593.16 JURY OF SIX; DRAWING; CHALLENGES

HISTORY. 1927 c 345 s 2; 1929 c 236 s 2.

593.17 CHALLENGES

HISTORY. 1927 c 345 s 3; 1929 c 236 s 3.

JUDICIAL PROOF

CHAPTER 595

WITNESSES

595.01 WITNESS

Unfavorable inference from failure to call a witness. 33 MLR 423.

Dissatisfaction with exclusionary rules relating to the admission of evidence. 34 MLR 582.

Compulsory use of blood grouping tests in paternity cases. 35 MLR 515.

Definition of reasonable doubt in criminal cases. 35 MLR 584.

Executive immunity from disclosure. 35 MLR 586.

Intentional multi-state torts. 36 MLR 1.

Admissibility of public opinion polls; hearsay evidence. 37 MLR 385.

State and federal income tax statutes, notable differences. 38 MLR 1.

Where plaintiff's witness on cross-examination testified that she did not remember making certain statements to defendant's representative concerning the accident and refused to admit or deny having made such statements, a sufficient foundation was laid to authorize defendant to call such representative as an impeaching witness to prove the statement. Koop v Great Northern, 224 M 286, 28 NW(2d) 687.

The competency of an expert witness is addressed to the sound discretion of the trial court. Beckman v Schroeder, 224 M 370, 28 NW(2d) 629.

The trial court primarily determines the qualifications of a witness offered as an expert. Sallblad v Burman, 225 M 104, 29 NW(2d) 673.

The demonstrated physical facts, fortified by the positive testimony of disinterested witnesses, must in the instant case prevail over the declarations of plaintiffs, who were vitally interested in securing a favorable outcome. It is manifest that the evidence, with its undisputed physical facts, so overwhelmingly and conclusively preponderates against the verdict as to negate the testimony of the plaintiffs and to leave the verdict without a reasonable basis for its support. Cofran v Swanman, 225 M 40, 29 NW(2d) 448.

The res ipsa loquitur rule does not apply where the instrumentality causing the injury was not under the exclusive control of the defendant; and in the instant case an injury to a woman falling into an open coal hole in the public sidewalk, abutting upon the church's property, did not of itself afford sufficient evidence to support her burden of proving that the church was guilty of negligence proximately causing or contributing to the accident. Fandel v Parish of St. John the Evangelist, 225 M 77, 29 NW(2d) 817.

In an action by the executrix to set aside gifts made by the testatrix during her lifetime on the ground of undue influence and lack of mental capacity, testimony of

one of the donees as to conversations had with the testatrix in order to show testatrix' mental condition was inadmissible unless such testimony was invited. Sullivan v Brown, 225 M 524, 31 NW(2d) 439.

A conflict in opinions of expert witnesses is to be resolved by the jury and in determining the comparative weight to be given respective opinions, the jury may consider qualifications of each expert and the source of his information. Koenigs v Thome, 226 M 14, 31 NW(2d) 534.

It is well settled that the parol evidence rule is not applicable to exclude evidence of fraudulent oral representations by which one party induces another to enter a written contract, provided the representations were such that the other party might reasonably rely upon them. Where a party to a contract has partially performed it before discovering the falsity of the representation which induced him to enter into it, he is not obliged to retrace his steps, but may complete performance without waiving the fraud and then bring an action for damages for deceit. Damages in an action for false representations and deceit are the natural and proximate loss sustained by the party because of reliance thereon. In cases where the fraud induced a purchase, the measure of damages is the difference in value between what was given and what was received. The burden of proving his loss is on plaintiff, and the amount of damages is a question of fact for the jury to determine from a consideration of all the facts of the case. Rosenquist v Baker, 227 M 217, 35 NW(2d) 346.

Medical testimony supports the finding of the industrial commission that no relation of cause and effect existed between a kick given to an employee by his "straw boss" when employee got behind in his work of detasseling corn and a severe case of osteomyelitis which employee developed within a few days thereafter. Roberts v De Kalb, 229 M 188, 38 NW(2d) 189.

