EVIDENCE

By L. RAY PATTERSON*

The rules of evidence in their present state present a theoretical quandry. They are primarily concerned with the exclusion of matter to be presented to the jury. But since they constitute *a priori* determinations of the matter to be excluded, their application in a particular case may well result in a distortion of the merits of the case, with consequent injustice to the parties. Thus, the appellate courts are faced with the problem of whether to apply the rules of evidence strictly, or to use them merely as guides in determining the evidential point in a particular case. While the appellate courts have not said so, and probably will not say so, they appear to be taking the latter course of action. In short, the courts are primarily interested in the merits of the case before them and not technicalities of the rules of evidence. This is as it should be, but it sometimes makes a difficult problem for the attorney relying on a clearly stated rule. And it makes for a confusing situation when the merits of the issues and the technicalities of the rule conflict.

One example of this trend is the extensive use which the appellate courts make of judicial notice; another is the apparent inconsistencies which prevail in the cases. Two more specific examples are presented in two cases which warrant the attention of all attorneys engaged in trying cases, more for their implications than the rules they lay down.

Harvey v. DeWeill[1] was a tort action arising from an attack made on the plaintiff guest in a motel by an employee. The plaintiff's injuries included the loss of an eye, and she recovered a verdict for $25,000.

The plaintiff's petition contained eight allegations of negligence, all of which the court found insufficient either as a matter of law or as unproved. There was, however, testimony of the defendant which was unobjected to that the employee had previously committed the crime of burglarly by entering a room and taking one hundred dollars, and that the defendant employers were aware of this fact. The court said that as a matter of law the defendants could properly be held liable for negligence in continuing in their employment an employee who had felonious tendencies. But the petition contained no

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1. 102 Ga. App. 394, 116 S.E. 2d 747 (1960).

allegation of this negligence. After some discussion of the problem, the court concluded that where evidence is admitted as to acts of negligence relating to the same cause of action, but which are not specifically charged in the petition, and no objection is made to the evidence, which evidence could have been properly admitted by amendment to the petition, such evidence proving negligence may be held to sustain a judgment rendered against the defendant.

> In such a case we find the rule to be that the defendant's failure to object to the evidence . . . amounts to a waiver upon his part of his right to insist upon an amendment to the petition, and the case then proceeds as though there had been an appropriate amendment permitting the introduction of testimony.[2]

The other case, *Goldstein v. Drexler*,[3] was an action on six promissory notes by the administratrix of the payee. The defense was no consideration. The payee was a brother of the maker of the notes, and there was testimony by two witnesses who testified that the payee had taken the note to give him the status of a prior secured creditor for the purpose of protecting his brother, the maker, who was beginning a business. The two witnesses were the former executor of the estate, another brother, who filed suit on the notes prior to his resignation as executor, and a sister of the defendant and the payee, who had worked as bookkeeper in the business. The trial court directed a verdict for the defendant.

The Court of Appeals reversed by raising, apparently of its own volition, the question of impeachment of the witnesses, and holding that the credibility of the witnesses where they have been impeached is a matter for the jury. The court concluded that the two witnesses had impeached themselves, the brother by having filed suit on the notes prior to his resignation as executor, and the sister by contradictions in her positive testimony.

JUDICIAL NOTICE

It is interesting to note that of the cases involving judicial notice during the survey period, only one was clearly concerned with the

2. *Id.* at 407, 116 S.E. 2d at 756.
Compare the following language from Meaders v. Jones, 102 Ga. App. 96, 99, 115 S.E. 2d 607, 609 (1960): "It is always true that one cannot recover on a cause of action, no matter how well sustained by proof, which is different from or at material variance with the cause of action set out in the declaration."
3. 102 Ga. App. 90, 115 S.E. 2d 744 (1960).

propriety of judicial notice on the part of the trial court.[4] The remaining cases were instances where the appellate court used judicial notice in support, or as an explanation, of its opinion. In one case,[5] the court, in affirming the trial court, held that the superior court may upon its own motion take cognizance of what transpired on a former hearing of the case, and judicially recognize the pleadings. But there is no showing in the opinion that the trial court took such action. And in *Balkcom v. Cross*,[6] the Supreme Court of Georgia used the rule that judicial notice must be taken of certain rules and regulations promulgated by the Secretary of Agriculture to support its opinion in reversing the Court of Appeals.[7]

