made at such time as reasonably to exclude the idea of design. Brown v. City of Fitzgerald, 177 Ga. App. 859, 341 S.E.2d 476, 1986 Ga. App. LEXIS 1553 (1986) (decided under former O.C.G.A. § 24-3-3).

Occurrence not necessarily limited in time. — Main fact or transaction from which the res gestae springs is not necessarily limited as to time; it may be a length of time in the action. Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474, 1972 Ga. App. LEXIS 1023 (1972) (decided under former Code 1933, § 38-305).

Admissible as part of continuous transaction. — Evidence relating to an attempted cocaine deal that failed to materialize was admissible since the attempted deal was part of a continuous transaction. Brewer v. State, 224 Ga. App. 656, 481 S.E.2d 608 (decided under former O.C.G.A. § 24-3-3).

Narratives of past occurrences are not admissible. — Principal point to be observed in all cases is whether the declarations offered in proof were contemporaneous with the main fact under consideration; for if the declarations are merely the narrative of a past occurrence, the declarations cannot be received in evidence. Bulter v. Stewart, 112 Ga. App. 293, 145 S.E.2d 47, 1965 Ga. App. LEXIS 674 (1965) (decided under former Code 1933, § 38-305).

No precise point of time can be fixed, a priori, when the res gestae ends. — Each case turns on its own circumstances. Indeed, the inquiry is rather into events, than into the precise time which has elapsed. Hall v. State, 48 Ga. 607, 1873 Ga. LEXIS 132 (1873) (decided under former Code 1873, § 3773); Lyles v. State, 130 Ga. 294, 60 S.E. 578, 1908 Ga. LEXIS 263 (1908) (decided under former Penal Code 1895, § 998); Walker v. State, 137 Ga. 397, 137 Ga. 398, 73 S.E. 368, 1911 Ga. LEXIS 393 (1911) (decided under former Penal Code 1910, § 1024); Hunter v. State, 147 Ga. 823, 95 S.E. 668, 1918 Ga. LEXIS 160 (1918) (decided under former Penal Code 1910, § 1024); O'Neal v. State, 172 Ga. 526, 158 S.E. 51, 1931 Ga. LEXIS 140 (1931) (decided under former Penal Code 1910, § 1024); Dye v. State, 218 Ga. 330, 127 S.E.2d 674, 1962 Ga. LEXIS 490 (1962) (decided under former Code 1933, § 38-305); Bunn v. State, 144 Ga. App. 879, 243 S.E.2d 105, 1978 Ga. App. LEXIS 1833 (1978) (decided under former Code 1933, § 38-305); Wallace v. State, 151 Ga. App. 171, 259 S.E.2d 172, 1979 Ga. App. LEXIS 2489 (1979) (decided under former Code 1933, § 38-305).

Mere question of lapse of time not controlling. — In determining whether declarations should be received as a part of the res gestae of an occurrence, the mere question of the lapse of time is not controlling. Berry v. Dinsmore, 115 Ga. App. 256, 154 S.E.2d 653, 1967 Ga. App. LEXIS 1075 (1967) (decided under former Code 1933, § 38-305); Augusta Coach Co. v. Lee, 115 Ga. App. 511, 154 S.E.2d 689, 1967 Ga. App. LEXIS 1147 (1967) (decided under former Code 1933, § 38-305).

Ultimate test is spontaneity and logical relation to main event. — Ultimate test of whether a statement is part of the res gestae is the statement's spontaneity and logical relation to the main event, that is, if it is a natural and probable consequence from the act contemporaneous with the main fact, but it need

not be precisely concurrent in point of time. C.A.J. v. State, 127 Ga. App. 813, 195 S.E.2d 225, 1973 Ga. App. LEXIS 1655 (1973) (decided under former Code 1933, § 38-305).

When declarations must be regarded as contemporaneous. — If the declarations appear to spring out of the transaction, if the declarations elucidate the transaction, if the declarations are voluntary and spontaneous, and if the declarations are made at a time so near to the transaction as reasonably to preclude the idea of deliberate design, then are the declarations to be regarded as contemporaneous. Southern Ry. v. Brown, 126 Ga. 1, 54 S.E. 911, 1906 Ga. LEXIS 299 (1906) (decided under former Civil Code 1895, § 5179); Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69, 1915 Ga. App. LEXIS 2 (1915) (decided under former Civil Code 1910, § 5766); Hodge v. American Mut. Liab. Ins. Co., 57 Ga. App. 403, 195 S.E. 765, 1938 Ga. App. LEXIS 613 (1938) (decided under former Code 1933, § 38-305); Aetna Life Ins. Co. v. Jones, 80 Ga. App. 472, 56 S.E.2d 305, 1949 Ga. App. LEXIS 865 (1949) (decided under former Code 1933, § 38-305); Clark v. State, 142 Ga. App. 851, 237 S.E.2d 459, 1977 Ga. App. LEXIS 2149 (1977) (decided under former Code 1933, § 38-305); Wallace v. State, 151 Ga. App. 171, 259 S.E.2d 172, 1979 Ga. App. LEXIS 2489 (1979) (decided under former Code 1933, § 38-305).

Statements made indefinite time after main fact were not res gestae. — Sayings were not admissible as a part of the res gestae if it appeared from the evidence that the statements were uttered at an indefinite time after the happening of the thing to which the statements related. Sims v. Macon & W.R.R., 28 Ga. 93, 1859 Ga. LEXIS 153 (1859) (decided under former law).

Trial court did not err by excluding testimony of a disabled child's mother that the child told the mother that a special education paraprofessional had sexually molested the child because the plaintiffs were unable to establish when the statements were made in relation to the alleged event. Harper v. Patterson, 270 Ga. App. 437, 606 S.E.2d 887, 2004 Ga. App. LEXIS 1500 (2004), cert. denied, No. S05C0551, 2005 Ga. LEXIS 275 (Ga. Mar. 28, 2005) (decided under former O.C.G.A. § 24-3-3).

Statements three-and-one-half hours after incident inadmissible. — Statements to a police officer by the victim in a prosecution for battery which were made three-and-one-half hours after the incident and which bore no mark of spontaneity or other such state of mind undeniably free of conscious device or afterthought were not part of the res gestae; as pure hearsay, the statements were inadmissible since the state did not show "necessity," to wit, that the declarant was unavailable and that it made reasonable efforts to secure the presence of the declarant. Wilbourne v. State, 214 Ga. App. 371, 448 S.E.2d 37, 1994 Ga. App. LEXIS 884 (1994) (decided under former O.C.G.A. § 24-3-3).

Statements hours after incident admissible. — Two statements made by defendant's wife, one four hours after the incident and the second four hours later, were part of the res gestae since the statements were made while she was still laboring under the excitement and strain of the event. Park v. State, 230 Ga. App. 274, 495 S.E.2d 886 (decided under former O.C.G.A. § 24-3-3).

Statements 20 minutes after discovering body admissible. — Statements a deceased witness had made to police at a murder scene were to assist the police in an ongoing emergency and were nontestimonial; therefore, the Confrontation Clause was not applicable. Although 20 minutes had elapsed between the time the witness discovered the victim's bloody body and the statements to police, the statements were admissible under the excited utterances exception to the hearsay rule, O.C.G.A. § 24-8-803(2), because the witness was still traumatized. McCord v. State, 305 Ga. 318, 825 S.E.2d 122, 2019 Ga. LEXIS 141 (2019).

Statements at scene of arrest. — Statement made by the passenger in an automobile driven by defendant charged with driving under the influence of alcohol that defendant had consumed more alcohol than the passenger had, made after defendant was arrested and the police

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were inquiring about the passenger's ability to drive defendant's vehicle away from the scene, was not part of the res gestae of the act concerning which the statement was made. Priebe v. State, 250 Ga. App. 725, 553 S.E.2d 5, 2001 Ga. App. LEXIS 843 (2001), superseded by statute as stated in Lopez v. State, 311 Ga. 269, 857 S.E.2d 467, 2021 Ga. LEXIS 131 (2021) (decided under former O.C.G.A. § 24-3-3).

3. Spontaneity

Spontaneous declaration doctrine. — That part of the former statute which admitted declarations so nearly connected with the act as to be free from all suspicion of device or afterthought in evidence was but a statement of the spontaneous declaration doctrine which was an exception to the rule against hearsay. Glens Falls Indem. Co. v. Gottlieb, 80 Ga. App. 634, 56 S.E.2d 799, 1949 Ga. App. LEXIS 892 (1949) (decided under former Code 1933, § 38-305).

When the statement of a passenger in an accident victim's car was made almost immediately after the crash as a spontaneous reaction to a startling event, rather than as a result of reflective thought, the testifying as to that statement by a third party was precisely the kind of excited utterance contemplated by former O.C.G.A. § 24-3-3, and was admissible as part of the res gestae. Copeland v. State, 235 Ga. App. 682, 510 S.E.2d 124 (decided under former O.C.G.A. § 24-3-3).

Declarations must be free from suspicion of device or afterthought. — Proximity of time in which declarations were made to the main transaction is not the only test of their admissibility as part of the res gestae, but the declarations must also be free from all suspicion of device or afterthought. Augusta & Summerville R.R. v. Randall, 79 Ga. 304, 4 S.E. 674, 1887 Ga. LEXIS 217 (1887) (decided under former Code 1882, § 3773); Savannah, Fla. & W. Ry. v. Holland, 82 Ga. 257, 10 S.E. 200, 1888 Ga. LEXIS 409 (1888) (decided under former Code 1882, § 3773); Shapiro Packing Co. v. Landrum, 109 Ga. App. 519, 136 S.E.2d 446, 1964 Ga. App. LEXIS 899 (1964) (decided under former Code 1933, § 38-305).

Trial court did not err in admitting testimony about statements defendant and defendant's cousin made to a witness at the time of the theft as defendant's arguments that admission of such evidence should not have been allowed because the statements were not "free from all suspicion of devise or afterthought" lacked merit since former O.C.G.A. § 24-3-3 referred to the statement at the time it was made, and not to the witness's testimony relating what was said. Wilson v. State, 258 Ga. App. 166, 573 S.E.2d 432, 2002 Ga. App. LEXIS 1378 (2002) (decided under former O.C.G.A. § 24-3-3).

Narrative recollections inadmissible. — Only the spontaneous declarations which spring out of the event are admissible. Narrative statements of the history of the event, made after the declarant has had time to reflect on the occurrence, are not admissible. Williams v. State, 144 Ga. App. 130, 240 S.E.2d 890, 1977 Ga. App. LEXIS 2608 (1977), superseded by statute as stated in Lopez v. State, 311 Ga. 269, 857 S.E.2d 467, 2021 Ga. LEXIS 131 (2021) (decided under former Code 1933, § 38-305).

Victim's narrative statement given to a police officer at a police station did not qualify as res gestae. Cartwright v. State, 242 Ga. App. 825, 531 S.E.2d 399, 2000 Ga. App. LEXIS 365 (2000) (decided under former O.C.G.A. § 24-3-3).

Narratives must be closely scrutinized. — When a statement is narrative rather than exclamatory, the circumstances must be closely scrutinized because a narrative is generally the result of afterthought. Clark v. State, 142 Ga. App. 851, 237 S.E.2d 459, 1977 Ga. App. LEXIS 2149 (1977) (decided under former Code 1933, § 38-305).

Mere fact that the statement was elicited by an inquiry did not necessarily deprive the statement of its spontaneity prerequisite for admission. United Motor Freight Term. Co. v. Hixon, 77 Ga. App. 506, 48 S.E.2d 769, 1948 Ga. App. LEXIS 586 (1948) (decided under former Code 1933, § 38-305).

Although statements lacked spontaneity because the statements were made in answer to a question, this fact alone did not render the statements inadmissible as

part of the res gestae. Thomas v. State, 242 Ga. 712, 251 S.E.2d 294, 1978 Ga. LEXIS 1339 (1978) (decided under former Code 1933, § 38-305).

Excited utterance. — Witness's testimony that the brother of a juvenile defendant told the witness, "My brother just shot someone," was not inadmissible hearsay; as the brother testified that the brother had not made such a statement, the testimony was admissible as an inconsistent statement, and it was also admissible as an excited utterance, as the statement was made by the brother after receiving a startling text message. In the Interest of B.S., 284 Ga. App. 680, 644 S.E.2d 527, 2007 Ga. App. LEXIS 379 (2007) (decided under former O.C.G.A. § 24-3-3).

Statements by bystanders that a defendant threw something as the defendant fled from the police were admissible under the excited utterance/res gestae exception to the hearsay rule as the statements were made during a sufficiently startling event — the defendant running by the defendant as the police were in pursuit — and the statements were made without premeditation or afterthought but with sufficient personal knowledge. Williams v. State, 292 Ga. App. 892, 666 S.E.2d 18, 2008 Ga. App. LEXIS 698 (2008) (decided under former O.C.G.A. § 24-3-3).

Out-of-court statements identifying the appellant as the man who beat the witness's stepson did not appear to be the most probative evidence to establish the appellant's identity as the killer because the witness's spouse testified directly to that same fact, but the statements were properly admitted under the hearsay exception for excited utterances since the statements were made just minutes after the stepson had been brutally attacked. Wilson v. State, 295 Ga. 84, 757 S.E.2d 825, 2014 Ga. LEXIS 294 (2014).

Trial court did not abuse the court's discretion by admitting statements that the victim allegedly made to the victim's niece, who discovered the victim on the morning after the beating, as exceptions to the rule against hearsay as present sense impressions, excited utterances, and to impeach the niece's trial testimony as, under the totality of the circumstances, the victim was still suffering under the stress of the all-night beating such that the victim's statements were admissible. Robbins v. State, 300 Ga. 387, 793 S.E.2d 62, 2016 Ga. LEXIS 790 (2016).

Trial court did not err by admitting into evidence the statements that the victim allegedly made to the victim's niece on the morning after the beating as an excited utterance because the statements were made the morning after the all-night beating, while the victim was incoherent and the attacker was still there. Robbins v. State, 300 Ga. 387, 793 S.E.2d 62, 2016 Ga. LEXIS 790 (2016).

Testimony of the first victim's grandson was not inadmissible hearsay, but was admissible under the excited utterance exception, as the victim made the statements immediately after learning that the victim had been scammed into wiring the money to a man who falsely posed as the victim's grandson, and the victim was confused and distraught. Akintoye v. State, 340 Ga. App. 777, 798 S.E.2d 720, 2017 Ga. App. LEXIS 141 (2017).

To the extent the victim's statements were hearsay, the statements were admissible under the excited utterance exception to the hearsay rule because the defendant's aggressive response to the victim's attempted escape, including the defendant's threat to shoot at the car the victim was in, qualified as a startling event; the victim's statements to the victim's niece indicated that the victim was afraid of the defendant and upset by the defendant's chaotic and threatening behavior; and the victim was under the continuing stress of excitement when the victim made each of the victim's statements. Blackmon v. State, 306 Ga. 90, 829 S.E.2d 75, 2019 Ga. LEXIS 380 (2019).

Because having a car hood fly up while driving would qualify as a startling event, and the victim's statement to a cousin was made as soon as the victim got to work after the event, the victim's statement that the victim believed the defendant had tried to kill the victim would qualify as an excited utterance and was admissible. Lynn v. State, 310 Ga. 608, 852 S.E.2d 843, 2020 Ga. LEXIS 931 (2020).

Trial court did not abuse the court's discretion in admitting the victim's state-

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ments about the attack under the excited utterance hearsay exception because ample evidence supported the finding that the victim was under the stress of excitement of a startling event, being stabbed, when the victim made the statements, including witness testimony that the victim honked the horn, yelled repeatedly that Migo stabbed the victim, and was visibly shaken after the officer arrived. Lopez v. State, 311 Ga. 269, 857 S.E.2d 467, 2021 Ga. LEXIS 131 (2021).

4. Declarant

Declarant need not be party to suit. — It is not required that the res gestae statement be excluded solely because the declarant is not a party to the suit or because the declaration was not made between a witness and a party. Piedmont Life Ins. Co. v. Lea, 140 Ga. App. 400, 231 S.E.2d 147, 1976 Ga. App. LEXIS 1494 (1976) (decided under former Code 1933, § 38-305).

Former Code 1933, §§ 38-305 and 38-414 (see former O.C.G.A. §§ 24-3-3 and 24-3-52) were applicable only when there was testimony by a third party as to a declaration, admission, or confession of a coconspirator and had no application when no such testimony was offered, but the accomplice merely testified against the defendant on the trial of the case. Banks v. State, 113 Ga. App. 661, 149 S.E.2d 415, 1966 Ga. App. LEXIS 1167 (1966) (decided under former Code 1933, § 38-305).

No unavailability requirement. — Trial court did not err in admitting the victim's oral statement to a police officer, through the police officer's testimony, or the victim's written statement made a few moments after the victim made the oral statement to the police officer pursuant to the res gestae exception to the hearsay rule as the statements were made while the victim was still under the influence of defendant's criminal act; also, the state was not required to show that the declarant was unavailable before the statements could be admitted. White v. State, 265 Ga. App. 117, 592 S.E.2d 905, 2004 Ga. App. LEXIS 27 (2004) (decided under former O.C.G.A. § 24-3-3).

Death of the person making the statements which form a part of the res gestae is no ground for the statements' exclusion from evidence. Augusta Factory v. Barnes, 72 Ga. 217, 1884 Ga. LEXIS 244 (1884) (decided under former Code 1882, § 3773); Callahan v. State, 229 Ga. 737, 194 S.E.2d 431, 1972 Ga. LEXIS 760 (1972) (decided under former Code 1933, § 38-305).

Declarant not in control of faculties. — It is not error to admit the declarations of a victim who is not a person in control of the victim's faculties, even when such declarations and the victim's accompanying physical actions display severe disorientation, as well as confusion as to where the victim was, what was happening, and who was around the victim. Andrews v. State, 249 Ga. 223, 290 S.E.2d 71, 1982 Ga. LEXIS 776 (1982) (decided under former Code 1933, § 38-305).

5. Discretion of Court

Admission is discretionary because no rule applicable in all cases. — No definition of res gestae can be found so comprehensive as to embrace all cases. Hence, it is left to the sound discretion of the courts what the court shall admit to the jury along with the main facts as part of the res gestae. Mitchum v. State, 11 Ga. 615, 1852 Ga. LEXIS 72 (1852) (decided under former law); Augusta & Summerville R.R. v. Randall, 79 Ga. 304, 4 S.E. 674, 1887 Ga. LEXIS 217 (1887) (decided under former Code 1882, § 3773); Southern Ry. v. Brown, 126 Ga. 1, 54 S.E. 911, 1906 Ga. LEXIS 299 (1906) (decided under former Civil Code 1895, § 5179); Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69, 1915 Ga. App. LEXIS 2 (1915) (decided under former Civil Code 1910, § 5766); Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474, 1972 Ga. App. LEXIS 1023 (1972) (decided under former Code 1933, § 38-305); Henry v. State, 176 Ga. App. 462, 336 S.E.2d 588, 1985 Ga. App. LEXIS 2891 (1985) (decided under former Code 1933, § 38-305).

Admissibility of declarations as res gestae testimony does not depend upon any arbitrary time or general rule for all cases, but is left to the sound discretion of the court in determining from the time, cir-

cumstances, and statements in question, whether declarations meet requirements of being free from all suspicion of device or afterthought. Aetna Life Ins. Co. v. Jones, 80 Ga. App. 472, 56 S.E.2d 305, 1949 Ga. App. LEXIS 865 (1949) (decided under former Code 1933, § 38-305); Wallace v. State, 151 Ga. App. 171, 259 S.E.2d 172, 1979 Ga. App. LEXIS 2489 (1979) (decided under former Code 1933, § 38-305); South Ga. Brokers, Inc. v. Fidelity Bankers Life Ins. Co., 153 Ga. App. 503, 265 S.E.2d 815, 1980 Ga. App. LEXIS 1871 (1980) (decided under former Code 1933, § 38-305).

Admissibility of declarations as part of the res gestae is left to the sound discretion of the trial court, considering the time, circumstances, and statements in question. Ward v. State, 186 Ga. App. 503, 368 S.E.2d 139, 1988 Ga. App. LEXIS 419 (1988) (decided under former O.C.G.A. § 24-3-3); Shortes v. State, 193 Ga. App. 859, 389 S.E.2d 354, 1989 Ga. App. LEXIS 1662 (1989).

Former statute concerned merely the admissibility of evidence, which was a question for the court, the weight to be given which was for the jury. Tiller v. State, 196 Ga. 508, 26 S.E.2d 883, 1943 Ga. LEXIS 371 (1943) (decided under former Code 1933, § 38-305); Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474, 1972 Ga. App. LEXIS 1023 (1972) (decided under former Code 1933, § 38-305).

Whether statements claimed to be a part of the res gestae are really such is a question of law to be determined by the court. Shapiro Packing Co. v. Landrum, 109 Ga. App. 519, 136 S.E.2d 446, 1964 Ga. App. LEXIS 899 (1964) (decided under former Code 1933, § 38-305).

Determination of res gestae within court's sound discretion. — Question of a given declaration's being a part of the res gestae is for the determination of the trial court and within the court's sound discretion. Augusta Coach Co. v. Lee, 115 Ga. App. 511, 154 S.E.2d 689, 1967 Ga. App. LEXIS 1147 (1967) (decided under former Code 1933, § 38-305); Thomas v. State, 242 Ga. 712, 251 S.E.2d 294, 1978 Ga. LEXIS 1339 (1978) (decided under former Code 1933, § 38-305).

In a wrongful interference with business relations and slander suit, a trial court properly excluded evidence sought to be introduced by the suing insurance company that customers canceled policies because of misrepresentations made by the defending insurance company since the suing company and one of the company's agents failed to show, inter alia, that any purported statement by one of many policyholders located in 23 states over an extended period of time was contemporaneous with a main fact, which in the case, would have been any alleged tortious statement by an agent of the defending insurance company. Am. Southern Ins. Group, Inc. v. Goldstein, 291 Ga. App. 1, 660 S.E.2d 810, 2008 Ga. App. LEXIS 386 (2008), cert. denied, No. S08C1555, 2008 Ga. LEXIS 680 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-3-3).

With regard to defendant's conviction for armed robbery and other crimes, the trial court properly allowed an officer to testify to what an adult in an apartment kitchen saw as the immediacy and urgency of the statement by the upset adult, who had just witnessed several men enter another apartment, made to the officer approaching the scene within minutes of the emergency call, authorized the trial court in the court's discretion to admit the statement as res gestae. Jennings v. State, 292 Ga. App. 149, 664 S.E.2d 248, 2008 Ga. App. LEXIS 718 (2008) (decided under former O.C.G.A. § 24-3-3).

Courts must be allowed some latitude. — What is the res gestae of a given transaction must depend upon the transaction's own peculiarities of character and circumstances; courts must be allowed some latitude in this matter. Aetna Life Ins. Co. v. Jones, 80 Ga. App. 472, 56 S.E.2d 305, 1949 Ga. App. LEXIS 865 (1949) (decided under former Code 1933, § 38-305).

Trial judge's determination not disturbed unless clearly erroneous. — Trial judge's determination that evidence is admissible as part of the res gestae will not be disturbed unless the determination is clearly erroneous. Robinson v. State, 197 Ga. App. 600, 399 S.E.2d 94, 1990 Ga. App. LEXIS 1414 (1990) (decided under former O.C.G.A. § 24-3-3).

Burglary conviction was upheld on appeal as: (1) sufficient evidence was pre-

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sented that the defendant entered the victim's home without permission with the intent to commit a theft therein; and (2) the state properly presented res gestae evidence, even if such improperly placed the defendant's character in evidence. Meyers v. State, 281 Ga. App. 670, 637 S.E.2d 78, 2006 Ga. App. LEXIS 1197 (2006) (decided under former O.C.G.A. § 24-3-3).

6. Application and Examples

a. Accounts

Settlements of accounts. — What parties say at the time of making up a settlement of accounts between the parties, as to the amount due from the one to the other, is a part of the res gestae, and admissible in evidence. Buttram v. Jackson, 32 Ga. 409, 1861 Ga. LEXIS 199 (1861) (decided under former law).

b. Agents

Statements of agent are admissible against the agent's principal. — Statements of the defendant's agent to the plaintiff in the course of a business transaction are admissible in behalf of the defendant as a part of the res gestae. Jones v. Norris N. Smith Co., 31 Ga. App. 383, 120 S.E. 804, 1923 Ga. App. LEXIS 953 (1923) (decided under former Civil Code 1910, § 5766).

Agency must be established independently. — Where extraneous circumstances, independently of and without regard to the declarations of the alleged agent personally, clearly tend to establish the fact of agency, the agent's declarations may be admitted and considered as a part of the res gestae of the transaction; but the declarations of an alleged agent, when standing alone, are never admissible to prove agency. Waddington v. Stores Mut. Protective Ass'n, 52 Ga. App. 331, 183 S.E. 143, 1935 Ga. App. LEXIS 161 (1935) (decided under former Code 1933, § 38-305).

c. Assignments

Declarations of an assignor, made after the execution of the deed of assignment, were inadmissible for the purpose of annulling the assignment or of recovering property embraced in the deed because such declarations did not accompany the making of the deed, or were so nearly connected therewith as to form part of the res gestae. Wright v. Zeigler Bros., 70 Ga. 501, 1883 Ga. LEXIS 364 (1883) (decided under former Code 1882, § 3773).

d. Bystanders

An exclamation of a bystander which merely expresses an opinion or conclusion is inadmissible as res gestae. South Ga. Brokers, Inc. v. Fidelity Bankers Life Ins. Co., 153 Ga. App. 503, 265 S.E.2d 815, 1980 Ga. App. LEXIS 1871 (1980) (decided under former Code 1933, § 38-305).

Accident witness's statement admissible. — Statement of unidentified declarant fell within res gestae exception since three witnesses to an accident overheard the declarant state within 15 minutes of the event, that defendant was involved and was wearing a flowered shirt because the declaration was the natural result of the incident and clarified the incident, was voluntary and spontaneous and was made at a time so close to the incident that the idea of any deliberate design was reasonably precluded. Williams v. Melton, 733 F.2d 1492, 1984 U.S. App. LEXIS 21768 (11th Cir.), cert. denied, 469 U.S. 1073, 105 S. Ct. 567, 83 L. Ed. 2d 508, 1984 U.S. LEXIS 4654 (1984) (decided under former O.C.G.A. § 24-3-3).

Statement a witness heard bystander make at the scene of the crime, after the crime occurred, is not part of the res gestae. Jones v. State, 167 Ga. App. 847, 307 S.E.2d 735, 1983 Ga. App. LEXIS 2638 (1983) (decided under former O.C.G.A. § 24-3-3).

Statements of bystanders held admissible as res gestae in the following cases. — See New Winder Lumber Co. v. Payne, 40 Ga. App. 188, 149 S.E. 85, 1929 Ga. App. LEXIS 80 (1929) (decided under former Civil Code 1910, § 5766); Bridges v. State, 242 Ga. 251, 248 S.E.2d 647, 1978 Ga. LEXIS 1163 (1978) (decided under former Code 1933, § 38-305); Ewald v. State, 156 Ga. App. 68, 274 S.E.2d 31,

1980 Ga. App. LEXIS 2881 (1980) (decided under former Code 1933, § 38-305); Super Disct. Mkts., Inc. v. Coney, 210 Ga. App. 659, 436 S.E.2d 803, 1993 Ga. App. LEXIS 1312 (1993) (decided under former O.C.G.A. § 24-3-3); Gilbert v. State, 241 Ga. App. 57, 526 S.E.2d 88 (decided under former O.C.G.A. § 24-3-3); Espy v. State, 246 Ga. App. 1, 539 S.E.2d 513, 2000 Ga. App. LEXIS 1134 (2000) (decided under former O.C.G.A. § 24-3-3); Couch v. State, 246 Ga. App. 106, 539 S.E.2d 609, 2000 Ga. App. LEXIS 1162 (2000) (decided under former O.C.G.A. § 24-3-3).

In a speeding and eluding prosecution, under the res gestae exception to the hearsay rule, former O.C.G.A. § 24-3-3, an officer was properly allowed to testify that a bystander had asked the officer whether the officer was searching for a blue sports car and then pointed to a direction. Since no testimonial statement was involved, the defendant's rights to confrontation as interpreted by Crawford v. Washington, 541 U.S. 36 (2004), were not violated. Segel v. State, 293 Ga. App. 506, 667 S.E.2d 670, 2008 Ga. App. LEXIS 990 (2008) (decided under former O.C.G.A. § 24-3-3).

Statement of witness to murder properly admitted. — Hearsay statement of a witness to a murder was properly admitted as an excited utterance under circumstances in which, when police arrived at the crime scene police saw the witness standing over the victim, sufficiently upset that the witness could not speak, and minutes later, the witness, who was described as still visibly distraught, upset, cursing, crying, almost like the witness was in shock, made statements identifying defendants as shooters to investigator and to other bystanders. Daniel v. State, 285 Ga. 406, 677 S.E.2d 120, 2009 Ga. LEXIS 247 (2009) (decided under former O.C.G.A. § 24-3-3).

Two prior statements of the child who observed the defendant slam the victim into the bed were admissible as excited utterances because the statements related to a startling event and were made shortly after the event, while the child was still under the stress of the event. Spence v. State, 307 Ga. 520, 837 S.E.2d 334, 2019 Ga. LEXIS 849 (2019).

Statements by bystanders held inadmissible as res gestae in the following cases. — See Everready Cab Co. v. Wilhite, 66 Ga. App. 815, 19 S.E.2d 343, 1942 Ga. App. LEXIS 308 (1942) (statement made prior to accident) (decided under former Code 1933, § 38-305); Camp v. Ledford, 103 Ga. App. 197, 119 S.E.2d 54, 1961 Ga. App. LEXIS 907 (1961) (unidentified doctor at scene of accident) (decided under former Code 1933, § 38-305).

9-1-1 call by victim's child. — Admission of a 9-1-1 call placed by the child of a battery victim was proper because, among other reasons, the call was placed moments after the child had witnessed the attack, and was thus part of the res gestae. Kuykendoll v. State, 278 Ga. App. 369, 629 S.E.2d 32, 2006 Ga. App. LEXIS 267 (2006) (decided under former O.C.G.A. § 24-3-3).

Recording of 9-1-1 call made by another driver. — In a trial for driving under the influence of alcohol to the extent of being a less safe driver in violation of O.C.G.A. § 40-6-391(a)(1), admission of a recording of a 9-1-1 call made by a caller who was following the defendant's vehicle was proper. Admission of the call did not violate the confrontation clause of the sixth amendment because the call's primary purpose was to prevent immediate harm to the public, not to establish evidentiary facts for a future prosecution, and the call was admissible under former O.C.G.A. § 24-3-3 because the caller had not deliberated about the statement and had personal knowledge of what the caller described to the 9-1-1 operator. Key v. State, 289 Ga. App. 317, 657 S.E.2d 273, 2008 Ga. App. LEXIS 76 (2008) (decided under former O.C.G.A. § 24-3-3).

9-1-1 calls by bystanders admissible. — Allowing a jury to hear an audiotape of two 9-1-1 calls made by bystanders to report a shooting was proper because, inter alia, the calls were placed within a short time after the shooting, and the callers had no opportunity to deliberate about their statements or be influenced by others; thus, the evidence was admissible

Bystanders (Cont'd)

under the former O.C.G.A. § 24-3-3 res gestae exception to the hearsay rule. Glover v. State, 285 Ga. 461, 678 S.E.2d 476, 2009 Ga. LEXIS 289 (2009) (decided under former O.C.G.A. § 24-3-3).

e. Children

Child's statements admissible though not competent witness. — Even though a child may be too young to be a competent witness this does not preclude admission of the child's declaration as part of the res gestae, if otherwise admissible. Williams v. State, 144 Ga. App. 130, 240 S.E.2d 890, 1977 Ga. App. LEXIS 2608 (1977), superseded by statute as stated in Lopez v. State, 311 Ga. 269, 857 S.E.2d 467, 2021 Ga. LEXIS 131 (2021) (decided under former Code 1933, § 38-305).

Standing alone, the fact that a declarant is a child of tender years cannot be said to free the statements from the suspicion of device or afterthought. Hight v. Butler, 230 Ga. 533, 198 S.E.2d 169, 1973 Ga. LEXIS 974 (1973) (decided under former Code 1933, § 38-305); Stamper v. State, 235 Ga. 165, 219 S.E.2d 140, 1975 Ga. LEXIS 811 (1975) (decided under former Code 1933, § 38-305).

Age may be taken into consideration. — Fact that the declarant was a child of tender years may be taken into consideration in determining whether, under the res gestae rule, the declarant's declarations are so free from the suspicion of afterthought as to be admissible in evidence. Berry v. State, 9 Ga. App. 868, 72 S.E. 433, 1911 Ga. App. LEXIS 387 (1911) (decided under former Civil Code 1910, § 5766).

Child victim's responses to medical questions admissible. — Testimony of a doctor who related a child victim's responses to medical questions for purposes of diagnosis and treatment was admissible under the exception to the hearsay rule provided by former O.C.G.A. § 24-3-3 since the responses were given within a matter of minutes after the patient was taken to the hospital. Allen v. State, 174 Ga. App. 206, 329 S.E.2d 586, 1985 Ga. App. LEXIS 1782 (1985) (decided under former O.C.G.A. § 24-3-3).

Statements made several days after incident not admissible. — When statements by a victim of cruelty to children were made several days after the incident and the child had several opportunities to report the incidents outside the presence of the child's parents and the reports were made over a period of several days in response to specific questions and there was no medically acceptable testimony that the child was laboring under some disability and the statements were narrative in form rather than spontaneously given, such statements lacked contemporaneity and spontaneity to such a degree as to be extremely suspect and therefore in violation of the res gestae exception to the hearsay rule. Allen v. State, 174 Ga. App. 206, 329 S.E.2d 586, 1985 Ga. App. LEXIS 1782 (1985) (decided under former O.C.G.A. § 24-3-3).

Admission of statement following startling event and made under stress caused by event. — Given that the child witness was four years old, the extent of the child's injuries, and the traumatic circumstances leading to the child's hospitalization — being involved in a serious multi-vehicle crash, the child's statement to a nurse was an excited-utterance as it related to a startling event or condition, and the child made the statement under the stress of excitement caused by the event or condition. Sullivan v. State, 308 Ga. 772, 843 S.E.2d 411, 2020 Ga. LEXIS 347 (2020).

Statements to parent in evening after afternoon molestation admissible. — When eight-year-old victim, who was allegedly molested in the afternoon, did not return to the victim's own home until that evening, after the victim's parent had returned from a doctor's appointment, and reported the act of molestation to the victim's parent at that time, which was the victim's first opportunity to do so since leaving the custody of defendant, the parent's testimony concerning the child's statements was admissible under the res gestae exception to the hearsay rule. Moseley v. State, 179 Ga. App. 698, 347 S.E.2d 686, 1986 Ga. App. LEXIS 2006 (1986) (decided under former O.C.G.A. § 24-3-3).

Statement by child to police approximately one year after the alleged molestation was not contemporaneous, was not spontaneous, but was in response to questioning of the police, and thus not a part of the res gestae. Lynn v. State, 181 Ga. App. 461, 352 S.E.2d 602, 1986 Ga. App. LEXIS 2829 (1986) (decided under former O.C.G.A. § 24-3-3).

Statements by children held admissible as res gestae in the following cases. — See Ferguson v. Columbus & Rome Ry., 75 Ga. 637, 1885 Ga. LEXIS 192 (1885) (cause of injury) (decided under former Code 1882, § 3773); Johnson v. State, 142 Ga. App. 560, 236 S.E.2d 552, 1977 Ga. App. LEXIS 1399 (1977) (relating details of child molestation) (decided under former Code 1933, § 38-305).

In the sexual molestation case, the trial court did not err in allowing into evidence the out-of-court statements of the sexual abuse victim's younger sibling who witnessed the molestation; the sibling's statements to the parent were made almost immediately after the defendant molested the victim and were made without premeditation or afterthought pursuant to former O.C.G.A. § 24-3-3. Mikell v. State, 281 Ga. App. 739, 637 S.E.2d 142, 2006 Ga. App. LEXIS 1237 (2006) (decided under former O.C.G.A. § 24-3-3).

f. Criminal Law — Defendants

All circumstances of crime making up res gestae may be proved. Duffy v. State, 146 Ga. App. 400, 246 S.E.2d 420, 1978 Ga. App. LEXIS 2375 (1978) (decided under former Code 1933, § 38-305).

Statement must be connected with crime. — Statement made by the accused was not admissible as part of the res gestae since while the statement was made "soon" after the shooting but it did not appear that it was so nearly connected with the homicide as to be "free from all suspicion of device or afterthought." Ingram v. State, 43 Ga. App. 218, 158 S.E. 529, 1931 Ga. App. LEXIS 263 (1931) (decided under former Penal Code 1910, § 1024).

Testimony should not have been admitted as part of the res gestae in a charge of two counts of aggravated assault arising from an altercation with the owners of a towing business since the testimony encompassed defendant's behavior during the receipt of medical treatment at some unspecified time after the commission of the charged crimes and did not involve any statements defendant made concerning the assault or any continuation of the defendant's actions at the scene of the crime. Heflin v. State, 204 Ga. App. 161, 418 S.E.2d 770, 1992 Ga. App. LEXIS 792 (1992) (decided under former O.C.G.A. § 24-3-3).

Remark made by one perpetrator to the other as the perpetrators fled from the liquor store, where one of the perpetrators had shot the store owner, to the van the perpetrators were going to steal to make the perpetrators' getaway, was admissible as part of the res gestae. Tesfaye v. State, 275 Ga. 439, 569 S.E.2d 849, 2002 Ga. LEXIS 640 (2002) (decided under former O.C.G.A. § 24-3-3).

Evidence that a witness taught defendant how to make methamphetamine was properly admitted at defendant's trial for possession and trafficking the drug because the evidence was part of the main transaction of conspiracy to manufacture methamphetamine and was admitted as part of the res gestae; therefore, there was no error on the part of the trial court by not requiring the state to have complied with the notice and hearing requirements of Ga. Unif. Super. Ct. R. 31.1 and Ga. Unif. Super. Ct. R. 31.3. Goldsby v. State, 273 Ga. App. 523, 615 S.E.2d 592, 2005 Ga. App. LEXIS 561 (2005) (decided under former O.C.G.A. § 24-3-3).

Defendant did not receive ineffective assistance of counsel as: (1) a hearsay objection to statements the defendant made during an argument and to testimony that the defendant stated that the defendant should have killed the other witnesses would have been futile as the statements were not offered for the truth of the matter asserted; (2) a hearsay objection to a witness's testimony as to the defendant's statements during a van ride would also have been futile as the statements were admissible under former O.C.G.A. § 24-3-3; and (3) counsel's strategic decision to attack certain testimony through cross-examination was not ineffective assistance of counsel. Johnson v.

Criminal Law — Defendants (Cont'd)

State, 281 Ga. 229, 637 S.E.2d 393, 2006 Ga. LEXIS 928 (2006) (decided under former O.C.G.A. § 24-3-3).

Trial court properly held that the events leading up to the assault on the victim served to illustrate the defendant's motive in participating with a cohort to steal money from the victim; moreover, even if the defendant reiterated an objection at trial, the statements uttered by the defendant were so connected with the commission of the offense to be admissible. White v. State, 282 Ga. App. 286, 638 S.E.2d 426, 2006 Ga. App. LEXIS 1368 (2006) (decided under former O.C.G.A. § 24-3-3).

Coconspirator's statements admissible. — Coconspirator's statements implicating defendant in a conspiracy to kill defendant's spouse were admissible as part of res gestae where made while the coconspirator was exercising control over the victims, and thus during the enterprise. Walker v. State, 213 Ga. App. 407, 444 S.E.2d 824, 1994 Ga. App. LEXIS 634 (1994), cert. denied, No. S94C1439, 1994 Ga. LEXIS 1012 (Ga. Sept. 16, 1994) (decided under former O.C.G.A. § 24-3-3).

Bruton objection was properly overruled as the codefendant's statement that the codefendant would check with defendant regarding the victim's participation was part of the res gestae, rather than a confession or a statement. Ford v. State, 274 Ga. App. 695, 617 S.E.2d 262, 2005 Ga. App. LEXIS 763 (2005), cert. denied, No. S05C1921, 2005 Ga. LEXIS 789 (Ga. Nov. 7, 2005) (decided under former O.C.G.A. § 24-3-3).

Trial court did not abuse the court's discretion in concluding that the co-indictee's initial statement that the co-indictee was on the phone with the defendant as the co-indictee was speaking with the defendant fell within the present sense impression exception to the hearsay rule. Downer v. State, 314 Ga. 617, 878 S.E.2d 537, 2022 Ga. LEXIS 254 (2022).

Informant's comments. — Comments which an informant made on tape shortly after defendant sold drugs to the informant and left the informant's car were part of the res gestae, and the trial court did not abuse the court's discretion by admitting the comments during defendant's trial on charges that defendant sold cocaine. Lyons v. State, 266 Ga. App. 89, 596 S.E.2d 226, 2004 Ga. App. LEXIS 307 (2004) (decided under former O.C.G.A. § 24-3-3).

Declaration held not admissible in favor of accused. — Declaration of another person that the person alone committed the crime for which the defendant was on trial, the declarant not naming the person whom declarant had killed, and it not being shown whether the declarant's declaration was made before or after the crime was committed, or, if after, how long after, was not admissible in evidence in favor of the accused, and as a part of the res gestae. Johnson v. State, 188 Ga. 662, 4 S.E.2d 813, 1939 Ga. LEXIS 617 (1939) (decided under former Code 1933, § 38-305).

Admission of absent codefendant disallowed. — Informant was not allowed to relate what a codefendant said during the course of the crime, nor could the defendant offer testimony regarding what the defendant's absent codefendant told others about the defendant's role in the crime because admission of such declarations would allow a person to subvert the ends of justice by admitting the crime to others and then absenting oneself from the jurisdiction of the court. Roberts v. State, 208 Ga. App. 64, 430 S.E.2d 175, 1993 Ga. App. LEXIS 428 (1993) (decided under former O.C.G.A. § 24-3-3).

Admission of victim's recollection of attacker's statements. — Rape victim's testimony that her attacker stated he was running from the law, had been drinking, was on drugs really bad, and needed money for gas was not impermissible character evidence and was admissible as res gestae. Hardegree v. State, 230 Ga. App. 111, 495 S.E.2d 347 (decided under former O.C.G.A. § 24-3-3).

Third party overheard on 9-1-1 call. — Because no evidence existed by which the trial court could assess the personal knowledge of the speaker overheard on a 9-1-1 call, who was not the caller, or the reliability of the statement generally, and the evidence against the defendant was less than overwhelming, the trial court's decision to admit the statement under the

res gestae exception was clearly erroneous; moreover, given that the jury sent a note to the trial court requesting to hear the recording again, stating that it was "vital" to their deliberations, it was clear that what was said on the recording figured importantly in the jury's deliberations. Orr v. State, 281 Ga. 112, 636 S.E.2d 505, 2006 Ga. LEXIS 844 (2006) (decided under former O.C.G.A. § 24-3-3).

Witness's statements during 9-1-1 call. — Trial court did not abuse the court's discretion in determining that a witness's statements during a 9-1-1 call were admissible under the excited utterance hearsay exception because the statements the witness made during the 9-1-1 call identifying the defendant as the shooter related to a startling event or condition, namely, the shooting of the victim, the witness's friend; and those statements were made moments after gunshots were heard. Jackson v. State, 311 Ga. 626, 859 S.E.2d 46, 2021 Ga. LEXIS 285 (2021).

When 9-1-1 caller did not testify. — Trial court did not violate the defendant's confrontation rights by admitting the 9-1-1 call without having the caller testify because the 9-1-1 call was made to avert a crime in progress or to seek assistance in a situation involving immediate danger and not to establish evidentiary facts or bear testimony against the defendant. Driskell v. State, 333 Ga. App. 886, 777 S.E.2d 717, 2015 Ga. App. LEXIS 548 (2015), cert. denied, No. S16C0191, 2016 Ga. LEXIS 115 (Ga. Feb. 1, 2016).

Statements by defendants held admissible as res gestae in the following cases. — See Thomas v. State, 27 Ga. 287, 1859 Ga. LEXIS 57 (1859) (declaration that shooting was in self-defense) (decided under former law); Caito v. State, 130 Ga. App. 831, 204 S.E.2d 765, 1974 Ga. App. LEXIS 1277 (1974) (statement that "you got me") (decided under former Code 1933, § 38-305); Collins v. State, 243 Ga. 291, 253 S.E.2d 729, 1979 Ga. LEXIS 893 (1979), vacated in part, 446 U.S. 961, 100 S. Ct. 2936, 64 L. Ed. 2d 820 (1980) (bragging of participation in murder) (decided under former Code 1933, § 38-305).

Defendant could not raise an objection to the admission of defendant's spontaneous statement to police officers executing a search warrant that "you've got me" for the first time on appeal absent plain error. There was no plain error in admitting the statement because: (1) defendant was being detained under O.C.G.A. § 17-5-28, and was not under arrest; (2) defendant was not being interrogated, making Miranda warnings not required; (3) defense counsel cross-examined the officers on the statement: (4) the statement was admissible as a spontaneous statement; and (5) the statement was admissible under former O.C.G.A. § 24-3-3 as a part of the res gestae. Zackery v. State, 262 Ga. App. 646, 586 S.E.2d 346, 2003 Ga. App. LEXIS 974 (2003) (decided under former O.C.G.A. § 24-3-3).

Evidence that the defendant was a drug dealer and gave the police a false name when questioned after the alleged crime was committed was admissible as relevant and part of the res gestae as the former was incidental to and followed directly from the defendant's participation in the sale of marijuana to the victim, and the latter was part of what transpired shortly after the commission of the victim's murder; moreover, this was true even if the defendant's character was incidentally placed in issue. Roberts v. State, 282 Ga. 548, 651 S.E.2d 689, 2007 Ga. LEXIS 716 (2007) (decided under former O.C.G.A. § 24-3-3).

In a defendant's prosecution for, inter alia, felony murder, the introduction of a second inmate's statement that the defendant and the second inmate did not mean to kill a third inmate did not violate the defendant's sixth amendment confrontation rights because the voluntary statement, which was made shortly after the third inmate was found in the defendant's cell, was admissible pursuant to the res gestae exception to the rule against hearsay under former O.C.G.A. § 24-3-3. Butler v. State, 284 Ga. 620, 669 S.E.2d 118, 2008 Ga. LEXIS 856 (2008) (decided under former O.C.G.A. § 24-3-3).

Although a police car video of a defendant's traffic stop had poor audio quality resulting in inaudible portions, defendant's admissions that defendant's license was suspended were admissible as part of the res gestae pursuant to former

Criminal Law — Defendants (Cont'd)

O.C.G.A. § 24-3-3. The defendant could attack the weight and credibility of the recording, but not the recording's admissibility. Steed v. State, 309 Ga. App. 546, 710 S.E.2d 696, 2011 Ga. App. LEXIS 393 (2011), cert. dismissed, No. S12C0138, 2012 Ga. LEXIS 381 (Ga. Apr. 24, 2012) (decided under former O.C.G.A. § 24-3-3).

In defendant's trial for sexual exploitation of children, aggravated sodomy, child molestation, and cruelty to children, evidence that the defendant told the victim, the defendant's niece, that the defendant had been molested by the defendant's father as a child were admissible as part of the res gestae of the crimes. Wiggins v. State, 338 Ga. App. 273, 787 S.E.2d 357, 2016 Ga. App. LEXIS 370 (2016), cert. denied, No. S17C0059, 2017 Ga. LEXIS 287 (Ga. Apr. 17, 2017) (decided under former O.C.G.A. § 24-3-3).

Witness statements about another's cry for help admissible. — Evidence was properly admitted by the trial court in defendant's trial for aggravated assault in violation of O.C.G.A. § 16-5-21 since statements of a witness that another screamed for help when the witness saw the victim and defendant fighting were part of the res gestae exception to hearsay pursuant to former O.C.G.A. § 24-3-3. Statements by a witness that defendant was ordered to leave the premises were not hearsay under former O.C.G.A. § 24-3-1 because the statements were used to explain defendant's motive and conduct of remaining on the premises and waiting for the victim pursuant to former O.C.G.A. § 24-3-2, and statements regarding information from a police report which was not admitted into evidence were deemed harmless as cumulative. Regardless, there was sufficient evidence without the disputed evidentiary rulings to support defendant's conviction based on observations of several witnesses and the cuts on the victim's face and body. Kelley v. State, 260 Ga. App. 238, 581 S.E.2d 584, 2003 Ga. App. LEXIS 337 (2003) (decided under former O.C.G.A. § 24-3-3).

Statement by defendant to father was narrative. — Defendant's statements to law enforcement and to a college intern shortly after the shooting were properly excluded by the trial court. Defendant's statements in the patrol car were not free from all suspicion of device or afterthought because defendant advised a female caller that the defendant could not talk because the defendant was in the back of a patrol car, and asked the caller not to call the defendant back, and defendant's recounting of recent events to the defendant's father was a narrative and not part of the res gestae. Crane v. State, 300 Ga. App. 450, 685 S.E.2d 314, 2009 Ga. App. LEXIS 1117 (2009) (decided under former O.C.G.A. § 24-3-3).

Surveillance videotape reflecting circumstances leading up to defendant's arrest was admissible as res gestae. — Because a department store videotape of defendant's spouse stealing items of merchandise from the store was made contemporaneously to the charged crime, which involved defendant leaving the store with merchandise in the defendant's cart for which the defendant had not paid, and because it provided context for the circumstances surrounding defendant's arrest, it was admissible as part of the res gestae of the crime under former O.C.G.A. § 24-3-3. Wright v. State, 301 Ga. App. 178, 687 S.E.2d 195, 2009 Ga. App. LEXIS 1340 (2009), superseded by statute as stated in Dickey v. State, 313 Ga. 593, 872 S.E.2d 297, 2022 Ga. LEXIS 105 (2022) (decided under former O.C.G.A. § 24-3-3).

No independent ground for admission of previous conviction. — No independent ground pursuant to the res gestae evidence rule of former O.C.G.A. § 24-3-3 authorized the introduction of evidence that defendant was previously convicted of aggravated assault when defendant did not testify. Furthermore, the statements regarding defendant's criminal record were inherently prejudicial, and, as a result of the statement's admission, defendant's convictions had to be reversed. Pelowski v. State, 306 Ga. App. 41, 701 S.E.2d 529, 2010 Ga. App. LEXIS 861 (2010) (decided under former O.C.G.A. § 24-3-3).

g. Criminal Law — Investigating Officers

Statements made about a fight. — Statements made to a magistrate about a fight by one of the participants on the same day of the fight, and a short distance from the scene, were held to be not admissible as a part of the res gestae. Cherry v. McCall, 23 Ga. 193, 1857 Ga. LEXIS 244 (1857) (decided under former law).

Officer not called as a witness. — Admission of police officer's testimony regarding the substance of what someone told the officer who had moved out of town at the time of trial and was not called as a witness was in error, since this testimony was hearsay and came under no exception to the hearsay rule. Liu's Enters. Corp. v. Li, 204 Ga. App. 397, 419 S.E.2d 511, 1992 Ga. App. LEXIS 874 (1992) (decided under former O.C.G.A. § 24-3-3).

Statement made to an officer after an arrest concerning a course of conduct by the person arrested is not a part of the res gestae but a narrative of events. Jones v. State, 62 Ga. App. 734, 9 S.E.2d 707, 1940 Ga. App. LEXIS 424 (1940) (decided under former Code 1933, § 38-305).

Statement made to officer at time of arrest. — When the stipulated facts showed the trustworthiness of statement made at time of arrest in that defendant's nephew informed officer that defendant had been operating a motorcycle soon after the occurrence of the contested driving offense; the statement was sufficiently contemporaneous to be a part of the res gestae and was therefore admissible. Jarrett v. State, 265 Ga. 28, 453 S.E.2d 461, 1995 Ga. LEXIS 89 (1995) (decided under former O.C.G.A. § 24-3-3).

Statements taken at scene of accident. — Statements made to an investigating officer not more than 20 to 30 minutes after an automobile collision may be allowed as testimony. Land v. McClure, 135 Ga. App. 243, 217 S.E.2d 600, 1975 Ga. App. LEXIS 1631 (1975) (decided under former Code 1933, § 38-305).

Observations by officer held admissible. — In a suit by an injured bystander against a restaurant arising out of a gun shot by an alleged restaurant employee, a police report suggesting that the shooter was working as a bouncer was admissible under O.C.G.A. § 24-4-803(8); however, the trial court failed to address the restaurant's objection that the report was not authenticated as required by O.C.G.A. § 24-9-901(a), requiring remand. Hungry Wolf/Sugar & Spice, Inc. v. Langdeau, 338 Ga. App. 750, 791 S.E.2d 850, 2016 Ga. App. LEXIS 540 (2016).

Telephone calls received by officer. — With regard to a defendant's conviction for possessing cocaine, the trial court did not err by admitting evidence of telephone conversations between a deputy and unknown callers which occurred during the time the deputy was serving a temporary protective order and warrant for a probation violation on the defendant at the defendant's apartment because the telephone conversations occurred contemporaneously with the seizure of the drugs found in the apartment and tended to indicate that the drugs had not been brought to the apartment by a casual guest, but belonged to someone who was receiving calls about the drugs at the apartment. Stewart v. State, 285 Ga. App. 760, 647 S.E.2d 411, 2007 Ga. App. LEXIS 638 (2007) (decided under former O.C.G.A. § 24-3-3).

Statement admissible despite misidentification. — Statement given to a police officer shortly after a stabbing incident was admissible, and the fact that the witness may have misidentified the suspect did not render the statement inadmissible. Taylor v. State, 226 Ga. App. 339, 486 S.E.2d 601 (decided under former O.C.G.A. § 24-3-3).

Statement by victim to officer minutes after crime. — Trial court did not improperly rely on hearsay in determining whether reasonable suspicions existed to detain defendant as the burglary victim's description of the perpetrator of the burglary to the police officer did not go to the issue of whether defendant was guilty or innocent, but instead went to whether reasonable suspicion existed to perform a Terry detention; moreover, the burglary victim's description given on the scene to the officer only minutes after the perpetrator fled was admissible under the res gestae exception to the hearsay rule. Spear v. State, 259 Ga. App. 803, 578 S.E.2d 504, 2003 Ga. App. LEXIS 265

Criminal Law — Investigating Officers (Cont'd)

(2003) (decided under former O.C.G.A. § 24-3-3).

Trial court did not err in overruling hearsay objections the defendant made during testimony from the responding police officer regarding statements the victim made to the officer during the preliminary investigation because the statements were admissible as part of the res gestae of the crime; because the officer testified that the victim was upset and had blood on the victim's face when the officer arrived and made the statements regarding the incident shortly thereafter, the statements were relevant and made without premeditation and were admissible as part of the res gestae. Mubarak v. State, 305 Ga. App. 419, 699 S.E.2d 788, 2010 Ga. App. LEXIS 751 (2010) (decided under former O.C.G.A. § 24-3-3).

Statement by defendant to officer not admissible. — Evidence of the defendant's statement to an officer that the defendant was showing the defendant's son a gun when the gun accidentally discharged was properly excluded as the statement was not an excited utterance because not only was there a passage of time sufficient for the defendant to formulate a specific version of the events to the defendant's advantage, but there was evidence supporting an inference that the defendant actually did so, when the defendant earlier asked a witness to help the defendant, and the defendant said that the defendant did not want to go to jail; and no evidence was presented that showed the defendant was actually experiencing stress or excitement at the time of the statement. Jenkins v. State, 303 Ga. 314, 812 S.E.2d 238, 2018 Ga. LEXIS 172 (2018).

Hearsay evidence was erroneously admitted at the probation revocation hearing. Although the victim's statement to the 9-1-1 operator was made while the victim was perceiving the event or immediately thereafter, the victim's later statement given to the responding officer was not sufficiently contemporaneous with the event to come within the present sense impression exception to the hearsay rule. Grimes v. State, 364 Ga. App. 518, 875 S.E.2d 500, 2022 Ga. App. LEXIS 336 (2022).

Witness's out-of-court statement to officer admissible. — Police officer's testimony as to out-of-court statements made by a witness that the witness had hidden in a closet while defendant fired shots through the wall and closet door was admissible as part of the res gestae. Morris v. State, 228 Ga. App. 90, 491 S.E.2d 190 (decided under former O.C.G.A. § 24-3-3).

h. Criminal Law — Other Crimes

Evidence of other crimes was admissible when the extraneous crime formed a part of the res gestae. Bradley v. State, 154 Ga. App. 333, 268 S.E.2d 388, 1980 Ga. App. LEXIS 2151 (1980) (decided under former Code 1933, § 38-305); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42, 1980 Ga. App. LEXIS 2315 (1980) (decided under former Code 1933, § 38-305).

Generally, in the prosecution for a particular offense, evidence of another distinct crime, wholly independent from that which the accused is on trial, is inadmissible, but if the allegedly separate offense was a part of the same incident for which the accused is being tried and forms a part of the res gestae, the evidence is admissible, and the fact that such part of the res gestae incidentally placed defendant's character in issue does not render the evidence inadmissible. Yarbrough v. State, 186 Ga. App. 845, 368 S.E.2d 802, 1988 Ga. App. LEXIS 485 (1988) (decided under former O.C.G.A. § 24-3-3).

Fact that relevant evidence may indicate a crime or incidentally place a defendant's character in issue does not render the evidence inadmissible. Martin v. State, 219 Ga. App. 277, 464 S.E.2d 872, 1995 Ga. App. LEXIS 1016 (1995), cert. denied, No. S96C0547, 1996 Ga. LEXIS 417 (Ga. Mar. 8, 1996) (decided under former O.C.G.A. § 24-3-3); Larkin v. State, 230 Ga. App. 129, 495 S.E.2d 605, 1998 Ga. App. LEXIS 24 (1998) (decided under former O.C.G.A. § 24-3-3).

Prosecutor's reference to other crime proper. — Trial court's denial of defendant's motion for mistrial for an argument made during an opening state-

ment to the jury that the prosecutor expected the evidence to show "defendant was asking for cocaine, said, 'Where is the cocaine . . . ,' " was not error although the defendant had not been charged with any offense involving drugs as the state is entitled to inform the jury of all the circumstances surrounding the commission of the crime or crimes charged, even though it may have incidentally placed the defendant's character in evidence. Houston v. State, 187 Ga. App. 335, 370 S.E.2d 178, 1988 Ga. App. LEXIS 679 (1988) (decided under former O.C.G.A. § 24-3-3).

Statements are a part of the res gestae and are admissible as such, notwithstanding the fact the statements may show other criminal conduct on the part of the one who made the statement. Potts v. State, 241 Ga. 67, 243 S.E.2d 510, 1978 Ga. LEXIS 879 (1978); Lord v. State, 156 Ga. App. 492, 274 S.E.2d 641, 1980 Ga. App. LEXIS 3088 (1980).

Trial court did not err in denying the defendant's motion in limine to exclude evidence of the defendant's probation status, and the underlying probation offense, as that evidence was properly admitted as part of the res gestae since the conduct of the officer flowed very directly from the statements made during the consensual encounter. Hampton v. State, 287 Ga. App. 896, 652 S.E.2d 915, 2007 Ga. App. LEXIS 1125 (2007) (decided under former O.C.G.A. § 24-3-3).

Statement was admissible as part of res gestae, even if statement incidentally placed defendant's character in evidence. — Defendant's claim that defendant's character was impermissibly placed in issue when a similar transaction witness testified that immediately after defendant had raped the witness, the defendant lay beside the victim and told the victim that "he had done that to five other women" was rejected as defendant failed to object to the testimony until after the jury was charged; moreover, had defendant raised a timely objection, the testimony still would have been admissible as part of the res gestae, even if the testimony incidentally placed defendant's character in evidence. Harden v. State, 272 Ga. App. 559, 612 S.E.2d 877, 2005 Ga. App. LEXIS 343 (2005) (decided under former O.C.G.A. § 24-3-3).

Uncharged crimes that occurred at same time as charged offenses. — Victim's testimony about seeing the defendant and the codefendant rob another person was admissible under former O.C.G.A. § 24-3-3 as part of the res gestae of the armed robbery and aggravated assault against the victim as the other act occurred in the same place and during the same time that the defendant and codefendant were committing the crimes against the victim. Herieia v. State, 297 Ga. App. 872, 678 S.E.2d 548, 2009 Ga. App. LEXIS 602 (2009) (decided under former O.C.G.A. § 24-3-3).

Offenses independent from prosecution. — Generally, in the prosecution for a particular offense, evidence of another offense wholly independent from the one being prosecuted is inadmissible. But, if the statement by the defendant forms a part of the same transaction of the one being prosecuted, it is a part of the res gestae and is admissible. The fact that it shows another crime and incidentally places the defendant's character in issue does not render the statement inadmissible. Mosley v. State, 150 Ga. App. 802, 258 S.E.2d 608, 1979 Ga. App. LEXIS 2383 (1979) (decided under former Code 1933, § 38-305).

Because facts surrounding the defendant's commission of a prior crime were similar enough to the charged crimes, evidence of the prior crime was properly admitted despite the defendant's hearsay claim since the state established that it was introducing the evidence for an appropriate purpose, there was sufficient similarity between the independent offense and the crime charged, and proof of the former tended to show the latter. Kimbrough v. State, 281 Ga. 885, 644 S.E.2d 125, 2007 Ga. LEXIS 300 (2007) (decided under former O.C.G.A. § 24-3-3).

Other crimes evidence admissible as part of res gestae. — In a prosecution for felony forgery, a witness's testimony that, just prior to the charged offense, the defendant had tried to induce the witness to cash forged checks and that the witness saw the defendant use an accomplice to

Criminal Law — Other Crimes (Cont'd)

cash forged checks, was properly admitted as res gestae evidence because the testimony showed the planning process for the forgeries in question. Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597, 2011 Ga. App. LEXIS 482 (2011), cert. denied, No. S11C1861, 2011 Ga. LEXIS 985 (Ga. Nov. 30, 2011) (decided under former O.C.G.A. § 24-3-3).

i. Criminal Law — Victims

Declarations as natural consequence of crime are admissible. — Victim's declarations, made shortly after the commission of the crime and as a natural consequence thereof, were admissible in evidence as part of the res gestae. Horn v. State, 140 Ga. App. 592, 231 S.E.2d 414, 1976 Ga. App. LEXIS 1577 (1976) (decided under former Code 1933, § 38-305).

Statements made during rape. — In a rape prosecution, statements the victim made to defendant and defendant's codefendant while the crime was in progress were admissible because the statements were part of the res gestae of the crime. Cole v. State, 279 Ga. App. 219, 630 S.E.2d 817, 2006 Ga. App. LEXIS 506 (2006), cert. denied, No. S06C1623, 2006 Ga. LEXIS 725 (Ga. Sept. 8, 2006) (decided under former O.C.G.A. § 24-3-3).

Statements within minutes of crime. — Testimony as to statements of a victim of armed robbery made within a few minutes after the incident was admissible. Perkins v. State, 226 Ga. App. 613, 487 S.E.2d 365 (decided under former O.C.G.A. § 24-3-3).

Absent victim's statements to the officer who first responded to the emergency call and the victim's first conversation with a detective at the hospital shortly after commission of the crime were admissible as part of the res gestae. Jay v. State, 232 Ga. App. 661, 503 S.E.2d 563 (decided under former O.C.G.A. § 24-3-3).

Trial court did not err in admitting the statements the domestic violence victim made to the police officer at the crime scene as the statements were made an hour or less after the officer arrived at the scene and while the victim was still under the effects of the crimes; accordingly, the statements were admissible as part of res gestae. Mize v. State, 262 Ga. App. 486, 585 S.E.2d 913, 2003 Ga. App. LEXIS 961 (2003) (decided under former O.C.G.A. § 24-3-3).

Trial counsel's failure to object to admission of the victim's statement to the witness that victim and defendant had just had sex, in a case in which defendant was being prosecuted for child molestation and statutory rape did not amount to ineffective assistance of counsel, as the victim made the statement to the witness moments after the sex occurred, and, thus, the statement was admissible as res gestae evidence. Drummond v. State, 275 Ga. App. 86, 619 S.E.2d 784, 2005 Ga. App. LEXIS 885 (2005) (decided under former O.C.G.A. § 24-3-3).

Victim's statement made within minutes of a crime to an officer was admissible as part of the res gestae, under former O.C.G.A. § 24-3-3, including the fact that the victim recognized one of the perpetrators of the crime as the defendant. Inman v. State, 281 Ga. 67, 635 S.E.2d 125, 2006 Ga. LEXIS 569 (2006), cert. denied, 552 U.S. 828, 128 S. Ct. 42, 169 L. Ed. 2d 40, 2007 U.S. LEXIS 9143 (2007) (decided under former O.C.G.A. § 24-3-3).

Murder victim's statements to neighbors, paramedics, and an officer identifying the defendant as the shooter were nontestimonial as the statements were made while the incident was still ongoing and the perpetrator was at large. Thus, the confrontation clause was not implicated, and the admission of the statements under former O.C.G.A. § 24-3-3, the res gestae exception to the hearsay rule, did not violate the defendant's sixth amendment rights. Thomas v. State, 284 Ga. 540, 668 S.E.2d 711, 2008 Ga. LEXIS 850 (2008) (decided under former O.C.G.A. § 24-3-3).

An armed robbery defendant's counsel was not ineffective in failing to object to the testimony of the detective as to what the victim and a witness said when the detective arrived at the bank, seven minutes after the robbery. There was no showing that the statements were made as the result of any afterthought; they were

therefore admissible as res gestae under former O.C.G.A. § 24-3-3. Collier v. State, 303 Ga. App. 31, 692 S.E.2d 697, 2010 Ga. App. LEXIS 292 (2010) (decided under former O.C.G.A. § 24-3-3).

Trial court did not err in admitting an investigating officer's testimony regarding the victim's prior consistent statement identifying the defendant as the victim's attacker despite the defendant's hearsay objection. The victim's statement was made within minutes of the violent assault and while the victim was still suffering its effects; therefore, the victim's statement was admissible as part of the res gestae of the event under former O.C.G.A. § 24-3-3. Mims v. State, 314 Ga. App. 170, 723 S.E.2d 486, 2012 Ga. App. LEXIS 143 (2012) (decided under former O.C.G.A. § 24-3-3).

When the victim's statements were derived solely from his or her personal observations, were made within minutes of the crime, and were free of all suspicion, the victim's statements are admissible under the res gestae exception to the hearsay rule. Milford v. State, 291 Ga. 347, 729 S.E.2d 352, 2012 Ga. LEXIS 653 (2012) (decided under former O.C.G.A. § 24-3-3).

Statement shortly after crime occurred. — Trial court was not clearly erroneous in admitting testimony as to a statement made by an earlier victim as to a sexual assault by defendant under the res gestae exception; the statement was made shortly after the crime occurred when the victim was still upset and shaking. Leaptrot v. State, 272 Ga. App. 587, 612 S.E.2d 887, 2005 Ga. App. LEXIS 337 (2005), cert. denied, No. S05C1261, 2005 Ga. LEXIS 614 (Ga. Sept. 19, 2005) (decided under former O.C.G.A. § 24-3-3).

Defendant's claim that trial counsel was ineffective for allowing the prosecutor to "elicit extensive hearsay" regarding what the victim told a friend about the rape was rejected as counsel made a hearsay objection to the testimony which was sustained in part; the trial court permitted the victim's outcry witness to testify about what the victim said because those statements were made immediately after the rape and, therefore, constituted admissible res gestae evidence. Powell v. State, 272 Ga. App. 628, 612 S.E.2d 916, 2005 Ga. App. LEXIS 342 (2005) (decided under former O.C.G.A. § 24-3-3).

Trial court properly admitted the excited utterances of an armed robbery victim as part of the res gestae free from all suspicion of device or afterthought; moreover, Crawford did not apply as the statements were not made to a police officer during a subsequent investigation of the crime, nor were the statements made to an officer or 9-1-1 operator for the purpose of proving a fact regarding some past event. Fields v. State, 283 Ga. App. 208, 641 S.E.2d 218, 2007 Ga. App. LEXIS 13 (2007) (decided under former O.C.G.A. § 24-3-3).

Trial court did not err in admitting into evidence statements the victim made to an officer that the defendant shot the victim because the statements were properly admitted under the res gestae exception to the hearsay rule, former O.C.G.A. § 24-3-3; the victim made the statements shortly after a shooting, in the midst of the chaos of the crime scene, and while awaiting emergency treatment. Sanford v. State, 287 Ga. 351, 695 S.E.2d 579, 2010 Ga. LEXIS 395 (2010), cert. denied, 562 U.S. 1237, 131 S. Ct. 1514, 179 L. Ed. 2d 336, 2011 U.S. LEXIS 1697 (2011) (decided under former O.C.G.A. § 24-3-3).

Because the victim's statements to the homeowner's daughter and the emergency medical technician (EMT) were made shortly after the rape occurred and were admissible as part of the res gestae, any objection to the testimony of the homeowner's daughter and the EMT regarding what the victim said to them would have been futile and could not provide the basis for an ineffective assistance claim. Miller v. State, 325 Ga. App. 764, 754 S.E.2d 804, 2014 Ga. App. LEXIS 70 (2014) (decided under former O.C.G.A. § 24-3-3).

Trial court did not abuse the court's discretion in admitting the victim's statements to the victim's neighbor as excited utterances as the statements were made shortly after the incident, when the neighbor found the victim sitting on the ground, crying and hysterical. Gregory v. State, 342 Ga. App. 411, 803 S.E.2d 367, 2017 Ga. App. LEXIS 347 (2017), cert. denied, No. S18C0007, 2018 Ga. LEXIS 186 (Ga. Mar. 20, 2018), cert. denied, 139 S. Ct.

Criminal Law — Victims (Cont'd)

180, 202 L. Ed. 2d 110, 2018 U.S. LEXIS 5563 (2018).

Statements within hours of crime. — Evidence showed that the victim's statements were all consistent and delivered within a few hours of the time the victim said the victim escaped captivity; trial court did not err in concluding that the statements were free from suspicion of device or afterthought so as to allow the statements' admission as an exception to the hearsay exclusion. Underwood v. State, 250 Ga. App. 764, 552 S.E.2d 915, 2001 Ga. App. LEXIS 853 (2001) (decided under former O.C.G.A. § 24-3-3).

Statements made by a child victim within hours of an alleged sexual assault were made at a time so nearly connected with the incident so as to be free from all suspicion, device, or afterthought, and hence, were admissible as part of res gestae. Freeman v. State, 282 Ga. App. 185, 638 S.E.2d 358, 2006 Ga. App. LEXIS 1347 (2006) (decided under former O.C.G.A. § 24-3-3).

Victim's on-the-scene description admissible. — There was no error in allowing the investigating officer to relate for the jury the distraught victim's on-the-scene description of the attack upon the victim, including the victim's description of the assailant, even though this evidence was more narrative than exclamatory. McKinney v. State, 218 Ga. App. 633, 463 S.E.2d 136, 1995 Ga. App. LEXIS 829 (1995) (decided under former O.C.G.A. § 24-3-3); Basu v. State, 228 Ga. App. 591, 492 S.E.2d 329 (decided under former O.C.G.A. § 24-3-3).

When an outcry is communicated to witnesses immediately after a victim locates the witnesses, which is within one hour after the offense, these declarations, made so shortly after the commission of the crime, constitute part of the res gestae. Tucker v. State, 243 Ga. 683, 256 S.E.2d 365, 1979 Ga. LEXIS 1028 (1979) (decided under former Code 1933, § 38-305).

Robbery victim's statements to the arresting officer and emergency room physician identifying the victim's assailant as the victim's great grandson were so closely connected to the offense as to be inherently reliable, particularly in light of the victim's refusal to testify once the victim realized the penal consequences to the defendant. Jenkins v. State, 232 Ga. App. 395, 501 S.E.2d 891 (decided under former O.C.G.A. § 24-3-3).

Conversations before crime not part of res gestae. — Testimony concerning a conversation between deceased victim and a murder suspect occurring some hours before the murder was not part of the res gestae because it did not lead to the murder, and was in no way connected with the murder. Mitchell v. State, 71 Ga. 128, 1883 Ga. LEXIS 153 (1883) (decided under former Code 1882, § 3773).

Statements preceding crime. — Statement from deceased child declarant that there was no need for the child's mother to call the school and confirm that the child arrived safely on the day the child disappeared was not part of the res gestae as it was not made contemporaneously with, or in relation to, the commission of the crimes for which defendant was being tried; appellate court believed that the statement was merely intended to demonstrate the child's nature and trusting disposition. Head v. State, 276 Ga. 131, 575 S.E.2d 883, 2003 Ga. LEXIS 75 (2003) (decided under former O.C.G.A. § 24-3-3).

Murder defendant claiming ineffective assistance of counsel failed to show that a hearsay objection to a security guard's testimony regarding the victim's statements at a nightclub shortly before the victim's murder would have been sustained because the statement could have been held admissible under O.C.G.A. § 24-8-803(1) (present-sense impression of declarant) or (3) (existing mental, emotional, or physical condition of declarant); also, counsel explained the failure to object. Morrison v. State, 300 Ga. 426, 796 S.E.2d 293, 2017 Ga. LEXIS 24 (2017).

Earlier incident involving other victims was admissible. — In an aggravated battery and criminal gang violence case that took place outside an amusement park, evidence of an earlier incident involving the gang inside the park was admissible as part of the res gestae of the

crime under former O.C.G.A. § 24-3-3 because the same people were involved and the beatings arose from a motive of revenge for the earlier incident. Morey v. State, 312 Ga. App. 678, 719 S.E.2d 504, 2011 Ga. App. LEXIS 960 (2011), cert. denied, No. S12C0451, 2012 Ga. LEXIS 592 (Ga. June 18, 2012) (decided under former O.C.G.A. § 24-3-3).

Audiotape of 9-1-1 calls. — In a prosecution for rape, kidnapping, assault, and sodomy, it was not error to allow the state to play a 9-1-1 audiotape of calls made by the victim and witnesses during the attack. Moore v. State, 217 Ga. App. 207, 456 S.E.2d 708, 1995 Ga. App. LEXIS 406 (1995), cert. denied, No. S95C1234, 1995 Ga. LEXIS 924 (Ga. July 14, 1995) (decided under former O.C.G.A. § 24-3-3).

When defendant kidnapped the victim in front of the victim's children, the victim and the children were part of res gestae since the victim's statements were made while the incident was in progress, one of the children was on the telephone with the 9-1-1 operator recounting the altercation as the altercation occurred, and a policeman found the children distraught and holding makeshift weapons; as the statements sprang out of the incident, the statements were admissible. Jackson v. State, 255 Ga. App. 279, 564 S.E.2d 865, 2002 Ga. App. LEXIS 598 (2002) (decided under former O.C.G.A. § 24-3-3).

When a tape of a 9-1-1 call was made contemporaneous with the call, the content of the call showed that the call was contemporaneous with the burglary at issue, the 9-1-1 operator testified that the tape was a fair and accurate depiction of the actual conversation, the caller's statements were made while the incident was actually in progress, and the statements were made without premeditation or afterthought, a trial court correctly allowed admission of the tape as part of the res gestae of the burglary. Sweney v. State, 265 Ga. App. 21, 593 S.E.2d 12, 2003 Ga. App. LEXIS 1514 (2003) (decided under former O.C.G.A. § 24-3-3).

Defendant's motion in limine to exclude evidence of a 9-1-1 call and the defendant's motion for a directed verdict were properly denied as the 9-1-1 call was not testimonial since the call was not premeditated and was made to prevent or stop a crime; under Georgia law, the 9-1-1 statements were admissible as part of the res gestae or as an excited utterance and the confrontation clause and Crawford v. Washington, 541 U. S. 36 (2004), were inapplicable. Kimbrell v. State, 280 Ga. App. 867, 635 S.E.2d 237, 2006 Ga. App. LEXIS 964 (2006) (decided under former O.C.G.A. § 24-3-3).

Trial court correctly admitted a 9-1-1 recording as part of the res gestae pursuant to former O.C.G.A. § 24-3-3 because the caller identified the defendant while or soon after the incident occurred in an attempt to secure police assistance and was still on the phone with the 9-1-1 operator when the police arrived. Landaverde v. State, 305 Ga. App. 488, 699 S.E.2d 816, 2010 Ga. App. LEXIS 730 (2010) (decided under former O.C.G.A. § 24-3-3).

Because the entirety of both of the victim's 9-1-1 calls took place while the victim was perceiving the danger posed to the victim by the defendant, and because the victim only ended the second 9-1-1 call when the officers arrived on the scene and the victim only then perceived that the most immediate danger had passed, the circumstances suggested that the victim was responding throughout the incident to the victim's reasonable perception of a real and present danger, and the trial court did not abuse the court's discretion when the court concluded that the victim's 9-1-1 calls were admissible under the present-sense impression exception to the hearsay rule. Owens v. State, 329 Ga. App. 455, 765 S.E.2d 653, 2014 Ga. App. LEXIS 709 (2014).

Victim's statements during the 9-1-1 call did not violate the defendant's constitutional right to confront the defendant's accusers because the victim's statements in the 9-1-1 call were non-testimonial as the statements were made while the family violence battery incident was ongoing, and the statements were made for the primary purpose of preventing the continuation of the domestic violence that was apparently occurring at that time, not for the purpose of establishing a past fact; and because the statements were admissible under the present sense impression exception to the hearsay rule. Legree v.

Criminal Law — Victims (Cont'd)

State, 344 Ga. App. 793, 812 S.E.2d 68, 2018 Ga. App. LEXIS 139 (2018).

Recording of victim's radio transmission. — Recorded radio voice transmission of the deceased victim made while proceeding to the scene of the homicide is admissible as forming part of the res gestae. The victim's voice transmission made while proceeding to the scene together with the events occurring there only moments later constituted the transaction under investigation. The death of the person making such statement is no ground for the statement's exclusion. Callahan v. State, 229 Ga. 737, 194 S.E.2d 431, 1972 Ga. LEXIS 760 (1972) (decided under former Code 1933, § 38-305).

Victim's taped interview. — Absent victim's taped interview made 18 or 19 hours after the incident was not part of the res gestae but, because it was cumulative of other testimony, admission of the statement was not reversible error. Jay v. State, 232 Ga. App. 661, 503 S.E.2d 563 (decided under former O.C.G.A. § 24-3-3).

Evidence that the victim heard an unidentified female voice scream defendant's name, tell the defendant "don't do it," and tell defendant that the defendant was going to kill the victim, as a gun was cocked and fired at the victim, was admissible under the res gestae exception to the hearsay rule. Sharif v. State, 272 Ga. App. 660, 613 S.E.2d 176, 2005 Ga. App. LEXIS 356 (2005) (decided under former O.C.G.A. § 24-3-3).

Statements by assault victims held admissible as res gestae in the following cases. — See Life & Cas. Ins. Co. v. Lingerfelt, 100 Ga. App. 482, 111 S.E.2d 730, 1959 Ga. App. LEXIS 646 (1959) (statement made within 10 minutes of assault) (decided under former Code 1933, § 38-305); Barker v. State, 144 Ga. App. 339, 241 S.E.2d 11, 1977 Ga. App. LEXIS 2693 (1977) (statement shortly after assault) (decided under former Code 1933, § 38-305); Nasworthy v. State, 169 Ga. App. 603, 314 S.E.2d 446, 1984 Ga. App. LEXIS 1647 (1984) (testimony of exspouse and child) (decided under former O.C.G.A. § 24-3-3); Robinson v. State, 197 Ga. App. 600, 399 S.E.2d 94, 1990 Ga. App. LEXIS 1414 (1990) (victim's identification of attacker to adult child) (decided under former O.C.G.A. § 24-3-3).

Nurse's testimony that a victim told the nurse that the victim was attacked by the victim's roommate while the victims was sleeping was admissible under former O.C.G.A. § 24-3-3 because of the victim's physical and emotional condition when the victim made the statements and because the statements were made immediately after the attack; further, the correctional officers had testified that defendant was the aggressor in the affray and that the victim appeared to have been asleep at the inception of the incident, so the hearsay testimony given by the nurse was cumulative of other evidence. Brown v. State, 273 Ga. App. 88, 614 S.E.2d 187, 2005 Ga. App. LEXIS 411 (2005) (decided under former O.C.G.A. § 24-3-3).

Statements by child molestation victim. — Testimony by two witnesses regarding statements made by one of the victims about seeing the defendants engaged in sex was admissible as res gestae evidence. Grimsley v. State, 233 Ga. App. 781, 505 S.E.2d 522 (decided under former O.C.G.A. § 24-3-3).

Statements by child molestation victim made to mother several hours after event admissible. — See Kilgore v. State, 177 Ga. App. 656, 340 S.E.2d 640, 1986 Ga. App. LEXIS 2451 (1986) (decided under former O.C.G.A. § 24-3-3).

Statements by victim of child molestation made to teacher some hours after the event was admissible. Samples v. State, 169 Ga. App. 605, 314 S.E.2d 448, 1984 Ga. App. LEXIS 1648 (1984) (decided under former O.C.G.A. § 24-3-3).

Statements by child molestation victim about battery on grandmother. — Trial court did not err in denying defendant's motion for mistrial after one of the child victims testified that defendant battered the child's grandmother shortly after the grandmother stumbled upon defendant molesting that child as the evidence supported a finding that this battering was part of the res gestae of the child molestation crime. Prather v. State, 279 Ga. App. 552, 631 S.E.2d 758, 2006 Ga. App. LEXIS 632 (2006) (decided under former O.C.G.A. § 24-3-3).

Witness's testimony concerning victim's recital to the witness of facts of an alleged rape some 12 hours after the offense was not admissible as an outcry — i.e., as part of the res gestae — but was admissible for the purpose of establishing that the prosecutor had complained that a rape had occurred. Barnes v. State, 171 Ga. App. 478, 320 S.E.2d 597, 1984 Ga. App. LEXIS 2989 (1984) (decided under former O.C.G.A. § 24-3-3).

Victim's parent's testimony about phone call following rape. — Victim's parent's testimony as to the daughter's telephone call to the parent after the rape was admissible as res gestae. Howard v. State, 228 Ga. App. 784, 492 S.E.2d 759 (decided under former O.C.G.A. § 24-3-3).

Victim's statement following phone call. — Victim's statement following a phone conversation with defendant that the victim had to "get" defendant because defendant told the victim the defendant was going to kill the victim, considered in the context in which it was made, was an excited utterance. Walthour v. State, 269 Ga. 396, 497 S.E.2d 799, 1998 Ga. LEXIS 419 (1998) (decided under former O.C.G.A. § 24-3-3).

Testimony of police officer that victim told the officer that defendant forced the victim's car off the road was within the "excited utterance" hearsay exception and admissible as part of the res gestae. T.G. & Y. Stores Co. v. Waters, 175 Ga. App. 884, 334 S.E.2d 910, 1985 Ga. App. LEXIS 2404 (1985) (decided under former O.C.G.A. § 24-3-3).

Testimony by victim on witness's statements to victim. — Trial court did not err by allowing a burglary victim to testify that the victim's neighbor, an eyewitness, told the victim that the witness saw someone running from the victim's house or as to the neighbor's description of the perpetrator when such declarations were made in a phone call to the victim substantially contemporaneously with the burglary and soon thereafter when the victim returned home. Lovelace v. State, 262 Ga. App. 690, 586 S.E.2d 386, 2003 Ga. App. LEXIS 991 (2003), cert. denied, No. S03C1862, 2004 Ga. LEXIS 47 (Ga. Jan. 12, 2004) (decided under former O.C.G.A. § 24-3-3).

Statements by victims identifying their murderers admissible as res gestae in the following cases. — See Jordan v. State, 180 Ga. 871, 181 S.E. 151, 1935 Ga. LEXIS 590 (1935) (decided under former Code 1933, § 38-305); Gates v. State, 120 Ga. App. 518, 171 S.E.2d 375, 1969 Ga. App. LEXIS 842 (1969) (decided under former Code 1933, § 38-305).

Defendant's threatening words and behavior made defendant's angry telephone message and act of hunting for the victim's hotel room a startling event that, in all probability, impeded the victim's normal thought processes, and the victim's comment to the victim's friend that defendant was going to kill the victim appears to have been spontaneous and not the result of reasoned deliberation. Testimony such as the friend's, that the declarant appeared nervous and upset, combined with a reasonable basis for emotional upset, will usually suffice for admission under the excited utterance exception of former O.C.G.A. § 24-3-3. Demons v. State, 277 Ga. 724, 595 S.E.2d 76, 2004 Ga. LEXIS 274 (2004) (decided under former O.C.G.A. § 24-3-3).

Firmly rooted hearsay exceptions, such as res gestae, the excited utterance exception of former O.C.G.A. § 24-3-3, are generally not a sufficient substitute for a prior opportunity for cross-examination in order to admit testimonial hearsay in a criminal case. However, when a deceased victim's statements were not "testimonial," the statements were not precluded from admission under Georgia's res gestae exception to the hearsay rule. Demons v. State, 277 Ga. 724, 595 S.E.2d 76, 2004 Ga. LEXIS 274 (2004) (decided under former O.C.G.A. § 24-3-3).

Admission of a murder victim's and the victim's fiancee's statements to police as the victim lay bleeding in the street after a shooting was not prohibited by the Confrontation Clause, although the victim died, because the statements were nontestimonial in that the statements were not intended to prove a past fact but to describe current circumstances that re-

Criminal Law — Victims (Cont'd)

quired immediate police action. The statements were admissible under the excited utterance and present sense impression exceptions to the hearsay rule. Varner v. State, 306 Ga. 726, 832 S.E.2d 792, 2019 Ga. LEXIS 593 (2019).

Rape and kidnapping part of one transaction. — Because the evidence showed that a victim's kidnapping and rape were part of one criminal transaction, the trial court did not abuse the court's discretion in admitting evidence of the rape, as it formed a part of the res gestae. Garrett v. State, 285 Ga. App. 282, 645 S.E.2d 718, 2007 Ga. App. LEXIS 509 (2007) (decided under former O.C.G.A. § 24-3-3).

Statement by victim to police officer. — Evidence of a victim's statement to the police, although not properly admitted as a prior inconsistent statement due to the failure to lay a proper foundation under former O.C.G.A. § 24-9-83 (see now O.C.G.A. § 24-6-608), was properly admitted as part of the res gestae under former O.C.G.A. § 24-3-3 because the victim's description of a distinctive jacket worn by one of the individuals who took a pickup truck was used by the police to search the defendant's residence. Stubbs v. State, 293 Ga. App. 692, 667 S.E.2d 905, 2008 Ga. App. LEXIS 1045 (2008) (decided under former O.C.G.A. § 24-3-3).

Testimony of officer. — Because a police officer's hearsay testimony of any instances of harassment was cumulative to the victim's direct testimony on the issue, there was no error on the part of the trial court to admit the testimony simply on the basis that the statement was hearsay. Pate v. State, 315 Ga. App. 205, 726 S.E.2d 691, 2012 Ga. App. LEXIS 344 (2012), cert. denied, No. S12C1308, 2012 Ga. LEXIS 1027 (Ga. Oct. 1, 2012) (decided under former O.C.G.A. § 24-3-1).

Trial counsel was not ineffective for failing to object on hearsay grounds to portions of a Secret Service agent's testimony about what the agent learned during the investigation as the testimony was not hearsay since the agent did not repeat the testimony of an out-of-court declarant. Bearden v. State, 316 Ga. App. 721, 728 S.E.2d 874, 2012 Ga. App. LEXIS 534 (2012), cert. denied, No. S12C1778, 2013 Ga. LEXIS 277 (Ga. Mar. 18, 2013) (decided under former O.C.G.A. § 24-3-1).

Trial counsel was not ineffective for failing to make a hearsay objection to the investigating officer's testimony concerning statements that a witness and the victim's mother made to the officer recounting the allegations of the victim because counsel's trial strategy was to highlight the inconsistencies between what the witness and the mother said the victim told them and what the victim subsequently told the forensic interviewer. Henry v. State, 316 Ga. App. 132, 729 S.E.2d 429, 2012 Ga. App. LEXIS 500 (2012) (decided under former O.C.G.A. § 24-3-1).

Pretermitting whether the testimony of the sheriff's deputy and police investigator fell within the res gestae exception to hearsay, because the defendant could not show any prejudice resulting from the admission of the testimony in light of the properly admitted testimony of the homeowner's daughter and emergency medical technician, the failure to object to evidence which was merely cumulative of other admissible evidence did not amount to ineffective assistance of counsel. Miller v. State, 325 Ga. App. 764, 754 S.E.2d 804, 2014 Ga. App. LEXIS 70 (2014) (decided under former O.C.G.A. § 24-3-3).

Testimony as to statements of third persons. — Trial counsel was not ineffective for failing to make a hearsay objection to the testimony of the victim's mother and a witness recounting allegations of molestation because trial counsel wanted the testimony admitted as part of counsel's trial strategy to show those witnesses fabricated the charges and coached the victim. Henry v. State, 316 Ga. App. 132, 729 S.E.2d 429, 2012 Ga. App. LEXIS 500 (2012) (decided under former O.C.G.A. § 24-3-1).

Prior consistent statement of victim. — Trial court erred in admitting the victim's prior consistent statements because the victim made the statements to a police officer after the victim was accused of possessing narcotics; nevertheless, any error in admitting the evidence was harmless because the jury acquitted the defen-

dant of the most serious sexual offenses, and the acquittals established that the jury was able to objectively consider the evidence of the charges, despite the improper bolstering. Pate v. State, 315 Ga. App. 205, 726 S.E.2d 691, 2012 Ga. App. LEXIS 344 (2012), cert. denied, No. S12C1308, 2012 Ga. LEXIS 1027 (Ga. Oct. 1, 2012) (decided under former O.C.G.A. § 24-3-1).

Evidence admissible under necessity exception. — Trial court did not abuse the court's discretion in allowing a witness to testify about the victim's statement regarding threats the victim had received a few days before the shooting because the requirements of the necessity exception to the hearsay rule were met; the victim was deceased and unavailable to testify, the witness testified that the victim and the witness were friends, and the defendant identified no alternative source of the information revealed in the statement. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661, 2012 Ga. LEXIS 625 (2012) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion by allowing the admission of hearsay evidence by three witnesses concerning statements that the victim made about the victim's relationship with the defendant because such admissions were proper under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b) (see now O.C.G.A. §§ 24-8-803 and 24-8-807), as the witnesses showed the close relationship between the defendant and the victim, the statements were uncontradicted, found reliable, and bore sufficient indicia of trustworthiness to be admissible. Bunnell v. State, 292 Ga. 253, 735 S.E.2d 281, 2013 Ga. LEXIS 2 (2013) (decided under former O.C.G.A. § 24-3-1).

In a murder case wherein the defendant killed the defendant's father and brother and was involved with the defendant's brother's wife, the trial court did not abuse the court's discretion when the court allowed a woman who had counseled the brother about the brother's marital problems to testify about an incident that the brother had described to the counselor, in which the defendant threatened the defendant's brother's life at their parents' home because the statement was admissible under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b), as the witness was shown to have been "like a second mother" to the brother, that the witness had counseled and advised the brother about the brother's marital problems, and that the brother had no reason to lie to the woman; further, the testimony was consistent with the testimony of other witnesses, including two witnesses who testified about another incident in which the brother and the defendant threatened to kill each other. Heidt v. State, 292 Ga. 343, 736 S.E.2d 384, 2013 Ga. LEXIS 4 (2013) (decided under former O.C.G.A. § 24-3-1).

No reversible error in criminal case when defendant failed to show harm. — Defendant failed to preserve for review the argument that the trial court erred in allowing a witness to testify about the victim's statement because although the codefendant's counsel vigorously opposed the state's request to elicit the hearsay statements, the defendant's counsel failed to object, join in the codefendant's objection, or argue in any way regarding the issue. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661, 2012 Ga. LEXIS 625 (2012) (decided under former O.C.G.A. § 24-3-1).

Testimony as to prior difficulties between defendant and the victim. — Trial court did not err in refusing to grant a mistrial on the ground that an eyewitness's testimony was based on hearsay because to the extent the testimony exposed prior difficulties between the codefendants and the victim, it was cumulative of other testimony that the defendant and the codefendant threatened the victim the day before the shooting; the other evidence implicating the defendant in the shooting made it highly probable that the hearsay testimony did not contribute to the verdict. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661, 2012 Ga. LEXIS 625 (2012) (decided under former O.C.G.A. § 24-3-1).

j. Donors

Statements by donor of gift. — Declarations of the donor, made on the evening of the same day on which an alleged gift was made, but after the gift was

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made, going to show that there was a gift, and the manner of the gift, are not admissible as parts of the res gestae. Carter v. Buchannon, 3 Ga. 513, 1847 Ga. LEXIS 132 (1847) (decided under former law).

k. Employees

Statement made by the store manager in a slip and fall action pertaining to the identity of the slippery substance which allegedly caused the fall was admissible as an admission against interest or under the res gestae exception and was sufficient to raise a question of fact precluding summary judgment in favor of the store. Brown v. Piggly Wiggly S., Inc., 210 Ga. App. 459, 436 S.E.2d 513, 1993 Ga. App. LEXIS 1207 (1993), cert. denied, No. S94C0106, 1994 Ga. LEXIS 195 (Ga. Jan. 6, 1994) (decided under former O.C.G.A. § 24-3-3).

Employee's statement held admissible. — Statement made just after plaintiff's fall by an unknown employee in the presence of the store manager that "if this floor had been mopped or kept mopped this wouldn't happen" was admissible as part of the res gestae and might also have been an admission against defendant store's interest. Sutton v. Winn Dixie Stores, Inc., 233 Ga. App. 424, 504 S.E.2d 245 (decided under former O.C.G.A. § 24-3-3).

Hearsay testimony of a bank employee as to another employee's telephone conversation was admissible under former O.C.G.A. §§ 24-3-1(b) and 24-3-3 (see now O.C.G.A. §§ 24-8-801, 24-8-802, and 24-8-803) as part of the res gestae of the other employee's conversation. Goldsmith v. Peterson, 307 Ga. App. 26, 703 S.E.2d 694, 2010 Ga. App. LEXIS 1091 (2010) (decided under former O.C.G.A. § 24-3-3).

Employee's statement held not admissible. — Extrajudicial admission of employee, who was not a party to the indemnity contract, nor a party to the suit was not admissible as a part of the res gestae of the larceny for which the employer was seeking indemnification, nor as an admission by a stranger to the suit bearing upon a collateral issue essential to the adjudication, as the admission was not collateral to the main issue involved, but bore directly upon it. Glens Falls Indem. Co. v. Gottlieb, 80 Ga. App. 634, 56 S.E.2d 799, 1949 Ga. App. LEXIS 892 (1949) (decided under former Code 1933, § 38-305).

In an action for injuries sustained after falling on a wet floor, testimony of the injured customer that a store employee came up to the customer after the customer fell and stated that a child had thrown up on the floor was not admissible as part of the res gestae. The testimony did not create a triable issue of fact as to the store owner's knowledge of a dangerous condition. Hagan v. Goody's Family Clothing, Inc., 227 Ga. App. 585, 490 S.E.2d 107 (decided under former O.C.G.A. § 24-3-3).

As a witness's hearsay statement to an investigator was made 13 days after the fire at issue in the litigation, it could not be said to have been voluntary or free of all suspicion or afterthought, and hence was not admissible under the res gestae exception. HCP III Woodstock, Inc. v. Healthcare Servs. Group, Inc., 254 Ga. App. 242, 562 S.E.2d 225, 2002 Ga. App. LEXIS 340 (2002) (decided under former O.C.G.A. § 24-3-3).

l. Opinions

An opinion or conclusion is admissible as res gestae evidence if it is spontaneous or reflective rather than a reasoned one arrived at deliberately after thoughtful consideration. Bentley v. State, 131 Ga. App. 425, 205 S.E.2d 904, 1974 Ga. App. LEXIS 1436 (1974) (decided under former Code 1933, § 38-305).

Prejudicial impact outweighed probative value of opinion testimony by victim's family. — Trial court did not abuse the court's discretion by limiting the cross-examination of the victim's wife and the wife's son about whether the victim had emotionally abused the wife and tricked or forced the wife into intercourse, resulting in a pregnancy, because, even assuming that the evidence was relevant, the evidence was not probative and was overly prejudicial to the victim by suggesting the victim was deserving of death. Gialenios v. State, 310 Ga. 869, 855 S.E.2d 559, 2021 Ga. LEXIS 79, overruled in

part, Outlaw v. State, 311 Ga. 396, 858 S.E.2d 63, 2021 Ga. LEXIS 197 (2021).

m. Personal Injuries

Statements by injured persons held admissible in the following cases. — See Charleston & W. Carolina Ry. v. Burckhalter, 141 Ga. 127, 80 S.E. 278, 1913 Ga. LEXIS 352 (1913) (statement to doctor) (decided under former Civil Code 1910, § 5766); Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69, 1915 Ga. App. LEXIS 2 (1915) (statement to spouse) (decided under former Civil Code 1910, § 5766); Aetna Life Ins. Co. v. Jones, 80 Ga. App. 472, 56 S.E.2d 305, 1949 Ga. App. LEXIS 865 (1949) (statement to stepson) (decided under former Code 1933, § 38-305); Gilbert Corp. of Del., Inc. v. Yetman, 219 Ga. App. 320, 464 S.E.2d 822, 1995 Ga. App. LEXIS 1041 (1995), cert. denied, No. S96C0611, 1996 Ga. LEXIS 693 (Ga. Apr. 5, 1996) (officer's testimony about decedent's statements) (decided under former O.C.G.A. § 24-3-3).

Statements held inadmissible. — Statements by an injured party to a hospital surgeon were held inadmissible. Hunter v. State, 147 Ga. 823, 95 S.E. 668, 1918 Ga. LEXIS 160 (1918) (decided under former Penal Code 1910, § 1024).

Excluded testimony of two witnesses that a patient told the witnesses that the patient had pointed out a bump on the patient's breast to a doctor and that the doctor told the patient not to be concerned about the bump was not admissible under the res gestae exception as it was unclear how much time elapsed between the office visit and the patient's statements to the witnesses; moreover, the patient did not testify that the patient told the witnesses about the office visit and there was no way to establish the exact sequence of events that occurred between the office visit and the discussions about that visit or to determine the circumstances surrounding the making of the statements. Davis v. Reid, 272 Ga. App. 312, 612 S.E.2d 112, 2005 Ga. App. LEXIS 282 (2005) (decided under former O.C.G.A. § 24-3-3).

n. Principal and Surety

Statements during transaction for which surety is bound held admissible. — If the admissions of a principal are made during the transaction of the business for which the surety is bound, the admissions become a part of the res gestae and are admissible; otherwise, the admissions are not. Dobbs v. Justices of Inferior Court, 17 Ga. 624, 1855 Ga. LEXIS 163 (1855) (decided under former law).

o. Sales

Agreement of sale. — Declarations of a vendor of property, as to the vendor's motive for the sale, made at the time and during the progress of the sale, and even so soon thereafter as to be free from all suspicion of afterthought, are admissible evidence on a trial as to the validity of the sale. McLean v. Clark, 47 Ga. 24, 1872 Ga. LEXIS 303 (1872) (decided under former Code 1868, § 3720).

p. Transcripts

Testimonial conclusions contained in an incident report prepared by store's security personnel that a customer of the store had been struck in the abdomen by shopping carts steered by an employee of the store were admissible under the res gestae exception to the hearsay rule. Super Disct. Mkts., Inc. v. Coney, 210 Ga. App. 659, 436 S.E.2d 803, 1993 Ga. App. LEXIS 1312 (1993) (decided under former O.C.G.A. § 24-3-3).

Photostatic copy of log made by the operator on duty representing radio communication of officers engaged in high speed chase with defendant was admissible as part of the res gestae. Waller v. State, 80 Ga. App. 488, 56 S.E.2d 491, 1949 Ga. App. LEXIS 867 (1949) (decided under former Code 1933, § 38-305).

q. Wills

Any acts or declarations by the principal legatee, who procures the will under which one claims to be written, may be given in evidence as a part of the res gestae. Morris v. Stokes, 21 Ga. 552, 1857 Ga. LEXIS 95 (1857) (decided under former law).

Statements for Medical Diagnosis/Treatment

Former statute related only to factual matters which would be within the

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immediate knowledge of the patient personally, and statements of medical opinion were not included. Dunn v. McIntyre, 146 Ga. App. 362, 246 S.E.2d 398, 1978 Ga. App. LEXIS 2355 (1978) (decided under former Code 1933, § 38-315).

Former statute did not encompass statements of medical opinion made by one physician to another but instead referred only to statements made by or on behalf of the patient when seeking medical care. Dunn v. McIntyre, 146 Ga. App. 362, 246 S.E.2d 398, 1978 Ga. App. LEXIS 2355 (1978) (decided under former Code 1933, § 38-315).

Former O.C.G.A. § 24-3-4 did not cover statements of medical opinion made by one physician to another, much less a secondhand recitation of what the witness was told by another person concerning the injured plaintiff's condition. Pirkle v. Hawley, 199 Ga. App. 371, 405 S.E.2d 71, 1991 Ga. App. LEXIS 481 (1991), cert. denied, No. S91C1026, 1991 Ga. LEXIS 753 (Ga. May 15, 1991) (decided under former O.C.G.A. § 24-3-4).

Responses to medical questions of patient taken to hospital admissible. — Testimony of a doctor who related a patient's responses to medical questions for purposes of diagnosis and treatment was admissible under the exception to the hearsay rule provided by former O.C.G.A. § 24-3-4 since the responses were given within a matter of minutes after the patient was taken to the hospital. Allen v. State, 174 Ga. App. 206, 329 S.E.2d 586, 1985 Ga. App. LEXIS 1782 (1985) (decided under former O.C.G.A. § 24-3-4).

Admission of evidence from sexual assault nurse examiner. — Defendant was not entitled to relief based on the admission of statements the victim made to the sexual assault nurse examiner (SANE) because, even if the purposes of the SANE's interview was to collect evidence and the testimony was admitted in error, the error was harmless given the DNA evidence linking the defendant to the rape and the defendant's weak alibi. McEady v. State, 355 Ga. App. 820, 846 S.E.2d 94, 2020 Ga. App. LEXIS 395 (2020).

Statements made by child to nurse several months after sexual abuse. — Testimony of nurse, who prepared child for examination by physician, as to statements made to the nurse by the child was admissible in prosecution for child molestation, even though the statements were made several months after the sexual abuse occurred, since the statements were made for the purpose of medical diagnosis and treatment and did not identify or in any way refer to the defendant. Sparks v. State, 172 Ga. App. 891, 324 S.E.2d 824, 1984 Ga. App. LEXIS 2705 (1984) (decided under former O.C.G.A. § 24-3-4).

Statements to psychologist as to grief. — When a psychologist, in a deposition which was introduced into evidence at trial, stated several times that plaintiffs were suffering from great pain, grief, and stress when the psychologist met with them approximately one year after the death of their son, the statements made to the psychologist during the psychologist's evaluation were exceptions to the hearsay rule under former O.C.G.A. § 24-3-4. Southern Ry. v. Lawson, 256 Ga. 798, 353 S.E.2d 491, 1987 Ga. LEXIS 661 (1987) (decided under former O.C.G.A. § 24-3-4).

Testimony from psychologist on schizophrenia. — In a proceeding on termination of parental rights, the trial court did not err in allowing a clinical psychologist to testify as to the possible effects schizophrenia may have on caring for children based upon the psychologist's psychological evaluations of the mother. In the Interest of M.D., 244 Ga. App. 156, 534 S.E.2d 889, 2000 Ga. App. LEXIS 654 (2000) (decided under former O.C.G.A. § 24-3-4).

Failure to assert admissibility is waiver. — Failure of the plaintiff to assert that a statement made by a therapist at a deposition was admissible under former O.C.G.A. § 24-3-4 as a statement made for medical diagnosis or treatment at trial when the trial court asked for the plaintiff's response to a hearsay objection precluded the appellate court from considering the issue for the first time on appeal. Bryant v. Food Giant, Inc., 184 Ga. App.

155, 361 S.E.2d 38, 1987 Ga. App. LEXIS 2189 (1987) (decided under former O.C.G.A. § 24-3-4).

Past recollections within medical record inadmissible. — When the original of the medical record itself is admissible but diagnostic opinions and conclusions therein are inadmissible, past recollection recorded by a doctor of a patient's medical history contained in a medical record, which included a diagnostic opinion of another doctor, would be inadmissible. Stoneridge Properties, Inc. v. Kuper, 178 Ga. App. 409, 343 S.E.2d 424, 1986 Ga. App. LEXIS 1663 (1986) (decided under former O.C.G.A. § 24-3-4).

Physical description of a victim's assailant was not reasonably pertinent to the diagnosis and treatment of the victim, and the exclusion of a hospital report containing such a description was proper. Arnold v. State, 166 Ga. App. 313, 304 S.E.2d 118, 1983 Ga. App. LEXIS 3228 (1983) (decided under former O.C.G.A. § 24-3-4).

Testimony pertinent to diagnosis and treatment of victim. — See Davis v. State, 168 Ga. App. 272, 308 S.E.2d 602, 1983 Ga. App. LEXIS 3389 (1983) (decided under former O.C.G.A. § 24-3-4).

Testimony by a doctor that the doctor received a report that a mixture of hot bleach was thrown in the victim's face was properly admitted as the testimony related to the cause of the victim's injuries and was made for the purpose of the victim's diagnosis and treatment. Payne v. State, 273 Ga. App. 483, 615 S.E.2d 564, 2005 Ga. App. LEXIS 544 (2005) (decided under former O.C.G.A. § 24-3-4).

Trial court properly admitted testimony of an emergency medical technician who arrived on the scene of a vehicle accident caused by defendant as the technician's questions to defendant were pertinent to defendant's medical treatment, and defendant's response that defendant had been drinking alcohol and smoking marijuana all night was properly admitted pursuant to former O.C.G.A. § 24-3-4. Ellis v. State, 275 Ga. App. 881, 622 S.E.2d 89, 2005 Ga. App. LEXIS 1132 (2005), cert. denied, No. S06C0309, 2006 Ga. LEXIS 88 (Ga. Jan. 30, 2006) (decided under former O.C.G.A. § 24-3-4).

Trial court did not err in permitting a challenged state expert, who examined the victim, to testify as to what the victim stated during an emergency room examination, as the victim corroborated the expert's testimony and the expert based the testimony on personal knowledge, not hearsay; moreover, the expert's testimony did not improperly bolster that of the victim, but merely repeated the information that the victim provided, which the expert used to examine the victim and draw medical conclusions. Scott v. State, 281 Ga. App. 106, 635 S.E.2d 582, 2006 Ga. App. LEXIS 1012 (2006) (decided under former O.C.G.A. § 24-3-4).

With regard to a defendant's trial and conviction for aggravated sodomy and simple battery involving the sexual assault of an inmate upon an inmate, the trial court did not violate the defendant's rights under the confrontation clause by admitting the statements made by the victim to the physician and the nurse who treated the victim for the injuries received because the statements were admissible under former O.C.G.A. § 24-3-4, the medical diagnosis or treatment exception, and did not fall within any class of testimonial statement. In particular, no objective witness would reasonably conclude that the statements were made under such circumstances that the statement would be available for use at a later trial. Thomas v. State, 288 Ga. App. 602, 654 S.E.2d 682, 2007 Ga. App. LEXIS 1259 (2007), cert. denied, No. S08C0725, 2008 Ga. LEXIS 471 (Ga. May 19, 2008) (decided under former O.C.G.A. § 24-3-4).

With regard to a defendant's convictions for aggravated sodomy, rape, and other related crimes, trial counsel's decision not to object to hearsay testimony of the emergency room physician who treated the victim did not amount to ineffective assistance of counsel as the physician's testimony was admissible under the hearsay exception set forth in former O.C.G.A. § 24-3-4 since the challenged statements related to the cause of the victim's injuries and were made for the purpose of the victim's diagnosis and treatment. As a result, the trial court did not err in admitting the statements and, therefore, since the statements were admissible, there

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was no merit to the defendant's contention that the defendant's trial counsel's failure to object to the hearsay testimony was ineffective assistance. Greene v. State, 295 Ga. App. 803, 673 S.E.2d 292, 2009 Ga. App. LEXIS 134 (2009), cert. denied, No. S09C0862, 2009 Ga. LEXIS 259 (Ga. Apr. 28, 2009) (decided under former O.C.G.A. § 24-3-4).

Nurse was properly allowed to testify as to a rape victim's statement to the nurse that her assailant had blindfolded her and pushed her into furniture because the victim's statement to the nurse was given to explain the nature and origin of some of her injuries. This evidence was sufficient to allow the jury to find that the rape victim had been pushed into furniture as she was pushed and dragged through her home while blindfolded, supporting the defendant's aggravated assault convictions. Bryant v. State, 304 Ga. App. 456, 696 S.E.2d 439, 2010 Ga. App. LEXIS 551 (2010), cert. denied, No. S10C1675, 2010 Ga. LEXIS 800 (Ga. Oct. 18, 2010) (decided under former O.C.G.A. § 24-3-4).

Medical history and records admissible. — In a personal injury action, plaintiff's alleged statements made to plaintiff's medical providers regarding medical history during plaintiff's diagnosis and treatment were not inadmissible hearsay. Barone v. Law, 242 Ga. App. 102, 527 S.E.2d 898, 2000 Ga. App. LEXIS 39 (2000) (decided under former O.C.G.A. § 24-3-4).

In an aggravated assault case, because there was no showing that the defense's discovery violation in failing to produce jail medical records showing the defendant's injuries were in bad faith, the trial court erred in excluding the records; the error was not harmless because the records would have been admissible under O.C.G.A. § 24-8-803(4) and (6), although the defendant's statements that the victim had injured the defendant were not admissible. Phillips v. State, 347 Ga. App. 147, 817 S.E.2d 711, 2018 Ga. App. LEXIS 473 (2018).

Admission of emergency room records. — Admission of hospital records that indicated the defendant presented to the emergency room intoxicated and needed to be cleared to go to jail without the one responsible for completing the forms testifying did not violate the defendant's confrontation rights because the Supreme Court of Georgia has specifically held that medical records created for treatment purposes are not testimonial; thus, the trial court properly admitted the records under O.C.G.A. § 24-8-803(6). Samuels v. State, 335 Ga. App. 819, 783 S.E.2d 344, 2016 Ga. App. LEXIS 93 (2016).

Testimony held not within rule. — When a physician's testimony includes the victim's out-of-court statements to the physician that intercourse with the victim's father (the defendant) had taken place, admission of that portion of the statement was error; the identity of the defendant contained in the out-of-court statements was unnecessary to any legitimate purpose addressed in the former statute. Johnson v. State, 149 Ga. App. 544, 254 S.E.2d 757, 1979 Ga. App. LEXIS 1924 (1979) (decided under former Code 1933, § 38-315).

Admission of an emergency room physician's testimony that the patient told the physician she had been raped by a black man named "Miller" was error; however, since the evidence was cumulative, the admission was not prejudicial to defendant. Miller v. State, 194 Ga. App. 533, 390 S.E.2d 901, 1990 Ga. App. LEXIS 179 (1990) (decided under former O.C.G.A. § 24-3-4).

Admission of a shooting victim's statements to a physician regarding the circumstances and activity prior to the shooting, which did not fall within the statutory exception because they were not reasonably pertinent to the physician's diagnosis or treatment, was harmless error since it was highly probable that the error did not contribute to the judgment. Howard v. State, 261 Ga. 251, 403 S.E.2d 204, 1991 Ga. LEXIS 167 (1991) (decided under former O.C.G.A. § 24-3-4).

Doctor's testimony that a child abuse victim's father told the doctor that defendant abused the child was not admissible as an out-of-court statement made for the purpose of describing medical history reasonably pertinent to diagnosis or treat-

ment. Cupe v. State, 253 Ga. App. 851, 560 S.E.2d 700, 2002 Ga. App. LEXIS 103 (2002) (decided under former O.C.G.A. § 24-3-4).

Nurse's testimony that a victim told the nurse that the victim was attacked by the victim's roommate while the victim was sleeping was not admissible under former O.C.G.A. § 24-3-4 as the statements were not reasonably pertinent to the nurse's diagnosis or treatment of the victim. Brown v. State, 273 Ga. App. 88, 614 S.E.2d 187, 2005 Ga. App. LEXIS 411 (2005) (decided under former O.C.G.A. § 24-3-4).

Testimony admissible. — Trial court did not err in admitting the medical record from the doctor as an exception to the hearsay rule. Central of Ga. R.R. v. Carter, 212 Ga. App. 528, 442 S.E.2d 269, 1994 Ga. App. LEXIS 305 (1994), cert. denied, No. S94C1098, 1994 Ga. LEXIS 939 (Ga. Sept. 9, 1994) (decided under former O.C.G.A. § 24-3-4).

In a negligence action seeking compensatory damages for a disabling injury, because an emergency room report was prepared prior to performance of the surgery on plaintiff's foot so that the statement was made before medical treatment was rendered, the trial court did not err in allowing admission as such under former O.C.G.A. § 24-3-4. Imm v. Chaney, 287 Ga. App. 606, 651 S.E.2d 855, 2007 Ga. App. LEXIS 1032 (2007) (decided under former O.C.G.A. § 24-3-4).

Trial court did not abuse its discretion when it admitted the testimony of the nurse who performed the initial examination of the victim because, even assuming that the victim's identification of the defendant as the victim's attacker was not reasonably pertinent to the diagnosis or treatment, that identification was cumulative of other evidence as to the defendant's identity. McGill v. State, 302 Ga. App. 378, 690 S.E.2d 648, 2010 Ga. App. LEXIS 69 (2010), cert. denied, No. S10C0986, 2010 Ga. LEXIS 523 (Ga. June 28, 2010) (decided under former O.C.G.A. § 24-3-4).

Nurse practitioner's testimony which identified child molestation victim's father as the molester was cumulative of that of other witnesses, including the victim personally, and therefore harmless. Hyde v. State, 189 Ga. App. 727, 377 S.E.2d 187, 1988 Ga. App. LEXIS 1495 (1988) (decided under former O.C.G.A. § 24-3-4).

Trial court did not err in sustaining the state's hearsay objection to a nurse's testimony regarding whether a doctor's medical report reflected that a victim had made an inconsistent statement because the defendant failed to show reversible error by the record since the medical report was not introduced for inclusion in the appellate record, and thus, the court of appeals had no means of determining whether the alleged impeachment evidence actually existed; any error in the exclusion of the evidence was harmless because the evidence would have been cumulative of the trial testimony that had already been admitted. Bearfield v. State, 305 Ga. App. 37, 699 S.E.2d 363, 2010 Ga. App. LEXIS 660 (2010) (decided under former O.C.G.A. § 24-3-4).

Impeachment of declarant. — Party must be given the opportunity to impeach the credibility of a declarant whose statement is admitted under the medical diagnosis or treatment exception to the hearsay rule. Allen v. State, 247 Ga. App. 10, 543 S.E.2d 45, 2000 Ga. App. LEXIS 1417 (2000), cert. denied, No. S01C0489, 2001 Ga. LEXIS 396 (Ga. May 7, 2001) (decided under former O.C.G.A. § 24-3-4).

Information given to a licensed professional counselor was admissible under this exception to the hearsay rule. Allen v. State, 247 Ga. App. 10, 543 S.E.2d 45, 2000 Ga. App. LEXIS 1417 (2000), cert. denied, No. S01C0489, 2001 Ga. LEXIS 396 (Ga. May 7, 2001) (decided under former O.C.G.A. § 24-3-4).

Business Records

1. In General

Purpose of exception. — Purpose of former O.C.G.A. § 24-3-14 was not to bolster the witness on the stand but to serve in place of witness by giving the manner of entry within the usual course of the business enterprise an independent prima facie probative value of its own, thus broadening an exception to the hearsay rule. Calhoun v. Chappell, 117 Ga. App. 865,

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162 S.E.2d 300, 1968 Ga. App. LEXIS 1271 (1968), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former statute was primarily adapted to allowing testimony of business records the authentication of which was otherwise difficult against a hearsay objection because it was "the routine product of an efficient clerical system." Calhoun v. Chappell, 117 Ga. App. 865, 162 S.E.2d 300, 1968 Ga. App. LEXIS 1271 (1968), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Purpose of exception in allowing into evidence routine business records is not to allow the conclusions of anyone, and it certainly was not intended that such conclusions stand without opportunity to cross-examine the maker. Wesley v. State, 225 Ga. 22, 165 S.E.2d 719, 1969 Ga. LEXIS 359 (1969) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Purpose of exception was to allow the determination of records without the necessity of producing all the various clerical personnel who made the entries. Dowling v. Jones-Logan Co., 123 Ga. App. 380, 181 S.E.2d 75 (1971) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Timothy McCarthy Constr. Co. v. Southern Detectives, Inc., 125 Ga. App. 205, 186 S.E.2d 895 (1971) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Cotton v. John W. Eshelman & Sons, 137 Ga. App. 360, 223 S.E.2d 757 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Lewis v. United Cal. Bank, 143 Ga. App. 126, 237 S.E.2d 645 (1977) , aff'd, 240 Ga. 823, 242 S.E.2d 581 (1978).Record Data, Inc. v. Vinylgrain Indus. of Ga., Inc., 143 Ga. App. 854, 240 S.E.2d 223, 1977 Ga. App. LEXIS 2538 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Gray v. Cousins Mtg. & Equity Invs., 150 Ga. App. 296, 257 S.E.2d 365, 1979 Ga. App. LEXIS 2186 (1979) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Reisman v. Martori, Meyer, Hendricks, & Victor, 155 Ga. App. 551, 271 S.E.2d 685, 1980 Ga. App. LEXIS 2669 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Purpose of former O.C.G.A. § 24-3-14 was to provide for the admissibility of records that would otherwise be excluded as hearsay. Allen v. State, 248 Ga. 676, 286 S.E.2d 3, 1982 Ga. LEXIS 1079 (1982) (decided under former O.C.G.A. § 24-3-14).

Former statute was intended to preempt the field with regard to admission of business records and the statutory requirements are exclusive in this regard. Dowling v. Jones-Logan Co., 123 Ga. App. 380, 181 S.E.2d 75, 1971 Ga. App. LEXIS 1231 (1971) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former Ga. L. 1952, p. 177, §§ 1, 2, 3 was intended to bring realities of business and professional practice into courtroom and should not be interpreted so as to destroy the former statute's obvious usefulness. Cotton v. John W. Eshelman & Sons, 137 Ga. App. 360, 223 S.E.2d 757, 1976 Ga. App. LEXIS 2445 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former statute opened a broad departure from the hitherto fixed rules of evidence relative to the introduction of books and papers. Guthrie v. Berrien Prods. Co., 91 Ga. App. 45, 84 S.E.2d 596, 1954 Ga. App. LEXIS 856 (1954) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former statute was never expanded to include private custody or simple possession since the circumstances of private possession were infinitely more varied than those of business or official custody. Martin v. State, 135 Ga. App. 4, 217 S.E.2d 312, 1975 Ga. App. LEXIS 1536 (1975) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Summary need not qualify as "business record." — Summary of business records is admissible even though the summary itself may not qualify as a "business record" under former O.C.G.A. § 24-3-14. Polma, Inc. v. Coastal Canvas Prods. Co., 199 Ga. App. 616, 405 S.E.2d 531, 1991 Ga. App. LEXIS 573 (1991) (decided under former O.C.G.A. § 24-3-14).

Discussion of the admissibility of summaries of business records. — See Tyner v. Sheriff, 164 Ga. App. 360, 297 S.E.2d 114, 1982 Ga. App. LEXIS 2801 (1982) (decided under former O.C.G.A. § 24-3-14).

Summaries of voluminous business records are admissible so long as the original records are accessible to the court and the parties. Lawhorn v. State, 200 Ga. App. 451, 408 S.E.2d 425, 1991 Ga. App. LEXIS 1047 (1991) (decided under former O.C.G.A. § 24-3-14).

In a suit to recover monies owed on notes and related guaranties, a bank failed to establish the amounts owed with admissible evidence because computer printouts of the balances due and interest and related fees owed were inadmissible hearsay since the printouts were summaries that were not accompanied by the underlying business records on which the summaries were based. Capital City Developers, LLC v. Bank of N. Ga., 316 Ga. App. 624, 730 S.E.2d 99, 2012 Ga. App. LEXIS 621 (2012) (decided under former O.C.G.A. § 24-3-14).

An affidavit need not recite the words "true and correct copies" before the accompanying business records will be admissible. Questions about the accuracy of business records go to their weight, not their admissibility. Bagley v. Fulton-DeKalb Hosp. Auth., 216 Ga. App. 537, 455 S.E.2d 325, 1995 Ga. App. LEXIS 223 (1995) (decided under former O.C.G.A. § 24-3-14).

Language of former statute suggested that writing must be made as memorandum or record rather than for some other purpose. American San. Servs. v. EDM of Tex., Inc., 139 Ga. App. 662, 229 S.E.2d 136, 1976 Ga. App. LEXIS 1939 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former statute did not abrogate right of party to cross-examine witness called against the party. Meeks v. Lunsford, 106 Ga. App. 154, 126 S.E.2d 531, 1962 Ga. App. LEXIS 655 (1962) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former O.C.G.A. § 24-3-14 must be liberally interpreted and applied. McConnell v. State, 166 Ga. App. 530, 304 S.E.2d 733, 1983 Ga. App. LEXIS 2236 (1983) (decided under former O.C.G.A. § 24-3-14).

Confrontation clause. — Business record exception is an exception to the hearsay rule, and not a general exception to the confrontation clause. Adams v. State, 217 Ga. App. 706, 459 S.E.2d 182, 1995 Ga. App. LEXIS 598 (1995), cert. denied, No. S95C1707, 1995 Ga. LEXIS 1094 (Ga. Oct. 13, 1995) (decided under former O.C.G.A. § 24-3-14).

Right to confrontation. — In a case when a summary of business records was properly admitted and the figures so introduced were relied upon by another witness, there was no violation of defendant's right of confrontation. Stewart v. State, 246 Ga. 70, 268 S.E.2d 906, 1980 Ga. LEXIS 970 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Records noting conversation's contents not admissible. — Records which noted the contents of a conversation rather than an act, transaction, occurrence, or event were not eligible for the business records exception to the hearsay rule. Mitchell v. State, 254 Ga. 353, 329 S.E.2d 481, 1985 Ga. LEXIS 704 (1985) (decided under former O.C.G.A. § 24-3-14).

Reason for reasonable time requirement is so the entry might appear to have taken place while the memory of the fact was recent, or the source from which the knowledge of it was derived was unimpaired. Martin v. Glenn's Furn. Co., 126 Ga. App. 692, 191 S.E.2d 567, 1972 Ga. App. LEXIS 1254 (1972) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Uniform business records as evidence statute. — Former Ga. L. 1952, p. 177, §§ 1, 2, 3 contained what was referred to by courts of other states and textbooks as the "Uniform Business Records as Evidence" statute. There was no material difference in the former Georgia statute and similar statutes of the other states. Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370, 1957 Ga. App. LEXIS 938 (1957) (for comment, see 20 Ga. B.J. 381 (1958)).

Kind of books. — Books contemplated by this exception are permanent books. Bush v. Fourcher, 3 Ga. App. 43, 59 S.E. 459, 1907 Ga. App. LEXIS 547 (1907) (decided under former law); Eley v. Holden, 48 Ga. App. 152, 172 S.E. 75, 1933 Ga. App. LEXIS 506 (1933) (decided under former law).

Bank's computer screen shot insufficient proof of damages in loan case. — In an action on a loan, a bank did not

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submit sufficient evidence to prove the bank's damages because a printout of the bank's electronic records reflecting the amounts then owed, without a detailed transaction history, was a summary requiring evidence that the underlying records were too voluminous to examine in court pursuant to O.C.G.A. § 24-10-1006, not a business record under O.C.G.A. § 24-8-803(6). D'Agnese v. Wells Fargo Bank, N.A., 335 Ga. App. 659, 782 S.E.2d 714, 2016 Ga. App. LEXIS 58 (2016).

Waiver. — Requirement that entries be made in the ordinary course of business can be waived. Finch v. Caldwell, 155 Ga. App. 813, 273 S.E.2d 216, 1980 Ga. App. LEXIS 2803 (1980), superseded by statute as stated in Forsyth County v. Mommies Props., 359 Ga. App. 175, 855 S.E.2d 126, 2021 Ga. App. LEXIS 145 (2021) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Money orders. — Trial court erred in admitting money orders stamped "apparent counterfeit" during the defendant's trial for forgery in the first degree, O.C.G.A. § 16-9-1(a), because the stamped money orders constituted inadmissible hearsay; the testimony of a bank's chief financial officer indicated that the determination that the money orders were counterfeit was a conclusion or opinion made by a third party institution, whose representatives did not testify at trial and, thus, the money orders were inadmissible as a business record under former O.C.G.A. § 24-3-14(b) to prove that the money orders were counterfeit. Holmes v. State, 315 Ga. App. 812, 727 S.E.2d 520, 2012 Ga. App. LEXIS 410 (2012), cert. denied, No. S12C1517, 2012 Ga. LEXIS 921 (Ga. Oct. 29, 2012) (decided under former O.C.G.A. § 24-3-1).

Plain error not shown in admitting medical records. — Trial court did not plainly err in admitting the victim's medical records under the business records exception to the hearsay rule because the victim testified directly as to the victim's injuries, rendering much of the evidence contained in the records cumulative and, thus, the defendant could not show that the outcome would have been different absent the admission of the medical records. Smith v. State, 354 Ga. App. 782, 841 S.E.2d 444, 2020 Ga. App. LEXIS 219 (2020).

2. Procedural Considerations

a. Foundation for Admission

Compliance renders further proof unnecessary. — Once a certificate of inspection is completed as specified under former O.C.G.A. § 24-3-14, the certificate is admissible in any court of law without further proof, and a further foundation for admission under the business records exception to the hearsay rule is rendered unnecessary. State v. Haddock, 235 Ga. App. 726, 510 S.E.2d 561 (decided under former O.C.G.A. § 24-3-14).

Nature of foundation. — Before a writing or record is admissible under subsection (b) of former O.C.G.A. § 24-3-14, a foundation must be laid through the testimony of a witness who is familiar with the method of keeping records and who can testify thereto and to facts which show that the entry was made in the regular course of business at the time of the event or within a reasonable time thereafter. Suarez v. Suarez, 257 Ga. 102, 355 S.E.2d 649, 1987 Ga. LEXIS 742 (1987) (decided under former O.C.G.A. § 24-3-14).

In an action in which the victim was awarded restitution for tools and equipment taken from a stolen truck, all that was required was that a foundation be laid through the testimony of a witness who was familiar with the method of keeping the record of the list of equipment and tools normally found on the truck who could testify thereto, and to facts which showed that the entry was made in the regular course of business at the time of the event or within a reasonable time thereafter. Tindol v. State, 284 Ga. App. 45, 643 S.E.2d 329, 2007 Ga. App. LEXIS 246 (2007) (decided under former O.C.G.A. § 24-3-14).

Preliminary proof is necessary before the writing or record is admissible. The evidence should include identification of the writing or record by a witness who is familiar with the method of keeping the records and who can testify thereto and to facts which show that the entry was made in the regular course of business and that

it was the regular course of the business to make such memorandum or record at the time of the event or within a reasonable time thereafter. Walburn v. Taunton, 107 Ga. App. 411, 130 S.E.2d 279, 1963 Ga. App. LEXIS 861 (1963) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Cassano v. Pilgreen's, Inc., 117 Ga. App. 260, 160 S.E.2d 439, 1968 Ga. App. LEXIS 1054 (1968) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Absent preliminary proof required to qualify statements as to facts, the knowledge of which were obtained from records not personally kept by testifying witness, had no probative value. Eatonton Oil & Auto Co. v. Greene County, 53 Ga. App. 145, 185 S.E. 296, 1936 Ga. App. LEXIS 28 (1936) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Thomasson v. Trust Co. Bank, 149 Ga. App. 556, 254 S.E.2d 881, 1979 Ga. App. LEXIS 1929 (1979) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Harris v. Collins, 149 Ga. App. 638, 255 S.E.2d 107, 1979 Ga. App. LEXIS 1965 (1979) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Hill Aircraft & Leasing Corp. v. Planes, Inc., 158 Ga. App. 151, 279 S.E.2d 250, 1981 Ga. App. LEXIS 2108 (1981) (decided under former O.C.G.A. § 24-3-14).

When defendant submitted an unsigned document purported to be in the plaintiff's handwriting, but was not able to locate anyone who could identify the document, defendant was unable to produce the required foundation testimony, and the document was properly excluded. Metropolitan Atlanta Rapid Transit Authority v. Green Int'l, Inc., 235 Ga. App. 419, 509 S.E.2d 674 (decided under former O.C.G.A. § 24-3-14).

Condominium declarations which were submitted by a condominium unit neighbor in an action against another condominium unit owner were hearsay under former O.C.G.A. § 24-3-1(a). However, the neighbor did not present admissible evidence of the heightened duty of care allegedly imposed by the declarations so that duty, therefore, could not be considered on summary judgment under former O.C.G.A. § 24-3-14(b). Karle v. Belle, 310 Ga. App. 115, 712 S.E.2d 96, 2011 Ga. App. LEXIS 506 (2011) (decided under former O.C.G.A. § 24-3-14).

Authentication required. — Witness's testimony is inadmissible in the absence of any authentication of the records which the witness's testimony is purported to track. Hall v. State, 244 Ga. 86, 259 S.E.2d 41, 1979 Ga. LEXIS 1126 (1979) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

In the absence of authentication by the issuing officer or testimony of the witness officers that the license tag number on the traffic ticket accurately reflected the license tag number of the car the witnesses saw appellant driving, the citations were hearsay as to the identity of the license tag number. Since the proper foundation was not laid, the tickets did not qualify for the business record exception to the hearsay rule. Curtis v. State, 190 Ga. App. 173, 378 S.E.2d 516, 1989 Ga. App. LEXIS 178 (1989), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (decided under former O.C.G.A. § 24-3-14).

An uncertified copy of a check was properly excluded since the witness had no personal knowledge of the transaction or the making of the copy and provided conflicting testimony about the witness's familiarity with the business practices or regular course of dealing. U.B. Vehicle Leasing, Inc. v. Vision Int'l, Inc., 224 Ga. App. 611, 481 S.E.2d 597 (decided under former O.C.G.A. § 24-3-14).

Ride safety checklist had not been authenticated as a business record and thus was merely inadmissible hearsay that could not be considered as evidence in support of a motion for summary judgment. Valentin v. Six Flags Over Ga., L.P., 286 Ga. App. 508, 649 S.E.2d 809, 2007 Ga. App. LEXIS 815 (2007) (decided under former O.C.G.A. § 24-3-14).

Trial court erred by granting summary judgment to a condominium association for past due sums because the only evidence offered to support those claims, namely an account ledger and an affidavit with unsupported testimony from the property manager regarding the amounts owed, was inadmissible hearsay; thus, the damages sought were not sufficiently certain. Hayek v. Chastain Park Condo. Ass'n, 329 Ga. App. 164, 764 S.E.2d 183, 2014 Ga. App. LEXIS 640 (2014).

Foundation for Admission (Cont'd)

In a wrongful foreclosure action, the trial court did not err by admitting evidence of an affidavit from a bank official because the plaintiffs were clearly on notice that the bank sought to introduce the bank records as business records, and the official had sufficiently authenticated the bank records relied upon and attached to the affidavit. Salas v. JP Morgan Chase Bank, N.A., 334 Ga. App. 274, 779 S.E.2d 48, 2015 Ga. App. LEXIS 618 (2015).

Personal knowledge not required. — It was not necessary that a witness identifying business records have personal knowledge of the correctness of the records or have actually made the entries personally. Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370 (1957) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3) for comment, see 20 Ga. B.J. 381 1958; Seaboard Coast Line R.R. v. Smalley, 127 Ga. App. 652, 194 S.E.2d 612, 1972 Ga. App. LEXIS 988 (1972) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Welborn v. State, 132 Ga. App. 207, 207 S.E.2d 688, 1974 Ga. App. LEXIS 1650 (1974) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Cotton v. John W. Eshelman & Sons, 137 Ga. App. 360, 223 S.E.2d 757, 1976 Ga. App. LEXIS 2445 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); F.N.B. Fin. Co. v. Glaze Tire Co., 140 Ga. App. 184, 230 S.E.2d 342, 1976 Ga. App. LEXIS 1395 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Smith v. Bank of S., 141 Ga. App. 114, 232 S.E.2d 629, 1977 Ga. App. LEXIS 1788 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Vaughn & Co. v. Saul, 143 Ga. App. 74, 237 S.E.2d 622, 1977 Ga. App. LEXIS 2193 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Phillips v. State, 153 Ga. App. 410, 265 S.E.2d 293, 1980 Ga. App. LEXIS 1826 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Whittington v. State, 155 Ga. App. 667, 272 S.E.2d 532, 1980 Ga. App. LEXIS 2729 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Hines v. Good Housekeeping Shop, 161 Ga. App. 318, 291 S.E.2d 238, 1982 Ga. App. LEXIS 1865 (1982) (decided under former O.C.G.A. § 24-3-14); Murphy v. State, 182 Ga. App. 791, 357 S.E.2d 147, 1987 Ga. App. LEXIS 2657 (1987) (decided under former O.C.G.A. § 24-3-14).

Witness identifying business records under former O.C.G.A. § 24-3-14 does not have to have personal knowledge of the correctness of the records or have made the entry personally. Hertz Corp. v. McCray, 198 Ga. App. 484, 402 S.E.2d 298, 1991 Ga. App. LEXIS 166 (1991) (decided under former O.C.G.A. § 24-3-14).

There is no requirement that in order to lay a proper foundation for the admission of a certificate of inspection under the business record exception, the person who conducted the inspection of the machine, or someone who actually witnessed the inspection, appear in court to testify about the inspection or the completion of the certificate. State v. Haddock, 235 Ga. App. 726, 510 S.E.2d 561 (decided under former O.C.G.A. § 24-3-14).

There was no error in denying the property owner's motion to strike virtually all of the evidence against the owner; the trial judge was authorized to admit the tax documents into evidence as records made in the regular course of business under former O.C.G.A. § 24-3-14(b) because the testimony of the custodian of the sheriff department's tax levy files and an employee of the county tax commissioner's delinquent tax division, even without personal knowledge, was sufficient to authorize finding that the witnesses were familiar with the method of keeping the records and that the documents were made in the regular course of business at the time of the events. Tharp v. Vesta Holdings I, LLC, 276 Ga. App. 901, 625 S.E.2d 46, 2005 Ga. App. LEXIS 1318 (2005), cert. denied, No. S06C0874, 2006 Ga. LEXIS 272 (Ga. May 8, 2006) (decided under former O.C.G.A. § 24-3-14).

Trial court did not err in admitting a copy of the defendant's fingerprint card, pursuant to former O.C.G.A. §§ 24-3-14 and 24-5-26 (see now O.C.G.A. §§ 24-8-803 and 24-10-1003), despite the defendant's claim that the testifying witness lacked personal knowledge with regard to the circumstances or time of the creation or transmission of the card, as the card itself showed that the card was created and transmitted at the time of the defendant's arrest, and was handled in the

gathering agency's regular and routine course of business. Tubbs v. State, 283 Ga. App. 578, 642 S.E.2d 205, 2007 Ga. App. LEXIS 115 (2007) (decided under former O.C.G.A. § 24-3-14).

Person laying foundation need not be custodian of records. — Georgia Business Records Act, former O.C.G.A. § 24-3-14, does not require that the person laying the foundation for business records' admissibility be the custodian of the records, that is, be the person who "keeps the records" under that person's "control and supervision." Hertz Corp. v. McCray, 198 Ga. App. 484, 402 S.E.2d 298, 1991 Ga. App. LEXIS 166 (1991) (decided under former O.C.G.A. § 24-3-14).

In a negligence action seeking compensatory damages for a disabling injury, the trial court did not err in admitting certain prescription drug records pertaining to the injured plaintiff as a pharmacist presented sufficient testimony to satisfy the foundational requirements necessary for admission under the business records exception to the hearsay rule. Imm v. Chaney, 287 Ga. App. 606, 651 S.E.2d 855, 2007 Ga. App. LEXIS 1032 (2007) (decided under former O.C.G.A. § 24-3-14).

Housekeeping supervisor of a motel where a victim was found dead of strangulation after being seen with a defendant could properly lay the foundation for the motel's lock interrogation log as the record only had to be made in the regular course of business at the time of the transaction; any lack of personal knowledge by the supervisor as to how the records were created only went to the weight of the evidence. Hamilton v. State, 297 Ga. App. 47, 676 S.E.2d 773, 2009 Ga. App. LEXIS 348 (2009) (decided under former O.C.G.A. § 24-3-14).

Testimony of a bank officer may provide the required foundation for business records. Shannon v. Toronto-Dominion Bank, 168 Ga. App. 279, 308 S.E.2d 682, 1983 Ga. App. LEXIS 2751 (1983) (decided under former O.C.G.A. § 24-3-14).

Affidavit of custodian of bank records. — The affidavit of a bank records custodian was properly admitted in support of the bank's motion for summary judgment under former O.C.G.A. § 24-3-14(b). The custodian averred that the custodian was the records custodian for the bank and that the records filed with the custodian's affidavit were maintained in the regular and ordinary course of business and that the transactions were recorded contemporaneously with the events as they occurred. Vadde v. Bank of Am., 301 Ga. App. 475, 687 S.E.2d 880, 2009 Ga. App. LEXIS 1355 (2009), cert. denied, No. S10C0624, 2010 Ga. LEXIS 338 (Ga. Apr. 19, 2010), cert. denied, 562 U.S. 894, 131 S. Ct. 298, 178 L. Ed. 2d 143, 2010 U.S. LEXIS 6399 (2010) (decided under former O.C.G.A. § 24-3-14).

In questions of proof of business records stored on tape on electronic computing equipment, the proper foundation to be laid was the same as that for business records of any other type or description. Cotton v. John W. Eshelman & Sons, 137 Ga. App. 360, 223 S.E.2d 757, 1976 Ga. App. LEXIS 2445 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Officer qualified to introduce other officer's report. — Police officer was qualified to lay foundation for introduction of accident report prepared by another officer since testifying officer was able to testify as to the preparation and keeping of such reports. Reed v. Heffernan, 171 Ga. App. 83, 318 S.E.2d 700, 1984 Ga. App. LEXIS 2105 (1984), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (decided under former O.C.G.A. § 24-3-14).

Any alleged inaccuracies in a ledger would go to weight and not to admissibility. Murphy v. State, 182 Ga. App. 791, 357 S.E.2d 147, 1987 Ga. App. LEXIS 2657 (1987) (decided under former O.C.G.A. § 24-3-14).

Compliance with provisions of statute prohibiting drunk driving not necessary for admission of blood-alcohol test. — When the blood-alcohol test was performed pursuant to the medical treatment of the plaintiff and recorded in the regular course of hospital business, and it was not administered for the purpose of determining whether plaintiff violated O.C.G.A. § 40-6-391, it was not necessary that defendant establish compliance with § 40-6-391 to render the

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test results admissible; the blood test results thus recorded in the regular course of hospital business were admissible under former O.C.G.A. § 24-3-14. Bynum v. Standard (Chevron) Oil Co., 157 Ga. App. 819, 278 S.E.2d 669, 1981 Ga. App. LEXIS 2022, cert. dismissed, 248 Ga. 254, 285 S.E.2d 186, 1981 Ga. LEXIS 982 (1981) (decided under former O.C.G.A. § 24-3-14).

Medical records in drunk driving case. — Medical records certified by the records custodian of a hospital showing the results of an independent chemical test requested by defendant in a drunk driving case were not admissible without further foundational evidence that would satisfy the requirements of the business records exception to the hearsay rule. Brahm v. State, 230 Ga. App. 407, 497 S.E.2d 240 (decided under former O.C.G.A. § 24-3-14).

Presumption on review. — Mere recital in the motion for a new trial that the preliminary proof of the requirements for admissibility of documentary evidence was lacking was insufficient to show that as a matter of fact such preliminary proof was not made, and the reviewing court must presume that such preliminary proof was made and affirm the action of the trial judge in admitting the evidence. Gray v. General Fin. Corp., 108 Ga. App. 586, 134 S.E.2d 58, 1963 Ga. App. LEXIS 712 (1963) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

State laid the proper foundation for the admission of certificates of equipment testing when two witnesses testified to them having been made within a reasonable time of the testing, and the notary jurat for each certificate confirmed the certificate was filled out on the day of inspection. Davis v. State, 236 Ga. App. 32, 510 S.E.2d 889 (decided under former O.C.G.A. § 24-3-14).

When a patrolman testified that certificates of inspection were generated in the police department's ordinary course of business, made at the time the breath analyzer was inspected, and kept along side the machine, this evidence was sufficient to satisfy the foundational requisites for the admission of the certificates as business records. Brandon v. State, 236 Ga. App. 203, 511 S.E.2d 573 (decided under former O.C.G.A. § 24-3-14).

Proper foundation found. — Professional association did not fail to lay the proper foundation for admission of computer printouts under the business records exception to the hearsay rule in order to establish the amount owed to a client for professional services since the president of the firm described of the president's own personal knowledge how the computer printouts were developed and how the printouts were used in determining what a client owed. Reisman v. Martori, Meyer, Hendricks, & Victor, 155 Ga. App. 551, 271 S.E.2d 685, 1980 Ga. App. LEXIS 2669 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

A "cash for keys" agreement entered into between a former owner's tenant and the new owner following a foreclosure sale was admissible in the former owner's wrongful eviction suit under the business record exception to the hearsay rule; the agreement was authenticated in the affidavit of the person who signed the agreement and witnessed the tenant sign the agreement, and the custodian testified by affidavit that the agreement was one of the custodian's own business records that were maintained in the regular course of business. Steed v. Fed. Nat'l Mortg. Corp., 301 Ga. App. 801, 689 S.E.2d 843, 2009 Ga. App. LEXIS 1452 (2009) (decided under former O.C.G.A. § 24-3-14).

Admission of two accident reports. — Trial court did not err by admitting into evidence two accident reports created by a driver's supervisor because the supervisor made the reports in the regular course of business shortly after the collision occurred based on what the driver had told the supervisor, and both the driver and the supervisor testified at trial and were available for cross examination. Lee v. Thomason, 277 Ga. App. 573, 627 S.E.2d 168, 2006 Ga. App. LEXIS 155 (2006) (decided under former O.C.G.A. § 24-3-14).

Proper admission of telephone records. — In a criminal case where the victim was robbed of a cellular telephone, the telephone records were properly ad-

mitted under former O.C.G.A. § 24-3-14; the testimony of the telephone company's records custodian provided the necessary foundation for the records to be introduced into evidence, and the custodian's lack of personal knowledge as to how the records were actually printed out affected their weight, not their admissibility. Santana v. State, 283 Ga. App. 696, 642 S.E.2d 390, 2007 Ga. App. LEXIS 166 (2007) (decided under former O.C.G.A. § 24-3-14).

Trial court did not err in admitting cell phone records because the information was obtained from a third party and a proper foundation was laid pursuant to the business records exception. Marchman v. State, 299 Ga. 534, 787 S.E.2d 734, 2016 Ga. LEXIS 421 (2016).

Admission of blood alcohol test. — State laid the foundation for admission of a hospital-administered blood alcohol test as a routine business record with the testimony of two witnesses, and admission of the results of the test was proper; a custodian of medical records testified that when a blood test was completed in the hospital, the results were printed out then entered into the hospital computer system in the normal course of business, the printout was stored as a hard copy, and the printout contained only the factual data of the test results and a lab manager familiar with the usual practices and policies of the emergency room testified that it was the normal procedure of emergency room personnel to draw a patient's blood once the patient was admitted, before the patient has been seen by an attending physician. The certified copy of the test results printout showed that the defendant's blood was drawn within the normal procedures of the hospital. Daniel v. State, 298 Ga. App. 245, 679 S.E.2d 811, 2009 Ga. App. LEXIS 661 (2009) (decided under former O.C.G.A. § 24-3-14).

Proper foundation for admission of public safety roadblock approval form. — Arresting officer's testimony laid a sufficient foundation for the introduction of a department of public safety roadblock approval form into evidence under the business records exception to the hearsay rule, former O.C.G.A. § 24-3-14, because the officer testified that the form was a type of document kept in the regular course of business at the Georgia State Patrol. Hite v. State, 315 Ga. App. 221, 726 S.E.2d 704, 2012 Ga. App. LEXIS 345 (2012), cert. denied, No. S12C1286, 2012 Ga. LEXIS 1020 (Ga. Oct. 1, 2012) (decided under former O.C.G.A. § 24-3-14).

Loan documents. — Trial court properly admitted the bank's loan history report as a business record because the report provided a description of each transaction relating to the estate's loan from the loan's inception, along with a corresponding posting date for each transaction, the transaction amount, and any change to the principal balance resulting from the transaction, and was not a summary. Roberts v. Cmty. & S. Bank, 331 Ga. App. 364, 771 S.E.2d 68, 2015 Ga. App. LEXIS 149 (2015).

Lease. — Individual guarantors were personally liable on a lease because the guaranty was in writing, the lease identified all of the essential parties and obligations, and the guarantors signed the guaranty as required by O.C.G.A. § 13-5-30(2); the guaranty was admissible as the lessor's successor's business record under O.C.G.A. § 24-8-803(6). Triple T-Bar, LLC v. DDR Southeast Springfield, LLC, 330 Ga. App. 847, 769 S.E.2d 586, 2015 Ga. App. LEXIS 72 (2015).

Banking records. — Fact that a witness never worked at the originating bank and did not have firsthand knowledge of the bank's record-keeping practices did not mean that the witness could not authenticate the bank's business records as the witness testified that the witness knew how the transaction statement was prepared, that the statement was made and kept in the regular course of the bank's business activity, and that it was the bank's regular business practice to make and keep such records. Matthews v. Wells Fargo Bank, N.A., 335 Ga. App. 526, 782 S.E.2d 312, 2016 Ga. App. LEXIS 23 (2016).

In an action to recover the balance of the money owed under a loan, because the guarantor of the loan failed to show the lack of an adequate foundation for the admitted evidence, a claim that the trial court erred in admitting the loan history report as a business record failed; hence,

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the proponent bank was properly granted summary judgment on the issue. Ishak v. First Flag Bank, 283 Ga. App. 517, 642 S.E.2d 143, 2007 Ga. App. LEXIS 100 (2007) (decided under former O.C.G.A. § 24-3-14).

Proper foundation not laid. — Trooper testified that the trooper was familiar with the book in which the records were maintained, but the trooper did not know if the documents were made contemporaneously with the testing; therefore, the trooper's testimony did not satisfy the foundational requirements. Mullinax v. State, 231 Ga. App. 534, 499 S.E.2d 903 (decided under former O.C.G.A. § 24-3-14).

Trial court properly ruled in favor of a subdivision association board of directors as to claims by the owner of a development company that the board erred in charging water service and building fees because the owner failed to show that any damages were suffered as a result of the imposition of the fees, as the trial court properly excluded computer records concerning the fees, as the records did not meet the former O.C.G.A. § 24-3-14 standard for the business records hearsay exception as the owner did not testify that the writings proffered were made in the regular course of business at the time of the underlying transaction or within a reasonable time thereafter. Crawford v. Dammann, 277 Ga. App. 442, 626 S.E.2d 632, 2006 Ga. App. LEXIS 122 (2006), cert. denied, No. S06C1045, 2006 Ga. LEXIS 436 (Ga. June 12, 2006) (decided under former O.C.G.A. § 24-3-14).

Worker injured while using an elevator had not shown that reports purportedly generated by elevator maintenance company fell within the business records exception to the hearsay rule; company's service technician was unfamiliar with the reports and did not testify that the reports were made in the regular course of business. Henson v. Georgia-Pacific Corp., 289 Ga. App. 777, 658 S.E.2d 391, 2008 Ga. App. LEXIS 197 (2008) (decided under former O.C.G.A. § 24-3-14).

Trial court erred in admitting the state's exhibits, which were copies of two traffic citations stamped "FTA," pursuant to former O.C.G.A. § 24-5-20 (see now O.C.G.A. § 24-10-1005) without any determination that the exhibits fell within an exception to the rule prohibiting the use of hearsay because the state introduced the exhibits to prove the truth of the statement of the unidentified person who stamped "FTA" on the citations that the defendant failed to appear for the defendant's court date, and despite defendant's objection to the documents as hearsay, the state argued only the issue of authentication and never identified any exception to the rule prohibiting hearsay that would authorize admitting the documents; the state failed to lay the required foundation for the application of the business records exception, former O.C.G.A. § 24-3-14(b), because the state did not call any witness to provide the required foundation. McKinley v. State, 303 Ga. App. 203, 692 S.E.2d 787, 2010 Ga. App. LEXIS 313 (2010) (decided under former O.C.G.A. § 24-3-14).

Disciplinary reports evaluated using regular course of business. — Disciplinary reports of a Diversion Center were not admissible as business records absent inquiry as to whether it was in the regular course of the Center's control officer to make an incident or disciplinary report and whether the reports were in fact made in the regular course of the Center's business. Kendrick v. State, 240 Ga. App. 530, 523 S.E.2d 414 (decided under former O.C.G.A. § 24-3-14).

Absence of officer testimony on preparation and keeping records. — State failed to lay the foundation required to admit hearsay under the business records exception when a police sergeant testified that reports were "copies of the typewritten reports submitted by an officer of the police department" and that the officer retrieved the reports from the police files, but the officer gave no testimony regarding the preparation and keeping of the reports. Johnson v. State, 247 Ga. App. 660, 544 S.E.2d 496, 2001 Ga. App. LEXIS 30 (2001), cert. denied, No. S01C0740, 2001 Ga. LEXIS 557 (Ga. June 25, 2001), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534

(2001) (decided under former O.C.G.A. § 24-3-14).

Absence of foundation held harmless. — Assuming a proper foundation was not presented for the introduction of medical records at defendant's trial for battery, any error in admitting the records was harmless since the records were not critical but merely cumulative evidence showing the extent of the victim's injuries. Flowers v. State, 181 Ga. App. 572, 353 S.E.2d 69, 1987 Ga. App. LEXIS 2555 (1987) (decided under former O.C.G.A. § 24-3-14).

Unidentified person reading from unidentified paper inadmissible. — Following an apartment resident's death due to asthma, allegedly linked to a gas leak in the apartment, testimony from a friend that an unknown person was reading from a paper outside the apartment that the resident had called to report a gas leak was inadmissible hearsay within hearsay. There was no evidence that the paper was a business record of the gas company; for example, there was no logo or trademark on the paper. Goodhart v. Atlanta Gas Light Company, 349 Ga. App. 65, 825 S.E.2d 465, 2019 Ga. App. LEXIS 108 (2019).

b. Weight and Credibility

Questions for jury. — Credibility, both of the books and of the party, is to be weighed by the jury, and depends upon various circumstances of which the jury are the judges. Taylor v. Tucker, 1 Ga. 231, 1846 Ga. LEXIS 60 (1846) (decided under former law); Allstate Ins. Co. v. Buck, 96 Ga. App. 376, 100 S.E.2d 142, 1957 Ga. App. LEXIS 585 (1957) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Seaboard Coast Line R.R. v. Hart, 120 Ga. App. 492, 171 S.E.2d 383, 1969 Ga. App. LEXIS 829 (1969) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

All circumstances may be shown to affect weight of evidence but not the admissibility of the evidence. Hurst v. Jackson, 134 Ga. App. 129, 213 S.E.2d 511, 1975 Ga. App. LEXIS 1931 (1975) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Serve v. First Nat'l Bank, 143 Ga. App. 239, 237 S.E.2d 719, 1977 Ga. App. LEXIS 2268 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Trial court did not err in admitting a podiatrist's medical records on a patient into evidence in a medical malpractice suit as the circumstances of the making of the records could be shown to affect the weight of the evidence; but the circumstances could not affect the admissibility of the records. Kohl v. Tirado, 256 Ga. App. 681, 569 S.E.2d 576, 2002 Ga. App. LEXIS 942 (2002), cert. denied, No. S02C1826, 2002 Ga. LEXIS 880 (Ga. Sept. 30, 2002) (decided under former O.C.G.A. § 24-3-14).

Physical appearance of records and their self-serving nature are questions that go to the weight of the evidence but not to admissibility. Whitehead v. Joiner, 234 Ga. 457, 216 S.E.2d 317, 1975 Ga. LEXIS 1159 (1975) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Hall v. State, 239 Ga. 832, 238 S.E.2d 912, 1977 Ga. LEXIS 1345 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Dispute over accuracy of record and of the witness's recollection affects only the weight to be given the record by the jury. Don Howard's Music Mart, Inc. v. Southern Bell Tel. & Tel. Co., 154 Ga. App. 648, 269 S.E.2d 506, 1980 Ga. App. LEXIS 2324 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Irregularities in account books sought to be introduced in evidence should be exceedingly gross and palpable to justify the court in arresting the evidence from that tribunal whose peculiar province it is to judge of the credibility of testimony. Bush v. Fourcher, 3 Ga. App. 43, 59 S.E. 459, 1907 Ga. App. LEXIS 547 (1907) (decided under former law).

Gaps in chain of custody of blood sample. — When the blood-alcohol test results are properly admitted as a business record, gaps in the chain of custody of the blood sample admitted as part of the hospital record do not affect the admissibility of the test results but merely go to the weight of the evidence accorded by the jury. Bynum v. Standard (Chevron) Oil Co., 157 Ga. App. 819, 278 S.E.2d 669, 1981 Ga. App. LEXIS 2022, cert. dismissed, 248 Ga. 254, 285 S.E.2d 186, 1981 Ga. LEXIS 982 (1981) (decided under former O.C.G.A. § 24-3-14).

Impeachment. — In a suit by a bank, the defendant having introduced in evi-

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dence the books of the bank, the defendant cannot impeach the books as a whole, but may show that particular items in the books are wrong and disprove those items, and that by mistake or fraud they have been improperly kept. Merchants' Bank v. Rawls, 7 Ga. 191, 1849 Ga. LEXIS 124 (1849) (decided under former law).

c. Objections

When document offered in evidence is admissible in part and inadmissible in part, and objection is made to the document as a whole, it is not error to admit the whole document. Stubbs v. Daughtry, 115 Ga. App. 22, 153 S.E.2d 633, 1967 Ga. App. LEXIS 987 (1967), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Deletion of objectionable material. — If it is desired by either side that a police report of accident be introduced in evidence after the foundation is laid, the report will not be offered unless all parts of the report containing objectionable material are first deleted. Calhoun v. Chappell, 117 Ga. App. 865, 162 S.E.2d 300, 1968 Ga. App. LEXIS 1271 (1968), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Failure to identify objectionable portions of record. — When defendant was offered two opportunities to identify objectionable portions of hospital records and was given time to review the records for that purpose, defendant's failure to identify objectionable portions resulted in a waiver of defendant's hearsay objection. Corbett v. State, 266 Ga. 561, 468 S.E.2d 757 (decided under former O.C.G.A. § 24-3-14).

Opinions and conclusions. — If a hospital record contains diagnostic opinions and conclusions, the record cannot, upon proper objection, be admitted into evidence unless and until the proper foundation is laid, i.e., the person who entered such diagnostic opinions and conclusions upon the record must qualify as an expert and relate the facts upon which the entry was based. Cassano v. Pilgreen's, Inc., 117 Ga. App. 260, 160 S.E.2d 439, 1968 Ga. App. LEXIS 1054 (1968) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

When the document as a whole contained conclusions, opinions, estimates, impressions, and recommendations of a third party not before the court the document was not admissible as a whole. Hurt v. State, 239 Ga. 665, 238 S.E.2d 542, 1977 Ga. LEXIS 1291 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

3. Applications and Illustrations

Prima facie evidence. — When the books conform to the provisions of the former statute, the books themselves stand as a witness of the correctness of the account and make a prima facie case which shifted the burden of proof to the defendant debtor to show the items contained in the books, or some of the items, were not correct. Chambers v. Williams Bros. Lumber Co., 80 Ga. App. 38, 55 S.E.2d 244, 1949 Ga. App. LEXIS 765 (1949) (decided under former law); International Bus. Consulting, Ltd. v. First Union Nat'l Bank, 192 Ga. App. 742, 386 S.E.2d 400, 1989 Ga. App. LEXIS 1168 (1989) (decided under former O.C.G.A. § 24-3-14).

Books of account when admitted under the former statute were prima facie evidence of the facts the books state, and when not contradicted or explained could become conclusive. Wright v. Trust Co., 108 Ga. App. 783, 134 S.E.2d 457, 1963 Ga. App. LEXIS 771 (1963) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Admission by defendant in defendant's testimony, that defendant bought of plaintiffs the articles set forth in the account sued on, the price being attached to each article, establishes prima facie the correctness of the account. F.N.B. Fin. Co. v. Glaze Tire Co., 140 Ga. App. 184, 230 S.E.2d 342, 1976 Ga. App. LEXIS 1395 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

If a business record is qualified according to the statutory standard it may be admissible to prove the truth of the fact stated therein. Moore v. State, 154 Ga. App. 535, 268 S.E.2d 706, 1980 Ga. App.

LEXIS 3237 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Primary evidence. — As a general rule, the testimony of a person who has knowledge of the facts from which books of account are made up is primary evidence as to these facts, and is admissible, whether or not the books themselves are put in evidence. Harper v. Hammond & Sons, 13 Ga. App. 238, 79 S.E. 44, 1913 Ga. App. LEXIS 106 (1913) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Christopher v. Georgian Co., 22 Ga. App. 707, 97 S.E. 97, 1918 Ga. App. LEXIS 704 (1918) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Atlantic Coast Line R.R. v. Grimes, 99 Ga. App. 774, 109 S.E.2d 890, 1959 Ga. App. LEXIS 961 (1959) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Don Howard's Music Mart, Inc. v. Southern Bell Tel. & Tel. Co., 154 Ga. App. 648, 269 S.E.2d 506, 1980 Ga. App. LEXIS 2324 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Admission against deceased debtors. — Business records that were admissible under the former statute were admissible against a deceased debtor. F & W Farm Serv., Inc. v. Citizens & S. Nat'l Bank, 116 Ga. App. 757, 159 S.E.2d 190, 1967 Ga. App. LEXIS 950 (1967) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Roberts v. Artistic Ornamental Iron Co., 124 Ga. App. 744, 186 S.E.2d 143, 1971 Ga. App. LEXIS 1089 (1971) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Glo-Ann Plastic Indus., Inc. v. Peak Textiles, Inc., 134 Ga. App. 924, 216 S.E.2d 715, 1975 Ga. App. LEXIS 2220 (1975) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Agents. — Rule that the entries of an agent, made in the course of the business, were admissible in evidence after the agent's death was recognized by former statute. Turner v. Turner, 123 Ga. 5, 50 S.E. 969, 1905 Ga. LEXIS 359 (1905) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Fact that a document was not signed by an agent or representative of the party to whom the document pertains did not affect the document's admissibility. F.N. Roberts Corp. v. Southern Bell Tel. & Tel. Co., 132 Ga. App. 800, 209 S.E.2d 138, 1974 Ga. App. LEXIS 1830 (1974) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Auction company records prepared in ordinary course of business admissible. — Auction company's business records, showing that the vehicle was announced at auction as having frame and body damage, were admissible without testimony from the inspector because the company's controller laid a sufficient foundation, averring that the controller had personal knowledge of the company's method of maintaining business records, such records were kept in the ordinary course of business, and record entries were made at or near the time of the auction and post-sale inspection. Isbell v. Credit Nation Lending Serv., LLC, 319 Ga. App. 19, 735 S.E.2d 46, 2012 Ga. App. LEXIS 1021 (2012) (decided under former O.C.G.A. § 24-3-14).

Business records. — Information in the affidavit of the management corporation's vice president regarding the lessor's record keeping methods fell squarely within the business records exception to the hearsay rule codified at former O.C.G.A. § 24-3-14. Int'l Biochemical Indus. v. Jamestown Mgmt. Corp., 262 Ga. App. 770, 586 S.E.2d 442, 2003 Ga. App. LEXIS 1022 (2003) (decided under former O.C.G.A. § 24-3-14).

Trial court's order granting summary judgment to a collection company and against a debtor in the former's deficiency action was upheld on appeal as it was not based on inadmissible hearsay, but upon records kept in the ordinary course of business, and thus admissible under the business records exception to the hearsay rule. Boyd v. Calvary Portfolio Servs., 285 Ga. App. 390, 646 S.E.2d 496, 2007 Ga. App. LEXIS 534 (2007) (decided under former O.C.G.A. § 24-3-14).

In a breach of contract action, a lender's witness was properly allowed to testify about the loan records involving the debtor sued under the business records exception to the hearsay rule as: (1) the witness testified that the records were kept in the ordinary course of the lender's business; (2) the witness was familiar with the records and the manner in which

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the records were kept; (3) the records were made at or near the time the documents were created or received by the lender; and (4) the records of the lender's predecessors became the records of the lender. Jenkins v. Sallie Mae, Inc., 286 Ga. App. 502, 649 S.E.2d 802, 2007 Ga. App. LEXIS 822 (2007) (decided under former O.C.G.A. § 24-3-14).

Trial court properly granted summary judgment to the purchaser of real estate in a quiet title action that involved the taxpayer's home and the taxpayer's failure to pay the property taxes on the property as the property was properly levied upon and no question of fact remained that the sheriff officially seized the property. Further, the affidavits of the civil process coordinator at the time of the tax sale, and the coordinator's successor, were properly admitted into evidence as such affidavits fell within the business records exception to the rule against hearsay. Davis v. Harpagon Co., LLC, 283 Ga. 539, 661 S.E.2d 545, 2008 Ga. LEXIS 423 (2008) (decided under former O.C.G.A. § 24-3-14).

In convictions of aggravated child molestation and statutory rape, defendant was not entitled to admission into evidence of a motel registration card under former O.C.G.A. § 24-3-14(b) because the defendant failed to present testimony of a motel employee, who was familiar with the motel registration card and the methods for generation and keeping the motel's business records. Flewelling v. State, 300 Ga. App. 505, 685 S.E.2d 758, 2009 Ga. App. LEXIS 1208 (2009) (decided under former O.C.G.A. § 24-3-14).

Trial court did not abuse the court's discretion in admitting the results of a hospital-administered blood test under the business record exception to the hearsay rule, former O.C.G.A. § 24-3-14, because the defendant acquiesced in the procedure by which a lab technician identified the computer printout but did not relate the results stated thereon, and acquiescence deprived the defendant of the right to complain of the procedure on appeal; because the lab technician testified that the document tendered was an accurate copy of the result obtained, the testimony was properly admitted as original evidence. Potter v. State, 301 Ga. App. 411, 687 S.E.2d 653, 2009 Ga. App. LEXIS 1402 (2009) (decided under former O.C.G.A. § 24-3-14).

State failed to prove that the defendant lacked the authority to possess and deliver money orders as required to support forgery convictions under O.C.G.A. § 16-9-1(a) because the trial court erred in admitting the "counterfeit" stamps on the money orders as business records under former O.C.G.A. § 24-3-14(b); the determination that the money orders were counterfeit was a conclusion made by a third party institution, whose representatives did not testify at trial, and to allow the admission of the stamp as proof that the money orders were counterfeit would deprive the defendant of the right to conduct a thorough and sifting cross-examination on the determination that the money orders were counterfeit. Forrester v. State, 315 Ga. App. 1, 726 S.E.2d 476, 2012 Ga. App. LEXIS 301 (2012) (decided under former O.C.G.A. § 24-3-14).

Trial court did not err in granting a bank's motion for summary judgment in the bank's action against guarantors to recover the outstanding balance on a promissory note because payoff statements, which were attached as exhibits to the affidavit of the bank's special assets manager, qualified as business records under the Business Records Act, former O.C.G.A. § 24-3-14(b), since the special assets manger testified that the manager had personal knowledge that the statements were made in the regular course of the bank's business; because the payoff statements conformed to the provisions of the Act, the statements themselves stood as a witness of the correctness of the account and made a prima facie case. Angel Business Catalysts, LLC v. Bank of the Ozarks, 316 Ga. App. 253, 728 S.E.2d 854, 2012 Ga. App. LEXIS 531 (2012) (decided under former O.C.G.A. § 24-3-14).

Trial court did not abuse the court's discretion in admitting documents pursuant to the Business Records Act, former O.C.G.A. § 24-3-14(b), because a bank es-

tablished that the affidavit of the bank's special assets manager and attached exhibits were admissible as business records; the special assets manager averred that the manager was the custodian of records for the bank, that the business records relating to a promissory note were transferred and delivered to the bank, that the documents included the original note and individual guaranties, and that the records were obtained in the regular course of business. Angel Business Catalysts, LLC v. Bank of the Ozarks, 316 Ga. App. 253, 728 S.E.2d 854, 2012 Ga. App. LEXIS 531 (2012) (decided under former O.C.G.A. § 24-3-14).

Business records of predecessor entity. — Attorney-in-fact for the entity serving as manager of a lender's assignee could authenticate the business records of the lender and the assignee in support of an action to collect on three promissory notes, pursuant to O.C.G.A. § 24-8-803(6); however, as to the third note, the affidavit failed to attach the payment history, and that claim failed. Ware v. Multibank 2009-1 RES-ADC Venture, LLC, 327 Ga. App. 245, 758 S.E.2d 145, 2014 Ga. App. LEXIS 308 (2014).

Because the corporate victim prepared a loss prevention report in every instance of shoplifting, concerns about reliability and trustworthiness were minimized and the report was admissible as a business record. Thompson v. State, 332 Ga. App. 204, 770 S.E.2d 364, 2015 Ga. App. LEXIS 254 (2015), cert. denied, No. S15C1245, 2015 Ga. LEXIS 562 (Ga. Sept. 8, 2015).

Records of debtor's account. — In a creditor's action on open account, the creditor's business records showing the debtor's account and bank records showing wire transfers made by the debtor were sufficient under O.C.G.A. § 24-8-803(6) to support its contention that it was entitled to summary judgment as to the debtor's liability; because of inconsistencies, however, further proceedings were required to determine the amount the debtor owed. SKC, Inc. v. eMag Solutions, LLC, 326 Ga. App. 798, 755 S.E.2d 298, 2014 Ga. App. LEXIS 160 (2014).

Telephone messages. — As telephone messages made following conversations between a party opponent and a testifying witness noted the contents of a conversation, not an act, transaction, occurrence, or event, the business records exception to the hearsay rule was inapplicable; for the contents of the party's telephone conversations to be admissible, the party would have to be given the opportunity to cross-examine the employees to whom the witness spoke with regard to the potential for misrepresenting the statements. Bailey v. Edmundson, 280 Ga. 528, 630 S.E.2d 396, 2006 Ga. LEXIS 355 (2006) (decided under former O.C.G.A. § 24-3-14).

Notations of a telephone conversation and testimony explaining the notation were not admissible under the business record exception to the hearsay rule, former O.C.G.A. § 24-2-14(b), because such notations were not considered records of a transaction, event or occurrence as contemplated by this rule. Griffin v. Bankston, 302 Ga. App. 647, 691 S.E.2d 229, 2009 Ga. App. LEXIS 1454 (2009), cert. denied, No. S10C1119, 2010 Ga. LEXIS 687 (Ga. Sept. 7, 2010) (decided under former O.C.G.A. § 24-3-14).

Telephone conversation not a business record. — Trial court erroneously admitted hearsay at trial because the document reflecting a telephone conversation between a claims representative and an insured, which an insurer offered into evidence, did not constitute a business record admissible under former O.C.G.A. § 24-3-14 since the document was nothing more than a record of a conversation; the hearsay evidence went directly to the ultimate issue before the jury, and its erroneous admission was not harmless. Saye v. Provident Life & Accident Ins. Co., 311 Ga. App. 74, 714 S.E.2d 614, 2011 Ga. App. LEXIS 553 (2011), cert. denied, No. S11C1857, 2011 Ga. LEXIS 984 (Ga. Nov. 30, 2011) (decided under former O.C.G.A. § 24-3-14).

Cell phone records were properly admitted under former O.C.G.A. § 24-3-14(b) after the records custodian testified that one of the records at issue listed the locations of all the company's cell phone towers during a span that included the date of the crimes and the other records showed the incoming and outgoing calls for the defendant's cell phone. Kilgore v. State, 295 Ga. 729, 763 S.E.2d 685, 2014

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Ga. LEXIS 736 (2014) (decided under former O.C.G.A. § 24-3-14).

Defendant's cell phone records were non-testimonial and, therefore, their admission through the business records exception to the hearsay rule did not violate the Confrontation Clause because the records were maintained in the ordinary course of the cell phone carrier's business and the records were not documents created for the primary purpose of establishing evidence for use in a future prosecution. Gialenios v. State, 310 Ga. 869, 855 S.E.2d 559, 2021 Ga. LEXIS 79, overruled in part, Outlaw v. State, 311 Ga. 396, 858 S.E.2d 63, 2021 Ga. LEXIS 197 (2021).

Notice of cancellation of insurance policy. — Supervisor who was the custodian of documents showing that notice of cancellation of an insurance policy was properly mailed was not required to have actual personal knowledge of the preparation of and mailing of the notice. Stapleton v. Colonial Ins. Co., 209 Ga. App. 674, 434 S.E.2d 116, 1993 Ga. App. LEXIS 940 (1993) (decided under former O.C.G.A. § 24-3-14).

Types of evidence held admissible. — See Hall v. Carey, 5 Ga. 239, 1848 Ga. LEXIS 88 (1848) (corporate books) (decided under former law); Banks v. Darden ex rel. Jerrenaud, 18 Ga. 318, 1855 Ga. LEXIS 198 (1855) (bank books) (decided under former law); Ganahl v. Shore, 24 Ga. 1 (1858) (account books) (decided under former law); Bush v. Fourcher, 3 Ga. App. 43, 59 S.E. 459, 1907 Ga. App. LEXIS 547 (1907) (account books of repairer) (decided under former law); Harper v. Hammond & Sons, 13 Ga. App. 238, 79 S.E. 44, 1913 Ga. App. LEXIS 106 (1913) (ledgers); Chambers v. Williams Bros. Lumber Co., 80 Ga. App. 38, 55 S.E.2d 244, 1949 Ga. App. LEXIS 765 (1949) (ledger sheets and tradesman's shop book) (decided under former law); Allstate Ins. Co. v. Buck, 96 Ga. App. 376, 100 S.E.2d 142, 1957 Ga. App. LEXIS 585 (1957) (invoices, delivery slips and circulation accounts) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Franco v. Bank of Forest Park, 118 Ga. App. 700, 165 S.E.2d 593, 1968 Ga. App. LEXIS 1505 (1968) (insurance policies and bank records showing premiums deposited to accounts of issuing companies) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Hamilton v. State, 118 Ga. App. 842, 165 S.E.2d 884, 1968 Ga. App. LEXIS 1541 (1968) (photostat copy of check identified as bank record) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Pickett v. State, 123 Ga. App. 1, 179 S.E.2d 303, 1970 Ga. App. LEXIS 705 (1970), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (police report); Butler v. Garrison, 123 Ga. App. 645, 182 S.E.2d 185, 1971 Ga. App. LEXIS 1330 (1971) (recorded claim for materialman's lien and invoices for materials) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Tidwell Co. v. Robley Hats, Inc., 125 Ga. App. 102, 186 S.E.2d 489, 1971 Ga. App. LEXIS 748 (1971) (fire department records) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Smith v. Smith, 125 Ga. App. 257, 187 S.E.2d 330, 1972 Ga. App. LEXIS 1283 (1972) (x-rays) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Harris v. United States Fid. & Guar. Co., 134 Ga. App. 739, 216 S.E.2d 127, 1975 Ga. App. LEXIS 2152 (1975) (mailing list constituting post office receipt for mailing) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Lawson v. State, 236 Ga. 770, 225 S.E.2d 258, 1976 Ga. LEXIS 1021, cert. denied, 429 U.S. 857, 97 S. Ct. 156, 50 L. Ed. 2d 134, 1976 U.S. LEXIS 2875 (1976), cert. denied, 429 U.S. 859, 97 S. Ct. 159, 50 L. Ed. 2d 136, 1976 U.S. LEXIS 2890 (1976) (registration of particular phone) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Bramblett v. State, 139 Ga. App. 745, 229 S.E.2d 484, 1976 Ga. App. LEXIS 1973 (1976), aff'd, 239 Ga. 336, 236 S.E.2d 580, 1977 Ga. LEXIS 908 (1977), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (return of search warrant) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Benn v. McBride, 140 Ga. App. 698, 231 S.E.2d 438, 1976 Ga. App. LEXIS 1604 (1976) (invoices) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Tillman & Deal Farm Supply, Inc. v. Deal, 146 Ga. App. 232, 246 S.E.2d 138, 1978 Ga. App. LEXIS 2305 (1978) (laboratory tests records) (decided under Ga. L. 1952, p. 177, §§ 1, 2,

3); SCM Corp. v. Thermo Structural Prods., Inc., 153 Ga. App. 372, 265 S.E.2d 598, 1980 Ga. App. LEXIS 1813 (1980) (annual tax return) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Graham v. State, 154 Ga. App. 198, 267 S.E.2d 842, 1980 Ga. App. LEXIS 2087 (1980) (computer printouts) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Wiggins v. State, 249 Ga. 302, 290 S.E.2d 427, 1982 Ga. LEXIS 813 (1982) (certifications from manufacturer regarding radar device; records of Department of Public Safety kept for use in speeding cases) (decided under former O.C.G.A. § 24-3-14); Zipperer v. State, 162 Ga. App. 775, 293 S.E.2d 44, 1982 Ga. App. LEXIS 2334 (1982) (probationer's travel permits in probation revocation proceeding) (decided under former O.C.G.A. § 24-3-14); Boatner v. Kandul, 180 Ga. App. 234, 348 S.E.2d 753, 1986 Ga. App. LEXIS 2118 (1986) (ledger book) (decided under former O.C.G.A. § 24-3-14); White v. State, 263 Ga. 94, 428 S.E.2d 789, 1993 Ga. LEXIS 409 (1993) (Red Cross blood testing) (decided under former O.C.G.A. § 24-3-14); Morris v. National W. Life Ins. Co., 208 Ga. App. 443, 430 S.E.2d 813, 1993 Ga. App. LEXIS 595 (1993) (computer-generated summaries) (decided under former O.C.G.A. § 24-3-14); Gee v. State, 210 Ga. App. 60, 435 S.E.2d 275, 1993 Ga. App. LEXIS 1035 (1993) (hospital intake record) (decided under former O.C.G.A. § 24-3-14); Stephens v. Howard, 221 Ga. App. 469, 471 S.E.2d 898, 1996 Ga. App. LEXIS 495 (1996), cert. denied, No. S96C1474, 1996 Ga. LEXIS 956 (Ga. Sept. 5, 1996) (physical therapist's report prepared for treating physician) (decided under former O.C.G.A. § 24-3-14); Neill v. State, 247 Ga. App. 152, 543 S.E.2d 436, 2000 Ga. App. LEXIS 1448 (2000), cert. denied, No. S01C0524, 2001 Ga. LEXIS 479 (Ga. June 4, 2001) (hotel registration card) (decided under former O.C.G.A. § 24-3-14).

Drug test results. — In a termination of parental rights case, the application for discretionary review was improvidently granted because the juvenile court properly admitted the drug test results as the results were admissible under the business records exception; the records were authenticated; the juvenile court did not err in enforcing the requirement of its previous order that the mother submit 12 consecutive months of clean drug screens; and the evidence was sufficient to support the termination as the mother failed to complete a case plan, the children were dependent as a result of the lack of proper parental control and care, the causes of the dependency were likely to continue, and the continued dependency was likely to cause serious harm to the children. In the Interest of L-M. C. L., 362 Ga. App. 520, 869 S.E.2d 161, 2022 Ga. App. LEXIS 59 (2022).

Admission of lawyer's notes. — In an action seeking reformation of an option contract, even assuming the trial court erred in admitting a lawyer's handwritten notes indicating that an option contract was to include all of the decedent's land because such notes were inadmissible hearsay, the estate failed to show reversible error because there was other evidence to support the court's ruling. Morris v. Morris, 282 Ga. App. 127, 637 S.E.2d 838, 2006 Ga. App. LEXIS 1334 (2006) (decided under former O.C.G.A. § 24-3-14).

Documents transmitted between businesses. — When routine, factual documents are made by one business, transmitted, or delivered to a second business, and there entered or kept by the second business in the regular course of business of the receiving business, the documents can become business records of the receiving business. Moore v. State, 154 Ga. App. 535, 268 S.E.2d 706, 1980 Ga. App. LEXIS 3237 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Jackson v. State, 209 Ga. App. 217, 433 S.E.2d 655, 1993 Ga. App. LEXIS 810 (1993) (decided under former O.C.G.A. § 24-3-14).

Sufficient evidence supported defendant's convictions for two counts of theft by deception based on defendant withdrawing the contents of two bank accounts after depositing checks from other banks into the accounts that were eventually dishonored because the dishonored checks were properly admitted into evidence without testimony from the payor banks as the checks became the business records of the bank from which funds were withdrawn, since there was testimony

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that the bank received, relied upon, and retained the checks in the regular course of the bank's business, as well as testimony from the bank establishing a foundation for admitting the checks. Ross v. State, 298 Ga. App. 525, 680 S.E.2d 435, 2009 Ga. App. LEXIS 615 (2009), cert. dismissed, No. S09C2034, 2009 Ga. LEXIS 705 (Ga. Nov. 2, 2009) (decided under former O.C.G.A. § 24-3-14).

Opinions. — Former statute did not authorize the introduction of papers containing the opinions of experts or the diagnosis of physicians. Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370 (1957) For comment, see 20 Ga. B.J. 381 (1958) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Meeks v. Lunsford, 106 Ga. App. 154, 126 S.E.2d 531, 1962 Ga. App. LEXIS 655 (1962) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

When a report was the opinion of the persons making the report and was based, at least to some extent, on what was reported to the people by unidentified persons, it was not admissible in evidence. Yarbrough v. Cantex Mfg. Co., 97 Ga. App. 438, 103 S.E.2d 138 (1958), for comment, see 22 Ga. B.J. 100 (1959) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Business record containing hearsay opinions is not generally admissible. Wallis v. Odom, 130 Ga. App. 437, 203 S.E.2d 613, 1973 Ga. App. LEXIS 1344 (1973) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Emmett v. State, 232 Ga. 110, 205 S.E.2d 231, 1974 Ga. LEXIS 882 (1974) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Business records must be reflective of an act, occurrence, or event, and not an opinion. Finch v. Caldwell, 155 Ga. App. 813, 273 S.E.2d 216, 1980 Ga. App. LEXIS 2803 (1980), superseded by statute as stated in Forsyth County v. Mommies Props., 359 Ga. App. 175, 855 S.E.2d 126, 2021 Ga. App. LEXIS 145 (2021) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Affidavits by company officials concerning alleged forgeries that were not memoranda or records of acts, transactions, occurrences, or events and that contained inadmissible opinions and conclusions were not admissible as business records. Adams v. State, 217 Ga. App. 706, 459 S.E.2d 182, 1995 Ga. App. LEXIS 598 (1995), cert. denied, No. S95C1707, 1995 Ga. LEXIS 1094 (Ga. Oct. 13, 1995) (decided under former O.C.G.A. § 24-3-14).

Even though an affidavit in support of a motion for summary judgment did not recite that the affidavit was made from the affiant's personal knowledge, it was admissible because the affidavit set forth the affiant's title and responsibilities and included attached documents made and kept in the ordinary course of business. Kondo v. Marietta Toyota, Inc., 224 Ga. App. 490, 480 S.E.2d 851 (decided under former O.C.G.A. § 24-3-14).

As the affidavits of an assignee's chief financial officer (CFO) showed that the CFO's knowledge of the facts sworn to was based on the CFO's review of the attached business records and not personal knowledge, the affidavits were inadmissible hearsay. Nyankojo v. North Star Capital Acquisition, 298 Ga. App. 6, 679 S.E.2d 57, 2009 Ga. App. LEXIS 574 (2009) (decided under former O.C.G.A. § 24-3-14).

Testimony by corporate attorney. — Testimony by attorney, who handled right of way acquisitions and maintained corporate records regarding rights of way for defendant corporation, as to width of the defendant's right of way was relevant background information that the attorney could testify to both from the attorney's personal knowledge and from corporate business records. Simpson v. Colonial Pipeline Co., 269 Ga. 520, 499 S.E.2d 634 (decided under former O.C.G.A. § 24-3-14).

Affidavit of an official made after a review of business records which were in the official's care, custody, and control, and which were maintained in the course of the company's business, was admissible. Carter v. Tokai Fin. Servs., Inc., 231 Ga. App. 755, 500 S.E.2d 638 (decided under former O.C.G.A. § 24-3-14).

Contents of records. — Since there was no testimony to the effect that a card or record was customarily made in the due course of business and since the card or record was not introduced in evidence as a

record made in the due course of business, the admission of testimony as to the contents of the card or record was erroneous. Hardy v. Waits, 97 Ga. App. 580, 104 S.E.2d 136, 1958 Ga. App. LEXIS 831, rev'd, 214 Ga. 495, 105 S.E.2d 719, 1958 Ga. LEXIS 471 (1958) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Testimony concerning the content of records, unsupported in the evidence by the records themselves, which are never offered in evidence should be excluded as hearsay. Foster v. National Ideal Co., 119 Ga. App. 773, 168 S.E.2d 872, 1969 Ga. App. LEXIS 1243 (1969) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Compiling documents for admission. — Individual documents could be compiled and admitted as a group, even though the documents were not kept together by the business as one record since each of the documents was made in the regular course of business and was kept as a business record. Archer Motor Co. v. International Bus. Inv., Inc., 193 Ga. App. 86, 386 S.E.2d 918, 1989 Ga. App. LEXIS 1308 (1989) (decided under former O.C.G.A. § 24-3-14).

Summaries. — When pertinent and essential facts can be ascertained only by an examination of a large number of entries in books of account, an auditor or an expert accountant who has made an examination and analysis of the books and figures may testify as a witness and give summarized statements of what the books show as a result of the expert's investigation, provided the books themselves are accessible to the court and the parties. Bible v. Somers Constr. Co., 197 Ga. 761, 30 S.E.2d 623, 1944 Ga. LEXIS 336 (1944) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Cotton v. John W. Eshelman & Sons, 137 Ga. App. 360, 223 S.E.2d 757, 1976 Ga. App. LEXIS 2445 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Vaughn & Co. v. Saul, 143 Ga. App. 74, 237 S.E.2d 622, 1977 Ga. App. LEXIS 2193 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Stewart v. State, 246 Ga. 70, 268 S.E.2d 906, 1980 Ga. LEXIS 970 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Extracts, summaries, and transcripts provided by one business purely as information to the second business clearly did not fall within the former statute. Moore v. State, 154 Ga. App. 535, 268 S.E.2d 706, 1980 Ga. App. LEXIS 3237 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Monthly statements which were either drafted by president of firm or prepared under the president's supervision were admissible as summaries of computer printouts which were already in evidence. Reisman v. Martori, Meyer, Hendricks, & Victor, 155 Ga. App. 551, 271 S.E.2d 685, 1980 Ga. App. LEXIS 2669 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

When invoices of business records were admissible under former O.C.G.A. § 24-3-14(b), an account statement that was a summary of the invoices therein was admissible. Walter R. Thomas Assocs. v. Media Dynamite, Inc., 284 Ga. App. 413, 643 S.E.2d 883, 2007 Ga. App. LEXIS 342 (2007) (decided under former O.C.G.A. § 24-3-14).

Trial court abused the court's discretion by considering a one-page summary of the amount owed under a lease in determining damages because the record a landlord submitted was not a business record under former O.C.G.A. § 24-3-14 but was a summary of such records; no underlying business records were available to the trial court or the guarantor. Patterson v. Bennett St. Props., 314 Ga. App. 896, 726 S.E.2d 147, 2012 Ga. App. LEXIS 299 (2012) (decided under former O.C.G.A. § 24-3-14).

Self-serving memoranda. — Former statute did not go to the extent of rendering admissible self-serving memoranda. Maryfield Plantation, Inc. v. Harris Gin Co., 116 Ga. App. 744, 159 S.E.2d 125, 1967 Ga. App. LEXIS 946 (1967) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Nationwide Mut. Fire Ins. Co. v. Rhee, 160 Ga. App. 468, 287 S.E.2d 257, 1981 Ga. App. LEXIS 3149 (1981) (decided under former O.C.G.A. § 24-3-14).

Document did not qualify as a business record since the document was prepared from notes dictated while a receiver of the property performed a complete walk-through of vacant units in an apartment complex and since the purpose of the document was to remind the receiver of what the receiver observed in each unit. Great

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W. Bank v. Davis, 203 Ga. App. 473, 416 S.E.2d 899, 1992 Ga. App. LEXIS 581 (1992) (decided under former O.C.G.A. § 24-3-14).

Trial court properly refused to admit into evidence unauthenticated handwritten bid allegedly taken over the telephone by a secretary no longer employed by defendant contractor. Bishop Contracting Co. v. North Ga. Equip. Co., 203 Ga. App. 655, 417 S.E.2d 400, 1992 Ga. App. LEXIS 592 (1992), cert. denied, No. S92C0970, 1992 Ga. LEXIS 479 (Ga. June 12, 1992) (decided under former O.C.G.A. § 24-3-14).

Handwritten note of deceased payee of promissory notes, as to loans to and payments from the signatory of the notes, was admissible. Harrison v. Martin, 213 Ga. App. 337, 444 S.E.2d 618, 1994 Ga. App. LEXIS 577 (1994) (decided under former O.C.G.A. § 24-3-14).

Letters. — To construe Ga. L. 1952, p. 177, § 1 et seq. to permit the admission in evidence of a letter in which is contained the diagnosis of a party's condition by a witness who has not been qualified as an expert, and a memorandum opinion not signed by any person but simply enclosed in the letter, when the party whose interest the letter and memorandum opinion are offered is not afforded the opportunity to examine either the author of the letter or the maker of the memorandum would in effect repeal former Code 1933, § 38-1705 (see now O.C.G.A. § 24-6-611), relating to the right of cross-examination, and ignore opinions of the Supreme Court and of this court. Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370 (1957). For comment, see 20 Ga. B.J. 381 (1958) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Letters frequently would not qualify as letters are usually written for the purpose of communicating rather than recording information. American San. Servs. v. EDM of Tex., Inc., 139 Ga. App. 662, 229 S.E.2d 136, 1976 Ga. App. LEXIS 1939 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former statute did not automatically render admissible correspondence and all kinds of writings if made by one in connection with the operation of a business. American San. Servs. v. EDM of Tex., Inc., 139 Ga. App. 662, 229 S.E.2d 136, 1976 Ga. App. LEXIS 1939 (1976) (decided under former O.C.G.A. § 24-3-14).

Claim letter required by the Department of Transportation as part of the department's contract with a contractor was admissible as original evidence and as a business record. DOT v. Dalton Paving & Constr., Inc., 227 Ga. App. 207, 489 S.E.2d 329 (decided under former O.C.G.A. § 24-3-14).

Financial statements. — Financial statement compiled from the records of the corporation is not itself a memorandum or record of any act, transaction, occurrence, or event but a compilation of figures furnished by someone else, and should not be admissible. Smith v. Smith, 224 Ga. 689, 164 S.E.2d 225, 1968 Ga. LEXIS 906 (1968) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Unaudited financial statements which had been prepared by independent accountants who were not present in court to authenticate the reports should not have been admitted into evidence as business records. DOT v. Fitzpatrick, 184 Ga. App. 249, 361 S.E.2d 241, 1987 Ga. App. LEXIS 2222 (1987) (decided under former O.C.G.A. § 24-3-14).

Documents provided by subcontractors to plaintiff for purposes of billing and reimbursement qualified as business records of the plaintiff and testimony of plaintiff's president was appropriate to lay the foundation for their admittance. Wheat Enters., Inc. v. Redi-Floors, Inc., 231 Ga. App. 853, 501 S.E.2d 30, 1998 Ga. App. LEXIS 540 (1998) (decided under former O.C.G.A. § 24-3-14).

Credit card holder failed to prove that the statement, demonstrating the holder's debt, attached to the assignee's summary judgment motion affidavit was hearsay and should not have been considered by the trial court in the court's grant of summary judgment; the holder failed to contradict the assignee's claim, made in the assignee's affidavit, that the statement fell under the business records exception to the hearsay rule under former O.C.G.A. § 24-3-14. Bozeman v. CACV of

Colo., LLC, 282 Ga. App. 256, 638 S.E.2d 387, 2006 Ga. App. LEXIS 1353 (2006) (decided under former O.C.G.A. § 24-3-14).

When a plaintiff purchased advertising time from media providers on behalf of the defendant, invoices received from the media providers and kept by the plaintiff as part of the plaintiff's own records were business records of the plaintiff under former O.C.G.A. § 24-3-14(b), and testimony from the plaintiff's president could lay a foundation for their introduction into evidence. Walter R. Thomas Assocs. v. Media Dynamite, Inc., 284 Ga. App. 413, 643 S.E.2d 883, 2007 Ga. App. LEXIS 342 (2007) (decided under former O.C.G.A. § 24-3-14).

Credit agreement and statements. — Credit card company's summary judgment motion, supported by the sworn statement of the company's operation analyst, together with a credit card agreement and statements showing the amount due, which were admissible as business records pursuant to former O.C.G.A. § 24-3-14, was properly granted. A copy of the credit application was not required. Melman v. FIA Card Servs., N.A., 312 Ga. App. 270, 718 S.E.2d 107, 2011 Ga. App. LEXIS 940 (2011), cert. denied, No. S12C0411, 2012 Ga. LEXIS 215 (Ga. Feb. 27, 2012) (decided under former O.C.G.A. § 24-3-14).

Trial court did not err by allowing into evidence as business records two spreadsheets regarding the alleged transactions supporting the defendant's convictions for theft by taking because the documents were created as part of the ordinary course of business and a proper foundation was laid for their admission. Raymond v. State, 322 Ga. App. 404, 745 S.E.2d 689, 2013 Ga. App. LEXIS 537 (2013) (decided under former O.C.G.A. § 24-3-14).

Department of Labor records. — In a prosecution for fraudulently obtaining public housing, computer printouts of defendant's wage records received by the county housing authority from the Department of Labor were admissible as business records. Robertson v. State, 210 Ga. App. 834, 437 S.E.2d 816, 1993 Ga. App. LEXIS 1381 (1993), cert. denied, No. S94C0312, 1994 Ga. LEXIS 380 (Ga. Feb. 3, 1994) (decided under former O.C.G.A. § 24-3-14).

Timeline prepared by a Georgia Department of Children and Families case worker was not a business record as it was prepared for a termination of parental rights proceeding, was not prepared in the regular course of business, and was not prepared and maintained pursuant to a routine practice; however, the admission of the timeline was harmless error. In the Interest of C.M., 258 Ga. App. 387, 574 S.E.2d 433, 2002 Ga. App. LEXIS 1467 (2002), cert. dismissed, No. S03C0542, 2003 Ga. LEXIS 213 (Ga. Feb. 24, 2003) (decided under former O.C.G.A. § 24-3-14).

Computer printouts. — Absence of original daily time sheets did not render computer printouts inadmissible; this may have gone to their credit but not to their admissibility. Reisman v. Martori, Meyer, Hendricks, & Victor, 155 Ga. App. 551, 271 S.E.2d 685, 1980 Ga. App. LEXIS 2669 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Computer printouts were clearly admissible under former O.C.G.A. § 24-3-14. WGNX, Inc. v. Gorham, 185 Ga. App. 489, 364 S.E.2d 621, 1988 Ga. App. LEXIS 13 (1988) (decided under former O.C.G.A. § 24-3-14).

Subcontractor agreement forms. — Because a limited liability company did not object to the admission of subcontractor agreement forms at trial on the ground that the forms did not fall within the business records exception to the hearsay rule, former O.C.G.A. § 24-3-14, an appellate court would not consider that argument on appeal. Forrest Cambridge Apts., LLC v. Redi-Floors, Inc., 295 Ga. App. 840, 673 S.E.2d 318, 2009 Ga. App. LEXIS 99 (2009) (decided under former O.C.G.A. § 24-3-14).

Use of a LeadsOnline application in prosecution for impersonating officer. — Defendant's conviction for impersonating a law enforcement officer was affirmed and the trial court did not err by admitting into evidence a computer-generated record of the defendant's application to LeadsOnline because the trial court properly found that the application

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fell within the business records exception to the hearsay rule and had been properly authenticated as the defendant had actual notice before trial that the state intended to authenticate via a self-authentication declaration. Chase v. State, 337 Ga. App. 449, 787 S.E.2d 802, 2016 Ga. App. LEXIS 352 (2016).

Operating record of intoximeter operator admissible. — Operating record of an intoximeter operator who gave a test to a driver, subsequently accused of driving while intoxicated, was a writing in proof of an act or transaction and, thus, was admissible as direct evidence of the manner in which a scientific test was conducted and results thereby obtained. Munda v. State, 172 Ga. App. 857, 324 S.E.2d 799, 1984 Ga. App. LEXIS 2690 (1984) (decided under former O.C.G.A. § 24-3-14).

Log sheet with handwritten intoxilyzer results admissible. — State's motion in limine to introduce a log sheet with handwritten intoxilyzer results was granted as the log sheet was admissible under the business records exception to the hearsay rule because the investigator averred that every officer at the county jail who performed intoxilyzer breath tests was required to record the officer's name, the name of the offender, the date of the test, the offender's driver's license number, the arresting officer's name, and the results of the two samples making up the test; thus, the log sheet was made at or near the time of the intoxilyzer tests, by a person with personal knowledge and a business duty to report the results, and kept in the course of the regularly conducted sheriff's office's activity. Jones v. State, 345 Ga. App. 14, 812 S.E.2d 337, 2018 Ga. App. LEXIS 169 (2018).

Breath testing device certificates. — Breath testing device certificates provided for in O.C.G.A. § 40-6-392(f) are records made within the regular course of business. Brown v. State, 268 Ga. 76, 485 S.E.2d 486 (decided under former O.C.G.A. § 24-3-14); Jackson v. State, 233 Ga. App. 568, 504 S.E.2d 505 (decided under former O.C.G.A. § 24-3-14).

Proper foundation for admitting an inspection certificate was provided through testimony of the trooper who actually tested the machine. Mealor v. State, 233 Ga. App. 193, 504 S.E.2d 29 (decided under former O.C.G.A. § 24-3-14).

"Self-authenticating" provision, O.C.G.A. § 40-6-392(f), contained the proper foundation for admission of a certificate of inspection, and a further foundation under the "business records" exception of subsection (b) of former O.C.G.A. § 24-3-14 was not necessary. Jackson v. State, 233 Ga. App. 568, 504 S.E.2d 505 (decided under former O.C.G.A. § 24-3-14).

Admission of self-authenticating certificates of inspection for the Intoxilyzer 5000 used to test defendant's breath was proper as the certificates were required by O.C.G.A. § 40-6-392(f), the certificates qualified as business records under former O.C.G.A. § 24-3-14, and the certificates did not violate defendant's confrontation rights under U.S. Const., amend. 6. Neal v. State, 281 Ga. App. 261, 635 S.E.2d 864, 2006 Ga. App. LEXIS 1068 (2006) (decided under former O.C.G.A. § 24-3-14).

As certificates of inspection regarding an Intoxilyzer 5000 used in defendant's criminal matter were properly admitted pursuant to the business records exception to the hearsay rule under former O.C.G.A. §§ 24-3-14 and 40-6-392(f), the trial court's refusal to give the limiting instruction regarding their use, as requested by defendant, was not reversible error. Neal v. State, 281 Ga. App. 261, 635 S.E.2d 864, 2006 Ga. App. LEXIS 1068 (2006) (decided under former O.C.G.A. § 24-3-14).

Testing certificates for a breath-testing machine were properly admitted into evidence in a defendant's trial for driving under the influence (less safe and per se) under former O.C.G.A. § 24-3-14 and O.C.G.A. § 40-6-392(f). The documents did not come within the Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) standard. Ritter v. State, 306 Ga. App. 689, 703 S.E.2d 8, 2010 Ga. App. LEXIS 888 (2010) (decided under former O.C.G.A. § 24-3-14).

Fingerprints. — An adequate foundation was laid for the admission of evidence of defendant's fingerprints since the trial record reflected that everybody arrested had a folder on them and the fingerprints were kept in the folder, the fingerprint card was a part of the record and was generally made at the time of a subject's arrest during the booking procedure, the name of the person who took the prints was on the card, and the card normally was maintained in the file jacket of the subject's arrest record at the sheriff's department. Davis v. State, 194 Ga. App. 902, 392 S.E.2d 327, 1990 Ga. App. LEXIS 363 (1990) (decided under former O.C.G.A. § 24-3-14).

Evidence established that the defendant's 1991 fingerprint card was made in the regular course of business when the card bore the defendant's full name, date of birth, description, and signature and when the officer who conducted the fingerprinting and signed the card testified that the officer would have obtained the information on the card from written identification. The defendant's assertion that the prints on the 1991 card could be those of someone else purporting to be the defendant and using the defendant's identification at the time the prints were obtained amounted to mere speculation, and the state was under no obligation to re-fingerprint the defendant. Hurst v. State, 285 Ga. 294, 676 S.E.2d 165, 2009 Ga. LEXIS 140 (2009) (decided under former O.C.G.A. § 24-3-14).

Trial court did not err in allowing the testimony of the state's fingerprint expert, an employee of the Georgia Bureau of Investigation (GBI), who identified the victim based on the victim's comparison of a post-mortem fingerprint card belonging to the victim and a fingerprint card bearing the victim's known fingerprints because a proper foundation was laid, and the fingerprints cards were properly admitted in evidence as business records under former O.C.G.A. § 24-3-14; the expert testified that the expert was familiar with GBI's methods of recordkeeping, that the GBI maintained post-mortem fingerprint cards in the regular course of business, and that the fingerprint cards were made contemporaneously with autopsies of dead persons conducted at the morgue. Rowe v. State, 302 Ga. App. 239, 690 S.E.2d 884, 2010 Ga. App. LEXIS 99 (2010) (decided under former O.C.G.A. § 24-3-14).

Trial court did not abuse the court's discretion in requiring the defendant's counsel to specify the missing steps of a business record exception after defense counsel objected to the state's introduction in evidence of the defendant's fingerprint cards because even assuming that the trial court erred, the fingerprint cards were not the sole evidence linking the defendant to the crimes; an investigator testified that the investigator made a visual comparison of the defendant's fingerprints and concluded that two latent prints taken from the scene belonged to the defendant, and the investigator also testified that the results of a computer analysis identified a known print of the defendant's as the closest of ten matches to the latent print. Mallory v. State, 306 Ga. App. 684, 703 S.E.2d 120, 2010 Ga. App. LEXIS 1028 (2010) (decided under former O.C.G.A. § 24-3-14).

Police report. — Narratives contained in police reports generated in connection with police investigations are not the appropriate subject of the business records exception to the hearsay rule. To the extent that any case holds that a police report narrative is admissible as a business record, those cases are overruled. Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (decided under former O.C.G.A. § 24-3-14).

Because a form document, entitled the "Henry County Police Department Roadblock & Safety Checkpoint Record," introduced at a motion to suppress hearing by the state was properly admitted as a business record under former O.C.G.A. § 24-3-14, and the testimonial evidence regarding the primary purpose of the roadblock passed constitutional muster, in that it was legitimately conducted as part of a statewide "zero tolerance" campaign, the defendant's motion to suppress the evidence seized as a result was properly denied. Yingst v. State, 287 Ga. App. 43, 650 S.E.2d 746, 2007 Ga. App. LEXIS 867 (2007) (decided under former O.C.G.A. § 24-3-14).

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There is no error in the admission of a police report showing that the defendant had a large amount of change in the defendant's possession when the defendant was apprehended inside a store. Johnson v. State, 168 Ga. App. 271, 308 S.E.2d 681, 1983 Ga. App. LEXIS 2748 (1983), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (decided under former O.C.G.A. § 24-3-14).

Police officer's receipt for property constituted business record. — When an undercover officer who purchased marijuana from defendant testified regarding the purchase, opined that the substance was marijuana, and also identified the receipt for property and testified that the official filled out the receipt in the normal course of business, the receipt for property was clearly identified as a business record and was properly admitted as such over defendant's hearsay objection. Green v. State, 165 Ga. App. 702, 302 S.E.2d 604, 1983 Ga. App. LEXIS 3179 (1983) (decided under former O.C.G.A. § 24-3-14).

Police officer's letter containing compilation of figures furnished by another showing the number of accidents involving left-turning vehicles at an intersection over a three-year period was not admissible as a business record. Loper v. Drury, 211 Ga. App. 478, 440 S.E.2d 32, 1993 Ga. App. LEXIS 1568 (1993), cert. denied, No. S94C0519, 1994 Ga. LEXIS 524 (Ga. Feb. 21, 1994) (decided under former O.C.G.A. § 24-3-14).

With regard to proof of transmittal of contraband to state crime lab by certified mail, the state could only produce a photostatic copy of the certification receipt in lieu of the original and the defendant urged that, without an adequate explanation for the absence of the original certified mail receipt as required by former O.C.G.A. § 24-5-4 (see now O.C.G.A. § 24-10-1002), the chain of custody was not sufficiently proven, but a deputy sheriff testified that the deputy would always make a copy of the certified mail receipt when the deputy mailed contraband to the state crime lab, but had been unable to locate the original receipt for this particular mailing, and identified the deputy's handwriting on the photostatic copy and noted that the certification number was identical to that on the state crime lab report, the trial court was authorized to conclude that the copy of the receipt had been made in the regular course of business so as to be admissible pursuant to former O.C.G.A. §§ 24-3-14 and 24-5-26 (see now O.C.G.A. §§ 24-8-803 and 24-10-1003). Spead v. State, 187 Ga. App. 359, 370 S.E.2d 213, 1988 Ga. App. LEXIS 700 (1988) (decided under former O.C.G.A. § 24-3-14).

9-1-1 call. — 9-1-1 recording was admissible as a business record as it was made by the county 9-1-1 center and accompanied in the record by a written declaration certifying it met the requirements for admissibility and, thus, trial counsel was not ineffective for failing to challenge the recording's admission. Gregory v. State, 342 Ga. App. 411, 803 S.E.2d 367, 2017 Ga. App. LEXIS 347 (2017), cert. denied, No. S18C0007, 2018 Ga. LEXIS 186 (Ga. Mar. 20, 2018), cert. denied, 139 S. Ct. 180, 202 L. Ed. 2d 110, 2018 U.S. LEXIS 5563 (2018).

4. Foundation for Admission

Business records admissible to prove crime. — Defendant's conviction for theft by taking in violation of O.C.G.A. § 16-8-2 was proper under former O.C.G.A. § 24-3-14 because the business records exception did not require that the person laying the foundation for the admission of business records be the custodian of the records. Instead, the former statute required only that the record offered to prove an act or transaction be made in the regular course of business and that it was the regular course of business to make the record at the time of the act or transaction; the witness's lack of personal knowledge regarding how the records were created did not render the records inadmissible, but merely affected the weight given to the evidence. Loyal v. State, 300 Ga. App. 65, 684 S.E.2d 124, 2009 Ga. App. LEXIS 1084 (2009) (decided under former O.C.G.A. § 24-3-14).

Possession of firearm acknowledgment. — Trial court did not abuse the

court's discretion in allowing an officer to testify that the defendant was given written notice that a condition of probation prohibited the defendant from possessing a firearm as the firearms acknowledgement was admissible under the business records exception to the hearsay rule. Beavers v. State, 346 Ga. App. 373, 816 S.E.2d 384, 2018 Ga. App. LEXIS 384 (2018).

Pawn ticket admissible as business record. — Pawn ticket constitutes a contemporaneous record of a transaction made in the regular course of business pursuant to regular business practices, and thus is admissible as evidence of the transaction under former O.C.G.A. § 24-3-14. Baxter v. State, 254 Ga. 538, 331 S.E.2d 561, 1985 Ga. LEXIS 780, cert. denied, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 275, 1985 U.S. LEXIS 5006 (1985); 498 U.S. 1041, 111 S. Ct. 714, 112 L. Ed. 2d 703 (1991) (decided under former O.C.G.A. § 24-3-14).

Report containing opinions of party not before court. — Even if a proper foundation was laid to introduce a laboratory report as a business record, it was still not admissible as a whole if the report contained the opinions or conclusion of a third party not before the court. Department of Human Resources v. Corbin, 202 Ga. App. 10, 413 S.E.2d 484, 1991 Ga. App. LEXIS 1651 (1991), cert. denied, No. S92C0320, 1992 Ga. LEXIS 186 (Ga. Feb. 6, 1992) (decided under former O.C.G.A. § 24-3-14).

Trial court did not err by refusing to admit medical records of non-testifying physicians who had treated plaintiff because defendant failed to lay a proper foundation. Hodson v. Mawson, 227 Ga. App. 490, 489 S.E.2d 855 (decided under former O.C.G.A. § 24-3-14).

Records which contain diagnostic opinions of third parties not before the court are not admissible under the business records exception to the hearsay rule. Baker v. State, 251 Ga. 464, 306 S.E.2d 917, 1983 Ga. LEXIS 859 (1983) (decided under former O.C.G.A. § 24-3-14).

Testimonials from customers. — In a suit between a manufacturer and a purchaser, the testimony of one of the purchaser's customers was properly excluded as hearsay because the testimony did not contain the type of routine facts whose accuracy was not affected by bias, judgment, and memory, as contemplated for the admission of business records under former O.C.G.A. § 24-3-14(b). Pendley Quality Trailer Supply, Inc. v. B&F Plastics, Inc., 260 Ga. App. 125, 578 S.E.2d 915, 2003 Ga. App. LEXIS 325 (2003) (decided under former O.C.G.A. § 24-3-14).

Medical records. — Medical records regarding plaintiff's injuries and treatment were not admissible in the absence of testimony satisfying foundational requirements. Buford v. Benton, 232 Ga. App. 102, 501 S.E.2d 272 (decided under former O.C.G.A. § 24-3-14).

Blood-alcohol test as hospital business record. — When the doctor who treated plaintiff-driver in the hospital emergency room following the accident detected what the doctor thought was the odor of alcohol about the plaintiff-driver and, without a request or direction by the officer, ordered a blood-alcohol test to be performed upon the plaintiff-driver in order to determine the type of anesthesia to use on plaintiff-driver, the blood-alcohol test results were admissible under former O.C.G.A. § 24-3-14 as part of a hospital record made in the regular course of hospital business, and thus, compliance with O.C.G.A. § 40-6-392(a)(2) and (3) was not a prerequisite to the admission of the blood test results. Bynum v. Standard (Chevron) Oil Co., 157 Ga. App. 819, 278 S.E.2d 669, 1981 Ga. App. LEXIS 2022, cert. dismissed, 248 Ga. 254, 285 S.E.2d 186, 1981 Ga. LEXIS 982 (1981) (decided under former O.C.G.A. § 24-3-14).

Trial court properly admitted, at defendant's trial for vehicular homicide, the results of a blood test performed by a hospital, since the test was administered for the purpose of assisting in defendant's medical treatment, was requested by the treating physician and not by a law enforcement officer, and was not obtained for the purpose of showing that defendant was in violation of the driving-under-the-influence statute. Jackson v. State, 196

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Ga. App. 724, 397 S.E.2d 13, 1990 Ga. App. LEXIS 1075 (1990) (decided under former O.C.G.A. § 24-3-14).

Blood alcohol test performed by officer. — There was adequate foundation to admit printouts of test results of defendant's breath test as business records under subsection (b) of former O.C.G.A. § 24-3-14, in that it was in the regular course of the trooper's business to perform such a test, and these printouts were the result of one of those tests conducted in the regular course of the trooper's duties; consequently, there was no violation of defendant's right of confrontation. Sisson v. State, 232 Ga. App. 61, 499 S.E.2d 422, 1998 Ga. App. LEXIS 574 (1998), overruled in part, State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865, 2019 Ga. LEXIS 320 (2019) (decided under former O.C.G.A. § 24-3-14).

Blood test results. — Hospital record showing blood test results was properly admitted as a business records exception to the hearsay rule. Dixon v. State, 227 Ga. App. 533, 489 S.E.2d 532 (decided under former O.C.G.A. § 24-3-14).

Videotape of surgical procedure. — Videotape of arthroscopic surgical procedure performed on plaintiff's shoulder was admissible as a business record since the doctor was available for cross-examination. Freeland v. Baker, 205 Ga. App. 470, 422 S.E.2d 315, 1992 Ga. App. LEXIS 1180 (1992) (decided under former O.C.G.A. § 24-3-14).

Summary prepared in support of demand for payment not "business record". — When a witness's testimony concerning the amount of alleged indebtedness under a lease is derived not from an examination of any books of account or other records prepared in the ordinary course of business, but rather from a summary prepared in support of a demand for payment, this summary is not a "business record" within the meaning of former O.C.G.A. § 24-3-14. Gateway Leasing Corp. v. Heath, 168 Ga. App. 858, 310 S.E.2d 549 (decided under former O.C.G.A. § 24-3-14).

Tax assessments did not fall under the business record exception to hearsay. Sheppard v. Sheppard, 229 Ga. App. 494, 494 S.E.2d 240, 1997 Ga. App. LEXIS 1385 (1997) (decided under former O.C.G.A. § 24-3-14).

List of promissory notes, not made according to regular business procedure, which was offered in evidence to support the witness's contention that such notes existed and to alert the jury of the amount of the notes, was improperly admitted under the business records exception. Growth Properties of Fla., Ltd. v. Wallace, 168 Ga. App. 893, 310 S.E.2d 715, 1983 Ga. App. LEXIS 2948 (1983) (decided under former O.C.G.A. § 24-3-14).

Officer's testimony admissible to prove absence of public record. — Officer's testimony about the search of the Clayton County, Georgia, database was admissible to prove the absence of a public record or entry under O.C.G.A. § 24-8-803(10) because the officer testified that the officer helped to maintain the records of crimes that occurred in Clayton County and that the officer regularly accessed the database to get information about victims and defendants used in the search. Tran v. State, 340 Ga. App. 546, 798 S.E.2d 71, 2017 Ga. App. LEXIS 100 (2017).

Bulldozer operator's worksheets prepared in anticipation of litigation were not admissible as evidence since the operator had not kept a contemporaneous record of the operator's hours or expenses. Goss v. Mathis, 188 Ga. App. 702, 373 S.E.2d 807, 1988 Ga. App. LEXIS 1170 (1988) (decided under former O.C.G.A. § 24-3-14).

Automobile repair estimates were not admissible in a personal injury action arising out of an automobile collision. Moore v. Graham, 221 Ga. App. 616, 472 S.E.2d 152 (decided under former O.C.G.A. § 24-3-14).

Billing statements. — Proof of attorney fees did not require the testimony of the attorneys or paralegals who performed the work; sufficient evidence was presented by a witness who introduced billing statements that were admissible as business records. Santora v. American Combustion, Inc., 225 Ga. App. 771, 485 S.E.2d 34 (decided under former O.C.G.A. § 24-3-14).

Minutes from meeting of church members. — Minutes of a meeting of

church members were not admissible as business records in the absence of a statement that it was the regular course of business to create the minutes. White Missionary Baptist Church v. Trustees of First Baptist Church, 268 Ga. 668, 492 S.E.2d 661, 1997 Ga. LEXIS 740 (1997) (decided under former O.C.G.A. § 24-3-14).

Fiber counts. — There was no evidence that skill of observation or judgment was a significant factor affecting the reliability of fiber counts performed for the former employer by an independent laboratory, or that the accuracy of the counts was affected by bias, so the trial court did not err by admitting the fiber counts under the business records exception to the hearsay rule. Stewart v. CSX Transp., Inc., 268 Ga. App. 434, 602 S.E.2d 665, 2004 Ga. App. LEXIS 941 (2004) (decided under former O.C.G.A. § 24-3-14).

Affidavit by creditor's "recovery specialist." — An affidavit supported by a creditor in support of the creditor's motion for summary judgment satisfied the business records exception when the affiant, a "recovery specialist," stated that the affiant was familiar with the creditor's books and records, that the books and records were kept in the ordinary course of business, that it was the ordinary course of business to keep such books and records, that the entries on the books and records concerning the debtor were posted at or about the time of the transaction, and that the documents named in the affidavit and identifiable in the record showed the terms of the contract between the parties and provided the financial history of the debtor's personal credit line account. Gerben v. Beneficial Ga., Inc., 283 Ga. App. 740, 642 S.E.2d 405, 2007 Ga. App. LEXIS 179 (2007) (decided under former O.C.G.A. § 24-3-14).

Preprinted form documents admissible. — As preprinted form documents contained very specific information concerning goods purchased, and bore signatures on behalf of the buyer and the seller, the trial court was authorized to find sufficient circumstantial evidence of authentication to admit the documents as business records. Nyankojo v. North Star Capital Acquisition, 298 Ga. App. 6, 679 S.E.2d 57, 2009 Ga. App. LEXIS 574 (2009) (decided under former O.C.G.A. § 24-3-14).

Sales acknowledgment. — In a suit against a carrier by a shipper's insurer under 49 U.S.C. § 14706 of the Interstate Commerce Act, the shipper's "sales acknowledgment" business records were admissible to show the sale of the goods to a third party, but were not sufficient to establish the necessary element of proof that the goods were delivered to the carrier in good condition. Transp. Solutions, Inc. v. St. Paul Mercury Ins. Co., 297 Ga. App. 757, 678 S.E.2d 201, 2009 Ga. App. LEXIS 537 (2009) (decided under former O.C.G.A. § 24-3-14).

Creditor failed to establish link in chain of assignment of debt. — Chapter 7 debtor's objections to three proofs of claim held by a creditor who was the fourth assignee of each of the debts were sustained as the creditor failed to establish any links in the chain of assignment as required under Georgia law and failed to lay a proper foundation for documents used as required by the Business Records Act, former O.C.G.A. § 24-3-14. An affidavit of sale from an authorized representative of one of the assignors was deficient because the affiant's testimony was not based on personal knowledge and because the only business record introduced was a contract assigning unidentified accounts; there were no documents identifying the account holder, the account number, and the account balance. In re Stephens, No. JTL, 443 B.R. 225, 2010 Bankr. LEXIS 4704 (Bankr. M.D. Ga. 2010), overruled in part, Pursley v. eCAST Settlement Corp. (In re Pursley), 451 B.R. 213, 2011 Bankr. LEXIS 2386 (Bankr. M.D. Ga. 2011) (decided under former O.C.G.A. § 24-3-14).

Evidence was properly admitted under former O.C.G.A. § 24-3-14 in the following cases. — See Haygood v. Smith, 80 Ga. App. 461, 56 S.E.2d 310, 1949 Ga. App. LEXIS 862 (1949) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Guthrie v. Berrien Prods. Co., 91 Ga. App. 45, 84 S.E.2d 596, 1954 Ga. App. LEXIS 856 (1954) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Crooke v. Elliott, 96 Ga. App. 314, 99 S.E.2d 842, 1957 Ga. App.

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LEXIS 568 (1957) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Home Fin Co. v. Smith, 116 Ga. App. 76, 156 S.E.2d 522, 1967 Ga. App. LEXIS 700 (1967) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Calhoun v. Chappell, 117 Ga. App. 865, 162 S.E.2d 300, 1968 Ga. App. LEXIS 1271 (1968), overruled in part, Brown v. State, 274 Ga. 31, 549 S.E.2d 107, 2001 Ga. LEXIS 534 (2001) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Huff v. State, 141 Ga. App. 66, 232 S.E.2d 403, 1977 Ga. App. LEXIS 1765 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Tucker v. Whitehead, 155 Ga. App. 104, 270 S.E.2d 317, 1980 Ga. App. LEXIS 2476 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Head v. State, 246 Ga. 360, 271 S.E.2d 452, 1980 Ga. LEXIS 1108 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Anderson v. Chatham, 190 Ga. App. 559, 379 S.E.2d 793, 1989 Ga. App. LEXIS 287 (1989) (decided under former O.C.G.A. § 24-3-14); Johnson v. State, 266 Ga. 775, 470 S.E.2d 637 (decided under former O.C.G.A. § 24-3-14); Tolver v. State, 269 Ga. 530, 500 S.E.2d 563 (decided under former O.C.G.A. § 24-3-14).

Recorded Recollections

1. In General

Obvious purpose of the former statute was to allow proper and legitimate aid to a witness which would enable the witness to testify fully as to the witness's knowledge. Whitaker v. State, 199 Ga. 344, 34 S.E.2d 499, 1945 Ga. LEXIS 316 (1945) (decided under former Code 1933, § 38-1707).

Illegal evidence must not be allowed to reach the jury on the pretense that the evidence was offered in compliance with the former statute. Whitaker v. State, 199 Ga. 344, 34 S.E.2d 499, 1945 Ga. LEXIS 316 (1945) (decided under former Code 1933, § 38-1707); Hull v. State, 265 Ga. 757, 462 S.E.2d 596, 1995 Ga. LEXIS 855 (1995) (decided under former O.C.G.A. § 24-9-69).

Past and present recollections distinguished. — For discussion of the distinction between cases where the witness finally testifies to a "past" recollection, and where the witness finally testifies to a "present" recollection, see Stansall v. Columbian Nat'l Life Ins. Co., 32 Ga. App. 87, 122 S.E. 733, 1924 Ga. App. LEXIS 290 (1924) (decided under former Civil Code 1910, § 5878).

Testimony must be based on memory and not on memorandum. — Witness may, for the purpose of refreshing the witness's recollection, use any memoranda useful for that purpose; and the witness's testimony will not be objectionable if it is not dependent upon the memoranda, but is based upon the memory of the witness, even though the memoranda may be necessary in order to refresh the witness's recollection. Southern Ry. v. Cowan, 52 Ga. App. 360, 183 S.E. 331, 1936 Ga. App. LEXIS 632 (1936) (decided under former Code 1933, § 38-1707).

Independent memory of contents not required. — Witness may testify from the witness's memory refreshed by a writing that the witness made, though the witness has no independent memory of the writing's contents. Bridges v. Mutual Benefit Health & Accident Ass'n, 49 Ga. App. 552, 176 S.E. 543, 1934 Ga. App. LEXIS 482 (1934) (decided under former Code 1933, § 38-1707); Steinmetz v. Chambley, 90 Ga. App. 519, 83 S.E.2d 318, 1954 Ga. App. LEXIS 747 (1954) (decided under former Code 1933, § 38-1707); Woodward v. City Council, 117 Ga. App. 857, 162 S.E.2d 304, 1968 Ga. App. LEXIS 1266 (1968) (decided under former Code 1933, § 38-1707); State Hwy. Dep't v. Godfrey, 118 Ga. App. 560, 164 S.E.2d 340, 1968 Ga. App. LEXIS 1458 (1968) (decided under former Code 1933, § 38-1707); Marby v. Henley, 123 Ga. App. 561, 181 S.E.2d 884, 1971 Ga. App. LEXIS 1296 (1971) (decided under former Code 1933, § 38-1707).

Does not affect probative value. — Rule relates as to the admissibility of testimony, and not a rule for the determination of the testimony's probative value. Scott v. Gidelight Mfg. Co., 37 Ga. App. 240, 139 S.E. 686, 1927 Ga. App. LEXIS 606 (1927) (decided under former Civil Code 1910, § 5873); Kines v. State, 67 Ga. App. 314, 20 S.E.2d 89, 1942 Ga. App.

LEXIS 400 (1942) (decided under former Code 1933, § 38-1707).

Reading record in hearing of jury. — Witness may not only read the witness's own deposition but it may be read to the witness in the presence and hearing of the jury to refresh the witness's memory. Burney v. Ball, 24 Ga. 505, 1858 Ga. LEXIS 243 (1858) (decided under former law).

Waiver. — When only part of the memorandum was admitted in evidence at the instance of the party who offered the witness, over objection urged by the opposite party that it was inadmissible, the putting in evidence later by the opposite party of the remainder of the memorandum amounted to a waiver of the party's objection. Scott v. Gidelight Mfg. Co., 37 Ga. App. 240, 139 S.E. 686, 1927 Ga. App. LEXIS 606 (1927) (decided under former Civil Code 1910, § 5873).

Error in allowing counsel to view witness's notes harmless. — Though the trial court erred in permitting the plaintiff's counsel to examine the notes used by the defendant's witness to refresh the witness's memory, the defendant failed to show how this error prejudiced the defense, therefore, the error was harmless. Seaboard Coastline R.R. v. Delahunt, 179 Ga. App. 647, 347 S.E.2d 627, 1986 Ga. App. LEXIS 2661 (1986), overruled, CSX Transp. v. Williams, 230 Ga. App. 573, 497 S.E.2d 66, 1998 Ga. App. LEXIS 225 (1998) (decided under former O.C.G.A. § 24-9-69).

Preserving error. — While it was true that under former O.C.G.A. § 24-9-69, a witness whose memory was refreshed with a document had to continue their testimony on the basis of recollection alone, when such was not the basis of the defendant's objection at trial, the claim was not preserved for review. Hunter v. State, 282 Ga. App. 355, 638 S.E.2d 804, 2006 Ga. App. LEXIS 1391 (2006) (decided under former O.C.G.A. § 24-9-69).

2. Written Instrument or Memorandum

Either personal preparation or knowledge that facts true. — In order to testify positively from paper itself, the witness must either have made the paper personally, or, at some time when facts were fresh in the witness's memory, the witness must have known the facts stated in the paper to be correct. Bradshaw v. State, 162 Ga. App. 750, 293 S.E.2d 360, 1982 Ga. App. LEXIS 3165 (1982) (decided under former O.C.G.A. § 24-9-69).

After a defendant was charged with DUI, the trial court did not err in allowing one of the police witnesses to refresh the witness's recollection from a written document without any showing that the witness had prepared the document personally; so long as a witness is testifying from personal recollection, the witness is entitled to have the witness's memory refreshed by a document which the witness personally did not prepare. Ussery v. State, 195 Ga. App. 394, 393 S.E.2d 522, 1990 Ga. App. LEXIS 485 (1990) (decided under former O.C.G.A. § 24-9-69).

Paper itself as evidence. — When a witness testifies from the witness's recollection refreshed as provided by statute, the paper itself, where not otherwise binding upon the party against whom the witness testifies, is without probative value and is not admissible as documentary evidence for any purpose. Stansall v. Columbian Nat'l Life Ins. Co., 32 Ga. App. 87, 122 S.E. 733, 1924 Ga. App. LEXIS 290 (1924) (decided under former Civil Code 1910, § 5873).

Excluding such memoranda as are admissible as business records or as part of the res gestae, it is generally held that the memorandum has no present evidentiary value, since it is not the memorandum that is the evidence, but the recollection of the witness. An exception is when the opposite side wished to introduce the memorandum in order to weaken the effect of the testimony. Woodward v. City Council, 117 Ga. App. 857, 162 S.E.2d 304, 1968 Ga. App. LEXIS 1266 (1968) (decided under former Code 1933, § 38-1707); State Hwy. Dep't v. Godfrey, 118 Ga. App. 560, 164 S.E.2d 340, 1968 Ga. App. LEXIS 1458 (1968) (decided under former Code 1933, § 38-1707); Mason v. State, 147 Ga. App. 179, 248 S.E.2d 302, 1978 Ga. App. LEXIS 2840 (1978) (decided under former Code 1933, § 38-1707).

Memorandum prepared by another. — If the writing, instrument, document, or other thing from which the witness

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refreshes the witness's recollection was made in the witness's presence or at the witness's direction and if the witness knows that it contains true and correct information and is willing to swear positively to that effect, it is immaterial that the witness did not personally make the thing from which the witness testified. Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639, 1959 Ga. App. LEXIS 902 (1959) (for comment, see 22 Ga. B.J. 380 (1960)).

Although a witness may refresh the witness's memory from a writing prepared by another, the witness must nevertheless testify from the witness's memory thus refreshed. When the document is prepared by a third person not in the presence of a witness, the memory is not refreshed by such memorandum and such testimony is inadmissible. Zilinmon v. State, 234 Ga. 535, 216 S.E.2d 830, 1975 Ga. LEXIS 1181 (1975), overruled in part, Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530, 2006 Ga. LEXIS 840 (2006) (decided under former Code 1933, § 38-1707).

In view of a prosecution witness's averment that the witness was testifying from the witness's refreshed memory, the trial court did not err in permitting the witness to testify to the tag number on defendant's truck, even though the witness refreshed the witness's memory by viewing a computer printout bearing the tag number; since the witness was entitled to have the witness's memory refreshed by a document which the witness personally did not prepare. Byrd v. State, 182 Ga. App. 284, 355 S.E.2d 666, 1987 Ga. App. LEXIS 2608 (1987) (decided under former O.C.G.A. § 24-9-69).

Trial court correctly allowed a testifying police officer to refresh the officer's memory of the incident using a report written by someone else; former O.C.G.A. § 24-9-69, permitted a witness to refresh and assist the witness's memory by the use of any written instrument or memorandum. Penland v. State, 258 Ga. App. 659, 574 S.E.2d 880, 2002 Ga. App. LEXIS 1538 (2002) (decided under former O.C.G.A. § 24-9-69).

Witness at some time must have had personal knowledge of the memorandum's correctness. Davis v. State, 91 Ga. 167, 17 S.E. 292 (1893) (decided under former Code 1882, § 3866); Hematite Mining Co. v. East Tenn., Va. & Ga. Ry., 92 Ga. 268, 18 S.E. 24 (1893) (decided under former Code 1882, § 3866); Jones v. State, 99 Ga. 46, 25 S.E. 617 (1896) (decided under former Penal Code 1895, § 1020); Lenney v. Finley, 118 Ga. 427, 45 S.E. 317 (1903) (decided under former Civil Code 1895, § 5284); Shrouder v. State, 121 Ga. 615, 49 S.E. 702 (1905) (decided under former Penal Code 1895, § 1020); Smith v. City of Atlanta, 22 Ga. App. 511, 96 S.E. 334 (1918) (decided under former Civil Code 1910, § 5873); Stansall v. Columbian Nat'l Life Ins. Co., 32 Ga. App. 87, 122 S.E. 733, cert. denied, 32 Ga. App. 807 (1924).Herring v. State, 122 Ga. App. 730, 178 S.E.2d 551 (1970) (decided under former Code 1933, § 38-1707); Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971) , cert. denied, 405 U.S. 1050, 92 S. Ct. 1511, 31 L. Ed. 2d 786 (1972).Moore v. State, 240 Ga. 807, 243 S.E.2d 1, 1978 Ga. LEXIS 839, cert. denied, 439 U.S. 903, 99 S. Ct. 268, 58 L. Ed. 2d 249, 1978 U.S. LEXIS 3404 (1978).

Investigation reports prepared by witness. — In a proceeding to terminate the parental rights of a parent who had been convicted of molesting the parent's children, the trial court did not err in allowing a probation official to use a confidential presentence investigation report to refresh the official's recollection about interviews the official had with the parent. In re S.M.L., 228 Ga. App. 81, 491 S.E.2d 186 (decided under former O.C.G.A. § 24-9-69).

It was not improper for an officer to use a police report to refresh the officer's recollection about a prior driving under the influence incident involving the defendant. Becker v. State, 280 Ga. App. 97, 633 S.E.2d 436, 2006 Ga. App. LEXIS 766 (2006) (decided under former O.C.G.A. § 24-9-69).

Investigation reports prepared by another witness. — Investigating officer's report can be used to refresh another witness's recollection. Brown v. State, 247 Ga. App. 741, 545 S.E.2d 114, 2001 Ga.

App. LEXIS 107 (2001) (decided under former O.C.G.A. § 24-9-69).

Statement as past recollection recorded. — Although it is preferable to ask a witness specifically at trial whether the witness had told the truth as the witness then perceived it when the witness gave the witness's oral statement and whether a transcript thereof constituted an accurate recording in toto of what the witness had personally stated, since an adequate foundation was established, the transcribed statement may qualify as past recollection recorded under former O.C.G.A. § 24-9-69. Platt v. National Gen. Ins. Co., 205 Ga. App. 705, 423 S.E.2d 387, 1992 Ga. App. LEXIS 1304 (1992), cert. denied, No. S93C0062, 1992 Ga. LEXIS 968 (Ga. Nov. 13, 1992) (decided under former O.C.G.A. § 24-9-69).

Statement was inadmissible as a past recollection recorded or under the medical diagnosis exception to the hearsay rule because after reviewing the typed statement, the social worker testified that the worker's memory was not refreshed and the worker was unwilling to swear that the statement accurately reflected the interview as required under former O.C.G.A. § 24-9-69. Sandlin v. State, 273 Ga. 440, 542 S.E.2d 496, 2001 Ga. LEXIS 146 (2001) (decided under former O.C.G.A. § 24-9-69).

Transcript allowed to go out with jury. — Transcript of statement by witness which was admissible as past recollection recorded should not have been allowed to go out with the jury during deliberation. Platt v. National Gen. Ins. Co., 205 Ga. App. 705, 423 S.E.2d 387, 1992 Ga. App. LEXIS 1304 (1992), cert. denied, No. S93C0062, 1992 Ga. LEXIS 968 (Ga. Nov. 13, 1992) (decided under former O.C.G.A. § 24-9-69).

Cross-examination concerning contents. — Cross-examiner should and does possess the right to quiz the witness concerning the contents of the written instrument without introduction of the document. In doing so the witness is entitled to shed light on the relevant issues whether this be favorable or unfavorable to the client's cause. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860, 1972 Ga. App. LEXIS 919 (1972) (decided under former Code 1933, § 38-1707).

Learned treatises. — In a medical malpractice case, because the Katz Committee Findings was used to unfairly impeach the plaintiff's expert witness as to the core issue of the standard of care, and because the sanctioning of a different anesthesiologist by the American Society of Anesthesiologists (ASA) for violating ASA expert-witness guidelines was conflated with standard-of-care issues reserved for the jury, the admission of that evidence was not harmless, was in fact prejudicial, and the plaintiff was entitled to a new trial. Moore v. WellStar Health System, Inc., 349 Ga. App. 834, 824 S.E.2d 787, 2019 Ga. App. LEXIS 211 (2019), cert. denied, No. S19C1100, 2019 Ga. LEXIS 815 (Ga. Nov. 18, 2019), cert. denied, No. S20C0381, 2019 Ga. LEXIS 822 (Ga. Nov. 18, 2019).

In a medical malpractice case, there was no basis to find that the Katz Committee Findings fell within the scope of the learned treatise exception as that exception did not expressly reference that type of document, which was written by the American Society of Anesthesiologists (ASA) about its own disciplinary proceedings against a different anesthesiologist, not involved in the current case, for a violation of specific ASA guidelines. Moore v. WellStar Health System, Inc., 349 Ga. App. 834, 824 S.E.2d 787, 2019 Ga. App. LEXIS 211 (2019), cert. denied, No. S19C1100, 2019 Ga. LEXIS 815 (Ga. Nov. 18, 2019), cert. denied, No. S20C0381, 2019 Ga. LEXIS 822 (Ga. Nov. 18, 2019).

Examination of memorandum by opposing counsel. — Trial court does not err in refusing to allow defense counsel to examine all a police officer's notes in the officer's file, although defense counsel is allowed to cross-examine the officer with reference to the notes used to refresh the officer's recollection. Sprague v. State, 147 Ga. App. 347, 248 S.E.2d 711, 1978 Ga. App. LEXIS 2686 (1978) (decided under former Code 1933, § 38-1707). ; See also Ellison v. Robinson, 96 Ga. App. 882, 101 S.E.2d 902, 1958 Ga. App. LEXIS 937 (1958).

Use of codefendant's testimony prohibited. — Witness may not refresh witness's memory from testimony given at the trial of another defendant under the

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same indictment. Brown v. State, 28 Ga. 199, 1859 Ga. LEXIS 180 (1859) (decided under former law).

3. Illustrations

Recollection refreshed. — Testimony was admissible in the following cases, when a witness's recollection was refreshed by a memorandum: Veal v. Wood, 29 Ga. App. 94, 113 S.E. 818, 1922 Ga. App. LEXIS 75 (1922) (decided under former Civil Code 1910, § 5873); Lazar v. Black & White Cab Co., 50 Ga. App. 567, 179 S.E. 250, 1935 Ga. App. LEXIS 224 (1935) (decided under former Code 1933, § 38-1707).

Since the doctor was present when the plaintiff was brought into the hospital immediately after plaintiff's injury, was present when X-ray pictures were taken and developed, examined the x-rays immediately thereafter and ascertained therefrom that the nature of the plaintiff's injury was such that it was necessary to refer the plaintiff to an orthopedic surgeon, the refusal of the court to allow the witness to refresh the witness's memory under the circumstances shown was probably harmful error and required a reversal of the case. Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639, 1959 Ga. App. LEXIS 902 (1959) (for comment, see 22 Ga. B. J. 380 (1960)) (decided under former Code 1933, § 38-1707).

Trial court did not improperly allow a prosecutor to refresh a victim's recollection with a letter the victim wrote to the district attorney's office expressing fear of the defendant as: (1) the defense counsel asked to see the letter before the prosecutor handed the letter to the victim; (2) the prosecutor granted that request; (3) after previewing the letter, the defense counsel did not object to the victim using the letter to refresh the victim's memory; and (4) the letter was neither admitted into evidence nor read to the jury. Haggins v. State, 277 Ga. App. 742, 627 S.E.2d 448, 2006 Ga. App. LEXIS 194 (2006) (decided under former O.C.G.A. § 24-9-69).

Detective's use of a photograph to refresh that detective's recollection as to which of the codefendants was the defendant on trial went to the weight of the detective's testimony, but did not require that the identification of the defendant on trial be excluded due to a substantial likelihood of irreparable misidentification. Ford v. State, 285 Ga. App. 106, 645 S.E.2d 590, 2007 Ga. App. LEXIS 428 (2007) (decided under former O.C.G.A. § 24-9-69).

Trial court did not err in allowing an attorney to read a letter memorializing a conversation between the attorney and a decedent because a proper foundation was laid for the attorney to read the letter to the jury as a past recollection recorded when the attorney testified that the attorney personally prepared the letter and that the conversation concerning the scope of a receipt that was recounted in the letter occurred no more than three days before the letter was prepared; although the attorney could not presently recall being told by the decedent that the release from indebtedness contained in the receipt was intended to be limited in scope, the attorney testified that based on the wording of the letter the attorney believed that such a conversation with the decedent and the executor's two siblings had taken place, and that testimony established that the attorney memorialized the conversation in the letter when it was fresh in the attorney's mind and that the attorney believed that the letter was true and accurate when written. Jerkins v. Jerkins, 300 Ga. App. 703, 686 S.E.2d 324, 2009 Ga. App. LEXIS 1251 (2009) (decided under former O.C.G.A. § 24-9-69).

Victim's statements that the victim was the person in the video, remembered giving a statement, had knowledge as to what the victim was talking about, told the truth when giving the statement, and things were fresh in the victim's mind when giving the statement were sufficient to establish that the videotaped statement concerned a matter about which the victim had knowledge but at trial had insufficient recollection. Pierce v. State, 302 Ga. 389, 807 S.E.2d 425, 2017 Ga. LEXIS 940 (2017).

Swearing positively from paper. — Testimony was admissible in the following cases when witness swore positively from

the paper that the facts contained therein were correct: Williams v. C. & G.H. Kelsey & Halsted, 1849 Ga. LEXIS 47, 6 Ga. 365 (1849) (decided under former law); Black v. Thornton, 30 Ga. 361, 1860 Ga. LEXIS 103 (1860) (decided under former law); Schmidt v. Wambacker & Weil, 62 Ga. 321, 1879 Ga. LEXIS 516 (1879) (decided under former Code 1873, § 3866); Scott v. Gidelight Mfg. Co., 37 Ga. App. 240, 139 S.E. 686, 1927 Ga. App. LEXIS 606 (1927) (decided under former Civil Code 1910, § 5873); Clackum v. State, 55 Ga. App. 44, 189 S.E. 397, 1936 Ga. App. LEXIS 424 (1936) (decided under former Code 1933, § 38-1707); Elliott v. Georgia Power Co., 58 Ga. App. 151, 197 S.E. 914, 1938 Ga. App. LEXIS 213 (1938), superseded by statute as stated in Payne v. Sherrer, 217 Ga. App. 761, 458 S.E.2d 916, 1995 Ga. App. LEXIS 580 (1995) (decided under former Code 1933, § 38-1707); Brown-Rogers-Dixson Co. v. Southern Ry., 79 Ga. App. 449, 53 S.E.2d 702, 1949 Ga. App. LEXIS 669 (1949) (decided under former Code 1933, § 38-1707); Haskins v. Carson, 115 Ga. App. 336, 154 S.E.2d 626, 1967 Ga. App. LEXIS 1100 (1967) (decided under former Code 1933, § 38-1707).

Before a witness may swear positively from a paper it is not necessary that the witness show a present recollection of the contents of the document. Mincey v. State, 257 Ga. 500, 360 S.E.2d 578, 1987 Ga. LEXIS 918 (1987) (decided under former O.C.G.A. § 24-9-69).

Reading from paper for rebuttal purposes. — Trial court properly permitted an arresting officer to read that portion of the form containing the Miranda warnings which the witness had administered to the defendant for the sole purpose of rebutting the defendant's contention that the defendant had not been advised of the defendant's Miranda rights. Adams v. State, 260 Ga. 298, 392 S.E.2d 866, 1990 Ga. LEXIS 257 (1990) (decided under former O.C.G.A. § 24-9-69).

Inadequate basis for use of memorandum. — Witness could not, over objection, testify to the contents of a typewritten signed memorandum which purported to be a statement of the witness's account with the plaintiff when on cross-examination the witness admitted that the witness did not prepare the memorandum, that the witness did not know who did, that the witness received the memorandum through the mail, but the witness did not recall even the return address on the envelope, that the memorandum was not signed, and that the witness had no independent knowledge of the memorandum's contents or that the items had in fact been charged back to the witness's account. Stalvey v. Varn Motors & Fin. Co., 56 Ga. App. 696, 193 S.E. 627, 1937 Ga. App. LEXIS 207 (1937) (decided under former Code 1933, § 38-1707).

No refreshment absent personal knowledge. — Trial court did not err by refusing to allow one of the prosecution witnesses (a police officer) to refresh the officer's recollection from a police report prepared by another officer since the officer testified that the officer had no such personal knowledge. Sweat v. State, 203 Ga. App. 290, 416 S.E.2d 845, 1992 Ga. App. LEXIS 503 (1992) (decided under former O.C.G.A. § 24-9-69).

Refusal to refresh recollection appropriate. — Refusal to allow the defendant to use an officer's report to refresh a witness's recollection was harmless error since the defendant's goal was to use the witness's refreshed recollection to impeach the witness in an impermissible manner — with a document created by one other than the witness and which the witness had not signed. Woods v. State, 269 Ga. 60, 495 S.E.2d 282 (decided under former O.C.G.A. § 24-9-69).

Pursuant to former O.C.G.A. § 24-9-69, a witness was allowed to refresh and assist the witness's memory by the use of any written instrument or memorandum; trial counsel's failure to object to the refreshing of a witness's recollection was not ineffective assistance of counsel. Usher v. State, 258 Ga. App. 459, 574 S.E.2d 580, 2002 Ga. App. LEXIS 1481 (2002) (decided under former O.C.G.A. § 24-9-69).

Refreshing police officer's recollection on be on the lookout bulletin. — Trial court's refusal in a suppression hearing to allow a police officer to refresh the officer's recollection about the contents of a be on the lookout police dispatch was harmless error because, given the other evidence that was presented, it did not

Illustrations (Cont'd)

contribute either to the court's decision on the suppression motion or to the court's adjudication of a juvenile as delinquent. In re H.A., 308 Ga. App. 111, 706 S.E.2d 615, 2011 Ga. App. LEXIS 133 (2011) (decided under former O.C.G.A. § 24-9-69).

Failure to object to reading of transcript from preliminary hearing did not constitute ineffective assistance of counsel. — As counsel allowed a detective to read from a transcript of the defendant's preliminary hearing so that counsel could cross-examine the detective about a "blank" in the transcript and thus imply that it did not reflect the defendant's entire statement, counsel's strategic decision not to object to the reading of the transcript under former O.C.G.A. § 24-9-69 did not constitute ineffective assistance. Nesbitt v. State, 296 Ga. App. 139, 673 S.E.2d 652, 2009 Ga. App. LEXIS 152 (2009) (decided under former O.C.G.A. § 24-9-69).

Public Records and Reports

Federal interpretation on utilization of certified document to prove absence of public records. — The Eleventh Circuit held that a certified document is admissible under Fed. R. Evid. 803(10) to prove the absence of public records. United States v. Herrera-Britto, 739 F.2d 551, 1984 U.S. App. LEXIS 19395 (11th Cir. 1984).

Admission of recall request letter from National Highway Traffic Safety Administration Office of Defect Investigation. — In a vehicle collision that resulted in the death of the plaintiffs' four-year-old child, the trial court did not abuse the court's discretion in admitting evidence of the National Highway Traffic Safety Administration Office of Defect Investigation's recall request letter under the public records exception to the hearsay rule because, inter alia, some of the findings in the recall request were not labeled as tentative, including the findings that the defendant was aware of the safety benefits of placing the tank in front of the rear axle; and that a 1993 study of fire related deaths in rear crashes concluded that the increasing relocation of tanks ahead of the rear axle had a substantial effect on the reduction of those deaths in rear impacts. Chrysler Group, LLC v. Walden, 339 Ga. App. 733, 792 S.E.2d 754, 2016 Ga. App. LEXIS 646 (2016), aff'd, 303 Ga. 358, 812 S.E.2d 244, 2018 Ga. LEXIS 154 (2018).

Admission of laboratory findings. — Since Ga. L. 1953, Jan.-Feb. Sess., p. 602, § 19 did not change the rules of competency or relevancy, and since the most that laboratory evidence procured under the statute could tend to prove was the analysis of the particular blood sample tested, it was necessary for the admissibility of this evidence to lay a proper foundation by showing the identity of the blood sample tested with the decedent and the chain of custody to render the report admissible as relevant evidence. Interstate Life & Accident Ins. Co. v. Whitlock, 112 Ga. App. 212, 144 S.E.2d 532, 1965 Ga. App. LEXIS 650 (1965) (decided under former Ga. L. 1953, Jan.-Feb. Sess., p. 602, § 19).

It was not error to exclude portion of death certificate containing coroner's findings and to refuse to admit into evidence the coroner's jury verdict in action on insurance policy itself or for purpose of negating insurer's bad faith. Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349, 1980 Ga. App. LEXIS 2506 (1980) (decided under former Ga. L. 1953, Jan.-Feb. Sess., p. 602, § 19).

Court of Appeals may not take judicial notice of rules and regulations of Public Service Commission. Atlanta Gas Light Co. v. Newman, 88 Ga. App. 252, 76 S.E.2d 536, 1953 Ga. App. LEXIS 1059 (1953) (decided under former Code 1933, § 93-504).

Police report in negligence action. — Trial court erred by holding that a police report was inadmissible hearsay because to the extent the police report referenced observations made by the officer, the content of the police report was admissible, and the error was not harmless since the trial court expressly noted in the court's order that if the information in the police report were admissible, the trial court would find a question of fact on

the issue of negligence. Maloof v. MARTA, 330 Ga. App. 763, 769 S.E.2d 174, 2015 Ga. App. LEXIS 57 (2015).

Notice and letter of unhabitability admissible as public records. — Trial court erred in granting the landlord and property management company (defendants) summary judgment on their counterclaim against the tenants because the tenants provided some evidence that the defendants failure to maintain the apartment in good repair rendered the apartment unfit for habitation, forcing the tenants to vacate the apartment, including the notice and letter from the city of unhabitability, which were admissible under the public records and reports exception to the hearsay rule. Ellis v. Hartford Run Apartments, LLC, 335 Ga. App. 118, 779 S.E.2d 103, 2015 Ga. App. LEXIS 633 (2015), cert. denied, No. S16C0607, 2016 Ga. LEXIS 289 (Ga. Apr. 4, 2016).

Investigative report into public school student's death admissible. — In a suit against a public school teacher arising out of the death of a student in the teacher's classroom, evidence from an independent investigative report on the student's death was admissible on a motion for summary judgment under O.C.G.A. § 24-8-803(8)(c), given there was no reason to question its trustworthiness. Barnett v. Atlanta Independent School System, 339 Ga. App. 533, 792 S.E.2d 474, 2016 Ga. App. LEXIS 661 (2016), aff'd in part, vacated in part, 302 Ga. 845, 809 S.E.2d 813, 2018 Ga. LEXIS 41 (2018).

Investigative report into death of public school student. — In a suit by a deceased high school student's parents against a teacher for leaving the classroom unsupervised, an investigator's report was admissible in evidence under O.C.G.A. § 24-8-803(8)(c), although witnesses interviewed in the report did not testify; such factual findings resulting from an investigation made pursuant to authority granted by law were admissible unless a lack of trustworthiness was shown. Barnett v. Atlanta Independent School System, 339 Ga. App. 533, 792 S.E.2d 474, 2016 Ga. App. LEXIS 661 (2016), aff'd in part, vacated in part, 302 Ga. 845, 809 S.E.2d 813, 2018 Ga. LEXIS 41 (2018).

Admission of gang members' convictions. — O.C.G.A. § 16-15-9 was declared unconstitutional on the statute's face under the Sixth Amendment's confrontation clause to the extent that the statute authorized the admission of the convictions of non-testifying non-parties as evidence of a criminal street gang; further, other alleged gang members' convictions were not admissible as business records or public records because those records were testimonial. State v. Jefferson, 302 Ga. 435, 807 S.E.2d 387, 2017 Ga. LEXIS 931 (2017).

Interest in Property

1. In General

Affidavit is a special pleading to be employed solely as a basis for raising and trying an issue as to the genuineness of a recorded deed. Haithcock v. Sargent, 145 Ga. 84, 88 S.E. 550, 1916 Ga. LEXIS 185 (1916) (decided under former Civil Code 1910, § 4210).

Former statute was intended to qualify the ordinary effect of registry, leaving the genuineness of the deed to be proved as with respect to other papers not required by law to be registered. Hanks v. Phillips, 39 Ga. 550, 1869 Ga. LEXIS 237 (1869) (decided under former Code 1868, § 2670).

Effect of the former statute was to make registration the equivalent of proof in the absence of an attack for forgery. McArthur v. Morrison, 107 Ga. 796, 34 S.E. 205, 1899 Ga. LEXIS 158 (1899) (decided under former Civil Code 1895, § 3628).

For former statute to apply, deed must have been recorded in county in which land laid; it was not sufficient if the deed had been recorded in an adjoining county in which other land embraced in the deed laid. Kennedy v. Harden, 92 Ga. 230, 18 S.E. 542, 1893 Ga. LEXIS 47 (1893) (decided under former Code 1882, § 2712).

Evidence as to what specific persons said about marker is hearsay. — When the evidence offered is not as to the general reputation of a boundary pin or as to the witness's knowledge of the pin, but is what specific persons said about a specific pin, it is clear that such testimony, being hearsay and inadmissible, is prop-

In General (Cont'd)

erly ruled out. Collier v. Stokes, 213 Ga. 464, 99 S.E.2d 821, 1957 Ga. LEXIS 414 (1957) (decided under former Code 1933, § 85-1602).

2. Applicability to Instruments and Issues

Former statute had no application to an unregistered deed. Payne v. Ormond, 44 Ga. 514, 1871 Ga. LEXIS 416 (1871) (decided under former Code 1868, § 2670); Gorham v. Montfort, 137 Ga. 134, 72 S.E. 893, 1911 Ga. LEXIS 328 (1911) (decided under former Civil Code 1910, § 4210).

Former statute applied to any registered deed though more than 30 years old. Hill v. Nisbet, 58 Ga. 586, 1877 Ga. LEXIS 177 (1877) (decided under former Code 1873, § 2712); Patterson v. Collier, 75 Ga. 419, 1885 Ga. LEXIS 148 (1885) (decided under former Code 1882, § 2712); Leverett v. Tift, 6 Ga. App. 90, 64 S.E. 317, 1909 Ga. App. LEXIS 190 (1909) (decided under former Civil Code 1895, § 3628).

Copy of a deed when admissible as proof may also be attacked for forgery. Patterson v. Collier, 75 Ga. 419, 1885 Ga. LEXIS 148 (1885) (decided under former Code 1882, § 2712).

Copy of deed not properly recorded is not admissible into evidence. Thus, the question of forgery is immaterial. Kennedy v. Harden, 92 Ga. 230, 18 S.E. 542, 1893 Ga. LEXIS 47 (1893) (decided under former Code 1882, § 2712); Crummey & Hamilton v. Bentley, 114 Ga. 746, 40 S.E. 765, 1902 Ga. LEXIS 783 (1902) (decided under former Civil Code 1895, § 3628).

Only issue permissible under the former statute is that of forgery vel non. Roberts v. Roberts, 101 Ga. 765, 29 S.E. 271, 1897 Ga. LEXIS 318 (1897) (decided under former Civil Code 1895, § 3628).

Former statute, being a special statutory proceeding designed to answer the one purpose of calling in question and trying the one issue as to the execution of the deed, there is no authority of law for drawing into the trial of that issue questions foreign to the fact of execution, and which tend only to raise an estoppel against the alleged grantor. Richards v. Smith, 170 Ga. 398, 153 S.E. 44, 1930 Ga. LEXIS 464 (1930) (decided under former Civil Code 1910, § 4210).

Former statute applies only when recorded deed was collaterally introduced in evidence, and did not refer to instruments forming the basis of the action. Steiner v. Blair, 38 Ga. App. 753, 145 S.E. 471, 1928 Ga. App. LEXIS 436 (1928) (decided under former Civil Code 1910, § 4210).

3. Admissibility of Recorded Instrument

Recorded deed admissible without further proof of execution. — Deed attested by three witnesses, one of whom was an officer authorized by law to attest deeds, and recorded was admissible in evidence without further proof of the deed's execution, and all presumptions were in favor of the deed's genuineness. Guthrie v. Gaskins, 171 Ga. 303, 155 S.E. 185, 1930 Ga. LEXIS 340 (1930) (decided under former Civil Code 1910, § 4210).

When the deed to the plaintiff, on which the plaintiff claimed title to the property in dispute, recited a valuable consideration and had been duly recorded, and no affidavit of forgery had been filed as required by the former statute, the court did not err in admitting the deed in evidence over the objection that there was no proof of the deed's execution. Page v. Brown, 192 Ga. 398, 15 S.E.2d 506, 1941 Ga. LEXIS 481 (1941) (decided under former Code 1933, § 29-415).

In a dispossessory action brought by a mortgage company against a possessor, the trial court properly granted the mortgage company a writ of possession as the company produced a recorded certified copy of the security deed, which the possessor failed to prove was a fraud since the possessor's signature on the deed matched that as appeared on the answer filed. The trial court properly rejected the possessor's attempt to examine the mortgage company's counsel regarding the authenticity of the deed since counsel represented the mortgage company and was, therefore, not competent to testify. Egana v. HSBC Mortg. Corp., 294 Ga. App. 456, 669 S.E.2d 159, 2008 Ga. App. LEXIS

1079 (2008) (decided under former O.C.G.A. § 44-2-23).

Effect of deed question of law. — Generally, a registered deed is entitled to be admitted in evidence, and the effect of such a deed is a question of law for the court. Miles v. Blanton, 211 Ga. 754, 88 S.E.2d 273, 1955 Ga. LEXIS 449 (1955) (decided under former Code 1933, § 29-415).

Recorded bill of sale admissible without proof of execution. — In the absence of an attack on a properly witnessed and recorded bill of sale, placing upon a party the burden of proving the bill of sale's execution, it was not error to admit the bill of sale without proof of the bill of sale's execution. Watkins v. Muse, 78 Ga. App. 17, 50 S.E.2d 90, 1948 Ga. App. LEXIS 669 (1948) (decided under former Code 1933, § 29-415).

Bill of sale for an automobile was not inadmissible because it was not recorded prior to bringing this suit. Recordation has no effect on title to personalty, which is acquired by the grantee in the bill of sale upon the execution and delivery of the instrument by the grantor. Recording an absolute bill of sale to personalty has only the effect of making the instrument admissible in evidence without further proof of the bill of sale's execution. Jones v. Liberty Mut. Fire Ins. Co., 90 Ga. App. 667, 83 S.E.2d 837, 1954 Ga. App. LEXIS 780 (1954) (decided under former Code 1933, § 29-415).

Certified copy has same effect as original recorded instrument. — Certified copy must be considered the same instrument as the original recorded retention title contract so that the admissibility of one necessarily controls the admissibility of its twin, providing, of course, that some reason appears why it should be necessary to introduce both. Dawson v. General Disct. Corp., 82 Ga. App. 29, 60 S.E.2d 653, 1950 Ga. App. LEXIS 1048 (1950) (decided under former Code 1933, § 29-415).

4. Procedure as to Proof of Genuineness

Presumption that alteration made at or before deed's execution. — Presumption is that any alteration was made at or before the time of the execution of the deed and, in the absence of an affidavit of forgery, the registered deed is admitted in evidence without an explanation of the alteration. Collins v. Boring, 96 Ga. 360, 23 S.E. 401, 1895 Ga. LEXIS 81 (1895) (decided under former Code 1882, § 2712); McConnell Bros. v. Slappey, 134 Ga. 95, 67 S.E. 440, 1910 Ga. LEXIS 125 (1910) (decided under former Civil Code 1895, § 3628); Gilmer v. Harrison, 146 Ga. 721, 92 S.E. 67, 1917 Ga. LEXIS 470 (1917) (decided under former Civil Code 1910, § 4210).

Presumption was sufficiently strong to admit a deed in evidence over objection that the deed had been altered since the deed's execution. Buck v. Kitchens, 155 Ga. 721, 118 S.E. 51, 1923 Ga. LEXIS 156 (1923) (decided under former Civil Code 1910, § 4210).

Burden of proof when affidavit of forgery filed. — Filing of the affidavit placed upon the party introducing the deed the burden of showing affirmatively what the law in case of a registered deed presumed in the party's favor: that it was in fact executed and delivered in accordance with what purported to be the facts as stated therein. Holland v. Carter, 79 Ga. 139, 3 S.E. 690, 1887 Ga. LEXIS 180 (1887) (decided under former Code 1882, § 2712); Collins v. Boring, 96 Ga. 360, 23 S.E. 401, 1895 Ga. LEXIS 81 (1895) (decided under former Code 1882, § 2712); Bentley v. McCall, 119 Ga. 530, 46 S.E. 645, 1904 Ga. LEXIS 266 (1904) (decided under former Civil Code 1895, § 3628); Sapp v. Cline, 131 Ga. 433, 62 S.E. 529, 1908 Ga. LEXIS 99 (1908) (decided under former Civil Code 1895, § 3628); Strickland v. Babcock Lumber Co., 142 Ga. 120, 82 S.E. 531, 1914 Ga. LEXIS 617 (1914) (decided under former Civil Code 1910, § 4210); James v. Steele, 147 Ga. 598, 95 S.E. 11, 1918 Ga. LEXIS 52 (1918) (decided under former Civil Code 1910, § 4210).

When the burden is upon the plaintiff to establish the genuineness of a deed, it will not suffice, after having shown the death of the two attesting witnesses to the deed, to prove the genuineness of the signature of the attesting witnesses, but, in order to carry the burden, one should go further

Procedure as to Proof of Genuineness (Cont'd)

and introduce primary evidence, that is, proof of the actual signing by the alleged maker of the deed, or of the genuineness of the maker's signature affixed thereto, or that such evidence is not attainable. Strickland v. Babcock Lumber Co., 142 Ga. 120, 82 S.E. 531, 1914 Ga. LEXIS 617 (1914) (decided under former Civil Code 1910, § 4210).

Filing an affidavit of forgery changes the burden of proof as to registered deeds, whereas primarily the party offering a deed has the burden of proving the deed's execution, the party may, in the absence of the affidavit, shift this burden by showing its regular registration, thereby making such a prima-facie case of genuineness that throughout the trial the deed is to be given the probative weight to which a genuine deed is entitled, unless further proof overcomes this presumption prima-facie raised in its favor. McCall v. Asbury, 190 Ga. 493, 9 S.E.2d 765, 1940 Ga. LEXIS 507 (1940) (decided under former Code 1933, § 29-415).

Proof of signing and signature may be done by circumstantial evidence. Bentley v. McCall, 119 Ga. 530, 46 S.E. 645, 1904 Ga. LEXIS 266 (1904) (decided under former Civil Code 1895, § 3628).

When no affidavit filed, burden of disputing genuineness upon party against whom deed admitted. — When no affidavit was filed, the burden was upon the party against whom the deed was admitted to disprove the deed's genuineness. Leverett v. Tift, 6 Ga. App. 90, 64 S.E. 317, 1909 Ga. App. LEXIS 190 (1909) (decided under former Civil Code 1895, § 3628); Haithcock v. Sargent, 145 Ga. 84, 88 S.E. 550, 1916 Ga. LEXIS 185 (1916) (decided under former Civil Code 1910, § 4210); Jett v. Hart, 152 Ga. 266, 109 S.E. 654, 1921 Ga. LEXIS 68 (1921) (decided under former Civil Code 1910, § 4210).

If a deed was duly recorded and no affidavit of forgery was filed, the burden of disputing the deed's genuineness rested upon the party against whom the deed had been admitted, though, in the ultimate sense, the burden of establishing the execution of the deed was upon the party offering the deed, throughout all the exigencies of the trial. McCall v. Asbury, 190 Ga. 493, 9 S.E.2d 765, 1940 Ga. LEXIS 507 (1940) (decided under former Code 1933, § 29-415).

Sufficiency of affidavit of forgery. — Affidavit must be made either by alleged maker of deed, the maker's heirs, or opposite party in the case. Kelly v. William Sharp Saddlery Co., 99 Ga. 393, 27 S.E. 741, 1896 Ga. LEXIS 417 (1896) (decided under former Civil Code 1895, § 3628).

Deed, when offered, may be attacked by an affidavit of forgery by the opposite party, whether the plaintiff or the defendant, and even by one who is not a party to the cause if one is the maker of the deed or an heir of the maker of the deed. Steiner v. Blair, 38 Ga. App. 753, 145 S.E. 471, 1928 Ga. App. LEXIS 436 (1928) (decided under former Civil Code 1910, § 4210).

In order to cast on the applicant for registration under the Land Registration Law (see § 44-2-40 et seq.) the burden of proving the genuineness of a deed shown in the preliminary report of the examiner, an affidavit of forgery must be filed, and written objections, though verified, which aver that certain deeds are forgeries, do not amount to an affidavit of forgery. McCall v. Asbury, 190 Ga. 493, 9 S.E.2d 765, 1940 Ga. LEXIS 507 (1940) (decided under former Code 1933, § 29-415).

No issue of genuineness when affidavit's purpose to show party induced to sign instrument. — When the alleged maker of a deed which is the basis of an action against the maker files an affidavit that the deed is a forgery, it is the duty of the court to arrest the case and require an issue to be made and tried as to the genuineness of the alleged instrument. The court does not err in refusing to require such an issue to be made and in allowing the instrument to be admitted in evidence when the defendant admits the genuineness of the defendant's signature, and when it appears, from the defendant's testimony, that the purpose of the affidavit is not to enable the defendant to prove a material and fraudulent alteration of the instrument, subsequent to the instrument's execution, by the party claiming a benefit thereunder, but is merely to show

that the defendant was induced to sign the instrument without reading the instrument, relying upon the good faith of the opposite party to incorporate therein the terms of the agreement previously arrived at. Ford v. Serenado Mfg. Co., 27 Ga. App. 535, 109 S.E. 415, 1921 Ga. App. LEXIS 249 (1921) (decided under former Civil Code 1910, § 4210); Odum v. Cotton States Fertilizer Co., 38 Ga. App. 46, 142 S.E. 470, 1928 Ga. App. LEXIS 25 (1928) (decided under former Civil Code 1910, § 4210).

Evidence admissible to show deed forged. — Affidavit of forgery was to be filed when the execution of a deed was denied, was in effect only a special pleading by which the factum of a deed may be determined in a special proceeding. Except for casting the burden of establishing the genuineness of the deed upon the party tendering the deed, the special plea was in effect no more than any other defense, for even though no affidavit of forgery was filed, if the defendant in the defendant's plea denied the execution of the deed, evidence was nevertheless admissible which tended to show that the deed is forged and fraudulent. United States v. 550.6 Acres of Land, 68 F. Supp. 151, 1945 U.S. Dist. LEXIS 1514 (D. Ga. 1945), aff'd, 157 F.2d 767, 1946 U.S. App. LEXIS 2801 (5th Cir. 1946) (decided under former Code 1933, § 29-415).

Notwithstanding that the deed had been recorded, the plaintiff was not required to file an affidavit of forgery, but could assail the deed's genuineness by allegation, thereby assuming the burden of disproving the deed's genuineness. Stow v. Hargrove, 203 Ga. 735, 48 S.E.2d 454, 1948 Ga. LEXIS 509 (1948) (decided under former Code 1933, § 29-415).

Possession of premises under forged deed. — It is possible to enter into possession of premises in good faith under forged deed, but the circumstances attendant upon the execution of the forgery are admissible in evidence as throwing light upon the bona fides of entry. Thorpe v. Atwood, 100 Ga. 597, 28 S.E. 287, 1897 Ga. LEXIS 110 (1897) (decided under former Civil Code 1895, § 3628).

Right to new trial. — Upon decision of forgery issue against the plaintiff, plaintiff has right to move for new trial. Vance v. Gamble, 95 Ga. 730, 22 S.E. 576, 1895 Ga. LEXIS 259 (1895) (decided under former Code 1882, § 2712).

5. Illustrative Cases

Reversible error not found in admission of deed. — In an action for trespass to land, it was not reversible error to admit in evidence a deed conveying to the defendant all of a certain land lot, when the entire controversy was with regard to only a portion of that lot, and the prevailing party relied for that party's claim to this portion of the lot not on this deed, but to other paper title and independent adverse possession. Anderson v. Black, 191 Ga. 627, 13 S.E.2d 650, 1941 Ga. LEXIS 350 (1941), aff'd, 199 Ga. 59, 33 S.E.2d 298, 1945 Ga. LEXIS 260 (1945) (decided under former Code 1933, § 29-415).

Fraudulent deed was facially regular and operated to release security interest. — A 2003 warranty deed that operated to release a prior lender's security interest in the property was not a forgery but was signed by someone fraudulently assuming the authority of an officer of the prior lender and was regular on the deed's face. Therefore, a subsequent lender that foreclosed on the property and purchased the property at the foreclosure sale was a bona fide purchaser for value entitled to take the property free of the prior lender's security interest. Deutsche Bank Nat'l Trust Co. v. JP Morgan Chase Bank, N.A., 307 Ga. App. 307, 704 S.E.2d 823, 2010 Ga. App. LEXIS 1082 (2010), cert. denied, No. S11C0595, 2011 Ga. LEXIS 359 (Ga. Apr. 26, 2011) (decided under former O.C.G.A. § 44-2-23).

Proof held sufficient to establish forgery. — Proof that a deed purporting to have been executed in 1835 was not recorded until 1883, when the subscribing witnesses were dead and shortly before the action for the land was brought, and also that the alleged grantor could not, in fact, write the grantor's name, and signed interrogatories with the grantor's mark, denying the signature of the deed, while the deed purported to be signed in writing, was held sufficient to establish forgery.

Illustrative Cases (Cont'd)

Walker v. Logan, 75 Ga. 759, 1885 Ga. LEXIS 226 (1885) (decided under former Code 1882, § 2712).

When the plaintiff, in an equitable proceeding seeking to enjoin the defendant from evicting the plaintiff from the premises, allege that the plaintiff was not a tenant of the defendant but was the owner of the premises, and that if the defendant claimed to have a deed to the premises, the deed was either a forgery or was fraudulently obtained, and the defendant in the defendant's answer claimed that the plaintiff was a tenant and that the defendant owned the title by virtue of the deed from the plaintiff, and the plaintiff testified that the plaintiff never executed a deed conveying the land to the defendant, this was sufficient (even though the recorded deed was introduced in evidence, and even though the subscribing witnesses testified as to its genuineness) to support a verdict and decree in favor of the plaintiff permanently enjoining the defendant from evicting the plaintiff from the premises involved. Hightower v. Phillips, 184 Ga. 532, 192 S.E. 26, 1937 Ga. LEXIS 572 (1937) (decided under former Code 1933, § 29-415).

6. Mortgages

Seal not necessary. — When the execution of a deed or mortgage has been admitted or proved, it is not a ground to exclude the deed or mortgage from evidence that the deed or mortgage is not under seal. Vizard v. Moody, 119 Ga. 918, 47 S.E. 348, 1904 Ga. LEXIS 406 (1904) (decided under former Civil Code 1895, § 2782).

Certified copy. — An original retention title contract, which was recorded, and a certified copy of this original must for purposes of admissibility, be considered as one and the same instrument, so that the admissibility of one necessarily controls the admissibility of its twin, providing, of course, that some reason appears why it should be necessary to introduce both. Dawson v. General Disct. Corp., 82 Ga. App. 29, 60 S.E.2d 653, 1950 Ga. App. LEXIS 1048 (1950) (decided under former Code 1933, § 67-110).

Record in another state. — Recording of a mortgage in the proper office in another state does not make a certified copy of it admissible in evidence, or dispense with proof of the execution of the original. Baskin v. Vernon, 74 Ga. 370, 1885 Ga. LEXIS 309 (1885) (decided under former Code 1882, § 1954); Pepper v. James, 7 Ga. App. 518, 67 S.E. 218, 1910 Ga. App. LEXIS 366 (1910).

Record in another county. — Evidence that a mortgage on personal property was filed for record and recorded in Elbert County was not sufficient to dispense with proof of the execution of the mortgage when it appeared without contradiction that the mortgagor resided in Wilkes County. Williams v. State, 13 Ga. App. 338, 79 S.E. 207, 1913 Ga. App. LEXIS 146 (1913) (decided under former Code 1910, § 3261).

Bill of sale. — When recorded, a bill of sale is admissible in evidence under the same rules as govern the admission of registered mortgages. Anderson & Conley v. Leverette, 116 Ga. 732, 42 S.E. 1026, 1902 Ga. LEXIS 238 (1902) (decided under former Civil Code 1895, § 2782).

Ancient Documents

Proof without compliance. — An instrument may be properly admitted as having been sufficiently proved pursuant to former Code 1933, § 38-707 (see now O.C.G.A. § 24-9-903), irrespective of whether or not there was a sufficient compliance with former Code 1933, § 38-312. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372, 1937 Ga. LEXIS 597 (1937) (decided under former Code 1933, § 38-312).

Copy not admissible. — Copy was not admissible as an ancient document; the paper itself must be introduced. Jones v. Morgan, 13 Ga. 515, 1853 Ga. LEXIS 123 (1853) (decided under former law); Bryan v. Walton, 14 Ga. 185, 1853 Ga. LEXIS 210 (1853) (decided under former law).

Comparison of handwriting. — Deed proven to be 30 years of age, purporting to be signed by the alleged grantor and under which the grantor surrendered possession to the person purporting to be the grantee who by the grantee and the grantee's privies in estate remained in possession, was so far proven to be the

genuine deed of the alleged grantor, and so far established the genuineness of the grantor's signature thereto, as to authorize the deed's admission in evidence, for the purpose of a comparison of handwriting, upon the trial of a cause involving the question of the genuineness of the signature of such grantor to another instrument. Goza v. Browning, 96 Ga. 421, 23 S.E. 842, 1895 Ga. LEXIS 96 (1895) (decided under former Civil Code 1895, § 5184).

Bond for title to land, if 30 years old, accompanied with proof of possession under the bond, was held to be admissible in evidence. Beverly v. Burke, 9 Ga. 440, 1851 Ga. LEXIS 35 (1851) (decided under former law).

Marriage contract was held to be admissible in evidence as an ancient document. Adams v. Dickson, 23 Ga. 406, 1857 Ga. LEXIS 288 (1857) (decided under former law).

Muniments of title proven to have been in existence for 40 years, with possession in conformity, and coming from the proper custody, were admissible as ancient documents. Bell v. McCawley, 29 Ga. 355, 1859 Ga. LEXIS 343 (1859) (decided under former law).

Will more than 50 years old, proven and recorded in the proper office, is admissible as an ancient paper or document, notwithstanding that probate is defective; provided, possession has been held of the property under and by virtue of that will. Jordan v. Cameron, 12 Ga. 267, 1852 Ga. LEXIS 124 (1852) (decided under former law).

Plat that does not show it was purportedly made by authority since it was shown to have been made before the city charter was ever issued does not meet the requirements of law, and could not be used in evidence without other testimony or evidence. Central of Ga. Ry. v. City of Metter, 222 Ga. 74, 148 S.E.2d 661, 1966 Ga. LEXIS 401 (1966) (decided under former Code 1933, § 38-312).

Ancient Boundaries and Landmarks

Metes and bounds description prevails over description as numbered lot. — If a deed describes land as being parts of certain numbered lots, and also contains a description of the tract of land by metes and bounds, calling for natural, visible, and ascertained objects and monuments, and such description by such metes and bounds includes a part of a lot not designated by number, such metes and bounds must govern. McCann v. Miller, 177 Ga. App. 53, 338 S.E.2d 509, 1985 Ga. App. LEXIS 2461 (1985) (decided under former O.C.G.A. § 24-3-13).

Deed with overly vague description does not validly convey title. — Deed wherein the description of the property sought to be conveyed is so vague and indefinite as to afford no means of identifying any particular tract of land is inoperative either as a conveyance of title or as color of title. McCann v. Miller, 177 Ga. App. 53, 338 S.E.2d 509, 1985 Ga. App. LEXIS 2461 (1985) (decided under former O.C.G.A. § 24-3-13).

Reputation as evidence. — An ancient boundary, corner, or station tree cannot, generally, be proved otherwise than by reputation; consequently, hearsay evidence is admissible for this purpose, from the necessity of the case. It is not the best testimony, however, to prove the identity of a lot of land, there being higher evidence of that fact in the power of the party. Martin v. Atkinson, 7 Ga. 228, 1849 Ga. LEXIS 131 (1849) (decided under former law).

Present day reputation is not sufficient to establish a line or landmark. McAfee v. Newberry, 144 Ga. 473, 87 S.E. 392, 1915 Ga. LEXIS 643 (1915) (decided under former Civil Code 1910, § 5772); Patterson v. Baugh, 56 Ga. App. 660, 193 S.E. 364, 1937 Ga. App. LEXIS 193 (1937) (decided under former Code 1933, § 38-313).

Evidence sufficient to support plaintiff's boundaries. — In a boundary line dispute filed pursuant to O.C.G.A. § 23-3-61, the trial court properly entered judgment on a jury verdict in favor of the plaintiffs, two landowners, and against their neighbor, and then denied the neighbor a new trial, or alternatively a judgment notwithstanding the verdict as: (1) the boundary line indicated on a plat reflecting the locations of monuments on the parcel owned by two landowners complied with the monuments referenced in

Ancient Boundaries and Landmarks (Cont'd)

the original warranty deed; and (2) the neighbor agreed to a special verdict form allowing the jury to find that the plat submitted by the two landowners accurately and sufficiently showed the true boundary line. Dover v. Higgins, 287 Ga. App. 861, 652 S.E.2d 829, 2007 Ga. App. LEXIS 1052 (2007), cert. denied, No. S08C0402, 2008 Ga. LEXIS 237 (Ga. Feb. 25, 2008) (decided under former O.C.G.A. § 24-3-13).

Evidence of declarations of persons since deceased, relative to the location of a landmark, is admissible over an objection on the ground of hearsay. Deaton v. Swanson, 196 Ga. 833, 28 S.E.2d 126, 1943 Ga. LEXIS 445 (1943) (decided under former Code 1933, § 38-313); Phelps v. Huff, 214 Ga. App. 398, 448 S.E.2d 64, 1994 Ga. App. LEXIS 881 (1994) (decided under former O.C.G.A. § 24-3-13).

A witness's testimony to declarations made to the witness a number of years earlier by a now deceased predecessor in title regarding the disputed location of the line between the properties of the contesting parties is admissible as an exception to the hearsay rule. Gilman Paper Co. v. James, 235 Ga. 348, 219 S.E.2d 447, 1975 Ga. LEXIS 876 (1975) (decided under former Code 1933, § 38-313).

As evidence the owners of several parcels of land sought to introduce regarding an iron pin was not as to the general reputation of the pin but rather was what the original grantor (by then deceased) had said about that specific pin, the evidence was hearsay and was properly excluded from a quiet title trial. Gibson v. Rustin, 297 Ga. App. 169, 676 S.E.2d 799, 2009 Ga. App. LEXIS 389 (2009) (decided under former O.C.G.A. § 24-3-13).

Appraisals constitute opinions and are inadmissible as hearsay. — Appraisals of property by a deceased appraiser were not admissible in a wrongful foreclosure action since the appraisals represented the opinion of the appraiser and as such constituted hearsay. Dickens v. Calhoun First Nat'l Bank, 214 Ga. App. 490, 448 S.E.2d 237, 1994 Ga. App. LEXIS 945 (1994) (decided under former O.C.G.A. § 24-3-13).

That a smaller tract is located within a larger tract, if the boundaries of which larger tract are not located, cannot be shown by common reputation. McAfee v. Newberry, 144 Ga. 473, 87 S.E. 392, 1915 Ga. LEXIS 643 (1915) (decided under former Civil Code 1910, § 5772).

In locating land described in a deed it is competent to establish the land's boundaries by proof of traditional reputation in the neighborhood, derived from ancient sources or from the declarations of persons since deceased who had peculiar means of knowing what the reputation of the boundary was in an ancient day. McAfee v. Newberry, 144 Ga. 473, 87 S.E. 392, 1915 Ga. LEXIS 643 (1915) (decided under former Civil Code 1910, § 5772).

When land conveyed in a deed is described as a city lot "designated by stakes", extrinsic evidence may supply the location and shape of the particular tract of land. The test as to the sufficiency of the description in a deed is whether or not it discloses with sufficient certainty the intention of the grantor with respect to the quantity and location of the land therein described. Lankford v. Pope, 206 Ga. 430, 57 S.E.2d 538, 1950 Ga. LEXIS 359 (1950) (decided under former Code 1933, § 38-313).

Boundaries of political subdivisions. — When the location of the line between two counties was disputed, and the line between adjoining lands coincided with the county line, which was claimed by both sides to be a straight line, evidence was admissible to show that for a considerable distance south of the place where the line was in dispute owners of land in the two counties, whose lands were bounded by the county line, had built fences up to a certain line and recognized it as being the county line, and had so bounded their possessions for 20 years or more; and that the line run between the lands of the parties by processioners was a continuation of the line so recognized. Ivey v. Cowart, 124 Ga. 159, 52 S.E. 436, 1905 Ga. LEXIS 682 (1905) (decided under former Civil Code 1895, § 5185).

As to the location of county lines and state lines and other boundaries, a witness is entitled to testify from what others have told the witness, from reputation in

the community, and from hearsay. Green v. State, 123 Ga. App. 286, 180 S.E.2d 564, 1971 Ga. App. LEXIS 1201 (1971) (decided under former Code 1933, § 38-313).

Iron pipes, fence line, hedgerow, and acquiescence in boundary was sufficient evidence for court. — While no natural landmarks established the disputed boundary between property belonging to the parties, other evidence did, including iron pipes marking the corners of the property, a fence line, a hedgerow, and acquiescence in the boundary, and the failure in landowners' deed to reference the land lot where the disputed acreage was located did not determine the result; sufficient evidence supported the trial court's findings as to the location of the boundary line. Sledge v. Peach County, 276 Ga. App. 780, 624 S.E.2d 288, 2005 Ga. App. LEXIS 1370 (2005) (decided under former O.C.G.A. § 24-3-13).

Venue. — Venue must be proved positively, and one of the methods of proving venue is by the testimony of witnesses as to their knowledge of a place, which the witnesses have learned from hearsay and from reputation. Green v. State, 123 Ga. App. 286, 180 S.E.2d 564, 1971 Ga. App. LEXIS 1201 (1971) (decided under former Code 1933, § 38-313).

Instrument complying fully with provisions of the former statute proved itself. Matthews v. Castleberry, 43 Ga. 346, 1871 Ga. LEXIS 241 (1871) (decided under former Code 1868, § 2658).

Instrument must be right upon the instrument's face, or made so by proof, before the instrument's age alone will dispense with proof. Hill v. Nisbet, 58 Ga. 586, 1877 Ga. LEXIS 177 (1877) (decided under former Code 1873, § 2700); Ferrell v. Hurst, 68 Ga. 132, 1881 Ga. LEXIS 329 (1881) (decided under former Code 1873, § 2700).

There must be preliminary proof of deed coming from proper custody. Harrell v. Culpepper, 47 Ga. 635, 1873 Ga. LEXIS 187 (1873) (decided under former Code 1868, § 2658); Maddox v. Gray, 75 Ga. 452, 1885 Ga. LEXIS 156 (1885) (decided under former Code 1882, § 2700); Swicard v. Hooks, 85 Ga. 580, 11 S.E. 863, 1890 Ga. LEXIS 103 (1890) (decided under former Civil Code 1895, § 3610); Williamson v. Mosley, 110 Ga. 53, 35 S.E. 301, 1900 Ga. LEXIS 323 (1900) (decided under former Civil Code 1895, § 3610).

Rebuttal of preliminary proof by any competent evidence may be made. Albright v. Jones, 106 Ga. 302, 31 S.E. 761, 1898 Ga. LEXIS 86 (1898) (decided under former Civil Code 1895, § 3610).

Presumption of delivery rebutted when recording takes place after grantor's death. — Ordinarily the recording of a deed is prima facie evidence of delivery. This presumption is rebutted when the recording takes place after the death of the grantor as delivery must occur during the grantor's lifetime. Corley v. Parson, 236 Ga. 346, 223 S.E.2d 708, 1976 Ga. LEXIS 865 (1976) (decided under former Code 1933, § 29-112).

Jury to pass on genuineness. — When such deed as described in the former statute was apparently genuine, had come from the proper custody, and was shown not to be inconsistent with possession, or if other corroboration appeared, it should be admitted in evidence as prima facie established. But the jury had the right to finally pass on the deed's genuineness, after hearing all the testimony pro and con. Gaskins v. Guthrie, 162 Ga. 103, 132 S.E. 764, 1926 Ga. LEXIS 114 (1926) (decided under former Civil Code 1910, § 4190).

Jury may find from face of deed that it was a forgery, without resort to aliunde evidence. Pridgen v. Green, 80 Ga. 737, 7 S.E. 97, 1888 Ga. LEXIS 243 (1888) (decided under former Code 1882, § 2700); Daugharty v. Drawdy, 134 Ga. 650, 68 S.E. 472, 1910 Ga. LEXIS 304 (1910) (decided under former Civil Code 1895, § 3610).

Instrument may be properly admitted as having been sufficiently proved pursuant to former Code 1933, § 38-707 (see now O.C.G.A. § 24-9-903), irrespective of whether or not there was a sufficient compliance with the rule admitting ancient writings without proof. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372, 1937 Ga. LEXIS 597 (1937) (decided under former Code 1933, § 29-112).

Proof of Pedigree

1. In General

History generally. — Former statute did not arise from a legislative enactment, but from a codification of the general rule. Terry v. Brown, 142 Ga. 224, 82 S.E. 566, 1914 Ga. LEXIS 656 (1914) (decided under former Civil Code 1910, § 5764).

Former statute was declaratory of the common law. Whigby v. Burnham, 135 Ga. 584, 69 S.E. 1114, 1911 Ga. LEXIS 10 (1911) (decided under former Civil Code 1910, § 5764).

Former statute provided one of the specified cases in which the general hearsay rule had been relaxed. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134, 1942 Ga. LEXIS 486 (1942) (decided under former Code 1933, § 38-303).

Rule as to proof of race-ancestry is not so strict as the rule as to proof of pedigree which confines evidence of reputation to general repute in the family. White v. Holderby, 192 F.2d 722, 1951 U.S. App. LEXIS 2780 (5th Cir. 1951) (decided under former Code 1933, § 38-303).

Possession of land cannot be established by family repute. Luttrell v. Whitehead, 121 Ga. 699, 49 S.E. 691, 1905 Ga. LEXIS 45 (1905) (decided under former Civil Code 1895, § 5177).

2. Relationship

Relationship cannot be proved by reputation in community outside of family. Lamar v. Allen, 108 Ga. 158, 33 S.E. 958, 1899 Ga. LEXIS 205 (1899) (decided under former Civil Code 1895, § 5177).

Branches of same family. — When the question is whether any, or what, relationship exists between two supposed branches of the same family, it is sufficient to establish the connection of the deceased declarant with either branch in order to render such declaration admissible. Terry v. Brown, 142 Ga. 224, 82 S.E. 566, 1914 Ga. LEXIS 656 (1914) (decided under former Civil Code 1910, § 5764).

Next of kin. — It was competent for a caveatrix to support a contention that she was the next of kin of the decedent by proving declarations to that effect made by the latter while in life. Malone v. Adams, 113 Ga. 791, 39 S.E. 507, 1901 Ga. LEXIS 384 (1901) (decided under former Civil Code 1895, § 5177).

Relationship to jurors. — In order for a new trial to be granted on the ground that the prosecutor was related to one of the jurors, it must be shown that the witness, testifying to such relationship, was testifying either from personal knowledge or from knowledge acquired by some means within the purview of the law. Davis v. State, 24 Ga. App. 776, 102 S.E. 378, 1920 Ga. App. LEXIS 519 (1920); Davis v. State, 150 Ga. 19, 102 S.E. 445, 1920 Ga. LEXIS 6 (1920) (decided under former Civil Code 1910, § 5764).

Affidavits by relatives, showing relationship to challenged jurors, are properly admitted in support of motion for new trial. Harris v. State, 188 Ga. 745, 4 S.E.2d 651, 1939 Ga. LEXIS 609 (1939) (decided under former Code 1933, § 38-303).

Paternity of child. — When the paternity of a child is the issue involved, the declarations of the reputed father, since deceased, are admissible in evidence. The weight to be given the declarations is a matter for the jury. Estill v. Estill, 149 Ga. 384, 100 S.E. 365, 1919 Ga. LEXIS 253 (1919) (decided under former Civil Code 1910, § 5764).

Proof seeking indirectly to show that a child is illegitimate, by showing general reputation in the community that the father was a single man, was inadmissible. Gibson v. Mason, 31 Ga. App. 584, 121 S.E. 584, 1924 Ga. App. LEXIS 76 (1924) (decided under former Civil Code 1910, § 5764).

Evidence sufficient to prove relationship with deceased. — Husband of the plaintiff having testified that she was his wife and that she was the mother of the deceased child sufficiently proved the necessary relationship between the plaintiff and the deceased. Scoggins v. Hughes, 112 Ga. App. 777, 146 S.E.2d 134, 1965 Ga. App. LEXIS 834 (1965) (decided under former Code 1933, § 38-303).

3. Birth and Age

Births may be proved by general repute in the family. Luke v. Hill, 137 Ga. 159, 73 S.E. 345, 1911 Ga. LEXIS 337 (1911) (decided under former Civil Code

1910, § 5764); Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134, 1942 Ga. LEXIS 486 (1942) (decided under former Code 1933, § 38-303).

Witness may testify to the witness's age without first requiring the witness to show from what source the witness derived the witness's information, and when and where the witness was born. Central R.R. v. Coggin, 73 Ga. 689, 1884 Ga. LEXIS 202 (1884) (decided under former Code 1882, § 3772); McCollum v. State, 119 Ga. 308, 46 S.E. 413, 1904 Ga. LEXIS 818 (1904) (decided under former Civil Code 1895, § 5177).

Bible containing family record. — Bible containing a family record, in the handwriting of a deceased daughter, which remained in the possession of the mother until her death, and then went into the possession of daughters, from whom the witness got it, is competent evidence on the question of age of one of the children of that mother. Southern Life Ins. Co. v. Wilkinson, 53 Ga. 535, 1874 Ga. LEXIS 522 (1874) (decided under former Code 1873, § 3772).

4. Marriage

Proof of marriage. — Fact of marriage may be at least prima facie shown by proof of general repute in family, by proof of general reputation in the community, or by proof of the fact that the man or the woman, as the case may be, lives together with a person of the opposite sex as his or her spouse, with general recognition in the community of their being married to each other. Plummer v. State, 27 Ga. App. 185, 108 S.E. 128, 1921 Ga. App. LEXIS 770 (1921) (decided under former Civil Code 1910, § 5764). ; See also Drawdy v. Hesters, 130 Ga. 161, 60 S.E. 451, 1908 Ga. LEXIS 248 (1908); Gibson v. Mason, 31 Ga. App. 584, 121 S.E. 584, 1924 Ga. App. LEXIS 76 (1924) (decided under former Civil Code 1910, § 5764).

Validity of marriage. — On an issue of validity of marriage, the declarations of the parties themselves that they were or were not married, made without view to litigation, are admissible evidence of the fact declared. But the declaration of such party as to a fact, evidentiary of the invalidity of the marriage, does not come within this exception to the rule of hearsay evidence. Whigby v. Burnham, 135 Ga. 584, 69 S.E. 1114, 1911 Ga. LEXIS 10 (1911) (decided under former Civil Code 1910, § 5764).

5. Death

Proof of death. — While, in a sense, hearsay was admissible to prove death, yet before the hearsay was admissible for that purpose, it must come up to the requirements of the former statute. Piedmont Hotel Co. v. Henderson, 9 Ga. App. 672, 72 S.E. 51, 1911 Ga. App. LEXIS 294 (1911) (decided under former Civil Code 1910, § 5764); Cone v. Lythgoe, 40 Ga. App. 491, 150 S.E. 465, 1929 Ga. App. LEXIS 595 (1929) (decided under former Civil Code 1910, § 5764).

Death could be established as provided by the former statute, by family repute, but by no other species of hearsay evidence. Ferguson v. Atlanta Newspapers, Inc., 91 Ga. App. 115, 85 S.E.2d 72, 1954 Ga. App. LEXIS 875 (1954) (decided under former Code 1933, § 38-303).

Source of information. — It was not competent for a witness to testify as to the death of a certain person, and who were the witness's heirs surviving at a certain date when a deed was executed, the witness testifying that the witness did not know these facts from the witness's own personal knowledge, but the witness knew the facts from family repute and from various other sources of information, such as a vast amount of correspondence from the decedent's family, and from the court records, and from wills and documents, which made the matter conclusive so far as could be ascertained by search. Imboden v. Etowah & Battle Branch Mining Co., 70 Ga. 86, 1883 Ga. LEXIS 300 (1883) (decided under former Code 1882, § 3772); Mobley v. Baxter & Co., 143 Ga. 565, 85 S.E. 859, 1915 Ga. LEXIS 527 (1915) (decided under former Civil Code 1910, § 5764); Mobley v. Pierce, 144 Ga. 327, 87 S.E. 24, 1915 Ga. LEXIS 188 (1915) (decided under former Civil Code 1910, § 5764).

After proof that a woman was married, her declaration that she had heard her husband was dead is not admissible to prove his death; it not appearing from

Death (Cont'd)

whom her information was derived. Williams v. State, 86 Ga. 548, 12 S.E. 743, 1891 Ga. LEXIS 17 (1891) (decided under former Code 1882, § 3772).

Missing persons. — In an action brought by a wife upon a policy of insurance in her favor upon the life of her husband, the insurance being against death by accident within one year from the date of the policy, and he having disappeared within the year, that his family regarded him as dead, or recognized him as being dead, is not competent evidence in behalf of the plaintiff. Travelers Ins. Co. v. Sheppard, 85 Ga. 751, 12 S.E. 18, 1890 Ga. LEXIS 145 (1890) (decided under former Code 1882, § 3772).

6. Requirements for Admission

Limitation on rule. — Former statute which permitted declarations to be received in proof of pedigree was limited to the extent that the declarations must have been made without view to litigation and under such circumstances that the person making the declarations could have no motive to misrepresent the facts. Mobley v. Pierce, 144 Ga. 327, 87 S.E. 24, 1915 Ga. LEXIS 188 (1915) (decided under former Civil Code 1910, § 5764); Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134, 1942 Ga. LEXIS 486 (1942) (decided under former Code 1933, § 38-303); Johnson v. Roberson, 88 Ga. App. 548, 77 S.E.2d 232, 1953 Ga. App. LEXIS 1131 (1953) (decided under former Code 1933, § 38-303).

First-hand knowledge not required. — Witnesses must appear to have had fair knowledge, or fair opportunity for acquiring knowledge upon the subject. It is not required that the witnesses were present at the birth, marriage, or death to be competent to testify as to relationship. Wilson v. State, 173 Ga. 275, 160 S.E. 319, 1931 Ga. LEXIS 307 (1931) (decided under former Civil Code 1910, § 5764).

Declarations concerning pedigree, to be admissible, need not be upon the knowledge of the declarant. Thus, evidence is admissible that a deceased member of the family said that the deceased heard from others of the deceased's family the facts of family history which the deceased stated. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134, 1942 Ga. LEXIS 486 (1942) (decided under former Code 1933, § 38-303).

Family source required. — One of the conditions upon which family tradition is received in evidence is that it emanate from a source within the family, and from persons having such a connection with the party to whom it relates that it is natural and likely that they cannot be mistaken and will speak the truth. In the event it appears that the evidence offered does not emanate from such source, the presumption of the reliability of the source of information is rebutted and the evidence becomes inadmissible. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134, 1942 Ga. LEXIS 486 (1942) (decided under former Code 1933, § 38-303).

Presumption of knowledgeable source. — Declarations respecting pedigree do not stand upon the footing of secondary evidence to be excluded when a witness can be produced who speaks upon the subject from the witness's own knowledge. This rule of law rests upon the presumption that the declaration or family tradition comes from persons who have competent knowledge with respect to the subject matter of the declaration, and speak the truth with reference thereto. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134, 1942 Ga. LEXIS 486 (1942) (decided under former Code 1933, § 38-303).

Notwithstanding the declarant did not mention the source from which the declarant derived the declarant's information, facts of family history heard from other family members are admissible. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134, 1942 Ga. LEXIS 486 (1942) (decided under former Code 1933, § 38-303).

Proof of relationship required. — Before the declarations of deceased persons may be received in evidence, the fact of relationship must be shown by other evidence. Greene v. Almand, 111 Ga. 735, 36 S.E. 957, 1900 Ga. LEXIS 705 (1900) (decided under former Civil Code 1895, § 5177); Terry v. Brown, 142 Ga. 224, 82

S.E. 566, 1914 Ga. LEXIS 656 (1914) (decided under former Civil Code 1910, § 5764); Mobley v. Pierce, 144 Ga. 327, 87 S.E. 24, 1915 Ga. LEXIS 188 (1915) (decided under former Civil Code 1910, § 5764); Wilson v. State, 173 Ga. 275, 160 S.E. 319, 1931 Ga. LEXIS 307 (1931) (decided under former Civil Code 1910, § 5764); Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134, 1942 Ga. LEXIS 486 (1942) (decided under former Code 1933, § 38-303).

Only slight proof of relationship is required as a foundation for the admission of hearsay evidence regarding pedigree. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134, 1942 Ga. LEXIS 486 (1942) (decided under former Code 1933, § 38-303).

Family members as witness. — When a witness reports matters of general repute and tradition in the witness's own family, it is not necessary for the witness to first establish by independent evidence the witness's relationship to the witness's family. Crawley v. Selby, 208 Ga. 530, 67 S.E.2d 775, 1951 Ga. LEXIS 434 (1951) (decided under former Code 1933, § 38-303).

No particular form of statement is required to render a declaration as to pedigree admissible. It may be oral or written, such as a letter or a recital in a deed. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134, 1942 Ga. LEXIS 486 (1942) (decided under former Code 1933, § 38-303).

Admission over objection. — When affidavit contained declarations tending to establish pedigree, and contained other statements which were inadmissible if properly objected to, and when the admissibility of such affidavit was objected to as a whole, upon the ground that it was hearsay and not binding upon the defendants, its admission over such objection is not ground for a new trial. Massell Realty Co. v. Hanbury, 165 Ga. 534, 141 S.E. 653, 1927 Ga. LEXIS 423 (1927) (decided under former Civil Code 1910, § 5764).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions under Ga. L. 1952, p. 177, §§ 1, 2, 3 are included in the annotations for this Code section.

Computer printout sheets. — Although computer printout sheets are generally classified as hearsay, and to be admissible into evidence the sheets must fall within an exception to the well-known hearsay rule, subject to the discretion of the court, computer printout sheets or records stored in an electronic computer may be admissible into evidence when such are permanent records made in the regular course of business. 1973 Op. Att'y Gen. No. 73-91 (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

RESEARCH REFERENCES

Am. Jur. 2d.

18 Am. Jur. 2d, Coroners or Medical Examiners, § 13 et seq. 23 Am. Jur. 2d, Deeds, § 166. 29A Am. Jur. 2d, Evidence, §§ 154, 694, 874, 881, 1099, 1195 et seq. 42 Am. Jur. 2d, Inspection Laws, § 11. 81 Am. Jur. 2d, Witnesses, § 742.

Am. Jur. Proof of Facts.

Admissibility of Computerized Business Records, 14 POF2d 173.

Foundation for Offering Business Records in Evidence, 34 POF2d 509.

Routine Business Practice, 35 POF2d 589.

Recovery and Reconstruction of Electronic Mail as Evidence, 41 POF3d 1.

Establishing A Foundation to Admit Computer-Generated Evidence as Demonstrative or Substantive Evidence, 57 POF3d 455.

C.J.S.

26A C.J.S., Deeds, §§ 507, 529. 31A C.J.S., Evidence, §§ 299, 310, 311, 332 et seq., 342, 345, 346, 349, 371, 548 et seq. 32 C.J.S., Evidence, §§ 885, 886, 916 et seq., 924, 939 et seq., 967, 971 et seq. 32A C.J.S., Evidence, §§ 978 et seq., 1029 et seq., 1072 et seq., 1296.

ALR.

Death certificate as evidence, 17 A.L.R. 359; 42 A.L.R. 1454; 96 A.L.R. 324.

Effect of filing affidavit of forgery against ancient deed, 18 A.L.R. 908.

Character and sufficiency of evidence to show that letter was mailed, 25 A.L.R. 9; 86 A.L.R. 541.

Entries in family Bible as evidence, 29 A.L.R. 372.

Dispensing with proof of proper custody as condition of admission of ancient document, 29 A.L.R. 630.

Illness after partaking of food or drink as evidence of negligence on part of one who prepared or sold it, 49 A.L.R. 592.

Parol evidence as applied to escrow agreements, 49 A.L.R. 1529.

Requirement of "positive" proof of death of insured as excluding circumstantial evidence, 60 A.L.R. 592.

Extrajudicial admissions by principal as evidence against surety, 60 A.L.R. 1500.

Necessity and manner of authenticating paper purporting to be act of private corporation, 65 A.L.R. 329.

Validity, construction, and effect of statutory provision to effect that corporate stock book shall be evidence, 65 A.L.R. 758.

Admissibility of opinion of medical expert as affected by his having heard the person in question give the history of his case, 65 A.L.R. 1217; 51 A.L.R.2d 1051.

Use of memorandum by witness to refresh recollection as affected by the time when it was made, 65 A.L.R. 1478; 125 A.L.R. 19.

Admissibility of declarations by one involved in an accident in relation to his employment by or agency for other person, 67 A.L.R. 170; 150 A.L.R. 623.

Forgery as affecting registration under Torrens Act, 68 A.L.R. 357.

Admissibility of telephone conversations in evidence, 71 A.L.R. 5; 105 A.L.R. 326.

Admissibility of hospital chart or other hospital record, 75 A.L.R. 378; 120 A.L.R. 1124.

Admissibility of declarations of testator on issue of undue influence, 79 A.L.R. 1447; 148 A.L.R. 1225.

Admissibility of declarations by testator on issue of revocation of will, 79 A.L.R. 1493; 172 A.L.R. 354.

Admissibility of statements or declarations of plaintiff's spouse in an action for alienation of affections for the purpose of showing his or her mental state, 82 A.L.R. 825.

Admissibility of loose-leaf systems of accounts, 83 A.L.R. 806.

Admissibility of dying declarations in cases other than prosecution for homicide, 91 A.L.R. 560.

Admissibility in favor of beneficiary of life or accident insurance of statements or declarations made by insured outside of his application, 93 A.L.R. 413.

Admissibility and weight of evidence of defendant's attempt to secure release by bribing officer, 93 A.L.R. 810.

Admissibility of memoranda made by one since deceased regarding matters in respect of which he acted for one of the parties to the present litigation, 103 A.L.R. 1501.

Privilege against self-incrimination as justification for refusal to comply with order or subpoena requiring production of books or documents of private corporation, 120 A.L.R. 1102.

Refreshment of recollection by use of memoranda or other writings, 125 A.L.R. 19; 82 A.L.R.2d 473.

Admissibility on issue of negligence or contributory negligence of statements warning one of danger, 125 A.L.R. 645.

Admissibility as res gestae of declaration by nonparticipant as affected by evidence or lack of evidence that he actually observed the act or fact, 127 A.L.R. 1030.

Admissibility of testimony of witness at former trial or in another case to cover gaps or omissions, due to faulty memory or other causes, in his present testimony given in person or by deposition, 129 A.L.R. 843.

Admissibility of statements by one who claimed to have met with an accident, as evidence of fact of accident, 130 A.L.R. 291.

Admissibility, on issue of negligence or contributory negligence, of statement or comment in respect of conduct of driver of car, or other person, shortly afterwards involved in an accident, 140 A.L.R. 874.

Admissibility of books of account as affected by mutilation, erasures, or alterations, 142 A.L.R. 1406.

Statute providing for admissibility as evidence of records or entries in the regular course of business (Model Act) as applicable to reports of accidents, 144 A.L.R. 727; 10 A.L.R. Fed 858.

Statute which disqualified one person as a witness because of death of another, as applicable to testimony as to statements or acts of deceased, offered as part of res gestae or to show mental condition ("verbal act" theory), 146 A.L.R. 250.

Financial statement or report to stockholders as admissible in evidence on issue between seller and purchaser as to value of stock sold, 147 A.L.R. 1150.

Admissibility of corporate books and records against officers or stockholders in criminal prosecutions against them, 154 A.L.R. 279.

Admissibility of evidence of complaint or details of complaint by alleged victim of rape or other similar offense as affected by fact that she is not a witness or is incompetent to testify because of age or other reason, 157 A.L.R. 1359.

Res gestae utterances in actions founded on accidents, 163 A.L.R. 15.

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Admissibility of records or report of welfare department or agency relating to payment to or financial condition of particular person, 42 A.L.R.2d 752.

Admissibility of hospital record relating to cause or circumstances of accident or incident in which patient sustained injury, 44 A.L.R.2d 553.

Admissibility in evidence of ancient maps and the like, 46 A.L.R.2d 1318.

Admissibility of dying declaration in civil case, 47 A.L.R.2d 526.

Admissibility as res gestae of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 A.L.R.2d 1245.

Spontaneity of declaration sought to be admitted as part of res gestae as question for court or ultimately for jury, 56 A.L.R.2d 372.

Admissibility of evidence of reputation or declaration as to matter of public interest, 58 A.L.R.2d 615.

Admissibility, in action on employee fidelity bond or policy, of confessions or declarations of such employee no longer available as witness, 65 A.L.R.2d 631.

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test, 66 A.L.R.2d 536.

Admissibility, in civil assault and battery action, of similar acts or assaults against other persons, 66 A.L.R.2d 806.

Forged deed or bond for title as constituting color of title, 68 A.L.R.2d 452.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 A.L.R.2d 308.

Admissibility and weight of surveys or polls of public or consumers' opinion, recognition, preference, or the like, 76 A.L.R.2d 619; 98 A.L.R. Fed. 20.

Admissibility in criminal case, as part of the res gestae, of statements or utterances of bystanders made at time of arrest, 78 A.L.R.2d 300.

Reviewing, setting aside, or quashing of verdict at coroner's inquest, 78 A.L.R.2d 1218.

Admissibility in evidence of receipt of third person, 80 A.L.R.2d 915.

Declarant's age as affecting admissibility as res gestae, 83 A.L.R.2d 1368; 15 A.L.R.4th 1043.

Admissibility of homicide victim's statements exculpating the accused, 95 A.L.R.2d 637.

Admissibility, as part of res gestae, of accusatory utterances made by homicide victim after act, 4 A.L.R.3d 149.

Procuring signature by fraud as forgery, 11 A.L.R.3d 1074.

Admissibility of party's book accounts to prove loans or payments by person by or for whom they are kept, 13 A.L.R.3d 284.

Admissibility, as res gestae, of statements relating to origin or cause of, or responsibility for, fire, 13 A.L.R.3d 1114.

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Admissibility in state court proceedings of police report as business records, 77 A.L.R.3d 115.

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Time element as affecting admissibility of statement or complaint made by victim of sex crime as res gestae, spontaneous exclamation, or excited utterance, 89 A.L.R.3d 102.

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Admissibility of hypnotic evidence at criminal trial, 92 A.L.R.3d 442; 77 A.L.R.4th 927.

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Admissibility in state court proceedings of police reports under official record exception to hearsay rule, 31 A.L.R.4th 913.

Fact that witness undergoes hypnotic examination as affecting admissibility of testimony in civil case, 31 A.L.R.4th 1239.

Necessity, in criminal prosecution, of independent evidence of principal act to allow admission, under res gestae or excited utterance exception to hearsay rule, of statement made at time of, or subsequent to, principal act, 38 A.L.R.4th 1237.

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Admissibility of evidence of reputation as to land boundaries or customs affecting land, under Rule 803(20) of Uniform Rules of Evidence and similar formulations, 79 A.L.R.4th 1044.

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Admissibility of summaries or charts of writings, recordings, or photographs under Rule 1006 of Federal Rules of Evidence, 198 A.L.R. Fed. 427.

24-8-804. Hearsay rule exceptions; declarant unavailable.

(a) As used in this Code section, the term "unavailable as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the declarant's statement;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance or, in the case of exceptions under paragraph (2), (3), or (4) of subsection (b) of this Code section, the declarant's attendance or testimony, by process or other reasonable means.