Where the opinions of medical experts have a reasonable basis on the facts but differ as to the cause of death, the credibility and weight to be given the opinion is ordinarily a question to be determined by the trier of facts. The evidence in the instant case was sufficient to present a question for the jury as to whether an accident which occurred 40 days before the decedent's death from coronary sclerosis or thrombosis was a contributing cause of the death so as to authorize recovery. Freeman v Mattson, 230 M 261, 41 NW(2d) 249.

Negligence and its causal relation to the injuries upon which the right to recover rests must be proved by that degree of proof established by law. It may be proved by substantial evidence, but the evidence sustaining the hypothesis contended for must preponderate against another hypothesis where there is no evidence to establish negligence, mere proof that plaintiff's intestate in some manner met his death by being hit or run over leaves the verdict for plaintiff based on conjecture and speculation, and it cannot stand. Hagsten v Simberg, 231 M 160, 44 NW(2d) 611.

A party has a right to explain contradictory statements made by him which have been received in evidence and the fact that certain statements made by a witness are inconsistent does little to impair the credibility of such witness when the inconsistency has been explained by the witness and his testimony is otherwise corroborated by independent evidence. Hanson v Homeland Co., 232 M 403, 45 NW(2d) 637.

If evidence as a whole so overwhelmingly preponderates in favor of a party as to leave no doubt as to factual truth, he is entitled to a directed verdict as a matter of law even though there is some evidence which, if standing alone, would justify a verdict to the contrary. Hanson v Homeland Co., 232 M 403, 45 NW(2d) 637.

The most commonly used and probably the most effective means of discrediting a witness is by showing that he has previously made statements inconsistent with his present testimony. 36 MLR 727.

Johnson v Young, 127 M 462, 149 NW 940; State v Jensen, 151 M 174, 186 NW 581; Newton v Minneapolis Street Railway, 187 M 439, 243 NW 684.

A witness may always be impeached by evidence tending to show that he is disposed to testify falsely for gain. 36 MLR 727.

Alward v Oakes, 63 M 190, 65 NW 270; State v Tall, 43 M 273, 45 NW 449.

At early common law a person who had a pecuniary interest in the outcome of the action was precluded from appearing as a witness. This rule has long since been published in all jurisdictions, but while such persons may now testify, the fact of their interest may be shown to affect their credibility. 36 MLR 726.

Evidence of the bias of a witness is always admissible and may be offered by cross-examination or extrinsic evidence. Bias includes both prejudice for and hostility against a party and is in many cases an effective means of impeachment since it shows a motive or reason why the witness could be lying. 36 MLR 725.

While the law of impeachment is in many respects well settled and uniform throughout the country, there are areas in which the Minnesota law is as yet unsettled or in which it differs from that of other jurisdictions. There are areas in which revision of the present law seems necessary, especially in view of the modern tendency of the courts to admit all evidence having probative value unless it should be excluded on clear grounds of policy. 36 MLR 724.

The bad reputation of a witness for truth and veracity may be shown to discredit him. 36 MLR 730.

Simmons v Holster, 13 M 249 (232); Rudsvill v Slingerland, 18 M 380 (342); Buse v Page, 32 M 111, 19 NW 736.

The rule in Minnesota is that prior misconduct is within the proper scope of inquiry on cross-examination but that the examiner is bound by the answers of the witness and the particular acts may not be shown by extrinsic evidence. 36 MLR 733.

Campbell v Aarstad, 124 M 284, 144 NW 956; State v Nelson, 148 M 285, 181 NW 850; State v Silvers, 230 M 15, 40 NW(2d) 632.

By statute a person convicted of a crime shall nevertheless be a competent witness, but the prior conviction may be shown to discredit his testimony. 36 MLR 735.

State v Sauer, 42 M 258, 44 NW 115; Brase v Williams Sanatorium, 192 M 304, 256 NW 176.

The preliminary question whether a witness offered as an expert has the necessary qualifications is for the trial court and is largely within its discretion. Beckman v Schroeder, 224 M 370, 28 NW(2d) 629.