Morgan v. Western Auto Supply Co.[8] involved a motion in arrest of a judgment of the McDuffie Superior Court. The hearing on the motion was held in chambers in the Superior Court of Wilkes County. The appellant objected to the procedure on the ground that the order nisi on the motion was executed by the court in Wilkes County in vacation and while McDuffie Superior Court was not in session, and the court had no authority to execute such an order beyond the limits of McDuffie County. The Court of Appeals held that the contention was not well taken, and went on to say:

> Furthermore, we take judicial notice that McDuffie Superior Court and Wilkes Superior Court are each within the Toombs Judicial Circuit, and, in absence of proof appearing in the record to the contrary, that neither McDuffie Superior Court nor Wilkes Superior Court was in vacation at the time the order objected to was entered.[9]

The appellate courts further took judicial notice of their own volition that Dodge County has a population of less than 200,000,[10] that governmental units, such as cities and counties, are separately created and possess divergent powers,[11] that it has been the custom of the

4. Union Bag-Camp Paper Corp. v. Coffee County Hunting and Fishing Club 216 Ga. 44, 114 S.E. 2d 511 (1960), holding that the trial court in an ejectment suit properly took judicial notice of size, shape, courses and distances of lot which was in the form of a square where a certified copy of the plat of land was introduced.
5. State of Georgia v. Smallwood, 103 Ga. App. 400, 119 S.E. 2d 297 (1961).
6. 216 Ga. 530, 118 S.E. 2d 185 (1961). This was a certiorari proceeding involving the judgment of a Review Committee affirming the action of the Agricultural Stabilization and Conservation Committee of Lee County in applying 1959 regulations for crop allotment purposes. The Supreme Court reversed the Court of Appeals, thereby affirming the judgment of the Review Committee.
7. Cross v. Balkcom, 102 Ga. App. 81, 115 S.E. 2d 783 (1960).
8. 102 Ga. App. 648, 117 S.E. 2d 253 (1960).
9. *Id.* at 651, 117 S.E. 2d at 256.
10. Studstill v. Gary, 216 Ga. 268, 116 S.E. 2d 213 (1960).
11. Madden v. Fulton County, 102 Ga. App. 19, 115 S.E. 2d 406 (1960).

Workmen's Compensation Board since its inception to serve notice of the hearing by posting it in the United States mail,[12] that an apparent owner's title to land is frequently found to be incomplete or defective for various reasons, and is often encumbered by liens for taxes and otherwise, which may or may not be enforceable,[13] and that motels usually have room entrances opening onto a courtyard and many of our citizens have effective minds below their calendar age.[14] The appellate courts also took judicial notice of the acts of the General Assembly,[15] and will take judicial notice of the natural course of events.[16]

PRESUMPTIONS

Of the cases involving presumptions, one merely reiterated the rule that there is a presumption in favor of the validity and legality of the official acts of a public officer.[17] Another, while not adding any new principle to Georgia law, presented a more interesting factual situation.[18] It arose out of an automobile accident involving a parked car and a taxicab, allegedly caused by the driver's losing consciousness. The petition alleged that the defendant driver had suffered a blackout caused by overwork and high blood pressure three years previously, and a physician had advised defendant employer that the driver was subject to having recurring blackouts and that it would be dangerous for him to drive while such a situation existed. In reversing the trial court's sustaining of special demurrers to the allegations as to defendant company's knowledge of the driver's being unsafe, the court said that a condition of fact once shown to exist is presumed to continue until a change in status is shown. "Conditions such as dizziness and loss of consciousness, when due to arterial disease, do not fall within that class of temporary illness the continuance of which will not be presumed."[19]

A third case[20] was a workmen's compensation case in which the defendant attempted to rely on GA. CODE ANN. §38-119 (1954 Rev.),