A declarant shall not be deemed unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. If deposition testimony is admissible under either the rules stated in Code Section 9-11-32 or this Code section, it shall be admissible at trial in accordance with the rules under which it was offered;

(2) In a prosecution for homicide or in a civil proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death;

(3) A statement against interest. A statement against interest is a statement:

(A) Which a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate a claim by the declarant against another or to expose the declarant to civil or criminal liability; and

(B) Supported by corroborating circumstances that clearly indicate the trustworthiness of the statement if it is offered in a criminal case as a statement that tends to expose the declarant to criminal liability;

(4) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or

marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated or a statement concerning the foregoing matters and death also of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared; or

(5) A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

History.

Code 1981, § 24-8-804, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Exceptions to the Rule Against Hearsay —When the Declarant Is Unavailable as a Witness, Fed. R. Evid. 804.

Law reviews.

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

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Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, §§ 3697, 3704, 3705, and 3709, former Code 1868, §§ 3721, 3728, and 3729, former Code 1873, §§ 3774 and 3781, former Code 1882, §§ 3774, 3776, 3781, and 3782, former Civil Code 1895, §§ 5180, 5181, and 5186, former Penal Code 1895, §§ 1000 and 1001, former Civil Code 1910, §§ 5767, 5768, and 5773, former Penal Code 1910, §§ 1026 and 1027, former Code 1933, §§ 38-307, 38-308, 38-309, 38-314, and 38-405, and former O.C.G.A. §§ 24-3-6, 24-3-7, 24-3-8, 24-3-10, and 24-3-35 are included in the annotations for this Code section.

In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-8-803, which may also be applicable to this Code section.

For case discussing history of former statute, see Burns v. State, 191 Ga. 60, 11 S.E.2d 350, 1940 Ga. LEXIS 606 (1940) (decided under former O.C.G.A. § 24-3-10).

Constitutional right of confrontation. — Confrontation clause was not offended when the defendant waived at trial, through defendant's counsel at that time, the use of prior sworn testimony of an inaccessible witness and therefore cannot claim the waiver was error for the first time on appeal. Riley v. State, 237 Ga. 124, 226 S.E.2d 922, 1976 Ga. LEXIS 1170 (1976), overruled in part, Clark v. State, 315 Ga. 423, 883 S.E.2d 317, 2023 Ga. LEXIS 13 (2023) (decided under former Code 1933, § 38-314).

Defendant's constitutional right to confront the defendant's accusers was violated because the state failed to show that the victim and the minor child were unavailable to testify at trial; and because the victim's and minor child's out-of-court statements to the police officer at the scene were testimonial in nature as, during the time the victim and minor child were being questioned by the police officer, the defendant remained at the residence at the officer's request and posed no apparent threat to anyone; and the victim and the minor child made statements to the officer under circumstances which objectively indicated that the primary purpose of the interrogation was to establish the facts necessary for criminal prosecution. Legree v. State, 344 Ga. App. 793, 812 S.E.2d 68, 2018 Ga. App. LEXIS 139 (2018).

Former statute was really a rule of necessity. Herndon v. Chamberlain, 39 Ga. App. 207, 146 S.E. 503, 1929 Ga. App. LEXIS 252 (1929) (decided under former Civil Code 1910, § 5773); Parrott v. Edwards, 113 Ga. App. 422, 148 S.E.2d 175, 1966 Ga. App. LEXIS 1085 (1966) (decided under former Code 1933, § 38-314).

Former statute has been uniformly applied to criminal as well as to civil cases. Burns v. State, 191 Ga. 60, 11 S.E.2d 350, 1940 Ga. LEXIS 606 (1940) (decided under former Code 1933, § 38-314).

Former O.C.G.A. § 24-3-10 was an exception to the hearsay rule to prove the testimony of a witness at a former trial under certain circumstances when the witness is unavailable at a later trial. Gottschalk v. State, 160 Ga. App. 769, 287 S.E.2d 107, 1982 Ga. App. LEXIS 1682 (1982) (decided under former O.C.G.A. § 24-3-10).

Relationship of former O.C.G.A. § 24-3-10 to O.C.G.A. § 9-11-32(a)(5). — Specific and limited provision for the admission into evidence in a subsequent trial of depositions taken in a prior action is made by O.C.G.A. § 9-11-32(a)(5). All other issues relating to the admission into evidence in a subsequent trial of testimony taken in connection with a prior action must be resolved under former O.C.G.A. § 24-3-10. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566, 1981 Ga. App. LEXIS 2912 (1981) (decided under former O.C.G.A. § 24-3-10).

Use and derivative use immunity. — Statement given under a promise of use and derivative-use immunity is not against the declarant's penal interest. Use and derivative-use immunity protect a witness from the use of potentially self-incriminating testimony and the fruits of that testimony against the witness in a

future prosecution. Lumpkin v. State, 310 Ga. 139, 849 S.E.2d 175, 2020 Ga. LEXIS 669 (2020).

Applicability of new rule on retrial. — Because the new evidence statute regarding the unavailability of a witness based on a defendant's engaging or acquiescing in wrongdoing is a procedural statute and would apply to a retrial, even if the trial court erroneously admitted testimonial and non-testimonial hearsay under the prior evidence code, the same evidence would be properly admitted at a second trial due to a procedural change in the laws of evidence. Brittain v. State, 329 Ga. App. 689, 766 S.E.2d 106, 2014 Ga. App. LEXIS 764 (2014).

Whether the party objecting had adequate opportunity to cross-examine the witness at the previous trial was the central issue in determining whether the former statute applied. Cates v. State, 245 Ga. 30, 262 S.E.2d 796, 1980 Ga. LEXIS 676 (1980) (decided under former Code 1933, § 38-314); Craft v. State, 154 Ga. App. 682, 269 S.E.2d 490, 1980 Ga. App. LEXIS 2340 (1980) (decided under former Code 1933, § 38-314).

For prior testimony to be admissible, the party challenging the testimony must have had the opportunity at the earlier proceeding to cross-examine the witness on the issue to be decided in the later proceeding, which necessarily means that the earlier and later proceedings have to involve substantially the same issue. In re Spruell, 227 Ga. App. 324, 489 S.E.2d 48 (decided under former O.C.G.A. § 24-3-10).

Sole question determined by former statute was whether the party against whom the former testimony was now offered had an adequate opportunity by cross-examination to sift this testimony. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566, 1981 Ga. App. LEXIS 2912 (1981) (decided under former Code 1933, 38-314).

When the issues and parties were identical and the party against whom the testimony was offered called the witness to the stand at the previous hearing or trial, the need for cross-examination is basically satisfied, and the requirement of former O.C.G.A. § 24-3-10 was met. Barnes v. State, 256 Ga. 370, 349 S.E.2d 387, 1986 Ga. LEXIS 876 (1986) (decided under former O.C.G.A. § 24-3-10).

Parties and issues in actions must be same. — Former O.C.G.A. § 24-3-10 required as the prerequisite to the admission in a subsequent action of the prior testimony of a since deceased witness that the parties and issues in the two actions be substantially the same. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566, 1981 Ga. App. LEXIS 2912 (1981) (decided under former O.C.G.A. § 24-3-10); GMC v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302, 1994 Ga. App. LEXIS 797 (1994), overruled, Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021) (decided under former O.C.G.A. § 24-3-10).

Substantial compliance with former requirement. — Substantial and not a literal compliance with the conditions of the former statute was all that was required. Mitchell v. State, 71 Ga. 128, 1883 Ga. LEXIS 153 (1883) (decided under former Code 1882, § 3782).

Same issues required. — Evidence as to what a deceased witness testified on a previous trial is not admissible when it appears that the issue therein involved was not substantially the same as that in controversy on the trial at which such evidence is tendered. Lathrop v. Adkisson, 87 Ga. 339, 13 S.E. 517, 1891 Ga. LEXIS 165 (1891) (decided under former Code 1882, § 3782); Whitaker v. Arnold, 110 Ga. 857, 36 S.E. 231, 1900 Ga. LEXIS 647 (1900) (decided under former Civil Code 1895, § 5186).

Former statute did not require that all the issues in the two proceedings be the same; but the issue to which the former testimony was directed must be the same as the issue upon which the testimony is offered in the second. Craft v. State, 154 Ga. App. 682, 269 S.E.2d 490, 1980 Ga. App. LEXIS 2340 (1980) (decided under former Code 1933, § 38-314).

Former statute did not demand that all the issues or parties be the same but requires only that the issue on which the testimony was offered in the first suit be the same as the issue upon which the testimony is offered in the second. Van-

General Consideration (Cont'd)

houten v. State, 193 Ga. App. 871, 389 S.E.2d 534, 1989 Ga. App. LEXIS 1663 (1989) (decided under former O.C.G.A. § 24-3-10).

Companion case growing out of a common occurrence, though not wholly between the same parties, was a former trial within the meaning of the former statute. Myrick v. Sievers, 104 Ga. App. 95, 121 S.E.2d 185, 1961 Ga. App. LEXIS 614 (1961) (decided under former Code 1933, § 38-314).

Probative value. — Testimony admitted under the former statute had probative value as original testimony. Maynard v. Rawlins, 45 Ga. App. 91, 163 S.E. 269, 1932 Ga. App. LEXIS 176 (1932) (decided under former Civil Code 1910, § 5773).

Burden of proof. — Party seeking introduction of the testimony at a prior trial must show that the witness is inaccessible. Riley v. State, 237 Ga. 124, 226 S.E.2d 922, 1976 Ga. LEXIS 1170 (1976), overruled in part, Clark v. State, 315 Ga. 423, 883 S.E.2d 317, 2023 Ga. LEXIS 13 (2023) (decided under former Code 1933, § 38-314).

Party seeking to introduce testimony given at a prior trial must show that the witness is inaccessible. Whether a witness is inaccessible depends upon the diligence shown by the party seeking to use the witness's testimony in ascertaining the witness's whereabouts and the attempts made to bring the witness into court. Johnson v. State, 197 Ga. App. 384, 398 S.E.2d 432, 1990 Ga. App. LEXIS 1290 (1990) (decided under former O.C.G.A. § 24-3-10).

Proof by parol evidence. — When a witness who testified at a committing trial subsequently died, on the final trial of the same case in the superior court the witness's testimony so given was admissible, and there being nothing to show that the testimony was reduced to writing, it was competent to prove such testimony by parol. Robinson v. State, 68 Ga. 833, 1882 Ga. LEXIS 156 (1882) (decided under former Code 1882, § 3782).

Testimony compelled by grant of immunity admissible. — Testimony may be admitted pursuant to former O.C.G.A. § 24-3-10 although that testimony was compelled by the state after a grant of immunity. Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217, 1983 Ga. App. LEXIS 1915 (1983) (decided under former O.C.G.A. § 24-3-10).

Testimony at plea hearing properly excluded. — Trial court did not abuse the court's discretion in refusing to admit under former O.C.G.A. § 24-3-10 statements a co-indictee made during a plea hearing because the co-indictee's testimony at the plea hearing did not satisfy former § 24-3-10, and the defendant failed to establish a substantial similarity of issues between the defendant's trial and the co-indictee's plea hearing such as would ensure that the state had an opportunity for meaningful cross-examination at the plea hearing; the state questioned the co-indictee at the co-indictee's plea hearing to establish the factual basis for the co-indictee's plea and to show that the co-indictee was entering the plea freely and voluntarily, and as the purpose of the hearing was to protect the co-indictee, the state was not afforded an opportunity for meaningful crossexamination. Silverio v. State, 306 Ga. App. 438, 702 S.E.2d 717, 2010 Ga. App. LEXIS 964 (2010) (decided under former O.C.G.A. § 24-3-10).

Victim's statements due to forfeiture by wrongdoing. — Trial court did not err by admitting into evidence statements made by the victim under the forfeiture by wrongdoing exception to the hearsay rule because the evidence showed that the defendant engaged in wrongdoing by pressuring the victim with the notion that the victim did not have to comply with the subpoena to appear for trial and by repeatedly telling the victim that the state would not be able to proceed with the case without the victim, the wrongdoing was intended to procure the victim's unavailability, and the wrongdoing did procure the victim's unavailability. Lopez v. State, 355 Ga. App. 319, 844 S.E.2d 195, 2020 Ga. App. LEXIS 309 (2020).

Witness unavailability procured by defendant. — Trial court did not abuse the court's discretion by admitting an officer's testimony that a witness traveled with the defendant after the crimes because the state met the state's burden to

allow for the admission of the hearsay statement into evidence by showing contact between the defendant and the witness in which the defendant procured the witness's absence from the rescheduled trial. Welch v. State, 309 Ga. 875, 848 S.E.2d 846, 2020 Ga. LEXIS 657 (2020).

Ineffective assistance of counsel. — Trial counsel was not ineffective for failing to challenge the admission of testimony regarding the victim's dying declaration because the statement satisfied the requirements for admission of a dying declaration under former O.C.G.A. § 24-3-6; the defendant identified no valid basis for objection. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661, 2012 Ga. LEXIS 625 (2012) (decided under former O.C.G.A. § 24-3-6).

Former Testimony

1. Deceased Witnesses

Deceased witness's testimony from preliminary hearing admissible. — Recounting of deceased's preliminary hearing testimony which had been given subject to cross-examination by the defendant's attorney does not violate the defendant's right of confrontation. Littles v. Balkcom, 245 Ga. 285, 264 S.E.2d 219, 1980 Ga. LEXIS 767 (1980) (decided under former Code 1933, § 38-314).

Error to admit testimony from deceased witness. — Because defendant had no opportunity to confront a deceased witness at an accomplice's trial, the trial court erred in admitting the witness's statements at defendant's trial pursuant to former O.C.G.A. § 24-3-10; in addition, the statements were testimonial and violated defendant's confrontation rights. Willingham v. State, 279 Ga. 886, 622 S.E.2d 343, 2005 Ga. LEXIS 849 (2005) (decided under former O.C.G.A. § 24-3-10).

Deceased codefendant's entire testimony at defendant's first trial was admissible at retrial even though defendant's character was incidentally placed in issue. Chambers v. State, 213 Ga. App. 414, 444 S.E.2d 820, 1994 Ga. App. LEXIS 633 (1994), cert. denied, No. S94C1461, 1994 Ga. LEXIS 1014 (Ga. Sept. 16, 1994) (decided under former O.C.G.A. § 24-3-10).

Deceased witness testimony from sentencing proceeding admissible. — Prior testimony of a deceased witness at a sentencing trial held before the defendant withdrew the defendant's guilty plea was admissible at the defendant's guilt/innocence trial. The state sought the admission of this testimony, which included the witness's account of the witness's rape and the murders of family members to help meet the state's burden to prove beyond a reasonable doubt that the defendant was guilty of these crimes; furthermore, there was no limitation on the defendant's cross-examination of the witness at the sentencing trial. Martin v. State, 284 Ga. 504, 668 S.E.2d 685, 2008 Ga. LEXIS 845 (2008) (decided under former O.C.G.A. § 24-3-10).

2. Inaccessible Witnesses

Whether a witness is inaccessible depends upon the diligence shown by the party seeking to use the witness's testimony of a former trial in ascertaining where the witness is and in attempting to bring the witness into court. Gaither v. State, 227 Ga. 668, 182 S.E.2d 434, 1971 Ga. LEXIS 812 (1971) (decided under former Code 1933, § 38-314); Robertson v. State, 124 Ga. App. 119, 183 S.E.2d 47, 1971 Ga. App. LEXIS 836 (1971) (decided under former Code 1933, § 38-314); Smith v. State, 247 Ga. 453, 276 S.E.2d 633, 1981 Ga. LEXIS 739 (1981) (decided under former O.C.G.A. § 24-3-10).

Prima facie showing of inaccessibility is sufficient. Williams v. Wolff, 3 Ga. App. 737, 60 S.E. 357, 1908 Ga. App. LEXIS 416 (1908) (decided under former Civil Code 1895, § 5186); Savannah Bank & Trust Co. v. Estill, 142 Ga. 447, 83 S.E. 137, 1914 Ga. LEXIS 745 (1914) (decided under former Civil Code 1910, § 5773); Estill v. Citizens & S. Bank, 153 Ga. 618, 113 S.E. 552, 1922 Ga. LEXIS 133 (1922) (decided under former Civil Code 1910, § 5773); Goodwin v. Allen, 83 Ga. App. 615, 64 S.E.2d 212, 1951 Ga. App. LEXIS 922 (1951) (decided under former Code 1933, § 38-314).

Mere contention insufficient. — State is allowed to use a transcript of testimony of an absent witness upon the

Inaccessible Witnesses (Cont'd)

state's showing, and not mere contention, that after diligent search, the state could not locate the witness. Hewell v. State, 136 Ga. App. 420, 221 S.E.2d 219, 1975 Ga. App. LEXIS 1371 (1975) (decided under former Code 1933, § 38-314).

Proof of inability to find a witness after diligent search may be sufficient to establish that such witness was inaccessible within the meaning of the former statute. Robinson v. State, 128 Ga. 254, 57 S.E. 315, 1907 Ga. LEXIS 78 (1907) (decided under former Penal Code 1895, § 1001); Goodwin v. State, 49 Ga. App. 223, 174 S.E. 742, 1934 Ga. App. LEXIS 340 (1934) (decided under former Code 1933, § 38-314); Jones v. State, 250 Ga. 166, 296 S.E.2d 598, 1982 Ga. LEXIS 1243 (1982) (decided under former O.C.G.A. § 24-3-10).

Parties never inaccessible. — Party to a pending case was not, though beyond the jurisdiction of the court when the case was tried, inaccessible within the meaning of the former statute. Crumm v. Allen & Co., 11 Ga. App. 203, 75 S.E. 108, 1912 Ga. App. LEXIS 334 (1912) (decided under former Civil Code 1910, § 5773).

Sufficiency of the search for the witness who testified previously is a matter left to the discretion of the trial judge, whose judgment will not be reversed unless a manifest abuse of discretion appears. Robinson v. State, 128 Ga. 254, 57 S.E. 315, 1907 Ga. LEXIS 78 (1907) (decided under former Penal Code 1895, § 1001); Goodwin v. State, 49 Ga. App. 223, 174 S.E. 742, 1934 Ga. App. LEXIS 340 (1934) (decided under former Code 1933, § 38-314); Norris v. State, 58 Ga. App. 399, 198 S.E. 714, 1938 Ga. App. LEXIS 281 (1938) (decided under former Code 1933, § 38-314); Gaither v. State, 227 Ga. 668, 182 S.E.2d 434, 1971 Ga. LEXIS 812 (1971) (decided under former Code 1933, § 38-314).

Pre-trial testimony of witness three (W3) was properly excluded as W3 was not an inaccessible witness under former O.C.G.A. § 24-3-10 since the subpoena obtained by the state, combined with the attempts to locate W3 on the day that the defendant intended to call W3 as a witness and on the following day, did not demand a finding of due diligence in obtaining W3's presence; the defendant's delay in attempting to contact W3 and the defendant's failure to have any investigator go to W3's known address were contrary to the requirements of diligence. Hill v. State, 291 Ga. 160, 728 S.E.2d 225, 2012 Ga. LEXIS 500 (2012) (decided under former O.C.G.A. § 24-3-10).

Witness beyond the limits of the state is inaccessible. Adair v. Adair, 39 Ga. 75, 1869 Ga. LEXIS 180 (1869) (decided under former Code 1868, § 3729); Smith v. State, 72 Ga. 114, 1883 Ga. LEXIS 27 (1883) (decided under former Code 1882, § 3782); Swift v. Oglesby & Smith, 8 Ga. App. 540, 70 S.E. 97, 1911 Ga. App. LEXIS 32 (1911) (decided under former Civil Code 1910, § 5773); Brinson Ry. v. Beard, 11 Ga. App. 737, 76 S.E. 76, 1912 Ga. App. LEXIS 146 (1912) (decided under former Civil Code 1910, § 5773); Brown v. Matheson, 142 Ga. 396, 83 S.E. 98, 1914 Ga. LEXIS 723 (1914) (decided under former Civil Code 1910, § 5773); Smith v. State, 147 Ga. 689, 95 S.E. 281, 1918 Ga. LEXIS 114 (1918) (decided under former Civil Code 1910, § 5773); Estill v. Citizens & S. Bank, 153 Ga. 618, 113 S.E. 552, 1922 Ga. LEXIS 133 (1922) (decided under former Civil Code 1910, § 5773); Taylor v. State, 155 Ga. 785, 118 S.E. 675, 1923 Ga. LEXIS 164 (1923) (decided under former Civil Code 1910, § 5773); Carswell, Moxley & Son v. Harrison, 33 Ga. App. 140, 126 S.E. 293, 1924 Ga. App. LEXIS 771 (1924) (decided under former Civil Code 1910, § 5773); Norris v. State, 58 Ga. App. 399, 198 S.E. 714, 1938 Ga. App. LEXIS 281 (1938) (decided under former Code 1933, § 38-314); Goodwin v. Allen, 83 Ga. App. 615, 64 S.E.2d 212, 1951 Ga. App. LEXIS 922 (1951) (decided under former Code 1933, § 38-314).

Word "inaccessible" does not apply to a witness who, though absent from the county of the trial, is nevertheless at the time of the trial, a resident of a different county in the same state. Taylor v. State, 126 Ga. 557, 55 S.E. 474, 1906 Ga. LEXIS 449 (1906) (decided under former Penal Code 1895, § 1001); Brinson Ry. v. Beard, 11 Ga. App. 737, 76 S.E. 76, 1912 Ga. App. LEXIS 146 (1912) (decided under former Civil Code 1910, § 5773).

In the case of a witness who may be difficult to locate, the state should begin to look for the witness sooner than the date of the beginning of the trial. Gaither v. State, 227 Ga. 668, 182 S.E.2d 434, 1971 Ga. LEXIS 812 (1971) (decided under former Code 1933, § 38-314).

Disability of witness. — In criminal prosecutions, according to the weight of authority, the mere temporary illness or disability of a witness is not sufficient to justify the reception of the witness's former testimony; it must appear that the witness is in such a state, either mentally or physically, that in reasonable probability the witness will never be able to attend the trial. Tanner v. State, 213 Ga. 820, 102 S.E.2d 176, 1958 Ga. LEXIS 294 (1958) (decided under former Code 1933, § 38-314).

Trial court did not err in relying in part on a letter from a physician treating a prior victim, who wrote that the victim's medical condition left the victim unable to travel to Chatham County, and in admitting the victim's prior testimony about a robbery because, whether the Screven County victim was unavailable presented a question of fact to be determined by the trial court as preliminary to the admissibility of the victim's prior testimony, and there was no error in the court's consideration of the physician's letter in resolving that question. Scott v. State, 309 Ga. 95, 844 S.E.2d 785, 2020 Ga. LEXIS 445 (2020).

Impact of assertion of Fifth Amendment privilege. — Trial court accepted the witness's assertion of the witness's Fifth Amendment privilege, which made the witness legally unavailable under O.C.G.A. § 24-8-804(a)(1). Lumpkin v. State, 310 Ga. 139, 849 S.E.2d 175, 2020 Ga. LEXIS 669 (2020).

Privilege as constituting inaccessibility. — Inaccessibility of witness has been construed to include assertion of privilege by a witness. Wiseman v. State, 249 Ga. 559, 292 S.E.2d 670, 1982 Ga. LEXIS 1161 (1982) (decided under former O.C.G.A. § 24-3-10).

Testimony from escaped prisoner admissible. — In trial for murder, where witness from preliminary hearing was not available at time of trial, having had escaped from prison, defendant's right of confrontation under U.S. Const., amend. 6 was not violated by admission of transcript of witness's testimony at defendant's preliminary hearing, at which defendant was represented by counsel and witness was cross-examined. Stidem v. State, 246 Ga. 637, 272 S.E.2d 338, 1980 Ga. LEXIS 1232 (1980) (decided under former Code 1933, § 38-314).

Failure to grant continuance proper. — Trial court did not err in admitting the testimony given by an inaccessible witness under oath in a former trial on substantially the same issue and between the same parties, and, thus, did not err in denying defendant's motion for a continuance as the former testimony was deemed "inherently reliable", its use did not violate the accused's right of confrontation, and defendant did not show that the witness could have been located if a continuance had been granted as diligent attempts had already been undertaken, without success, to locate the witness. Dillingham v. State, 275 Ga. 665, 571 S.E.2d 777, 2002 Ga. LEXIS 954 (2002) (decided under former O.C.G.A. § 24-3-10).

Testimony from probation revocation hearing admissible when witness unavailable. — When a witness made it clear that the witness would not testify about the shooting at trial, the witness's sworn testimony at the defendant's probation revocation hearing, which concerned substantially the same issue and where the witness was subject to cross-examination, was admissible under former O.C.G.A. § 24-3-10. Hardeman v. State, 277 Ga. App. 180, 626 S.E.2d 138, 2006 Ga. App. LEXIS 16 (2006) (decided under former O.C.G.A. § 24-3-10).

Evidence sufficient to show inaccessibility of witnesses in the following cases. — See Armstrong Furn. Co. v. Nickle, 110 Ga. App. 686, 140 S.E.2d 72, 1964 Ga. App. LEXIS 740 (1964) (decided under former Code 1933, § 38-314); Hewell v. State, 139 Ga. App. 622, 229 S.E.2d 92, 1976 Ga. App. LEXIS 1915 (1976), rev'd, 238 Ga. 578, 234 S.E.2d 497, 1977 Ga. LEXIS 1111 (1977); Tolbert v. State, 239 Ga. App. 703, 521 S.E.2d 827 (decided under former O.C.G.A. § 24-3-

Inaccessible Witnesses (Cont'd)

10); Walton v. State, 272 Ga. 73, 526 S.E.2d 333, 2000 Ga. LEXIS 92 (2000) (decided under former O.C.G.A. § 24-3-10).

Evidence insufficient to show inaccessibility of witnesses in the following cases. — See Herndon v. Chamberlain, 39 Ga. App. 207, 146 S.E. 503, 1929 Ga. App. LEXIS 252 (1929) (decided under former Penal Code 1910, § 1027); Standridge v. Standridge, 224 Ga. 102, 160 S.E.2d 377, 1968 Ga. LEXIS 678 (1968) (decided under former Code 1933, § 38-314); Whatley v. State, 230 Ga. 523, 198 S.E.2d 176, 1973 Ga. LEXIS 969 (1973) (decided under former Code 1933, § 38-314); Century Dodge, Inc. v. Mobley, 155 Ga. App. 712, 272 S.E.2d 502, 1980 Ga. App. LEXIS 2756 (1980) (decided under former Code 1933, § 38-314).

Inaccessibility not shown. — Trial court's ruling that defendant failed to show inaccessibility of a witness upon the exercise of due diligence was affirmed since defendant had six months after defendant's arraignment attempted three times to serve a subpoena on the witness prior to trial, and since defendant declined the trial court's offer of a continuance for the purpose of further searching for the witness. Carter v. State, 266 Ga. App. 691, 598 S.E.2d 76, 2004 Ga. App. LEXIS 456 (2004), superseded by statute as stated in Anderson v. State, 313 Ga. 178, 869 S.E.2d 401, 2022 Ga. LEXIS 33 (2022) (decided under former O.C.G.A. § 24-3-10).

Inaccessibility of a witness is to be determined within the sound discretion of the court and will not be disturbed unless there is a manifest abuse of discretion. Estill v. Citizens & S. Bank, 153 Ga. 618, 113 S.E. 552 (1922) (decided under former Civil Code 1910, § 5773); Brooks v. State, 69 Ga. App. 697, 26 S.E.2d 549 (1943) (decided under former Code 1933, § 38-314); Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765 (1952) (decided under former Code 1933, § 38-314); Tanner v. State, 213 Ga. 820, 102 S.E.2d 176 (1958) (decided under former Code 1933, § 38-314); Robertson v. State, 124 Ga. App. 119, 183 S.E.2d 47 (1971) (decided under former Code 1933, § 38-314); Riley v. State, 237 Ga. 124, 226 S.E.2d 922 (1976) (decided under former Code 1933, § 38-314); LaCount v. State, 237 Ga. 181, 227 S.E.2d 31 (1976) , cert. denied, 429 U.S. 1046, 97 S. Ct. 753, 50 L. Ed. 2d 761 (1977).Hewell v. State, 139 Ga. App. 622, 229 S.E.2d 92 (1976) , rev'd on other grounds, 238 Ga. 578, 234 S.E.2d 497 (1977).Smith v. State, 247 Ga. 453, 276 S.E.2d 633, 1981 Ga. LEXIS 739 (1981) (decided under former O.C.G.A. § 24-3-10); Gibson v. State, 160 Ga. App. 615, 287 S.E.2d 595, 1981 Ga. App. LEXIS 3112 (1981) (decided under former O.C.G.A. § 24-3-10); Jones v. State, 250 Ga. 166, 296 S.E.2d 598, 1982 Ga. LEXIS 1243 (1982) (decided under former O.C.G.A. § 24-3-10); Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217, 1983 Ga. App. LEXIS 1915 (1983) (decided under former O.C.G.A. § 24-3-10); Thomas v. State, 192 Ga. App. 744, 386 S.E.2d 402, 1989 Ga. App. LEXIS 1163 (1989) (decided under former O.C.G.A. § 24-3-10); Barry v. State, 214 Ga. App. 418, 448 S.E.2d 243, 1994 Ga. App. LEXIS 909 (1994) (decided under former O.C.G.A. § 24-3-10); Palmer v. Taylor, 215 Ga. App. 546, 451 S.E.2d 486, 1994 Ga. App. LEXIS 1299 (1994), cert. denied, No. S95C0589, 1995 Ga. LEXIS 413 (Ga. Mar. 17, 1995) (decided under former O.C.G.A. § 24-3-10).

Standard on appeal of question of inaccessibility. — Primary consideration on appeal is not whether the Court of Appeals agrees with the trial court's finding that a witness was inaccessible, but whether that finding constitutes an abuse of discretion. Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217, 1983 Ga. App. LEXIS 1915 (1983) (decided under former O.C.G.A. § 24-3-10).

Any error was harmless. — Any error in the admission of prior testimony of an unavailable witness, including objections and cross-examination, was harmless because it was highly probable that it did not contribute to the verdicts since the jury had already heard evidence of two other similar robberies and the other evidence against the defendant included a witness's pretrial and in-court identifications of the defendant as the gunman. Harris v. State, 313 Ga. 653, 872 S.E.2d 732, 2022 Ga. LEXIS 128 (2022).

3. Proceedings

Survival of action. — When a parent began suit against a railroad for damages for a personal injury to the parent, and subsequently died from the results of the injury, and a suit for the homicide was brought by the parent's child, answers of the decedent to interrogatories taken during the decedent's life in the suit were admissible in the action by the child. Atlanta & W.P.R.R. v. Venable, 67 Ga. 697, 1881 Ga. LEXIS 258 (1881) (decided under former Code 1873, § 3782).

Substantial similarity not found. — Suit for personal injuries to a minor, brought in the minor's behalf by the minor's father as next friend, is not, either as to cause of action or as to parties, actually or substantially the same as a suit by the father in the father's own right for loss of the minor's services, occasioned by those injuries. Hooper v. Southern Ry., 112 Ga. 96, 37 S.E. 165, 1900 Ga. LEXIS 49 (1900) (decided under former Civil Code 1895, § 5186).

Preliminary hearings. — Introduction of testimony previously taken of a witness at a preliminary hearing is permitted if it is shown either that the witness is out of the jurisdiction or that the witness cannot with due diligence be found within the state. LaCount v. State, 237 Ga. 181, 227 S.E.2d 31, 1976 Ga. LEXIS 1192 (1976), cert. denied, 429 U.S. 1046, 97 S. Ct. 753, 50 L. Ed. 2d 761, 1977 U.S. LEXIS 301 (1977) (decided under former Code 1933, § 38-314).

When the victim died before trial, the victim's preliminary hearing testimony identifying defendant as a burglar was admissible. Igle v. State, 223 Ga. App. 498, 478 S.E.2d 622 (decided under former O.C.G.A. § 24-3-10).

Trial court did not err in allowing an unavailable witness's preliminary hearing testimony to be read to the jury pursuant to former O.C.G.A. § 24-3-10 because the state exercised due diligence in seeking to locate the witness; despite efforts by state officials, the witness could not be located. Thomas v. State, 290 Ga. 653, 723 S.E.2d 885, 2012 Ga. LEXIS 253 (2012) (decided under former O.C.G.A. § 24-3-10).

Trial court did not commit plain error by admitting an individual's prior testimony from a preliminary hearing into evidence since the individual was unavailable and gave previous testimony because the defendant's trial counsel intentionally relinquished any objection to the trial court's ruling when counsel agreed with the state's analysis and asked that all of the individual's previous testimony be admitted. Davis v. State, 311 Ga. 225, 857 S.E.2d 207, 2021 Ga. LEXIS 132 (2021).

Testimony given at hearing on suppression of evidence. — Transcript of the testimony of an unavailable witness who testified for the defendant at the hearing on defendant's motion to suppress evidence was admissible since the testimony involved essentially the same issue as in the trial. Williams v. State, 214 Ga. App. 280, 447 S.E.2d 676, 1994 Ga. App. LEXIS 856 (1994), aff'd, 265 Ga. 471, 457 S.E.2d 665, 1995 Ga. LEXIS 346 (1995) (decided under former O.C.G.A. § 24-3-10).

Testimony given at guilty plea hearing. — Trial court did not abuse the court's discretion by excluding from evidence hearsay statements that the defendant's co-indictee made during the co-indictee's guilty plea hearing because, although the co-indictee's invocation of the co-indictee's Fifth Amendment privilege against compelled self-incrimination made the co-indictee unavailable as a witness, the state did not have a similar motive to develop the co-indictee's testimony at the plea hearing. The state's motive in questioning the co-indictee at the plea hearing was to establish that the guilty pleas were voluntarily entered and that there was a sufficient factual basis for the pleas, not to develop testimony specifically about the defendant. Shealey v. State, 308 Ga. 847, 843 S.E.2d 864, 2020 Ga. LEXIS 363 (2020).

Testimony given at coroner's inquest. — Testimony as to the substance of evidence given at a coroner's inquest by a witness since deceased was admissible when offered for impeachment purposes. Darby v. Moore, 144 Ga. 758, 87 S.E. 1067, 1916 Ga. LEXIS 118 (1916) (decided under former Civil Code 1910, § 5773).

Admission of transcripts of jury trial. — Although the trial court abused the court's discretion by admitting the

Proceedings (Cont'd)

transcripts of the defendant's jury trial and motion for new trial hearing under O.C.G.A. § 24-8-804(b)(1) without making any determination regarding whether the witnesses who provided the testimony in those transcripts were available for the 2019 immunity hearing, the trial court did not abuse the court's discretion by considering and admitting that evidence under O.C.G.A. § 24-8-807. State v. Hamilton, 308 Ga. 116, 839 S.E.2d 560, 2020 Ga. LEXIS 140 (2020).

Production of articles present at former trial. — When the testimony of a deceased witness who had testified at the former trial contained references to certain physical objects, which at the former trial were in court, this fact did not stop the operation of the former statute on the ground that such articles were not produced in court at the trial now under review nor offered in evidence, even though the state did not account for their absence. Bloodworth v. State, 161 Ga. 332, 131 S.E. 80, 1925 Ga. LEXIS 351 (1925) (decided under former Penal Code 1910, § 1027).

Former testiomy properly admitted. — Trial counsel was not ineffective for failing to object to the individual's prior testimony because counsel admitted at the motion for new trial hearing that the individual's testimony was strategically useful to support the defendant's theory of self-defense as the individual testified that the victim ran up and tried to grab the defendant immediately before the victim was stabbed. Davis v. State, 311 Ga. 225, 857 S.E.2d 207, 2021 Ga. LEXIS 132 (2021).

Agreed writing. — Evidence of a witness, since deceased, given on a former trial, on the same case, between the same parties, reduced to writing and agreed upon by counsel, is admissible on a subsequent trial. Walker v. Walker, 14 Ga. 242, 1853 Ga. LEXIS 216 (1853) (decided under former Code 1863, § 3705); Smith v. State, 28 Ga. 19, 1859 Ga. LEXIS 131 (1859) (decided under former law); Adair v. Adair, 39 Ga. 75, 1869 Ga. LEXIS 180 (1869) (decided under former Code 1868, § 3729); Lathrop v. Adkisson, 87 Ga. 339, 13 S.E. 517, 1891 Ga. LEXIS 165 (1891) (decided under former Code 1882, § 3782).

Ex parte affidavits. — Former statute did not authorize the admission in evidence on the final trial of the case an ex parte affidavit made by a witness since deceased for use on the hearing of an application for interlocutory injunction in the same case. Fender v. Ramsey & Phillips, 131 Ga. 440, 62 S.E. 527, 1908 Ga. LEXIS 100 (1908) (decided under former Civil Code 1895, § 5186); Byrd v. Prudential Ins. Co. of America, 185 Ga. 625, 196 S.E. 72, 1938 Ga. LEXIS 494 (1938) (decided under former Code 1933, § 38-314).

Testimony given at execution of an affidavit for an arrest warrant. — In a probation revocation proceeding, a court clerk's testimony regarding a wife's statements at the time of an application for an arrest warrant was not admissible since the party against whom the warrant was offered had not had the opportunity to cross-examine the wife. Farmer v. State, 266 Ga. 869, 472 S.E.2d 70 (decided under former O.C.G.A. § 24-3-10).

"Former trial" includes a commitment hearing. Wiseman v. State, 249 Ga. 559, 292 S.E.2d 670, 1982 Ga. LEXIS 1161 (1982) (decided under former O.C.G.A. § 24-3-10).

Guilty plea to a reduced criminal charge is proper evidence as an admission in a subsequent civil action, despite the fact that the admission was the result of a compromise in the criminal case. Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217, 1983 Ga. App. LEXIS 1915 (1983) (decided under former O.C.G.A. § 24-3-10).

Statement of child witness about abuse of victim not admissible. — Out-of-court statements of a child witness who observes the physical abuse of another child, but who is not personally a victim of such abuse, may not be admitted as an exception to the hearsay rule under former O.C.G.A. § 24-3-10. Thornton v. State, 264 Ga. 563, 449 S.E.2d 98, 1994 Ga. LEXIS 863 (1994), superseded by statute as stated in Bunn v. State, 291 Ga. 183, 728 S.E.2d 569, 2012 Ga. LEXIS 565 (2012) (decided under former O.C.G.A. § 24-3-10).

Testimony in probation revocation hearings. — Trial court erred in consid-

ering the prior testimony of witnesses who were not shown to be dead, disqualified, or otherwise inaccessible in a probation revocation hearing; nevertheless, any inadmissible hearsay was merely cumulative of the admissible probative testimony which was sufficient to show by a preponderance of the evidence that defendant committed the offense of aggravated assault. Wolcott v. State, 278 Ga. 664, 604 S.E.2d 478, 2004 Ga. LEXIS 941 (2004) (decided under former O.C.G.A. § 24-3-10).

Admission of cumulative testimony denied. — Defendant's reading into evidence the prior testimony of an unavailable witness was properly denied since the testimony would have been cumulative of other testimony, except as to a nonprobative matter. Pickens v. State, 225 Ga. App. 792, 484 S.E.2d 731 (decided under former O.C.G.A. § 24-3-10).

Former testimony was properly admitted in the following cases. — See Banks v. Bradwell, 140 Ga. 640, 79 S.E. 572, 1913 Ga. LEXIS 209 (1913) (decided under former Civil Code 1910, § 5773); Hunter v. State, 147 Ga. 823, 95 S.E. 668, 1918 Ga. LEXIS 160 (1918) (decided under former Penal Code 1910, § 1027); Sheppard v. State, 167 Ga. 326, 145 S.E. 654, 1928 Ga. LEXIS 149 (1928) (decided under former Penal Code 1910, § 1027); Georgia Chem. Works v. Malcolm, 186 Ga. 275, 197 S.E. 763, 1938 Ga. LEXIS 593 (1938) (decided under former Code 1933, § 38-314); Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765, 1952 Ga. App. LEXIS 671 (1952) (decided under former Code 1933, § 38-314); National Life & Accident Ins. Co. v. Fender, 146 Ga. App. 545, 247 S.E.2d 195, 1978 Ga. App. LEXIS 2450 (1978) (decided under former Code 1933, § 38-314); Gibson v. State, 160 Ga. App. 615, 287 S.E.2d 595, 1981 Ga. App. LEXIS 3112 (1981) (decided under former O.C.G.A. § 24-3-10); Knight v. State, 210 Ga. App. 63, 435 S.E.2d 276, 1993 Ga. App. LEXIS 1046 (1993) (decided under former O.C.G.A. § 24-3-10); Ortiz v. State, 222 Ga. App. 432, 474 S.E.2d 300 (decided under former O.C.G.A. § 24-3-10); Pope v. Fields, 273 Ga. 6, 536 S.E.2d 740, 2000 Ga. LEXIS 674 (2000) (decided under former O.C.G.A. § 24-3-10).

Similar motive in questioning victim in first trial. — Trial court did not err by admitting the victim's testimony from the first trial when the victim failed to appear for the second trial because, although the defendant did not know when the defendant cross-examined the victim in the first trial that the victim had attempted to influence a witness and tamper with evidence, the underlying issues and the context of the defendant's questioning during the cross-examination were similar in both trials, and the defendant had the similar motive to attempt to discredit the victim's testimony. Sanchez v. State, 353 Ga. App. 832, 840 S.E.2d 61, 2020 Ga. App. LEXIS 92 (2020).

Testimony properly excluded in the following cases. — See Brooks v. State, 69 Ga. App. 697, 26 S.E.2d 549, 1943 Ga. App. LEXIS 172 (1943) (decided under former Code 1933, § 38-314); Elders v. State, 145 Ga. App. 139, 253 S.E.2d 817 (1979) (decided under former Code 1933, § 38-314); Smith v. State, 247 Ga. 453, 276 S.E.2d 633, 1981 Ga. LEXIS 739 (1981) (decided under former O.C.G.A. § 24-3-10); Troy v. Interfinancial, Inc., 171 Ga. App. 763, 320 S.E.2d 872, 1984 Ga. App. LEXIS 2333 (1984) (decided under former O.C.G.A. § 24-3-10); Green v. State, 207 Ga. App. 800, 429 S.E.2d 169, 1993 Ga. App. LEXIS 340 (1993) (decided under former O.C.G.A. § 24-3-10); Adams v. State, 231 Ga. App. 279, 499 S.E.2d 105 (decided under former O.C.G.A. § 24-3-10).

Testimony improperly excluded in the following cases. — See Parrott v. Edwards, 113 Ga. App. 422, 148 S.E.2d 175, 1966 Ga. App. LEXIS 1085 (1966) (decided under former Code 1933, § 38-314); Rini v. State, 236 Ga. 715, 225 S.E.2d 234, 1976 Ga. LEXIS 1002, cert. denied, 429 U.S. 924, 97 S. Ct. 326, 50 L. Ed. 2d 293, 1976 U.S. LEXIS 3360 (1976).

Declarations Against Interest

1. Deceased Persons

History generally. — Former statute was a mere codification of a well-settled principle in the law. While such evidence was hearsay, it was admitted as one of the exceptions to the rule against hearsay evidence on the ground of the extreme improbability of its falsity. Massee-Felton

Deceased Persons (Cont'd)

Lumber Co. v. Sirmans, 122 Ga. 297, 50 S.E. 92, 1905 Ga. LEXIS 184 (1905) (decided under former Civil Code 1895, § 5181).

Former Code 1933, § 38-309 had no application since the party seeking to give hearsay evidence was not a competent witness under former Code 1933, § 38-1603 (see now O.C.G.A. § 24-6-601). Bloodworth v. Taylor, 208 Ga. 770, 69 S.E.2d 747, 1952 Ga. LEXIS 358 (1952) (decided under former Code 1933, § 38-309); Dye v. Richards, 210 Ga. 601, 81 S.E.2d 820, 1954 Ga. LEXIS 377 (1954) (decided under former Code 1933, § 38-309).

Prerequisites. — To render declaration or entries admissible, it must appear that the declarant is deceased, that the declarant possessed competent knowledge of the facts, or that it was his duty to know them, and the declarations were at variance with the declarant's interests. Field v. Boynton, 33 Ga. 239, 1862 Ga. LEXIS 21 (1862) (decided under former law); Murdock v. Adamson, 12 Ga. App. 275, 77 S.E. 181, 1913 Ga. App. LEXIS 539 (1913) (decided under former Civil Code 1910, § 5768).

Declarations of persons since deceased must be trustworthy before the declarations are admissible under the rule of necessity, and self-serving declarations are not admissible. Chrysler Motors Corp. v. Davis, 226 Ga. 221, 173 S.E.2d 691, 1970 Ga. LEXIS 489 (1970) (decided under former Code 1933, § 38-309).

Declarations of a decedent to others are admissible if there are no other witnesses to the alleged occurrence, it being for the jury, under appropriate instructions, to determine their weight and credibility. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566, 1981 Ga. App. LEXIS 2912 (1981) (decided under former O.C.G.A. § 24-3-8).

Time of making declarations. — Declarations are not admissible in behalf of a claimant, if made after the judgment was obtained or while the litigation was pending and with reference thereto. James v. Taylor, 93 Ga. 275, 20 S.E. 309, 1893 Ga. LEXIS 419 (1893) (decided under former law).

Nature of declarations. — Declarations of one, whether verbal or in writing, of a matter which is against one's interest at the time, and who is since deceased, is admissible as evidence in a suit between third persons, whether such declaration relates to the present or past occurrences. Field v. Boynton, 33 Ga. 239, 1862 Ga. LEXIS 21 (1862) (decided under former law); Barbre v. Scott, 75 Ga. App. 524, 43 S.E.2d 760, 1947 Ga. App. LEXIS 575 (1947) (decided under former Code 1933, § 38-309).

Declaration containing statements both for and against declarant's interest. — If the declaration or entry contains statements both in favor of the declarant and against the declarant's interest, the statements are to be balanced, and if those in favor of interest equal or preponderate over those against interest the declaration is not admissible; otherwise it is. Massee-Felton Lumber Co. v. Sirmans, 122 Ga. 297, 50 S.E. 92, 1905 Ga. LEXIS 184 (1905) (decided under former Civil Code 1895, § 5181).

If a declaration or entry contains statements both in favor of the declarant and against the declarant's interest, the statements are to be balanced, and if those in favor of interest equal or preponderate over those against interest, the declaration is not admissible. Mattison v. Travelers Indem. Co., 167 Ga. App. 521, 307 S.E.2d 39, 1983 Ga. App. LEXIS 3335 (1983) (decided under former O.C.G.A. § 24-3-8).

Weight of evidence. — Declarations or entries when admitted are evidence as to any fact stated therein which was within the knowledge of the declarant or which it was the declarant's duty to know. Massee-Felton Lumber Co. v. Sirmans, 122 Ga. 297, 50 S.E. 92, 1905 Ga. LEXIS 184 (1905) (decided under former Civil Code 1895, § 5181).

Cause of injury. — Declaration by an injured party tending to exonerate the defendant is admissible. Georgia R.R. & Banking v. Fitzgerald, 108 Ga. 507, 34 S.E. 316, 1899 Ga. LEXIS 282 (1899) (decided under former Civil Code 1895, § 5181); Murdock v. Adamson, 12 Ga. App. 275, 77 S.E. 181, 1913 Ga. App. LEXIS 539 (1913) (decided under former Civil Code 1910, § 5768).

Declaration as to marriage. — When equivocal conduct such as cohabitation is relied upon as a circumstance material to the issue to prove marriage, declarations of one of the parties since deceased, made pending the period of cohabitation, disaffirming the marriage, are admissible. Drawdy v. Hesters, 130 Ga. 161, 60 S.E. 451, 1908 Ga. LEXIS 248 (1908) (decided under former Civil Code 1895, § 5181).

Insurance. — When an insurance policy is sued on by a creditor who was a beneficiary, a letter of the insured to a third person stating that the insured had not applied for any insurance is admissible. Chandler v. Mutual Life & Indus. Ass'n, 131 Ga. 82, 61 S.E. 1036, 1908 Ga. LEXIS 24 (1908) (decided under former Civil Code 1895, § 5181).

It was permissible for the defendant to prove that a few months before applying for the insurance the insured made to third persons declarations contrary to the facts stated in the application, the same being admissible as declarations of a person, since deceased, against the deceased's interest, and not made with a view to pending litigation. Henderson v. Jefferson Std. Life Ins. Co., 39 Ga. App. 609, 147 S.E. 901, 1929 Ga. App. LEXIS 462 (1929) (decided under former Civil Code 1910, § 5768).

Parties to contracts. — Testimony of a person other than the party to the contract that the person heard the deceased state that the person was going to will the deceased's property to the plaintiff is admissible. Brewer v. Mackey, 177 Ga. 813, 171 S.E. 273, 1933 Ga. LEXIS 434 (1933) (decided under former Code 1933, § 38-309).

In a personal injury case, to the extent that an employer implied or stated that a deceased employee agreed to make certain deliveries, those statements were admissible because alleged oral agreements by the decedent were considered against the decedent's interest. Thompson v. Club Group, Ltd., 251 Ga. App. 356, 553 S.E.2d 842, 2001 Ga. App. LEXIS 949 (2001), cert. denied, No. S02C0005, 2002 Ga. LEXIS 113 (Ga. Feb. 11, 2002) (decided under former O.C.G.A. § 24-3-8).

Proffer of declaration by beneficiary thereof. — Decedent's declarations in disparagement of decedent's title would be admissible pursuant to former O.C.G.A. § 24-3-8, as the declarations negate the existence of a gift and are, therefore, against the decedent's pecuniary interest; that such declarations are proffered by one who would benefit from their admission into evidence is not a valid ground for excluding the declarations from the jury's consideration. Cole v. Cole, 205 Ga. App. 332, 422 S.E.2d 230, 1992 Ga. App. LEXIS 1142 (1992) (decided under former O.C.G.A. § 24-3-8).

Parties and their privities. — It is not necessary for purposes of former O.C.G.A. § 24-3-8 that a declarant be a party or in privity with a party. Horan v. Pirkle, 197 Ga. App. 151, 397 S.E.2d 734, 1990 Ga. App. LEXIS 1196 (1990) (decided under former O.C.G.A. § 24-3-8).

Pending litigation. — While a confessor to a crime may believe that litigation is impending, that one might well become involved in criminal proceedings as a result of one's confession, the possibility or probability of litigation does not translate into "pending" litigation as the term is used in former O.C.G.A. § 24-3-8. State Farm Auto. Ins. Co. v. Great Am. Ins. Co., 164 Ga. App. 457, 297 S.E.2d 355, 1982 Ga. App. LEXIS 2834 (1982) (decided under former O.C.G.A. § 24-3-8).

When defendant's deceased brother had been fingerprinted and booked at the time he was interviewed by police, his statement, made with a view to litigation, was inadmissible. Jones v. State, 196 Ga. App. 842, 397 S.E.2d 181, 1990 Ga. App. LEXIS 1130 (1990) (decided under former O.C.G.A. § 24-3-8).

Rule of necessity. — Since deceased was the only eyewitness to events leading up to a fire, the deceased's out-of-court declarations in the form of the deceased's "trustworthy" deposition testimony are admissible as coming within the rule of necessity. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566, 1981 Ga. App. LEXIS 2912 (1981) (decided under former O.C.G.A. § 24-3-8).

Dying declaration properly included in determination of sufficiency of evidence. — Because a statement, which qualified as a dying declaration is admissible as an exception to the hearsay rule, the testimony regard-

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ing the victim's dying declarations was properly included in the supreme court's determination of the sufficiency of the evidence, as a whole, to support the convictions. Hager v. State, 297 Ga. 112, 772 S.E.2d 692, 2015 Ga. LEXIS 302 (2015) (decided under former O.C.G.A. § 24-3-6).

Declarations held inadmissible. — See Hollis v. Sales, 103 Ga. 75, 29 S.E. 482, 1897 Ga. LEXIS 359 (1897) (decided under former Civil Code 1895, § 5181); State Banking Co. v. Miller, 185 Ga. 653, 196 S.E. 47, 1938 Ga. LEXIS 487 (1938) (decided under former Code 1933, § 38-309); Martin v. Turner, 235 Ga. 35, 218 S.E.2d 789, 1975 Ga. LEXIS 772 (1975), superseded by statute as stated in Newton v. Lawson, 313 Ga. App. 29, 720 S.E.2d 353, 2011 Ga. App. LEXIS 1070 (2011) (decided under former Code 1933, § 38-309); Crowder v. State, 237 Ga. 141, 227 S.E.2d 230, 1976 Ga. LEXIS 1177 (1976) (decided under former Code 1933, § 38-309); Cobb v. Garner, 158 Ga. App. 110, 279 S.E.2d 280, 1981 Ga. App. LEXIS 2333 (1981) (decided under former O.C.G.A. § 24-3-8); Boehm v. Abi-Sarkis, 211 Ga. App. 181, 438 S.E.2d 410, 1993 Ga. App. LEXIS 1486 (1993) (decided under former O.C.G.A. § 24-3-8).

Declarations held properly admitted. — See Elwell v. New England Mtg. Sec. Co., 101 Ga. 496, 28 S.E. 833, 1897 Ga. LEXIS 250 (1897) (decided under former Civil Code 1895, § 5181); Holland v. Gunn, 171 Ga. 204, 154 S.E. 887, 1930 Ga. LEXIS 307 (1930) (decided under former Civil Code 1910, § 5768).

Trial counsel was not ineffective for failing to challenge the admission of testimony regarding the victim's dying declaration because the statement satisfied the requirements for admission of a dying declaration under former O.C.G.A. § 24-3-6; the defendant identified no valid basis for objection. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661, 2012 Ga. LEXIS 625 (2012) (decided under former O.C.G.A. § 24-3-6).

Victim's non-verbal statements to the victim's sibling and the victim's wife were admissible as dying declarations under former O.C.G.A. § 24-3-6 as the victim was conscious of the victim's dire condition at the time the victim made the non-verbal statements inculpating the defendant as the shooter as the victim prayed with the victim's spouse for forgiveness and died a few days later due to complications related to the multiple serious injuries. Wiggins v. State, 295 Ga. 684, 763 S.E.2d 484, 2014 Ga. LEXIS 720 (2014) (decided under former O.C.G.A. § 24-3-6).

2. As to Title by Possessors

Presumption. — Until the contrary appears, every man is presumed to be cognizant of the law; and whenever admissions are made, as to the title of property, by the party in possession, the presumption is, that the statements were made, not only with a knowledge of the facts, but of the party's legal rights, also, growing out of those facts. Butler v. Livingston, 15 Ga. 565, 1854 Ga. LEXIS 87 (1854) (decided under former law).

Possession required. — Statement by the alleged predecessor in title was properly rejected because it did not appear that at the time of making the admission referred to the party making the statement was in possession of the land. George v. Williams, 177 Ga. 630, 170 S.E. 790, 1933 Ga. LEXIS 376 (1933) (decided under former Code 1933, § 38-308).

Proof of privity required. — Before the sayings of one person should be received in evidence against another, it ought to be clear beyond a reasonable doubt, that the other claims under him, or bears to him some relation of privity. Aiken v. Cato, 23 Ga. 154, 1857 Ga. LEXIS 231 (1857) (decided under former law).

Tax returns. — Tax returns were held in the nature of declarations to show adverse possession. Smith v. Haire, 58 Ga. 446, 1877 Ga. LEXIS 138 (1877) (decided under former Code 1873, § 3774).

County property inventory purporting to include all property belonging to the county is in the nature of such a declaration. Ogden v. Dodge County, 97 Ga. 461, 25 S.E. 321, 1895 Ga. LEXIS 504 (1895) (decided under former Civil Code 1895, § 5180).

Testimony held not admissible. — See Ehrlich v. Mills, 203 Ga. 600, 48 S.E.2d 107, 1948 Ga. LEXIS 496 (1948)

(decided under former Code 1933, § 38-308); Turner v. McKee, 97 Ga. App. 531, 103 S.E.2d 658, 1958 Ga. App. LEXIS 818 (1958) (decided under former Code 1933, § 38-308).

3. Disparagement of Own Title

Competency depends on time of making. — Whether admissions made by defendant, while in possession of land levied on and claimed, in disparagement of defendant's title, are competent, depends, in some measure, upon the time when the admissions were made. If made before the commencement of the plaintiff's suit, the admissions would be admissible even in favor of the claimant. Powell v. Watts, 72 Ga. 770, 1884 Ga. LEXIS 319 (1884) (decided under former Code 1882, § 3774). ; See also Rountree v. Gaulden, 128 Ga. 737, 58 S.E. 346, 1907 Ga. LEXIS 198 (1907).

Party privity required. — While declarations by a person in possession of property, in disparagement of the person's own title, shall be admissible in evidence in favor of anyone and against privies, it was error to admit the testimony of a witness as to a statement made by someone else involved, which adjoined him, neither of these persons being in possession of the land and neither being in privity with either of the parties to the present proceeding. Morgan v. Lester, 215 Ga. 570, 111 S.E.2d 228, 1959 Ga. LEXIS 544 (1959) (decided under former Code 1933, § 38-308).

Declarations of a deceased person in disparagement of the deceased's title to land, made while in possession thereof, are admissible in evidence, not only against the declarant and those claiming under the declarant, but also for or against strangers. McLeod v. Swain, 87 Ga. 156, 13 S.E. 315 (1891) (decided under former Code 1882, § 3774); Hall v. Collier, 146 Ga. 815, 92 S.E. 536 (1917) (decided under former Civil Code 1910, § 5767); McCrea v. Georgia Power Co., 179 Ga. 1, 174 S.E. 798 (1934) , later appeal, 187 Ga. 708, 15 S.E.2d 664 (1939).Kimbrough v. Rutherford, 70 Ga. App. 294, 28 S.E.2d 370, 1943 Ga. App. LEXIS 300 (1943) (decided under former Code 1933, § 38-308).

Party having two distinct titles to property may disclaim one and rely entirely on the other, and after such election is made, the admissions of one's privies in the disclaimed title are not evidence against that one. Oliver v. Persons, 30 Ga. 391, 1860 Ga. LEXIS 106 (1860) (decided under former Code 1863, § 3697).

Possessor of personal property. — Declarations of one in possession of personal property, adverse to one's title, are evidence against a party holding under one by purchase subsequent to the making of such declarations. Doughty v. McMillan, 92 Ga. 818, 19 S.E. 59, 1893 Ga. LEXIS 260 (1893) (decided under former Code 1882, § 3774).

Party declaring against part interest. — Declaration of one in possession of a lot of land, with a deed to the whole lot, that one did not claim a particular part of the land, is admissible in evidence against a privy of the declarant. Callaway v. Beauchamp, 147 Ga. 17, 92 S.E. 538, 1917 Ga. LEXIS 20 (1917) (decided under former Civil Code 1910, § 5767).

Declarations by a donor of land in favor of the donor's own title, made after the donor has delivered possession of the land to the donee, are not admissible in evidence against the latter. Declarations of a donor against the donor's title and in favor of that of the donee bind the donor and donor's privies in estate, and consequently are admissible in the donee's favor against one who derived title from the donor after the declarations were made. Ogden v. Dodge County, 97 Ga. 461, 25 S.E. 321, 1895 Ga. LEXIS 504 (1895) (decided under former Civil Code 1895, § 5180).

Admissions of trustee. — If one was a continuing trustee, holding the legal title for the cestui que trust, one's admissions, while actually handling the subject matter of the trust, would be admissible. Knorr v. Raymond, 73 Ga. 749, 1884 Ga. LEXIS 219 (1884) (decided under former Code 1882, § 3774).

Declarations of an assignor were admissible if the declarations were made in disparagement of the assignor's title while the assignor was in possession. Wright v. Zeigler Bros., 70 Ga. 501, 1883

Disparagement of Own Title (Cont'd)

Ga. LEXIS 364 (1883) (decided under former Code 1882, § 3774).

Claim cases. — In a claim case, the sayings of the defendant in execution while in possession, or of any other person in possession of the land, are evidence for the plaintiff in execution to show that the defendant, or such third person, was not the tenant of the claimant. Ozmore v. Hood & Kiddoo, 53 Ga. 114, 1874 Ga. LEXIS 416 (1874) (decided under former Code 1873, § 3774).

4. Adverse Possession

Declarations are admissible to characterize the possession as bearing on whether the possession was permissive or adverse, when that fact is relevant, but not to show the truth of the statements, without more. Sausey v. White, 143 Ga. 7, 84 S.E. 58, 1915 Ga. LEXIS 255 (1915) (decided under former Civil Code 1910, § 5767).

Declarations of a person in possession of land are admissible to characterize the possession as bearing on whether the possession was permissive or adverse, when that fact is relevant, but not to show the truth of the statements without more. Higdon v. Dixon, 203 Ga. 67, 45 S.E.2d 423, 1947 Ga. LEXIS 572 (1947) (decided under former Code 1933, § 38-308).

Declarations admissible for limited purpose. — Declarations in favor of one's own title are admissible for no other purpose than to prove adverse possession. Rucker v. Rucker, 136 Ga. 830, 72 S.E. 241, 1911 Ga. LEXIS 241 (1911) (decided under former Civil Code 1910, § 5767).

Nature of predecessor's title. — When a claimant relies upon statements of the claimant's father to show that the latter had purchased land with money of his wife, taking title thereto in his own name, declarations made by the father, while in possession of the land, that the land was not bought with money of his wife, but with his own funds, are admissible to show his adverse possession. Wallace v. Mize, 153 Ga. 374, 112 S.E. 724, 1922 Ga. LEXIS 83 (1922) (decided under former Civil Code 1910, § 5767).

Deceased Persons

1. In General

Constitutionality. — Admission of dying declarations does not contravene that provision of the Constitution of the United States which provides that the accused shall be confronted with the witnesses against the accused. Jones v. State, 130 Ga. 274, 60 S.E. 840, 1908 Ga. LEXIS 262 (1908) (decided under former Penal Code 1895, § 1000). ; SeeCampbell v. State, 11 Ga. 353, 1852 Ga. LEXIS 52 (1852).

If the declarant did not die, the statement is not admissible as a dying declaration. Stembridge v. Georgia, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130, 1952 U.S. LEXIS 2062 (1952).

Must be in prosecution for homicide of deceased. — Declarations made by a person in extremis are not admissible as dying declarations except where the defendant is on trial for killing declarant. Wooten v. Wilkins, 39 Ga. 223, 1869 Ga. LEXIS 205 (1869) (decided under former Code 1863, § 3704); Miliken v. State, 8 Ga. App. 478, 69 S.E. 915, 1910 Ga. App. LEXIS 231 (1910) (decided under former Penal Code 1895, § 1000).

Declarations, though made by a person in extremis, are not admissible as dying declaration in a homicide case since the defendant is not on trial for killing the declarant, though the declarant may have been killed in the transaction to which the trial relates. Westberry v. State, 175 Ga. 115, 164 S.E. 905, 1932 Ga. LEXIS 201 (1932) (decided under former Penal Code 1910, § 1026).

Dying declarations can be used by the accused for the purpose of showing the accused's innocence. Johnson v. State, 169 Ga. 814, 152 S.E. 76, 1930 Ga. LEXIS 40 (1930) (decided under former Penal Code 1910, § 1026).

Credibility of declarations. — Even though all the conditions be satisfied still dying declarations should be received with great caution. Carter v. State, 2 Ga. App. 254, 58 S.E. 532, 1907 Ga. App. LEXIS 340 (1907) (decided under former Penal Code 1895, § 1000); Smith v. State, 9 Ga. App. 403, 71 S.E. 606, 1911 Ga. App. LEXIS 580 (1911) (decided under former Penal Code 1910, § 1026).

Evidence of a dying declaration should be received with great caution because first, the declarant is not under oath second, because the declarant is not subject to cross-examination third, because of the likelihood of its being misquoted and fourth, because although it is of a species of proof spoken of as an anomaly, and contrary to all the general rules of evidence, yet it has, where it is received, the greatest weight with juries. Hardy v. State, 76 Ga. App. 488, 46 S.E.2d 536, 1948 Ga. App. LEXIS 399 (1948) (decided under former Code 1933, § 38-307).

Ambiguous statements. — When a statement is susceptible of two constructions, one that the declarant realized the declarant was in a dying condition and the other that the declarant might recover, and when the other circumstances are sufficient to show prima facie that the declarant was in the article of death and conscious of the declarant's condition, a declaration as to the cause of the declarant's death and the person who killed the declarant is not to be excluded because of such ambiguity. Parker v. State, 197 Ga. 340, 29 S.E.2d 61, 1944 Ga. LEXIS 255 (1944) (decided under former Code 1933, § 38-307).

Subsequent affirmations. — Declarations not admissible because, at the time of making, the declarant did not believe declarant was going to die, may become admissible by subsequent affirmation since the declarations were referred to and affirmed as to their truth at the time when the declarant was conscious the declarant was dying. Cooper v. State, 182 Ga. 42, 184 S.E. 716, 1936 Ga. LEXIS 281 (1936) (decided under former Code 1933, § 38-307).

When victim makes same statement before and after awareness of impending death. — There was no error in permitting the state's witnesses to testify about the victim's statement, made prior to the time that the victim was aware of the victim's impending death, about who had beaten the victim, since there was evidence that the victim later made the same statement while fully aware of the victim's impending death. Wright v. State, 254 Ga. 484, 330 S.E.2d 358, 1985 Ga. LEXIS 737 (1985) (decided under former O.C.G.A. § 24-3-6).

Former dead man's statute rendered a witness incompetent to testify as to a conversation with a person since deceased regardless of whether the testimony might be admissible under other rules of evidence. Willis v. Kennedy, 267 Ga. 165, 476 S.E.2d 246 (decided under former O.C.G.A. § 24-3-9).

Testimony of friend of deceased murder victim admissible. — In a malice murder case, the trial court did not abuse the court's discretion by finding that a statement by a murder victim's close, personal friend that the victim told the friend that the victim intended and was making arrangements to separate from the defendant and force the defendant to move out of their home was admissible under the necessity exception to the hearsay rule because the victim shared personal confidences with the friend and, therefore, the statement exhibited a particularized guarantee of trustworthiness. McNaughton v. State, 290 Ga. 894, 725 S.E.2d 590, 2012 Ga. LEXIS 358 (2012) (decided under former O.C.G.A. § 24-3-1).

2. Declarations

a. Completeness

Exclusion as fragmentary and incomplete. — Dying declaration which was uncompleted because the declarant' became unconscious before finishing the declarant's statement is not thereby rendered inadmissible. But if it appears that the statement was intended by the declarant to be connected with and qualified by other statements which from any cause the declarant was prevented from making, the statement should be excluded as fragmentary and incomplete. Kalb v. State, 195 Ga. 544, 25 S.E.2d 24, 1943 Ga. LEXIS 542 (1943), overruled, Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976), overruled in part as stated in Elliott v. State, 305 Ga. 179, 824 S.E.2d 265, 2019 Ga. LEXIS 112 (2019) (decided under former Code 1933, § 38-307).

Telling of less than full knowledge. — If a dying person finishes the statement the person wishes to make, it is no objection to the statement's admissibility as a dying declaration that the person told

Completeness (Cont'd)

only a portion of what the person might have been able to tell. A distinct statement of facts meets the requirement of completeness. Kalb v. State, 195 Ga. 544, 25 S.E.2d 24, 1943 Ga. LEXIS 542 (1943), overruled, Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976), overruled in part as stated in Elliott v. State, 305 Ga. 179, 824 S.E.2d 265, 2019 Ga. LEXIS 112 (2019) (decided under former Code 1933, § 38-307).

Failure to use full name. — Dying declarations sought to be admitted were not objectionable because the full name of the defendant was not stated, there being other evidence to show that the name used by the deceased referred to the accused. Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, 1943 Ga. LEXIS 541 (1943), cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464, 1943 U.S. LEXIS 263 (1943), overruled, Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976), overruled in part as stated in Elliott v. State, 305 Ga. 179, 824 S.E.2d 265, 2019 Ga. LEXIS 112 (2019) (decided under former Code 1933, § 38-307).

Fact that the deceased in the deceased's dying declaration did not call the full name of the defendant does not render this evidence inadmissible when taken in connection with the other evidence that there was no other person present at the time of the homicide with such name. Patterson v. State, 199 Ga. 773, 35 S.E.2d 504, 1945 Ga. LEXIS 384 (1945) (decided under former Code 1933, § 38-307).

Since the victim's dying declaration referred to a woman at the scene of a crime, and since the state established that the defendant was the only woman present when the victim was killed, the victim's failure to use her name does not render the victim's statement inadmissible. Dixon v. State, 243 Ga. 46, 252 S.E.2d 431, 1979 Ga. LEXIS 800 (1979) (decided under former Code 1933, § 38-307).

b. Factual Requirements

Reason for admission is based on the fact that a man in a dying condition would not misrepresent a fact. Hill v. State, 41 Ga. 484, 1871 Ga. LEXIS 130 (1871) (decided under former Code 1868, § 3728); Solomon v. State, 2 Ga. App. 92, 58 S.E. 381, 1907 Ga. App. LEXIS 284 (1907) (decided under former Penal Code 1910, § 1026).

Must be certain and definite. — All vague and indefinite expressions, all language that does not distinctly point to the cause of death, and death's attending circumstances, but requires to be aided by supposition or inference in order to establish facts tending to criminate the respondent should be held inadmissible. Mitchell v. State, 71 Ga. 128, 1883 Ga. LEXIS 153 (1883) (decided under former Code 1882, § 3781); Odom v. State, 13 Ga. App. 687, 79 S.E. 858, 1913 Ga. App. LEXIS 326 (1913) (decided under former Penal Code 1910, § 1026).

Must be as to facts. — Dying declarations are competent, provided the declarations do not amount to the mere expression of an opinion by the deceased as to the cause and manner of the declarant's death. The rule of law is that a dying declaration to be admissible must consist of a statement of a matter of fact, and a declaration which amounts to the mere expression of an opinion by the person making it should not be received in evidence. White v. State, 100 Ga. 659, 28 S.E. 423, 1897 Ga. LEXIS 127 (1897) (decided under former Penal Code 1895, § 1000).

Presumption of personal knowledge. — When want of knowledge does not appear either from the statement itself or from other evidence in the case, it must be presumed that the declarant stated a fact within the declarant's knowledge. In these circumstances, it was a question for the jury whether the declaration represented the primary knowledge of the deceased or merely the deceased's opinion. Strickland v. State, 167 Ga. 452, 145 S.E. 879, 1928 Ga. LEXIS 171 (1928) (decided under former Penal Code 1910, § 1026); Hawkins v. State, 213 Ga. 749, 101 S.E.2d 710, 1958 Ga. LEXIS 269 (1958) (decided under former Code 1933, § 38-307).

c. Scope of Declarations

Declarations should be limited to the cause of death and the person who killed the victim. Harris v. State, 142 Ga.

627, 83 S.E. 514, 1914 Ga. LEXIS 482 (1914) (decided under former Penal Code 1910, § 1026).

Dying declaration not strictly limited. — Dying declaration is not strictly limited to the physical cause of death and the identity of the killer but may include the res gestae of the homicide as part of the cause of death. McAllister v. State, 246 Ga. 246, 271 S.E.2d 159, 1980 Ga. LEXIS 1067 (1980) (decided under former Code 1933, § 38-307).

Dying declarations admissible to prove any relevant fact embraced in the res gestae of the killing. Wilkerson v. State, 91 Ga. 729, 17 S.E. 990 (1893) (decided under former Code 1882, § 3781). ; SeeBush v. State, 109 Ga. 120, 34 S.E. 298, 1899 Ga. LEXIS 587 (1899); Rozier v. State, 197 Ga. 420, 29 S.E.2d 602, 1944 Ga. LEXIS 282 (1944) (decided under former Code 1933, § 38-307).

Relation required. — Dying declarations must relate to the cause of death or the person who killed the deceased in order to be admissible. Rozier v. State, 197 Ga. 420, 29 S.E.2d 602, 1944 Ga. LEXIS 282 (1944) (decided under former Code 1933, § 38-307).

Proper parts of res gestae. — Every fact or circumstance shedding light upon the transaction, including such conversation and conduct of the parties as are properly parts of the res gestae of the homicide, may lawfully go to the jury in a dying declaration made by the deceased. Taylor v. State, 120 Ga. 857, 48 S.E. 361, 1904 Ga. LEXIS 721 (1904) (decided under former Penal Code 1895, § 1000); Harris v. State, 142 Ga. 627, 83 S.E. 514, 1914 Ga. LEXIS 482 (1914) (decided under former Penal Code 1910, § 1026); Rozier v. State, 197 Ga. 420, 29 S.E.2d 602, 1944 Ga. LEXIS 282 (1944) (decided under former Code 1933, § 38-307).

d. Identity of Assailant

Mere expression of opinion as to who assailant was, when it was manifestly impossible that the deceased could have seen the assailant or known certainly who the assailant was, is not admissible as a dying declaration. Strickland v. State, 167 Ga. 452, 145 S.E. 879, 1928 Ga. LEXIS 171 (1928) (decided under former Penal Code 1910, § 1026).

Conclusions based on appearances. — When a declaration by the declaration's terms, taken in connection with the circumstances, merely expresses the declarant's belief as to the identity of the guilty person, it should be excluded; however, if the declarant sees the declarant's assailant or assailants, and from appearances which the declarant may describe the declarant draws a conclusion as to the assailant's identity, it is admissible. Hawkins v. State, 213 Ga. 749, 101 S.E.2d 710, 1958 Ga. LEXIS 269 (1958) (decided under former Code 1933, § 38-307).

Question of fact. — When the evidence did not show that it was impossible for the deceased to have seen the person who shot the deceased, it was a question of fact for the jury to determine whether the deceased had personal knowledge of the assailant's identity. Hawkins v. State, 213 Ga. 749, 101 S.E.2d 710, 1958 Ga. LEXIS 269 (1958) (decided under former Code 1933, § 38-307).

e. Elicited by Questions

Admissibility is not affected by the fact that the statements may have been elicited in response to questions put to the deceased by the bystanders. Brinson v. State, 22 Ga. App. 649, 97 S.E. 102, 1918 Ga. App. LEXIS 660 (1918) (decided under former Penal Code 1910, § 1026); Davis v. State, 204 Ga. 467, 50 S.E.2d 604, 1948 Ga. LEXIS 491 (1948) (decided under former Code 1933, § 38-307).

Not rebuttal of other evidence. — If preliminary statement made by the deceased as to the deceased's condition, in answer to questions, could be construed as lacking definiteness as a statement that the deceased was conscious of the fact that the deceased was going to die, this would not necessarily rebut the other evidence and circumstances from which it could have been inferred that the deceased believed the deceased would die. Davis v. State, 204 Ga. 467, 50 S.E.2d 604, 1948 Ga. LEXIS 491 (1948) (decided under former Code 1933, § 38-307).

Officer's questioning of dying victim. — Trial court did not abuse the court's discretion in overruling the defen-

Elicited by Questions (Cont'd)

dant's objection to an officer's testimony that the victim said that the victim thought that the defendant had shot the victim since they had been in a relationship that ended because the officer responded to the emergency situation, found the fatally wounded victim, and asked the victim what happened in order to assess the exigencies; also, the officer wanted to keep the victim talking in order to keep the victim from losing consciousness before emergency responders arrived. Sanford v. State, 287 Ga. 351, 695 S.E.2d 579, 2010 Ga. LEXIS 395 (2010), cert. denied, 562 U.S. 1237, 131 S. Ct. 1514, 179 L. Ed. 2d 336, 2011 U.S. LEXIS 1697 (2011) (decided under former O.C.G.A. § 24-3-6).

3. Conscious of Condition

Must be conscious of condition. — It must appear to the court that there was a probability that the deceased was conscious of the deceased's impending death at the time of making the dying declarations. Walton v. State, 79 Ga. 446, 5 S.E. 203, 1887 Ga. LEXIS 250 (1887) (decided under former Code 1882, § 3781); Young v. State, 114 Ga. 849, 40 S.E. 1000, 1902 Ga. LEXIS 812 (1902) (decided under former Penal Code 1895, § 1000); Crews v. State, 44 Ga. App. 546, 162 S.E. 146, 1932 Ga. App. LEXIS 373 (1932) (decided under former Penal Code 1910, § 1026); Gibbs v. State, 190 Ga. 207, 9 S.E.2d 248, 1940 Ga. LEXIS 467 (1940) (decided under former Code 1933, § 38-307); Freeman v. State, 233 Ga. 745, 213 S.E.2d 643, 1975 Ga. LEXIS 1431 (1975) (decided under former Code 1933, § 38-307).

Means unimportant. — It does not matter how or by what means the deceased becomes conscious that the deceased is dying. Smith v. State, 9 Ga. App. 403, 71 S.E. 606, 1911 Ga. App. LEXIS 580 (1911) (decided under former Penal Code 1910, § 1026).

Declarations of a person since deceased are admissible to show that the person was conscious of the person's dying condition. Jenkins v. State, 190 Ga. 556, 9 S.E.2d 909, 1940 Ga. LEXIS 519 (1940) (decided under former Code 1933, § 38-307).

Statement of recovery hopes most common. — Most common way to determine whether or not the deceased was conscious of impending death at the time of making the declaration is to look at the deceased's statement concerning the deceased's hope of recovery. Wallace v. State, 90 Ga. 117, 15 S.E. 700, 1892 Ga. LEXIS 134 (1892) (decided under former Code 1882, § 3781).

Consciousness may be inferred. — Consciousness on the part of the deceased that the deceased was dying and was actually in extremis may be inferred, not only from the deceased's statements, but also from the nature of the wound and other circumstances. Smith v. State, 110 Ga. 255, 34 S.E. 204 (1899) (decided under former Penal Code 1895, § 1000); Young v. State, 114 Ga. 849, 40 S.E. 1000 (1902) (decided under former Penal Code 1895, § 1000); Jefferson v. State, 137 Ga. 382, 73 S.E. 499 (1912) (decided under former Penal Code 1910, § 1026); Johnson v. State, 169 Ga. 814, 152 S.E. 76 (1930) (decided under former Penal Code 1910, § 1026); Crews v. State, 44 Ga. App. 546, 162 S.E. 146 (1932) (decided under former Penal Code 1910, § 1026); Keith v. State, 175 Ga. 385, 165 S.E. 262 (1932) (decided under former Penal Code 1910, § 1026); McCullough v. State, 177 Ga. 315, 170 S.E. 220 (1933) (decided under former Penal Code 1910, § 1026); Simmons v. State, 181 Ga. 761, 184 S.E. 291 (1936) (decided under former Code 1933, § 38-307); Rouse v. State, 183 Ga. 551, 188 S.E. 904 (1936).Etheridge v. State, 187 Ga. 30, 199 S.E. 185 (1938), for comment, see 1 Ga. B.J. 49 (1939) (decided under former Code 1933, § 38-307); Satterfield v. State, 68 Ga. App. 7, 21 S.E.2d 861 (1942).Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943) , overruled on other grounds, Howard v. State, 237 Ga. 471, 228 S.E.2d 860 (1976).Patterson v. State, 199 Ga. 773, 35 S.E.2d 504, 1945 Ga. LEXIS 384 (1945) (decided under former Code 1933, § 38-307); Hardy v. State, 76 Ga. App. 488, 46 S.E.2d 536, 1948 Ga.

App. LEXIS 399 (1948) (decided under former Code 1933, § 38-307); Davis v. State, 204 Ga. 467, 50 S.E.2d 604, 1948 Ga. LEXIS 491 (1948) (decided under former Code 1933, § 38-307); Stembridge v. State, 82 Ga. App. 214, 60 S.E.2d 491, 1950 Ga. App. LEXIS 1086 (1950) (decided under former Code 1933, § 38-307); Norris v. State, 258 Ga. 889, 376 S.E.2d 653, 1989 Ga. LEXIS 85 (1989), overruled in part, Johnson v. State, 272 Ga. 254, 526 S.E.2d 549, 2000 Ga. LEXIS 122 (2000) (decided under former O.C.G.A. § 24-3-6).

With regard to a defendant's conviction for malice murder, the trial court did not err by admitting into evidence statements that the victim made to friends who found the victim wounded that the same person who had accused the victim of committing a robbery earlier in the day (the defendant) was the same person who shot the victim. The victim had lost consciousness after no longer being able to walk after having suffered a gunshot wound to the chest and was found several hours later fully knowing of the need of immediate medical attention; therefore, a prima facie showing for the admission of the victim's statements as dying declarations was established. Ventura v. State, 284 Ga. 215, 663 S.E.2d 149, 2008 Ga. LEXIS 527 (2008) (decided under former O.C.G.A. § 24-3-6).

Identification testimony of murder victim who had suffered third-degree burns over 95 percent of the victim's body, and was aware of the victim's impending death at the time the identification was made, was properly admitted. Norris v. State, 258 Ga. 889, 376 S.E.2d 653, 1989 Ga. LEXIS 85 (1989), overruled in part, Johnson v. State, 272 Ga. 254, 526 S.E.2d 549, 2000 Ga. LEXIS 122 (2000) (decided under former O.C.G.A. § 24-3-6).

Consciousness of impending death may be inferred from the declarant's statements, the nature of declarant's wounds, and other circumstances. Early v. State, 170 Ga. App. 158, 316 S.E.2d 527, 1984 Ga. App. LEXIS 2860 (1984) (decided under former O.C.G.A. § 24-3-6).

Asking for physician. — Fact that the deceased whose last statements were sought to be admitted, might have asked for a doctor does not establish, and might not of itself be taken in the mind of the jury as in any way indicating that the deceased was unaware of the deceased's dying condition, since it is but natural that even a dying man could wish to be attended by a physician. Patterson v. State, 199 Ga. 773, 35 S.E.2d 504, 1945 Ga. LEXIS 384 (1945) (decided under former Code 1933, § 38-307).

Notwithstanding that a physician informed the declarant that there was a chance for the declarant to recover, declarations were held admissible. Bryant v. State, 80 Ga. 272, 4 S.E. 853, 1887 Ga. LEXIS 379 (1887) (decided under former Code 1882, § 3781).

Officer's reassurance to victim did not preclude admission. — Fact that victim asked whether the victim was going to die, the victim's knowledge of the serious gunshot wound, the occurrence of the victim's death within a matter of hours, and the victim's great pain established a prima facie case that the victim realized that death was impending and, therefore, the ultimate determination was for the jury; the police officer's reassurance of the victim did not preclude admission of the dying declaration. Morgan v. State, 275 Ga. 222, 564 S.E.2d 192, 2002 Ga. LEXIS 448 (2002) (decided under former O.C.G.A. § 24-3-6).

Victim conscious of critical condition. — Trial court did not err in admitting into evidence statements the victim made to an officer that the defendant shot the victim because the circumstances made a prima facie showing for the admission of the statements as the victim's dying declarations when the victim was conscious of the victim's critical condition at the time the victim made the statements; it was apparent that the victim's wounds were extremely serious, the victim was clutching a pillow to the victim's abdomen for comfort, the victim's breathing was "stressed", the victim was in great pain, and the victim appeared to be overwhelmed with fear. Sanford v. State, 287 Ga. 351, 695 S.E.2d 579, 2010 Ga. LEXIS 395 (2010), cert. denied, 562 U.S. 1237, 131 S. Ct. 1514, 179 L. Ed. 2d 336, 2011 U.S. LEXIS 1697 (2011) (decided under former O.C.G.A. § 24-3-6).

4. Time Requirements

Dying declaration need not be made at the time of the transaction or immediately thereafter. McAllister v. State, 246 Ga. 246, 271 S.E.2d 159, 1980 Ga. LEXIS 1067 (1980) (decided under former Code 1933, § 38-307).

Although life may have continued longer than was expected despair of dying may exist and be sufficiently proved. Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, 1943 Ga. LEXIS 541 (1943), cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464, 1943 U.S. LEXIS 263 (1943), overruled, Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976), overruled in part as stated in Elliott v. State, 305 Ga. 179, 824 S.E.2d 265, 2019 Ga. LEXIS 112 (2019) (decided under former Code 1933, § 38-307).

Actual period of survival after making the declarations is not controlling. The necessary element is the declarant's expectation; and the subsequent duration of life, whatever it may turn out to be, has no relation to the declarant's state of mind when the declarant made the declaration. Johnson v. State, 169 Ga. 814, 152 S.E. 76, 1930 Ga. LEXIS 40 (1930) (decided under former Penal Code 1910, § 1026); Crews v. State, 44 Ga. App. 546, 162 S.E. 146, 1932 Ga. App. LEXIS 373 (1932) (decided under former Penal Code 1910, § 1026); Rouse v. State, 183 Ga. 551, 188 S.E. 904, 1936 Ga. LEXIS 266 (1936) (decided under former Code 1933, § 38-307); Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, 1943 Ga. LEXIS 541 (1943), cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464, 1943 U.S. LEXIS 263 (1943), overruled, Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976), overruled in part as stated in Elliott v. State, 305 Ga. 179, 824 S.E.2d 265, 2019 Ga. LEXIS 112 (2019); Kalb v. State, 195 Ga. 544, 25 S.E.2d 24, 1943 Ga. LEXIS 542 (1943), overruled, Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976), overruled in part as stated in Elliott v. State, 305 Ga. 179, 824 S.E.2d 265, 2019 Ga. LEXIS 112 (2019); Davis v. State, 204 Ga. 467, 50 S.E.2d 604, 1948 Ga. LEXIS 491 (1948) (decided under former Code 1933, § 38-307); Stembridge v. State, 82 Ga. App. 214, 60 S.E.2d 491, 1950 Ga. App. LEXIS 1086 (1950) (decided under former Code 1933, § 38-307); Ayers v. State, 215 Ga. 325, 110 S.E.2d 669, 1959 Ga. LEXIS 467 (1959) (decided under former Code 1933, § 38-307); Ward v. State, 226 Ga. 724, 177 S.E.2d 378, 1970 Ga. LEXIS 654 (1970) (decided under former Code 1933, § 38-307).

Declarations were held admissible despite length of survival in the following cases. — See Johnson v. State, 169 Ga. 814, 152 S.E. 76, 1930 Ga. LEXIS 40 (1930) (survived three weeks after declaration) (decided under former Penal Code 1910, § 1026); Cooper v. State, 182 Ga. 42, 184 S.E. 716, 1936 Ga. LEXIS 281 (1936) (survived several days after declaration which was made 11 months after shooting) (decided under former Code 1933, § 38-307); Miles v. State, 182 Ga. 75, 185 S.E. 286, 1936 Ga. LEXIS 286 (1936) (survived 33 or 34 days after declaration) (decided under former Code 1933, § 38-307); Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, 1943 Ga. LEXIS 541 (1943), cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464, 1943 U.S. LEXIS 263 (1943), overruled, Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976), overruled in part as stated in Elliott v. State, 305 Ga. 179, 824 S.E.2d 265, 2019 Ga. LEXIS 112 (2019) (decided under former Code 1933, § 38-307).

Long intervals evidence of state of mind. — Fact that death does not immediately follow the declaration will not render evidence of the declaration inadmissible as a matter of law; although, if the interval is long, this fact may be some evidence that the declarant had not despaired of recovery. Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, 1943 Ga. LEXIS 541 (1943), cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464, 1943 U.S. LEXIS 263 (1943), overruled, Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976), overruled in part as stated in Elliott v. State, 305 Ga. 179, 824 S.E.2d 265, 2019 Ga. LEXIS 112 (2019) (decided under former Code 1933, § 38-307).

Lapse of time between the declaration and the time of death may be some evi-

dence that the declarant has not despaired of recovery, but it is not controlling. Early v. State, 170 Ga. App. 158, 316 S.E.2d 527, 1984 Ga. App. LEXIS 2860 (1984) (decided under former O.C.G.A. § 24-3-6).

Fact that victim survived 54 days following the victim's declaration did not make declaration inadmissible. Early v. State, 170 Ga. App. 158, 316 S.E.2d 527, 1984 Ga. App. LEXIS 2860 (1984) (decided under former O.C.G.A. § 24-3-6).

5. Procedure

a. Evidentiary Foundation

Affirmative proof not required. — It is not, in order to render dying declarations admissible in evidence upon a trial for murder, essential for the state to show that the declarant affirmatively said the declarant was in a dying condition or used language of like import. Gibson v. State, 52 Ga. App. 297, 183 S.E. 83, 1935 Ga. App. LEXIS 141 (1935) (decided under former Code 1933, § 38-307); Parker v. State, 197 Ga. 340, 29 S.E.2d 61, 1944 Ga. LEXIS 255 (1944) (decided under former Code 1933, § 38-307); Ayers v. State, 215 Ga. 325, 110 S.E.2d 669, 1959 Ga. LEXIS 467 (1959) (decided under former Code 1933, § 38-307).

Only prima facie evidence needed. — In order to submit a dying declaration to the jury it is only necessary for the state to submit facts which prima facie prove that the deceased was in the article of death at the time of the statement and that the deceased was conscious of impending death. Dumas v. State, 62 Ga. 58, 1878 Ga. LEXIS 299 (1878) (decided under former Code 1873, § 3781); Mitchell v. State, 71 Ga. 128, 1883 Ga. LEXIS 153 (1883) (decided under former Code 1882, § 3781); Walton v. State, 79 Ga. 446, 5 S.E. 203, 1887 Ga. LEXIS 250 (1887) (decided under former Code 1882, § 3781); Bird v. State, 128 Ga. 253, 57 S.E. 320, 1907 Ga. LEXIS 77 (1907) (decided under former Penal Code 1895, § 1000); Moody v. State, 1 Ga. App. 772, 58 S.E. 262, 1907 Ga. App. LEXIS 102 (1907) (decided under former Penal Code 1895, § 1000); Hawkins v. State, 141 Ga. 212, 80 S.E. 711, 1914 Ga. LEXIS 175 (1914) (decided under former Penal Code 1910, § 1026); Green v. State, 154 Ga. 117, 113 S.E. 536, 1922 Ga. LEXIS 315 (1922) (decided under former Penal Code 1910, § 1026); Faulkner v. State, 166 Ga. 645, 144 S.E. 193, 1928 Ga. LEXIS 371 (1928) (decided under former Penal Code 1910, § 1026); Johnson v. State, 169 Ga. 814, 152 S.E. 76, 1930 Ga. LEXIS 40 (1930) (decided under former Penal Code 1910, § 1026); Gibbs v. State, 41 Ga. App. 574, 153 S.E. 613, 1930 Ga. App. LEXIS 997 (1930) (decided under former Penal Code 1910, § 1026); Crews v. State, 44 Ga. App. 546, 162 S.E. 146, 1932 Ga. App. LEXIS 373 (1932) (decided under former Penal Code 1910, § 1026); Rounds v. State, 174 Ga. 308, 162 S.E. 696, 1932 Ga. LEXIS 42 (1932) (decided under former Penal Code 1910, § 1026); McCullough v. State, 177 Ga. 315, 170 S.E. 220, 1933 Ga. LEXIS 170 (1933) (decided under former Penal Code 1910, § 1026); Cooper v. State, 182 Ga. 42, 184 S.E. 716, 1936 Ga. LEXIS 281 (1936) (decided under former Code 1933, § 38-307); Sisk v. State, 182 Ga. 448, 185 S.E. 777, 1936 Ga. LEXIS 384 (1936) (decided under former Code 1933, § 38-307); Etheridge v. State, 187 Ga. 30, 199 S.E. 185, 1938 Ga. LEXIS 717 (1938) (for comment, see 1 Ga. B.J. 49 (1939)) (decided under former Code 1933, § 38-307); Simmons v. State, 181 Ga. 761, 184 S.E. 291, 1936 Ga. LEXIS 428 (1936); Satterfield v. State, 68 Ga. App. 7, 21 S.E.2d 861, 1942 Ga. App. LEXIS 9 (1942) (decided under former Code 1933, § 38-307); Parker v. State, 197 Ga. 340, 29 S.E.2d 61, 1944 Ga. LEXIS 255 (1944) (decided under former Code 1933, § 38-307); Stembridge v. State, 82 Ga. App. 214, 60 S.E.2d 491, 1950 Ga. App. LEXIS 1086 (1950) (decided under former Code 1933, § 38-307); Carter v. State, 227 Ga. 788, 183 S.E.2d 392, 1971 Ga. LEXIS 846 (1971) (decided under former Code 1933, § 38-307).

Decedent's declarations admissible as foundation. — While testimony of decedent's spouse as to decedent's declarations to the spouse did not indicate the cause of the decedent's death or the person who killed the decedent, but strongly tended to show that the decedent was in a dying condition and was conscious

Evidentiary Foundation (Cont'd)

thereof, the statements were admissible to support other declarations made by the decedent to other persons in which the decedent had indicated, not only consciousness of the decedent's dying condition, but facts going to show the cause of the decedent's death and the person who killed the decedent. Gibbs v. State, 190 Ga. 207, 9 S.E.2d 248, 1940 Ga. LEXIS 467 (1940) (decided under former Code 1933, § 38-307).

Evidence was sufficient to authorize admission of statements as dying declarations in the following cases. — White v. State, 100 Ga. 659, 28 S.E. 423, 1897 Ga. LEXIS 127 (1897) (decided under former Penal Code 1895, § 1000); Lee v. State, 2 Ga. App. 481, 58 S.E. 676, 1907 Ga. App. LEXIS 433 (1907) (decided under former Penal Code 1895, § 1000); Faulkner v. State, 166 Ga. 645, 144 S.E. 193, 1928 Ga. LEXIS 371 (1928) (decided under former Penal Code 1910, § 1026); Etheridge v. State, 187 Ga. 30, 199 S.E. 185, 1938 Ga. LEXIS 717 (1938) (decided under former Code 1933, § 38-307); Jenkins v. State, 190 Ga. 556, 9 S.E.2d 909, 1940 Ga. LEXIS 519 (1940) (decided under former Code 1933, § 38-307); Davis v. State, 204 Ga. 467, 50 S.E.2d 604, 1948 Ga. LEXIS 491 (1948) (decided under former Code 1933, § 38-307); Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562, 1951 Ga. LEXIS 404 (1951) (decided under former Code 1933, § 38-307); Lee v. State, 211 Ga. 170, 84 S.E.2d 353, 1954 Ga. LEXIS 517 (1954) (decided under former Code 1933, § 38-307); Phillips v. State, 260 Ga. 742, 399 S.E.2d 202, 1991 Ga. LEXIS 3 (1991) (decided under former O.C.G.A. § 24-3-6).

Declarations were erroneously admitted in the following cases. — See Lyens v. State, 133 Ga. 587, 66 S.E. 792, 1909 Ga. LEXIS 281 (1909) (decided under former Penal Code 1895, § 1000); Howard v. State, 144 Ga. 169, 86 S.E. 540, 1915 Ga. LEXIS 102 (1915) (decided under former Penal Code 1910, § 1026).

b. Witnesses

All evidence from same witness not required. — It is not necessary that the testimony relating to declarations by the deceased as to the cause of the deceased's death, the person who killed the deceased, the deceased's dying condition, and the deceased's consciousness of such fact at the time the declarations were made, should come from the same witness. Gibbs v. State, 190 Ga. 207, 9 S.E.2d 248, 1940 Ga. LEXIS 467 (1940) (decided under former Code 1933, § 38-307).

Individual testimony requirements. — It was not necessary that the testimony of each witness should disclose that the deceased was in a dying condition and conscious thereof, in order for such testimony to be admissible, but it was permissible to lay the foundation by other witnesses. Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, 1943 Ga. LEXIS 541 (1943), cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464, 1943 U.S. LEXIS 263 (1943), overruled, Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976), overruled in part as stated in Elliott v. State, 305 Ga. 179, 824 S.E.2d 265, 2019 Ga. LEXIS 112 (2019) (decided under former Code 1933, § 38-307).

Right of confrontation not violated by absent witness. — Because there was no error admitting the witness's statements under O.C.G.A. § 24-8-804(b)(5) since the witness did not appear to testify at the defendant's trial and evidence showed that the defendant pressured the witness not to comply with the subpoena, the trial court's decision to admit the witness' statements under Rule 804(b)(5) established no merit to defendant's argument that admission of those statements violated defendant's constitutional right of confrontation. Morrell v. State, 313 Ga. 247, 869 S.E.2d 447, 2022 Ga. LEXIS 23 (2022).

Grandmother's testimony admissible due to forfeiture-by-wrongdoing. — Trial court did not err by admitting into evidence statements made by the defendant's grandmother to police pursuant to the forfeiture-by-wrongdoing exception to the rule against hearsay because the defendant sent correspondence to the grandmother calling the grandmother a snitch and screamed at the grandmother not to talk to the state or say anything to the point where the grandmother was shaking and claimed not to remember the

statement to police. Hendrix v. State, 303 Ga. 525, 813 S.E.2d 339, 2018 Ga. LEXIS 207 (2018).

c. Impeachment

Bad character of deceased. — On a trial for murder, when dying declarations of the deceased have been introduced against the accused, it is competent for the latter to impeach these declarations by showing that the deceased, because of general bad character, was unworthy of belief. Redd v. State, 99 Ga. 210, 25 S.E. 268, 1896 Ga. LEXIS 302 (1896) (decided under former Penal Code 1895, § 1000); Johnson v. State, 169 Ga. 814, 152 S.E. 76, 1930 Ga. LEXIS 40 (1930) (decided under former Penal Code 1910, § 1026).

Conflicting statements. — Statements of the deceased in conflict with proved dying declarations, if any have been made, are admissible. Johnson v. State, 169 Ga. 814, 152 S.E. 76, 1930 Ga. LEXIS 40 (1930) (decided under former Penal Code 1910, § 1026); Keith v. State, 175 Ga. 385, 165 S.E. 262, 1932 Ga. LEXIS 255 (1932) (decided under former Penal Code 1910, § 1026).

d. Instructions

Contents of instructions. — Better practice when charging on the question of dying declarations to charge substantially in the language of the former statute, without explaining to the jury why such declarations were admitted. Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562, 1951 Ga. LEXIS 404 (1951) (decided under former Code 1933, § 38-307).

Decedent's condition. — Jury should be instructed that the statements attributed to the deceased should be received and considered with great caution, and should have no weight unless the jury is satisfied from the evidence that such statements were made by the deceased at a time when the deceased was in a dying condition, and that the deceased was at that time conscious that the deceased was dying. Cooper v. State, 182 Ga. 42, 184 S.E. 716, 1936 Ga. LEXIS 281 (1936) (decided under former Code 1933, § 38-307).

When defendant made no objection to the admission of testimony as to statements of murder victim on the ground that it was not shown that such declarations of the deceased were conscious utterances in the apprehension and immediate prospect of death, and the witness who testified to the statement also testified that victim was in a dying condition and knew that the victim was, court did not err in refusing a new trial merely because the court made no reference in the court's charge to dying declarations, and did not charge the jury that the alleged dying statement was admitted by the court prima facie and that before the jury could receive it and act upon the declaration they must believe that the declaration was made by the deceased in the article of death and when the deceased was conscious of the deceased's condition. Allen v. State, 187 Ga. 178, 200 S.E. 109, 1938 Ga. LEXIS 756 (1938) (decided under former Code 1933, § 38-307).

Credibility. — While the testimony of a witness, whose evidence goes to the jury through the medium of dying declarations, is to be considered under the same rules that govern them in determining the credibility of other witnesses who testify from the stand, the failure of the judge to charge upon the subject of such rules will not be a sufficient reason for granting a new trial, in the absence of an appropriate and timely written request asking instructions upon the subject. Carter v. State, 227 Ga. 788, 183 S.E.2d 392, 1971 Ga. LEXIS 846 (1971) (decided under former Code 1933, § 38-307).

Admission over objection. — When testimony relating to a dying declaration of the decedent is received in evidence and no objection is made thereto, it is not error for the court to give in charge to the jury the legal principles applicable to dying declarations. Craig v. State, 55 Ga. App. 207, 189 S.E. 727, 1937 Ga. App. LEXIS 49 (1937) (decided under former Code 1933, § 38-307).

Proof beyond reasonable doubt. — It was error for the court, when the defendant personally introduced dying declarations as an affirmative defense, to instruct the jury in effect that the jury would have to be satisfied beyond a reasonable doubt that the deceased was, at the time the deceased made such declarations, in the

Instructions (Cont'd)

article of death and conscious of the deceased's condition. Poole v. State, 47 Ga. App. 303, 170 S.E. 309, 1933 Ga. App. LEXIS 384 (1933) (decided under former Penal Code 1910, § 1026).

Failure to instruct. — Failure of the court to add, in addition to other instructions given upon the subject of dying declarations, the further instruction that the dying declaration must be received with caution, is not reversible error. Key v. State, 177 Ga. 329, 170 S.E. 230, 1933 Ga. LEXIS 172 (1933) (decided under former Penal Code 1910, § 1026).

When in a homicide prosecution during colloquy between counsel and the trial judge with reference to admission of dying declaration the court stated that the court would charge the jury on dying declarations, but nothing further was said by counsel or the court pertaining to the evidence of a dying declaration, it was not reversible error to fail to charge the former statute. Dudley v. State, 67 Ga. App. 256, 19 S.E.2d 833, 1942 Ga. App. LEXIS 359 (1942) (decided under former Code 1933, § 38-307).

Failure of the court to instruct the jury as to the jury's consideration of dying declarations is not cause for a new trial since the state does not rely for conviction solely on dying declarations, and since there is no appropriate and timely written request for instructions as to dying declarations. Murray v. State, 214 Ga. 350, 104 S.E.2d 905, 1958 Ga. LEXIS 420 (1958) (decided under former Code 1933, § 38-307).

When the state relies solely on a dying declaration, it is error to fail to instruct the jury thereon. Holcomb v. State, 249 Ga. 658, 292 S.E.2d 839, 1982 Ga. LEXIS 893 (1982) (decided under former O.C.G.A. § 24-3-6).

When the trial court fails to properly instruct the jury as to the jury's consideration of statements preliminarily admitted by the court as dying declarations, the error is not cause for a new trial since the state does not rely for conviction solely on dying declarations and since there is no appropriate and timely written request for instructions as to the declarations. Kitchens v. State, 256 Ga. 1, 342 S.E.2d 320, 1986 Ga. LEXIS 666 (1986) (decided under former O.C.G.A. § 24-3-6).

e. Duty of Jury

Ultimate determination. — When the foundation for a declaration has been prima facie established, the evidence is properly admitted, and the ultimate determination as to whether the person making the declaration was in articulo mortis and realized that death was impending, is a matter for the jury. Freeman v. State, 112 Ga. 48, 37 S.E. 172, 1900 Ga. LEXIS 24 (1900) (decided under former Penal Code 1895, § 1000); Darby v. State, 22 Ga. App. 606, 96 S.E. 707, 1918 Ga. App. LEXIS 621 (1918) (decided under former Penal Code 1910, § 1026); Gibbs v. State, 41 Ga. App. 574, 153 S.E. 613, 1930 Ga. App. LEXIS 997 (1930) (decided under former Penal Code 1910, § 1026); McCullough v. State, 177 Ga. 315, 170 S.E. 220, 1933 Ga. LEXIS 170 (1933) (decided under former Penal Code 1910, § 1026); Cooper v. State, 182 Ga. 42, 184 S.E. 716, 1936 Ga. LEXIS 281 (1936) (decided under former Code 1933, § 38-307); Etheridge v. State, 187 Ga. 30, 199 S.E. 185, 1938 Ga. LEXIS 717 (1938) (for comment, see 1 Ga. B.J. 49 (1939)) (decided under former Code 1933, § 38-307); Simmons v. State, 181 Ga. 761, 184 S.E. 291, 1936 Ga. LEXIS 428 (1936); Satterfield v. State, 68 Ga. App. 7, 21 S.E.2d 861, 1942 Ga. App. LEXIS 9 (1942) (decided under former Code 1933, § 38-307); Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, 1943 Ga. LEXIS 541 (1943), cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464, 1943 U.S. LEXIS 263 (1943), overruled, Howard v. State, 237 Ga. 471, 228 S.E.2d 860, 1976 Ga. LEXIS 1272 (1976), overruled in part as stated in Elliott v. State, 305 Ga. 179, 824 S.E.2d 265, 2019 Ga. LEXIS 112 (2019); Carter v. State, 227 Ga. 788, 183 S.E.2d 392, 1971 Ga. LEXIS 846 (1971) (decided under former Code 1933, § 38-307).

Impartiality of jurors. — Trial court did not abuse the court's discretion in refusing to remove Juror 34, because although Juror 34 expressed doubts about the juror's ability to remain impartial, Juror 34 did not express a fixed opinion

about the defendant's guilt or innocence; nor did Juror 34 unequivocally indicate Juror 34 would be unable to decide the case based upon the evidence presented at trial and the trial court's instructions. Morrell v. State, 313 Ga. 247, 869 S.E.2d 447, 2022 Ga. LEXIS 23 (2022).

Weight of declarations. — Circumstances surrounding a dying declaration are matters which may properly be considered by the jury in determining the weight to be given to the declaration. Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562, 1951 Ga. LEXIS 404 (1951).

Statements by Deceased Persons in Civil Matters

Boundary lines. — Declarations of deceased individuals who do not appear to have any motive to misrepresent are properly received in evidence, at least in the case of private boundaries. Waddell v. Cole, 138 Ga. App. 15, 225 S.E.2d 491, 1976 Ga. App. LEXIS 2033 (1976) (decided under former Code 1933, § 38-311).

Declarations as to the location of the property line by the deceased husband were competent evidence of the line and landmarks thereon since this line had been claimed as the true line and was at least impliedly agreed to by the deceased husband. Banks v. Myrick, 149 Ga. App. 252, 253 S.E.2d 873, 1979 Ga. App. LEXIS 1807 (1979) (decided under former Code 1933, § 38-311).

Actions to quiet title. — In an action to quiet title to real property, testimony about a rock foundation being the location of the family home was admissible under former O.C.G.A. § 24-3-9 (see now O.C.G.A. § 24-8-803). Resseau v. Bland, 268 Ga. 634, 491 S.E.2d 809 (decided under former O.C.G.A. § 24-3-9).

Statements by Third Parties

In general. — Sayings of one who is not a party to the case, or in privity with a party, are not admissible as evidence against either party. Bailey v. E.F. Wood & Co., 24 Ga. 164, 1858 Ga. LEXIS 171 (1858) (decided under former law); Chastain & Luck v. Robinson, 30 Ga. 55, 1860 Ga. LEXIS 31 (1860) (decided under former law).

When admission by person not a party to action is admissible. — Rule, as to parties to a suit, is that a plea of guilty may be shown as an admission against interest; admissions by persons not a party to an action, however, are admissible in evidence only if the party making the admission is the real party in interest, although not a party to the record, or if a party to the record refers another to such third party for information, or if there is an admission by a third person against that person's interest as to a fact collateral to the main issue between the litigants but essential to the adjudication of the cause. Cobb v. Garner, 158 Ga. App. 110, 279 S.E.2d 280, 1981 Ga. App. LEXIS 2333 (1981) (decided under former Code 1933, § 38-405).

Third party's plea was admissible under former O.C.G.A. § 24-3-35(2) as a third-party admission because the third party's fault had properly been made an issue under O.C.G.A. § 51-12-33. Woods v. Allied Van Lines, Inc., 316 Ga. App. 548, 730 S.E.2d 35, 2012 Ga. App. LEXIS 606 (2012), cert. denied, No. S12C1805, 2012 Ga. LEXIS 876 (Ga. Nov. 5, 2012) (decided under former O.C.G.A. § 24-3-35).

Referral for information. — When certain documentary evidence is offered, which upon its face is not admissible, but is claimed to be admissible, it is not error to exclude such evidence when there is no evidence to show that either party had referred the other to the author of the evidence for information. Myers v. Adcock, 198 Ga. 180, 31 S.E.2d 160, 1944 Ga. LEXIS 369 (1944) (decided under former Code 1933, § 38-405).

Information sought to be elicited from a witness as to the location of boundary line, having been obtained from another at the suggestion of one not a party to the case, was properly rejected by the trial court as hearsay, and was not admissible. Palmer v. Jackson, 86 Ga. App. 642, 72 S.E.2d 130, 1952 Ga. App. LEXIS 1026 (1952) (decided under former Code 1933, § 38-405).

Collateral to main issue. — Whatever may be meant by the language "collateral to the main issue but essential to the adjudication," it is certainly not applicable if the statement bears directly upon the main issue in the case. Lewis v. American Rd. Ins. Co., 119 Ga. App. 507, 167 S.E.2d 729, 1969 Ga. App. LEXIS 1148

Statements by Third Parties (Cont'd)

(1969) (decided under former Code 1933, § 38-405).

Collateral to main issue not found. — Extrajudicial admission of employee, who was not a party to the indemnity contract, nor a party to the suit, was not admissible as an admission by a stranger to the suit bearing upon a collateral issue essential to the adjudication as the admission was not collateral to the main issue involved, but bore directly upon the issue. Glens Falls Indem. Co. v. Gottlieb, 80 Ga. App. 634, 56 S.E.2d 799, 1949 Ga. App. LEXIS 892 (1949) (decided under former Code 1933, § 38-405).

Letters. — There being evidence to authorize a finding by the jury that a conspiracy had existed as alleged, and it appearing from the uncontradicted testimony of the plaintiff that, during the existence of the conspiracy, one of the conspirators had referred the plaintiff to a third person, a stranger to the suit, for certain information connected with the subject matter of the conspiracy, it was not error to admit in evidence letters from the third person, pertaining to such information. Hill v. Reynolds, 19 Ga. App. 334, 91 S.E. 434, 1917 Ga. App. LEXIS 113 (1917) (decided under former Civil Code 1910, § 5778).

Carbon copies of two letters written by parties to a case to one not a party, which were not otherwise admissible, were not admissible when there was nothing to show that either of the parties had referred the other to the letter's recipient for information. The fact that one of the parties was seeking information about the other did not bring the letter within the former statute, and the letter would merely constitute hearsay evidence. Myers v. Adcock, 198 Ga. 180, 31 S.E.2d 160, 1944 Ga. LEXIS 369 (1944) (decided under former Code 1933, § 38-405).

Title to account. — Plaintiff's contention being that the account sued upon was plaintiff's account, and the defendants contending that it was contracted with and belonged to others who were not parties to the suit, and there being no assignment of the account in writing, it was not competent for the plaintiff to prove oral admissions made by these strangers to the suit that the account belonged to the plaintiff, and that these strangers had no interest in the account. Churchman, Williams & Co. v. Robinson, 93 Ga. 731, 20 S.E. 215, 1894 Ga. LEXIS 398 (1894) (decided under former Code 1882, § 3786).

Entry on minutes of third party insurance company. — In an action upon a benefit certificate, an entry upon the minutes of another association to which the deceased had applied for a benefit certificate was not, in such a trial, admissible against the plaintiff, it not being shown that the deceased had anything to do with the making of this entry. Supreme Conclave Knights of Damon v. O'Connell, 107 Ga. 97, 32 S.E. 946, 1899 Ga. LEXIS 18 (1899) (decided under former Civil Code 1895, § 5191).

An affidavit by a shooting victim urging nonprosecution of her defendant husband was not competent evidence. Freeman v. State, 233 Ga. 745, 213 S.E.2d 643, 1975 Ga. LEXIS 1431 (1975) (decided under former Code 1933, § 38-405).

Criminal confessions. — Statements by a third party to the effect that the third party, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused upon the accused's trial, nor does the fact that the party, whose confession is sought to be introduced, is in another state and unavailable as a witness, or that there is testimony tending to establish the guilt of the one making such confession, change the foregoing rule. Bryant v. State, 197 Ga. 641, 30 S.E.2d 259, 1944 Ga. LEXIS 314 (1944) (decided under former Code 1933, § 38-405).

Declarations to third persons against the declarant's penal interest to the effect that the declarant, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused at the accused's trial, or to procure a new trial on the basis of newly discovered evidence. Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792, 1980 Ga. LEXIS 1174 (1980) (decided under former Code 1933, § 38-405).

Witness's testimony as to a conversation the witness had with a child's mother

was properly excluded as the mother testified and defendant did not ask the mother about the conversation. Georgia does not recognize a third party's admission against penal interest when that admission exculpates the defendant. Hood v. State, 273 Ga. App. 430, 615 S.E.2d 244, 2005 Ga. App. LEXIS 545 (2005) (decided under former O.C.G.A. § 24-3-35).

Trial court did not abuse the court's discretion in excluding the testimony of the defendant's roommate that an inmate told the roommate that the inmate and another man committed the murder because the inmate denied that the inmate had anything to do with the murder and the inmate further denied ever making any statement to the roommate admitting to the murder; and the police conducted an independent investigation of both the inmate and the other man based on the roommate's allegations and found no relevant evidence in the men's apartments to connect them to the victim's murder, and they did not find any fingerprint evidence to connect the men to the white truck used as the getaway vehicle. Roscoe v. State, 302 Ga. 19, 805 S.E.2d 11, 2017 Ga. LEXIS 780 (2017).

Other driver's statement to a cell-mate were not admissible because the cell-mate never disclosed to defendant's attorney what the driver allegedly said and nothing was disclosed on the record about the circumstances surrounding the making of the statement. Because the defendant made no effort to establish the trustworthiness of the alleged statement, the trial court did not abuse the court's discretion by refusing to admit the statement. Anderson v. State, 360 Ga. App. 291, 861 S.E.2d 151, 2021 Ga. App. LEXIS 334 (2021).

Guilty pleas. — As to parties to a civil action, a guilty plea constitutes an admission against interest which is prima facie evidence of the facts admitted. Tomlinson, Inc. v. Roberts, 142 Ga. App. 134, 235 S.E.2d 721, 1977 Ga. App. LEXIS 1506 (1977) (decided under former Code 1933, § 38-405).

Party disclaiming title. — If the defendant in trover relies, amongst other things, upon paramount outstanding title in another, the acts and declarations of the third person, disclaiming title in oneself and acquiescing in the plaintiff's title, are admissible in evidence. White v. Dinkins, 19 Ga. 285, 1856 Ga. LEXIS 172 (1856) (decided under former law).

Declaration of holder of negotiable instrument. — Party who acquires title to a bill or note, by endorsement, delivery, or otherwise, before due, but with express notice of any defect or incumbrance, insofar identified with the previous owner, that the previous owner's declarations or admissions while owner, may be received in evidence against such party. Glanton v. Griggs, 5 Ga. 424, 1848 Ga. LEXIS 110 (1848) (decided under former law).

Affidavit of guarantor's attorney. — In an action by lessors against guarantors, the affidavit of an attorney representing the guarantors, recalling a conversation she had with an officer of the lessee, was not admissible because the statements therein were not against the interest of the officer, were self-serving, and were not collateral to the main issue. Athens Int'l, Inc. v. Venture Capital Properties, Inc., 230 Ga. App. 286, 495 S.E.2d 900 (decided under former O.C.G.A. § 24-3-35).

Statements that conveyances had been made for purpose of support of widow. — In a widow's suit seeking to impose a constructive trust on accounts and assets conveyed by the decedent to the decedent's executor, the trial court did not err in excluding hearsay testimony of the widow's daughter and a close friend of the decedent stating that the assets had been conveyed to the executor for the care and support of the widow. The testimony was vague and was not proven to be admissible under the trustworthiness exception of O.C.G.A. § 24-8-807. Rabun v. Rabun, 341 Ga. App. 878, 802 S.E.2d 296, 2017 Ga. App. LEXIS 299 (2017).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 813, 838, 841, 842, 843, 904 et seq.

C.J.S.

31A C.J.S., Evidence, §§ 299, 312 et seq., 342, 350 et seq., 447, 482, 537 et seq.

ALR.

Death of adverse party as affecting evidence with respect to book account, 6 A.L.R. 756.

Admissibility of dying declaration with respect to transaction prior to homicide, 14 A.L.R. 757.

Use in criminal case of testimony given on former trial, or preliminary examination, by witness not available at present trial, 15 A.L.R. 495; 79 A.L.R. 1392; 122 A.L.R. 425; 159 A.L.R. 1240.

Impeaching or discrediting dying declarations, 16 A.L.R. 411.

Dying declarations involving an opinion or conclusion, 25 A.L.R. 1370; 86 A.L.R.2d 905.

Admissibility in favor of accused in criminal case of extrajudicial confession by stranger, 35 A.L.R. 441; 48 A.L.R. 348.

When transfer deemed to be one in contemplation of death within the meaning of the Inheritance Tax Law, 41 A.L.R. 989; 75 A.L.R. 544; 120 A.L.R. 170; 148 A.L.R. 1051.

Admissibility of dying declarations in cases not involving homicide, 49 A.L.R. 1282; 91 A.L.R. 560; 47 A.L.R.2d 526.

Admissibility of dying declarations inculpating defendant in murder of one other than victim named in indictment, 69 A.L.R. 1221.

Admissibility in behalf of defendant in action for libel or slander of similar charges made by other persons against plaintiff, 74 A.L.R. 732.

When one deemed to be beyond jurisdiction of court within meaning of statute relating to admissibility of testimony given on former trial, 87 A.L.R. 891.

Admissibility of dying declarations in cases other than prosecution for homicide, 91 A.L.R. 560.

Admissibility of dying declarations as affected by their incompleteness, 94 A.L.R. 679.

Quantum of proof of preliminary facts necessary to admissibility of dying declarations, 96 A.L.R. 621.

Constitutionality, construction, and application of statutes making statements of deceased persons admissible in evidence, 96 A.L.R. 686.

Admissibility of memoranda made by one since deceased regarding matters in respect of which he acted for one of the parties to the present litigation, 103 A.L.R. 1501.

Admissibility in connection with dying declarations of other declarations by deceased not made in circumstances entitling them to admission as independent dying declarations, 104 A.L.R. 1319.

Admissibility of admissions against title to tangible personal property made by one subsequent to executing chattel mortgage thereon, 106 A.L.R. 1296.

Admissibility of oral testimony as to dying declarations which had been reduced to writing, 112 A.L.R. 43.

Permitting dying declarations to be taken into jury room, 114 A.L.R. 1519.

Adverse possession as affected by attempt during period thereof to change, or make more specific, the tract claimed, 115 A.L.R. 1299.

Effect of war on litigation pending at the time of its outbreak, 137 A.L.R. 1335; 147 A.L.R. 1298; 148 A.L.R. 1384; 149 A.L.R. 1451; 149 A.L.R. 1452; 150 A.L.R. 1417; 150 A.L.R. 1418; 151 A.L.R. 1453; 152 A.L.R. 1450; 154 A.L.R. 1447.

Admissibility of oral or written statement by deceased as to fact or terms of an antenuptial or postnuptial agreement which cannot be found, 140 A.L.R. 1133.

Identity of parties as condition of admissibility in civil case of testimony or deposition in former action or proceeding of witness not available in present action or proceeding, 142 A.L.R. 673.

Admissibility on question of constructive trust of declarations made by grantor after execution and delivery of deed absolute on its face, 156 A.L.R. 1335.

Weight and value of dying declarations as evidence, 167 A.L.R. 147.

Binding effect of party's own unfavorable testimony, 169 A.L.R. 798.

Use of interpreter in court proceedings, 172 A.L.R. 923.

Mode of proof of testimony given at former examination, hearing, or trial, 11 A.L.R.2d 30.

Right of prosecution, in homicide case, to introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased, 34 A.L.R.2d 451.

Admissibility of declarations of grantor on issue of delivery of deed, 34 A.L.R.2d 588.

Adverse possession of landlord as affected by tenant's recognition of title of third person, 38 A.L.R.2d 826.

Reputation as to ownership or claim as admissible on question of adverse possession, 40 A.L.R.2d 770.

Admissibility of dying declaration in civil case, 47 A.L.R.2d 526.

Opinion of doctor or other attendant as to declarant's consciousness of imminent death so as to qualify his statement as dying declaration, 48 A.L.R.2d 733.

Declarations or admissions of person in control of vehicle as admissible against or binding upon owner, lien claimants, or the like, of a vehicle subjected to forfeiture proceedings, 55 A.L.R.2d 1280.

Admissibility, in action on employee fidelity bond or policy, of confessions or declarations of such employee no longer available as witness, 65 A.L.R.2d 631.

Identity of subject matter or of issues as condition of admissibility in civil case of testimony or deposition in former proceeding of witness not now available, 70 A.L.R.2d 494.

Use in civil case of testimony given in criminal case by witness no longer accessible, 70 A.L.R.2d 1179.

Admissibility in evidence of receipt of third person, 80 A.L.R.2d 915.

Admissibility in criminal trial of dying declarations involving an asserted opinion or conclusion, 86 A.L.R.2d 905.

Admissibility of homicide victim's statements exculpating the accused, 95 A.L.R.2d 637.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide, 98 A.L.R.2d 6.

Admissibility, as part of res gestae, of accusatory utterances made by homicide victim after act, 4 A.L.R.3d 149.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 A.L.R.3d 671.

Statements of declarant as sufficiently showing consciousness of impending death to justify admission of dying declaration, 53 A.L.R.3d 785.

Sufficiency of showing of consciousness of impending death, by circumstances other than statements of declarant, to justify admission of dying declaration, 53 A.L.R.3d 1196.

Admissibility, as against interest, in civil case of declaration of commission of criminal act, 90 A.L.R.3d 1173.

Sufficiency of efforts to procure missing witness's attendance to justify admission of his former testimony — state cases, 3 A.L.R.4th 87.

Disqualification, for bias, of one offered as interpreter of testimony, 6 A.L.R.4th 158.

Fence as factor in fixing location of boundary line — modern cases, 7 A.L.R.4th 53.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter, 12 A.L.R.4th 1016.

Former testimony used at subsequent trial as subject to ordinary objections and exceptions, 40 A.L.R.4th 514.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through interpreter — state cases, 97 A.L.R.6th 567.

Hearsay objections to admission of text messages or testimony thereof, 10 A.L.R.7th 4.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter — federal cases, 91 A.L.R. Fed. 2d 187.

When do corroborating circumstances clearly indicate trustworthiness of hearsay statement tending to expose declarant to criminal liability and offered to exculpate accused, so as to permit admission of statement under Rule 804(b)(3) of Federal Rules of Evidence (28 USCS Appx), 125 A.L.R. Fed. 477.

Admissibility under Rules 804(b)(1) and 807 of Federal Rules of Evidence (Fed. Rules Evid. Rules 804(b)(1) and 807, 28 USCA) of grand jury testimony of unavailable witness, 149 A.L.R. Fed. 231.

24-8-805. Hearsay within hearsay.

Hearsay included within hearsay shall not be excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule.

History.
Code 1981, § 24-8-805, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Hearsay within hearsay, Fed. R. Evid. 805.

JUDICIAL DECISIONS

Editor's notes. — In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Sections 24-8-803 and 24-8-804 for notes on hearsay exceptions and their applicability. In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-3-1 are included in the annotations for this Code section.

Double hearsay inadmissible in property action. — Trial court did not err in granting a property owner's motion in limine to exclude evidence that a father of a record title holder's descendant told the descendant that the father told the owner's brother that the brother could not build a house on property because the evidence was double hearsay and inadmissible. DeFoor v. DeFoor, 290 Ga. 540, 722 S.E.2d 697, 2012 Ga. LEXIS 88 (2012) (decided under former O.C.G.A. § 24-3-1).

Even if the investigator's report was admissible under the business records exception to the hearsay rule, the summary of the statement of a student was not subject to an exception and, thus, both parts of the hearsay were not covered as required. Tuggle v. Rose, 333 Ga. App. 431, 773 S.E.2d 485, 2015 Ga. App. LEXIS 396 (2015), cert. denied, No. S15C1862, 2015 Ga. LEXIS 813 (Ga. Nov. 2, 2015).

Unidentified person reading from unidentified paper inadmissible. — Following an apartment resident's death due to asthma, allegedly linked to a gas leak in the apartment, testimony from a friend that an unknown person was reading from a paper outside the apartment that the resident had called to report a gas leak was inadmissible hearsay within hearsay. There was no evidence that the paper was a business record of the gas company; for example, there was no logo or trademark on the paper. Goodhart v. Atlanta Gas Light Company, 349 Ga. App. 65, 825 S.E.2d 465, 2019 Ga. App. LEXIS 108 (2019).

24-8-806. Attacking and supporting credibility of a declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, shall not be subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party shall be entitled to examine the declarant on the statement as if under cross-examination.

History.

Code 1981, § 24-8-806, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Attacking and supporting the declarant's credibility, Fed. R. Evid. 806.

Editor's notes.

In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-8-803 for notes on hearsay declarants.

JUDICIAL DECISIONS

Prior inconsistent statement. — Trial court did not err in admitting extrinsic evidence of the cousin's prior inconsistent statements because the state complied with the prerequisites of O.C.G.A. § 24-6-613(b) as both the prosecutor and defense counsel examined the witness as to each of the prior inconsistent statements and the witness was afforded an opportunity to explain or to deny the prior inconsistent statements, which entitled the prosecutor to ask leading questions. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290, 2014 Ga. App. LEXIS 845 (2014).

Absent declarant impeached with former conviction. — Because the defendant's accountant had authored a chart regarding billing and finance for two disabled men in the defendant's unlicensed personal care home and the accountant did not testify, the information in the chart was hearsay under O.C.G.A. § 24-8-801(c), and the state was entitled to impeach the accountant's credibility with a former conviction, O.C.G.A. § 24-8-806. Hawkins v. State, 350 Ga. App. 862, 830 S.E.2d 301, 2019 Ga. App. LEXIS 377 (2019).

Telephone statements. — Witness's hearsay testimony about the defendant's statements to the witness on the telephone shortly after a robbery and shooting in the witness's front yard was admissible against the co-defendant in their joint trial under the co-conspirator exception; however, the defendant's statements exonerating the co-defendant during the defendant's plea hearing were not admissible to impeach the telephone statements. Esprit v. State, 305 Ga. 429, 826 S.E.2d 7, 2019 Ga. LEXIS 159 (2019).

Exclusion of impeaching conviction harmless, if error. — Assuming that the trial court's exclusion of a hearsay declarant's certified conviction was error, the error was harmless because counsel was able to elicit testimony regarding the conviction, and the copy would have been merely cumulative. Redding v. State, 307 Ga. 722, 838 S.E.2d 282, 2020 Ga. LEXIS 55 (2020).

24-8-807. Residual exception.

A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that:

(1) The statement is offered as evidence of a material fact;

(2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this Code section unless the proponent of it makes known to the adverse party,

sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

History.
Code 1981, § 24-8-807, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Residual exception, Fed. R. Evid. 807.

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-8-804 for notes on admissibility of statements by unavailable or deceased declarants. In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-301 and former O.C.G.A. § 24-3-1 are included in the annotations for this Code section.

Improper to rely on former evidence code. — Trial court did not properly apply O.C.G.A. § 24-8-807 because in analyzing whether a witness's statement to police had sufficient guarantees of trustworthiness the court primarily relied on cases decided under the former evidence code, which was no longer applicable. State v. Holmes, 304 Ga. 524, 820 S.E.2d 26, 2018 Ga. LEXIS 654 (2018).

Trial court did not abuse the court's discretion by concluding that the witness's statements were inadmissible under the residual exception to the hearsay rule because, although the trial court should not have relied on cases applying the former Evidence Code, the error was harmless since it was clear from the trial court's order that it ultimately applied the proper standard. State v. Kenney, 315 Ga. 408, 883 S.E.2d 298, 2023 Ga. LEXIS 14 (2023).

The two underlying reasons for any exception to the hearsay rule are a necessity for the exception and a circumstantial guaranty of the trustworthiness of the offered evidence which is that there must be something present which the law considers a substitute for the oath of the declarant and the declarant's cross-examination by the party against whom the hearsay is offered. Gale v. State, 138 Ga. App. 261, 226 S.E.2d 264, 1976 Ga. App. LEXIS 2129 (1976); (decided under former Code 1933, § 38-801).

Failure to explicitly make required determinations. — Defendant's claim that the trial court erred by admitting hearsay evidence under the residual exception without first explicitly making the determinations required lacked merit because, although the better practice would be for trial courts to state on the record that each requirement was met and why, the failure to do so was not an abuse of discretion. Smith v. State, 311 Ga. 288, 857 S.E.2d 698, 2021 Ga. LEXIS 149 (2021).

Necessity Exception

Necessity. — Under former O.C.G.A. § 24-3-1, hearsay evidence was admitted in specified cases from necessity. There were three prerequisites for admission of hearsay because of necessity: (1) necessity; (2) particularized guarantees of trustworthiness; and (3) the evidence must be relevant to a material fact and more probative on that material fact than other evidence that may be procured or

offered. Booth v. State, 264 Ga. App. 393, 590 S.E.2d 789, 2003 Ga. App. LEXIS 1486 (2003) (decided under former O.C.G.A. § 24-3-1).

Trial counsel was not ineffective for failing to object to the admission of the victim's hearsay statements to the extent that the statements expressed the victim's opinions regarding the defendant's racial and cultural bias because trial counsel's vigorous efforts to exclude the totality of the victim's hearsay statements as ineligible for admission under the necessity exception were successful in large measure and greatly narrowed the scope of the hearsay evidence that was ultimately admitted; and the defendant could not establish prejudice from that testimony as it was cumulative of other evidence the state adduced regarding the defendant's racial and cultural bias, including, but not limited to, the damning testimony by the jailhouse informant. Rai v. State, 297 Ga. 472, 775 S.E.2d 129, 2015 Ga. LEXIS 505 (2015) (decided under former O.C.G.A. § 24-3-1(b)).

Victim's aunt, grandmother, and sister were allowed to testify about the defendant's disapproval of the relationship of the victim and the defendant's son based on racial and cultural differences, and the fact that the victim and the defendant's son moved to Atlanta to get away from the defendant and the defendant's family because the victim was unavailable to testify; the nature and extent of the defendant's negativity toward the victim, the defendant's daughter-in-law, were essential to explaining the defendant's motivation in orchestrating the victim's murder; and the statements bore sufficient indicia of trustworthiness, in that the statements were made to family members who each shared a close and confidential relationship with the victim. Rai v. State, 297 Ga. 472, 775 S.E.2d 129, 2015 Ga. LEXIS 505 (2015) (decided under former O.C.G.A. § 24-3-1(b)).

Requirements for necessity exception. — To meet the necessity exception, the state had to show that the declarant was unavailable to testify and that it made reasonable efforts to locate the declarant and secure the declarant's presence. Holmes v. State, 271 Ga. 138, 516 S.E.2d 61 (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion in deeming a witness to be unavailable when the evidence showed that investigators for both the state and a codefendant could not locate the witness after diligent and extensive efforts conducted over a month and a half before trial. Holmes v. State, 271 Ga. 138, 516 S.E.2d 61 (decided under former O.C.G.A. § 24-3-1).

In a malice murder prosecution, statements made by the victim in the months before death were admissible under the necessity exception to hearsay as the statements were made to investigating police officers shortly after the events involving defendant and the victim. Peterson v. State, 274 Ga. 165, 549 S.E.2d 387, 2001 Ga. LEXIS 581 (2001) (decided under former O.C.G.A. § 24-3-1).

Trial court properly excluded a statement by the injured passenger because the statement was an unsworn statement given to an insurance agent and constituted hearsay and did not fall under an exception since the passenger's state of mind was not at issue, the statement did not meet the foundational requirements for a regularly conducted activity, was not a public record, and did not fall under the residual exception. Maloof v. MARTA, 330 Ga. App. 763, 769 S.E.2d 174, 2015 Ga. App. LEXIS 57 (2015).

"Necessity" exception applied only when witness unavailable. — "Necessity" exception to the hearsay rule, set forth in former O.C.G.A. § 24-3-1, applied only when the witness was unavailable, usually because of death or in cases in which the witness could not be compelled to testify, as in the case of a wife who could not be compelled to testify against her husband. Glisson v. State, 188 Ga. App. 152, 372 S.E.2d 462, 1988 Ga. App. LEXIS 933 (1988) (decided under former O.C.G.A. § 24-3-1).

Necessity exception was inapplicable when declarant incompetent. — Necessity exception most commonly applied when the out-of-court declarant was unavailable to testify because of death or the exercise of a privilege not to testify, and the circumstances surrounding the

statement provided a guaranty of trustworthiness, not when the declarant was unavailable because the declarant failed to qualify as a competent witness. Shaver v. State, 199 Ga. App. 428, 405 S.E.2d 281, 1991 Ga. App. LEXIS 530 (1991), cert. denied, No. S91C1028, 1991 Ga. LEXIS 751 (Ga. May 15, 1991) (decided under former O.C.G.A. § 24-3-1).

Admission of necessity. — When statements explaining the circumstances of the murder were spontaneous and unsolicited, and made immediately after the shooting, after the defendant fled the scene, the statements satisfied the criteria for an admission out of necessity. White v. State, 276 Ga. 583, 581 S.E.2d 18, 2003 Ga. LEXIS 490 (2003) (decided under former O.C.G.A. § 24-3-1).

Because the testimony of two witnesses recounting what the victim said to the witnesses prior to the victim's death was relevant to demonstrate the prior difficulties between defendant and the victim, and was accompanied by particular guarantees of trustworthiness, the trial court did not err in admitting the testimony under the "necessity" exception to the hearsay rule. Mathis v. State, 279 Ga. 100, 610 S.E.2d 62, 2005 Ga. LEXIS 152 (2005) (decided under former O.C.G.A. § 24-3-1).

Necessity for admission of friend's testimony. — In defendant's prosecution for murdering defendant's former girlfriend, the girlfriend's statements to two friends were properly admitted under former O.C.G.A. § 24-3-1(b) because the statements were uncontradicted statements made to people the victim had known for over a year, in whom the girlfriend placed great confidence and to whom the girlfriend regularly turned for advice with personal problems and to discuss personal matters, so the trial court could find the statements contained particularized guarantees of trustworthiness. Williams v. State, 279 Ga. 731, 620 S.E.2d 816, 2005 Ga. LEXIS 653 (2005) (decided under former O.C.G.A. § 24-3-1).

Testimony by a friend of the decedent that, before the death of the decedent, the decedent had told the friend that the decedent had been beaten in a fight by the defendant was admissible evidence under the necessity exception to the hearsay rule. The statements by the decedent were made to a friend (not an agent of law enforcement) in seeking help with an ongoing emergency and preventing immediate harm to the decedent. Miller v. State, 289 Ga. 854, 717 S.E.2d 179, 2011 Ga. LEXIS 827 (2011) (decided under former O.C.G.A. § 24-3-1).

Necessity for admission of parent's testimony. — Parent's statement that the parent's child, a passenger in the defendant's car, came to the parent sick and vomiting after a sleepless night and told the parent that the passenger witnessed a murder was nontestimonial in nature and fell within the necessity exception to the hearsay rule. Testimony by the parent and by a police investigator who was looking for the passenger showed that the passenger was unavailable, and this was a situation where a declarant made a statement to a person in whom the declarant placed great confidence and to whom the declarant turned for help with problems. Shipman v. State, 288 Ga. App. 134, 653 S.E.2d 383, 2007 Ga. App. LEXIS 1155 (2007) (decided under former O.C.G.A. § 24-3-1).

Necessity for admission of statements from other family members. — Trial court did not abuse the court's discretion by finding that uncontradicted statements by a murder victim's daughters and sister exhibited particularized guarantees of trustworthiness when the evidence showed that the daughters and the sister had a close familial relationship with the victim and the victim regularly confided in the daughters and the sister about personal matters. McNaughton v. State, 290 Ga. 894, 725 S.E.2d 590, 2012 Ga. LEXIS 358 (2012) (decided under former O.C.G.A. § 24-3-1).

Necessity for admission of family and coworker statement. — Testimony of the victim's sons and a coworker as to the statements the victim made regarding the victim's relationship with the defendant were admissible under the necessity exception to the hearsay rule as the victim enjoyed a close relationship with the victim's sons and routinely discussed personal issues with the coworker, and the statements were the only evidence of the victim's longstanding intention to leave

the defendant. Faircloth v. State, 293 Ga. 134, 744 S.E.2d 52, 2013 Ga. LEXIS 497 (2013).

Necessity for statement of spouse. — Trial court did not err by admitting the testimony of the victim's wife under the necessity exception of O.C.G.A. § 24-8-807 as defense counsel was permitted to recross-examine the witness to challenge the reliability of the victim's out-of-court statement and even if it were error to have admitted the wife's testimony concerning the victim's out-of-court statement about a previous fight with the defendant over a drug debt, the Supreme Court of Georgia found that it was highly probable that the error did not contribute to the judgment since it was merely cumulative of other evidence. Bulloch v. State, 293 Ga. 179, 744 S.E.2d 763, 2013 Ga. LEXIS 550 (2013).

Hearsay statements by a murder victim were necessary as the victim was deceased and unavailable. Bryant v. State, 282 Ga. 631, 651 S.E.2d 718, 2007 Ga. LEXIS 718 (2007) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in admitting hearsay statements made by the deceased victim to a girlfriend in two cell phone calls at the time of the victim's murder based on their long acquaintance (10 years) and the fact they had been living together for 11 months, under the necessity exception to the hearsay rule. Taylor v. State, 296 Ga. 761, 770 S.E.2d 805, 2015 Ga. LEXIS 190 (2015).

Statements of deceased witness admitted. — Statements of deceased witness were properly admitted out of necessity under former O.C.G.A. § 24-3-1. Jackson v. State, 202 Ga. App. 582, 414 S.E.2d 905, 1992 Ga. App. LEXIS 117 (1992), cert. denied, No. S92C0603, 1992 Ga. LEXIS 250 (Ga. Mar. 19, 1992) (decided under former O.C.G.A. § 24-3-1).

Statements of a deceased juvenile made to a police detective in the course of an official investigation were admissible under the "necessity" exception to the rule against the admission of hearsay. White v. State, 268 Ga. 28, 486 S.E.2d 338 (decided under former O.C.G.A. § 24-3-1).

At defendant's trial for incest and child molestation, testimony from one of defendant's daughters, which was read from a transcript from a 1985 trial at which defendant was also convicted of child molestation, was hearsay evidence properly admitted under former O.C.G.A. § 24-3-1 based on necessity since the daughter was now deceased; there were sufficient guarantees of trustworthiness in the daughter's testimony when it was made under oath during trial and the testimony was corroborated by her sister and medical records; and the testimony was clearly relevant to and more probative than other testimony the state could present on the issue of whether defendant sexually abused and committed incest with one of defendant's daughters when she reached a certain age when it demonstrated defendant's plan, scheme, bent of mind, and course of conduct, whereby defendant would subject defendant's daughters to the defendant's acts of sexual abuse. Booth v. State, 264 Ga. App. 393, 590 S.E.2d 789, 2003 Ga. App. LEXIS 1486 (2003) (decided under former O.C.G.A. § 24-3-1).

Under former O.C.G.A. § 24-3-1, testimony by the victim's husband about a conversation with the victim just prior to the crime was admissible because the victim was deceased, the statements about who was present in the store immediately before the victim's death were relevant, and the statement was trustworthy, having been made to the victim's husband, with whom the victim often spoke daily about matters at the store. Johnson v. State, 294 Ga. 86, 750 S.E.2d 347, 2013 Ga. LEXIS 874 (2013) (decided under former O.C.G.A. § 24-3-1).

Grandchild's testimony regarding a victim's statements were admissible under the residual exception to the hearsay rule, because the victim died prior to trial, the statements to the grandson provided a material fact, that the victim wired money under a false pretense, the circumstances provided sufficient guarantees of trustworthiness due to the close relationship, there were no other comparable evidence that the transfer was induced by fraud, and the state gave pretrial notice to the defendant. Akintoye v. State, 340 Ga. App. 777, 798 S.E.2d 720, 2017 Ga. App. LEXIS 141 (2017).

Admission of testimony from the victim's mother about the victim's statements about the defendant's threats and physical abuse and the statements made to a case worker who had been working closely with the victim were cumulative of the testimony of other witnesses who testified to the regular abuse the defendant inflicted upon the victim and were, therefore, harmless. Davenport v. State, 309 Ga. 385, 846 S.E.2d 83, 2020 Ga. LEXIS 479 (2020).

Assertion of spousal privilege meets the necessity requirement for admission of hearsay under the former O.C.G.A. § 24-3-1(b) necessity exception. Herring v. State, 252 Ga. App. 4, 555 S.E.2d 233, 2001 Ga. App. LEXIS 1172 (2001) (decided under former O.C.G.A. § 24-3-1).

Defendant's spouse's statement necessary and trustworthy. — Defendant's spouse's statement was properly admitted in defendant's criminal trial under the necessity exception to the hearsay rule, pursuant to former O.C.G.A. § 24-3-1(b) (see now O.C.G.A. §§ 24-8-801 and 24-8-802), since it was necessary and it evidenced a guarantee of sufficient trustworthiness; the spouse was unavailable because the spouse refused to testify, the statements were trustworthy because the statements were made to police during their investigation of the criminal incident, and the statements were necessary because the statements provided insight into defendant's state of mind. Scott v. State, 261 Ga. App. 756, 583 S.E.2d 579, 2003 Ga. App. LEXIS 764 (2003), cert. denied, No. S03C1553, 2003 Ga. LEXIS 924 (Ga. Oct. 20, 2003) (decided under former O.C.G.A. § 24-3-1).

Admission of an audio tape of an out-of-court interview of the defendant's wife under the necessity exception to the bar against hearsay testimony, former O.C.G.A. § 24-3-1(b), violated the confrontation clause of U.S. Const., amend. 6 however, the content of the wife's speech was barely discernible on the tape, and, to the extent that the tape was audible, the wife's statements were cumulative of other testimony, so there was no reasonable possibility that the tape contributed to the convictions, and the error in admitting the tape was harmless. Daniels v. State, 280 Ga. 349, 628 S.E.2d 110, 2006 Ga. LEXIS 197 (2006) (decided under former O.C.G.A. § 24-3-1).

Testimony regarding statement by defendant's former spouse. — Georgia Bureau of Investigation agent's testimony regarding a statement by defendant's former spouse implicating defendant in a killing was admissible as an exception to the general hearsay rule, since the former spouse remarried defendant before refusing to testify at defendant's trial, and there was a "necessity" that the finder of fact be acquainted with the statement of the only eyewitness to the homicide. Higgs v. State, 256 Ga. 606, 351 S.E.2d 448, 1987 Ga. LEXIS 541 (1987) (decided under former O.C.G.A. § 24-3-1); Wallace v. State, 216 Ga. App. 718, 455 S.E.2d 615, 1995 Ga. App. LEXIS 248 (1995) (decided under former O.C.G.A. § 24-3-1).

Statement by deceased victim to fiancé. — Trial court did not err in admitting the testimony of the victim's fiancé that the victim had told her about his desire for a restraining order against the defendant and about a prior difficulty with the defendant earlier on the day of the shooting because the victim was unavailable due to his murder, the statements were relevant to material facts and more probative thereof than other available evidence, and the statements had particular guarantees of trustworthiness because the victim and the fiancé had been living together for over a year and had a very close relationship; in light of the overwhelming evidence of the defendant's involvement in the crimes, it was highly probable that the admission of the contested testimony did not contribute to the verdicts, and, therefore, any error in admitting the statements was not harmful. McIlwain v. State, 287 Ga. 115, 694 S.E.2d 657, 2010 Ga. LEXIS 318 (2010), overruled, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-3-1).

Testimony of defendant's mother. — Even assuming the statements of the defendant's mother were admissible under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), the statements' exclusion was harmless error

as the statements were cumulative of other evidence admitted at trial, making it highly probable that the statements' exclusion did not affect the verdict. Nix v. State, 280 Ga. 141, 625 S.E.2d 746, 2006 Ga. LEXIS 20 (2006) (decided under former O.C.G.A. § 24-3-1).

Out-of-court statement of close friend of defendant was not admissible under the necessity exception since there was no indicia of reliability and the statement lacked any spontaneity or timeliness. Atwater v. State, 233 Ga. App. 339, 503 S.E.2d 919 (decided under former O.C.G.A. § 24-3-1).

Necessity requirement held satisfied. — See Patterson v. State, 202 Ga. App. 440, 414 S.E.2d 895, 1992 Ga. App. LEXIS 28 (1992) (decided under former O.C.G.A. § 24-3-1); Jones v. State, 240 Ga. App. 723, 524 S.E.2d 773 (decided under former O.C.G.A. § 24-3-1); Battle v. State, 244 Ga. App. 771, 536 S.E.2d 761, 2000 Ga. App. LEXIS 857 (2000) (decided under former O.C.G.A. § 24-3-1).

Statements in divorce action. — Hearsay statements were admissible under the necessity exception despite the fact that some of the statements were made during the pendency of separations or a divorce action; the statements were made over a 10-year period and many of the statements were not made during the separations or the divorce action. Watson v. State, 278 Ga. 763, 604 S.E.2d 804, 2004 Ga. LEXIS 999 (2004), overruled, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-3-1).

Statements to deputy. — Any error in admitting a victim's statements to a deputy responding to a 9-1-1 call under the necessity exception to the hearsay rule was harmless as the hearsay portion of the deputy's testimony consisted of no more than two sentences, was cumulative of the other properly admitted evidence, and did not go to the core issue of the case. Watson v. State, 278 Ga. 763, 604 S.E.2d 804, 2004 Ga. LEXIS 999 (2004), overruled, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-3-1).

Statements to family members. — In a defendant's prosecution for malice murder and cruelty to children, testimony by the five-year-old victim's grandmother as to prior difficulties between the victim and the defendant, including a statement by the victim to the grandmother that the defendant had hit the victim in the stomach on the day prior to the fatal incident, was properly admitted under the necessity exception as the grandmother took care of the victim on a regular basis and was concerned for the victim's welfare. Wright v. State, 285 Ga. 57, 673 S.E.2d 249, 2009 Ga. LEXIS 102 (2009) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion in admitting out-of-court statements a victim made to the victim's sister under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), because the specific indicia of reliability did not have to be established by the testifying witness alone, and in the defendant's own testimony, the defendant described the relationship between the victim and the victim's sister as "real close;" even if the trial court did err, the error was harmless because the other evidence of the defendant's guilt was overwhelming and was corroborated by the defendant's own testimony, so it was highly probable that any error did not contribute to the verdict. Mills v. State, 287 Ga. 828, 700 S.E.2d 544, 2010 Ga. LEXIS 650 (2010) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in allowing the victim's cousin and the cousin's girlfriend to testify at trial about prior difficulties between the victim and the defendant pursuant to the necessity exception to the rule excluding hearsay, and the testimony did not violate the defendant's right to confrontation, because the trial court concluded the proffered testimony of the witnesses was reliable and trustworthy as it found the victim was like a sibling to the witnesses, and because any alleged harm from the admission of that testimony was mitigated by the fact that both witnesses testified the victim and the defendant continued to be friends in spite of their prior difficulties. Thompson v. State, 294 Ga. 693, 755 S.E.2d 713, 2014 Ga. LEXIS 173 (2014) (decided under former O.C.G.A. § 24-3-1(b)).

Trial court did not err when the court admitted the testimony of the victim's

sister that, the day before the murder, the victim told the sister that the defendant gave the victim a bloody nose and threatened to stab the victim to death because, under the necessity exception to the hearsay rule of the old Evidence Code, the victim and the sister were very close, and the victim confided in and trusted the sister; there was no indication that the victim's statement to the sister was fabricated or lacking veracity; the prosecutor told the trial court that there was no other source for that information; and that there were no statements by the victim to law enforcement that would have avoided Confrontation Clause issues. Taylor v. State, 308 Ga. 57, 838 S.E.2d 774, 2020 Ga. LEXIS 86 (2020) (decided under former O.C.G.A. § 24-3-1).

Parent's statement admitted by necessity. — Trial court did not err by allowing the victim's parent to testify that the victim told the parent a few days before the victim died that the victim was going to go to the defendant's house in a few days because the evidence was properly admitted under the necessity exception to the rule against hearsay; because the victim was deceased, the victim was unavailable to testify, and the testimony offered was relevant to explain the state of feelings between the defendant and the victim and when and why the victim would have been at the defendant's apartment, which was where the victim's body was found. Jennings v. State, 288 Ga. 120, 702 S.E.2d 151, 2010 Ga. LEXIS 816 (2010) (decided under former O.C.G.A. § 24-3-1).

Necessity for statement of spouse. — Trial court did not err in admitting statements the defendant made to the defendant's spouse under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), because the court properly concluded that the defendant and the defendant's spouse maintained a confidential relationship and that the out-of-court statements were trustworthy, and the statements were relevant to show the defendant's bent of mind on the day the defendant shot the victim; although the defendant's spouse moved to California where the spouse lived with the spouse's parents, the defendant and the defendant's spouse continued to speak to each other regularly by telephone, and they spoke several times on the day in question. Herrera v. State, 288 Ga. 231, 702 S.E.2d 854, 2010 Ga. LEXIS 819 (2010) (decided under former O.C.G.A. § 24-3-1).

Necessity for roommate's testimony. — Trial court did not err in admitting the testimony of the victim's roommate under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), because the confidential nature of their relationship, coupled with the roommate's identification of bruises the victim sustained at the time of the beating, were sufficient to attribute veracity to the hearsay declarations. Jeffers v. State, 290 Ga. 311, 721 S.E.2d 86, 2012 Ga. LEXIS 9 (2012) (decided under former O.C.G.A. § 24-3-1).

Any claim as to the admissibility of a witness's testimony under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), was waived because while a pretrial motion in limine sought to exclude the testimony on hearsay grounds, it was agreed that counsel would renew any objection counsel had to the witness' testimony at trial, and the defendant did not timely object at trial; the untimely motion for mistrial was based on improper character evidence, not on hearsay grounds as asserted on appeal. Jeffers v. State, 290 Ga. 311, 721 S.E.2d 86, 2012 Ga. LEXIS 9 (2012) (decided under former O.C.G.A. § 24-3-1).

Close relationship justified application of necessity exception. — Trial court did not abuse the court's discretion by allowing the admission of hearsay evidence by three witnesses concerning statements that the victim made about the victim's relationship with the defendant because such admissions were proper under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b) (see now O.C.G.A. §§ 24-8-803 and 24-8-807), as the witnesses showed the close relationship between the defendant and the victim, the statements were uncontradicted, found reliable, and bore sufficient indicia of trustworthiness to be admissible. Bunnell v. State, 292 Ga. 253, 735 S.E.2d 281, 2013 Ga. LEXIS 2 (2013) (decided under former O.C.G.A. § 24-3-1).

Pursuant to the necessity exception, the hearsay statement of the first victim's cousin that the first victim stated that the defendant was asking the first victim some questions about the defendant's girlfriend, the second victim, and stated that the defendant thought the first victim was messing around with the defendant's girlfriend, and that the first victim did not feel safe around the defendant was admissible because the first victim was clearly unavailable as the defendant had killed the first victim; the first victim's statement was relevant to the defendant's motive for shooting the first victim; and the first victim's statement bore significant indicia of trustworthiness. Williams v. State, 299 Ga. 209, 787 S.E.2d 187, 2016 Ga. LEXIS 414 (2016) (decided under former O.C.G.A. § 24-3-1(b)).

Requirements of necessity and guaranty of trustworthiness satisfied. — In a murder prosecution, when defendant's common-law wife asserted the privilege not to testify against the husband, statements the wife made during the official investigation and confirmed at a subsequent pre-trial hearing were admissible as an exception to the hearsay rule without conducting an additional hearing on their reliability. Drane v. State, 265 Ga. 663, 461 S.E.2d 224, 1995 Ga. LEXIS 720 (1995). But see Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (decided under former O.C.G.A. § 24-3-1).

Wife's out-of-court statement containing a reference to defendant's inculpatory admission was admissible pursuant to the "necessity" hearsay exception. Quijano v. State, 271 Ga. 181, 516 S.E.2d 81 (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion in admitting testimony of the victim's cousin regarding the victim's statement that the defendant had "jumped him" because the victim's statement satisfied all three prerequisites for the admission of hearsay under the necessity exception, former O.C.G.A. § 24-3-1(b); the victim had been murdered and was not available, the statements had the appropriate indicia of trustworthiness because the statements were made when the victim was confiding in the victim's cousin, whom the victim had known all the victim's life and had lived with for some time, and the victim's statement was highly probative of the combative nature of the victim's relationship with the defendant. Evans v. State, 288 Ga. 571, 707 S.E.2d 353, 2011 Ga. LEXIS 92 (2011) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion by holding that the testimony of the victim's friend regarding the victim's statements bore sufficient indicia of trustworthiness to be admissible under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), because the victim was deceased and unavailable to testify, and the statements were relevant to show the defendant's intent, motive, and bent of mind and were more probative of the facts than other evidence that could be procured and offered; the friend and the victim were close personal friends who frequently worked together and regularly confided in each other about personal matters including the fact that the victim was involved in an extra-marital affair. Gibson v. State, 290 Ga. 6, 717 S.E.2d 447, 2011 Ga. LEXIS 721 (2011) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion by concluding that the witnesses' testimony regarding statements the victim made about a relationship with the defendant bore sufficient indicia of trustworthiness to be admissible under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), because the victim was deceased and unavailable to testify, the statements were relevant to show the defendant's intent, motive, and bent of mind, and the statements were more probative of the facts than other evidence that could be procured and offered; both witnesses stated that the witnesses discussed personal and confidential matters with the victim. Butler v. State, 290 Ga. 425, 721 S.E.2d 889, 2012 Ga. LEXIS 86 (2012) (decided under former O.C.G.A. § 24-3-1).

Under the necessity exception to hearsay, former O.C.G.A. § 24-3-1(b), the testimony of four individuals about the victim's statements regarding the subletting of the townhouse, the problems the victim was having about retrieving the mail, and the missing furniture and checks were

admissible because the victim's statements were necessary and sufficiently trustworthy since they were made to the individuals in whom the victim placed a great deal of confidence. Thomas v. State, 274 Ga. 156, 549 S.E.2d 359, 2001 Ga. LEXIS 586 (2001) (decided under former O.C.G.A. § 24-3-1).

Statements failed to meet necessity exception. — When the prosecution asked only how long each witness had known the murder victim and whether each witness was familiar with the relationship between defendant and the victim, there was no showing of the required particularized guarantees of trustworthiness to permit admission of the hearsay statements of the victim under the necessity exception of former O.C.G.A. § 24-3-1(b); there was no testimony about the nature of the relationships between the witnesses and the victim. Mote v. State, 277 Ga. 429, 588 S.E.2d 748, 2003 Ga. LEXIS 998 (2003), cert. denied, 541 U.S. 1066, 124 S. Ct. 2395, 158 L. Ed. 2d 968, 2004 U.S. LEXIS 3743 (2004) (decided under former O.C.G.A. § 24-3-1).

In a will contest action, the trial court did not err by refusing the challenger's proffer of having a grandchild for the decedent testify that the decedent was unaware of a change in a medical appointment as the testimony did not fit the hearsay necessity exception. The trial court did not abuse the court's discretion by finding that the alleged statement to the grandchild, who certainly had an interest in seeing that the objector, the grandchild's parent, benefited from the admission of the testimony and, therefore, the testimony lacked sufficient trustworthiness. Horton v. Hendrix, 291 Ga. App. 416, 662 S.E.2d 227, 2008 Ga. App. LEXIS 522 (2008), cert. denied, No. S08C1574, 2008 Ga. LEXIS 780 (Ga. Sept. 22, 2008) (decided under former O.C.G.A. § 24-3-1).

Out-of-court statements identifying the appellant as the man who beat the witness's stepson did not appear to be the most probative evidence to establish the appellant's identity as the killer because the witness's spouse testified directly to that same fact, but the statements were properly admitted under the hearsay exception for excited utterances since the statements were made just minutes after the stepson had been brutally attacked. Wilson v. State, 295 Ga. 84, 757 S.E.2d 825, 2014 Ga. LEXIS 294 (2014).

Trial court did not abuse the court's discretion in ruling that the police reports about the three separate incidents of violence allegedly committed by the co-indictee in Baltimore in 1998 were inadmissible under the necessity exception to the hearsay rule because, even assuming that the authors of the police reports and the victims and witnesses whose statements were recounted in two of the reports were all outside Georgia and thus unavailable, the defendants failed to establish the necessary guarantees of trustworthiness as the only information about violent acts contained in the police reports of the first two incidents was double hearsay, and there was no reliable evidence that the co-indictee was the person identified in the police reports. Brown v. State, 295 Ga. 804, 764 S.E.2d 376, 2014 Ga. LEXIS 751 (2014) (decided under former O.C.G.A. § 24-3-1(b)).

Trial court did not err in excluding a witness's hearsay statement under the necessity exception to the hearsay rule because the witness's statement was not the only evidence that could establish that the co-indictee's gun was actually capable of firing as two eyewitnesses testified that the witnesses believed the co-indictee actually fired shots, and the witness's statement did not prove that the co-indictee's gun was capable of firing because the witness never said that the witness saw the gun fire. Brown v. State, 295 Ga. 804, 764 S.E.2d 376, 2014 Ga. LEXIS 751 (2014) (decided under former O.C.G.A. § 24-3-1(b)).

Requirements of necessity and guaranty of trustworthiness not satisfied. — Victim's declarations to an army medic before the crimes in question that the defendant had injured the victim were inherently untrustworthy, and thus were improperly admitted under the necessity exception to the hearsay doctrine: (1) the victim was intoxicated when the victim made the statements; and (2) the victim also stated that the victim would lie to the victim's chain of command about the injury. The error was harmless, however,

because the evidence could not have contributed to the verdict as two eyewitnesses implicated the defendant as a party to the crimes. Navarrete v. State, 283 Ga. 156, 656 S.E.2d 814, 2008 Ga. LEXIS 43, cert. denied, 555 U.S. 820, 129 S. Ct. 104, 172 L. Ed. 2d 33, 2008 U.S. LEXIS 6704 (2008) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err when it declined to admit hearsay after finding that the party seeking to use the hearsay had not made the necessary proffer because, although defense counsel asserted that the persons who would testify to the utterances purportedly made by the victims were friends of the victims who reported the utterances to police shortly after the victims were killed, such a presentation was insufficient to authorize the admission of hearsay pursuant to the necessity exception found in former O.C.G.A. § 24-3-1(b) since there was no showing of the required special relationship between the deceased declarants and the proffered witnesses. Coleman v. State, 286 Ga. 291, 687 S.E.2d 427, 2009 Ga. LEXIS 703 (2009) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse its discretion in refusing to allow testimony under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), that the victim had told her sister that her neighbor had raped her several months prior to her murder because the hearsay testimony was not proper impeachment evidence when it was not relevant to the crimes for which the defendant was on trial, and it was also not relevant to the neighbor's motive or interest in testifying; although the victim, the declarant, was deceased and unavailable, the defendant failed to prove that the hearsay testimony was relevant to and probative of a material fact since the alleged rape occurred several months prior to the victim's murder, there was no evidence connecting either the rape or the neighbor to it, and even assuming the proffered testimony's trustworthiness, the fact that the neighbor had raped the victim in the past did not directly connect him to the victim's murder or show that he committed the murder or a similar crime. Arrington v. State, 286 Ga. 335, 687 S.E.2d 438, 2009 Ga. LEXIS 690 (2009), cert. denied, 562 U.S. 853, 131 S. Ct. 112, 178 L. Ed. 2d 69, 2010 U.S. LEXIS 6037 (2010) (decided under former O.C.G.A. § 24-3-1).

In a widow's suit seeking to impose a constructive trust on accounts and assets conveyed by the decedent to the decedent's executor, the trial court did not err in excluding hearsay testimony of the widow's daughter and a close friend of the decedent stating that the assets had been conveyed to the executor for the care and support of the widow. The testimony was vague and was not proven to be admissible under the trustworthiness exception of O.C.G.A. § 24-8-807. Rabun v. Rabun, 341 Ga. App. 878, 802 S.E.2d 296, 2017 Ga. App. LEXIS 299 (2017).

Other Exceptions

Residual exception applied when witness unavailable. — Appellate counsel was not ineffective for failing to adequately challenge the admission of the victim's hearsay statements to witnesses because the appellate court's ruling that the victim's statements were admissible under the residual hearsay exception was proper, given the victim's unavailability to testify due to the victim's death and the evidence of the victim's close relationship with one of the witnesses. Emmons v. Bryant, 312 Ga. 711, 864 S.E.2d 1, 2021 Ga. LEXIS 649 (2021), cert. denied, 142 S. Ct. 1458, 212 L. Ed. 2d 546, 2022 U.S. LEXIS 1801 (2022).

Habeas court erred by finding that appellate counsel was ineffective for failing to adequately challenge the admission of the victim's hearsay statements to witnesses because the victim's statements were admissible under the residual hearsay exception. Emmons v. Bryant, 312 Ga. 711, 864 S.E.2d 1, 2021 Ga. LEXIS 649 (2021), cert. denied, 142 S. Ct. 1458, 212 L. Ed. 2d 546, 2022 U.S. LEXIS 1801 (2022).

Trial court did not err by allowing the State to present evidence of the deceased victim's statements at trial because the victim's post-rape statements, made to close friends and family shortly after the incident, were offered as evidence that she had been raped, forcibly and against her will, the statements were more probative

Other Exceptions (Cont'd)

on the points for which they were offered than other evidence which could have been procured through reasonable efforts, and the trial court found that the general purpose of the rules of evidence and the interests of justice would best be served by admission of the statements into evidence. Brooks v. State, 365 Ga. App. 711, 880 S.E.2d 226, 2022 Ga. App. LEXIS 497 (2022).

Statements admissible as trustworthy. — Admitting the victim's hearsay statements pursuant to a residual exception to the hearsay rule was not reversible error because the victim's statements to the victim's mother during the victim's hospitalization were trustworthy given the victim's close relationship with the mother. Tanner v. State, 301 Ga. 852, 804 S.E.2d 377, 2017 Ga. LEXIS 712 (2017).

Materiality and probative value. — Death or unavailability of the declarant cannot alone satisfy the necessity component without allowing the exception to swallow the rule; additionally, the proponent of the evidence must show that the statement is relevant to a material fact and that the statement is more probative on that material fact than other evidence that may be procured and offered. Chapel v. State, 270 Ga. 151, 510 S.E.2d 802 (decided under former O.C.G.A. § 24-3-1).

Requirement of particularized guarantees of trustworthiness has not been met as to witnesses who had known the deceased victim for only a short time before the deceased began confiding in them about the problems in the marriage to defendant. Slakman v. State, 272 Ga. 662, 533 S.E.2d 383, 2000 Ga. LEXIS 583 (2000) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in admitting a friend's testimony as to the statements the murder victim made to the friend about the murder victim's relationship with defendant and the way defendant treated the murder victim since sufficient guarantees of trustworthiness existed to warrant admission of that testimony; the evidence showed that the friend and the murder victim worked together for a year and that the murder victim confided in the friend on a daily basis about the details of the murder victim's relationship with defendant, and, thus, the testimony was admissible under the necessity exception to the rule prohibiting hearsay evidence because the declarant was deceased and the testimony was more probative on the issues of motive and intent than other evidence offered at trial. Brinson v. State, 276 Ga. 671, 581 S.E.2d 548, 2003 Ga. LEXIS 537 (2003) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in admitting the testimony of a long-time friend of the deceased wife about prior difficulties between the deceased wife and defendant as such testimony was admissible under the necessity exception to the hearsay rule; the deceased wife was unavailable, the testimony contained particular guarantees of trustworthiness, and the testimony was relevant to the relationship between the deceased wife and defendant, and was more probative of that than other evidence that could be procured and offered. Rowe v. State, 276 Ga. 800, 582 S.E.2d 119, 2003 Ga. LEXIS 549 (2003) (decided under former O.C.G.A. § 24-3-1).

Admission of victim's statement made two months before the victim's death was not error since it was established that the declarant was unavailable due to death; that the declarant's statement regarding gang membership was relevant to a material fact — the motive for the shooting; and that the most probative evidence of the declarant's gang membership was the declarant's admission of that fact. Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (decided under former O.C.G.A. § 24-3-1).

Although the statements were not dying declarations, statements by the murdered victim to the victim's friends regarding death threats made by the victim's spouse carried sufficient indicia of reliability to be admissible. Morris v. State, 275 Ga. 601, 571 S.E.2d 358, 2002 Ga. LEXIS 920 (2002) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in allowing a deceased witness's sister to testify, pursuant to the necessity exception to the hearsay rule, regarding statements the decedent made to the sister prior to the murder, which implicated the defendant,

as the decedent was unavailable, the statements were relevant to show motive, and the statements were trustworthy because the decedent was confiding in the sister regarding a fear of being associated with the robbery defendant committed. Grimes v. State, 280 Ga. 363, 628 S.E.2d 580, 2006 Ga. LEXIS 195 (2006) (decided under former O.C.G.A. § 24-3-1).

Admission of statements made by the defendant's cousin prior to the cousin's murder were proper under the necessity exception to the hearsay rule pursuant to former O.C.G.A. § 24-3-1(b) because the statements indicated that the cousin was going to tell the defendant to move out of a shared apartment and the statements were probative on the issues of the defendant's motive and intent; the statements were trustworthy because the statements were made to the cousin's family members, whom the cousin confided in. Jackson v. State, 284 Ga. 826, 672 S.E.2d 640, 2009 Ga. LEXIS 13 (2009) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion by admitting into evidence statements the victim made to a witness, the victim's close friend, regarding a missing key because the state offered statements at issue as an explanation for the lack of evidence of forced entry to the victim's home and did not predicate admission of that testimony on the witness's credibility as a witness. Tyner v. State, 305 Ga. 326, 825 S.E.2d 129, 2019 Ga. LEXIS 145 (2019).

Residual exception applied to witness statement. — Trial court did not err in admitting the victim's statements to two witnesses under the residual exception to the hearsay rule because there was no evidence apart from hearsay statements to show that the defendant owed the victim money for drugs, that the victim was overcharging the defendant for the drugs, and that 20 minutes before the victim was stabbed, the victim planned to meet the defendant to pay the debt and purchase more drugs. Lopez v. State, 311 Ga. 269, 857 S.E.2d 467, 2021 Ga. LEXIS 131 (2021).

Deceased victim's statements to close friend. — Trial court did not abuse the court's discretion when the court allowed a witness's testimony that the victim told the witness that the victim had a fight with the defendant under the residual hearsay exception because the witness testified that, when the witness went to pick the victim up from a club, the witness saw that the victim had a busted lip, a missing tooth, and broken eyeglasses; the victim explained the victim's condition to the witness, whom the victim had known for three decades and with whom the victim had maintained a close relationship, by stating the victim was in a fight with the defendant; and the evidence was more probative of the relationship troubles between the defendant and the victim than other evidence in the case. Miller v. State, 303 Ga. 1, 810 S.E.2d 123, 2018 Ga. LEXIS 79 (2018).

Trial court did not improperly allow the victim's girlfriend to testify about certain statements uttered by the victim concerning the defendant's personality and demeanor as: (1) the declarant-victim died and was thus unavailable; (2) the statements were relevant to the defendant's relationship with the victim, and the defendant's apparent motive, pattern of conduct, and opportunity to commit the crimes; and (3) the statements had particular guarantees of trustworthiness because of the close relationship between the victim and the defendant. Lyons v. State, 282 Ga. 588, 652 S.E.2d 525, 2007 Ga. LEXIS 781 (2007), overruled in part, Garza v. State, 284 Ga. 696, 670 S.E.2d 73, 2008 Ga. LEXIS 865 (2008) (decided under former O.C.G.A. § 24-3-1).

Victim unable to give meaningful testimony. — Trial court did not err by admitting into evidence the victim's forensic interview under the residual hearsay exception because the interview was not more probative than other evidence at trial and, when asked about the events of the rape, the victim had an episode requiring a break in the proceedings and, upon the victim's return, the victim was largely unresponsive making the victim unable to testify meaningfully. Davis v. State, 353 Ga. App. 651, 839 S.E.2d 184, 2020 Ga. App. LEXIS 62 (2020).

Sibling relationship satisfied guarantees of trustworthiness. — Trial court did not abuse the court's discretion

Other Exceptions (Cont'd)

in determining that sisters had the sort of relationship which held guarantees of trustworthiness, such that the victim's statements to the sister concerning her finances were admissible under the necessity exception to hearsay, former O.C.G.A. § 24-3-1(b). Todd v. State, 274 Ga. 98, 549 S.E.2d 116, 2001 Ga. LEXIS 576 (2001) (decided under former O.C.G.A. § 24-3-1).

Requirement of trustworthiness satisfied. — In a malice murder case, the victim's statements to friends were admissible under the residual hearsay exception because the statements were trustworthy as the statements consistently spoke to the defendant's abusive, controlling, and violent behavior towards the victim during their marriage and during the victim's efforts to leave the defendant; and the victim's statements about the abusive threats that the defendant made to the victim, that harm to the victim would not be caused by the victim, and the victim's fears that the defendant might do something to the victim were trustworthy and admissible as those statements also stemmed from the domestic abuse about which the victim had been informing the victim's close confidantes. Jacobs v. State, 303 Ga. 245, 811 S.E.2d 372, 2018 Ga. LEXIS 144 (2018).

As the victim's diary entries contained the victim's own words concerning an unhappy relationship with the defendant and the defendant's angry and controlling behavior, and there was no evidence indicating that the victim had a motive to fabricate the statements when writing them, the trial court did not abuse its discretion by determining that the diary evidence had sufficient guarantees of trustworthiness to be admissible. Jones v. State, 311 Ga. 455, 858 S.E.2d 462, 2021 Ga. LEXIS 270 (2021).

Circumstantial guarantees of trustworthiness. — When the defendant was convicted of various offenses for denying the defendant's relationship with the man who murdered the defendant's husband, the trial court did not err by admitting into evidence under the necessity exception to the hearsay rule a witness's testimony regarding non-testimonial statements made to the witness by the man about the man's relationship with the defendant because there were circumstantial guarantees of trustworthiness; the statements were evidence of a material fact and more probative than other evidence the state could procure; and the evidentiary rules and the interests of justice were best served by admission of the statements. Sneiderman v. State, 336 Ga. App. 153, 784 S.E.2d 18, 2016 Ga. App. LEXIS 143 (2016), cert. denied, No. S16C1152, 2016 Ga. LEXIS 641 (Ga. Oct. 3, 2016), overruled in part, Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391, 2016 Ga. App. LEXIS 460 (2016).

Application

Statement to show defendant's motive. — Trial court did not abuse the court's discretion in admitting a victim's statements to the victim's close friends as to defendant's threats against the victim, defendant's physical and mental abuse, and other difficulties under the necessity exception to the hearsay rule as the victim was dead, the statements were relevant to defendant's intent, motive, and state of mind, and the statements had particularized guarantees of trustworthiness. Watson v. State, 278 Ga. 763, 604 S.E.2d 804, 2004 Ga. LEXIS 999 (2004), overruled, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err by allowing the victim's parent to testify that the victim told the parent that the defendant had threatened to kill the victim if the victim sought a divorce under the necessity exception to the hearsay rule as: (1) the victim was the declarant; (2) the victim was unavailable because the victim had been murdered; (3) the victim's statement was uniquely relevant to show the defendant's motive, intent, and bent of mind; and (4) the victim's statement was trustworthy because the victim made the statement while confiding in the victim's parent. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639, 2006 Ga. LEXIS 927 (2006) (decided under former O.C.G.A. § 24-3-1).

Statements on relationship by victim's close friends and family members admitted. — Trial court did not err by allowing the victim's close friends and

family to testify about the defendant's relationship problems with the victim because the statements about abuse and problems in the victim's romantic relationship made to close friends and family demonstrated sufficient guarantees of trustworthiness under O.C.G.A. § 24-8-807 Ward v. State, 313 Ga. 265, 869 S.E.2d 470, 2022 Ga. LEXIS 24 (2022).

Victim's statements to a divorce attorney regarding the victim's spouse's violence were not admissible since there was insufficient indicia of reliability to admit the statements under the necessity exception. Dix v. State, 267 Ga. 429, 479 S.E.2d 739 (decided under former O.C.G.A. § 24-3-1).

Statement of confidential informant. — Informant's written statement to an attorney made two weeks after defendant's arraignment was insufficiently trustworthy to be admissible under the "necessity" exception. Nelson v. State, 226 Ga. App. 93, 485 S.E.2d 582 (decided under former O.C.G.A. § 24-3-1).

Evidence lacked reliability. — Trial court did not abuse the court's discretion by excluding from the evidence an out-of-court statement by one of the men convicted for the home invasion and a letter from another man who was convicted of the home invasion because the statement and the letter lacked any indicia of reliability. Thus, the defendant was not entitled to introduce the evidence under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b). Pope v. State, 266 Ga. App. 658, 598 S.E.2d 48, 2004 Ga. App. LEXIS 453 (2004), cert. denied, No. S04C1368, 2004 Ga. LEXIS 743 (Ga. Sept. 7, 2004) (decided under former O.C.G.A. § 24-3-1).

Jury Instructions

Failure to object and acquiescence to curative instruction waived claim of error. — Any claim of error as to the admissibility of the testimony of the victim's coworker under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), that the defendant had been harassing and stalking the victim was waived for purposes of appeal because defense counsel acquiesced in the curative instruction that the defendant was on trial for the charges contained in the indictment only, and the jury could not consider allegations of any other crimes because it was introduced without any hearsay objections from the defendant. Jeffers v. State, 290 Ga. 311, 721 S.E.2d 86, 2012 Ga. LEXIS 9 (2012) (decided under former O.C.G.A. § 24-3-1).

Curative instruction to disregard improper hearsay evidence was sufficient. — Trial court did not abuse the court's discretion by not granting the defendant's motion for a mistrial because the trial court's curative instruction was sufficient to protect the defendant from the prejudicial effect of the hearsay testimony as although such testimony reflected poorly on the defendant's character, the defendant offered no evidence that the jury did not follow the trial court's instruction to disregard the testimony. Rosser v. State, 308 Ga. 597, 842 S.E.2d 821, 2020 Ga. LEXIS 338 (2020).

ARTICLE 2

ADMISSIONS AND CONFESSIONS

Law reviews.

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-8-820. Testimony as to child's description of sexual contact or physical abuse.

(a) A statement made by a child younger than 16 years of age describing any act of sexual contact or physical abuse performed with or on such child by another or with or on another in the presence of such child shall be admissible in evidence by the testimony of the person to

whom made if the proponent of such statement provides notice to the adverse party prior to trial of the intention to use such out-of-court statement and such child testifies at the trial, unless the adverse party forfeits or waives such child's testimony as provided in this title, and, at the time of the testimony regarding the out-of-court statements, the person to whom the child made such statement is subject to cross-examination regarding the out-of-court statements.

(b) This Code section shall apply to any motion made or hearing or trial commenced on or after April 18, 2019.

History.

Code 1981, § 24-8-820, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 222, § 13/HB 349; Ga. L. 2019, p. 81, § 6/HB 424.

Cross references.

Competency of children generally, § 24-6-601 et seq.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2019, "on or after April 18, 2019" was substituted for "on or after the effective date of this subsection" at the end of subsection (b).

Editor's notes.

Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense."

Law reviews.

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For comment, "Maryland v. Craig: The Constitutionality of Closed Circuit Testimony in Child Sexual Abuse Cases," see 25 Ga. L. Rev. 167 (1990).

For note, "Admissibility of Video-taped Testimony: What is the Standard After Maryland v. Craig and How Will the Practicing Defense Attorney be Affected?," see 42 Mercer L. Rev. 883 (1991).

For note, "The Georgia Child Hearsay Statute, and the Sixth Amendment: Is There a Confrontation?," see 10 Ga. St. U.L. Rev. 367 (1994).

For article, "Domestic Relations Law," see 53 Mercer L. Rev. 265 (2001).

For article, "Evidence," see 53 Mercer L. Rev. 281 (2001).

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U. L. Rev. 17 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration
Recordings
Reliability
Application
Jury Issues and Instructions

General Consideration

Editor's notes. — In light of the reenactment of this title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-4-414, for annotations on admissibility of similar acts in child molestation cases, which may also be applicable to this Code

section. In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-3-16 are included in the annotations for this Code section.

In light of the similarity of the statutory provisions, annotations decided when the statute concerned statements from children aged 14 years or younger are included in the annotations for this Code section.

Constitutionality. — Former O.C.G.A. § 24-3-16 was not constitutionally deficient. Rayburn v. State, 194 Ga. App. 676, 391 S.E.2d 780, 1990 Ga. App. LEXIS 252 (1990), cert. denied, No. S90C0811, 1990 Ga. LEXIS 693 (Ga. Apr. 25, 1990), cert. denied, 498 U.S. 969, 111 S. Ct. 434, 112 L. Ed. 2d 417, 1990 U.S. LEXIS 5707 (1990) (decided under former O.C.G.A. § 24-3-16); Toledo v. State, 216 Ga. App. 480, 455 S.E.2d 595, 1995 Ga. App. LEXIS 191 (1995), cert. denied, No. S95C1018, 1995 Ga. LEXIS 633 (Ga. May 19, 1995) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 was not unconstitutional for allowing the state to bolster the testimony of the victim while denying the same opportunity to the defendant. Weathersby v. State, 262 Ga. 126, 414 S.E.2d 200, 1992 Ga. LEXIS 211 (1992) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 did not violate the due process clause of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec. I, Para. I, on its face and was not void for vagueness and uncertainty. Weathersby v. State, 262 Ga. 126, 414 S.E.2d 200, 1992 Ga. LEXIS 211 (1992) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 was not violative of the federal Sixth Amendment. McLelland v. State, 203 Ga. App. 93, 416 S.E.2d 340, 1992 Ga. App. LEXIS 397 (1992), cert. denied, No. S92C0727, 1992 Ga. LEXIS 376 (Ga. Apr. 30, 1992); Fuller v. State, 211 Ga. App. 104, 438 S.E.2d 183, 1993 Ga. App. LEXIS 1442 (1993) (decided under former O.C.G.A. § 24-3-16).

Applicability at date of trial. — Testimony concerning an outcry made by the victim some four months after the last incident of child molestation was properly admitted under former O.C.G.A. § 24-3-16. While the outcry occurred prior to the effective date of former § 24-3-16, the determinative date as to the applicability of former § 24-3-16 was the date of trial. Vargas v. State, 184 Ga. App. 650, 362 S.E.2d 461, 1987 Ga. App. LEXIS 2337 (1987) (decided under former O.C.G.A. § 24-3-16).

Defendant's constitutional rights not violated. — Admission of videotapes in child molestation cases did not infringe upon a defendant's Sixth Amendment right to confront witnesses if the child victim testified. Frazier v. State, 195 Ga. App. 109, 393 S.E.2d 262, 1990 Ga. App. LEXIS 428 (1990), cert. denied, No. S90C1024, 1990 Ga. LEXIS 756 (Ga. May 16, 1990) (decided under former O.C.G.A. § 24-3-16); Toledo v. State, 216 Ga. App. 480, 455 S.E.2d 595, 1995 Ga. App. LEXIS 191 (1995), cert. denied, No. S95C1018, 1995 Ga. LEXIS 633 (Ga. May 19, 1995) (decided under former O.C.G.A. § 24-3-16).

Admission of a child molestation victim's out-of-court statements did not violate the defendant's Sixth Amendment right to confrontation since the statements bore sufficient "indicia of reliability." Smith v. State, 199 Ga. App. 378, 405 S.E.2d 78, 1991 Ga. App. LEXIS 487 (1991), cert. denied, No. S91C1010, 1991 Ga. LEXIS 761 (Ga. May 15, 1991) (decided under former O.C.G.A. § 24-3-16).

Constitutional right of confrontation. — Former O.C.G.A. § 24-3-16 was not constitutionally deficient. The defendant did not need to be placed in the position of calling the alleged victim to the stand in order to exercise the defendant's rights under the Sixth Amendment. Rather, the court will call the alleged victim at the request of either party, informing the jury that it was the court which had called the child and that both parties would have an opportunity to examine the child. Eberhardt v. State, 257 Ga. 420, 359 S.E.2d 908, 1987 Ga. LEXIS 891 (1987), cert. denied, 484 U.S. 1069, 108 S. Ct. 1036, 98 L. Ed. 2d 999, 1988 U.S. LEXIS 934 (1988) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 contemplated testimony about what a child victim said and did relevant to the alleged sexual contact from both the child and

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those witnessing the child's later reaction. The purpose of this procedure was to allow a defendant to exercise the defendant's right to confrontation without requiring the defendant to be cast unfavorably before the jury for forcing the child to testify; any "bolstering" by other witnesses could be explored by the defendant on cross-examination. Rayburn v. State, 194 Ga. App. 676, 391 S.E.2d 780, 1990 Ga. App. LEXIS 252 (1990), cert. denied, No. S90C0811, 1990 Ga. LEXIS 693 (Ga. Apr. 25, 1990), cert. denied, 498 U.S. 969, 111 S. Ct. 434, 112 L. Ed. 2d 417, 1990 U.S. LEXIS 5707 (1990) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16, as construed by the Supreme Court in Sosebee v. State, 257 Ga. 298 (1987) and in other appellate cases, could not pass constitutional muster because the statute failed to put the onus on the prosecution to put the child victim on the witness stand to confront the defendant, and any cases suggesting the contrary were overruled; however, the former statute could be construed to survive a confrontation clause attack because the right of confrontation could be satisfied by construing the former statute to require pretrial notice of the state's intent to use a child victim's hearsay statements. Hatley v. State, 290 Ga. 480, 722 S.E.2d 67, 2012 Ga. LEXIS 137 (2012) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 required the prosecution to notify the defendant within a reasonable period of time prior to trial of the prosecutor's intent to use a child victim's hearsay statements and to give the defendant an opportunity to raise a confrontation clause objection; if the defendant objected, and the state wished to introduce hearsay statements, the state needed to present the child witness at trial; if the defendant did not object, the state could introduce the child victim's hearsay statements subject to the trial court's determination that the circumstances of the statements provided sufficient indicia of reliability, and the trial court should have taken reasonable steps to ascertain, and put on the record, whether the defendant waived the defendant's right to confront the child witness. Hatley v. State, 290 Ga. 480, 722 S.E.2d 67, 2012 Ga. LEXIS 137 (2012) (decided under former O.C.G.A. § 24-3-16).

Defendant's right of confrontation was not violated by the introduction of the victim's hearsay statements because the victim's statements to the victim's mother were non-testimonial, whereas the victim's statement to the forensic interviewer, made several weeks after the crimes, was testimonial; but even if the victim's statement to the forensic examiner, and the statements made by the victim and the victim's mother to the police were admitted erroneously, the errors were harmless beyond a reasonable doubt. The victim's statement to the forensic interviewer was the same as the victim's statement to the victim's mother, and the statements made by the victim and the victim's mother to police were cumulative of the victim's statement to the victim's mother, as well as the mother's testimony and the forensic interviewer's evidence was properly admitted against the defendant. Hatley v. State, 290 Ga. 480, 722 S.E.2d 67, 2012 Ga. LEXIS 137 (2012) (decided under former O.C.G.A. § 24-3-16).

Former statute valid despite equal protection challenge. — Defendant asserted that defendant was similarly situated to all other criminal and civil litigants and that former O.C.G.A. § 24-3-16 created an irrational and arbitrary class of litigants because only persons charged with physical and/or sexual abuse of a child under the age of 14 were subject to the exception contained therein. These assertions were not enough to overcome the presumptive validity of former O.C.G.A. § 24-3-16. Dobbins v. State, 262 Ga. 161, 415 S.E.2d 168, 1992 Ga. LEXIS 213 (1992) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. §§ 24-3-16 and 24-9-5 (see now O.C.G.A. §§ 24-8-820, 24-6-601, and 24-6-603) needed to be construed together. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18, 1990 Ga. App. LEXIS 1497 (1990) (decided under former O.C.G.A. § 24-3-16); McGarity v. State, 212 Ga. App. 17, 440 S.E.2d 695, 1994 Ga.

App. LEXIS 119 (1994), cert. denied, No. S94C0811, 1994 Ga. LEXIS 506 (Ga. Mar. 25, 1994) (decided under former O.C.G.A. § 24-3-16).

Competency of children to testify in a divorce action could be established only by demonstrating that the children understood the nature of an oath, as required by former O.C.G.A. § 24-9-5. Woodruff v. Woodruff, 272 Ga. 485, 531 S.E.2d 714, 2000 Ga. LEXIS 493 (2000) (decided under former O.C.G.A. § 24-3-16).

Procedure upon invocation of former O.C.G.A. § 24-3-16. — If the prosecution invoked former O.C.G.A. § 24-3-16 to introduce out-of-court declarations by the alleged victim, the court was required to do as follows: before the state rests, the court shall, at the request of either party, cause the alleged victim to take the stand. The court shall then inform the jury that it is the court who has called the child as a witness, and that both parties have the opportunity to examine the child. The court shall then allow both parties to examine and cross-examine the child as though former O.C.G.A. § 24-3-16 had not been invoked. Sosebee v. State, 257 Ga. 298, 357 S.E.2d 562, 1987 Ga. LEXIS 800 (1987), overruled in part as stated in Wadley v. State, 317 Ga. App. 333, 730 S.E.2d 536, 2012 Ga. App. LEXIS 658 (2012) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 did not require the court to make a finding of necessity before admitting into evidence the statement of a child under the age of 14 describing sexual contact. Newberry v. State, 184 Ga. App. 356, 361 S.E.2d 499, 1987 Ga. App. LEXIS 2781 (1987) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 did not require that a hearing to determine indicia of reliability be held prior to receiving the testimony. Moreover, there is no requirement that the trial court make a specific finding of sufficient indicia of reliability in order for the out-of-court statements of child victims to be admissible. Xulu v. State, 256 Ga. App. 272, 568 S.E.2d 74, 2002 Ga. App. LEXIS 773 (2002) (decided under former O.C.G.A. § 24-3-16).

Admission of out-of-court outcry statement. — It is not error for a trial court to admit an out-of-court outcry statement that meets the statutory requirements of O.C.G.A. § 24-8-820. Latta v. State, 341 Ga. App. 696, 802 S.E.2d 264, 2017 Ga. App. LEXIS 266 (2017), cert. denied, No. S17C1877, 2017 Ga. LEXIS 1021 (Ga. Dec. 11, 2017), cert. denied, 138 S. Ct. 1582, 200 L. Ed. 2d 768, 2018 U.S. LEXIS 2291 (2018).

Defendant must deal with child hearsay. — If it is rational to imprison a defendant who causes a child to witness sexual contact or physical abuse, it is surely rational to make the defendant merely deal with hearsay from such a child, whom the defendant may require to appear in court to testify and face cross-examination; the fact that the General Assembly loosened the hearsay rule for child witnesses to crimes involving only sexual contact and physical abuse, as opposed to all crimes or all violent crimes, should pose no problem under a rational basis review. Bunn v. State, 291 Ga. 183, 728 S.E.2d 569, 2012 Ga. LEXIS 565 (2012) (decided under former O.C.G.A. § 24-3-16).

Court of appeals properly held that children's out-of-court statements about sexual conduct that happened to each other in their presence were admissible under the Child Hearsay Statute, O.C.G.A. § 24-3-16, because the court did not err in declining to extend the holding of Woodard v. State, 269 Ga. 317 (1998), which was overruled to the defendant's case; there is nothing irrational about creating disparate classes of criminal defendants based on the young age of the witnesses to their crimes. Bunn v. State, 291 Ga. 183, 728 S.E.2d 569, 2012 Ga. LEXIS 565 (2012) (decided under former O.C.G.A. § 24-3-16).

Viewing of video during deliberations. — Trial court did not err in permitting the jury to view the video tape of the victim's forensic interview as the jury was entitled to consider the victim's out-of-court statements as substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-3-16. State v. Martinez-Palomino, 329 Ga. App. 304, 764 S.E.2d 886, 2014 Ga. App. LEXIS 673 (2014) (decided under former O.C.G.A. § 24-3-16).

Double jeopardy did not bar retrial. — Trial court properly denied the defendant's plea in bar that alleged that the

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admission of the child victim's out-of-court statements violated the Georgia Child Hearsay Statute, former O.C.G.A. § 24-3-16, and U.S. Const., amend. VI as: (1) a retrial was not barred by the Double Jeopardy Clause, U.S. Const., amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, because the evidence against the defendant was not insufficient; (2) the child hearsay testimony could be properly introduced on retrial if the state proceeded under Hatley v. State, 722 SE2d 67 (Ga. 2012); and (3) the child hearsay evidence could be made admissible at re-trial by laying the proper foundation, and could be considered when examining whether the evidence was sufficient. Wadley v. State, 317 Ga. App. 333, 730 S.E.2d 536, 2012 Ga. App. LEXIS 658 (2012), cert. denied, No. S12C2005, 2013 Ga. LEXIS 287 (Ga. Mar. 18, 2013) (decided under former O.C.G.A. § 24-3-16).

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Admission of videotape. — In a child molestation case, defendant knew that the videotaped interview of one of the children was to be played for the jury, that the child would not be testifying for the state, and that defendant had the opportunity to call the child, but defendant did not inquire about the child's availability to testify at trial, nor did defendant request that the child be produced to testify; thus, the failure of the child to testify at trial did not make the videotaped statements inadmissible at trial. Baker v. State, 252 Ga. App. 238, 555 S.E.2d 899, 2001 Ga. App. LEXIS 1250 (2001) (decided under former O.C.G.A. § 24-3-16).

State proffered substantial evidence to establish the reliability of children's videotaped statements accusing defendant of molestation, and the proffer was then supported by evidence presented at trial; thus, the state fulfilled its burden in demonstrating that the children's statements had the "requisite degree of trustworthiness" to be admitted at trial and the trial court did not abuse the court's discretion in admitting the videotapes. Baker v. State, 252 Ga. App. 238, 555 S.E.2d 899, 2001 Ga. App. LEXIS 1250 (2001) (decided under former O.C.G.A. § 24-3-16).

Reliability of a child's videotaped statement was established since the child was not subjected to repeated questioning by different people, nor was evidence presented that the child was coached, the child's mother called the police almost immediately after discovering the molestation, and the fact that an interview took place some time after the incident, did not, without more, make the statement unreliable; the juvenile had ample opportunity to cross-examine the victim and question the child about the child's memory of and the circumstances surrounding the child's statement. In the Interest of A.H., 259 Ga. App. 608, 578 S.E.2d 247, 2003 Ga. App. LEXIS 214 (2003) (decided under former O.C.G.A. § 24-3-16).

Trial court did not abuse the court's discretion when the court allowed the state to show the jury videotapes of interviews police made with children who accused defendant of touching their genitals, or when the court allowed the children's parents to testify about statements their children made to them, and the appellate court held that evidence which showed that defendant touched the genitals of several children who were enrolled in tae kwon do classes defendant taught and sodomized three children was sufficient to sustain defendant's convictions on 18 counts of child molestation and three counts of aggravated child molestation. Fiek v. State, 266 Ga. App. 523, 597 S.E.2d 585, 2004 Ga. App. LEXIS 418 (2004), cert. denied, No. S04C1337, 2004 Ga. LEXIS 755 (Ga. Sept. 7, 2004) (decided under former O.C.G.A. § 24-3-16).

Trial court did not err in admitting the videotaped statement of the child victim in the defendant's trial for child molestation since the child was 11 years old when the statement was made, the clinical psychologist who conducted the interview assessed and commented on the child's demeanor and emotional state, and testified that the child's language and vocabulary were generally within normal range, that the child gave sensory and contextual details about the incidents, that the child did not appear to have been coached, and that it was unnecessary to ask the child leading questions because the child pro-

vided sufficient details on the child's own; moreover, the child's out-of-court statements were detailed and consistent, the defendant had the opportunity to cross-examine the child in the presence of the jury, and had the opportunity to allow the jury to judge the child's demeanor, and the defendant also cross-examined the psychologist extensively regarding the statement. Harris v. State, 279 Ga. App. 241, 630 S.E.2d 853, 2006 Ga. App. LEXIS 513 (2006) (decided under former O.C.G.A. § 24-3-16).

In a child molestation case involving defendant's 13-year-old child, defense counsel was not ineffective for not requesting that the trial court determine the reliability of the victim's videotaped statement under former O.C.G.A. § 24-3-16 or for not objecting to the statement's admission; the victim spontaneously told the victim's foster mother about the incidents when the victim was upset, and the victim repeatedly expressed love for the defendant and a desire not to get the defendant into trouble. Foster v. State, 286 Ga. App. 250, 649 S.E.2d 322, 2007 Ga. App. LEXIS 756 (2007), cert. dismissed, No. S07C1883, 2007 Ga. LEXIS 875 (Ga. Dec. 10, 2007) (decided under former O.C.G.A. § 24-3-16).

In admitting the videotaped interview under former O.C.G.A. § 24-3-16, and allowing the defendant to cross-examine the victim at trial, the trial court determined that there were sufficient indicia of reliability surrounding the victim's out-of-court statements to justify the statement's admission. Phillips v. State, 284 Ga. App. 224, 644 S.E.2d 153, 2007 Ga. App. LEXIS 290 (2007) (decided under former O.C.G.A. § 24-3-16).

In a child molestation prosecution, videotaped interviews by the police with a defendant's victim had sufficient indicia of reliability to be admissible under former O.C.G.A. § 24-3-16 because the victim was interviewed outside the presence of the victim's parent and the victim's recounting of the events remained consistent; an additional safeguard was provided by the fact that the victim testified at the defendant's trial and, thus, was subject to cross-examination. Hughes v. State, 297 Ga. App. 581, 677 S.E.2d 674, 2009 Ga. App. LEXIS 388 (2009), cert. denied, No. S09C1440, 2009 Ga. LEXIS 560 (Ga. Sept. 8, 2009) (decided under former O.C.G.A. § 24-3-16).

In a conviction of aggravated child molestation and aggravated sodomy involving a four-year-old child, there was sufficient indicia of reliability to admit a videotape of a forensic interview of the child because the interviewer developed a rapport with the child, and there were no threats or promises for the child's answers. Brown v. State, 300 Ga. App. 359, 685 S.E.2d 377, 2009 Ga. App. LEXIS 1161 (2009) (decided under former O.C.G.A. § 24-3-16).

Evidence supported defendant's conviction for molesting defendant's granddaughter. The videotaped police interview of the victim and the testimony of the victim's mother, the child therapist, and the victim's brother concerning what the victim told them, was substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-3-16. Towry v. State, 304 Ga. App. 139, 695 S.E.2d 683, 2010 Ga. App. LEXIS 468 (2010) (decided under former O.C.G.A. § 24-3-16).

Reliability of videotaped statements not established. — Circumstances surrounding the making of videotaped statements of 4 ½ year old alleged child molestation victim failed to establish the inherent reliability of those statements, even though the victim used terminology which would not be expected of a child the child's age and although the child had no apparent motive to fabricate, the child's statements did not meet the test of "spontaneity and consistent repetition," some of the assertions made by the child during the two videotaped interviews were inconsistent with the known facts, and the interviews were conducted by persons acting in a law enforcement capacity, with the clear intention of gathering evidence for use against the defendant. Rolader v. State, 202 Ga. App. 134, 413 S.E.2d 752, 1991 Ga. App. LEXIS 1726 (1991), cert. denied, No. S92C0339, 1992 Ga. LEXIS 55 (Ga. Jan. 13, 1992) (decided under former O.C.G.A. § 24-3-16).

Videotape of interview between child victim and investigating officer. — When the circumstances surrounding the videotape of an interview between a

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child victim and an investigating officer provided sufficient indicia of reliability of the statements therein, any conflicts between the videotaped statement and the testimony of the child at trial would not necessarily render the former inadmissible, but would rather present a question of credibility of the witness to be resolved by the trier of fact. Ware v. State, 191 Ga. App. 896, 383 S.E.2d 368, 1989 Ga. App. LEXIS 844 (1989) (decided under former O.C.G.A. § 24-3-16).

Taped interview with a child was admissible under former O.C.G.A. § 24-3-16 if it described acts of sexual contact or physical abuse, if the child was available to testify in court, and if the circumstances of the statement were shown to have sufficient indicia of reliability. Vick v. State, 194 Ga. App. 616, 391 S.E.2d 455, 1990 Ga. App. LEXIS 273 (1990) (decided under former O.C.G.A. § 24-3-16); Heidler v. State, 273 Ga. 54, 537 S.E.2d 44, 2000 Ga. LEXIS 693 (2000), cert. denied, 532 U.S. 1029, 121 S. Ct. 1979, 149 L. Ed. 2d 771, 2001 U.S. LEXIS 3741 (2001) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 did not require a hearing for the determination that reliability of the videotaped interviews of a four-year-old child was indicated by the neutrality of the interviewer and place of interview, and the spontaneity of the interviews conducted shortly after the alleged molestation. King v. State, 194 Ga. App. 662, 391 S.E.2d 660, 1990 Ga. App. LEXIS 260 (1990), cert. denied, No. S90C0898, 1990 Ga. LEXIS 761 (Ga. May 16, 1990) (decided under former O.C.G.A. § 24-3-16).

When two videotapes of interviews with a child were showed to a jury, the child was called as the court's witness and testified similarly, and the child was examined by all parties, there was no abuse of the court's discretion in finding the child qualified to testify, nor in admitting the videotapes. Frazier v. State, 195 Ga. App. 109, 393 S.E.2d 262, 1990 Ga. App. LEXIS 428 (1990), cert. denied, No. S90C1024, 1990 Ga. LEXIS 756 (Ga. May 16, 1990) (trial held prior to April 19, 1989) (decided under former O.C.G.A. § 24-3-16); Dupree v. State, 206 Ga. App. 4, 424 S.E.2d 316, 1992 Ga. App. LEXIS 1551 (1992); Lindo v. State, 218 Ga. App. 756, 463 S.E.2d 148, 1995 Ga. App. LEXIS 872 (1995) (decided under former O.C.G.A. § 24-3-16).

Requirement of a neutral interviewer and place of interview should be recognized as relating to the atmosphere, circumstances, and manner in which the interview was conducted. Interviews by police officers of young victims of sexual abuse are not barred; such cases merely require that the officer conduct the interview in a manner conducive to eliciting the truth. Knight v. State, 210 Ga. App. 228, 435 S.E.2d 682, 1993 Ga. App. LEXIS 1111 (1993) (decided under former O.C.G.A. § 24-3-16).

In a case where defendant was tried for first degree cruelty to children for allegedly burning the three-year-old victim's back with a cigarette, the trial court did not abuse the court's discretion in admitting the victim's videotaped interview; although several factors weighed against admitting the videotaped interview, such as the victim's tender age, the length of time between the event and the videotaped interview, and the fact that police officers conducted the interview, these factors did not require that the videotaped interview be excluded as a matter of law, and because the victim testified at trial, defendant had the opportunity to cross-examine the victim regarding the victim's memory of the interview and the circumstances surrounding the interview. Conley v. State, 257 Ga. App. 563, 571 S.E.2d 554, 2002 Ga. App. LEXIS 1221 (2002) (decided under former O.C.G.A. § 24-3-16).

In defendant's conviction for child molestation, trial court properly denied defendant's motion for directed verdict of acquittal as sufficient evidence existed based on testimony of the child victim's parent, who testified as to discovery of defendant on top of the victim; further evidence in support of defendant's conviction included the child's videotaped police interviews describing what happened. Lopez v. State, 291 Ga. App. 210, 661 S.E.2d 618, 2008 Ga. App. LEXIS 444 (2008), cert. denied, No. S08C1441, 2008 Ga. LEXIS 675 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-3-16).

Whether videotape bolstered testimony irrelevant. — After a defendant

molested a nine-year-old child, a videotape of the child's interview by a detective was properly admitted under former O.C.G.A. § 24-3-16 as a statement made by a child under the age of 14 years describing an act of sexual contact. Whether the videotape also bolstered the child's trial testimony was immaterial. Whitaker v. State, 293 Ga. App. 427, 667 S.E.2d 202, 2008 Ga. App. LEXIS 962 (2008), cert. dismissed, No. S09C0672, 2009 Ga. LEXIS 128 (Ga. Mar. 9, 2009) (decided under former O.C.G.A. § 24-3-16).

Trial court did not abuse the court's discretion in admitting a videotaped forensic interview of a child molestation victim because the victim testified at trial and was subject to cross-examination about the circumstances surrounding the videotaped interview and statements the victim made during the interview, and it was the jury's responsibility, as the trier of fact, to resolve any inconsistencies in the victim's statements and judge the victim's credibility; there was no evidence to support the defendant's claim that the victim recanted the allegations the victim made or that the victim falsely accused the defendant of molesting the victim's sister, the videotape showed that the victim was sufficiently credible for the interview to be shown to the jury, and the interview in question took place at a neutral location with only the interviewer present. Lynn v. State, 300 Ga. App. 170, 684 S.E.2d 325, 2009 Ga. App. LEXIS 1108 (2009) (decided under former O.C.G.A. § 24-3-16).

Victim's testimony not bolstered by videotape. — Playing of the videotape of the interview with the victim before the jury did not constitute an impermissible bolstering of the victim's testimony. Knight v. State, 210 Ga. App. 228, 435 S.E.2d 682, 1993 Ga. App. LEXIS 1111 (1993) (decided under former O.C.G.A. § 24-3-16).

Videotape of interview between child victim and psychotherapist. — Admission of a videotaped interview with a child victim of defendant's sexual offenses was proper under the Child Hearsay Statute, former O.C.G.A. § 24-3-16, although defendant was not indicted for offenses requiring proof of sexual contact or physical abuse as the former statute applied to descriptions of physical abuse or sexual contact, which could have been merely verbal. Carolina v. State, 276 Ga. App. 298, 623 S.E.2d 151, 2005 Ga. App. LEXIS 1233 (2005) (decided under former O.C.G.A. § 24-3-16).

Audio tape of victim's testimony recorded by social worker was admissible even though the tape was stopped and restarted several times during the interview; the victim was available to testify and testimony of the social worker established sufficient indicia of reliability. Martin v. State, 205 Ga. App. 591, 422 S.E.2d 876, 1992 Ga. App. LEXIS 1264 (1992), cert. denied, No. S93C0201, 1993 Ga. LEXIS 47 (Ga. Jan. 7, 1993) (decided under former O.C.G.A. § 24-3-16).

Audio recording by parent of child victim admissible. — Trial court did nor err in overruling the defendant's objections to a recorded audio statement the older victim made to the victim's father on the day of the outcry because it was correctly admitted under the Child Hearsay Statute, as the father testified that after the victim told the father the defendant had touched the victim, the father used a tape recorder to record the victim's detailed account of the events and identified the audio recording the father made. Nembhard v. State, 360 Ga. App. 568, 859 S.E.2d 118, 2021 Ga. App. LEXIS 259 (2021).

In child molestation case, videotape of victim was properly admitted after the trial court conducted a lengthy hearing outside the presence of the jury to determine the tape's reliability. Court considered the atmosphere and circumstances of the interview, the spontaneity of the victim's responses, and the demeanor of the victim during the interview. Penaranda v. State, 203 Ga. App. 740, 417 S.E.2d 683, 1992 Ga. App. LEXIS 614 (1992), cert. denied, No. S92C0967, 1992 Ga. LEXIS 465 (Ga. June 4, 1992); Allen v. State, 263 Ga. 60, 428 S.E.2d 73, 1993 Ga. LEXIS 359 (1993) (decided under former O.C.G.A. § 24-3-16).

Trial court did not err in admitting a videotaped statement of a defendant's daughter describing incidents of molestation committed by defendant when she

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was four years old because the daughter was available for cross-examination at trial, although she was not very responsive to the state's questions on direct examination. Conn v. State, 300 Ga. App. 193, 685 S.E.2d 745, 2009 Ga. App. LEXIS 1116 (2009), cert. denied, No. S10C0226, 2010 Ga. LEXIS 131 (Ga. Feb. 1, 2010) (decided under former O.C.G.A. § 24-3-16).

Reliability

Dual burden in determining reliability. — Former O.C.G.A. § 24-3-16 imposed a dual burden on the trial court and the proponent of child hearsay testimony. The state had to present evidence proving the child's reliability, and the court had to assess that evidence. But former O.C.G.A. § 24-3-16 did not authorize the state to eviscerate the rule against improper bolstering. Roberson v. State, 241 Ga. App. 226, 526 S.E.2d 428, 1999 Ga. App. LEXIS 1588 (1999) (decided under former O.C.G.A. § 24-3-16).

Burden is on the state to show that the state's evidence falls within the hearsay exception created by former O.C.G.A. § 24-3-16 for the admission of out-of-court hearsay statements of a child victim of sexual abuse; former O.C.G.A. § 24-3-16 imposed a dual burden on the trial court and the proponent of child hearsay testimony, as the state had to present evidence proving the child's reliability, and the trial court had to assess that evidence. Ferreri v. State, 267 Ga. App. 811, 600 S.E.2d 793, 2004 Ga. App. LEXIS 790 (2004) (decided under former O.C.G.A. § 24-3-16).

Court could consider factors in determining reliability. — Trial court could consider certain factors when deciding if a child's statement's provided sufficient indicia of reliability pursuant to the former statute; any bolstering could be explored by a defendant in cross examination. Howard v. State, 252 Ga. App. 465, 556 S.E.2d 536, 2001 Ga. App. LEXIS 1310 (2001) (decided under former O.C.G.A. § 24-3-16).

Factors considered in determining reliability. — Indicia of reliability must spring from the circumstances of the statement. The factors which the court may consider, when applicable, include but are not limited to the following: (1) the atmosphere and circumstances under which the statement was made (including the time, the place, and the people present); (2) the spontaneity of the child's statement to the people present; (3) the child's age; (4) the child's general demeanor; (5) the child's condition (physical or emotional); (6) the presence or absence of threats or promise of benefits; (7) the presence or absence of drugs or alcohol; (8) the child's general credibility; (9) the presence or absence of any coaching by parents or other third parties before or at the time of the child's statement, and the type of coaching and circumstances surrounding the statement and, the nature of the child's statement and type of language used therein; and (10) the consistency between repeated out-of-court statements by the child. Gregg v. State, 201 Ga. App. 238, 411 S.E.2d 65, 1991 Ga. App. LEXIS 1307 (1991), cert. denied, No. S92C0074, 1991 Ga. LEXIS 893 (Ga. Nov. 1, 1991); Williams v. State, 204 Ga. App. 878, 420 S.E.2d 781, 1992 Ga. App. LEXIS 1034 (1992) (decided under former O.C.G.A. § 24-3-16); Gentry v. State, 213 Ga. App. 24, 443 S.E.2d 667, 1994 Ga. App. LEXIS 475 (1994) (decided under former O.C.G.A. § 24-3-16); Heard v. State, 221 Ga. App. 166, 471 S.E.2d 22 (decided under former O.C.G.A. § 24-3-16).

Reliability hearing required. — Defendant's child molestation conviction was reversed as given that the child victim was three-years-old, that the victim gave inconsistent statements, that the victim might have been coached by defendant's estranged spouse, that law enforcement was involved in the child's interviews, that 75 out-of-court hearsay statements of the child were introduced by the state, and that the child's hearsay statements formed the bulk of the evidence against defendant, a pretrial Gregg hearing on the reliability of the statements was required under former O.C.G.A. § 24-9-5. Ferreri v. State, 267 Ga. App. 811, 600 S.E.2d 793, 2004 Ga. App. LEXIS 790 (2004) (decided under former O.C.G.A. § 24-3-16).

Statement to victim's friend reliable and admissible. — Victim's statement to the victim's friend had a sufficient

indicia of reliability to render the statement admissible pursuant to former O.C.G.A. § 24-3-16 since both young women were 13 years old, there was no evidence to suggest the victim had a tendency to exaggerate or falsify information, the victim's friend testified that discussing the acts of molestation obviously upset the victim and the victim began to cry, and all of the victim's out-of-court statements and the victim's in-court testimony were consistent. Peters v. State, 206 Ga. App. 143, 424 S.E.2d 372, 1992 Ga. App. LEXIS 1407 (1992) (decided under former O.C.G.A. § 24-3-16).

There was a sufficient showing of reliability when the victim's statements, introduced through hearsay at trial, were made originally by the victim in a spontaneous manner without apparent coaching and, although there was evidence presented that the victim had originally named other possible perpetrators, the victim's later statements consistently named the defendant. White v. State, 211 Ga. App. 694, 440 S.E.2d 68, 1994 Ga. App. LEXIS 18 (1994) (decided under former O.C.G.A. § 24-3-16).

Trial court properly admitted child hearsay testimony after the victim's version of events as recounted to the victim's mother to sheriff's department officials, to Department of Family & Children Services representatives, in the victim's grand jury testimony, and in the victim's trial testimony was not shown by defendant to be inconsistent. Tidwell v. State, 219 Ga. App. 233, 464 S.E.2d 834, 1995 Ga. App. LEXIS 1004 (1995) (decided under former O.C.G.A. § 24-3-16).

Although the child gave differing accounts as to the number of times the defendant had molested the child, under the totality of the circumstances, the child's out-of-court statements bore sufficient indicia of reliability to authorize the statement's admission in evidence. Jenkins v. State, 235 Ga. App. 53, 508 S.E.2d 710 (decided under former O.C.G.A. § 24-3-16).

Taped statement of the young victim was properly found to be reliable, notwithstanding that the victim was interviewed after the victim's mother was interviewed in the victim's presence, since the interviewing officer testified that the victim was not coached and spoke voluntarily and no evidence was presented showing that the tape was unreliable or inadmissible. Scroggins v. State, 237 Ga. App. 122, 514 S.E.2d 252 (decided under former O.C.G.A. § 24-3-16).

Considering the atmosphere and circumstances under which a child made out-of-court statements, the spontaneity of a number of the statements, the absence of any threats, promise of benefits, or coaching, the consistency of the statements with one another, and the child's provision of certain details which could have been found corroborative, the trial court was authorized to find that sufficient indicia of reliability warranted admission of the statements in evidence. Croy v. State, 247 Ga. App. 654, 545 S.E.2d 80, 2001 Ga. App. LEXIS 75 (2001) (decided under former O.C.G.A. § 24-3-16).

Sufficient indicia of reliability existed for a trial court to have admitted a child victim's out-of-court statements regarding sexual abuse by the victim's father where, inter alia, the victim's description of the incidents were consistent every time the victim gave a statement to an adult prior to trial and the medical evidence corroborated the victim's testimony. Ivey v. State, 258 Ga. App. 719, 574 S.E.2d 908, 2002 Ga. App. LEXIS 1553 (2002) (decided under former O.C.G.A. § 24-3-16).

Trial court permitted the state to introduce the testimony of the victim under the provisions of the child hearsay statute, former O.C.G.A. § 24-3-16, in a trial on a charge of child molesting because the victim was made available for cross-examination, and the trial court took sufficient steps to ensure that the victim's testimony was reliable. Howell v. State, 278 Ga. App. 634, 629 S.E.2d 398, 2006 Ga. App. LEXIS 146 (2006), cert. denied, No. S06C1363, 2006 Ga. LEXIS 739 (Ga. Sept. 8, 2006), overruled in part, Hatley v. State, 290 Ga. 480, 722 S.E.2d 67, 2012 Ga. LEXIS 137 (2012), overruled in part as stated in Wadley v. State, 317 Ga. App. 333, 730 S.E.2d 536, 2012 Ga. App. LEXIS 658 (2012) (decided under former O.C.G.A. § 24-3-16).

Trial court did not abuse the court's discretion in concluding that a child's

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hearsay statements regarding abuse contained sufficient indicia of reliability to support their admission because the victim was nine years old at the time of the alleged incidents, there was no evidence that the child was forced to make the statements or coached regarding what to say, and the statements were made in a therapeutic setting without provocation or intervention from the state; although some of the statements were inconsistent with statements given to others regarding the defendant's participation in the abuse, the statements were also consistent with statements given to others. Finally, the victim was available in court, but defense counsel elected not to call the victim. Pickle v. State, 280 Ga. App. 821, 635 S.E.2d 197, 2006 Ga. App. LEXIS 894 (2006), cert. denied, No. S06C2150, 2007 Ga. LEXIS 110 (Ga. Jan. 8, 2007), cert. denied, No. S06C2143, 2007 Ga. LEXIS 111 (Ga. Jan. 8, 2007), overruled in part, Virger v. State, 305 Ga. 281, 824 S.E.2d 346, 2019 Ga. LEXIS 111 (2019) (decided under former O.C.G.A. § 24-3-16).

In the sexual abuse case, the trial court did not abuse the court's discretion in finding, without a hearing, the child victim's videotape hearsay to be reliable under former O.C.G.A. § 24-3-16; the victim, age 12 at the time, did not refuse to speak with the interviewing detective, the victim was not coached, led, pressured, threatened, or induced, and the victim testified at trial and was subject to cross-examination. Newton v. State, 281 Ga. App. 549, 636 S.E.2d 728, 2006 Ga. App. LEXIS 1163 (2006), cert. denied, No. S07C0198, 2006 Ga. LEXIS 945 (Ga. Nov. 6, 2006), overruled in part, McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465, 2008 Ga. App. LEXIS 214 (2008) (decided under former O.C.G.A. § 24-3-16).

During a defendant's trial for criminal charges arising out of sexual offenses committed against the defendant's 11-year-old child, the Georgia Child Hearsay Statute, former O.C.G.A. § 24-3-16, permitted the admission of the testimony of a caseworker that a sibling of the child saw the rapist having sex with the child and reported it several times to the defendant and the testimony of a neighbor to whom the victim said that the defendant had not tried to stop the rapist from molesting the victim; no hearing or express judicial findings of reliability were required, the defendant did not object at trial to the admission of the statements, and the defendant failed to explain on appeal how the record lacked evidence of reliability. Johnson v. State, 283 Ga. App. 99, 640 S.E.2d 644, 2006 Ga. App. LEXIS 1509 (2006), cert. denied, No. S07C0596, 2007 Ga. LEXIS 278 (Ga. Mar. 26, 2007) (decided under former O.C.G.A. § 24-3-16).

In a conviction for aggravated child molestation and child molestation for acts committed upon defendant's four-year-old daughter, the victim's statements had sufficient indicia of reliability because the victim made several spontaneous disclosures regarding the acts committed upon the victim by defendant using age-appropriate language, which did not appear to have been the result of adult coaching, and the videotaped statements were consistent with statements made to the victim's mother and therapist, which were made in a neutral location and without any threats or promises. Romani v. State, 303 Ga. App. 829, 695 S.E.2d 303, 2010 Ga. App. LEXIS 412 (2010), cert. dismissed, No. S10C1848, 2011 Ga. LEXIS 46 (Ga. Jan. 13, 2011) (decided under former O.C.G.A. § 24-3-16).

Recorded interview of the victim was admissible because the recording showed sufficient indicia of reliability including that, inter alia, the interview occurred outside the presence of the victim's mother, the interview resulted from the victim's spontaneous outcry, the victim appeared to understand the questions and the victim's responses seemed unrehearsed and spontaneous, and there was no evidence the victim received either threats or promises. Anderson v. State, 315 Ga. App. 679, 727 S.E.2d 504, 2012 Ga. App. LEXIS 404 (2012) (decided under former O.C.G.A. § 24-3-16).

Statement to family member reliable and admissible. — Victims' statements made to their mother and social caseworker were sufficiently reliable in light of: (1) their repeated consistency over the course of three separate occa-

sions; (2) the children's apparent uncoached and generally relaxed trial demeanor; (3) the lack of any promises or threats made to the children; and (4) their full availability to the defendant's cross-examination at trial. Tucker v. State, 208 Ga. App. 441, 430 S.E.2d 811, 1993 Ga. App. LEXIS 593 (1993) (decided under former O.C.G.A. § 24-3-16).

Considering the child's age; the immediacy and spontaneity of the outcry to the child's mother; the general consistency of the child's statements to numerous adults trained to work with abused children (police, medical personnel, and a DFACS worker); the lack of time between the incident and the outcry, thereby demonstrating the absence of "coaching"; the child's fear of the defendant; and the physical manifestations of possible abuse consistent with the child's statements, the record established a sufficient showing of indicia of reliability within the meaning of former O.C.G.A. § 24-3-16 so as to support the admission of the outcry testimony. Medina v. State, 234 Ga. App. 13, 505 S.E.2d 558 (decided under former O.C.G.A. § 24-3-16).

Considering the immediacy and spontaneity of the child's outcry to the father, the child's age, the limited time between the child's return home and the initial outcry, thus demonstrating the absence of coaching, and the general consistency of the child's statements to several adults, sufficient indicia of reliability was established to support the admission of the challenged statements. Herrington v. State, 241 Ga. App. 326, 527 S.E.2d 33, 1999 Ga. App. LEXIS 1619 (1999) (decided under former O.C.G.A. § 24-3-16).

There was no abuse of discretion in the decision of the court to admit testimony concerning a child's statements about sexual abuse by the child's father where the child's mother's testimony corroborated the statements made by the child to others and the foster mother never suggested to the child that the child's father had abused the child. In the Interest of J.W., 249 Ga. App. 849, 549 S.E.2d 802, 2001 Ga. App. LEXIS 645 (2001) (decided under former O.C.G.A. § 24-3-16).

Circumstances surrounding a six-year-old victim's out-of-court statements to the victim's mother and a nurse practitioner regarding being sexually molested contained sufficient indicia of reliability under former O.C.G.A. § 24-3-16 to allow the mother and the nurse practitioner to testify about the statements since: (1) there was no evidence that the victim was forced to make the statements or was coached regarding what to say; (2) there was a lack of contact with anyone concerning the incidents until the victim made the initial out-cry to the victim's mother; (3) the language the victim used was appropriate for a six-year-old; (4) the statement to the victim's mother was consistent with the statement that the victim made to the nurse practitioner; (5) the victim's demeanor during both statements showed that the victim was obviously upset by the acts of molestation; and (6) there was no evidence that the victim had been exposed to any sexually explicit material. In the Interest of K.C., 258 Ga. App. 363, 574 S.E.2d 413, 2002 Ga. App. LEXIS 1462 (2002) (decided under former O.C.G.A. § 24-3-16).

In defendant's trial for child molestation, the trial court did not abuse the court's discretion by admitting the victim's statements made to the victim's mother, brother, a child forensic investigator, and the investigating officer as the statements were spontaneous when made and were remarkably consistent and corroborated at trial by the testimony of the victim's siblings, the victim's videotaped interview, and defendant's confession. Simmons v. State, 291 Ga. App. 642, 662 S.E.2d 660, 2008 Ga. App. LEXIS 586 (2008) (decided under former O.C.G.A. § 24-3-16).

Reliability of statement to best friend. — With regard to a defendant's convictions for child molestation and related crimes arising from actions the defendant took toward three children and those that the defendant forced the children to engage in amongst each other by gunpoint while the defendant was a babysitter for the children, the trial court did not err by allowing one of the victim's best friend to testify that the victim told the witness that the defendant had a gun and had made the victim do stuff as the testimony was properly admitted under

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the Child Hearsay Statute, former O.C.G.A. § 24-3-16. The victim's disclosure to the friend occurred in the relaxed setting of a private conversation between two friends, there was no evidence of any threats, promise of benefits, coaching, drugs, or alcohol that would have influenced the victim's disclosure, and there was no evidence that the victim had a tendency to exaggerate or falsify information or otherwise lacked general credibility. Sullivan v. State, 295 Ga. App. 145, 671 S.E.2d 180, 2008 Ga. App. LEXIS 1259 (2008), cert. denied, No. S09C0624, 2009 Ga. LEXIS 215 (Ga. Apr. 20, 2009) (decided under former O.C.G.A. § 24-3-16).

Finding of indicia of reliability. — Testimony of several witnesses regarding what the 11-year-old victim told the witnesses about an incident soon after the incident happened was admissible and the court was not required to make an explicit finding of sufficient indicia of reliability. Wells v. State, 222 Ga. App. 587, 474 S.E.2d 764 (decided under former O.C.G.A. § 24-3-16).

Although the defendant argued that the videotaped statement of the victim, which was admitted pursuant to the child hearsay statute found in former O.C.G.A. § 24-3-16, was not properly admitted because the trial court failed to make the findings of reliability required by that statute, the trial court actually did make a finding that there were sufficient indicia of reliability. Moreover, an express finding in that regard was not necessary as the statutory requirement was met after both parties rested; the record contained evidence which would support such a finding. Adams v. State, 288 Ga. 695, 707 S.E.2d 359, 2011 Ga. LEXIS 96 (2011) (decided under former O.C.G.A. § 24-3-16).

Defense attorney was not subject to disqualification as a necessary witness to a child's statement. — Molestation defendant's attorney was not subject to disqualification on the basis that the attorney's testimony was necessary for admission of a child's statement in the attorney's presence under former O.C.G.A. § 24-3-16. The testimony was not necessary under Ga. St. Bar R. 4-102(d):3.7(a) because the child's mother was present at the interview and could testify to the circumstances of the statement. Schaff v. State, 304 Ga. App. 638, 697 S.E.2d 305, 2010 Ga. App. LEXIS 596 (2010) (decided under former O.C.G.A. § 24-3-16).

Testimony of officer admitted. — There was sufficient evidence of reliability of a child's statement to a police officer based on the officer's testimony that the child left the child's residence and reported the molestation immediately after the molestation occurred, that the officer spoke with the child the same evening, that the officer saw no evidence that the child was coached, and the officer did not lead the child in making a statement. Crider v. State, 246 Ga. App. 765, 542 S.E.2d 13, 2000 Ga. App. LEXIS 1356 (2000) (decided under former O.C.G.A. § 24-3-16).

No error in failing to determine reliability. — Because every event described by the detective and the investigator was confirmed by the victim in much greater detail, there was no error in failing to determine the reliability of the victim's statements. Nelson v. State, 255 Ga. App. 315, 565 S.E.2d 551, 2002 Ga. App. LEXIS 625 (2002) (decided under former O.C.G.A. § 24-3-16).

Application

Statement about contact with other child inadmissible. — Statements made by the victim to a witness about sexual contact between the defendant and another child were not admissible evidence. Riddle v. State, 208 Ga. App. 8, 430 S.E.2d 153, 1993 Ga. App. LEXIS 438 (1993) (decided under former O.C.G.A. § 24-3-16).

Age of child at time witness testifies irrelevant. — It is plain from the face of former O.C.G.A. § 24-3-16 that the age of the child at the time the witness testifies is irrelevant as long as the child's statement about which the witness testifies was made while the child was under 14 years of age. Greer v. State, 201 Ga. App. 775, 412 S.E.2d 843, 1991 Ga. App. LEXIS 1576 (1991), cert. denied, No. S92C0296, 1992 Ga. LEXIS 33 (Ga. Jan. 10, 1992)

(decided under former O.C.G.A. § 24-3-16).

In a child molestation case where similar transaction evidence about alleged sexual abuse of the defendant's child was admitted, testimony of the child's other parent and a videotaped interview with the child were properly admitted under the child hearsay statute because the child was ten when the child made the statements; it was immaterial that the child was 19 at the time of the trial. Slade v. State, 287 Ga. App. 34, 651 S.E.2d 352, 2007 Ga. App. LEXIS 874 (2007), cert. denied, No. S07C1895, 2008 Ga. LEXIS 118 (Ga. Jan. 28, 2008), cert. denied, 555 U.S. 815, 129 S. Ct. 56, 172 L. Ed. 2d 24, 2008 U.S. LEXIS 6644 (2008) (decided under former O.C.G.A. § 24-3-16).

Age of the child at the time the statements were made is determinative of their admissibility under former O.C.G.A. § 24-9-5. Darden v. State, 206 Ga. App. 400, 425 S.E.2d 409, 1992 Ga. App. LEXIS 1648 (1992) (decided under former O.C.G.A. § 24-3-16).

Statements about which the friend testified concerning the molestation of the victim by the victim's stepfather were made when the victim was 13 years old and so were admissible under O.C.G.A. § 24-3-16. Geiger v. State, 258 Ga. App. 57, 573 S.E.2d 85, 2002 Ga. App. LEXIS 1196 (2002), cert. denied, No. S03C0362, 2003 Ga. LEXIS 154 (Ga. Feb. 10, 2003) (decided under former O.C.G.A. § 24-3-16).

Because the child was not under the age of 14 when the child made the alleged hearsay statement at issue, former O.C.G.A. § 24-9-5, did not apply; moreover, because the contested witness's testimony was substantially the same as to what the child victim testified to, the evidence was cumulative and any error in admission was harmless. Currington v. State, 270 Ga. App. 381, 606 S.E.2d 619, 2004 Ga. App. LEXIS 1444 (2004) (decided under former O.C.G.A. § 24-3-16).

As a child was 15 when the child told an officer that the defendant had molested the child, the officer's testimony about the child's accusation was not admissible under former O.C.G.A. § 24-9-5. Cash v. State, 294 Ga. App. 741, 669 S.E.2d 731, 2008 Ga. App. LEXIS 1303 (2008) (decided under former O.C.G.A. § 24-3-16).

Trial court did not err in permitting the victim's mother to testify to the victim's prior consistent statements about what happened on the night the defendant had sexual intercourse with the victim over the defendant's bolstering objection because the victim was thirteen years old at the time the victim made the statements, the mother's testimony relating those statements was admissible under former O.C.G.A. § 24-9-5. Davis v. State, 303 Ga. App. 799, 694 S.E.2d 381, 2010 Ga. App. LEXIS 403 (2010) (decided under former O.C.G.A. § 24-3-16).

Mental ability equivalent to child below 14 years. — Although there was evidence that the 15-year-old victim was mildly mentally handicapped with intellectual abilities and social skills equivalent to an average child below 14 years of age, the trial court improperly ruled that former O.C.G.A. § 24-9-5 applied. Foster v. State, 216 Ga. App. 26, 453 S.E.2d 482, 1994 Ga. App. LEXIS 1416 (1994) (decided under former O.C.G.A. § 24-3-16).

When the state called the child as a witness and the child was fully cross-examined, there was no error. McLelland v. State, 203 Ga. App. 93, 416 S.E.2d 340, 1992 Ga. App. LEXIS 397 (1992), cert. denied, No. S92C0727, 1992 Ga. LEXIS 376 (Ga. Apr. 30, 1992) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 was inapplicable as the child testified at trial and was fully cross-examined by the defendant. Hayes v. State, 274 Ga. 875, 560 S.E.2d 656, 2002 Ga. LEXIS 91 (2002) (decided under former O.C.G.A. § 24-3-16).

Five-year-old child's out-of-court statements to the child's grandmother and aunt regarding a sexual assault were admissible under former O.C.G.A. § 24-9-5 because: (1) the child was upset when making the statement to the aunt; (2) the child was at home when making the statements, and there was no evidence that the child was forced to make the statements or that the child was coached regarding what to say; (3) the child used age-appropriate language; (4) the statements were consistent; and (5) the child testified and defense counsel had the opportunity to

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cross-examine the child. Ingram v. State, 262 Ga. App. 304, 585 S.E.2d 211, 2003 Ga. App. LEXIS 914 (2003) (decided under former O.C.G.A. § 24-3-16).

Age of witness irrelevant. — Any competent person could present testimony under former O.C.G.A. § 24-9-5; thus, a 13-year-old friend properly testified. Peters v. State, 206 Ga. App. 143, 424 S.E.2d 372, 1992 Ga. App. LEXIS 1407 (1992) (decided under former O.C.G.A. § 24-3-16).

Demeanor is one of the factors used to determine the reliability of a child's statement. Keller v. State, 221 Ga. App. 846, 473 S.E.2d 194 (decided under former O.C.G.A. § 24-3-16).

Finding as to reliability not a condition precedent. — While the court must find that "the circumstances of the statement provide sufficient indicia of reliability," such finding is not a condition precedent to the admissibility of the statement; rather, the requirement of former O.C.G.A. § 24-9-5 was met if after both parties have rested, the record contained evidence which would support such a finding. Gregg v. State, 201 Ga. App. 238, 411 S.E.2d 65, 1991 Ga. App. LEXIS 1307 (1991), cert. denied, No. S92C0074, 1991 Ga. LEXIS 893 (Ga. Nov. 1, 1991); Tidwell v. State, 219 Ga. App. 233, 464 S.E.2d 834, 1995 Ga. App. LEXIS 1004 (1995) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-9-5 did not require a hearing to determine "indicia of reliability" be held prior to receiving the testimony. Holden v. State, 202 Ga. App. 558, 414 S.E.2d 910, 1992 Ga. App. LEXIS 108 (1992) (decided under former O.C.G.A. § 24-3-16).

With regard to a defendant's convictions on several counts of child molestation, the trial court properly admitting the tape recorded statement of the child victim under former O.C.G.A. § 24-9-5 as by stating that the court found no reason to question the reliability of the child's statement, the trial court, in effect, made the required finding that the tape was reliable. There was no requirement that the trial court make a specific finding of sufficient indicia of reliability for the out-of-court statement of the child victim to be admissible. Taylor v. State, 292 Ga. App. 846, 666 S.E.2d 85, 2008 Ga. App. LEXIS 805 (2008), overruled in part, Adams v. State, 299 Ga. App. 39, 681 S.E.2d 725, 2009 Ga. App. LEXIS 830 (2009) (decided under former O.C.G.A. § 24-3-16).

Questions regarding victim's credibility not allowed. — Trial court erred in asking the witness, in the presence of the jury, whether the victim had exhibited "a general attitude of credibility" during the interview process. Buice v. State, 1999 Ga. App. 953, 239 Ga. App. 52, 520 S.E.2d 258 (decided under former O.C.G.A. § 24-3-16).

Corroboration of testimony not required. — Former O.C.G.A. § 24-9-5 required only that the child be available to testify; it did not require the child to corroborate the hearsay testimony. Jones v. State, 200 Ga. App. 103, 407 S.E.2d 85, 1991 Ga. App. LEXIS 769 (1991) (decided under former O.C.G.A. § 24-3-16); Braddy v. State, 205 Ga. App. 424, 422 S.E.2d 260, 1992 Ga. App. LEXIS 1195 (1992) (decided under former O.C.G.A. § 24-3-16); Bookout v. State, 205 Ga. App. 530, 423 S.E.2d 7, 1992 Ga. App. LEXIS 1237 (1992), cert. denied, No. S93C0074, 1992 Ga. LEXIS 1002 (Ga. Dec. 2, 1992); Kapua v. State, 228 Ga. App. 193, 491 S.E.2d 387 (decided under former O.C.G.A. § 24-3-16).

Child molestation and aggravated child molestation convictions were upheld on appeal as a videotaped statement from the victim of those crimes accusing the defendant of requiring the victim to place the defendant's penis in the victim's mouth was corroborated by another witness; hence, the defendant was not denied due process and former O.C.G.A. § 24-9-5, did not require corroboration of child hearsay. Simpson v. State, 282 Ga. App. 456, 638 S.E.2d 900, 2006 Ga. App. LEXIS 1423 (2006) (decided under former O.C.G.A. § 24-3-16).

Appellant's convictions for multiple sex and drug-related offenses was upheld because testimony of three child victims, standing alone, was sufficient to support appellant's convictions, physical evidence of sexual abuse was not required, and jury was also permitted to consider out-of-court statements made by children in fo-

rensic interviews and to foster (now adoptive) mother as substantive evidence of appellant's guilt. Rider v. State, 366 Ga. App. 260, 883 S.E.2d 374, 2022 Ga. App. LEXIS 547 (2022).

Spontaneous statement admissible. — Phrase "available to testify" means "competent to testify under [former] O.C.G.A. § 24-9-5" (see now O.C.G.A. §§ 24-6-601 and 24-6-603). In re K.T.B., 192 Ga. App. 132, 384 S.E.2d 231, 1989 Ga. App. LEXIS 945 (1989) (decided under former O.C.G.A. § 24-3-16); In re K.G.L., 198 Ga. App. 891, 403 S.E.2d 464, 1991 Ga. App. LEXIS 321 (1991) (decided under former O.C.G.A. § 24-3-16).

Hearsay testimony of a social worker was properly admitted under former O.C.G.A. § 24-9-5 as a child was with a parent in a comfortable non-threatening environment when the child said, "(The defendant) hurt me. I don't like (the defendant. The defendant's) mean"; the statement was not made in response to any inquiry, but was a spontaneous reaction to something said by the parent. Revells v. State, 283 Ga. App. 59, 640 S.E.2d 587, 2006 Ga. App. LEXIS 1321 (2006) (decided under former O.C.G.A. § 24-3-16).

In a case decided under former O.C.G.A. § 24-3-16, a victim's out-of-court statements to a forensic interviewer in group therapy and to the victim's family members had sufficient indicia of reliability as the statements appeared to be fairly spontaneous, without coaching, and, thus, the statements were properly admitted. Bowman v. State, 332 Ga. App. 766, 774 S.E.2d 805, 2015 Ga. App. LEXIS 404 (2015) (decided under former O.C.G.A. § 24-3-16).

Child "available to testify" in former O.C.G.A. § 24-3-16 meant one competent to testify under former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). For offenses occurring before April 19, 1989, including child molestation, a child incompetent as a witness is not available to testify and any out-of-court statements are not rendered admissible by former O.C.G.A. § 24-3-16. Hunnicutt v. State, 194 Ga. App. 714, 391 S.E.2d 790, 1990 Ga. App. LEXIS 319 (1990) (decided under former O.C.G.A. § 24-3-16).

Child was considered "available to testify" under former O.C.G.A. § 24-3-16 only if the child was "competent" to testify within the meaning of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). Shaver v. State, 199 Ga. App. 428, 405 S.E.2d 281, 1991 Ga. App. LEXIS 530 (1991), cert. denied, No. S91C1028, 1991 Ga. LEXIS 751 (Ga. May 15, 1991) (decided under former O.C.G.A. § 24-3-16).

Availability of child for pretrial interview. — When the witness is a child, it is permissible for the legal custodian to decide whether the child will be made available to defense counsel for a pretrial interview. Kelly v. State, 197 Ga. App. 811, 399 S.E.2d 568, 1990 Ga. App. LEXIS 1480 (1990) (decided under former O.C.G.A. § 24-3-16).

Defendant's right to notice of statements before trial. — There was no requirement in former O.C.G.A. § 24-3-16 that the state provide the defense with pretrial notice of the state's intention to introduce child hearsay statements in evidence. Schwindler v. State, 254 Ga. App. 579, 563 S.E.2d 154, 2002 Ga. App. LEXIS 335 (2002), cert. denied, No. S02C1230, 2002 Ga. LEXIS 677 (Ga. Sept. 6, 2002), cert. denied, 538 U.S. 1016, 123 S. Ct. 1935, 155 L. Ed. 2d 854, 2003 U.S. LEXIS 3533 (2003), overruled, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020), overruled in part, George v. State, 312 Ga. 801, 865 S.E.2d 127, 2021 Ga. LEXIS 679 (2021) (decided under former O.C.G.A. § 24-3-16).

Evidence admissible although child available to testify. — In a prosecution for child molestation, hearsay evidence was admissible under former O.C.G.A. § 24-3-16 because the child was clearly available to testify, and the defendant did not challenge the existence of indicia of reliability. Trew v. State, 244 Ga. App. 76, 534 S.E.2d 804, 2000 Ga. App. LEXIS 633 (2000) (decided under former O.C.G.A. § 24-3-16).

Child's own statements about molestation were admissible under the child hearsay statute. Phillips v. State, 251 Ga. App. 179, 553 S.E.2d 847, 2001 Ga. App. LEXIS 960 (2001) (decided under former O.C.G.A. § 24-3-16).

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Tape recorded police interview with an eight year old female victim was properly admissible under former O.C.G.A. § 24-3-16 at defendant's trial for child molestation. The child testified at trial and the defendant had the opportunity to cross examine the child regarding the child's memory and the circumstances surrounding the child's out-of-court statements, and the judge and jury had an opportunity to evaluate the child's veracity. The police officer testified about the manner in which the child's mother came to the officer and about the officer's involvement in recording the interview. There was no evidence that the child was forced to make the child's statements or that the child was coached regarding what to say. Hayes v. State, 252 Ga. App. 897, 557 S.E.2d 468, 2001 Ga. App. LEXIS 1395 (2001) (decided under former O.C.G.A. § 24-3-16).

Although a trial court stated that a child witness would not testify at trial because the child kept crying, because the child was present and available to testify at trial, inadmissibility of the child's hearsay statements was not present under former O.C.G.A. § 24-3-16; the judge's comment that the witness would not testify was not an improper comment on the evidence under O.C.G.A. § 17-8-57. Brock v. State, 270 Ga. App. 250, 605 S.E.2d 907, 2004 Ga. App. LEXIS 1399 (2004) (decided under former O.C.G.A. § 24-3-16).

Trial court did not abuse the court's discretion in denying defendant's motion in limine to exclude statements that the 13-year-old male child molestation victim made to the parents as such statements were admissible under former O.C.G.A. § 24-3-16 because sufficient indicia of reliability were established; the victim was present at trial and testified on direct examination as to why the victim initially denied the molestation when the victim was first confronted by the parents, and then why the victim finally admitted the molestation. Steverson v. State, 276 Ga. App. 876, 625 S.E.2d 476, 2005 Ga. App. LEXIS 1385 (2005) (decided under former O.C.G.A. § 24-3-16).

Evidence presented at trial was sufficient to establish the reliability of the statement that the child victim made to an aunt, and the trial court did not err in finding that the statement had the requisite degree of trustworthiness to be admitted at trial; moreover, admission of the statement was harmless because all the child victims testified about the incident at trial and the defendant was acquitted of an aggravated child molestation charge. Nelson v. State, 279 Ga. App. 859, 632 S.E.2d 749, 2006 Ga. App. LEXIS 704 (2006) (decided under former O.C.G.A. § 24-3-16).

In the sexual molestation case, the trial court did not err in allowing into evidence the out-of-court statements of the six-year-old victim via the parent's hearsay testimony; the statements were admissible under former O.C.G.A. § 24-9-5 as the victim's out-of-court statements were made under circumstances that provided sufficient indicia of reliability in that the statements were made immediately after the incident and remained consistent, and the victim testified at trial and was cross-examined. Mikell v. State, 281 Ga. App. 739, 637 S.E.2d 142, 2006 Ga. App. LEXIS 1237 (2006) (decided under former O.C.G.A. § 24-3-16).

No abuse of discretion resulted from the admission of testimony from the investigating officer, the child victim's mother, and the child victim's sister, about the alleged child molestation committed by the juvenile as: (1) the child was available to testify; (2) cross-examination of the child victim in the judge's chambers was attempted, but proved unsuccessful; and (3) the judge ruled that no further purpose would be served by having the child examined in the open courtroom. In the Interest of S.S., 281 Ga. App. 781, 637 S.E.2d 151, 2006 Ga. App. LEXIS 1255 (2006) (decided under former O.C.G.A. § 24-3-16).

Defendant's conviction for aggravated child molestation under O.C.G.A. § 16-6-4 was affirmed because the trial court did not err by admitting the victim's prior out-of-court statement made in the initial interview with the police investigator, pursuant to O.C.G.A. § 24-8-820, that the victim believed that the bleeding from the victim's vagina had been caused by the defendant. Robinson v. State, 342 Ga.

App. 624, 805 S.E.2d 103, 2017 Ga. App. LEXIS 390 (2017).

Juvenile court did not err in allowing the foster mother to give hearsay testimony about statements the children made under former O.C.G.A. § 24-3-16 because the statements described acts of sexual contact performed with another person in the children's presence and the children were physically in the courthouse and available to testify. In the Interest of A. S., 318 Ga. App. 457, 734 S.E.2d 225, 2012 Ga. App. LEXIS 938 (2012) (decided under former O.C.G.A. § 24-3-16).

Recanting of child victim's testimony. — Former O.C.G.A. § 24-3-16 did not require the child to corroborate the hearsay testimony, and conflicts between the videotaped statement and the testimony of the child at trial do not necessarily render the former inadmissible, but rather present a question of credibility of the witness to be resolved by the trier of fact; despite a child victim's apparent recantation of the victim's accusations of molestation at trial, sufficient evidence supported convictions of child molestation and aggravated child molestation after the victim described the molestation in a pre-trial videotaped interview, when an expert witness testified that children may recant testimony with regard to sexual abuse for reasons unrelated to falsity, including embarrassment and fear, and a doctor also testified that the doctor's examination of the victim revealed "unusual" findings that would have caused the doctor to inquire regarding sexual abuse if the findings had appeared on a routine exam. Amerson v. State, 268 Ga. App. 855, 602 S.E.2d 857, 2004 Ga. App. LEXIS 1031 (2004) (decided under former O.C.G.A. § 24-3-16).

Witnesses testified pursuant to former O.C.G.A. § 24-3-16 that the defendant's stepchild, then 12, told the witnesses about being repeatedly raped and molested by the defendant. That the stepchild recanted these statements at trial did not render the hearsay inadmissible under former O.C.G.A. § 24-3-16, and as the stepchild's credibility was for the jury to decide, the evidence was sufficient to support the defendant's convictions for rape, incest, and child molestation. Harvey v. State, 295 Ga. App. 458, 671 S.E.2d 924, 2009 Ga. App. LEXIS 12 (2009) (decided under former O.C.G.A. § 24-3-16).

Evidence admissible because victim took stand. — Direct testimony of the victim and out-of-court statements the victim made to others were admissible since the victim took the stand and was examined and cross-examined by both parties. Fields v. State, 194 Ga. App. 149, 390 S.E.2d 71, 1990 Ga. App. LEXIS 38 (1990) (decided under former O.C.G.A. § 24-3-16).

Because a child victim testified of defendant's sexual abuse and that defendant showed the victim "pictures or movies where people didn't have any clothes on," the trial court properly admitted the videotapes and determined that a psychotherapist's testimony was admissible under former O.C.G.A. § 24-3-16; consequently, defendant failed to show that trial counsel was ineffective. Johnson v. State, 274 Ga. App. 69, 616 S.E.2d 848, 2005 Ga. App. LEXIS 671 (2005), cert. denied, No. S05C1834, 2005 Ga. LEXIS 696 (Ga. Oct. 11, 2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671, 2006 U.S. LEXIS 3611 (2006), overruled in part, Miller v. State, 285 Ga. 285, 676 S.E.2d 173, 2009 Ga. LEXIS 143 (2009) (decided under former O.C.G.A. § 24-3-16).

In a case where a defendant was convicted of cruelty to children in violation of O.C.G.A. § 16-5-70, the trial court did not err in denying the defendant's motion for a mistrial or in refusing to strike certain testimony because hearsay statements by the defendant's daughter were admissible pursuant to former O.C.G.A. § 24-3-16 since the daughter was available to appear at trial and, in fact, took the witness stand. Stegall v. State, 297 Ga. App. 425, 677 S.E.2d 441, 2009 Ga. App. LEXIS 441 (2009) (decided under former O.C.G.A. § 24-3-16).

Defendant denied right of confrontation. — Trial court erroneously and over objection allowed the state to ask defendant's daughter, in a prosecution for child molestation and incest, whether she had heard her brothers tell her mother what defendant had done to them, as this evidence was hearsay and double hearsay

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not falling the exception of former O.C.G.A. § 24-3-16 because the brothers were not available to testify. Cobb v. State, 209 Ga. App. 708, 434 S.E.2d 513, 1993 Ga. App. LEXIS 981 (1993) (decided under former O.C.G.A. § 24-3-16).

Defendant was not denied the right of confrontation, even though the defendant was unable to confront the victim when the victim's statements were originally made since the victim actually testified at trial and was subject to a thorough cross-examination. Reynolds v. State, 257 Ga. 725, 363 S.E.2d 249, 1988 Ga. LEXIS 6 (1988) (decided under former O.C.G.A. § 24-3-16); Sticher v. State, 209 Ga. App. 423, 433 S.E.2d 660, 1993 Ga. App. LEXIS 929 (1993), cert. denied, No. S93C1666, 1993 Ga. LEXIS 1129 (Ga. Dec. 3, 1993) (decided under former O.C.G.A. § 24-3-16); White v. State, 213 Ga. App. 429, 445 S.E.2d 309, 1994 Ga. App. LEXIS 596 (1994) (decided under former O.C.G.A. § 24-3-16).

When the victim had been called by the state and the defendant had an opportunity to cross-examine without having to call the victim to the stand, the application of former O.C.G.A. § 24-3-16 did not violate the defendant's right to due process to confront the witness. Lawhorn v. State, 257 Ga. 780, 364 S.E.2d 559, 1988 Ga. LEXIS 44 (1988) (decided under former O.C.G.A. § 24-3-16).

Child witness's unresponsiveness to a number of questions as put by defendant did not constitute a deprivation of defendant's constitutional confrontation right so as to require that the witness's out-of-court statements be stricken since defendant was not denied the right to a thorough and sifting cross-examination of a witness who appeared to answer as well as the witness was capable of answering. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18, 1990 Ga. App. LEXIS 1497 (1990) (decided under former O.C.G.A. § 24-3-16).

Defendant's right to confront and cross-examine a child witness was protected in spite of the child's unresponsiveness on cross-examination as to the merits of the case brought against the defendant; the child's unresponsiveness did not preclude the defendant from thoroughly cross-examining the child as to the veracity of hearsay statements made against the defendant's interests by the child's parents and the caseworker. Byrd v. State, 204 Ga. App. 252, 419 S.E.2d 111, 1992 Ga. App. LEXIS 840 (1992) (decided under former O.C.G.A. § 24-3-16).

Hearsay testimony of an investigator was properly admitted under former O.C.G.A. § 24-3-16 as the trial court listened to the audiotape of an interview with a child and concluded there had been no excessive coaching or planting of information and that there was sufficient indicia of reliability; moreover, the child was available for cross-examination by defense counsel concerning the child's claimed memory lapses and confusion, but counsel chose not to cross-examine the child. Revells v. State, 283 Ga. App. 59, 640 S.E.2d 587, 2006 Ga. App. LEXIS 1321 (2006) (decided under former O.C.G.A. § 24-3-16).

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Transcript of forensic interview admissible. — In a prosecution for attempted child molestation, both the 10-year-old victim and the forensic interviewer testified at trial, and both were subjected to cross-examination; therefore, a transcript of the forensic interview was admissible under O.C.G.A. § 24-8-820. Shaum v. State, 355 Ga. App. 513, 844 S.E.2d 863, 2020 Ga. App. LEXIS 343 (2020).

Procedure employed by court satisfactory. — When the trial court ultimately found a child victim's statements reliable and admitted the statements, and obviously would have done the same following a separate hearing, any conceivable error arising from the procedure employed by the trial court would have been of the defendants' own making since the defendant's persuaded the trial court to review the child's video-recorded statements and assured the court at the time that the procedure was satisfactory. Newman v. State, 286 Ga. App. 353, 649 S.E.2d

349, 2007 Ga. App. LEXIS 777 (2007) (decided under former O.C.G.A. § 24-3-16).

Statements of four-year-old properly admitted. — Trial court did not err in exercising the trial court's broad discretion to admit a four-year-old child's out-of-court statements under the child hearsay statute, former O.C.G.A. § 24-3-16, with regard to defendant's convictions for aggravated child molestation and two counts of child molestation. Given the totality of the circumstances, the trial court was authorized to find sufficient indicia of reliability to admit the child's hearsay statements based on: (1) the child's tender years; (2) a therapist testifying that there was no indication that the child had been coached; and (3) an interview report that purportedly raised questions about coaching and the reliability of the statements was never introduced into evidence at trial. Brumbelow v. State, 289 Ga. App. 520, 657 S.E.2d 603, 2008 Ga. App. LEXIS 141 (2008) (decided under former O.C.G.A. § 24-3-16).

Interval of time between offenses and interview. — Passage of an interval of time between the commission of the offenses and the making of the videotape does not preclude any possibility of spontaneity; the relevance of such chronological intervals must be considered along with other factors, but there is no authority for a bright line rule precluding admission of an interview. Knight v. State, 210 Ga. App. 228, 435 S.E.2d 682, 1993 Ga. App. LEXIS 1111 (1993) (decided under former O.C.G.A. § 24-3-16).

Statement made days, weeks, or months after incident. — Fact that the statement is made days, weeks, or even several months after the alleged incident, in and of itself, does not make the statement unreliable. Gregg v. State, 201 Ga. App. 238, 411 S.E.2d 65, 1991 Ga. App. LEXIS 1307 (1991), cert. denied, No. S92C0074, 1991 Ga. LEXIS 893 (Ga. Nov. 1, 1991) (decided under former O.C.G.A. § 24-3-16).

Admission of similar transactions. — Nothing in former O.C.G.A. § 24-3-16 restricted the statement to use solely in connection with the prior incident, and in child molestation cases, the appellate court had consistently upheld the admission of similar transactions involving incidents for which the defendant was not on trial. Guest v. State, 216 Ga. App. 457, 454 S.E.2d 622, 1995 Ga. App. LEXIS 184 (1995) (decided under former O.C.G.A. § 24-3-16).

Fathers of the two similar transaction victims were allowed to give hearsay testimony about the victims' statements that defendant had molested the victims, because this sort of hearsay testimony, describing a child's statement about sexual abuse, is admissible similar transaction evidence under former O.C.G.A. § 24-3-16. Deal v. State, 241 Ga. App. 879, 528 S.E.2d 289, 2000 Ga. App. LEXIS 65 (2000) (decided under former O.C.G.A. § 24-3-16).

Statements admissible as substantive evidence. — In a criminal prosecution for sexual and non-sexual acts committed against a child, the jury was allowed to consider the child's out-of-court statements as substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-3-16, and conflicts between the child's testimony at trial and out-of-court statements were for the jury to resolve. Manders v. State, 281 Ga. App. 786, 637 S.E.2d 460, 2006 Ga. App. LEXIS 1252 (2006) (decided under former O.C.G.A. § 24-3-16).

Subsequent report of molestation by another not admissible. — Subsequent report by the victim of molestation by another was neither prior to nor necessarily inconsistent with the victim's earlier report that the defendant was the victim's only molester, and was not admissible as impeaching evidence. Thompson v. State, 187 Ga. App. 152, 369 S.E.2d 523, 1988 Ga. App. LEXIS 657 (1988) (decided under former O.C.G.A. § 24-3-16).

Testimony of child sodomy victim's accusation allowed. — Trial court did not err in allowing testimony of the child's accusation that defendant committed the acts which constitute the crime of aggravated child molestation since the victim told the victim's grandmother that defendant orally sodomized the victim and that defendant forced the victim to perform acts of oral sodomy and the victim's mother's testimony that she had never dis-

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cussed oral sodomy with the three-year-old victim and that she had never known the child to make up stories. Williams v. State, 204 Ga. App. 878, 420 S.E.2d 781, 1992 Ga. App. LEXIS 1034 (1992) (decided under former O.C.G.A. § 24-3-16).

Child sodomy victim's statements qualified as "outcry" arguably so near to the event and so free of afterthought and forethought, connivance, or "reflective thought," as to be part of the res gestae, and so as to be evidence of the crime itself, and not merely a later statement by the child about the crime, as it might have been under former O.C.G.A. § 24-3-16, where these outcries occurred while the child was asleep the night the child returned home after the child's mother picked the child up at the child's grandfather's house where the crime allegedly occurred. Godfrey v. State, 187 Ga. App. 319, 370 S.E.2d 183, 1988 Ga. App. LEXIS 685 (1988) (decided under former O.C.G.A. § 24-3-16).

Statement as part of res gestae of child molestation charge. — Child's statement to an investigative agent regarding a "game" in which the defendant, the child victim, and others removed articles of their clothing were admissible as describing part of the res gestae of the crime of child molestation. Berry v. State, 235 Ga. App. 35, 508 S.E.2d 435 (decided under former O.C.G.A. § 24-3-16).

Testimony by the mother of a child-molestation victim concerning allegations made by her child to her against defendant was properly admitted since the court considered atmosphere, circumstances, spontaneity, and demeanor in judging the reliability of the statement. Ortiz v. State, 188 Ga. App. 532, 374 S.E.2d 92, 1988 Ga. App. LEXIS 1125 (1988) (decided under former O.C.G.A. § 24-3-16).

Testimony of victim's mother concerning statements made to her by victim was admissible. Dupree v. State, 206 Ga. App. 4, 424 S.E.2d 316, 1992 Ga. App. LEXIS 1551 (1992) (decided under former O.C.G.A. § 24-3-16).

State complied with former O.C.G.A. § 24-3-16 by having the eight-year-old sexual molestation victim present at the courthouse and the trial court found indicia of reliability in a video interview of the child and the mother's testimony as to what the child told her when she interrupted the defendant with his pants down in a closed room with the child; the defendant did not object on Confrontation Clause grounds, waiving that issue. Matabarahona v. State, 335 Ga. App. 25, 780 S.E.2d 731, 2015 Ga. App. LEXIS 746 (2015), cert. denied, No. S16C0507, 2016 Ga. LEXIS 220 (Ga. Mar. 7, 2016) (decided under former O.C.G.A. § 24-3-16).

Mother's testimony following victim's recanting of original statement. — Although the victim was not under the age of 14 at the time the statements were made, this did not affect the admissibility of the testimony of the victim's mother and a detective because the victim's veracity was placed in issue after the victim signed an affidavit recanting the victim's original statement, and the victim was present at trial and was thoroughly cross-examined about the truthfulness of the victim's original statement. Frady v. State, 245 Ga. App. 832, 538 S.E.2d 893, 2000 Ga. App. LEXIS 1105 (2000), cert. denied, No. S01C0077, 2001 Ga. LEXIS 172 (Ga. Feb. 16, 2001) (decided under former O.C.G.A. § 24-3-16).

Statement made through interpreter admissible. — Statements made through an interpreter by an 11-year-old victim of child molestation to witnesses who asked the victim questions were admissible through testimony of the witnesses even though the interpreter did not testify at the trial. Davis v. State, 214 Ga. App. 360, 448 S.E.2d 26, 1994 Ga. App. LEXIS 901 (1994) (decided under former O.C.G.A. § 24-3-16).

Witness statements admissible despite child's unresponsiveness. — Trial court did not err in refusing to strike the testimony of adult witnesses who related a child molestation victim's statements to the witnesses in spite of the victim's unresponsiveness as a witness when called by the court. Smith v. State, 228 Ga. App. 144, 491 S.E.2d 194 (decided under former O.C.G.A. § 24-3-16).

Child who told adults that defendant placed the defendant's finger inside her

vagina was not unavailable within the meaning of former O.C.G.A. § 24-3-16 because she was unresponsive when she was asked questions in court, and the trial court's decision allowing adults to testify about out-of-court statements the child made to the adults was correct. Bell v. State, 263 Ga. App. 894, 589 S.E.2d 653, 2003 Ga. App. LEXIS 1372 (2003) (decided under former O.C.G.A. § 24-3-16).

Physical appearance of victim at trial all that is required. — Availability requirement under former O.C.G.A. § 24-3-16 was met even if the victim took the stand and was incapable of reiterating the accusations against the defendant or was uncommunicative or unresponsive; the child needed only physically appear at trial. Jenkins v. State, 235 Ga. App. 53, 508 S.E.2d 710 (decided under former O.C.G.A. § 24-3-16).

Victim/witness director allowed to testify regarding conversation with victim. — In an incest and child molestation trial, there was no error in the trial court's decision allowing the victim/witness director to testify regarding the contents of a conversation the director had with the victim. Chambers v. State, 205 Ga. App. 78, 421 S.E.2d 326, 1992 Ga. App. LEXIS 1073 (1992), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019) (decided under former O.C.G.A. § 24-3-16).

Witnesses' testimony regarding statements of victim's mother admissible. — Witnesses' testimony that older victim said when she told her mother what defendant was doing, the mother said to pray and not tell anyone, was not beyond permissible hearsay under former O.C.G.A. § 24-3-16 because it was not offered to show the truth of matters asserted therein. Mother's response to her daughter was not an assertion but a request, and the testimony concerning her response was presented not to prove prayer and silence on the subject of defendant's conduct were desirable, but simply to show the mother's request for prayer and silence was made. Gibby v. State, 213 Ga. App. 20, 443 S.E.2d 852, 1994 Ga. App. LEXIS 473 (1994), cert. denied, No. S94C1205, 1994 Ga. LEXIS 848 (Ga. July 7, 1994) (decided under former O.C.G.A. § 24-3-16).

Mother's and other professional witnesses' statements admissible. — Trial court properly allowed hearsay testimony about statements made by the victim to the victim's mother, the school counselor, and the nurse practitioner who examined the victim pursuant to former O.C.G.A. § 24-3-16 in defendant's child molestation trial; defendant's arguments that there was no evidence that the statements were spontaneous and that there were two inconsistencies in the victim's statements, giving differing answers when asked how many times defendant had molested the victim and describing the incidents in a different order in two different statements, were not sufficient to show that the trial court abused the court's discretion in admitting the statements. Flowers v. State, 255 Ga. App. 660, 566 S.E.2d 339, 2002 Ga. App. LEXIS 672 (2002) (decided under former O.C.G.A. § 24-3-16).

Statements of victim's mother held inadmissible. — In a child custody proceeding, former O.C.G.A. § 24-3-16 did not apply to allow mother to present hearsay testimony regarding harassment of her children by their stepbrother. Martin v. True, 232 Ga. App. 435, 502 S.E.2d 285 (decided under former O.C.G.A. § 24-3-16).

Evidence inadmissible when child unavailable to testify. — Child was not available within the meaning of former O.C.G.A. § 24-3-16; therefore, the child's mother's testimony regarding the child's out-of-court statements was inadmissible since the trial court excused the child without the child ever being sworn and examined as a witness because the child was distraught. Hines v. State, 248 Ga. App. 752, 548 S.E.2d 642, 2001 Ga. App. LEXIS 383 (2001) (decided under former O.C.G.A. § 24-3-16).

State failed to meet the state's burden of showing that an allegedly abused child was "available to physically appear" at the deprivation hearing as required for hearsay testimony to be admissible under former O.C.G.A. § 24-3-16. The juvenile court erred in relying on the hearsay testimony of a social worker and a DFCS case

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manager regarding what the child said. In the Interest A.T., 309 Ga. App. 822, 711 S.E.2d 382, 2011 Ga. App. LEXIS 460 (2011) (decided under former O.C.G.A. § 24-3-16).

Statements as to the circumstances in which appellant chased appellant's son down the hall while carrying a maul constitutes statements regarding any act of physical abuse within the meaning of former O.C.G.A. § 24-3-16. Brewton v. State, 216 Ga. App. 346, 454 S.E.2d 558, 1995 Ga. App. LEXIS 107 (1995), rev'd, 266 Ga. 160, 465 S.E.2d 668, 1996 Ga. LEXIS 40 (1996) (decided under former O.C.G.A. § 24-3-16).

Child molestation victim's statements included in expert witness testimony are admissible. — Trial court did not err in allowing into evidence the testimony of the prosecution's expert witness as to statements made to the witness by the child molestation victim, which statements were incriminating of defendant, since the record shows that the victim was not only available to testify in the proceedings, but was called as the prosecution's first witness and that, prior to the admission of the expert witness's testimony, the trial court determined that the circumstances surrounding the victim's statements provided sufficient indicia of reliability. Knopp v. State, 190 Ga. App. 266, 378 S.E.2d 703, 1989 Ga. App. LEXIS 183 (1989) (decided under former O.C.G.A. § 24-3-16).

Statements admissible when victim available. — In a prosecution for child molestation, testimony by two witnesses regarding statements made by one of the victims about seeing the defendants engaged in sex was admissible since the victim, although not called by the state, was available to be called as a witness. Grimsley v. State, 233 Ga. App. 781, 505 S.E.2d 522 (decided under former O.C.G.A. § 24-3-16).

Hearsay statements of the victim were admissible because the defendant received notice of the state's intent to use the victim's out-of-court statements, the victim testified at trial, and the persons to whom the victim made the statements were subject to cross-examination at trial. Cornell v. State, 349 Ga. App. 883, 827 S.E.2d 63, 2019 Ga. App. LEXIS 219 (2019).

Statements made to government agency investigator admissible. — Trial court did not err in admitting out-of-court statements made by a five-year-old victim to her aunt and a Department of Family Services investigator. McCormick v. State, 228 Ga. App. 467, 491 S.E.2d 903 (decided under former O.C.G.A. § 24-3-16).

In a proceeding to terminate the parental rights of a father who had been convicted of molesting his children, the trial court did not err in allowing a child protective services investigator, women's shelter manager, and a therapist to testify as to statements made by the children. In re S.M.L., 228 Ga. App. 81, 491 S.E.2d 186 (decided under former O.C.G.A. § 24-3-16).

Defendant's claim of error in the admission of an investigator's testimony regarding a child victim's statements to a forensic interviewer was rejected as the investigator was behind a two-way mirror when the victim made the statements and the victim knew that the investigator was listening. Brown v. State, 280 Ga. App. 884, 635 S.E.2d 240, 2006 Ga. App. LEXIS 972 (2006) (decided under former O.C.G.A. § 24-3-16).

In an action wherein two parents were found to have deprived an adopted child due to one parent's sexual abuse of the child and the other parent's failure to protect the child from such abuse, the juvenile court did not abuse the court's discretion by allowing the testimony of a forensic interviewer regarding statements made by the child as the Child Hearsay Statute, former O.C.G.A. § 24-3-16, permitted such testimony, despite the parents' challenges to the competency of the child. In the Interest of B.H., 295 Ga. App. 297, 671 S.E.2d 303, 2008 Ga. App. LEXIS 1278 (2008) (decided under former O.C.G.A. § 24-3-16).

Question regarding victim's credibility properly admitted. — Trial court properly admitted testimony from a psychologist who stated that the psychologist treated an 11-year-old girl after the

girl told several people that her stepfather molested her and believed that the girl had not made up her story because the testimony was offered to rehabilitate the girl's credibility after the stepfather attacked the girl's credibility. Horne v. State, 262 Ga. App. 604, 586 S.E.2d 13, 2003 Ga. App. LEXIS 813 (2003) (decided under former O.C.G.A. § 24-3-16).

With regard to a defendant's convictions on four counts of aggravated child molestation and three counts of child molestation, the trial court did not err by failing to hold a hearing outside of the jury's presence with regard to the testimony of a social worker who made an audiotape of the victim's statement, and by allowing the social worker to testify as to the general credibility assessment of the victim because the defendant failed to object at trial to the social worker's testimony. By waiting to raise the issue on appeal, the defendant waited too late and such failure amounted to a waiver of any objection that might have been raised. Hargrove v. State, 289 Ga. App. 363, 657 S.E.2d 282, 2008 Ga. App. LEXIS 91 (2008), cert. denied, No. S08C0970, 2008 Ga. LEXIS 500 (Ga. May 19, 2008) (decided under former O.C.G.A. § 24-3-16).

Spontaneous statement admissible. — When the victim, a 14-year-old, in a spontaneous, unprompted, crying event told the residential manager of the mobile home park in which the victim lived that the victim's father was abusing the victim and later that same day the victim made substantially the same statements to a government social worker, the statements bore sufficient indicia of reliability. Smith v. State, 207 Ga. App. 55, 427 S.E.2d 48, 1993 Ga. App. LEXIS 62 (1993) (decided under former O.C.G.A. § 24-3-16).

Showing of necessity to support the admission of a videotape of a police interview of the victim under former O.C.G.A. § 24-3-16 was satisfied by the fact that the victim was a witness at the trial whom the defendant was permitted to cross-examine. Knight v. State, 210 Ga. App. 228, 435 S.E.2d 682, 1993 Ga. App. LEXIS 1111 (1993) (decided under former O.C.G.A. § 24-3-16).

When one of two victims was ruled incompetent to testify, but a pediatrician's testimony established that both girls had been sexually molested, and the other child testified that the defendant molested her and that she saw him molest her sister, the defendant's conviction was not based on inadmissible hearsay. Mantooth v. State, 197 Ga. App. 797, 399 S.E.2d 505, 1990 Ga. App. LEXIS 1472 (1990), overruled in part, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669, 2003 Ga. LEXIS 775 (2003) (decided under former O.C.G.A. § 24-3-16).

Cumulative testimony concerning victim's statements held harmless error. — After a witness was allowed to testify as to statements which were not made directly to the witness but which the witness observed and heard by watching a monitor during the taping, the testimony was not admissible. However, the testimony was merely cumulative of other testimony presented at trial, and the error consequently presented no ground for reversal. Kelly v. State, 197 Ga. App. 811, 399 S.E.2d 568, 1990 Ga. App. LEXIS 1480 (1990) (decided under former O.C.G.A. § 24-3-16).

Trial court erroneously admitted under the Child Hearsay Statute, former O.C.G.A. § 24-3-16, the foster mother's statement that the foster mother overheard the children making remarks to one another that allegedly implicated the defendant in sexually abusing the children as the foster mother could not testify under former O.C.G.A. § 24-3-16 since the statement was not made to the foster mother; the evidence was cumulative of other evidence of abuse, however, so the error was harmless. Clemmons v. State, 282 Ga. App. 261, 638 S.E.2d 409, 2006 Ga. App. LEXIS 1364 (2006) (decided under former O.C.G.A. § 24-3-16).

Habeas court properly denied the appellant relief based on ineffective assistance because the appellant did not question appellate counsel regarding that allegation and so there was no record of why appellate counsel did not pursue the specific issue at the motion for new trial stage or on direct appeal; plus, the habeas court resolved the allegation by determining the admission of the child's videotaped forensic interview was harmless because it was cumulative of the child's trial testimony.

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Cobb v. Hart, 295 Ga. 89, 757 S.E.2d 840, 2014 Ga. LEXIS 293 (2014) (decided under former O.C.G.A. § 24-3-16).

More than one statement admissible. — Trial court did not err in allowing the introduction of the victim's prior consistent statements before the victim testified. Wooten v. State, 244 Ga. App. 101, 533 S.E.2d 441, 2000 Ga. App. LEXIS 469 (2000), rev'd, 273 Ga. 529, 543 S.E.2d 721, 2001 Ga. LEXIS 210 (2001) (decided under former O.C.G.A. § 24-3-16).

Erroneous admission of the child's statements is only reversible if it appears likely that the hearsay contributed to the guilty verdict. Estep v. State, 238 Ga. App. 170, 518 S.E.2d 176 (decided under former O.C.G.A. § 24-3-16).

Judge was not required to conduct a hearing to determine whether there existed any indicia of reliability surrounding statements made by a child to a psychologist in a parental rights termination proceeding. In the Interest of D.R.C., 198 Ga. App. 348, 401 S.E.2d 754, 1991 Ga. App. LEXIS 42 (1991) (decided under former O.C.G.A. § 24-3-16).

Necessary finding of admissibility implicit in judge's ruling. — Mother's testimony as to what the victim told her was properly admitted in evidence, even though the judge did not make a specific finding of "sufficient indicia of reliability." Implicit in any ruling by a judge is that the judge has made the necessary finding of admissibility before admitting such evidence. Windom v. State, 187 Ga. App. 18, 369 S.E.2d 311, 1988 Ga. App. LEXIS 586 (1988) (decided under former O.C.G.A. § 24-3-16).

It is implicit in the admission of statements pursuant to former O.C.G.A. § 24-3-16 that the trial court made the necessary finding. Calloway v. State, 202 Ga. App. 816, 415 S.E.2d 533, 1992 Ga. App. LEXIS 173 (1992) (decided under former O.C.G.A. § 24-3-16); Green v. State, 212 Ga. App. 250, 441 S.E.2d 689, 1994 Ga. App. LEXIS 175 (1994) (decided under former O.C.G.A. § 24-3-16); Roberson v. State, 214 Ga. App. 288, 447 S.E.2d 640 (1994) (decided under former O.C.G.A. § 24-3-16).

Proffer required to appeal exclusion of testimony. — Defendant's failure to make a proffer at trial showing that testimony should have been admitted under former O.C.G.A. § 24-9-5 precluded consideration on appeal of the issue of the exclusion of such testimony. Jones v. State, 232 Ga. App. 505, 502 S.E.2d 345 (decided under former O.C.G.A. § 24-3-16).

Effective assistance of counsel. — Alleged failure of counsel to demand a reliability ruling for those witnesses who were called to testify about hearsay statements made by the victim did not constitute ineffective assistance since counsel did demand a reliability ruling regarding the pediatrician's repetition of the victim's statement, counsel filed a motion to invoke the procedures of Sosebee v. State, 257 Ga. 298, 357 S.E.2d 562 (1987), and when the motion was heard the state indicated that the victim would testify. Also, there was a sufficient showing of indicia of reliability, within the meaning of former O.C.G.A. § 24-9-5, as to all out-of-court statements made by the victim, which were testified to by witnesses in the presence of the jury. Williamson v. State, 207 Ga. App. 565, 428 S.E.2d 628, 1993 Ga. App. LEXIS 292 (1993) (decided under former O.C.G.A. § 24-3-16).

Defendant was not denied effective assistance of counsel at a trial for aggravated child molestation because it would have been futile to object to the 10-year old victim's videotaped statement, which was admissible under the former statute's exception for a child's statement of sexual abuse, since there were sufficient indicia of reliability and the child was available to testify at trial. Campos v. State, 263 Ga. App. 119, 587 S.E.2d 264, 2003 Ga. App. LEXIS 1136 (2003) (decided under former O.C.G.A. § 24-3-16).

Defendant did not receive ineffective assistance of counsel for counsel's failure to object to a psychologist's testimony that it was uncommon for a child to be able to specify incident dates if there was a recurrence of events over a prolonged period;

the psychologist did not improperly bolster the victim's testimony and the psychologist's testimony was not a comment on an ultimate issue of fact; the trial court was authorized to find that the conclusion drawn by the expert was beyond the ken of the jurors. Maddox v. State, 275 Ga. App. 869, 622 S.E.2d 80, 2005 Ga. App. LEXIS 1121 (2005) (decided under former O.C.G.A. § 24-3-16).

Decision as to whether to call an expert witness concerning interviewing techniques of children in a child molestation case is one of trial strategy and in a case where trial counsel testified at the second hearing on the motion for new trial that trial counsel did not consult an expert on interviewing techniques because after reviewing the videotape, trial counsel determined that the factors outlined in case law had been met, trial counsel had filed three pretrial motions seeking to exclude or restrict child hearsay statements, and required the state to lay a proper foundation for the use of child hearsay, trial counsel's performance was not deficient in that regard. Nichols v. State, 288 Ga. App. 118, 653 S.E.2d 300, 2007 Ga. App. LEXIS 1024 (2007) (decided under former O.C.G.A. § 24-3-16).

Defendant failed to establish ineffective assistance of counsel with regard to defendant's trial and conviction for child molestation based on trial counsel's failure to object and conceding to the issue of reliability for the admission of the child victim's hearsay testimony as: (1) defendant failed to point to any evidence indicating that the victim's statements were unreliable since the statements were videotaped at a neutral location in a room alone with a professional forensic interviewer; (2) the forensic interviewer testified that the victim was very bright and articulate and did not appear to be coached; (3) the victim's videotaped statements were spontaneous, voluntary, and not coerced; (4) the victim's videotaped statements were consistent with other out-of-court statements; and (5) significantly, the victim's statements were consistent with defendant's statements to police. Williams v. State, 290 Ga. App. 841, 660 S.E.2d 740, 2008 Ga. App. LEXIS 228 (2008), overruled in part, Hatley v. State, 290 Ga. 480, 722 S.E.2d 67, 2012 Ga. LEXIS 137 (2012), overruled in part as stated in Wadley v. State, 317 Ga. App. 333, 730 S.E.2d 536, 2012 Ga. App. LEXIS 658 (2012) (decided under former O.C.G.A. § 24-3-16).

Although defendant's trial counsel's performance fell below the objective standard of reasonableness under the first prong of the Strickland ineffective assistance of counsel test, the error however was harmless because although defendant's trial counsel performed deficiently in failing to raise a hearsay objection to admission of the victim's statements contained in the videotaped interview, defendant did not show that trial counsel's error prejudiced the defense since statements made by the victim during the videotaped interview were merely cumulative of testimony the victim offered at trial and for which the victim was cross-examined by trial counsel. Forde v. State, 289 Ga. App. 805, 658 S.E.2d 410, 2008 Ga. App. LEXIS 206 (2008) (decided under former O.C.G.A. § 24-3-16).

Trial counsel was not ineffective in failing to ask for a hearing on the admissibility of the child molestation victim's videotaped statement because counsel testified that counsel chose not to request a hearing under former O.C.G.A. § 24-9-5 since counsel had never seen a victim's statement declared inadmissible, and counsel did not want the delay resulting from such a request to give the state additional time to prepare the state's case; trial counsel is under no obligation to invoke his or her client's legal right to a hearing designed to protect that client's interests if the invocation of that abstract right would, in his or her professional judgment of the circumstances presented by a specific case, do actual harm to those interests. Robinson v. State, 308 Ga. App. 45, 706 S.E.2d 577, 2011 Ga. App. LEXIS 110 (2011) (decided under former O.C.G.A. § 24-3-16).

Trial counsel was not ineffective for failing to object to the trial court's determination that the victim was present and available to testify without further inquiring into the reliability of the victim's out-of-court statements under former O.C.G.A. § 24-3-16 because counsel did not want the statements to be excluded in

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light of counsel's trial strategy to show that the victim had been coached. Henry v. State, 316 Ga. App. 132, 729 S.E.2d 429, 2012 Ga. App. LEXIS 500 (2012) (decided under former O.C.G.A. § 24-3-16).

Trial counsel was not ineffective in failing to object to the testimony of the victim's friend to whom the victim first reported that the defendant had raped the victim, to the testimony of the legal guardian's daughter who relayed a similar outcry, or to the testimony of the victim's legal guardian, who described the conversation in which the victim finally disclosed the abuse, because each of the conversations transpired before the victim turned 16 years old, the statements were admissible under the Child Hearsay Statute, and any objection by counsel would not have been sustained. Brown v. State, 336 Ga. App. 428, 785 S.E.2d 84, 2016 Ga. App. LEXIS 196 (2016).

Trial counsel was not ineffective for failing to object to testimony from the victim's mother and father about the victim's statements to them about the defendant's actions as the Child Hearsay Statute, O.C.G.A. § 24-8-820, permitted evidence of the victim's outcry statements and forensic interview to be admitted even though it was bolstering because the victim was younger than 16 years old when the victim made the out-of-court statements; the statements described acts of sexual contact performed on the victim or in the victim's presence by the defendant; the state provided the defendant with notice prior to trial of the stae's intention to use the out-of-court statements; the victim testified at trial; and the mother and father were subject to cross-examination. Jackson v. State, 344 Ga. App. 618, 810 S.E.2d 672, 2018 Ga. App. LEXIS 79 (2018).

Counsel was not ineffective for failing to object to the state's notice prior to trial that the state intended to use at trial a child's out-of-court statement because the state's email to defense counsel constituted proper notice as it was supplied approximately two weeks before trial, and it complied with the notice requirement in O.C.G.A. § 24-8-820. Adams v. State, 350 Ga. App. 340, 829 S.E.2d 412, 2019 Ga. App. LEXIS 295 (2019).

Trial counsel was not ineffective for failing to object when the prosecutor asked the victim if the victim had told the truth during the victim's forensic interview because, when a witness's statement did not directly address the credibility of another witness, there was no improper bolstering; and the Child Hearsay Statute actually contemplated testimony from both the child and those witnessing the child's later reaction, even if the hearsay might be bolstering. Alvarado v. State, 365 Ga. App. 305, 878 S.E.2d 266, 2022 Ga. App. LEXIS 435 (2022).

Speculation does not support ineffective assistance of counsel claim. — Defendant's ineffective assistance of counsel claim was rejected as the defendant's claim that trial counsel was not knowledgeable about the Child Hearsay Statute, former O.C.G.A. § 24-9-5, and failed to highlight the unreliability of the child victim's statement to a nurse was based on mere speculation that a more thorough cross-examination would have altered the outcome at trial. Brown v. State, 280 Ga. App. 884, 635 S.E.2d 240, 2006 Ga. App. LEXIS 972 (2006) (decided under former O.C.G.A. § 24-3-16).

Defendant's right to notice of statements before trial. — There was no requirement that the state provide defendant with pretrial notice of the state's intention to introduce child hearsay statements and, when defendant was notified in advance that there was nothing exculpatory in videotaped interviews with children and defendant was allowed to view tapes during the trial, defendant's due process rights were not violated by not being permitted to view the tapes prior to trial. Thornton v. State, 264 Ga. 563, 449 S.E.2d 98, 1994 Ga. LEXIS 863 (1994), superseded by statute as stated in Bunn v. State, 291 Ga. 183, 728 S.E.2d 569, 2012 Ga. LEXIS 565 (2012) (decided under former O.C.G.A. § 24-3-16).

Evidence sufficed for aggravated child molestation conviction. — Evidence and testimony from several adults that the victim reported defendant's sexual assault in the manner charged in the indictment was sufficient to convict for

aggravated child molestation, although the victim testified that the criminal act occurred while the victim was wearing jeans. McGuire v. State, 209 Ga. App. 813, 434 S.E.2d 802, 1993 Ga. App. LEXIS 1014 (1993) (decided under former O.C.G.A. § 24-3-16).

Evidence was sufficient to convict defendant of child molestation, even if much of the evidence was hearsay repetition of the child's out-of-court statements, as defendant failed to argue that the evidence did not satisfy the reliability criteria set forth in former O.C.G.A. § 24-9-5. Brown v. State, 267 Ga. App. 826, 600 S.E.2d 774, 2004 Ga. App. LEXIS 786 (2004) (decided under former O.C.G.A. § 24-3-16).

There was sufficient evidence to support a defendant's convictions for aggravated child molestation, child molestation, and false imprisonment with regard to allegations that the defendant forced a romantic friend's minor child to perform oral sex on the defendant several times over a three year period, based on the testimony of the victim (which alone was sufficient), the videotaped forensic interview of the victim, the testimony of the police investigator and the victim's mother concerning what the victim told them, as well as the testimony of the victim's siblings, who were eyewitnesses to one incident. Further, the testimony of the victim that the defendant locked the victim in the house and would not let the victim leave supported the conviction on the false imprisonment charge, and the videotaped forensic interview and the testimony of the police investigator and the victim's mother concerning what the victim told them were admissible as substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-9-5. Metts v. State, 297 Ga. App. 330, 677 S.E.2d 377, 2009 Ga. App. LEXIS 431 (2009) (decided under former O.C.G.A. § 24-3-16).

Failing to object to the testimony of the state's witnesses regarding what the victim told the witnesses was not a deficiency by counsel because these statements would have been admissible under the Child Hearsay Statute, former O.C.G.A. § 24-9-5, since the victim, age ten, was a witness at trial whom the defendant cross-examined. Silcox v. State, 241 Ga. App. 845, 528 S.E.2d 271, 2000 Ga. App. LEXIS 47 (2000) (decided under former O.C.G.A. § 24-3-16).

Parents' testimony admissible. — When the record shows the victims testified at trial and were subject to examination and cross-examination, the trial court did not abuse the court's discretion under the Child Hearsay Statute, former O.C.G.A. § 24-9-5, by admitting the parents' testimony about things the victims said to the parent's about defendant. Kight v. State, 242 Ga. App. 13, 528 S.E.2d 542, 2000 Ga. App. LEXIS 70 (2000), cert. denied, No. S00C0853, 2000 Ga. LEXIS 396 (Ga. May 5, 2000) (decided under former O.C.G.A. § 24-3-16).

Statement made to therapist admissible. — Court properly admitted hearsay testimony by a child's therapist that the defendant "put his thing" in the child's mouth where the statement was made in a child-friendly, one-on-one therapy session, not an investigative interview, and the statement was made in response to a non-leading question. Guzman v. State, 273 Ga. App. 819, 616 S.E.2d 142, 2005 Ga. App. LEXIS 625 (2005) (decided under former O.C.G.A. § 24-3-16).

Statement during medical examination admissible. — Nurse's testimony as to a 13-year-old victim's statements that defendant forced intercourse upon the victim made during the medical examination was properly admissible under former O.C.G.A. § 24-9-5. Bell v. State, 294 Ga. App. 779, 670 S.E.2d 476, 2008 Ga. App. LEXIS 1313 (2008) (decided under former O.C.G.A. § 24-3-16).

Statements admissible. — In a child molestation case, the trial court properly allowed a deputy to read the statements of three of the teenagers involved into evidence; while all of the teenagers and their parents were present when the teenagers wrote out their statements for the deputy, the record reflected no evidence of undue pressure or influence, and the deputy was not directly involved in later videotaped interviews. Krirat v. State, 286 Ga. App. 650, 649 S.E.2d 786, 2007 Ga. App. LEXIS 778 (2007), cert. denied, No. S07C1788, 2007 Ga. LEXIS 745 (Ga. Oct. 9, 2007) (decided under former O.C.G.A. § 24-3-16).

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After a trial court properly admitted sufficiently reliable videotaped statements made by three siblings who were the victims of a defendant's cruelty, there was no error in also admitting testimony from nurses from the hospital where the children were taken regarding statements the children made to the nurses as the matters testified to by the nurses were the same matters detailed in the videotaped statements. Williams v. State, 293 Ga. App. 617, 668 S.E.2d 21, 2008 Ga. App. LEXIS 1025 (2008) (decided under former O.C.G.A. § 24-3-16).

Under O.C.G.A. § former O.C.G.A. § 24-9-5, the trial court properly allowed a school counselor to testify about the victim's out-of-court statements to the counselor. The victim was available to testify and did in fact testify and was thoroughly cross-examined as was the counselor; furthermore, because the statements were admissible, counsel was not ineffective for failing to object to the statements. Hilliard v. State, 298 Ga. App. 473, 680 S.E.2d 541, 2009 Ga. App. LEXIS 716 (2009) (decided under former O.C.G.A. § 24-3-16).

Victim's testimony alone was sufficient to prove defendant guilty of child molestation (O.C.G.A. § 16-6-4(a)) and aggravated child molestation (O.C.G.A. § 16-6-22.2(b)), pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8). The testimony of the victim's cousin, two school friends, and the interviewing detective, was admissible as substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-9-5. Vaughn v. State, 301 Ga. App. 391, 687 S.E.2d 651, 2009 Ga. App. LEXIS 1394 (2009) (decided under former O.C.G.A. § 24-3-16).

There was competent evidence to support the defendant's convictions for aggravated child molestation, O.C.G.A. § 16-6-4(c), and child molestation, O.C.G.A. § 16-6-4(a)(1), because the victim's step-uncle and one of the forensic interviewers proffered evidence that the defendant sexually molested the victim pursuant to the Child Hearsay Act, former O.C.G.A. § 24-9-5; although the victim testified that the defendant touched the victim in a way that the victim did not like, the victim did not provide any details about those incidents, but both the step-uncle and the forensic interviewer testified that the victim disclosed that the defendant touched the victim's privates with the defendant's hand and the defendant's own privates and forced the victim to place the victim's mouth on the defendant's privates, and the jury resolved any credibility or inconsistency issues against the defendant. Westbrooks v. State, 309 Ga. App. 398, 710 S.E.2d 594, 2011 Ga. App. LEXIS 347 (2011) (decided under former O.C.G.A. § 24-3-16).

Trial court did not abuse the court's discretion in allowing the testimony of an investigator, a pediatrician, and a forensic interviewer regarding statements the victims made to them under former O.C.G.A. § 24-9-5, because the witnesses did not opine as to whether the victims were telling the truth but rather testified regarding the victims' statements to them. Ledford v. State, 313 Ga. App. 389, 721 S.E.2d 585, 2011 Ga. App. LEXIS 1081 (2011) (decided under former O.C.G.A. § 24-3-16).

Admission of testimony from the victim's mother and a police officer as to what the victim told them about the defendant's inappropriate contact with the victim was proper as the victim was only 10 years old, the victim testified about the abuse, and both the mother and the officer were available for cross-examination about the out-of-court statements. McMurtry v. State, 338 Ga. App. 622, 791 S.E.2d 196, 2016 Ga. App. LEXIS 512 (2016), cert. denied, No. S17C0415, 2017 Ga. LEXIS 272 (Ga. Apr. 17, 2017), cert. denied, 138 S. Ct. 333, 199 L. Ed. 2d 223, 2017 U.S. LEXIS 6149 (2017).

Trial court did not err in allowing testimony of the victim's aunt, the victim's mother, and the investigating detective regarding statements the victim made to them regarding the defendant's abuse as such evidence was admissible under the Child Hearsay Statute (see now O.C.G.A. § 24-8-820). Laster v. State, 340 Ga. App. 96, 796 S.E.2d 484, 2017 Ga. App. LEXIS 17 (2017) (decided under former O.C.G.A. § 24-3-16).

Plain error doctrine inapplicable. — Plain error doctrine had been limited to capital cases and to criminal cases in

which the trial judge allegedly intimated an opinion of the defendant's guilt in violation of O.C.G.A. § 17-8-57 and had no application to a defendant's claims that a child molestation victim's hearsay statements served to bolster the victim's credibility and lacked sufficient indicia of reliability. Brown v. State, 280 Ga. App. 884, 635 S.E.2d 240, 2006 Ga. App. LEXIS 972 (2006) (decided under former O.C.G.A. § 24-3-16).

Harmless error. — If the trial court erroneously allowed under former O.C.G.A. § 24-9-5 the testimony of the psychologist in the child molestation case, any error was harmless; although the defendant argued that the testimony was the only evidence of the defendant's mental state, there was ample evidence that the defendant had the propensity to molest children, including the victim's detailed statements, the corroborating medical examination, and the testimony of the children's parent that the defendant had molested the children's parent when the children's parent was very young. Clemmons v. State, 282 Ga. App. 261, 638 S.E.2d 409, 2006 Ga. App. LEXIS 1364 (2006) (decided under former O.C.G.A. § 24-3-16).

With regard to a defendant's convictions for child molestation and related crimes arising from actions the defendant took toward three children and those that the defendant forced the children to engage in by gunpoint while the defendant was a babysitter for the children, although the testimony of the mother of one of the victims that the victim was forced to have sex with the defendant was double hearsay and inadmissible, the error was not reversible since other legally admissible evidence of the same fact was introduced, therefore, the error was harmless. Sullivan v. State, 295 Ga. App. 145, 671 S.E.2d 180, 2008 Ga. App. LEXIS 1259 (2008), cert. denied, No. S09C0624, 2009 Ga. LEXIS 215 (Ga. Apr. 20, 2009) (decided under former O.C.G.A. § 24-3-16). In a rape and child molestation case, the trial court did not err in admitting the victim's hearsay statements as the victim appeared at trial, took the witness stand, and was available for cross-examination; and there was no requirement that the child victim testify as to the defendant's specific actions or the specific contents of the victim's interview video, let alone that the state successfully elicited such testimony on direct examination. Alvarado v. State, 365 Ga. App. 305, 878 S.E.2d 266, 2022 Ga. App. LEXIS 435 (2022).

Jury Issues and Instructions

Evidence was sufficient for the jury to find a defendant guilty of child molestation beyond a reasonable doubt as it was within the jury's province to reject the defendant's defense denying the crime with regard to the victim as well as with regard to the witnesses who testified as to similar transactions with the defendant. The testimony of the victim was corroborated by an investigator and a forensic interviewer, who testified as to what the victim had told had occurred; the victim's statements were corroborated by the sheriff's investigator; and the jury was entitled to consider the victim's out-of-court statements as substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-3-16. Lamb v. State, 293 Ga. App. 65, 666 S.E.2d 462, 2008 Ga. App. LEXIS 900 (2008) (decided under former O.C.G.A. § 24-3-16).

Trial court did not err in denying the defendant's motion for new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 because the jury was authorized to conclude that the defendant was guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1); under the Child Hearsay Statute, former O.C.G.A. § 24-3-16, the jury was entitled to consider the victim's out-of-court statements as substantive evidence, and the victim was made available at trial for confrontation and cross-examination, at which time the jury was allowed to judge the credibility of the victim's accusations. Hargrave v. State, 311 Ga. App. 852, 717 S.E.2d 485, 2011 Ga. App. LEXIS 857 (2011), overruled in part, Martin v. McLaughlin, 298 Ga. 44, 779 S.E.2d 294, 2015 Ga. LEXIS 793 (2015) (decided under former O.C.G.A. § 24-3-16).

Evidence that a defendant became highly intoxicated while having visitation with his seven-year-old daughter, that he licked her vagina, kissed her with his tongue in her mouth, and made her rub

Jury Issues and Instructions (Cont'd)

her hand on his penis was sufficient to support convictions for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). A jury could infer from the evidence that the defendant's intent was to arouse and satisfy his sexual desires pursuant to O.C.G.A. § 16-2-6. Obeginski v. State, 313 Ga. App. 567, 722 S.E.2d 162, 2012 Ga. App. LEXIS 22 (2012), cert. denied, No. S12C0908, 2012 Ga. LEXIS 1013 (Ga. Oct. 1, 2012) (decided under former O.C.G.A. § 24-3-16).

Credibility of witness within jury's purview. — Despite defendant's argument that expert testimony showed it as likely that statements of defendant's grandson to the lead detective regarding defendant's sexual molestation of the grandson were coached, those were deemed admissible pursuant to the Child Hearsay Statute, former O.C.G.A. § 24-3-16, in that they were statements by a child available to testify in the proceedings that described abuse of a child under 14 which provided sufficient indicia of reliability; determinations as to the credibility of a witness were a matter solely within the jury's purview and would not be disturbed on appeal. Wright v. State, 259 Ga. App. 74, 576 S.E.2d 64, 2003 Ga. App. LEXIS 2 (2003) (decided under former O.C.G.A. § 24-3-16).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Corroboration of a Child's Sexual Abuse Allegation with Behavioral Evidence, 25 POF3d 189.

ALR.

Witnesses: child competency statutes, 60 A.L.R.4th 369.

Validity, construction, and application of child hearsay statutes, 71 A.L.R.5th 637.

24-8-821. Admissions in pleadings.

Without offering the same in evidence, either party may avail himself or herself of allegations or admissions made in the pleadings of the other.

History.

Code 1981, § 24-8-821, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-3-30, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Wood v. Isom, 68 Ga. 417 (1882) and East Tenn., V. & Ga. Ry. v. Kane, 92 Ga. 187, 18 S.E. 18 (1893).

Cross references.

Request for admission of opposing party, § 9-11-36.

JUDICIAL DECISIONS

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General Considerations

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5188, former Civil Code 1910, § 5775, former Code 1933, § 38-402, and former

O.C.G.A. § 24-3-30\ are included in the annotations for this Code section.

History of statute. — Former statute was a codification of the principle announced in East Tenn., V. & Ga. Ry. v. Kane, 92 Ga. 187, 18 S.E.2d 18, 22 L.R.A. 315 (1893), and a number of prior cases, in which it was asserted that "certainly a party should be relieved from proving that which his adversary distinctly alleges," and this a party may do "without formally tendering the pleading in evidence." Greene v. Gulf Oil Corp., 119 Ga. App. 87, 166 S.E.2d 626, 1969 Ga. App. LEXIS 990 (1969) (decided under former Code 1933, § 38-402); Carver v. Saye, 198 Ga. App. 146, 400 S.E.2d 683, 1990 Ga. App. LEXIS 1573 (1990), cert. denied, No. S91C0511, 1991 Ga. LEXIS 457 (Ga. Jan. 31, 1991).

An admission in the pleadings is to be taken as true, and the record should not be burdened by proof of the fact admitted. Greene v. Gulf Oil Corp., 119 Ga. App. 87, 166 S.E.2d 626, 1969 Ga. App. LEXIS 990 (1969) (decided under former Code 1933, § 38-402).

Pleader is bound by the allegations of the pleader's own pleadings, and what the pleader alleges in the pleader's pleadings to be true is evidence that the pleader is not even permitted to deny. State Hwy. Dep't v. Lumpkin, 222 Ga. 727, 152 S.E.2d 557, 1966 Ga. LEXIS 614 (1966) (decided under former Code 1933, § 38-402).

When the plaintiff never sought to amend or withdraw averments of fact made in plaintiff's declaratory judgment petition, plaintiff was bound by those admissions and could not put up evidence over objection to contradict them. Keeley v. Cardiovascular Surgical Assocs., 236 Ga. App. 26, 510 S.E.2d 880, 1999 Ga. App. LEXIS 27 (1999) (decided under former O.C.G.A. § 24-3-30).

When the trial court accepted into evidence tenants' affidavits which directly contradicted earlier admissions made by the tenants in their pleadings, those earlier admissions were considered withdrawn. Therefore, the trial court erred in granting summary judgment to the landlord as a matter of law under the termination clause of the lease based on the tenants' earlier admissions that the tenants were the ones who had terminated the lease. Michel v. Abrahams, 254 Ga. App. 293, 562 S.E.2d 194, 2002 Ga. App. LEXIS 240 (2002), cert. denied, No. S02C1109, 2002 Ga. LEXIS 616 (Ga. July 15, 2002) (decided under former O.C.G.A. § 24-3-30).

Admissions of fact in the pleadings can always be taken advantage of by the opposite party, and can be used as evidence, even though the pleadings should be stricken or withdrawn. Improved Fertilizer Co. v. Swift & Co., 15 Ga. App. 601, 84 S.E. 132, 1915 Ga. App. LEXIS 4 (1915) (decided under former Civil Code 1910, § 5775); Clift & Goodrich, Inc. v. Mincey Mfg. Co., 41 Ga. App. 38, 152 S.E. 136, 1930 Ga. App. LEXIS 452 (1930); Carver v. Carver, 199 Ga. 352, 34 S.E.2d 509, 1945 Ga. LEXIS 426 (1945) (decided under former Code 1933, § 38-402); Stallings v. Britt, 204 Ga. 250, 49 S.E.2d 517, 1948 Ga. LEXIS 405 (1948) (decided under former Code 1933, § 38-402); Cummings v. State, 84 Ga. App. 698, 67 S.E.2d 156, 1951 Ga. App. LEXIS 769 (1951) (decided under former Code 1933, § 38-402); Spurlock v. Commercial Banking Co., 151 Ga. App. 649, 260 S.E.2d 912, 1979 Ga. App. LEXIS 2675 (1979) (decided under former Code 1933, § 38-402); Lawson v. Duke Oil Co., 155 Ga. App. 363, 270 S.E.2d 898, 1980 Ga. App. LEXIS 2580 (1980) (decided under former Code 1933, § 38-402).

When the pleading has been stricken, the admission contained in the pleading remains to be utilized as evidence of fact which the admitting party can explain but may be unable to conclusively refute. Strozier v. Simmons U.S.A. Corp., 192 Ga. App. 601, 385 S.E.2d 677, 1989 Ga. App. LEXIS 1088 (1989) (decided under former O.C.G.A. § 24-3-30).

In an action seeking damages from an insurance company based on a claim that the company acted in bad faith when the company failed to settle an injured party's claim against an insured, the insurance company admission, in the company's answer to the complaint, that the injured party offered to settle the case for the policy limits of the insured's policy was properly offered to the jury as an admission that there was a policy of insurance.

General Considerations (Cont'd)

VFH Captive Ins. Co. v. Cielinski, 260 Ga. App. 807, 581 S.E.2d 335, 2003 Ga. App. LEXIS 426 (2003) (decided under former O.C.G.A. § 24-3-30).

Mesothelioma plaintiff's allegations in the plaintiff's complaint that the plaintiff was exposed to asbestos manufactured or distributed by numerous companies were admissible as admissions in judicio under O.C.G.A. § 24-8-821, even when withdrawn, and the manufacturers remaining in the suit could use these admissions as evidence that fault should be apportioned. Georgia-Pacific, LLC v. Fields, 293 Ga. 499, 748 S.E.2d 407, 2013 Ga. LEXIS 634 (2013).

Alternative pleadings. — Civil Practice Act, O.C.G.A. Ch. 11, T. 9, which permits alternative pleadings does not change the rule of evidence that a party is bound by the party's judicial admissions. Ditch v. Royal Indem. Co., 205 Ga. App. 478, 422 S.E.2d 868, 1992 Ga. App. LEXIS 1216 (1992), cert. denied, No. S93C0030, 1992 Ga. LEXIS 928 (Ga. Nov. 5, 1992) (decided under former O.C.G.A. § 24-3-30).

Considered as evidence in record. — When matter is contained in a pleading, from which inferences may be drawn beneficial to the opposite party, it may be considered as evidence in the record in the party's favor. Johnson v. Daniel, 135 Ga. App. 926, 219 S.E.2d 579, 1975 Ga. App. LEXIS 1878 (1975) (decided under former Code 1933, § 38-402); Lawson v. Duke Oil Co., 155 Ga. App. 363, 270 S.E.2d 898, 1980 Ga. App. LEXIS 2580 (1980) (decided under former Code 1933, § 38-402); Metro Leasing, Inc. v. Health Educ. & Research Servs., Inc., 193 Ga. App. 157, 387 S.E.2d 399, 1989 Ga. App. LEXIS 1420 (1989) (decided under former O.C.G.A. § 24-3-30).

Can be explained or disproved. — When the answer admitted an allegation of the petition but was later amended by striking the admission, the admission, though introduced as evidence for the plaintiff, was not conclusive, and could be explained or disproved by the defendant. Watkins v. Price Mercantile Co., 45 Ga. App. 272, 164 S.E. 231, 1932 Ga. App. LEXIS 281 (1932) (decided under former Civil Code 1910, § 5775).

Rule only applies to factual admissions. — Rule that a party cannot disprove an admission in pleadings without first withdrawing the admission from the record applies to admissions of fact, and is not applicable when the admission is merely the opinion on the part of the party making the admission as to the legal effect of the instrument sued on. Clift & Goodrich, Inc. v. Mincey Mfg. Co., 41 Ga. App. 38, 152 S.E. 136, 1930 Ga. App. LEXIS 452 (1930) (decided under former Civil Code 1910, § 5775); Scott v. Jefferson, 174 Ga. App. 651, 331 S.E.2d 1, 1985 Ga. App. LEXIS 1917 (1985) (decided under former O.C.G.A. § 24-3-30); Perry & Co. v. New S. Ins. Brokers of Ga., Inc., 182 Ga. App. 84, 354 S.E.2d 852, 1987 Ga. App. LEXIS 1605 (1987) (decided under former O.C.G.A. § 24-3-30); Ellerbee v. Interstate Contract Carrier Corp., 183 Ga. App. 828, 360 S.E.2d 280, 1987 Ga. App. LEXIS 2087 (1987), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014) (decided under former O.C.G.A. § 24-3-30).

Pleading that was replete with a party's opinions and legal conclusions could not be considered an admission in judicio that would be effectively binding upon other parties. Mountain Bound, Inc. v. Alliant FoodService, Inc., 242 Ga. App. 557, 530 S.E.2d 272, 2000 Ga. App. LEXIS 259 (2000) (decided under former O.C.G.A. § 24-3-30).

Cannot take judicial notice of matters subject to proof. — Trial court did not err in denying the defendant's request to take judicial notice of certain findings of fact and conclusions of law made by the trial court in the portion of the court's order granting the defendant's summary judgment motion regarding the plaintiff's premises liability claim because the trial court could not take judicial notice of matters that were the subject of proof in the case. Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 760 S.E.2d 674, 2014 Ga. App. LEXIS 566 (2014).

Averments negativing existence of right claimed. — If the averments of a complaint expressly negative the exis-

tence of a right claimed therein, or show the impossibility of its existence, they are to be regarded as evidence deposited in the record in favor of the opposite party, and demand the finding thereon in the party's favor. New Zealand Fire Ins. Co. v. Brewer, 29 Ga. App. 773, 116 S.E. 922, 1923 Ga. App. LEXIS 189 (1923) (decided under former Civil Code 1910, § 5775).

Admissions not binding on codefendant when interests adverse. — Any admissions in judicio as to amounts owed to lenders by a corporation made by the first borrower were not binding on the corporation under former O.C.G.A. § 24-3-30 as the borrowers' interests were not joint but adverse as the first borrower was not a shareholder, officer, or director of the corporation. Walker v. Ace Auto Sales & Leasing, Inc., 294 Ga. App. 267, 668 S.E.2d 877, 2008 Ga. App. LEXIS 1161 (2008) (decided under former O.C.G.A. § 24-3-30).

Effect of pretrial order. — In a personal injury suit, a company explicitly preserved the company's argument that the company was not a proper party in the consolidated pretrial order which the trial court signed. Under Ga. Unif. Super. Ct. R. 7.2, this order expressly superseded the pleadings and established the issues in litigation; thus, the company was not estopped under former O.C.G.A. § 24-3-30 from asserting at trial that the company was not the proper party to be sued. First Support Servs. v. Trevino, 288 Ga. App. 850, 655 S.E.2d 627, 2007 Ga. App. LEXIS 1221 (2007), cert. denied, No. S08C0717, 2008 Ga. LEXIS 388 (Ga. Apr. 21, 2008) (decided under former O.C.G.A. § 24-3-30).

Inconsistent defenses. — Defendant may, of course, file inconsistent defenses; but the plaintiff may take advantage of the contradictory nature of the defenses, and may use, as an admission against the defendant, a statement made is one of the pleas, although in another of the pleas there is set up a contradictory state of facts. The jury is not bound to accept the testimony of a witness which is contradictory to a plea one has filed. Wheeler v. Salinger, 33 Ga. App. 300, 125 S.E. 888, 1924 Ga. App. LEXIS 849 (1924) (decided under former Civil Code 1910, § 5775); Myers v. Woodson, 33 Ga. App. 748, 127 S.E. 888, 1925 Ga. App. LEXIS 712 (1925) (decided under former Civil Code 1910, § 5775).

Estoppel. — When upon a suit on a contract, the plaintiff obtains a judgment or relief amounting to an adjudication in the plaintiff's favor, and is afterwards sued for a subsequent breach of plaintiff's own part of the contract, the plaintiff is estopped to deny the essential terms of the contract as pleaded in the former petition under which the plaintiff recovered. Florence, Phillips & Co. v. Newsome, 26 Ga. App. 501, 106 S.E. 619, 1921 Ga. App. LEXIS 501 (1921) (decided under former Civil Code 1910, § 5775).

Reviewing court on appeal will not consider the question of whether a plaintiff's alleged bill of sale was sufficient to constitute a valid lien or claim of title to the proceeds of the sale since the defendant had conceded in the court below, by a solemn admission in judicio, that the bill of sale of the plaintiff constituted a prior claim on the proceeds of the sale, and the defendant defended upon the sole ground of estoppel. C.I. & M. Dingfelder v. Georgia Peach Growers Exch., 182 Ga. 521, 186 S.E. 425, 1936 Ga. LEXIS 479 (1936) (decided under former Code 1933, § 38-402).

Estoppel not applicable in later and different action. — Statements in pleadings are considered as judicial and not as evidentiary admissions, and for these purposes, until withdrawn or amended, are conclusive; but estoppels by admissions made in pleading apply only between parties and privies to the suit or litigation in which the admissions relied on as an estoppel were made; when such admissions in pleadings are introduced as evidence in a later and different action, they no longer operate as admissions in judicio but, rather, as evidentiary admissions and, as evidence, such admissions may be explained or contradicted. Foster v. State, 157 Ga. App. 554, 278 S.E.2d 136, 1981 Ga. App. LEXIS 1909 (1981) (decided under former Code 1933, § 38-402).

