EVIDENCE

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THE BEARING OF THE FEDERAL CONSTITUTION

The most important development in this field in recent years is the increased control exercised by the federal courts over evidence in state courts through new interpretations of the fourteenth amendment. In effect, at least, the courts are reading into this amendment many of the standards of the first eight amendments to the Constitution of the United States. The three most important segments of evidence law affected are search and seizure, self-incrimination and confessions. Two other rights recognized by the Constitution which have been applied to the states are confrontation and appointment of counsel.[1]

During the period being surveyed the Supreme Court of the United States held for the first time that the right of an accused to confront the witnesses against him is obligatory on the states as a result of the fourteenth amendment.[2] The first case involved the receipt in evidence, over objection, of a transcript of testimony of a witness given at the preliminary hearing. The accused was not represented by counsel at the preliminary hearing and did not attempt to cross-examine the particular witness. At the time of the trial the witness was unavailable. Nevertheless, the Court held that the right to confrontation includes an opportunity to cross-examine which, due to the absence of counsel, was not adequately granted to the accused. He was denied a constitutional right, and this denial constituted reversible error. The second case reported was decided on the same day. In it, a prosecution for assault with intent to murder, a witness, who had been tried separately and convicted of the same crime, was called by the state. The witness claimed his privilege against self-incrimination and declined to answer any questions concerning the crime. He was declared to be a hostile witness by the trial judge, and the solicitor proceeded to cross-examine him. A purported confession said to be signed by him was read by the solicitor, who paused every few sentences to ask the witness in the presence of the jury, "Did you make that statement?" The witness claimed the privilege each time. After the entire writing had been read, it was identified by the testimony of three law enforcement officers as embodying a confession made and signed by the witness. The writing was not offered in evidence. Defendant was convicted

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1. See as to all except confrontation Malloy v. Hogan, 378 U.S. 1, 6, 7 (1964).
2. Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965). *Cf.* In re Oliver, 333 U.S. 257 (1948).

and appealed after his motion for a new trial was denied. Although defendant objected three times to the reading of the confession and moved to exclude it and for a mistrial, the Alabama Court of Appeals held that each question following a reading of a part of the document should have been objected to and therefore found a waiver by the accused. The Supreme Court of Alabama denied review. The Supreme Court of the United States granted *certiorari* and held that the objections made were sufficient to preserve the federal question. The Court decided that effective confrontation of the witness in question was possible only if he affirmed the statement as his own. But, he claimed privilege and refused to answer. Hence, the Court ruled that the accused's rights under the confrontation clause of the sixth amendment as applied to the states was violated.[3]

Several Georgia cases recently decided deal with claims that particular real evidence was inadmissible because obtained in violation of the Constitution. *Jackson v. State*[4] cites *Mapp v. Ohio*[5] but holds legal a search for and seizure, without a search warrant, of allegedly stolen articles found in the possession of the accused after an arrest, without a warrant, for a crime committed in the arresting officer's presence. Because the search and seizure were not unreasonable under the circumstances, the articles were correctly held to be admissible against the accused.

In *Johnson v. State*[6] a search warrant was issued by the deputy clerk of a municipal court. It was held that he, although not a judicial officer, could exercise the authority to issue conferred by statute. In this case, neither the warrant, nor the affidavit upon which it was issued disclosed any of the facts upon which the determination of probable cause for issuance was based. The Court of Appeals, applying federal standards and citing United States Supreme Court decisions, held that (1) the warrant was void; (2) its admission in evidence having been made to the warrant on the ground of absence from the affidavit and warrant of facts upon which a determination of probable cause could be made, the burden was on the state to show what facts were submitted before the magistrate; (3) the facts must be such as to lead a man of prudence and caution to believe that the offense has been committed; (4) the state failed to carry the burden in the case at bar; (5) the real evidence and the testimony of the officers as to what they saw while searching the house was inadmissible because the articles and the information were obtained by use of a void search warrant.

Prior to 1961, the fourteenth amendment was not interpreted as requiring the exclusion of evidence obtained by unreasonable search and seizure. Although there was and is a provision of the Georgia Constitution[7] similar to the search and seizure provision of the fourth amendment, the existence of

3. Douglas v. Alabama, 380 U.S. 415 at 417, 419 (1964).
4. 111 Ga. App. 192, 141 S.E.2d 177 (1965).
5. 367 U.S. 643, (1961).
6. 111 Ga. App. 298, 141 S.E.2d 574 (1965).
7. GA. CONST., art. I, §1, para. 16 (1945).