12. Bailey-Lewis-Williams of Georgia, Inc. v. Thomas, 103 Ga. App. 279, 119 S.E. 2d 141 (1961).
13. State Highway Department v. Hendrix, 215 Ga. 821, 113 S.E. 2d 761 (1960). Here, the court used the clause, "It is a matter of common knowledge," rather than the term, "judicial notice."
14. Harvey v. DeWeill, 102 Ga. App. 394, 116 S.E. 2d 747 (1960). The court also used here the clause, "It is a matter of common knowledge."
15. R. G. Foster & Co. v. Fountain, 216 Ga. 113, 114 S.E. 2d 863 (1960).
16. Fields v. Jackson, 102 Ga. App. 117, 115 S.E. 2d 877 (1960).
17. Timbs v. Straub, 216 Ga. 451, 117 S.E. 2d 462 (1960).
18. Jackson v. Co-op Cab Co., 102 Ga. App. 688, 117 S.E. 2d 627 (1960).
19. *Id.* at 690, 117 S.E. 2d at 630.
20. Independent Life & Accident Insurance Co. v. Craton, 102 Ga. App. 78, 115 S.E. 2d 636 (1960).

providing that where a party has evidence in his power and refuses to produce it, this raises a presumption against him. The claimant in the case had refused to authorize the release of hospital records pertaining to his hospitalization for an injury occurring three years after the injury for which he received compensation. The court agreed that the statute was pertinent, but rejected counsel's argument that it created a conclusive presumption, since the statute by its terms states that the presumption may be rebutted. The main point, however, was that the presumption was one of fact for the triers of fact, here the State Board of Workmen's Compensation, and it was exclusively for the finders of fact to resolve.

In *Goldstein v. Drexler,*[21] a suit on promissory notes by the administratrix of the payee, the question was whether the notes were given for consideration. The court said that the presumption of consideration in such instances is a presumption of law which gives way to testimony, and where all the evidence in the case affirmatively establishes failure of consideration, the plaintiff would not be entitled to recover, and it would not be error to direct a verdict.[22]

Gwin v. Thunderbird Motor Hotels, Inc.[23] reiterated the rule that a corporation's members, directors and officers are conclusively presumed to know the corporate by-laws.

Opinion

The most interesting case involving opinion was *Sutton v. State Highway Department,*[24] a condemnation proceeding in which opinion as to the value of land was involved. The trial court excluded testimony by a witness for the condemnee that he had agreed to lease a part of the property for fifty dollars a month from the condemnee. The parties to the agreement did not agree upon a term for the lease, and did not execute a written agreement. The witness' opinion was that the agreed rental value was the fair rental value of the part of the building he proposed to lease.

The condemnor relied on *Southern Ry. v. Miller*[25] to support its contention that the evidence was properly excluded. The evidence in that case concerned price negotiations for certain property, but the parties never executed a contract, and the court held the evidence too speculative and uncertain to prove actual value at the time of condemnation. In the *Sutton* case, the court refused to accept the

21. 102 Ga. App. 90, 115 S.E. 2d 744 (1960).
22. The directed verdict for defendant, however, was reversed on the ground that the credibility of the witness presented a question for the jury.
23. 216 Ga. 652, 119 S.E. 2d 14 (1961).
24. 103 Ga. App. 29, 118 S.E.2d 285 (1961).
25. 94 Ga. App. 701, 96 S.E. 2d 297 (1956).

Miller case as authority because the court had been evenly divided on the point in question, and the cases relied on in that case "were cases wherein unaccepted offers were sought to be used as direct evidence of 'market value'." The court said that such evidence is not in and of itself evidence of market value.

> However, where a nonexpert testifies as to the facts on which he bases his opinion as to what the "market value" of property is, then such opinion evidence is admissible. The witness, whose testimony was excluded, testified as to the facts on which his opinion was based and such evidence was admissible . . . .[26]

In another condemnation case,[27] the witness gave testimony as to the effect the condemnation of an easement would have on the remainder of condemnee's property. The court said that the objection to this evidence as a conclusion of the witness was well taken at the time it was made, because no proper foundation as to the value of the entire tract was laid. However, the condemnor cured this defect on cross-examination by eliciting from the witness testimony as to the value of the entire property, and there was no error.