Opinion evidence should be received only when the subject matter is complicated or its operation difficult and where it embraces matter either in construction or operation not of common knowledge. When the subject matter of inquiry lies outside the range of common knowledge, expert evidence is admissible. Beckman v Schroeder, 224 M 370, 28 NW(2d) 629.

The rule that a trier of fact cannot disregard positive testimony of an unimpeached witness until the record shows such improbability or inconsistency as furnishes a reasonable ground for so doing, has no application where witness' testimony is contradicted or where he is evasive. The trier of fact may reject the testimony of a witness where it is contradicted or where it is evasive. Grengs v Erickson, 225 M 153, 29 NW(2d) 881.

Whether a witness qualifies as an expert is a question of fact to be decided by the trial court. The court's determination will not be reversed on appeal unless it appears that the determination was not justified by the evidence, or was based on an erroneous construction of legal principles; and a conflict in the opinions of expert witnesses is to be resolved by the jury who may consider the qualifications of each expert and the source of his information. Koenig v Thome, 226 M 14, 31 NW(2d) 534.

A general practitioner, plaintiff's personal physician for many years prior to the automobile accident, qualified as an expert, enabling him to testify as to preexisting condition of plaintiff's health in suffering from Friedreich's ataxia; and that plaintiff's suffering was aggravated by the injuries sustained. Koenig v Thome, 226 M 14, 31 NW(2d) 537.

Prior contradictory statements of a witness are admissible for impeachment, but it must appear that there is an inconsistency between the prior statements of the witness and the present testimony before they become admissible. Bosell v Rannestad, 226 M 413, 33 NW(2d) 41.

Where an employee who could give important testimony relative to issues in litigation is not present and his absence is unaccounted for by his employer, who is a party to the action, a presumption arises that the testimony of such employee would be unfavorable to his employer. The foregoing rule has no application, however, where such a witness is no longer in the employ of the party to the litigation and no obligation rests upon the latter under such circumstances to present the former employee as a witness, particularly where the burden of proof is upon the opposing litigant. Held that trial court erred in permitting over objection counsel for plaintiff to draw jury's attention to failure of defendant corporation to produce as a witness a former employee whose employment with such defendant had been terminated some four years prior to the trial, and to insist that defendant's failure in this respect warranted the jury in drawing unfavorable inferences against defendant because thereof. Ellerman v Skelly Oil Co., 227 M 65, 34 NW(2d) 251.

Utterances of a party incapable of recollecting and narrating the facts to which his utterances relate are inadmissible as admissions. Utterances of a party incapable of recollecting and narrating the facts to which his utterances relate are inadmissible as part of the res gestae. Ordinarily, under the rule of Ryan v Metropolitan Life Insurance Co., 206 M 562, 289 NW 557, an instruction that there is a presumption that decedent at the moment of death was in the exercise of due care should not be given in a civil case; but if it be conceded, as it is contended here, that such an instruction should be given in an action for wrongful death, where the evidence as to decedent's alleged contributory negligence is in equilibrio or the jury disbelieves it, refusal to give such an instruction here was, under the circumstances stated in the opinion, without prejudice. Amundson v Tinholt, 228 M 115, 36 NW(2d) 521.

It is entirely improper for counsel to become a witness for his client in a case which he is trying, but occasionally an emergency develops where the attorney is compelled to testify in order to protect his client's interest and assist in the furtherance of justice. When such emergency occurs, it is within the trial court's discretion to decide whether the testimony of the attorney should be admissible. In the instant case where the trial judge permitted the attorney to testify, there was no abuse of discretion. Hagerty v Radle, 228 M 487, 37 NW(2d) 819.

Where one party introduced inadmissible evidence he cannot complain if the trial court permits his opponent in rebuttal to introduce similar inadmissible evidence. State v De Zeler, 230 M 39, 41 NW(2d) 313.

The performance of experiments in the presence of the jury, or the admission of evidence of experiments performed out of the presence of the jury, when they are made under conditions and circumstances substantially similar to those existing in the case at issue, for the purpose of proving facts in issue, rests in the sound discretion of the trial court in both criminal and civil proceedings. State v De Zeler, 230 M 39, 41 NW(2d) 313.

