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Evidence

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eral Assembly has in effect, made the 'equity' cases and the law established therein applicable to situations such as that before us."[9] The court further found that the defendant's evidence in support of laches was the passage of the long period of time and held that such was not enough. No material prejudice was shown and the court refused to infer prejudice from the mere lapse of time. "In order to successfully prosecute a claim of laches, the person asserting the claim must show that he has been materially prejudiced by the delay of the adverse party in asserting his rights."[10] It was stated that the defendant had established nothing more than "mere inconvenience."

Frantz v. Maher[11] held that the rule against enforceability of an oral contract to make a will, which was based upon the Statute of Frauds, had no application to a contract in which the promise was not to make a will, but to allow property to descend to the plaintiff by intestate distribution.

In *Adam v. Southwood,*[12] an action was brought for recission of a contract for the purchase of a house and a lot on the ground of misrepresentation. The owner of the lot adjacent to that of the vendor had previously filed suit against the vendor to require removal of a fence which, it was alleged, interfered with the neighbor's use of a joint driveway. This suit, pending at the time the contract of sale was entered into, was subsequently settled in the vendor's favor. At the time of the negotiations for the sale, in answer to direct questioning by the vendee, the vendor stated that all matters relating to the fence had been settled. The court held that the recission should be granted because of this misrepresentation.

EDGAR I. KING

EVIDENCE

INFERENCE ON AN INFERENCE

On a Sunday morning in 1918, a boy was injured by a moving motor truck. Suit for his injuries was brought against the owner of the truck who was alleged by plaintiff to be responsible. It became necessary to prove (1) that the defendant did in fact own the truck which caused the harm, and (2) that at the time in question it was being driven by an employee of the defendant in the scope of his em-

9. Smith v. Smith, 168 Ohio St. 447, 456, 156 N.E.2d 113, 120 (1959). See also discussion in *Domestic Relations* section, p. 375 *supra.*

10. *Id.* at 455, 156 N.E. 2d at 119.

11. 106 Ohio App. 465, 155 N.E.2d 471 (1957). See also discussion *Wills and Decedents' Estates* section, p. 453 *infra.*

12. 107 Ohio App. 425, 159 N.E.2d 781 (1958).

ployment. One witness testified that he saw the words "The Lubric" inscribed on the truck. There was no other evidence of ownership, and much less that whoever was responsible for the truck's operation was an employee of the defendant.

The supreme court held that while evidence of the inscription on the truck would support an inference that defendant owned the truck, it would not support the further inference that it was being driven by an employee of the defendant on defendant's business when the injury occurred.[1] As is set forth in the syllabus of the case, "an inference of fact cannot be predicated upon another inference, but must be predicated upon a fact supported by evidence."[2]

This rule is stated over and over again by courts without further analysis[3] and without a realization on their part that, as Wigmore says:

> There is no such orthodox rule; nor can be. If there were, hardly a single trial could be adequately prosecuted.[4]

Some courts, probably secretly troubled by the lack of basis for this all-embracing rule, have occasionally attempted to distinguish and escape its irrational stringency by allowing several "parallel" inferences to be drawn from the same fact which has been established by the evidence, or, to put it differently:

> . . . [A] given state of facts proven to the satisfaction of the jury may give rise to two or more separate inferences, and in such a case one inference is not built upon the other, each is drawn independently from the same evidence.[5]

In *McDougall v. Glenn Cartage Company*,[6] the supreme court had before it a fact situation similar to that in *Sobolovitz v. Lubric Oil Company*. The negligence and injury were clearly shown; there was evidence of ownership by the defendant, perhaps a bit stronger than in *Sobolovitz*, though no argument appears to have been made on this point. Scope of employment was about as much a matter of inference as it was in *Sobolovitz*. In the trial court, defendant's mo-

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1. Sobolovitz v. Lubric Oil Co., 107 Ohio St. 204, 140 N.E. 634 (1923).

2. *Id.* at syllabus 2.