Two cases reiterated well established rules in Georgia. It is not error to refuse to admit opinion evidence as to the value of property without a proper foundation,[28] and a witness who shows that he observed a person's condition may testify, as a statement of fact actually observed by him, as to whether such person was intoxicated.[29] However, in *Bentley v. Ayers*,[30] the court held that it was not error to refuse to permit a Georgia State patrolman who investigated the accident to testify that defendant was under the influence of alcohol when he first saw him an hour and a half after the collision. The intervening time period made the testimony incompetent and prejudicial. In *Eller v. Matthews*,[31] a habeas corpus proceeding for custody of a child, the court held it is not error to permit a teacher to testify that in her opinion if the child had been failing all subjects, it would suggest to her that the child was emotionally disturbed.

The line between fact and opinion or conclusion is a thin one, as is shown by the *Bentley*[32] case in which the defendant testified, "I don't know of anything I could have done to avoid the collision."

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26. Sutton v. State Highway Department, 103 Ga. App. 29, 32, 118 S.E. 2d 285, 287 (1961).
27. Georgia Power Co. v. Faulk, 102 Ga. App. 141, 115 S.E. 2d 733 (1960).
28. Ward v. Nance, 102 Ga. App. 201, 115 S.E. 2d 781 (1960).
29. Fountain v. Smith, 103 Ga. App. 192, 118 S.E. 2d 852 (1961). See also Hill v. Rosser, 102 Ga. App. 776, 117 S.E. 2d 889 (1960).
30. 102 Ga. App. 733, 117 S.E. 2d 633 (1960).
31. 216 Ga. 315, 116 S.E. 2d 235 (1960).
32. *Supra*, note 30.

The plaintiff objected to this statement as a conclusion. The court agreed that if the statement were a conclusion, it would be inadmissible, but pointed out that the defendant gave detailed testimony amounting to a sufficient foundation upon which he could base his opinion. The court then distinguished between a statement that "I don't know of anything I could have done," and a statement that "I did everything possible."

> In the latter instance the conclusion would be made by the witness and thus would amount to an invasion of the province of the jury as to the ultimate issue to be decided. However, in the former instance we construe the statement to mean that insofar as the witness knew, his opinion was that there was nothing else he could have done.[33]

In *Atlantic Coast Line Railroad v. McDonald*[34] appellant lost two bases for error as to opinion evidence by reason of his cross-examination, and by allowing a similar question without objection. The case involved a railroad painter's action against the railroad for injuries sustained when water containing caustic solution splashed on him. Counsel for plaintiff asked a co-worker of plaintiff if a rain suit would have been any protection for him on the job. Defendant's counsel then asked on cross-examination what other protective clothing it would have been proper for employees to have worn. The other testimony was as to a safer way of doing the job in question. Although this testimony was objected to, the same witness later gave similar testimony to which no objection was made. Consequently, the court held these two grounds showed no harmful error. Even so the language of the opinion does not indicate that any of the testimony objected to would have resulted in harmful error.

A third error alleged as to opinion evidence was a co-worker's testimony that the solution involved was strong enough to cause "pretty severe burns." The court said the witness was familiar with the work and it was competent for him to testify from first hand experience on this point. The ultimate question for the jury was not whether the solution could have caused burns, but whether any solution was splashed onto plaintiff in sufficient quantities and concentration to cause burns.

In *State Highway Department v. Sinclair Refining Co.*,[35] a condemnation case, the trial court refused to permit the condemnor to ask condemnee's witness on cross-examination: "Did you or did you not know that your pumps and your competitor's pumps were hold-

33. Bentley v. Ayers, 102 Ga. App. 733, 735, 117 S.E. 2d 633, 636 (1960).
34. 103 Ga. App. 328, 119 S.E. 2d 356 (1961).
35. 103 Ga. App. 18, 118 S.E. 2d 293 (1961).

ing up the building and construction of the new highway?" The appellate court sustained the trial court, explaining that conclusions of witnesses are of no probative value unless the facts on which the opinions are based sustain the opinions. Here, the question shows that any answer that the witness might have given would have been a conclusion.