Objection invalid. — When the defendant admitted in the defendant's plea the execution by the defendant of an instrument which formed a part of the plaintiff's

General Considerations (Cont'd)

abstract of title, in view of the former statute it was not a good objection to the admission of the instrument in evidence that the instrument's execution had not been proved. Vizard v. Moody, 119 Ga. 918, 47 S.E. 348, 1904 Ga. LEXIS 406 (1904) (decided under former Civil Code 1895, § 5188).

Incorporating admission in brief of evidence. — Admissions in pleading were properly incorporated in the brief of evidence, though stricken by amendment after evidence closed. Lydia Pinkham Medicine Co. v. Gibbs, 108 Ga. 138, 33 S.E. 945, 1899 Ga. LEXIS 202 (1899) (decided under former Civil Code 1895, § 5188).

Instructions. — If a party desires instructions to the jury touching admissions made in the other party's pleadings, the party should present a proper request therefor. Georgia Power Co. v. Rabun, 111 Ga. App. 63, 140 S.E.2d 568, 1965 Ga. App. LEXIS 881 (1965) (decided under former Code 1933, § 38-402).

In the absence of a proper request, a trial court does not err in failing to instruct the jury specifically that various portions of the opposite party's pleadings should be considered by the jury as admissions against that party. Crane v. Doolittle, 116 Ga. App. 572, 158 S.E.2d 426, 1967 Ga. App. LEXIS 894 (1967) (decided under former Code 1933, § 38-402).

Conflicts

When the pleading is inconsistent, the admission, not the denial, prevails. Taylor v. Crawford, 119 Ga. App. 262, 167 S.E.2d 404, 1969 Ga. App. LEXIS 1067 (1969) (decided under former Code 1933, § 38-402); Johnson v. Daniel, 135 Ga. App. 926, 219 S.E.2d 579, 1975 Ga. App. LEXIS 1878 (1975) (decided under former Code 1933, § 38-402).

Effect of conflicting evidence on pleadings. — Party is not prevented, per se, from making an admission in judicio in the party's pleadings as to a fact merely because conflicting evidence may exist as to that issue of fact. If the trial court admits that conflicting evidence and either the court (e.g., when ruling on a motion for summary judgment) or the jury (when reaching a verdict) considers the conflicting evidence on the merits, the pleadings at that point become amended to conform to such evidence. Walker v. Jack Eckerd Corp., 209 Ga. App. 517, 434 S.E.2d 63, 1993 Ga. App. LEXIS 934 (1993), cert. denied, No. S93C1686, 1993 Ga. LEXIS 1033 (Ga. Oct. 29, 1993) (decided under former O.C.G.A. § 24-3-30).

When the trial court does not allow conflicting evidence to be admitted or, when applicable, elects not to consider the issue on the merits, the admission of fact made in the pleadings remains in full force and effect as an admission in judicio and is conclusive of the fact admitted. Walker v. Jack Eckerd Corp., 209 Ga. App. 517, 434 S.E.2d 63, 1993 Ga. App. LEXIS 934 (1993), cert. denied, No. S93C1686, 1993 Ga. LEXIS 1033 (Ga. Oct. 29, 1993) (decided under former O.C.G.A. § 24-3-30).

Withdrawals

Admission must be withdrawn from record. — Party to a suit will not even be allowed to disprove an admission made in the party's pleadings without first withdrawing the admission from the record. Clift & Goodrich, Inc. v. Mincey Mfg. Co., 41 Ga. App. 38, 152 S.E. 136, 1930 Ga. App. LEXIS 452 (1930) (decided under former Civil Code 1910, § 5775); Maryland Cas. Co. v. Sammons, 67 Ga. App. 83, 19 S.E.2d 314, 1942 Ga. App. LEXIS 340 (1942); Head v. Lee, 203 Ga. 191, 45 S.E.2d 666, 1947 Ga. LEXIS 589 (1947) (decided under former Code 1933, § 38-402); Dye v. Hirsch, 92 Ga. App. 803, 90 S.E.2d 332, 1955 Ga. App. LEXIS 716 (1955) (decided under former Code 1933, § 38-402); Plymouth Record Corp. v. Books, Inc., 92 Ga. App. 753, 90 S.E.2d 336, 1955 Ga. App. LEXIS 708 (1955) (decided under former Code 1933, § 38-402); Grigsby v. Fleming, 96 Ga. App. 664, 101 S.E.2d 217, 1957 Ga. App. LEXIS 657 (1957) (decided under former Code 1933, § 38-402); Greene v. Gulf Oil Corp., 119 Ga. App. 87, 166 S.E.2d 626, 1969 Ga. App. LEXIS 990 (1969) (decided under former Code 1933, § 38-402); Sambo's of Ga., Inc. v. First Am. Nat'l Bank, 152 Ga.

App. 899, 264 S.E.2d 330, 1980 Ga. App. LEXIS 1647 (1980), superseded by statute as stated in Accredited Associates, Inc. v. Shottenfeld, 162 Ga. App. 575, 292 S.E.2d 417, 1982 Ga. App. LEXIS 2248 (1982) (decided under former Code 1933, § 38-402); Strozier v. Simmons U.S.A. Corp., 192 Ga. App. 601, 385 S.E.2d 677, 1989 Ga. App. LEXIS 1088 (1989).

Use of withdrawn pleadings. — When a part of a petition or of a plea is stricken by amendment, the stricken part may, if pertinent to any issue remaining in the case, be offered in evidence; but, unless so offered and admitted in evidence, it is not evidence for the consideration of the jury or proper matter for argument of counsel, save only when the amendment is made after the evidence is closed. Lydia Pinkham Medicine Co. v. Gibbs, 108 Ga. 138, 33 S.E. 945, 1899 Ga. LEXIS 202 (1899) (decided under former Civil Code 1895, § 5188); Alabama Midland Ry. v. Guilford, 114 Ga. 627, 40 S.E. 794, 1902 Ga. LEXIS 743 (1902) (decided under former Civil Code 1895, § 5188); Continental Trust Co. v. Bank of Harrison, 36 Ga. App. 149, 136 S.E. 319, 1926 Ga. App. LEXIS 833 (1926) (decided under former Civil Code 1910, § 5775).

Withdrawal of admission by amendment of pleadings. — In an action against a negligent driver's father, the father's initial admission that the vehicle was a family purpose vehicle was made regarding a legal opinion, i.e., agency under the family purpose doctrine, and, therefore, it could not be an admission in judicio or an admission against interest, because the admission was a legal opinion or conclusion that had been withdrawn by amendment from the pleadings. Wahnschaff v. Erdman, 232 Ga. 77, 502 S.E.2d 246 (decided under former O.C.G.A. § 24-3-30).

Defendant could not cross-examine plaintiff on allegations in plaintiff's complaint since the complaint was amended and the contentions therein were no longer solemn admissions in judicio. Crosby v. Cooper Tire & Rubber Co., 240 Ga. App. 857, 524 S.E.2d 313 (decided under former O.C.G.A. § 24-3-30).

If the party amended the party's pleadings to withdraw the party's judicial admissions, the party could introduce evidence contravening the admissions, and if such contradictory evidence was admitted, even over the objection of the other party, then under O.C.G.A. § 9-11-15(b), such evidence could be deemed to amend the pleadings to withdraw the admissions. SAKS Assocs., LLC v. Southeast Culvert, Inc., 282 Ga. App. 359, 638 S.E.2d 799, 2006 Ga. App. LEXIS 1388 (2006) (decided under former O.C.G.A. § 24-3-30).

In passengers' negligence suit against a taxicab company, to the extent the company's initial answer contained an admission under former O.C.G.A. § 24-3-30 that the driver was the company's employee, such admission was withdrawn by timely amendment, allowing positive evidence of the contrary to overcome it as an admission. Lopez v. El Palmar Taxi, Inc., 297 Ga. App. 121, 676 S.E.2d 460, 2009 Ga. App. LEXIS 385 (2009) (decided under former O.C.G.A. § 24-3-30).

Trial court erred in dismissing the plaintiff's retaliation claim under the Georgia False Medicaid Claims Act, O.C.G.A. § 49-4-168 et seq., because the allegation in the plaintiff's prior complaint that contained a judicial admission that precluded the plaintiff from alleging that the Faculty Practice was the plaintiff's employer was no longer binding after the plaintiff filed the second amended complaint. Hill v. Bd. of Regents of the Univ. Sys. of Ga., 351 Ga. App. 455, 829 S.E.2d 193, 2019 Ga. App. LEXIS 423 (2019), cert. denied, No. S19C1531, 2020 Ga. LEXIS 164 (Ga. Feb. 28, 2020).

Application

Defendants were bound by admissions which were never expressly withdrawn. — Defendants, who never expressly withdrew the admissions contained in the pleadings, were bound by the admissions, and even if the amendment to their answer impliedly withdrew the admissions, the defendants would still be faced with the admissions as evidence. Strozier v. Simmons U.S.A. Corp., 192 Ga. App. 601, 385 S.E.2d 677, 1989 Ga. App. LEXIS 1088 (1989) (decided under former O.C.G.A. § 24-3-30).

Pleading "heir at law." — Pleading "admission" that a particular person was

Application (Cont'd)

an heir at law of the deceased was not conclusive against the pleader. Scott v. Jefferson, 174 Ga. App. 651, 331 S.E.2d 1, 1985 Ga. App. LEXIS 1917 (1985) (decided under former O.C.G.A. § 24-3-30).

Withdrawn admission of execution of guaranty.— Doctor's withdrawn admission that the doctor executed the guaranty did not create a genuine issue of material fact as to whether the doctor was personally bound by it as the doctor's withdrawn admission that the doctor guaranteed payment of all sums owing under the lease was only an opinion or conclusion as to the legal effect of that instrument and could not be used to the lessor's advantage. Citrus Tower Blvd. Imaging Ctr. v. David S. Owens, MD, PC, 325 Ga. App. 1, 752 S.E.2d 74, 2013 Ga. App. LEXIS 954 (2013).

Appellants made admission in judicio, in their motion for new trial or in the alternative motion to amend judgment, of the fact that the probate court "entered a judgment styled 'Final Order'"; this admission in judicio expressed the fact that the order was entered on the date specified. Jabaley v. Jabaley, 208 Ga. App. 179, 430 S.E.2d 119, 1993 Ga. App. LEXIS 478 (1993), cert. denied, No. S93C1068, 1993 Ga. LEXIS 757 (Ga. July 1, 1993) (decided under former O.C.G.A. § 24-3-30).

Admission by materialman. — Trial court did not err in granting summary judgment to the materialman on the materialman's action to recover under a lien discharge bond, as the surety admitted in surety's response to the materialman's amended complaint that the materialman had performed all conditions precedent to bring the materialman's action; the surety's admission was a judicial admission that bound the surety and contradicted its defense that the materialman had not fulfilled a lien statute notice requirement. Washington Intl Ins. Co. v. Hughes Supply, Inc., 271 Ga. App. 50, 609 S.E.2d 99, 2004 Ga. App. LEXIS 1342 (2004), cert. denied, No. S05C0709, 2005 Ga. LEXIS 323 (Ga. Apr. 26, 2005) (decided under former O.C.G.A. § 24-3-30).

Exposure to asbestos admitted in judicio. — Claimant's allegations of injurious exposure to asbestos after the claimant's time with a former employer, which were made in an Illinois toxic tort suit, were admissions in judicio, conclusive, and binding against the claimant. McKenney's, Inc. v. Sinyard, 350 Ga. App. 260, 828 S.E.2d 639, 2019 Ga. App. LEXIS 285 (2019), cert. denied, No. S19C1348, 2020 Ga. LEXIS 25 (Ga. Jan. 13, 2020).

Admissions in brief used to find contempt. — In a child custody dispute and contempt proceeding arising out of the parent's refusal to participate in a court-ordered custody evaluation, the trial judge could find the parent in contempt based on the parent's response to the motion in which the parent expressly defied the evaluation order and declared to be justified in refusing to sign the required documents. Murphy v. Murphy, 330 Ga. App. 169, 767 S.E.2d 789, 2014 Ga. App. LEXIS 760 (2014), cert. denied, No. S15C0640, 2015 Ga. LEXIS 164 (Ga. Mar. 2, 2015).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d Evidence, § 787.

C.J.S.

31A C.J.S., Evidence, § 418 et seq.

ALR.

Admissibility as evidence of pleadings as containing admissions against interest, 14 A.L.R. 22; 90 A.L.R. 1393; 52 A.L.R.2d 516.

Necessity in action on judgment of sister state confessed under warrant of attorney, of alleging and proving the law of the latter state permitting such judgment, 155 A.L.R. 921.

Admissibility in evidence of withdrawn, superseded, amended, or abandoned pleading as containing admissions against interest, 52 A.L.R.2d 516.

Admissibility of pleading as evidence against pleader, on behalf of stranger to proceedings in which pleading was filed, 63 A.L.R.2d 412.

Counsel's right, in summation in civil case, to point out inconsistencies between

opponent's pleading and testimony, 72 A.L.R.2d 1304.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 A.L.R.2d 1224.

24-8-822. Right to have whole conversation heard.

When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence.

History.
Code 1981, § 24-8-822, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3738, former Code 1873, § 3791, former Code 1882, § 3791, former Penal Code 1895, § 1004, former Civil Code 1910, § 5783, former Code 1933, § 38-410, and former O.C.G.A. § 24-3-38 are included in the annotations for this Code section.

It is the universal rule, in both civil and criminal cases, that if part of a conversation is introduced, all that is said in the same conversation which is relevant to the issue should be admitted. West v. State, 200 Ga. 566, 37 S.E.2d 799, 1946 Ga. LEXIS 305 (1946) (decided under former Code 1933, § 38-410).

Admission defined. — An admission is positive or substantive proof of the facts asserted. Seaboard Coast Line R.R. v. Duncan, 123 Ga. App. 479, 181 S.E.2d 535, 1971 Ga. App. LEXIS 1270 (1971) (decided under former Code 1933, § 38-410).

An admission is an out-of-court statement which is inconsistent with the contention of the party. Seaboard Coast Line R.R. v. Duncan, 123 Ga. App. 479, 181 S.E.2d 535, 1971 Ga. App. LEXIS 1270 (1971) (decided under former Code 1933, § 38-410).

All of confession must be admitted. — On the trial of a person charged with an offense, it is error to admit part of the person's confession and exclude the other part. Long v. State, 22 Ga. 40, 1857 Ga. LEXIS 106 (1857) (decided under former law); Peterson v. State, 47 Ga. 524, 1873 Ga. LEXIS 155 (1873).

Because the earlier exculpatory portions of the defendant's transcribed statement were relevant as to both whether the defendant committed the rape and whether the defendant's statement was voluntary, the trial court violated the rule of completeness and abused the court's discretion when the court excluded those earlier portions of that statement; however, the error was harmless because the admitted and improperly excluded evidence showed overwhelmingly that the defendant was guilty of rape, whether principally or as a party to the crime, rendering it highly probable that any error in failing to admit the earlier portions of the defendant's statement did not contribute to the jury's verdict. Morales v. State, 337 Ga. App. 614, 788 S.E.2d 535, 2016 Ga. App. LEXIS 381 (2016).

Remainder of conversation shown by cross-examination. — Generally, when part of a conversation has been introduced in evidence, the rest of the conversation may be brought out by the opposite party on cross-examination of the witness. Cox v. State, 64 Ga. 374, 37 Am. R. 76 (1879). See Betts v. State, 66 Ga. 508, 1881 Ga. LEXIS 47 (1881) (decided under former Code 1873, § 3791).

No cross-examination when no direct examination. — Trial court did not err in preventing the defendant from cross-examining the investigating officer about an incriminating statement made

by the defendant after the state introduced evidence concerning the statement. Former O.C.G.A. §§ 24-3-38 and 24-9-64 (see now O.C.G.A. §§ 24-8-822 and 24-6-611) ("The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him") were inapplicable because there had been no direct examination relating to any part of the statement by the state. Davis v. State, 261 Ga. 382, 405 S.E.2d 648, 1991 Ga. LEXIS 324 (1991) (decided under former O.C.G.A. § 24-3-38).

Refusal to state remainder of conversation. — If in the examination in chief the witness should testify to anything occurring in such communications material to the witness's side of the case, the other party would have the right to inquire concerning the entire conversation. If there should be anything tending to incriminate the witness and the witness should refuse to answer as to it, the whole conversation should be excluded. Young v. State, 65 Ga. 525, 1880 Ga. LEXIS 246 (1880) (decided under former Code 1873, § 3791).

Use to avoid impeachment. — When witness was asked about a conversation, with a view to laying a foundation to impeach the witness, the witness had the right to give the whole conversation so far as it is pertinent. Archer v. Gwinnett County, 110 Ga. App. 442, 138 S.E.2d 895, 1964 Ga. App. LEXIS 664 (1964) (decided under former Code 1933, § 38-410).

Irrelevant matters not admissible. — Matters in conversation or documents otherwise irrelevant, and wholly disconnected with the part first offered, were not thereby made admissible by the former statute. Brown v. State, 119 Ga. 572, 46 S.E. 833, 1904 Ga. LEXIS 291 (1904) (decided under former Penal Code 1895, § 1004).

Since past sexual experiences of a victim of child molestation were not shown to be relevant, the trial court did not err by redacting such material from a taped interview of the victim. Roberts v. State, 232 Ga. App. 745, 503 S.E.2d 614 (decided under former O.C.G.A. § 24-3-38).

In a prosecution for rape, the omission, premised on the former rape-shield statute, of defendant's reference to the victim as a "well known whore" in a statement to police was not error. Johnson v. State, 238 Ga. App. 677, 520 S.E.2d 221 (decided under former O.C.G.A. § 24-3-38).

Admissibility into evidence of a complete one page letter to a detective that contained defendant's signature at the bottom was not affected by the fact that other pages enclosed with the letter, relating to the alleged criminal activity of other people, had been forwarded by the detective to the Georgia Bureau of Investigation. Boatman v. State, 272 Ga. 139, 527 S.E.2d 560, 2000 Ga. LEXIS 208 (2000) (decided under former O.C.G.A. § 24-3-38).

Matters irrelevant and wholly disconnected with the conversation first offered are not rendered admissible by admission of some of the conversation. Brown v. State, 119 Ga. 572, 46 S.E. 833, 1904 Ga. LEXIS 291 (1904) (decided under former Penal Code 1895, § 1004).

Self-serving declarations. — In a suit by an executrix to recover certain personal property from another, there was no error in excluding a self-serving declaration made by the surviving party to a contract under which the possession of the property in dispute was held by the surviving party, which attempted to set up an additional claim or demand against the deceased party to the contract, as a basis for the surviving party's adverse possession. May v. Subers, 19 Ga. App. 306, 91 S.E. 435, 1917 Ga. App. LEXIS 103 (1917) (decided under former Civil Code 1910, § 5783).

Subsequent conversations. — In a subsequent conversation with the same person and upon the same subject, what was said in the first admission, in the absence of something to the contrary, is necessarily understood, and must be taken and considered as a component part of the subsequent conversation. West v. State, 200 Ga. 566, 37 S.E.2d 799, 1946 Ga. LEXIS 305 (1946) (decided under former Code 1933, § 38-410).

Indicative of other crimes not objection. — Testimony which constitutes an admission by the defendant regarding the offense for which the defendant is on trial is not subject to objection for the reason that the testimony likewise indi-

cates the defendant was guilty of another offense since the language is such that it is impossible to convey the defendant's meaning without repeating the complete statement. Crider v. State, 98 Ga. App. 164, 105 S.E.2d 506, 1958 Ga. App. LEXIS 534 (1958) (decided under former Code 1933, § 38-410).

Failure to hear whole conversation. — That a witness did not hear all of the conversation about which the witness is asked to testify is no ground of objection to the witness stating as much of the conversation as the witness did hear. Westmoreland v. State, 45 Ga. 225, 1872 Ga. LEXIS 220 (1872) (decided under former Code 1868, § 3738); Woolfolk v. State, 85 Ga. 69, 11 S.E. 814, 1890 Ga. LEXIS 4 (1890) (decided under former Code 1882, § 3791); Lynn v. State, 140 Ga. 387, 79 S.E. 29, 1913 Ga. LEXIS 142 (1913) (decided under former Penal Code 1910, § 1030).

Extracts from prior statements. — An extract, shown to be substantially correct, from a prisoner's statement made on a former trial was admissible without offering the entire statement, though it was shown that the statement made at the former trial as taken down by the official reporter had been lost. Medlin v. State, 149 Ga. 23, 98 S.E. 551, 1919 Ga. LEXIS 96 (1919) (decided under former Penal Code 1910, § 1030).

Part of trial report used. — State may read in evidence a part of a stenographic report of a former trial without putting in the whole, the other party being at liberty to introduce the balance, or so much thereof as is pertinent. Burnett v. State, 87 Ga. 622, 13 S.E. 552, 1891 Ga. LEXIS 247 (1891) (decided under former Code 1882, § 3791).

Recorded telephone conversations with an informant. — There was circumstantial evidence that a defendant was the participant in recorded phone conversations with an informant; therefore the conversations were admissible as admissions of a party opponent under former O.C.G.A. § 24-3-31 (see now O.C.G.A. § 24-8-801), and the entirety of the calls were admissible under former O.C.G.A. § 24-3-38. Kimble v. State, 301 Ga. App. 237, 687 S.E.2d 242, 2009 Ga. App. LEXIS 1358 (2009), cert. denied, No. S10C0570, 2010 Ga. LEXIS 464 (Ga. May 17, 2010), cert. denied, No. S10C0569, 2010 Ga. LEXIS 466 (Ga. May 17, 2010) (decided under former O.C.G.A. § 24-3-38).

When a part of a conversation, which amounts to an incriminatory admission, is admitted in evidence, it is the right of the accused to bring out other portions of the same conversation, even though it is self-serving in its nature, or exculpatory, in that it justifies, excuses, or mitigates the act. West v. State, 200 Ga. 566, 37 S.E.2d 799, 1946 Ga. LEXIS 305 (1946) (decided under former Code 1933, § 38-410).

It was error to deny the accused the right, under cross-examination, to have a witness further testify what the accused told the witness in the first conversation which may tend to exculpate the accused after a witness had testified as to a second conversation containing an admission by the accused. West v. State, 200 Ga. 566, 37 S.E.2d 799, 1946 Ga. LEXIS 305 (1946) (decided under former Code 1933, § 38-410).

Incomplete return. — When a plaintiff offered in evidence an incomplete return of an administrator as an admission, and it had folded in it various receipts, accounts, etc., referred to as vouchers, plaintiff was not compelled to put the vouchers in evidence along with the returns. That was the right of the defendants, if the defendants could show that the enclosed were either a part of the admission or connected therewith. Dowling v. Feeley, 72 Ga. 557, 1884 Ga. LEXIS 295 (1884) (decided under former Code 1882, § 3791).

Admission of partial statement upheld. — In a prosecution for rape, despite former O.C.G.A. § 24-3-38, the rape shield statute prohibited the admission of a portion of defendant's statement in which the defendant said that the victim had sexual intercourse with the victim's cousin. Snow v. State, 228 Ga. App. 649, 492 S.E.2d 564 (decided under former O.C.G.A. § 24-3-38).

Trial court did not err by refusing the defendant's request to admit only the portions of letters written by the codefendant

that cast the codefendant in a bad light relative to the crimes and excluding other portions that described the defendant's role in the crimes as being more significant than the defendant had described in a custodial interview because the defendant was not permitted to admit portions of the letters for the purportedly-limited purpose of showing the codefendant's state of mind without waiving the defendant's objections to the state's introduction of the remainder of the letters. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, 2010 Ga. LEXIS 186, cert. denied, 562 U.S. 1011, 131 S. Ct. 522, 178 L. Ed. 2d 385, 2010 U.S. LEXIS 8606 (2010) (decided under former O.C.G.A. § 24-3-38).

State's introduction of a partial recording of a phone call that the defendant made to the defendant's mother did not violate the rule of completeness because the portion of the call in which the defendant told the mother about a potential plea offer was unrelated to the later conversation about the defendant's uncle, who was an eyewitness to the shooting. Jackson v. State, 301 Ga. 866, 804 S.E.2d 367, 2017 Ga. LEXIS 702 (2017).

Trial court did not err by allowing the state to introduce the defendant's recorded interrogation into evidence with the defendant's statements that the victim told the defendant that the victim was almost 18 years old and that the defendant would not have had sex with the victim if the defendant had known that the victim was younger redacted as the defendant's belief as to the victim's age was not relevant because it was not an essential element of either statutory rape or child molestation; mistake of fact regarding the victim's age was not a defense to either crime; and any statement the victim might have given regarding the victim's age was not admissible for impeachment purposes. West v. State, 344 Ga. App. 274, 808 S.E.2d 914, 2017 Ga. App. LEXIS 594 (2017), cert. denied, No. S18C0778, 2018 Ga. LEXIS 608 (Ga. Aug. 27, 2018), cert. denied, 139 S. Ct. 947, 203 L. Ed. 2d 136, 2019 U.S. LEXIS 783 (2019).

Death of party making statements. — Whole conversation should go in under the former statute, though involving statements made by one since dead. Powell v. Watts, 72 Ga. 770, 1884 Ga. LEXIS 319 (1884) (decided under former Code 1882, § 3791).

At the defendant's trial for DUI and battery, the trial court did not err in excluding admission of the sheriff's return call to the homeowner, who then admitted that punching the defendant's spouse was accidental, as hearsay, because the emergency leading to the homeowner's two 9-1-1 calls had then abated, making the statement testimonial, and the homeowner had later died. Further, the defendant was acquitted of the battery charge. Danley v. State, 342 Ga. App. 61, 802 S.E.2d 851, 2017 Ga. App. LEXIS 306 (2017), overruled in part, McClure v. State, 306 Ga. 856, 834 S.E.2d 96, 2019 Ga. LEXIS 643 (2019).

Non-testifying witness's hearsay statement. — Pretermitting whether a complained-of hearsay statement was admissible under the rule of completeness, admission of the statement was harmless beyond a reasonable doubt given that the admission was cumulative of other positive witness identifications, defendant's own confession, and the videotaped evidence depicting defendant robbing the store, all of which overwhelmingly established defendant's guilt. Jackson v. State, 262 Ga. App. 451, 585 S.E.2d 745, 2003 Ga. App. LEXIS 953 (2003), overruled in part, Carter v. State, 266 Ga. App. 691, 598 S.E.2d 76, 2004 Ga. App. LEXIS 456 (2004), overruled in part as stated in Mitchell v. State, 283 Ga. App. 456, 641 S.E.2d 674, 2007 Ga. App. LEXIS 86 (2007), overruled in part as stated in Grimes v. State, 291 Ga. App. 585, 662 S.E.2d 346, 2008 Ga. App. LEXIS 579 (2008) (decided under former O.C.G.A. § 24-3-38).

Law student's testimony on pretrial interview admissible. — Trial court did not improperly admit a law student's testimony about a pretrial interview of a witness because the testimony was not improper bolstering but admissible pursuant to the rule of completeness and former O.C.G.A. § 24-3-38 (see now O.C.G.A. § 24-8-822). Westbrook v. State, 291 Ga. 60, 727 S.E.2d 473, 2012 Ga. LEXIS 441

(2012) (decided under former O.C.G.A. § 24-3-38).

Refusal to utilize remainder of statements. — Trial court erred in denying a codefendant's motion to sever the trial from the defendant's trial because the codefendant was not allowed to introduce the exculpatory portions of the statements that explained the excerpted admissions introduced by the state, which supported the codefendant's antagonistic defense that the codefendant was present at the robberies due to coercion by the defendant. To avoid potential Bruton issues, the state introduced only those portions of the codefendant's 9-1-1 calls or custodial statements made establishing that the codefendant was at the scene of two robberies, that the codefendant's vehicles were used, and that the codefendant sent police to a motel room to investigate the robberies, but refused the additional portions of the statements that tended to support the codefendant's defense that the codefendant was coerced into participating in the crimes. Bowe v. State, 288 Ga. App. 376, 654 S.E.2d 196, 2007 Ga. App. LEXIS 1202 (2007), cert. dismissed, No. S08C0548, 2008 Ga. LEXIS 318 (Ga. Mar. 31, 2008) (decided under former O.C.G.A. § 24-3-38).

Trial court erred in excluding testimony from a witness that, during a lengthy conversation with the defendant after the defendant killed the defendant's wife, the defendant told the witness the wife had been unfaithful, that the defendant did not mean for the wife's death to happen, and the defendant loved the wife, because such testimony was admissible under the rule of completeness. Allaben v. State, 299 Ga. 253, 787 S.E.2d 711, 2016 Ga. LEXIS 420 (2016).

Assuming that the son's statement fell within the scope of the rule of completeness, the trial court did not abuse the court's discretion by not allowing the defendant to cross-examine the son with regard to the son's entire statement because the son's statement to the police was not introduced into evidence or published to the jury and the statement did not even appear in the trial record. The son simply refreshed his recollection from the statement with regard to what the son had told the police and then testified based on the son's recollection of the events in question. Gialenios v. State, 310 Ga. 869, 855 S.E.2d 559, 2021 Ga. LEXIS 79, overruled in part, Outlaw v. State, 311 Ga. 396, 858 S.E.2d 63, 2021 Ga. LEXIS 197 (2021).

Playing only portion of recording of police interview of witness. — Defendant did not show that the trial court plainly erred by not allowing the defendant to play the entire recording of a witness's police interview because the trial court allowed the defendant to play an additional segment of the recording to show that the witness's prior statements to the police might have been affected by medication; and the defendant did not identify any other specific statements in the portions of the recording that the state played for the jury which needed to be explained by playing the rest of the witness's interview. Thompson v. State, 304 Ga. 146, 816 S.E.2d 646, 2018 Ga. LEXIS 459 (2018).

Failure to listen to all of audiotape was harmless error. — In a recorded conversation, the defendant denied committing a murder. Assuming that under former O.C.G.A. § 24-3-38, the defendant should have been allowed to play the audiotape in its entirety because an accomplice had testified to a portion of the conversation, any error was harmless as the defendant's recorded denial of involvement would have been cumulative of other evidence. Patterson v. State, 285 Ga. 597, 679 S.E.2d 716, 2009 Ga. LEXIS 396 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892, 2010 U.S. LEXIS 296 (2010) (decided under former O.C.G.A. § 24-3-38).

Ineffective assistance of counsel not established. — Defendant failed to show that trial counsel was ineffective by not arguing the rule of completeness, former O.C.G.A. § 24-3-38, as a means to get the defendant's entire post-stabbing statement into evidence because there were discrepancies between the defendant's trial testimony and the account of a witness regarding a statement the defendant allegedly made on the night of the stabbing; therefore, an acquittal would not likely have resulted had the jury heard the witness' testimony in its entirety. Car-

ruth v. State, 290 Ga. 342, 721 S.E.2d 80, 2012 Ga. LEXIS 24 (2012) (decided under former O.C.G.A. § 24-3-38).

Issue not preserved for review. — "Rule of completeness" as a ground for admissibility was not preserved for review because defense counsel did not raise the "rule of completeness" as a ground for allowing a witness to testify to the defendant's entire statement. Carruth v. State, 290 Ga. 342, 721 S.E.2d 80, 2012 Ga. LEXIS 24 (2012) (decided under former O.C.G.A. § 24-3-38).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, § 759.

C.J.S.

31A C.J.S., Evidence, § 518.

ALR.

Proof of entire conversation containing alleged confession, 2 A.L.R. 1017; 26 A.L.R. 541.

Duty of court to instruct regarding exculpatory or mitigating statements in confession or admission introduced by prosecution, 116 A.L.R. 1459.

Party's waiver of privilege as to communications with counsel by taking stand and testifying, 51 A.L.R.2d 521.

Testifying in civil proceeding as waiver of privilege against self-incrimination, 72 A.L.R.2d 830.

24-8-823. Admissions and confessions received with care; no conviction on uncorroborated confession.

All admissions shall be scanned with care, and confessions of guilt shall be received with great caution. A confession alone, uncorroborated by any other evidence, shall not justify a conviction.

History.

Code 1981, § 24-8-823, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3739, former Code 1873, § 3792, Code 1882, § 3792, former Civil Code 1895, § 5197, former Penal Code 1895, §§ 1005, 1006, former Penal Code 1910, § 1031, former Code 1933, § 38-420, and former O.C.G.A. § 24-3-53 are included in the annotations for this Code section.

History generally. — The opinion of Judge Lumpkin in Miller v. Cotten, 5 Ga. 341 (1848), had been since followed, and from it and its successors on the same line the provisions of the former statute were drawn; in fact the former version of this section embodied principles, long previously established by the common-law courts, and were merely declaratory of these principles. Beall v. Clark, 71 Ga. 818, 1883 Ga. LEXIS 281 (1883) (decided under former Code 1882, § 3792).

Reason for the rule. — All confessions should be received with care and caution, not on account of the character of the testimony, but on account of the fact of their transmission through one or two different channels with consequent liability of mistake as to what was said, and

liability of mistake in repeating. Calvin v. State, 118 Ga. 73, 44 S.E. 848, 1903 Ga. LEXIS 449 (1903) (decided under former Penal Code 1895, § 1005).

That a witness is liable to misunderstand the language of the one making the confession is another reason for the rule. Minton v. State, 99 Ga. 254, 25 S.E. 626, 1896 Ga. LEXIS 330 (1896) (decided under former Penal Code 1895, §§ 1005, 1006).

Discretion of court. — While admissions should be scanned with care, admissions are evidence; and when a jury bases a verdict thereon, and the trial judge approves the finding, the reviewing court will not interfere with the judge's discretion in refusing a new trial. Burk v. Hill, 119 Ga. 38, 45 S.E. 732, 1903 Ga. LEXIS 14 (1903) (decided under former Civil Code 1895, § 5197).

When trial judge resolves issues in favor of admissibility, such factual and credibility determinations must be accepted by appellate courts unless such determinations are clearly erroneous. Cunningham v. State, 248 Ga. 835, 286 S.E.2d 427, 1982 Ga. LEXIS 696 (1982) (decided under former Code 1933, § 38-420).

It is not required that admissions be corroborated by other evidence in the case, as are confessions of the crime. Sheffield v. State, 188 Ga. 1, 2 S.E.2d 657, 1939 Ga. LEXIS 469 (1939) (decided under former Code 1933, § 38-420); Lowe v. State, 267 Ga. 180, 476 S.E.2d 583 (decided under former O.C.G.A. § 24-3-53).

While admissions are to be scanned with care and considered, along with other evidence, for what the admissions are worth, it is not required that the admissions be corroborated by other evidence as are confessions to a crime. Brown v. State, 167 Ga. App. 851, 307 S.E.2d 737, 1983 Ga. App. LEXIS 3363 (1983) (decided under former O.C.G.A. § 24-3-38); Williams v. State, 246 Ga. App. 347, 540 S.E.2d 305, 2000 Ga. App. LEXIS 1227 (2000), cert. denied, No. S01C0355, 2001 Ga. LEXIS 289 (Ga. Mar. 19, 2001) (decided under former O.C.G.A. § 24-3-38).

Defendant's statement in which the defendant did not admit every essential element of the charged offense constituted an admission rather than a confession for which no corroboration was required. Stowers v. State, 205 Ga. App. 518, 422 S.E.2d 870, 1992 Ga. App. LEXIS 1236 (1992), cert. denied, No. S93C0060, 1992 Ga. LEXIS 1003 (Ga. Dec. 2, 1992); Herrington v. State, 243 Ga. App. 265, 533 S.E.2d 133, 2000 Ga. App. LEXIS 455 (2000) (decided under former O.C.G.A. § 24-3-53).

Standard for determining admissibility of confessions is preponderance of the evidence. Bassett v. State, 159 Ga. App. 829, 285 S.E.2d 260, 1981 Ga. App. LEXIS 2835 (1981) (decided under former Code 1933, § 38-420).

Applicable rules when state relies on defendant's statements to show intent. — When the state solely relies upon the extrajudicial statements of the accused alone to show intent to commit the crime charged and no other evidence is introduced to show such intent there are two rules which apply: one rule holds that the defendant's explanation of the crime charged must be accepted since the defendant's statement is consistent with the physical facts shown, and the other rule holds that the defendant's explanation may be rejected by the trial court when the defendant's statement is not consistent with and does not explain the other direct and circumstantial evidence. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398, 1981 Ga. LEXIS 834 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398, 1983 U.S. LEXIS 4712 (1983) (decided under former Code 1933, § 38-420).

Fact that language of confession indicates commission of other offense. — It is no valid ground of objection to the admission in evidence of an incriminatory statement or confession made by the accused in a criminal case that the language indicated that the accused had committed also another and separate offense. Laney v. State, 159 Ga. App. 609, 284 S.E.2d 114, 1981 Ga. App. LEXIS 2722 (1981) (decided under former Code 1933, § 38-420).

Admission is not inadmissible on grounds that it was written by someone else from defendant's dictation, even if defendant had not signed the statement

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as defendant's own because the officer who interviewed defendant would be permitted to testify to the content of the verbal statement voluntarily given the officer by defendant. Graves v. State, 180 Ga. App. 446, 349 S.E.2d 519, 1986 Ga. App. LEXIS 2738 (1986) (decided under former O.C.G.A. § 24-3-53).

Admission defined. — Admissions relate to any fact material to the issue, and are to be scanned with care and considered, with any other evidence, for what the admissions are worth. Sheffield v. State, 188 Ga. 1, 2 S.E.2d 657, 1939 Ga. LEXIS 469 (1939) (decided under former Code 1933, § 38-420).

An admission as applied to criminal cases, is the avowal of a fact or of circumstances from which guilt may be inferred, but only tending to prove the offense charged, and not amounting to a confession of guilt. Oliphant v. State, 52 Ga. App. 105, 182 S.E. 523, 1935 Ga. App. LEXIS 64 (1935) (decided under former Code 1933, § 38-420).

Unless the statement of the defendant is broad enough to comprehend every essential element necessary to make out the case against the defendant, it cannot be said to be an admission of guilt. Johnson v. State, 204 Ga. 528, 50 S.E.2d 334, 1948 Ga. LEXIS 479 (1948) (decided under former Code 1933, § 38-420).

An admission as applied to a criminal case is the statement made by the defendant of a fact or facts pertinent to the issue, and tending, in connection with other facts and circumstances, to prove the guilt of the accused, but which does not contain all the essential elements of the crime. Johns v. State, 79 Ga. App. 429, 54 S.E.2d 142, 1949 Ga. App. LEXIS 664 (1949) (decided under former Code 1933, § 38-420).

An admission of the main fact from which the essential elements of the criminal act may be inferred amounts to an admission of the crime itself. Jones v. State, 223 Ga. 157, 154 S.E.2d 228, 1967 Ga. LEXIS 391, rev'd, 389 U.S. 24, 88 S. Ct. 4, 19 L. Ed. 2d 25, 1967 U.S. LEXIS 503 (1967) (decided under former Code 1933, § 38-420).

Confession defined. — Confession is a voluntary admission of guilt. Oliphant v. State, 52 Ga. App. 105, 182 S.E. 523, 1935 Ga. App. LEXIS 64 (1935) (decided under former Code 1933, § 38-420).

The requirements to constitute a confession are that the facts admitted must comprise all the essential elements necessary to make out the case against the defendant, yet a confession is sufficiently plenary in substance, and responsive to the requirement that it contain all the essential elements necessary to make out the case, when the confession, though lacking in a recital of the many details constituting the crime, does disclose certain facts from which the main fact of guilt is revealed. Meriwether v. State, 63 Ga. App. 667, 11 S.E.2d 816, 1940 Ga. App. LEXIS 523 (1940) (decided under former Code 1933, § 38-420).

Confession is a person's admission of declaration of the person's agency or participation in a crime, and is restricted to admissions of guilt. Johnson v. State, 204 Ga. 528, 50 S.E.2d 334, 1948 Ga. LEXIS 479 (1948) (decided under former Code 1933, § 38-420).

Confession is an admission of the main fact in a charge of crime, without any exculpatory explanation. Johns v. State, 79 Ga. App. 429, 54 S.E.2d 142, 1949 Ga. App. LEXIS 664 (1949) (decided under former Code 1933, § 38-420).

Incriminating statements and confessions distinguished. — There is a difference between an incriminating statement and a confession of guilt. In the former only one or more facts entering into the criminal act is admitted, while in the latter the entire criminal act is confessed. Cumberlander v. State, 53 Ga. App. 276, 185 S.E. 379, 1936 Ga. App. LEXIS 65 (1936) (decided under former Code 1933, § 38-420); Johnson v. State, 204 Ga. 528, 50 S.E.2d 334, 1948 Ga. LEXIS 479 (1948) (decided under former Code 1933, § 38-420).

A confession is a voluntary statement acknowledging guilt of a criminal offense, and the term admission ordinarily signifies the avowal or acknowledgment of a fact or of circumstances from which guilt may be inferred and only tending to prove the offense charged, but not amounting to

a confession of guilt. Norrell v. State, 116 Ga. App. 479, 157 S.E.2d 784, 1967 Ga. App. LEXIS 859 (1967) (decided under former Code 1933, § 38-420).

An incriminating statement, to be the equivalent of a confession of guilt, must be so comprehensive as to include every essential element of the offense. Johnson v. State, 204 Ga. 528, 50 S.E.2d 334, 1948 Ga. LEXIS 479 (1948); Norrell v. State, 116 Ga. App. 479, 157 S.E.2d 784, 1967 Ga. App. LEXIS 859 (1967) (decided under former Code 1933, § 38-420).

Admission as constituting high degree of evidence. — There was nothing in the provisions of the former statute, nor in any other statute of the state, which declared that when an admission was established to the satisfaction of the jury the admission constituted a high degree of evidence and the jury should give it great weight. Raleigh & G.R.R. v. Allen, 106 Ga. 572, 32 S.E. 622, 1899 Ga. LEXIS 728 (1899) (decided under former Civil Code 1895, § 5197).

Confession alone may be evidence. — Since it is unnecessary that a confession be corroborated by independent proof in all its details and particulars, and since a confession is direct evidence and not circumstantial evidence, a confession is sufficient to prove the manner and means of death as charged in an indictment, without independent corroborating evidence, just as it is the rule that once the requirements of the corpus delicti are met, the confession of the accused is available to identify the person confessing as the criminal agent. McVeigh v. State, 205 Ga. 326, 53 S.E.2d 462, 1949 Ga. LEXIS 357 (1949) (decided under former Code 1933, § 38-420).

Ambiguous admissions. — Admissions contained in a letter are to be scanned with care if the admissions are susceptible of more than one construction, and if, in order to discover their true meaning, attention should be directed to the precise terms employed by the writer. Richmond & D.R.R. v. Kerler, 88 Ga. 39, 13 S.E. 833, 1891 Ga. LEXIS 291 (1891) (decided under former Code 1882, § 3792).

Admissions in pleas. — Fact that an admission made; by the defendant in a plea which had been stricken by amendment and was put in evidence by the introduction of the plea containing the admission had, before the plea was amended, possessed the character of an admission in judicio, does not relieve the admission from the application of the rule of law (generally applicable to all admissions) that admissions should be scanned with care and it was not error for the court so to charge. Griffin v. Browning, 51 Ga. App. 743, 181 S.E. 801, 1935 Ga. App. LEXIS 459 (1935) (decided under former Code 1933, § 38-420).

Admissions by infants. — In general, infants are not bound by their admissions. Howard v. Hall, 112 Ga. App. 247, 145 S.E.2d 70, 1965 Ga. App. LEXIS 656 (1965) (decided under former Code 1933, § 38-420).

While the decision of whether a child, or "infant," is competent to testify is one made in the sound discretion of the judge, based upon the capacity of the child to know the nature of the oath rather than upon the child's years, the admission in evidence of an infant's admission against interest must be very carefully scanned because of the child's immaturity and the deleterious effect such admissions would have. Howard v. Hall, 112 Ga. App. 247, 145 S.E.2d 70, 1965 Ga. App. LEXIS 656 (1965) (decided under former Code 1933, § 38-420).

Confessions of juveniles are scanned with more care and received with greater caution. Crawford v. State, 240 Ga. 321, 240 S.E.2d 824, 1977 Ga. LEXIS 1495 (1977), overruled in part, Clark v. State, 315 Ga. 423, 883 S.E.2d 317, 2023 Ga. LEXIS 13 (2023) (decided under former Code 1933, § 38-420); Howe v. State, 250 Ga. 811, 301 S.E.2d 280, 1983 Ga. LEXIS 627 (1983), overruled in part, Clark v. State, 315 Ga. 423, 883 S.E.2d 317, 2023 Ga. LEXIS 13 (2023) (decided under former Code 1933, § 38-420).

Conviction not required to admit similar transaction evidence. — While former O.C.G.A. § 24-3-53 did not allow a conviction based solely on an uncorroborated confession, such a limitation did not apply to the admission of prior similar transaction evidence regarding a defendant's involvement in a similar uncharged

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robbery as the defendant did not have to be convicted for such evidence to be admissible. Dean v. State, 292 Ga. App. 695, 665 S.E.2d 406, 2008 Ga. App. LEXIS 843 (2008) (decided under former O.C.G.A. § 24-3-53).

Accomplices. — Confession made by the accused and supported by evidence of the corpus delicti will serve as sufficient corroboration of the evidence of an accomplice. Westbrook v. State, 91 Ga. 11, 16 S.E. 100, 1892 Ga. LEXIS 483 (1892) (decided under former Code 1882, § 3792); Allen v. State, 91 Ga. 189, 16 S.E. 980, 1892 Ga. LEXIS 560 (1892) (decided under former Code 1882, § 3792); Schaefer v. State, 93 Ga. 177, 18 S.E. 552, 1893 Ga. LEXIS 374 (1893) (decided under former Code 1882, § 3792).

Proof of the corpus delicti, even though independent of the confession or evidence of an accomplice, does not at all corroborate the testimony of the confessing accomplice so as to authorize a conviction of another accomplice who has not confessed. Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248, 1940 Ga. App. LEXIS 111 (1940) (decided under former Code 1933, § 38-420).

Mere fact that the defendant had accomplices in the commission of a crime does not change the rule that proof of the corpus delicti may be sufficient corroboration of a confession of guilt to sustain a verdict of guilty, as it relates to the amount of evidence, other than the testimony of an accomplice, necessary to corroborate the confession in order to support a verdict of guilty. Moreover, evidence of the confessions is sufficient to corroborate the testimony of an accomplice so as to support a verdict of guilty against the confessor. Motes v. State, 66 Ga. App. 543, 18 S.E.2d 497, 1942 Ga. App. LEXIS 216 (1942) (decided under former Code 1933, § 38-420).

While it is the rule that the testimony of an accomplice must be corroborated by circumstances definitely connecting the accused with the perpetration of the crime, this is not the rule in reference to the corroboration of a confession. Lastinger v. State, 84 Ga. App. 760, 67 S.E.2d 411, 1951 Ga. App. LEXIS 787 (1951) (decided under former Code 1933, § 38-420).

Trial court's findings upheld on appeal. — Unless clearly erroneous, a trial court's findings as to factual determinations and credibility relating to the admissibility of a confession will be upheld on appeal. Bassett v. State, 159 Ga. App. 829, 285 S.E.2d 260, 1981 Ga. App. LEXIS 2835 (1981) (decided under former Code 1933, § 38-410).

Corroboration

Corroboration of admission not required. — Defendant's statement to an officer that the defendant's license was suspended was an admission and not a confession requiring corroboration under former O.C.G.A. § 24-3-53, because the defendant's statement did not include an admission to driving on a highway of the state, which was an essential element of the offense of driving with a suspended license under O.C.G.A. § 40-5-121(a). Griffin v. State, 302 Ga. App. 807, 692 S.E.2d 7, 2010 Ga. App. LEXIS 142 (2010), cert. denied, No. S10C1172, 2010 Ga. LEXIS 699 (Ga. Sept. 7, 2010) (decided under former O.C.G.A. § 24-3-53).

Corroboration of the defendant's statement was not required because the defendant claimed self-defense and, therefore, it was a mere incriminating statement. Thomas v. State, 308 Ga. 26, 838 S.E.2d 801, 2020 Ga. LEXIS 92 (2020).

Sufficiency of corroboration. — Corroborating testimony need not show the fact beyond a reasonable doubt, but is adequate if the testimony tends materially to corroborate the confession and to connect the defendant with the crime. Douglas v. State, 6 Ga. App. 157, 64 S.E. 490 (1909); Navarra v. State, 51 Ga. App. 321, 180 S.E. 375, 1935 Ga. App. LEXIS 680 (1935) (decided under former Code 1933, § 38-420); Logue v. State, 198 Ga. 672, 32 S.E.2d 397, 1944 Ga. LEXIS 450 (1944) (decided under former Code 1933, § 38-420).

Corroboration by manner of death. Sufficient corroboration of defendant's confession existed in the form of additional evidence regarding the manner in which the victim was killed and the vic-

tim's body disposed. Walsh v. State, 269 Ga. 427, 499 S.E.2d 332 (decided under former O.C.G.A. § 24-3-53).

Video as corroboration of property crime. — Store owner's testimony and the videotape concerning the commission of the burglary corroborated defendant's confession to entering the store with a shirt over defendant's head, stealing beer and cigarettes, and then selling them. Ward v. State, 242 Ga. App. 246, 529 S.E.2d 378, 2000 Ga. App. LEXIS 141 (2000) (decided under former O.C.G.A. § 24-3-53).

Corroboration in drug cases. — Defendant's cocaine possession conviction was affirmed as the defendant's statement that the defendant and two other men went to the victim's house to buy cocaine, that the victim came out of the victim's house with the cocaine and gave it to the defendant, and that the defendant split the cocaine with the defendant's accomplices was corroborated by proof that cash was found on the victim's bed next to several bags of a substance that later tested positive for crack cocaine. Williams v. State, 270 Ga. App. 424, 606 S.E.2d 871, 2004 Ga. App. LEXIS 1456 (2004) (decided under former O.C.G.A. § 24-3-53).

Corroboration by gun evidence. — Defendant's statement to the police was in the nature of an admission and defendant's conviction for malice and felony murder was corroborated by showing that the gun that defendant carried to the scene was the same gun that fired the fatal shot, that the defendant had access to the weapon, and that the defendant arranged the meeting with the victim. Flanders v. State, 279 Ga. 35, 609 S.E.2d 346, 2005 Ga. LEXIS 139 (2005) (decided under former O.C.G.A. § 24-3-53).

Evidence that the defendant possessed the murder weapon was sufficient under former O.C.G.A. § 24-3-53 to corroborate the defendant's confession that the defendant pointed a gun at a clerk in a convenience store and ultimately murdered the clerk. Moore v. State, 285 Ga. 157, 674 S.E.2d 315, 2009 Ga. LEXIS 85 (2009) (decided under former O.C.G.A. § 24-3-53).

Corroboration of confession sufficient. —Because defendant's confession was videotaped and defendant admitted to attacking the victim because defendant wanted money to buy drugs, the admission of defendant's confession via videotape was held to have been sufficiently corroborated because the two interviewing police officers both testified at the trial and established the corpus delicti of each crime, thereby providing the requisite corroboration to sustain the convictions for aggravated assault, armed robbery, kidnapping, and hijacking a motor vehicle. Cummings v. State, 272 Ga. App. 886, 614 S.E.2d 121, 2005 Ga. App. LEXIS 387 (2005) (decided under former O.C.G.A. § 24-3-53).

Defendant's confessions were sufficiently corroborated by the victim and the officer's testimony, and a confession to eight armed robberies was corroborated by testimony confirming when the crimes occurred, defendant's conduct during the crimes, and the use of a stolen car to flee. Robinson v. State, 276 Ga. App. 502, 623 S.E.2d 711, 2005 Ga. App. LEXIS 1297 (2005) (decided under former O.C.G.A. § 24-3-53).

Defendant's convictions for armed robbery and robbery by intimidation in violation of O.C.G.A. §§ 16-8-40(a)(2) and 16-8-41(a) were appropriate because the defendant's own confessions to participating in the crimes were corroborated by the testimony of the victims, among other evidence. Likewise, the defendant's codefendants' statements and testimony implicating the defendant in the crimes were corroborated by the defendant's confessions and the victims' testimony. Cantrell v. State, 299 Ga. App. 746, 683 S.E.2d 676, 2009 Ga. App. LEXIS 958 (2009) (decided under former O.C.G.A. § 24-3-53).

Defendant's confession was corroborated by independent evidence that the victim was found dead on the floor, that the victim died from manual strangulation, that the defendant was present at the time of the victim's death, and that the defendant previously had threatened to kill the victim in the victim's sleep. Merritt v. State, 292 Ga. 327, 737 S.E.2d 673, 2013 Ga. LEXIS 69 (2013) (decided under former O.C.G.A. § 24-3-53).

Evidence was sufficient to convict the defendant of armed robbery because the

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defendant admitted to committing the armed robbery and there was sufficient evidence corroborating the defendant's confession as the victim was working at a gas station; the defendant, with whom the victim was familiar with as a repeat customer, entered the gas station and asked the victim to retrieve something from behind the counter; when the victim turned the victim's back to the counter, the defendant, who was not disguised, was pointing a gun at the victim; the defendant threatened to kill the victim and demanded that the victim give the defendant the cash from the register; the victim complied; and the victim identified the defendant from a photo line-up and in court. Spratlin v. State, 336 Ga. App. 872, 785 S.E.2d 427, 2016 Ga. App. LEXIS 237 (2016).

Corroboration in sexual assault cases. — Trial court properly denied a defendant's motion for a directed verdict regarding at least five counts of the indictment charging four counts of aggravated child molestation and three counts of child molestation because the verdicts were not based solely on the defendant's uncorroborated confession. The evidence corresponded to the defendant's confession and was sufficient to establish the corpus delicti, namely that the crimes actually occurred, because it showed more than two improper sexual acts by the defendant against the defendant's child: the (1) testimony of a social worker; (2) the victim's audiotaped statement, in which the victim described how the defendant abused the victim; (3) the victim's trial testimony that the victim told the social worker the truth; and (4) evidence that the victim's behavior was typical of an abused child, were sufficient for the jury to find that the victim had been abused on numerous occasions. Hargrove v. State, 289 Ga. App. 363, 657 S.E.2d 282, 2008 Ga. App. LEXIS 91 (2008), cert. denied, No. S08C0970, 2008 Ga. LEXIS 500 (Ga. May 19, 2008) (decided under former O.C.G.A. § 24-3-53).

Statements as admissions not confessions. — Evidence demonstrating that the defendant shot and killed the victim did not consist only of the defendant's uncorroborated confessions to the defendant's aunt and ex-wife because the defendant did not make confessions, but made admissions; and, even if the defendant's statements were confessions, the corroborating evidence was ample as the victim obtained a protective order because the victim feared the defendant; the defendant stated that if the defendant could not have the victim no one could; the defendant argued with the victim only minutes before the defendant shot the victim; and the defendant followed the victim as the victim left a close friend's place of employment and continued to do so as the victim drove down Washington Street. McMullen v. State, 300 Ga. 173, 794 S.E.2d 118, 2016 Ga. LEXIS 758 (2016).

Evidence was sufficient to convict the defendant of felony murder in connection with the shooting death of the defendant's accomplice in an attempted armed robbery because the defendant told the accomplice's brother that the defendant, the accomplice, and another individual went to an apartment complex with the intent to rob the putative armed robbery victim, that the defendant knew the accomplice was armed, and that the accomplice was shot during the confrontation with the putative victim; the defendant admitted to being a party to the attempted armed robbery; and there was evidence corroborating the defendant's confession, including participation with the accomplice in renting the car found at the crime scene. Muckle v. State, 302 Ga. 675, 808 S.E.2d 713, 2017 Ga. LEXIS 972 (2017).

Evidence was sufficient to convict the defendant of malice murder, aggravated assault, and possession of a firearm in commission of a felony because, whether the defendant's three statements that the defendant shot two people amounted to confessions or merely admissions, other evidence sufficiently corroborated the defendant's participation in the crimes as one witness saw the defendant don a mask and jacket and take out a gun immediately before the shooting; a mask and jacket were recovered from the scene, with the defendant's keys in the pocket; and a trash bag outside of the defendant's former apartment contained a box of the same brand and caliber of ammunition used in the murder, along with personal

papers in the defendant's name. Mitchell v. State, 303 Ga. 491, 813 S.E.2d 367, 2018 Ga. LEXIS 204 (2018) (decided under former O.C.G.A. § 24-3-53).

Jury instruction on single witness and corroboration sufficient. — Trial court did not commit plain error in instructing the jury that a single witness was sufficient to prove a fact, without instructing the jury that the defendant's confession had to be corroborated because there was corroborating evidence as, although there were no eyewitnesses to the murder, two witnesses placed the defendant in the victim's home on the evening of the murder, and the defendant acknowledged to police that the defendant was there as late as 9:00 p.m.; and the defendant's mother told police that the mother's conversation with the defendant that the defendant killed the victim took place as the mother was going to bed, around 11:00 p.m. or midnight. Horton v. State, 310 Ga. 310, 849 S.E.2d 382, 2020 Ga. LEXIS 740 (2020).

Sufficient corroboration of confession of murder when no body was found. — Pursuant to former O.C.G.A. § 24-3-53, a defendant's confession was sufficiently corroborated by evidence that the victim disappeared near the time of the Super Bowl, that the victim left with the defendant to go to the Super Bowl, that the defendant always carried a .380 handgun, and that the defendant had shot the other victim. Rogers v. State, 290 Ga. 401, 721 S.E.2d 864, 2012 Ga. LEXIS 81 (2012), overruled in part, State v. Sims, 296 Ga. 465, 769 S.E.2d 62, 2015 Ga. LEXIS 97 (2015) (decided under former O.C.G.A. § 24-3-53).

All essential facts must be proved. — Amount of corroboration necessary to support the conviction is in every case a question of fact for the jury. But even if incriminatory admissions, supplemented by other circumstances, be equivalent to a confession, evidence that the accused confessed the commission of an offense would not be sufficient to authorize a conviction, unless all of the facts essential to establish that the alleged offense was in fact committed are satisfactorily proved. Boyd v. State, 4 Ga. App. 58, 60 S.E. 801, 1908 Ga. App. LEXIS 197 (1908) (decided under former Penal Code 1895, § 1005); West v. State, 6 Ga. App. 105, 64 S.E. 130, 1909 Ga. App. LEXIS 194 (1909) (decided under former Penal Code 1895, § 1005); Harvey v. State, 8 Ga. App. 660, 70 S.E. 141, 1911 Ga. App. LEXIS 91 (1911) (decided under former Penal Code 1910, § 1031); Davenport v. State, 12 Ga. App. 102, 76 S.E. 756, 1912 Ga. App. LEXIS 42 (1912) (decided under former Penal Code 1910, § 1031).

When juvenile defendants confessed to entering a vacant home and causing damage therein, and a police officer testified to the condition of the home and the damage the officer found upon investigation, together with witness statements from people who were with defendants prior to and after the acts, wherein the witnesses' testified that defendants indicated the defendants' intent to damage the house, there was sufficient evidence to support an adjudication of delinquency pursuant to O.C.G.A. § 15-11-2; there was sufficient corroborative evidence under former O.C.G.A. § 24-3-53 to support the conviction as well. In the Interest of Q.D., 263 Ga. App. 293, 587 S.E.2d 336, 2003 Ga. App. LEXIS 1180 (2003) (decided under former O.C.G.A. § 24-3-53).

Corroboration of confession in any particular. — Although an uncorroborated confession cannot support a conviction under former O.C.G.A. § 24-3-53, corroboration of a confession in any particular satisfied the requirements of the former statute. Sands v. State, 262 Ga. 367, 418 S.E.2d 55, 1992 Ga. LEXIS 582 (1992) (decided under former O.C.G.A. § 24-3-53); Miller v. State, 268 Ga. 1, 485 S.E.2d 752 (decided under former O.C.G.A. § 24-3-53).

Although an uncorroborated confession cannot support a conviction under former O.C.G.A. § 24-3-53, corroboration of a confession in any particular satisfied the requirements of the former statute; thus, when defendant's detailed confessions to two counts of armed robbery, two counts of theft by taking, three counts of aggravated assault, three counts of simple battery, three counts of kidnapping, and two counts of possessing a firearm during the commission of a crime were corroborated by the testimony of one of the victims who ultimately identified defendant as the per-

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son who placed a knife to the victim's neck during the robbery of the victim's spouse's store and forced the victim to the back of the store and secured the victim with duct tape, such evidence more than amply authorized the convictions. Phanamixay v. State, 260 Ga. App. 177, 581 S.E.2d 286, 2003 Ga. App. LEXIS 363 (2003) (decided under former O.C.G.A. § 24-3-53).

Failure to corroborate. — When the evidence pertaining to one count of the indictment was supported only by a confession, which was not corroborated by any evidence, the court committed reversible error in denying the motion for a new trial as to that count. Chapman v. State, 90 Ga. App. 845, 84 S.E.2d 485, 1954 Ga. App. LEXIS 831 (1954) (decided under former Code 1933, § 38-420).

Even though the defendant confessed to the crime of possession of cocaine, since the state did not offer the alleged cocaine in evidence or offer any other evidence that the substance found was cocaine, the trial court erred in denying defendant's motion for a directed verdict of acquittal. Johnson v. State, 205 Ga. App. 760, 423 S.E.2d 702, 1992 Ga. App. LEXIS 1394 (1992) (decided under former O.C.G.A. § 24-3-53).

Question for jury. — Former statute did not fix the amount of evidence necessary to corroborate a confession but left the question of its corroborative sufficiency entirely with the jury, who may consider the confession along with other facts and circumstances independent of and separate from the confession in determining whether or not the corpus delicti had been established to the jury's satisfaction. Murray v. State, 43 Ga. 256, 1871 Ga. LEXIS 209 (1871) (decided under former Code 1868, § 3739); Holsenbake v. State, 45 Ga. 43, 1872 Ga. LEXIS 160 (1872) (decided under former Code 1868, § 3739); Smith v. State, 64 Ga. 605, 1880 Ga. LEXIS 368 (1880) (decided under former Code 1873, § 3792); Cook v. State, 9 Ga. App. 208, 70 S.E. 1019, 1911 Ga. App. LEXIS 476 (1911) (decided under former Penal Code 1895, § 1005); Perdue v. State, 24 Ga. App. 50, 99 S.E. 797, 1919 Ga. App. LEXIS 401 (1919) (decided under former Penal Code 1910, § 1031); Hinson v. State, 152 Ga. 243, 109 S.E. 661, 1921 Ga. LEXIS 59 (1921) (decided under former Penal Code 1910, § 1031); Gilder v. State, 219 Ga. 495, 133 S.E.2d 861, 1963 Ga. LEXIS 490 (1963) (decided under former Penal Code 1910, § 1031); Navarra v. State, 51 Ga. App. 321, 180 S.E. 375, 1935 Ga. App. LEXIS 680 (1935) (decided under former Code 1933, § 38-420); Logue v. State, 198 Ga. 672, 32 S.E.2d 397, 1944 Ga. LEXIS 450 (1944) (decided under former Code 1933, § 38-420); Kicklighter v. State, 76 Ga. App. 246, 45 S.E.2d 719, 1947 Ga. App. LEXIS 424 (1947) (decided under former Code 1933, § 38-420); Figures v. State, 80 Ga. App. 832, 57 S.E.2d 629, 1950 Ga. App. LEXIS 791 (1950) (decided under former Code 1933, § 38-420); Gilder v. State, 219 Ga. 495, 133 S.E.2d 861, 1963 Ga. LEXIS 490 (1963) (decided under former Code 1933, § 38-420); Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870, 1972 Ga. App. LEXIS 905 (1972) (decided under former Code 1933, § 38-420); Hilliard v. State, 128 Ga. App. 157, 195 S.E.2d 772, 1973 Ga. App. LEXIS 1423 (1973) (decided under former Code 1933, § 38-420); Griswold v. State, 159 Ga. App. 22, 282 S.E.2d 679, 1981 Ga. App. LEXIS 2465 (1981) (decided under former Code 1933, § 38-420); Sheppard v. State, 165 Ga. App. 393, 301 S.E.2d 306, 1983 Ga. App. LEXIS 1881 (1983) (decided under former O.C.G.A. § 24-3-53); Singleton v. State, 195 Ga. App. 119, 393 S.E.2d 6, 1990 Ga. App. LEXIS 440 (1990) (decided under former O.C.G.A. § 24-3-38).

Amount of evidence necessary to corroborate a confession is left entirely within the province of the jury and corroboration in any material particular satisfies the requirements of the law. Reynolds v. State, 168 Ga. App. 555, 309 S.E.2d 867, 1983 Ga. App. LEXIS 3421 (1983) (decided under former O.C.G.A. § 24-3-38).

Defendant's confession was significantly corroborated by the victim's testimony that the defendant was the person who robbed the victim. Although the defendant challenged the accuracy of the identification, this was a credibility issue for the jury to resolve. Burns v. State, 288 Ga. App. 507, 654 S.E.2d 405, 2007 Ga.

App. LEXIS 1170 (2007) (decided under former O.C.G.A. § 24-3-38).

Proof of corpus delicti sufficient corroboration. — Conviction may be lawfully had upon a free and voluntary confession though the confession be not otherwise corroborated than by proof of the corpus delicti. Johnson v. State, 86 Ga. 90, 13 S.E. 282, 1890 Ga. LEXIS 188 (1890) (decided under former Code 1882, § 3792); Westbrook v. State, 91 Ga. 11, 16 S.E. 100, 1892 Ga. LEXIS 483 (1892) (decided under former Code 1882, § 3792); Allen v. State, 91 Ga. 189, 16 S.E. 980, 1892 Ga. LEXIS 560 (1892) (decided under former Code 1882, § 3792); Schaefer v. State, 93 Ga. 177, 18 S.E. 552, 1893 Ga. LEXIS 374 (1893) (decided under former Code 1882, § 3792); Simmons v. State, 18 Ga. App. 104, 88 S.E. 904, 1916 Ga. App. LEXIS 142 (1916) (decided under former Penal Code 1910, § 1005); Millen v. State, 175 Ga. 283, 165 S.E. 226, 1932 Ga. LEXIS 236 (1932) (decided under former Penal Code 1910, § 1005); Mathis v. State, 55 Ga. App. 727, 191 S.E. 272, 1937 Ga. App. LEXIS 475 (1937) (decided under former Code 1933, § 38-420); Wilson v. State, 57 Ga. App. 839, 197 S.E. 48, 1938 Ga. App. LEXIS 414 (1938) (decided under former Code 1933, § 38-420); Burns v. State, 188 Ga. 22, 2 S.E.2d 627, 1939 Ga. LEXIS 792 (1939) (decided under former Code 1933, § 38-420); Miller v. State, 60 Ga. App. 682, 4 S.E.2d 729, 1939 Ga. App. LEXIS 140 (1939) (decided under former Code 1933, § 38-420); Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248, 1940 Ga. App. LEXIS 111 (1940) (decided under former Code 1933, § 38-420); Moore v. State, 193 Ga. 877, 20 S.E.2d 403, 1942 Ga. LEXIS 494 (1942) (decided under former Code 1933, § 38-420); Byars v. State, 73 Ga. App. 727, 38 S.E.2d 53, 1946 Ga. App. LEXIS 400 (1946) (decided under former Code 1933, § 38-420); Webb v. State, 73 Ga. App. 748, 38 S.E.2d 54, 1946 Ga. App. LEXIS 404 (1946) (decided under former Code 1933, § 38-420); Reddick v. State, 202 Ga. 209, 42 S.E.2d 742, 1947 Ga. LEXIS 414 (1947) (decided under former Code 1933, § 38-420); Jackson v. State, 77 Ga. App. 635, 49 S.E.2d 198, 1948 Ga. App. LEXIS 606 (1948), cert. denied, 335 U.S. 905, 69 S. Ct. 403, 93 L. Ed. 439, 1949 U.S. LEXIS 2912 (1949); Grimes v. State, 204 Ga. 854, 51 S.E.2d 797, 1949 Ga. LEXIS 484 (1949) (decided under former Code 1933, § 38-420); McVeigh v. State, 205 Ga. 326, 53 S.E.2d 462, 1949 Ga. LEXIS 357 (1949) (decided under former Code 1933, § 38-420); (decided under former Code 1933, § 38-420); Lastinger v. State, 84 Ga. App. 760, 67 S.E.2d 411, 1951 Ga. App. LEXIS 787 (1951) (decided under former Code 1933, § 38-420); Moon v. State, 85 Ga. App. 212, 68 S.E.2d 617, 1952 Ga. App. LEXIS 691 (1952) (decided under former Code 1933, § 38-420); Barksdale v. State, 88 Ga. App. 861, 78 S.E.2d 82, 1953 Ga. App. LEXIS 1233 (1953) (decided under former Code 1933, § 38-420); Davis v. State, 211 Ga. 76, 84 S.E.2d 46, 1954 Ga. LEXIS 495 (1954) (decided under former Code 1933, § 38-420); Poythress v. State, 95 Ga. App. 124, 97 S.E.2d 165, 1957 Ga. App. LEXIS 733 (1957) (decided under former Code 1933, § 38-420); Gray v. State, 135 Ga. App. 253, 217 S.E.2d 482, 1975 Ga. App. LEXIS 1636 (1975) (decided under former Code 1933, § 38-420); Soggins v. State, 156 Ga. App. 652, 275 S.E.2d 676, 1980 Ga. App. LEXIS 3159 (1980) (decided under former Code 1933, § 38-420); Rosser v. State, 157 Ga. App. 161, 276 S.E.2d 672, 1981 Ga. App. LEXIS 1752 (1981) (decided under former Code 1933, § 38-420); Christian v. State, 190 Ga. App. 667, 379 S.E.2d 807, 1989 Ga. App. LEXIS 374 (1989) (decided under former O.C.G.A. § 24-3-53); Montijo v. State, 238 Ga. App. 696, 520 S.E.2d 24 (decided under former O.C.G.A. § 24-3-53).

Conviction may be lawfully had upon a free and voluntary confession although corroborated only by proof of the corpus delicti. Brown v. State, 167 Ga. App. 851, 307 S.E.2d 737, 1983 Ga. App. LEXIS 3363 (1983) (decided under former O.C.G.A. § 24-3-53); Kirksey v. State, 177 Ga. App. 428, 339 S.E.2d 401, 1986 Ga. App. LEXIS 2418 (1986) (decided under former O.C.G.A. § 24-3-53); Ryan v. State, 179 Ga. App. 210, 346 S.E.2d 3, 1986 Ga. App. LEXIS 1886 (1986) (decided under former O.C.G.A. § 24-3-53); Nation v. State, 180 Ga. App. 460, 349 S.E.2d 479, 1986 Ga. App. LEXIS 2747 (1986) (decided under former O.C.G.A. § 24-3-53).

Corroboration (Cont'd)

When the testimony of the victims established the corpus delicti of each crime a defendant was charged with, the testimony provided the requisite corroboration of the defendant's confession to charges of rape, sodomy, assault, and burglary. Smith v. State, 195 Ga. App. 486, 393 S.E.2d 743, 1990 Ga. App. LEXIS 572 (1990) (decided under former O.C.G.A. § 24-3-53).

Testimony by a victim who survived a robbery in which the victim's companion was killed was sufficient to corroborate defendant's confession that defendant was one of four men who committed the robbery and that defendant shot the victim who died when the victim grabbed the barrel of a gun the defendant was holding, and the state supreme court affirmed defendant's convictions for felony murder and armed robbery. Chapman v. State, 275 Ga. 314, 565 S.E.2d 442, 2002 Ga. LEXIS 483 (2002), overruled in part, Worthen v. State, 304 Ga. 862, 823 S.E.2d 291, 2019 Ga. LEXIS 22 (2019) (decided under former O.C.G.A. § 24-3-53).

Confession is corroborated by the testimony of the victim who establishes the corpus delicti. Patrick v. State, 169 Ga. App. 302, 312 S.E.2d 385, 1983 Ga. App. LEXIS 3468 (1983), aff'd, 252 Ga. 509, 314 S.E.2d 909, 1984 Ga. LEXIS 755 (1984); McCloud v. State, 210 Ga. App. 69, 435 S.E.2d 281, 1993 Ga. App. LEXIS 1044 (1993) (decided under former O.C.G.A. § 24-3-53).

Corroborated by defendant's confession, the victim's testimony that defendant had sexual intercourse with the victim when the victim was 14 sufficed to sustain the conviction. Bankston v. State, 249 Ga. App. 118, 548 S.E.2d 25, 2001 Ga. App. LEXIS 451 (2001) (decided under former O.C.G.A. § 24-3-53).

Corpus delicti may be proved either by direct or circumstantial evidence. Davis v. State, 105 Ga. 808, 32 S.E. 158, 1898 Ga. LEXIS 716 (1898) (decided under former Penal Code 1895, § 1005); Harvey v. State, 8 Ga. App. 660, 70 S.E. 141, 1911 Ga. App. LEXIS 91 (1911) (decided under former Penal Code 1895, § 1005); Tolver v. State, 10 Ga. App. 33, 72 S.E. 516, 1911 Ga. App. LEXIS 629 (1911) (decided under former Penal Code 1895, § 1005); Sutton v. State, 17 Ga. App. 713, 88 S.E. 122, 1916 Ga. App. LEXIS 877 (1916) (decided under former Penal Code 1895, § 1005); Thomas v. State, 18 Ga. App. 101, 88 S.E. 917, 1916 Ga. App. LEXIS 140 (1916) (decided under former Penal Code 1895, § 1005); Underwood v. State, 51 Ga. App. 735, 181 S.E. 500, 1935 Ga. App. LEXIS 452 (1935) (decided under former Code 1933, § 38-420); Brown v. State, 98 Ga. App. 350, 105 S.E.2d 785, 1958 Ga. App. LEXIS 582 (1958) (decided under former Code 1933, § 38-420).

Corpus delicti must be proved independently of confession. — Corpus delicti cannot be proved by the extrajudicial confession of the accused, but must be shown by evidence aliunde the confession or incriminatory admissions. West v. State, 6 Ga. App. 105, 64 S.E. 130, 1909 Ga. App. LEXIS 194 (1909) (decided under former Penal Code 1895, § 1005); Moon v. State, 12 Ga. App. 614, 77 S.E. 1088, 1913 Ga. App. LEXIS 663 (1913) (decided under former Penal Code 1910, § 1005); Sims v. State, 12 Ga. App. 551, 77 S.E. 891, 1913 Ga. App. LEXIS 634 (1913); Wilburn v. State, 141 Ga. 510, 81 S.E. 444, 1914 Ga. LEXIS 24 (1914) (decided under former Penal Code 1910, § 1005); Pyant v. State, 46 Ga. App. 490, 167 S.E. 922, 1933 Ga. App. LEXIS 118 (1933) (decided under former Penal Code 1910, § 1005); Navarra v. State, 51 Ga. App. 321, 180 S.E. 375, 1935 Ga. App. LEXIS 680 (1935) (decided under former Code 1933, § 38-420); Underwood v. State, 51 Ga. App. 735, 181 S.E. 500, 1935 Ga. App. LEXIS 452 (1935) (decided under former Code 1933, § 38-420); Grimes v. State, 204 Ga. 854, 51 S.E.2d 797, 1949 Ga. LEXIS 484 (1949) (decided under former Code 1933, § 38-420); Williams v. State, 96 Ga. App. 833, 101 S.E.2d 747, 1958 Ga. App. LEXIS 916 (1958) (decided under former Code 1933, § 38-420).

Jury may consider the confession along with other facts and circumstances independent of and separate from the confession it in determining whether or not the corpus delicti has been established to the jury's satisfaction. Stephens v. State, 127 Ga. App. 416, 193

S.E.2d 870, 1972 Ga. App. LEXIS 905 (1972).

Jury may believe only portions of confessions. — Every confession necessarily contains incriminatory admissions, and though a statement as a whole may amount to a confession, still it is within the province of the jury to disbelieve that part which would constitute it a confession, and believe only the portion thereof which amounted to incriminatory admissions. Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28, 1945 Ga. LEXIS 301 (1945), overruled, Milton v. State, 245 Ga. 20, 262 S.E.2d 789, 1980 Ga. LEXIS 672 (1980) (decided under former Code 1933, § 38-420).

Two confessions. — Even two positive confessions of guilt, without independent proof of the corpus delicti, are not sufficient to authorize a conviction. Bines v. State, 118 Ga. 320, 45 S.E. 376, 1903 Ga. LEXIS 549 (1903) (decided under former Penal Code 1895, § 1005).

To prove the corpus delicti in a charge of murder, in order to corroborate a confession, it is essential to establish that the person alleged to have been killed is actually dead, and that death was caused or accomplished by violence or other direct criminal agency of another human being; that is, it was not accidental, nor due to natural causes, nor to the act of the deceased, and that the accused caused the death in the manner charged. Grimes v. State, 204 Ga. 854, 51 S.E.2d 797, 1949 Ga. LEXIS 484 (1949) (decided under former Code 1933, § 38-420).

Evidence sufficient to corroborate confession to burglary. — When defendant admitted both defendant's presence at the scene of the crime and that the defendant had cut defendant's hand on a broken windowpane there, and there was also testimony that broken bloodstained glass was found within the burglarized home, such evidence was sufficient to corroborate the defendant's confession. Carter v. State, 160 Ga. App. 299, 287 S.E.2d 313, 1981 Ga. App. LEXIS 3050 (1981) (decided under former Code 1933, § 38-420).

Evidence supported defendant's conviction for burglary and entering an automobile with the intent to commit a theft because there was evidence corroborating defendant's confession regarding how defendant gained entry into both a warehouse and a car. Morris v. State, 274 Ga. App. 41, 616 S.E.2d 829, 2005 Ga. App. LEXIS 665 (2005) (decided under former O.C.G.A. § 24-3-53).

Because the defendant's statement was sufficiently corroborated by evidence that a bullet from the 9 mm handgun in the defendant's possession killed the victim, and by the defendant's admission to both being involved in the commission and planning of the robbery of the victim, sufficient evidence existed to find the defendant guilty as a party to the crime of burglary beyond a reasonable doubt. Valentine v. State, 289 Ga. App. 60, 656 S.E.2d 208, 2007 Ga. App. LEXIS 1332 (2007) (decided under former O.C.G.A. § 24-3-53).

Testimony of an accomplice was not required to be corroborated since the store clerk (victim) was able to testify positively that the defendant was one of the two men who entered the store and performed the robbery. Welch v. State, 179 Ga. App. 221, 346 S.E.2d 4, 1986 Ga. App. LEXIS 1866 (1986) (decided under former O.C.G.A. § 24-3-53).

Hearsay cannot corroborate confession. — Since hearsay lacks any probative value, hearsay cannot provide the material evidence necessary to corroborate a defendant's confession, which, without such corroboration, is insufficient to support a conviction. The argument that hearsay is rendered trustworthy and admissible because corroborated by the defendant's confession, while the confession is simultaneously corroborated by the hearsay, is unpersuasive. This would sanction admission of otherwise unreliable evidence by mutual bootstrapping. Shaver v. State, 199 Ga. App. 428, 405 S.E.2d 281, 1991 Ga. App. LEXIS 530 (1991), cert. denied, No. S91C1028, 1991 Ga. LEXIS 751 (Ga. May 15, 1991) (decided under former O.C.G.A. § 24-3-53).

Confession found to be sufficiently corroborated. Steele v. State, 166 Ga. App. 24, 303 S.E.2d 462, 1983 Ga. App. LEXIS 3205 (1983) (decided under former O.C.G.A. § 24-3-53); Hunt v. State, 166 Ga. App. 524, 304 S.E.2d 576, 1983 Ga.

Corroboration (Cont'd)

App. LEXIS 2233 (1983) (decided under former O.C.G.A. § 24-3-53); Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82, 1983 Ga. LEXIS 754 (1983) (decided under former O.C.G.A. § 24-3-53); Barnes v. State, 260 Ga. 398, 396 S.E.2d 207, 1990 Ga. LEXIS 318 (1990) (decided under former O.C.G.A. § 24-3-53); White v. State, 266 Ga. 134, 465 S.E.2d 277, 1996 Ga. LEXIS 4 (1996) (decided under former O.C.G.A. § 24-3-53); McCant v. State, 234 Ga. App. 433, 506 S.E.2d 917 (decided under former O.C.G.A. § 24-3-53); Kirkland v. State, 271 Ga. 217, 518 S.E.2d 687 (decided under former O.C.G.A. § 24-3-53).

When on a trial for leaving the scene of an accident, in addition to the defendant's "confession," evidence was adduced at trial showing the corpus delicti, one witness placed defendant near the scene of the accident in question on the night the accident occurred, and evidence was also produced showing that defendant's automobile was damaged at approximately the same time the accident took place, the trial court was authorized to find that the confession was corroborated as required by former O.C.G.A. § 24-3-53. Sheppard v. State, 165 Ga. App. 393, 301 S.E.2d 306, 1983 Ga. App. LEXIS 1881 (1983) (decided under former O.C.G.A. § 24-3-53).

Following evidence of corroboration of the defendant's confession to murder satisfied the requirement of former O.C.G.A. § 24-3-53: (1) a bloody claw hammer matching the description of the hammer the defendant confessed defendant used to kill the victim was found near the victim's body; and (2) the paint samples taken from the defendant's truck were similar to those taken from the crime scene. Brown v. State, 253 Ga. 363, 320 S.E.2d 539, 1984 Ga. LEXIS 948 (1984) (decided under former O.C.G.A. § 24-3-53).

Defendant's conviction of financial transaction card fraud was affirmed since evidence that a VISA card was used without the owner's authorization to obtain goods and money established the corpus delicti, and the owner's testimony that defendant had access to the owner's mail and that the signatures on the charge slips closely paralleled defendant's handwriting provided sufficient corroboration of defendant's confession. Goswick v. State, 201 Ga. App. 799, 412 S.E.2d 293, 1991 Ga. App. LEXIS 1610 (1991) (decided under former O.C.G.A. § 24-3-53).

State presented sufficient independent evidence to corroborate the defendant's confessions after it was shown that the victim died from gunshot wounds inflicted by another human being using a .38 caliber weapon or a .357 Magnum shortly after the defendant was seen in the victim's company. Blackwell v. State, 270 Ga. 509, 512 S.E.2d 233 (decided under former O.C.G.A. § 24-3-53).

Evidence that defendant gave several false statements about the victim's whereabouts, contributing to the victim's body not being discovered, sufficiently corroborated defendant's confession to concealing a death in violation of O.C.G.A. § 16-10-31. Howard v. State, 262 Ga. App. 214, 585 S.E.2d 115, 2003 Ga. App. LEXIS 784 (2003) (decided under former O.C.G.A. § 24-3-53).

Despite the fact that the defendant did not admit to every element of the charged offenses, the state presented sufficient evidence to corroborate the admissions made; specifically, that the victim died from manual strangulation inflicted by another human being shortly after the defendant was in the victim's company, and presented ample evidence of the defendant's intent to take the victim's life. Sheffield v. State, 281 Ga. 33, 635 S.E.2d 776, 2006 Ga. LEXIS 641 (2006) (decided under former O.C.G.A. § 24-3-53).

Because the defendant's statement to a police investigator was corroborated by both the victim and an eyewitness as well as evidence of the defendant's fingerprint on the victim's stolen car, the defendant's claim that the evidence was not corroborated as required by former O.C.G.A. § 24-3-53 was rejected. Sheely v. State, 287 Ga. App. 92, 650 S.E.2d 762, 2007 Ga. App. LEXIS 884 (2007) (decided under former O.C.G.A. § 24-3-53).

Evidence that a vehicle was, in fact, stolen from a location reported by a juvenile involved in a high-speed chase with a state trooper, and abandoned after crashing into a pole in an apartment complex was sufficient to corroborate the juvenile's

confession under former O.C.G.A. § 24-3-53. In the Interest of L.A., 292 Ga. App. 101, 663 S.E.2d 420, 2008 Ga. App. LEXIS 704 (2008) (decided under former O.C.G.A. § 24-3-53).

With regard to a defendant's malice murder conviction arising from the suffocation death of the defendant's newborn daughter, the defendant's confession was legally sufficient to support the convictions since the state produced independent evidence to corroborate the confession, namely, the recovered physical evidence and the witness testimony regarding the defendant's comments, appearance, and behavior before and after the victim's birth. Wright v. State, 285 Ga. 428, 677 S.E.2d 82, 2009 Ga. LEXIS 157 (2009), cert. denied, 558 U.S. 1123, 130 S. Ct. 1076, 175 L. Ed. 2d 903, 2010 U.S. LEXIS 281 (2010) (decided under former O.C.G.A. § 24-3-53).

Defendant's statement to police and the defendant's trial testimony regarding two charges of child molestation, alleging that the defendant had the victims' touch the defendant's sexual organ with their hands, were sufficiently corroborated because the evidence showed that the defendant engaged in a series of text messages with the teenage victims which culminated in the defendant arriving at the house where the victims were staying between 1:00 and 1:30 A.M.; the defendant and the first victim went into a bedroom together and engaged in sexual activity; and the defendant then left that bedroom and went into another bedroom with the second victim, and engaged in sexual activity with the second victim until the defendant ejaculated. Jackson v. State, 330 Ga. App. 822, 769 S.E.2d 567, 2015 Ga. App. LEXIS 66 (2015) (decided under former O.C.G.A. § 24-3-53).

Evidence was sufficient to convict the defendant of necrophilia because the state presented evidence corroborating the defendant's confession; the victim's body was found in the room registered to the defendant at the hotel where the defendant told the police the defendant took the victim; and the physical evidence found at the crime scene and testimony from the medical examiner corroborated the defendant's statements about the manner in which the defendant killed the victim, the items used to kill the victim, and the multiple days the defendant spent with the victim's body after the defendant killed the victim. Norman v. State, 298 Ga. 344, 781 S.E.2d 784, 2016 Ga. LEXIS 73 (2016) (decided under former O.C.G.A. § 24-3-53).

Instructions

Charge on the law of confessions, when unauthorized by the evidence, constitutes reversible error. Denson v. State, 150 Ga. 618, 104 S.E. 780, 1920 Ga. LEXIS 251 (1920), writ of error dismissed, 258 U.S. 608, 42 S. Ct. 316, 66 L. Ed. 788, 1922 U.S. LEXIS 2315 (1922) (decided under former Penal Code 1910, § 1005); Oliphant v. State, 52 Ga. App. 105, 182 S.E. 523, 1935 Ga. App. LEXIS 64 (1935) (decided under former Code 1933, § 38-420); Meriwether v. State, 63 Ga. App. 667, 11 S.E.2d 816, 1940 Ga. App. LEXIS 523 (1940) (decided under former Code 1933, § 38-420); Johnson v. State, 204 Ga. 528, 50 S.E.2d 334, 1948 Ga. LEXIS 479 (1948) (decided under former Code 1933, § 38-420); Norrell v. State, 116 Ga. App. 479, 157 S.E.2d 784, 1967 Ga. App. LEXIS 859 (1967) (decided under former Code 1933, § 38-420).

Evidence was sufficient to warrant an instruction based on O.C.G.A. § 24-3-53. — See Wallace v. Mize, 153 Ga. 374, 112 S.E. 724, 1922 Ga. LEXIS 83 (1922) (decided under former Penal Code 1910, § 1005); Southern Ry. v. Bullock, 42 Ga. App. 495, 156 S.E. 456, 1931 Ga. App. LEXIS 29 (1931) (decided under former Penal Code 1910, § 1005); Timbs v. State, 71 Ga. App. 141, 30 S.E.2d 290, 1944 Ga. App. LEXIS 299 (1944) (decided under former Code 1933, § 38-420); McDowell v. State, 78 Ga. App. 116, 50 S.E.2d 633, 1948 Ga. App. LEXIS 693 (1948) (decided under former Code 1933, § 38-420).

Charge did not shift burden of proof. — Trial court did not err in charging the jury to consider with great care and caution the evidence of any statement the defendant made, and the jury charge did not improperly shift the burden away from the state, as the charge clearly referred to the jury's consideration of the defendant's custodial statement and not the defendant's testimony, and was given

Instructions (Cont'd)

immediately after an explanation of how to determine the voluntariness of the defendant's custodial statement; moreover, the charge impressed upon the jury its duty to determine the credibility of the statement, instructing that a statement unsupported by any other evidence was not sufficient to justify a conviction. Ford v. State, 281 Ga. App. 114, 635 S.E.2d 391, 2006 Ga. App. LEXIS 1013 (2006) (decided under former O.C.G.A. § 24-3-53).

With regard to a defendant's conviction for robbery, the trial court did not err by instructing the jury that the jury should consider with great care and caution the evidence of any statement made by the defendant as former O.C.G.A. § 24-3-53 provided the authority for such an instruction. However, the appellate court suggested that to avoid any possibility of confusion, the suggested pattern instruction authorized by former § 24-3-53 should be modified to refer to incriminatory statements only, for example, admissions and confessions. McKenzie v. State, 293 Ga. App. 350, 667 S.E.2d 142, 2008 Ga. App. LEXIS 938 (2008) (decided under former O.C.G.A. § 24-3-53).

Failure to give instruction. — In the absence of any timely written request, the failure to charge the jury on the law of the former statute was not reversible error, since there was evidence, independent of such confessions or admissions, to sustain the conviction. Walker v. State, 118 Ga. 34, 44 S.E. 850, 1903 Ga. LEXIS 426 (1903) (decided under former Penal Code 1895, § 1005); Cooner v. State, 16 Ga. App. 539, 85 S.E. 688, 1915 Ga. App. LEXIS 116 (1915) (decided under former Penal Code 1910, § 1031); Denson v. State, 150 Ga. 618, 104 S.E. 780, 1920 Ga. LEXIS 251 (1920), writ of error dismissed, 258 U.S. 608, 42 S. Ct. 316, 66 L. Ed. 788, 1922 U.S. LEXIS 2315 (1922); Wallace v. Mize, 153 Ga. 374, 112 S.E. 724, 1922 Ga. LEXIS 83 (1922) (decided under former Penal Code 1910, § 1031); Williamson v. State, 29 Ga. App. 283, 114 S.E. 919, 1922 Ga. App. LEXIS 247 (1922) (decided under former Penal Code 1910, § 1031); Gore v. State, 162 Ga. 267, 134 S.E. 36, 1926 Ga. LEXIS 160 (1926) (decided under former Penal Code 1910, § 1031); Whitfield v. State, 51 Ga. App. 439, 180 S.E. 630, 1935 Ga. App. LEXIS 733 (1935), overruled in part, Worthen v. State, 304 Ga. 862, 823 S.E.2d 291, 2019 Ga. LEXIS 22 (2019); (decided under former Code 1933, § 38-420); Mims v. State, 188 Ga. 702, 4 S.E.2d 831, 1939 Ga. LEXIS 624 (1939) (decided under former Code 1933, § 38-420); Anderson v. State, 190 Ga. 455, 9 S.E.2d 642, 1940 Ga. LEXIS 489 (1940) (decided under former Code 1933, § 38-420); Davis v. State, 66 Ga. App. 877, 19 S.E.2d 543, 1942 Ga. App. LEXIS 321 (1942) (decided under former Code 1933, § 38-420); Mika v. State, 196 Ga. 473, 26 S.E.2d 616, 1943 Ga. LEXIS 349 (1943) (decided under former Code 1933, § 38-420); (decided under former Code 1933, § 38-420); Brandt v. Eckman, 79 Ga. App. 47, 52 S.E.2d 665, 1949 Ga. App. LEXIS 585 (1949) (decided under former Code 1933, § 38-420); Elvine v. State, 205 Ga. 528, 54 S.E.2d 626, 1949 Ga. LEXIS 568 (1949) (decided under former Code 1933, § 38-420); Staggers v. State, 101 Ga. App. 463, 114 S.E.2d 142, 1960 Ga. App. LEXIS 897 (1960) (decided under former Code 1933, § 38-420); Pryor v. State, 113 Ga. App. 660, 149 S.E.2d 401, 1966 Ga. App. LEXIS 1166 (1966) (decided under former Code 1933, § 38-420); Welch v. State, 235 Ga. 243, 219 S.E.2d 151, 1975 Ga. LEXIS 846 (1975) (decided under former Code 1933, § 38-420); Simonton v. State, 151 Ga. App. 431, 260 S.E.2d 487, 1979 Ga. App. LEXIS 2561 (1979) (decided under former Code 1933, § 38-420); Jackson v. State, 596 Ga. App. 596, 260 S.E.2d 565 (1979) (decided under former Code 1933, § 38-420).

Absent a timely request, the trial court did not err in failing to charge on the evidentiary weight to be given admissions and confessions or in failing to charge that an uncorroborated confession is insufficient to support a conviction. Hunt v. State, 166 Ga. App. 524, 304 S.E.2d 576, 1983 Ga. App. LEXIS 2233 (1983) (decided under former O.C.G.A. § 24-3-53).

Trial court did not err by failing to charge the jury on the state's burden of proving the corpus delicti since defendant filed no written request to charge, and the subject of defendant's oral request regard-

ing the state's burden of proving the corpus delicti was fully satisfied by the trial court's charge regarding the presumption of defendant's innocence and the state's burden of proving all elements of the crime. Barnes v. State, 260 Ga. 398, 396 S.E.2d 207, 1990 Ga. LEXIS 318 (1990) (decided under former O.C.G.A. § 24-3-53).

Trial court's decision not to give defendant's requested instruction on the jury considering defendant's admissions with caution, pursuant to former O.C.G.A. § 24-3-53, was not reversible; defendant acquiesced in the counsel's request that a standard charge on credibility be given instead, and defendant was not entitled to acquiesce in that decision and later complain about the decision on appeal. Lummus v. State, 274 Ga. App. 636, 618 S.E.2d 692, 2005 Ga. App. LEXIS 820 (2005), overruled in part, McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465, 2008 Ga. App. LEXIS 214 (2008) (decided under former O.C.G.A. § 24-3-53).

Failure to give a jury charge regarding the corroboration of confessions did not constitute plain error because the defendant's statements were admissions, not confessions, as the defendant did not confess to the murder or the arson; and, even if the defendant's statements to the witnesses were confessions, the defendant did not show that the error affected the outcome of the proceedings as there was ample corroborating evidence, including a witness's testimony that the defendant was alone with the victim shortly before the murder; testimony that a neighbor saw the defendant flee through the neighbor's yard, and the defendant's request on a recorded tape that two witnesses fabricate an alibi defense for the defendant for the time of the crime. English v. State, 300 Ga. 471, 796 S.E.2d 258, 2017 Ga. LEXIS 30 (2017) (decided under former O.C.G.A. § 24-3-53).

Defendant's claim that the trial court did not adequately instruct the jury on the principles in O.C.G.A. § 24-8-823 by not telling the jury that corroboration of the statements was absolutely required for conviction lacked merit, as the trial court advised the jury that a defendant's out-of-court statement that was not supported by any other evidence was not sufficient to justify conviction. Simmons v. State, 314 Ga. 883, 880 S.E.2d 125, 2022 Ga. LEXIS 276 (2022).

Court not required to give instruction absent specific request. — Because the defendant failed to request a charge on voluntariness of confessions and consideration of statements, admissions, and confessions, the defendant was precluded from asserting error on that basis; the trial court did not need to give an instruction on voluntariness of confessions absent a specific request therefor. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913, 2009 Ga. LEXIS 390 (2009) (decided under former O.C.G.A. § 24-3-53).

Failure to charge the language of former O.C.G.A. § 24-3-53 when there had been an admission, but not a "confession," was not error. Richardson v. State, 256 Ga. 746, 353 S.E.2d 342, 1987 Ga. LEXIS 726 (1987) (decided under former O.C.G.A. § 24-3-53); Gay v. State, 199 Ga. App. 80, 403 S.E.2d 895, 1991 Ga. App. LEXIS 346 (1991) (decided under former O.C.G.A. § 24-3-53).

Trial court did not err in failing to charge the language of former O.C.G.A. § 24-3-53 since the defendant's statement, while an admission, was not a confession to the crime of murder, inasmuch as the defendant contended that the killing was justified and the court's charge informed the jury that the statement should be examined closely for voluntariness. Houston v. State, 253 Ga. 696, 324 S.E.2d 183, 1985 Ga. LEXIS 535 (1985) (decided under former O.C.G.A. § 24-3-53).

Omission in instructions. — Fact that charge omits an instruction as to the weight to be given to confessions is not cause for new trial, in the absence of a request therefor. Williams v. State, 196 Ga. 503, 26 S.E.2d 926, 1943 Ga. LEXIS 379 (1943) (decided under former Code 1933, § 38-420).

Request to charge on principle of corroboration properly denied. — Trial court did not err in refusing to give a requested charge on the principle of corroboration since the charge was not adjusted to the evidence. Flanders v. State, 279 Ga. 35, 609 S.E.2d 346, 2005 Ga.

Instructions (Cont'd)

LEXIS 139 (2005) (decided under former O.C.G.A. § 24-3-53).

Language used in charging former O.C.G.A. § 24-3-53 was discussed in the following cases. — See Ford v. Kennedy, 64 Ga. 537, 1880 Ga. LEXIS 349 (1880); Ocean S.S. Co. v. McAlphin, 69 Ga. 437 (1882); Raleigh & G.R.R. v. Allen, 106 Ga. 572, 32 S.E. 622, 1899 Ga. LEXIS 728 (1899); Louisville & N.R.R. v. Bradford, 135 Ga. 522, 69 S.E. 870, 1910 Ga. LEXIS 22 (1910); (decided under former Code 1933, § 38-420); Williams v. State, 199 Ga. 504, 34 S.E.2d 854, 1945 Ga. LEXIS 346 (1945) (decided under former Code 1933, § 38-420); Elvine v. State, 205 Ga. 528, 54 S.E.2d 626, 1949 Ga. LEXIS 568 (1949) (decided under former Code 1933, § 38-420); Figures v. State, 80 Ga. App. 832, 57 S.E.2d 629, 1950 Ga. App. LEXIS 791 (1950) (decided under former Code 1933, § 38-420); Reece v. State, 212 Ga. 609, 94 S.E.2d 723, 1956 Ga. LEXIS 462 (1956) (decided under former Code 1933, § 38-420); Beard v. State, 151 Ga. App. 724, 261 S.E.2d 404, 1979 Ga. App. LEXIS 2769 (1979) (decided under former Code 1933, § 38-420); Hill v. State, 246 Ga. 402, 271 S.E.2d 802, 1980 Ga. LEXIS 1137 (1980), cert. denied, 451 U.S. 923, 101 S. Ct. 2001, 68 L. Ed. 2d 313, 1981 U.S. LEXIS 1808 (1981).

Requested charge on out-of-court statement not ineffective assistance of counsel. — Defendant failed to establish that trial counsel was ineffective for requesting a jury instruction about the defendant's out-of-court statement, which was entirely exculpatory, as in light of the charge as a whole and the strength of the evidence of the defendant's guilt, the defendant failed to show the required prejudice since the trial court properly cautioned the jury about relying on the out-of-court statement. Jones v. State, 359 Ga. App. 688, 859 S.E.2d 845, 2021 Ga. App. LEXIS 269 (2021).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 765, 766, 1394.

C.J.S.

31A C.J.S., Evidence, §§ 523, 524.

ALR.

Proof of entire conversation containing alleged confession, 2 A.L.R. 1017; 26 A.L.R. 541.

Confession by one who has been subjected to or threatened with physical suffering, 24 A.L.R. 703.

Confession as circumstantial evidence, 40 A.L.R. 571.

Duty of court to institute preliminary investigation as to voluntary or involuntary character of confession, 102 A.L.R. 605.

Presumption and burden of proof as to voluntariness of nonjudicial confession, 102 A.L.R. 641.

Right of witness to state his conclusion or opinion that confession was voluntary or involuntary, 114 A.L.R. 974.

Detective or other person participating in crime to obtain evidence as accomplice within rule requiring corroboration of, or cautionary instruction as to, testimony of accomplice, 119 A.L.R. 689.

Propriety of instruction, or requested instruction, in civil case, as to caution in considering testimony of oral admissions, or as to weight of such admissions as evidence, 126 A.L.R. 66.

Corroboration of confession, 127 A.L.R. 1130; 45 A.L.R.2d 1316.

Admissibility and weight of party's admissions as to tort occurring during his absence, 54 A.L.R.2d 1069.

Admissibility of inculpatory statements made in presence of accused to which he refuses to reply on advice of counsel, 77 A.L.R.2d 463.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 A.L.R.2d 1224.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud, 99 A.L.R.2d 772.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimina-

tion as to crime in question, 9 A.L.R.3d 990.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 A.L.R.4th 419.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 A.L.R.4th 495.

Sufficiency of corroboration of confession for purpose of establishing corpus delicti as question of law or fact, 33 A.L.R.5th 571.

24-8-824. Only voluntary confessions admissible.

To make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury.

History.

Code 1981, § 24-8-824, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI.

Law reviews.

For comment, "School Bullies — They Aren't Just Students: Examining School Interrogations and the Miranda Warning," see 59 Mercer L. Rev. 731 (2008).

For annual survey on evidence, see 74 Mercer L. Rev. 129 (2022).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3740, former Code 1873, § 3793, former Penal Code 1895, § 1006, former Penal Code 1910, § 1032, former Code 1933, § 38-411, and former O.C.G.A. § 24-3-50 are included in the annotations for this Code section.

In general. — Any statement or conduct of a person, indicating a consciousness of guilt, when such person is, at the time or thereafter, charged with or suspected of a crime, is admissible against the person upon trial for committing the crime. Bridges v. State, 246 Ga. 323, 271 S.E.2d 471, 1980 Ga. LEXIS 1124 (1980) (decided under former Code 1933, § 38-411).

Fact that a confession was not reduced to writing does not render confession inadmissible. Hayes v. State, 152 Ga. App. 858, 264 S.E.2d 307, 1980 Ga. App. LEXIS 1629 (1980) (decided under former Code 1933, § 38-411).

Confession not inadmissible despite indicating other offenses. — Criminal confession is not rendered inadmissible because the language used therein indicates that the accused had committed another and separate offense. Dampier v. State, 245 Ga. 427, 265 S.E.2d 565, 1980 Ga. LEXIS 812 (1980) (decided under former Code 1933, § 38-411).

Harmless error. — Any possible error in admitting a confession of a codefendant

General Consideration (Cont'd)

after the codefendant refused to testify is rendered harmless when the confession parallels the statements of the codefendants. Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637, 1980 Ga. App. LEXIS 2634 (1980) (decided under former Code 1933, § 38-411).

Reversible error. — When inadmissible evidence as to a confession is offered and admitted, its admission constitutes reversible error unless the jury is expressly instructed that the evidence is admitted for the purpose of impeachment only, whether or not a request to so charge be made, and whether or not any exceptions are made to the charge as given. Askea v. State, 153 Ga. App. 849, 267 S.E.2d 279, 1980 Ga. App. LEXIS 2007 (1980) (decided under former Code 1933, § 38-411).

Confession defined. — A confession is an admission freely and voluntarily made by the accused whereby the accused acknowledges personally to be guilty of the offense charged, and discloses the circumstances of the act, and the share and participation the accused had in the act. Allen v. State, 187 Ga. 178, 200 S.E. 109, 1938 Ga. LEXIS 756 (1938) (decided under former Code 1933, § 38-411); Pressley v. State, 201 Ga. 267, 39 S.E.2d 478, 1946 Ga. LEXIS 453 (1946) (decided under former Code 1933, § 38-411); Johnson v. State, 204 Ga. 528, 50 S.E.2d 334, 1948 Ga. LEXIS 479 (1948) (decided under former Code 1933, § 38-411); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868, 1954 Ga. App. LEXIS 629 (1954) (decided under former Code 1933, § 38-411).

Incriminating statements distinguished. — There is a difference between an incriminating statement and a confession of guilt. In the former only one or more facts entering into the criminal act is admitted, while in the latter the entire criminal act is confessed. Johnson v. State, 204 Ga. 528, 50 S.E.2d 334, 1948 Ga. LEXIS 479 (1948) (decided under former Code 1933, § 38-411); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868, 1954 Ga. App. LEXIS 629 (1954) (decided under former Code 1933, § 38-411).

True determinant of whether a defendant has made a confession or merely given a statement is whether the statement is offered by the accused as exculpatory or inculpatory. Sanford v. State, 153 Ga. App. 541, 265 S.E.2d 868, 1980 Ga. App. LEXIS 1891 (1980) (decided under former Code 1933, § 38-411).

An admission of the main fact, from which the essential elements of the criminal act charged may be inferred, amounts to a confession of the crime itself. Sanford v. State, 153 Ga. App. 541, 265 S.E.2d 868, 1980 Ga. App. LEXIS 1891 (1980) (decided under former Code 1933, § 38-411).

An admission of a fact not in itself involving criminal intent is not a confession. Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868, 1954 Ga. App. LEXIS 629 (1954) (decided under former Code 1933, § 38-411).

Unless the statement of the defendant is broad enough to comprehend every essential element necessary to make out the case against the defendant, it cannot be said to be an admission of guilt. Allen v. State, 187 Ga. 178, 200 S.E. 109, 1938 Ga. LEXIS 756 (1938) (decided under former Code 1933, § 38-411); Johnson v. State, 204 Ga. 528, 50 S.E.2d 334, 1948 Ga. LEXIS 479 (1948) (decided under former Code 1933, § 38-411); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868, 1954 Ga. App. LEXIS 629 (1954) (decided under former Code 1933, § 38-411).

Prima-facie showing of the admissibility of a confession is made by evidence of compliance with former O.C.G.A. § 24-3-50 in addition to evidence showing that defendant confessed after having been given defendant's Miranda rights. Pruitt v. State, 176 Ga. App. 317, 335 S.E.2d 724, 1985 Ga. App. LEXIS 2842 (1985) (decided under former O.C.G.A. § 24-3-50); Adams v. State, 186 Ga. App. 599, 367 S.E.2d 871, 1988 Ga. App. LEXIS 423 (1988).

"Hope of benefit" to which former O.C.G.A. § 24-3-50 referred was usually a hope of lighter punishment. Tyler v. State, 247 Ga. 119, 274 S.E.2d 549, 1981 Ga. LEXIS 641, cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981); Caffo v. State, 247 Ga. 751, 279 S.E.2d 678, 1981 Ga. LEXIS 876 (1981) (decided under former Code 1933, § 38-411).

Within the context of former O.C.G.A. § 24-3-50, the slightest hope of benefit

referred to a lighter sentence. Burton v. State, 212 Ga. App. 100, 441 S.E.2d 470, 1994 Ga. App. LEXIS 147 (1994) (decided under former O.C.G.A. § 24-3-50).

Record did not show that the officer made any assurances to defendant that the defendant's sentence would be lighter if the defendant gave an incriminating statement and the officer's statement to the accused that substance abuse counseling was available was an offer of a collateral benefit which did not invalidate the statement. Burton v. State, 212 Ga. App. 100, 441 S.E.2d 470, 1994 Ga. App. LEXIS 147 (1994) (decided under former O.C.G.A. § 24-3-50).

Promise by an officer to assist defendant in getting help through counseling did not constitute an impermissible hope of benefit under former O.C.G.A. § 24-3-50. Peinado v. State, 223 Ga. App. 271, 477 S.E.2d 408 (decided under former O.C.G.A. § 24-3-50).

An offer by officers to "help" defendant if defendant told the truth and the officer's statement that defendant would face a jury trial if defendant lied were not promises of an improper benefit that would render defendant's confession inadmissible under the "slightest hope of benefit" to which O.C.G.A. § 24-3-40 refers. Porter v. State, 264 Ga. App. 526, 591 S.E.2d 436, 2003 Ga. App. LEXIS 1502 (2003) (decided under former O.C.G.A. § 24-3-50).

Hope to be released did not implicate former statute. — "Hope of benefit" to which former O.C.G.A. § 24-3-50 referred was usually a hope of lighter punishment. Consequently, being released was not a hope of benefit that would implicate that Code section. Further, even if the court were to find that the GBI agent said that the defendant would be released if the defendant gave the agent information, this would be an offer of a collateral benefit which did not invalidate the statement and thus the statement was admissible. Overton v. State, 295 Ga. App. 223, 671 S.E.2d 507, 2008 Ga. App. LEXIS 1358 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. Apr. 20, 2009) (decided under former O.C.G.A. § 24-3-50).

Clear intention of the former statute was that a confession induced by the slightest hope of benefit or remotest fear of injury could not be used against a defendant. Williams v. State, 239 Ga. 327, 236 S.E.2d 672, 1977 Ga. LEXIS 903 (1977) (decided under former Code 1933, § 38-411).

Construction with former O.C.G.A. § 24-3-53 (see now O.C.G.A. § 24-8-823). — Both former Code 1933, §§ 38-411 and 38-420 (see now O.C.G.A. §§ 24-8-824 and 24-8-823) refer to evidence in criminal trials. The former statute recognized the distinction between admissions and confessions. In former Code 1933, § 38-420 only one or more facts entering into a criminal act were admitted, while in former Code 1933, § 38-411 the entire criminal act was confessed. Burns v. State, 188 Ga. 22, 2 S.E.2d 627, 1939 Ga. LEXIS 792 (1939) (decided under former Code 1933, § 38-411).

Issue regarding voluntariness of confession pursuant to former O.C.G.A. § 24-3-50 must be raised in the trial court. Turner v. State, 246 Ga. App. 49, 539 S.E.2d 553, 2000 Ga. App. LEXIS 1150 (2000), cert. denied, No. S01C0164, 2001 Ga. LEXIS 177 (Ga. Feb. 16, 2001) (decided under former O.C.G.A. § 24-3-50).

Oral admissions properly admitted after voluntariness determined. — Trial court does not err in admitting defendant's oral admissions contained in the testimony of the investigating officer after the trial court as the trier of fact outside the presence of the jury determined the voluntariness of the defendant's admissions. Kelley v. State, 160 Ga. App. 343, 287 S.E.2d 68, 1981 Ga. App. LEXIS 3218 (1981) (decided under former Code 1933, § 38-411).

Court's decision to allow confession into evidence not error. Johnson v. State, 261 Ga. 419, 405 S.E.2d 686, 1991 Ga. LEXIS 333 (1991) (decided under former O.C.G.A. § 24-3-50); Davis v. State, 271 Ga. 527, 520 S.E.2d 218 (decided under former O.C.G.A. § 24-3-50).

Constitutional Considerations

In general. — Admission in evidence of a confession voluntarily made, without being induced by another by the slightest hope of benefit or the remotest fear of

Constitutional Considerations (Cont'd)

injury, does not contravene the provisions of the state constitution that no person shall be compelled to give testimony tending in any manner to incriminate oneself, nor is it inimical to anything contained in the Fourteenth Amendment to the Constitution of the United States. Wilburn v. State, 141 Ga. 510, 81 S.E. 444, 1914 Ga. LEXIS 24 (1914) (decided under former Penal Code 1910, § 1032).

Use of threats or promises to coerce a criminal defendant to make a statement is contrary to Georgia law and to federal constitutional law. Young v. State, 243 Ga. 546, 255 S.E.2d 20, 1979 Ga. LEXIS 984 (1979) (decided under former Code 1933, § 38-411).

Self-incrimination. — Confessions, if made voluntarily without hope of benefit or fear of injury, are admissible and are not rendered inadmissible as violating the constitutional inhibition against self-incrimination by the fact that the confession is in affidavit form. Elliott v. State, 87 Ga. App. 456, 74 S.E.2d 366, 1953 Ga. App. LEXIS 768 (1953) (decided under former Code 1933, § 38-411).

Interrogation by private citizen afforded no constitutional protection. — Confessions which result from coercive interrogations conducted by private citizens are not subject to a constitutional due process analysis in determining whether or not to exclude the confession at trial. Griffin v. State, 230 Ga. App. 318, 496 S.E.2d 480 (decided under former O.C.G.A. § 24-3-50).

Defendant's constitutional rights could not have been violated when the defendant was not under arrest or in custody at the time of the confession and no police or other law enforcement personnel were present. Gaston v. State, 153 Ga. App. 538, 265 S.E.2d 866, 1980 Ga. App. LEXIS 1889 (1980) (decided under former Code 1933, § 38-411).

Fifth and Sixth Amendments not violated. — When the evidence heard was sufficient to authorize the trial court to determine that the defendant was advised of the defendant's rights, that the defendant was not placed under any duress, that the defendant seemed to understand the defendant's rights, that the defendant was not under influence of drugs or alcohol and that the defendant seemed completely aware of what was going on around the defendant, the defendant's confession was voluntarily elicited and not in violation of the Fifth and Sixth Amendments. Simonton v. State, 151 Ga. App. 431, 260 S.E.2d 487, 1979 Ga. App. LEXIS 2561 (1979) (decided under former Code 1933, § 38-411).

Question was not a request for counsel. — Question by a defendant as to whether the defendant would have been arrested if the defendant asked for an attorney was not a clear request for counsel that required cessation of police questioning or clarification before continuing the interrogation and there was no evidence that the statement was given in fear of injury or for a hope of benefit; additionally, while the investigator lied to the defendant throughout the interview about the existence and amount of inculpatory evidence, nothing suggested that the investigator sought to procure a false statement. Wright v. State, 279 Ga. App. 155, 630 S.E.2d 656, 2006 Ga. App. LEXIS 488 (2006) (decided under former O.C.G.A. § 24-3-50).

Waiver of Miranda rights. — When a defendant objects to the admission into evidence of defendant's confession, the state must prove by a preponderance of the evidence that the confession was voluntary, and, if the confession is the product of a custodial interrogation by officers of the government, that the confession was preceded by the appellant's knowing and voluntary waiver of the appellant's Miranda rights. Brooks v. State, 244 Ga. 574, 261 S.E.2d 379, 1979 Ga. LEXIS 1338 (1979), vacated in part, 446 U.S. 961, 100 S. Ct. 2937, 64 L. Ed. 2d 821 (1980) (decided under former Code 1933, § 38-411).

Whether, after the Miranda warnings are given, the waiver of those rights was free and voluntary depends upon the totality of the circumstances. Miller v. State, 155 Ga. App. 587, 271 S.E.2d 719, 1980 Ga. App. LEXIS 2689 (1980) (decided under former Code 1933, § 38-411).

Trial court did not err by refusing to exclude the defendant's post-arrest state-

ment, which admitted that the defendant was the shooter because the defendant did not explain how the Miranda warnings were inadequate; the defendant was advised of the rights both verbally and in writing and signed a waiver, and a detective testified that the detective secured the defendant's Miranda waiver before interrogating the defendant. Funes v. State, 289 Ga. 793, 716 S.E.2d 183, 2011 Ga. LEXIS 713 (2011) (decided under former O.C.G.A. § 24-3-50).

Questioning had none of earmarks of coercion. — Trial court erred in granting the defendant's motion to suppress the statements made to the officers before the defendant's arrest because even assuming the officers erred when the officers failed to Mirandize the defendant immediately, the defendant's initial response to questioning had none of the earmarks of coercion and the officers did not exploit the unwarned admission to pressure the defendant into waiving the right to remain silent. State v. Richardson, 353 Ga. App. 368, 837 S.E.2d 524, 2020 Ga. App. LEXIS 2 (2020), cert. denied, No. S2000756, 2020 Ga. LEXIS 626 (Ga. Aug. 10, 2020).

Due process clause of the Fourteenth Amendment to the United States Constitution requires that the trial judge determine whether a confession is voluntary before permitting the jury to consider the confession. Stone v. State, 155 Ga. App. 357, 271 S.E.2d 22, 1980 Ga. App. LEXIS 2576 (1980) (decided under former Code 1933, § 38-411).

Defendant's constitutional rights are violated when defendant's challenged confession is introduced without a determination by the trial judge of the confession's voluntariness after an adequate hearing. Strickland v. State, 226 Ga. 750, 177 S.E.2d 238, 1970 Ga. LEXIS 670 (1970) (decided under former Code 1933, § 38-411).

Right to counsel violated by last but not earlier statements. — While non-custodial and custodial statements were properly admitted as not vitiating the defendant's constitutional rights once defendant invoked the right to counsel, a subsequent interview initiated by police violated this right; as a result, cocaine seized through information obtained from the interview had to be suppressed as fruit of the poisonous tree. Vergara v. State, 283 Ga. 175, 657 S.E.2d 863, 2008 Ga. LEXIS 202 (2008), overruled in part, Clark v. State, 315 Ga. 423, 883 S.E.2d 317, 2023 Ga. LEXIS 13 (2023) (decided under former O.C.G.A. § 24-3-50).

Due process not violated. — When evidence shows that confessions were voluntarily made and were not induced by another by hope of award or fear of punishment, or when it is an issue of fact as to whether the confessions were properly obtained, defendant is not denied due process of law as guaranteed by the state and federal constitutions, by their introduction in evidence against the defendant. Claybourn v. State, 190 Ga. 861, 11 S.E.2d 23, 1940 Ga. LEXIS 589 (1940) (decided under former Code 1933, § 38-411).

Appellant's affidavit not subject to Confrontation Clause. — Counsel did not perform deficiently by not making an objection to the affidavit of the appellant because the affidavit, written by the appellant, was hearsay, but it was nevertheless admissible as an admission by a party-opponent and such an admission by a defendant generally was not subject to the Confrontation Clause. Reed v. State, 307 Ga. 527, 837 S.E.2d 272, 2019 Ga. LEXIS 837 (2019).

Voluntariness

Voluntary character of the confession depends on the question whether the making of the statement was voluntary, and not whether the particular communication contained in the confession was voluntary. Turner v. State, 203 Ga. 770, 48 S.E.2d 522, 1948 Ga. LEXIS 514 (1948) (decided under former Code 1933, § 38-411).

Officer's knowledge of defendant. — Fact that the interrogating officer did not know the defendant's age, education, or familiarity with the "custodial experience" did not render the defendant's confession invalid or involuntary; further, the failure to advise the defendant as to the crimes about which the defendant was to be questioned before a Miranda waiver was irrelevant to whether the waiver was knowing and voluntary. Rivera v. State, 279 Ga. App. 1, 630 S.E.2d 152, 2006 Ga. App.

Voluntariness (Cont'd)

LEXIS 430 (2006) (decided under former O.C.G.A. § 24-3-50).

Totality of the circumstances. — To determine whether the state has proven that a confession was made voluntarily, the trial court must consider the totality of the circumstances. Presley v. State, 251 Ga. App. 823, 555 S.E.2d 156, 2001 Ga. App. LEXIS 1147 (2001) (decided under former O.C.G.A. § 24-3-50); Harrison v. State, 253 Ga. App. 179, 558 S.E.2d 760, 2002 Ga. App. LEXIS 10 (2002) (decided under former O.C.G.A. § 24-3-50).

Given the totality of the circumstances, and the defendant's age, education, and knowledge of both the substance of the charge and nature of the rights to an attorney and to remain silent, because the defendant voluntarily gave a statement to a police detective about an uncharged armed robbery, absent any threats, coercion, or promises in exchange for doing so, the statement was admissible. Swain v. State, 285 Ga. App. 550, 647 S.E.2d 88, 2007 Ga. App. LEXIS 586 (2007) (decided under former O.C.G.A. § 24-3-50).

Based on the totality of the circumstances and the undisputed evidence, because the defendant's confession to a police detective was voluntary and admissible under former O.C.G.A. § 24-3-50, not coerced or received as a result of promises made, and not subject to exclusion due to improper methods used by the police, the trial court did not err in admitting the confession; further, exclusion of the confession was not required based on a violation of the defendant's right to counsel. Swain v. State, 285 Ga. App. 550, 647 S.E.2d 88, 2007 Ga. App. LEXIS 586 (2007) (decided under former O.C.G.A. § 24-3-50).

With regard to a defendant's conviction for rape of a minor relative, the trial court did not err by denying the defendant's motion to suppress a non-custodial audio recording of a statement the defendant made to the victim that the victim obtained via a hidden recorder as a hearing was held by the trial court on the admissibility of the recording at which time the trial court concluded that, under the totality of the circumstances, the defendant's statement was made voluntarily and the victim did not promise the defendant anything to make the statement and did not threaten the defendant into making the statement. Flournoy v. State, 299 Ga. App. 377, 682 S.E.2d 632, 2009 Ga. App. LEXIS 806 (2009) (decided under former O.C.G.A. § 24-3-50).

Any error in refusing to suppress the defendant's statements inside the patrol vehicle was harmless beyond a reasonable doubt because the later statements at the sheriff's department were preceded by Miranda warnings, were made after the defendant signed a waiver of rights, were made an hour-and-a-half later to different law enforcement officers, and were made without the new officers' reminding the defendant of any of the statements in the patrol vehicle. Spears v. State, 296 Ga. 598, 769 S.E.2d 337, 2015 Ga. LEXIS 132 (2015), overruled in part, Willis v. State, 304 Ga. 686, 820 S.E.2d 640, 2018 Ga. LEXIS 685 (2018).

Trial court did not err when the court admitted evidence of a custodial statement that the defendant gave after being arrested as under the totality of the circumstances the recording of the interview supported the trial court's finding that the defendant's statement was not given as a result of any promise of reduced criminal punishment as the defendant continued to deny involvement and there was no showing that the defendant interpreted the detective's statement as an offer of reduced punishment. Finley v. State, 298 Ga. 451, 782 S.E.2d 651, 2016 Ga. LEXIS 140 (2016).

Appellant's statement to law enforcement was not involuntary as the appellant was advised of the appellant's Miranda rights numerous times (and had executed a written waiver), a video-recorded statement plainly reflected that both the appellant and law enforcement understood that the appellant was free to leave anytime during the interview, and the investigator's statement that the appellant would never see the light of day if not truthful was an exhortation to tell the truth, not a promise of a lighter punishment. Price v. State, 305 Ga. 608, 825 S.E.2d 178, 2019 Ga. LEXIS 144 (2019).

Implicit finding of voluntariness in admission of confession. — When the court denied the defendants' motions to

suppress the defendant's confessions, implicit in the ruling was the court's finding that the statements were freely and voluntarily made, without hope of benefit or reward. Eady v. State, 182 Ga. App. 293, 355 S.E.2d 778, 1987 Ga. App. LEXIS 2611 (1987), overruled, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-3-50).

A person who is mentally ill can be competent to make a voluntary confession. Johnson v. State, 256 Ga. 259, 347 S.E.2d 584, 1986 Ga. LEXIS 791 (1986) (decided under former O.C.G.A. § 24-3-50).

When an admission of guilt was not product of interrogation but was spontaneous statement of the defendant the statement is admissible. Williams v. State, 159 Ga. App. 772, 285 S.E.2d 232, 1981 Ga. App. LEXIS 2803 (1981) (decided under former O.C.G.A. § 24-3-50).

Hope of reward or fear of punishment which renders confession inadmissible, etc. is that which is induced by another. Jones v. State, 18 Ga. App. 310, 89 S.E. 347, 1916 Ga. App. LEXIS 320 (1916) (decided under former Penal Code 1910, § 1032); Phinazee v. State, 22 Ga. App. 258, 95 S.E. 878, 1918 Ga. App. LEXIS 287 (1918) (decided under former Penal Code 1910, § 1032); Hill v. State, 148 Ga. 521, 97 S.E. 442, 1918 Ga. LEXIS 420 (1918) (decided under former Penal Code 1910, § 1032); Abrams v. State, 223 Ga. 216, 154 S.E.2d 443, 1967 Ga. LEXIS 471 (1967) (decided under former Code 1933, § 38-411); Dickey v. State, 157 Ga. App. 13, 276 S.E.2d 75, 1981 Ga. App. LEXIS 1700 (1981) (decided under former Code 1933, § 38-411).

Although the interrogating officer did tell defendant that the defendant was helping defendant by telling the truth, that judges love to hear that defendants helped the police, and that although telling the truth put defendant right in the hot seat, it also showed that the defendant cooperated, these statements, when combined with repeated statements that the officer could not promise any help, did not constitute the kind of "hope of benefit" which was contemplated by former O.C.G.A. § 24-3-50. Stephens v. State, 164 Ga. App. 398, 297 S.E.2d 90, 1982 Ga. App. LEXIS 3308 (1982) (decided under former O.C.G.A. § 24-3-50).

Even though interrogating officer's deception may not have been intended to procure an untrue statement, since the deception was intended and indeed did induce defendant to confess in the hope of receiving a lighter punishment, the confession was not voluntary. State v. Ritter, 268 Ga. 108, 485 S.E.2d 492 (decided under former O.C.G.A. § 24-3-50).

Defendant's claim that defendant's statement was inadmissible on the basis that the statement was obtained by a threat of an increased punishment was not valid because the challenged words could only have been construed as the officer's assessment that the defendant's credibility was being destroyed and that defendant was imperiling any claim of innocence by insisting on a version of the facts which was so dramatically contrary to the evidence gathered by the police. Robinson v. State, 272 Ga. 752, 533 S.E.2d 718, 2000 Ga. LEXIS 622 (2000) (decided under former O.C.G.A. § 24-3-50).

Court of appeals erred in affirming the defendant's conviction for criminal attempt to commit armed robbery and aggravated assault and in determining that the trial court did not err by denying the defendant's motion to suppress the confession as involuntary and induced by an improper hope of benefit because the defendant's confession had to be considered involuntary and inadmissible when the record showed that the defendant gave self-incriminating statement only after being told that the defendant could receive a "shorter term" by doing so, which was exactly the hope of benefit that was prohibited under former O.C.G.A. § 24-3-50; as a result, the defendant's confession was induced by a hope of benefit, it had to be presumed to be legally false, and it could not be the underlying basis of a conviction. Canty v. State, 286 Ga. 608, 690 S.E.2d 609, 2010 Ga. LEXIS 180 (2010) (decided under former O.C.G.A. § 24-3-50).

Defendant juvenile's incriminating statements to police were improperly admitted as the statements were not volun-

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tary because, in the second interview, the detective grew frustrated with the defendant's denials of involvement in any other burglaries; and the detective told the defendant to tell the truth about those burglaries, explicitly threatening the defendant that the defendant would be charged with the other burglaries if the defendant did not tell the truth, and promising the defendant not to do anything if the defendant did tell the truth; thus, the defendant's confession was induced by another by the slightest hope of benefit as the defendant was told that confessing to the crime would result in not being charged at all. Jones v. State, 344 Ga. App. 774, 811 S.E.2d 496, 2018 Ga. App. LEXIS 135 (2018).

"Hope of benefit" contemplated by former O.C.G.A. § 24-3-50 must be induced by another; therefore, any hope which originated in the mind of the person making a confession would not exclude admission of the confession. Wesley v. State, 177 Ga. App. 877, 341 S.E.2d 507, 1986 Ga. App. LEXIS 2475 (1986) (decided under former O.C.G.A. § 24-3-50).

Hope or fear which originates in the mind of the person making the confession and which originates from seeds of the person's own planting would not exclude a confession. The hope or fear must be induced by another. Hall v. State, 180 Ga. App. 366, 349 S.E.2d 255, 1986 Ga. App. LEXIS 2732 (1986) (decided under former O.C.G.A. § 24-3-50); Shelton v. State, 196 Ga. App. 163, 395 S.E.2d 618, 1990 Ga. App. LEXIS 871 (1990), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019) (decided under former O.C.G.A. § 24-3-50); Ramos v. State, 198 Ga. App. 65, 400 S.E.2d 353, 1990 Ga. App. LEXIS 1548 (1990) (decided under former O.C.G.A. § 24-3-50).

While former O.C.G.A. § 24-3-50 prohibits the introduction of a statement induced "by the slightest hope of benefit," the hope contemplated must be induced by another. Bryant v. State, 193 Ga. App. 840, 389 S.E.2d 405, 1989 Ga. App. LEXIS 1657 (1989) (decided under former O.C.G.A. § 24-3-50); Vineyard v. State, 195 Ga. App. 788, 395 S.E.2d 49, 1990 Ga. App. LEXIS 717 (1990) (decided under former O.C.G.A. § 24-3-50).

A hope or fear which originates in the mind of the person making a confession and which originates from seeds of one's own planting would not exclude a confession, and defendant's contention that the defendant viewed the investigative detective as a "mother figure" did not exclude defendant's confession. Owens v. State, 209 Ga. App. 272, 433 S.E.2d 382, 1993 Ga. App. LEXIS 842 (1993) (decided under former O.C.G.A. § 24-3-50).

Promise not to bring additional charges constituted a hope of benefit. — During the defendant's interrogation for sales of XLR11, a Schedule I controlled substance, the investigators' comments such as, "there aren't anymore charges" and "what you're charged with now is what you're charged with," were promises not to bring additional charges and thus constituted a hope of benefit under O.C.G.A. § 24-8-824; however, admission of the defendant's statements was harmless. To the extent Sosniak v. State, 287 Ga. 279 (2010) is contrary, such decision is disapproved. Budhani v. State, 306 Ga. 315, 830 S.E.2d 195, 2019 Ga. LEXIS 448 (2019).

Confessions made as a tactical decision are admissible when the hope or fear is a product of the defendant's own mind rather than the result of inducement by others. Gray v. State, 240 Ga. App. 716, 523 S.E.2d 626 (decided under former O.C.G.A. § 24-3-50).

Offer to obtain psychologist. — Police officer's offer to assist defendant in finding a psychologist and the officer's suggestions that it best behooved the defendant to tell the truth did not constitute the hope of benefit prohibited by former O.C.G.A. § 24-3-50. Clay v. State, 209 Ga. App. 266, 433 S.E.2d 377, 1993 Ga. App. LEXIS 849 (1993) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in suppressing the defendant's statements during the first two interviews because those statements were induced by promises related to the potential criminal charges the defendant faced. State v. Chulpayev, 296 Ga.

764, 770 S.E.2d 808, 2015 Ga. LEXIS 193 (2015).

Hope of benefit not created by explanation of consecutive and concurrent sentences. — Trial court did not err in denying the defendant's motion to exclude the defendant's statement as being induced by hope of benefit because the investigator's explanation of consecutive versus concurrent sentences and the options available to the district attorney's office merely emphasized the seriousness of the charges and amounted to no more than a permissible admonition to tell the truth. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381, 2013 Ga. App. LEXIS 837 (2013), cert. dismissed, No. S14C0875, 2014 Ga. LEXIS 684 (Ga. Sept. 8, 2014).

Promise of change of cell not hope of benefit. — Any promise made to defendant to facilitate a change in defendant's jail cell was not a promise or hope of benefit which would taint defendant's otherwise voluntary confession. Billings v. State, 212 Ga. App. 125, 441 S.E.2d 262, 1994 Ga. App. LEXIS 152 (1994), cert. denied, No. S94C0851, 1994 Ga. LEXIS 626 (Ga. Apr. 7, 1994) (decided under former O.C.G.A. § 24-3-50).

Plea agreement as hope of benefit. — Defendant's statements, wherein the defendant admitted the defendant's culpability in a victim's murder, were properly admitted as voluntary in the defendant's criminal trial as the defendants' claim that defendants were each induced by the hope of receiving benefits pursuant to former O.C.G.A. § 24-3-50 lacked merit; the claims were contradicted by other testimony given by defendant that the defendant offered the statements freely, and one statement was not given in exchange for a plea agreement, as such agreement was already in place when the statement was made. Redwine v. State, 280 Ga. 58, 623 S.E.2d 485, 2005 Ga. LEXIS 863 (2005) (decided under former O.C.G.A. § 24-3-50).

No deceit or hope of benefit. — Second defendant's statements were voluntary because the statements were not obtained by deceit intended to elicit an untrue response and were not induced by the hope of benefit; the investigators' alleged deception regarding whether the investigators had articulated a belief as to the second defendant's participation in the crimes, or indeed had probable cause to obtain an arrest warrant, had no bearing on the voluntariness of the defendant's statement in the absence of any evidence that the investigative technique was designed to procure a false statement. Moreover, the description of the second defendant as "not a suspect" offered no hope of benefit because the statement offered no potential future outcome. Daniel v. State, 285 Ga. 406, 677 S.E.2d 120, 2009 Ga. LEXIS 247 (2009) (decided under former O.C.G.A. § 24-3-50).

No hope of benefit from officer's statement on cooperation. — Officer's testimony that the officer would inform the district attorney of defendant's cooperation was not sufficient to create a hope of benefit within the meaning of former O.C.G.A. § 24-3-50. Autry v. State, 210 Ga. App. 150, 435 S.E.2d 512, 1993 Ga. App. LEXIS 1087 (1993) (decided under former O.C.G.A. § 24-3-50); McFadden v. State, 251 Ga. App. 342, 554 S.E.2d 323, 2001 Ga. App. LEXIS 1006 (2001) (decided under former O.C.G.A. § 24-3-50).

No hope of benefit was created when the defendant asked the interrogating officer, "What should I do? Should I talk?" and the officer replied, "That's up to you, man. All you're going to do is help yourself out." Lee v. State, 270 Ga. 798, 514 S.E.2d 1, 1999 Ga. LEXIS 172 (decided under former O.C.G.A. § 24-3-50).

Officer's statements during interrogation to the effect that it would look better to the judge if defendant would confess to committing the murder rather than denying committing murder when the police could prove defendant was the murderer did not constitute a hope of benefit to elicit a statement. Taylor v. State, 274 Ga. 269, 553 S.E.2d 598, 2001 Ga. LEXIS 776 (2001), overruled in part, State v. Chulpayev, 296 Ga. 764, 770 S.E.2d 808, 2015 Ga. LEXIS 193 (2015) (decided under former O.C.G.A. § 24-3-50).

In defendant's trial on charges of malice murder, felony murder, and armed robbery, there was no evidence in the record that a police officer who took defendant's statement referred to any possibility of a lighter sentence when the officer ques-

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tioned defendant, and the trial court properly rejected defendant's claim that defendant's statement to police should be suppressed because the officer who interviewed the defendant attempted to coerce defendant into giving a statement by informing defendant that police had defendant's fingerprints or because defendant held only a general equivalency diploma. Evans v. State, 277 Ga. 51, 586 S.E.2d 326, 2003 Ga. LEXIS 726 (2003) (decided under former O.C.G.A. § 24-3-50).

There was no violation of former O.C.G.A. § 24-3-50 regarding coercion of a statement because the officers made no promise to defendant that the defendant would not go to jail or that the defendant might receive a lighter sentence; the detectives only indicated that the detectives would note defendant's cooperation and the defendant's efforts to straighten out the defendant's life. Jones v. State, 270 Ga. App. 233, 606 S.E.2d 288, 2004 Ga. App. LEXIS 1400 (2004) (decided under former O.C.G.A. § 24-3-50).

Defendant's statement given during an interview by a Department of Family and Children Services (DFACS) caseworker in the presence of two police officers was voluntary and not induced by deceit because neither the police nor DFACS offered defendant anything for the testimony. Moss v. State, 244 Ga. App. 295, 535 S.E.2d 292, 2000 Ga. App. LEXIS 686 (2000) (decided under former O.C.G.A. § 24-3-50).

While the defendant testified that the officers made certain promises to free the defendant, the interviewing officers testified that the officers made no promises or threats to the defendant, and the defendant signed a document in which the defendant acknowledged that no benefits had been promised the defendant, because some evidence supported the trial court's finding that defendant's confession was voluntary, those findings were not clearly erroneous. Bowden v. State, 279 Ga. App. 173, 630 S.E.2d 792, 2006 Ga. App. LEXIS 494 (2006) (decided under former O.C.G.A. § 24-3-50).

Defendant's statement to police was not rendered involuntary because the statement was given based upon a hope of benefit as there was no evidence in the record to suggest that the police offered the defendant the hope of lighter punishment in exchange for that statement. Givens v. State, 281 Ga. App. 370, 636 S.E.2d 94, 2006 Ga. App. LEXIS 1105 (2006) (decided under former O.C.G.A. § 24-3-50).

Statements by interrogating officers that the defendant should help oneself, that it was in the defendant's best interest to tell what the defendant knew, and that the officers would show the district attorney and the judge that the defendant did not want to help oneself, did not constitute a hope of benefit under former O.C.G.A. § 24-3-50. Stinski v. State, 281 Ga. 783, 642 S.E.2d 1, 2007 Ga. LEXIS 128 (2007) (decided under former O.C.G.A. § 24-3-50).

Defendant's confession was not rendered involuntary merely because the confession was made with the hope of benefit from the interrogating officers because the evidence demonstrated that any hope of benefit given by the officers was dispelled by one officer's statement that the officers had no influence over the defendant's possible punishment. Valentine v. State, 289 Ga. App. 60, 656 S.E.2d 208, 2007 Ga. App. LEXIS 1332 (2007) (decided under former O.C.G.A. § 24-3-50).

Given evidence that the defendant was not provided any assurances by law enforcement that any assistance offered to the defendant would prove beneficial, the defendant's subsequent statement to law enforcement was voluntarily made. Garcia v. State, 290 Ga. App. 164, 658 S.E.2d 904, 2008 Ga. App. LEXIS 279 (2008) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in admitting an alleged confession the defendant made to an investigator because the defendant gave a statement that implicated both the defendant and the defendant's sibling, and the trial court was fully authorized to find that the statement was not induced by any hope of benefit extended by a sergeant; thus, former O.C.G.A. § 24-3-50 did not prevent admission of the statement. Mitchell v. State, 292 Ga. App. 124, 663 S.E.2d 800, 2008 Ga. App. LEXIS 712

(2008) (decided under former O.C.G.A. § 24-3-50).

In a prosecution for felony murder, armed robbery, and burglary, a defendant's post-Miranda statements were properly admitted at trial as a detective's telling the defendant the detective knew the defendant was not the shooter did not constitute the hope of a lighter sentence that tainted the voluntariness of the defendant's statements. Jackson v. State, 284 Ga. 484, 668 S.E.2d 700, 2008 Ga. LEXIS 846 (2008) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in failing to suppress the defendant's post-Miranda confession because the confession was not induced by the hope of benefit in violation of former O.C.G.A. § 24-3-50; the interrogating officer repeatedly told the defendant that the officer could not offer any deals for lighter punishment. State v. Folsom, 286 Ga. 105, 686 S.E.2d 239, 2009 Ga. LEXIS 669 (2009), overruled in part, State v. Abbott, 303 Ga. 297, 812 S.E.2d 225, 2018 Ga. LEXIS 173 (2018) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in refusing to suppress statements the defendant made after an officer told the defendant that withholding information would make things worse for the defendant because the officer's statement to the defendant was, in context, an admonition not to damage the defendant's credibility but to tell the truth, and the statement did not show the physical or mental torture or the coercion by threats that constitutes the remotest fear of injury forbidden by former O.C.G.A. § 24-3-50; since no promises of lighter punishment were made, such an admonition to tell the truth did not constitute hope of benefit so as to render involuntary any statement made thereafter. Madrigal v. State, 287 Ga. 121, 694 S.E.2d 652, 2010 Ga. LEXIS 327 (2010), overruled in part, State v. Kelly, 290 Ga. 29, 718 S.E.2d 232, 2011 Ga. LEXIS 860 (2011) (decided under former O.C.G.A. § 24-3-50).

Defendant waived the defendant's claim that the defendant's confession to the murder of the defendant's spouse was induced by a hope of benefit or a fear of injury, in violation of former O.C.G.A. § 24-3-50, by failing to raise the issue at the Jackson v. Denno hearing, at a renewed Jackson v. Denno motion made at trial, or when the statements were introduced at trial. Turner v. State, 287 Ga. 793, 700 S.E.2d 386, 2010 Ga. LEXIS 606 (2010) (decided under former O.C.G.A. § 24-3-50).

Trial court erred in granting the defendant's motion to suppress a confession because investigators' statements that the defendant would go home after the interview did not offer the defendant a "hope of benefit" that would otherwise render the defendant's confession inadmissible, and the investigators' statement that the defendant would not be arrested on the spot was collateral and not the type of "hope of benefit" contemplated by former O.C.G.A. § 24-3-50; even assuming that the statement was not collateral, any hope of benefit was dispelled by the officers' assertions that the officers had no control over what would ultimately happen to the defendant, and throughout the interview, the defendant expressed an understanding that there would be consequences for the defendant's actions. State v. Brown, 308 Ga. App. 480, 708 S.E.2d 63, 2011 Ga. App. LEXIS 207 (2011), aff'd, 290 Ga. 865, 725 S.E.2d 320, 2012 Ga. LEXIS 348 (2012) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in admitting the defendant's pre-arrest statements because the offer to obtain counseling for the defendant did not bear on the question of punishment but involved a collateral benefit, and promises of a collateral benefit did not impact a statement's admissibility; the defendant offered no evidence that the officers induced the defendant to believe the defendant would receive a three year sentence, but the defendant came up with that scenario on the defendant's own, and the trial court, therefore, properly found the defendant's statements were voluntary and admissible. Dunson v. State, 309 Ga. App. 484, 711 S.E.2d 53, 2011 Ga. App. LEXIS 375 (2011), cert. dismissed, No. S15C1215, 2015 Ga. LEXIS 580 (Ga. Sept. 8, 2015) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err by allowing the defendant's inculpatory statements to po-

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lice. An investigator's statement that defendant's lack of cooperation showed that the defendant was "not trying to help" oneself was an encouragement to tell the truth and did not constitute an impermissible hope of benefit under former O.C.G.A. § 24-3-50. Rogers v. State, 289 Ga. 675, 715 S.E.2d 68, 2011 Ga. LEXIS 667 (2011) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in admitting statements the defendant made during a custodial interrogation under former O.C.G.A. § 24-3-50 because the officers' statements that the defendant had to "man up" and "own up" to the charges and that the defendant's assistance would go a long way in helping the defendant out did not constitute promises of a lighter sentence; upon beginning the interview with the police, the defendant immediately told the officers that the defendant was willing to work with the officers if the officers were willing to work with the defendant, and the officers responded by stating that the officers had no authority to make promises but would listen. Nowell v. State, 312 Ga. App. 150, 717 S.E.2d 730, 2011 Ga. App. LEXIS 911 (2011) (decided under former O.C.G.A. § 24-3-50).

Defendant's motion to suppress several statements made to the investigators was properly denied because the assurances made to the defendant, that the defendant could go home if the defendant told the truth and that investigators had no intention of charging the defendant, did not amount to a "hope of benefit" rendering the statements involuntary. Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738, 2013 Ga. LEXIS 549 (2013), cert. denied, 571 U.S. 1210, 134 S. Ct. 1297, 188 L. Ed. 2d 322, 2014 U.S. LEXIS 1150 (2014), overruled in part, Willis v. State, 304 Ga. 686, 820 S.E.2d 640, 2018 Ga. LEXIS 685 (2018) (decided under former O.C.G.A. §§ 24-3-50 and 24-3-51).

Trial court erred in suppressing the defendant's custodial statement pursuant to former O.C.G.A. § 24-3-50 because it was not induced by a "hope of benefit" promised from the state; the defendant's statement was not actually induced by a belief that the defendant would not be charged with forcible rape, not be thrown in jail, and not have to register as a sex offender if the defendant confessed to having sex with the victim. State v. Munoz, 324 Ga. App. 386, 749 S.E.2d 48, 2013 Ga. App. LEXIS 802 (2013) (decided under former O.C.G.A. § 24-3-50).

Officer did not improperly induce the defendant's custodial statement when, in response to the defendant's plea to "help me out," the detective stated: "All right. What I've got to do before I can talk to you is read you your rights, OK?" This statement was not a promise that rendered the defendant's statement involuntary under O.C.G.A. § 24-8-824. Wilson v. State, 293 Ga. 508, 748 S.E.2d 385, 2013 Ga. LEXIS 633 (2013).

In defendant's felony murder trial, the defendant's statement to police was admissible because the sheriff's statement that no one was going to come after the defendant for getting rid of a dead body the defendant found in the defendant's home and that the most the defendant could be charged with would be disposing of a body was merely an exhortation to tell the truth and not a promise of benefit under O.C.G.A. § 24-8-824. Currier v. State, 294 Ga. 392, 754 S.E.2d 17, 2014 Ga. LEXIS 68 (2014).

Record did not support the defendant's claim that the defendant's confession was induced by the hope of benefit as the detective denied promising anything to the defendant and the officers' comments regarding punishment amounted to explanation of the seriousness of the situation and admonitions to tell the truth. Lucas v. State, 331 Ga. App. 455, 771 S.E.2d 142, 2015 Ga. App. LEXIS 178 (2015).

The fact that the defendant might have hoped the police would offer the defendant something more if the defendant confessed did not render the statement inadmissible as the detective did not make an offer of a hope of benefit. Eason v. State, 331 Ga. App. 59, 769 S.E.2d 772, 2015 Ga. App. LEXIS 101 (2015).

Defendant's statements to police were voluntary and properly admitted at trial because none of the interview techniques utilized by the interrogating officers were impermissible; there was no evidence that

the officers ever offered the defendant any leniency in charges or sentencing such as would amount to an improper hope of benefit; and there was no evidence of excessively lengthy interrogation, physical deprivation, brutality, or other such hallmarks of coercive police activity. Drake v. State, 296 Ga. 286, 766 S.E.2d 447, 2014 Ga. LEXIS 941 (2014) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in denying the defendant's motion to suppress the defendant's statement because the court did not err when the court concluded that the defendant's confession was voluntary as the officer's statements to the defendant were mere exhortations that the defendant should tell the truth as no hope of benefit sprung from the officer's statements. Morales v. State, 337 Ga. App. 614, 788 S.E.2d 535, 2016 Ga. App. LEXIS 381 (2016).

Detectives' statements to the defendant, acknowledging that the defendant wanted a deal and perhaps could get some arrangement, were not the type of promise that would render the defendant's statements to the detectives involuntary. Shepard v. State, 300 Ga. 167, 794 S.E.2d 121, 2016 Ga. LEXIS 756 (2016).

After the defendant was convicted of three malice murders and conspiracy to traffic in cocaine, the trial court did not err when the court denied the defendant's motion to suppress the defendant's custodial statement because the trial court did not clearly err when the court found that no improper hope of benefit was raised by the statement about the defendant being present for the defendant's children as the children grew up or by the statement that the truth would set the defendant free. Huff v. State, 299 Ga. 801, 792 S.E.2d 368, 2016 Ga. LEXIS 651 (2016).

Defendant's statement was voluntary and was not induced by another by the slightest hope of benefit because the officer's statements were aimed at encouraging the defendant to come to the homicide office, not to give a statement to police; the officer's statement to the defendant over the phone before the defendant came to the homicide office that the shooting looked like self-defense did not amount to a representation that the defendant would not be arrested or charged or that coming to the homicide office would lead to a reduction in charges or sentencing; and the officer informed the defendant of the charges the defendant was facing before the defendant gave a statement. McCray v. State, 301 Ga. 241, 799 S.E.2d 206, 2017 Ga. LEXIS 223 (2017) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in denying the defendant's motion to suppress the statement the defendant gave to police because a review of the taped interview revealed that the interview lasted for approximately 24 minutes and that the complained of comments by the detective indicating that the detective would let the district attorney know of the defendant's cooperation did not occur until over 16 minutes into the interview; any of the defendant's incriminating statements that came prior to the detective's comments were not actually induced by those comments; and the defendant did not identify any specific incriminating statements made after the detective's comments that should have been suppressed as being induced by a hope of benefit. Kaye v. State, 341 Ga. App. 846, 801 S.E.2d 922, 2017 Ga. App. LEXIS 292 (2017), cert. dismissed, No. S17C1913, 2017 Ga. LEXIS 1016 (Ga. Dec. 11, 2017) (decided under former O.C.G.A. § 24-3-50).

Trial court properly found, under former O.C.G.A. § 24-3-50 (see now O.C.G.A. § 24-8-824), that the defendant's confession was not made due to a promise of probation as the defendant was read Miranda rights and voluntarily waived the rights and the defendant confirmed that no one had made any promises in exchange for the defendant's statement. Thompson v. State, 345 Ga. App. 20, 812 S.E.2d 329, 2018 Ga. App. LEXIS 167 (2018) (decided under former O.C,G.A. § 24-3-50).

Trial court did not err in denying the defendant's motion to suppress the defendant's confession as the corporal's statements that the district attorney might ask the corporal for a recommendation and the corporal could inform the district attorney of the defendant's cooperation and might not recommend the maximum pun-

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ishment was not the type of "hope of benefit" that would render the defendant's confession involuntary. Meddings v. State, 346 Ga. App. 294, 816 S.E.2d 140, 2018 Ga. App. LEXIS 368 (2018), cert. denied, No. S18C1476, 2019 Ga. LEXIS 78 (Ga. Feb. 4, 2019).

Trial court did not err by admitting certain statements the defendant made while in police custody because the detective never told the defendant that the defendant would not be charged with murder, that the defendant would be charged with a lesser crime, or that the defendant would receive a shorter sentence if the defendant told the detective what happened and telling the defendant that the court having mercy on the defendant was not the type of exhortation by a law enforcement officer that rendered a confession inadmissible. Rosser v. State, 308 Ga. 597, 842 S.E.2d 821, 2020 Ga. LEXIS 338 (2020).

Trial court did not err in denying the defendant's motion to suppress the statements the defendant made to a detective because the detective imploring the defendant to tell the truth was not improper as the detective never promised the defendant that the defendant would not be charged with a crime or that the defendant would receive reduced charges, sentencing or punishment if the defendant made incriminating statements; and the detective made it clear that the detective could not make any kind of promise about what would happen to the defendant. Dawson v. State, 308 Ga. 613, 842 S.E.2d 875, 2020 Ga. LEXIS 332 (2020) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err by failing to suppress statements the defendant made to detectives because, contrary to the defendant's claim, the statements were not induced by "hope of benefit" in violation of former O.C.G.A. § 24-3-50, but were voluntarily made after the defendant was advised of and waived the defendant's rights under Miranda, without any promises from the detectives that the robbery charges would be reduced or dismissed. Tolbert v. State, 308 Ga. 185, 839 S.E.2d 592, 2020 Ga. LEXIS 139 (2020) (decided under former O.C.G.A.§ 24-3-50).

When the defendant was convicted on two counts of child molestation, the defendant's statements to law enforcement officers were admissible as the statements were voluntary because the recordings of the defendant's interviews showed that the officers made the defendant no promises regarding counseling or any other aspect of the defendant's potential prosecution or punishment; and, after being told by an officer that the defendant could go to jail, the defendant admitted that the defendant touched the second victim. Pinkston v. State, 353 Ga. App. 88, 834 S.E.2d 571, 2019 Ga. App. LEXIS 513 (2019).

Trial court did not err by admitting the defendant's custodial statement to law enforcement into evidence at trial based on the detectives offering the defendant a hope of benefit by stating that the defendant could face different potential charges depending on what had occurred, that those charges carried different sentences, and that the defendant had an opportunity to help the defendant's own self out by telling the truth because those types of statements by law enforcement officers did not amount to a hope of benefit under O.C.G.A. § 24-8-824. Clay v. State, 309 Ga. 593, 847 S.E.2d 530, 2020 Ga. LEXIS 592 (2020).

Trial court did not err in admitting into evidence the defendant's custodial statement because the investigators testified that the investigators found the defendant to be articulate and the investigators saw no indication that the defendant was intoxicated; the investigators, who were in plain clothes and unarmed, did not physically abuse or overtly intimidate the defendant; and, although the investigators told the defendant that the defendant could help the defendant by being honest and by telling the investigators what had really happened, those statements were not the equivalent of offering a hope of benefit. Perez v. State, 309 Ga. 687, 848 S.E.2d 395, 2020 Ga. LEXIS 612 (2020).

Timing of confession following allegedly improper statement. — Defendant's confession was not induced by an impermissible hope of benefit as defendant testified and specifically denied that the defendant's motivation for confessing

was based upon a hope that doing so would lead to reduced charges or a reduced sentence; the fact that a confession was made under spiritual exhortation, promise of secrecy, or a promise of a collateral benefit did not exclude it; and the defendant made no admissions and did not confess immediately after any of the disputed statements, but, instead, the defendant confessed to shooting the victim approximately 20 minutes after the final allegedly improper statement. Kessler v. State, 311 Ga. 607, 858 S.E.2d 1, 2021 Ga. LEXIS 192 (2021).

Defendant's statements in the first interview were not induced by a hope of benefit as the evidence at the hearing showed that the defendant agreed to talk to investigators and accompany them to the station before the issue of the defendant's lack of a driver's license arose; the defendant consented to having an officer drive the defendant to the station; and the defendant's statements in the defendant's two phone conversations during the first interview reflected that the defendant understood that the defendant was not in trouble based on the traffic violation, but rather was there to answer questions about the death of the child victim. Acosta v. State, 311 Ga. 320, 857 S.E.2d 701, 2021 Ga. LEXIS 150 (2021) (decided under former O.C.G.A.§ 24-3-50).

Where the record showed that the defendant elected to speak with law enforcement officers because "it's the right thing to do," even after the defendant acknowledged that law enforcement officers had not said they would help the defendant out, the supreme court could not say that the confession was induced by a hope of benefit and the trial court did not err when it admitted the confession. Lewis v. State, 311 Ga. 650, 859 S.E.2d 1, 2021 Ga. LEXIS 288 (2021).

Statement of district attorney did not create hope of benefit. — Trial court did not err in admitting three of the defendant's statements because a district attorney's statement that the district attorney and the other prosecutors were in a position to "help" the defendant was not a prohibited "hope of benefit" and did not render the defendant's subsequent statements inadmissible. Dukes v. State, 365 Ga. App. 246, 878 S.E.2d 104, 2022 Ga. App. LEXIS 428 (2022).

Timing of confession following allegedly improper statement. — Defendant's confession was not induced by an impermissible hope of benefit as defendant testified and specifically denied that the defendant's motivation for confessing was based upon a hope that doing so would lead to reduced charges or a reduced sentence; the fact that a confession was made under spiritual exhortation, promise of secrecy, or a promise of a collateral benefit did not exclude it; and the defendant made no admissions and did not confess immediately after any of the disputed statements, but, instead, the defendant confessed to shooting the victim approximately 20 minutes after the final allegedly improper statement. Kessler v. State, 311 Ga. 607, 858 S.E.2d 1, 2021 Ga. LEXIS 192 (2021).

Admission of apology letter. — Trial court's decision to admit the defendant's apology letter to the victims was not erroneous because the trial court was authorized to find that the investigative officer's techniques were not impermissible and did not render the apology letter involuntary; the investigating officer's request for an apology letter did not induce the defendant's confession because the investigating officer stated that the officer did not promise the defendant a reduced charge or sentence in exchange for the defendant's cooperation. Edwards v. State, 312 Ga. App. 141, 717 S.E.2d 722, 2011 Ga. App. LEXIS 910 (2011), cert. denied, No. S12C0363, 2012 Ga. LEXIS 221 (Ga. Feb. 27, 2012) (decided under former O.C.G.A. § 24-3-50).

No hope of benefit from giving of water and cigarette. — Defendant's custodial statements were voluntary and admissible, although the defendant was only 19, the defendant was held in isolation for over an hour prior to being read the defendant's rights, and the defendant was videotaped while the defendant waited. Giving the defendant water and a cigarette was not a "hope of benefit" that prevented the confession from being admissible. Browner v. State, 296 Ga. 138,

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765 S.E.2d 348, 2014 Ga. LEXIS 892 (2014) (decided under former O.C.G.A. § 24-3-50).

Smoking does not render hope of benefit. — Permitting defendant to smoke was a collateral benefit and was insufficient hope of benefit to render defendant's statement inadmissible. White v. State, 266 Ga. 134, 465 S.E.2d 277, 1996 Ga. LEXIS 4 (1996) (decided under former O.C.G.A. § 24-3-50).

Notifying prosecution of cooperation does not render hope of benefit. — Merely telling a defendant that his or her cooperation will be made known to the prosecution does not constitute the "hope of benefit" sufficient to render a statement inadmissible. Leigh v. State, 223 Ga. App. 726, 478 S.E.2d 905 (decided under former O.C.G.A. § 24-3-50); Lawrence v. State, 227 Ga. App. 70, 487 S.E.2d 608 (decided under former O.C.G.A. § 24-3-50).

Officer's statement that defendant's cooperation would be made known to the prosecutor did not render defendant's confession to molesting defendant's stepdaughter involuntary. Frei v. State, 252 Ga. App. 535, 555 S.E.2d 530, 2001 Ga. App. LEXIS 1329 (2001) (decided under former O.C.G.A. § 24-3-50).

Notifying judge of cooperation does not render hope of benefit. — Detective's implied promises to tell the judge of defendant's cooperation did not constitute the kind of hope of benefit contemplated by former O.C.G.A. § 24-3-50. Tucker v. State, 231 Ga. App. 210, 498 S.E.2d 774, 1998 Ga. App. LEXIS 404 (1998) (decided under former O.C.G.A. § 24-3-50).

Though the defendant enumerated as error the admission of a custodial statement into evidence, claiming the statement was induced by hope of benefit of a lesser sentence in that a detective stated that the detective was going to be the prosecuting officer and that the detective would like to be able to tell the judge that the defendant was honest and cooperated with the detective since the detective specifically testified that the detective did not promise the defendant any hope of benefit, the statement was not coerced under former O.C.G.A. § 24-3-50 and was admissible. Cooper v. State, 257 Ga. App. 896, 572 S.E.2d 417, 2002 Ga. App. LEXIS 1336 (2002) (decided under former O.C.G.A. § 24-3-50).

Detectives did not improperly induce or promise defendant that they would talk to the judge and the prosecutor about defendant being cooperative, which might increase defendant's chances of getting a bond, as these statements did not guarantee defendant anything. Jackson v. State, 262 Ga. App. 451, 585 S.E.2d 745, 2003 Ga. App. LEXIS 953 (2003), overruled in part, Carter v. State, 266 Ga. App. 691, 598 S.E.2d 76, 2004 Ga. App. LEXIS 456 (2004), overruled in part as stated in Mitchell v. State, 283 Ga. App. 456, 641 S.E.2d 674, 2007 Ga. App. LEXIS 86 (2007), overruled in part as stated in Grimes v. State, 291 Ga. App. 585, 662 S.E.2d 346, 2008 Ga. App. LEXIS 579 (2008) (decided under former O.C.G.A. § 24-3-50).

An officer's implied promise to tell the trial judge of the defendant's cooperation was not a "hope of benefit" making defendant's statements involuntary under former O.C.G.A. § 24-3-50. Davis v. State, 292 Ga. App. 782, 666 S.E.2d 56, 2008 Ga. App. LEXIS 763 (2008) (decided under former O.C.G.A. § 24-3-50).

Statement that defendant was in big trouble. — Interrogating officer's statements to defendant that defendant was in big trouble and, in effect, that the officer could help defendant if defendant cooperated were not offers of hope of benefit or threat of injury. Davis v. State, 245 Ga. App. 508, 538 S.E.2d 159, 2000 Ga. App. LEXIS 993 (2000) (decided under former O.C.G.A. § 24-3-50).

Mere explanations of defendant's arrest and of the law did not constitute an improper offer of some hope of benefit. State v. Todd, 250 Ga. App. 265, 549 S.E.2d 821, 2001 Ga. App. LEXIS 643 (2001), cert. denied, No. S01C1548, 2001 Ga. LEXIS 945 (Ga. Nov. 30, 2001) (decided under former O.C.G.A. § 24-3-50).

Officer's urging defendant to tell the truth if defendant wanted ":the officer] to be in a position to do anything to say that you cooperated" did not create a hope of a lighter sentence or any other hope of benefit. Caldwell v. State, 249 Ga.

App. 885, 549 S.E.2d 449, 2001 Ga. App. LEXIS 579 (2001), cert. denied, No. S01C1430, 2001 Ga. LEXIS 957 (Ga. Nov. 30, 2001) (decided under former O.C.G.A. § 24-3-50).

Nothing officer said implied freedom for confession. — Defendant's custodial statement to the police was admissible because it was made voluntarily as defendant did not contend that an interrogating officer mentioned a confession or sentence, only that the officer periodically stated that defendant would soon be released, while questioning continued; nothing suggested that freedom would be forthcoming if defendant confessed to committing crimes. Brown v. State, 278 Ga. 724, 609 S.E.2d 312, 2004 Ga. LEXIS 1042 (2004) (decided under former O.C.G.A. § 24-3-50).

Officer's incomplete explanation of Miranda rights meant defendant's waiver was not voluntary. — In the defendant's malice murder trial, the trial court erred in allowing incriminating statements the defendant made in custody because it was clear from the defendant's restatement of the warnings that the defendant did not understand the rights, and although the officer then explained the right to remain silent, the officer did not explain the remaining rights. Without knowledge of the rights, the defendant's waiver was not voluntary. Benton v. State, 302 Ga. 570, 807 S.E.2d 450, 2017 Ga. LEXIS 932 (2017).

Promise of benefit to relatives. — While the defendant claimed that a custodial statement was made to keep defendant's spouse from going to jail, and therefore was made under duress, an agent testified that the agent told the defendant that the spouse was not going to be arrested, and denied telling the spouse that the spouse was going to be arrested, so a trial court's ruling that the defendant's statement was voluntary pursuant to former O.C.G.A. § 24-3-50 was not error. Kania v. State, 280 Ga. App. 356, 634 S.E.2d 146, 2006 Ga. App. LEXIS 853 (2006) (decided under former O.C.G.A. § 24-3-50).

Denial of a defendant's motion to suppress a confession was proper as a police officer testified that the confession was not given in reliance on a promise not to arrest the two women in the house; further, the defendant's testimony that the confession was given in exchange for not arresting the women did not render the confession involuntary since there was no promise to treat the defendant favorably and any promise of a benefit to the defendant's relatives was collateral to the defendant. Jackson v. State, 280 Ga. App. 716, 634 S.E.2d 846, 2006 Ga. App. LEXIS 930 (2006) (decided under former O.C.G.A. § 24-3-50).

Officer's promise to help the defendant with a drug problem was a collateral benefit, and did not bear on the question of punishment; hence, the trial court did not clearly err in admitting the defendant's statement in evidence as such did not amount to a promise of leniency in exchange for the statement. Smith v. State, 281 Ga. App. 91, 635 S.E.2d 385, 2006 Ga. App. LEXIS 1009 (2006) (decided under former O.C.G.A. § 24-3-50).

Investigator's actions in requesting that the defendant's bond be lowered did not amount to the slightest hope of benefit under former O.C.G.A. § 24-3-50. Gonzalez v. State, 283 Ga. App. 843, 643 S.E.2d 8, 2007 Ga. App. LEXIS 199 (2007) (decided under former O.C.G.A. § 24-3-50).

Arranging meeting between spouses is not hope of benefit. — Accommodating a meeting between the defendant's wife and the defendant did not amount to the "slightest hope of benefit" which would have rendered the defendant's statement involuntary and inadmissible as it was not uncommon for a suspect in custody to be allowed to speak with a family member, and the record showed that the defendant reinitiated further communication with police and made a knowing and intelligent waiver of any right to counsel previously invoked. Rivera v. State, 282 Ga. 355, 647 S.E.2d 70, 2007 Ga. LEXIS 486 (2007) (decided under former O.C.G.A. § 24-3-50).

Officer's comments about punishment did not impact confession. — Defendant's statement introduced into evidence was voluntarily given without any hope of benefit; the interrogating officer's comments about punishment

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amounted to no more than an explanation of the seriousness of the defendant's situation, and the officer's requests to the defendant to permit the officer to help were the equivalent of the officer's urging the defendant to tell the truth, which would not invalidate a confession. Preston v. State, 282 Ga. 210, 647 S.E.2d 260, 2007 Ga. LEXIS 477 (2007) (decided under former O.C.G.A. § 24-3-50).

Officer's statement regarding children when parents are in custody. — An officer's statement that if adults were arrested, their children would routinely be taken to the county department of family and children services was merely a recounting of fact, not a threat of injury or promise of hope of benefit within the meaning of former O.C.G.A. § 24-3-50. Rubia v. State, 287 Ga. App. 122, 650 S.E.2d 797, 2007 Ga. App. LEXIS 890 (2007) (decided under former O.C.G.A. § 24-3-50).

Coaxing by investigator did not render statement inadmissible. — With regard to a defendant's conviction for child molestation, the trial court did not err by admitting the defendant's confession at trial as although the defendant may have been coaxed into providing the statement by an investigator, in doing so, the investigator did not offer any hope of benefit or fear of injury. Dexter v. State, 293 Ga. App. 388, 667 S.E.2d 172, 2008 Ga. App. LEXIS 943 (2008) (decided under former O.C.G.A. § 24-3-50).

Use of word "favors" by officer does create hope of benefit. — An officer told the defendant that one of the defendant's accomplices had told the officer the truth but the other two had not, so those accomplices would get no "favors" from the officer. As the officer's reference to "favors" did not suggest that the defendant might receive a lighter sentence by cooperating, the defendant's subsequent statement was admissible under former O.C.G.A. § 24-3-50. Simpson v. State, 293 Ga. App. 760, 668 S.E.2d 451, 2008 Ga. App. LEXIS 1019 (2008) (decided under former O.C.G.A. § 24-3-50).

Officer informing of potential legal consequences. — Defendant's convictions for armed robbery and robbery by intimidation were appropriate because the defendant voluntarily confessed to the defendant's involvement in the crimes. A statement by police that made the defendant aware of the potential legal consequences was in the nature of a mere truism and did not constitute a threat of injury or promise of benefit within the meaning of former O.C.G.A. § 24-3-50. Cantrell v. State, 299 Ga. App. 746, 683 S.E.2d 676, 2009 Ga. App. LEXIS 958 (2009) (decided under former O.C.G.A. § 24-3-50).

Detective made no promises, just general statement. — When the detective told defendant that the detective could not and would not make any promises, just that any cooperation would be favorable to the investigation, defendant's statement was made voluntarily without the slightest hope of benefit. Evans v. State, 248 Ga. App. 99, 545 S.E.2d 641, 2001 Ga. App. LEXIS 181 (2001) (decided under former O.C.G.A. § 24-3-50).

Codefendant's motion to suppress was properly denied as the codefendant's confession was not made with a hope of benefit in violation of former O.C.G.A. § 24-3-50 since the codefendant told the detectives that the codefendant wanted to go home and a detective replied "let's straighten this out and we'll see about getting you home"; the statement did not relate to either the charge or sentence that the codefendant was facing, nor did the detective give codefendant a hope of a lighter sentence in return for the codefendant's statement. Smith v. State, 269 Ga. App. 133, 603 S.E.2d 445, 2004 Ga. App. LEXIS 1007 (2004), cert. denied, No. S05C0089, 2004 Ga. LEXIS 1056 (Ga. Nov. 22, 2004) (decided under former O.C.G.A. § 24-3-50).

Promise of leniency contingent on future assistance. — Defendant's confession was admissible because the trial court could have concluded that any promise of leniency for defendant was contingent on future assistance by defendant and was unrelated to defendant's confession. Bailey v. State, 248 Ga. App. 120, 545 S.E.2d 659, 2001 Ga. App. LEXIS 194 (2001) (decided under former O.C.G.A. § 24-3-50).

Victim's mother promised leniency. — Although the victim's mother allegedly agreed to have the charges dropped if the

defendant confessed, pursuant to former O.C.G.A. § 24-3-50, the confession was made voluntarily, and could be submitted to the jury for consideration. Davenport v. State, 277 Ga. App. 758, 627 S.E.2d 133, 2006 Ga. App. LEXIS 134 (2006) (decided under former O.C.G.A. § 24-3-50).

Statements by victim's parent impacting confession. — Trial court did not err in finding that the defendant's statements were voluntarily made (and not improperly induced by anything said to the defendant by the victim's parent) because the defendant did not point to any evidence indicating that the defendant was threatened by the statement that the victim's parent made, that the defendant believed the parent had any power to prevent the defendant from getting out of jail, or that the parent was acting as an agent of the state when the parent made that statement; and the defendant did not make any incriminating statements on October 4 after speaking to the victim's parent. Carter v. State, 302 Ga. 685, 808 S.E.2d 704, 2017 Ga. LEXIS 970 (2017) (decided under former O.C.G.A. § 24-3-50).

Confessions made during plea negotiations with the prosecutor are not admissible because the confessions are made in the hope that the defendant will get a better deal than otherwise possible. Gray v. State, 240 Ga. App. 716, 523 S.E.2d 626 (decided under former O.C.G.A. § 24-3-50).

Express language not required. — When a conviction was based upon confessions induced by the threatening acts of the parties obtaining the confessions, though no language was used expressly extending the hope of benefit or fear of injury, a new trial will be ordered. Irwin v. State, 54 Ga. 39, 1875 Ga. LEXIS 64 (1875) (decided under former Code 1873, § 3793).

Slightest hope or remotest fear excludes. — Confessions are not admissible if there is evidence, arising from the testimony as to the circumstances under which the confession was made, that the making of the confession was induced by the slightest hope of benefit or the remotest fear of injury. King v. State, 155 Ga. 707, 118 S.E. 368, 1923 Ga. LEXIS 152 (1923) (decided under former Penal Code 1910, § 1032); Goodwin v. State, 45 Ga. App. 593, 165 S.E. 453, 1932 Ga. App. LEXIS 620 (1932) (decided under former Penal Code 1910, § 1032); McLemore v. State, 181 Ga. 462, 182 S.E. 618, 1935 Ga. LEXIS 126 (1935) (decided under former Code 1933, § 38-411); Jordan v. State, 77 Ga. App. 656, 48 S.E.2d 756, 1948 Ga. App. LEXIS 610 (1948) (decided under former Code 1933, § 38-411); Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626, 1950 Ga. App. LEXIS 798 (1950) (decided under former Code 1933, § 38-411); Harrison v. State, 253 Ga. App. 179, 558 S.E.2d 760, 2002 Ga. App. LEXIS 10 (2002) (decided under former O.C.G.A. § 24-3-50).

Although inducement was held out by one person, and the confession was subsequently made to another, who has no knowledge of such inducement, and who offers none personally, such confession is involuntary. Thomas v. State, 169 Ga. 182, 149 S.E. 871, 1929 Ga. LEXIS 308 (1929) (decided under former Penal Code 1910, § 1032).

Custody does not render confession involuntary. — Mere fact that the accused was in custody, or under arrest at the time the confession was made, did not render the confession incompetent if in fact it was made voluntarily within the legal meaning of the term. Wilburn v. State, 141 Ga. 510, 81 S.E. 444, 1914 Ga. LEXIS 24 (1914) (decided under former Penal Code 1910, § 1032); Bradberry v. State, 170 Ga. 859, 154 S.E. 344, 1930 Ga. LEXIS 259 (1930) (decided under former Penal Code 1910, § 1032); Russell v. State, 196 Ga. 275, 26 S.E.2d 528, 1943 Ga. LEXIS 339 (1943) (decided under former Code 1933, § 38-411).

Finding defendant was not in custody was erroneous. — Trial court's determinations that the defendant was not in custody when the defendant made a pre-Miranda statement, and that the statement was voluntary, were based at least partly on a material factual finding that was clearly erroneous, that being that the defendant drove to the police station, as the testimony indicated that the defendant was taken there by law enforcement officers. Stallings v. State,

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343 Ga. App. 135, 806 S.E.2d 613, 2017 Ga. App. LEXIS 459 (2017).

Statements if arrest is illegal. — Voluntary confession or incriminatory statement is not inadmissible merely because it was made pending an illegal arrest. Campbell v. State, 90 Ga. App. 1, 81 S.E.2d 880, 1954 Ga. App. LEXIS 609 (1954) (decided under former Code 1933, § 38-411).

Statements made when reason for arrest is unknown. — Statement made by an accused is not rendered inadmissible solely because the accused has not been told why the accused was under arrest at the time of the making of the statement. Moses v. State, 245 Ga. 180, 263 S.E.2d 916, 1980 Ga. LEXIS 732 (1980), cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60, 1980 U.S. LEXIS 2962 (1980), overruled, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490, 1993 Ga. LEXIS 326 (1993) (decided under former Code 1933, § 38-411).

Failure to inform defendant. — Fact that the state did not show that the defendant prior to making certain incriminatory statements had been apprised by the interrogating officers of the nature of the investigation and its possible consequences did not affect the admissibility or voluntary character of the statements made by the defendant. Gossett v. State, 105 Ga. App. 17, 123 S.E.2d 322, 1961 Ga. App. LEXIS 557 (1961) (decided under former Code 1933, § 38-411).

Surroundings by which the declarant may be environed may be more ominous and more potential in inducing a confession than the use of threats. Moon v. State, 12 Ga. App. 614, 77 S.E. 1088, 1913 Ga. App. LEXIS 663 (1913) (decided under former Penal Code 1910, § 1032).

Legality, duration, and conditions of detention are relevant in the determination of voluntariness of an accused's statement. Pless v. State, 142 Ga. App. 594, 236 S.E.2d 842, 1977 Ga. App. LEXIS 1414 (1977) (decided under former Code 1933, § 38-411).

Statement that it is always better to tell the truth is not such a hope of benefit as would render a confession inadmissible. Wilson v. State, 19 Ga. App. 759, 92 S.E. 309, 1917 Ga. App. LEXIS 352 (1917) (decided under former Penal Code 1910, § 1032); Hicks v. State, 178 Ga. 561, 173 S.E. 395, 1934 Ga. LEXIS 97 (1934) (decided under former Code 1933, § 38-411); McKennon v. State, 63 Ga. App. 466, 11 S.E.2d 416, 1940 Ga. App. LEXIS 475 (1940) (decided under former Code 1933, § 38-411); Turner v. State, 203 Ga. 770, 48 S.E.2d 522, 1948 Ga. LEXIS 514 (1948) (decided under former Code 1933, § 38-411); Daniel v. State, 150 Ga. App. 798, 258 S.E.2d 604, 1979 Ga. App. LEXIS 2382 (1979) (decided under former Code 1933, § 38-411); Askea v. State, 153 Ga. App. 849, 267 S.E.2d 279, 1980 Ga. App. LEXIS 2007 (1980) (decided under former Code 1933, § 38-411); Fowler v. State, 246 Ga. 256, 271 S.E.2d 168, 1980 Ga. LEXIS 1071 (1980) (decided under former Code 1933, § 38-411); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549, 1981 Ga. LEXIS 641, cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981) (decided under former Code 1933, § 38-411); Caffo v. State, 247 Ga. 751, 279 S.E.2d 678, 1981 Ga. LEXIS 876 (1981) (decided under former Code 1933, § 38-411); Kettman v. State, 257 Ga. 603, 362 S.E.2d 342, 1987 Ga. LEXIS 1029 (1987) (decided under former O.C.G.A. § 24-3-50); Stowers v. State, 205 Ga. App. 518, 422 S.E.2d 870, 1992 Ga. App. LEXIS 1236 (1992), cert. denied, No. S93C0060, 1992 Ga. LEXIS 1003 (Ga. Dec. 2, 1992); Henry v. State, 265 Ga. 732, 462 S.E.2d 737, 1995 Ga. LEXIS 848 (1995) (decided under former O.C.G.A. § 24-3-50); Duke v. State, 268 Ga. 425, 489 S.E.2d 811 (decided under former O.C.G.A. § 24-3-50); Gilliam v. State, 268 Ga. 690, 492 S.E.2d 185 (decided under former O.C.G.A. § 24-3-50); Collis v. State, 252 Ga. App. 659, 556 S.E.2d 221, 2001 Ga. App. LEXIS 1274 (2001), cert. denied, No. S02C0508, 2002 Ga. LEXIS 344 (Ga. Apr. 15, 2002) (decided under former O.C.G.A. § 24-3-50).

Statements neither coerced nor induced hope. — Trial court did not err by admitting into evidence defendant's pretrial statements in response to allegations of physical child abuse by officers from another jurisdiction and officials' state-

ments telling defendant defendant's cooperation would be conveyed to the prosecuting attorney because the defendant personally never claimed defendant's statement was given either under the force of coercion or in the hope of a benefit. Helton v. State, 206 Ga. App. 600, 426 S.E.2d 172, 1992 Ga. App. LEXIS 1719 (1992), cert. denied, No. S93C0502, 1993 Ga. LEXIS 438 (Ga. Feb. 25, 1993) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in admitting the defendant's statements because the statements were voluntary as the officer did not tell the defendant that the defendant could not leave until the officer heard what the officer wanted, and the detective's statements that the defendant's friend and mother could be arrested if the evidence showed they were involved in the crime were mere truisms or recounting of facts rather than a threat of injury or promise of benefit. Moore v. State, 325 Ga. App. 749, 754 S.E.2d 792, 2014 Ga. App. LEXIS 66 (2014) (decided under former O.C.G.A. § 24-3-50).

Officer discussing right to bury relatives after suspect invoking right to counsel. — Officer's statement to the defendant, given after the defendant invoked the right to counsel, in which the officer expressed the officer's knowledge of the request for a lawyer, urged the defendant not to say anything, and told the defendant that everyone should have the opportunity to bury their loved ones, as did the officer recently when the officer's father and brother died, was not calculated to procure an untrue statement, and because the defendant was not threatened with fear of injury nor promised hope of benefit, because there was no deception, nor did the police inject religion into the exchange, and because the officer's speech was not coercive police activity, the police did not violate the defendant's Fifth Amendment right against coerced self-incrimination; however, while the defendant's statements themselves, in which the defendant confessed to killing the defendant's uncle and told the police where the defendant disposed of the body, were inadmissible based on the defendant's invocation of the right to counsel, nevertheless the fruits of the statements were admissible. State v. Woods, 280 Ga. 758, 632 S.E.2d 654, 2006 Ga. LEXIS 480 (2006) (decided under former O.C.G.A. § 24-3-50).

Statement by officer that the officer was considering charging defendant's girlfriend was a mere "truism" or recounting of facts, rather than a threat of injury or promise of benefit. Anderson v. State, 224 Ga. App. 608, 481 S.E.2d 595 (decided under former O.C.G.A. § 24-3-50).

Advice from officer that suspect will feel better if the suspect tells the truth will not render confession inadmissible. Caffo v. State, 247 Ga. 751, 279 S.E.2d 678, 1981 Ga. LEXIS 876 (1981) (decided under former Code 1933, § 38-411).

Officer's statement that "it would mean a lot in the end." — Juvenile's statement was not induced in the hope of benefit based on an officer's comment that the juvenile needed to tell the truth "because it would mean a lot in the end." In re J.L., 229 Ga. App. 447, 494 S.E.2d 274 (decided under former O.C.G.A. § 24-3-50).

Officer's statement after arrest that "no lawyer can do you any good at this point" did not render defendant's statements involuntary. Gober v. State, 264 Ga. 226, 443 S.E.2d 616, 1994 Ga. LEXIS 442 (1994) (decided under former O.C.G.A. § 24-3-50).

Officer's statement that spouse was target of investigation. — When an officer interviewing the defendant told the defendant that the defendant's spouse was the target of an investigation, this did not make the defendant's confession involuntary under former O.C.G.A. § 24-3-50. The officer, who sought to deflect attention from the spouse's role as the tipster who led police to the defendant, had not created a fear of injury invalidating the confession as the defendant had not exonerated the spouse during the interview but implicated the spouse in other illegal activity. Smith v. State, 291 Ga. App. 535, 662 S.E.2d 305, 2008 Ga. App. LEXIS 562 (2008) (decided under former O.C.G.A. § 24-3-50).

Fact that a confession was procured by the employment of false-

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hood by a police officer, detective, or other person does not alone exclude the confession, where not calculated to do other than elicit the truth and does not prevent the confession from being free and voluntary. Moore v. State, 230 Ga. 839, 199 S.E.2d 243, 1973 Ga. LEXIS 1074 (1973), superseded by statute as stated in Gage v. State, 358 Ga. App. 855, 856 S.E.2d 440, 2021 Ga. App. LEXIS 142 (2021) (decided under former Code 1933, § 38-411).

Confession otherwise admissible is not inadmissible because the confession was prompted by advice of a relative of the defendant. Dick v. State, 246 Ga. 697, 273 S.E.2d 124, 1980 Ga. LEXIS 1243 (1980), cert. denied, 451 U.S. 976, 101 S. Ct. 2059, 68 L. Ed. 2d 357, 1981 U.S. LEXIS 2009 (1981); Cunningham v. State, 248 Ga. 835, 286 S.E.2d 427, 1982 Ga. LEXIS 696 (1982) (decided under former Code 1933, § 38-411).

Confession obtained through trickery. — Defendant's custodial statement to the police was admissible because the statement was made voluntarily as even if an interrogating officer allowed defendant to overhear a coconspirator's implication of defendant, there was no evidence that the officer was attempting to procure an untrue statement from defendant. Brown v. State, 278 Ga. 724, 609 S.E.2d 312, 2004 Ga. LEXIS 1042 (2004) (decided under former O.C.G.A. § 24-3-50).

Hope of lighter punishment, induced by other person, is usually "hope of benefit", etc. referred to in former O.C.G.A. § 24-3-50. Wesley v. State, 177 Ga. App. 877, 341 S.E.2d 507, 1986 Ga. App. LEXIS 2475 (1986); State v. Barber, 197 Ga. App. 353, 398 S.E.2d 419, 1990 Ga. App. LEXIS 1304 (1990) (decided under former O.C.G.A. § 24-3-50); In re R.J.C., 210 Ga. App. 286, 435 S.E.2d 759, 1993 Ga. App. LEXIS 1135 (1993) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in finding that a portion of the defendant's police interview was inadmissible because it was induced by an officer's statement that "the person that cooperates is the person that gets help," made after the defendant and two accomplices were arrested, and the statement indicated that if the defendant cooperated truthfully, the defendant would get a lighter sentence than the accomplices. State v. Robinson, 326 Ga. App. 63, 755 S.E.2d 869, 2014 Ga. App. LEXIS 118 (2014).

Confession inadmissible after sheriff promised prosecution on only one count. — Defendant's confessions made to a sheriff were based on a promise that the defendant would be prosecuted on only one count of burglary and were therefore involuntary under former O.C.G.A. § 24-3-50. However, the defendant had identified defendant's connection with the defendant's accomplices prior to the involuntary statements, and the defendant's accomplices' testimony against the defendant was still admissible. Stidham v. State, 299 Ga. App. 858, 683 S.E.2d 906, 2009 Ga. App. LEXIS 1008 (2009) (decided under former O.C.G.A. § 24-3-50).

Statement induced by written promise not to press additional charges held involuntary. — Defendant was granted new trial for convictions for felony murder and other crimes after it was determined that defendant's statement to detectives as to the location of the gun used in the murder and defendant's provision of the gun to two co-indictees was involuntary and inadmissible under former O.C.G.A. § 24-3-50 as the statement was induced by a written promise not to press any additional weapons charges against defendant. Foster v. State, 283 Ga. 484, 660 S.E.2d 521, 2008 Ga. LEXIS 340 (2008) (decided under former O.C.G.A. § 24-3-50).

Statement that others will remain under arrest until possessor of contraband determined. — When the officers told the defendant that defendant's stepfather and girlfriend, who were also arrested at the trailer, were going to remain under arrest pending a determination of who was in possession of the contraband, such a statement falls into the category of a mere "truism" or "recounting of the facts," rather than an offer of benefit or threat of injury. Sampson v. State, 165 Ga. App. 833, 303 S.E.2d 77, 1983 Ga.

App. LEXIS 2033 (1983) (decided under former O.C.G.A. § 24-3-50).

Statement that cooperation would be noted in court not hope of benefit. — Police officer's statement to a 17-year-old defendant that it would be better if the defendant cooperated with the police, and if the defendant does so, the officer will have to say in court that the defendant cooperated, does not constitute a "hope of benefit" making a subsequent confession inadmissible. Rounds v. State, 166 Ga. App. 212, 303 S.E.2d 543, 1983 Ga. App. LEXIS 3217 (1983) (decided under former O.C.G.A. § 24-3-50).

Offering to make known a suspect's confession to the district attorney and the trial judge is not an offer of benefit. McKenzie v. State, 187 Ga. App. 840, 371 S.E.2d 869, 1988 Ga. App. LEXIS 998 (1988); Sims v. State, 197 Ga. App. 214, 398 S.E.2d 244, 1990 Ga. App. LEXIS 1254 (1990) (decided under former O.C.G.A. § 24-3-50).

Agreeing to tell the trial judge of the defendant's cooperation if the defendant confesses does not constitute the "hope of benefit" contemplated by former O.C.G.A. § 24-3-50. Moore v. State, 179 Ga. App. 488, 347 S.E.2d 318, 1986 Ga. App. LEXIS 2637 (1986) (decided under former O.C.G.A. § 24-3-50); Butler v. State, 194 Ga. App. 208, 390 S.E.2d 278, 1990 Ga. App. LEXIS 24 (1990) (decided under former O.C.G.A. § 24-3-50); Carswell v. State, 268 Ga. 531, 491 S.E.2d 343 (decided under former O.C.G.A. § 24-3-50); Martin v. State, 271 Ga. 301, 518 S.E.2d 898 (decided under former O.C.G.A. § 24-3-50).

Encouraging cooperation by a defendant and promising to bring defendant's cooperation to the attention of the prosecutor or the trial judge does not constitute the "hope of benefit" contemplated by former O.C.G.A. § 24-3-50. Bussey v. State, 202 Ga. App. 483, 414 S.E.2d 710, 1992 Ga. App. LEXIS 62 (1992) (decided under former O.C.G.A. § 24-3-50).

Defendant's confession was voluntary and admissible because the investigators framed the investigators' inquiries in terms of what they wanted to be able to tell the judge, and any suggestions of a possible benefit were either nonspecific (e.g., "help yourself") or along the lines of allowing the defendant to have more credibility with the jury for being honest; the promises did not relate to the charges or sentence the defendant was facing so as to render the confession inadmissible under O.C.G.A. § 24-8-824. Baughns v. State, 335 Ga. App. 600, 782 S.E.2d 494, 2016 Ga. App. LEXIS 42 (2016).

Investigator's statement to defendant that if the defendant cooperated, the investigator would let the district attorney know and it might help the defendant did not impermissibly hold out some hope of benefit so as to make defendant's confession inadmissible. Lyles v. State, 221 Ga. App. 560, 472 S.E.2d 132 (decided under former O.C.G.A. § 24-3-50).

Evidence that investigator suggested defendant could be charged with lesser offense. — An investigating officer's admission that the officer discussed bringing a lesser charge of theft by taking rather than armed robbery with a defendant, and the specific language in the defendant's written statement expressly admitting to the lesser offense, along with the statement to another officer that the crime was theft by taking, supported the trial court's factual finding that the defendant gave the custodial statement with the hope of benefit. Thus, the trial court properly granted the defendant's motion to suppress the statement. State v. Klepper, 301 Ga. App. 753, 688 S.E.2d 673, 2009 Ga. App. LEXIS 1439 (2009) (decided under former O.C.G.A. § 24-3-50).

Officer's statement that the officer wanted to "help" the defendant was not an offer of reward which tainted the confession by inducing a hope of benefit in the defendant making the statement involuntary under former O.C.G.A. § 24-3-50. Cooper v. State, 256 Ga. 234, 347 S.E.2d 553, 1986 Ga. LEXIS 811 (1986) (decided under former O.C.G.A. § 24-3-50).

Officer's statement to a suspect that the officer was trying to help the suspect did not constitute the "slightest hope of benefit" under former O.C.G.A. § 24-3-50 and did not require the exclusion of an inculpatory statement the defendant made in

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response to the officer's statement. Stringer v. State, 285 Ga. 842, 684 S.E.2d 590, 2009 Ga. LEXIS 503 (2009), overruled in part, State v. Sims, 296 Ga. 465, 769 S.E.2d 62, 2015 Ga. LEXIS 97 (2015) (decided under former O.C.G.A. § 24-3-50).

Promises to obtain psychiatric help and medical attention for defendant were not the kind of "hope of benefit" which would invalidate defendant's subsequent confession. Head v. State, 180 Ga. App. 901, 350 S.E.2d 854, 1986 Ga. App. LEXIS 2302 (1986) (decided under former O.C.G.A. § 24-3-50).

Hope of benefit raised initially by defendant does not render confession inadmissible. — When the officer who took defendant's statement testified that it was defendant who first raised the notion of a reduction of bail bond, defendant's hope of benefit was not induced by another and would not serve to render defendant's confession inadmissible. Heard v. State, 165 Ga. App. 252, 300 S.E.2d 213, 1983 Ga. App. LEXIS 3141 (1983) (decided under former O.C.G.A. § 24-3-50); Pounds v. State, 189 Ga. App. 809, 377 S.E.2d 722, 1989 Ga. App. LEXIS 68 (1989) (decided under former O.C.G.A. § 24-3-50).

Codefendant's prior confession does not affect voluntariness. — That one party to the commission of a crime has confessed to that party's participation in the crime does not render the defendant's later confession involuntary. Whittington v. State, 252 Ga. 168, 313 S.E.2d 73, 1984 Ga. LEXIS 629 (1984) (decided under former O.C.G.A. § 24-3-50).

Promise to help keep defendant out of certain prison. — Confession is not rendered inadmissible by an assurance that whatever help could be given would be given in keeping the defendant out of a certain prison, since this is similar to a promise to inform the court of a defendant's cooperation. Patrick v. State, 169 Ga. App. 302, 312 S.E.2d 385, 1983 Ga. App. LEXIS 3468 (1983), aff'd, 252 Ga. 509, 314 S.E.2d 909, 1984 Ga. LEXIS 755 (1984) (decided under former O.C.G.A. § 24-3-50).

Promise to end adverse publicity. — When an inculpatory statement was made by the fire department lieutenant in return for the investigator's alleged promise to "stop all the publicity against the fire and police department and not arrest and persecute anyone else," the promise pertained to collateral benefits and the trial court did not err in ruling the statement to be voluntary and admissible. Johnson v. State, 170 Ga. App. 71, 316 S.E.2d 160, 1984 Ga. App. LEXIS 2852 (1984) (decided under former O.C.G.A. § 24-3-50).

Promise of collateral benefit. — An investigator's statement that the investigator would talk to the district attorney's office at a later time about having a warrant against the defendant dismissed was no more than a promise of a collateral benefit and thus did not make the defendant's custodial statement inadmissible under former O.C.G.A. §§ 24-3-50 and 24-3-51 (see now O.C.G.A. § 24-8-824 and 24-8-825). Boone v. State, 293 Ga. App. 654, 667 S.E.2d 880, 2008 Ga. App. LEXIS 1041 (2008) (decided under former O.C.G.A. § 24-3-50).

It was not error for a trial court to decline to exclude the defendant's custodial statements on the theory that the statements were made based on an improper hope of benefit because an officer's promise not to tell the defendant's wife that the defendant had been arrested merely promised a collateral benefit which did not render the statements excludable. Millsaps v. State, 310 Ga. App. 769, 714 S.E.2d 661, 2011 Ga. App. LEXIS 654 (2011) (decided under former O.C.G.A. § 24-3-50).

Statement that the defendant "needed" to tell the police officers if defendant knew anything about the crime does not render the confession involuntary. Whittington v. State, 252 Ga. 168, 313 S.E.2d 73, 1984 Ga. LEXIS 629 (1984) (decided under former O.C.G.A. § 24-3-50).

Confession not induced by fear. — Trial court's determination that defendant's confession was not rendered invol-

untary because the confession was induced by fear because of a deputy's statement during the post arrest interview purportedly threatening the defendant with a life sentence was supported by sufficient evidence. Baker v. State, 211 Ga. App. 515, 439 S.E.2d 668, 1993 Ga. App. LEXIS 1567 (1993) (decided under former O.C.G.A. § 24-3-50).

Hollering by interrogating officer not "fear of injury" negating voluntariness. — Defendant's fear when the detective interrogating defendant "hollered" at defendant was self-induced and not the "fear of injury" contemplated by former O.C.G.A § 24-3-50 since there was no evidence that the police had threatened to harm the defendant if the defendant did not make a statement. Mungin v. State, 183 Ga. App. 290, 358 S.E.2d 673, 1987 Ga. App. LEXIS 2687 (1987), cert. denied, 485 U.S. 908, 108 S. Ct. 1083, 99 L. Ed. 2d 242, 1988 U.S. LEXIS 963 (1988) (decided under former O.C.G.A. § 24-3-50).

Intimidation not established. — Defendant's claim that defendant's confession was the product of intimidation was not established by defendant's testimony that one of the interrogating officers became angry and brushed the officer's jacket back, revealing the officer's gun. Raulerson v. State, 268 Ga. 623, 491 S.E.2d 791 (decided under former O.C.G.A. § 24-3-50).

Withholding medical attention from defendant until after an interrogation was concluded does not render the defendant's statement to the police involuntary and having been induced by the hope of benefit since the evidence upholds the voluntariness of the statement. Cannon v. State, 257 Ga. 475, 360 S.E.2d 592, 1987 Ga. LEXIS 932 (1987) (decided under former O.C.G.A. § 24-3-50).

Officer's statement that the defendant would not be taken to jail if the defendant submitted to a drug recognition examination did not amount to an improper hope of benefit in violation of former O.C.G.A. § 24-3-50 and, thus, the trial court did not err in failing to suppress evidence of the drug recognition exam. Edison v. State, 327 Ga. App. 366, 759 S.E.2d 247, 2014 Ga. App. LEXIS 343 (2014) (decided under former O.C.G.A. § 24-3-50).

Absence of counsel. — It is not the law of this state that when a prisoner is known by police to be represented by counsel, anything the prisoner says to police in absence of counsel is per se inadmissible, whether voluntary or not. Pierce v. State, 235 Ga. 237, 219 S.E.2d 158, 1975 Ga. LEXIS 842 (1975) (decided under former Code 1933, § 38-411).

Considering the totality of the circumstances a confession may be shown to be voluntary even though made in the absence of counsel after counsel has been retained or appointed. Pierce v. State, 235 Ga. 237, 219 S.E.2d 158, 1975 Ga. LEXIS 842 (1975) (decided under former Code 1933, § 38-411).

Offer of settlement. — Confession freely and voluntarily made is admissible in evidence against the defendant, although such confession is coupled with the proposition on defendant's part to settle or compromise the case or charge against the defendant; such an offer of settlement not being induced by another. Hecox v. State, 105 Ga. 625, 31 S.E. 592, 1898 Ga. LEXIS 683 (1898) (decided under former law); Grubbs v. State, 53 Ga. App. 377, 186 S.E. 140, 1936 Ga. App. LEXIS 126 (1936) (decided under former Code 1933, § 38-411).

Defendant's confession made to the victim's parents was not involuntary on the basis that the confession was induced by the hope of benefit—specifically, the victim's parents' representation that the parents would not involve the police. Wiley v. State, 245 Ga. App. 580, 538 S.E.2d 483, 2000 Ga. App. LEXIS 1016 (2000) (decided under former O.C.G.A. § 24-3-50).

Defendant must object to confession. — When evidence of a confession is offered by the state in a criminal case, and there is no objection by the defendant upon the ground that the alleged confession was not voluntarily made, the confession is admissible as a voluntary confession. Washington v. State, 24 Ga. App. 65, 100 S.E. 31, 1919 Ga. App. LEXIS 409 (1919) (decided under former Penal Code 1910, § 1032).

Presumption of waiver. — If a prima facie case of admissibility of a confession is sought to be improperly established, but

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no proper objections are made to its insufficiency at the trial, the right to object will be presumed to have been waived. McLemore v. State, 181 Ga. 462, 182 S.E. 618, 1935 Ga. LEXIS 126 (1935) (decided under former Code 1933, § 38-411).

If a prima facie case of admissibility is sought to be improperly established, but no proper objections are made to its sufficiency at the trial, the right to object will be presumed to have been waived, and where timely objection or motion is made to exclude such testimony which at best still leaves in doubt whether statements were made which may have induced the confession or inculpatory statement, it is error not to reject such testimony of the confession or inculpatory statement. Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626, 1950 Ga. App. LEXIS 798 (1950) (decided under former Code 1933, § 38-411).

Failure to object when confession involuntary. — When not made freely and voluntarily, a confession is presumed to be legally false, and cannot be the underlying basis of a conviction; the failure to object to such evidence does not give the confession probative value where it is shown without dispute that the confession was not freely and voluntarily made. McKennon v. State, 63 Ga. App. 466, 11 S.E.2d 416, 1940 Ga. App. LEXIS 475 (1940) (decided under former Code 1933, § 38-411).

If the confession is admitted without timely objection and the evidence shows without dispute that the confession was not voluntary, then, whether the confession is objected to or not it is not legal evidence and has no probative value. The evidence, exclusive of the confession, must be sufficient to authorize a verdict of guilty after it appears that the confession was not voluntary, for the failure to object to the confession would not give the confession probative value; and since, without the confession, the verdict is unsupported by the evidence, the case, if not reversed on some other special ground, must be reversed solely on the general grounds. Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504, 1942 Ga. App. LEXIS 534 (1942) (decided under former Code 1933, § 38-411).

Absence of a signed waiver of rights does not render a confession inadmissible if the evidence otherwise authorized a finding of voluntariness. Patterson v. State, 149 Ga. App. 438, 254 S.E.2d 445, 1979 Ga. App. LEXIS 1882 (1979) (decided under former Code 1933, § 38-411).

Fact that no signed waiver was obtained from defendant did not militate against the finding that defendant's confession was freely and voluntarily given. Miller v. State, 155 Ga. App. 587, 271 S.E.2d 719, 1980 Ga. App. LEXIS 2689 (1980) (decided under former Code 1933, § 38-411).

Objection after verdict. — Confessions are legal evidence. Unless the circumstances under which the confessions were made show the confessions were not voluntary, the confessions are admissible. If they are given in, and not objected to, it is too late after the verdict to say there was not sufficient inquiry into the circumstances. Hill v. State, 214 Ga. 794, 107 S.E.2d 662, 1959 Ga. LEXIS 348 (1959) (decided under former Code 1933, § 38-411).

Capacity to waive. — Mere fact that the defendant was 21 years old with a sixth grade education does not lead to the conclusion that the defendant was incapable of knowingly, voluntarily, and intelligently waiving defendant's constitutional rights. Gates v. State, 244 Ga. 587, 261 S.E.2d 349, 1979 Ga. LEXIS 1340 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980); Cunningham v. State, 248 Ga. 835, 286 S.E.2d 427, 1982 Ga. LEXIS 696 (1982) (decided under former Code 1933, § 38-411).

Lack of literacy does not dictate determination that there has been no voluntary knowledgeable waiver. Watson v. State, 159 Ga. App. 618, 284 S.E.2d 636, 1981 Ga. App. LEXIS 2775 (1981) (decided under former Code 1933, § 38-411).

A statement may be voluntary even if the suspect has a limited education. Harrison v. State, 253 Ga. App. 179, 558 S.E.2d 760, 2002 Ga. App. LEXIS 10 (2002) (decided under former O.C.G.A. § 24-3-50).

Subsequent waiver valid. — Although defendant had refused to sign a

written acknowledgment that defendant had been informed of defendant's right to remain silent and right to representation, defendant's subsequent acknowledgment in writing two hours later that the defendant had been informed of these rights supported the trial court's findings that defendant's statement was freely and voluntarily given. Pierce v. State, 209 Ga. App. 366, 433 S.E.2d 641, 1993 Ga. App. LEXIS 883 (1993), cert. denied, No. S93C1648, 1993 Ga. LEXIS 962 (Ga. Oct. 12, 1993) (decided under former O.C.G.A. § 24-3-50).

Time lapse between waiver and confession. — Ten-hour lapse between the time of the waiver of rights and the actual confession at which time previous warnings were reiterated does not render a confession inadmissible. Dick v. State, 246 Ga. 697, 273 S.E.2d 124, 1980 Ga. LEXIS 1243 (1980), cert. denied, 451 U.S. 976, 101 S. Ct. 2059, 68 L. Ed. 2d 357, 1981 U.S. LEXIS 2009 (1981) (decided under former Code 1933, § 38-411).

Erroneous promise by police did not make confession inadmissible. — Detective erroneously promised during an interview that a defendant would not be charged with an offense that required sex offender registration because a conviction for electronically furnishing obscene material to a minor under O.C.G.A. § 16-12-100.1 would require registration as a sex offender under O.C.G.A. § 42-1-12(e)(2); prior to the erroneous promise, the defendant's confession was voluntarily made under former O.C.G.A. § 24-3-50 as the confession was made without the slightest hope of benefit. State v. Lee, 295 Ga. App. 49, 670 S.E.2d 879, 2008 Ga. App. LEXIS 1352 (2008) (decided under former O.C.G.A. § 24-3-50).

Question to witness as to voluntariness of confession does not call for conclusion. — When a witness testified to the circumstances surrounding the confession, showing clearly that the confession was voluntary, a question then posed to the witness regarding the confession's voluntariness does not call for a conclusion. Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3, 1981 Ga. LEXIS 1095 (1981) (decided under former Code 1933, § 38-411).

Juvenile's confession voluntary despite officer's statement to drive home. — Because a police officer's statement to defendant juvenile that the officer would drive defendant home once they were through, even if construed as the promise of a benefit for defendant's confession, was only a collateral benefit that would not implicate the provisions of former O.C.G.A. § 24-3-50; thus, the trial court did not clearly err in finding the juvenile's statements to police were voluntary. In re D. T., 294 Ga. App. 486, 669 S.E.2d 471, 2008 Ga. App. LEXIS 1267 (2008) (decided under former O.C.G.A. § 24-3-50).

Juvenile's statement involuntary. — Habeas court properly granted the petition on the basis that the petitioner juvenile's trial counsel was ineffective for failing to advise the petitioner that inculpatory custodial statements by the petitioner could have been suppressed as involuntary because the petitioner was 14 years old at the time of the police interview, and had not yet entered high school, having failed the eighth grade; law enforcement's interview of the petitioner was a relatively lengthy two-and-a-half hours, and petitioner was held in the interrogation room for more than four hours; the officers used aggressive interrogation methods; and some of the officers' statements arguably constituted assurances creating a hope of a benefit. Oubre v. Woldemichael, 301 Ga. 299, 800 S.E.2d 518, 2017 Ga. LEXIS 439 (2017), overruled in part, Clark v. State, 315 Ga. 423, 883 S.E.2d 317, 2023 Ga. LEXIS 13 (2023).

Facts sufficient to support voluntariness. — When a police officer testified that the officer twice read defendant the defendant's rights, that the defendant indicated that the defendant did not want a lawyer but wanted to make a statement, that the defendant did not appear to be under the influence of alcohol or drugs, and that the defendant's statement was made without threat or coercion or under any offer of hope or benefit, there was no

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error in admitting the defendant's statement. Jones v. State, 194 Ga. App. 746, 391 S.E.2d 663, 1990 Ga. App. LEXIS 332 (1990) (decided under former O.C.G.A. § 24-3-50).

Defendant's interrogation in the office of a retail store by as many as five police officers at different times did not evince an unduly coercive environment since the main interrogating officer testified and denied the making of any promises or threats to defendant. Pinson v. State, 207 Ga. App. 734, 429 S.E.2d 106, 1993 Ga. App. LEXIS 344 (1993) (decided under former O.C.G.A. § 24-3-50).

In defendant's trial on charges of child molestation and statutory rape, the trial court found that defendant's waiver of Miranda rights applied to statements defendant made after defendant took a polygraph examination and not just to statements defendant made while taking the test, and the appellate court sustained that finding and held that the trial court properly admitted defendant's statements. Little v. State, 260 Ga. App. 87, 579 S.E.2d 84, 2003 Ga. App. LEXIS 316 (2003) (decided under former O.C.G.A. § 24-3-50).

Prisoner's habeas petition under 28 U.S.C. § 2254 was properly denied because the state habeas court correctly applied controlling federal precedent in finding that there was no ineffective assistance of counsel under the Sixth Amendment in that the prisoner's confession was made while the prisoner was sober and there was nothing to support an argument of involuntariness or intoxication. Therefore, the confession was admissible both under the due process clause of the Fourteenth Amendment and former O.C.G.A. § 24-3-50. Newland v. Hall, 527 F.3d 1162, 2008 U.S. App. LEXIS 10433 (11th Cir. 2008), cert. denied, 555 U.S. 1183, 129 S. Ct. 1336, 173 L. Ed. 2d 607, 2009 U.S. LEXIS 1348 (2009) (decided under former O.C.G.A. § 24-3-50).

Defendant's statements to a local detective regarding the defendant's role in three robberies were voluntary and, thus, admissible under former O.C.G.A. § 24-3-50 because the defendant was told that the defendant was not in custody when initially interviewed, defendant was not a suspect at that time, and defendant did not make a confession in the hope of some benefit; defendant was thought to be a witness to a robbery. Dean v. State, 292 Ga. App. 695, 665 S.E.2d 406, 2008 Ga. App. LEXIS 843 (2008) (decided under former O.C.G.A. § 24-3-50).

Defendant's custodial statements were properly deemed voluntary under former O.C.G.A. § 24-3-50. The defendant was advised of defendant's Miranda rights; signed a waiver of those rights; admitted no threats or promises were made; and, although the defendant claimed not to understand the Miranda rights due to limited mental capacity, there was no evidence the defendant was mentally or cognitively impaired. Inman v. State, 295 Ga. App. 461, 671 S.E.2d 921, 2009 Ga. App. LEXIS 13 (2009) (decided under former O.C.G.A. § 24-3-50).

In a statutory rape case, as the record showed that police had not misrepresented the 12-year-old victim's status to the defendant or promised that the defendant would be charged with rape only if the investigation established that the defendant had committed forcible rape, the defendant's confession and DNA test results which showed that the defendant was the parent of the victim's child were not inadmissible as having been obtained through trickery and deceit. Henry v. State, 295 Ga. App. 758, 673 S.E.2d 120, 2009 Ga. App. LEXIS 67 (2009) (decided under former O.C.G.A. § 24-3-50).

With regard to a defendant's malice murder conviction arising from the suffocation death of the defendant's newborn daughter, the trial court did not err by admitting into evidence the defendant's confession that acknowledged that the baby was breathing and whimpering after birth since, given the totality of the circumstances, the trial court's ruling that the confession was given freely and voluntarily after the court viewed the videotapes of the police interviews was not clearly erroneous and there was no merit to the defendant's contention that the confession was encouraged by threats, including that the investigation would turn to a romantic friend, since under former

O.C.G.A. § 24-3-50, the remotest fear of injury that rendered a confession involuntary and inadmissible was physical or mental torture, which was not claimed. Wright v. State, 285 Ga. 428, 677 S.E.2d 82, 2009 Ga. LEXIS 157 (2009), cert. denied, 558 U.S. 1123, 130 S. Ct. 1076, 175 L. Ed. 2d 903, 2010 U.S. LEXIS 281 (2010) (decided under former O.C.G.A. § 24-3-50).

Even if investigators' statements that the defendant would be allowed to go home after the interview constituted an improper "hope of benefit," the investigators did not actually induce the defendant's confession because the defendant made the incriminatory statements voluntarily; the defendant was familiar with the defendant's constitutional rights, was 19 years old at the time of the interview, was a high school graduate, was aware of the allegations against the defendant, was not in custody when the defendant initially confessed, was not yet indicted, and was questioned for approximately two hours but confessed after less than one hour. State v. Brown, 308 Ga. App. 480, 708 S.E.2d 63, 2011 Ga. App. LEXIS 207 (2011), aff'd, 290 Ga. 865, 725 S.E.2d 320, 2012 Ga. LEXIS 348 (2012) (decided under former O.C.G.A. § 24-3-50).

Trial court properly ruled that the defendant's inculpatory statement was not subject to suppression as involuntary because the defendant received Miranda warnings at the beginning of the interview, before making the statement, and the defendant acknowledged those warnings again part-way through the interview. Williams v. State, 314 Ga. App. 840, 726 S.E.2d 66, 2012 Ga. App. LEXIS 183 (2012), cert. denied, No. S12C1204, 2012 Ga. LEXIS 703 (Ga. Sept. 10, 2012) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in finding that the defendant freely and voluntarily made a statement to police admitting that the defendant knew methamphetamine was being manufactured in the garage a few feet from the defendant's three-month-old child because the defendant was advised of the Miranda rights, waived the right to counsel, and agreed to speak with the investigator and during that conversation made the admission. Blackwell v. State, 337 Ga. App. 173, 786 S.E.2d 552, 2016 Ga. App. LEXIS 290 (2016).

Trial court did not clearly err by denying the defendant's pretrial motion to suppress because the evidence supported the court's determination that the defendant knowingly and voluntarily waived the defendant's rights and gave the defendant's statement as the detective testified and the video recording showed that the defendant was informed of the defendant's rights under Miranda and formally waived those rights, the defendant expressed the defendant's understanding and willingness to speak with police both by nodding to show assent and in writing, and the detective testified that the detective did not smell alcohol or marijuana on the defendant's breath, and the defendant's appearance indicated that the defendant was sober. Thomas v. State, 308 Ga. 26, 838 S.E.2d 801, 2020 Ga. LEXIS 92 (2020).

Defendant's confession was not involuntary even though the interrogating officers falsely told the defendant that the victim had woken up and told the officers that the defendant caused the victim's injuries as the statement that the victim was still alive was truthful and the defendant seemed to place little, if any, reliance on the statements regarding the victim's health and simply wanted to explain that the death was an accident. Mann v. State, 307 Ga. 696, 838 S.E.2d 305, 2020 Ga. LEXIS 57 (2020).

Defendant was not in custody for purposes of Miranda at the time the defendant gave the defendant's statement, and the statement was properly admitted into evidence, because defendant went to the police station voluntarily and was allowed to leave once the questioning was finished; thus, a reasonable person in defendant's position would have concluded that the defendant was not under formal arrest and that the defendant's freedom was not restrained. Jones v. State, 270 Ga. App. 233, 606 S.E.2d 288, 2004 Ga. App. LEXIS 1400 (2004) (decided under former O.C.G.A. § 24-3-50).

In action decided under former O.C.G.A. § 24-3-50, a detective's false claim that the defendant's DNA was found on the brass knuckles did not affect the

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admissibility of the defendant's confession, made after the defendant knowingly and voluntarily waived Miranda rights. Johnson v. State, 295 Ga. 421, 761 S.E.2d 13, 2014 Ga. LEXIS 541 (2014) (decided under former O.C.G.A. § 24-3-50).

Defendant's statement was not involuntary under former O.C.G.A. § 24-3-50 because the defendant agreed to be interviewed at the police station, with an attorney, before the defendant was charged, and before the interview, the defendant and the attorney were told by the interviewer that the interviewer wanted to hear the defendant's side of the story relating to allegations of sexual battery and child molestation; no promises were made to the defendant regarding arrest or sentencing. Pollio v. State, 278 Ga. App. 729, 629 S.E.2d 583, 2006 Ga. App. LEXIS 602 (2006) (decided under former O.C.G.A. § 24-3-50).

Testimony that the defendant, who worked as a detention officer, might be fired if the defendant did not talk to the investigator who questioned the defendant was true and was simply a recounting of fact and, thus, did not support a finding that the defendant's confession was coerced under former O.C.G.A. § 24-3-50. Duncan v. State, 315 Ga. App. 67, 726 S.E.2d 558, 2012 Ga. App. LEXIS 318 (2012) (decided under former O.C.G.A. § 24-3-50).

Defendant's statements during a second interview with police were voluntary and admissible as the investigator's statements did not concern a charge or sentence facing the defendant and did not constitute physical or mental torture. Turner v. State, 296 Ga. 394, 768 S.E.2d 458, 2015 Ga. LEXIS 1 (2015) (decided under former O.C.G.A. § 24-3-50).

Trial court did not clearly err in denying the defendant's motion to suppress evidence of the defendant's confession because, while the detective interviewing the defendant told the defendant that the defendant might garner sympathy by being honest and forthcoming, the officer did not promise a lighter sentence or reduced charges; and a detective's statement that the detective was getting "pissed off" did not amount to a threat of injury that rendered the defendant's confession inadmissible. Burden v. State, 332 Ga. App. 811, 775 S.E.2d 183, 2015 Ga. App. LEXIS 399 (2015) (decided under former O.C.G.A. § 24-3-50).

Defendant's motion to suppress was properly granted in part, excluding any custodial statements the defendant made before the defendant was advised of the defendant's Miranda rights, but properly denied in part as to the statements made after the defendant received the Miranda warning as the defendant's statements were voluntary because the officer did not tell the defendant that the defendant would be better off if the defendant confessed or threaten injury if the defendant refused to cooperate as the officer merely warned the defendant of the consequences of lying to the police. Hudson v. State, 353 Ga. App. 223, 836 S.E.2d 217, 2019 Ga. App. LEXIS 676 (2019).

Promise not to seek divorce. — Because the promise made by the defendant's spouse not to seek a divorce if the defendant talked to police regarding the crimes charged did not bear on the question of punishment, and served as merely a collateral benefit, the trial court did not err in finding the defendant's statement to be voluntary and in denying a motion to suppress the statement. Robbins v. State, 290 Ga. App. 323, 659 S.E.2d 628, 2008 Ga. App. LEXIS 174 (2008), cert. denied, No. S08C1232, 2008 Ga. LEXIS 592 (Ga. June 16, 2008) (decided under former O.C.G.A. § 24-3-50).

Confessions were found to be involuntary in the following cases. — See Frain v. State, 40 Ga. 529, 1869 Ga. LEXIS 133 (1869) (decided under former Code 1868, § 3740); Earp v. State, 55 Ga. 136, 1875 Ga. LEXIS 351 (1875) (decided under former Code 1873, § 3793); Burns v. State, 61 Ga. 192, 1878 Ga. LEXIS 68 (1878) (decided under former Code 1873, § 3793); Byrd v. State, 68 Ga. 661, 1882 Ga. LEXIS 79 (1882) (decided under former Code 1873, § 3793); Johnson v. State, 76 Ga. 76, 1885 Ga. LEXIS 24 (1885) (decided under former Code 1882, § 3793); Green v. State, 88 Ga. 516, 15 S.E. 10, 1891 Ga. LEXIS 354 (1891) (decided under former Penal Code 1895,

§ 1006); Smith v. State, 125 Ga. 252, 54 S.E. 190, 1906 Ga. LEXIS 114 (1906) (decided under former Penal Code 1895, § 1006); Johnson v. State, 1 Ga. App. 129, 57 S.E. 934, 1907 Ga. App. LEXIS 165 (1907) (decided under former Penal Code 1895, § 1006); Adams v. State, 129 Ga. 248, 58 S.E. 822, 1907 Ga. LEXIS 345 (1907) (decided under former Penal Code 1895, § 1006); Hawkins v. State, 6 Ga. App. 109, 64 S.E. 289, 1909 Ga. App. LEXIS 197 (1909) (decided under former Penal Code 1910, § 1032); Morris v. State, 33 Ga. App. 53, 125 S.E. 508, 1924 Ga. App. LEXIS 715 (1924) (decided under former Penal Code 1910, § 1032); Lee v. State, 168 Ga. 554, 148 S.E. 400, 1929 Ga. LEXIS 186 (1929) (decided under former Code 1933, § 38-411); Brown v. State, 52 Ga. App. 536, 183 S.E. 848, 1936 Ga. App. LEXIS 173 (1936) (decided under former Code 1933, § 38-411); Turner v. State, 203 Ga. 770, 48 S.E.2d 522, 1948 Ga. LEXIS 514 (1948) (decided under former Code 1933, § 38-411); Biddy v. State, 127 Ga. App. 212, 193 S.E.2d 31, 1972 Ga. App. LEXIS 836 (1972) (decided under former Code 1933, § 38-411); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258, 1975 Ga. LEXIS 1151 (1975), cert. denied, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976) (decided under former Code 1933, § 38-411); Porter v. State, 143 Ga. App. 640, 239 S.E.2d 694, 1977 Ga. App. LEXIS 2442 (1977) (decided under former Code 1933, § 38-411); State v. Ray, 272 Ga. 450, 531 S.E.2d 705, 2000 Ga. LEXIS 479 (2000) (decided under former O.C.G.A. § 24-3-50); Patterson v. State, 274 Ga. 713, 559 S.E.2d 472, 2002 Ga. LEXIS 61 (2002) (decided under former O.C.G.A. § 24-3-50).

Confessions were properly admitted in the following cases. — See Smith v. State, 139 Ga. 230, 76 S.E. 1016, 1913 Ga. LEXIS 385 (1913) (decided under former Penal Code 1910, § 1032); Sledge v. State, 24 Ga. App. 698, 102 S.E. 31, 1920 Ga. App. LEXIS 467 (1920) (decided under former Penal Code 1910, § 1032); Whitworth v. State, 155 Ga. 395, 117 S.E. 450, 1923 Ga. LEXIS 80 (1923) (decided under former Penal Code 1910, § 1032); Bradberry v. State, 170 Ga. 859, 154 S.E. 344, 1930 Ga. LEXIS 259 (1930) (decided under former Penal Code 1910, § 1032); White v. State, 177 Ga. 115, 169 S.E. 499, 1933 Ga. LEXIS 129 (1933) (decided under former Penal Code 1910, § 1032); Riley v. State, 180 Ga. 869, 181 S.E. 154, 1935 Ga. LEXIS 589 (1935) (decided under former Code 1933, § 38-411); Simmons v. State, 181 Ga. 761, 184 S.E. 291, 1936 Ga. LEXIS 428 (1936) (decided under former Code 1933, § 38-411); Mincey v. State, 187 Ga. 281, 200 S.E. 144, 1938 Ga. LEXIS 769 (1938) (decided under former Code 1933, § 38-411); Bryant v. State, 191 Ga. 686, 13 S.E.2d 820, 1941 Ga. LEXIS 376 (1941) (decided under former Code 1933, § 38-411); Russell v. State, 196 Ga. 275, 26 S.E.2d 528, 1943 Ga. LEXIS 339 (1943) (decided under former Code 1933, § 38-411); James v. State, 86 Ga. App. 282, 71 S.E.2d 568, 1952 Ga. App. LEXIS 934 (1952) (decided under former Code 1933, § 38-411); Blackwell v. State, 113 Ga. App. 536, 148 S.E.2d 912, 1966 Ga. App. LEXIS 1126 (1966) (decided under former Code 1933, § 38-411); Williams v. State, 244 Ga. 485, 260 S.E.2d 879, 1979 Ga. LEXIS 1304 (1979) (decided under former Code 1933, § 38-411); Gray v. State, 151 Ga. App. 684, 261 S.E.2d 402, 1979 Ga. App. LEXIS 2748 (1979) (decided under former Code 1933, § 38-411); Riden v. State, 151 Ga. App. 654, 261 S.E.2d 409, 1979 Ga. App. LEXIS 2737 (1979) (decided under former Code 1933, § 38-411); Clayton v. State, 156 Ga. App. 285, 274 S.E.2d 682, 1980 Ga. App. LEXIS 3035 (1980) (decided under former Code 1933, § 38-411); Lane v. State, 247 Ga. 19, 273 S.E.2d 397, 1981 Ga. LEXIS 589 (1981), overruled in part, Clark v. State, 315 Ga. 423, 883 S.E.2d 317, 2023 Ga. LEXIS 13 (2023) (decided under former Code 1933, § 38-411); Copeland v. State, 162 Ga. App. 398, 291 S.E.2d 560, 1982 Ga. App. LEXIS 2187 (1982) (decided under former O.C.G.A. § 24-3-50); McLeod v. State, 170 Ga. App. 415, 317 S.E.2d 253, 1984 Ga. App. LEXIS 2890 (1984) (decided under former O.C.G.A. § 24-3-50); Smith v. State, 190 Ga. App. 702, 379 S.E.2d 643, 1989 Ga. App. LEXIS 315 (1989) (decided under former O.C.G.A. § 24-3-50); Sparks v. State, 232 Ga. App. 179, 501 S.E.2d 562 (decided under former O.C.G.A. § 24-3-50); Gidden v. State, 234 Ga. App. 268, 506 S.E.2d 448 (decided under former

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O.C.G.A. § 24-3-50); Heidler v. State, 273 Ga. 54, 537 S.E.2d 44, 2000 Ga. LEXIS 693 (2000), cert. denied, 532 U.S. 1029, 121 S. Ct. 1979, 149 L. Ed. 2d 771, 2001 U.S. LEXIS 3741 (2001) (decided under former O.C.G.A. § 24-3-50); King v. State, 273 Ga. 258, 539 S.E.2d 783, 2000 Ga. LEXIS 886 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834, 2002 U.S. LEXIS 4925 (2002), overruled in part, Clark v. State, 315 Ga. 423, 883 S.E.2d 317, 2023 Ga. LEXIS 13 (2023) (decided under former O.C.G.A. § 24-3-50).

Trial court's determination that a law enforcement agent's claim that the defendant orally confessed to selling crack cocaine was more credible than the defendant's claim that there was no such oral confession was not clearly erroneous, such that the confession was properly admitted pursuant to former O.C.G.A. § 24-3-50. Harris v. State, 297 Ga. App. 589, 677 S.E.2d 763, 2009 Ga. App. LEXIS 486 (2009) (decided under former O.C.G.A. § 24-3-50).

Defendant's testimony supported findings of coercion and duress. — Trial court did not err in suppressing the defendant's pre-trial statement on voluntariness grounds because the defendant's testimony regarding statements made by police officers fully supported the trial court's findings of coercion and duress, and the testimony regarding statements police officers made, expressing anger at the defendant and blaming the defendant for damage to a police car and the death of police dogs, did not constitute inadmissible hearsay when those statements were not offered to prove the truth of the facts asserted therein but to show the defendant's fear of injury by the officers; the trial court did not err in believing the defendant's testimony over that of a detective because a portion of the detective's testimony was successfully impeached, none of the officers testified, and the state did not offer the officers as witnesses until its motion for reconsideration was filed. State v. Lynch, 286 Ga. 98, 686 S.E.2d 244, 2009 Ga. LEXIS 674 (2009) (decided under former O.C.G.A. § 24-3-50).

Procedural Considerations

1. Use as Evidence

Voluntariness not a defense. — Accused cannot defend against a criminal charge on the basis that a confession was not voluntary. Robinson v. State, 272 Ga. 752, 533 S.E.2d 718, 2000 Ga. LEXIS 622 (2000) (decided under former O.C.G.A. § 24-3-50).

Involuntary statement may not be used for any purpose at trial. — It is a denial of due process of law for the state to use an involuntary statement against a defendant at trial for any purpose. Fain v. State, 165 Ga. App. 188, 300 S.E.2d 197, 1983 Ga. App. LEXIS 3128 (1983) (decided under former O.C.G.A. § 24-3-50).

Even though defendant exposed existence of statement. — Fact that defendant exposed the existence of a statement does not render the substance of the statement immune from the requirement for admissibility that the statement be given voluntarily. Fain v. State, 165 Ga. App. 188, 300 S.E.2d 197, 1983 Ga. App. LEXIS 3128 (1983) (decided under former O.C.G.A. § 24-3-50).

Hearing required before state seeks to use statement for impeachment or rebuttal. — Once defendant raises the issue of voluntariness of a statement the state wishes to use for impeachment purposes and with a rebuttal witness, the defendant is entitled to a determination of the issue by the trial court before the statement can be used, although not to a separate "Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)" hearing. Fain v. State, 165 Ga. App. 188, 300 S.E.2d 197, 1983 Ga. App. LEXIS 3128 (1983) (decided under former O.C.G.A. § 24-3-50).

Reversible error. — It is always reversible error to allow a confession or incriminatory admission in evidence against the maker thereof when the confession or admission is not free and voluntary or made with the hope of reward or immunity. Bryant v. State, 132 Ga. App. 186, 207 S.E.2d 671, 1974 Ga. App. LEXIS 1640 (1974) (decided under former Code 1933, § 38-411).

Not illegal evidence. — Without doubt, confessions must be voluntary, that

is, if the confessions are made under the hope of reward or fear of hurt the confessions are not competent; but confessions are not illegal evidence, standing alone. Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504, 1942 Ga. App. LEXIS 534 (1942) (decided under former Code 1933, § 38-411); Harrison v. State, 83 Ga. App. 367, 64 S.E.2d 83, 1951 Ga. App. LEXIS 869 (1951) (decided under former Code 1933, § 38-411).

Probative value. — If it does not appear that the confessions were not voluntary, and the confessions are introduced without objection, the confessions or incriminating statements are admissible and have probative value. Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504, 1942 Ga. App. LEXIS 534 (1942) (decided under former Code 1933, § 38-411).

Confession made involuntarily within the meaning of the former statute was without probative value. Allen v. State, 85 Ga. App. 355, 69 S.E.2d 638, 1952 Ga. App. LEXIS 734 (1952) (decided under former Code 1933, § 38-411).

If a confession is inadmissible because not voluntarily made, the confession may not be used for impeachment. Green v. State, 154 Ga. App. 295, 267 S.E.2d 898, 1980 Ga. App. LEXIS 2129 (1980) (decided under former Code 1933, § 38-411).

Confessions of a principal felon, as to the felon's own guilt, are competent evidence to show that fact on the trial of the accessory, but the confessions must be such as would be competent evidence on the trial of the principal, and must not be induced by another with the slightest hope of benefit or remotest fear of injury to the party making the confessions. Smith v. State, 46 Ga. 298, 1872 Ga. LEXIS 59 (1872) (decided under former Code 1868, § 3740).

Codefendant's confession. — Defendant has no standing to complain of the voluntariness of the codefendant's confession. Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637, 1980 Ga. App. LEXIS 2634 (1980) (decided under former Code 1933, § 38-411).

When oral confession was incorporated in written confession, any error in the confession's admission for jury consideration is harmless. Hammond v. State, 157 Ga. App. 647, 278 S.E.2d 188, 1981 Ga. App. LEXIS 1951 (1981) (decided under former Code 1933, § 38-411).

New trial not required. — Admission into evidence of testimony as to a confession by defendant given in hope of reward did not require a new trial since another witness testified without objection to the same facts. Jones v. State, 181 Ga. 19, 181 S.E. 80, 1935 Ga. LEXIS 11 (1935) (decided under former Code 1933, § 38-411).

Videotaped confession not admissible after plea agreement void. — When a plea agreement was conditioned on defendant's giving a videotaped statement and, after defendant accepted the deal and gave the statement, defendant decided to plead not guilty, the statement was not admissible at defendant's trial. Corthran v. State, 268 Ga. 443, 491 S.E.2d 66 (decided under former O.C.G.A. § 24-3-50).

Defendants taped telephone conversation properly admitted. — Admission of the defendant's secretly-taped telephone conversation with a coconspirator did not violate former O.C.G.A. §§ 24-3-50 and 24-9-20 (see now O.C.G.A. §§ 24-5-506 and 24-8-824); the elicitation of the defendant's unguarded response to a perceived confidante regarding the circumstances of the crimes in which they had both participated was clearly designed to procure an unfiltered, genuine statement from the defendant. Further, absent any evidence that the police investigative techniques were designed to induce the slightest hope of benefit or fear of injury, the resulting statements were not rendered involuntary. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913, 2009 Ga. LEXIS 390 (2009) (decided under former O.C.G.A. § 24-3-50).

Admonishment to tell the truth and that defendant safer in custody. — With regard to a defendant's convictions for felony murder, with the underlying felony being rape, among other crimes, the trial court did not err by admitting the defendant's statements made to the police into evidence since the statements were not induced by fear of injury and hope of benefit. Specifically, the detectives' admonishing the defendant to be truthful

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was not a hope of benefit rendering the defendant's confession inadmissible nor did the detectives' suggestion that the defendant would be safer in custody induce fear of injury. Mangrum v. State, 285 Ga. 676, 681 S.E.2d 130, 2009 Ga. LEXIS 316 (2009) (decided under former O.C.G.A. § 24-3-50).

Voluntariness established. — A defendant's contention that the defendant's custodial statements, made without counsel present, should have been suppressed under former O.C.G.A. § 24-3-50 because the defendant was read the defendant's rights, confirmed that those rights were understood, and signed a waiver of rights, and the officer repeatedly told the defendant that the officer could not promise the defendant any benefit. Stevens v. State, 286 Ga. 692, 690 S.E.2d 816, 2010 Ga. LEXIS 241 (2010) (decided under former O.C.G.A. § 24-3-50).

Trial court properly admitted the defendant's jailhouse statements as voluntary, spontaneous outbursts, made in an encounter that the defendant initiated, not in response to any questioning as the statements were made several hours after the defendant's interrogation, the statements were made in a different location than that interrogation, and the statements were made to different officers, which demonstrated a sufficient break from the defendant's earlier, involuntary statements to render the defendant's jailhouse statements voluntary and admissible. Ellington v. State, 292 Ga. 109, 735 S.E.2d 736, 2012 Ga. LEXIS 965 (2012), overruled in part, Willis v. State, 304 Ga. 686, 820 S.E.2d 640, 2018 Ga. LEXIS 685 (2018) (decided under former O.C.G.A. § 24-3-50).

Statement made during plea negotiations. — Trial court erred by allowing the defendant's pre-trial statement, made without the defendant being advised under Miranda, to be used for impeachment purposes because the statement was made as part of plea negotiations and was not the product of the defendant's own mind or a tactical decision of defense counsel. Babbitt v. State, 337 Ga. App. 553, 789 S.E.2d 205, 2016 Ga. App. LEXIS 387 (2016), cert. denied, No. S16C1806, 2017 Ga. LEXIS 114 (Ga. Feb. 27, 2017).

2. Preliminary Proceedings

Former statute required as an indispensable foundation to the introduction of an alleged confession a showing that the confession was freely and voluntarily made and that the confession was not induced by another by the slightest fear of punishment nor the remotest hope of reward. Sims v. State, 221 Ga. 190, 144 S.E.2d 103, 1965 Ga. LEXIS 416 (1965), rev'd, 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593, 1967 U.S. LEXIS 2451 (1967) (decided under former O.C.G.A. § 24-3-50).

Equal application to state and private actions. — Requirement of former O.C.G.A. § 24-3-50 for a hearing on the voluntariness of confessions applies equally to state and private actions. Griffin v. State, 230 Ga. App. 318, 496 S.E.2d 480 (decided under former O.C.G.A. § 24-3-50).

Separate hearing required. — When a confession is challenged, as by objection to the confession's introduction in evidence, a separate hearing on the question of voluntariness must be held before the trial judge but when no challenge is made or ruling invoked, there is no requirement for such a hearing. Smith v. State, 131 Ga. App. 605, 206 S.E.2d 708, 1974 Ga. App. LEXIS 1488 (1974) (decided under former Code 1933, § 38-411).

When the voluntariness of a confession is questioned it is necessary under the decision in Jackson v. Denno, 378 U.S. 368, 378 U.S. 368, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964) to have a separate hearing as to the confession's voluntariness before the confession is finally presented to the jury for consideration as to the confession's voluntariness. In the absence of a proper objection, however, there is no requirement for such a hearing. James v. State, 223 Ga. 677, 157 S.E.2d 471, 1967 Ga. LEXIS 659 (1967) (decided under former Code 1933, § 38-411); Royals v. State, 155 Ga. App. 378, 270 S.E.2d 906, 1980 Ga. App. LEXIS 2587 (1980) (decided under former Code 1933, § 38-411).

In a prosecution for theft by taking, defendants were entitled to a preliminary

hearing and threshold determination by the trial court on the voluntariness of written confessions defendants gave to an employee of a retail store. Griffin v. State, 230 Ga. App. 318, 496 S.E.2d 480 (decided under former O.C.G.A. § 24-3-50).

Requirement for a hearing on the issue of voluntariness applies only if the evidence presents a fair question as to the confession's voluntariness. Carter v. State, 239 Ga. App. 549, 521 S.E.2d 590 (decided under former O.C.G.A. § 24-3-50).

Burden of proof as to the voluntariness of a confession is upon the state. McLemore v. State, 181 Ga. 462, 182 S.E. 618, 1935 Ga. LEXIS 126 (1935) (decided under former Code 1933, § 38-411); Smith v. State, 132 Ga. App. 491, 208 S.E.2d 351, 1974 Ga. App. LEXIS 1725 (1974) (decided under former Code 1933, § 38-411); Jones v. State, 245 Ga. 592, 266 S.E.2d 201, 1980 Ga. LEXIS 869 (1980) (decided under former Code 1933, § 38-411); Cofield v. State, 247 Ga. 98, 274 S.E.2d 530, 1981 Ga. LEXIS 633 (1981) (decided under former Code 1933, § 38-411).

Burden of proof can shift. When such confession is shown to have been freely and voluntarily made, the burden is then on the defendant to show that the confession was not so made. Bradberry v. State, 170 Ga. 859, 154 S.E. 344, 1930 Ga. LEXIS 259 (1930) (decided under former Penal Code 1910, § 1032).

Standard for determining the admissibility of confessions is the preponderance of the evidence. Pierce v. State, 235 Ga. 237, 219 S.E.2d 158, 1975 Ga. LEXIS 842 (1975) (decided under former Code 1933, § 38-411); Gates v. State, 244 Ga. 587, 261 S.E.2d 349, 1979 Ga. LEXIS 1340 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980) (decided under former Code 1933, § 38-411); Jones v. State, 245 Ga. 592, 266 S.E.2d 201, 1980 Ga. LEXIS 869 (1980) (decided under former Code 1933, § 38-411); Lee v. State, 154 Ga. App. 562, 269 S.E.2d 65, 1980 Ga. App. LEXIS 2286 (1980) (decided under former Code 1933, § 38-411); Etterle v. State, 155 Ga. App. 210, 270 S.E.2d 376, 1980 Ga. App. LEXIS 2530 (1980) (decided under former Code 1933, § 38-411); Whitacre v. State, 155 Ga. App. 359, 270 S.E.2d 894, 1980 Ga. App. LEXIS 2578 (1980) (decided under former Code 1933, § 38-411); Bridges v. State, 155 Ga. App. 369, 271 S.E.2d 25, 1980 Ga. App. LEXIS 2582 (1980) (decided under former Code 1933, § 38-411); Fowler v. State, 246 Ga. 256, 271 S.E.2d 168, 1980 Ga. LEXIS 1071 (1980) (decided under former Code 1933, § 38-411); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549, 1981 Ga. LEXIS 641, cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981).

Prima facie showing as to a confession's voluntary character must be made before the confession is admissible into evidence, and if this preliminary proof fails to make such a showing, the confession or statement must be excluded. Bryant v. State, 191 Ga. 686, 13 S.E.2d 820, 1941 Ga. LEXIS 376 (1941) (decided under former Code 1933, § 38-411); Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504, 1942 Ga. App. LEXIS 534 (1942) (decided under former Code 1933, § 38-411); Garrett v. State, 203 Ga. 756, 48 S.E.2d 377, 1948 Ga. LEXIS 505 (1948) (decided under former Code 1933, § 38-411); Phillips v. State, 206 Ga. 418, 57 S.E.2d 555, 1950 Ga. LEXIS 363 (1950) (decided under former Code 1933, § 38-411); Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626, 1950 Ga. App. LEXIS 798 (1950) (decided under former Code 1933, § 38-411).

Grounds for exclusion. — Until it affirmatively appears from testimony, without question, that proposed confession was freely and voluntarily made, without any extraneous inducement, the statement alleged to have been a confession must be excluded. McLemore v. State, 181 Ga. 462, 182 S.E. 618, 1935 Ga. LEXIS 126 (1935) (decided under former Code 1933, § 38-411); Russell v. State, 196 Ga. 275, 26 S.E.2d 528, 1943 Ga. LEXIS 339 (1943) (decided under former Code 1933, § 38-411).

Requirements for prima facie case. — Alleged confession should be affirmatively shown to have been made without the slightest hope of benefit or remotest fear of injury before the state has succeeded in making a prima facie case as will establish that the confession was free from extraneous inducement. McLemore

Preliminary Proceedings (Cont'd)

v. State, 181 Ga. 462, 182 S.E. 618, 1935 Ga. LEXIS 126 (1935) (decided under former Code 1933, § 38-411); Russell v. State, 196 Ga. 275, 26 S.E.2d 528, 1943 Ga. LEXIS 339 (1943) (decided under former Code 1933, § 38-411); Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626, 1950 Ga. App. LEXIS 798 (1950) (decided under former Code 1933, § 38-411).

Trial court must consider the totality of the circumstances to determine whether the state has proven that a confession was made voluntarily. Gates v. State, 244 Ga. 587, 261 S.E.2d 349, 1979 Ga. LEXIS 1340 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980); Lee v. State, 154 Ga. App. 562, 269 S.E.2d 65, 1980 Ga. App. LEXIS 2286 (1980) (decided under former Code 1933, § 38-411); Fowler v. State, 246 Ga. 256, 271 S.E.2d 168, 1980 Ga. LEXIS 1071 (1980) (decided under former Code 1933, § 38-411); Bassett v. State, 154 Ga. App. 829, 285 S.E.2d 260 (1981) (decided under former Code 1933, § 38-411); Franklin v. State, 249 Ga. App. 834, 549 S.E.2d 794, 2001 Ga. App. LEXIS 640 (2001) (decided under former O.C.G.A. § 24-3-50).

Inferences not acceptable. — On preliminary examination by the court, a witness should be permitted, over objection, to state an inference drawn from "collective facts" or to state in a shorthand way that a confession was freely and voluntarily made, without stating the circumstances under which the confession was made. Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626, 1950 Ga. App. LEXIS 798 (1950) (decided under former Code 1933, § 38-411).

Defendant's evidence. — If the evidence for the state makes out a prima facie case for the admission of such a confession, the court is not bound, before admitting the confession, to hear evidence on behalf of the accused, tending to show coercion or improper inducement in the confession's procurement. McLemore v. State, 181 Ga. 462, 182 S.E. 618, 1935 Ga. LEXIS 126 (1935) (decided under former Code 1933, § 38-411); Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626, 1950 Ga. App. LEXIS 798 (1950) (decided under former Code 1933, § 38-411).

A hearing at which the defendant is not allowed to present testimony on the surrounding circumstances affecting the voluntariness of the defendant's statements does not meet the standards of Jackson v. Denno, 1964 U.S. LEXIS 826, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 28 Ohio Op. 2d 177, 1 A.L.R.3d 1205 (1964) (decided under former Code 1933, § 38-411); Pittman v. State, 245 Ga. 453, 265 S.E.2d 592, 1980 Ga. LEXIS 818 (1980) (decided under former Code 1933, § 38-411).

In making a determination of the voluntariness of a confession the defendant's testimony is relevant and such proof must be allowed if the defendant elects to testify in this regard. Stone v. State, 155 Ga. App. 357, 271 S.E.2d 22, 1980 Ga. App. LEXIS 2576 (1980) (decided under former Code 1933, § 38-411).

When the voluntariness of a statement is not challenged, no violation of former O.C.G.A. § 24-3-50 is asserted, and no hearing under Jackson v. Denno, 378 U.S. 368 (84 SC 1774, 12 L. Ed. 2d 908) (1964) is required. Ward v. State, 242 Ga. App. 246, 529 S.E.2d 378, 2000 Ga. App. LEXIS 141 (2000) (decided under former O.C.G.A. § 24-3-50).

Question for jury. — Once the state had made a prima facie showing of voluntariness, the question of whether or not defendant's statement was freely and voluntarily given is one of fact for the jury's determination. Griner v. State, 121 Ga. 614, 49 S.E. 700, 1905 Ga. LEXIS 24 (1905) (decided under former Penal Code 1895, § 1006); Cantrell v. State, 141 Ga. 98, 80 S.E. 649, 1913 Ga. LEXIS 335 (1913) (decided under former Penal Code 1910, § 1032); Thomas v. State, 169 Ga. 182, 149 S.E. 871, 1929 Ga. LEXIS 308 (1929) (decided under former Penal Code 1910, § 1032); Bradberry v. State, 170 Ga. 859, 154 S.E. 344, 1930 Ga. LEXIS 259 (1930) (decided under former Penal Code 1910, § 1032); Goodwin v. State, 45 Ga. App. 593, 165 S.E. 453, 1932 Ga. App. LEXIS 620 (1932) (decided under former Code 1933, § 38-411); McLemore v. State, 181 Ga. 462, 182 S.E. 618, 1935 Ga. LEXIS 126 (1935) (decided under former Code 1933, § 38-411); Bryant v. State, 191 Ga. 686, 13 S.E.2d 820, 1941 Ga. LEXIS

376 (1941) (decided under former Code 1933, § 38-411); Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504, 1942 Ga. App. LEXIS 534 (1942) (decided under former Code 1933, § 38-411); Russell v. State, 196 Ga. 275, 26 S.E.2d 528, 1943 Ga. LEXIS 339 (1943) (decided under former Code 1933, § 38-411); Stroup v. Mount, 197 Ga. 804, 30 S.E.2d 477, 1944 Ga. LEXIS 321 (1944) (decided under former Code 1933, § 38-411); Byars v. State, 73 Ga. App. 727, 38 S.E.2d 53, 1946 Ga. App. LEXIS 400 (1946) (decided under former Code 1933, § 38-411); Garrett v. State, 203 Ga. 756, 48 S.E.2d 377, 1948 Ga. LEXIS 505 (1948) (decided under former Code 1933, § 38-411); Jackson v. State, 77 Ga. App. 635, 49 S.E.2d 198, 1948 Ga. App. LEXIS 606 (1948), cert. denied, 335 U.S. 905, 69 S. Ct. 403, 93 L. Ed. 439, 1949 U.S. LEXIS 2912 (1949); Moore v. State, 221 Ga. 636, 146 S.E.2d 895, 1966 Ga. LEXIS 658 (1966) (decided under former Code 1933, § 38-411); ; Trask v. State, 132 Ga. App. 645, 208 S.E.2d 591, 1974 Ga. App. LEXIS 1776 (1974) (decided under former Code 1933, § 38-411); Frazier v. State, 150 Ga. App. 343, 258 S.E.2d 29, 1979 Ga. App. LEXIS 2305 (1979) (decided under former Code 1933, § 38-411); Meyer v. State, 150 Ga. App. 613, 258 S.E.2d 217, 1979 Ga. App. LEXIS 2228 (1979), cert. denied, 445 U.S. 952, 100 S. Ct. 1602, 63 L. Ed. 2d 788, 1980 U.S. LEXIS 1341 (1980) (decided under former Code 1933, § 38-411); Simonton v. State, 151 Ga. App. 431, 260 S.E.2d 487, 1979 Ga. App. LEXIS 2561 (1979) (decided under former Code 1933, § 38-411); Doucet v. State, 153 Ga. App. 775, 266 S.E.2d 554, 1980 Ga. App. LEXIS 1976 (1980) (decided under former Code 1933, § 38-411); Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637, 1980 Ga. App. LEXIS 2634 (1980) (decided under former Code 1933, § 38-411).

3. Instructions

Omission to charge on the law of confessions, in the absence of a timely request, is not error. Allen v. State, 187 Ga. 178, 200 S.E. 109, 1938 Ga. LEXIS 756 (1938) (decided under former Code 1933, § 38-411); Mims v. State, 188 Ga. 702, 4 S.E.2d 831, 1939 Ga. LEXIS 624 (1939) (decided under former Code 1933, § 38-411); Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504, 1942 Ga. App. LEXIS 534 (1942) (decided under former Code 1933, § 38-411); Murray v. State, 214 Ga. 350, 104 S.E.2d 905, 1958 Ga. LEXIS 420 (1958) (decided under former Code 1933, § 38-411); Staggers v. State, 101 Ga. App. 463, 114 S.E.2d 142, 1960 Ga. App. LEXIS 897 (1960) (decided under former Code 1933, § 38-411); McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577, 1974 Ga. LEXIS 767 (1974), cert. denied, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976); Welch v. State, 235 Ga. 243, 219 S.E.2d 151, 1975 Ga. LEXIS 846 (1975) (decided under former Code 1933, § 38-411).

Charge on the law of confessions, when unauthorized by the evidence, constitutes reversible error. Allen v. State, 187 Ga. 178, 200 S.E. 109, 1938 Ga. LEXIS 756 (1938) (decided under former Code 1933, § 38-411); Johnson v. State, 240 Ga. 528, 50 S.E.2d 334 (1948) (decided under former Code 1933, § 38-411); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868, 1954 Ga. App. LEXIS 629 (1954) (decided under former Code 1933, § 38-411); Sanford v. State, 153 Ga. App. 541, 265 S.E.2d 868, 1980 Ga. App. LEXIS 1891 (1980) (decided under former Code 1933, § 38-411).

Law on confessions was properly charged in the following cases. — See Oglesby v. State, 80 Ga. App. 493, 56 S.E.2d 637, 1949 Ga. App. LEXIS 868 (1949) (decided under former Code 1933, § 38-411); Philpot v. State, 212 Ga. 79, 90 S.E.2d 577, 1955 Ga. LEXIS 553 (1955) (decided under former Code 1933, § 38-411); Weatherby v. State, 213 Ga. 188, 97 S.E.2d 698, 1957 Ga. LEXIS 338 (1957) (decided under former Code 1933, § 38-411); Kennedy v. State, 156 Ga. App. 792, 275 S.E.2d 339, 1980 Ga. App. LEXIS 3202 (1980) (decided under former Code 1933, § 38-411); Kirton v. State, 246 Ga. App. 670, 541 S.E.2d 673, 2000 Ga. App. LEXIS 1325 (2000) (decided under former O.C.G.A. § 24-3-50).

If the defendant wanted an elaboration of the charge actually given on confessions, the defendant should have submitted a timely written request. Webb v. State, 73 Ga. App. 748, 38 S.E.2d 54,

Instructions (Cont'd)

1946 Ga. App. LEXIS 404 (1946) (decided under former Code 1933, § 38-411).

Trial court not required to give instruction absent specific request. — Because the defendant failed to request a charge on voluntariness of confessions and consideration of statements, admissions, and confessions, the defendant was precluded from asserting error on that basis; the trial court did not need to give an instruction on voluntariness of confessions absent a specific request therefor. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913, 2009 Ga. LEXIS 390 (2009) (decided under former O.C.G.A. § 24-3-50).

Jury instruction not applicable to testimony of witness other than defendant. — Trial court did not err by denying the defendant's request to instruct the jury regarding the voluntariness of an eyewitness's prior inconsistent statement to police in which the eyewitness, the defendant's girlfriend, implicated the defendant in the victim's murder because the charge requested was based on a statute regarding the admissibility of a confession; and the charge requested was not applicable to the testimony of a witness other than the defendant. Poellnitz v. State, 296 Ga. 134, 765 S.E.2d 343, 2014 Ga. LEXIS 889 (2014) (decided under former O.C.G.A. § 24-3-50).

4. Review

Failure of defendant to request hearing. — When the defendant did not request a hearing under former O.C.G.A. § 24-3-50 as to the admissibility and voluntariness of defendant's non-custodial admission, the appellate court had no jurisdiction to address the failure of the trial court to conduct a hearing as to that issue. Hawkins v. State, 236 Ga. App. 346, 512 S.E.2d 59 (decided under former O.C.G.A. § 24-3-50).

Since there was no evidence a confession was false, the conclusion that the confession was voluntary was not clearly erroneous. Pinckney v. State, 259 Ga. App. 309, 576 S.E.2d 574, 2003 Ga. App. LEXIS 19 (2003), cert. denied, No. S03C0816, 2003 Ga. LEXIS 520 (Ga. May 5, 2003) (decided under former O.C.G.A. § 24-3-50).

Ineffective assistance of counsel for failing to suppress statements to detectives. — Trial counsel did not provide ineffective assistance by not moving to suppress incriminating statements that the defendant made to detectives at the defendant's house because the defendant did not show, inter alia, a reasonable probability that the outcome of the trial would have been different had the statements been suppressed based on the other incriminating evidence against the defendant. Lucas v. State, 328 Ga. App. 741, 760 S.E.2d 257, 2014 Ga. App. LEXIS 570 (2014).

Failure to include videotaped statement within appellate record. — Defendant failed to include the videotape or a transcript of the audio portion in the appellate record and the appellate court was unable to review defendant's contention that the trial court erred by denying the motion to suppress the videotaped statement to the police on the ground that certain comments by the interviewing detective constituted a hope of benefit. Clark v. State, 279 Ga. 243, 611 S.E.2d 38, 2005 Ga. LEXIS 241 (2005) (decided under former O.C.G.A. § 24-3-50).

Judge's conclusion that the confession is voluntary must appear from the record with unmistakable clarity, although the judge need not make formal findings of fact or write an opinion. When there has been no ruling on the issue of voluntariness made with the required "unmistakable clarity," remand with instruction to conduct a further hearing and make a determination of voluntariness may be appropriate. Cofield v. State, 247 Ga. 98, 274 S.E.2d 530, 1981 Ga. LEXIS 633 (1981) (decided under former Code 1933, § 38-411).

It is the duty of the Supreme Court of Georgia to independently review the evidence to determine whether the state has carried the state's burden of proving the admissibility of the accused's confession by a preponderance of the evidence. Brooks v. State, 244 Ga. 574, 261 S.E.2d 379, 1979 Ga. LEXIS 1338 (1979), vacated in part, 446 U.S. 961, 100 S. Ct.

2937, 64 L. Ed. 2d 821 (1980) (decided under former Code 1933, § 38-411).

Appellate court upholds Jackson v. Denno findings. — Trial court sits as the factfinder in a Jackson-Denno hearing (Jackson v. Denno, 378 U.S. 368 (1964)) regarding the voluntariness of a confession and its resolution of factual issues will be upheld by an appellate court unless it is clearly erroneous. Harrison v. State, 253 Ga. App. 179, 558 S.E.2d 760, 2002 Ga. App. LEXIS 10 (2002) (decided under former O.C.G.A. § 24-3-50).

Unless clearly erroneous, a trial court's findings as to factual determinations and credibility relating to the admissibility of a confession will be upheld on appeal. Gates v. State, 244 Ga. 587, 261 S.E.2d 349, 1979 Ga. LEXIS 1340 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980); Green v. State, 154 Ga. App. 295, 267 S.E.2d 898, 1980 Ga. App. LEXIS 2129 (1980) (decided under former Code 1933, § 38-411); Etterle v. State, 155 Ga. App. 210, 270 S.E.2d 376, 1980 Ga. App. LEXIS 2530 (1980) (decided under former Code 1933, § 38-411); Phipps v. State, 155 Ga. App. 229, 270 S.E.2d 393, 1980 Ga. App. LEXIS 2538 (1980) (decided under former Code 1933, § 38-411); Whitacre v. State, 155 Ga. App. 359, 270 S.E.2d 894, 1980 Ga. App. LEXIS 2578 (1980) (decided under former Code 1933, § 38-411); Fowler v. State, 246 Ga. 256, 271 S.E.2d 168, 1980 Ga. LEXIS 1071 (1980) (decided under former Code 1933, § 38-411); Cofield v. State, 247 Ga. 98, 274 S.E.2d 530, 1981 Ga. LEXIS 633 (1981) (decided under former Code 1933, § 38-411); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549, 1981 Ga. LEXIS 641, cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981) (decided under former Code 1933, § 38-411); Caffo v. State, 247 Ga. 751, 279 S.E.2d 678, 1981 Ga. LEXIS 876 (1981) (decided under former Code 1933, § 38-411).

Determinations regarding the facts and witness credibility are entirely within the purview of the trial court and will not be disturbed unless such determinations are clearly erroneous. Ward v. State, 234 Ga. App. 610, 507 S.E.2d 506 (decided under former O.C.G.A. § 24-3-50).

Trial court's denial of defendant's motion to suppress defendant's statement to police was proper and not clearly erroneous because the statement was found to have been made voluntarily, without the slightest hope of benefit or remotest fear of injury under former O.C.G.A. § 24-3-50; as the police officer's statements to defendant were nothing more than routine police questioning, aimed at eliciting a response from defendant in custody, and statements from the officer that defendant may not have intended to kill the victim did not amount to a hope of benefit, nor did a statement that defendant would not be prosecuted on drug charges give defendant any hope of benefit, as it was made because there was no evidence of the drugs. Pittman v. State, 277 Ga. 475, 592 S.E.2d 72, 2004 Ga. LEXIS 4 (2004) (decided under former O.C.G.A. § 24-3-50).

Law of the case. — Because the supreme court ruled adversely to the defendant in the defendant's first appeal on the issue of whether an incriminating statement the defendant made during a custodial interrogation should have been suppressed as involuntarily made, that decision was the law of the case. Foster v. State, 290 Ga. 599, 723 S.E.2d 663, 2012 Ga. LEXIS 198 (2012) (decided under former O.C.G.A. § 24-3-50).

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29A Am. Jur. 2d, Evidence, § 720.

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Invalidity of Suspect's Waiver of Miranda Rights, 42 POF2d 617.

Invalidity of Confession or Waiver of Miranda Rights by Mentally Retarded Person, 42 POF3d 147.

ALR.

Necessity that confession in prosecution for homicide during perpetration of another felony be corroborated by other evidence of the commission of the other felony, 79 A.L.R. 508.

Right of defendant in criminal case, where state has introduced incriminating portion of conversation or statements made by him, to elicit or introduce in evidence his exculpatory statements, 118 A.L.R. 138.

Constitutional aspects of procedure for determining voluntariness of pretrial confession, 1 A.L.R.3d 1251; 132 A.L.R. Fed. 415.

Mental subnormality of accused as affecting voluntariness or admissibility of confession, 8 A.L.R.4th 16.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 A.L.R.4th 419.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment — modern state cases, 28 A.L.R.4th 1121.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 A.L.R.4th 495.

Confession by one who has been subjected to or threatened with physical suffering, 24 A.L.R. 703.

Voluntariness of confession admitted by court as question for jury, 85 A.L.R. 870; 170 A.L.R. 567.

Admissibility, on question as to voluntariness of confession, of events occurring, or statement made after the confession by defendant or others not as witnesses at trial, 85 A.L.R. 942.

Offer of defendant in criminal case to concede or stipulate fact, or his admission of same, as affecting prosecution's right to introduce evidence thereof, 91 A.L.R. 1478.

Duty of court to institute preliminary investigation as to voluntary or involuntary character of confession, 102 A.L.R. 605.

Presumption and burden of proof as to voluntariness of nonjudicial confession, 102 A.L.R. 641.

Right of witness to state his conclusion or opinion that confession was voluntary or involuntary, 114 A.L.R. 974.

Presence of jury during preliminary inquiry of court as to voluntariness of confession as prejudicial, 148 A.L.R. 546.

Suppression before indictment or trial of confession unlawfully obtained, 1 A.L.R.2d 1012.

Admissibility in evidence of unsigned confession, 23 A.L.R.2d 919.

Right of accused to show body to jury as evidence of violence by police in securing confession, 72 A.L.R.2d 1322.

Voluntariness and admissibility of minor's confession, 87 A.L.R.2d 624.

Impeachment of accused as witness by use of involuntary or not properly qualified confession, 89 A.L.R.2d 478.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud, 99 A.L.R.2d 772.

Admissibility of confession by one accused of felonious homicide, as affected by its inducement through compelling, or threatening to compel, accused to view victim's corpse, 27 A.L.R.3d 1185.

What constitutes "custodial interrogation" within rule of Miranda v. Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation, 31 A.L.R.3d 565.

Admissibility, in civil action, of confession or admission which could not be used against party in criminal prosecution because obtained by improper police methods, 43 A.L.R.3d 1375.

Admissibility of defense communications made in connection with plea bargaining, 59 A.L.R.3d 441.

Confession as defense in action for malicious prosecution, 66 A.L.R.3d 95.

Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination, 89 A.L.R.3d 230.

Admissibility of polygraph evidence at trial on issue of voluntariness of confession made by accused, 92 A.L.R.3d 1317.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters, 7 A.L.R.4th 180.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 A.L.R.4th 419.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment — modern state cases, 28 A.L.R.4th 1121.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 A.L.R.4th 495.

Duty of court, in federal criminal prosecution, to conduct inquiry into voluntariness of accused's statement — modern cases, 132 A.L.R. Fed. 415.

24-8-825. Confessions under spiritual exhortation, promise of secrecy, or collateral benefit admissible.

The fact that a confession has been made under a spiritual exhortation, a promise of secrecy, or a promise of collateral benefit shall not exclude it.

History.
Code 1981, § 24-8-825, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3794, former Code 1882, § 3794, former Penal Code 1910, § 1033, former Code 1933, § 38-412, and former O.C.G.A. § 24-3-51 are included in the annotations for this Code section.

Reason for rule. — Keeping in view the true reason upon which confession evidence is excluded, and the test by which the courts have sought to determine whether or not the truthfulness of the confession is sufficiently evidenced to admit the evidence thereof to the jury, it is clear that a confession should not be excluded because made under spiritual exhortation, or promise of secrecy, or promise of collateral benefit, since these means, or none of them, have the slightest tendency in a proper sense to induce one to confess falsely. Wilson v. State, 19 Ga. App. 759, 92 S.E. 309, 1917 Ga. App. LEXIS 352 (1917) (decided under former Penal Code 1910, § 1033).

Confessions otherwise admissible are not rendered inadmissible because the accused was told by another in substance that it was always best to tell the truth. Turner v. State, 203 Ga. 770, 48 S.E.2d 522, 1948 Ga. LEXIS 514 (1948) (decided under former Code 1933, § 38-412); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549, 1981 Ga. LEXIS 641, cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981).

Prayers overheard. — Testimony that the defendant while alone in defendant's cell was overheard to say, "Lord, have mercy upon me for what I have done; the only thing I regret is killing my father," was not incompetent because the witness was the jailer in charge of the defendant, the law not disqualifying a jailer from testifying as to voluntary acts and confessions of prisoners under the jailer's charge. Testimony as to prayers in which the defendant declared defendant's innocence of the crime, although offered in reply to the above, was properly rejected, the rule being to admit inculpatory declarations or confessions, and to exclude those which are exculpatory, when disconnected therewith. Woolfolk v. State, 85 Ga. 69, 11 S.E. 814, 1890 Ga. LEXIS 4 (1890) (decided under former Code 1882, § 3794).

Confession made by the defendant to a fellow-prisoner, who was in jail for stealing, and grossly irreligious, as appears from defendant's own evidence, but who read the Bible and sang Psalms to the defendant, and told the defendant that if the defendant were guilty the defendant had better confess and seek the defendant's God, was admissible. Stafford v. State, 55 Ga. 591, 1876 Ga. LEXIS 425 (1876) (decided under former Code 1873, § 3794).

Fact that the statements made by the defendant were in response to an appeal made by defendant's sister, in which she alluded to the death of defendant's brother and incarceration of defendant's mother as results of the crime, would not render the statements inadmissible. The appeal

was not stronger than "spiritual exhortations," which the Code declares shall not exclude a confession. White v. State, 177 Ga. 115, 169 S.E. 499, 1933 Ga. LEXIS 129 (1933) (decided under former Penal Code 1910, § 1033).

Timing of confession following allegedly improper statement. — Defendant's confession was not induced by an impermissible hope of benefit as defendant testified and specifically denied that the defendant's motivation for confessing was based upon a hope that doing so would lead to reduced charges or a reduced sentence; the fact that a confession was made under spiritual exhortation, promise of secrecy, or a promise of a collateral benefit did not exclude it; and the defendant made no admissions and did not confess immediately after any of the disputed statements, but, instead, the defendant confessed to shooting the victim approximately 20 minutes after the final allegedly improper statement. Kessler v. State, 311 Ga. 607, 858 S.E.2d 1, 2021 Ga. LEXIS 192 (2021).

Promise to help keep defendant out of certain prison. — Confession is not rendered inadmissible by an assurance that whatever help could be given would be given in keeping the defendant out of a certain prison, since this is similar to a promise to inform the court of a defendant's cooperation. Patrick v. State, 169 Ga. App. 302, 312 S.E.2d 385, 1983 Ga. App. LEXIS 3468 (1983), aff'd, 252 Ga. 509, 314 S.E.2d 909, 1984 Ga. LEXIS 755 (1984) (decided under former O.C.G.A. § 24-3-51).

Investigator offered collateral benefit by talking to DA office. — An investigator's statement that the investigator would talk to the district attorney's office at a later time about having a warrant against the defendant dismissed was no more than a promise of a collateral benefit and thus did not make the defendant's custodial statement inadmissible under former O.C.G.A. §§ 24-3-50 and 24-3-51 (see now O.C.G.A. §§ 24-8-824 and 24-8-825). Boone v. State, 293 Ga. App. 654, 667 S.E.2d 880, 2008 Ga. App. LEXIS 1041 (2008) (decided under former O.C.G.A. § 24-3-51).

Promises to obtain psychiatric help and medical attention for defendant were not the kind of "hope of benefit" which would invalidate defendant's subsequent confession. Head v. State, 180 Ga. App. 901, 350 S.E.2d 854, 1986 Ga. App. LEXIS 2302 (1986) (decided under former O.C.G.A. § 24-3-51).

Promise to secure counseling. — With regard to an alleged promise by a detective to help secure counseling for the defendant when the defendant got to prison, the benefit involved was no hope of lighter punishment (induced by a person other than the defendant) but was a collateral benefit which did not render defendant's confession inadmissible. Hall v. State, 180 Ga. App. 366, 349 S.E.2d 255, 1986 Ga. App. LEXIS 2732 (1986) (decided under former O.C.G.A. § 24-3-51).

Trial court did not err in admitting the defendant's pre-arrest statements because the offer to obtain counseling for the defendant did not bear on the question of punishment but involved a collateral benefit, and promises of a collateral benefit did not impact a statement's admissibility; the defendant offered no evidence that the officers induced the defendant to believe the defendant would receive a three year sentence, but the defendant came up with that scenario on the defendant's own, and the trial court, therefore, properly found the defendant's statements were voluntary and admissible. Dunson v. State, 309 Ga. App. 484, 711 S.E.2d 53, 2011 Ga. App. LEXIS 375 (2011), cert. dismissed, No. S15C1215, 2015 Ga. LEXIS 580 (Ga. Sept. 8, 2015) (decided under former O.C.G.A. § 24-3-51).

Promise to end adverse publicity. — When an inculpatory statement was made by the fire department lieutenant in return for the investigator's alleged promise to "stop all the publicity against the fire and police department and not arrest and persecute anyone else," the promise pertained to collateral benefits and the trial court did not err in ruling the statement to be voluntary and admissible. Johnson v. State, 170 Ga. App. 71, 316 S.E.2d 160, 1984 Ga. App. LEXIS 2852 (1984) (decided under former O.C.G.A. § 24-3-51).

Promise to get help for drug problem. — Officer's promise to help the defendant with a drug problem was a collateral benefit and did not bear on the

question of punishment; hence, the trial court did not clearly err in admitting the defendant's statement in evidence as such did not amount to a promise of leniency in exchange for the statement. Smith v. State, 281 Ga. App. 91, 635 S.E.2d 385, 2006 Ga. App. LEXIS 1009 (2006) (decided under former O.C.G.A. § 24-3-51).

Exhortation to tell truth was not promise of lighter punishment. — Appellant's statement to law enforcement was not involuntary as the appellant was advised of the appellant's Miranda rights numerous times (and had executed a written waiver), a video-recorded statement plainly reflected that both the appellant and law enforcement understood that the appellant was free to leave anytime during the interview, and the investigator's statement that the appellant would never see the light of day if not truthful was an exhortation to tell the truth, not a promise of a lighter punishment. Price v. State, 305 Ga. 608, 825 S.E.2d 178, 2019 Ga. LEXIS 144 (2019).

Reduction in bond. — Reduction of bond is in the same class of collateral benefits as the promises of a solitary cell, a psychiatric examination, and communication to the judge of the defendant's cooperation. Heard v. State, 165 Ga. App. 252, 300 S.E.2d 213, 1983 Ga. App. LEXIS 3141 (1983) (decided under former O.C.G.A. § 24-3-51); Pounds v. State, 189 Ga. App. 809, 377 S.E.2d 722, 1989 Ga. App. LEXIS 68 (1989) (decided under former O.C.G.A. § 24-3-51).

Long relationship as confidential informant. — Statements of an inculpatory nature made while in custody were not inadmissible under former O.C.G.A. § 24-3-51 on the theory that defendant worked with law enforcement officers as a confidential informant for many years and that it was understood that the defendant would be "taken care of" and the sheriff admitted that in the sheriff's own mind the sheriff felt the sheriff owed defendant something, since there were no overt promises made and the understanding was subjective in nature. Tyson v. State, 165 Ga. App. 22, 299 S.E.2d 69, 1983 Ga. App. LEXIS 1750 (1983) (decided under former O.C.G.A. § 24-3-51).

Waiver. — Because defendant requested the future assistance of an attorney, not immediate assistance, and because defendant knew that defendant's confession would be handed over to law enforcement, the clergy-parishioner privilege in former O.C.G.A. §§ 24-3-51 and 24-9-22 (see now O.C.G.A. §§ 24-8-825 and 24-5-502) was inapplicable; therefore, defendant's confession to the crimes was voluntary. Willis v. State, 287 Ga. 703, 699 S.E.2d 1, 2010 Ga. LEXIS 491 (2010) (decided under former O.C.G.A. § 24-3-51).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 740, 741, 745.

ALR.

Voluntariness of confession admitted by court as question for jury, 85 A.L.R. 870; 170 A.L.R. 567.

Suppression before indictment or trial of confession unlawfully obtained, 1 A.L.R.2d 1012.

Voluntariness and admissibility of minor's confession, 87 A.L.R.2d 624.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud, 99 A.L.R.2d 772.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 A.L.R.4th 495.

Voluntary nature of confession as affected by appeal to religious beliefs, 20 A.L.R.6th 479.

24-8-826. Medical reports in narrative form.

(a) Upon the trial of any civil proceeding involving injury or disease, any medical report in narrative form which has been signed and dated

by an examining or treating licensed physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist shall be admissible and received in evidence insofar as it purports to represent the history, examination, diagnosis, treatment, prognosis, or interpretation of tests or examinations, including the basis therefor, by the person signing the report, the same as if that person were present at trial and testifying as a witness; provided, however, that such report and notice of intention to introduce such report shall first be provided to the adverse party at least 60 days prior to trial. A statement of the qualifications of the person signing such report may be included as part of the basis for providing the information contained therein, and the opinion of the person signing the report with regard to the etiology of the injury or disease may be included as part of the diagnosis. Any adverse party may object to the admissibility of any portion of the report, other than on the ground that it is hearsay, within 15 days of being provided with the report. Further, any adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony. The party tendering the report may also introduce testimony of the person signing the report for the purpose of supplementing the report or otherwise.

(b) In all juvenile dependency adjudications under Article 3 of Chapter 11 of Title 15 involving injury or disease, any medical report in narrative form as described in subsection (a) of this Code section and notice of intention to introduce such report shall first be provided to the adverse party at least five days prior to the adjudication hearing. Any adverse party may object to the admissibility of any portion of the report, other than on the ground that it is hearsay, within three days of being provided with the report. All other provisions contained in subsection (a) of this Code section concerning medical reports in narrative form shall be applicable to juvenile dependency cases.

(c) In all termination of parental rights hearings under Article 4 of Chapter 11 of Title 15 involving injury or disease, any medical report in narrative form as described in subsection (a) of this Code section and a notice of intention to introduce such report shall first be provided to the adverse party at least 15 days prior to the adjudication hearing. Any adverse party may object to the admissibility of any portion of the report, other than on the ground that it is hearsay, within seven days of being provided with such report. All other provisions contained in subsection (a) of this Code section concerning medical reports in narrative form shall be applicable to parental rights hearings.

(d) The medical narrative shall be presented to the jury as depositions are presented to the jury and shall not go out with the jury as documentary evidence.

History.

Code 1981, § 24-8-826, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2023, p. 374, § 2/SB 134, effective July 1, 2023.

The 2023 amendment, effective July 1, 2023, added subsections (b) and (c) and redesignated former subsection (b) as present subsection (d).

Cross references.

Hearing before administrative law judge, § 34-9-102.

Editor's notes.

Ga. L. 2023, p. 374, § 2/SB 134 purported to add two new subsections but actually set out the entire Code section.

Law reviews.

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-3-18 are included in the annotations for this Code section.

Admission of records in medical malpractice action. — Trial court did not err in admitting the podiatrist's medical records on the patient into evidence in the patient's medical malpractice case. Kohl v. Tirado, 256 Ga. App. 681, 569 S.E.2d 576, 2002 Ga. App. LEXIS 942 (2002), cert. denied, No. S02C1826, 2002 Ga. LEXIS 880 (Ga. Sept. 30, 2002) (decided under former O.C.G.A. § 24-3-18).

Records properly excluded when 60-day notice requirement not met. — In a premises liability suit, the trial court properly excluded certified copies of some of an invitee's medical records under former O.C.G.A. § 24-7-8 (see now O.C.G.A. § 24-9-902) because the invitee had not provided the requisite 60-day notice under former O.C.G.A. § 24-3-18. Former O.C.G.A. § 24-7-8 concerned only the authentication of medical records and did not allow the invitee to circumvent other evidentiary rules; furthermore, the invitee failed to provide a record citation for the specific medical records that the invitee claimed should have been admitted and thus it was unclear whether those records were narratives, to which former § 24-3-18(a) applied, or other types of records. Fuller v. Flash Foods, Inc., 298 Ga. App. 217, 679 S.E.2d 775, 2009 Ga. App. LEXIS 632 (2009), cert. denied, No. S09C1670, 2009 Ga. LEXIS 549 (Ga. Sept. 8, 2009) (decided under former O.C.G.A. § 24-3-18).

Admissibility on summary judgment. — In a wrongful death suit brought by a minor child's parents, alleging negligence and police misconduct arising out of an incident in which emergency surgery on their child was delayed due to police detention of the doctor who was to perform the surgery, summary judgment was improperly granted; the medical narrative report prepared by the doctor was admissible evidence under former O.C.G.A. § 24-3-18(a) and could be considered in opposition to a motion for summary judgment under O.C.G.A. § 9-11-56(c), in that the doctor's opinion in the report that the son, "in all likelihood," would have survived had the doctor not been prevented from caring for the son constituted a properly expressed medical opinion. Dalton v. City of Marietta, 280 Ga. App. 202, 633 S.E.2d 552, 2006 Ga. App. LEXIS 689 (2006), cert. denied, No. S06C1926, 2006 Ga. LEXIS 957 (Ga. Nov. 6, 2006), cert. denied, No. S06C1925, 2006 Ga. LEXIS 958 (Ga. Nov. 6, 2006) (decided under former O.C.G.A. § 24-3-18).

Neurologist's notes improperly admitted. — In a personal injury suit, it was error to admit a neurologist's notes under former O.C.G.A. § 24-3-18(a), as the notes were replete with unexplained medical terms and test results and thus did not comprise a medical narrative "in story form" as contemplated by the former statute; the error was not harmless, as the notes constituted the vast majority of appellees' medical evidence and for the most part were not cumulative of other testimony. Lott v. Ridley, 285 Ga. App. 513, 647 S.E.2d 292, 2007 Ga. App. LEXIS 561 (2007) (decided under former O.C.G.A. § 24-3-18).

Neurologist report inadmissible in undue influence case. — Daughter

failed to carry the daughter's burden of showing a genuine issue of fact as to her parent's testamentary capacity or undue influence at the time the parent signed a will excluding her as a beneficiary although the parent became ill and died soon after executing the will. A neurologist report was not admissible under former O.C.G.A. § 24-3-18(a) because the report was not in narrative form and relied on unexplained medical terms and lab results. Prine v. Blanton, 290 Ga. 307, 720 S.E.2d 600, 2012 Ga. LEXIS 8 (2012) (decided under former O.C.G.A. § 24-3-18).

Report prepared by others inadmissible. — Trial court did not err in refusing to permit the manufacturer's two expert witnesses to testify to asbestos fiber counts on the manufacturer's packing in decedent's case against the manufacturer for decedent's exposure to asbestos that allegedly was in the manufacturer's packing material used in the plant where decedent worked as that testimony was inadmissible hearsay since neither of the expert witnesses were involved in preparing those counts; absent a witness from the laboratory that performed the counts of a report that complied with former O.C.G.A. § 24-3-18(a), such testimony was inadmissible. John Crane, Inc. v. Jones, 262 Ga. App. 531, 586 S.E.2d 26, 2003 Ga. App. LEXIS 852 (2003), aff'd, 278 Ga. 747, 604 S.E.2d 822, 2004 Ga. LEXIS 996 (2004) (decided under former O.C.G.A. § 24-3-18).

Chiropractor's report properly admitted. — In a personal injury suit, it was proper to admit a chiropractor's report under former O.C.G.A. § 24-3-18(a); as the report was in a narrative form, summarized a patient's injuries and treatment, and presented the relevant aspects of the patient's injury, diagnosis, treatment, and prognosis in a logical form; although it contained medical terms, it attempted to explain those terms in the context of the report. Lott v. Ridley, 285 Ga. App. 513, 647 S.E.2d 292, 2007 Ga. App. LEXIS 561 (2007) (decided under former O.C.G.A. § 24-3-18).

Recitation of records was not a narrative. — In a personal injury suit, a bare recitation of a doctor's unedited records was not a medical narrative in story form, as contemplated by former O.C.G.A. § 24-3-18(a); therefore, a trial court committed reversible error by allowing plaintiffs' counsel to merely read into the record the doctor's notes, with no attempt to organize the doctor's notes or structure the notes to make the notes more readily understandable to the jury. Lott v. Ridley, 285 Ga. App. 513, 647 S.E.2d 292, 2007 Ga. App. LEXIS 561 (2007) (decided under former O.C.G.A. § 24-3-18).

Medical narrative in undue influence claim. — In a probate action, an oncologist's opinion, when considered along with other evidence of a testator's mental impairment and weakness after being prescribed drugs, was relevant in determining the amount of influence necessary to dominate the testator's mind and destroy free agency and willpower. Bailey v. Edmundson, 280 Ga. 528, 630 S.E.2d 396, 2006 Ga. LEXIS 355 (2006) (decided under former O.C.G.A. § 24-3-18).

Medical narrative in personal injury admissible. — In a personal injury action, the trial court abused the court's discretion in sustaining the defendant's objections to the plaintiff's treating physician's medical narrative because the physician's discussion of future treatment was not too speculative, inconclusive, or vague, the physician's opinion that the plaintiff was not a malingerer was part of the physician's diagnosis, and the physician properly expressed an opinion on causation. The trial court misapplied the relevant law as the contested statements were made after the physician had examined the plaintiff and were admissible as the physician's interpretation of that examination. Owensby v. Williams, 355 Ga. App. 695, 843 S.E.2d 899, 2020 Ga. App. LEXIS 295 (2020).

Trial court did not abuse the court's discretion in overruling defendants' objections to the admission of the physician's medical narrative report pursuant to O.C.G.A. § 24-8-826 because the fact that it contradicted the physician's deposition testimony went to the physician's credibility, which would be assessed by the jury, not the report's admissibility. Edwards v. Roundtree, 365 Ga. App. 812, 880 S.E.2d 298, 2022 Ga. App. LEXIS 500 (2022).

This section did not restrict the basis upon which a physician could rely in forming medical opinions to his own personal knowledge of facts acquired while treating the patient, and therefore the fact that the physician relied on information he obtained from medical records and deposition testimony rather than solely on his own personal knowledge acquired from treating plaintiff did not render his report inadmissible. Edwards v. Roundtree, 365 Ga. App. 812, 880 S.E.2d 298, 2022 Ga. App. LEXIS 500 (2022).

CHAPTER 9

AUTHENTICATION AND IDENTIFICATION

Article 1

General Provisions

Sec.

24-9-901. Requirement of authentication or identification.
24-9-902. Self-authentication.
24-9-903. Subscribing witness's testimony.
24-9-904. Definitions.

Article 2

Specific Types of Records and Evidence

24-9-920. Authentication of Georgia state and county records.
24-9-921. Identification of medical bills; expert witness unnecessary.
24-9-922. Proof of laws, records, nonjudicial records, or books of other states, territories, or possessions; full faith and credit.
24-9-923. Admissibility of photographs, motion pictures, video recordings, and audio recordings when witness unavailable.
24-9-924. Admissibility of records of Department of Driver Services; admissibility of computer transmitted records.

Law reviews.
For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

For annual survey on evidence, see 71 Mercer L. Rev. 1021 (2020).

ARTICLE 1

GENERAL PROVISIONS

Law reviews.
For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-9-901. Requirement of authentication or identification.

(a) The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Code section:

(1) Testimony of a witness with knowledge that a matter is what it is claimed to be;

(2) Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation;

(3) Comparison by the trier of fact or by expert witnesses with

specimens which have been authenticated. Such specimens shall be furnished to the opposite party no later than ten days prior to trial;

(4) Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances;

(5) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker;

(6) Telephone conversations, by evidence that a call was made to the number assigned at the time by a telephone service provider to a particular person or business, if:

(A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone;

(7) Evidence that a document authorized by law to be recorded or filed and in fact recorded or filed in a public office or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept;

(8) Evidence that a document or data compilation, in any form:

(A) Is in such condition as to create no suspicion concerning its authenticity;

(B) Was in a place where it, if authentic, would likely be; and

(C) Has been in existence 20 years or more at the time it is offered;

(9) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result; or

(10) Any method of authentication or identification provided by law.

History.
Code 1981, § 24-9-901, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Authenticating or identifying evidence, Fed. R. Evid. 901.

Law reviews.
For comment on Copeland v. State, 66 Ga. App. 142, 17 S.E.2d 288 (1941), see 4 Ga. B.J. 53 (1942).

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration
Proof of Authenticity of Writing
Authentication of Document Submitted for Comparison
Documents Affecting Party's Character or Reputation
Letters
Source of Knowledge of Witnesses
Authentication by Expert Witnesses
Authentication by Nonexpert Witnesses
Authenticity Is Question for Jury

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, §§ 3762, 3763, former Code 1868, §§ 3786, 3787, former Code 1873, §§ 3839, 3840, former Code 1882, §§ 3839, 3840, former Civil Code 1895, §§ 5239, 5246, 5247, former Penal Code 1895, § 1016, former Civil Code 1910, §§ 5828, 5835, 5836, former Penal Code 1910, § 1042, former Code 1933, § 38-701, 38-708, and former O.C.G.A. §§ 24-7-1, 24-7-6, and 24-7-7 are included in the annotations for this Code section. The reader is advised to also consult the annotations following O.C.G.A. § 24-9-920, for annotations regarding authentication of Georgia state and county records.

In general. — Law applied only where the contents of the missing writing are in issue. Springer v. State, 238 Ga. 81, 230 S.E.2d 883, 1976 Ga. LEXIS 1108 (1976) (decided under former Code 1933, § 38-701); Pryor v. State, 238 Ga. 698, 234 S.E.2d 918, 1977 Ga. LEXIS 1172 (1977), cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977), overruled, overruled in part as stated in , Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530, 2006 Ga. LEXIS 840 (2006), overruled in part as stated in Scott v. State, 356 Ga. App. 152, 846 S.E.2d 241, 2020 Ga. App. LEXIS 416 (2020) (decided under former Code 1933, § 38-701).

Handwriting inadmissible without proof. — Writing, alleged to be in the handwriting or signature of a party, is inadmissible unless the writing is proved or acknowledged to be genuine. Gunter v. State, 243 Ga. 651, 256 S.E.2d 341, 1979 Ga. LEXIS 1020 (1979) (decided under former Code 1933, § 38-708).

Witnesses to the authenticity of handwriting may be illiterate. Smith v. State, 77 Ga. 705, 1886 Ga. LEXIS 388 (1886) (decided under former Code 1882, § 3839).

Document to show that party can sign name in writing and not by mark is admissible. Stewart v. White, 143 Ga. 22, 84 S.E. 63, 1915 Ga. LEXIS 264 (1915) (decided under former Civil Code 1910, § 5836); Corley v. Parson, 236 Ga. 346, 223 S.E.2d 708, 1976 Ga. LEXIS 865 (1976) (decided under former Code 1933, § 38-709).

Document in possession of opposing party. — When the document was in the defendant's possession, a witness for the plaintiff in fieri facias was not allowed to testify as to the witness's examination of the document since the document itself was the best evidence. Hawes v. Red Oak Hauling Co., 116 Ga. App. 302, 157 S.E.2d 38, 1967 Ga. App. LEXIS 785 (1967) (decided under former Code 1933, § 38-701).

Circumstantial evidence. — Authenticity of the writing may be proved by circumstantial evidence. Gunter v. State, 243 Ga. 651, 256 S.E.2d 341, 1979 Ga. LEXIS 1020 (1979) (decided under former Code 1933, § 38-708).

Copies made in same operation. — Court did not err in admitting in evidence copies or duplicate licenses for operation of hotel when the city clerk testified that the duplicate documents were made at the same time as the originals, with the same operation. Hannifin v. Wolpert, 56 Ga. App. 466, 193 S.E. 81, 1937 Ga. App. LEXIS 132 (1937) (decided under former Code 1933, § 38-701).

Alterations in original writing. — It was presumed, absent a contrary showing, or a denial by the signer, that alterations, erasures, or corrections in a writing were made prior to the signing of the writing. Kingston v. State, 127 Ga. App. 660, 194 S.E.2d 675, 1972 Ga. App. LEXIS 990 (1972) (decided under former Code 1933, § 38-701).

Writings admitted as evidence. — When a plea of guilty from a prior criminal case was admitted in a subsequent civil case for impeachment, the plea was not admitted as a court paper but as a private writing. Webb v. May, 91 Ga. App. 437, 85 S.E.2d 641, 1955 Ga. App. LEXIS 768 (1955) (decided under former Code 1933, § 38-701).

Admission of prejudicial hearsay testimony held harmless error. — Because the trial court's admission of prejudicial hearsay testimony regarding the authenticity of the victim's ministry ordination certificates was harmless error, given the overwhelming evidence of the defendant's guilt, a voluntary manslaughter conviction, as a lesser-included offense of murder, was upheld on appeal. Smith v. State, 283 Ga. App. 722, 642 S.E.2d 399, 2007 Ga. App. LEXIS 177 (2007) (decided under former O.C.G.A. § 24-7-1).

Lease need not be introduced in action for rent. — When the landlord's testimony that the tenant did not pay the tenant's rent as agreed under the lease was based on the tenant's personal knowledge, this was primary evidence and there was no reason why the original writing needed to be produced. McKinnon v. Shoemaker, 166 Ga. App. 231, 303 S.E.2d 770, 1983 Ga. App. LEXIS 2113 (1983) (decided under former Code 1933, § 38-701).

Presumption of authenticity. — When a witness swore positively to the genuineness of handwriting, and when other handwriting by the same author was submitted to the jury for comparison, an inference of genuineness was proper. Boggus v. State, 34 Ga. 275, 1866 Ga. LEXIS 85 (1866) (decided under former Code 1863, § 3762); Gatlin v. State, 18 Ga. App. 9, 89 S.E. 345, 1916 Ga. App. LEXIS 71 (1916) (decided under former Civil Code 1910, § 38-708).

Trial court properly admitted an unsigned affidavit as the affidavit referred to key facts in the case including the source of the murder weapon, stolen televisions, accomplices' names, and the appellant's note on the back referred to an accomplice and upcoming trial; thus, even if another accomplice was not familiar with the appellant's handwriting, the references and the circumstances in which the other accomplice received the note authorized the finding that the state had properly authenticated the note. McCammon v. State, 306 Ga. 516, 832 S.E.2d 396, 2019 Ga. LEXIS 505 (2019).

Assumption of authenticity of trust from trial court's order. — Although the record contained no authenticated copy of a grantor's trust, the trial court stated that at a hearing the trustee had presented evidence that was not rebutted by the trustee's sister, and that, based on that evidence, the court ruled in favor of the trustee on issues under the trust. Because no transcript of the hearing was included in the record on appeal, the appellate court assumed that the trial court relied on a true and correct copy of the trust. McIntyre v. Moss, 350 Ga. App. 723, 830 S.E.2d 262, 2019 Ga. App. LEXIS 361 (2019).

Witness must express opinion. — Before the testimony of a witness as to the identity of handwriting can go to the jury, the witness must express what amounts to an opinion, one way or the other, at the time when the witness is testifying, under the circumstances then existing. Foster v. Jenkins & Belt, 30 Ga. 476, 1860 Ga. LEXIS 121 (1860) (decided under former law).

Comparison with signature on pleading in case. — Defendant's handwriting may not be measured in genuineness by a comparison with defendant's signature to a plea filed in the case, merely because such plea is in the case. Washington v. State, 124 Ga. 423, 52 S.E. 910, 1905 Ga. LEXIS 733 (1905) (decided under former Civil Code 1895, § 5246).

Documents admitted for comparison only. — Law may be applied to writings not normally admissible if the documents are to be used for a comparison of handwriting and not for documents' content. Mitchell v. State, 89 Ga. App. 80, 78 S.E.2d 563, 1953 Ga. App. LEXIS 908

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(1953) (decided under former Code 1933, § 38-709); Guy v. State, 138 Ga. App. 11, 225 S.E.2d 492, 1976 Ga. App. LEXIS 2032 (1976) (decided under former Code 1933, § 38-709).

Writings admitted solely for comparison. — Former Code 1933, § 38-708, together with former Code 1933, § 38-709, may be applied to writings not normally admissible under former Code 1933, § 38-418 if the documents were not to be used for their content, but rather for the limited use of a comparison of the handwritings. Guy v. State, 138 Ga. App. 11, 225 S.E.2d 492, 1976 Ga. App. LEXIS 2032 (1976) (decided under former Code 1933, § 38-708).

Improperly admitted testimony harmless when relevant only to counts on which defendant acquitted. — When handwriting testimony was improperly admitted but was relevant only to those counts of the indictment of which defendant was acquitted, the admission of such testimony was clearly harmless. Dowdy v. State, 159 Ga. App. 805, 285 S.E.2d 764, 1981 Ga. App. LEXIS 2822 (1981) (decided under former O.C.G.A. § 24-7-6).

Authentication of police report required even if admissible as public record. — In a suit by an injured bystander against a restaurant arising out of a gun shot by an alleged restaurant employee, a police report suggesting that the shooter was working as a bouncer was admissible under O.C.G.A. § 24-4-803(8); however, the trial court failed to address the restaurant's objection that the report was not authenticated as required by O.C.G.A. § 24-9-901(a), requiring remand. Hungry Wolf/Sugar & Spice, Inc. v. Langdeau, 338 Ga. App. 750, 791 S.E.2d 850, 2016 Ga. App. LEXIS 540 (2016).

Federal interpretation on admission of ancient documents. — The Eleventh Circuit held that, once an ancient document has been authenticated under Fed. R. Evid. 901(b)(8), the admission of the document under the hearsay exception in Fed. R. Evid. 902 is automatic. United States v. Koizy, 728 F.2d 1314, 1984 U.S. App. LEXIS 25118 (11th Cir.), cert. denied, 469 U.S. 835, 105 S. Ct. 130, 83 L. Ed. 2d 70, 1984 U.S. LEXIS 3297 (1984).

Proof of Authenticity of Writing

Kinds of proof acceptable. — Execution of a deed may be proven by: (1) its ancientness and self-contained evidence of genuineness; (2) by admission of the opposite party; (3) by registration according to law; and (4) by witnesses. Gibson v. Causey, 223 Ga. 135, 153 S.E.2d 704, 1967 Ga. LEXIS 440 (1967) (decided under former Code 1933, § 38-701).

Ancient documents. — Deed more than 30 years old (now 20 years under current O.C.G.A. § 24-9-901), having the appearance of genuineness on inspection, and coming from the proper custody, if possession had been consistent therewith, was admissible in evidence without proving the deed's execution. McArthur v. Morrison, 107 Ga. 796, 34 S.E. 205, 1899 Ga. LEXIS 158 (1899) (decided under former Civil Code 1895, § 5239).

Email not properly authenticated. — In a child molestation prosecution, an email that the defendant claimed the victim sent, which the defendant sought to introduce for impeachment, was properly excluded because defendant as offering party did not tender proof of the writing's authenticity. The victim denied writing the email, and the only proof the defendant offered to authenticate the email was the fact that the email came from the victim's email address, which did not prove the email's genuineness. Hollie v. State, 298 Ga. App. 1, 679 S.E.2d 47, 2009 Ga. App. LEXIS 575 (2009), aff'd, 287 Ga. 389, 696 S.E.2d 642, 2010 Ga. LEXIS 497 (2010) (decided under former O.C.G.A. § 24-7-1).

Consideration of print out of e-mail. — Trial court's evidentiary ruling was reversed because the trial court failed to exercise the court's discretion in ruling on the admissibility of Exhibit 3, a printout of an e-mail regarding the terms of the lease, as the record showed that the trial court failed to consider the wide variety of means by which the guarantor could authenticate the writing, including that the trial court refused to consider circumstantial evidence of its authenticity such as

the appearance, contents, and substance of the document, and the fact that the lessor produced the document in response to the guarantor's discovery requests. Koules v. SP5 Atl. Retail Ventures, 330 Ga. App. 282, 767 S.E.2d 40, 2014 Ga. App. LEXIS 825 (2014).

Compilation of text messages from cell phone. — In the defendant's murder trial, the state introduced a compilation of text messages between the defendant and the defendant's friend (on whom the defendant blamed the murder) on the night of the murder; the friend, as a participant in the text conversation, properly authenticated the document's contents pursuant to O.C.G.A. § 24-9-901(b)(1). Hodges v. State, 302 Ga. 564, 807 S.E.2d 856, 2017 Ga. LEXIS 949 (2017).

Admission of opposite party. — When the plaintiff admitted the execution of the deed offered in evidence by the defendant, further proof of execution was unnecessary. Ward-Truitt Co. v. Nicholson, 23 Ga. App. 672, 99 S.E. 153, 1919 Ga. App. LEXIS 281 (1919) (decided under former Civil Code 1910, § 5828).

Loan documents properly authenticated. — Limited liability company and its individual members were properly held liable to a bank following their failure because there was ample undisputed evidence that the bank was the company's successor-in-interest under the credit line agreements as various documents allowed judicial notice that the bank had acquired the company's assets and the loan documents were properly authenticated. Jaycee Atlanta Dev., LLC v. Providence Bank, 330 Ga. App. 322, 765 S.E.2d 536, 2014 Ga. App. LEXIS 815 (2014), cert. denied, No. S15C0632, 2015 Ga. LEXIS 169 (Ga. Mar. 2, 2015).

Circumstantial evidence. — Genuineness of a writing may be proved by circumstantial evidence. State v. Smith, 246 Ga. 129, 269 S.E.2d 21, 1980 Ga. LEXIS 988 (1980) (decided under former Code 1933, § 38-701).

Possession combined with other circumstances required. — While possession alone was insufficient to establish a prima facie showing of authenticity, possession, together with other circumstances, could meet the burden. Martin v. State, 135 Ga. App. 4, 217 S.E.2d 312, 1975 Ga. App. LEXIS 1536 (1975) (decided under former Code 1933, § 38-701); State v. Smith, 246 Ga. 129, 269 S.E.2d 21, 1980 Ga. LEXIS 988 (1980) (decided under former Code 1933, § 38-701); Hull v. State, 265 Ga. 757, 462 S.E.2d 596, 1995 Ga. LEXIS 855 (1995) (decided under former O.C.G.A. § 24-7-1).

Burden of proof. — Burden of proving the genuineness of a writing rests upon the party introducing the writing. Anderson v. Cuthbert, 103 Ga. 767, 30 S.E. 244, 1898 Ga. LEXIS 245 (1898) (decided under former Civil Code 1895, § 5239); State v. Smith, 246 Ga. 129, 269 S.E.2d 21, 1980 Ga. LEXIS 988 (1980) (decided under former Code 1933, § 38-701).

Laying a proper foundation. — When a writing other than an original is introduced into evidence, a proper foundation must be laid including evidence that the original is not available and that the evidence being introduced is a fair and correct representation of what it purports to show. Matthews & Son v. Richards, 13 Ga. App. 412, 79 S.E. 227, 1913 Ga. App. LEXIS 179 (1913); Ward-Truitt Co. v. Nicholson, 23 Ga. App. 672, 99 S.E. 153, 1919 Ga. App. LEXIS 281 (1919) (decided under former Civil Code 1910, § 5828); Swiney v. State Hwy. Dep't, 116 Ga. App. 667, 158 S.E.2d 321, 1967 Ga. App. LEXIS 921 (1967) (decided under former Code 1933, § 38-701).

Authentication of Document Submitted for Comparison

Writing must be either proven or acknowledged before admissible in evidence for comparison. McVicker v. Conkle, 96 Ga. 584, 24 S.E. 23, 1895 Ga. LEXIS 140 (1895) (decided under former Civil Code 1895, § 5247); Vizard v. Moody, 119 Ga. 918, 47 S.E. 348, 1904 Ga. LEXIS 406 (1904) (decided under former Civil Code 1895, § 5247); Chicago Bldg. & Mfg. Co. v. Butler, 139 Ga. 816, 78 S.E. 244, 1913 Ga. LEXIS 620 (1913) (decided under former Civil Code 1910, § 5836); Ginn v. Ginn, 142 Ga. 420, 83 S.E. 118, 1914 Ga. LEXIS 730 (1914) (decided under former Civil Code 1910, § 5836); Smith v. State, 138 Ga. App. 226, 225 S.E.2d 744, 1976 Ga. App. LEXIS 2115 (1976) (decided un-

Authentication of Document Submitted for Comparison (Cont'd)

der former Code 1933, § 38-709); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341, 1979 Ga. LEXIS 1020 (1979) (decided under former Code 1933, § 38-709).

An ancient deed was so far proven to be the genuine deed of the grantor, and so far established the genuineness of the grantor's signature thereto as to authorize the deed's admission in evidence for the purpose of a comparison of handwriting, upon the trial of a cause involving the question of the genuineness of the signature of such grantor to another instrument. Goza v. Browning, 96 Ga. 421, 23 S.E. 842, 1895 Ga. LEXIS 96 (1895) (decided under former Civil Code 1895, § 5247).

Circumstantial evidence. — Genuineness of the writing may be proved by circumstantial evidence. Gunter v. State, 243 Ga. 651, 256 S.E.2d 341, 1979 Ga. LEXIS 1020 (1979) (decided under former Code 1933, § 38-709).

Circumstantial evidence of a postmark and a return address for a handwritten letter, along with a witness's testimony that the witness received the letter in the mail, was not sufficient authentication of the letter. Ross v. State, 194 Ga. App. 464, 390 S.E.2d 671, 1990 Ga. App. LEXIS 118 (1990) (decided under former O.C.G.A. § 24-7-7).

Possession not proof of authenticity. — Possession of letters was not of itself sufficient to prove that the possessor wrote letters, and thus establish the handwriting thereof as a standard with which to compare the handwriting. McCombs v. State, 109 Ga. 496, 34 S.E. 1021, 1900 Ga. LEXIS 241 (1900) (decided under former Civil Code 1895, § 5247).

Plea in another action. — When the deed was signed by mark instead of by the signature of the vendor, and it was shown that the vendor could write, it was not error to allow the plaintiff to introduce in evidence the original plea, filed in another suit brought against the vendor about the time of the execution of the deed alleged to be forged, with the signature of the vendor affixed to such plea, for the purpose of showing that the vendor could write and that the vendor signed the vendor's name in writing and not by mark. Stewart v. White, 143 Ga. 22, 84 S.E. 63, 1915 Ga. LEXIS 264 (1915) (decided under former Civil Code 1910, § 5836).

Documents Affecting Party's Character or Reputation

In general. — Upon the trial of one accused of murder it was not error to admit signatures of defendant on two pleas of guilty on two indictments for check forgery for comparison over the objection that this evidence put the defendant's character in issue. Hyde v. State, 196 Ga. 475, 26 S.E.2d 744, 1943 Ga. LEXIS 360 (1943) (decided under former Code 1933, § 38-709); Watkins v. State, 151 Ga. App. 496, 260 S.E.2d 547 (1979). (even though other samples of defendant's handwriting were available) (decided under former Code 1933, § 38-709).

Documents showing another crime. — Checks which were the basis for a prior forgery conviction could be offered for a comparison with the handwriting on the 34 checks at issue in the forgery case on trial as those checks had a direct relevancy to the case and, therefore, were not objectionable because those checks also tended to show a distinct and separate crime on the part of appellant. Watkins v. State, 151 Ga. App. 510, 260 S.E.2d 547, 1979 Ga. App. LEXIS 2616 (1979) (decided under former Code 1933, § 38-709).

Letters

For proof necessary to authenticate an unsigned letter, see Rumph v. State, 91 Ga. 20, 16 S.E. 104, 1892 Ga. LEXIS 488 (1892) (decided under former Code 1882, § 3839).

Last letters. — Contents of a lost note are not proven when the witness can give no evidence of knowledge of the handwriting of the person alleged to have written the note. Bone v. State, 86 Ga. 108, 12 S.E. 205, 1890 Ga. LEXIS 193 (1890) (decided under former Code 1882, § 3839).

Possession not proof of authenticity. — Proof that letters were found in the defendant's possession is not proof that the handwriting in the letters was defendant's handwriting. McCombs v. State, 109 Ga. 496, 34 S.E. 1021, 1900 Ga.

LEXIS 241 (1900) (decided under former Penal Code 1895, § 1016).

Authentication sufficient. — Testimony by the recipient of a letter that the handwriting on the letter appeared to be that of the defendant was sufficient authentication of the letter to allow the letter's admission against defendant during defendant's trial for aggravated assault. Harrison v. State, 253 Ga. App. 179, 558 S.E.2d 760, 2002 Ga. App. LEXIS 10 (2002) (decided under former O.C.G.A. § 24-7-6).

Handwritten note, in which the first of two defendants admitted to killing the victim in order to prevent the victim from testifying was properly authenticated because the letter was consistent with prior conversations involving the non-accomplice witness and the first defendant, and was personally addressed to the non-accomplice. Williams v. State, 280 Ga. 584, 630 S.E.2d 370, 2006 Ga. LEXIS 262 (2006) (decided under former O.C.G.A. § 24-7-6).

Any error in the admission of a defendant's response to a detective's statement that the co-indictee had implicated the defendant in a murder and robbery made before Miranda warnings were administered was harmless as the statement was cumulative of a non-expert's admissible testimony authenticating letters from the defendant to the co-indictee under former O.C.G.A. § 24-7-6 containing a certain racial epithet also used by the defendant in the response. Phillips v. State, 285 Ga. 213, 675 S.E.2d 1, 2009 Ga. LEXIS 44 (2009) (decided under former O.C.G.A. § 24-7-6).

Letter written by the defendant was sufficiently authenticated by admissible evidence, and even absent the challenged testimony about the letter, the state presented sufficient evidence from which the jury could have inferred the letter was from the defendant. Brown v. State, 332 Ga. App. 635, 774 S.E.2d 708, 2015 Ga. App. LEXIS 374 (2015).

Trial court properly admitted a letter in the defendant's trial for convictions in connection with a drive-by shooting because the state properly authenticated the letter as authored by the defendant since the letter was given to the prosecution by defense counsel and was properly introduced as evidence of the defendant's guilty consciousness relating to the shooting and the letter's relevance was substantially outweighed by any danger of unfair prejudice. Amey v. State, 337 Ga. App. 480, 788 S.E.2d 80, 2016 Ga. App. LEXIS 361 (2016).

Trial court did not err in admitting into evidence the defendant's handwritten letters because the state provided sufficient evidence to establish a prima facie case that the defendant wrote the letters, including the co-indictee's testimony that the co-indictee was familiar with the defendant's handwriting and identifying the handwriting in the letters as the defendant's handwriting. Smith v. State, 300 Ga. 538, 796 S.E.2d 666, 2017 Ga. LEXIS 53 (2017).

Trial court did not abuse the court's discretion in admitting into evidence the letters that the accomplice received from the defendant while the two men were being held in the same jail because the state made out a prima facie case that the defendant wrote the letters based on the accomplice's testimony that the accomplice believed the defendant had written the letters and the circumstances surrounding receipt of the letters in the jail indicated that the letters were from the defendant. Irving v. State, 351 Ga. App. 779, 833 S.E.2d 162, 2019 Ga. App. LEXIS 494 (2019).

Letter received in mail. — Letter received through the mail was not admissible in evidence when offered by the recipient, without proof of the letter's authenticity, but proof of the letter's execution could be shown by circumstantial evidence. Deaderick v. Deaderick, 182 Ga. 96, 185 S.E. 89, 1936 Ga. LEXIS 289 (1936) (decided under former Code 1933, § 38-701).

Source of Knowledge of Witnesses

Knowledge from business correspondence. — When a witness testified that from business correspondence the witness was acquainted with the handwriting of the writer of a letter received by due course of mail, such testimony was enough to carry to the jury as evidence, and the court was right to admit the

Source of Knowledge of Witnesses (Cont'd)

evidence. Pearson & Co. v. McDaniel, 62 Ga. 100, 1878 Ga. LEXIS 305 (1878) (decided under former Code 1873, § 3839).

Witness comparing by recollection. — Witness was not competent to testify as to the genuineness of a signature to a lost writing when all the knowledge that the witness had upon the subject was based upon a comparison of the witness's recollection of such signature with writing proved by other witnesses to be that of the person whose name was signed to the lost instrument. Gress Lumber Co. v. Georgia Pine Shingle Co., 120 Ga. 751, 48 S.E. 115, 1904 Ga. LEXIS 697 (1904) (decided under former Civil Code 1895, § 5246).

Manner in which a witness acquired knowledge of a person's handwriting was immaterial. Reid v. State, 20 Ga. 681, 1856 Ga. LEXIS 131 (1856) (decided under former law); Bruce v. Crews, 39 Ga. 544, 1869 Ga. LEXIS 236 (1869) (decided under former Code 1863, § 3762); Shaw v. Chiles, 9 Ga. App. 460, 71 S.E. 745, 1911 Ga. App. LEXIS 178 (1911) (decided under former Civil Code 1910, § 5835); Notis v. State, 84 Ga. App. 199, 65 S.E.2d 622, 1951 Ga. App. LEXIS 660 (1951) (decided under former Code 1933, § 38-708).

Investigators' testimony. — State met requirements of O.C.G.A. § 24-9-901 based on presenting evidence that investigators sought and obtained the wiretap warrants for the phone numbers of the appellant and the appellant's brother, and the lead investigator testified about the steps taken to identify and verify the target phone numbers, the process of monitoring the phone calls, and the procedures used to discern whether the recorded calls were pertinent to the investigation of the victim's murder. Kilpatrick v. State, 308 Ga. 194, 839 S.E.2d 551, 2020 Ga. LEXIS 132 (2020).

Authentication by Expert Witnesses

In general. — When two other letters, purporting to come from the same source as the first, were shown to experts, who compared the letters with the first letter and testified that the experts were of the opinion that the letters were all in the same handwriting, this was sufficient to admit the letters in evidence. Smith v. State, 77 Ga. 705, 1886 Ga. LEXIS 388 (1886) (decided under former Code 1882, § 3840).

Trial court did not err in admitting in evidence two notebooks, representing handwriting samples, for comparison with the kidnapping ransom note, and in refusing to strike the testimony of the state's expert witness as to comparison of these notebooks with the ransom note. Gross v. State, 161 Ga. App. 489, 288 S.E.2d 733, 1982 Ga. App. LEXIS 3050 (1982) (decided under former O.C.G.A. § 24-7-7).

