Judicial Proof

CHAPTER 595

WITNESSES

595.01 WITNESS.

HISTORY. R.S. 1851 c. 95 s. 50; P.S. 1858 c. 84 s. 50; G.S. 1866 c. 73 s. 6; G.S. 1878 c. 73 s. 6; G.S. 1894 s. 5657; R.L. 1905 s. 4654; G.S. 1913 s. 8369; G.S. 1923 s. 9808; M.S. 1927 s. 9808.

The rule of competency as to the attesting witness to a will is that defined by statute, sections 595.01, 595.02. Holt's Will, 56 M 33, 57 NW 219.

The testimony of the payee, given at the first trial with full opportunity of cross-examination by the same counsel, is admissible upon the second trial, the witness being absent from the state. Cox v Selover, 171 M 216, 213 NW 902.

Instruction to the jury that admission of evidence of defendant's previous conviction of crime was properly received for its bearing on his credibility as a witness. State v Skogman, 171 M 515, 213 NW 923.

The foundation for expert testimony is largely a matter within the discretion of the trial court. Dumbeck v Chgo. Great Western, 177 M 261, 225 NW 111.

A justified disbelief in the testimony of a witness does not justify a finding of fact to the contrary without evidence in its support. State v Novak, 181 M 574, 233 NW 309.

Where a witness is able to testify to the material facts from his own recollection, it is not prejudicial error to refuse to permit him to refer to a memorandum in order to refresh his memory. Bullock v New York Life, 182 M 192, 233 NW 858.

There was no violation of the parol evidence rule in admitting testimony to identify the party with whom defendant contracted, the written contract being ambiguous and uncertain. Drabek v Wedrickas, 182 M 217, 234 NW 6.

Where the attending physician testified at a hearing to prove the will that the testator was not of testamentary capacity when he signed the will, it was competent to introduce as evidence a letter the physician had written in which he stated of the testator that "he was no doubt of sound mind." Jensen's Estate, 185 M 284, 240 NW 656.

595.02 COMPENTENCY OF WITNESSES.

HISTORY. R.S. 1851 c. 95 ss. 51, 53; 1852 amend. p. 20; P.S. 1858 c. 84 ss. 51, 53; G.S. 1866 c. 73 ss. 7, 10; 1868 c. 70 s. 1; G.S. 1878 c. 73 ss. 7, 10; 1879 c. 72 s. 1; G.S. 1894 ss. 5658, 5662; 1895 c. 31; 1903 c. 227; R.L. 1905 s. 4660; G.S. 1913 s. 8375; 1919 c. 513 s. 1; G.S. 1923 s. 9814; M.S. 1927 s. 9814; 1931 c. 206 s. 1.

1. Generally

All persons not excepted are competent. Jacobs v Cross, 19 M 523 (454).

An interested heir may give evidence of family history and reputation or tradition or of a declaration of a deceased member of the family, tending to show illegitimacy of one claiming to be an heir. Geisler v Geisler, 160 M 463, 200 NW 742.

A hotel register voluntarily surrendered by owner to police officers searching the hotel for a missing girl, which register was used as a means of perpetrating the crime of keeping a disorderly resort, was properly admitted in prosecution of keeping a disorderly resort. State v Sauer, 217 M 591, 15 NW(2d) 17.

An officer of the public employees retirement association may advise those interested as to the standing of a member and the date when he became a member. OAG May 22, 1944 (851-i).

A wife has the same right to testify against her husband because of moral injuries he inflicts, as she would have if the injuries were physical. So she may testify against her husband charged under the Mann Act for transporting her in interstate commerce for purposes of prostitution. United States v Williams, 55 F. Supp. 375.

Impaneling juries. 7 MLR 7.

Disqualifications of witnesses. 18 MLR 518.

2. Spouse

A prosecution of the crime of adultery does not fall within the cases in which a wife may testify against her husband. State v Armstrong, 4 M 335 (251); State v Lasher, 131 M 97, 154 NW 735.

A wife cannot be a witness against her husband without his consent, although the action is one against a person for enticing her away and defense is based on alleged ill treatment of wife by husband. Huot v Wise, 27 M 68, 6 NW 425.

