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EVIDENCE

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ADMISSIBILITY

Two cases concerning admissibility of evidence were treated by the Georgia appellate courts as matters of first impression.

In *Williams v. Colonial Pipeline Co.*,[1] the trial court had excluded the testimony of a witness as to the value of condemned property. The Court of Appeals sustained.[2] The court assumed the evidence was admissible, but held that its exclusion was harmless because four other witnesses had testified as to the value of the property and the excluded testimony was within the limits of their testimony.

On certiorari the Supreme Court of Georgia reversed. Finding no supreme court cases on this precise point, it adopted the general rule[3] that a trial judge may not limit the number of witnesses to a main, controlling, controverted fact. The error was not harmless, as the jury might have accepted the opinion of the excluded witness, because of their confidence in him, while rejecting the same opinion from another. Also, the jury may consider the number of witnesses in determining the preponderance of the evidence.[4] This holding seems to overrule the long line of court of appeals cases holding erroneous exclusion of testimony harmless error if other witnesses testify to the same point.[5]

In *Pethel v. Waters*,[6] the defendant offered the transcript of the plaintiff's testimony in an interlocutory hearing for the purpose of impeaching the plaintiff's testimony at the trial. The transcript was read to the plaintiff, and he admitted that he had testified to the facts it contained. The trial judge refused, however, to admit the transcript itself. The Supreme Court of Georgia found "a dearth of precedent" on the point and adopted the

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1. 109 Ga. App. 815, 137 S.E.2d 667, *rev'd*, 220 Ga. 381, 139 S.E.2d 308, *on remand*, 110 Ga. App. 824, 140 S.E.2d 150 (1964).
2. 109 Ga. App. 815, 137 S.E.2d 667 (1964).
3. 88 C.J.S. *Trial* §92b, at 202 (1955).
4. GA. CODE ANN. §38-107 (Supp. 1965).
5. Elders v. Griner, 40 Ga. App. 649, 150 S.E. 857 (1929).
6. 220 Ga. 543, 140 S.E.2d 252 (1965).

general rule, as stated in a Minnesota case:[7] Where a witness unequivocally admits all the prior inconsistent statements contained in the transcript, when read to him, the transcript is inadmissible. The statements being admitted, there is no need to prove them.

In a similar case,[8] the Court of Appeals held it reversible error to refuse to admit a deposition to impeach a witness. The court pointed out that depositions are construed to be written statements in some judicial proceeding, within the meaning of GA. CODE ANN. section 38-1803 (Supp. 1965). There was no showing in this case whether or not the witness admitted the prior statements, or was given the opportunity to do so, before they were offered in evidence.

Cagle Poultry & Egg Co. v. Busick[9] involved the admissibility of four photographs of the injured party. The Court of Appeals held that testimony by the plaintiff that the pictures accurately reflected the appearance of his wife was sufficient foundation for admission of the pictures, even though the plaintiff was not present when the pictures were made. The court also held it was not error to admit all four pictures. As there can be more than one witness to a fact, so can there be more than one piece of documentary evidence tending to prove a fact.

Two cases involved admissibility of doctors' bills. In *Taylor v. Associated Cab Co.*,[10] the plaintiff placed in evidence doctors' bills and drug bills, identifying the bills himself. The Court of Appeals reversed the trial court, holding that no foundation for admission of the bills had been laid, *i.e.*, proof that they were reasonable and necessary and resulted from the particular injury. Also, the failure of plaintiff to call the doctors as witnesses raised the presumption that their testimony would be unfavorable.

In *Melaver v. Garis*,[11] a different division of the Court of Appeals affirmed the admission of doctors' bills as evidence of pain and suffering. There is no indication in this case as to the nature of the foundation laid. The objection was to the relevancy of the bills and to the fact that they focused attention on the cost of the treatment in a suit for pain and suffering only.

In *Lacy v. City of Atlanta*,[12] a witness for the plaintiff testified, over objection, that she had called the city hall to report the defective condition of the sidewalk. The telephone was answered "City Hall," and she explained her business. She was then put in connection with another person, to whom she made her report. She could not identify the person with whom she spoke. The Court of Appeals held it was sufficient that the witness testified positively that she had contacted the defendant's place of business. It would not be presumed that she had been put in connection with an

7. Briggs v. Chicago Great W. Ry., 248 Minn. 418, 80 N.W.2d 625 (1957).
8. Phillips v. Howard, 109 Ga. App. 404, 136 S.E.2d 473 (1964).
9. 110 Ga. App. 551, 139 S.E.2d 461 (1964).
10. 110 Ga. App. 616, 139 S.E.2d 519 (1964).
11. 110 Ga. App. 267, 138 S.E.2d 435 (1964).
12. 110 Ga. App. 814, 140 S.E.2d 144 (1964).

employee unauthorized to receive the information. The same witness, however, also testified that repairs had been made after her call and after the plaintiff's fall. This was inadmissible and the court affirmed the granting of a new trial.