And, finally, in *Georgia Southern & Florida Railroad v. Haygood*,[36] the court held that testimony of plaintiff's physician that plaintiff's pain and disability could have been caused by the injuries received in the collision was not subject to the objection that such was an unwarranted conclusion.

PAROL EVIDENCE

Although parol evidence is a rule for the construction of contracts, and is not a rule of evidence, authorities continue to treat it under the heading of evidence. For the most part, cases involving the parol evidence rule during the survey period consisted of the application of accepted principles. However, there was one case, *United States Fidelity & Guaranty Co. v. Coastal Service, Inc.*,[37] in which the court extended the application of the rule, apparently for the first time in Georgia. In Georgia, where a contract is signed with addition of the word *agent* to the signature, parol evidence is admissible to show that the parties intended the contract to be the obligation of the principal.[38] In the *Coastal Service* case, the defendant in *fi. fa.* testified that although the contract for the sale of an automobile was made out in his name, with no indication that he was an agent, he bought the car for the corporation of which he was president, and that it was seller's error in showing his name as purchaser on the bill of sale. The plaintiff objected to this evidence as violating the parol evidence rule. The court said that parol evidence may be used in cases involving undisclosed principals in ordinary contracts which are not under seal. The court reasoned that otherwise GA. CODE ANN. §4-313, giving the advantage of its agent's contracts in the same manner as he is bound by them, could not be applied in all cases. The court also relied on language from an Oregon case for the proposition that all authorities concur in holding that parol evidence which shows that the agent who made the contract in his own name was acting for the principal does not contradict the writing, but simply explains the transaction.

36. 103 Ga. App. 381, 119 S.E. 2d 277 (1961).
37. 103 Ga. App. 133, 118 S.E. 2d 710 (1961).
38. Burkhalter v. Perry & Brown, 127 Ga. 438, 56 S.E. 631 (1906) (action on note).

This language, however, cannot be reconciled with the language in a case decided a few days later than the *Coastal Service* case. In *Spiegel v. Hays*[39] the court said:

> The substitution of one party for another in a contract is certainly a material deviation, and where the contract itself recites that it contains the entire agreement, it can hardly be contended that such a contract will permit one of the parties to show by parol that another than the person named therein was in fact the one intended to be bound.[40]

There are factual distinctions in the two cases, but the disparity of the language used indicates that the operation of the parol evidence rule depends primarily upon the use that is being made of it.

In *Bowdoin v. Kingloff*,[41] the purchaser of a house sued the vendor's agents for breach of the agents' alleged oral contract to make certain improvements and remedy defects appearing within a year. The court held that the purchaser, who accepted the deed and warranty of the vendor, was not entitled to recover from the agents as principals on the theory of undisclosed agency for representations and agreements made during negotiations, even though the agents did not disclose their principal until the time of closing and conveyance. The court pointed out that the action did not proceed upon the theory that the promises of defendants were an independent and personal undertaking, and that even if the question of agency was not present, the doctrine of merger would foreclose the plaintiff, since parol evidence is inadmissable to impose additional and other terms dependent upon a prior or contemporaneous parol agreement.

Covington v. Brewer[42] presents an example of a written contract being modified by a subsequent oral agreement. The case was a personal injury action by the tenant against the landlord by reason of a defective elevator. The lease, containing an indemnity provision, was signed on June 25, 1958, and it contemplated extensive improvements before the lessee entered the premises. The parties entered into a subsequent oral agreement for the installation of the elevator and further entered into an oral agreement modifying the written contract, delaying the payment of rent until the premises were turned over to the lessee on October 14, 1958, rather than August 1, 1958, as originally planned. The accident occurred on October 9, 1958. The court held that the lease contract had been modified by a subsequent oral agreement, and since the elevator was not contemplated at the

39. 103 Ga. App. 293, 119 S.E. 2d 123 (1961).
40. *Id.* at 298, 119 S.E. 2d at 127.
41. 102 Ga. App. 783, 118 S.E. 2d 197 (1960).
42. 101 Ga. App. 724, 115 S.E. 2d 368 (1960).

time of the original agreement, the indemnity provision of the lease could not be invoked as a defense by the lessor.

