EVIDENCE

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BURDEN OF PROOF

In a profession where the weapons (or tools) are words, it is surprising how often we adopt and use words or terms which are ambiguous and capable of widely divergent meanings, without making any distinction as to which meaning is intended. The courts, as well as the practitioners, fall into this practice. Text writers emphasize the difference between meanings attributed to the term "burden of proof." The burden of persuasion which rests on the party asserting a contention is to convince the trier, judge or jury, to accept that contention, and remains on that party until adjudication. The courts often say that this burden does not "shift." The burden of producing evidence, frequently referred to as the burden of evidence, means rather the necessity of producing satisfactory evidence of a particular fact in issue. It will usually rest on the moving party, and, after being met by him, will shift to his adversary. These distinct and separate burdens are all too often referred to indifferently as burden of proof. The practice is the more understandable in the light of the terms of the Code sections.[1]

In at least one case decided by the court of appeals during the period covered by this survey this situation was recognized.[2] In a processioning case where the applicant was contending for the line fixed by the processioners and the protestant was contending for another and different line, the trial judge had charged "that the burden of proof in this case is on [applicant] to make out a prima facie case; that when he makes this case out by showing the processioners' return and the plat and when he has done that, then the burden shifts over to the defendant in this case [the protestant], and she must sustain the burden by a preponderance of the evidence . . . in order to make out a prima facie case [applicant] must show the line was run by the processioners, that the plat was made thereof and that it was returned into the court of ordinary as required by law. Then when he has done that, the burden shifts to the defendant [protestant] in

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1. GA. CODE §§ 38-103, 104 (1933).
2. Dally v. Arnold, 91 Ga. App. 395, 85 S.E.2d 808 (1955).

this case to show the line established by the processioners is not the true line." The defendant-protestant in the single ground of the amended motion for a new trial took exception to this charge on the ground that the law placed the burden on the plaintiff and it was improper for the trial judge to charge that such burden rested upon defendant. The court of appeals approved the charge and held: "It is unquestionably the law that the burden of proof is ordinarily fixed by the pleadings, and does not shift from one party to another. However, the burden of evidence, in reference to some or all the issues in the case, at various stages of the trial shifts from one to the other."

PRESUMPTIONS

Closely related to the burden of proof, and actually frequently controlling the shifting of the burden of producing evidence, are presumptions, another word of varying meanings. Presumption all too frequently is used interchangeably to mean intimation, inference, presumption, or conclusion. Presumptions may be either permissive or compulsory. The cases decided during the period under review, however, were not too involved in these discrepancies of meaning. The presumption and judicial notice have been facetiously termed the last resort (afterthought) of the lazy lawyer. Actually they may serve on occasion to eliminate the necessity for the production of evidence or to redeem from the failure to produce that evidence. The courts' recognition of these factors rests largely on the strong probability of accuracy and procedural convenience.

In a case seeking an annulment of the parties' marriage on the grounds of the defendant wife's previous marriage to another from whom she was never divorced, the grant of the annulment was sustained.[3] The point was made that there was no showing to the effect that the former marriage had not been annuled in Ohio, the then residence of the parties to that marriage. The court held that annulment was a creature of statute not authorized under common law, that Ohio having been part of the Northwest Territory belonging to England, in the absence of any statutes pleaded it would be presumed that the law of Ohio is the common law as interpreted by the courts of this state, which did not authorize such annulments (annulments in this state being statutory).[4] In another case where the seller of an automobile was by the purchaser vouched into a proceeding in Tennessee to defend the title, in a subsequent action in Georgia the

3. Andrews v. Andrews, 91 Ga. App. 659, 86 S.E.2d 669 (1955).
4. Ga. Laws 1952, p. 149; GA. CODE ANN. Ch. 53-6 (Supp. 1954).

seller was held bound by the Tennessee judgment.[5] The Georgia statute on vouchment[6] was held to be simply a codification of the common law and, Tennessee being a part of the original thirteen colonies, it was presumed in the absence of anything to the contrary that the common law of that state is the same as the common law of this state as interpreted by the Georgia courts.

