CASE NOTES

PROCEDURE—DISCOVERY—THE TERMS MENTAL AND PHYSICAL CONDITION OF A PARTY INCLUDES BLOOD TEST UNDER GA. CODE §38-2110.

Is *Rider v. Rider*,[1] Paula and Mike Rider, by and through their guardian, brought a paternity action against their alleged father to require him to pay a reasonable sum for their upkeep, maintenance, and education. The defendant denied paternity and filed a special pleading in which he moved that the court require the minor plaintiffs and their mother, who was not a party, to submit to blood tests to determine paternity and offered to take a blood test himself. Orders were issued by the trial court requiring the plaintiffs, the mother and the defendant to report to a named doctor and submit to a blood test. The defendant submitted, but the plaintiffs did not. The trial court upon learning of the plaintiffs non-compliance rendered an order dismissing plaintiff's petition. An exception was filed to that judgment. *Held*: affirmed. The Court of Appeals held that the trial judge in his discretion was authorized under GA. CODE section 38-2110 to order their examinations and the majority opinion also states:

> Since it appears from the order of the trial judge dismissing the action it was based solely on the failure of the plaintiffs to comply with the previous order for a blood test and not upon any failure of the plaintiff's mother, *who was not a party to this action,* to comply with such order, no question is presented by the record before this court as to the authority of the trial court to order one not a party to the action to submit to a physical examination.[2]

Section 38-2110 of the GA. CODE is identical to Rule 35 of the Federal Rules of Civil Procedure. Both state and federal rules refer to "an action in which the mental or physical condition of a party is in controversy. . . . " Judge Frankum in his majority opinion in the *Rider* case seems to have recognized this fact. Professor Wright in his recent hornbook on federal courts indicates that the rule applies only to "parties." He says that "although inherent power has been claimed to permit such examinations, it is doubtful whether this is proper in federal court, where there was no inherent power prior to the adoption of Rule 35."[3]

1. Rider v. Rider 110 Ga. App. 382, 138 S.E.2d 621 (1964).
2. *Id.* at 384.
3. Wright, Federal Courts 339 (1963).

Although in state proceedings some cases would seem to authorize the ordering of blood grouping tests in the absence of statutes[4] prior to the adoption of Rule 35, the federal courts could not order an examination unless express authority was granted by the laws of the state in which the court sat.[5] With the adoption of Rule 35, such examinations could be ordered regardless of the law of the state in which the district court was sitting and such examination was not only as to blood test but as to any physical or mental condition of a party which was in controversy.[6] It would seem that Georgia by enacting CODE section 38-2110 has merely clarified law in this regard.

In his dissent in the *Rider* case, Chief Judge Felton says:

> It is inconceivable to me that the blood type of a person could be said to involve his mental or physical condition. If it could be constitutionally so provided by rule or statute, it would require a clearer and more certain indication of intention than can be obtained by a dictionary definition of "condition". Since the said code section does not include authority to order a blood test for the purpose for which the test was ordered in this case, the application of penalties provided in code §38-2111 was unauthorized in this case.[7]

To sustain his proposition, Judge Felton does not cite any authority for his view. He may feel that Georgia should not follow the federal decisions in this area and the court could have so held, for federal decisions are merely persuasive.[8] However, the federal courts have for some time taken the non-restrictive view of Rule 35 holding that it not only applied to personal injury litigation, but also to blood test.[9] The majority of the court seemed to be in accord with the federal law on this and they cite the leading federal case of *Beach v. Beach*.[10]

An earlier comment in the MERCER LAW REVIEW has pointed out that there are apparently no Georgia statute or cases dealing directly with blood tests in procedings to prove non-paternity.[11] However, Green does indicate that admissions of experiments are largely in the discretion of the trial judge.[12] Accordingly, it would seem that blood test evidence once obtained could be admitted during the trial of the case.