3. In the period covered by this Survey, it is found in Dungan v. Hart, 107 Ohio App. 431, 159 N.E.2d 903 (1958). Of course, one can hardly blame a court of appeals for following a well-established precedent. For a discussion of the *Dungan* case, see *Torts* section, p. 434 *infra.*

4. 1 WIGMORE, EVIDENCE § 41 (3d ed. 1940). Strangely, in his list of horrible examples, he cites St. Mary's Gas Co. v. Brodbeck, 114 Ohio St. 423, 151 N.E. 323 (1926), and does not mention *Sobolovitz v. Lubric Oil Co.*

5. Gero v. John Hancock Mut. Life Ins. Co., 111 Vt. 462, 480, 18 A.2d 154, 163 (1941); see also Hurt v. Charles J. Rogers Transp. Co., 164 Ohio St. 329, 130 N.E.2d 820 (1955); Hozian v. Crucible Steel Casting Co., 132 Ohio St. 453, 9 N.E.2d 143 (1937).

6. 169 Ohio St. 522, 160 N.E.2d 266 (1959). See also discussion in *Conflict of Laws* section, p. 355 *supra.*

tion for a directed verdict was sustained at the close of plaintiff's case on the authority of *Sobolovitz*.

The supreme court reversed and remanded, overruling *Sobolovitz* "so far as it conflicts with this opinion."[7] The supreme court appears to have put great stress upon the fact that the offending vehicle "bore defendant's name and distinctive markings with ICC and PUCO permits and numbers."[8]

It is hard for this writer to tell whether the basis for the court's decision is that of parallel inferences drawn from the same established fact or whether the decision terminated the earlier rule that an inference of fact cannot be predicated upon an inference. Although the decision in *McDougall* appears to be correct, still, there is a valid basis for what Wigmore calls "an underlying distrust of inferences which rest upon *too many intervening inferences.*"[9] (Emphasis added.)

Undoubtedly, this most recent decision will lead to others of a similar nature in varying situations, and the new rule will slowly take definite shape before our eyes.

PRESUMPTIONS

In another case[10] decided during the period covered by this Survey, the Court of Appeals for Lucas County applied to a criminal case the rule, heretofore found in numerous civil cases,[11] that a presumption is a procedural device which is resorted to only in the absence of evidence by the party in whose favor a presumption would otherwise operate. Where a litigant produces evidence tending to prove a fact, either directly or by inference, which for procedural purposes would be presumed in the absence of such evidence, the presumption never arises, and the case must be submitted to the jury without any reference to the presumption in either a general or a special charge. In the face of evidence on the matter, a charge on the presumption

7. *Id.* at syllabus 3.

8. *Id.* at 528, 160 N.E.2d at 270. If this were so, it hardly seems that it was necessary to indulge in any inference of ownership, which was what seems to have troubled the court in *Sobolovitz*. In other words, ownership being clear, only the one inference of scope of employment was necessary.

9. 1 WIGMORE, *op. cit. supra* note 4, § 41. Wigmore quotes from New York Life Ins. Co. v. McNeely, 52 Ariz. 187, 195, 79 P.2d 948, 955 (1938), in which the following significant test is used. ". . . [T]he courts do not mean that under no circumstances may an inference be drawn from an inference, but rather that the prior inferences must be established to the exclusion of any other reasonable theory rather than merely by a probability, in order that the last inference in the *probability* of the ultimate fact may be based thereon." For a case in which, without adverting to the *Sobolovitz* rule, the court refused to go from one inference to another on the basis of unreasonableness, see Nanashe v. Lemmon, 162 N.E.2d 569 (Ohio Ct. App. 1958).

