EVIDENCE

By FRANK C. JONES*

In this survey of decisions on evidence, no effort will be made to treat the large number of decisions involving only a determination of such questions as whether the evidence was sufficient to sustain the verdict, whether a non-suit or directed verdict was properly granted, and the like. In many other cases rulings on whether certain evidence was relevant and material involved a lengthy and detailed analysis of the pleadings and the contentions of the parties, as well as a consideration of other evidence presented in the case, and it is difficult to properly illustrate such rulings without giving these details. For the sake of brevity, a discussion of these decisions is avoided except in selected instances.

Questions of practice and procedure, both civil and criminal, are often closely related to problems of evidence, but these subjects are fully treated elsewhere in the survey issue and will not be covered herein.

JUDICIAL NOTICE

The Court of Appeals had occasion, during the survey period, to judicially recognize:

(a) That effective and efficient brakes, if properly set, will hold an automobile on an incline, in the absence of some external force being applied.[1]

(b) That timber cutters can get injured or killed by falling trees without the intervention of intoxicants.[2]

(c) That, where evidence discloses facts from which bias or interest is to be inferred, a juror will probably act in accordance with the bias disclosed.[3]

(d) That, in determining any matter, the physical laws, the laws of immutable nature, and the various conclusions which scientific investigation has established, including the science

*Member of the firm of Jones, Sparks, Benton & Cork, Macon; B.B.A., 1947, Emory University; LL.B., 1950, Walter F. George School of Law, Mercer University; Member Macon, Georgia, and American Bar Associations.

1. Wright Contracting Co. v. Waller, 89 Ga. App. 827, 81 S.E.2d 541 (1954); Peggy Ann of Georgia, Inc. v. Scoggins, 90 Ga. App. 18, 81 S.E.2d 859 (1954).
2. Hudson v. Taylor, 88 Ga. App. 575, 77 S.E.2d 100 (1953).
3. Shipman v. Johnson, 89 Ga. App. 620, 80 S.E.2d 717 (1954).

of mathematics, must be considered.[4]

(e) A city charter.[5]

Our courts have uniformly refused to take judicial notice of municipal ordinances, it being necessary that a party relying on a city ordinance plead and prove it.[6] In the case of *Harmon v. Givens*,[7] the plaintiff in a damage suit pleaded that section of a city code providing for the giving of a signal on making a turn, but did not plead the succeeding section, which defined the methods by which such signal could be given. Both sections were, however, admitted in evidence over the objection of the defendant that the last mentioned section had not been plead, since the first section stated that the manner of giving the signal would be "hereinafter provided," and the section which had not been pleaded referred back to it.

The court refused to take judicial notice of the rules and regulations of the Georgia Public Service Commission.[8]

Section 38-112 of the Code, in setting forth the matters to be judicially recognized by the courts of Georgia, provides in part:

> " . . . *the laws* of the United States and *of the several states* thereof, *as published by authority, . . . shall be judicially recognized without the introduction of proof.*" (Emphasis supplied.)

It would appear from a casual reading of this section that it would not be necessary to plead the law of a foreign state or to "prove" that law in the sense that recognition of the necessity of proof excludes the subject as being a proper one for judicial notice.[9] Nevertheless, the general rule announced by our appellate courts has been that the law of another state must be pleaded and proved if it is relied upon to furnish a right of recovery or defense different from the law of Georgia or the common law.[10]

4. Lamar Electric Membership Corp. v. Carroll, 89 Ga. App. 440, 79 S.E.2d 832 (1953). In Wright Contracting Co. v. Waller, note 1 *supra*, where there was no showing that an automobile parked on an incline had been influenced by any force except gravity, an allegation that it "lurched" into motion was held to be contradictory of the primary physical laws.
5. Pollock v. City of Albany, 88 Ga. App. 737, 77 S.E.2d 579 (1953).
6. See collection of cases under catchwords "Municipal Ordinances" in annotations to GA. CODE § 38-112 (1933). The only exception is in case of Recorder or other city judicial officer or tribunal, e.g., Hill v. City of Atlanta, 125 Ga. 697, 54 S.E. 354 (1906).
7. 88 Ga. App. 629, 77 S.E.2d 223 (1953).
8. Atlanta Gas Light Co. v. Newman, 88 Ga. App. 252, 76 S.E.2d 536 (1953).
9. See the discussion of this section by Justice Cobb in the early case of Seaboard Air-Line Railway Co. v. Phillips, 117 Ga. 98, 100, 43 S.E. 494 (1902).
10. The decisions on this subject, as collected in the annotations to § 38-112 under catchword "Laws," suggest considerable confusion. There are categorical statements both that judicial notice will be taken of all state laws, e.g. Crowley v. Hughes, 74 Ga. App. 531, 40 S.E.2d 570 (1946), and that it will not, Alropa Corp. v. Pomerance, 190 Ga. 1, 8 S.E.2d 62 (1940). The Court of Appeals stated that three methods

In two recent decisions, this problem was presented. In *Lane v. Varner*,[11] involving a South Carolina automobile accident, the court stated that where the law of another state which is one of the original thirteen states is applicable, but such law is not pleaded or proved, it will be *assumed* that the law of the state where the tort occurred is the *common law* as declared and interpreted by the courts of the State of Georgia. In that case, the plaintiff had pleaded and proved several South Carolina code sections. On appeal from a jury verdict for the defendant, the plaintiff complained about a charge on the subject of "pure accident," contending it should not have been charged because no South Carolina statute relative thereto had been pleaded or proven. The charge was held to be correct on the basis of the rule that where on party offers a section of the code of another state as proof of the law of that state, he is not required to introduce all cognate sections.