Where the facts and circumstances disclosed by circumstantial evidence form a complete chain, which in the light of the evidence as a whole lead so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt, the verdict must stand. State v De Zeler, 230 M 39, 41 NW(2d) 315.

Evidence that a motorist proceeded cautiously through intersection and was struck when more than half way through by an automobile being driven without lights at midnight, by a drunken driver, supported a ruling refusing to submit the issue of contributory negligence of the motorist to the jury. Freeman v Mattson, 230 M 261, 41 NW(2d) 249.

Whether expert real estate witnesses were sufficiently acquainted with the property to qualify them to give their opinions as to its value is a question for determination by the trial court. In the instant case the court did not abuse its discretion. Marion v Miller, ... M ....., 55 NW(2d) 52.

In action against landlord and tenant for injuries sustained by tenant's customer when he fell down elevator shaft, testimony of plaintiff that tenant's employee, who raised elevator gate, was not plaintiff's fellow worker, was not objectionable as an effort by plaintiff to impeach hospital record previously submitted by him, on which it was indicated that such employee was a fellow worker of plaintiff, but such testimony was merely an attempt to correct error in hospital record, and did nothing to discredit plaintiff's previous testimony, nor did it cause prejudice to any of the parties. Dix v Harris Machinery Co., ... M ....., 60 NW(2d) 628.

The nature and feasibility of safeguards and precautions that could have been taken with respect to a potentially dangerous condition are proper subjects for expert testimony provided that they are not of such common knowledge that the jury is equally capable of judging them. Testimony of this nature given by plaintiff's expert witness over a defendant's objection of insufficient foundation considered and is not grounds for reversal. Whether a witness qualifies as an expert ordinarily is a question to be decided by the trial court, and its ruling thereon will not be reversed on appeal unless it is based on some erroneous view of the law or is clearly not justified by the evidence. Rulings of trial court rejecting certain testimony offered by defendant considered and found to present no grounds for reversal. Hartmon v National Heater Co., ... M ....., 60 NW(2d) 804.

It is difficult to imagine any satisfactory ground for deciding that evidence which is admissible before the federal trade commission is inadmissible before a judge sitting without a jury in a civil anti-trust case brought by the government. United States v United Shoe Machinery Corporation, 89 F Supp 349.

595.02 COMPETENCY OF WITNESSES

NOTE: It has been suggested that Minnesota should adopt, either in toto or in part, Rule 106 of the Model Code of Evidence which reads: "(1) Subject to Paragraphs (2) and (3), for the purpose of impairing or supporting the credibility of a witness, any party including a party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issue of his credibility as a witness, and need not, in examining him as to a statement made by him in writing inconsistent with any part of his testimony, show or read to him any part of the writing, except that extrinsic evidence shall be inadmissible.

"(a) of traits of his character other than honesty or veracity or their opposites, or

"(b) of his conviction of crime not involving dishonesty or false statement, or

"(c) of specific instances of his conduct relevant only as tending to prove a trait of his character.

"(2) The judge in his discretion may exclude extrinsic evidence of a written or oral statement of the witness offered under Paragraph (1) unless the witness was so examined while testifying as to give him an opportunity to deny or explain the statement.

"(3) If an accused who testifies at the trial introduces no evidence for the sole purpose of supporting his credibility, no evidence concerning his commission or conviction of crime shall, for the sole purpose of impairing his credibility, be elicited on his cross-examination or be otherwise introduced against him; if he introduces evidence for the sole purpose of supporting his credibility, all evidence admissible under Paragraph (1) shall be admissible against him."

Discovery under federal rules. 31 MLR 712.

Capacity of the spouse as a witness; privileged communications between spouses. 32 MLR 267.

Admissibility of lie detector test results into evidence. 35 MLR 310.

Admissibility of uncommunicated threats. 35 MLR 315.

Privilege of a communication to a judge. 35 MLR 409.

The rights of husband and wife to limit evidenciary disclosures in court by their spouses. 36 MLR 251.