4. State v. Eli., ___ N.D. ___, 62 N.W.2d 469 (1954); Parsons v. Parsons, 197 Ore. 420, 253 P.2d 914 (1953).
5. Union Pac. R. Co. v. Botsford, 141 U.S. 250 (1891); Camden & Suburban R. Co. v. Stetson, 77 U.S. 172 (1900).
6. Wright, Federal Courts 339 (1963).
7. *Supra* n. 1 at 384-385.
8. Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1961).
9. Beach v. Beach, 114 F.2d 479 (1940).
10. *Ibid.*
11. 16 MERCER L. REV. 306 (1963).
12. Green, The Georgia Law of Evidence 377 (1957).

The *Reynolds* decision provides a method of discovery in a civil proceeding prior to trial whereby blood test evidence may be obtained. It is to be noted, however, this procedure would not be available in a criminal action such as a bastardy proceeding, under GA. CODE section 68-1625.[13]

The majority opinion in the case under discussion also indicated the admission of such blood test was in the discretion of the trial judge.[14] It would seem such discretion must be a judicial one and not arbitrary or capricious. To show an abuse of discretion in the trial judge it would seem necessary to show a timely request and the necessity and desirability of these tests and such should appear in the record.[15]

The failure of the plaintiffs to comply with the order of the court in *Reynolds* resulted in a dismissal which is provided for in CODE section 38-2111 (b) (2) along with other appropriate penalties.

JOHN W. BROADFOOT

TORTS—ASSAULT AND BATTERY—PHYSICIAN-PATIENT RELATIONSHIP

Plaintiff sought to establish her claim for damages against a defendant physician based on assault and battery. The question involved was "whether after treatment or examination has begun, the patient's consent previously given may be withdrawn so as to subject the doctor to liability for assault and battery if the treatment or examination is continued."[1] With no precedent to guide them, the Georgia Court of Appeals held that it could. The court then went on to devise a test by which consent once given could be negated. This test consists of two requisites:

> (1) The patient must act or use language which can be subject to no other inference and which must be unquestioned responses from a clear and rational mind. These actions and utterances of the patient must be such as to leave no room for doubt in the minds of reasonable men that in view of all the circumstances consent was actually withdrawn. (2) When medical treatments or examinations occuring with the patient's consent are proceeding in a manner requiring bodily contact by the physician with the patient and consent to the

13. The Uniform Act on Blood Test to Determine Paternity was approved by the National Conference of Commissioner on Uniform State Laws in 1952. This act provides for the issuance of blood grouping test orders in civil and criminal procedings in which paternity is a relevant factor. For a discussion of this topic see, Annot., 46 A.L.R.2d 1004 (1956).

14. *Supra* n. 1 at 383.

15. Dale v. Buckingham, 241 Iowa 40, 40 N.W.2d 45 (1949).

16. Mims v. Boland, 110 Ga. App. 477, 138 S.E.2d 902 (1964).

> contact is revoked, it must be medically feasible for the doctor to desist in the treatment or examination at that point without the cessation being detrimental to the patient's health or life from a medical viewpoint.[2]

Although the case arises out of the physician-patient relationship, it pursues neither of the usual courses of negligence or medical malpractice. Instead, it is an action based on assault and battery against a medical practitioner. The right to such an action is well established.[3]

The nature of the relationship between a physician and patient is consensual and the absence of consent gives rise to a battery.[4] The gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff.[5] "As a general rule there can be no tort committed against the person consenting thereto, if that consent is free and not obtained by fraud, and is the action of a sound mind."[6] Consent to medical treatment may be manifested by acts and conduct.[7] Thus when a patient (1924).
voluntarily consults a physician and allows him to do what should be done, he at least implicates consent to whatever the physician considers reasonably necessary for treatment.[8]

But the question of what constitutes a sufficient withdrawal of consent previously given is a case of first impression not only in Georgia but elsewhere as well.[9] It would seem that the court, in devising this standard for determining whether consent once given may be withdrawn, is acting in keeping with the basic principles of tort law. This new standard broadens the substantive law and should be helpful in deciding like issues in other jurisdictions.