The other decision, *Garnto v. Henson*,[12] involved an accident which occurred in Florida. The court stated that since the law of Florida was not pleaded, it would be *presumed* that its law, inasmuch as Florida was not one of the original thirteen states, was the same as the *statutes and laws* in force in Georgia.

The writer believes that these cases indicate a need for legislative action. A Uniform Judicial Notice of Foreign Law Act was drafted by the National Conference of Commissioners on Uniform State laws and approved by the American Bar Association in 1936, and it has now been adopted by a majority of the states of the Union. The act provides, briefly, that courts shall take judicial notice of the common law and statutes of every state, and that a court may inform itself of such laws in any manner it may deem proper, including calling on counsel for aid in obtaining the information. The determination of foreign law would be made by the court and not by the jury, and would be reviewable.

PRESUMPTIONS AND BURDEN OF PROOF

As pointed out by Professor Green in the evidence section of last year's survey issue,[13] the word "presumption" has many

of "proof" of foreign law have been recognized: (a) by proof of witnesses familiar with the law; (b) by certified copy of the statute; and (c) by judicial recognition. Missouri State Life Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S.E. 93 (1907). The chief stumbling block to judicial notice has been the language "as published by authority".

11. 89 Ga. App. 47, 78 S.E.2d 528 (1953).
12. 88 Ga. App. 320, 76 S.E.2d 636 (1953).
13. 5 MERCER L. REV. 88 (1953).

meanings, and just what is necessary to rebut a presumption varies from meaning to meaning.

Where the law of another state is not plead and proven, as indicated by the last two cases of the preceding section, the Georgia courts indulge in presumptions as to such foreign law with the nature of the presumption being dependent upon whether the foreign state was one of the original thirteen. This presumption is conclusive in the absence of "proof" as to such foreign law.

Whether a presumption of fact or law has been rebutted[14] is ordinarily a question to be determined by the jury.[15] This is illustrated by several of the recent decisions. The presumption that a husband is liable for necessary medical services rendered to his wife may be overcome by facts showing an express agreement between the wife and a physician furnishing services that the wife was to be personally liable therefor.[16] In the absence of evidence to the contrary, every adult is presumed to possess ordinary intelligence, judgment and discretion.[17]

Where a party has evidence in his power and within his reach, by which he may repel a claim or charge against him, and omits to produce it, or, having more certain and satisfactory evidence in his power, relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded; but this presumption may be rebutted.[18] In *Barrett v. Distributor's Group, Inc.*,[19] an action for a deficiency judgment on a conditional sales contract after repossession and resale of the property, one of the seller's officers testified respecting two of the resales. He did not actually make the sales and it was contended that the failure of the seller to produce witnesses who could testify in a more direct way as to the transactions involved raised a presumption that the testimony of such absent witnesses would have been unfavorable. Inasmuch as the trial judge sat both as judge and jury, it was held that the questions of whether the presumption had been raised and whether it had been overcome were for him to decide.

In *Hightower v. Citizens Pharmacy*,[20] the plaintiff had subpoenaed a physician but had not called him to the stand, and counsel for the plaintiff attempted, for the purpose of preventing the jury from presuming that the physician's testimony would

14. "Presumptions of law and of fact . . . may be rebutted by evidence." Bryan v. Watson, Administrator, 20 Ga. 480 (1856).
15. See GA. CODE § 38-113 and annotations thereunder.
16. Herring v. Holden, 88 Ga. App. 212, 76 S.E.2d 515 (1953).
17. Beasley v. Elder, 88 Ga. App. 419, 76 S.E.2d 849 (1953).
18. GA. CODE § 38-119 (1933).
19. 89 Ga. App. 458, 79 S.E.2d 587 (1953).
20. 90 Ga. App. 30, 82 S.E.2d 46 (1954).

have been unfavorable to the plaintiff, to show that the physician had a financial interest as a stockholder in the defendant corporation. The refusal of the trial court to permit this was upheld, it being pointed out that there was no showing that any of the jury knew that the physician in question had been subpoenaed and the trial court had stated that the plaintiff could explain the absence of the witness.

Whitley v. Wilson[21] contained a good synopsis of the law relevant to the determination of who has the burden of proof and the burden of going forward with the evidence. The burden of proof is fixed by the pleadings,[22] and the effect of a denial by the defendant of the plaintiff's allegations is to put the plaintiff on notice that the burden is on him to prove these allegations. Where the defendant alleges new matter, not dealt with in the petition, which would constitute a defense to the case as pleaded, if true, then the burden is on the defendant to sustain such an affirmative defense. However, affirmative statements in an answer do not operate to cast the burden on the defendant if the statements amount only to a denial of the allegations thereof, that is if they merely set out evidence or argument which the defendant might have submitted under a general denial.