These holdings on presumptions as to common law in no wise mitigate against the again repeated rule that statutory laws of a sister state must be pleaded and proved in this jurisdiction when they are relied on in legal proceedings.[7] In a school bond validation proceeding the court of appeals held: "a) It is presumed that entries and orders of a public official are true," and "b) In the absence of proof to the contrary elections held under legally constituted authority are presumed to be regular and valid."[8] This same court in two cases held a death certificate filed pursuant to law was prima facie evidence of the facts stated therein, though such presumption was rebuttable.[9] The supreme court indulged the presumption that the building inspector acted within his authority and according to rules and regulations of the zoning ordinance.[10] The court of appeals, citing recent supreme court cases as authority, held "where there is more than one marriage, the law presumes the last marriage to be valid; and the burden is upon the one attacking it to overcome the presumption by proving its invalidity. . . . The presumption as to the validity of the second marriage can be negatived only by disproving every reasonable possibility. The invalidity of the marriage attacked must be shown by clear, distinct, positive and satisfactory proof.[11]

Reliance upon presumption to excuse the introduction of evidence may be a dangerous procedure, as was demonstrated to counsel on both sides of one case of particular interest which traveled through both appellate courts. The trial judge directed a verdict for the insurer in a suit on a policy of life insurance where the insurer introduced evidence of false and material misrepresentations in an application for reinstatement, and the only evidence offered by the beneficiary was as to the good character of the insured. On certiorari from a

5. Lowrance Buick Company, Inc., v. Mullinax, 91 Ga. App. 865, 87 S.E.2d 412 (1955).
6. GA. CODE § 38-624 (1933).
7. Rodale v. Grimes, 211 Ga. 50, 84 S.E.2d 68 (1954).
8. Searcy v. State of Georgia, 91 Ga. App. 603, 86 S.E.2d 652 (1955).
9. Davis v. Atlantic Steel Corporation, 91 Ga. App. 102, 84 S.E.2d 839 (1954); Family Fund Life Insurance Company v. Wiley, 91 Ga. App. 225, 85 S.E.2d 448 (1954).
10. Ledbetter v. Callaway, 211 Ga. 607, 87 S.E.2d 317 (1955).
11. Robertson v. Robertson, 90 Ga. App. 576, 83 S.E.2d 619 (1954).

reversal by the court of appeals, by a sharply divided court, the supreme court held that such character evidence was not sufficient to contradict the affirmative evidence of fraud.[12] When the case came back to the court of appeals that court adhered to the reversal of its decision by the supreme court, and went on to reverse the trial court on the ground that the insurer had introduced no evidence showing it relied upon such misrepresentations, and "there is no presumption and no required inference that the company relied on the misrepresentations . . from the mere fact that the application was filed and the policy reinstated."[13]

Judicial Notice

The courts took judicial notice of who held the office of Solicitor General of one circuit,[14] and the office of Commissioner of Roads and Revenues of one county.[15] Also, judicial notice was taken that Washington County is a dry county.[16] and the supreme court took judicial notice of other proceedings filed in that court.[17] Two questions of "common knowledge" were recognized by the court of appeals—"that physical conditions almost invariably improve or deteriorate with the passing of time,"[18] and "it is common knowledge that some service stations do mechanical work."[19] The same court held that "this court will take judicial cognizance of the fact that efficient and effective brakes will hold a motor vehicle on an incline unless some external force be applied. . . . The presumption would be that if the brakes were efficient and would hold the car on the incline unless some external force were exerted, its descent was caused either by the wind or because the brakes were not properly set."[20]

Opinion Testimony

There were during the survey period many cases touching on opinion testimony, its admissibility and probative value, but the decisions did not represent any detectable change in the thinking of the courts.