Adjuster's affidavit relied on unauthenticated documents. — Vacancy exclusion did not bar coverage for the vandalism loss to an insured as a matter of law, and the trial court erred in failing to grant summary judgment to the insured on that issue because the senior field adjuster's affidavit did not include any admissible evidence regarding the status of the renovation work as it relied on hearsay and unauthenticated documents. R&G Invs. & Holdings, LLC v. Am. Family Ins. Co., 337 Ga. App. 588, 787 S.E.2d 765, 2016 Ga. App. LEXIS 331 (2016), cert. denied, No. S16C1830, 2017 Ga. LEXIS 144 (Ga. Feb. 27, 2017).

Handwriting expert may testify as to the genuineness of handwriting. Borders v. City of Macon, 18 Ga. App. 333, 89 S.E. 451, 1916 Ga. App. LEXIS 346 (1916) (decided under former Penal Code 1910, § 1042).

When handwriting expert's testimony was based upon the expert's comparison between admitted exemplars of defendant's handwriting and other unadmitted documents, introduction of such testimony into the record was error. Dowdy v. State, 159 Ga. App. 805, 285 S.E.2d 764, 1981 Ga. App. LEXIS 2822 (1981) (decided under former O.C.G.A. § 24-7-6).

Officer unable to authenticate video recording of defendant's statement to officers. — Trial court did not err in suppressing the video recordings of any statement the defendant made to law enforcement officers while in custody because although the investigator testified

that the investigator had auditioned a disc and that it reflected everything that occurred during the defendant's interview, on cross-examination, the investigator admitted that the investigator did not view the entire video in the judge's chambers; and, although the investigator testified that the disc that the investigator watched in chambers was the one the investigator had reviewed earlier and placed in a binder and gave to the prosecutor, the investigator acknowledged the disc had no identifying markers on the disc that would confirm that fact. State v. Smith, 299 Ga. 901, 792 S.E.2d 677, 2016 Ga. LEXIS 700 (2016).

Gang expert authenticated phone records. — First defendant's phone records were properly authenticated after a gang expert testified to reviewing the cell phone records, that the subscriber address on the account matched an address listed for the first defendant on documents related to a prior arrest and on the first defendant's driver's license, that text messages from the cell phone number used Bloods slang and terminology, and that the number communicated with the phone numbers of the second defendant and accomplices. Nicholson v. State, 307 Ga. 466, 837 S.E.2d 362, 2019 Ga. LEXIS 844 (2019).

Authentication by Nonexpert Witnesses

In general. — A nonexpert witness may identify the handwriting of a particular individual (as the witness would identify the individual personally), provided the witness knows the handwriting or is so familiar with the handwriting that the witness would recognize the handwriting, but such witness may not testify as to the identity of handwriting if the witness's opinion is founded solely on a comparison of a handwriting brought into court and proved to be genuine with the handwriting in question. Copeland v. State, 66 Ga. App. 142, 17 S.E.2d 288 (1941), for comment, see 4 Ga. B.J. 53 (1942) (decided under former Code 1933, § 38-709).

Basis for testimony of nonexpert witness. — Anyone familiar with the handwriting of another may offer opinion testimony as to its authenticity based on that person's knowledge and belief. Bates v. State, 18 Ga. App. 718, 90 S.E. 481, 1916 Ga. App. LEXIS 1221 (1916) (decided under former Civil Code 1910, § 5835); Waddell v. Watkins Medical Co., 25 Ga. App. 657, 104 S.E. 250, 1920 Ga. App. LEXIS 136 (1920) (decided under former Civil Code 1910, § 5835); Haygood v. Clark Co., 27 Ga. App. 101, 107 S.E. 379, 1921 Ga. App. LEXIS 715 (1921) (decided under former Civil Code 1910, § 5835); Copeland v. State, 66 Ga. App. 142, 17 S.E.2d 288, 1941 Ga. App. LEXIS 155 (1941) (decided under former Code 1933, § 38-708); Gaulding v. Courts, 90 Ga. App. 472, 83 S.E.2d 288, 1954 Ga. App. LEXIS 739 (1954) (decided under former Code 1933, § 38-708); Wooten v. Life Ins. Co., 93 Ga. App. 665, 92 S.E.2d 567, 1956 Ga. App. LEXIS 827 (1956) (decided under former Code 1933, § 38-708); Kinney v. Youngblood, 216 Ga. 354, 116 S.E.2d 608, 1960 Ga. LEXIS 471 (1960) (decided under former Code 1933, § 38-708).

Nonexpert witness may identify the handwriting of a particular individual (as the witness would identify the individual personally), provided the witness knows the handwriting or is so familiar with the handwriting that the witness would recognize the handwriting. Quick v. State, 256 Ga. 780, 353 S.E.2d 497, 1987 Ga. LEXIS 658 (1987) (decided under former O.C.G.A. § 24-7-6); Summerour v. State, 211 Ga. App. 65, 438 S.E.2d 176, 1993 Ga. App. LEXIS 1410 (1993) (decided under former O.C.G.A. § 24-7-6).

Although the witnesses to a will were deceased, the lawyer who prepared the will and the lawyer's paralegal were not permitted to testify that the signature on the will was the decedent's because the lawyer and paralegal did not demonstrate a familiarity with the decedent's signature. Ammons v. Clouds, 295 Ga. 225, 758 S.E.2d 282, 2014 Ga. LEXIS 350 (2014).

Availability of direct evidence of execution. — Former O.C.G.A. § 24-7-6 did not exclude opinion testimony on the authenticity of a signature when direct evidence of execution was available. Ham v. Ham, 257 Ga. App. 415, 571 S.E.2d 441, 2002 Ga. App. LEXIS 1173 (2002) (decided under former O.C.G.A. § 24-7-6).

Nonexpert witness must have reasons for recognizing the writing in

Authentication by Nonexpert Witnesses (Cont'd)

question. Bruce v. Crews, 39 Ga. 544, 1869 Ga. LEXIS 236 (1869) (decided under former Code 1868, § 3786); Wimbish v. State, 89 Ga. 294, 15 S.E. 325, 1892 Ga. LEXIS 329 (1892) (decided under former Code 1882, § 3839); Haygood v. Clark Co., 27 Ga. App. 101, 107 S.E. 379, 1921 Ga. App. LEXIS 715 (1921) (decided under former Civil Code 1910, § 5835).

Comparison with other handwriting. — Nonexpert witness could not testify as to the identity of handwriting if the witness's opinion was based solely on comparison with handwriting proved to be genuine. Copeland v. State, 66 Ga. App. 142, 17 S.E.2d 288, 1941 Ga. App. LEXIS 155 (1941) (for comment, see 4 Ga. B.J. 53 (1942)) (decided under former Code 1933, § 38-708).

Trial court did not err in allowing a police detective, who gained knowledge of defendant's signature by witnessing the defendant sign the arraignment form, from identifying the signature on an indictment from a prior conviction; the source of the detective's knowledge was a proper question for investigation and went entirely to the credit and weight of the detective's evidence. Williams v. State, 259 Ga. App. 742, 578 S.E.2d 128, 2003 Ga. App. LEXIS 127 (2003) (decided under former O.C.G.A. § 24-7-6).

Employee's recognition of supervisor's signature. — Employee's testimony that the employee transmitted a document to a supervisor and received the document back with the supervisor's signature and that the employee recognized the signature as that of the supervisor because the employee was familiar with the signature satisfied the requirements of former O.C.G.A. § 24-7-6. Malin v. Servisco, Inc., 172 Ga. App. 418, 323 S.E.2d 278, 1984 Ga. App. LEXIS 2532 (1984) (decided under former O.C.G.A. § 24-7-6).

Authentication of text messages by police officer. — Trial court did not err in finding photographs of text messages on a second victim's phone were properly authenticated as a lieutenant testified that the images were fair and accurate representations of what appeared on the second victim's cell phone screen and the second victim testified that the phone number on the screen was the defendant's phone number as confirmed by a text from the defendant saying it was the defendant. Pierce v. State, 302 Ga. 389, 807 S.E.2d 425, 2017 Ga. LEXIS 940 (2017).

Text messages found on the defendant's phone were properly authenticated because the state presented ample evidence to authenticate outgoing text messages found on the defendant's phone and to establish that the defendant authored those messages as the state supplied sufficient, nonhearsay evidence via testimony of the detective as to the identity of the source such that a reasonable factfinder could have concluded that the evidence was what it was claimed to be. Johnson v. State, 348 Ga. App. 667, 824 S.E.2d 561, 2019 Ga. App. LEXIS 69 (2019).

Authentication of messages on social media website. — Because the defendant's only objection to the messages on a social media website was that they were prejudicial and not probative, the defendant waived any objection that the messages were not properly authenticated; however, even if the defendant did not waive the authentication objection, the victim's mother properly authenticated the messages as the mother knew the defendant went by the name "Bucky Raw" because the mother had seen videos that the defendant had posted — and in which the defendant appeared — on another website using that alias; and the mother was able to discern the defendant's identity through the conversations the mother had with the defendant on the accounts that the mother and the mother's friend had set up. Cotton v. State, 297 Ga. 257, 773 S.E.2d 242, 2015 Ga. LEXIS 362 (2015).

Authentication of e-mails. — Trial court did not err by allowing e-mails sent by the defendant to the victim while the defendant was in jail to go out with the jury during deliberations because the state authenticated the e-mails, as the state provided a certificate of authenticity from the jail, the victim acknowledged that the victim had been communicating

with the defendant, and the e-mails contained information related to the details of the case. Woodruff v. State, 356 Ga. App. 659, 848 S.E.2d 670, 2020 Ga. App. LEXIS 505 (2020).

Ex-girlfriend's identification of defendant's voice. — Trial counsel was not ineffective for failing to object to the admission of the video-recorded interview of the defendant's ex-girlfriend as the defendant's statements in that voicemail were admissions of a party opponent; and the defendant did not show that had trial counsel objected to a lack of foundation as to the voicemail instead of to the video interview, such an objection would have been meritorious because the ex-girlfriend testified that the ex-girlfriend had previously been in a relationship with the defendant and that it was the defendant's voice in the voice message. Lyons v. State, 309 Ga. 15, 843 S.E.2d 825, 2020 Ga. LEXIS 361 (2020).

Defendant's voice on a recording was properly authenticated after a witness and a detective both testified that they had listened to the recording that was played for the jury and recognized the defendant's voice on the recording. The witness explained that the witness was familiar with the defendant's voice from working with the defendant, and the detective said that the detective was familiar with the defendant's voice from in-person conversations. Edwards v. State, 308 Ga. 176, 839 S.E.2d 599, 2020 Ga. LEXIS 126 (2020).

Authenticity Is Question for Jury

In general. — It is the duty of the jury to compare the disputed writing with admittedly or proven authentic writings and then determine the authenticity of the disputed writing. Boggus v. State, 34 Ga. 275, 1866 Ga. LEXIS 85 (1866) (decided under former Code 1863, § 3763); Bruce v. Crews, 39 Ga. 544, 1869 Ga. LEXIS 236 (1869) (decided under former Code 1868, § 3787); Collins v. Glisson, 35 Ga. App. 111, 132 S.E. 114, 1926 Ga. App. LEXIS 574 (1926) (decided under former Civil Code 1910, § 5836); Rogers v. Rogers, 52 Ga. App. 548, 184 S.E. 404, 1936 Ga. App. LEXIS 179 (1936) (decided under former Code 1933, § 38-709).

Jury instructions. — If any specific instruction was desired as to the jury's duty to compare such writings with the signature on the note alleged to have been forged, a special written request should have been made. McRae v. Wilby, 59 Ga. App. 401, 1 S.E.2d 77, 1939 Ga. App. LEXIS 41 (1939) (decided under former Code 1933, § 38-709).

Authenticity was question for jury. — Statement that the handwriting was that of a certain person was to be taken not as a conclusion but merely as an opinion the weight of which was a matter entirely for the jury. Borders v. City of Macon, 18 Ga. App. 333, 89 S.E. 451, 1916 Ga. App. LEXIS 346 (1916) (decided under former Civil Code 1910, § 5835); Bates v. State, 18 Ga. App. 718, 90 S.E. 481, 1916 Ga. App. LEXIS 1221 (1916) (decided under former Civil Code 1910, § 5835); Rogers v. Rogers, 52 Ga. App. 548, 184 S.E. 404, 1936 Ga. App. LEXIS 179 (1936) (decided under former Code 1933, § 38-708); Notis v. State, 84 Ga. App. 199, 65 S.E.2d 622, 1951 Ga. App. LEXIS 660 (1951) (decided under former Code 1933, § 38-708); Gaulding v. Courts, 90 Ga. App. 472, 83 S.E.2d 288, 1954 Ga. App. LEXIS 739 (1954) (decided under former Code 1933, § 38-708).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 1045, 1209.

C.J.S.

32 C.J.S., Evidence, §§ 820 et seq., 835 et seq., 891 et seq., 974 et seq.

ALR.

Admissibility in evidence, for purpose of comparison, of writing made by accused person at request of public authorities, 1 A.L.R. 1304.

Use of photographs in examination and comparison of handwriting or typewriting, 31 A.L.R. 1431; 17 A.L.R.2d 308.

Admissibility and weight of opinion evidence as to genuineness of signature by mark, 101 A.L.R. 767.

Authorship or authenticity of written or

printed matter as inferable without extrinsic proof from name used therein or from its contents or subject matter, 131 A.L.R. 301.

Changes in handwriting as evidence of change in physical or mental condition, 134 A.L.R. 641.

Probative value of opinion testimony of handwriting experts that document is not genuine, opposed to testimony of persons claiming to be attesting witnesses, 154 A.L.R. 649.

Mode and degree of proof required to establish genuineness of handwriting offered as standard or exemplar for comparison with a disputed writing or signature, 41 A.L.R.2d 575.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 A.L.R.2d 308.

Competency, as a standard of comparison to establish genuineness of handwriting, of writings made after controversy arose, 72 A.L.R.2d 1274.

Propriety of jury, or court sitting as trier of facts, making a comparison of a disputed writing with a standard produced in court, without the aid of an expert witness, 80 A.L.R.2d 272.

Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence, 5 A.L.R.3d 1018.

Unaccepted offer for purchase of real property as evidence of its value, 25 A.L.R.4th 571.

Unaccepted offer to sell or buy comparable real property as evidence of value of property in issue, 25 A.L.R.4th 615.

Unaccepted offer to sell or listing of real property as evidence of its value, 25 A.L.R.4th 983.

Admissibility of evidence as to linguistics of typing style (forensic linguistics) as basis of identification of typist or author, 36 A.L.R.4th 598.

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 18 A.L.R.6th 613.

Authentication of electronically stored evidence, including text messages and e-mail, 45 A.L.R.4th 602.

Hearsay objections to admission of text messages or testimony thereof, 10 A.L.R.7th 4.

Authentication of text messages, 38 A.L.R.7th Art. 2.

Authentication of social media records and communications, 40 A.L.R.7th Art. 1.

Authentication and admission of foreign business records in federal criminal proceeding pursuant to 18 USCS § 3505. 41 A.L.R. Fed. 2d 537.

Admissibility of handwriting expert's testimony in federal criminal case, 183 A.L.R. Fed. 333.

24-9-902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility shall not be required with respect to the following:

(1) A document bearing a seal purporting to be that of the United States or of any state, district, commonwealth, territory, or insular possession thereof or the Panama Canal Zone or the Trust Territory of the Pacific Islands or of a political subdivision, department, officer, or agency thereof or of a municipal corporation of this state and bearing a signature purporting to be an attestation or execution;

(2) A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) of this Code section having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine;

(3) A document purporting to be executed or attested in an official

capacity by a person authorized by the laws of a foreign country to make such execution or attestation and accompanied by a final certification as to the genuineness of the signature, official position of the executing or attesting person, or of any foreign official whose certificate of genuineness of signature and official position relates to such execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to such execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that such documents be treated as presumptively authentic without final certification or permit such documents to be evidenced by an attested summary with or without final certification;

(4) A duplicate of an official record or report or entry therein or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification by certificate complying with paragraph (1), (2), or (3) of this Code section or complying with any law of the United States or of this state, including Code Section 24-9-920;

(5) Books, pamphlets, or other publications purporting to be issued by a public office;

(6) Printed materials purporting to be newspapers or periodicals;

(7) Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin;

(8) Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments;

(9) Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law;

(10) Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic;

(11) The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration of its custodian or other qualified person certifying that the record:

(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of such matters;

(B) Was kept in the course of the regularly conducted activity; and

(C) Was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration; or

(12) In a civil proceeding, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) Was kept in the course of the regularly conducted activity; and

(C) Was made by the regularly conducted activity as a regular practice.

The declaration shall be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration.

History.

Code 1981, § 24-9-902, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-7-25, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived in part from 28 U.S.C. § 1739.

Cross references.

Proof of lack of public record by evidence showing that record cannot be found, § 9-11-44.

Records, documents, and papers of public officers generally, § 50-18-1 et seq.

Evidence that is self authenticating, Fed. R. Evid. 902.

Law reviews.

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Analysis

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General Considerations

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1830, Cobb's 1851 Digest, p. 273, former Laws 1836, Cobb's 1851 Digest, p. 273, former Ga. L. 1855-56, p. 143, § 1, former Code 1863, §§ 3739, 3753, former Code 1868, §§ 3763, 3777, former Code 1873, §§ 3816, 3829, former Code 1882, § 3816, former Ga. L. 1890-91, p. 109, § 1, former Civil Code 1895, §§ 5211, 5216, 5235, former Penal Code 1895, § 1015, former Civil Code 1910, §§ 5798, 5803, 5822, former Penal Code 1910, § 1041, former Code 1933, §§ 38-601, 38-606, 38-625, 38-627, former Ga. L. 1967, p. 226, § 20, former Ga. L. 1971, p. 441, §§ 1, 2, and former O.C.G.A. §§ 9-11-44, 24-7-8, 24-7-20, 24-7-21, 24-7-23, 24-7-24, 24-7-25, 24-7-26, and 24-7-27 are included in the annotations for this Code section. The reader is also advised to consult the annotations under O.C.G.A. § 24-8-803, for annotations regarding when deeds serve as evidence, O.C.G.A. § 24-9-920 for annotations regarding the authentication of Georgia state and county records, and O.C.G.A. § 24-9-922, for annotations regarding foreign state laws and records.

Federal interpretation on admission of ancient documents. — The Eleventh Circuit held that, once an ancient document has been authenticated under Fed. R. Evid. 901(b)(8), the admission of the document under the hearsay exception in Fed. R. Evid. 902 is automatic. United States v. Koizy, 728 F.2d 1314, 1984 U.S. App. LEXIS 25118 (11th Cir.), cert. denied, 469 U.S. 835, 105 S. Ct. 130, 83 L. Ed. 2d 70, 1984 U.S. LEXIS 3297 (1984).

Certificate and Seal

Form of certificate. — Certificate in the following form: "The above and foregoing is a true copy," etc., was a sufficient authentication of a record. Harden v. Webster, Parmelee & Co., 29 Ga. 427, 1859 Ga. LEXIS 358 (1859) (decided under Ga. L. 1855-56, p. 143, § 1).

Sufficiency of certificate. — To make a certificate from the Executive Department admissible in evidence, it was not necessary that the certificate give a copy of that to which it relates. It was sufficient that it gave, substantially, the contents, or a part of the contents, of the thing to which it related. Henderson v. Hackney, 16 Ga. 521, 1854 Ga. LEXIS 214 (1854) (decided under Laws 1830, Cobb's 1851 Digest, p. 273).

Validity of record certified. — In action for alimony when plaintiff intro-

Certificate and Seal (Cont'd)

duced a certified copy of marriage certificate, no issue as to validity of marriage was made in the absence of a direct attack on the record by the defendant. Guess v. Guess, 202 Ga. 364, 43 S.E.2d 326, 1947 Ga. LEXIS 448 (1947) (decided under former Code 1933, § 38-601).

Two sets of protests. — When two sets of notarial protests upon the same bill were filed, both were entitled to be read without further proof by the notary. Southern Bank v. Mechanics Sav. Bank, 27 Ga. 252, 1859 Ga. LEXIS 48 (1859) (decided under Laws 1836, Cobb's 1851 Digest, p. 273).

Failing to file in court. — That a certificate may not have been filed in court and there permitted to remain, agreeably to the provisions of the former statute, simply furnished grounds for objecting to the certificate's reception in evidence. Having been regularly admitted in evidence, it was proper for the court to tell the jury what effect the law attached to a notarial certificate of protest. Patton v. Bank of La Fayette, 124 Ga. 965, 53 S.E. 664, 1906 Ga. LEXIS 676 (1906), overruled, Sharpe v. DOT, 267 Ga. 267, 476 S.E.2d 722, 1996 Ga. LEXIS 723 (1996) (decided under former Civil Code 1895, § 5243).

Protest rejected for nonfiling. — When considered in connection with the evidence of the notary public who issued a certificate of protest on the paper sued on, the certificate not having been filed in court and permitted to remain there as provided by the former statute, it was not error to reject the certificate from evidence when offered by the plaintiff. Woods v. Mays, 143 Ga. 209, 84 S.E. 450, 1915 Ga. LEXIS 351 (1915) (decided under former Civil Code 1910, § 5822).

Protest with notice. — Notarial certificate, which stated that a draft was presented at maturity, and payment demanded and refused for want of funds, and that due notice of the nonpayment was given on the same day to all the parties concerned, was sufficient notice of the dishonor thereof. Fields v. Thornton, 1 Ga. 306, 1846 Ga. LEXIS 78 (1846) (decided under Laws 1836, Cobb's 1851 Digest, p. 273).

Law not only made certificates prima facie evidence of the nonpayment of a note, but evidence of notice also, when so stated in the certificate under the hand and seal of the notary. Walker v. Bank of Augusta, 3 Ga. 486, 1847 Ga. LEXIS 130 (1847) (decided under Laws 1836, Cobb's 1851 Digest, p. 273).

Protest without notice. — But a notarial certificate reciting the fact of protest for nonpayment, but silent as to whether or not notice of protest was given to the endorser, was no evidence that such notice was in fact given. Hobbs & Tucker v. Chemical Nat'l Bank, 97 Ga. 524, 25 S.E. 348, 1895 Ga. LEXIS 519 (1895) (decided under former Civil Code 1895, § 5235).

Nothing in former O.C.G.A. § 24-7-20 required that certified copies be photostatic copies of original documents. Cook v. State, 255 Ga. 565, 340 S.E.2d 843, 1986 Ga. LEXIS 607, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166, 1986 U.S. LEXIS 4139 (1986) (decided under former O.C.G.A. § 24-7-20).

Elements of authentication. — Establishment of three elements was commonly spoken of as authentication: the authority of the officer issuing the document, the incumbency of the officer, and the genuineness of the officer's signature or seal. Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24, 1946 Ga. LEXIS 432 (1946) (decided under former Code 1933, § 38-627).

Handwritten signature not required. — Under former O.C.G.A. § 24-7-24, the signature of the clerk need not be handwritten, nor is there a requirement that the foreign judgment itself be explicitly mentioned in the clerk's certificate. Foy v. Lewis, 248 Ga. 234, 282 S.E.2d 295, 1981 Ga. LEXIS 968 (1981) (decided under former O.C.G.A. § 24-7-24).

There was no requirement that the signature of the clerk be handwritten rather than stamped. Sandifer v. Lynch, 244 Ga. 369, 260 S.E.2d 78, 1979 Ga. LEXIS 1239 (1979) (decided under former Code 1933, § 38-627).

Attestation

Contents of record. — Former statute merely required a certificate or attesta-

tion, without specifying any detail as to the location and length of the record, by reference to the number of pages, minute book, case number, and similar details. McIntyre v. Balkcom, 229 Ga. 81, 189 S.E.2d 445, 1972 Ga. LEXIS 506 (1972) (decided under former Code 1933, § 38-601).

Defendant's conviction for impersonating a law enforcement officer was affirmed and the trial court did not err by admitting into evidence a computer-generated record of the defendant's application to LeadsOnline because the trial court properly found that the application fell within the business records exception to the hearsay rule and had been properly authenticated as the defendant had actual notice before trial that the state intended to authenticate via a self-authentication declaration. Chase v. State, 337 Ga. App. 449, 787 S.E.2d 802, 2016 Ga. App. LEXIS 352 (2016).

Seal not required. — Former statute required a certificate or attestation without specifying the necessity for the seal by a court reporter. Kinney v. Avery & Co., 14 Ga. App. 180, 80 S.E. 663, 1914 Ga. App. LEXIS 163 (1914) (decided under former Civil Code 1910, § 5798); Canal Ins. Co. v. Tate, 111 Ga. App. 377, 141 S.E.2d 851, 1965 Ga. App. LEXIS 979 (1965) (decided under former Code 1933, § 38-601); McIntyre v. Balkcom, 229 Ga. 81, 189 S.E.2d 445, 1972 Ga. LEXIS 506 (1972) (decided under former Code 1933, § 38-601).

Treatment of Specific Records

1. In General

Acknowledgment of service. — There was no error in admitting in evidence the certified copy of an acknowledgment of service. James v. Edward Thompson Co., 17 Ga. App. 578, 87 S.E. 842, 1916 Ga. App. LEXIS 796 (1916) (decided under former Civil Code 1910, § 5798).

Administrative records. — Properly authenticated administrative records are admissible. Niehaus v. State, 149 Ga. App. 575, 254 S.E.2d 895, 1979 Ga. App. LEXIS 1940 (1979) (decided under former Code 1933, § 38-601).

Conditional sales contract. — Conditional sales contract duly recorded and on its face properly executed and attested was admissible in evidence. Central Bank & Trust Co. v. Creede, 103 Ga. App. 203, 118 S.E.2d 844, 1961 Ga. App. LEXIS 909 (1961) (decided under former Code 1933, § 38-601).

County bonds. — It was the duty of the clerk of the superior court to sign a validation certificate and attach the seal of the clerk's office to all county bonds regularly validated. Touchton v. Echols County, 211 Ga. 85, 84 S.E.2d 81, 1954 Ga. LEXIS 510 (1954) (decided under former Code 1933, § 38-601).

Distribution of estate. — When a division in kind was made between heirs and distributees of a decedent, a certified copy of the return of the commissioners, and of the order of the court approving the return, were admissible in evidence in an action involving title to the land covered by the award. Bell v. Cone, 208 Ga. 467, 67 S.E.2d 558, 1951 Ga. LEXIS 402 (1951) (decided under former Code 1933, § 38-601).

Driver's license. — Because a defendant's driver's license was a properly certified public record, the trial court was permitted to infer the reliability of any hearsay contained therein and to conclude that no confrontation clause violation had been shown pursuant to former O.C.G.A. §§ 24-3-17 and 24-7-20 (see now O.C.G.A. §§ 24-8-803 and 24-9-924). Douglas v. State, 312 Ga. App. 585, 718 S.E.2d 908, 2011 Ga. App. LEXIS 1022 (2011), cert. denied, No. S12C0470, 2012 Ga. LEXIS 606 (Ga. June 18, 2012) (decided under former O.C.G.A. §§ 24-3-17 and 24-7-20).

Fertilizer analysis record. — A certified copy of an analysis of fertilizers to be used in an action for false or incorrect branding should not contain a statement as to the penalty or damage for which the manufacturer or dealer might be deemed to be liable; only the mathematical result of the chemical analysis should be stated. Georgia Fertilizer Co. v. Walker, 45 Ga. App. 68, 163 S.E. 277, 1932 Ga. App. LEXIS 166 (1932) (decided under former Civil Code 1910, § 5798).

Loan documents. — Limited liability company and its individual members were properly held liable to a bank following their failure because there was ample

In General (Cont'd)

undisputed evidence that the bank was the company's successor-in-interest under the credit line agreements as various documents allowed judicial notice that the bank had acquired the company's assets and the loan documents were properly authenticated. Jaycee Atlanta Dev., LLC v. Providence Bank, 330 Ga. App. 322, 765 S.E.2d 536, 2014 Ga. App. LEXIS 815 (2014), cert. denied, No. S15C0632, 2015 Ga. LEXIS 169 (Ga. Mar. 2, 2015).

In a wrongful foreclosure action, the trial court did not err by admitting evidence of an affidavit from a bank official because the plaintiffs were clearly on notice that the bank sought to introduce the bank records as business records and the official had sufficiently authenticated the bank records relied upon and attached to the affidavit. Salas v. JP Morgan Chase Bank, N.A., 334 Ga. App. 274, 779 S.E.2d 48, 2015 Ga. App. LEXIS 618 (2015).

Map of county. — Properly certified copy of a map of a county, in the office of the Secretary of State, was admissible in evidence without proof of the correctness or existence of the original. Berry v. Clark, 117 Ga. 964, 44 S.E. 824, 1903 Ga. LEXIS 401 (1903) (decided under former Civil Code 1895, § 5211).

Marriage record. — Public record of a ceremonial marriage was conclusive evidence of such marriage, in the absence of a timely direct attack on such record, which attack must be supported by proper proof. Guess v. Guess, 202 Ga. 364, 43 S.E.2d 326, 1947 Ga. LEXIS 448 (1947) (decided under former Code 1933, § 38-601).

Intoxilyzer report. — Defendant's conviction for driving under the influence to the extent that defendant's blood-alcohol content exceeded the legal limit was reversed as the trial court erroneously admitted a copy of the Intoxilyzer report over a best evidence objection; the state was unable to explain the absence of the original, the state presented no evidence that the state made any effort to locate the original, and former O.C.G.A. § 24-7-20 did not apply. Lumley v. State, 280 Ga. App. 82, 633 S.E.2d 413, 2006 Ga. App. LEXIS 755 (2006) (decided under former O.C.G.A. § 24-7-20).

Log sheet with handwritten intoxilyzer results admissible. — In a case in which the original intoxilyzer printouts could not be located, because the investigator was a former deputy who averred that the investigator was familiar with the procedures of the sheriff's office regarding the handling of the intoxilyzer printout cards, and that the investigator asked for the intoxilyzer log sheet with handwritten intoxilyzer results, after the investigator was unsuccessful in locating the intoxilyzer printout cards, and explained the procedure for completing and maintaining the log book at the jail facility in detail, the trial court did not err in determining that the investigator was a qualified person under O.C.G.A. § 24-9-902 to properly authenticate the log book entry. Jones v. State, 345 Ga. App. 14, 812 S.E.2d 337, 2018 Ga. App. LEXIS 169 (2018).

Book-in photographs. — Although the appellate court found that book-in photographs which the state offered to prove that defendant was the same person who was convicted of a prior felony, albeit under a different name, could have been admitted under former O.C.G.A. § 24-7-20, and the appellate court recommended that practice, the appellate court held that the trial court did not abuse the court's discretion during the sentencing phase of defendant's trial when the court admitted the photographs and used them to determine that defendant was subject to a sentence of life in prison without parole, pursuant to O.C.G.A. § 17-10-7(c), because defendant had prior felony convictions. Farmer v. State, 268 Ga. App. 831, 603 S.E.2d 16, 2004 Ga. App. LEXIS 858 (2004), cert. denied, No. S04C2071, 2004 Ga. LEXIS 970 (Ga. Oct. 25, 2004) (decided under former O.C.G.A. § 24-7-20).

Search warrants. — Rule that a public record could be proved only by a duly certified copy thereof, in the absence of admission in open court that the document was an original public record, did not apply to search warrants. DePalma v. State, 228 Ga. 272, 185 S.E.2d 53, 1971

Ga. LEXIS 539 (1971) (decided under former Code 1933, § 38-601).

Secretary of State's office records. — A certified copy of a record in the office of the Secretary of State was held admissible on the question as to who was the grantee of land from the state. Ferrell v. Hurst, 68 Ga. 132, 1881 Ga. LEXIS 329 (1881) (decided under former Code 1873, § 3816).

Computer printout from state website. — Former homeowner was required to give notice to a defendant under O.C.G.A. § 10-1-399 even though the defendant was incorporated and had its principal place of business in a different state. There was no evidence that the defendant did not maintain a place of business in Georgia or keep some assets in Georgia, and the homeowner's contention was predicated on uncertified computer printouts from the Secretary of State's website, which were inadmissible under former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-907). Steed v. Fed. Nat'l Mortg. Corp., 301 Ga. App. 801, 689 S.E.2d 843, 2009 Ga. App. LEXIS 1452 (2009) (decided under former O.C.G.A. § 24-7-20).

Transcript of tax records. — Upon the trial of a tax collector for embezzlement, transcripts from the books of the Comptroller General and former Treasurer of the State, certified under the former statute, were admissible in evidence to show a failure on the part of such defendant to pay over the taxes collected by the defendant tax collector. Shivers v. State, 53 Ga. 149, 1874 Ga. LEXIS 425 (1874) (decided under former Code 1873, § 3816).

Tax returns. — It was not error to allow material portions of certified copies of tax returns of the defendant in ejectment, as to the number of acres of land given in by the defendant and the value thereof for certain years, to be received in evidence over the objection that the copies were certified to by the tax receiver, and not by the tax collector; that the original returns themselves, and not certified copies of the returns, should be produced in evidence. Jett v. Hart, 152 Ga. 266, 109 S.E. 654, 1921 Ga. LEXIS 68 (1921) (decided under former Civil Code 1910, § 5798).

Tax return records of state. — Books of tax returns in the office of the Comptroller General were of equal rank as evidence with those in the proper offices of the respective counties, and the certificate of the Comptroller General touching the contents of such books was no less admissible than the certificates of the proper county officer were. Clark v. Empire Lumber Co., 87 Ga. 742, 13 S.E. 826, 1891 Ga. LEXIS 270 (1891) (decided under former Code 1882, § 3816).

Execution for unpaid taxes. — After an execution for unpaid taxes was issued by the Comptroller General against a certain tract of unreturned wild land, and a sale of the land was made thereunder, and the execution was returned to the Comptroller's office with the official entries thereon, it became an office paper, and a certified copy of such execution and entries was admissible in evidence in lieu of the original. Cannon v. Gorham, 136 Ga. 167, 71 S.E. 142 (1911) (decided under former Civil Code 1910, § 5798).

Uncertified copies of computer printouts. — Uncertified copies of computer printouts apparently obtained from the Secretary of State's website could not be used as evidence to show a relationship between corporations because the printouts did not contain a certificate or attestation of a public officer and thus were not properly authenticated. Matson v. Noble Inv. Group, LLC, 288 Ga. App. 650, 655 S.E.2d 275, 2007 Ga. App. LEXIS 1266 (2007) (decided under former O.C.G.A. § 24-7-20).

Name search records from Secretary of State in form of computer printouts. — Trial court erred in considering name search documents from the Ohio Secretary of State's office because the documents were not properly authenticated under former O.C.G.A. § 24-7-20. Uncertified copies of computer printouts from a Secretary of State's website were not admissible as evidence unless authenticated. Std. Bldg. Co. v. Wallen Concept Glazing, Inc., 298 Ga. App. 443, 680 S.E.2d 527, 2009 Ga. App. LEXIS 706 (2009) (decided under former O.C.G.A. § 24-7-20).

Tally sheets of election. — Exemplifications of "records and minutes" of mu-

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nicipal corporations did not include tally sheets of former municipal elections. Sewell v. City of Tallapoosa, 145 Ga. 19, 88 S.E. 577, 1916 Ga. LEXIS 161 (1916) (decided under former Civil Code 1910, § 5803).

Owner of a lost negotiable promissory note no longer has the option of "establishing" the note pursuant to former O.C.G.A. § 24-7-24 (see now O.C.G.A. §§ 24-9-902 and 24-9-927). The owner must now bring suit directly on the lost note itself pursuant to O.C.G.A. § 11-3-804. Ballard v. Frey, 179 Ga. App. 455, 346 S.E.2d 893, 1984 Ga. App. LEXIS 2765 (1984) (decided under former O.C.G.A. § 24-7-24).

Trial court properly admitted certified copy of arrest warrant. — See Elliott v. State, 253 Ga. 417, 320 S.E.2d 361, 1984 Ga. LEXIS 929 (1984) (decided under former O.C.G.A. § 24-7-21).

Adjuster's affidavit relied on unauthenticated documents. — Vacancy exclusion did not bar coverage for the vandalism loss to an insured as a matter of law, and the trial court erred in failing to grant summary judgment to the insured on that issue because the senior field adjuster's affidavit did not include any admissible evidence regarding the status of the renovation work as the affidavit relied on hearsay and unauthenticated documents. R&G Invs. & Holdings, LLC v. Am. Family Ins. Co., 337 Ga. App. 588, 787 S.E.2d 765, 2016 Ga. App. LEXIS 331 (2016), cert. denied, No. S16C1830, 2017 Ga. LEXIS 144 (Ga. Feb. 27, 2017).

Recording of 9-1-1 call was properly admitted as a self-authenticating business record. Gregory v. State, 342 Ga. App. 411, 803 S.E.2d 367, 2017 Ga. App. LEXIS 347 (2017), cert. denied, No. S18C0007, 2018 Ga. LEXIS 186 (Ga. Mar. 20, 2018), cert. denied, 139 S. Ct. 180, 202 L. Ed. 2d 110, 2018 U.S. LEXIS 5563 (2018).

Cell phone records. — Defendant's cell phone records were non-testimonial and, therefore, their admission through the business records exception to the hearsay rule did not violate the Confrontation Clause because the records were maintained in the ordinary course of the cell phone carrier's business and the records were not documents created for the primary purpose of establishing evidence for use in a future prosecution. Gialenios v. State, 310 Ga. 869, 855 S.E.2d 559, 2021 Ga. LEXIS 79, overruled in part, Outlaw v. State, 311 Ga. 396, 858 S.E.2d 63, 2021 Ga. LEXIS 197 (2021).

2. Federal Records

Elements of authentication, the authority, the incumbency, and the genuineness of the signature of the certifying custodian, were applicable to records of the federal, not the state, government. O'Connor v. United States, 11 Ga. App. 246, 75 S.E. 110, 1912 Ga. App. LEXIS 353 (1912) (decided under former Civil Code 1910, § 5798); Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24, 1946 Ga. LEXIS 432 (1946) (decided under former Code 1933, § 38-601); Pressley v. State, 207 Ga. 274, 61 S.E.2d 113, 1950 Ga. LEXIS 445 (1950) (decided under former Code 1933, § 38-601); Mach v. State, 109 Ga. App. 154, 135 S.E.2d 467, 1964 Ga. App. LEXIS 822 (1964), superseded by statute as stated in State v. Cook, 172 Ga. App. 433, 323 S.E.2d 634, 1984 Ga. App. LEXIS 2539 (1984) (decided under former Code 1933, § 38-601); Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311, 1973 Ga. App. LEXIS 1311 (1973) (decided under former Code 1933, § 38-601).

Former statute applicable to state, territorial and possession, but not federal, records, acts, and proceedings. — Former O.C.G.A. § 24-7-24 (see now O.C.G.A. §§ 24-9-902 and 24-9-922) applied only to acts, records, and judicial proceedings of states, territories, and possessions of the United States. There was no Georgia statute expressly governing the authentication of copies of federal records. Rice v. State, 178 Ga. App. 748, 344 S.E.2d 720, 1986 Ga. App. LEXIS 2578 (1986) (decided under former O.C.G.A. § 24-7-24).

3. Court Records

In general. — Clerk of court may certify a copy or transcript of the court record, but the clerk's certificate of the nonexistence on the records of certain facts was not admissible. Miller v. Reinhart, 18

Ga. 239, 1855 Ga. LEXIS 183 (1855) (decided under Laws 1830, Cobb's 1851 Digest, p. 273); Dillon v. Mattox, 21 Ga. 113, 1857 Ga. LEXIS 13 (1857) (decided under Ga. L. 1855-56, p. 143, § 1); Martin v. Anderson, 21 Ga. 301, 1857 Ga. LEXIS 56 (1857) (decided under Ga. L. 1855-56, p. 143, § 1); Walker v. Logan, 75 Ga. 759, 1885 Ga. LEXIS 226 (1885) (decided under former Code 1882, § 3816); Lamar v. Pearre, 90 Ga. 377, 17 S.E. 92, 1892 Ga. LEXIS 184 (1892) (decided under former Code 1882, § 3816); Hines v. Johnston, 95 Ga. 644, 23 S.E. 470 (1895) (decided under former Civil Code 1895, § 5211); Greer v. Fergerson, 104 Ga. 552, 30 S.E. 943, 1898 Ga. LEXIS 363 (1898) (decided under former Civil Code 1895, § 5211); but see for contra implication Thompson v. Cheatham, 244 Ga. 120, 259 S.E.2d 62 (1979).

Court proceedings. — The only legal way to prove proceedings of the superior court was by an extract from the minutes of that court duly certified by the court's clerk. Bowden v. Taylor, 81 Ga. 199, 6 S.E. 277, 1888 Ga. LEXIS 91, writ denied, 81 Ga. 204, 6 S.E. 280, 1888 Ga. LEXIS 92 (1888) (decided under former Code 1882, § 3816); Weaver v. Tuten, 138 Ga. 101, 74 S.E. 835, 1912 Ga. LEXIS 210 (1912) (decided under former Civil Code 1910, § 5798).

Criminal proceedings. — Exemplification of the record of an illegality case, under the hand and seal of the clerk, exhibiting among other things, the assignment by the plaintiff of the writ of fi. fa., was admissible in evidence to prove the transfer. Napier v. Neal, 3 Ga. 298, 1847 Ga. LEXIS 110 (1847) (decided under Laws 1830, Cobb's 1851 Digest, p. 273).

Guilty plea. — Trial court properly used a prior guilty plea to sentence the defendant as a recidivist when the state had presented a certified copy of the plea that was signed and initialed by defense counsel along with a plea hearing transcript; even if the plea hearing transcript was uncertified and unauthenticated, the certified copy of the plea was admissible under former O.C.G.A. § 24-7-20, and the defendant did not produce evidence of invalidity once the fact of conviction was proved and the state showed that the defendant was represented by counsel. Moorer v. State, 286 Ga. App. 395, 649 S.E.2d 537, 2007 Ga. App. LEXIS 784 (2007), cert. dismissed, No. S07C1910, 2007 Ga. LEXIS 806 (Ga. Oct. 29, 2007) (decided under former O.C.G.A. § 24-7-20).

Proceedings in same court. — Original papers of proceedings in the court were admissible in another case in the same court where otherwise relevant. Sellers v. Page, 127 Ga. 633, 56 S.E. 1011, 1907 Ga. LEXIS 445 (1907) (decided under former Civil Code 1895, § 5211); Woods v. Travelers Ins. Co., 53 Ga. App. 429, 186 S.E. 467, 1936 Ga. App. LEXIS 142 (1936) (decided under former Code 1933, § 38-601); Clackum v. State, 55 Ga. App. 44, 189 S.E. 397, 1936 Ga. App. LEXIS 424 (1936) (decided under former Code 1933, § 38-601); Williford v. State, 55 Ga. App. 40, 192 S.E. 93 (1937) (decided under former Code 1933, § 38-601); Brantley v. State, 121 Ga. App. 79, 172 S.E.2d 852, 1970 Ga. App. LEXIS 1113 (1970) (decided under former Code 1933, § 38-601); Thompson v. Cheatham, 244 Ga. 120, 259 S.E.2d 62 (1979) (decided under former Code 1933, § 38-601).

Proceedings in other courts. — Former statute made provision for exemplification by certificate of any public officer of authenticity of any copy or transcript of any record, but had no relation to the court record in another case or cases pending in the same court in which the records were offered in evidence. Brantley v. State, 121 Ga. App. 79, 172 S.E.2d 852, 1970 Ga. App. LEXIS 1113 (1970) (decided under former Code 1933, § 38-601).

Certification by superior court clerk. — It was entirely proper for the clerk of the superior court, as custodian of the court's records, to certify what appears or does not appear upon the minutes of the court. Thompson v. Cheatham, 244 Ga. 120, 259 S.E.2d 62 (1979) (decided under former Ga. L. 1967, p. 226, § 20).

Certification of nonconforming record. — Certification by the clerk of court must speak the truth, and the clerk must not be required by a mandamus, or otherwise, to certify an instrument that did not conform to the records in the clerk's office. Touchton v. Echols County, 211 Ga. 85, 84

Court Records (Cont'd)

S.E.2d 81, 1954 Ga. LEXIS 510 (1954) (decided under former Code 1933, § 38-601).

Judgment. — Introduction of a certified copy of a judgment against a party was sufficient evidence to prove the existence of that judgment. Gowdey v. Rem Assocs., 176 Ga. App. 83, 335 S.E.2d 309, 1985 Ga. App. LEXIS 2226 (1985) (decided under former O.C.G.A. § 24-7-20).

Trial court did not abuse the court's discretion when the court excluded a document purported to be the codefendant's felony conviction, as the document was not a properly certified copy and was unauthenticated. McClendon v. State, 276 Ga. App. 543, 623 S.E.2d 738, 2005 Ga. App. LEXIS 1306 (2005) (decided under former O.C.G.A. § 24-7-20).

Record of conviction. — Certification and seal on record of conviction furnished by an officer of the Department of Offender Rehabilitation (now Corrections) who was required by law to keep the records on file was sufficient to qualify the record for admission into evidence to establish the fact of lawfulness of incarceration even though the certification was not by the Superior Court of Whitfield County, the source of the original document. Ward v. State, 165 Ga. App. 163, 300 S.E.2d 528, 1983 Ga. App. LEXIS 1803 (1983) (decided under former O.C.G.A. § 24-7-20).

Authentication does not automatically establish admissibility. — Former O.C.G.A. § 24-7-20 did not address hearsay concerns; the former statute did not require the admission of hearsay merely because the hearsay had been recorded in a court of record. McGaha v. State, 221 Ga. App. 440, 471 S.E.2d 533 (decided under former O.C.G.A. § 24-7-20).

Clerical error in a certified copy of the sentence of one convicted of crime did not render the paper inadmissible in evidence if it clearly appeared from the context what the true purport of the document was. Daniel v. State, 114 Ga. 533, 40 S.E. 805, 1902 Ga. LEXIS 712 (1902) (decided under former Penal Code 1895, § 1015).

Objection to admission of record. — It was too late to object to a record for want of proper authentication after the record had been admitted and read to the jury without objection. Williams v. Rawlins, 33 Ga. 117, 1861 Ga. LEXIS 297 (1861) (decided under Ga. L. 1855-56, p. 143, § 1).

Uniform Traffic Citations were not evidence, and thus could not provide the factual basis necessary to establish venue. Graves v. State, 269 Ga. 772, 504 S.E.2d 679 (reversing Graves v. State, 227 Ga. App. 628, 490 S.E.2d 111, 1997 Ga. App. LEXIS 874 (1997)) (decided under former O.C.G.A. § 24-7-21).

Applicability. — Georgia resident's argument that the supplemental affidavit attached to the motion under the Uniform Act to Secure the Attendance of Witnesses from Without the State was inadmissible because it did not comply with former O.C.G.A. § 24-7-27 failed because former O.C.G.A. § 24-7-27 provided the method for authenticating out-of-state court records and the affidavit was not a court record. Wollesen v. State, 242 Ga. App. 317, 529 S.E.2d 630, 2000 Ga. App. LEXIS 177 (2000) (decided under former O.C.G.A. § 24-7-24).

Traffic citation indicating guilty plea admissible. — In a suit for damages sustained in an automobile collision, alleging that the defendant negligently failed to yield the right-of-way at a stop sign, the trial court did not err by admitting evidence of a traffic citation issued against the defendant in conjunction with the accident. The citation noted entry of a guilty plea, but also indicated the defendant was found guilty by the municipal court. Though ambiguous and subject to conflicting interpretations, the citation was relevant if interpreted by the jury as a plea of guilty. Hunter v. Hardnett, 199 Ga. App. 443, 405 S.E.2d 286, 1991 Ga. App. LEXIS 533 (1991), cert. denied, No. S91C1021, 1991 Ga. LEXIS 490 (Ga. July 3, 1991) (decided under former O.C.G.A. § 24-7-20).

Pleading not used as court record. — When a plea of guilty, in a prior criminal proceeding arising from the same occurrence, was admitted in evidence in the subsequent civil case for its impeaching value, the plea was not admitted as a court paper, and the former statute did

not apply. Webb v. May, 91 Ga. App. 437, 85 S.E.2d 641, 1955 Ga. App. LEXIS 768 (1955) (decided under former Code 1933, § 38-601).

4. Medical Records

Purpose. — Ga. L. 1971, p. 441, §§ 1 and 2 (see former O.C.G.A. § 24-7-8) and Ga. L. 1970, p. 225, § 1 (see former O.C.G.A. § 24-7-9) deal with the method of authenticating records which are otherwise admissible and are not new rules of admissibility eliminating the hearsay rule. Moody v. State, 244 Ga. 247, 260 S.E.2d 11, 1979 Ga. LEXIS 1205 (1979) (decided under Ga. L. 1971, p. 441, §§ 1, 2).

Rules of evidence apply. — Admissibility of the contents of hospital records was governed by the rules of admissibility and not by the manner in which the records were obtained, whether the records were obtained through certification, or through subpoena, or notice to produce. Dennis v. Adcock, 138 Ga. App. 425, 226 S.E.2d 292, 1976 Ga. App. LEXIS 2180 (1976) (decided under Ga. L. 1971, p. 441, §§ 1, 2).

In a premises liability suit, the trial court properly excluded certified copies of some of an invitee's medical records under former O.C.G.A. § 24-7-8 because the invitee had not provided the requisite 60-day notice under former O.C.G.A. § 24-3-18 (see now O.C.G.A. § 24-8-826). Former § 24-7-8 concerned only the authentication of medical records and did not allow the invitee to circumvent other evidentiary rules; furthermore, the invitee failed to provide a record citation for the specific medical records that the invitee claimed should have been admitted and thus it was unclear whether those records were narratives, to which former § 24-3-18(a) applied, or other types of records. Fuller v. Flash Foods, Inc., 298 Ga. App. 217, 679 S.E.2d 775, 2009 Ga. App. LEXIS 632 (2009), cert. denied, No. S09C1670, 2009 Ga. LEXIS 549 (Ga. Sept. 8, 2009) (decided under former O.C.G.A. § 24-7-8).

Hearsay rule applicable. — Former O.C.G.A. § 24-7-8 dealt with the authentication of medical records which were otherwise admissible, and did not eliminate the rule against hearsay or create a new one. Giles v. Taylor, 166 Ga. App. 563, 305 S.E.2d 154, 1983 Ga. App. LEXIS 2248 (1983) (decided under former O.C.G.A. § 24-7-8).

Former statutes which pertained to the authentication of documents did not remove hearsay considerations. Manning v. State, 231 Ga. App. 584, 499 S.E.2d 650 (decided under former O.C.G.A. § 24-7-8).

Effect of certification is to dispense with preliminary proof of authenticity on the part of the custodian of the records, but not to make admissible any matter contained in the reports which is otherwise subject to objection. Smith v. State, 141 Ga. App. 720, 234 S.E.2d 385, 1977 Ga. App. LEXIS 2059 (1977) (decided under Ga. L. 1971, p. 441, §§ 1, 2); Adams v. MARTA, 246 Ga. App. 698, 542 S.E.2d 130, 2000 Ga. App. LEXIS 1335 (2000) (decided under former O.C.G.A. § 24-7-8).

Certification by custodian. — If a hospital record contained diagnostic opinions and conclusions, the record could not, upon proper objection, be admitted into evidence unless and until the person who entered such diagnostic opinions and conclusions upon the record qualified as an expert and related the facts upon which the entry was based. Dennis v. Adcock, 138 Ga. App. 425, 226 S.E.2d 292, 1976 Ga. App. LEXIS 2180 (1976) (decided under Ga. L. 1971, p. 441, §§ 1, 2).

Relevant portion of records admissible. — Records which contain diagnostic opinions, conclusions, and other statements of third parties not before the court are still not admissible if tendered in toto, though relevant portions of such records not subject to such defects may be. Dennis v. Adcock, 138 Ga. App. 425, 226 S.E.2d 292, 1976 Ga. App. LEXIS 2180 (1976) (decided under Ga. L. 1971, p. 441, §§ 1, 2); Moody v. State, 244 Ga. 247, 260 S.E.2d 11, 1979 Ga. LEXIS 1205 (1979) (decided under Ga. L. 1971, p. 441, §§ 1, 2).

Photographs are admissible to show the condition of the body of the deceased and the nature and extent of the deceased's wounds, and when used to illustrate medical testimony as to the cause of death of the deceased, photographs are not inadmissible because the photographs

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might inflame the jury, but are relevant and material to the issue. Sirmans v. State, 229 Ga. 743, 194 S.E.2d 476, 1972 Ga. LEXIS 761 (1972) (decided under Ga. L. 1971, p. 441, §§ 1, 2).

Testimony of preparer of records unnecessary. — When the records in question were certified as accurate by the custodian of the treating hospital and contained no inadmissible hearsay evidence, it was not necessary for foundation to be laid for admitting records in evidence by offering testimony of examining doctor or medical personnel who prepared the records. Venenga v. State, 163 Ga. App. 161, 293 S.E.2d 553, 1982 Ga. App. LEXIS 2432 (1982) (decided under former O.C.G.A. § 24-7-8); Wilson v. Childers, 174 Ga. App. 179, 329 S.E.2d 503, 1985 Ga. App. LEXIS 1775 (1985) (decided under former O.C.G.A. § 24-7-8).

5. Council Records

Action of city council. — Until the contrary appeared, the action of a city council was supposed to be in writing; and its book of minutes, properly proved as such, or an exemplification of the record, certified by the clerk or keeper of such records, under seal, was the proper mode of placing the evidence before the court. Farrar Lumber Co. v. City of Dalton, 20 Ga. App. 138, 92 S.E. 946, 1917 Ga. App. LEXIS 753 (1917) (decided under former Civil Code 1910, § 5803); Mullis v. State, 197 Ga. 550, 30 S.E.2d 99, 1944 Ga. LEXIS 299 (1944) (decided under former Code 1933, § 38-606).

Original book of minutes. — Official minutes of the city council may be proved by the production of the original book of minutes identified as such by the clerk of the corporation, and shown to have come from the clerk's custody. Mullis v. State, 197 Ga. 550, 30 S.E.2d 99, 1944 Ga. LEXIS 299 (1944) (decided under former Code 1933, § 38-606).

Certified copy was not the exclusive evidence of the minutes and records of a municipal corporation. Mullis v. State, 197 Ga. 550, 30 S.E.2d 99, 1944 Ga. LEXIS 299 (1944) (decided under former Code 1933, § 38-606).

6. Proving Ordinances

a. In General

Two methods of proof of city ordinances were: (1) by an official certified copy thereof under seal as provided by statute; or, (2) by the production of the original book of ordinances, identified as such by the clerk of the corporation and shown to have come from the clerk's custody. Metropolitan St. R.R. v. Johnson, 90 Ga. 500, 16 S.E. 49, 1892 Ga. LEXIS 210 (1892) (decided under Ga. L. 1890-91, p. 109, § 1); Western & Atl. R.R. v. Hix, 104 Ga. 11, 30 S.E. 424, 1898 Ga. LEXIS 271 (1898) (decided under former Civil Code 1895, § 5216); Southern Ry. v. Thompson, 96 Ga. App. 305, 99 S.E.2d 845, 1957 Ga. App. LEXIS 567 (1957) (decided under former Code 1933, § 38-606); R.O.H. Properties, Inc. v. Westside Elec. Co., 151 Ga. App. 857, 261 S.E.2d 767, 1979 Ga. App. LEXIS 2712 (1979) (decided under former Code 1933, § 38-606).

Judicial notice. — That a municipal ordinance could not be judicially noticed by state courts was a well settled rule since the ordinances were treated as private statutes, and must be alleged and proved as matters of fact. Greenberg v. Rothberg, 72 Ga. App. 882, 35 S.E.2d 485, 1945 Ga. App. LEXIS 733 (1945) (decided under former Code 1933, § 38-606).

If a local ordinance was relied on, the ordinance must be pled and proved in the trial court and, absent a properly admitted copy of the ordinance, neither the trial court nor the court of appeals may take judicial notice of the ordinance's existence. In re J.T., 239 Ga. App. 756, 521 S.E.2d 862 (decided under former O.C.G.A. § 24-7-21).

Parol evidence insufficient. — An ordinance of a municipality cannot be established by parol evidence. Western & A.R.R. v. Peterson, 168 Ga. 259, 147 S.E. 513, 1929 Ga. LEXIS 116 (1929) (decided under former Civil Code 1910, § 5803); Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694, 1931 Ga. App. LEXIS 621 (1931) (decided under former Civil Code 1910, § 5803); Greenberg v. Rothberg, 72 Ga. App. 882, 35 S.E.2d 485, 1945 Ga. App. LEXIS 733 (1945) (decided under former Code 1933, § 38-606);

Southern Ry. v. Thompson, 96 Ga. App. 305, 99 S.E.2d 845, 1957 Ga. App. LEXIS 567 (1957) (decided under former Code 1933, § 38-606).

b. Exemplification of City Ordinance

Certification of whole ordinance. — Where it was sought to have the clerk of a municipal corporation certify to a transcript of an ordinance, generally the entire ordinance on the subject in hand should be copied, but the admission of the certified transcript of one section would not always furnish ground for a reversal. Cason v. State, 134 Ga. 786, 68 S.E. 554, 1910 Ga. LEXIS 351 (1910) (decided under former Civil Code 1910, § 5803).

Codified ordinances. — When city ordinances were codified, and such codification was adopted by an ordinance, and the clerk copied and certified a section of such codification, and also prepared and certified from the record a copy of the adopting ordinance, this was sufficient to authorize the admission in evidence of the copy of the section of the city code. Nashville, C. & St. L. Ry. v. Peavler, 134 Ga. 618, 68 S.E. 432, 1910 Ga. LEXIS 295 (1910) (decided under former Civil Code 1910, § 5803); Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694, 1931 Ga. App. LEXIS 621 (1931) (decided under former Civil Code 1910, § 5803).

Improper certification. — City court did not err in refusing to admit in evidence a copy of an ordinance which copy was not properly exemplified. Carroll v. Yearty, 102 Ga. App. 677, 117 S.E.2d 248, 1960 Ga. App. LEXIS 717 (1960) (decided under former Code 1933, § 38-606).

Ordinance from published book or pamphlet. — Certification that the alleged ordinance was an exemplification from a book gave it no greater dignity than the book itself, as the former statute referred to records and minutes, and the ordinance without proof of the ordinance's validity in the form of proper records or minutes was inadmissible. Western & A.R.R. v. Peterson, 168 Ga. 259, 147 S.E. 513, 1929 Ga. LEXIS 116 (1929) (decided under former Civil Code 1910, § 5803); Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694, 1931 Ga. App. LEXIS 621 (1931) (decided under former Civil Code 1910, § 5803); City of Dalton v. Cochran, 80 Ga. App. 252, 55 S.E.2d 907, 1949 Ga. App. LEXIS 816 (1949) (decided under former Code 1933, § 38-606); Southern Ry. v. Thompson, 96 Ga. App. 305, 99 S.E.2d 845, 1957 Ga. App. LEXIS 567 (1957) (decided under former Code 1933, § 38-606).

Constitutionality of ordinance. — When there was no constitutional attack on the former statute permitting a local ordinance, the appeals court was required to hold that a properly certified copy of such ordinance was admissible in evidence on the trial of an automobile negligence case in which it was alleged, and proof was tendered, that the defendants violated such an ordinance. Cambron v. Cogburn, 118 Ga. App. 454, 164 S.E.2d 350, 1968 Ga. App. LEXIS 1428 (1968) (decided under former Code 1933, § 38-606).

Validity of ordinance. — City ordinance certified by the clerk and keeper of the records of the municipality was not subject to the objection that it must be shown that the ordinance was duly and properly adopted. Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709, 1948 Ga. App. LEXIS 729 (1948) (decided under former Code 1933, § 38-606); Cambron v. Cogburn, 118 Ga. App. 454, 164 S.E.2d 350, 1968 Ga. App. LEXIS 1428 (1968) (decided under former Code 1933, § 38-606).

c. Production of Original

Municipal ordinance may be proved by the production of the original book of ordinances, identified as such by the clerk of the corporation, and shown to have come from the clerk's custody. Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694, 1931 Ga. App. LEXIS 621 (1931) (decided under former Civil Code 1910, § 5803).

Ordinance proven by original minutes. — It was not error for the court to permit the introduction, under proper proof, of the original minutes showing the adoption of the ordinance in question, rather than to require a certified copy thereof; this was competent evidence of an expression of formal corporate action. Mullis v. State, 197 Ga. 550, 30 S.E.2d 99,

Production of Original (Cont'd)

1944 Ga. LEXIS 299 (1944) (decided under former Code 1933, § 38-606).

City clerk was the proper person to certify to the ordinance. Cason v. State, 134 Ga. 786, 68 S.E. 554, 1910 Ga. LEXIS 351 (1910) (decided under former Civil Code 1910, § 5803).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 38-601 have been included in the opinions for this Code section.

Former statute related only to the certification of state and county records, and did not embrace federal records. 1970 Op. Att'y Gen. No. U70-176 (decided under former Code 1933, § 38-601).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 974 et seq., 1192, 1193, 1272, 1323, 1333 et seq., 1339 et seq. 42 Am. Jur. 2d, Inspection Laws, § 11.

Am. Jur. Pleading and Practice Forms.

21A Am. Jur. Pleading and Practice Forms, Records and Recording Laws, § 3.

C.J.S.

32 C.J.S., Evidence, §§ 841 et seq., 886, 896, 897, 900 et seq., 909. 32A C.J.S., Evidence, §§ 1037, 1106.

ALR.

Pendency of appeal from judgment as affecting right to enforce it in another state, 5 A.L.R. 1269.

Weight of oral testimony as to law of another state or country, 6 A.L.R. 1344.

Refusal to entertain an action upon a judgment rendered in another state upon a cause of action which it would have been contrary to statute or public policy of the forum to have entertained, 10 A.L.R. 719; 24 A.L.R. 1437.

Full-faith and credit provision as applying to decree of another state admitting a will to probate, 13 A.L.R. 498.

Right of notary who protests paper to change or contradict his certificate, 28 A.L.R. 543.

Determination of question relating to foreign law as one of law or of fact, 34 A.L.R. 1447.

Conclusiveness of decision of sister state on a contested hearing as to its own jurisdiction, 52 A.L.R. 740.

Foreign judgment based upon, or which fails to give effect to, a judgment previously rendered at the forum, or in a third jurisdiction, 53 A.L.R. 1146.

Construction and effect of foreign statutes or judicial decisions as question for court or for jury, 68 A.L.R. 809.

Conclusiveness as against insured or beneficiary or physician's report made as, or in connection with, proofs of loss or death, 93 A.L.R. 1342.

Judgment or order upholding prior judgment in the same state against direct attack upon ground of lack of jurisdiction, as conclusive in another state under the full faith and credit provision or doctrine of res judicata, 104 A.L.R. 1187.

Full faith and credit provision as affecting insurance contracts, 119 A.L.R. 483; 173 A.L.R. 1138.

Admissibility of hospital chart or other hospital record, 120 A.L.R. 1124.

Admissibility of records of a practicing physician or surgeon as evidence of physical or mental condition of person examined, 135 A.L.R. 1258.

Conflict of laws as to trusts inter vivos, 139 A.L.R. 1129.

Waiver of, or estoppel to assert, failure to plead or prove foreign law (apart from judicial notice), 149 A.L.R. 759.

Decree for alimony in instalments as within full faith and credit provision, 157 A.L.R. 170.

Necessity that the transcript of a judgment of another state upon a cognovit under warrant of attorney shall include

the cognovit and the note containing the alleged warrant of attorney, 162 A.L.R. 685.

Right to maintain action or proceeding in one state or country to collect or enforce tax due to another state or country or political subdivision thereof, 165 A.L.R. 796.

Conclusiveness of decree assessing stockholders or policyholders of insolvent corporations or mutual insurance companies, as against nonresidents, not personally served within state in which decree was rendered, 175 A.L.R. 1419.

Recognition as to marital status of foreign divorce decree attached on ground of lack of domicile, since Williams decision, 1 A.L.R.2d 1358; 28 A.L.R.2d 1303.

Admissibility of X-ray report made by physician taking or interpreting X-ray pictures, 6 A.L.R.2d 406.

Foreign divorce decree as subject to attack by spouse in state of which neither spouse is resident, 12 A.L.R.2d 382.

Foreign filiation or support order in bastardy proceedings, requiring periodic payments, as extraterritorially enforceable, 16 A.L.R.2d 1098.

Admissibility, in personal injury or death action arising out of airplane accident, of documents and reports pertaining to investigations, 23 A.L.R.2d 1360.

Presumption and prima facie case as to ownership of vehicle causing highway accident, 27 A.L.R.2d 167.

Admissibility of records or report of welfare department or agency relating to payment to or financial condition of particular person, 42 A.L.R.2d 752.

Injunction against suit in another state or country for divorce or separation, 54 A.L.R.2d 1240.

Identification of parties in action on foreign judgment, 60 A.L.R.2d 1024.

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test, 66 A.L.R.2d 536.

Admissibility of report of police or other public officer or employee, or portions of reports, as to cause of or responsibility for accident, injury to person, or damage to property, 69 A.L.R.2d 1148.

Federal Civil Procedure Rule 44 and Federal Criminal Procedure Rule 27, relating to proof of official records, 70 A.L.R.2d 1227; 41 A.L.R. Fed. 784.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 A.L.R.2d 308.

Choice of law in application of automobile guest statutes, 95 A.L.R.2d 12.

Preliminary proof, verification, or authentication of X-rays requisite to their introduction in evidence in civil cases, 5 A.L.R.3d 303.

Extraterritorial effect of valid award of custody of child of divorced parents, in absence of substantial change in circumstances, 35 A.L.R.3d 520.

Necessity of expert evidence to support action against hospital for injury to or death of patient, 40 A.L.R.3d 515.

Weather reports and records as evidence, 57 A.L.R.3d 713.

Admissibility under business entry statutes of hospital records in criminal case, 69 A.L.R.3d 22.

Admissibility under Uniform Business Records and Evidence Act or similar statute of medical report made by consulting physician to treating physician, 69 A.L.R.3d 104.

Admissibility, under public records exception to hearsay rule, of record kept by public official without express statutory direction or authorization, 80 A.L.R.3d 414.

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, 80 A.L.R.3d 456.

Disbarment or suspension of attorney in one state as affecting right to continue practice in another state, 81 A.L.R.3d 1281.

Choice of law as to application of comparative negligence doctrine, 86 A.L.R.3d 1206.

Admissibility in personal injury action of hospital or other medical bill which includes expenses for treatment of condition unrelated to injury, 89 A.L.R.3d 1012.

Admissibility in evidence of professional directories, 7 A.L.R.4th 638.

Authentication of electronically stored evidence, including text messages and e-mail, 45 A.L.R.4th 602.

Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records, 69 A.L.R.4th 906.

Proof of foreign official record under Rule 44(a)(2) of Federal Rules of Civil Procedure, 41 A.L.R. Fed. 784.

24-9-903. Subscribing witness's testimony.

The testimony of a subscribing witness shall not be necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

History.

Code 1981, § 24-9-903, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-7-5, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived in part from the decision in McVicker v. Conkle, 96 Ga. 584, 24 S.E. 23 (1895).

Cross references.

Requirements regarding proving of wills by witnesses, § 53-3-13.

Subscribing witness's testimony, Fed. R. Evid. 903.

Law reviews.

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration
Ancient Writings
Subscribing Witnesses Not Available
Writing Only Collaterally Material
Testimony by Party Executing Writing

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3837, former Code 1882, § 3837, former Ga. L. 1895, p. 31, § 1, former Civil Code 1895, §§ 5244, 5245, former Civil Code 1910, §§ 5833, 5834, former Code 1933, §§ 38-706, 38-707, and former O.C.G.A. §§ 24-7-4 and 24-7-5 are included in the annotations for this Code section. The reader is also advised to consult the annotations under O.C.G.A. § 24-9-920 for annotations regarding the authentication of Georgia state and county records, and O.C.G.A. § 24-9-922, for annotations regarding foreign state laws and records.

One witness to bill of sale. — Bill of sale to personalty though attested by two subscribing witnesses, is admissible in evidence upon due proof of its execution by only one of them, without calling or accounting for the other. Cooper v. O'Brien, 98 Ga. 773, 26 S.E. 470, 1896 Ga. LEXIS 144 (1896) (decided under former Civil Code 1895, § 5244).

Copy of lost original. — Lost original having been accounted for and the copy being relevant to the issue, the latter was admissible in evidence over an objection that there was no proof of the existence and execution of the original. The handwriting of the subscribing witnesses to an inaccessible paper could not possibly be proved. Baker v. Adams, 99 Ga. 135, 25 S.E. 28, 1896 Ga. LEXIS 245 (1896) (decided under former Civil Code 1895, § 5244).

Failure to object to writing. — When a proper plea of non est factum has not been filed, proof of execution of the instru-

ment on which suit is based is not necessary. Diversified Growth Corp. v. Equitable Leasing Corp., 140 Ga. App. 511, 231 S.E.2d 505, 1976 Ga. App. LEXIS 1541 (1976) (decided under former Code 1933, § 38-706).

Witnesses not infallible. — Witness can never testify truthfully as to any past transaction with which the witness was connected, except from the witness's recollection, and so a jury is not required to find against the declared recollection of a witness merely because the witness states that the witness may be in error and cannot swear positively — thus recognizing that the witness's memory may not be infallible. Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744, 1947 Ga. LEXIS 524 (1947) (decided under former Code 1933, § 38-706).

Witnesses were required to authenticate a material writing in the following cases. — See Barron v. Walker, 80 Ga. 121, 7 S.E. 272, 1887 Ga. LEXIS 339 (1887) (decided under former Code 1882, § 3837); Coody v. Gress Lumber Co., 82 Ga. 793, 10 S.E. 218, 1889 Ga. LEXIS 344 (1889) (contract of sale) (decided under former Code 1882, § 3837); Summerour v. Felker, 102 Ga. 254, 29 S.E. 448, 1897 Ga. LEXIS 499 (1897); Thornton v. Martin, 116 Ga. 115, 42 S.E. 348, 1902 Ga. LEXIS 40 (1902) (decided under former Code 1882, § 3837); Singer Sewing Mach. Co. v. Wardlaw, 29 Ga. App. 626, 116 S.E. 207, 1923 Ga. App. LEXIS 144 (1923) (decided under former Civil Code 1910, § 5833); Commercial Credit Co. v. Grant, 33 Ga. App. 31, 125 S.E. 382, 1924 Ga. App. LEXIS 688 (1924) (conveyance not recorded) (decided under former Civil Code 1910, § 5833); Hines v. Moore, 168 Ga. 451, 148 S.E. 162, 1929 Ga. LEXIS 163 (1929) (decided under former Civil Code 1910, § 5833).

Ancient Writings

Ancient writings, generally. — An instrument may be properly admitted as having been sufficiently proved irrespectively of whether or not there was a sufficient compliance with the rule admitting ancient writings without proof. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372, 1937 Ga. LEXIS 597 (1937) (decided under former Code 1933, § 38-707).

Writing more than 30 years old. — When a receipt or other written instrument is more than 30 years old, the receipt's execution need not be proved to admit the receipt in evidence, although the subscribing witness may be living. Settle v. Alison, 8 Ga. 201, 1850 Ga. LEXIS 35 (1850) (decided under former law).

Subscribing witness alive and available. — An ancient writing is admissible in evidence though an attesting witness is still alive and accessible, and is not examined. Settle v. Alison, 8 Ga. 201, 1850 Ga. LEXIS 35 (1850) (decided under former law); Gardner v. Granniss, 57 Ga. 539, 1876 Ga. LEXIS 169 (1876) (decided under former Code 1873, § 3837).

Subscribing Witnesses Not Available

Any competent evidence admissible. — While it is incumbent upon a party offering in evidence a paper the execution of which the party is required to prove, and which purports to have been attested by a subscribing witness, to introduce or account for such witness, if the latter upon examination does not remember or denies that the witness attested the instrument, the execution thereof may then be proved by any other competent evidence. Buchanan v. Simpson Grocery Co., 105 Ga. 393, 31 S.E. 105, 1898 Ga. LEXIS 522 (1898) (decided under former Civil Code 1895, § 5245).

Circumstantial evidence. — Existence and genuineness of a deed may be proved by circumstantial evidence. Campbell v. Sims, 161 Ga. 517, 131 S.E. 483, 1926 Ga. LEXIS 292 (1926) (decided under former Civil Code 1910, § 5834).

Proof of handwriting. — When the alleged maker of an unrecorded deed, who signed by the maker's mark, and the two subscribing witnesses to the instrument are dead, proof that the signature of the two latter upon the instrument are in their genuine handwriting is evidence of the fact of execution; and the charge of the court, which in effect instructed the jury that such proof was prima facie evidence of the fact of the execution of the deed, was not contrary to law. Edenfield v. Brinson,

Subscribing Witnesses Not Available (Cont'd)

149 Ga. 377, 100 S.E. 373, 1919 Ga. LEXIS 249 (1919) (decided under former Civil Code 1910, § 5834).

Names of witnesses unknown. — In view of the former statute when a deed had been lost, and the subscribing witnesses were unknown, proof of the deed's existence and due execution may be made by any witness who knew the facts. Turner v. Cates, 90 Ga. 731, 16 S.E. 971, 1892 Ga. LEXIS 241 (1892) See also Felton v. Pitman, 14 Ga. 530, 1854 Ga. LEXIS 134 (1854) (decided under former Code 1882, § 3837).

Witnesses to last writing unknown. — When the witnesses, if any, are unknown, it is not necessary to prove that the alleged lost original writing was executed with any particular formality in order to admit secondary evidence of the writing's contents. Sharp v. Autry, 185 Ga. 160, 194 S.E. 194, 1937 Ga. LEXIS 692 (1937) (decided under former Code 1933, § 38-707).

Witness not in county. — Fact that a witness is not in the county will not (without more) lay the foundation for receiving other evidence. Baker & Swain v. Massengale, 83 Ga. 137, 10 S.E. 347, 1889 Ga. LEXIS 20 (1889) (decided under former Code 1882, § 3837).

Witness attending school in another state. — When it appeared that the subscribing witness to a written instrument was attending school in another state at the time of the trial, the witness's absence was sufficiently accounted for, and the execution of the instrument could be proved otherwise than by the witness's testimony. Terry v. Broadhurst, 127 Ga. 212, 56 S.E. 282, 1906 Ga. LEXIS 806 (1906) (decided under former Civil Code 1895, § 5244).

Death of subscribing witnesses. — When an affidavit of forgery was filed to a recorded deed, after having shown death of the two attesting witnesses, the plaintiff should introduce proof of actual signing by the alleged maker or of the genuinenesses of the maker's signature fixed thereto, or that such evidence was not attainable. Strickland v. Babcock Lumber Co., 142 Ga. 120, 82 S.E. 531, 1914 Ga. LEXIS 617 (1914) (decided under former Civil Code 1910, § 5834).

Writing Only Collaterally Material

Bond for title. — When a bond for title admitted over objection is only collaterally material, the bond falls within this exception. Chance v. Chance, 163 Ga. 267, 135 S.E. 923, 1926 Ga. LEXIS 58 (1926) (decided under former Civil Code 1910, § 5833).

Contract on action on check. — Since this was an action on the check itself, the contract between the purchaser and the seller was only incidentally or collaterally involved, and proof of the proper execution of the check was neither necessary nor material to the case. Dealers Disct. & Inv. Co. v. Mitchell Motors, Inc., 101 Ga. App. 900, 115 S.E.2d 420, 1960 Ga. App. LEXIS 1037 (1960) (decided under former Code 1933, § 38-706).

Contract of sale. — Contract of sale, whereby the sole stockholder of the old corporation transferred part of the stockholder's interest therein, established no rights between the parties to a pending suit by a new corporation, to recover the unpaid purchase-money on a contract of sale entered into between the corporation and the defendant, and is therefore only incidentally and collaterally material to the suit. Permitting proof of the execution of a contract otherwise than by the testimony of the subscribing witnesses thereto was not error. Johnson-Battle Lumber Co. v. Emanuel Lumber Co., 33 Ga. App. 517, 126 S.E. 861, 1925 Ga. App. LEXIS 562 (1925) (decided under former Civil Code 1910, § 5833).

Landlord's lien. — When the existence of a landlord's lien for supplies was directly in issue, a writing attested by a subscribing witness and purporting to create such a lien was not admissible in evidence without proof by such witness of the writing's execution or duly accounting for nonproduction in view of the former statute. Baker & Swain v. Massengale, 83 Ga. 137, 10 S.E. 347, 1889 Ga. LEXIS 20 (1889) (decided under former Code 1882, § 3837).

Transfer of mortgage. — When the transfer of a mortgage, if material at all, is

simply incidentally or collaterally relevant to the real issues in the case, as a mere circumstance which may tend to throw some light upon a question of fact involved in the case it is not necessary to produce a subscribing witness, in view of the law. Prescott v. Fletcher, 133 Ga. 404, 65 S.E. 877, 1909 Ga. LEXIS 224 (1909) (decided under former Civil Code 1895, § 5244).

Testimony by Party Executing Writing

Accounting for absence of party executing. — On trial of a suit by a beneficiary in a life-insurance policy, it was error to receive in evidence secondary evidence respecting the execution of the application to reinstate without preliminary proof accounting for the subscribing witness thereto. Lamb v. Empire Life Ins. Co., 143 Ga. 180, 84 S.E. 439, 1915 Ga. LEXIS 337 (1915) (decided under former Civil Code 1910, § 5833).

Deed not recorded. — Deed need not be recorded to be admissible if proper foundation is laid; such foundation can be laid if party executing deed testifies to the deed's execution in accordance with the law or witnesses to deed are examined as to the deed's execution. Smith v. Forrester, 156 Ga. App. 79, 274 S.E.2d 101, 1980 Ga. App. LEXIS 2886 (1980) (decided under former Code 1933, § 38-706).

Time of execution. — When the subscribing witnesses to a deed were called to prove the deed's execution, but because of failure of memory were unable to locate the time of the deed's execution, the deed was, even before the passage of this provision, competent for the alleged maker to testify that the deed was in fact made at the time the deed purported on the deed's face to have been executed. Kelly v. William Sharp Saddlery Co., 99 Ga. 393, 27 S.E. 741, 1896 Ga. LEXIS 417 (1896) (decided under former Civil Code 1895, § 5244).

Signature to blank paper. — When the maker of an instrument testified that the maker's signature thereto was genuine, the court properly admitted the instrument in evidence, notwithstanding the fact that in the same breath the maker testified that when the maker put the maker's signature on this paper it was a blank piece of paper, that the maker did not make the statements contained in this paper, and knew nothing of the contents thereof. Campbell v. State, 157 Ga. 233, 121 S.E. 306, 1924 Ga. LEXIS 27 (1924) (decided under former Civil Code 1910, § 5833).

Transfer of note by corporation. — Execution of a written transfer of a promissory note by a corporation as the payee, denied on oath, is proved by the undisputed evidence of the president of the corporation that as president and duly authorized agent of the corporation the written transfer of the note was executed, for and in the name of the corporation. Christie v. Shingler, 10 Ga. App. 529, 73 S.E. 751, 1912 Ga. App. LEXIS 600 (1912) (decided under former Civil Code 1910, § 5833).

Bill of sale not acknowledged. — It was not error to admit in evidence a paper purporting to be a bill of sale, over objection that the paper appeared to have been recorded but not to have been acknowledged before a notary public; there being testimony that the maker signed the paper, and the maker as a witness admitting so signing. James v. Bettis, 21 Ga. App. 170, 94 S.E. 85, 1917 Ga. App. LEXIS 503 (1917) (decided under former Civil Code 1910, § 5833).

Deed. — Between the parties, the testimony of the maker is sufficient proof of execution of a deed. Vizard v. Moody, 119 Ga. 918, 47 S.E. 348, 1904 Ga. LEXIS 406 (1904) (decided under former Civil Code 1895, § 5244).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 1051, 1190, 1203 et seq., 1229.

C.J.S.

32 C.J.S., Evidence, §§ 986, 989, 990, 1125.

ALR.

Authorship or authenticity of written or printed matter as inferable without extrinsic proof from name used therein or from its contents or subject matter, 131 A.L.R. 301.

Introduction of decedent's books of account by his personal representative as waiver of "dead man's statute," 26 A.L.R.2d 1009.

24-9-904. Definitions.

As used in this article, the term:

(1) "Public office" shall have the same meaning as set forth in Code Section 24-8-801.

(2) "Public officer" means any person appointed or elected to be the head of any entity included in paragraph (1) of Code Section 24-9-902.

(3) "Telephone service provider" shall have the same meaning as "voice service provider" as set forth in Code Section 46-5-231.

History.

Code 1981, § 24-9-904, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1890-91, p. 109, § 1, former Civil Code 1895, § 5216, former Civil Code 1910, § 5803, and former Code 1933, § 38-606, are included in the annotations for this Code section. The reader is also advised to consult the annotations under O.C.G.A. § 24-9-920 for annotations regarding the authentication of Georgia state and county records, and O.C.G.A. § 24-9-922, for annotations regarding foreign state laws and records.

In general. — The former statute came from an Act of Legislature (Ga. L. 1890-91, p. 109). Former Code 1882, § 3816 applied exclusively to public officers of this state and the several counties thereof and therefore could have no reference to certificates signed by municipal officers. In fact, exemplification of the records of municipal corporations were not admissible at all until made so by former Ga. L. 1890-91, p. 109, and the former merely provided that the records shall be admitted in evidence when certified under seal. Metropolitan St. R.R. v. Johnson, 90 Ga. 500, 16 S.E. 49, 1892 Ga. LEXIS 210 (1892) (decided under Ga. L. 1890-91, p. 109, § 1); Western & Atl. R.R. v. Hix, 104 Ga. 11, 30 S.E. 424, 1898 Ga. LEXIS 271 (1898) (decided under former Civil Code 1895, § 5216); Farrar Lumber Co. v. City of Dalton, 20 Ga. App. 138, 92 S.E. 946, 1917 Ga. App. LEXIS 753 (1917) (decided under former Civil Code 1910, § 5803); Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694, 1931 Ga. App. LEXIS 621 (1931) (decided under former Civil Code 1910, § 5803); R.O.H. Properties, Inc. v. Westside Elec. Co., 151 Ga. App. 857, 261 S.E.2d 767, 1979 Ga. App. LEXIS 2712 (1979) (decided under former Code 1933, § 38-606).

ARTICLE 2

SPECIFIC TYPES OF RECORDS AND EVIDENCE

Law reviews.
For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-9-920. Authentication of Georgia state and county records.

The certificate or attestation of any public officer either of this state or any county thereof or any clerk or keeper of county, consolidated government, or municipal records in this state shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper or file, or other matter or thing in such public officer's respective office, or pertaining thereto, to admit the same in evidence.

History.
Code 1981, § 24-9-920, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Proof of lack of public record by evidence showing that record cannot be found, § 9-11-44.

Records, documents, and papers of public officers generally, T. 50, C. 18.

Law reviews.
For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration
Public Officers
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Laws 1830, Cobb's 1851 Digest, p. 273, Ga. L. 1855-56, p. 143, § 1, former Code 1863, § 3739, former Code 1868, § 3763, former Code 1873, § 3816, former Code 1882, § 3816, former Civil Code 1895, § 5211, former Penal Code 1895, § 1015, former Civil Code 1910, § 5798, former Penal Code 1910, § 1041, former Code 1933, § 38-601, and former O.C.G.A. § 24-7-20 are included in the annotations for this Code section. The reader is also advised to consult the annotations under O.C.G.A. §§ 24-9-901 and 24-9-902, for annotations discussing authentication requirements in general.

Public Officers

Commission not required. — "Public officer," whose certification authenticated copies of records, was not expressly required to be commissioned by the Governor. Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311, 1973 Ga. App. LEXIS 1311 (1973) (decided under former Code 1933, § 38-601); Waddill v. Waddill, 143 Ga.

Public Officers (Cont'd)

App. 806, 240 S.E.2d 129, 1977 Ga. App. LEXIS 2513 (1977) (decided under former Code 1933, § 38-601).

Deputies authorized to certify. — Certificate need not be by a public officer personally, rather than by a deputy officer who certified that the deputy was the custodian of the records. Musgrove v. State, 230 Ga. 46, 195 S.E.2d 407, 1973 Ga. LEXIS 805 (1973) (decided under former Code 1933, § 38-601); Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311, 1973 Ga. App. LEXIS 1311 (1973) (decided under former Code 1933, § 38-601); Waddill v. Waddill, 143 Ga. App. 806, 240 S.E.2d 129, 1977 Ga. App. LEXIS 2513 (1977) (decided under former Code 1933, § 38-601); Blackmon v. State, 153 Ga. App. 359, 265 S.E.2d 320, 1980 Ga. App. LEXIS 1806 (1980) (decided prior to 1980 amendment to former Code 1933, § 68B-215 (see § 40-5-2) and under Code 1933, § 38-601).

Court reporters were not authorized to certify. Hardeman v. English, 79 Ga. 387, 5 S.E. 70, 1887 Ga. LEXIS 234 (1887) (decided under former Code 1882, § 3816).

Clerk of court authorized to certify. — Any witness who read the records in the clerk's office could testify as to what was found or not found but only the certificate of the clerk was sufficient to authenticate any record existing in the clerk's office. Hines v. Johnston, 95 Ga. 644, 23 S.E. 970 (1895) (decided under former Code 1882, § 3816).

Federal officers and employees were not authorized to certify. O'Connor v. United States, 11 Ga. App. 246, 75 S.E. 110, 1912 Ga. App. LEXIS 353 (1912) (decided under former Penal Code 1910, § 1041); Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24, 1946 Ga. LEXIS 432 (1946) (decided under former Code 1933, § 38-601); Pressley v. State, 207 Ga. 274, 61 S.E.2d 113, 1950 Ga. LEXIS 445 (1950) (decided under former Code 1933, § 38-601); Mach v. State, 109 Ga. App. 154, 135 S.E.2d 467, 1964 Ga. App. LEXIS 822 (1964), superseded by statute as stated in State v. Cook, 172 Ga. App. 433, 323 S.E.2d 634, 1984 Ga. App. LEXIS 2539 (1984) (decided under former Code 1933, § 38-601); Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311, 1973 Ga. App. LEXIS 1311 (1973) (decided under former Code 1933, § 38-601).

Ineffective assistance of counsel for failing to object to officer's hearsay testimony. — Appellate court reversed the trial court's denial of the defendant's motion for a new trial with respect to the two misdemeanor traffic violations because the prejudice from trial counsel's failure to object was clear since the officer's hearsay testimony was the only evidence offered to prove the elements of the traffic offenses and had the evidence been excluded, there would not have been sufficient evidence to convict on those offenses. Taylor v. State, 337 Ga. App. 486, 788 S.E.2d 97, 2016 Ga. App. LEXIS 357 (2016).

Certificate and Seal

Form of certificate. — Certificate in the following form: "The above and foregoing is a true copy," etc., was a sufficient authentication of a record. Harden v. Webster, Parmelee & Co., 29 Ga. 427, 1859 Ga. LEXIS 358 (1859) (decided under Ga. L. 1855-56, p. 143, § 1).

Sufficiency of certificate. — To make a certificate from the Executive Department admissible in evidence, it was not necessary that the certificate give a copy of that to which it relates. It was sufficient that it gave, substantially, the contents, or a part of the contents, of the thing to which it related. Henderson v. Hackney, 16 Ga. 521, 1854 Ga. LEXIS 214 (1854) (decided under Laws 1830, Cobb's 1851 Digest, p. 273).

Validity of record certified. — In action for alimony when plaintiff introduced a certified copy of marriage certificate, no issue as to validity of marriage was made in the absence of a direct attack on the record by the defendant. Guess v. Guess, 202 Ga. 364, 43 S.E.2d 326, 1947 Ga. LEXIS 448 (1947) (decided under former Code 1933, § 38-601).

Nothing in former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902) required that certified copies be photostatic copies of original documents. Cook v. State, 255 Ga. 565, 340 S.E.2d

843, 1986 Ga. LEXIS 607, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166, 1986 U.S. LEXIS 4139 (1986) (decided under former O.C.G.A. § 24-7-20).

Elements of authentication. — Establishment of three elements was commonly spoken of as authentication: the authority of the officer issuing the document, the incumbency of the officer, and the genuineness of the officer's signature or seal. Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24, 1946 Ga. LEXIS 432 (1946) (decided under former Code 1933, § 38-627).

Municipality without corporate seal. — When a municipality had no seal, it was not error to admit in evidence an original ordinance if it was admitted to be such. Greenberg v. Rothberg, 72 Ga. App. 882, 35 S.E.2d 485, 1945 Ga. App. LEXIS 733 (1945) (decided under former Code 1933, § 38-606).

Attestation

Contents of record. — Former statute merely required a certificate or attestation, without specifying any detail as to the location and length of the record, by reference to the number of pages, minute book, case number, and similar details. McIntyre v. Balkcom, 229 Ga. 81, 189 S.E.2d 445, 1972 Ga. LEXIS 506 (1972) (decided under former Code 1933, § 38-601).

Treatment of Specific Records

Acknowledgment of service. — There was no error in admitting in evidence the certified copy of an acknowledgment of service. James v. Edward Thompson Co., 17 Ga. App. 578, 87 S.E. 842, 1916 Ga. App. LEXIS 796 (1916) (decided under former Civil Code 1910, § 5798).

Administrative records. — Properly authenticated administrative records are admissible. Niehaus v. State, 149 Ga. App. 575, 254 S.E.2d 895, 1979 Ga. App. LEXIS 1940 (1979) (decided under former Code 1933, § 38-601).

Conditional sales contract. — Conditional sales contract duly recorded and on its face properly executed and attested was admissible in evidence. Central Bank & Trust Co. v. Creede, 103 Ga. App. 203, 118 S.E.2d 844, 1961 Ga. App. LEXIS 909 (1961) (decided under former Code 1933, § 38-601).

County bonds. — It was the duty of the clerk of the superior court to sign a validation certificate and attach the seal of the clerk's office to all county bonds regularly validated. Touchton v. Echols County, 211 Ga. 85, 84 S.E.2d 81, 1954 Ga. LEXIS 510 (1954) (decided under former Code 1933, § 38-601).

Distribution of estate. — When a division in kind was made between heirs and distributees of a decedent, a certified copy of the return of the commissioners, and of the order of the court approving the return, were admissible in evidence in an action involving title to the land covered by the award. Bell v. Cone, 208 Ga. 467, 67 S.E.2d 558, 1951 Ga. LEXIS 402 (1951) (decided under former Code 1933, § 38-601).

Driver's license. — Because a defendant's driver's license was a properly certified public record, the trial court was permitted to infer the reliability of any hearsay contained therein and to conclude that no confrontation clause violation had been shown pursuant to former O.C.G.A. §§ 24-3-17 and 24-7-20 (see now O.C.G.A. §§ 24-9-902 and 24-9-924). Douglas v. State, 312 Ga. App. 585, 718 S.E.2d 908, 2011 Ga. App. LEXIS 1022 (2011), cert. denied, No. S12C0470, 2012 Ga. LEXIS 606 (Ga. June 18, 2012) (decided under former O.C.G.A. § 24-7-20).

Fertilizer analysis record. — A certified copy of an analysis of fertilizers to be used in an action for false or incorrect branding should not contain a statement as to the penalty or damage for which the manufacturer or dealer might be deemed to be liable; only the mathematical result of the chemical analysis should be stated. Georgia Fertilizer Co. v. Walker, 45 Ga. App. 68, 163 S.E. 277, 1932 Ga. App. LEXIS 166 (1932) (decided under former Civil Code 1910, § 5798).

Map of county. — Properly certified copy of a map of a county, in the office of the Secretary of State, was admissible in evidence without proof of the correctness or existence of the original. Berry v. Clark, 117 Ga. 964, 44 S.E. 824, 1903 Ga. LEXIS 401 (1903) (decided under former Civil Code 1895, § 5211).

Treatment of Specific Records (Cont'd)

Marriage record. — Public record of a ceremonial marriage was conclusive evidence of such marriage, in the absence of a timely direct attack on such record, which attack must be supported by proper proof. Guess v. Guess, 202 Ga. 364, 43 S.E.2d 326, 1947 Ga. LEXIS 448 (1947) (decided under former Code 1933, § 38-601).

Intoxilyzer report. — Defendant's conviction for driving under the influence to the extent that defendant's blood-alcohol content exceeded the legal limit was reversed as the trial court erroneously admitted a copy of the Intoxilyzer report over a best evidence objection; the state was unable to explain the absence of the original, the state presented no evidence that the state made any effort to locate the original, and former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902) did not apply. Lumley v. State, 280 Ga. App. 82, 633 S.E.2d 413, 2006 Ga. App. LEXIS 755 (2006) (decided under former O.C.G.A. § 24-7-20).

Book-in photographs. — Although the appellate court found that book-in photographs which the state offered to prove that defendant was the same person who was convicted of a prior felony, albeit under a different name, could have been admitted under former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902), and the appellate court recommended that practice, the appellate court held that the trial court did not abuse the court's discretion during the sentencing phase of defendant's trial when the court admitted the photographs and used them to determine that defendant was subject to a sentence of life in prison without parole, pursuant to O.C.G.A. § 17-10-7(c), because defendant had prior felony convictions. Farmer v. State, 268 Ga. App. 831, 603 S.E.2d 16, 2004 Ga. App. LEXIS 858 (2004), cert. denied, No. S04C2071, 2004 Ga. LEXIS 970 (Ga. Oct. 25, 2004) (decided under former O.C.G.A. § 24-7-20).

Search warrants. — Rule that a public record could be proved only by a duly certified copy thereof, in the absence of admission in open court that the document was an original public record, did not apply to search warrants. DePalma v. State, 228 Ga. 272, 185 S.E.2d 53, 1971 Ga. LEXIS 539 (1971) (decided under former Code 1933, § 38-601).

Secretary of State's office records. — A certified copy of a record in the office of the Secretary of State was held admissible on the question as to who was the grantee of land from the state. Ferrell v. Hurst, 68 Ga. 132, 1881 Ga. LEXIS 329 (1881) (decided under former Code 1873, § 3816).

Computer printout from state website. — Former homeowner was required to give notice to a defendant under O.C.G.A. § 10-1-399 even though the defendant was incorporated and had its principal place of business in a different state. There was no evidence that the defendant did not maintain a place of business in Georgia or keep some assets in Georgia, and the homeowner's contention was predicated on uncertified computer printouts from the Secretary of State's website, which were inadmissible under former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-907). Steed v. Fed. Nat'l Mortg. Corp., 301 Ga. App. 801, 689 S.E.2d 843, 2009 Ga. App. LEXIS 1452 (2009) (decided under former O.C.G.A. § 24-7-20).

Transcript of tax records. — Upon the trial of a tax collector for embezzlement, transcripts from the books of the Comptroller General and former Treasurer of the State, certified under the former statute, were admissible in evidence to show a failure on the part of such defendant to pay over the taxes collected by the defendant tax collector. Shivers v. State, 53 Ga. 149, 1874 Ga. LEXIS 425 (1874) (decided under former Code 1873, § 3816).

Tax returns. — It was not error to allow material portions of certified copies of tax returns of the defendant in ejectment, as to the number of acres of land given in by the defendant and the value thereof for certain years, to be received in evidence over the objection that the copies were certified to by the tax receiver, and not by the tax collector; that the original returns themselves, and not certified copies of the returns, should be produced in evidence. Jett v. Hart, 152 Ga. 266, 109

S.E. 654, 1921 Ga. LEXIS 68 (1921) (decided under former Civil Code 1910, § 5798).

Tax return records of state. — Books of tax returns in the office of the Comptroller General were of equal rank as evidence with those in the proper offices of the respective counties, and the certificate of the Comptroller General touching the contents of such books was no less admissible than the certificates of the proper county officer were. Clark v. Empire Lumber Co., 87 Ga. 742, 13 S.E. 826, 1891 Ga. LEXIS 270 (1891) (decided under former Code 1882, § 3816).

Execution for unpaid taxes. — After an execution for unpaid taxes was issued by the Comptroller General against a certain tract of unreturned wild land, and a sale of the land was made thereunder, and the execution was returned to the Comptroller's office with the official entries thereon, it became an office paper, and a certified copy of such execution and entries was admissible in evidence in lieu of the original. Cannon v. Gorham, 136 Ga. 167, 71 S.E. 142 (1911) (decided under former Civil Code 1910, § 5798).

Uncertified copies of computer printouts. — Uncertified copies of computer printouts apparently obtained from the Secretary of State's website could not be used as evidence to show a relationship between corporations because the printouts did not contain a certificate or attestation of a public officer and thus were not properly authenticated. Matson v. Noble Inv. Group, LLC, 288 Ga. App. 650, 655 S.E.2d 275, 2007 Ga. App. LEXIS 1266 (2007) (decided under former O.C.G.A. § 24-7-20).

Name search records from Secretary of State in form of computer printouts. — Trial court erred in considering name search documents from the Ohio Secretary of State's office because the documents were not properly authenticated under former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902). Uncertified copies of computer printouts from a Secretary of State's website were not admissible as evidence unless authenticated. Std. Bldg. Co. v. Wallen Concept Glazing, Inc., 298 Ga. App. 443, 680 S.E.2d 527, 2009 Ga. App. LEXIS 706 (2009) (decided under former O.C.G.A. § 24-7-20).

Tally sheets of election. — Exemplifications of "records and minutes" of municipal corporations did not include tally sheets of former municipal elections. Sewell v. City of Tallapoosa, 145 Ga. 19, 88 S.E. 577, 1916 Ga. LEXIS 161 (1916) (decided under former Civil Code 1910, § 5803).

Not Applicable to Federal Records

Elements of authentication, the authority, the incumbency, and the genuineness of the signature of the certifying custodian, were applicable to records of the federal, not the state, government. O'Connor v. United States, 11 Ga. App. 246, 75 S.E. 110, 1912 Ga. App. LEXIS 353 (1912) (decided under former Civil Code 1910, § 5798); Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24, 1946 Ga. LEXIS 432 (1946) (decided under former Code 1933, § 38-601); Pressley v. State, 207 Ga. 274, 61 S.E.2d 113, 1950 Ga. LEXIS 445 (1950) (decided under former Code 1933, § 38-601); Mach v. State, 109 Ga. App. 154, 135 S.E.2d 467, 1964 Ga. App. LEXIS 822 (1964), superseded by statute as stated in State v. Cook, 172 Ga. App. 433, 323 S.E.2d 634, 1984 Ga. App. LEXIS 2539 (1984) (decided under former Code 1933, § 38-601); Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311, 1973 Ga. App. LEXIS 1311 (1973) (decided under former Code 1933, § 38-601).

Court Records

In general. — Clerk of court may certify a copy or transcript of the court record, but the clerk's certificate of the nonexistence on the records of certain facts was not admissible. Miller v. Reinhart, 18 Ga. 239, 1855 Ga. LEXIS 183 (1855) (decided under Laws 1830, Cobb's 1851 Digest, p. 273); Dillon v. Mattox, 21 Ga. 113, 1857 Ga. LEXIS 13 (1857) (decided under Ga. L. 1855-56, p. 143, § 1); Martin v. Anderson, 21 Ga. 301, 1857 Ga. LEXIS 56 (1857) (decided under Ga. L. 1855-56, p. 143, § 1); Walker v. Logan, 75 Ga. 759, 1885 Ga. LEXIS 226 (1885) (decided under former Code 1882, § 3816); Lamar v. Pearre, 90 Ga. 377, 17 S.E. 92, 1892 Ga. LEXIS 184 (1892) (decided under former

Court Records (Cont'd)

Code 1882, § 3816); Hines v. Johnston, 95 Ga. 644, 23 S.E. 470 (1895) (decided under former Civil Code 1895, § 5211); Greer v. Fergerson, 104 Ga. 552, 30 S.E. 943, 1898 Ga. LEXIS 363 (1898) (decided under former Civil Code 1895, § 5211); but see for contra implication Thompson v. Cheatham, 244 Ga. 120, 259 S.E.2d 62 (1979).

Court proceedings. — The only legal way to prove proceedings of the superior court was by an extract from the minutes of that court duly certified by the court's clerk. Bowden v. Taylor, 81 Ga. 199, 6 S.E. 277, 1888 Ga. LEXIS 91, writ denied, 81 Ga. 204, 6 S.E. 280, 1888 Ga. LEXIS 92 (1888) (decided under former Code 1882, § 3816); Weaver v. Tuten, 138 Ga. 101, 74 S.E. 835, 1912 Ga. LEXIS 210 (1912) (decided under former Civil Code 1910, § 5798).

Criminal proceedings. — Exemplification of the record of an illegality case, under the hand and seal of the clerk, exhibiting among other things, the assignment by the plaintiff of the writ of fi. fa., was admissible in evidence to prove the transfer. Napier v. Neal, 3 Ga. 298, 1847 Ga. LEXIS 110 (1847) (decided under Laws 1830, Cobb's 1851 Digest, p. 273).

Guilty plea. — Trial court properly used a prior guilty plea to sentence the defendant as a recidivist when the state had presented a certified copy of the plea that was signed and initialed by defense counsel along with a plea hearing transcript; even if the plea hearing transcript was uncertified and unauthenticated, the certified copy of the plea was admissible under former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902), and the defendant did not produce evidence of invalidity once the fact of conviction was proved and the state showed that the defendant was represented by counsel. Moorer v. State, 286 Ga. App. 395, 649 S.E.2d 537, 2007 Ga. App. LEXIS 784 (2007), cert. dismissed, No. S07C1910, 2007 Ga. LEXIS 806 (Ga. Oct. 29, 2007) (decided under former O.C.G.A. § 24-7-20).

Proceedings in same court. — Original papers of proceedings in the court were admissible in another case in the same court where otherwise relevant. Sellers v. Page, 127 Ga. 633, 56 S.E. 1011, 1907 Ga. LEXIS 445 (1907) (decided under former Civil Code 1895, § 5211); Woods v. Travelers Ins. Co., 53 Ga. App. 429, 186 S.E. 467, 1936 Ga. App. LEXIS 142 (1936) (decided under former Code 1933, § 38-601); Clackum v. State, 55 Ga. App. 44, 189 S.E. 397, 1936 Ga. App. LEXIS 424 (1936) (decided under former Code 1933, § 38-601); Williford v. State, 55 Ga. App. 40, 192 S.E. 93 (1937) (decided under former Code 1933, § 38-601); Brantley v. State, 121 Ga. App. 79, 172 S.E.2d 852, 1970 Ga. App. LEXIS 1113 (1970) (decided under former Code 1933, § 38-601); Thompson v. Cheatham, 244 Ga. 120, 259 S.E.2d 62 (1979) (decided under former Code 1933, § 38-601).

Proceedings in other courts. — Former statute made provision for exemplification by certificate of any public officer of authenticity of any copy or transcript of any record, but had no relation to the court record in another case or cases pending in the same court in which the records were offered in evidence. Brantley v. State, 121 Ga. App. 79, 172 S.E.2d 852, 1970 Ga. App. LEXIS 1113 (1970) (decided under former Code 1933, § 38-601).

Certification of nonconforming record. — Certification by the clerk of court must speak the truth, and the clerk must not be required by a mandamus, or otherwise, to certify an instrument that did not conform to the records in the clerk's office. Touchton v. Echols County, 211 Ga. 85, 84 S.E.2d 81, 1954 Ga. LEXIS 510 (1954) (decided under former Code 1933, § 38-601).

Judgment. — Introduction of a certified copy of a judgment against a party was sufficient evidence to prove the existence of that judgment. Gowdey v. Rem Assocs., 176 Ga. App. 83, 335 S.E.2d 309, 1985 Ga. App. LEXIS 2226 (1985) (decided under former O.C.G.A. § 24-7-20).

Trial court did not abuse the court's discretion when the court excluded a document purported to be the codefendant's felony conviction, as the document was not a properly certified copy and was unauthenticated. McClendon v. State, 276 Ga. App. 543, 623 S.E.2d 738, 2005 Ga. App. LEXIS 1306 (2005) (decided under former O.C.G.A. § 24-7-20).

Record of conviction. — Certification and seal on record of conviction furnished by an officer of the Department of Offender Rehabilitation (now Corrections) who was required by law to keep the records on file was sufficient to qualify the record for admission into evidence to establish the fact of lawfulness of incarceration even though the certification was not by the Superior Court of Whitfield County, the source of the original document. Ward v. State, 165 Ga. App. 163, 300 S.E.2d 528, 1983 Ga. App. LEXIS 1803 (1983) (decided under former O.C.G.A. § 24-7-20).

Authentication does not automatically establish admissibility. — Former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902) did not address hearsay concerns; the former statute did not require the admission of hearsay merely because the hearsay had been recorded in a court of record. McGaha v. State, 221 Ga. App. 440, 471 S.E.2d 533 (decided under former O.C.G.A. § 24-7-20).

Clerical error in a certified copy of the sentence of one convicted of a crime did not render the paper inadmissible in evidence if it clearly appeared from the context what the true purport of the document was. Daniel v. State, 114 Ga. 533, 40 S.E. 805, 1902 Ga. LEXIS 712 (1902) (decided under former Penal Code 1895, § 1015).

Objection to admission of record. — It was too late to object to a record for want of proper authentication after the record had been admitted and read to the jury without objection. Williams v. Rawlins, 33 Ga. 117, 1861 Ga. LEXIS 297 (1861) (decided under Ga. L. 1855-56, p. 143, § 1).

Traffic citation indicating guilty plea admissible. — In a suit for damages sustained in an automobile collision, alleging that the defendant negligently failed to yield the right-of-way at a stop sign, the trial court did not err by admitting evidence of a traffic citation issued against the defendant in conjunction with the accident. The citation noted entry of a guilty plea, but also indicated the defendant was found guilty by the municipal court. Though ambiguous and subject to conflicting interpretations, the citation was relevant if interpreted by the jury as a plea of guilty. Hunter v. Hardnett, 199 Ga. App. 443, 405 S.E.2d 286, 1991 Ga. App. LEXIS 533 (1991), cert. denied, No. S91C1021, 1991 Ga. LEXIS 490 (Ga. July 3, 1991) (decided under former O.C.G.A. § 24-7-20).

Pleading not used as court record. — When a plea of guilty, in a prior criminal proceeding arising from the same occurrence, was admitted in evidence in the subsequent civil case for its impeaching value, the plea was not admitted as a court paper, and the former statute did not apply. Webb v. May, 91 Ga. App. 437, 85 S.E.2d 641, 1955 Ga. App. LEXIS 768 (1955) (decided under former Code 1933, § 38-601).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 38-601 and former O.C.G.A. § 24-7-20 have been included in the opinions for this Code section.

Former statute related only to the certification of state and county records, and did not embrace federal records. 1970 Op. Att'y Gen. No. U70-176 (decided under former Code 1933, § 38-601).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 1303, 1320, 1321.

Am. Jur. Pleading and Practice Forms.

21A Am. Jur. Pleading and Practice Forms, Records and Recording Laws, § 3.

C.J.S.

32 C.J.S., Evidence, §§ 841 et seq., 886, 896, 897. 32A C.J.S., Evidence, § 1037.

ALR.

Admissibility, in personal injury or death action arising out of airplane accident, of documents and reports pertaining to investigations, 23 A.L.R.2d 1360.

Presumption and prima facie case as to ownership of vehicle causing highway accident, 27 A.L.R.2d 167.

Admissibility of report of police or other public officer or employee, or portions of reports, as to cause of or responsibility for accident, injury to person, or damage to property, 69 A.L.R.2d 1148.

Weather reports and records as evidence, 57 A.L.R.3d 713.

Admissibility, under public records exception to hearsay rule, of record kept by public official without express statutory direction or authorization, 80 A.L.R.3d 414.

Authentication of electronically stored evidence, including text messages and e-mail, 45 A.L.R.4th 602.

24-9-921. Identification of medical bills; expert witness unnecessary.

(a) Upon the trial of any civil proceeding involving injury or disease, the patient or the member of his or her family or other person responsible for the care of the patient shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such a witness that the expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial and that the bills were received from:

(1) A hospital;

(2) An ambulance service;

(3) A pharmacy, drugstore, or supplier of therapeutic or orthopedic devices; or

(4) A licensed practicing physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist.

(b) Such items of evidence need not be identified by the one who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary. However, nothing in this Code section shall be construed to limit the right of a thorough and sifting cross-examination as to such items of evidence.

History.

Code 1981, § 24-9-921, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-706.1 and former O.C.G.A. § 24-7-9 are included in the annotations for this Code section.

Purpose. — Law creates a streamlined procedure permitting laymen to introduce bills incurred for treatment of injuries resulting from the subject of litigation without requiring an expert witness to testify that such charges were reasonable and necessary. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860, 1972 Ga. App. LEXIS 919 (1972) (decided under former Code 1933, § 38-706.1); Piggly-Wiggly S., Inc. v. Tucker, 139 Ga. App. 873, 229 S.E.2d 804, 1976 Ga. App. LEXIS 2026 (1976) (decided under former Code 1933, § 38-706.1).

Former O.C.G.A. § 24-7-9 was only a statutory rule of evidence regarding the admission of medical bills. It does not purport to obviate a plaintiff's further satisfaction of the evidentiary obligation to demonstrate the liability of the defendant for the damages being sought. Eberhart v. Morris Brown College, 181 Ga. App. 516, 352 S.E.2d 832, 1987 Ga. App. LEXIS 1455 (1987) (decided under former O.C.G.A. § 24-7-9).

Scope. — Law accomplishes three goals: (1) it eliminates the necessity of having the person submitting the bill to testify; (2) it makes it unnecessary to produce an expert witness to prove such charges were reasonable and necessary; and (3) it makes laymen competent witnesses to identify such bills. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860, 1972 Ga. App. LEXIS 919 (1972) (decided under former Code 1933, § 38-706.1).

Statute not exclusive. — Law was not intended as the sole means of proving medical damages in personal injury suits. Piggly-Wiggly S., Inc. v. Tucker, 139 Ga. App. 873, 229 S.E.2d 804, 1976 Ga. App. LEXIS 2026 (1976) (decided under former Code 1933, § 38-706.1).

Rules of evidence apply. — Ga. L. 1970, p. 225, § 1 and Ga. L. 1971, p. 441, §§ 1 and 2 (see now O.C.G.A. § 24-9-902) deal with the method of authenticating records which were otherwise admissible and were not new rules of admissibility eliminating the hearsay rule. Dennis v. Adcock, 138 Ga. App. 425, 226 S.E.2d 292, 1976 Ga. App. LEXIS 2180 (1976) (decided under former Code 1933, § 38-706.1); Moody v. State, 244 Ga. 247, 260 S.E.2d 11, 1979 Ga. LEXIS 1205 (1979) (decided under former Code 1933, § 38-706.1).

Right to cross-examine not limited. — Law allows a thorough and sifting cross-examination for the purpose of undermining the credibility of the lay witness, but the fact that the witness's accuracy is impugned does not affect the admissibility of the exhibits. Atlanta Transit Sys. v. Smith, 141 Ga. App. 87, 232 S.E.2d 580, 1977 Ga. App. LEXIS 1775 (1977) (decided under former Code 1933, § 38-706.1).

Law does not require the showing that a hospital is licensed as a prerequisite to admission of hospital and medical bills from that institution. Kamman v. Seabolt, 149 Ga. App. 167, 253 S.E.2d 842, 1979 Ga. App. LEXIS 1771 (1979) (decided under former Code 1933, § 38-706.1).

Irrelevant items in records. — When a submitted bill includes without differentiation items having no relevance to the automobile collision, the proffered evidence not only fails to meet the statutory requisites but may be properly rejected under the rule that testimony offered as a whole without separating the relevant from that which is irrelevant and inad-

missible is to be repelled in its entirety. Maloy v. Dixon, 127 Ga. App. 151, 193 S.E.2d 19, 1972 Ga. App. LEXIS 821 (1972) (decided under former Code 1933, § 38-706.1); Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860, 1972 Ga. App. LEXIS 919 (1972) (decided under former Code 1933, § 38-706.1); Jordan v. Hagewood, 133 Ga. App. 958, 213 S.E.2d 85, 1975 Ga. App. LEXIS 2347 (1975) (decided under former Code 1933, § 38-706.1).

Expenses from hospital and nursing home. — Trial court properly admitted a deceased patient's medical bills in support of the patient's claims against a nursing home under O.C.G.A. § 24-7-9, because the patient's expert subtracted from the total hospital bills the amount that would have been incurred had the patient remained in the nursing home receiving treatment for previous problems. Tucker Nursing Ctr., Inc. v. Mosby, 303 Ga. App. 80, 692 S.E.2d 727, 2010 Ga. App. LEXIS 277 (2010) (decided under former O.C.G.A. § 24-7-9).

Admission of medical bills. — No error occurred in admitting the edited medical bills over the defendant's objection because the plaintiff provided lay testimony that the edited bills admitted into evidence were related solely to the injury at issue in the present litigation and the defendant elected not to cross-examine the witness regarding those bills. Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 760 S.E.2d 674, 2014 Ga. App. LEXIS 566 (2014).

Physician's action for services. — Physician in an action to recover for professional services rendered has the burden of proving the value as represented by the ordinary and reasonable fee for the services, despite this statute whereby in certain cases it shall not be necessary for an expert to testify that the medical charges were reasonable and necessary. Bouldin v. Baum, 134 Ga. App. 484, 214 S.E.2d 734, 1975 Ga. App. LEXIS 2049 (1975) (decided under former Code 1933, § 38-706.1).

Authentication of canceled checks. — Former statute did not mention authentication of canceled checks and, as a result, canceled checks could be authenticated in the traditional manner. Piggly-Wiggly S., Inc. v. Tucker, 139 Ga. App. 873, 229 S.E.2d 804, 1976 Ga. App. LEXIS 2026 (1976) (decided under former Code 1933, § 38-706.1).

Canceled checks as evidence. — Since neither the spirit nor the literal application of the former statute placed a limitation upon the admission of canceled checks in evidence, the checks' admission would be assessed by the jury in light of testimony showing the checks had been drawn for payment of treatment of injuries which plaintiff received due to defendant's negligence. Piggly-Wiggly S., Inc. v. Tucker, 139 Ga. App. 873, 229 S.E.2d 804, 1976 Ga. App. LEXIS 2026 (1976) (decided under former Code 1933, § 38-706.1).

Testimony on reasonableness of charges. — When testimony of plaintiff describes the plaintiff's injuries arising out of an auto collision and number of visits to a named doctor for treatment and the spouse identifies the doctor's bill and states the spouse's payment thereof, it is not necessary to have the physician testify that the charges were reasonable and necessary. Rutledge v. Glass, 125 Ga. App. 549, 188 S.E.2d 261, 1972 Ga. App. LEXIS 1400 (1972) (decided under former Code 1933, § 38-706.1).

Testimonial foundation was sufficient for the admission of evidence. — See Harper v. Samples, 164 Ga. App. 511, 298 S.E.2d 29, 1982 Ga. App. LEXIS 2849 (1982) (decided under former O.C.G.A. § 24-7-9); Zack's Properties, Inc. v. Gafford, 241 Ga. App. 43, 526 S.E.2d 80 (decided under former O.C.G.A. § 24-7-9).

Testimonial foundation was insufficient for admission of evidence. — Plaintiff in a personal injury action failed to lay the proper foundation for admission of a summary of plaintiff's medical expenses, where the plaintiff introduced a summary sheet that listed only the medical providers by name, a range of dates, the total amount per provider, and the final total of services from multiple sources, but the plaintiff admitted that the plaintiff did not and could not compile the totals, and the plaintiff did not provide specific testimony substantiating the vari-

ous subtotals. Hossain v. Nelson, 234 Ga. App. 792, 507 S.E.2d 243 (decided under former O.C.G.A. § 24-7-9).

Error in admission of bills held harmless. — See Binns v. Metropolitan Atlanta Rapid Transit Auth., 168 Ga. App. 261, 308 S.E.2d 674, 1983 Ga. App. LEXIS 2745 (1983), aff'd, 252 Ga. 289, 313 S.E.2d 104, 1984 Ga. LEXIS 688 (1984) (decided under former O.C.G.A. § 24-7-9).

Medical bills not speculative evidence. — In a personal injury suit brought by a married couple, evidence of the cost of medical treatment that the injured spouse received from all of the various medical providers was not speculative and was properly considered by the jury when the injured spouse testified as to the medical treatment received and introduced the medical bills into evidence. Hart v. Shergold, 295 Ga. App. 94, 670 S.E.2d 895, 2008 Ga. App. LEXIS 1364 (2008), cert. denied, No. S09C0582, 2009 Ga. LEXIS 230 (Ga. Apr. 20, 2009) (decided under former O.C.G.A. § 24-7-9).

Expert medical testimony not required to withstand defendant's motion for directed verdict. — Causal connection, requiring expert medical testimony, must be established when the "potential continuance of a disease" is at issue. However, if there is no significant lapse of time between the injury sustained and the onset of the physical condition for which the injured party seeks compensation, and the injury sustained is a matter which jurors must be credited with knowing by reason of common knowledge, expert medical testimony is not required in order for a plaintiff to establish a personal injury case sufficient to withstand a defendant's motion for directed verdict. Jordan v. Smoot, 191 Ga. App. 74, 380 S.E.2d 714, 1989 Ga. App. LEXIS 475 (1989) (decided under former O.C.G.A. § 24-7-9).

Clarification of opposing counsel's semantics argument did not impact testimony on medical bills. — In a premises liability case, the trial court did not prevent an invitee from identifying the invitee's medical bills through the invitee's own testimony. This contention was clearly belied by the record which demonstrated that the trial court simply clarified opposing counsel's semantics argument but allowed the invitee to testify regarding the invitee's medical bills and the total dollar amount incurred. Fuller v. Flash Foods, Inc., 298 Ga. App. 217, 679 S.E.2d 775, 2009 Ga. App. LEXIS 632 (2009), cert. denied, No. S09C1670, 2009 Ga. LEXIS 549 (Ga. Sept. 8, 2009) (decided under former O.C.G.A. § 24-7-9).

RESEARCH REFERENCES

ALR.

Admissibility in personal injury action of hospital or other medical bill which includes expenses for treatment of condition unrelated to injury, 89 A.L.R.3d 1012.

24-9-922. Proof of laws, records, nonjudicial records, or books of other states, territories, or possessions; full faith and credit.

The acts of the legislature of any other state, territory, or possession of the United States, the records and judicial proceedings of any court of any such state, territory, or possession, and the nonjudicial records or books kept in the public offices in any such state, territory, or possession, if properly authenticated, shall have the same full faith and credit in every court within this state as they have by law or usage in the courts of such state, territory, or possession from which they are taken.

History.

Code 1981, § 24-9-922, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-7-24, which contained comparable provisions to this

Code section, as effective January 1, 2013, was derived in part from 28 U.S.C. § 1738.

Law reviews.

For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982).

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1890-91, p. 109, § 1, former Civil Code 1895, §§ 5216, 5237, former Civil Code 1910, §§ 5803, 5824, former Code 1933, §§ 38-606, 38-627, 38-630, and former O.C.G.A. §§ 24-7-24 and 24-7-25 are included in the annotations for this Code section.

In general. — It was usually considered that a substantial compliance with the terms of the former statute was sufficient. Drake v. Drake, 187 Ga. 423, 1 S.E.2d 573, 1939 Ga. LEXIS 430 (1939) (decided under former Code 1933, § 38-627).

Provisions not exclusive. — Former statute was not exclusive but cumulative of the method authorized by statute. Sloan v. Wolfsfeld, 110 Ga. 70, 35 S.E. 344, 1900 Ga. LEXIS 327 (1900) (decided under former Civil Code 1895, § 5237); Seaboard Air-Line Ry. v. Phillips, 117 Ga. 98, 43 S.E. 494, 1903 Ga. LEXIS 161 (1903) (decided under former Civil Code 1895, § 5237); Missouri State Life Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S.E. 93, 1907 Ga. App. LEXIS 260 (1907) (decided under former Civil Code 1895, § 5237).

Choice of Law

Georgia law applies in absence of proof of foreign law. — Although an insurance policy provided that the policy should be construed pursuant to another state's law, upon the failure to prove that state's law as required by former O.C.G.A. § 24-7-24 (see now O.C.G.A. § 24-9-902), the law of Georgia was applied. General Am. Life Ins. Co. v. Samples, 167 Ga. App. 622, 307 S.E.2d 51, 1983 Ga. App. LEXIS 2561 (1983) (decided under former O.C.G.A. § 24-7-24).

In an action to domesticate a New York default judgment, the trial court properly applied Georgia law because the judgment debtor did not give written notice of intent to rely on foreign law pursuant to O.C.G.A. § 9-11-43(c), nor did the debtor prove New York law as required by former O.C.G.A. § 24-7-24 (see now O.C.G.A. § 24-9-902). Giarratano v. Glickman, 232 Ga. App. 75, 501 S.E.2d 266, 1998 Ga. App. LEXIS 582 (1998) (decided under former O.C.G.A. § 24-7-24).

Georgia law applied in an action arising out of a Louisiana divorce decree because neither party met the requirements in O.C.G.A. § 9-11-43(c) and former O.C.G.A. § 24-7-24 (see now O.C.G.A. § 24-9-902) that the parties give notice and thereafter prove the law of another state. Davis v. Davis, 310 Ga. App. 512, 713 S.E.2d 694, 2011 Ga. App. LEXIS 604 (2011) (decided under former O.C.G.A. § 24-7-24).

Child support orders. — Courts of this state are required to give full faith and credit to child support orders from other states that satisfy the jurisdictional

due process standards of the federal Full Faith and Credit for Child Support Orders Act (28 U.S.C. § 1738B). Georgia Dep't of Human Resources v. Pinter, 241 Ga. App. 10, 525 S.E.2d 715 (decided under former O.C.G.A. § 24-7-24).

Adoption proceedings. — Relatives of the mother of a child born with Fetal Alcohol Syndrome were not required to comply with the requirements of O.C.G.A. § 19-8-7, as the father's relinquishment of his rights was valid because it was knowingly and voluntarily made in accordance with New Mexico law pursuant to former O.C.G.A. § 24-7-24 (see now O.C.G.A. § 24-9-902). Rokowski v. Gilbert, 275 Ga. App. 305, 620 S.E.2d 509, 2005 Ga. App. LEXIS 953 (2005), cert. denied, No. S06C0163, 2006 Ga. LEXIS 27 (Ga. Jan. 17, 2006) (decided under former O.C.G.A. § 24-7-24).

Responsibility on party wishing to raise foreign law issue. — Notice of intent was required to raise an issue of foreign law, to establish such law by compliance with statutory means (O.C.G.A. § 9-11-43(c) and former O.C.G.A. §§ 24-1-4 and 24-7-24 (see now O.C.G.A. § 24-9-902)), or cause a duty to be imposed on a court to judicially recognize any relevant, existing foreign law. Samay v. Som, 213 Ga. App. 812, 446 S.E.2d 230, 1994 Ga. App. LEXIS 737 (1994), cert. denied, No. S94C1694, 1994 Ga. LEXIS 1132 (Ga. Oct. 28, 1994) (decided under former O.C.G.A. §§ 24-1-4 and 24-7-24).

Authentication not exclusive means of proving law. — Authentication of foreign law pursuant to former O.C.G.A. § 24-7-24 (see now O.C.G.A. § 24-9-902) rendered that evidence of foreign law admissible, and perhaps constituted the most certain method of proving foreign law, but it was not the exclusive means of introducing foreign law in a case. Meeker v. Eufaula Bank & Trust, 208 Ga. App. 702, 431 S.E.2d 475, 1993 Ga. App. LEXIS 544 (1993) (decided under former O.C.G.A. § 24-7-24).

Judicial cognizance taken of substantive Alabama law. — Presenting copies of relevant portions of the Code of Alabama and copies of two decisions of the Alabama Supreme Court published in the Southern Reporter, and requesting that the trial court take judicial notice of the Alabama law, permitted judicial cognizance of the substantive Alabama law. Meeker v. Eufaula Bank & Trust, 208 Ga. App. 702, 431 S.E.2d 475, 1993 Ga. App. LEXIS 544 (1993) (decided under former O.C.G.A. § 24-7-24).

Foreign Judgments

Lack of jurisdiction not appearing on face of judgment. — Judgment creditor's evidence showed a prima facie case for domestication where judgment creditor produced an authenticated copy of its Louisiana judgment and the lack of jurisdiction did not appear on the face of the judgment nor did any fact regarding judgment debtor's possible nonresidency. Toledo Center Floor Covering, Inc. v. Richfield Carpet Mills, Inc., 176 Ga. App. 400, 336 S.E.2d 320, 1985 Ga. App. LEXIS 2336 (1985) (decided under former O.C.G.A. § 24-7-24).

Giving effect to judgment granted in sister state. — Full faith and credit clause of the United States Constitution required the courts of this state to give effect to a judgment granted in a sister state when the same is properly proved in a proceeding in which it may be relevant. Melnick v. Bank of Highwood, 151 Ga. App. 261, 259 S.E.2d 667, 1979 Ga. App. LEXIS 2523 (1979) (decided under former Code 1933, § 38-627).

Case action summary. — Certified copy of Alabama court's case action summary was admissible as proof of defendant's status as a convicted felon in a prosecution for possession of a firearm by a convicted felon. Taylor v. State, 249 Ga. App. 5389, 548 S.E.2d 662, 2001 Ga. App. LEXIS 549 (2001) (decided under former O.C.G.A. § 24-7-24).

Prima facie case was made by alleging and proving a properly authenticated copy of the judgment itself. Melnick v. Bank of Highwood, 151 Ga. App. 261, 259 S.E.2d 667, 1979 Ga. App. LEXIS 2523 (1979) (decided under former Code 1933, § 38-627).

Judgment rendered by competent court of another state was conclusive on merits when made basis of action or defense in the courts of Georgia, and the merits could not be reinvestigated.

Foreign Judgments (Cont'd)

Melnick v. Bank of Highwood, 151 Ga. App. 261, 259 S.E.2d 667, 1979 Ga. App. LEXIS 2523 (1979) (decided under former Code 1933, § 38-627).

Foreign judgment was conclusive as to all matters which were decided or could have been heard at the time of the obtaining of the foreign judgment. Melnick v. Bank of Highwood, 151 Ga. App. 261, 259 S.E.2d 667, 1979 Ga. App. LEXIS 2523 (1979) (decided under former Code 1933, § 38-627).

Responsibility of state. — State could not by merely failing or refusing to amend the state's code place greater restrictions upon a party seeking to rely on a foreign judgment than were imposed by the procedure enacted by Congress pursuant to the provisions of the full faith and credit clause of the United States Constitution. Peeples v. Peeples, 103 Ga. App. 462, 119 S.E.2d 710, 1961 Ga. App. LEXIS 967 (1961) (decided under former Code 1933, § 38-627).

Collateral attack. — An authenticated foreign judgment did not preclude the defendant from pleading any special matter in avoidance of the judgment, such as fraud in the judgment's rendition. Potter v. Potter, 40 Ga. App. 324, 149 S.E. 579, 1929 Ga. App. LEXIS 148 (1929) (decided under former Civil Code 1910, § 5824).

Collateral attack upon a petition to domesticate a foreign judgment that was based on lack of personal jurisdiction was precluded in this state only if the defendant had appeared in the foreign court and had thus had an opportunity to litigate the issue. Maxwell v. Columbia Realty Venture, 155 Ga. App. 289, 270 S.E.2d 704, 1980 Ga. App. LEXIS 2559 (1980) (decided under former Code 1933, § 38-627).

When defense to foreign judgment is made, the responsibility of raising the issue concerning the law of the sister state is upon the plaintiff. Ramseur v. American Mgt. Ass'n, 155 Ga. App. 340, 270 S.E.2d 880, 1980 Ga. App. LEXIS 2572 (1980) (decided under former Code 1933, § 38-627).

When clerk of court in Ohio certified the records of three prior felony convictions of a person with the same name of appellant, the trial court properly admitted the records into evidence because the appellant admitted having lived in Ohio at the time of the convictions and the appellant's name was unusual; moreover, this gave the jury a sufficient basis to find that the appellant actually was a convicted felon for impeachment purposes. Wyley v. State, 169 Ga. App. 106, 311 S.E.2d 530, 1983 Ga. App. LEXIS 3457 (1983) (decided under former O.C.G.A. § 24-7-24).

Certified copies of a defendant's out-of-state judgment of conviction, associated complaint, and plea hearing transcript were properly admitted into evidence to show that the defendant was a convicted felon for purposes of O.C.G.A. § 16-11-131, which prohibits possession of a firearm by a convicted felon. Warren v. State, 289 Ga. App. 481, 657 S.E.2d 533, 2008 Ga. App. LEXIS 20 (2008), cert. denied, No. S08C0978, 2008 Ga. LEXIS 508 (Ga. June 2, 2008), overruled, Hill v. State, 360 Ga. App. 143, 860 S.E.2d 893, 2021 Ga. App. LEXIS 318 (2021) (decided under former O.C.G.A. § 24-7-24).

In suit to domesticate default judgment rendered against defendant in another state, summary judgment was not authorized, it appearing that the copy of the foreign state's return of service which was filed of record in the Georgia case was not properly certified, in that it was not accompanied by the certificate of a judge to the effect that the attestation of the clerk was in proper form, nor was the seal of the foreign court affixed to the clerk's attestation. Moore v. Sanford, Adams, McCullough & Beard, 171 Ga. App. 549, 320 S.E.2d 394, 1984 Ga. App. LEXIS 2263 (1984) (decided under former O.C.G.A. § 24-7-24).

Foreign order was found improperly certified in accordance with Georgia law. Southeastern Metal Prods., Inc. v. Horger, 166 Ga. App. 205, 303 S.E.2d 536, 1983 Ga. App. LEXIS 2102 (1983) (decided under former O.C.G.A. § 24-7-24).

Without an original signature or court seal, a foreign divorce decree did not meet the statutory requirements for proper domestication. Henderson v. Justice, 223 Ga. App. 591, 478 S.E.2d 434 (decided under former O.C.G.A. § 24-7-24).

Full Faith and Credit Granted

Properly exemplified acts, records, and judicial proceedings or copies thereof shall have the same full faith and credit in every court within this state as those documents have by law or usage in the courts of the state from which those documents are taken. Van Buskirk v. Great Am. Bank, 175 Ga. App. 101, 332 S.E.2d 394, 1985 Ga. App. LEXIS 2031 (1985) (decided under former O.C.G.A. § 24-7-24).

Bankruptcy proceedings. — See Venable v. Venable, 153 Ga. 689, 112 S.E. 891, 1922 Ga. LEXIS 150 (1922) (decided under former Civil Code 1910, § 5824).

Divorce decrees. — See Beggs v. Beggs, 208 Ga. 415, 67 S.E.2d 135, 1951 Ga. LEXIS 381 (1951) (decided under former Code 1933, § 38-627); Parker v. Parker, 233 Ga. 434, 211 S.E.2d 729, 1975 Ga. LEXIS 1332 (1975) (decided under former Code 1933, § 38-627).

Letters of administration. — See Stewart v. Fisher, 18 Ga. App. 519, 89 S.E. 1052, 1916 Ga. App. LEXIS 1083 (1916) (decided under former Civil Code 1910, § 5824).

Prior criminal conviction. — See Strong v. State, 232 Ga. 294, 206 S.E.2d 461, 1974 Ga. LEXIS 932 (1974) (decided under former Code 1933, § 38-627).

Wills. — See White v. First Nat'l Bank, 174 Ga. 281, 162 S.E. 701, 1932 Ga. LEXIS 39 (1932) (decided under former Civil Code 1910, § 5824); Blackwell v. Grant, 46 Ga. App. 241, 167 S.E. 333, 1933 Ga. App. LEXIS 10 (1933) (decided under former Code 1933, § 38-627); Tripp v. Hutchings, 214 Ga. 330, 104 S.E.2d 423, 1958 Ga. LEXIS 416 (1958) (decided under former Code 1933, § 38-627).

When the clerk's certificate was incomplete, the docket of mayor's court was not given full faith and credit. Mason v. Nashville, C. & St. L. Ry., 135 Ga. 741, 70 S.E. 225, 1911 Ga. LEXIS 71 (1911) (decided under former Civil Code 1910, § 5824).

State records. — Full faith and credit statute applied only to state records and proceedings. Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24, 1946 Ga. LEXIS 432 (1946) (decided under former Code 1933, § 38-630).

Judicial records and proceedings. — See Jackson v. Johnson, 67 Ga. 167, 1881 Ga. LEXIS 149 (1881) (decided under former law); Tharpe v. Pearce, 89 Ga. 194, 15 S.E. 46, 1892 Ga. LEXIS 302 (1892) (decided under former law); McFarland v. Fricks, 99 Ga. 104, 24 S.E. 868, 1896 Ga. LEXIS 212 (1896) (decided under former Civil Code 1895, § 5237); Sloan v. Wolfsfeld, 110 Ga. 70, 35 S.E. 344, 1900 Ga. LEXIS 327 (1900) (decided under former Civil Code 1895, § 5237); Hope v. First Nat'l Bank, 142 Ga. 310, 82 S.E. 929, 1914 Ga. LEXIS 694 (1914) (decided under former Civil Code 1910, § 5824); Parker v. Cramton, 143 Ga. 421, 85 S.E. 338, 1915 Ga. LEXIS 470 (1915) (decided under former Civil Code 1910, § 5824); Clein v. Diamond, 17 Ga. App. 652, 87 S.E. 1101, 1916 Ga. App. LEXIS 834 (1916) (decided under former Civil Code 1910, § 5824); Sullivan v. Douglas Gibbons, Inc., 58 Ga. App. 708, 199 S.E. 554, 1938 Ga. App. LEXIS 105 (1938), aff'd, 187 Ga. 764, 2 S.E.2d 89, 1939 Ga. LEXIS 459 (1939); Brown v. Beckner, 60 Ga. App. 827, 5 S.E.2d 409, 1939 Ga. App. LEXIS 182 (1939) (decided under former Code 1933, § 38-627); Roadway Express, Inc. v. McBroom, 61 Ga. App. 223, 6 S.E.2d 460, 1939 Ga. App. LEXIS 262 (1939) (decided under former Code 1933, § 38-627); Minor v. Lillie Rubin, Inc., 84 Ga. App. 112, 65 S.E.2d 691, 1951 Ga. App. LEXIS 644 (1951) (decided under former Code 1933, § 38-627); Albert v. Albert, 86 Ga. App. 560, 71 S.E.2d 904, 1952 Ga. App. LEXIS 1009 (1952) (decided under former Code 1933, § 38-627); Soman v. Yeager, 209 Ga. 444, 73 S.E.2d 198, 1952 Ga. LEXIS 525 (1952) (decided under former Code 1933, § 38-627); Peeples v. Peeples, 103 Ga. App. 462, 119 S.E.2d 710, 1961 Ga. App. LEXIS 967 (1961) (decided under former Code 1933, § 38-627); Kelly v. Kelly, 115 Ga. App. 700, 155 S.E.2d 732, 1967 Ga. App. LEXIS 1212 (1967) (decided under former Code 1933, § 38-627); Ramseur v. American Mgt. Ass'n, 155 Ga. App. 340, 270 S.E.2d 880, 1980 Ga. App. LEXIS 2572 (1980) (decided under former Code 1933, § 38-627); Southeastern Metal Prods., Inc. v. Horger, 175 Ga. App. 143, 332 S.E.2d 662, 1985 Ga. App. LEXIS 2041 (1985) (decided under former O.C.G.A. § 24-7-24); Smith v. Airtouch Cellular of Ga., Inc., 244 Ga. App. 71, 534

Full Faith and Credit
Granted (Cont'd)

S.E.2d 832, 2000 Ga. App. LEXIS 634 (2000), cert. denied, No. S00C1575, 2000 Ga. LEXIS 740 (Ga. Oct. 6, 2000) (decided under former O.C.G.A. § 24-7-24).

Trial court properly denied the applicants' motion to terminate a father's parental rights and denied the applicants' adoption petition because a State of Alabama paternity order obtained by the father was substantially equivalent to a Georgia legitimation order such that the father had not lost his right to contest the adoption and the father properly domesticated the Alabama order with the trial court. Park v. Bailey, 329 Ga. App. 569, 765 S.E.2d 721, 2014 Ga. App. LEXIS 742 (2014).

Full Faith and Credit Denied

Judicial record or proceedings. — See James v. Kerby, 29 Ga. 684, 1860 Ga. LEXIS 274 (1860) (decided under former law). ; See also Tharpe v. Pearce, 89 Ga. 194, 15 S.E. 46, 1892 Ga. LEXIS 302 (1892); Sloan v. Wolfsfeld, 110 Ga. 70, 35 S.E. 344, 1900 Ga. LEXIS 327 (1900) (decided under former Civil Code 1895, § 5237); Mason v. Nashville, C. & St. L. Ry., 135 Ga. 741, 70 S.E. 225, 1911 Ga. LEXIS 71 (1911) (decided under former Civil Code 1910, § 5824); Atkinson v. Atkinson, 160 Ga. 480, 128 S.E. 765, 1925 Ga. LEXIS 189 (1925) (decided under former Civil Code 1910, § 5824); King v. King, 203 Ga. 811, 48 S.E.2d 465, 1948 Ga. LEXIS 510 (1948) (decided under former Code 1933, § 38-627).

Divorce proceedings. — See Elliott v. Elliott, 181 Ga. 545, 182 S.E. 845, 1935 Ga. LEXIS 159 (1935) (decided under former Code 1933, § 38-627).

Wills. — See Youmans v. Ferguson, 122 Ga. 331, 50 S.E. 141, 1904 Ga. LEXIS 808 (1904) (decided under former Civil Code 1895, § 5237).

Court Records

Applicability. — Georgia resident's argument that the supplemental affidavit attached to the motion under the Uniform Act to Secure the Attendance of Witnesses from Without the State was inadmissible because it did not comply with former O.C.G.A. § 24-7-27 (see now O.C.G.A. § 24-9-902) failed because former § 24-7-27 provided the method for authenticating out-of-state court records and the affidavit was not a court record. Wollesen v. State, 242 Ga. App. 317, 529 S.E.2d 630, 2000 Ga. App. LEXIS 177 (2000) (decided under former O.C.G.A. § 24-7-24).

Council Records

Action of city council. — Until the contrary appeared, the action of a city council was supposed to be in writing; and its book of minutes, properly proved as such, or an exemplification of the record, certified by the clerk or keeper of such records, under seal, was the proper mode of placing the evidence before the court. Farrar Lumber Co. v. City of Dalton, 20 Ga. App. 138, 92 S.E. 946, 1917 Ga. App. LEXIS 753 (1917) (decided under former Civil Code 1910, § 5803); Mullis v. State, 197 Ga. 550, 30 S.E.2d 99, 1944 Ga. LEXIS 299 (1944) (decided under former Code 1933, § 38-606).

Original book of minutes. — Official minutes of the city council may be proved by the production of the original book of minutes identified as such by the clerk of the corporation, and shown to have come from the clerk's custody. Mullis v. State, 197 Ga. 550, 30 S.E.2d 99, 1944 Ga. LEXIS 299 (1944) (decided under former Code 1933, § 38-606).

RESEARCH REFERENCES

ALR.

Determination of question relating to foreign law as one of law or of fact, 34 A.L.R. 1447.

Conclusiveness of decision of sister state on a contested hearing as to its own jurisdiction, 52 A.L.R. 740.

Foreign judgment based upon, or which fails to give effect to, a judgment previously rendered at the forum, or in a third jurisdiction, 53 A.L.R. 1146.

Construction and effect of foreign statutes or judicial decisions as question for court or for jury, 68 A.L.R. 809.

Judgment or order upholding prior judgment in the same state against direct attack upon ground of lack of jurisdiction, as conclusive in another state under the full faith and credit provision or doctrine of res judicata, 104 A.L.R. 1187.

Full faith and credit provision as affecting insurance contracts, 119 A.L.R. 483; 173 A.L.R. 1138.

Right to maintain action or proceeding in one state or country to collect or enforce tax due to another state or country or political subdivision thereof, 165 A.L.R. 796.

24-9-923. Admissibility of photographs, motion pictures, video recordings, and audio recordings when witness unavailable.

(a) As used in this Code section, the term "unavailability of a witness" includes situations in which the authenticating witness:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the authentication;

(2) Persists in refusing to testify concerning the subject matter of the authentication despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the authentication;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the authentication has been unable to procure the attendance of the authenticating witness by process or other reasonable means.

An authenticating witness shall not be deemed unavailable as a witness if his or her exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of an authentication for the purpose of preventing the witness from attending or testifying.

(b) Subject to any other valid objection, photographs, motion pictures, video recordings, and audio recordings shall be admissible in evidence when necessitated by the unavailability of a witness who can provide personal authentication and when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered.

(c) Subject to any other valid objection, photographs, motion pictures, video recordings, and audio recordings produced at a time when the device producing the items was not being operated by an individual person or was not under the personal control or in the presence of an individual operator shall be admissible in evidence when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are

offered, provided that, prior to the admission of such evidence, the date and time of such photograph, motion picture, or video recording shall be contained on such evidence, and such date and time shall be shown to have been made contemporaneously with the events depicted in such photograph, motion picture, or video recording.

(d) This Code section shall not be the exclusive method of introduction into evidence of photographs, motion pictures, video recordings, and audio recordings but shall be supplementary to any other law and lawful methods existing in this state.

History.

Code 1981, § 24-9-923, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For article, "Understanding and Challenging Photographic Evidence: What the Camera Never Saw," see 10 Ga. St. B.J. 20 (2004).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-4-48 are included in the annotations for this Code section.

Brief nonresponsive reference to polygraph test did not open the door to the cross-examination of a witness about the witness's polygraph test; additionally, the polygraph reference did not prejudice a defendant because the reference indicated nothing about the results of the polygraph. Franks v. State, 278 Ga. 246, 599 S.E.2d 134, 2004 Ga. LEXIS 539 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784, 2005 U.S. LEXIS 568 (2005) (decided under former O.C.G.A. § 24-4-48).

Internet chat session transcript admissible. — Transcript of an internet chat session was admissible because the operator of the machine which produced the transcript, or one who personally witnessed the events recorded, testified that the videotape accurately portrayed what the witness saw take place at the time the events occurred. Ford v. State, 274 Ga. App. 695, 617 S.E.2d 262, 2005 Ga. App. LEXIS 763 (2005), cert. denied, No. S05C1921, 2005 Ga. LEXIS 789 (Ga. Nov. 7, 2005) (decided under former O.C.G.A. § 24-4-48).

Transcript of an Internet chat room conversation between defendant and a police officer, posing as a 14-year-old girl, was properly admitted as similar transaction evidence in defendant's trial for pimping, contributing to the delinquency of a minor, and sexual exploitation of a minor; the officer was present to testify, personally witnessed the real-time chat recorded in the transcript as it was taking place, and testified that the transcript accurately represented the on-line conversation; the officer's testimony was tantamount to that of a witness to an event and was sufficient to authenticate the transcript. Ford v. State, 274 Ga. App. 695, 617 S.E.2d 262, 2005 Ga. App. LEXIS 763 (2005), cert. denied, No. S05C1921, 2005 Ga. LEXIS 789 (Ga. Nov. 7, 2005) (decided under former O.C.G.A. § 24-4-48).

Audiotapes

9-1-1 call admissible. — An audiotape of a witness's 9-1-1 emergency telephone call that was admitted into evidence without meeting foundation requirements was properly authenticated by testimony of the witness that the witness had reviewed the tape and that the tape accurately portrayed the conversation the witness had with the 9-1-1 operator, with no deletions, additions, or alterations. Hudson v. State, 273 Ga. 124, 538 S.E.2d 751, 2000 Ga. LEXIS 856 (2000) (decided under former O.C.G.A. § 24-4-48).

Audiotape of two 9-1-1 calls was properly admitted into evidence since the records custodian of the county 9-1-1 communications bureau presented detailed testimony as to the process used in producing both the original audiotapes and the copy admitted into evidence, the records custodian explained that calls are automatically recorded without the intervention of the 9-1-1 operator, and the records custodian further testified that the copy was a true and correct copy of the original recording. Shaw v. State, 247 Ga. App. 867, 545 S.E.2d 399, 2001 Ga. App. LEXIS 146 (2001) (decided under former O.C.G.A. § 24-4-48).

Although the 9-1-1 operator did not speak Spanish, because the operator reviewed the recording, identified the recording as a fair and accurate reproduction of the call with no additions or deletions, recognized the operator's own voice, and identified the interpreter's voice, the trial court did not abuse the court's discretion when the court admitted the recording of the 9-1-1 call, regardless of the operator's inability to understand the Spanish portions of the recorded conversation. Rodriguez-Nova v. State, 295 Ga. 868, 763 S.E.2d 698, 2014 Ga. LEXIS 818 (2014) (decided under former O.C.G.A. § 24-4-48).

Audiotape of deceased victim admissible. — With regard to a defendant's convictions for malice murder and kidnapping with bodily injury as a result of the defendant killing a former girlfriend who was also the mother of the defendant's two children, the trial court did not err by admitting an audiotape of a telephone conversation between the victim and the defendant since the state laid a proper foundation for the admission of the audiotape by adequately demonstrating that the victim was the person who made the tape, the victim was a party to the conversation, and the tape was not inadmissible under O.C.G.A. § 16-11-62. Griffin v. State, 282 Ga. 215, 647 S.E.2d 36, 2007 Ga. LEXIS 482 (2007), overruled in part, Garza v. State, 284 Ga. 696, 670 S.E.2d 73, 2008 Ga. LEXIS 865 (2008) (decided under former O.C.G.A. § 24-4-48).

Proper foundation for admission of audiotape. — Deed grantee laid a proper foundation pursuant to former O.C.G.A. § 24-4-48(c) (see now O.C.G.A. § 25-9-923) for purposes of admission of an audiotape in a deed grantor's action to set aside the deed since the grantee testified that the tape was of a voice mail left on a cell phone that went unanswered, and that the voice on the tape was that of the grantor. Dae v. Patterson, 295 Ga. App. 818, 673 S.E.2d 306, 2009 Ga. App. LEXIS 83 (2009), cert. dismissed, No. S09C1048, 2009 Ga. LEXIS 756 (Ga. May 18, 2009), overruled in part, Southall v. State, 300 Ga. 462, 796 S.E.2d 261, 2017 Ga. LEXIS 33 (2017) (decided under former O.C.G.A. § 24-4-48).

Proper foundation for admission of automated recording. — Evidence of a recording of a phone call made from the county jail in which the defendant admitted that the defendant was at the house where the victim was shot at the time of the murder was admissible as competent evidence tended to show reliably that the automated recording was in fact a recording of the phone call that the defendant made from jail because the state showed, through the testimony of a lieutenant that the jail recording system accurately recorded phone calls and that the system recorded the defendant's phone call at the time that the call was made; and an investigator with the Georgia Bureau of Investigation, who knew the defendant's voice, testified that the man in the recording sounded like the defendant. Jones v. State, 299 Ga. 40, 785 S.E.2d 886, 2016 Ga. LEXIS 353 (2016).

Improper foundation for admission of audiotape in controlled drug buy. — Trial court erred in admitting an audiotape recording of a controlled drug sale by

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a confidential informant (CI) with defendant as neither party to the sale testified as to the authenticity and accuracy of the recording, and former O.C.G.A. § 24-4-48 could not be the vehicle by which the tape was admitted because the essential criterion, the unavailability of an authenticating witness, could not be met; another audiotape of a second controlled buy was properly admitted as a police officer who listened to the transaction via a bug that had been attached to the CI testified that the tape recording was a fair and accurate portrayal of the conversation. Brown v. State, 274 Ga. App. 302, 617 S.E.2d 227, 2005 Ga. App. LEXIS 726 (2005), cert. denied, No. S05C1902, 2005 Ga. LEXIS 734 (Ga. Oct. 24, 2005) (decided under former O.C.G.A. § 24-4-48).

Claim of error in admission of tape rejected. — Defendant's claim that an audiotape was improperly admitted into evidence was rejected as defendant did not include the tape in the record and defendant failed to specify the harm that resulted from any error in admitting the tape. Dupree v. State, 267 Ga. App. 561, 600 S.E.2d 654, 2004 Ga. App. LEXIS 711 (2004) (decided under former O.C.G.A. § 24-4-48).

Transcript of audiotape and photographs. — Since a proper foundation for a transcript of defendant's statements to the police was laid by the trial court properly informing the jury that the transcript was not to be considered independent evidence, and that the jury had to return the transcript after listening to an audiotape thereof, admission of the transcript was proper; in addition, the photographs of the victim, which were not unduly gruesome or prejudicial, were admissible. Palmer v. State, 277 Ga. 124, 587 S.E.2d 1, 2003 Ga. LEXIS 791 (2003) (decided under former O.C.G.A. § 24-4-48).

Photos

Proper foundation for admission of photo. — Since the defendant failed to establish the photo's origins or source, and also failed to connect the photo to the threatening letters defendant claimed defendant received while in jail, under former O.C.G.A. § 24-4-48(b), the trial court did not abuse the court's discretion in finding that a proper foundation was not laid for the photo's admission. Sweet v. State, 276 Ga. 545, 580 S.E.2d 231, 2003 Ga. LEXIS 373 (2003) (decided under former O.C.G.A. § 24-4-48).

Defendant's motion for a mistrial based on the admission of a photograph of the victim's head was not an abuse of discretion as: (1) if pre-autopsy photographs were relevant and material to any issue in the case, they were admissible even if they were duplicative and might inflame the jury; (2) photographs showing the extent and nature of the victim's wounds were material and relevant, even if the cause of death was not in dispute; (3) the state had the burden to prove beyond a reasonable doubt that the defendant caused the death of the victim with malice aforethought; and (4) the photograph was relevant to the state's claim that the defendant had done so by shooting a single shot into the victim's head with a .38 revolver. Bradley v. State, 281 Ga. 173, 637 S.E.2d 19, 2006 Ga. LEXIS 886 (2006) (decided under former O.C.G.A. § 24-4-48).

It was within the broad discretion of the trial court to allow photographs to be introduced to show the locations of two docks during the time frames testified to by a landowner because notwithstanding that the witness who obtained the photographs did not have the exact same aerial view as the tendered photographs, the witness explained the basis for the testimony as to the date of the photographs and testified that the photographs accurately depicted those locations as of those time periods. Dillon v. Reid, 312 Ga. App. 34, 717 S.E.2d 542, 2011 Ga. App. LEXIS 882 (2011) (decided under former O.C.G.A. § 24-4-48).

Child victim provided proper foundation. — Photos that were introduced not to show that they accurately represented the sexual events depicted, but rather to show that the defendant possessed sexually explicit photographs, were admissible after the photos were identified by the child victim as being photographs shown to the victim by the defendant and by other witnesses as the photos

shown to the child victim on the defendant's computer. Abernathy v. State, 278 Ga. App. 574, 630 S.E.2d 421, 2006 Ga. App. LEXIS 380 (2006), cert. denied, No. S06C1377, 2006 Ga. LEXIS 693 (Ga. Sept. 8, 2006) (decided under former O.C.G.A. § 24-4-48).

Trial court did not abuse the court's discretion in admitting numerous sexually explicit photographs and several video recordings into evidence as they were authenticated by showing the photographs to either minor victim during their testimony and having them identify themselves as being fairly depicted therein; in addition, both victims also testified that they viewed the digital video recordings prior to the admission of that evidence and were able to recognize themselves as being fairly depicted in those recordings. Walthall v. State, 281 Ga. App. 434, 636 S.E.2d 126, 2006 Ga. App. LEXIS 1121 (2006) (decided under former O.C.G.A. § 24-4-48).

No foundation for admission of photo. — Trial court properly refused to admit photos of a subdivision, tendered by a utility to rebut testimony by the condemnees' appraiser that property around power lines was usually the last piece of residential property to be developed, and was usually relegated to low income housing because the utility (1) failed to authenticate the pictures by showing the identity or address of the subdivision; (2) failed to present any evidence as to the value of the property in the pictures; and (3) failed to demonstrate whether the subdivision was built before or after the power lines were installed. Ga. Power Co. v. Jones, 277 Ga. App. 332, 626 S.E.2d 554, 2006 Ga. App. LEXIS 93 (2006), cert. denied, No. S06C0985, 2006 Ga. LEXIS 359 (Ga. May 18, 2006) (decided under former O.C.G.A. § 24-4-48).

Trial court erred in allowing an officer to identify the defendant in two surveillance photographs, based on the officer's familiarity with the defendant's appearance and absent a change in the defendant's appearance, because the testimony was offered to establish a fact which the jurors could decide for themselves; hence, the evidence was erroneously admitted as invading the jury's province to decide the issue. Mitchell v. State, 283 Ga. App. 456, 641 S.E.2d 674, 2007 Ga. App. LEXIS 86 (2007), superseded by statute as stated in Goforth v. State, 360 Ga. App. 832, 861 S.E.2d 800, 2021 Ga. App. LEXIS 400 (2021), superseded by statute as stated in Anderson v. State, 313 Ga. 178, 869 S.E.2d 401, 2022 Ga. LEXIS 33 (2022) (decided under former O.C.G.A. § 24-4-48).

Photos of a deceased body. — Photographs of a victim's body after the body had been taken to the crime lab were material, relevant, and admissible as the photographs showed the location, nature, and extent of the victim's multiple gunshot wounds. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639, 2006 Ga. LEXIS 927 (2006) (decided under former O.C.G.A. § 24-4-48).

Trial court did not err in admitting two post-incision autopsy photographs of the victim, despite the fact that the depicted injuries might not have been the direct cause of the victim's death, as the internal injuries could not have been shown by photographs of the outside of the body and were material in corroborating the details of the assault on the victim, which ultimately resulted in death. Lyons v. State, 282 Ga. 588, 652 S.E.2d 525, 2007 Ga. LEXIS 781 (2007), overruled in part, Garza v. State, 284 Ga. 696, 670 S.E.2d 73, 2008 Ga. LEXIS 865 (2008) (decided under former O.C.G.A. § 24-4-48).

In a defendant's prosecution for, inter alia, felony murder, a photograph of the victim's body just prior to the beginning of the autopsy did not violate the rule pertaining to post-autopsy incision photographs as the incision marks shown related to an organ harvest after attempts to keep the victim alive failed; photographs that displayed the body's exposed rib cage and the calcification of ribs broken weeks before the victim's death were also properly admitted as those injuries formed the basis of charges against the defendant of cruelty to a child and aggravated assault, separate from the acts that immediately caused the victim's death. Berryhill v. State, 285 Ga. 198, 674 S.E.2d 920, 2009 Ga. LEXIS 100 (2009) (decided under former O.C.G.A. § 24-4-48).

Photographs properly admitted. — In a boundary line dispute, the fact that the surveyor who prepared an exhibit de-

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picting the area at issue did not testify, and that the exhibit did not contain a surveyor's stamp or signature, was not certified or authenticated, was not incorporated into a deed, and was labeled "not to scale," did not preclude the exhibit's admission. It was an aerial photo that a defendant used to explain the defendant's testimony about the defendant's understanding of the location of the boundary line and, thus, was properly admitted. Griggs v. Fletcher, 294 Ga. App. 60, 668 S.E.2d 521, 2008 Ga. App. LEXIS 1104 (2008) (decided under former O.C.G.A. § 24-4-48).

Videotapes

Videotape without authentication insufficient. — Introduction into evidence of videotapes, depicting a male and female engaged in sexual activity, without authentication by the operator of the machine which produced the videotapes, or by one who personally witnessed the events recorded, was error and required reversal of convictions for aggravated child molestation and sexual exploitation of a child. Phagan v. State, 268 Ga. 272, 486 S.E.2d 876 (decided under former O.C.G.A. § 24-4-48).

First and third portions of a videotape were not properly authenticated under former O.C.G.A. § 24-4-48, as the subject child molestation victims were not sleeping in these segments of the videotape, and the victims, both of whom testified at trial, were available to authenticate these portions of the videotape; neither child was asked during testimony to confirm that the videotape accurately portrayed the events the children had witnessed. Smith v. State, 285 Ga. App. 658, 647 S.E.2d 346, 2007 Ga. App. LEXIS 616 (2007) (decided under former O.C.G.A. § 24-4-48).

Evidence sufficient to authenticate videotape. — To establish that tape was taken from a surveillance camera at the scene of the crime, testimony of the store supervisor, the agent who found the tape, the forensic photographer who repaired the tape, and the investigator who created the state's exhibit was sufficient authentication. Tolver v. State, 269 Ga. 530, 500 S.E.2d 563 (decided under former O.C.G.A. § 24-4-48).

Surveillance tape of a convenience store robbery was admissible into evidence because, even though the tape showed the wrong date because a store employee did not know how to properly set the videorecorder, the tape was properly authenticated by the store clerk and customers that were in the store during the robbery. Wallace v. State, 267 Ga. App. 801, 600 S.E.2d 808, 2004 Ga. App. LEXIS 809 (2004) (decided under former O.C.G.A. § 24-4-48).

Since the victim was semiconscious at the time of acts of alleged child molestation due to drug and alcohol use, the victim was an unavailable witness under former O.C.G.A. § 24-4-48 for purposes of authenticating a videotape found at the scene; however, the trial court did not err in admitting the videotape because, in a pretrial statement to police, the defendant acknowledged that the victim had performed oral sex on the defendant on the evening in question and did not dispute the accuracy of the tape's depiction of it, the victim identified herself on the tape, another victim was identified on the videotape by the victim's mother, and another attendee at the party identified herself on the videotape. Wilson v. State, 279 Ga. App. 459, 631 S.E.2d 391, 2006 Ga. App. LEXIS 483 (2006), cert. denied, No. S06C1689, 2006 Ga. LEXIS 1036 (Ga. Oct. 2, 2006) (decided under former O.C.G.A. § 24-4-48).

Trial court was authorized to find that a segment of a videotape reliably showed the facts for which the videotape was offered and was admissible under former O.C.G.A. § 24-4-48(b); that a child molestation victim appeared on the tape and that the defendant made the tape was shown by the testimony of the investigating officer, who identified the victim and who recognized the defendant's voice on the segment of the tape showing the victim to be asleep. Smith v. State, 285 Ga. App. 658, 647 S.E.2d 346, 2007 Ga. App. LEXIS 616 (2007) (decided under former O.C.G.A. § 24-4-48).

Fast food restaurant video surveillance tape was properly admitted under former

O.C.G.A. § 24-4-48(d), although the tape lacked date and time stamps, because other evidence authenticated the tape, including identification of the tape by a police officer who saw the tape, date and time stamps on still photographs from the tape, and the tape's corroboration of an employee's description of events. Dixon v. State, 300 Ga. App. 183, 684 S.E.2d 679, 2009 Ga. App. LEXIS 1119 (2009) (decided under former O.C.G.A. § 24-4-48).

Video recording was properly admitted as the complaining witness testified that the witness personally transferred the video from the victim's home security system to the disc the witness presented to the court and that the video accurately depicted the incident on the date in question. Birdsong v. Barnett, 334 Ga. App. 120, 778 S.E.2d 372, 2015 Ga. App. LEXIS 583 (2015).

Date and time stamp on videotape. — Defendant argued only that a proper foundation was not laid under former O.C.G.A. § 24-4-48(c) because no competent witness testified as to the date and time of the tape; however, since the videotape was not admitted under that portion of the former statute which required a date and time on such evidence, that enumeration of error presented nothing for review. Rogers v. State, 294 Ga. App. 195, 670 S.E.2d 106, 2008 Ga. App. LEXIS 1135 (2008) (decided under former O.C.G.A. § 24-4-48).

Defendant's conviction for malice murder and other crimes was affirmed because even if evidence of social media videos purportedly of gang activity were not properly authenticated, any error was harmless based on several eyewitnesses who saw the defendant at the scene of the murder, one saw the defendant shoot the victim, and several witnesses were able to identify the defendant as the shooter from mall surveillance videos. Moore v. State, 305 Ga. 251, 824 S.E.2d 377, 2019 Ga. LEXIS 95 (2019).

Under plain error review, the admission of mall surveillance video recordings was not in error because the state presented testimony of eyewitnesses to events to authenticate two mall surveillance video recordings. Moore v. State, 305 Ga. 251, 824 S.E.2d 377, 2019 Ga. LEXIS 95 (2019).

Admitted to authenticate videotape. — Trial court did not abuse the court's discretion when the court found that the state exercised due diligence in attempting to locate a robbery victim who had moved or by allowing a police officer to testify about out-of-court statements the victim made after a robbery to authenticate a videotape showing the robbery. Fernandez v. State, 263 Ga. App. 750, 589 S.E.2d 309, 2003 Ga. App. LEXIS 1307 (2003) (decided under former O.C.G.A. § 24-4-48).

Defendant unavailable as authenticating witness due to right against self-incrimination. — Child pornography defendant was deemed unavailable as an authenticating witness of seized photographic and videotape evidence against the defendant because defendant could not be compelled to testify due to the constitutional right against self-incrimination; but even though defendant was unavailable, the evidence was admissible through the testimony of the seizing officers. Craft v. State, 252 Ga. App. 834, 558 S.E.2d 18, 2001 Ga. App. LEXIS 1432 (2001), cert. denied, No. S02C0654, 2002 Ga. LEXIS 418 (Ga. May 13, 2002), cert. denied, 537 U.S. 1025, 123 S. Ct. 537, 154 L. Ed. 2d 437, 2002 U.S. LEXIS 8433 (2002) (decided under former O.C.G.A. § 24-4-48).

Videotaped statement of testifying witness properly admitted. — Defendant's right of confrontation was not violated by the admission of a videotaped statement of a witness, who did not remain silent at the trial, and who completely denied making any statement to the police regarding the murder. Wilson v. State, 277 Ga. 114, 587 S.E.2d 9, 2003 Ga. LEXIS 777 (2003) (decided under former O.C.G.A. § 24-4-48).

Surveillance videotape was properly admitted, and the trial court's reliability finding was upheld on appeal, based on the surrounding testimony, despite the fact that the state was unable to present testimony from a witness who actually observed the events transpire contemporaneously with the recording of

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the tape; moreover, the tape was not rendered inadmissible merely because the tape did not contain the date and time on which it was recorded, as such went to the weight of the evidence, and not the admissibility. Holloway v. State, 287 Ga. App. 655, 653 S.E.2d 95, 2007 Ga. App. LEXIS 1054 (2007) (decided under former O.C.G.A. § 24-4-48).

Hotel surveillance tape was properly admitted under former O.C.G.A. § 24-4-48. Testimony that security personnel in the dispatch office were not trained to operate machinery in the dispatch room and did nothing more than replace spent tapes with fresh ones established that the devices producing the images were not operated by a person or under the personal control or in the presence of an individual operator; the fact that the date-time stamp was 104 minutes "off" went to the weight of the evidence, not to the evidence's admissibility; and the purported poor quality of the recording did not preclude the tape's admissibility. Dawson v. State, 283 Ga. 315, 658 S.E.2d 755, 2008 Ga. LEXIS 257, cert. denied, 555 U.S. 871, 129 S. Ct. 169, 172 L. Ed. 2d 122, 2008 U.S. LEXIS 6812 (2008) (decided under former O.C.G.A. § 24-4-48).

Trial court did not abuse the court's discretion in admitting a videotape of the footage from surveillance cameras depicting the defendant's theft of the victim's property because the victim testified that the victim recognized oneself on the tape, and police officers testified that the officers viewed the tape at the U. S. Attorney's Office shortly after the theft. Sheppard v. State, 300 Ga. App. 631, 686 S.E.2d 295, 2009 Ga. App. LEXIS 1235 (2009) (decided under former O.C.G.A. § 24-4-48).

Trial court did not abuse the court's discretion in admitting a videotape after a detective testified that the detective retrieved the video using a system for which the detective certified that the system appeared to be working properly except that the date-time stamp was inaccurate by a time period the detective was able to determine. Brannon v. State, 298 Ga. 601, 783 S.E.2d 642, 2016 Ga. LEXIS 207 (2016).

Trial court did not abuse the court's discretion by admitting the video because the dispatcher testified as to the circumstances and was personally at the sheriff's department when the video was captured and the state's failure to produce the original recording and the dispatcher's failure to testify impacted the weight and not the admissibility of the video. Yancey v. State, 342 Ga. App. 294, 802 S.E.2d 702, 2017 Ga. App. LEXIS 342 (2017), cert. denied, No. S17C1935, 2018 Ga. LEXIS 16 (Ga. Jan. 16, 2018).

Voicemail message properly authenticated. — With regard to a defendant's murder conviction, the trial court did not err by admitting the tape of the voicemail message the defendant left on the victim's sibling's voicemail service shortly before the shooting based on the defendant's contention that the voicemail itself, as opposed to the tape of the voicemail, was not properly authenticated because competent evidence sufficient to establish the reliability of the voicemail message for purposes of authentication was admitted at trial via the testimony of the sibling as to retrieval of the message and the state presenting evidence of the phone records. Henley v. State, 285 Ga. 500, 678 S.E.2d 884, 2009 Ga. LEXIS 301, cert. denied, 558 U.S. 1076, 130 S. Ct. 800, 175 L. Ed. 2d 559, 2009 U.S. LEXIS 8805 (2009) (decided under former O.C.G.A. § 24-4-48).

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24-9-924. Admissibility of records of Department of Driver Services; admissibility of computer transmitted records.

(a) Any court may receive and use as evidence in any proceeding information otherwise admissible from the records of the Department of Public Safety or the Department of Driver Services obtained from any terminal lawfully connected to the Georgia Crime Information Center without the need for additional certification of such records.

(b) Any court may receive and use as evidence for the purpose of imposing a sentence in any criminal proceeding information otherwise admissible from the records of the Department of Driver Services obtained from a request made in accordance with a contract with the Georgia Technology Authority for immediate on-line electronic furnishing of information.

History.

Code 1981, § 24-9-924, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-3-17 are included in the annotations for this Code section.

Records obtained from Georgia Crime Information Center. — Former O.C.G.A. § 24-3-17 provided for self-authentication when the document sought to be admitted was obtained from a computer terminal lawfully connected to the Georgia Crime Information Center. Thomas v. State, 196 Ga. App. 88, 395 S.E.2d 615, 1990 Ga. App. LEXIS 830 (1990) (decided under former O.C.G.A. § 24-3-17).

There was an inadequate foundation for the introduction of an uncertified driver's record since the prosecutor merely represented in argument that the record was from a computer connected to the Georgia Crime Information Center, but no witness testified that it was so obtained. Waters v. State, 210 Ga. App. 305, 436 S.E.2d 44, 1993 Ga. App. LEXIS 1185 (1993) (decided under former O.C.G.A. § 24-3-17); Tipton v. State, 213 Ga. App. 764, 445 S.E.2d 860, 1994 Ga. App. LEXIS 703 (1994) (decided under former O.C.G.A. § 24-3-17).

An uncertified copy of defendant's driving record was properly introduced in evidence since the state adduced a sworn witness to identify the printout as a report from the Georgia Crime Information Center. Jackson v. State, 228 Ga. App. 877, 492 S.E.2d 897 (decided under former O.C.G.A. § 24-3-17).

In a prosecution for possession of vehicles with an altered vehicle identification number (VIN), the trial court prop-

erly permitted the introduction into evidence of four computer printouts that listed the make, model, VIN, and owner of four of the cars that allegedly had altered VINs where the printouts came from the Georgia Crime Information Center (GCIC) computer and the state laid a proper foundation when a certified GCIC operator testified that the computer printouts were obtained from a GCIC terminal. Brennan v. State, 247 Ga. App. 515, 544 S.E.2d 210, 2001 Ga. App. LEXIS 23 (2001) (decided under former O.C.G.A. § 24-3-17).

In a case where defendant, who had been convicted of driving with a suspended license, claimed that the state had not laid a proper legal foundation for the admission of the defendant's driving record, there was no error in the driving record's admission as there was at least circumstantial evidence that the driving record was connected to the Georgia crime information computer. Worthy v. State, 252 Ga. App. 852, 557 S.E.2d 448, 2001 Ga. App. LEXIS 1390 (2001) (decided under former O.C.G.A. § 24-3-17).

Defendant's challenge to the admission of a Georgia Crime Information Center (GCIC) report was rejected as the state complied with the requirements of former O.C.G.A. § 24-3-17 and the caselaw; the evidence was sufficient to show identity for purposes of the admission of the GCIC report as the GCIC record bore defendant's name, and defendant did not deny that it was defendant's. Evans v. State, 267 Ga. App. 706, 600 S.E.2d 671, 2004 Ga. App. LEXIS 720 (2004), cert. denied, No. S04C1683, 2004 Ga. LEXIS 883 (Ga. Sept. 27, 2004) (decided under former O.C.G.A. § 24-3-17).

Record from Georgia Department of Public Safety. — Driving with a suspended license conviction was affirmed after the state proved that defendant received notice of defendant's license suspension by introducing defendant's driving record; an officer testified that the officer was certified to run driving histories and that the officer obtained a printout of defendant's driving history from an approved computer terminal at the Georgia Department of Public Safety. Fannin v. State, 267 Ga. App. 413, 599 S.E.2d 355, 2004 Ga. App. LEXIS 668 (2004) (decided under former O.C.G.A. § 24-3-17).

Certified copy of driver's license. — Because a defendant's driver's license was a properly certified public record, the trial court was permitted to infer the reliability of any hearsay contained therein and to conclude that no confrontation clause violation had been shown pursuant to former O.C.G.A. §§ 24-3-17 and 24-7-20 (see now O.C.G.A. §§ 24-9-902 and 24-9-924). Douglas v. State, 312 Ga. App. 585, 718 S.E.2d 908, 2011 Ga. App. LEXIS 1022 (2011), cert. denied, No. S12C0470, 2012 Ga. LEXIS 606 (Ga. June 18, 2012) (decided under former O.C.G.A. § 24-3-17).

National Crime Information Center printout of defendant's criminal record was competent, admissible evidence that defendant had three prior shoplifting convictions, one in Georgia and two in Arizona. State v. Sterling, 244 Ga. App. 328, 535 S.E.2d 329, 2000 Ga. App. LEXIS 702 (2000) (decided under former O.C.G.A. § 24-3-17).

Printout establishing date of license suspension properly admitted. — When the defendant was charged with driving with a suspended license, a certified copy of the defendant's notice of suspension prepared in connection with an earlier driving-under-the-influence conviction and a computer printout establishing the date of the suspension were properly admitted under former O.C.G.A. § 24-3-17. Before the printout was submitted to the jury, the trial court required that the prejudicial information on the printout be redacted. Hann v. State, 292 Ga. App. 719, 665 S.E.2d 731, 2008 Ga. App. LEXIS 851 (2008) (decided under former O.C.G.A. § 24-3-17).

Insufficient foundation for admission of evidence. — Testimony of an employee of the county solicitor's (now district attorney) office that the employee had obtained a copy of defendant's driving record from the state patrol office was not sufficient foundation for admission of the record. Tolbert v. State, 227 Ga. App. 647, 490 S.E.2d 183 (decided under former O.C.G.A. § 24-3-17).

Ineffective assistance of counsel for failing to object to officer's hearsay testimony. — Appellate court reversed the trial court's denial of the defendant's

motion for a new trial with respect to the two misdemeanor traffic violations because the prejudice from trial counsel's failure to object was clear since the officer's hearsay testimony was the only evidence offered to prove the elements of the traffic offenses and had the evidence been excluded, there would not have been sufficient evidence to convict on those offenses. Taylor v. State, 337 Ga. App. 486, 788 S.E.2d 97, 2016 Ga. App. LEXIS 357 (2016).

CHAPTER 10

BEST EVIDENCE RULE

Sec.
24-10-1001. Definitions.
24-10-1002. Requirement of original.
24-10-1003. Admissibility of duplicates.
24-10-1004. Admissibility of other evidence of contents of a writing, recording, or photograph.
24-10-1005. Public records.
24-10-1006. Summaries.
24-10-1007. Testimony or written admission of party.
24-10-1008. Functions of court and jury.

Law reviews.
For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

For article on the 2011 enactment of this chapter, see 28 Ga. St. U.L. Rev. 1 (2011).

24-10-1001. Definitions.

As used in this chapter, the term:

(1) "Writing" or "recording" means letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, magnetic impulse, or mechanical or electronic recording or other form of data compilation.

(2) "Photograph" includes still photographs, X-ray films, video recordings, and motion pictures.

(3) "Original" means the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

(4) "Duplicate" means a counterpart produced by the same impression as the original or from the same matrix or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, chemical reproduction, or other equivalent techniques which accurately reproduce the original.

(5) "Public record" shall have the same meaning as set forth in Code Section 24-8-801.

History.
Code 1981, § 24-10-1001, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Definitions that apply to article, Fed. R. Evid. 1001.

Law reviews.
For comment on Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337 (1958), see 21 Ga. B.J. 553 (1959).

For note discussing the possible uses of

video tape and its admissibility as evidence, see 5 Ga. St. B.J. 393 (1969).

For article, "The Best Evidence Rule Made Better: A Glimpse into Georgia's New Evidence Code," see 19 Ga. St. B.J. 12 (Aug. 2013).

For annual survey on evidence law, see 66 Mercer L. Rev. 81 (2014).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3761, former Civil Code 1910, § 5750, former Code 1933, § 38-204, and former O.C.G.A. § 24-5-1 are included in the annotations for this Code section.

Duplicate original signed by both parties at the same time as the original constituted primary instead of secondary evidence and was admissible without the necessity of first serving a notice to produce the "original." Beard v. Westmoreland, 90 Ga. App. 632, 84 S.E.2d 93, 1954 Ga. App. LEXIS 771 (1954) (decided under former Code 1933, § 38-204); Raulerson v. Jones, 122 Ga. App. 440, 177 S.E.2d 181, 1970 Ga. App. LEXIS 893 (1970) (decided under former Code 1933, § 38-204).

Written bill of sale is the best evidence, and parol evidence is inadmissible to show the title to personalty. Epping v. Mockler, 55 Ga. 376, 1875 Ga. LEXIS 432 (1875) (decided under former Code 1873, § 3761).

Evidence of title. — If there be written evidence of title that evidence should be produced. Morgan v. Jones, 24 Ga. 155, 1858 Ga. LEXIS 170 (1858) (decided under former law).

Familiarity with basis for record. — As a general rule, the testimony of a person who has knowledge of the facts from which books of account are made up is primary evidence as to those facts, and is admissible whether or not the books themselves are put in evidence. Mayor of Buford v. Medley, 58 Ga. App. 48, 197 S.E. 494, 1938 Ga. App. LEXIS 183 (1938) (decided under former Code 1933, § 38-204).

Oral testimony by a police officer that the officer was certified to operate particular model of intoximeter at the time the officer tested defendant was not barred by the best evidence rule. Clarke v. State, 170 Ga. App. 852, 319 S.E.2d 16, 1984 Ga. App. LEXIS 2061 (1984) (decided under former O.C.G.A. § 24-5-1).

Claim under best evidence rule waived. — Driver waived the driver's claim that the trial court erred in denying the driver's pretrial motion seeking to exclude an injured party from cross-examining the driver about a traffic citation without producing a certified copy of the guilty plea under the former best evidence rule when the driver testified on direct that the driver received a traffic citation in connection with the automobile accident with the injured party and that the driver paid a fine on the citation, and the driver did not object when the injured party asked the driver about the citation without introducing a certified copy. Daniel v. Smith, 266 Ga. App. 637, 597 S.E.2d 432, 2004 Ga. App. LEXIS 311 (2004), cert. denied, No. S04C1379, 2004 Ga. LEXIS 739 (Ga. Sept. 7, 2004) (decided under former O.C.G.A. § 24-5-1).

Exact carbon copy. — When it is proved that a genuine original was executed, proof that a document is an exact carbon copy of that original is sufficient to admit the copy into evidence without proving the loss of the original. Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337, 1958 Ga. LEXIS 464 (1958) (for comment, see 21 Ga. B.J. 553 (1959)) (decided under former Code 1933, § 38-204).

Production of photocopy of search warrant was sufficient to evidence valid search when issuing magistrate testified that the magistrate searched the magistrate's files and had not found the original warrant, and the police officer who executed the warrant similarly found only the photocopy in the officer's file. Early v. State, 170 Ga. App. 158, 316 S.E.2d 527, 1984 Ga. App. LEXIS 2860 (1984) (decided under former O.C.G.A. § 24-5-1).

Unsigned copy of the existing original contract was properly excluded from evidence. Brenard Mfg. Co. v. Winn-Wil-

kes Drug Co., 31 Ga. App. 200, 120 S.E. 446, 1923 Ga. App. LEXIS 846 (1923) (decided under former Civil Code 1910, § 5750).

Altered copy of contract properly excluded. — When an unaltered original of a contract was available to the plaintiff from the defendant according to the assertion of plaintiff's president at trial but plaintiff's president did not attempt to subpoena the document, the trial court properly exercised the court's discretion in excluding an altered copy of the contract since the plaintiff failed to exercise diligence to obtain the original. Jeff Goolsby Homes Corp. v. Thomas, 181 Ga. App. 308, 352 S.E.2d 172, 1986 Ga. App. LEXIS 2402 (1986) (decided under former O.C.G.A. § 24-5-1).

A press letter book is not original but secondary evidence of the contents of the letters. Watkins v. Paine, 57 Ga. 50, 1876 Ga. LEXIS 18 (1876) (decided under former Code 1873, § 3761).

Witness's notes. — Best evidence of the expert witness's opinion was the witness's own testimony not the worksheet which the witness had prepared in order to assist the witness in presenting the testimony. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860, 1972 Ga. App. LEXIS 919 (1972) (decided under former Code 1933, § 38-204).

Illegal hearsay distinguished. — There is a distinction between illegal testimony and secondary evidence in that hearsay testimony (illegal testimony) has no probative force whatsoever, and its only effect is to prejudice the minds of the jury against the party against whom such hearsay evidence is introduced, while the only objection to secondary evidence is that the evidence is received without first laying the preliminary foundation; such evidence stands on a different footing, and if admitted without objection it is nevertheless competent, for by allowing such evidence without objecting at the time it is sought to be introduced the party waives the party's right to have the best evidence of such fact sought to be proved, and cannot subsequently insist that the court should withdraw such secondary evidence from the consideration of the jury. Rushin v. State, 63 Ga. App. 646, 11 S.E.2d 844, 1940 Ga. App. LEXIS 515 (1940) (decided under former Code 1933, § 38-204).

Preliminary proof. — Party must always make the usual preliminary proof for the admission of secondary evidence, or that kind of evidence will not be admitted. Morgan v. Jones, 24 Ga. 155, 1858 Ga. LEXIS 170 (1858) (decided under former law).

Criminal confessions. — Rules governing the admission of primary and secondary evidence to establish a contract have no application to the confession of a crime. In making a confession, all that the accused voluntarily wrote, or said, or signed, which is material to the charge, is competent against the accused because it is the accused's own admission, and against the accused's own interest. Cawthon v. State, 71 Ga. App. 497, 31 S.E.2d 64, 1944 Ga. App. LEXIS 140 (1944) (decided under former Code 1933, § 38-204).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 38-204 are included in the annotations for this Code section.

Photostatic copies made from microfilms are admissible. 1945-47 Ga. Op. Att'y Gen. 286 (decided under former Code 1933, § 38-204).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

9A Am. Jur. Pleading and Practice Forms, Evidence, § 73.

C.J.S.

32A C.J.S., Evidence, § 1040.

ALR.

Proof, in absence of direct testimony by

survivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident, 32 A.L.R.2d 988.

Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent, 42 A.L.R.2d 1055.

24-10-1002. Requirement of original.

To prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required.

History.

Code 1981, § 24-10-1002, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Parol contracts, § 13-1-6.

Statute of frauds, § 13-5-30 et seq.

Parol evidence generally, T. 24, Ch. 3.

Requirement of the original, Fed. R. Evid. 1002.

Law reviews.

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

Analysis

General Consideration
Application
Acceptable Evidence

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, §§ 3707, 3709, former Code 1873, §§ 3760, 3762, former Civil Code 1895, §§ 5162, 5166, former Civil Code 1910, §§ 5748, 5752, former Code 1933, §§ 38-203, 38-205, and former O.C.G.A. § 24-5-4 are included in the annotations for this Code section.

Rule restricted to writings and has nothing to do with evidence generally. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860, 1972 Ga. App. LEXIS 919 (1972) (decided under former Code 1933, §§ 38-203, 38-205); Willingham v. State, 134 Ga. App. 603, 215 S.E.2d 521, 1975 Ga. App. LEXIS 2101 (1975) (decided under former Code 1933, §§ 38-203, 38-205); Rutledge v. State, 152 Ga. App. 755, 264 S.E.2d 244, 1979 Ga. App. LEXIS 3075 (1979) (decided under former Code 1933, §§ 38-203, 38-205); Bostic v. State, 183 Ga. App. 430, 359 S.E.2d 201, 1987 Ga. App. LEXIS 2719 (1987) (decided under former Code 1933, §§ 38-203, 38-205).

Contents of writing in issue. — Former statute applied only when the contents of a writing were in issue. Young v. State, 226 Ga. 553, 176 S.E.2d 52, 1970 Ga. LEXIS 592 (1970) (decided under former Code 1933, §§ 38-203, 38-205); Springer v. State, 238 Ga. 81, 230 S.E.2d 883, 1976 Ga. LEXIS 1108 (1976) (decided under former Code 1933, §§ 38-203, 38-205); Pryor v. State, 238 Ga. 698, 234 S.E.2d 918, 1977 Ga. LEXIS 1172 (1977), cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977), overruled, overruled in part as stated in , Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530, 2006 Ga. LEXIS 840 (2006), overruled in part as stated in Scott v. State, 356 Ga. App. 152, 846 S.E.2d 241, 2020 Ga. App. LEXIS 416 (2020); Guthrie v. State, 147 Ga. App. 351, 248 S.E.2d 714, 1978 Ga. App. LEXIS 2687 (1978) (decided under former Code 1933, §§ 38-203, 38-205); Smith v. State, 147 Ga. App. 549, 249 S.E.2d 353, 1978 Ga. App. LEXIS 2770 (1978) (decided under former Code 1933, §§ 38-203, 38-205); Ferrell v. State, 149 Ga. App. 405, 254 S.E.2d 404, 1979 Ga. App. LEXIS 1873 (1979), cert. denied, 444 U.S. 1021, 100 S. Ct. 679, 62 L. Ed. 2d 653, 1980 U.S. LEXIS 365 (1980) (decided under former Code 1933, §§ 38-203, 38-205); Denson v.

General Consideration (Cont'd)

State, 149 Ga. App. 453, 254 S.E.2d 455, 1979 Ga. App. LEXIS 1887 (1979) (decided under former Code 1933, §§ 38-203, 38-205).

Preference for original writing. — Former statute was really a preferential rule giving first preference to the original writing. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860, 1972 Ga. App. LEXIS 919 (1972) (decided under former Code 1933, §§ 38-203, 38-205); Willingham v. State, 134 Ga. App. 603, 215 S.E.2d 521, 1975 Ga. App. LEXIS 2101 (1975) (decided under former Code 1933, §§ 38-203, 38-205).

Former statute should be more appropriately called the "original document rule." Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860, 1972 Ga. App. LEXIS 919 (1972) (decided under former Code 1933, §§ 38-203, 38-205); Pugh v. Jones, 131 Ga. App. 600, 206 S.E.2d 650, 1974 Ga. App. LEXIS 1487 (1974) (decided under former Code 1933, §§ 38-203, 38-205).

Accounting for absence of notes. — There was no violation of the former statute by the failure to introduce the officer's notes taken during interviews with the defendant when the absence of notes was accounted for and explained. Dowdy v. State, 215 Ga. App. 576, 451 S.E.2d 528, 1994 Ga. App. LEXIS 1303 (1994) (decided under former O.C.G.A. § 24-5-4).

When, with regard to proof of transmittal of contraband to state crime lab by certified mail, the state could only produce a photostatic copy of the certification receipt in lieu of the original and the defendant urged that, without an adequate explanation for the absence of the original certified mail receipt as required by former O.C.G.A. § 24-5-4, the chain of custody was not sufficiently proven, but a deputy sheriff testified that the deputy would always make a copy of the certified mail receipt when the deputy mailed contraband to the state crime lab, but had been unable to locate the original receipt for this particular mailing, and identified the deputy's handwriting on the photostatic copy and noted that the certification number was identical to that on the state crime lab report, the trial court was authorized to conclude that the copy of the receipt had been made in the regular course of business so as to be admissible pursuant to former O.C.G.A. §§ 24-3-14 and 24-5-26 (see now O.C.G.A. §§ 24-8-803 and 24-10-1003). Spead v. State, 187 Ga. App. 359, 370 S.E.2d 213, 1988 Ga. App. LEXIS 700 (1988) (decided under former O.C.G.A. § 24-5-4).

Inadmissible testimony. — It was error to admit the testimony of witnesses as to the contents of a notebook without establishing the notebook's existence, admissibility, authentication and without accounting for the absence of the original. Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (decided under former O.C.G.A. § 24-5-4).

In a civil forfeiture proceeding in connection with an action brought under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., a witness's testimony regarding newspaper and billboard advertising, telephone calls, and credit card charges violated the former best evidence rule because the state neither produced documentary evidence to support the statements, nor accounted for the absence of such evidence. Pabey v. State, 262 Ga. App. 272, 585 S.E.2d 200, 2003 Ga. App. LEXIS 881 (2003) (decided under former O.C.G.A. § 24-5-4).

Trial court erred in excluding the testimony of the defendant's parent concerning a missing letter written to the parent by the codefendant because testimony regarding the letter was inadmissible under the former best evidence rule; because the parent was not so familiar with the defendant's handwriting that the parent would recognize the handwriting, and there was no other evidence that the letter the parent described was written by the codefendant, the letter was not properly authenticated. Norris v. State, 289 Ga. 154, 709 S.E.2d 792, 2011 Ga. LEXIS 301 (2011) (decided under former O.C.G.A. § 24-5-4).

Inadmissible evidence. — Cover letter sought to be introduced was a photocopy of an alleged original that had never been produced, that the introducing party had never seen, and that the other party claimed did not exist; thus, without additional foundation, the photocopy was sus-

ceptible to a best evidence objection, and a trial court properly denied admission of the letter. Dixon Dairy Farms, Inc. v. Purina Mills, Inc., 267 Ga. App. 738, 601 S.E.2d 152, 2004 Ga. App. LEXIS 768 (2004) (decided under former O.C.G.A. § 24-5-4).

Guarantors' claims that the guarantors entered into written agreements with a bank releasing the guarantors from their guaranty agreements was not supported by any evidence; there was nothing to satisfactorily account for the absence of the written agreements, former O.C.G.A. § 24-5-4(a), and any oral assurances by bank personnel were inadmissible to vary from the terms of the guaranty agreements under O.C.G.A. § 13-2-2(1). Windham & Windham, Inc. v. Suntrust Bank, 313 Ga. App. 841, 723 S.E.2d 70, 2012 Ga. App. LEXIS 92 (2012) (decided under former O.C.G.A. § 24-5-4).

Suspicion of fraud as basis for rule. — Ground of the former rule was a suspicion of fraud and, if there was better evidence of the fact which was withheld, a presumption arose that the party had some secret or sinister motive in not producing the better evidence. United States v. Reyburn, 31 U.S. 352, 8 L. Ed. 424, 1832 U.S. LEXIS 481 (1832) (decided under former law); Fitzgerald v. Adams, 9 Ga. 471, 1851 Ga. LEXIS 39 (1851) (decided under former law).

Evidence which itself indicates accessibility of other and better proof is inadmissible. Wise v. State, 52 Ga. App. 98, 182 S.E. 535, 1935 Ga. App. LEXIS 60 (1935) (decided under former Code 1933, §§ 38-203, 38-205); Short v. Haney, 60 Ga. App. 585, 4 S.E.2d 497, 1939 Ga. App. LEXIS 91 (1939) (decided under former Code 1933, §§ 38-203, 38-205).

Rule does not require introduction of chattels into evidence. Hill v. State, 221 Ga. 65, 142 S.E.2d 909, 1965 Ga. LEXIS 383 (1965); Adams v. State, 142 Ga. App. 252, 235 S.E.2d 667, 1977 Ga. App. LEXIS 1565 (1977) (decided under former Code 1933, §§ 38-203, 38-205).

Rule may be waived. Moret v. State, 246 Ga. 5, 268 S.E.2d 635, 1980 Ga. LEXIS 998 (1980) (decided under former Code 1933, §§ 38-203, 38-205).

Defendant waived this rule when, with knowledge that officer's notes taken during interviews with the defendant were accessible, the defendant did not demand that the notes be produced and allowed the introduction of typed notes. Dowdy v. State, 215 Ga. App. 576, 451 S.E.2d 528, 1994 Ga. App. LEXIS 1303 (1994) (decided under former O.C.G.A. § 24-5-4).

Other evidence of similar import. — Party cannot complain that evidence was admitted when the party offered other evidence of similar legal import. Cain v. State, 113 Ga. App. 477, 148 S.E.2d 508, 1966 Ga. App. LEXIS 1101 (1966) (decided under former Code 1933, §§ 38-203, 38-205).

Harmless error. — Error in failing to require production of a warrant was harmless if its only effect was to establish a state of facts the defendant admitted to be true. Cain v. State, 113 Ga. App. 477, 148 S.E.2d 508, 1966 Ga. App. LEXIS 1101 (1966) (decided under former Code 1933, §§ 38-203, 38-205).

Effect of failure to comply with rule. — Failure to comply with the "original document rule" in attachments may cause the affidavit to be stricken. Pugh v. Jones, 131 Ga. App. 600, 206 S.E.2d 650, 1974 Ga. App. LEXIS 1487 (1974) (decided under former Code 1933, §§ 38-203, 38-205).

Expert's opinion must be based on original record. — It is reversible error to allow an expert witness to base an opinion upon what the expert says a chart of an official Navy health record shows when the record itself is not introduced in evidence. Pressley v. State, 205 Ga. 197, 53 S.E.2d 106, 1949 Ga. LEXIS 338 (1949) (decided under former Code 1933, §§ 38-203, 38-205).

Insurance card testimony admissible. — In light of defendant's own admission at trial that the defendant did not have an insurance card because the defendant paid for insurance in installments, the trial court did not abuse the court's discretion in allowing the officer's testimony without producing the card itself. Johnson v. State, 209 Ga. App. 395, 433 S.E.2d 638, 1993 Ga. App. LEXIS 896 (1993), cert. denied, No. S93C1561, 1993 Ga. LEXIS 968 (Ga. Oct. 12, 1993) (decided under former Code 1933, §§ 38-203, 38-205).

Application

Videotapes. — Former best evidence rule applied only to writings and not to videotapes. Collins v. State, 232 Ga. App. 651, 502 S.E.2d 498 (decided under former O.C.G.A. § 24-5-4).

Former best evidence rule did not apply to videotapes. Reese v. State, 252 Ga. App. 650, 556 S.E.2d 150, 2001 Ga. App. LEXIS 1217 (2001), cert. denied, No. S02C0519, 2002 Ga. LEXIS 294 (Ga. Mar. 29, 2002) (decided under former O.C.G.A. § 24-5-4).

Trial court abused the court's discretion in admitting the officer's testimony describing the contents of a security video showing theft of the truck because neither the officer nor the state's representatives undertook any effort whatsoever to retrieve the video recording, which the officer testified had been taken into evidence, or to account for its absence. Thus, the officer's testimony concerning the content of the security video violated the best evidence rule. Glasper v. State, 364 Ga. App. 608, 876 S.E.2d 11, 2022 Ga. App. LEXIS 341 (2022).

Former best evidence rule did not apply to collateral evidence. Walls v. State, 161 Ga. App. 235, 291 S.E.2d 15, 1982 Ga. App. LEXIS 1830 (1982) (decided under former O.C.G.A. § 24-5-4).

When essential fact to be proved was neither existence nor contents of quarterly bank statements, which were merely collateral or incidental to issue involved, it was not error to admit photocopies of such statements since plaintiff testified that the plaintiff did not have the originals. Jones v. Sudduth, 162 Ga. App. 602, 292 S.E.2d 448, 1982 Ga. App. LEXIS 2258 (1982) (decided under former O.C.G.A. § 24-5-4).

Rule inapplicable when contents of writing not in issue. — See Jones v. Blackburn, 75 Ga. App. 791, 44 S.E.2d 555, 1947 Ga. App. LEXIS 643 (1947) (decided under former Code 1933, §§ 38-203, 38-205); DeKalb County v. Townsend Assocs., 243 Ga. 80, 252 S.E.2d 498, 1979 Ga. LEXIS 814 (1979) (decided under former Code 1933, §§ 38-203, 38-205); Wells v. State, 151 Ga. App. 416, 260 S.E.2d 374, 1979 Ga. App. LEXIS 2553 (1979), overruled, Copeland v. State, 160 Ga. App. 786, 287 S.E.2d 120, 1982 Ga. App. LEXIS 1687 (1982) (decided under former Code 1933, §§ 38-203, 38-205); Borenstein v. Blumenfeld, 151 Ga. App. 420, 260 S.E.2d 377, 1979 Ga. App. LEXIS 2554 (1979) (decided under former Code 1933, §§ 38-203, 38-205); Brown v. State, 177 Ga. App. 284, 339 S.E.2d 332, 1985 Ga. App. LEXIS 2948 (1985) (decided under former O.C.G.A. § 24-5-4); Johnson v. State, 177 Ga. App. 705, 340 S.E.2d 662, 1986 Ga. App. LEXIS 2443 (1986) (decided under former O.C.G.A. § 24-5-4); Blue Cross of Georgia/Columbus, Inc. v. Whatley, 180 Ga. App. 93, 348 S.E.2d 459, 1986 Ga. App. LEXIS 2062 (1986) (decided under former O.C.G.A. § 24-5-4); Covington v. State, 226 Ga. App. 484, 486 S.E.2d 706 (decided under former O.C.G.A. § 24-5-4).

With regard to a defendant's convictions for aggravated sodomy and kidnapping, the trial court did not err by admitting the testimony of the defendant's relative regarding letters the defendant sent to the relative while the defendant was awaiting trial wherein the defendant asked the relative to testify at trial that the relative had seen the victim and the defendant together the day before the attack at a motel, which was an event that never occurred. Contrary to the defendant's contention that the admission of the relative's testimony violated the best evidence rule, the best evidence rule did not apply since the contents of the writings were not in issue. Smith v. State, 294 Ga. App. 692, 670 S.E.2d 191, 2008 Ga. App. LEXIS 1295 (2008) (decided under former O.C.G.A. § 24-5-4).

Revocation of the appellant's probation was affirmed because evidence was sufficient based on testimony of a witness that the appellant had lied at the plea hearing to exonerate a witness and the trial court did not abuse the court's discretion when the court overruled the appellant's best evidence objection to witness testimony since the rule did not require production of a document simply because the document contained facts testified to by the witness. Almeda v. State, 348 Ga. App. 576, 824 S.E.2d 72, 2019 Ga. App. LEXIS 52 (2019).

When contents or existence not in issue. — Former best evidence rule was inapplicable when neither the existence

nor the contents of documents was in issue. Bacon v. Decatur Fed. Sav. & Loan Ass'n, 169 Ga. App. 538, 313 S.E.2d 727, 1984 Ga. App. LEXIS 1629 (1984) (decided under former O.C.G.A. § 24-5-4); Calloway v. State, 176 Ga. App. 674, 337 S.E.2d 397, 1985 Ga. App. LEXIS 2529 (1985) (decided under former O.C.G.A. § 24-5-4).

Currency was not a "writing". — Photocopy of a $20 bill used as "buy money" in a drug transaction was admissible. Johnson v. State, 231 Ga. App. 114, 497 S.E.2d 666 (decided under former O.C.G.A. § 24-5-4).

Computer screen as writing. — Admission of the oral testimony of a clerk whose computer defendant used to "back out" taxes, that the clerk's computer showed evidence of backing out, did not violate the best evidence rule, even assuming that a computer screen constituted a writing; at issue was a question of fact, whether defendant used the clerk's computer to back out taxes, and not the contents or terms of a writing. Parham v. State, 275 Ga. App. 528, 621 S.E.2d 532, 2005 Ga. App. LEXIS 1016 (2005) (decided under former O.C.G.A. § 24-5-4).

Transcript of online conversations. — With regard to the defendant's conviction for criminal attempt to commit child molestation and related crimes, the trial court did not err in admitting into evidence transcripts of all of the online conversations between the defendant and a detective, posing as the 15-year-old victim, because the detective testified that the detective participated in all of the online conversations with the defendant; that the detective created the transcripts by copying the text exactly as the text appeared on the computer screen, without making any additions, omissions, or other alterations to that text; and that the transcript reflected the exact words used in the conversation, as well as the online names used by the persons who typed those words, which was sufficient to authenticate the transcript. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400, 2013 Ga. App. LEXIS 280 (2013), cert. denied, No. S13C1278, 2013 Ga. LEXIS 814 (Ga. Oct. 7, 2013), cert. denied, 572 U.S. 1050, 134 S. Ct. 1797, 188 L. Ed. 2d 765, 2014 U.S. LEXIS 2463 (2014).

Nonexistence of fact. — When it is sought to show that certain records do not contain a certain thing, the testimony of the keeper of the records, or of any other person who has read the records, that the records do not show the thing in question, is not inadmissible. Cary v. State, 55 Ga. App. 167, 189 S.E. 625, 1937 Ga. App. LEXIS 25 (1937) (decided under former Code 1933, §§ 38-203, 38-205); Peters v. Adcock, 196 Ga. 118, 26 S.E.2d 342, 1943 Ga. LEXIS 324 (1943) (decided under former Code 1933, §§ 38-203, 38-205).

Existence of fact to which writing is incidental. — Oral testimony of a fact in issue may be primary evidence thereof, although there is written evidence of the same fact, where the essential fact to be proved is neither the existence nor the contents of the writing, but the existence of the independent fact itself, to which the writing is merely collateral or incidental. Peterson v. Lott, 200 Ga. 390, 37 S.E.2d 358, 1946 Ga. LEXIS 404 (1946) (decided under former Code 1933, §§ 38-203, 38-205); Burke v. State, 153 Ga. App. 769, 266 S.E.2d 549, 1980 Ga. App. LEXIS 1973 (1980) (decided under former Code 1933, §§ 38-203, 38-205); Emmett v. Regions Bank, 238 Ga. App. 455, 518 S.E.2d 472 (decided under former O.C.G.A. § 24-5-4).

Existence of writing. — Witness may testify that a writing exists since the witness does not attempt to testify as to the contents of the writing. Jones v. Blackburn, 75 Ga. App. 791, 44 S.E.2d 555, 1947 Ga. App. LEXIS 643 (1947) (decided under former Code 1933, §§ 38-203, 38-205).

Trial court erred in granting summary judgment to a rehabilitation company based on a contractual exculpatory clause because the material provisions of the agreement at issue were illegible, and given that an affidavit was insufficient to establish a basis for the admission of the alleged exemplar, the company failed to show that the agreement signed by the participant contained an exculpatory clause waiving and releasing the company from liability for the company's own negligence. Sanchez v. Atlanta Union Mission Corp., 329 Ga. App. 158, 764 S.E.2d 178, 2014 Ga. App. LEXIS 641 (2014).

Existence of notes, checks, letters, and the like. — Parol evidence as to the existence of notes, checks, receipts, books,

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letters, and the like, or as to their location, size, length, quantity, and other factors, but not undertaking to disclose the material contents thereof, is not subject to the objection that the writings themselves would be higher proof; where such writings are only collaterally in point, and are in no sense the foundation of the action or defense, even their contents may sometimes be shown by parol without accounting for the nonproduction of the papers themselves. Butts v. Maryland Cas. Co., 52 Ga. App. 838, 184 S.E. 774, 1936 Ga. App. LEXIS 265 (1936) (decided under former Code 1933, §§ 38-203, 38-205).

Existence of magazine pictures. — Trial court properly allowed an arresting officer to testify regarding the presence of magazine pictures of female nudes in defendant's home since the pictures were not introduced into evidence. King v. State, 209 Ga. App. 529, 433 S.E.2d 722, 1993 Ga. App. LEXIS 932 (1993) (decided under former O.C.G.A. § 24-5-4).

Summary of accounting book entries. — When pertinent and essential facts can be ascertained only by an examination of a large number of entries in books of account, an auditor or an expert accountant who has made an examination and analysis of the books and figures may testify as a witness and give summarized statements of what the books show as a result of the investigation, provided the books themselves are accessible to the court and the parties. Stewart v. State, 246 Ga. 70, 268 S.E.2d 906, 1980 Ga. LEXIS 970 (1980) (decided under former Code 1933, §§ 38-203, 38-205); Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8, 1981 Ga. App. LEXIS 1917 (1981) (decided under former Code 1933, §§ 38-203, 38-205).

Showing absence of administration. — Best method of proving that no administration was ever had upon a particular estate is to introduce the evidence of one who has examined the records in the court where letters of administration should have been granted, that no such letters are shown by those records. Cowan v. Corbett, 68 Ga. 66, 1881 Ga. LEXIS 313 (1881) (decided under former Code 1873, §§ 3760, 3762); Greenfield v. McIntyre, 112 Ga. 691, 38 S.E. 44, 1901 Ga. LEXIS 60 (1901) (decided under former Civil Code 1895, §§ 5162, 5166); Compton v. Fender, 132 Ga. 483, 64 S.E. 475, 1909 Ga. LEXIS 336 (1909) (decided under former Civil Code 1895, §§ 5162, 5166).

Accounting for absence. — Hearsay testimony of a deputy about the contents of a missing letter that defendant allegedly wrote and sent to a codefendant was admissible as an incriminating statement by the defendant; the state satisfactorily accounted for the absence of the letter through the codefendant, who testified that the codefendant destroyed the letter after showing the letter to the deputy. Summerour v. State, 211 Ga. App. 65, 438 S.E.2d 176, 1993 Ga. App. LEXIS 1410 (1993) (decided under former O.C.G.A. § 24-5-4).

Trial court's admission of a photocopy of a letter examined by a documents examiner did not violate the former best evidence rule as the original letter was lost and the copy was properly authenticated. Roberts v. State, 282 Ga. 548, 651 S.E.2d 689, 2007 Ga. LEXIS 716 (2007) (decided under former O.C.G.A. § 24-5-4).

No error in admission of copy of warranty. Croxton v. Leggett Motor Rebuilding, 168 Ga. App. 258, 308 S.E.2d 640, 1983 Ga. App. LEXIS 2741 (1983) (decided under former O.C.G.A. § 24-5-4).

Still photographs taken from videotape were inapplicable to the former statute; the snapshots were merely positive enlargements of the frames which the jury could not have easily seen. Cleveland v. State, 204 Ga. App. 101, 418 S.E.2d 430, 1992 Ga. App. LEXIS 699 (1992) (decided under former O.C.G.A. § 24-5-4).

Still photographs taken from videotape. — Admission of photographs taken from a surveillance tape did not violate the best evidence rule, as the tape was also admitted. Hafeez v. State, 339 Ga. App. 467, 793 S.E.2d 632, 2016 Ga. App. LEXIS 645 (2016).

Former statute was inapplicable in the following cases. — See International Harvester Co. of Am. v. Morgan, 19 Ga. App. 716, 92 S.E. 35, 1917 Ga. App. LEXIS 325 (1917) (prior written agreement) (decided under former Civil Code

1910, §§ 5748, 5752); Jenkins v. Lane, 154 Ga. 454, 115 S.E. 126, 1922 Ga. LEXIS 393 (1922) (parol evidence to establish implied trust) (decided under former Civil Code 1910, §§ 5748, 5752); Maynard v. Rawlins, 45 Ga. App. 91, 163 S.E. 269, 1932 Ga. App. LEXIS 176 (1932) (testimony concerning note admitted by agreement of counsel) (decided under former Civil Code 1910, §§ 5748, 5752); Oliver v. Lane, 46 Ga. App. 136, 167 S.E. 116, 1932 Ga. App. LEXIS 75 (1932) (parol evidence concerning note) (decided under former Civil Code 1910, §§ 5748, 5752); Cooper v. State, 180 Ga. 612, 180 S.E. 103, 1935 Ga. LEXIS 505 (1935) (oral criminal confession) (decided under former Code 1933, §§ 38-203, 38-205); Garcia v. State, 52 Ga. App. 80, 182 S.E. 526, 1935 Ga. App. LEXIS 51 (1935) (testimony derived from records) (decided under former Code 1933, §§ 38-203, 38-205); Wise v. State, 52 Ga. App. 98, 182 S.E. 535, 1935 Ga. App. LEXIS 60 (1935) (testimony concerning addresses printed on stolen property) (decided under former Code 1933, §§ 38-203, 38-205); Butts v. Maryland Cas. Co., 52 Ga. App. 838, 184 S.E. 774, 1936 Ga. App. LEXIS 265 (1936) (accord and satisfaction) (decided under former Code 1933, §§ 38-203, 38-205); Jones v. State, 182 Ga. 378, 185 S.E. 571, 1936 Ga. LEXIS 369 (1936) (certificate of insurance issued under group policy) (decided under former Code 1933, §§ 38-203, 38-205); Roberts v. State, 86 Ga. App. 768, 72 S.E.2d 551, 1952 Ga. App. LEXIS 1055 (1952) (parol evidence to impeach) (decided under former Code 1933, §§ 38-203, 38-205); Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga. App. 380, 170 S.E.2d 724, 1969 Ga. App. LEXIS 785 (1969) (testimony concerning records) (decided under former Code 1933, §§ 38-203, 38-205); Young v. State, 226 Ga. 553, 176 S.E.2d 52, 1970 Ga. LEXIS 592 (1970) (proof to convict) (decided under former Code 1933, §§ 38-203, 38-205); Denson v. State, 149 Ga. App. 453, 254 S.E.2d 455, 1979 Ga. App. LEXIS 1887 (1979) (testimony concerning ownership and possession of car) (decided under former Code 1933, §§ 38-203, 38-205); Jones v. Brawner, 151 Ga. App. 437, 260 S.E.2d 385, 1979 Ga. App. LEXIS 2564 (1979) (testimony concerning existence of perpetual care reserve fund) (decided under former Code 1933, §§ 38-203, 38-205); Causey v. State, 154 Ga. App. 76, 267 S.E.2d 475, 1980 Ga. App. LEXIS 2048 (1980) (transcript of tape recording) (decided under former Code 1933, §§ 38-203, 38-205); Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792, 1980 Ga. LEXIS 1174 (1980) (copy of forged check) (decided under former Code 1933, §§ 38-203, 38-205); Knox v. State, 165 Ga. App. 26, 299 S.E.2d 105, 1983 Ga. App. LEXIS 1752 (1983) (checks) (decided under former O.C.G.A. § 24-5-4); Fantasia v. State, 268 Ga. 512, 491 S.E.2d 318 (photocopies of original inspection certificates) (decided under former O.C.G.A. § 24-5-4).

In a breach of contract action between a business and an advertiser, the former best evidence rule required the advertiser to produce the first affidavit provided by the advertiser's senior director of business affairs, and the trial court erred in considering the affidavit without requiring the affidavit's production. But, given that the second affidavit showed that the parties entered into the contract at issue, the trial court properly considered the affidavit to that effect. Alcatraz Media, LLC v. Yahoo! Inc., 290 Ga. App. 882, 660 S.E.2d 797, 2008 Ga. App. LEXIS 364 (2008) (decided under former O.C.G.A. § 24-5-4).

Acceptable Evidence

Certified copy of a public record is the best evidence of the records contents. O'Connor v. United States, 11 Ga. App. 246, 75 S.E. 110, 1912 Ga. App. LEXIS 353 (1912) (decided under former Civil Code 1910, §§ 5748, 5752); Pressley v. State, 205 Ga. 197, 53 S.E.2d 106, 1949 Ga. LEXIS 338 (1949) (decided under former Code 1933, §§ 38-203, 38-205); Pugh v. Jones, 131 Ga. App. 600, 206 S.E.2d 650, 1974 Ga. App. LEXIS 1487 (1974) (decided under former Code 1933, §§ 38-203, 38-205).

Deed is the best evidence of the deed's contents. Hall v. Waller, 66 Ga. 483, 1881 Ga. LEXIS 40 (1881) (decided under former Code 1873, §§ 3760, 3762); McConnell Bros. v. Slappey, 134 Ga. 95, 67 S.E. 440, 1910 Ga. LEXIS 125 (1910) (decided under former Civil Code 1895,

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§§ 5162, 5166); Head v. Lee, 203 Ga. 191, 45 S.E.2d 666, 1947 Ga. LEXIS 589 (1947) (decided under former Code 1933, §§ 38-203, 38-205); Ehrlich v. Mills, 203 Ga. 600, 48 S.E.2d 107, 1948 Ga. LEXIS 496 (1948) (decided under former Code 1933, §§ 38-203, 38-205); Green v. Wright, 225 Ga. 25, 165 S.E.2d 843, 1969 Ga. LEXIS 361 (1969) (decided under former Code 1933, §§ 38-203, 38-205); Hembree v. Cotton States Mut. Ins. Co., 132 Ga. App. 556, 208 S.E.2d 568, 1974 Ga. App. LEXIS 1740 (1974) (decided under former Code 1933, §§ 38-203, 38-205).

Record of a conviction is the best evidence of conviction. Johnson v. State, 48 Ga. 116, 1873 Ga. LEXIS 26 (1873) (decided under former Code 1868, §§ 3707, 3709); Beach v. State, 138 Ga. 265, 75 S.E. 139, 1912 Ga. LEXIS 278 (1912), overruled, Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Civil Code 1910, §§ 5748, 5752); Howard v. State, 144 Ga. 169, 86 S.E. 540, 1915 Ga. LEXIS 102 (1915) (decided under former Civil Code 1910, §§ 5748, 5752); Swain v. State, 151 Ga. 375, 107 S.E. 40, 1921 Ga. LEXIS 260 (1921) (decided under former Civil Code 1910, §§ 5748, 5752); Lovinger v. State, 39 Ga. App. 116, 146 S.E. 346, 1929 Ga. App. LEXIS 209 (1929) (decided under former Civil Code 1910, §§ 5748, 5752); Corley v. State, 64 Ga. App. 841, 14 S.E.2d 121, 1941 Ga. App. LEXIS 526 (1941) (decided under former Code 1933, §§ 38-203, 38-205); Carroll v. Crawford, 218 Ga. 635, 129 S.E.2d 865, 1963 Ga. LEXIS 284 (1963) (decided under former Code 1933, §§ 38-203, 38-205).

Patients' dental records. — When, in a dentist's suit to recover income for work performed for a dental clinic, it appeared that the patients' individual records constituted the primary documentary evidence of their visits, charges, and payments and that those records were otherwise available or accessible, the trial court did not err in refusing to admit plaintiff's own purported summary as secondary evidence of that information. White v. Dilworth, 178 Ga. App. 226, 342 S.E.2d 709, 1986 Ga. App. LEXIS 1641 (1986) (decided under former O.C.G.A. § 24-5-4).

Reconstruction of recorded statement. — Since the tape recorder malfunctioned for a period of time during the giving of defendant's statement to police, and the interview continued after the recorder had been repaired; since the officers who conducted the interview offered their reconstruction of the interview's unrecorded portions, and testified that they were substantially the same as the recorded parts; and the recorded statement, as thus supplemented, was admitted only after a Jackson-Denno hearing, there was no error. McGee v. State, 260 Ga. 178, 391 S.E.2d 400, 1990 Ga. LEXIS 197 (1990) (decided under former O.C.G.A. § 24-5-4).

Testimony of investigator as to contents of missing affidavits. — Trial court did not err when the court denied the defendant's motion to suppress even though the unsigned, unsworn document an investigator identified as the investigator's unsigned affidavit presented at the suppression hearing did not qualify as a "duplicate original" under Georgia law since the affidavit was not made by the same pen stroke at the same time or was not a copy executed at the same time as the "original" of the document; in light of an investigator's testimony concerning the loss of the sealed packet containing the original search warrants and affidavits, the trial court did not abuse the court's discretion when the court admitted secondary evidence under former O.C.G.A. § 24-5-21 (see now O.C.G.A. §§ 24-10-1003 and 24-10-1004), i.e., the testimony of the investigator as to the contents of the missing affidavits. Baptiste v. State, 288 Ga. 653, 706 S.E.2d 442, 2011 Ga. LEXIS 161 (2011) (decided under former O.C.G.A. § 24-5-4).

Failure to present evidence of permits. — Trial court erred in denying the appellants' motion for summary judgment because the appellees failed to present evidence sufficient to create a jury issue as to whether the appellants had a duty to inspect the exhaust vent since no permits were produced as evidence and the appellants were only required to inspect if a

permit was issued. Martin v. Ledbetter, 342 Ga. App. 208, 802 S.E.2d 432, 2017 Ga. App. LEXIS 331 (2017).

Log sheet with handwritten intoxilyzer results admissible. — Because the original intoxilyzer printouts could not be located even after the investigator conducted a multi-source search, and the defendant did not point the appellate court to any evidence in the record suggesting any bad faith on the part of the state in connection with the missing documents, the trial court did not abuse the court's discretion in finding that admission of a log sheet with handwritten intoxilyzer results would not violate the best evidence rule. Jones v. State, 345 Ga. App. 14, 812 S.E.2d 337, 2018 Ga. App. LEXIS 169 (2018).

Examples of best evidence are found in the following cases. — See Fitzgerald v. Adams, 9 Ga. 471, 1851 Ga. LEXIS 39 (1851) (writing as evidence of transaction) (decided under former law); Cook v. North & S.R.R., 50 Ga. 211, 1873 Ga. LEXIS 243 (1873) (written contract) (decided under former Code 1868, §§ 3707, 3709); White v. Claxton, 12 Ga. App. 141, 76 S.E. 1040, 1913 Ga. App. LEXIS 465 (1913) (written application for insurance) (decided under former Civil Code 1910, §§ 5748, 5752); Probasco v. Shaw, 144 Ga. 416, 87 S.E. 466, 1915 Ga. LEXIS 224 (1915) (unconditional note) (decided under former Civil Code 1910, §§ 5748, 5752); Smith v. Lawrence, 23 Ga. App. 795, 99 S.E. 536, 1919 Ga. App. LEXIS 358 (1919) (specific written agreement) (decided under former Civil Code 1910, §§ 5748, 5752); Bowen v. Mobley, 40 Ga. App. 833, 151 S.E. 667, 1930 Ga. App. LEXIS 722 (1930) (mortgage) (decided under former Civil Code 1910, §§ 5748, 5752); Southern Loan & Inv. Co. v. State, 68 Ga. App. 75, 22 S.E.2d 108, 1942 Ga. App. LEXIS 40 (1942) (charter and bylaws of company) (decided under former Code 1933, §§ 38-203, 38-205); Shaw v. Fehn, 196 Ga. 661, 27 S.E.2d 406, 1943 Ga. LEXIS 414 (1943) (will) (decided under former Code 1933, §§ 38-203, 38-205); Sikes v. State, 76 Ga. App. 883, 47 S.E.2d 677, 1948 Ga. App. LEXIS 477 (1948) (record of trial) (decided under former Code 1933, §§ 38-203, 38-205); Pressley v. State, 205 Ga. 197, 53 S.E.2d 106, 1949 Ga. LEXIS 338 (1949) (verified copy) (decided under former Code 1933, §§ 38-203, 38-205); Delinski v. Dunn, 209 Ga. 402, 73 S.E.2d 171, 1952 Ga. LEXIS 514 (1952) (record of board of corrections and certified copy of sentence) (decided under former Code 1933, §§ 38-203, 38-205); Beard v. Westmoreland, 90 Ga. App. 632, 84 S.E.2d 93, 1954 Ga. App. LEXIS 771 (1954) (duplicate original of property settlement) (decided under former Code 1933, §§ 38-203, 38-205); Carroll v. Crawford, 218 Ga. 635, 129 S.E.2d 865, 1963 Ga. LEXIS 284 (1963) (indictment) (decided under former Code 1933, §§ 38-203, 38-205); Cain v. State, 113 Ga. App. 477, 148 S.E.2d 508, 1966 Ga. App. LEXIS 1101 (1966) (search warrant) (decided under former Code 1933, §§ 38-203, 38-205); Hawes v. Red Oak Hauling Co., 116 Ga. App. 302, 157 S.E.2d 38, 1967 Ga. App. LEXIS 785 (1967) (documents in possession of party) (decided under former Code 1933, §§ 38-203, 38-205); Consolidated Eng'g Co. v. U.I.R. Contractors, 136 Ga. App. 923, 222 S.E.2d 692, 1975 Ga. App. LEXIS 1531 (1975) (checks and vouchers) (decided under former Code 1933, §§ 38-203, 38-205); Barrett v. State, 146 Ga. App. 207, 245 S.E.2d 890, 1978 Ga. App. LEXIS 2215 (1978) (duplicate original) (decided under former Code 1933, §§ 38-203, 38-205); Ferrell v. State, 149 Ga. App. 405, 254 S.E.2d 404, 1979 Ga. App. LEXIS 1873 (1979), cert. denied, 444 U.S. 1021, 100 S. Ct. 679, 62 L. Ed. 2d 653, 1980 U.S. LEXIS 365 (1980) (traffic citations) (decided under former Code 1933, §§ 38-203, 38-205).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, § 1062 et. seq.

C.J.S.

32A C.J.S., Evidence, §§ 1041 et seq., 1050 et seq.

ALR.

Parol evidence to prove title to real property when the title is only collaterally involved, 1 A.L.R. 1143.

Admissibility in evidence of audit or testimony of auditor or accountant, 52 A.L.R. 1266.

Parol-evidence rule: evidence of agreements as to manner or medium of payment of bill or note, or as to credit, setoff, or counterclaim with respect to the same, 71 A.L.R. 548.

Admissibility and weight of testimony based on taste, sight, and smell as to unlawful content of liquor, 78 A.L.R. 439.

Admissibility as against the beneficiary of life or accident insurance of statements or declarations by the insured outside of his application, 86 A.L.R. 146.

Mutilations, alterations, and deletions as affecting admissibility in evidence of public record, 28 A.L.R.2d 1443.

Proof, in absence of direct testimony by survivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident, 32 A.L.R.2d 988.

Admissibility of testator's declarations upon issue of genuineness or due execution of purported will, 62 A.L.R.2d 855.

Carbon copies of letters or other written instruments as evidence, 65 A.L.R.2d 342.

Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing, 68 A.L.R.2d 903.

Admissibility in evidence of receipt of third person, 80 A.L.R.2d 915.

Proof, in absence of direct testimony, of identity of motor vehicle involved in accident, 81 A.L.R.2d 861.

Admissibility in evidence of sample or samples of article or substance of which the quality, condition, or the like is involved in litigation, 95 A.L.R.2d 681.

Effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements, 7 A.L.R.3d 1394.

Applicability of parol-evidence rule in favor of or against one not a party to contract of release, 13 A.L.R.3d 313.

Workmen's compensation: use of medical books or treatises as independent evidence, 17 A.L.R.3d 993.

Admissibility of newspaper article as evidence of the truth of the facts stated therein, 55 A.L.R.3d 663.

Admissibility of nonexpert opinion testimony as to weather conditions, 56 A.L.R.3d 575.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules, 58 A.L.R.3d 598.

Proof of public records kept or stored on electronic computing equipment, 71 A.L.R.3d 232.

Requirement of notice as condition for admission in evidence of summary of voluminous records, 80 A.L.R.3d 405.

Sufficiency of evidence that will was not accessible to testator for destruction, in proceeding to establish lost will, 86 A.L.R.3d 980.

Admissibility of photographs of stolen property, 94 A.L.R.3d 357.

Admissibility of visual recording of event or matter other than that giving rise to litigation on prosecution, 41 A.L.R.4th 877.

Application of best evidence rule to electronic evidence, including text messages and e-mail, 12 A.L.R.7th 1.

24-10-1003. Admissibility of duplicates.

A duplicate shall be admissible to the same extent as an original unless:

(1) A genuine question is raised as to the authenticity of the original; or

(2) A circumstance exists where it would be unfair to admit the duplicate in lieu of the original.

History.

Code 1981, § 24-10-1003, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Primary evidentiary value of photostatic copies of records produced from mi-

crofilm and print-out copies of computer records, § 50-18-96.

Admissibility of duplicates, Fed. R. Evid. 1003.

Law reviews.

For article, "The Admissibility of Computer-Generated Evidence in Georgia," see 18 Ga. St. B.J. 137 (1982).

For annual survey on evidence law, see 66 Mercer L. Rev. 81 (2014).

JUDICIAL DECISIONS

Analysis

General Consideration
Carbon Copies
Application
1. In General
2. Real Estate Transactions
3. Banking

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1855-56, p. 138, § 2, Ga. L. 1858, p. 53, § 1, former Code 1863, §§ 3741, 3744, and 3745, former Penal Code 1895, § 996, former Civil Code 1910, §§ 5761 and 5829, former Code 1933, §§ 38-206, 38-212, 38-214, 38-702, Ga. L. 1950, p. 73, § 1, and O.C.G.A. §§ 24-5-2, 24-5-21, 24-5-25, and 24-5-26, are included in the annotations for this Code section. The reader is also advised to consult the annotations under O.C.G.A. §§ 24-9-901 through 24-9-904, for annotations discussing identity, authentication, and foundation issues related to duplicates and copies.

In general. — Existence of a genuine original was essential to the admissibility of a copy and therefore whether there was any primary evidence relating to the existence of a genuine original deed became a material question. Latham v. Fowler, 199 Ga. 648, 34 S.E.2d 870, 1945 Ga. LEXIS 348 (1945) (decided under former Code 1933, § 38-214).

Former statute simply permitted photostatic, microphotographic, and photographic reproductions of original writings or records made in the regular course of business to be admitted in evidence without accounting for the original. Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370, 1957 Ga. App. LEXIS 938 (1957) (decided under Ga. L. 1950, p. 73, § 1); Ricketts v. Liberty Mut. Ins. Co., 127 Ga. App. 483, 194 S.E.2d 311, 1972 Ga. App. LEXIS 922 (1972) (decided under Ga. L. 1950, p. 73, § 1).

Recorded instruments. — Former law applied to those deeds and instruments that were, by law, authorized and required to be recorded. Gill v. Strozier, 32 Ga. 688, 1861 Ga. LEXIS 257 (1861) (decided under Ga. L. 1858, p. 53, § 1).

Construction with other provisions. — Provisions of Ga. L. 1950, p. 73, § 1, permitting the introduction of photostatic copies of original writings or records made in the regular course of business to be introduced as original evidence in a case did not have any bearing upon former Code 1933, § 38-709. Ga. L. 1950, p. 73 applied to situations where the contents of the document were sought to be introduced because the document itself had a bearing upon the issues sought to be proved, the test of admissibility being relevancy and materiality, while documents containing signatures introduced under the provisions of former Code 1933, § 38-709 did not necessarily have any bearing upon the issue being tried, and their sole purpose was to establish a criterion by which the genuineness or forgery of the signature on some other document relevant to the cause could be established. Mitchell v. State, 89 Ga. App. 80, 78 S.E.2d 563, 1953 Ga. App. LEXIS 908 (1953) (decided under Ga. L. 1950, p. 73, § 1).

Duplicate original. — When more than one copy of a document was executed

General Consideration (Cont'd)

at the same time, any copy thereof was a duplicate original, and it was primary evidence of the agreement instead of secondary evidence. Raulerson v. Jones, 122 Ga. App. 440, 177 S.E.2d 181, 1970 Ga. App. LEXIS 893 (1970) (decided under former Code 1933, § 38-206).

Papers which are executed simultaneously with the original, by the same stroke of the pen or the typewriter, are admissible as primary evidence without accounting for the original because the papers are considered duplicate originals. Strickland v. Foundation Life Ins. Co., 129 Ga. App. 614, 200 S.E.2d 306, 1973 Ga. App. LEXIS 1078 (1973) (decided under Ga. L. 1950, p. 73, § 1).

Standard is one of moral certainty. — Former best evidence rule required that the court be satisfied that the better evidence had not been willfully destroyed nor voluntarily withheld, but the rule did not exact that the loss or destruction of the document should be proven beyond all possibility of a mistake; the rule only demanded that a moral certainty should exist that the court has had every opportunity for examining and deciding the cause upon the best evidence within the power or ability of the litigant. Fowler v. Latham, 201 Ga. 68, 38 S.E.2d 732, 1946 Ga. LEXIS 351 (1946) (decided under former Code 1933, § 38-214).

Execution as well as existence of written contract must be proved before a copy can be used as evidence. Bigelow v. Young, 30 Ga. 121, 1860 Ga. LEXIS 49 (1860) (decided under former law); Durham v. Holeman, 30 Ga. 619, 1860 Ga. LEXIS 153 (1860) (decided under former law).

Unauthorized execution. — Evidence that a contract was executed by the treasurer of an insurance company, without proof of the treasurer's authority so to do, was insufficient to show that the original contract was the act of the company and did not satisfy the law. Brown v. Bass, 132 Ga. 41, 63 S.E. 788, 1909 Ga. LEXIS 34 (1909) (decided under former Penal Code 1895, § 996).

Formality of execution. — When the witnesses, if any, were unknown, it was not necessary to prove that the alleged lost original writing was executed with any particular formality in order to admit secondary evidence of the writing's contents. Sharp v. Autry, 185 Ga. 160, 194 S.E. 194, 1937 Ga. LEXIS 692 (1937) (decided under former Code 1933, § 38-214).

Execution may be proved by circumstances when no direct evidence of the execution of a written instrument was attainable. Sharp v. Autry, 185 Ga. 160, 194 S.E. 194, 1937 Ga. LEXIS 692 (1937) (decided under former Code 1933, § 38-214).

Copies of duplicate originals are admissible without accounting for the original. Strickland v. Foundation Life Ins. Co., 129 Ga. App. 614, 200 S.E.2d 306, 1973 Ga. App. LEXIS 1078 (1973) (decided under Ga. L. 1950, p. 73, § 1).

Copies of duplicate originals were admissible under former O.C.G.A. § 24-5-26 (see now O.C.G.A. §§ 24-10-1003 and 24-10-1004), without accounting for the original. Ellerbee v. State, 215 Ga. App. 102, 449 S.E.2d 874, 1994 Ga. App. LEXIS 1132 (1994), cert. denied, No. S95C0324, 1995 Ga. LEXIS 290 (Ga. Feb. 17, 1995) (decided under former O.C.G.A. § 24-5-25).

Duplicate original of instrument admissible into evidence without violation of the best evidence rule. Georgia Farm Bureau Mut. Ins. Co. v. Latimore, 151 Ga. App. 786, 261 S.E.2d 735, 1979 Ga. App. LEXIS 2682 (1979) (decided under former Code 1933, § 38-702).

Copy need not be exact. — It is not necessary that a copy sought to be proved shall be identical with the original, but it may be either a literal or a substantial copy, provided other rules as to the admission of secondary evidence are satisfied. Georgia Farm Bureau Mut. Ins. Co. v. Latimore, 151 Ga. App. 786, 261 S.E.2d 735, 1979 Ga. App. LEXIS 2682 (1979) (decided under former Code 1933, § 38-702).

Response to notice to produce. — When a party to a cause serves on the opposite party, who is presumably in possession of a once existing material writing, a notice to produce such writing, and the party served responds that the writing is lost, or fails to produce the writing at

the trial, secondary evidence as to the contents of the original writing becomes admissible. Middlebrooks v. Cabaniss, 193 Ga. 764, 20 S.E.2d 10, 1942 Ga. LEXIS 469 (1942) (decided under former Code 1933, § 38-214).

Carbon Copies

Original of exhibit inadvertently removed from attorney's office. — When a witness testified that the original of an exhibit was prepared by the witness, and that the exhibit was an exact copy of the original, and when the plaintiff's attorney stated in plaintiff's place that the original had been given to the attorney and several copies made, and also stated that through inadvertence the original went out of the attorney's office as an exhibit to the complaint and could not be located, the trial judge did not abuse judicial discretion in admitting the exhibit. Palmer v. Wilkins, 163 Ga. App. 104, 294 S.E.2d 355, 1982 Ga. App. LEXIS 3188 (1982) (decided under former O.C.G.A. § 24-5-21).

Carbon copies of documents. — When it is proved that a genuine original was executed, proof that a document is an exact carbon copy of that original is sufficient to admit it into evidence without proving the loss of the original. Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337, 1958 Ga. LEXIS 464 (1958) (for comment, see 21 Ga. B.J. 553 (1959)) (decided under former Code 1933, § 38-212).

Trial court did not err in admitting certain copies of a store's receipts of defendant's fraudulent transactions rather than the originals as the store's loss prevention manager testified that although the originals had been maintained at the store, the manager had not been able to locate the receipts in time for trial and that the manager had made the copies of the original receipts, which accurately reflected the original receipts; defendant did not show that the best evidence rule had been violated. Epps v. State, 262 Ga. App. 113, 584 S.E.2d 701, 2003 Ga. App. LEXIS 854 (2003) (decided under former O.C.G.A. § 24-5-2).

Exact carbon copy admissible. — If it was proved that a genuine original was executed, proof that a proffered document was an exact carbon copy of that original was sufficient to admit in evidence the carbon copy without proving loss of the original. Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337, 1958 Ga. LEXIS 464 (1958) (decided under former Code 1933, § 38-702).

Carbonless copies held admissible. — In light of a landowner's testimony that the original cancelled checks and bank statements showing evidence of payment from 1986 for the land in question were unavailable, the trial court could not be said to have abused the court's discretion in allowing the landowner to introduce two "carbonless copies" of checks showing payment. Murray v. Stone, 283 Ga. 6, 655 S.E.2d 821, 2008 Ga. LEXIS 14 (2008) (decided under former O.C.G.A. § 24-5-21).

Carbon copy inadmissible. — When a carbon copy of a letter was offered in evidence without any proof of the execution, mailing, or receipt of an original and the copy contained a signature only in type, the copy was prejudicial and the court erred in admitting the copy. Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337, 1958 Ga. LEXIS 464 (1958) (decided under former Code 1933, § 38-702).

Application

1. In General

Accounting for original when photocopy was used. — Photocopy may not be admitted in evidence without accounting for the original except when there was proof that the copy was identical to the original. Lester v. Groves, 162 Ga. App. 590, 291 S.E.2d 785, 1982 Ga. App. LEXIS 2255 (1982) (decided under former O.C.G.A. § 24-5-26).

Photocopies of claim forms identified as authentic by a witness are properly admissible under Ga. L. 1950, p. 73, § 1 without accounting for the original under former Code 1933, § 38-212. Strickland v. Foundation Life Ins. Co., 129 Ga. App. 614, 200 S.E.2d 306, 1973 Ga. App. LEXIS 1078 (1973) (decided under former Code 1933, § 38-212).

Photocopy of the forged check was admissible as a bank supervisor testified that the bank supervisor gave the check to

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the branch manager, who faxed a copy to the bank's corporate security; the state presented evidence that the original would have been stored at the branch or in the bank's loss prevention facility; and a supervisor testified that the check could not be located at either location. Thomas v. State, 319 Ga. App. 690, 738 S.E.2d 149, 2013 Ga. App. LEXIS 51 (2013) (decided under former O.C.G.A. § 24-5-26).

Showing that photocopy was made in regular course of business. — When the party offering photostatic reproductions as evidence made no attempt to establish that the photocopies were made in the regular course of business and failed to properly account for the absence of the original, it was not error to refuse to admit the photocopies. State v. Mincey, 167 Ga. App. 850, 308 S.E.2d 18, 1983 Ga. App. LEXIS 2639 (1983) (decided under former O.C.G.A. § 24-5-26).

Photocopy of insurance application form. — Court did not err in refusing to admit a photocopy of an insurance application form offered as evidence by the defendant since the defendant was in possession of the original and had made no attempt to establish that the photocopy was made in the regular course of business. Nationwide Mut. Fire Ins. Co. v. Rhee, 160 Ga. App. 468, 287 S.E.2d 257, 1981 Ga. App. LEXIS 3149 (1981) (decided under Ga. L. 1950, p. 73, § 1).

Photostatic copies of claim forms identified as authentic by a witness are properly admissible. Strickland v. Foundation Life Ins. Co., 129 Ga. App. 614, 200 S.E.2d 306, 1973 Ga. App. LEXIS 1078 (1973) (decided under Ga. L. 1950, p. 73, § 1).

Investigator's unsigned affidavit did not qualify as duplicate original. — Trial court did not err when the court denied the defendant's motion to suppress even though the unsigned, unsworn document an investigator identified as the investigator's unsigned affidavit presented at the suppression hearing did not qualify as a "duplicate original" under Georgia law since the affidavit was not made by the same pen stroke at the same time or was not a copy executed at the same time as the "original" of the document; in light of an investigator's testimony concerning the loss of the sealed packet containing the original search warrants and affidavits, the trial court did not abuse the court's discretion when the court admitted secondary evidence under former O.C.G.A. § 24-5-21, i.e., the testimony of the investigator as to the contents of the missing affidavits. Baptiste v. State, 288 Ga. 653, 706 S.E.2d 442, 2011 Ga. LEXIS 161 (2011) (decided under former O.C.G.A. § 24-5-21).

Copies of affidavits. — Affidavits introduced in evidence that were reproductions of the original affidavits were admissible notwithstanding an objection based on the best evidence rule. Adams v. State, 217 Ga. App. 706, 459 S.E.2d 182, 1995 Ga. App. LEXIS 598 (1995), cert. denied, No. S95C1707, 1995 Ga. LEXIS 1094 (Ga. Oct. 13, 1995) (decided under former O.C.G.A. § 24-5-26).

Photostatic receipt for evidence. — When, with regard to proof of transmittal of contraband to the state crime lab by certified mail, the state could only produce a photostatic copy of the certification receipt in lieu of the original and the defendant urged that, without an adequate explanation for the absence of the original certified mail receipt as required by former O.C.G.A. § 24-5-4 (see now O.C.G.A. § 24-10-1002), the chain of custody was not sufficiently proven, but a deputy sheriff testified that the deputy would always make a copy of the certified mail receipt when the deputy mailed contraband to the state crime lab, but had been unable to locate the original receipt for this particular mailing, and identified the deputy's handwriting on the photostatic copy and noted that the certification number was identical to that on the state crime lab report, the trial court was authorized to conclude that the copy of the receipt had been made in the regular course of business so as to be admissible pursuant to former O.C.G.A. §§ 24-3-14 and 24-5-26 (see now O.C.G.A. §§ 24-8-803 and 24-10-1003). Spead v. State, 187 Ga. App. 359, 370 S.E.2d 213, 1988 Ga. App. LEXIS 700 (1988) (decided under former O.C.G.A. § 24-5-26).

Reproduction admissible despite testifying witness's lack of personal knowledge. — Trial court did not err in

admitting a copy of the defendant's fingerprint card, pursuant to former O.C.G.A. §§ 24-3-14 and 24-5-26 (see now O.C.G.A. §§ 24-8-803 and 24-10-1003), despite the defendant's claim that the testifying witness lacked personal knowledge with regard to the circumstances or time of the creation or transmission of the card as the card itself showed that the card was created and transmitted at the time of the defendant's arrest and was handled in the gathering agency's regular and routine course of business. Tubbs v. State, 283 Ga. App. 578, 642 S.E.2d 205, 2007 Ga. App. LEXIS 115 (2007) (decided under former O.C.G.A. § 24-5-26).

Copy of particular magazine issue. — As copies of magazines of the same issue are usually duplicates of the original, there was no error in admitting another copy of the same issue used by an investigating officer when the officer testified the magazine was identical. Verble v. State, 172 Ga. App. 321, 323 S.E.2d 239, 1984 Ga. App. LEXIS 3050 (1984) (decided under former O.C.G.A. § 24-5-26).

Photostatic copies of bill payments and original bills excluded. — Bills from a court reporter for depositions and from company for the company's efforts to locate indemnitee, the photostatic copies of checks issued in payment of these bills, and the photostatic copy of check issued in payment of the claim were properly excluded under the best evidence rule. Commercial Union Ins. Co. v. Smith, 179 Ga. App. 734, 347 S.E.2d 701, 1986 Ga. App. LEXIS 2026 (1986) (decided under former O.C.G.A. § 24-5-25).

Transcript of online conversations. — With regard to the defendant's conviction for criminal attempt to commit child molestation and related crimes, the trial court did not err in admitting into evidence transcripts of all of the online conversations between the defendant and a detective, posing as the 15-year-old victim, because the detective testified that the detective participated in all of the online conversations with the defendant; that the detective created the transcripts by copying the text exactly as the text appeared on the computer screen, without making any additions, omissions, or other alterations to that text; and that the transcript reflected the exact words used in the conversation, as well as the online names used by the persons who typed those words, which was sufficient to authenticate the transcript. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400, 2013 Ga. App. LEXIS 280 (2013), cert. denied, No. S13C1278, 2013 Ga. LEXIS 814 (Ga. Oct. 7, 2013), cert. denied, 572 U.S. 1050, 134 S. Ct. 1797, 188 L. Ed. 2d 765, 2014 U.S. LEXIS 2463 (2014).

Copies accurate duplicates in pimping prosecution. — When the defendant was convicted of pimping a person under the age of 18, contributing to the delinquency of a minor, and trafficking a person for sexual servitude, the copies of the birth certificate and social security card found in the victim's purse were admissible as there was never any issue raised that the copies of the documents entered into evidence were not accurate duplicates of those documents; and, although the victim at one time denied being the person identified in the documents, that did not bear on the admissibility of the copies as an accurate representation of what was found in the victim's purse. Mackey v. State, 342 Ga. App. 791, 805 S.E.2d 596, 2017 Ga. App. LEXIS 413 (2017).

Photograph of cell phone screen. — Digital photographs of what appeared on the screen of the victim's cell phone were duplicates and admissible to the same extent as the original. Pierce v. State, 302 Ga. 389, 807 S.E.2d 425, 2017 Ga. LEXIS 940 (2017).

Failure to present evidence on permits. — Trial court erred in denying the appellants' motion for summary judgment because the appellees failed to present evidence sufficient to create a jury issue as to whether the appellants had a duty to inspect the exhaust vent since no permits were produced as evidence and the appellants were only required to inspect if a permit was issued. Martin v. Ledbetter, 342 Ga. App. 208, 802 S.E.2d 432, 2017 Ga. App. LEXIS 331 (2017).

Evidence inadmissible. — In a civil forfeiture proceeding in connection with an action brought under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq.,

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a witness's testimony regarding newspaper and billboard advertising, telephone calls, and credit card charges violated the best evidence rule because the state neither produced documentary evidence to support the statements, nor accounted for the absence of such evidence. Pabey v. State, 262 Ga. App. 272, 585 S.E.2d 200, 2003 Ga. App. LEXIS 881 (2003) (decided under former O.C.G.A. § 24-5-25).

State's showing insufficient. — Sentencing court improperly considered defendant's prior state court conviction because the state presented only hearsay, rather than competent evidence, showing that the state was unable to obtain a certified copy of the conviction, and there was no evidence regarding whether the state used due diligence to obtain such a copy. Brinkley v. State, 301 Ga. App. 827, 689 S.E.2d 116, 2009 Ga. App. LEXIS 1456 (2009) (decided under former O.C.G.A. § 24-5-2).

2. Real Estate Transactions

Deed on record. — Deed should be held to be legally and properly on record by due proof of signing, sealing, and delivery until the contrary appears. Walls v. Smith, 19 Ga. 8, 1855 Ga. LEXIS 13 (1855) (decided under Ga. L. 1855-56, p. 138, § 2).

Title to land. — If there is written evidence of title to land, that evidence must be produced in order to prove its contents and before secondary evidence is competent to show its contents, it must first be shown to the court that the original once existed, that the original was properly executed and that the original is either lost or destroyed, or for some other sufficient cause is not accessible to the diligence of the party. Head v. Lee, 203 Ga. 191, 45 S.E.2d 666, 1947 Ga. LEXIS 589 (1947) (decided under former Code 1933, § 38-214).

Deed. — If a party wishes to introduce a copy of a deed in evidence, it will be a sufficient compliance with the rule to swear that the original deed in the party's belief was lost or destroyed, and the deed was not in the party's custody, power, or control. Ratteree v. Nelson, 10 Ga. 439, 1851 Ga. LEXIS 124 (1851) (decided under former law); Drew v. Drew, 146 Ga. 479, 91 S.E. 541, 1917 Ga. LEXIS 352 (1917) (decided under former Civil Code 1910, § 5829).

When in a suit for land the right of the plaintiffs is predicated upon an alleged lost and unrecorded deed, proof of the existence of a genuine original must be established before secondary evidence relating thereto is admissible. Latham v. Fowler, 199 Ga. 648, 34 S.E.2d 870, 1945 Ga. LEXIS 348 (1945) (decided under former Code 1933, § 38-214).

Typewritten copy of deed. — Certified copy of a petition filed by the plaintiffs' father (holder of life estate under the alleged deed) to sell for reinvestment and attaching a typewritten copy of what purported to be the alleged unrecorded deed did not establish that in fact a genuine deed had been executed. Latham v. Fowler, 199 Ga. 648, 34 S.E.2d 870, 1945 Ga. LEXIS 348 (1945) (decided under former Code 1933, § 38-214).

Proof of handwriting not required. — If an original deed remains in existence in possession of the grantee, proof of the handwriting would be prima facie evidence that the deed was sealed and delivered; but when the deed is lost, positive proof of the handwriting is not to be expected or required, and the grantee must depend on other proof. Fowler v. Latham, 201 Ga. 68, 38 S.E.2d 732, 1946 Ga. LEXIS 351 (1946) (decided under former Code 1933, § 38-214).

Attesting witnesses to deed not necessary. — When a deed has been recorded and lost and the record has been destroyed, a copy of the original may be proved by the person who made the deed, and the attesting witnesses need not be called for that purpose. Fletcher v. Horne, 75 Ga. 134, 1885 Ga. LEXIS 83 (1885) (decided under former Code 1863, §§ 3741, 3744, and 3745).

Indefinite statement concerning deed. — Evidence of a statement by a defendant that the defendant knew such a deed as alleged by the plaintiffs was in existence in which the father and his children were grantees was not sufficient to establish the deed because such an admission was too indefinite to properly

identify and establish the existence of any particular deed. Latham v. Fowler, 199 Ga. 648, 34 S.E.2d 870, 1945 Ga. LEXIS 348 (1945) (decided under former Code 1933, § 38-214).

3. Banking

Photostatic copy of bank account signature card. — When the original of the bank account signature card was on file in the bank and the custodian of the bank's records brought with the custodian a photostatic copy, which was a copy routinely made in the normal course of business, the photostatic copy was admissible. Hawkins v. State, 167 Ga. App. 143, 305 S.E.2d 797, 1983 Ga. App. LEXIS 2421 (1983) (decided under former O.C.G.A. § 24-5-26).

Photostatic copy of check drawn on a New York bank and returned for insufficient funds was properly identified as a bank record since the original was accounted for as having been returned to the defendant. Hamilton v. State, 118 Ga. App. 842, 165 S.E.2d 884, 1968 Ga. App. LEXIS 1541 (1968) (decided under Ga. L. 1950, p. 73, § 1).

Testimony concerning record books. — Testimony of a claimant that the claimant had recently examined the books of a bank in another state was insufficient to show the authenticity of such books as a foundation for the admission of secondary evidence of their contents, it not appearing that the books were found in the custody of any trustee or officer of court in charge of such insolvent bank, or in the possession of any person whose duty it was to keep and preserve the books. McDonald v. Redding Lumber Co., 43 Ga. App. 656, 159 S.E. 888, 1931 Ga. App. LEXIS 501 (1931) (decided under former Civil Code 1910, § 5761).

When the original, cancelled checks were returned by the payor bank to the bank's home office in another state, the photostatic copies of the issued checks were admissible under former O.C.G.A. § 24-5-26 (see now O.C.G.A. §§ 24-10-1003 and 24-10-1004). Commercial Union Ins. Co. v. Smith, 179 Ga. App. 734, 347 S.E.2d 701, 1986 Ga. App. LEXIS 2026 (1986) (decided under former O.C.G.A. § 24-5-26).

Copy of currency. — Since the police department routinely made copies of currency used in drug buys, the photocopy of a $20 bill used as "buy money" in a drug transaction was admissible under either former O.C.G.A. § 24-5-26 (see now O.C.G.A. §§ 24-10-1003 and 24-10-1004) or former O.C.G.A. § 24-5-4 (see now O.C.G.A. § 24-10-1002). Johnson v. State, 231 Ga. App. 114, 497 S.E.2d 666 (decided under former O.C.G.A. § 24-5-26).

Harmless error in failing to account for original check. — In an identity fraud case, the transcript showed that the state never accounted for the original check when defense counsel objected on the ground that the admission of the original was the best evidence; therefore, it was error for the trial court to admit the photostatic copy pursuant to former O.C.G.A. § 24-5-2 (see now O.C.G.A. §§ 24-10-1003 and 24-10-1004), but the error was harmless because the state's witnesses provided direct testimony regarding details about the check, and specifically testified regarding defendant's use of the identity fraud victim's driver's license; thus, the check itself was of little or no significance in determining defendant's guilt or innocence of identity fraud, and any error in admitting a photostatic copy of the check into evidence would not have influenced the jury's verdict in any way. Wilson v. State, 276 Ga. App. 39, 622 S.E.2d 411, 2005 Ga. App. LEXIS 1144 (2005) (decided under former O.C.G.A. § 24-5-2).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Ga. L. 1950, p. 73, § 1, are included in the annotations for this Code section.

Photostatic copies made from microfilms are admissible as primary evidence. 1945-47 Ga. Op. Att'y Gen. 286 (decided under former law).

Microfilms of records would probably be admissible into evidence. 1973 Op. Att'y Gen. No. 73-91 (decided under Ga. L. 1950, p. 73, § 1).

Microfilm copies of scholarship agreements and notes would be admissible in evidence. 1972 Op. Att'y Gen. No. 72-142 (decided under Ga. L. 1950, p. 73, § 1).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Admissibility of Computerized Business Records, 14 POF2d 173.

Foundation for Offering Business Records in Evidence, 34 POF2d 509.

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Recovery and Reconstruction of Electronic Mail as Evidence, 41 POF3d 1.

Establishing A Foundation to Admit Computer-Generated Evidence as Demonstrative or Substantive Evidence, 57 POF3d 455.

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 1066 et seq., 1250.

C.J.S.

23 C.J.S., Criminal Law, § 1131 et seq. 32 C.J.S., Evidence, §§ 924, 939, 940, 949, 954 et seq. 32A C.J.S., Evidence, §§ 1049, 1050, 1089 et seq., 1093 et seq., 1100 et seq.

U.L.A.

Uniform Photographic Copies of Business and Public Records as Evidence Act (U.L.A.) § 1.

ALR.

Release or assignment of interest by witness as removing disqualification to testify in action by or against estate of decedent, 28 A.L.R. 6.

Admissibility in evidence of audit or testimony of auditor or accountant, 52 A.L.R. 1266.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 A.L.R. 77.

Presumption or circumstantial evidence to establish missing link in chain of title, 67 A.L.R. 1333.

Use as evidence against officers, employees, or stockholders of corporation of illegally seized documents or other articles belonging to corporation, 78 A.L.R. 343.

Use of photograph, plan, map, cast, model, etc., as evidence as affected by marking or legends thereon, 108 A.L.R. 1415.

Photographic representation of writing as primary or secondary evidence, 142 A.L.R. 1270; 76 A.L.R.2d 1356.

Degree or quantum of evidence necessary to establish a lost instrument and its contents, 148 A.L.R. 400.

Verification and authentication of slips, tickets, bills, invoices, etc., made in regular course of business, under the Uniform Business Records as Evidence Act, or under similar "Model Acts," 21 A.L.R.2d 773.

Form, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records, and documents, 23 A.L.R.2d 862.

Sufficiency of certificate of acknowledgment, 25 A.L.R.2d 1124.

Admissibility of opinion of medical expert as affected by his having heard the person in question give the history of his case, 51 A.L.R.2d 1051.

Carbon copies of letters or other written instruments as evidence, 65 A.L.R.2d 342.

Necessity, in order to enter judgment by confession on instrument containing warrant of attorney, that original note or other instrument and original warrant be produced or filed, 68 A.L.R.2d 1156.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 A.L.R.2d 308.

Photographic representation or photostat of writing as primary or secondary evidence within best evidence rule, 76 A.L.R.2d 1356.

Proof, in absence of direct testimony, of identity of motor vehicle involved in accident, 81 A.L.R.2d 861.

Preliminary proof, verification, or authentication of X-rays requisite to their introduction in evidence in civil cases, 5 A.L.R.3d 303.

Admissibility of newspaper article as evidence of the truth of the facts stated therein, 55 A.L.R.3d 663.

Applicability of attorney-client privilege to matters relating to drafting of nonexistent or unavailable nontestamentary documents, 55 A.L.R.3d 1322.

Admissibility of video tape film in evidence in criminal trial, 60 A.L.R.3d 333; 41 A.L.R.4th 812; 41 A.L.R.4th 877.

Proof of public records kept or stored on electronic computing equipment, 71 A.L.R.3d 232.

Admissibility of computerized private business records, 7 A.L.R.4th 8.

Application of best evidence rule to electronic evidence, including text messages and e-mail, 12 A.L.R.7th 1.

24-10-1004. Admissibility of other evidence of contents of a writing, recording, or photograph.

The original shall not be required and other evidence of the contents of a writing, recording, or photograph shall be admissible if:

(1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) No original can be obtained by any available judicial process or procedure;

(3) At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) The writing, recording, or photograph is not closely related to a controlling issue.

History.

Code 1981, § 24-10-1004, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Recording lost or destroyed deeds, § 44-2-12.

Admissibility of other evidence of content, Fed. R. Evid. 1004.

Law reviews.

For comment on Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337 (1958), see 21 Ga. B.J. 553 (1959).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1858, p. 53, § 1, Ga. L. 1855, p. 138, § 2, former Code 1863, § 3691, former Code 1868, § 3714, former Code 1873, §§ 3767, 3818, 3821, 3822, former Code 1882, § 3767, former Civil Code 1895, §§ 5172, 5173, former Civil Code 1910, §§ 5759, 5829, former Code 1933, §§ 38-211, 38-212, 38-702, and former O.C.G.A. §§ 24-5-2, 24-5-3, 24-5-5, 24-5-21 through 24-5-24, and 24-5-26 are included in the annotations for this Code

General Consideration (Cont'd)

section. In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-10-1003, which may also be applicable to this Code section.

Rule as to the degree of secondary evidence. was that when there was no ground for the presumption that better secondary evidence existed, any proof was received which was admissible by the other rules of law, unless the objecting party can show that better evidence was previously known to the other party, and might have been produced. Doe v. Biggers, 6 Ga. 188, 1849 Ga. LEXIS 24 (1849) (decided under former law).

Requirements for admission of secondary evidence. — To admit secondary evidence as by law provided, it was necessary to prove that there had been an original and that the original was lost. Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337, 1958 Ga. LEXIS 464 (1958) (decided under former Code 1933, § 38-702).

While the former statute left the question of diligence to the sound discretion of the court, before secondary evidence could be admitted, the party would be required to show that the party had, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery, which the nature of the case suggested and which were accessible to the party. Pendley v. Murphy, 112 Ga. App. 33, 143 S.E.2d 674, 1965 Ga. App. LEXIS 595 (1965) (decided under former Code 1933, § 38-702).

Foundation for secondary evidence. — Affidavit by a party that an original paper, of which one desired to make proof by secondary evidence, was lost or mislaid, and after diligent search that one cannot find it, was a substantial compliance. Smith v. Atwood, 14 Ga. 402, 1854 Ga. LEXIS 126 (1854) (decided under former law).

Recorded instruments. — Law applied to those deeds and instruments that were, by law, authorized and required to be recorded. Gill v. Strozier, 32 Ga. 688, 1861 Ga. LEXIS 257 (1861) (decided under Ga. L. 1858, p. 53, § 1).

Accessibility and diligence. — In order to introduce secondary evidence of the contents of a lost paper, it was only necessary to establish a reasonable presumption of the paper's loss; and this presumption was held to be established when the party showed that in a reasonable degree, the party had exhausted all the sources of information and means of discovery, which the nature of the cases suggests and which were accessible to the party. Ellis v. Doe, 10 Ga. 253, 1851 Ga. LEXIS 98 (1851) (decided under former law); Harper v. Scott, 12 Ga. 125, 1852 Ga. LEXIS 102 (1852) (decided under former law); Molyneaux v. Collier, 13 Ga. 406, 1853 Ga. LEXIS 103 (1853) (decided under former law); Bryan v. Walton, 14 Ga. 185, 1853 Ga. LEXIS 210 (1853) (decided under former law).

Function of trial court was not to determine the worthiness or credibility of secondary evidence, but is only to determine whether what is offered as evidence is the best form accessible to the court. Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816, 1980 Ga. App. LEXIS 2565 (1980) (decided under former Code 1933, §§ 38-212, 38-702).

Discretion of trial judge. — Question of inaccessibility of primary evidence and diligence of the party is a determination within the discretion of the trial judge and the judge's decision will not be overturned unless that discretion is abused. Hawes v. Paul, 41 Ga. 609, 1871 Ga. LEXIS 152 (1871) (decided under former Code 1868, § 3714); Florida Coca Cola Bottling Co. v. Ricker, 136 Ga. 411, 71 S.E. 734, 1911 Ga. LEXIS 562 (1911) (decided under former Civil Code 1910, § 5759); Orr v. Dunn, 145 Ga. 137, 88 S.E. 669, 1916 Ga. LEXIS 209 (1916) (decided under former Civil Code 1910, § 5759); Brookman v. Rennolds, 148 Ga. 721, 98 S.E. 543, 1919 Ga. LEXIS 45 (1919) (decided under former Civil Code 1910, § 5759); Bedgood v. State, 100 Ga. App. 736, 112 S.E.2d 430, 1959 Ga. App. LEXIS 715 (1959) (decided under former Code 1933, § 38-212); Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816, 1980 Ga. App. LEXIS 2565 (1980) (decided under former Code 1933, § 38-212).

Discretion of court. — Exercise of such discretion mentioned in former stat-

ute would not be controlled, unless the discretion was abused. Cowart v. Fender, 137 Ga. 586, 73 S.E. 822, 1912 Ga. LEXIS 100 (1912) (decided under former Civil Code 1910, § 5829); Metropolitan Life Ins. Co. v. Vickery, 49 Ga. App. 727, 176 S.E. 815, 1934 Ga. App. LEXIS 541 (1934) (decided under former Code 1933, § 38-702); Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816, 1980 Ga. App. LEXIS 2565 (1980) (decided under former Code 1933, § 38-702).

It was an abuse of discretion to exclude testimony which should have qualified as secondary evidence and which comprised the defendant's most critical defense to the only direct evidence against the defendant. Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816, 1980 Ga. App. LEXIS 2565 (1980) (decided under former Code 1933, § 38-702).

Secondary evidence admitted without objection. — Court has a right to charge, and the jury to find, upon secondary evidence, provided the evidence has been introduced without objection. Goodwyn v. Goodwyn, 20 Ga. 600, 1856 Ga. LEXIS 113 (1856) (decided under former law).

Party as witness. — Proof that a paper was lost or destroyed lays a proper foundation for the admission of secondary evidence, and a party was a competent witness to this point. Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816, 1980 Ga. App. LEXIS 2565 (1980) (decided under former Code 1933, § 38-212).

If witnesses are unknown, it is not necessary to prove that the alleged lost original writing was executed with any particular formality in order to admit secondary evidence of the writing's contents. Sharp v. Autry, 185 Ga. 160, 194 S.E. 194, 1937 Ga. LEXIS 692 (1937) (decided under former Code 1933, § 38-212).

Former O.C.G.A. § 24-5-21 applied both to secondary documentary evidence and to parol testimony. Croxton v. Leggett Motor Rebuilding, 168 Ga. App. 258, 308 S.E.2d 640, 1983 Ga. App. LEXIS 2741 (1983) (decided under former O.C.G.A. § 24-5-21).

Parol evidence. — Contents of a lost writing may be established by parol. Segars v. City of Cornelia, 60 Ga. App. 457, 4 S.E.2d 60, 1939 Ga. App. LEXIS 61 (1939) (decided under former Code 1933, § 38-212); Cummings v. State, 84 Ga. App. 698, 67 S.E.2d 156, 1951 Ga. App. LEXIS 769 (1951) (decided under former Code 1933, § 38-212).

Contents of lost writing may be established by parol. Segars v. City of Cornelia, 60 Ga. App. 457, 4 S.E.2d 60, 1939 Ga. App. LEXIS 61 (1939) (decided under former Code 1933, §§ 38-607, 38-610, and 38-611).

Original photographic line-up lost. — Admission of a photocopy of an original photographic lineup did not violate the best evidence rule since the original photographic copy was missing from the state's file and the photocopies were clear enough to be easily recognizable. Pinson v. State, 266 Ga. App. 254, 596 S.E.2d 734, 2004 Ga. App. LEXIS 348 (2004) (decided under former O.C.G.A. § 24-5-23).

Copy as evidence. — When an approved copy is in evidence, parol testimony as to its contents is inadmissible. Shedden v. Heard, 110 Ga. 461, 35 S.E. 707, 1900 Ga. LEXIS 559 (1900) (decided under former Civil Code 1895, § 5173); See also Williams v. Waters, 36 Ga. 454, 1867 Ga. LEXIS 67 (1867).

Secondary evidence was found admissible in the following cases. — See Hawes v. Paul, 41 Ga. 609, 1871 Ga. LEXIS 152 (1871) (material evidence) (decided under former Code 1868, § 3714); Sims v. Scheussler, 2 Ga. App. 466, 58 S.E. 693, 1907 Ga. App. LEXIS 425 (1907) (certified copy of deed) (decided under former Civil Code 1895, § 5172); Sharp v. Autry, 185 Ga. 160, 194 S.E. 194, 1937 Ga. LEXIS 692 (1937) (circumstantial evidence) (decided under former Code 1933, § 38-212); Everitt v. Harris, 67 Ga. App. 64, 19 S.E.2d 545, 1942 Ga. App. LEXIS 337 (1942) (carbon copies) (decided under former Code 1933, § 38-212); Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744, 1947 Ga. LEXIS 524 (1947) (circumstantial evidence) (decided under former Code 1933, § 38-212); Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816, 1980 Ga. App. LEXIS 2565 (1980) (critical evidence) (decided under former Code 1933, § 38-212).

Inaccessibility

Inaccessibility was found in the following cases. — See Jackson v. Johnson, 67 Ga. 167, 1881 Ga. LEXIS 149 (1881) (administrator's bond in foreign state) (decided under former Code 1873, § 3767); Sims v. Scheussler, 2 Ga. App. 466, 58 S.E. 693, 1907 Ga. App. LEXIS 425 (1907) (mortgage) (decided under former Civil Code 1895, § 5172); Davis v. State, 25 Ga. App. 532, 103 S.E. 819, 1920 Ga. App. LEXIS 59 (1920) (telegraph messages) (decided under former Civil Code 1910, § 5759); Beall v. Francis, 163 Ga. 894, 137 S.E. 251, 1927 Ga. LEXIS 90 (1927) (certified copy of marriage contract) (decided under former Civil Code 1910, § 5759); Carpenter v. State, 140 Ga. App. 368, 231 S.E.2d 97, 1976 Ga. App. LEXIS 1481 (1976) (golf membership card) (decided under former Code 1933, § 38-212); Knox v. State, 165 Ga. App. 26, 299 S.E.2d 105, 1983 Ga. App. LEXIS 1752 (1983) (laboratory) (decided under former O.C.G.A. § 24-5-2); General Ins. Servs., Inc. v. Marcola, 231 Ga. App. 144, 497 S.E.2d 679 (contract) (decided under former O.C.G.A. § 24-5-2).

Diligence

Proof of diligence. — While upon proof that a paper was lost, secondary evidence as to the paper's contents was admissible, the mere statement of a party that a paper "is lost" was nothing but a conclusion of the witness, and, in the absence of testimony as to any search for the missing paper, or other facts to support the witness's conclusion, such secondary evidence, on timely objection, should be rejected. Underdonk & Pitts v. Jester, 17 Ga. App. 419, 87 S.E. 680, 1916 Ga. App. LEXIS 976 (1916) (decided under former Civil Code 1910, § 5829).

Since, during the giving of defendant's statement to police the tape recorder malfunctioned for a period of time, and the interview continued after the recorder had been repaired; since the officers who conducted the interview offered their reconstruction of the interview's unrecorded portions, and testified that the statements were substantially the same as the recorded parts, and the recorded statement, as thus supplemented, was admitted only after a Jackson-Denno hearing, there was no error. McGee v. State, 260 Ga. 178, 391 S.E.2d 400, 1990 Ga. LEXIS 197 (1990) (decided under former O.C.G.A. § 24-5-21).

Diligence was found. — When absence of letter in court was explained by the receiver of the letter, as was the receiver's diligence in searching for the letter, and in no other way could this letter be accounted for but that it was "lost," this was good and reasonable cause for inaccessibility. Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816, 1980 Ga. App. LEXIS 2565 (1980) (decided under former Code 1933, § 38-212).

Diligence was not found. — Copy of a deed taken from the register is not admissible evidence against the grantee, without notice to the grantee to produce the original. Solomon & Son v. Creech, 82 Ga. 445, 9 S.E. 165, 1889 Ga. LEXIS 398 (1889) (decided under former Code 1882, § 3767).

Admission in evidence of testimony as to the contents of a lost document was error since there was not sufficient evidence of the diligence of the defendants to show its nonavailability. Pendley v. Murphy, 112 Ga. App. 33, 143 S.E.2d 674, 1965 Ga. App. LEXIS 595 (1965) (decided under former Code 1933, § 38-702).

Application

1. In General

Copy of contract admissible. — Since the original copy of a contract was admittedly destroyed by the defendant, and testimony was introduced that the plaintiff and the third party to the contract formally executed the original, though there was no evidence that the defendant ever signed the contract, and there was evidence to the effect that the defendant followed the provisions of the contract until the parties had a falling out, evidence was sufficient to infer that defendant had received the benefits of such contract and to admit the copy into evidence over the defendant's objection. Silvey v. Wynn, 102 Ga. App. 283, 115 S.E.2d 774, 1960 Ga. App. LEXIS 601

(1960) (decided under former Code 1933, § 38-702).

Illegible writing as part of contract. — Trial court erred in granting summary judgment to a rehabilitation company based on a contractual exculpatory clause because the material provisions of the agreement at issue were illegible, and given that an affidavit was insufficient to establish a basis for the admission of the alleged exemplar, the company failed to show that the agreement signed by the participant contained an exculpatory clause waiving and releasing the company from liability for the company's own negligence. Sanchez v. Atlanta Union Mission Corp., 329 Ga. App. 158, 764 S.E.2d 178, 2014 Ga. App. LEXIS 641 (2014).

Record. — Mere failure of the record, as appeared in the writ book, to show the existence of a portion of the record of a lost paper was not conclusive of the nonexistence of the paper, but the existence and the contents of such lost portion of a record could be established by parol. Benton v. Maddox, 52 Ga. App. 813, 184 S.E. 788, 1936 Ga. App. LEXIS 258 (1936) (decided under former Code 1933, § 38-702).

Letters. — When letters which would be admissible in evidence were lost or destroyed, the letters' contents are provable by parol after proof of loss or destruction. Marietta Sav. Bank v. Janes, 66 Ga. 286, 1881 Ga. LEXIS 6 (1881) (decided under former Code 1873, § 3832); Knox v. Harrell, 26 Ga. App. 772, 107 S.E. 594, 1921 Ga. App. LEXIS 632 (1921).

Trial court's admission of a photocopy of a letter examined by a documents examiner did not violate the best evidence rule as the original letter was lost and the copy was properly authenticated. Roberts v. State, 282 Ga. 548, 651 S.E.2d 689, 2007 Ga. LEXIS 716 (2007) (decided under former O.C.G.A. § 24-5-21).

Last person who had custody of letter must make a complete and proper showing with respect to the alleged nonexistence or inaccessibility or loss of the letter; merely asserting the loss, without showing diligence in attempting to provide the item, will not do. Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816, 1980 Ga. App. LEXIS 2565 (1980) (decided under former Code 1933, § 38-702).

Memorandum of terms of settlement. — When a memorandum of the terms of a settlement was reduced to writing, and handed to defendant's agent, parol evidence as to the memorandum's contents was admissible when such agent testified that the agent never had such memorandum, or if the agent ever had the memorandum in the agent's possession, the memorandum was lost or mislaid even though no notice to produce was served either on the defendant or the agent. Carr v. Smith, 58 Ga. 361, 1877 Ga. LEXIS 108 (1877) (decided under former Code 1873, § 3832).

Proving lost antenuptial agreement. — In a divorce case, applying the preponderance of the evidence standard, and deferring to the trial court's finding that both a husband and a wife believed their opposing positions regarding the contents of a lost antenuptial agreement, the husband failed to prove the terms of the lost agreement, and the agreement could not be enforced. Coxwell v. Coxwell, 296 Ga. 311, 765 S.E.2d 320, 2014 Ga. LEXIS 897 (2014).

Original document, not disclosed during discovery, excluded. — When the defendant introduced evidence to show that a contract had been altered, and when the plaintiff then tendered the original of the contract, which contained blank spaces, the original was properly excluded by the trial court on the basis that the plaintiff had not disclosed the original's existence during discovery. White v. Lance H. Herndon, Inc., 203 Ga. App. 580, 417 S.E.2d 383, 1992 Ga. App. LEXIS 1584 (1992), cert. denied, No. S92C0885, 1992 Ga. LEXIS 530 (Ga. May 21, 1992) (decided under former O.C.G.A. § 24-5-21).

Contents of a journal. — Trial court did not err in ruling that the best evidence rule precluded defendant's wife from testifying about the contents of the victim's journal because the victim testified that the victim threw the journal away; there was no harm in the trial court's refusal to allow further testimony about the contents of the journal as the victim testified

In General (Cont'd)

that the victim did not include the sexual assaults in the journal, and the wife's testimony about the journal's contents was consistent with the victim's testimony. Eley v. State, 266 Ga. App. 45, 596 S.E.2d 660, 2004 Ga. App. LEXIS 295 (2004), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019) (decided under former O.C.G.A. § 24-5-21).

Failure to account for warranty. — In a consumer's suit against a car dealer for breach of a written warranty, regarding the sale of a used car which the dealer's salesperson falsely represented had not been in a wreck, it was not error for the trial court to grant a directed verdict to the dealer because, while the consumer testified that the dealer sold the consumer a written warranty for the vehicle, the consumer did not produce the warranty or account for the warranty's absence, rendering the testimony inadmissible under the best evidence rule. Mitchell v. Backus Cadillac-Pontiac, Inc., 274 Ga. App. 330, 618 S.E.2d 87, 2005 Ga. App. LEXIS 758 (2005), cert. denied, No. S05C1878, 2005 Ga. LEXIS 784 (Ga. Nov. 7, 2005) (decided under former O.C.G.A. § 24-5-21).

Failure to present evidence on permits. — Trial court erred in denying the appellants' motion for summary judgment because the appellees failed to present evidence sufficient to create a jury issue as to whether the appellants had a duty to inspect the exhaust vent since no permits were produced as evidence and the appellants were only required to inspect if a permit was issued. Martin v. Ledbetter, 342 Ga. App. 208, 802 S.E.2d 432, 2017 Ga. App. LEXIS 331 (2017).

Exemplified copy of will. — Exemplified copy of a will from the ordinary's office was presumptive proof that the will was properly probated, otherwise the will could not have been recorded. Thursby v. Myers, 57 Ga. 155, 1876 Ga. LEXIS 56 (1876) (decided under former Code 1873, §§ 3818, 3821, 3822).

Presumption in favor of proper probate was raised when the records were burnt. Oliver v. Persons, 30 Ga. 391, 1860 Ga. LEXIS 106 (1860) (decided under Ga. L. 1858, p. 53, § 1).

Transcript of tape recording. — Best evidence rule did not apply to a tape recorded statement and, therefore, a transcript of a tape recorded statement was admissible when the court determined that a reasonable necessity existed for the reading of the transcript rather than experiencing a delay caused by the additional effort of playing the tape before the court. In re F.L.P., 184 Ga. App. 164, 361 S.E.2d 43, 1987 Ga. App. LEXIS 2761 (1987) (decided under former O.C.G.A. § 24-5-3).

Oral testimony. — Trial court did not err in allowing a witness to testify that the defendant signed personal guaranties of defendant's company's prior indebtednesses to the plaintiff since the failure to produce the original of such personal guaranties was explained and oral testimony was shown to be the "best" secondary evidence of the guaranties' existence. Dedousis v. First Nat'l Bank, 181 Ga. App. 425, 352 S.E.2d 577, 1986 Ga. App. LEXIS 2410 (1986) (decided under former O.C.G.A. § 24-5-5).

Patients' dental records. — When, in a dentist's suit to recover income for work performed for a dental clinic, it appeared that the patients' individual records constituted the primary documentary evidence of their visits, charges, and payments and that those records were otherwise available or accessible, the trial court did not err in refusing to admit plaintiff's own purported summary as secondary evidence of that information. White v. Dilworth, 178 Ga. App. 226, 342 S.E.2d 709, 1986 Ga. App. LEXIS 1641 (1986) (decided under former O.C.G.A. § 24-5-2).

Records destroyed. — Trial court erred in directing a verdict as to damages after a landlord satisfied the requirement for submitting secondary evidence by establishing that the primary evidence, the purchase invoices, had been destroyed and that higher secondary evidence from the company was unavailable; the oral evidence as to the wholesale fair market value and as to the dealer's discount, based upon the actual damaged parts, was sufficient secondary evidence to go to a

jury. Hodges v. Vara, 268 Ga. App. 815, 603 S.E.2d 327, 2004 Ga. App. LEXIS 1022 (2004), cert. denied, No. S04C2061, 2004 Ga. LEXIS 973 (Ga. Oct. 25, 2004) (decided under former O.C.G.A. §§ 24-5-2 and 24-5-3).

Admission of W-2 and spouse's memory to prove income of deceased. — In a spouse's wrongful death suit against the Georgia Department of Transportation, the trial court did not err by allowing the surviving spouse to testify as to that spouse's memory of the deceased spouse's income as the question at issue concerned the prior earnings of the deceased spouse, not the actual contents of prior paychecks. Although W-2 forms and other documentary evidence certainly contained evidence of the past earnings, those documents did not preclude the admission of other evidence to prove the actual fact at issue, namely, the amount of the deceased spouse's income. DOT v. Baldwin, 292 Ga. App. 816, 665 S.E.2d 898, 2008 Ga. App. LEXIS 874 (2008) (decided under former O.C.G.A. § 24-5-2).

No application to videotapes. — Former O.C.G.A. § 24-5-21 applied to writings, not videotapes. Bowen v. State, 237 Ga. App. 597, 516 S.E.2d 311 (decided under former O.C.G.A. § 24-5-21).

Original of exhibit inadvertently removed from attorney's office. — When a witness testified that the original of an exhibit was prepared by the witness, and that the exhibit was an exact copy of the original, and when the plaintiff's attorney stated in plaintiff's place that the original had been given to the attorney and several copies made, and also stated that through inadvertence the original went out of the attorney's office as an exhibit to the complaint and could not be located, the trial judge did not abuse judicial discretion in admitting the exhibit. Palmer v. Wilkins, 163 Ga. App. 104, 294 S.E.2d 355, 1982 Ga. App. LEXIS 3188 (1982) (decided under former O.C.G.A. § 24-5-21).

Certifications from manufacturer as to accuracy of radar device were admissible under business records rule although the officer testifying did not have personal knowledge of the correctness of the record and did not make entries personally, and the person who made entries did not testify. Wiggins v. State, 249 Ga. 302, 290 S.E.2d 427, 1982 Ga. LEXIS 813 (1982) (decided under former O.C.G.A. § 24-5-26).

2. Real Estate Transactions

Evidence of title to land. — If there is written evidence of title to land, it must be produced in order to prove its contents; and before secondary evidence was competent to show its contents, it must first be shown to the court that the original one existed, that it was properly executed and that it was either lost or destroyed, or for some other sufficient cause was not accessible to the diligence of the party. Head v. Lee, 203 Ga. 191, 45 S.E.2d 666, 1947 Ga. LEXIS 589 (1947) (decided under former Code 1933, § 38-212).

Deed. — If a party wishes to introduce a copy of a deed in evidence, it will be a sufficient compliance with the rule to swear that the original deed in the party's belief was lost or destroyed, and the deed was not in the party's custody, power, or control. Ratteree v. Nelson, 10 Ga. 439, 1851 Ga. LEXIS 124 (1851) (decided under former law); Drew v. Drew, 146 Ga. 479, 91 S.E. 541, 1917 Ga. LEXIS 352 (1917) (decided under former Civil Code 1910, § 5829).

Deed on record. — Deed should be held to be legally and properly on record by due proof of signing, sealing, and delivery until the contrary appears. Walls v. Smith, 19 Ga. 8, 1855 Ga. LEXIS 13 (1855) (decided under Ga. L. 1855, p. 138, § 2).

Deed in hands of nonresident grantee. — Parol evidence of the contents of a deed to land in this state is not admissible under the theory that the original deed is in the hands of nonresident grantees who are not parties to the suit, and therefore beyond the power of the court, without making preliminary proof that the deed was not duly recorded. McConnell Bros. v. Slappey, 134 Ga. 95, 67 S.E. 440, 1910 Ga. LEXIS 125 (1910) (decided under former Civil Code 1895, § 5173).

Purchaser of land. — Equity will grant no relief in favor of one who buys land, when one fails to exercise any dili-

Real Estate Transactions (Cont'd)

gence for one's protection, and asserts that one blindly relied on the representations of the seller as to matters of which one could have informed oneself. Browning v. Richardson, 181 Ga. 413, 182 S.E. 516, 1935 Ga. LEXIS 104 (1935) (decided under former Code 1933, § 38-211).

Attesting witnesses to deed not necessary. — When a deed has been recorded and lost and the record has been destroyed, a copy of the original may be proved by the person who made the deed, and the attesting witnesses need not be called for that purpose. Fletcher v. Horne, 75 Ga. 134, 1885 Ga. LEXIS 83 (1885) (decided under former Code 1863, §§ 3741, 3744, 3745).

3. Criminal Matters

Certified copy of conviction is not secondary evidence. — To impeach a witness by a prior conviction, the conviction must be proved by the record of the conviction itself. The certified copy of a conviction was primary evidence, as opposed to secondary evidence, and was the best proof. Howard v. State, 204 Ga. App. 743, 420 S.E.2d 594, 1992 Ga. App. LEXIS 1003, amended, No. A92A0545 (Ga. Ct. App. 1992) (decided under former O.C.G.A. § 24-5-2).

Log sheet with handwritten intoxilyzer results admissible. — Because the original intoxilyzer printouts could not be located even after the investigator conducted a multi-source search, and the defendant did not point the appellate court to any evidence in the record suggesting any bad faith on the part of the state in connection with the missing documents, the trial court did not abuse the court's discretion in finding that admission of a log sheet with handwritten intoxilyzer results would not violate the best evidence rule. Jones v. State, 345 Ga. App. 14, 812 S.E.2d 337, 2018 Ga. App. LEXIS 169 (2018).

Accounting for absence of best evidence by deputy. — Hearsay testimony of a deputy about the contents of a missing letter that the defendant allegedly wrote and sent to the codefendant was admissible as an incriminating statement by the defendant; the state satisfactorily accounted for the absence of the letter through the codefendant, who testified that the codefendant destroyed the letter after showing the letter to the deputy. Summerour v. State, 211 Ga. App. 65, 438 S.E.2d 176, 1993 Ga. App. LEXIS 1410 (1993) (decided under former O.C.G.A. § 24-5-21).

Destruction of notebook not in bad faith. — Officer's testimony regarding writings in a notebook that no longer existed was properly admitted because it was undisputed that the officer lost, misplaced, or destroyed the notebook but there was no evidence that the state intentionally destroyed the notebook in bad faith. Ceballos v. State, 345 Ga. App. 714, 815 S.E.2d 89, 2018 Ga. App. LEXIS 269 (2018).

Evidence lost 13 years after use at earlier trial. — Although a note that the defendant left after stabbing the defendant's ex-wife 13 years earlier could not be located, the state explained that the state had attempted to locate the note in the prior prosecutor's file and it was believed destroyed. At the defendant's trial for the slaying of an ex-female friend, at which the defendant left a similar note, an officer was properly allowed to testify as to the officer's recollection of the first note's contents. Hooks v. State, 295 Ga. 835, 764 S.E.2d 409, 2014 Ga. LEXIS 769 (2014) (decided under former O.C.G.A. §§ 24-5-4 and 24-5-21).

Perjury proven through witness testimony. — Since an original record of the trial during which the perjury with which the defendant was charged occurred was unavailable and could not be produced despite the exercise of the state's due diligence, the state was authorized to prove the defendant's perjured testimony through witness testimony. Walker v. State, 314 Ga. App. 714, 725 S.E.2d 771, 2012 Ga. App. LEXIS 193 (2012), cert. denied, No. S12C1194, 2012 Ga. LEXIS 878 (Ga. Nov. 5, 2012) (decided under former O.C.G.A. § 24-5-2).

When the defendant was convicted of three counts of computer or electronic pornography and child exploitation, the trial court did not plainly err in admitting a retired police officer's testimony during

the trial about the retired officer's investigation of an alleged similar transaction in 2008 because it was undisputed that the relevant videos and photographs from the 2008 investigation were destroyed when the hard drive used in that investigation crashed; there was no evidence that the state intentionally destroyed the videos and photographs in bad faith; and the admission of the retired officer's identification testimony did not affect the outcome of the trial as the evidence of the defendant's guilt was overwhelming. Patch v. State, 337 Ga. App. 233, 786 S.E.2d 882, 2016 Ga. App. LEXIS 302 (2016).

Copies of affidavit and search warrant at motion to suppress hearing. — While the trial court errs in considering copies of an affidavit and search warrant at a motion to suppress hearing, without requiring the originals to be accounted for, the subsequent inclusion of the originals in the record obviates any technical error which may result. Williams v. State, 168 Ga. App. 614, 309 S.E.2d 856, 1983 Ga. App. LEXIS 3427 (1983) (decided under former O.C.G.A. § 24-5-2).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 38-620 and 38-621, are included in the annotations for this Code section.

Correction of records. — Clerk may not correct a misnomer in a marriage record but, when the record was incorrectly made, the clerk may rerecord the certificate just as the certificate was, with the additional recording of the affidavits attached to the certificate, and cross-index the original record and the new one. 1945-47 Ga. Op. Att'y Gen. 86 (decided under former Code 1933, §§ 38-620 and 38-621).

Indictment. — Clerk's certification that the indictment was lost was not sufficient replacement for a certified copy of the actual indictment. 1970 Op. Att'y Gen. No. 70-61 (decided under former Code 1933, §§ 38-620 and 38-621).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, § 453.

29A Am. Jur. 2d, Evidence, § 1066.

C.J.S.

32A C.J.S., Evidence, §§ 1040, 1049 et seq., 1089 et seq., 1098 et seq.

ALR.

Meaning of "duplicate," 24 A.L.R. 1209.

Admissibility in evidence of audit or testimony of auditor or accountant, 52 A.L.R. 1266.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 A.L.R. 77.

Carbon copies of letters or other written instruments as evidence, 65 A.L.R.2d 342.

Photographic representation or photostat of writing as primary or secondary evidence within best evidence rule, 76 A.L.R.2d 1356.

Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters, 63 A.L.R.3d 311.

Application of best evidence rule to electronic evidence, including text messages and e-mail, 12 A.L.R.7th 1.

24-10-1005. Public records.

The contents of a public record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by duplicate, certified as correct in accordance with Code Section 24-9-902 or Code Section 24-9-920 or testified to be correct by a witness who has compared it with the original. If a duplicate which complies with this

Code section cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

History.

Code 1981, § 24-10-1005, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Records, documents, and papers of public officers generally, § 50-18-1 et seq.

Evidentiary value of certified copies of wills proved and recorded in probate court, § 53-3-5.

Use of photostatic copies of wills in lieu of original in judicial proceedings, §§ 53-3-20, 53-3-21.

Copies of public records to prove content, Fed. R. Evid. 1005.

Editor's notes.

This Code section and Code Section 24-9-902 being so closely allied, and so often construed together by the courts, the notes to one will be found helpful in construing the other.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, § 3817, former Civil Code 1895, §§ 5167, 5212, former Civil Code 1910, §§ 5753, 5799, former Code 1933, §§ 38-206, 38-602, 38-608, 38-609, Ga. L. 1965, p. 250, § 1, and former O.C.G.A. §§ 24-5-20 and 24-5-31 are included in the annotations for this Code section. The reader is also advised to consult the annotations under O.C.G.A. §§ 24-9-920 and 24-9-922, for annotations regarding other issues relating to admissibility of public records, including authentication.

In general. — Best evidence rule did not prevent the introduction of certified copies of exhibits, deeds on file in the clerk of court's office, and notes when the contents of the writing were not in issue. DeKalb County v. Townsend Assocs., 243 Ga. 80, 252 S.E.2d 498, 1979 Ga. LEXIS 814 (1979) (decided under Ga. L. 1965, p. 250, § 1).

Original records as evidence. — While the use of original records as evidence was disapproved, yet when an original record had been brought into court and admitted to be such, it was admissible in evidence; and hence the original order of the commissioners calling a road bond election, as well as extracts from the original minute book of the commissioners, being admittedly originals, were not inadmissible, in the instant case, although the better method of proof would have been by properly exemplified copies. Moody v. Board of Comm'rs, 29 Ga. App. 21, 113 S.E. 103, 1922 Ga. App. LEXIS 22 (1922) (decided under former Civil Code 1910, § 5799).

Original records admissible. — While the use of the record as evidence was disapproved, yet when an original record was brought into court and admitted to be such, that record was admissible in evidence. A certified copy would not be higher or better evidence than the original. Moody v. Board of Comm'rs, 29 Ga. App. 21, 113 S.E. 103, 1922 Ga. App. LEXIS 22 (1922) (decided under former Civil Code 1910, § 5753); Mason v. State, 197 Ga. App. 534, 398 S.E.2d 822, 1990 Ga. App. LEXIS 1378 (1990) (decided under former O.C.G.A. § 24-5-31).

Notwithstanding the statutory rules as to the proof of official and court records by certified or exemplified copies, and as to such exemplifications being primary evidence, it was also the rule that, when the record of a court in which a case was being tried was material evidence in a case it may be proved by the production of the record itself, and a certified copy was not necessary. Woods v. Travelers Ins. Co., 53 Ga. App. 429, 186 S.E. 467, 1936 Ga. App. LEXIS 142 (1936) (decided under former Code 1933, § 38-602); Harrison v. State, 120 Ga. App. 812, 172 S.E.2d 328, 1969 Ga. App. LEXIS 936 (1969) (decided under former Code 1933, § 38-602).

Original records inadmissible. — Original minutes of a superior court were not admissible in the trial of an action in a city court, over the objection that such minutes were not primary evidence. Tray-

lor v. Epps, 11 Ga. App. 497, 75 S.E. 828, 1912 Ga. App. LEXIS 86 (1912) (decided under former Civil Code 1910, § 5753).

City court did not err in excluding from evidence the original papers of foreclosure proceedings in a justice's court. Original records of one court ordinarily were not admissible in evidence in a different court, but certified copies of such papers constitute primary evidence. Hall v. Treadaway, 12 Ga. App. 492, 77 S.E. 878, 1913 Ga. App. LEXIS 605 (1913) (decided under former Civil Code 1910, § 5799).

Unsigned order of court. — Exemplification of an unsigned order of a court for the sale of lands was admissible. Smith & Co. v. Ross, 108 Ga. 198, 33 S.E. 953, 1899 Ga. LEXIS 214 (1899) (decided under former Civil Code 1895, § 5167).

Prior court order not given judicial notice. — While the trial court erred in giving a prior court order "judicial notice" and binding effect, it was clear that the court could consider a prior court order as evidence. Genins v. Boyd, 166 Ga. App. 843, 305 S.E.2d 391, 1983 Ga. App. LEXIS 2348 (1983) (decided under former O.C.G.A. § 24-5-31).

Certified copies. — When a division in kind was made between heirs and distributees of a decedent, a certified copy of the return of the commissioners, and of the order of the court approving the return, were admissible in evidence in an action involving title to the land covered by the award. Bell v. Cone, 208 Ga. 467, 67 S.E.2d 558, 1951 Ga. LEXIS 402 (1951) (decided under former Code 1933, § 38-206).

In a deprivation proceeding, the trial court properly admitted documents from a parent's criminal case under former O.C.G.A. § 24-5-31. The court found that the documents were attached to a negotiated plea and had been certified. In the Interest of A. R., 296 Ga. App. 62, 673 S.E.2d 586, 2009 Ga. App. LEXIS 119 (2009) (decided under former O.C.G.A. § 24-5-31).

Juvenile court proceedings. — Plans for family reunification prepared by the county Department of Family and Children Services as copies of records of judicial proceedings were admissible as primary evidence in a proceeding to terminate parental rights. In re C.W.D., 232 Ga. App. 200, 501 S.E.2d 232 (decided under former O.C.G.A. § 24-5-31).

Exemplified copy of will from the judge's office was presumptive proof that the will was properly probated as otherwise the will could not have been recorded. Davis v. Tyson, 60 Ga. App. 714, 4 S.E.2d 704, 1939 Ga. App. LEXIS 150 (1939) (decided under former Code 1933, § 38-206).

Indictment and record of trial. — Highest and best evidence of a writing or of a judicial proceeding, including an indictment and the trial thereupon, were the indictment and the record of the trial. Sikes v. State, 76 Ga. App. 883, 47 S.E.2d 677, 1948 Ga. App. LEXIS 477 (1948) (decided under former Code 1933, § 38-206).

Lost records. — While the contents of lost papers in a case on file in the clerk's office of the court may be established by copies of the papers as they appear of record in the writ book required to be kept by the clerk of the court, this method of proof was cumulative only; parol evidence was also admissible to establish the contents of the lost papers. Benton v. Maddox, 52 Ga. App. 813, 184 S.E. 788, 1936 Ga. App. LEXIS 258 (1936) (decided under former Code 1933, §§ 38-608 and 38-609).

Other records in writ book. — On the trial of an issue to establish lost papers in a case on file in the office of the clerk of the court when it appears from parol evidence introduced to establish copies of the lost papers that there was a return of service by the officer, but when from the evidence, which consists of the copies of the proceedings as contained in the writ book on file in the office of the clerk of the court, there appeared no return of service upon the papers, evidence consisting of the records in other cases recorded in the same writ book immediately before and immediately after the record in the present case, in which there appears no record of a return of service, and evidence of the original papers in such cases which contain a return of service, were admissible. Benton v. Maddox, 52 Ga. App. 813, 184 S.E. 788, 1936 Ga. App. LEXIS 258 (1936) (decided under former Code 1933, §§ 38-608 and 38-609).

Admission of hearsay. — Like former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902), former O.C.G.A. § 24-5-20 did not address hearsay concerns. Consequently, that Code section did not require the admission of hearsay merely because the hearsay had been recorded in a court record certified by facsimile. McKinley v. State, 303 Ga. App. 203, 692 S.E.2d 787, 2010 Ga. App. LEXIS 313 (2010) (decided under former O.C.G.A. § 24-5-20).

Bonds. — Bond being an office paper of the court, a certified copy or an exemplification of the bond, was primary evidence. Blount v. Bowne, 82 Ga. 346, 9 S.E. 164, 1889 Ga. LEXIS 382 (1889) (decided under former Code 1882, § 3817); Richardson v. Whitworth, 103 Ga. 741, 30 S.E. 573, 1898 Ga. LEXIS 240 (1898) (decided under former Civil Code 1895, § 5212).

Books of minutes of municipality. — Book of minutes of a municipal corporation may be proved to be such by any witness who knows the fact, there being no objection that a certified copy would be the primary evidence. Robinson v. State, 82 Ga. 535, 9 S.E. 528, 1889 Ga. LEXIS 287 (1889) (decided under former Code 1882, § 3817).

Original minute book of county commissioners was not primary evidence. Daniel v. State, 114 Ga. 533, 40 S.E. 805, 1902 Ga. LEXIS 712 (1902) (decided under former Civil Code 1895, § 5212).

Homestead papers. — Exemplification, or certified copy of the plat of homestead and schedule of personalty, certified by the clerk of the superior court of the county when those papers were recorded, was only secondary evidence under former Code 1933, §§ 38-601 and 38-602. Brown v. Driggers, 60 Ga. 114, 1878 Ga. LEXIS 389 (1878) (decided under former Code 1873, § 3817).

Original papers were the primary evidence. Pritchett v. Davis, 101 Ga. 236, 28 S.E. 666, 1897 Ga. LEXIS 204 (1897) (decided under former Civil Code 1895, § 5212).

Railroad lease. — Lease of a certain railroad being a paper which was required to be kept on file in the proper office of the executive department, a certified copy of the lease was primary evidence. Branan v. Nashville, C. & S. L. Ry., 119 Ga. 738, 46 S.E. 882, 1904 Ga. LEXIS 348 (1904) (decided under former Civil Code 1895, § 5212).

Failure to present evidence on permits. — Trial court erred in denying the appellants' motion for summary judgment because the appellees failed to present evidence sufficient to create a jury issue as to whether the appellants had a duty to inspect the exhaust vent since no permits were produced as evidence and the appellants were only required to inspect if a permit was issued. Martin v. Ledbetter, 342 Ga. App. 208, 802 S.E.2d 432, 2017 Ga. App. LEXIS 331 (2017).

Search warrants. — Former law did not apply to search warrants. DePalma v. State, 228 Ga. 272, 185 S.E.2d 53, 1971 Ga. LEXIS 539 (1971) (decided under former Code 1933, § 38-602).

Schedule of creditors. — Original triplicate of the schedule of creditors and the creditors' claims, required to be filed by a bankrupt in the court of bankruptcy under the Bankruptcy Act, was an office paper, and a certified copy thereof was primary evidence. Harvard v. Davis, 145 Ga. 580, 89 S.E. 740, 1916 Ga. LEXIS 408 (1916) (decided under former Civil Code 1910, § 5799).

Traffic citation indicating guilty plea admissible. — In a suit for damages sustained in an automobile collision, alleging that the defendant negligently failed to yield the right-of-way at a stop sign, the trial court did not err by admitting evidence of a traffic citation issued against the defendant in conjunction with the accident. The citation noted entry of a guilty plea, but also indicated the defendant was found guilty by the municipal court. Though ambiguous and subject to conflicting interpretations, the citation was relevant if interpreted by the jury as a plea of guilty. Hunter v. Hardnett, 199 Ga. App. 443, 405 S.E.2d 286, 1991 Ga. App. LEXIS 533 (1991), cert. denied, No. S91C1021, 1991 Ga. LEXIS 490 (Ga. July 3, 1991) (decided under former O.C.G.A. § 24-5-20).

Traffic citations stamped "FTA" were inadmissible hearsay. — Trial court erred in admitting the state's exhibits, which were copies of two traffic cita-

tions stamped "FTA," pursuant to former O.C.G.A. § 24-5-20 without any determination that the exhibits fell within an exception to the rule prohibiting the use of hearsay because the state introduced the exhibits to prove the truth of the statement of the unidentified person who stamped "FTA" on the citations that the defendant failed to appear for the defendant's court date, and despite defendant's objection to the documents as hearsay, the state argued only the issue of authentication and never identified any exception to the rule prohibiting hearsay that would authorize admitting the documents; the state failed to lay the required foundation for the application of the business records exception, former O.C.G.A. § 24-3-14(b) (see O.C.G.A. § 24-8-803), because the state did not call any witness to provide the required foundation. McKinley v. State, 303 Ga. App. 203, 692 S.E.2d 787, 2010 Ga. App. LEXIS 313 (2010) (decided under former O.C.G.A. § 24-5-20).

Evidence held admissible. — Since an original record of the trial during which the perjury with which the defendant was charged occurred was unavailable and could not be produced despite the exercise of the state's due diligence, as required by former O.C.G.A. § 24-5-31, the state was authorized to prove the defendant's perjured testimony through witness testimony pursuant to former O.C.G.A. § 24-5-2 (see now O.C.G.A. §§ 24-10-1003 and 24-10-1004). Walker v. State, 314 Ga. App. 714, 725 S.E.2d 771, 2012 Ga. App. LEXIS 193 (2012), cert. denied, No. S12C1194, 2012 Ga. LEXIS 878 (Ga. Nov. 5, 2012) (decided under former O.C.G.A. § 24-5-31).

Evidence held inadmissible. — Since the defendant did not tender the copies of the convictions which the defendant desired to have introduced to impeach the witnesses, but only made a proffer of the testimony of the clerk's representative, the state's objection based on the failure to produce the best evidence was properly sustained. The testimony of the deputy clerk as to the content of the records was not only not the best evidence, it was also hearsay. Lipscomb v. State, 194 Ga. App. 657, 391 S.E.2d 773, 1990 Ga. App. LEXIS 282 (1990), cert. denied, No. S90C0799, 1990 Ga. LEXIS 774 (Ga. Apr. 5, 1990), overruled in part, Southall v. State, 300 Ga. 462, 796 S.E.2d 261, 2017 Ga. LEXIS 33 (2017) (decided under former O.C.G.A. § 24-5-31).

Sentencing court improperly considered the defendant's prior state court conviction based on an uncertified copy of the indictment, a document titled "State's Version of the Offense," and a computer print-out showing that a guilty plea had been entered because the state presented only hearsay, rather than competent evidence, showing that the state was unable to obtain a certified copy of the conviction, and there was no evidence regarding whether the state used due diligence to obtain such a copy. Brinkley v. State, 301 Ga. App. 827, 689 S.E.2d 116, 2009 Ga. App. LEXIS 1456 (2009) (decided under former O.C.G.A. § 24-5-31).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 38-608 and 38-609 are included in the annotations for this Code section.

Indictment. — Clerk's certification that the indictment was lost wais not sufficient replacement for a certified copy of the actual indictment. 1970 Op. Att'y Gen. No. 70-61 (decided under former Code 1933, §§ 38-608 and 38-609).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, §§ 1203, 1229. 42 Am. Jur. 2d, Inspection Laws, § 11.

C.J.S.

32 C.J.S., Evidence, § 883 et seq. 32A C.J.S., Evidence, §§ 773, 993, 1028, 1037.

ALR.

Photostatic or other method of recording instrument, 57 A.L.R. 159.

Necessity and manner of authenticating paper purporting to be act of private corporation, 65 A.L.R. 329.

Sheriff's deed as making a prima facie case for one seeking to recover land thereunder, 108 A.L.R. 667.

Judgment or order in connection with appointment of executor or administrator as res judicata, as law of the case, or as evidence, on questions other than the validity of the appointment, 119 A.L.R. 594.

Admissibility of evidence on question of testamentary capacity or undue influence in a will contest as affected by remoteness, relative to the time when the will was executed, of the facts of events to which the evidence relates, 124 A.L.R. 433.

Photographic representation of writing as primary or secondary evidence, 142 A.L.R. 1270; 76 A.L.R.2d 1356.

Carbon copies of letters or other written instruments as evidence, 65 A.L.R.2d 342.

Admissibility and effect of evidence or comment on party's military service or lack thereof, 9 A.L.R.2d 606.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 A.L.R.2d 308.

Admissibility, on issue of testamentary capacity, of previously executed wills, 89 A.L.R.2d 177.

Sufficiency of evidence that will was not accessible to testator for destruction, in proceeding to establish lost will, 86 A.L.R.3d 980.

24-10-1006. Summaries.

The contents of otherwise admissible voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that the contents of such writings, recordings, or photographs be produced in court.

History.

Code 1981, § 24-10-1006, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Summaries to prove content, Fed. R. Evid. 1006.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 38-203, 38-205, and former O.C.G.A. § 24-5-29 are included in the annotations for this Code section.

Summary of accounting book entries. — When pertinent and essential facts can be ascertained only by an examination of a large number of entries in books of account, an auditor or an expert accountant who has made an examination and analysis of the books and figures may testify as a witness and give summarized statements of what the books show as a result of the investigation, provided the books themselves are accessible to the court and the parties. Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8, 1981 Ga. App. LEXIS 1917 (1981).

For a discussion of the admissibility of summaries of business records, see Tyner v. Sheriff, 164 Ga. App. 360, 297 S.E.2d 114, 1982 Ga. App. LEXIS 2801 (1982) (decided under former O.C.G.A. § 24-5-29).

Loan history report properly admitted. — Trial court properly admitted the bank's loan history report as a business record because the report provided a description of each transaction relating to the estate's loan from the loan's inception,

along with a corresponding posting date for each transaction, the transaction amount, and any change to the principal balance resulting from the transaction, and was not a summary. Roberts v. Cmty. & S. Bank, 331 Ga. App. 364, 771 S.E.2d 68, 2015 Ga. App. LEXIS 149 (2015).

Bank's computer screen shot insufficient proof of damages in loan case. — In an action on a loan, a bank did not submit sufficient evidence to prove the bank's damages because a printout of the bank's electronic records reflecting the amounts then owed, without a detailed transaction history, was a summary requiring evidence that the underlying records were too voluminous to examine in court pursuant to O.C.G.A. § 24-10-1006, not a business record under O.C.G.A. § 24-8-803(6). D'Agnese v. Wells Fargo Bank, N.A., 335 Ga. App. 659, 782 S.E.2d 714, 2016 Ga. App. LEXIS 58 (2016).

RESEARCH REFERENCES

ALR.

Requirement of notice as condition for admission in evidence of summary of voluminous records, 80 A.L.R.3d 405.

24-10-1007. Testimony or written admission of party.

The contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

History.

Code 1981, § 24-10-1007, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Testimony or a statement of a party to prove content, Fed. R. Evid. 1007.

Law reviews.

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration
Specific Writings Produced Under Notice

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3836, former Code 1882, § 3836, former Civil Code 1910, § 5832, and former Code 1933, § 38-705 are included in the annotations for this Code section.

Writing with subscribing witnesses. — When a writing was offered in evidence, to which there was a subscribing witness, the latter must be produced in all cases, except in the five instances specified in former Civil Code 1910, § 5833 (see now O.C.G.A. § 24-9-903), and those named in former Civil Code 1910, § 5832. Lamb v. Empire Life Ins. Co., 143 Ga. 180, 84 S.E. 439, 1915 Ga. LEXIS 337 (1915) (decided under former Civil Code 1910, § 5832).

Reliance on writing creates presumption of validity. — Reason of the former statute was founded in the fact that when a paper was drawn out from the possession of a party claiming title or other benefit under the paper, that the presumption of the law was that one relied upon its genuineness and validity, and, therefore, the producing dispenses with the proof. Campbell v. Roberts, 66 Ga. 733, 1881 Ga. LEXIS 100 (1881) (decided under former Code 1873, § 3836).

Failure to prove execution. — There

General Consideration (Cont'd)

was no error in admitting in evidence a document sued on, over the objection that the document's execution had not been sufficiently shown at the time, notwithstanding the general rule that "where the execution of a note is denied by a plea of non est factum, the note will not be received until some extrinsic evidence of its execution has been submitted." Mendel v. Converse & Co., 30 Ga. App. 549, 118 S.E. 586, 1923 Ga. App. LEXIS 527 (1923) (decided under former Civil Code 1910, § 5832).

Claim of benefit. — To hold a paper as a receipt or voucher is a sufficient claim of benefit under it to meet the requirements of law. Louisville & N.R.R. v. Yudelson, 135 Ga. 731, 70 S.E. 576, 1911 Ga. LEXIS 65 (1911) (decided under former Civil Code 1910, § 5832).

Specific Writings Produced Under Notice

Irrelevant paper. — Production of a paper, upon notice that is not relevant to the issue, but which recites another paper that is pertinent and material, will not overcome the necessity of proof of execution of the latter paper that is material. Doe v. Guthry, 32 Ga. 307, 1861 Ga. LEXIS 181 (1861) (decided under former law).

RESEARCH REFERENCES

ALR.

Production, in response to call therefor by adverse party, of document otherwise inadmissible in evidence, as making it admissible, 151 A.L.R. 1006.

24-10-1008. Functions of court and jury.

When the admissibility of other evidence of the contents of writings, recordings, or photographs under the rules of evidence depends upon the fulfillment of a condition of fact, the question of whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Code Section 24-1-104; provided, however, that when an issue is raised as to:

(1) Whether the asserted writing, recording, or photograph ever existed;

(2) Whether another writing, recording, or photograph produced at the trial is the original; or

(3) Whether other evidence of the contents correctly reflects the contents,

the issue is for the trier of fact to determine as in the case of other issues of fact.

History.

Code 1981, § 24-10-1008, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Provision that purchaser of instrument takes with notice of claim or defense if instrument bears visible evidence of forgery or alteration, § 11-3-304.

Functions of the court and jury, Fed. R. Evid. 1008.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5242, former Civil Code 1910, § 5831, and former Code 1933, § 38-704, are included in the annotations for this Code section.

Materiality of an alteration is a question of law for the court. Winkles v. Guenther & Co., 98 Ga. 472, 25 S.E. 527, 1896 Ga. LEXIS 73 (1896) (decided under former Civil Code 1895, § 5242).

Explanation is question for jury. — When the genuineness of the instrument is denied under oath, the time when, and the intention with which, a change was made in the instrument, are questions for a jury. Winkles v. Guenther & Co., 98 Ga. 472, 25 S.E. 527, 1896 Ga. LEXIS 73 (1896).

RESEARCH REFERENCES

ALR.

Admissibility of books of account as affected by mutilation, erasures, or alterations, 142 A.L.R. 1406.

Mutilations, alterations, and deletions as affecting admissibility in evidence of public record, 28 A.L.R.2d 1443.

Presumptions and burden of proof as to time of alteration of deed, 30 A.L.R.3d 571.

CHAPTER 11

ESTABLISHMENT OF LOST RECORDS

Article 1

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Sec.

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Law reviews.

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

ARTICLE 1

PUBLIC RECORDS

Law reviews.

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-11-1. Definitions.

As used in this chapter, the term:

(1) "Custodian" means the person charged with the duty of maintaining public records.

(2) "Duplicate" means a counterpart which accurately reproduces the original.

(3) "Public record" shall have the same meaning as set forth in Code Section 24-8-801.

History.
Code 1981, § 24-11-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-11-2. Establishment of lost records.

(a) Where any original public records have been lost, mutilated, stolen, or destroyed, the custodian may establish duplicates in accordance with the provisions of this article. When such public records are established by duplicates, they shall have all of the effect in evidence as the original records would have had.

(b) The custodian of the lost, mutilated, stolen, or destroyed public records shall bring a petition to establish such records in the superior court of the county in which the public records were located.