In an action by a creditor of the husband to have certain real estate standing in the name of the wife declared held in trust for the husband as real owner, the husband not being a party, the wife would be a competent witness for the plaintiff without the husband's consent. Leonard v Green, 30 M 497, 16 NW 399; National Bank v Lawrence, 77 M 282, 79 NW 1016, 80 NW 363; Evans v Staalle, 88 M 253, 92 NW 951.

Statute excludes evidence of all private conversations between husband and wife, even though not confidential. Leppla v Minn. Tribune, 35 M 310, 29 NW 127; Newstrom v St. Paul & Duluth, 61 M 78, 63 NW 253.

The fact that the wife refuses to allow adverse party to examine husband against her does not preclude her from subsequently calling him in her behalf. Wolford v Farnham, 44 M 159, 46 NW 295.

A married person is not to be deemed an incompetent attesting witness at the time of the execution of a will simply because the husband or wife of such person is a beneficiary under the will. Holt's will, 56 M 33, 57 NW 219.

Where the defendant committed the crime of manslaughter upon a woman, her husband being an accomplice to the crime, her dying declarations may be admitted in evidence against the defendant. State v Pearce, 56 M 226, 55 NW 652, 57 NW 1065.

Upon a charge of adultery, the testimony of the injured husband or wife is competent to prove the offense. State v Vollander, 57 M 225, 58 NW 878.

The statute excludes evidence of all private conversations between husband and wife, even after death of one. Newstrom v St. Paul & Duluth, 61 M 78, 63 NW 253; Beckett v N. W. Assoc. 67 M 298, 69 NW 923.

Wife held not incompetent to testify in an action for alienation of her husband's affections, her testimony not relating to conversations between herself and her husband. Lockwood v Lockwood, 67 M 476, 70 NW 784.

The wife is not a competent witness for the state in prosecution against the husband for a crime against her committed before their marriage. State v Frey 76 M 526, 79 NW 518.

When one spouse calls the other as a witness, the adverse party has a right to cross-examine. The cross-examination is not limited to matters touched on in-

direct examination. Declarations of husband and wife are subject to the same rules of exclusion as those governing their testimony as witnesses. The mere fact that one spouse does not call the other as witness does not authorize the court to instruct the jury that they may take into consideration as tending to raise a presumption that the testimony, if given, would not be favorable. National Bank v Lawrence, 77 M 282, 79 NW 1016, 80 NW 363; Holbert v Pranke, 91 M 204, 97 NW 976.

Error in examining husband against wife held waived by the wife subsequently calling him as a witness and examining him in relation to the same matter. Lloyd v Simons, 90 M 237, 95 NW 903.

The reception of certain evidence of communications between husband and wife in apparent violation of this section was without prejudice. White v White, 101 M 451, 112 NW 627; Wilkins v Sublette, 111 M 339, 126 NW 1089.

The objection to the calling of one of several defendants for cross-examination under the statute, "for the reason that he is not in any manner interested in this case" does not challenge the competency of the witness under this section, on the ground that he is the husband of one of the other defendants and cannot be called without her consent. Haataja v Saarenpaa, 118 M 255, 136 NW 871.

Admissions against interest are admissible against the one making them, although the spouse of such person is a party to the action. Kaune v Kaune, 119 M 265, 138 NW 25.

The county attorney called the wife of the defendant as a witness for the state. Defendant claimed his statutory privilege and excluded her testimony. The action of the county attorney was not misconduct, though defendant, before he was indicted, had notified the county attorney he would object. State v Roby, 128 M 187, 150 NW 793.

It was not prejudicial misconduct on the part of the county attorney, in his closing, to allude to the desire of the state to have had defendant's wife as a witness. State v Virgens, 128 M 422, 151 NW 190.

The widow of the deceased was not precluded by the provisions of sections 595.02 or 595.04, from testifying to a conversation between the plaintiff and herself in the presence of the deceased who did not participate therein. Thaden v Bagan, 139 M 46, 165 NW 864.

