EVIDENCE

By MALLORY C. ATKINSON*

OBJECTIONS

The advance of the cut-off date of the survey period served to reduce the number of decisions on evidence to be surveyed, but the pattern of the decisions is similar to that of prior years and we find no startling new developments in this field.

To the practitioner no emphasis is needed on the necessity for and importance of appropriate and timely objection to evidence sought to be excluded. The Court of Appeals held[1] that an objection must be specific enough to state the grounds of the objection and mere conclusions that testimony is "remote, speculative and not binding on the parties" is insufficient. In another case[2] the same court quoted earlier authorities to the effect that specific grounds to admission of evidence, not presented when the evidence was offered on the trial, do not raise questions for decision on review. Although there may be a ground of objection to testimony which would have been good if made, yet if the objectiin made be not good, it will be overruled. Application of a collateral rule was made in a case[3] decided by the Supreme Court in holding that when a charge of the court states a correct principle of law applicable to the pleadings and the evidence, the judge, in the absence of a timely written request, is not required to further amplify or make application of the law dealt with.

The cases already cited illustrate further the hazards of waiver by failure to object on the proper ground and at the proper time. Waiver of objection may also be effectuated by objection to evidence a part of which is admissible although some of the evidence objected to may be inadmissible.[4] Where the objecting party had submitted similar evidence to that objected to, such would constitute a waiver of the objection.[5] Furthermore it is not necessary that the earlier evidence have been offered by the objecting party as the Court of Appeals held[6] that an objection is not good when substantially the same evidence

*Professor of Law, Walter F. George School of Law, Mercer University; B.Ph., 1926, Emory University; LL.B., 1930, Lamar School of Law, Emory University; formerly Judge, Superior Courts of the Macon Circuit; Member American, Georgia and Macon Bar Associations.

1. Justice v. State Highway Department, 100 Ga. App. 794, 112 S.E.2d 307 (1959).
2. Royal Crown Bottling Company of Macon v. Bell, 100 Ga. App. 438, 111 S.E.2d 734 (1959).
3. Cowart, Administrators v. Johnson, 215 Ga. 287, 110 S.E.2d 363 (1959).
4. Whitfield v. Washburn Storage Company, 99 Ga. App. 708, 109 S.E.2d 865 (1959).
5. Selman v. Manis, 100 Ga. App. 422, 111 S.E.2d 747 (1959).
6. Justice v. State Highway Department, 100 Ga. App. 794, 112 S.E.2d 307 (1959).

sought to be excluded has been admitted without objection earlier in the trial.

This division of this survey has to do largely with procedural necessities as manifested by the cases cited. One case[7] decided by the Supreme Court made no criticism of the nature of the objection procedurally, but took occasion to define a leading question. A question is leading when it is so framed as to suggest to the witness the answer which is desired; on the other hand a question not suggesting the desired answer is not leading where it inquires only into a single fact. There exist in our practice at least two dangers widely prevalent amongst trial lawyers. The objectionable or unobjectionable nature of leading questions is in the first instance within the discretion of the trial judge. As the witness takes the stand he is greeted "Your name is Willie Witness" and there may or may not be a question mark after the greeting. This obviously is leading, but no trial judge would exclude it as objectionable. Such question and those of a similar nature are not even objected to. It is easy, however, for examining counsel to continue this method of examination, and unless opposing counsel be alert the method may well be productive of inadmissible evidence. The other danger lies in the failure of counsel to appreciate the real vice in the method as indicated by the decision cited and attribute an imagined magical quality to such words as "state whether or not".

JUDICIAL NOTICE

Judicial notice may indeed prove a welcome friend to counsel who through inadventence or neglect has failed to produce otherwise needed evidence. It is of obvious importance, however, for counsel to be as cognizant as possible of just what matters may be and just what matters will not be considered the subject of judicial notice.

The Supreme Court,[8] citing earlier authorities, held that a court may take judicial notice of its own records in the immediate case or proceedings before it, including all prior proceedings in the main case; and an application for mandamus nisi to require a trial judge to certify a bill of exceptions is a part of the proceedings in the main case. Consequently where germane to any issue in the cause the appellate court on review should take judicial notice of the time in which the mandamus proceedings were pending in that court. The same court

7. James v. The State, 215 Ga. 213, 109 S.E.2d 735 (1959).
8. State Department of Revenue v. McCray, 215 Ga. 678, 113 S.E.2d 132 (1960).

held[9] it could properly take judicial cognizance of the record in another case which was before the court, and[10] that it was bound to take judicial cognizance of "the laws of the United States".