the provision was held by the Georgia courts not to require the exclusion of evidence illegally obtained; it was thought that other remedies theoretically available to the person whose rights were violated were sufficient.[8] After the decision in *Mapp v. Ohio*,[9] the realization grew that the question of who has authority in this state to issue search warrants and other questions concerning the procedure to be followed needed to be answered.[10] At the 1966 session of the General Assembly a statute was passed with this objective. The statute states the purposes for which a person may be arrested and the area within such person's immediate presence which may reasonably be searched without a search warrant, but after a lawful arrest has been effected. It provides for the issuance of warrants for the seizure of instruments of crime, kidnapped persons, human fetus, corpse, stolen or embezzled property, things the possession of which is unlawful, or things, other than the private papers of any person, which are tangible evidence of the commission of the crime. The search warrant may be issued by any judicial officer authorized to hold a court of inquiry to examine into an arrest of an offender against the penal laws. It may issue upon the written complaint of a Georgia law enforcement officer under oath or affirmation which states facts sufficient to show probable cause that a crime is being committed, or has been committed, and which particularly describes the place or person, or both, to be searched and the things to be seized. The execution of search warrants is regulated by a time limit and in other respects. The statute also provides for a motion to suppress evidence illegally seized through an unlawful search and seizure but does not say when the motion is to be made.[11]

Mapp is held in a Georgia case[12] to make evidence obtained by searches and seizures which violate the United States Constitution, inadmissible in an action in a state court to abate gambling as a nuisance. It was said in the opinion of the court that the exclusionary rule is not for criminal cases only, citing *One* 1958 *Plymouth Sedan v. Pennsylvania*.[13] The cited decision involved a forfeiture proceeding which it described as quasi-criminal.

With regard to confessions the view has been expressed that the United States Supreme Court would consider the Georgia procedure for determining voluntariness to be a denial of due process, and that this procedure can no longer be used.[14] During the survey period two cases were decided in which the validity of the confession procedure was attacked. In both, the majority of the Georgia Supreme Court upheld the Georgia procedure.[15] In both,

8. Williams v. State, 100 Ga. 511, 28 S.E. 624 (1897); McIntyre v. State, 190 Ga. 872, 11 S.E.2d 5 (1940).
9. *Supra* n. 5.
10. See Sparks, *Search and Seizure*, 1 GA. S. B. J. 42 (1965).
11. GA. LAWS, 1966, pp. 567, 572.
12. Carson v. State, 221 Ga. 291, 144 S.E.2d 381 (1965).
13. 380 U.S. 693 (1965).
14. Leverett, *Confessions and the Privilege against Self-Incrimination*, 1 GA. S. B. J. 433, 440 (1965).
15. Britten v. State, 221 Ga. 97, 143 S.E.2d 176 (1965); Sims v. State, 221 Ga. 190, 144 S.E.2d 103 (1965).

Justice Almand dissented, expressing the opinion that the decision of the Supreme Court of the United States in *Jackson v. Denno*[16] was controlling and required a contrary holding. The decision of the Court in the *Jackson* case against the validity of the New York procedure for determining the voluntariness of confessions was based on disapproval of the rule that, if the evidence presents a fair question as to the voluntariness of the confession, the judge must receive the confession and leave to the jury the ultimate determination of its voluntary character. Since the jury merely returns a verdict of guilty or not guilty, conclusions as to the voluntariness or involuntariness of the confession are not clearly evident from the record. The Georgia procedure is essentially the same.[17]

In the first of the two Georgia cases mentioned in the preceding paragraph, the majority of the court sought in its opinion to distinguish the case at bar from *Jackson v. Denno* on the ground that the Georgia accused admitted on the stand that he participated in the robbery in which the victim was murdered and that the incriminatory admissions introduced in evidence were freely and voluntarily made. In the second case the *Jackson* decision was again said by the court to be distinguishable. This time, Chief Justice Duckworth, writing the majority opinion, stressed the failure of the *Jackson* opinion to consider the following legal requirements: first, that a conviction cannot rest on a confession alone without corroboration; second, that there must be a showing that it was freely and voluntarily made; and third, that the trial judge review the case after conviction. Relying upon the presence of these requirements in the Georgia law and the absence from the case of evidence of the involuntariness of the confession, the court affirmed the conviction. Justice Almand in this case, as in the earlier one, dissented, insisting that the trial judge, by submitting the question to the jury and permitting the jury to consider the voluntariness of the confession, not separately, but along with the other evidence, and to render one verdict on the guilt or innocence of the defendant, violated the ruling of the United States Supreme Court in *Jackson v. Denno.*

In these same two Georgia cases[18] the defendants also cited the Court's decision in *Escodedo v. Illinois*[19] and contended, apparently, that because counsel was not present when the out-of-court statements of the accused were made the statements were inadmissible. All of the Georgia justices who heard the case ruled unanimously against this contention of the defendants.