12. Life Insurance Company of Georgia v. Lawler, 211 Ga. 246, 85 S.E.2d 1 (1954).
13. Lawler v. Life Insurance Company of Georgia, 91 Ga. App. 443, 85 S.E.2d 814 (1955).
14. Welch v. State, 91 Ga. App. 86, 84 S.E.2d 838 (1954); Robinson v. State, 91 Ga. App. 376, 85 S.E.2d 632 (1955).
15. Northington v. Candler, 211 Ga. 410 86 S.E.2d 325 (1955).
16. Tanner v. State, 90 Ga. App. 789, 84 S.E.2d 600 (1954).
17. Baker v. City of Atlanta, 211 Ga. 34, 83 S.E.2d 682 (1954).
18. American Employers' Insurance Co. v. Hardeman, 91 Ga. App. 462, 85 S.E.2d 805 (1955).
19. Thomas v. Smith, 91 Ga. App. 508, 86 S.E.2d 353 (1955).
20. McClelland v. Northwestern Fire & Marine Ins. Co., 91 Ga. App. 640, 86 S.E.2d 729 (1955).

Wigmore suggests that such evidence should be rejected only when it is superfluous in the sense that it will be of no value to the jury.[21] The Georgia courts have not gone so far as to adopt this as a rule, but the trend continues in that direction. The key to admissibility and probative value of an opinion or conclusion of a non-expert witness seems to be the likelihood that the witness has knowledge of facts to sustain his opinion and, unless manifest from the circumstances, ordinarily the opinion testimony is predicated upon facts stated by the witness.[22]

While a subscribing witness to a will may give his opinion as to the sanity of the testator at the time of the execution of the will without stating facts upon which such opinion is founded,[23] still a witness (doctor) was not allowed to testify as to the sanity or insanity (monomania) of the testator basing his opinion solely on the context of the will,[24] and the Code section was cited in support of this ruling.[25] Where opinion testimony is admitted as to value, this may be considered by the jury, but the jury is not bound by this evidence as to value even though it be uncontradicted.[26] Opinion testimony as to the speed of an automobile where given by a state patrolman experienced in investigating such accidents based on his observations shortly after the accident, though he was not an eyewitness, where not objected to was admitted and accredited with probative value.[27] But where an eyewitness observed a car for only two seconds while the car traveled one car length it was held that such was insufficient observation upon which to base testimony as to speed.[28]

Upon the trial of a homicide case, the trial court was upheld in refusing to permit a witness on cross examination, who was an investigating officer, to respond to the question, "Did you determine what . . . the provocation or justification of this matter was?"[29] In the same case, another witness was properly permitted to testify that on a certain

21. 7 WIGMORE, EVIDENCE § 1918 (3d ed. 1940).
22. Gordy v. Dunwody, 210 Ga. 810, 83 S.E.2d 7 (1954); Atlantic Coast Line Railroad Co. v. Godard, 211 Ga. 373, 86 S.E.2d 311 (1955).
23. Tinnerman v. Baldwin, 211 Ga. 532, 87 S.E.2d 65 (1955).
24. McGahee v. Phillips, 211 Ga. 118, 84 S.E.2d 19 (1954).
25. GA. CODE § 38-1708. (1933).
26. Barker & Co. v. Glenn, 90 Ga. App. 500, 83 S.E.2d 263 (1954); Harwick v. Webb, 91 Ga. App. 542, 86 S.E.2d 361 (1955); Hayes v. Carter, 91 Ga. App. 540, 86 S.E.2d 532 (1955); Touchton v. Mock, 91 Ga. App. 689, 86 S.E.2d 699 (1955); Wallis v. McMurray, 91 Ga. App. 549, 86 S.E.2d 529 (1955). The Wallis case is of particular interest for the holding on the procedural point concerning the rendition of judgment on an action not ex delicto where in default that it is the duty of the judge without a jury to hear evidence, fix the amount of damages, and render judgment accordingly.
27. Elliott v. Yawn, 90 Ga. App. 780, 84 S.E.2d 108 (1954).
28. Allen v. Hatchett, 91 Ga. App. 571, 86 S.E.2d 662 (1955).
29. Rooker v. State, 211 Ga. 361, 86 S.E.2d 307 (1955).