From each of the appellate courts we have an expression concerning matters of "common knowledge". The Supreme Court recognized[11] "it is a matter of common knowledge in this State that an apparent owner's title to land is frequently found to be incomplete or defective for various reasons, and that title to land is often encumbered by liens for taxes and otherwise, which may or may not be enforceable". Though lawyers dealing extensively in land titles may fervently wish it were otherwise there will be little, if any, denial of the accuracy of the observation. The Court of Appeals took occasion to observe[12] that matters of common knowledge must be taken into account by courts and juries in measuring the prudence or negligence of conduct.

By no means may all vacuums in an evidentiary record be filled by judicial notice, and counsel may well feel frustrated if reliance is placed thereon without justification. A state court cannot take judicial notice of a discharge of bankruptcy.[13] In an action for personal injuries sustained by plaintiff when she stepped on a concrete landing and steps outside a building[14] the Court of Appeals recognized that while concrete may be manufactured so that it is not naturally slick and dangerous, the court cannot take judicial cognizance that such a slick and dangerous finish cannot be placed on concrete. Another illustration by the same court[15] of what the court will and will not note judicially was to the effect that although the court can take judicial notice that the date of the injury was a Sunday, it will not presume that all of the shopping center was closed for business on that day in the face of an allegation that it was open to the public, since there are businesses such as drug stores and service stations, which operate on Sunday. One further holding not dissimilar and by the same court[16] was to the effect that while the court will take judicial notice that copper, when exposed to air, will corrode, it cannot take judicial notice that under no circumstances will corroded copper wire not appear to the untrained eye to be galvanized iron wire. The Supreme

9. Ammons v. Central of Georgia Railway Company, 215 Ga. 764, 113 S.E.2d 443 (1960).
10. City of Carrollton v. Walker, 215 Ga. 505, 111 S.E.2d 79 (1959).
11. State Highway Department v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960).
12. Allen v. Gornto, 100 Ga. App. 744, 112 S.E.2d 368 (1959).
13. Aiken v. Bank of Georgia, 101 Ga. App. 200, 113 S.E.2d 405 (1960).
14. Cox v. Ray M. Lee Company, Inc., 100 Ga. App. 333, 111 S.E.2d 246 (1959).
15. Spindel v. Gulf Oil Corp., 100 Ga. App. 323, 111 S.E.2d 160 (1959).
16. Midland Properties Company v. Farmer, 100 Ga. App. 8, 110 S.E.2d 100 (1959); Midland Properties Company v. Evans, 100 Ga. App. 36, 110 S.E.2d 119 (1959).

Court[17] took occasion to note the general rule that the court is required to take judicial notice of the acts of the General Assembly.

> But, when an attack is made upon an act as being unconstitutional, no such rule applies. The court in that instance is permitted to look only at what is plainly and specifically alleged in the petition. If this were not true, all that would be necessary in any case would be simply to say that an Act of the General Assembly is unconstitutional, and it would then be the duty of the court to examine the law and determine that question. Surely, no such rule would ever be permitted in determining the important question of the constitutionality of a law enacted by the General Assembly.

PRESUMPTIONS

Of all presumptions recognized by the courts probably the one most striking to the individual, most impressive to the lawyer and most awe inspiring to the law student is that everyone is presumed to know the law. The Court of Appeals, in a case[18] decided within the survey period, had occasion to recognize this presumption, holding

> The general rule is well settled that fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law. [authorities cited] The basis for this generally is that everyone is presumed to know the law, and therefore cannot in legal contemplation be deceived by erroneous statements of law. It has been held that this principle of law is especially true where there is no confidential relationship between the parties.