Where questions to a witness indicate that the answers will disclose a conversation had with persons since deceased are not objected to on that ground, the matter of striking the evidence out on motion subsequently made rests in the discretion of the trial court. Tousley v First National, 155 M 162, 193 NW 38.

Where the officers of a bank discovering the cashier's forgeries seek to retrieve the loss by procuring conveyance of wife's real estate, the cashier becomes the bank's agent, and in an action to set aside the conveyances for fraud, testimony of the conversation had between husband and wife is admissible, and section 595.02 does not apply. Sommerfield v Griffith, 175 M 51, 216 NW 311.

This section applies in case of an action for alienation of the wife's affections or damages for criminal conversation. Gjesdahl v Harmon, 175 M 419, 221 NW 639; Conrad v Peloquin, 177 M 578, 226 NW 195.

Where a man not the husband is accused of being the father of the wife's child, testimony of both husband and wife is available to prove non-access to each other. State v Soyka, 181 M 535, 233 NW 300.

By calling his wife as a witness in his behalf, the defendant waived the privilege that she be not used as a witness against him, and she was subject to cross-examination. State v Stearns, 184 M 456, 238 NW 895.

An action by an administrator of the estate of a decedent for damages for wrongful death, against the husband of the sole beneficiary, is not an action in tort by a wife against her husband. Albrecht v Potthoff, 192 M 563, 257 NW 377.

The mother of an illegitimate child who marries the reputed father between the date of his arrest and the date of the trial, cannot be called as a witness against her husband except with his consent. State v Feste, 205 M 73, 285 NW 85.

There was no error in the refusal of the trial court to permit the divorced wife of the decedent to testify as to a conversation with the testator which had occurred during marriage. Osbon's Estate, 205 M 419, 286 NW 306.

In an action by minor beneficiary of life policy by her guardian to recover on policy, where certain medical testimony was excluded as privileged on objection by guardian's counsel, court properly instructed that fact of objection should have no bearing upon decision of jury since evidence was excluded by authority of law, and it was the duty of the guardian to look after the interest of the ward. Dahlke v Metropolitan Life, 218 M 181, 15 NW(2d) 524.

A referee in bankruptcy is not bound to accept the testimony of a wife relating to a claim filed by her for services for her husband, the bankrupt, over a term of years, though entirely uncontradicted, but may examine it in the light of other facts and circumstances. In re Ralph, 293 F 903.

Privileged communications between husband and wife; waiver. 11 MLR 576.

Law of evidence; family relations. 13 MLR 675.

Admissibility of testimony of spouse as to non-access. 15 MLR 349.

Admissibility of evidence of one spouse against the other in criminal actions in the federal courts. 20 MLR 694.

Minnesota probate practice. 20 MLR 716.

Admissibility of testimony of one spouse against the other in cases of a crime committed by one against the other. 27 MLR 205.

3. Attorney

The fact of the retainer or employment may be testified to, even if by letter, although any communication beyond that made at the same time may not. Eickman v Trall, 29 M 124, 12 NW 347.

An attorney for the decedent may testify as to business matters had between himself and his client where there is nothing to reflect on the decedent, and for certain purposes, such as to throw light on the sanity of the testator. Layman's Estate, 40 M 371, 42 NW 286; Coates v Semper, 82 M 460, 85 NW 217.

An attorney is not obliged to produce a writing intrusted to him by his client, or to disclose its contents without his consent, but he may be required to state whether or not he has it in his possession for the purpose of authorizing the adverse party to give parol evidence of its contents. Stokoe v St. Paul, Mpls. 40 M 545, 42 NW 482; Davis v New York & Western, 70 M 37, 72 NW 823.

Privilege belongs to the client and not the attorney. Witness who has testified to given fact on direct examination may be compelled on cross-examination to state whether he has communicated the fact to his attorney. State v Tall, 43 M 273, 45 NW 449.

Conversation between parties to a mortgage in hearing of attorney employed to draft mortgage not embracing communications made to him as attorney, or for the purpose of obtaining his advice or legal opinion is not privileged. Hansen v Bean, 51 M 546, 53 NW 871.

If client attacks the attorney, the privilege is waived, so far at least, as is necessary to the attorney to make his defense. State v Madigan, 66 M 10, 68 NW 179.