occasion the defendant "appeared to be excited and mad," as that was referred to by the court as a matter of fact. The court of appeals reiterated the holding that "the testimony of an injured person as to the extent of his injuries may be believed in preference to the opinions of 'a whole college of physicians' testifying to the contrary."[30] In a suit to annul a marriage on the ground of impotency, the supreme court held that a finding of impotency was not demanded, stating "courts generally recognize that proof of impotency rests primarily on the testimony of medical experts."[31]

A non-expert witness, under the terms of Georgia Code section 38-708 (1933), is competent to testify as to his belief in the genuineness or falsity of the signature to a writing, if he will swear that he knows or would recognize the handwriting of the person purporting to have signed. The source of the witness' knowledge goes to his credit and the weight of his evidence.[32] In an action to set aside deeds as made for the purpose of hindering, delaying or defrauding creditors, the maker is permitted to testify that in executing the conveyance he had no intention to hinder, delay or defraud the plaintiff or any other creditor. A party may testify to his intention. It is evidence to be considered, but the facts—all of the facts—are to be considered to arrive at the truth respecting his real motive.[33]

Refreshing Recollection

The Code section[34] provides, "A witness may refresh and assist his memory by the use of any written instrument or memorandum, provided he finally shall speak from his recollection thus refreshed, or shall be willing to swear positively from the paper." The court of appeals recognized that provision, but upheld the trial court in refusing to a witness for the defendant on cross-examination the opportunity to refer to his notes to refresh his memory to aid him in identifying one photograph (of several introduced in evidence by the defendant) which had been testified about by the witness on direct examination. The court said that here the question was not one of the witness' memory, but rather of his ability to identify a photograph that showed skid marks that he had testified about.[35]

30. Fulton Bag & Cotton Mills v. Speaks, 90 Ga. App. 685, 83 S.E.2d 872 (1954).
31. S. v. S., 211 Ga. 365, 86 S.E.2d 103 (1955).
32. Gaulding v. Courts, 90 Ga. App. 472 83 S.E. 2d 288 (1954).
33. Childers v. Ackerman Construction Company, 211 Ga. 350, 86 S.E.2d 227 (1955).
34. Ga. Code § 38-1707 (1933).
35. Steinmetz v. Chambley, 90 Ga. App. 519, 83 S.E.2d 318 (1954).

ADMISSIBILITY AND PROBATIVE VALUE

Evidence of other allegedly similar transactions came under review in a civil case.[36] In an action against two defendants, the car owner and the driver respectively, where negligent operation was charged against the driver and the owner was charged with negligence in permitting the driver to drive "knowing him to be a reckless and incompetent driver." It was held that evidence of the driver's incompetence and his reputation in this respect would be admissible against the owner but not against the driver.

The question of the admissibility of such evidence in criminal cases arose in a number of instances during the survey period, and both courts had occasion to reiterate the established rule in this state that evidence of other criminal transactions is not generally admissible, there being an exception in cases where two crimes are so similar in point of method or time that the proof of one tends to prove the other[37] for the purpose of identification and showing the state of mind, plan, motive and scheme of the defendant.[38] The exception is strictly viewed by the courts and there must be some logical connection between the two from which it can be said that proof of one tends to establish the other.[39].