One of the more frequently indulged presumptions is that public officers are presumed to have done their duty. This presumption was by the Court of Appeals[19] applied to the members of a Board of Education, and by the Supreme Court[20] to the fiscal and taxing authorities of a county. The Court of Appeals in a case[21] involving foreclosure for balance owing on the purchase price of an automobile held that since California was not one of the original thirteen colonies nor carved out of land embraced therein, where the law of that state was not pleaded nor proved, it will be presumed that the law of that state

17. Adams v. Ray, 215 Ga. 656, 113 S.E.2d 100 (1960).
18. Williams v. Dougherty County, 101 Ga. App. 193, 113 S.E.2d 168 (1960).
19. General Accident, Fire & Life Assurance Corporation, Ltd. v. Fountain, 100 Ga. App. 802, 112 S.E.2d 630 (1959).
20. Kight v. Gilliard, Tax Commissioner, 215 Ga. 152, 109 S.E.2d 599 (1959).
21. Nalley Chevrolet, Inc. v. California Bank, 100 Ga. App. 197, 110 S.E.2d 577 (1959).

is the same as the law of Georgia. In the same case the court took note of another frequently recurring presumption to the effect that a condition or fact once shown to exist is presumed to continue until a change in such status is shown.

RELEVANCY

Final determination of the relevance of certain testimony may, on occasion, have to await determination of the contentions of the parties. While ordinarily these may be determined from the pleadings, in a distress warrant proceeding[22] before the Court of Appeals is was noted that in such a proceeding proof of any defense can be appropriately raised by the simple denial of the defendant's counter-affidavit that the amount of rent claimed in the distress warrant was not due; and where defendant contended that plaintiff did not make possession of a portion of the premises available to him, testimony in support of this contention and testimony as to reasonable rental values would be admissible.

The same court in a condemnation case[23] discussed the comparable sales approach for fixing value. The court cited the rule that evidence of sales of similar properties made at or near the time of the taking was competent, the exact limit of similarity or difference, or of nearness or remoteness in point of time, being difficult if not impossible to prescribe by any arbitrary rule must to a large extent depend on the location and character of the property and the circumstances of the case . . .

> the rule thus formulated was intended to permit the introduction of evidence of particular sales, after such evidence had been qualified by the introduction of evidence as to the similarity of the particular property thus referred to and sought to be compared with the property being condemned or taken. . . . After the introduction of such preliminary evidence as to similarity, the trial judge must make a determination as to whether such property sought to be compared is sufficiently similar or so nearly like the property being condemned, and whether the particular sale of such comparable property was made under circumstances as to time and manner of sale as to be truly illustrative of the value of the property condemned. The trial judge having thus made the preliminary determination and exercised his discretion in admitting the evidence, the jury may then be permitted to use such evidence as it sees fit as

22. Selman v. Manis, 100 Ga. App. 422, 111 S.E.2d 747 (1959).
23. Fulton County v. Cox, 99 Ga. App. 743, 109 S.E.2d 849 (1959).

> an aid in arriving at the value of the property being condemned.

In a divorce case[24] before the Supreme Court the rule of relevancy was given: "Facts or circumstances serving to elucidate or throw light upon the issue being tried constitute proper evidence in the case", and conversely "where the evidence offered does not tend to establish in any way the points in issue, it should be excluded."

It was held by the Court of Appeals[25] that a witness may explain why his memory is correct. Quoting from an earlier Supreme Court case the court said

> We see no objection to [a witness] stating, as evidence of the correctness of his memory, that he told his brother so and so just after the thing transpired. It is no evidence of what did transpire. That depends on the oath of the witness. This is but his reason for thinking his memory is correct, and is nothing more than the frequent statement of witnesses that they are sure they remember correctly, because so and so.

Even though the courts are zealous in protecting the right of counsel to a searching and thorough cross-examination, even in this field relevancy plays an important role. In another condemnation case[26] before the Court of Appeals the rule was repeated "While the right of cross-examination of the witnesses called against a party is a substantial right, the trial judge may restrict the cross-examination to matters material to the issues. . . . "

HEARSAY

"Hearsay evidence is that which does not derive its value solely from the credit of the witness, but rests mainly on the veracity and competency of other persons."[27] In a condemnation case[28] before the Court of Appeals it was held that where testimony concerning a plat or map was elicited to the effect that the highwater mark was fixed thereon by asking residents along the road when the survey was made, it was proper to admit such testimony over the objection that it was hearsay testimony. The court pointed out that assuming the basis for the mark on the plans was hearsay, the testimony would not be objectionable. That testimony simply described how the plans were