16. 378 U.S. 368 (1964).
17. 378 U.S. at 414-15 (1964). Appendix A to the opinion of Mr. Justice Black dissenting in part; Leverett, *supra* n. 14 at 440-41. *But see* 378 U.S. at 396 (1964).
18. *Supra* n. 15.
19. 378 U.S. 478 (1964). In the later case of Miranda v. Arizona, 868 Sup. Ct. 1602 (1966) it is held that unless other full effective means are devised to inform persons questioned by law enforcement officers after they have been taken into custody, no statement by the accused may be used by the prosecution if he has not been informed prior to interrogation of his right to an attorney and to remain silent; warned that what he says may be used as evidence against him and does not have or waive the presence of his attorney.

According to the testimony of law enforcement officers in one of these two cases the accused said that he did not need[20] and in the other that[21] he did not want an attorney.

The fundamental right of an accused to the assistance of counsel, which the fourteenth amendment requires the states to grant, includes the right to be questioned by his counsel, but the Supreme Court of Georgia holds that the requirement of the amendment is satisfied by the present Georgia law.[22] Since the 1962 change in GA. CODE ANN. section 38-415-16 (Supp. 1962), the accused has a choice of making an unsworn statement and avoiding cross-examination or of being sworn as a witness. If he makes the latter choice, he has a right to be questioned by his attorney and is subject to cross-examination by a prosecuting attorney. If he chooses the other alternative of making an unsworn statement, he has no right to be questioned, but the trial judge has discretion to permit questioning of the accused by his counsel in connection with the statement, and the choice which the accused has satisfies the fourteenth amendment.[23]

BURDEN OF PROOF

Where a defendant is sued for damages for negligence and sets up in his pleading that plaintiff's injury was caused by certain specified acts of negligence on the part of plaintiff, the burden rests on the defendant to establish the truth of this affirmative defense by a preponderance of the evidence; the same burden must be borne if the defense pleaded is that the plaintiff by the exercise of ordinary care could have avoided the negligence of the defendant.[24]

In an action by a lessor after expiration of the term for breach of the lessee's covenant to keep the premises in repair, or to surrender them in good repair or in the same condition as when leased, the burden is on the landlord to show four things in addition to the existence of the lease. These are the termination of the lease, the condition of the property at the commencement and at the end of the term, and the cost of restoring the property.[25]

In another case the Court of Appeals held that in a motor vehicle negligence action in which defendant contended that it was engaged in highway work and therefore was exempted by GA. CODE ANN. section 68-1603 (b) (1957 Rev.) from traffic regulations prohibiting use of the left half of the highway and prohibiting vehicles from standing on the highway, the defendant has the burden of proving it came within the statutory exemption.[26]

20. Britten v. State, 221 Ga. 97, 104, 143 S.E.2d 176, 181 (1965).
21. Sims v. State, 221 Ga. 190, 197, 144 S.E.2d 103, 109, 110 (1965).
22. *See* Williams v. State, 220 Ga. 766, 141 S.E.2d 436 (1965).
23. *Ibid.*
24. Purcell v. Hill, 111 Ga. App. 256, 141 S.E.2d 153 (1965).
25. Spacemaker, Inc. v. Borochoff Properties, Inc., 112 Ga. App. 512, 145 S.E.2d 740 (1965).
26. Myerholtz v. Garrett, 111 Ga. App. 361, 141 S.E.2d 607 (1965).

The frequently mentioned distinction between the two meanings of burden of proof was pointed out in *Lawson v. Dixie Feed & Seed Co.*,[27] a suit on an open account. Evidence of the defendant's failure to object within a reasonable time to the account rendered was held to be sufficient to shift to the defendant the burden of going forward with the evidence, but not the burden of proof, in the sense of the burden of persuasion. The latter is the risk of failing to persuade the trier of fact of the truth of one's contentions by a preponderance of the evidence or other measure of persuation set by law. The court said that the burden of persuasion never shifts. This statement is too broad[28] although the court seems to be correct in holding that the burden was not shifted in the particular case.

In *Exchange Bank v. Slocumb*[29] the Court of Appeals reached the proper result in approving the failure of the trial court to charge as to the shifting to the claimant of the burden of going forward with the evidence. However, the court said that "in the absence of a written request therefor" the failure to charge was not error. The question arises as to why the jury should be instructed on this subject even when a request is made. The burden of producing evidence is the risk of not getting past the judge and suffering an involuntary nonsuit or directed verdict. Why does the jury need to know about this? Won't the charge simply confuse them?