A proper and necessary function of impeachment is to discredit the testimony of a witness by showing that the witness is incapable of correctly observing, remembering, or narrating the facts to which he testifies. 36 MLR 738.

Rights of insane offenders. 36 MLR 933.

With the exception of an adverse party called for cross-examination and a witness required by statute, such as an attesting witness to a will, a party cannot impeach his own witness by the showing of a prior inconsistent statement unless the party was surprised by the testimony. 36 MLR 738. See, Selover v Bryant, 54 M 434, 56 NW 58; Lindquist v Dickson, 98 M 369, 107 NW 958; State v Shea, 148 M 368, 182 NW 445.

The supreme court will take judicial notice of the fact that the purchasing power of money has shrunk, and will take such shrinkage into consideration when comparing present verdicts with verdicts previously rendered, to determine whether present verdicts are excessive. Kauppi v Northern Pacific Ry., 235 M 104, 49 NW(2d) 670.

In a tort case arising out of an automobile collision, the testimony of the highway patrolman as to admissions made by the defendant in the presence of several persons as to how the collision occurred was inadmissible under the provisions of this section. The admissions were not made in official confidence. There were other persons present. There was no showing that the public interest would suffer by the disclosure. The fact that the county attorney was present when the admissions were made is immaterial. Rockwood v Pierce, 235 M 519, 51 NW(2d) 670.

A witness engaged in selling and servicing automobiles since 1914, and who had worked on a great many wrecked automobiles and participated in or supervised their repair, was qualified after examining photographs of automobiles involved in a collision to state his opinion as to the part of defendant's automobile that collided with plaintiff's truck. Whether a sufficient violation has been laid to qualify a witness as an expert is a question for the trial court. The fact that the opinion of an expert bears directly on the issue is to be determined by the jury, does not render it inadmissible. Woyak v Konieske, 237 M 213, 54 NW(2d) 649.

Where each motorist involved in intersection collision brought separate action against the other for damages sustained in the collision, and actions were consolidated and verdict in both actions was returned for the same motorist, granting of new trial of one action and denying new trial of the other was error, in view of fact that verdict or judgment in action in which new trial was denied would constitute estoppel or res judicata as to issues of negligence and contributory negligence in retrial of other action. Hierl v McClure, ... M ....., 56 NW(2d) 721.

In an action for injuries sustained where plaintiff, while embarking on an airplane at defendant's airport, slipped on a rubber roller and fell between a removable stairway and the airplane to which it was adjacent, the evidence on the issue as to plaintiff's contributory negligence was for the jury, and an award of $50,000 to the plaintiff who became afflicted with multiple sclerosis was not excessive under the evidence which indicated that prior to the accident the plaintiff was young, healthy and capable of earning a substantial living as an accountant and capable of operating a profitable enterprise and that as a result of the accident he would be crippled for life. Weller v Northwest Airlines, ... M ....., 58 NW(2d) 739.

Medical books, however celebrated their authors, are not admissible in evidence; but where an expert witness has based his opinion upon a particular medical book, he may be cross-examined with reference to it and parts of the book which contradict him may be read into the record. Briggs v Chicago, Great Western Ry. Co., ... M ....., 57 NW(2d) 572.

A layman, as a nonexpert witness, may give an opinion as to the mental capacity or condition of a testator's mind, only if a proper foundation has been laid by showing that the witness had an opportunity to observe and did observe testator's

mental characteristics and habits at such times with respect to such facts and under such circumstances as enabled him to form a reasonably reliable and trustworthy opinion as to the testator's mental condition. Cade v Hoff, 237 M 313, 54 NW(2d) 784.

In a proceeding to contest the validity of a will on the ground of mental incapacity or undue influence, if there are two or more beneficiaries whose interests under the will are several and not joint, inconsistent extrajudicial declarations or admissions of one beneficiary are inadmissible as substantive evidence if they are prejudicial, not merely in a technical sense, to the interests of the co-beneficiaries. Cade v Hoff, 237 M 313, 54 NW(2d) 784.

It is not an appellate court's province to set aside a verdict based upon testimony and approved by the trial court unless the record discloses prejudicial error. Katlaba v Pfeifer, ... M ....., 56 NW(2d) 721.