WITNESSES

a. Competency

Several decisions involved an application of the so-called "dead man's statute."[23] In a suit by the transferee of a note against a married woman,[24] the defendant sought, in support of a plea that she had signed the note in question as a surety only, to testify as to a conversation she had at the time of execution with the cashier of the payee bank, the cashier being deceased at the time of trial. She was held to be incompetent because of the application of those paragraphs of Code Section 38-1603 which provide that where a suit is instituted or defended by a transferee of a deceased person, the opposite party shall not be permitted to testify in his or her own favor as to communications with such deceased, and that the surviving party cannot testify as to communications

21. 90 Ga. App. 16, 81 S.E.2d 877 (1954).
22. Or, as in the case of a claim under the Workmen's Compensation statute, by contentions of the parties. See Hudson v. Taylor, 88 Ga. App. 575, 77 S.E.2d 100 (1953) where it is pointed out that burden is on employer to show that alleged intoxication was proximate cause of death. GA. CODE § 114-105 (1933).
23. GA. CODE, § 38-1603 (1933).
24. Dye v. Richards, 210 Ga. 601, 81 S.E.2d 820 (1954).

with a deceased agent where the witness would not be competent if the deceased agent had been the principal.[25]

In a suit against an intestate's sole heir for a decree establishing petitioner's equitable title to property which the intestate had allegedly promised to will to her, and where the widow and sole heir had obtained an order that no administration was necessary, the plaintiff was held incompetent under this statute to testify as to transactions or communications with the intestate. The court said that the widow and sole heir was clearly the "personal representative" within the meaning of the Code.[26] The personal representative was not rendered incompetent by the statute to testify as to transactions between the plaintiff and the deceased since she was not an "opposite party" within the meaning of the statute.

The principle statutory change in the law of evidence during the past year concerned this subject.

The dead man's statute was passed in 1889 and subsequently codified as Section 38-1603. Subdivision 3 thereof provided that where a suit was instituted or defended by a corporation, the opposite party would not be permitted to testify in his own behalf to transactions or communications solely with a deceased or insane officer or agent of the corporation. Because of the strict construction which has been given to this act since its inception[27] it has been held in a long line of cases that this did not render incompetent a surviving officer or agent of a corporation as to transactions or communications with a deceased opposite party.[28] The recent act[29] simply made the surviving officer or agent of a corporation incompetent in the latter situation, thus restoring a measure of equality which had not existed.

By Code Section 38-1604, a wife is rendered incompetent to testify against her husband. In the case of *Waye v. State*,[30] where the evidence revealed that the wife was present at the time of the homicide, it was held to be error requiring the grant of a new trial to refuse to give a timely written request instructing the jury on the incompetency of the wife to testify.

25. It was also properly pointed out that § 38-309 of the Code, which sets forth the "declarations against interest" exception to the hearsay rule, has no application whatsoever to the incompetency established by the dead man's statute.
26. Shadburn v. Tapp, 209 Ga. 887, 77 S.E.2d 7 (1953).
27. See, for example, Eley v. Reese, 171 Ga. 212, 155 S.E. 24 (1930).
28. Ullman v. The Brunswick Title Guarantee & Loan Co., 96 Ga. 625, 24 S.E. 409 (1895); Maxwell v. Imperial Fertilizer Co., 103 Ga. 108, 29 S.E. 597 (1897).
29. Ga. Laws, Nov.-Dec. Sess. 1953, p. 319.
30. 89 Ga. App. 691, 80 S.E.2d 821 (1954).

b. Cross-Examination

It was stated many times that the purpose of cross examination is to provide a searching test of the intelligence, memory, accuracy and veracity of a witness, and that it is better for cross examination to be too free than too much restricted.[31] In *Ledford v. State*,[32] the state called as a witness an army investigator who testified as to the taking of certain photographs. On cross examination, the witness revealed that he had taken other photographs which had not been introduced in evidence by the state, including several of the automobile in which the defendants were riding. Although recognizing that the condition of the automobile was relevant, the trial court refused to allow counsel for the defendant to question the witness as to what was wrong with the automobile, et cetera, holding that the defendant would not be entitled to cross examine the witness as to these photographs unless they were to be introduced in evidence, which counsel for the defendants refused to do. The conviction was reversed because of this ruling, the court stating that the defendants had a right to cross examine the witness as to every relevant and material aspect of the case about which he had knowledge, even though the state's examination had been limited to a formal identification of photographs.[33]

The cases dealing with this subject during this survey period effectively illustrated the limits which are placed by our courts on this right. Great latitude should be allowed by the trial court in a party's cross examination of an adverse witness for purpose of impeaching or discrediting the witness, and a denial or abridgement of a party's statutory right in this respect is material error requiring the grant of a new trial. However, as pointed out in the case of *Ammons v. State*,[34] the trial judge has a duty to protect the witness under cross examination from being unfairly dealt with and has a discretion to control the right of cross examination within reasonable bounds. He can and should confine it to mattrs relevant to the case.[35] In the last mentioned case, which was a prosecution for selling whiskey, the trial court did not err in refusing to require a state's witness, to whom whiskey had allegedly been sold, to answer questions such as (a) what was the first thing he did when he "got over there," (b) where