The defendant in *Pittman v. State*[13] had voluntarily submitted to a blood test when accused of driving under the influence. When the report proved unfavorable, he objected to its admission. The results of the test, in the form of a written report, were admitted at the trial, over his objection. A patrolman testified that the blood was drawn and mailed to the state crime laboratory. In due course, the report was returned. The Court of Appeals held that the report was erroneously admitted. There was no showing as to who took the blood, who mailed it, who tested it at the crime laboratory, or who prepared the report. There was no expert testimony as to the effect of the alcoholic content as indicated in the report. Nor could the state avail itself of the presumption created by GA. CODE ANN. section 68-1625 (b) (1957 Rev.), because there had been no compliance with the terms of that statute. The statute provides for a test to be made in the county of the defendant's confinement by a designated specialist. This was not done. The report could therefore be used only if the chain of custody of the sample was established and the results testified to by an expert.

The Court of Appeals, in a full bench decision, gave full effect to *Mapp v. Ohio*,[14] as it was obliged to do.[15] The defendant had been picked up by the police on "suspicion" before the police knew any crime had been committed. He was "requested" by the arresting officer to turn over his clothing and was convicted on evidence obtained therefrom. The majority recognized that the arrest of a man walking along peacefully, in broad daylight, by officers who did not even know of a crime, is illegal. The court also recognized that a "request" by an officer of a man in custody is in reality an order. Under the *Mapp* ruling, the admission of evidence so obtained was erroneous. The dissenting opinion by Judges Jordan and Bell considered the arrest, and therefore the search, legal. The majority opinion mourned at length over the necessity of following the Supreme Court of the United States in this matter, with great citation of authority from the early years of the 19th century. However, it also quoted the now vindicated statement of Georgia's Judge Townsend, that the admission of illegally obtained evidence makes "an empty shell of what was intended by the framers of these great guarantees of liberty to be the living seed of freedom."[16]

Archer v. Gwinnett County[17] was a suit by the county to recover money

13. 110 Ga. App. 625, 139 S.E.2d 507 (1964).
14. 367 U.S. 643 (1961).
15. Raif v. State, 109 Ga. App. 354, 136 S.E.2d 169 (1964).
16. Winston v. State, 79 Ga. App. 711, 714, 54 S.E.2d 354, 356 (1949).
17. 110 Ga. App. 442, 138 S.E.2d 895 (1964).

allegedly received as "kickbacks" on county contracts. The defendant engineer appealed the failure to strike certain statements made by commissioners about finding an engineer willing to pay a kickback. This defendant contended that the statements were made before the alleged conspiracy started, that is, before an engineer was found. The Court of Appeals affirmed. The gist of the action was a tort, and the statements made by joint conspirators were admissible against one who later joined the conspiracy.

More is required than professional training to qualify a witness as an expert. The Court of Appeals reversed the trial court's admission of testimony by an engineer to an optical-illusion effect.[18] Although the witness held several degrees in engineering, there was no showing that he had any special training in optics. The court stated that, in this age of specialization, a person termed an "engineer" is not deemed to have expert knowledge in all fields of science.

VALUE

In *Fulton County v. Elliott*,[19] the Court of Appeals sustained admission by the trial court of evidence of a comparable sale of property located two miles from the property condemned. The sale involved property for a particular use, a church, and occurred five years before the taking under condemnation. The court pointed out that admission of such evidence is "very much within" the discretion of the trial judge and found no abuse of discretion.

The holding in *Fulton County v. Power*[20] is not clear. The owner of property condemned testified to an unaccepted offer, while the attorney for the condemnor was saying, "I don't believe he can testify as to what he could have sold it for." The court held that opinion of value could be based in part on unaccepted offers, but also stated that it doubted that the objection was proper. It also stated that the admission "if error" was harmless because similar evidence was admitted without objection.