The parole evidence rule[40] was treated in several court of appeals decisions. In determining whether a transaction is a bona fide time price sale or a device to cloak usury, the court will look to the substance of the transaction, and to that end parol evidence is admissible to show that the writing executed by the parties does not represent the true agreement.[41] In the absence of a charge of fraud or mistake, generally the rule is strictly adhered to and parol evidence is not admissible to vary the terms of a written instrument.[42]

The obligation on a party to produce the highest and best evidence (or account for its absence) was reaffirmed by both courts

36. Healan v. Powell, 91 Ga. App. 787, 87 S.E.2d 332 (1955).
37. Diggs v. State, 90 Ga. App. 853, 84 S.E.2d 611 (1954); Smith v. State, 91 Ga. App. 360, 85 S.E.2d 623 (1955); Craig v. State, 91 Ga. App. 418, 85 S.E.2d 777 (1955).
38. Mosley v. State, 211 Ga. 611, 87 S.E.2d 314 (1955).
39. Strickland v. State, 91 Ga. App. 843, 87 S.E.2d 363 (1955); Howard v. State, 211 Ga. 186, 84 S.E.2d 455 (1954); Pilcher v. State, 91 Ga. App. 428, 85 S.E.2d 618. (1955).
40. GA. CODE § 38-501 (1933).
41. Jackson v. Commercial Credit Corp., 90 Ga. App. 352, 83 S.E.2d 76 (1954).
42. Owens v. Service Fire Ins. Co., 90 Ga. App. 553, 83 S.E.2d 249 (1954); Kiser v. Godwin, 90 Ga. App. 825, 84 S.E.2d 474 (1954); McCullough v. Stepp, 91 Ga. App. 103, 85 S.E.2d 159 (1954); Gilder v. Underwriters at Lloyds, 91 Ga. App. 231, 85 S.E.2d 499 (1954); Horne v. Harris Motor Company, 91 Ga. App. 844, 87 S.E.2d 350 (1955).

during the survey period.[43] On the question of probative value after admission, however, the court of appeals held that the presumption that may arise where the plaintiff had certain and satisfactory evidence in his power to produce but relied upon weaker or inferior evidence[44] is a presumption of fact and not of law, and consequently is to be applied by the jury.[45] Certified copies of public county records kept in accordance with the law constituted evidence in the only form the law would permit.[46]

The position of the Georgia courts heretofore taken under the common law sustaining the admissibility of illegally obtained evidence,[47] which is in opposition to the so-called "federal" rule,[48] was reaffirmed.[49]

Where properly objected to, the admission of irrelevant, immaterial and prejudicial matter is improper.[50]

The usual exclusion of hearsay evidence[51] is fundamentally based upon the following objections. 1) The declarant speaks (or writes) without the solemnity of an oath. 2) There is no opportunity for the fact finding body to observe his demeanor. 3) There is danger of the witness reporting the statement inaccurately. 4) No opportunity is offered to the adversary to cross examine the absent declarant.

An investigative report made by the Assistant Superintendent of Banks was excluded in a mandamus proceeding against the Superintendent of Banks to require him to issue a certificate approving an application for a bank charter.[52] Hearsay evidence may be admissible when it derives its competency from the necessity of the case,[53] and in two workmen's compensation cases this exception served to admit testimony as to statements made by the deceased employee prior to death.[54] But where plaintiff sought to testify as to a statement made

43. Atlantic Coast Line Railroad Company v. Godard, 211 Ga. 373, 86 S.E.2d 311 (1955); Jones v. Liberty Mutual Fire Insurance Co., 90 Ga. App. 667, 83 S.E.2d 837 (1954); Beard v. Westmoreland, 90 Ga. App. 632, 84 S.E.2d 93 (1954); Webb v. May, 91 Ga. App. 437, 85 S.E.2d 641 (1955); Rogers Lumber Company v. Smith, 91 Ga. App. 632, 86 S.E.2d 640 (1955).
44. GA. CODE § 38-119 (1933).
45. Burns v. Colonial Stores, Inc., 90 Ga. App. 492, 83 S.E.2d 259 (1954).
46. Gordy v. Dunwody, 210 Ga. 810, 83 S.E.2d 7 (1954).
47. 8 WIGMORE, EVIDENCE § 2183 (3d Ed. 1940).
48. United States v. Puliese, 153 F.2d 497 (2nd Cir. 1945).
49. Jones v. State, 90 Ga. App. 761, 84 S.E.2d 124 (1954); Sideh v. State, 91 Ga. App. 387, 85 S.E.2d 610 (1955).
50. Livingston v. Livingston, 211 Ga. 420, 86 S.E.2d 288 (1955); Housing Authority of the City of Calhoun v. Spink, 91 Ga. App. 72, 85 S.E.2d 80 (1954); Keebler v. Willard, 91 Ga. App. 551, 86 S.E.2d 379 (1955).
51. GA. CODE § 38-301 (1933).
52. Persons v. Mashburn, 211 Ga. 477, 86 S.E.2d 319 (1955).
53. Todd v. State, 200 Ga. 582, 37 S.E.2d 779 (1946).
54. Atlanta v. Crouch, 91 Ga. App. 38, 84 S.E.2d 475 (1954); Flemming v. St. Paul-Mercury Indemnity Company, 91 Ga. App. 582, 86 S.E.2d 637 (1955).