31. *E.g.*, Ledford v. State, 89 Ga. App. 683, 80 S.E.2d 828 (1954).
32. See note 31 *supra*.
33. A good illustration of the doctrine known as the "Massachusetts Rule", which has always been followed in Georgia, that a witness may be cross examined on every point in the case regardless of the limited purpose for which he was called on direct examination. See cases under catchword "Scope" in annotations to GA. CODE § 38-1705 (1933).
34. 88 Ga. App. 791, 78 S.E.2d 63 (1953).
35. GA. CODE § 38-1704 (1933).

he had been for the last three or four days, (c) whether he had bought any whiskey from a named person other than the defendant, and (d) whether he knew that gaming was against the law, in the absence of an explanation by interrogating counsel of the connection between the facts sought and the issue to be tried.

Although leading questions are generally allowed on cross examination,[36] the right to a thorough and sifting cross examination does not include the right to require a witness to answer a question calling for a legal conclusion,[37] or a conclusion of fact.[38] It was also held that the privilege of cross examining the opposite party does not include the right to require such party to attend court so that he may be cross examined,[39] the remedy being to subpoena him. Where the plaintiff in an action against two defendants calls one of them for the purpose of cross examination, counsel for the co-defendant was refused the right to cross examine the witness at that time, it being pointed out that he had a full opportunity to call a witness at a later stage of the trial.[40]

c. Credibility

A party cannot impeach his own witness for any purpose unless entrapped.[41] In *Hightower v. Citizens Pharmacy*,[42] the plaintiff was not permitted to show that a physician whom he had subpoenaed but not called to the stand had a financial interest as a stockholder in the defendant corporation, in an effort to explain his reason for not calling the witness.

The various methods of impeachment, as enumerated in Chapter 38-18 of the Code, were well illustrated by the recent decisions. Several cases involved a use of prior contradictory statements of a witness as a method of impeachment[43] it being pointed out that such testimony should be excluded where a proper foundation has not been laid,[44] and that where admitted the sufficiency of the proof was to be determined by the jury.[45]

36. GA. CODE § 38-1705 (1933).
37. City of Sylvania v. Miller, 210 Ga. 290, 79 S.E.2d 808 (1954). (Whether witness recognized that certain streets had been dedicated to the city.)
38. Revill v. State, 210 Ga. 139, 78 S.E.2d 12 (1953). (Why it was necessary for an officer to put defendant's hat and coat on him before witness could identify the defendant.)
39. Johnston v. Dollar, 89 Ga. App. 876, 81 S.E.2d 502 (1954).
40. Southern Railway Co. v. Allen, 88 Ga. App. 435, 77 S.E.2d 277 (1953).
41. GA. CODE § 38-1801 (1933).
42. 90 Ga. App. 30, 82 S.E.2d 46 (1954).
43. Young v. Kendrick, 89 Ga. App. 547, 80 S.E.2d 201 (1954); McGregor v. State, 89 Ga. App. 522, 80 S.E.2d 67 (1954); Johnson v. Roberson, 88 Ga. App. 548, 77 S.E.2d 232 (1953).
44. Johnson v. Roberson, *supra* note 43, GA. CODE § 38-1803 (1933).
45. Young v. Kendrick, *supra* note 43, GA. CODE § 38-1805, 1806 (1933).

When it is sought to impeach a witness by proof of bad character by means of the statutory questions,[46] one who is familiar with the witness' reputation in the place where he pursues his daily vocation or work may testify as to his reputation in such place, although not familiar with the community in which he lives.[47] The making of false statements to an F.B.I. agent was held to be criminal offense involving moral turpitude[48] and, therefore, an authenticated record, showing that a witness had pleaded guilty to and had been sentenced for such offense, was admissible in evidence for the purpose of impeachment. Where it is sought to impeach a witness by a showing of bias or interest, the evidence relied on must be material to the case under consideration. In *Harmon v. Givens,*[49] which was a suit by a minor against the driver and owner of a taxicab for personal injuries received from a collision between the cab and a bus, the fact that the child's mother also had a suit pending against the owner and driver of the cab would go to her credibility and was properly admissible in evidence, but the fact that she had herself executed a covenant not to sue the bus company (in addition to a covenant which had been executed in behalf of the minor) and had received a sum in payment therefor was held to be immaterial, even for the purpose of impeaching her, in the trial of the minor's case.

d. Miscellaneous

Where testimony is uncertain and contradictory it cannot be made the basis for a recovery.[50] The rule that where a party offers himself as a witness in his own behalf his testimony which is self-contradictory, vague or equivocal is construed most strongly against him, was illustrated by two recent decisions. One was a suit against a railroad to recover damages resulting from a fire allegedly caused by a train,[51] the measure of damages being the diminution in the value of the land. The plaintiff testified as to the diminishment in value per acre of certain pasture land, but later said that he did not deal in the type of land involved, did not know its market value, and could not say what the fair market value would be before or after the fire. There being no other evidence as to value, it was held that the trial court erred in submitting that issue to the jury. The same principle was applied