The rule of privilege does not extend to writings obtained by attorneys from other sources than their clients, or from third parties whether strangers or opponents. Davis v New York & Western, 70 M 37, 72 NW 823.

Communications from client to attorney obviously designed for communication to adverse party, or another, is not privileged. Georges v Niess, 70 M 248, 73 NW 644; Shove v Martine, 85 M 29, 88 NW 254, 412.

Relations of attorney and client do not exist between the county attorney and one making complaint for purpose of criminal prosecution. Cole v Andrews, 74 M 93, 76 NW 962.

Termination of the relation of attorney and client does not authorize attorney to disclose communications made during existence of the relation. Struckmeyer v Lamb, 75 M 366, 77 NW 987.

Whether a person waives privilege as to communications made to an attorney in relation to a crime by subsequently confessing and testifying in relation to the crime is an open question. State v Nelson, 91 M 143, 97 NW 652.

Communications made in furtherance of a criminal purpose is not privileged. McKenzie v Banks, 94 M 496, 103 NW 497.

Communications to the clerk of an attorney is privileged if in the course of professional duties. Hilary v Mpls. Street Ry. 104 M 432, 116 NW 933.

The privilege is that of the client and cannot be asserted by the state calling the client as a witness. State v Madden, 161 M 132, 201 NW 297.

Testimony as to a statement made by a witness to an attorney was properly excluded as a communication between client and attorney. Grisim v Live Stock Bank, 167 M 93, 208 NW 805.

Voluntary evidence by an attorney relative to alleged fraud. Maguire v Maguire, 171 M 497, 214 NW 666.

On appellant's application to share in his grandfather's estate, on the ground that he had been unintentionally omitted, the communications between testator and the attorney who drew and attested the will were properly received in evidence. Wunsch's Estate, 177 M 169, 225 NW 109.

Communications by a testator to the attorney drafting his will are not privileged in litigation over the estate between persons all of whom claim under the testator. Hanefeld v Fairbrother, 191 M 550, 254 NW 821.

Except when essential to the end of justice, a lawyer should avoid testifying in court in behalf of his client. Ferraro v Taylor, 197 M 5, 265 NW 829.

Where an employer delivers to an attorney a document prepared by an agent or employee for the purpose of obtaining professional advice or for use in prospective or pending litigation, the document is privileged, in this instance a claim agent's report. Schmitt v Emery, 211 M 547, 2 NW(2d) 413.

Motion for new trial in a criminal case will not be granted on the ground of ignorance or incompetence of the attorney for the defendant, there being no showing of infidelity on the attorney's part and no strong showing of incompetence. State v Gorman, 219 M 162, 17 NW(2d) 42.

The assumption by the attorney for the defendant of the dual role of attorney and witness gave the state a legitimate opportunity to cross-examine him vigorously, even to the extent of challenging the authenticity of the will prepared by him and the legality of his acts in the case. State v Gorman, 219 M 162, 17 NW(2d) 42.

The impropriety of counsel becoming a witness for his client in a case which he was trying is waived where no objection is made to his continuing the examination of witnesses after he had testified or to his arguing the case to the jury. Cunningham's Estate, 219 M 80, 17 NW(2d) 85.

Privileged communications between attorney and client; waiver. 16 MLR 819.

Privileged communications between attorney and client; effect of the presence of a third person. 22 MLR 110.

Extent of the privilege between attorney and client's agent. 26 MLR 744.

4. Clergymen

Under the common law, communications made to a minister were not privileged. To be privileged under this section, the communication must be penitential in character and made to him in his capacity as a clergyman in confidence while seeking spiritual advice and comfort. In re Swenson, 183 M 602, 237 NW 589.

The statement to the clergyman was not given by way of confession or in obtaining spiritual comfort or consolation, but was made in casual conversation, and there is no privilege. Christensen v Pestorious, 189 M 548, 250 NW 363.

Privilege of confidential communications made to clergymen. 16 MLR 105.

5. Physicians

The facts communicated by plaintiff were not "information acquired in attending plaintiff as a patient" or which was necessary for the physician to prescribe or act for plaintiff as a "patient," and there was no privilege. Jacobs v Cross, 19 M 523 (454).