In an action by a bailor against a warehouse corporation to recover property bailed or its value, the defense was that the property (235 bags of dry milk solids) had been seized and condemned under order of the United States District Court. An issue was whether the defendant gave notice to the plaintiff of the fact that the defendant was served with the court proceedings. The Civil Court of Fulton County directed a verdict in favor of the defendant and plaintiff assigned error. An officer of defendant testified that she telephoned the office of plaintiff's agent and gave notice; that she talked with either Mr. H. or Mr. L. and to the best of her recollection it was Mr. H.; that later when the goods were seized she again called and to the best of her recollection talked to Mr. L. Mr. H. testified that the only conversation he had about this matter with her was on the second date she testified to calling. The opinion of the Court of Appeals pointed out that the evidence of Mr. H. contradicted a part of the testimony of defendant's agent and held that when testimony is uncertain or is that of an interested witness, or when there are circumstances the jury can weigh in determining the weight and credibility of the testimony the jury is not bound to accept it as true although it is not contradicted by direct evidence. The judgment was reversed since the evidence did not demand the verdict directed for the defendant.[30]

27. 112 Ga. App. 562, 145 S.E.2d 820 (1965).
28. GREEN, GEORGIA LAW OF EVIDENCE 57, n. 12 (1957).
29. 112 Ga. App. 399, 145 S.E.2d 285 (1965).
30. Fitzgerald Milk Prods. Corp. v. Kimbro Serv. Whse., 112 Ga. App. 456, 145 S.E.2d 630 (1965).

With regard to the time of making a motion for directed verdict, section 50 of the Georgia Civil Practice Act will change the present rule by this provision: "A motion for a directed verdict may be made at the close of the evidence offered by an opponent or at the close of the case."[31]

In *Dr. Pepper Bottling Co. v. Harris*[32] the Court of Appeals held that the maxim *res ipsa loquitur* was not brought into play and that the trial judge erred in denying defendant's motion for judgment *n.o.v.* and for a new trial on the general grounds. The action was based on a claim of negilgence by defendant bottler in allowing foreign matter in the bottle. The evidence failed to show that the bottle obtained from the stock of a retailer was in the same condition when opened as when it left the possession of the bottler.

PRESUMPTIONS

A statute passed at the last session of the General Assembly raises several questions. It provides that the holding of certain federal gambling tax stamps or receipts, or of evidence of paying a tax on coin operated gaming devices, or the payment of such tax shall be held prima facie evidence of guilt of violation of the gambling or lottery laws of Georgia.[33] The first question is, does the statute create a presumption? The Court of Appeals has spoken of a provision, containing the phrase "shall be prima facie evidence," as a statutory presumption.[34] The next question is what kind of presumption does the 1966 statute create? This is difficult to answer. Definite guides are not furnished by precedents dealing with other presumptions, and this one is so new that no decisions interpreting it are available. In this state many presumptions have the effect of placing the burden of proof (persuasion).[35] Some shift the burden of producing evidence. Whether the one under discussion is the first type or the other is not clear. Is the statute constitutional?

There seem to be special constitutional restrictions on legislative pronouncements creating presumptions or placing burden of proof in criminal cases. These may be loosely described as justice, fairness, and convenience in selection of the point at which the burden of going forward is placed on the accused.[36] There may also be very strict regulations or, possibly, prohibitions with regard to putting the burden of persuasion on the accused. These are still somewhat in doubt apparently.[37]

There are also restrictions applying to civil and criminal cases. In *Mobile, J., & K. C. R.R. v. Turnipseed,*[38] there was a challenge to a Mississippi stat-

31. GA. LAWS, 1966, p. 609.
32. 112 Ga. App. 360, 145 S.E.2d 288 (1965).
33. GA. LAWS, 1966, p. 559.
34. Atl. Coast Line R.R. v. Thomas, 83 Ga. App. 477, 483, 64 S.E.2d 301 (1951).
35. *See, e.g.,* GA. LAWS, 1962, p. 156; Cairo Banking Co. v. Hall, 42 Ga. App. 785, 157 S.E. 346 (1931).
36. *See* Speiser v. Randall, 357 U.S. 513, 523-524 (1958).
37. *See* Note, *Constitutionality of Rebuttable Statutory Presumptions,* 55 COL. L. REV. 527, 541 (1955).
38. 219 U.S. 35 (1910).

ute which made proof of injury by locomotive or cars prima facie evidence of the railroad's negligence. The Supreme Court of the United States held that a legislative presumption does not fail in due process of law nor deny the equal protection of the law if there is a rational connection between the fact proved and the ultimate fact presumed. However, it seemed to say that the presumption would be invalid on those grounds if the presumption of one fact from another is unreasonable or arbitrary. The Mississippi statute in question was held to be constitutional. It was treated as creating a presumption of negligence on the part of employees of the railroad company when an injury arising from the operation of the locomotives or cars is shown. The effect was said to be to cast upon the railroad company the duty of producing evidence to the contrary, i.e., evidence of due care. When that is done the presumption is at an end.

Nineteen years later, in *W. & Atl. Ry. v. Henderson*,[39] the Court had before it a presumption created by a Georgia statute in which the basic fact was the same, injury caused by the running of locomotive or cars, and the presumed fact the same, negligence of the railroad company or its employees. However, in this instance, the state courts interpreted the state statute as creating a presumption which could only be rebutted by opposing evidence which preponderated. In other words, the presumption placed the burden of persuasion on the defendant and the jury was to determine whether the presumption had been rebutted. The Supreme Court of the United States erroneously assumed that the result was to make an artificial inference evidence and held that the statute was unreasonable and arbitrary and violated the due process clause of the fourteenth amendment.[40] The rational connection test first stated in the *Turnipseed* case was actually used to invalidate a presumption in the *Henderson* case.