24. Shivers v. Shivers, 215 Ga. 536, 111 S.E.2d 376 (1959).
25. Glover v. Maddox, 100 Ga. App. 262, 111 S.E.2d 164 (1959).
26. State Highway Department v. Irvin, 100 Ga. App. 624, 112 S.E.2d 216 (1959).
27. GA. CODE §38-301 (1933).
28. Justice v. State Highway Department, 100 Ga. App. 794, 112 S.E.2d 307 (1959).

drawn. It would only be when the plans were offered in evidence that objection might be made if insufficient or inadequate foundation had been laid for admissibility.

In another case[29] citing previous authorities, the court mentioned the distinction between secondary and hearsay evidence. Georgia courts are in the minority in adhering to the proposition that hearsay evidence admitted without objection is still without probative value. The court mentioned that the distinction between secondary and hearsay evidence in some instances is important, because secondary evidence admitted without objection may support a recovery or defense, whereas heresay evidence is ordinarily without probative value. As a matter of course evidence may be both secondary and hearsay in which event it would still be without probative value.

In a divorce and alimony case[30] before the Supreme Court attention was directed to the fact that objection to the testimony of a psychiatrist on the ground of hearsay was not sustainable. Such testimony was actually expert opinion testimony and not excludable on the objection made. The same court in an ejectment suit[31] held it error to admit testimony of a witness as to statements made by another as to who owned the land involved, which adjoined his, where neither of such persons were in possession of the land involved nor in privity with either party to the proceeding. Such declarations would not fall within the exception as declarations by persons in possession as provided for in Code section 38-308.

While admissions of the opposite party are generally admissible the Court of Appeals, citing the section of the Code so providing,[32] held that admissions or propositions made with a view of compromise are not proper evidence.[33]

An expert medical witness may properly present opinion testimony where a proper foundation is laid, but the Court of Appeals pointed out in a personal injury case[34] testimony by such a witness as to an operation performed where the witness neither performed the operation nor was present when it was performed and where that testimony went further than relating what was observed would not be admissible.

In another personal injury case[35] before the same court occasion was taken to define the line as to hearsay testimony concerning phy-

29. Knox Metal Products, Inc. v. Watson, 100 Ga. App. 832, 112 S.E.2d 295 (1959).
30. Wills v. Wills, 215 Ga. 556, 111 S.E.2d 355 (1959).
31. Morgan v. Lester, 215 Ga. 570, 111 S.E.2d 228 (1959).
32. GA. CODE §38-408 (1933).
33. Seal v. Aldredge, 100 Ga. App. 458, 111 S.E.2d 769 (1959).
34. Heard v. Heard, 99 Ga. App. 864, 110 S.E.2d 76 (1959).
35. Morgan v. Mull, 101 Ga. App. 36, 112 S.E.2d 661 (1960).

sical condition. The plaintiff's wife as a witness could not properly testify as to any complaints of pain and suffering which the plaintiff may have made to her because such would be hearsay. She may, however, give testimony expressing her personal observations as to symptoms which she observed, indicating that her husband suffered from headache.

One of the most frequently resorted to exceptions to the hearsay exclusionary rule is that of declarations constituting a part of the res gestae as provided for in the Code.[36] Two cases involving reliance upon this exception came before the Court of Appeals. In one of these cases[37] the court held admission in evidence of statements made by the insured within ten minutes of the act of stabbing the substance of which was to name her assailant and say she had cut or stabbed her was proper. In the other case[38] statements made several hours after the occurrence were not a part of the res gestae, especially where such statements were not connected with the transaction, did not have any bearing on it nor serve to illustrate it in any manner.