GEORGE C. KELLEY, III

EVIDENCE—JUDGMENTS—ADMISSIBILITY AND CONCLUSIVENESS OF CRIMINAL CONVICTION IN SUBSEQUENT CIVIL ACTION

Defendant, in a federal criminal proceeding, was convicted[1] of extortion under a federal statute.[2] Subsequently, in a civil action by the victim to recover from defendant the extorted money, a Pennsylvania

2. *Ibid.*
3. Perry v. Hodgson, 168 Ga. 678, 148 S.E. 659 (1929); Keen v. Coleman, 67 Ga. App. 331, 20 S.E.2d 175 (1942).
4. 41 AM. JUR., *Physicians and Surgeons* §108, p. 220 (1942).
5. PROSSER, TORTS §9, p. 35 (3rd ed. 1964).
6. GA. CODE ANN. §105-1803; Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905
7. Kritzer v. Criton, 101 Cal. App. 2d 33, 224 P.2d 808 (1950).
8. Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906).
9. *Supra* n. 1.
1. United States v. Stirone, 361 U.S. 212 (1960).
2. HOBBS ANTI-RACKETEERING ACT, 18 U.S.C.A. 1951 (1948).

court held that the record of conviction was conclusive as to the fact of extortion. The trial court upon the conclusiveness of the conviction directed a verdict for the plaintiff which was affirmed upon appeal.[3]

Traditionally, evidence of a criminal conviction is not admissible much less conclusive in a civil action arising out of the same factual situation.[4] Such remains the prevailing view as evidenced by decisions and rulings of other jurisdictions.[5] Before the principal case[6] Pennsylvania courts adhered to the majority view[7] except as otherwise provided by statute[8] or where evidence of conviction was presented without objection.[9] A growing minority of courts have allowed evidence of conviction to be introduced for the jury's consideration[10] and now as evidenced by the *Hurtt* case,[11] text writers,[12] the MODEL CODE OF EVIDENCE,[13] and the UNIFORM RULES OF EVIDENCE,[14] a trend may be developing to not only permit into evidence the record of conviction but under certain circumstances to make such record conclusive.

Decisions holding a criminal conviction to be clearly conclusive are limited to isolated instances;[15] or where the convicted person as defendant in a civil action himself introduces the record of conviction;[16] where the parties to both criminal and civil actions are identical (col-

3. Hurtt v. Stirone, ___ Pa. ___, 206 A.2d 624 (1965).
4. Castrique v. Imrie (1870), L.R. 4 H.L. 434; Leyman v. Latimer (1870), L.R. 3 Ex. D. 352; Betts v. Town of New Hartford, 25 Conn. 180 (1856); Jarvis v. Manlove, 5 Har. 452 (Del. 1854); Bankston v. Folks, 38 La. Ann. 267 (1886); Clark v. Irvin, 9 Ham. 131 (Ohio 1839).
5. Moore v. Young, 260 N.C. 654, 133 S.E.2d 510 (1963); Webb v. McDaniel, 218 Ga. 366, 127 S.E.2d 551 (1962); U.S. v. Burch, 294 F.2d 1 (5th Cir. 1961); McSweeney v. Utica Fire Ins. Co., 224 F.2d 327 (4th Cr. 1955); State v. Schwartz, 137 Ohio St. 371, 30 N.E.2d 551 (1940); Cammarand v. Gimino, 234 Ill. App. 556 (1924).
6. *Supra* n. 3.
7. Nowak v. Orange, 349 Pa. 217, 36 A.2d 781 (1944); Auslander v. Pa. R. R. Co., 350 Pa. 473, 39 A.2d 595 (1944); Smith v. Kurtz, 34 Pa. D. & C. 439 (1938); Commonwealth v. Funk, 323 Pa. 390, 186 Atl. 65 (1936).
8. Romano v. Romano, 34 Pa. D. & C. 215 (1938).
9. Porter v. Seiler, 23 Pa. 424 (1854).
10. United States *ex rel.* Valenti v. Karmuth, 1 F. Supp. 370 (D. N.Y. 1932); Fidelity Phenix Fire Ins. Co. v. Murphy, 226 Ala. 226, 146 So. 387 (1933); North River Ins. Co. v. Militello, 100 Colo. 343, 67 P.2d 625 (1937); Greenwell's Adm'r v. Burba, 298 Ky. 255, 182 S.W.2d 436 (1944); Warren v. Marsh, 215 Minn. 615, 11 N.W.2d 528 (1943); Schindler v. Royal Ins. Co., 258 N.Y. 310, 179 N.E. 711 (1932); Ashby v. Steinitz, 238 N.Y.S.2d 395 (1963).
11. *Supra* n. 3.
12. JONES, EVIDENCE §639 (5th Ed. 1958); MCCORMICK, EVIDENCE 295 (1954); WIGMORE, EVIDENCE §1671a (3rd Ed. 1940).
13. MODEL CODE OF EVIDENCE rule 521 (1942).
14. UNIFORM RULES OF EVIDENCE rule 63 (20) (1954).
15. Eagle, Star, and British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927).
16. *Supra* n. 9.