Two other tests of validity are suggested by Supreme Court opinions handed down within a few years of the *Henderson* decision. *Ferry v. Ramsey*[41] upheld a Kansas statute upon the ground that a legislative body which has the power to impose a greater liability can use a presumption to impose a lesser liability in the same matter on the same class of persons. *Morrison v. California*[42] says that "a manifest disparity in convenience of proof and opportunity for knowledge" may justify the placing of the burden of proof even if the rational connection is weak or entirely absent.

These two alternative tests were repudiated by *Tot v. United States*,[43] which presents rational connection as the sole test of constitutionality in relation to due process. The nature of the test was explained as follows:

> . . . Under our decisions, a statutory presumption cannot be sus-

39. 279 U.S. 639 (1929).
40. The reasoning in this case has been criticized by the late Professor E. M. Morgan, 18 A.L.I. PROCEEDINGS 206 (1941).
41. 277 U.S. 88 (1928).
42. 291 U.S. 82 (1934).
43. 319 U.S. 463 (1943).

> tained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.[44]

The use of this as the sole criterion of validity has been criticized by the leading students of evidence.[45]

Nevertheless, the precedents have not been overruled and the federal court still cite them.[46] State courts also continue to cite the *Turnipseed* and *Henderson* cases in connection with the validity or invalidity of presumptions, or in such a way as to show an assumption that they are still sound.[47]

The Supreme Court and other federal courts continue to use the rational connection requirement to test presumptions.[48]

The present article has dealt with civil and criminal cases as though the same considerations apply to the requirement of rational connection in both classes of cases. The cases cited above generally take the same approach.

The statutory presumption arising from possession of a federal tax stamp or from the other facts specified above seems to be based on logical connection. It may be subject to other constitutional attacks however. This is uncertain since the nature and effect of the presumption is not clear.

A novel point was raised by a contention that the failure of the defendant to have the plaintiff examined under GA. CODE ANN. section 38-2110 (a) (1954) amounted to an admission of the injuries alleged in the petition. The court, on plaintiff's assignment of error, rejected his contention, pointing out that the defendant could not have secured an order of the trial court for a physical examination of the plaintiff as a matter of right, but only as a matter within the discretion of the trial judge. The court held that the presumption arising from the failure to produce evidence was not applicable because until the examination took place, no additional evidence was available, and hence, none was suppressed, and the results of the examination, if held, would have been available equally to all parties.[49]

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44. *Id.* at 467-468.
45. WIGMORE, EVIDENCE 724 (3d ed. 1940); MCCORMICK EVIDENCE 661, 662 (1954); MORGAN, *Foreword*, A.L.I. MODEL CODE OF EVIDENCE 59-60 (1942); Note, 56 HARV. L. REV. 1324 (1943).
46. Speiser v. Randall, 357 U.S. 513 (1958); Cutchlow v. United States, 301 F.2d 295, 297 (9th Cir. 1962).
47. *E.g.*, Berens v. Chicago, M., St. P., & Pac. R.R., 80 S.D. 175, 120 N.W.2d 565 (1963); State v. Schultz, 1 Ohio Misc. 81, 205 N.E.2d 126 (1964); Hot Springs Street Ry. v. Jones, 234 Ark. 695, 354 S.W.2d 278, 279 (1962); Payne v. Kinder, 147 W. Va. 375, 127 S.E.2d 726, 741 (1962).
48. United States v. Romano, 382 U.S. 136 (1965); Republic Aviation Corp. v. Board, 324 U.S. 743, 805 (1945); Estes v. United States, 335 F.2d 609, 617 (5th Cir. 1964); Edwing v. United States, 323 F.2d 674, 682 (9th Cir. 1963); Barrett v. United States, 322 F.2d 292 (5th Cir. 1963); Sipes v. United States, 321 F.2d 174, 179 (8th Cir. 1963).
49. Bradford v. Parish, 111 Ga. App. 167, 141 S.E.2d 125 (1965).

In an action on an accident insurance policy the defense was suicide. The evidence at the trial was as follows: The insured was a twenty-year-old, fun-loving, happy-go-lucky, youth, a "big mixer." He had a job in which he seemed interested and prior to his death talked to his family and friends repeatedly of his plans for the future. On the night of his death, he attended a high school football game, and the team on which he had previously played and served as captain won. He appeared delighted over the victory. He had shown no signs of brooding or despondency. After the football game he went a dairy bar for something to eat. There he met the girl whom he had been dating. He drove her to a vacant house and parked. They talked for a while and he urged her to marry him. When she did not agree, he got out a pistol which he had said he bought to sell for a profit. He put the pistol to his head and threatened to shoot himself if she would not marry him. He said she had until he counted five. When she did not answer, he counted five and then said he would give her another chance but this time would shoot at the count of three. He put his head against hers and the gun against his head on the other side. He counted one and two, clicking his fingernail against the trigger, seemingly to frighten her; at the count of two, she moved her head and about then the gun fired. She testified she did not see whether he pulled the trigger or not. He was killed instantly. The verdict was for the plaintiff. The defendant's motions for judgment notwithstanding the verdict and for a new trial were denied.