10. City of Toledo v. Gfell, 107 Ohio App. 93, 156 N.E.2d 752 (1958).

11. Ayers v. Woodard, 166 Ohio St. 138, 140 N.E.2d 401 (1957); Carson v. Metropolitan Life Ins. Co., 165 Ohio St. 238, 135 N.E.2d 259 (1956); Shepherd v. Midland Mut. Life Ins. Co., 152 Ohio St. 6, 87 N.E.2d 156 (1949).

would indicate to the trier of the facts that the presumption has some evidentiary weight.[12]

The city ordinance under which defendant-appellant was convicted of driving while under the influence of alcohol contained explicit presumptions as to the degree of influence or non-influence, depending upon the chemical analysis of the defendant's bodily substance tested. However, there were in evidence some "objective symptoms" from which an inference could be drawn that the defendant at the time and place was under the influence of alcohol. Therefore, the court of appeals held that to charge the jury on the presumptions of the ordinance was prejudicial error.

Prejudicial Comment by Counsel

Two cases decided during the period covered by this Survey were reversed as a result of prejudicial remarks by counsel during trial. In *Sellers v. Commins*,[13] the following occurred during the *voir dire*:

> Mr. Sieman [plaintiff's counsel]: Are there any members of this panel that are employed by an insurance company selling liability insurance on motor vehicles? (no answer) Are there any members of the panel that own stock or any of you that have any financial interest in any insurance company selling liability insurance on automobiles? (no answer) (Conference at bench by Mr. Day [defendant's counsel] and court)
>
> Mr. Sieman: *Did he want to make that openly to the jury?*
>
> Mr. Day: I object to that question in the hearing of the jury.
>
> Mr. Sieman: If Mr. Day has an objection *let him make his objection out loud in the hearing of the jury.*
>
> Mr. Day: (at bench) I move to discharge the panel by reason of the last two questions, and by reason of his *twice repeating the statement "Do you want to make that objection to the jury"* and I move to withdraw a juror and discharge the entire panel.
>
> Mr. Sieman: Counsel for plaintiff denies having made the statement twice and/or that counsel for plaintiff asked Mr. Day when he went to the judge to make the objection whether or not he cared to make that objection openly . . . .[14] (Emphasis the court's.)

Of this the supreme court said:

> In our opinion, the trial court should have forthwith granted defendant's motion to withdraw a juror and discharge the panel. We can see no possible justification for this apparent effort by the plaintiff's counsel, at the outset of a trial, to discredit opposing counsel by suggesting that he was trying to hide something from the jury. If plaintiff's counsel had really wanted to hear what opposing counsel had to say to the court, he could readily have availed himself of that opportunity in a dignified and orderly manner by joining him at the bench. We cannot understand the argument in plaintiff's brief that "there was no misconduct. . . ,

12. This view, although supported by Wigmore, is not universally held. See McCormick, Evidence §§ 314-16 (1954).

13. 169 Ohio St. 332, 159 N.E.2d 600 (1959).

14. *Id.* at 333, 159 N.E.2d at 601.

since plaintiff's counsel is entitled to know what defendant's counsel is attempting to read into the record." Plaintiff's counsel could have easily found that out from the reporter without trying to discredit his opponent with the jury.

In his brief, plaintiff's counsel states that "as evidence of plaintiff's counsel's good faith, he denied immediately in the presence of counsel for the defendant, out of the hearing of the jury, that he had made any such statements." We cannot comprehend how denials, which the foregoing-quoted parts of the record (which we must assume to be accurate) apparently indicate as false denials, would be any evidence at all of good faith.[15]

In *Shapiro v. Kilgore Cleaning and Storage Company,*[16] plaintiff, an attorney, sued defendant for injuries sustained in a head-on collision with defendant's truck. From an adverse judgment, plaintiff appealed. The testimony was almost irreconcilably conflicting, principally over whether plaintiff's automobile was on the wrong side of the road at the time of the impact. The only witnesses were plaintiff and defendant's driver. Their credibility was therefore of vital importance.