In *Sumner v. State Highway Dep't*,[21] the condemnor introduced testimony and a deed showing the sale price of the portion of the condemnee's land not taken. The condemnee objected that the sale had been made pending condemnation proceedings and was not shown to be voluntary. The Court of Appeals held that the admission was not an abuse of the discretion of the trial judge. The mere fact that condemnation proceedings were under way did not make the sale involuntary. The burden was on the condemnee to show that the sale was forced, rather than free and open. Georgia recognizes sales to buyers having power of eminent domain as involuntary, and other jurisdictions recognize other types of forced sales as not representing the true value of the property. This case indicates that a trial judge may

18. Southern Ry. v. Cabe, 109 Ga. App. 432, 136 S.E.2d 438 (1964).
19. 109 Ga. App. 775, 137 S.E.2d 477 (1964).
20. 109 Ga. App. 783, 137 S.E.2d 474 (1964).
21. 110 Ga. App. 646, 139 S.E.2d 493 (1965).

take other types of compulsion into consideration in determining whether a sale offered as comparable is in fact open and free. But the burden is on the party opposing admission.

RES GESTAE

In *Thurmond v. State*,[22] the defendant, on trial for the murder of a woman, objected to the admission of autopsy evidence of a dead fetus. The court recognized that evidence of a crime other than the one charged is not generally admissible. An exception, however, is when the second crime comes within the res gestae of the first, as was here the case.

The Court of Appeals reversed the trial court's failure to strike an allegation in a petition that the driver of the defendant's vehicle, three minutes after the collision, said that he was sorry the collision occurred, that it was his fault, and that his employer had insurance, which would compensate the injured party.[23] The court rested its ruling on two grounds. First, it distinguished the instant case from *Sims v. Martin*,[24] in which similar declarations by the defendant, including a reference to insurance, were admitted as part of the res gestae. The court pointed out that, in the *Sims* case, the declarations were made by the defendant, while in the instant case, they were made by the defendant's agent. The court recognized that statements by an agent are admissible against a principal, but held that this driver had no authority to "implicate and prejudice" his employer in this manner. It is not a very clear distinction. The court also held that allegations as to proximity of time alone are not sufficient to bring a statement within the res gestae. The statement must also be free of all suspicions of "device or afterthought." The allegations of the petition did not meet this requirement. Because of the rule of construction of pleadings against the pleader, this is a sounder basis for the decision.

PRESUMPTIONS

The powerful presumption against suicide prevailed in *Belch v. Gulf Life Ins. Co.*[25] The deceased was found dead in his car parked behind a funeral home, with a pistol wound in his chest, a pistol near his body, and a note on the seat beside him asking that no one sit up with the body. The insurer concluded that death resulted from suicide and refused to pay accidental death benefits. The widow sued, and the jury, naturally, returned a verdict for principal, penalty, and attorney's fees. The trial court refused to grant a judgment n.o.v. and the defendant appealed. The Court of Appeals reversed the failure to grant the judgment n.o.v.,[26] holding that the evidence demanded a finding of suicide. On certiorari, the Supreme Court

22. 220 Ga. 277, 138 S.E.2d 372 (1964).
23. Shapiro Packing Co. v. Landrum, 109 Ga. App. 519, 136 S.E.2d 446 (1964).
24. 33 Ga. App. 486, 126 S.E. 872 (1925).
25. 219 Ga. 823, 136 S.E.2d 351 (1964), *reversing* 108 Ga. App. 480, 133 S.E.2d 622 (1963).
26. Gulf Life Ins. Co. v. Belch, 108 Ga. App. 480, 133 S.E.2d 622 (1963).

reversed, holding that the presumption against suicide goes into the jury room and only in a "clear cut" case should the jury's finding be disturbed. The court gave as an example of a "clear cut" case, an eye witness to the suicidal act. The court pointed out that the note might have been written at an earlier time. When the deceased borrowed the fatal 22 pistol, he declined the loan of a 38. The court believed the higher caliber weapon better suited for self destruction. The bullet wound was in the chest, but did not penetrate the heart. The court felt a "suicide" might have selected the spot more carefully. Then too, the deceased had a reputation for "cutting up." His death could have resulted from an extreme form of practical joke. The Supreme Court did reverse the award of penalty and attorney's fees. After all, there was some slight indication that the death was not accidental.