The Court of Appeals reversed by a vote of five to four, holding that the evidence, including the deceased's declaration of intention to shoot himself, demanded a verdict for the defendant and that final judgment must be entered for defendant.[50] The majority opinion and one of the dissenting opinions discuss at length the presumption against suicide and its bearing on the case. The Supreme Court granted *certiorari* and reversed.[51] The evidence being in conflict, it made an issue for the jury.

In another case with a lengthy opinion, the presumption of intoxication resulting from the per cent of alcohol in the blood,[52] although created by a criminal statute, was applied in a civil case to an insured whose blood was taken from his corpse.[53]

JUDICIAL NOTICE

The Court of Appeals ruled against the taking of judicial notice of Federal Communications Commission tariffs, which are filed with the commission but are not published for general distribution,[54] and on September 23, 1965, took the same position with regard to rules of the Georgia Industrial Loan

50. Liberty Nat'l Life Ins. Co. v. Power, 111 Ga. App. 458, 142 S.E.2d 103 (1965).
51. Power v. Liberty Mut. Life Ins. Co., 221 Ga. 305, 144 S.E.2d 389 (1965).
52. GA. CODE ANN. §68-1625 (1957 Rev.).
53. Interstate Life & Acc. Ins. Co. v. Whitlock, 112 Ga. App. 212, 144 S.E.2d 532 (1965).
54. Sims v. So. Bell Tel. & Tel. Co., 111 Ga. App. 363, 141 S.E.2d 788 (1965).

Commissioner.[55] The latter decision could have been different in view of the requirement of the Georgia Adminstrative Procedure Act that judicial notice be taken by the courts of the rules of all agencies of the state.[56] The term "agencies" includes all boards and officials having rulemaking powers with certain exceptions of which the Loan Commissioner is not one. In the particular case of copy of the pertinent rules was attached to the party's brief.

RELEVANCY

In an action for flood damage by the lessee against the lessor based on the lessor's duty to repair, one of the grounds of defendant's motion for a new trial complained of the admission of testimony by a witness for the plaintiff. He testified that approximately a year after the flooding and damage he found a valve in the air conditioning system defective. On appeal this was held not to be error because where the relevancy or competency of evidence is doubtful, it should be admitted and its weight left to the jury, and the admissibility of evidence relating to facts remote in time rests largely in the discretion of the trial court.[57]

Upon the trial of one accused of murder it was held that a peace warrant against the defendant which was procured by the deceased shortly before the killing could be introduced since it showed motive, and the fact that it might also have shown bad character did not make it inadmissible.[58]

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Defendant was convicted of burglary and brought error. A wrist watch identified by the prosecuting witness from the band attached thereto, which had been clamped on the watch with pliers by the witness, a roll of dimes in the same type of wrapper as that stolen from the witness, and a number of one-dollar bills in almost the same quantity as that stolen a few hours before they were found in the defendant's possession were held to have been sufficiently identified and properly admitted in evidence.[59]

In another case decided during the survey period the claim was for injuries received in a collision with a train at a grade crossing. Photographs of the crossing were received in evidence over the objection that they were made during daylight while the accident had occured just prior to midnight, and that they did not truly portray the situation as it appeared at the time of the accident. This was held to be a matter within the discretion of the trial judge. His ruling was not erroneous.[60] It may be added that it would prob-

55. Brown v. Quality Fin. Co., 112 Ga. App. 369, 145 S.E.2d 99 (1965).
56. GA. CODE ANN. §3A-108 (Supp. 1965). As to the Industrial Loan Commissioner's Rules see GA. CODE ANN. §25-306 (a) (1955).
57. Big Apple Super Mkts. v. W. J. Milner & Co., 111 Ga. App. 282, 141 S.E.2d 567 (1965).
58. Wyatt v. State, 111 Ga. App. 192, 141 S.E.2d 177 (1965).
59. Jackson v. State, 111 Ga. App. 192, 141 S.E.2d 177 (1965).
60. Grasham v. So. Ry., 111 Ga. App. 158, 141 S.E.2d 189 (1965).

ably not be possible to take a picture at night that would show the jury the same appearance that the plaintiff and engineer saw.