Counsel for defendant made his argument to the jury on the facts and then proceeded to the issue of credibility in the following unfortunate manner:

I am troubled by something in this case that goes far deeper, and with this I am through. I think the facts are perfectly clear that under these pictures Mr. Shapiro's story can't be accurate. I don't accuse him of being deliberately misleading. I think he is mistaken. But as you well know, in the eyes of the public, lawyers do not have the most savory reputation. This goes for me, for Mr. Gaines (Gaines was counsel for the plaintiff), and for all of us. The word "shyster" has a meaning in our language. If a person says that word you know what he is talking about. Now, ladies and gentlemen, I have nothing against a lawyer coming into court and demanding redress for an injury, but when he is so obviously wrong I confess it makes me sick. Every time a lawyer goes sour in the public prints, every time it happens it is a little harder for my wife to go into the grocery store and do her shopping. They tar us all with the same brush. Please, please, don't tar me with this one. . . .[17]

The court of appeals found this to be prejudicial error, not cured by the efforts of the trial court to correct this in its general charge. With both decisions the writer of this article could not more heartily concur.

Judicial Notice of Tests for Alcoholic Influence

In *Parton v. Weilnau,*[18] the supreme court stated that "the scientific foundation for [the blood alcohol] test for sobriety is not so well

15. *Id.* at 334, 159 N.E.2d at 601.

16. 156 N.E.2d 866 (Ohio Ct. App. 1959).

17. *Id.* at 868.

18. 169 Ohio St. 145, 158 N.E.2d 719 (1959). The court invited comparison to City of

established and known that a court can take judicial notice as to its significance," and that, "therefore, a jury *without the guidance of expert testimony,* should not be permitted to speculate as to its significance."[19] (Emphasis added.)

Use of Testimony Given at a Former Trial

Ohio Revised Code section 2945.49 is a statutory regulation of the use of testimony taken at an examination or a preliminary hearing, or by deposition, or at a former trial. In substance, it provides for the use of such testimony by either the state or the defendant for several causes, one of which is ". . . whenever the witness . . . cannot for any reason be produced at the trial . . . ." In *City of Columbus v. Edmister,*[20] the trial court, over defendant's objection that to do so violated his constitutional rights, permitted the official court reporter to read the testimony of a witness given at a former trial (at which the jury had been unable to agree), upon testimony that the witness had enlisted in the Women's Air Force and was stationed in Texas.

The Court of Appeals for Franklin County upheld the use of the former testimony, distinguishing *Mitchell v. State.*[21] In the latter case, the witness was out of the court's jurisdiction for a short vacation, and a short postponement would have, in all probability, enabled the state to produce him.[22]

Failure to Swear Jury Before Voir Dire

Ohio Revised Code section 2313.42, which became effective September 9, 1957, requires that:

> Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications.

Undoubtedly, many trial lawyers were slow in appreciating this change in the law. In *In re Appropriation of Easement for Highway Purposes,*[23] the trial had commenced a week after the effective date

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East Cleveland v. Farrell, 168 Ohio St. 298, 154 N.E.2d 630 (1958), in which the court permitted judicial notice to be taken of the accuracy in general of the measurement of speed of moving objects by radar devices. See DeWitt, *Evidence, Survey of Ohio Law — 1958,* 10 West. Res. L. Rev. 405 (1959).

19. Parton v. Weilnau, 169 Ohio St. 145, 151, 158 N.E.2d 719, 724 (1959). Many traffic court judges are in fact taking judicial notice of the significance of blood alchohol tests in cases tried to them as finders of the facts. In the light of the supreme court's statement, should they? A close reading of the opinion indicates that the statement *may* be dictum, since the court found it ". . . difficult on the facts of this case to conceive of any reasonable basis for a finding of any proximate causal relationship between . . . plaintiff's injuries" and defendant's decedent's intoxication, even if intoxication were proved. *Id.* at 151, 158 N.E.2d at 725.

20. 106 Ohio App. 443, 155 N.E.2d 72 (1958).

21. 40 Ohio App. 367, 178 N.E. 325 (1931).

22. For a more complete discussion of the use of recorded testimony, see Note, 11 West. Res. L. Rev. 471 (1960).

23. 162 N.E.2d 190 (Ohio Ct. App. 1958).