46. GA. CODE § 38-1804 (1933).
47. Pethel v. State, 89 Ga. App. 8, 78 S.E.2d 428 (1953).
48. Mercer v. Foster, 210 Ga. 546, 81 S.E.2d 458 (1954).
49. 88 Ga. App. 629, 77 S.E.2d 223 (1953).
50. Griffin v. Burdine, 89 Ga. App. 391, 79 S.E.2d 562 (1953).
51. Ga. R. and Bank. Co. v. Flynt, 89 Ga. App. 315, 79 S.E.2d 377 (1953).

in *Atlanta Life Ins. Co. v. Mason*,[52] where the defendant testified that he had entered into a certain contract under duress, but elsewhere testified that he had signed the contract because he thought he would lose his job if he did not. A threat of causing the defendant to lose his job was not duress said the court.

A conviction was set aside in the case of *Barfield v. State*[53] because the state had improperly injected the character of the defendant into issue. In *Jones v. State*,[54] a prosecution for murder, where the defendant had voluntarily put her character in issue, a question asked the defendant's character witness by counsel for the state on cross examination as to whether the witness' opinion of defendant's reputation would be affected if the witness knew that defendant carried a pistol in her bosom was held to be a proper one, in view of the fact that at least one other witness testified that the defendant was carrying a pistol in the bosom of her dress before the homicide.

To make an objection to evidence available in the reviewing court, it must appear that objection was made in the trial court and upon what grounds, it being insufficient that evidence was admitted over objection or that certain reasons are stated in the motion for new trial why the evidence was not admissible.[55] It is not error for trial court to refuse a new trial which is sought on basis of improper evidence, to which no objection was interposed.[56]

Several other statutes involving witnesses were passed at the last session of the General Assembly. These are as follows:

1. Female witnesses in civil cases may now be required to attend in person under the same conditions and requirements that apply to male witnesses.[57]

2. It was provided that subpoenas in blank may be obtained from the Clerk of court, with the name and address of the proposed witness to be filled in on the subpoena by the party or his attorney before service thereof, provided that not less than 24 hours before commencement of the trial in which an subjoena has

52. 89 Ga. App. 319, 79 S.E.2d 352 (1953).
53. 89 Ga. App. 204, 79 S.E.2d 68 (1953).
54. 88 Ga. App. 330, 76 S.E.2d 810 (1953).
55. Rushing v. Akins, 210 Ga. 450, 80 S.E.2d 813 (1954).
56. Bryant v. State, 88 Ga. App. 208, 76 S.E.2d 446 (1953).
57. Ga. Laws Nov.-Dec. Sess. 1953, p. 212. Sections 38-2101 and 38-2403 of the Code, relating to who may be examined on interrogatories and by depositions, were also amended by striking the specific references therein to female witnesses, in line with the act hereinabove mentioned making them subject to subpoena.

been issued in blank, the party obtaining same must present to the Clerk the name and address of any witness who has been so subpoenaed. Upon failure to do so, said party is deprived of any claim for continuance based upon the failure of any such witness to appear in court in answer to the subpoena.[58]

RELEVANCY

As stated in the introduction, a great many cases involved a determination of whether certain testimony was or was not relevant.[59] While it is not possible to cover all of these decisions without going into considerable detail, the rulings in several cases are mentioned as being illustrative of the problems which were posed during the survey period.

Generally, evidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly,[60] and this is true even though the evidence be offered for the purpose of impeaching a witness.[61] It is not error for trial court to reject evidence tending to establish affirmative defense as to issue not made by pleadings.[62]

58. Ga. Laws Nov.-Dec. Sess. 1953, p. 484.
59. In the following cases, the evidence in question was held to be relevant:
(a) Moore v. Johnson, 89 Ga. App. 164, 78 S.E.2d 823 (1953). A dispossessory proceeding where the defendant contended he held under a five year lease. An unsigned five year rental agreement from which the lessor's name had been stricken was, together with testimony of the witnesses to the instrument as to the intention of the parties thereto, properly admitted.
(b) Herring v. Holden, 88 Ga. App. 212, 76 S.E.2d 515 (1953). Suit against a husband for medical services rendered to his wife. In support of defense that wife and physician agreed that she was to be personally liable therefor, a letter from the attorneys for the physician to the wife demanding payment of the account by her should have been admitted in evidence as one of the circumstances tending to show that credit had been extended to the wife and not the husband.
(c) Byrd v. Riggs, 209 Ga. 930, 76 S.E.2d 774 (1953). Plaintiff had filed a caveat to a will which was subsequently probated in solemn form and in this case was attempting to probate an alleged later will, without setting aside the probate of the first will or reversing the judgment therein. Copies of the proceedings relating to the judgment ordering the first will to probate were germane and admissible.
(d) Shadburn v. Tapp, 209 Ga. 887, 77 S.E.2d 7 (1953). Suit against sole heir of intestate for decree establishing plaintiff's title to funeral home which intestate had allegedly promised to will him. In support of contention that after death of intestate the plaintiff was working for a salary and not as equitable owner of funeral home, it was proper to admit salary checks payable to plaintiff.
60. GA. CODE § 38-201 (1933).
61. Ammons v. State, 88 Ga. App. 791, 78 S.E.2d 63 (1953); Harmon v. Givens, 88 Ga. App. 629, 77 S.E.2d 223 (1953); Banks v. Kilday, 88 Ga. App. 307, 76 S.E.2d 642 (1953).
62. Brown v. Brown, 89 Ga. App. 428, 80 S.E.2d 2 (1953).