In an action against the owner of property for breach of a written contract for repairs,[43] the defendant contended that the financing provisions were framed in uncertain terms. The court said that objection was not well taken, but in any event, parol evidence could explain any ambiguity in the agreement. The court elucidated this proposition in *Southern Airways Co. v. DeKalb County*,[44] an action involving the lease of an airport by DeKalb County, but only in terms of familiar principles. Parol evidence may be used to explain an ambiguity, latent or patent, in a contract, but there is a difference between ambiguity which imports doubleness and uncertainty of meaning, and that degree of indefiniteness which imports no meaning at all. The former can be explained by parol; the latter cannot be merely explained, but a deficiency must be supplied.

And in *Irwin v. Dailey*,[45] the court held that the true date an instrument becomes effective may be shown to differ from the date shown in the instrument itself.

Best Evidence

The Georgia Code provides that one must produce the best evidence which exists to prove a fact.[46] But in most instances, the cases do not tell what the best evidence is, and in none of the three cases involving the best evidence rule did appellant succeed in having his allegation of error sustained. In one case,[47] plaintiff objected to the testimony of defendant in *fi. fa.* that notes for the purchase of cigarette vending machines were paid with corporate funds. The contention was that the cancelled checks of the corporation would be the highest and best evidence. The court distinguished an earlier case holding that an auditor's testimony of certain payments made by check was not admissible over objection that the cancelled checks were the best evidence. In the present case, there was other evidence in the record from which the jury could find that claimant corporation owned the property, and the court said that the issue in the case was ownership, not the method of payment. The error, if any, was harmless.

Two cases applied accepted principles as to the best evidence rule. Where a document is shown to be outside the state in the hands of a

43. Hanson v. Stern, 102 Ga. App. 341, 116 S.E. 2d 237 (1960).
44. 102 Ga. App. 850, 118 S.E. 2d 234 (1960).
45. 216 Ga. 630, 118 S.E. 2d 827 (1961).
46. Ga. Code §38-203 (1933).
47. United States Fidelity & Guaranty Co. v. Coastal Service, Inc., 103 Ga. App. 133, 118 S.E. 2d 710 (1961).

third party, secondary evidence of its contents will be admitted.[48] And where a party has pleaded a document which he later strikes, he cannot complain of error in the admission of a copy of the document by his adversary.[49]

HEARSAY

Although the hearsay rule, together with its many exceptions, is in force in Georgia, few cases find reversible error because of hearsay. *Camp v. Ledford*[50] is an exception, and is interesting only because the Court of Appeals reversed the trial court solely for the erroneous admission of hearsay. The case involved an automobile collision, and the hearsay was as follows:

> "There was a lady come down there and she said she was a doctor and she looked at Mr. Camp and says, 'He is just shook up.' After she came down there she told us to scatter back, she was a doctor."[51]

The court said this was clearly hearsay, and refused to allow it under the res gestae exception, because it was not a spontaneous exclamation, but a deliberate statement of opinion.

In *Carroll v. Yearty*,[52] the court held that the trial court properly excluded the oral testimony of a city clerk as to the speed limit in the city where he testified that he did not know of his own knowledge that there was an ordinance fixing the speed limit at twenty-five miles per hour. The court further upheld the trial court in refusing to admit into evidence a copy of the ordinance which was not properly exemplified. It is interesting to note, however, that the court went on to say that the exclusion of the evidence was harmless to plaintiff because one of the defendants testified on cross-examination as to a speed limit sign near the collision which showed the speed limit to be twenty miles per hour. This evidence established prima facie proof that such was the speed limit.