by her doctor to her husband and the husband was available in court, such evidence was properly excluded.[55] Affidavits offered to be used on interlocutory hearing are subject to the hearsay rule, and where violative of that rule should be excluded,[56] The fact of death may be established by family repute,[57] but by no other species of hearsay evidence, and in the decision so holding the court repeated the Georgia rule (which is at variance with the majority rule) that hearsay evidence when not admissible under some statutory provision is without probative value.[58] Conversations with or between third parties would normally fall within the hearsay rule, but where the fact of such dealings is material to the issue and it is such fact, and not the details of the hearsay, that is sought to be proved, the testimony relative thereto is held to be admissible.[59] Upon establishment of a prima facie foundation for its admission, a statement made by the deceased as a dying declaration is admissible.[60]

Upon the trial of a criminal case, the state may not first inject the issue of the defendant's character. When the defendant places his general good character in issue, the state may rebut it by evidence as to general bad character, but not by specific acts.[61] Where evidence is admissible to show motive, the fact that it may inject the issue of the defendant's character does not, however, render such evidence inadmissible.[62]

While the law of evidence relating to confessions falls within the field of criminal law, and that is frequently true as to admissions, the latter frequently becomes pertinent in the trial of civil cases. In a suit on an insurance policy payable upon accidental injury where the determinative issue was whether or not the policy was in effect on the date of the accident, there was admitted in evidence a slip of paper bearing the policy number and dates indicative of effectiveness of policy on the date in question. The admission of this paper was held to be error for the reason that there was no evidence that the admission was made as a part of the res gestae, or by an officer of the corporation so authorized, or that the agent otherwise

55. Price v. Whitley Construction Company, 91 Ga. App. 257, 85 S.E.2d 528 (1954).
56. Levin v. Myers, 211 Ga. 474, 86 S.E.2d 283 (1955); S. A. Lynch Corporation v. Stone, 211 Ga. 516, 87 S.E.2d 57 (1955).
57. GA. CODE § 38-303 (1933).
58. Ferguson v. Atlanta Newspapers, Inc., 91 Ga. App. 115, 85 S.E.2d 72 (1954).
59. Bromberg v. Drake, 91 Ga. App. 118, 85 S.E.2d 160 (1954); Beard v. Westmoreland, 90 Ga. App. 632, 84 S.E.2d 93 (1954).
60. Lee v. State, 211 Ga. 170, 84 S.E.2d 353 (1954).
61. Folds v. State, 90 Ga. App. 849, 84 S.E.2d 584 (1954); Smith v. State, 91 Ga. App. 360, 85 S.E.2d 623 (1955).
62. Crawford v. State, 211 Ga. 166, 84 S.E.2d 354 (1954).