The following appeared in the insurance application: "Does the person expressly waive all provisions of law forbidding any physician or surgeon who has attended him from disclosing any information which he thereby acquired? Answer. "Yes." This referred only to past medical attendance, and did not include the future. Geare v United States Life, 66 M 91, 68 NW 731.

A physician may be called to testify that he attended a person as his patient, and as to the number of his visits. Price v Standard Life, 90 M 264, 95 NW 1118.

Professional communications are not privileged if made in furtherance of a criminal purpose, but in the instant case, the court did not abuse its discretion in refusing to receive the communications in evidence, because the fact sought to be proved was only remotely relevant to the issue. McKenzie v Banks, 94 M 496, 103 NW 497.

The privilege is for protection of the patient, and he may waive it, as may also those who represent him after death. Olson v Court of Honor, 100 M 117, 110 NW 374; Magean v G. N. 103 M 295, 115 NW 651, 946.

A mere statement by a party made under cross-examination, and without advice of counsel, that he had no objection to the physician testifying is not a waiver that cannot be withdrawn. Ross v G. N. 101 M 122, 111 NW 951.

The privilege is not waived by the mere fact that the patient testified concerning his condition while receiving treatment. Hilary v Mpls. Street Ry. 104 M 432, 116 NW 933; McAllister v St. Paul City Ry. 105 M 1, 116 NW 917.

Where a waiver of privilege was procured by fraud, it is not error to disregard it and allow the privilege to be claimed. Kloppenburg v Mpls. St. Paul, 123 M 174, 143 NW 322.

Physician who is being sued to recover back money paid to him under a guaranty of cure cannot raise the issue of privilege. Bernard v Dr. Nelson, 123 M 468, 143 NW 1133.

The testimony of a physician as to the instructions given his patient, and as to whether the patient obeyed the instructions is within the privilege. Marfia v Great Northern, 124 M 467, 145 NW 385; Buck v Buck, 126 M 275, 148 NW 117.

The testimony of examining physicians to ascertain plaintiff's physical ability to work on the railroad, the information not being for the purpose of treating him, is not privileged. Cherpeski v G. N. 128 M 361, 150 NW 1091.

In order to protect the right of privilege, patient must make a timely objection to the admission of evidence. Burke v Chgo. N. W. 131 M 209, 154 NW 960.

What the patient disclosed, and what the physician learned by examination, when she consulted him for treatment, was privileged, but her request that he perform a criminal operation is not. Sticha v Benzick, 156 M 55, 194 NW 752.

Plaintiff did not waive his privilege by bringing an action to recover for injuries, and testifying at the trial that the broken bone had been set and leg placed in a cast by a physician. Polin v St. Paul Union Depot, 159 M 410, 199 NW 87.

Plaintiff received medical attention from a physician. Another physician was present, and at the request of the attending physician, participated in the examination. The information acquired by both physicians was privileged. Leonczack v Mpls. St. Paul, 161 M 305, 201 NW 551.

The practice in examination of medical experts as disclosed in the opinion is disapproved. Rasmussen v Benz, 168 M 319, 210 NW 75, 212 NW 20.

The record sufficiently discloses the facts upon which a physician based his expert opinion. Hackett v Palon, 169 M 218, 210 NW 996.

Information acquired by a physician in attempting to revive a patient, and the opinions based thereon, are privileged, although the attempts at resuscitation fail, and the patient may have been dead when such attempts were made. Palmer v United Commercial Travellers, 187 M 272, 245 NW 146.

When the privileged part ofthe doctor's testimony is excluded, what is left is not sufficient to grant a new trial because of newly discovered evidence. Stone v Sigel, 189 M 47, 248 NW 285.

Where the examination and treatment of a patient by two or more physicians is a unitary affair and the patient permits one of them, as his own witness, to

testify as to the whole matter, the privilege against disclosure afforded by section 595.02 is thereby waived. Doll v Scandrett, 201 M 316, 276 NW 281.