Evidence of a change of condition or proof of repairs after an injury is never admissible as proof of negligence on the part of the defendant in not having made repairs or taken precautions prior to the accident.[63] In an action to recover for work done by the plaintiff in moving equipment of the defendant pursuant to contract, the plaintiff was not allowed, in an effort to show the value of the work, to testify that it was a "universal custom" of the trade to pay for overtime and work on Sunday on an increased basis, inasmuch as the contract between them did not so provide and there was no statute relevant thereto.[64] In an action for a partnership accounting,[65] where the only issue was whether a partnership existed, it was not error for the trial court to refuse to require the defendant on cross examination to state the amount of money he had received from a certain construction job, since this evidence would throw no light on the issue before the court.

HEARSAY

Where it appears that a witness had no direct or personal knowledge of the transaction testified to and that his testimony is based upon hearsay, it is properly excluded.[66] In three recent decisions evidence was excluded where it appeared that the witness was not testifying from his own knowledge. *Faw v. American Appraisal Co.*,[67] was an action based on a contract whereby defendant promised to pay plaintiff its expenses, office charge and per diem for making appraisals. The only testimony as to the expenses and office charge was that of one of the appraisers to the effect that, to the best of his knowledge, the account sued on was correct, and that he had access to the original books of account, which showed a certain outstanding balance; this was held to be objectionable as hearsay.

In an action to recover for work done by the plaintiff in moving

63. Atlantic Coast Line R. Co. v. Sellars, 89 Ga. App. 293, 79 S.E.2d 35 (1953). This was an action by an owner of realty against the railroad to recover for damages to trees from fire which the railroad had allegedly permitted to escape from its locomotive. A witness called by the defendant was permitted on cross examination, over objection, to testify that a diesel engine had been placed on the particular line and run involved in this case. The Court of Appeals said that if this evidence tended to prove any fact relevant to the case it was that the defendant, by changing from steam to diesel, admitted that the steam engine was deficient, and that it was certainly not proper to show this under the general rule cited.
64. Stevens v. Fort Industries, Inc., 88 Ga. App. 584, 77 S.E.2d 273 (1953).
65. McCowen v. Aldred, 88 Ga. App. 788, 78 S.E.2d 66 (1953).
66. Banks v. Kilday, 88 Ga. App. 307, 76 S.E.2d 642 (1953); GA. CODE § 38-301 (1933).
67. 89 Ga. App. 62, 78 S.E.2d 846 (1953).

equipment of the defendant pursuant to contract,[68] one of the issues was as to the number of men on the job. The trial court refused to permit the plaintiff's wife to testify as to how many men were on the job, since evidence revealed that she was never on the job and could not have known this information personally. A similar result was reached in *Banks v. Kilday*.[69]

However, as is pointed out by *Barrett v. Distributor's Group, Inc.*,[70] where it does not affirmatively appear that the testimony of a witness is based on other than his own knowledge, a contention that testimony is hearsay will be rejected. In *Eason v. Crews*,[71] a physician was allowed, over the objection that it was hearsay, to testify that a patient was suffering pain when he first saw him, that the pain was worse the next day, and that it was "excruciating, severe," since the doctor, in addition to basing this on what the boy told him, also reached his conclusion from watching him and thus on objective symptoms.

The so-called "pedigree" exception to the hearsay rule is codified in Georgia as Section 38-303. In an action for wrongful death,[72] the plaintiff testified that the age of her husband at the time of his death was 32, this being based on what he had told her. The court applied the pedigree rule and concluded that the testimony was not without probative value.

Admissions and Confessions

Admissions and confessions, in that they involve extrajudicial assertions, are generally classed as an exception to the hearsay rule. As Professor Wigmore points out, however, there is actually no hearsay problem; a party's testimonial utterances out of court run into the barrier of the hearsay rule when they are offered *for* him, but not when offered *against* him, because he does not need to cross examine himself. In other words, the hearsay rule is satisfied.[73]

In *Willis Lumber Co v. Roddenberry*,[74] the plaintiff had sued an individual who allegedly cut his timber unlawfully and had joined as a defendant the lumber company to whom the timber