had authority to make the admission.[63] In a civil negligence case, a plea of guilty to a charge of violating a criminal statute is admissible against the offender where the negligence relied on grew out of the violation of the statute.[64] The plaintiff in a civil case will not be permitted to recover where recovery is dependent upon his own testimony that is vague, inconsistent, equivocal and contradictory; but an extra-judicial statement which in some way contradicted his testimony cannot bring this rule of construction into play.[65] While this rule is applicable against a corporate party, the court of appeals held "it has never been extended beyond the president to other officers."[66] On the question of admission by an agent being binding on the corporate party, the court of appeals held that where defendant taxicab company in an action for injuries sustained by a passenger had denied in its pleadings that plaintiff was a passenger in one of its cabs, but the general manager and vice president of the company admitted that on the day following the injury he had received a telephone call from the plaintiff's attorney and had discussed her injuries, testimony of that attorney that on that day he had called the telephone number of defendant company and that a person holding himself out to be manager of the company had stated that the accident had been reported to him and that he was investigating the extent of plaintiff's injuries, was admissible as an admission against interest under Georgia Code section 38-403 (1933).[67]

In criminal cases the rule is reaffirmed that "a confession of guilt freely and voluntarily made by the accused is direct evidence of the highest character, and sufficient to authorize a verdict of guilty when corroborated by proof of the corpus delicti."[68] Where the confession is not corroborated by any evidence outside the confession, a verdict of guilty thereon cannot stand.[69] Admitting a confession over objection where the proper and necessary foundation has not been laid necessitates a new trial.[70] Where the defendant freely and voluntarily made a verbal statement to the sheriff which was admitted without objection, it was not error also to admit in evidence the further portion of his verbal statement where both portions involved damaging admissions.[71]

63. Life & Casualty Insurance Company of Tennessee v. Monday, 91 Ga. App. 656, 86 S.E.2d 689 (1955).
64. Webb v. May, 91 Ga. App. 437, 85 S.E.2d 641 (1955).
65. Tuggle v. Waller, 91 Ga. App. 721, 87 S.E.2d 123 (1955).
66. Ray v. Thomas McDonald Corp., 90 Ga. App. 872, 84 S.E.2d 705 (1954).
67. Pope v. Associated Cab Co., 90 Ga. App. 560, 83 S.E.2d 310 (1954).
68. Davis v. State, 211 Ga. 76, 84 S.E.2d 46 (1954).
69. Chapman v. State, 90 Ga. App. 845, 84 S.E.2d 485 (1954).
70. Tucker v. State, 91 Ga. App. 592, 86 S.E.2d 634 (1955).
71. Jackson v. State, 211 Ga. 490, 86 S.E.2d 306 (1955).

The writer on the subject of evidence in the survey issue of this Law Review for the year 1949-1950[72] advocated the enactment in this state of a business enteries statute. Such a statute was in fact enacted in 1952.[73] The court of appeals had a case under review falling squarely within the terms of that statute. Upon the trial of the case, plaintiff's bookkeeper identified certain of plaintiff's ledger sheets setting out the account. On cross examination, however, he testified, "I did not make any of the entries. . . . I do not know who made them. . . I have never seen (the defendant) sign his name; I do not know his signature. I did not deliver the fertilizer to him; I did not see him get any fertilizer delivered to him; I do not know whether any fertilizer was ever delivered to him or not. . . ." The ledger sheets were admitted in evidence over objection and the court of appeals affirmed the judgment for the plaintiff. The court said "There was evidence . . . from which the court could have determined that the entries were made in the regular course of business. . . Prior to the enactment of the Code section quoted (Georgia Laws 1952, p. 177) there could be no question that the testimony of a witness who did not make entries and did not know them to be correct would not furnish sufficient foundation for the introduction of the entries in evidence. This section certainly opens a broad departure from the hitherto fixed rules of evidence relative to the introduction of books and papers."[74]