The case history given by decedent several months prior to the collision when at Mayo Clinic for examination, and the records there made were rightly ruled inadmissable as privileged under section 595.02. Ost v Ulring, 207 M 500, 292 NW 207.

Dorctor Waldron's testimony was admissible. Krueger v Henschke, 210 M 310, 298 NW 44.

Disclosure made by a patient to a doctor which related wholly to nonprofessional matters not necessary for treatment were not privileged. Leifson v Henning, 210 M 316, 298 NW 41.

The statutory privilege between physician and patient may be waived only by the patient. If the patient calls the physician to testify to the patient's condition, the statutory privilege is waived, and the case is opened in its entirety to cross-examination. Maas v Laursen, 219 M 461, 18 NW(2d) 233.

Section 595.02, when considered with other portions of the statute treatment of competency of witnesses, does not extend to a hospital dietitian and nurse so as to render inadmissible their testimony as to treatment accorded deceased insured prior to the time insured filed for application for the policy. First Trust Co. v Kansas City Life, 79 F(2d) 49.

Privilege of a physician performing an autopsy. 12 MLR 390.

Communications to or information acquired by a physician or surgeon; waiver. 22 MLR 580.

6. Officials

Communication made to the county attorney relating to a proposed criminal prosecution is not privileged. Cole v Andrews, 74 M 93, 76 NW 962.

Prohibiting public officers from disclosing communications made to them in official confidence when the public interest would suffer from such disclosure, gives a privilege against disclosure. Thaden v Bagan, 139 M 47, 165 NW 864.

The county attorney properly refused to answer regarding a disclosure made to him by an alleged accomplice. State v McClemdon, 172 M 109, 214 NW 782.

It is idle to claim that public interests will suffer by a disclosure of admissions by a litigant that facts testified to by his witness were untrue. Commercial Union v Connolly, 183 M 7, 235 NW 634.

A city clerk or other city official having information in his possession, being papers not a part of the regular files and records required to be kept by law, or communications to the clerk sent to him in confidence, and such that the public interest would suffer by their disclosure, may withhold such information. 1934 OAG 132, Oct. 1933 (851-i).

Public records are open to the inspection of a citizen or taxpayer. 1934 OAG 133, April 27, 1934 (59a-6).

Records of the state department of education are open to the taxpayer. 1936 OAG 337, April 2, 1935 (851-i).

Privileged communications to a juvenile court judge. 4 MLR 229.

Privilege of communications by a complaining witness to a prosecuting officer. 5 MLR 570.

7. Persons incapacitated

The trial court must determine a witness' competency when he is offered; the pleadings do not determine it. Persons are competent if, when offered, they have such an understanding as enables them to retain in memory the events of which they have been witnesses, and have a knowledge of right and wrong to appreciate the sanctity and obligation of an oath. Cannady v Lynch, 27 M 435, 8 NW 164.

The question of the mental competency of a witness is ordinarily determined by such preliminary examination of the proposed witness as the court deems necessary, or from scrutiny or observation of his condntion, conduct, and appear-

ance when called to the witness stand. The question of competency is one of law for the trial court. State v Prokosch, 152 M 86, 187 NW 971.

The competency of a witness depends upon his mental condition when he is offered as a witness, and should be determined as of that time, and that a witness had at one time been an inmate of an insane hospital does not establish incompetency at the time he is offered. State v Kahner, 217 M 580, 15 NW(2d) 105.

Testimonial competency of an infant. 4 MLR 549.

595.03 EXAMINATION BY ADVERSE PARTY.

HISTORY. 1885 c. 193 s. 1; G.S. 1878 Vol. 2 (1888 Supp.) c. 73 s. 7a; 1893 c. 105 s. 1; G.S. 1894 s. 5659; R.L. 1905 s. 4662; G.S. 1913 s. 8377; G.S. 1923 s. 9816; M.S. 1927 s. 9816.

1. Scope

The object of the statute is to permit a party to call his adversary at the trial, without making him his own witness, and elicit from him, if possible, material facts within his knowledge by a cross-examination precisely as if he had already been examined on his own behalf in chief. Brown's Will, 38 M 112, 35 NW 726; Suter v Page, 64 M 444, 67 NW 67.