lateral estoppel);[17] or where the defense was active and yet no rebutting evidence was offered by the defendant.[18]

The majority view that a record of criminal conviction is not admissible in a civil action arising out of the same facts is based upon the rational that the criminal judgment is hearsay opinion;[19] the parties are different;[20] and the objects and purposes of the litigations are of a different nature.[21] In the criminal case the issue is whether a public right has been violated, whereas the civil case is concerned with the civil rights of the parties.[22]

Acquittal in a criminal proceeding, with little variance, has been held not admissible in a civil action where a verdict of acquittal is reached because the proof failed to show "guilt" beyond a reasonable doubt; yet for purposes of the civil action the same evidence may constitute a preponderance, permitting a judgment against the defendant.[23] Since the person prosecuted could not have introduced judgment of acquittal into a civil action many courts apply the theory of reciprocity, *i.e.*, that a judgment of conviction should also be barred.[24]

The minority view, that a record of conviction should be admitted, is supported by the reasoning that since a criminal conviction does require proof of "guilt" beyond a reasonable doubt as against only a preponderance of evidence in a civil action, it is not logical to ignore the criminal conviction,[25] especially where the conviction rests upon a plea of "guilty".[26]

From a superficial examination of the aforesaid authorities who advocate admissibility of criminal convictions, it is apparent that they do not openly advocate that the character of conclusiveness be given to criminal conviction. However, would not the practical result be that if admitted for the trier of fact's consideration, such conviction would probably dominate all other evidence, resulting in defendant's supposed right of rebuttal being virtually futile? If this be answered affirmatively, the idea is carried to its logical limit, *i.e.*, that evidence of conviction in effect would be conclusive.

17. United States v. Ben Brunstein & Sons Co., 127 F. Supp. 907 (D. N.J. 1955).
18. Stagecrafters' Club v. Dist. of Col. Div. of Am. Legion, 111 F. Supp. 127 (D. D.C. 1953).
19. McCormick, *supra* n. 12.
20. Seidman v. Seidman, 53 R.I. 96, 164 A. 194 (1933).
21. *Ibid.*
22. *Ibid.*
23. Clough v. Greyhound Corp., 91 Ga. App. 246, 85 S.E.2d 476 (1954), *rev'd on other grounds*, 211 Ga. 574, 87 S.E.2d 387 (1954), *conformed to*, 92 Ga. App. 558, 88 S.E.2d 700, *vacated*, 92 Ga. App. 558, 88 S.E.2d 700 (1955); Cottingham v. Weeks, 54 Ga. 275 (1875); Bray-Robinson Clothing Co. v. Higgens, 219 Ky. 293, 293 S.W. 151 (1927).
24. *Supra* n. 19.
25. *Supra* n. 10.
26. United States *ex rel.* Valenti v. Karmuth, *supra* n. 10.