68. Stevens v. Fort Industries, Inc., 88 Ga. App. 584, 77 S.E.2d 273 (1953).
69. 88 Ga. App. 307, 76 S.E.2d 642 (1953).
70. 89 Ga. App. 458, 79 S.E.2d 587 (1953).
71. 88 Ga. App. 602, 77 S.E.2d 245 (1953).
72. Johnson v. Roberson, 88 Ga. App. 548, 77 S.E.2d 232 (1953).
73. 4 Wigmore, Evidence § 1048 p. 2 *et seq.*, (3rd Ed. 1940); " . . . anything said by the party-opponent may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony. (This proviso never needs to be enforced, because no party offers thus his opponent's statement unless it does appear to be inconsistent.)"
74. 88 Ga. App. 352, 77 S.E.2d 110 (1953).

was allegedly sold. Testimony that the individual defendant had admitted cutting timber and hauling it to the lumber company was held to be admissible, over objection that it was hearsay. In the absence of a requested instruction by the lumber company, it was not error for the court to fail to instruct the jury to limit its consideration to the one purpose for which it is admissible, i.e., as against the individual defendant.[75]

Several cases involved admissions or confessions in criminal cases. A defendant's silence at the time of his arrest when statements were made in his presence and hearing by another, implicating defendant in the offense, could be treated as an admission.[76] The party tendering evidence as to a pertinent admission, conversation, or declaration previously made by a party or witness may prove only such portion as it deemed material and the adverse party may then bring out the whole of the admission, conversation or declaration insofar as essential to arrive at the true intent and meaning of what was said.[77] In *Parrish v. State,*[78] where a written statement was offered in evidence by the state and it contained the entire inculpatory admission of the defendant as reduced to writing by the officers and signed by the defendant, the contention that such statement did not contain the entire conversation between the defendant and the officers at the time it was made did not constitute a valid ground of objection for excluding the statement. The defendant would be entitled to show any part of such conversation omitted from the statement.

The fact that the language of an incriminatory statement or confession indicates the commission of another and separate offense was not a valid ground of objection to its admission in evidence, where otherwise admissible, it being specifically held that it was not objectionable as placing the character of the defendant in issue.[79] Admission of the confession of a joint defendant is not error where it was made in the presence of the defendant under trial and it corroborates the statement made by the defendant himself.[80] Finally, where the sheriff at the time defendant allegedly made a confession stated to the defendant that, because of the condition in which he was living, the defendant "ought to do something about it with his Lord" this did not

75. It was further pointed out that the defendant lumber company had gone into the testimony complained of on cross examination, thereby curing any error which might have been created by its admission into evidence.
76. Eberhart v. State, 88 Ga. App. 501, 76 S.E.2d 832 (1953).
77. See GA. CODE § 38-410 (1933).
78. 88 Ga. App. 881, 78 S.E.2d 366 (1953).
79. Calhoun v. State, 210 Ga. 180, 78 S.E.2d 425 (1953).
80. Jones v. State, 210 Ga. 94, 78 S.E.2d 18 (1953).

constitute an offering of some hope of reward such as would invalidate the confession.[81]

OPINION

Most of the cases decided during the survey period involved questions of expert opinion. It was stated that the diagnosis and treatment of injury and disease are essentially medical questions to be established by physicians as expert witnesses and not by laymen.[82] A properly qualified physician may testify as to the probable cause of a bleeding ulcer and that an injury received by a claimant in a Workmen's Compensation proceeding was not the cause thereof, and such evidence is competent and will support an award denying liability.[83] While a medical expert may give his opinion as to the cause of an injury, where this cause constitutes the ultimate issue of fact to be determined by the fact finding tribunal, such opinion is not absolutely binding upon it and the fact finding body must take the evidence of the medical expert along with all other facts and circumstances and thus determine the ultimate issue.[84]

In *Southeastern Wholesale Furniture Co. v. Atlanta Metallic Casket Co.*,[85] the question raised was whether there was a partnership or joint venture between the defendant and another. It was held that an expert bookkeeper and auditor could express his opinion in the form of conclusions as to what certain books and papers showed, where the books and papers referred to were in court. The expert could, from calculation, testify what various entries disclosed as to whom profits were or were not distributed and whether they were shared among the parties to the alleged partnership, and that the entries did not indicate that the profits were divided; however, while he could testify to the facts indicated by the books, he could not give an opinion as to the existence of whatever legal status might thereby be indicated.

Ellis v. Southern Railway Co.[86] was a suit by a widow for the homicide of her husband resulting from his being struck by a train. The defendant in its answer alleged that the deceased was observed, just prior to the collision, with his head on the west rail of the track. On cross examination, an undertaker, who had

81. King v. State, 210 Ga. 92, 78 S.E.2d 20 (1953).
82. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Gilliam, 88 Ga. App. 451, 76 S.E.2d 834 (1953).
83. LaBranche v. American Automobile Ins. Co., 89 Ga. App. 148, 78 S.E.2d 621 (1953).
84. Lockheed Aircraft Corp. v. Marks, 88 Ga. App. 167, 76 S.E.2d 507 (1953).
85. 89 Ga. App. 248, 79 S.E.2d 27 (1953).
86. 89 Ga. App. 407, 79 S.E.2d 541 (1953).