In *Shelton v. State* a finger print record was held admissible.[61]

BEST EVIDENCE

In an action to enjoin an action, in another county, on a note, which the plaintiff in the injunction suit claims has been paid in full, the plaintiffs introduced at the trial the original pages of the deed records showing the record of the security deed securing the note and the cancellation of the deed appearing to be signed by the grantee-defendant. The pages were objected to by the defense on the ground that the cancellation was a forgery. This objection was overruled, and the ruling was approved on appeal.[62] Were the plaintiffs attempting to prove the contents or the mere existence of the cancellation and direction to the clerk? If the former, it seems that the record would not be admissible, as the paper allegedly signed by the defendant would be the original writing which would have to be produced or accounted for before secondary evidence would be received.

Another case involving the best evidence rule was one in which testimony was received over the objection that a poultry weight ticket showed a certain named corporation as the buyer. The report of the case says, "The evidence showed that the original ticket was given to the plaintiff's husband and that only one copy was retained by Commerce Poultry, Inc." The plaintiff testified that she had been given notice to produce the ticket but could not find it. The Court of Appeals held that due diligence had not been shown by the defense and that the trial court "abused its discretion in admitting secondary evidence as to the contents of the ticket."[63] The court was sound in disapproving the admission of the testimony because Georgia recognizes degrees of secondary evidence.[64] However, it apparently used the word "secondary" inadvertently. The notice to produce to the person shown to have had the ticket should dispense with production of the original. The oral evidence was inadmissible because the copy was not satisfactorily accounted for.

WITNESSES

A misleading statement is made in *Wilbanks v. Wilbanks*[65] on competency. A proceeding to obtain custody of a child was brought against the mother. It was alleged that she had not given proper care and attention to the child, had engaged in immoral conduct, and had been guilty of adultery. Defendant assigned error on the trial judge's ruling allowing testimony by

61. 111 Ga. App. 351, 141 S.E.2d 776 (1965).
62. Todd v. Conner, 221 Ga. 51, 142 S.E.2d 923 (1965).
63. Pendley v. Murphy, 112 Ga. App. 33, 143 S.E.2d 674 (1965).
64. GA. CODE ANN. §38-213 (1954 Rev.).
65. 220 Ga. 665, 141 S.E.2d 161 (1965).

the man with whom she was accused of committing adultery. She claimed that he was wholly incompetent to testify, relying on GA. CODE ANN. section 38-1606 (1954). The ruling was against her on the grounds, first, that the witness could in any event testify as to facts other than adultery since that was not the only ground on which the proceeding was instituted and, second, that only parties to the suit are disqualified in an action instituted in consequence of adultery. The result is correct but the latter reason is unsound. GA. CODE ANN. section 38-1603 (1954) mentions persons previously disqualified for crime and interest and in addition, husbands and wives of parties to the case or to the adultery are disqualified in actions instituted in consequence of adultery.[66]

In a malpractice case it was held that an otherwise qualified medical expert familiar with standards of care considered by the profession generally to represent a reasonable degree of care and skill may testify although he is unable to show personal knowledge of medical standards in the particular locality or community where the alleged tort was committed.[67]

In a criminal case the chief witness for the prosecution had been adjudicated insane. Such a person was held not to be incompetent to testify.[68] The only case cited does not decide such a broad proposition but says that a person adjudged insane is not, in all cases, incompetent as a witness and that his evidence is admisible if he has sufficient understanding to comprehend the obligation of an oath and to be capable of giving a correct account of the matters upon which he is examined. The case cited by the court goes on to indicate that whether the witness has this understanding and capacity is to be determined by the judge and that a previous adjudication throws the burden of proving competency upon the party offering the witness. The precedent was actually not followed; rather, it was misinterpreted.

An important change was made in Georgia law by the 1966 General Assembly when it added to GA. CODE ANN. section 27-1403 (1953) the following sentence:

> Without the consent of the defendant, no witness shall be permitted to testify for the state whose name does not appear upon the list of witnesses as furnished to the defendant unless the solicitor or prosecuting attorney shall state in his place that the evidence sought to be presented is newly discovered evidence which the state was not aware of at the time of its furnishing the defendant with a list of the witnesses.[69]

OPINION

The subject of opinion evidence is in considerable confusion in this state.

66. Howard v. State, 94 Ga. 586, 20 S.E. 436 (1894); Thompson v. Crawford, 30 Ga. App. 796, 119 S.E. 440 (1923).
67. Murphy v. Little, 112 Ga. App. 517, 145 S.E.2d 760 (1965).
68. Saxe v. State, 112 Ga. App. 804, 146 S.E.2d 376 (1965).
69. GA. LAWS, 1966, p. 430.