The presumption of regularity of court records and of proper conduct of court officials is not quite so powerful. In *Balcom v. Vickers*,[27] the petitioner's testimony in a habeas corpus action was sufficient to overcome the presumption that he had been furnished counsel at his sentencing.

The appellate courts are properly wary of presumptions against the accused in criminal cases. The defendant in *Cole v. State*[28] was convicted solely on the presumption raised by his recent possession of stolen property, an automobile. The car was found near the house occupied by the defendant's wife and children. Of course, there is also a presumption that anything found at a family home is in the possession of the husband, provided the husband and wife live together.[29] In this case, the defendant testified that he was separated from his wife, and this testimony was not disproved. The Court of Appeals reversed the conviction.

In *Ohio So. Express Co. v. Beeler*,[30] suit was filed in Georgia for damages sustained in Tennessee. The Court of Appeals held that the trial court judge properly refused to charge the Georgia law of comparative negligence. In the absence of proof, the courts presume that the common law is in effect in another jurisdiction. The rule of comparative negligence in force in Georgia will not be presumed, but rather the common-law contributory-negligence rule.

JUDICIAL NOTICE

In *Rives v. Atlanta Newspapers, Inc.*,[31] the court set out the test for judicial notice: a matter of common everyday knowledge to men of average intelligence and indisputable. The court also stated that judicial notice should be used sparingly to strike down pleadings. It therefore refused to take notice that the Atlanta Journal is first published in Fulton County, so as to permit the venue of a libel suit to be attacked by general demurrer.

27. 220 Ga. 345, 138 S.E.2d 868 (1964).
28. 109 Ga. App. 576, 136 S.E.2d 483 (1964).
29. Barron v. State, 46 Ga. App. 829, 169 S.E. 323 (1933).
30. 110 Ga. App. 867, 140 S.E.2d 235 (1965).
31. 110 Ga. App. 184, 138 S.E.2d 100 (1964).

The court did take notice in a "fall-down" case[32] that water accumulates near doorways when it rains and upheld the sustaining of a general demurrer to the petition.

The courts judicially noticed that Fulton County has a population over 500,000,[33] that the words "mortgage" and "deed to secure debt" are frequently confounded in everyday usage,[34] and that property sold at a forced sale does not bring its true value.[35] In *G. C. G. Jewelry Mfg. Corp. v. Atlanta Baggage & Cab Co.*,[36] the court took judicial notice that the boundaries of cities are not regular and that city streets frequently traverse areas not within the city limits.

More interesting than the cases in which courts take judicial notice are those in which they refuse to do so. As with presumptions, courts are slow to aid the state in criminal cases by judicial notice. In *Chester v. State*,[37] the defendant was indicted for burglary of "Friendship Elementary School." The court pointed out that burglary is an offense against the habitation of certain specified buildings. It refused to take notice that the named school was a part of the public school system, or any other building within the statute, and reversed the trial court's overruling of the defendant's general demurrer to the indictment.

Res Ipsa Loquitur

The Court of Appeals carefully avoided the phrase "res ipsa loquitur" until the end of its opinion, and then only mentioned that counsel on both sides had debated the subject at length and quoted Judge Powell about the danger of frightening members of the bar with the term. The court frightened no one and merely held that when a wheel runs off a trailer on the highway it is a circumstance from which a reasonable mind may find negligence.[38]

Newly Discovered Evidence

In *Queen v. Hunnicutt*,[39] the Supreme Court upheld a ruling by the trial court denying a new trial on the grounds of newly discovered evidence. The court held that the affidavit supporting the motion did not meet the requirements of Ga. Code Ann. section 70-205 (1963 Rev.). It failed to show the associates, character, and credibility of the new witness.

32. Gibson v. Consolidated Credit Co., 110 Ga. App. 170, 138 S.E.2d 77 (1964).
33. Grimes v. Lindsey, 219 Ga. 779, 135 S.E.2d 860 (1964).
34. Cole v. Cates, 110 Ga. App. 820, 140 S.E.2d 36 (1964).
35. State Highway Dep't v. Futch, 109 Ga. App. 741, 137 S.E.2d 350 (1964).
36. 109 Ga. App. 469, 136 S.E.2d 419 (1964).
37. 110 Ga. App. 733, 140 S.E.2d 52 (1964).
38. Arnold Servs., Inc. v. Sullins, 110 Ga. App. 19, 137 S.E.2d 727 (1964).
39. 220 Ga. 89, 137 S.E.2d 45 (1964).