(c) The petition shall set forth the fact that some portion of the public records has been lost, mutilated, stolen, or destroyed, specifying as nearly as may be possible the books or parts of the books in which those records existed, and shall pray for the establishment of such records.

History.
Code 1981, § 24-11-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5810, and former O.C.G.A. §§ 24-8-1, 24-8-2, and 24-8-3 are included in the annotations for this Code section.

Jurisdiction of Supreme Court. — Proceeding which was for the purpose of establishing a copy of a lost record of a will previously probated and admitted to record, and not to probate a copy of a lost or destroyed will, did not fall within the cases of which the Supreme Court had jurisdiction on writ of error. Bond v. Reid, 152 Ga. 481, 110 S.E. 281, 1922 Ga. LEXIS 195 (1922) (decided under former Civil Code 1910, § 5810).

Separation of powers not violated by establishing version of law. — Application of former O.C.G.A. § 24-8-1 in a county's action to establish a copy of a zoning ordinance that had been lost did not violate the constitutional doctrine of separation of powers because the trial court's decree did not have the effect of either adopting or amending any zoning ordinance when the legislative process was complete, and the ordinance from which the alleged illegality arose was, in fact, a law; the supreme court's authority to reestablish a previously adopted ordinance, like its authority to construe statutes, neither violated the constitutional separation of powers nor constituted an unconstitutional delegation of legislative authority. East Georgia Land & Dev. Co. v. Baker, 286 Ga. 551, 690 S.E.2d 145, 2010 Ga. LEXIS 86 (2010) (decided under former O.C.G.A. § 24-8-1).

No violation of zoning procedure law. — Application of former O.C.G.A. § 24-8-1 in a county's action to establish a copy of a zoning ordinance that had been lost did not violate the Zoning Procedures Law (ZPL), O.C.G.A. § 36-66-1 et seq., because the trial court's decree did not have the effect of either adopting or amending any zoning ordinance; because it did not constitute final legislative action by a local government resulting in such adoption or amendment, the decree was not a "zoning decision" to which the ZPL

applied. East Georgia Land & Dev. Co. v. Baker, 286 Ga. 551, 690 S.E.2d 145, 2010 Ga. LEXIS 86 (2010) (decided under former O.C.G.A. § 24-8-1).

Copy of zoning ordinance. — Superior court did not err in denying a land and development company's motion for involuntary dismissal pursuant to O.C.G.A. § 9-11-41(b) in a county's action under former O.C.G.A. § 24-8-1 to establish a copy of a zoning ordinance that had been lost because the superior court thoroughly reviewed the evidence upon which the court relied, including the testimony of the company's forensic expert and several witnesses who were county officials when the ordinance was enacted and their successors in office, as well as the dovetailing of subsequent amendments to the sections and subsections of the proffered copy; that evidence was sufficient to support the superior court's finding that the copy was a true and correct duplicate of the original ordinance adopted at the meeting of the county board of commissioners. East Georgia Land & Dev. Co. v. Baker, 286 Ga. 551, 690 S.E.2d 145, 2010 Ga. LEXIS 86 (2010) (decided under former O.C.G.A. § 24-8-1).

Transcription prevailing over copy of will. — In a proceeding to establish a copy of a lost or destroyed record of a will theretofore duly probated and admitted to record, a copy which a witness who was neither contradicted nor impeached sware positively was correctly transcribed by the witness from the record of wills in the judge's office, before the will's destruction, must prevail over a copy testified by other witnesses to be a correct copy merely of a will (not of the record thereof), which "will" was not shown to have been probated or recorded. Bond v. Reid, 29 Ga. App. 558, 116 S.E. 318, 1923 Ga. App. LEXIS 116 (1923) (decided under former Civil Code 1910, § 5810).

Application to any public records. — Superior court did not err in finding that a zoning ordinance was a public record under former O.C.G.A. § 24-8-1 and in establishing a copy as an original because the plain language of former § 24-8-1 showed that it applied to "any public records" and did not include any limitation to court records, and the fact that county ordinances could not normally be proved by parol evidence did not prevent such proof in the proceeding; when a proceeding was instituted to establish a copy of a public record which has been lost for many years, circumstantial evidence must be resorted to, and any circumstance legitimately offering an inference that the record was as contended may be considered, and a lost or destroyed ordinance could be established by parol evidence. East Georgia Land & Dev. Co. v. Baker, 286 Ga. 551, 690 S.E.2d 145, 2010 Ga. LEXIS 86 (2010) (decided under former O.C.G.A. § 24-8-1).

RESEARCH REFERENCES

Am. Jur. 2d.
29A Am. Jur. 2d, Evidence, § 1271.

24-11-3. Appointment of auditor; hearing; establishment of duplicates.

(a) The court shall either appoint an auditor for such petition in accordance with Chapter 7 of Title 9 or shall conduct a hearing on the petition. If an auditor is appointed, the provisions of Code Sections 9-7-1 through 9-7-16 and Code Section 9-7-21 shall apply to such proceedings. An auditor shall receive compensation for services rendered as may be allowed by the court, to be paid out of the funds of the office of the custodian whose records were lost, mutilated, stolen, or destroyed.

(b) If the court hears the petition, after receiving evidence, the court shall determine whether the purported duplicate is, in fact, the same as the original record which has been lost, mutilated, stolen, or destroyed, and it shall be discretionary with the court to order the whole or any part of such records established. The court shall give precedence to a petition filed pursuant to this article and hear the petition as speedily as possible.

(c) The duplicates which are established pursuant to this Code section, as nearly as may be possible, shall specify and conform to the original book and pages of the same on which they originally existed.

History.
Code 1981, § 24-11-3, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-617, and former O.C.G.A. § 24-8-4 are included in the annotations for this Code section.

Discretion of trial court. — In equity cases, the Supreme Court would not interfere with the discretion of a trial judge in overruling exceptions of fact to an auditor's report, unless it appeared that there had been a manifest abuse of such discretion. Christian v. Bremer, 199 Ga. 285, 34 S.E.2d 40, 1945 Ga. LEXIS 303 (1945) (decided under former Code 1933, § 38-617).

Copy of zoning ordinance. — Former O.C.G.A. § 24-8-4 expressly contemplated the hearing of evidence and summoning of witnesses, and former O.C.G.A. § 24-8-3 (see now O.C.G.A. § 24-11-2) required that the copy established must conform as nearly as may be possible to the pages on which they originally existed. When a proceeding was instituted to establish a copy of a public record which had been lost for many years, circumstantial evidence must be resorted to, and any circumstance legitimately offering an inference that the record was as contended could be considered. Establishment of a lost record was necessarily by parol evidence. East Georgia Land & Dev. Co. v. Baker, 286 Ga. 551, 690 S.E.2d 145, 2010 Ga. LEXIS 86 (2010) (decided under former O.C.G.A. § 24-8-4).

Burden of proof. — When error was assigned upon the refusal of the judge to approve an exception of fact to an auditor's report in an equity case, the burden was upon the plaintiff in error to show to the satisfaction of the Supreme Court that the finding of the auditor was unsupported by evidence, the presumption being that the finding was correct; and, if it did not distinctly appear that the finding is unsupported, the judgment refusing to approve the exceptions of fact would be affirmed. Christian v. Bremer, 199 Ga. 285, 34 S.E.2d 40, 1945 Ga. LEXIS 303 (1945) (decided under former Code 1933, § 38-617).

RESEARCH REFERENCES

ALR.
Admissibility in evidence of audit or testimony of auditor or accountant, 52 A.L.R. 1266.

ARTICLE 2

PRIVATE PAPERS

Law reviews.
For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-11-20. Establishment of lost office papers.

(a) Upon the loss of any original pleading, declaration, bill of indictment, special presentment, accusation, or other office paper, a duplicate may be established instanter on motion.

(b) As used in this article, the term "office paper" means the instrument upon which a proceeding has been brought after the case has gone to trial.

History.
Code 1981, § 24-11-20, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Analysis

General Consideration
Particular Instruments

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Laws 1799, Cobbs 1851 Digest, p. 463, former Code 1868, §§ 3904, 3905, former Code 1873, §§ 3980 3981, former Civil Code 1895, §§ 4743, 4744, former Civil Code 1910, §§ 5312, 5313, former Code 1933, §§ 63-201, 63-202, and former O.C.G.A. § 24-8-20 are included in the annotations for this Code section.

Pleadings presumed correct. — Lost pleadings established by the court on motion were presumed to be correct. Southern Fertilizer & Chem. Co. v. Kirby, 52 Ga. App. 688, 184 S.E. 363, 1936 Ga. App. LEXIS 224 (1936) (decided under former Code 1933, §§ 63-201, 63-202); Salter v. Salter, 81 Ga. App. 864, 60 S.E.2d 424, 1950 Ga. App. LEXIS 1014 (1950) (decided under former Code 1933, §§ 63-201, 63-202).

Papers lost or unrecorded. — Fact that the papers were not recorded or the record cannot be found is no excuse for not establishing according to law. Eagle & Phenix Mfg. Co. v. Bradford, 57 Ga. 249, 1876 Ga. LEXIS 92 (1876) (decided under former Code 1873, §§ 3980, 3981).

Proof of contents by parol. — Contents may have been proved by parol without establishing the lost or destroyed original. Bridges v. Thomas, 50 Ga. 378, 1873 Ga. LEXIS 275 (1873) (decided under former Code 1868, §§ 3904, 3905); Saffold v. Banks, 69 Ga. 289, 1882 Ga. LEXIS 211 (1882) (decided under former Code 1873, §§ 3980, 3981); Lewis v. State Bd. of Medical Exmrs., 23 Ga. App. 647, 99 S.E. 147, 1919 Ga. App. LEXIS 260 (1919) (decided under former Civil Code 1910, §§ 5312, 5313).

Notice not indispensably necessary to be given of a motion to the court to establish copies of office papers. Doe v. Roe, 3 Ga. 121, 1847 Ga. LEXIS 83 (1847) (decided under former Laws 1799, Cobb's 1851 Digest, p. 463); Eagle & Phenix Mfg. Co. v. Bradford, 57 Ga. 249, 1876 Ga.

LEXIS 92 (1876) (decided under former Code 1873, §§ 3980, 3981).

Rule nisi and notice not required. — Copies of lost papers belonging to or pertaining to a suit pending in court may have been established instanter on motion; and it was not indispensably essential to the validity of an order of court establishing lost papers that a formal rule nisi should issue, or that the opposite party should be served with notice of the proceeding. Southern Fertilizer & Chem. Co. v. Kirby, 52 Ga. App. 688, 184 S.E. 363, 1936 Ga. App. LEXIS 224 (1936) (decided under former Code 1933, §§ 63-201, 63-202).

Waiver. — When judgment establishing lost papers rendered in municipal court in a case which had originated in a justice's court and which was transferable to the municipal court, a judgment afterwards rendered in the municipal court against the garnishee on the garnishee's default in answering the summons of garnishment was not illegal and void and subject to be set aside as void on motion in arrest on the ground that the papers had been lost while the case was pending in the justice's court, and before the establishment by the municipal court, and therefore that the municipal court had no jurisdiction to establish the papers, where no attack upon the validity of the order establishing the papers in the municipal court was made by the garnishee on the ground that the papers could not legally have been established in the municipal court. Southern Fertilizer & Chem. Co. v. Kirby, 52 Ga. App. 688, 184 S.E. 363, 1936 Ga. App. LEXIS 224 (1936) (decided under former Code 1933, §§ 63-201, 63-202).

Traverse. — When a motion is made to establish a lost paper and the opposite party files a written traverse, denying the existence of the alleged lost original, it was error to refuse that party the right to offer competent evidence in support of the traverse. Beall v. Patterson, 146 Ga. 233, 91 S.E. 71, 1916 Ga. LEXIS 677 (1916) (decided under former Civil Code 1910, §§ 5312, 5313).

Variance between original and copy. — Plaintiff having introduced in evidence a copy of the indictment alleged to have been maliciously procured, together with an order of the court thereon, establishing the same as an office paper in lieu of the lost original, and an order of nolle prosequi entered upon the established copy, the court did not err in permitting the defendant to know, by parol, that the established copy was prepared by counsel for the accused, that there was a material variance between it and the original indictment, and that, after being so established, it was nolle prosequied solely because of that variance. O'Berry v. Davis, 31 Ga. App. 755, 121 S.E. 857, 1924 Ga. App. LEXIS 168 (1924) (decided under former Civil Code 1910, §§ 5312, 5313).

When case transferred to new county. — When a case was to be transferred from an old county to a new one, lost court papers in the case must have been established, before the transfer, in the old county. McDougald v. Maitland, Kennedy & Co., 30 Ga. 703, 1860 Ga. LEXIS 178 (1860) (decided under former Laws 1799, Cobb's 1851 Digest, p. 463).

Paper subsequently found. — Superior court had power to rectify an order establishing a lost paper, by the paper itself, when found. Phillips v. Behn & Foster, 19 Ga. 298, 1856 Ga. LEXIS 175 (1856) (decided under former Laws 1799, Cobb's 1851 Digest, p. 463).

State as party. — State through its solicitor general (now district attorney) should have been a party to all motions to establish lost papers belonging to a state case. Buchanan v. Beckham, 18 Ga. 527, 1855 Ga. LEXIS 234 (1855) (decided under former Laws 1799, Cobb's 1851 Digest, p. 463).

Particular Instruments

Bill of exceptions deposited in the clerk's officer but not with the clerk, never became an office paper and the court erred in establishing it in a summary manner. Perry v. Friedin, 17 Ga. App. 417, 87 S.E. 683, 1916 Ga. App. LEXIS 975 (1916) (decided under former Civil Code 1910, §§ 5312, 5313).

Certiorari, though sanctioned, which was never in the office of the clerk of the superior court was not an office paper. Lovelady v. Hockenhull, 58 Ga. 469, 1877 Ga. LEXIS 145 (1877) (decided under former Code 1873, §§ 3980, 3981).

Particular Instruments (Cont'd)

Unfiled certiorari. — Certiorari not marked "filed in office" and which was never in the office of the clerk of the superior court or even in the possession of the clerk at all, was not an office paper so as to be established by copy instanter on motion. Humphries v. Morris, 179 Ga. 55, 175 S.E. 242, 1934 Ga. LEXIS 214 (1934) (decided under former Code 1933, §§ 63-201, 63-202).

Claim affidavit. — Claim affidavit transmitted to the superior court became an office paper and could be established instanter. Crawford v. Crawford, 139 Ga. 68, 76 S.E. 564, 1912 Ga. LEXIS 531 (1912) (decided under former Civil Code 1910, §§ 5312, 5313).

Guardian's bond was not an office paper and cannot be established instanter. Bryant v. Owen, 1 Ga. 355, 1846 Ga. LEXIS 85 (1846) (decided under former Laws 1799, Cobb's 1851 Digest, p. 463).

Written sentence in criminal case in the superior court did not cease to be an office paper or record because the sentence had not been recorded in the record book of writs in the office of the clerk of the superior court. Teasley v. Nelson, 164 Ga. 242, 138 S.E. 72, 1927 Ga. LEXIS 164 (1927) (decided under former Civil Code 1910, §§ 5312, 5313).

Summons and pleadings. — After a suit in a justice's court upon a note had proceeded to judgment and execution issued thereon, the summons, service thereof and pleas, if any, were office papers, and if lost may have been established in that court instanter on motion. Bell v. Bowdoin, 109 Ga. 209, 34 S.E. 339, 1899 Ga. LEXIS 613 (1899) (decided under former Civil Code 1895, §§ 4743, 4744).

Transcript. — Copy of an official transcript preserved in the office of the clerk of the Supreme Court, duly certified, was competent and sufficient evidence as to contents. Eagle & Phenix Mfg. Co. v. Bradford, 57 Ga. 249, 1876 Ga. LEXIS 92 (1876) (decided under former Code 1873, §§ 3980, 3981).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 63-201 and 63-202, are included in the annotations for this Code section.

Clerk's certification insufficient. — Clerk's certification that the indictment was lost was not sufficient replacement for a certified copy of the actual indictment. 1970 Op. Att'y Gen. No. 70-61 (decided under former Code 1933, §§ 63-201, 63-202).

RESEARCH REFERENCES

C.J.S.
54 C.J.S., Lost Instruments, § 8 et seq.

24-11-21. Petition to probate court to establish duplicate of lost or destroyed evidence of indebtedness.

(a) The owner, agent of the owner, or legal representative of the owner of any bond, bill, note, draft, check, or other evidence of indebtedness which has been lost or destroyed may establish a duplicate of the same in a summary manner by filing a petition with the judge of the probate court of the county of the residence of the alleged debtor or maker, if he or she is a resident of this state; and the judge of the probate court shall be deemed a judicial officer for the purpose of this Code section. The petition shall be sworn to by the party applying and shall contain as full and accurate a description as possible of the

lost paper, of the loss and mode of loss, and of the inability to find the same and why, along with a prayer for the establishment of a duplicate setting forth the duplicate desired to be established.

(b) Upon the filing of a petition, the judge shall issue a citation or notice to the alleged debtor or maker requiring the debtor or maker to appear at a day not more than ten days distant and show cause, if he or she has any, why the duplicate should not be established in lieu of the lost original. The citation or notice shall be personally served in the manner provided in Code Section 9-11-4 at least five days before the time of the hearing.

(c) If no successful defense is made at the time and place appointed, the judge shall proceed to establish, by an order entered on the petition, the duplicate so prayed to be established, which shall have all the effect of the original. The petition, notice, and order shall be entered in a book of record specially prepared for this purpose.

(d) If the debtor or maker files a defense under oath to the effect that the original never existed as claimed, the judge shall decide the case, after giving the parties time for preparation and hearing, not to exceed 20 days. If the judge's decision is in favor of the applicant and no appeal is entered as provided in subsection (e) of this Code section, the decision shall be entered on the petition, and the duplicate so established shall have the same effect as an original. If the judge's decision is in favor of the alleged debtor or maker, the judge shall also enter his or her decision on the petition. In all cases, the proceedings shall be recorded as provided in subsection (c) of this Code section.

(e) Except as provided in Article 6 of Chapter 9 of Title 15, if either party to the proceedings provided for in this Code section is dissatisfied, such party may appeal upon giving the usual bond and security for costs, as in cases of appeal from the probate court to the superior court. The appeal shall be tried in the superior court from all the pleadings and proceedings as were before the judge of the probate court. In the superior court, the case shall be tried and determined as provided in Code Sections 24-11-23 through 24-11-26.

(f) This Code section shall not apply to evidences of indebtedness to which Title 11, the "Uniform Commercial Code," is applicable.

History.

Code 1981, § 24-11-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Maintenance of action on lost or destroyed instrument governed by T. 11, the "Uniform Commercial Code," § 11-3-804.

RESEARCH REFERENCES

Am. Jur. 2d.
52 Am. Jur. 2d, Lost and Destroyed Instruments, § 7.
C.J.S.
54 C.J.S., Lost Instruments, § 8 et seq.
ALR.
Constitutionality, construction, and effect of statutes in relation to issuance by public body of duplicates of mutilated, lost, or destroyed bonds or warrants, 39 A.L.R. 1246; 63 A.L.R. 388.

24-11-22. Service of nonresident debtor or maker of lost or destroyed evidence of indebtedness.

When the person alleged to be a debtor or maker of a lost or destroyed paper as set forth in Code Section 24-11-21 does not reside in this state, the alleged debtor or maker may be made a party to the proceedings by publication, in a newspaper to be designated by the judge of the probate court, twice a month for two months. When the person has been made a party, this article shall apply in his or her case.

History.
Code 1981, § 24-11-22, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

RESEARCH REFERENCES

Am. Jur. 2d.
52 Am. Jur. 2d, Lost and Destroyed Instruments, §§ 18, 23.

24-11-23. Procedure for establishment of lost or destroyed papers other than office paper.

(a) The owner of a lost or destroyed paper which is not an office paper, as defined in Code Section 24-11-20, who desires to establish such paper shall present to the clerk of the superior court of the county where the maker of the paper resides, if the maker is a resident of this state, a petition in writing, together with a duplicate, in substance, of the paper lost or destroyed, as nearly as he or she can recollect, which duplicate shall be sworn to by the petitioner, the petitioner's agent, or the petitioner's attorney.

(b) The clerk shall issue a rule nisi in the name of the judge of the superior court calling upon the opposite party to show cause, if he or she has any, why the duplicate sworn to should not be established in lieu of the lost or destroyed original. If the respondent is found in this state, the rule nisi shall be served personally upon the respondent in the manner provided by Code Section 9-11-4 at least 20 days before the sitting of the court to which the rule nisi is made returnable. If the respondent cannot be found in this state, the rule nisi shall be served

upon the respondent by publication in the manner provided in Code Section 9-11-4 before the final hearing of the rule nisi.

History.

Code 1981, § 24-11-23, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Filing of foreign judgments, § 9-12-132.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Code 1873, § 3982, Civil Code 1895, §§ 4751, 4754, former Civil Code 1910, §§ 5314 to 5320, and Ga. L. 1855-56, p. 238, §§ 1, 2, former Code 1933, § 63-203, and former O.C.G.A. § 24-8-24 are included in the annotations for this Code section.

Effect of establishment. — When once established, the copy was original evidence and is admissible as such in any controversy where the original would be admissible. Leggett v. Patterson, 114 Ga. 714, 40 S.E. 736, 1902 Ga. LEXIS 773 (1902) (decided under former Civil Code 1895, §§ 4751, 4754).

Remedy cumulative. — An established copy may thereafter have afforded a basis for an action at law. This procedure, however, was merely cumulative, and not exclusive of the right of the owner or holder of a lost paper to sue upon a copy of the paper, and prove the existence of the lost original if it was disputed. Continental Fertilizer Co. v. Pass, 7 Ga. App. 721, 67 S.E. 1052, 1910 Ga. App. LEXIS 489 (1910) (decided under former Civil Code 1895, §§ 4751, 4754).

Petition. — It was not necessary (though it was the better practice) for the petition to allege the loss; and if the loss is proved, the plaintiff may have recovered upon sufficient evidence of the contents. Trice v. Adams, 33 Ga. App. 257, 125 S.E. 878, 1924 Ga. App. LEXIS 833 (1924) (decided under former Civil Code 1910, §§ 5314-5320).

Allegation of jurisdiction. — Petition must have alleged that the defendants, or one of the defendants, resided in the county in which the application was made, in order to give that court jurisdiction. Cobb v. Cobb, 10 Ga. 445, 1851 Ga. LEXIS 126 (1851) (decided under former law).

Copy attached to petition. — Something must have been presented in the petition, or annexed to the petition, which was claimed to be a copy in substance of the lost volume or document. Ex parte Calhoun, 87 Ga. 359, 13 S.E. 694, 1891 Ga. LEXIS 168 (1891) (decided under former law).

Copy of entire instrument. — Copy required by the former section must have been a copy of the entire instrument. Jefferson v. Bowers, 33 Ga. 452, 1863 Ga. LEXIS 8 (1863) (decided under former law).

Personal service. — Notice of a proceeding to establish a lost or destroyed paper must have been served personally on the party, if to be found within the state; and if a party residing out of the county was served by leaving a copy at the party's residence, the proceeding was void. Bond v. Whitfield, 28 Ga. 537, 1859 Ga. LEXIS 255 (1859) (decided under former law).

Proper parties. — Law did not contain any provision as to who were proper parties to a suit for the establishment of lost papers. Bogle & Fields v. Maddox, 27 Ga. 472, 1859 Ga. LEXIS 100 (1859) (decided under former law).

Need not be party. — Procedure need not have been by a party but may be by any one who best knows the facts. Banks v. Dixon, 24 Ga. 483, 1858 Ga. LEXIS 239 (1858) (decided under former law).

Representative of deceased as party. — Legal representatives of deceased makers of a note need not have been made parties. Jefferson v. Bowers, 33 Ga. 452, 1863 Ga. LEXIS 8 (1863) (decided under former law).

Acceptor of draft as party. — If the proceeding be against the drawer of a draft, the acceptors should have been made parties. Bond v. Whitfield, 28 Ga.

537, 1859 Ga. LEXIS 255 (1859) (decided under former law).

Standing of heir. — An heir at law of the grantee in an unrecorded deed conveying land had such an interest in the land as would authorize the heir to maintain an action to establish a copy of the deed after the deed had been lost. Orr v. Dunn, 145 Ga. 137, 88 S.E. 669, 1916 Ga. LEXIS 209 (1916) (decided under former Civil Code 1910, §§ 5314-5320).

Res judicata. — Judgment establishing a copy of an alleged lost original constitutes a conclusive determination that a genuine original had in fact existed and was binding upon the parties in that proceeding and upon heirs at law of the alleged deceased grantor since the grantor's administrator was a party defendant therein. Milner v. Allgood, 184 Ga. 288, 191 S.E. 132, 1937 Ga. LEXIS 519 (1937) (decided under former Code 1933, § 63-203).

Effect of decree. — When in a suit to establish a copy of a lost deed the jury found in favor of the plaintiff's contention as to the character of the deed, and upon such verdict the judge entered a decree that the plaintiff recover the land described, that fee-simple title be vested in the plaintiff, and that the deed attached to the petition be established as prayed, the only effect of the decree was to establish the deed as prayed by the plaintiff, the provisions therein as to recovery of land and decree of title being surplusage. Loftin v. Carroll County Bd. of Educ., 195 Ga. 689, 25 S.E.2d 293, 1943 Ga. LEXIS 544, transferred, 70 Ga. App. 315, 28 S.E.2d 372, 1943 Ga. App. LEXIS 305 (1943) (decided under former Code 1933, § 63-203).

Equitable jurisdiction. — When a petition in equity was consolidated with the petition at law in the same court for the establishment of the lost bond, the fact that law and equity had a concurrent jurisdiction in the establishment of lost instruments would not have defeated the equitable jurisdiction of the court or precluded the court from granting all necessary and proper relief to each of the parties. Bainbridge Farm Co. v. Bower, 194 Ga. 304, 21 S.E.2d 224, 1942 Ga. LEXIS 555 (1942) (decided under former Code 1933, § 63-203).

Appellate jurisdiction. — When a petition in a superior court to establish a copy of a deed claimed to have been lost alleged only that the debtor resided in the county in which the suit was filed, that the debtor had executed to the plaintiff a certain deed, a true copy of which was attached to the petition, and that the deed had been lost, and in which petition the only prayer was that "the clerk of this court issue a rule nisi calling upon (the defendant) to show cause, if any he has, why the copy deed aforesaid should not be established in lieu of said lost original," such petition was a mere statutory proceeding to establish a copy of the deed claimed to have been lost, and was not a suit in equity such as to grant appellate jurisdiction in the Supreme Court. Loftin v. Carroll County Bd. of Educ., 195 Ga. 689, 25 S.E.2d 293, 1943 Ga. LEXIS 544, transferred, 70 Ga. App. 315, 28 S.E.2d 372, 1943 Ga. App. LEXIS 305 (1943) (decided under former Code 1933, § 63-203).

Establishment as bar to defense on note. — Establishment of a lost note was no bar to any defense that might be set up to the original note. Jenkins v. Forbes, 121 Ga. 383, 49 S.E. 284, 1904 Ga. LEXIS 163 (1904), superseded by statute as stated in Ballard v. Frey, 179 Ga. App. 455, 346 S.E.2d 893, 1984 Ga. App. LEXIS 2765 (1984) (decided under former Civil Code 1895, §§ 4751, 4754).

Schedule and plot in homestead. — After the plot and schedule had been approved by the ordinary (now judge of the probate court) and have been recorded those documents were private papers and may be established. Paschal v. Turner, 116 Ga. 736, 42 S.E. 1010, 1902 Ga. LEXIS 239 (1902) (decided under former Civil Code 1895, §§ 4751, 4754); Paschal v. Hutchinson, 119 Ga. 243, 46 S.E. 103, 1903 Ga. LEXIS 773 (1903) (decided under former Civil Code 1895, §§ 4751, 4754).

Lost wills. — Superior courts of this state had no jurisdiction to establish copies of lost wills. Perkins v. Perkins, 21 Ga. 13, 1857 Ga. LEXIS 2 (1857) (decided under Ga. L. 1855-56, p. 238, §§ 1, 2); Ponce v. Underwood, 55 Ga. 601, 1876 Ga. LEXIS 428 (1876) (decided under former Code 1873, 3982).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.
17 Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments, § 6.

24-11-24. Continuance in proceeding to establish lost or destroyed paper.

In a proceeding to establish lost papers under Code Section 24-11-23, no continuance shall be granted unless it appears reasonable and just to the court; nor shall a continuance be allowed to the same party more than once, except for providential cause.

History.
Code 1981, § 24-11-24, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-11-25. Establishment of lost or destroyed paper.

When a rule nisi has been served as provided in Code Section 24-11-23, the court shall grant a rule absolute establishing the duplicate of the lost or destroyed paper sworn to, unless good and sufficient cause is shown why the rule absolute should not be granted.

History.
Code 1981, § 24-11-25, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5316 are included in the annotations for this Code section.

Judgment conclusive. — Judgment establishing a copy of a deed was conclusive, and evidence of nondelivery of the original was excluded. Graham v. Graham, 137 Ga. 668, 74 S.E. 426, 1912 Ga. LEXIS 121 (1912) (decided under former Civil Code 1910, § 5316).

24-11-26. Furnishing certified endorsement of copy of established lost or destroyed paper.

When the duplicate of the lost or destroyed paper is established, the clerk of the court in which it is done shall furnish the duplicate to the party who had it established, with a certified endorsement thereon of the day and term of the court when the rule absolute was granted, provided all costs of the proceeding have been paid.

History.
Code 1981, § 24-11-26, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-11-27. Procedure as to action on lost or destroyed note, bill, bond, or other instrument.

(a) If the paper which has been lost or destroyed is a note, bill, bond, or other instrument upon which a proceeding may be brought, the owner may institute a proceeding thereon as soon as the rule nisi has been issued as provided for in Code Section 24-11-23. The complaint shall set forth that the paper upon which the proceeding is based is lost or destroyed. In no case shall a judgment be entered in the proceeding until it is determined whether the application to establish the paper is granted or not. If the application is granted, then judgment shall be entered as in other proceedings.

(b) In a proceeding as provided for in subsection (a) of this Code section, production of the paper upon which the proceeding is based shall not be demanded until the time for rendition of judgment in the proceeding; at that time, if the plaintiff produces a duplicate of the paper with a certified endorsement thereon by the clerk of the court in which it was established, as provided in Code Section 24-11-26, it shall be taken and considered as the original.

(c) This Code section shall not apply to instruments to which Title 11, the "Uniform Commercial Code," is applicable.

History.
Code 1981, § 24-11-27, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Maintenance of action on lost or destroyed instrument governed by T. 11, the "Uniform Commercial Code," § 11-3-804.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, §§ 4750, 4751 and 4754, former Code 1868, §§ 3910, 3911, former Civil Code 1910, §§ 5319, 5320, former Code 1933, § 63-207, and former O.C.G.A. § 24-8-28 are included in the annotations for this Code section.

Parol evidence. — It was, on the trial of an action upon a promissory note, after showing the loss or destruction thereof, competent to prove by parol that a paper attached as an exhibit to the plaintiff's declaration was a true and correct copy of the lost original. Haug v. Riley, 101 Ga. 372, 29 S.E. 44, 1897 Ga. LEXIS 236 (1897), superseded by statute as stated in Ballard v. Frey, 179 Ga. App. 455, 346 S.E.2d 893, 1984 Ga. App. LEXIS 2765 (1984) (decided under former Civil Code 1895, § 4750).

Admission of copy. — In answer to a plea of non est factum it was only necessary for the plaintiff to make out a prima facie case to authorize the admission in evidence of the paper alleged to be a substantial copy of the original note. Brown v. Wilson, 55 Ga. App. 262, 189 S.E. 860, 1937 Ga. App. LEXIS 63 (1937) (decided under former Code 1933, § 63-207).

Finding original pending suit. — When proceedings were instituted to establish a lost note, and suit was commenced after the rule nisi has issued and, pending the cause, the original note was found, it was not error to allow plaintiff to amend plaintiff's declaration so as to sue upon the original note thus found, even though there may be some immaterial

discrepancies between the original note and the copy which it was sought to establish. Cheney v. Dalton, 46 Ga. 401, 1872 Ga. LEXIS 78 (1872) (decided under former Code 1868, §§ 3910, 3911).

Judgment on note. — Suit on a lost note was as effectual as a suit upon an established copy if the only purpose of establishing the copy was to obtain judgment upon the note, and fact that there was a plea of non est factum made no difference; and a suit upon an established copy of a note was as effectual as a suit upon the original. Brown v. Wilson, 55 Ga. App. 262, 189 S.E. 860, 1937 Ga. App. LEXIS 63 (1937) (decided under former Code 1933, § 63-207).

Prior payment on note. — In an action upon an established copy of a lost promissory note, payment made prior to the judgment establishing the copy may have been pleaded. Jenkins v. Forbes, 121 Ga. 383, 49 S.E. 284, 1904 Ga. LEXIS 163 (1904), superseded by statute as stated in Ballard v. Frey, 179 Ga. App. 455, 346 S.E.2d 893, 1984 Ga. App. LEXIS 2765 (1984) (decided under former Civil Code 1895, §§ 4751, 4754).

Owner of a lost negotiable promissory note no longer has the option of "establishing" the note. The owner must have brought suit directly on the lost note itself pursuant to O.C.G.A. § 11-3-804. Ballard v. Frey, 179 Ga. App. 455, 346 S.E.2d 893, 1984 Ga. App. LEXIS 2765 (1984) (decided under former law).

Dismissal of action. — Although the petition in an action on a lost note might have been subject to a timely demurrer (now motion to dismiss), still the action could not properly be dismissed on oral motion. Witherington v. Ware, 17 Ga. App. 433, 87 S.E. 603, 1916 Ga. App. LEXIS 987 (1916) (decided under former Civil Code 1910, §§ 5319, 5320).

RESEARCH REFERENCES

Am. Jur. 2d.
52 Am. Jur. 2d, Lost and Destroyed Instruments, §§ 25, 34, 38.

C.J.S.
54 C.J.S., Lost Instruments, § 20 et seq.

24-11-28. Joinder of additional party defendants in proceedings to establish lost or destroyed papers.

In all proceedings for the purpose of establishing any lost or destroyed paper other than an office paper, as defined in Code Section 24-11-20, any person whose interest will be affected by the establishment of the lost paper shall, upon motion, by order of the court, be made a party respondent in the proceeding and shall be allowed all the rights of defense against the establishment of the paper as fully as if he or she was the maker of the lost paper.

History.
Code 1981, § 24-11-28, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

RESEARCH REFERENCES

Am. Jur. 2d.
52 Am. Jur. 2d, Lost and Destroyed Instruments, § 9.

C.J.S.
54 C.J.S., Lost Instruments, § 11 et seq.

24-11-29. Applicability of article.

Other than Code Section 24-11-20, this article shall not apply to lost or destroyed papers to which Title 11, the "Uniform Commercial Code," is applicable.

History.
Code 1981, § 24-11-29, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

CHAPTER 12

MEDICAL AND OTHER CONFIDENTIAL INFORMATION

Article 1

Release of Medical Information and Confidentiality of Raw Research Data

Sec.

24-12-1. Release of medical information by physician, hospital, health care facility, or pharmacist; immunity from liability; waiver of privilege; exceptions.

24-12-2. Confidentiality of raw research data.

Article 2

Confidentiality of Medical Information

24-12-10. Definitions.

24-12-11. Effect of confidential or privileged character of medical records upon legally required or consensual disclosure.

24-12-12. Disclosure of medical records — Use of medical matter disclosed.

24-12-13. Immunity from liability for required or consensual disclosure of medical records.

24-12-14. Construction of article in relation to educational purposes.

Article 3

AIDS Information

24-12-20. Confidential nature of AIDS information.

24-12-21. Disclosure of AIDS confidential information.

Article 4

Other Confidential Information

24-12-30. Confidential nature of certain library records.

24-12-31. Confidential nature of veterinarian records; disclosure of rabies vaccination record.

Cross references.

Power of Department of Community Health to require reporting of certain diseases and injuries, § 31-12-2.

Disclosure of medical records and other medical information pertaining to the mentally ill, the mentally retarded, alcoholics, and others, §§ 37-3-166, 37-4-125, 37-7-166.

Privilege of state officers and employees to refuse to disclose identity of persons furnishing information pursuant to medical or public health investigation by Department of Community Health, § 50-18-72.

Law reviews.

For article, "The Medical Records Custodian's Perspective," see 6 Ga. St. B.J. 8 (2001).

For article, "Criminal Law," see 53 Mercer L. Rev. 209 (2001).

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Medical Malpractice — Use of Hospital Records, 22 POF2d 1.

Qualification of Medical Expert Witness, 33 POF2d 179.

Foundation for Admissibility of Hospital Records and X-Rays, 38 POF2d 145.

Qualification of Chiropractor as Expert Witness, 45 POF2d 137.

Protected Communication Between Physician and Patient, 45 POF2d 595.

Foundation for Admission of Thermogram, 46 POF2d 275.

Admissibility and Reliability of Electrocardiogram, 4 POF3d 73.

Use of CAT Scans in Litigation, 8 POF3d 145.

Proof of Paralysis, 67 POF3d 1.

Sexual Organ Injuries: Male Genitalia, 70 POF3d 229.

Traumatic Brain Injuries, 72 POF3d 363.

ARTICLE 1

RELEASE OF MEDICAL INFORMATION AND CONFIDENTIALITY OF RAW RESEARCH DATA

Law reviews.

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

For article, "Health Insurance Portability and Accountability Act of 1996: Health: Discussing Title 31 of the Official Code of Georgia Annotated, Relating to the Notification of Disease and the Control of Hazardous Conditions, Preventable Diseases, and Metabolic Disorders & Public Welfare: Discussing Title 45 of the Code of Federal Regulations, Relating to the Department of Health and Human Services, and Administrative Data Standards and Related Requirements," see 37 Ga. St. U.L. Rev. 153 (2020).

24-12-1. Release of medical information by physician, hospital, health care facility, or pharmacist; immunity from liability; waiver of privilege; exceptions.

(a) No physician licensed under Chapter 34 of Title 43 and no hospital or health care facility, including those operated by an agency or bureau of this state or other governmental unit, shall be required to release any medical information concerning a patient except to the Department of Public Health, its divisions, agents, or successors when required in the administration of public health programs pursuant to Code Section 31-12-2 and where authorized or required by law, statute, or lawful regulation; or on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or on appropriate court order or subpoena; provided, however, that any physician, hospital, or health care facility releasing information under written authorization or other waiver by the patient, or by his or her parents or guardian ad litem in the case of a minor, or pursuant to law, statute, or lawful regulation, or under court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any judicial proceeding. This Code section shall not apply to psychiatrists or to hospitals in which the patient is being or has been treated solely for mental illness.

(b) No pharmacist licensed under Chapter 4 of Title 26 shall be

required to release any medical information concerning a patient except on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena; provided, however, that any pharmacist releasing information under written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any judicial proceeding.

History.

Code 1981, § 24-12-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 141, § 24/HB 79.

Cross references.

Physical examination of state employees, § 45-2-40 et seq.

Administrative rules and regulations.

Release of Confidential Prescription Drug Order Information, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia State Board of Pharmacy, Miscellaneous Guidelines for Pharmacists, Rule 480-16-.07.

Law reviews.

For comment, "The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved," see 34 Emory L.J. 777 (1985).

For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

For article, "Controlling Conflicts of Interest in the Doctor-Patient Relationship: Lessons from Moore v. Regents of the University of California," see 42 Mercer L. Rev. 989 (1991).

For survey article on criminal law and procedure for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003).

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For note, "The Final Patient Privacy Regulations Under the Health Insurance Portability and Accountability Act — Promoting Patient Privacy or Public Confusion?," see 37 Ga. L. Rev. 723 (2003).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-418 and former O.C.G.A. § 24-9-40 are included in the annotations for this Code section.

Federal law preempts state law. — Regulations enacted under 42 U.S.C. § 1320d-2(d)(2)(A) of the Health Insurance Portability and Accountability Act (HIPAA) preempted former O.C.G.A. § 24-9-40(a) with regard to ex parte communications between defense counsel and a plaintiff's prior treating physicians because HIPAA afforded patients more control over their medical records than former § 24-9-40(a) when it came to informal contacts between litigants and physicians. Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68, 2008 Ga. LEXIS 864 (2008) (decided under former O.C.G.A. § 24-9-40).

Fact of employment is not within the physician-patient privilege. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844, 1969 Ga. App. LEXIS 826 (1969) (decided under former Code 1933, § 38-418).

Employee and company-appointed physician. — No physician-patient relationship existed between an employee and a company-appointed physician retained to give the employee a return to work physical. Payne v. Sherrer, 217 Ga. App.

761, 458 S.E.2d 916, 1995 Ga. App. LEXIS 580 (1995) (decided under former O.C.G.A. § 24-9-40).

Ex parte communications not required. — Denial of the defendants' motion for a qualified protection order in a medical malpractice and wrongful death action was not erroneous because the defendants failed to support the defendants' assertions that ex parte interviews were necessary to obtain affidavits or medical narratives from the healthcare providers or to protect the providers' work product or why the providers needed to meet with the provider ex parte to "prepare" the providers for trial testimony, as the providers were not parties, were not the defendants' expert witnesses, were not agents or employees of the defendants, were in a confidential patient-physician relationship with the decedent, and had an ongoing fiduciary duty to the decedent to protect that confidential information. Tender Loving Health Care Servs. of Ga., LLC v. Ehrlich, 318 Ga. App. 560, 734 S.E.2d 276, 2012 Ga. App. LEXIS 953 (2012), overruled in part, Wellstar Health Sys. v. Jordan, 293 Ga. 12, 743 S.E.2d 375, 2013 Ga. LEXIS 443 (2013) (decided under former O.C.G.A. § 24-9-40).

Employment agreement regarding confidential medical issues. — Medical director's agreement to abide by policies of contract employer in order to obtain patient privileges at its hospital constituted a waiver under former O.C.G.A. § 24-9-40 of an action for the contract employer's alleged failure to keep the medical director's test result records showing the medical director had tested positive for an infectious disease confidential as the agreement permitted authorized hospital representatives and staff to provide and act upon information bearing on the medical director's professional ability and qualifications, and the medical director agreed to waive all legal claims related to such disclosure. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557, 2002 Ga. App. LEXIS 1230 (2002) (decided under former O.C.G.A. § 24-9-40).

Applicability of physician shield law to physicians generally and to psychiatrists. — Former O.C.G.A. § 24-9-40 read with former O.C.G.A. § 24-9-21(5) (see now O.C.G.A. § 24-5-501) reflected that the physician shield law applied to physicians generally but required physicians to release information upon proper order, whereas the confidentiality of communications to psychiatrists is protected by public policy and such communications were expressly excepted from the shield statute. Gilmore v. State, 175 Ga. App. 376, 333 S.E.2d 210, 1985 Ga. App. LEXIS 2098 (1985) (decided under former O.C.G.A. § 24-9-40).

Protective order under HIPAA. — Trial court did not err in granting a hospital's motion for a qualified protective order under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to conduct ex parte interviews with a patient's health care providers because the hospital complied with 45 C.F.R. § 164.512(e)(1)(ii)(B), and any ex parte interviews conducted pursuant to the qualified protective order would be permitted under the HIPAA; because the order prohibited the use or disclosure of the patient's health information for purposes other than the litigation and required the return or destruction thereof at the conclusion of proceedings, it constituted a qualified protective order as defined in § 164.512(e)(1)(v). Baker v. Wellstar Health Sys., 288 Ga. 336, 703 S.E.2d 601, 2010 Ga. LEXIS 821 (2010) (decided under former O.C.G.A. § 24-9-40).

In issuing orders authorizing ex parte interviews, trial courts should have stated with particularity: (1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview was at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview was voluntary; in addition, when issuing or modifying such orders, trial courts should have considered whether the circumstances, including any evidence indicating that ex parte interviews have or were expected to stray beyond their proper bounds, warranted requiring defense counsel to provide the patient-plaintiff

with prior notice of, and the opportunity to appear at, scheduled interviews or, alternatively, required the transcription of the interview by a court reporter at the patient-plaintiff's request because the use of carefully crafted orders specifying precise parameters within which ex parte interviews may have been conducted would have served to enforce the privacy protections afforded under state law and advance the purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) while at the same time preserved a mode of informal discovery that may have been helpful in streamlining litigation in Georgia. Baker v. Wellstar Health Sys., 288 Ga. 336, 703 S.E.2d 601, 2010 Ga. LEXIS 821 (2010) (decided under former O.C.G.A. § 24-9-40).

Transmittal of records to health care professional performing subsequent treatment. — Psychologist who performed the neuropsychological testing and evaluation did not violate the patient's policy rights either by transmitting the records in question to the health care professional who took over the patient's treatment or by discussing the case with that professional. Jarallah v. Schwartz, 202 Ga. App. 32, 413 S.E.2d 210, 1991 Ga. App. LEXIS 1675 (1991) (decided under former O.C.G.A. § 24-9-40).

Subpoena of personal medical records. — In the absence of waiver and without notice to the accused or an opportunity to object, it was not "appropriate" under former O.C.G.A. § 24-9-40 for the state in a criminal case to subpoena a defendant's own personal medical records which were then in the possession of a physician, hospital, or health care facility. King v. State, 272 Ga. 788, 535 S.E.2d 492, 2000 Ga. LEXIS 308 (2000) (decided under former O.C.G.A. § 24-9-40).

Unlike the Fourth Amendment, which required that the state have probable cause prior to the seizure of an accused or an accused's property, former O.C.G.A. § 24-9-40(a) did not contain any express limits on the use of a subpoena to obtain a defendant's medical records for possible introduction as evidence in a criminal proceeding; therefore, defendant was not entitled to notice of a search warrant and an opportunity to object prior to the state's receipt of defendant's private medical records. King v. State, 276 Ga. 126, 577 S.E.2d 764, 2003 Ga. LEXIS 64 (2003) (decided under former O.C.G.A. § 24-9-40).

Health information contained in the defendant's hospital records was subject to disclosure under former O.C.G.A. § 24-9-40(a) after the district attorney's office obtained a search warrant, which was narrowly drafted to seek only the records related to the defendant's treatment on the night of a crime. Bowling v. State, 289 Ga. 881, 717 S.E.2d 190, 2011 Ga. LEXIS 823 (2011) (decided under former O.C.G.A. § 24-9-40).

Psychiatrist-patient communications absolutely privileged. — Legislature has clearly expressed legislature's intent that, as a matter of public policy, psychiatrist-patient communications were to be privileged and were to remain privileged even though the patient's "care and treatment or the nature and extent of his injuries [have been put] at issue in any civil or criminal proceeding," such that communications between a deceased patient and the psychiatrist did not lose their privileged character and were not discoverable merely because they were the most objective evidence of the relevant issue of the decedent's mental state. Dynin v. Hall, 207 Ga. App. 337, 428 S.E.2d 89, 1993 Ga. App. LEXIS 180 (1993), cert. denied, No. S93C0796, 1993 Ga. LEXIS 419 (Ga. Apr. 8, 1993) (decided under former O.C.G.A. § 24-9-40).

Criminal defense attorney who subpoened records from a psychiatric hospital was entitled to rely on the presumption that the records the attorney received from the hospital were either non-privileged or that the hospital first obtained a waiver from the patient. Karpowicz v. Hyles, 247 Ga. App. 292, 543 S.E.2d 51, 2000 Ga. App. LEXIS 1402 (2000), cert. denied, No. S01C0556, 2001 Ga. LEXIS 455 (Ga. June 5, 2001) (decided under former O.C.G.A. § 24-9-40).

Defendant placed mental state in issue. — Trial court did not err when the court denied a motion in limine and allowed a psychiatrist who examined the defendant in jail to testify because the defendant placed the defendant's mental

capacity in issue when the defendant filed a notice of intent to pursue a defense of not guilty by reason of insanity, which constituted a waiver of any state constitutional right of privacy or statutory privilege in the defendant's mental health records. Armstead v. State, 293 Ga. 243, 744 S.E.2d 774, 2013 Ga. LEXIS 544 (2013) (decided under former O.C.G.A. § 24-9-40).

Dentist was not immune from liability under former O.C.G.A. § 24-9-40; however, if the defendant complied in good faith with a production request, or if the defendant had been compelled to comply by a court, the defendant was shielded from liability for the disclosure under former O.C.G.A. § 24-9-44 (see now O.C.G.A. § 24-12-13). McFarlin v. Taylor, 187 Ga. App. 54, 369 S.E.2d 330, 1988 Ga. App. LEXIS 527 (1988) (decided under former O.C.G.A. § 24-9-40).

Trial court did not err in admitting testimony of a family practice physician from whom the defendant sought psychiatric referral two days after an alleged rape and who also consulted with the victim and attempted an examination of her pelvic area. Barnes v. State, 171 Ga. App. 478, 320 S.E.2d 597, 1984 Ga. App. LEXIS 2989 (1984) (decided under former O.C.G.A. § 24-9-40).

Past recollections within medical record inadmissible. — If the original of the medical record itself was admissible but diagnostic opinions and conclusions therein were inadmissible, past recollection recorded by a doctor of a patient's medical history contained in a medical record, which included a diagnostic opinion of another doctor, would have been inadmissible. Stoneridge Properties, Inc. v. Kuper, 178 Ga. App. 409, 343 S.E.2d 424, 1986 Ga. App. LEXIS 1663 (1986) (decided under former O.C.G.A. § 24-9-40).

In the absence of a waiver by the patient, the privileged material was neither discoverable nor admissible at trial and the provider was not precluded from asserting the privilege, which survived the patient's death. Advantage Behavioral Health Sys. v. Cleveland, 350 Ga. App. 511, 829 S.E.2d 763, 2019 Ga. App. LEXIS 332 (2019).

Filing of action as waiver. — Once plaintiff filed action questioning the nature and quality of medical treatment rendered to plaintiff's child, the plaintiff waived the child's qualified right to privacy implicit in the Hippocratic oath, and doctor having source of information pertaining to that action was authorized to release information pertaining thereto and was immune from liability to the patient or any other person for release of that information. Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548, 1982 Ga. App. LEXIS 2290 (1982) (decided under former O.C.G.A. § 24-9-40).

Fact that plaintiff was seeking to recover damages for injuries of a mental and emotional nature would not constitute a waiver of the privilege to exclude testimony of a psychiatrist. Wilson v. Bonner, 166 Ga. App. 9, 303 S.E.2d 134, 1983 Ga. App. LEXIS 2054 (1983) (decided under former O.C.G.A. § 24-9-40).

Communications to coordinate care. — Trial court properly directed a verdict in favor of the defendant, a psychiatrist, with regard to the plaintiff's invasion of privacy complaint, which asserted that the defendant's letters to the other treating physicians of the plaintiff violated the plaintiff's right to privacy because the evidence established that the information in the three letters disclosed to the plaintiff's other treating physicians was disclosed in an attempt to coordinate care; the sharing of the information did not amount to a public disclosure and there was no evidence that the other treating physicians shared the information with anyone else. Haughton v. Canning, 287 Ga. App. 28, 650 S.E.2d 718, 2007 Ga. App. LEXIS 785 (2007), cert. denied, No. S07C1869, 2008 Ga. LEXIS 157 (Ga. Feb. 11, 2008) (decided under former O.C.G.A. § 24-9-40).

Names and addresses of stop-smoking clinic patients not privileged information. — When the trial court ordered the defendant stop smoking clinic to produce the names and addresses of all persons who received the clinic's stop smoking treatment, the trial court was authorized to order disclosure of any relevant, nonprivileged information, and as

the information sought by plaintiffs was not privileged there was no reversible error in the trial court's decision. National Stop Smoking Clinic-Atlanta, Inc. v. Dean, 190 Ga. App. 289, 378 S.E.2d 901, 1989 Ga. App. LEXIS 227 (1989) (decided under former O.C.G.A. § 24-9-40).

Whether defendant had AIDS placed "at issue." — Defendant, who was charged with aggravated assault with intent to murder after biting a police officer, placed "at issue" the issue of AIDS by defendant's conduct in committing an act which was inextricably linked to the question of defendant having AIDS. Scroggins v. State, 198 Ga. App. 29, 401 S.E.2d 13, 1990 Ga. App. LEXIS 1555 (1990) (decided under former O.C.G.A. § 24-9-40).

RESEARCH REFERENCES

Am. Jur. 2d.

81 Am. Jur. 2d, Witnesses, § 416.

C.J.S.

98 C.J.S. (Rev), Witnesses, § 411 et seq.

ALR.

Waiver by beneficiary or personal representative, in actions on insurance policy, of privilege of communications to physician, 15 A.L.R. 1544.

Evidence: privilege as to family matters or affairs incidentally learned by physician while professionally attending patient, 24 A.L.R. 1202.

Evidence: privilege as to facts learned on autopsy or post-mortem examination, 58 A.L.R. 1134.

Classes of persons within term "physician" in rule as to privileged communications, 68 A.L.R. 176.

Privilege in respect of testimony of physician or surgeon that he noticed odor of liquor on patient's breath or other indications of recent use of liquor, 79 A.L.R. 1131.

Presence of third person as affecting privileged character of communications between patient and physician, 96 A.L.R. 1419.

Voluntary disclosure at trial of one's physical condition at certain time as waiver of privilege as regards testimony by physician as to condition at earlier time, 98 A.L.R. 1284.

Physician-patient privilege as affected by contention that purpose was examination and not treatment, 107 A.L.R. 1495.

When testimony by patient deemed to waive physician-patient privilege, 114 A.L.R. 798.

Physician-patient, attorney-client, or priest-penitent privilege as applicable in nonjudicial proceeding or investigation, 133 A.L.R. 732.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician, 25 A.L.R.2d 1429.

Evidence: privilege of communications by or to nurse or attendant, 47 A.L.R.2d 742.

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test, 66 A.L.R.2d 536.

Who may waive privilege of confidential communication to physician by person since deceased, 97 A.L.R.2d 393.

Physician-patient privilege: testimony as to communications or observations as to mental condition of patient treated for other condition, 100 A.L.R.2d 648.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 A.L.R.3d 1244.

Applicability in criminal proceedings of privilege as to communications between physician and patient, 7 A.L.R.3d 1458.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings, 21 A.L.R.3d 912.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.3d 1401.

Physician-patient privilege as applied to physicians testimony concerning wound required to be reported to public authority, 85 A.L.R.3d 1196.

Evidence of automobile passenger's blood-alcohol level as admissible in support of defense that passenger was contributorily negligent or assumed risk of automobile accident, 5 A.L.R.4th 1194.

Physician-patient privilege as extending to patient's medical or hospital records, 10 A.L.R.4th 552.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Physician's tort liability for unauthorized disclosure of confidential information about patient, 48 A.L.R.4th 668.

State statutes or regulations expressly governing disclosure of fact that person has tested positive for human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS), 12 A.L.R.5th 149.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 A.L.R.5th 591.

24-12-2. Confidentiality of raw research data.

(a) The General Assembly finds and declares that protecting the confidentiality of research data from disclosure in judicial and administrative proceedings is essential to safeguarding the integrity of research in this state, guaranteeing the privacy of individuals who participate in research projects, and ensuring the continuation of research in science, medicine, and other fields that benefits the citizens and institutions of Georgia and other states. The protection of such research data has more than local significance, is of equal importance to all citizens of this state, is of state-wide concern, and consequently is properly a matter for regulation under the police power of this state.

(b) As used in this Code section, the term "confidential raw research data" means medical information, interview responses, reports, statements, memoranda, or other data relating to the condition, treatment, or characteristics of any person which are gathered by or provided to a researcher:

(1) In support of a research study approved by an appropriate research oversight committee of a hospital, health care facility, or educational institution; and

(2) With the objective to develop, study, or report aggregate or anonymous information not intended to be used in any way in which the identity of an individual is material to the results.

The term shall not include published compilations of the raw research data created by the researcher or the researcher's published summaries, findings, analyses, or conclusions related to the research study.

(c) Confidential raw research data in a researcher's possession shall not be subject to subpoena, otherwise discoverable, or deemed admissible as evidence in any judicial or administrative proceeding in any court except as otherwise provided in subsection (d) of this Code section.

(d) Confidential raw research data may be released, disclosed, sub-

ject to subpoena, otherwise discoverable, or deemed admissible as evidence in a judicial or administrative proceeding as follows:

(1) Confidential raw research data related to a person may be disclosed to that person or to another person on such person's behalf where the authority is otherwise specifically provided by law;

(2) Confidential raw research data related to a person may be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the research participant or where a designation is made in writing by a person authorized by law to act for the participant;

(3) Confidential raw research data related to a person may be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if such data are required by law or regulation to be reported to such agency or department;

(4) Confidential raw research data may be disclosed in any proceeding in which a party was a participant, researcher, or sponsor in the underlying research study, including, but not limited to, any judicial or administrative proceeding in which a research participant places his or her care, treatment, injuries, insurance coverage, or benefit plan coverage at issue; provided, however, that the identity of any research participant other than the party to the judicial or administrative proceeding shall not be disclosed, unless the researcher or sponsor is a defendant in such proceeding;

(5) Confidential raw research data may be disclosed in any judicial or administrative proceeding in which the researcher has either volunteered to testify or has been hired to testify as an expert by one of the parties to such proceeding; and

(6) In a criminal proceeding, the court shall order the production of confidential raw research data if the data are relevant to any issue in the proceeding, impose appropriate safeguards against unauthorized disclosure of the data, and admit confidential raw research data into evidence if the data are material to the defense or prosecution.

(e) Nothing in this Code section shall be construed to permit, require, or prohibit the disclosure of confidential raw research data in any setting other than a judicial or administrative proceeding that is governed by the requirements of this title.

(f) Any disclosure of confidential raw research data authorized or required by this Code section or any other law shall in no way destroy the confidential nature of that data except for the purpose for which the authorized or required disclosure is made.

History.
Code 1981, § 24-12-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Use of confidential, classified, or restricted records for research, § 50-18-101.

ARTICLE 2

CONFIDENTIALITY OF MEDICAL INFORMATION

Law reviews.
For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-12-10. Definitions.

As used in this article, the term:

(1) "Confidential or privileged" means the protection afforded by law from unauthorized disclosure, whether the protection is afforded by law as developed and applied by the courts, by statute or lawful regulations, or by the requirements of the Constitutions of the State of Georgia or the United States. The term "confidential or privileged" also includes protection afforded by law from compulsory process or testimony.

(2) "Disclosure" means the act of transmitting or communicating medical matter to a person who would not otherwise have access thereto.

(3) "Health care facility" means any institution or place in which health care is rendered to persons, which health care includes, but is not limited to, medical, psychiatric, acute, intermediate, rehabilitative, and long-term care.

(4) "Laws requiring disclosure" means laws and statutes of the State of Georgia and of the United States and lawful regulations issued by any department or agency of the State of Georgia or of the United States which require the review, analysis, or use of medical matter by persons not originally having authorized access thereto. The term "laws requiring disclosure" also includes any authorized practice of disclosure for purposes of evaluating claims for reimbursement for charges or expenses under any public or private reimbursement or insurance program.

(5) "Limited consent to disclosure" means proper authorization given by or on behalf of a person entitled to protection from disclosure of medical matter and given for a specific purpose related to such person's health or related to such person's application for insurance or like benefits.

(6) "Medical matter" means information respecting the medical or psychiatric condition, including without limitation the physical and the mental condition, of a natural person or persons, however recorded, obtained, or communicated.

(7) "Nurse" means a person authorized by license issued under Chapter 26 of Title 43 as a registered professional nurse or licensed practical nurse to practice nursing.

(8) "Physician" means any person lawfully licensed in this state to practice medicine and surgery pursuant to Chapter 34 of Title 43.

History.
Code 1981, § 24-12-10, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

RESEARCH REFERENCES

ALR.
Admissibility of hospital chart or other hospital record, 120 A.L.R. 1124.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician, 25 A.L.R.2d 1429.

Admissibility of hospital record relating to physician's opinion as to whether patient is malingering or feigning injury, 55 A.L.R.2d 1031.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 A.L.R.3d 1244.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 A.L.R.5th 591.

24-12-11. Effect of confidential or privileged character of medical records upon legally required or consensual disclosure.

The disclosure of confidential or privileged medical matter constituting all or part of a record kept by a health care facility, a nurse, or a physician, pursuant to laws requiring disclosure or pursuant to limited consent to disclosure, shall not serve to destroy or in any way abridge the confidential or privileged character thereof, except for the purpose for which such disclosure is made.

History.
Code 1981, § 24-12-11, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

RESEARCH REFERENCES

ALR.
Evidence: privilege as to facts learned on autopsy or post-mortem examination, 58 A.L.R. 1134.

Admissibility of hospital chart or other hospital record, 120 A.L.R. 1124.

Evidence: public health record as subject of privilege, 136 A.L.R. 856.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician, 25 A.L.R.2d 1429.

Admissibility of hospital record relating to physician's opinion as to whether patient is malingering or feigning injury, 55 A.L.R.2d 1031.

Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident, 89 A.L.R.2d 1001.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 A.L.R.3d 1244.

Discovery, in medical malpractice action, of names of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 A.L.R.5th 591.

24-12-12. Disclosure of medical records — Use of medical matter disclosed.

Persons to whom confidential or privileged medical matter is disclosed in the circumstances described in Code Section 24-12-11 shall utilize such matter only in connection with the purpose or purposes of such disclosure and thereafter shall keep such matter in confidence. However, nothing in this article shall prohibit the use of such matter where otherwise authorized by law.

History.

Code 1981, § 24-12-12, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

RESEARCH REFERENCES

ALR.

Admissibility of hospital chart or other hospital record, 120 A.L.R. 1124.

Evidence: public health record as subject of privilege, 136 A.L.R. 856.

Admissibility of hospital record relating to physician's opinion as to whether patient is malingering or feigning injury, 55 A.L.R.2d 1031.

Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident, 89 A.L.R.2d 1001.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 A.L.R.3d 1244.

Discovery, in medical malpractice action, of names of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 A.L.R.5th 591.

24-12-13. Immunity from liability for required or consensual disclosure of medical records.

Any person, corporation, authority, or other legal entity acting in good faith shall be immune from liability for the transmission, receipt, or use of medical matter disclosed pursuant to laws requiring disclosure or pursuant to limited consent to disclosure.

History.

Code 1981, § 24-12-13, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-44 are included in the annotations for this Code section.

Dentist not liable if good faith disclosure. — Dentist was not immune from liability under former O.C.G.A. § 24-9-40 (see now O.C.G.A. § 24-12-1). However, if the dentist complied in good faith with a production request, or if the dentist had been compelled to comply by a court, the dentist was shielded from liability for the disclosure under former O.C.G.A. § 24-9-44. McFarlin v. Taylor, 187 Ga. App. 54, 369 S.E.2d 330, 1988 Ga. App. LEXIS 527 (1988) (decided under former O.C.G.A. § 24-9-44).

RESEARCH REFERENCES

ALR.

Admissibility of hospital chart or other hospital record, 120 A.L.R. 1124.

Evidence: public health record as subject of privilege, 136 A.L.R. 856.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 A.L.R.3d 1244.

24-12-14. Construction of article in relation to educational purposes.

Nothing in this article shall be construed to prevent the customary and usual audit, discussion, and presentation of cases in connection with medical and public education.

History.

Code 1981, § 24-12-14, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

ARTICLE 3

AIDS INFORMATION

Law reviews.

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

For note, "The Incentive to Refer: How the AIDS Healthcare Foundation Is Increasing the Likelihood of Early Treatment Through the Use of Lawful Kickbacks," see 70 Mercer L. Rev. 1153 (2019).

24-12-20. Confidential nature of AIDS information.

AIDS confidential information as defined in Code Section 31-22-9.1 and disclosed or discovered within the patient-physician relationship shall be confidential and shall not be disclosed except as otherwise provided in Code Section 24-12-21.

History.

Code 1981, § 24-12-20, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-40.1 are included in the annotations for this Code section.

Use of pseudonyms. — When a patient filed suit solely alleging that the improper disclosure of HIV confidential information and the non-disclosure exception of former O.C.G.A. § 24-9-47(y) (see now O.C.G.A. § 24-12-21) did not apply, a trial court retained discretion to determine if the patient could prosecute a case under a pseudonym. Doe v. Hall, 260 Ga. App. 421, 579 S.E.2d 838, 2003 Ga. App. LEXIS 393 (2003) (decided under former O.C.G.A. § 24-9-40.1).

24-12-21. Disclosure of AIDS confidential information.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) Except as otherwise provided in this Code section:

(1) No person or legal entity which receives AIDS confidential information pursuant to this Code section or which is responsible for recording, reporting, or maintaining AIDS confidential information shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity; and

(2) No person or legal entity which receives AIDS confidential information which that person or legal entity knows was disclosed in violation of paragraph (1) of this subsection shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity.

(c) AIDS confidential information shall be disclosed to the person identified by that information or, if that person is an incompetent person, to that person's legal guardian. AIDS confidential information may be disclosed to such person's parent or legal guardian if that person is a minor.

(d) AIDS confidential information shall be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the person identified by that information or, if that person is a minor or incompetent person, by that person's parent or legal guardian.

(e) AIDS confidential information shall be disclosed to any agency or

department of the federal government, this state, or any political subdivision of this state if that information is authorized or required by law to be reported to that agency or department.

(f) The results of an HIV test shall be disclosed to the person, or that person's designated representative, who ordered such tests of the body fluids or tissue of another person.

(g) When the patient of a physician has been determined to be infected with HIV and that patient's physician reasonably believes that the spouse or sexual partner or any child of the patient, spouse, or sexual partner is a person at risk of being infected with HIV by that patient, the physician may disclose to that spouse, sexual partner, or child that the patient has been determined to be infected with HIV, after first attempting to notify the patient that such disclosure is going to be made.

(h)(1) An administrator of an institution licensed as a hospital by the Department of Community Health or a physician having a patient who has been determined to be infected with HIV may disclose to the Department of Public Health:

(A) The name and address of that patient;

(B) That such patient has been determined to be infected with HIV; and

(C) The name and address of any other person whom the disclosing physician or administrator reasonably believes to be a person at risk of being infected with HIV by that patient.

(2) When mandatory and nonanonymous reporting of confirmed positive HIV tests to the Department of Public Health is determined by that department to be reasonably necessary, that department shall establish by regulation a date on and after which such reporting shall be required. On and after the date so established, each health care provider, health care facility, or any other person or legal entity which orders an HIV test for another person shall report to the Department of Public Health the name and address of any person thereby determined to be infected with HIV. No such report shall be made regarding any confirmed positive HIV test provided at any anonymous HIV test site operated by or on behalf of the Department of Public Health.

(3) The Department of Public Health may disclose that a person has been reported, under paragraph (1) or (2) of this subsection, to have been determined to be infected with HIV to the board of health of the county in which that person resides or is located if reasonably necessary to protect the health and safety of that person or other persons who may have come in contact with the body fluids of the HIV

infected person. The Department of Public Health or county board of health to which information is disclosed pursuant to this paragraph or paragraph (1) or (2) of this subsection:

(A) May contact any person named in such disclosure as having been determined to be an HIV infected person for the purpose of counseling that person and requesting therefrom the name of any other person who may be a person at risk of being infected with HIV by that HIV infected person;

(B) May contact any other person reasonably believed to be a person at risk of being infected with HIV by that HIV infected person for the purposes of disclosing that such infected person has been determined to be infected with HIV and counseling such person to submit to an HIV test; and

(C) Shall contact and provide counseling to the spouse of any HIV infected person whose name is thus disclosed if both persons are reasonably likely to have engaged in sexual intercourse or any other act determined by the Department of Public Health likely to have resulted in the transmission of HIV between such persons within the preceding seven years and if that spouse may be located and contacted without undue difficulty.

(h.1) The Department of Public Health may disclose AIDS confidential information regarding a person who has been reported, under paragraph (1) or (2) of subsection (h), to be infected with HIV to a health care provider licensed pursuant to Chapter 11, 26, or 34 of Title 43 whom that person has consulted for medical treatment or advice.

(i) Any health care provider authorized to order an HIV test may disclose AIDS confidential information regarding a patient thereof if that disclosure is made to a health care provider or health care facility which has provided, is providing, or will provide any health care service to that patient and as a result of such provision of service that health care provider or facility:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(j) A health care provider or any other person or legal entity authorized but not required to disclose AIDS confidential information pursuant to this Code section shall have no duty to make such disclosure and shall not be liable to the patient or any other person or legal entity for failing to make such disclosure. A health care provider

or any other person or legal entity which discloses information as authorized or required by this Code section or as authorized or required by law or rules or regulations made pursuant thereto shall have no civil or criminal liability therefor.

(k) When any person or legal entity is authorized or required by this Code section or any other law to disclose AIDS confidential information to a person at risk of being infected with HIV and that person at risk is a minor or incompetent person, such disclosure may be made to any parent or legal guardian of the minor or incompetent person, to the minor or incompetent person, or to both the minor or incompetent person and any parent or legal guardian thereof.

(l) When an institutional care facility is the site at which a person is at risk of being infected with HIV and as a result of that risk a disclosure of AIDS confidential information to any person at risk at that site is authorized or required under this Code section or any other law, such disclosure may be made to the person at risk or to that institutional care facility's chief administrative or executive officer, or such officer's designee, in which case that officer or designee shall be authorized to make such disclosure to the person at risk.

(m) When a disclosure of AIDS confidential information is authorized or required by this Code section to be made to a physician, health care provider, or legal entity, that disclosure may be made to employees of that physician, health care provider, or legal entity who have been designated thereby to receive such information on behalf thereof. Those designated employees may thereafter disclose to and provide for the disclosure of that information among such other employees of that physician, health care provider, or legal entity, but such disclosures among those employees shall only be authorized when reasonably necessary in the ordinary course of business to carry out the purposes for which that disclosure is authorized or required to be made to that physician, health care provider, or legal entity.

(n) Any disclosure of AIDS confidential information authorized or required by this Code section or any other law and any unauthorized disclosure of such information shall in no way destroy the confidential nature of that information except for the purpose for which the authorized or required disclosure is made.

(o) Any person or legal entity which violates subsection (b) of this Code section shall be guilty of a misdemeanor.

(p) Nothing in this Code section or any other law shall be construed to authorize the disclosure of AIDS confidential information if that disclosure is prohibited by federal law, or regulations promulgated thereunder, nor shall anything in this Code section or any other law be construed to prohibit the disclosure of information which would be

AIDS confidential information except that such information does not permit the identification of any person.

(q) A public safety agency or prosecuting attorney may obtain the results from an HIV test to which the person named in the request has submitted under Code Section 15-11-603, 17-10-15, 42-5-52.1, or 42-9-42.1, notwithstanding that the results may be contained in a sealed record.

(r) Any person or legal entity required by an order of a court to disclose AIDS confidential information in the custody or control of such person or legal entity shall disclose that information as required by that order.

(s) AIDS confidential information shall be disclosed as medical information pursuant to Code Section 24-12-1 or pursuant to any other law which authorizes or requires the disclosure of medical information if:

(1) The person identified by that information:

(A) Has consented in writing to that disclosure;

(B) Has been notified of the request for disclosure of that information at least ten days prior to the time the disclosure is to be made and does not object to such disclosure prior to the time specified for that disclosure in that notice; or

(C) Is suspected of being mentally ill and is the subject of an order issued pursuant to Code Section 37-3-41 when the court issuing such order finds in an in camera hearing by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this subparagraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal; or

(2) A superior court in an in camera hearing finds by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the

public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this paragraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal.

(t)(1) A superior court of this state may order a person or legal entity to disclose AIDS confidential information in its custody or control to:

(A) A prosecutor in connection with a prosecution for the alleged commission of reckless conduct under subsection (c) of Code Section 16-5-60;

(B) Any party in a civil proceeding; or

(C) A public safety agency or the Department of Public Health if that agency or department has an employee thereof who has, in the course of that employment, come in contact with the body fluids of the person identified by the AIDS confidential information sought in such a manner reasonably likely to cause that employee to become an HIV infected person and provided the disclosure is necessary for the health and safety of that employee,

and, for purposes of this subsection, the term "petitioner for disclosure" means any person or legal entity specified in subparagraph (A), (B), or (C) of this paragraph.

(2) An order may be issued against a person or legal entity responsible for recording, reporting, or maintaining AIDS confidential information to compel the disclosure of that information if the petitioner for disclosure demonstrates by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests.

(3) A petition seeking disclosure of AIDS confidential information under this subsection shall substitute a pseudonym for the true name of the person concerning whom the information is sought. The disclosure to the parties of that person's true name shall be communicated confidentially, in documents not filed with the court.

(4) Before granting any order under this subsection, the court shall provide the person concerning whom the information is sought with notice and a reasonable opportunity to participate in the proceedings if that person is not already a party.

(5) Court proceedings as to disclosure of AIDS confidential information under this subsection shall be conducted in camera unless the person concerning whom the information is sought agrees to a hearing in open court.

(6) Upon the issuance of an order that a person or legal entity be required to disclose AIDS confidential information regarding a person named in that order, that person or entity so ordered shall disclose to the ordering court any such information which is in the control or custody of that person or entity and which relates to the person named in the order for the court to make an in camera inspection thereof. If the court determines from that inspection that the person named in the order is an HIV infected person, the court shall disclose to the petitioner for disclosure that determination and shall impose appropriate safeguards against unauthorized disclosure which shall specify the persons who may have access to the information, the purposes for which the information shall be used, and appropriate prohibitions on future disclosure.

(7) The record of the proceedings under this subsection shall be sealed by the court.

(8) An order may not be issued under this subsection against the Department of Public Health, any county board of health, or any anonymous HIV test site operated by or on behalf of that department.

(u) A health care provider, health care facility, or other person or legal entity who, in violation of this Code section, unintentionally discloses AIDS confidential information, notwithstanding the maintenance of procedures thereby which are reasonably adopted to avoid risk of such disclosure, shall not be civilly or criminally liable, unless such disclosure was due to gross negligence or wanton and willful misconduct.

(v) AIDS confidential information may be disclosed when that disclosure is otherwise authorized or required by Code Section 42-1-6, if AIDS or HIV infection is the communicable disease at issue, or when that disclosure is otherwise authorized or required by any law which specifically refers to "AIDS confidential information," "HIV test results," or any similar language indicating a legislative intent to disclose information specifically relating to AIDS or HIV.

(w) A health care provider who has received AIDS confidential information regarding a patient from the patient's health care provider directly or indirectly under the provisions of subsection (i) of this Code section may disclose that information to a health care provider which has provided, is providing, or will provide any health care service to that patient and as a result of that provision of service that health care provider:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(x) Neither the Department of Public Health nor any county board of health shall disclose AIDS confidential information contained in its records unless such disclosure is authorized or required by this Code section or any other law, except that such information in those records shall not be a public record and shall not be subject to disclosure through subpoena, court order, or other judicial process.

(y) The protection against disclosure provided by Code Section 24-12-20 shall be waived and AIDS confidential information may be disclosed to the extent that the person identified by such information, his or her heirs, successors, assigns, or a beneficiary of such person, including, but not limited to, an executor, administrator, or personal representative of such person's estate:

(1) Files a claim or claims other entitlements under any insurance policy or benefit plan or is involved in any civil proceeding regarding such claim;

(2) Places such person's care and treatment, the nature and extent of his or her injuries, the extent of his or her damages, his or her medical condition, or the reasons for his or her death at issue in any judicial proceeding; or

(3) Is involved in a dispute regarding coverage under any insurance policy or benefit plan.

(z) AIDS confidential information may be collected, used, and disclosed by an insurer in accordance with the provisions of Chapter 39 of Title 33.

(aa) In connection with any judicial proceeding in which AIDS confidential information is disclosed as authorized or required by this Code section, the party to whom that information is thereby disclosed may subpoena any person to authenticate such AIDS confidential information, establish a chain of custody relating thereto, or otherwise testify regarding that information, including, but not limited to, testifying regarding any notifications to the patient regarding results of an HIV test. The provisions of this subsection shall apply to records, personnel, or both of the Department of Public Health or a county board of health notwithstanding Code Section 50-18-72, but only as to test results obtained by a prosecutor under subsection (q) of this Code section and to be used thereby in a prosecution for reckless conduct under subsection (c) of Code Section 16-5-60.

(bb) AIDS confidential information may be disclosed as a part of any proceeding or procedure authorized or required pursuant to Chapter 3, 4, or 7 of Title 37, regarding a person who is alleged to be or who is mentally ill, developmentally disabled, or alcoholic or drug dependent, or as a part of any proceeding or procedure authorized or required pursuant to Title 29, regarding the guardianship of a person or that person's estate, as follows:

(1) Any person who files or transmits a petition or other document which discloses AIDS confidential information in connection with any such proceeding or procedure shall provide a cover page which contains only the type of proceeding or procedure, the court in which the proceeding or procedure is or will be pending, and the words "CONFIDENTIAL INFORMATION" without in any way otherwise disclosing thereon the name of any individual or that such petition or other document specifically contains AIDS confidential information;

(2) AIDS confidential information shall only be disclosed pursuant to this subsection after disclosure to and with the written consent of the person identified by that information, or that person's parent or guardian if that person is a minor or has previously been adjudicated as being incompetent, or by order of court obtained in accordance with subparagraph (C) of paragraph (3) of this subsection;

(3) If any person files or transmits a petition or other document in connection with any such proceeding or procedure which discloses AIDS confidential information without obtaining consent as provided in paragraph (2) of this subsection, the court receiving such information shall either obtain written consent as set forth in that paragraph (2) for any further use or disclosure of such information or:

(A) Return such petition or other document to the person who filed or transmitted same, with directions against further filing or transmittal of such information in connection with such proceeding or procedure except in compliance with this subsection;

(B) Delete or expunge all references to such AIDS confidential information from the particular petition or other document; or

(C)(i) If the court determines there is a compelling need for such information in connection with the particular proceeding or procedure, petition a superior court of competent jurisdiction for permission to obtain or disclose that information. If the person identified by the information is not yet represented by an attorney in the proceeding or procedure in connection with which the information is sought, the petitioning court shall appoint an attorney for such person. The petitioning court shall have both that person and that person's attorney personally served with notice of the petition and time and place of the superior court

hearing thereon. Such hearing shall not be held sooner than 72 hours after service, unless the information is to be used in connection with an emergency guardianship proceeding under Code Section 29-4-14, in which event the hearing shall not be held sooner than 48 hours after service.

(ii) The superior court in which a petition is filed pursuant to division (i) of this subparagraph shall hold an in camera hearing on such petition. The purpose of the hearing shall be to determine whether there is clear and convincing evidence of a compelling need for the AIDS confidential information sought in connection with the particular proceeding or procedure which cannot be accommodated by other means. In assessing compelling need, the superior court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this subparagraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal; and

(4) The court having jurisdiction over such proceeding or procedure, when it becomes apparent that AIDS confidential information will likely be or has been disclosed in connection with such proceeding or procedure, shall take such measures as the court determines appropriate to preserve the confidentiality of the disclosed information to the maximum extent possible. Such measures shall include, without being limited to, closing the proceeding or procedure to the public and sealing all or any part of the records of the proceeding or procedure containing AIDS confidential information. The records of any appeals taken from any such proceeding or procedure shall also be sealed. Furthermore, the court may consult with and obtain the advice of medical experts or other counsel or advisers as to the relevance and materiality of such information in such proceedings or procedures, provided that the identity of the person identified by such information is not thereby revealed.

History.

Code 1981, § 24-12-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942; Ga. L. 2013, p. 294, § 4-42/HB 242; Ga. L. 2014, p. 814, § 1/SB 342; Ga. L. 2015, p. 598, § 1A-1/HB 72; Ga. L. 2016, p. 735, § 5/HB 1058.

Cross references.

Child committing delinquent act constituting AIDS transmission crime including testing and reporting, § 15-11-603.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2013, "Department of Public Health" was substituted for "Department of Community Health" in several instances throughout subsection (h), in subparagraph

(t)(1)(C), paragraph (t)(8), subsection (x), and in the last sentence of subsection (aa).

Editor's notes.

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Administrative rules and regulations.

Acquired Immune Deficiency Syndrome, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Public Health, Chapter 290-5-48.Confidentiality, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Public Health, Disease Surveillance and Control, Acquired Immunodeficiency Syndrome AIDS, Rule 511-2-5-.09.

Law reviews.

For comment, "Confidentiality and Dissemination of Personal Information: An Examination of State Laws Governing Data Protection," see 41 Emory L.J. 1185 (1992).

For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 63 (2015).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-47 are included in the annotations for this Code section.

Statute not intended as shield in prosecution for criminal conduct. — Former O.C.G.A. § 24-9-47 was never intended to be a shield in a prosecution for criminal conduct involving the AIDS disease. Scroggins v. State, 198 Ga. App. 29, 401 S.E.2d 13, 1990 Ga. App. LEXIS 1555 (1990) (decided under former O.C.G.A. § 24-9-47).

Subparagraph (t)(1)(A) of former O.C.G.A. § 24-9-47 proved an overriding policy to facilitate prosecution of HIV-infected persons for criminal conduct with potential for endangering any member of society. The legislature's failure in this directive to include prosecutions for a crime of wilful conduct by a person with the AIDS disease or HIV virus was an oversight. Scroggins v. State, 198 Ga. App. 29, 401 S.E.2d 13, 1990 Ga. App. LEXIS 1555 (1990) (decided under former O.C.G.A. § 24-9-47).

Defendant, who was charged with aggravated assault with intent to murder after biting a police officer, placed "at issue" the issue of AIDS by defendant's conduct in committing an act which was inextricably linked to the question of defendant having AIDS. Scroggins v. State, 198 Ga. App. 29, 401 S.E.2d 13, 1990 Ga. App. LEXIS 1555 (1990) (decided under former O.C.G.A. § 24-9-47).

Right of patient to keep HIV-infected status confidential. — Trial court properly granted summary judgment to doctor who disclosed to HIV-infected dental hygienist's employer, a dentist who occasionally provided the dental hygienist with free dental care, that the dental hygienist had tested positive for HIV as not only did the dental hygienist sign a consent form allowing disclosure, but the right of the dental hygienist to keep that status confidential was outweighed by the right of the doctor to disclose that status pursuant to former O.C.G.A. § 24-9-47 to specified people in that statute so that those people could take appropriate precautions. Waddell v. Bhat, 257 Ga. App. 580, 571 S.E.2d 565, 2002 Ga. App. LEXIS 1229 (2002) (decided under former O.C.G.A. § 24-9-47).

Failure to inform patient of HIV status. — Patient's claim against a doctor and hospital for failure to report the positive results of the patient's HIV test to the patient as required under O.C.G.A. § 31-

22-9.2 was a classic medical malpractice claim despite the patient's claim that it was ordinary negligence; because the claim was brought eight years after the test, the claim was barred by the five-year statute of repose, O.C.G.A. § 9-3-71(b). Piedmont Hospital, Inc. v. D. M., 335 Ga. App. 442, 779 S.E.2d 36, 2015 Ga. App. LEXIS 775 (2015), cert. denied, No. S16C0676, 2016 Ga. LEXIS 328 (Ga. Apr. 26, 2016).

Use of pseudonym in trial court's discretion. — When a patient filed suit solely alleging that the improper disclosure of HIV confidential information under former O.C.G.A. § 24-9-40.1 (see now O.C.G.A. § 24-12-20) and the non-disclosure exception of former O.C.G.A. § 24-9-47(y) did not apply, a trial court retained discretion to determine if the patient could prosecute a case under a pseudonym. Doe v. Hall, 260 Ga. App. 421, 579 S.E.2d 838, 2003 Ga. App. LEXIS 393 (2003) (decided under former O.C.G.A. § 24-9-47).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting not required. — Offenses arising from a violation of O.C.G.A. § 24-12-21 do not, at this time, appear to be offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.

RESEARCH REFERENCES

ALR.

Rescission or cancellation of insurance policy for insured's misrepresentation or concealment of information concerning human immunodeficiency virus (HIV), acquired immunodeficiency syndrome (AIDS), or related health problems, 15 A.L.R.5th 92.

ARTICLE 4

OTHER CONFIDENTIAL INFORMATION

Law reviews.

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-12-30. Confidential nature of certain library records.

(a) Circulation and similar records of a library which identify the user of library materials shall not be public records but shall be confidential and shall not be disclosed except:

(1) To members of the library staff in the ordinary course of business;

(2) Upon written consent of the user of the library materials or the user's parents or guardian if the user is a minor or ward; or

(3) Upon appropriate court order or subpoena.

(b) Any disclosure authorized by subsection (a) of this Code section or any unauthorized disclosure of materials made confidential by subsection (a) of this Code section shall not in any way destroy the confidential nature of that material, except for the purpose for which an authorized disclosure is made. A person disclosing material as authorized by subsection (a) of this Code section shall not be liable therefor.

History.
Code 1981, § 24-12-30, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-12-31. Confidential nature of veterinarian records; disclosure of rabies vaccination record.

(a) No veterinarian licensed under Chapter 50 of Title 43 shall be required to disclose any information concerning the veterinarian's care of an animal except on written authorization or other waiver by the veterinarian's client or on appropriate court order or subpoena. Any veterinarian releasing information under written authorization or other waiver by the client or under court order or subpoena shall not be liable to the client or any other person. The confidentiality provided by this Code section shall be waived to the extent that the veterinarian's client places the veterinarian's care and treatment of the animal or the nature and extent of injuries to the animal at issue in any judicial proceeding. As used in this Code section, the term "client" means the owner of the animal or, if the owner of the animal is unknown, the person who presents the animal to the veterinarian for care and treatment.

(b) Notwithstanding the provisions of subsection (a) of this Code section, a veterinarian shall disclose the rabies vaccination history of any animal within such veterinarian's care within 24 hours of receipt of a written request by the physician of any person bitten by such animal.

History.
Code 1981, § 24-12-31, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2018, p. 770, §§ 2, 4/HB 956.

CHAPTER 13

SECURING ATTENDANCE OF WITNESSES AND PRODUCTION AND PRESERVATION OF EVIDENCE

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Cross references.

Depositions and discovery, § 9-11-26 et seq.

Power of court to compel attendance of witnesses, § 17-7-25.

Law reviews.

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

RESEARCH REFERENCES

ALR.

Compelling testimony of opponent's expert in state court, 66 A.L.R.4th 213.

ARTICLE 1

GENERAL PROVISIONS

Law reviews.

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-13-1. Freedom of witnesses from arrest.

A witness shall not be arrested on any civil process while attending any court to which he or she is subpoenaed or otherwise required to attend as a witness or while going to or returning from such court. An officer who holds such witness imprisoned after seeing his or her subpoena or being satisfied of the fact that such person was a witness shall be liable for false imprisonment.

History.

Code 1981, § 24-13-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For comment on White v. Henry, 232 Ga. 64, 205 S.E.2d 206 (1974), see 26 Mercer L. Rev. 317 (1974).

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, § 3850, former Civil Code 1910, § 5854, former Code 1933, § 38-1506, and former O.C.G.A. § 24-10-1 are included in the annotations for this Code section.

In general. — Nonresident witness or suitor in attendance upon the trial of any case in court was exempt from service of any writ or summons while so attending and in going to or returning from the court. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123, 1935 Ga. App. LEXIS 407 (1935) (decided under former Code 1933, § 38-1506); Ausbon v. Ausbon, 131 Ga. App. 530, 206 S.E.2d 546, 1974 Ga. App. LEXIS 1457 (1974) (decided under former Code 1933, § 38-1506).

Service is voidable. — Service of process in violation of the former statute was not void, but voidable upon proper action in proper time by the person served. Thornton v. American Writing Mach. Co., 83 Ga. 288, 9 S.E. 679, 1889 Ga. LEXIS 49 (1889) (decided under former Code 1882, § 3850).

Officer's satisfaction. — It was not essential that a witness show any subpoena to the sheriff, all that was required was that the officer be "satisfied of the fact." Turner v. McGee, 217 Ga. 769, 125 S.E.2d 36, 1962 Ga. LEXIS 390 (1962) (decided under former Code 1933, § 38-1506).

Nonjudicial proceedings. — Privilege of exemption from service was not only assured while a nonresident was attending upon strictly judicial proceedings, but upon any tribunal whose business had reference to or was intended to affect judicial proceedings. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123, 1935 Ga. App. LEXIS 407 (1935) (decided under former Code 1933, § 38-1506).

Inapplicable to criminal defendant. — Privilege was limited to witnesses and did not apply to a defendant in a criminal case. Rogers v. Rogers, 138 Ga. 803, 76 S.E. 48, 1912 Ga. LEXIS 718 (1912) (decided under former Civil Code 1910, § 5854); Warren v. Hiers, 105 Ga. App. 202, 124 S.E.2d 445, 1962 Ga. App. LEXIS 880 (1962) (decided under former Code 1933, § 38-1506).

Applicable to criminal defendant. — Immunity from civil process extended to a nonresident defendant who voluntarily appeared in answer to a criminal charge or who appeared in compliance with a bail bond, because the defendant's appearance saved the state the expense, delay, and uncertainty of extradition and promoted the orderly, expeditious, and unobstructed administration of justice. White v. Henry, 232 Ga. 64, 205 S.E.2d 206, 1974 Ga. LEXIS 863 (1974) (decided under former Code 1933, § 38-1506).

Parties. — Suitors were exempted from arrest while going to, attending on, or

returning from court and the fact that one of the suitors resided out of the state and has previously had the suitors adversary arrested under bail process did not justify a departure from the practice. Lomax v. Lomax, 176 Ga. 605, 168 S.E. 863, 1933 Ga. LEXIS 231 (1933) (decided under former Civil Code 1910, § 5854).

Deposition. — If a person was present in a county other than that of the person's residence for the sole purpose of attending the taking of depositions therein in a case to which the person was a party, and advantage was taken of the person's presence to serve process on the person in another action, to compel the person to defend it in a jurisdiction other than that of the person's residence, the service of such process should have been quashed. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123, 1935 Ga. App. LEXIS 407 (1935) (decided under Code 1933, § 38-1506).

Service of habitual-violator notice. — Former O.C.G.A. § 24-10-1 did not immunize defendant from service of notice that the defendant was a habitual violator under O.C.G.A. § 40-5-58 while defendant was being tried on an unrelated offense, since former § 24-10-1 pertained to civil process, and service of notice of revocation under § 40-5-58 was not service of a civil process. Hill v. State, 162 Ga. App. 637, 292 S.E.2d 512, 1982 Ga. App. LEXIS 3155 (1982) (decided under former O.C.G.A. § 24-10-1).

RESEARCH REFERENCES

ALR.

Waiver of privilege against or nonliability to arrest in civil action, 8 A.L.R. 754.

Duration of imprisonment for refusal to answer question as a witness before the grand jury, 28 A.L.R. 1364.

Privilege of party, witness, or attorney while going to, attending, or returning from court as extending to privilege from arrest for crime, 74 A.L.R.2d 592.

Immunity from service of process as affected by relationship between subject matters of litigation in which process was issued, and litigation which nonresident served was attending, 84 A.L.R.2d 421.

24-13-2. Procedure for claiming witness fees.

A witness in making a claim or proof of a claim for witness fees for attendance shall indicate the date on which he or she attended and, in the event of a continuance, shall not claim or receive witness fees for any day after the date to which the docket shows the proceeding was continued nor for any day before the continuance was granted on which he or she did not attend.

History.

Code 1981, § 24-13-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-13-3. Witness fee exceptions.

(a) A witness shall not receive any witness fees for attendance on a subpoena if such witness is absent from the proceeding, or if the proceeding is continued at any time due to his or her absence, where such absence did not arise from providential cause.

(b) No witness shall receive witness fees from both parties in the same proceeding; the fees of a witness for both parties shall be

apportioned equally between the parties unless the costs are all taxed against one party.

History.
Code 1981, § 24-13-3, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-13-4. Penalty for excessive witness fee claim.

A witness who claims more than is due to such witness shall forfeit all witness fees and shall pay to the injured party, in addition thereto, four times the amount so unjustly claimed.

History.
Code 1981, § 24-13-4, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-4 are included in the annotations for this Code section.

Attendance pursuant to subpoena. — Expert, who was asked to conduct a preliminary review of evidence in order to better give an opinion as an expert, was entitled to demand extra compensation for attendance in court pursuant to a subpoena. Kent v. Brown, 238 Ga. App. 607, 518 S.E.2d 737 (decided under former O.C.G.A. § 24-10-4).

24-13-5. Production of evidence when item not available; oath.

When any person is served with a subpoena for the production of evidence or a notice to produce, seeking books in his or her possession to be used as testimony on the trial of any cause, if the person makes oath that he or she cannot produce the books required without suffering a material injury in his or her business and also makes or causes to be made out a full transcript from the books of all the accounts and dealings with the opposite party, has the transcript examined and sworn to by an impartial witness, and produces the same in court, the witness shall be deemed to have complied with the notice to produce or subpoena for the production of evidence.

History.
Code 1981, § 24-13-5, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Discovery of documents generally, § 9-11-34.

RESEARCH REFERENCES

C.J.S.
32A C.J.S., Evidence, § 1020.

24-13-6. Procedure when adverse party dissatisfied with response pursuant to Code Section 24-13-5.

When the transcript provided for in Code Section 24-13-5 is produced in court, if the adverse party is dissatisfied therewith and swears that he or she believes that the books contain entries material to the adverse party which do not appear in the transcript, the court shall grant him or her a commission directed to certain persons named by the parties and approved by the court. The commission shall cause the person with possession of the books to produce the books required with the person swearing that the books produced are all that he or she has or had that answer to the description in the subpoena or notice to produce. The commission shall examine the books and transmit to the court a full and fair statement of the accounts and entries between the parties under their hand. When received by the court, the statement of the commission shall be deemed a compliance with the notice to produce or subpoena for the production of evidence.

History.
Code 1981, § 24-13-6, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, § 3518, former Civil Code 1895, § 5259, former Civil Code 1910, § 5848, former Code 1933, § 38-1002, and former O.C.G.A. § 24-10-6 are included in the annotations for this Code section.

Notice to insurance company. — When notice was served on defendant insurance company to produce all the records of the company's dealings in Georgia, and the defendant furnished a transcript of the defendant's dealings with the plaintiff, this was sufficient. If the plaintiff was dissatisfied, plaintiff had a remedy under the former statute. Grant v. Alabama Gold Life Ins. Co., 76 Ga. 575, 1886 Ga. LEXIS 62 (1886) (decided under former Code 1882, § 3518).

Merchant's books. — Transcript from merchant's books, made out and produced under notice, and inspected by the party giving the notice, should be allowed to go to the jury as evidence in the case. Fielder & Bros. & Co. v. Collier, 13 Ga. 496, 1853 Ga. LEXIS 118 (1853) (decided under former law).

24-13-7. Withdrawal of originals introduced in evidence; substitution of copies; discretion of court.

Parties interested and participating in the trial of all cases tried in the courts are authorized and empowered, on the order of the court trying the case, to withdraw from the court and record of the case all original deeds, maps, blueprints, notes, papers, and documents belonging to the parties and which are introduced in evidence on the trial, on substituting therefor, when required by the court, duplicates thereof, verified as such by the parties or their agents, representatives, or attorneys. However, if any such deeds, maps, blueprints, notes, papers, or documents shall be attacked by any party to the case as forgeries, or

as not being genuine originals, it shall be in the discretion of the court to require the original deeds, maps, blueprints, notes, papers, or documents so attacked to remain on file in the court as a part of the record in the case.

History.
Code 1981, § 24-13-7, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

RESEARCH REFERENCES

ALR.
Necessity, in order to enter judgment by confession on instrument containing warrant of attorney, that original note or other instrument and original warrant be produced or filed, 68 A.L.R.2d 1156.

ARTICLE 2

SUBPOENAS AND NOTICE TO PRODUCE

Cross references.
Issuance of subpoena for taking of depositions, § 9-11-45.
Further provisions regarding discovery and securing of attendance of witnesses at criminal proceedings, § 17-7-190 et seq.

Law reviews.
For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

RESEARCH REFERENCES

ALR.
Right of independent expert to refuse to testify as to expert opinion, 50 A.L.R.4th 680.

24-13-20. Applicability.

This article shall apply to all civil proceedings and, insofar as consistent with the Constitution, to all criminal proceedings.

History.
Code 1981, § 24-13-20, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.
For article discussing available means of discovery for criminal cases in Georgia, see 12 Ga. St. B.J. 134 (1976).
For note, "Criminal Discovery: The Use of Notices to Produce," see 30 Mercer L. Rev. 331 (1978).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1966, p. 502, § 2 and former O.C.G.A. § 24-10-29 are included in the annotations for this Code section.

Limitation on use by state. — Words "insofar as consistent with the Constitution" constituted a limitation on the state's use of subpoenas and notices to produce more than a limitation on its use by an accused. Brown v. State, 238 Ga. 98, 231 S.E.2d 65, 1976 Ga. LEXIS 1114 (1976) (decided under former Ga. L. 1966, p. 502, § 2); Johnson v. State, 156 Ga.

App. 496, 274 S.E.2d 837, 1980 Ga. App. LEXIS 3091 (1980) (decided under former Ga. L. 1966, p. 502, § 2).

Unconstitutional self-incrimination. — State may not have used a notice to produce to reseize property and redivest the defendant of custody and possession by retaining the property and using the property as evidence in a criminal proceeding; unconstitutional self-incrimination would have been the result of compliance with the state's notice. Johnson v. State, 156 Ga. App. 496, 274 S.E.2d 837, 1980 Ga. App. LEXIS 3091 (1980) (decided under former Ga. L. 1966, p. 502, § 2).

Notice to produce. — Pursuant to Ga. L. 1966, p. 502, § 2 and former Code 1933, §§ 38-801—38-807 (see now O.C.G.A. § 24-13-27), providing for notices to produce writing and tangible objects in lieu of subpoena, was applicable to criminal cases. Goldsmith v. State, 148 Ga. App. 786, 252 S.E.2d 657, 1979 Ga. App. LEXIS 1658 (1979) (decided under former Ga. L. 1966, p. 502, § 2); Wilson v. State, 246 Ga. 62, 268 S.E.2d 895, 1980 Ga. LEXIS 1021 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981).

Discovery as such not available to accused in criminal cases in Georgia, but a motion to produce books, writings, or other documents or tangible things pursuant to former Code 1933, §§ 38-801 and 38-802 (see now O.C.G.A. § 24-13-26) was applicable to criminal cases. Pryor v. State, 238 Ga. 698, 234 S.E.2d 918, 1977 Ga. LEXIS 1172 (1977), cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977), overruled, overruled in part as stated in , Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530, 2006 Ga. LEXIS 840 (2006), overruled in part as stated in Scott v. State, 356 Ga. App. 152, 846 S.E.2d 241, 2020 Ga. App. LEXIS 416 (2020) (decided under former Ga. L. 1966, p. 502, § 2).

Exculpatory matter. — Defendant was entitled to discovery of all exculpatory matter and anything in the district attorney's file which was favorable to defendant's defense. Maddox v. State, 136 Ga. App. 370, 221 S.E.2d 231, 1975 Ga. App. LEXIS 1354 (1975) (decided under former Ga. L. 1966, p. 502, § 2).

Material creating reasonable doubt. — Prosecutor was under a duty to furnish the defendant, without request, material which created a reasonable doubt as to the defendant's guilt. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895, 1980 Ga. LEXIS 1021 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Ga. L. 1966, p. 502, § 2).

Confidential informant. — It was within the sound discretion of a trial court whether to require the state to disclose to the defendant the name and address of a confidential informant. Clayton v. State, 145 Ga. App. 541, 244 S.E.2d 67, 1978 Ga. App. LEXIS 2028 (1978) (decided under former Ga. L. 1966, p. 502, § 2).

Reports and summaries made by police investigators were not the types of books, writings, or other documents or tangible things subject to a notice to produce. Bennett v. State, 158 Ga. App. 421, 280 S.E.2d 429, 1981 Ga. App. LEXIS 2238 (1981) (decided under former Ga. L. 1966, p. 502, § 2).

Improper use of notice to produce. — Defendant having "moved to suppress" the evidence by virtue of contesting the libel for condemnation of former Code 1933, § 79A-828 (see now O.C.G.A. § 16-13-49) and the state having failed to meet the state's burden in that regard, the state may not have used the notice to produce to "reseize" the property for evidentiary purposes. Johnson v. State, 156 Ga. App. 496, 274 S.E.2d 837, 1980 Ga. App. LEXIS 3091 (1980) (decided under former Ga. L. 1966, p. 502, § 2).

Corporate document not protected by self-incrimination privilege. — Defendant in a criminal case, an attorney who was the sole shareholder of a professional corporation, was properly held in civil contempt for not producing a noncompetition agreement between the corporation and a former employee. The agreement was a corporate document, and the defendant had been subpoenaed to produce the document as a corporate agent; thus, the defendant could not assert the defendant's personal right against self-incrimination and the small size of the corporation was immaterial. Thompson v. State, 294 Ga. App. 363, 670 S.E.2d 152, 2008 Ga. App. LEXIS 1193 (2008) (decided under former O.C.G.A. § 24-10-29).

RESEARCH REFERENCES

C.J.S.
32A C.J.S., Evidence, § 1013.
ALR.
Subpoenaing unnecessary witnesses as contempt, 37 A.L.R. 1113.
Mandamus to compel court or judge to require witness to testify or produce documents, 41 A.L.R. 436.
Construction and application of provisions of Fair Labor Standards Act regarding investigatory subpoena duces tecum, 166 A.L.R. 553.

24-13-21. Issuance of subpoena; form; punishment for misuse.

(a) As used in this Code section, the term "subpoena" includes a witness subpoena and a subpoena for the production of evidence.

(b) A subpoena shall state the name of the court, the name of the clerk, and the title of the proceeding and shall command each person to whom it is directed to attend and give testimony or produce evidence at a time and place specified by the subpoena.

(c) The clerk of court shall make subpoenas in blank available on demand by electronic or other means to parties or their counsel or to the grand jury.

(d) An attorney who is counsel of record in a proceeding may issue and sign a subpoena obtained by electronic or other means from the clerk of court as an officer of a court for any deposition, hearing, or trial held in conjunction with such proceeding.

(e) A district attorney may issue, and upon the request of the grand jury shall issue, a subpoena in grand jury proceedings.

(f) A subpoena shall be completed prior to being served.

(g) Subpoenas are enforceable as provided in Code Section 24-13-26.

(h) If an individual misuses a subpoena, he or she shall be subject to punishment for contempt of court and shall be punished by a fine of not more than $300.00 or not more than 20 days' imprisonment, or both.

History.
Code 1981, § 24-13-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942.
Cross references.
Subpoena, Fed. R. Civ. P. 45.
Subpoena, Fed. R. Crim. P. 17.
Law reviews.
For article, "Best Practices for Issuing Subpoenas Depositions of Georgia Residents in Cases Pending Out of State," see 12 Ga. St. B.J. 12 (2007).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5260, former Civil Code 1910, § 5849, former Code 1933, § 38-1501, Ga. L. 1966, p. 502, § 1, Ga. L. 1980, p. 70, § 2, and former O.C.G.A. § 24-10-20 are included in the annotations for this Code section.

Use of word "shall" in the former statute indicated that the subpoena must

be issued by the clerk, signed by the clerk, and under the seal of the court; the word "shall" was in its ordinary signification a word of command. State v. Brantley, 147 Ga. App. 569, 249 S.E.2d 365, 1978 Ga. App. LEXIS 2780 (1978) (decided under former Code 1933, § 38-1501).

Signature by clerk. — Subpoena commanding the presence of a person in court as a witness is a judicial writ, and to be valid must, when there was a clerk, be signed and issued by that officer. Horton v. State, 112 Ga. 27, 37 S.E. 100, 1900 Ga. LEXIS 12 (1900) (decided under former Civil Code 1895, § 5260).

Signature by attorney. — Subpoena to which the attorney for a defendant has signed the name of the clerk, under a general direction from that officer to "prepare" the subpoenas in the case, was not valid. Horton v. State, 112 Ga. 27, 37 S.E. 100, 1900 Ga. LEXIS 12 (1900) (decided under former Civil Code 1895, § 5260).

Signing and sealing were ministerial acts. — Signing and sealing of a subpoena amount to nothing more than ministerial acts which add nothing of substance to the subpoena, the only purpose of which was to give notice to a witness to appear in court; a statute was regarded as directory when no substantial rights depend on it, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than that prescribed, with substantially the same results. State v. Brantley, 147 Ga. App. 569, 249 S.E.2d 365, 1978 Ga. App. LEXIS 2780 (1978) (decided under former Code 1933, § 38-1501).

Obligation to produce evidence. — Although the trial court granted the appellants' motion to quash the landlords' subpoenas requiring several third-party financial institutions to produce evidence for failing to comply with the requirements of O.C.G.A. § 24-13-21, the trial court did not err in compelling the appellants, not the nonparty financial institutions, to produce the financial records under O.C.G.A. § 9-11-34. Global Education-SAT Acad. v. DF Duluth, 366 Ga. App. 775, 884 S.E.2d 37, 2023 Ga. App. LEXIS 49 (2023).

Defendant's responsibility to ensure presence of witnesses. — When defendant elected to represent oneself it was the defendant's responsibility, not the trial court's, to ensure the presence of witnesses by the issuance of subpoenas. Kegler v. State, 267 Ga. 147, 475 S.E.2d 593 (decided under former O.C.G.A. § 24-10-20).

As the defendant, who was proceeding pro se during a criminal trial, failed to request issuance of subpoenas pursuant to former O.C.G.A. §§ 24-10-20(b) and 24-10-21, there was no violation of the right to compulsory process. Sheppard v. State, 297 Ga. App. 806, 678 S.E.2d 509, 2009 Ga. App. LEXIS 552 (2009), cert. denied, No. S09C1575, 2009 Ga. LEXIS 795 (Ga. Sept. 28, 2009) (decided under former O.C.G.A. § 24-10-20).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 24-10-20 and some provisions of former O.C.G.A. § 24-10-21 are included in the annotations for this Code section.

Issuing blank subpoena to requesting party proper. — Under former O.C.G.A. § 24-10-20, the clerk of the superior court may properly issue to a requesting party in a pending case a subpoena which was blank except as to the signature of the clerk and the seal of court. 1981 Op. Att'y Gen. No. U81-37 (decided under former O.C.G.A. § 24-10-21).

Clerks of county recorder's courts may issue in blank subpoenas to police officers to be completed by the officers and served upon witnesses in pending cases. 1983 Op. Att'y Gen. No. U83-41 (decided under former O.C.G.A. § 24-10-21).

Information required by former subsection (a) could be filled in by requesting party. — Since subsection (b) of former O.C.G.A. § 24-10-20 authorized the clerk to issue a subpoena signed and sealed "but otherwise in blank," the information contained in subsection (a) of former § 24-10-20 could be filled in before service by the party requesting the sub-

poena, thus providing a witness with a subpoena complete with all information required by former § 24-10-20. 1981 Op. Att'y Gen. No. U81-37 (decided under former O.C.G.A. § 24-10-20).

If a police officer had just issued a traffic citation, there would be a pending case for purposes of subpoena issuance. 1983 Op. Att'y Gen. No. U83-41 (decided under former O.C.G.A. § 24-10-21).

RESEARCH REFERENCES

Am. Jur. 2d.
81 Am. Jur. 2d, Witnesses, §§ 6, 7.
C.J.S.
98 C.J.S. (Rev), Witnesses, §§ 6, 26 et seq.
ALR.
Subpoenaing unnecessary witnesses as contempt, 37 A.L.R. 1113.
Power of court to control evidence or witnesses going before grand jury, 52 A.L.R.3d 1316.

24-13-22. Issuance of subpoena requiring attendance; service.

At the request of any party, subpoenas for attendance at a hearing or trial shall be issued under the authority of the clerk of the court in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within this state.

History.
Code 1981, § 24-13-22, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5260, former Code 1933, § 38-1501, Ga. L. 1966, p. 502, § 1, and former O.C.G.A. §§ 24-10-20 and 24-10-21 are included in the annotations for this Code section.

Constitutionality. — Former statute was not unconstitutional as applied to a habeas corpus proceeding. Hooten v. State, 245 Ga. 250, 264 S.E.2d 192, 1980 Ga. LEXIS 759, cert. denied, 446 U.S. 942, 100 S. Ct. 2168, 64 L. Ed. 2d 797, 1980 U.S. LEXIS 1641 (1980) (decided under Ga. L. 1966, p. 502, § 1).

Use of word "shall" in the former statute indicated that the subpoena must be issued by the clerk, signed by the clerk, and under the seal of the court; the word "shall" was in its ordinary signification a word of command. State v. Brantley, 147 Ga. App. 569, 249 S.E.2d 365, 1978 Ga. App. LEXIS 2780 (1978) (decided under former Code 1933, § 38-1501).

Signature by clerk. — Subpoena commanding the presence of a person in court as a witness is a judicial writ, and to be valid must, when there was a clerk, be signed and issued by that officer. Horton v. State, 112 Ga. 27, 37 S.E. 100, 1900 Ga. LEXIS 12 (1900) (decided under former Civil Code 1895, § 5260).

Signature by attorney. — Subpoena to which the attorney for a defendant has signed the name of the clerk, under a general direction from that officer to "prepare" the subpoenas in the case, was not valid. Horton v. State, 112 Ga. 27, 37 S.E. 100, 1900 Ga. LEXIS 12 (1900) (decided under former Civil Code 1895, § 5260).

Defendant's responsibility to ensure presence of witnesses. — When defendant elected to represent oneself it was the defendant's responsibility, not the

trial court's, to ensure the presence of witnesses by the issuance of subpoenas. Kegler v. State, 267 Ga. 147, 475 S.E.2d 593 (decided under former O.C.G.A. § 24-10-20).

As the defendant, who was proceeding pro se during a criminal trial, failed to request issuance of subpoenas pursuant to former O.C.G.A. §§ 24-10-20(b) and 24-10-21 (see now O.C.G.A. §§ 24-13-21 and 24-13-22), there was no violation of the right to compulsory process. Sheppard v. State, 297 Ga. App. 806, 678 S.E.2d 509, 2009 Ga. App. LEXIS 552 (2009), cert. denied, No. S09C1575, 2009 Ga. LEXIS 795 (Ga. Sept. 28, 2009) (decided under former O.C.G.A. §§ 24-10-20 and 24-10-21).

Expenses. — Former statute did not contemplate that the public should bear the expense of bringing witnesses into court because the residents of other counties could be examined by depositions (oral examination or written interrogatories) if the defendant so desired. Neal v. Smith, 226 Ga. 96, 172 S.E.2d 684, 1970 Ga. LEXIS 445 (1970) (decided under former Ga. L. 1966, p. 502, § 1).

Habeas corpus proceeding. — Sixth Amendment guarantee to the accused of compulsory process to obtain the testimony of witnesses had no application in the context of habeas corpus proceedings, which were civil in nature. Pulliam v. Balkcom, 245 Ga. 99, 263 S.E.2d 123, 1980 Ga. LEXIS 702, cert. denied, 447 U.S. 927, 100 S. Ct. 3023, 65 L. Ed. 2d 1121, 1980 U.S. LEXIS 2071 (1980) (decided under former Ga. L. 1966, p. 502, § 1).

Argument to jury. — When a witness was not amendable to subpoena, the witness's failure to testify in person was not a proper subject matter of argument by counsel. Floyd v. Colonial Stores, Inc., 121 Ga. App. 852, 176 S.E.2d 111, 1970 Ga. App. LEXIS 1378 (1970) (decided under former Ga. L. 1966, p. 502, § 1).

Charge to jury that any accused had a right to subpoena any witnesses to testify that the accused wishes, but that the accused had no burden to produce any witnesses, and that the jury should arrive at a decision from the evidence presented without speculating about other matters, was without error. Miller v. State, 155 Ga. App. 54, 270 S.E.2d 466, 1980 Ga. App. LEXIS 2454 (1980) (decided under former Ga. L. 1966, p. 502, § 1).

Trial court did not impermissibly shift the burden of proof when the court charged the jury that defendant had the right to subpoena witnesses. The jury charge was an accurate statement of the law and provided no ground for reversal. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348, 2009 Ga. App. LEXIS 566 (2009) (decided under former O.C.G.A. § 24-10-21).

Criminal defendant's right to compulsory process. — Trial court erred in making a determination that a prospective witness was incompetent to testify based on ex parte statements made by the administrator of the institution where the prospective witness was confined. When this error is not harmless beyond a reasonable doubt, if it is determined that one was competent, then defendant's right to compulsory process was abridged and a new trial must be ordered. Cofield v. State, 247 Ga. 98, 274 S.E.2d 530, 1981 Ga. LEXIS 633 (1981) (decided under former O.C.G.A. § 24-10-21).

Determination of whether witness is necessary and material. — Court of appeals erred in ruling that the trial court did not abuse the court's discretion in denying the defendant's motion under the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), to obtain evidence possessed by a witness in Kentucky because the proper statute was not applied since the court of appeals stated that the defendant was required to show that the out-of-state witness was necessary and material to the case; whether the witness was "necessary and material" was one of the determinations that must be made under the Act, former O.C.G.A. § 24-10-92(b) (see now O.C.G.A. § 24-13-92), by the judge in the county where the out-of-state witness was located, and the Georgia trial court evaluated the request under the Act, former O.C.G.A. § 24-10-94 (see now O.C.G.A. § 24-13-94), and must determine only whether the out-of-state witness was a

"material witness" in the Georgia criminal prosecution and whether the court should issue the certificate requesting the out-of-state court to order the out-of-state witness to attend the criminal proceeding in Georgia. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699, 2011 Ga. LEXIS 502 (2011) (decided under former O.C.G.A. § 24-10-21).

Attendance by agent of out-of-state corporation. — Court of appeals erred when the court concluded that a request under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. Yeary v. State, 289 Ga. 394, 711 S.E.2d 694, 2011 Ga. LEXIS 501 (2011) (decided under former O.C.G.A. § 24-10-21).

Prior deposition. — Trial court's sua sponte determination that the existence of a prior deposition rendered the presence of a material witness subpoenaed by the plaintiff superfluous and that, hence, that witness would be excused, but no continuance would be granted, denied the plaintiff the right to present plaintiff's case to the jury in the manner in which plaintiff chose. Ricketson v. Blair, 171 Ga. App. 714, 320 S.E.2d 788, 1984 Ga. App. LEXIS 2324 (1984) (decided under former O.C.G.A. § 24-10-21).

RESEARCH REFERENCES

Am. Jur. 2d.

81 Am. Jur. 2d, Witnesses, §§ 6, 7.

C.J.S.

98 C.J.S. (Rev), Witnesses, §§ 6, 26 et seq.

ALR.

Subpoenaing unnecessary witnesses as contempt, 37 A.L.R. 1113.

Power of court to control evidence or witnesses going before grand jury, 52 A.L.R.3d 1316.

24-13-23. Subpoena for production of documentary evidence; motion to quash or modify.

(a) A subpoena may also command the person to whom it is directed to produce the evidence designated therein.

(b) The court, upon written motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:

(1) Quash or modify the subpoena if it is unreasonable and oppressive; or

(2) Condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the evidence.

History.
Code 1981, § 24-13-23, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.
Discovery of documentary and tangible evidence generally, § 9-11-34.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, §§ 3514, 3515, former Civil Code 1895, §§ 5255, 5256, former Civil Code 1910, §§ 5844, 5845, former Code 1933, §§ 38-901, 38-902, and former O.C.G.A. § 24-10-22 are included in the annotations for this Code section.

Relevance. — While admissibility was a matter to be determined when records, documents, or other items were tendered in evidence and was not a test for determining whether an order requiring production should be entered, pertinence or relevance was. Horton v. Huiet, 113 Ga. App. 166, 147 S.E.2d 669, 1966 Ga. App. LEXIS 1003 (1966) (decided under former Code 1933, § 38-902).

Required prima facie showing of relevancy under the former statute entailed proof of: (1) the existence of a grand jury investigation; (2) a general characterization of the subject matter and purpose of the investigation; and (3) the fact that each general category of the subpoenaed documents bore some relevance to the investigation being pursued. Morris v. State, 246 Ga. 510, 272 S.E.2d 254, 1980 Ga. LEXIS 1177 (1980) (decided under former Code 1933, §§ 38-901, 38-902).

"Unreasonable and oppressive" standard was tested by the peculiar facts arising from the subpoena itself and other proper sources. Kamensky v. Southern Oxygen Supply Co., 127 Ga. App. 343, 193 S.E.2d 164, 1972 Ga. App. LEXIS 879 (1972) (decided under former Code 1933, §§ 38-901, 38-902); Aycock v. HFC, 142 Ga. App. 207, 235 S.E.2d 578, 1977 Ga. App. LEXIS 1546 (1977), cert. denied, 240 Ga. 570, 241 S.E.2d 835, 1978 Ga. LEXIS 712 (1978); Washburn v. Sardi's Restaurants, 191 Ga. App. 307, 381 S.E.2d 750, 1989 Ga. App. LEXIS 577 (1989).

Applicable only to court proceedings. — Former statute providing for quashing or modifying a subpoena upon stated grounds was applicable only to court proceedings and not to investigative procedures. Southeastern Adjusters, Inc. v. Caldwell, 229 Ga. 4, 189 S.E.2d 76, 1972 Ga. LEXIS 482 (1972) (decided under former O.C.G.A. § 24-10-22).

Parties. — Subpoena duces tecum never issued to any one who is a party to the cause. Ex parte Calhoun, 87 Ga. 359, 13 S.E. 694, 1891 Ga. LEXIS 168 (1891) (decided under former Code 1882, §§ 3514, 3515).

Grand jury. — In a proper case, a subpoena duces tecum may have issued in a cause pending before the grand jury to be brought before that body. In re Lester, 77 Ga. 143, 1886 Ga. LEXIS 318 (1886) (decided under former Code 1882, §§ 3514, 3515).

Modifying subpoena. — Regardless of proper standard or deference that should be applied to administrative agency's investigation or its investigative subpoenas, O.C.G.A. § 9-11-37 was not proper mechanism to modify investigative subpoena. Ga. Gov't Transparency & Campaign Fin. Comm'n v. New Ga. Project Action Fund, 366 Ga. App. 198, 880 S.E.2d 635, 2022 Ga. App. LEXIS 528 (2022).

Necessity for production. — Court, before requiring the peremptory order to produce the books or papers of the adverse party, should have satisfied itself of the necessity for such production. Fluker v. Bank of Union Point, 178 Ga. 297, 173 S.E. 149, 1934 Ga. LEXIS 41 (1934) (decided under former Code 1933, §§ 38-901, 38-902).

Inauguration of suit. — Subpoena duces tecum was not process by which to inaugurate a suit, or by which to connect a new party with a pending suit. Ex parte Calhoun, 87 Ga. 359, 13 S.E. 694, 1891 Ga. LEXIS 168 (1891) (decided under former Code 1882, §§ 3514, 3515).

Burden of proof. — An individual moving to quash a grand jury subpoena duces tecum as unreasonable had the general burden of persuasion. Morris v. State, 246 Ga. 510, 272 S.E.2d 254, 1980 Ga.

LEXIS 1177 (1980) (decided under former Code 1933, §§ 38-901, 38-902).

Burden of going forward. — Regarding the relevancy component of reasonableness, since the secrecy of grand jury deliberations ensured that the party moving to quash a subpoena duces tecum had no precompliance knowledge of the subject matter of the investigation, the party who caused a subpoena duces tecum to issue had the burden of going forward, to make a prima facie showing that the subpoenaed documents are relevant to a legitimate grand jury investigation. Morris v. State, 246 Ga. 510, 272 S.E.2d 254, 1980 Ga. LEXIS 1177 (1980) (decided under former Code 1933, §§ 38-901, 38-902).

Pleadings. — An abstract company could not be compelled by a subpoena duces tecum to make discovery of the contents of lost public records in a proceeding to establish a copy of such records since the pleadings did not allege or set out anything whatever as the specific contents to be proved. Ex parte Calhoun, 87 Ga. 359, 13 S.E. 694, 1891 Ga. LEXIS 168 (1891) (decided under former Code 1882, §§ 3514, 3515).

Request to modify subpoena properly denied. — Trial court did not abuse the court's discretion in denying the motion to modify the subpoena, particularly in light of the wide latitude given to make complete discovery possible, the burden on the hospital to show more than that the materials would not themselves be admissible at trial, and the fact that the hospital did not argue that the material was privileged or that the discovery request was burdensome. WellStar Kennestone Hosp. v. Roman, 344 Ga. App. 375, 810 S.E.2d 600, 2018 Ga. App. LEXIS 34 (2018).

Sufficiency of subpoena. — After a document had been produced under a subpoena duces tecum, the sufficiency of the subpoena as a means of compelling is not a material question in the case. Starr v. Mayer & Co., 60 Ga. 546, 1878 Ga. LEXIS 532 (1878) (decided under former Code 1873, § 3514, 3515).

Deletion of privileged matter. — When any document sought to be produced contained a mixture of privileged and nonprivileged communication or information, ample remedy wais provided to delete privileged matter, and this also would have been within the inherent power of the court. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844, 1969 Ga. App. LEXIS 826 (1969) (decided under former Code 1933, §§ 38-901, 38-902).

Subpoena directed to corporation. — It was proper to issue a subpoena directed simply to a named company, and to have it served upon the general manager of such corporation; the documents called for being in the possession of the manager at the time, it was the manager's duty to respond to the subpoena duces tecum and produce the documents before the grand jury unless the manager desired to test the validity and sufficiency of the subpoena duces tecum by legal means. Jones v. State, 99 Ga. App. 858, 109 S.E.2d 859, 1959 Ga. App. LEXIS 972 (1959) (decided under former Code 1933, §§ 38-901, 38-902).

Subpoena for information on certification of drug dog. — Trial court improperly granted the state's motion to quash the defendant's subpoena for all records and documents pertaining to the drug detection dog and the dog's handler involved in the detection of drugs in the defendant's luggage because the appellate court could not determine from the existing record whether the training materials were relevant to the issue of reliability of the drug dog as certification of the drug dog on the day of the alert did not preclude a challenge to its reliability; other than the blanket assertion that training materials were irrelevant to show reliability, the state offered no other basis for the state's objection to the subpoena; and the trial court had the discretion to modify the subpoena if the subpoena was overly broad. Harris v. State, 341 Ga. App. 831, 802 S.E.2d 708, 2017 Ga. App. LEXIS 288 (2017).

Interference by third party in ordering individual in possession of corporate documents sought by subpoena duces tecum to turn the documents over to the party for the purpose of concealing, destroying, or otherwise withholding the information therein contained from the grand jury would be an act of contempt which the court would be well authorized to punish. Jones v. State, 99 Ga. App. 858,

109 S.E.2d 859, 1959 Ga. App. LEXIS 972 (1959) (decided under former Code 1933, §§ 38-901, 38-902).

Identical subpoenas served on president and employee of corporation. — When identical subpoenas directed to a corporation were served upon the president in control of the corporation and an employee having actual custody of the papers, it was perfectly proper for the president to demand and acquire custody of the documents from the president's employee for the purpose of producing the papers in compliance with the subpoena served upon the individual as such president; it did not constitute a contempt of court that the defendant, before complying with the subpoena, saw fit to test its sufficiency by means of a motion to quash, since the defendant did in fact, upon obtaining a ruling by the court adverse to the defendant's contentions, surrender the documents called for by the subpoena. Jones v. State, 99 Ga. App. 858, 109 S.E.2d 859, 1959 Ga. App. LEXIS 972 (1959) (decided under former Code 1933, §§ 38-901, 38-902).

Agent of receiver. — Fact that the person directed to produce evidence was the agent of the receiver for a railway did not exempt the person from the enforcement of the order for the production of the freight-bills and receipts in the person's possession, where they were material evidence in the investigation of criminal charges against the accused named in certain cases pending before the grand jury. Blitch v. State, 145 Ga. 882, 90 S.E. 42, 1916 Ga. LEXIS 529 (1916) (decided under former Civil Code 1910, §§ 5844, 5845).

An entire record could not be removed from one court to another by a notice to the officers to produce the record, or by a subpoena duces tecum directed to and served upon them. In re Lester, 77 Ga. 143, 1886 Ga. LEXIS 318 (1886) (decided under former Code 1882, §§ 3514, 3515).

Cell phone records not discoverable. — Trial court did not abuse the court's discretion in quashing a subpoena for the appellee's cell phone records as those cell phone records were not reasonably calculated to lead to the discovery of admissible evidence under former O.C.G.A. § 24-10-22 (see now O.C.G.A. § 24-13-23) or information relevant to the intrusiveness nature of the behavior alleged to be tortious. Anderson v. Mergenhagen, 283 Ga. App. 546, 642 S.E.2d 105, 2007 Ga. App. LEXIS 33 (2007) (decided under former O.C.G.A. § 24-10-22).

Continuance on ground of absence of witness. — When the postponement of a case was requested on the ground of the absence of a witness served with a subpoena duces tecum, it was not an abuse of discretion to refuse the request in view of this statute, when it appeared that the witness was a resident of the county and was not served with the subpoena duces tecum ten days prior to the trial of the case. Frost v. Pennington, 6 Ga. App. 298, 65 S.E. 41, 1909 Ga. App. LEXIS 267 (1909) (decided under former Civil Code 1895, §§ 5255, 5256).

Post-judgment discovery. — It was clear that any forfeiture would not result from the answering of the questions or production of documents, but rather, as a result of a judgment already entered. Any other interpretation of this privilege would make the Georgia post-judgment discovery rules meaningless. Kushner v. Mascho, 143 Ga. App. 801, 240 S.E.2d 290, 1977 Ga. App. LEXIS 2511 (1977) (decided under former Code 1933, §§ 38-901, 38-902).

Judgment creditor was authorized to seek bank records of the debtor's wife in post-judgment discovery because the creditor was entitled to seek information that would lead to any property or other sources of income of the debtor; further, the wife had begun paying the husband's country club dues from her bank accounts after the judgment was entered. Hickey v. RREF BB SBL Acquisitions, LLC, 336 Ga. App. 411, 785 S.E.2d 72, 2016 Ga. App. LEXIS 193 (2016).

Mayor, who was ex-officio the presiding judge of a court of record, was not subject to the subpoena duces tecum, commanding the mayor to bring into the superior court "the information docket" of this court, to be used in evidence before the grand jury, either in a specific case or generally. In re Lester, 77 Ga. 143, 1886 Ga. LEXIS 318 (1886) (decided under former Code 1882, §§ 3514, 3515).

Request for records of homicides overbroad. — Request for statistical in-

formation contained in notes, books, records, writings, and/or documents pertaining to any and all homicides both solved and unsolved, either committed within the city limits of Atlanta, Fulton County or the surrounding counties in which bodies were found covering a period of almost a decade was overbroad rendering it unreasonable and oppressive. Williams v. State, 251 Ga. 749, 312 S.E.2d 40, 1983 Ga. LEXIS 980 (1983) (decided under former O.C.G.A. § 24-10-22).

Subpoena for irrelevant evidence. — In the personal injury action filed by plaintiff against the pawn shop, the trial court did not err in granting the pawn shop's motion to quash a subpoena for production of the saw that caused the injury at the hearing on the summary judgment motion; the trial court did not abuse the court's discretion under former O.C.G.A. § 24-10-22(b)(1) (see now O.C.G.A. § 24-13-23) in quashing the subpoena since the manner in which the saw was functioning three years after the accident was not relevant. Walker v. Bruhn, 281 Ga. App. 149, 635 S.E.2d 322, 2006 Ga. App. LEXIS 958 (2006), cert. denied, No. S07C0038, 2006 Ga. LEXIS 902 (Ga. Oct. 30, 2006) (decided under former O.C.G.A. § 24-10-22).

Court committed reversible error in quashing subpoena for former police officer's personnel file, where anything in the file tending to show training the former officer received which would enable the officer to commit and cover up the crimes of murder, arson, and rape was relevant to defendant's contention that the former officer committed the crimes. Henderson v. State, 255 Ga. 687, 341 S.E.2d 439, 1986 Ga. LEXIS 637 (1986) (decided under former O.C.G.A. § 24-10-22).

In a prosecution for driving with an unlawful blood-alcohol level, defendant was entitled to subpoena from the state's forensic chemist the chain of custody documents and other documents which pertained to the actual test of defendant's blood, including gas chromatograph results. Bazemore v. State, 244 Ga. App. 460, 535 S.E.2d 830, 2000 Ga. App. LEXIS 761 (2000) (decided under former O.C.G.A. § 24-10-22).

Documents which pertained to the qualifications of the person who drew defendant's blood and the certification documentation on the machine were not sufficiently relevant to be discovered by defendant in defendant's prosecution for driving with an unlawful blood-alcohol level. Bazemore v. State, 244 Ga. App. 460, 535 S.E.2d 830, 2000 Ga. App. LEXIS 761 (2000) (decided under former O.C.G.A. § 24-10-22).

Motion to quash properly denied to probationer. — Probationer, who was prohibited from obtaining an investigative file from a sheriff's office by way of a subpoena duces tecum in anticipation of a probation-revocation hearing and, thus, since the probationer met the initial burden of showing that the documents sought were relevant and the subpoena was not unreasonable and oppressive, the trial court did not abuse the court's discretion by denying the motion to quash. In re Whittle, 339 Ga. App. 83, 793 S.E.2d 123, 2016 Ga. App. LEXIS 585 (2016).

Attorney fees for quashing subpoena not permitted. — Trial judge in a criminal case was not authorized to award attorney fees as compensation in conjunction with an order quashing a subpoena duces tecum pursuant to former O.C.G.A. § 24-10-22 (see now O.C.G.A. § 24-13-23). Garcia v. Allen, 202 Ga. App. 529, 414 S.E.2d 742, 1992 Ga. App. LEXIS 67 (1992) (decided under former O.C.G.A. § 24-10-22).

Motion to quash properly granted. — Because the allegations in the affidavits of title simply described either the relationship of the parties or other objective facts or circumstances affecting title to the property, and nearly all of those allegations were asserted or confirmed by the property owner either in the property owner's answer to the bank's complaint, the property owner's counterclaim or the property owner's brief on appeal, the trial court did not abuse the court's discretion in effectively granting the motion to quash the subpoena for the bank's counsel and refusing to allow the property owner to question the bank's counsel. Cronan v. JP Morgan Chase Bank, N.A., 336 Ga. App. 201, 784 S.E.2d 57, 2016 Ga. App. LEXIS 147 (2016), overruled in part, SRM Group,

Inc. v. Travelers Prop. Cas. Co. of Am., 308 Ga. 404, 841 S.E.2d 729, 2020 Ga. LEXIS 235 (2020).

Motion to quash improperly denied. — When attorneys for a defendant in a capital case served a subpoena regarding the funding of indigent services on the Executive Director of the Georgia Public Defender Standards Council, it was error to deny the Council's motion to quash the subpoena. The documents had no bearing on the defendant's guilt or innocence and were irrelevant to the criminal case; moreover, the general funding that other capital defendants might have received had nothing to do with the funding of the present defendant's specific defense. Britt v. State, 282 Ga. 746, 653 S.E.2d 713, 2007 Ga. LEXIS 847 (2007) (decided under former O.C.G.A. § 24-10-22).

ADVISORY OPINIONS OF THE STATE BAR

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-22 are included in the annotations for this Code section.

Issuing of a subpoena. — Subpoena issued pursuant to former O.C.G.A. § 24-10-22(a) should only have been issued for actual hearings and trialsand should not have been requested when in fact no hearing or trial had been scheduled. Likewise, a subpoena issued pursuant to O.C.G.A. § 9-11-45 of the Civil Practice Act should have been requested and issued only for depositions which have been actually scheduled by agreement between parties or when a notice of deposition had been filed and served upon all parties, and should not be issued when no deposition had been scheduled. Adv. Op. No. 84-40 (September 21, 1984) (decided under former O.C.G.A. § 24-10-22).

Notice of subpoena. — There was no need for notice of a subpoena issued pursuant to former O.C.G.A. § 24-10-22(a) because all parties received notice of hearings and trials, so long as they were real hearings and real trials. Adv. Op. No. 84-40 (September 21, 1984) (decided under former O.C.G.A. § 24-10-22).

RESEARCH REFERENCES

C.J.S.

32A C.J.S., Evidence, §§ 1012 et seq., 1023, 1024. 98 C.J.S. (Rev), Witnesses, §§ 6, 67et seq.

ALR.

Construction and application of provisions of Fair Labor Standards Act regarding investigatory subpoena duces tecum, 166 A.L.R. 553.

Compelling production or authentication for use as evidence of court records or writings or objects in custody of court or officer thereof, 170 A.L.R. 334.

Form, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records, and documents, 23 A.L.R.2d 862.

Pretrial examination or discovery to ascertain from defendant in action for injury, death, or damages, existence and amount of liability insurance and insurer's identity, 13 A.L.R.3d 822.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege, but owned by another, 37 A.L.R.3d 1373.

Right of member, officer, agent, or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records, 52 A.L.R.3d 636.

Availability of sole shareholder's Fifth Amendment privilege against self-incrimination to resist production of corporation's books and records—modern status, 87 A.L.R. Fed. 177.

24-13-24. Service of subpoenas.

A subpoena may be served by any sheriff, by his or her deputy, or by

any other person not less than 18 years of age. Proof may be shown by return or certificate endorsed on a copy of the subpoena. Subpoenas may also be served by registered or certified mail or statutory overnight delivery, and the return receipt shall constitute prima-facie proof of service. Service upon a party may be made by serving his or her counsel of record.

History.

Code 1981, § 24-13-24, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Issuance of subpoenas by Superior Court of Fulton County on behalf of the Committees on Ethics of the Senate and House of Representatives, § 28-1-16.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-1501 and former O.C.G.A. § 24-10-23 are included in the annotations for this Code section.

Invalid subpoena. — When service of the subpoenas was not effected either by personal service or by certified mail, the only two modes authorized by the former statute, the lack of service invalidated the legal force and effect of the subpoena; therefore, the subpoena could not serve as the basis for a conviction as a defaulting witness. Edenfield v. State, 147 Ga. App. 502, 249 S.E.2d 316, 1978 Ga. App. LEXIS 2736 (1978) (decided under former Code 1933, § 38-1501).

Actual receipt immaterial. — With respect to subpoenas which must have been served upon an adversary party, it was immaterial that the party actually received the pleading or other matter when service was otherwise improper. Heard v. Hopper, 233 Ga. 617, 212 S.E.2d 797, 1975 Ga. LEXIS 1391 (1975) (decided under former Code 1933, § 38-1501); Edenfield v. State, 147 Ga. App. 502, 249 S.E.2d 316, 1978 Ga. App. LEXIS 2736 (1978) (decided under former Code 1933, § 38-1501); Lake v. Hamilton Bank, 148 Ga. App. 348, 251 S.E.2d 177, 1978 Ga. App. LEXIS 3108 (1978), overruled in part, Hamilton Capital Group, Inc. v. Equifax Credit Info. Servs., 266 Ga. App. 1, 596 S.E.2d 656, 2004 Ga. App. LEXIS 286 (2004) (decided under former Code 1933, § 38-1501).

Email not proper method for serving subpoena. — Trial court erred in denying the defendant's motion for a continuance of the hearing on the defendant's motion for new trial so that the defendant could produce an alibi witness to testify at that hearing because counsel did not properly serve a subpoena on the alibi witness as email was not a proper means of serving a subpoena, and the defendant made no assertion that the defendant attempted to subpoena the alibi witness as statutorily required. Smith v. State, 308 Ga. 81, 839 S.E.2d 630, 2020 Ga. LEXIS 144 (2020).

Incompetent witness. — Defendant's offer to prove service of the subpoena in compliance with former O.C.G.A. § 24-10-23 was foreclosed and its necessity mooted by the trial court's ruling, communicated to the jury, that the person upon whom the subpoena was purportedly served was incompetent to testify. Cofield v. State, 247 Ga. 98, 274 S.E.2d 530, 1981 Ga. LEXIS 633 (1981) (decided under former O.C.G.A. § 24-10-23).

Inability of witness to appear. — When the failure to hand the subpoena to the witness personally appeared to have had nothing to do with the absence of the witness, a motion for continuance should have been granted. Waters v. State, 85 Ga. App. 79, 68 S.E.2d 233, 1951 Ga. App. LEXIS 1003 (1951) (decided under former Code 1933, § 38-1501).

Informal notice of hearing date change sufficient. — Witness's duty to testify after the witness was properly served with the initial witness subpoena, was not dissolved merely because the witness received notice of a change in the

hearing date from the witness's receptionist rather than by the means authorized for service of subpoenas under former O.C.G.A. § 24-10-23. Mijajlovic v. State, 179 Ga. App. 506, 347 S.E.2d 325, 1986 Ga. App. LEXIS 1953 (1986) (decided under former O.C.G.A. § 24-10-23).

Nonparties. — Although former O.C.G.A. § 24-10-23 permitted service on a party by service on that party's attorney, it did not provide for such service on nonparties. Haywood v. Aerospec, Inc., 193 Ga. App. 479, 388 S.E.2d 367, 1989 Ga. App. LEXIS 1482 (1989) (decided under former O.C.G.A. § 24-10-23).

RESEARCH REFERENCES

Am. Jur. 2d.
29 Am. Jur. 2d, Evidence, §§ 9, 15.
C.J.S.
98 C.J.S. (Rev), Witnesses, §§ 31, 53 et seq.

24-13-25. Fees and mileage; when tender required.

Except as provided in Code Section 24-13-28, the witness fee shall be $25.00 per diem, and execution shall be issued by the clerk upon affidavit of the witness to enforce payment thereof. The payment of witness fees shall not be demanded as a condition precedent to attendance; but, when a witness resides outside the county where the testimony is to be given, service of the subpoena, to be valid, shall be accompanied by tender of the witness fee for one day's attendance plus mileage of 45¢ per mile for traveling expenses for going from and returning to his or her place of residence by the nearest practical route. Tender of witness fees and mileage may be made by United States currency, postal money order, cashier's check, certified check, or the check of an attorney or law firm. When the subpoena is issued on behalf of this state, or an officer, agency, or political subdivision thereof, or an accused in a criminal proceeding, witness fees and mileage need not be tendered.

History.
Code 1981, § 24-13-25, enacted by Ga. L. 2011, p. 99, § 2/HB 24.
Cross references.
Witness fees for attendance before Judicial Qualifications Commission, Rules of the Judicial Qualifications Commission, Rule 18(d).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1799, Cobb's 1851 Digest, p. 277, former Laws 1842, Cobb's 1851 Digest, p. 280, former Code 1863, §§ 3765, 3768, former Code 1868, §§ 3789, 3792, former Code 1873, §§ 3842, 3845, former Code 1882, §§ 3842, 3845, former Civil Code 1895, § 5261, former Penal Code 1895, § 1115, former Civil Code 1910, § 5850, former Penal Code 1910, § 1144, former Code 1933, §§ 38-1502, 38-1902, and former O.C.G.A. § 24-10-24 are included in the annotations for this Code section.

Tender of fee and mileage. — Mileage and per diem required by the former statute for out of county residents must

have been tendered before their attendance could have been compelled. Neal v. Smith, 226 Ga. 96, 172 S.E.2d 684, 1970 Ga. LEXIS 445 (1970) (decided under former Code 1933, §§ 38-1502, 38-1902).

While a witness fee and mileage expenses might not have been a prerequisite to the production of documents, the subpoena and letter served upon the Georgia Department of Corrections' legal counsel instructed that "you are hereby required to be and appear" and listed the documents and evidence the Department was to bring to the hearing. Thus, pursuant to former O.C.G.A. § 24-10-24, the attendant witness fee and mileage expense were required. Williams v. Russo, 322 Ga. App. 654, 745 S.E.2d 842, 2013 Ga. App. LEXIS 584 (2013) (decided under former O.C.G.A. § 24-10-24).

Determination of mileage. — Nonresident witness was entitled to mileage from the county treasurer for the whole distance traveled from and returning to the witness's home. Dutcher v. Justices of Inferior Court, 38 Ga. 214, 1868 Ga. LEXIS 76 (1868) (decided under former Code 1863, §§ 3765, 3768).

Continuance. — Witness could not charge for attendance rendered after the case had been postponed or continued, whether the witness happened to hear the announcement of the postponement or continuance or not. Robison v. Banks, 17 Ga. 211, 1855 Ga. LEXIS 94 (1855) (decided under Laws 1842, Cobb's 1851 Digest, p. 280).

Expert witnesses. — No statute in Georgia allowed or prohibited fees to expert witnesses, and while there could be no charge beyond the legal fees of ordinary witnesses for attendance on the court in obedience to subpoena, still, as a physician could not be required to make any examination or preliminary preparations, or to listen to the testimony, in order the better to give the expert's opinion as an expert, the expert may have for such services demanded extra compensation. Schofield v. Little, 2 Ga. App. 286, 58 S.E. 666, 1907 Ga. App. LEXIS 346 (1907) (decided under former Penal Code 1895, § 1115).

Lodging and airfare costs. — There was no specific statutory authorization for assessing a criminal defendant for the lodging and airfare costs of witnesses for the state. Smith v. State, 272 Ga. 83, 526 S.E.2d 59, 2000 Ga. LEXIS 96 (2000) (reversing Smith v. State, 236 Ga. App. 548, 512 S.E.2d 19, 1999 Ga. App. LEXIS 104 (1999)) (decided under former O.C.G.A. § 24-10-24).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 38-1502 and 38-1902, and former O.C.G.A. § 24-10-24 are included in the annotations for this Code section.

Legislative intent of the former provisions was to eliminate witness fees in justice courts. 1970 Op. Att'y Gen. U70-234 (decided under former Code 1933, §§ 38-1502 and 38-1902).

Applicability. — Former statute applied to both civil and criminal cases. 1972 Op. Att'y Gen. No. U72-55 (decided under former Code 1933, §§ 38-1502 and 38-1902).

Criminal cases. — County must pay the per diem witness fee to witnesses summoned in criminal cases as well as to those summoned in civil cases; the source of funds for witness fees was from county taxes. 1970 Op. Att'y Gen. No. U70-11 (decided under former Code 1933, §§ 38-1502 and 38-1902).

Resident of county from which the subpoena originated was entitled to payment of the witness fee, but the resident cannot demand prepayment as a condition to the resident's appearance in court. 1967 Op. Att'y Gen. No. 67-311 (decided under former Code 1933, §§ 38-1502 and 38-1902).

Peace officer who, required by subpoena, attended court on behalf of the state during any hours except regular duty hours, was entitled to mileage as provided by former Code 1933, §§ 38-1502 and 38-1902; under these conditions, the officer was also entitled to per diem. 1971 Op. Att'y Gen. No. U71-57 (decided under former Code 1933, §§ 38-1502 and 38-1902).

State officer or agent was to be treated as an ordinary witness and would follow the same procedure and payment as was set forth in the former statute. However, if the state officer was a witness for the state, an officer, agency, or political subdivision thereof, or a defendant in a criminal case, fees and mileage need not be tendered as a condition precedent to appearance; as for the average citizen, service of the subpoena must be accompanied by tender of the above payment to a non-county resident or the subpoena was invalid; with respect to the rights of a county resident, this class of witness still had a right to the per diem witness fee, but the exact time of such payment was within the discretion of the court. 1967 Op. Att'y Gen. No. 67-311 (decided under former Code 1933, §§ 38-1502 and 38-1902).

RESEARCH REFERENCES

C.J.S.

98 C.J.S. (Rev), Witnesses, §§ 119, 121, 226.

ALR.

Amount of fees allowable to examiners of questioned documents or handwriting experts for serving and testifying, 86 A.L.R.2d 1283.

24-13-26. Enforcement of subpoenas; continuance; secondary evidence of books, papers, or documents.

(a) Subpoenas may be enforced by attachment for contempt and by a fine of not more than $300.00 or not more than 20 days' imprisonment, or both. In all proceedings under this Code section, the court shall consider whether under the circumstances of each proceeding the subpoena was served within a reasonable time, but in any event not less than 24 hours prior to the time that appearance thereunder was required.

(b) The court may also in appropriate proceedings grant continuance of the proceeding. Where subpoenas were issued in blank, no continuance shall be granted because of failure to respond thereto when the party obtaining such subpoenas fails to present to the clerk the name and address of the witness so subpoenaed at least six hours before appearance is required.

(c) When evidence is unsuccessfully sought, secondary evidence thereof shall be admissible.

History.

Code 1981, § 24-13-26, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5263, former Civil Code 1910, § 5852, former Code 1933, § 38-1504, and former O.C.G.A. § 24-10-25 are included in the annotations for this Code section.

Service. — In order to compel the attendance of a witness by attachment, it must have been shown that the witness

had been served with the precept of the court. Harrison v. Langston & Woodson, 100 Ga. 394, 28 S.E. 162, 1897 Ga. LEXIS 71 (1897) (decided under former Civil Code 1895, § 5263).

Witness not served. — When the defendant's motion for continuance was based upon the absence of a material witness for whom a subpoena was not issued by the defendant until the morning the trial was to begin and who had not been served therewith at the time the motion was made, there was no error in overruling the motion. Eady v. State, 129 Ga. App. 656, 200 S.E.2d 767, 1973 Ga. App. LEXIS 1101 (1973) (decided under former Code 1933, § 38-1504).

Service less than 24 hours. — Trial court could not impose sanctions upon a witness who failed or refused to appear in answer to a subpoena served less than 24 hours before the required appearance. Eubanks v. Brooks, 139 Ga. App. 166, 227 S.E.2d 923, 1976 Ga. App. LEXIS 1721 (1976) (decided under former Code 1933, § 38-1504).

Trial court did not err in failing to enforce defendant's subpoenas because the subpoenas were not served more than 24 hours prior to trial. Byron v. State, 229 Ga. App. 795, 495 S.E.2d 123 (decided under former O.C.G.A. § 24-10-25).

In a personal injury action, because a driver waited until the eve of trial to serve the doctor with a subpoena for the doctor's testimony, the trial court: (1) did not abuse the court's discretion in determining that such service was not reasonable under former O.C.G.A. § 24-10-25(a); and (2) did not err in refusing to grant the driver a continuance or citing the physician in contempt for failing to appear in court; moreover, since the subpoena was unenforceable, evidence surrounding the doctor's failure to appear became irrelevant under former O.C.G.A. § 24-2-1 (see now O.C.G.A. § 24-4-401 et seq.). Buster v. Poole, 279 Ga. App. 828, 632 S.E.2d 680, 2006 Ga. App. LEXIS 638 (2006), cert. dismissed, No. S06C1865, 2006 Ga. LEXIS 876 (Ga. Oct. 16, 2006) (decided under former O.C.G.A. § 24-10-25).

Discretion of court. — An important exercise of discretion on the part of the trial judge was necessary under the former statute, and it was only when this discretion was abused that it should have been controlled by the reviewing court. Carter & Co. v. Southern Ry., 3 Ga. App. 34, 59 S.E. 209, 1907 Ga. App. LEXIS 546 (1907) (decided under former Civil Code 1895, § 5263).

Circumstances of each case. — Former statute allowed the trial court to consider the circumstances of each case in determining whether the period between service of the subpoena and the required appearance was sufficient. Eubanks v. Brooks, 139 Ga. App. 166, 227 S.E.2d 923, 1976 Ga. App. LEXIS 1721 (1976) (decided under former Code 1933, § 38-1504).

Trial court could extend length of notice when the court believed preparation was required but the trial court could not arbitrarily reduce the notice requirement below 24 hours. Eubanks v. Brooks, 139 Ga. App. 166, 227 S.E.2d 923, 1976 Ga. App. LEXIS 1721 (1976) (decided under former Code 1933, § 38-1504).

Contempt order insufficiently definite. — Contempt order was not sufficiently specific enough to allow a post-judgment debtor to determine what documents to produce to purge the debtor of contempt because the order referred to "any documents that have been requested" and not produced, and there were multiple requests; further, the self-executing nature of the order violated the debtor's due process rights. Rocker v. First Bank of Dalton, 343 Ga. App. 501, 806 S.E.2d 884, 2017 Ga. App. LEXIS 519 (2017).

Contempt power of imprisonment applied only in the event that the witness, after having been cited, refused to testify in the case. Moody v. State, 131 Ga. App. 355, 206 S.E.2d 79, 1974 Ga. App. LEXIS 1421 (1974) (decided under former Code 1933, § 38-1504).

Subpoenas may have been enforced by attachment for contempt, but this meant citation, notice, hearing, and assistance of counsel, as in contempts generally, and not the punishment meted out for courtroom incidents under the court's inherent power to maintain order. Moody v. State, 131 Ga. App. 355, 206 S.E.2d 79,

1974 Ga. App. LEXIS 1421 (1974) (decided under former Code 1933, § 38-1504).

Challenge to subpoena to produce gun waived by production of gun. — In a prosecution against a defendant for aggravated assault and other charges arising out of a road rage incident, the defendant waived a challenge under former O.C.G.A. § 24-10-25 to the timeliness of a subpoena directing the production of the defendant's gun by producing the gun prior to moving to quash the subpoena, and the defendant failed to provide a means of appellate review by including the subpoena or any service affidavit in the record; the defendant's motion to quash the subpoena under former O.C.G.A. § 24-10-25(a) was therefore properly denied. Adams v. State, 282 Ga. App. 819, 640 S.E.2d 329, 2006 Ga. App. LEXIS 1462 (2006) (decided under former O.C.G.A. § 24-10-25).

Interference by third party in ordering individual in possession of corporate documents sought by subpoena duces tecum to turn the documents over to the third party for the purpose of concealing, destroying, or otherwise withholding the information therein contained from the grand jury would have been an act of contempt which the court would have been well authorized to punish. Jones v. State, 99 Ga. App. 858, 109 S.E.2d 859, 1959 Ga. App. LEXIS 972 (1959) (decided under former Code 1933, § 38-1504).

Identical subpoenas served on president and employee of corporation. — When identical subpoenas directed to a corporation were served upon the president in control of the corporation and an employee having actual custody of the papers, it was perfectly proper for the president to demand and acquire custody of the documents from the employee for the purpose of producing the documents in compliance with the subpoena served upon the individual as such president; it did not constitute a contempt of court that the defendant, before complying with the subpoena, saw fit to test the subpoena's sufficiency by means of a motion to quash, since the defendant did in fact, upon obtaining a ruling by the court adverse to the defendant's contentions, surrender the documents called for by the subpoena. Jones v. State, 99 Ga. App. 858, 109 S.E.2d 859, 1959 Ga. App. LEXIS 972 (1959) (decided under former Code 1933, § 38-1504).

Continuance. — When the court offered to issue an attachment to compel the attendance of a witness, and the witness's counsel declined to take the same, but instead thereof relied upon the service of a second subpoena, which latter the witness likewise disobeyed, there was not abuse of discretion in refusing a continuance on account of the absence of the witness. Brady v. State, 120 Ga. 181, 47 S.E. 535, 1904 Ga. LEXIS 490 (1904) (decided under former Civil Code 1895, § 5263).

Waiver. — Subpoenaed witness could waive the 24 hour notice requirement. Eubanks v. Brooks, 139 Ga. App. 166, 227 S.E.2d 923, 1976 Ga. App. LEXIS 1721 (1976) (decided under former Code 1933, § 38-1504).

Notice period waived by witness testifying. — Subpoenaed witness waived the 24-hour notice requirement when the witness refused the trial court's offer of continuance and voluntarily testified at trial. Stein v. Cherokee Ins. Co., 169 Ga. App. 1, 311 S.E.2d 220, 1983 Ga. App. LEXIS 2959 (1983) (decided under former O.C.G.A. § 24-10-25).

Motions to compel and for sanctions were not proper vehicles for the enforcement of a notice to produce. Bergen v. Cardiopul Medical, Inc., 175 Ga. App. 700, 334 S.E.2d 28, 1985 Ga. App. LEXIS 2142 (1985) (decided under former O.C.G.A. § 24-10-25).

Motion to produce filed on morning of trial was too late. Williams v. State, 142 Ga. App. 764, 236 S.E.2d 893, 1977 Ga. App. LEXIS 2134 (1977) (decided under former Code 1933, § 38-1504).

Secondary evidence admissible. — When a party to a cause served on the opposite party, who was presumably in possession of a once existing material writing, a notice to produce such writing, and the party served responded that the writing was lost, or failed to produce the writing at the trial, secondary evidence as to the contents of the original writing became admissible. Middlebrooks v. Cabaniss, 193 Ga. 764, 20 S.E.2d 10, 1942 Ga. LEXIS 469 (1942) (decided under former Code 1933, § 38-1504).

RESEARCH REFERENCES

C.J.S.

32A C.J.S., Evidence, §§ 1019, 1020, 1022. 98 C.J.S. (Rev), Witnesses, §§ 6, 67 et seq.

ALR.

Mandamus to compel court or judge to require witness to testify or produce documents, 41 A.L.R. 436.

Admissibility of evidence of party's refusal to permit examination or inspection of property or person, 175 A.L.R. 234.

Tort or statutory liability for failure or refusal of witness to give testimony, 61 A.L.R.3d 1297.

24-13-27. Notice to produce.

Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party. Service may be perfected in accordance with Code Section 24-13-24, but no witness fees or mileage shall be allowed therefor. Such notices may be enforced in the manner prescribed by Code Section 24-13-26, and Code Section 24-13-23 shall also apply to such notices. The notice shall be in writing, signed by the party seeking production of the evidence, or the party's attorney, and shall be directed to the opposite party or his or her attorney.

History.

Code 1981, § 24-13-27, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Discovery of documentary and tangible evidence generally, § 9-11-34.

Law reviews.

For article discussing available means of discovery for criminal cases in Georgia, see 12 Ga. St. B.J. 134 (1976).

For note, "Criminal Discovery: The Use of Notices to Produce," see 30 Mercer L. Rev. 331 (1978).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Laws 1841, Cobb's 1851 Digest, p. 465, former Code 1873, §§ 3508, 3509, 3510, 3511, 3512, 3513, and 3834, former Code 1882, §§ 3508, 3509, 3510, 3511, 3512, 3513, 3834, former Civil Code 1895, §§ 5248, 5249, 5250, 5251, 5252, 5253, and 5254, former Civil Code 1910, §§ 5837, 5838, 5839, 5840, 5841, 5842, 5843, former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, and 38-807, and former O.C.G.A. § 24-10-26

General Consideration (Cont'd)

are included in the annotations for this Code section.

Purpose. — Notice under the former provisions was the appropriate means of procuring the primary evidence, or of laying the foundation for secondary evidence. McAdam v. Weikel & Smith Spice Co., 64 Ga. 441, 1879 Ga. LEXIS 94 (1879) (decided under former Code 1873, §§ 3508, 3509, 3510, 3511, 3512, 3513, 3834).

Notice to produce applied only to parties. — Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112, 1965 Ga. App. LEXIS 904 (1965) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Subpoena duces tecum and notice distinguished. — Papers were produced under notice, when directed to parties or their counsel; when in the possession of others, they must have been reached by a subpoena duces tecum. Wright v. Central R.R. & Banking Co., 21 Ga. 345, 1857 Ga. LEXIS 62 (1857) (decided under former Laws 1841, Cobb's 1851 Digest, p. 465); Ex parte Calhoun, 87 Ga. 359, 13 S.E. 694, 1891 Ga. LEXIS 168 (1891) (decided under former Code 1882, §§ 3508, 3509, 3510, 3511, 3512, 3513, 3834).

Equitable and legal cases. — Provisions of former statute were applicable to all cases, whether the relief prayed for be legal or equitable. Georgia Iron & Coal Co. v. Etowah Iron Co., 104 Ga. 395, 30 S.E. 878, 1898 Ga. LEXIS 338 (1898) (decided under former Civil Code 1895, §§ 5248, 5249, 5250, 5251, 5252, 5253, 5254).

General description sufficient. — There was no necessity for a technical description of the papers to have the papers produced; a very general description would have been effectual. Fletcher v. Faust, 22 Ga. 559, 1857 Ga. LEXIS 181 (1857) (decided under Laws 1841, Cobb's 1851 Digest, p. 465).

Specificity of notice. — Notice to produce should have been specific enough in its demands to relate the documents sought to the questions at issue. Horton v. Huiet, 113 Ga. App. 166, 147 S.E.2d 669, 1966 Ga. App. LEXIS 1003 (1966) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Sufficiency of description. — Description was sufficiently definite if the party who was called on to produce or to give an inspection would have been enabled to know what to produce or what the party must give an inspection of. Fluker v. Bank of Union Point, 178 Ga. 297, 173 S.E. 149, 1934 Ga. LEXIS 41 (1934) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Material not in possession of party. — Failure to produce material not in possession, control, or custody did not constitute a failure to comply with notice to produce. Gibson v. State, 150 Ga. App. 718, 258 S.E.2d 537, 1979 Ga. App. LEXIS 2353 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Materiality of evidence question for court. — Determination of the materiality of evidence involved the exercise of a judicial function; the conclusion of a witness that the contents of a paper were material, when there was no proof as to what the paper contained, was no proof that the papers sought to be produced were in fact necessary, and could not relieve the court from the duty of passing upon the question of materiality. Central of Ga. Ry. v. Lewis, 2 Ga. App. 428, 58 S.E. 674, 1907 Ga. App. LEXIS 411 (1907) (decided under former Civil Code 1895, §§ 5248, 5249, 5250, 5251, 5252, 5253, 5254).

Term to term. — Notice to produce was not defective in that the notice did not specifically call for the production of the paper from "term to term," and the party served therewith was not relieved from compliance with the notice because the trial occurred at a term subsequent to the term at which such party was notified to produce the paper. Carrington v. Brooks, 121 Ga. 250, 48 S.E. 970, 1904 Ga. LEXIS 99 (1904) (decided under former Civil Code 1895, §§ 5248, 5249, 5250, 5251, 5252, 5253, 5254).

All books covered by the notice to produce must have been produced. American Nat'l Bank v. Brunswick Light & Water Co., 100 Ga. 92, 26 S.E. 473, 1896 Ga.

LEXIS 572 (1896) (decided under former Civil Code 1895, §§ 5248, 5249, 5250, 5251, 5252, 5253, 5254).

Books which were irrelevant, though produced under notice, were not admissible. Gow v. Charlotte, C. & A.R.R., 68 Ga. 54, 1881 Ga. LEXIS 308 (1881) (decided under former Code 1873, §§ 3508, 3509, 3510, 3511, 3512, 3513, 3834).

Motion to produce filed on morning of trial was too late. Williams v. State, 142 Ga. App. 764, 236 S.E.2d 893, 1977 Ga. App. LEXIS 2134 (1977) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Motion to produce timely despite expiration of time under Superior Court Rule 5.1. — Plaintiff who served a notice to produce approximately 20 days prior to trial was entitled to have documents produced even though the six-month discovery period provided by Superior Court Rule 5.1 had expired. Gaffron v. Metropolitan Atlanta Rapid Transit Auth., 229 Ga. App. 426, 494 S.E.2d 54, 1997 Ga. App. LEXIS 1384 (1997), cert. denied, No. S98C0447, 1998 Ga. LEXIS 398 (Ga. Mar. 6, 1998) (decided under former O.C.G.A. § 24-10-26).

Quashing or enforcement of notice. — Motions pursuant to O.C.G.A. §§ 9-11-26, 9-11-34, and 9-11-37 for a protective order or sanctions were not proper vehicles for the quashing or the enforcement of a former O.C.G.A. § 24-10-26 notice to produce. Joel v. Duet Holdings, Inc., 181 Ga. App. 705, 353 S.E.2d 548, 1987 Ga. App. LEXIS 1552 (1987) (decided under former O.C.G.A. § 24-10-26).

Motions to compel and for sanctions were not proper vehicles for the enforcement of a notice to produce. Bergen v. Cardiopul Medical, Inc., 175 Ga. App. 700, 334 S.E.2d 28, 1985 Ga. App. LEXIS 2142 (1985) (decided under former O.C.G.A. § 24-10-26).

Trial court did not have the discretion to hold that a notice to produce under former O.C.G.A. § 24-10-26 had been converted into a request for production under O.C.G.A. § 9-11-34. Bergen v. Cardiopul Medical, Inc., 175 Ga. App. 700, 334 S.E.2d 28, 1985 Ga. App. LEXIS 2142 (1985) (decided under former O.C.G.A. § 24-10-26).

Criminal Cases

1. In General

Application in criminal cases. — See Brown v. State, 238 Ga. 98, 231 S.E.2d 65, 1976 Ga. LEXIS 1114 (1976) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Phillips v. State, 146 Ga. App. 423, 246 S.E.2d 438, 1978 Ga. App. LEXIS 2389 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Natson v. State, 242 Ga. 618, 250 S.E.2d 420, 1978 Ga. LEXIS 1303 (1978), cert. denied, 441 U.S. 925, 99 S. Ct. 2036, 60 L. Ed. 2d 399, 1979 U.S. LEXIS 1667 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Watson v. State, 147 Ga. App. 847, 250 S.E.2d 540, 1978 Ga. App. LEXIS 2975 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Crosby v. State, 150 Ga. App. 804, 258 S.E.2d 593, 1979 Ga. App. LEXIS 2384 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Wilson v. State, 246 Ga. 62, 268 S.E.2d 895, 1980 Ga. LEXIS 1021 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Jackson v. State, 158 Ga. App. 530, 281 S.E.2d 252, 1981 Ga. App. LEXIS 2294 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Use of statute by state. — Former statute applied not only to the obligation of the state to produce certain items, but also applied to any party who desired to compel production of books, writings, or other documents or tangible things in the possession, custody, or control of another party; accordingly, the state had as much right to utilize the former statute as a defendant. Phillips v. State, 146 Ga. App. 423, 246 S.E.2d 438, 1978 Ga. App. LEXIS 2389 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Constitutionality of use by state. — Sanctioning the state's resort to the former statute in compelling a defendant to

In General (Cont'd)

produce specific property for use as evidence against the defendant would have been unconstitutional. Johnson v. State, 156 Ga. App. 496, 274 S.E.2d 837, 1980 Ga. App. LEXIS 3091 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Unconstitutional self-incrimination. — State may not have used a notice to produce to reseize property and redivest the defendant of custody and possession by retaining the property and using the property as evidence in a criminal proceeding; unconstitutional self-incrimination would have been the result of compliance with the state's notice. Johnson v. State, 156 Ga. App. 496, 274 S.E.2d 837, 1980 Ga. App. LEXIS 3091 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Omission of evidence of reasonable doubt is commission of constitutional error. — Proper standard of materiality must have reflected the overriding concern with the justice of the finding of guilt. Such a finding was permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence created a reasonable doubt that did not otherwise exist, constitutional error had been committed. This means that the omission must have been evaluated in the context of the entire record. If there was no reasonable doubt about guilt whether or not the additional evidence was considered, there was no justification for a new trial. On the other hand, if the verdict was already of questionable validity, additional evidence of relatively minor importance might have been sufficient to create a reasonable doubt. Smith v. State, 248 Ga. 507, 284 S.E.2d 406, 1981 Ga. LEXIS 1131 (1981) (decided under former O.C.G.A. § 24-10-26).

No discovery in criminal cases. — Although an accused may have utilized the notice to produce provision of the former statute to compel the production of tangible objects and documents at trial, discovery as such was not available to an accused in criminal cases in Georgia. Howard v. State, 144 Ga. App. 208, 240 S.E.2d 908, 1977 Ga. App. LEXIS 2638 (1977) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Pryor v. State, 238 Ga. 698, 234 S.E.2d 918, 1977 Ga. LEXIS 1172 (1977), cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977), overruled, overruled in part as stated in , Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530, 2006 Ga. LEXIS 840 (2006), overruled in part as stated in Scott v. State, 356 Ga. App. 152, 846 S.E.2d 241, 2020 Ga. App. LEXIS 416 (2020); Toole v. State, 146 Ga. App. 305, 246 S.E.2d 338, 1978 Ga. App. LEXIS 2330 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Notice to produce not used to circumvent discovery reciprocity. — Notice to produce under former O.C.G.A. § 24-10-26 could not be used as a discovery tool to circumvent discovery reciprocity under the discovery act. Farmer v. State, 222 Ga. App. 506, 474 S.E.2d 711 (decided under former O.C.G.A. § 24-10-26); McGuire v. State, 243 Ga. App. 899, 534 S.E.2d 549, 2000 Ga. App. LEXIS 598 (2000) (decided under former O.C.G.A. § 24-10-26).

Compared with Civil Practice Act. — Notice to produce in a criminal case was not as all-inclusive as a request to produce discoverable evidence under the Civil Practice Act. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895, 1980 Ga. LEXIS 1021 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

There was no absolute right to examine original evidence; the motion for an independent examination must have been timely made, and the accused must have shown that the original evidence was materially favorable to the accused. Brooks v. State, 141 Ga. App. 725, 234 S.E.2d 541, 1977 Ga. App. LEXIS 2061 (1977) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Criminal defendant had burden of showing how defendant's case had been

materially prejudiced by failure to produce even when trial court declined to make an in camera inspection. Patterson v. State, 154 Ga. App. 877, 270 S.E.2d 86, 1980 Ga. App. LEXIS 2427 (1980) (decided under former O.C.G.A. § 24-10-26).

In camera inspection. — On motion for production of specific material, the defendant must have been furnished exculpatory information; i.e., information favorable to the defendant and material either to guilt or punishment. When a motion was made and the prosecutor did not make the specified material available to defense counsel, the trial judge should have made an in camera inspection of the material sought. On motion by the defendant the material examined in camera should either have been sealed and filed, or an inventory or record of the examined material made so as to permit appellate review. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895, 1980 Ga. LEXIS 1021 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Refusal to search for evidence. — Prosecution did not suppress evidence by refusing to conduct a search for the evidence, even though the evidence may have been more accessible to the state than to the defense. Baker v. State, 245 Ga. 657, 266 S.E.2d 477, 1980 Ga. LEXIS 883 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Right of victim prevails over right of defendant. — Fourth Amendment right of the victim of a crime to be secure against an unreasonable search must have prevailed over the right of the accused to obtain evidence for the accused's defense. State v. Haynie, 240 Ga. 866, 242 S.E.2d 713, 1978 Ga. LEXIS 858 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Confidential informant. — It was within the sound discretion of a trial court whether to require the state to disclose to the defendant the name and address of a confidential informant. Clayton v. State, 145 Ga. App. 541, 244 S.E.2d 67, 1978 Ga. App. LEXIS 2028 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

2. Items Not Subject to Notice to Produce

Material not in state's possession was not subject to a notice to produce. — Ferrell v. State, 149 Ga. App. 405, 254 S.E.2d 404, 1979 Ga. App. LEXIS 1873 (1979), cert. denied, 444 U.S. 1021, 100 S. Ct. 679, 62 L. Ed. 2d 653, 1980 U.S. LEXIS 365 (1980); Patterson v. State, 154 Ga. App. 877, 270 S.E.2d 86, 1980 Ga. App. LEXIS 2427 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

When the materials sought by defendant were not types of items reasonably expected to be found in the custody of the solicitor (now district attorney) preparing the case against the defendant and such evidence could have been obtained only if the prosecution actively sought the evidence, thereby causing the state to investigate the case for the defense, the trial court did not err in denying the defendant's motion to produce such evidence or in denying the motion for continuance based upon the absence of the materials in the courtroom at the time of trial. Fletcher v. State, 157 Ga. App. 707, 278 S.E.2d 444, 1981 Ga. App. LEXIS 1979 (1981) (decided under former O.C.G.A. § 24-10-26).

In a prosecution for homicide by vehicle, it was not error to deny the defendant's motion to produce the deceased's automobile, absent a showing that the automobile was in the state's possession, custody, or control. Wheat v. State, 171 Ga. App. 583, 320 S.E.2d 808, 1984 Ga. App. LEXIS 2286 (1984) (decided under former O.C.G.A. § 24-10-26).

State was not required to produce documents pursuant to defendants' motions, since the materials sought were not of the type reasonably expected to be found in the custody of the solicitor (now district attorney) preparing the case. Dixon v. State, 196 Ga. App. 15, 395 S.E.2d 577, 1990 Ga. App. LEXIS 797 (1990), cert. denied, No. S91C1570, 1991 Ga. LEXIS 613 (Ga. Sept. 6, 1991) (decided under former O.C.G.A. § 24-10-26).

In a prosecution for driving under the influence, the state was not required to

Items Not Subject to Notice to Produce (Cont'd)

comply with defendant's notice to produce documents relating to the Intoxilyzer because such materials are not reasonably expected to be found in the possession, custody, or control of the prosecutor. Maurer v. State, 240 Ga. App. 145, 525 S.E.2d 104 (decided under former O.C.G.A. § 24-10-26).

District attorney's work product. — Notice to produce could not be used in a criminal case to require the production of the district attorney's work product; reports, memoranda, and documents in the files of law enforcement officers; addresses and telephone numbers of the state's witnesses; or the names and addresses of other persons with knowledge of the facts. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895, 1980 Ga. LEXIS 1021 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

File of district attorney. — Defendant in a criminal case did not have the right to inspect the file of the district attorney before the defendant was put on trial. White v. State, 230 Ga. 327, 196 S.E.2d 849, 1973 Ga. LEXIS 896 (1973) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Notice to produce could not be used to enable defense counsel to examine, in advance of trial or evidentiary hearing, the contents of the district attorney's file. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895, 1980 Ga. LEXIS 1021 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Defendant's diaries, which were in the state's possession, were not a proper subject of discovery under former O.C.G.A. § 24-10-26 (now see O.C.G.A § 24-13-27). Sims v. State, 251 Ga. 877, 311 S.E.2d 161, 1984 Ga. LEXIS 530 (1984) (decided under former O.C.G.A. § 24-10-26).

Statement of defendant. — State was under no duty to provide defense counsel a prior contradictory statement of defendant which impeached defendant because the statement was neither exculpatory nor likely to be used in evidence by the defense. Farmer v. State, 222 Ga. App. 506, 474 S.E.2d 711 (decided under former O.C.G.A. § 24-10-26).

Photos of the crime scene not presented in evidence by the state and not exculpatory were not subject to discovery. Sims v. State, 251 Ga. 877, 311 S.E.2d 161, 1984 Ga. LEXIS 530 (1984) (decided under former O.C.G.A. § 24-10-26).

Statements of witnesses in the prosecutor's files, if nothing more appeared, may not have been reached by statutory provisions on notice to produce. Stevens v. State, 242 Ga. 34, 247 S.E.2d 838, 1978 Ga. LEXIS 1080 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Spain v. State, 243 Ga. 15, 252 S.E.2d 436, 1979 Ga. LEXIS 780 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Holton v. State, 243 Ga. 312, 253 S.E.2d 736, 1979 Ga. LEXIS 896, cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181, 1979 U.S. LEXIS 3473 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Hamby v. State, 243 Ga. 339, 253 S.E.2d 759, 1979 Ga. LEXIS 902 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Stanley v. State, 153 Ga. App. 42, 264 S.E.2d 533, 1980 Ga. App. LEXIS 1663 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Wilson v. State, 246 Ga. 62, 268 S.E.2d 895, 1980 Ga. LEXIS 1021 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650, 1981 Ga. LEXIS 873 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982); Hill v. State, 161 Ga. App. 346, 287 S.E.2d 779, 1982 Ga. App. LEXIS 1871 (1982) (decided under former O.C.G.A. § 24-10-26); Holbrook v. State, 162 Ga. App. 400, 291 S.E.2d 729, 1982 Ga. App. LEXIS 3133 (1982) (decided under former

O.C.G.A. § 24-10-26); Ivester v. State, 252 Ga. 333, 313 S.E.2d 674, 1984 Ga. LEXIS 668 (1984) (decided under former O.C.G.A. § 24-10-26); Pittman v. State, 175 Ga. App. 50, 332 S.E.2d 356, 1985 Ga. App. LEXIS 2012 (1985) (decided under former O.C.G.A. § 24-10-26).

Witness statements have never been subject to a notice to produce, although exculpatory witness statements were subject to disclosure, if requested under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Welch v. State, 251 Ga. 197, 304 S.E.2d 391, 1983 Ga. LEXIS 763 (1983) (decided under former O.C.G.A. § 24-10-26); Ivester v. State, 252 Ga. 333, 313 S.E.2d 674, 1984 Ga. LEXIS 668 (1984) (decided under former O.C.G.A. § 24-10-26).

Pretrial statements of state's witnesses were not within the ambit of former O.C.G.A. § 24-10-26 (now see O.C.G.A. § 24-13-27) notice to produce. Ford v. State, 256 Ga. 375, 349 S.E.2d 361, 1986 Ga. LEXIS 853 (1986) (decided under former O.C.G.A. § 24-10-26).

Evidence used on behalf of state and not needed for defense. — Failure to produce a photo array which was displayed to an eyewitness before the array was introduced at trial did not violate former O.C.G.A. § 24-10-26 (now see O.C.G.A § 24-13-27) since the array and the identification pursuant to it were used as evidence on behalf of the state, and were not needed by the defendant as evidence in support of the defendant's defense. Gilstrap v. State, 256 Ga. 20, 342 S.E.2d 667, 1986 Ga. LEXIS 650 (1986) (decided under former O.C.G.A. § 24-10-26).

Trial court did not err in admitting two photographs of a rape victim when, although the state had not supplied the photographs in response to defendant's pretrial notice to produce, the photographs were used as evidence on behalf of the state and were not needed by defendant as evidence in support of defendant's defense. Sweetenburg v. State, 197 Ga. App. 36, 397 S.E.2d 451, 1990 Ga. App. LEXIS 1185 (1990), cert. denied, No. S91C0055, 1990 Ga. LEXIS 495 (Ga. Oct. 24, 1990) (decided under former O.C.G.A. § 24-10-26).

Police surveillance videotape was not subject to discovery since the tape was not needed for use as evidence on the defendant's behalf and was only introduced on re-direct examination to rehabilitate the testimony of a witness. Deal v. State, 199 Ga. App. 184, 404 S.E.2d 343, 1991 Ga. App. LEXIS 408 (1991) (decided under former O.C.G.A. § 24-10-26).

Statement of nonwitness. — When no exculpatory material was suppressed, there was no requirement that the prosecution allow discovery of a statement of a person who was not a trial witness. Crosby v. State, 150 Ga. App. 804, 258 S.E.2d 593, 1979 Ga. App. LEXIS 2384 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Tape recordings of drug transaction. — Tape recording of a drug transaction was not discoverable pursuant to former O.C.G.A. § 24-10-26 nor under § 17-7-210 [repealed], since the recording was not of any taped statement given by the defendant while in police custody, nor under former § 17-7-211, since the tape recording did not constitute a written scientific report. Weldon v. State, 204 Ga. App. 221, 419 S.E.2d 59, 1992 Ga. App. LEXIS 747 (1992) (decided under former O.C.G.A. § 24-10-26).

Police and investigation reports. — Former statute did not require a district attorney to open the district attorney's files to the attorney for the accused, nor was the accused entitled as a matter of right to receive copies of police reports and investigation reports made in the course of preparing the case against the client. Stevens v. State, 242 Ga. 34, 247 S.E.2d 838, 1978 Ga. LEXIS 1080 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

There was no Georgia procedure requiring the district attorney to open the district attorney's files to the accused, nor was the accused entitled as a matter of right to receive copies of police reports and investigation reports made in the course of preparing the case against the accused. Baker v. State, 245 Ga. 657, 266 S.E.2d 477, 1980 Ga. LEXIS 883 (1980) (decided under former Code 1933, §§ 38-801, 38-

Items Not Subject to Notice to Produce (Cont'd)

802, 38-803, 38-804, 38-805, 38-806, 38-807).

Reports and summaries made by police investigators were not the types of "books, writings or other documents or tangible things" subject to a notice to produce. Carter v. State, 150 Ga. App. 119, 257 S.E.2d 11, 1979 Ga. App. LEXIS 2152 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Bennett v. State, 158 Ga. App. 421, 280 S.E.2d 429, 1981 Ga. App. LEXIS 2238 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Intoximeter data. — Computer data upon which an intoximeter test was based were not the types of items reasonably expected to be found in the "custody" of the solicitor (now district attorney) preparing the case against the defendant. Ross v. State, 192 Ga. App. 850, 386 S.E.2d 721, 1989 Ga. App. LEXIS 1221 (1989) (decided under former O.C.G.A. § 24-10-26).

Improper use of notice to produce. — Defendant having "moved to suppress" the evidence by virtue of contesting the libel for condemnation of former Code 1933, § 79A-828 (see now O.C.G.A. § 16-13-49) and the state having failed to meet the state's burden in that regard, the state may not use the notice to produce to "reseize" the property for evidentiary purposes. Johnson v. State, 156 Ga. App. 496, 274 S.E.2d 837, 1980 Ga. App. LEXIS 3091 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Possession of bullet in body of victim. — State could not, under any theory, be deemed to have in the state's possession a bullet lodged in the body of a victim of a crime, and the state did not have any more right to require the removal of a bullet from the body of a living victim than did the accused. State v. Haynie, 240 Ga. 866, 242 S.E.2d 713, 1978 Ga. LEXIS 858 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

3. Items Subject to Notice to Produce

Admissible and necessary evidence. — Notices to produce could be used in a criminal case "to compel production of books, writings or other documents or tangible things in the possession, custody or control" of the opposite party (district attorney and investigating officers), for use at trial or at a pretrial evidentiary hearing, when such books, etc., would be admissible and were needed for use as evidence on behalf of the defendant. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895, 1980 Ga. LEXIS 1021 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Tangible objects and documents. — Accused may have used the notice to produce provision to compel the production of tangible objects and documents at trial. Brooks v. State, 141 Ga. App. 725, 234 S.E.2d 541, 1977 Ga. App. LEXIS 2061 (1977) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

More than list of witnesses. — Notice to produce was available in criminal cases for more than the limited purpose of obtaining a copy of the accusation and list of witnesses already available under former Code 1933, § 27-1403 [repealed]. Brown v. State, 238 Ga. 98, 231 S.E.2d 65, 1976 Ga. LEXIS 1114 (1976) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Exculpatory matter. — Defendant was entitled to discovery of all exculpatory matter and anything in the district attorney's file which was favorable to defendant's defense. Maddox v. State, 136 Ga. App. 370, 221 S.E.2d 231, 1975 Ga. App. LEXIS 1354 (1975) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Material creating reasonable doubt. — Prosecutor was under a duty to furnish the defendant, without request, material which created a reasonable doubt as to the defendant's guilt. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895, 1980

Ga. LEXIS 1021 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 24-10-26 are included in the annotations for this Code section.

Law enforcement officer who was covered by the Fair Labor Standards Act of 1938 would not be entitled to the witness fee established by former O.C.G.A. § 24-10-26 for testifying during "off-duty" hours. 1986 Op. Att'y Gen. No. U86-26 (decided under former O.C.G.A. § 24-10-26).

RESEARCH REFERENCES

C.J.S.

32A C.J.S., Evidence, § 755.

ALR.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution, 7 A.L.R.3d 8.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 A.L.R.3d 181.

24-13-28. Witness fees for law enforcement officers.

(a) As used in this Code section, the term:

(1) "Director" means the appropriate chief of police, sheriff, director of public safety of a college or university, local fire chief, director of the Georgia Bureau of Investigation, the commanding officer of the Georgia State Patrol, the commissioner of natural resources, the superintendent of a correctional institution, or the state fire marshal.

(2) "Law enforcement officer" means any member of a municipal or county police force, any deputy sheriff, any campus policeman as defined in Code Section 20-8-1, any member of a local fire department, any member of the Georgia State Patrol or Georgia Bureau of Investigation, any correctional officer, any person employed by the Department of Natural Resources as a law enforcement officer, or any arson investigator of the state fire marshal's office.

(3) "Regular duty hours" means the daily shift of duty to which a law enforcement officer is assigned and shall not include paid or unpaid vacation, paid or unpaid sick leave, paid or unpaid holiday leave, or any other paid or unpaid leave status established pursuant to the personnel regulations or scheduling practices of the employing agency.

(b) Any law enforcement officer who shall be required by subpoena to attend any superior court, other courts having jurisdiction to enforce the penal laws of this state, municipal court having jurisdiction to

enforce the penal laws of this state as provided by Code Section 40-13-21, juvenile court, grand jury, hearing or inquest held or called by a coroner, or magistrate court involving any criminal matter, as a witness on behalf of the state during any hours except the regular duty hours to which the officer is assigned, shall be paid for such attendance at a fixed rate to be established by the governing authority, but not less than $25.00 per diem. The claim for the witness fees shall be endorsed on the subpoena showing the dates of attendance and stating that attendance was required during the hours other than the regular duty hours to which the claimant was assigned. The claimant shall verify this statement. The dates of attendance shall be certified by the judge or the prosecuting attorney of the court attended. The director or his or her designee shall certify that the claimant has not received any overtime pay for his or her attendance and that his or her attendance was required during hours other than regular duty hours. The amount due shall be paid by the governing body authorized to dispense public funds for the operation of the court. However, no such law enforcement officer shall claim or receive more than one witness fee per day for attendance in any court or before the grand jury regardless of the number of subpoenas which the law enforcement officer may have received requiring such officer to appear in such court or before the grand jury on any one day.

(c)(1) Except as provided in paragraph (2) of this subsection, any law enforcement officer who shall be required by subpoena to attend any court of this state with respect to any civil proceeding, as a witness concerning any matter relative to the law enforcement duties of such law enforcement officer during any hours except the regular duty hours to which the law enforcement officer is assigned, shall be paid for such attendance at a fixed rate to be established by the governing authority, but not less than $25.00 per diem. Any such law enforcement officer shall also be entitled to the mileage allowance provided in Code Section 24-13-25 when such law enforcement officer resides outside the county where the testimony is to be given. The claim for the witness fees shall be endorsed on the subpoena showing the dates of attendance and stating that attendance was required during the hours other than the regular duty hours to which the claimant was assigned. The claimant shall verify such statement. The dates of attendance shall be certified by the party obtaining the subpoena. The director or his or her designee shall certify that the claimant has not received any overtime pay for the law enforcement officer's attendance and that such law enforcement officer's attendance was required during hours other than regular duty hours.

(2) Any law enforcement officer covered by paragraph (1) of this subsection who is required by subpoena to attend any court with respect to any civil proceeding, as a witness concerning any matter

which is not related to the duties of such law enforcement officer, shall be compensated as provided in Code Section 24-13-25.

(d) The fee specified by subsections (b) and (c) of this Code section shall not be paid if the law enforcement officer receives any overtime pay for time spent attending such court pursuant to the subpoena.

History.
Code 1981, § 24-13-28, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-27 are included in the annotations for this Code section.

Failure of proof that fee accrued. — When a police officer did not in the officer's affidavit verify that the officer's attendance was required during hours which were other than the officer's regularly assigned duty hours and there was no certification from the officer's superior that the officer was neither paid additional compensation nor given time off on account of the officer's service, there was a failure of proof that a witness fee had accrued. Walden v. State, 185 Ga. App. 413, 364 S.E.2d 304, 1987 Ga. App. LEXIS 2513 (1987), rev'd in part, 258 Ga. 503, 371 S.E.2d 852, 1988 Ga. LEXIS 369 (1988) (decided under former O.C.G.A. § 24-10-27).

Lodging and airfare costs. — There was no specific statutory authorization for assessing a criminal defendant for the lodging and airfare costs of witnesses for the state. Smith v. State, 272 Ga. 83, 526 S.E.2d 59, 2000 Ga. LEXIS 96 (2000) (reversing Smith v. State, 236 Ga. App. 548, 512 S.E.2d 19, 1999 Ga. App. LEXIS 104 (1999)) (decided under former O.C.G.A. § 24-10-27).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1968, p. 434, § 1, former Ga. L. 1978, p. 925, § 1, former Ga. L. 1980, p. 439, § 1, and former O.C.G.A. § 24-10-27 are included in the opinions for this Code section.

Criminal as well as civil cases. — County must pay the per diem witness fee to witnesses summoned in criminal cases, as well as to those summoned in civil cases; the source of funds for witness fees was from county taxes. 1970 Op. Att'y Gen. No. U70-11. (decided under former Ga. L. 1968, p. 434, § 1).

Word "member" in the former statute did not include fingerprint experts employed by the Division of Investigation. 1972 Op. Att'y Gen. No. 72-157. (decided under former Ga. L. 1968, p. 434, § 1).

Peace officer who, required by subpoena, attended court on behalf of the state during any hours except regular duty hours, was entitled to mileage as provided by former O.C.G.A. § 24-10-24 (see now O.C.G.A. § 24-13-28); under these conditions, the peace officer was also entitled to per diem as provided in Ga. L. 1968, p. 434, § 1 (see O.C.G.A. § 24-13-27). 1971 Op. Att'y Gen. No. U71-57.

Attendance at justice court commitment hearing did not entitle an officer to a fee. 1970 Op. Att'y Gen. No. U70-234. (decided under former Ga. L. 1968, p. 434, § 1).

Endorsement of claim for fees. — Under the provisions of former O.C.G.A. § 24-10-27 (now see O.C.G.A. § 24-13-28), a post commander may have endorsed a state trooper's claim for witness fees stating that attendance was required during hours other than the trooper's regular duty hours. However, only the commanding officer of the division to which the

trooper was assigned was authorized to certify that the claimant had been paid no additional compensation and had been given no time off on account of the claimant's court appearance. 1985 Op. Att'y Gen. No. U85-28. (decided under former O.C.G.A. § 24-10-27).

Subpoena of duty records by grand juries. — Grand juries did not have the power to subpoena duty records of the state patrol or city police to determine the accuracy of disbursement of witness fees by the clerk's office. 1985 Op. Att'y Gen. No. U85-28. (decided under former O.C.G.A. § 24-10-27).

RESEARCH REFERENCES

C.J.S.
98 C.J.S. (Rev), Witnesses, § 147.

24-13-29. Legislators' exemption.

No member of the General Assembly of Georgia shall be compelled to attend and give testimony at any hearing or trial or to produce evidence while the General Assembly is in regular or extraordinary session.

History.
Code 1981, § 24-13-29, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

ARTICLE 3

SECURING ATTENDANCE OF PRISONERS

Law reviews.
For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-13-60. Order requiring prisoner's delivery to serve as witness or criminal defendant generally; expenses; prisoner under death sentence as witness.

(a) When a prisoner confined in any state prison, county correctional institution, or other penal institution under the jurisdiction of the Board of Corrections, other than a prisoner under a death sentence, is needed as a witness in any judicial proceeding in any court of record in this state or when it is desired that such person stand trial on an indictment or accusation charging the prisoner with commission of a felony or misdemeanor, the judge of the court wherein the proceeding is pending shall be authorized to and shall issue an ex parte order, directed to the commissioner of corrections, requiring the prisoner's delivery to the sheriff of the county where the prisoner is desired as a witness or accused. The sheriff or his or her deputies shall take custody of the prisoner on the date named in the order, safely keep the prisoner pending the proceeding, and return him or her to the original place of detention after the prisoner's discharge by the trial judge.

(b) If the prisoner was desired as a witness by this state in a criminal

proceeding or if the prisoner's release to the sheriff was for the purpose of standing trial on criminal charges, the county wherein the proceeding was pending shall pay all expenses of transportation and keeping, including per diem and mileage of the sheriff, jail fees, and any other proper expense approved by the trial judge.

(c) If the prisoner was desired as a witness by the accused in a criminal proceeding or by either party to a civil proceeding, the costs and expenses referred to in subsection (b) of this Code section shall be borne by the party requesting the prisoner as a witness. The court shall require a deposit of money sufficient to defray same, except where the judge, after examining into the matter, determines that the prisoner's presence is required by the interests of justice and that the party requesting it is financially unable to make the deposit, in which case the expenses shall be taxed as costs of court.

(d) If a prisoner under a death sentence is needed as a witness for either the prosecution or the defense in any felony case, the requesting party may interview the proposed witness. Following such interview, the requesting party may move for a writ of habeas corpus ad testificandum. Such motion shall be accompanied by a proffer of the testimony of the proposed witness. The requesting party shall make such motion and proffer as soon as possible but shall not make such motion later than 20 days prior to the date of the trial. Nothing in this Code section shall limit the right of a party from presenting a material witness at a hearing or trial and to have compulsory process for that purpose.

History.
Code 1981, § 24-13-60, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 38-2001—38-2005 and former O.C.G.A. § 24-10-60 are included in the annotations for this Code section.

Some showing of need was contemplated in the production of convicts as witnesses. Reid v. State, 119 Ga. App. 368, 166 S.E.2d 900, 1969 Ga. App. LEXIS 1104 (1969) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005); Brand v. State, 154 Ga. App. 781, 270 S.E.2d 206, 1980 Ga. App. LEXIS 2386 (1980) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005).

Trial judge must exercise discretion in determining whether the presence of the witnesses was "required by the ends of justice" (now "interests of justice"). In the exercise of the judge's discretion, the trial judge could require this to be shown by affidavits or depositions. Phillips v. Hopper, 237 Ga. 68, 227 S.E.2d 1, 1976 Ga. LEXIS 1154 (1976) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005).

Defendant has the burden of satisfying the trial court that the defendant was unable to pay the expenses of having prisoners produced as witnesses and that the presence of the prisoners as witnesses was required by the ends of justice before

the defendant can secure an order requiring the production of the prisoners as witnesses and taxing the expenses thereof as costs of courts. Phillips v. Hopper, 237 Ga. 68, 227 S.E.2d 1, 1976 Ga. LEXIS 1154 (1976) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005).

Habeas corpus. — Former law did not require the court to subpoena witnesses at the request of the petitioner for habeas corpus. Phillips v. Hopper, 237 Ga. 68, 227 S.E.2d 1, 1976 Ga. LEXIS 1154 (1976) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005).

Prisoner not required to pay prisoner's expenses. — Prisoner confined in the state penitentiary under a prior conviction was not required to pay expenses involved in the prisoner's transportation from the state penitentiary to the county of the superior court for trial of a pending indictment or indictments against the prisoner therein, or the expenses of the prisoner's return from the county of the prisoner's trial to the state penitentiary; these expenses were a proper charge of the county of that trial court. Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461, 1967 Ga. App. LEXIS 914 (1967) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005).

Court had no compulsory process powers without state. — Reid v. State, 119 Ga. App. 368, 166 S.E.2d 900, 1969 Ga. App. LEXIS 1104 (1969) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005).

RESEARCH REFERENCES

ALR.

Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 A.L.R.2d 762.

Right of defendant in criminal proceeding to have immunity from prosecution granted to defense witness, 4 A.L.R.4th 617.

24-13-61. Issuance of order requiring prisoner's delivery to serve as witness in superior court.

Any judge of the superior court may issue an order to any officer having a lawfully imprisoned person in his or her custody, requiring the production of such person before the court for the purpose of giving evidence in any criminal cause pending therein, without any formal application or writ of habeas corpus ad testificandum for that purpose.

History.

Code 1981, § 24-13-61, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, § 4027, former Penal Code 1895, § 1230, former Penal Code 1910, § 1311, former Code 1933, § 50-123, and former O.C.G.A. § 24-10-61 are included in the annotations for this Code section.

Accused had the right to have the presence of the inmate compelled by court order, pursuant to former O.C.G.A. § 24-10-61, and when the witness, without fault on the part of the accused, failed to be present when the case was called, the accused was entitled to a continuance in order to obtain the presence of the witness. Grant v. State, 212 Ga. App. 565, 442 S.E.2d 899 (1994) (decided under former O.C.G.A. § 24-10-61).

Tender of expenses. — Tender of money to defray the expenses of the wit-

ness was not necessary since application was made to the court. Roberts v. State, 72 Ga. 673, 1884 Ga. LEXIS 304 (1884) (decided under former Code 1882, § 4027).

RESEARCH REFERENCES

Am. Jur. 2d.
81 Am. Jur. 2d, Witnesses, § 5.
C.J.S.
98 C.J.S. (Rev), Witnesses, § 107 et seq.
ALR.
Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 A.L.R.2d 762.

24-13-62. Issuance of writ of habeas corpus requiring prisoner's delivery to serve as witness in superior court.

The writ of habeas corpus ad testificandum may be issued by the superior court to cause the production in court of any witness under legal imprisonment.

History.
Code 1981, § 24-13-62, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-1505 and former O.C.G.A. § 24-10-62 are included in the annotations for this Code section.

Some showing of need was contemplated. Brand v. State, 154 Ga. App. 781, 270 S.E.2d 206, 1980 Ga. App. LEXIS 2386 (1980) (decided under former Code 1933, § 38-1505).

Dismissal of inmate's mandamus action was error. — Trial court erred when the court dismissed an inmate's mandamus action pursuant to O.C.G.A. § 9-6-20, wherein the inmate sought additional jail time credit, upon the inmate's failure to appear at a hearing in the matter, as the trial court failed to rule on the inmate's motion for habeas corpus ad testificandum under former O.C.G.A. § 24-10-62 and, accordingly, the inmate had no ability to appear in court on the hearing date. Rozar v. Donald, 280 Ga. 111, 622 S.E.2d 850, 2005 Ga. LEXIS 862 (2005) (decided under former O.C.G.A. § 24-10-62).

RESEARCH REFERENCES

C.J.S.
98 C.J.S. (Rev), Witnesses, § 107.
ALR.
Constitutionality of statute restoring competency of convicts as witnesses, 63 A.L.R. 982.

Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 A.L.R.2d 762.

ARTICLE 4

UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE

Cross references.

Securing attendance of witnesses at grand jury or trial proceedings generally, § 17-7-190 et seq.

Procedure for testimony of out of state witnesses in guardianship or conservatorship proceeding, § 29-11-6.

Law reviews.

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. Art. 5, Ch. 10, T. 24 are included in the annotations for this Code section.

Under Georgia's new Evidence Code, unless a fact-finding proceeding involves one of the 12 situations enumerated in O.C.G.A. § 24-1-2(c) and (d), the rules of evidence fully apply; similarity to one or more of the enumerated situations is insufficient to limit the applicability of the evidence rules. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

Provisions of § 17-7-192 not applicable to procedure to secure witnesses. — Provisions of O.C.G.A. § 17-7-192, prohibiting a continuance due to the absence of witnesses when the accused failed to use the means provided in the former statutory provisions, which dealt with the accused's right to obtain subpoenas for such witnesses as the accused may deem material for the accused's defense, did not apply to the procedure set forth in former O.C.G.A. Art. 5, Ch. 10, T. 24 (see now O.C.G.A. Art. 4, Ch. 13, T. 24). Farrell v. State, 160 Ga. App. 321, 287 S.E.2d 318, 1981 Ga. App. LEXIS 3055 (1981) (decided under former O.C.G.A. Art. 5, Ch. 10, T. 24).

Defendant lacked standing to complain of any procedural irregularities involved in obtaining a witness whom the state procured by means of former O.C.G.A. Art. 5, Ch. 10, T. 24 (see now O.C.G.A. Art. 4, Ch. 13, T. 24). Moon v. State, 258 Ga. 748, 375 S.E.2d 442, 1988 Ga. LEXIS 521 (1988), cert. denied, 499 U.S. 982, 111 S. Ct. 1638, 113 L. Ed. 2d 733, 1991 U.S. LEXIS 2295 (1991) (decided under former O.C.G.A. Art. 5, Ch. 10, T. 24).

Application of rules of evidence. — Under O.C.G.A. § 24-1-2(b), the rules of evidence apply to a proceeding for issuance of a material witness certificate under the out-of-state witness act unless one of the exceptions in § 24-1-2(c) or (d) applies. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

RESEARCH REFERENCES

U.L.A.

Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (U.L.A.). Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (U.L.A.).

ALR.

Availability under uniform act to secure the attendance of witnesses from without a state in criminal proceedings of subpoena duces tecum, 7 A.L.R.4th 836.

Sufficiency of evidence to support or require finding that out-of-state witness in criminal case is "material witness" justifying certificate to secure attendance under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 A.L.R.4th 742.

Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 A.L.R.4th 771.

24-13-90. Short title.

This article shall be known and may be cited as "The Uniform Act to Secure the Attendance of Witnesses from Without the State."

History.

Code 1981, § 24-13-90, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

For annual survey of evidence law, see 67 Mercer L. Rev. 63 (2015).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-90 are included in the annotations for this Code section.

Subpoena duces tecum request not sufficiently specific. — Trial court properly denied a child molestation defendant's motion for a subpoena duces tecum to obtain out-of-state records pertaining to the victims. The defendant failed to identify any specific person, entity, agency, or records custodian who should be directed to produce the records and thus did not satisfy the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. French v. State, 288 Ga. App. 775, 655 S.E.2d 224, 2007 Ga. App. LEXIS 1181 (2007) (decided under former O.C.G.A. § 24-10-90).

Wrong standard applied for refusing certificate. — Trial court applied the wrong standard when the court refused to issue a certificate under the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), to secure the appearance of an out-of-state witness because the trial court concluded that the defendant failed to show that the witness was necessary and material, but the trial court simply had to determine whether a witness was "material." DiMauro v. State, 310 Ga. App. 526, 714 S.E.2d 105, 2011 Ga. App. LEXIS 607 (2011) (decided under former O.C.G.A. § 24-10-90).

Error in application of hearsay rules to material witness consideration. — Trial court erred in applying the hearsay rules to exclude the appellant's proffered documents from the evidence the court considered in ruling on a motion for material witness certificates as to the Kentucky-based manufacturer of the breathalyzer because an exception under O.C.G.A. § 24-1-2(c)(1) applied. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

25B Am. Jur. Pleading and Practice Forms, Witnesses, § 1.

24-13-91. Definitions.

As used in this article, the term:

(1) "Penal institution" means a jail, prison, penitentiary, house of correction, or other place of penal detention.

(2) "State" means any state or territory of the United States and the District of Columbia.

(3) "Summons" means a subpoena, order, or other notice requiring the appearance of a witness.

(4) "Witness" means a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal prosecution or proceeding held by the prosecution or the defense, including a person who is confined in a penal institution in any state.

History.
Code 1981, § 24-13-91, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-91 are included in the annotations for this Code section.

No counsel error in failing to secure witness for trial. — Because the only testimony in a hearing on a motion for a new trial with regard to defendant's murder conviction regarding the content of defendant's sister's potential testimony showed that it would have merely reiterated defendant's mother's testimony, the trial court did not err by failing to secure the attendance of the sister through an interstate subpoena. Tollette v. State, 280 Ga. 100, 621 S.E.2d 742, 2005 Ga. LEXIS 770 (2005), cert. denied, 549 U.S. 893, 127 S. Ct. 199, 166 L. Ed. 2d 162, 2006 U.S. LEXIS 5449 (2006) (decided under former O.C.G.A. § 24-10-91).

Determination of whether witness was necessary and material. — It was the out-of-state judge who must decide whether the sought-after witness was necessary and material, not the requesting court in Georgia. The Georgia trial judge presented with a request for a certificate was charged with deciding whether the sought-after witness was a "material witness," under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, former O.C.G.A. § 24-10-94(a) (see now O.C.G.A. § 24-13-94); in light of the former Uniform Act, former O.C.G.A. § 24-10-97 (see now O.C.G.A. § 24-13-97), "material witness" was construed as a witness who could testify about matters having some logical connection with the consequential facts, especially if few others, if any, knew about these matters. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699, 2011 Ga. LEXIS 502 (2011) (decided under former O.C.G.A. § 24-10-91).

RESEARCH REFERENCES

Am. Jur. 2d.
81 Am. Jur. 2d, Witnesses, §§ 50, 51.

C.J.S.
98 C.J.S. (Rev), Witnesses, § 1.

24-13-92. Procedure for compelling witness attendance before a foreign court in criminal or grand jury proceedings; expenses; punishment.

(a) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court or that a grand jury investigation has commenced or is about to commence, that a person within this state is a material witness in such prosecution or grand jury investigation, and that the witness's presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which the person is found, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing. The witness shall at all times be entitled to counsel.

(b) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and the laws of the state in which the prosecution is pending or grand jury investigation has commenced or is about to commence will give to such witness protection from arrest and the service of civil and criminal process, the judge shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing, the certificate shall be prima-facie evidence of all the facts stated therein.

(c) If such certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure the witness's attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that the witness be forthwith brought before him or her for the hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima-facie proof of such desirability, may, in lieu of issuing a subpoena or summons, order that the witness be forthwith taken into custody and delivered to an officer of the requesting state.

(d) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 45¢ a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending and $25.00 for each day that the witness is required to travel and attend as a witness, fails without good

cause to attend and testify as directed in the summons, the witness shall be punished in the manner provided for in Code Section 24-13-26.

History.
Code 1981, § 24-13-92, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1976, p. 1366, § 3 and former O.C.G.A. § 24-10-92 are included in the annotations for this Code section.

Application of rules of evidence. — Under Georgia's new Evidence Code, unless a fact-finding proceeding involves one of the 12 situations enumerated in O.C.G.A. § 24-1-2(c) and (d), the rules of evidence fully apply; similarity to one or more of the enumerated situations is insufficient to limit the applicability of the evidence rules. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

Application of rules of evidence to issuance of material witness certificate. — Under O.C.G.A. § 24-1-2(b), the rules of evidence apply to a proceeding for issuance of a material witness certificate under the out-of-state witness act unless one of the exceptions in § 24-1-2(c) or (d) applies. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

Scope. — Former statute did not provide for the issuance of a subpoena, but was rather a process for obtaining a court order for the production of the witness, who could also appear in the jurisdiction where the witness was found and convince the court to deny or quash the subpoena. Mafnas v. State, 149 Ga. App. 286, 254 S.E.2d 409, 1979 Ga. App. LEXIS 1820 (1979), overruled, Davenport v. State, 289 Ga. 399, 711 S.E.2d 699, 2011 Ga. LEXIS 502 (2011) (decided under former law).

Defendant lacked standing to complain of any procedural irregularities involved in obtaining a witness whom the state had procured by means of former O.C.G.A. Art. 5, Ch. 10, T. 24. Moon v. State, 258 Ga. 748, 375 S.E.2d 442, 1988 Ga. LEXIS 521 (1988), cert. denied, 499 U.S. 982, 111 S. Ct. 1638, 113 L. Ed. 2d 733, 1991 U.S. LEXIS 2295 (1991) (decided under former O.C.G.A. § 24-10-92).

No guarantee of appearance. — Right to compulsory process did not amount to a guarantee by the state that the witness requested by a defendant would in fact appear at trial, but only related to the issuance of the process. Mafnas v. State, 149 Ga. App. 286, 254 S.E.2d 409, 1979 Ga. App. LEXIS 1820 (1979), overruled, Davenport v. State, 289 Ga. 399, 711 S.E.2d 699, 2011 Ga. LEXIS 502 (2011) (decided under Ga. L. 1976, p. 1366, § 3).

Determination of whether witness was necessary and material. — Court of appeals erred in ruling that the trial court did not abuse the court's discretion in denying the defendant's motion under the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), to obtain evidence possessed by a witness in Kentucky because the proper statute was not applied since the court of appeals stated that the defendant was required to show that the out-of-state witness was necessary and material to the case; whether the witness was "necessary and material" was one of the determinations that must be made under the Act, former O.C.G.A. § 24-10-92(b), by the judge in the county where the out-of-state witness was located, and the Georgia trial court evaluated the request under the Act, former O.C.G.A. § 24-10-94 (see now O.C.G.A. § 24-13-94), and must determine only whether the out-of-state witness was a "material witness" in the Georgia criminal prosecution and whether the court should issue the certificate requesting the out-of-state court to order the out-of-state witness to attend the criminal proceeding in Georgia. Davenport v. State,

289 Ga. 399, 711 S.E.2d 699, 2011 Ga. LEXIS 502 (2011) (decided under former O.C.G.A. § 24-10-92).

It was the out-of-state judge who must decide whether the sought-after witness was necessary and material, not the requesting court in Georgia. The Georgia trial judge presented with a request for a certificate was charged with deciding whether the sought-after witness was a "material witness"; in light of the former Uniform Act, former O.C.G.A. § 24-10-97 (see now O.C.G.A. § 24-13-97), "material witness" was construed as a witness who can testify about matters having some logical connection with the consequential facts, especially if few others, if any, know about these matters. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699, 2011 Ga. LEXIS 502 (2011) (decided under former O.C.G.A. § 24-10-92).

Trial court did not err in ruling that, under former O.C.G.A. § 24-10-90 et seq., the victim's half-brother and a doctor were not material witnesses because the defendant failed to show the witnesses would have been material at the criminal trial. Aburto v. State, 327 Ga. App. 424, 759 S.E.2d 276, 2014 Ga. App. LEXIS 353 (2014) (decided under former O.C.G.A. § 24-10-90 et seq.).

Witness must be necessary and material. — When the assistant state's attorney in Maryland presented evidence sufficient to persuade the requesting court that the Georgia resident was essential to the grand jury's investigation and the local Georgia trial court found the facts similarly persuasive, the Georgia resident, having presented no evidence, failed to convince the superior court to deny the state's petition to grant Maryland's request. Wollesen v. State, 242 Ga. App. 317, 529 S.E.2d 630, 2000 Ga. App. LEXIS 177 (2000) (decided under former O.C.G.A. § 24-10-92).

Out-of-state corporation. — Court of appeals erred when the court concluded that a request under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. Yeary v. State, 289 Ga. 394, 711 S.E.2d 694, 2011 Ga. LEXIS 501 (2011) (decided under former O.C.G.A. § 24-10-92).

Trial court erred in applying the hearsay rules to exclude the appellant's proffered documents from the evidence the court considered in ruling on a motion for material witness certificates as to the Kentucky-based manufacturer of the breathalyzer because an exception under O.C.G.A. § 24-1-2(c)(1) applied. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

Order to testify encompassed production of documents. — Power to order a witness to travel to a foreign state for the purpose of testifying at a grand jury hearing implicitly encompassed the power to order the witness to produce relevant documents. Wollesen v. State, 242 Ga. App. 317, 529 S.E.2d 630, 2000 Ga. App. LEXIS 177 (2000) (decided under former O.C.G.A. § 24-10-92).

RESEARCH REFERENCES

Am. Jur. 2d.

38A Am. Jur. 2d, Grand Jury, § 38. 81 Am. Jur. 2d, Witnesses, §§ 4, 6, 10, 34, 35, 39, 66, 68.

C.J.S.

38A C.J.S., Grand Juries, § 42. 98 C.J.S. (Rev), Witnesses, §§ 20 et seq., 32 et seq., 95, 116 et seq., 119, 121, 203, 226.

24-13-93. Procedure for compelling witness attendance of persons confined in a state penal institution before a foreign court in criminal or grand jury proceedings; exceptions.

(a) A judge of a state court of record in another state which by its laws has made provision for commanding persons confined in penal institutions within that state to attend and testify in this state may certify that there is a criminal proceeding or investigation by a grand jury or a criminal proceeding pending in the court, that a person who is confined in a penal institution in this state is a material witness in the proceeding or investigation, and that the witness's presence will be required during a specified time. Upon presentation of the certificate to any judge having jurisdiction over the person confined and upon notice to the Attorney General, the judge in this state shall fix a time and place for a hearing and shall make an order directed to the person having custody of the prisoner requiring that the prisoner be produced before him or her at the hearing.

(b) If at the hearing the judge determines that the witness is material and necessary, that the witness attending and testifying are not adverse to the interest of this state or to the health and legal rights of the witness, that the laws of the state in which the witness is required to testify will give the witness protection from arrest and the service of civil and criminal process because of any act committed prior to the witness's arrival in the state under the order, and that as a practical matter the possibility is negligible that the witness may be subject to arrest or to the service of civil or criminal process in any state through which the witness will be required to pass, the judge shall issue an order, with a copy of the certificate attached, directing the witness to attend and testify, directing the person having custody of the witness to produce the witness in the court where the criminal proceeding is pending or where the grand jury investigation is pending at a time and place specified in the order, and prescribing such conditions as the judge shall determine. The judge, in lieu of directing the person having custody of the witness to produce the witness in the requesting jurisdiction's court, may direct and require in the court's order that the requesting jurisdiction shall come to the Georgia penal institution in which the witness is confined to accept custody of the witness for physical transfer to the requesting jurisdiction; that the requesting jurisdiction shall provide proper safeguards on the witness's custody while in transit; that the requesting jurisdiction shall be liable for and shall pay all expenses incurred in producing and returning the witness, including, but not limited to, food, lodging, clothing, and medical care; and that the requesting jurisdiction shall promptly deliver the witness back to the same or another Georgia penal institution as specified by the Department of Corrections at the conclusion of his or her testimony.

(c) The order to the witness and to the person having custody of the witness shall provide for the return of the witness at the conclusion of his or her testimony, proper safeguards on his or her custody, and proper financial reimbursement or prepayment by the requesting jurisdiction of all expenses incurred in the production and return of the witness and may prescribe such other conditions as the judge thinks proper or necessary. If the judge directs and requires the requesting jurisdiction to accept custody of the witness at the Georgia penal institution in which the witness is confined and to deliver the witness back to the same or another Georgia penal institution at the conclusion of the witness's testimony, no prepayment of expenses shall be necessary. The order shall not become effective until the judge of the state requesting the witness enters an order directing compliance with the conditions prescribed.

(d) This Code section shall not apply to any person in this state confined as insane or mentally ill or under sentence of death.

History.
Code 1981, § 24-13-93, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

RESEARCH REFERENCES

Am. Jur. 2d.
38A Am. Jur. 2d, Grand Jury, § 38. 81 Am. Jur. 2d, Witnesses, §§ 4, 6, 10, 34, 35, 39, 66, 68.

C.J.S.
38A C.J.S., Grand Juries, § 42. 98 C.J.S. (Rev), Witnesses, §§ 119, 121, 203, 226.

24-13-94. Procedure for compelling an out-of-state witness to attend criminal or grand jury proceedings.

(a) If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations commenced or about to commence in this state is a material witness in a prosecution pending in a court of record in this state or in a grand jury investigation which has commenced or is about to commence a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(b) If the witness is summoned to attend and testify in this state, the witness shall be tendered the sum of 45¢ a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending and $25.00 for each day that the witness is required to travel

and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state for a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, the witness shall be punished in the manner provided for in Code Section 24-13-26.

History.
Code 1981, § 24-13-94, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1976, p. 1366, § 5 and former O.C.G.A. § 24-10-94 are included in the annotations for this Code section.

Application of rules of evidence. — Under Georgia's new Evidence Code, unless a fact-finding proceeding involves one of the 12 situations enumerated in O.C.G.A. § 24-1-2(c) and (d), the rules of evidence fully apply; similarity to one or more of the enumerated situations is insufficient to limit the applicability of the evidence rules. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

No absolute right to witness. — Party requesting the presence of an out-of-state witness did not have an absolute right to obtain the witness. Mafnas v. State, 149 Ga. App. 286, 254 S.E.2d 409, 1979 Ga. App. LEXIS 1820 (1979), overruled, Davenport v. State, 289 Ga. 399, 711 S.E.2d 699, 2011 Ga. LEXIS 502 (2011) (decided under Ga. L. 1976, p. 1366, § 5).

Determination of whether witness was necessary and material. — Court of appeals erred in ruling that the trial court did not abuse the court's discretion in denying the defendant's motion under the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), to obtain evidence possessed by a witness in Kentucky because the proper statute was not applied since the court of appeals stated that the defendant was required to show that the out-of-state witness was necessary and material to the case; whether the witness was "necessary and material" was one of the determinations that must be made under the Act, former O.C.G.A. § 24-10-92(b) (see now O.C.G.A. § 24-13-92), by the judge in the county where the out-of-state witness was located, and the Georgia trial court evaluated the request under the Act, former O.C.G.A. § 24-10-94, and must determine only whether the out-of-state witness was a "material witness" in the Georgia criminal prosecution and whether it should issue the certificate requesting the out-of-state court to order the out-of-state witness to attend the criminal proceeding in Georgia. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699, 2011 Ga. LEXIS 502 (2011) (decided under former O.C.G.A. § 24-10-94).

Error in applying hearsay rules in determining witness status. — Trial court erred in applying the hearsay rules to exclude the appellant's proffered documents from the evidence the court considered in ruling on a motion for material witness certificates as to the Kentucky-based manufacturer of the breathalyzer because an exception under O.C.G.A. § 24-1-2(c)(1) applied. Parker v. State, 296 Ga. 586, 769 S.E.2d 329, 2015 Ga. LEXIS 133 (2015).

Failure to determine if witness material. — Defendant was entitled to a new determination as to whether the defendant was entitled to subpoena an out-of-state witness because the trial court weighed the safeguards protecting the va-

lidity of the test results and the trial process generally and essentially determined that the witness was not necessary rather than evaluating whether the out-of-state witness was "material." Spann v. State, 318 Ga. App. 740, 736 S.E.2d 749, 2012 Ga. App. LEXIS 986 (2012) (decided under former O.C.G.A. § 24-10-94).

Judicial discretion. — As to out-of-state witnesses to whom the court's subpoena power was inapplicable, the decision whether to utilize the provisions of the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), was purely discretionary. Ealy v. State, 251 Ga. 426, 306 S.E.2d 275, 1983 Ga. LEXIS 821 (1983) (decided under former O.C.G.A. § 24-10-94).

Witness not material. — Trial court properly concluded that an out-of-state witness, who could have testified as to source codes for the breath testing device, was not "material" as the defendant presented no evidence mouth alcohol was present during a breath test such that an error message should have been generated that was not; the mere possibility that alcohol remained in the defendant's mouth due to a surgical implant and retainer was not evidence pointing to actual existence of excess alcohol in the mouth. Cronkite v. State, 293 Ga. 476, 745 S.E.2d 591, 2013 Ga. LEXIS 593 (2013) (decided under former O.C.G.A. § 24-10-94).

Defendant's motion for certification of materiality of an out-of-state witness under the Uniform Act to Secure the Attendance of Witnesses from Without the State was properly denied as the only evidence the defendant submitted in support of the motion consisted of the notes from an intern with the Public Defender's office, which simply summarized the contents of a conversation between the witness and the defendant's former counsel, and the court was permitted to assign little or no weight to that hearsay evidence; and the police report apparently indicated that the witness was inside of the witness's residence when the defendant attacked the defendant's girlfriend outside, and the girlfriend's trial testimony confirmed that fact. Bowman v. State, 363 Ga. App. 711, 872 S.E.2d 485, 2022 Ga. App. LEXIS 211 (2022).

Unlocated witness. — Neither the Georgia nor the United States Constitution obligated the state to compel the attendance of witnesses who cannot be located within the state's jurisdiction. Mafnas v. State, 149 Ga. App. 286, 254 S.E.2d 409, 1979 Ga. App. LEXIS 1820 (1979), overruled, Davenport v. State, 289 Ga. 399, 711 S.E.2d 699, 2011 Ga. LEXIS 502 (2011) (decided under Ga. L. 1976, p. 1366, § 5).

Trial counsel was not ineffective for failing to take the steps necessary to try to secure an alibi witness, after counsel made attempts to locate the witness, and based on the testimony of both of defendant's accomplices, and the evidence corroborating that testimony, it was unlikely that the trial would have been different had this alleged alibi witness been found, specially subpoenaed, and testified. Ziegler v. State, 270 Ga. App. 787, 608 S.E.2d 230, 2004 Ga. App. LEXIS 1365 (2004), cert. dismissed, No. S05C0721, 2005 Ga. LEXIS 340 (Ga. Apr. 26, 2005), cert. denied, 546 U.S. 1019, 126 S. Ct. 656, 163 L. Ed. 2d 532, 2005 U.S. LEXIS 8440 (2005) (decided under former O.C.G.A. § 24-10-94).

Out-of-state corporation. — Court of appeals erred when the court concluded that a request under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. Yeary v. State, 289 Ga. 394, 711 S.E.2d 694, 2011 Ga. LEXIS 501 (2011) (decided under former O.C.G.A. § 24-10-94).

Out-of-state corporation could be "a person" that was a material witness under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), and could be determined to be in possession of material evidence, and the expedient course was to permit a party to request that a corporation, rather than the corporation's human agent, be found to be a material witness under the Uniform Act and leave the issue of designation of the corporation's human agent to the corporation; the designation need not occur until after a certificate of materiality had been issued by the Georgia trial court and the court in the county in which the out-of-state corporation was located conducted a hearing which the corporation had been ordered to attend, on the request for issuance of a summons to appear at the Georgia trial with the material evidence purportedly in the corporation's possession under former O.C.G.A. § 24-10-92(a). Yeary v. State, 289 Ga. 394, 711 S.E.2d 694, 2011 Ga. LEXIS 501 (2011) (decided under former O.C.G.A. § 24-10-94).

In 10 driving under the influence cases, because the defendants failed to present any evidence of facts supporting the existence of an error in their breath test results as required by case law, the trial court did not abuse the court's discretion when the court determined that the defendants failed to show that the machine's manufacturer was a material witness under the Uniform Act to Secure Attendance of an Out-of-State Witness, O.C.G.A. § 24-13-94(a). Young v. State, 324 Ga. App. 127, 749 S.E.2d 423, 2013 Ga. App. LEXIS 807 (2013), cert. denied, No. S14C0243, 2014 Ga. LEXIS 361 (Ga. May 5, 2014), cert. denied, No. S14C0249, 2014 Ga. LEXIS 364 (Ga. May 5, 2014).

Continuance of case properly denied. — Trial court did not abuse the court's discretion by denying the defendant's request for a continuance because the court had granted a certificate pursuant to O.C.G.A. § 24-13-94 to permit the defense an opportunity to obtain the information and witnesses from the breathalyzer manufacturer set the case with enough time for the defense to do so, and, after the Kentucky court issued an order denying the request, which order was entitled to full faith and credit, required the defendant to proceed to trial. Phillips v. State, 324 Ga. App. 728, 751 S.E.2d 526, 2013 Ga. App. LEXIS 923 (2013), cert. denied, No. S14C0457, 2014 Ga. LEXIS 370 (Ga. May 5, 2014).

Trial court did not err by denying the defendant's motion. — Trial court did not abuse the court's discretion in denying the defendant's motion for a certificate of need for testimony because the testimony of the expert the defendant presented did not establish the materiality of the evidence sought pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-94(a), which must be supported by admissible and probative evidence; the expert was required to testify to some fact indicating the possibility of an error in the case, but the expert was only able to speculate. Cronkite v. State, 317 Ga. App. 57, 730 S.E.2d 694, 2012 Ga. App. LEXIS 687 (2012), aff'd, 293 Ga. 476, 745 S.E.2d 591, 2013 Ga. LEXIS 593 (2013) (decided under former O.C.G.A. § 24-10-94).

Full faith and credit given to out-of-state order. — Trial court did not err by requiring defendant to proceed to trial without the source code and other requested information because it had granted a certificate pursuant to O.C.G.A. § 24-13-94 to permit the defense an opportunity to obtain the information from the manufacturer located in Kentucky, set the case with enough time to do so, and, after the Kentucky court issued an order denying the request, which order was entitled to full faith and credit, required defendant to proceed to trial. Phillips v. State, 324 Ga. App. 728, 751 S.E.2d 526, 2013 Ga. App. LEXIS 923 (2013), cert. denied, No. S14C0457, 2014 Ga. LEXIS 370 (Ga. May 5, 2014).

RESEARCH REFERENCES

Am. Jur. 2d.
38A Am. Jur. 2d, Grand Jury, § 38. 81 Am. Jur. 2d, Witnesses, §§ 4, 6, 10, 34, 35, 39, 66, 68.

C.J.S.
38A C.J.S., Grand Juries, § 41. 98 C.J.S. (Rev), Witnesses, §§ 20 et seq., 32 et seq., 119, 121, 203, 226.

24-13-95. Procedure for compelling witness attendance of persons confined in a penal institution out of state in criminal or grand jury proceedings; order of compliance.

(a) If a person confined in a penal institution in any other state is a material witness in a criminal proceeding pending in a court of record or in a grand jury investigation in this state, a judge of the court may certify that there is a criminal proceeding or investigation by a grand jury or a criminal proceeding pending in the court, that a person who is confined in a penal institution in the other state is a material witness in the proceeding or investigation, and that the witness's presence will be required during a specified time. The certificate shall be presented to a judge of a court of record in the other state having jurisdiction over the confined prisoner, and a notice shall be given to the attorney general of the state in which the prisoner is confined.

(b) The judge of the court in this state may enter an order directing compliance with the terms and conditions prescribed by the judge of the state in which the witness is confined.

History.
Code 1981, § 24-13-95, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

RESEARCH REFERENCES

Am. Jur. 2d.
81 Am. Jur. 2d, Witnesses, §§ 4, 34, 35, 39.

C.J.S.
98 C.J.S. (Rev), Witnesses, §§ 20 et seq., 32 et seq.

24-13-96. Exemption of witnesses from arrest and service of process.

(a) If a person comes into this state in obedience to a summons directing him or her to attend and testify in this state, such person shall not, while in this state pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before such person's entrance into this state under the summons.

(b) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while

returning therefrom, he or she shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before such person's entrance into this state under the summons.

History.
Code 1981, § 24-13-96, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2023, p. 730, § 3(1)/HB 475, effective July 1, 2023.

The 2023 amendment, effective July 1, 2023, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (a).

Cross references.
Exercise of personal jurisdiction over nonresidents generally, § 9-10-90 et seq.

RESEARCH REFERENCES

Am. Jur. 2d.
5 Am. Jur. 2d, Arrest, § 85. 62B Am. Jur. 2d, Process, § 36 et seq. 81 Am. Jur. 2d, Witnesses, §§ 34, 35, 39.

C.J.S.
72 C.J.S., Process, § 33 et seq.

ALR.
Immunity of nonresident litigant or witness from service of process as affected by transactions or activities unrelated to action, 162 A.L.R. 280.

Privilege of party, witness, or attorney while going to, attending, or returning from court as extending to privilege from arrest for crime, 74 A.L.R.2d 592.

24-13-97. Construction.

This article shall be interpreted and construed so as to effectuate its general purpose to make uniform the laws of the states which enact it and shall be applicable only to such states as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses as provided in this article.

History.
Code 1981, § 24-13-97, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

RESEARCH REFERENCES

Am. Jur. 2d.
73 Am. Jur. 2d, Statutes, § 227 et seq.

C.J.S.
82 C.J.S., Statutes, § 505.

ARTICLE 5

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

Editor's notes.
Ga. L. 2012, p. 651, § 2-1/HB 46, effective January 1, 2013, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 24-13-110 through 24-13-112, relating to the Uniform Foreign Depositions Act, and was based on Code 1981, §§ 24-13-110—24-13-112, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Ga. L. 2012, p. 651, § 3-1(b)(1)/HB 46, not codified by the General Assembly, provides, in part, that this article shall apply

to subpoenas served on or after July 1, 2013, and in actions pending on or after July 1, 2013.

24-13-110. Short title.

This article shall be known and may be cited as the "Uniform Interstate Depositions and Discovery Act."

History.
Code 1981, § 24-13-110, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.

24-13-111. Definitions.

As used in this article, the term:

(1) "Foreign jurisdiction" means a state other than this state.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Native American tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) Attend and give testimony at a deposition;

(B) Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of such person; or

(C) Permit inspection of premises under the control of such person.

History.
Code 1981, § 24-13-111, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.

24-13-112. Requirements for issuance of foreign subpoenas; application.

(a) To request issuance of a subpoena under this Code section, a party shall submit a foreign subpoena to the clerk of superior court of the county in which the person receiving the subpoena resides. A request for the issuance of a subpoena under this Code section shall not constitute an appearance in the courts of this state.

(b) When a party submits a foreign subpoena to a clerk of superior court in this state, the clerk shall promptly issue and provide to the requestor a subpoena for service upon the person to which the foreign subpoena is directed.

(c) A subpoena under subsection (b) of this Code section shall:

(1) Incorporate the terms used in the foreign subpoena; and

(2) Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(d) This Code section shall only apply to a subpoena to be issued in this state if the foreign jurisdiction that issued the foreign subpoena has adopted a version of the "Uniform Interstate Depositions and Discovery Act."

(e) This Code section shall not apply to criminal proceedings.

History.
Code 1981, § 24-13-112, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.

24-13-113. Compelling foreign witness to appear and testify.

(a) For purposes of this Code section, the term "subpoena" shall have only the meaning set forth in subparagraph (A) of paragraph (5) of Code Section 24-13-111.

(b) In addition to the mechanism for issuing subpoenas provided for in Code Section 24-13-112, whenever any mandate, writ, or commission is issued out of any court of record in a foreign jurisdiction, a witness may be compelled by subpoena issued by the clerk of superior court of the county in which such witness resides to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

History.
Code 1981, § 24-13-113, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.

24-13-114. Service of foreign subpoena.

A subpoena issued by the clerk of superior court under Code Section 24-13-112 or 24-13-113 shall be served in compliance with Code Section 24-13-23 and shall be served within a reasonable time prior to the appearance required by such subpoena.

History.
Code 1981, § 24-13-114, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.

24-13-115. Applicability of Article 2 to certain provisions of this article.

Article 2 of this chapter shall apply to subpoenas issued under Code Section 24-13-112 or 24-13-113.

History.
Code 1981, § 24-13-115, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.

24-13-116. Protective order or enforcement, quashing, or modification of foreign subpoena.

An application for a protective order or to enforce, quash, or modify a subpoena issued by the clerk of superior court under Code Section 24-13-112 or 24-13-113 shall comply with the statutes and court rules of this state and shall be submitted to the superior court of the county in which the subpoena was issued.

History.
Code 1981, § 24-13-116, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.

ARTICLE 6

DEPOSITIONS TO PRESERVE TESTIMONY IN CRIMINAL PROCEEDINGS

Law reviews.
For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

RESEARCH REFERENCES

ALR.
Use, in federal criminal prosecution, of deposition of absent witness taken in foreign country, as affected by Federal Rule of Criminal Procedure 15(b) and (d) requiring presence of accused and that deposition be taken in manner provided in civil actions, 105 A.L.R. Fed. 537.

24-13-130. When deposition to preserve testimony in criminal proceedings may be taken.

(a)(1) At any time after an accused has been charged with an offense against the laws of this state or an ordinance of any political subdivision or authority thereof, upon motion of the state or the accused, the court having jurisdiction to try the offense charged may, after notice to the parties, order that the testimony of a prospective material witness of a party be taken by deposition and that any designated evidence not privileged be produced at the same time and place.

(2) At any time after an accused has been charged with an offense of child molestation, aggravated child molestation, or physical or sexual abuse of a child, upon motion of the state or the accused, the court having jurisdiction to try the offense charged may, after notice to the parties, order that the testimony of any physician whose testimony is relevant to such charge be taken by deposition and that any designated evidence not privileged be produced at the same time and place.

(b) The court shall not order the taking of the witness's testimony, except as provided in paragraph (2) of subsection (a) of this Code section, unless it appears to the satisfaction of the court that the testimony of the witness is material to the proceeding and the witness:

(1) Is in imminent danger of death or great bodily harm;

(2) Has been threatened with death or great bodily harm because of the witness's status as a potential witness in a criminal trial or proceeding;

(3) Is about to leave this state, and there are reasonable grounds to believe that such witness will be unable to attend a criminal trial or proceeding;

(4) Is so sick or infirm as to afford reasonable grounds to believe that such witness will be unable to testify as a witness at a criminal trial or proceeding;

(5) Is being detained as a material witness, and there are reasonable grounds to believe that the witness will flee if released from detention; or

(6) Is 72 years of age or older.

(c) A motion to take a deposition of a material witness, or a physician as provided in paragraph (2) of subsection (a) of this Code section, shall be verified and shall state:

(1) The nature of the offense charged;

(2) The status of the criminal proceedings;

(3) The name of the witness and an address in Georgia where the witness may be contacted unless, for good cause shown, the court allows an exception to this paragraph;

(4) That the testimony of the witness is material to the proceeding or that the witness is a physician as provided in paragraph (2) of subsection (a) of this Code section; and

(5) The basis for taking the deposition as provided in subsection (b) of this Code section.

(d) A motion to take a deposition shall be filed in the court having jurisdiction to try the accused for the offense charged; provided, however, that if the accused is charged with multiple offenses, only the court having jurisdiction to try the most serious charge against the accused shall have jurisdiction to hear and decide the motion to take a deposition.

(e) The party moving the court for an order pursuant to this Code section shall give not less than one day's notice of the hearing to the opposite party. A copy of the motion shall be sent to the opposing party or his or her counsel by any means which will reasonably ensure timely delivery, including transmission by facsimile or by digital or electronic means. A copy of the notice shall be attached to the motion and filed with the clerk of court.

(f) If the court is satisfied that the examination of the witness is authorized by law and necessary, the court shall enter an order setting a time period of not more than 30 days during which the deposition shall be taken.

(g) On motion of either party, the court may designate a judge who shall be available to rule on any objections to the interrogation of the witness or before whom the deposition shall be taken. The judge so designated may be a judge of any court of this state who is otherwise qualified to preside over the trial of criminal proceedings in the court having jurisdiction over the offense charged.

History.
Code 1981, § 24-13-130, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 524, § 1-4A/HB 78.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-130 are included in the annotations for this Code section.

Any technical violation of the notice provision of former O.C.G.A. § 24-10-130 was harmless since the defendant did in fact receive notice of the date, time, and place of the deposition and did not request a predeposition hearing on the propriety or necessity of taking a deposi-

tion. Burrell v. State, 258 Ga. 841, 376 S.E.2d 184, 1989 Ga. LEXIS 56 (1989) (decided under former O.C.G.A. § 24-10-130).

Defendant's pretrial request to depose victims after the victims refused to talk with defense counsel was properly denied by the trial court. Evans v. State, 233 Ga. App. 85, 503 S.E.2d 344 (decided under former O.C.G.A. § 24-10-130).

Introduction of material witness's sworn statement improper. — Because the state never filed a motion to take a material witness's deposition as required by former O.C.G.A. § 24-10-130, the trial court never held a hearing, never found grounds for the deposition, and never ordered that the deposition be taken during a particular time period; therefore, the defendant's conviction for financial transaction card fraud under O.C.G.A. § 16-9-33(a) was reversed and the case was remanded for a new trial. Evans v. State, 275 Ga. App. 621, 621 S.E.2d 584, 2005 Ga. App. LEXIS 1058 (2005) (decided under former O.C.G.A. § 24-10-130).

Deceased elderly victim's audio statement inadmissible. — During the prosecution of two defendants, who were charged with exploiting an elderly woman, the trial court properly deemed the audio recording of the elderly victim inadmissible because the defendants did not have an adequate opportunity to effectively cross-examine the elderly victim about her interview statements. State v. Hines, 356 Ga. App. 341, 847 S.E.2d 21, 2020 Ga. App. LEXIS 442 (2020).

Victim's deposition properly taken. — Trial court did not abuse the court's discretion in allowing an 80-year-old victim's deposition to be taken under former O.C.G.A. § 24-10-130(b)(4) because the victim had a brain tumor, which predisposed the victim to dizziness and vertigo, and a generalized anxiety disorder, which sometimes caused the victim to suffer chest pains, shortness of breath, blurred vision, confusion, and loss of consciousness when the victim was exposed to unfamiliar or stressful public situations. Austin v. State, 275 Ga. App. 560, 621 S.E.2d 546, 2005 Ga. App. LEXIS 1034 (2005) (decided under former O.C.G.A. § 24-10-130).

Deposition of allegedly ineffective counsel. — When a habeas court found an inmate's claim of ineffective assistance of counsel was not procedurally barred, under O.C.G.A. § 9-14-48(d), for failing to raise the issue on direct appeal because the allegedly ineffective counsel could not, due to illness, attend a hearing held on remand during the inmate's direct appeal, and, thus, could not be cross-examined, this was error because, even if the claim was different enough from barred claims to fall within a defaulted-claim analysis, it overlooked the readily available legal remedy of a court order to obtain counsel's sworn testimony for use at the remand hearing, under former O.C.G.A. § 24-10-130, so counsel's absence from the hearing did not establish cause for failure to raise the ineffective assistance claim. Schofield v. Meders, 280 Ga. 865, 632 S.E.2d 369, 2006 Ga. LEXIS 392 (2006), cert. denied, 549 U.S. 1126, 127 S. Ct. 958, 166 L. Ed. 2d 729, 2007 U.S. LEXIS 257 (2007) (decided under former O.C.G.A. § 24-10-130).

24-13-131. Notice of deposition; presence of defendant at examination; child witness.

(a) The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined.

(b) On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition.

(c) The officer having custody of an accused shall be notified of the

time and place set for the examination and shall, unless the accused waives in writing the right to be present, produce the accused at the examination and keep the accused in the presence of the witness during the examination unless, after being warned by the judge that disruptive conduct will cause the accused's removal from the place where the deposition is being taken, the accused persists in conduct which would justify exclusion from that place.

(d) An accused not in custody shall have the right to be present at the examination; but failure of the accused to appear, absent good cause shown, after notice and tender of expenses, shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(e) Notwithstanding the provisions of subsections (c) and (d) of this Code section, if the witness is a child, the court may order that the deposition be taken in accordance with Code Section 17-8-55.

History.
Code 1981, § 24-13-131, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-131 are included in the annotations for this Code section.

Interviews not depositions. — In a prosecution for child molestation, audio and videotapes of interviews with the victims were not depositions, and former O.C.G.A. § 24-10-131 did not require that the state notify the defendant before the interviews were conducted. Price v. State, 223 Ga. App. 185, 477 S.E.2d 353, 1996 Ga. App. LEXIS 1096 (1996) (decided under former O.C.G.A. § 24-10-131).

24-13-132. Appointment of counsel; payment of costs and expenses.

(a) If an accused is financially unable to employ counsel, the court shall appoint counsel as provided in Chapter 12 of Title 17, unless the accused elects to proceed without counsel.

(b) Whenever a deposition is taken at the instance of the state, the cost of any such deposition shall be paid by the state in the same manner as any other motion hearing that may appear on the criminal calendar.

(c) Depositions taken at the instance of an accused shall be paid for by the accused; provided, however, that, whenever a deposition is taken at the instance of an accused who is eligible for the appointment of counsel as provided in Chapter 12 of Title 17, the court shall direct that the reasonable expenses for the taking of the deposition and of travel and subsistence of the accused and the accused's attorney for atten-

dance at the examination, not to exceed the limits established pursuant to Article 2 of Chapter 7 of Title 45, be paid for out of the fine and bond forfeiture fund of the county where venue is laid.

History.
Code 1981, § 24-13-132, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2015, p. 693, § 3-33/HB 233; Ga. L. 2019, p. 845, § 5-1/HB 239.

Editor's notes.
Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews.
For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).
For article on the 2019 amendment of this Code section, see 36 Ga. St. U.L. Rev. 1 (2019).

24-13-133. Manner of taking and filing deposition.

Except as provided in Code Section 24-13-137, a deposition shall be taken and filed in the manner provided in civil proceedings or any nonjury motion hearing, provided that (1) in no event shall a deposition be taken of an accused party without his or her consent and (2) the scope of examination and cross-examination shall be such as would be allowed in the trial itself. On request or waiver by the accused, the court may direct that a deposition be taken on written interrogatories in the manner provided in civil proceedings. Such request shall constitute a waiver by the accused of any objection to the taking and use of the deposition based upon its being so taken. If a judge has been designated to rule on objections or to preside over the deposition, objections to interrogation of the witness shall be made to and ruled on by such judge in the same manner as at the trial of a criminal proceeding.

History.
Code 1981, § 24-13-133, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2019, p. 845, § 5-2/HB 239.

Law reviews.
For article on the 2019 amendment of this Code section, see 36 Ga. St. U.L. Rev. 1 (2019).

24-13-134. Availability to state and defendant of deponent's previous statements.

The state or the accused shall make available to each other, for examination and use at the taking of a deposition pursuant to this article, any statement of the witness being deposed which is in the possession of the state or the accused and which would be required to be made available if the witness were testifying at the trial.

History.
Code 1981, § 24-13-134, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-13-135. Admissibility and use of deposition.

At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if the witness is unavailable. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered, and any party may offer other parts. A witness is not unavailable if the exemption, refusal to testify, claim of lack of memory, inability, or absence of such witness is due to the procurement or wrongdoing of the party offering the deposition at the hearing or trial for the purpose of preventing the witness from attending or testifying.

History.
Code 1981, § 24-13-135, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-135 are included in the annotations for this Code section.

Prosecuting attorney's agreement to cooperate with defense counsel in videotaping of a deposition did not constitute an agreement of stipulation that the deposition could be admitted at trial. Hullender v. State, 256 Ga. 86, 344 S.E.2d 207, 1986 Ga. LEXIS 693 (1986) (decided under former O.C.G.A. § 24-10-135).

Victim's deposition at retrial. — Trial court did not abuse the court's discretion in allowing a deposition of an 80-year-old victim, who had a brain tumor and a generalized anxiety disorder, to be offered in lieu of the victim's testimony at defendant's retrial because the trial court had overruled defendant's former O.C.G.A. § 24-10-135 objection in defendant's first trial and stood on the court's earlier ruling in defendant's retrial; while it would have been better to make an explicit finding of unavailability in the retrial, the finding was implicit in the trial court's ruling and was authorized by the evidence. Austin v. State, 275 Ga. App. 560, 621 S.E.2d 546, 2005 Ga. App. LEXIS 1034 (2005) (decided under former O.C.G.A. § 24-10-135).

24-13-136. Objections to admission of deposition.

Objections to receiving in evidence a deposition or part thereof may be made as provided in civil proceedings.

History.
Code 1981, § 24-13-136, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-13-137. Recordation of deposition.

(a) Any party shall have the right to require that the deposition be recorded and preserved by the use of audio-visual equipment in addition to a stenographic record. The audio-visual recording shall be

transmitted to the clerk of the court which ordered the deposition and shall be made available for viewing and copying only to the prosecuting attorney and accused's attorney prior to trial. An audio-visual recording made pursuant to this Code section shall not be available for inspection or copying by the public until such audio-visual recording has been admitted into evidence during a trial or hearing in the case in which such deposition is made.

(b) An audio-visual recording made pursuant to this Code section may be admissible at a trial or hearing as an alternative to the stenographic record of the deposition.

(c) A stenographic record of the deposition contemplated in this Code section shall be made pursuant to Code Section 9-11-28.

History.
Code 1981, § 24-13-137, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-13-138. Agreement of parties to deposition.

Nothing in this article shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition by agreement of the parties with the consent of the court.

History.
Code 1981, § 24-13-138, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-13-139. Depositions taken only in exceptional circumstances; misuse of procedures.

It is the intent of the General Assembly that depositions shall be taken in criminal proceedings only in exceptional circumstances when it is in the interests of justice that the testimony of a prospective witness be taken and preserved for use at trial. If the court finds that any party or counsel for a party is using the procedures set forth in this article for the purpose of harassment or delay, such conduct may be punished as contempt of court.

History.
Code 1981, § 24-13-139, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

ARTICLE 7

PERPETUATION OF TESTIMONY

Cross references.
Depositions before action or pending appeal, § 9-11-27.

Law reviews.
For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-13-150. Proceedings to perpetuate testimony.

Superior courts may entertain proceedings for the perpetuation of testimony in all proceedings in which the fact to which the testimony relates cannot immediately be made the subject of investigation at law and in which, for any cause, the common-law proceeding authorized under this title is not as available, or as completely available, as a proceeding in equity.

History.
Code 1981, § 24-13-150, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

RESEARCH REFERENCES

Am. Jur. 2d.
23 Am. Jur. 2d, Depositions and Discovery, § 4.

24-13-151. Inadequacy of usual proceeding to be shown.

A petition for discovery merely or to perpetuate testimony shall not be sustained unless some reason is shown why the usual proceeding at law is inadequate.

History.
Code 1981, § 24-13-151, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Orig. Code 1863, § 4094, former Code 1868, § 4123, former Code 1873, § 4182, former Code 1882, § 4182, former Civil Code 1895, § 3959, former Civil Code 1910, § 4556, former Code 1933, § 38-1302, and former O.C.G.A. § 24-10-151 are included in the annotations for this Code section.

Discovery must be necessary. — For equity to take jurisdiction on the ground of discovery, it must appear that the discovery was necessary, not merely that discovery was desirable or could be useful or that the complainant can more satisfactorily prove the complainant's case with than without discovery. Lucas v. Neidlinger, 210 Ga. 557, 81 S.E.2d 825, 1954 Ga. LEXIS 379 (1954) (decided under former Code 1933, § 38-1302).

Pleading. — Pleadings must set forth facts which show either that the matter to which the testimony would apply can not

be immediately investigated in a court of law; or if it can be so investigated, that the sole right of action belonged to the other party; or that the opposite party had interposed some impediment to an immediate trial of the suit, so that there was danger of a loss of the evidence before trial. Booker v. Booker, 20 Ga. 777, 1856 Ga. LEXIS 149 (1856) (decided under former law).

RESEARCH REFERENCES

Am. Jur. 2d.
23 Am. Jur. 2d, Depositions and Discovery, § 4.

24-13-152. Materiality of possession of property; availability of parties in interest.

The possession of the property is immaterial; nor shall the proceeding be denied though all parties in interest cannot be ascertained or reached.

History.
Code 1981, § 24-13-152, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-13-153. Use of testimony.

Testimony taken in the proceedings contemplated under Code Section 24-13-150 shall be used only from the necessity of the case, but in such case may be used against all persons, whether parties to the proceeding or not.

History.
Code 1981, § 24-13-153, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Orig. Code 1863, § 3043, former Code 1868, § 3055, former Code 1873, § 3110, former Code 1882, § 3110, former Civil Code 1895, § 3961, former Civil Code 1910, § 4558, former Code 1933, § 38-1304, and former O.C.G.A. § 24-10-153 are included in the annotations for this Code section.

Witness available. — When a witness was alive and capable of examination at the time of trial, the testimony could not be read. Booker v. Booker, 20 Ga. 777 (1856) (decided under former law) , compare, Howard v. Crawford, 1854 Ga. LEXIS 59, 15 Ga. 423 (1854).

24-13-154. Costs of proceedings.

The complainant shall in all cases be taxed with the costs of proceedings to perpetuate testimony.

History.
Code 1981, § 24-13-154, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

CHAPTER 14

PROOF GENERALLY

Article 1

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Law reviews.

For note, "Evidence-Voiceprints-The Value of Spectrographic Analysis," see 9 Ga. St. B.J. 242 (1973).

For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former T. 24, C. 4 are included in the annotations for this Code section.

Documents must be offered. — It is elementary that documents upon which a party rests the party's case must be offered into evidence. Hadden v. Owens, 154

Ga. App. 467, 268 S.E.2d 760, 1980 Ga. App. LEXIS 2230 (1980) (decided under former T. 24, C. 4).

Documents admissible. — Documentary evidence illustrative of oral testimony and authenticated by oral testimony is admissible. King v. Browning, 246 Ga. 46, 268 S.E.2d 653, 1980 Ga. LEXIS 1011 (1980) (decided under former T. 24, C. 4).

Tampering with evidence. — It is not necessary that the state negative all possibility of tampering with evidence but only that the state show that it is reasonably certain there was no alteration — when there is only a bare speculation of tampering, it is proper to admit the evidence and let what doubt remains go to the weight of the evidence. Marshall v. State, 153 Ga. App. 198, 264 S.E.2d 718, 1980 Ga. App. LEXIS 1747 (1980) (decided under former T. 24, C. 4).

Lie detector test. — Upon an express stipulation of the parties that lie detector results shall be admissible, the results of the test shall be admissible as evidence for the jury to attach to the results whatever probative value the jury may find the results to have. Jordan v. State, 159 Ga. App. 716, 285 S.E.2d 71, 1981 Ga. App. LEXIS 2725 (1981) (decided under former T. 24, C. 4).

Proof of a fact by unobjected to evidence renders harmless subsequent incompetent or inadmissible evidence. Lightsey v. State, 160 Ga. App. 62, 286 S.E.2d 41, 1981 Ga. App. LEXIS 2878 (1981) (decided under former T. 24, C. 4).

RESEARCH REFERENCES

Am. Jur. Trials.

Excluding Illegally Obtained Evidence, 5 Am. Jur. Trials 331.

ALR.

Death certificate as evidence, 17 A.L.R. 359; 42 A.L.R. 1454; 96 A.L.R. 324.

Admissibility of evidence obtained by illegal search and seizure, 32 A.L.R. 408; 41 A.L.R. 1145; 52 A.L.R. 477; 88 A.L.R. 348; 134 A.L.R. 819; 150 A.L.R. 566; 50 A.L.R.2d 531.

Admissibility in favor of writer of unanswered letter not part of mutual correspondence, 34 A.L.R. 560; 55 A.L.R. 460.

Admissibility in favor of accused in criminal case of extrajudicial confession by stranger, 48 A.L.R. 348.

Admission of bankrupt or insolvent before or during bankruptcy or insolvency proceedings as evidence against trustee in bankruptcy or assignee in insolvency, 53 A.L.R. 650.

Presumption or burden of proof as to whether or not instrument affecting title to property is recorded, 53 A.L.R. 668.

Admissibility of evidence obtained by government or other public officer by intercepting letter or telegraph or telephone message, 53 A.L.R. 1485; 66 A.L.R. 397; 134 A.L.R. 614.

Demonstrative evidence on issue of negligence or contributory negligence at railroad crossing, 55 A.L.R. 1340.

Conduct and actions of animals or fowls as evidence, 61 A.L.R. 888.

Admissibility of evidence of other offenses in criminal prosecution to prove identity of defendant, 63 A.L.R. 602.

Admissibility of subsequent declarations of vendor on issue whether sale was in fraud of creditors, 64 A.L.R. 797.

Admissibility of evidence as to character or conduct of plaintiff or reputation of his house in action for alienation of affections or criminal conversation, 68 A.L.R. 560.

Admissibility of check stubs as evidence, 68 A.L.R. 692.

Admissibility of report of operator filed pursuant to law, respecting automobile accident, 69 A.L.R. 905.

Production of paper purporting to be indorsed in blank by payee or by a special indorsee as prima facie evidence of plaintiff's title, 85 A.L.R. 304.

Experimental evidence as affected by similarity or dissimilarity of conditions, 85 A.L.R. 479.

Admissibility in criminal prosecution of adjudication or judgment in civil case or procedure, 87 A.L.R. 1258.

Tax deeds and recitals therein as evidence of regularity of tax proceedings as to advertising and notice of sale, and as to time, manner, and place of sale, 88 A.L.R. 264.

Admissibility and weight of evidence of resemblance on question of paternity or other relationship, 95 A.L.R. 314.

Competency of testimony as to one's mental condition, based upon handwriting, 103 A.L.R. 900.

Admissibility of telephone conversations in evidence, 105 A.L.R. 326.

Questions of evidence involved in the inspection and examination of typewritten documents and typewriting machines, 106 A.L.R. 721.

Offering improper evidence, or asking improper question, as ground for new trial or reversal, 109 A.L.R. 1089.

Admissibility of testimony of person who spoke or wrote the words upon which an action for slander or libel is predicated as to his intention or the sense in which the words were spoken or written, 113 A.L.R. 670.

Admissibility of declarations of testator on issue of undue influence, 148 A.L.R. 1225.

Admissibility of report of public officer or employee on cause of or responsibility for injury to person or damage to property, 153 A.L.R. 163; 69 A.L.R.2d 1148.

Ancient instrument of executor, administrator, receiver, or other fiduciary or officer as affected by matters of judicial or other public record touching his authority, 159 A.L.R. 436.

Admissibility in civil case of testimony by one charged with willful misconduct as to his intention or state of mind at time in question, 171 A.L.R. 683.

Authentication or verification of photograph as basis for introduction in evidence, 9 A.L.R.2d 899; 41 A.L.R.4th 812; 41 A.L.R.4th 877.

Proof of unadjudged incompetency which prevents running of statute of limitations, 9 A.L.R.2d 964.

Propriety of permitting jury to take X-ray picture, introduced in evidence, with them into jury room, 10 A.L.R.2d 918.

Admissibility of evidence of fact of making or receiving telephone calls, 13 A.L.R.2d 1409.

Admissibility of posed photograph based on recollection of position of persons or movable objects, 19 A.L.R.2d 877.

Valuation for taxation purposes as admissible to show value for other purposes, 39 A.L.R.2d 209.

Admissibility, in Federal Employers' Liability Act action, of rules, practices, precautions, safety devices, etc., used by other railroads, 43 A.L.R.2d 618.

Admissibility of opinion or estimate by nonexpert witness in personal injury action of future hospital expenses, future hospitalization, or the like, 45 A.L.R.2d 1148.

Right to have reporter's notes read to jury, 50 A.L.R.2d 176.

Modern status of rule governing admissibility of evidence obtained by unlawful search and seizure, 50 A.L.R.2d 531.

Admissibility in evidence of withdrawn, superseded, amended, or abandoned pleading as containing admissions against interest, 52 A.L.R.2d 516.

Admissibility of sound recordings, in evidence, 58 A.L.R.2d 1024; 57 A.L.R.3d 746; 58 A.L.R.3d 598.

Admissibility of report of police or other public officer or employee, or portions of report, as to cause of or responsibility for accident, injury to person, or damage to property, 69 A.L.R.2d 1148.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, 73 A.L.R.2d 769.

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 73 A.L.R.2d 1025.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 86 A.L.R.2d 611.

Admissibility of evidence of accused's re-enactment of crime, 100 A.L.R.2d 1257.

Official death certificate as evidence of cause of death in civil or criminal action, 21 A.L.R.3d 418.

Admissibility, and prejudicial effect of admission, of "mug shot," "rogues' gallery" photograph, or photograph taken in prison, of defendant in criminal trial, 30 A.L.R.3d 908.

Refusal of defendant in "public figure" libel case to identify claimed sources as raising presumption against existence of source, 19 A.L.R.4th 919.

Admissibility of evidence of fingernail comparisons in criminal case, 40 A.L.R.4th 575.

Consumption or destruction of physical evidence due to testing or analysis by prosecution's expert as warranting suppression of evidence or dismissal of case against accused in state court, 40 A.L.R.4th 594.

Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 A.L.R.4th 812.

Admissibility of visual recording of event or matter other than that giving rise to litigation or prosecution, 41 A.L.R.4th 877.

Proof of mailing by evidence of business or office custom, 45 A.L.R.4th 476.

Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, 50 A.L.R.4th 1049.

Admissibility of traffic conviction in later state civil trial, 73 A.L.R.4th 691.

Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 A.L.R.4th 576.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 11 A.L.R.5th 497.

Propriety of attorney's surreptitious sound recording of statements by others who are or may become involved in litigation. 32 A.L.R.5th 715.

Admissibility in homicide prosecution of allegedly gruesome or inflammatory visual recording of crime scene, 37 A.L.R.5th 515.

Failure of police to preserve potentially exculpatory evidence as violating criminal defendant's rights under state constitution, 40 A.L.R.5th 113.

Sufficiency of DNA Evidence for Weapons Possession Under State Law, 58 A.L.R.7th Art. 5.

Construction and application of standard for reviewing challenges to sufficiency of evidence supporting conviction — Supreme Court cases, 76 A.L.R. Fed. 2d 295.

ARTICLE 1

GENERAL PROVISIONS

Law reviews.

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-14-1. Party with burden of proof.

The burden of proof generally lies upon the party who is asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential. If a negation or negative affirmation is essential to a party's case or defense, the proof of such negation or negative affirmation shall lie on the party so affirming it.

History.

Code 1981, § 24-14-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For comment on Moore v. Allen, 80 Ga. App. 784, 57 S.E.2d 511 (1950), see 12 Ga. B.J. 481 (1950).

For article, the right to open and conclude the argument in tort cases, see 22 Ga. B.J. 297 (1960).

For comment on Parham v. State, 120 Ga. App. 723, 171 S.E.2d 911 (1969) and the rejection of charge that defendant must prove alibi to the satisfaction of the jury, see 21 Mercer L. Rev. 511 (1970).

For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Analysis

General Considerations
Specific Actions
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General Considerations

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3758, former Code 1882, § 3758, former Civil Code 1895, § 5160, former Penal Code 1895, § 994, former Civil Code 1910, § 5746, former Penal Code 1910, § 1020, former Code 1933, §§ 38-103 and 38-105, and former O.C.G.A. § 24-4-1 are included in the annotations for this Code section.

In general. — Burden of proof as applied to the facts of a given case under its facts has a dual meaning; one of those meanings applies to the ultimate burden of proof which rests with the plaintiff from the beginning throughout the trial of the case, and the other meaning applies when the burden of procedure or burden of introducing evidence shifts from one party to the other. Central of Ga. Ry. v. Hester, 94 Ga. App. 226, 94 S.E.2d 124, 1956 Ga. App. LEXIS 513 (1956) (decided under former Code 1933, § 38-103); Evans v. DeKalb County Hosp. Auth., 154 Ga. App. 17, 267 S.E.2d 319, 1980 Ga. App. LEXIS 2031 (1980) (decided under former Code 1933, § 38-103).

Burden determined by pleadings. — Generally, the burden of proof rests where the pleadings originally placed the burden. Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S.E. 391, 1917 Ga. App. LEXIS 709 (1917) (decided under former Civil Code 1910, § 5746); Richter Bros. v. Atlantic Co., 59 Ga. App. 137, 200 S.E. 462, 1938 Ga. App. LEXIS 458 (1938); Atlantic Coast Line R.R. v. Thomas, 83 Ga. App. 477, 64 S.E.2d 301, 1951 Ga. App. LEXIS 890 (1951) (decided under former Code 1933, § 38-103); Whitley v. Wilson, 90 Ga. App. 16, 81 S.E.2d 877, 1954 Ga. App. LEXIS 614 (1954) (decided under former Code 1933, § 38-103); Lovett v. American Family Life Ins. Co., 107 Ga. App. 603, 131 S.E.2d 70, 1963 Ga. App. LEXIS 922 (1963) (decided under former Code 1933, § 38-103).

Effect of defendant's admission of prima facie case. — If the plaintiff alleges a right to recover, and the defendant denies the allegations without more, the plaintiff, upon the case as a whole carries the burden of proof; that is, the burden of showing, by a preponderance of the evidence, that the plaintiff is entitled to recover. If the defendant does not file a denial of the plaintiff's allegations, but admits in defendant's pleadings a prima facie case in favor of the plaintiff, and sets up an affirmative plea, the defendant then assumes the burden. Williamson-Inman & Co. v. Thompson, 53 Ga. App. 821, 187 S.E. 194, 1936 Ga. App. LEXIS 405 (1936) (decided under former Code 1933, § 38-103); Atlantic Coast Line R.R. v. Thomas, 83 Ga. App. 477, 64 S.E.2d 301, 1951 Ga. App. LEXIS 890 (1951) (decided under former Code 1933, § 38-103).

Plaintiff carries burden of proving plaintiff's right to recover by a preponderance of the evidence. Courson v. Pearson, 132 Ga. 698, 64 S.E. 997, 1909 Ga. LEXIS 390 (1909) (decided under former Civil Code 1895, § 5160); Thigpen v. Aldred, 175 Ga. 120, 165 S.E. 27, 1932 Ga. LEXIS 202 (1932) (decided under former Civil Code 1910, § 5746); Grimsley v. Morgan, 178 Ga. 40, 172 S.E. 49, 1933 Ga. LEXIS 11 (1933) (decided under former Code 1933, § 38-103); Abernathy v. Putnam, 85 Ga. App. 644, 69 S.E.2d 896, 1952 Ga. App. LEXIS 802 (1952) (decided under former Code 1933, § 38-103); Maloy v. Dixon, 127 Ga. App. 151, 193 S.E.2d 19, 1972 Ga. App. LEXIS 821 (1972) (decided under former Code 1933, § 38-103); Carr v. Jacuzzi Bros., 133 Ga. App. 70, 210 S.E.2d 16, 1974 Ga. App. LEXIS 973 (1974) (decided under former Code 1933, § 38-103); Anderson v. Poythress, 246 Ga. 435, 271 S.E.2d 834, 1980 Ga. LEXIS 1153 (1980) (decided under former Code 1933, § 38-103).

When the plaintiff failed to present any evidence which raised a question of fact as to whether the defendant was negligent, plaintiff's contentions regarding what might have happened disappeared in light of the uncontradicted witness testimony as to what did happen, and the trial court correctly granted summary judgment to the defendant. Etheredge v. Kersey, 236 Ga. App. 243, 510 S.E.2d 544 (decided under former O.C.G.A. § 24-4-1).

The burden of proof is determined by the pleadings, and a defendant's denial of the plaintiff's allegations is notice to the plaintiff that the plaintiff has the burden to prove the allegations. Carver v. Jones, 166 Ga. App. 197, 303 S.E.2d 529, 1983 Ga. App. LEXIS 2101 (1983) (decided under former O.C.G.A. § 24-4-1).

Standing. — Trial court did not err in dismissing state agency's petition for downward modification of father's child support obligation as the agency did not prove the agency's assertion that the agency had standing to bring such an action, since the agency did not show the legislature intended to give the state agency the power to seek modification of support to the same extent a parent could do so; accordingly, the state agency could only prove the agency had standing if the agency showed there was a prior court order which established or enforced a child support obligation and which the state agency participated in obtaining, and the agency was unable to make that showing. Dep't of Human Res. v. Allison, 276 Ga. 175, 575 S.E.2d 876, 2003 Ga. LEXIS 3 (2003) (decided under former O.C.G.A. § 24-4-1).

Burden on state in criminal case. — In all criminal trials the burden is upon the state to prove every allegation which is material to an essential element of the offense. Conyers v. State, 50 Ga. 103, 1873 Ga. LEXIS 214 (1873) (lack of parental consent) (decided under former Code 1873, § 3758); Bell v. State, 91 Ga. 15, 16 S.E. 207, 1892 Ga. LEXIS 485 (1892) (capacity of infant to commit crime) (decided under former Code 1882, § 3758); Neil v. State, 117 Ga. 14, 43 S.E. 435, 1903 Ga. LEXIS 133 (1903) (marital status of alleged fornicator) (decided under former Penal Code 1895, § 994); Sikes v. State, 120 Ga. 494, 48 S.E. 153, 1904 Ga. LEXIS 611 (1904); Harris v. State, 14 Ga. App. 574, 81 S.E. 815, 1914 Ga. App. LEXIS 384 (1914) (decided under former Penal Code 1910, § 1020); McLemore v. State, 181 Ga. 462, 182 S.E. 618, 1935 Ga. LEXIS 126 (1935) (voluntariness of confession) (decided under former Code 1933, § 38-103); Butts v. State, 153 Ga. App. 464, 265 S.E.2d 370, 1980 Ga. App. LEXIS 1852 (1980).

Effect of denial by defendant of the plaintiff's allegations is to put the plaintiff on notice that the burden is on the plaintiff to prove those allegations. Whitley v. Wilson, 90 Ga. App. 16, 81 S.E.2d 877, 1954 Ga. App. LEXIS 614 (1954) (decided under former Code 1933, § 38-103).

Defendant has burden of proof as to all matters purely of defense. Life & Cas. Ins. Co. v. Cartrell, 74 Ga. App. 204, 39 S.E.2d 437, 1946 Ga. App. LEXIS 486 (1946) (decided under former Code 1933, § 38-103).

When a third-party defendant was unable to demonstrate any specific evidence that a claim was paid wrongfully by the third-party plaintiff, a surety, and that any consideration of the surety's late affidavit led to an unjust result, the trial court's grant of summary judgment was not error. Horton v. U.S. Fid. & Guar. Co., 194 Ga. App. 881, 392 S.E.2d 25, 1990 Ga. App. LEXIS 379 (1990) (decided under former O.C.G.A. § 24-4-1).

Affirmative defenses generally. — When the defendant admits the essential facts of the petition and sets up other facts in justification or avoidance, plaintiff has the burden of proving such affirmative defense. Hunter v. Sanders, Swan & Co., 113 Ga. 140, 38 S.E. 406, 1901 Ga. LEXIS 185 (1901) (decided under former Civil Code 1895, § 5160); Brunswick & W.R.R. v. Wiggins, 113 Ga. 842, 39 S.E. 551, 1901 Ga. LEXIS 396 (1901) (decided under former Civil Code 1895, § 5160); Milledgeville Cotton Co. v. Bacon, 138 Ga. 470, 75 S.E. 604, 1912 Ga. LEXIS 584 (1912) (decided under former Civil Code 1910, § 5746); Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S.E. 391, 1917 Ga. App. LEXIS 709 (1917) (decided under former Civil Code 1910, § 5746); Branch v. American Agric. Chem. Co., 22 Ga. App. 52, 95 S.E.

General Considerations (Cont'd)

476, 1918 Ga. App. LEXIS 136 (1918) (decided under former Civil Code 1910, § 5746); Alston v. Mobley, 42 Ga. App. 98, 155 S.E. 81, 1930 Ga. App. LEXIS 247 (1930) (decided under former Civil Code 1910, § 5746); Hill v. City of Calhoun, 47 Ga. App. 753, 171 S.E. 459, 1933 Ga. App. LEXIS 644 (1933) (decided under former Code 1933, § 38-103); Jones v. Knightstown Body Co., 52 Ga. App. 667, 184 S.E. 427, 1936 Ga. App. LEXIS 215 (1936) (decided under former Code 1933, § 38-103); Whitley v. Wilson, 90 Ga. App. 16, 81 S.E.2d 877, 1954 Ga. App. LEXIS 614 (1954) (decided under former Code 1933, § 38-103); Purcell v. Hill, 111 Ga. App. 256, 141 S.E.2d 153, 1965 Ga. App. LEXIS 938 (1965) (decided under former Code 1933, § 38-103); Willis v. Kemp, 130 Ga. App. 758, 204 S.E.2d 486, 1974 Ga. App. LEXIS 1251 (1974) (decided under former Code 1933, § 38-103); Metropolitan Publishers Representatives, Inc. v. Arnsdorff, 153 Ga. App. 877, 267 S.E.2d 260, 1980 Ga. App. LEXIS 2017 (1980) (decided under former Code 1933, § 38-103).

When the defendant asserts affirmative defenses, it is not improper to argue that the burden of establishing those defenses lies on the one asserting the defenses. Pembrook Mgt., Inc. v. Cossaboon, 157 Ga. App. 675, 278 S.E.2d 100, 1981 Ga. App. LEXIS 1963 (1981) (decided under former O.C.G.A. § 24-4-1).

Justification and avoidance are affirmative defenses. — When a defendant admits the essential facts of a plaintiff's petition but sets up other facts in justification or avoidance, an affirmative defense is presented and the defendant ordinarily has the burden of proving the defense. Carver v. Jones, 166 Ga. App. 197, 303 S.E.2d 529, 1983 Ga. App. LEXIS 2101 (1983) (decided under former O.C.G.A. § 24-4-1).

Failure to consider student's affirmative defense of self-defense by local board. — Judgment upholding the decision of a local board of education (local board) expelling a student for fighting was reversed because the record fully supported that the student properly raised the issue of self-defense before the local board and that the board failed to apply the proper law and make the board's own findings of fact on the issue. Henry County Bd. of Educ. v. S. G., 301 Ga. 794, 804 S.E.2d 427, 2017 Ga. LEXIS 689 (2017).

Effect of entry of appearance. — When the defendant filed no written plea, but simply entered an appearance as required by the rules of the municipal court in cases of the character of this case, this amounted to a plea of general denial; it was not a plea in the nature of one in confession and avoidance, and therefore, being one merely generally denying the allegations of the plaintiff, the burden which may have rested upon the plaintiff, if any, was the burden only of going on with the evidence, and this burden the plaintiff was not required to carry by a preponderance of the evidence. Boss v. Ed. & Al. Matthews, Inc., 51 Ga. App. 889, 181 S.E. 688, 1935 Ga. App. LEXIS 492 (1935) (on motion for rehearing) (decided under former Code 1933, § 38-103).

Effect of proving prima facie case. — Fact that the plaintiff introduced sufficient evidence to make out a prima facie case, and that in so doing plaintiff was relieved by statute of the burden of introducing evidence on an issue, the affirmative of which was essential to a recovery, in no way relieved the plaintiff of ultimately establishing the essential facts of plaintiff's case by a preponderance of the evidence. Richter Bros. v. Atlantic Co., 59 Ga. App. 137, 200 S.E. 462, 1938 Ga. App. LEXIS 458 (1938) (decided under former Code 1933, § 38-103).

Effect of failure to prove prima facie case. — Rule that the burden is on the defendant to establish defendant's defense of contributory negligence on the part of the plaintiff, such as would bar a recovery, would not impose upon defendant such a duty in a case when the plaintiff personally had failed to make out a prima facie case, by failing to show negligence on the part of the defendant as alleged or by personally showing defendant's own contributory negligence. McCrackin v. McKinney, 52 Ga. App. 519, 183 S.E. 831, 1936 Ga. App. LEXIS 168 (1936) (decided under former Code 1933, § 38-103).

Right to open and conclude argument. — Party having the burden of proof

is entitled to open and conclude the argument before the jury. Willett Seed Co. v. Kirkeby-Gundestrup Seed Co., 145 Ga. 559, 89 S.E. 486, 1916 Ga. LEXIS 397 (1916) (decided under former Civil Code 1910, § 5746); Simmons v. Brannen, 155 Ga. 494, 117 S.E. 318, 1923 Ga. LEXIS 106 (1923) (decided under former Civil Code 1910, § 5746); Seagraves v. Couch & Jackson, 168 Ga. 38, 147 S.E. 61, 1929 Ga. LEXIS 66 (1929) (decided under former Civil Code 1910, § 5746); Morgan-Hill Paving Co. v. Shanks, 45 Ga. App. 274, 164 S.E. 221, 1932 Ga. App. LEXIS 283 (1932) (decided under former Civil Code 1910, § 5746).

Defendant in defendant's plea may admit a prima facie case for the plaintiff, and if the defendant does so before the plaintiff introduces evidence, the burden of proving defendant's defense is on the defendant, and the defendant is entitled to open and conclude. United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30, 1942 U.S. Dist. LEXIS 2220 (D. Ga. 1942) (decided under former Code 1933, § 38-103).

Proving a negative. — When one party has the burden of proving a negative, but all the proof on the subject is within the control of the other party, the burden is shifted to the party having the power to produce the proof. Mayo v. Owen, 208 Ga. 483, 67 S.E.2d 709, 1951 Ga. LEXIS 421 (1951) (decided under former Code 1933, § 38-103).

Propounder who offered a will for probate assumed the non-shifting burden of persuasion as to the validity of that document, including the requirement of showing by a preponderance of the evidence that the signature was that of decedent. Heard v. Lovett, 273 Ga. 111, 538 S.E.2d 434, 2000 Ga. LEXIS 850 (2000) (decided under former O.C.G.A. § 24-4-1).

Prima facie case on life insurance contract. — Plaintiff's right to recover a life insurance contract is established prima facie, without proof of payment of the required premiums, on proof of possession of the policy by the plaintiff and its introduction in evidence, and proof of all other essentials to a recovery under the policy. Masonic Relief Ass'n v. Hicks, 47 Ga. App. 499, 171 S.E. 215, 1933 Ga. App. LEXIS 531 (1933) (decided under former Code 1933, § 38-103).

Second marriages. — For a brief discussion of the presumption of validity or invalidity of second marriage, see Scott v. Jefferson, 174 Ga. App. 651, 331 S.E.2d 1, 1985 Ga. App. LEXIS 1917 (1985) (decided under former O.C.G.A. § 24-4-1).

Specific Actions

Contributory negligence. — When the evidence is sufficient to raise an issue for the jury, and such issue is in fact submitted to the jury upon the question of the defendant's negligence, then, in order for the defendant to avail oneself of the affirmative defense of contributory negligence, it is incumbent upon defendant to prove the defense, and this is true even though defendant does not in defendant's own pleadings confess defendant's negligence as charged. McCrackin v. McKinney, 52 Ga. App. 519, 183 S.E. 831, 1936 Ga. App. LEXIS 168 (1936) (decided under former Code 1933, § 38-103).

Comparative negligence. — While comparative negligence is available as an affirmative defense in Georgia, the burden of proving the defense remains with the party relying upon the defense and not upon the party making the original negligence claim to disprove the defense. Glenridge Unit Owners Ass'n v. Felton, 183 Ga. App. 858, 360 S.E.2d 418, 1987 Ga. App. LEXIS 2104 (1987) (decided under former O.C.G.A. § 24-4-1).

Defense of alternative proximate causation. — Trial court did not err when the court declined to give the customer and spouse's jury instruction directing that the pharmacy and pharmacist had the burden of proving their defense of alternative proximate causation in the customer and spouse's pharmaceutical malpractice action against them as the trial court's given instruction covered the same principle as that contained in the customer and spouse's requested charge and the charge given was a correct statement of the law. Moresi v. Evans, 257 Ga. App. 670, 572 S.E.2d 327, 2002 Ga. App. LEXIS 1255 (2002), cert. denied, No.

Specific Actions (Cont'd)

S03C0251, 2003 Ga. LEXIS 32 (Ga. Jan. 13, 2003) (decided under former O.C.G.A. § 24-4-1).

Denial of contract not affirmative defense. — When a plaintiff is suing on an alleged express contract by which plaintiff claims defendant agreed to pay a sum certain as rent, and defendant denies there is any such express contract, defendant's answer is not an affirmative defense as to which defendant is required to carry the burden of proof. Willis v. Kemp, 130 Ga. App. 758, 204 S.E.2d 486, 1974 Ga. App. LEXIS 1251 (1974) (decided under former Code 1933, § 38-103).

Legitimacy. — Existence of the presumption of legitimacy arising from the birth of a child requires the production of contrary evidence from the husband, but it does not relieve the wife of her burden of proof to establish legitimacy in the first place. Miller v. Miller, 258 Ga. 168, 366 S.E.2d 682, 1988 Ga. LEXIS 117 (1988) (decided under former O.C.G.A. § 24-4-1).

Medical malpractice. — Defense counsel's claim that the conduct of the patient and the midwife was an intervening cause of the fetal death, and that the patient had the burden of proof under former O.C.G.A. § 24-4-1 to show that there was no such intervening cause, was error which the trial court should have corrected. Steele v. Atlanta Maternal-Fetal Medicine, 271 Ga. App. 622, 610 S.E.2d 546, 2005 Ga. App. LEXIS 51 (2005), cert. denied, No. S05C1009, 2005 Ga. LEXIS 486 (Ga. June 30, 2005), overruled on other grounds, Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147, 2009 Ga. LEXIS 395 (2009) (decided under former O.C.G.A. § 24-4-1).

Party asserting an accord and satisfaction bears the burden of proof on that issue. Carpet Transp., Inc. v. TMS Ins. Agency, Inc., 165 Ga. App. 734, 302 S.E.2d 421, 1983 Ga. App. LEXIS 2001 (1983) (decided under former O.C.G.A. § 24-4-1).

Status as hospital charity patient. — When a nonpaying patient, who in the end was the recipient of a hospital's charity, claims the patient was able to pay and was not a charity patient so that the hospital would be subject to a negligence claim, the trial court abused the court's discretion in refusing to put the burden of proof on the patient or the patient's personal representative. Fulton-DeKalb Hosp. Auth. v. Fanning, 196 Ga. App. 556, 396 S.E.2d 534, 1990 Ga. App. LEXIS 975 (1990), cert. denied, No. S90C1515, 1990 Ga. LEXIS 593 (Ga. Sept. 4, 1990) (decided under former O.C.G.A. § 24-4-1).

Specific issues. — For burden of proof on specific civil issues, see the following cases: Lanier v. Hughley, 91 Ga. 719, 18 S.E. 39 (1893) (payment) (decided under former Code 1882, § 3758); Pyron & Son v. Ruohs, 120 Ga. 1060, 48 S.E. 434, 1904 Ga. LEXIS 797 (1904) (jurisdiction) (decided under former Civil Code 1895, § 5160); Gaskins v. Touchton, 151 Ga. 458, 107 S.E. 38, 1921 Ga. LEXIS 291 (1921) (payment) (decided under former Civil Code 1910, § 5746); Bankers Trust & Audit Co. v. Hanover Nat'l Bank, 35 Ga. App. 619, 134 S.E. 195, 1926 Ga. App. LEXIS 1034 (1926) (lack of consideration) (decided under former Civil Code 1910, § 5746); Paulk v. Roberts, 42 Ga. App. 79, 155 S.E. 55, 1930 Ga. App. LEXIS 238 (1930) (legality of administrator's investments) (decided under former Civil Code 1910, § 5746); Branon v. Ellbee Pictures Corp., 42 Ga. App. 293, 155 S.E. 923, 1930 Ga. App. LEXIS 366 (1930) (mitigation of damages) (decided under former Civil Code 1910, § 5746); Supreme Kingdom, Inc. v. Fourth Nat'l Bank, 174 Ga. 779, 164 S.E. 204, 1932 Ga. LEXIS 140 (1932) (forgery) (decided under former Civil Code 1910, § 5746); State Hwy. Bd. v. Lewis, 46 Ga. App. 162, 167 S.E. 219, 1932 Ga. App. LEXIS 89 (1932) (invalidity of marriage) (decided under former Civil Code 1910, § 5746); Masonic Relief Ass'n v. Hicks, 47 Ga. App. 499, 171 S.E. 215, 1933 Ga. App. LEXIS 531 (1933) (invalidity of insurance contract) (decided under former Code 1933, § 38-103); Hill v. City of Calhoun, 47 Ga. App. 753, 171 S.E. 459, 1933 Ga. App. LEXIS 644 (1933) (affidavit of illegality) (decided under former Code 1933, § 38-103); Bell v. City of Valdosta, 47 Ga. App. 808, 171 S.E. 572, 1933 Ga. App. LEXIS 674 (1933) (invalidity of municipal ordinance) (decided under former Code 1933, § 38-103); Thomas v. Southern Ry.,

92 F.2d 445, 1937 U.S. App. LEXIS 4607 (5th Cir. 1937) (contributory negligence) (decided under former Code 1933, § 38-103); Heaton v. Hayes, 188 Ga. 632, 4 S.E.2d 570, 1939 Ga. LEXIS 592 (1939) (payment in suit to foreclose security deed) (decided under former Code 1933, § 38-103); Marion County v. First Nat'l Bank, 193 Ga. 263, 18 S.E.2d 475, 1942 Ga. LEXIS 375 (1942) (unconstitutional county debt) (decided under former Code 1933, § 38-103); Hamilton v. North Ga. Elec. Membership Corp., 201 Ga. 689, 40 S.E.2d 750, 1946 Ga. LEXIS 290 (1946) (invalidity of municipal ordinance) (decided under former Code 1933, § 38-103); Palatine Ins. Co. v. Gilleland, 79 Ga. App. 18, 52 S.E.2d 537, 1949 Ga. App. LEXIS 578 (1949) (lack of notice of application by insured for appointment of umpire) (decided under former Code 1933, § 38-103); Estridge v. Janko, 96 Ga. App. 246, 99 S.E.2d 682, 1957 Ga. App. LEXIS 551 (1957) (set off and counterclaim) (decided under former Code 1933, § 38-103); Polk v. Fulton County, 96 Ga. App. 733, 101 S.E.2d 736, 1957 Ga. App. LEXIS 677 (1957) (value of condemned property) (decided under former Code 1933, § 38-103); Cobb v. Dutton, 222 Ga. 11, 148 S.E.2d 399, 1966 Ga. LEXIS 384 (1966) (lack of counsel) (decided under former Code 1933, § 38-103); Smith v. Morgan, 113 Ga. App. 865, 150 S.E.2d 164, 1966 Ga. App. LEXIS 1237 (1966) (title to land) (decided under former Code 1933, § 38-103); First Pentecostal Church v. City of Atlanta, 144 Ga. App. 718, 242 S.E.2d 357, 1978 Ga. App. LEXIS 1764 (1978) (unreasonableness of tax) (decided under former Code 1933, § 38-103); Forehand v. Pace, 146 Ga. App. 682, 247 S.E.2d 192, 1978 Ga. App. LEXIS 2505 (1978) (negligence) (decided under former Code 1933, § 38-103); Brown v. Minter, 243 Ga. 397, 254 S.E.2d 326, 1979 Ga. LEXIS 911, cert. denied, 444 U.S. 844, 100 S. Ct. 88, 62 L. Ed. 2d 57, 1979 U.S. LEXIS 2765 (1979) (access to public records) (decided under former Code 1933, § 38-103); A & N Inv., Inc. v. Cronic, 151 Ga. App. 738, 261 S.E.2d 469, 1979 Ga. App. LEXIS 2776 (1979) (signing of note) (decided under former Code 1933, § 38-103); Anderson v. Poythress, 246 Ga. 435, 271 S.E.2d 834, 1980 Ga. LEXIS 1153 (1980) (action of public official) (decided under former Code 1933, § 38-103); Carter v. Kim, 157 Ga. App. 418, 277 S.E.2d 776, 1981 Ga. App. LEXIS 1851 (1981) (existence of contract and agency) (decided under former O.C.G.A. § 24-4-1); Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653, 1981 Ga. App. LEXIS 2011 (1981) (hypersensitivity to x-rays) (decided under former O.C.G.A. § 24-4-1).

Workers' compensation proceeding. — When claimant proved that claimant's injury arose out of and in the scope of claimant's employment, the burden shifted to the employer to prove that either claimant's injuries were intentionally self-inflicted or the injuries were caused by an attack for reasons personal to claimant. Hulbert v. Domino's Pizza, Inc., 239 Ga. App. 370, 521 S.E.2d 43 (decided under former O.C.G.A. § 24-4-1).

Burden of persuasion on propounders in "will contest". — Trial court did not err in finding that a codicil to a testator's will was invalid because it properly charged the jury that the caveators had no burden to prove the grounds of their caveats to the propounders' petition to probate codicils; because testamentary capacity and voluntary execution were necessary elements of the propounders' case, the burden of persuasion remained on the propounders to prove their assertions by a preponderance of the evidence, and in the absence of an asserted affirmative defense, the caveators had no duty to affirmatively prove anything but were required only to come forward with evidence to rebut the propounders' prima facie case as to essential elements. Parker v. Melican, 286 Ga. 185, 684 S.E.2d 654, 2009 Ga. LEXIS 646 (2009) (decided under former O.C.G.A. § 24-4-1).

Jury Instructions

Instructions generally. — In the absence of a timely and appropriate request to charge, it is not reversible error for the judge to omit to instruct the jury upon the burden of proof. Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S.E. 391, 1917 Ga. App. LEXIS 709 (1917) (decided under former Penal Code 1910, § 1012).

Instruction must be correct if the judge does charge the jury upon the bur-

Jury Instructions (Cont'd)

den of proof. Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S.E. 391, 1917 Ga. App. LEXIS 709 (1917) (decided under former Penal Code 1910, § 1012).

Instruction on shifting burden. — When the judge correctly charges in regard to the general burden of proof, the judge is not required, as an essential part of the judge's charge (in the absence of a proper request), to discuss the shifting of the burden as to the particular points of contest made by the evidence. Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S.E. 391, 1917 Ga. App. LEXIS 709 (1917) (decided under former Penal Code 1910, § 1012); Haugabrooks v. Metropolitan Life Ins. Co., 63 Ga. App. 829, 12 S.E.2d 163, 1940 Ga. App. LEXIS 564 (1940) (decided under former Code 1933, § 38-103).

In action by bank to collect on promissory note, when prima facie case had been admitted by defendant, it was misleading and confusing to jury to instruct the jury that burden still remained upon plaintiff to prove plaintiff's case to the jury's satisfaction by a preponderance of the evidence; the court should have instructed the jury that in view of defendant's admission as to prima facie right of plaintiff to recover, burden was upon defendant to meet this prima facie right by establishing defendant's affirmative defense of partial accord and satisfaction by a preponderance of the evidence. Citizens Bank v. Ansley, 164 Ga. App. 437, 296 S.E.2d 370, 1982 Ga. App. LEXIS 2826 (1982) (decided under former O.C.G.A. § 24-4-1).

Request for instructions. — If a party is not satisfied with the general charge on the subject of the burden of proof, it is incumbent upon the party to make timely written request to charge on the shifting of the burden if the party desires such charge. Hyde v. Chappell, 194 Ga. 536, 22 S.E.2d 313, 1942 Ga. LEXIS 635 (1942) (decided under former Code 1933, § 38-103).

Charge as to apportionment. — In a personal injury case, the defendant's apportionment claim was an affirmative defense, thus, the defendant had the burden of showing by a preponderance of the evidence that the nonparty tractor-trailer driver was negligent and that the driver's negligence proximately caused all or some portion of damages to the plaintiff, thus, the trial court committed no error in charging the jury to that effect. Brown v. Tucker, 337 Ga. App. 704, 788 S.E.2d 810, 2016 Ga. App. LEXIS 399 (2016).

Instruction in murder case. — On trial of one charged with murder, it is not error to charge the jury: "The law puts upon the defendant, where he admits the killing, the burden to satisfy the jury that he was justified under some rule of law, unless the admissions, together with the evidence in the case against him, or the statement of the defendant, shows justification or mitigation." Gay v. State, 173 Ga. 793, 161 S.E. 603, 1931 Ga. LEXIS 406 (1931) (decided under former Penal Code 1910, § 1020).

Condemnation suit instruction in language of former statute was a correct abstract principle of law and was not confusing or misleading to the jury. Georgia Power Co. v. Smith, 94 Ga. App. 166, 94 S.E.2d 48, 1956 Ga. App. LEXIS 495 (1956) (decided under former Code 1933, § 38-105).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, §§ 1, 171.

Am. Jur. Pleading and Practice Forms.

9A Am. Jur. Pleading and Practice Forms, Evidence, § 94.

C.J.S.

31A C.J.S., Evidence, § 165 et seq.

ALR.

Burden of proof as regards discharge in bankruptcy, 2 A.L.R. 1672.

Duty to charge as to reasonable doubt as between different degrees of crime or included offenses, 20 A.L.R. 1258.

Presumption and burden of proof as to loss from failure of pledgee to sell or

collect choses in action pledged, 53 A.L.R. 1075.

Effect of fraud in the inception of a bill or note to throw upon the subsequent holder the burden of proving that he is a holder in due course, 57 A.L.R. 1083.

Res ipsa loquitur in its relation to burden of proof and burden of evidence, 59 A.L.R. 486; 92 A.L.R. 653.

Burden of proof as to consideration for bill or note, when plaintiff not protected as a holder in due course, 65 A.L.R. 904; 127 A.L.R. 1003.

Burden and degree of proof as to alibi, 67 A.L.R. 138; 124 A.L.R. 471.

Prima facie case for proponent in will contest as shifting burden of proof, 76 A.L.R. 373.

Governing law as regards presumption and burden of proof, 78 A.L.R. 883; 168 A.L.R. 191.

Pleading want of contributory negligence as waiver of right to presumption of freedom from negligence, 96 A.L.R. 1116.

Presumption and burden of proof of settlement in action by one town or poor district against another for support of pauper, 99 A.L.R. 457.

Burden of proof as to outlawry by limitation or otherwise of criminal prosecution when relied upon to defeat claim of privilege against self-incrimination, 101 A.L.R. 389.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 A.L.R. 1510.

Necessity and sufficiency of proof, in prosecution for perjury during trial, that oath was administered, 132 A.L.R. 1311.

Presumption and burden of proof regarding mitigation of damages, 134 A.L.R. 242.

Statute which places burden of proof as to contributory negligence on defendant or creates a presumption against contributory negligence as applicable to actions by one person for consequential damages resulting from injury to another, 147 A.L.R. 726.

Distinction between burden of proof and burden of evidence as related to statutory provisions regarding presumption and burden of proof in respect of commercial paper, 152 A.L.R. 1331.

Burden of proof as to doctrine of last clear chance, 159 A.L.R. 724.

Burden of proof in partition suit as regards alleged prior voluntary partition of property, 1 A.L.R.2d 473.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case, 1 A.L.R.2d 1291.

Burden of proving value of relief from performing contract in suit based on defendant's breach preventing or excusing full performance, 17 A.L.R.2d 968.

Presumption and burden of proof of accuracy of scientific and mechanical instruments for measuring speed, temperature, time, and the like, 21 A.L.R.2d 1200.

Burden of proof in actions under general declaratory judgment acts, 23 A.L.R.2d 1243.

Reference by counsel for prosecution in opening statement to matters which he does not later attempt to prove as ground for new trial, reversal, or modification, 28 A.L.R.2d 972.

Sufficiency of evidence, in absence of survivors or of eyewitnesses competent to testify, as to place or point of impact of motor vehicles going in opposite directions and involved in collision, 77 A.L.R.2d 580.

Conviction of criminal offense without evidence as denial of due process of law, 80 A.L.R.2d 1362.

Res ipsa loquitur with respect to personal injuries or death on or about ship, 1 A.L.R.3d 642.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 A.L.R.3d 19.

Zoning as a factor in determination of damages in eminent domain, 9 A.L.R.3d 291.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 A.L.R.3d 146.

Conflict of laws as to presumptions and burden of proof concerning facts of civil case, 35 A.L.R.3d 289.

Burden of proof of defendant's age, in prosecution where attainment of particular age is statutory requisite of guilt, 49 A.L.R.3d 526.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment, 52 A.L.R.3d 1084.

Setting aside arbitration award on ground of interest or bias of arbitrators, 56 A.L.R.3d 697.

Homicide: burden of proof on defense that killing was accidental, 63 A.L.R.3d 936.

Burden of proof as to lack of license in criminal prosecution for carrying or possession of weapon without license, 69 A.L.R.3d 1054.

Answers to interrogatories as limiting answering party's proof at state trial, 86 A.L.R.3d 1089.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief, 16 A.L.R.4th 810.

Burden of proof as to entrapment defense — state cases, 52 A.L.R.4th 775.

Setting aside arbitration award on ground of interest or bias of arbitrators — commercial, business, or real estate transactions, 67 A.L.R.5th 179.

24-14-2. Change of burden in discretion of court.

What amount of evidence will change the onus or burden of proof shall be a question to be decided in each case by the sound discretion of the court.

History.

Code 1981, § 24-14-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For note discussing shifting burden of persuasion in will contests involving undue influence in Georgia, see 22 Ga. B.J. 555 (1960).

For note, "Georgia's Approach to Proportionality and Sanctions for the Spoliation of Electronically Stored Information," see 37 Ga. St. U.L. Rev. 603 (2021).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5747, former Code 1933, § 38-104, and former O.C.G.A. § 24-4-2 are included in the annotations for this Code section.

In general. — Term, "burden of proof," is used in two senses: one, the burden of proof thrust upon the party by the pleadings which remains upon the party throughout the trial and, two, the burden of the evidence which may and does shift during the progress of the trial as to facts or issues from one party to the other. Hawkins v. Davie, 136 Ga. 550, 71 S.E. 873, 1911 Ga. LEXIS 138 (1911) (decided under former Civil Code 1910, § 5747); Atlantic Coast Line R.R. v. Thomas, 83 Ga. App. 477, 64 S.E.2d 301, 1951 Ga. App. LEXIS 890 (1951) (decided under former Code 1933, § 38-104); Deloach v. Automatic Transmission & Brake Shop, Inc., 106 Ga. App. 797, 128 S.E.2d 512, 1962 Ga. App. LEXIS 858 (1962) (decided under former Code 1933, § 38-104).

Burden of proof. — Former statute had no application to the burden of proof placed by the pleadings; the former statute applied only to the burden of evidence which may, as to any particular fact or issue, shift from one party to the other. Department of Revenue v. Stewart, 67 Ga. App. 281, 20 S.E.2d 40, 1942 Ga. App. LEXIS 377 (1942) (decided under former Code 1933, § 38-104); Davison Chem. Corp. v. Hart, 68 Ga. App. 413, 23 S.E.2d 107, 1942 Ga. App. LEXIS 140 (1942) (decided under former Code 1933, § 38-104); Atlantic Coast Line R.R. v. Thomas, 83 Ga. App. 477, 64 S.E.2d 301, 1951 Ga. App. LEXIS 890 (1951) (decided under former Code 1933, § 38-104); Deloach v. Automatic Transmission & Brake Shop, Inc., 106 Ga. App. 797, 128 S.E.2d 512, 1962 Ga. App. LEXIS 858 (1962) (decided under former Code 1933, § 38-104); Richards v. Wilkinson Shaving Co., 198 Ga. App. 45, 400 S.E.2d 344, 1990 Ga. App. LEXIS 1536 (1990) (decided under former O.C.G.A. § 24-4-2).

Discretion of judge. — As to the burden of proof placed by the pleadings, the

trial judge has no discretion — it is a matter of law; but as to the shifting of the burden of the evidence, the judge has discretion to determine whether the evidence produced, together with any applicable rules of presumption and procedure, in the particular case has shifted the burden. Deloach v. Automatic Transmission & Brake Shop, Inc., 106 Ga. App. 797, 128 S.E.2d 512, 1962 Ga. App. LEXIS 858 (1962) (decided under former Code 1933, § 38-104).

Application not always discretionary. — Former statute did not intend to lay down the rule that whether under an affirmation and denial in pleadings upon the case one party or the other carried the burden of establishing that party's allegation was a matter of discretion in every case. Atlantic Coast Line R.R. v. Thomas, 83 Ga. App. 477, 64 S.E.2d 301, 1951 Ga. App. LEXIS 890 (1951) (decided under former Code 1933, § 38-104).

Exercise of discretion. — As to the discretion which the law invests in the trial judge, the judge may call to the judges's assistance in reaching a correct decision other well-recognized and fundamental principles of procedure and practice which are so well recognized that they take the form of substantive evidence. The judge may consider the question of peculiar knowledge. Department of Revenue v. Stewart, 67 Ga. App. 281, 20 S.E.2d 40, 1942 Ga. App. LEXIS 377 (1942) (decided under former Code 1933, § 38-104).

Burden shifted to defendant. — When the plaintiff makes out a prima facie case, the burden is shifted to the defendant. Equitable Life Assurance Soc'y v. Florence, 47 Ga. App. 711, 171 S.E. 317, 1933 Ga. App. LEXIS 621 (1933) (decided under former Code 1933, § 38-104).

Effect of failure to carry burden. — If the burden of proof has shifted and the party to whom the burden has shifted has not successfully carried this burden of evidence, the trial judge has authority to withdraw the case from the jury by directing a verdict. Deloach v. Automatic Transmission & Brake Shop, Inc., 106 Ga. App. 797, 128 S.E.2d 512, 1962 Ga. App. LEXIS 858 (1962) (decided under former Code 1933, § 38-104).

Instructions. — Charge of the court should state what testimony would shift the onus, rather than when the onus would be changed, because the latter expression would intimate an opinion as to the sufficiency of the proof. Clark v. Cassidy, 64 Ga. 662, 1880 Ga. LEXIS 386 (1880) (decided under former Code 1873, § 3759); Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S.E. 391, 1917 Ga. App. LEXIS 709 (1917) (decided under former Civil Code 1910, § 5747).

When state filed for condemnation of a DC-3 airplane, a truck, a trailer, and the contents of the vehicles which had been used previously to transport contraband drugs, the trial court did not err in charging the jury that the defendant had to prove that the defendant had no knowledge that the vehicles were used in violation of controlled substances laws after the state had made out a prima facie case that the vehicles had been used to transport drugs. Morgan v. State, 172 Ga. App. 375, 323 S.E.2d 620, 1984 Ga. App. LEXIS 2515 (1984) (decided under former O.C.G.A. § 24-4-2).

Proving a negative. — If a negation or negative affirmation is essential to prove a party's case, the burden of proof of such negative lies on the party so affirming it. Supreme Kingdom, Inc. v. Fourth Nat'l Bank, 174 Ga. 779, 164 S.E. 204, 1932 Ga. LEXIS 140 (1932) (decided under former Civil Code 1910, § 5747).

Proving status as hospital charity patient. — When a nonpaying patient, who in the end was the recipient of a hospital's charity, claims the patient was able to pay and was not a charity patient so that the hospital would be subject to a negligence claim, the trial court abused the court's discretion in refusing to put the burden of proof on the patient or the patient's personal representative. Fulton-DeKalb Hosp. Auth. v. Fanning, 196 Ga. App. 556, 396 S.E.2d 534, 1990 Ga. App. LEXIS 975 (1990), cert. denied, No. S90C1515, 1990 Ga. LEXIS 593 (Ga. Sept. 4, 1990) (decided under former O.C.G.A. § 24-4-2).

Mitigation. — When the lessor under an exclusive rights contract brought an action for damages against the lessee for a breach of the contract, and alleged that the lessor's damages were the total of the fixed amounts to be paid under the con-

tract for the pictures and proved upon the trial the execution of the contract and a breach thereof by the lessee, a prima facie case in favor of the plaintiff for the full amount sued for was made out, and the burden was then upon the defendant to prove that the plaintiff could have lessened plaintiff's damages, and such proof should have included sufficient data to allow the jury to reasonably estimate how much the damages could have been mitigated. Branon v. Ellbee Pictures Corp., 42 Ga. App. 293, 155 S.E. 923, 1930 Ga. App. LEXIS 366 (1930) (decided under former Civil Code 1910, § 5747).

Partnership accounting. — When the pleadings and the evidence in a partnership accounting showed that the defendant partner was in possession of the farm, that the defendant kept the books and records, and that the defendant admitted the receipt of the gross amount of money charged to the defendant by the plaintiff, from the sale of the farm and the equipment and cattle thereon, it was not error to charge that the burden was on the defendant of proving a proper disposition of the assets that came into the defendant's hands as a member of the partnership in charge of the partnership's business and assets. Brosnan v. Long, 75 Ga. App. 837, 44 S.E.2d 809, 1947 Ga. App. LEXIS 653 (1947) (decided under former Code 1933, § 38-104).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, §§ 172, 183.

ALR.

Res ipsa loquitur in its relation to burden of proof and burden of evidence, 59 A.L.R. 486; 92 A.L.R. 653.

Burden and degree of proof as to alibi, 67 A.L.R. 138; 124 A.L.R. 471.

Prima facie case for proponent in will contest as shifting burden of proof, 76 A.L.R. 373.

Governing law as regards presumption and burden of proof, 78 A.L.R. 883; 168 A.L.R. 191.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 A.L.R. 1510.

Exception to principle of pari delicto where refusal of relief would involve harmful effect on persons for whose protection the law made the transaction illegal, 120 A.L.R. 1461.

Use of the word "satisfaction" or a derivative in instructions in civil case relating to degree or amount or proof, 147 A.L.R. 380.

Sufficiency of evidence, in absence of survivors or of eyewitness competent to testify, as to place or point of impact of motor vehicles going in opposite directions and involved in collision, 77 A.L.R.2d 580.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 A.L.R.3d 19.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment, 52 A.L.R.3d 1084.

Homicide: burden of proof on defense that killing was accidental, 63 A.L.R.3d 936.

Burden of proof as to lack of license in criminal prosecution for carrying or possession of weapon without license, 69 A.L.R.3d 1054.

Answers to interrogatories as limitating answering party's proof at state trial, 86 A.L.R.3d 1089.

24-14-3. Required mental conviction in civil and criminal proceedings.

Moral and reasonable certainty is all that can be expected in legal investigation. Except as provided in Code Section 51-1-29.5 or Code Section 51-12-5.1, in all civil proceedings, a preponderance of evidence shall be considered sufficient to produce mental conviction. In criminal

proceedings, a greater strength of mental conviction shall be held necessary to justify a verdict of guilty.

History.

Code 1981, § 24-14-3, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-4-3, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in John v. State, 33 Ga. 257 (1862) and Lucas v. State, 48 Ga. App. 42, 171 S.E. 850 (1933).

Law reviews.

For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3749, former Code 1882, § 3749, former Civil Code 1895, § 5144, former Penal Code 1895, § 986, former Civil Code 1910, § 5730, former Penal Code 1910, § 1012, former Code 1933, § 38-105, and former O.C.G.A. § 24-4-3 are included in the annotations for this Code section.

Civil Cases

Degree of proof. — Proof should be satisfactory, but the proof need not be perfectly clear or wholly unimpeached. M.J. Atkins & Co. v. Cobb, 56 Ga. 86, 1876 Ga. LEXIS 213 (1876) (decided under former Code 1873, § 3749); City Bank v. Kent, 57 Ga. 283, 1876 Ga. LEXIS 104 (1876) (decided under former Code 1873, § 3749); Poullain v. Poullain, 76 Ga. 420, 4 S.E. 92, 1886 Ga. LEXIS 47 (1886) (decided under former Code 1882, § 3749); Patton v. State, 117 Ga. 230, 43 S.E. 533, 1903 Ga. LEXIS 204 (1903) (decided under former Penal Code 1895, § 986).

Conviction as prima facie evidence of murder. — *Unpublished decision:* In a case in which a husband had been convicted of killing his wife, the estate executors were entitled to summary judgment for an order of distribution of life insurance proceeds under O.C.G.A. § 33-25-13. The husband's criminal conviction was prima facie evidence under former O.C.G.A. § 24-4-3 (see now O.C.G.A. §24-14-3) that he was guilty of his wife's murder for the purpose of determining that he could not receive proceeds of an insurance policy on her life. Cont'l Cas. Co. v. Adamo, 286 Fed. Appx. 625, 2008 U.S. App. LEXIS 13979 (11th Cir. 2008) (decided under former O.C.G.A. § 24-4-3).

Preponderance of evidence. — It is improper to charge in a civil case that proof must establish the contention to a reasonable and moral certainty; a preponderance or superior weight of evidence is sufficient. Supreme Conclave Knights of Damon v. Woods, 120 Ga. 328, 47 S.E. 940, 1904 Ga. LEXIS 542 (1904) (decided under former Civil Code 1895, § 5144); Youmans v. Moore, 11 Ga. App. 66, 74 S.E. 710, 1912 Ga. App. LEXIS 257 (1912) (decided under former Civil Code 1910, § 5730); Masonic Relief Ass'n v. Hicks, 47 Ga. App. 499, 171 S.E. 215, 1933 Ga. App. LEXIS 531 (1933) (decided under former Code 1933, § 38-105); Life Ins. Co. v. Lawler, 211 Ga. 246, 85 S.E.2d 1, 1954 Ga. LEXIS 538 (1954) (decided under former Code 1933, § 38-105); Hospital Auth. v. Eason, 113 Ga. App. 401, 148 S.E.2d 499, 1966 Ga. App. LEXIS 1081, rev'd, 222 Ga. 536, 150 S.E.2d 812, 1966 Ga. LEXIS 548 (1966).

In a civil action under the Georgia

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RICO Act, given the similarities in the purpose and language of the federal and Georgia RICO statutes, together with the General Assembly's mandate to liberally construe the Act to effectuate the Act's remedial purposes, under O.C.G.A. § 16-14-2(b), the applicable standard of proof in state civil RICO actions was held to be a preponderance of the evidence; thus, the Supreme Court of Georgia overruled Simpson Consulting, Inc. v. Barclays Bank PLC, 227 Ga. App. 648 (1997), and those other cases holding to the contrary, specifically, Blanton v. Bank of America, 256 Ga. App. 103 (2002), In re Copelan, 250 Ga. App. 856 (2001) and Tronitec, Inc. v. Shealy, 249 Ga. App. 442 (2001). Williams Gen. Corp. v. Stone, 279 Ga. 428, 614 S.E.2d 758, 2005 Ga. LEXIS 445 (2005) (decided under former O.C.G.A. § 24-4-3).

Preponderance standard establishing terms of lost document. — In a divorce case, applying the preponderance of the evidence standard, and deferring to the trial court's finding that both a husband and a wife believed their opposing positions regarding the contents of a lost antenuptial agreement, the husband failed to prove the terms of the lost agreement, and the agreement could not be enforced. Coxwell v. Coxwell, 296 Ga. 311, 765 S.E.2d 320, 2014 Ga. LEXIS 897 (2014).

Charging entire former statute was not injuriously inapplicable to a civil case. Central of Ga. Ry. v. McGuire, 10 Ga. App. 483, 73 S.E. 702, 1912 Ga. App. LEXIS 580 (1912) (decided under former Civil Code 1910, § 5730).

Charge ignoring former statute in an action for debt was erroneous. Central of Ga. Ry. v. Swann, 144 Ga. 11, 85 S.E. 1001, 1915 Ga. LEXIS 7 (1915) (decided under former Civil Code 1910, § 5730).

Question for jury. — Preponderance is a question for the jury and should be decided not from mere number of witnesses, but from interest, opportunity, and general deportment and manner of testifying. Clark v. Cassidy, 62 Ga. 607 (1879) (decided under former Code 1873, § 3749).

Question of law. — When the evidence as a whole, with all reasonable inferences and deductions to be drawn therefrom, presents no conflict in any material particular, and points only to one result, and in that sense there is no question of fact to be determined, then it becomes a question of law, when the evidence is properly presented, to decide whether the verdict is supported by the evidence. Dyal v. Sanders, 194 Ga. 228, 21 S.E.2d 596, 1942 Ga. LEXIS 566 (1942) (decided under former Code 1933, § 38-105).

In res ipsa loquitur case the plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that the plaintiff must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable men can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not. It is enough that the court cannot say that the jury could not reasonably come to that conclusion. Hospital Auth. v. Eason, 113 Ga. App. 401, 148 S.E.2d 499, 1966 Ga. App. LEXIS 1081, rev'd, 222 Ga. 536, 150 S.E.2d 812, 1966 Ga. LEXIS 548 (1966) (decided under former Code 1933, § 38-105).

Specific performance. — Notwithstanding the former statute, to authorize specific performance of a parol contract for the sale of land or to authorize reformation of a written contract for such sale, the evidence must be so clear, strong, and satisfactory as to leave no reasonable doubt as to the agreement. Redman Bros. v. Mays, 129 Ga. 435, 59 S.E. 212, 1907 Ga. LEXIS 399 (1907) (decided under former Civil Code 1895, § 5144); Williams v. Segers, 147 Ga. 219, 93 S.E. 215, 1917 Ga. LEXIS 131 (1917) (decided under former Civil Code 1910, § 5730); Gordon v. Spellman, 148 Ga. 394, 96 S.E. 1006, 1918 Ga. LEXIS 351 (1918) (decided under former Civil Code 1910, § 5730); Lloyd v. Redford, 148 Ga. 575, 97 S.E. 523, 1918 Ga. LEXIS 446 (1918) (decided under former Civil Code 1910, § 5730); Allen v. Allen, 151 Ga. 278, 106 S.E. 81, 1920 Ga. LEXIS 199 (1920) (decided under former Civil Code 1910, § 5730); Ezell v. Mobley, 160 Ga. 872, 129 S.E. 532, 1925 Ga. LEXIS

284 (1925) (decided under former Civil Code 1910, § 5730).

Administrative hearings. — Preponderance of evidence standard was applicable in a disciplinary proceeding conducted by the Board of Dentistry. Georgia Bd. of Dentistry v. Pence, 223 Ga. App. 603, 478 S.E.2d 437 (decided under former O.C.G.A. § 24-4-3).