In the absence of manifest error the court under the doctrine of stare decisis must follow its previous decision; and while the common law is flexible and adaptive and applicable to new conditions, courts cannot abrogate its established rules any more than they can abrogate a statute. One spouse cannot maintain an action against the other for a personal tort committed during coverture. The driver of an automobile was not liable to the wife in tort for injuries sustained by her in a collision with an insured automobile and the liability insurer, having satisfied a judgment for such injuries against the insureds could not recover contribution from the injured person's husband, since his marital immunity from liability to the injured wife resulted in an absence of the element of common liability essential to action for contribution. American Auto Insurance Co. v Molling, ... M ....., 57 NW(2d) 847.

Parol evidence was inadmissible to vary the commission salesman's employment contract to show that the salesman had orally agreed to devote his entire efforts to his employer's service. Jimmerson v Troy Seed Co., 236 M 395, 53 NW(2d) 273.

The terms and conditions of a written contract implied by law are no more subject to variation by parol evidence than the express terms of a contract. Jimmerson v Troy Seed Co., 236 M 395, 53 NW(2d) 273.

Where the terms of a written contract are uncertain and ambiguous and susceptible of more than one interpretation, parol evidence may be introduced to show what was in the minds of the parties when the contract was made and the actual situation that then existed to the knowledge of both parties. The basic rate of an architect's compensation which under the written contract was to be based upon the total cost of work defined as a contract, sums incurred for execution of the work, could be determined only after construction of the contract had been let and could not be based on a rejected bid substantially in excess of the limitation placed by the owner on the cost of the work. Wick v Murphy, 237 M 447, 54 NW(2d) 805.

It is only in the clearest of cases, when facts are undisputed and it is plain that only one reasonable conclusion can be drawn therefrom, that the question of contributory negligence becomes one of law, and if there is an honest difference of opinion among reasonable men as to whether a party's conduct was negligent or otherwise, the question is one for the jury. Weller v Northwest Airlines, ... M ....., 58 NW(2d) 739.

Where an employer provides a safe and reasonable means of ingress to and egress from his premises, and an employee, for his own convenience, chooses not to use it but instead finds a ladder and scales a ten-foot fence and is injured in so doing, such injuries are not caused by an accident arising out of the course of his employment. It is common knowledge that a ten-foot high fence located around a building under construction is there to prevent ingress and egress at places where the fence is located. Corcoran v Fitzgerald Bros., ... M ....., 58 NW(2d) 744.

The fact that the so-called "house counsel" is an attorney who is paid an annual salary, occupies office in his employer's building, and is an employee rather than an independent contractor, does not prevent him claiming the attorney-client privilege when called before the grand jury or upon trial to give evidence. United States v United Shoe Machinery Corp., 89 F Supp 357.

Where the operator of a milk farm brought an action against the United States to recover damages for the destruction of the animals allegedly caused by the navy pilots flying low over the farm, the credibility and weight of the evidence of the farm operator and the airplane pilots who were witnesses was for the trier of facts. Leisy v United States, 102 F Supp 789.

595.03 Superseded by Rules of Civil Procedure, Rule 43.02.

Annotations relating to superseded section 595.03.

Where plaintiff's witness on cross-examination testified that she did not remember making certain statements to defendant's representative concerning the accident and refused to admit or deny having made such statements, a sufficient foundation was laid to authorize defendant to call such representative as an impeaching witness to prove the statement. Koop v Great Northern, 224 M 286, 28 NW(2d) 687.

An insurance agent whose activities are confined solely to the solicitation and procurement of applications for insurance from prospective risks, and who has no authority to approve the application, to accept or compromise insurance claims, to employ agents, or otherwise to supervise the insurance company's business, is not a "managing agent" subject to cross-examination. Pomerenke v Farmers Life Company, 228 M 256, 36 NW(2d) 703.

In a preliminary hearing before a justice of the peace in paternity proceedings, the accused may be called for cross-examination as an adverse witness. OAG June 18, 1953 (840-C-7).