A case involving similar testimony is *Fields v. Jackson*,[53] except that the speed limit in the ordinance and on the sign were the same, and the trial court admitted the testimony of the town clerk, although it was objected to as hearsay. The Court of Appeals conceded that the parol testimony of the clerk should have been rejected, but held that its admission was not reversible error because testimony as to

48. Silvey v. Wynn, 102 Ga. App. 283, 115 S.E. 2d 774 (1960).
49. Associates Discount Corp. v. Brantley, 102 Ga. App. 751, 117 S.E. 2d 916 (1960).
50. 103 Ga. App. 197, 119 S.E. 2d 54 (1961).
51. *Id.* at 198, 119 S.E. 2d at 55.
52. 102 Ga. App. 677, 117 S.E. 2d 248 (1960).
53. 102 Ga. App. 117, 115 S.E. 2d 877 (1960).

the speed limit sign established the fact plaintiff sought to establish by the clerk's testimony, and had the court rejected the testimony, plaintiff "would undoubtedly then have offered the ordinance book in evidence," since it was in court.

Another point in the same case was the admission into evidence of a letter from the director of the National Almanac Office of the U.S. Naval Observatory giving the time of sunrise at Portal, Georgia on January 27, 1959. The letter contained a certification. The defendant objected that the proper way to establish the time of sunrise was to have someone testify to the fact. The court said that if the admission of the letter was error, it was harmless, because the court could take judicial notice of things properly belonging in an almanac.

In *State Highway Department v. Wells*,[54] the trial court ruled out testimony as to the value of a house because on cross-examination the witness, Chapman, testified that he took the word of someone else as to the number of square feet in the house. During the trial of the case, another witness, Washburn, upon whose information Chapman had relied, testified as to the size of the house. The appellant alleged error because the court failed to charge that the jury was not to consider hearsay testimony ruled out, although there was no request for the charge. The court relied on *Martin v. The State*[55] for the proposition that where a witness gives hearsay testimony as to a fact which is later established by a witness with personal knowledge, the admission of the hearsay is not reversible error. Consequently, the court held that it was not reversible error to fail to charge the jury without a request not to consider the hearsay testimony that had been ruled out. The court did not make clear whether a failure to so charge upon request would be reversible error.

In *Chatham Amusement Co., Inc. v. Perry*,[56] an action for specific performance of a contract to convey land, the court held that the admission in evidence of a letter accompanying the tender of the purchase price was not error. Even if the letter were a self-serving declaration, it was uttered to the vendor's agent, and was an integral part of the res gestae.

ADMISSIONS

In *Bentley v. Ayers*,[57] a tort action arising from an automobile collision, plaintiff alleged error because the trial court admitted copies of petitions in similar suits filed by plaintiff and his wife in a prior

54. 102 Ga. App. 152, 115 S.E. 2d 585 (1960).
55. 44 Ga. App. 276, 161 S.E. 371 (1931).
56. 216 Ga. 445, 117 S.E. 2d 320 (1960).
57. 102 Ga. App. 733, 117 S.E. 2d 633 (1960).

year. The basis of both suits was a back injury sustained by the wife. The Court of Appeals upheld the trial court, saying that "The admissions contained in the pleading of one party, made and filed by him in another case, are admissible in evidence against him when pertinent to a question involved in the case of trial."[58]

The plaintiff in *Sutherland v. Woodring*,[59] also a tort action arising from an automobile accident, was a sixteen year old girl. In his amended motion for a new trial, the defendant contended that plaintiff had made solemn admissions in judicio while testifying showing that defendant was not guilty of gross negligence. The Court of Appeals said that the jury was authorized to disregard the plaintiff's opinion because she was young, inexperienced and frightened. Even if the jury was so authorized, the rule invoked by defendant is not applicable "when plaintiff's testimony is not the sole testimony and evidence authorizes a finding in the plaintiff's favor."

THE DEAD MAN'S STATUTE

The dead man's statute[60] appeared in two cases during the survey period. One case[61] was an action on a note by the administratrix of the payee. The defendant entered a special plea that the indebtedness had been discharged by the payment in full of a *fi. fa.* issued on a judgment entered by the U.S. District Court in favor of the trustee in bankruptcy of the deceased against defendant. The trial court rejected as evidence a copy of the suit and order of default judgment in that case on the ground that it did not refer to the notes in question. Defendant also offered in evidence the original petition in bankruptcy of the deceased to show that there was no recitation of defendant's indebtedness, as well as some of the sworn testimony in the bankruptcy proceeding. The trial court rejected all of this evidence and directed a verdict for plaintiff.