The GA. CODE ANN. section 38-1708 (1965) contains a more or less meaningless statement as to when opinion is admissible.[70] The widely accepted view in this country is that a non-expert witness may testify to his opinion where it is not practicable to place before the jury all the facts upon which the opinion is founded.[71] Several Georgia cases have used this test.[72] During the survey period, however, the test used has been whether the opinion is based on facts to which the opinion witness testified. If it is, the evidence is admissible.[73] This is a liberal and probably preferable view. Humans customarily talk in the form of opinions and conclusions and tend to testify in the same way. To a certain extent judges and lawyers permit this. If they do not permit it, the witness may find it difficult to communicate and wind up giving less information, which may have been the purpose of the objection all along. But, on the whole, the effort to keep out opinion is apt to be fruitless.

A different approach, used particularly in the case of opinion as to market value GA. CODE ANN. section 38-1709 (1954) has a tendency to restrict the use of opinion evidence. This doctrine permits inquiry as to the knowledge of the subject by the witness and opportunity to form a correct opinion. In one case during our period, the basis for his opinion was brought out on cross-examination, and the Court of Appeals considered this basis, the purchase price alone, insufficient.[74] The approach appears inconsistent with the first view discussed above, as does the second view. Perhaps, the conflicts could be eliminated by amending the CODE section so as to make it state a workable rule.

Evidence of the result of a lie-detector test would be useful only if accompanied by the expert opinion of the person administering the test. The generally accepted view is that such evidence is inadmissible, especially if there has been no stipulation between the parties for the administering of the test. The first reported case in Georgia was decided this year. It was a criminal prosecution in which the defendant sought to question two witnesses called by him concerning the results of a lie-detector test administered to him by them. He had taken the test voluntarily. No mention is made of a stipulation or agreement. The trial court refused to allow the testimony as to the result of the test. The Supreme Court of Georgia approved this ruling, holding that the lie detector's reliability and technique have not yet received scientific acceptance as an accurate means of detecting deception, and citing decisions from other jurisdictions.[75]

70. GA. CODE ANN. §38-1708 (1954 Rev.).
71. MCCORMICK, EVIDENCE 13, n. 23 (1954).
72. Southeastern Greyhound Lines v. Durham, 62 Ga. App. 99, 8 S.E.2d 99 (1940); Jefferson v. State, 56 Ga. App. 383, 192 S.E. 644 (1937); Taylor v. State, 135 Ga. 622, 70 S.E. 237 (1911).
73. Atlanta Stove Works, Inc. v. Hollon, 112 Ga. App. 8, 146 S.E.2d 358 (1965); Hughes v. Brown, 111 Ga. App. 676, 143 S.E.2d 30 (1965).
74. Mills v. Mangum, 111 Ga. 396, 141 S.E.2d 773 (1965).
75. Salisbury v. State, 221 Ga. 718, 146 S.E.2d 776 (1966).

HEARSAY

On the trial of an indictment for murder, a photograph identified as a picture of the room where the fatal blow was allegedly struck was excluded from evidence. The witness who identified the photograph was not present when the encounter took place. He put a mark on the photograph "where he understood the accused was standing when the deceased attacked him with a knife." On appeal the addition of the mark was held to be hearsay and the exclusion of the evidence proper.[76]

In *Green v. Holloway*[77] the defendants offered in evidence a plat showing the boundary and dividing lines of the two lots of the respective parties. Counsel for plaintiff said that he did not object to the plat itself, but did object to certain writing on the plat. This consisted of typewritten words placed thereon by the surveyor such as the distance "from corner claimed by L. G. Green to be lot corner;" "fence encroachment." The entries on the plat were objected to as hearsay. The appellate court ruled against the objection, quoting from the Superior Court Rules:[78] "Every surveyor shall represent on his plat, as nearly as he can, the different enclosures of the parties, and the extent or boundaries within which each party may have exercised acts of ownership."

Does the foregoing provision, Rule 85, apply to surveys made by persons other than the county surveyor? It has been held that the preceding Rule (number 84) applies only to official surveys.[79]

Nat. Life Ins. Co. v. Power[80] holds that although the person in charge of interment is required to file a certificate of death, the certificate is not prima facie evidence of the facts stated therein under GA. CODE ANN. section 88-11 (1963 Rev.). The only persons who may complete death certificates so as to give them that effect are the physician last in attendance upon the deceased and the coroner or "person acting as such." The exception is in case of fetal death. The decision in the particular case was that a certificate of death signed by a physician as assistant medical examiner where he was subject to objection as hearsay and on other grounds.

This article has necessarily been selective. The evidence decisions in this state in a twelve month period are too numerous and many of them too insiginficant to justify an effort to cover all of them. Many merely decide questions frequently decided the same way before.

76. Green v. State, 112 Ga. App. 329, 145 S.E.2d 80 (1965).
77. 220 Ga. 819, 142 S.E.2d (1965).
78. GA. CODE ANN. §24-3385 (1959 Rev.).
79. Wooten v. Solomon, 139 Ga. 433, 77 S.E. 375 (1913).
80. 112 Ga. App. 547, 145 S.E.2d 801 (1965).