Instances when preponderance of evidence was sufficient. — In the following cases the preponderance was sufficient to satisfy the jury: Berry v. Mathewes, 7 Ga. 457, 1849 Ga. LEXIS 164 (1849) (whether a party has waived lien given by contract) (decided under former law); M.J. Atkins & Co. v. Cobb, 56 Ga. 86, 1876 Ga. LEXIS 213 (1876) (proving that goods purchased were inferior) (decided under former Code 1873, § 3749); Crockett v. Crockett, 73 Ga. 647, 1884 Ga. LEXIS 192 (1884) (to correct a mistake in a voluntary deed) (decided under former Code 1882, § 3749); Poullain v. Poullain, 76 Ga. 420, 4 S.E. 92, 1886 Ga. LEXIS 47 (1886) (to overcome findings of fact by an auditor or master) (decided under former Code 1882, § 3749); Atlanta Journal v. Mayson, 92 Ga. 640, 18 S.E. 1010, 1893 Ga. LEXIS 220 (1893) (in an action for libel although a plea of justification, imputes crime to the plaintiff) (decided under former Code 1882, § 3749); Drakeford v. Adams, 98 Ga. 722, 25 S.E. 833, 1896 Ga. LEXIS 131 (1896) (action by receiver to recover money to prove that the respondent had such money) (decided under former Civil Code 1895, § 5144); Brothers v. Horne, 140 Ga. 617, 79 S.E. 468, 1913 Ga. LEXIS 202 (1913) (to authorize a recovery in trover) (decided under former Civil Code 1910, § 5730); Harp v. Adams, 142 Ga. 5, 82 S.E. 246, 1914 Ga. LEXIS 247 (1914) (to prove the material allegations in a probate of a nuncupative will) (decided under former Civil Code 1910, § 5730); Cowart v. Strickland, 149 Ga. 397, 100 S.E. 447, 1919 Ga. LEXIS 255 (1919) (to prove forgery of a deed in an action of ejectment) (decided under former Civil Code 1910, § 5730); Carter v. Norton, 25 Ga. App. 79, 102 S.E. 648, 1920 Ga. App. LEXIS 605 (1920) (in a plea of justification, in an action for slander) (decided under former Civil Code 1910, § 5730); Currie v. State, 153 Ga. 178, 111 S.E. 727, 1922 Ga. LEXIS 50 (1922) (defense of insanity on a trial for murder must be proved by a preponderance) (decided under former Civil Code 1910, § 5730); Goosby v. State, 153 Ga. 496, 112 S.E. 467, 1922 Ga. LEXIS 110 (1922) (insanity by preponderance of evidence in murder trial) (decided under former Civil Code 1910, § 5730); Mansor v. Opelinsky, 30 Ga. App. 158, 117 S.E. 113, 1923 Ga. App. LEXIS 326 (1923) (purchase price of goods) (decided under former Civil Code 1910, § 5730).

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Proof required. — Burden of proof is on the state to show that defendant's guilt to a moral and reasonable certainty and beyond a moral and reasonable doubt. Blakeley v. State, 78 Ga. App. 516, 51 S.E.2d 598, 1949 Ga. App. LEXIS 918 (1949) (decided under former Code 1933, § 38-105); Life Ins. Co. v. Lawler, 211 Ga. 246, 85 S.E.2d 1, 1954 Ga. LEXIS 538 (1954) (decided under former Code 1933, § 38-105).

Degree of certainty required. — Mathematical certainty is not required and cannot be attained in a legal investigation; moral and reasonable certainty is all the law requires. McNaughton v. State, 136 Ga. 600, 71 S.E. 1038, 1911 Ga. LEXIS 157 (1911), writ of error dismissed, 223 U.S. 744, 32 S. Ct. 532, 56 L. Ed. 639, 1912 U.S. LEXIS 2510 (1912) (decided under former Penal Code 1910, § 1012).

"Moral and reasonable certainty." — Better practice in charging the jury on reasonable doubt is to omit the phrase "moral and reasonable certainty", since "what is perceived as 'moral' may differ from group to group, from class to class, and from individual to individual," and the equivocal nature of the term "reasonable" might conceivably lead a juror to apply to the evidence a lesser standard of proof than beyond a reasonable doubt. Gearin v. State, 208 Ga. App. 878, 432 S.E.2d 818, 1993 Ga. App. LEXIS 742 (1993) (decided under former O.C.G.A. § 24-4-3).

Court's instruction that "No person shall be convicted of any crime unless and until each element of the crime is proven

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beyond a reasonable doubt and to a moral and reasonable certainty..." was not reasonably likely to be interpreted by the jury to allow conviction on proof not meeting the standard of beyond a reasonable doubt or on factors other than the government's proof when, in defining reasonable doubt, the court did not equate it with anything else and repeated the "beyond a reasonable doubt" standard many times. Nevertheless, the "moral certainty" terminology should not be used in jury instructions. Lloyd v. State, 214 Ga. App. 564, 448 S.E.2d 729, 1994 Ga. App. LEXIS 973 (1994) (decided under former O.C.G.A. § 24-4-3).

Charging entire former statute not prejudicial. — While it is the better practice in criminal cases to omit from the charge the portion of the former statute relating to preponderance of the evidence, no prejudicial error is shown when the entire former statute was charged. Howell v. State, 124 Ga. 698, 52 S.E. 649, 1906 Ga. LEXIS 591 (1906) (decided under former Penal Code 1895, § 986); Williams v. State, 125 Ga. 302, 54 S.E. 108, 1906 Ga. LEXIS 145 (1906) (decided under former Penal Code 1895, § 986); Holmes v. State, 131 Ga. 806, 63 S.E. 347, 1909 Ga. LEXIS 17 (1909) (decided under former Penal Code 1895, § 986); Brundage v. State, 7 Ga. App. 726, 67 S.E. 1051, 1910 Ga. App. LEXIS 491 (1910) (decided under former Penal Code 1910, § 1012); Fowler v. State, 187 Ga. 472, 1 S.E.2d 18 (1939) (decided under former Code 1933, § 38-105).

Failure to charge former statute not prejudicial. — When the court properly instructs the jury as to the law of reasonable doubt, the failure to charge the provisions of the former statute afforded no cause for a new trial. Skinner v. State, 98 Ga. 127, 26 S.E. 475, 1895 Ga. LEXIS 615 (1895) (decided under former Penal Code 1895, § 986); Middleton v. State, 7 Ga. App. 1, 66 S.E. 22, 1909 Ga. App. LEXIS 508 (1909) (decided under former Penal Code 1895, § 986); Fort v. State, 31 Ga. App. 525, 121 S.E. 128, 1924 Ga. App. LEXIS 21 (1924) (decided under former Penal Code 1910, § 1012); Albritton v. State, 175 Ga. 891, 166 S.E. 643, 1932 Ga. LEXIS 358 (1932) (decided under former Penal Code 1910, § 1012).

Province of jury. — When evidence is adduced to authorize a conviction in a criminal case, it is the province of the jury to decide the weight and credit to be given the evidence and whether the state's proof when considered together with that submitted on behalf of the defendant meets the standard of removing every reasonable doubt as to the guilt of the accused. Whitus v. State, 222 Ga. 103, 149 S.E.2d 130, 1966 Ga. LEXIS 408 (1966), rev'd, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599, 1967 U.S. LEXIS 2452 (1967) (decided under former Code 1933, § 38-105).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, §§ 173, 185.

C.J.S.

32A C.J.S., Evidence, §§ 1272, 1274, 1277.

ALR.

Admissibility and probative force on issue as to mental condition, of evidence that one had been adjudged incompetent or insane, or had been confined in insane asylum, 7 A.L.R. 568; 68 A.L.R. 1309.

Quantum of proof in civil case on issue involving fraudulent, dishonest, or criminal misappropriation of property, 62 A.L.R. 1449.

Rule of reasonable doubt as applicable to proof of previous conviction for purpose of enhancing punishment, 79 A.L.R. 1337.

Degree or quantum of evidence required to establish oral rescission or modification of written contract, 94 A.L.R. 1278.

Reasonable doubt rule as applicable to evidence in civil case of facts amounting to felony or misdemeanor, 124 A.L.R. 1378.

Conviction of criminal offense without evidence as denial of due process of law, 80 A.L.R.2d 1362.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence, 88 A.L.R.2d 852.

Admissibility of expert medical testimony as to future consequences of injury

as affected by expression in terms of probability a possibility, 75 A.L.R.3d 9.

24-14-4. Determining where preponderance of evidence lies.

In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, the probability or improbability of their testimony, their interest or want of interest, and their personal credibility so far as the same may legitimately appear from the trial. The jury may also consider the number of the witnesses, though the preponderance is not necessarily with the greater number.

History.

Code 1981, § 24-14-4, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-4-4 which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Clark v. Cassidy, 62 Ga. 407 (1879); Head v. Bridges, 67 Ga. 227 (1881); Cleghorn v. Jones, 68 Ga. 87 (1881); and Kinnebrew v. State, 80 Ga. 232, 5 S.E. 26 (1887).

Law reviews.

For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5146, former Civil Code 1910, § 5732, former Code 1933, § 38-107, and former O.C.G.A. § 24-4-4 are included in the annotations for this Code section.

Former statute not mandatory as to jury. — Directions in the former statute were for the jury only and not mandatory as to the jury but merely addressed to the jury's discretion. Alexander v. State, 1 Ga. App. 289, 57 S.E. 996, 1907 Ga. App. LEXIS 220 (1907) (decided under former Civil Code 1895, § 5146).

Jury "may" consider rules. — It was not error to charge that jury "may" consider the rules of the former statute. Louisville & N.R.R. v. Rodgers, 21 Ga. App. 324, 94 S.E. 321, 1917 Ga. App. LEXIS 587 (1917) (decided under former Civil Code 1910, § 5732); Hatcher v. Bray, 88 Ga. App. 344, 77 S.E.2d 64, 1953 Ga. App. LEXIS 1085 (1953) (decided under former Code 1933, § 38-107).

Jury "will" consider rules. — There was no error in using the word "will" instead of the word "may" in connection with the former statute. Robinson v. State, 158 Ga. 47, 122 S.E. 886, 1924 Ga. LEXIS 76 (1924) (decided under former Civil Code 1910, § 5732).

Province of jury. — It is the province of the jury to determine the credibility of

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witnesses. Caldwell v. Caldwell, 59 Ga. App. 637, 1 S.E.2d 764, 1939 Ga. App. LEXIS 380 (1939) (interest of witness) (decided under former Code 1933, § 38-107); Couch v. State, 73 Ga. App. 153, 35 S.E.2d 708, 1945 Ga. App. LEXIS 410 (1945) (bias of witness) (decided under former Code 1933, § 38-107); Pantone v. Pantone, 206 Ga. 305, 57 S.E.2d 77, 1950 Ga. LEXIS 332 (1950) (weight and credit of testimony) (decided under former Code 1933, § 38-107); Harrison v. Regents of Univ. Sys., 99 Ga. App. 762, 109 S.E.2d 854, 1959 Ga. App. LEXIS 959 (1959) (interest of witness) (decided under former Code 1933, § 38-107); Freedman v. Housing Auth., 108 Ga. App. 418, 136 S.E.2d 544, 1963 Ga. App. LEXIS 663 (1963) (bias of witness) (decided under former Code 1933, § 38-107); Brown v. Nutter, 125 Ga. App. 449, 188 S.E.2d 133, 1972 Ga. App. LEXIS 1366 (1972) (credibility of party) (decided under former Code 1933, § 38-107); Brown Transp. Co. v. Parker, 129 Ga. App. 737, 201 S.E.2d 17, 1973 Ga. App. LEXIS 1131 (1973) (party at interest) (decided under former Code 1933, § 38-107).

Within the closing argument presented by the state, the probability or improbability of a police officer's testimony, as well as an interest or want of interest and personal credibility, could properly be considered by the jury. Cantrell v. State, 290 Ga. App. 651, 660 S.E.2d 468, 2008 Ga. App. LEXIS 394 (2008) (decided under former O.C.G.A. § 24-4-4).

Equal credibility of witnesses. — Personal credibility of the witnesses in conflict must first be equal before the other contingencies named in the former statute will apply equally. Nashville, C. & S.L. Ry. v. Hubble, 139 Ga. 300, 76 S.E. 1009, 1913 Ga. LEXIS 410 (1913) (decided under former Civil Code 1910, § 5732); Georgia Power Co. v. Burger, 63 Ga. App. 784, 11 S.E.2d 834, 1940 Ga. App. LEXIS 554 (1940) (decided under former Code 1933, § 38-107).

Unimpeached witnesses. — Rule that the uncontradicted testimony of unimpeached witnesses cannot be arbitrarily disregarded does not mean that the jury are obliged to believe testimony which the jury in fact discredits, but means that the jury are to consider the testimony of every witness who is sworn, and not arbitrarily disregard the testimony of any witness. Caldwell v. Caldwell, 59 Ga. App. 637, 1 S.E.2d 764, 1939 Ga. App. LEXIS 380 (1939) (decided under former Code 1933, § 38-107); American Cas. Co. v. Windham, 26 F. Supp. 261, 1939 U.S. Dist. LEXIS 3116 (D. Ga.), aff'd, 107 F.2d 88, 1939 U.S. App. LEXIS 2687 (5th Cir. 1939); Pantone v. Pantone, 206 Ga. 305, 57 S.E.2d 77, 1950 Ga. LEXIS 332 (1950) (decided under former Code 1933, § 38-107); Brown v. Nutter, 125 Ga. App. 449, 188 S.E.2d 133, 1972 Ga. App. LEXIS 1366 (1972) (decided under former Code 1933, § 38-107); Brown Transp. Co. v. Parker, 129 Ga. App. 737, 201 S.E.2d 17, 1973 Ga. App. LEXIS 1131 (1973) (decided under former Code 1933, § 38-107).

Testimony of party who offers oneself as a witness in one's own behalf is to be construed most strongly against that party. Western & Atl. R.R. v. Michael, 42 Ga. App. 603, 157 S.E. 226, 1931 Ga. App. LEXIS 63 (1931) (decided under former Civil Code 1910, § 5732).

Equivocal testimony of party. — Testimony of a party who offers oneself as a witness in one's own behalf is to be construed most strongly against that party when it is self-contradictory, vague, or equivocal. Brooks v. Douglas, 154 Ga. App. 54, 267 S.E.2d 495, 1980 Ga. App. LEXIS 2040 (1980) (decided under former Code 1933, § 38-107).

Court's charge to jury that equivocal testimony of a party is to be construed most strongly against that party and that there should not be a finding in that party's favor if that version would support a verdict against that party is reversible error when other competent evidence supports the equivocal testimony of that witness, because such a charge unjustly prejudices the jury. Weathers v. Cowan, 176 Ga. App. 19, 335 S.E.2d 392, 1985 Ga. App. LEXIS 2841 (1985) (decided under former O.C.G.A. § 24-4-4).

Testimony of principal witness. — Instruction that "when the testimony of a party or a principal witness is vague, equivocal or self-contradictory, it should

be construed most strongly against the cause for which he is testifying" violates the former statute unless the party is the sole witness testifying in that party's behalf. Slaton Mach. Sales, Inc. v. Owens-Illinois, Inc., 138 Ga. App. 80, 225 S.E.2d 473, 1976 Ga. App. LEXIS 2061 (1976) (decided under former Code 1933, § 38-107).

Unwillingness of witness to commit oneself. — Testimony of a witness is not to be excluded merely because the witness prefaces the witness's statement by an expression of unwillingness to commit oneself absolutely and positively to the accuracy of what one says. Holcombe v. State, 5 Ga. App. 47, 62 S.E. 647, 1908 Ga. App. LEXIS 11 (1908) (decided under former Civil Code 1895, § 5146).

Number of witnesses. — While a plaintiff may sustain plaintiff's case by the greater number of witnesses, this does not necessarily mean that the preponderance of the testimony is in the plaintiff's favor. Sometimes, in the minds of jurors, the testimony of one witness is of more weight and credit than that of a host of witnesses. McGriff v. McGriff, 154 Ga. 560, 115 S.E. 21, 1922 Ga. LEXIS 419 (1922) (decided under former Civil Code 1910, § 5732).

When number of witnesses equal. — Ruling that it might amount to reversible error, in charging the provisions of the former statute, to fail to include in the charge the provision that "the jury may also consider the number of witnesses, though the preponderance is not necessary with the greater number," does not apply to a case if the number of witnesses on both sides are the same. Atlanta Gas-Light Co. v. Cook, 35 Ga. App. 622, 134 S.E. 198, 1926 Ga. App. LEXIS 1037 (1926) (decided under former Civil Code 1910, § 5732).

Argument to jury concerning credibility. — While it is the right of counsel for the defendant in counsel's argument to the jury to comment on the credibility of a witness for the state, and to accuse the witness of having committed perjury, counsel has no absolute right while doing so to point the witness out to the jury as the witness sits in the courtroom. Corley v. State, 64 Ga. App. 841, 14 S.E.2d 121, 1941 Ga. App. LEXIS 526 (1941) (decided under former Code 1933, § 38-107).

Argument to jury concerning deposition testimony. — Counsel may by argument call attention to the fact that the opponent relied on written depositions, and that this manner of the witnesses in testifying cannot in this way be observed, although the witnesses themselves were in court. Georgia, Fla. & Ala. Ry. v. Sasser, 4 Ga. App. 276, 61 S.E. 505, 1908 Ga. App. LEXIS 271 (1908) (decided under former Civil Code 1895, § 5146).

Personal knowledge of juror. — Juror must not consider any personal knowledge that the juror might have in reference to the plaintiff's character. Georgia Ry. & Elec. Co. v. Dougherty, 4 Ga. App. 614, 62 S.E. 158, 1908 Ga. App. LEXIS 489 (1908) (decided under former Civil Code 1895, § 5146).

Preponderance of evidence justified immunity to educator. — When the defendant, a special education teacher, was indicted on six counts of cruelty to children and five counts of false imprisonment for actions involving five students, the defendant was entitled to the benefits of the immunity statute because the evidence was sufficient to show by a preponderance of the evidence that the defendant's actions were undertaken to maintain discipline and restore order in the defendant's classroom; and that the defendant acted in good faith as the defendant told an investigator that the defendant's actions were never malicious, that the defendant never tried to hurt any of the students, and that whatever the defendant did with the students was aimed at helping the students. State v. Pickens, 330 Ga. App. 862, 769 S.E.2d 594, 2015 Ga. App. LEXIS 78 (2015), cert. denied, No. S15C1016, 2015 Ga. LEXIS 403 (Ga. May 26, 2015).

Appellate court considers only the sufficiency of the evidence; the weight of the evidence is within the sole province of the jury. Sherman v. Stephens, 30 Ga. App. 509, 118 S.E. 567, 1923 Ga. App. LEXIS 519 (1923) (decided under former Civil Code 1910, § 5732); Reaves v. Columbus Elec. & Power Co., 32 Ga. App. 140, 122 S.E. 824, 1924 Ga. App. LEXIS 316 (1924); Crawley v. Marta, 147 Ga.

General Consideration (Cont'd)

App. 293, 248 S.E.2d 555, 1978 Ga. App. LEXIS 2658 (1978) (decided under former Code 1933, § 38-107); Coleman v. State, 150 Ga. App. 380, 258 S.E.2d 12, 1979 Ga. App. LEXIS 2323 (1979) (decided under former Code 1933, § 38-107).

Instructions

1. Civil Cases

Failure to charge on preponderance of the evidence is not error in the absence of a special request. — See Freeman v. Coleman Ray & Co., 88 Ga. 421, 14 S.E. 551, 1892 Ga. LEXIS 34 (1892) (decided under former law); Rome Ry. & Light Co. v. King, 33 Ga. App. 383, 126 S.E. 294, 1925 Ga. App. LEXIS 785 (1925) (decided under former Civil Code 1910, § 5732); Loftin v. Carroll County Bd. of Educ., 70 Ga. App. 315, 28 S.E.2d 372, 1943 Ga. App. LEXIS 305 (1943) (decided under former Code 1933, § 38-107); Flatauer v. Goodman, 84 Ga. App. 881, 67 S.E.2d 794, 1951 Ga. App. LEXIS 814 (1951) (decided under former Code 1933, § 38-107).

Instruction must be full and complete. — If the court undertakes to charge the jury on the preponderance of the evidence as laid down in the former statute, it is the court's duty to instruct the jury fully and completely with respect thereto and not merely to charge certain portions of that statute. A.F. Gossett & Sons v. Wilder, 46 Ga. App. 651, 167 S.E. 903, 168 S.E. 903, 1933 Ga. App. LEXIS 161 (1933) (decided under former Code 1933, § 38-107); Travelers Indem. Co. v. Paramount Publix Corp., 52 Ga. App. 239, 182 S.E. 923, 1935 Ga. App. LEXIS 121 (1935) (decided under former Code 1933, § 38-107); Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504, 1942 Ga. App. LEXIS 534 (1942) (decided under former Code 1933, § 38-107); Fountain v. McCallum, 194 Ga. 269, 21 S.E.2d 610, 1942 Ga. LEXIS 569 (1942) (decided under former Code 1933, § 38-107); Smaha v. George, 195 Ga. 412, 24 S.E.2d 385, 1943 Ga. LEXIS 505 (1943) (decided under former Code 1933, § 38-107); Turner v. Joiner, 77 Ga. App. 603, 48 S.E.2d 907, 1948 Ga. App. LEXIS 603 (1948) (decided under former Code 1933, § 38-107); Southern Ry. v. Florence, 81 Ga. App. 1, 57 S.E.2d 856, 1950 Ga. App. LEXIS 806 (1950) (decided under former Code 1933, § 38-107); Georgia Power Co. v. Pittman, 92 Ga. App. 673, 89 S.E.2d 577, 1955 Ga. App. LEXIS 685 (1955) (decided under former Code 1933, § 38-107); Bell v. Proctor, 212 Ga. 325, 92 S.E.2d 514, 1956 Ga. LEXIS 357 (1956) (decided under former Code 1933, § 38-107); Williams v. Southern Ry., 99 Ga. App. 503, 109 S.E.2d 343, 1959 Ga. App. LEXIS 891 (1959) (decided under former Code 1933, § 38-107).

Incomplete charge not necessarily reversible. — If the language in A.F. Gossett & Sons v. Wilder, 46 Ga. App. 651, 168 S.E. 903 (1933), is so construed that it is always reversible error for a trial judge, in charging the provisions of the former statute, to omit any of the provisions therein, such language is expressly disapproved. Georgia Power Co. v. Burger, 63 Ga. App. 784, 11 S.E.2d 834, 1940 Ga. App. LEXIS 554 (1940) (decided under former Code 1933, § 38-107).

Existence of reversible error depends on particular facts. — In charging to the jury the provisions of the former statute, the better practice is to charge the former statute in its entirety, but the omission of some of the provisions, may or may not be error, depending on the facts of the case. Georgia Power Co. v. Burger, 63 Ga. App. 784, 11 S.E.2d 834, 1940 Ga. App. LEXIS 554 (1940) (decided under former Code 1933, § 38-107); Callaway v. Fischer, 69 Ga. App. 251, 25 S.E.2d 131, 1943 Ga. App. LEXIS 56 (1943) (decided under former Code 1933, § 38-107); Cedrone v. Beck, 74 Ga. App. 488, 40 S.E.2d 388, 1946 Ga. App. LEXIS 572 (1946) (decided under former Code 1933, § 38-107); City of Louisville v. Clark, 108 Ga. App. 389, 133 S.E.2d 45, 1963 Ga. App. LEXIS 657 (1963) (decided under former Code 1933, § 38-107); Carter v. Wyatt, 113 Ga. App. 235, 148 S.E.2d 74, 1966 Ga. App. LEXIS 1029 (1966) (decided under former Code 1933, § 38-107).

Former statute as means for determining credibility. — It was not error to charge that the language of the former statute is also a means for determining

the credibility of witnesses. Andrews Taxi & U-Drive It Co. v. McEver, 101 Ga. App. 383, 114 S.E.2d 145, 1960 Ga. App. LEXIS 883 (1960) (decided under former Code 1933, § 38-107); Collins v. Porterfield, 102 Ga. App. 294, 116 S.E.2d 105, 1960 Ga. App. LEXIS 603 (1960) (decided under former Code 1933, § 38-107); Chandler v. Alabama Power Co., 104 Ga. App. 521, 122 S.E.2d 317, 1961 Ga. App. LEXIS 731 (1961).

Detailed charge unauthorized. — Trial court is not authorized to charge a jury in specific detail as to certain testimony neutralizing other testimony because what has been proven is solely and exclusively to be determined by the jury. Fules, Inc. v. Rutland, 123 Ga. App. 23, 179 S.E.2d 290, 1970 Ga. App. LEXIS 712 (1970) (decided under former Code 1933, § 38-107).

Error must be shown. — Even if the court has not instructed in the terms of the former statute, error must be shown for a reversal. Southern Ry. v. Wessinger, 32 Ga. App. 551, 124 S.E. 100, 1924 Ga. App. LEXIS 548 (1924) (decided under former Civil Code 1910, § 5732).

Specific exceptions. — In order to take advantage of an omission to charge a specific part of the former statute, it is necessary to make specific exception. Harris v. Central of Ga. Ry., 30 Ga. App. 720, 119 S.E. 349, 1923 Ga. App. LEXIS 645 (1923) (decided under former Civil Code 1910, § 5732).

2. Criminal Cases

Applicability to credibility. — Insofar as the former statute relates to matters pertinent to the consideration of the credibility of witnesses, the former statute may be given in a charge to the jury in a criminal case. Bell v. State, 47 Ga. App. 216, 169 S.E. 732, 1933 Ga. App. LEXIS 350 (1933) (decided under former Code 1933, § 38-107); Campbell v. State, 53 Ga. App. 380, 186 S.E. 137, 1936 Ga. App. LEXIS 127 (1936) (decided under former Code 1933, § 38-107); Moore v. State, 57 Ga. App. 287, 195 S.E. 320, 1938 Ga. App. LEXIS 569 (1938) (decided under former Code 1933, § 38-107); Couch v. State, 73 Ga. App. 153, 35 S.E.2d 708, 1945 Ga. App. LEXIS 410 (1945) (decided under former Code 1933, § 38-107); Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, 1943 Ga. LEXIS 318, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468, 1943 U.S. LEXIS 227 (1943); McDonald v. State, 104 Ga. App. 578, 122 S.E.2d 145, 1961 Ga. App. LEXIS 739 (1961) (decided under former Code 1933, § 38-107).

Inapplicability to quantum of proof. — This statute, insofar as it relates to the determination of where the preponderance of the evidence lies has no application to a criminal case and should not be charged. Baker v. State, 47 Ga. App. 205, 170 S.E. 209, 1933 Ga. App. LEXIS 345 (1933) (decided under former Code 1933, § 38-107); Eller v. State, 48 Ga. App. 163, 172 S.E. 592, 1934 Ga. App. LEXIS 3 (1934) (decided under former Code 1933, § 38-107); Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504, 1942 Ga. App. LEXIS 534 (1942) (decided under former Code 1933, § 38-107); Couch v. State, 73 Ga. App. 153, 35 S.E.2d 708, 1945 Ga. App. LEXIS 410 (1945) (decided under former Code 1933, § 38-107); McDonald v. State, 104 Ga. App. 578, 122 S.E.2d 145, 1961 Ga. App. LEXIS 739 (1961) (decided under former Code 1933, § 38-107).

Harmless error. — While it is ordinarily inapt to charge the former statute in a criminal case, doing so is not reversible error if the instruction appears to be harmless. Eller v. State, 48 Ga. App. 163, 172 S.E. 592, 1934 Ga. App. LEXIS 3 (1934) (decided under former Code 1933, § 38-107); Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, 1943 Ga. LEXIS 318, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468, 1943 U.S. LEXIS 227 (1943); Harper v. State, 201 Ga. 10, 39 S.E.2d 45, 1946 Ga. LEXIS 434 (1946) (decided under former Code 1933, § 38-107); Fountain v. State, 207 Ga. 144, 60 S.E.2d 433, 1950 Ga. LEXIS 424 (1950), overruled on other grounds, Lavender v. State, 234 Ga. 608, 216 S.E.2d 855, 1975 Ga. LEXIS 1199 (1975) (decided under former Code 1933, § 38-107)..

Examples

1. Civil Cases

Failure to charge certain portions of statute harmful error in the follow-

Civil Cases (Cont'd)

ing cases: Hinson v. Hooks, 27 Ga. App. 430, 108 S.E. 822, 1921 Ga. App. LEXIS 946 (1921) (number of witnesses) (decided under former Civil Code 1910, § 5732); Farmers State Bank v. Kelley, 166 Ga. 683, 144 S.E. 258, 1928 Ga. LEXIS 378 (1928) (number of witnesses) (decided under former Civil Code 1910, § 5732); Shankle v. Crowder, 174 Ga. 399, 163 S.E. 180, 1932 Ga. LEXIS 59 (1932) (credibility) (decided under former Civil Code 1910, § 5732); Tucker v. Talmadge, 186 Ga. 798, 198 S.E. 726, 1938 Ga. LEXIS 661 (1938) (number of witnesses) (decided under former Code 1933, § 38-107); Garner v. Wood, 188 Ga. 463, 4 S.E.2d 137, 1939 Ga. LEXIS 548 (1939) (number of witnesses) (decided under former Code 1933, § 38-107); Fountain v. McCallum, 194 Ga. 269, 21 S.E.2d 610, 1942 Ga. LEXIS 569 (1942) (intelligence of witnesses and nature of facts to which the witnesses testified) (decided under former Code 1933, § 38-107); Edge v. Dorsey, 78 Ga. App. 70, 50 S.E.2d 227, 1948 Ga. App. LEXIS 683 (1948) (number of witnesses) (decided under former Code 1933, § 38-107); Bank of Loganville v. Briscoe, 93 Ga. App. 558, 92 S.E.2d 326, 1956 Ga. App. LEXIS 800 (1956) (probability of testimony) (decided under former Code 1933, § 38-107); Bell v. Proctor, 93 Ga. App. 816, 92 S.E.2d 807, 1956 Ga. App. LEXIS 872 (1956) (interest of witnesses) (decided under former Code 1933, § 38-107); Sheridan v. Haggard, 95 Ga. App. 792, 99 S.E.2d 163, 1957 Ga. App. LEXIS 920 (1957) (witnesses' means of knowing facts) (decided under former Code 1933, § 38-107); Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337, 1958 Ga. LEXIS 464 (1958) (credibility) (decided under former Code 1933, § 38-107); Willard v. Willard, 221 Ga. 2, 142 S.E.2d 849, 1965 Ga. LEXIS 365 (1965) (number of witnesses) (decided under former Code 1933, § 38-107).

Failure to charge entire statute harmless error in the following cases. — See Palmer-Murphey Co. v. Barnett, 32 Ga. App. 635, 124 S.E. 538, 1924 Ga. App. LEXIS 568 (1924); Travelers Ins. Co. v. Anderson, 53 Ga. App. 1, 184 S.E. 813, 1936 Ga. App. LEXIS 1 (1936) (decided under former Code 1933, § 38-107); Georgia Power Co. v. Burger, 63 Ga. App. 784, 11 S.E.2d 834, 1940 Ga. App. LEXIS 554 (1940) (decided under former Code 1933, § 38-107); Rushing v. Akins, 210 Ga. 450, 80 S.E.2d 813, 1954 Ga. LEXIS 353 (1954) (decided under former Code 1933, § 38-107); Frady v. State, 212 Ga. 84, 90 S.E.2d 664, 1955 Ga. LEXIS 554 (1955) (decided under former Code 1933, § 38-107); Bank of Loganville v. Briscoe, 93 Ga. App. 558, 92 S.E.2d 326, 1956 Ga. App. LEXIS 800 (1956) (intelligence of witnesses and probability of the witnesses' testimony) (decided under former Code 1933, § 38-107); Bell v. Proctor, 212 Ga. 325, 92 S.E.2d 514, 1956 Ga. LEXIS 357 (1956); Williams v. Southern Ry., 99 Ga. App. 503, 109 S.E.2d 343, 1959 Ga. App. LEXIS 891 (1959) (decided under former Code 1933, § 38-107); (nature of facts to which witnesses testified) (decided under former Code 1933, § 38-107); Southern Ry. Sys. v. Yancey, 102 Ga. App. 159, 115 S.E.2d 693, 1960 Ga. App. LEXIS 576 (1960); Chandler v. Alabama Power Co., 140 Ga. App. 521, 122 S.E.2d 317 (1961) , rev'd on other grounds, 217 Ga. 550, 123 S.E.2d 767 (1962); City of Louisville v. Clark, 108 Ga. App. 389, 133 S.E.2d 45, 1963 Ga. App. LEXIS 657 (1963) (decided under former Code 1933, § 38-107).

Instructions proper in the following cases. — See Western & Atlantic R.R. v. Henderson, 6 Ga. App. 385, 65 S.E. 48, 1909 Ga. App. LEXIS 309 (1909) (credibility) (decided under former Civil Code 1895, § 5146); Rome Ry. & Light Co. v. King, 33 Ga. App. 383, 126 S.E. 294, 1925 Ga. App. LEXIS 785 (1925) (credibility) (decided under former Civil Code 1910, § 5732); Daughtry v. Georgia Power Co., 61 Ga. App. 505, 6 S.E.2d 454, 1939 Ga. App. LEXIS 469 (1939) (action for damages) (decided under former Code 1933, § 38-107); Jackson v. Moultrie Prod. Credit Ass'n., 76 Ga. App. 768, 47 S.E.2d 127, 1948 Ga. App. LEXIS 452 (1948) (credibility) (decided under former Code 1933, § 38-107); Georgia Automatic Gas Co. v. Fowler, 77 Ga. App. 675, 49 S.E.2d 550, 1948 Ga. App. LEXIS 615 (1948) (nature of witnesses' testimony) (decided under former Code 1933, § 38-107); Lud-

wig v. J.J. Newberry Co., 78 Ga. App. 871, 52 S.E.2d 485, 1949 Ga. App. LEXIS 997 (1949) (action for damages) (decided under former Code 1933, § 38-107); Hughes v. Al Grider, Inc., 97 Ga. App. 599, 103 S.E.2d 627, 1958 Ga. App. LEXIS 838 (1958) (number of witnesses) (decided under former Code 1933, § 38-107); Andrews Taxi & U-Drive It Co. v. McEver, 101 Ga. App. 383, 114 S.E.2d 145, 1960 Ga. App. LEXIS 883 (1960) (credibility of witnesses) (decided under former Code 1933, § 38-107); King v. Faries, 120 Ga. App. 393, 170 S.E.2d 747, 1969 Ga. App. LEXIS 790 (1969) (number of witnesses) (decided under former Code 1933, § 38-107).

2. Criminal Cases

Instructions harmless error in the following cases. — See Howard v. State, 60 Ga. App. 229, 4 S.E.2d 418, 1939 Ga. App. LEXIS 554 (1939) (manner of testifying) (decided under former Code 1933, § 38-107); Couch v. State, 73 Ga. App. 153, 35 S.E.2d 708, 1945 Ga. App. LEXIS 410 (1945) (number of witnesses, inapplicability of preponderance standard in criminal case) (decided under former Code 1933, § 38-107); Smith v. State, 85 Ga. App. 129, 68 S.E.2d 393, 1951 Ga. App. LEXIS 1015 (1951) (error which party invited) (decided under former Code 1933, § 38-107); Morris v. State, 97 Ga. App. 762, 104 S.E.2d 483, 1958 Ga. App. LEXIS 878 (1958) (credibility of witnesses) (decided under former Code 1933, § 38-107).

Instructions proper in the following cases. — See Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, 1943 Ga. LEXIS 318, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468, 1943 U.S. LEXIS 227 (1943) (credibility) (decided under former Code 1933, § 38-107); Carter v. State, 69 Ga. App. 570, 26 S.E.2d 374, 1943 Ga. App. LEXIS 141 (1943) (reasonable doubt) (decided under former Code 1933, § 38-107); Couch v. State, 73 Ga. App. 153, 35 S.E.2d 708, 1945 Ga. App. LEXIS 410 (1945) (credibility) (decided under former Code 1933, § 38-107).

RESEARCH REFERENCES

C.J.S.

32A C.J.S., Evidence, § 1275.

ALR.

Right to cross-examine accused as to previous prosecution for, or conviction of, crime, for purpose of affecting his credibility, 6 A.L.R. 1608; 25 A.L.R. 339; 103 A.L.R. 350; 161 A.L.R. 233.

Instructions on sudden emergency in motor vehicle cases, 80 A.L.R.2d 5.

Limiting number of noncharacter witnesses in civil case, 5 A.L.R.3d 169.

Limiting number of noncharacter witnesses in criminal case, 5 A.L.R.3d 238.

24-14-5. Reasonable doubt in criminal cases.

Whether dependent upon direct or circumstantial evidence, the true question in criminal cases is not whether it is possible that the conclusion at which the evidence points may be false, but whether there is sufficient evidence to satisfy the mind and conscience beyond a reasonable doubt.

History.

Code 1981, § 24-14-5, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-4-5, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decision in John v. State, 33 Ga. 257 (1862).

JUDICIAL DECISIONS

Analysis

General Consideration
Jury Instructions

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1895, § 987, former Penal Code 1910, § 1013, former Code 1933, § 38-110, and former O.C.G.A. § 24-4-5 are included in the annotations for this Code section.

Statute applies to recorder's courts. Scott v. Mayor of Athens, 111 Ga. App. 173, 140 S.E.2d 922, 1965 Ga. App. LEXIS 909 (1965) (decided under former Code 1933, § 38-110).

Preponderance of evidence standard inapplicable. — Law of the preponderance of evidence is not applicable in criminal cases. McDonald v. State, 104 Ga. App. 578, 122 S.E.2d 145, 1961 Ga. App. LEXIS 739 (1961) (decided under former Code 1933, § 38-110).

Reasonable and moral certainty. — Reasonable doubt is such as leaves the mind in an uncertain and wavering condition where it is impossible to say with reasonable and moral certainty that the accused is guilty. Dumas v. State, 63 Ga. 600, 1879 Ga. LEXIS 288 (1879) (decided under former law); Davis v. State, 114 Ga. 104, 39 S.E. 906, 1901 Ga. LEXIS 588 (1901) (decided under former Penal Code 1895, § 987).

Mathematical certainty not required and cannot be attained in a legal investigation; moral and reasonable certainty is all that the law requires. McNaughton v. State, 136 Ga. 600, 71 S.E. 1038, 1911 Ga. LEXIS 157 (1911), writ of error dismissed, 223 U.S. 744, 32 S. Ct. 532, 56 L. Ed. 639, 1912 U.S. LEXIS 2510 (1912) (decided under former Penal Code 1910, § 1013).

Mere doubt insufficient. — Reasonable doubt is not a vague or conjectural doubt on a mere guess. Giles v. State, 6 Ga. 276, 1849 Ga. LEXIS 40 (1849) (decided under former law); Bone v. State, 102 Ga. 387, 30 S.E. 845, 1897 Ga. LEXIS 510 (1897) (decided under former Penal Code 1895, § 987); Brantley v. State, 133 Ga. 264, 65 S.E. 426, 1909 Ga. LEXIS 205 (1909), aff'd, 217 U.S. 284, 30 S. Ct. 514, 54 L. Ed. 768, 1910 U.S. LEXIS 1961 (1910) (decided under former Penal Code 1895, § 987).

Bare suspicion not sufficient. — Bare suspicion of guilt is not sufficient to authorize a conviction. Oneil v. State, 48 Ga. 66, 1873 Ga. LEXIS 19 (1873) (decided under former law); Hammond v. State, 2 Ga. App. 384, 58 S.E. 509, 1907 Ga. App. LEXIS 381 (1907) (decided under former Penal Code 1895, § 987); Diggs v. State, 90 Ga. App. 853, 84 S.E.2d 611, 1954 Ga. App. LEXIS 833 (1954) (decided under former Code 1933, § 38-110); Scott v. Mayor of Athens, 111 Ga. App. 173, 140 S.E.2d 922, 1965 Ga. App. LEXIS 909 (1965) (decided under former Code 1933, § 38-110); Muckle v. State, 165 Ga. App. 873, 303 S.E.2d 54, 1983 Ga. App. LEXIS 2047 (1983) (decided under former O.C.G.A. § 24-4-5).

Reason for doubt. — In the charge of the court on the subject of reasonable doubt, it was not error to include the phrase, "a doubt for which you can give a reason." Vann v. State, 83 Ga. 44, 9 S.E. 945, 1889 Ga. LEXIS 7 (1889) (decided under former law); Bryant v. State, 197 Ga. 641, 30 S.E.2d 259, 1944 Ga. LEXIS 314 (1944) (decided under former Code 1933, § 38-110); Carter v. State, 71 Ga. App. 626, 31 S.E.2d 666, 1944 Ga. App. LEXIS 179 (1944) (decided under former Code 1933, § 38-110).

Moral certainty equated with reasonable doubt. — Phrases, "to a moral and reasonable certainty" and "beyond a reasonable doubt," and applied to the quality of proof in a case, are identical in meaning. Austin v. State, 6 Ga. App. 211, 64 S.E. 670, 1909 Ga. App. LEXIS 244 (1909) (decided under former Penal Code 1895, § 987); Dicks v. State, 155 Ga. App.

591, 271 S.E.2d 727, 1980 Ga. App. LEXIS 2691 (1980) (decided under former Code 1933, § 38-110).

Moral certainty equated with absolute certainty. — Statute requires proof to a moral certainty, as distinguished from an absolute certainty. As applied to a judicial trial for a crime, the two phrases are synonymous and equivalent; each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible. Bone v. State, 102 Ga. 387, 30 S.E. 845, 1897 Ga. LEXIS 510 (1897) (decided under former Penal Code 1895, § 987).

Reversible error despite defendant's failure to object to the charge. — After trial court gave the jury the suggested pattern charge on reasonable doubt the court summarized the charge by saying "In other words, if you honestly believe he's guilty, convict him. If you honestly believe he is not guilty, find him not guilty." Jones v. State, 252 Ga. App. 332, 556 S.E.2d 238, 2001 Ga. App. LEXIS 1276 (2001) (decided under former O.C.G.A. § 24-4-5).

Trial court's instruction that "neither does [reasonable doubt] mean a possibility that the defendant may be innocent" violates defendant's state and federal due process rights. Mangum v. State, 274 Ga. 573, 555 S.E.2d 451, 2001 Ga. LEXIS 897 (2001) (decided under former O.C.G.A. § 24-4-5).

Conflicts in testimony do not preclude finding of guilt. — While there may be conflicts in the testimony of witnesses at trial, a rational trier of fact, in certain cases, may still reasonably find from the evidence adduced at trial proof of defendant's guilt beyond a reasonable doubt. Hammonds v. State, 157 Ga. App. 393, 277 S.E.2d 762, 1981 Ga. App. LEXIS 1835 (1981) (decided under former Code 1933, 38-110).

Quantum of proof. — Burden of proof is on the state in all criminal cases to show the defendant's guilt to a moral and reasonable certainty and beyond a moral and reasonable doubt. Walker v. State, 137 Ga. 397, 137 Ga. 398, 73 S.E. 368, 1911 Ga. LEXIS 393 (1911) (decided under former Penal Code 1910, § 1013); Montgomery v. State, 202 Ga. 678, 44 S.E.2d 242, 1947 Ga. LEXIS 497 (1947) (decided under former Code 1933, § 38-110); Blakeley v. State, 78 Ga. App. 516, 51 S.E.2d 598, 1949 Ga. App. LEXIS 918 (1949) (decided under former Code 1933, § 38-110); Life Ins. Co. v. Lawler, 211 Ga. 246, 85 S.E.2d 1, 1954 Ga. LEXIS 538 (1954) (decided under former Code 1933, § 38-110).

Proof beyond reasonable doubt required in criminal contempt prosecution. — It is a denial of a defendant's right of due process of law under the federal and state constitutions and former O.C.G.A. § 24-4-5 to fail to require proof beyond a reasonable doubt in a criminal contempt prosecution because the result of such a conviction is to deny the defendant's liberty and the levy of a penal fine. In re Crane, 253 Ga. 667, 324 S.E.2d 443, 1985 Ga. LEXIS 524 (1985) (decided under former O.C.G.A. § 24-4-5).

It is not necessary for state to prove that it was impossible for offenses charged to have been committed by anybody else. Perry v. State, 158 Ga. App. 349, 280 S.E.2d 390, 1981 Ga. App. LEXIS 2204 (1981) (decided under former O.C.G.A. § 24-4-5).

Every element of crime must be proved beyond a reasonable doubt. Gosha v. State, 56 Ga. 36, 1876 Ga. LEXIS 198 (1876), overruled on other grounds, Worthen v. State, 304 Ga. 862, 823 S.E.2d 291, 2019 Ga. LEXIS 22 (2019) (venue) (decided under former law); Bell v. State, 91 Ga. 15, 16 S.E. 207, 1892 Ga. LEXIS 485 (1892) (capacity to commit crime) (decided under former law); Barnes v. State, 113 Ga. 716, 39 S.E. 488, 1901 Ga. LEXIS 361 (1901) (grade of offense) (decided under former Penal Code 1895, § 987); Glover v. State, 114 Ga. 828, 40 S.E. 998, 1902 Ga. LEXIS 798 (1902) (identity of defendant) (decided under former Penal Code 1895, § 987); Green v. State, 4 Ga. App. 260, 61 S.E. 234, 1908 Ga. App. LEXIS 257 (1908) (venue) (decided under former Penal Code 1895, § 987); Simpson v. State, 12 Ga. App. 292, 77 S.E. 105, 1913 Ga. App. LEXIS 543 (1913) (grade of offense) (decided under former Penal Code

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1910, § 1013); Davis v. State, 46 Ga. App. 174, 46 Ga. App. 194, 167 S.E. 205, 1932 Ga. App. LEXIS 96 (1932) (possession of stolen article) (decided under former Penal Code 1910, § 1013).

Circumstantial evidence sufficient to convict if the evidence is consistent with the hypothesis of the guilt of the defendant and excludes every other reasonable hypothesis. Graham v. State, 183 Ga. 381, 183 Ga. 881, 189 S.E. 910, 1937 Ga. LEXIS 420 (1937) (decided under former Code 1933, § 38-110); Carter v. State, 57 Ga. App. 180, 194 S.E. 842, 1938 Ga. App. LEXIS 515 (1938) (decided under former Code 1933, § 38-110); Dominick v. State, 66 Ga. App. 531, 18 S.E.2d 502, 1942 Ga. App. LEXIS 207 (1942) (decided under former Code 1933, § 38-110); Diggs v. State, 90 Ga. App. 853, 84 S.E.2d 611, 1954 Ga. App. LEXIS 833 (1954) (decided under former Code 1933, § 38-110); Crane v. State, 123 Ga. App. 226, 180 S.E.2d 289, 1971 Ga. App. LEXIS 1173 (1971) (decided under former Code 1933, § 38-110); Lewis v. State, 149 Ga. App. 181, 254 S.E.2d 142, 1979 Ga. App. LEXIS 1778 (1979) (decided under former Code 1933, § 38-110); Barfield v. State, 160 Ga. App. 228, 286 S.E.2d 516, 1981 Ga. App. LEXIS 3036 (1981) (decided under former O.C.G.A. § 24-4-5).

To sustain a conviction on circumstantial evidence only, the state must prove facts that are not only consistent with the hypothesis of the guilt of the accused, but the facts proved must exclude every other reasonable hypothesis. Johnson v. State, 159 Ga. App. 497, 283 S.E.2d 711, 1981 Ga. App. LEXIS 2666 (1981) (decided under former O.C.G.A. § 24-4-5).

Circumstantial evidence may outweigh positive evidence in probative value. Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870, 1972 Ga. App. LEXIS 905 (1972) (decided under former Code 1933, § 38-110).

Two theories presented. — When the facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, the justice and humanity of the law compel the acceptance of the theory which is consistent with innocence. Davis v. State, 13 Ga. App. 142, 78 S.E. 866, 1913 Ga. App. LEXIS 75 (1913) (decided under former Penal Code 1910, § 1013); Rutland v. State, 46 Ga. App. 417, 167 S.E. 705, 1933 Ga. App. LEXIS 80 (1933) (decided under former Code 1933, § 38-110); Barnett v. State, 153 Ga. App. 430, 265 S.E.2d 348, 1980 Ga. App. LEXIS 1837 (1980) (decided under former Code 1933, § 38-110); Johnson v. State, 159 Ga. App. 497, 283 S.E.2d 711, 1981 Ga. App. LEXIS 2666 (1981) (decided under former Code 1933, § 38-107).

Evidence found sufficient to support conviction in the following cases. — See Johnson v. State, 79 Ga. App. 210, 53 S.E.2d 498, 1949 Ga. App. LEXIS 620 (1949) (illegal possession of whiskey) (decided under former Code 1933, § 38-110); Gray v. State, 151 Ga. App. 684, 261 S.E.2d 402, 1979 Ga. App. LEXIS 2748 (1979) (rape) (decided under former Code 1933, § 38-110); Cosby v. State, 151 Ga. App. 676, 261 S.E.2d 424, 1979 Ga. App. LEXIS 2744 (1979) (burglary) (decided under former Code 1933, § 38-110).

Jury Instructions

An instruction that the existence of two equal theories, guilt or innocence, requires acquittal is not error unless the evidence relied on by the state is wholly circumstantial, in which case the word "equal" should not appear in the instruction. Carpenter v. State, 167 Ga. App. 634, 307 S.E.2d 19, 1983 Ga. App. LEXIS 3338 (1983), aff'd, 252 Ga. 79, 310 S.E.2d 912, 1984 Ga. LEXIS 585 (1984) (decided under former O.C.G.A. § 24-4-5).

Presumption of innocence. — Every accused person has a presumption of innocence in the accused's favor, and the accused cannot be convicted until this evidence is overcome and the accused's guilt established beyond all reasonable doubt. Smith v. State, 63 Ga. 168, 1879 Ga. LEXIS 160 (1879) (decided under former law); Campbell v. State, 100 Ga. 267, 28 S.E. 71, 1897 Ga. LEXIS 39 (1897) (decided under former Penal Code 1895, § 987); Wimberly v. State, 12 Ga. App.

540, 77 S.E. 879, 1913 Ga. App. LEXIS 630 (1913) (decided under former Penal Code 1910, § 1013).

Reasonable doubt must be charged. — In every criminal case the court should charge the jury that to authorize conviction, guilt must be proved "beyond a reasonable doubt"; and, unless the evidence demands the verdict rendered, the failure to do so will be reversible error. Norman v. State, 10 Ga. App. 802, 74 S.E. 428, 1912 Ga. App. LEXIS 701 (1912) (decided under former Penal Code 1910, § 1013).

Not error to charge this statute. — It is never error for the trial court to charge the jury on the subject of reasonable doubt in the language of this statute. Thomas v. State, 33 Ga. App. 680, 127 S.E. 891, 1925 Ga. App. LEXIS 678 (1925) (decided under former Penal Code 1910, § 1013); McDowell v. State, 78 Ga. App. 116, 50 S.E.2d 633, 1948 Ga. App. LEXIS 693 (1948) (decided under former Code 1933, § 38-110).

Charging entire statute unnecessary. — When the charge given was not the entire charge on reasonable doubt as found in this statute, if the charge was fair and did not shift any burden to the defendant the charge is approved. Jones v. State, 139 Ga. App. 366, 228 S.E.2d 387, 1976 Ga. App. LEXIS 1810 (1976) (decided under former Code 1933, § 38-110).

Definition of reasonable doubt unnecessary. — Court need not attempt to define reasonable doubt. Jordan v. State, 16 Ga. App. 393, 85 S.E. 455, 1915 Ga. App. LEXIS 645 (1915) (decided under former Penal Code 1910, § 1013); Bell v. State, 148 Ga. 352, 96 S.E. 861, 1918 Ga. LEXIS 337 (1918) (decided under former Penal Code 1910, § 1013); Floyd v. State, 58 Ga. App. 867, 200 S.E. 207, 1938 Ga. App. LEXIS 160 (1938) (decided under former Code 1933, § 38-110); Fountain v. State, 71 Ga. App. 191, 30 S.E.2d 359, 1944 Ga. App. LEXIS 312 (1944) (decided under former Code 1933, § 38-110); Brock v. State, 91 Ga. App. 141, 85 S.E.2d 177, 1954 Ga. App. LEXIS 883 (1954) (decided under former Code 1933, § 38-110); Lingo v. State, 96 Ga. App. 379, 100 S.E.2d 116, 1957 Ga. App. LEXIS 586 (1957) (decided under former Code 1933, § 38-110).

Province of jury. — It is the province of the jury to decide the weight and credit to be given the evidence. Fortson v. State, 69 Ga. App. 378, 25 S.E.2d 820, 1943 Ga. App. LEXIS 87 (1943) (decided under former Code 1933, § 38-110); Whitus v. State, 222 Ga. 103, 149 S.E.2d 130, 1966 Ga. LEXIS 408 (1966), rev'd, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599, 1967 U.S. LEXIS 2452 (1967) (decided under former Code 1933, § 38-110); Armour v. State, 154 Ga. App. 740, 270 S.E.2d 22, 1980 Ga. App. LEXIS 2368 (1980) (decided under former Code 1933, § 38-110); Mosley v. State, 157 Ga. App. 578, 278 S.E.2d 154, 1981 Ga. App. LEXIS 1920 (1981) (decided under former O.C.G.A. § 24-4-5); Davis v. State, 159 Ga. App. 197, 283 S.E.2d 17, 1981 Ga. App. LEXIS 2546 (1981) (decided under former O.C.G.A. § 24-4-5); Painter v. State, 159 Ga. App. 479, 283 S.E.2d 695, 1981 Ga. App. LEXIS 2658 (1981) (decided under former O.C.G.A. § 24-4-5).

Whether every reasonable hypothesis except that of guilt of the defendant has been excluded is question for jury, when the jury is properly instructed. Barfield v. State, 160 Ga. App. 228, 286 S.E.2d 516, 1981 Ga. App. LEXIS 3036 (1981) (decided under former O.C.G.A. § 24-4-5).

Instructions not error in the following cases. — See Smith v. State, 34 Ga. App. 779, 131 S.E. 923, 1926 Ga. App. LEXIS 24 (1926) (decided under former Penal Code 1910, § 1013); Lucas v. State, 48 Ga. App. 42, 171 S.E. 850, 1933 Ga. App. LEXIS 450 (1933) (decided under former Code 1933, § 38-110); Pound v. State, 180 Ga. 83, 178 S.E. 291, 1935 Ga. LEXIS 179 (1935) (decided under former Code 1933, § 38-110); Stowe v. State, 51 Ga. App. 726, 181 S.E. 419, 1935 Ga. App. LEXIS 450 (1935) (decided under former Code 1933, § 38-110); Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139, 1943 Ga. LEXIS 449 (1943) (decided under former Code 1933, § 38-110); Rogers v. State, 72 Ga. App. 791, 35 S.E.2d 473, 1945 Ga. App. LEXIS 701 (1945) (decided under former Code 1933, § 38-110); Johnson v. State, 209 Ga. 333, 72 S.E.2d 291, 1952 Ga. LEXIS 478 (1952) (decided under former Code 1933, § 38-110); Dicks v. State, 155 Ga. App. 591, 271 S.E.2d 727, 1980 Ga. App. LEXIS 2691 (1980) (decided under former Code 1933, § 38-110); Jackson

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v. State, 157 Ga. App. 581, 278 S.E.2d 156, 1981 Ga. App. LEXIS 1923 (1981) (decided under former O.C.G.A. § 24-4-5).

Erroneous charge. — Following charge was held inaccurate: "Whether dependent upon positive or circumstantial evidence, the true question in all criminal cases is not that the conclusion to which the evidence points may be false, but whether or not the state has satisfied the minds and consciences of the jury beyond a reasonable doubt of the guilt of the accused." King v. State, 163 Ga. 313, 136 S.E. 154, 1926 Ga. LEXIS 73 (1926) (decided under former Penal Code 1910, § 1013).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 38-110, which was repealed and succeeded by provisions in this Code section, are included in the annotations for this Code section.

Statute inapplicable to contempt case. — Criminal contempt is not strictly speaking a "criminal case" and as such does not require proof beyond a reasonable doubt as required for other criminal cases. 1979 Op. Att'y Gen. No. 79-36 (decided under former Code 1933, § 38-110).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, § 185. 29A Am. Jur. 2d, Evidence, § 1414.

ALR.

Admissibility and probative force on issue as to mental condition, of evidence that one had been adjudged incompetent or insane, or had been confined in insane asylum, 7 A.L.R. 568; 68 A.L.R. 1309.

Propriety of instructions as to the significance of evidence concerning the defendant's good character as an element bearing upon the question of reasonable doubt, 10 A.L.R. 8; 68 A.L.R. 1068.

Duty to charge as to reasonable doubt as between different degrees of crime of included offenses, 20 A.L.R. 1258.

Instruction on circumstantial evidence in criminal case, 89 A.L.R. 1379.

Admissibility and weight on question of materiality of misrepresentation, of testimony of officers or employees of insurer to effect that application would not have been accepted but for the misrepresentation, or that there was a rule or policy to reject risks of the kind that would have been shown but for the misrepresentation, 115 A.L.R. 100.

Instruction applying rule of reasonable doubt specifically to particular matter or defense as curing instruction placing burden of proof upon defendant in that regard, 120 A.L.R. 591.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 123 A.L.R. 119; 91 A.L.R.2d 1046.

Reasonable doubt rule as applicable to evidence in civil case of facts amounting to felony or misdemeanor, 124 A.L.R. 1378.

Rule of reasonable doubt as applicable to reasonable doubt on part of individual juror, 137 A.L.R. 394.

Admissibility, in prosecution for burglary, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements, 143 A.L.R. 1199.

Use of term "actual doubt" in instruction on reasonable doubt, 147 A.L.R. 1046.

Conviction of criminal offense without evidence as denial of due process of law, 80 A.L.R.2d 1362.

Construction of statute or ordinance making it an offense to possess or have alcoholic beverages in opened package in motor vehicle, 35 A.L.R.3d 1418.

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 A.L.R.3d 988.

Instructions to jury: sympathy to accused as appropriate factor in jury consideration, 72 A.L.R.3d 842.

Sufficiency of prosecution proof that substance defendant is charged with pos-

sessing or selling, or otherwise unlawfully dealing in, is marijuana, 75 A.L.R.3d 717.

Admissibility of DNA identification evidence, 84 A.L.R.4th 313.

24-14-6. Conviction based on circumstantial evidence.

To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.

History.

Code 1981, § 24-14-6, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-4-6, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Martin v. State, 38 Ga. 293 (1868); Carter v. State, 46 Ga. 637 (1872); and Simmons v. State, 85 Ga. 224, 11 S.E. 555 (1890).

Law reviews.

For survey of cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978).

For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

For article, "Criminal Law," see 53 Mercer L. Rev. 209 (2001).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1895, § 984, Penal Code 1910, § 1010, Code 1933, § 38-109, and former O.C.G.A. § 24-4-6 are included in the annotations for this Code section.

Meaning of the former statute was so clear and manifest as not to require explanation. Morris v. State, 176 Ga. 243, 167 S.E. 509, 1933 Ga. LEXIS 56 (1933) (decided under former Code 1933, § 38-109).

Statute constitutes standard of proof. — Although former O.C.G.A. § 24-4-6 was designated as a rule of evidence, in substance the former statute was actually a standard of proof required for a conviction based upon circumstantial evidence. Wilcox v. Ford, 813 F.2d 1140, 1987 U.S. App. LEXIS 4420 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247, 1987 U.S. LEXIS 4561 (1987) (decided under former O.C.G.A. § 24-4-6).

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Standard in federal court. — In setting out the federal constitutional standard in Jackson v. Virginia 443 U.S. 307 (1979), the United States Supreme Court expressly rejected the standard of proof now embodied in former O.C.G.A. § 24-4-6, and that state standard has no place in a federal appellate court's sufficiency of the evidence analysis in a habeas corpus case. Wilcox v. Ford, 813 F.2d 1140, 1987 U.S. App. LEXIS 4420 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247, 1987 U.S. LEXIS 4561 (1987); Bishop v. Kelso, 914 F.2d 1468, 1990 U.S. App. LEXIS 18056 (11th Cir. 1990) (decided under former O.C.G.A. § 24-4-6).

Question of admissibility of circumstantial evidence is largely in the discretion of the trial court, and when facts are such that the jury may or may not make an inference pertinent to the issue, it is not error to permit the jury to hear the circumstantial evidence. Bond v. State, 104 Ga. App. 627, 122 S.E.2d 310, 1961 Ga. App. LEXIS 756 (1961) (decided under former Code 1933, § 38-109).

Statute applicable to municipal court sitting as a jury. Hanjaras v. City of Atlanta, 6 Ga. App. 575, 65 S.E. 356, 1909 Ga. App. LEXIS 396 (1909) (decided under former Penal Code 1895, § 984); Porter v. Mayor of Athens, 18 Ga. App. 232, 89 S.E. 173, 1916 Ga. App. LEXIS 254 (1916) (decided under former Penal Code 1910, § 1010).

Statute applies to circumstantial evidence, not direct evidence. — Defendant's reliance on the circumstantial evidence rule of former O.C.G.A. § 24-4-6 to assert defendant's innocence for the crimes of armed robbery and hijacking a motor vehicle was misplaced as use of that rule presumed that only circumstantial evidence was offered, but, in fact, direct evidence was offered in the form of the victim's positive identification of defendant at the scene of the arrest. Lane v. State, 255 Ga. App. 274, 564 S.E.2d 857, 2002 Ga. App. LEXIS 589 (2002) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in denying defendant's motion for directed verdict of acquittal as direct evidence that defendant fired at the victim and defendant's own admission that defendant fired at the victim was sufficient to submit the question of whether defendant was guilty of aggravated assault to the jury; no error occurred pursuant to former O.C.G.A. § 24-4-6, involving a conviction based solely on circumstantial evidence, as the state offered more than circumstantial evidence to support the state's case against defendant. Cobb v. State, 268 Ga. App. 66, 601 S.E.2d 443, 2004 Ga. App. LEXIS 845 (2004) (decided under former O.C.G.A. § 24-4-6).

Defendant's claim that the evidence was insufficient to disprove alternative hypotheses of innocence necessarily presumed that the evidence was entirely circumstantial, failed in light of the direct evidence of the victim's in-court identification of defendant. Banks v. State, 269 Ga. App. 653, 605 S.E.2d 47, 2004 Ga. App. LEXIS 1249 (2004) (decided under former O.C.G.A. § 24-4-6).

In attacking defendant's convictions for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony arising from a shooting death, defendant's reliance on former O.C.G.A. § 24-4-6 was misplaced because there was direct evidence of defendant's guilt in the form of defendant's own statement and eyewitness testimony that defendant approached the victim's car armed with a pistol and that multiple shots were fired. Wallace v. State, 279 Ga. 26, 608 S.E.2d 634, 2005 Ga. LEXIS 116 (2005) (decided under former O.C.G.A. § 24-4-6).

When defendant sat in a stolen would-be getaway car while the accomplice murdered a victim, and then defendant and the accomplice abandoned that car and fled the scene, defendant's conviction for the accomplice's crime was not based solely on circumstantial evidence, as a neighbor saw a person leaning into the stolen car who fit defendant's physical appearance, and defendant admitted to being that person. Jackson v. State, 274 Ga. App. 279, 617 S.E.2d 249, 2005 Ga. App. LEXIS 749 (2005) (decided under former O.C.G.A. § 24-4-6).

Evidence supported a defendant's conviction for possession of a firearm by a

convicted felon as defendant's possession of the victim's handgun and shotgun on the night of the crimes was shown by the victim's direct testimony since: (1) the victim testified that two men forced their way into the victim's house, hit the victim in the head with a blunt object, recovered a .380 caliber handgun and a 20-gauge single-barrel shotgun, forced the victim to give them thousands of dollars the victim had hidden in the attic; (2) during a consensual search, the police found a .380 caliber handgun hidden in the defendant's bedroom that was identified as the victim's by the victim and that bore the same serial number as the victim's gun; and (3) the victim identified defendant in a photo array and at trial; the evidence authorized the jury to find that the defendant was in actual possession of the handgun on February 21 and that the defendant continued to be in at least constructive possession of the gun when the gun was found in the defendant's bedroom. Tanksley v. State, 281 Ga. App. 61, 635 S.E.2d 353, 2006 Ga. App. LEXIS 994 (2006) (decided under former O.C.G.A. § 24-4-6).

Defendant's argument that the evidence presented by the state failed to exclude every alternative, reasonable hypothesis failed; the reasonable hypothesis rule, under former O.C.G.A. § 24-4-6, had no application to the case as there was direct evidence of the defendant's guilt in the form of the victim's prior inconsistent statements about being beaten by the defendant. Meeks v. State, 281 Ga. App. 334, 636 S.E.2d 77, 2006 Ga. App. LEXIS 1095 (2006) (decided under former O.C.G.A. § 24-4-6).

In a drug possession case, the defendant was not convicted based on circumstantial evidence that, in violation of former O.C.G.A. § 24-4-6, failed to exclude every other hypothesis save that of the defendant's guilt; the passenger's testimony that the defendant handed the passenger drugs and told the passenger to discard the drugs provided direct evidence that the defendant possessed more than an ounce of marijuana in violation of O.C.G.A. § 16-13-30. Curtis v. State, 282 Ga. App. 322, 638 S.E.2d 773, 2006 Ga. App. LEXIS 1301 (2006), cert. denied, No. S07C0427, 2007 Ga. LEXIS 203 (Ga. Feb. 26, 2007) (decided under former O.C.G.A. § 24-4-6).

Because the victim's testimony provided direct evidence of defendant's guilt, the rule that the facts had to exclude every other reasonable hypothesis save that of the guilt of the accused was not at issue. Mack v. State, 294 Ga. App. 518, 669 S.E.2d 487, 2008 Ga. App. LEXIS 1258 (2008) (decided under former O.C.G.A. § 24-4-6).

Because a codefendant's prior inconsistent statements were based on the codefendant's eyewitness account of what occurred, the statements were direct evidence of the defendant's guilt, rendering the reasonable hypothesis rule inapplicable. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348, 2009 Ga. App. LEXIS 566 (2009) (decided under former O.C.G.A. § 24-4-6).

There was no merit to the defendant's argument that the state's evidence failed to exclude every reasonable hypothesis save that of the defendant's guilt because the prior statement of the defendant's father to an investigator provided direct evidence that the defendant had moved and supported the charge that the defendant had changed residences without notifying the local authorities as required by O.C.G.A. § 42-1-12. State v. Canup, 300 Ga. App. 678, 686 S.E.2d 275, 2009 Ga. App. LEXIS 1207 (2009) (decided under former O.C.G.A. § 24-4-6).

Venue may be shown by circumstantial evidence. Graham v. State, 16 Ga. App. 221, 84 S.E. 981, 1915 Ga. App. LEXIS 553 (1915) (decided under former Penal Code 1910, § 1010); Dickerson v. State, 186 Ga. 557, 199 S.E. 142, 1938 Ga. LEXIS 706 (1938) (decided under former Code 1933, § 38-109).

Evidence was sufficient to prove venue in Effingham County, Georgia beyond a reasonable doubt because the state showed that the crime was committed at the defendant's residence and that Effingham County 9-1-1 dispatchers received the defendant's 9-1-1 call and dispatched Effingham County EMS and police to the defendant's address; the victim's attending physician telephoned the Effingham County sheriff's office to report that a crime was committed at the defendant's

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address. Brinson v. State, 289 Ga. 150, 709 S.E.2d 789, 2011 Ga. LEXIS 302 (2011) (decided under former O.C.G.A. § 24-4-6).

Case involving life or imprisonment. — Statute should never be relaxed in a case involving life or imprisonment. Cook v. State, 114 Ga. 523, 40 S.E. 703, 1902 Ga. LEXIS 699 (1902) (decided under former Penal Code 1895, § 984); Creech v. State, 30 Ga. App. 631, 118 S.E. 501, 1923 Ga. App. LEXIS 581 (1923) (decided under former Penal Code 1910, § 1010).

Incriminatory statements. — When the defendant makes incriminatory statements after the victim's death, the case is not one depending entirely upon circumstantial evidence. Phipps v. State, 203 Ga. App. 128, 416 S.E.2d 319, 1992 Ga. App. LEXIS 387 (1992), cert. denied, No. S92C0740, 1992 Ga. LEXIS 291 (Ga. Apr. 9, 1992) (decided under former O.C.G.A. § 24-4-6).

Defendant was not convicted of possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131(b) merely based on circumstantial evidence that failed, in violation of former O.C.G.A. § 24-4-6, to exclude every other reasonable hypothesis except that of the defendant's guilt; the defendant made several admissions to officers that constituted direct evidence, including that the defendant had a gun in the defendant's bedroom and that the defendant used the gun to hunt. Parramore v. State, 277 Ga. App. 372, 626 S.E.2d 567, 2006 Ga. App. LEXIS 91 (2006) (decided under former O.C.G.A. § 24-4-6).

Confession was not circumstantial evidence; thus, defendant was not entitled to directed verdict under former O.C.G.A. § 24-4-6 since the defendant failed to prove that defendant's confession was unlawfully obtained. Bigham v. State, 222 Ga. App. 353, 474 S.E.2d 254 (decided under former O.C.G.A. § 24-4-6).

Defendant's admission that the defendant shot the victim but did so in self-defense removed the case from the rule that a conviction based entirely on circumstantial evidence can be affirmed only if every reasonable hypothesis other than guilt is excluded. Wright v. State, 294 Ga. App. 20, 668 S.E.2d 505, 2008 Ga. App. LEXIS 1098 (2008) (decided under former O.C.G.A. § 24-4-6).

Proven facts must be inconsistent with innocence to warrant a conviction on circumstantial evidence. Riley v. State, 1 Ga. App. 651, 57 S.E. 1031, 1907 Ga. App. LEXIS 63 (1907) (decided under former Penal Code 1895, § 984); Middleton v. State, 7 Ga. App. 1, 66 S.E. 22, 1909 Ga. App. LEXIS 508 (1909) (decided under former Penal Code 1895, § 984).

When the circumstances authorize a mere conjecture of guilt. Fowler v. State, 32 Ga. App. 361, 123 S.E. 43, 1924 Ga. App. LEXIS 399 (1924) (decided under former Penal Code 1910, § 1010); Vinson v. State, 120 Ga. App. 425, 170 S.E.2d 749, 1969 Ga. App. LEXIS 803 (1969) (decided under former Code 1933, § 38-109); Jackson v. State, 152 Ga. App. 441, 263 S.E.2d 181, 1979 Ga. App. LEXIS 2957 (1979) (decided under former Code 1933, § 38-109); Hall v. State, 155 Ga. App. 211, 270 S.E.2d 377, 1980 Ga. App. LEXIS 2531 (1980) (decided under former Code 1933, § 38-109).

Witness credibility does convert direct evidence into circumstantial evidence. — Appellate court rejected the defendant's argument that the evidence presented at trial was legally insufficient to support the defendant's convictions based on the state's two key witnesses being so unreliable that the witnesses' testimony should be considered circumstantial rather than direct evidence because direct evidence from a witness who observed a crime does not convert into circumstantial evidence by the witness's credibility or lack thereof. Lewis v. State, 296 Ga. 259, 765 S.E.2d 911, 2014 Ga. LEXIS 910 (2014).

Exclusion of Reasonable Hypothesis

In general. — When the state relies for a conviction on circumstantial evidence alone, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis except that of the guilt of the accused. Amorous v. State, 1 Ga. App. 313, 57 S.E. 999, 1907 Ga. App. LEXIS 226

(1907) (decided under former Penal Code 1895, § 984); Toomer v. State, 130 Ga. 63, 60 S.E. 198, 1908 Ga. LEXIS 228 (1908) (decided under former Penal Code 1895, § 984); Carter v. State, 57 Ga. App. 180, 194 S.E. 842, 1938 Ga. App. LEXIS 515 (1938) (decided under former Code 1933, § 38-109); Blakeley v. State, 78 Ga. App. 516, 51 S.E.2d 598, 1949 Ga. App. LEXIS 918 (1949) (decided under former Code 1933, § 38-109); McQuire v. State, 82 Ga. App. 132, 60 S.E.2d 526, 1950 Ga. App. LEXIS 1068 (1950) (decided under former Code 1933, § 38-109); Diggs v. State, 90 Ga. App. 853, 84 S.E.2d 611, 1954 Ga. App. LEXIS 833 (1954) (decided under former Code 1933, § 38-109); Crane v. State, 123 Ga. App. 226, 180 S.E.2d 289, 1971 Ga. App. LEXIS 1173 (1971) (decided under former Code 1933, § 38-109); Ridley v. State, 232 Ga. 646, 208 S.E.2d 466, 1974 Ga. LEXIS 1044 (1974) (decided under former Code 1933, § 38-109); Wright v. State, 147 Ga. App. 111, 248 S.E.2d 183, 1978 Ga. App. LEXIS 2798 (1978) (decided under former Code 1933, § 38-109); Barnett v. State, 153 Ga. App. 430, 265 S.E.2d 348, 1980 Ga. App. LEXIS 1837 (1980) (decided under former Code 1933, § 38-109); Perry v. State, 158 Ga. App. 349, 280 S.E.2d 390, 1981 Ga. App. LEXIS 2204 (1981) (decided under former Code 1933, § 38-109); Johnson v. State, 159 Ga. App. 497, 283 S.E.2d 711, 1981 Ga. App. LEXIS 2666 (1981) (decided under former Code 1933, § 38-109).

If the state relies upon circumstantial evidence, that evidence must be so strong as to exclude every other reasonable hypothesis save that of the guilt of the accused. It must be inconsistent with the accused's innocence. This court has ruled on several occasions that, in cases involving life or liberty, this rule must not be relaxed. Parks v. State, 202 Ga. 84, 42 S.E.2d 103, 1947 Ga. LEXIS 353 (1947) (decided under former Code 1933, § 38-1097).

In a trial for aggravated assault, although there were certain discrepancies in the evidence, and a portion of the evidence was circumstantial rather than direct, the quantum of evidence in the defendant's favor fell far short of that necessary to "demand" a verdict of acquittal; since there was direct evidence pointing to the same conclusion as the circumstantial evidence, the verdict was not disturbed on appeal. Cobb v. State, 195 Ga. App. 429, 393 S.E.2d 723, 1990 Ga. App. LEXIS 556 (1990) (decided under former O.C.G.A. § 24-4-6).

In a prosecution of the offense of terroristic threats, the state's failure to present evidence excluding a reasonable hypothesis of innocence resulted in a failure of proof in regard to several elements of the crime charged and should have precluded the jury's return of a verdict of guilty. Cooley v. State, 219 Ga. App. 176, 464 S.E.2d 619, 1995 Ga. App. LEXIS 1005 (1995) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence is worth nothing if circumstances are reasonably consistent with the hypothesis of innocence as well as the hypothesis of guilt. Johnson v. State, 159 Ga. App. 497, 283 S.E.2d 711, 1981 Ga. App. LEXIS 2666 (1981) (decided under former Code 1933, § 38-109).

"Exclusion of reasonable hypothesis" only applied in cases when evidence was purely circumstantial; hence, the defendant could not benefit from the that legal principle when all the state's evidence, including the identification evidence, was direct evidence. Morales v. State, 286 Ga. App. 698, 649 S.E.2d 873, 2007 Ga. App. LEXIS 850 (2007) (decided under former O.C.G.A. § 24-4-6).

Exclusion of reasonable hypothesis. — Evidence sufficient to exclude every reasonable hypothesis except that of defendant's guilt. Brown v. State, 260 Ga. 153, 391 S.E.2d 108, 1990 Ga. LEXIS 172 (1990) (decided under former O.C.G.A. § 24-4-6); Grover v. State, 215 Ga. App. 907, 452 S.E.2d 586, 1994 Ga. App. LEXIS 1377 (1994) (decided under former O.C.G.A. § 24-4-6).

Term "hypothesis" refers to such reasonable inferences as are ordinarily drawn by men in the light of their experience in everyday life. White v. State, 18 Ga. App. 214, 89 S.E. 175, 1916 Ga. App. LEXIS 240 (1916) (decided under former Penal Code 1910, § 1010); Wrisper v. State, 193 Ga. 157, 17 S.E.2d 714, 1941 Ga. LEXIS 503 (1941) (decided under for-

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mer Code 1933, § 38-109); Hunter v. State, 91 Ga. App. 136, 85 S.E.2d 90, 1954 Ga. App. LEXIS 881 (1954) (decided under former Code 1933, § 38-109); Townsend v. State, 115 Ga. App. 529, 154 S.E.2d 788, 1967 Ga. App. LEXIS 1155 (1967) (decided under former Code 1933, § 38-109); Johnson v. State, 126 Ga. App. 93, 189 S.E.2d 900, 1972 Ga. App. LEXIS 1061 (1972) (decided under former Code 1933, § 38-109); D.O.D. v. State, 156 Ga. App. 301, 274 S.E.2d 696, 1980 Ga. App. LEXIS 2950 (1980) (decided under former Code 1933, § 38-109); McGee v. State, 159 Ga. App. 763, 285 S.E.2d 224, 1981 Ga. App. LEXIS 2797 (1981) (decided under former Code 1933, § 38-109); Holland v. State, 176 Ga. App. 343, 335 S.E.2d 739, 1985 Ga. App. LEXIS 2874 (1985) (decided under former O.C.G.A. § 24-4-6); Lewis v. State, 186 Ga. App. 349, 367 S.E.2d 123, 1988 Ga. App. LEXIS 317 (1988) (decided under former O.C.G.A. § 24-4-6); Redwine v. State, 188 Ga. App. 638, 373 S.E.2d 804, 1988 Ga. App. LEXIS 1154 (1988), cert. denied, 489 U.S. 1069, 109 S. Ct. 1347, 103 L. Ed. 2d 816, 1989 U.S. LEXIS 1334 (1989); Sanford v. State, 193 Ga. App. 18, 386 S.E.2d 899, 1989 Ga. App. LEXIS 1257 (1989) (decided under former O.C.G.A. § 24-4-6).

Reasonableness question for jury. — Whether or not in a given case circumstances are sufficient to exclude every reasonable hypothesis save the guilt of the accused is primarily a question for determination by the jury. Fortson v. State, 69 Ga. App. 378, 25 S.E.2d 820, 1943 Ga. App. LEXIS 87 (1943) (decided under former Code 1933, § 38-109); Townsend v. State, 115 Ga. App. 529, 154 S.E.2d 788, 1967 Ga. App. LEXIS 1155 (1967) (decided under former Code 1933, § 38-109); Brown v. State, 125 Ga. App. 300, 187 S.E.2d 301, 1972 Ga. App. LEXIS 1307 (1972) (decided under former Code 1933, § 38-109); Jackson v. State, 129 Ga. App. 901, 201 S.E.2d 816, 1973 Ga. App. LEXIS 1192 (1973) (decided under former Code 1933, § 38-109); Neal v. State, 130 Ga. App. 708, 204 S.E.2d 451, 1974 Ga. App. LEXIS 1235 (1974) (decided under former Code 1933, § 38-109); Murray v. State, 135 Ga. App. 264, 217 S.E.2d 293, 1975 Ga. App. LEXIS 1641 (1975) (decided under former Code 1933, § 38-109); Harris v. State, 236 Ga. 242, 223 S.E.2d 643, 1976 Ga. LEXIS 826 (1976) (decided under former Code 1933, § 38-109); Parker v. State, 140 Ga. App. 92, 230 S.E.2d 99, 1976 Ga. App. LEXIS 1358 (1976) (decided under former Code 1933, § 38-109); Collins v. State, 146 Ga. App. 857, 247 S.E.2d 602, 1978 Ga. App. LEXIS 2572 (1978) (decided under former Code 1933, § 38-109); Dowdy v. State, 150 Ga. App. 137, 257 S.E.2d 41, 1979 Ga. App. LEXIS 2161 (1979) (decided under former Code 1933, § 38-109); Anglin v. State, 244 Ga. 1, 257 S.E.2d 513, 1979 Ga. LEXIS 1080 (1979), overruled on other grounds, Welch v. State, 254 Ga. 603, 331 S.E.2d 573, 1985 Ga. LEXIS 781 (1985) (decided under former Code 1933, § 38-109); Butler v. State, 150 Ga. App. 751, 258 S.E.2d 691, 1979 Ga. App. LEXIS 2365 (1979) (decided under former Code 1933, § 38-109); Baldwin v. State, 153 Ga. App. 35, 264 S.E.2d 528, 1980 Ga. App. LEXIS 1659 (1980) (decided under former Code 1933, § 38-109); Hendrix v. State, 153 Ga. App. 791, 266 S.E.2d 568, 1980 Ga. App. LEXIS 1983 (1980) (decided under former Code 1933, § 38-109); Estep v. State, 154 Ga. App. 1, 267 S.E.2d 314, 1980 Ga. App. LEXIS 2025 (1980) (decided under former Code 1933, § 38-109); Smith v. State, 154 Ga. App. 497, 268 S.E.2d 714, 1980 Ga. App. LEXIS 2246 (1980) (decided under former Code 1933, § 38-109); Humphries v. State, 154 Ga. App. 596, 269 S.E.2d 90, 1980 Ga. App. LEXIS 2303 (1980) (decided under former Code 1933, § 38-109); Brewer v. State, 156 Ga. App. 468, 274 S.E.2d 817, 1980 Ga. App. LEXIS 3070 (1980) (decided under former Code 1933, § 38-109); Wood v. State, 156 Ga. App. 810, 275 S.E.2d 694, 1980 Ga. App. LEXIS 3209 (1980) (decided under former Code 1933, § 38-109); Walker v. State, 157 Ga. App. 728, 278 S.E.2d 487, 1981 Ga. App. LEXIS 1991 (1981) (decided under former O.C.G.A. § 24-4-6); Barfield v. State, 160 Ga. App. 228, 286 S.E.2d 516, 1981 Ga. App. LEXIS 3036 (1981) (decided under former Code 1933, § 38-109); In re J.P., 160 Ga. App. 896, 288 S.E.2d 607, 1982 Ga. App. LEXIS

2991 (1982) (decided under former O.C.G.A. § 24-4-6).

Question of whether every other reasonable hypothesis has been excluded is generally a question for the jury. Muckle v. State, 165 Ga. App. 873, 303 S.E.2d 54, 1983 Ga. App. LEXIS 2047 (1983) (decided under former O.C.G.A. § 24-4-6); Bird v. State, 178 Ga. App. 687, 344 S.E.2d 468, 1986 Ga. App. LEXIS 2557 (1986) (decided under former O.C.G.A. § 24-4-6).

What is a reasonable hypothesis is generally a question for the jury, and there is no yardstick to determine what is a "reasonable" hypothesis save the opinion of the jurors. Jenkins v. State, 201 Ga. App. 395, 411 S.E.2d 122, 1991 Ga. App. LEXIS 1345 (1991) (decided under former O.C.G.A. § 24-4-6).

Only reasonable hypotheses need be excluded. — To sustain a conviction, it is not required that the evidence exclude every possibility or every inference that may be drawn from proven facts; it is only necessary to exclude reasonable inferences and reasonable hypotheses which may be drawn from the evidence under all the facts and circumstances surrounding the particular case. Reese v. State, 94 Ga. App. 387, 94 S.E.2d 741, 1956 Ga. App. LEXIS 552 (1956) (decided under former Code 1933, § 38-109); Bobo v. State, 100 Ga. App. 643, 112 S.E.2d 205, 1959 Ga. App. LEXIS 684 (1959) (decided under former Code 1933, § 38-109); Samsell v. State, 222 Ga. 235, 149 S.E.2d 367, 1966 Ga. LEXIS 444 (1966) (decided under former Code 1933, § 38-109); Alexander v. State, 223 Ga. 34, 153 S.E.2d 431, 1967 Ga. LEXIS 402 (1967) (decided under former Code 1933, § 38-109); Townsend v. State, 115 Ga. App. 529, 154 S.E.2d 788, 1967 Ga. App. LEXIS 1155 (1967) (decided under former Code 1933, § 38-109); Vinson v. State, 120 Ga. App. 425, 170 S.E.2d 749, 1969 Ga. App. LEXIS 803 (1969) (decided under former Code 1933, § 38-109); Wheeler v. State, 228 Ga. 402, 185 S.E.2d 900, 1971 Ga. LEXIS 581 (1971) (decided under former Code 1933, § 38-109); Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474, 1972 Ga. App. LEXIS 1023 (1972) (decided under former Code 1933, § 38-109); Murray v. State, 135 Ga. App. 264, 217 S.E.2d 293, 1975 Ga. App. LEXIS 1641 (1975) (decided under former Code 1933, § 38-109); McConnell v. State, 235 Ga. 366, 220 S.E.2d 5, 1975 Ga. LEXIS 884 (1975) (decided under former Code 1933, § 38-109); Rogers v. State, 139 Ga. App. 656, 229 S.E.2d 132, 1976 Ga. App. LEXIS 1935 (1976) (decided under former Code 1933, § 38-109); Weatherington v. State, 139 Ga. App. 795, 229 S.E.2d 676, 1976 Ga. App. LEXIS 1997 (1976) (decided under former Code 1933, § 38-109); Parker v. State, 142 Ga. App. 396, 236 S.E.2d 141, 1977 Ga. App. LEXIS 1631 (1977) (decided under former Code 1933, § 38-109); Runnels v. State, 146 Ga. App. 75, 245 S.E.2d 475, 1978 Ga. App. LEXIS 2254 (1978) (decided under former Code 1933, § 38-109); Lewis v. State, 149 Ga. App. 181, 254 S.E.2d 142, 1979 Ga. App. LEXIS 1778 (1979) (decided under former Code 1933, § 38-109); Dowdy v. State, 150 Ga. App. 137, 257 S.E.2d 41, 1979 Ga. App. LEXIS 2161 (1979) (decided under former Code 1933, § 38-109); Creamer v. State, 150 Ga. App. 428, 258 S.E.2d 212 (1979) (decided under former Code 1933, § 38-109); Baldwin v. State, 153 Ga. App. 35, 264 S.E.2d 528, 1980 Ga. App. LEXIS 1659 (1980) (decided under former Code 1933, § 38-109); Thompson v. State, 154 Ga. App. 704, 269 S.E.2d 474, 1980 Ga. App. LEXIS 2349 (1980) (decided under former Code 1933, § 38-109); Brewer v. State, 156 Ga. App. 468, 274 S.E.2d 817, 1980 Ga. App. LEXIS 3070 (1980) (decided under former Code 1933, § 38-109); Strickland v. State, 156 Ga. App. 475, 274 S.E.2d 823, 1980 Ga. App. LEXIS 3076 (1980) (decided under former Code 1933, § 38-109); Perry v. State, 158 Ga. App. 349, 280 S.E.2d 390, 1981 Ga. App. LEXIS 2204 (1981) (decided under former Code 1933, § 38-109); Slack v. State, 159 Ga. App. 185, 283 S.E.2d 64, 1981 Ga. App. LEXIS 2541 (1981) (decided under former O.C.G.A. § 24-4-6); In re J.P., 160 Ga. App. 896, 288 S.E.2d 607, 1982 Ga. App. LEXIS 2991 (1982) (decided under former O.C.G.A. § 24-4-6).

Rule as to the sufficiency of circumstantial evidence to support a conviction is that the evidence exclude every reasonable hypothesis except that of guilt, not that it remove every possibility of the innocence of the defendant. Barfield v.

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State, 160 Ga. App. 228, 286 S.E.2d 516, 1981 Ga. App. LEXIS 3036 (1981) (decided under former Code 1933, § 38-109).

To sustain the judgment of conviction, the evidence need not exclude every inference or hypothesis except guilt of the accused, but only reasonable inferences and hypotheses so as to justify the inference, beyond reasonable doubt, of guilt. Chambless v. State, 165 Ga. App. 194, 300 S.E.2d 201, 1983 Ga. App. LEXIS 3129 (1983) (decided under former O.C.G.A. § 24-4-6); Hulsey v. State, 210 Ga. App. 251, 435 S.E.2d 713, 1993 Ga. App. LEXIS 1123 (1993), cert. denied, No. S94C0027, 1994 Ga. LEXIS 206 (Ga. Jan. 6, 1994) (decided under former O.C.G.A. § 24-4-6).

Conviction based solely upon circumstantial evidence must be supported by facts which not only are consistent with guilt of the accused, but should exclude every reasonable hypothesis save that of the guilt of the accused. This does not mean that the state must exclude every possible hypothesis showing innocence, but any reasonable hypothesis showing innocence. Robinson v. State, 168 Ga. App. 569, 309 S.E.2d 845, 1983 Ga. App. LEXIS 2852 (1983) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence must include only reasonable hypothesis; it need not exclude every inference or hypothesis except that of the defendant's guilt. Smith v. State, 257 Ga. 381, 359 S.E.2d 662, 1987 Ga. LEXIS 875 (1987) (decided under former O.C.G.A. § 24-4-6).

When a conviction is based on circumstantial evidence, although the circumstantial evidence must exclude every other reasonable hypothesis save the defendant's guilt, it need not exclude every inference or hypothesis. Mason v. State, 199 Ga. App. 691, 405 S.E.2d 747, 1991 Ga. App. LEXIS 639 (1991) (decided under former O.C.G.A. § 24-4-6).

When the evidence connecting a defendant to the charged crime is circumstantial, to warrant a conviction the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused. Dean v. State, 203 Ga. App. 836, 418 S.E.2d 117, 1992 Ga. App. LEXIS 629 (1992) (decided under former O.C.G.A. § 24-4-6).

Beyond the witnesses' identification of a juvenile's hairstyle and clothing as those worn by one of the burglars, and beyond the burglars' going to the juvenile's home to escape, the juvenile's possession of the stolen items soon after the burglary was sufficient to uphold the court's adjudication of delinquency on that charge; furthermore, any reasonable hypothesis of innocence was undermined by the identification of the juvenile's hairstyle and clothes and by the identification of the juvenile's residence as the place to which the burglars escaped. In the Interest of A.D., 282 Ga. App. 586, 639 S.E.2d 556, 2006 Ga. App. LEXIS 1476 (2006) (decided under former O.C.G.A. § 24-4-6).

Jury was not required to find that the defendant's hypothesis that the husband committed the crimes acting alone was a reasonable one because the evidence was sufficient to convict the defendant of the murder of the defendant's 11-month-old son and the aggravated assault and child cruelty of the defendant's two-year-old daughter because the defendant was alone with the children for almost the entire time during which the medical evidence established that someone inflicted the fatal injury on the son's head; and a rational trier of fact could have found beyond a reasonable doubt that the defendant was — either directly or as a party to the husband's criminal activity — guilty of the crimes of which the defendant was convicted. Black v. State, 296 Ga. 658, 769 S.E.2d 898, 2015 Ga. LEXIS 147 (2015) (decided under former O.C.G.A. § 24-4-6).

Evidence supporting two theories. — When the circumstantial evidence supports more than one theory, one consistent with guilt and another with innocence, it does not exclude every other reasonable hypothesis except guilt and is not sufficient to prove the defendant's guilt beyond a reasonable doubt. Carr v. State, 119 Ga. App. 540, 167 S.E.2d 707, 1969 Ga. App. LEXIS 1156 (1969) (decided under former Code 1933, § 38-109); Roberson v. State, 145 Ga. App. 687, 244 S.E.2d 629, 1978 Ga. App. LEXIS 2088 (1978) (decided un-

der former Code 1933, § 38-109); Kreager v. State, 148 Ga. App. 548, 252 S.E.2d 1, 1978 Ga. App. LEXIS 3216 (1978) (decided under former Code 1933, § 38-109); Johnson v. State, 159 Ga. App. 497, 283 S.E.2d 711, 1981 Ga. App. LEXIS 2666 (1981) (decided under former Code 1933, § 38-109).

When evidence failed to establish whether the defendant first took property and then killed the victim and ransacked the house, or first killed the victim and then took the property and ransacked the house, the evidence was insufficient to meet the standard of former O.C.G.A. § 24-4-6 and, moreover, was insufficient for a rational trier of fact to have found the defendant guilty of armed robbery beyond a reasonable doubt. Miles v. State, 261 Ga. 232, 403 S.E.2d 794, 1991 Ga. LEXIS 217 (1991) (decided under former O.C.G.A. § 24-4-6).

Consideration of defendant's explanation. — In making a determination of whether any other reasonable hypothesis exists, the defendant's explanation must be taken into consideration insofar as it is consistent with the circumstantial evidence properly admitted. Elam v. State, 125 Ga. App. 427, 187 S.E.2d 920, 1972 Ga. App. LEXIS 1360 (1972) (decided under former Code 1933, § 38-109); Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474, 1972 Ga. App. LEXIS 1023 (1972) (decided under former Code 1933, § 38-109); Wright v. State, 147 Ga. App. 111, 248 S.E.2d 183, 1978 Ga. App. LEXIS 2798 (1978) (decided under former Code 1933, § 38-109); Jackson v. State, 152 Ga. App. 441, 263 S.E.2d 181, 1979 Ga. App. LEXIS 2957 (1979) (decided under former Code 1933, § 38-109); Barnett v. State, 153 Ga. App. 430, 265 S.E.2d 348, 1980 Ga. App. LEXIS 1837 (1980) (decided under former Code 1933, § 38-109); Bogan v. State, 158 Ga. App. 1, 279 S.E.2d 229, 1981 Ga. App. LEXIS 2046 (1981) (decided under former Code 1933, § 38-109); Ragan v. State, 250 Ga. App. 89, 550 S.E.2d 476, 2001 Ga. App. LEXIS 694 (2001) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to support defendant's convictions on four counts of aggravated battery and one count of cruelty to children in the first degree after the 17-month-old daughter of a girlfriend was found with hot-water immersion burns incurred while defendant was watching the daughter for the girlfriend; the jury was free to reject the explanation that defendant had no criminal intent at the time the burns were incurred and that defendant maliciously and intentionally immersed the baby in hot water after the baby soiled a diaper, especially since defendant's explanations were not consistent with the evidence. Lee v. State, 275 Ga. App. 93, 619 S.E.2d 767, 2005 Ga. App. LEXIS 888 (2005) (decided under former O.C.G.A. § 24-4-6).

Because sufficient evidence was presented to support a finding that the defendant was intoxicated to the level that the intoxication caused both the defendant's loss of consciousness and an accident resulting in the defendant's truck straddling a ditch with the truck's nose down at close to a 90-degree angle, and the responding deputies testified that the defendant appeared to be under the influence of alcohol to the extent that it was less safe to drive, the defendant's conviction for violating O.C.G.A. § 40-6-391(a)(1) was supported by sufficient direct evidence of guilt; moreover, based on the evidence, the trial court could reasonably reject as unreasonable the hypothesis that the defendant became intoxicated after the accident occurred. Stewart v. State, 288 Ga. App. 735, 655 S.E.2d 328, 2007 Ga. App. LEXIS 1281 (2007) (decided under former O.C.G.A. § 24-4-6).

Sufficient evidence supported defendant's convictions on one count of simple assault and two counts of battery, which arose from a fight with a romantic friend, as it was within the jury's province to consider defendant's self-defense theory and reject the defense; jury heard witnesses and observed testimony and was more capable of determining reasonableness of the hypothesis produced by evidence or lack of evidence than appellate court. Thompson v. State, 291 Ga. App. 355, 662 S.E.2d 135, 2008 Ga. App. LEXIS 446 (2008), cert. denied, No. S08C1547, 2008 Ga. LEXIS 710 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-4-6).

There was sufficient evidence to support the defendant's conviction for the malice

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murder of the defendant's mother based on the facts adduced at trial that showed that, contrary to the defendant's version of events that the mother died from smoke inhalation from a kitchen fire, or another version that someone else committed the crime, the medical examiner established that the mother died from strangulation by hands, and the fire investigator established that the kitchen fire was insignificant. Nichols v. State, 292 Ga. 290, 736 S.E.2d 407, 2013 Ga. LEXIS 14 (2013) (decided under former O.C.G.A. § 24-4-6).

Evidence presented at trial was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt of felony murder based on the testimony of several witnesses that the defendant hit the victim in the back of the head with a brick and, despite the defendant asserting that another individual hit the victim, it was for the jury to determine the credibility of the witnesses and the weight of the evidence. Wilson v. State, 295 Ga. 84, 757 S.E.2d 825, 2014 Ga. LEXIS 294 (2014).

Evidence was sufficient to convict the defendant of malice murder and concealing the death of another in connection with the death of the victim, the defendant's wife, because officers located the victim's decomposing body inside orange trash bags; a forensic analyst matched the bags to the roll of garbage bags found in the defendant's home; and the jury was not required to find that defendant's hypothesis that the victim simply fell down the stairs and died was a reasonable one as the jury could have inferred that the defendant concealed the victim's death and then lied to the police, the defendant's family, and a religious leader about the victim's disappearance for more than a week as the defendant had committed the murder. Guzman-Perez v. State, 310 Ga. 573, 853 S.E.2d 76, 2020 Ga. LEXIS 924 (2020).

Based on evidence that the defendant threatened to kill whomever had stolen drugs and money from the defendant's car, that the defendant found out the victims were responsible and got the victims' address, and that the defendant's cell phone moved to the victims' county on the day of the murders, the jury was not required to believe the defendant's claim that drug dealers murdered the victims. Swinson v. State, 311 Ga. 48, 855 S.E.2d 629, 2021 Ga. LEXIS 73, overruled in part, Outlaw v. State, 311 Ga. 396, 858 S.E.2d 63, 2021 Ga. LEXIS 197 (2021).

Evidence raising an inference of a defendant's innocence improperly excluded. — During a trial for felony murder while in the commission of cruelty to a child arising from the death of a defendant's child from brain trauma sustained while the child was in the defendant's care, the defendant was improperly prevented from cross-examining a person who was in the apartment at the time about the person's history of inappropriate behavior toward the person's own child, including allegations of child abuse, because it was a crucial element of the defense that the person was a likely suspect, and, under former O.C.G.A. § 24-4-6, the circumstantial evidence did not exclude the reasonable hypothesis that the person was the likely culprit; the defendant's conviction required reversal because it was not highly improbable that the jury's verdict would have been different if the evidence had been admitted, and the error therefore could not be considered harmless. Scott v. State, 281 Ga. 373, 637 S.E.2d 652, 2006 Ga. LEXIS 965 (2006) (decided under former O.C.G.A. § 24-4-6).

Although evidence was sufficient to find the defendant guilty of the murder of the defendant's girlfriend's adopted child, the conviction was reversed because the defendant was prevented from introducing testimony from the girlfriend's ex-husband that the girlfriend had slapped her infant in the face for refusing to eat and threatened the children. Gilreath v. State, 298 Ga. 670, 784 S.E.2d 388, 2016 Ga. LEXIS 241 (2016).

Error to charge guilt in less reasonable explanation. — Charge given by trial court in theft case that the jury could have inferred guilt unless there was from the evidence a reasonable explanation of possession consistent with a plea of innocence was not a sufficient restatement of former O.C.G.A. § 24-4-6. The jury was

not adequately instructed that the state's circumstantial evidence of guilt should "exclude every other reasonable hypothesis save that of the guilt of the accused." McChargue v. State, 209 Ga. App. 612, 434 S.E.2d 153, 1993 Ga. App. LEXIS 948 (1993) (decided under former O.C.G.A. § 24-4-6).

Proof to moral certainty. — It is not necessary to show that it was impossible for the offense to have been committed by anybody else or that it might not, by bare possibility, have been done by another; it is sufficient to show to a moral certainty that it was the defendant. Johnson v. State, 126 Ga. App. 93, 189 S.E.2d 900, 1972 Ga. App. LEXIS 1061 (1972) (decided under former Code 1933, § 38-109); Neal v. State, 130 Ga. App. 708, 204 S.E.2d 451, 1974 Ga. App. LEXIS 1235 (1974) (decided under former Code 1933, § 38-109); Harris v. State, 236 Ga. 766, 225 S.E.2d 263, 1976 Ga. LEXIS 1019 (1976) (decided under former Code 1933, § 38-109); Van Voltenburg v. State, 138 Ga. App. 628, 227 S.E.2d 451, 1976 Ga. App. LEXIS 2263 (1976) (decided under former Code 1933, § 38-109); Castleberry v. State, 152 Ga. App. 769, 264 S.E.2d 239, 1979 Ga. App. LEXIS 3080 (1979) (decided under former Code 1933, § 38-109); Strickland v. State, 156 Ga. App. 475, 274 S.E.2d 823, 1980 Ga. App. LEXIS 3076 (1980) (decided under former Code 1933, § 38-109).

Former O.C.G.A. § 24-4-6 did not mean that the act might by bare possibility have been done by somebody else, but that the state should show to a moral certainty that it was the defendant's act. McGee v. State, 159 Ga. App. 763, 285 S.E.2d 224, 1981 Ga. App. LEXIS 2797 (1981) (decided under former Code 1933, § 38-109).

Burden on state. — Defendant does not have the obligation to offer a theory consistent with innocence. Rather, the state has the burden of proving guilt. Howard v. State, 148 Ga. App. 598, 251 S.E.2d 829, 1979 Ga. App. LEXIS 1564 (1979) (decided under former Code 1933, § 38-109).

Burden under former O.C.G.A. § 24-4-6 to present evidence excluding every other reasonable hypothesis save that of guilt, was upon the state. Cornish v. State, 187 Ga. App. 140, 369 S.E.2d 515, 1988 Ga. App. LEXIS 658 (1988) (decided under former O.C.G.A. § 24-4-6).

Hypothesis considered by jury. — Questions as to the reasonableness of hypothesis are generally to be decided by the jury and when the jury finds that the evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt, that finding will not be disturbed unless the verdict of guilty is insupportable as a matter of law. Robbins v. State, 269 Ga. 500, 499 S.E.2d 323 (decided under former O.C.G.A. § 24-4-6); Callahan v. State, 249 Ga. App. 108, 547 S.E.2d 741, 2001 Ga. App. LEXIS 459 (2001) (decided under former O.C.G.A. § 24-4-6).

Sufficient evidence supported the defendant's convictions for felony murder and two aggravated assaults because despite no eyewitness able to say who fired the shot that fatally wounded the victim, the defendant was among a group that fired at least three handguns, one of which fatally wounded the victim, and the state was not required to prove that the defendant personally fired the fatal shot, so long as it proved that the defendant was a party to the fatal shooting. Pyatt v. State, 298 Ga. 742, 784 S.E.2d 759, 2016 Ga. LEXIS 249 (2016).

Although a murder defendant admitted beating the victim for looking at the defendant's girlfriend, the defendant claimed that the victim died due to the victim's intoxication and falling and striking the victim's head on the bumper of a van; however, the jury was not required to accept this hypothesis because the medical examiner testified that it was unlikely that such a fall caused the victim's death. Gibson v. State, 300 Ga. 494, 796 S.E.2d 712, 2017 Ga. LEXIS 50 (2017).

Rigor mortis unhelpful in determining time of death. — Circumstantial evidence that the defendant murdered the victim was sufficient to exclude the defendant's claim that someone else had murdered the victim based on the state of rigor mortis; the ballistic evidence connected the defendant to the crime and rigor mortis was unhelpful in determining the time of death because the thermostat

Exclusion of Reasonable Hypothesis (Cont'd)

in the victim's home was set to 64 degrees. Cochran v. State, 305 Ga. 827, 828 S.E.2d 338, 2019 Ga. LEXIS 333 (2019).

Evidence did not exclude every reasonable hypothesis. — Circumstantial evidence was insufficient for adjudication as a delinquent for acts that would have constituted cocaine possession if committed by an adult because the circumstantial evidence of defendant's spatial proximity to cocaine found in a car's console and the fact that the defendant did not live near the parking lot where the car was parked did not exclude every reasonable hypothesis other than constructive possession. In the Interest of J.S., 303 Ga. App. 788, 694 S.E.2d 375, 2010 Ga. App. LEXIS 399 (2010) (decided under former O.C.G.A. § 24-4-6).

Rejection of alternative hypothesis. — Even assuming, without deciding, that case against appellant was wholly circumstantial, jury was authorized to reject appellant's alternative hypothesis that victim was armed and aggressor as unreasonable based on evidence showing no firearms were found at scene and appellant arranged meeting with victim. Martin v. State, No. S23A0340, 2023 Ga. LEXIS 80 (Ga. Apr. 18, 2023).

Instructions

1. In General

Abstract principles for jury. — In trying a case depending upon circumstantial evidence, very few abstract principles should be given to the jury. Dacus v. State, 56 Ga. App. 439, 193 S.E. 93, 1937 Ga. App. LEXIS 392 (1937) (decided under former Code 1933, § 38-109).

Request to charge not waived when request not in writing. — As the defendant's request to charge the jury on circumstantial evidence as set forth in former O.C.G.A. § 24-4-6 directed the trial court to the language in the pattern jury instructions that defendant wished to have the trial court use, and the trial court recognized what was requested, the defendant's request to charge the principle stated in § 24-4-6 was not waived by the failure to properly submit the request in writing under Ga. Unif. Super. Ct. R. 10.3. Davis v. State, 285 Ga. 176, 674 S.E.2d 879, 2009 Ga. LEXIS 92 (2009) (decided under former O.C.G.A. § 24-4-6).

When charge required. — When the conviction depends entirely upon circumstantial evidence, the court's failure to charge the law pertaining to circumstantial evidence is reversible error, even in the absence of a timely written request. Harris v. State, 18 Ga. App. 710, 90 S.E. 370, 1916 Ga. App. LEXIS 1215 (1916) (decided under former Penal Code 1910, § 1010); Coggin v. State, 41 Ga. App. 659, 154 S.E. 376, 1930 Ga. App. LEXIS 1045 (1930) (decided under former Penal Code 1910, § 1010); Towler v. State, 44 Ga. App. 262, 161 S.E. 164, 1931 Ga. App. LEXIS 661 (1931) (decided under former Penal Code 1910, § 1010); Cofer v. State, 178 Ga. 742, 174 S.E. 331, 1934 Ga. LEXIS 160 (1934) (decided under former Code 1933, § 38-109); Grooms v. State, 53 Ga. App. 348, 185 S.E. 596, 1936 Ga. App. LEXIS 97 (1936) (decided under former Code 1933, § 38-109); De Loach v. State, 57 Ga. App. 799, 196 S.E. 924, 1938 Ga. App. LEXIS 389 (1938) (decided under former Code 1933, § 38-109); Kinsey v. State, 57 Ga. App. 813, 197 S.E. 61 (1938) (decided under former Code 1933, § 38-109); Williams v. State, 196 Ga. 503, 26 S.E.2d 926, 1943 Ga. LEXIS 379 (1943) (decided under former Code 1933, § 38-109); Dyer v. State, 71 Ga. App. 41, 29 S.E.2d 922, 1944 Ga. App. LEXIS 267 (1944) (decided under former Code 1933, § 38-109); Steed v. State, 80 Ga. App. 360, 56 S.E.2d 171, 1949 Ga. App. LEXIS 840 (1949) (decided under former Code 1933, § 38-109); Culver v. State, 80 Ga. App. 438, 56 S.E.2d 197, 1949 Ga. App. LEXIS 854 (1949) (decided under former Code 1933, § 38-109); Jones v. State, 91 Ga. App. 662, 86 S.E.2d 724, 1955 Ga. App. LEXIS 836 (1955) (decided under former Code 1933, § 38-109); McGruder v. State, 213 Ga. 259, 98 S.E.2d 564, 1957 Ga. LEXIS 355 (1957) (decided under former Code 1933, § 38-109); Ledford v. State, 215 Ga. 799, 113 S.E.2d 628, 1960 Ga. LEXIS 346 (1960) (decided under former Code 1933, § 38-109); Harvey v. State, 111 Ga. App. 279, 141 S.E.2d 604, 1965 Ga.

App. LEXIS 949 (1965) (decided under former Code 1933, § 38-109); Campbell v. State, 129 Ga. App. 836, 201 S.E.2d 666, 1973 Ga. App. LEXIS 1171 (1973) (decided under former Code 1933, § 38-109); Hethcox v. State, 138 Ga. App. 207, 225 S.E.2d 764, 1976 Ga. App. LEXIS 2107 (1976) (decided under former Code 1933, § 38-109); Williams v. State, 239 Ga. 12, 235 S.E.2d 504, 1977 Ga. LEXIS 793 (1977) (decided under former Code 1933, § 38-109); Jones v. State, 243 Ga. 584, 255 S.E.2d 702, 1979 Ga. LEXIS 999 (1979) (decided under former Code 1933, § 38-109); Nelms v. State, 150 Ga. App. 720, 258 S.E.2d 531, 1979 Ga. App. LEXIS 2354, dismissed, 244 Ga. 825, 263 S.E.2d 437, 1979 Ga. LEXIS 1429 (1979) (decided under former Code 1933, § 38-109); Russell v. State, 152 Ga. App. 693, 263 S.E.2d 689, 1979 Ga. App. LEXIS 3008 (1979) (decided under former Code 1933, § 38-109); Arnett v. State, 245 Ga. 470, 265 S.E.2d 771, 1980 Ga. LEXIS 821 (1980) (decided under former Code 1933, § 38-109); Thompson v. State, 154 Ga. App. 704, 269 S.E.2d 474, 1980 Ga. App. LEXIS 2349 (1980) (decided under former Code 1933, § 38-109); Caylor v. State, 155 Ga. App. 489, 270 S.E.2d 924, 1980 Ga. App. LEXIS 2631 (1980) (decided under former Code 1933, § 38-109); Stephens v. State, 208 Ga. App. 291, 430 S.E.2d 29, 1993 Ga. App. LEXIS 444 (1993) (decided under former O.C.G.A. § 24-4-6); Dunaway v. State, 214 Ga. App. 128, 447 S.E.2d 153, 1994 Ga. App. LEXIS 825 (1994) (decided under former O.C.G.A. § 24-4-6); Stubbs v. State, 265 Ga. 883, 463 S.E.2d 686, 1995 Ga. LEXIS 936 (1995) (decided under former O.C.G.A. § 24-4-6).

Charge on circumstantial evidence must be given when the defendant has made a timely written request therefor. Hancock v. State, 158 Ga. App. 829, 282 S.E.2d 401, 1981 Ga. App. LEXIS 2435 (1981) (decided under former Code 1933, § 38-109); Dunaway v. State, 214 Ga. App. 128, 447 S.E.2d 153, 1994 Ga. App. LEXIS 825 (1994) (decided under former O.C.G.A. § 24-4-6).

If the state's case depends, in whole or in part, on circumstantial evidence, a charge on the law of circumstantial evidence must be given on request whether or not the jury is authorized to find that the direct evidence presented by witness testimony has been impeached. Gidden v. State, 205 Ga. App. 245, 422 S.E.2d 30, 1992 Ga. App. LEXIS 1119 (1992), cert. denied, No. S92C1462, 1992 Ga. LEXIS 803 (Ga. Oct. 2, 1992) (decided under former O.C.G.A. § 24-4-6).

When the state's case depends, in whole or in part, on circumstantial evidence, a charge on the law of circumstantial evidence must be given on request. Postell v. State, 261 Ga. 842, 412 S.E.2d 831, 1992 Ga. LEXIS 74 (1992), overruled in part, State v. Burns, 306 Ga. 117, 829 S.E.2d 367, 2019 Ga. LEXIS 400 (2019) (decided under former O.C.G.A. § 24-4-6).

When the case against the defendant is close or doubtful and is composed solely of circumstantial evidence, it is reversible error for a trial court to fail to charge former O.C.G.A. § 24-4-6 even absent a request. Jenkins v. State, 209 Ga. App. 19, 432 S.E.2d 270, 1993 Ga. App. LEXIS 714 (1993) (decided under former O.C.G.A. § 24-4-6).

Since no drugs were found in the defendant's actual possession, the case was dependent on circumstantial evidence and it was error to refuse to so charge upon written request. Lowe v. State, 208 Ga. App. 49, 430 S.E.2d 169, 1993 Ga. App. LEXIS 421 (1993) (decided under former O.C.G.A. § 24-4-6).

Failure to charge on circumstantial evidence did not constitute plain error. — Because the evidence of the defendant's participation in the first burglary was wholly circumstantial, the clear and longstanding precedent required the trial court to instruct the jury on proof by circumstantial evidence even though the defendant did not request such an instruction; however, the defendant did not meet the burden under the plain error test to show that the omission of the instruction likely affected the jury's verdict as the trial court's charge sufficiently informed the jury of the state's burden of excluding all other reasonable hypotheses except the defendant's guilt with respect to the first burglary, and the defendant never suggested that the defendant's brother committed the first burglary alone. Gadson v. State, 303 Ga. 871, 815 S.E.2d 828, 2018

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Ga. LEXIS 432 (2018) (decided under former O.C.G.A. § 24-4-6).

In the defendant's trial for murder, burglary, aggravated assault, and other charges, the trial court's refusal to give a requested charge on circumstantial evidence based on O.C.G.A. § 24-14-6 was clear and obvious error, but it was harmless because the state's case was not based primarily on circumstantial evidence but on the direct testimony of two victims in the apartment and the evidence of the defendant's guilt was strong. Jackson v. State, 305 Ga. 614, 825 S.E.2d 188, 2019 Ga. LEXIS 197 (2019).

Instruction on circumstantial evidence not plain error. — Defendant did not establish plain error in the jury instruction on circumstantial evidence because the instructions the trial court gave adequately advised the jury that if the jury believed that the circumstantial evidence supported an alternative hypothesis, the jury should return a verdict of not guilty, and it was unlikely that the jury would have returned a different verdict had the trial court added the language of the circumstantial evidence statute to the instructions. Weaver v. State, 351 Ga. App. 167, 830 S.E.2d 618, 2019 Ga. App. LEXIS 420 (2019), cert. denied, No. S19C1502, 2020 Ga. LEXIS 113 (Ga. Feb. 10, 2020).

Charge on circumstantial evidence is required, upon request in appropriate cases, pursuant to former O.C.G.A. § 24-4-6. Kelly v. State, 212 Ga. App. 278, 442 S.E.2d 462, 1994 Ga. App. LEXIS 239 (1994) (decided under former O.C.G.A. § 24-4-6).

Only when evidence is wholly circumstantial is substance of former O.C.G.A. § 24-4-6 required to be given in charge, and when there was direct evidence, as well as circumstantial, and when there was no such equality of theories of guilt or innocence as to require such charge it was not error to refuse charge as requested by defendant. Bearden v. State, 163 Ga. App. 434, 294 S.E.2d 667, 1982 Ga. App. LEXIS 2521 (1982) (decided under former O.C.G.A. § 24-4-6).

Only when the case is wholly dependent on circumstantial evidence is a charge on circumstantial evidence required. Galloway v. State, 165 Ga. App. 536, 301 S.E.2d 894, 1983 Ga. App. LEXIS 1937 (1983) (decided under former O.C.G.A. § 24-4-6).

Jury charge under former O.C.G.A. § 24-4-6, though requested by a defendant, is required only when the evidence relied on for conviction is entirely circumstantial. Griffith v. State, 172 Ga. App. 255, 322 S.E.2d 921, 1984 Ga. App. LEXIS 3044 (1984) (decided under former O.C.G.A. § 24-4-6); Todd v. State, 184 Ga. App. 750, 362 S.E.2d 400, 1987 Ga. App. LEXIS 2827 (1987) (decided under former O.C.G.A. § 24-4-6).

Because the state presented direct evidence that the defendant committed a drive-by shooting and the defendant did not request the full circumstantial evidence instruction in writing, the trial court did not commit reversible error; the trial court instructed the jury on the definition of circumstantial evidence and gave a full instruction on reasonable doubt. Walker v. State, 295 Ga. 688, 763 S.E.2d 704, 2014 Ga. LEXIS 722 (2014).

Charge when case totally dependent on circumstantial evidence. — Refusal to give a requested instruction on former O.C.G.A. § 24-4-6 is not error except when the case is totally dependent upon circumstantial evidence. Heath v. State, 186 Ga. App. 655, 368 S.E.2d 346, 1988 Ga. App. LEXIS 426 (1988) (decided under former O.C.G.A. § 24-4-6); Lewis v. State, 198 Ga. App. 808, 403 S.E.2d 233, 1991 Ga. App. LEXIS 286 (1991).

When there is some direct evidence against the defendant, it is not error to fail to charge on circumstantial evidence. Terrell v. State, 258 Ga. 722, 373 S.E.2d 751, 1988 Ga. LEXIS 512 (1988) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in refusing to give defendant's requested instruction on circumstantial evidence since the evidence in the case was not entirely circumstantial. Ebenezer v. State, 191 Ga. App. 901, 383 S.E.2d 373, 1989 Ga. App. LEXIS 865 (1989) (decided under former O.C.G.A. § 24-4-6); Rainey v. State, 216 Ga. App. 557, 455 S.E.2d 73, 1995 Ga. App. LEXIS

194 (1995), aff'd, 266 Ga. 163, 465 S.E.2d 447, 1996 Ga. LEXIS 39 (1996) (decided under former O.C.G.A. § 24-4-6); Carter v. State, 240 Ga. App. 203, 523 S.E.2d 47 (decided under former O.C.G.A. § 24-4-6).

Trial court did not err by failing to instruct the jury on circumstantial evidence since direct evidence of guilt obviated the requirement of such a charge. Baines v. State, 201 Ga. App. 354, 411 S.E.2d 95, 1991 Ga. App. LEXIS 1341 (1991) (decided under former O.C.G.A. § 24-4-6).

In a case involving both direct and circumstantial evidence, it was not reversible error for the trial court to fail to give a charge on circumstantial evidence as contained in former O.C.G.A. § 24-4-6, nor to fail to instruct the jury that a conviction based on circumstantial evidence was permissible only if the offense charged was proved beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis. This type of instruction was required only when the case was totally dependent upon circumstantial evidence. Williams v. State, 199 Ga. App. 566, 405 S.E.2d 716, 1991 Ga. App. LEXIS 591 (1991) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in failing to give a charge on circumstantial evidence since the requested charge was not adjusted to the principles involved in the case since a charge on how the jury should treat a defendant's testimony in the context of a circumstantial evidence case was included but defendant did not testify. Minor v. State, 264 Ga. 195, 442 S.E.2d 754, 1994 Ga. LEXIS 423 (1994) (decided under former O.C.G.A. § 24-4-6).

Failure to charge on former O.C.G.A. § 24-4-6 was not reversible error when the case was not close or doubtful, the charge on reasonable doubt was full and fair, and no other reasonable hypothesis save that of guilt was offered. Cato v. State, 212 Ga. App. 417, 441 S.E.2d 900, 1994 Ga. App. LEXIS 283 (1994) (decided under former O.C.G.A. § 24-4-6).

Even if the victims were impeached, a charge on circumstantial evidence was not warranted because there was no other evidence authorizing a verdict of guilty. Miller v. State, 212 Ga. App. 193, 441 S.E.2d 443, 1994 Ga. App. LEXIS 186 (1994), cert. denied, No. S94C0925, 1994 Ga. LEXIS 666 (Ga. Apr. 15, 1994) (decided under former O.C.G.A. § 24-4-6).

Because there was some direct evidence of defendant's guilt and no request was made for a charge on circumstantial evidence, the trial court's failure to give an instruction in the language of former O.C.G.A. § 24-4-6 was not error. Brooks v. State, 265 Ga. 548, 458 S.E.2d 349, 1995 Ga. LEXIS 510 (1995) (decided under former O.C.G.A. § 24-4-6).

When the state's case includes both direct and circumstantial evidence, a defendant is not relieved from the necessity of requesting the charge and, in the absence of such a request, it is not error to fail to give the charge. Yarn v. State, 265 Ga. 787, 462 S.E.2d 359, 1995 Ga. LEXIS 732 (1995) (decided under former O.C.G.A. § 24-4-6).

Failure to give a requested circumstantial evidence charge was not error because the evidence was consistent only with defendant's guilt as to the acts alleged in the indictment and was completely inconsistent with a reasonable hypothesis of innocence. Carroll v. State, 224 Ga. App. 543, 481 S.E.2d 562 (decided under former O.C.G.A. § 24-4-6).

Request of circumstantial evidence charge required. — Defendant must request a circumstantial evidence charge within a similar transaction charge since the case against the defendant is not wholly circumstantial. Johnson v. State, 236 Ga. App. 252, 511 S.E.2d 603 (decided under former O.C.G.A. § 24-4-6).

Because the defendant did not request a charge under former O.C.G.A. § 24-4-6, the trial court did not commit reversible error in failing to give the charge. Barrino v. State, 282 Ga. App. 496, 639 S.E.2d 489, 2006 Ga. App. LEXIS 1445 (2006) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in failing to charge the jury on circumstantial evidence because nothing of record showed that the defendant requested such a charge; nevertheless, the record showed that the trial court properly charged the jury sua sponte on circumstantial evidence, and when trial counsel was asked if counsel objected to the jury charge as

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given counsel indicated that counsel did not, which resulted in waiver on appeal. Jackson v. State, 306 Ga. App. 33, 701 S.E.2d 481, 2010 Ga. App. LEXIS 737 (2010) (decided under former O.C.G.A. § 24-4-6).

Direct evidence presented. — Defense counsel was not ineffective in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV, for failing to request a charge on circumstantial evidence based on former O.C.G.A. § 24-4-6, which imposed certain requirements for convictions based on circumstantial evidence; the trial court adequately charged the jury on reasonable doubt, and direct evidence for both offenses was presented. Guillen v. State, 275 Ga. App. 316, 620 S.E.2d 518, 2005 Ga. App. LEXIS 954 (2005), cert. denied, No. S06C0146, 2006 Ga. LEXIS 141 (Ga. Feb. 13, 2006) (decided under former O.C.G.A. § 24-4-6).

Because the evidence rested largely on the direct evidence provided by the eyewitnesses to the event, and there was no reasonable likelihood that had the circumstantial evidence charge been given to the jury the outcome of the trial would have differed, the defendant's trial counsel could not be found ineffective in failing to request the instruction. Holden v. State, 287 Ga. App. 472, 651 S.E.2d 552, 2007 Ga. App. LEXIS 1009 (2007), cert. denied, No. S08C0189, 2008 Ga. LEXIS 153 (Ga. Feb. 11, 2008) (decided under former O.C.G.A. § 24-4-6).

Because the testimony from the medical examiner amounted to direct, and not circumstantial, evidence that: (1) the accident the defendant was charged with causing caused the decedent's death; (2) either the defendant's or the other impact caused the blunt force trauma to the decedent's head; and (3) any of the impacts, alone, could have caused the trauma, the defendant's requested circumstantial evidence charge was properly denied by the trial court. Kirk v. State, 289 Ga. App. 125, 656 S.E.2d 251, 2008 Ga. App. LEXIS 18 (2008) (decided under former O.C.G.A. § 24-4-6).

Request for charge in writing. — Because the defendant made an oral request that the jury be charged on the law under former O.C.G.A. § 24-4-6, but did not make a written request for that charge, the trial court did not err in failing to charge the jury as the defendant requested. Attaway v. State, 284 Ga. App. 855, 644 S.E.2d 919, 2007 Ga. App. LEXIS 418 (2007) (decided under former O.C.G.A. § 24-4-6).

When the evidence at trial consisted of both direct and circumstantial evidence, the defendant did not request in writing a charge regarding former O.C.G.A. § 24-4-6, and defense counsel stated that the trial court's proposed charges were sufficient, it was not error not to give a charge based on former § 24-4-6. Moore v. State, 286 Ga. App. 313, 649 S.E.2d 337, 2007 Ga. App. LEXIS 765 (2007) (decided under former O.C.G.A. § 24-4-6).

Must request charge on circumstantial evidence. — Unless the evidence relied upon for conviction is entirely circumstantial, it is not error to fail to charge the law of circumstantial evidence in the absence of a request to do so. Wilson v. State, 152 Ga. 337, 110 S.E. 8, 1921 Ga. LEXIS 87 (1921) (decided under former Penal Code 1910, § 1010); Chamblee v. State, 50 Ga. App. 251, 177 S.E. 824, 1934 Ga. App. LEXIS 726 (1934) (decided under former Code 1933, § 38-109); Roberts v. State, 50 Ga. App. 307, 177 S.E. 825, 1934 Ga. App. LEXIS 748 (1934) (decided under former Code 1933, § 38-109); Wyatt v. State, 50 Ga. App. 266, 177 S.E. 840, 1934 Ga. App. LEXIS 735 (1934) (decided under former Code 1933, § 38-109); Summers v. State, 63 Ga. App. 445, 11 S.E.2d 409, 1940 Ga. App. LEXIS 119 (1940) (decided under former Code 1933, § 38-109); Hall v. State, 66 Ga. App. 655, 19 S.E.2d 40, 1942 Ga. App. LEXIS 264 (1942) (decided under former Code 1933, § 38-109); Allen v. State, 194 Ga. 430, 22 S.E.2d 65, 1942 Ga. LEXIS 605 (1942) (decided under former Code 1933, § 38-109); Miller v. State, 69 Ga. App. 847, 26 S.E.2d 851, 1943 Ga. App. LEXIS 194 (1943) (decided under former Code 1933, § 38-109); Newsome v. State, 69 Ga. App. 445, 26 S.E.2d 113, 1943 Ga. App. LEXIS 111 (1943) (decided under former Code 1933, § 38-109); Daniels v. State, 199 Ga. 818, 35 S.E.2d 362, 1945 Ga. LEXIS 370 (1945) (decided under former Code 1933, § 38-109); Johnson

v. State, 84 Ga. App. 745, 67 S.E.2d 246, 1951 Ga. App. LEXIS 783 (1951) (decided under former Code 1933, § 38-109); Young v. State, 85 Ga. App. 122, 68 S.E.2d 219, 1951 Ga. App. LEXIS 1013 (1951) (decided under former Code 1933, § 38-109); Hicks v. State, 86 Ga. App. 365, 71 S.E.2d 695, 1952 Ga. App. LEXIS 956 (1952) (decided under former Code 1933, § 38-109); Weaver v. State, 86 Ga. App. 699, 71 S.E.2d 901, 1952 Ga. App. LEXIS 1032 (1952) (decided under former Code 1933, § 38-109); Johnson v. State, 209 Ga. 333, 72 S.E.2d 291, 1952 Ga. LEXIS 478 (1952) (decided under former Code 1933, § 38-109); King v. State, 86 Ga. App. 786, 72 S.E.2d 502, 1952 Ga. App. LEXIS 1061 (1952) (decided under former Code 1933, § 38-109); Marshman v. State, 88 Ga. App. 250, 76 S.E.2d 443, 1953 Ga. App. LEXIS 1058 (1953) (decided under former Code 1933, § 38-109); Jones v. State, 88 Ga. App. 330, 76 S.E.2d 810, 1953 Ga. App. LEXIS 1078 (1953) (decided under former Code 1933, § 38-109); Wiggins v. State, 92 Ga. App. 65, 87 S.E.2d 652, 1955 Ga. App. LEXIS 522 (1955) (decided under former Code 1933, § 38-109); Nelson v. State, 92 Ga. App. 746, 90 S.E.2d 91, 1955 Ga. App. LEXIS 706 (1955) (decided under former Code 1933, § 38-109); Weatherby v. State, 213 Ga. 188, 97 S.E.2d 698, 1957 Ga. LEXIS 338 (1957) (decided under former Code 1933, § 38-109); Whiting v. State, 108 Ga. App. 374, 133 S.E.2d 50, 1963 Ga. App. LEXIS 649 (1963) (decided under former Code 1933, § 38-109); Ryder v. State, 121 Ga. App. 796, 175 S.E.2d 882, 1970 Ga. App. LEXIS 1362 (1970) (decided under former Code 1933, § 38-109); Bryant v. State, 229 Ga. 60, 189 S.E.2d 435, 1972 Ga. LEXIS 499 (1972) (decided under former Code 1933, § 38-109); Johnson v. State, 235 Ga. 486, 220 S.E.2d 448, 1975 Ga. LEXIS 909 (1975), overruled in part, Lester v. State, 310 Ga. 81, 849 S.E.2d 425, 2020 Ga. LEXIS 738 (2020); (decided under former Code 1933, § 38-109); Jones v. State, 243 Ga. 584, 255 S.E.2d 702, 1979 Ga. LEXIS 999 (1979) (decided under former Code 1933, § 38-109); Fuller v. State, 166 Ga. App. 734, 305 S.E.2d 463, 1983 Ga. App. LEXIS 3270 (1983) (decided under former O.C.G.A. § 24-4-6); Whittington v. State, 252 Ga. 168, 313 S.E.2d 73, 1984 Ga. LEXIS 629 (1984) (decided under former O.C.G.A. § 24-4-6); McGarity v. State, 212 Ga. App. 17, 440 S.E.2d 695, 1994 Ga. App. LEXIS 119 (1994), cert. denied, No. S94C0811, 1994 Ga. LEXIS 506 (Ga. Mar. 25, 1994) (decided under former O.C.G.A. § 24-4-6); Sharpe v. State, 272 Ga. 684, 531 S.E.2d 84, 2000 Ga. LEXIS 478, cert. denied, 531 U.S. 948, 121 S. Ct. 350, 148 L. Ed. 2d 282, 2000 U.S. LEXIS 6984 (2000) (decided under former O.C.G.A. § 24-4-6).

Trial court failed to give a complete jury charge on circumstantial evidence because the evidence against the defendant was both direct and circumstantial and, thus, the statutory language of former O.C.G.A. § 24-4-6 was not required. Evans v. State, 288 Ga. 571, 707 S.E.2d 353, 2011 Ga. LEXIS 92 (2011) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in refusing to give a requested jury instruction based on former O.C.G.A. § 24-4-6, concerning a conviction based on circumstantial evidence because such a charge was not warranted since the state's evidence supporting the defendant's conviction was not circumstantial; the state relied on direct evidence in the form of the eyewitness testimony of the two police officers. Crawford v. State, 314 Ga. App. 796, 726 S.E.2d 58, 2012 Ga. App. LEXIS 149 (2012), cert. denied, No. S12C1218, 2012 Ga. LEXIS 715 (Ga. Sept. 10, 2012) (decided under former O.C.G.A. § 24-4-6).

Trial court properly denied the defendant's motion for a new trial premised on the defendant's contention that the defendant was rendered ineffective assistance of counsel due to defense counsel failing to request a jury charge because the state adduced both direct eyewitness testimony and circumstantial evidence at trial in the case, thus, the trial court was not required to charge the jury on circumstantial evidence pursuant to former O.C.G.A. § 24-4-6. Russell v. State, 319 Ga. App. 472, 735 S.E.2d 797, 2012 Ga. App. LEXIS 1067 (2012) (decided under former O.C.G.A. § 24-4-6).

Because the defendant's admissions of guilt following the killing were direct evidence of the defendant's guilt, the state's case was not based solely on circumstan-

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tial evidence and the additional circumstantial evidence charge requested by the defendant was not required. Rodriguez-Nova v. State, 295 Ga. 868, 763 S.E.2d 698, 2014 Ga. LEXIS 818 (2014) (decided under former O.C.G.A. § 24-4-6).

Charge not required when guilt is the only reasonable hypothesis. — Even in a case which is wholly dependent on circumstantial evidence, if from the proved facts only one reasonable hypothesis presents itself, i.e., that the defendant is guilty of the offense charged, then a failure to charge former O.C.G.A. § 24-4-6 does not furnish cause for a new trial. Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977) (decided under former Code 1933, § 38-109). But see Stewart v. State, 232 Ga. App. 565, 502 S.E.2d 502.

Better practice to charge statute on circumstantial evidence when the evidence upon which the state depends for conviction is both direct and circumstantial. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13, 1948 Ga. App. LEXIS 706 (1948) (decided under former Code 1933, § 38-109); Jackson v. State, 92 Ga. App. 774, 90 S.E.2d 29, 1955 Ga. App. LEXIS 711 (1955) (decided under former Code 1933, § 38-109); Ramsey v. State, 212 Ga. 381, 92 S.E.2d 866, 1956 Ga. LEXIS 378 (1956) (decided under former Code 1933, § 38-109); Holton v. State, 192 Ga. App. 745, 386 S.E.2d 404, 1989 Ga. App. LEXIS 1165 (1989) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence charge should have been given. — When state introduced circumstantial as well as direct evidence in the state's case against defendant, defendant was entitled to have defendant's requested charge on circumstantial evidence given to the jury. Mims v. State, 264 Ga. 271, 443 S.E.2d 845, 1994 Ga. LEXIS 452 (1994) (decided under former O.C.G.A. § 24-4-6).

A trial court's failure to give the circumstantial evidence charge under former O.C.G.A. § 24-4-6 constituted reversible error, even though the defendant failed to request such a charge, because the evidence against the defendant in a cocaine trafficking case under O.C.G.A. § 16-13-31(a)(1) was entirely circumstantial based on the defendant's participation in the crime with the defendant's sibling and a third party. Martinez v. State, 303 Ga. App. 71, 692 S.E.2d 737, 2010 Ga. App. LEXIS 278 (2010) (decided under former O.C.G.A. § 24-4-6).

Charging precise language of statute unnecessary. — Failure of the court to charge the law of circumstantial evidence in the exact language of the statute is not error. Sellers v. State, 36 Ga. App. 653, 137 S.E. 912, 1927 Ga. App. LEXIS 217 (1927) (decided under former Penal Code 1910, § 1010); Thompson v. State, 166 Ga. 512, 143 S.E. 896, 1928 Ga. LEXIS 346 (1928) (decided under former Penal Code 1910, § 1010); Brent v. State, 44 Ga. App. 777, 163 S.E. 319, 1932 Ga. App. LEXIS 500 (1932) (decided under former Penal Code 1910, § 1010); Pound v. State, 180 Ga. 83, 178 S.E. 291, 1935 Ga. LEXIS 179 (1935) (decided under former Code 1933, § 38-109); Rowland v. State, 51 Ga. App. 54, 179 S.E. 585, 1935 Ga. App. LEXIS 551 (1935) (decided under former Code 1933, § 38-109); Sanders v. State, 71 Ga. App. 334, 30 S.E.2d 810, 1944 Ga. App. LEXIS 356 (1944) (decided under former Code 1933, § 38-109); Townsend v. State, 86 Ga. App. 459, 71 S.E.2d 738, 1952 Ga. App. LEXIS 976 (1952) (decided under former Code 1933, § 38-109); Roman v. State, 155 Ga. App. 355, 271 S.E.2d 21, 1980 Ga. App. LEXIS 2575 (1980) (decided under former Code 1933, § 38-109).

Trial court need not track the exact language of former O.C.G.A. § 24-4-6 in order to satisfy the requirement that the jury be instructed on the principle of the sufficiency of circumstantial evidence to warrant a conviction. Price v. State, 180 Ga. App. 215, 348 S.E.2d 740, 1986 Ga. App. LEXIS 2693 (1986) (decided under former O.C.G.A. § 24-4-6).

Trial court was not required to give the exact language of former O.C.G.A. § 24-4-6 in the court's charge to the jury. Richards v. State, 189 Ga. App. 146, 375 S.E.2d 278, 1988 Ga. App. LEXIS 1336 (1988) (decided under former O.C.G.A. § 24-4-6).

Charge on circumstantial evidence which added the word "alone" to the statutory phrase "to warrant a conviction on

circumstantial evidence," was the functional equivalent of the statutory language because the trial court did not have to track the exact language in order to properly instruct the jury on the principle contained therein. Lowe v. State, 267 Ga. 180, 476 S.E.2d 583 (decided under former O.C.G.A. § 24-4-6); Wynn v. State, 236 Ga. App. 98, 511 S.E.2d 201 (decided under former O.C.G.A. § 24-4-6); Morris v. State, 239 Ga. App. 100, 520 S.E.2d 485 (decided under former O.C.G.A. § 24-4-6).

When a circumstantial evidence charge given to the jury added the word "alone" to the phrase "to warrant a conviction on circumstantial evidence," it was the functional equivalent of the rule contained in former O.C.G.A. § 24-4-6 and was not error. Martin v. State, 235 Ga. App. 844, 510 S.E.2d 602 (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in giving a circumstantial evidence charge that was the functional equivalent of former O.C.G.A. § 24-4-6 since the trial court added the word "alone" twice, substituted the word "theory" for "hypothesis," and amplified upon the statutory language. Johnson v. State, 251 Ga. App. 455, 554 S.E.2d 587, 2001 Ga. App. LEXIS 1054 (2001) (decided under former O.C.G.A. § 24-4-6).

Failure to track statute's language held to be error. — Even though the trial court instructed the jury on the definitions of direct and circumstantial evidence and the difference between them, its refusal to give defendant's requested charge tracking the language of former O.C.G.A. § 24-4-6 was reversible error. Waits v. State, 232 Ga. App. 357, 501 S.E.2d 870 (decided under former O.C.G.A. § 24-4-6).

Charge using the statutory language satisfied the requirement that, where the state's case depends, in whole or in part, on circumstantial evidence, a charge on the law of circumstantial evidence must be given on request. Wiley v. State, 238 Ga. App. 334, 519 S.E.2d 10 (decided under former O.C.G.A. § 24-4-6).

Instruction defining circumstantial evidence and its weight approved. — Following instruction was entirely consistent with former O.C.G.A. § 24-4-6: "Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may infer other related or connected facts which are reasonable and justified in the light of your experience. Circumstantial evidence alone will not justify a finding of guilt unless the circumstances are entirely consistent with the defendant's guilt, wholly inconsistent with any reasonable theory of the defendant's innocence, and are so convincing as to exclude a reasonable doubt of the defendant's guilt." Carpenter v. State, 167 Ga. App. 634, 307 S.E.2d 19, 1983 Ga. App. LEXIS 3338 (1983), aff'd, 252 Ga. 79, 310 S.E.2d 912, 1984 Ga. LEXIS 585 (1984) (decided under former O.C.G.A. § 24-4-6).

Court's instruction was proper which instructed the jury concerning the differences between direct and circumstantial evidence and charged that the comparative weight of circumstantial evidence and direct evidence on any given issue is a question of fact for the jury to decide. Grier v. State, 217 Ga. App. 409, 458 S.E.2d 139, 1995 Ga. App. LEXIS 463 (1995) (decided under former O.C.G.A. § 24-4-6).

Defendant's request that the court give a "two theories" charge did not constitute a request for a charge on circumstantial evidence. Grier v. State, 217 Ga. App. 409, 458 S.E.2d 139, 1995 Ga. App. LEXIS 463 (1995) (decided under former O.C.G.A. § 24-4-6).

Charge language describing two equal theories. — Charge language describing two equal theories, one of guilt and the other of innocence, did not accurately state the principle addressed. The charge related to the weight of the evidence and therefore was not an accurate statement of the "two theories" principle. Langston v. State, 208 Ga. App. 175, 430 S.E.2d 365, 1993 Ga. App. LEXIS 472 (1993) (decided under former O.C.G.A. § 24-4-6); Blue v. State, 212 Ga. App. 847, 433 S.E.2d 635 (1994) (decided under former O.C.G.A. § 24-4-6).

Defendant was not entitled to an instruction that, when the facts, evidence and all reasonable deductions therefrom present two reasonable theories, one of guilt and the other consistent with innocence, the justice and humanity of the law

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compels acceptance of the theory which is consistent with innocence; the requested charge was not substantially equivalent to the principle set forth in former O.C.G.A. § 24-4-6. Jones v. State, 213 Ga. App. 11, 444 S.E.2d 89, 1994 Ga. App. LEXIS 450 (1994), cert. denied, No. S94C1213, 1994 Ga. LEXIS 854 (Ga. July 14, 1994) (decided under former O.C.G.A. § 24-4-6).

When the trial court properly charged the jury on the law of circumstantial evidence, the presumption of innocence and the need to prove the defendant's guilt beyond a reasonable doubt, it was not error to refuse to give the "two theories" charge. Stephens v. State, 214 Ga. App. 183, 447 S.E.2d 26, 1994 Ga. App. LEXIS 819 (1994), cert. denied, No. S94C1802, 1994 Ga. LEXIS 1195 (Ga. Nov. 18, 1994), cert. denied, No. S94C1803, 1994 Ga. LEXIS 1196 (Ga. Nov. 18, 1994) (decided under former O.C.G.A. § 24-4-6).

It is never error to refuse to give a requested "two equal theories" charge when a trial court properly instructs the jury on circumstantial evidence. Smith v. State, 264 Ga. 857, 452 S.E.2d 494, 1995 Ga. LEXIS 43 (1995) (decided under former O.C.G.A. § 24-4-6); Mitchell v. State, 233 Ga. App. 92, 503 S.E.2d 293 (decided under former O.C.G.A. § 24-4-6).

Failure to charge circumstantial evidence harmless error since the case is not close or doubtful and the charge on reasonable doubt is full and fair. Germany v. State, 235 Ga. 836, 221 S.E.2d 817, 1976 Ga. LEXIS 1461 (1976) (decided under former Code 1933, § 38-109); Hawes v. State, 240 Ga. 327, 240 S.E.2d 833, 1977 Ga. LEXIS 1496 (1977) (decided under former Code 1933, § 38-109). But see Stewart v. State, 232 Ga. App. 565, 502 S.E.2d 502; 154 Ga. App. 871, 269 S.E.2d 883 (decided under former Code 1933, § 38-109); Hinton v. State, 215 Ga. App. 750, 452 S.E.2d 519, 1994 Ga. App. LEXIS 1367 (1994) (decided under former O.C.G.A. § 24-4-6); Livery v. State, 233 Ga. App. 882, 506 S.E.2d 165 (decided under former O.C.G.A. § 24-4-6); Burks v. State, 246 Ga. App. 22, 538 S.E.2d 769, 2000 Ga. App. LEXIS 1052 (2000), cert. denied, No. S01C0124, 2001 Ga. LEXIS 116 (Ga. Feb. 2, 2001) (decided under former O.C.G.A. § 24-4-6).

Trial court's failure to instruct a jury on the burden of proof required to convict defendant of armed robbery with circumstantial evidence was harmless error given the overwhelming direct evidence of defendant's guilt, which included a videotape of the robbery, defendant's parent's identification of defendant as the person on the videotape with a gun, and defendant's accomplice's confession and implication of defendant in the crime. Bradwell v. State, 262 Ga. App. 651, 586 S.E.2d 355, 2003 Ga. App. LEXIS 979 (2003) (decided under former O.C.G.A. § 24-4-6).

Although the state's case against the defendant was based on both direct and circumstantial evidence, the trial court's failure to give the requested jury charge on circumstantial evidence under former O.C.G.A. § 24-4-6 was harmless error given the overwhelming evidence of guilt. Gregory v. State, 277 Ga. App. 664, 627 S.E.2d 79, 2006 Ga. App. LEXIS 104 (2006), cert. denied, No. S06C1131, 2006 Ga. LEXIS 534 (Ga. July 13, 2006) (decided under former O.C.G.A. § 24-4-6).

With regard to defendant's malice murder conviction, the trial court did not err by refusing to give defendant's requested jury instruction in the language of former O.C.G.A. § 24-4-6, which provided that a conviction based on circumstantial evidence could be affirmed only if every reasonable hypothesis other than guilt was excluded, as defendant's admission to having shot the victim, but claiming self-defense, removed the case from that rule. Even assuming that the state introduced circumstantial evidence to establish some item of proof, and that defendant's requested charge should have been given, any error was harmless in light of the overwhelming evidence of guilt. Thompson v. State, 283 Ga. 581, 662 S.E.2d 124, 2008 Ga. LEXIS 447 (2008) (decided under former O.C.G.A. § 24-4-6).

Failure to charge reversible error. — Failure to give the defendant's requested charge, which tracked former O.C.G.A. § 24-4-6, and instructed the jury that, to warrant a conviction on circumstantial evidence, the facts must exclude

every reasonable theory other than guilt of the accused, was reversible error in a driving under the influence case, since the officer's opinion that the defendant was impaired was based on circumstantial evidence. Taylor v. State, 278 Ga. App. 181, 628 S.E.2d 611, 2006 Ga. App. LEXIS 279 (2006) (decided under former O.C.G.A. § 24-4-6).

As the defendant's request to charge directed the trial court to the language in the pattern jury instructions on circumstantial evidence, which was a proper statement of the law as set forth in former O.C.G.A. § 24-4-6, the case largely depended on circumstantial evidence, and evidence of the defendant's guilt was not overwhelming, the failure to give the requested instruction was reversible error. Davis v. State, 285 Ga. 176, 674 S.E.2d 879, 2009 Ga. LEXIS 92 (2009) (decided under former O.C.G.A. § 24-4-6).

Defendant's conviction for serving alcohol to a minor, under O.C.G.A. § 3-3-23(a)(1), was reversed because: (1) the state relied on circumstantial evidence to show that defendant knowingly served alcohol to a minor; and (2) the trial court erroneously refused defendant's request for an instruction on circumstantial evidence under former O.C.G.A. § 24-4-6. Butler v. State, 298 Ga. App. 129, 679 S.E.2d 361, 2009 Ga. App. LEXIS 612 (2009) (decided under former O.C.G.A. § 24-4-6).

Trial court's refusal to give the defendant's requested charge on circumstantial evidence amounted to plain error because the charges as given failed to provide the jury with the proper guideline for determining the defendant's guilt or innocence and, thus, the error likely affected the outcome of the trial. Stroud v. State, 344 Ga. App. 827, 812 S.E.2d 309, 2018 Ga. App. LEXIS 148 (2018) (decided under former O.C.G.A. § 24-4-6).

Effect of jury discrediting direct evidence. — When the only direct evidence comes from a witness who the jury was authorized to find had been impeached, and the trial court properly instructed the jury on the law of impeachment, it is error requiring the grant of a new trial for the trial court to fail to instruct the jury on the law of circumstantial evidence. Horne v. State, 93 Ga. App. 345, 91 S.E.2d 824, 1956 Ga. App. LEXIS 736 (1956) (decided under former Code 1933, § 38-109); Gibson v. State, 150 Ga. App. 718, 258 S.E.2d 537, 1979 Ga. App. LEXIS 2353 (1979) (decided under former Code 1933, § 38-109).

It was not erroneous for the court, in the absence of a timely and appropriate request, to omit to charge the law of circumstantial evidence to be applied in the event the jury should not believe that the confession which had been introduced into evidence had been made. Ellis v. State, 51 Ga. App. 557, 181 S.E. 87, 1935 Ga. App. LEXIS 404 (1935) (decided under former Code 1933, § 38-109).

Elaboration unnecessary. — When the judge sufficiently covered the provisions of the former statute in the judge's charge to the jury, refusal of a request to elaborate upon the former statute was not error. Reynolds v. State, 170 Ga. 810, 154 S.E. 229, 1930 Ga. LEXIS 245 (1930) (decided under former Penal Code 1910, § 1010); Dacus v. State, 56 Ga. App. 439, 193 S.E. 93, 1937 Ga. App. LEXIS 392 (1937) (decided under former Code 1933, § 38-109); Flynn v. State, 77 Ga. App. 791, 50 S.E.2d 91, 1948 Ga. App. LEXIS 646 (1948) (decided under former Code 1933, § 38-109).

Extraneous charge concerning circumstantial evidence. — Charge relating to circumstantial evidence, if erroneous because of contention that only direct evidence was introduced, was not injurious to the accused, as it gave a rule more favorable than the accused could claim. Latimer v. State, 188 Ga. 775, 4 S.E.2d 631, 1939 Ga. LEXIS 601 (1939) (decided under former Code 1933, § 38-109).

Charge invading province of jury. — When in a prosecution for possession of beer for purposes of sale, charge to the jury that frequent presence of quantities of beer was sufficient to meet the circumstantial evidence rule was error in that it constituted an invasion of the province of the jury. Crider v. State, 98 Ga. App. 164, 105 S.E.2d 506, 1958 Ga. App. LEXIS 534 (1958) (decided under former Code 1933, § 38-109).

Charge containing opinion of court. — When in prosecution for larceny the state's evidence was wholly circum-

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stantial, charge that the state had introduced evidence tending to establish the fact that the defendant was guilty of the charge was clearly, though inadvertently, an intimation of the court's opinion as to what had been proved in the case and constituted reversible error. Rowland v. State, 71 Ga. App. 154, 30 S.E.2d 368, 1944 Ga. App. LEXIS 303 (1944) (decided under former Code 1933, § 38-109).

Failure to recharge not error. — When the court defined direct and circumstantial evidence and then charged when circumstantial evidence was sufficient to convict after a conviction is sought on circumstantial evidence, an omission to recharge the law of circumstantial evidence in immediate connection with the law of reasonable doubt did not amount to an expression of opinion that direct evidence had been introduced, and did not exclude from the consideration of the jury the law that requires the evidence to be sufficient to exclude every reasonable hypothesis save that of the guilt of the accused before a conviction would be authorized in a case depending upon circumstantial evidence only. Lucas v. State, 48 Ga. App. 42, 171 S.E. 850, 1933 Ga. App. LEXIS 450 (1933) (decided under former Code 1933, § 38-109).

Charge using "should" instead of "must", in quoting the former statute, did not require a new trial. Adams v. State, 34 Ga. App. 144, 128 S.E. 924, 1925 Ga. App. LEXIS 85 (1925) (decided under former Penal Code 1910, § 1010); Poulos v. State, 71 Ga. App. 730, 32 S.E.2d 101, 1944 Ga. App. LEXIS 200 (1944) (decided under former Code 1933, § 38-109).

Effect of admission. — Rule of the former statute should not have been omitted from the instructions to the jury since the state relied wholly on circumstantial evidence and on an admission. Harvey v. State, 111 Ga. App. 279, 141 S.E.2d 604, 1965 Ga. App. LEXIS 949 (1965) (decided under former Code 1933, § 38-109).

Instruction held not erroneous. — When the trial court charged the jury that "when the facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, justice and humanity of the law compel the acceptance of the theory that is consistent with innocence," instruction was at least as beneficial to defendant if not more so, than a charge in the exact language of former O.C.G.A. § 24-4-6, and thus was not error. Price v. State, 180 Ga. App. 215, 348 S.E.2d 740, 1986 Ga. App. LEXIS 2693 (1986) (decided under former O.C.G.A. § 24-14-6).

In a prosecution for burglary, the trial court did not err in giving an instruction as to recent possession of stolen property after a charge on circumstantial evidence. Martin v. State, 228 Ga. App. 59, 491 S.E.2d 142 (decided under former O.C.G.A. § 24-14-6).

Since the state's case was based upon direct as well as circumstantial evidence, the trial court did not err under former O.C.G.A. § 24-4-6 by sua sponte charging the jury on the standard of proof necessary to convict an accused on circumstantial evidence. Cupe v. State, 327 Ga. App. 642, 760 S.E.2d 647, 2014 Ga. App. LEXIS 396 (2014) (decided under former O.C.G.A. § 24-4-6).

Direct evidence was presented in the following cases, obviating the need to charge circumstantial evidence. — See Ellis v. State, 51 Ga. App. 557, 181 S.E. 87, 1935 Ga. App. LEXIS 404 (1935) (confession) (decided under former Code 1933, § 38-109); Gilder v. State, 52 Ga. App. 252, 183 S.E. 95, 1935 Ga. App. LEXIS 126 (1935) (presumption derived from direct evidence) (decided under former Code 1933, § 38-109); Kittle v. State, 54 Ga. App. 231, 187 S.E. 611, 1936 Ga. App. LEXIS 511 (1936) (confession) (decided under former Code 1933, § 38-109); Walker v. State, 63 Ga. App. 297, 11 S.E.2d 45, 1940 Ga. App. LEXIS 75 (1940) (confession) (decided under former Code 1933, § 38-109); Summers v. State, 63 Ga. App. 445, 11 S.E.2d 409, 1940 Ga. App. LEXIS 119 (1940) (testimony that contract never existed) (decided under former Code 1933, § 38-109); Wilson v. State, 76 Ga. App. 257, 45 S.E.2d 709, 1947 Ga. App. LEXIS 427 (1947) (admission) (decided under former Code 1933, § 38-109); Lyons v. State, 90 Ga. App. 25, 81 S.E.2d 890, 1954 Ga. App. LEXIS 616 (1954) (statement of guilt) (decided under former

Code 1933, § 38-109); Ryals v. State, 193 Ga. App. 68, 387 S.E.2d 33, 1989 Ga. App. LEXIS 1267 (1989); Brown v. State, 214 Ga. App. 481, 448 S.E.2d 259, 1994 Ga. App. LEXIS 953 (1994). (child molestation) (decided under former O.C.G.A. § 24-4-6).

Instruction not warranted when evidence is not entirely circumstantial. — When a case is not entirely based on circumstantial evidence, a requested charge on circumstantial evidence is not warranted. Fuller v. State, 166 Ga. App. 734, 305 S.E.2d 463, 1983 Ga. App. LEXIS 3270 (1983) (decided under former O.C.G.A. § 24-4-6).

When there is direct evidence, the trial court does not err by not also charging that the defendant's explanation must be taken into consideration insofar as it is consistent with the circumstantial evidence properly admitted. Brown v. State, 251 Ga. 598, 308 S.E.2d 182, 1983 Ga. LEXIS 934 (1983) (decided under former O.C.G.A. § 24-4-6); Preston v. State, 183 Ga. App. 20, 357 S.E.2d 825, 1987 Ga. App. LEXIS 2676 (1987), cert. denied, 183 Ga. App. 905.

When the state's case included both direct and circumstantial evidence and the defendant did not request a charge on circumstantial evidence, the failure of the court to give such a charge was not error. Livery v. State, 233 Ga. App. 882, 506 S.E.2d 165 (decided under former O.C.G.A. § 24-4-6).

No direct evidence presented in the following cases, hence charge on circumstantial evidence was required. — Turner v. State, 40 Ga. App. 662, 151 S.E. 120, 1929 Ga. App. LEXIS 696 (1929) (possession of stolen goods in burglary or larceny case) (decided under former law); Hodges v. State, 52 Ga. App. 378, 183 S.E. 216, 1936 Ga. App. LEXIS 636 (1936) (whiskey on property adjoining defendant's) (decided under former Code 1933, § 38-109); De Loach v. State, 57 Ga. App. 799, 196 S.E. 924, 1938 Ga. App. LEXIS 389 (1938) (possession of stolen goods in larceny case) (decided under former Code 1933, § 38-109).

2. Offenses Against People

Instruction required in child molestation conviction. — In a prosecution for child molestation, it was reversible error to refuse to give defendant's requested charge on circumstantial evidence, when defendant offered evidence of an intention other than to arouse defendant's or the child's sexual desires and the trial court gave the jury no instructions under which the jury could consider this evidence. Hathcock v. State, 214 Ga. App. 188, 447 S.E.2d 104 (decided under former O.C.G.A. § 24-4-6).

Two different rules governed when the trial court must instruct the jury on former O.C.G.A. § 24-4-6 were: (1) the charge must be given absent a request if the case against the defendant was wholly circumstantial; and (2) the charge must be given upon request if the case relied to any degree upon circumstantial evidence. Yarn v. State, 215 Ga. App. 883, 452 S.E.2d 537, 1994 Ga. App. LEXIS 1380 (1994), aff'd, 265 Ga. 787, 462 S.E.2d 359, 1995 Ga. LEXIS 732 (1995) (decided under former O.C.G.A. § 24-4-6).

Whenever the state introduces circumstantial evidence of the defendant's guilt, it is error not to charge under former O.C.G.A. § 24-4-6 if such has been timely requested; however, it is not error to fail to give such a charge in the absence of a timely request when the state's case depends both upon direct and circumstantial evidence. Davis v. State, 266 Ga. 801, 471 S.E.2d 191 (decided under former O.C.G.A. § 24-4-6).

In a prosecution for child molestation, a charge under former O.C.G.A. § 24-4-6 was not appropriate since the evidence directly contradicted defendant's contention that inadvertent contact was made with the victim's leg or thigh as a result of a trip and fall. Turner v. State, 245 Ga. App. 294, 536 S.E.2d 814, 2000 Ga. App. LEXIS 860 (2000), cert. denied, No. S00C1975, 2001 Ga. LEXIS 92 (Ga. Jan. 19, 2001), overruled in part, Miller v. State, 285 Ga. 285, 676 S.E.2d 173, 2009 Ga. LEXIS 143 (2009) (decided under former O.C.G.A. § 24-4-6).

Instruction in kidnapping case not required when direct evidence exists. — Trial court's failure to give a charge under former O.C.G.A. § 24-4-6 was not harmful as a matter of law because the state presented direct evidence that the

Offenses Against People (Cont'd)

defendant committed the crime of kidnapping. Holden v. State, 287 Ga. App. 472, 651 S.E.2d 552, 2007 Ga. App. LEXIS 1009 (2007), cert. denied, No. S08C0189, 2008 Ga. LEXIS 153 (Ga. Feb. 11, 2008) (decided under former O.C.G.A. § 24-4-6).

Must request charge on circumstantial evidence. — Unless the evidence relied upon for conviction is entirely circumstantial, it is not error to fail to charge the law of circumstantial evidence in the absence of a request to do so. Wilson v. State, 152 Ga. 337, 110 S.E. 8, 1921 Ga. LEXIS 87 (1921) (decided under former Penal Code 1910, § 1010); Chamblee v. State, 50 Ga. App. 251, 177 S.E. 824, 1934 Ga. App. LEXIS 726 (1934) (decided under former Code 1933, § 38-109); Roberts v. State, 50 Ga. App. 307, 177 S.E. 825, 1934 Ga. App. LEXIS 748 (1934) (decided under former Code 1933, § 38-109); Wyatt v. State, 50 Ga. App. 266, 177 S.E. 840, 1934 Ga. App. LEXIS 735 (1934) (decided under former Code 1933, § 38-109); Summers v. State, 63 Ga. App. 445, 11 S.E.2d 409, 1940 Ga. App. LEXIS 119 (1940) (decided under former Code 1933, § 38-109); Hall v. State, 66 Ga. App. 655, 19 S.E.2d 40, 1942 Ga. App. LEXIS 264 (1942) (decided under former Code 1933, § 38-109); Allen v. State, 194 Ga. 430, 22 S.E.2d 65, 1942 Ga. LEXIS 605 (1942) (decided under former Code 1933, § 38-109); Miller v. State, 69 Ga. App. 847, 26 S.E.2d 851, 1943 Ga. App. LEXIS 194 (1943) (decided under former Code 1933, § 38-109); Newsome v. State, 69 Ga. App. 445, 26 S.E.2d 113, 1943 Ga. App. LEXIS 111 (1943) (decided under former Code 1933, § 38-109); Daniels v. State, 199 Ga. 818, 35 S.E.2d 362, 1945 Ga. LEXIS 370 (1945) (decided under former Code 1933, § 38-109); Johnson v. State, 84 Ga. App. 745, 67 S.E.2d 246, 1951 Ga. App. LEXIS 783 (1951) (decided under former Code 1933, § 38-109); Young v. State, 85 Ga. App. 122, 68 S.E.2d 219, 1951 Ga. App. LEXIS 1013 (1951) (decided under former Code 1933, § 38-109); Hicks v. State, 86 Ga. App. 365, 71 S.E.2d 695, 1952 Ga. App. LEXIS 956 (1952) (decided under former Code 1933, § 38-109); Weaver v. State, 86 Ga. App. 699, 71 S.E.2d 901, 1952 Ga. App. LEXIS 1032 (1952) (decided under former Code 1933, § 38-109); Johnson v. State, 209 Ga. 333, 72 S.E.2d 291, 1952 Ga. LEXIS 478 (1952) (decided under former Code 1933, § 38-109); King v. State, 86 Ga. App. 786, 72 S.E.2d 502, 1952 Ga. App. LEXIS 1061 (1952) (decided under former Code 1933, § 38-109); Marshman v. State, 88 Ga. App. 250, 76 S.E.2d 443, 1953 Ga. App. LEXIS 1058 (1953) (decided under former Code 1933, § 38-109); Jones v. State, 88 Ga. App. 330, 76 S.E.2d 810, 1953 Ga. App. LEXIS 1078 (1953) (decided under former Code 1933, § 38-109); Wiggins v. State, 92 Ga. App. 65, 87 S.E.2d 652, 1955 Ga. App. LEXIS 522 (1955) (decided under former Code 1933, § 38-109); Nelson v. State, 92 Ga. App. 746, 90 S.E.2d 91, 1955 Ga. App. LEXIS 706 (1955) (decided under former Code 1933, § 38-109); Weatherby v. State, 213 Ga. 188, 97 S.E.2d 698, 1957 Ga. LEXIS 338 (1957) (decided under former Code 1933, § 38-109); Whiting v. State, 108 Ga. App. 374, 133 S.E.2d 50, 1963 Ga. App. LEXIS 649 (1963) (decided under former Code 1933, § 38-109); Ryder v. State, 121 Ga. App. 796, 175 S.E.2d 882, 1970 Ga. App. LEXIS 1362 (1970) (decided under former Code 1933, § 38-109); Bryant v. State, 229 Ga. 60, 189 S.E.2d 435, 1972 Ga. LEXIS 499 (1972) (decided under former Code 1933, § 38-109); Johnson v. State, 235 Ga. 486, 220 S.E.2d 448, 1975 Ga. LEXIS 909 (1975), overruled in part, Lester v. State, 310 Ga. 81, 849 S.E.2d 425, 2020 Ga. LEXIS 738 (2020); (decided under former Code 1933, § 38-109); Jones v. State, 243 Ga. 584, 255 S.E.2d 702, 1979 Ga. LEXIS 999 (1979) (decided under former Code 1933, § 38-109); Fuller v. State, 166 Ga. App. 734, 305 S.E.2d 463, 1983 Ga. App. LEXIS 3270 (1983) (decided under former O.C.G.A. § 24-4-6); Whittington v. State, 252 Ga. 168, 313 S.E.2d 73, 1984 Ga. LEXIS 629 (1984) (decided under former O.C.G.A. § 24-4-6); McGarity v. State, 212 Ga. App. 17, 440 S.E.2d 695, 1994 Ga. App. LEXIS 119 (1994), cert. denied, No. S94C0811, 1994 Ga. LEXIS 506 (Ga. Mar. 25, 1994) (decided under former O.C.G.A. § 24-4-6); Sharpe v. State, 272 Ga. 684, 531 S.E.2d 84, 2000 Ga. LEXIS 478, cert. denied, 531 U.S. 948, 121 S. Ct. 350, 148 L. Ed. 2d 282, 2000 U.S. LEXIS 6984 (2000) (decided under former O.C.G.A. § 24-4-6).

Trial court failed to give a complete jury charge on circumstantial evidence because the evidence against the defendant was both direct and circumstantial and, thus, the statutory language of former O.C.G.A. § 24-4-6 was not required. Evans v. State, 288 Ga. 571, 707 S.E.2d 353, 2011 Ga. LEXIS 92 (2011) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in refusing to give a requested jury instruction based on former O.C.G.A. § 24-4-6, concerning a conviction based on circumstantial evidence because such a charge was not warranted since the state's evidence supporting the defendant's conviction was not circumstantial; the state relied on direct evidence in the form of the eyewitness testimony of the two police officers. Crawford v. State, 314 Ga. App. 796, 726 S.E.2d 58, 2012 Ga. App. LEXIS 149 (2012), cert. denied, No. S12C1218, 2012 Ga. LEXIS 715 (Ga. Sept. 10, 2012) (decided under former O.C.G.A. § 24-4-6).

Trial court properly denied the defendant's motion for a new trial premised on the defendant's contention that the defendant was rendered ineffective assistance of counsel due to defense counsel failing to request a jury charge because the state adduced both direct eyewitness testimony and circumstantial evidence at trial in the case, thus, the trial court was not required to charge the jury on circumstantial evidence pursuant to former O.C.G.A. § 24-4-6. Russell v. State, 319 Ga. App. 472, 735 S.E.2d 797, 2012 Ga. App. LEXIS 1067 (2012) (decided under former O.C.G.A. § 24-4-6).

Because the defendant's admissions of guilt following the killing were direct evidence of the defendant's guilt, the state's case was not based solely on circumstantial evidence and the additional circumstantial evidence charge requested by the defendant was not required. Rodriguez-Nova v. State, 295 Ga. 868, 763 S.E.2d 698, 2014 Ga. LEXIS 818 (2014) (decided under former O.C.G.A. § 24-4-6).

Instruction in felony murder case. — In a defendant's prosecution for, inter alia, felony murder, the trial court did not err by failing to instruct the jury on the law of circumstantial evidence as set forth in former O.C.G.A. § 24-4-6 because both direct and circumstantial evidence were presented by the state and the defendant failed to request a circumstantial evidence instruction. Sumlin v. State, 283 Ga. 264, 658 S.E.2d 596, 2008 Ga. LEXIS 253 (2008) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence instruction in multiple offenses against individual. — In convictions of aggravated sodomy, kidnapping, burglary, and aggravated assault, a trial court did not err in failing to sua sponte instruct the jury about circumstantial evidence because the victims provided direct evidence of defendant's guilt. Fortune v. State, 300 Ga. App. 550, 685 S.E.2d 466, 2009 Ga. App. LEXIS 1222 (2009) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence instruction in death of child. — Reasonable hypothesis rule regarding circumstantial evidence under former O.C.G.A. § 24-4-6 did not apply in a defendant's trial for the murder and involuntary manslaughter of defendant's 17-month-old son because the evidence was not entirely circumstantial, given the defendant's direct admissions that the defendant had shaken defendant's son to make the child stop crying. Lewis v. State, 304 Ga. App. 831, 698 S.E.2d 365, 2010 Ga. App. LEXIS 626 (2010), cert. denied, No. S10C1868, 2011 Ga. LEXIS 73 (Ga. Jan. 13, 2011) (decided under former O.C.G.A. § 24-4-6).

When the defendant makes incriminatory statements after the victim's death, the case is not one depending entirely upon circumstantial evidence. Stewart v. State, 163 Ga. App. 735, 295 S.E.2d 112, 1982 Ga. App. LEXIS 3244 (1982) (decided under former O.C.G.A. § 24-4-6); Yarborough v. State, 183 Ga. App. 198, 358 S.E.2d 484, 1987 Ga. App. LEXIS 2685 (1987) (decided under former O.C.G.A. § 24-4-6).

3. Offenses Against Property

Direct evidence in robbery case controlled instruction. — Since there was no request to charge on the circumstantial evidence rule, the charge was needed only if the state's case was based wholly on circumstantial evidence, and no such charge was needed when defendant's

Offenses Against Property (Cont'd)

cousin testified that the cousin saw defendant rob a store; that was direct evidence, not circumstantial. Moore v. State, 268 Ga. App. 398, 601 S.E.2d 854, 2004 Ga. App. LEXIS 928 (2004) (decided under former O.C.G.A. § 24-4-6).

Instruction in cases of burglary, theft by taking and criminal trespass. — Prosecution against the defendant on charges of burglary, theft by taking, and criminal trespass included both direct and circumstantial evidence, and convictions on those charges were not subject to being reversed merely because the trial court failed to charge former O.C.G.A. § 24-4-6 as the defendant failed to request that charge. Rodriguez v. State, 283 Ga. App. 752, 642 S.E.2d 705, 2007 Ga. App. LEXIS 186 (2007) (decided under former O.C.G.A. § 24-4-6).

Charge required if possession of stolen goods is only evidence of burglary. — In a burglary prosecution, if the only evidence tending to connect the accused with the alleged offense is the accused's unsatisfactorily explained possession of recently stolen goods, it is error for the trial court to fail to give, with or without request, a charge on the principle contained in former O.C.G.A. § 24-4-6. Price v. State, 180 Ga. App. 215, 348 S.E.2d 740, 1986 Ga. App. LEXIS 2693 (1986) (decided under former O.C.G.A. § 24-4-6).

4. Drug Crimes

Instruction for prosecution for trafficking in cocaine. — In a prosecution for trafficking in cocaine involving direct and circumstantial evidence, in the absence of any evidence evincing a plausible explanation or reasonable hypothesis of innocence and, particularly in the context of the entire charge in the case, the omission of a charge reciting the principle in former O.C.G.A. § 24-4-6 was not reversible error. Roura v. State, 214 Ga. App. 43, 447 S.E.2d 52, 1994 Ga. App. LEXIS 767 (1994), cert. denied, No. S94C1717, 1994 Ga. LEXIS 1139 (Ga. Oct. 28, 1994) (decided under former O.C.G.A. § 24-4-6).

Instruction required in DUI conviction. — In a prosecution for driving under the influence of alcohol, defendant was entitled to defendant's requested instruction on circumstantial evidence based on a reasonable hypothesis from defendant's use of Benadryl that the defendant was not guilty of the crime charged. Cato v. State, 212 Ga. App. 417, 441 S.E.2d 900, 1994 Ga. App. LEXIS 283 (1994) (decided under former O.C.G.A. § 24-4-6).

It is error to fail to charge the substance of former O.C.G.A. § 24-4-6 when the circumstances from which a guilty intent can be inferred are consistent with an innocent intention or an intention different from that charged against the accused. Hathcock v. State, 214 Ga. App. 188, 447 S.E.2d 104 (decided under former O.C.G.A. § 24-4-6).

In a prosecution for driving under the influence of alcohol, evidence upon which an officer based the officer's opinion that defendant was impaired and a less safe driver was circumstantial, and the failure to give a requested charge on former O.C.G.A. § 24-4-6 was reversible error. Tomko v. State, 233 Ga. App. 20, 503 S.E.2d 300 (decided under former O.C.G.A. § 24-4-6).

Instruction required in DUI conviction and operating unsafe motor vehicle. — In a prosecution for driving under the influence and driving an unsafe motor vehicle with defective equipment, the state was required to prove defendant was driving the car, proof of which was dependent in part on circumstantial evidence requiring the giving of a charge under former O.C.G.A. § 24-4-6. Coates v. State, 216 Ga. App. 93, 453 S.E.2d 35, 1994 Ga. App. LEXIS 1425 (1994) (decided under former O.C.G.A. § 24-4-6).

When the state's case is composed solely of circumstantial evidence, a defendant is relieved from the necessity of requesting a charge on former O.C.G.A. § 24-4-6; even in the absence of such a request, it may be reversible error to fail to give the instruction. Yarn v. State, 265 Ga. 787, 462 S.E.2d 359, 1995 Ga. LEXIS 732 (1995) (decided under former O.C.G.A. § 24-4-6).

Trial court must charge on the law of circumstantial evidence, even absent a request, if the case against the defendant is wholly circumstantial, and if the case relies to any degree upon circumstantial evidence, a charge on circumstantial evi-

dence is required upon written request. Massey v. State, 270 Ga. 76, 508 S.E.2d 149 (decided under former O.C.G.A. § 24-4-6).

Instruction not required in DUI trial. — When the defendant was charged with driving under the influence with a blood alcohol percentage of .10, the evidence introduced by the state in support of this charge, the results from the breath test, was characterized as direct evidence, not circumstantial evidence, and the trial court did not err in refusing to give a circumstantial evidence instruction. Cawthon v. State, 235 Ga. App. 791, 510 S.E.2d 586 (decided under former O.C.G.A. § 24-4-6).

Sufficiency of Circumstantial Evidence

1. In General

Sufficiency is for jury even though all evidence is circumstantial. — When, at the close of the state's case, all six defendants move for directed verdicts of acquittal, if there is any evidence of guilt, it is for the jury to decide whether that evidence, circumstantial though it may be, is sufficient to warrant a conviction. Castillo v. State, 166 Ga. App. 817, 305 S.E.2d 629, 1983 Ga. App. LEXIS 3279 (1983) (decided under former O.C.G.A. § 24-4-6).

Defendant must be connected with criminal act. Newman v. State, 26 Ga. 633, 1859 Ga. LEXIS 397 (1859) (decided under former law); Griffin v. State, 2 Ga. App. 534, 58 S.E. 781, 1907 Ga. App. LEXIS 447 (1907) (decided under former Penal Code 1895, § 984); Dougherty v. State, 7 Ga. App. 91, 66 S.E. 276, 1909 Ga. App. LEXIS 548 (1909) (decided under former Penal Code 1895, § 984).

Despite defendant's assertion that the evidence against the defendant was completely circumstantial and did not exclude every reasonable hypothesis save that of the defendant's guilt, any inconsistencies in the evidence presented were for the jury to resolve, and resolution of such conflicts did not render the evidence insufficient. Sims v. State, 278 Ga. 587, 604 S.E.2d 799, 2004 Ga. LEXIS 998 (2004) (decided under former O.C.G.A. § 24-4-6).

Appellant's murder conviction upheld because jury was authorized to reject as unreasonable appellant's alternative hypotheses that unknown assailant or another killed victim and record showed that DNA expert testified that appellant's blood overwhelmed mixed DNA sample and masked other contributor to profile so significantly that no one, other than appellant, could be identified. Carter v. State, 315 Ga. 214, 881 S.E.2d 678, 2022 Ga. LEXIS 310 (2022).

Conspiracy may be shown by circumstantial evidence. Dixon v. State, 116 Ga. 186, 42 S.E. 357, 1902 Ga. LEXIS 54 (1902) (decided under former Penal Code 1895, § 984); McLeroy v. State, 125 Ga. 240, 54 S.E. 125, 1906 Ga. LEXIS 109 (1906) (decided under former Penal Code 1895, § 984); Cook v. State, 22 Ga. App. 770, 97 S.E. 264, 1918 Ga. App. LEXIS 744 (1918) (decided under former Penal Code 1910, § 1010); Sentell v. State, 227 Ga. 153, 179 S.E.2d 234, 1971 Ga. LEXIS 623 (1971) (decided under former Code 1933, § 38-109).

Corpus delicti may be shown by circumstantial evidence. Hutchings v. State, 4 Ga. App. 451, 61 S.E. 837, 1908 Ga. App. LEXIS 436 (1908) (decided under former Penal Code 1895, § 984); Hurt v. State, 18 Ga. App. 110, 88 S.E. 901, 1916 Ga. App. LEXIS 150 (1916) (decided under former Penal Code 1910, § 1010); Wright v. State, 199 Ga. 576, 34 S.E.2d 879, 1945 Ga. LEXIS 349 (1945) (decided under former Code 1933, § 38-109); Hilliard v. State, 92 Ga. App. 294, 88 S.E.2d 425, 1955 Ga. App. LEXIS 579 (1955) (decided under former Code 1933, § 38-109); Reese v. State, 94 Ga. App. 387, 94 S.E.2d 741, 1956 Ga. App. LEXIS 552 (1956) (decided under former Code 1933, § 38-109); Brown v. State, 98 Ga. App. 350, 105 S.E.2d 785, 1958 Ga. App. LEXIS 582 (1958) (decided under former Code 1933, § 38-109); Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474, 1972 Ga. App. LEXIS 1023 (1972) (decided under former Code 1933, § 38-109).

Fingerprint evidence. — To warrant a conviction based solely on fingerprint evidence, the fingerprints corresponding to those of the defendant must have been found in the place where the crime was

In General (Cont'd)

committed, and under such circumstances that the fingerprints could only have been impressed at the time when the crime was committed. Jackson v. State, 158 Ga. App. 530, 281 S.E.2d 252, 1981 Ga. App. LEXIS 2294 (1981) (decided under former O.C.G.A. § 24-4-6).

Fingerprints of the defendant found on bottles at the crime scene were sufficient to support the defendant's conviction for murder since the condition of the crime scene made it clear that the bottles were left just before the victim's death and the evidence suggested no occasion for the defendant to have left defendant's fingerprints there except during the crime. Leonard v. State, 269 Ga. 867, 506 S.E.2d 853 (decided under former O.C.G.A. § 24-4-6).

Since the defendant's fingerprints on a lamp globe were not the only evidence linking the defendant to the crimes, and there was testimony that the defendant was a close friend of the victim, the victim was perceived to have money, and the crime scene suggested that the victim knew the attackers, who were looking for something of value and tortured the victim to find out where it was located, the evidence supported the defendant's convictions for malice murder, kidnapping, and false imprisonment. Roberts v. State, 296 Ga. 719, 770 S.E.2d 589, 2015 Ga. LEXIS 182 (2015).

Evidence was sufficient to adjudicate the defendant juvenile delinquent for acts that, if committed by an adult, would constitute the offenses of burglary and attempted burglary because, for purposes of the first burglary, it appeared to the investigating officers that the burglar had entered through a kitchen window at the rear of the house, and the officers found the defendant's palm prints on the outside of the bottom lower window pane of that window; for purposes of the second burglary, the officers found the defendant's palm prints on the outside of three windows at the back of the house; and the only reasonable hypothesis was that the defendant's palm prints were impressed at the time of the burglaries. In the Interest of S. B., 348 Ga. App. 339, 822 S.E.2d 835, 2019 Ga. App. LEXIS 3 (2019).

Possession of pistol may be shown by circumstantial evidence. Reese v. State, 3 Ga. App. 532, 60 S.E. 122, 1908 Ga. App. LEXIS 364 (1908) (decided under former Penal Code 1895, § 984); Williams v. State, 12 Ga. App. 84, 76 S.E. 785, 1912 Ga. App. LEXIS 36 (1912) (decided under former Penal Code 1910, § 1010).

Circumstantial evidence was sufficient to show specific facts in the following cases. — See Johnson v. State, 119 Ga. 446, 46 S.E. 634, 1904 Ga. LEXIS 867 (1904) (specific acts of sexual intercourse) (decided under former Penal Code 1895, § 984); Jordan v. Smith, 119 Ga. 443, 46 S.E. 679, 1904 Ga. LEXIS 865 (1904) (bar to statute of limitations) (decided under former Penal Code 1895, § 984); Little v. State, 3 Ga. App. 441, 60 S.E. 113, 1908 Ga. App. LEXIS 172 (1908) (weapon of assault) (decided under former Penal Code 1895, § 984); Glover v. State, 15 Ga. App. 44, 82 S.E. 602, 1914 Ga. App. LEXIS 12 (1914) (intention) (decided under former Penal Code 1910, § 1010); Burke v. State, 183 Ga. 726, 189 S.E. 516, 1937 Ga. LEXIS 382 (1937) (identity of defendant) (decided under former Code 1933, § 38-109); Smith v. State, 154 Ga. App. 497, 268 S.E.2d 714, 1980 Ga. App. LEXIS 2246 (1980) (prior similar offense) (decided under former Code 1933, § 38-109); Baxter v. State, 160 Ga. App. 181, 286 S.E.2d 460, 1981 Ga. App. LEXIS 2949 (1981) (similar modus operandi) (decided under former Code 1933, § 38-109); Shaw v. State, 211 Ga. App. 647, 440 S.E.2d 245, 1994 Ga. App. LEXIS 29 (1994) (burglary) (decided under former O.C.G.A. § 24-4-6); Alford v. State, 224 Ga. App. 451, 480 S.E.2d 893 (attempted burglary) (decided under former O.C.G.A. § 24-4-6); Gooch v. State, 249 Ga. App. 643, 549 S.E.2d 724, 2001 Ga. App. LEXIS 581 (2001), cert. denied, No. S01C1381, 2001 Ga. LEXIS 895 (Ga. Nov. 5, 2001); Hill v. State, 276 Ga. 220, 576 S.E.2d 886, 2003 Ga. LEXIS 109 (2003) (possession of methamphetamine) (decided under former O.C.G.A. § 24-4-6); (felony murder, armed robbery, and possession of a firearm) (decided under former O.C.G.A. § 24-4-6).

Flight may be shown by circumstantial evidence. Terry v. State, 15 Ga. App. 108,

82 S.E. 635, 1914 Ga. App. LEXIS 35 (1914) (decided under former Penal Code 1910, § 1010); Blakely v. State, 78 Ga. App. 262, 50 S.E.2d 762 (1948) (decided under former Code 1933, § 38-109).

Flight of the accused is a circumstance which may be considered by the jury in determining the accused's guilt. Brooks v. State, 63 Ga. App. 575, 11 S.E.2d 688, 1940 Ga. App. LEXIS 499 (1940) (decided under former Code 1933, § 38-109); Kirkland v. State, 67 Ga. App. 256, 19 S.E.2d 787, 1942 Ga. App. LEXIS 358 (1942) (decided under former Code 1933, § 38-109); Tyler v. State, 91 Ga. App. 87, 84 S.E.2d 843, 1954 Ga. App. LEXIS 866 (1954) (decided under former Code 1933, § 38-109).

Flight considered alone. — Mere fact of flight alone is not an incriminatory circumstance of sufficient probative value of itself to authorize a conviction for a crime. Burchfield v. State, 40 Ga. App. 506, 150 S.E. 459, 1929 Ga. App. LEXIS 613 (1929) (decided under former Penal Code 1910, § 1010); Seay v. State, 63 Ga. App. 286, 11 S.E.2d 54, 1940 Ga. App. LEXIS 68 (1940) (decided under former Code 1933, § 38-109).

Flight is generally not sufficient to support a conviction even if the flight was from the scene of the crime. Muckle v. State, 165 Ga. App. 873, 303 S.E.2d 54, 1983 Ga. App. LEXIS 2047 (1983) (decided under former O.C.G.A. § 24-4-6).

Flight of concealment considered with other circumstances is sufficient to convict. Diggs v. State, 90 Ga. App. 853, 84 S.E.2d 611, 1954 Ga. App. LEXIS 833 (1954) (decided under former Code 1933, § 38-109).

Inference of participation. — Confession of facts that are matter from which an inference of participation arises are circumstantial. Eberhart v. State, 41 Ga. 598, 1871 Ga. LEXIS 149 (1871) (see now O.C.G.A. § 24-14-6); Riley v. State, 1 Ga. App. 651, 57 S.E. 1031, 1907 Ga. App. LEXIS 63 (1907) (decided under former Penal Code 1895, § 984).

Presence, and approval of act, not sufficient. — Presence at the scene of a crime is not sufficient to show that a defendant is a party to the crime under O.C.G.A. § 16-2-20, and even approval of the act, not amounting to encouragement, will not suffice. This is so because of former O.C.G.A. § 24-4-6 as to a conviction on circumstantial evidence. Ridgeway v. State, 187 Ga. App. 381, 370 S.E.2d 216, 1988 Ga. App. LEXIS 695 (1988) (decided under former O.C.G.A. § 24-4-6).

Direct evidence required. — Circumstances relied upon must be proved by direct evidence. Georgia Ry. & Elec. Co. v. Harris, 1 Ga. App. 714, 57 S.E. 1076, 1907 Ga. App. LEXIS 86 (1907) (decided under former Penal Code 1895, § 984).

Evidence not entirely circumstantial. — Contrary to the defendant's claim, the evidence was not entirely circumstantial, but included testimony by a person the defendant dated that the defendant paid a cousin to kill the victim, and evidence that the defendant and the victim were in financial distress, the defendant stood to gain $600,000 from the victim's death, and the defendant told a friend the defendant needed to collect insurance money on the victim and, under former O.C.G.A. § 24-4-6, that evidence was sufficient to support the convictions. Clark v. State, 296 Ga. 543, 769 S.E.2d 376, 2015 Ga. LEXIS 128 (2015) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to support the defendant's convictions because the state did not rely solely on circumstantial evidence as there was substantial direct evidence including the witnesses identifying the defendant as one of their assailants, and the defendant admitting to the defendant's participation in the home invasion to the deceased accomplice's older brother; furthermore, direct evidence from a witness who observed a crime was not converted into circumstantial evidence by the witness's credibility or lack thereof, and the totality of the circumstantial evidence presented was sufficient for the jury to reject any other reasonable theory except that the defendant was guilty as charged. Hill v. State, 297 Ga. 675, 777 S.E.2d 460, 2015 Ga. LEXIS 650 (2015) (decided under former O.C.G.A. § 24-4-6).

Evidence against the defendant was not wholly circumstantial as the state presented direct evidence in the form of a witness's statements during a 9-1-1 call, identifying the defendant as the person

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who shot the victim; several witnesses testified that they saw the defendant with a handgun in the location where the shooting occurred, saw the defendant's car parked nearby, saw the defendant and the victim in a fist fight just before hearing gunshots, and saw the defendant's car speeding out of the neighborhood immediately after the victim was shot; and the defendant's cell phone records confirmed that the defendant was in the city where the shooting occurred the entire day of the shooting, undermining the defendant's alibi. Jackson v. State, 311 Ga. 626, 859 S.E.2d 46, 2021 Ga. LEXIS 285 (2021).

Evidence was sufficient to convict the defendant of felony murder because this Code section did not apply as the case against the defendant was not wholly circumstantial; and the state presented at least some direct evidence of the defendant's guilt, namely, the recording of the defendant's interview with a GBI Special Agent, in which the defendant admitted that the defendant intentionally fired the bullet that hit the victim. Rogers v. State, 311 Ga. 634, 859 S.E.2d 92, 2021 Ga. LEXIS 284 (2021).

Evidence sufficient. — Evidence sufficient to exclude every reasonable hypothesis except that of defendant's guilt. Brown v. State, 260 Ga. 153, 391 S.E.2d 108, 1990 Ga. LEXIS 172 (1990) (decided under former O.C.G.A. § 24-4-6); Grover v. State, 215 Ga. App. 907, 452 S.E.2d 586, 1994 Ga. App. LEXIS 1377 (1994) (decided under former O.C.G.A. § 24-4-6).

Evidence held sufficient to support conviction. — See Griffin v. State, 2 Ga. App. 534, 58 S.E. 781, 1907 Ga. App. LEXIS 447 (1907) (gaming) (decided under former Penal Code 1895, § 984); Perry v. State, 9 Ga. App. 871, 72 S.E. 446, 1911 Ga. App. LEXIS 388 (1911) (larceny) (decided under former Penal Code 1910, § 1010); Brown v. State, 13 Ga. App. 144, 78 S.E. 868, 1913 Ga. App. LEXIS 76 (1913) (larceny) (decided under former Penal Code 1910, § 1010); Smith v. State, 148 Ga. 332, 96 S.E. 632, 1918 Ga. LEXIS 330 (1918) (murder) (decided under former Penal Code 1910, § 1010); Shirley v. State, 168 Ga. 344, 148 S.E. 91, 1929 Ga. LEXIS 138 (1929) (murder) (decided under former Penal Code 1910, § 1010); Cheatham v. State, 57 Ga. App. 858, 197 S.E. 70, 1938 Ga. App. LEXIS 422 (1938) (larceny) (decided under former Code 1933, § 38-109); Johnson v. State, 79 Ga. App. 210, 53 S.E.2d 498, 1949 Ga. App. LEXIS 620 (1949) (illegal possession whiskey) (decided under former Code 1933, § 38-109); Fouts v. State, 96 Ga. App. 876, 101 S.E.2d 925, 1958 Ga. App. LEXIS 934 (1958) (possession of beer) (decided under former Code 1933, § 38-109); Blackwell v. State, 99 Ga. App. 579, 109 S.E.2d 62, 1959 Ga. App. LEXIS 908 (1959) (larceny) (decided under former Code 1933, § 38-109); Harvey v. State, 111 Ga. App. 279, 141 S.E.2d 604, 1965 Ga. App. LEXIS 949 (1965) (larceny and burglary) (decided under former Code 1933, § 38-109); Anderson v. State, 120 Ga. App. 147, 169 S.E.2d 629, 1969 Ga. App. LEXIS 697 (1969) (burglary) (decided under former Code 1933, § 38-109); Brown v. State, 125 Ga. App. 300, 187 S.E.2d 301, 1972 Ga. App. LEXIS 1307 (1972) (larceny or burglary) (decided under former Code 1933, § 38-109); Brown v. State, 133 Ga. App. 56, 209 S.E.2d 721, 1974 Ga. App. LEXIS 968 (1974) (burglary) (decided under former Code 1933, § 38-109); Cosby v. State, 151 Ga. App. 676, 261 S.E.2d 424, 1979 Ga. App. LEXIS 2744 (1979) (burglary) (decided under former Code 1933, § 38-109); Prescott v. State, 164 Ga. App. 671, 297 S.E.2d 362, 1982 Ga. App. LEXIS 3340 (1982) (no one other than self and wife had access to the bedroom closet) (decided under former O.C.G.A. § 24-4-6); Chambless v. State, 165 Ga. App. 194, 300 S.E.2d 201, 1983 Ga. App. LEXIS 3129 (1983) (armed robbery) (decided under former O.C.G.A. § 24-4-6); Smith v. State, 250 Ga. 729, 300 S.E.2d 798, 1983 Ga. LEXIS 1025 (1983) (murder) (decided under former O.C.G.A. § 24-4-6); Wilcox v. State, 250 Ga. 745, 301 S.E.2d 251, 1983 Ga. LEXIS 1029 (1983) (murder and unlawful concealment of death) (decided under former O.C.G.A. § 24-4-6); Fields v. State, 167 Ga. App. 400, 306 S.E.2d 695, 1983 Ga. App. LEXIS 3328 (1983) (entering motor vehicle with intent to commit theft) (decided under former O.C.G.A. § 24-4-6); Fredericks v. State, 176 Ga. App. 40, 335 S.E.2d 154,

1985 Ga. App. LEXIS 2850 (1985) (driving while under the influence of alcohol) (decided under former O.C.G.A. § 24-4-6); Holland v. State, 176 Ga. App. 343, 335 S.E.2d 739, 1985 Ga. App. LEXIS 2874 (1985) (possession of controlled substances; no evidence that anyone other than defendants had access to bedroom where controlled substances were found) (decided under former O.C.G.A. § 24-4-6); Childs v. State, 176 Ga. App. 549, 336 S.E.2d 309, 1985 Ga. App. LEXIS 2315 (1985) (burglary) (decided under former O.C.G.A. § 24-4-6); Turner v. State, 176 Ga. App. 785, 338 S.E.2d 37, 1985 Ga. App. LEXIS 2913 (1985) (robbery) (decided under former O.C.G.A. § 24-4-6); Wilcox v. Ford, 813 F.2d 1140, 1987 U.S. App. LEXIS 4420 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247, 1987 U.S. LEXIS 4561 (1987) (murder and concealment of death) (decided under former O.C.G.A. § 24-4-6); Smith v. State, 257 Ga. 381, 359 S.E.2d 662, 1987 Ga. LEXIS 875 (1987) (murder) (decided under former O.C.G.A. § 24-4-6); Chews v. State, 187 Ga. App. 600, 371 S.E.2d 124, 1988 Ga. App. LEXIS 836 (1988) (drug violation) (decided under former O.C.G.A. § 24-4-6); Beach v. State, 258 Ga. 700, 373 S.E.2d 210, 1988 Ga. LEXIS 451 (1988); Rich v. State, 191 Ga. App. 312, 381 S.E.2d 567, 1989 Ga. App. LEXIS 611 (1989) (decided under former O.C.G.A. § 24-4-6); (burglary) (decided under former O.C.G.A. § 24-4-6); Horton v. State, 194 Ga. App. 797, 392 S.E.2d 259, 1990 Ga. App. LEXIS 361 (1990), cert. denied, No. S90C0871, 1990 Ga. LEXIS 685 (Ga. Apr. 12, 1990) (drug violation) (decided under former O.C.G.A. § 24-4-6); Ware v. State, 198 Ga. App. 24, 400 S.E.2d 384, 1990 Ga. App. LEXIS 1529 (1990) (intent to distribute cocaine) (decided under former O.C.G.A. § 24-4-6); Anderson v. State, 225 Ga. App. 727, 484 S.E.2d 783; Savage v. State, 229 Ga. App. 560, 494 S.E.2d 359 (decided under former O.C.G.A. § 24-4-6); (possession of cocaine) (decided under former O.C.G.A. § 24-4-6); Ross v. State, 240 Ga. App. 563, 524 S.E.2d 255 (malice murder) (decided under former O.C.G.A. § 24-4-6); Lindsey v. State, 271 Ga. 657, 522 S.E.2d 459 (murder) (decided under former O.C.G.A. § 24-4-6); Foster v. State, 273 Ga. 34, 537 S.E.2d 659, 2000 Ga. LEXIS 773 (2000) (burglary) (decided under former O.C.G.A. § 24-4-6); Peek v. State, 247 Ga. App. 364, 542 S.E.2d 517, 2000 Ga. App. LEXIS 1346 (2000) (burglary) (decided under former O.C.G.A. § 24-4-6); Gresham v. State, 246 Ga. App. 705, 541 S.E.2d 679, 2000 Ga. App. LEXIS 1333 (2000) (entering automobile with intent to commit theft) (decided under former O.C.G.A. § 24-4-6); Withers v. State, 282 Ga. 656, 653 S.E.2d 40, 2007 Ga. LEXIS 836 (2007) (felony murder and possession of a firearm) (decided under former O.C.G.A. § 24-4-6); Davis v. State, 285 Ga. App. 315, 645 S.E.2d 753, 2007 Ga. App. LEXIS 496 (2007).

Circumstantial evidence of previous felony conviction. — Circumstantial evidence presented was sufficient to prove that the defendant was previously convicted of forgery in the first degree, a felony, so as to support the defendant's conviction for possession of a firearm by a convicted felon as the evidence included an accusation showing the defendant's guilty plea and no alternative hypothesis was put forward in the evidence, in argument, or in the jury instructions. McKie v. State, 306 Ga. 111, 829 S.E.2d 376, 2019 Ga. LEXIS 398 (2019).

In a mother and son defendants' trial for the murder of the son's wife, there was direct evidence of the son's guilt, including his statement to a fellow inmate describing in detail how he killed his wife; further, the jury could have rejected his hypothesis that some unknown assailant shot her during a road rage incident as unreasonable. Bamberg v. State, 308 Ga. 340, 839 S.E.2d 640, 2020 Ga. LEXIS 141 (2020), cert. denied, 141 S. Ct. 1406, 209 L. Ed. 2d 139, 2021 U.S. LEXIS 1097 (2021).

Evidence was sufficient to convict the defendant of fraud in obtaining food stamps as the defendant did not disclose the wife's income on the renewal applications and did not dispute that the defendant was ineligible for public assistance; and the state presented strong circumstantial evidence of the defendant's guilt because the evidence showed that an EBT card, as well as a replacement card, was issued in the defendant's name and

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mailed to the defendant's home address; that detailed and accurate personal information available only to the defendant and family members was submitted to the Georgia Department of Family and Children Services on multiple occasions; and that the wife specifically denied applying for or obtaining the benefits. Clarke v. State, 365 Ga. App. 708, 880 S.E.2d 223, 2022 Ga. App. LEXIS 495 (2022).

Evidence sufficient for forgery conviction. — Sufficient circumstantial evidence supported the defendant's conviction for forgery based on the reasonable inferences arising from the evidence showing that a check was drawn on an account of a roofing company for which the defendant never worked; thus, the inference arose that the defendant knew that the company did not owe any money to the defendant and that the defendant was not authorized to present the check for payment. Bettes v. State, 329 Ga. App. 13, 763 S.E.2d 366, 2014 Ga. App. LEXIS 608 (2014).

Evidence sufficient for murder of infant child. — Defendant's conviction for murder was upheld on appeal because the evidence established that the only possible perpetrators of the fatal abdominal trauma to the child were defendant or the mother and the expert opinion evidence established that the death would have occurred within 45 minutes after the abdominal trauma and likely sooner than that and the mother had already gone to work and the neighbor who drove the child and the defendant to the hospital testified that the child was still alive. Wilson v. State, 308 Ga. 306, 840 S.E.2d 370, 2020 Ga. LEXIS 170 (2020).

Sufficient circumstantial evidence in death of child. — Comparing the child's condition at the time the defendant took the child from the child's mother and shortly thereafter, with the child's condition at the time the child and the defendant appeared at the fire station, and considering the acts of abuse admitted by the defendant, the evidence, when viewed most favorably to the verdict, was sufficient to have authorized a rational trier of fact in finding beyond a reasonable doubt that the defendant caused the child's death. Phipps v. State, 203 Ga. App. 128, 416 S.E.2d 319, 1992 Ga. App. LEXIS 387 (1992), cert. denied, No. S92C0740, 1992 Ga. LEXIS 291 (Ga. Apr. 9, 1992) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient when there is direct evidence. — Evidence was sufficient to support defendant's conviction for shoplifting, and the state was not required under former O.C.G.A. § 24-4-6 to present evidence excluding every other reasonable hypothesis except defendant's guilt because the state's case was not based on circumstantial evidence, but on the direct testimony of an eyewitness to the shoplifting. Fitzpatrick v. State, 271 Ga. App. 804, 611 S.E.2d 95, 2005 Ga. App. LEXIS 176 (2005) (decided under former O.C.G.A. § 24-4-6).

Defendant's claim that the evidence was insufficient to support defendant's conviction for theft by shoplifting because the evidence was completely circumstantial and did not exclude every reasonable hypothesis save that of the defendant's guilt failed; contrary to the defendant's contention, the testimony from a store's loss prevention employee that the employee observed the defendant remove an item from a shelf, place the item in the defendant's back pocket, and then leave the store without presenting the item to a cashier was direct not circumstantial evidence. Walton v. State, 291 Ga. App. 736, 662 S.E.2d 820, 2008 Ga. App. LEXIS 630 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence held insufficient to support conviction. — See Park v. State, 123 Ga. 164, 51 S.E. 317, 1905 Ga. LEXIS 403 (1905) (murder) (decided under former Penal Code 1895, § 1984); Bush v. State, 7 Ga. App. 607, 67 S.E. 685, 1910 Ga. App. LEXIS 421 (1910) (larceny) (decided under former Penal Code 1910, § 1010); Calhoun v. State, 9 Ga. App. 501, 71 S.E. 765, 1911 Ga. App. LEXIS 209 (1911) (burglary) (decided under former Penal Code 1910, § 1010); Henderson v. State, 147 Ga. 134, 92 S.E. 871, 1917 Ga. LEXIS 82 (1917) (murder) (decided under former Penal Code 1910, § 1010); Haire v. State, 38 Ga. App. 116, 142 S.E. 697, 1928 Ga. App. LEXIS 74 (1928) (cattle stealing)

(decided under former Penal Code 1910, § 1010); Wallin v. State, 38 Ga. App. 194, 143 S.E. 597, 1928 Ga. App. LEXIS 126 (1928) (burglary) (decided under former Penal Code 1910, § 1010); Smith v. State, 38 Ga. App. 741, 145 S.E. 500, 1928 Ga. App. LEXIS 426 (1928) (larceny) (decided under former Penal Code 1910, § 1010); Hughie v. State, 52 Ga. App. 73, 182 S.E. 197, 1935 Ga. App. LEXIS 40 (1935) (larceny of automobile) (decided under former Code 1933, § 38-109); Graham v. State, 183 Ga. 381, 183 Ga. 881, 189 S.E. 910, 1937 Ga. LEXIS 420 (1937) (murder) (decided under former Code 1933, § 38-109); Orr v. State, 62 Ga. App. 774, 9 S.E.2d 917, 1940 Ga. App. LEXIS 433 (1940) (manufacturing whiskey) (decided under former Code 1933, § 38-109); Cheney v. State, 61 Ga. App. 726, 7 S.E.2d 335, 1940 Ga. App. LEXIS 242 (1940) (arson) (decided under former Code 1933, § 38-109); Wells v. State, 75 Ga. App. 588, 44 S.E.2d 66, 1947 Ga. App. LEXIS 587 (1947) (larceny) (decided under former Code 1933, § 38-109); Woody v. State, 99 Ga. App. 857, 109 S.E.2d 896, 1959 Ga. App. LEXIS 971 (1959) (burglary) (decided under former Code 1933, § 38-109); Purser v. State, 104 Ga. App. 728, 122 S.E.2d 749, 1961 Ga. App. LEXIS 783 (1961) (voluntary manslaughter) (decided under former Code 1933, § 38-109); Crane v. State, 123 Ga. App. 226, 180 S.E.2d 289, 1971 Ga. App. LEXIS 1173 (1971) (burglary) (decided under former Code 1933, § 38-109); Williams v. State, 126 Ga. App. 350, 190 S.E.2d 785, 1972 Ga. App. LEXIS 1144 (1972) (burglary) (decided under former Code 1933, § 38-109); Ennis v. State, 130 Ga. App. 716, 204 S.E.2d 519, 1974 Ga. App. LEXIS 1236 (1974) (possession of marijuana) (decided under former Code 1933, § 38-109); Russell v. State, 132 Ga. App. 35, 207 S.E.2d 619, 1974 Ga. App. LEXIS 1593 (1974) (possession of marijuana) (decided under former Code 1933, § 38-109); Wright v. State, 147 Ga. App. 111, 248 S.E.2d 183, 1978 Ga. App. LEXIS 2798 (1978) (burglary) (decided under former Code 1933, § 38-109); Kametches v. State, 242 Ga. 721, 251 S.E.2d 232, 1978 Ga. LEXIS 1341 (1978) (possession for sale of obscene materials) (decided under former Code 1933, § 38-109); Hall v. State, 155 Ga. App. 211, 270 S.E.2d 377, 1980 Ga. App. LEXIS 2531 (1980) (burglary) (decided under former Code 1933, § 38-109); Smith v. State, 188 Ga. App. 415, 373 S.E.2d 97, 1988 Ga. App. LEXIS 1037 (1988) (entering an automobile) (decided under former O.C.G.A. § 24-4-6); Krull v. State, 211 Ga. App. 37, 438 S.E.2d 152, 1993 Ga. App. LEXIS 1401 (1993) (DUI, no proof of insurance, driving with suspended license, and failure to maintain lane) (decided under former O.C.G.A. § 24-4-6); Calhoun v. State, 213 Ga. App. 375, 444 S.E.2d 405, 1994 Ga. App. LEXIS 553 (1994) (shoplifting) (decided under former O.C.G.A. § 24-4-6); Jordan v. State, 225 Ga. App. 424, 484 S.E.2d 60 (trafficking in cocaine) (decided under former O.C.G.A. § 24-4-6); Mitchell v. State, 268 Ga. 592, 492 S.E.2d 204 (possession with intent to distribute marijuana) (decided under former O.C.G.A. § 24-4-6); In re A.D.C., 228 Ga. App. 829, 493 S.E.2d 38 (possession with intent to distribute marijuana) (decided under former O.C.G.A. § 24-4-6); Greene v. State, 230 Ga. App. 155, 495 S.E.2d 634 (drug violation) (decided under former O.C.G.A. § 24-4-6); Johnson v. State, 245 Ga. App. 583, 538 S.E.2d 481, 2000 Ga. App. LEXIS 1015 (2000) (possession of cocaine) (decided under former O.C.G.A. § 24-4-6).

When the defendant drove a codefendant away from the crime scene in a subdivision after the codefendant shot the victim, to the extent that the evidence that the defendant's car had been parked at some point with the car's front end facing in the direction going out of the subdivision constituted circumstantial evidence of the defendant's guilt as a party, the evidence did not exclude every other reasonable hypothesis, as required by former O.C.G.A. § 24-4-6. Ratana v. State, 297 Ga. App. 747, 678 S.E.2d 193, 2009 Ga. App. LEXIS 534 (2009) (decided under former O.C.G.A. § 24-4-6).

Except as to one incident, the evidence was insufficient to show that a mother aided and abetted her husband's sexual abuse of their twin daughters when they were between four and eight years old, because the record showed that the mother had no knowledge of seven of the eight incidents until she took the children

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to therapy, and the prosecution's circumstantial evidence — including the fact of the family's nudist lifestyle, the existence of pornographic movies in the home, and the fact that during therapy, the mother advised the girls to not talk about their father — was insufficient to prove aiding and abetting beyond a reasonable doubt. Naylor v. State, 300 Ga. App. 401, 685 S.E.2d 383, 2009 Ga. App. LEXIS 1184 (2009) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient to convict the defendant of misdemeanor fleeing or attempting to elude a police officer because a deputy identified the defendant as the driver; another officer followed the defendant out of the parking lot when the defendant refused to stop; and the officer activated the vehicle's lights and siren but lost sight of the speeding car moments before a car of the same color struck another vehicle just ahead; however, the evidence was insufficient to convict the defendant of felony fleeing or attempting to elude as no evidence was presented that the defendant was attempting to elude arrest for a non-traffic violation when the defendant struck the other vehicle. Johnson v. State, 337 Ga. App. 622, 788 S.E.2d 559, 2016 Ga. App. LEXIS 380 (2016).

2. Crimes Against the Person

Defendant's conviction of murder and armed robbery was supported by sufficient evidence; pursuant to former O.C.G.A. § 24-4-6, to sustain a conviction based on circumstantial evidence, the evidence had to exclude all reasonable hypotheses other than the defendant's guilt, and there was sufficient evidence from which a rational trier of fact could have excluded all reasonable hypotheses other than defendant's guilt, based on the facts that defendant was the last person in the victim's store on the night of the murder, the victim's blood was found on defendant's shoes, and defendant began spending money heavily after the crime even though the defendant did not have a job at the time. Bibbs v. State, 275 Ga. 659, 571 S.E.2d 770, 2002 Ga. LEXIS 962 (2002) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for assault and rape conviction. — State presented direct evidence of the defendant's assault and rape of the victim in the form of the victim's testimony, and thus former O.C.G.A. § 24-4-6 did not apply, and the state was not required to exclude every reasonable hypothesis save that of guilt. Tarver v. State, 280 Ga. App. 89, 633 S.E.2d 415, 2006 Ga. App. LEXIS 756 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for aggravated sexual battery conviction. — Circumstantial evidence that a defendant chastised the defendant's two-year-old child for soiling a diaper by poking the child's anus with a stick, resulting in perineal lacerations, was sufficient to support a conviction for aggravated sexual battery in violation of O.C.G.A. § 16-6-22.2(b). Viers v. State, 303 Ga. App. 387, 693 S.E.2d 526, 2010 Ga. App. LEXIS 202 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for conviction of sexual exploitation. — Evidence was sufficient to convict the defendant of 15 counts of sexual exploitation of children based on the child pornography found on the defendant's girlfriend's computer because a Georgia Bureau of Investigation expert in computer forensics explained that there was no evidence that a virus had downloaded any of the illegal files, and that there was no evidence that anyone had hacked into the computer; the defendant's mother, the defendant's girlfriend, and the defendant's girlfriend's mother and brothers testified that they did not download the illegal files onto the computer; and the downloads began just one month after the defendant moved in with the defendant's girlfriend and only on days when the defendant was not incarcerated. Beaver v. State, 330 Ga. App. 496, 767 S.E.2d 503, 2014 Ga. App. LEXIS 839 (2014) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for kidnapping conviction. — Because the eyewitness testimony showed that the defendant pushed, pulled, and then carried the vic-

tim out of a restaurant as the victim yelled for a coworker to call the police, and which was direct, not circumstantial, evidence that the victim did not go with the defendant willingly, sufficient evidence supported the defendant's kidnapping conviction. Holden v. State, 287 Ga. App. 472, 651 S.E.2d 552, 2007 Ga. App. LEXIS 1009 (2007), cert. denied, No. S08C0189, 2008 Ga. LEXIS 153 (Ga. Feb. 11, 2008) (decided under former O.C.G.A. § 24-4-6).

Aggravated battery. — Trial court properly denied a motion for a directed verdict of acquittal pursuant to O.C.G.A. § 17-9-1(a) since there was ample circumstantial evidence under former O.C.G.A. § 24-4-6 for the jury to have found that the defendant was guilty of aggravated battery, in violation of O.C.G.A. § 16-5-24(a); defendant's claim that the defendant tripped and fell while carrying the infant son was contradicted by expert testimony that the injury to the infant's brain was caused by Shaken Baby Syndrome. Lindo v. State, 278 Ga. App. 228, 628 S.E.2d 665, 2006 Ga. App. LEXIS 300 (2006) (decided under former O.C.G.A. § 24-4-6).

Victim was struck from behind with a beer bottle; the victim's head was cut, requiring stitches. The circumstantial evidence was sufficient to convict the defendant of aggravated assault because: (1) the victim saw the defendant standing close behind the victim after the blow was struck, and defendant began fighting with the victim; (2) similar transaction evidence showed the defendant's history of making unprovoked attacks on unsuspecting victims; and (3) a bartender's testimony that someone else committed the crime was internally inconsistent and uncorroborated. Maiorano v. State, 294 Ga. App. 726, 669 S.E.2d 678, 2008 Ga. App. LEXIS 1192 (2008), cert. denied, No. S09C0507, 2009 Ga. LEXIS 116 (Ga. Mar. 9, 2009) (decided under former O.C.G.A. § 24-4-6).

Jury's verdict finding the defendant guilty of first degree cruelty to children and aggravated battery was not unsupportable because an expert testified that the injuries suffered by the defendant's baby were caused by some type of trauma to the body; at trial, the defendant offered no alternative hypothesis for the injuries; and, to the extent that the defendant offered on appeal the alternative hypothesis that the defendant's mother could have injured the baby, the jury was entitled to reject that hypothesis as unreasonable as the parties entered a stipulation that law enforcement had ruled out the defendant's mother as a suspect, and that stipulation was read to the jury. Weaver v. State, 351 Ga. App. 167, 830 S.E.2d 618, 2019 Ga. App. LEXIS 420 (2019), cert. denied, No. S19C1502, 2020 Ga. LEXIS 113 (Ga. Feb. 10, 2020).

Jury's verdict finding the defendant guilty of first degree cruelty to children and aggravated battery was not unsupportable because an expert testified that the injuries suffered by the defendant's baby were caused by some type of trauma to the body and that the injuries were most consistent with at least two different instances of child physical abuse; at trial, the defendant offered no alternative hypothesis for the injuries; and the jury specifically considered whether the defendant's boyfriend could have injured the baby when the jury addressed the charges against the boyfriend, finding the boyfriend not guilty on all counts. Weaver v. State, 351 Ga. App. 167, 830 S.E.2d 618, 2019 Ga. App. LEXIS 420 (2019), cert. denied, No. S19C1502, 2020 Ga. LEXIS 113 (Ga. Feb. 10, 2020).

Malice murder. — Defendant's conviction for malice murder was affirmed as it could be concluded that the evidence of malice murder, though circumstantial, was sufficient to exclude every reasonable hypothesis, save that of the guilt of the accused since: (1) the defendant was upset with the victim; (2) the defendant got a rifle and carried the rifle into the bedroom; (3) the victim asked the defendant to put the rifle down twice, but the defendant refused; (4) the defendant then shot the victim in the head; and (5) the defendant gave the police three versions of the events and the first two were refuted by a firearms expert and a supervisor in the criminal investigations division. Yeager v. State, 281 Ga. 1, 635 S.E.2d 704, 2006 Ga. LEXIS 584 (2006) (decided under former O.C.G.A. § 24-4-6).

Defendant's conviction for felony murder and related charges was upheld on

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appeal because the evidence showed that the defendant had admitted to killing the defendant's girlfriend and others and the gun used to shoot the victim was the same that the defendant had shot at a party earlier in the evening; the defendant had asked the victim for a ride home from the party and the evidence indicated that defendant shot the victim twice and dumped the body in a wooded area. Lee v. State, 281 Ga. 511, 640 S.E.2d 287, 2007 Ga. LEXIS 27 (2007) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient to support defendant's malice murder conviction of her husband because they had a tumultuous marriage; she was faced that day with explaining her entanglement with the victim's finances; she was in financial difficulty, as she had filed for bankruptcy, and she was the beneficiary of the victim's insurance policies; defendant could not account for 30 minutes of her whereabouts during the relevant time; and defendant's gun, which had recently been used, matched the type used to kill the victim. Merritt v. State, 285 Ga. 778, 683 S.E.2d 855, 2009 Ga. LEXIS 469 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of malice murder because the jury was authorized to find that the defendant met with the victim's husband and other codefendants on at least two occasions to discuss the murder of the victim, that the defendant accepted money from the husband prior to the murder, that the defendant instructed one of the codefendants on how to kill the victim, that the defendant drove to the victim's home with the husband and another codefendant on the morning of the murder, and that the defendant demanded and accepted money from the husband as compensation for the murder. Owens v. State, 286 Ga. 821, 693 S.E.2d 490, 2010 Ga. LEXIS 331 (2010), cert. denied, 562 U.S. 866, 131 S. Ct. 156, 178 L. Ed. 2d 93, 2010 U.S. LEXIS 6512 (2010), overruled in part, Shelton v. Lee, 299 Ga. 350, 788 S.E.2d 369, 2016 Ga. LEXIS 452 (2016) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence the state presented was sufficient to authorize a rational trier of fact to find the codefendant guilty beyond a reasonable doubt of the malice murder of a girlfriend's child; both the girlfriend and the codefendant were with the child during the time period within which the fatal injuries were believed to have been inflicted upon the child. Smith v. State, 290 Ga. 428, 721 S.E.2d 892, 2012 Ga. LEXIS 85 (2012) (decided under former O.C.G.A. § 24-4-6).

There was sufficient evidence to support the defendant's murder conviction and the defendant's argument that the state relied solely on circumstantial evidence was belied by the admission of the defendant's statement to police that the defendant hit the victim with the ax handle. Bunnell v. State, 292 Ga. 253, 735 S.E.2d 281, 2013 Ga. LEXIS 2 (2013) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to find the defendant guilty of the malice murder because the defendant and the victim had a domestic dispute over the money that the defendant had borrowed from the victim; two days later, human body parts that were later identified as the victim's were found scattered around a secluded, wooded area near a house owned by the defendant; a coroner examined the remains and determined that the cause of death was homicide by unknown cause; the defendant never reported the victim missing; the defendant told conflicting stories about the victim's disappearance and the defendant's activities around that time; and the defendant towed the victim's car to a hotel parking lot and left the car. Benson v. State, 294 Ga. 618, 754 S.E.2d 23, 2014 Ga. LEXIS 70 (2014).

Circumstantial evidence was sufficient to convict the defendant of malice murder and possession of a firearm in the commission of a felony because an eyewitness identified the defendant as the man leaving the victim's apartment wearing a camouflage jacket and with a gun in the defendant's hand; video from the

convenience store at the time the defendant and the co-defendant encountered the victim showed the defendant wearing a camouflage jacket; the same or a similar jacket was later given to police by the defendant's aunt; and the defendant's own testimony placed the defendant at the scene, even though the defendant initially denied having been present and attempted to hide from police. Neely v. State, 302 Ga. 121, 805 S.E.2d 18, 2017 Ga. LEXIS 771 (2017).

Circumstantial evidence was sufficient to convict the defendant of the malice murder of a girlfriend's nine-month-old child because the medical examiner concluded that the cause of the child's death was blunt force injuries to the child's head and extremities, with the bleeding in the child's brain causing the child's organs to shut down and stop the child's breathing; the defendant was alone with the child just before the child's death; the medical examiner concluded that the child's injuries did not likely occur the way the defendant described; and the jury was authorized to reject the defendant's hypothesis that the child's mother caused the child's death. Bennett v. State, 301 Ga. 874, 804 S.E.2d 360, 2017 Ga. LEXIS 703 (2017).

Evidence was sufficient to convict the defendant of malice murder and other crimes in connection with the shooting death of the victim because the investigators visited the defendant at the defendant's house and found three .32-caliber shell casings inside a trash can on top of the defendant's other trash, which matched the caliber of the gun used in the shooting; the defendant admitted that the defendant was at the victim's house on the night of the murder; all of the evidence supporting the defendant's alternative hypothesis could be characterized as presenting inconsistencies in the evidence; and the evidence excluded every reasonable hypothesis other than the defendant's guilt. Clark v. State, 309 Ga. 473, 847 S.E.2d 364, 2020 Ga. LEXIS 514 (2020).

Defendant's motion for a new trial was properly denied because the circumstantial evidence was sufficient to convict the defendant of malice murder and possession of a firearm during the commission of a felony as the defendant's mother told police officers and an EMT that the mother heard a gunshot and saw the defendant standing over the victim with the murder weapon in the defendant's hand; the defendant took off when the police arrived; ballistics evidence indicated that the defendant's pistol fired the fatal shot, and gunshot primer residue was found on the defendant's hands; and the defendant revealed the location of the murder weapon, which was recovered by the investigator in the place the defendant described. Taylor v. State, 313 Ga. 5, 867 S.E.2d 88, 2021 Ga. LEXIS 734 (2021).

Evidence was sufficient to support defendant's convictions of malice murder and other crimes because days before the victim was reported missing the victim exchanged text messages with defendant about money, the victim told defendant the victim had no choice but to tell defendant's wife about defendant's drug activities, shortly before the victim's disappearance defendant bought a revolver that could have fired the two bullets recovered from the victim's body, defendant admitted to sending a text message claiming to be the victim, defendant acted nervous when appearing to look through the area where the victim's body was later found, and soil samples recovered from the shovel found at defendant's house were indistinguishable from samples taken near the gravesite. Anglin v. State, 312 Ga. 503, 863 S.E.2d 148, 2021 Ga. LEXIS 628 (2021).

Evidence was sufficient to support defendant's conviction of malice murder because it showed that the gang members planned the victim's murder to retaliate for defendant's arrest, defendant was angry that the victim had identified him, during phone calls from jail defendant encouraged his fellow gang members to kill the victim, and defendant expressly relief when he found out that the victim had been killed. Drennon v. State, 314 Ga. 854, 880 S.E.2d 139, 2022 Ga. LEXIS 282 (2022).

Evidence was sufficient to convict the defendant as a party of, inter alia, malice murder and a violation the Street Gang Terrorism and Prevention Act as the de-

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fendant and the codefendant were active members of the same gang; cell phone records placed the defendant's phone near the victims' apartment, various ATMs, and the gang house on the day of the murders; the jury was free to reject as unreasonable the possibility that some other unidentified person was using the defendant's SUV and phone; and the jury could infer that the murders were committed in order to obtain status within the gang. Beamon v. State, 314 Ga. 798, 879 S.E.2d 457, 2022 Ga. LEXIS 261 (2022).

Evidence sufficient for malice murder. — Defendant's convictions on five counts of malice murder and other crimes was upheld because evidence presented at trial was sufficient to support the convictions under O.C.G.A. § 24-14-6 and as matter of constitutional due process as the factfinder was authorized to reject the defendant's shifting stories and alternative hypothesis as unreasonable. Peacock v. State, 314 Ga. 709, 878 S.E.2d 247, 2022 Ga. LEXIS 241 (2022).

Evidence sufficient to show murder, not suicide. — Sufficient evidence supported the defendant's murder conviction because the defendant's own expert witness testified that it was unlikely that the victim shot herself in the back of the head, and the state's forensic pathology expert and crime scene investigation expert both determined the case to be a homicide rather than a suicide. Davenport v. State, 309 Ga. 385, 846 S.E.2d 83, 2020 Ga. LEXIS 479 (2020).

Evidence was sufficient to support the defendant's conviction of malice murder because the defendant admitted that the defendant was in the driver's seat of the vehicle with the tinted windows when shots were fired from the driver's side window, killing the victim, the defendant admitted that a short time later the defendant fled from the police, the police found the rifle from which the defendant's fingerprints were lifted discarded in the wooded area near the vehicle, the rifle was the only weapon found in or around the vehicle that could not be excluded as the weapon that fired the fatal shot, and the defendant's fingerprints and DNA placed the defendant in the vehicle. Frazier v. State, 309 Ga. 219, 845 S.E.2d 579, 2020 Ga. LEXIS 460 (2020).

Evidence sufficient for spouse's felony murder conviction arising out of killing officer. — Defendant's conviction for felony murder arising out of the defendant's spouse's shooting and killing a police officer was supported by circumstantial evidence that the defendant was a party to the spouse's crime of possessing a firearm as a convicted felon and that the crime was the proximate cause of the officer's death. Lebis v. State, 302 Ga. 750, 808 S.E.2d 724, 2017 Ga. LEXIS 965 (2017).

Circumstantial evidence sufficient to sustain conviction in death of child. — Circumstantial evidence was sufficient to convict the defendant of malice murder in connection with the beating death of the victim, the defendant's 10-month-old daughter, because, at the time the victim died, the victim had sustained numerous injuries in the days and hours leading up to the victim's death; the defendant was the sole adult with the victim in the hours preceding the victim's death; the jury heard expert testimony that the victim's injuries were not consistent with a fall; and the defendant had made an incriminating statement in a letter to the victim's mother while awaiting trial. Walker v. State, 308 Ga. 33, 838 S.E.2d 792, 2020 Ga. LEXIS 97 (2020).

Evidence was sufficient for the jury to reject as unreasonable the hypothesis that the father killed the adopted child and instead to find that the appellant mother was responsible. While the evidence did not show exactly how the victim's fatal injuries were inflicted, the evidence was sufficient to support the appellant's murder and child cruelty convictions, as the father said consistently that the father was out by the car at the time the injuries occurred, whereas the appellant admitted to being alone in the room with the victim and changed the appellant's story several times, each time giving an account that was dubious in light of the physical and medical evidence. Long v. State, 309 Ga. 721, 848 S.E.2d 91, 2020 Ga. LEXIS 609 (2020).

Circumstantial evidence was sufficient to convict the defendant of felony murder

and cruelty to children in the first degree because the defendant had sole responsibility for the eight-month-old child from the time that the child's mother left for work until the defendant brought the child downstairs to the defendant's sister for help (though the defendant asked the sister not to call 911), at which point the child had suffered the blunt force trauma to the head that led to the child's death; and the mother testified that the child was acting normally when the mother left for work. Norris v. State, 316 Ga. 119, 884 S.E.2d 371, 2023 Ga. LEXIS 35 (2023).

Murder of two-year old child. — Evidence presented was sufficient to authorize a rational jury to find that the state had excluded every reasonable hypothesis except that of appellant's guilt with regard to the felony murder of a two-year-old child left in appellant's care based on the child being healthy when left in appellant's care, died as the result of blunt force trauma to the head which could not have resulted from the normal activities of a child or a fall down the stairs, and appellant was alone with the child. Alexander v. State, 294 Ga. 345, 751 S.E.2d 408, 2013 Ga. LEXIS 962 (2013).

Murder of child. — Evidence that the defendant, the child's mother, and the child's father were the child's sole caregivers and were the only ones with access to the child in the timeframe of the fatal injury, that the defendant was the primary caregiver, that the fatal blow would have caused immediate and visible symptoms, that the child suffered many additional injuries, and that the defendant did not seek medical care for the child was sufficient to support convictions for felony murder and cruelty to children. Akhimie v. State, 297 Ga. 801, 777 S.E.2d 683, 2015 Ga. LEXIS 640 (2015).

Revenge killing of infant daughter rejected. — Defendant's conviction for murder of defendant's infant daughter was upheld as the state presented testimony that there was no evidence connecting anyone besides the defendant to the child's death and defendant's suggestion that another kidnapped and killed the child as an act of revenge was impossible, given that the accused was in jail at the time the crime was committed. McNabb v. State, 313 Ga. 701, 872 S.E.2d 251, 2022 Ga. LEXIS 159 (2022).

Evidence sufficient for felony murder and armed robbery convictions. — Given the testimony provided by both the codefendant and the codefendant's former wife, to whom the defendant admitted to firing the fatal shots killing the victim, which netted the victim's cellular phone and pager and evidence describing how the defendant participated in the events that happened before, during, and after the commission of the crimes, sufficient evidence was presented to uphold the defendant's convictions for felony murder and armed robbery as a party to the crimes. Pruitt v. State, 282 Ga. 30, 644 S.E.2d 837, 2007 Ga. LEXIS 347 (2007) (decided under former O.C.G.A. § 24-4-6).

Defendant's conviction for felony murder and armed robbery was not based upon insufficient circumstantial evidence because there was directed evidence of the defendant's guilt; the conviction was supported by an eyewitness identification, DNA consistent with the defendant's on the crack in the windshield of the getaway car, the defendant's fingerprint on the handle of the driver's door of the getaway car, and the defendant's birth certificate and mail in the getaway vehicle. Sanders v. State, 290 Ga. 637, 723 S.E.2d 436, 2012 Ga. LEXIS 209 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for convictions for aggravated assault, burglary, and possession of a firearm. — Given that the circumstantial evidence presented against the defendant sufficiently showed that: (1) the victim shot one of the intruders who committed the burglary; (2) shortly after the burglary, the defendant was treated for a gunshot wound and arrived at the hospital in a vehicle matching the description of the automobile seen leaving the crime scene; (3) the DNA evidence on ski masks found at the scene matched that of the owner of the car and the other passenger, who was also the defendant's brother; and (4) according to the defendant's brother, the driver of the car admitted to shooting the victim, the defendant's convictions for aggravated assault, burglary, and possession of a firearm during the commission of a felony

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were affirmed on appeal. Sherman v. State, 284 Ga. App. 809, 644 S.E.2d 901, 2007 Ga. App. LEXIS 407 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for involuntary manslaughter conviction. — There was sufficient evidence to support a defendant's conviction for involuntary manslaughter of the defendant's romantic friend given the evidence of the defendant's admission that the defendant placed the friend in a headlock during a fight, and the medical examiner's findings that the friend was strangled to death. As a result, the jury was authorized to exclude all other reasonable hypotheses and conclude that the defendant unintentionally caused the friend's death while committing simple battery. Lemon v. State, 293 Ga. App. 488, 667 S.E.2d 654, 2008 Ga. App. LEXIS 984 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for felony murder but insufficient for rape. — In the defendants' joint trial for rape, murder, and other crimes against three separate victims, the evidence supported the felony murder verdict against one defendant because witnesses placed the defendants together prior to the murder, text messages on the defendant's phone discussed robbing the victim, and the defendant fled the state after the murder; but the evidence as to the rape merely placed the defendant at the scene, requiring reversal. Thomas v. State, 300 Ga. 433, 796 S.E.2d 242, 2017 Ga. LEXIS 27 (2017).

Evidence sufficient for aggravated battery conviction. — Defendant's attempt to invoke the circumstantial evidence rule of former O.C.G.A. § 24-4-6 was rejected and the evidence was sufficient to support defendant's conviction of aggravated battery as the evidence was not entirely circumstantial since there was direct evidence that: (1) defendant said that defendant was going to set the victim on fire; (2) defendant was present and poured the gasoline on the victim; (3) defendant reached in defendant's pocket for something just before the fire started; and (4) the victim questioned why defendant had done it. Miller v. State, 265 Ga. App. 402, 593 S.E.2d 943, 2004 Ga. App. LEXIS 134 (2004) (decided under former O.C.G.A. § 24-4-6).

Convictions of arson, O.C.G.A. § 16-7-60(a), and stalking, O.C.G.A. § 16-5-90, were proper because the circumstantial evidence presented at trial included a kerosene-soaked, partially burned, mailing label addressed to the defendant found at the scene of a fire at the victim's home; the state also presented evidence of the defendant's escalating obsession with the victim and the threatening phone calls the defendant made to the victim shortly before the fire. Although the circumstantial evidence must have excluded every other reasonable hypothesis save defendant's guilt, the evidence need not have excluded every inference or hypothesis. Ransom v. State, 297 Ga. App. 902, 678 S.E.2d 574, 2009 Ga. App. LEXIS 577 (2009) (decided under former O.C.G.A. § 24-4-6).

Conviction not entirely circumstantial in child molestation. — State's evidence was not entirely circumstantial as the retail store's surveillance video constituted direct evidence that the defendant touched the clothing around the defendant's genital area in a manner consistent with masturbation while in close proximity to and watching the victim. Gonzalez v. State, 359 Ga. App. 147, 857 S.E.2d 88, 2021 Ga. App. LEXIS 165 (2021).

Evidence held sufficient to support murder conviction. — Although circumstantial, the evidence was sufficient to convict the defendant of murder, armed robbery, and related crimes in connection with the death of the victim because the defendant was identified by a witness as the person the witness saw coming upstairs from the victim's apartment just before the witness discovered the crimes; the defendant's fingerprints were found on the car used in the crimes; and the defendant's own statements, both via text message and in person, corroborated the defendant's participation in the murder and robbery. Babbage v. State, 296 Ga. 364, 768 S.E.2d 461, 2015 Ga. LEXIS 2 (2015) (decided under former O.C.G.A. § 24-4-6).

Defendant's appeal from the defendant's convictions for murder and other crimes arising out of the defendant's

shooting a car repair shop worker (son) and shooting at the shop's owner (father) on the basis that the evidence was merely circumstantial was rejected because there was eyewitness testimony that the defendant shot at the father without provocation, fled the scene immediately, and attempted to evade law enforcement by running into a residential area and taking off the defendant's shirt. Willis v. State, 304 Ga. 781, 822 S.E.2d 203, 2018 Ga. LEXIS 777 (2018).

Evidence was sufficient to convict the defendant of evidence tampering because, based on the circumstantial evidence, the defendant retrieved a firearm that the defendant's child had hidden and that the defendant's child had used to shoot and kill the victim; a friend drove the defendant to a fishing pond and heard a splash; law enforcement recovered a firearm matching the description of the murder weapon in the exact place where the friend heard the splash; and there was no evidence presented at trial to support a reasonable inference that the defendant disposed of a different gun than the one used by the defendant's child to commit murder. Elkins v. State, 350 Ga. App. 816, 830 S.E.2d 345, 2019 Ga. App. LEXIS 383 (2019).

In the defendant's murder trial, circumstantial evidence supported the jury's verdict: the evidence included text messages showing the defendant and the victim were meeting for sex; the defendant's saliva was on the victim's penis; the murder weapon was found in the defendant's backpack; however, the defendant's financial transaction fraud conviction was reversed because, despite the defendant's attempts, the defendant was not able to obtain anything of value using the victim's debit card. Carter v. State, 305 Ga. 863, 828 S.E.2d 317, 2019 Ga. LEXIS 325 (2019).

Evidence was sufficient to support the defendant's conviction of felony murder based upon aggravated battery because the evidence showed that the defendant was the only adult in the home in the time leading up to the child victim's injuries, the victim's injury was profound and would have immediately incapacitated the victim, and the defendant's account of events did not explain the severity of the injury, which could only have resulted from massive trauma inconsistent with a typical fall down a staircase. Hamilton v. State, 309 Ga. 1, 843 S.E.2d 840, 2020 Ga. LEXIS 364 (2020).

Although circumstantial, sufficient evidence supported the defendant's convictions for murder and aggravated assault, given video evidence of defendant and the victim in a school courtyard before midnight, evidence that the victim was bludgeoned to death with a bloody rock found at the scene, DNA evidence showing the victim's blood on the defendant's clothes, and the defendant's attack of a pedestrian for the pedestrian's coat a few blocks away 20 minutes later. Carson v. State, 308 Ga. 761, 843 S.E.2d 421, 2020 Ga. LEXIS 348 (2020).

Evidence was sufficient to support defendant's convictions because the jury could have reasonably inferred that defendant not only knew of the felons' plans but shared a common criminal intent and acted in concert with them in committing the crimes. Poole v. State, 312 Ga. 515, 863 S.E.2d 93, 2021 Ga. LEXIS 630 (2021).

Evidence was sufficient to support defendant's conviction of felony murder and other offenses, even though it was based on circumstantial evidence, because it showed that defendant was a gang member, the defendant was attacked by rival gang members days before the drive-by shootings, the rival gang members tended to congregate at the house where the drive-by shootings occurred, when police attempted an arrest the defendant barricaded himself in a room with a gun, a witness's testimony placed the defendant in a particular vehicle minutes before one of the shootings, and the defendant claimed on social media to possess a gun that could have fired the shell casings recovered at the scene of both shootings. Harris v. State, 313 Ga. 225, 869 S.E.2d 461, 2022 Ga. LEXIS 37 (2022).

Even though there was no direct evidence of the defendant's guilt, the circumstantial evidence allowed the jury to infer that the defendant murdered the victim as, shortly before the victim was killed, the victim told the defendant's cousin that

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the victim was afraid of the defendant; the victim was alone with the defendant in the house before the victim's death, and no witness saw the defendant leave the residence; and the victim told a cousin on the phone around the time the victim was estimated to have been killed that the victim was in the closet, and then the victim immediately hung up the phone after the victim said that the defendant was coming toward the victim. Adkins v. State, 314 Ga. 477, 877 S.E.2d 582, 2022 Ga. LEXIS 225 (2022).

Circumstantial evidence for malice murder. — Circumstantial evidence was sufficient to support the defendant's convictions for malice murder and theft by taking because: (1) after the victim, who was the defendant's roommate, disappeared, the defendant began driving the victim's car; (2) a witness who lived on a street on which the defendant used to live and that was miles away from the defendant's residence noticed a fire on the side of the road and a person squatting by the road watching the fire; (3) the victim's burned body was later found at the road side; (4) the victim's body had been burned, decapitated, drained of almost all blood, and cut into pieces; (5) the defendant told the police detectives who went to the defendant's apartment that the victim was on vacation and that the defendant did not know where the victim was; (6) the defendant's apartment had been recently cleaned and cleaning supplies were found in the apartment; (7) Luminol testing faintly revealed the presence of blood on the bathtub and surrounding walls of the apartment; (8) the trash which was collected from the apartment's dumpster included the victim's wallet, driver's license, and debit card; and (9) broken furniture, socks, and a sheet with the victim's blood were found in the trash. Adel v. State, 290 Ga. 690, 723 S.E.2d 666, 2012 Ga. LEXIS 286 (2012) (decided under former O.C.G.A. § 24-4-6).

Death of a child. — Comparing the child's condition at the time the defendant took the child from the child's mother and shortly thereafter, with the child's condition at the time the child and the defendant appeared at the fire station, and considering the acts of abuse admitted by the defendant, the evidence, when viewed most favorably to the verdict, was sufficient to have authorized a rational trier of fact in finding beyond a reasonable doubt that the defendant caused the child's death. Phipps v. State, 203 Ga. App. 128, 416 S.E.2d 319, 1992 Ga. App. LEXIS 387 (1992), cert. denied, No. S92C0740, 1992 Ga. LEXIS 291 (Ga. Apr. 9, 1992) (decided under former O.C.G.A. § 24-4-6).

Evidence that the defendant, the child's mother, and the child's father were the child's sole caregivers and were the only ones with access to the child in the timeframe of the fatal injury, that the defendant was the primary caregiver, that the fatal blow would have caused immediate and visible symptoms, that the child suffered many additional injuries, and that the defendant did not seek medical care for the child was sufficient to support convictions for felony murder and cruelty to children. Akhimie v. State, 297 Ga. 801, 777 S.E.2d 683, 2015 Ga. LEXIS 640 (2015).

Appellant's conviction for vehicular homicide was affirmed because the verdict led to the strong inference that the appellant, while driving under the influence, killed the victim with a vehicle appellant was driving at a high rate of speed and there was no other evidence that another car or anything else struck the victim while alive with such force as to kill. Taylor v. State, 337 Ga. App. 486, 788 S.E.2d 97, 2016 Ga. App. LEXIS 357 (2016).

While the victim could not identify the gunman, the combined testimony of the other witnesses was sufficient to enable a rational jury to find the defendant guilty beyond a reasonable doubt as the perpetrator of the charged crimes, including armed robbery and aggravated battery, and to exclude every reasonable hypothesis except that of the defendant's guilt. Epperson v. State, 340 Ga. App. 25, 796 S.E.2d 1, 2016 Ga. App. LEXIS 701 (2016).

Evidence sufficient for murder conviction. — Physical evidence of signs of struggle at victim's residence, defendant's attempts to remove these, and defendant's subsequent behavior regarding the dis-

posal of victim's body sufficed to permit the jury to exclude every other hypothesis save the guilt of the accused in a prosecution for murder. White v. State, 263 Ga. 94, 428 S.E.2d 789, 1993 Ga. LEXIS 409 (1993) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to authorize the jury to find the defendant guilty of armed robbery and malice murder because the victim went missing shortly after coming into a substantial amount of cash, the defendant had access to the victim's home, and the defendant was seen driving around in the victim's two vehicles, selling the victim's property, and with a large amount of cash; the victim died from blunt trauma to the head, a mallet with blood on the mallet was found inside the house, and a witness testified that the defendant confided to the witness that the defendant killed the victim, placed the victim's body in a freezer, and took the victim's money. Cutrer v. State, 287 Ga. 272, 695 S.E.2d 597, 2010 Ga. LEXIS 475 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient under former O.C.G.A. § 24-4-6 to support the defendant's convictions for malice murder, felony murder, aggravated assault, possession of a knife during the commission of a crime, financial transaction card fraud, and recidivism because there was evidence placing the defendant at the victim's home during the time of the murder and evidence of the victim's blood on the defendant's shoes, which the defendant intentionally chose not to wear when being questioned by police; the evidence, together with the defendant's own statements regarding his use of the victim's debit card, was sufficient to authorize the jury to determine that the state excluded all reasonable hypotheses save that of the defendant's guilt and to find the defendant guilty beyond a reasonable doubt of the crimes of which he was convicted. Johnson v. State, 288 Ga. 771, 707 S.E.2d 92, 2011 Ga. LEXIS 167 (2011) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence presented was sufficient under former O.C.G.A. § 24-4-6 to support the defendant's felony murder conviction because the evidence established that a witness saw the defendant in possession of a gun, that the defendant went to the victim's home, that the defendant used the defendant's gun to coerce the victim into the victim's car and to drive as the defendant instructed, that the victim stopped the victim's car and the victim and the defendant exited and went behind some bushes, that multiple gunshots were heard, that a witness saw the defendant step from behind the bushes and run back toward the car, and that the victim's body was found behind the bushes with 10 gunshots, including five shots to the head. Brown v. State, 288 Ga. 902, 708 S.E.2d 294, 2011 Ga. LEXIS 266 (2011) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence, including that there was no evidence that the victim died from a cause other than asphyxia due to strangulation, the fact that the victim tested negative for drugs at the time of death, negating any theory about a lethal combination of alcohol and drugs, and the lack of evidence of forced entry to a room that the defendant and the victim shared was sufficient to support the defendant's murder conviction. Simpson v. State, 293 Ga. 131, 744 S.E.2d 49, 2013 Ga. LEXIS 494 (2013).

Circumstantial evidence was sufficient to convict the defendant of murder as the victim's daughter saw that the victim had about $600 in the victim's wallet the day before the murder; after the murder, the victim's purse had no cash in it; the defendant's girlfriend identified the knife handle and blade found near the victim's body as the steak knife with a loosened handle that the girlfriend had used in cooking at the defendant's apartment; and the defendant admitted to another prisoner that the defendant stabbed the victim. Bates v. State, 293 Ga. 855, 750 S.E.2d 323, 2013 Ga. LEXIS 866 (2013).

Jury could reasonably infer from the evidence that the defendant called the defendant's gang members to retrieve the defendant from an apartment where someone was threatening the defendant, as well as the defendant's celebrating with the gang that evening after the shooting, that the defendant was a party to the crime under O.C.G.A. § 16-2-20(b)(4) by advising, encouraging, counseling, or procuring others to commit the crime. Slaton

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v. State, 296 Ga. 122, 765 S.E.2d 332, 2014 Ga. LEXIS 884 (2014).

Evidence sufficient for murder of infant child. — Defendant's conviction for murder was upheld on appeal because the evidence established that the only possible perpetrators of the fatal abdominal trauma to the child were defendant or the mother and the expert opinion evidence established that the death would have occurred within 45 minutes after the abdominal trauma and likely sooner than that and the mother had already gone to work and the neighbor who drove the child and the defendant to the hospital testified that the child was still alive. Wilson v. State, 308 Ga. 306, 840 S.E.2d 370, 2020 Ga. LEXIS 170 (2020).

Sufficient evidence of murder conviction of child. — Evidence was sufficient to for the jury to reject as unreasonable the hypothesis that the defendant's boyfriend alone killed the defendant's two-year-old child and instead to find that the defendant was responsible because the jury heard evidence that the defendant forcefully shook and slapped the child close to the time that the child became stiff and unresponsive, the defendant did not immediately seek help for the child even though the defendant was a nurse, and once the defendant finally did get help the defendant did not seem upset and apologized to the defendant's boyfriend at the hospital. Smith v. State, 307 Ga. 680, 838 S.E.2d 321, 2020 Ga. LEXIS 52 (2020).

After the state presented evidence collected from the defendant's house and the crime scene connecting the defendant to the victim's death, the defendant gave conflicting accounts of events to police, and there was similar-transaction evidence regarding a prior serious of domestic violence incidents between the defendant and a former girlfriend, the evidence was sufficient to find the defendant guilty of malice murder and concealing the death of another. Shaw v. State, 307 Ga. 233, 835 S.E.2d 279, 2019 Ga. LEXIS 719 (2019).

Evidence sufficient for malice murder conviction. — There was sufficient evidence to enable a rational trier of fact to find defendant guilty beyond a reasonable doubt of malice murder after the victim, found in defendant's home, had been beaten and died from a severe blow to the head. Hannah v. State, 278 Ga. 195, 599 S.E.2d 177, 2004 Ga. LEXIS 548 (2004) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to support a malice murder conviction since witnesses saw the defendant arguing with the victim, go with the victim into an area behind a motel where the victim lived, heard shots from the area behind the motel, and later the victim's body was found in that area; also, the defendant was seen at a house with an item wrapped in cloth, and later, the defendant's gun, the murder weapon, was found in the yard of that house, wrapped in cloth. Smith v. State, 280 Ga. 161, 625 S.E.2d 766, 2006 Ga. LEXIS 17 (2006) (decided under former O.C.G.A. § 24-4-6).

Bloody jogging suit belonging to the defendant found at the defendant's girlfriend's house with the victim's blood on it, witnesses' description of the defendant wearing that same jogging suit after the shooting, and a .380 pistol found hidden in a cinder block at the girlfriend's house that matched the type of gun used to kill the victim were sufficient evidence to support convictions for malice murder and other related crimes with regard to the killing of the girlfriend's neighbor. Hooks v. State, 280 Ga. 164, 626 S.E.2d 114, 2006 Ga. LEXIS 70 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence that the defendant threatened to kill the victim on numerous occasions, sometimes while brandishing a knife; that shortly before the victim was fatally stabbed, the defendant was seen in the victim's front yard; and that police matched the boots the defendant was wearing that night to a footprint at the crime scene was sufficient to convict the defendant of malice murder. Smith v. State, 284 Ga. 304, 667 S.E.2d 65, 2008 Ga. LEXIS 753 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, armed robbery, and aggravated assault beyond a reason-

able doubt because although the defendant denied to police that the defendant had any contact with the silver car that was connected to the robbery, the defendant's fingerprints were found on the outside of the car; an eyewitness's physical description of the second gunman from the robbery matched the defendant. Carter v. State, 289 Ga. 51, 709 S.E.2d 223, 2011 Ga. LEXIS 253 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to convict the defendant as a party to the crimes of malice murder, voluntary manslaughter, and aggravated assault because the evidence showed that, during a drug deal and the subsequent shootings, the defendant was in the apartment and the defendant's blood was found there; witnesses saw two men matching the defendant's and the codefendant's descriptions leaving quickly; ammunition of the type used to kill the victim was found in a car that was owned by the codefendant with whom the defendant was living; and the defendant denied knowing any of the other defendants and fabricated a story that the defendant had been shot in a confrontation at a gas station. Dixon v. State, 298 Ga. 200, 779 S.E.2d 290, 2015 Ga. LEXIS 912 (2015) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient to convict the defendant of directly committing the crimes of malice murder and concealing the death of another or that the defendant was a party to the crimes because there was evidence of prior difficulties between the defendant and the victim, including evidence that the defendant had acted violently against the victim a few months before the victim's body was found; evidence that days before the victim's body was found, the defendant's son used the victim's cell phone to call their relatives; and evidence that the police found the victim's personal items, including items which could have been used to inflict the fatal injuries to the victim's body, inside the defendant's bags. Miller v. State, 303 Ga. 1, 810 S.E.2d 123, 2018 Ga. LEXIS 79 (2018).

Circumstantial evidence was sufficient to convict the defendant of malice murder and concealing the death of another because, inter alia, the evidence showed that the defendant compressed the victim's neck until the victim asphyxiated; and that the defendant placed the victim's body face up in a brush pile and failed to inform the police of the victim's location. Collett v. State, 305 Ga. 853, 828 S.E.2d 362, 2019 Ga. LEXIS 331 (2019).

Circumstantial evidence was sufficient to convict the defendant of malice murder because the defendant had been in a relationship with the victim for about 12 years; after the relationship ended, the victim began a romantic relationship with another man; the defendant repeatedly told the victim that it was not over between them; weeks before the shooting, the defendant told another individual that the defendant was going to kill the victim and the other man; and the gun used in the murder was found about two and a half miles from the scene of the shooting. Moss v. State, 305 Ga. 878, 828 S.E.2d 309, 2019 Ga. LEXIS 332 (2019).

Evidence sufficient for rape conviction. — Combination of circumstantial and direct evidence, including the victim's identification of the attacker, DNA evidence, and the testimony of several eyewitnesses who saw a man fitting the defendant's description in the area near the time of the attack, was sufficient to sustain a rape conviction. McKeehan v. State, 274 Ga. App. 14, 616 S.E.2d 489, 2005 Ga. App. LEXIS 650 (2005) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for malice murder and attempted arson convictions. — Malice murder and attempted arson convictions were upheld as: (1) the evidence presented showed that an attempted arson was inextricably linked to the victim's murder, and the jury was authorized to find beyond a reasonable doubt that the defendant was guilty; (2) the admission of two handwritten documents that defendant had penned was proper, as their prejudicial impact did not outweigh their probative value; and (3) the trial court did not abuse the court's discretion in determining that any prejudicial impact of a religious prayer asking for strength, and an expression of uncertainty as to what "makes me tick," did not outweigh the probative value of the evi-

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dence. Fortson v. State, 280 Ga. 376, 628 S.E.2d 104, 2006 Ga. LEXIS 196 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for felony murder while in commission of cruelty to children conviction. — Evidence that a defendant's 13-month-old child died while in the defendant's care from brain trauma caused by being struck by or against an object or violently shaken at a time when one other person and that person's child were in the defendant's apartment provided sufficient circumstantial evidence under former O.C.G.A. § 24-4-6 to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder while in the commission of cruelty to a child; questions as to the reasonableness of hypotheses were to be decided by the jury, and the jury's finding was not to be disturbed unless the guilty verdict was insupportable as a matter of law. Scott v. State, 281 Ga. 373, 637 S.E.2d 652, 2006 Ga. LEXIS 965 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for malice murder and armed robbery convictions. — Evidence, which included uncontroverted testimony from an eyewitness who saw the defendant order a store employee into the street shortly before the employee was shot, the testimony of two other eyewitnesses, and the fact that calls had been made from the employee's stolen cellular phone to the defendant's mother, was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, armed robbery, and a number of other associated crimes. Horne v. State, 281 Ga. 799, 642 S.E.2d 659, 2007 Ga. LEXIS 240 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for felony murder and arson convictions. — Circumstantial evidence was sufficient under former O.C.G.A. § 24-4-6 to support the defendant's arson and felony murder convictions and to exclude the theory that an intruder set the fire in the house since the defendant rented a room from the victim: (1) testimony of neighbors contradicted the defendant's claim that the defendant was asleep and unaware of the fire; (2) there was no evidence of a forced entry other than that of the neighbors who tried to save the victim; (3) the layout of the house authorized the jury to find that the defendant would have noticed an intruder; and (4) a motive could be inferred from the fact that the defendant owed rent to the victim and that the victim was planning to ask the defendant for the rent. Green v. State, 283 Ga. 126, 657 S.E.2d 221, 2008 Ga. LEXIS 137 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for felony murder conviction. — Circumstantial evidence supported the defendant's conviction of the felony murder of the defendant's two-month-old child. The victim's grandparent had not had contact with the victim on the day of the murder, and the evidence that the victim was well when the victim's other parent left the house, combined with a medical examiner's testimony and time line regarding the time of the child's death, excluded the other parent's guilt as well. Nixon v. State, 284 Ga. 800, 671 S.E.2d 503, 2009 Ga. LEXIS 11 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence authorized the jury to find the defendant guilty beyond a reasonable doubt of felony murder and possession of a firearm during the commission of a crime because there was substantial corroborating evidence in addition to the accomplice's testimony; the defendant stated that the defendant had killed someone, other witnesses corroborated the accomplice's testimony regarding the arrival and departure of the two men on the night of the shooting, and blood was found on the shirt the defendant wore that night and tried to have destroyed. Gonnella v. State, 286 Ga. 211, 686 S.E.2d 644, 2009 Ga. LEXIS 733 (2009) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient to convict the defendant of felony murder predicated upon aggravated assault because the evidence at the crime scene showed there had been a struggle; the victim's injuries were consistent with strangulation; male DNA taken from the victim's body was later matched to the defendant's DNA; no other male DNA was found in the samples taken from the vic-

tim's body; and the state excluded all reasonable hypotheses except that of the defendant's guilt. Reeves v. State, 294 Ga. 673, 755 S.E.2d 695, 2014 Ga. LEXIS 165 (2014) (decided under former O.C.G.A. § 24-4-6).

Evidence supported the defendant's conviction for felony murder given that the defendant's fingerprints were found inside the victim's home, the defendant was seen standing outside the home several times on the day the victim was murdered, and one time the defendant was carrying the victim's television, and the defendant confessed details of the murder that were not public to a cellmate. Brown v. State, 304 Ga. 435, 819 S.E.2d 14, 2018 Ga. LEXIS 595 (2018).

Evidence was sufficient to convict the defendant as a party to the crimes of felony murder and possession of a firearm during the commission of a felony in connection with the shooting death of one of the accomplices to an attempted armed robbery because the defendant was not just an innocent bystander as the defendant admitted that the defendant was with the accomplices before the shooting; the jury could have reasonably inferred that the defendant was the person whom two witnesses overheard in the background of a call encouraging the armed robbery; and the defendant admitted that the defendant accompanied the accomplices knowing that the buyer and the group the defendant was with planned to rob each other during a purported drug deal. Frazier v. State, 308 Ga. 450, 841 S.E.2d 692, 2020 Ga. LEXIS 231 (2020).

Circumstantial evidence was sufficient to convict the defendant of felony murder predicated on criminal attempt to commit armed robbery because the victim was found dead from gunshot wounds; the victim's wallet was missing when the victim was found; the suspect fled the scene in a small, silver sedan; the defendant's co-indictee was driving a vehicle matching that description in the area at the time of the murder; and the defendant stated in a jailhouse telephone conversation that the defendant was involved in the week-long crime spree. Perdomo v. State, 307 Ga. 670, 837 S.E.2d 762, 2020 Ga. LEXIS 9 (2020).

Circumstantial evidence of the defendant's contentious relationship with the victim, who lived in a cabin on the defendant's property, that the victim was struck multiple times with a hatchet found in the defendant's trailer, and that a gun found in the defendant's hotel room was used to shoot the victim, supported the defendant's felony murder conviction. Eggleston v. State, 309 Ga. 888, 848 S.E.2d 853, 2020 Ga. LEXIS 663 (2020).

Evidence sufficient for felony murder and aggravated assault conviction. — Contrary to a defendant's contention that the state presented only circumstantial evidence under former O.C.G.A. § 24-4-6 that did not exclude all reasonable hypotheses except that of the defendant's guilt, the evidence was sufficient to support the conviction for felony murder and aggravated assault; the defendant's infant child died of a massive closed head trauma complicated by blunt force chest trauma, and the defendant had the sole care of the child just before the child suffered rib injuries allegedly due to the defendant pushing on the child's chest while the child was choking and just before the child suffered seizure-like symptoms. Berryhill v. State, 285 Ga. 198, 674 S.E.2d 920, 2009 Ga. LEXIS 100 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence authorized the jury to find the defendant guilty beyond a reasonable doubt of murder, felony murder, aggravated assault, and possession of a weapon during the commission of a felony because contrary to the defendant's arguments, the evidence showed that the person who was sitting in the back seat of the victim's car was not sitting directly behind the victim, but instead, that person was in the rear seat on the passenger's side of the car; the forensics testing showed that the murderer was located to the left of the victim, not the right, and there was blood spatter on the seat behind the victim from which the jury could have inferred that no one was sitting there at the time of the shooting. Julius v. State, 286 Ga. 413, 687 S.E.2d 828, 2010 Ga. LEXIS 90 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to convict the defendant of the felony murder (predicated on aggravated assault) and the ag-

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gravated assaults because there were warning signs on the off-ramp indicating that anyone driving in that direction was going the wrong way; once the defendant was on the parkway, the defendant drove at approximately 80 miles per hour, and four vehicles had to swerve out of the way to avoid colliding with the defendant; there were at least five places where the defendant could have safely pulled over before entering the curve where the collisions occurred; and the defendant was driving in excess of 75 miles an hour with the vehicle's cruise control engaged when the defendant collided with the felony murder victim. Sullivan v. State, 308 Ga. 772, 843 S.E.2d 411, 2020 Ga. LEXIS 347 (2020).

Evidence sufficient for aggravated assault conviction. — Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt as a party to two counts of aggravated assault in violation of O.C.G.A. § 16-5-21 because even though the defendant did not actually use a weapon, there was evidence that an accomplice brandished a handgun and pointed the handgun at both the manager and the clerk of the video store, and the accomplice's use of a weapon could be attributed to the defendant; one who intentionally aids or abets the commission of a crime by another is a party to the crime and equally guilty with the principal, and reasonable apprehension of injury can be proved by circumstantial or indirect evidence as well as by direct or positive evidence since the presence of a gun would normally place a victim in reasonable apprehension of being injured violently. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246, 2010 Ga. App. LEXIS 1121 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for aggravated assault. — Evidence was sufficient to support a defendant's conviction for aggravated assault. The reasonable hypothesis rule in former O.C.G.A. § 24-4-6 was not applicable in the case as the evidence was not entirely circumstantial, in that the state presented direct evidence of the defendant's participation in the events at issue, that the defendant carried a shotgun from the scene of the assault, that the defendant rode away with the weapon near the defendant in the car, and that the defendant fled from police, both in the car and on foot. Emerson v. State, 315 Ga. App. 105, 726 S.E.2d 600, 2012 Ga. App. LEXIS 331 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for aggravated child molestation conviction. — Evidence, including that defendant had access and opportunity to infect a victim at least two weeks prior to the victim exhibiting symptoms, and that the victim's immediate outcry was consistent with the victim's statement to a doctor identifying defendant, and excluding the hypothesis that the victim's father was present prior to the onset of the victim's symptoms, was sufficient to convict defendant of aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). Zuniga v. State, 300 Ga. App. 45, 684 S.E.2d 77, 2009 Ga. App. LEXIS 953 (2009), cert. denied, No. S10C0169, 2010 Ga. LEXIS 125 (Ga. Feb. 1, 2010) (decided under former O.C.G.A. § 24-4-6).

Evidence held insufficient to support conviction. — See Park v. State, 123 Ga. 164, 51 S.E. 317, 1905 Ga. LEXIS 403 (1905) (murder) (decided under former Penal Code 1895, § 1984); Bush v. State, 7 Ga. App. 607, 67 S.E. 685, 1910 Ga. App. LEXIS 421 (1910) (larceny) (decided under former Penal Code 1910, § 1010); Calhoun v. State, 9 Ga. App. 501, 71 S.E. 765, 1911 Ga. App. LEXIS 209 (1911) (burglary) (decided under former Penal Code 1910, § 1010); Henderson v. State, 147 Ga. 134, 92 S.E. 871, 1917 Ga. LEXIS 82 (1917) (murder) (decided under former Penal Code 1910, § 1010); Haire v. State, 38 Ga. App. 116, 142 S.E. 697, 1928 Ga. App. LEXIS 74 (1928) (cattle stealing) (decided under former Penal Code 1910, § 1010); Wallin v. State, 38 Ga. App. 194, 143 S.E. 597, 1928 Ga. App. LEXIS 126 (1928) (burglary) (decided under former Penal Code 1910, § 1010); Smith v. State, 38 Ga. App. 741, 145 S.E. 500, 1928 Ga. App. LEXIS 426 (1928) (larceny) (decided under former Penal Code 1910, § 1010); Hughie v. State, 52 Ga. App. 73, 182 S.E.

197, 1935 Ga. App. LEXIS 40 (1935) (larceny of automobile) (decided under former Code 1933, § 38-109); Graham v. State, 183 Ga. 381, 183 Ga. 881, 189 S.E. 910, 1937 Ga. LEXIS 420 (1937) (murder) (decided under former Code 1933, § 38-109); Orr v. State, 62 Ga. App. 774, 9 S.E.2d 917, 1940 Ga. App. LEXIS 433 (1940) (manufacturing whiskey) (decided under former Code 1933, § 38-109); Cheney v. State, 61 Ga. App. 726, 7 S.E.2d 335, 1940 Ga. App. LEXIS 242 (1940) (arson) (decided under former Code 1933, § 38-109); Wells v. State, 75 Ga. App. 588, 44 S.E.2d 66, 1947 Ga. App. LEXIS 587 (1947) (larceny) (decided under former Code 1933, § 38-109); Woody v. State, 99 Ga. App. 857, 109 S.E.2d 896, 1959 Ga. App. LEXIS 971 (1959) (burglary) (decided under former Code 1933, § 38-109); Purser v. State, 104 Ga. App. 728, 122 S.E.2d 749, 1961 Ga. App. LEXIS 783 (1961) (voluntary manslaughter) (decided under former Code 1933, § 38-109); Crane v. State, 123 Ga. App. 226, 180 S.E.2d 289, 1971 Ga. App. LEXIS 1173 (1971) (burglary) (decided under former Code 1933, § 38-109); Williams v. State, 126 Ga. App. 350, 190 S.E.2d 785, 1972 Ga. App. LEXIS 1144 (1972) (burglary) (decided under former Code 1933, § 38-109); Ennis v. State, 130 Ga. App. 716, 204 S.E.2d 519, 1974 Ga. App. LEXIS 1236 (1974) (possession of marijuana) (decided under former Code 1933, § 38-109); Russell v. State, 132 Ga. App. 35, 207 S.E.2d 619, 1974 Ga. App. LEXIS 1593 (1974) (possession of marijuana) (decided under former Code 1933, § 38-109); Wright v. State, 147 Ga. App. 111, 248 S.E.2d 183, 1978 Ga. App. LEXIS 2798 (1978) (burglary) (decided under former Code 1933, § 38-109); Kametches v. State, 242 Ga. 721, 251 S.E.2d 232, 1978 Ga. LEXIS 1341 (1978) (possession for sale of obscene materials) (decided under former Code 1933, § 38-109); Hall v. State, 155 Ga. App. 211, 270 S.E.2d 377, 1980 Ga. App. LEXIS 2531 (1980) (burglary) (decided under former Code 1933, § 38-109); Smith v. State, 188 Ga. App. 415, 373 S.E.2d 97, 1988 Ga. App. LEXIS 1037 (1988) (entering an automobile) (decided under former O.C.G.A. § 24-4-6); Krull v. State, 211 Ga. App. 37, 438 S.E.2d 152, 1993 Ga. App. LEXIS 1401 (1993) (DUI, no proof of insurance, driving with suspended license, and failure to maintain lane) (decided under former O.C.G.A. § 24-4-6); Calhoun v. State, 213 Ga. App. 375, 444 S.E.2d 405, 1994 Ga. App. LEXIS 553 (1994) (shoplifting) (decided under former O.C.G.A. § 24-4-6); Jordan v. State, 225 Ga. App. 424, 484 S.E.2d 60 (trafficking in cocaine) (decided under former O.C.G.A. § 24-4-6); Mitchell v. State, 268 Ga. 592, 492 S.E.2d 204 (possession with intent to distribute marijuana) (decided under former O.C.G.A. § 24-4-6); In re A.D.C., 228 Ga. App. 829, 493 S.E.2d 38 (possession with intent to distribute marijuana) (decided under former O.C.G.A. § 24-4-6); Greene v. State, 230 Ga. App. 155, 495 S.E.2d 634 (drug violation) (decided under former O.C.G.A. § 24-4-6); Johnson v. State, 245 Ga. App. 583, 538 S.E.2d 481, 2000 Ga. App. LEXIS 1015 (2000) (possession of cocaine) (decided under former O.C.G.A. § 24-4-6).

When the defendant drove a codefendant away from the crime scene in a subdivision after the codefendant shot the victim, to the extent that the evidence that the defendant's car had been parked at some point with the car's front end facing in the direction going out of the subdivision constituted circumstantial evidence of the defendant's guilt as a party, the evidence did not exclude every other reasonable hypothesis, as required by former O.C.G.A. § 24-4-6. Ratana v. State, 297 Ga. App. 747, 678 S.E.2d 193, 2009 Ga. App. LEXIS 534 (2009) (decided under former O.C.G.A. § 24-4-6).

Except as to one incident, the evidence was insufficient to show that a mother aided and abetted her husband's sexual abuse of their twin daughters when they were between four and eight years old, because the record showed that the mother had no knowledge of seven of the eight incidents until she took the children to therapy, and the prosecution's circumstantial evidence — including the fact of the family's nudist lifestyle, the existence of pornographic movies in the home, and the fact that during therapy, the mother advised the girls to not talk about their father — was insufficient to prove aiding and abetting beyond a reasonable doubt. Naylor v. State, 300 Ga. App. 401, 685

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S.E.2d 383, 2009 Ga. App. LEXIS 1184 (2009) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient to convict the defendant of misdemeanor fleeing or attempting to elude a police officer because a deputy identified the defendant as the driver; another officer followed the defendant out of the parking lot when the defendant refused to stop; and the officer activated the vehicle's lights and siren but lost sight of the speeding car moments before a car of the same color struck another vehicle just ahead; however, the evidence was insufficient to convict the defendant of felony fleeing or attempting to elude as no evidence was presented that the defendant was attempting to elude arrest for a non-traffic violation when the defendant struck the other vehicle. Johnson v. State, 337 Ga. App. 622, 788 S.E.2d 559, 2016 Ga. App. LEXIS 380 (2016).

Evidence insufficient for aggravated battery, aggravated assault, and firearm possession conviction. — Convictions of aggravated battery, O.C.G.A. § 16-5-24, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106, were not supported by sufficient evidence because, although the defendant's conduct before the crime was suspicious, the circumstantial evidence against the defendant was insufficient under O.C.G.A. § 24-4-6; the state did not show that the defendant was anywhere near the scene at the time of the shooting, did not present evidence connecting a weapon used in the shooting to the defendant, and, although a witness testified that three days before the shooting, the witness saw the defendant's brother hand the defendant a gun, the witness could not identify the type of gun involved, and this testimony did not connect the defendant with the shooting. The state also failed to adduce evidence that the defendant intentionally aided, abetted, or encouraged the commission of the crimes of which the defendant was convicted. Gresham v. State, 298 Ga. App. 136, 679 S.E.2d 344, 2009 Ga. App. LEXIS 510 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for malice murder, aggravated assault, and firearm possession convictions. — Evidence did not show that defendant intentionally or knowingly provided handguns to two cousins who used the guns to commit murder and other crimes, and because defendant was not present when the crimes were committed and the evidence did not exclude all possibilities except guilt, the state supreme court reversed defendant's convictions for malice murder, aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. Clyde v. State, 276 Ga. 839, 584 S.E.2d 253, 2003 Ga. LEXIS 625 (2003) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for aggravated assault. — Trial court did not err in convicting the defendant and the defendant's codefendant of aggravated assault because based on the circumstantial evidence, the jury was entitled to infer that the defendant and the codefendant accompanied their accomplice to a convenience store knowing that the accomplice intended to assault the victim because of their past differences, that the defendant had specifically served as the getaway driver, and that the codefendant had accompanied the accomplice inside the store as a lookout, making both individuals parties to the aggravated assault. Romero v. State, 307 Ga. App. 348, 705 S.E.2d 195, 2010 Ga. App. LEXIS 1027 (2010), cert. denied, No. S11C0642, 2011 Ga. LEXIS 634 (Ga. Sept. 6, 2011), cert. denied, No. S11C0627, 2011 Ga. LEXIS 650 (Ga. Sept. 6, 2011) (decided under former O.C.G.A. § 24-4-6).

3. Crimes Against Property

Evidence insufficient to show knowledge that car was unregistered. — Evidence that a defendant received and drove a car following the defendant's father's death was insufficient to prove a violation of O.C.G.A. § 40-6-15 because there was no evidence from which the jury could infer that the defendant knew that the car was not registered. Lawson v. State, 313 Ga. App. 751, 722 S.E.2d 446,

2012 Ga. App. LEXIS 71 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for armed robbery conviction. — Although defendant was convicted on circumstantial evidence, the conviction was properly supported by that evidence as the facts that were proven at trial were not only consistent with the hypothesis of guilt, but excluded every other reasonable hypothesis save that of the guilt of defendant since the defendant could not explain the presence of a distinctive boot print on the bathroom floor of the store defendant was accused of burglarizing, the presence of defendant's fingerprints on the bathroom wall seven feet off the ground, or defendant's fingerprints on a drink bottle in a space above the bathroom ceiling where defendant had hidden while defendant waited for the store to close so defendant could commit an armed robbery of the store. Lighten v. State, 259 Ga. App. 280, 576 S.E.2d 658, 2003 Ga. App. LEXIS 80 (2003) (decided under former O.C.G.A. § 24-4-6).

From the defendant's words, demeanor, companionship, and conduct before and after an armed robbery, a jury could have concluded beyond a reasonable doubt that the state established the requisite intent; the evidence authorized the jury to find that before an armed robbery, the defendant had planned to take money from a convenience store, the defendant's accomplice went into the store, took the money from the clerk at gunpoint, and then joined the defendant with the money, and that when the cohorts realized moments later that the police suspected the pair of the armed robbery, the defendant disobeyed police commands to stop, acted as the getaway driver in a high speed chase, and then tried to flee the police on foot. Espinosa v. State, 285 Ga. App. 69, 645 S.E.2d 529, 2007 Ga. App. LEXIS 160 (2007), cert. denied, No. S07C1281, 2007 Ga. LEXIS 760 (Ga. Oct. 9, 2007) (decided under former O.C.G.A. § 24-4-6).

Rational trier of fact was authorized to find the defendant guilty beyond a reasonable doubt of being a party to the crime of robbery in violation of O.C.G.A. §§ 16-2-20 and 16-8-40 because the defendant's admission that the defendant was present at the scene of the robbery, in conjunction with the defendant's possession of the recently stolen item, which the jury could find was unsatisfactorily explained by defendant, was sufficient to support the defendant's robbery conviction; the jury was entitled to reject the defendant's version of events because although the defendant contended that the defendant's videotaped police interview and defendant's trial testimony created a reasonable hypothesis of innocence, defendant's interview and trial testimony were not consistent with one another in all material respects, and defendant's statements also were inconsistent with the testimony of the pursuing patrol officers. Boggs v. State, 304 Ga. App. 698, 697 S.E.2d 843, 2010 Ga. App. LEXIS 599 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence of the circumstances was sufficient to establish the defendant's identity as the perpetrator and the defendant's guilt of armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106, because the defendant matched the description of the perpetrator given by both a convenience store clerk and another store employee; when the defendant was apprehended, an officer recovered next to the defendant's person the contraband and instrumentalities used in the commission of the robbery. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91, 2011 Ga. App. LEXIS 608 (2011) (decided under former O.C.G.A. § 24-4-6).

There was sufficient evidence to support the defendant's conviction for armed robbery as a party to a crime given evidence that the defendant drove the vehicle with three other occupants to the site of the robbery, that there were four black masks for the four men, that the defendant hid a shotgun and showed police where to find the shotgun, and that the defendant was found one street over from the robbery site and was the only person in the area. Clemente v. State, 331 Ga. App. 84, 769 S.E.2d 790, 2015 Ga. App. LEXIS 110 (2015).

Defendant's armed robbery conviction was not based on insufficient circumstantial evidence based on the fact that the victim could not identify the defendant as

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one of the men who robbed the victim because the state presented evidence that two men, one taller and one shorter, used handguns to take property from the victim, and within minutes the police located the defendant's vehicle, which matched the victim's description and contained the victim's stolen belongings as well as two handguns; and, when stopped, the defendant spontaneously stated that the defendant committed the crime. Demps v. State, 337 Ga. App. 657, 788 S.E.2d 525, 2016 Ga. App. LEXIS 382 (2016) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient to convict the defendant of armed robbery, aggravated assault, and possession of a firearm during the commission of a crime because, although it might be plausible that the defendant left a driver's license, wallet, and social security card in the girlfriend's car at some unknown time before the robbery took place, that hypothesis was not a reasonable one as it would mean that two strangers with no apparent relationship to the defendant's girlfriend somehow gained access to the girlfriend's car the night of the robbery, and then, right after robbing the store, they for some reason placed and received a flurry of phone calls and text messages to and from people close to the defendant's girlfriend. Drake v. State, 363 Ga. App. 653, 872 S.E.2d 306, 2022 Ga. App. LEXIS 191 (2022).

Evidence insufficient for armed robbery conviction. — Evidence was insufficient to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41(a) because the evidence supported two equally reasonable hypotheses, which did not meet the standard of former O.C.G.A. § 24-4-6; there was no direct evidence regarding where the victim was when the defendant entered the victim's kitchen, and there was no evidence, like signs of forced entry, from which the jury could have reasonably inferred that the victim heard and confronted the defendant before the defendant could take anything or that the victim usually kept the victim's wallet on the victim's person or in the victim's bedroom, which could support an inference that the defendant had to confront the victim before taking the wallet. Fox v. State, 289 Ga. 34, 709 S.E.2d 202, 2011 Ga. LEXIS 148 (2011) (decided under former O.C.G.A. § 24-4-6).

Defendant's armed robbery conviction had to be overturned because the evidence failed to establish that the victim's debit card was taken with force before or contemporaneous with the taking, and the evidence failed to establish whether the defendant first took the debit card and then killed the victim or whether the defendant killed the victim and then took the debit card; the evidence incriminating the defendant of armed robbery was wholly circumstantial, and both scenarios were equally reasonable. Johnson v. State, 288 Ga. 771, 707 S.E.2d 92, 2011 Ga. LEXIS 167 (2011) (decided under former O.C.G.A. § 24-4-6).

Several counts of the defendant's robbery and burglary convictions and one count of criminal attempt to commit armed robbery were reversed because the finding of the proceeds of some of the robberies at an apartment did not show that the defendant was in possession of the property taken and no witness testified connecting the defendant with some of the home invasions; thus, the evidence did not exclude the reasonable possibility that the defendant did not participate in some of the crimes. Cisneros v. State, 334 Ga. App. 659, 780 S.E.2d 360, 2015 Ga. App. LEXIS 703 (2015), aff'd, 299 Ga. 841, 792 S.E.2d 326, 2016 Ga. LEXIS 656 (2016).

Evidence sufficient for armed robbery and aggravated assault conviction. — When the testimonies of the victim, a doctor, and other witnesses were a sufficient indication under former O.C.G.A. § 24-4-6 of the severity of the blow to show that a bludgeon device was used as an offensive weapon, there was sufficient competent evidence to find defendant guilty of armed robbery and aggravated assault under O.C.G.A. §§ 16-5-21(a) and 16-8-41(a). Garrett v. State, 263 Ga. App. 310, 587 S.E.2d 794, 2003 Ga. App. LEXIS 1193 (2003) (decided under former O.C.G.A. § 24-4-6).

Ample evidence concerning the child victim's condition and expert testimony

regarding the child's condition was presented to authorize the jury to find defendant guilty of committing felony murder by holding the child in scalding water, and guilty of committing cruelty to a child by failing to provide medical attention, and to reject the evidence and hypotheses defendant presented in an attempt to refute the charges. Robles v. State, 277 Ga. 415, 589 S.E.2d 566, 2003 Ga. LEXIS 1018 (2003) (decided under former O.C.G.A. § 24-4-6).

Despite the defendant's claim of innocence, convictions for armed robbery and two counts of aggravated assault were upheld on appeal, given sufficient evidence showing that the defendant waited at the scene of the robbery and then assisted the codefendants in an attempted escape; hence, the defendant was not entitled to a directed verdict of acquittal and the state was not required to exclude every reasonable hypothesis except guilt as required by O.C.G.A. § 24-4-6. Jordan v. State, 281 Ga. App. 419, 636 S.E.2d 151, 2006 Ga. App. LEXIS 1128 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for shoplifting conviction. — Evidence was sufficient to support the defendant's convictions on three counts of shoplifting following eyewitness testimony that the defendant had concealed cologne bottles under the defendant's shirt at a drugstore and had walked out of a grocery store carrying items that had not been paid for supported two of the counts; also, testimony that video games had been taken from a video store without being purchased, and that the defendant had the games on the defendant's person about 20 minutes after leaving the video store and at the time of the defendant's apprehension for shoplifting at the drug store was sufficient circumstantial evidence to exclude every reasonable hypothesis of the defendant's innocence under former O.C.G.A. § 24-4-6. Crosby v. State, 287 Ga. App. 109, 650 S.E.2d 775, 2007 Ga. App. LEXIS 888 (2007) (decided under former O.C.G.A. § 24-4-6).

To the extent that a defendant's criminal intent to commit a shoplifting could only be shown by circumstantial evidence, based on the uncontroverted direct evidence that the defendant and the defendant's accomplice took a cart with merchandise into a restricted area, lied about their purpose of being in the area, surveyed various emergency exits from the store defendants were in, abandoned the merchandise when an emergency exit jammed, and lacked any means for paying for the merchandise, no reasonable hypothesis for the defendant's innocence existed that was consistent with the evidence. Alford v. State, 292 Ga. App. 514, 664 S.E.2d 870, 2008 Ga. App. LEXIS 800 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for criminal trespass conviction. — Because all the evidence was circumstantial as a defendant was not seen removing anything from the alleged victim's barn, the defendant's conviction for criminal trespass under O.C.G.A. § 16-7-21 was inappropriate pursuant to former O.C.G.A. § 24-4-6 because although the defendant was on the victim's property without permission, it was not proven that the defendant was there for a criminal purpose as the evidence indicated that the defendant was at the barn to drop off a saw that the defendant wanted to sell to the victim. Parker v. State, 297 Ga. App. 384, 677 S.E.2d 345, 2009 Ga. App. LEXIS 319 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for burglary conviction. — Because all the evidence was circumstantial as a defendant was not seen removing anything from the alleged victim's barn, the defendant's conviction for burglary was inappropriate pursuant to former O.C.G.A. § 24-4-6 as the evidence did not exclude the reasonable hypothesis that the defendant was only at the victim's barn to drop off a saw the defendant wanted to sell to the victim based on a telephone message left by the defendant for the victim and eyewitness testimony. Parker v. State, 297 Ga. App. 384, 677 S.E.2d 345, 2009 Ga. App. LEXIS 319 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to convict defendant of the burglary of two residences where defendant's shoe prints and tire tracks were found; both tire tracks and shoe prints connected defendant to these burglaries, and defendant was caught by

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the police wearing the same shoes and driving the same car while in the process of participating in the burglary of a third residence, located near the first two residences. Wise v. State, 325 Ga. App. 377, 752 S.E.2d 628, 2013 Ga. App. LEXIS 998 (2013) (decided under former O.C.G.A. § 24-4-6).

Burglary conviction. — Sufficient circumstantial evidence of defendant's intent supported defendant's burglary conviction as defendant admitted entering the victim's home, and the victim testified that medications and cash were missing from the victim's home after the incident and that no one else had been in the victim's home from the time that the victim last saw the items until the victim noticed the items missing; the trial court's comments as to defendant's intent referred to the trial court's reason for finding defendant not guilty of burglary with intent to commit rape, and did not go to defendant's burglary with intent to commit theft. Joyner v. State, 267 Ga. App. 309, 599 S.E.2d 286, 2004 Ga. App. LEXIS 631 (2004) (decided under former O.C.G.A. § 24-4-6).

Regarding defendants' convictions for burglary and theft by receiving stolen property, sufficient evidence authorized the jury's decision to reject one defendant's version of events — that defendants believed that the property involved belonged to an accomplice — because, with regard to one of the burglarized residences, the fact that defendants were unsuccessful in taking anything from the home was irrelevant to the burglary convictions since the crime was completed upon entry into the dwelling. As to the second residence, the fact that property from that residence was found in the vehicle in which defendants were in was sufficient to establish that the property had been stolen. Clark v. State, 289 Ga. App. 612, 658 S.E.2d 190, 2008 Ga. App. LEXIS 160 (2008) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence supported a defendant's conviction of burglarizing a garden center. On the morning the garden center burglary was discovered, the defendant was caught burglarizing a car dealership two doors down; gloves that fell from the defendant's pocket at the dealership came from the garden center; a shoe print on another glove from the center matched the defendant's boots; an investigator who drove by the area the previous evening testified that neither building showed signs of forced entry at that time; and the defendant stated that the defendant could have committed the garden center burglary but did not remember doing so. Johnson v. State, 291 Ga. App. 253, 661 S.E.2d 642, 2008 Ga. App. LEXIS 457 (2008) (decided under former O.C.G.A. § 24-4-6).

Defendant's burglary conviction in violation of O.C.G.A. § 16-7-1 was supported by sufficient evidence because the defendant entered the victim's house without permission and there was circumstantial evidence that the defendant intended to commit a theft therein since there was money in the house before the defendant entered, but the money was gone after the defendant left. Hall v. State, 294 Ga. App. 274, 668 S.E.2d 880, 2008 Ga. App. LEXIS 1165 (2008) (decided under former O.C.G.A. § 24-4-6).

Although circumstantial, the evidence was sufficient to support the defendant's conviction of burglary under O.C.G.A. § 16-7-1(a). The victim's stolen computer was discovered in the attic area between the victim's side of a duplex and the defendant's side, and an officer noticed a path in the insulation from the defendant's side to the victim's attic access door. Norful v. State, 296 Ga. App. 387, 674 S.E.2d 633, 2009 Ga. App. LEXIS 231 (2009) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in convicting the defendant of burglary in violation of O.C.G.A. § 16-7-1(a) because there was sufficient evidence from which the jury could conclude that the defendant entered the victim's apartment without permission when although the victim, who owned the apartment, did not testify at trial, the evidence was that the victim had changed the locks after the defendant moved out and that the defendant could no longer use the defendant's keys; on the day of the burglary, the defendant at-

tempted unsuccessfully to use the defendant's keys and then went around to the patio, climbed over the railing around the patio, and went, uninvited, into the apartment through the patio door. Ursulita v. State, 307 Ga. App. 735, 706 S.E.2d 123, 2011 Ga. App. LEXIS 64 (2011) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient under former O.C.G.A. § 24-4-6 for defendant's conviction of burglary because: (1) an investigating officer, who responded to a burglary alarm at a townhouse, found the defendant coming from the back of the townhouse; (2) the defendant said that the defendant had just put the defendant's dog away through the back door of the defendant's neighboring townhouse; (3) the defendant's shoe print was found outside the broken window of the townhouse with the alarm, and the defendant had a remote control in the defendant's pocket that operated a television set that had been unplugged and was put on the floor by the front door of the townhouse; and (4) the defendant's fingerprints were found on the television. Reggler v. State, 307 Ga. App. 721, 706 S.E.2d 111, 2011 Ga. App. LEXIS 60 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to convict a defendant of burglarizing a tool supply store because the defendant's blood was found on the smashed-in door and the defendant had two prior convictions for strikingly similar hardware store burglaries. Although the evidence was circumstantial, there was no other evidence of how the defendant's blood could have been at the scene. The trial court's definition of "entry" as entry on to real estate was not error or if error was not harmful, because the charge as a whole required that the defendant enter the building. Roberts v. State, 309 Ga. App. 681, 710 S.E.2d 878, 2011 Ga. App. LEXIS 428 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to convict a defendant of burglary in violation of O.C.G.A. § 16-7-1(a) because the defendant was caught within four minutes of the burglary in a truck matching the victims' description of the truck outside their home, and the defendant was carrying a crowbar, had the victims' television, and fled from police. Veasley v. State, 312 Ga. App. 728, 719 S.E.2d 585, 2011 Ga. App. LEXIS 1031 (2011) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence that a cigarette butt with the defendant's DNA on the butt was found in a burglary victim's home, that the defendant was seen standing in a neighbor's yard, that the defendant was wet and muddy, and that some of the stolen items were also wet and near a creek near the victim's home was sufficient to support the defendant's burglary conviction. Stokes v. State, 327 Ga. App. 511, 759 S.E.2d 585, 2014 Ga. App. LEXIS 375 (2014).

Although circumstantial, the evidence was sufficient to convict the defendant of burglary because the blood pools and drag marks found at the crime scene indicated that the victims were shot before being dragged inside their home, and the medical examiner testified to the absence of soot in one of the victim's lungs showing that that victim was not breathing during the fire; thus, the jury could reasonably infer that the defendant entered the home without the victims' consent and that the defendant did so with the intention of committing the felony of arson once inside. Saffold v. State, 298 Ga. 643, 784 S.E.2d 365, 2016 Ga. LEXIS 236 (2016) (decided under former O.C.G.A. § 24-4-6).

Defendant's convictions for burglary and smash and grab burglary under O.C.G.A. §§ 16-7-1(c) and 16-7-2(b) were supported by circumstantial evidence, including cell phone evidence that the defendant was near the scenes of the two burglaries and DNA evidence from a cigarette butt found in a very similar burglary days after the charged crimes. Nations v. State, 345 Ga. App. 92, 812 S.E.2d 346, 2018 Ga. App. LEXIS 176 (2018).

Burglary and aggravated assault. — Defendant's convictions of aggravated assault, O.C.G.A. § 16-5-21, and burglary, O.C.G.A. § 16-7-1, were affirmed as there was sufficient circumstantial evidence under former O.C.G.A. § 24-4-6 to prove that the defendant was the person who committed the acts in question, based on witness testimony and the discovery of clothes and a gun used in the robbery in the defendant's room. Moore v. State, 277

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Ga. App. 474, 627 S.E.2d 107, 2006 Ga. App. LEXIS 129 (2006) (decided under former O.C.G.A. § 24-4-6).

Possession of stolen goods may authorize conviction. — Fact that stolen goods were in defendant's possession shortly after commission of the burglary would, in and of itself, authorize the jury to infer that defendant was guilty, unless the defendant explained satisfactorily the defendant's possession of such stolen goods. McGee v. State, 159 Ga. App. 763, 285 S.E.2d 224, 1981 Ga. App. LEXIS 2797 (1981) (decided under former O.C.G.A. § 24-4-6).

Robbery. — When a defendant was arrested for one robbery, but connected to three prior robberies by witnesses who identified the mask taken from the defendant's car as being the mask worn in the three prior robberies, and other similarities were shown between the methods used in all of the robberies, there was more than sufficient evidence to convict the defendant. Gamble v. State, 194 Ga. App. 765, 391 S.E.2d 801, 1990 Ga. App. LEXIS 324 (1990) (decided under former O.C.G.A. § 24-4-6).

When the defendant jumped out of defendant's vehicle and began running away upon the approach of officers, narcotics were found in the immediate area of defendant's residence, the defendant was in possession of large amounts of money in small denominations, and no other persons were present in the area, there was more than sufficient evidence to convict the defendant. Jones v. State, 208 Ga. App. 559, 430 S.E.2d 877, 1993 Ga. App. LEXIS 632 (1993) (decided under former O.C.G.A. § 24-4-6).

Even though the evidence that defendant forcibly entered the elderly victims' home, attacked and robbed the victims, inflicted fatal injuries, then later sold or attempted to sell items stolen from the victims, along with similar transaction evidence that defendant was involved in a pattern of conduct of forcing defendant's way into the homes of elderly victims, attacking the victims, and then stealing items from them to trade for crack cocaine, was largely circumstantial, the largely circumstantial evidence was sufficient for the jury to exclude every reasonable hypothesis except defendant's guilt of the armed robbery and murder of the victims. Weston v. State, 276 Ga. 680, 580 S.E.2d 204, 2003 Ga. LEXIS 359 (2003) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for robbery by sudden snatching conviction. — Although the victim never saw the defendant with the wallet, there was sufficient evidence to show that at the moment the defendant's companion darted in front of the victim's cart distracting the victim's attention, the defendant snatched the wallet from the victim's purse; despite the victim's detection of the defendant's efforts, nothing more was needed to prove the elements of the crime of robbery by sudden snatching. Andrews v. State, 270 Ga. App. 362, 606 S.E.2d 587, 2004 Ga. App. LEXIS 1436 (2004) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession of tools for commission of crime conviction. — Items stolen from victims' vehicles found in the defendant's car, stopped as the vehicle left the area of the thefts were sufficient to sustain convictions of entering an auto with the intent to commit theft, O.C.G.A. § 16-8-18; however, as there was no similar testimony as to items stolen from different victims, insufficient evidence supported other convictions, because the defendant's presence at the scene of the crime, without any other direct evidence, was insufficient to convict the defendant of the crimes that a passenger admitted to committing. Along with the stolen items found in the defendant's vehicle, and the defendant's presence at the crime scene where cars were broken into with the kind of tools found in the defendant's vehicle, the evidence was sufficient to sustain a conviction for possession of tools for the commission of a crime. Walker v. State, 281 Ga. App. 94, 635 S.E.2d 577, 2006 Ga. App. LEXIS 1014 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for armed robbery, burglary, and possession of a firearm conviction. — After two intruders burglarized and robbed a home at gunpoint, a pickup truck near the home

fled from a patrol car and crashed, then two people matching the victims' description of the intruders fled from the truck. Since the defendant was trapped behind the steering wheel, and the items stolen from the home and a handgun were found in the truck, the circumstantial evidence was sufficient to convict the defendant as a party to armed robbery, burglary, and possession of a firearm during the commission of a burglary. Olds v. State, 293 Ga. App. 884, 668 S.E.2d 485, 2008 Ga. App. LEXIS 1089 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence held sufficient to support conviction for arson. — Given evidence of defendant's serious altercation with a woman-resident of the subject arson house prior to the house's burning, defendant's identification at and around the premises minutes prior to, and after the fire, and other circumstantial indicia of motive, opportunity, and inconsistency, the evidence, though wholly circumstantial, was sufficient to sustain a conviction for arson. Jenkins v. State, 207 Ga. App. 500, 428 S.E.2d 410, 1993 Ga. App. LEXIS 224 (1993) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence presented at trial: that the defendant and the defendant's family were to leave a house they bought for failure to make payments, that the defendant was upset about the fact that the defendant was not going to receive the return of the earnest money, that defendant was alone in the house at the time of the fire, and that defendant appeared nervous was sufficient to convict defendant of arson. Burchette v. State, 260 Ga. App. 739, 580 S.E.2d 609, 2003 Ga. App. LEXIS 405 (2003), cert. denied, No. S03C1195, 2003 Ga. LEXIS 772 (Ga. Sept. 8, 2003), aff'd, 278 Ga. 1, 596 S.E.2d 162, 2004 Ga. LEXIS 332 (2004) (decided under former O.C.G.A. § 24-4-6).

Jury was authorized to find defendant guilty of arson even though the evidence was circumstantial as the proven facts were consistent with the hypothesis of guilt and excluded every other reasonable hypothesis other than defendant's guilt as defendant's burning of three trucks using gasoline at a truck-driving school where defendant failed truck-driving courses, defendant's presence at a gas station around the time of the fire, and defendant's admission that defendant burned the trucks because an instructor "burned" defendant, meant defendant's conviction was supportable as a matter of law. Denson v. State, 259 Ga. App. 342, 577 S.E.2d 29, 2003 Ga. App. LEXIS 104 (2003) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for arson conviction. — Conviction of first degree arson, O.C.G.A. § 16-7-60(a)(2), was not supported by sufficient evidence since there was no showing that a truck allegedly burned by the defendant was designed for use as a dwelling, and there was no showing of a lack of consent to the burning by the lienholder on the truck or by the joint owner, the defendant's wife; neither the wife's insurance claim form stating that she did not procure the loss, nor an insurance payment to the lienholder showed the required lack of consent, and there was no evidence in the entirely circumstantial case from which a jury could have excluded the very reasonable alternate hypothesis that the lien holder consented to the fire so as to recover the insurance proceeds for payment on a loan owed by a financially-troubled debtor, the defendant. Prater v. State, 279 Ga. App. 527, 631 S.E.2d 746, 2006 Ga. App. LEXIS 625 (2006) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence for theft of motor vehicle. — Although circumstantial, the evidence was sufficient to convict the defendant of theft of a motor vehicle because the victims' missing vehicle was found with one of the victim's blood on it and abandoned on railroad tracks near where the defendant's girlfriend picked the defendant up on the night of the murders. Saffold v. State, 298 Ga. 643, 784 S.E.2d 365, 2016 Ga. LEXIS 236 (2016) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient to support conviction of credit card fraud. — Jury was authorized to find that the defendant acted with guilty knowledge and intent to commit credit card theft in violation of O.C.G.A. § 16-9-31(a)(1) because the evidence established that the defendant obtained unauthorized possession of the vic-

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tim's credit card, and there was circumstantial evidence from which an inference could be drawn that the defendant had knowledge that the defendant was accepting the credit card without authority and as part of an unlawful scheme; when the defendant was confronted by police officers, the defendant fled, and the defendant maintained unauthorized possession of a different credit card, along with additional items that could be used to engage in fraudulent credit transactions. Amaechi v. State, 306 Ga. App. 333, 702 S.E.2d 680, 2010 Ga. App. LEXIS 937 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for burglary convictions. — Circumstantial evidence of the burglary was sufficient to exclude every other reasonable hypothesis save defendants' guilt as was required by former O.C.G.A. § 24-4-6 since defendants were seen at the burglarized property at the time that the burglary occurred, defendants fled the scene, and one of the defendants gave the police inconsistent stories as to what defendants were doing on the property. Bollinger v. State, 259 Ga. App. 102, 576 S.E.2d 80, 2003 Ga. App. LEXIS 26 (2003) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence supported defendant's burglary conviction because: (1) defendant drove a truck that exactly matched the truck in the surveillance tape; (2) defendant had a board in defendant's truck with glass particles embedded in the board that were of the same thickness and physical chemical properties as the glass of the window that was broken during the crime; (3) a sweater cap and white gloves found in the truck appeared to match those worn by the perpetrator in the surveillance tape; and (4) the stolen television and videocassette recorder were found approximately 500 yards from the defendant's mother's home. Brooks v. State, 273 Ga. App. 691, 615 S.E.2d 829, 2005 Ga. App. LEXIS 607 (2005), overruled in part, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56, 2007 Ga. LEXIS 182 (2007), overruled in part, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient for the factfinder to determine beyond a reasonable doubt that the defendant juvenile committed burglary in violation of O.C.G.A. § 16-7-1(a) and possession of a weapon during the commission of a crime in violation of O.C.G.A. § 16-11-106(b)(2) because the defendant was in the vicinity of the victim's apartment shortly after the burglary, wearing a jacket that matched the victim's description of the jacket worn by the perpetrator, carrying a loaded pistol, and wearing shoes that matched the tread pattern and size of the muddy footprints found in the victim's apartment. In the Interest of J.D., 305 Ga. App. 519, 699 S.E.2d 827, 2010 Ga. App. LEXIS 743 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for robbery convictions. — There was sufficient evidence of defendant's intent to participate in the robbery of a delivery man since the evidence showed that defendant was privy to the robbery plan, participated in the robbery, and convened with the codefendants after the robbery. In the Interest of C.L.B., 267 Ga. App. 456, 600 S.E.2d 407, 2004 Ga. App. LEXIS 684 (2004) (decided under former O.C.G.A. § 24-4-6).

Denial of defendant's motion for a new trial was affirmed as defendant's fingerprint was on the robbery note, the victim eliminated all but the defendant's and one other's photos from a photo lineup, the victim's description matched the defendant's appearance, and the victim in a similar robbery positively identified the defendant as the robber; a defense witness's testimony that the witness saw defendant playing with cards in the hotel lobby a few days before the robbery did not exonerate the defendant as the witness did not see the defendant playing with cards similar to the one on which the robbery note was written. Dailey v. State, 271 Ga. App. 492, 610 S.E.2d 126, 2005 Ga. App. LEXIS 83 (2005) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for criminal attempt to commit armed robbery. — Jury was authorized to conclude that the evidence excluded every reasonable hy-

pothesis except the defendant's guilt of criminal attempt to commit armed robbery because the defendant surreptitiously watched others at a fast food restaurant, wore a mask, and drew a BB handgun that resembled a semi-automatic weapon when the defendant was confronted by a police officer. New v. State, 270 Ga. App. 341, 606 S.E.2d 865, 2004 Ga. App. LEXIS 1421 (2004) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for financial identity fraud. — Because the state's evidence failed to demonstrate that the defendant accessed the resources of another by using identifying information to procure a cell phone, and a service contract for the cell phone, and failed to establish that defendant either knew that a store clerk: (1) could not issue a phone without accessing the resources of a specific individual; (2) would need to use the identifying information of that individual to access such resources; or (3) in fact used such identifying information to access the resources of another for the purpose of providing defendant with a cell phone, the evidence was insufficient to sustain the defendant's conviction of financial identity fraud. Jones v. State, 285 Ga. App. 822, 648 S.E.2d 133, 2007 Ga. App. LEXIS 657 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for theft by taking conviction. — Evidence did not support the finding that a juvenile defendant committed theft by taking. Although there was circumstantial evidence that the defendant had a key to the home from which items were taken and had been in and out of the home at the time of the theft, the defendant testified that the defendant had left the door unlocked and returned to the home to find the home ransacked; the circumstantial evidence supported the defendant's version of the facts as well as the state's and thus did not warrant a finding of guilt under former O.C.G.A. § 24-4-6. In the Interest of M.H., 288 Ga. App. 663, 655 S.E.2d 249, 2007 Ga. App. LEXIS 1268 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for theft by receiving stolen property. — Juvenile court erred by adjudicating the defendant juvenile delinquent for violating O.C.G.A. § 16-8-7(a) by committing theft by receiving a stolen motorcycle because the evidence did not support the finding that the defendant should have known that the motorcycle was stolen; the defendant's testimony permitted an inference that only after learning of the theft did the defendant realize that the motorcycle was stolen, the defendant rode the motorcycle on the street in front of the victim's house, and there was no evidence that the defendant tried to conceal the motorcycle; absent evidence of the real value of the motorcycle at the time of the theft, the evidence did not support a finding that the price the defendant offered to pay for the motorcycle was grossly disproportionate to the value. In re J. L., 306 Ga. App. 89, 701 S.E.2d 564, 2010 Ga. App. LEXIS 869 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for theft by taking conviction. — Circumstantial evidence was sufficient to authorize the jury to exclude every reasonable hypothesis except that the defendant was guilty of theft by taking because an ATM was removed from a bank's property without authorization, defendant's vehicle was observed at the bank approximately two hours before the theft was reported and shortly after the alarm was activated; tire tracks at the scene matched the tire prints on the defendant's vehicle, the vehicle had a tow strap with a large metal hook tied to it, scrape marks consistent with a heavy object being drug on the pavement led from the ATM's location in the direction of a nearby grassy lot, where the ATM was later found, and the defendant possessed black electrical tape and gloves upon the defendant's arrest; the jury was authorized to consider the defendant's flight from the scene and police as circumstantial evidence of the defendant's guilt. Tauch v. State, 305 Ga. App. 643, 700 S.E.2d 645, 2010 Ga. App. LEXIS 778 (2010) (decided under former O.C.G.A. § 24-4-6).

Rational trier of fact was authorized to find that the evidence was sufficient to exclude every reasonable hypothesis except that of the defendant's guilt and to conclude beyond a reasonable doubt that

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the defendant was guilty of theft by taking, O.C.G.A. § 16-8-2, because there was evidence that the defendant was alone for 20 minutes or more on the floor of the house where the money was kept and where no cleaning was to be performed; while there was circumstantial evidence that also implicated another house cleaner, reasonable jurors could have found from the evidence that the hypothesis that the house cleaner took the money was excluded based on testimony that the defendant had been alone in the area of the house where the money was kept, and there was no such evidence regarding the house cleaner. Cookston v. State, 309 Ga. App. 708, 710 S.E.2d 900, 2011 Ga. App. LEXIS 434 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence that a defendant showed an interest in a car that was for sale and took a test drive and returned the car, that the car was stolen the next day, that the defendant was found driving the car hours after the car was stolen using a duplicate key, and that the defendant fled from an officer was sufficient to authorize the defendant's conviction for theft by taking (automobile) in violation of O.C.G.A. § 16-8-2(a). Kelly v. State, 313 Ga. App. 582, 722 S.E.2d 175, 2012 Ga. App. LEXIS 27 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for theft by receiving property conviction. — Circumstantial evidence of a larcenous taking was insufficient to sustain defendant's conviction for theft by receiving beyond a reasonable doubt because the officer's testimony that radio dispatch identified the pistol as stolen was non-probative hearsay and the fact that the weapon was labeled for law enforcement use only and loaded with police-issue ammunition did not exclude the possibility that the weapon may have been given away or sold "on the black market" in violation of the warning. Lopez v. State, 259 Ga. App. 720, 578 S.E.2d 304, 2003 Ga. App. LEXIS 257 (2003), cert. denied, No. S03C0933, 2003 Ga. LEXIS 583 (Ga. June 2, 2003) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for weapons conviction. — Circumstantial evidence was insufficient under former O.C.G.A. § 24-4-6 to prove that defendant had constructive possession of a gun found in a car in which defendant was riding as a passenger or to support defendant's convictions for carrying a concealed weapon under O.C.G.A. § 16-11-126(a) or possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131(b) since: (1) the car was stopped for a traffic offense, and was searched, revealing the gun; (2) all of the occupants in the car denied possessing the gun; (3) the gun was found under a seat where defendant had been sitting; (4) the arresting officers did not see defendant bend over or appear to put anything under the seat; and (5) because defendant was only a passenger in a car that defendant did not own or control, there was no presumption that defendant possessed the gun. Wofford v. State, 262 Ga. App. 291, 585 S.E.2d 207, 2003 Ga. App. LEXIS 887 (2003) (decided under former O.C.G.A. § 24-4-6).

4. Drug Crimes

Evidence sufficient for DUI conviction. — When evidence of defendant's intoxication may have been circumstantial in nature, but the defense put up no evidence of a reasonable alternative hypothesis, and the arguments that were offered by the defense were rejected by the jury, the evidence was sufficient to find that defendant was intoxicated so as to support a DUI conviction. Green v. State, 244 Ga. App. 565, 536 S.E.2d 240, 2000 Ga. App. LEXIS 786 (2000) (decided under former O.C.G.A. § 24-4-6).

Sufficient circumstantial evidence existed to support the defendant's convictions given that: (1) the defendant admitted to drinking and driving the vehicle that an officer testified to as having a warm engine; (2) the defendant had slurred speech, bloodshot eyes, and swaying movements; and (3) the surrounding circumstances helped to show that the defendant had been drinking and driving recently enough to satisfy the three-hour requirement under O.C.G.A. § 40-6-391(a)(5). O'Connell v. State, 285 Ga. App. 835, 648 S.E.2d 147, 2007 Ga. App. LEXIS

652 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for marijuana conviction. — Evidence was sufficient to authorize the defendant's conviction for possessing more than one ounce of marijuana because the defendant was presumed to have exclusive possession and control of the marijuana that a police officer found in the car the defendant was driving; as the factfinder, the jury was entitled to reject the testimony of the defendant's friend that the marijuana was the friend's and to determine that the presumption of the defendant's possession of the marijuana had not been rebutted. Nix v. State, 312 Ga. App. 43, 717 S.E.2d 550, 2011 Ga. App. LEXIS 880 (2011) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in convicting the defendants of felony possession of more than one ounce of marijuana in violation of O.C.G.A. § 16-13-30(j)(1) because the trial court was authorized to conclude that the defendants had equal access to and joint constructive possession of the marijuana that was found in a minivan and that the defendants participated as parties to the drug possession offense; the defendants, who were passengers in the back of the minivan, knew that marijuana was inside the minivan, and the driver informed an officer that the passengers were hiding marijuana inside the minivan. Dennis v. State, 313 Ga. App. 595, 722 S.E.2d 190, 2012 Ga. App. LEXIS 31 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession with intent to distribute. — Evidence of a defendant's unusual behavior in lifting up and kneeling next to the only doghouse in a dog pen that concealed contraband, the defendant's attempt to hide in the bushes when law enforcement officers arrived, and the defendant's previous history of selling drugs to passers-by from the same property, provided sufficient evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that the defendant had knowledge of the presence of the contraband, access to it, and the power and intention to exercise control over it. Price v. State, 303 Ga. App. 859, 694 S.E.2d 712, 2010 Ga. App. LEXIS 377 (2010), cert. dismissed, No. S10C1470, 2010 Ga. LEXIS 743 (Ga. Oct. 4, 2010) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to establish the defendant's conviction for possession of marijuana with intent to distribute in violation of O.C.G.A. § 16-13-30(j)(1) because during the execution of a search warrant at the defendant's residence, police officers seized eighteen baggies of marijuana individually packaged in a manner that was indicative of possession with intent to distribute, and the residence belonged to the defendant, which permitted an inference that the defendant controlled the premises and was in constructive possession of the drug contraband; the circumstantial evidence implied the defendant's consciousness of guilt and further supported the defendant's conviction because when the officers approached the residence, the defendant fled inside to the closet area where the drugs were later located, and when the officers searched the closet, the officers discovered that the jacket the defendant had been wearing was placed over the box containing the drugs. Williams v. State, 303 Ga. App. 222, 692 S.E.2d 820, 2010 Ga. App. LEXIS 321 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to support the defendant's conviction for possession with intent to distribute marijuana because the defendant was in possession of clear, plastic baggies, smaller baggies of suspected marijuana, a digital scale, and cash, and a police officer testified that in the officer's capacity as a marijuana tester for the county sheriff's office, the officer tested a total of 11 bags, containing approximately 190 grams of a substance that tested positive for marijuana; possession of a scale, baggies, and large amounts of currency along with drugs can constitute circumstantial evidence of intent to distribute. Hardaway v. State, 309 Ga. App. 432, 710 S.E.2d 634, 2011 Ga. App. LEXIS 353 (2011) (decided under former O.C.G.A. § 24-4-6).

Appellate court refused to disturb the jury's verdict convicting defendant of possession of drugs with the intent to distribute because after hearing the evidence

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and having the opportunity to judge the credibility of the witnesses, the jury properly concluded that the only reasonable hypothesis was that defendant possessed the drugs found hidden in the kitchen, despite defendant's argument that others had equal access. King v. State, 325 Ga. App. 777, 755 S.E.2d 22, 2014 Ga. App. LEXIS 74 (2014).