Section 595.03 did not change the law as to the competency of witnesses. Wolford v Farnham, 44 M 159, 46 NW 295; Natl. Bank v Lawrence, 77 M 282, 79 NW 1016, 80 NW 363; Lloyd v Simons, 90 M 237, 95 NW 903.

This section does not affect the order of trial or the rule which forbids a party to make out his case by cross-examining the witnesses of the adverse party. Schmidt v Schmidt, 47 M 451, 50 NW 598.

It was not intended to permit a plaintiff to make one of his own witnesses a nominal party to the record, and then call and cross-examine him, not as an adverse party, but as a witness against the actual adverse party. The statute must be given a reasonable construction, and one in accord with its manifest purpose. Suter v Page, 64 M 444, 67 NW 67; Strom v Montana Central, 81 M 346, 84 NW 46.

This section applies to the trial of any civil action involving an issue of fact; or any proceeding involving such an issue which the parties, as a matter of right, are entitled to have heard on oral testimony. Only in exceptional cases will the court in its discretion permit the hearing of a motion on oral testimony of witnesses, and permit the examination of an adverse party under the statute as if under cross-examination. Strom v Montana Central, 81 M 346, 84 NW 46.

The most serious question in this case arises from the erroneous cross-examination under the statute of an employee of defendant under the mistaken impression that the defendant was a corporation, whereas it was in fact a partnership. Kelly v Tyra, 103 M 183, 114 NW 750, 115 NW 636.

The proponent of the second will who was named as executrix, and was a beneficiary, and who actively engaged in sustaining it and opposing the 1911 will, in which she was also named executrix and beneficiary, was subject to cross-examination as an adverse party. Simmon's Estate, 156 M 144, 194 NW 330.

There was no error in calling defendant Jansen for cross-examination, the effect of his admissions being properly limited. Sohns v Hubbard, 163 M 187, 203 NW 782.

No prejudice resulted from defendant's being permitted to call a witness for cross-examination under the statute, even if it be conceded that such witness was not then an officer of plaintiff. Northern Oil v Birkeland, 164 M 466, 203 NW 228, 205 NW 449, 206 NW 380.

The mere fact that a person had been an officer of the adverse party at the time of the transaction does not, in itself, give the right to cross-examination under the statute. First Bank v Seliskar, 169 M 321, 211 NW 163.

The court permitted the plaintiff, in chambers, to cross-examine the defendant under the statute "for the purpose of laying a foundation for examining the jury as to their qualifications." Eystad v Stambaugh, 203 M 397, 281 NW 526.

A plaintiff may prove his cause of action by cross-examination; but it is within the discretion of the trial court to restrict the examination of the defendant to matters within his knowledge. It must not degenerate into a fishing excursion. Bylund v Carroll, 203 M 488, 281 NW 873.

2. Who may be called

A mere nominal party cannot be called. There must be a real issue to be tried between the party calling and the party called; a party cannot make one of his own witnesses a nominal party and then call him under the statute. Wheaton v Berg, 50 M 525, 52 NW 926; Suter v Page, 64 M 444, 67 NW 67; Bachmeier v Bachmeier, 69 M 472, 72 NW 710; Pipestone Bank v Ward, 81 M 263, 83 NW 991; Ames v Aetna Insurance, 83 M 346, 86 NW 344; Birum v Johnson, 87 M 362, 92 NW 1.

Any officer, superintendent, or agent of a corporation having supervision or control of the work or act of the corporation involved in the case may be called whether he is a general or subordinate officer. Bennett v Backus, 77 M 198, 79 NW 682.

Any person for whose immediate benefit the action is brought or defended may be called. Pipestone Bank v Ward, 81 M 263, 83 NW 991; Kellogg v Holm, 82 M 416, 85 NW 159; O'Gara v Hansing, 88 M 401, 93 NW 307.

A stockholder of a corporation held properly called under the circumstances and under the pleadings. Corse v Minn. Grain, 94 M 331, 102 NW 728.

The defendant, Bernick, did not answer. While it was a technical error to permit him to be called for cross-examination under the statute, it was in the instant case, without prejudice. Bernick v McClure, 107 M 9, 119 NW 247.