OPINION

In three different cases during the survey period the Court of Appeals had occasion to discuss opinion testimony elicited from an expert witness. In one[39] case note was taken that a foundation or basis must first be established before admitting such evidence. The court held that an expert witness should not be permitted to give his opinion on facts stated in a hypothetical question where those facts have not been testified to by other witnesses in the case prior to the asking of such hypothetical question, but such opinion testimony may be received when predicated upon facts placed in evidence by the testimony of other witnesses or by any other legal means. This case together with one other[40] discussed the probative value or weight of such testimony. While such evidence is receivable, the ultimate weight given thereto is to be determined by the jury and the jury is not bound or concluded by the testimony of any witness, but may believe a part of that testimnoy and not accept another part of the same witness' testimony, whether he be an expert or non expert witness. In a work-

36. GA. CODE §38-305 (1933).
37. Life & Casualty Insurance Company v. Lingerfelt, 100 Ga. App. 482, 111 S.E.2d 730 (1959).
38. Rodgers v. Styles, 100 Ga. App. 124, 110 S.E.2d 582 (1959).
39. Mutual Benefit Health & Accident Association of Omaha v. Hickman, 100 Ga. App. 348, 111 S.E.2d 380 (1959).
40. Parks v. Fuller, Administrator, 100 Ga. App. 463, 111 S.E.2d 755 (1959).

men's compensation case[41] the court recognized the rule that while direct and positive testimony cannot arbitrarily be rejected by the trier of facts, this rule does not apply to opinion evidence of physicians or other experts. In a workmen's compensation case the weight and credit to be given to such testimony is a matter to be determined by the trier of the facts.

Even as to a non expert witness, such witness may testify as to his opinion of value. In this instance also some evidence must appear as to the basis of this opinion. It has been held[42] that where the witness testifies that he is acquainted with the value of land, he may testify giving his opinion of its value, even without giving any data as the basis for his conclusion. In a condemnation case[43] where no evidence was introduced as to any particular sale, but the witness offered to testify as to a broad general conclusion on his part as to the average price per square foot paid for unspecified parcels of property with undescribed and undefined improvements thereon, there was no key furnished by which the trial judge could have exercised his discretion in determining whether such evidence had any probative value as illustrating the value of the property being condemned, and such proffered testimony was too vague and general to illustrate any question for the jury.

The Supreme Court[44] had occasion to reaffirm the proposition that "when facts sufficient to authorize the introduction of opinion evidence of a non expert witness as to the mental condition are shown, such opinion evidence may be introduced," and further "It is the province of the judge to determine the admissibility of evidence, and, accordingly, it is his province to determine in the first instance whether or not sufficient facts have been shown to authorize the introduction of such opinion evidence."

Demonstrative Evidence

Demonstrative evidence is not ever entirely separable from testimonial evidence because it must generally depend upon the latter for identification and authentication essential to its admission. In a case[45] before the Court of Appeals it was noted that while maps and other drawings are not admissible in evidence without proof of their

41. Peacock v. Manufacturer's Casualty Insurance Company, 100 Ga. App. 346, 111 S.E.2d 111 (1959).
42. Selman v. Manis, 100 Ga. App. 422, 111 S.E.2d 747 (1959).
43. Fulton County v. Cox, 99 Ga. App. 743, 109 S.E.2d 849 (1959).
44. Martin, Caveatrix v. Baldwin, Executor, 215 Ga. 293, 110 S.E.2d 344 (1959).
45. Clarke County School District v. Madden, 99 Ga. App. 670, 110 S.E.2d 47 (1959).

accuracy by the person making them, the rule is otherwise where a witness testifies as to the correctness of the drawing, and it is not essential that the witness testifying to the correctness of the drawing be the one who made it. Nor is it essential, the court went on to hold, that such map must be shown to have been made from particular measurements or made by professional surveyors or engineers. "The only requirement is that a witness testify as to the correctness of the map . . . as representing the thing purporting to be shown." And even then "accuracy" and "correctness" are relative terms and do not necessarily require perfection. In another case[46] attention was called to the necessity before admission of a photograph of laying the proper foundation to the effect that it is a true likeness of the subject matter involved. Photographs are sometimes admissible, or their admission is not harmful error, where, although there are differences, there is sufficient testimony to make it clear what differences exist and therefore what parts of the pictorial representation are to be disregarded. Picture of a machine used for the same purpose as the one with which the court was concerned but "as different as a Ford and a Cadillac" was properly excluded. In a land case[47] before the Supreme Court where deeds were offered in evidence, while these deeds had inaccurate descriptions they were sufficiently certain to show the intention of the grantor as to what property was conveyed and to make its identification practicable, and as a consequence the deeds were properly admissible in evidence.