Although circumstantial, evidence of the defendant's behavior in attempting to obtain the package including questioning the recipient about whether the recipient contacted police and opened the package, use of a false name to conceal identity, and prior convictions for conspiracy to sell marijuana and possession of cocaine was sufficient for a jury to conclude that the defendant had knowledge of the presence of the marijuana in the package and the power and intent to control the package. Murray v. State, 335 Ga. App. 634, 782 S.E.2d 694, 2016 Ga. App. LEXIS 45 (2016), cert. denied, No. S16C0916, 2016 Ga. LEXIS 435 (Ga. June 20, 2016) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient to show substance cocaine. — Trial court did not err in revoking probation on the ground that the probationer committed the felony offense of possession of cocaine with intent to distribute because the trial court did not manifestly abuse the court's discretion when the court found by a preponderance of the evidence that the substance found in the car in which the probationer was riding was cocaine; in addition to an officer's opinion on the identity of the substance, the record contained other circumstantial evidence indicating that the substance was cocaine, and the circumstantial evidence of the substance's identity was not offered to convict the probationer of possession of cocaine, but was offered to show that the probationer had violated a term of probation and, as such, was subject to a different standard of proof. Thurmond v. State, 304 Ga. App. 587, 696 S.E.2d 516, 2010 Ga. App. LEXIS 582 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient to convict defendant of possession of cocaine with intent to distribute. — There was insufficient evidence of intent to convict the defendant of possession of cocaine with intent to distribute under O.C.G.A. § 16-13-30 as there was no evidence that the cocaine had been divided and packaged for individual sale or as to a personal use quantity; thus, the circumstantial evidence did not permit a rational trier to exclude the reasonable hypothesis, pursuant to former O.C.G.A. § 24-4-6, that the defendant intended to use the cocaine. Florence v. State, 282 Ga. App. 31, 637 S.E.2d 779, 2006 Ga. App. LEXIS 1306 (2006) (decided under former O.C.G.A. § 24-4-6).

While the evidence was sufficient to convict the defendant of possession of cocaine found in a pill bottle in the defendant's vehicle, it was insufficient to prove that the defendant intended to distribute the cocaine under O.C.G.A. § 16-13-30(b) because the state produced no evidence that the defendant had scales, cutting implements, weapons, a large amount of cash, a customer list, or drug packaging materials; there was no evidence of prior convictions of drug possession with intent to distribute, no testimony that the defendant was seen selling or trying to sell drugs, no expert testimony that the amount of drugs seized was inconsistent with personal use, and no evidence as to the amount of cocaine seized. Under former O.C.G.A. § 24-4-6, storing drugs in a pill bottle, and possessing an unidentified number of sales-size pieces of the drug, without more, equally supported the hypothesis that the person found with the drugs was a user rather than a dealer. Hicks v. State, 293 Ga. App. 830, 668 S.E.2d 474, 2008 Ga. App. LEXIS 1226 (2008) (decided under former O.C.G.A. § 24-4-6).

Codefendant's convictions for possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), and possession with intent to distribute a controlled substance within 1,000 feet of a housing project, O.C.G.A. § 16-13-32.5(b), was unsupportable as a matter of law, and the trial court erred by denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence and the reasonable inferences derived therefrom were insufficient to connect the code-

fendant to the cocaine, which was found in an upstairs bedroom occupied by the codefendants; no evidence was introduced to show that the codefendant resided in the apartment where the cocaine was found, which could authorize an inference that the codefendant possessed the property therein. Jackson v. State, 306 Ga. App. 33, 701 S.E.2d 481, 2010 Ga. App. LEXIS 737 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession of dangerous drugs conviction. — Jury was authorized to conclude that the defendant intended to possess a dangerous drug in violation of the Dangerous Drug Act, O.C.G.A. § 16-13-72, even if the defendant was subjectively unaware of the precise chemical compound in the bottle and its regulated nature because there was evidence supporting an inference that the defendant used a dangerous drug to sedate the defendant's sexual battery victim, and that conduct demonstrated the defendant's knowledge of the harmful effect of the compound; the term "dangerous drug" was defined to include alkyl nitrite, which was the compound the defendant possessed. Serna v. State, 308 Ga. App. 518, 707 S.E.2d 904, 2011 Ga. App. LEXIS 222 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession of drugs. — If the totality of the evidence was sufficient to connect defendant to possession of drugs, even though there was evidence to authorize a contrary finding, the conviction would be sustained. Blair v. State, 216 Ga. App. 545, 455 S.E.2d 97, 1995 Ga. App. LEXIS 214 (1995) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for cocaine possession and possession with intent to distribute conviction. — Defendant's convictions for possessing 28 grams or more of cocaine, possessing cocaine with intent to distribute, and possession of a firearm during the commission of a felony were upheld on appeal as sufficient evidence was presented via the direct testimony of the defendant's live-in girlfriend, which when combined with the evidence showing their joint constructive possession of the drugs and gun tended to connect and identify the defendant with the crimes charged. Allen v. State, 286 Ga. App. 469, 649 S.E.2d 583, 2007 Ga. App. LEXIS 810 (2007) (decided under former O.C.G.A. § 24-4-6).

Given an alternative school's security officer's actual observation of a hand-to-hand exchange from a juvenile to another student at the school and the discovery of marijuana in the recipient's hand immediately thereafter, the only reasonable hypothesis was that the juvenile had just possessed the marijuana satisfying former O.C.G.A. § 24-4-6. In the Interest of T. M., 303 Ga. App. 322, 693 S.E.2d 574, 2010 Ga. App. LEXIS 351 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for methamphetamine possession conviction. — An officer found methamphetamine in a portion of a truck where the defendant kept personal belongings; the defendant was the sole occupant of the vehicle. The defendant's testimony denying possession of the drugs and stating that others had equal access to the truck did not establish under former O.C.G.A. § 24-4-6 that the circumstantial evidence was insufficient to convict the defendant of possession of methamphetamine. Bryson v. State, 293 Ga. App. 392, 667 S.E.2d 170, 2008 Ga. App. LEXIS 946 (2008) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal after a jury found the defendant guilty of possession of methamphetamine because the totality of the evidence, although circumstantial, was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt and to reject as speculative and unreasonable the hypothesis that someone else discarded the drugs in a patrol car; the defendant possessed a homemade smoking pipe containing methamphetamine residue, there was similar transaction evidence, and the patrol officer testified that the officer had exclusive control of the officer's patrol car, the officer stayed with the officer's car whenever the car was serviced by third parties, the officer searched the backseat immediately after the defendant exited from the car, and the officer discovered the drugs directly up under the seat where the defendant had

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been sitting. Taylor v. State, 305 Ga. App. 748, 700 S.E.2d 841, 2010 Ga. App. LEXIS 807 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence supporting the defendant's conviction for methamphetamine possession was sufficient because the presumption of possession and control attached since the state presented evidence that the defendant was the sole resident of the house present during the execution of the search warrant when the methamphetamine was found in a common area of the house; the presumption of possession was not the sole evidence connecting the defendant to the crime of possession because the arresting officer testified that the defendant exhibited clear signs of methamphetamine intoxication. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871, 2010 Ga. App. LEXIS 809 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient to support conviction of trafficking in methamphetamine. — Trial court did not err in convicting the defendant of trafficking in methamphetamine because the evidence sufficed to sustain the conviction, and the jury was authorized to conclude that the circumstances excluded the hypothesis that another passenger had placed drugs in the bed of a truck; the passenger testified at trial that the passenger did not place the drugs in the truck bed, and a police officer testified that the passenger, whom the officer had in sight the entire time, never came within five-to-six feet of the truck and that the officer not only saw the defendant place the defendant's arm in the truck bed but heard an accompanying thump. Haggard v. State, 302 Ga. App. 502, 690 S.E.2d 651, 2010 Ga. App. LEXIS 57 (2010) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in denying a codefendant's motion for a directed verdict on the charge of trafficking in methamphetamine because based upon the circumstantial evidence presented, the jury was authorized to find that the codefendant was in joint constructive possession of the methamphetamine with the defendant, which was located at the kitchen table where the defendant had been sitting; the defendant lived at the residence with the codefendant, the defendant was present at the time of a controlled buy, and the defendant had access to the drugs that were seized from the kitchen table. Fyfe v. State, 305 Ga. App. 322, 699 S.E.2d 546, 2010 Ga. App. LEXIS 628 (2010), cert. denied, No. S10C1942, 2011 Ga. LEXIS 229 (Ga. Feb. 28, 2011), overruled in part, McNair v. State, 293 Ga. 282, 745 S.E.2d 646, 2013 Ga. LEXIS 594 (2013), overruled in part, Maddox v. State, 322 Ga. App. 811, 746 S.E.2d 280, 2013 Ga. App. LEXIS 617 (2013) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in convicting the defendant of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(f)(1) because given the evidence, the jury was authorized under former O.C.G.A. § 24-4-6 to find that the defendant was guilty beyond a reasonable doubt as either the actual perpetrator or as a party to the crime of the offense of trafficking in methamphetamine as charged in the indictment; officers executing a search warrant for a house discovered the defendant on a couch with a codefendant and baggies of methamphetamine. Hughes v. State, 309 Ga. App. 150, 709 S.E.2d 900, 2011 Ga. App. LEXIS 325 (2011) (decided under former O.C.G.A. § 24-4-6).

Others having access to drugs. — Evidence that cocaine was found hidden on the outside of defendant's mobile home, which was parked in an area to which a large number of persons, not only visitors to the unit occupied by defendant but anyone having business in the mobile home park had potential access was insufficient to sustain defendant's conviction for possession of cocaine. Prescott v. State, 164 Ga. App. 671, 297 S.E.2d 362, 1982 Ga. App. LEXIS 3340 (1982) (decided under former O.C.G.A. § 24-4-6).

Trial court erred in denying the defendant's motion for new trial after a jury found the defendant guilty of possession of more than one ounce of marijuana in violation of O.C.G.A. § 16-13-30(j) because the evidence adduced at trial was insufficient to show that the defendant was in sole constructive possession of the

contraband when the defendant alone was charged with possessing the marijuana although the passenger in his car had equal access to it, and the only legal evidence linking the defendant to the marijuana in the back seat was his spatial proximity to it; an officer's testimony concerning scales that were found in the car, to the extent it suggested some deception on the passenger's part, that deception did not give rise to the sole, reasonable inference that defendant was in sole constructive possession of the marijuana, and because the inference did not exclude every other reasonable hypothesis save the guilt of defendant, it was insufficient to prove beyond a reasonable doubt that he was in sole constructive possession of the marijuana. Rogers v. State, 302 Ga. App. 65, 690 S.E.2d 437, 2010 Ga. App. LEXIS 47 (2010), overruled in part, Maddox v. State, 322 Ga. App. 811, 746 S.E.2d 280, 2013 Ga. App. LEXIS 617 (2013) (decided under former O.C.G.A. § 24-4-6).

Mere presence of contraband on premises occupied by an accused is insufficient to sustain a conviction when there is also evidence of access by others. Shockley v. State, 166 Ga. App. 182, 303 S.E.2d 519, 1983 Ga. App. LEXIS 2092 (1983) (decided under former O.C.G.A. § 24-4-6).

Acquaintance, proximity, and dress insufficient for drug conviction. — Fact that defendant knew a momentarily detained drug suspect, had been seen associating with the suspect in the past, and was dressed in a fashion not uncommon to drug vendors was insufficient circumstantial evidence to establish beyond a reasonable doubt that defendant had joint constructive possession over controlled substances found in a nearby cache. Brooks v. State, 206 Ga. App. 485, 425 S.E.2d 911, 1992 Ga. App. LEXIS 1683 (1992) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession of cocaine conviction. — Trial court did not err in convicting the defendant of possession of cocaine with the intent to distribute, O.C.G.A. § 16-13-30(b), and possession of marijuana, O.C.G.A. § 16-13-2(b), because the circumstantial evidence established a meaningful connection between the defendant and the contraband, evidence which showed the defendant exercising power and dominion over the drugs found inside the wheel well on the front passenger's side of a car; the jury could infer that the drugs had been recently placed in the wheel well, and because the defendant had fled from the police, had been caught within arm's reach of the drugs, and had a large amount of cash in his pockets, the jury could infer that the defendant was a drug dealer and that the defendant had placed the drugs in the wheel well to avoid being prosecuted for possessing them. Wright v. State, 302 Ga. App. 332, 690 S.E.2d 654, 2010 Ga. App. LEXIS 56 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for conviction of assorted drugs. — Any rational trier of fact could have found the defendant guilty of trafficking in cocaine, possession of methylenedioxyamphetamine, and possession of less than one ounce of marijuana beyond a reasonable doubt because based on the evidence, the jury was authorized to conclude that the defendant threw a plastic bag containing drugs out the passenger side window of the defendant's car; the state presented evidence that a deputy saw the defendant actually possessing the bag of illegal narcotics as the defendant held the bag in the car before the defendant threw the bag out the passenger's window, and another deputy assigned to the drug suppression task force testified, without objection, that the amount of cocaine in the bag was more than a user would have in a user's possession and that would be the amount that a mid-level dealer would have in a dealer's possession. McCombs v. State, 306 Ga. App. 64, 701 S.E.2d 496, 2010 Ga. App. LEXIS 798 (2010) (decided under former O.C.G.A. § 24-4-6).

Insufficient circumstantial evidence of drug possession by inmate. — Defendant's conviction for possession of drugs by an inmate in violation of O.C.G.A. § 42-5-18(c) was reversed because the state failed to present any evidence to support even an inference that the defendant had any prior knowledge of drugs that were found in a bag or any idea what was in the bag; the state failed to

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demonstrate that the defendant had the bag in the defendant's possession for any reason other than the performance of the defendant's assigned duties of cleaning the visitation lobby in the prison and, thus, failed to exclude the reasonable hypothesis that the defendant was merely performing the job when the defendant removed the bag from one trash can and placed the bag in the other. Strozier v. State, 313 Ga. App. 804, 723 S.E.2d 39, 2012 Ga. App. LEXIS 84 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for trafficking in cocaine and possession of heroine with intent to distribute. — Defendant's convictions for trafficking in cocaine and possession of heroin with intent to distribute, in violation of O.C.G.A. §§ 16-13-30(b) and 16-13-31(a), were supported by sufficient circumstantial evidence, pursuant to former O.C.G.A. § 24-4-6, since it was shown that a witness stated that defendant was residing in an apartment and selling drugs, a search of the apartment revealed drugs, cash, and photographs and papers with defendant's name on them, as well as a sweater which defendant was seen wearing, and defendant had changed the locks on the apartment; accordingly, the trial court's denial of defendant's motions for a directed verdict pursuant to O.C.G.A. § 17-9-1 and for a new trial pursuant to O.C.G.A. § 5-5-23 were properly denied. Williams v. State, 262 Ga. App. 67, 584 S.E.2d 625, 2003 Ga. App. LEXIS 713 (2003) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient to support trafficking heroin. — Defendant's convictions for trafficking heroin and other drug offenses were reversed because insufficient evidence supported a link between the defendant and the drugs and guns found in the home as the defendant did not own or lease the home, the defendant's driver's license listed a different address, and identifications were found in the house in several other peoples' names. Hill v. State, 360 Ga. App. 143, 860 S.E.2d 893, 2021 Ga. App. LEXIS 318 (2021).

Evidence sufficient for possession of drugs conviction. — Jury could rationally find from circumstantial evidence that defendant committed the offenses of possession of both amphetamine and GHB because substances found in defendant's gym locker were tested and found to be amphetamine and GHB, the amount of GHB found could be for personal use over a long period of time, and the containers in which the substances were found contained several prints that could not be identified but contained one that matched defendant's finger. Hobbs v. State, 272 Ga. App. 148, 611 S.E.2d 775, 2005 Ga. App. LEXIS 235 (2005) (decided under former O.C.G.A. § 24-4-6).

As the defendant was the driver, owner, and sole occupant of a vehicle, and 250 grams of methamphetamine were found hidden beneath the steering column, within arm's reach of the driver, the circumstantial evidence was sufficient to establish the defendant's "knowing" possession of the drugs as required by O.C.G.A. § 16-13-31(e). The mere possibility that someone other than the defendant committed the crime was not such a reasonable hypothesis as had to be excluded in order for circumstantial evidence to authorize a verdict of guilty under former O.C.G.A. § 24-4-6. Garcia v. State, 293 Ga. App. 422, 667 S.E.2d 205, 2008 Ga. App. LEXIS 961 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession of cocaine conviction. — Circumstantial evidence under former O.C.G.A. § 24-4-6 was sufficient to support defendant's conviction for possession of cocaine, in violation of O.C.G.A. § 16-13-30, as the defendant was approached by two undercover officers and upon seeing that one of the officers had a badge, defendant turned around and made a throwing motion with a clenched fist in the direction of a trash barrel; defendant was in an area known for drug sales, and three pieces of crack cocaine were found in the vicinity of the trash barrel. Woods v. State, 275 Ga. App. 471, 620 S.E.2d 660, 2005 Ga. App. LEXIS 997 (2005) (decided under former O.C.G.A. § 24-4-6).

Police officer testified about searching a patrol car before transporting the defendant in the car, and about the officer's suspicions that the defendant had stuffed something underneath the backseat be-

cause the officer saw debris on the back of the defendant's pants and on the backseat. This circumstantial evidence was sufficient under former O.C.G.A. § 24-4-6 to convict the defendant of possessing the cocaine found wedged underneath the backseat. Simmons v. State, 299 Ga. App. 21, 681 S.E.2d 712, 2009 Ga. App. LEXIS 827 (2009) (decided under former O.C.G.A. § 24-4-6).

Trial court was authorized to find a defendant guilty of possession of cocaine on the basis that the evidence excluded every other reasonable hypothesis save that of the defendant's guilt, pursuant to former O.C.G.A. § 24-4-6, as the state presented evidence other than the defendant's mere spatial proximity to the pipe containing cocaine to show that the defendant had constructive possession over it, in that the pipe, which was found on the grass where the defendant had been arrested, was dry, although it had been raining and the surrounding area was "soaked"; from this evidence the factfinder could infer that the pipe had been on the ground for a very short period of time. In addition, the state introduced similar transaction evidence that the defendant had been carrying a small crack pipe in the pocket of the defendant's jacket on the occasion of an earlier arrest. Brown v. State, 314 Ga. App. 212, 723 S.E.2d 504, 2012 Ga. App. LEXIS 152 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession of cocaine with intent to distribute and proximity to housing project convictions. — Defendant's convictions for possession of cocaine with intent to distribute and possession of a controlled substance within 1,000 feet of a housing project, in violation of O.C.G.A. §§ 16-13-30(b) and 16-13-32.5(b), were based on sufficient evidence since the state proved by circumstantial evidence pursuant to former O.C.G.A. § 24-4-6 that defendant had been walking back and forth to an overturned bucket when people approached from the street in what appeared to be drug transactions, and the drugs were found under the bucket; there was evidence that the amount of drugs recovered were more than one would use for personal use, indicating an intent to distribute, and there was also evidence indicating the proximity of the bucket to a nearby public housing complex. Reason v. State, 283 Ga. App. 608, 642 S.E.2d 236, 2007 Ga. App. LEXIS 136 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to support the defendant's conviction for possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), because the evidence established beyond any reasonable doubt that the defendant had the power and the intent to exercise control over the cocaine, and the state established by overwhelming circumstantial evidence that the defendant was in either constructive or actual possession of the cocaine; the defendant was found kneeling over the contraband, the jury was authorized to infer that the defendant had been "fidgeting" with a piggy bank in which 37 small bags of cocaine were hidden, and pants with the defendant's driver's license and cash were found in the same corner of the bedroom as the cocaine. Jackson v. State, 306 Ga. App. 33, 701 S.E.2d 481, 2010 Ga. App. LEXIS 737 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for trafficking marijuana conviction. — There was sufficient evidence to support the defendant's conviction for trafficking marijuana as the jury was authorized to conclude that it was not reasonable, as the defendant suggested, that someone other than the defendant placed over 21 pounds of marijuana in open view in the back of a trailer of which the defendant had the only key, without the defendant's knowledge. Mora v. State, 292 Ga. App. 860, 666 S.E.2d 412, 2008 Ga. App. LEXIS 829 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for cocaine possession conviction. — When: (1) defendant's only connection to cocaine that was found in a jacket was that defendant picked up the jacket after the jacket had been lying outside on an air conditioner in close proximity to a juvenile who was suspected in drug transactions and an unidentified woman; and (2) there was no evidence as to who placed the jacket on the air conditioner, the evidence against defendant was entirely circumstantial

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and did not exclude every other hypothesis except guilt; therefore, the evidence was insufficient under former O.C.G.A. § 24-4-6 to support defendant's conviction of possessing cocaine in violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq. Stephens v. State, 258 Ga. App. 774, 575 S.E.2d 661, 2002 Ga. App. LEXIS 1503 (2002), cert. denied, No. S03C0590, 2003 Ga. LEXIS 271 (Ga. Mar. 10, 2003) (decided under former O.C.G.A. § 24-4-6).

State failed to prove the state's case that defendant, a minor, was delinquent under O.C.G.A. § 15-11-2 for trafficking in cocaine in violation of O.C.G.A. § 16-13-31 as the state did not prove the necessary connection between defendant and the drugs, other than spatial proximity, which was insufficient; the fact that defendant was in a house in the middle of the night with non-family members, that a large amount of cocaine and cash were found in the house, although not visible, and that defendant was sitting on a couch where a bag containing crack cocaine was found did not establish the necessary connection, and did not exclude all other possibilities except the guilt of defendant under former O.C.G.A. § 24-4-6. In re E.A.D., 271 Ga. App. 531, 610 S.E.2d 153, 2005 Ga. App. LEXIS 93 (2005) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient to show constructive possession of controlled substance. — Trial court erred in finding that the defendant violated the defendant's probation by committing the new felony of possessing a controlled substance, piperazine or TFMPP, in violation of O.C.G.A. § 16-13-30 because the circumstantial evidence was insufficient to show the defendant's constructive possession of the TFMPP pills; the only evidence linking the defendant to the drugs was spatial proximity, but it was at least equally likely that the pills belonged to the driver of the truck where the pills were found. Scott v. State, 305 Ga. App. 596, 699 S.E.2d 894, 2010 Ga. App. LEXIS 761 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for methamphetamine possession. — Evidence of a defendant's unconsciousness, possibly due to consumption of alcohol or other legal substances, and the defendant's spatial proximity to methamphetamine and pipes used to smoke it, to which two codefendants had equal access, was insufficient circumstantial evidence under former O.C.G.A. § 24-4-6 to exclude every other reasonable hypothesis save that the defendant possessed methamphetamine. Therefore, the evidence was insufficient to support the defendant's conviction. O'Neill v. State, 285 Ga. 125, 674 S.E.2d 302, 2009 Ga. LEXIS 73 (2009) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was insufficient to show constructive possession of methamphetamine found in a car, in which defendant was a passenger, because there was no evidence, besides spatial proximity, connecting the defendant with the contraband since there was no evidence showing that the defendant knew that a baggy found in the car contained contraband or the defendant hid the baggy in the car. Millsaps v. State, 300 Ga. App. 383, 685 S.E.2d 371, 2009 Ga. App. LEXIS 1177 (2009), overruled in part, Maddox v. State, 322 Ga. App. 811, 746 S.E.2d 280, 2013 Ga. App. LEXIS 617 (2013) (decided under former O.C.G.A. § 24-4-6).

Trial court erred in convicting the defendant of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e)(3) because although the evidence raised grave suspicions of the defendant's guilt, the state failed to establish that the defendant had both the power and the intention at the time of the defendant's arrest to exercise dominion or control over the drugs and failed to show that other men did not have equal access to the house and the items within the house; all of the evidence was circumstantial with regard to the defendant's constructive possession of the contraband, there was nothing in the case linking the defendant to the drugs or manufacturing equipment in the house, and several other people with access to the house were unaccounted for and were not charged. Aquino v. State, 308 Ga. App. 163, 706 S.E.2d 746, 2011 Ga. App. LEXIS 141 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for marijuana possession conviction. — Evidence did

not support defendant's conviction for possession of marijuana with intent to distribute as the mere fact that a package of marijuana was addressed, but not delivered, to an apartment leased by defendant did not tie defendant to the drugs; the evidence was circumstantial and it was equally plausible that the codefendants were independently dealing in marijuana. Patten v. State, 275 Ga. App. 574, 621 S.E.2d 550, 2005 Ga. App. LEXIS 1040 (2005) (decided under former O.C.G.A. § 24-4-6).

Trial court erred in revoking the defendant's probation because the evidence was insufficient to support the trial court's finding that the defendant committed the new offense of possession of less than one ounce of marijuana since the state presented no evidence other than the defendant's mere spatial proximity to the marijuana to support a finding that the defendant had the intent to exercise dominion and control over the marijuana; there was no drug paraphernalia, the defendant was cooperative with the police and did not try to flee, there was no evidence that the defendant tried to hide or conceal anything in the vehicle or that the defendant had continuous access and control over the vehicle, and the defendant did not have any marijuana in the defendant's possession and was not under the influence of drugs. Smith v. State, 306 Ga. App. 54, 701 S.E.2d 490, 2010 Ga. App. LEXIS 786 (2010), cert. denied, No. S11C0204, 2011 Ga. LEXIS 111 (Ga. Feb. 7, 2011) (decided under former O.C.G.A. § 24-4-6).

Intoxication causing accident. — Circumstantial evidence that defendant's alleged intoxication caused the accident was sufficient under former O.C.G.A. § 24-4-6 to exclude defendant's reasonable hypotheses of innocence due to mechanical failure. Griffin v. State, 242 Ga. App. 878, 531 S.E.2d 752, 2000 Ga. App. LEXIS 361 (2000) (decided under former O.C.G.A. § 24-4-6).

Appeal

Question on appeal is whether there were sufficient circumstances to enable twelve men who found the facts to conclude that the accused was guilty. Brown v. State, 13 Ga. App. 144, 78 S.E. 868, 1913 Ga. App. LEXIS 76 (1913) (decided under former Penal Code 1910, § 1010).

Appellate courts do not undertake to weigh circumstantial evidence, but look only to seek if there is sufficient competent evidence to support the verdict, when viewed in the light most favorable to the verdict. Hopkins v. State, 167 Ga. App. 811, 307 S.E.2d 707, 1983 Ga. App. LEXIS 2626 (1983) (decided under former O.C.G.A. § 24-4-6).

Presumption in favor of verdict. — After the verdict, the testimony is construed in the testimony's most favorable light to the prevailing party, which is in this case, the state, for every presumption and inference is in favor of the verdict. This rule has been applied when the evidence is circumstantial. Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474, 1972 Ga. App. LEXIS 1023 (1972) (decided under former Code 1933, § 38-109).

Should a trial court decline to direct the verdict and the jury then finds the defendant guilty, the appellate court is obliged to review the evidence in a light most favorable to the jury verdict. Muckle v. State, 165 Ga. App. 873, 303 S.E.2d 54, 1983 Ga. App. LEXIS 2047 (1983) (decided under former O.C.G.A. § 24-4-6).

Verdict will not be disturbed when circumstances are aided by direct evidence. McGinnis v. State, 31 Ga. 236, 1860 Ga. LEXIS 321 (1860) (decided under former law); Hudson v. State, 92 Ga. 472, 17 S.E. 847, 1893 Ga. LEXIS 137 (1893) (decided under former law); Coney v. State, 101 Ga. 582, 28 S.E. 918, 1897 Ga. LEXIS 275 (1897) (decided under former Penal Code 1895, § 984).

Verdict not disturbed unless unsupportable as matter of law. — If a jury is authorized to find that the evidence, circumstantial though it may be, is sufficient to exclude every reasonable hypothesis save that of guilt, the verdict of the jury will not be disturbed by the appellate court unless the verdict is insupportable as a matter of law. Brewer v. State, 156 Ga. App. 468, 274 S.E.2d 817, 1980 Ga. App. LEXIS 3070 (1980) (decided under former Code 1933, § 38-109); Lawhorn v. State, 200 Ga. App. 451, 408 S.E.2d 425, 1991 Ga. App. LEXIS 1047 (1991) (decided under former O.C.G.A. § 24-4-6).

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Questions of reasonableness are generally decided by the jury, and the appellate court will not disturb the jury's finding that the evidence was sufficient to exclude every reasonable hypothesis save that of guilt unless the verdict is unsupportable as a matter of law. Shockley v. State, 166 Ga. App. 182, 303 S.E.2d 519, 1983 Ga. App. LEXIS 2092 (1983) (decided under former O.C.G.A. § 24-4-6).

Questions as to reasonableness are generally to be decided by the jury which heard the evidence and when the jury is authorized to find that the evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt, the appellate court will not disturb the finding, unless the verdict is unsupportable as a matter of law. Chambless v. State, 165 Ga. App. 194, 300 S.E.2d 201, 1983 Ga. App. LEXIS 3129 (1983) (decided under former O.C.G.A. § 24-4-6).

When verdict overturned. — Supreme Court is admittedly without authority to interfere with a verdict supported by direct evidence; it may declare, however, even though the jury has found otherwise, and the trial judge has approved their finding, that the proven circumstances do not sustain by their consistency the claim of the state as to the guilt of the defendant. Willoughby v. City of Atlanta, 50 Ga. App. 180, 177 S.E. 527, 1934 Ga. App. LEXIS 682 (1934) (decided under former Code 1933, § 38-109).

Hypothesis consistent with innocence. — When there appears a hypothesis from the evidence, or from the lack of evidence and the defendant's statement, pointing to the innocence of the accused and which, tested by all human experience, is a reasonable one, an appellate court, may declare it so as a matter of law. Wood v. State, 156 Ga. App. 810, 275 S.E.2d 694, 1980 Ga. App. LEXIS 3209 (1980) (decided under former Code 1933, § 38-109); Walker v. State, 157 Ga. App. 728, 278 S.E.2d 487, 1981 Ga. App. LEXIS 1991 (1981) (decided under former Code 1933, § 38-109).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, § 1390.

C.J.S.

32A C.J.S., Evidence, §§ 1604, 1605.

ALR.

May conviction of perjury rest on circumstantial evidence, 15 A.L.R. 634; 27 A.L.R. 857; 42 A.L.R. 1063; 88 A.L.R.2d 852.

Character and sufficiency of evidence to show that letter was mailed, 25 A.L.R. 9; 86 A.L.R. 541.

Instruction on circumstantial evidence in criminal case, 89 A.L.R. 1379.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 123 A.L.R. 119; 91 A.L.R.2d 1046.

Admissibility, in prosecution for burglary, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements, 143 A.L.R. 1199.

Conviction of criminal offense without evidence as denial of due process of law, 80 A.L.R.2d 1362.

Homicide: identification of victim as person named in indictment or information, 86 A.L.R.2d 722.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence, 88 A.L.R.2d 852.

Construction of statute or ordinance making it an offense to possess or have alcoholic beverages in opened package in motor vehicle, 35 A.L.R.3d 1418.

What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking, 51 A.L.R.3d 727.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 A.L.R.3d 948.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 A.L.R.3d 1319.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 A.L.R.3d 1128.

Modern status of rule regarding neces-

sity of instruction on circumstantial evidence in criminal trial — state cases, 36 A.L.R.4th 1046.

24-14-7. Positive testimony preferred over negative; exception.

The existence of a fact testified to by one positive witness is to be believed, rather than that such fact did not exist because many other witnesses who had the same opportunity of observation swear that they did not see or know of its having existed. This rule shall not apply when two parties have equal facilities for seeing or hearing a thing and one swears that it occurred while the other swears that it did not.

History.

Code 1981, § 24-14-7, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-4-7, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Cobb v. State, 27 Ga. 648 (1859) and Atlanta & W.P.R.R. v. Johnson, 66 Ga. 260 (1881).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5165, former Penal Code 1895, § 985, former Civil Code 1910, § 5751, former Penal Code 1910, § 1011, former Code 1933, § 38-111, and former O.C.G.A. § 24-4-7 are included in the annotations for this Code section.

Reason for the former statute was probably that the law would not care to attribute perjury to a witness unless necessary, and negative testimony as a result may be taken as an oversight on the part of a witness to observe the fact in question. The last provision of the former statute provided for those cases where a witness could swear positively to the nonoccurrence of a fact. Such testimony was of as much weight as positive testimony. Skinner v. State, 108 Ga. 747, 32 S.E. 844, 1899 Ga. LEXIS 327 (1899) (decided under former Penal Code 1895, § 985); Nelms v. State, 123 Ga. 575, 51 S.E. 588, 1905 Ga. LEXIS 547 (1905) (decided under former Penal Code 1895, § 985); Hunter v. State, 4 Ga. App. 761, 62 S.E. 466, 1908 Ga. App. LEXIS 533 (1908) (decided under former Penal Code 1895, § 985).

Rule of the former statute was so inaptly stated that to instruct the jury in the language of the former statute was ordinarily error. Warrick v. State, 125 Ga. 133, 53 S.E. 1027, 1906 Ga. LEXIS 76 (1906) (decided under former Penal Code 1895, § 985); Moore v. State, 57 Ga. App. 287, 195 S.E. 320, 1938 Ga. App. LEXIS 569 (1938) (decided under former Code 1933, § 38-111); Great Am. Indem. Co. v. Oxford, 68 Ga. App. 884, 24 S.E.2d 726, 1943 Ga. App. LEXIS 391 (1943) (decided under former Code 1933, § 38-111).

Failure to charge not error in absence of request. — In the absence of a request, it was not error for the court to fail to charge the former statute as to positive and negative testimony. Grice v. State, 224 Ga. 376, 162 S.E.2d 432, 1968 Ga. LEXIS 786 (1968) (decided under former Code 1933, § 38-111).

Witnesses of equal credibility. — Former statute applied only if the witnesses were of equal credibility. Great Am. Indem. Co. v. Oxford, 68 Ga. App. 844, 24 S.E.2d 726 (1943) (decided under former Code 1933, § 38-111); Rider v. State, 196 Ga. 767, 27 S.E.2d 667, 1943 Ga. LEXIS 419 (1943) (decided under former Code 1933, § 38-111); Kaylor v. Kaylor, 199 Ga. 516, 35 S.E.2d 1, 1945 Ga. LEXIS 352 (1945) (decided under former Code 1933, § 38-111).

Qualification of rule. — Former statute did not apply when two parties had equal facilities for seeing or hearing a

thing and one swears that it occurred and the other that it did not. Weeks v. State, 79 Ga. 36, 3 S.E. 323, 1887 Ga. LEXIS 157 (1887) (decided under former law); Skinner v. State, 108 Ga. 747, 32 S.E. 844, 1899 Ga. LEXIS 327 (1899) (decided under former Penal Code 1895, § 985); Nelms v. State, 123 Ga. 575, 51 S.E. 588, 1905 Ga. LEXIS 547 (1905) (decided under former Penal Code 1895, § 985); Wood v. State, 1 Ga. App. 684, 58 S.E. 271, 1907 Ga. App. LEXIS 78 (1907) (decided under former Penal Code 1895, § 985); Benton v. State, 3 Ga. App. 453, 60 S.E. 116, 1908 Ga. App. LEXIS 336 (1908) (decided under former Penal Code 1895, § 985).

Credibility of witnesses. — When the former statute was applicable, it is error for the court to give the statute in charge to the jury without further instructing the jury that in weighing such testimony the jury should take into consideration the credibility of the witnesses. Central of Ga. Ry. v. Sowell, 3 Ga. App. 142, 59 S.E. 323, 1907 Ga. App. LEXIS 577 (1907) (decided under former Civil Code 1895, § 5165); Georgia R.R. & Banking Co. v. Radford, 144 Ga. 22, 85 S.E. 1006, 1915 Ga. LEXIS 22 (1915) (decided under former Civil Code 1910, § 5751); Georgia Ry. & Power Co. v. Pounds, 20 Ga. App. 201, 20 Ga. App. 202, 92 S.E. 1026, 1917 Ga. App. LEXIS 809 (1917) (decided under former Civil Code 1910, § 5751); McDuffie v. State, 24 Ga. App. 653, 101 S.E. 812, 1920 Ga. App. LEXIS 432 (1920) (decided under former Penal Code 1910, § 1011); Green v. State, 26 Ga. App. 109, 105 S.E. 634, 1920 Ga. App. LEXIS 297 (1920) (decided under former Penal Code 1910, § 1011); Carter v. State, 34 Ga. App. 230, 129 S.E. 10, 1925 Ga. App. LEXIS 176 (1925) (decided under former Penal Code 1910, § 1011); Moore v. State, 57 Ga. App. 287, 195 S.E. 320, 1938 Ga. App. LEXIS 569 (1938) (decided under former Code 1933, § 38-111); Progressive Life Ins. Co. v. Archer, 73 Ga. App. 639, 37 S.E.2d 713, 1946 Ga. App. LEXIS 374 (1946) (decided under former Code 1933, § 38-111); Goodyear Clearwater Mills v. Wheeler, 77 Ga. App. 570, 49 S.E.2d 184, 1948 Ga. App. LEXIS 600 (1948) (decided under former Code 1933, § 38-111).

Jurors not obliged to discard negative evidence merely because of the existence of positive evidence in conflict with it. Innis v. State, 42 Ga. 473, 1871 Ga. LEXIS 86 (1871) (decided under former law); Hunter v. State, 4 Ga. App. 761, 62 S.E. 466, 1908 Ga. App. LEXIS 533 (1908) (decided under former Penal Code 1895, § 985); Pendergrast v. Greeson, 6 Ga. App. 47, 64 S.E. 282, 1909 Ga. App. LEXIS 172 (1909) (decided under former Civil Code 1895, § 5165); Pollard v. Gorman, 52 Ga. App. 127, 182 S.E. 678, 1935 Ga. App. LEXIS 75 (1935) (decided under former Code 1933, § 38-111); Jefferson Std. Life Ins. Co. v. Bentley, 55 Ga. App. 272, 190 S.E. 50, 1937 Ga. App. LEXIS 67 (1937) (decided under former Code 1933, § 38-111); Progressive Life Ins. Co. v. Smith, 71 Ga. App. 157, 30 S.E.2d 411, 1944 Ga. App. LEXIS 307 (1944) (decided under former Code 1933, § 38-111); Abbot Inv. Co. v. Jefferson County, 77 Ga. App. 76, 49 S.E.2d 918 (1948) (decided under former Code 1933, § 38-111); Ellis v. Southern Ry., 96 Ga. App. 687, 101 S.E.2d 230, 1957 Ga. App. LEXIS 970 (1957) (decided under former Code 1933, § 38-111); Allison v. Cobb County, 97 Ga. App. 331, 103 S.E.2d 195, 1958 Ga. App. LEXIS 770 (1958) (decided under former Code 1933, § 38-111).

Reconciliation of testimony. — When the testimony of witnesses who testified positively may be true without it being necessary to reject any of the negative testimony as untrue, and the testimony can be harmonized without discrediting any witness, it is the duty of the jury to prefer the positive testimony. Gamblin v. State, 33 Ga. App. 51, 125 S.E. 517, 1924 Ga. App. LEXIS 714 (1924) (decided under former Penal Code 1910, § 1011).

Types of evidence. — Law and logic both recognize the fact that testimony as to a thing may be positive, negative, or contradictory. Hughes v. Etheridge, 39 Ga. App. 730, 148 S.E. 358, 1929 Ga. App. LEXIS 540 (1929) (decided under former Civil Code 1910, § 5751).

Failure to explain meaning of positive and negative evidence is not error in the absence of a special request. Southern Ry. v. Maddox, 63 Ga. App. 508, 11 S.E.2d 501, 1940 Ga. App. LEXIS 487 (1940) (decided under former Code 1933, § 38-111).

Instruction on latter part of statute is usually necessary to fully explain to the jury the distinction between testimony which is negative in character and that which is contradictory of positive testimony, and which otherwise might be thought to be negative. Benton v. State, 3 Ga. App. 453, 60 S.E. 116, 1908 Ga. App. LEXIS 336 (1908) (decided under former Penal Code 1895, § 985).

Positive and negative evidence defined in the following cases: McConnell v. State, 67 Ga. 633, 1881 Ga. LEXIS 244 (1881) (decided under former law); Hunter v. State, 4 Ga. App. 761, 62 S.E. 466, 1908 Ga. App. LEXIS 533 (1908) (decided under former Penal Code 1895, § 985); Heywood v. State, 12 Ga. App. 643, 77 S.E. 1130, 1913 Ga. App. LEXIS 677 (1913) (decided under former Penal Code 1910, § 1011); Progressive Life Ins. Co. v. Archer, 73 Ga. App. 639, 37 S.E.2d 713, 1946 Ga. App. LEXIS 374 (1946) (decided under former Code 1933, § 38-111).

Charge favorable to losing party. — If the positive evidence in regard to the facts under consideration was introduced by the losing party, and the negative evidence in regard to such facts was introduced by the successful party, a charge to the effect that positive testimony should outweigh that which is negative without qualification, would be more favorable to the losing party than the losing party would have a right to ask; and such error in favor of the unsuccessful litigant would not furnish ground for a reversal on the losing party's motion. Rider v. State, 196 Ga. 767, 27 S.E.2d 667, 1943 Ga. LEXIS 419 (1943) (decided under former Code 1933, § 38-111).

Testimony sufficient to charge on positive and negative evidence as to whether automobile turned over in accident. Progressive Life Ins. Co. v. Archer, 73 Ga. App. 639, 37 S.E.2d 713, 1946 Ga. App. LEXIS 374 (1946) (decided under former Code 1933, § 38-111).

Issue properly submitted to jury. — When the existence of a fact was affirmed by positive evidence and denied by negative evidence, an issue was raised, and the trial judge committed no error in properly submitting such issue to the jury. Pollard v. Gorman, 52 Ga. App. 127, 182 S.E. 678, 1935 Ga. App. LEXIS 75 (1935) (decided under former Code 1933, § 38-111); Abbot Inv. Co. v. Jefferson County, 77 Ga. App. 761, 49 S.E.2d 918, 1948 Ga. App. LEXIS 637 (1948) (decided under former Code 1933, § 38-111).

Positive and negative testimony at play. — When there was testimony that immediately before plaintiff's mule was struck by a train, a horse and colt crossed the track in front of the train and this testimony, by a section hand was corroborated by the section foreman, but the engineer of the train testified that the engineer did not see such a horse or colt cross the track in front of the train, although there was nothing which could have obstructed the engineer's view of them, the rule relative to positive and negative testimony is called into play, and, under a proper instruction from the court, the jury was authorized to believe the positive testimony of the section hand and section foreman rather than that of the engineer. Atlantic Coast Line R.R. v. Hodges, 90 Ga. App. 870, 84 S.E.2d 711, 1954 Ga. App. LEXIS 838 (1954) (decided under former Code 1933, § 38-111).

Refusal to charge former O.C.G.A. § 24-4-7 was not error. — See Green v. State, 253 Ga. 693, 324 S.E.2d 181, 1985 Ga. LEXIS 530 (1985) (decided under former O.C.G.A. § 24-4-7).

On appeal. — Former statute would not justify the setting aside of the jury's verdict on appeal when there was evidence to support the verdict. Kelly v. Gaskins, 238 Ga. 730, 235 S.E.2d 386, 1977 Ga. LEXIS 1183 (1977) (decided under former Code 1933, § 38-111).

RESEARCH REFERENCES

Am. Jur. 2d.
29A Am. Jur. 2d, Evidence, § 1368.

C.J.S.
32A C.J.S., Evidence, § 1602.

ALR.

Conclusiveness of uncontradicted testimony of interested witness where opposed to presumption, 72 A.L.R. 94.

Comparative value of positive and negative testimony, 98 A.L.R. 161.

Relative weight of testimony of attesting witnesses in support of mental competency of testator, 123 A.L.R. 88.

Admissibility, in support of general credibility of an accomplice-witness who has not been impeached of evidence from nonaccomplice witness not otherwise relevant or of probative value as against defendant, 138 A.L.R. 1266.

Distinction between positive and negative evidence, 140 A.L.R. 530.

Probative force of testimony offered to show that crossing signals were not given on approach of train, 162 A.L.R. 9.

24-14-8. Number of witnesses required generally; exceptions; effect of corroboration.

The testimony of a single witness is generally sufficient to establish a fact. However, in certain cases, including prosecutions for treason, prosecutions for perjury, and felony cases where the only witness is an accomplice, the testimony of a single witness shall not be sufficient. Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness, except in prosecutions for treason.

History.

Code 1981, § 24-14-8, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For comment on Drummond v. State, 87 Ga. App. 105, 73 S.E.2d 43 (1952), see 16 Ga. B.J. 226 (1953).

For article, "The Demise of the Corroboration Requirement — Its History in Georgia Rape Law," see 26 Emory L.J. 805 (1977).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3702, former Code 1873, § 3755, former Code 1882, § 3755, former Penal Code 1895, § 991, former Penal Code 1910, § 1017, former Code 1933, § 38-121, and former O.C.G.A. § 24-4-8 are included in the annotations for this Code section.

Former statute inapplicable. — Exception stated in the former statute did not apply when the state does not rely solely on the testimony of a single accomplice. Ross v. State, 245 Ga. 173, 263 S.E.2d 913, 1980 Ga. LEXIS 730 (1980) (decided under former Code 1933, § 38-121).

Admissibility of other crimes evidence is not governed by former O.C.G.A. § 24-4-8. Turner v. State, 268 Ga. 213, 486 S.E.2d 839 (decided under former O.C.G.A. § 24-4-8).

Failure to charge on accomplice testimony and corroboration was not error as

the prosecution largely relied on other evidence, not accomplice testimony, to prove defendant's guilt. Dillard v. State, 272 Ga. App. 523, 612 S.E.2d 804, 2005 Ga. App. LEXIS 198 (2005), cert. denied, No. S05C1272, 2005 Ga. LEXIS 476 (Ga. July 8, 2005) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony that the victim knew both robbers and recognized the robbers during the robbery and the next day, even without the accomplice's pretrial statement implicating the defendant, was direct and circumstantial evidence of the defendant's participation in the crime and former O.C.G.A. § 24-4-8 was inapplicable. Jordan v. State, 278 Ga. App. 126, 628 S.E.2d 221, 2006 Ga. App. LEXIS 264 (2006) (decided under former O.C.G.A. § 24-4-8).

Testimony of a single witness was sufficient to establish venue. — See Moreno v. State, 255 Ga. App. 88, 564 S.E.2d 505, 2002 Ga. App. LEXIS 481 (2002) (decided under former O.C.G.A. § 24-4-8).

When a victim of an aggravated assault and battery testified that the incident, wherein her former boyfriend was following her closely in his car and then shot her, occurred in a particular county at a stated location, such was sufficient to establish venue for those crimes. Morris v. State, 263 Ga. App. 115, 587 S.E.2d 272, 2003 Ga. App. LEXIS 1137 (2003) (decided under former O.C.G.A. § 24-4-8).

Testimony of single witness to establish fact. — Testimony of a single witness is generally sufficient to establish a fact, and an officer's testimony that the officer saw defendant's hands on a plastic bag containing cocaine was sufficient to authorize a rational trier of fact to find that defendant possessed the cocaine. Lester v. State, 226 Ga. App. 373, 487 S.E.2d 25 (decided under former O.C.G.A. § 24-4-8).

Testimony of a single witness was sufficient to authorize a jury's verdict that defendant was guilty beyond a reasonable doubt of committing aggravated assault with a deadly weapon and that the defendant committed simple battery by intentionally kicking the victim on the ankle, causing a bruise. Ringo v. State, 236 Ga. App. 38, 510 S.E.2d 893 (decided under former O.C.G.A. § 24-4-8).

Where the 14-year-old victim allegedly consented to having sex with defendant, the sexual molestation conviction under O.C.G.A. § 16-6-4(a) was supported by sufficient evidence; under O.C.G.A. § 16-2-1, consent by the victim was irrelevant due to the inability of the victim to legally consent to intercourse, and it was for the jury to determine, in accordance with the testimony of at least a single witness pursuant to former O.C.G.A. § 24-4-8, whether defendant's conduct was immoral or indecent under O.C.G.A. § 16-6-4(a). Slack v. State, 265 Ga. App. 306, 593 S.E.2d 664, 2004 Ga. App. LEXIS 1 (2004) (decided under former O.C.G.A. § 24-4-8).

When an eye-witness identified defendant as the individual the witness saw leave the witness's storage shed with the witness's goods, the evidence sufficed to sustain a verdict of guilty on the charge of burglary under O.C.G.A. § 16-7-1(a). Pursuant to former O.C.G.A. § 24-4-8, a single witness is generally sufficient to establish a fact. Gibson v. State, 268 Ga. App. 696, 603 S.E.2d 319, 2004 Ga. App. LEXIS 999 (2004) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support defendant's burglary conviction after an employee of the burglarized store testified that the employee encountered defendant between 3:30 and 4:30 a.m. in the store, while defendant was trying to pry open the lock on a jewelry counter with a knife, the employee identified defendant from a photographic lineup and at trial, and under former O.C.G.A. § 24-4-8, the testimony of one witness is sufficient to establish a fact. Standfill v. State, 267 Ga. App. 612, 600 S.E.2d 695, 2004 Ga. App. LEXIS 731 (2004) (decided under former O.C.G.A. § 24-4-8).

Defendant's multiple convictions for armed robbery, aggravated assault, kidnapping, possessing a firearm during the commission of a felony, burglary, and kidnapping with bodily injury, were supported by sufficient evidence because defendant and another robbed a store while holding the two owners at gunpoint, defendant led police on a high-speed car chase, and the defendant broke into and

General Consideration (Cont'd)

robbed two homes, one of which had an occupant that defendant beat; only one store owner's testimony was needed to establish the facts to support the aggravated assault conviction. Owens v. State, 271 Ga. App. 365, 609 S.E.2d 670, 2005 Ga. App. LEXIS 44 (2005) (decided under former O.C.G.A. § 24-4-8).

There was sufficient evidence to support defendant's convictions for child molestation, aggravated child molestation, statutory rape. and incest, in violation of O.C.G.A. §§ 16-6-3, 16-6-4, 16-6-4(c), and 16-6-22, because defendant's step-daughter gave detailed testimony as to the continuing sexual conduct that defendant inflicted on the step-daughter over a period of years as the testimony from just that witness was sufficient to support the convictions, pursuant to former O.C.G.A. § 24-4-8; further, there was corroborative testimony from a friend of the step-daughter who witnessed at least one incident, and from an aunt who testified that the older step-daughter had sat in defendant's lap and that defendant rubbed her legs, which was properly admitted for purposes of corroboration, bent of mind, lustful disposition toward children, and motive. Lewis v. State, 275 Ga. App. 41, 619 S.E.2d 699, 2005 Ga. App. LEXIS 831 (2005) (decided under former O.C.G.A. § 24-4-8).

Defendant's new trial motion under O.C.G.A. § 5-5-22 was properly denied as the fact that the state failed to turn over two videotaped statements from defendant's sons, arising from criminal charges due to a domestic dispute, was based on inadvertence rather than bad faith, there was unimpeached eyewitness testimony from other witnesses that was sufficient to support defendant's convictions pursuant to former O.C.G.A. § 24-4-8, and there was no showing that defendant suffered the kind of prejudice that undermined confidence in the outcome of the trial; accordingly, defendant's Brady rights were not violated and there was no violation of O.C.G.A. §§ 17-16-6 and 17-16-7. Ely v. State, 275 Ga. App. 708, 621 S.E.2d 811, 2005 Ga. App. LEXIS 1101 (2005) (decided under former O.C.G.A. § 24-4-8).

Testimony of a single witness was sufficient to establish a fact under former O.C.G.A. § 24-4-8, and the defendant's convictions for rape was supported by sufficient evidence since the victim testified that defendant forced her into a train boxcar, threatened to kill her, and had vaginal and oral sex with her against her will and without her consent. Davis v. State, 278 Ga. App. 628, 629 S.E.2d 537, 2006 Ga. App. LEXIS 383 (2006) (decided under former O.C.G.A. § 24-4-8).

On appeal from convictions of armed robbery, aggravated assault, kidnapping, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon, the defendant's sufficiency of the evidence claim lacked merit as independent corroboration of the alleged victim's testimony was unnecessary, given that testimony from a single witness was generally sufficient to establish a fact, and this included a victim's uncorroborated identification of an assailant; moreover, even if corroboration were needed, the similar transaction provided sufficient evidence of the defendant's identity, which was one of the purposes for which it was introduced. Pringle v. State, 281 Ga. App. 230, 635 S.E.2d 843, 2006 Ga. App. LEXIS 1057 (2006) (decided under former O.C.G.A. § 24-4-8).

In a prosecution for felony theft by taking of a van, the trial court was entitled to conclude that the victim was an innocent purchaser for value, believing the seller to be the owner, the defendant's claim to the contrary notwithstanding; moreover, pursuant to former O.C.G.A. § 24-4-8, the testimony of a single witness was sufficient to establish this fact. Coursey v. State, 281 Ga. App. 494, 636 S.E.2d 669, 2006 Ga. App. LEXIS 1021 (2006) (decided under former O.C.G.A. § 24-4-8).

Because the victim's testimony, standing alone, was sufficient to establish the defendant's guilt beyond a reasonable doubt, when the evidence showed: (1) two separate aggravated assaults, one with a knife and one with a hammer; (2) two separate instances of simple battery; and (3) a hours-long detention of the victim by the defendant, the evidence amply supported the jury's conviction on the charges of false imprisonment, aggravated as-

sault, and simple battery. Brigman v. State, 282 Ga. App. 481, 639 S.E.2d 359, 2006 Ga. App. LEXIS 1409 (2006) (decided under former O.C.G.A. § 24-4-8).

Defendant's convictions for aggravated assault, aggravated battery, and first-degree child cruelty pursuant to O.C.G.A. §§ 16-5-21(a), 16-5-24(a), and 16-5-70(b) for participating in a drive-by shooting were supported by sufficient evidence because the testimony of a single witness was generally sufficient to establish a fact pursuant to former O.C.G.A. § 24-4-8 and it was the function of the jury to evaluate the credibility of witnesses; based on the testimony of the witnesses to the shooting, a reasonable jury could have rejected the defendant's claims and determined that the defendant was a party to each of the crimes. Hill v. State, 282 Ga. App. 743, 639 S.E.2d 637, 2006 Ga. App. LEXIS 1522 (2006), cert. denied, No. S07C0575, 2007 Ga. LEXIS 282 (Ga. Mar. 26, 2007) (decided under former O.C.G.A. § 24-4-8).

Because sufficient evidence was presented via the testimony of the victim regarding the defendant's attack with a screwdriver, which was corroborated by the defendant's own admissions at trial, the defendant's simple battery conviction was upheld on appeal; moreover, the defendant's characterization of the incident as one involving mutual argument did not in and of itself justify the actions. Rainey v. State, 286 Ga. App. 682, 649 S.E.2d 871, 2007 Ga. App. LEXIS 848 (2007) (decided under former O.C.G.A. § 24-4-8).

There was sufficient evidence to support defendant's conviction for armed robbery because the state met the state's burden of proving that defendant took the property of another from the person or the immediate presence of another by use of an offensive weapon; the state offered the testimony of the bus counter clerk as to the facts of the robbery and as to the identification of defendant as the gunman. That testimony, standing alone, was sufficient to support defendant's conviction. Range v. State, 289 Ga. App. 727, 658 S.E.2d 245, 2008 Ga. App. LEXIS 184 (2008) (decided under former O.C.G.A. § 24-4-8).

Defendant was not entitled to a directed verdict of acquittal on a voluntary manslaughter count predicated on the defendant's claim of self-defense, O.C.G.A. § 16-3-21(a), because the evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of voluntary manslaughter in violation of O.C.G.A. § 16-5-2(a) and to enable a rational trier of fact to find that the defendant's stabbing of the victim was not justified as an act of self-defense; under former O.C.G.A. § 24-4-8, a neighbor's eyewitness testimony, standing alone, was sufficient to support a finding that the defendant was the aggressor, continued to use force after any imminent danger posed by the victim had passed, or used excessive force. Muckle v. State, 307 Ga. App. 634, 705 S.E.2d 721, 2011 Ga. App. LEXIS 31 (2011) (decided under former O.C.G.A. § 24-4-8).

Evidence from a child molestation victim was sufficient to convict a defendant of five counts of child molestation in violation of O.C.G.A. § 16-6-4. The trial court properly admitted evidence that the defendant had asked the victim's sister to sleep with the defendant on a couch, and properly denied evidence that the victim had made an accusation of sexual misconduct against the victim's grandfather. Mauldin v. State, 313 Ga. App. 228, 721 S.E.2d 182, 2011 Ga. App. LEXIS 1101 (2011) (decided under former O.C.G.A. § 24-4-8).

There was sufficient evidence to support the defendant's conviction for child molestation, aggravated child molestation, and first degree cruelty to children with regard to the defendant's girlfriend's niece based on the testimony of the victim and similar transaction evidence involving the defendant's older daughter. Royal v. State, 319 Ga. App. 466, 735 S.E.2d 793, 2012 Ga. App. LEXIS 1066 (2012) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to find the defendant guilty of armed robbery and possession of a firearm during the commission of a felony even though it was based on the victim's identifications of the defendant's eyes. Jones v. State, 329 Ga. App. 478, 765 S.E.2d 657, 2014 Ga. App. LEXIS 715 (2014).

Evidence was sufficient to convict the defendant of malice murder and posses-

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sion of a firearm during the commission of a felony because, although there was a lack of physical evidence connecting the defendant to the crimes, the state was not required to produce any physical evidence, video or otherwise; there was substantial direct evidence in the form of testimony from multiple eyewitnesses identifying the defendant as the perpetrator; the testimony of a single witness was generally sufficient to establish a fact; and showing witnesses photographs of the defendant during the investigation of a crime only affected the credibility of the witnesses and the weight to be given to their testimony, which were matters for the jury. Jackson v. State, 307 Ga. 770, 838 S.E.2d 246, 2020 Ga. LEXIS 49 (2020).

The evidence presented at trial was sufficient to find the defendant guilty beyond a reasonable doubt of the charged offense of kidnapping based on the girlfriend's testimony that the defendant forced her into the defendant's car and held the girlfriend there against her will as the defendant drove from Gwinnett County to DeKalb County. Sims v. State, 360 Ga. App. 886, 862 S.E.2d 556, 2021 Ga. App. LEXIS 413 (2021).

Evidence was sufficient to convict the defendant of malice murder, armed robbery, firearm possession by a convicted felon, and possession of a firearm during the commission of a felony because the first victim identified the defendant as the person who robbed the first victim and shot the second victim and identified the accomplice as the driver; the first victim testified at trial that the first victim was positive about those identifications; the testimony of a single witness was generally sufficient to establish a fact; and the first victim's testimony was corroborated by the statement of the defendant's girlfriend to a detective and the accomplice's statement to a cousin. Hinton v. State, 312 Ga. 258, 862 S.E.2d 320, 2021 Ga. LEXIS 580 (2021).

Testimony of the girl that the defendant was dating relaying the defendant's statements to the girl about the crimes, including that "the lick went bad," was sufficient for the jury to find the defendant guilty of felony murder and other crimes as the testimony of a single witness was generally sufficient to establish a fact. McCoy v. State, 315 Ga. 536, 883 S.E.2d 740, 2023 Ga. LEXIS 28 (2023).

Identification of officer sufficient. — Police detective's in-court identification of defendant as the drug seller was sufficient to sustain conviction. James v. State, 233 Ga. App. 516, 504 S.E.2d 533 (decided under former O.C.G.A. § 24-4-8).

Undercover agent's in-court identification of defendant as the seller of crack cocaine was sufficient to authorize the jury's guilty verdict. Ivory v. State, 234 Ga. App. 858, 508 S.E.2d 421 (decided under former O.C.G.A. § 24-4-8).

Although a videotape of the transaction provided helpful confirmation of an undercover officer's identification of the defendant as the seller of cocaine, the testimony of the officer, by itself, was sufficient to support the jury's determination of guilt. Williams v. State, 277 Ga. App. 633, 627 S.E.2d 196, 2006 Ga. App. LEXIS 166 (2006) (decided under former O.C.G.A. § 24-4-8).

Testimony of a single witness is generally sufficient to establish a fact. Barber v. State, 236 Ga. App. 294, 512 S.E.2d 48 (decided under former O.C.G.A. § 24-4-8); Moton v. State, 242 Ga. App. 397, 530 S.E.2d 31, 2000 Ga. App. LEXIS 203 (2000) (decided under former O.C.G.A. § 24-4-8); Cecil v. State, 263 Ga. App. 48, 587 S.E.2d 197, 2003 Ga. App. LEXIS 1090 (2003) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony sufficient. — Victim's statement in a videotape made by police that the victim was 16-years-old at the time defendant gave the victim marijuana and alcohol was sufficient to support defendant's conviction for contributing to the delinquency of a minor as the testimony of a single witness was generally sufficient to establish a fact, such as the fact that the victim was a minor at the time the acts giving rise to the charge occurred. Little v. State, 262 Ga. App. 377, 585 S.E.2d 677, 2003 Ga. App. LEXIS 923 (2003) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support convictions against defendant for aggravated

assault in violation of O.C.G.A. § 16-5-21 and aggravated battery in violation of O.C.G.A. § 16-5-24 since the victim identified defendant from a pre-trial photograph and from an in-court identification, a codefendant and a witness testified against defendant, and the gun that was used to shoot the victim was found near the car with shell casings in the car; it was noted that the testimony of just the victim was sufficient to establish a fact pursuant to former O.C.G.A. § 24-4-8. Dunn v. State, 262 Ga. App. 643, 586 S.E.2d 352, 2003 Ga. App. LEXIS 973 (2003) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony, alone, was sufficient to establish the time frame for the charged offenses. Henry v. State, 274 Ga. App. 139, 616 S.E.2d 883, 2005 Ga. App. LEXIS 681 (2005) (decided under former O.C.G.A. § 24-4-8).

Evidence supported convictions for armed robbery and aggravated assault since after using defendant's mother's telephone number, defendant contacted the victim and arranged a meeting to buy shoes, the victim identified the car defendant was driving, which was registered to defendant's mother, the victim identified defendant from a pretrial police photo array and at trial, and where, at the meeting arranged by the victim was shot in the face and defendant then rummaged through the victim's car where the victim kept the shoes. Waddell v. State, 277 Ga. App. 772, 627 S.E.2d 840, 2006 Ga. App. LEXIS 202 (2006), cert. denied, No. S06C1143, 2006 Ga. LEXIS 377 (Ga. May 18, 2006), cert. denied, 549 U.S. 1081, 127 S. Ct. 731, 166 L. Ed. 2d 567, 2006 U.S. LEXIS 9304 (2006) (decided under former O.C.G.A. § 24-4-8).

In a case in which the victim was allegedly bound and beaten by the defendant and thrown into a camper, which the defendant towed to a motel, the victim's testimony was sufficient to support a conviction for kidnapping with bodily injury under O.C.G.A. § 16-5-40 as the testimony of a single witness was all that was necessary under former O.C.G.A. § 24-4-8. Johnson v. State, 281 Ga. App. 7, 635 S.E.2d 278, 2006 Ga. App. LEXIS 983 (2006) (decided under former O.C.G.A. § 24-4-8).

Trial court properly denied the defendant's motion for a directed verdict of acquittal, and the defendant's rape conviction was upheld on appeal, as the victim's testimony at trial that the defendant's sexual organ penetrated hers after telling the defendant to stop was sufficient in and of itself, and no evidence was presented that directly contradicted this statement. Scott v. State, 281 Ga. App. 106, 635 S.E.2d 582, 2006 Ga. App. LEXIS 1012 (2006) (decided under former O.C.G.A. § 24-4-8).

Despite the defendant's contentions that insufficient evidence as to a child's presence in the room when the victim was accosted required reversal of a cruelty to children conviction, such conviction was upheld, supported by the victim's testimony notifying the defendant of the presence of the child before the defendant fired a shot next to the victim's head. Price v. State, 281 Ga. App. 844, 637 S.E.2d 468, 2006 Ga. App. LEXIS 1262 (2006) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony alone was sufficient under former O.C.G.A. § 24-4-8 to establish the elements of a charge against the defendant of child molestation, in violation of O.C.G.A. § 16-6-4(a), as the victim testified that while she was at the defendant's home visiting his daughter, he requested that she kiss him and have sexual intercourse with him, and that he showed her his erect penis; there was also testimony from a jail nurse who confirmed that the defendant had a tattoo on his penis as described by the victim, and there was an internet instant-message conversation between the defendant and the victim, during which he apologized to her for his actions. Hammontree v. State, 283 Ga. App. 736, 642 S.E.2d 412, 2007 Ga. App. LEXIS 181 (2007) (decided under former O.C.G.A. § 24-4-8).

Defendant's family violence battery conviction was affirmed on appeal as testimony from the victim, standing alone, describing the defendant's attack, when coupled with testimony regarding two prior incidents, sufficiently supported the conviction. Simmons v. State, 285 Ga. App. 129, 645 S.E.2d 622, 2007 Ga. App. LEXIS 437 (2007) (decided under former O.C.G.A. § 24-4-8).

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Despite the defendant's claim that the victim's testimony was too uncertain to support a conviction for aggravated sexual battery, the conviction was upheld on appeal as: (1) it was not for the appeals court to determine or question how the jury resolved any apparent conflicts or uncertainties in the evidence; (2) in general, the testimony of the victim was sufficient to establish a fact; and (3) corroboration was not required, and if corroboration were, the bite mark on the defendant's shoulder, which was testified to by the victim, provided sufficient corroboration. Boyt v. State, 286 Ga. App. 460, 649 S.E.2d 589, 2007 Ga. App. LEXIS 813 (2007) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support armed robbery conviction since the victim testified that defendant took the victim's cell phone while defendant pointed a gun at the victim and threatened to shoot the victim; under former O.C.G.A. § 24-4-8, testimony of a single witness was generally sufficient to establish a fact. Burden v. State, 290 Ga. App. 734, 660 S.E.2d 481, 2008 Ga. App. LEXIS 402 (2008), cert. dismissed, No. S08C1431, 2008 Ga. LEXIS 725 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence existed to support a defendant's convictions for incest and child molestation with regard to actions the defendant took toward the defendant's own children based on the children's recorded police interviews that were played for the jury; the testimony from a licensed clinical social worker who was admitted as an expert in child sexual abuse and the abuse's effect on children; and the testimony of the pediatric nurse practitioner who examined the victims and stated that, although the victims' physical exams were normal, the results were consistent with their reports of sexual abuse. The victims' testimony, standing alone, would have been sufficient to support the convictions; therefore, the trial court did not err by denying the defendant's motion for a directed verdict. Hubert v. State, 297 Ga. App. 71, 676 S.E.2d 436, 2009 Ga. App. LEXIS 357 (2009), cert. denied, No. S09C1250, 2009 Ga. LEXIS 583 (Ga. Sept. 8, 2009) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence was presented to support a defendant's conviction for armed robbery because the victim, a taxi driver, identified the defendant as one of the perpetrators based, inter alia, on the victim's knowledge of the defendant from living in the same townhome complex; a single witness's testimony was sufficient to establish a fact under former O.C.G.A. § 24-4-8. Troutman v. State, 297 Ga. App. 196, 676 S.E.2d 836, 2009 Ga. App. LEXIS 397 (2009) (decided under former O.C.G.A. § 24-4-8).

Because former O.C.G.A. § 24-4-8 provided that a victim's testimony, standing alone, was sufficient, the victim's testimony that defendant twice shot at the victim was sufficient to find defendant guilty of violating O.C.G.A. § 16-5-21(a)(2) despite testimony to the contrary. Hartley v. State, 299 Ga. App. 534, 683 S.E.2d 109, 2009 Ga. App. LEXIS 908 (2009) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of malice murder, aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime because although one of the victim's identification was the only evidence linking the defendant to the crimes, the determination of a witness' credibility, including the accuracy of eyewitness identification, was within the exclusive province of the jury, and under former O.C.G.A. § 24-4-8, the testimony of a single witness was generally sufficient to establish a fact. Reeves v. State, 288 Ga. 545, 705 S.E.2d 159, 2011 Ga. LEXIS 101 (2011) (decided under former O.C.G.A. § 24-4-8).

Defendant's convictions for kidnapping, hijacking a motor vehicle, armed robbery, possession of a firearm during the commission of a felony, carrying a concealed weapon, and possession of a weapon on school property were authorized because pursuant to former O.C.G.A. § 24-4-8, the victim's testimony alone established the essential elements of the offenses. Lester v. State, 309 Ga. App. 1, 710 S.E.2d 161,

2011 Ga. App. LEXIS 310 (2011), cert. denied, No. S11C1126, 2011 Ga. LEXIS 761 (Ga. Oct. 3, 2011) (decided under former O.C.G.A. § 24-4-8).

Trial counsel's failure to cross-examine the codefendant about a plea deal was not patently unreasonable because trial counsel's decision not to question the codefendant due to the potential harm to the defendant was a tactical and strategic decision; even if trial counsel performed deficiently, the defendant could not show prejudice in light of the overwhelming evidence against the defendant, and even in the absence of the defendant's testimony placing the defendant at the scene and acknowledging that the defendant hit the victim, under former O.C.G.A. § 24-4-8, the victim's testimony alone was sufficient to establish the facts necessary to support the defendant's convictions. Bonner v. State, 308 Ga. App. 827, 709 S.E.2d 358, 2011 Ga. App. LEXIS 298 (2011) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of bus hijacking, O.C.G.A. § 16-12-123(a)(1)(A), because the jury was authorized to conclude beyond a reasonable doubt that the defendant exercised control of the bus by force; the defendant brandished a handgun in the open door of the bus as the defendant ordered a passenger to get off, and the bus driver testified that the driver did not feel free to drive away because the driver felt the driver's life was in danger and the driver did not want to agitate the defendant. Cannon v. State, 310 Ga. App. 262, 712 S.E.2d 645, 2011 Ga. App. LEXIS 546 (2011) (decided under former O.C.G.A. § 24-4-8).

Because the victim's testimony was legally sufficient under former O.C.G.A. § 24-4-8 to establish that the defendants assaulted the victim with intent to rob, the issue of which defendant actually held the weapon was immaterial; therefore, pursuant to O.C.G.A. § 16-2-20(a), the evidence was sufficient to find them both guilty of aggravated assault with intent to rob and of possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-21(a)(1) and 16-11-106. Clark v. State, 311 Ga. App. 58, 714 S.E.2d 736, 2011 Ga. App. LEXIS 694 (2011) (decided under former O.C.G.A. § 24-4-8).

Evidence that a defendant became highly intoxicated while having visitation with his seven-year-old daughter, that he licked her vagina, kissed her with his tongue in her mouth, and made her rub her hand on his penis was sufficient to support convictions for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). A jury could infer from the evidence that the defendant's intent was to arouse and satisfy his sexual desires pursuant to O.C.G.A. § 16-2-6. Obeginski v. State, 313 Ga. App. 567, 722 S.E.2d 162, 2012 Ga. App. LEXIS 22 (2012), cert. denied, No. S12C0908, 2012 Ga. LEXIS 1013 (Ga. Oct. 1, 2012) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support the defendant's conviction for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the victim testified that the defendant held a knife when the defendant told the victim to take her clothes off and to open her legs so that the defendant could have vaginal intercourse with her against her will; pursuant to former O.C.G.A. § 24-4-8, that testimony alone was sufficient to support the conviction. Ellis v. State, 316 Ga. App. 352, 729 S.E.2d 492, 2012 Ga. App. LEXIS 560 (2012) (decided under former O.C.G.A. § 24-4-8).

Evidence from a victim that the defendant robbed the victim of cash, cell phones, and a GPS unit at knifepoint was sufficient pursuant to O.C.G.A. § 24-14-8 to establish that the defendant committed armed robbery with a knife in violation of O.C.G.A. §§ 16-8-41(a) and 16-11-106(b)(1), although the defendant testified that the victim gave the defendant these items for drugs. Sanders v. State, 324 Ga. App. 4, 749 S.E.2d 14, 2013 Ga. App. LEXIS 777 (2013).

Evidence was sufficient to convict the defendant of three counts of aggravated assault, one count of burglary, and several firearms charges because: (1) both victims testified that the defendant was their assailant; and (2) the victims' testimony alone was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of the

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charged offenses. Smith v. State, 325 Ga. App. 739, 754 S.E.2d 783, 2014 Ga. App. LEXIS 62 (2014) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of rape because the victim testified that the defendant forced the victim to have vaginal intercourse with the defendant against the victim's will; the victim's testimony, standing alone, was sufficient to sustain the conviction; and testing showed that DNA found on the swabs taken from the victim as part of the sexual assault kit matched the defendant's DNA profile. Miller v. State, 325 Ga. App. 764, 754 S.E.2d 804, 2014 Ga. App. LEXIS 70 (2014) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence supported the defendant's convictions for aggravated assault with the intent to rape, aggravated sexual battery, and burglary based on the testimony of the victim that at approximately 4:00 a.m. the victim was in bed asleep when a man got into the victim's bed and began choking the victim, that it was not consensual, and that the perpetrator indicated watching the victim for some time and inserted two fingers into the victim's vagina. Davis v. State, 326 Ga. App. 778, 757 S.E.2d 443, 2014 Ga. App. LEXIS 274 (2014).

Evidence was sufficient to convict the defendant of armed robbery, kidnapping with bodily injury, hijacking a motor vehicle, possession of a firearm during the commission of a felony, financial-transaction-card fraud, battery, and possession of a firearm by a convicted felon during a crime because the victim identified the defendant as the perpetrator who sat with the victim in the backseat of the car and threatened to shoot the victim in the victim's side; the testimony of a single witness was generally sufficient to establish a fact; the defendant was overheard saying on the night in question that the defendant wanted to commit a robbery; and the defendant attempted to persuade an acquaintance to provide the defendant with a false alibi. Belcher v. State, 344 Ga. App. 729, 812 S.E.2d 51, 2018 Ga. App. LEXIS 126 (2018).

Sufficient evidence supported the defendant's convictions for incest with the defendant's daughter both before and after the victim was 14 years old based on the testimony of the victim, which was corroborated with testimony from the victim's sister, brother, and mother. Torres v. State, 353 Ga. App. 470, 838 S.E.2d 137, 2020 Ga. App. LEXIS 25 (2020).

Testimony of rape victim sufficient. — Evidence was more than sufficient to authorize a jury's verdict that the defendant was guilty, beyond a reasonable doubt, of rape because the victim's testimony that "it hurt" when the defendant pushed his penis in her vagina and that he threatened to put her family out of his house if she told her parents or if she refused sexual contact was more than sufficient evidence of force; the jury was authorized to consider that the victim failed to initially disclose the incidents because she was fearful of the defendant and that the defendant yelled at the victim when she moved during intercourse as additional evidence of his forcible acts, and the victim's testimony, together with her immediate and consistent outcry to her father, law enforcement, and an emergency room pediatrician, provided the jury with ample evidence of penetration. Matlock v. State, 302 Ga. App. 173, 690 S.E.2d 489, 2010 Ga. App. LEXIS 77 (2010) (decided under former O.C.G.A. § 24-4-8).

Testimony from nurse as to cause of rape victim's injuries. — Nurse was properly allowed to testify as to a rape victim's statement to the nurse that her assailant had blindfolded her and pushed her into furniture because the victim's statement to the nurse was given to explain the nature and origin of some of her injuries. The nurse's evidence was sufficient to allow the jury to find that the rape victim had been pushed into furniture as she was pushed and dragged through her home while blindfolded, supporting the defendant's assault convictions. Bryant v. State, 304 Ga. App. 456, 696 S.E.2d 439, 2010 Ga. App. LEXIS 551 (2010), cert. denied, No. S10C1675, 2010 Ga. LEXIS 800 (Ga. Oct. 18, 2010) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony sufficiently corroborated an accomplice's testimony

regarding the defendant's involvement in the commission of the crimes involving the victim because the accomplice testified that, on the night of the armed robbery against the victim, an individual picked the accomplice up, and that the defendant and a third person were in the car; the victim testified that the accomplice called the victim, and that the victim drove to the accomplice's apartment complex, the accomplice got into the victim's vehicle, two men then appeared, pointed guns at the victim, and ordered the victim out of the car, the victim was beaten after being forced out of the car, and the victim heard the sound of a gunshot as the victim fled from the scene. Boynton v. State, 355 Ga. App. 590, 845 S.E.2d 327, 2020 Ga. App. LEXIS 352 (2020), cert. denied, No. S20C1449, 2021 Ga. LEXIS 90 (Ga. Feb. 15, 2021).

Testimony of single informant sufficient to sustain conviction. — Because the informant's testimony was the only testimony in which defendant was identified as the person who sold the methamphetamine to the informant in violation of O.C.G.A. § 16-13-31, there was sufficient evidence to support the conviction; under former O.C.G.A. § 24-4-8, the testimony of one witness was sufficient to establish defendant's identity. Vasquez v. State, 275 Ga. App. 548, 621 S.E.2d 764, 2005 Ga. App. LEXIS 1027 (2005) (decided under former O.C.G.A. § 24-4-8).

Testimony of motorist sufficient. — Motorist's identification of defendant as the driver of a pick-up truck that hit the motorist's vehicle and then drove away was sufficient under former O.C.G.A. § 24-4-8 to establish defendant's identity for purposes of defendant's conviction for leaving the scene of an accident and following too closely, in violation of O.C.G.A. §§ 40-6-49 and 40-6-270(a)(1). Craig v. State, 276 Ga. App. 329, 623 S.E.2d 518, 2005 Ga. App. LEXIS 1147 (2005) (decided under former O.C.G.A. § 24-4-8).

Officer's testimony sufficient. — Because the testimony of a single witness was generally sufficient to establish a fact, and there was no requirement that an actual exchange of money for drugs be witnessed by more than one person or be recorded on videotape, the defendant's sale of cocaine conviction was upheld on appeal, based on a law enforcement agent's actions of handing the defendant $40 in exchange for two pieces of a substance that tested positive for cocaine. Hicks v. State, 281 Ga. App. 217, 635 S.E.2d 830, 2006 Ga. App. LEXIS 1053 (2006) (decided under former O.C.G.A. § 24-4-8).

When a deputy testified that the defendant resisted the deputy's efforts to break up a prison fight, then turned on the deputy, punched the deputy, and swung at the deputy repeatedly, injuring the deputy, there was sufficient evidence of mutiny in a penal institution and felony obstruction of an officer; the trial court was authorized under O.C.G.A. § 16-2-6 to infer from the circumstances that the defendant both knowingly and willfully obstructed the deputy by the use of violence and intended to cause the deputy serious bodily injury by striking the deputy with a fist, and under former O.C.G.A. § 24-4-8 testimony of a single witness was sufficient. Butler v. State, 284 Ga. App. 802, 644 S.E.2d 898, 2007 Ga. App. LEXIS 412 (2007) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence existed to support a finding that the arresting officer had a clear and unobstructed view of the defendant not wearing a seat belt as required by O.C.G.A. § 40-8-76.1(f), based solely on that officer's testimony, as the testimony of a single witness was sufficient to establish a fact. Schramm v. State, 286 Ga. App. 156, 648 S.E.2d 392, 2007 Ga. App. LEXIS 553 (2007) (decided under former O.C.G.A. § 24-4-8).

Given that two officers testified that the officers saw the defendant, in plain view, packaging 35 grams of cocaine and 94 grams of marijuana into smaller packages, and the testimony of a single witness was generally sufficient to establish a fact, the defendant's convictions for trafficking in cocaine and possession of marijuana with the intent to distribute were upheld on appeal. King v. State, 289 Ga. App. 461, 657 S.E.2d 570, 2008 Ga. App. LEXIS 120 (2008) (decided under former O.C.G.A. § 24-4-8).

Evidence that a defendant was seen riding a bicycle after midnight while car-

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rying a tire iron and a black saw case and wearing a new leather tool belt around the defendant's waist, along with the defendant's own statement that the defendant had been working at the address later determined to have been broken into and a tool belt and saw taken, was sufficient to convict the defendant of burglary under O.C.G.A. § 16-7-1, although the defendant fled from police and the stolen items were not recovered. Wilcox v. State, 310 Ga. App. 382, 713 S.E.2d 468, 2011 Ga. App. LEXIS 563 (2011) (decided under former O.C.G.A. § 24-4-8).

Testimony of arresting officer sufficient to convict. — Defendant was properly convicted of felony possession of marijuana as a deputy sheriff testified that the defendant admitted that the marijuana found in the trunk of a rental car belonged to the defendant. Even though the defendant denied saying this, or possessing the drugs, the credibility of witnesses was for the jury to determine, and under former O.C.G.A. § 24-4-8, the testimony of a single witness was sufficient to establish the facts. McKinney v. State, 293 Ga. App. 419, 667 S.E.2d 210, 2008 Ga. App. LEXIS 958 (2008) (decided under former O.C.G.A. § 24-4-8).

With regard to a defendant's convictions for obstruction of a police officer and other related crimes, there was sufficient evidence to support the convictions based on the single testimony of the officer involved. Because it was the function of the jury to determine the credibility of witnesses and weigh any conflict in the evidence, the testimony of a single witness is generally sufficient to establish a fact; therefore, the testimony of the police officer who was involved in the altercation with the defendant was sufficient evidence for the jury to convict the defendant. Whatley v. State, 296 Ga. App. 72, 673 S.E.2d 510, 2009 Ga. App. LEXIS 75 (2009) (decided under former O.C.G.A. § 24-4-8).

Testimony of police investigator sufficient. — Police investigator's testimony that the defendant held a three-inch knife to the investigator's throat amply supported a conviction under former O.C.G.A. § 24-4-8. Lloyd v. State, 280 Ga. 187, 625 S.E.2d 771, 2006 Ga. LEXIS 6 (2006) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony that the defendant raped the victim at knifepoint, standing alone, was sufficient to establish the defendant's guilt beyond a reasonable doubt. Johnson v. State, 280 Ga. App. 341, 634 S.E.2d 134, 2006 Ga. App. LEXIS 851 (2006), overruled in part, Kimbrough v. State, 300 Ga. 516, 796 S.E.2d 694, 2017 Ga. LEXIS 48 (2017) (decided under former O.C.G.A. § 24-4-8).

Under former O.C.G.A. § 24-4-8, the victim's testimony that the defendant pulled a knife out of the defendant's pocket with the defendant's right hand and lunged at the victim was sufficient in itself to support convictions for aggravated assault and carrying a concealed weapon under O.C.G.A. §§ 16-5-21 and 16-11-126. Testimony that the defendant had arthritis in the right hand at most created a conflict in the evidence, as there was also testimony that the defendant, a carpenter, used both hands in the defendant's trade. Carder v. State, 291 Ga. App. 265, 661 S.E.2d 632, 2008 Ga. App. LEXIS 460 (2008) (decided under former O.C.G.A. § 24-4-8).

Victim testified that as the victim walked in front of the defendant's car, the defendant hit the gas pedal, throwing the victim onto the hood; accelerated when the victim asked the defendant to stop; and slammed on the brakes, causing the victim to slide down the hood, and the victim's legs and foot to be broken as they went underneath the car. As the victim's testimony alone was sufficient to establish these facts under former O.C.G.A. § 24-4-8, the defendant was properly convicted of aggravated battery. Cash v. State, 293 Ga. App. 702, 667 S.E.2d 691, 2008 Ga. App. LEXIS 1055 (2008) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony that the defendant kicked in the door of the victim's residence, entered without permission, pointed a shotgun at the victim, and threatened to shoot the victim if the victim did not give defendant money was sufficient in and of itself to support the defendant's conviction for armed robbery,

aggravated assault, burglary, and possession of a firearm during the commission of a crime. Reed v. State, 293 Ga. App. 479, 668 S.E.2d 1, 2008 Ga. App. LEXIS 981 (2008) (decided under former O.C.G.A. § 24-4-8).

With regard to a defendant's conviction for aggravated assault, there was sufficient evidence to support the conviction based on the victim's testimony that the defendant was the individual who approached the victim's car with a gun and ordered the victim out, causing the victim to be in fear. Kashamba v. State, 295 Ga. App. 540, 672 S.E.2d 512, 2009 Ga. App. LEXIS 38 (2009) (decided under former O.C.G.A. § 24-4-8).

Victim's uncorroborated testimony that the defendant entered the victim's home by removing the back door from the door's hinges, ordered the victim at gunpoint to get in the defendant's truck, and did not bring the victim back home for hours, was sufficient to convict the defendant of burglary and kidnapping. Hollis v. State, 295 Ga. App. 529, 672 S.E.2d 487, 2009 Ga. App. LEXIS 30 (2009) (decided under former O.C.G.A. § 24-4-8).

With regard to a defendant's conviction for aggravated assault, there was sufficient evidence to support the conviction based on the victim's testimony that the defendant was the individual who approached the victim's car with a gun and ordered the victim out, causing the victim to be in fear. Kashamba v. State, 295 Ga. App. 540, 672 S.E.2d 512, 2009 Ga. App. LEXIS 38 (2009) (decided under former O.C.G.A. § 24-4-8).

There was sufficient evidence to support a defendant's convictions for aggravated child molestation, child molestation, and false imprisonment with regard to allegations that the defendant forced a romantic friend's minor child to perform oral sex on the defendant several times over a three year period, based on the testimony of the victim (which alone was sufficient), the videotaped forensic interview of the victim, the testimony of the police investigator and the victim's mother concerning what the victim told them, as well as the testimony of the victim's siblings, who were eyewitnesses to one incident. Further, the testimony of the victim that the defendant locked the victim in the house and would not let the victim leave supported the conviction on the false imprisonment charge. Metts v. State, 297 Ga. App. 330, 677 S.E.2d 377, 2009 Ga. App. LEXIS 431 (2009) (decided under former O.C.G.A. § 24-4-8).

Secret Service agent testimony. — Trial counsel was not ineffective for failing to object on hearsay grounds to portions of a Secret Service agent's testimony about what the agent learned during the investigation since the agent did not repeat the testimony of an out-of-court declarant. Bearden v. State, 316 Ga. App. 721, 728 S.E.2d 874, 2012 Ga. App. LEXIS 534 (2012), cert. denied, No. S12C1778, 2013 Ga. LEXIS 277 (Ga. Mar. 18, 2013) (decided under former O.C.G.A. § 24-4-8).

In child molestation case, the victim's testimony did not require corroboration because: (1) the defendant's 15-year-old granddaughter testified that the defendant molested her in his home and in his pickup truck between the time she was in kindergarten until about the time she was in the sixth grade; (2) a physician testified that she found physical evidence that was consistent with penetration and sexual abuse; (3) an older granddaughter testified that she was molested by defendant 25 years ago; and (4) evidence was presented that defendant molested his five-year-old great granddaughter. Delk v. State, 274 Ga. App. 261, 619 S.E.2d 310, 2005 Ga. App. LEXIS 657 (2005) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of five counts of aggravated child molestation, two counts of child molestation, and one count of enticing a child for indecent purposes because the state presented evidence showing that the defendant had sexually abused the defendant's two minor stepdaughters; and the testimony of one of the victims alone about the abuse supported the defendant's convictions, despite the absence of any physical evidence. Bland v. State, 363 Ga. App. 268, 870 S.E.2d 823, 2022 Ga. App. LEXIS 143 (2022).

Testimony alone sufficient to prove mental suffering. Fabe v. Floyd, 199 Ga. App. 322, 405 S.E.2d 265, 1991 Ga. App.

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LEXIS 475 (1991) (on motion for rehearing) (decided under former O.C.G.A. § 24-4-8).

Former statute not controlling in federal court. — Georgia law requires independent corroboration of an accomplice's testimony; this Georgia rule is not controlling upon collateral review by a federal court. Llewellyn v. Stynchcombe, 609 F.2d 194, 1980 U.S. App. LEXIS 21628 (5th Cir. 1980) (decided under former Code 1933, § 38-121).

Juvenile proceedings. — Requirement of independent corroboration of an accomplice's testimony now set forth in former O.C.G.A. § 24-4-8 is applicable to a juvenile proceeding. In re J.H.M., 202 Ga. App. 79, 413 S.E.2d 515, 1991 Ga. App. LEXIS 1668 (1991) (decided under former O.C.G.A. § 24-4-8).

Basis for principle of requiring corroboration in a felony when the only witness is an accomplice is to safeguard against one person falsely maintaining that the person and the defendant were accomplices to commit the crime. Coleman v. State, 227 Ga. 769, 183 S.E.2d 379, 1971 Ga. LEXIS 838 (1971) (decided under former Code 1933, § 38-121).

At common law one could be convicted on the uncorroborated testimony of an accomplice; in Georgia, in felony cases, when the only witness is an accomplice, the accomplice's testimony must be corroborated and at common law, the doctrine did not amount to a rule of evidence, but merely to a "counsel of caution" given by the judge to a jury. LaFray v. State, 48 Ga. App. 133, 172 S.E. 155 (1933) (decided under former Code 1933, § 38-121).

If witness not accomplice. — Unless a witness sought to be impeached is an accomplice of the accused, the witness's testimony, without any corroboration, may authorize the conviction of the accused in a felony case. Preston v. State, 42 Ga. App. 280, 155 S.E. 774, 1930 Ga. App. LEXIS 344 (1930) (decided under former Penal Code 1910, § 1017).

State was not barred from retrying the defendant because a properly instructed jury could have found that a witness in the car in which the victim was shot was not an accomplice as there was evidence, including inconsistencies in the witness's and the former girlfriend's testimony and their statements to the police, to conclude that the witness had no knowledge that the defendant intended to shoot the victim, did not share the defendant's criminal intent to do so, and jumped out of the car and fled the scene out of fear and surprise. Because a properly instructed jury could have found that the witness was not an accomplice, corroboration of the witness's testimony was not required. Johnson v. State, 311 Ga. 221, 857 S.E.2d 463, 2021 Ga. LEXIS 133 (2021).

Uncorroborated testimony of accomplice is not sufficient to authorize a felony conviction. Holton v. State, 61 Ga. App. 654, 7 S.E.2d 202, 1940 Ga. App. LEXIS 209 (1940) (decided under former Code 1933, § 38-121); Dye v. State, 77 Ga. App. 517, 48 S.E.2d 742, 1948 Ga. App. LEXIS 590 (1948) (decided under former Code 1933, § 38-121); Potts v. State, 86 Ga. App. 779, 72 S.E.2d 553, 1952 Ga. App. LEXIS 1059 (1952) (decided under former Code 1933, § 38-121); Edenfield v. State, 95 Ga. App. 2, 96 S.E.2d 533, 1957 Ga. App. LEXIS 693 (1957) (decided under former Code 1933, § 38-121); Harris v. State, 96 Ga. App. 395, 100 S.E.2d 120, 1957 Ga. App. LEXIS 591 (1957) (decided under former Code 1933, § 38-121); Famber v. State, 134 Ga. App. 112, 213 S.E.2d 525, 1975 Ga. App. LEXIS 1925 (1975) (decided under former Code 1933, § 38-121); Adams v. State, 140 Ga. App. 621, 231 S.E.2d 547, 1976 Ga. App. LEXIS 1585 (1976) (decided under former Code 1933, § 38-121); Dudley v. State, 148 Ga. App. 560, 251 S.E.2d 815, 1978 Ga. App. LEXIS 3211 (1978) (decided under former Code 1933, § 38-121); Stinson v. State, 151 Ga. App. 533, 260 S.E.2d 407, 1979 Ga. App. LEXIS 2625 (1979) (decided under former Code 1933, § 38-121); Ladson v. State, 248 Ga. 470, 285 S.E.2d 508, 1981 Ga. LEXIS 1066 (1981) (decided under former Code 1933, § 38-121).

Defendant may not be convicted on the uncorroborated testimony of an accomplice. Castell v. State, 250 Ga. 776, 301 S.E.2d 234, 1983 Ga. LEXIS 1026 (1983) (decided under former O.C.G.A. § 24-4-8).

Rule applies only when accomplice is sole witness. — Rule that a felony

conviction is not to be had on the uncorroborated testimony of an accomplice applies only when the accomplice is the sole witness upon whose testimony the state relies. McDaniel v. State, 158 Ga. App. 320, 279 S.E.2d 762, 1981 Ga. App. LEXIS 2183 (1981) (decided under former Code 1933, § 38-121).

Defendant's conviction did not rely solely on accomplice testimony, contrary to former O.C.G.A. § 24-4-8, because the accomplice's sister testified. White v. State, 315 Ga. App. 54, 726 S.E.2d 548, 2012 Ga. App. LEXIS 312 (2012) (decided under former O.C.G.A. § 24-4-8).

Corroboration of accomplice not necessary to sustain a misdemeanor conviction. Parsons v. State, 43 Ga. 197 (1871) (decided under former Code 1868, § 3702); Grant v. State, 89 Ga. 393, 15 S.E. 488 (1892) (decided under former Code 1882, § 3755); Martin v. State, 17 Ga. App. 372, 86 S.E. 945 (1915) (decided under former Penal Code 1910, § 1017); Carson v. State, 37 Ga. App. 100, 138 S.E. 920 (1927) (decided under former Penal Code 1910, § 1017); Dobbs v. State, 44 Ga. App. 749, 162 S.E. 845 (1932) (decided under former Penal Code 1910, § 1017); Johnson v. State, 57 Ga. App. 813, 197 S.E. 61 (1938) (decided under former Code 1933, § 38-121); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-121); Bell v. State, 85 Ga. App. 242, 68 S.E.2d 925 (1952) (decided under former Code 1933, § 38-121); Drummond v. State, 87 Ga. App. 105, 73 S.E.2d 43 (1952) (decided under former Code 1933, § 38-121) ; , (for comment, see 16 Ga. B.J. 226 (1953)); Bridges v. State, 106 Ga. App. 363, 126 S.E.2d 903 (1962).C.C.R. v. State, 145 Ga. App. 27, 243 S.E.2d 601, 1978 Ga. App. LEXIS 1847 (1978) (decided under former Code 1933, § 38-121); Neal v. State, 152 Ga. App. 270, 262 S.E.2d 561, 1979 Ga. App. LEXIS 2891 (1979) (decided under former Code 1933, § 38-121); Dabney v. State, 154 Ga. App. 355, 268 S.E.2d 408, 1980 Ga. App. LEXIS 2162 (1980) (decided under former Code 1933, § 38-121).

Trial court did not err in denying the codefendant's motion for directed verdict as to the defendant's conviction for misdemeanor theft by shoplifting because no corroboration of accomplice testimony was necessary to support a misdemeanor conviction. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555, 2011 Ga. App. LEXIS 1057 (2011), cert. denied, No. S12C0656, 2012 Ga. LEXIS 398 (Ga. Apr. 24, 2012), cert. denied, No. S12C0654, 2012 Ga. LEXIS 373 (Ga. Apr. 24, 2012), overruled in part, Jackson v. State, 301 Ga. 137, 800 S.E.2d 356, 2017 Ga. LEXIS 375 (2017) (decided under former O.C.G.A. § 24-4-8).

Even though the prosecution was initiated as one seeking felony punishment, the factfinder was empowered to determine that the value of the property taken was less than the felony value, and when that was the decision the factfinder reached, the case was not a "felony case" for purposes of the accomplice corroboration requirement and the testimony of a single witness accomplice did not have to be corroborated. Heatherly v. State, 301 Ga. 386, 801 S.E.2d 827, 2017 Ga. LEXIS 533 (2017).

When several crimes are charged, each offense must be corroborated if accomplices are involved. Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627, 1981 Ga. App. LEXIS 2620 (1981) (decided under former Code 1933, § 38-121).

Distinction between general and specific testimony. — Distinction must be made between evidence which tends to prove the truth of the accomplice's general testimony and that which tends to prove the identity and participation of the accused. Gaudin v. State, 133 Ga. App. 252, 211 S.E.2d 189, 1974 Ga. App. LEXIS 1035 (1974) (decided under former Code 1933, § 38-121); Boggus v. State, 136 Ga. App. 917, 222 S.E.2d 686, 1975 Ga. App. LEXIS 1530 (1975) (decided under former Code 1933, § 38-121); Hill v. State, 236 Ga. 831, 225 S.E.2d 281, 1976 Ga. LEXIS 1041 (1976) (decided under former Code 1933, § 38-121); Vaughn v. State, 139 Ga. App. 565, 228 S.E.2d 741, 1976 Ga. App. LEXIS 1888 (1976) (decided under former Code 1933, § 38-121); Adams v. State, 140 Ga. App. 621, 231 S.E.2d 547, 1976 Ga. App. LEXIS 1585 (1976) (decided under former Code 1933, § 38-121).

Corroboration as to material facts. — If the accomplice is corroborated in material parts of the accomplice's testi-

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mony, then the accomplice may be believed by the jury as to other material parts as to which there is no corroboration. Pitts v. State, 128 Ga. App. 434, 197 S.E.2d 495, 1973 Ga. App. LEXIS 1505 (1973) (decided under former Code 1933, § 38-121); Quaid v. State, 132 Ga. App. 478, 208 S.E.2d 336, 1974 Ga. App. LEXIS 1724 (1974) (decided under former Code 1933, § 38-121).

Partial corroboration. — Simply because an accomplice's testimony is corroborated in most details, it does not follow that the accomplice's testimony alone as to the identity and participation of the accused is sufficient to justify conviction. Nix v. State, 133 Ga. App. 417, 211 S.E.2d 26, 1974 Ga. App. LEXIS 1092 (1974) (decided under former Code 1933, § 38-121); Gaudin v. State, 133 Ga. App. 252, 211 S.E.2d 189, 1974 Ga. App. LEXIS 1035 (1974) (decided under former Code 1933, § 38-121); Hill v. State, 236 Ga. 831, 225 S.E.2d 281, 1976 Ga. LEXIS 1041 (1976) (decided under former Code 1933, § 38-121); Vaughn v. State, 139 Ga. App. 565, 228 S.E.2d 741, 1976 Ga. App. LEXIS 1888 (1976) (decided under former Code 1933, § 38-121); Hobbs v. State, 142 Ga. App. 782, 237 S.E.2d 16, 1977 Ga. App. LEXIS 2142 (1977) (decided under former Code 1933, § 38-121).

Two crimes in unified transaction. — When armed robbery was an integral part of a murder transaction and was simultaneous with the murder, independent corroboration of the murder is adequate to corroborate an accomplice's testimony as to the entire unified transaction including the armed robbery. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756, 1975 Ga. LEXIS 905 (1975) (decided under former Code 1933, § 38-121).

Independent evidence of defendant's involvement. — Evidence showed that a witness's testimony was sufficiently corroborated to prove the defendant's involvement in the attempted robbery and murder of the victim because independent evidence showed that the defendant knew that the victim had lots of money; that the shooter planned and participated in the robbery with the defendant; that the defendant sent a driver to pick the shooter up on the night that the victim was shot; that the defendant threatened one of the defendant's escorts with a gun after the murder when the defendant suspected that the escort had spoken to police; and that the defendant fled Atlanta when the defendant knew that police could have been looking for the defendant in connection with the victim's murder. Rutledge v. State, 298 Ga. 37, 779 S.E.2d 275, 2015 Ga. LEXIS 788 (2015) (decided under former O.C.G.A. § 24-4-8).

Witness as party. — Fact that the witness is a party and is a prisoner convicted of a crime does not afford any basis to disregard the witness's testimony. Balkcom v. Vickers, 220 Ga. 345, 138 S.E.2d 868, 1964 Ga. LEXIS 547 (1964), overruled in part, Reed v. State, 291 Ga. 10, 727 S.E.2d 112, 2012 Ga. LEXIS 364 (2012) (decided under former Code 1933, § 38-121).

Testimony of victim. — When the alleged victim of the attack was the only witness to positively identify the defendant as the perpetrator, but when the victim's testimony was in many material respects corroborated, the jury had the right to believe the victim's testimony. Finney v. State, 51 Ga. App. 545, 181 S.E. 144, 1935 Ga. App. LEXIS 400 (1935) (decided under former Code 1933, § 38-121).

While the victim had just pulled into the parking lot of the victim's employer when defendant pointed a gun at the victim and demanded the victim's wallet, the victim's positive identification of defendant as the robber was sufficient to establish defendant's guilt and to support defendant's armed robbery conviction. Parks v. State, 257 Ga. App. 25, 570 S.E.2d 350, 2002 Ga. App. LEXIS 1530 (2002) (decided under former O.C.G.A. § 24-4-8).

Because the victim's statement of sexual abuse was sufficient under former O.C.G.A. § 24-4-8 to convict defendant of kidnapping with bodily injury, aggravated child molestation, rape, aggravated sodomy, aggravated assault, and possession of a knife during the commission of a crime, the victim's testimony did not have to be corroborated by physical evidence.

Gartrell v. State, 272 Ga. App. 726, 613 S.E.2d 226, 2005 Ga. App. LEXIS 376 (2005) (decided under former O.C.G.A. § 24-4-8).

Evidence that the defendant intentionally struck the victim with a stick and that either the defendant or one of the other parties to the assault intentionally struck the victim with their fists and a concrete block supported an aggravated assault conviction; further, although the victim was the only person who testified about having been hit with a concrete block, and was not sure which of the victim's attackers struck that blow, this testimony was sufficient to establish that the victim was hit with a concrete block because it made no difference whether an accomplice, and not the defendant, assaulted the victim in the manner alleged in the indictment. Oliver v. State, 278 Ga. App. 425, 629 S.E.2d 63, 2006 Ga. App. LEXIS 334 (2006) (decided under former O.C.G.A. § 24-4-8).

Even if a burglary victim had not testified that the checks were missing, an intent to steal could have been inferred since the evidence showed the defendant's unlawful entry into the building of another where valuable goods were kept, and the trial court did not err in charging the jury that it was allowed to "infer" an intent to steal in the context of burglary; while the defendant denied the burglary upon a defense of alibi, the testimony of a single witness was generally sufficient to establish a fact, and the defendant's challenge to the sufficiency of the evidence was without merit. Studiemeyer v. State, 278 Ga. App. 756, 629 S.E.2d 593, 2006 Ga. App. LEXIS 408 (2006) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony as to the non-consensual and forcible nature of the victim's sexual contact with the defendant, standing alone, was sufficient to sustain the defendant's conviction of rape in violation of O.C.G.A. § 16-6-1(a)(1). Brown v. State, 293 Ga. App. 633, 667 S.E.2d 899, 2008 Ga. App. LEXIS 1046 (2008) (decided under former O.C.G.A. § 24-4-8).

While the state failed to produce a weapon, fingerprints, or other physical evidence tying defendant to the crimes, pursuant to former O.C.G.A. § 24-4-8, the jury was authorized to accept the cashier's identification testimony; accordingly, the evidence was sufficient to support defendant's conviction for armed robbery. Clowers v. State, 299 Ga. App. 576, 683 S.E.2d 46, 2009 Ga. App. LEXIS 871 (2009) (decided under former O.C.G.A. § 24-4-8).

The testimony of an armed robbery victim and the victim's love interest, who were eyewitnesses to the defendant's crimes of armed robbery and aggravated assault, and who separately identified the defendant as the perpetrator of the robbery and assault, standing alone, was sufficient to establish the defendant's identity as the perpetrator. Crawford v. State, 301 Ga. App. 633, 688 S.E.2d 409, 2009 Ga. App. LEXIS 1423 (2009) (decided under former O.C.G.A. § 24-4-8).

Jury could have found the defendant guilty beyond a reasonable doubt of two counts of aggravated assault because the victim's testimony that the defendant pointed a gun at the victim and that a shot was subsequently fired wounding the victim was sufficient circumstantial evidence that the defendant committed a violent injury to the victim. Wright v. State, 302 Ga. App. 101, 690 S.E.2d 220, 2010 Ga. App. LEXIS 67 (2010) (decided under former O.C.G.A. § 24-4-8).

Testimony of child victim. — Even though child victim's testimony was the only direct evidence proving the essential elements, the child's testimony was sufficient to authorize defendant's conviction. Cantrell v. State, 231 Ga. App. 629, 500 S.E.2d 386 (decided under former O.C.G.A. § 24-4-8).

Georgia law does not require corroboration of a child molestation victim's testimony. Atkins v. State, 243 Ga. App. 489, 533 S.E.2d 152, 2000 Ga. App. LEXIS 453 (2000) (decided under former O.C.G.A. § 24-4-8).

In a child molestation prosecution, the victim's testimony that defendant touched the victim "down there" was sufficient to support defendant's conviction. Kidd v. State, 257 Ga. App. 744, 572 S.E.2d 80, 2002 Ga. App. LEXIS 1314 (2002) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony alone was sufficient to prove defendant guilty of child molestation (O.C.G.A. § 16-6-4(a)) and aggra-

General Consideration (Cont'd)

vated child molestation (O.C.G.A. § 16-6-22.2(b)), pursuant to former O.C.G.A. § 24-4-8. The testimony of the victim's cousin, two school friends, and the interviewing detective, was admissible as substantive evidence under the former Child Hearsay Statute, former O.C.G.A. § 24-3-16. Vaughn v. State, 301 Ga. App. 391, 687 S.E.2d 651, 2009 Ga. App. LEXIS 1394 (2009) (decided under former O.C.G.A. § 24-4-8).

Victim need not be corroborated. — There is no requirement that the testimony of the victim of an alleged assault be corroborated in order to legally convict the accused. Gay v. State, 143 Ga. App. 857, 240 S.E.2d 226, 1977 Ga. App. LEXIS 2540 (1977) (decided under former Code 1933, § 38-121); Samuels v. State, 223 Ga. App. 275, 477 S.E.2d 414 (decided under former O.C.G.A. § 24-4-8).

When the victim's testimony established each and every element of the four offenses, the victim's testimony, alone, was sufficient to support a finding of guilt beyond a reasonable doubt. Thompson v. State, 203 Ga. App. 339, 416 S.E.2d 755, 1992 Ga. App. LEXIS 408 (1992), cert. denied, No. S92C0785, 1992 Ga. LEXIS 363 (Ga. Apr. 24, 1992) (decided under former O.C.G.A. § 24-4-8).

Testimony of three victims of armed robbery was sufficient to support conviction, and the testimony did not require corroboration. Johnson v. State, 213 Ga. App. 194, 444 S.E.2d 334, 1994 Ga. App. LEXIS 488 (1994) (decided under former O.C.G.A. § 24-4-8).

When a third person testifies that a witness for the prosecution was an accomplice of the third person, and that the defendant was not a party to the crime, the testimony of the witness for the prosecution may not be excluded on the principle of requiring corroboration in a felony since the only witness is an accomplice. Coleman v. State, 227 Ga. 769, 183 S.E.2d 379, 1971 Ga. LEXIS 838 (1971) (decided under former Code 1933, § 38-121).

Subscribing witnesses. — Bill of sale to personalty, though attested by two subscribing witnesses, is admissible in evidence upon due proof of the document's execution by only one of the witnesses, without calling or accounting for the other. Cooper v. O'Brien, 98 Ga. 773, 26 S.E. 470, 1896 Ga. LEXIS 144 (1896) (decided under former Civil Code 1895, § 5156).

Transaction with deceased person. — Generally, the testimony of one witness is sufficient to establish a fact, even though such witness may be testifying to a transaction or communications with a deceased person. Donald v. Groves, 160 Ga. 163, 126 S.E. 583, 1925 Ga. LEXIS 105 (1925) (decided under former Civil Code 1910, § 5742).

Grounds for new trial. — Motion to rule out testimony of a witness who is a coindictee on the ground that such testimony shows the witness to be an accomplice is not a legal ground of objection, but the argument can be considered in connection with the general grounds of a motion for a new trial which contend that there is insufficient corroboration to warrant a conviction. Patterson v. State, 109 Ga. App. 582, 137 S.E.2d 74, 1964 Ga. App. LEXIS 925 (1964) (decided under former Code 1933, § 38-121).

Crime of illegally selling drugs was not one of those listed in the former statute which would require the testimony of a second witness to support a conviction. Crews v. State, 133 Ga. App. 764, 213 S.E.2d 34, 1975 Ga. App. LEXIS 2274 (1975) (decided under former Code 1933, § 38-121); Johnson v. State, 153 Ga. App. 771, 266 S.E.2d 551, 1980 Ga. App. LEXIS 1974 (1980). (decided under former Code 1933, § 38-121.

Corroboration of facts in perjury prosecution. — State complied with O.C.G.A. § 24-4-8 in producing more than two fact witnesses to testify about the facts alleged to have been falsely sworn to, i.e., the underlying acts the defendants used as a basis to swear out arrest warrants, but the state was not required to produce opinion witnesses to testify that the defendants swore falsely and committed perjury. Watson v. State, 235 Ga. App. 381, 509 S.E.2d 87 (decided under former O.C.G.A. § 24-4-8).

Witness testimony about inaccurate date-time stamp. — Trial court did not err in admitting under former

O.C.G.A. § 24-4-48(b) still photographs taken from an ATM's videotapes in a defendant's theft by deception prosecution because while a bank investigator testified that the date-time stamp was inaccurate by approximately one hour, such an inaccuracy went to the weight to be given the evidence but not to the evidence's admissibility. Parks v. State, 294 Ga. App. 646, 669 S.E.2d 684, 2008 Ga. App. LEXIS 1296 (2008) (decided under former O.C.G.A. § 24-4-8).

Testimony was sufficient to sustain adjudication of child deprivation. — Juvenile court did not err in adjudicating a child deprived and granting temporary custody of the child to the Department of Family and Children Services because, under former O.C.G.A. § 24-4-8, the testimony of the pediatrician, the detective, and the caseworker were sufficient to sustain the adjudication that the child was deprived. In the Interest of K.B., 302 Ga. App. 50, 690 S.E.2d 627, 2010 Ga. App. LEXIS 36 (2010) (decided under former O.C.G.A. § 24-4-8).

Who Is an Accomplice

Test for determining. — Test for determining whether a witness is an accomplice is: "could the witness himself have been indicted for the offense, either as principal or as accessory?" Stone v. State, 118 Ga. 705, 45 S.E. 630, 1903 Ga. LEXIS 665 (1903); Montford v. State, 144 Ga. 582, 87 S.E. 797, 1916 Ga. LEXIS 51 (1916); LaFray v. State, 48 Ga. App. 133, 172 S.E. 115, 1933 Ga. App. LEXIS 495 (1933); Kearce v. State, 178 Ga. 220, 172 S.E. 643, 1934 Ga. LEXIS 16 (1934); Head v. State, 59 Ga. App. 451, 1 S.E.2d 227, 1939 Ga. App. LEXIS 319 (1939); Lanier v. State, 187 Ga. 534, 1 S.E.2d 405, 1939 Ga. LEXIS 747 (1939); Mosley v. State, 65 Ga. App. 800, 16 S.E.2d 504, 1941 Ga. App. LEXIS 417 (1941); Stebbins v. State, 78 Ga. App. 534, 51 S.E.2d 592, 1949 Ga. App. LEXIS 922 (1949); Harris v. State, 96 Ga. App. 395, 100 S.E.2d 120, 1957 Ga. App. LEXIS 591 (1957); Fortner v. State, 96 Ga. App. 855, 101 S.E.2d 908, 1958 Ga. App. LEXIS 926 (1958); Payne v. State, 135 Ga. App. 245, 217 S.E.2d 476, 1975 Ga. App. LEXIS 1632 (1975); Herrin v. State, 138 Ga. App. 729, 227 S.E.2d 498, 1976 Ga. App. LEXIS 2301 (1976).

Former O.C.G.A. § 24-4-8 provides, in part, that in felony cases when the only witness is an accomplice, the testimony of a single witness is not sufficient. This rule has been applied to juvenile proceedings. In re A.Z., 301 Ga. App. 524, 687 S.E.2d 887, 2009 Ga. App. LEXIS 1357 (2009), cert. denied, No. S10C0587, 2010 Ga. LEXIS 357 (Ga. Apr. 19, 2010) (decided under former O.C.G.A. § 24-4-8).

Accessory before the fact and principals in the first and second degrees are all accomplices. Kearce v. State, 178 Ga. 220, 172 S.E. 643, 1934 Ga. LEXIS 16 (1934) (decided under former Code 1933, § 38-121); Stebbins v. State, 78 Ga. App. 534, 51 S.E.2d 592, 1949 Ga. App. LEXIS 922 (1949) (decided under former Code 1933, § 38-121).

Accessory after the fact was not an accomplice within the meaning of the former statute. Allen v. State, 74 Ga. 769 (1885) (decided under former Code 1882, § 3755); Springer v. State, 102 Ga. 447, 30 S.E. 971 (1897) (decided under former Penal Code 1895, § 991); Kearce v. State, 178 Ga. 220, 172 S.E. 643 (1934) (decided under former Code 1933, § 38-121); Mills v. State, 193 Ga. 139, 17 S.E.2d 719 (1941) (decided under former Code 1933, § 38-121); Moore v. State, 240 Ga. 210, 240 S.E.2d 68 (1977) (decided under former Code 1933, § 38-121); Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983) , aff'd, 252 Ga. 418, 314 S.E.2d 210 (1984).Givens v. State, 273 Ga. 818, 546 S.E.2d 509, 2001 Ga. LEXIS 337 (2001) (decided under former O.C.G.A. § 24-4-8).

Association in crime. — An accomplice is one who is associated with others in the commission of a crime, all being principals. Mosley v. State, 65 Ga. App. 800, 16 S.E.2d 504, 1941 Ga. App. LEXIS 417 (1941) (decided under former Code 1933, § 38-121).

An accomplice is defined as one who is associated with others in the commission of a crime, all being principals. Johnson v. State, 153 Ga. App. 771, 266 S.E.2d 551, 1980 Ga. App. LEXIS 1974 (1980) (decided under former Code 1933, § 38-121).

Defendant's convictions were not based on insufficient evidence when a witness gave uncorroborated testimony because the witness was not the defendant's ac-

Who Is an Accomplice (Cont'd)

complice as: (1) the defendant only asked the witness how to make a fake brick of cocaine; and (2) nothing showed the witness advised, encouraged, or counseled the defendant to commit a crime, under O.C.G.A. § 16-2-20(b)(4), or that the witness intended to participate in a crime. Williams v. State, 289 Ga. 672, 715 S.E.2d 76, 2011 Ga. LEXIS 663 (2011) (decided under former O.C.G.A. § 24-4-8).

Witness not accomplice. — Evidence presented at trial was legally sufficient to sustain the verdict because the evidence authorized the jury to find that the witness was not an accomplice at all, notwithstanding that the trial judge in the judge's capacity as a thirteenth juror found otherwise; and, even if the jury had found that the witness was an accomplice, there was some evidence that would have authorized the jury to find sufficient corroboration of the witness's testimony, notwithstanding that the trial judge as the thirteenth juror found corroboration wanting. State v. Grier, 309 Ga. 452, 847 S.E.2d 313, 2020 Ga. LEXIS 517 (2020).

Trial court did not commit plain error in failing to instruct the jury that the testimony of an accomplice had to be corroborated because the defendant's mother was not an accomplice as the evidence did not show that the mother aided or abetted the commission of the crimes or advised the defendant to do so, that the mother was ever at the crime scene, or that the mother witnessed, participated in, or was even aware of the incident until the defendant appeared at the mother's door covered in blood and announced that the defendant had killed the victim; and the mother's actions of helping the defendant, and initially denying to investigators that the mother knew anything, were more typical of an accessory after the fact than an accomplice. Horton v. State, 310 Ga. 310, 849 S.E.2d 382, 2020 Ga. LEXIS 740 (2020).

Trial court did not plainly err by failing to give an accomplice testimony jury instruction because there was no evidence that the witnesses shared defendant's intent to murder the victim or that they aided or abetted the killing in any way. as the evidence indicated only that the witnesses heard about the victim's killing later. Ash v. State, 312 Ga. 771, 865 S.E.2d 150, 2021 Ga. LEXIS 680 (2021).

Evidence was sufficient to support defendant's felony murder conviction because the jury could have reasonably concluded that the witness was not an accomplice in the charged crimes, so the witness's testimony did not require corroborating evidence. The jury was instructed on the pertinent legal principles, the general verdict did not specify whether the jury found that the witness was an accomplice, and the jury could have inferred from the witness's testimony that the witness had no prior knowledge of defendant's intent to shoot the victim or do anything other than buy marijuana and that the witness had not participated in the shooting. Caldwell v. State, 313 Ga. 640, 872 S.E.2d 712, 2022 Ga. LEXIS 141 (2022).

Evidence was sufficient to convict the defendant of malice murder and other crimes as the evidence regarding the defendant's cell phone data that connected the defendant to the murders did not need to be excluded from the sufficiency analysis even if it was improperly admitted; questions about a witness's credibility was for the jury to decide; and the jury was authorized to credit the witness's own testimony that the witness did not know the defendant would shoot the victims and that the witness was afraid the defendant might shoot the witness, too, and to find that the witness was not an accomplice and that the witness's testimony did not need to be corroborated. Copeland v. State, 314 Ga. 44, 875 S.E.2d 636, 2022 Ga. LEXIS 167 (2022).

Evidence was sufficient to convict the defendant of aggravated assault as the evidence presented in the joint trial of the defendant and the two other defendants authorized the jury to conclude that no corroboration was required because the state's witness was not an accomplice. Bronner v. State, 364 Ga. App. 280, 874 S.E.2d 474, 2022 Ga. App. LEXIS 297 (2022).

Aiding and abetting. — An "accomplice" is one who is present at the commission of a crime, aiding and abetting the

perpetrator, or who could be convicted of the crime as an accessory before the fact. Venable v. State, 56 Ga. App. 366, 192 S.E. 646, 1937 Ga. App. LEXIS 354 (1937) (decided under former Code 1933, § 38-121).

An "accomplice" is one who is present at the commission of the crime, aiding and abetting the perpetrator, or who could be convicted of such crime as an accessory before the fact. Lanier v. State, 187 Ga. 534, 1 S.E.2d 405, 1939 Ga. LEXIS 747 (1939) (decided under former Code 1933, § 38-121).

Definition of an accomplice is one who was present at the commission of a crime, aiding and abetting the perpetrator. Milton v. State, 248 Ga. 192, 282 S.E.2d 90, 1981 Ga. LEXIS 955 (1981) (decided under former O.C.G.A. § 24-4-8).

Participation in the commission of the same criminal act and in the execution of a common criminal intent is necessary to render one criminal, in a legal sense, an accomplice of another. Venable v. State, 56 Ga. App. 366, 192 S.E. 646, 1937 Ga. App. LEXIS 354 (1937) (decided under former Code 1933, § 38-121); Mosley v. State, 65 Ga. App. 800, 16 S.E.2d 504, 1941 Ga. App. LEXIS 417 (1941) (decided under former Code 1933, § 38-121); Cooper v. State, 197 Ga. 611, 30 S.E.2d 177, 1944 Ga. LEXIS 306 (1944) (decided under former Code 1933, § 38-121); Johnson v. State, 153 Ga. App. 771, 266 S.E.2d 551, 1980 Ga. App. LEXIS 1974 (1980) (decided under former Code 1933, § 38-121); Milton v. State, 248 Ga. 192, 282 S.E.2d 90, 1981 Ga. LEXIS 955 (1981) (decided under former O.C.G.A. § 24-4-8).

An accessory after the fact is not an accomplice. Castell v. State, 250 Ga. 776, 301 S.E.2d 234, 1983 Ga. LEXIS 1026 (1983) (decided under former O.C.G.A. § 24-4-8).

Voluntary participation in the commission of the same criminal act is necessary to make one an accomplice; a participation that is the result of the will of another is not such participation as will make such a participant guilty. Perryman v. State, 63 Ga. App. 819, 12 S.E.2d 388, 1940 Ga. App. LEXIS 562 (1940) (decided under former Code 1933, § 38-121); Fortner v. State, 96 Ga. App. 855, 101 S.E.2d 908, 1958 Ga. App. LEXIS 926 (1958) (decided under former Code 1933, § 38-121).

Criminal intent is a necessary ingredient of crime and is essential to render one an accomplice. It follows that when this element is absent, one is not an accomplice. Mosley v. State, 65 Ga. App. 800, 16 S.E.2d 504, 1941 Ga. App. LEXIS 417 (1941) (decided under former Code 1933, § 38-121); Johnson v. State, 153 Ga. App. 771, 266 S.E.2d 551, 1980 Ga. App. LEXIS 1974 (1980) (decided under former Code 1933, § 38-121).

Presence at scene of crime. — Although a witness may have been present at or near the scene of the crime, and may have concealed the fact for a time, yet if the witness did not in any way aid, abet, procure, or participate in the crime, the witness is not an accomplice. Venable v. State, 56 Ga. App. 366, 192 S.E. 646, 1937 Ga. App. LEXIS 354 (1937) (decided under former Code 1933, § 38-121).

Accomplice corroboration jury instruction was not required because there was no evidence that three witnesses for the state were the defendant's accomplices in a gang robbery and murder; although there was evidence that the three were present near or at the time of the shooting, the accomplices were in a separate vehicle, and if the accomplices had committed the crimes, the defendant would have been completely innocent. Stripling v. State, 304 Ga. 131, 816 S.E.2d 663, 2018 Ga. LEXIS 454 (2018).

Instruction on accomplice testimony should have been given. — Trial court plainly erred when instructing the jury that a single witness's testimony was sufficient to prove a fact without also instructing the jury on the requirement that an accomplice's testimony must be corroborated because it was a clear and obvious error for the trial court to instruct the jury that the testimony of a single witness was sufficient to establish a fact without also instructing the jury that an accomplice's testimony must be corroborated. Pindling v. State, 311 Ga. 232, 857 S.E.2d 474, 2021 Ga. LEXIS 141 (2021).

Tactical reason not to request accomplice corroboration instruction. — Clear and obvious error for the trial court not to instruct the jury as to corrobo-

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ration requirements of O.C.G.A. § 24-14-8 but the record made clear that the defendant intentionally relinquished the right to have the jury instructed on accomplice-corroboration requirement as counsel established a tactical reason for not requesting the instruction as the decision was made to focus on putting blame on the accomplice. Vasquez v. State, 306 Ga. 216, 830 S.E.2d 143, 2019 Ga. LEXIS 433 (2019).

Curative instruction improperly denied on accomplice. — Trial court erred by failing to give a curative instruction after the state made improper and inaccurate statements in its closing argument regarding its authority to determine that the state's witness was not an accomplice; and the jury was to determine whether the state's witness was an accomplice. Bronner v. State, 364 Ga. App. 280, 874 S.E.2d 474, 2022 Ga. App. LEXIS 297 (2022).

Witness guilty only of concealing evidence of a crime after the crime's commission was not an "accomplice" within the meaning of the former statute. Ford v. State, 232 Ga. 511, 207 S.E.2d 494, 1974 Ga. LEXIS 992 (1974) (decided under former Code 1933, § 38-121).

Joint indictment and plea of guilty. — Neither the joinder of a witness in an indictment with the defendant, nor a plea of guilty entered by the witness, necessarily makes the witness an accomplice with the defendant so as to require corroboration of the witness's testimony on the latter's trial. Maddox v. State, 131 Ga. App. 86, 205 S.E.2d 31, 1974 Ga. App. LEXIS 1337 (1974) (decided under former Code 1933, § 38-121).

Parties jointly indicted. — Former statute has no application to one who, while jointly indicted with the accused, is not shown by the evidence to have been the accused's accomplice or to have participated in the crime. Walker v. State, 118 Ga. 757, 45 S.E. 608, 1903 Ga. LEXIS 681 (1903) (decided under former Penal Code 1895, § 991); Davis v. State, 122 Ga. 564, 50 S.E. 376, 1905 Ga. LEXIS 260 (1905) (decided under former Penal Code 1895, § 991).

Evidence of conviction or plea of guilty is admissible to show the guilt of the accomplice and thereby show the status or relationship of the parties and thus lay the foundation for determining the character of testimony against the defendant and whether or not corroboration thereof is required. Dye v. State, 77 Ga. App. 517, 48 S.E.2d 742, 1948 Ga. App. LEXIS 590 (1948) (decided under former Code 1933, § 38-121).

Concealment of crime constitutes complicity. — Fact that witness concealed the crime for which defendant was on trial made the witness an accomplice within the meaning of former O.C.G.A. § 24-4-8. Collins v. State, 251 Ga. 521, 307 S.E.2d 496, 1983 Ga. LEXIS 897 (1983) (decided under former O.C.G.A. § 24-4-8).

Accomplice is one who acts as result of free will and not of duress or coercion. Milton v. State, 248 Ga. 192, 282 S.E.2d 90, 1981 Ga. LEXIS 955 (1981) (decided under former O.C.G.A. § 24-4-8).

Action was not free will of an accomplice. — Trial court did not err by allowing the uncorroborated testimony of a witness to be admitted against two defendants as, contrary to the defendants' contentions, the witness was not an accomplice since the evidence authorized the jury to have found that the witness was coerced into participating in the racketeering crimes for which the defendants were convicted. Overton v. State, 295 Ga. App. 223, 671 S.E.2d 507, 2008 Ga. App. LEXIS 1358 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. Apr. 20, 2009) (decided under former O.C.G.A. § 24-4-8).

Indictment for same crime does not make witness an accomplice. — Fact that witness was indicted for the same murder as the defendant does not, without more, make the witness an accomplice. Collins v. State, 251 Ga. 521, 307 S.E.2d 496, 1983 Ga. LEXIS 897 (1983) (decided under former O.C.G.A. § 24-4-8).

Fact that witness was jointly indicted with defendant on trial does not of itself render such witness an accomplice. Milton v. State, 248 Ga. 192, 282 S.E.2d 90, 1981 Ga. LEXIS 955 (1981) (decided under former O.C.G.A. § 24-4-8).

Female under the age of consent cannot be convicted of incestuous adultery and thus cannot be an accomplice. Mosley v. State, 65 Ga. App. 800, 16 S.E.2d 504, 1941 Ga. App. LEXIS 417 (1941) (decided under former Code 1933, § 38-121).

Informer for law enforcement agency who was cooperating with law enforcement at the time the evidence against the defendant was being gathered was not an accomplice. Marshall v. State, 98 Ga. App. 429, 105 S.E.2d 748, 1958 Ga. App. LEXIS 600 (1958) (decided under former Code 1933, § 38-121).

Principal thief is not an accomplice of the receiver of stolen goods. Birdsong v. State, 120 Ga. 850, 48 S.E. 329, 1904 Ga. LEXIS 718 (1904), overruled in part, Selvidge v. State, 252 Ga. 243, 313 S.E.2d 84, 1984 Ga. LEXIS 675 (1984).

Thief and one who receives stolen property from the thief are not accomplices. Stover v. State, 158 Ga. App. 644, 281 S.E.2d 642, 1981 Ga. App. LEXIS 2351 (1981) (decided under former O.C.G.A. § 24-4-8).

If a thief and a receiver of stolen goods have acted pursuant to a common criminal enterprise, they are accomplices. Selvidge v. State, 252 Ga. 243, 313 S.E.2d 84, 1984 Ga. LEXIS 675, cert. denied, 469 U.S. 823, 105 S. Ct. 99, 83 L. Ed. 2d 44, 1984 U.S. LEXIS 3136 (1984) (decided under former O.C.G.A. § 24-4-8).

Presenter of check was not accomplice. — Uttering element was established by sufficient evidence that the defendant's friend presented the check to a bank for cashing at the defendant's behest; the trial court properly charged the jury on the corroboration requirement for accomplice testimony even though the jury determined that the friend was not an accomplice. King v. State, 277 Ga. App. 190, 626 S.E.2d 161, 2006 Ga. App. LEXIS 26 (2006) (decided under former O.C.G.A. § 24-4-8).

Buyer of whiskey is not an accomplice of the seller. Gamble v. State, 4 Ga. App. 845, 62 S.E. 544, 1908 Ga. App. LEXIS 557 (1908) (decided under former Penal Code 1895, § 991).

Person is not an accomplice to murder when the person does not know who the intended victim is or when the attempt on the victim's life is to be made, and the person does not in any way participate in or encourage the murder. Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82, 1983 Ga. LEXIS 754 (1983) (decided under former O.C.G.A. § 24-4-8).

Self incrimination. — Joint principals to a crime as accomplices are competent witnesses against each other, and while the one sought to be used as a witness has the right to claim the protection afforded by Ga. Const. 1983, Art. I, Sec. I, Para. XVI, providing that no person shall be competent to give testimony tending in any manner to criminate oneself, yet this constitutional guaranty is a personal privilege belonging to the witness and cannot be claimed for the witness for the benefit of another party. Dye v. State, 77 Ga. App. 517, 48 S.E.2d 742, 1948 Ga. App. LEXIS 590 (1948) (decided under former Code 1933, § 38-121).

Sufficiency of Corroborating Evidence

Rules concerning extent of corroboration required are: (1) it is not essential that the testimony of the accomplice should be corroborated in every material particular; (2) it is not required that this corroboration shall of itself be sufficient to warrant a verdict, or that the testimony of the accomplice be corroborated in every material particular; (3) such corroborating circumstances need not be enough to amount to another witness or sufficient to support one to that extent; (4) slight evidence of corroboration connecting defendant with the crime is sufficient; and (5) the sufficiency of corroboration of the accomplice is entirely a matter for the jury. Quaid v. State, 132 Ga. App. 478, 208 S.E.2d 336, 1974 Ga. App. LEXIS 1724 (1974) (decided under former Code 1933, § 38-121).

Although a defendant may not be convicted on the uncorroborated testimony of an accomplice, the corroborating evidence need not of itself be sufficient to warrant a conviction of the crime charged, the corroborating evidence may be circumstantial, and the sufficiency of the corroborating evidence is a matter for the jury to determine. An accomplice's testimony combined with a videotape of defendant in

Sufficiency of Corroborating Evidence (Cont'd)

the front seat of a car while talking to a confidential police informant during a drug buy was sufficient corroboration to justify defendant's convictions for selling drugs. Etchison v. State, 266 Ga. App. 528, 597 S.E.2d 583, 2004 Ga. App. LEXIS 417 (2004) (decided under former O.C.G.A. § 24-4-8).

Defendant's claim to the contrary notwithstanding, the record was replete with evidence corroborating the testimony of defendant's accomplice which identified defendant as one of the perpetrators of an armed robbery; there was no claim that a store clerk's opinion as to the identity of the perpetrators was unfounded, the clerk's testimony that the clerk heard a customer identify one of the perpetrators as defendant was undisputed res gestae, and the clerk's testimony that the clerk had been sprayed in the face with mace corroborated this aspect of the accomplice's testimony as well. Carter v. State, 266 Ga. App. 691, 598 S.E.2d 76, 2004 Ga. App. LEXIS 456 (2004), superseded by statute as stated in Anderson v. State, 313 Ga. 178, 869 S.E.2d 401, 2022 Ga. LEXIS 33 (2022) (decided under former O.C.G.A. § 24-4-8).

Slight evidence sufficient to prove identity and participation. — Evidence independent of an accomplice's testimony provided the slight corroboration of the accomplice's account of the defendant's identity and participation in the crimes necessary to sustain the defendant's convictions. Montanez v. State, 311 Ga. 843, 860 S.E.2d 551, 2021 Ga. LEXIS 485 (2021).

Independent inference of defendant's guilt. — To sustain a conviction upon the testimony of an accomplice, there must be corroborating circumstances which in themselves and independently of the testimony of the accomplice directly connect the defendant with the crime, or lead to the inference that defendant is guilty. Childers v. State, 52 Ga. 106 (1874) (decided under former Code 1873, § 3755); McCrory v. State, 101 Ga. 779, 28 S.E. 92 (1897) (decided under former Penal Code 1895, § 991); Taylor v. State, 110 Ga. 150, 35 S.E. 161 (1900) (decided under former Penal Code 1895, § 991); Braxley v. State, 17 Ga. App. 196, 86 S.E. 425 (1915) (decided under former Penal Code 1910, § 1017); Allen v. State, 40 Ga. App. 657, 150 S.E. 863 (1929) (decided under former Penal Code 1910, § 1017); Jolly v. State, 41 Ga. App. 494, 153 S.E. 432 (1930) (decided under former Penal Code 1910, § 1017); Bradshaw v. State, 44 Ga. App. 783, 163 S.E. 295 (1932) (decided under former Penal Code 1910, § 1017); Whitehead v. State, 46 Ga. App. 176, 167 S.E. 204 (1932) (decided under former Penal Code 1910, § 1017); Sanders v. State, 46 Ga. App. 175, 167 S.E. 207 (1932) (decided under former Penal Code 1910, § 1017); Austin v. State, 47 Ga. App. 217, 169 S.E. 729 (1933) (decided under former Code 1933, § 38-121); Thompson v. State, 52 Ga. App. 105, 182 S.E. 414 (1935) (decided under former Code 1933, § 38-121); Perkins v. State, 59 Ga. App. 335, 200 S.E. 812 (1939) (decided under former Code 1933, § 38-121); Worley v. State, 60 Ga. App. 557, 4 S.E.2d 417 (1939) (decided under former Code 1933, § 38-121); Smith v. State, 189 Ga. 169, 5 S.E.2d 762 (1939) (decided under former Code 1933, § 38-121); Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248 (1940) (decided under former Code 1933, § 38-121); Middleton v. State, 72 Ga. App. 817, 35 S.E.2d 317 (1945) (decided under former Code 1933, § 38-121); Blakely v. State, 78 Ga. App. 282, 50 S.E.2d 762 (1948) (decided under former Code 1933, § 38-121); Stebbins v. State, 78 Ga. App. 534, 51 S.E.2d 592 (1949) (decided under former Code 1933, § 38-121); Crowe v. State, 83 Ga. App. 325, 63 S.E.2d 682 (1951) (decided under former Code 1933, § 38-121); Ivey v. State, 91 Ga. App. 455, 85 S.E.2d 829 (1955) (decided under former Code 1933, § 38-121); McPherson v. State, 96 Ga. App. 839, 101 S.E.2d 750 (1958) (decided under former Code 1933, § 38-121); Allen v. State, 215 Ga. 455, 111 S.E.2d 70 (1959) (decided under former Code 1933, § 38-121); Patterson v. State, 109 Ga. App. 582, 137 S.E.2d 74 (1964) (decided under former Code 1933, § 38-121); Waldrop v. State, 221 Ga. 319, 144 S.E.2d 372 (1965) (decided under former Code 1933, § 38-121); Sutton v. State, 223

Ga. 313, 154 S.E.2d 578 (1967) (decided under former Code 1933, § 38-121); Powell v. State, 123 Ga. App. 795, 182 S.E.2d 677 (1971) (decided under former Code 1933, § 38-121); West v. State, 232 Ga. 861, 209 S.E.2d 195 (1974) (decided under former Code 1933, § 38-121); Smith v. State, 236 Ga. 12, 222 S.E.2d 308, cert. denied, 428 U.S. 910, 96 S. Ct. 3224, 49 L. Ed. 2d 1219 (1976).Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976) (decided under former Code 1933, § 38-121); Birt v. State, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976).Hill v. State, 236 Ga. 831, 225 S.E.2d 281 (1976) (decided under former Code 1933, § 38-121); Vaughn v. State, 139 Ga. App. 565, 228 S.E.2d 741 (1976) (decided under former Code 1933, § 38-121); Green v. State, 139 Ga. App. 652, 229 S.E.2d 129 (1976) (decided under former Code 1933, § 38-121); Baker v. State, 238 Ga. 389, 233 S.E.2d 347, cert. denied, 431 U.S. 970, 97 S. Ct. 2931, 53 L. Ed. 2d 1066 (1977).Smith v. State, 238 Ga. 640, 235 S.E.2d 17, 1977 Ga. LEXIS 1146 (1977) (decided under former Code 1933, § 38-121); Hobbs v. State, 142 Ga. App. 782, 237 S.E.2d 16, 1977 Ga. App. LEXIS 2142 (1977) (decided under former Code 1933, § 38-121); Felix v. State, 143 Ga. App. 376, 238 S.E.2d 734, 1977 Ga. App. LEXIS 2328 (1977) (decided under former Code 1933, § 38-121); J.B.L. v. State, 144 Ga. App. 223, 241 S.E.2d 40, 1977 Ga. App. LEXIS 2645 (1977) (decided under former Code 1933, § 38-121); Eubanks v. State, 240 Ga. 544, 242 S.E.2d 41, 1978 Ga. LEXIS 704 (1978) (decided under former Code 1933, § 38-121); Llewellyn v. State, 241 Ga. 192, 243 S.E.2d 853, 1978 Ga. LEXIS 1358 (1978) (decided under former Code 1933, § 38-121); Reaves v. State, 146 Ga. App. 409, 246 S.E.2d 427, 1978 Ga. App. LEXIS 2382 (1978) (decided under former Code 1933, § 38-121); Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204, 1980 Ga. LEXIS 763 (1980), cert. denied, 454 U.S. 1068, 102 S. Ct. 618, 70 L. Ed. 2d 603, 1981 U.S. LEXIS 4598 (1981) (decided under former Code 1933, § 38-121); Stanford v. State, 157 Ga. App. 633, 278 S.E.2d 175, 1981 Ga. App. LEXIS 1945 (1981) (decided under former O.C.G.A. § 24-4-8); Gilbert v. State, 159 Ga. App. 326, 283 S.E.2d 361, 1981 Ga. App. LEXIS 2592 (1981) (decided under former O.C.G.A. § 24-4-8).

Contrary to defendant's argument, the testimony of defendant's accomplice, corroborated by two witnesses, provided sufficient evidence for the jury to find defendant guilty; the jury did not have to find that the corroborating evidence was itself sufficient to support the verdict, or that that evidence matched the testimony of the accomplice in every detail, as slight evidence identifying defendant as a participant in the criminal act was sufficient corroboration. Mitchell v. State, 279 Ga. 158, 611 S.E.2d 15, 2005 Ga. LEXIS 233 (2005) (decided under former O.C.G.A. § 24-4-8).

Testimony of a single witness was generally sufficient to establish a fact, and the defendant's conviction of burglary, O.C.G.A. § 16-7-1, was supported by sufficient evidence, including a neighbor's eyewitness testimony that the neighbor saw the defendant taking property out of the victim's house during the time when the burglary happened, which was corroborated by the discovery of an item of stolen property at the place where the defendant was residing, evidence which was entitled to even greater weight was the discovery of a business card from the defendant's probation officer at the victim's home. Walker v. State, 279 Ga. App. 390, 631 S.E.2d 413, 2006 Ga. App. LEXIS 575 (2006) (decided under former O.C.G.A. § 24-4-8).

Corroboration must be independent of the accomplice's testimony, and the corroboration must connect the defendant to the crime or lead to the inference that the defendant is guilty. Castell v. State, 250 Ga. 776, 301 S.E.2d 234, 1983 Ga. LEXIS 1026 (1983); Allen v. State, 175 Ga. App. 128, 333 S.E.2d 11, 1985 Ga. App. LEXIS 2780 (1985) (decided under former O.C.G.A. § 24-4-8); Hanson v. State, 193 Ga. App. 246, 387 S.E.2d 441, 1989 Ga. App. LEXIS 1384 (1989) (decided under former O.C.G.A. § 24-4-8); In re P.A.W., 224 Ga. App. 329, 480 S.E.2d 347 (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence supported defendant's felony murder conviction because the defendant's polygraph results, which

Sufficiency of Corroborating Evidence (Cont'd)

the defendant stipulated to admitting at trial, corroborated the defendant's accomplice's inculpatory testimony. Thornton v. State, 279 Ga. 676, 620 S.E.2d 356, 2005 Ga. LEXIS 634 (2005) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err by denying the defendant's motion for a directed verdict of acquittal because there was sufficient evidence to corroborate the accomplice's testimony including the 9-1-1 caller, a surveillance video seen by the jury, and the testimony of an officer as to the timing of driving from the murder scene to the car wash. Mangram v. State, 304 Ga. 213, 817 S.E.2d 682, 2018 Ga. LEXIS 465 (2018).

Inadequate corroboration for armed robbery conviction. — Error in admitting evidence of the defendant's prior arrest for armed robbery was not harmless as the evidence against the defendant was not overwhelming because none of the people in the bank during the robbery identified the defendant as one of the robbers; and the only witness connecting the defendant to the robbery was an accomplice, whose testimony, standing alone, would not support the defendant's conviction as corroboration of the accomplice's testimony was required. Blackwell v. State, 351 Ga. App. 302, 830 S.E.2d 782, 2019 Ga. App. LEXIS 429 (2019).

Corroboration by other accomplices. — Evidence was sufficient to convict the defendant of murder as the defendant used a knife to stab the victim in the neck; a jailhouse informant testified that the defendant had admitted that the defendant and a juvenile had beat the victim with a pan, strangled the victim with a belt, and stabbed the victim in the neck; and, even if the supreme court were to assume that the only evidence of the defendant's guilt was the testimony of accomplices, because more than one accomplice testified at trial, the testimony of one accomplice could be corroborated by the testimony of the others. Ramirez v. State, 294 Ga. 440, 754 S.E.2d 325, 2014 Ga. LEXIS 99 (2014) (decided under former O.C.G.A. § 24-4-8).

Trial court did not commit plain error by failing to sua sponte instruct the jury that corroboration was required of an accomplice's testimony because there was evidence to corroborate the testimony that the defendant was involved with the crimes because two other witnesses testified that the defendant contacted the witnesses before the burglary. Barney v. State, 333 Ga. App. 807, 777 S.E.2d 490, 2015 Ga. App. LEXIS 540 (2015).

Evidence was sufficient to convict the defendant of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony because the state presented both circumstantial and direct evidence at trial as the defendant was identified as the shooter by two different witnesses; and the first accomplice's testimony that the defendant shot the victim was sufficiently corroborated by the second accomplice's testimony, the physical evidence found at the scene, the forensic evidence presented by the state's expert witnesses, the lay witness testimony concerning the defendant's odd behavior and statements after the shooting, and the evidence of the defendant's flight after the murder. Rivera v. State, 304 Ga. 767, 822 S.E.2d 216, 2018 Ga. LEXIS 779 (2018) (decided under former O.C.G.A. § 24-4-8).

In a murder case, the evidence was sufficient to corroborate the first codefendant's testimony about the defendant's participation in the crimes, including the second codefendant's testimony that the first codefendant was acting at the defendant's direction and that the defendant had wanted to kidnap the victim and sell the victim to the cartel to satisfy a drug debt, was angry with the victim for stealing from the defendant, and had expressed a desire to kill the victim shortly before the victim was killed. McGarity v. State, 308 Ga. 417, 841 S.E.2d 718, 2020 Ga. LEXIS 239 (2020).

Defendant's claim that the evidence was insufficient to show the defendant participated in the brother's crimes lacked merit because three accomplices testified, corroborating each other's testimony, that the defendant participated by helping to plan and acting as the get-away driver. In addition, non-testimonial evidence cor-

roborated the testimony of the accomplices, including the gas-station video recording showing them together before the crimes. Styles v. State, 309 Ga. 463, 847 S.E.2d 325, 2020 Ga. LEXIS 528 (2020) (decided under former O.C.G.A. § 24-4-8).

There was sufficient evidence to support the defendants' convictions, as the accomplice testimony was mutually corroborating as to the plan to rob the victim and the beating and shooting, and it was further corroborated by the security videos from the apartment complex and gas station and the neighbor's testimony about hearing loud booms coming from the victim's house around the time of the shooting. Bedford v. State, 311 Ga. 329, 857 S.E.2d 708, 2021 Ga. LEXIS 155 (2021), overruled in part, Clark v. State, 315 Ga. 423, 883 S.E.2d 317, 2023 Ga. LEXIS 13 (2023).

Appellant's convictions for home invasion, rape, and other crimes upheld although failure to give jury charge on accomplice corroboration constituted clear or obvious error, error likely did not affect outcome of trial as two other accomplices corroborated main accomplice's testimony that appellant participated in crimes, and victim also testified that man matching appellant's description raped victim. Palencia v. State, 366 Ga. App. 316, 881 S.E.2d 461, 2022 Ga. App. LEXIS 538 (2022).

Testimony of an accomplice must be corroborated by independent evidence as to the identity and participation of the accused which tends to connect the accused with the crime or leads to the inference that the accused is guilty. Gaddis v. Kemp, 638 F. Supp. 819, 1986 U.S. Dist. LEXIS 23731 (S.D. Ga. 1986) (decided under former O.C.G.A. § 24-4-8).

Connection of defendant with crime. — Corroborating circumstances must connect the defendant with the crime independently of the testimony of the accomplice, and this requirement is not met by merely corroborating the accomplice as to time, place, and circumstances of the transaction, if there is nothing to connect the defendant therewith. Lanier v. State, 187 Ga. 534, 1 S.E.2d 405 (1939) (decided under former Code 1933, § 38-121); Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248 (1940) (decided under former Code 1933, § 38-121); Rozier v. State, 68 Ga. App. 797, 24 S.E.2d 137 (1943) (decided under former Code 1933, § 38-121); Croker v. State, 101 Ga. App. 742, 115 S.E.2d 413 (1960) (decided under former Code 1933, § 38-121); Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968).Pritchard v. State, 224 Ga. 776, 164 S.E.2d 808, 1968 Ga. LEXIS 945 (1968), superseded by statute as stated in State v. Stanford, 312 Ga. 707, 864 S.E.2d 448, 2021 Ga. LEXIS 655 (2021) (decided under former Code 1933, § 38-121); Nix v. State, 133 Ga. App. 417, 211 S.E.2d 26, 1974 Ga. App. LEXIS 1092 (1974) (decided under former Code 1933, § 38-121); Gaudin v. State, 133 Ga. App. 252, 211 S.E.2d 189, 1974 Ga. App. LEXIS 1035 (1974) (decided under former Code 1933, § 38-121).

Defendant's conduct before, during, and after the fatal strangulation of the victim including: (1) volunteering to kill the victim after an accomplice claimed that the victim's brother was responsible for the death of the accomplice's cousin; (2) participating in the strangulation death of the victim; (3) concealing the victim's dead body; and (4) disposing of the victim in the woods provided ample evidence to support defendant's guilt as a party to a malice murder and other crimes. Mitchell v. State, 279 Ga. 158, 611 S.E.2d 15, 2005 Ga. LEXIS 233 (2005) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in entering judgments of conviction on defendant's three burglary convictions in two cases following jury verdicts finding defendant guilty of those offenses; the state introduced sufficient evidence apart from the testimony of defendant's accomplice to warrant convictions, primarily based on the three homeowners' identification of the property taken and the homeowners' testimony about the circumstances under which the relevant property went missing. Daniel v. State, 275 Ga. App. 70, 619 S.E.2d 770, 2005 Ga. App. LEXIS 889 (2005) (decided under former O.C.G.A. § 24-4-8).

In an armed robbery prosecution, when an investigator who had viewed and heard

Sufficiency of Corroborating Evidence (Cont'd)

a videotape of the crime, in which one of the perpetrators made a high-pitched yell, testified that, while at the jail, the officer heard defendant make a sound that was so much like the sound on the tape that, "it was unreal," this testimony authorized the jury to convict this defendant. Shannon v. State, 275 Ga. App. 550, 621 S.E.2d 540, 2005 Ga. App. LEXIS 1031 (2005) (decided under former O.C.G.A. § 24-4-8).

On appeal from the defendant's aggravated assault, possession of a firearm during the commission of a crime, and first-degree criminal damage to property convictions, the court held that the testimony provided by two of the victims identifying the defendant as one of the perpetrators was sufficient to uphold the conviction as: (1) the testimony of a single witness was generally sufficient to establish a fact; and (2) under former O.C.G.A. § 24-9-80 (see now O.C.G.A. § 24-6-620), the credibility of a witness was a matter to be determined by the jury under proper instructions from the court. Reid v. State, 281 Ga. App. 640, 637 S.E.2d 62, 2006 Ga. App. LEXIS 1184 (2006) (decided under former O.C.G.A. § 24-4-8).

Passenger's testimony stating that the defendant passed marijuana to the passenger and told the passenger to discard the marijuana was sufficiently corroborated under former O.C.G.A. § 24-4-8 to support a finding of guilt of possession of more than an ounce of marijuana under O.C.G.A. § 16-13-30; the marijuana found near the defendant was packaged the same way as the marijuana found outside the car, and it could, therefore, be inferred that the marijuana found outside the car had previously been in the back seat beside the defendant. Curtis v. State, 282 Ga. App. 322, 638 S.E.2d 773, 2006 Ga. App. LEXIS 1301 (2006), cert. denied, No. S07C0427, 2007 Ga. LEXIS 203 (Ga. Feb. 26, 2007) (decided under former O.C.G.A. § 24-4-8).

While the testimony of an accomplice standing alone was insufficient to convict, when the evidence identifying two of the three defendants as participants to an armed robbery of a female victim was not limited to the uncorroborated testimony of the driver of the getaway car, the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that both were guilty. Williamson v. State, 285 Ga. App. 779, 648 S.E.2d 118, 2007 Ga. App. LEXIS 642 (2007) (decided under former O.C.G.A. § 24-4-8).

Defendant's convictions for possessing 28 grams or more of cocaine, possessing cocaine with intent to distribute, and possession of a firearm during the commission of a felony were upheld on appeal as sufficient evidence was presented via the direct testimony of the defendant's live-in girlfriend, which when combined with the evidence showing their joint constructive possession of the drugs and gun tended to connect and identify the defendant with the crimes charged. Allen v. State, 286 Ga. App. 469, 649 S.E.2d 583, 2007 Ga. App. LEXIS 810 (2007) (decided under former O.C.G.A. § 24-4-8).

Despite a juvenile's challenge to the sufficiency of the evidence, an adjudication entered by the juvenile court on a charge of attempted rape was proper because the charge was supported not only by the testimony of the victim, but also by the corroborating testimony offered by both the victim's neighbor, who witnessed the attack, and the victim's sister, who chased the juvenile away from the scene. In the Interest of J.L.H., 289 Ga. App. 30, 656 S.E.2d 160, 2007 Ga. App. LEXIS 1314 (2007) (decided under former O.C.G.A. § 24-4-8).

Despite waiving error regarding a show up identification because: (1) a victim's identification of the defendant as one of the perpetrators of a burglary, robbery, and battery was sufficient and non-suggestive; and (2) the corroborating testimony from the defendant's two accomplices was admissible to support the defendant's convictions, as both accomplices testified as to the defendant's involvement in the crimes, those convictions were upheld on appeal; thus a new trial was properly denied. Carr v. State, 289 Ga. App. 875, 658 S.E.2d 419, 2008 Ga. App. LEXIS 220 (2008) (decided under former O.C.G.A. § 24-4-8).

With regard to a defendant's convictions on one count of enticing a child for inde-

cent purposes, ten counts of child molestation, one count of aggravated child molestation, and three counts of cruelty to children in the first degree, regarding actions the defendant took toward three children and what the children were forced to do to each other by gunpoint while the defendant was a babysitter for the children, the state proved the charged offenses beyond a reasonable doubt based on the testimony of the three victims and the victims' videotaped forensic interviews. It was within the province of the jury to disbelieve the defendant's testimony that the defendant did not commit the charged crimes. Sullivan v. State, 295 Ga. App. 145, 671 S.E.2d 180, 2008 Ga. App. LEXIS 1259 (2008), cert. denied, No. S09C0624, 2009 Ga. LEXIS 215 (Ga. Apr. 20, 2009) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in convicting the defendant of armed robbery of a restaurant, O.C.G.A. § 16-8-41(a), and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), because sufficient evidence corroborated an accomplice's testimony that the defendant participated in the robbery; the driver corroborated that the driver picked the defendant up and dropped the defendant and the accomplice off at the defendant's residence near the restaurant about two-and-one-half hours before the robbery, the driver overheard the defendant speaking to the accomplice about committing a robbery, and two more witnesses confirmed that the two were together that evening. Jones v. State, 302 Ga. App. 147, 690 S.E.2d 460, 2010 Ga. App. LEXIS 59 (2010) (decided under former O.C.G.A. § 24-4-8).

There was sufficient corroboration of the defendant as a perpetrator of the principal crime, and, ultimately, sufficient evidence to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment, possession of a firearm during the commission of a felony, and burglary because there was circumstantial evidence to show that the defendant committed a similar transaction after the first incident, that the same gun an accomplice bought and used in the first crime was used in the second crime and ended up in a car at the house of the defendant's mother afterwards, and that the defendant was nervous and felt guilty about events that the defendant participated in with the accomplice, whom the defendant had only known a short time; that corroborative evidence connected the accomplice to the crimes. Ward v. State, 304 Ga. App. 517, 696 S.E.2d 471, 2010 Ga. App. LEXIS 558 (2010) (decided under former O.C.G.A. § 24-4-8).

Any rational trier of fact could have found the defendant guilty of trafficking in cocaine, possession of methylenedioxyamphetamine, and possession of less than one ounce of marijuana beyond a reasonable doubt because based on the evidence, the jury was authorized to conclude that the defendant threw a plastic bag containing drugs out the passenger side window of the defendant's car when the state presented evidence that a deputy saw the defendant actually possessing the bag of illegal narcotics as the defendant held the bag in the car before the defendant threw the bag out the passenger's window; an officer's testimony that the officer saw the defendant's hand on a plastic bag containing cocaine is sufficient to authorize a rationale trier of fact to find that the defendant possessed the cocaine. McCombs v. State, 306 Ga. App. 64, 701 S.E.2d 496, 2010 Ga. App. LEXIS 798 (2010) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of malice murder and related offenses because there was no violation of former O.C.G.A. § 24-4-8 since although a co-indictee could be considered an accomplice to murder and the other non-drug-related crimes on which the defendant was tried, there was no evidence of the co-indictee's intent to participate in any crime other than drug trafficking; assuming that the co-indictee was an accomplice, a witness's apparent firsthand knowledge about the crime connected the defendant to the crime and thereby corroborated a co-indictee's testimony identifying the defendant as the shooter. Moore v. State, 288 Ga. 187, 702 S.E.2d 176, 2010 Ga. LEXIS 853 (2010) (decided under former O.C.G.A. § 24-4-8).

Sufficiency of Corroborating Evidence (Cont'd)

Defendant's conviction for trafficking in cocaine, in violation of O.C.G.A. § 16-13-31(a)(1), was supported by sufficient evidence under O.C.G.A. § 16-2-20(b)(3) and former O.C.G.A. § 24-4-8 since the defendant and the codefendant had both made statements regarding the defendant's involvement in the criminal activity, and the police observed the defendant's actions; there was evidence that the defendant was an active participant and a party to the trafficking offense. Martinez v. State, 314 Ga. App. 551, 724 S.E.2d 851, 2012 Ga. App. LEXIS 232 (2012) (decided under former O.C.G.A. § 24-4-8).

With regard to the defendant's challenge to the sufficiency of the evidence supporting the defendant's conviction for aggravated assault, the testimony of the victim alone was sufficient to support the conviction based on the victim identifying the defendant as the assailant from a photo array, as well as the victim testifying that the defendant had a gun, that when the victim turned and ran, the victim heard a gunshot and then discovered that the victim was shot. Lomax v. State, 319 Ga. App. 693, 738 S.E.2d 152, 2013 Ga. App. LEXIS 50 (2013) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err by denying the defendant's motion for a new trial based on the defendant's contention that the evidence was insufficient to corroborate the accomplice testimony implicating the defendant in the robbery because the testimony of the victim identified the defendant as the perpetrator and was sufficient corroboration of the accomplice's testimony. Vann v. State, 322 Ga. App. 148, 742 S.E.2d 767, 2013 Ga. App. LEXIS 432 (2013).

With regard to the defendant's murder conviction, the defendant's contention on appeal that the accomplice testimony used to convict was not corroborated was found meritless because there was slight evidence from an extraneous source identifying the defendant as a participant in the crime; specifically, authorities found the defendant's blood and palm print on the car used during the crime which evidence corroborated the accomplice's testimony that the defendant was injured on the broken glass of the window the men used to gain entry to the victim's house. Lewis v. State, 293 Ga. 110, 744 S.E.2d 21, 2013 Ga. LEXIS 488 (2013).

With regard to the defendant's robbery conviction, contrary to the defendant's contention that the testimony of an accomplice was uncorroborated and thus insufficient to support the conviction, there was no conflict in the testimony that the defendant was a participant; thus, the corroborating evidence was more than slight and was sufficient to authorize the jury to find that the accomplice's testimony was corroborated. Carter v. State, 324 Ga. App. 118, 749 S.E.2d 404, 2013 Ga. App. LEXIS 809 (2013), cert. denied, No. S14C0253, 2014 Ga. LEXIS 77 (Ga. Jan. 21, 2014).

Sufficient evidence supported the defendant's conviction for armed robbery based on the victim identifying the defendant as the person who hit the victim on the head, an accomplice's testimony, the victim's car keys were found in a bag that the defendant had been holding when stopped by an officer, and the defendant fled from the officers when the officers attempted to arrest. Brooks v. State, 323 Ga. App. 681, 747 S.E.2d 688, 2013 Ga. App. LEXIS 708 (2013).

There was ample corroboration of the accomplice's testimony, including evidence that the murder weapon was found in the defendant's home, a cap and t-shirt like the ones that the victim said the defendant discarded near the murder scene were found near there, and the defendant's DNA was found on a cap found in the vehicle where the victims were shot. Bradshaw v. State, 296 Ga. 650, 769 S.E.2d 892, 2015 Ga. LEXIS 144 (2015).

Since the accomplice's testimony was corroborated by phone records, physical evidence, and the testimony of other witnesses, including the defendant's own statements to police, under former O.C.G.A. § 24-4-8, the evidence was sufficient to support the defendant's convictions. McDonald v. State, 296 Ga. 643, 770 S.E.2d 6, 2015 Ga. LEXIS 143 (2015) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support the appellant's conviction as a party to the crime of violating O.C.G.A. § 40-6-395(a) for fleeing and eluding because the appellant testified and admitted shoplifting, admitted to having a prior record of shoplifting, had only recently been released from prison, and that getting caught on the day of the events would be a parole violation that would send the appellant back to prison. McNeely v. State, 296 Ga. 422, 768 S.E.2d 751, 2015 Ga. LEXIS 11 (2015).

Trial court properly denied the defendant's motion for a directed verdict based on the testimony of the victim that the defendant repeatedly had sexual intercourse and engaged in other sexual acts with the victim, who was younger than 16, as well as the wife's testimony that the defendant admitted to having sex with the victim. Jones v. State, 333 Ga. App. 796, 777 S.E.2d 480, 2015 Ga. App. LEXIS 539 (2015).

The testimony of the victim's brother, identifying the defendant as the shooter, was sufficient to support the convictions because two other eyewitnesses to the shooting corroborated the brother's description of the car driven by the shooter, and another witness corroborated the brother's description of the shooter getting out of the distinctive car a few days after the shooting at the apartment complex where the defendant was soon after arrested. Moss v. State, 298 Ga. 613, 783 S.E.2d 652, 2016 Ga. LEXIS 203 (2016).

Victim's testimony that she had sex, including oral sex, with the defendant, her stepfather, beginning when she was 12 years old was corroborated by, among other things, the defendant's admissions and, therefore, the evidence was sufficient to support the statutory rape, child molestation, aggravated child molestation, and incest convictions. Jackson v. State, 339 Ga. App. 313, 793 S.E.2d 201, 2016 Ga. App. LEXIS 619 (2016).

While the co-murderer's statement to police did make up a significant portion of the testimony connecting the defendant to the murders, it was not the only evidence against the defendant as cell phone evidence indicated the defendant was near the victims' home near the time the crimes took place and direct testimony established that the defendant recruited at least one participant in the robbery scheme that resulted in the murders. Thompson v. State, 302 Ga. 533, 807 S.E.2d 899, 2017 Ga. LEXIS 950 (2017).

Evidence was sufficient to convict the defendant of, inter alia, malice murder, felony murder, and aggravated assault with a deadly weapon because, assuming that the first witness was an accomplice, there was evidence independent of the first witness's testimony connecting the defendant to the crimes as cell phone records showed the defendant's cell phone was near the towing company where the victim worked around the time of the shooting; a second witness heard gunshots and saw a blue truck with a man standing outside and a man hanging out of a window with the man's arms formed as if shooting; and a third witness reported to police that the defendant and the co-indictee admitted to the third witness that they had killed the victim. Parks v. State, 302 Ga. 345, 806 S.E.2d 529, 2017 Ga. LEXIS 877 (2017).

Evidence was sufficient to support the defendant's convictions of armed robbery, burglary, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon because the defendant's girlfriend's testimony that the defendant told the girlfriend about the defendant's involvement in the robbery corroborated the defendant's accomplice's testimony and was admissible as a party-opponent against penal interest. Wilson v. State, 349 Ga. App. 386, 825 S.E.2d 843, 2019 Ga. App. LEXIS 166 (2019).

Accomplice testimony about the appellant's participation in the victim's murder was adequately corroborated by independent evidence based on the appellant's admissions, the testimony of the appellant's girlfriend, and cell phone records, which placed the appellant in the same area at the time of the murder and showed communications with the victim and the individual who held the murder weapon after the killing. McCammon v. State, 306 Ga. 516, 832 S.E.2d 396, 2019 Ga. LEXIS 505 (2019).

Evidence that the defendant shot the two victims, although given through the

Sufficiency of Corroborating Evidence (Cont'd)

testimony of an accomplice, was supported by testimony from a friend that they appeared to have been running, confirming the accomplice's testimony that they ran from police, and defendant's DNA was found on a bottle on the side of the road near the bodies. Mattox v. State, 308 Ga. 302, 840 S.E.2d 373, 2020 Ga. LEXIS 173 (2020).

There was sufficient corroboration of the defendant's accomplice's testimony because from the detective's testimony regarding a witness's report of the confession to the shooting by two men, the jury could infer that one of the men was the defendant. Doyle v. State, 307 Ga. 609, 837 S.E.2d 833, 2020 Ga. LEXIS 6 (2020).

Even if the jury determined that the witness was an accomplice, there was adequate evidence to corroborate the witness's testimony, including physical descriptions of the shooter, an eyewitness's testimony about the shooter's Creole or Cajun accent and use of the term "woahdie," and the defendant's move to Detroit after the shooting and flight when officers tried to arrest the defendant. Fisher v. State, 309 Ga. 814, 848 S.E.2d 434, 2020 Ga. LEXIS 604 (2020).

State corroborated the drug dealer's testimony because the defendant was identified by the victim's son as the man who fatally shot the victim, the defendant was identified by an acquaintance as the defendant fled the crime scene, and the defendant confessed to an ex-boyfriend that the defendant had shot the victim. Studivant v. State, 309 Ga. 650, 847 S.E.2d 588, 2020 Ga. LEXIS 584 (2020).

Appellant's convictions for multiple sex and drug-related offenses was upheld because testimony of three child victims, standing alone, was sufficient to support appellant's convictions, physical evidence of sexual abuse was not required, and jury was also permitted to consider out-of-court statements made by children in forensic interviews and to foster (now adoptive) mother as substantive evidence of appellant's guilt. Rider v. State, 366 Ga. App. 260, 883 S.E.2d 374, 2022 Ga. App. LEXIS 547 (2022).

Accomplice to felony exception not applicable. — Sufficient evidence supported defendant's O.C.G.A. § 16-7-1 burglary conviction. The former O.C.G.A. § 24-4-8 "accomplice to a felony" exception did not apply and the defendant's codefendant's evidence was admissible (and subject to cross-examination) since a neighbor also testified that the neighbor saw the defendant enter the victim's home and remove items which were later recovered from the codefendant. Millirons v. State, 268 Ga. App. 644, 602 S.E.2d 346, 2004 Ga. App. LEXIS 981 (2004) (decided under former O.C.G.A. § 24-4-8).

Knowledge and use of home security code. — Accomplice's testimony was sufficiently corroborated when the victim's body was found in a manner consistent with the accomplice's testimony, other witnesses corroborated various details of the accomplice's testimony, and defendant left town, as the accomplice testified defendant warned the accomplice to do likewise. Hinely v. State, 275 Ga. 777, 573 S.E.2d 66, 2002 Ga. LEXIS 1070 (2002) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence to convict the defendant of burglary, assault, and battery included an accomplice's testimony (sufficiently corroborated under former O.C.G.A. § 24-4-8 by accomplice's knowledge and use of the defendant's grandmother's security code) that defendant hired an accomplice to kill the grandmother. Hill v. State, 268 Ga. App. 642, 602 S.E.2d 348, 2004 Ga. App. LEXIS 980 (2004) (decided under former O.C.G.A. § 24-4-8).

Identity of accomplice alone is insufficient corroboration. — Under former O.C.G.A. § 24-4-8, testimony which concerns the identity of other participants must be corroborated by some means independent of the testimony of the accomplice. One who is guilty of a crime in which one participated will always be able to relate the facts of the case and if the corroboration goes only to the truth of that history, without identifying the person ac-

cused, it is really no corroboration at all. Milton v. State, 248 Ga. 192, 282 S.E.2d 90, 1981 Ga. LEXIS 955 (1981) (decided under former O.C.G.A. § 24-4-8).

Corroboration required by former O.C.G.A. § 24-4-8 need not be sufficient to warrant guilty verdict or prove every material element of the crime; it need only tend to connect and identify the defendant with the crime charged. Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627, 1981 Ga. App. LEXIS 2620 (1981) (decided under former O.C.G.A. § 24-4-8); Raines v. State, 186 Ga. App. 239, 366 S.E.2d 841, 1988 Ga. App. LEXIS 306 (1988) (decided under former O.C.G.A. § 24-4-8); Hanson v. State, 193 Ga. App. 246, 387 S.E.2d 441, 1989 Ga. App. LEXIS 1384 (1989) (decided under former O.C.G.A. § 24-4-8).

Accomplice's testimony was corroborated for bank robbery conviction since: (1) the security guard identified defendant as a perpetrator; (2) a baseball cap dropped by the gunman was scientifically linked to defendant; (3) defendant gave the accomplice a gun before the later robberies, and the gun the accomplice discarded after a later robbery was the weapon taken from the bank security guard at the bank robbery; and (4) a still photograph of the gunman made from the bank surveillance videotape was shown to the jury. Smith v. State, 257 Ga. App. 595, 571 S.E.2d 817, 2002 Ga. App. LEXIS 1232 (2002) (decided under former O.C.G.A. § 24-4-8).

Accomplice's identification of participants in crime must be corroborated. — When an accomplice's testimony is corroborated in material part, other uncorroborated testimony may be believed by the jury, with one important exception: testimony which concerns the identity of other participants must be corroborated by some means independent of the testimony of the accomplice. Cofer v. State, 166 Ga. App. 436, 304 S.E.2d 537, 1983 Ga. App. LEXIS 2202 (1983) (decided under former O.C.G.A. § 24-4-8).

Testimony of a defendant's accomplice implicating the defendant in several robberies was sufficiently corroborated based on the defendant's admission, eyewitnesses confirming that two persons participated, and the defendant's use of the victims' bank cards after the robberies. Thus, the defendant's participation as an accessory was sufficiently corroborated by evidence other than from the accomplice. Epps v. State, 296 Ga. App. 92, 673 S.E.2d 608, 2009 Ga. App. LEXIS 140 (2009) (decided under former O.C.G.A. § 24-4-8).

Slight evidence sufficient to prove identity. — Corroborating evidence of testimony of an accomplice, albeit slight, tended to prove defendant's identity and participation in the crime and therefore was sufficient as a matter of law. Walker v. State, 57 Ga. App. 868, 197 S.E. 67, 1938 Ga. App. LEXIS 426 (1938) (decided under former Code 1933, § 38-121); McPherson v. State, 96 Ga. App. 839, 101 S.E.2d 750, 1958 Ga. App. LEXIS 919 (1958) (decided under former Code 1933, § 38-121); Trull v. State, 221 Ga. 442, 145 S.E.2d 242, 1965 Ga. LEXIS 487 (1965) (decided under former Code 1933, § 38-121); Pitts v. State, 128 Ga. App. 434, 197 S.E.2d 495, 1973 Ga. App. LEXIS 1505 (1973) (decided under former Code 1933, § 38-121); Harris v. State, 165 Ga. App. 186, 299 S.E.2d 393, 1983 Ga. App. LEXIS 3127 (1983) (decided under former O.C.G.A. § 24-4-8); Williams v. State, 198 Ga. App. 725, 402 S.E.2d 796, 1991 Ga. App. LEXIS 245 (1991) (decided under former O.C.G.A. § 24-4-8); Brown v. State, 199 Ga. App. 18, 404 S.E.2d 154, 1991 Ga. App. LEXIS 341 (1991) (decided under former O.C.G.A. § 24-4-8); Tucker v. State, 205 Ga. App. 683, 423 S.E.2d 422, 1992 Ga. App. LEXIS 1293 (1992) (decided under former O.C.G.A. § 24-4-8); Young v. State, 213 Ga. App. 278, 444 S.E.2d 598, 1994 Ga. App. LEXIS 586 (1994) (decided under former O.C.G.A. § 24-4-8); Knott v. State, 225 Ga. App. 604, 484 S.E.2d 342 (decided under former O.C.G.A. § 24-4-8).

Slight evidence of corroboration, which may be entirely circumstantial, that connects a defendant with the crime satisfies the requirements of former O.C.G.A. § 24-4-8, and the sufficiency of the corroboration of an accomplice's testimony is peculiarly a matter for the jury; thus, the evidence presented at defendant's trial for multiple burglary counts was sufficient to support defendant's convictions since the testimony of defendant's nephew, who

Sufficiency of Corroborating Evidence (Cont'd)

acted as an accomplice, was corroborated by the testimony of the victims describing the methods used to break into their homes and the items that were taken. Gibson v. State, 267 Ga. App. 473, 600 S.E.2d 417, 2004 Ga. App. LEXIS 694 (2004) (decided under former O.C.G.A. § 24-4-8).

There was at least slight evidence from sources extraneous to the defendant's accomplice as to the defendant's identity and participation in a robbery, and the evidence was sufficient to support a guilty verdict on that count. Extraneous evidence connected the defendant to at least one robbery in which the defendant employed the same modus operandi as the accomplice employed. Grimes v. State, 291 Ga. App. 585, 662 S.E.2d 346, 2008 Ga. App. LEXIS 579 (2008) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support the defendant's convictions for armed robbery, burglary, aggravated assault, criminal attempt to commit armed robbery, criminal attempt to commit burglary, and sexual battery because there was at lease slight evidence from sources extraneous to a co-conspirator as to the defendant's identity and participation in a home invasion and robbery; the co-conspirator testified that the co-conspirator attended a meeting to plan the robbery and that the meeting occurred at the apartment where the defendant resided, and extraneous evidence connected the defendant to at least two home invasions that employed the same modus operandi. Martinez v. State, 306 Ga. App. 512, 702 S.E.2d 747, 2010 Ga. App. LEXIS 979 (2010) (decided under former O.C.G.A. § 24-4-8).

Testimony of other witnesses sufficient. — Finding of delinquency by virtue of the minor's having committed acts which if done by an adult would have constituted motor vehicle theft and burglary was not based solely upon the uncorroborated testimony of an accomplice; rather, many of the details were also corroborated by the testimony of two investigators, a relative of the minor, the owner of one of the stolen vehicles and the minor personally. In re J.B., 223 Ga. App. 429, 477 S.E.2d 874 (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support defendant's convictions for armed robbery and kidnapping as the testimony of at least one witness that was presented against defendant as to each offense was sufficient to establish as a fact that defendant committed the offenses. Singleton v. State, 259 Ga. App. 184, 577 S.E.2d 6, 2003 Ga. App. LEXIS 36 (2003) (decided under former O.C.G.A. § 24-4-8).

Trial court properly denied defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, because there was sufficient evidence to support the convictions for aggravated assault and reckless conduct, in violation of O.C.G.A. §§ 16-5-21(a)(2) and 16-5-60(b), respectively; defendant and the codefendants were involved in a physical altercation with two restaurant patrons, and a codefendant's testimony that defendant retrieved a gun and shot the victim was sufficiently repeated by the testimony of other witnesses, who also connected defendant with the shooting pursuant to the corroboration requirement in former O.C.G.A. § 24-4-8. Baker v. State, 273 Ga. App. 297, 614 S.E.2d 904, 2005 Ga. App. LEXIS 481 (2005) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support defendant's conviction for violation of O.C.G.A. § 16-13-30 of the Georgia Controlled Substances Act because a passenger in the defendant's truck testified that defendant purchased crack cocaine from an individual in a high drug area, a rock of crack cocaine was found in defendant's truck, and a police officer corroborated that testimony pursuant to former O.C.G.A. § 24-4-8 with the officer's own observations that the individual that defendant was talking to had money in a hand as the individual lowered the hand from defendant's truck window. Millsap v. State, 275 Ga. App. 732, 621 S.E.2d 837, 2005 Ga. App. LEXIS 1104 (2005) (decided under former O.C.G.A. § 24-4-8).

There was sufficient evidence to support a defendant's convictions for aggravated assault and possession-of-a-firearm based on the testimony of three separate wit-

nesses, including the victim, that the defendant threateningly pointed a gun at the victim's head. Further, regarding the need to show the victim's reasonable apprehension of immediately receiving a violent injury, the state presented evidence from the victim's mouth that the victim feared the gun and that the fear resulted in the victim urinating on the victim's person and in the victim lying to an officer at the front door to protect the victim's children. Hardy v. State, 293 Ga. App. 265, 666 S.E.2d 730, 2008 Ga. App. LEXIS 896 (2008), cert. denied, No. S08C2141, 2008 Ga. LEXIS 1016 (Ga. Nov. 17, 2008) (decided under former O.C.G.A. § 24-4-8).

The testimony of a victim and the victim's neighbor that the defendant was the person who held a gun to the victim's side and led the victim outside to search for money in the victim's truck, as well as a letter from the defendant to a codefendant implicating the defendant, was sufficient corroboration under former O.C.G.A. § 24-4-8 to create a jury question as to whether the defendant was guilty of aggravated assault. Decoteau v. State, 302 Ga. App. 451, 691 S.E.2d 328, 2010 Ga. App. LEXIS 154 (2010) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal on the ground that there was insufficient corroboration of an accomplice's testimony because there was no violation of former O.C.G.A. § 24-4-8; the testimony of the victim's fiancée and the accomplice's friend was sufficient to corroborate the accomplice's testimony directly identifying the defendant as the shooter, the physical description of the shooter that the fiancé provided to the police fit the defendant, and the fiancée's description of the shooter's clothes was consistent with the accomplice's trial testimony about what the defendant was wearing on the day of the incident. Johnson v. State, 288 Ga. 803, 708 S.E.2d 331, 2011 Ga. LEXIS 259 (2011) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support the defendant's convictions as the getaway driver's testimony about the heights of the defendant and the codefendant was consistent with the gas station clerk's comparison of their heights, and there was evidence that the defendant, who had no job, was spending significant amounts of money on cars and expensive clothing. Harrell v. State, 322 Ga. App. 115, 744 S.E.2d 105, 2013 Ga. App. LEXIS 463 (2013) (decided under former O.C.G.A. § 24-4-8).

In a case decided under former O.C.G.A. § 24-4-8, the testimony of an accomplice implicating the defendant was corroborated by evidence that the defendant believed the victim stole the defendant's cocaine, witnesses identified the defendant as being involved in dragging a man into a vehicle, and the victim's blood was found in the defendant's sister's basement. McKibbins v. State, 293 Ga. 843, 750 S.E.2d 314, 2013 Ga. LEXIS 873 (2013) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the first defendant of felony murder, two counts of aggravated assault, and possession of a firearm during the commission of a crime because the testimony of the fourth defendant's ex-girlfriend placed the first defendant at the scene of the shooting when the shooting occurred, which corroborated the testimony of the state's witness, who was a participant in the crimes, that the witness saw the first defendant at the scene shooting a gun and then fleeing with the other defendants. Grimes v. State, 296 Ga. 337, 766 S.E.2d 72, 2014 Ga. LEXIS 922 (2014).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment, and possession of a firearm during the commission of a felony in violation of O.C.G.A. §§ 16-8-41, 16-5-21, 16-5-41, and 16-11-106, based on testimony from witnesses inside the bank, the defendant's clothing, a text message between the defendant and the defendant's accomplice, and the defendant's accomplice's testimony, which was corroborated as required by O.C.G.A. § 24-14-8. Odle v. State, 331 Ga. App. 146, 770 S.E.2d 256, 2015 Ga. App. LEXIS 114 (2015).

While the victim could not identify the gunman, the combined testimony of the other witnesses was sufficient to enable a rational jury to find the defendant guilty

Sufficiency of Corroborating Evidence (Cont'd)

beyond a reasonable doubt as the perpetrator of the charged crimes, including armed robbery and aggravated battery, and to exclude every reasonable hypothesis except that of the defendant's guilt. Epperson v. State, 340 Ga. App. 25, 796 S.E.2d 1, 2016 Ga. App. LEXIS 701 (2016).

Evidence was sufficient to support the defendant's malice murder conviction because there was evidence apart from the accomplice's testimony from which the jury could have inferred that the defendant was a participant, including eyewitness testimony that an accomplice pointed a gun at the victim when the group attempted to rob the victim, a witness testified that the defendant did not abandon the group at this point but proceeded with the others in the victim's direction, the defendant remained for the attempted robbery of the victim, the defendant did not seek aid for the victim after the victim was shot, and the defendant fled the scene. Daniels v. State, 306 Ga. 559, 832 S.E.2d 372, 2019 Ga. LEXIS 524 (2019).

In a malice murder case, an accomplice's testimony was corroborated as required since two others recounted the planning and execution of the crimes. Martin v. State, 310 Ga. 658, 852 S.E.2d 834, 2020 Ga. LEXIS 933 (2020).

Corroboration by detective. — When a former detective testified without objection that a witness to a robbery gave a statement positively identifying the defendant as the gunman in an armed robbery, this testimony corroborated testimony of a co-participant, and whether it was sufficient for a conviction was for the jury to determine. Kenney v. State, 236 Ga. App. 359, 511 S.E.2d 923 (decided under former O.C.G.A. § 24-4-8).

Corroboration by officer. — Because sufficient evidence was presented that a juvenile was a party to the crime of entering an automobile with the intent to commit a theft or felony, and the evidence was corroborated by a police officer who questioned the juvenile's cohort, an adjudication based on the juvenile's commission of the act was upheld on appeal; thus, the juvenile's motion for a directed verdict was properly denied. In the Interest of B.D., 287 Ga. App. 185, 651 S.E.2d 129, 2007 Ga. App. LEXIS 910 (2007) (decided under former O.C.G.A. § 24-4-8).

Corroboration by victim. — Because testimony from a single witness was sufficient to establish a fact, testimony from both victims of an armed robbery that the defendant was the gunman during that robbery was sufficient direct evidence to establish that fact; moreover, the fact that the defendant offered another explanation for the defendant's presence at the scene, did not render the other evidence against the defendant insufficient or circumstantial. Bakyayita v. State, 278 Ga. App. 624, 629 S.E.2d 539, 2006 Ga. App. LEXIS 382 (2006) (decided under former O.C.G.A. § 24-4-8).

Corroboration by parent of child. — In defendant's conviction for child molestation, the trial court properly denied defendant's motion for a directed verdict of acquittal as sufficient evidence existed based on testimony of the child victim's parent, who testified as to discovery of defendant on top of the victim; further evidence in support of defendant's conviction included the child's videotaped police interviews describing what happened. Lopez v. State, 291 Ga. App. 210, 661 S.E.2d 618, 2008 Ga. App. LEXIS 444 (2008), cert. denied, No. S08C1441, 2008 Ga. LEXIS 675 (Ga. Sept. 8, 2008) (decided under former O.C.G.A. § 24-4-8).

Corroboration in child molestation. — Evidence was sufficient for the jury to find a defendant guilty of child molestation beyond a reasonable doubt as it was within the jury's province to reject the defendant's defense denying the crime with regard to the victim as well as with regard to the witnesses who testified as to similar transactions with the defendant. The testimony of the victim was corroborated by an investigator and a forensic interviewer, who testified as to what the victim had told had occurred; the victim's statements were corroborated by the sheriff's investigator; and the jury was entitled to consider the victim's out-of-court statements as substantive evidence under the former Child Hearsay Statute, former O.C.G.A. § 24-3-16. Lamb v. State, 293 Ga. App. 65, 666 S.E.2d 462, 2008 Ga.

App. LEXIS 900 (2008) (decided under former O.C.G.A. § 24-4-8).

Corroboration in DUI cases. — Trial court did not err in convicting the defendant of driving under the influence of alcohol to the extent it was less safe for the defendant to drive, possession of an open container of alcoholic beverage, and disorderly conduct because the testimony of the driver accosted by the defendant and the arresting officer was sufficient to enable a rational jury to find the defendant guilty beyond a reasonable doubt of the charged crimes. Corbin v. State, 305 Ga. App. 768, 700 S.E.2d 868, 2010 Ga. App. LEXIS 810 (2010) (decided under former O.C.G.A. § 24-4-8).

Corroboration in forgery cases. — Evidence was sufficient to support the defendant's conviction for forgery because although the only witness who testified to the defendant's participation in the forgery was her boyfriend's daughter, who testified that she and the defendant had together forged counterfeit currency, the trial court found that the daughter's testimony was corroborated by the fact that the counterfeit currency was found in a common area of the house where the defendant was the only resident; the judgment as to the sufficiency of the corroborating evidence was for the finder of fact to determine, and the trial court clearly found that the presumption of possession raised by the defendant's residence at the home was sufficiently corroborative. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871, 2010 Ga. App. LEXIS 809 (2010) (decided under former O.C.G.A. § 24-4-8).

Corroboration in burglary cases. — Testimony of two codefendants that a defendant was the third man in a burglary was sufficiently corroborated under former O.C.G.A. § 24-4-8 because the codefendants corroborated each other, and one codefendant's sibling testified that the sibling lent the three defendants the sibling's car and later noticed the defendant carrying a flat-screen television, which was taken in the burglary. Sims v. State, 306 Ga. App. 68, 701 S.E.2d 534, 2010 Ga. App. LEXIS 865 (2010) (decided under former O.C.G.A. § 24-4-8).

Single witness sufficient for murder conviction. — Evidence was sufficient to support a malice murder conviction, although no forensic or physical evidence was presented, because the jury determined that the eyewitnesses' testimony that the defendant fatally shot the victim during a drug transaction was credible. The testimony of a single witness was sufficient pursuant to former O.C.G.A. § 24-4-8. Handley v. State, 289 Ga. 786, 716 S.E.2d 176, 2011 Ga. LEXIS 714 (2011) (decided under former O.C.G.A. § 24-4-8).

Sufficient corroboration for aggravated assault. — Evidence was sufficient to support a defendant's conviction for aggravated assault. Pursuant to former O.C.G.A. § 24-4-8, a defendant could not be convicted solely upon the uncorroborated testimony of an accomplice, and while the only evidence of the shotgun at the scene of the assault of the victim came from a codefendant, other evidence from the victim and the police served to corroborate it. Emerson v. State, 315 Ga. App. 105, 726 S.E.2d 600, 2012 Ga. App. LEXIS 331 (2012) (decided under former O.C.G.A. § 24-4-8).

Counsel not ineffective for not requesting accomplice corroboration charge. — Defense counsel was not ineffective for failing to request a charge on accomplice corroboration because the accomplice was not the only witness; thus, there was no error in failing to give the accomplice corroboration charge since the state relied on other evidence apart from the accomplice's testimony. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381, 2013 Ga. App. LEXIS 837 (2013), cert. dismissed, No. S14C0875, 2014 Ga. LEXIS 684 (Ga. Sept. 8, 2014).

Corroboration by victim's family members. — Testimony of the victim's cousin was sufficient, under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), to corroborate the accomplice's identification of the defendant as the shooter. Sutton v. State, 295 Ga. 350, 759 S.E.2d 846, 2014 Ga. LEXIS 496 (2014) (decided under former O.C.G.A. § 24-4-8).

Corroboration of attempted armed robbery. — Evidence was sufficient to support the defendant's conviction of attempted armed robbery as a party to the crime because there was evidence apart from the accomplice's testimony from

Sufficiency of Corroborating Evidence (Cont'd)

which the jury could have inferred that the defendant was a participant, including evidence that multiple witnesses identified the defendant as part of the group that approached the second victim with the accomplice pointing a gun at the second victim, the second victim testified that the defendant directed an associate to check the second victim's pockets or socks, and after the group was unable to obtain anything from the second victim, they went in the direction of the first victim. Daniels v. State, 306 Ga. 559, 832 S.E.2d 372, 2019 Ga. LEXIS 524 (2019).

Corroboration need not extend to every material detail. — Testimony of one accomplice adequately corroborated that of another accomplice to the murder of appellant's former husband since although there were inconsistencies in that each attempted to place more culpability on the other in carrying out the scheme, they amply corroborated each other on the ultimate question of appellant's involvement in the scheme to have her former husband killed. Blalock v. State, 250 Ga. 441, 298 S.E.2d 477, 1983 Ga. LEXIS 537 (1983) (decided under former O.C.G.A. § 24-4-8).

Need not warrant conviction. — Corroborating evidence need not be in and of itself so strong as to support a verdict of guilty. Nance v. State, 126 Ga. 95, 54 S.E. 932, 1906 Ga. LEXIS 333 (1906) (decided under former Penal Code 1895, § 991); Parham v. State, 3 Ga. App. 468, 60 S.E. 123, 1908 Ga. App. LEXIS 341 (1908) (decided under former Penal Code 1895, § 991); Smith v. State, 189 Ga. 169, 5 S.E.2d 762, 1939 Ga. LEXIS 691 (1939) (decided under former Code 1933, § 38-121); Smith v. State, 238 Ga. 640, 235 S.E.2d 17, 1977 Ga. LEXIS 1146 (1977) (decided under former Code 1933, § 38-121); Castell v. State, 250 Ga. 776, 301 S.E.2d 234, 1983 Ga. LEXIS 1026 (1983).

Grave suspicion not sufficient. — Corroborating evidence which merely casts a grave suspicion upon the defendant is not sufficient. McCalla v. State, 66 Ga. 346, 1881 Ga. LEXIS 20 (1881) (decided under former Code 1873, § 3755); Baker v. State, 14 Ga. App. 578, 81 S.E. 805, 1914 Ga. App. LEXIS 387 (1914) (decided under former Penal Code 1910, § 1017); Thompson v. State, 52 Ga. App. 105, 182 S.E. 414, 1935 Ga. App. LEXIS 65 (1935) (decided under former Code 1933, § 38-121); Worley v. State, 60 Ga. App. 557, 4 S.E.2d 417, 1939 Ga. App. LEXIS 83 (1939) (decided under former Code 1933, § 38-121); Ivey v. State, 91 Ga. App. 455, 85 S.E.2d 829, 1955 Ga. App. LEXIS 776 (1955) (decided under former Code 1933, § 38-121); Hill v. State, 236 Ga. 831, 224 S.E.2d 281 (1976) (decided under former Code 1933, § 38-121); Smith v. State, 238 Ga. 640, 235 S.E.2d 17, 1977 Ga. LEXIS 1146 (1977) (decided under former Code 1933, § 38-121).

Testimony of an accomplice must be corroborated by independent evidence tending to connect the accused with the crime or leading to an inference that the accused is guilty and must do more than merely cast a grave suspicion of guilt on the accused. Powell v. State, 166 Ga. App. 393, 304 S.E.2d 515, 1983 Ga. App. LEXIS 2184 (1983) (decided under former O.C.G.A. § 24-4-8).

Slight evidence from an extraneous source identifying the accused as a participator in the criminal act is sufficient corroboration of the accomplice to support a verdict. Hargett v. State, 55 Ga. App. 192, 189 S.E. 675 (1937) (decided under former Code 1933, § 38-121); King v. State, 77 Ga. App. 720, 49 S.E.2d 790 (1948) (decided under former Code 1933, § 38-121); Blakely v. State, 78 Ga. App. 282, 50 S.E.2d 762 (1948) (decided under former Code 1933, § 38-121); McPherson v. State, 96 Ga. App. 839, 101 S.E.2d 750 (1958) (decided under former Code 1933, § 38-121); Wilkins v. State, 96 Ga. App. 841, 101 S.E.2d 912 (1958) (decided under former Code 1933, § 38-121); Waldrop v. State, 221 Ga. 319, 144 S.E.2d 372 (1965) (decided under former Code 1933, § 38-121); Lindsey v. State, 227 Ga. 48, 178 S.E.2d 848 (1970) (decided under former Code 1933, § 38-121); Pitts v. State, 128 Ga. App. 434, 197 S.E.2d 495 (1973) (decided under former Code 1933, § 38-121); Birt v. State, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976).Jones v. State, 139

Ga. App. 643, 229 S.E.2d 121, 1976 Ga. App. LEXIS 1928 (1976) (decided under former Code 1933, § 38-121); Green v. State, 139 Ga. App. 652, 229 S.E.2d 129, 1976 Ga. App. LEXIS 1932 (1976) (decided under former Code 1933, § 38-121); Hill v. State, 237 Ga. 794, 229 S.E.2d 737, 1976 Ga. LEXIS 1395 (1976) (decided under former Code 1933, § 38-121); Smith v. State, 238 Ga. 640, 235 S.E.2d 17, 1977 Ga. LEXIS 1146 (1977) (decided under former Code 1933, § 38-121); Felix v. State, 143 Ga. App. 376, 238 S.E.2d 734, 1977 Ga. App. LEXIS 2328 (1977) (decided under former Code 1933, § 38-121); Cummings v. State, 240 Ga. 104, 239 S.E.2d 529, 1977 Ga. LEXIS 1411 (1977) (decided under former Code 1933, § 38-121); Reaves v. State, 242 Ga. 542, 250 S.E.2d 376, 1978 Ga. LEXIS 1280 (1978), overruled in part, Felker v. State, 252 Ga. 351, 314 S.E.2d 621, 1984 Ga. LEXIS 691 (1984) (decided under former Code 1933, § 38-121); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341, 1979 Ga. LEXIS 1020 (1979) (decided under former Code 1933, § 38-121); Neal v. State, 152 Ga. App. 270, 262 S.E.2d 561, 1979 Ga. App. LEXIS 2891 (1979) (decided under former Code 1933, § 38-121); Smith v. State, 245 Ga. 205, 264 S.E.2d 15, 1980 Ga. LEXIS 743 (1980) (decided under former Code 1933, § 38-121); Davis v. State, 154 Ga. App. 803, 269 S.E.2d 874, 1980 Ga. App. LEXIS 2397 (1980), cert. dismissed, 247 Ga. 8, 273 S.E.2d 409, 1981 Ga. LEXIS 591 (1981) (decided under former Code 1933, § 38-121); Smith v. State, 154 Ga. App. 741, 270 S.E.2d 5, 1980 Ga. App. LEXIS 2369 (1980) (decided under former Code 1933, § 38-121); Black v. State, 155 Ga. App. 798, 272 S.E.2d 762, 1980 Ga. App. LEXIS 2795 (1980) (decided under former Code 1933, § 38-121); Cole v. State, 156 Ga. App. 288, 274 S.E.2d 685, 1980 Ga. App. LEXIS 3037 (1980) (decided under former Code 1933, § 38-121); Inman v. State, 182 Ga. App. 209, 355 S.E.2d 119, 1987 Ga. App. LEXIS 1636 (1987) (decided under former O.C.G.A. § 24-4-8); Thurston v. State, 186 Ga. App. 881, 368 S.E.2d 822, 1988 Ga. App. LEXIS 493 (1988) (decided under former O.C.G.A. § 24-4-8); Martin v. State, 209 Ga. App. 720, 434 S.E.2d 534, 1993 Ga. App. LEXIS 1003 (1993) (decided under former O.C.G.A. § 24-4-8); Dalton v. State, 237 Ga. App. 217, 513 S.E.2d 745 (decided under former O.C.G.A. § 24-4-8).

Only slight evidence of participation in the offense from an extraneous source will provide the necessary corroboration under former O.C.G.A. § 24-4-8, which may consist entirely of circumstantial evidence. Chergi v. State, 234 Ga. App. 548, 507 S.E.2d 795 (decided under former O.C.G.A. § 24-4-8).

Although evidence corroborating an accomplice's testimony was slight, it was nonetheless sufficient to prove the defendant's involvement in the robbery: the robbery occurred in the defendant's apartment, the defendant was aware the victims had large amounts of cash because they were showing it off and one of them had given the defendant $100, and the defendant and others had told the victims they were planning a robbery. Brown v. State, 350 Ga. App. 104, 828 S.E.2d 110, 2019 Ga. App. LEXIS 250 (2019).

Confession of defendant was corroborated. — Defendant's convictions for armed robbery and robbery by intimidation in violation of O.C.G.A. §§ 16-8-40(a)(2) and 16-8-41(a) were appropriate because the defendant's own confessions to participating in the crimes were corroborated by the testimony of the victims, among other evidence. Likewise, the defendant's codefendants' statements and testimony implicating the defendant in the crimes were corroborated by the defendant's confessions and the victims' testimony. Cantrell v. State, 299 Ga. App. 746, 683 S.E.2d 676, 2009 Ga. App. LEXIS 958 (2009) (decided under former O.C.G.A. § 24-4-8).

Connection with crime more than suspicion of guilt. — Corroborating evidence must, independently of the accomplice's testimony and of itself, connect the defendant on trial with the commission of the offense and tend to show defendant's guilt; a grave suspicion of the defendant's guilt is not sufficient. King v. State, 77 Ga. App. 720, 49 S.E.2d 790 (1948) (decided under former Code 1933, § 38-121); Price v. State, 208 Ga. 695, 69 S.E.2d 253 (1952) (decided under former Code 1933, § 38-121); Wilkins v. State, 96 Ga. App. 841,

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101 S.E.2d 912 (1958) (decided under former Code 1933, § 38-121); Allen v. State, 215 Ga. 455, 111 S.E.2d 70 (1959) (decided under former Code 1933, § 38-121); Seay v. State, 108 Ga. App. 724, 134 S.E.2d 422 (1963) (decided under former Code 1933, § 38-121); Pritchard v. State, 224 Ga. 776, 164 S.E.2d 808 (1968) (decided under former Code 1933, § 38-121); Caldwell v. State, 227 Ga. 703, 182 S.E.2d 789 (1971) (decided under former Code 1933, § 38-121); Vaughn v. State, 139 Ga. App. 565, 228 S.E.2d 741 (1976) (decided under former Code 1933, § 38-121); Felix v. State, 143 Ga. App. 376, 238 S.E.2d 734 (1977) (decided under former Code 1933, § 38-121); Drake v. State, 241 Ga. 583, 247 S.E.2d 57 (1978) , cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979).Stinson v. State, 151 Ga. App. 533, 260 S.E.2d 407, 1979 Ga. App. LEXIS 2625 (1979) (decided under former Code 1933, § 38-121); Black v. State, 155 Ga. App. 798, 272 S.E.2d 762, 1980 Ga. App. LEXIS 2795 (1980) (decided under former Code 1933, § 38-121).

Need not warrant conviction but must do more than create suspicion. — Corroborating evidence need not be so strong as to support a verdict of guilty, but it must be sufficient to connect the accused with the perpetration of the offense and lead to the inference of the accused's guilt, and more than sufficient to merely raise a suspicion against the accused. Sheppard v. State, 44 Ga. App. 481, 162 S.E. 413, 1931 Ga. App. LEXIS 772 (1931) (decided under former Penal Code 1910, § 1017); Reaves v. State, 242 Ga. 542, 250 S.E.2d 376, 1978 Ga. LEXIS 1280 (1978), overruled in part, Felker v. State, 252 Ga. 351, 314 S.E.2d 621, 1984 Ga. LEXIS 691 (1984) (decided under former Code 1933, § 38-121); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341, 1979 Ga. LEXIS 1020 (1979) (decided under former Code 1933, § 38-121).

Need not warrant conviction or be exhaustively corroborated. — Corroboration need not of itself be sufficient to warrant a verdict or be corroborated in every material particular. Hargett v. State, 55 Ga. App. 192, 189 S.E. 675 (1937) (decided under former Code 1933, § 38-121); Mitchell v. State, 202 Ga. 247, 42 S.E.2d 767 (1947) (decided under former Code 1933, § 38-121); Blakely v. State, 78 Ga. App. 282, 50 S.E.2d 762 (1948) (decided under former Code 1933, § 38-121); Mears v. State, 98 Ga. App. 576, 106 S.E.2d 854 (1958) (decided under former Code 1933, § 38-121); Waldrop v. State, 221 Ga. 319, 144 S.E.2d 372 (1965) (decided under former Code 1933, § 38-121); Pitts v. State, 128 Ga. App. 434, 197 S.E.2d 495 (1973) (decided under former Code 1933, § 38-121); Atcheson v. State, 136 Ga. App. 152, 220 S.E.2d 483 (1975) (decided under former Code 1933, § 38-121); Turner v. State, 235 Ga. 826, 221 S.E.2d 590 (1976) (decided under former Code 1933, § 38-121); Birt v. State, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976).Jones v. State, 139 Ga. App. 643, 229 S.E.2d 121, 1976 Ga. App. LEXIS 1928 (1976) (decided under former Code 1933, § 38-121); Cole v. State, 156 Ga. App. 288, 274 S.E.2d 685, 1980 Ga. App. LEXIS 3037 (1980) (decided under former Code 1933, § 38-121).

Evidence corroborating the accomplice's testimony does not have to be sufficient in and of itself to support a verdict of guilty; circumstantial evidence tying the defendant to the crime and justifying an inference of guilt is satisfactory. Cofer v. State, 166 Ga. App. 436, 304 S.E.2d 537, 1983 Ga. App. LEXIS 2202 (1983) (decided under former O.C.G.A. § 24-4-8).

Slight evidence not warranting conviction and not supporting every material fact. — Law does not require that the corroborating evidence shall in and of itself alone be sufficient to warrant a verdict of guilty, or that the testimony of the accomplice shall be corroborated in every material particular. On the contrary, slight evidence that the crime was committed by both defendants, and identifying the defendants with the crime, will corroborate the testimony of the accomplice and warrant a conviction. Evans v. State, 78 Ga. 351 (1886) (decided under former Code 1882, § 3755); Boswell v. State, 92 Ga. 581, 17 S.E. 805 (1893) (decided under former Code 1882,

§ 3755); Pritchett v. State, 92 Ga. 33, 18 S.E. 350 (1893) (decided under former Code 1882, § 3755); Chapman v. State, 112 Ga. 56, 37 S.E. 102 (1900) (decided under former Penal Code 1895, § 991); Dixon v. State, 116 Ga. 186, 42 S.E. 357 (1902) (decided under former Penal Code 1895, § 991); Nance v. State, 126 Ga. 95, 54 S.E. 932 (1906) (decided under former Penal Code 1895, § 991); Davis v. State, 25 Ga. App. 532, 103 S.E. 819, cert. denied, 25 Ga. App. 840 (1920).Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248 (1940) (decided under former Code 1933, § 38-121); Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968).Caldwell v. State, 227 Ga. 703, 182 S.E.2d 789, 1971 Ga. LEXIS 821 (1971) (decided under former Code 1933, § 38-121); Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204, 1980 Ga. LEXIS 763 (1980), cert. denied, 454 U.S. 1068, 102 S. Ct. 618, 70 L. Ed. 2d 603, 1981 U.S. LEXIS 4598 (1981) (decided under former Code 1933, § 38-121); Bennett v. State, 156 Ga. App. 617, 275 S.E.2d 701, 1980 Ga. App. LEXIS 3143 (1980) (decided under former Code 1933, § 38-121); Powell v. State, 166 Ga. App. 393, 304 S.E.2d 515, 1983 Ga. App. LEXIS 2184 (1983) (decided under former O.C.G.A. § 24-4-8); Whitton v. State, 178 Ga. App. 862, 344 S.E.2d 703, 1986 Ga. App. LEXIS 2579 (1986) (decided under former O.C.G.A. § 24-4-8); Howard v. State, 181 Ga. App. 187, 351 S.E.2d 550, 1986 Ga. App. LEXIS 2363 (1986) (decided under former O.C.G.A. § 24-4-8); Durham v. State, 181 Ga. App. 155, 351 S.E.2d 683, 1986 Ga. App. LEXIS 2815 (1986) (decided under former O.C.G.A. § 24-4-8); Slaughter v. State, 227 Ga. App. 739, 490 S.E.2d 399, 1997 Ga. App. LEXIS 858 (1997), cert. denied, No. S97C2034, 1998 Ga. LEXIS 152 (Ga. Jan. 5, 1998) (decided under former O.C.G.A. § 24-4-8).

Direct or circumstantial evidence. — Sufficient corroboration may consist of either direct or circumstantial evidence which connects the defendant with the crime, tends to show the defendant's participation therein, and would justify an inference of the guilt of the accused independently of the testimony of the accomplice. Gunter v. State, 243 Ga. 651, 256 S.E.2d 341, 1979 Ga. LEXIS 1020 (1979) (decided under former Code 1933, § 38-121).

Circumstantial evidence. — Circumstantial evidence, when taken with the accomplice testimony, showing guilt beyond a reasonable doubt is sufficient corroboration. Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627, 1981 Ga. App. LEXIS 2620 (1981) (decided under former O.C.G.A. § 24-4-8).

Although corroboration may be by circumstantial evidence, the evidence must do more than merely cast a grave suspicion of guilt on the accused. Claybrooks v. State, 189 Ga. App. 431, 375 S.E.2d 880, 1988 Ga. App. LEXIS 1432 (1988) (decided under former O.C.G.A. § 24-4-8).

Circumstantial evidence presented at trial sufficient to corroborate testimony of accomplice. — See Howard v. State, 187 Ga. App. 74, 369 S.E.2d 271, 1988 Ga. App. LEXIS 592 (1988) (decided under former O.C.G.A. § 24-4-8); Martinez v. State, 222 Ga. App. 497, 474 S.E.2d 708 (decided under former O.C.G.A. § 24-4-8).

Testimony of other witnesses linking the defendant to the crime was sufficient to corroborate the testimony of the accomplice and was sufficient for a rational trier of fact to find defendant guilty of the crimes charged beyond a reasonable doubt. Sanchez v. State, 203 Ga. App. 61, 416 S.E.2d 139, 1992 Ga. App. LEXIS 398 (1992) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to corroborate accomplice testimony in a prosecution for burglary of a store since the corroborating evidence included a burglary call to the police, a store security video which showed events testified to by the accomplice, and an incriminating statement made by the defendant. Williams v. State, 234 Ga. App. 191, 506 S.E.2d 237 (decided under former O.C.G.A. § 24-4-8).

Sufficient corroborating evidence enabled the jury to conclude that the defendant was a party to the robbery based on testimony that the defendant and an accomplice met before and immediately following the robbery, defendant's own testimony of being in the drug business,

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cellular phone records indicating the defendant was in the vicinity of the robbery when the robbery occurred, eyewitness testimony, and evidence that the defendant sent the amount of money taken from the victim to another. Jackson v. State, 294 Ga. 34, 751 S.E.2d 63, 2013 Ga. LEXIS 889 (2013).

Corroboration by second accomplice. — Evidence was sufficient to support the defendant's convictions of armed robbery under O.C.G.A. § 16-8-41(a), aggravated battery under O.C.G.A. § 16-5-24(a), aggravated assault under O.C.G.A.§ 16-5-21(a), burglary under O.C.G.A.§ 16-7-1(a)(2), possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b), and conspiracy to possess cocaine under O.C.G.A. §§ 16-4-8 and 16-13-30(a) as a conspirator because, while the uncorroborated testimony of one accomplice was insufficient under former O.C.G.A. § 24-4-8, the evidence sufficed to sustain the defendant's conviction where an additional accomplice provided testimony to corroborate that of the first accomplice. Both codefendants testified that the defendant was present from the robbery's inception through the robbery's execution, that the defendant was aware of the conspiracy to obtain the victim's money and cocaine by armed robbery, and that the defendant willingly participated in the crimes and shared the criminal intent of those who committed the crimes inside the victim's residence by supplying the defendant's car and acting as a get-away driver. Watson v. State, 308 Ga. App. 871, 708 S.E.2d 703, 2011 Ga. App. LEXIS 295 (2011) (decided under former O.C.G.A. § 24-4-8).

Corroboration circumstantial and consistent with innocence. — When corroboration of the alleged accomplice's testimony is entirely circumstantial and is of itself as consistent with innocence as with guilt, such evidence is insufficient to sustain a verdict. Reed v. State, 127 Ga. App. 458, 194 S.E.2d 121, 1972 Ga. App. LEXIS 915 (1972) (decided under former Code 1933, § 38-121).

Source of corroboration. — Corroboration of an accomplice must come from a source or sources other than his or her own testimony, were it otherwise the rule as to corroboration would obviously be nugatory and worthless. Taylor v. State, 110 Ga. 150, 35 S.E. 161, 1900 Ga. LEXIS 339 (1900) (decided under former Penal Code 1895, § 991); Butler v. State, 17 Ga. App. 522, 87 S.E. 712, 1916 Ga. App. LEXIS 748 (1916) (decided under former Penal Code 1910, § 1017).

Corroboration of accomplice's testimony. — Sufficient corroborating evidence existed to support accomplice's testimony that defendant kicked in the door of the victim's residence and committed other crimes inside that residence against the victim, as another person, other than defendant and the other two men who committed the crimes, gave a statement to police regarding defendant's presence at the scene of the crime and that statement was introduced at trial through the police officer who witnessed the statement. Moore v. State, 261 Ga. App. 752, 583 S.E.2d 588, 2003 Ga. App. LEXIS 760 (2003) (decided under former O.C.G.A. § 24-4-8).

Because of the corroborating testimony from the defendant's two accomplices, the accomplice testimony was admissible to support the defendant's conviction for aggravated assault, O.C.G.A. § 16-5-21(a)(3), and aggravated battery, O.C.G.A. § 16-5-24(a). Scott v. State, 302 Ga. App. 111, 690 S.E.2d 242, 2010 Ga. App. LEXIS 70 (2010) (decided under former O.C.G.A. § 24-4-8).

Testimony of the defendant's two accomplices was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt of the crimes (murder, armed robbery, and aggravated assault) for which the defendant was convicted. Herbert v. State, 288 Ga. 843, 708 S.E.2d 260, 2011 Ga. LEXIS 258 (2011) (decided under former O.C.G.A. § 24-4-8).

Evidence corroborating an accomplice's testimony was sufficient to authorize the jury's determination that the defendant was guilty beyond a reasonable doubt of theft by receiving because in addition to the accomplice's testimony, a deputy with the county sheriff's office observed the accomplice and a codefendant appear to shoplift at a store, after which they got

into the defendant's car; the defendant did not stop when police were chasing the defendant but instead continued to drive evasively while the codefendant threw items out of the passenger window, and there were no receipts showing that the items had been purchased. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555, 2011 Ga. App. LEXIS 1057 (2011), cert. denied, No. S12C0656, 2012 Ga. LEXIS 398 (Ga. Apr. 24, 2012), cert. denied, No. S12C0654, 2012 Ga. LEXIS 373 (Ga. Apr. 24, 2012), overruled in part, Jackson v. State, 301 Ga. 137, 800 S.E.2d 356, 2017 Ga. LEXIS 375 (2017) (decided under former O.C.G.A. § 24-4-8).

In an armed robbery prosecution, the testimony of the defendant's accomplice was corroborated as required by former O.C.G.A. § 24-4-8, in that the accomplice's testimony regarding the defendant's planning of the crime was corroborated by telephone records, the store's security video tape, and the fact that money was deposited into the defendant's account only two days after the crime. Bell v. State, 314 Ga. App. 28, 722 S.E.2d 871, 2012 Ga. App. LEXIS 110 (2012) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the first defendant of felony murder of two of the victims, the aggravated assault of another two victims, conspiracy to commit armed robbery, and conspiracy to possess cocaine because the accomplice's testimony that the first defendant participated in the crimes was corroborated both by an assault victim's identification of the first defendant at trial as well as the rap lyrics the first defendant composed in jail which referenced the use of an AK-47 that resulted in the first defendant becoming a co-defendant of the shooter. Taylor v. State, 297 Ga. 132, 772 S.E.2d 630, 2015 Ga. LEXIS 307 (2015) (decided under former O.C.G.A. § 24-4-8).

Evidence corroborating an accomplice's testimony, including evidence that all three participating were members of a gang and text messages regarding the removal of fingerprints, was sufficient to satisfy the requirements of former O.C.G.A. § 24-4-8. Veal v. State, 298 Ga. 691, 784 S.E.2d 403, 2016 Ga. LEXIS 243 (2016), overruled in part, Jones v. Mississippi, 141 S. Ct. 1307, 209 L. Ed. 2d 390, 2021 U.S. LEXIS 2110 (2021), overruled in part as stated in Holmes v. State, 311 Ga. 698, 859 S.E.2d 475, 2021 Ga. LEXIS 296 (2021) (decided under former O.C.G.A. § 24-4-8).

In addition to accomplice testimony, evidence that the defendant was in possession of the murder weapon in the days preceding the crimes, placed calls from the vicinity of the crime scene in the early morning hours on the day of the crimes, and was with the victim the night before and the morning of the crimes was sufficient to convict the defendant of malice murder, possession of a firearm during the commission of a felony and possession of a firearm by a first offender probationer. McCain v. State, 300 Ga. 400, 794 S.E.2d 58, 2016 Ga. LEXIS 768 (2016).

Evidence was sufficient to convict the second defendant of felony murder, violations of the Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., and other offenses because the second defendant was a member of a local street gang; the accomplice's testimony was sufficiently corroborated as there was a recorded cell phone call in which the second defendant stated that the second defendant was carrying weapons and seeking a criminal opportunity; the second defendant was tied to the first set of crimes in which the second defendant's victim was killed through ballistic evidence; and the second defendant's involvement in the second set of crimes was corroborated by the second defendant's own statements to a cousin. Daniels v. State, 302 Ga. 90, 805 S.E.2d 80, 2017 Ga. LEXIS 770 (2017), overruled, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of, inter alia, malice murder, two counts of felony murder, and attempted armed robbery as the state presented ample evidence corroborating an accomplice's testimony because a witness testified that the defendant was present when the victim opened the victim's wallet to reveal a large amount of cash; the defendant agreed to do a controlled phone call with the accomplice, which was re-

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corded by police and played for the jury; and, in that phone call, the defendant made incriminating statements regarding the location of the murder weapon, retrieving the weapon, and getting their story straight. Robinson v. State, 303 Ga. 321, 812 S.E.2d 232, 2018 Ga. LEXIS 171 (2018).

After the defendants were convicted of two counts of armed robbery and three counts of aggravated assault stemming from a late-evening robbery of a pizzeria, in addition to the testimony of the getaway driver, who the state believed to be the defendants' accomplice, the testimony of the two store employees and DNA evidence presented by the state allowed the jury to infer that, during the robbery, the first defendant was wearing a black ski mask and a letterman-style jacket and carrying a revolver, while the second defendant was dressed in a Halloween mask and carrying a set of brass knuckles; thus, the state presented sufficient evidence to corroborate the testimony presented by the defendants' accomplice. Hughes v. State, 345 Ga. App. 107, 812 S.E.2d 363, 2018 Ga. App. LEXIS 179 (2018).

Evidence was sufficient to convict the defendant of malice murder as there was more than slight, independent evidence corroborating the accomplice's testimony that the defendant was a participant in the shooting because the accomplice testified that the defendant said that the defendant had shot the victim; after first lying about the defendant's presence, the defendant admitted to being at the murder scene; and the jeans that the defendant admitted that the defendant was wearing when the victim was shot had a bloodstain on them. Coley v. State, 305 Ga. 658, 827 S.E.2d 241, 2019 Ga. LEXIS 233 (2019) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of malice murder as, even assuming the jury found another gang member to be an accomplice, there was other evidence that did not come from the accomplice, including a pawn shop video; a witness's description of the shooter's clothing, location, and physical characteristics that was consistent with the accomplice's trial testimony; and cell phone record evidence. Barber v. State, 314 Ga. 759, 879 S.E.2d 428, 2022 Ga. LEXIS 270 (2022).

Physical evidence corroborated crime. — Evidence of defendant's participation in the crimes and defendant's gang membership was sufficiently corroborated by the physical evidence collected from the crime scene, by a witness's testimony regarding the events that occurred the evening of the crimes, by postings on defendant's social media accounts, and by cell phone data. Poole v. State, 312 Ga. 515, 863 S.E.2d 93, 2021 Ga. LEXIS 630 (2021).

Other evidence supporting conviction. — Although the uncorroborated testimony of a codefendant was insufficient to convict defendant under former O.C.G.A. § 24-4-8, there was other evidence, including defendant's statements to police that defendant urged the codefendant to kill the victim, to show that defendant aided and abetted and counseled another to commit the crimes under O.C.G.A. § 16-2-20(b)(3) and (4). Lucky v. State, 286 Ga. 478, 689 S.E.2d 825, 2010 Ga. LEXIS 153 (2010) (decided under former O.C.G.A. § 24-4-8).

Sufficient corroborating evidence in armed robbery. — Evidence that the defendant was linked to the getaway vehicle, and that the defendant was present the next morning at a hotel with the vehicle, the co-indictee, the first defendant, the marijuana, and the cash was sufficient corroborating evidence to support the defendant's convictions for felony murder and other crimes related to the armed robbery of the four victims and the subsequent shootings that killed the first victim and injured the second victim. Cowart v. State, 294 Ga. 333, 751 S.E.2d 399, 2013 Ga. LEXIS 964 (2013).

Evidence sufficiently corroborated victim's testimony. — Evidence sufficiently corroborated the victim's testimony that the defendant, along with the three co-defendants, kidnapped the victim for ransom because the proprietor of a business located in the same strip mall as the victim's clothing store saw the victim

being forcibly taken away; on conversations monitored from one of the co-defendant's telephones, the victim was overheard pleading that the defendants not kill the victim; the victim was overheard asking the victim's family for money; after an investigatory stop, the defendant was found in the back seat, along with the victim and a hidden gun; and the victim stated that the victim's life had been threatened. Deleon-Alvarez v. State, 324 Ga. App. 694, 751 S.E.2d 497, 2013 Ga. App. LEXIS 920 (2013), cert. denied, No. S14C0447, 2014 Ga. LEXIS 261 (Ga. Mar. 28, 2014), cert. denied, No. S14C0445, 2014 Ga. LEXIS 278 (Ga. Mar. 28, 2014).

Corroboration of violation of stalking order. — Complaining witness's testimony that the defendant violated the 12-month stalking protective order by repeatedly shining a light on the witness when the witness took out the trash, shining the light into the witness's house, and yelling obscenities at the witness was sufficient to establish that the defendant violated the protective order where video evidence supplemented such testimony. Birdsong v. Barnett, 334 Ga. App. 120, 778 S.E.2d 372, 2015 Ga. App. LEXIS 583 (2015).

There was adequate corroboration. — See Cain v. State, 212 Ga. App. 531, 442 S.E.2d 279, 1994 Ga. App. LEXIS 274 (1994), cert. denied, No. S94C1070, 1994 Ga. LEXIS 742 (Ga. June 3, 1994) (decided under former O.C.G.A. § 24-4-8); Bush v. State, 267 Ga. 877, 485 S.E.2d 466 (decided under former O.C.G.A. § 24-4-8); Givens v. State, 227 Ga. App. 861, 490 S.E.2d 530 (decided under former O.C.G.A. § 24-4-8); In re J.L., 229 Ga. App. 447, 494 S.E.2d 274 (decided under former O.C.G.A. § 24-4-8); Pye v. State, 269 Ga. 779, 505 S.E.2d 4 (decided under former O.C.G.A. § 24-4-8); Sparks v. State, 234 Ga. App. 11, 505 S.E.2d 555 (decided under former O.C.G.A. § 24-4-8); Dalton v. State, 237 Ga. App. 217, 513 S.E.2d 745 (decided under former O.C.G.A. § 24-4-8); Purvis v. State, 239 Ga. App. 900, 522 S.E.2d 499 (decided under former O.C.G.A. § 24-4-8); Terrell v. State, 271 Ga. 783, 523 S.E.2d 294 (decided under former O.C.G.A. § 24-4-8); Crumpton v. State, 244 Ga. App. 57, 534 S.E.2d 809, 2000 Ga. App. LEXIS 638 (2000) (decided under former O.C.G.A. § 24-4-8); Blair v. State, 246 Ga. App. 533, 541 S.E.2d 120, 2000 Ga. App. LEXIS 1279 (2000) (decided under former O.C.G.A. § 24-4-8); Jackson v. State, 246 Ga. App. 731, 541 S.E.2d 701, 2000 Ga. App. LEXIS 1348 (2000) (decided under former O.C.G.A. § 24-4-8); Callaway v. State, 247 Ga. App. 310, 542 S.E.2d 596, 2000 Ga. App. LEXIS 1386 (2000), cert. denied, No. S01C0563, 2001 Ga. LEXIS 483 (Ga. June 4, 2001) (decided under former O.C.G.A. § 24-4-8); Rogers v. State, 247 Ga. App. 219, 543 S.E.2d 81, 2000 Ga. App. LEXIS 1407 (2000), cert. denied, No. S01C0522, 2001 Ga. LEXIS 388 (Ga. May 7, 2001), cert. denied, No. S01C0492, 2001 Ga. LEXIS 395 (Ga. May 7, 2001) (decided under former O.C.G.A. § 24-4-8); Eidson v. State, 247 Ga. App. 26, 543 S.E.2d 100, 2000 Ga. App. LEXIS 1411 (2000) (decided under former O.C.G.A. § 24-4-8); Miller v. State, 273 Ga. 831, 546 S.E.2d 524, 2001 Ga. LEXIS 340 (2001) (decided under former O.C.G.A. § 24-4-8); Parker v. State, 249 Ga. App. 530, 549 S.E.2d 154, 2001 Ga. App. LEXIS 555 (2001) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to authorize a rational trier of fact to find the defendants guilty beyond a reasonable doubt of malice murder and aggravated assault because the independent corroborating evidence in the case was substantial; an accomplice's testimony implicating the defendants was corroborated by the aggravated assault victim, who positively identified one of the defendants, that defendant's own admission to a woman in the defendant's apartment, evidence that the second defendant had sustained shotgun wounds on the evening of the crimes, ballistics evidence tying that defendant to the crime scene, and the presence of that defendant's blood on the first defendant's clothing and in the getaway vehicle. Ward v. State, 288 Ga. 641, 706 S.E.2d 430, 2011 Ga. LEXIS 157 (2011) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of five counts of obtaining a controlled substance by fraud because, although only the defendant's alleged ac-

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complice testified that the defendant possessed the requisite criminal intent to obtain possession of the controlled substances by fraud and deception, the state presented evidence of corroborating circumstances that proved the defendant's intent as the defendant went to the pharmacy on one occasion to pick up a medication that was clearly labeled as having been dispensed for the defendant, purportedly on the authority of a doctor who had never provided care for the defendant. Hopkins v. State, 328 Ga. App. 844, 761 S.E.2d 896, 2014 Ga. App. LEXIS 574 (2014).

Adequate corroboration for RICO conviction. — Testimony by defendant's cousin that the cousin saw defendant deliver packages to defendant's mother on several occasions corroborated defendant's mother's testimony that defendant supplied cocaine for sale by family members and was sufficient to sustain defendant's conviction under the Georgia Racketeer Influenced and Corrupt Organization Act, O.C.G.A. § 16-14-1 et seq. McGee v. State, 255 Ga. App. 708, 566 S.E.2d 431, 2002 Ga. App. LEXIS 745 (2002), cert. denied, No. S02C1566, 2002 Ga. LEXIS 802 (Ga. Sept. 6, 2002), cert. denied, 537 U.S. 1058, 123 S. Ct. 633, 154 L. Ed. 2d 539, 2002 U.S. LEXIS 8872 (2002) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for marijuana conviction. — Sufficient corroboration existed to support a conviction for possession of marijuana with intent to distribute based on the testimony of an accomplice after the police saw that defendant was in a house that had marijuana in many rooms, the marijuana was divided into different colored baggies, implying different ownership, and defendant's flight from the scene showed defendant's consciousness of guilt. Ellison v. State, 265 Ga. App. 446, 594 S.E.2d 675, 2004 Ga. App. LEXIS 140 (2004), overruled on other grounds, Middleton v. State, 309 Ga. 337, 846 S.E.2d 73, 2020 Ga. LEXIS 476 (2020) (decided under former O.C.G.A. § 24-4-8).

In a trial for attempted trafficking in marijuana, a codefendant's statements were sufficiently corroborated under former O.C.G.A. § 24-4-8 by the testimony of a case agent that a loaded pistol was found at the defendant's feet and that a bag containing the currency used in the drug transaction was found within arm's reach of the defendant. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348, 2009 Ga. App. LEXIS 566 (2009) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for burglary conviction. — Evidence was sufficient to support defendant's conviction for burglary after an accomplice's testimony that defendant was an active participant in the burglary was corroborated by: (1) a police officer's testimony that defendant was in a vehicle with two accomplices shortly after the burglary; (2) another officer's testimony that handguns were found in a pillowcase retrieved from the vehicle; and (3) the pawn shop owner's testimony that the guns found in the vehicle were the guns stolen from the owner's shop. Reynolds v. State, 267 Ga. App. 148, 598 S.E.2d 868, 2004 Ga. App. LEXIS 550 (2004) (decided under former O.C.G.A. § 24-4-8).

Testimony of defendant's accomplice was sufficiently corroborated by defendant's possession of tools used in the crime, the fact that defendant was found near the scene of a bank burglary covered in grease that could have come from a bank machine, the fact that defendant was sweaty, as if defendant had been working, and the fact that pine straw similar to the pine straw in front of the burglarized bank was found in defendant's car. McNair v. State, 267 Ga. App. 872, 600 S.E.2d 830, 2004 Ga. App. LEXIS 799 (2004) (decided under former O.C.G.A. § 24-4-8).

Defendant's burglary convictions were affirmed based on the defendant's accomplice's testimony that the defendant was present with the accomplice during two of the three burglaries, corroborated by the property owners' testimony that items were stolen during unauthorized entries into their respective residences, evidence that the stolen items were found in the defendant's bedroom shortly thereafter,

and the defendant's inconsistent explanations for the defendant's possession of the stolen items. Mays v. State, 306 Ga. App. 507, 703 S.E.2d 21, 2010 Ga. App. LEXIS 978 (2010) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for aggravated assault conviction. — Sufficient evidence supported aggravated assault conviction because both the victim and another witness testified that defendant stabbed the victim, and a nurse testified that the victim's injury was serious. Hampton v. State, 272 Ga. App. 273, 612 S.E.2d 96, 2005 Ga. App. LEXIS 266 (2005) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence supported the defendant's conviction of aggravated assault under O.C.G.A. § 16-5-21(a)(2) after the defendant's companions used metal knuckles, a metal pipe, and a gun to beat the victim; the defendant was a party to the offense under O.C.G.A. § 16-2-20(a), as the victim, whose testimony was sufficient to establish a fact under former O.C.G.A. § 24-4-8, testified that, during the incident, the defendant summoned the companions to help beat the victim, and the defendant and the companions repeatedly warned the victim not to testify in court in the defendant's criminal case. Souder v. State, 281 Ga. App. 339, 636 S.E.2d 68, 2006 Ga. App. LEXIS 1103 (2006), cert. denied, No. S07C0113, 2007 Ga. LEXIS 97 (Ga. Jan. 8, 2007), overruled in part, Willis v. State, 304 Ga. 686, 820 S.E.2d 640, 2018 Ga. LEXIS 685 (2018) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for malice murder conviction. — Sufficient non-accomplice evidence was presented to corroborate the testimony by accomplices of both defendants in trial on charges of malice murder and other related offenses, specifically, that: (1) the first defendant admitted to the victim's killing, via a note from that defendant to a non-accomplice witness, in order to prevent the victim from testifying; and (2) independent evidence was presented regarding the second defendant's participation in the crimes to corroborate the testimony of the accomplice. Williams v. State, 280 Ga. 584, 630 S.E.2d 370, 2006 Ga. LEXIS 262 (2006) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of malice murder because, when the victim turned the victim's back on the defendant, and started walking away, the defendant pulled out a gun, put it to the back of the victim's head, and fatally shot the victim; the first co-defendant saw the defendant running back to the car with a gun in the defendant's hand; the second co-defendant testified that the defendant shot the victim; the testimony of the victim's friend supported the testimony of the two co-defendants, though the friend was unable to unequivocally identify the defendant as the shooter; and, although some of the evidence was conveyed through the testimony of co-defendants, that evidence was properly corroborated. Fisher v. State, 299 Ga. 629, 791 S.E.2d 58, 2016 Ga. LEXIS 572 (2016).

Assuming that a testifying witness who initially agreed to participate in the robbery but then fled was an accomplice, sufficient evidence corroborated the witness's testimony that the defendant shot the victim, a cab driver, including the defendant's own statement that the defendant was at the scene, the defendant's description of the crime to others, and the defendant's resisting arrest and attempting to escape. Raines v. State, 304 Ga. 582, 820 S.E.2d 679, 2018 Ga. LEXIS 687 (2018).

Evidence was sufficient to support defendant's convictions because the jury was authorized to reject defendant's testimony and find, based upon other direct and circumstantial evidence, that both defendant and the co-defendant were parties to the victim's murder, and that defendant killed the victim because the victim had quit the victim's job while owing defendant thousands of dollars. The co-defendant's statement to the police was sufficiently corroborated as the forensic evidence and witness testimony corroborated the co-defendant's statement and showed that defendant participated in the murder. Williams v. State, 315 Ga. 797, 884 S.E.2d 877, 2023 Ga. LEXIS 57 (2023).

Adequate corroboration for methamphetamine conviction. — Sufficient evidence existed to support defendant's

Sufficiency of Corroborating Evidence (Cont'd)

conviction for criminal attempt to manufacture methamphetamine, and defendant's challenge to the sufficiency of the evidence based upon the uncorroborated testimony of defendant's accomplice alone failed as the incriminating testimony by the accomplice was adequately corroborated by independent evidence, including defendant's possession of essential items for manufacturing methamphetamine; defendant's statement to a passenger in the back of the patrol car that a store likely had ratted about the matchbook purchases; and the large quantity of matchbooks found discarded along the route defendant had just traveled. Kohlmeier v. State, 289 Ga. App. 709, 658 S.E.2d 261, 2008 Ga. App. LEXIS 191 (2008) (decided under former O.C.G.A. § 24-4-8).

Because the accomplice testimony presented against a juvenile was sufficiently corroborated by two other witness, the juvenile's prior similar acts, and the juvenile's flight from the scene, the appeals court rejected the juvenile's sufficiency challenge. In the Interest of S.K., 289 Ga. App. 672, 658 S.E.2d 220, 2008 Ga. App. LEXIS 173 (2008) (decided under former O.C.G.A. § 24-4-8).

Defendant's girlfriend's statement to police that the defendant was selling methamphetamine from her home was corroborated by more than slight evidence: the defendant admitted to police that a handgun at the home belonged to the defendant; police discovered $ 1,021 in cash on the defendant's person; and the investigator testified that these items, coupled with the drug paraphernalia in the home, were consistent with somebody who was selling drugs. Benton v. State, 356 Ga. App. 441, 847 S.E.2d 625, 2020 Ga. App. LEXIS 460 (2020), cert. denied, No. S21C0110, 2021 Ga. LEXIS 253 (Ga. Apr. 5, 2021).

Adequate corroboration for armed robbery and hijacking motor vehicle conviction. — Trial court properly convicted defendant of armed robbery and hijacking of a motor vehicle because: (1) there was sufficient evidence to establish defendant committed the crimes based on the testimony of the victim, who identified defendant as the individual who approached the victim's vehicle, pointed a gun, and demanded the vehicle; (2) two officers testified as to observing defendant driving the stolen vehicle the same night; and (3) the victim's cell phone was found on defendant's person when the defendant was arrested. Culver v. State, 290 Ga. App. 321, 659 S.E.2d 390, 2008 Ga. App. LEXIS 187 (2008) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for robbery, burglary, and related crimes conviction. — With regard to a defendant's convictions for robbery, burglary, and other related crimes, the testimony of a codefendant that implicated defendant was sufficiently corroborated by other testimony and evidence at trial. Burton v. State, 293 Ga. App. 822, 668 S.E.2d 306, 2008 Ga. App. LEXIS 1087 (2008) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for armed robbery conviction. — Evidence was sufficient to support a defendant's armed robbery conviction since an accomplice, who was wearing a mask and holding a gun when the accomplice entered the victim's bedroom, testified that the defendant had given the accomplice the mask and the gun and that the accomplice had shouted downstairs to the defendant during the robbery; the testimony was corroborated under former O.C.G.A. § 24-4-8 by the victim's recognition of the defendant's voice from the shouted conversation during the robbery and by the defendant's resistance and flight when police arrived. Williams v. State, 287 Ga. App. 361, 651 S.E.2d 768, 2007 Ga. App. LEXIS 969 (2007) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict a defendant of armed robbery since the testimony of a 14-year-old accomplice was corroborated by testimony from a clerk in the store that was robbed by the defendant and others, and the state presented physical evidence—clothing worn by the robbers—that linked the defendant to the robbery. Sellers v. State, 294 Ga. App. 536, 669 S.E.2d 544, 2008 Ga. App. LEXIS 1230 (2008) (decided under former O.C.G.A. § 24-4-8).

In an armed robbery prosecution, as the victim identified the defendant as the driver of a car and the codefendant as the passenger who robbed the victim at gunpoint, and the pistol used in the robbery was found in the car's locked glove compartment, to which only the defendant had the key, the evidence was sufficient to establish that the defendant aided and abetted the codefendant in the robbery under O.C.G.A. § 16-2-20 and sufficiently corroborated the codefendant's accomplice testimony under former O.C.G.A. § 24-4-8. Bailey v. State, 295 Ga. App. 480, 672 S.E.2d 450, 2009 Ga. App. LEXIS 16 (2009) (decided under former O.C.G.A. § 24-4-8).

While no witness could specifically identify the dark clothes that were recovered by the police from the crawl space of the defendant's parent as having been worn by one of the robbers of a grocery store, these articles of clothing matched descriptions given to an officer that the two suspects wore dark attire with full sleeves. This evidence sufficiently corroborated an accomplice's testimony that the defendant participated in the robbery. Jupiter v. State, 308 Ga. App. 386, 707 S.E.2d 592, 2011 Ga. App. LEXIS 192 (2011) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in denying the defendant's motion for directed verdict after the defendant was convicted of armed robbery because there was no violation of former O.C.G.A. § 24-4-8 since there was evidence from which a jury could find sufficient corroboration of the accomplice's testimony to support the defendant's conviction; the testimony of the victims corroborated the accomplice's testimony because the victims physical description of the perpetrator was consistent with the accomplice's testimony about what the defendant was wearing on the day of the robbery. Harris v. State, 311 Ga. App. 336, 715 S.E.2d 757, 2011 Ga. App. LEXIS 717 (2011) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of armed robbery because, even if the driver was the defendant's accomplice, there was sufficient evidence to corroborate the driver's testimony that the defendant stated that the defendant robbed the victim as video surveillance images corroborated the driver's testimony that the driver drove the defendant to the scene to buy two pounds of marijuana; the discovery of a packet of marijuana on the victim's body corroborated the nature of the deal; and neither the two pounds of marijuana corroborated by another person's testimony nor the $2,400 confirmed by the defendant, was found in the car with the victim after the defendant shot and killed the victim and returned to the driver's car. Ngumezi v. State, 300 Ga. 764, 798 S.E.2d 229, 2017 Ga. LEXIS 188 (2017) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for weapons possession conviction. — Evidence was sufficient to convict a defendant of possession of a weapon during the commission of a crime as the testimony of the defendant's accomplice that the defendant raped the victim at gunpoint was corroborated by the victim's out-of-court and in-court identification of the defendant as the rapist, and the fact that the defendant's DNA was found on the victim's clothing. Williams v. State, 295 Ga. App. 9, 670 S.E.2d 828, 2008 Ga. App. LEXIS 1335 (2008) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for rape conviction. — Evidence was sufficient to convict a defendant of rape as the testimony of the defendant's accomplice that the defendant raped the victim was corroborated by the victim's out-of-court and in-court identification of the defendant as the rapist and the fact that the defendant's DNA was found on the victim's clothing. Williams v. State, 295 Ga. App. 9, 670 S.E.2d 828, 2008 Ga. App. LEXIS 1335 (2008) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for sodomy conviction. — Trial court properly denied a defendant's motion for new trial on the ground that there was insufficient evidence to prove aggravated sodomy since the only evidence of the victim performing oral sodomy upon the defendant came from the uncorroborated testimony of the victim's parent, who was an accomplice to the sexual abuse and because

Sufficiency of Corroborating Evidence (Cont'd)

there was insufficient evidence of force. To the contrary, the victim's testimony as to the sexual abuse committed by the defendant sufficiently corroborated the testimony of the victim's parent, and the testimony of the victim that the defendant kept multiple guns around the outbuilding where the trio lived and that the defendant had repeatedly threatened to shoot the victim if the victim did not engage in the sexual acts was sufficient to prove the element of force. Driggers v. State, 295 Ga. App. 711, 673 S.E.2d 95, 2009 Ga. App. LEXIS 81 (2009) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for cocaine conviction. — While a defendant claimed that the evidence was insufficient to exclude the possibility that the cocaine belonged solely to the defendant's passenger, the testimony of the passenger that the passenger dropped the drugs out of the truck after the defendant threw the drugs in the passenger's lap was adequately corroborated under former O.C.G.A. § 24-4-8 by the facts that the defendant had more than $2,000 in the defendant's pocket and that the defendant was the owner and driver of the truck from which the drugs were thrown; the defendant was, thus, properly convicted of trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1) and possession of cocaine as a lesser included offense of possession with intent to distribute. Wingfield v. State, 297 Ga. App. 476, 677 S.E.2d 704, 2009 Ga. App. LEXIS 454 (2009) (decided under former O.C.G.A. § 24-4-8).

Defendant's accomplice's testimony that the defendant was knowingly in possession of cocaine found in their vehicle was corroborated by evidence of 575 grams of cocaine in the vehicle, that the defendant was extremely anxious when stopped by police, and the fact that there were 18 air fresheners hung throughout the vehicle, and was therefore sufficiently corroborated under former O.C.G.A. § 24-4-8, supporting the defendant's conviction for trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1). Richardson v. State, 305 Ga. App. 850, 700 S.E.2d 738, 2010 Ga. App. LEXIS 827 (2010) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for robbery conviction. — Evidence that the defendant committed a robbery was not based solely on the uncorroborated testimony of the defendant's accomplice. A store employee corroborated the accomplice's testimony, and items similar to those taken during the robbery, as well as items taken during a later robbery, were recovered from the defendant's car, which was occupied by the defendant and the accomplice. Savage v. State, 298 Ga. App. 350, 679 S.E.2d 734, 2009 Ga. App. LEXIS 593 (2009) (decided under former O.C.G.A. § 24-4-8).

Accomplice cannot corroborate the accomplices own testimony by something the accomplice told another witness. The corroborating circumstances must be independent of the testimony of the accomplice. Payne v. State, 135 Ga. App. 245, 217 S.E.2d 476, 1975 Ga. App. LEXIS 1632 (1975) (decided under former Code 1933, § 38-121).

Corroboration required for each offense. — Although slight evidence of corroboration connecting the defendant with the crime is sufficient, when the defendant is charged with the commission of several offenses, there must be corroborating evidence for each offense charged. Davis v. State, 154 Ga. App. 803, 269 S.E.2d 874, 1980 Ga. App. LEXIS 2397 (1980), cert. dismissed, 247 Ga. 8, 273 S.E.2d 409, 1981 Ga. LEXIS 591 (1981) (decided under former Code 1933, § 38-121).

Testimony corroborated in murder trial. — Testimony of the principal witness, an accomplice in the murder of which the accused was tried, was corroborated and the conviction was authorized by the evidence. George v. State, 167 Ga. 532, 146 S.E. 120, 1928 Ga. LEXIS 184 (1928) (decided under former Penal Code 1910, § 1017).

When appellant was convicted of burglary, armed robbery, and felony murder, and appellant admitted that the appellant went to the victim's house with an accomplice, but insisted that the accomplice killed the victim, and contends that the only evidence that the appellant commit-

ted the murder is the uncorroborated testimony of the appellant's accomplice, the court found that the evidence was sufficient to satisfy the requirements of former O.C.G.A. § 24-4-8, since appellant's own statement is sufficient evidence of the appellant's participation in the crime to corroborate the testimony of the accomplice. Wisenbaker v. State, 259 Ga. 416, 383 S.E.2d 132, 1989 Ga. LEXIS 335 (1989) (decided under former O.C.G.A. § 24-4-8).

Contrary to the defendant's claim, the defendant's convictions did not rest solely on the uncorroborated testimony of an accomplice as the timing and circumstances supported the identity of the defendant as the mastermind. The defendant had ample motive to kill the victim to prevent the victim from testifying against the defendant and the plain inference that the defendant was responsible for menacing phone calls was uncontradicted. Lindsey v. State, 295 Ga. 343, 760 S.E.2d 170, 2014 Ga. LEXIS 500 (2014), superseded by statute as stated in Belcher v. State, 344 Ga. App. 729, 812 S.E.2d 51, 2018 Ga. App. LEXIS 126 (2018) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of felony murder and the unlawful possession of a firearm during the commission of a felony because the defendant and the accomplice planned to rob the victim; the accomplice heard two gunshots, and the defendant ran back to the car and pulled out some cash and a bank card with the victim's name on it; the victim later died; and the accomplice's testimony was sufficiently corroborated as the defendant had financial problems and, thus, had a motive for robbery; and, in a recorded phone call, the defendant told the accomplice that the defendant had not used the bank card, which amounted to at least slight evidence that the defendant possessed the victim's property. Edwards v. State, 299 Ga. 20, 785 S.E.2d 869, 2016 Ga. LEXIS 351 (2016) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of felony murder and the unlawful possession of a firearm during the commission of a felony as a party because the witness testified that the witness was sleeping in the co-defendant's car when the witness awoke to the sound of gunshots, the co-defendant returned to the car and put down a revolver, and the witness jumped out of the car, saw the victim's body, and ran; and, if the witness was an accomplice, the witness's testimony was corroborated by other evidence as, inter alia, a jailhouse informant described a conversation in which the co-defendant complained that the witness was telling everything about a drug sale that went wrong, and the co-defendant admitted to shooting the victim. Anderson v. State, 299 Ga. 193, 787 S.E.2d 202, 2016 Ga. LEXIS 404 (2016) (decided under former O.C.G.A. § 24-4-8).

Corroborating evidence was sufficient to convict the defendant as a party to felony murder and armed robbery as the co-indictee broke into the victim's home; the defendant hit the victim twice with a baseball bat; the defendant and the co-indictee put the victim's body into a burn pit and tried to burn it; and, when the defendant was arrested, the defendant was wearing the victim's Army ring. Downer v. State, 314 Ga. 617, 878 S.E.2d 537, 2022 Ga. LEXIS 254 (2022).

Evidence of tenancy and drug paraphernalia. — Evidence that the defendant lived in an apartment and quantities of methamphetamine were located there, along with the implements of trafficking, a triple-beam scale, cutting materials, and baggies for packaging was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of the offense of possession of methamphetamine with intent to distribute. Lowe v. State, 208 Ga. App. 49, 430 S.E.2d 169, 1993 Ga. App. LEXIS 421 (1993) (decided under former O.C.G.A. § 24-4-8).

Testimony corroborated for drug possession. — When defendant's flight itinerary was identical to drug courier's and defendant made voluntary statements that defendant would have cooperated with officials had the officials talked to defendant first instead of talking to "that girl first," the conviction was authorized by the evidence. Warren v. State, 207 Ga. App. 53, 427 S.E.2d 45, 1993 Ga. App. LEXIS 60 (1993) (decided under former O.C.G.A. § 24-4-8).

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There was sufficient corroboration when the testimony of the detective regarding what the detective heard about setting up the deal, the detective's observation of the drug transaction, and the detective's later finding the marked bill was at least slight evidence from which the jury could conclude that evidence, independent of the accomplice's testimony, connected defendant to the crime and led to the inference that defendant was guilty. Black v. State, 242 Ga. App. 271, 529 S.E.2d 410, 2000 Ga. App. LEXIS 153 (2000), rev'd, 276 Ga. 691, 583 S.E.2d 4, 2003 Ga. LEXIS 551 (2003) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict defendant of possession of cocaine since defendant's two accomplices testified as to their purchase of cocaine and their being stopped by the police while enroute to a motel to smoke the cocaine and since the police found cocaine in the back seat of the car defendant was driving to the motel. Heard v. State, 257 Ga. App. 505, 571 S.E.2d 524, 2002 Ga. App. LEXIS 1200 (2002) (decided under former O.C.G.A. § 24-4-8).

Testimony corroborated in sudden snatching robbery. — Independent testimony of two separate victims sufficiently established evidence that defendant participated in accomplice's crimes, and thus was sufficient corroboration of accomplice's testimony. Daniel v. State, 207 Ga. App. 720, 429 S.E.2d 130, 1993 Ga. App. LEXIS 319 (1993) (decided under former O.C.G.A. § 24-4-8).

Testimony of victim sufficient to corroborate accomplice's testimony. — Jury charge that defendant may not have been convicted on the uncorroborated testimony of an accomplice to the charged home invasion was unwarranted since, inter alia, the victims' testimony corroborated the accomplice's testimony regarding defendant's involvement. Skaggs-Ferrell v. State, 266 Ga. App. 248, 596 S.E.2d 743, 2004 Ga. App. LEXIS 349 (2004) (decided under former O.C.G.A. § 24-4-8).

Although under Georgia law, a defendant could not be convicted solely upon the uncorroborated testimony of an accomplice, former O.C.G.A. § 24-4-8, the evidence corroborated some particulars of the accomplice's testimony implicating the codefendants in the charged crimes since all three of the victims from the three separate gas stations provided descriptions of their assailants that generally matched the codefendants and the accomplice, and all three victims also testified that their assailants brandished a handgun and a shotgun, which were indeed the weapons that were found at the scene where the stolen SUV crashed and where the accomplice was arrested. Accordingly, the evidence corroborating the accomplice's testimony was sufficient to authorize the jury's determination that the codefendants were guilty beyond a reasonable doubt as parties to armed robbery, O.C.G.A. § 16-8-41, hijacking a motor vehicle, O.C.G.A. § 16-5-44.1, aggravated assault, O.C.G.A. § 16-5-21, theft by taking, O.C.G.A. § 16-8-2, theft by receiving, O.C.G.A. § 16-8-7, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106. Daniels v. State, 306 Ga. App. 577, 703 S.E.2d 41, 2010 Ga. App. LEXIS 995 (2010) (decided under former O.C.G.A. § 24-4-8).

Testimony of defendant sufficient to corroborate accomplice's testimony. — In a prosecution for malice murder, even though defendant and defendant's accomplice each accused the other of being the actual perpetrator, defendant's own testimony — placing oneself at the scene and as a participant in disposing of some of the evidence, including the murder weapon — provided ample corroboration for the accomplice's testimony to support a conviction of defendant either as a party to the crime or as an actual perpetrator in the murder. Parkerson v. State, 265 Ga. 438, 457 S.E.2d 667, 1995 Ga. LEXIS 355 (1995) (decided under former O.C.G.A. § 24-4-8).

Defendant's testimony sufficiently corroborated that of a codefendant to support the defendant's conviction of armed robbery since the defendant testified that the defendant was present during the planning of an armed robbery and that the defendant supplied the gun used during the robbery. Short v. State, 234 Ga. App.

633, 507 S.E.2d 514 (decided under former O.C.G.A. § 24-4-8).

Defendant's statement concerning willing accompaniment of friends despite knowing those friends were involved in criminal activity and defendant's knowledge about items that were taken during such activity was sufficient evidence corroborating an accomplice's testimony inculpating the defendant. Moore v. State, 245 Ga. App. 641, 537 S.E.2d 764, 2000 Ga. App. LEXIS 948 (2000), cert. denied, No. S01C0012, 2001 Ga. LEXIS 169 (Ga. Feb. 16, 2001) (decided under former O.C.G.A. § 24-4-8).

When defendant robbed the victims at gunpoint with two accomplices, the testimony of one accomplice that defendant was involved in the robbery was sufficient to corroborate testimony to the same effect from defendant's other accomplice and sustain defendant's convictions for armed robbery and aggravated assault, under O.C.G.A. §§ 16-5-21(a)(1), (2) and 16-8-41(a). Gallimore v. State, 264 Ga. App. 629, 591 S.E.2d 485, 2003 Ga. App. LEXIS 1545 (2003) (decided under former O.C.G.A. § 24-4-8).

There was sufficient corroboration of an accomplice's testimony as required under former O.C.G.A. § 24-4-8 based on the defendant's own testimony admitting that the defendant deliberately drove to the scene of the murder and shooting with others, knew that the men doing the shooting were armed, and moved to the crime scene rather than away from the scene. Laye v. State, 312 Ga. App. 862, 720 S.E.2d 233, 2011 Ga. App. LEXIS 1021 (2011), cert. denied, No. S12C0534, 2012 Ga. LEXIS 280 (Ga. Mar. 5, 2012) (decided under former O.C.G.A. § 24-4-8).

Testimony of state's witness sufficient to corroborate testimony of accomplice. — See Herndon v. State, 187 Ga. App. 77, 369 S.E.2d 264, 1988 Ga. App. LEXIS 593 (1988) (decided under former O.C.G.A. § 24-4-8).

Recent possession of stolen property, not satisfactorily explained, is sufficient basis for the corroboration of an accomplice's testimony. Inman v. State, 182 Ga. App. 209, 355 S.E.2d 119, 1987 Ga. App. LEXIS 1636 (1987) (decided under former O.C.G.A. § 24-4-8).

Guns and ski mask sufficient corroboration. — Testimony of the codefendant, corroborated by circumstantial evidence was sufficient to support a conviction of armed robbery, since the codefendant testified that defendant actively participated in the robbery and guns and a ski mask identified as those used in the commission of the crime were found in the defendant's trailer. Eschena v. State, 203 Ga. App. 621, 417 S.E.2d 214, 1992 Ga. App. LEXIS 553 (1992), cert. denied, No. S92C0851, 1992 Ga. LEXIS 564 (Ga. July 8, 1992) (decided under former O.C.G.A. § 24-4-8).

Identification by robbery victim. — Evidence was sufficient to sustain the defendant's conviction for armed robbery and to corroborate the accomplice's testimony, when one of the robbery victims identified the defendant as one of the robbers. Telfair v. State, 234 Ga. App. 444, 507 S.E.2d 195 (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41 and possession of a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(1) because even though the defendant was found near a car similar to that involved in the robbery, with a shotgun similar to that used in the attack, and the defendant admitted being present at the scene of the robbery, the victim's testimony alone was sufficient to authorize the jury's verdict of guilty beyond a reasonable doubt pursuant to former O.C.G.A. § 24-4-8. Law v. State, 308 Ga. App. 76, 706 S.E.2d 604, 2011 Ga. App. LEXIS 129 (2011) (decided under former O.C.G.A. § 24-4-8).

Testimony corroborated in prosecution for armed robbery. — An accomplice's specific, extensive testimony linking the defendant to an armed robbery was sufficiently corroborated by substantial evidence of the defendant's immediate, unexplained possession of stolen checks, forged identification cards, and the vehicle used during the robbery. Smith v. State, 234 Ga. App. 586, 506 S.E.2d 406 (decided under former O.C.G.A. § 24-4-8).

In a prosecution for armed robbery and possession of a firearm by a convicted felon, the defendant's presence at a convenience store identified by defendant's ac-

Sufficiency of Corroborating Evidence (Cont'd)

complice, at the specific time identified by the accomplice, in the type of vehicle identified by the accomplice, with the array of loaded weaponry — including a 9mm weapon — identified by the accomplice, was sufficient to corroborate the accomplice's testimony regarding the defendant's participation as a party to the crime. House v. State, 237 Ga. App. 504, 515 S.E.2d 652 (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient for a rational trier of fact to find that the defendant participated in an armed robbery because an accomplice's testimony, which implicated the defendant as a party to the crimes, was sufficiently corroborated by the testimony and evidence at trial when the testimony of a second accomplice regarding the circumstances surrounding the planned robbery, the defendant's participation in the planning of the robbery, and the party's actions before and after the robbery sufficiently corroborated the first accomplice's testimony; the first accomplice's testimony was further corroborated by the victims' descriptions of the events surrounding the robbery, and the police chief testified at trial that police found two sets of shoe prints at the scene of the robbery, but only one set where the second accomplice waited with the car, which also corroborated the accomplice's testimony about what happened after the robbery. Smith v. State, 302 Ga. App. 222, 690 S.E.2d 867, 2010 Ga. App. LEXIS 95 (2010), cert. denied, No. S10C0943, 2010 Ga. LEXIS 660 (Ga. Sept. 7, 2010) (decided under former O.C.G.A. § 24-4-8).

In a malice murder action, an accomplice's testimony that defendant was the shooter was corroborated by the evidence of defendant's animosity towards the victim, the fact that defendant had previously pulled a handgun on the victim, and the fact that defendant had celebrated the victim's murder. Moreover, defendant's confession to another that defendant shot the victim corroborated the accomplice's testimony. Hewitt v. State, 277 Ga. 327, 588 S.E.2d 722, 2003 Ga. LEXIS 955 (2003) (decided under former O.C.G.A. § 24-4-8).

Violation of former statute not grounds for habeas corpus relief. — Corroboration of the testimony of an accomplice is a statutory requirement, not a constitutional right. Since violation of a state law no longer constitutes a basis for habeas corpus relief, there is no constitutional nor habeas corpus ground for relief since the contention is the absence of corroboration of the testimony of an accomplice. Gunter v. Hickman, 256 Ga. 315, 348 S.E.2d 644, 1986 Ga. LEXIS 836 (1986). (concurring opinions); .

Corroborated by other testimony and physical evidence. — Although there was one witness who implicated defendant in the commission of aggravated assault and recanted the witness's statements at trial, the evidence was sufficient to convict defendant since the witness's statements to police implicating defendant in the fatal assault were corroborated by other testimony and the physical evidence. Kinney v. State, 271 Ga. 877, 525 S.E.2d 91, 2000 Ga. LEXIS 14 (2000) (decided under former O.C.G.A. § 24-4-8).

There was sufficient evidence under former O.C.G.A. § 24-4-8 to convict defendant of firearms offenses and drug possession, after the codefendant testified that defendant owned five of the guns and the drugs that were found in the stopped vehicle in which defendant was a passenger, and the police officer who stopped defendant's vehicle corroborated the codefendant's testimony by stating that the officer found a gun under defendant's seat in the car. Spratling v. State, 255 Ga. App. 500, 565 S.E.2d 839, 2002 Ga. App. LEXIS 662 (2002) (decided under former O.C.G.A. § 24-4-8).

Accomplice's testimony corroborated. — Although a conviction cannot be based upon the uncorroborated testimony of an accomplice, slight evidence of defendant's identity and participation from an extraneous source is all that is required to corroborate the accomplice's testimony, and thus, support the verdict. Leonard v. State, 241 Ga. App. 899, 528 S.E.2d 540, 2000 Ga. App. LEXIS 74 (2000) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of malice murder, aggravated assault, and possession of a firearm during the commission of a felony following a drug deal in which the victim took pills without paying for the pills because the shooter's testimony as an accomplice or party to the crime was not the only evidence identifying the defendant as a participant as the defendant's statement to police placed the defendant on the scene; the defendant's witnesses testified that the defendant engaged in the pursuit; the shooter testified that the defendant told the shooter to take a pistol from the front console and recover the pills, or else the defendant would kill the shooter; and the shooter fired multiple rounds, killing the victim. Huff v. State, 300 Ga. 807, 796 S.E.2d 688, 2017 Ga. LEXIS 52 (2017).

Accomplice's testimony not sufficiently corroborated. — Juvenile adjudications were reversed since the testimony of an accomplice witness was not sufficiently corroborated to support the guilty findings; the victim's prior report to a school concerning two of the three defendants did not connect defendants to the crime, and was insufficient corroboration. In the Interest of M.B., 267 Ga. App. 721, 601 S.E.2d 370, 2004 Ga. App. LEXIS 772 (2004) (decided under former O.C.G.A. § 24-4-8).

Accomplice's testimony that the second defendant participated in the crimes of felony murder of two of the victims, the aggravated assault of another two victims, conspiracy to commit armed robbery, and conspiracy to possess cocaine was not sufficiently corroborated to sustain the second defendant's convictions because the testimony of the shooter's girlfriend that the girlfriend saw the second defendant in a vehicle with the first defendant and the shooter on the evening after the murder did nothing to indicate that the second defendant actually participated in the crimes. Taylor v. State, 297 Ga. 132, 772 S.E.2d 630, 2015 Ga. LEXIS 307 (2015) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in granting the defendant's motion for new trial because the witness was a party to the crime of armed robbery as the witness was with the victim before the armed robbery, was present for the robbery's planning, and had prior knowledge the robbery was going to occur; the witness was present when the armed robbery and shooting occurred, fled the scene with the co-conspirators, and received $50 to stay quiet about the robbery and murder; and the witness's accomplice testimony was insufficiently corroborated. State v. Grier, 309 Ga. 452, 847 S.E.2d 313, 2020 Ga. LEXIS 517 (2020).

Lay opinion testimony of deputy admitted. — Trial court did not err in denying the defendant's motion for directed verdict because the evidence was sufficient to find the defendant guilty of distribution of cocaine beyond a reasonable doubt; a deputy's lay opinion testimony was sufficient to identify the defendant as the perpetrator of the crime. Strickland v. State, 302 Ga. App. 44, 690 S.E.2d 638, 2010 Ga. App. LEXIS 30 (2010) (decided under former O.C.G.A. § 24-4-8).

Retrial of defendant permissible. — Evidence was sufficient to support the defendant's convictions, and the state could retry the defendant as the cell phone records showed the accomplice's extensive communications with the defendant on the day of the murder, and the defendant's attempt to flee arrest constituted at least slight corroborating evidence of the accomplice's testimony. State v. Thomas, 311 Ga. 407, 858 S.E.2d 52, 2021 Ga. LEXIS 198 (2021).

Evidence Constituting Corroboration

Testimony of one accomplice may be corroborated by the testimony of another accomplice. Chance v. State, 33 Ga. App. 137, 125 S.E. 730 (1924) (decided under former Penal Code 1910, § 1017); Pope v. State, 171 Ga. 655, 156 S.E. 599 (1930), answer conformed to, 42 Ga. App. 680, 157 S.E. 211 (1931); Austin v. State, 47 Ga. App. 217, 169 S.E. 729 (1933) (decided under former Code 1933, § 38-121); Wise v. State, 52 Ga. App. 98, 182 S.E. 535 (1935) (decided under former Code 1933, § 38-121); Wise v. State, 53 Ga. App. 363, 186 S.E. 142 (1936) (decided under former Code 1933, § 38-121); Walker v. State, 57

Evidence Constituting Corroboration (Cont'd)

Ga. App. 868, 197 S.E. 67 (1938) (decided under former Code 1933, § 38-121); Rozier v. State, 68 Ga. App. 797, 24 S.E.2d 137 (1943) (decided under former Code 1933, § 38-121); Greeson v. State, 90 Ga. App. 57, 81 S.E.2d 839 (1954) (decided under former Code 1933, § 38-121); Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968).Nix v. State, 133 Ga. App. 417, 211 S.E.2d 26 (1974) (decided under former Code 1933, § 38-121); Vaughn v. State, 139 Ga. App. 565, 228 S.E.2d 741 (1976) (decided under former Code 1933, § 38-121); Baker v. State, 238 Ga. 389, 233 S.E.2d 347, cert. denied, 431 U.S. 970, 97 S. Ct. 2931, 53 L. Ed. 2d 1066 (1977).Eubanks v. State, 240 Ga. 544, 242 S.E.2d 41, 1978 Ga. LEXIS 704 (1978) (decided under former Code 1933, § 38-121); Smith v. State, 154 Ga. App. 741, 270 S.E.2d 5, 1980 Ga. App. LEXIS 2369 (1980) (decided under former Code 1933, § 38-121); Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627, 1981 Ga. App. LEXIS 2620 (1981) (decided under former O.C.G.A. § 24-4-8); Hanifa v. State, 269 Ga. 797, 505 S.E.2d 731 (decided under former O.C.G.A. § 24-4-8).

Rule barring conviction based on uncorroborated testimony of a single accomplice was inapplicable to a robbery case since the evidence against each of three juvenile defendants was derived from more than one witness and was supported by corroborating evidence after the victim identified one juvenile defendant and one of the two coconspirators, but the victim could not identify the others, and an officer testified regarding statements given to the officer by one of the coconspirators and another of the juvenile defendants which implicated all three juvenile defendants in the crime; although all three juvenile defendants argued that the corroborating evidence was not credible, the trial court was the sole arbiter of credibility. In the Interest of C.L.B., 267 Ga. App. 456, 600 S.E.2d 407, 2004 Ga. App. LEXIS 684 (2004) (decided under former O.C.G.A. § 24-4-8).

Pursuant to former O.C.G.A. § 24-4-8, defendant juvenile's statements to the police corroborated an accomplice's testimony that the juvenile struck a woman unconscious, caused her serious bodily injury, used force to steal her pocketbook, and dragged her down onto her front yard; accordingly, the evidence was sufficient to adjudicate the juvenile delinquent under O.C.G.A. §§ 16-5-21(a)(2), 16-5-40(a), and 16-8-40(a)(1). In re D. T., 294 Ga. App. 486, 669 S.E.2d 471, 2008 Ga. App. LEXIS 1267 (2008) (decided under former O.C.G.A. § 24-4-8).

First defendant's claim that the evidence was insufficient to support the convictions for malice murder and related offenses because the only evidence directly incriminating the defendant was the uncorroborated testimony of an accomplice failed because the accomplice's testimony was adequately corroborated by a second accomplice. Nicholson v. State, 307 Ga. 466, 837 S.E.2d 362, 2019 Ga. LEXIS 844 (2019).

Felony conviction based on testimony of accomplice. — In order to sustain a felony conviction based upon the testimony of an accomplice, there must be corroborating facts and circumstances, which, in themselves and independently of the testimony of the accomplice, directly connect the defendant with the crime or lead to the inference that the defendant is guilty, and are more than sufficient to merely cast on the defendant a grave suspicion of guilt. The necessary corroboration may consist entirely of circumstantial evidence, and evidence of the defendant's conduct before and after the crime was committed may give rise to an inference that defendant participated in the crime. Bradford v. State, 262 Ga. 512, 421 S.E.2d 523, 1992 Ga. LEXIS 846 (1992) (decided under former O.C.G.A. § 24-4-8); Klinect v. State, 269 Ga. 570, 501 S.E.2d 810 (decided under former O.C.G.A. § 24-4-8).

Defendant's possession of the gun identified by the victim as used in the crime was sufficient to corroborate the accomplice's testimony as to the sequence of events and acts perpetrated by defendant and the accomplice with regard to the crimes of armed robbery, rape, and aggravated sodomy with the accomplice agreeing to testify against the defendant in

return for a lighter sentence. Palmer v. State, 286 Ga. App. 751, 650 S.E.2d 255, 2007 Ga. App. LEXIS 618 (2007), cert. denied, No. S07C1770, 2007 Ga. LEXIS 678 (Ga. Sept. 24, 2007) (decided under former O.C.G.A. § 24-4-8).

Uncorroborated testimony of accomplices is sufficient to authorize a felony conviction; thus, convictions of defendant for hijacking a motor vehicle, aggravated assault, and armed robbery that were based upon the testimony of defendant's two accomplices to the crimes were affirmed. Boles v. State, 257 Ga. App. 240, 570 S.E.2d 677, 2002 Ga. App. LEXIS 1119 (2002) (decided under former O.C.G.A. § 24-4-8).

Conduct on the part of the defendant may act to corroborate the testimony of an accomplice. Holton v. State, 61 Ga. App. 654, 7 S.E.2d 202, 1940 Ga. App. LEXIS 209 (1940) (decided under former Code 1933, § 38-121); Nix v. State, 133 Ga. App. 417, 211 S.E.2d 26, 1974 Ga. App. LEXIS 1092 (1974) (decided under former Code 1933, § 38-121); Drake v. State, 241 Ga. 583, 247 S.E.2d 57, 1978 Ga. LEXIS 1053 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979).

Defendant's attempts to conceal defendant's participation in an offense can corroborate defendant's accomplice's testimony regarding defendant's participation. Smith v. State, 245 Ga. 168, 263 S.E.2d 910, 1980 Ga. LEXIS 728 (1980) (decided under former Code 1933, § 38-121); Drake v. State, 245 Ga. 798, 267 S.E.2d 237, 1980 Ga. LEXIS 940 (1980) (decided under former Code 1933, § 38-121).

Evidence of conduct as corroboration may be circumstantial or direct. — Conduct of a defendant before, during the time of, and after the commission of a crime can corroborate the testimony of an accomplice and can be shown by circumstantial as well as by direct evidence. Smith v. State, 238 Ga. 640, 235 S.E.2d 17, 1977 Ga. LEXIS 1146 (1977) (decided under former Code 1933, § 38-121); Stanford v. State, 157 Ga. App. 633, 278 S.E.2d 175, 1981 Ga. App. LEXIS 1945 (1981) (decided under former O.C.G.A. § 24-4-8).

Jury may consider the conduct of the defendant before, during, and after the commission of the crime to determine the defendant's intent and defendant's participation in the crime to determine whether defendant's conduct is sufficient corroboration of the accomplice's testimony to sustain the conviction. Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627, 1981 Ga. App. LEXIS 2620 (1981) (decided under former O.C.G.A. § 24-4-8).

The necessary corroboration required by former O.C.G.A. § 24-4-8 may consist entirely of circumstantial evidence, and evidence of the defendant's conduct before and after the crime was committed may give rise to an inference that defendant participated in the crime. Berry v. State, 248 Ga. 430, 283 S.E.2d 888, 1981 Ga. LEXIS 1053 (1981) (decided under former O.C.G.A. § 24-4-8).

While a conviction based upon uncorroborated testimony of an alleged accomplice is insufficient, corroboration itself is peculiarly a matter for the jury, and may be shown by direct or circumstantial evidence tending to show defendant's participation. Howell v. State, 163 Ga. App. 445, 295 S.E.2d 329, 1982 Ga. App. LEXIS 3209 (1982) (decided under former O.C.G.A. § 24-4-8).

Corroborating evidence connecting a defendant to a crime may consist entirely of circumstantial evidence, and evidence of the defendant's conduct before and after the crime was committed may give rise to an inference that the defendant participated in the crime; whether the corroborating evidence was sufficient in a given context was a matter for the jury, and even slight evidence of corroboration connecting an accused to a crime was legally sufficient. Anderson v. State, 261 Ga. App. 456, 582 S.E.2d 575, 2003 Ga. App. LEXIS 657 (2003), cert. denied, No. S03C1500, 2003 Ga. LEXIS 868 (Ga. Oct. 6, 2003) (decided under former O.C.G.A. § 24-4-8).

Evidence presented at trial was sufficient to authorize the defendant's conviction as a party to the crimes charged as it was established that the defendant and the accomplice entered the store together, the defendant watched the accomplice brandish a gun and reach toward the cash drawer, a witness observed the pair running out of the store in the same direction together, and it was a reasonable infer-

Evidence Constituting Corroboration (Cont'd)

ence for the jury to conclude that the defendant lied to police about knowing the accomplice. Daniels v. State, 339 Ga. App. 837, 795 S.E.2d 94, 2016 Ga. App. LEXIS 671 (2016).

Modus operandi evidence in the case was sufficient to corroborate a witness's testimony identifying the appellant as a participant in two additional home invasion crimes because the perpetrators were all Spanish speaking and conducted themselves the same way as to all four home invasions that occurred and each happened over the course of only three weeks and were committed within the same county. Cisneros v. State, 299 Ga. 841, 792 S.E.2d 326, 2016 Ga. LEXIS 656 (2016), cert. denied, 138 S. Ct. 63, 199 L. Ed. 2d 45, 2017 U.S. LEXIS 5262 (2017).

Confession is sufficient to corroborate the testimony of an accomplice. Lancaster v. State, 54 Ga. App. 243, 187 S.E. 617, 1936 Ga. App. LEXIS 519 (1936) (decided under former Code 1933, § 38-121); Wade v. State, 195 Ga. 870, 25 S.E.2d 712, 1943 Ga. LEXIS 304 (1943) (decided under former Code 1933, § 38-121); Nix v. State, 133 Ga. App. 417, 211 S.E.2d 26, 1974 Ga. App. LEXIS 1092 (1974) (decided under former Code 1933, § 38-121); Vaughn v. State, 139 Ga. App. 565, 228 S.E.2d 741, 1976 Ga. App. LEXIS 1888 (1976) (decided under former Code 1933, § 38-121); Spencer v. State, 192 Ga. App. 822, 386 S.E.2d 705, 1989 Ga. App. LEXIS 1255 (1989) (decided under former O.C.G.A. § 24-4-8).

Testimony of the codefendant that the murder defendant was the triggerman in the armed robbery was corroborated by the defendant's confession in which defendant admitted participation in the robbery. McCleskey v. Kemp, 753 F.2d 877, 1985 U.S. App. LEXIS 28073 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262, 1987 U.S. LEXIS 1817 (1987) (decided under former O.C.G.A. § 24-4-8).

Defendant's own testimony regarding defendant's presence at the scene of the crime provided corroboration for defendant's brother's testimony linking the defendant with the crime. Mosier v. State, 223 Ga. App. 75, 476 S.E.2d 842 (decided under former O.C.G.A. § 24-4-8).

Proof of corpus delicti as corroboration. — Proof of the corpus delicti independently of the evidence of the accomplice is corroborative of the guilt of the accomplice, but does not at all corroborate the accomplice's testimony as to the guilt of another. Childers v. State, 52 Ga. 106, 1874 Ga. LEXIS 247 (1874) (decided under former Code 1873, § 3755); McCalla v. State, 66 Ga. 346, 1881 Ga. LEXIS 20 (1881) (decided under former Code 1873, § 3755); Altman v. State, 5 Ga. App. 833, 63 S.E. 928, 1909 Ga. App. LEXIS 141 (1909) (decided under former Penal Code 1895, § 991); Smith v. State, 7 Ga. App. 781, 68 S.E. 335, 1910 Ga. App. LEXIS 519 (1910) (decided under former Penal Code 1910, § 1017); Sanders v. State, 46 Ga. App. 175, 167 S.E. 207, 1932 Ga. App. LEXIS 98 (1932) (decided under former Penal Code 1910, § 1017); Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248, 1940 Ga. App. LEXIS 111 (1940) (decided under former Code 1933, § 38-121).

Statement describing burglary corroborated by officer's observations and guilty plea. — Defendant's videotaped statement describing a burglary, which statement conflicted with defendant's subsequent testimony denying knowledge of or participation in the burglary, could be corroborated by: (1) the officer's independent observations of the items taken which corresponded with defendant's description; and (2) the district attorney's testimony as to defendant's plea of guilty to the burglary. Dixon v. State, 172 Ga. App. 803, 324 S.E.2d 780, 1984 Ga. App. LEXIS 2672 (1984) (decided under former O.C.G.A. § 24-4-8).

Recent unexplained possession of stolen property is sufficient basis for the corroboration of an accomplice's testimony and for a conviction of burglary. Green v. State, 139 Ga. App. 652, 229 S.E.2d 129, 1976 Ga. App. LEXIS 1932 (1976); Cole v. State, 156 Ga. App. 288, 274 S.E.2d 685, 1980 Ga. App. LEXIS 3037 (1980) (decided under former Code 1933, § 38-121).

Unexplained recent possession of goods taken in an armed robbery and burglary has some corroborative value. Brady v. State, 169 Ga. App. 316, 312

S.E.2d 632, 1983 Ga. App. LEXIS 3469 (1983) (decided under former O.C.G.A. § 24-4-8).

Pregnancy of the unmarried prosecutor, unless it be shown that such pregnancy resulted from the act of the defendant, does not constitute corroboration of the testimony of the prosecutor. Wilkins v. State, 96 Ga. App. 841, 101 S.E.2d 912, 1958 Ga. App. LEXIS 920 (1958) (decided under former Code 1933, § 38-121).

When testimony of defendant's wife-accomplice was corroborated by testimony of wife's sister who observed defendant beating the same victim on an earlier occasion, such evidence was sufficient to sustain defendant's conviction for cruelty to children. Jackson v. State, 178 Ga. App. 378, 343 S.E.2d 122, 1986 Ga. App. LEXIS 2530 (1986) (decided under former O.C.G.A. § 24-4-8).

Polygraph test results are sufficient corroboration of an accomplice's testimony. Smith v. State, 245 Ga. 205, 264 S.E.2d 15, 1980 Ga. LEXIS 743 (1980) (decided under former Code 1933, § 38-121).

Defendant's prior inconsistent statements, which constituted substantive evidence, were sufficient to corroborate the accomplice's testimony. Arnold v. State, 243 Ga. App. 118, 532 S.E.2d 458, 2000 Ga. App. LEXIS 402 (2000) (decided under former O.C.G.A. § 24-4-8).

Video evidence and testimony of other witnesses. — In an action for felony murder and related offenses, there was sufficient evidence to support the defendant's convictions, including accomplice testimony that the accomplice and the defendant were gang members, that the gang's leader directed them to kidnap the victim, and describing the events leading to the victim being fatally shot, which was corroborated by each other, video evidence and testimony of other witnesses. Yarn v. State, 305 Ga. 421, 826 S.E.2d 1, 2019 Ga. LEXIS 156 (2019).

Evidence from extraneous source. — First defendant and second defendant were incorrect in asserting that their convictions arising out of the robbery and murder of a drug dealer were supported by insufficient evidence as their convictions were not based solely on the uncorroborated testimony of accomplices; rather, those convictions also rested on extraneous source evidence identifying the defendants as participants in the crime, including the testimony and identification of the defendant's by a person present at the drug dealer's apartment when the crimes were committed as well as substantial forensic evidence linking the defendants to the crimes. Howard v. State, 279 Ga. 166, 611 S.E.2d 3, 2005 Ga. LEXIS 239 (2005) (decided under former O.C.G.A. § 24-4-8).

Testimony and cell phone records sufficient corroboration. — Defendant's convictions of malice murder, armed robbery, and other crimes were not based on the uncorroborated testimony of an accomplice in violation of former O.C.G.A. § 24-4-8 as: 1) a victim testified that intruders took a wallet that police later found in the defendant's home; and 2) cell phone tower records established that the defendant and the accomplice were exchanging phone calls during the times when the crimes were committed and within the vicinity of the crime sites. Jackson v. State, 289 Ga. 798, 716 S.E.2d 188, 2011 Ga. LEXIS 716 (2011) (decided under former O.C.G.A. § 24-4-8).

Slight physical evidence sufficient to corroborate. — Evidence of a large bag of marijuana, digital scales, and plastic baggies in a bedroom belonging to defendant slightly corroborated defendant's brother's girlfriend's testimony that defendant possessed the marijuana and gave it to the girlfriend to sell, and a tax return and receipt belonging to defendant corroborated the girlfriend's contention that this room belonged to defendant. Slight corroboration was sufficient under former O.C.G.A. § 24-4-8. Williams v. State, 299 Ga. App. 798, 683 S.E.2d 860, 2009 Ga. App. LEXIS 971 (2009) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for gang related beating. — In addition to an accomplice's testimony linking the defendants to the beatings of the victims, there was evidence that one defendant was involved in a conversation about retribution, that the defendant was near the exit to an amusement park among the larger group shortly before the assault, and that

Evidence Constituting Corroboration (Cont'd)

the defendant rode home in a car with an admitted participant in the beating. Morey v. State, 312 Ga. App. 678, 719 S.E.2d 504, 2011 Ga. App. LEXIS 960 (2011), cert. denied, No. S12C0451, 2012 Ga. LEXIS 592 (Ga. June 18, 2012) (decided under former O.C.G.A. § 24-4-8).

Perjury

Perjury is never presumed. Georgia Power Co. v. Owen, 207 Ga. 178, 60 S.E.2d 436, 1950 Ga. LEXIS 425 (1950) (decided under former Code 1933, § 38-121).

In general. — To convict of perjury, there must be two witnesses, or one witness and proof by corroborating circumstances. McLaren v. State, 4 Ga. App. 643, 62 S.E. 138, 1908 Ga. App. LEXIS 499 (1908) (decided under former Penal Code 1895, § 991); Davis v. State, 7 Ga. App. 680, 67 S.E. 839, 1910 Ga. App. LEXIS 463 (1910) (decided under former Penal Code 1910, § 1017). ; SeeFlemister v. State, 81 Ga. 768, 7 S.E. 642, 1888 Ga. LEXIS 344 (1888); Rodenberry v. State, 37 Ga. App. 359, 140 S.E. 386, 1927 Ga. App. LEXIS 678 (1927) (decided under former Penal Code 1910, § 1017); Potts v. State, 78 Ga. App. 799, 52 S.E.2d 575, 1949 Ga. App. LEXIS 982 (1949) (decided under former Code 1933, § 38-121).

Evidence was insufficient to support a finding that the juvenile committed perjury and, thus, was not sufficient to support the juvenile's adjudication as a delinquent since the state's perjury case against the juvenile rested solely on the testimony of a codefendant, and was not supported by the required two witnesses, or one witness and corroborating circumstances. In the Interest of C.H., 262 Ga. App. 630, 585 S.E.2d 921, 2003 Ga. App. LEXIS 970 (2003) (decided under former O.C.G.A. § 24-4-8).

Sufficiency of corroboration. — Nature and sufficiency of the corroboration necessary to prove the perjury must in each case be determined by the jury, but the equilibrium between the oath of the alleged perjurer and the oath of the contradicting witness should be destroyed by material and independent circumstances strongly corroborative of the positive testimony of the witness. Bell v. State, 5 Ga. App. 701, 63 S.E. 860, 1909 Ga. App. LEXIS 111 (1909) (decided under former Penal Code 1895, § 991).

Evidence was sufficient to support defendant's conviction for armed robbery since: (1) defendant affirmatively lied by denying that defendant knew one accomplice in defendant's initial statement to the police; (2) defendant was driving the getaway car when it was stopped by the police; and (3) defendant was in possession of the handgun used in the armed robbery and the money stolen in the armed robbery. The sufficiency of the corroboration of the accomplice's testimony that defendant participated in the planning of the robbery as required under former O.C.G.A. § 24-4-8 was a matter for the jury to determine. Clemons v. State, 265 Ga. App. 825, 595 S.E.2d 530, 2004 Ga. App. LEXIS 148 (2004), cert. denied, No. S04C1128, 2004 Ga. LEXIS 505 (Ga. June 7, 2004) (decided under former O.C.G.A. § 24-4-8).

State satisfied the corroboration requirement as to the defendant's perjury conviction based on the defendant's denial that the defendant and the man who murdered the defendant's husband had a romantic relationship because the state produced testimony from a bartender at a night club who saw the defendant and the man at the club on the dance floor pressing their bodies together while the man cupped the defendant's buttocks and they engaged in passionate kissing; and the state produced corroborating circumstances in the form of romantic email messages between the man and the defendant and evidence that they shared hotel rooms on out-of-town business trips. Sneiderman v. State, 336 Ga. App. 153, 784 S.E.2d 18, 2016 Ga. App. LEXIS 143 (2016), cert. denied, No. S16C1152, 2016 Ga. LEXIS 641 (Ga. Oct. 3, 2016), overruled in part, Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391, 2016 Ga. App. LEXIS 460 (2016).

Conspirator's testimony sufficient. — Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a cocon-

spirator's testimony under former O.C.G.A. § 24-4-8 and for the jury to find beyond a reasonable doubt that the defendant committed the crimes for which the defendant was convicted; the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the coconspirator's testimony about the defendant's participation in the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413, 2011 Ga. App. LEXIS 537 (2011) (decided under former O.C.G.A. § 24-4-8).

Proof based on circumstantial evidence. — Former statute did not apply to a case where the proof of perjury was necessarily based upon circumstantial evidence. Mallard v. State, 19 Ga. App. 99, 90 S.E. 1044, 1916 Ga. App. LEXIS 64 (1916) (decided under former Penal Code 1910, § 1017).

Charging part of former statute when inapplicable. — Court did not err in giving in charge the former statute as to the number of witnesses necessary to convict of perjury and certain other offenses, although a part of the statute was not applicable to the case where the inapplicable part was explained. Pence v. State, 36 Ga. App. 270, 136 S.E. 820, 1927 Ga. App. LEXIS 6 (1927) (decided under former Penal Code 1910, § 1017).

Jury

When state does not rely solely upon evidence of accomplice to connect the accused with an offense, it is not incumbent upon the court, without request, to instruct the jury on corroboration. Smith v. State, 154 Ga. App. 741, 270 S.E.2d 5, 1980 Ga. App. LEXIS 2369 (1980) (decided under former Code 1933, § 38-121).

Charge unnecessary when two witnesses testify. — When two witnesses swear to the same state of facts, the fact that the witnesses are accomplices or are not accomplices, or that one is an accomplice and other not an accomplice, does not require a charge by the court, in the trial of a defendant alleged to be a party to a joint crime, that "where the only witness is an accomplice" the accomplice's testimony must be corroborated. Wilson v. State, 51 Ga. App. 570, 181 S.E. 134, 1935 Ga. App. LEXIS 408 (1935) (decided under former Code 1933, § 38-121); Farley v. State, 210 Ga. App. 580, 436 S.E.2d 770, 1993 Ga. App. LEXIS 1246 (1993) (decided under former O.C.G.A. § 24-4-8); Reeves v. State, 244 Ga. App. 15, 534 S.E.2d 179, 2000 Ga. App. LEXIS 550 (2000), cert. denied, No. S00C1489, 2000 Ga. LEXIS 842 (Ga. Oct. 27, 2000) (decided under former O.C.G.A. § 24-4-8).

Trial counsel was not ineffective for failing to request a jury charge on the requirement for corroboration of accomplice testimony based on the state relying heavily on the testimony of the girlfriends who drove the gang members because not only did the women corroborate each other's testimony, but their testimony was corroborated by a jailhouse admission from the defendant, thus, it was unlikely that the omission of the instruction affected the outcome of the defendant's trial. Jordan v. State, 307 Ga. 450, 836 S.E.2d 86, 2019 Ga. LEXIS 801 (2019).

Failure to charge connection with crime. — In charging upon the subject of corroboration of an accomplice, the court having instructed that the extent of corroborative testimony was a question for the jury, it was not error, in the absence of a proper request, to fail to charge further that the evidence in corroboration should connect the accused with the commission of the crime. Jones v. State, 200 Ga. 793, 38 S.E.2d 429, 1946 Ga. LEXIS 331 (1946) (decided under former Code 1933, § 38-121); Hill v. State, 237 Ga. 794, 229 S.E.2d 737, 1976 Ga. LEXIS 1395 (1976) (decided under former Code 1933, § 38-121).

Charge on corroboration required. — Because there was evidence to support a finding that the witness was an accomplice, the trial court erred, pursuant to former O.C.G.A. § 24-4-8, in refusing to give the defendant's requested instruction on the need for corroboration of an accomplice's testimony. Hamm v. State, 294 Ga. 791, 756 S.E.2d 507, 2014 Ga. LEXIS 222 (2014) (decided under former O.C.G.A. § 24-4-8).

Trial court committed plain error by not providing a jury charge on the necessity of corroboration of the accomplice's testimony because by failing to give the required accomplice corroboration charge

Jury (Cont'd)

and instead charging the jury that the testimony of a single witness, if believed, was generally sufficient to establish a fact, the trial court impermissibly empowered the jury to find the defendant guilty based solely on the accomplice's testimony; while there was sufficient corroborating evidence to support a verdict, that evidence was in no way overwhelming; the outcome of the trial court proceedings was likely affected by the error; and the error seriously affected the fairness, integrity, or public reputation of the proceedings. Stanbury v. State, 299 Ga. 125, 786 S.E.2d 672, 2016 Ga. LEXIS 383 (2016) (decided under former O.C.G.A. § 24-4-8).

Defendant demonstrated prejudice resulting from trial counsel's failure to request an instruction regarding the corroboration of an accomplice's testimony as to the defendant's identity as the shooter, as the accomplice's identification of the defendant as the sole shooter was directly contradicted by the testimony of the bank manager, who identified the accomplice as the shooter, and other circumstantial evidence pointing to the accomplice. Burns v. State, 342 Ga. App. 379, 803 S.E.2d 79, 2017 Ga. App. LEXIS 316 (2017).

Trial court properly granted the defendant a new trial because the court plainly erred in failing to instruct the jury that accomplice testimony required corroboration as the trial court's instructions deviated from the rule that unequivocally required corroboration of accomplice testimony in felony cases; the trial court impermissibly empowered the jury to find the defendant guilty based solely on the accomplice's testimony; the outcome of the trial court proceedings was likely affected by the trial court's failure to provide that charge to the jury because virtually all of the incriminating evidence flowed from the accomplice; and the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. State v. Johnson, 305 Ga. 237, 824 S.E.2d 317, 2019 Ga. LEXIS 98 (2019).

Trial court clearly and obviously erred in instructing the jury as to how the jury could consider the codefendant's statements because the trial court not only erred in failing to inform the jury of the accomplice-corroboration requirement, but also erroneously instructed the jury that the testimony of a single witness if believed was sufficient and that generally there was no legal requirement of corroboration of a witness. Finney v. State, 311 Ga. 1, 855 S.E.2d 578, 2021 Ga. LEXIS 82 (2021).

Court of appeals erred in concluding that the trial court did not plainly err by failing to charge the jury on the requirement that accomplice testimony be corroborated because corroboration was required for the jury to credit any of the accomplices' testimony identifying the defendant as a perpetrator. Palencia v. State, 313 Ga. 625, 872 S.E.2d 681, 2022 Ga. LEXIS 130 (2022).

When charge on corroboration not required. — Trial court did not err in failing to charge the jury that an accomplice's testimony alone, without corroboration, was insufficient to support a conviction because trial counsel did not request this charge and because the state did not rely wholly on the accomplice's testimony. Wooten v. State, 240 Ga. App. 725, 524 S.E.2d 776 (decided under former O.C.G.A. § 24-4-8).

Because the state relied on evidence other than the accomplice's testimony, the trial court was not required to submit the issue of the sufficiency of the corroborating evidence to the jury and was therefore not required to charge the jury on corroboration. Jenkins v. Byrd, 103 F. Supp. 2d 1350, 2000 U.S. Dist. LEXIS 8944 (S.D. Ga. 2000), aff'd, 273 F.3d 397, 2001 U.S. App. LEXIS 28492 (11th Cir. 2001) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in failing to instruct the jury that the testimony of an accomplice had to be corroborated because, pretermitting whether the failure to instruct the jury on corroboration was error, the defendant could not successfully demonstrate that it was plain error as evidence from multiple witnesses, including the defendant's witnesses and the defendant personally, corroborated the shooter's testimony. Huff v. State, 300 Ga. 807, 796 S.E.2d 688, 2017 Ga. LEXIS 52 (2017).

Jury could have determined that the witness who identified the defendant as

the shooter was not an accomplice and, therefore, the witness's testimony did not need to be corroborated because the properly charged jury was authorized to credit the witness's testimony that the witness had no prior knowledge that the defendant would shoot or kill the victim and that the witness drove the defendant away from the shooting out of fear that the defendant might shoot the witness too. Fisher v. State, 309 Ga. 814, 848 S.E.2d 434, 2020 Ga. LEXIS 604 (2020).

In a malice murder case, the defendant's claim that the trial court plainly erred in not instructing the jury that an accomplice's testimony had to be corroborated failed as any error did not likely affect the outcome of the proceeding because multiple witnesses, including the defendant, corroborated that the defendant participated in the crimes, and the state presented expert testimony that, as an elder in the gang, the defendant would have had the authority to order others to commit the crimes. Jackson v. State, 314 Ga. 751, 879 S.E.2d 410, 2022 Ga. LEXIS 267 (2022).

Charge not harmful. — Charge in regard to the provision of the former statute, relating to corroboration of testimony of an accomplice in a felony case was not harmful to the defendants. Cole v. State, 156 Ga. App. 288, 274 S.E.2d 685, 1980 Ga. App. LEXIS 3037 (1980) (decided under former Code 1933, § 38-121).

Accomplice jury instruction proper. — Trial court did not commit plain error by giving the jury a pattern jury instruction excluding certain witnesses from the definition of "accomplice" because, even assuming that there was at least slight evidence that two witnesses were accomplices whose testimony required corroboration, the provision of an accomplice-corroboration jury instruction did not preclude the trial court from also giving a jury charge on a witness's unknowing participation as the state introduced at least slight evidence that the witnesses were unknowing participants. Collins v. State, 312 Ga. 727, 864 S.E.2d 85, 2021 Ga. LEXIS 640 (2021).

Jury instruction proper. — Trial court did not err in charging the jury as follows while deleting the bracketed word "generally": "The testimony of a witness is :generally] sufficient to establish a fact if the jury believes the witness." Thomas v. State, 249 Ga. App. 556, 548 S.E.2d 71, 2001 Ga. App. LEXIS 500 (2001) (decided under former O.C.G.A. § 24-4-8).

Trial counsel was not ineffective for failing to object to a jury charge that the testimony of a single witness, if believed, was generally sufficient to establish a fact because the trial court did not err in giving the charge. Bellamy v. State, 312 Ga. App. 899, 720 S.E.2d 323, 2011 Ga. App. LEXIS 1071 (2011) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err by charging the jury that the testimony of a single witness, if believed, was generally sufficient to establish a fact because the first sentence of former O.C.G.A. § 24-4-8 was not a truism that the jury could only be instructed on when the case involved one of the exceptions. Bellamy v. State, 312 Ga. App. 899, 720 S.E.2d 323, 2011 Ga. App. LEXIS 1071 (2011) (decided under former O.C.G.A. § 24-4-8).

Jury charge regarding corroboration of an accomplice's testimony as given properly informed the jury of what corroboration was required; and the jury was instructed on reasonable doubt, participation in a crime, mere presence at the scene of a crime, and that grave suspicion did not authorize a conviction; thus, there was no likelihood that the failure to instruct the jury using the complete language of the suggested pattern jury instructions affected the outcome of the trial, and there was no plain error. Daniels v. State, 302 Ga. 90, 805 S.E.2d 80, 2017 Ga. LEXIS 770 (2017), overruled on other grounds, State v. Lane, 308 Ga. 10, 838 S.E.2d 808, 2020 Ga. LEXIS 98 (2020).

Whether witness was an accomplice is a question for the jury. Venable v. State, 56 Ga. App. 366, 192 S.E. 646, 1937 Ga. App. LEXIS 354 (1937); Maddox v. State, 131 Ga. App. 86, 205 S.E.2d 31, 1974 Ga. App. LEXIS 1337 (1974); Payne v. State, 135 Ga. App. 245, 217 S.E.2d 476, 1975 Ga. App. LEXIS 1632 (1975); Durham v. State, 243 Ga. 408, 254 S.E.2d 359, 1979 Ga. LEXIS 915 (1979) (decided under former Code 1933, § 38-121).

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Former O.C.G.A. § 24-4-8 requires that accomplice testimony be corroborated in felony cases when the only witness is the accomplice, but only slight evidence from an extraneous source as to a defendant's identity and participation is needed to corroborate an accomplice's testimony, and, such evidence may be entirely circumstantial. Smith v. State, 257 Ga. App. 595, 571 S.E.2d 817, 2002 Ga. App. LEXIS 1232 (2002) (decided under former O.C.G.A. § 24-4-8).

Submitting question as to whether witness was accomplice. — It is not error to submit to the jury the question of whether a witness for the state was or was not an accomplice even if the witness had confessed to being an accomplice and had been jointly indicted with the defendant on trial. Milton v. State, 248 Ga. 192, 282 S.E.2d 90, 1981 Ga. LEXIS 955 (1981) (decided under former O.C.G.A. § 24-4-8).

Supreme Court of Georgia found that jury heard significant amount of incriminating testimony that was neither alleged hearsay testimony by detectives nor statements by accomplices, and defendant showed no reasonable probability that jury convicted defendant based on uncorroborated statement of single witness who was accomplice or that result of trial would have been different in absence of alleged hearsay. Payne v. State, 314 Ga. 322, 877 S.E.2d 202, 2022 Ga. LEXIS 213 (2022).

Jury determines whether participation voluntary. — When a witness testifies that the witness was forced to accompany the defendants out of fear of one or both of the defendant's, it is for the jury to determine whether the witness is an accomplice. Milton v. State, 248 Ga. 192, 282 S.E.2d 90, 1981 Ga. LEXIS 955 (1981) (decided under former O.C.G.A. § 24-4-8); Jones v. State, 268 Ga. 12, 483 S.E.2d 871 (decided under former O.C.G.A. § 24-4-8).

Instruction to jury on status as accomplice is expression of opinion of guilt. — To be accomplices of each other, both the defendant and the state's witness must have been involved in the criminal enterprise. One cannot be the "accomplice" of an innocent man. It therefore constitutes an expression of opinion by the court as to the guilt of the accused to instruct the jury that a witness who testified as to the defendant's guilt and admitted the witness's participation in the crime would be an accomplice of the accused. Ladson v. State, 248 Ga. 470, 285 S.E.2d 508, 1981 Ga. LEXIS 1066 (1981) (decided under former O.C.G.A. § 24-4-8).

Failure to request accomplice corroboration instruction. — Defendant received constitutionally ineffective assistance of counsel because counsel was deficient in failing to request an accomplice corroboration instruction regarding the testimony of the state's witness as the admission of the involvement of the state's witness with the defendant in the events before, during, and after the shooting, along with the initial lies of the state's witness to the police at the crime scene, could support a finding that the state's witness was an accomplice and not merely present for the crimes; and defense counsel's deficient performance prejudiced the defendant as the lynchpin of the state's case against the defendant was the credibility of the state's witness. Fisher v. State, 299 Ga. 478, 788 S.E.2d 757, 2016 Ga. LEXIS 470 (2016).

Corroboration instruction. — Although it was clear and obvious error for the trial court not to instruct the jury as to the corroboration requirements so that the jurors could properly evaluate the accomplice's testimony and the need to have the testimony corroborated, it did not amount to plain error because the defendant failed to establish that omitting the corroboration instruction probably affected the outcome of the trial since the defendant testified to driving the accomplice to the house. Showers v. State, 353 Ga. App. 754, 839 S.E.2d 245, 2020 Ga. App. LEXIS 78 (2020), cert. denied, No. S20C0926, 2020 Ga. LEXIS 728 (Ga. Sept. 8, 2020).

Trial court did not plainly err by failing to instruct the jury on accomplice corroboration because defendant failed to show that omitting the instruction probably affected the outcome of the trial, as the evidence against defendant was substantial and included two eyewitness identifi-

cations of defendant as the perpetrator and incriminating text messages from defendant's cell phone to gang-affiliated contacts acknowledging that defendant participated in the home invasion and shooting. Rucker v. State, 315 Ga. 568, 883 S.E.2d 790, 2023 Ga. LEXIS 25 (2023).

Charge on single witness rule. — Trial court did not err in charging the jury on the single witness rule because the state presented testimony from witnesses who were not accomplices of the defendant and, therefore, the accomplice corroboration instruction was not warranted. Gay v. State, 351 Ga. App. 811, 833 S.E.2d 305, 2019 Ga. App. LEXIS 496 (2019), cert. denied, No. S20C0264, 2020 Ga. LEXIS 317 (Ga. Apr. 20, 2020).

Instruction on slight evidence. — Judge should not charge the jury as matter of law that slight evidence is sufficient to corroborate the testimony of an accomplice; but as a matter of fact slight evidence is sufficient, if it is satisfactory to the minds of the jury. Smith v. State, 189 Ga. 169, 5 S.E.2d 762, 1939 Ga. LEXIS 691 (1939) (decided under former Code 1933, § 38-121).

Trial court's pattern charge that "slight evidence" connecting the defendant to the crime may have been sufficient to support the testimony of an accomplice stated the law accurately. Richardson v. State, 277 Ga. App. 429, 626 S.E.2d 518, 2006 Ga. App. LEXIS 42 (2006), cert. denied, No. S06C1032, 2006 Ga. LEXIS 310 (Ga. May 8, 2006) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err when the court charged the jury on a dictionary definition of "corroborating evidence" in response to the jury's question asking for a definition of the term "slight corroboration" as the jury was properly instructed on the full scope of accomplice testimony; the definition of "corroborating evidence" given by the trial court was an accurate statement consistent with the law; the instruction on accomplice testimony was devoid of the term "slight corroboration" but rather used the terms "supporting evidence" and "slight evidence from another source." Grimes v. State, 296 Ga. 337, 766 S.E.2d 72, 2014 Ga. LEXIS 922 (2014).

Sufficiency of corroboration of accomplice's testimony is a question for the jury. Powers v. State, 44 Ga. 209 (1871) (decided under former Code 1868, § 3702); Ransone v. Christian, 56 Ga. 351 (1876) (decided under former Code 1873, § 3755); Bell v. State, 73 Ga. 572 (1884) (decided under former Code 1882, § 3755); Evans v. State, 78 Ga. 351 (1886) (decided under former Code 1882, § 3755); Sikes v. State, 105 Ga. 592, 31 S.E. 567 (1898) (decided under former Penal Code 1895, § 991); Parham v. State, 3 Ga. App. 468, 60 S.E. 123 (1908) (decided under former Penal Code 1895, § 991); Gilbert v. State, 27 Ga. App. 604, 109 S.E. 697 (1921) (decided under former Penal Code 1910, § 1017); Sheppard v. State, 44 Ga. App. 481, 162 S.E. 413 (1931) (decided under former Penal Code 1910, § 1017); Hargett v. State, 55 Ga. App. 192, 189 S.E. 675 (1937) (decided under former Code 1933, § 38-121); Garner v. State, 72 Ga. App. 819, 35 S.E.2d 317 (1945) (decided under former Code 1933, § 38-121); Waldrop v. State, 221 Ga. 319, 144 S.E.2d 372 (1965) (decided under former Code 1933, § 38-121); Sutton v. State, 223 Ga. 313, 154 S.E.2d 578 (1967) (decided under former Code 1933, § 38-121); Lindsey v. State, 227 Ga. 48, 178 S.E.2d 848 (1970) (decided under former Code 1933, § 38-121); Pitts v. State, 128 Ga. App. 434, 197 S.E.2d 495 (1973) (decided under former Code 1933, § 38-121); Smith v. State, 236 Ga. 12, 222 S.E.2d 308, cert. denied, 428 U.S. 910, 96 S. Ct. 3224, 49 L. Ed. 2d 1219 (1976).Birt v. State, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976).Jones v. State, 139 Ga. App. 643, 229 S.E.2d 121, 1976 Ga. App. LEXIS 1928 (1976) (decided under former Code 1933, § 38-121); Green v. State, 139 Ga. App. 652, 229 S.E.2d 129, 1976 Ga. App. LEXIS 1932 (1976) (decided under former Code 1933, § 38-121); Davis v. State, 154 Ga. App. 803, 269 S.E.2d 874, 1980 Ga. App. LEXIS 2397 (1980), cert. dismissed, 247 Ga. 8, 273 S.E.2d 409, 1981 Ga. LEXIS 591 (1981) (decided under former Code 1933, § 38-121); Smith v. State, 154 Ga. App. 741, 270 S.E.2d 5, 1980 Ga. App. LEXIS 2369 (1980) (decided under former Code 1933, § 38-121); Cody

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v. State, 195 Ga. App. 318, 393 S.E.2d 692, 1990 Ga. App. LEXIS 487 (1990) (decided under former O.C.G.A. § 24-4-8).

Jury must infer guilt. — Sufficiency of circumstances proved to corroborate the accomplice is entirely a matter for the jury, provided the circumstances proved, independently of the testimony of the accomplice, lead to the inference that the defendant is guilty, and in some way connect the defendant with the guilty act. Potts v. State, 86 Ga. App. 779, 72 S.E.2d 553, 1952 Ga. App. LEXIS 1059 (1952) (decided under former Code 1933, § 38-121); Mears v. State, 98 Ga. App. 576, 106 S.E.2d 854, 1958 Ga. App. LEXIS 631 (1958) (decided under former Code 1933, § 38-121).

Slight evidence to support jury's determination. — Extent of corroboration is a question to be determined by the jury; it may be strong, or it may be slight, but in each case it must be of such character as to satisfy the minds of the jury as to the connection of the accused with the criminal enterprise. Sheppard v. State, 44 Ga. App. 481, 162 S.E. 413 (1931) (decided under former Penal Code 1910, § 1017); Walker v. State, 57 Ga. App. 868, 197 S.E. 67 (1938) (decided under former Code 1933, § 38-121); Smith v. State, 189 Ga. 169, 5 S.E.2d 762 (1939) (decided under former Code 1933, § 38-121); Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248 (1940) (decided under former Code 1933, § 38-121); Mitchell v. State, 202 Ga. 247, 42 S.E.2d 767 (1947) (decided under former Code 1933, § 38-121); Blakely v. State, 78 Ga. App. 282, 50 S.E.2d 762 (1948) (decided under former Code 1933, § 38-121); Croker v. State, 101 Ga. App. 742, 115 S.E.2d 413 (1960) (decided under former Code 1933, § 38-121); Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968).Quaid v. State, 132 Ga. App. 478, 208 S.E.2d 336 (1974) (decided under former Code 1933, § 38-121); Townsend v. State, 141 Ga. App. 743, 234 S.E.2d 368 (1977) (decided under former Code 1933, § 38-121); Smith v. State, 238 Ga. 640, 235 S.E.2d 17 (1977) (decided under former Code 1933, § 38-121); Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978).Haynes v. State, 149 Ga. App. 179, 253 S.E.2d 851, 1979 Ga. App. LEXIS 1776 (1979) (decided under former Code 1933, § 38-121); Butler v. State, 150 Ga. App. 751, 258 S.E.2d 691, 1979 Ga. App. LEXIS 2365 (1979) (decided under former Code 1933, § 38-121); Williams v. State, 153 Ga. App. 421, 265 S.E.2d 341, 1980 Ga. App. LEXIS 1832 (1980) (decided under former Code 1933, § 38-121); Cole v. State, 156 Ga. App. 288, 274 S.E.2d 685, 1980 Ga. App. LEXIS 3037 (1980) (decided under former Code 1933, § 38-121); Castell v. State, 250 Ga. 776, 301 S.E.2d 234, 1983 Ga. LEXIS 1026 (1983).

Jury to decide sufficiency of corroborating evidence. — Sufficiency of corroboration evidence is peculiarly a matter for the jury to determine. If the verdict is founded on slight evidence of corroboration connecting a defendant with the crime, the verdict is legally sufficient. Bradford v. State, 262 Ga. 512, 421 S.E.2d 523, 1992 Ga. LEXIS 846 (1992) (decided under former O.C.G.A. § 24-4-8); Klinect v. State, 269 Ga. 570, 501 S.E.2d 810 (decided under former O.C.G.A. § 24-4-8); Pinkins v. State, 243 Ga. App. 737, 534 S.E.2d 192, 2000 Ga. App. LEXIS 548 (2000) (decided under former O.C.G.A. § 24-4-8).

Failure to charge statute. — When a person accused of perjury is on trial, the judge should instruct the jury that, before the jury would be authorized to convict the accused, the charge must be established by the testimony of two witnesses or by one witness and corroborating circumstances. However, the failure so to charge could not be harmful to the cause of the defendant, since the defendant introduced no evidence, and two or more witnesses for the plaintiff testified positively to each of the material allegations in the indictment. Oxford v. State, 40 Ga. App. 511, 150 S.E. 466, 1929 Ga. App. LEXIS 618 (1929) (decided under former Penal Code 1910, § 1017).

Trial court committed plain error by failing to instruct the jury of the corroboration requirement for accomplice testimony because the evidence presented

could have supported a finding that the accomplice intentionally aided in the shooting as the accomplice testified that the accomplice drove the defendant and codefendant after hearing them discussing getting payback, the accomplice saw that they had guns, the accomplice drove them away from the scene after hearing gunshots, and the accomplice did not report the shooting. The trial court's failure to give the accomplice-corroboration in conjunction with the single-witness charge violated O.C.G.A. § 24-14-8. Doyle v. State, 307 Ga. 609, 837 S.E.2d 833, 2020 Ga. LEXIS 6 (2020).

Trial court did not commit plain error by failing to give a jury instruction about the requirement of accomplice corroboration because the defendant failed to show the failure affected the outcome given the overwhelming evidence against the defendant and the fact that the accomplice statements played at trial made no mention of the defendant. Willis v. State, 315 Ga. 19, 880 S.E.2d 158, 2022 Ga. LEXIS 280 (2022).

Failure to request instruction amounted to ineffective assistance of counsel. — Trial counsel's failure to request a jury instruction regarding the requirement that accomplice testimony be corroborated amounted to ineffective assistance as it was error and prejudiced the defendant as the accomplice's identification of the defendant as the sole shooter was directly contradicted by the testimony of the bank manager who affirmatively identified the accomplice as the shooter. Burns v. State, 342 Ga. App. 379, 803 S.E.2d 79, 2017 Ga. App. LEXIS 346 (2017).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, § 1407.

ALR.

Rule as to corroborative evidence in prosecutions for subornation of perjury, 56 A.L.R. 407.

Character and sufficiency of evidence required to corroborate testimony of plaintiff in divorce suit, 65 A.L.R. 169.

Testimony of defendant in favor of codefendant on setoff or counterclaim interposed by latter alone against decedent's estate, under statute disqualifying or requiring corroboration of adverse or interested party, 67 A.L.R. 1548.

Bribe giver as accomplice of bribe taker and vice versa within rule requiring corroboration of testimony of accomplice, 73 A.L.R. 389.

Corroboration of accomplice by evidence of defendant's actual or contemplated flight, or concealment of himself, 87 A.L.R. 767.

Corroboration by circumstantial evidence of testimony of single witness in prosecution for perjury, 111 A.L.R. 825.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury, 156 A.L.R. 499.

Question as to who are accomplices, within rule requiring corroboration of their testimony, as one of law or fact, 19 A.L.R.2d 1352.

Corroboration required under statute prohibiting judgment against representative of deceased person on uncorroborated testimony of his adversary, 21 A.L.R.2d 1013.

Thief as accomplice of one charged with receiving stolen property, or vice versa, within rule requiring corroboration or cautionary instruction, 53 A.L.R.2d 817.

Necessity and sufficiency of corroboration of plaintiff's testimony concerning ground for annulment of marriage, 71 A.L.R.2d 620.

Prosecutrix in incest case as accomplice or victim, 74 A.L.R.2d 705.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence, 88 A.L.R.2d 852.

Corroboration of accomplice witness by objective evidence authenticated by same accomplice, 96 A.L.R.2d 1185.

Limiting number of noncharacter witnesses in civil case, 5 A.L.R.3d 169.

Limiting number of noncharacter witnesses in criminal case, 5 A.L.R.3d 238.

Woman upon whom abortion is committed or attempted as accomplice for pur-

poses of rule requiring corroboration of accomplice testimony, 34 A.L.R.3d 858.

Receiver of stolen goods as accomplice of thief for purposes of corroboration, 74 A.L.R.3d 560.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused, 19 A.L.R.4th 368.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 A.L.R.4th 120.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury — state cases, 41 A.L.R.5th 1.

24-14-9. Inferences from evidence or lack thereof.

In arriving at a verdict, the jury, from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved.

History.

Code 1981, § 24-14-9, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-4-9, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Beall v. State, 68 Ga. 820 (1882); Castleberry v. City of Atlanta, 74 Ga. 164 (1885); Brown v. Matthews, 79 Ga. 1, 4 S.E. 13 (1887); and White v. Hammond, 79 Ga. 182, 4 S.E. 102 (1887).