595.04 CONVERSATION WITH DECEASED OR INSANE PERSON

HISTORY. RS 1851 c 95 s 51; 1852 Amend p 20 s 93; PS 1858 c 84 s 51; 1861 c 36 s 1; 1862 c 39 s 1; Ex1862 c 13 s 1; 1863 c 34 s 1; GS 1866 c 73 s 8; 1874 c 70; 1877 c 40 s 1; GS 1878 c 73 s 8; GS 1894 s 5660; 1895 c 27; RL 1905 s 4663; GS 1913 s 8378.

Where evidence disclosed that prior to his death insured had executed change-of-beneficiary form furnished to him by insurer through its soliciting agent and cashier and had left same, together with the policy with them, with instructions to insert date in notice and thereafter forward same to insurer's home office upon notification by insured that his divorce had been granted; and where insured subsequently notified soliciting agent that his divorce had been granted and to insert date in notice and forward it with policy at once to insurer's home office, held that such acts and instructions on part of insured were sufficient to establish that insured had set in motion the transmission of notice and policy to insurer's home office and had done everything reasonably possible to effectuate the desired change, and that such change had been effectuated thereby, notwithstanding failure of agent to deposit notice and policy in mail until subsequent to insured's death the following morning. Where evidence disclosed that insurer had furnished a soliciting agent and its cashier with blank change-of-beneficiary forms to assist policyholders in making changes of beneficiary; had given specific instructions to such agent and cashier as to manner and method to be followed in assisting policyholders in bringing about such changes; and had delivered receipts for such notices in name of insurer, such agent and cashier were agents of insurer rather than of insured in performing the described acts. Boehne v Guardian Life Insurance Co., 224 M 58, 28 NW(2d) 54.

Section 595.04 is not too strictly construed. It must be given a fair and reasonable construction to accomplish its purpose to carry out the legislative intent. Pomerenke v Farmers' Life, 228 M 256, 36 NW(2d) 703.

The verbal acts rule, as an exception to section 595.04, and referred to in Estate of Mumm, 177 M 226, 225 NW 102, does not permit a party or interested person to give conversations with a deceased as a basis for the drawing of an inference as to the decedent's actual intent on the theory that the conversations reveal that decedent's mental attitude was one of hostility or prejudice toward a certain person or subject. In re Eklund's Estate, 233 M 519, 47 NW(2d) 422.

A wife of a party to an action, by virtue of her inchoate statutory interest in the lands of her husband, is a person interested in event of action and is not competent

to give evidence of or concerning any conversation with a decedent relative to any matter at issue between the parties with respect to such lands. In re Eklund's Estate, 233 M 519, 47 NW(2d) 422.

To warrant specific performance of an oral contract to give real property by will, the contract (a) must be established by clear, positive, and convincing evidence; (b) must have been made for an adequate consideration and upon terms which are otherwise fair and reasonable; (c) have been induced without sharp practice, misrepresentation or mistake; (d) its enforcement must not cause unreasonable or disproportionate hardship or loss to the defendants or to third persons; and (e) must have been performed in such a manner and by the rendering of services of such a nature that under such circumstances the beneficiary cannot be properly compensated in damages. A party is competent to testify when his testimony is adverse to his own interest. Ehmke v Hill, 230 M 353, 41 NW(2d) 813.

Where the purchaser relies primarily not upon his own personal assets but upon the proceeds of a contemplated loan or loans to be made to him by a third party, he is financially able to buy only if he has a definite and binding commitment from such third-party loaner. Shell Oil Co. v Kapler, 235 M 292, 50 NW(2d) 707.

A presumption is merely a procedural device for controlling the burden of going forward with the evidence and it has no additional function other than the limited one of dictating the decision where there is an entire lack of competent evidence to the contrary; the very moment substantial countervailing evidence appears from any source, it vanishes completely, and the case is to be decided by the trier of fact as if the presumption had never existed. Shell Oil Co. v Kapler, 235 M 292, 50 NW(2d) 707.