been produced as a witness by the plaintiff, was asked whether the deceased could have sustained the injuries inflicted if he had been so lying on the track and the witness was permitted to answer this question over objection. In holding that the admission of such testimony was reversible error, the Court of Appeals stated there was no evidence in the record that the deceased was lying on the track with either his head or feet on the rail, and applied the rule that a witness should not be permitted to give his opinion in response to a hypothetical question based on facts which have not been testified to by other witnesses.[87]

Generally speaking, a non-expert witness may not give his opinion as to cause and effect. However, he may, when he states the facts on such opinion is based, give his opinion in connection therewith if the data cannot be placed before the jury in such a way that they might draw the inference as well as he.[88] In *Wade v. Roberts*,[89] a non-expert had testified without objection that certain marks on the highway were skid marks, and it was held that the trial court properly permitted him at a later point in his testimony to state that he thought the brakes were applied at a certain point. A similar question as to speed was considered in *Harmon v. Givens*.[90]

A number of cases applied the general rule that a witness cannot give his opinion where he states that he has no facts on which to base it.[91] In an action by a divorced wife to recover back alimony from her former husband, the husband was not permitted to state that he owed no money to her, over objection that this called for a conclusion.[92] An objection that a question called for a conclusion of fact was sustained in several other cases.[93]

Writings, Real Evidence

Where written evidence of title to personal property is available and is not produced, it is error to prove title to such property by parol evidence over the objection that the document is itself the best evidence of title.[94]

In *Decatur Lumber and Supply Co. v. Baker*,[95] a loan deed

87. The court assumed but did not decide that the undertaker was such an expert as is referred to in GA. CODE § 38-1710 (1933).
88. Wade v. Roberts, 89 Ga. App. 607, 80 S.E.2d 728 (1954).
89. See note 88, *supra*.
90. 88 Ga. App. 629, 77 S.E.2d 223 (1953).
91. Georgia R. and Bank. Co. v. Flynt, 89 Ga. App. 315, 79 S.E.2d 377 (1953).
92. Brown v. Brown, 89 Ga. App. 428, 80 S.E.2d 2 (1953).
93. See, e.g., Revill v. State, 210 Ga. 139, 78 S.E.2d 12 (1953).
94. Head v. Pollard Lumber Sales, Inc., 88 Ga. App. 757, 77 S.E.2d 827 (1953).
95. 210 Ga. 184, 78 S.E.2d 417 (1953).

provided that it was made to secure a described grant "or any other present or future indebtedness or liability of mine. . . ." This was held to be unambiguous and, consequently, evidence as to the intention of the parties, contrary to the terms of the deed, was inadmissible. An objection based in part on the best evidence rule was also sustained in the case of *Faw v. American Appraisal Co.*[96] where an appraiser sought to testify as to what certain original books of account showed.

Section 38-709 of the Code provides that, in the proof of handwriting, other writings, proved or acknowledged to be genuine, may be admitted in evidence for the purpose of comparison by the jury. It is expressly provided, however, that such other new papers, when intended to be introduced, shall be submitted to the opposite party before he announces himself ready for trial. In *Mitchell v. State,*[97] the other writings used by a handwriting expert for purpose of comparison had not been submitted to the opposite party before trial, as required by the above section, and it was held to be error to admit testimony based on such comparison. The fact that the documents in question had previously been submitted to the same defendant in another case on a similar issue did not satisfy the section, nor was it sufficient that photostatic copies of some of the signatures had been submitted to him. Furthermore, it was pointed out that Section 38-710,[98] which permits introduction of copies of original writings or records made in the regular course of business, did not in any way affect the requirements of Section 38-709.

In several cases problems involving documentary evidence were presented. In the case of *Casteel v. Anderson,*[99] which was an action by a minor bicyclist against the driver and owner of a truck, the defendants offered in evidence a drawing representing the highway and the successive positions of the defendant's truck and the plaintiff's bicycle before and after the collision. The defendant driver testified that the drawing fairly represented the movements of the two vehicles. The drawing was admitted over objection that it was not a true picture of what happened and that it had the effect of leading the witness. While conceding that the drawing might be leading where not prepared by the witness, the Court of Appeals concluded that it was properly admitted in view of the testimony that it fairly represented the facts, and held that its weight was for the jury.

A plat was likewise held to be admissible in *Whitton v. Central*

96. 89 Ga. App. 62, 78 S.E.2d 846 (1953).
97. 89 Ga. App. 80, 78 S.E.2d 563 (1953).
98. Ga. Laws, 1950, p. 73, GA. CODE ANN. § 38-710 (Supp. 1951).
99. 89 Ga. App. 68, 78 S.E.2d 831 (1953).

of Georgia Ry. Co.,[100] which was a suit for damages based on a crossing collision. A witness called by the defendant testified that, from his own knowledge, the map was a correct description of the crossing at the time of the collision and clearly showed the situation then existing. This was held to be a sufficient foundation and the plat was not objectionable as being inaccurate, even though the witness testified on cross examination that the plat had been prepared by someone else from measurements he had made and that he could not swear the distances were correct according to scale. A speed recorder tape was also held to be admissible in this case, a proper foundation having been laid.

100. 89 Ga. App. 304, 79 S.E.2d 331 (1953).