Georgia seemingly adheres to the majority view.[27] *Curtis v. Macon Ry. & Light Co.*[28] held that it was error for the court to admit evidence that plaintiff was convicted in police court for having been drunk and for reckless driving at the time the injury complained of occurred. However, *Hardeman v. Georgia Power Co.*,[29] expressly overruled the *Curtis* case by holding that evidence of conviction for drunkenness at the time of the damage producing collision was admissible. *Padgett v. Williams*[30] appears to have returned Georgia to the majority view by holding that evidence showing defendant had been convicted in traffic court of having been intoxicated at the time and place of the collision with plaintiff's automobile was inadmissible. *Webb v. McDaniel*[31] held that a record of ciriminal prosecution is not admissible in a subsequent civil action even though the record sought to be introduced was one of acquittal on an indictment of murder.

It seems ironic that the courts of Georgia at one time[32] held evidence of conviction in a traffic court to be admissible in a civil action for damages arising out of the same facts when the so-called modern view[33] hesitates to advocate admissibility of convictions from police courts, justice of the peace courts, and similar courts. The modern view rests upon what appears to be the sound basis that these lower courts often are surrounded with a veil of untrustworthiness where for expediency a person charged with a traffic violation or misdemeanor, even though in fact is innocent, pleads "guilty" and pays a nominal fine rather than go to the time and expense necessary to actively defend upon the merits.[34] Yet they would admit evidence of conviction for a felony and generally a misdemeanor[35] supposedly upon the assumption that courts and juries who hear and determine this class of cases are always "trustworthy" and have afforded the defendant the best judicial treatment available. While it appears obvious that such conviction must be conclusive as to the purposes of the criminal litigation, it should be borne in mind that the purpose of litigation is to ultimately achieve justice. Expediency, consistency of judgments, and reasoning such as the Pennsylvania court followed in the principal case,[36] exemplified by its statement, "[n]o valid reason exists why he should be given a chance to try his luck with another jury,"[37] obviously "discounts" the traditional

27. GREEN, THE GEORGIA LAW OF EVIDENCE §318 (1957).
28. 18 Ga. App. 145, 88 S.E. 997 (1916).
29. 42 Ga. App. 435, 156 S.E. 642 (1931).
30. 82 Ga. App. 509, 61 S.E.2d 676 (1950).
31. 218 Ga. 366, 127 S.E.2d 900 (1962).
32. *Supra* n. 27.
33. Hurtt v. Stirone, *supra* n. 3; MCCORMICK, EVIDENCE, *supra* n. 19.
34. *Ibid.*
35. Hurtt v. Stirone, *supra* n. 3; MODEL CODE OF EVIDENCE, *supra* n. 13.
36. *Supra* n. 3.
37. *Id.* at 626-627.

distinctions betwen the two types of actions upon which basis the defendant heretofore has been given every opportunity to rebut any and all evidence the plaintiff might have been allowed to introduce. The possibility has been expressed that the mere introduction of a record of conviction might so prejudice the trier of fact that in effect its admission would be tantamount to its being conclusive. In either view, whether it be for mere admisibility for some consideration or as conclusive evidence, why should the public prosecutor be permitted in effect to prove a subsequent civil plaintiff's case? The rules pertaining to admissibility and conclusiveness seemingly have, even by their respective advocates, been so riddled with exceptions that application to a given factual situation could lead to nothing better than utter confusion. That is, the advocates of the "modern view" appear divided as to what weight such evidence should theoretically have and to what class of cases admissibility and conclusivenes should apply. Those who advocate admissibility for some consideration only, appear to "overlook" that in effect evidence of a criminal conviction would probably have the force of conclusive evidence.

The more recent Georgia cases have affirmed their confidence in the majority and seemingly better rule that a record of criminal prosecution is incompetent evidence in a subsequent civil action arising out of the same facts.[38]

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38. Padgett v. Williams, *supra* n. 28; Webb v. McDaniel, *supra* n. 29; Crawford v. Summerau, 100 Ga. App. 499, 111 S.E.2d 746 (1959).