The parol evidence rule is firmly embedded in our practice. Twice during the period the Supreme Court discussed this rule. In one case[48] the court enunciated the rule "in the absence of a showing of fraud, the contract embodying the entire agreement between the parties cannot be varied by parol evidence." In that case it appeared that all the oral representations and promises were made prior to the signing of the written contract and were contradictory to the plain terms of the contract and as a consequence evidence of those verbal statements would furnish no basis for relief from the contract terms. The other case[49] recognized the admissibility of parol evidence to explain an ambiguous written contract, but cautions

> The construction of a contract, if needed, being a question of law for the court, as well as a duty that rests upon the court, there can be no ambiguity within the rule to which we

46. Southeastern Engineering & Manufacturing Co. v. Lyda, 100 Ga. App. 208, 110 S.E.2d 550 (1959).
47. Everett v. Culberson, 215 Ga. 577, 111 S.E.2d 367, (1959).
48. Dr. Pepper Finance Corporation v. Cooper, 215 Ga. 598, 112 S.E.2d 585 (1960).
49. Davis v. United American Life Insurance Co., 215 Ga. 521, 111 S.E.2d 488 (1959).

> have referred, unless and until an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties.

The business entries statute enacted in 1952 and codified as section 38-711 of the Code came under review a number of times during the survey period. In two cases[50] decided by the Court of Appeals involving insurance policies, evidence of a material nature was held to be properly admissible under this statute. In another case,[51] an action by a landscape contractor for materials and services, exhibits which were clearly shown to have been taken from plaintiff's books, kept in accordance with the statute, were admissible in evidence.

In a will case[52] before the Supreme Court, Justice Mobley took occasion to discuss the business entries statute[53] enacted in 1952 more fully than elsewhere discussed in our judicial opinions. Headnotes (1), (2), and (4) of the syllabus by the court summarize the holdings.

> 1. The complete file of the Veterans' Administration consisting of numerous documents, where offered as a whole, was properly excluded from evidence, since certain of the documents in the form of letters from doctors as to the condition of the testator many years before the execution of his will—which have no relevancy to the question at issue and which are not a memorandum or record of any act, transaction, occurrence, or event made in the regular course of business of the Veterans' Administration—were inadmissible.
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> 2. (a) Documents from the Veterans' Administration file on the testator were not admissible in evidence as having been submitted by the testator to the Veterans' Administration, where the evidence failed to show that they had been sent in by him or at his instance.
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> (b) Letters purporting to be signed by named persons as doctors found in the file kept by the Veterans' Administration on the testator, a veteran, were not a memorandum or record of any act, transaction, occurrence, or event made in the regular course of business by the Veterans' Administration within contemplation of Code (Ann.) Sec. 38-711.
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> (c) Records of a Veterans' Administration hospital and a

50. Reserve Life Insurance Company v. Gay, 101 Ga. App. 96, 112 S.E.2d 786 (1960); Service Casualty Company of New York v. Carr, 101 Ga. App. 70, 113 S.E.2d 175 (1960).
51. Ragsdale v. Duren, 100 Ga. App. 291, 111 S.E.2d 144 (1959).
52. Martin, Caveatrix v. Baldwin, Executor, 215 Ga. 293, 110 S.E.2d 344 (1959).
53. Ga. Laws 1952, p. 177, GA. CODE ANN. §38-711 (1954 Rev.).

Veterans' Administration office, made in the regular course of the business of the hospital or office, which contain opinion evidence, conclusions, impressions, matter of conjecture, diagnoses of physicians or other parties, are not admissible in evidence under Code (Ann.) Sec. 38-711, since they are not the contemporaneous records of events, acts, transactions, or occurrences as required by the act, but are opinions or conclusions which may or may not be based upon facts, and lack that reliability of records which exists in the routine recording of facts in regular business books or other records.

(d) Photostatic copies of an Army discharge and Army clinical records, produced from a Veterans' Administration file, are not admissible in evidence under Code (Ann.) Sec. 38-711 as records made in the regular course of business of the Veterans' Administration, as they are obviously records of the War Department or the Defense Department, but are not offered as such with necessary proof that they are records of that department made in the regular course of its business.