Law reviews.

For article, "The Doctrine of Res Ipsa Loquitur in Georgia," see 9 Ga. B.J. 31 (1946).

For note, "Res Ipsa Loquitur and its Application in Georgia," see 14 Mercer L. Rev. 427 (1963).

JUDICIAL DECISIONS

Analysis

General Consideration
Res Ipsa Loquitur

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5157, former Civil Code 1910, § 5743, former Code 1933, § 38-123, and former O.C.G.A. § 24-4-9 are included in the annotations for this Code section.

Constitutionality. — Presumption that allows, but does not require, the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant is not inherently unconstitutional, but is to be tested by a "rational connection" test asking if the ultimate fact to be presumed is more likely than not to flow from the proved fact. Whisenhunt v. State, 152 Ga. App. 829, 264 S.E.2d 271, 1979 Ga. App. LEXIS 3097 (1979), cert. denied, 449 U.S. 886, 101 S. Ct. 241, 66 L. Ed. 2d 112, 1980 U.S. LEXIS 3399 (1980) (decided under former Code 1933, § 38-123).

Admissibility. — When facts are such that the jury may or may not make an inference pertinent to the issue, the facts are such that the jury ought to be permitted to hear the facts. Brand v. State, 154 Ga. App. 781, 270 S.E.2d 206, 1980 Ga. App. LEXIS 2386 (1980) (decided under former Code 1933, § 38-123).

When facts are such that the jury, if permitted to hear the facts, may or may not make an inference pertinent to the issue, according to the view which the jury may take of the facts, in connection with the other facts in evidence, the facts are such that the jury ought to be permitted to

hear those facts. Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205, 1979 Ga. App. LEXIS 1619 (1979) (decided under former Code 1933, § 38-123).

Inference of guilt. — When there is some evidence from which the guilt of one accused of a crime can be legitimately inferred, it is entirely within the province of the jury to draw that inference. Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205, 1979 Ga. App. LEXIS 1619 (1979) (decided under former Code 1933, § 38-123).

Effect of positive and uncontradicted evidence. — Finding of fact which may be inferred but is not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists. Backus v. Ray Jones, Inc., 150 Ga. App. 753, 258 S.E.2d 693, 1979 Ga. App. LEXIS 2366 (1979) (decided under former Code 1933, § 38-123).

Directed verdict properly denied. — In a medical malpractice action, the issue of reliance by a patient on a hospital to provide needed services and personnel was subject to proof by circumstantial evidence; thus, denial of a directed verdict in favor of the hospital was not error. Doctors Hosp. v. Bonner, 195 Ga. App. 152, 392 S.E.2d 897, 1990 Ga. App. LEXIS 442 (1990), cert. denied, No. S90C0950, 1990 Ga. LEXIS 724 (Ga. May 9, 1990) (decided under former O.C.G.A. § 24-4-9).

Flight is always a circumstance which may be shown and which the jury is authorized to take into account in determining guilt or innocence of an accused. Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205, 1979 Ga. App. LEXIS 1619 (1979) (decided under former Code 1933, § 38-123).

Jury was authorized to believe that defendant's attempts to flee when confronted by firefighters constituted circumstantial evidence of guilt. Williams v. State, 273 Ga. App. 213, 614 S.E.2d 834, 2005 Ga. App. LEXIS 453 (2005) (decided under former O.C.G.A. § 24-4-9).

Evidence of a refusal to submit to a blood-alcohol test is circumstantial evidence. — There was ample evidence to support the defendant's DUI conviction, after the arresting officer testified that the officer smelled alcohol as the officer approached the defendant's van, that the defendant's eyes were red, glassy, and "hazed over," that the defendant's speech was slower than normal, and that the defendant performed poorly on sobriety field tests, and the defendant's failure to submit to breath tests was circumstantial evidence of defendant's intoxication. Lucas v. State, 234 Ga. App. 534, 507 S.E.2d 253 (decided under former O.C.G.A. § 24-4-9).

Doctrine of presumption of continuity. — Whether the doctrine of presumption of continuity — a state of things once existing is presumed to continue until a change occurs — holds true in a particular case is a question for jury determination. Mattison v. Travelers Indemn. Co., 157 Ga. App. 372, 277 S.E.2d 746, 1981 Ga. App. LEXIS 1825 (1981) (decided under former O.C.G.A. § 24-4-9).

Permissive inference almost identical to presumption of fact. — No reversible error occurred when a trial court charged the jury in language of permissive inference rather than presumption of fact. A thin line exists at best between a permissible inference of fact and a rebuttable presumption of fact. Pouncey v. Adams, 206 Ga. App. 126, 424 S.E.2d 376, 1992 Ga. App. LEXIS 1419 (1992) (decided under former O.C.G.A. § 24-4-9).

Summary judgment determines only whether material fact exists. — On summary judgment, a trial court determines only whether a material issue of fact exists, and such determination does not include "the discovery of the truth of such fact" or permit frustration of a plaintiff's constitutional right to a trial by jury "by inferring with the existence of other facts" from predicate evidence. Bruno's Food Stores, Inc. v. Taylor, 228 Ga. App. 439, 491 S.E.2d 881 (decided under former O.C.G.A. § 24-4-9).

Res Ipsa Loquitur

Doctrine of res ipsa loquitur is embraced in this statute and the doctrine's application authorized by statute. Macon Coca-Cola Bottling Co. v. Chancey, 216 Ga. 61, 114 S.E.2d 517, 1960 Ga. LEXIS 388 (1960) (decided under former Code 1933, § 38-123); Hospital Auth. v. Eason, 222 Ga. 536, 150 S.E.2d 812, 1966 Ga.

Res Ipsa Loquitur (Cont'd)

LEXIS 548 (1966) (decided under former Code 1933, § 38-123).

Elements of doctrine. — In a tort action for personal injuries, the doctrine of res ipsa loquitur applies when the following elements are present: (1) the injury must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) the injury must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) the injury must not have been due to any voluntary action or contribution on the part of the plaintiff; and (4) the injury must have occurred absent an intervening cause which could have produced the injury. Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734, 1980 U.S. App. LEXIS 18047 (5th Cir. 1980) (decided under former Code 1933, § 38-123).

Application of doctrine. — When an event is unusual and extraordinary in nature, and there is nothing to indicate an external cause, but the peculiar character of the accident is sufficient within itself to indicate that the event must have been brought about by negligence on the part of someone, and when the most reasonable and probable inference which can be rationally drawn from the happening of such an event is that it would not and could not have taken place, had not the person charged with furnishing or maintaining the instrumentality causing the accident been guilty of the particular acts or omissions set forth by the plaintiff as constituting the actual cause, then the jury is authorized to apply the rule of evidence known as the doctrine of res ipsa loquitur in determining whether or not the accident must have been thus occasioned. Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S.E. 443, 1903 Ga. LEXIS 162 (1903) (decided under former Civil Code 1895, § 5157); Sinkovitz v. Peters Land Co., 5 Ga. App. 788, 64 S.E. 93, 1909 Ga. App. LEXIS 120 (1909) (decided under former Civil Code 1895, § 5157); Bonita Theatre v. Bridges, 31 Ga. App. 798, 122 S.E. 255, 1924 Ga. App. LEXIS 203 (1924) (decided under former Civil Code 1910, § 5743); Atlanta Coca-Cola Bottling Co. v. Shipp, 41 Ga. App. 705, 154 S.E. 385, 1930 Ga. App. LEXIS 1061 (1930) (decided under former Civil Code 1910, § 5743); Macon Coca-Cola Bottling Co. v. Crane, 55 Ga. App. 573, 190 S.E. 879, 1937 Ga. App. LEXIS 427 (1937) (decided under former Code 1933, § 38-123); Macon Coca-Cola Bottling Co. v. Chancey, 216 Ga. 61, 114 S.E.2d 517, 1960 Ga. LEXIS 388 (1960) (decided under former Code 1933, § 38-123); Hall v. Chastain, 246 Ga. 782, 273 S.E.2d 12, 1980 Ga. LEXIS 1281 (1980) (decided under former Code 1933, § 38-123).

Trial court committed reversible error, entitling the plaintiffs in a personal injury suit to a new trial after a verdict in favor of the defense was returned, by refusing to charge the jury on the doctrine of res ipsa loquitur; here, the plaintiffs established the three elements necessary for the doctrine to apply, namely: that a 15-ton machine rolling off a trailer without explanation and crushing a car was an extraordinary event; that the defendant driver admitted that trailers do not ordinarily roll over and that the defendant driver was in exclusive control of the truck and trailer; and that the defendant driver testified twice that the plaintiffs did nothing to cause the accident. Doyle v. RST Constr. Specialty, Inc., 286 Ga. App. 53, 648 S.E.2d 664, 2007 Ga. App. LEXIS 690 (2007), cert. denied, No. S07C1631, 2007 Ga. LEXIS 860 (Ga. Nov. 5, 2007) (decided under former O.C.G.A. § 24-4-9).

Doctrine applied with caution. — Doctrine of res ipsa loquitur, when applicable, should be applied with caution, and should be drawn by the jury only in extreme cases. Sinkovitz v. Peters Land Co., 5 Ga. App. 788, 64 S.E. 93, 1909 Ga. App. LEXIS 120 (1909) (decided under former Civil Code 1895, § 5157); Miller v. Gerber Prods. Co., 207 Ga. 385, 62 S.E.2d 174, 1950 Ga. LEXIS 628 (1950) (decided under former Code 1933, § 38-123).

Rule of evidence. — Doctrine of res ipsa loquitur is simply a rule of circumstantial evidence which permits an inference to be drawn from proved facts. Cochrell v. Langley Mfg. Co., 5 Ga. App. 317, 63 S.E. 244, 1908 Ga. App. LEXIS 111 (1908) (decided under former Civil Code 1895, § 5157); Armour & Co. v. Gulley, 61 Ga. App. 414, 6 S.E.2d 165, 1939 Ga. App.

LEXIS 308 (1939) (decided under former Code 1933, § 38-123); White v. Executive Comm. of Baptist Convention, 65 Ga. App. 840, 16 S.E.2d 605, 1941 Ga. App. LEXIS 435 (1941) (decided under former Code 1933, § 38-123); Clayton Coca-Cola Bottling Co. v. Coleman, 68 Ga. App. 302, 22 S.E.2d 768, 1942 Ga. App. LEXIS 115 (1942) (decided under former Code 1933, § 38-123); Dalton Coca-Cola Bottling Co. v. Watkins, 70 Ga. App. 790, 29 S.E.2d 281, 1944 Ga. App. LEXIS 104 (1944) (decided under former Code 1933, § 38-123); Miller v. Gerber Prods. Co., 207 Ga. 385, 62 S.E.2d 174, 1950 Ga. LEXIS 628 (1950) (decided under former Code 1933, § 38-123).

Presumption of negligence not raised. — Application of the rule of res ipsa loquitur does not raise a presumption of negligence, unless it is to the extent of getting a case to a jury only, but authorizes a jury in the jury's discretion to infer negligence. Wimpy v. Rogers, 58 Ga. App. 67, 197 S.E. 656, 1938 Ga. App. LEXIS 187 (1938) (decided under former Code 1933, § 38-123).

Mere inference. — Res ipsa loquitur creates a mere inference of fact and not a presumption of truth. DeVane v. Smith, 154 Ga. App. 442, 268 S.E.2d 711, 1980 Ga. App. LEXIS 2217 (1980) (decided under former Code 1933, § 38-123).

Inference is slight. — Maxim res ipsa loquitur is applied with caution in every case and when applied, the inference is only prima facie, is generally slight, and is easily overcome. White v. Executive Comm. of Baptist Convention, 65 Ga. App. 840, 16 S.E.2d 605, 1941 Ga. App. LEXIS 435 (1941) (decided under former Code 1933, § 38-123).

Exclusion of other hypotheses. — In the application of the res ispa loquitor doctrine, if in the opinion of the jury the most reasonable and most probable inference which can be drawn from the nature and character of an extraordinary event is that it would not and could not have happened had not the defendant been guilty of the particular conduct charged, then there has been an exclusion in their minds of every other reasonable hypothesis, not by evidence, but by virtue of the peculiar nature and character of the event speaking for itself. Macon Coca-Cola Bottling Co. v. Chancey, 216 Ga. 561, 114 S.E.2d 517 (1960) (decided under former Code 1933, § 38-123).

Negligence of defendant. — Before the doctrine can be applied, the act must speak not only of negligence but of negligence on the part of the defendant. Payne v. Rome Coca-Cola Bottling Co., 10 Ga. App. 762, 73 S.E. 1087, 1912 Ga. App. LEXIS 677 (1912) (decided under former Civil Code 1910, § 5743).

Probability of defendant's negligence. — In order to invoke a theory of res ipsa loquitur, the plaintiff must prove "control" by evidence sufficient to permit a finding that there is a greater probability that the injury was the result of defendant's negligence than some other cause. Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225 S.E.2d 691, 1976 Ga. App. LEXIS 2044 (1976) (decided under former Code 1933, § 38-123).

No evidence of external cause. — Doctrine of res ipsa loquitur is applicable only in the absence of evidence as to an external cause of injury. Stansfield v. Gardner, 56 Ga. App. 634, 193 S.E. 375, 1937 Ga. App. LEXIS 185 (1937) (decided under former Code 1933, § 38-123); Floyd v. Swift & Co., 59 Ga. App. 154, 200 S.E. 531, 1938 Ga. App. LEXIS 462 (1938) (decided under former Code 1933, § 38-123).

Conclusions must be clear. — When "the thing itself speaks" or "the obvious is self-evident," the obvious must be clearly seen, and what is spoken must be plain. If two images appear, or the statement spoken is ambiguous, before a legal verdict can be predicated thereon, the conclusions claimed must more clearly appear or be understood than any other or inconsistent theory. Armour & Co. v. Gulley, 61 Ga. App. 414, 6 S.E.2d 165, 1939 Ga. App. LEXIS 308 (1939) (decided under former Code 1933, § 38-123); White v. Executive Comm. of Baptist Convention, 65 Ga. App. 840, 16 S.E.2d 605, 1941 Ga. App. LEXIS 435 (1941) (decided under former Code 1933, § 38-123); Miller v. Gerber Prods. Co., 207 Ga. 385, 62 S.E.2d 174, 1950 Ga. LEXIS 628 (1950) (decided under former Code 1933, § 38-123).

Inference of fact. — When something unusual happens with respect to a defen-

Res Ipsa Loquitur (Cont'd)

dant's property, over which defendant has control, and by such extraordinary occurrence a plaintiff is injured, an inference may in some case arise from an unexplained occurrence which has worked an injury to another that the defendant who had in charge the instrumentality which was the direct cause of the injury was guilty of negligence, which inference of negligence may or may not be drawn by the jury but, like the facts of negligence or no negligence, the inference which the jury may be authorized to draw is peculiarly an inference of fact, and it is not an inference of law. And, if from the facts an inference of negligence arises, it may be rebutted by the defendant, like any other inference arising from the proof submitted. Georgia Power Co. v. Stonecypher, 47 Ga. App. 386, 170 S.E. 530, 1933 Ga. App. LEXIS 414 (1933) (decided under former Code 1933, § 38-123).

Inference authorized but not required. — While negligence is never presumed from the mere fact of injury, the manner of the occurrence of the injury complained of, or the attendant circumstances, may sometimes well warrant an inference of negligence, such inference being one which the jury is authorized to draw, and not an inference which the jury is compelled to draw. Gainesville Coca-Cola Bottling Co. v. Stewart, 51 Ga. App. 102, 179 S.E. 734, 1935 Ga. App. LEXIS 582 (1935) (decided under former Code 1933, § 38-123); Macon Coca-Cola Bottling Co. v. Chancey, 216 Ga. 61, 114 S.E.2d 517, 1960 Ga. LEXIS 388 (1960) (decided under former Code 1933, § 38-123).

Inference based on proven facts. — Before the jury could arrive at the ultimate fact by inference of the existence of other facts, the facts inferred must be reasonably and logically consequent upon proven facts; the jury cannot assume the ultimate fact merely from other facts which are based upon an inference rather than upon proof. Miller v. Gerber Prods. Co., 207 Ga. 385, 62 S.E.2d 174, 1950 Ga. LEXIS 628 (1950) (decided under former Code 1933, § 38-123); Hospital Auth. v. Eason, 222 Ga. 536, 150 S.E.2d 812, 1966 Ga. LEXIS 548 (1966) (decided under former Code 1933, § 38-123).

Inference based on circumstantial evidence. — When the inference of negligence is dependent upon circumstantial evidence, and direct unambiguous testimony shows that the defendant was without negligence, a verdict for the plaintiff is unauthorized. Miller v. Gerber Prods. Co., 207 Ga. 385, 62 S.E.2d 174, 1950 Ga. LEXIS 628 (1950) (decided under former Code 1933, § 38-123).

Inference based on inference. — Proof of plaintiff's case resting upon inferences made from inferences is insufficient when the inference is too remote. Spruell v. Georgia Automatic Gas Appliance Co., 84 Ga. App. 657, 67 S.E.2d 178, 1951 Ga. App. LEXIS 761 (1951) (decided under former Code 1933, § 38-123).

Intervening cause. — When there is some intervention or intermediary cause which produces or could produce the injury complained of, the doctrine of res ipsa loquitur is not applicable. Floyd v. Swift & Co., 59 Ga. App. 154, 200 S.E. 531, 1938 Ga. App. LEXIS 462 (1938) (decided under former Code 1933, § 38-123); Miller v. Gerber Prods. Co., 207 Ga. 385, 62 S.E.2d 174, 1950 Ga. LEXIS 628 (1950) (decided under former Code 1933, § 38-123); Rupek v. Pig'n Whistle, Inc., 94 Ga. App. 404, 94 S.E.2d 747, 1956 Ga. App. LEXIS 556 (1956) (decided under former Code 1933, § 38-123).

Fact of injury. — Mere fact of injury does not call for the application of the doctrine of res ipsa loquitur. Stansfield v. Gardner, 56 Ga. App. 634, 193 S.E. 375, 1937 Ga. App. LEXIS 185 (1937) (decided under former Code 1933, § 38-123).

Question for jury. — Maxim res ipsa loquitur is of limited application, and the process by which it is to be determined whether the physical facts and circumstances accompanying an injury are such that the act may be said itself to speak the negligence of the defendant is to be worked out by the jury, and not by the court. Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S.E. 443, 1903 Ga. LEXIS 162 (1903) (decided under former Civil Code 1895, § 5157); Sinkovitz v. Peters Land Co., 5 Ga. App. 788, 64 S.E. 93, 1909 Ga. App. LEXIS 120 (1909) (decided under

former Civil Code 1895, § 5157); Bonita Theatre v. Bridges, 31 Ga. App. 798, 122 S.E. 255, 1924 Ga. App. LEXIS 203 (1924) (decided under former Civil Code 1910, § 5743); Dawson v. American Heritage Life Ins. Co., 121 Ga. App. 266, 173 S.E.2d 424, 1970 Ga. App. LEXIS 1192 (1970) (decided under former Code 1933, § 38-123).

Conclusions beyond evidence. — In construing and applying testimony, reasonable inferences and deductions may be made, and conclusions may be reached that lie quite beyond the mere letter of the evidence. Armour & Co. v. Gulley, 61 Ga. App. 414, 6 S.E.2d 165, 1939 Ga. App. LEXIS 308 (1939) (decided under former Code 1933, § 38-123).

Shifting of burden. — If the extraordinary character of the occurrence is sufficient to raise an inference of the negligence alleged, a prima facia case is established, and the burden of disproving negligence is cast upon the defendant, to disprove negligence upon the defendant's part. Sinkovitz v. Peters Land Co., 5 Ga. App. 788, 64 S.E. 93, 1909 Ga. App. LEXIS 120 (1909) (decided under former Civil Code 1895, § 5157); Macon Coca-Cola Bottling Co. v. Crane, 55 Ga. App. 573, 190 S.E. 879, 1937 Ga. App. LEXIS 427 (1937) (decided under former Code 1933, § 38-123).

Burden of proof not shifted. — Doctrine of res ipsa loquitur is merely a rule of evidence permitting the jury to draw the inference of negligence and does not have the effect of shifting the burden of proof. DeVane v. Smith, 154 Ga. App. 442, 268 S.E.2d 711, 1980 Ga. App. LEXIS 2217 (1980) (decided under former Code 1933, § 38-123).

Rebuttal by defendant. — An inference of negligence may be rebutted by the defendant like any other presumption arising from proofs submitted. Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S.E. 443, 1903 Ga. LEXIS 162 (1903) (decided under former Civil Code 1895, § 5157).

Motion for nonsuit should not be granted when there is any evidence tending to sustain the plaintiff's action, or when the jury can fairly infer from the evidence a state of facts favorable to the plaintiff. Mason v. Hall, 72 Ga. App. 867, 35 S.E.2d 478, 1945 Ga. App. LEXIS 731 (1945) (decided under former Code 1933, § 38-123).

Specific applications. — Doctrine of res ispa loquitur has been applied in the following cases: Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S.E. 443, 1903 Ga. LEXIS 162 (1903) (unexplained falling of brick arch) (decided under former Civil Code 1895, § 5157); Rivers v. State, 118 Ga. 42, 44 S.E. 859, 1903 Ga. LEXIS 429 (1903) (purpose for leasing house) (decided under former Civil Code 1895, § 5157); McDonnell v. Central of Ga. Ry., 118 Ga. 86, 44 S.E. 840, 1903 Ga. LEXIS 459 (1903) (explosion of boilers) (decided under former Civil Code 1895, § 5157); Seaboard Air-Line Ry. v. Bishop, 132 Ga. 71, 63 S.E. 1103, 1909 Ga. LEXIS 45 (1909) (projecting nail) (decided under former Civil Code 1895, § 5157); Payne v. Rome Coca-Cola Bottling Co., 10 Ga. App. 762, 73 S.E. 1087, 1912 Ga. App. LEXIS 677 (1912) (explosion of bottle) (decided under former Civil Code 1895, § 5157); McPherson v. Capuano & Co., 31 Ga. App. 82, 121 S.E. 580, 1923 Ga. App. LEXIS 733 (1923) (illness following eating in restaurant) (decided under former Civil Code 1895, § 5157); Eckerd-Walton, Inc. v. Adams, 126 Ga. App. 210, 190 S.E.2d 490, 1972 Ga. App. LEXIS 1101 (1972) (driving car through wall of building) (decided under former Code 1933, § 38-123); Parrish v. State, 182 Ga. App. 247, 355 S.E.2d 682, 1987 Ga. App. LEXIS 1679 (1987) (destruction of marijuana plants) (decided under former O.C.G.A. § 24-4-9).

Proof insufficient. — Mere proof that a hospital bed was on fire, from undetermined origin, was not sufficient to invoke res ipsa loquitur. Hospital Auth. v. Eason, 222 Ga. 536, 150 S.E.2d 812, 1966 Ga. LEXIS 548 (1966) (decided under former Code 1933, § 38-123).

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Res ipsa loquitur as affected by circumstances tending to negative negligence by defendant, 22 A.L.R. 1471.

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Res ipsa loquitur distinguished from characterization of a known condition as negligence, and the establishment of negligence by circumstantial evidence, 59 A.L.R. 468; 78 A.L.R. 731; 141 A.L.R. 1016.

Res ipsa loquitur in its relation to burden of proof and burden of evidence, 59 A.L.R. 486; 92 A.L.R. 653.

Res ipsa loquitur as applicable in action against municipality for injuries from dangerous condition in parks, streets, or highways, 74 A.L.R. 1226.

Pleading particular cause of injury as waiver of right to rely on res ipsa loquitur, 79 A.L.R. 48; 160 A.L.R. 1450; 2 A.L.R.3d 1335.

Debtor's intent to defraud or delay creditors within contemplation of attachment statute as inferable as matter of law from fact that he has removed or is about to remove property from the state without making adequate provision for his creditors, 92 A.L.R. 966.

Right or duty of court to instruct jury as to presumptions, 103 A.L.R. 126.

Presumption of ownership of automobile by one in whose name it is registered or whose license plates it bears, 103 A.L.R. 138.

Presumption against suicide as evidence, 103 A.L.R. 185; 158 A.L.R. 747.

Presumption of negligence from foreign substance in food, 105 A.L.R. 1039.

Res ipsa loquitur, or presumption, or inference of negligence on part of carrier where passenger is injured by object coming from outside, through or against, car window, 129 A.L.R. 1340.

Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from middleman, 140 A.L.R. 191; 142 A.L.R. 1490.

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Res ipsa loquitur as applied to a collision between a moving automobile and a standing automobile or other vehicle, 151 A.L.R. 876.

May presumption rest upon admission by opponent's pleading without proof of constituent fact, 153 A.L.R. 1106.

Physicians and surgeons: presumption or inference of negligence in malpractice cases; res ipsa loquitur, 162 A.L.R. 1265; 82 A.L.R.2d 1262.

"Res ipsa loquitur" as a presumption or a mere permissible inference, 167 A.L.R. 658.

Res ipsa loquitur doctrine as affected by injured person's control over or connection with instrumentality, 169 A.L.R. 953.

Presumption of negligence from foreign substance in food, 171 A.L.R. 1209.

Right of plaintiff in res ipsa loquitur case to an instruction respecting inference by jury, 173 A.L.R. 880.

Application of res ipsa loquitur rule in case of injury or damages from heating unit, electrical appliance, etc., installed by defendant, 3 A.L.R.2d 1448.

Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile, 5 A.L.R.2d 196.

Res ipsa loquitur in aviation accidents, 6 A.L.R.2d 528.

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Applicability of res ipsa loquitur to injuries or death sustained by collapse, failure, or falling of scaffold, 22 A.L.R.2d 1176.

Applicability of res ipsa loquitur doctrine to fall of object or substance from ceiling of place of public resort, 24 A.L.R.2d 643.

Error as to instructions on burden of proof under doctrine of res ipsa loquitur as prejudicial, 29 A.L.R.2d 1390.

Proof, in absence of direct testimony by survivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident, 32 A.L.R.2d 988.

Evidence of specific negligence as affecting reliance on res ipsa loquitur, 33 A.L.R.2d 791.

Liability for injuries occasioned by falling of awning or the like, 34 A.L.R.2d 486.

Res ipsa loquitur in Federal Employers' Liability Act cases, 35 A.L.R.2d 475.

Applicability of res ipsa loquitur or doctrine of exclusive control to injury or damage caused by fall of object from train, 41 A.L.R.2d 932.

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Applicability of res ipsa loquitur doctrine in nonautomatic elevator accident cases, 56 A.L.R.2d 1059.

Liability of proprietor of store, office, or similar business premises for injury from fall on floor made slippery by tracked-in or spilled water, oil, mud, snow, and the like, 62 A.L.R.2d 6.

Liability of proprietor of store, office, or similar business premises for injury from fall or steps made slippery by tracked-in or spilled water, oil, mud, snow, and the like, 62 A.L.R.2d 131.

Liability of proprietor of store, office, or similar business premises for injury from fall down open stairway, or into trap door or similar floor-level opening, 66 A.L.R.2d 331.

Liability of proprietor of store, office, or similar business premises for fall due to improper lighting of steps or stairway, 66 A.L.R.2d 443.

Liability to patron of scenic railway, roller coaster, or miniature railway, 66 A.L.R.2d 689.

Applicability of res ipsa loquitur doctrine where objects being transported fall from motor vehicle, 66 A.L.R.2d 1255.

Comment, in argument of civil case, on adversary's failure to call employee as witness, 68 A.L.R.2d 1072.

Applicability of res ipsa loquitur where injury or damage results from contact with open door or tailgate of motor vehicle, 71 A.L.R.2d 375.

Sufficiency of evidence, in absence of survivors or of eyewitnesses competent to testify, as to place or point of impact of motor vehicles going in opposite directions and involved in collision, 77 A.L.R.2d 580.

Liability of manufacturer or seller for injury caused by automobile or other vehicle, aircraft, boat, or their parts, supplies, or equipment, 78 A.L.R.2d 460.

Liability of manufacturer or seller for injury caused by industrial, business, or farm machinery, tools, equipment, or materials, 78 A.L.R.2d 594.

Liability of manufacturer or seller for injury caused by paint, cement, lumber, building supplies, ladders, small tools, and like products, 78 A.L.R.2d 696.

Liability of manufacturer or seller for injury caused by toys, games, athletic or sports equipment, or like products, 78 A.L.R.2d 738.

Applicability of res ipsa loquitur doctrine where motor vehicle leaves road, 79 A.L.R.2d 6.

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Modern trends as to pleading a particular cause of injury or act of negligence as waiving or barring the right to rely on res ipsa loquitur, 2 A.L.R.3d 1335.

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Res ipsa loquitur in action against hospital for injury to patient, 9 A.L.R.3d 1315; 49 A.L.R.4th 63.

Liability for accident occurring in motor transportation of house or similar structure on public streets or highways, 9 A.L.R.3d 1436.

Liability of water distributor for damage caused by water escaping from main, 20 A.L.R.3d 1294.

Water distributor's liability for injuries due to condition of service lines, meters, and the like, which serve individual consumer, 20 A.L.R.3d 1363.

Applicability of res ipsa loquitur where plaintiff must prove active or gross negligence, willful misconduct, recklessness, or the like, 23 A.L.R.3d 1083.

Hospital's liability for injuries sustained by patient as a result of restraints imposed on movement, 25 A.L.R.3d 1450.

Liability, because of improper loading, of railroad consignee or his employee injured while unloading car, 29 A.L.R.3d 1039.

Aviation: helicopter accidents, 35 A.L.R.3d 707.

Malpractice: attending physician's liability for injury caused by equipment furnished by hospital, 35 A.L.R.3d 1068.

Liability in connection with fire or explosion of explosives while being stored or transported, 35 A.L.R.3d 1177.

Liability for injury to guest in airplane, 40 A.L.R.3d 1117.

Liability of owner or proprietor for injury or death caused by collision with glass door, panel, or wall, 41 A.L.R.3d 176.

Liability of one selling or distributing liquid or bottled fuel gas, for personal injury, death, or property damage, 41 A.L.R.3d 782.

Liability for alleged negligence of independent servicer or repairer of aircraft, 41 A.L.R.3d 1320.

Liability of vendor or grantor of real estate for personal injury to purchaser or third person due to defective condition of premises, 48 A.L.R.3d 1027.

Products liability: proof of defect under doctrine of strict liability in tort, 51 A.L.R.3d 8.

Products liability: necessity and sufficiency of identification of defendant as manufacturer or seller of product alleged to have caused injury, 51 A.L.R.3d 1344.

Liability for injury to or death of passenger from accident due to physical condition of carrier's employee, 53 A.L.R.3d 669.

Presumption of negligence and application of res ipsa loquitur doctrine in action for injury or damage caused by accidental starting up of parked car, 55 A.L.R.3d 1260.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 A.L.R.3d 1128.

Liability of innkeeper to guest for injury due to fire, 60 A.L.R.3d 1217.

Liability of owner or operator for injury caused by door of automatic passenger elevator, 63 A.L.R.3d 893.

Liability for injury caused by fall of person into shaft, or by abrupt drop, sudden movement, or stopping between floors, of automatic passenger elevator, 64 A.L.R.3d 950.

Liability of installer or maintenance company for injury caused by door of automatic passenger elevator, 64 A.L.R.3d 1005.

Liability of owner or operator for injury caused by failure of automatic elevator to level at floor, 64 A.L.R.3d 1020.

Res ipsa loquitur as applied to accident resulting from wheel or part thereof becoming detached from motor vehicle, 79 A.L.R.3d 346.

Products liability: liability for injury or death allegedly caused by defective tires, 81 A.L.R.3d 318.

Products liability: liability for injury or death allegedly caused by defect in snowmobile or other recreational-purpose vehicle, 81 A.L.R.3d 394.

Products liability: liability for injury or death allegedly caused by defect in mobile home or trailer, 81 A.L.R.3d 421.

Liability of power company for injury or death resulting from contact of radio or television antenna with electrical line, 82 A.L.R.3d 113.

Liability of manufacturer, seller, or installer for personal injury caused by door glass, 84 A.L.R.3d 877.

Res ipsa loquitur as applicable in actions for damage to property by the overflow or escape of water, 91 A.L.R.3d 186.

Application of res ipsa loquitur doctrine to accidents incurred by passenger while boarding or alighting from a carrier, 93 A.L.R.3d 776.

Applicability of res ipsa loquitur doctrine in action for injury to patron of beauty salon, 93 A.L.R.3d 897.

Products liability: toys and games, 95 A.L.R.3d 390.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 A.L.R.3d 627.

Liability for injury on, or in connection with, escalator, 1 A.L.R.4th 144.

Products liability: liability of manufacturer or seller for injury or death caused by defect in boat or its parts, supplies, or equipment, 1 A.L.R.4th 411.

Products liability: industrial accidents involving conveyor belts or systems, 2 A.L.R.4th 262.

Products liability: defective vehicular windows, 3 A.L.R.4th 489.

Products liability: farm machinery, 4 A.L.R.4th 13.

Products liability: elevators, 7 A.L.R.4th 852.

Products liability: stud guns, staple guns, or parts thereof, 8 A.L.R.4th 70.

Products liability: transformer and other electrical equipment, 10 A.L.R.4th 854.

Products liability: cranes and other lifting apparatuses, 13 A.L.R.4th 476.

Products liability: cement and concrete, 15 A.L.R.4th 1186.

Products liability: tire rims and wheels, 16 A.L.R.4th 137.

Products liability: firefighting equipment, 19 A.L.R.4th 326.

Destruction of ampoule used in alcohol breath test as warranting suppression of result of test, 19 A.L.R.4th 509.

Res ipsa loquitur as to cause of or liability for real-property fires, 21 A.L.R.4th 929.

Res ipsa loquitur in aviation accidents, 25 A.L.R.4th 1237.

Products liability: stud guns, staple guns, or parts thereof, 33 A.L.R.4th 1189.

Applicability of res ipsa loquitur in case of multiple, nonmedical defendants — modern status, 59 A.L.R.4th 201.

Products liability: building and construction lumber, 61 A.L.R.4th 121.

Strict products liability: product malfunction or occurrence of accident as evidence of defect, 65 A.L.R.4th 346.

Liability for injury incurred in operation of power golf cart, 66 A.L.R.4th 622.

Applicability of res ipsa loquitur in case of multiple medical defendants — modern status, 67 A.L.R.4th 544.

Products liability: industrial refrigerator equipment, 72 A.L.R.4th 90.

Products liability: scaffolds and scaffolding equipment, 74 A.L.R.4th 904.

Products liability: tractors, 75 A.L.R.4th 312.

Products liability: bicycles and accessories, 76 A.L.R.4th 117.

Products liability: exercise and related equipment, 76 A.L.R.4th 145.

Products liability: trampolines and similar devices, 76 A.L.R.4th 171.

Products liability: competitive sports equipment, 76 A.L.R.4th 201.

Products liability: skiing equipment, 76 A.L.R.4th 256.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases, 76 A.L.R.4th 812.

Adverse presumption or inference based on party's failure to produce or question examining doctor—modern cases, 77 A.L.R.4th 463.

Products liability: general recreational equipment, 77 A.L.R.4th 1121.

Products liability: mechanical amusement rides and devices, 77 A.L.R.4th 1152.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney—modern cases, 78 A.L.R.4th 571.

Adverse presumption or inference based on party's failure to produce or examine witness who was occupant of vehicle involved in accident—modern cases, 78 A.L.R.4th 616.

Liability of proprietor of private gymnasium, reducing salon, or similar health club for injury to patron, 79 A.L.R.4th 127.

Adverse presumption or inference based on party's failure to produce or examine spouse — modern cases, 79 A.L.R.4th 694.

Adverse presumption or inference based on party's failure to produce or examine friend—modern cases, 79 A.L.R.4th 779.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases, 80 A.L.R.4th 337.

Adverse presumption or inference based on party's failure to produce or examine witness with employment relationship to party — modern cases, 80 A.L.R.4th 405.

Adverse presumption or inference based on state's failure to produce or examine informant in criminal prosecution — modern cases, 80 A.L.R.4th 547.

Products liability: lubricating products and systems, 80 A.L.R.4th 972.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel — modern cases, 81 A.L.R.4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue — modern cases, 81 A.L.R.4th 939.

Admissibility of DNA identification evidence, 84 A.L.R.4th 313.

Products liability: Mechanical amusement rides and devices, 3 A.L.R.5th 851.

Malpractice in diagnosis and treatment of male urinary tract and related organs, 48 A.L.R.5th 575.

Products liability: ladders, 81 A.L.R.5th 245.

ARTICLE 2

PRESUMPTIONS AND ESTOPPEL

Law reviews.

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-14-20. Presumptions of law and of fact distinguished.

Presumptions are either of law or of fact. Presumptions of law are conclusions and inferences which the law draws from given facts. Presumptions of fact shall be exclusively questions for the jury, to be decided by the ordinary test of human experience.

History.

Code 1981, § 24-14-20, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For comment discussing the right to present evidence for the purposes of rebutting, in light of Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), see 10 Ga. St. B.J. 484 (1974).

JUDICIAL DECISIONS

Analysis

General Consideration
Specific Presumptions

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3699, former Code 1873, § 3752, former Code 1882, § 3752, former Civil Code 1895, § 5149, former Penal Code 1895, § 988, former Civil Code 1910, § 5735, former Penal Code 1910, § 1014, former Code 1933, § 38-113, and former O.C.G.A. § 24-4-20 are included in the annotations for this Code section.

Constitutionality. — Presumption that allowed, but did not require, the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that placed no burden of any kind on the defendant was not inherently unconstitutional, but was to be tested by a "rational connection" test asking if the ultimate fact to be presumed was more likely than not to flow from the proved fact. Whisenhunt v. State, 152 Ga. App. 829, 264 S.E.2d 271, 1979 Ga. App. LEXIS 3097 (1979), cert. denied, 449 U.S. 886, 101 S. Ct. 241, 66 L. Ed. 2d 112, 1980 U.S. LEXIS 3399 (1980) (decided under former Code 1933, § 38-113).

Discussion of relationship of presumptions to due process. — See Williamson v. State, 248 Ga. 47, 281 S.E.2d 512, 1981 Ga. LEXIS 906 (1981) (decided under former Code 1933, § 38-113).

Presumption was an inference as to the existence of a fact not actually known arising from its necessary or usual connection with others which were known. Ivey v. State, 23 Ga. 576, 1857 Ga. LEXIS 314 (1857) (decided under former law).

Presumptions of fact are different from presumptions of law. Continental Assurance Co. v. Rothell, 121 Ga. App. 868, 176 S.E.2d 259, 1970 Ga. App. LEXIS 1379 (1970), aff'd in part and rev'd in part, 227 Ga. 258, 181 S.E.2d 283, 1971 Ga. LEXIS 665 (1971) (decided under former Code 1933, § 38-113).

Presumptions of law and fact distinguished. — Presumptions of fact were founded on actual probability, but it was impossible to sustain the doctrine of presumptions of law on the theory that they rest on a probability of fact. Morris v. State, 47 Ga. App. 792, 171 S.E. 555, 1933 Ga. App. LEXIS 667 (1933) (decided under former Penal Code 1910, § 1014).

Presumption of fact was same as inference. Carpenter v. State, 140 Ga. App. 368, 231 S.E.2d 97, 1976 Ga. App. LEXIS 1481 (1976) (decided under former Code 1933, § 38-113).

Permissive inference almost identical to presumption of fact. — No reversible error occurred when a trial court charged the jury in language of permissive inference rather than presumption of fact. A thin line exists at best between a permissible inference of fact and a rebuttable presumption of fact. Pouncey v. Adams, 206 Ga. App. 126, 424 S.E.2d 376, 1992 Ga. App. LEXIS 1419 (1992) (decided under former O.C.G.A. § 24-4-20).

Inference drawn by common sense. — Presumptions of fact are inferences as to the existence of some fact drawn from the existence of some other fact, inferences which common sense draws from circumstances usually occurring in such cases. Morris v. State, 47 Ga. App. 792, 171 S.E. 555, 1933 Ga. App. LEXIS 667 (1933) (decided under former Penal Code 1910, § 1014).

Derivation of presumptions of law. — Presumptions of law were inferences or positions established for the most part, by the common law, but occasionally by statute, which were obligatory alike on judges and juries. Morris v. State, 47 Ga. App. 792, 171 S.E. 555, 1933 Ga. App. LEXIS 667 (1933) (decided under former O.C.G.A. § 24-4-20).

Function of presumption of law. — Presumptions of law were rules which, in certain cases, either forbid or dispense with any further inquiry. Morris v. State, 47 Ga. App. 792, 171 S.E. 555, 1933 Ga. App. LEXIS 667 (1933) (decided under former Code 1933, § 38-113).

General Consideration (Cont'd)

If presumption was mandatory, it was irrelevant whether other evidence was in the record in addition to basic facts from which presumption was drawn. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512, 1981 Ga. LEXIS 906 (1981) (decided under former Code 1933, § 38-113).

When ultimate fact was element of crime charged, it may not rest on mandatory presumption. This was true in a case where presumption was the only proof of ultimate fact, and it was true in a case when there was additional proof of ultimate fact apart from presumption. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512, 1981 Ga. LEXIS 906 (1981) (decided under former Code 1933, § 38-113).

Reliance on permissive presumption in criminal case. — If the prosecution relied on permissive presumption as evidence of defendant's guilt, but offered other evidence of defendant's guilt, it may rely on all of evidence in the record to meet the standard of proof beyond a reasonable doubt. There need be only substantial assurance that the presumed fact was more likely than not to flow from the proved fact on which it was made to depend. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512, 1981 Ga. LEXIS 906 (1981) (decided under former Code 1933, § 38-113).

When permissive presumption was sole and sufficient basis for finding of guilt, it was not enough that presumption met "more-likely-than-not" test. The presumed fact must follow from proved fact beyond a reasonable doubt in such cases. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512, 1981 Ga. LEXIS 906 (1981) (decided under former Code 1933, § 38-113).

Court or jury drawing inference. — When there was a legal presumption, the law did the reasoning, and drew the inference; when presumptions of fact were involved, the jury was left to do the reasoning, and to make an inference or not as the jury believed the premises warrant. Mitchell v. Mayor of Rome, 49 Ga. 19, 1873 Ga. LEXIS 300 (1873) (decided under former Code 1868, § 3699); Jenkins v. Jenkins, 83 Ga. 283, 9 S.E. 541, 1889 Ga. LEXIS 48 (1889) (decided under former Code 1882, § 3752).

Unrebutted presumption prevails. — While a legal presumption was only prima facie true and may be rebutted, if it was not rebutted the law draws the conclusion. Goode v. Tuggle, 52 Ga. App. 510, 183 S.E. 850, 1936 Ga. App. LEXIS 166 (1936) (decided under former Code 1933, § 38-113); Continental Assurance Co. v. Rothell, 121 Ga. App. 868, 176 S.E.2d 259, 1970 Ga. App. LEXIS 1379 (1970), aff'd in part and rev'd in part, 227 Ga. 258, 181 S.E.2d 283, 1971 Ga. LEXIS 665 (1971); Strother Ford, Inc. v. First Nat'l Bank, 132 Ga. App. 268, 208 S.E.2d 25, 1974 Ga. App. LEXIS 1672 (1974), superseded by statute as stated in Metzger v. Americredit Fin. Svcs., 273 Ga. App. 453, 615 S.E.2d 120, 2005 Ga. App. LEXIS 336 (2005) (decided under former Code 1933, § 38-113).

Testimony outweighs presumption. — Bare presumptions of law give way to testimony, which may shift the burden of proof or of proceeding to the opposite party, who was not then entitled to prevail upon the presumption alone. Jarvis v. State, 71 Ga. App. 617, 31 S.E.2d 673, 1944 Ga. App. LEXIS 177 (1944) (decided under former Code 1933, § 38-113).

Presumption yields to direct evidence. — Prima facie presumption that negotiable paper is issued for a valuable consideration yields to direct, uncontradicted, and unimpeached evidence that there was in fact no consideration. Goldstein v. Drexler, 102 Ga. App. 90, 115 S.E.2d 744, 1960 Ga. App. LEXIS 565 (1960) (decided under former Code 1933, § 38-113).

Presumption of fact for jury. — Presumptions of fact are exclusively questions for the jury. Kinnebrew v. State, 80 Ga. 232, 5 S.E. 56, 1887 Ga. LEXIS 370 (1887) (decided under former Code 1882, § 3752); Templeton v. Kennesaw Life & Accident Ins. Co., 216 Ga. 770, 119 S.E.2d 549, 1961 Ga. LEXIS 336 (1961) (decided under former Code 1933, § 38-113); Belch v. Gulf Life Ins. Co., 219 Ga. 823, 136 S.E.2d 351, 1964 Ga. LEXIS 418 (1964) (decided under former Code 1933, § 38-113).

Choice among inferences. — When a given state of facts bears several different interpretations, it is the function of the jury to say which one of the facts should be adopted, but when only one reasonable inference can be drawn therefrom, the question resolves itself into one of law, and may be determined by the court. Callaway v. Barmore, 32 Ga. App. 665, 124 S.E. 382, 1924 Ga. App. LEXIS 587 (1924) (decided under former Civil Code 1910, § 5735).

Rebuttal for jury. — Whether a presumption has been successfully rebutted with testimony is ordinarily a question for the jury. Jarvis v. State, 71 Ga. App. 617, 31 S.E.2d 673, 1944 Ga. App. LEXIS 177 (1944) (decided under former Code 1933, § 38-113).

Jury determination of rebutted presumption. — Pest Masters, Inc. v. Callaway, 133 Ga. App. 123, 210 S.E.2d 243 (1974) is overruled to the extent it holds that "the facts arising from presumption, although rebutted by uncontradicted evidence, must be determined by a jury." Allen Kane's Major Dodge, Inc. v. Barnes, 243 Ga. 776, 257 S.E.2d 186, 1979 Ga. LEXIS 1065, aff'd, 151 Ga. App. 835, 262 S.E.2d 643, 1979 Ga. App. LEXIS 2701 (1979) (decided under former Code 1933, § 38-113).

Presumptions in civil cases have an effect at two stages during a jury trial: when a party moves for a directed verdict; and when the trial court instructs the jury. Under Georgia law, a rebuttable presumption of law generally does not vanish when the opposing party introduces evidence contrary to the presumption, and it does not matter how much counter evidence the opponent has presented to rebut the presumed fact, the presumption remains alive through jury instructions and can only disappear if the jury decides to discount it. Beach v. Lipham, 276 Ga. 302, 578 S.E.2d 402, 2003 Ga. LEXIS 252 (2003) (decided under former O.C.G.A. § 24-4-20).

Rebuttal of valid marriage presumption. — Presumption as to the validity of a marriage can only be negatived by disproving every reasonable possibility. State Hwy. Bd. v. Lewis, 46 Ga. App. 162, 167 S.E. 219, 1932 Ga. App. LEXIS 89 (1932) (decided under former Civil Code 1910, § 5735).

Verdict not disturbed. — When there is proof of facts or circumstances to support the presumption, and the evidence as a whole is conflicting, a verdict in favor of either party will not be disturbed upon general grounds. Jarvis v. State, 71 Ga. App. 617, 31 S.E.2d 673, 1944 Ga. App. LEXIS 177 (1944) (decided under former Code 1933, § 38-113).

Specific Presumptions

No presumption of marriage. — There was no presumption of law or fact that a given person was married or single. Neil v. State, 117 Ga. 14, 43 S.E. 435, 1903 Ga. LEXIS 133 (1903) (decided under former Civil Code 1895, § 5149).

Doctrine of presumption of continuity. — Whether the doctrine of presumption of continuity — a state of things once existing is presumed to continue until a change occurs — holds true in a particular case is a question for jury determination. Mattison v. Travelers Indemn. Co., 157 Ga. App. 372, 277 S.E.2d 746, 1981 Ga. App. LEXIS 1825 (1981) (decided under former Code 1933, § 38-113).

Continuation of marriage. — Marriage once shown to exist, nothing more appearing, was presumed to continue in existence until rebutted by proof of the marriage's dissolution. Walker v. Hall, 123 Ga. App. 457, 181 S.E.2d 508, 1971 Ga. App. LEXIS 1259 (1971) (decided under former Code 1933, § 38-113).

Dissolution of first marriage. — When a second marriage by a person is established, and it is shown that he or she had previously married another person, who was living at the time of the second marriage, the presumption is that the first marriage had been dissolved by a decree of divorce, and the burden is upon the person attacking the validity of the second marriage to show that a divorce had not been granted. State Hwy. Bd. v. Lewis, 46 Ga. App. 162, 167 S.E. 219, 1932 Ga. App. LEXIS 89 (1932) (decided under former Penal Code 1910, § 5735).

Presumption of death. — When a person moves from this state to a point in another state, and, upon inquiry at such

Specific Presumptions (Cont'd)

point in the other state, ascertains that the person has been gone and is unaccounted for and unheard of for the past seven years or longer, the presumption of the continuance of life ceases, and a legal presumption as to the person's death at the end of the seven years arises. Goode v. Tuggle, 52 Ga. App. 510, 183 S.E. 850, 1936 Ga. App. LEXIS 166 (1936) (decided under former Code 1933, § 38-113).

Presumption against suicide. — While proof of death alone, no other facts appearing, is sufficient to raise a presumption against suicide, it is necessary that not only death be shown, but also that death be caused by violent and external means in order to raise a presumption of accidental death. Continental Assurance Co. v. Rothell, 121 Ga. App. 868, 176 S.E.2d 259, 1970 Ga. App. LEXIS 1379 (1970), aff'd in part and rev'd in part, 227 Ga. 258, 181 S.E.2d 283, 1971 Ga. LEXIS 665 (1971) (decided under former Code 1933, § 38-113).

Qualification of officer. — When it appeared from the minutes of the court that a named person was selected as bailiff, a presumption arose that the person was duly sworn and qualified to act in that capacity. Zeigler v. State, 2 Ga. App. 632, 58 S.E. 1066, 1907 Ga. App. LEXIS 467 (1907) (decided under former Civil Code 1895, § 5149). ; See also Bird v. State, 53 Ga. 602, 1875 Ga. LEXIS 24 (1875).

Duties of officers. — All officers are presumed to have properly discharged their sworn official duties. Kirk v. State, 73 Ga. 620, 1884 Ga. LEXIS 187 (1884) (decided under former Code 1882, § 3752); Nixon v. Lehman, 137 Ga. 516, 73 S.E. 747, 1912 Ga. LEXIS 70 (1912) (decided under former Penal Code 1910, § 1014); Alston v. Mobley, 42 Ga. App. 98, 155 S.E. 81, 1930 Ga. App. LEXIS 247 (1930) (decided under former Penal Code 1910, § 1014); Jarrett v. City of Boston, 209 Ga. 530, 74 S.E.2d 549, 1953 Ga. LEXIS 320 (1953) (decided under former Code 1933, § 38-113).

Officer within authority. — It will be presumed that an officer has not exceeded the officer's authority, unless some showing to the contrary is made. Jones v. McCrary, 123 Ga. 282, 51 S.E. 349, 1905 Ga. LEXIS 444 (1905) (decided under former Penal Code 1895, § 988); Jarrett v. City of Boston, 209 Ga. 530, 74 S.E.2d 549, 1953 Ga. LEXIS 320 (1953) (decided under former Code 1933, § 38-113).

Genuineness of deed. — Deed attested by three witnesses, one of whom is an officer authorized by law to attest deeds, and recorded is admissible in evidence without further proof of the deed's execution, and all presumptions are in favor of its genuineness. Guthrie v. Gaskins, 171 Ga. 303, 155 S.E. 185, 1930 Ga. LEXIS 340 (1930) (decided under former Civil Code 1910, § 5735).

Honesty. — Law presumed all men honest in their dealings. Eaves v. Fears, 131 Ga. 820, 64 S.E. 269, 1908 Ga. LEXIS 196 (1908) (decided under former Civil Code 1895, § 5149).

Physical and mental soundness. — There was a general presumption that the ordinary human facilities were possessed by every individual and in the absence of proof the law presumed soundness both as to mental and bodily functions. Holcombe v. State, 5 Ga. App. 47, 62 S.E. 647, 1908 Ga. App. LEXIS 11 (1908) (decided under former Civil Code 1895, § 5149).

Legality of warrant. — Nothing to the contrary appearing, the presumption is that the warrant was regularly and legally issued. Hilburn v. State, 121 Ga. 344, 49 S.E. 318, 1904 Ga. LEXIS 144 (1904) (decided under former Penal Code 1895, § 3988).

Indictment not presumed lawful. — Indictment will not be presumed regularly returned into court when no return was entered on minutes at term indictment was found. Bowen v. State, 81 Ga. 482, 8 S.E. 736, 1888 Ga. LEXIS 271 (1888) (decided under former Code 1882, § 3752).

Interlineations proper. — Interlineations appearing in an accusation will be presumed to have been made at the proper time and by the proper authority. Crawford v. State, 4 Ga. App. 789, 62 S.E. 501, 1908 Ga. App. LEXIS 539 (1908) (decided under former Civil Code 1895, § 5149).

Influence of juror. — When a juror overheard remarks prejudicial to the ac-

cused, the juror was presumed to be influenced thereby. Downer v. State, 10 Ga. App. 827, 74 S.E. 301, 1912 Ga. App. LEXIS 711 (1912) (decided under former Penal Code 1910, § 1014).

Stolen goods. — Unsatisfactorily explained possession of stolen goods raises a presumption of guilt against their possessor. This presumption, however, is one of fact, and not of law. Holliday v. State, 23 Ga. App. 400, 98 S.E. 386, 1919 Ga. App. LEXIS 140 (1919) (decided under former Penal Code 1910, § 1910); Morris v. State, 47 Ga. App. 792, 171 S.E. 555, 1933 Ga. App. LEXIS 667 (1933) (decided under former Code 1933, § 38-113); Stevenson v. State, 143 Ga. App. 813, 240 S.E.2d 123, 1977 Ga. App. LEXIS 2516 (1977) (decided under former Code 1933, § 38-113).

Recent unexplained possession of stolen goods was a circumstance sufficient to authorize a jury to find that the accused was guilty as charged (assuming other elements of the crime were proved) but it did not create a presumption of law against the accused, and it was not of itself necessarily proof of the accused's guilt. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512, 1981 Ga. LEXIS 906 (1981) (decided under former Code 1933, § 38-113).

While it was the rule that recent unexplained possession of stolen property permitted the jury to infer that the accused committed the theft, it should be emphasized that recent unexplained possession created only a permissible inference of guilt of a "presumption of fact" in terms of former Code 1933, § 38-113 which the jury may or may not draw. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512, 1981 Ga. LEXIS 906 (1981) (decided under former Code 1933, § 38-113).

To convict a accused, the state must prove that: (1) goods in accused's possession were recently stolen; and (2) someone committed the crime. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512, 1981 Ga. LEXIS 906 (1981) (decided under former Code 1933, § 38-113).

Theft. — Nearer the possession to the time of theft, the stronger will be the inference of guilt; and question of result of lapse of time was for jury. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512, 1981 Ga. LEXIS 906 (1981) (decided under former Code 1933, § 38-113).

Confinement to chain gang lawful. — When a person was confined to the chain gang, the presumption was that the person was lawfully confined there. Williford v. State, 121 Ga. 173, 48 S.E. 962, 1904 Ga. LEXIS 73 (1904) (decided under former Penal Code 1895, § 988).

Medical negligence and due care pattern jury instructions. — Although the presumption of due care pattern jury instructions was a correct statement of the law, in discussing the presumption that health care professionals exercise due care, the pattern jury instruction needs to explain more clearly the presumption's relationship to the plaintiff's burden of proof and the defendant's standard of care. The jury needs to be instructed that: (1) the law presumes that physicians or other medical professionals perform medical services in an ordinarily skillful manner; (2) the person claiming an injury may overcome this legal presumption by introducing evidence that the physician did not treat the patient in an ordinarily skillful manner; (3) expert medical testimony is required to overcome the presumption; and (4) the plaintiff's burden in proving the physician's lack of due care and skill is by the preponderance of the evidence. These suggested changes are intended to uphold the tradition of having physicians judged by their peers while ensuring that jurors are instructed that the due-care presumption does not change the plaintiff's burden of proof in medical negligence cases. Beach v. Lipham, 276 Ga. 302, 578 S.E.2d 402, 2003 Ga. LEXIS 252 (2003) (decided under former O.C.G.A. § 24-4-20).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, §§ 7, 198.

Am. Jur. Pleading and Practice Forms.

9A Am. Jur. Pleading and Practice Forms, Evidence, § 103.

C.J.S.

31A C.J.S., Evidence, § 173 et seq.

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Presumption from derailment as requiring submission of carrier's negligence to jury in action by passenger, notwithstanding uncontradicted evidence negativing negligence, 23 A.L.R. 1214.

Presumption and burden of proof as to carrier's responsibility for goods received in good condition and delivered to consignee in bad condition, 53 A.L.R. 996; 106 A.L.R. 1156.

Presumption and burden of proof as to loss from failure of pledgee to sell or collect choses in action pledged, 53 A.L.R. 1075.

Province of court and jury respectively as to construction of written contract where extrinsic evidence as to intention has been introduced, 65 A.L.R. 648.

Governing law as regards presumption and burden of proof, 78 A.L.R. 883; 168 A.L.R. 191.

Voluntariness of confession admitted by court as question for jury, 85 A.L.R. 870; 170 A.L.R. 567.

Constitutionality of statutes or ordinances making one fact presumptive or prima facie evidence of another, 86 A.L.R. 179; 162 A.L.R. 495.

Rebuttal of presumption of receipt of letter properly mailed and addressed, 91 A.L.R. 161.

Presumption and burden of proof of settlement in action by one town or poor district against another for support of pauper, 99 A.L.R. 457.

Presumption of ownership of automobile by one in whose name it is registered or whose license plates it bears, 103 A.L.R. 138.

Presumption against suicide as evidence, 103 A.L.R. 185; 158 A.L.R. 747.

Construction, application, and effect of provision of statute or policy which raises a presumption of total and permanent disability of insured after continuation of disability for a specified period, 110 A.L.R. 631.

Presumption of death as evidence, 115 A.L.R. 404.

Distinction between effect of fact to create presumption of further fact and its effect as prima facie evidence of the further fact in determining burden of proof and weight of evidence, 121 A.L.R. 1078.

Presumption and burden of proof regarding mitigation of damages, 134 A.L.R. 242.

Presumption that description by reference to highway carries fee to center thereof, as affected by presence of water system or other apparatus under highway, 147 A.L.R. 667.

Statute which places burden of proof as to contributory negligence on defendant or creates a presumption against contributory negligence as applicable to actions by one person for consequential damages resulting from injury to another, 147 A.L.R. 726.

May presumption rest upon admission by opponent's pleading without proof of constituent fact, 153 A.L.R. 1106.

Presumption and burden of proof as regards continuance or revocation of will produced for probate, 165 A.L.R. 1188.

Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile, 5 A.L.R.2d 196.

Inference of malice or intent to kill where killing is by blow without weapon, 22 A.L.R.2d 854.

Validity of legislation creating presumption of intoxication or the like from presence of specified percentage of alcohol in blood, 46 A.L.R.2d 1176.

Judicial notice of intoxicating quality, and the like, of a liquor or particular liquid, from its name, 49 A.L.R.2d 764.

Spontaneity of declaration sought to be admitted as part of res gestae as question for court or ultimately for jury, 56 A.L.R.2d 372.

Presumption against suicide as overcome as a matter of law by physical facts related to death in action on accident or life insurance policy, 85 A.L.R.2d 722.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 A.L.R.3d 19.

Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption, 5 A.L.R.3d 100.

Relation back of presumption of continuance of condition of property, 7 A.L.R.3d 1302.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 A.L.R.3d 1128.

Presumption of payment as applicable to bank deposit, 69 A.L.R.3d 1311.

Amnesiac as entitled to presumption of due care, 88 A.L.R.3d 622.

24-14-21. Rebuttable presumptions of law.

Certain presumptions of law, such as the presumption of innocence, in some cases the presumption of guilt, the presumption of continuance of life for seven years, the presumption of a mental state once proved to exist, and all similar presumptions, may be rebutted by proof.

History.

Code 1981, § 24-14-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

Presumption of death of missing person, § 53-9-1 et seq.

Law reviews.

For comment regarding denial of due process through statute involving administration of estate of absentee minor, in light of Payne v. Home Sav. Bank, 193 Ga. 406, 18 S.E.2d 770 (1942), see 5 Ga. B.J. 62 (1943).

For comment discussing the right to present evidence for the purposes of rebutting presumption, in light of Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), see 10 Ga. St. B.J. 484 (1974).

For note, "Commitment and Release of Persons Found Not Guilty by Reason of Insanity: A Georgia Perspective," see 15 Ga. L. Rev. 1065 (1981).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3677, former Code 1882, § 3754, former Civil Code 1910, § 5740, former Penal Code 1910, § 1016, former Code 1933, § 38-118, and former O.C.G.A. § 24-4-21 are included in the annotations for this Code section.

Constitutionality. — Former Code 1933, § 38-118 (see now O.C.G.A. § 24-4-21) was not violative of the due process and equal protection guarantees of U.S. Const., amend. 14. Evans v. State, 159 Ga. App. 776, 285 S.E.2d 235, 1981 Ga. App. LEXIS 2805 (1981) (decided under former Code 1933, § 38-118).

Presumption of negligence against a railroad company, when property was injured by the running of its trains, was a disputable presumption, and could be rebutted like other such presumptions. Savannah, Florida & Western Ry. v. Gray, 77 Ga. 440, 3 S.E. 158, 1887 Ga. LEXIS 123

General Consideration (Cont'd)

(1887) (decided under former Code 1882, § 3754).

Presumption of valuable consideration yielded to direct evidence. — Prima facie presumption that negotiable paper was issued for a valuable consideration yielded to direct, uncontradicted and unimpeached evidence that there was in fact no consideration. In such a case, the plaintiff could not recover on the presumption alone, but would have to carry the whole case by virtue of a preponderance of the evidence. Goldstein v. Drexler, 102 Ga. App. 90, 115 S.E.2d 744, 1960 Ga. App. LEXIS 565 (1960) (decided under former Code 1933, § 38-118).

Instruction on presumption of intended consequences. — No unconstitutional shift of the burden of persuasion occurred when court's instruction on presumption of intended consequences was given with an instruction that a person was not presumed to act with criminal intent and that the presumption of intended consequence could be rebutted. Williams v. State, 157 Ga. App. 494, 277 S.E.2d 781, 1981 Ga. App. LEXIS 1880 (1981) (decided under former Code 1933, § 38-118).

When uncontradicted and unimpeached evidence was produced as to the real facts, any inference to the contrary disappeared, and did not create a conflict in the evidence so as to require its submission to a jury. International Computer Group, Inc. v. Data Gen. Corp., 159 Ga. App. 169, 283 S.E.2d 12, 1981 Ga. App. LEXIS 2536 (1981) (decided under former Code 1933, § 38-118).

Performance of official and social duties. — Unless and until there be facts or circumstances to indicate to the contrary, it will be presumed that every person obeys the mandates of law and performs all of the person's official and social duties. Strother Ford, Inc. v. First Nat'l Bank, 132 Ga. App. 268, 208 S.E.2d 25, 1974 Ga. App. LEXIS 1672 (1974), superseded by statute as stated in Metzger v. Americredit Fin. Svcs., 273 Ga. App. 453, 615 S.E.2d 120, 2005 Ga. App. LEXIS 336 (2005) (decided under former Code 1933, § 38-118).

Jury determination of rebutted presumption. — Presumptions in civil cases have an effect at two stages during a jury trial; when a party moves for a directed verdict; and when the trial court instructs the jury. Under Georgia law, a rebuttable presumption of law generally does not vanish when the opposing party introduces evidence contrary to the presumption, and it does not matter how much counter evidence the opponent has presented to rebut the presumed fact; the presumption remains alive through jury instructions and can only disappear if the jury decides to discount the presumption. Beach v. Lipham, 276 Ga. 302, 578 S.E.2d 402, 2003 Ga. LEXIS 252 (2003) (decided under former O.C.G.A. § 24-4-21).

Most rational hypothesis. — Presumption of law was merely a circumstantial inference selected by the law as the most rational hypothesis from given facts, and may or may not be rebutted according to the quality of evidence introduced. Jefferson Std. Life Ins. Co. v. Bentley, 55 Ga. App. 272, 190 S.E. 50, 1937 Ga. App. LEXIS 67 (1937) (decided under former Code 1933, § 38-118); Continental Assurance Co. v. Rothell, 121 Ga. App. 868, 176 S.E.2d 259, 1970 Ga. App. LEXIS 1379 (1970), aff'd in part and rev'd in part, 227 Ga. 258, 181 S.E.2d 283, 1971 Ga. LEXIS 665 (1971).

Presumption yields to proved facts. — Presumption of law yields to direct, positive, and uncontradicted evidence, i.e., it gives way to proved facts. Jefferson Std. Life Ins. Co. v. Bentley, 55 Ga. App. 272, 190 S.E. 50, 1937 Ga. App. LEXIS 67 (1937) (decided under former Code 1933, § 38-118); Continental Assurance Co. v. Rothell, 121 Ga. App. 868, 176 S.E.2d 259, 1970 Ga. App. LEXIS 1379 (1970), aff'd in part and rev'd in part, 227 Ga. 258, 181 S.E.2d 283, 1971 Ga. LEXIS 665 (1971).

Presumption of continuity. — Under the doctrine known as the presumption of continuity, a status, when proved to exist, will be presumed to have continued to exist. Strother Ford, Inc. v. First Nat'l Bank, 132 Ga. App. 268, 208 S.E.2d 25,

1974 Ga. App. LEXIS 1672 (1974), superseded by statute as stated in Metzger v. Americredit Fin. Svcs., 273 Ga. App. 453, 615 S.E.2d 120, 2005 Ga. App. LEXIS 336 (2005) (decided under former Code 1933, § 38-118).

Presumption of demand for possession yields to direct evidence. — While the defendant may not deny in the defendant's counter-affidavit that a demand for possession had been made upon the defendant by the plaintiff prior to the issuance of the dispossessory warrant, and defendant's failure to do so raises a presumption of law that such a demand was made, still such presumption must give way to the direct and positive testimony of the defendant on the trial that no demand was made upon the defendant for possession by anyone prior to the issuance of the dispossessory warrant. Bare presumptions of law give way to testimony, which may shift the burden of proof or of proceeding to the opposite party, and one is then not entitled to prevail upon the presumption alone. Ginn v. Johnson, 74 Ga. App. 35, 38 S.E.2d 753, 1946 Ga. App. LEXIS 450 (1946) (decided under former Code 1933, § 38-118).

Medical negligence and due care pattern jury instructions. — Although the presumption of due care pattern jury instructions was a correct statement of the law in discussing the presumption that health care professionals exercise due care, the pattern jury instruction needs to explain more clearly the presumption's relationship to the plaintiff's burden of proof and the defendant's standard of care. The jury needs to be instructed that: (1) the law presumes that physicians or other medical professionals perform medical services in an ordinarily skillful manner; (2) the person claiming an injury may overcome this legal presumption by introducing evidence that the physician did not treat the patient in an ordinarily skillful manner; (3) expert medical testimony is required to overcome the presumption; and (4) the plaintiff's burden in proving the physician's lack of due care and skill is by the preponderance of the evidence. These suggested changes are intended to uphold the tradition of having physicians judged by their peers while ensuring that jurors are instructed that the due-care presumption does not change the plaintiff's burden of proof in medical negligence cases. Beach v. Lipham, 276 Ga. 302, 578 S.E.2d 402, 2003 Ga. LEXIS 252 (2003) (decided under former O.C.G.A. § 24-4-21).

Innocence. — Every person charged with crime is presumed innocent until proven guilty by competent evidence. Thigpen v. State, 11 Ga. App. 846, 76 S.E. 596, 1912 Ga. App. LEXIS 220 (1912) (decided under former Penal Code 1910, § 1016).

Continuity of domicile. — Until evidence is introduced to the contrary, it is presumed that a person has not changed the person's residence or domicile. Strother Ford, Inc. v. First Nat'l Bank, 132 Ga. App. 268, 208 S.E.2d 25, 1974 Ga. App. LEXIS 1672 (1974), superseded by statute as stated in Metzger v. Americredit Fin. Svcs., 273 Ga. App. 453, 615 S.E.2d 120, 2005 Ga. App. LEXIS 336 (2005) (decided under former Code 1933, § 38-118).

Presumptions Regarding Death

Life. — One of the presumptions of law in this state is "continuance of life for seven years." Poole v. State, 22 Ga. App. 248, 95 S.E. 935, 1918 Ga. App. LEXIS 276 (1918) (decided under former Civil Code 1910, § 5740); Gantt v. American Nat'l Ins. Co., 173 Ga. 323, 160 S.E. 345, 1931 Ga. LEXIS 311 (1931) (decided under former Civil Code 1910, § 5740).

Presumption of life was not statutory. — There was no express statutory provision in this state making absence from the state for seven years the ground of the presumption of death. The only provision in the Code with reference of such presumption was former Civil Code 1910, § 5740 (see now O.C.G.A. § 24-4-21). There being no statutory provision, therefore, making mere absence from the state the ground of the presumption, the common-law rule must be applied, which was as ruled in Hansen v. Owens, 132 Ga. 648, 64 S.E. 800 (1909). Rudulph v. Brown, 150 Ga. 147, 103 S.E. 251, 1920 Ga. LEXIS 87 (1920) (decided under former Civil Code 1910, § 5740).

Presumption of continuation of life ends. — Presumption of the duration of

Presumptions Regarding Death (Cont'd)

life, with respect to people of whom no account can be given, ends at the expiration of seven years from the time when the people were last known to be living. Doe ex dem. Cofer v. Roe, 1 Ga. 538, 1846 Ga. LEXIS 105 (1846) (decided under former law); Doe v. Roe & Benson, 26 Ga. 582, 1858 Ga. LEXIS 367 (1858) (decided under former law); Executors of Adams v. Administrator of Jones, 39 Ga. 479, 1869 Ga. LEXIS 229 (1869) (decided under former Code 1863, § 3677). See also Poole v. State, 22 Ga. App. 248, 95 S.E. 935, 1918 Ga. App. LEXIS 276 (1918); Pilgrim Health & Life Ins. Co. v. Shows, 60 Ga. App. 872, 5 S.E.2d 585, 1939 Ga. App. LEXIS 195 (1939) (decided under former Code 1933, § 38-118).

Death occurring after seven years. — In the absence of facts or circumstances tending to establish the date of death, death was presumed to have occurred at the expiration of seven years. Gantt v. American Nat'l Ins. Co., 173 Ga. 323, 160 S.E. 345, 1931 Ga. LEXIS 311 (1931) (decided under former Civil Code 1910, § 5740); Gantt v. American Nat'l Ins. Co., 53 Ga. App. 425, 186 S.E. 458, 1936 Ga. App. LEXIS 141 (1936) (decided under former Code 1933, § 38-118); Pfenning v. Life Ins. Co. of Va., 60 Ga. App. 706, 4 S.E.2d 682, 1939 Ga. App. LEXIS 147 (1939) (decided under former Code 1933, § 38-118); Payne v. Home Sav. Bank, 193 Ga. 406, 18 S.E.2d 770, 1942 Ga. LEXIS 411 (1942) (decided under former Code 1933, § 38-118); Georgia Cas. & Sur. Co. v. Bloodworth, 120 Ga. App. 313, 170 S.E.2d 433, 1969 Ga. App. LEXIS 758 (1969) (decided under former Code 1933, § 38-118).

Presumption of death established by probate court. — Order of probate court under former Code 1933, § 113-2601 (see now O.C.G.A. § 53-9-1) establishing presumption of death of insured constituted a rebuttable presumption of law in later case involving action on life insurance policy. Ritter v. Prudential Ins. Co. of Am., 538 F. Supp. 398, 1982 U.S. Dist. LEXIS 12292 (N.D. Ga. 1982) (decided under former Code 1933, § 38-118).

Presumption of death of one moving to another state. — In order to raise a presumption of the death of a person who moves from this state to a named point in another state, inquiry must be made at the last known domicile of the absentee at which the absentee resided in the other state; and it must be shown, by those who would be most likely to hear from the absentee, that the absentee was absent and unheard of in the last place of residence for seven years. Rudulph v. Brown, 150 Ga. 147, 103 S.E. 251, 1920 Ga. LEXIS 87 (1920) (decided under former Penal Code 1910, § 1016); National Life & Accident Ins. Co. v. Hankerson, 49 Ga. App. 350, 175 S.E. 590, 1934 Ga. App. LEXIS 401 (1934) (decided under former Code 1933, § 38-118); Pilgrim Health & Life Ins. Co. v. Shows, 60 Ga. App. 872, 5 S.E.2d 585, 1939 Ga. App. LEXIS 195 (1939) (decided under former Code 1933, § 38-118).

Evidence of absence of person from one's original place of residence will not raise the presumption of death, when it appears that the person has moved to another place and there located. National Life & Accident Ins. Co. v. Hankerson, 49 Ga. App. 350, 175 S.E. 590, 1934 Ga. App. LEXIS 401 (1934) (decided under former Code 1933, § 38-118).

Issue of life or death for jury. — When the presumption from absence is relied upon to show death, the issue as to life or death would be for the jury when the evidence tending to rebut the legal presumption is merely circumstantial, or when, notwithstanding direct or circumstantial rebuttal evidence, the bare legal presumption of death is itself supported by direct or circumstantial proof. But the mere legal presumption is completely overcome by positive, uncontradicted evidence that the person is in fact alive, and even by competent proof of the person's existence within the seven-year period. National Life & Accident Ins. Co. v. Hankerson, 49 Ga. App. 350, 175 S.E. 590, 1934 Ga. App. LEXIS 401 (1934) (decided under former Code 1933, § 38-118).

No presumption of survival. — When a family was absent for over seven

years there would be no presumption that a husband survived his wife and daughter, or that he had no other children whom he survived. Cock v. Lipsey, 148 Ga. 322, 96 S.E. 628, 1918 Ga. LEXIS 328 (1918) (decided under former Civil Code 1910, § 5740).

Insanity

Presumption of insanity not unconstitutionally irrebuttable. — Construction of presumptions in former O.C.G.A. § 24-4-21 did not create a de facto irrebuttable (and, therefore, unconstitutional) presumption of insanity because the fact-finders duty not to disregard expert testimony applied to cases presuming sanity or insanity, and the court's standard of review and the findings and conclusions required for that review, ensure that the presumption of insanity cannot be applied irrebuttably. Nagel v. State, 262 Ga. 888, 427 S.E.2d 490, 1993 Ga. LEXIS 326 (1993) (decided under former O.C.G.A. § 24-4-21).

Presumption of continuing insanity applied prospectively to future acts of the defendant, not retroactively to past behavior. Vanderpool v. State, 244 Ga. App. 804, 536 S.E.2d 821, 2000 Ga. App. LEXIS 867 (2000), cert. denied, No. S00C1833, 2000 Ga. LEXIS 902 (Ga. Nov. 13, 2000), cert. denied, 532 U.S. 996, 121 S. Ct. 1658, 149 L. Ed. 2d 640, 2001 U.S. LEXIS 3269 (2001) (decided under former O.C.G.A. § 24-4-21).

Presumption of continuation of a mental state comported with due process, because it was rational to assume that, once a mental state was proven to exist, that mental state continued to do so in the absence of evidence to the contrary. Clark v. State, 245 Ga. 629, 266 S.E.2d 466, 1980 Ga. LEXIS 879 (1980) (decided under former Code 1933, § 38-118).

Continuation of mental condition. — Mental condition, once proved to exist, was presumed to continue. Carter v. State, 225 Ga. 310, 168 S.E.2d 158, 1969 Ga. LEXIS 478 (1969) (decided under former Code 1933, § 38-118).

Continuation of insanity. — There was a presumption of continuation of insanity, once insanity was proved to exist. Dicken v. Johnson, 7 Ga. 484, 1849 Ga. LEXIS 168 (1849) (decided under former law); Terry v. Buffington, 11 Ga. 337, 1852 Ga. LEXIS 50 (1852) (decided under former law); Stanfield v. Hursey, 36 Ga. App. 394, 136 S.E. 826, 1927 Ga. App. LEXIS 88 (1927) (decided under former Civil Code 1910, § 5740).

Defendant failed to carry the defendant's burden of showing by a preponderance of the evidence that the defendant was sane after the defendant was found not guilty by reason of insanity on two stalking charges and was ordered into a civil commitment to a mental health facility; the verdict of not guilty by reason of insanity established both that the defendant committed the criminal offense and that the defendant did so because of a mental illness, and once the defendant was ruled insane, a presumption existed under former O.C.G.A. § 24-4-21 that the insanity existed thereafter, and the defendant put on very little evidence to the contrary. Bonney v. State, 295 Ga. App. 706, 673 S.E.2d 102, 2009 Ga. App. LEXIS 79 (2009) (decided under former O.C.G.A. § 24-4-21).

Trial court erred in denying a recommendation filed by the Department of Behavioral Health with Developmental Disabilities that a patient be moved to a group home for outpatient involuntary treatment because the preponderance of the evidence supported a finding that the patient overcame the presumption under former O.C.G.A. § 24-4-21 of a continued need for inpatient involuntary treatment, and there was no evidence to support the trial court's finding that under O.C.G.A. § 37-3-1(9.1), the patient posed a substantial risk of imminent harm to the patient or others or was so unable to care for the patient's own physical health and safety as to create an imminently life-endangering crisis; the group home would have only two other suitable patient occupants, both of whom would be under the supervision of live-in supervisors and would have little opportunity to pressure the patient into misconduct, the patient would not be permitted to leave the group home unsupervised, the manager of the group home testified that as soon as patients were admitted into the group home and evaluated, an individualized service

Insanity (Cont'd)

plan was created, and there was no statutory requirement that a plan existed prior to release. Nelor v. State, 309 Ga. App. 165, 709 S.E.2d 904, 2011 Ga. App. LEXIS 327 (2011) (decided under former O.C.G.A. § 24-4-21).

Insanity of insanity-acquittee. — When there has been a previous adjudication finding a defendant not guilty by reason of defendant's insanity, a presumption of such insanity exists at the commencement of a hearing to secure defendant's release. Pennewell v. State, 148 Ga. App. 611, 251 S.E.2d 832, 1979 Ga. App. LEXIS 1571 (1979) (decided under former Code 1933, § 38-118); Clark v. State, 245 Ga. 629, 266 S.E.2d 466, 1980 Ga. LEXIS 879 (1980) (decided under former Code 1933, § 38-118).

Presumption of continued insanity for release applications. — In deciding applications for release, the court may rely on the presumption of continued insanity and is not bound by the opinions of either lay or expert witnesses. Gross v. State, 210 Ga. App. 125, 435 S.E.2d 496, 1993 Ga. App. LEXIS 1080 (1993) (decided under former O.C.G.A. § 24-4-21).

Effect of release. — Administrative release canceled the continuing presumption of insanity, although the prior adjudication was evidence tending to show mental condition and could be considered by the fact-finder to rebut the presumption of sanity. Gilbert v. State, 235 Ga. 501, 220 S.E.2d 262, 1975 Ga. LEXIS 911 (1975) (decided under former Code 1933, § 38-118).

Denial of release held proper. — Rational trier of fact could have found that appellant failed to prove by a preponderance of the evidence that the appellant was no longer insane and should be released from civil commitment since experts testified that the appellant became violently "psychotic" when the appellant engaged in substance abuse and that, although appellant might not exhibit violently "psychotic" behavior so long as the appellant underwent the regimen of "forced abstinence" in a hospital setting, there was nothing to show that, once released from that setting and regimen, the appellant would not again engage in substance abuse and commit yet another violent "psychotic" act. Nagel v. State, 264 Ga. 150, 442 S.E.2d 446, 1994 Ga. LEXIS 399 (1994) (decided under former O.C.G.A. § 24-4-21).

Sanity after release from mental institution. — Presumption of sanity prevailed even after a commitment to a mental institution if the accused had been released from that institution. Durham v. State, 239 Ga. 697, 238 S.E.2d 334, 1977 Ga. LEXIS 1302 (1977) (decided under former Code 1933, § 38-118).

Court may presume insanity despite witnesses' opinions. — Superior court, in deciding applications for release of a person committed upon a plea of insanity, may rely on the presumption of continued insanity and is not bound by the opinions of either lay or expert witnesses. The court also may take judicial notice of the evidence at trial pursuant to O.C.G.A. § 17-7-131(e). Butler v. State, 258 Ga. 344, 369 S.E.2d 252, 1988 Ga. LEXIS 271 (1988) (decided under former O.C.G.A. § 24-4-21).

Verdict of not guilty by reason of insanity reflected two crucial factual determinations. First, such verdict indicated a determination beyond reasonable doubt by a finder of fact that the defendant committed the crime in question. Secondly, this verdict indicated finding that it had been demonstrated by a preponderance of the evidence that the defendant, at the time the criminal act was committed, met the criteria for civil commitment. Under former Code 1933, § 38-118 (see now O.C.G.A. § 24-4-21), this mental state was presumed to continue so that the burden of proof in a release proceeding under former Code 1933, § 27-1503 (see now O.C.G.A. § 17-7-131) rested on the insanity acquittee. Whitfield v. State, 158 Ga. App. 660, 281 S.E.2d 643, 1981 Ga. App. LEXIS 2359 (1981) (decided under former Code 1933, § 38-118).

Marriage

Continuation of marriage. — Marriage once shown to exist, nothing more appearing, was presumed to continue in existence until rebutted by proof of the marriage's dissolution. Walker v. Hall, 123

Ga. App. 457, 181 S.E.2d 508, 1971 Ga. App. LEXIS 1259 (1971) (decided under former Code 1933, § 38-118).

Prior marriage dissolved by death. — Presumption that a first marriage was dissolved by death prevailed whether the time elapsing between the date the former spouse was last heard of and the second marriage was ten months or ten years. Longstreet v. Longstreet, 205 Ga. 255, 53 S.E.2d 480, 1949 Ga. LEXIS 360 (1949) (decided under former Code 1933, § 38-118).

Ownership by husband. — Husband is recognized by law as the head of his family and where he and wife reside together, the legal presumption is that the house and all the household effects, belong to the husband as the head of the family; this presumption of course is rebuttable. Kreutz v. State, 53 Ga. App. 219, 185 S.E. 371, 1936 Ga. App. LEXIS 38 (1936) (decided under former Code 1933, § 38-118).

Conflicting presumptions. — When the presumption of the validity of a marriage conflicts with the presumption of the continued life of a former spouse of one of the parties, if neither is aided by proof of facts or circumstances corroborating it, the presumption of the validity of the second marriage will prevail over the presumption of the continuance of life of the former spouse. Longstreet v. Longstreet, 205 Ga. 255, 53 S.E.2d 480, 1949 Ga. LEXIS 360 (1949) (decided under former Code 1933, § 38-118); Baker v. Musa, 170 Ga. App. 77, 316 S.E.2d 178, 1984 Ga. App. LEXIS 1805 (1984) (decided under former O.C.G.A. § 24-4-21).

Officers

Officer's duties. — All officers are presumed to have properly discharged their sworn official duties. Kirk v. State, 73 Ga. 620, 1884 Ga. LEXIS 187 (1884) (decided under former Code 1882, § 3754); Brantley v. Thompson, 216 Ga. 164, 115 S.E.2d 533, 1960 Ga. LEXIS 416 (1960) (decided under former Code 1933, § 38-118).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, § 212.

Am. Jur. Pleading and Practice Forms.

8A Am. Jur. Pleading and Practice Forms, Death, § 168.

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Validity of by-law of mutual benefit association preventing recovery upon presumption of death from seven years' absence, 17 A.L.R. 418; 21 A.L.R. 1346; 36 A.L.R. 982; 40 A.L.R. 1274.

Circumstances justifying inference of death of insured before the lapse of seven years from his disappearance, 34 A.L.R. 1389; 61 A.L.R. 1327.

Ownership of automobile as prima facie evidence of responsibility for negligence of person operating it, 42 A.L.R. 898; 74 A.L.R. 951; 96 A.L.R. 634.

Constitutionality of statutes or ordinances making one fact presumptive or prima facie evidence of another, 51 A.L.R. 1139; 86 A.L.R. 179; 162 A.L.R. 495.

Statutory or contractual limitation where presumption of death of the insured from seven years' absence is relied upon, 61 A.L.R. 686; 119 A.L.R. 1308.

Presumption of death from seven years' absence as affected by domestic troubles, 64 A.L.R. 1288.

Conclusiveness of uncontradicted testimony of interested witness where opposed to presumption, 72 A.L.R. 94.

Presumption of death of insured in relation to time of death as affecting failure to pay premiums during seven-year period, 75 A.L.R. 630.

Presumption of innocence as evidence, 94 A.L.R. 1042; 152 A.L.R. 626.

When finding or adjudication as to one's mental condition by official or body not clearly judicial is conclusive evidence or has effect of a judgment as regards legal mental status, 108 A.L.R. 47.

Insanity as affecting presumption against suicide, 112 A.L.R. 1278.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 A.L.R. 1510.

Direct evidence as to what took place at time of accident as displacing presump-

tion arising from instinct of self-preservation that one was acting with concern for own safety, 116 A.L.R. 340.

Effect of words "value received" or similar words in written instrument, other than negotiable instrument or sealed instrument, to create presumption or make prima facie case of consideration, 116 A.L.R. 545.

Distinction between effect of fact to create presumption of further fact and its effect as prima facie evidence of the further fact in determining burden of proof and weight of evidence, 121 A.L.R. 1078.

Administration of estate of one the fact of whose death rests upon presumption or circumstantial evidence, 140 A.L.R. 1403.

Validity of marriage celebrated while spouse by former marriage of one of the parties was living and undivorced, in reliance upon presumption from lapse of time of death of such spouse, 144 A.L.R. 747.

Presumption against suicide as evidence, 158 A.L.R. 747.

Presumption and burden of proof as regards continuance or revocation of will produced for probate, 165 A.L.R. 1188.

Form and sufficiency of proof of death in case of insured's disappearance, 26 A.L.R.2d 1073.

Judicial notice of intoxicating quality, and the like, of a liquor or particular liquid, from its name, 49 A.L.R.2d 764.

Validity, construction, and effect of statutes or regulations making possession of fish or game, or of specified hunting or fishing equipment, prima facie evidence of violation, 81 A.L.R.2d 1093.

Necessity and sufficiency of showing of search and inquiry by one relying on presumption of death from seven years' absence, 99 A.L.R.2d 307.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 A.L.R.3d 19.

Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption, 5 A.L.R.3d 100.

Relation back of presumption of continuance of condition of property, 7 A.L.R.3d 1302.

Application of res ipsa loquitur doctrine to accidents incurred by passenger while boarding or alighting from a carrier, 93 A.L.R.3d 776.

Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records, 69 A.L.R.4th 906.

24-14-22. Presumption from failure to produce evidence.

If a party has evidence in such party's power and within such party's reach by which he or she may repel a claim or charge against him or her but omits to produce it or if such party has more certain and satisfactory evidence in his or her power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against such party is well founded; but this presumption may be rebutted.

History.

Code 1981, § 24-14-22, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-4-422, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Mitchell v. State, 71 Ga. 128 (1883); First Nat'l Bank v. Atlanta Rubber Co., 77 Ga. 781 (1886); Savannah, Florida & Western Ry. v. Gray, 77 Ga. 440, 3 S.E. 158 (1887); and Stevenson v. State, 83 Ga. 575, 10 S.E. 234 (1889).

Law reviews.

For comment on Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964), see 1 Ga. St. B. J. 550 (1965).

For comment discussing the right to present evidence for the purposes of rebutting presumption, in light of Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), see 10 Ga. St. B.J. 484 (1974).

For article, "Spoliation of Evidence," see 8 Ga. St. B.J. 12 (2003).

For note, "Spoliating the Adverse Inference Instruction: The Impact of the 2015 Amendment to Federal Rule of Civil Procedure 37(E)," see 51 Ga. L. Rev. 917 (2017).

For note, "Georgia's Approach to Proportionality and Sanctions for the Spoliation of Electronically Stored Information," see 37 Ga. St. U.L. Rev. 603 (2021).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5163, former Penal Code 1895, § 989, former Civil Code 1910, § 5749, former Penal Code 1910, § 1015, and former O.C.G.A. § 24-4-22 are included in the annotations for this Code section.

In general. — When a party had evidence within the party's power or control by which the party may rebut a claim against the party and failed to produce that evidence, a presumption arose that the evidence would be unfavorable or harmful to the party failing to produce the evidence. Maloy v. Dixon, 127 Ga. App. 151, 193 S.E.2d 19, 1972 Ga. App. LEXIS 821 (1972) (decided under former Code 1933, § 38-119).

Rebuttable presumption in former O.C.G.A. § 24-4-22 applied when both parties fail to produce evidence as conclusive and satisfactory as appeared to be within their respective control. Eddie Parker Interests, Inc. v. Booth, 160 Ga. App. 15, 285 S.E.2d 753, 1981 Ga. App. LEXIS 2855 (1981) (decided under former Code 1933, § 38-119).

Constitutionality. — Former statute violated the fundamental principle of criminal law that the guilt of the accused must be shown by competent evidence before a conviction could be legally had. Sokolic v. State, 228 Ga. 788, 187 S.E.2d 822, 1972 Ga. LEXIS 908 (1972) (decided under former Code 1933, § 38-119).

Former O.C.G.A. § 24-4-22 was violative of a defendant's right to be convicted by evidence establishing guilt beyond a reasonable doubt. Radford v. State, 251 Ga. 50, 302 S.E.2d 555, 1983 Ga. LEXIS 695 (1983) (decided under former O.C.G.A. § 24-4-22).

Not applicable in criminal case. — See Harper v. State, 129 Ga. 770, 59 S.E. 792, 1907 Ga. LEXIS 579 (1907) (decided under former Penal Code 1895, § 989); Davis v. State, 4 Ga. App. 441, 61 S.E. 843, 1908 Ga. App. LEXIS 329 (1908) (decided under former Penal Code 1895, § 989); Mills v. State, 133 Ga. 155, 65 S.E. 368, 1909 Ga. LEXIS 173 (1909) (decided under former Penal Code 1895, § 989); Wilson v. State, 8 Ga. App. 816, 70 S.E. 193, 1911 Ga. App. LEXIS 158 (1911) (decided under former Penal Code 1910, § 1015); Worley v. State, 136 Ga. 231, 71 S.E. 153, 1911 Ga. LEXIS 495 (1911) (decided under former Penal Code 1910, § 1015); Williamson v. State, 9 Ga. App. 442, 71 S.E. 509, 1911 Ga. App. LEXIS 598 (1911) (decided under former Penal Code 1910, § 1015); Whitley v. State, 14 Ga. App. 577, 81 S.E. 797, 1914 Ga. App. LEXIS 386 (1914) (decided under former Penal Code 1910, § 1015); Waller v. State, 164 Ga. 128, 138 S.E. 67, 1927 Ga. LEXIS 138 (1927) (decided under former Penal Code 1910, § 1015); Summerville v. State, 65 Ga. App. 11, 14 S.E.2d 574, 1941 Ga. App. LEXIS 228 (1941) (decided under former Code 1933, § 38-119); Bond v. State, 68 Ga. App. 15, 21 S.E.2d 866, 1942 Ga. App. LEXIS 16 (1942) (decided under former Code 1933, § 38-119); Clay v. State, 122 Ga. App. 677, 178 S.E.2d 331, 1970 Ga. App. LEXIS 1000 (1970) (decided under former Code 1933, § 38-119); Sokolic v.

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State, 228 Ga. 788, 187 S.E.2d 822, 1972 Ga. LEXIS 908 (1972) (decided under former Code 1933, § 38-119); Lyle v. State, 131 Ga. App. 8, 205 S.E.2d 126, 1974 Ga. App. LEXIS 1306 (1974) (decided under former Code 1933, § 38-119); Peters v. State, 131 Ga. App. 513, 206 S.E.2d 623, 1974 Ga. App. LEXIS 1451 (1974) (decided under former Code 1933, § 38-119); Perryman v. State, 139 Ga. App. 655, 229 S.E.2d 131, 1976 Ga. App. LEXIS 1934 (1976) (decided under former Code 1933, § 38-119); Joseph v. State, 149 Ga. App. 296, 254 S.E.2d 383, 1979 Ga. App. LEXIS 1822 (1979) (decided under former Code 1933, § 38-119); Brown v. State, 150 Ga. App. 831, 258 S.E.2d 641, 1979 Ga. App. LEXIS 2391 (1979) (decided under former Code 1933, § 38-119); Tiller v. State, 159 Ga. App. 557, 284 S.E.2d 63, 1981 Ga. App. LEXIS 2692 (1981) (decided under former Code 1933, § 38-119); Radford v. State, 251 Ga. 50, 302 S.E.2d 555, 1983 Ga. LEXIS 695 (1983) (decided under former Code 1933, § 38-119); Drummond v. State, 173 Ga. App. 337, 326 S.E.2d 787, 1985 Ga. App. LEXIS 1532 (1985) (decided under former Code 1933, § 38-119); Jacobs v. State, 201 Ga. App. 57, 410 S.E.2d 320, 1991 Ga. App. LEXIS 1182 (1991) (decided under former O.C.G.A. § 24-4-22); Clayton v. State, 203 Ga. App. 843, 418 S.E.2d 610, 1992 Ga. App. LEXIS 627 (1992), cert. denied, No. S92C0991, 1992 Ga. LEXIS 466 (Ga. June 4, 1992).; Williams v. State, 239 Ga. App. 30, 521 S.E.2d 27 (decided under former O.C.G.A. § 24-4-22).

Charge on spoliation of evidence based upon former O.C.G.A. § 24-4-22 was not appropriate in a criminal case; thus, the trial court did not err in not giving such a charge. Doyal v. State, 287 Ga. App. 667, 653 S.E.2d 52, 2007 Ga. App. LEXIS 894 (2007) (decided under former O.C.G.A. § 24-4-22).

Former O.C.G.A. § 24-4-22 not applicable in criminal case. — Trial counsel was not ineffective for failing to request a jury charge under former O.C.G.A. § 24-4-22 addressing the state's failure to preserve a child molestation victim's pajamas because the trial court stated it would not have given the charge if requested, and former § 24-4-22 was not appropriate in a criminal case. Cline v. State, 300 Ga. App. 615, 685 S.E.2d 501, 2009 Ga. App. LEXIS 1236 (2009) (decided under former O.C.G.A. § 24-4-22).

Jury may not be charged on failure to produce evidence in criminal case but may draw conclusion therefrom. — While the jury may not be instructed to infer that if the defendant had evidence by which defendant might repel or rebut the charge against the defendant and failed to introduce the evidence the presumption arises that the defendant is guilty, the jury may be apprised of the facts from which it arrives at the same conclusion. Pritchard v. State, 160 Ga. App. 105, 286 S.E.2d 338, 1981 Ga. App. LEXIS 2929 (1981) (decided under former Code 1933, § 38-119).

Instruction only in exceptional cases. — Principle set forth in former O.C.G.A. § 24-4-22 applied only in cases when it was shown that a party withheld evidence within the party's power and control, and an instruction on that principle should be given only in exceptional cases. Hendley v. Evans, 319 Ga. App. 310, 734 S.E.2d 548, 2012 Ga. App. LEXIS 982 (2012), cert. denied, No. S13C0695, 2013 Ga. LEXIS 530 (Ga. June 3, 2013) (decided under former O.C.G.A. § 24-4-22).

Intention of legislature was to penalize either party by a presumption of fact against either party for withholding evidence within their power to produce, and relying on evidence of a weaker nature. Fields v. Yellow Cab Co., 80 Ga. App. 569, 56 S.E.2d 845, 1949 Ga. App. LEXIS 880 (1949) (decided under former Code 1933, § 38-119).

Limited application. — It may be conceded that this principle cannot be safely given as a charge except in a very limited class of cases, but it cannot be said to be improper in all cases. Cotton States Fertilizer Co. v. Childs, 179 Ga. 23, 174 S.E. 708, 1934 Ga. LEXIS 203 (1934) (decided under former Code 1933, § 38-119).

Application in divorce case as to financial worth. — In divorce case when one of the issues in the case was the financial worth of the defendant, when the

plaintiff introduced documentary evidence showing that the defendant received about $24,000 in cash from a certain business venture and the defendant did not offer any written evidence to substantiate defendant's contention that only a small portion of the sum received was profit, there was no error in charging on the presumption arising from failure to produce evidence, or the strongest evidence. West v. West, 199 Ga. 378, 34 S.E.2d 545, 1945 Ga. LEXIS 322 (1945) (decided under former Code 1933, § 38-119).

Presumption of fact. — Presumption against a party withholding or suppressing evidence within the party's control or reach was not one of law, but of fact and it could be rebutted. Savannah, Florida & Western Ry. v. Gray, 77 Ga. 440, 3 S.E. 158, 1887 Ga. LEXIS 123 (1887) (decided under former law); Brothers v. Horne, 140 Ga. 617, 79 S.E. 468, 1913 Ga. LEXIS 202 (1913) (decided under former Code 1933, § 38-119); Cocroft v. Cocroft, 158 Ga. 714, 124 S.E. 346, 1924 Ga. LEXIS 331 (1924) (decided under former Code 1933, § 38-119); Cotton States Fertilizer Co. v. Childs, 179 Ga. 23, 174 S.E. 708, 1934 Ga. LEXIS 203 (1934) (decided under former Code 1933, § 38-119); Burns v. Colonial Stores, Inc., 90 Ga. App. 492, 83 S.E.2d 259, 1954 Ga. App. LEXIS 741 (1954) (decided under former Code 1933, § 38-119); Independent Life & Accident Ins. Co. v. Craton, 102 Ga. App. 78, 115 S.E.2d 636, 1960 Ga. App. LEXIS 1056 (1960) (decided under former Code 1933, § 38-119); Gulf Life Ins. Co. v. Belch, 108 Ga. App. 480, 133 S.E.2d 622, 1963 Ga. App. LEXIS 680 (1963), rev'd, 219 Ga. 823, 136 S.E.2d 351, 1964 Ga. LEXIS 418 (1964); Glynn Plymouth, Inc. v. Davis, 120 Ga. App. 475, 170 S.E.2d 848, 1969 Ga. App. LEXIS 827 (1969), aff'd, 226 Ga. 221, 173 S.E.2d 691, 1970 Ga. LEXIS 489 (1970).

Burden of proof irrelevant. — Former statute applied irrespective of the burden of proof. Shiver & Barnett v. Firemens Ins. Co., 60 Ga. App. 57, 2 S.E.2d 760, 1939 Ga. App. LEXIS 501 (1939) (decided under former Code 1933, § 38-119).

No evidence held back. — When it did not appear that the party held back evidence within the party's power to produce the non-production of more full and definite evidence than the party presented raised no presumption against the party and it was error to charge the former provisions. Schnell v. Toomer, 56 Ga. 168, 1876 Ga. LEXIS 231 (1876) (decided under former law); Western & A.R.R. v. Morrison, 102 Ga. 319, 29 S.E. 104, 1897 Ga. LEXIS 507 (1897) (decided under former Civil Code 1895, § 5163); Central of Ga. Ry. v. Bernstein, 113 Ga. 175, 38 S.E. 394, 1901 Ga. LEXIS 199 (1901) (decided under former Civil Code 1895, § 5163); Shields v. Georgia Ry. & Elec. Co., 1 Ga. App. 172, 57 S.E. 980, 1907 Ga. App. LEXIS 181 (1907) (decided under former Civil Code 1895, § 5163); Alabama Great Southern Ry. v. Hamby, 56 Ga. App. 215, 192 S.E. 467, 1937 Ga. App. LEXIS 323 (1937) (decided under former Code 1933, § 38-119); Howard v. Obie, 190 Ga. 394, 9 S.E.2d 666, 1940 Ga. LEXIS 495 (1940) (decided under former Code 1933, § 38-119); Brosnan v. Long, 75 Ga. App. 837, 44 S.E.2d 809, 1947 Ga. App. LEXIS 653 (1947) (decided under former Code 1933, § 38-119); Maloy v. Dixon, 127 Ga. App. 151, 193 S.E.2d 19, 1972 Ga. App. LEXIS 821 (1972) (decided under former Code 1933, § 38-119).

Trial court did not err when the court failed to preclude defendants from putting on evidence that contradicted an estate administrator's version of events due to the defendants' alleged failure to produce a video recording of a parking lot where an incident occurred pursuant to former O.C.G.A. § 24-4-22 as the administrator waived that claim. Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 715 S.E.2d 728, 2011 Ga. App. LEXIS 685 (2011) (decided under former O.C.G.A. § 24-4-22).

Proving assertions without calling other witness. — No presumption will ever arise prejudicial to the party failing to produce the witness, provided the jury was satisfied from the evidence before the jury that the party who had such witness accessible had nevertheless proved the party's claim or established the party's defense. Weinkle & Sons v. Brunswick & W.R.R., 107 Ga. 367, 33 S.E. 471, 1899 Ga. LEXIS 76 (1899), overruled on other

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grounds, Smith v. Telecable of Columbus, Inc., 238 Ga. 559, 234 S.E.2d 24, 1977 Ga. LEXIS 1101 (1977); Howard v. Obie, 190 Ga. 394, 9 S.E.2d 666, 1940 Ga. LEXIS 495 (1940) (decided under former Code 1933, § 38-119).

Proving a negative. — When the means of proving a negative are not within the power of one of the parties, but all the proof on the subject is within the control of the other, who, if the negative is not true, can disprove it at once, the truth of the negative averment can be presumed from the fact that the party who has within the party's power proof (if such exists) that the negative is not true still withholds or does not produce such proof. Hyer v. Holmes & Co., 12 Ga. App. 837, 79 S.E. 58, 1913 Ga. App. LEXIS 773 (1913) (decided under former Civil Code 1910, § 5749); Mayo v. Owen, 208 Ga. 483, 67 S.E.2d 709, 1951 Ga. LEXIS 421 (1951) (decided under former Code 1933, § 38-119).

All witnesses need not testify. — It never was the intention of the former statutory provisions of this statute to require that all witnesses to a scene of a collision, the nature of which was in question, should be summoned and used as witnesses. Fields v. Yellow Cab Co., 80 Ga. App. 569, 56 S.E.2d 845, 1949 Ga. App. LEXIS 880 (1949) (decided under former Code 1933, § 38-119).

Former O.C.G.A. § 24-4-22 (see now O.C.G.A. § 24-4-22) did not require a party actually to produce all possible witnesses, but merely provided that an adverse presumption may arise from a failure to so produce. Jacobs v. State, 201 Ga. App. 57, 410 S.E.2d 320, 1991 Ga. App. LEXIS 1182 (1991) (decided under former O.C.G.A. § 24-4-22).

If all witnesses not produced. — Party was not required to produce all witnesses; a party may rest one's case upon one witness, though another be accessible, but that party subjects oneself to presumption arising from failure to so produce. Shiver & Barnett v. Firemens Ins. Co., 60 Ga. App. 57, 2 S.E.2d 760, 1939 Ga. App. LEXIS 501 (1939) (decided under former Code 1933, § 38-119); Trammell v. Williams, 97 Ga. App. 31, 101 S.E.2d 887, 1958 Ga. App. LEXIS 697 (1958) (decided under former Code 1933, § 38-119).

Calling one of two witnesses. — Fact that a party called only one of two witnesses who had an equal opportunity to know the facts which it was sought to establish did not authorize an inference that the other witness would have testified differently, or warrant an instruction under the former statutory provisions to the jury. Bank of Emanuel v. Smith, 32 Ga. App. 606, 124 S.E. 114, 1924 Ga. App. LEXIS 558 (1924) (decided under former Civil Code 1910, § 5749).

Evidence under power and control of party. — Charging former statutory provisions was error since there was nothing to show that the absent witness was in any way under the power and control of the defendant, or that as a witness, if the witness were accessible at all, the witness was not as much so to the plaintiff as to the defendant. Anderson v. Southern Ry., 107 Ga. 500, 33 S.E. 644, 1899 Ga. LEXIS 102 (1899) (decided under former Civil Code 1895, § 5163); Brothers v. Horne, 140 Ga. 617, 79 S.E. 468, 1913 Ga. LEXIS 202 (1913) (decided under former Civil Code 1910, § 5749); Cocroft v. Cocroft, 158 Ga. 714, 124 S.E. 346, 1924 Ga. LEXIS 331 (1924) (decided under former Civil Code 1910, § 5749); Trammell v. Atlanta Coach Co., 51 Ga. App. 705, 181 S.E. 315, 1935 Ga. App. LEXIS 446 (1935); Atlanta Baggage & Cab Co. v. Atlanta Taxicabs, Inc., 104 Ga. App. 89, 121 S.E.2d 175, 1961 Ga. App. LEXIS 612 (1961) (decided under former Code 1933, § 38-119).

Witness accessible to both parties. — When witness was present at the trial, equally accessible to both parties, it was error for the judge to give in charge the former statutory provisions. Bank of Emanuel v. Smith, 32 Ga. App. 606, 124 S.E. 114, 1924 Ga. App. LEXIS 558 (1924) (decided under former Civil Code 1910, § 5749).

Examining physician was equally available as a witness to both parties; no presumption could arise against either party for failure to produce the physician as a witness. Bradford v. Parrish, 111 Ga. App. 167, 141 S.E.2d 125, 1965 Ga. App.

LEXIS 907 (1965) (decided under former Code 1933, § 38-119).

Duty to preserve evidence if litigation reaonably foreseeable. — Duty to preserve relevant evidence arises when litigation is reasonably foreseeable to the party in control of that evidence, and thus while actual notice of litigation would clearly make such litigation foreseeable, other circumstances may show that the defendant or alleged tortfeasor actually or reasonably should have anticipated litigation, even without notice of a claim being provided; the court could consider any internal investigation and the reasons for notification of counsel and insurers. Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596, 2015 Ga. LEXIS 485 (2015).

Failure of both parties to produce evidence. — When both parties failed to produce as conclusive and satisfactory evidence as appeared to be within their respective control, the charge of the former statute was appropriate. Davidson v. Consolidated Quarries Corp., 99 Ga. App. 359, 108 S.E.2d 495, 1959 Ga. App. LEXIS 856 (1959) (decided under former Code 1933, § 38-119).

Evidence used up before party aware of request to preserve. — Trial court properly rejected the spoliation claim since the evidence showed that the batch of sanitizer used to clean the playground on the day the child suffered the alleged injury would have been used up by the time the restaurant owner was asked to preserve any evidence related to the incident. Stern v. Pettis, 357 Ga. App. 78, 847 S.E.2d 824, 2020 Ga. App. LEXIS 456 (2020), cert. denied, No. S21C0374, 2021 Ga. LEXIS 338 (Ga. May 17, 2021).

Failure of defendant to appear in court and the failure to offer evidence raised a presumption against the defendant that the charges against the defendant were true. Mitchell v. Hayden, Stone, Inc., 225 Ga. 711, 171 S.E.2d 280, 1969 Ga. LEXIS 623 (1969) (decided under former Code 1933, § 38-119).

Failure of party to testify. — Provisions of former statutory were not applicable to the failure of a party defendant to testify at the party's trial. Ramirez v. Mansour, 104 Ga. App. 651, 122 S.E.2d 594, 1961 Ga. App. LEXIS 761 (1961) (decided under former Code 1933, § 38-119); Maloy v. Dixon, 127 Ga. App. 151, 193 S.E.2d 19, 1972 Ga. App. LEXIS 821 (1972) (decided under former Code 1933, § 38-119).

Failure to testify at former trial. — It was admissible to show that the defendant, since deceased, who was present at a former trial and competent as a witness, failed to testify concerning the transaction in issue, of which the defendant had peculiar knowledge; the bona fides of which was attacked by the plaintiffs. Wood v. Wilson, 145 Ga. 256, 88 S.E. 980, 1916 Ga. LEXIS 267 (1916) (decided under former Civil Code 1910, § 5749).

Documentary evidence. — Former statute applied equally to documentary evidence. Oliver v. Fair Jewelers, Inc., 104 Ga. App. 392, 121 S.E.2d 787, 1961 Ga. App. LEXIS 694 (1961) (decided under former Code 1933, § 38-119).

Medical exam under court order. — Former statutory presumption arising from failure to produce evidence was not applicable in a personal injury action when there could be no additional medical evidence available until after an examination was had under court order. Bradford v. Parrish, 111 Ga. App. 167, 141 S.E.2d 125, 1965 Ga. App. LEXIS 907 (1965) (decided under former Code 1933, § 38-119).

Refusal to submit to physical examination. — Evidence that the plaintiff in a case of personal injury refused to allow a physical examination was admissible. City of Cedartown v. Brooks, 2 Ga. App. 583, 59 S.E. 836, 1907 Ga. App. LEXIS 454 (1907) (decided under former Civil Code 1895, § 5163).

Failure to produce testimony is badge of fraud, since the bona fides of the transaction is in issue, and witnesses who ought to be able to explain the transaction are in reach. Cotton States Fertilizer Co. v. Childs, 179 Ga. 23, 174 S.E. 708, 1934 Ga. LEXIS 203 (1934) (decided under former Code 1933, § 38-119); State Banking Co. v. Miller, 185 Ga. 653, 196 S.E. 47, 1938 Ga. LEXIS 487 (1938) (decided under former Code 1933, § 38-119).

Spoliation of evidence raises a presumption against the spoliator. Glynn Plymouth, Inc. v. Davis, 120 Ga. App. 475,

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170 S.E.2d 848, 1969 Ga. App. LEXIS 827 (1969), aff'd, 226 Ga. 221, 173 S.E.2d 691, 1970 Ga. LEXIS 489 (1970) (decided under former Code 1933, § 38-119).

Visitor's claim that the trial court erred by finding that the visitor was not entitled to a presumption of spoliation lacked merit as the visitor failed to show that there was a factual dispute as to whether the subject elevator was removed from service and, thus, that there existed spoliation. Jones v. Med. Ctr. of Cent. Ga., Inc., 341 Ga. App. 888, 802 S.E.2d 286, 2017 Ga. App. LEXIS 298 (2017).

Rules of spoliation triggered. — After the collision between a tractor trailer and a vehicle towing a car, the defendants were aware of contemplated litigation based on: (1) the letter from the plaintiffs' attorney; (2) the defendants' investigation; and (3) the defendants' knowledge that every such highway collision could result in claims. This was sufficient to automatically trigger the rules of spoliation under former O.C.G.A. § 24-4-22. Sentry Select Ins. Co. v. Treadwell, 318 Ga. App. 844, 734 S.E.2d 818, 2012 Ga. App. LEXIS 1013 (2012) (decided under former O.C.G.A. § 24-4-22).

In a software design company's claim alleging that the appellants improperly copied the company's software products, the appellants' answer was properly struck on the ground that spoliation of evidence occurred because the appellants knew that they had an affirmative duty to preserve the images of their hard drives as that evidence was clearly relevant to the pending litigation; the relief the company prayed for was, inter alia, that all hard drives belonging to the appellants be imaged immediately; and the temporary restraining order expressly prohibited the appellants from destroying, deleting or removing from any computers any data or software before the hard drives of each computer were imaged for inspection and analysis by a special master. Delphi Communs. v. Advanced Computing Techs., 336 Ga. App. 435, 784 S.E.2d 802, 2016 Ga. App. LEXIS 200 (2016).

Destruction of evidence. — When a party has destroyed evidence which may be material to ensuing litigation, the trial judge may be authorized to dismiss the case or prevent the party's expert witness from testifying in any respect about the evidence. Chapman v. Auto Owners Ins. Co., 220 Ga. App. 539, 469 S.E.2d 783 (decided under former O.C.G.A. § 24-4-22).

Argument to jury. — Failure to produce witnesses who are accessible to a party will authorize counsel of the opposite party to argue before the jury that, if they are in doubt as to the truth of the transaction, they would be authorized to infer that, if the absent witnesses had testified, the testimony would have been prejudicial to the party who might most easily have produced them. City of Atlanta v. Feeney, 42 Ga. App. 135, 155 S.E. 370, 1930 Ga. App. LEXIS 260 (1930) (decided under former Civil Code 1910, § 5749); Howard v. Obie, 190 Ga. 394, 9 S.E.2d 666, 1940 Ga. LEXIS 495 (1940) (decided under former Code 1933, § 38-119).

Comment on defendant's failure to produce evidence was not a comment on the defendant's failure to testify as prohibited by the former statute. Wood v. State, 234 Ga. 758, 218 S.E.2d 47, 1975 Ga. LEXIS 1252 (1975) (decided under former Code 1933, § 38-119).

Comment on failure to present certain witnesses in criminal cases. — Defense counsel in a criminal case is not barred from commenting, when appropriate, on the failure of the opposing side to present certain witnesses; while no legal presumption may arise from such failure, it is proper for counsel to draw an inference of fact from such failure and comment on such failure to the jury when there is competent evidence before the jury that the missing witness has knowledge of material and relevant facts. Morgan v. State, 267 Ga. 203, 476 S.E.2d 747 (decided under former O.C.G.A. § 24-4-22).

Evidentiary value. — Fact that the accused failed to produce evidence had some evidentiary value and counsel could comment on it to the jury. Hunt v. State, 81 Ga. 140, 7 S.E. 142, 1888 Ga. LEXIS 77 (1888) (decided under former law); Morgan v. State, 124 Ga. 442, 52 S.E. 748,

1905 Ga. LEXIS 741 (1905) (decided under former Penal Code 1895, § 989); Saffold v. State, 11 Ga. App. 329, 75 S.E. 338, 1912 Ga. App. LEXIS 388 (1912) (decided under former Penal Code 1910, § 1015).

Question for jury. — It was not error for court to charge that if either party in this case had in the party's power or control any evidence that would have illustrated any issue in the case and such party failed to produce that evidence, the jury might infer it would have been against the party so failing to produce it, in the event the jury saw fit to do so; the charge left it for the jury to determine whether or not there existed a state of facts from which the presumption would arise and did not have the effect of invading the province of the jury. Beardsley v. Suburban Coach Co., 83 Ga. App. 381, 63 S.E.2d 911, 1951 Ga. App. LEXIS 872 (1951) (decided under former Code 1933, § 38-119).

Charge demanding inference. — When a stated set of circumstances will demand a particular inference, it is not error for the court to instruct the jury to that effect, provided the question of whether the circumstances do in fact exist is left open for determination by the jury. Cotton States Fertilizer Co. v. Childs, 179 Ga. 23, 174 S.E. 708, 1934 Ga. LEXIS 203 (1934) (decided under former Code 1933, § 38-119); Shiver & Barnett v. Firemens Ins. Co., 60 Ga. App. 57, 2 S.E.2d 760, 1939 Ga. App. LEXIS 501 (1939) (decided under former Code 1933, § 38-119).

There was no reversible error shown in the trial court's exercise of the court's discretion to charge the jury on the rebuttable presumption arising from spoliation, as opposed to instructing the jury that the jury had to accept as true an estate administrator's description of a fatal assault on the administrator's decedent as there was no authority cited that mandated the former instruction in the circumstances. Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 715 S.E.2d 728, 2011 Ga. App. LEXIS 685 (2011) (decided under former O.C.G.A.§ 24-2-2).

Harmless error. — When the former statute was not applicable to the facts of a case, the court did not err in failing to give the former statute in a charge to the jury. Especially was this true when there was no written request for the charge. Shields v. Georgia Ry. & Elec. Co., 1 Ga. App. 172, 57 S.E. 980, 1907 Ga. App. LEXIS 181 (1907) (decided under former Civil Code 1895, § 5163).

Although the former statute was charged in a case where it was not applicable, in absence of harm or injury to one side, the charge did not require a reversal. Goldstein v. Ipswich Hosiery Co., 104 Ga. App. 500, 122 S.E.2d 339, 1961 Ga. App. LEXIS 730 (1961) (decided under former Code 1933, § 38-119).

Defendant admitted liability and did not produce the accident report and pictures of the truck involved; since the withheld evidence went to liability and not damages, any error in giving a "withheld evidence" charge to the jury was harmless. AT Sys. Southeast, Inc. v. Carnes, 272 Ga. App. 671, 613 S.E.2d 150, 2005 Ga. App. LEXIS 286 (2005) (decided under former O.C.G.A. § 24-4-22).

Exclusion of explanation harmless error. — Party should be permitted to explain the absence of witnesses which the evidence shows have knowledge of facts material to the case, so as to avoid the application of this statute, but the exclusion of testimony of explanation, if error, is harmless error, since the evidence of such witness or witnesses would be merely cumulative of the testimony of the complaining party, and which testimony the verdict of the jury shows the jury accepted. Gray v. General Fin. Corp., 108 Ga. App. 586, 134 S.E.2d 58, 1963 Ga. App. LEXIS 712 (1963) (decided under former Code 1933, § 38-119).

Illustrations

When husband of plaintiff was in court, summoned there by the plaintiff, and it appeared that he knew a great deal about the infirmities of his wife before the crash which was the subject of the suit, and about her condition after such collision, there was sufficient evidence to authorize a charge setting forth the principles of law set forth in the former statute. Price v. Whitley Constr. Co., 91 Ga. App. 257, 85 S.E.2d 528, 1954 Ga. App. LEXIS 907 (1954) (decided under former Code 1933, § 38-119).

Illustrations (Cont'd)

Since appellant father had knowledge of his own financial situation and of the needs of his son, who was living with him at that time, his failure to produce evidence of such to refute or amplify the appellee's showing, raised a rebuttable presumption that the appellee's showing was accurate. Ritchea v. Ritchea, 242 Ga. 524, 250 S.E.2d 435, 1978 Ga. LEXIS 1274 (1978) (decided under former Code 1933, § 38-119).

When eyewitness to homicide, and to the vital incidents and circumstances leading up thereto, was present in court, and the plaintiff nevertheless relied entirely upon evidence of a weaker and inferior nature, consisting of secondary evidence in the form of testimony as to the declarations made by the defendant, and which were not altogether certain or clear as to their proper import, the court was altogether justified in giving in charge the principle of law set forth by the former statute. Blanchard v. Ogletree, 41 Ga. App. 4, 152 S.E. 116, 1929 Ga. App. LEXIS 586 (1929) (decided under former Civil Code 1910, § 5749).

Written offer. — When plaintiff failed to introduce in evidence written offer in plaintiff's possession to buy defendant's property, but instead relied on oral testimony to prove such offer, the court erred in refusing defendant's instruction on drawing adverse inference on party's omission to produce evidence within the defendant's reach to repel charge against the defendant. Steinmetz v. Draper-Owens Co., 71 Ga. App. 814, 32 S.E.2d 417, 1944 Ga. App. LEXIS 236 (1944) (decided under former Code 1933, § 38-119).

Destruction of driver's log book raised a presumption against truck company-employer that driver was compelled to drive with insufficient rest. J.B. Hunt Transport, Inc. v. Bentley, 207 Ga. App. 250, 427 S.E.2d 499, 1992 Ga. App. LEXIS 1833 (1992), cert. denied, No. S93C0773, 1993 Ga. LEXIS 421 (Ga. Apr. 8, 1993) (decided under former O.C.G.A. § 24-2-2).

Witnesses listed on indictment. — When the state called as witnesses seven of the 11 persons whose names appeared on the indictment, and there was nothing in the record which disclosed that the other four witnessed the homicide or that those witnesses were present at the trial or even accessible to the state, no presumption unfavorable to the state would arise from a failure to introduce those individuals as witnesses. Lucear v. State, 221 Ga. 572, 146 S.E.2d 316, 1965 Ga. LEXIS 532 (1965) (decided under former Code 1933, § 38-119).

Inability to question defense witnesses precludes judgment. — In a negligence action, the court erred in granting summary judgment before the plaintiff was able to question two key defense witnesses who avoided plaintiff's discovery attempts, but who filed affidavits in support of the defendant's motion. This judgment deprived the plaintiff of an opportunity to develop proof which may have well given rise to triable issues of fact, and also overlooked the rule that, when a party fails to produce evidence, the charge or claim against the party is presumed to be well founded. Shipley v. Handicaps Mobility Sys., 222 Ga. App. 101, 473 S.E.2d 533 (decided under former O.C.G.A. § 24-2-2).

In petition for custody, former husband's evidence charging the wife with misconduct and illicit relations with a named individual did not require the wife to procure from such individual a statement that the charge was not true. Waller v. Waller, 202 Ga. 535, 43 S.E.2d 535, 1947 Ga. LEXIS 461 (1947) (decided under former Code 1933, § 38-119).

In a medical malpractice action, the court did not err in refusing to instruct the jury with regard to spoliation of evidence by the defendant physician since it was undisputed that the physician's chart was missing vital signs data for the 15-minute period during which the physician was attempting to provide the plaintiff's decedent with oxygen and that a monitor recorded this information, but the plaintiff did not point to any evidence which suggested what might have been proven with the missing data and, when questioned at trial, the plaintiff's medical expert acknowledged that when the expert reviewed the case and developed an opinion, the expert did not have any problem with the defendant's charting. Johnson v. Riv-

erdale Anesthesia Assocs., P.C., 249 Ga. App. 152, 547 S.E.2d 347, 2001 Ga. App. LEXIS 385 (2001), aff'd, 275 Ga. 240, 563 S.E.2d 431, 2002 Ga. LEXIS 383 (2002) (decided under former O.C.G.A. § 24-4-22).

Trial court did not err in failing to instruct the jury on the law pertaining to spoliation of evidence because there was no evidence that the doctor had notice that the patient and the patient's spouse were contemplating litigation when the manufacturer replaced the device used on the patient. Hand v. S. Ga. Urology Ctr., P.C., 2015 Ga. App. LEXIS 121.

In a medical malpractice case involving the birth of a baby with serious defects due to lack of oxygen, in which the hospital destroyed the paper strips containing records of the fetal heart monitoring pursuant to its usual practice, the trial court could consider whether the hospital reasonably should have anticipated litigation, even without notice of a claim, considering the seriousness of the injury, the likelihood of litigation arising, and other factors. Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596, 2015 Ga. LEXIS 485 (2015).

Trial court did not err in failing to instruct the jury on the law pertaining to spoliation of evidence because there was no evidence that the doctor had notice that the patient and the patient's spouse were contemplating litigation when the manufacturer replaced the device used on the patient. Hand v. S. Ga. Urology Ctr., P.C., 332 Ga. App. 148, 769 S.E.2d 814, 2015 Ga. App. LEXIS 265 (2015), cert. denied, No. S15C1304, 2015 Ga. LEXIS 594 (Ga. Sept. 8, 2015), overruled in part, Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596, 2015 Ga. LEXIS 485 (2015).

In a Dram Shop Act suit, given proof of spoliation under former O.C.G.A. § 24-4-22, the trial court erred in granting summary judgment to an injured party's guardian as the tavern's manager was aware of the potential for litigation and failed to preserve whatever videotaped evidence might have been captured as to whether one of the tavern's intoxicated patron's would soon be driving; hence, a rebuttable presumption arose against the tavern that the evidence destroyed would have been harmful to the tavern, rendering summary judgment inappropriate. Baxley v. Hakiel Indus., 282 Ga. 312, 647 S.E.2d 29, 2007 Ga. LEXIS 471 (2007) (decided under former O.C.G.A. § 24-4-22).

Workers' compensation. — When an employer in a workers' compensation action offers no evidence, and testimony of the employee further shows that the employer's doctors examined the employee and were fully conversant with the employee's physical condition, the presumption arises that if the employer had produced the doctors as witnesses, the doctors' testimony would have corroborated that of the employee. GMC v. Craig, 91 Ga. App. 239, 85 S.E.2d 441, 1954 Ga. App. LEXIS 904 (1954) (decided under former Code 1933, § 38-119).

When the defendant offered no testimony in defendant's own behalf in a workers' compensation case and failed to produce defendant's employment records although the plaintiff had issued a subpoena in an effort to obtain those records, a presumption adverse to the defendant was authorized. 105 Ga. App. 408, 124 S.E.2d 655 (decided under former Code 1933, § 38-119).

Material witness in slip and fall case. — In a slip and fall case, after the defendant submitted an affidavit stating the store policy on sweeping, but did not submit affidavits from the employees who actually carried out the purported inspections and sweeping on the date in question, former O.C.G.A. § 24-4-22 allowed an inference to be drawn that the employees' testimony would show that the employees did have actual or constructive knowledge of the hazard but negligently refused to remove the hazard. Straughter v. J.H. Harvey Co., 232 Ga. App. 29, 500 S.E.2d 353 (decided under former O.C.G.A. § 24-4-22).

Recording over videotape justified sanction. — In a premises liability case brought by a customer against a retailer, the trial court did not exceed the court's authority in excluding testimony about a videotape sought to be admitted by the retailer that would have purportedly contradicted the customer's and the customer's parent's recollections of what had

Illustrations (Cont'd)

been recorded with regard to the customer being carjacked and shot in the retailer's parking lot as the retailer was on notice, or should have been aware, that the customer was contemplating litigation based on correspondence to the retailer. The retailer knew of the importance of the tape, which depicted the robbery; failed to follow the retailer's own policy as to retaining tapes for seven years; and the trial court was within the court's discretion to have been "disturbed" that the retailer destroyed the tape by having other recordings made on top of the recording of the incident. Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 659 S.E.2d 905, 2008 Ga. App. LEXIS 372 (2008), cert. denied, No. S08C1311, 2008 Ga. LEXIS 703 (Ga. Sept. 8, 2008) (decided under former O.C.G.A.§ 24-4-22).

E-mail equally available to both parties. — Permittee alleged the Environmental Protection Division of the Georgia Department of Natural Resources (EPD) violated former O.C.G.A. § 24-4-22 by intentionally destroying email correspondence between the permittee and EPD which was favorable to the former. As the permittee was equally in a position to produce the evidence since the alleged email exchange took place between the permittee and EPD, it was not prejudiced as a result of the alleged destruction of the evidence. Agri-Cycle LLC v. Couch, 284 Ga. 90, 663 S.E.2d 175, 2008 Ga. LEXIS 546 (2008) (decided under former O.C.G.A.§ 24-4-22).

Failure to report elevator accident. — Trial court erred in granting a directed verdict to a landlord in tenants' claims that the tenants were injured in a malfunctioning elevator. The landlord failed to report the incident and inspect the elevator as required by O.C.G.A. § 8-2-106, giving rise to the spoliation presumption under former O.C.G.A. § 24-4-22 that the evidence would have favored the tenants. Beach v. B.F. Saul Prop. Co., 303 Ga. App. 689, 694 S.E.2d 147, 2010 Ga. App. LEXIS 347 (2010) (decided under former O.C.G.A.§ 24-4-22).

Charging former provisions authorized in the following cases. — See Fountain v. Fuller E. Callaway Co., 144 Ga. 550, 87 S.E. 651, 1916 Ga. LEXIS 770 (1916) (decided under former Civil Code 1910, § 5749); Cocroft v. Cocroft, 158 Ga. 714, 124 S.E. 346, 1924 Ga. LEXIS 331 (1924) (decided under former Civil Code 1910, § 5749); Layfield v. O'Neill, 37 Ga. App. 265, 139 S.E. 924, 1927 Ga. App. LEXIS 617 (1927) (decided under former Civil Code 1910, § 5749); Murray v. Fitzgerald Convenient Ctrs., Inc., 239 Ga. App. 799, 521 S.E.2d 915 (decided under former O.C.G.A. § 24-4-22).

Sanction for spoliation of evidence was erroneous. — In a personal injury case, the trial court erred by imposing the most extreme sanction of striking the defendants' answer as a sanction for spoliation of evidence under former O.C.G.A. § 24-4-22 that included logbooks, data, and the results of an investigation. Because the plaintiff cited no evidence showing that the allegedly destroyed hard brake information was ever available and the defendants' provided expert testimony showing that the data was not available, the trial court relied on erroneous findings in fashioning the appropriate sanction. Sentry Select Ins. Co. v. Treadwell, 318 Ga. App. 844, 734 S.E.2d 818, 2012 Ga. App. LEXIS 1013 (2012) (decided under former O.C.G.A. § 24-4-22).

RESEARCH REFERENCES

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29 Am. Jur. 2d, Evidence, § 259 et seq.

Am. Jur. Proof of Facts.

Intentional Spoliation of Evidence, 18 POF3d 515.

C.J.S.

31A C.J.S., Evidence, § 239.

ALR.

Validity of statute making concealment of or failure to produce books or papers presumptive evidence, 4 A.L.R. 471.

Constitutionality of statutes or ordinances making one fact presumptive or prima facie evidence of another, 51 A.L.R. 1139; 86 A.L.R. 179; 162 A.L.R. 495.

Adverse inference from failure of party to produce available witness or evidence,

as affirmative or substantive proof, 70 A.L.R. 1326.

Presumption of death as evidence, 115 A.L.R. 404.

Presumption or inference from party's failure to produce witnesses within his control, as affected by his introduction of some evidence on the matter in question, 135 A.L.R. 1375.

Presumption and burden of proof as regards continuance or revocation of will produced for probate, 165 A.L.R. 1188.

Admissibility of evidence of party's refusal to permit examination or inspection of property or person, 175 A.L.R. 234.

Relationship between party and witness as giving rise to or affecting presumption or inference from failure to produce or examine witness, 5 A.L.R.2d 893.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 A.L.R.3d 19.

Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption, 5 A.L.R.3d 100.

Hospital's liability for injuries sustained by patient as a result of restraints imposed on movement, 25 A.L.R.3d 1450.

Propriety and prejudicial effect of comment or instruction by court with respect to party's refusal to permit introduction of privileged testimony, 34 A.L.R.3d 775.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases, 76 A.L.R.4th 812.

Adverse presumption or inference based on party's failure to produce or question examining doctor—modern cases, 77 A.L.R.4th 463.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney—modern cases, 78 A.L.R.4th 571.

Adverse presumption or inference based on party's failure to produce or examine witness who was occupant of vehicle involved in accident—modern cases, 78 A.L.R.4th 616.

Adverse presumption or inference based on party's failure to produce or examine spouse — modern cases, 79 A.L.R.4th 694.

Adverse presumption or inference based on party's failure to produce or examine friend—modern cases, 79 A.L.R.4th 779.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases, 80 A.L.R.4th 337.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel — modern cases, 81 A.L.R.4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue — modern cases, 81 A.L.R.4th 939.

Effect of spoliation of evidence in tort actions other than product liability actions, 121 A.L.R.5th 157.

Electronic spoliation of evidence, 3 A.L.R.6th 13.

24-14-23. Presumption from failure to answer business letter.

In the ordinary course of business, when good faith requires an answer, it is the duty of the party receiving a letter from another to answer within a reasonable time. Otherwise, the party shall be presumed to admit the propriety of the acts mentioned in the letter of the party's correspondent and to adopt them.

History.

Code 1981, § 24-14-23, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-4-23, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in McLendon v. Wilson, Callaway & Co., 52 Ga. 42 (1874) and Bray & Bro. v. Gunn, 53 Ga. 144 (1874).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5741, former Code 1933, § 38-120, and former O.C.G.A. § 24-4-23 are included in the annotations for this Code section.

Principle of former Code 1933, § 38-120 was the same as that expressed more generally in former Code 1933, § 38-409 (see now O.C.G.A. § 24-8-801): "acquiescence or silence, when the circumstances require an answer or denial or other conduct, may amount to an admission." Metropolitan Life Ins. Co. v. Shalloway, 151 F.2d 548, 1945 U.S. App. LEXIS 2991 (5th Cir. 1945) (decisions under former Code 1933, § 38-120).

Former O.C.G.A. § 24-4-23 was applicable only when two parties have carried on mutual correspondence in reference to a particular matter, and one of the parties had written a letter to the other making statements concerning a subject of which the latter had knowledge, and which the latter would naturally deny if true. Defendants could not rely upon their unilateral actions to establish a mutual correspondence. Smith v. Freeport Kaolin Co., 687 F. Supp. 1550, 1988 U.S. Dist. LEXIS 4913 (M.D. Ga. 1988) (decisions under former O.C.G.A. § 24-4-23).

Question was whether the evidence showed a due course of business as to warrant the application of former O.C.G.A. § 24-4-23; the phrase "due course of business" was construed to apply to those cases where two parties have carried on a mutual correspondence in reference to a particular matter, and one of the parties wrote a letter concerning a matter which the other would naturally deny if not true. Godwin v. Caldwell, 231 Ga. App. 523, 500 S.E.2d 49 (decisions under former O.C.G.A. § 24-4-23).

Rebuttable presumption of fact. — Presumption of this former statute was not an irrebuttable presumption of law, but one of fact, and the failure to reply was subject to explanation. Metropolitan Life Ins. Co. v. Shalloway, 151 F.2d 548, 1945 U.S. App. LEXIS 2991 (5th Cir. 1945) (decisions under former Code 1933, § 38-120); Whitaker v. Paden, 78 Ga. App. 145, 50 S.E.2d 774, 1948 Ga. App. LEXIS 702 (1948); (decisions under former Code 1933, § 38-120); Georgia Health Care, Inc. v. Loeb, 151 Ga. App. 350, 259 S.E.2d 734, 1979 Ga. App. LEXIS 2592 (1979). (decisions under former Code 1933, § 38-120).

Presumption arising from a failure to answer a letter was not a presumption of law, but one of fact, and subject to explanation. Godwin v. Caldwell, 231 Ga. App. 523, 500 S.E.2d 49 (decisions under former O.C.G.A. § 24-4-23).

Excuses for not answering. — Fact that plaintiff failed to answer a letter written to plaintiff by agent of an insurance company being in evidence, it was competent for plaintiff to explain why plaintiff did not answer, though a part of the explanation was that plaintiff's counsel advised plaintiff not to answer. Travelers Ins. Co. v. Sheppard, 85 Ga. 751, 12 S.E. 18, 1890 Ga. LEXIS 145 (1890) (decisions under former law).

An exchange of several letters was not always necessary to establish mutual correspondence; thus, plaintiff contractor's letter which mentioned outstanding invoices and which followed two letters from defendant concerning problems with the contractor's product and requesting service was sent in the ordinary course of business and a charge under former O.C.G.A. § 24-4-23 was warranted. Crotts Enters., Inc. v. John Payne Co., 219 Ga. App. 173, 464 S.E.2d 844, 1995 Ga. App. LEXIS 1006 (1995) (decisions under former O.C.G.A. § 24-4-23).

Silence regarding terms of agreement. — Physician had a duty and obligation to respond to limitations on the physician's privileges set forth in an agreement with a hospital, and when the physician silently exercised the privileges for several years, the physician waived the physician's right to insist on compliance with other procedural requirements pertaining to the physician's termination. St. Mary's Hosp. v. Cohen, 216 Ga. App. 761, 456 S.E.2d 79, 1995 Ga. App. LEXIS 278 (1995), cert. denied, No. S95C1086,

1995 Ga. LEXIS 746 (Ga. May 25, 1995) (decisions under former O.C.G.A. § 24-4-23).

Construction of lease agreement. — When a lessee informed the lessor, by means of three annual letters, of the construction the lessee was placing on a provision of the lease agreement, and received no reply from the lessor, the lessor was precluded from relying on a different interpretation, since it was incumbent upon the lessor to advise the lessee that the lessor disagreed with the lessee's construction of the agreement. Wiggins v. Engelhard Minerals & Chems. Corp., 328 F. Supp. 33, 1970 U.S. Dist. LEXIS 11677 (M.D. Ga. 1970), aff'd, 443 F.2d 1358, 1971 U.S. App. LEXIS 9705 (5th Cir. 1971) (decisions under former Code 1933, § 38-120).

Settlement agreement. — Trial court erred in granting the insureds' motion to enforce a settlement agreement a parent and an administrator allegedly reached with an insurer because the insurer's tender was not sufficient to constitute acceptance of the settlement offer; the attorney for the mother and the administrator was not silent but stated the intent to consult with the parent and the administrator, the attorney committed to no deadline for responding, and the terms of the offer were in writing and equally known to all parties. Kitchens v. Ezell, 315 Ga. App. 444, 726 S.E.2d 461, 2012 Ga. App. LEXIS 290 (2012), cert. denied, No. S12C1386, 2012 Ga. LEXIS 805 (Ga. Oct. 15, 2012) (decisions under former O.C.G.A.§ 24-4-23).

Letter memorializing a conversation, to which recipient failed to respond, was admissible as an admission by silence. — Trial court did not err in allowing an attorney to read a letter memorializing a conversation between the attorney and a decedent because the out-of-court statement of the decedent referenced in the letter was admissible as an admission by silence of the executor when the attorney mailed a package containing closing documents to the executor, including a receipt the decedent had executed, and the executor mailed a check to the attorney based on the erroneous assumption that the executor needed to do so in order to pay off the advance that had been received and was referenced in the receipt; the attorney mailed the letter to the executor, returned the check, and set forth the conversation with the decedent concerning the intent behind the receipt, and the executor's failure to respond could be construed as an acquiescence to the construction of the receipt set forth in the letter. Jerkins v. Jerkins, 300 Ga. App. 703, 686 S.E.2d 324, 2009 Ga. App. LEXIS 1251 (2009) (decisions under former O.C.G.A. § 24-4-23).

Instructions. — It was not error for the court to fail to give in charge to the jury the provisions of the former statute, there having been no timely written request of such instructions. White Crown Fruit Jar Co. v. Cox Co., 19 Ga. App. 195, 91 S.E. 245, 1917 Ga. App. LEXIS 60 (1917) (decisions under former Civil Code 1910, § 5741).

Trial court properly charged a jury regarding the former O.C.G.A. § 24-3-36 (see now O.C.G.A. § 24-8-801) evidentiary presumption arising from a limited liability company's (LLC's) agent's failure to reply to a corporation's invoices because the LLC admitted receiving some of the corporation's goods and services, only disputing the amount due, and the failure to respond to an invoice was not a declaration against the LLC's interest pursuant to O.C.G.A. § 10-6-64; in addition, the charge was supported by former O.C.G.A. § 24-4-23. Forrest Cambridge Apts., LLC v. Redi-Floors, Inc., 295 Ga. App. 840, 673 S.E.2d 318, 2009 Ga. App. LEXIS 99 (2009) (decisions under former O.C.G.A. § 24-4-23).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, § 815.

ALR.

Admissibility in favor of writer of unanswered letter not part of mutual correspondence, 8 A.L.R. 1163; 34 A.L.R. 560; 55 A.L.R. 460.

Presumption as to delivery of letter

from mailing other than at post office or in street letter box, 63 A.L.R. 931.

Character and sufficiency of evidence to show that letter was mailed, 86 A.L.R. 541.

Rebuttal of presumption of receipt of letter properly mailed and addressed, 91 A.L.R. 161.

24-14-24. Presumption of occupancy of railroad right of way.

In any proceeding to establish a right, title, or interest in or to real property that is a part of a railroad right of way, including a right of ingress or egress, where such proceeding is based upon occupancy of the railroad right of way by a person or entity other than the railroad corporation or railroad company, there shall be a presumption that any such occupancy of the railroad right of way is with the permission of the railroad corporation or railroad company. Such presumption may be rebutted.

History.
Code 1981, § 24-14-24, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-14-25. Presumption of payment of check.

(a) As used in this Code section:

(1) "Bank" means any person engaged in the business of banking and includes, in addition to a commercial bank, a savings and loan association, savings bank, or credit union.

(2) "Check" means a draft, other than a documentary draft, payable on demand and drawn on a bank, even though it is described by another term, such as "share draft" or "negotiable order of withdrawal."

(b) In any dispute concerning payment by means of a check, a duplicate of the check produced in accordance with Code Section 24-10-1003, together with the original bank statement that reflects payment of the check by the bank on which it was drawn or a duplicate thereof produced in the same manner, shall create a presumption that the check has been paid.

History.
Code 1981, § 24-14-25, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-14-26. Estoppels defined; enumeration generally.

(a) Conclusive presumptions of law are termed estoppels; averments to the contrary of such presumptions shall not be allowed. Estoppels are not generally favored.

(b) Estoppels include presumptions in favor of:

(1) A record or judgment unreversed;

(2) The proper conduct of courts and judicial officers acting within their legitimate spheres;

(3) The proper conduct of other officers of the law after the lapse of time has rendered it dangerous to open the investigation of their acts in regard to mere formalities of the law;

(4) Ancient deeds and other instruments more than 30 years old, when they come from proper custody and possession has been held in accordance with them;

(5) Recitals in deeds, except payment of purchase money, as against a grantor, sui juris, acting in his or her own right, and his or her privies in estate, in blood, and in law;

(6) A landlord's title as against his or her tenant in possession;

(7) Solemn admissions made in judicio; or

(8) Admissions upon which other parties have acted, either to their own injury or to the benefit of the persons making the admissions.

Estoppels also include all similar cases where it would be more unjust and productive of evil to hear the truth than to forbear investigation.

History.
Code 1981, § 24-14-26, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.
For article on the effect of judicial estoppel on nolo contendere plea, see 13 Ga. L. Rev. 723 (1979).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3700, former Code 1873, § 3753, former Code 1882, § 3753, former Civil Code 1895, § 5150, former Civil Code 1910, § 5736, former Code 1933, § 38-114, and former O.C.G.A. § 24-4-24 are included in the annotations for this Code section.

An estoppel is a preclusion in law, which prevents a person from alleging or denying a fact, in consequence of the person's own previous act, allegation, or de-

General Consideration (Cont'd)

nial of a contrary tenor. Davis v. Collier & Beers, 13 Ga. 485, 1853 Ga. LEXIS 115 (1853) (decided under former law).

Presumptions of law are sometimes conclusive, and an averment to the contrary will not be allowed. These are termed estoppels. Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787, 1924 Ga. App. LEXIS 819 (1924) (decided under former Civil Code 1910, § 5736).

Difference between waiver and estoppel is slight but there is a difference. Boston Ins. Co. v. Barnes, 120 Ga. App. 585, 171 S.E.2d 626, 1969 Ga. App. LEXIS 869 (1969) (decided under former Code 1933, § 38-114).

Estoppels rarely resorted to. — Estoppels are never resorted to, except when it would be more unjust and more productive of evil to hear the truth than to forbear the investigation. Patterson v. Collier, 75 Ga. 419, 1885 Ga. LEXIS 148 (1885) (decided under former Code 1882, § 3753); Globe & Rutgers Fire Ins. Co. v. Atlantic & Gulf Shipping Co., 51 Ga. App. 904, 181 S.E. 310, 1935 Ga. App. LEXIS 494 (1935) (decided under former Code 1933, § 38-114); Hollins v. State, 133 Ga. App. 183, 210 S.E.2d 354, 1974 Ga. App. LEXIS 1010 (1974) (decided under former Code 1933, § 38-114).

Estoppels are not favored. Wilkinson & Wilson v. Thigpen, 71 Ga. 497, 1883 Ga. LEXIS 206 (1883) (decided under former Code 1882, § 3753); Corporation of Royal Exch. Assurance v. Franklin, 158 Ga. 644, 124 S.E. 172, 1924 Ga. LEXIS 320 (1924) (decided under former Civil Code 1910, § 5736); Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787, 1924 Ga. App. LEXIS 819 (1924) (decided under former Civil Code 1910, § 5736).

Essential ingredient of estoppel is detriment or prejudice to one who asserts the estoppel. There must be inducement to change one's position for the worse. United States v. Ferguson, 409 F. Supp. 393, 1975 U.S. Dist. LEXIS 11415 (S.D. Ga. 1975), aff'd, 529 F.2d 999, 1976 U.S. App. LEXIS 12012 (5th Cir. 1976) (decided under former Code 1933, § 38-114).

Reliance by invoking party. — In order to create an estoppel as authorized, the evidence must show that the party relying on such estoppel acted on the conduct of the opposite party to the relying party's detriment. Swift & Co. v. Hall, 94 Ga. App. 239, 94 S.E.2d 145, 1956 Ga. App. LEXIS 515 (1956) (decided under former Code 1933, § 38-114); State Farm Mut. Auto. Ins. Co. v. Penrow, 142 Ga. App. 463, 236 S.E.2d 275, 1977 Ga. App. LEXIS 1656 (1977) (decided under former Code 1933, § 38-114).

Representation inducing injury. — An estoppel arises when one makes representations to another concerning a matter, about which the other acts to one's injury or to the benefit of the person making the representations. Gostin v. Scott, 80 Ga. App. 630, 56 S.E.2d 778, 1949 Ga. App. LEXIS 891 (1949) (decided under former Code 1933, § 38-114); Usry v. Hadden, 87 Ga. App. 710, 75 S.E.2d 275, 1953 Ga. App. LEXIS 835 (1953) (decided under former Code 1933, § 38-114); Walker v. Sutton, 222 Ga. App. 638, 476 S.E.2d 34 (decided under former O.C.G.A. § 24-4-24).

Good faith and reasonable diligence. — Since the whole doctrine of estoppel is a creature of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence; otherwise, no equity will arise in that party's favor. Bachrodt Realty Corp. v. Walker, 237 Ga. 696, 229 S.E.2d 455, 1976 Ga. LEXIS 1357 (1976) (decided under former Code 1933, § 38-114).

Strangers not bound. — Estoppels must be mutual. Strangers can neither take advantage of, nor be bound by an estoppel. Its binding effect is between the immediate parties, their privies in blood, in law and by estate. Howard v. Perkins, 229 Ga. 279, 191 S.E.2d 46, 1972 Ga. LEXIS 581 (1972) (decided under former Code 1933, § 38-114).

Legislative act. — Party is not estopped from denying any fact which is recited in a legislative act. Dougherty v. Bethune, 7 Ga. 90, 1849 Ga. LEXIS 103 (1849) (decided under former Code 1933, § 38-114); Thornton v. Lane, 11 Ga. 459,

1852 Ga. LEXIS 64 (1852) (decided under former Code 1933, § 38-114).

Unconstitutional act. — As between individuals, when no question of the general welfare of society or public policy is involved, the principle of estoppel runs throughout the law. Although an act be unconstitutional and void, it will operate as an estoppel upon the party applying for the estoppel, and procuring the estoppel's passage and accepting the estoppel's benefits. Christopher v. Christopher, 198 Ga. 361, 31 S.E.2d 818, 1944 Ga. LEXIS 425 (1944) (decided under former Code 1933, § 38-114).

Statute of frauds. — Summary judgment in favor of a psychiatrist in a consultant's breach of an oral contract claim was proper as the oral assumption by the psychiatrist of the debts of the medical practice that the psychiatrist purchased, including the consultant's fees, was barred by the Statute of Frauds, O.C.G.A. § 13-5-30(2), because it was not in writing; further, as it was conceded that the agreement was secondary in nature and not an original undertaking, claims that it was established pursuant to former O.C.G.A. § 24-4-24 lacked merit. Grumet v. Bunt, 279 Ga. App. 728, 632 S.E.2d 486, 2006 Ga. App. LEXIS 690 (2006) (decided under former O.C.G.A. § 24-4-24).

Waiver or estoppel defense is not available in a case involving only violations of Georgia and/or federal securities laws. Jones v. Miles, 656 F.2d 103, 1981 U.S. App. LEXIS 18102 (5th Cir. 1981) (decided under former Code 1933, § 38-114).

Estoppel by Judgment

Scope of estoppel. — Doctrine of estoppel by judgment is applied only as to such matters within the scope of the pleadings in the previous litigation as necessarily had to be adjudicated in order for the previous judgment or decree to be rendered, or as to such matters within the scope of the pleadings as might or might not have been adjudicated, but which are shown by aliunde proof to have been actually litigated and determined. Slaughter v. Slaughter, 190 Ga. 229, 9 S.E.2d 70, 1940 Ga. LEXIS 442 (1940) (decided under former Code 1933, § 38-114); Mimms v. Sisk Decorating Co., 156 Ga. App. 572, 275 S.E.2d 148, 1980 Ga. App. LEXIS 3127 (1980) (decided under former Code 1933, § 38-114).

Estoppel by judgment occurs only as to such matters as were necessarily or actually adjudicated in the former litigation. Greyhound Lines v. Cobb County, 523 F. Supp. 422, 1981 U.S. Dist. LEXIS 14989 (N.D. Ga. 1981), aff'd, 681 F.2d 1327, 1982 U.S. App. LEXIS 16926 (11th Cir. 1982) (decided under former O.C.G.A. § 24-14-26).

Res judicata and estoppel distinguished. — Under the doctrine of res judicata, whenever there has been a judgment by a court of competent jurisdiction in a former litigation between the same parties, based upon the same cause of action as a pending litigation, the litigants are bound to the extent of all matters put in issue or which under the rules of law might have been put in issue by the pleadings in the previous litigation. A somewhat different rule applies in regard to the doctrine of estoppel by judgment since the latter doctrine has reference to previous litigation between the same parties based upon a different cause of action. In the latter case, there is an estoppel by judgment only as to such matters as were necessarily or actually adjudicated in the former litigation; that is to say, there is an estoppel by judgment only as to such matters within the scope of the previous pleadings as necessarily had to be adjudicated in order for the previous judgment to be rendered, or as to such matters, within the scope of those pleadings, as might or might not have been adjudicated, but which are shown by aliunde proof to have been actually litigated and determined. Harvey v. Wright, 80 Ga. App. 232, 55 S.E.2d 835, 1949 Ga. App. LEXIS 812 (1949) (decided under former Code 1933, § 38-114).

To whom applicable. — Estoppels apply only as between parties and privies to the suit or litigation. Wilkinson & Wilson v. Thigpen, 71 Ga. 497, 1883 Ga. LEXIS 206 (1883) (decided under former Code 1882, § 3753).

Not binding on nonparty. — One who was physically present at a trial, but took no part therein, was not bound by a judg-

Estoppel by Judgment (Cont'd)

ment in a case to which one was not a party. Calhoun v. Williamson, 76 Ga. App. 91, 45 S.E.2d 87, 1947 Ga. App. LEXIS 378 (1947) (decided under former Code 1933, § 38-114).

Validity of conviction and sentence. — There is a presumption in favor of the validity of a conviction and sentence imposed upon the accused and the burden of overcoming that presumption in a habeas corpus proceeding is on the accused. Cobb v. Dutton, 222 Ga. 11, 148 S.E.2d 399, 1966 Ga. LEXIS 384 (1966) (decided under former Code 1933, § 38-114); Dutton v. Parker, 222 Ga. 532, 150 S.E.2d 833, 1966 Ga. LEXIS 544 (1966) (decided under former Code 1933, § 38-114); Dutton v. Morris, 222 Ga. 595, 151 S.E.2d 125, 1966 Ga. LEXIS 569 (1966) (decided under former Code 1933, § 38-114); Beavers v. Smith, 227 Ga. 344, 180 S.E.2d 717, 1971 Ga. LEXIS 698 (1971) (decided under former Code 1933, § 38-114); Smith v. Brown, 228 Ga. 584, 187 S.E.2d 142, 1972 Ga. LEXIS 854 (1972) (decided under former Code 1933, § 38-114); Brown v. Holland, 228 Ga. 628, 187 S.E.2d 246, 1972 Ga. LEXIS 869 (1972) (decided under former Code 1933, § 38-114); Burton v. Caldwell, 228 Ga. 795, 187 S.E.2d 900, 1972 Ga. LEXIS 911 (1972) (decided under former Code 1933, § 38-114); Caldwell v. Beard, 232 Ga. 701, 208 S.E.2d 564, 1974 Ga. LEXIS 1062 (1974) (decided under former Code 1933, § 38-114).

Absence of transcript on appeal. — When the defendant does not request that the transcript of evidence of the trial be sent up on appeal, the verdict and judgment are presumed to be valid. Hiller v. Culbreth, 139 Ga. App. 351, 228 S.E.2d 374, 1976 Ga. App. LEXIS 1799 (1976) (decided under former Code 1933, § 38-114).

Criminal defendant's absence during trial. — Defendant's testimony that defendant was not present during defendant's trial but was in the judge's office was not sufficient to overcome the presumption in favor of the conviction as the able counsel representing the defendant may have with defendant's consent or in defendant's presence waived defendant's presence in the courtroom, which the defendant could have done; or the prisoner may have voluntarily absented oneself from the courtroom during the trial, in which case the defendant would not be allowed to take advantage of defendant's own laches. Dutton v. Morris, 222 Ga. 595, 151 S.E.2d 125, 1966 Ga. LEXIS 569 (1966) (decided under former Code 1933, § 38-114).

Application of judicial estoppel in criminal prosecution. — In a criminal prosecution, application of the doctrine of judicial estoppel was inappropriate; further, in opposing the defendant's motion for mistrial based on statements made by two prospective jurors regarding the sentences the perpetrators had received, the state did not adopt a contrary position to the state's motion in limine because the state did not solicit or capitalize on the prospective jurors' comments. Purnell v. State, 355 Ga. App. 899, 843 S.E.2d 637, 2020 Ga. App. LEXIS 287 (2020).

Burden of proof. — When a judgment is relied on to establish an estoppel, the burden is on the party relying on the former judgment to prove that the judgment is valid, and that the particular matter in controversy was necessarily or actually determined in the former litigation. Hunter v. Associated Mtg. Cos., 183 Ga. 506, 188 S.E. 700, 1936 Ga. LEXIS 606 (1936) (decided under former Code 1933, § 38-114); Gormley v. Cleveland, 187 Ga. 457, 200 S.E. 793, 1939 Ga. LEXIS 407 (1939) (decided under former Code 1933, § 38-114); South Am. Managers, Inc. v. Reeves, 220 Ga. 493, 140 S.E.2d 201, 1965 Ga. LEXIS 545 (1965) (decided under former Code 1933, § 38-114); Allen v. Smith, 223 Ga. 265, 154 S.E.2d 605, 1967 Ga. LEXIS 491 (1967) (decided under former Code 1933, § 38-114).

Admissibility of decree. — When a decree is offered in evidence to establish any particular state of facts, or as an adjudication upon the subject matter, such decree is admissible only when accompanied by the entire record of the suit in which the decree was rendered. Holcombe v. Jones, 197 Ga. 825, 30 S.E.2d 903, 1944 Ga. LEXIS 352 (1944) (decided under former Code 1933, § 38-114).

Recital in final order. — When the final order upon an appraiser's return

recites that notice has been published "as required by law," and the entire record with respect to the year's support is on its face full and complete, the recital must be accepted as true, in the absence of aliunde evidence conclusively showing that it is in fact untrue. Southern Oldsmobile Co. v. Baker, 25 Ga. App. 580, 103 S.E. 826, 1920 Ga. App. LEXIS 88 (1920) (decided under former Civil Code 1910, § 5736).

Consent decree. — Decree made with the consent and at the instance of a party cannot be set aside by the party by bill of review, unless, by clerical error something has been inserted therein as by consent which had not been consented to. Murphy v. Mayor of Savannah, 73 Ga. 263, 1884 Ga. LEXIS 113 (1884) (decided under former Code 1882, § 3753).

Mandamus order. — Under the doctrine of estoppel by judgment, a mandamus order requiring the defendants to issue to the plaintiff a permit to operate taxicabs, which on review by the Supreme Court was affirmed, is conclusive against the defendants in a subsequent proceeding for contempt. Settle v. McWhorter, 203 Ga. 93, 45 S.E.2d 210, 1947 Ga. LEXIS 553 (1947) (decided under former Code 1933, § 38-114).

Workers' compensation. — Doctrines of res judicata and estoppel by judgment are applicable to awards of the State Board of Workers' Compensation on all questions of fact in matters in which the board has jurisdiction. Mimms v. Sisk Decorating Co., 156 Ga. App. 572, 275 S.E.2d 148, 1980 Ga. App. LEXIS 3127 (1980) (decided under former Code 1933, § 38-114).

Rescission of contract of sale. — When the petition under consideration in the second suit arising from the same occurrence has already been held by the Court of Appeals on a previous appeal to state a cause of action for rescission of a contract of sale of a car based upon the fraud and deceit of the defendant, which judgment was not vacated, reversed, or modified and when the contents of the petition in the second suit are substantially the same as that of the previous action in which the plaintiff was nonsuited, it is error to dismiss the case on the ground that the plaintiff has made inconsistent elections as to the affirmance or repudiation of the contract in issue. McBurney v. Woodward, 86 Ga. App. 629, 72 S.E.2d 89, 1952 Ga. App. LEXIS 1023 (1952) (decided under former Code 1933, § 38-114).

Name of firm. — Defendants were estopped from denying the character and name under which the defendants traded and obtained credit after judgment had been rendered against the defendants covering the transaction. Georgia Ice Co. v. Porter & Meakin, 70 Ga. 637, 1883 Ga. LEXIS 388 (1883) (decided under former Code 1882, § 3753).

Regularity of judicial proceedings. — There is a presumption in favor of the regularity and legality of all proceedings in the superior court. Johnson v. Cleveland, 131 Ga. App. 560, 206 S.E.2d 704, 1974 Ga. App. LEXIS 1470 (1974) (decided under former Code 1933, § 38-114); Bennett v. Adel Banking Co., 144 Ga. App. 282, 241 S.E.2d 23, 1977 Ga. App. LEXIS 2676 (1977) (decided under former Code 1933, § 38-114); Key v. State, 147 Ga. App. 800, 250 S.E.2d 527, 1978 Ga. App. LEXIS 2953 (1978) (decided under former Code 1933, § 38-114).

Judicial officer acting legally. — Presumption of law is that a judicial officer, or court, has acted legally within the officer's proper sphere. Nashville, C. & St. L. Ry. v. Ham, 78 Ga. App. 403, 50 S.E.2d 831, 1948 Ga. App. LEXIS 746, 1948 Ga. App. LEXIS 747 (1948) (decided under former Code 1933, § 38-114).

Presumption of proper conduct of trial judge's duties. — In the absence of any evidence to the contrary, it is presumed that a trial judge's conduct in performing the judge's official duties was proper. Riggins v. State, 159 Ga. App. 791, 285 S.E.2d 579, 1981 Ga. App. LEXIS 2814 (1981) (decided under former Code 1933, § 38-114).

Juror excused properly. — In the absence of any evidence in the record as to who actually excused a juror in question and whether the person who excused the juror was one of the two persons authorized to do so, it is presumed that the trial court and the court's officers performed their duties properly. Thomas v. State, 174 Ga. App. 560, 330 S.E.2d 777, 1985 Ga.

Estoppel by Judgment (Cont'd)

App. LEXIS 1882 (1985) (decided under former O.C.G.A. § 24-4-24).

Judgment supported by facts. — In reviewing judgments of the lower court, the Court of Appeals presumes that such order or judgment is supported by every fact essential to make it valid and binding. Pichulik v. Simpson, 123 Ga. App. 604, 181 S.E.2d 925, 1971 Ga. App. LEXIS 1308 (1971) (decided under former Code 1933, § 38-114); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols, 138 Ga. App. 593, 226 S.E.2d 742, 1976 Ga. App. LEXIS 2245 (1976) (decided under former Code 1933, § 38-114).

Ministerial acts by judicial officer. — There is a presumption in favor of the regularity and legality of all proceedings in the courts, but circumstances attending a purely ministerial act may be investigated, even though the person performing the act is a judicial officer. Vaughan v. Car Tapes, Inc., 135 Ga. App. 178, 217 S.E.2d 436, 1975 Ga. App. LEXIS 1606 (1975) (decided under former Code 1933, § 38-114).

Rebuttable presumption. — Presumption in favor of the regularity of judgments and proper conduct of courts and judicial officers set forth in statute is rebuttable; the ordinary rules of evidence apply in such rebuttal. Balkcom v. Vickers, 220 Ga. 345, 138 S.E.2d 868, 1964 Ga. LEXIS 547 (1964), overruled in part, Reed v. State, 291 Ga. 10, 727 S.E.2d 112, 2012 Ga. LEXIS 364 (2012) (decided under former Code 1933, § 38-114).

Estoppel by Deed

Estoppel cannot be basis of title to land. — Davis v. Auerbach, 78 Ga. App. 575, 51 S.E.2d 527, 1949 Ga. App. LEXIS 932 (1949) (decided under former Code 1933, § 38-114).

Although former prohibits O.C.G.A. § 24-4-24 prohibits a grantor from denying recitals contained within the grantor's deed, it was insufficient to establish title. Yaali, Ltd. v. Barnes & Noble, Inc., 269 Ga. 695, 506 S.E.2d 116 (decided under former O.C.G.A. § 24-4-24).

Parties bound. — Recitals in deeds bind not only the parties thereto, but their privies in estate. Atlanta Land & Loan Co. v. Haile, 106 Ga. 498, 32 S.E. 606, 1899 Ga. LEXIS 712 (1899) (decided under former Code 1882, § 3753); Wyley Loose Leaf Co. v. Bird, 159 Ga. 246, 125 S.E. 496, 1924 Ga. LEXIS 423 (1924) (decided under former Civil Code 1910, § 5736); Doe v. Newton, 171 Ga. 418, 156 S.E. 25, 1930 Ga. LEXIS 371 (1930) (decided under former Civil Code 1910, § 5736); Williams v. Harris, 207 Ga. 576, 63 S.E.2d 386, 1951 Ga. LEXIS 470 (1951) (decided under former Code 1933, § 38-114); Bell v. Studdard, 220 Ga. 756, 141 S.E.2d 536, 1965 Ga. LEXIS 624 (1965) (decided under former Code 1933, § 38-114).

Administrator bound. — When the grantor filed a sworn bill, alleging that the grantor made an instrument as a deed, and that the instrument was procured by fraud, and sought to have the instrument canceled or reformed, after the grantor's death, the grantor's administrator, who was made a party in the grantor's stead, was estopped from denying the character of the paper as a deed. Youngblood v. Youngblood, 74 Ga. 614, 1885 Ga. LEXIS 371 (1885) (decided under former Code 1882, § 3753).

Specificity of recital. — In order to create an estoppel, the recital in the deed must be specific, and an estoppel by a recital in a deed will not extend beyond the specific fact contained in the recital. Toland v. Brewster, 144 Ga. 236, 86 S.E. 1089, 1915 Ga. LEXIS 152 (1915) (decided under former Civil Code 1910, § 5736); Doe v. Newton, 171 Ga. 418, 156 S.E. 25, 1930 Ga. LEXIS 371 (1930) (decided under former Civil Code 1910, § 5736).

Conclusiveness of recital as to consideration. — When the statement in a deed as to its consideration is merely by way of recital, the actual consideration of the deed is subject to explanation; but if the consideration is referred to in the deed in such a way as to make it one of the terms or conditions of the contract, it cannot be varied by parol. Sikes v. Sikes, 162 Ga. 302, 133 S.E. 239, 1926 Ga. LEXIS 169 (1926) (decided under former Civil Code 1910, § 5736); Shapiro v. Steinberg, 179 Ga. 18, 175 S.E. 1, 1934 Ga. LEXIS 202 (1934) (decided under former Code 1933, § 38-114).

Recital of payment of the purchase-money in a deed or other contract does not estop the maker from denying the fact and proving the contrary. McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839, 1945 Ga. LEXIS 344 (1945) (decided under former Code 1933, § 38-114).

Recital of administrator. — Former statute would not allow an administrator to dispute the truth of a solemn recital contained in the administrator's deed that the property was exposed for sale and that the highest bid was a stated sum, and that the administrator held the property therefor. The administrator may deny that the administrator received the proceeds of the sale, but cannot deny the truth of the recital that the property was sold at public outcry for a stated sum. Gammage v. Perry, 29 Ga. App. 427, 116 S.E. 126, 1923 Ga. App. LEXIS 53 (1923) (decided under former Civil Code 1910, § 5736).

Collection of proceeds of sale by executrix. — An executrix who duly and legally advertises and sells the land of an estate and makes a deed thereto in accordance with the sale cannot avoid liability to the heirs or creditors of the estate by showing that the executrix did not in fact collect the proceeds of the sale. Carder v. Arundel Mtg. Co., 47 Ga. App. 309, 170 S.E. 312, 1933 Ga. App. LEXIS 385 (1933) (decided under former Civil Code 1910, § 5736).

Usurious note secured by deed. — One who makes a usurious note and secures the note's payment by executing a deed to realty, the usury not appearing upon the face of the papers is, as against another whom one induces to purchase the note by representing that it and the deed "are valid and all right" (the purchase being made in good faith and in ignorance of the usury), estopped from setting up the usury in the transaction. Henry v. McAllister, 99 Ga. 557, 26 S.E. 469, 1896 Ga. LEXIS 446 (1896) (decided under former Civil Code 1895, § 5150).

Restrictive covenants. — Plaintiff was not estopped by acquiescence from seeking to enjoin violations of restrictive covenants by defendants merely because the same covenants were previously violated by other and different parties, by more remote sales. Dooley v. Savannah Bank & Trust Co., 199 Ga. 353, 34 S.E.2d 522, 1945 Ga. LEXIS 425 (1945) (decided under former Code 1933, § 38-114).

Easement. — Grantee who accepts a deed to the property granted is estopped to deny the truth of a recital that the grantor had previously granted an easement or interest in the property to another person. Toland v. Brewster, 144 Ga. 236, 86 S.E. 1089, 1915 Ga. LEXIS 152 (1915) (decided under former Civil Code 1910, § 5736).

Reliance on plat. — When an owner of land sells a part of the land in lots for residential purposes, the sales being made with reference to a plat by which another part of the land is designated as a park, and when the purchasers in buying rely upon the plat, the seller is estopped from asserting a claim adverse to the right of the purchasers, or their assigns, to have the land restricted to use as a park and to share such use. Caffey v. Parris, 186 Ga. 303, 197 S.E. 898, 1938 Ga. LEXIS 619 (1938) (decided under former Code 1933, § 38-114).

Reacquisition of property. — When the grantor in a first security deed reacquired the property by purchasing the property at a sale under a power contained in such deed, a junior security deed made to another by the same grantor immediately attached as a first claim upon the property, and constituted an encumbrance thereon as against a subsequent grantee of such purchaser, notwithstanding the second security deed may show upon the deed's face that the deed is a junior deed. Federal Land Bank v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9, 1941 Ga. LEXIS 615 (1941) (decided under former Code 1933, § 38-114).

Mortgagee. — If claimant at time of execution of mortgage stated to the mortgagee that property belonged to her husband, the mortgagor, and he acted thereon in making the loan and taking the mortgage, she would be estopped from asserting her title to the property as against the plaintiff, the mortgagee. Tanner v. Tanner, 52 Ga. App. 460, 183 S.E. 666, 1936 Ga. App. LEXIS 155 (1936) (decided under former Code 1933, § 38-114).

Exception of interest in land contained in a deed is notice to the grantee

Estoppel by Deed (Cont'd)

and the grantee's successors. Brown v. Mathis, 201 Ga. 740, 41 S.E.2d 137, 1947 Ga. LEXIS 305 (1947) (decided under former Code 1933, § 38-114).

No title to easement defeated claim of title by estoppel. — Because at the time the appellee executed the deed to the appellant the appellee had no title to the easement which the appellee attempted to convey to appellant, the appellant's claim of title by estoppel was completely without merit. Elrod v. Elrod, 272 Ga. 188, 526 S.E.2d 339, 2000 Ga. LEXIS 87 (2000) (decided under former O.C.G.A. § 24-4-24).

Equitable Estoppel

1. Solemn Admissions in Judicio

Admission in judicio conclusively binding. — Solemn admission in judicio is, at least until withdrawn after notice, conclusively binding upon the parties thereto. Tribble v. State, 89 Ga. App. 593, 80 S.E.2d 711, 1954 Ga. App. LEXIS 521 (1954) (decided under former Code 1933, § 38-114); Spector v. Model Constr. Co., 95 Ga. App. 14, 96 S.E.2d 900, 1957 Ga. App. LEXIS 700 (1957) (decided under former Code 1933, § 38-114); State Farm Mut. Auto. Ins. Co. v. Anderson, 107 Ga. App. 348, 130 S.E.2d 144, 1963 Ga. App. LEXIS 838, cert. dismissed, 219 Ga. 218, 132 S.E.2d 556, 1963 Ga. LEXIS 407 (1963); McDonald v. Hester, 115 Ga. App. 740, 155 S.E.2d 720, 1967 Ga. App. LEXIS 1231 (1967) (decided under former Code 1933, § 38-114).

Daughter who admitted that assets she took from her grandmother still belonged to her grandmother was not allowed to subsequently claim that she received the assets as a loan, and the probate court properly denied the daughter's motion for an order requiring the grandmother's guardian to return assets the guardian seized from the daughter, based on the daughter's claim that she has a legal right to the property. In re McCool, 267 Ga. App. 445, 600 S.E.2d 403, 2004 Ga. App. LEXIS 676 (2004) (decided under former O.C.G.A. § 24-4-24).

Applicable to facts in particular case. — Admissions in judicio apply only to facts in litigations in a particular case. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883, 1980 Ga. App. LEXIS 2573 (1980) (decided under former Code 1933, § 38-114).

Inconsistent positions. — When a person has assumed a certain position in a litigation, and has succeeded in maintaining that position through a judgment or decision of the court, or through the acquiescence of the opposite party, to the detriment of that party, the person will not be permitted to assume a contrary position in a subsequent suit between the parties relating to the same subject-matter. Florence, Phillips & Co. v. Newsome, 26 Ga. App. 501, 106 S.E. 619, 1921 Ga. App. LEXIS 501 (1921) (decided under former Civil Code 1910, § 5736).

Testimony in case between other parties. — Admissions made in one suit do not estop a witness from testifying differently in a case between other parties. Wilkinson & Wilson v. Thigpen, 71 Ga. 497, 1883 Ga. LEXIS 206 (1883) (decided under former Code 1882, § 3753).

Admission in pleadings. — Party to a suit or proceeding will not be allowed to disprove an admission made in the party's pleadings, without withdrawing the pleading from the record. Duke v. Ayers, 163 Ga. 444, 136 S.E. 410, 1927 Ga. LEXIS 100 (1927) (decided under former Civil Code 1910, § 5736); Anderson v. Oakley, 133 Ga. App. 758, 212 S.E.2d 875, 1975 Ga. App. LEXIS 2273 (1975) (decided under former Code 1933, § 38-114).

Admission not withdrawn. — Trial court properly granted a seller's motion for partial summary judgment, and denied the escrow agent's motion to dismiss, in the seller's suit to recover the earnest money deposited by the buyers as the buyers admitted in their answer that the buyers knew the identity and location of the property, and although the buyers later amended their answer to raise a Georgia Statute of Frauds, O.C.G.A. § 13-5-30, defense, the buyers never withdrew their admission, and the buyers and the escrow agent were bound by the admission; the admission constituted a solemn admission in judicio under former O.C.G.A. § 24-4-24(b)(7), and created a conclusive presumption of law under former § 24-4-24(a). Nhan v. Wellington

Square, LLC, 263 Ga. App. 717, 589 S.E.2d 285, 2003 Ga. App. LEXIS 1300 (2003) (decided under former O.C.G.A. § 24-4-24).

Admissions in forfeiture complaint. — District attorney was bound by an admission in judicio in a forfeiture complaint since the complaint admitted that the claimants were the purported owners or interest holders of real and personal property sought to be forfeited, and went on to recite the recordation of the book and page of the deed in the superior court clerk's records that listed claimants as owners of the property. Bell v. State, 234 Ga. App. 693, 507 S.E.2d 535 (decided under former O.C.G.A. § 24-4-24).

Civil Practice Act did not wipe out or destroy the law in Georgia to the effect that a party to an action is bound by material allegations made in the party's pleadings so long as the allegations remain in the party's pleadings, and the plaintiff's contradictory pleadings, if any, are to be construed in favor of the defendant. Anderson v. Oakley, 133 Ga. App. 758, 212 S.E.2d 875, 1975 Ga. App. LEXIS 2273 (1975) (decided under former Code 1933, § 38-114).

Parties and privies bound. — Estoppels by admissions made in pleading apply only between parties and privies to the suit or litigation in which the admissions relied on as an estoppel were made. Murray County v. Pickering, 198 Ga. 354, 31 S.E.2d 722, 1944 Ga. LEXIS 415 (1944) (decided under former Code 1933, § 38-114).

Admissions contained in stricken plea may be introduced in evidence by the opposite party. Such admissions when thus made are to be taken as true, because the admissions are asserted by the party personally; and while the party may withdraw the admissions formally from the pleadings, the party cannot by a mere withdrawal avoid the effect of the admissions since the admissions may still be used as evidence against the party. Stallings v. Britt, 204 Ga. 250, 49 S.E.2d 517, 1948 Ga. LEXIS 405 (1948) (decided under former Code 1933, § 38-114).

Admission of prima facie case. — Defendant who in a plea has admitted a prima facie case in favor of the plaintiff for the purpose of obtaining the opening and conclusion in the case cannot, after having failed to carry the burden thus assumed, make an amendment withdrawing such admission and thus preclude the plaintiff from the right to rely upon the admission contained in the original plea. Fisher v. George S. Jones Co., 108 Ga. 490, 34 S.E. 172, 1890 Ga. LEXIS 348 (1890) (decided under former Civil Code 1895, § 5150).

An agreed statement of facts entered into between the parties to an action for the purpose of dispensing with proof on some or all of the issues presented by the pleadings constitutes a solemn admission in judicio, and so long as the admission remains in the case, the admission is conclusive so as to preclude either party from introducing evidence to disprove or contradict the admission. United States Fid. & Guar. Co. v. Clarke, 187 Ga. 774, 2 S.E.2d 608, 1939 Ga. LEXIS 464 (1939) (decided under former Code 1933, § 38-114); State Farm Mut. Auto. Ins. Co. v. Anderson, 107 Ga. App. 348, 130 S.E.2d 144, 1963 Ga. App. LEXIS 838, cert. dismissed, 219 Ga. 218, 132 S.E.2d 556, 1963 Ga. LEXIS 407 (1963); McDonald v. Hester, 115 Ga. App. 740, 155 S.E.2d 720, 1967 Ga. App. LEXIS 1231 (1967) (decided under former Code 1933, § 38-114); Holland-America Line v. United Coops., 124 Ga. App. 375, 183 S.E.2d 620, 1971 Ga. App. LEXIS 923 (1971) (decided under former Code 1933, § 38-114).

Criminal defendant's agreed statement of facts. — In criminal cases, the defendant's agreed statement of facts upon which a case is to be tried constitutes a solemn admission in judicio and direct evidence of the fact stated. Tribble v. State, 89 Ga. App. 593, 80 S.E.2d 711, 1954 Ga. App. LEXIS 521 (1954) (decided under former Code 1933, § 38-114).

Defendant's stipulation to the elements of the criminal charge against defendant, including venue, reserving for appeal only the issue of the sufficiency of the search warrant affidavit, was conclusively binding upon defendant and waived defendant's right to raise the issue of venue on appeal. Sanders v. State, 252 Ga. App. 609, 556 S.E.2d 505, 2001 Ga. App. LEXIS 1301 (2001) (decided under former O.C.G.A. § 24-4-24).

Repudiation of stipulations from former trial. — On a new trial of a case,

Solemn Admissions in Judicio (Cont'd)

either party may, as a matter of right, withdraw from and repudiate an agreed statement of facts had at the former trial, by giving proper and timely notice of such intended action to the opposite party, provided the opposite party has not been injured thereby. In such case, the agreed statement of facts is admissible in evidence against the party making the statement, in favor of the opposite party. It is not, however, absolutely binding and conclusive upon the party by whom the statement was signed, but it is that party's right to disprove, rebut, or explain any statement therein contained. United States Fid. & Guar. Co. v. Clarke, 187 Ga. 774, 2 S.E.2d 608, 1939 Ga. LEXIS 464 (1939) (decided under former Code 1933, § 38-114).

Statements of counsel during the trial of a case may be regarded as admissions in judicio. Gregory v. Star Enters., Inc., 122 Ga. App. 12, 176 S.E.2d 241, 1970 Ga. App. LEXIS 761 (1970) (decided under former Code 1933, § 38-114).

Alleged admission in judicio by investor's attorney in prior action that investor's note and agreement were enforceable did not harm investor's case as the investor presented evidence that the investor owed nothing under the note and agreement; also, the corporation could not rely on that admission since issue preclusion based upon admissions in judicio was based on the equitable doctrine of estoppel and the alleged statement was made in reliance on fraudulent representations made by the three individual principals to which equity did not apply. Kothari v. Patel, 262 Ga. App. 168, 585 S.E.2d 97, 2003 Ga. App. LEXIS 756 (2003), cert. denied, No. S03C1673, 2003 Ga. LEXIS 965 (Ga. Nov. 10, 2003) (decided under former O.C.G.A. § 24-4-24).

Suggestions of counsel. — If, in discussing a case, every suggestion or passing statement of each attorney touching what might be the effect of a deed, will, or other instrument would irrevocably fix that construction upon it, the courts might be much hampered in placing a proper judicial construction on the paper and might sometimes be compelled to construe the same clause in very conflicting ways, none of which might be the correct way. The eloquence of the advocate may sometimes soar a little without being weighted down with the fear of estoppel. Orkin Exterminating Co. v. Gill, 222 Ga. 760, 152 S.E.2d 411, 1966 Ga. LEXIS 620 (1966) (decided under former Code 1933, § 38-114).

Unfavorable testimony of party. — Party testifying in the party's own behalf is not entitled to a finding in the party's favor if that version of the party's testimony which is most unfavorable to the party shows that the party is not entitled to recover. Norair Eng'r Corp. v. Saint Joseph's Hosp., 147 Ga. App. 595, 249 S.E.2d 642, 1978 Ga. App. LEXIS 2864 (1978) (decided under former Code 1933, § 38-114).

Confession. — Complete confession from the witness stand of participation in the crime provides more than sufficient evidence to convict. Jenkins v. State, 237 Ga. 493, 228 S.E.2d 877, 1976 Ga. LEXIS 1281 (1976) (decided under former Code 1933, § 38-114).

Mandamus. — When in a mandamus proceeding plaintiffs in error took position that bill of exceptions was certified conditionally in order that the trial court might have jurisdiction to sign another certificate, plaintiffs are later estopped to contend that the certificate is unconditional. NAACP v. Williams, 98 Ga. App. 74, 104 S.E.2d 923, 1958 Ga. App. LEXIS 509 (1958), cert. denied, 359 U.S. 550, 79 S. Ct. 947, 3 L. Ed. 2d 1023, 1959 U.S. LEXIS 900 (1959) (decided under former Code 1933, § 38-114).

Condemnation. — Once the assessor has made the award in a condemnation proceeding the condemnor is estopped from taking a position contrary to its solemn admissions in judicio and dismissing the suit. Housing Auth. v. Mercer, 123 Ga. App. 38, 179 S.E.2d 275, 1970 Ga. App. LEXIS 716 (1970) (decided under former Code 1933, § 38-114).

Testimony of insured. — None of insured's testimony as to whether the nephew of the insured was covered by a motor vehicle policy at a time of the vehicle accident constituted an admission in

judicio binding upon the insurer. Allstate Ins. Co. v. Sapp, 223 Ga. App. 443, 477 S.E.2d 869 (decided under former O.C.G.A. § 24-4-24).

2. Estoppel by Other Conduct

Elements. — In order to constitute estoppel by conduct, there must concur: first, a false representation or concealment of facts; second, it must be within the knowledge of the party making the one or concealing the other; third, the person affected thereby must be ignorant of the truth; fourth, the person seeking to influence the conduct of the other must act intentionally for that purpose; and, fifth, persons complaining shall have been induced to act by reason of such conduct of the other. Calhoun v. Williamson, 76 Ga. App. 91, 45 S.E.2d 87, 1947 Ga. App. LEXIS 378 (1947) (decided under former Code 1933, § 38-114).

Origin of estoppel in pais is found in the doctrine of equity that if a representation be made to another who deals upon the faith of the representation, the former must make the representation good if the former knew or was bound to know the representation to be false. Elliott v. Keith, 102 Ga. 117, 29 S.E. 155, 1897 Ga. LEXIS 465 (1897) (decided under former Civil Code 1895, § 5150); Rieves v. Smith, 184 Ga. 657, 192 S.E. 372, 1937 Ga. LEXIS 597 (1937) (decided under former Code 1933, § 38-114).

Basis of equitable estoppel is to promote the equity and justice of the individual case by preventing a party from asserting the party's rights under a general technical rule of law, when the party has so conducted oneself that it would be contrary to equity and good conscience for that party to allege and prove the truth. Davis v. Auerbach, 78 Ga. App. 575, 51 S.E.2d 527, 1949 Ga. App. LEXIS 932 (1949) (decided under former Code 1933, § 38-114).

Party invoking estoppel must show detriment and reliance. — One invoking the conduct of another as constituting an estoppel in pais must show that one has acted thereon to one's detriment, or has been hurt thereby, before one can successfully urge such conduct as an estoppel in pais. Tompkins v. Philips, 12 Ga. 52, 1852 Ga. LEXIS 92 (1852) (decided under former law); Gaither v. Gaither, 23 Ga. 521, 1857 Ga. LEXIS 309 (1857) (decided under former law); Rowe v. Sam Weichselbaum Co., 3 Ga. App. 504, 60 S.E. 275, 1908 Ga. App. LEXIS 354 (1908) (decided under former Civil Code 1895, § 5150); Hancock v. King, 133 Ga. 734, 66 S.E. 949, 1910 Ga. LEXIS 42 (1910) (decided under former Civil Code 1895, § 5150); Union Brokerage Co. v. Beall Bros., 30 Ga. App. 748, 119 S.E. 533, 1923 Ga. App. LEXIS 663 (1923) (decided under former Civil Code 1910, § 5736); Kaufman v. Young, 32 Ga. App. 135, 122 S.E. 822, 1924 Ga. App. LEXIS 314 (1924) (decided under former Civil Code 1910, § 5736).

No creation of new right. — Operation of this principle is not direct so as to create a new right in the opposite party, but primarily indirect and negative against the party making the statement, precluding the party and the party's privies from denying the truth of the statement or basing a defense on the statement's untruth. Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787, 1924 Ga. App. LEXIS 819 (1924) (decided under former Civil Code 1910, § 5736); Rieves v. Smith, 184 Ga. 657, 192 S.E. 372, 1937 Ga. LEXIS 597 (1937) (decided under former Code 1933, § 38-114).

Estoppel cannot be waived. — While two contracting parties may agree that waivers must be in writing, there is no authority that holds the parties may agree that an estoppel may not arise against one or the other party if one's conduct is such as to amount to estoppel. Boston Ins. Co. v. Barnes, 120 Ga. App. 585, 171 S.E.2d 626, 1969 Ga. App. LEXIS 869 (1969) (decided under former Code 1933, § 38-114).

Pleading unnecessary. — While the general rule is that estoppel, to be relied on, must be pleaded yet there are well-recognized exceptions to this general rule. Thus, since it is unnecessary to file a replication, this rule does not apply when the plaintiff relies upon estoppel in order to defeat a defense raised by the defendant in the defendant's answer, and in such a case evidence in rebuttal of other evidence of the defendant is admissible for

Estoppel by Other Conduct (Cont'd)

the plaintiff for the purpose of showing an estoppel, even though estoppel is not pleaded, nor, if the elements and facts of an estoppel are set out, is it necessary that the pleader should have used the word "estoppel." Rieves v. Smith, 184 Ga. 657, 192 S.E. 372, 1937 Ga. LEXIS 597 (1937) (decided under former Code 1933, § 38-114).

Estoppel is question for jury, unless it is unequivocally established. Tune v. Beeland, 131 Ga. 528, 62 S.E. 976, 1908 Ga. LEXIS 139 (1908) (decided under former Civil Code 1895, § 5150); Corporation of Royal Exch. Assurance v. Franklin, 158 Ga. 644, 124 S.E. 172, 1924 Ga. LEXIS 320 (1924) (decided under former Civil Code 1910, § 5736); Calhoun v. Williamson, 76 Ga. App. 91, 45 S.E.2d 87, 1947 Ga. App. LEXIS 378 (1947) (decided under former Code 1933, § 38-114); Eiberger v. West, 247 Ga. 767, 281 S.E.2d 148, 1981 Ga. LEXIS 880 (1981) (decided under former Code 1933, § 38-114).

Estoppel is usually an issue of fact to be decided by the jury. Eiberger v. West, 247 Ga. 767, 281 S.E.2d 148, 1981 Ga. LEXIS 880 (1981) (decided under former Code 1933, § 38-114).

Changing reason for conduct after litigation begins. — Rule which prevents one who has given a reason for one's conduct and decision in a matter from placing one's conduct upon another and different ground after litigation has begun is but an application of the principle of estoppel in pais, and applies only when one's conduct has caused another to act respecting the matter to the injury and detriment of the latter, and when the latter would be placed at an inequitable disadvantage, should the former be allowed to rely upon a ground other than that first urged as a reason for one's conduct and decision in the matter. Globe & Rutgers Fire Ins. Co. v. Atlantic & Gulf Shipping Co., 51 Ga. App. 904, 181 S.E. 310, 1935 Ga. App. LEXIS 494 (1935) (decided under former Code 1933, § 38-114).

Silence. — When one under a duty to speak fails to do so, one is thereafter estopped to deny what one's silence imports. Cheek v. J. Allen Couch & Son Funeral Home, 125 Ga. App. 438, 187 S.E.2d 907, 1972 Ga. App. LEXIS 1365 (1972) (decided under former Code 1933, § 38-114).

Estoppel of minor. — Admissions by one, upon which others have acted, either to their own injury or for the benefit of the person making the admissions, are deemed estoppels and even minors may be estopped by their admissions from denying the truth of the admissions, or by their silence when the circumstances call for a disclosure of their claims or their rights, provided the minor has arrived at those years of discretion when a fraudulent intent can be reasonably imputed to the minor; a married woman has no legal rights that can exempt her from this rule of law and justice; that is, the law of estoppel in pais. Wootten v. Braswell, 48 Ga. App. 312, 172 S.E. 679, 1934 Ga. App. LEXIS 52 (1934) (decided under former Code 1933, § 38-114).

Minority defense to contract. — Defendant is estopped from exercising one's privilege of avoiding a fair and reasonable contract upon the ground of defendant's minority at the time the agreement was made when it appears that the defendant has consumed the contract's irrestorable benefits; and when it appears that the plaintiff, dealing in good faith and being free from negligence was induced to act to plaintiff's injury by reason of the false and fraudulent representation of the defendant with respect to defendant's apparent majority. Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787, 1924 Ga. App. LEXIS 819 (1924) (decided under former Civil Code 1910, § 5736).

Existence or effect of contract. — Person may be estopped from questioning the existence or effect of a contract, the existence of which the person has asserted to the other party, to the person's own benefit or the injury of the other. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372, 1937 Ga. LEXIS 597 (1937) (decided under former Code 1933, § 38-114).

Nonsuit by consent. — Party is estopped from complaint of the grant of the nonsuit when it appears, from the record, that a nonsuit was granted upon motion of the party's counsel. Patterson v. Sams, 2

Ga. App. 755, 59 S.E. 18, 1907 Ga. App. LEXIS 512 (1907) (decided under former Civil Code 1895, § 5150).

Validity of title to personalty. — False and fraudulent representations as to the validity of the title to personalty, acted on by another to that person's injury, will estop the maker of the representations from setting up title to the property. Roberts v. Davis, 72 Ga. 819, 1884 Ga. LEXIS 327 (1884) (decided under former Code 1882, § 3753).

Silence concerning purchase of chattel. — Mere silence by one who stands by and sees another make a gift to a third person of a chattel in which one has an interest will not alone estop one from asserting one's title against the donee. Hartz v. Hartz, 144 Ga. 98, 86 S.E. 220, 1915 Ga. LEXIS 69 (1915) (decided under former Civil Code 1910, § 5736).

Inducement to buy property. — One who by acts or declarations induces another to buy property, as the property of a third person, is thereby estopped from setting up title in themselves to that property; but to make such acts or declarations a bar, it should appear that the acts or declarations were known to the purchaser, and that the purchaser acted upon the acts or declarations, and not upon the purchaser's own knowledge or judgment. McCune v. McMichael, 29 Ga. 312, 1859 Ga. LEXIS 333 (1859) (decided under former Code 1882, § 3753).

Time of insisting on invalidity of instrument. — Though an instrument may be "absolutely void," this does not imply that there is no limit to the time within which its void character may be insisted upon. Truth is always precious, but it may become too late to assert it. It may be "more unjust and productive of more evil to hear the truth than to forbear the investigation". Sutton v. Aiken, 62 Ga. 733, 1879 Ga. LEXIS 610 (1879) (decided under former Code 1873, § 3753).

Acceptance of insurance premiums and placing the money in the general funds of the defendant insurer amounted to such an unconditional acceptance as to estop the defendant to contend that the insured's policy was not in force. Progressive Fire Ins. Co. v. Morrison, 72 Ga. App. 473, 34 S.E.2d 173, 1945 Ga. App. LEXIS 612 (1945) (decided under former Code 1933, § 38-114); Georgia Cas. & Sur. Co. v. Rainwater, 132 Ga. App. 170, 207 S.E.2d 610, 1974 Ga. App. LEXIS 1635 (1974) (decided under former Code 1933, § 38-114).

Change in insurance policy. — Insurer may be estopped from relying on a provision in a policy that the agent or officer cannot waive or change the insurance unless by writing attached, when the agent consents to changes in the policy, but fails to make the writing. Corporation of Royal Exch. Assurance v. Franklin, 158 Ga. 644, 124 S.E. 172, 1924 Ga. LEXIS 320 (1924) (decided under former Civil Code 1910, § 5736).

Clause in insurance policy. — Insurer is estopped to deny coverage under a clause which provided that a lack of occupancy for more than 60 days would void coverage, since the insurer, through the insurer's agent, knew of the lack of occupancy when the building was first insured, and at all times thereafter. Boston Ins. Co. v. Barnes, 120 Ga. App. 585, 171 S.E.2d 626, 1969 Ga. App. LEXIS 869 (1969) (decided under former Code 1933, § 38-114).

Contesting amount of note. — Estoppel to contest the amount of a note does not result from paying part and obtaining an indefinite extension of time for payment of the balance. Long v. Lawson, 7 Ga. App. 460, 67 S.E. 123, 1910 Ga. App. LEXIS 345 (1910) (decided under former Civil Code 1895, § 5150).

Extension of time from holder of note. — Maker of promissory notes who obtained from the holder an extension of time for the payment of the principal due on each note and, as a consideration therefor, pays the interest due on each of the notes, was precluded thereby from setting up that the holder was not the owner thereof. Such agreement, it was true, did not change the real title to the notes, but it bared the maker from contesting the ownership with the holder. Yarbrough v. Seagraves, 47 Ga. App. 436, 170 S.E. 553, 1933 Ga. App. LEXIS 431 (1933) (decided under former Civil Code 1910, § 5736).

Estoppel can lie to bar defense of usury. Eiberger v. West, 247 Ga. 767, 281

Estoppel by Other Conduct (Cont'd)

S.E.2d 148, 1981 Ga. LEXIS 880 (1981) (decided under former Code 1933, § 38-114).

When note requiring usury was prepared by a borrower and presented to an unwary lender doctrine of estoppel was applicable. Eiberger v. West, 247 Ga. 767, 281 S.E.2d 148, 1981 Ga. LEXIS 880 (1981) (decided under former Code 1933, § 38-114).

Silence by guarantors at time of renewing of corporate obligations estops them as a matter of law from asserting defenses of which they then had knowledge. Citizens & S. Nat'l Bank v. Yeager Enters., 247 Ga. 797, 279 S.E.2d 674, 1981 Ga. LEXIS 875 (1981) (decided under former Code 1933, § 38-114).

Performance bond. — When there is no evidence that the makers of a performance bond acted on any conduct or declarations of the surety in releasing a third party from liability for the bond premium, the surety was not estopped from maintaining an action on an application signed by the makers whereby the makers obligated themselves to pay the premium on the bond. Loftis Plumbing & Heating Co. v. American Sur. Co., 74 Ga. App. 590, 40 S.E.2d 667, 1946 Ga. App. LEXIS 591 (1946) (decided under former Code 1933, § 38-114).

Sureties on government bond. — Sureties on county treasurer's bond are estopped from setting up by parol that the bond was delivered conditionally, the treasurer having a commission, and possession of the revenues in consequence of the bond. Lewis v. Board of Comm'rs, 70 Ga. 486, 1883 Ga. LEXIS 363 (1883) (decided under former Code 1882, § 3753).

Surety on bond to dissolve garnishment is estopped from denying that the garnishee had effects belonging to the defendants or that the garnishee was indebted to the defendants in a sum equal to the amount that might be recovered against the defendants. Nevin v. Fouche, 77 Ga. 47, 1886 Ga. LEXIS 280 (1886) (decided under former Code 1882, § 3753).

Delivery of assets to parties not entitled. — Delivery of assets to parties, who were not entitled, was, to that extent, a devastavit, and the party entitled is not estopped by the party's acts of consenting to the distribution, from claiming of the administrator the party's full rights as heir-at-law. Davis v. Bagley, 40 Ga. 181, 1869 Ga. LEXIS 54 (1869) (decided under former Code 1868, § 3700).

When chattels are mistakenly delivered to the vendee of realty subsequent to the sale thereof upon the vendee's representation that the chattels were included in the sale, when in fact the chattels were not so included, such delivery is not a waiver of the rights of the plaintiff to a recovery of the chattels upon plaintiff's ascertainment of the true state of facts, nor is the plaintiff estopped thereby from asserting title to the personalty. Gostin v. Scott, 80 Ga. App. 630, 56 S.E.2d 778, 1949 Ga. App. LEXIS 891 (1949) (decided under former Code 1933, § 38-114).

Payment to general contractor. — When subcontractor and homeowner had an agreement subsequent to the original contract whereby subcontractor consented for homeowner to make payment for all work to the general contractor which payment was made, the subcontractor's action worked as an estoppel against the subcontractor. Hill v. Brooks, 133 Ga. App. 138, 210 S.E.2d 176, 1974 Ga. App. LEXIS 991 (1974) (decided under former Code 1933, § 38-114).

Violator of bylaw seeking benefit of bylaw. — One who borrows money from a building and loan association cannot set up, in defense to an action for the recovery of the money, that the loan was made in disregard of a bylaw prohibiting the making of loans to any persons other than those who have been members of the association for a stated period. Whatever may be the object of such a bylaw, one who obtains a benefit from a violation of the bylaw is estopped from taking any advantage of the fact that such violation occurred. Reynolds v. Georgia State Bldg. & Loan Ass'n, 102 Ga. 126, 29 S.E. 187, 1897 Ga. LEXIS 468 (1897) (decided under former Civil Code 1895, § 5150).

Sale for benefit of creditors. — Doctrine of estoppel would apply and forbid a dissatisfied creditor from in any manner interfering with or preventing the consummation of an agreement to turn a

stock of goods over to a third person to sell for the benefit of creditors, to which one had been a consenting party. W.W. Stovall Co. v. W.E. Shepherd Co., 10 Ga. App. 498, 73 S.E. 761, 1912 Ga. App. LEXIS 591 (1912) (decided under former Civil Code 1910, § 5736).

Purchaser setting up invalidity of judicial sale. — In suit by a sheriff upon a bid at the sale of personalty, the bidder is estopped from setting up as a defense the invalidity of the sale when, after bidding off the property, the bidder was given possession of the property, and removed the property, so that the sheriff could not find the property to resell the property. McDonald v. Ellis, 17 Ga. App. 471, 87 S.E. 711, 1916 Ga. App. LEXIS 703 (1916) (decided under former Civil Code 1910, § 5736).

When year's support was set apart to a widow and minor children, and the widow, in order to obtain a loan upon the property, represented to the lender that she needed the loan as a support for herself and the children, and the loan was made upon the faith of such representation, and the lender was not negligent in failing to ascertain the truth, the lender is protected, and may enforce a security deed executed as a part of the transaction, whether or not the money was used, or was intended to be used, for a different purpose. Reynolds v. Baxter, 177 Ga. 849, 171 S.E. 706, 1933 Ga. LEXIS 444 (1933) (decided under former Code 1933, § 38-114).

Forfeiting dower. — While the right of dower is highly favored and carefully guarded by the courts, yet if the widow should practice fraud upon innocent purchasers, and induce them to become purchasers of land subject to her dower, under the impression that they were getting property free from such encumbrance, she would be estopped from setting up her right to dower in such land. Knox v. Higginbotham, 75 Ga. 699, 1885 Ga. LEXIS 210 (1885). (The right of dower is abolished. See O.C.G.A. § 53-1-1. See Code 1863, § 3676).

Purchase by wife on own account. — Admission by a wife that she is purchasing goods on her own account amounts to an estoppel; and, in a subsequent suit against her for the purchase price of the goods, it will preclude her from setting up the defense that it was the husband's debt. Wolff & Happ v. Hawes, 105 Ga. 153, 31 S.E. 425, 1898 Ga. LEXIS 468 (1898) (decided under former Civil Code 1895, § 5150).

Validity of election. — Although a constable, while occupying the constable's office and performing the duties thereof, entered as a candidate for the office in a void election and was defeated, this conduct would not estop the constable from attacking the validity of the election and claiming title to the office for the unexpired portion of the term for which the constable was elected and qualified at the regular election held two years previously. Motes v. Davis, 188 Ga. 682, 4 S.E.2d 597, 1939 Ga. LEXIS 598 (1939) (decided under former Code 1933, § 38-114).

Erroneous legal advice given by a person was not an "admission" within the meaning of the former statute, although such advice may have been acted upon to another's injury and to the benefit of the party giving it. This was especially true when it did not appear that the advice was given in bad faith or with intent to deceive or defraud. Lee v. Hill, 28 Ga. App. 312, 111 S.E. 211, 1922 Ga. App. LEXIS 473 (1922) (decided under former Civil Code 1910, § 5736).

Insufficient evidence of equitable estoppel. — Trial court did not err in awarding summary judgment to the State Medical Education Board, making a student liable for both the amount of the scholarship received and attorney's fees as: (1) estoppels were unfavored under Georgia law; (2) the student came forward with no more than hearsay to support a claim that oral misrepresentations of fact were made regarding the scholarship; (3) the contract was not rescinded by either party; (4) no mutual mistake of fact was found; and (5) any impossibility in performing the contract was personal to the student. Calabro v. State Med. Educ. Bd., 283 Ga. App. 113, 640 S.E.2d 581, 2006 Ga. App. LEXIS 1561 (2006) (decided under former O.C.G.A. § 24-4-24).

Court of appeals correctly reversed a trial court's grant of summary judgment to a driver and a corporation, which was

Estoppel by Other Conduct (Cont'd)

based on a second driver's lack of diligence in serving the second driver's personal injury complaint in the driver's voluntarily dismissed original action because that driver was not equitably estopped from proceeding with the second driver's renewal action; the first driver and corporation did not allege an affirmative act of deception, and to the extent that the second driver had a duty to speak to them, it was to inform them of the lawsuit, but that duty was defined by the Georgia Code, which included the renewal statute, O.C.G.A. § 9-2-61. Robinson v. Boyd, 288 Ga. 53, 701 S.E.2d 165, 2010 Ga. LEXIS 772 (2010) (decided under former O.C.G.A. § 24-4-24).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, §§ 201, 219 et seq.

Am. Jur. Proof of Facts.

Equitable Adoption, 18 POF2d 531.

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9A Am. Jur. Pleading and Practice Forms, Estoppel and Waiver, § 4.

C.J.S.

31A C.J.S., Evidence, §§ 183, 227.

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Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like, 9 A.L.R. 634.

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like, 9 A.L.R. 842.

Effect of filing affidavit of forgery against ancient deed, 18 A.L.R. 908.

Rights and remedies of tenant who remains in possession of all or part of the premises against landlord for interfering with his possession or enjoyment, 20 A.L.R. 1369; 28 A.L.R. 1333; 64 A.L.R. 900.

Dispensing with proof of proper custody as condition of admission of ancient document, 29 A.L.R. 630.

Estoppel of mortgagor or seller to deny existence of property mortgaged or sold, 40 A.L.R. 382.

Decree of divorce or pleadings or evidence in divorce suit as estoppel to deny marriage between the parties thereto, 45 A.L.R. 925.

Waiver of or estoppel to assert lien by filing claim with or receiving dividend from assignee for creditors, 55 A.L.R. 993.

Nature of conveyance or covenants which will create estoppel to assert after-acquired title or interest in real property, 58 A.L.R. 345; 144 A.L.R. 554.

Effect of intrusting another with stock certificate endorsed or assigned in blank to estop owner as against a bona fide purchaser or pledgee for value, 73 A.L.R. 1405.

Estoppel by conduct during testator's life to dissent from or attack validity of will, 74 A.L.R. 659.

Estoppel of one riparian owner to complain of diversion of water by another riparian owner, 74 A.L.R. 1129.

Provision in sale contract to the effect that only conditions incorporated therein shall be binding, 75 A.L.R. 1032; 127 A.L.R. 132; 133 A.L.R. 1360.

Estoppel by apparent acquiescence in or silence concerning improvements of real property to assert antagonistic title or interest, 76 A.L.R. 304.

Estoppel of wife who permits record title to realty to remain in husband's name to assert her own title as against one extending credit to husband, 76 A.L.R. 1501.

Waiver of, or estoppel to assert, debtor's exemption, by laches or delay, 82 A.L.R. 648.

Right of a purchaser assuming a mortgage debt, with the authorization of the mortgagor, to set up usury in mortgage as a defense or rely upon it as a ground of relief in equity, 82 A.L.R. 1153.

Estoppel by recitals in municipal bonds as to lawfulness of issue, 86 A.L.R. 1057; 158 A.L.R. 938.

Estoppel of municipal corporation or other political subdivision by recitals in its bonds to dispute their validity as affected by the character of the owner of bonds as an original holder or a transferee, 86 A.L.R. 1129.

Distinction between judgment as bar to cause of action and as estoppel as to particular fact, 88 A.L.R. 574.

Estoppel of municipality to deny that it gave its consent to street franchise, 89 A.L.R. 619.

Rule of estoppel of tenant to deny landlord's title as applicable where landlord affirmatively asserts a title or interest beyond that essential to his right to create the tenancy, 89 A.L.R. 1295.

Statement or estimate by mortgagee as to amount due or to become due, made to prospective purchaser or subsequent mortgagee of property, as basis of estoppel, 90 A.L.R. 1432.

Voluntary payment or other relief by insurance carrier under Workmen's Compensation Act as estoppel to deny issuance of policy or that case is within coverage, 91 A.L.R. 1530.

Estoppel by silence or delay, after knowledge, in disclosing forgery of guaranty, 96 A.L.R. 379.

Personal liability of officer or his bond as affected by his failure to file return of his proceedings after seizing property under writ or process, 98 A.L.R. 692.

Entrusting possession of securities to bank officer or employee who uses them to make a fraudulent showing of bank assets as estoppel of owner to reclaim them as against bank receivers, 100 A.L.R. 679.

Estoppel to assert usury against innocent purchaser of usurious instrument, 110 A.L.R. 451.

Acts done by executor or administrator in a representative capacity as estoppel in individual capacity, or vice versa, 110 A.L.R. 599.

Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses, 111 A.L.R. 742.

Reacquisition by mortgagor, or his grantee, of the title through foreclosure of first mortgage as affecting rights under a second mortgage to which the property was subject before the foreclosure, 111 A.L.R. 1285.

Doctrine of election or estoppel as applicable as against beneficiary of will where provision for other beneficiary is invalid, not for reasons personal to former, but because of statute or public policy, 112 A.L.R. 377.

Testimony or sworn statements in prior action or proceeding as basis of estoppel in favor of one not a party or privy thereto, 113 A.L.R. 925.

Abandonment of appeal or right of appeal by commencement, or prosecution to judgment, of another action, 115 A.L.R. 121.

Promissory estoppel, 115 A.L.R. 152; 48 A.L.R.2d 1069.

Tax exemption as affected by failure to claim or delay in claiming it for past years, 115 A.L.R. 1484.

Judgment or order in connection with appointment of executor or administrator as res judicata, as law of the case, or as evidence, on questions other than the validity of the appointment, 119 A.L.R. 594.

Conclusiveness of charter as regards character, kind, or purposes of corporation, 119 A.L.R. 1012.

Judgment in action for personal injury or death as res judicata as to negligence or contributory negligence in subsequent action for death in same accident of person whose estate was represented by defendant in first action, 119 A.L.R. 1469.

Pleading waiver, estoppel, and res judicata, 120 A.L.R. 8.

Distinction between effect of fact to create presumption of further fact and its effect as prima facie evidence of the further fact in determining burden of proof and weight of evidence, 121 A.L.R. 1078.

Estoppel as ground for holding defendant liable for negligence in conduct of business which appears to be his but which in fact belongs to another, 122 A.L.R. 256.

Creditor's statement or assurance to debtor, not supported by a consideration, that payment need not be made at time due, as binding upon creditor by way of estoppel, 124 A.L.R. 1248.

Doctrine of estoppel as applicable against one's right to hold a public office or his status as a public officer, 125 A.L.R. 294.

Mistake as to date of lapse of policy in insurer's statement of reason for denial of claim under policy as affecting its right to insist upon lapse as defense, 125 A.L.R. 1270.

Liability of one exercising the rights of an owner of realty for injuries due to its

condition, as affected by want of legal title, 130 A.L.R. 1525.

Waiver or estoppel predicated upon surviving partner's surrender of possession of partnership property to personal representative of deceased partner, 137 A.L.R. 1024.

Estoppel to assert invalidity of decree of divorce for lack of domicil at divorce forum or failure to obtain jurisdiction of person of defendant, 140 A.L.R. 914; 153 A.L.R. 941; 175 A.L.R. 538.

Estoppel of grantee or mortgagee as to amount of prior mortgage recited, 141 A.L.R. 1184.

Ultimate fact, as distinguished from evidentiary fact, as regards effect of judgment as estoppel, 142 A.L.R. 1243; 152 A.L.R. 1193.

Falsity of representation or warranty as defense to action upon policy of insurance on life of infant, 143 A.L.R. 331.

What amounts to waiver, estoppel, or loss of bank's right to set off depositor's indebtedness against deposit or to apply deposit upon indebtedness, 143 A.L.R. 453.

Estoppel by silence or other conduct (other than failure to file) to assert against estate claim antedating decedent's death, 146 A.L.R. 1179.

Estoppel of mechanic's lien claimant as predicable upon his representations to owner as to payment made to claimant by contractor or subcontractor, 155 A.L.R. 350.

Estoppel of owner of tangible personal property who knowingly or voluntarily permits another to have possession of certificates or other evidences of title, endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge, or otherwise deal with, the property, 155 A.L.R. 690.

Provision of life insurance policy limiting insurer's liability under specified conditions to return of premiums, as subject to waiver or estoppel by reason of agent's knowledge of breach of condition respecting insured's health, 163 A.L.R. 691.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 A.L.R. 1209.

Estoppel of intervenor to assert claim against original complainant, 166 A.L.R. 911.

Construction and application of statute respecting estoppel of insurer where insured was examined by medical examiner, 172 A.L.R. 143.

Right of tenant, as against landlord, to acquire or assert title based on foreclosure of lien or sale for tax or special assessment, 172 A.L.R. 1181.

Acceptance by building or construction contractor of payments under his contract as a waiver of right of action upon implied warrant as to conditions affecting cost, 173 A.L.R. 308.

Applicability of doctrine of estoppel against government and its governmental agencies, 1 A.L.R.2d 338.

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 A.L.R.2d 294.

Estoppel of mortgagee to contest the mortgagor's title, 11 A.L.R.2d 1397.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 15 A.L.R.2d 534.

Insurer's demand for additional or corrected proof of loss as waiver or estoppel as to right to assert contractual limitation provision, or as suspending running thereof, 15 A.L.R.2d 955.

Conviction or acquittal as evidence of the facts on which it was based in civil action, 18 A.L.R.2d 1287.

Estoppel of one selling or conveying property to dissolved or defunct corporation to deny its existence, 20 A.L.R.2d 1084.

Renunciation of beneficial interest under inter vivos trust as condition of right to contest its validity, 21 A.L.R.2d 1457.

Estoppel of United States, state, or political subdivision by deed or other instrument, 23 A.L.R.2d 1419.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

Estoppel to contest will or attack its validity, 28 A.L.R.2d 116.

Insurer's admission of liability, offers of settlement, negotiations, and the like, as waiver of, or estoppel to assert, contractual limitation provision, 29 A.L.R.2d 636.

Insurer's admission of liability, offers of settlement, and negotiations for adjustment or settlement, as waiver of proof of property loss, 49 A.L.R.2d 87.

Denial of liability as waiver of proofs of loss required by insurance policy, 49 A.L.R.2d 161.

Presumption of consideration from revenue stamps on deed, 51 A.L.R.2d 1004.

Estoppel by lease: effect of lessor's after-acquired title or interest during lease term, 51 A.L.R.2d 1238.

Right to attack validity of statute, ordinance, or regulation relating to occupational or professional license as affected by applying for, or securing license, 65 A.L.R.2d 660.

Estoppel of oil and gas lessee to deny lessor's title, 87 A.L.R.2d 602.

Estoppel of one doing business with personal representative purporting to carry on decedent's business, to assert representative's personal liability, 3 A.L.R.3d 757.

Modern status of doctrine of res judicata in criminal cases, 9 A.L.R.3d 203.

Purchaser of real property as precluded from attacking validity of zoning regulations existing at the time of the purchase and affecting the purchased property, 17 A.L.R.3d 743.

Judgment in action against seller or supplier of product as res judicata in action against manufacturer for injury from defective product, or vice versa, 34 A.L.R.3d 518.

Liability of insurance agent, for exposure of insurer to liability, because of failure to cancel or reduce risk, 35 A.L.R.3d 792.

Liability of insurance agent, for exposure of insurer to liability, because of failure to fully disclose or assess risk or to report issuance of policy, 35 A.L.R.3d 821.

Liability of insurance agent, for exposure of insurer to liability, because of issuance of policy beyond authority or contrary to instructions, 35 A.L.R.3d 907.

Judgment against parents in action for loss of minor's services as precluding minor's action for personal injuries, 41 A.L.R.3d 536.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations, 45 A.L.R.3d 630.

Delay caused by other litigation as estopping reliance on statute of limitations, 45 A.L.R.3d 703.

Setting aside arbitration award on ground of interest or bias of arbitrators, 56 A.L.R.3d 697.

Promissory estoppel as basis for avoidance of statute of frauds, 56 A.L.R.3d 1037.

Automobile or motorcycle as necessary for infant, 56 A.L.R.3d 1335.

Modern status of rules regarding materiality and effect of false statement by insurance applicant as to previous insurance cancellations or rejections, 66 A.L.R.3d 749.

Modern status of law as to equitable adoption or adoption by estoppel, 97 A.L.R.3d 347.

Estoppel of state or local government in tax matters, 21 A.L.R.4th 573.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder, 78 A.L.R.4th 90.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 A.L.R.5th 233.

Setting aside arbitration award on ground of interest or bias of arbitrators — commercial, business, or real estate transactions, 67 A.L.R.5th 179.

24-14-27. Estoppel relating to real estate.

(a) Where an estoppel relates to the title to real estate, the party claiming to have been influenced by the other party's acts or declarations shall not only have been ignorant of the true title, but also ignorant of any convenient means of acquiring such knowledge.

(b) Where both parties have equal knowledge or equal means of obtaining the truth, there shall be no estoppel.

History.

Code 1981, § 24-14-27, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-4-25, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decision in Wilkins v. McGhehee, 86 Ga. 764, 13 S.E. 84 (1891).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5151, former Civil Code 1910, § 5737, former Code 1933, § 38-115, and former O.C.G.A. § 24-4-25 are included in the annotations for this Code section.

In general. — Purchaser must be ignorant of the falsity of the alleged inducements and really act upon the inducements and not upon purchaser's own knowledge or judgment and have no convenient means of acquiring knowledge of title. Tune v. Beeland, 131 Ga. 528, 62 S.E. 976, 1908 Ga. LEXIS 139 (1908) (decided under former Civil Code 1895, § 5151); Stonecipher v. Kear, 131 Ga. 688, 63 S.E. 215, 1908 Ga. LEXIS 181 (1908) (decided under former Civil Code 1895, § 5151); Wall v. Louisville & N.R.R., 143 Ga. 417, 85 S.E. 325, 1915 Ga. LEXIS 469 (1915) (decided under former Civil Code 1910, § 5737); Norman v. McMillan, 151 Ga. 363, 107 S.E. 325, 1921 Ga. LEXIS 254 (1921) (decided under former Civil Code 1910, § 5737); Jackson v. Lipham, 158 Ga. 557, 123 S.E. 887, 1924 Ga. LEXIS 298 (1924) (decided under former Civil Code 1910, § 5737).

Elements of estoppel. — In order to constitute estoppel by conduct, there must occur: (1) a false representation or concealment of facts; (2) it must be within the knowledge of the party making the one or concealing the other; (3) the person affected thereby must be ignorant of the truth; (4) the person seeking to influence the conduct of the other must act intentionally for that purpose; and (5) persons complaining shall have been induced to act by reason of such conduct of the other. Jones v. Tri-State Elec. Coop., 212 Ga. 577, 94 S.E.2d 497, 1956 Ga. LEXIS 449 (1956) (decided under former Code 1933, § 38-115).

Estoppels do not convey title in this state. Kennedy v. Hannans, 246 Ga. 55, 268 S.E.2d 646, 1980 Ga. LEXIS 1017 (1980) (decided under former Code 1933, § 38-115).

Recovery of land. — If estoppel by acts or false declarations can in any case be the basis upon which to predicate the recovery of land, it fell clearly within the provisions of the former statute. Groover v. Simmons, 163 Ga. 778, 137 S.E. 237, 1927 Ga. LEXIS 65 (1927) (decided under former Civil Code 1910, § 5737).

Good faith and reasonable diligence. — Party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted in good faith and reasonable diligence; otherwise, no equity will arise in the party's favor. Travelodge Corp. v. Carwen Realty Co., 223 Ga. 821, 158 S.E.2d 378, 1967 Ga. LEXIS 719 (1967) (decided under former Code 1933, § 38-115).

Exercise of due diligence. — No estoppel defense is available when a party fails to exercise due diligence to obtain information concerning the title. Allen v. Bacon, 171 Ga. 479, 156 S.E. 20, 1930 Ga. LEXIS 483 (1930) (decided under former Civil Code 1910, § 5737).

No ignorance of true title. — When there was nothing in the evidence showing or tending to show that the defendant or any of its predecessors in title were ignorant of the true title when they purchased, the evidence failed to establish any estoppel which would preclude the plaintiff from asserting and recovering on plaintiff's legal title. Seaboard Air-Line Ry. v. Holliday, 165 Ga. 200, 140 S.E. 507, 1927 Ga. LEXIS 355 (1927) (decided under former Civil Code 1910, § 5737); Bank of Lenox v. Webb Naval Stores Co., 171 Ga. 464, 156 S.E. 30, 1930 Ga. LEXIS 480 (1930) (decided under former Civil Code 1910, § 5737).

Ignorance of true title. — Fact that a deed from a husband to his wife, under

which a wife claimed title, may have been based upon a valuable consideration and duly recorded would not necessarily prevent a subsequent purchaser, by security deed, from relying upon the principle of estoppel, if the subsequent purchaser was in fact ignorant of the true title. Roop Grocery Co. v. Gentry, 195 Ga. 736, 25 S.E.2d 705, 1943 Ga. LEXIS 303 (1943) (decided under former Code 1933, § 38-115).

Ignorance of adverse interest. — It must appear that the party to the deed was ignorant of the interest of the attesting witness. Duncan v. Beasley, 174 Ga. 28, 161 S.E. 829, 1931 Ga. LEXIS 5 (1931) (decided under former Civil Code 1910, § 5737).

No means of acquiring knowledge. — When the estoppel relates to real estate, it is essential to the application of the doctrine that the party claiming to have been influenced by the conduct of another was personally not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Bennett v. Davis, 201 Ga. 58, 39 S.E.2d 3, 1946 Ga. LEXIS 429 (1946) (decided under former Code 1933, § 38-115).

Means of knowing over extended period of time. — If a person having legal title to land, which fact the person does not know but has convenient means of knowing, and after a lapse of 27 years, during which time the person was under no legal disability, the person still has not learned the fact of the person's interest in the land, and in those circumstances the person induces one to buy the land from a third person by representations that the land is the property of such third person, the person's misrepresentations to the purchaser innocently made, coupled with the person's delay in ascertaining the truth, will amount to constructive fraud, and may be pleaded as an estoppel by the purchaser on the faith of the title of the person's vendor. Lanier v. Bryant, 180 Ga. 409, 179 S.E. 346, 1935 Ga. LEXIS 273 (1935) (decided under former Code 1933, § 38-115).

Equal means of knowledge. — Disclaimer of interest by a distributee, in ignorance, when the other party had equal means of knowledge, is no estoppel as to the distributee or the grantee. Peyton v. Stephens, 130 Ga. 338, 60 S.E. 563, 1908 Ga. LEXIS 266 (1908) (decided under former Civil Code 1895, § 5151).

Contrary to a cotenant's contention, the cotenant's affidavit did not create an issue of fact as to whether heirs should have been estopped from challenging the cotenant's adverse possession claim relating to certain real estate; the cotenant had equal means to obtain the truth about the status of a probate case by which the cotenant claimed exclusive possession of the property at issue, and the consequences of letting the case languish. Ward v. Morgan, 280 Ga. 569, 629 S.E.2d 230, 2006 Ga. LEXIS 245 (2006) (decided under former O.C.G.A. § 24-4-25).

Prior recorded deed becomes constructive notice for subsequent purchasers and the holder of a prior recorded interest will not be subject to estoppel. Pressley v. Maxwell, 242 Ga. 360, 249 S.E.2d 49, 1978 Ga. LEXIS 1207 (1978) (decided under former Code 1933, § 38-115).

Recorded deed as means of acquiring knowledge. — Recorded deed was not necessarily such "convenient means of acquiring knowledge" of title, within the contemplation of former Code 1933, § 38-115, as to abrogate the effect of former Code 1933, § 105-304 (see O.C.G.A. § 51-6-4) on one who remained silent while a third party represented to another that the third party owned certain property which in actuality belonged to the aphonic one. Anderson v. Manning, 221 Ga. 421, 144 S.E.2d 772, 1965 Ga. LEXIS 482 (1965) (decided under former Code 1933, § 38-115); Pressley v. Maxwell, 242 Ga. 360, 249 S.E.2d 49, 1978 Ga. LEXIS 1207 (1978) (decided under former Code 1933, § 38-115).

Admission in favor of third person. — Admissions against one's title to land, and in favor of the title of a third person, will not be estopped in behalf of one to whom the admissions were not made, and who has merely heard of the admissions, it not appearing that the admissions were made for the purpose of being acted upon, or with any design or intention that the admissions should be acted upon. Ran-

dolph v. Merchants & Mechanics Banking & Loan Co., 181 Ga. 671, 183 S.E. 801, 1936 Ga. LEXIS 406 (1936) (decided under former Code 1933, § 38-115).

Agent's knowledge. — Estoppel did not result from an agent's knowledge when a contract provided that knowledge must be brought directly to the principal by the opposite party. Sovereign Camp Woodmen of the World v. Griffin, 30 Ga. App. 217, 117 S.E. 261, 1923 Ga. App. LEXIS 356 (1923) (decided under former Civil Code 1910, § 5737).

Improvements. — One who has title to land and sees another who is in bona fide possession thereof place valuable improvements thereon, without giving notice of one's title, is not thereby subsequently estopped from asserting one's title. Owen v. Miller, 209 Ga. 875, 76 S.E.2d 772, 1953 Ga. LEXIS 440 (1953) (decided under former Code 1933, § 38-115).

Merely attesting deed will not work an estoppel. Duncan v. Beasley, 174 Ga. 28, 161 S.E. 829, 1931 Ga. LEXIS 5 (1931) (decided under former Civil Code 1910, § 5737).

Burden of proof rests upon the party asserting an estoppel to establish all the elements necessary to constitute an estoppel. Hartsfield Loan & Sav. Co. v. Garner, 184 Ga. 283, 191 S.E. 119, 1937 Ga. LEXIS 511 (1937) (decided under former Code 1933, § 38-115); Bennett v. Davis, 201 Ga. 58, 39 S.E.2d 3, 1946 Ga. LEXIS 429 (1946) (decided under former Code 1933, § 38-115).

Limitation on § 51-6-4. — Former Code 1933, § 36-115 limited former Code 1933, § 105-304 (see O.C.G.A. § 51-6-4) to purchasers without notice. Fuller v. Calhoun Nat'l Bank, 59 Ga. App. 419, 1 S.E.2d 86, 1939 Ga. App. LEXIS 45 (1939) (decided under former Code 1933, § 38-115).

Construction with § 51-6-4. — Principle stated in former Code 1933, § 105-304 (see O.C.G.A. § 51-6-4), did not depend for the principle's operation upon the existence or absence of mere constructive notice, nor would a recorded deed necessarily constitute a "convenient means of acquiring such knowledge," within the meaning of former Code 1933, § 38-115; this latter statute should have been construed in harmony with the former. Roop Grocery Co. v. Gentry, 195 Ga. 736, 25 S.E.2d 705, 1943 Ga. LEXIS 303 (1943).

RESEARCH REFERENCES

ALR.

Estoppel to assert title to real property by conduct subsequent to contract between third persons, 1 A.L.R. 1482.

Estoppel of one not a party to a transaction involving real property by failure to disclose his interest in the property, 50 A.L.R. 668.

Failure to record or delay in recording an instrument affecting real property as basis of estoppel in favor of creditors not directly within protection of recording Acts, 52 A.L.R. 183.

Nature of conveyance or covenants which will create estoppel to assert after-acquired title or interest in real property, 58 A.L.R. 345; 144 A.L.R. 554.

Estoppel of one riparian owner to complain of diversion of water by another riparian owner, 74 A.L.R. 1129.

Estoppel by apparent acquiescence in or silence concerning improvements of real property to assert antagonistic title or interest, 76 A.L.R. 304.

Estoppel of wife who permits record title to realty to remain in husband's name to assert her own title as against one extending credit to husband, 76 A.L.R. 1501.

Permitting record title to real property to stand in another's name as estopping owner to avail himself of statute or rule requiring authority to contract regarding real estate to be in writing, 78 A.L.R. 588.

Right of a purchaser assuming a mortgage debt, with the authorization of the mortgagor, to set up usury in mortgage as a defense or rely upon it as a ground of relief in equity, 82 A.L.R. 1153.

Rule of estoppel of tenant to deny landlord's title as applicable where landlord affirmatively asserts a title or interest beyond that essential to his right to create the tenancy, 89 A.L.R. 1295.

Estoppel to question validity of proceedings extending boundaries of municipality, 101 A.L.R. 581.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 A.L.R. 1310.

Promissory estoppel, 115 A.L.R. 152; 48 A.L.R.2d 1069.

Estoppel of owner of tangible personal property who knowingly or voluntarily permits another to have possession of certificates or other evidences of title, endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge, or otherwise deal with, the property, 151 A.L.R. 690.

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 A.L.R.2d 294.

Renunciation of beneficial interest under inter vivos trust as condition of right to contest this validity, 21 A.L.R.2d 1457.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

Estoppel of oil and gas lessee to deny lessor's title, 87 A.L.R.2d 602.

Promissory estoppel as basis for avoidance of statute of frauds, 56 A.L.R.3d 1037.

24-14-28. Trustees estopped to set up title adverse to trust.

Trustees and other representatives with custody of papers have ample opportunities to discover defects in the title of property in their care and shall be estopped from setting up title adverse to their trust.

History.

Code 1981, § 24-14-28, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-4-26, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Benjamin v. Gill, 45 Ga. 110 (1872) and Allen v. Solomon, 54 Ga. 483 (1875).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5153, former Civil Code 1910, § 5739, former Code 1933, § 38-117, and former O.C.G.A. § 24-4-26 are included in the annotations for this Code section.

Executors. — When the plaintiff maintained a suit for specific performance of the contract alleged, in which plaintiff sought to have decreed in oneself title to the entire property owned by plaintiff's testatrix at the time of the testatrix's death, and devised by the testatrix and given to the executor (plaintiff) and other beneficiaries, it was held that plaintiff was estopped on the ground that plaintiff had the will probated and qualified as executor, and continued in the office of executor for two years, during which time plaintiff had discharged the duties of plaintiff's office and had paid out large sums of money; this conduct being inconsistent with plaintiff's claim of title to the entire estate of plaintiff's testatrix. Hardeman v. Ellis, 162 Ga. 664, 135 S.E. 195, 1926 Ga. LEXIS 265 (1926) (decided under former Civil Code 1910, § 5739); Scoggins v. Strickland, 265 Ga. 417, 456 S.E.2d 208, 1995 Ga. LEXIS 178 (1995) (decided under former O.C.G.A. § 24-4-26).

Multiple executors. — Rule which prohibits a person from suing oneself does not apply when there are two or more executors. Spratlin v. Spratlin, 216 Ga. 27, 114 S.E.2d 370, 1960 Ga. LEXIS 380 (1960) (decided under former Code 1933, § 38-117).

Ownership in estate. — When ownership was once shown to be in an estate, the executor cannot acquire title by adverse holding by reason of the former statute. Dozier v. McWhorter, 117 Ga. 786, 45 S.E. 61, 1903 Ga. LEXIS 336 (1903)

(decided under former Civil Code 1895, § 5153).

Claim anterior to appointment. — Administrator who sold property at public outcry, executing a deed, and signing as administrator was estopped from setting up any title or interest, based upon a claim anterior to the administrator's appointment. Gammage v. Perry, 29 Ga. App. 427, 116 S.E. 126, 1923 Ga. App. LEXIS 53 (1923) (decided under former Civil Code 1910, § 5739).

Title not vested. — Rule of estoppel against an administrator does not operate if the legal title to land in controversy was not vested in the decedent at the time of death. Crummey v. Crummey, 190 Ga. 774, 10 S.E.2d 859, 1940 Ga. LEXIS 575 (1940) (decided under former Code 1933, § 38-117).

Mistake of law. — When claimant contended that the former statute should not be applied because claimant did not know at the time claimant was appointed administrator that claimant had title to the land, and testified that the claimant believed that when the claimant lost the claimant's deed the claimant's title had been killed, the claimant acted with full knowledge of the facts, but under a mistake of law as to the claimant's legal rights; such testimony was not sufficient to demand a finding that the claimant was not estopped under the former statute. Wright v. Thompson, 190 Ga. 173, 8 S.E.2d 640, 1940 Ga. LEXIS 427 (1940) (decided under former Code 1933, § 38-117).

Claim not setting up title. — There is nothing inimical in the principle that an heir, next of kin, or creditor is favored in the appointment of an administrator, and is not precluded from receiving proper share or claim from the assets of the estate, since such a claim does not have the legal effect of setting up a "title adverse to their trust." Crummey v. Crummey, 190 Ga. 774, 10 S.E.2d 859, 1940 Ga. LEXIS 575 (1940) (decided under former Code 1933, § 38-117).

Guardian. — Law will not permit a guardian to act in such way that the guardian's own personal interest may come in conflict with the interest of the guardian's ward with respect to the estate of the latter in the guardian's charge. Allen v. Wade, 203 Ga. 753, 48 S.E.2d 538, 1948 Ga. LEXIS 519 (1948) (decided under former Code 1933, § 38-117).

Trustee of corporations. — Principles apply to a trustee holding choses in action for a corporation. Caswell v. Vanderbilt, 35 Ga. App. 34, 132 S.E. 123, 1926 Ga. App. LEXIS 542 (1926) (decided under former Civil Code 1910, § 5739).

Inconsistent positions. — When one is in a situation in which one may elect between two inconsistent positions or proceedings, the choice of one's position or proceeding must be made before bringing suit. One cannot bring either action without selecting and determining to accept and occupy a position consistent with that action or position and inconsistent with the other. Spratlin v. Spratlin, 216 Ga. 27, 114 S.E.2d 370, 1960 Ga. LEXIS 380 (1960) (decided under former Code 1933, § 38-117).

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Acts done by executor or administrator in a representative capacity as estoppel in individual capacity, or vice versa, 110 A.L.R. 599.

Action by employee in reliance on employment contract which violates statute of frauds as rendering contract enforceable, 54 A.L.R.3d 715.

24-14-29. Equitable estoppel.

In order for an equitable estoppel to arise, there shall generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by which another has been misled to his or her injury.

History.

Code 1981, § 24-14-29, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-4-27, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decision in Wilkins v. McGhehee, 86 Ga. 764, 13 S.E. 84 (1891).

Law reviews.

For article, "The Legislative Process in Georgia Local Government Law," see 5 Ga. L. Rev. 1 (1971).

For article, "Promissory Estoppel and the Georgia Statute of Frauds," see 15 Ga. L. Rev. 204 (1980).

JUDICIAL DECISIONS

Analysis

General Consideration
Illustrations

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5152, former Civil Code 1910, § 5738, former Code 1933, § 38-116, and former O.C.G.A. § 24-4-27 are included in the annotations for this Code section.

Elements. — In order to constitute estoppel by conduct, there must concur: (1) a false representation or concealment of facts; (2) it must be within the knowledge of the party making the one or concealing the other; (3) the person affected thereby must be ignorant of the truth; (4) the person seeking to influence the conduct of the other must act intentionally for that purpose; and (5) persons complaining shall have been induced to act by reason of such conduct of the other. Cobb County Rural Elec. Membership Corp. v. Board of Lights & Water Works, 211 Ga. 535, 87 S.E.2d 80, 1955 Ga. LEXIS 381 (1955) (decided under former Code 1933, § 38-116); Jones v. Tri-State Elec. Coop., 212 Ga. 577, 94 S.E.2d 497, 1956 Ga. LEXIS 449 (1956) (decided under former Code 1933, § 38-116).

Function of estoppel. — Estoppel may be used to prevent a party from denying at the time of litigation a representation that was made by that party and accepted and reasonably acted upon by another party with detrimental results to the party that acted thereon. Sabin Meyer Regional Sales Corp. v. Citizens Bank, 502 F. Supp. 557, 1980 U.S. Dist. LEXIS 17261 (N.D. Ga. 1980) (decided under former Code 1933, § 38-116).

Estoppels are not favored by Georgia law. Cobb County Rural Elec. Membership Corp. v. Board of Lights & Water Works, 211 Ga. 535, 87 S.E.2d 80, 1955 Ga. LEXIS 381 (1955) (decided under former Code 1933, § 38-116).

Estoppels are rarely resorted to, except when it would be more unjust and more productive of evil to hear the truth than to forbear the investigation. Globe & Rutgers Fire Ins. Co. v. Atlantic & Gulf Shipping Co., 51 Ga. App. 904, 181 S.E. 310, 1935 Ga. App. LEXIS 494 (1935) (decided under former Code 1933, § 38-116).

Estoppel does not create new rights. — Doctrines of estoppel are primarily negative in their operation against the party making the statement or admission, rather than creative of any new rights in the opposite party. Sabin Meyer Regional Sales Corp. v. Citizens Bank, 502 F. Supp. 557, 1980 U.S. Dist. LEXIS 17261 (N.D. Ga. 1980) (decided under former Code 1933, § 38-116).

Existing rights. — Estoppel in pais operates only upon existing rights, not upon rights subsequently acquired. Atlantic C.L.R.R. v. Williams, 50 Ga. App. 726, 179 S.E. 136, 1934 Ga. App. LEXIS 585 (1934) (decided under former Code 1933, § 38-116); Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800, 1978 Ga. App. LEXIS 3217 (1978) (decided under former Code 1933, § 38-116).

General Consideration (Cont'd)

Estoppel cannot legalize or vitalize that which the law declares unlawful and void. Macon Ambulance Serv., Inc. v. Snow Properties, Inc., 218 Ga. 262, 127 S.E.2d 598, 1962 Ga. LEXIS 476 (1962) (decided under former Code 1933, § 38-116).

Existing cause of action required. — Without some proper legal cause of action, establishing all the elements of equitable estoppel will not entitle plaintiff to relief. Sabin Meyer Regional Sales Corp. v. Citizens Bank, 502 F. Supp. 557, 1980 U.S. Dist. LEXIS 17261 (N.D. Ga. 1980) (decided under former Code 1933, § 38-116).

Contrary to equity and good conscience. — Equitable estoppel is an established principle of Georgia law and arises when a party has so acted that the party has by the party's conduct either gained some advantage for the party or caused some disadvantage to another by reason of which it would be contrary to equity and good conscience to permit the party to allege and prove the truth. A.S. Int'l Corp. v. Salem Carpet Mills, Inc., 441 F. Supp. 125, 1977 U.S. Dist. LEXIS 12996 (N.D. Ga. 1977) (decided under former Code 1933, § 38-116).

Estoppel in pais. — Doctrine of estoppel in pais proceeds wholly on the theory that the party to be estopped has, by the party's declarations or conduct, misled another to the party's prejudice, so that it would be a fraud upon the party to allow the true state of the facts to be proved. Gainesville Glass Co. v. Don Hammond, Inc., 157 Ga. App. 640, 278 S.E.2d 182, 1981 Ga. App. LEXIS 1949 (1981) (decided under former Code 1933, § 38-116).

No equitable estoppel arises when no harm or disadvantage is presented as injury is essential for an equitable estoppel. Blackburn v. Blackburn, 168 Ga. App. 66, 308 S.E.2d 193, 1983 Ga. App. LEXIS 2683 (1983) (decided under former Code 1933, § 38-116).

Inducement and injury. — To assert an estoppel in pais one must show that one has lost or the other party gained something which makes it unjust for the latter to insist upon preexistent rights. There must be inducement by which one changes one's position for the worse. Injury is its essence. Meeks v. Adams La. Co., 49 F. Supp. 489, 1943 U.S. Dist. LEXIS 2904 (D. Ga.), modified, 138 F.2d 458, 1943 U.S. App. LEXIS 4083 (5th Cir. 1943) (decided under former Code 1933, § 38-116).

Inducement to forego valuable right. — When a party by making an invalid agreement or promise induces another to forego a valuable legal right, one waives and is estopped to deny the right of the promisee to have the agreement carried out or the promise fulfilled. Pethel v. Waters, 220 Ga. 543, 140 S.E.2d 252, 1965 Ga. LEXIS 558 (1965) (decided under former Code 1933, § 38-116).

Injury or disadvantage. — When in a case no facts appear from which it can be said that a party has been injured or placed at any disadvantage by the conduct of the party allegedly estopped, no estoppel resulted therefrom. City of Atlanta v. Anglin, 209 Ga. 170, 71 S.E.2d 419, 1952 Ga. LEXIS 445 (1952) (decided under former Code 1933, § 38-116).

Changing reason for conduct. — Rule which prevents one who has given a reason for one's conduct and decision in a matter from placing one's conduct upon another and different ground after litigation has begun is but an application of the principle of estoppel in pais, and applies only where one's conduct has caused another to act respecting the matter to the injury and detriment of the latter, and if the latter would be placed at an inequitable disadvantage, should the former be allowed to rely upon a ground other than that first urged as a reason for one's conduct and decision in the matter. Globe & Rutgers Fire Ins. Co. v. Atlantic & Gulf Shipping Co., 51 Ga. App. 904, 181 S.E. 310, 1935 Ga. App. LEXIS 494 (1935) (decided under former Code 1933, § 38-116).

Good faith and reasonable diligence. — Party seeking the benefit of estoppel must not only have been free from fraud, but must have acted in good faith and reasonable diligence; otherwise no equity will arise in that party's favor. Tybrisa Co. v. Tybeeland, Inc., 220 Ga. 442, 139 S.E.2d 302, 1964 Ga. LEXIS 577 (1964) (decided under former Code 1933,

§ 38-116); Travelodge Corp. v. Carwen Realty Co., 223 Ga. 821, 158 S.E.2d 378, 1967 Ga. LEXIS 719 (1967) (decided under former Code 1933, § 38-116); Whitco Produce Co. v. Bonanza Int'l, Inc., 154 Ga. App. 92, 267 S.E.2d 627, 1980 Ga. App. LEXIS 2051 (1980) (decided under former Code 1933, § 38-116).

Reliance. — Party claiming estoppel must have relied and acted upon declarations or conduct of the other party and not on one's own knowledge or judgment. Tybrisa Co. v. Tybeeland, Inc., 220 Ga. 442, 139 S.E.2d 302, 1964 Ga. LEXIS 577 (1964) (decided under former Code 1933, § 38-116).

Doctrine of estoppel by representation is ordinarily applicable only to representations as to facts either past or present, and not to promises concerning the future which, if binding at all, must be binding as contracts. Gainesville Glass Co. v. Don Hammond, Inc., 157 Ga. App. 640, 278 S.E.2d 182, 1981 Ga. App. LEXIS 1949 (1981) (decided under former Code 1933, § 38-116).

Representation to invoking party. — General rule is that for an estoppel by misrepresentation to arise the false representation must be made to the person seeking the benefit of the estoppel or intended for communication to that person. James Talcott, Inc. v. Carder, 300 F.2d 654, 1962 U.S. App. LEXIS 5627 (5th Cir. 1962) (decided under former Code 1933, § 38-116).

Contract by estoppel presupposes that one party has a defense to imposition of contractual liability but, by reason of one's conduct, is estopped to assert it. Gainesville Glass Co. v. Don Hammond, Inc., 157 Ga. App. 640, 278 S.E.2d 182, 1981 Ga. App. LEXIS 1949 (1981) (decided under former Code 1933, § 38-116).

Equal knowledge or means of knowing truth. — There is no estoppel by conduct when both parties have equal knowledge or equal means of obtaining the truth. Gay v. Laurens County, 213 Ga. 518, 100 S.E.2d 271, 1957 Ga. LEXIS 428 (1957) (decided under former Code 1933, § 38-116); Yancey Bros. Co. v. Dehco, Inc., 108 Ga. App. 875, 134 S.E.2d 828, 1964 Ga. App. LEXIS 1047 (1964) (decided under former Code 1933, § 38-116); Tybrisa Co. v. Tybeeland, Inc., 220 Ga. 442, 139 S.E.2d 302, 1964 Ga. LEXIS 577 (1964) (decided under former Code 1933, § 38-116).

Duty to speak. — In cases of estoppel through silence there must be not only the right but the duty to speak before failure to do so can operate as an estoppel. Tybrisa Co. v. Tybeeland, Inc., 220 Ga. 442, 139 S.E.2d 302, 1964 Ga. LEXIS 577 (1964) (decided under former Code 1933, § 38-116).

Testimony of party at second trial. — In a second trial of a case, a party is not estopped to give testimony at the second trial which is different from the party's testimony given at the first trial. Central of Ga. Ry. v. Brower, 106 Ga. App. 340, 127 S.E.2d 33, 1962 Ga. App. LEXIS 704, rev'd, 218 Ga. 525, 128 S.E.2d 926, 1962 Ga. LEXIS 552 (1962) (decided under former Code 1933, § 38-116).

Burden of proof rests upon the party asserting an estoppel to establish all the elements necessary to constitute an estoppel. Hartsfield Loan & Sav. Co. v. Garner, 184 Ga. 283, 191 S.E. 119, 1937 Ga. LEXIS 511 (1937) (decided under former Code 1933, § 38-116); Bennett v. Davis, 201 Ga. 58, 39 S.E.2d 3, 1946 Ga. LEXIS 429 (1946) (decided under former Code 1933, § 38-116).

Burden of pleading. — In order for an estoppel to be proved, it must be properly pleaded; a defendant who relies upon equitable estoppel must set up the same by answer in the suit of one's adversary. Citizens & S. Bank v. Barron, 181 Ga. 351, 181 S.E. 859, 1935 Ga. LEXIS 86 (1935) (decided under former Code 1933, § 38-116); Hartsfield Loan & Sav. Co. v. Garner, 184 Ga. 283, 191 S.E. 119, 1937 Ga. LEXIS 511 (1937) (decided under former Code 1933, § 38-116).

Pleading concealment of facts. — It is not error for the trial court to strike the plaintiff in error's plea of estoppel when there is no allegation showing a concealment of facts which resulted in the party asserting the estoppel acting to one's detriment. Beeland v. Alston, 101 Ga. App. 584, 114 S.E.2d 545, 1960 Ga. App. LEXIS 950 (1960) (decided under former Code 1933, § 38-116).

General Consideration (Cont'd)

Question for jury. — When the facts relied on to establish estoppel do not unequivocally show an estoppel in pais, the jury, and not the judge, should determine whether the facts constitute such an estoppel. Tune v. Beeland, 131 Ga. 528, 62 S.E. 976, 1908 Ga. LEXIS 139 (1908) (decided under former Civil Code 1895, § 5152).

As a factual determination, estoppel is a matter to be determined by a jury. Mathis v. Rock Springs Whsle. Co., 157 Ga. App. 726, 278 S.E.2d 484, 1981 Ga. App. LEXIS 1990 (1981) (decided under former Code 1933, § 38-116).

Estoppel of state. — State can only be estopped from asserting the state's right to the state's own property by legislative enactment or resolution. State Hwy. Dep't v. Strickland, 214 Ga. 467, 105 S.E.2d 299, 1958 Ga. LEXIS 463 (1958) (decided under former Code 1933, § 38-116).

Illustrations

Admission in favor of third person. — Admissions against one's title to land, and in favor of the title of a third person, will be no estoppel in behalf of one to whom they were not made and who has merely heard of them, it not appearing that they were made for the purpose of being acted upon or with any design or intention that they should be acted upon. Randolph v. Merchants & Mechanics Banking & Loan Co., 181 Ga. 671, 183 S.E. 801, 1936 Ga. LEXIS 406 (1936) (decided under former Code 1933, § 38-116).

Silence after sale by tenant in common. — When plaintiff did not stand by at the time of the sale with knowledge that the sale was taking place, but only remained silent after learning of the sale previously made and of the valuable, permanent, and expensive improvements made thereon by the purchaser, the plaintiff is not estopped to assert the plaintiff's title or claim of interest in the property within seven years from the date of the sale. Owen v. Miller, 209 Ga. 875, 76 S.E.2d 772, 1953 Ga. LEXIS 440 (1953) (decided under former Code 1933, § 38-116).

Persons acquiescing in partitions. — Persons sui juris, who acquiesced in a partition and took possession of their shares, could not recover from a grantee of one partitioner. Watkins v. Gilmore, 130 Ga. 797, 62 S.E. 32, 1908 Ga. LEXIS 427 (1908) (decided under former Civil Code 1895, § 5152).

Recorded deed. — Fact that a deed from a husband to his wife, under which a wife claimed title, may have been based upon a valuable consideration and duly recorded would not necessarily prevent a subsequent purchaser, by security deed, from relying upon the principle of estoppel, if he was in fact ignorant of the true title. Roop Grocery Co. v. Gentry, 195 Ga. 736, 25 S.E.2d 705, 1943 Ga. LEXIS 303 (1943) (decided under former Code 1933, § 38-116).

Innocent representations coupled with delay in ascertaining truth. — If a person having legal title to land, which fact person does not know but has convenient means of knowing, and after a lapse of 27 years, during which time person was under no legal disability, person still has not learned the fact of the person's interest in the land, and in those circumstances the person induces one to buy the land from a third person by representations that the land is the property of such third person, the person's misrepresentations to the purchaser innocently made, coupled with the person's delay in ascertaining the truth, will amount to constructive fraud, and they may be pleaded as an estoppel by the purchaser on the faith of the title of the person's vendor. Lanier v. Bryant, 180 Ga. 409, 179 S.E. 346, 1935 Ga. LEXIS 273 (1935) (decided under former Code 1933, § 38-116).

Valuable improvements on land. — One who has title to land and sees another who is in bona fide possession thereof place valuable improvements thereon, without giving notice of one's title, is not thereby subsequently estopped from asserting ones' title. Owen v. Miller, 209 Ga. 875, 76 S.E.2d 772, 1953 Ga. LEXIS 440 (1953) (decided under former Code 1933, § 38-116).

Restrictive covenant. — Plaintiff was not estopped by acquiescence from seeking to enjoin violations of restrictive covenants by defendants merely because the same covenants were previously violated by other and different parties by more remote sales. Dooley v. Savannah Bank & Trust Co., 199 Ga. 353, 34 S.E.2d 522, 1945 Ga. LEXIS 425 (1945) (decided under former Code 1933, § 38-116).

Waiver of landlord's lien. — Even if the claimant by the claimant's signature to the waiver of the claimant's landlord's lien against the immediately preceding bill of sale to secure debt, and by the express reference in the claimant's waiver to such bill of sale, did not in effect so recognize the covenant and warranty of title made by the debtor in the bill of sale to the property in question as to be conclusively bound thereby the same as if the claimant had signed the bill of sale as a party thereto, the claimant will at least be prima facie presumed to have read the bill of sale, to which the claimant expressly referred, or to have had knowledge of its essential contents; the claimant will be assumed not to have acted without knowledge of the property on which the claimant expressly waived the claimant's lien. Federal Intermediate Credit Bank v. Sherrod, 50 Ga. App. 501, 178 S.E. 477, 1935 Ga. App. LEXIS 191 (1935) (decided under former Code 1933, § 38-116).

Condemnation. — When there was no evidence of intentional deception on the part of the plaintiff, or any conduct which actually misled the defendant, the plaintiff would not be estopped from asserting any of the plaintiff's legal rights in injunction proceedings against the condemnation of property for a railroad right of way. Piedmont Cotton Mills v. Georgia Ry. & Elec. Co., 131 Ga. 129, 62 S.E. 52, 1908 Ga. LEXIS 36 (1908) (decided under former Civil Code 1895, § 5152).

Claiming equitable title to property. — When a wife, who claimed the equitable title to property, knowingly permitted her husband to retain the legal title and possession thereof, and credit was extended to him upon the faith of his apparent ownership or arose from the purchase of his outstanding promissory note, she was estopped from asserting her secret equity as against a creditor, whether or not he had reduced his claim to judgment, who had no notice of such equity. Rowe v. Cole, 171 Ga. 391, 155 S.E. 473, 1930 Ga. LEXIS 362 (1930) (decided under former Code 1933, § 38-116).

Equitable estoppel defense not available to defending trustee in action at law. — In a trust administration dispute, the trial court's ruling that a trustee's attempt to rely on the equitable defenses of unclean hands, laches, and equitable estoppel failed was proper because the challenging beneficiary filed an action at law against the trustee seeking only money damages; thus, because it was an action at law, the equitable defenses of laches and unclean hands had no application to the case. Hasty v. Castleberry, 293 Ga. 727, 749 S.E.2d 676, 2013 Ga. LEXIS 788 (2013).

Actual knowledge. — When one knows that one owns the title to or an interest in real or personal property, and knowingly permits or acquiesces in the property's sale, encumbrance, or pledge by another, one will be estopped from setting up one's title or interest against the person who by such conduct has been misled to one's injury; however, when the estoppel relied upon is not one by deed or from an express contract, signed by the person against whom the rule is invoked, and is merely an equitable estoppel, it is the general rule that such person must, before the injury, have had actual knowledge of the transfer, sale, or encumbrance, and the material facts and circumstances attending the transaction. Federal Intermediate Credit Bank v. Sherrod, 50 Ga. App. 501, 178 S.E. 477, 1935 Ga. App. LEXIS 191 (1935) (decided under former Code 1933, § 38-116).

Actual knowledge did not entitle party to equitable estoppel. — Trial court did not err in finding the lending company failed to comply with the foreclosure notice provisions of O.C.G.A. § 44-14-162.2 because the company's attorney failed to offer any reasonable explanation as to why, despite knowing that the debtor was the record owner of the properties, it only sent the notices to the predecessor in interest, and its agent, and the lending company was not entitled to equitable

Illustrations (Cont'd)

estoppel despite actual notice to the debtor. DIP Lending I, LLC v. Cleveland Avenue Properties, LLC, 345 Ga. App. 155, 812 S.E.2d 532, 2018 Ga. App. LEXIS 189 (2018).

Husband and wife. — Wife was estopped from claiming title to personalty in her husband's possession and mortgaged by him. Whitchard v. Exchange Nat'l Bank, 15 Ga. App. 190, 82 S.E. 770, 1914 Ga. App. LEXIS 54 (1914) (decided under former Civil Code 1910, § 5738).

Consent of wife to include her property in husband's mortgage. — Fact that a wife may have consented for her husband to include personal property, belonging to her, in a mortgage executed by him to secure his individual debt would not estop her from thereafter setting up her title to the property, where the mortgagee had knowledge of the true ownership of the property at the time the mortgage was executed. Whitchard v. Exchange Nat'l Bank, 15 Ga. App. 190, 82 S.E. 770, 1914 Ga. App. LEXIS 54 (1914) (decided under former Civil Code 1910, § 5738).

Signing ancillary agreement. — When one who is not a party to the instrument of sale signs an ancillary agreement thereon, which agreement is material to the force and effect of the instrument on the signer, and which expressly refers to the preceding instrument, one is estopped from asserting any interest one may have. Federal Intermediate Credit Bank v. Sherrod, 50 Ga. App. 501, 178 S.E. 477, 1935 Ga. App. LEXIS 191 (1935) (decided under former Code 1933, § 38-116).

Failure to file will. — One's failure to move in the matter of compelling another to file the alleged will after one's refusal, and to apply to have the will probated for so long a time, is such gross negligence as would amount to constructive fraud against a purchaser from the other without notice of the will and acting on faith of one's apparent title as heir at law, and would estop one and one's assigns from setting up title under the subsequently probated will as against such purchaser from the husband claiming as heir at law. Hadden v. Stevens, 181 Ga. 165, 181 S.E. 767, 1935 Ga. LEXIS 50 (1935) (decided under former Code 1933, § 38-116).

Acceptance of insurance premiums and placing the money in the general funds of the defendant insurer amounted to such an unconditional acceptance as to estop the defendant to contend that the insured's policy was not in force at the date of the fire. Progressive Fire Ins. Co. v. Morrison, 72 Ga. App. 473, 34 S.E.2d 173, 1945 Ga. App. LEXIS 612 (1945) (decided under former Code 1933, § 38-116).

State utility company and railroad station owner were estopped from contending that debtor's lease had been terminated prior to the debtor's bankruptcy filing since a revised memorandum effecting only the minor change of extending a termination date did not serve to negate the debtor's reasonable reliance on the previously established general terms of the contested deal. Historic Macon Station Ltd. Partnership v. Piedmont-Forrest Corp., 152 B.R. 358, 1993 Bankr. LEXIS 510 (Bankr. M.D. Ga. 1993), reaff'd, 165 B.R. 963, 1994 Bankr. LEXIS 452 (Bankr. M.D. Ga. 1994) (decided under former O.C.G.A. § 24-4-27).

Invalidity of franchise. — Regardless of the amount of expenditures holder of franchise and transferee might have made in connection therewith, no equitable estoppel would arise against city barring it from challenging validity of the franchise since there was evidence to show such expenses were incurred with knowledge of the invalidity of the franchise and therefore good faith was wholly lacking. Mid-Georgia Natural Gas Co. v. City of Covington, 211 Ga. 163, 84 S.E.2d 451, 1954 Ga. LEXIS 525 (1954) (decided under former Code 1933, § 38-116).

Bank's refusal to honor check. — Car auction contended that a bank should have been equitably estopped from denying that the bank had an obligation to honor checks drawn on a special account. However, the bank made no intentional misrepresentations and had no duty to disclose the bank's customer's financial status. The car auction, also, did not act with reasonable diligence by relying on the credit history of the customer's father instead of performing the auction's standard credit check. Georgia Cas. & Sur. Co.

v. Tennille Banking Co. (In re Smith), 51 B.R. 904, 1985 Bankr. LEXIS 5556 (Bankr. M.D. Ga. 1985) (decided under former O.C.G.A. § 24-4-27).

Use of other's name in making purchase to escape sales tax payment. — Use of out-of-state party's name and address to avoid payment of state sales tax does not give rise to estoppel to assert title to diamond ring since such party knew of the use of her name and address and has not adversely changed position in reliance thereon. Kornegay v. Thompson, 157 Ga. App. 558, 278 S.E.2d 140, 1981 Ga. App. LEXIS 1911 (1981) (decided under former Code 1933, § 38-116).

Wife who benefited from a loan obtained by her husband from his mother because it protected the marital home from foreclosure was not estopped from pursuing a claim to the residence since it was not shown that the wife was in any way directly involved in the discussions and negotiations that procured the loan. Watkins v. Watkins, 256 Ga. 58, 344 S.E.2d 220, 1986 Ga. LEXIS 702 (1986) (decided under former O.C.G.A. § 24-4-27).

No evidence party misled to that party's detriment. Cowen v. Snellgrove, 169 Ga. App. 271, 312 S.E.2d 623, 1983 Ga. App. LEXIS 3048 (1983) (decided under former O.C.G.A. § 24-4-27).

In a dispute between adjoining landowners over title to approximately six acres of land, because appellant adjoining neighbors failed to identify any evidence of deception on the part of the adjoining landowner or the landowner's predecessors, the trial court did not err by omitting a jury charge on equitable estoppel. Pirkle v. Turner, 281 Ga. 846, 642 S.E.2d 849, 2007 Ga. LEXIS 258 (2007) (decided under former O.C.G.A. § 24-4-27).

No fraud shown on part of developer. — In an action brought by the purchasers of a lot seeking to cancel the developer's security deed based upon alleged fraud, the trial court properly granted summary judgment to the developer as, even if the developer knew of the sale of the lot to the purchasers, such sale did not estop the developer from the developer's claim against the lot pursuant to the developer's security deed; however, the trial court did err by denying the equitable subrogation claim asserted by the purchasers' lender since exercising subrogation did not prejudice the developer in any manner. Byers v. McGuire Props., 285 Ga. 530, 679 S.E.2d 1, 2009 Ga. LEXIS 243 (2009), overruled on other grounds, SRM Group, Inc. v. Travelers Prop. Cas. Co. of Am., 308 Ga. 404, 841 S.E.2d 729, 2020 Ga. LEXIS 235 (2020) (decided under former O.C.G.A. § 24-4-27).

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Estoppel to assert title to real property by conduct subsequent to contract between third persons, 1 A.L.R. 1482.

What names import corporation within rule that one contracting with body described by corporate name is estopped to deny its corporate existence, 5 A.L.R. 1580.

Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like, 9 A.L.R. 634.

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like, 9 A.L.R. 842.

Denial of, or expression of doubt as to paternity or other relationship as estoppel to assert right of inheritance by virtue of such relationship, 33 A.L.R. 579.

Estoppel of mortgagor or seller to deny existence of property mortgaged or sold, 40 A.L.R. 382.

Failure to record or delay in recording an instrument affecting real property as basis of estoppel in favor of creditors not directly within protection of recording acts, 52 A.L.R. 183.

Execution of deed in representative or fiduciary capacity as estoppel of one in his individual capacity, 64 A.L.R. 1556.

Effect of intrusting another with stock certificate endorsed or assigned in blank to estop owner as against a bona fide purchaser or pledgee for value, 73 A.L.R. 1405.

Estoppel by conduct during testator's life to dissent from or attack validity of will, 74 A.L.R. 659.

Estoppel of one riparian owner to complain of diversion of water by another riparian owner, 74 A.L.R. 1129.

Estoppel by apparent acquiescence in or silence concerning improvements of real property to assert antagonistic title or interest, 76 A.L.R. 304.

Estoppel of wife who permits record title to realty to remain in husband's name to assert her own title as against one extending credit to husband, 76 A.L.R. 1501.

Waiver of, or estoppel to assert, debtor's exemption, by laches or delay, 82 A.L.R. 648.

Right of a purchaser assuming a mortgage debt, with the authorization of the mortgagor, to set up usury in mortgage as a defense or rely upon it as a ground of relief in equity, 82 A.L.R. 1153.

Estoppel of municipality to deny that it gave its consent to street franchise, 89 A.L.R. 619.

Principle which denies relief to party who has conveyed or transferred property in fraud of his creditors, as affected by execution, as part of, or as contemplated at time of, the fraudulent transaction, of reconveyance or retransfer of the property to him, 89 A.L.R. 1166.

Rule of estoppel of tenant to deny landlord's title as applicable where landlord affirmatively asserts a title or interest beyond that essential to his right to create the tenancy, 89 A.L.R. 1295.

Intrusting possession of securities to bank officer or employee who uses them to make a fraudulent showing of bank assets as estoppel of owner to reclaim them as against bank receivers, 100 A.L.R. 679.

Estoppel to question validity of proceedings extending boundaries of municipality, 101 A.L.R. 581.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 A.L.R. 1310.

Waiver of, or estoppel to assert, or election not to assert, forfeiture of executory land contract because of default in payment, 107 A.L.R. 345.

Abandonment of appeal or right of appeal by commencement, or prosecution to judgment, of another action, 115 A.L.R. 121.

Promissory estoppel, 115 A.L.R. 152; 48 A.L.R.2d 1069.

Tax exemption as affected by failure to claim or delay in claiming it for past years, 115 A.L.R. 1484.

Estoppel as ground for holding defendant liable for negligence in conduct of business which appears to be his but which in fact belongs to another, 122 A.L.R. 256.

Estoppel to assert invalidity of foreign decree of divorce for lack of domicil at divorce forum or failure to obtain jurisdiction of person of defendant, 122 A.L.R. 1321; 140 A.L.R. 914; 153 A.L.R. 941; 175 A.L.R. 538.

Creditor's statement or assurance to debtor, not supported by a consideration, that payment need not be made at time due, as binding upon creditor by way of estoppel, 124 A.L.R. 1248.

Doctrine of estoppel as applicable against one's right to hold a public office or his status as a public officer, 125 A.L.R. 294.

Mistake as to date of lapse of policy in insurer's statement of reason for denial of claim under policy as affecting its right to insist upon lapse as defense, 125 A.L.R. 1270.

Estoppel to rely on statute of limitations, 130 A.L.R. 8; 24 A.L.R.2d 1413.

Estoppel by acquiescence or delay to question validity of plan for reorganization of bank, 139 A.L.R. 659.

Estoppel of grantee or mortgagee as to amount of prior mortgage recited, 141 A.L.R. 1184.

What agreement or conduct subsequent to assignment of lease amounts to assumption by assignee of covenants of lease, or estoppel to deny such assumption, 148 A.L.R. 393.

Estoppel of owner of tangible personal property who knowingly or voluntarily permits another to have possession of certificates or other evidences of title, endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge, or otherwise deal with, the property, 151 A.L.R. 690.

Estoppel to invoke rule or statute against perpetuities, 162 A.L.R. 156.

Estoppel of intervener to assert claim against original complainant, 166 A.L.R. 911.

Construction and application of statute respecting estoppel of insurer where insured was examined by medical examiner, 172 A.L.R. 143.

Acceptance by building or construction contractor of payments under his contract as a waiver of right of action upon implied warranty as to conditions affecting cost, 173 A.L.R. 308.

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 A.L.R.2d 294.

Insurer's demand for additional or corrected proof of loss as waiver or estoppel as to right to assert contractual limitation provision, or as suspending running thereof, 15 A.L.R.2d 955.

Estoppel of one selling or conveying property to dissolved or defunct corporation to deny its existence, 20 A.L.R.2d 1084.

Renunciation of beneficial interest under inter vivos trust as condition of right to contest its validity, 21 A.L.R.2d 1457.

Estoppel to contest will or attack its validity, 28 A.L.R.2d 116.

Insurer's admission of liability, offers of settlement, negotiations, and the like, as waiver of, or estoppel to assert, contractual limitation provision, 29 A.L.R.2d 636.

Insurer's admission of liability, offers of settlement, and negotiations for adjustment or settlement, as waiver of proof of property loss, 49 A.L.R.2d 87.

Denial of liability as waiver of proofs of loss required by insurance policy, 49 A.L.R.2d 161.

Estoppel to assert that article annexed to realty is or is not a fixture, 60 A.L.R.2d 1209.

Right to attack validity of statute, ordinance, or regulation relating to occupational or professional license as affected by applying for, or securing license, 65 A.L.R.2d 660.

Partial payment on private building or construction contract as waiver of defects, 66 A.L.R.2d 570.

Waiver of, or estoppel to rely upon, contractual limitation of time for bringing action against municipality or other political subdivision, 81 A.L.R.2d 1039.

Purchaser's right to set up invalidity of contract because of violation of state securities regulation as affected by doctrines of estoppel or pari delicto, 84 A.L.R.2d 479.

Estoppel of lessee, because of occupancy of, or other activities in connection with, premises, to assert invalidity of lease because of irregularities in description or defects in execution, 84 A.L.R.2d 920.

Physician giving medical examination to insurance applicant as agent of insured or of insurer, 94 A.L.R.2d 1389.

Quantum or degree of evidence necessary to prove an equitable estoppel, 4 A.L.R.3d 361.

Infant's misrepresentation as to his age as estopping him from disaffirming his voidable transaction, 29 A.L.R.3d 1270.

Settlement negotiations as estopping reliance on statute of limitations, 39 A.L.R.3d 127.

Agreement of parties as estopping reliance on statute of limitations, 43 A.L.R.3d 756.

Estoppel of municipality as to encroachments upon public streets, 44 A.L.R.3d 257.

Promises to settle or perform as estopping reliance on statute of limitations, 44 A.L.R.3d 482.

Plaintiff's diligence as affecting his right to have defendant estopped from pleading the statute of limitations, 44 A.L.R.3d 760.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations, 45 A.L.R.3d 630.

Delay caused by other litigation as estopping reliance on statute of limitations, 45 A.L.R.3d 703.

Promissory estoppel as basis for avoidance of statute of frauds, 56 A.L.R.3d 1037.

Automobile or motorcycle as necessary for infant, 56 A.L.R.3d 1335.

Public contracts: duty of public authority to disclose to contractor information, allegedly in its possession, affecting cost or feasibility of project, 86 A.L.R.3d 182.

Failure of creditor, or creditor's assignee, to secure credit insurance as affecting rights or liabilities of debtor, upon debtor's loss, 88 A.L.R.3d 794.

Modern status of law as to equitable adoption or adoption by estoppel, 97 A.L.R.3d 347.

Liability insurer's waiver of right, or estoppel, to set up breach of cooperation clause, 30 A.L.R.4th 620.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder, 78 A.L.R.4th 90.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 A.L.R.5th 233.

ARTICLE 3

PARTICULAR MATTERS OF PROOF

Law reviews.

For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-14-40. Evidence of identity; burden in civil proceedings.

(a) Concordance of name alone is some evidence of identity. Residence, vocation, ownership of property, and other like facts may be proved. Reasonable certainty shall be all that is be required.

(b) In civil proceedings, parties shall generally be relieved from the onus of proving identity, as it is a fact generally more easily disproved than established.

History.

Code 1981, § 24-14-40, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

History of Section.

Former Code Section 24-4-40, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decision in Mullery v. Hamilton, 71 Ga. 720 (1884).

Cross references.

DNA sampling, collection, and analysis, § 35-3-160.

Law reviews.

For article, "DNA Fingerprinting: A Scientific Perspective," see 42 Mercer L. Rev. 1099 (1991).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5765, former Code 1933, § 38-304, and former O.C.G.A. § 24-4-40 are included in the annotations for this Code section.

Constitutionality of speech identification. — Requiring a suspect in a criminal case to verbalize specified words for identification purposes, whether or not the words used were the same as those allegedly used during the commission of the offense, did not violate an accused's privilege against self-incrimination accorded the accused by the United States Constitution and the state statutes and Constitution. Tate v. State, 153 Ga. App. 508, 265 S.E.2d 818, 1980 Ga. App. LEXIS 1873 (1980) (decided under former Code 1933, § 38-304).

Identification testimony admissible when it was relevant and supported by facts. Clark v. State, 153 Ga. App. 829, 266 S.E.2d 577, 1980 Ga. App. LEXIS 1997 (1980) (decided under former Code 1933, § 38-304).

Jury question. — Question of identity was one for the jury. Calhoun v. Herrin, 125 Ga. App. 518, 188 S.E.2d 273, 1972 Ga. App. LEXIS 1391 (1972) (decided under former Code 1933, § 38-304).

Identity of names was generally prima facie evidence of identity of persons. Hardrick v. State, 96 Ga. App. 670,

101 S.E.2d 99, 1957 Ga. App. LEXIS 659 (1957) (decided under former Code 1933, § 38-304).

Concordance of name was sufficient to show that the defendant and the individual previously convicted were the same person, in the absence of any denial by the defendant and no proof to the contrary. Hammond v. State, 139 Ga. App. 820, 229 S.E.2d 685, 1976 Ga. App. LEXIS 2009 (1976) (decided under former Code 1933, § 38-304).

In the absence of a denial by the defendant that the defendant was the perpetrator of a previous crime and any proof to the contrary, a concordance of name was sufficient to show that the defendant and the individual previously convicted were the same person. Lewis v. State, 234 Ga. App. 873, 508 S.E.2d 218 (decided under former O.C.G.A. § 24-4-40).

Under former O.C.G.A. § 24-4-40(a), if a defendant had the same name as is specified in a certified copy of a conviction, the concordance of name alone was some evidence of identity; without evidence to the contrary, the concordance of name established the previous conviction. Additionally, defendant stated the sentence set forth in the final disposition and acknowledged that defendant served the sentence. Patterson v. State, 259 Ga. App. 630, 577 S.E.2d 850, 2003 Ga. App. LEXIS 210 (2003) (decided under former O.C.G.A. § 24-4-40).

Trial court did not err in admitting similar transaction evidence because the prior armed robbery victim's identification of the defendant as one of the robbers was based on an investigating officer's personal knowledge; a second police officer's testimony that the officer had arrested a man with the same name as the defendant with a date of birth of February 23, 1984, was sufficient circumstantial evidence that the defendant committed a motor vehicle theft in 1998. Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742, 2010 Ga. App. LEXIS 600 (2010), overruled in part, Reed v. State, 291 Ga. 10, 727 S.E.2d 112, 2012 Ga. LEXIS 364 (2012) (decided under former O.C.G.A. § 24-4-40).

Adoption of name. — Witness could testify as to the identity of another person by showing that the other person had assumed and adopted the name in question. Hardrick v. State, 96 Ga. App. 670, 101 S.E.2d 99, 1957 Ga. App. LEXIS 659 (1957) (decided under former Code 1933, § 38-304).

Reference to person in case. — If a witness mentioned the name of a person, it would be referred to the person in the case of that name, rather than to some outsider. Swift v. Oglesby & Smith, 8 Ga. App. 540, 70 S.E. 97, 1911 Ga. App. LEXIS 32 (1911) (decided under former Civil Code 1910, § 5765).

If pretrial showup may have been unnecessarily suggestive, the criteria to determine whether there was a substantial likelihood of irreparable misidentification are: (1) opportunity to view the defendant at the scene; (2) witness's degree of attention; (3) accuracy of prior description; (4) level of certainty demonstrated at confrontation; and (5) time lapse. Tate v. State, 153 Ga. App. 508, 265 S.E.2d 818, 1980 Ga. App. LEXIS 1873 (1980) (decided under former Code 1933, § 38-304); Smith v. State, 160 Ga. App. 60, 286 S.E.2d 45, 1981 Ga. App. LEXIS 2877 (1981) (decided under former Code 1933, § 38-304).

Two-prong test for admissibility of preindictment lineup. — In determining whether the eyewitness testimony following a preindictment investigative lineup should be admitted, each case must have been considered on its own facts and a two-prong test must have been applied: (1) whether the photographic display was impermissibly suggestive, and, if it was, the court must consider (2) whether there was a substantial likelihood of irreparable misidentification. Cheeves v. State, 157 Ga. App. 566, 278 S.E.2d 148, 1981 Ga. App. LEXIS 1914 (1981) (decided under former O.C.G.A. § 24-4-40).

In considering whether lineup was impermissibly suggestive, evil to be avoided was likelihood of misidentification of an accused. James v. State, 157 Ga. App. 645, 278 S.E.2d 187, 1981 Ga. App. LEXIS 1950 (1981) (decided under former O.C.G.A. § 24-4-40).

Reliability of any identification procedure requires determination of whether it was in any way tainted by illegal pretrial showup or lineup or by use

of photographs; in such situations the court should consider the totality of the circumstances and determine first if the procedures were impermissibly suggestive, and, if so, did that procedure give rise to a substantial likelihood of irreparable misidentification. Miller v. State, 158 Ga. App. 21, 279 S.E.2d 289, 1981 Ga. App. LEXIS 2054 (1981) (decided under former O.C.G.A. § 24-4-40).

Photo array was not impermissibly suggestive because the eyewitnesses testified that the eyewitnesses looked at the lineup outside the presence of each other, read an admonition form before looking at the lineup, and picked out defendant's photograph; furthermore, the officer showing the lineup to the eyewitnesses did not tell the eyewitnesses that the eyewitnesses had picked the "right" photograph. Pace v. State, 272 Ga. App. 16, 611 S.E.2d 694, 2005 Ga. App. LEXIS 205 (2005), cert. denied, No. S05C1122, 2005 Ga. LEXIS 425 (Ga. June 6, 2005) (decided under former O.C.G.A. § 24-4-40).

Vocal verification was analogous to visual verification. Wallace v. State, 156 Ga. App. 525, 275 S.E.2d 110, 1980 Ga. App. LEXIS 3106 (1980) (decided under former Code 1933, § 38-304).

Photographic array could be suggestive when used close in time to a lineup, but when the record was devoid of specifics which would substantiate a claim of misidentification and the witness was able to identify appellant from the array, the procedure was not impermissibly suggestive. Coleman v. State, 150 Ga. App. 380, 258 S.E.2d 12, 1979 Ga. App. LEXIS 2323 (1979) (decided under former Code 1933, § 38-304).

Evidence of other offenses of a similar nature may have been admitted in criminal prosecutions for the purpose of identifying the accused and for the purpose of showing a common motive, plan, scheme, bent of mind, or course of conduct. Laws v. State, 153 Ga. App. 166, 264 S.E.2d 700, 1980 Ga. App. LEXIS 1725 (1980) (decided under former Code 1933, § 38-304); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42, 1980 Ga. App. LEXIS 2315 (1980) (decided under former Code 1933, § 38-304).

Admissible evidence. — Personal appearance, conversations, account one gave of oneself, one's family connections and associations, were admissible. Mullery v. Hamilton, 71 Ga. 720, 1883 Ga. LEXIS 258 (1883) (decided under former law).

Evidence sufficient. — In the instant suit by the beneficiary on a policy insuring the life of one's brother, even if under this rule the burden of providing that the person, bearing the same name as the insured and as to whom proof of death by pleuro-pneumonia was made, was the insured named in the policy, the onus was sufficiently met by the plaintiff's testimony, admitted without objection, that plaintiff's brother, of the name stated in the policy, was a world war veteran, that the Veterans' Bureau in Washington, D.C., informed plaintiff of plaintiff's brother's death, and that upon further inquiry plaintiff found that plaintiff's brother had died in a town in New Jersey, no evidence having been presented by the defendant to dispute such identity, a finding on that question was demanded for the plaintiff. Progressive Life Ins. Co. v. Haygood, 53 Ga. App. 231, 185 S.E. 534, 1936 Ga. App. LEXIS 48 (1936) (decided under former Code 1933, § 38-304).

Sufficient evidence established the juvenile's identity beyond a reasonable doubt because, when the juvenile court called the case for hearing, the judge used the juvenile's full first and last names to identify the case, and announced for the record that the juvenile was present; during the officer's testimony, the officer used the juvenile's surname, to identify the juvenile at the apartment complex who fled when the officer approached, causing the officer to give chase; and the record contained no evidence of any other juvenile with the same last name being at the scene of the July 18 incident or in the courtroom at the time of the hearing. In the Interest of A. A., 334 Ga. App. 37, 778 S.E.2d 28, 2015 Ga. App. LEXIS 568 (2015).

RESEARCH REFERENCES

Am. Jur. 2d.

29 Am. Jur. 2d, Evidence, § 576 et seq. 29A Am Jur. 2d, Evidence, §§ 1399, 1400, 1403 et seq.

Am. Jur. Proof of Facts.

Lineups and Showups — Admissibility and Effect of Pretrial Identification, 19 POF2d 435.

Foundation for DNA Fingerprint Evidence, 8 POF3d 749.

C.J.S.

31A C.J.S., Evidence, § 263. 32A C.J.S., Evidence, § 1304, 1305.

ALR.

Footprints as evidence, 31 A.L.R. 204; 35 A.L.R.2d 856.

Baptismal certificate or church record as evidence of age, 36 A.L.R. 689.

Admissibility and weight of evidence of resemblance on question of paternity or other relationship, 40 A.L.R. 97; 95 A.L.R. 314.

Admissibility in action for death of statements against interest by decedent, 114 A.L.R. 921.

Blood grouping tests, 163 A.L.R. 939; 46 A.L.R.2d 1000.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction, 11 A.L.R.2d 870.

Admissibility of declaration of persons other than members of family as to pedigree, 15 A.L.R.2d 1412.

Proof of identity of person or thing where object, specimen, or part is taken from a human body, as basis for admission of testimony or report of expert or officer based on such object, specimen, or part, 21 A.L.R.2d 1216.

Fingerprints, palm prints, or bare footprints as evidence, 28 A.L.R.2d 1115.

Identification of accused by his voice, 70 A.L.R.2d 995.

Homicide: identification of victim as person named in indictment or information, 86 A.L.R.2d 722.

What evidence is admissible to identify plaintiff as person defamed, 95 A.L.R.2d 227.

Admissibility of evidence of showup identification as affected by allegedly suggestive showup procedures, 39 A.L.R.3d 791.

Admissibility of evidence of photographic identification as affected by allegedly suggestive identification procedures, 39 A.L.R.3d 1000.

Malicious prosecution: liability for instigation or continuation of prosecution of plaintiff mistakenly identified as person who committed an offense, 66 A.L.R.3d 10.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 A.L.R.4th 229.

Admissibility of bare footprint evidence, 45 A.L.R.4th 1178.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 A.L.R.5th 672.

Admissibility of evidence of voice identification of defendant as affected by allegedly suggestive voice lineup procedures, 55 A.L.R.5th 423.

24-14-41. Proof of de facto officer.

An officer de facto may be proved to be such by his or her acts, without the production of his or her commission or appointment.

History.

Code 1981, § 24-14-41, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5754; former Code 1933, § 38-207; and former O.C.G.A. § 24-4-41 are included in the annotations for this Code section.

De facto notary doctrine. — Pursuant to the de facto notary doctrine, an expert's affidavit satisfied the requirements of O.C.G.A. § 9-11-9.1, despite the fact that the commission of the notary who attested the affidavit had expired. Thomas v. Gastroenterology Assocs. of Gainesville, P.C., 280 Ga. 698, 632 S.E.2d 118, 2006 Ga. LEXIS 466 (2006) (decided under former O.C.G.A. § 24-4-41).

24-14-42. Judgment admissible; effect.

A judgment shall be admissible between any parties to show the fact of the rendition thereof; between parties and privies it is conclusive as to the matter directly in issue, until reversed or set aside.

History.

Code 1981, § 24-14-42, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Law reviews.

For article on the effect of a conviction that is based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5820, former Code 1933, § 38-623, and former O.C.G.A. § 24-4-42 are included in the annotations for this Code section.

Direct or indirect relitigation prohibited. — Questions settled by a former final judgment must have been considered an end of the litigation; those questions could not be litigated in other actions, directly or indirectly. Smith v. Robinson, 214 Ga. 835, 108 S.E.2d 317, 1959 Ga. LEXIS 365 (1959) (decided under former Code 1933, § 38-623).

Issues in second suit are concluded as between parties and their privies if they were made in the first suit or if, under the rules of pleading and evidence, they could have been put in issue. Roadway Express, Inc. v. McBroom, 61 Ga. App. 223, 6 S.E.2d 460, 1939 Ga. App. LEXIS 262 (1939) (decided under former Code 1933, § 38-623).

Mere witness not estopped. — While an adjudication of the same subject matter in issue in a former suit between the same parties by a court of competent jurisdiction is an end of litigation, the plaintiff was not estopped by the judgment rendered in the court of ordinary (now probate court) in a proceeding to which the plaintiff was not a party, although the plaintiff appeared as a witness therein. McAfee v. Martin, 211 Ga. 14, 83 S.E.2d 605, 1954 Ga. LEXIS 467 (1954) (decided under former Code 1933, § 38-623).

New rule of law irrelevant. — Judgment of the Court of Appeals, reversing a judgment of the trial court could not be set aside on motion in the trial court, upon the ground that since the rendition of the decision by the Court of Appeals, the Supreme Court, in another case, announced a rule of law contrary to the decision of the Court of Appeals. Atkinson v. Battle, 11 Ga. App. 837, 76 S.E. 597, 1912 Ga. App. LEXIS 210 (1912) (decided under former Civil Code 1910, § 5820).

Decree in chancery was evidence, not merely of the fact of its rendition, but also of all the consequences resulting therefrom. It may have been given in proof against persons who were not parties to the bill, in support of the plaintiff's right or title to sue. Hardwock v. Hook, 8 Ga. 354, 1850 Ga. LEXIS 61 (1850) (decided under former law).

Judgment could not be collaterally questioned by third persons, except on the ground of fraud and collusion, in the procurement of the judgment. Creditors or bona fide purchasers could attack a judgment fraudulently obtained, whenever the judgment interfered with their rights, either at law or in equity. Hammock v. McBride, 6 Ga. 178, 1849 Ga. LEXIS 22 (1849) (decided under former law).

Same parties and privies. — Debtor's transfer of real property to the debtor's wife, a default judgment in a lawsuit, which the trustee claimed rendered the debtor insolvent, in which the wife did not participate and which was filed after the transfer did not prove the debtor's insolvency at the time of the transfer for purposes of former O.C.G.A. § 18-2-22(3); the wife's status as the debtor's wife, standing alone, did not establish privity with the debtor, and the judgment against the debtor did not bind the wife. Thurmond v. Turner (In re Turner), No. 00-72597-PWB, No. 02-6433, 2006 Bankr. LEXIS 2745 (Bankr. N.D. Ga. Sept. 19, 2006) (decided under former O.C.G.A. § 24-4-42).

Irregular judgment. — Although the judgment of a court may have been irregular, still the judgment may have been given in evidence for many purposes. Bryan v. Watson, 20 Ga. 480, 1856 Ga. LEXIS 88 (1856) (decided under former law).

Consent order in previous litigation involving an insurer and insured in subsequent litigation, unreversed and not set aside, which recited that a compromise settlement release was valid according to all its terms and provisions was conclusive on the parties as to any claim under the policy. Mutual of Omaha Ins. Co. v. Morris, 120 Ga. App. 525, 171 S.E.2d 378, 1969 Ga. App. LEXIS 847 (1969) (decided under former Code 1933, § 38-623).

Litigation of jurisdiction. — When in an action for divorce brought by wife, the husband appeared and filed an answer denying the allegations as to residence and also filed a plea to the jurisdiction, the question as to jurisdiction was necessarily litigated despite the fact that he had not appeared to defend the action in person, and the result was binding on the husband, in the absence of fraud, accident, or mistake, unmixed with negligence on his part. Johnson v. Johnson, 188 Ga. 800, 4 S.E.2d 807, 1939 Ga. LEXIS 615 (1939) (decided under former Code 1933, § 38-623).

Issue directly litigated. — When the defendant in a trover suit sued the plaintiff therein for divorce, and the question of title to the automobile was adjudicated by a court of competent jurisdiction, without objection by either party, in the action for divorce, the judgment rendered in that case, when the issue as to the title of the automobile was directly made, was conclusive on that question in the trover case. Maddox v. Carithers, 77 Ga. App. 280, 47 S.E.2d 888, 1948 Ga. App. LEXIS 533 (1948) (decided under former Code 1933, § 38-623).

When custody of minor child was vested in the mother by prior judgment, until and unless it was set aside in accordance with law, it was conclusive against the father, and was res judicata in a habeas corpus proceeding by the father. Levens v. Edge, 217 Ga. 418, 122 S.E.2d 728, 1961 Ga. LEXIS 474 (1961) (decided under former Code 1933, § 38-623).

Res judicata in criminal case. — Court properly sustained the state's plea of res judicata and dismissed on oral motion the defendant's special plea, when the judgment pleaded in bar thereof adjudicated the issue, as the judgment so pleaded by the state had been neither reversed nor modified by any exception which the accused had taken to it, such unreversed and unmodified judgment had consequently become and was the law of the case. Seymour v. State, 210 Ga. 571, 81 S.E.2d 808, 1954 Ga. LEXIS 374 (1954) (decided under former Code 1933, § 38-623).

Evidence of original divorce decree. — Trial court presiding over an action for modification of alimony erred in refusing to allow the introduction into evidence of the original divorce decree. Cotton v. Cotton, 272 Ga. 276, 528 S.E.2d 255, 2000 Ga. LEXIS 289 (2000) (decided under former O.C.G.A. § 24-4-42).

Admissibility of civil judgment in criminal case. — Judgment in a civil action was not admissible in a criminal action to prove any fact determined in the civil action. Flynt v. State, 153 Ga. App. 232, 264 S.E.2d 669, application for stay of execution, 449 U.S. 888, 100 S. Ct. 2960, 64 L. Ed. 2d 837 (1980) (decided under former Code 1933, § 38-623).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, § 1277 et seq.

Am. Jur. Pleading and Practice Forms.

9A Am. Jur. Pleading and Practice Forms, Evidence, § 11.

C.J.S.

32A C.J.S., Evidence, § 1027.

ALR.

Judgment in favor of less than all parties to contract as bar to action against other parties, 2 A.L.R. 124.

Conviction or acquittal as evidence of facts on which it was based, in a civil action, 31 A.L.R. 261; 18 A.L.R.2d 1287.

Judgment in action on commercial paper as affecting party to the paper who was not a party to the suit, 34 A.L.R. 152.

Conclusiveness of decree assessing stockholders of insolvent corporation as against nonresident stockholders not personally served within the state in which it was rendered, 48 A.L.R. 669; 175 A.L.R. 1419.

Judgment in action for services of physician or surgeon as bar to action against him for malpractice, 49 A.L.R. 551.

Suit in one state or country to enforce a contract as regards real property therein as a bar to suit in another state or country to enforce the contract as regards the property therein, 52 A.L.R. 180.

Judgment in action for death as a bar to an action for the same death in another jurisdiction or under another statute, 53 A.L.R. 1275.

Necessity of verdict against servant or agent as condition of verdict against master or principal for tort of servant or agent, 78 A.L.R. 365.

Admissibility and effect of finding or order on claim under Workmen's Compensation Act for personal injury, in proceedings on claim for compensation for death, 88 A.L.R. 1179.

Necessity of offering in evidence the record in the prior case in support of plea or claim that former judgment is bar or res judicata, 96 A.L.R. 944.

Judgment in favor of defendant in action for personal injuries as bar to suit for death caused by such injuries, and vice versa, 99 A.L.R. 1091.

Homestead exemption as exception to rule that judgment is conclusive as to defenses which might have been but were not raised, 103 A.L.R. 934.

Extraterritorial recognition and effect, as regards marital status, of a decree of divorce or separation rendered in a state or country in which neither of the parties was domiciled, 105 A.L.R. 817; 1 A.L.R.2d 1385; 28 A.L.R.2d 1303.

Findings or order upon application for alimony pendente lite in action for divorce or separation as res judicata, 105 A.L.R. 1406.

Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses, 111 A.L.R. 742.

Adjudication in fixing inheritance, succession, or estate tax, as conclusive for other purposes, 117 A.L.R. 1227.

Judgment against tort-feasor's insurer in action by injured person as res judicata in similar action by another person injured in same accident, 121 A.L.R. 890.

Rule of res judicata as applied to judicial construction of will, 136 A.L.R. 1180.

Judgment as conclusive as against, or in favor of one not a party of record or privy to a party, who prosecuted or defended suit on behalf and in the name of party, or assisted him or participated with him in its prosecution or defense, 139 A.L.R. 9.

Judgment for plaintiff in action in tort or contract against codefendants, as conclusive in subsequent action between codefendants as to the liability of both or the liability of one and the nonliability of the other, 142 A.L.R. 727.

Conclusiveness as to merits of judgment of court of foreign country, 148 A.L.R. 991.

Judgment in wrongful death action as res judicata in a subsequent action in same jurisdiction for the same death under same statute brought by or for benefit of statutory beneficiary whose status as such was ignored in the former action, 148 A.L.R. 1346.

Judgment for or against ward, cestui que trust, trustor, or distributee, as res judicata as to guardian, trustee, assignee for creditors, receiver, or personal representative, not a party to action or proceed-

ing in which judgment was rendered, 162 A.L.R. 1024.

Judgment in tax case as to one period as res judicata as to another period, 162 A.L.R. 1204.

Judgment for defendant based on the statute of limitations as bar to maintenance of action in another state, 164 A.L.R. 693.

Judgment based on construction of instrument as res judicata of its validity, 164 A.L.R. 873.

Privity between cotenants for purposes of doctrine of res judicata, 169 A.L.R. 179.

Recognition as to marital status of foreign divorce decree attacked on ground of lack of domicil, since Williams decision, 1 A.L.R.2d 1385; 28 A.L.R.2d 1303.

Denial of divorce in sister state or foreign country as res judicata in another suit for divorce between the same parties, 4 A.L.R.2d 107.

Privity as between lessor or bailor and lessee or bailee of personal property as regards effect of judgment in third person's action for damages against lessee or bailee as res judicata in lessor's or bailor's subsequent action against third person for damage to the property, or vice versa, 4 A.L.R.2d 1378.

Judgment denying validity of will because of undue influence, lack of mental capacity, or the like, as res judicata as to validity of another will, deed, or other instrument, 25 A.L.R.2d 657.

Decree granting or refusing injunction as res judicata in action for damages in relation to matter concerning which injunction was asked in first suit, 26 A.L.R.2d 446.

Judgment involving real property against one spouse as binding against other spouse not a party to the proceeding, 58 A.L.R.2d 701.

Decree in suit for "separation" as res judicata in subsequent suit for divorce or annulment, 90 A.L.R.2d 745.

Judgment in spouse's action for personal injuries as binding, as regards loss of consortium and similar resulting damage, upon other spouse not a party to the action, 12 A.L.R.3d 933.

Judgment in action against codefendants for injury or death of person, or for damage to property, as res judicata in subsequent action between codefendants as to their liability inter se, 24 A.L.R.3d 318.

Liability insurer's right to open or set aside, or contest matters relating to merits of, judgment against insured, entered in action in which insurer did not appear or defend, 27 A.L.R.3d 350.

Judgment in action against seller or supplier of product as res judicata in action against manufacturer for injury from defective product, or vice versa, 34 A.L.R.3d 518.

Validity of verdict or verdicts by same jury in personal injury action awarding damages to injured spouse but denying recovery to other spouse seeking collateral damages, or vice versa, 66 A.L.R.3d 472.

Modern views of state courts as to whether consent judgment is entitled to res judicata or collateral estoppel effect, 91 A.L.R.3d 1170.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action or vice versa, 94 A.L.R.3d 676.

24-14-43. Calendars as proof of dates.

Stern's United States calendar and Stafford's office calendar shall be admissible in proof of dates for the space of time covered by them respectively without further proof.

History.
Code 1981, § 24-14-43, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-14-44. American Experience Mortality Tables.

In all civil proceedings where the life expectancy of a person shall be

an issue, the American Experience Mortality Tables shall be admissible as evidence of the life expectancy of such person.

History.

Code 1981, § 24-14-44, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

The American Experience Mortality Table, appendix to this volume.

Law reviews.

For article discussing the use of mortality tables in determining the value of life earnings of the deceased in wrongful death actions, with emphasis on the Carlisle table, see 9 Ga. St. B.J. 293 (1973).

For article, economic evaluation of damages in personal injury and wrongful death litigation, see 19 Ga. St. B.J. 60 (1982).

For article, "Damage Calibrations Under the Federal Tort Claims Act," see 25 Ga. St. B.J. 100 (1988).

For article, "Calculating Economic Damages in Georgia Personal Injury and Wrongful Death Cases," see 22 Ga. St. Bar. J. 18 (Feb. 2017).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1956, p. 68, § 1 and former O.C.G.A. § 24-4-44 are included in the annotations for this Code section.

Permanent injuries. — Court erred in failing to charge that mortality tables were to be used only if the injuries sued for were permanent, and that the value of the victim-wife's services and consortium in the future, for the loss of which the plaintiff husband sought recovery, should be reduced to present cash value when there was an issue as to whether or not the injuries sustained by the plaintiff wife were permanent. Davison-Paxon Co. v. Archer, 91 Ga. App. 131, 85 S.E.2d 182, 1954 Ga. App. LEXIS 880 (1954) (decided under former Ga. L. 1956, p. 68, § 1).

Jury not bound by tables. — While standard mortality tables were admissible in evidence as an aid to the jury in determining the life expectancy of a deceased person, the jurors were not bound by such tables, but may have used any method known to jurors as upright and intelligent individuals in applying jurors' knowledge of the common phenomena and facts of human experience to the evidence, when sufficient facts appeared as to the age, health, physical condition, and habits of the deceased to afford a basis for a proper conclusion. Pollard v. Gorman, 52 Ga. App. 127, 182 S.E. 678, 1935 Ga. App. LEXIS 75 (1935) (decided under former law).

RESEARCH REFERENCES

C.J.S.

32A C.J.S., Evidence, § 1033.

ALR.

Instructions regarding determination of life expectancy in action for personal injuries or death, 87 A.L.R. 910.

Admissibility and weight of mortality tables as evidence as affected by lack of normal health, 116 A.L.R. 416.

Shortening of life expectancy as element of damages recoverable in action by person injured or in action under survival statute or death statute, 131 A.L.R. 1351.

Use of mortality tables as aid in determining life expectancy of young child whose age is not tabulated therein, 162 A.L.R. 1003.

Admissibility of mortality tables in personal injury action as dependent upon showing of permanency of injury, 50 A.L.R.2d 419.

Cost of annuity as a factor for consideration in fixing damages in personal injury or death action, 53 A.L.R.2d 1454.

Counsel's use, in trial of personal injury or wrongful death case, of blackboard,

chart, diagram, or placard not introduced in evidence, relating to damages, 86 A.L.R.2d 239.

24-14-45. Other mortality tables; supplemental nature.

(a) In addition to any other lawful methods of computing the value of the life of a decedent in wrongful death cases or of determining the present value of future due earnings or amounts in proceedings involving permanent personal injuries, there shall be admissible in evidence, as competent evidence in such proceedings, either or both of the following mortality tables:

(1) The Commissioners 1958 Standard Ordinary Mortality Table; or

(2) Annuity Mortality Table for 1949, Ultimate.

(b) In addition to the provisions set out in subsection (a) of this Code section, the jury or court shall be authorized in cases of wrongful death or permanent personal injuries to use any table determined by the jury or court, whichever is the trier of fact, to be accurate in showing the value of annuities on single lives according to the mortality tables listed in subsection (a) of this Code section.

(c) The admissible evidence provided for in subsections (a) and (b) of this Code section shall not be the exclusive method which the jury or court is required to use in such proceedings but shall be supplementary to other lawful and allowable evidence and methods for such purpose.

History.

Code 1981, § 24-14-45, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Cross references.

The Commissioners 1958 Standard Ordinary Mortality Table and the Annuity Mortality Table for 1949, Ultimate, appendix to this volume.

Law reviews.

For article discussing the use of mortality tables in determining the value of life earnings of the deceased in wrongful death actions, with emphasis on the Carlisle table, see 9 Ga. St. B.J. 293 (1973).

For article, economic evaluation of damages in personal injury and wrongful death litigation, see 19 Ga. St. B.J. 60 (1982).

For article, "Damage Calibrations Under the Federal Tort Claims Act," see 25 Ga. St. B.J. 100 (1988).

For article, "Calculating Economic Damages in Georgia Personal Injury and Wrongful Death Cases," see 22 Ga. St. Bar. J. 18 (Feb. 2017).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1970, p. 168, §§ 1, 3, 4, and former O.C.G.A. § 24-4-45 are included in the annotations for this Code section.

Jury's findings must be fair. — While a jury had latitude in determining the

value of a person's life in considering income, health, life expectancy, etc., and were not bound by mortality tables which may have been introduced in evidence and may have reduced the value of a person's life to its present cash value by any method satisfactory to them which produces a definite result that was fair and reasonable and was authorized by the evidence, their final finding as to the present cash value of the decedent's life must have been fair and within reason and adjusted to the evidence within the latitudes above mentioned. Swift & Co. v. Lawson, 95 Ga. App. 35, 97 S.E.2d 168, 1957 Ga. App. LEXIS 708 (1957) (decided under former law).

Expert testimony. — Evidence offered by an expert on the value of the life of the deceased may have taken into account statistical studies and inflationary trends. Georgia S. & Fla. Ry. v. Odom, 152 Ga. App. 664, 263 S.E.2d 469, 1979 Ga. App. LEXIS 3000 (1979) (decided under former Ga. L. 1970, p. 168, §§ 1, 3, 4).

Table properly admitted. — Trial court did not err in admitting into evidence, over objection, a mortality table and in charging the jury on permanent injury since plaintiff was injured on February 28, 1983, and at the time of trial on March 19, 1986, was still disabled from performing some normal, everyday functions, and the court limited any damages awarded to future pain and suffering. Cox v. Cantrell, 181 Ga. App. 722, 353 S.E.2d 582, 1987 Ga. App. LEXIS 1549 (1987) (decided under former O.C.G.A. 24-4-45).

RESEARCH REFERENCES

Am. Jur. 2d.

29A Am. Jur. 2d, Evidence, § 1348 et seq.

C.J.S.

32A C.J.S., Evidence, § 1033.

ALR.

Medical books or treatises as independent evidence, 65 A.L.R. 1102; 84 A.L.R.2d 1338.

Remarriage tables, 25 A.L.R.2d 1464.

Admissibility of mortality tables in personal injury action as dependent upon showing of permanency of injury, 50 A.L.R.2d 419.

Cost of annuity as a factor for consideration in fixing damages in personal injury or death action, 53 A.L.R.2d 1454.

Admissibility of evidence as to experiments or tests in civil action for death, injury, or property damage against electric power company or the like, 54 A.L.R.2d 922.

Counsel's use, in trial of personal injury or wrongful death case, of blackboard, chart, diagram, or placard not introduced in evidence, relating to damages, 86 A.L.R.2d 239.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of homemaker, 47 A.L.R.4th 100.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in trades and manual occupations, 47 A.L.R.4th 134.

Admissibility of evidence, in action for personal injury or death, of injured party's use of intoxicants or illegal drugs on issue of life expectancy, 86 A.L.R.4th 1135.

24-14-46. United States Department of Agriculture inspection certificates prima-facie evidence.

All inspection certificates issued by the United States Department of Agriculture over the signature of any inspector thereof which are admissible in courts of the United States as prima-facie evidence of the truth of the statements therein contained shall be admissible in all courts of the State of Georgia as prima-facie evidence of the truth of the statements therein contained.

History.
Code 1981, § 24-14-46, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

24-14-47. Proof that person is dead or missing as evidence.

(a) A written finding of presumed death made by officers or employees of the United States authorized to make such findings pursuant to any law of the United States or a duly certified copy of such finding shall be received in any court, office, or other place in this state as evidence of the death of the person therein found to be dead and the date, circumstances, and place of his or her disappearance.

(b) An official written report, record, or duly certified copy thereof that a person is missing, missing in action, interned in a neutral country, beleaguered, besieged, or captured by an enemy, dead or alive, made by an officer or employee of the United States authorized by any law of the United States to make the same shall be received in any court, office, or other place in this state as evidence that such person is missing, missing in action, interned in a neutral country, beleaguered, besieged, or captured by an enemy, dead or alive, as the case may be.

(c) For the purposes of subsections (a) and (b) of this Code section, any finding, report, record, or duly certified copy thereof purporting to have been signed by an officer or employee of the United States as is described in this Code section shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his or her authority.

History.
Code 1981, § 24-14-47, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

U.S. Code.
Payments to missing federal employees, 5 U.S.C. § 5561 et seq. Payments to missing service personnel, 37 U.S.C. § 551 et seq.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.
8A Am. Jur. Pleading and Practice Forms, Death, § 168.

ALR.
Circumstances justifying inference of death of insured before the lapse of seven years from his disappearance, 34 A.L.R. 1389; 61 A.L.R. 1327.

Presumption of death from absence as affected by fact that person was fugitive from justice, 44 A.L.R. 1488.

Death certificate as evidence, 96 A.L.R. 324.

Presumption of death as evidence, 115 A.L.R. 404.

Presumption against suicide as overcome by death certificate, coroner's verdict, or similar documentary evidence, 159 A.L.R. 181.

APPENDIX

AMERICAN EXPERIENCE MORTALITY TABLE

Age	Expectation of Life (Years)	Age	Expectation of Life (Years)
10	48.72	53	18.79
11	48.08	54	18.09
12	47.45	55	17.40
13	46.80	56	16.72
14	46.16	57	16.05
15	45.50	58	15.39
16	44.85	59	14.74
17	44.19	60	14.10
18	43.53	61	13.47
19	42.87	62	12.86
20	42.20	63	12.26
21	41.53	64	11.67
22	40.85	65	11.10
23	40.17	66	10.54
24	39.49	67	10.00
25	38.81	68	9.47
26	38.12	69	8.97
27	37.43	70	8.48
28	36.73	71	8.00
29	36.03	72	7.55
30	35.33	73	7.11
31	34.63	74	6.68
32	33.92	75	6.27
33	33.21	76	5.88
34	32.50	77	5.49
35	31.78	78	5.11
36	31.07	79	4.74
37	30.35	80	4.39
38	29.62	81	4.05
39	28.90	82	3.71
40	28.18	83	3.39
41	27.45	84	3.08
42	26.72	85	2.77
43	26.00	86	2.47
44	25.27	87	2.18
45	24.54	88	1.91

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Age	Expectation of Life (Years)	Age	Expectation of Life (Years)
46	23.81	89	1.66
47	23.08	90	1.42
48	22.36	91	1.19
49	21.63	92	.98
50	20.91	93	.80
51	20.20	94	.64
52	19.49	95	.50

Cross references.

Admissibility of this table in civil cases where life expectancy of a person is an issue, § 24-14-44.

THE COMMISSIONERS 1958 STANDARD ORDINARY MORTALITY TABLE

Age	Expectation of Life (Years)	Age	Expectation of Life (Years)
0	68.30	50	23.63
1	67.78	51	22.82
2	66.90	52	22.03
3	66.00	53	21.25
4	65.10	54	20.47
5	64.19	55	19.71
6	63.27	56	18.97
7	62.35	57	18.23
8	61.43	58	17.51
9	60.51	59	16.81
10	59.58	60	16.12
11	58.65	61	15.44
12	57.72	62	14.78
13	56.80	63	14.14
14	55.87	64	13.51
15	54.95	65	12.90
16	54.03	66	12.31
17	53.11	67	11.73
18	52.19	68	11.17
19	51.28	69	10.64
20	50.37	70	10.12
21	49.46	71	9.63
22	48.55	72	9.15
23	47.64	73	8.69
24	46.73	74	8.24
25	45.82	75	7.81
26	44.90	76	7.39
27	43.99	77	6.98
28	43.08	78	6.59
29	42.16	79	6.21
30	41.25	80	5.85
31	40.34	81	5.51
32	39.43	82	5.19
33	38.51	83	4.89
34	37.60	84	4.60
35	36.69	85	4.32
36	35.78	86	4.06
37	34.88	87	3.80
38	33.97	88	3.55

APPENDIX

Age	Expectation of Life (Years)	Age	Expectation of Life (Years)
39	33.07	89	3.31
40	32.18	90	3.06
41	31.29	91	2.82
42	30.41	92	2.58
43	29.54	93	2.33
44	28.67	94	2.07
45	27.81	95	1.80
46	26.95	96	1.51
47	26.11	97	1.18
48	25.27	98	.83
49	24.45	99	.50

Cross references.

Admissibility of this table in cases of wrongful death or permanent personal injury, § 24-14-45.

ANNUITY MORTALITY TABLE FOR 1949, ULTIMATE

Age	Expectation of Life (Years) Male	Female	Age	Expectation of Life (Years) Male	Female
0	73.18	78.69	55	22.20	26.33
1	72.47	77.94	56	21.44	25.46
2	71.59	77.04	57	20.68	24.59
3	70.65	76.10	58	19.93	23.72
4	69.70	75.14	59	19.20	22.87
5	68.75	74.17	60	18.48	22.02
6	67.78	73.19	61	17.76	21.18
7	66.82	72.21	62	17.06	20.36
8	65.85	71.23	63	16.37	19.54
9	64.89	70.24	64	15.68	18.73
10	63.92	69.26	65	15.01	17.94
11	62.95	68.27	66	14.36	17.16
12	61.98	67.29	67	13.71	16.39
13	61.01	66.30	68	13.08	15.64
14	60.04	65.32	69	12.46	14.90
15	59.07	64.33	70	11.86	14.18
16	58.10	63.35	71	11.28	13.47
17	57.13	62.37	72	10.71	12.78
18	56.17	61.39	73	10.15	12.11
19	55.20	60.41	74	9.61	11.45
20	54.23	59.43	75	9.09	10.82
21	53.26	58.45	76	8.58	10.20
22	52.30	57.48	77	8.10	9.60
23	51.33	56.50	78	7.63	9.02
24	50.37	55.53	79	7.17	8.47
25	49.41	54.55	80	6.74	7.93
26	48.44	53.58	81	6.32	7.42
27	47.48	52.61	82	5.92	6.93
28	46.52	51.64	83	5.54	6.46
29	45.56	50.67	84	5.18	6.01
30	44.61	49.70	85	4.84	5.58
31	43.65	48.73	86	4.51	5.18
32	42.70	47.77	87	4.20	4.79
33	41.74	46.80	88	3.90	4.43
34	40.79	45.84	89	3.62	4.09
35	39.85	44.88	90	3.36	3.77
36	38.90	43.92	91	3.12	3.47
37	37.96	42.97	92	2.88	3.19
38	37.02	42.01	93	2.67	2.92

APPENDIX

Age	Expectation of Life (Years) Male	Female	Age	Expectation of Life (Years) Male	Female
39	36.08	41.06	94	2.47	2.68
40	35.15	40.11	95	2.28	2.45
41	34.22	39.17	96	2.10	2.24
42	33.29	38.22	97	1.94	2.05
43	32.38	37.28	98	1.79	1.87
44	31.47	36.35	99	1.65	1.71
45	30.57	35.41	100	1.52	1.56
46	29.67	34.48	101	1.40	1.42
47	28.80	33.56	102	1.29	1.30
48	27.93	32.64	103	1.20	1.19
49	27.07	31.72	104	1.10	1.09
50	26.23	30.81	105	1.02	0.99
51	25.40	29.91	106	0.94	0.91
52	24.58	29.01	107	0.86	0.83
53	23.78	28.11	108	0.75	0.73
54	22.98	27.22	109	0.50	0.50

Cross references.
Admissibility of this table in cases of wrongful death or permanent personal injury, § 24-14-45.

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