In another case before this court, counsel for the defendant car owner offered in evidence in the trial court the playing in the presence of the jury of a dictaphone record which contained questions propounded by such counsel to the co-defendant who was the driver, and the answers elicited thereto. The court of appeals sustained the trial court in refusing to admit the proffered evidence placing the decision on the basis that a proper foundation had not been laid for its admission, and went on to enumerate seven requisites of such a foundation. "1) It must be shown that the mechanical transcription device was capable of taking testimony. 2) It must be shown that the operator of the device was competent to operate the device. 3) The authenticity and correctness of the recording must be established. 4) It must be shown that changes, additions, or deletions have not been made. 5) The manner of preservation of the record must be shown. 6) Speakers must be identified. 7) It must be shown that the testimony elicited was freely and voluntarily made, with-

72. 2 MERCER L. REV. 88, 108 (1950).
73. GA. LAWS 1952, p. 177, GA. CODE ANN. § 38-711 (Rev. 1954).
74. Guthrie v. Berrien Products Company, 91 Ga. App. 45, 84 S.E.2d 596 (1954).

out any kind of duress."[75] The report of the case unfortunately, does not specify whether this transcription was offered as the testimony of the co-defendant, or simply as an extra-judicial statement offered to impeach or contradict his sworn testimony. It would, of course, make a great deal of difference, for if it be offered as the former there would be further grave questions such as administration of an oath, commission or consent to take testimony, and protection of the right of cross examination, and the court makes no mention of these. On the other hand if the evidence was offered as an extra-judicial statement, the printed report of the case shows no basis for the admission of such.

COMPETENCY

The last issue of this Law Review carried a comprehensive treatment of the incompetency of witnesses under the "dead man" rule as prescribed by Georgia Code section 38-1603 (1933).[67] The supreme court had this question before it on two occasions during the survey period. In one of these cases it appeared that in 1949 Mrs. Childers had procured a verdict and judgment against the construction company for monies due her testator. In 1951, she filed suit against the company and two of its officers alleging insolvency of the company and seeking to set aside deeds from the company to the individual defendants on the ground that they were made for the purpose of hindering, delaying or defrauding creditors of the defendant company. During the trial the defendants tendered as evidence two canceled checks dated after the dates of the deeds but prior to the 1949 suit signed by the defendant company payable to plaintiff's testator, both of which were paid by the bank. Objection was made on the ground that the checks related to a matter adjudicated in the 1949 suit, and also on the ground that they had reference to a transaction between defendants and plaintiff's testator, since deceased, and consequently fall within the terms of the Code section. The checks were admitted "for the limited purpose of determining whether or not an obligation then due (plaintiff's testator) by Ackerman Construction Company was paid in full subsequently to the date the deeds sought to be cancelled were executed." The admission of this evidence for the limited purpose was approved, but the admission by the trial court of testimony by one of the individual defendants that these checks paid the claim (of plaintiff's testator) as a creditor of the construction company in full to that date was held to be erroneous.

75. Steve M. Solomon, Jr., Inc. v. Edgar, 92 Ga. App. 207, 88 S.E.2d 167 (1955).
76. Harper, *The Dead Man Rule*, 6 MERCER L. REV. 249 (1955).

The court held, however, that under the circumstances of the case the verdict rendered was demanded and the case would not be reversed.[77]

In the second case, the supreme court reiterated the rule that the grantee of a deceased person would fall within the terms "assignee or transferee" of such deceased person within the meaning of Georgia Code section 38-1603 (1) (1933).[78]

PRIVILEGE

Under the caption of privileged communications, the court of appeals affirmed the trial court in excluding evidence sought to be elicited from an attorney as to what conversation he had with his client when he was representing him.[79] The supreme court held "ordinarily one who acts in the capacity of a peace officer will not be required to disclose the name of his informant concerning the crime for which the accused is being tried . . . such rule rests upon sound public policy.[80]

77. Childers v. Ackerman Construction Company, 211 Ga. 350, 86 S.E.2d 227 (1955).
78. Martin v. Smith, 211 Ga. 600, 87 S.E.2d 406 (1955).
79. Sechler v. State, 90 Ga. App. 700, 83 S.E.2d 847 (1954).
80. GA. CODE § 38-1102 (1933); Morgan v. State, 211 Ga. 172, 84 S.E.2d 365 (1954).