4. A record or writing is not admissible under Code (Ann.) Sec. 38-711 without the testimony of a witness whose evidence shows that the writing or record offered is a memorandum or record of an act, transaction, occurrence or event made in the regular course of the business, and that it was the regular course of the business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

In an allegedly negligent homicide case[54] before the Court of Appeals, where the earnings of the deceased was in issue, that court held that the business entries statute did not serve under the "best evidence rule" to exclude testimony of a witness as to the amount of such earnings where the testimony was based upon the witness' knowledge of the facts whether or not the books themselves are put in evidence.

COMPETENCY

In a will case[55] before the Supreme Court that court took note of the long established and well recognized exception to the common law rule of privileged communications to the effect that communications by a client to his attorney who prepared his will, in respect to that document, are not after the client's death within the protection of the rule in a suit between the testator's devisees and heirs at law. The court

54. Atlantic Coast Line Railroad Company v. Grimes, 99 Ga. App. 774, 109 S.E.2d 890 (1959).
55. DeLoach, Administrator v. Myers, 215 Ga. 255, 109 S.E.2d 777 (1959).

went on to hold, however, that under the mandate of the code section[56] this exception would not cover a situation where the proposed will was never executed and the action was for specific performance of an alleged oral contract to make a will.

The so-called dead man statute[57] came under consideration in a case[58] before the Court of Appeals and in that case, relying on antecedent case authority cited, it was held that where testimony of such nature as would fall within the terms of the statue and be such that the witness would be incompetent to testify thereto, if admitted without objection would still be of no probative value, the analogy being made between such evidence and hearsay evidence under the Georgia law.

Privileged Communications

The Supreme Court in a divorce case[59] took note of the enactment of the statute[60] in 1959 rendering privileged statements made by a patient to his psychiatrist.

The privileged nature of a conversation between attorney and client was recognized in a criminal case[61] before the Court of Appeals.

Weight

There were the usual number of cases during the survey period to the effect that the evidence was (or was not) sufficient to warrant the verdict. These cases are not herein cited.

Several cases did come before the Court of Appeals however dealing with the weight of evidence and credibility of witnesses. In a criminal case[62] the court noted that where one witness for the state had made numerous purchases of whiskey without making any arrest at the time of purchase, and where another was a convicted burglar these matters went only to the credit of the witness. In a civil case[63] the weight of impeachment testimony was recognized in the holding that although declarations made out of court by a witness may be used to impeach the witness, they cannot be treated as substantive evidence to establish

56. Ga. Code §38-1605 (1933).
57. Ga. Code §38-1603 (1933).
58. Massachusetts Bonding & Insurance Co. v. Bins & Equipment Company, Inc., 100 Ga. App. 847, 112 S.E.2d 626 (1959).
59. Wills v. Wills, 215 Ga. 556, 111 S.E.2d 355 (1959).
60. Ga. Laws 1959, p. 190, Ga. Code Ann. §38-418 (Supp. 1959).
61. Miles v. The State, 100 Ga. App. 614, 112 S.E.2d 237 (1959).
62. Morris v. The State, 100 Ga. App. 457, 111 S.E.2d 655 (1959).
63. Brock v. Avery Company, Inc., 99 Ga. App. 881, 110 S.E.2d 122 (1959).

the facts which they affirmed, and a charge of the court so treating them is erroneous.

The rule has been often repeated that the testimony of a party litigant must, where equivocal or contradictory, be construed most strongly against him[64] and if the facts shown by the plaintiff's direct testimony proves his case, and the evidence he gives on cross examination shows that those facts are untrue, or that he does not know them to be true, his direct and cross examination neutralizes his testimony and proves nothing.[65] In another case[66] before this court these rules were recognized but Judge Quillian in writing the opinion pointed out that generally when the party's testimony fails to sustain his cause or defense, simply because it is contradictory, the inconsistency may be cured by the testimony of other witnesses that clearly reveal the truth. Where such is the case it is error for the trial judge to withdraw the case from the jury.

64. Cash v. American Surety Company, 101 Ga. App. 379, 114 S.E.2d 57 (1960).
65. Hamby v. Hamby, 99 Ga. App. 808, 110 S.E.2d 133 (1959).
66. Fulton v. Chattanooga Publishing Company, 100 Ga. App. 573, 112 S.E.2d 15 (1959). Reversed on other grounds in 215 Ga. 880, 114 S.E.2d 138 (1960).