The doctrine of part performance sufficient to take an oral contract out of the statute of frauds may rest either on the fraud theory or the unequivocal reference theory; where the plaintiff has failed to bring his cash within the confines of either of these theories, specific performance of the oral contract is denied. Burke v Fine, 236 M 52, 51 NW(2d) 818.

A son who had no interest in his father's estate as heir, legatee, creditor or otherwise was not prohibited by the dead man's statute from testifying in support of claims in respect to loans and advances made by claimant to the witnesses' father at the father's request for the father's benefit. In re Arnt's Estate, 237 M 245, 54 NW(2d) 333.

A son to whom was made payable the check at the time of the loan and who endorsed such check in blank, had such interest with respect to the lender's claim against the deceased father's estate as to render the son incompetent under the dead man's statute as to testify as to conversations which the father had with the son and lender relating to the loan transaction. On appeal by claimant whose four claims against the estate were disallowed, from an order denying amended findings and conclusions of law, or for new trial, the supreme court would allow three of the claims where it was conclusively established that such claims were for money loaned to the decedent, and would order a new trial as to the fourth claim where the material facts with reference thereto were in sharp dispute. In re Arnt's Estate, 237 M 245, 54 NW(2d) 333.

Where goods are wrongfully comingled every reasonable doubt should be resolved against the wrongdoer. Where husband and wife pooled their earnings and the wife thereafter allegedly wrongfully converted part of the joint savings, the parties' respective rights to the joint account must be determined as of the time of the conversion and not by a balancing of the property acquired by the husband prior to the conversion with what he would have had if there had been no pooling of funds. In a replevin action by the mother of the deceased against the deceased's husband to recover United States bonds in which the mother was named as beneficiary, although the husband is prevented from testifying to conversations with his deceased wife, the circumstances concerning their dealings with each other may be taken into consideration as well as testimony of the disinterested witnesses in determining whether the evidence is sufficient to establish an argument between them. Peterson v Swan, ... M ....., 57 NW(2d) 842.

Conversations with a party since deceased prevented the plaintiff from relating any conversations had with the decedent as to a contract to devise property to plaintiff. Alsdorf v Svoboda, ... M ....., 57 NW(2d) 824.

In determining whether the evidence is sufficient to establish an agreement between husband and wife, the circumstances concerning their dealings with each other may be taken into consideration as well as the testimony of disinterested witnesses. Peterson v Swan, ... M ....., 57 NW(2d) 842.

Where there was nothing in the record that the witness for the contestant to a will was an interested witness or party within the meaning of the "dead man's statute," a motion to strike all of her testimony concerning conversations with the decedent was properly denied. Palmer's Estate, ... M ....., 57 NW(2d) 409.

In an action to recover balance of joint bank accounts opened by plaintiff's aunt, now deceased, in name of herself and plaintiff brought against the bank and against the person named as joint depositor in accounts subsequently opened, plaintiff was not competent to testify that the aunt, when opening the accounts in the joint name, stated to an official of the defendent bank that "she wished to give me an interest in her bank account" for the purpose of establishing a present gift. Cashman v Mason, 72 F Supp 487.

595.05 Superseded by Rules of Civil Procedure, Rule 43.04.

595.06 CAPACITY OF WITNESS

A "res gestae" statement must be contemporaneous with the cost or transaction of which it is a part and it is sufficient if made so soon after the act or transaction that it may fairly be regarded as a part or incident thereof. In determining whether an utterance or statement is a part of the res gestae, the trial court has a wide discretion which is not absolute. State v Gorman, 229 M 524, 40 NW(2d) 347.

CHAPTER 596

SUBPOENAS

596.01 Superseded by Rules of Civil Procedure, Rule 45.05, to the extent applicable to district and municipal courts.

596.02 Superseded by Rules of Civil Procedure, Rule 45.03.

596.04 Superseded by Rules of Civil Procedure, Rule 45.06.

CHAPTER 597

DEPOSITIONS

597.01 Superseded by Rules of Civil Procedure, Rules 26.01, 26.07, 28.01, 28.02, and 30.01.

Annotations relating to superseded section 597.01.

Discovery under the federal rules. 31 MLR 712.

Depositions. 31 MLR 716.