The Court of Appeals recognized that defendant's problem was the dead man's statute preventing him from testifying as to any transaction on the note. However, it sustained the trial court on the ground that there was no positive connection between the offered evidence and the note. The court also pointed out that, contrary to universal practice upon payment, the payee had not surrendered the note, and the implication was that it had not been paid. The court also appeared to express approval of the dead man's statute.

58. *Id.* at 735, 117 S.E. 2d at 636, quoting from Central of Georgia Ry. v. Goens, 30 Ga. App. 770, 119 S.E. 669, 670 (1923).
59. 103 Ga. App. 205, 118 S.E. 2d 846 (1961).
60. GA. CODE §38-1703 (1) (1933).
61. Gaskill v. Brown, 103 Ga. App. 33, 118 S.E. 2d 113 (1961).

> While the policy of the law which seals the lips of those who wish to testify as to transactions with the dead may on occasion result in an injustice to the living, it is designed to prevent the possibility of more frequent injustice to the dead or their heirs.[62]

The other case[63] was a trover action to recover kitchen equipment which was covered by a defectively attested title-retention contract from the subsequent purchasers of the house containing the equipment. Plaintiff contended that defendants' deceased attorney had actual knowledge of the title-retention contract and that such knowledge was chargeable to defendants. The Court of Appeals, however, upheld the trial court in its exclusion of testimony by the president of the plaintiff corporation concerning a conversation between himself and defendants' attorney. The court relied on GA. CODE ANN. §38-1603 (5) (1954 Rev.), holding that a surviving agent shall not testify in favor of a surviving party as to transactions with a deceased agent under circumstances where such witness would be incompetent if the deceased agent had been a principal. The court pointed out that the excluded evidence did not show the attorney's actual knowledge at the time of the execution of the contract.

IMPEACHMENT

The language in *State Highway Department v. Sinclair Refining Co.*,[64] although somewhat unclear, indicates that a corporate party to a suit cannot be impeached. The appellant alleged error because the trial court refused to permit a witness for the condemnor to answer the following question: "In dealing with Sinclair Oil Company, or Sinclair Refining Company, do you consider that they treated you fairly?" Counsel explained that the purpose of the question was to impeach witnesses for the condemnee, a corporation, by showing that the witness would not believe its officers, agents and employees under oath. The court said where a party does not testify, what is there to impeach. The witness for a corporate party may be impeached, but where a witness who is not himself a party is impeached, this does not impeach every witness who testifies for the party. The court further concluded that the effect of the testimony would not have been to impeach the "corporation," but to weaken the testimony of the condemnor's witness by showing that he harbored ill will toward the corporation. Consequently, the exclusion of the evidence, if error, was not harmful error.

62. *Id.* at 35, 118 S.E. 2d at 114.
63. American Distributing Co. v. Reid, 101 Ga. App. 477, 114 S.E. 2d 299 (1960).
64. 103 Ga. App. 18, 118 S.E. 2d 293 (1961).

In *State Highway Department v. J. A. Worley & Co.*,[65] another condemnation case, the trial court admitted evidence that a witness for the condemnor who had also served as an assessor had made a return of the property at a much higher value than he gave on direct examination during the trial. The court instructed the jury that this evidence was not evidence as to the value of the property, but was allowed solely for the purpose of impeachment. The court allowed the witness to explain the inconsistency, and the admission of the evidence for impeachment was not error.

In *Anderson v. The State*,[66] a manslaughter case, the court reaffirmed the rule that a party cannot impeach his own witness except where he can show that the witness entrapped him by testifying contrary to previous statements made to the party or his attorney. Thus, the trial court did not err in admitting the written statement of a witness for the state impeaching her testimony at the trial of the case.

65. 103 Ga. App. 25, 118 S.E. 2d 298 (1961).
66. 103 Ga. App. 83, 118 S.E. 2d 381 (1961).