Whether it was error to call the street commissioner of the defendant city for cross-examination under the statute is left undecided, but in the instant case, there was no showing of prejudicial error. Leystrom v City of Ada, 110 M 343, 125 NW 507.

Where an election is contested on the ground that the contestees voted illegally, such contestees may be called as adverse parties for cross-examination. Hanson v Village of Adrian, 126 M 298, 148 NW 276.

In proceedings for the appointment of a guardian for an alleged incompetent person, the council for the petitioner may, under the discretion of the court, examine such person. This is a proceeding not adversary in character but rather a proceeding in parens patriae, where all facts should be brought in protection of one who may need protection. Prokosch v Brust, 128 M 327, 151 NW 130; Wood v Wood, 137 M 252, 163 NW 297.

Whether a former agent of a party may be called for cross-examination under the statute is not decided, but there was no prejudice to defendant's substantial rights in the refusal of the court to permit such cross-examination. Farmers Elevator v G. N. 131 M 152, 154 NW 954.

The right to call an officer of an adverse party for cross-examination is to be determined as the situation is at the time of the trial, and there is no right to cross-examine one not an officer at the time of the trial, though he was an officer at the time of the transaction involved. Snelling Bank v Classen, 132 M 404, 157 NW 643.

The motorman of a street car is not a managing agent of the company within the meaning of the statute which authorizes an adverse party to call a managing

agent of a corporation for cross-examination. Moore v St. Paul City Ry. Co. 136 M 316, 162 NW 298; May v Chgo. Milwaukee, 147 M 310, 180 NW 218.

A proponent of a will for probate, though named as executor in the will, and is the husband of a divorcee, is a mere nominal party to the proceedings and not adverse within the meaning of General Statutes 1913, Section 8377 (595.03). Bowler v Fahey, 136 M 408, 162 NW 515.

The rules of evidence applicable in criminal cases should be observed at the hearing in a proceeding in which a person is accused of a criminal contempt, and he cannot be called as an adverse witness for cross-examination. State ex rel v District Court, 144 M 326, 175 NW 908.

There was no error in permitting a district master car builder of the defendant company in charge of 500 workmen to be called by plaintiff for cross-examination. Johnson v Chgo. & N. W. 175 M 197, 220 NW 602.

In a proceeding for discipline of an attorney, he may be called for cross-examination under the statute. In re Halvorson, 175 M 520, 221 NW 907.

Officers of a bank in the hands of the commissioner of banks for liquidation so long as they remain as such officers, may be called for cross-examination under the statute. Adams v Farmers Bank, 176 M 110, 222 NW 576.

A defendant in default in a case where the plaintiff must prove his cause of action may be called under the statute. Adams v Farmers Bank, 176 M 110, 222 NW 576.

A railway section foreman, having the authority and duties appearing in this case, was properly called for examination under the statute. Garedpy v Chgo. Milwaukee, 176 M 331, 223 NW 605.

The court did not err in permitting plaintiff's counsel to call the driver of defendant's truck for cross-examination under the statute. Wogstrom v Joseph, 192 M 220, 255 NW 822.

Calling under the statute an assistant chief engineer to gain facts on which to predicate value. Mpls. St. Paul Dist. v Fitzpatrick, 201 M 450, 277 NW 394.

Vendee after purchasing a farm by executory contract improved the property. The plaintiff lumber company is in this action foreclosing a materialman's lien. There being no issue in this action between the vendor and vendee the vendor has no right to cross-examine the vendee under the statute as an adverse party. Snell v Florscheim, 217 M 21, 13 NW(2d) 776.

The master of a vessel owned by a corporation may be called as an adverse party in a suit growing out of the navigation of the vessel. Davidson v U. S. 142 F 315.

3. In what cases

In proceedings to probate a will, one of the proponents was examined as a witness for the contestants. Under Laws 1885, Chapter 193 (section 595.03) he could be interrogated by contestants concerning statements said to have been made by him to others concerning the mental capacity of the deceased. Brown's Estate, 38 M 112, 35 NW 726.

This section applies to the trial of any civil action involving an issue of fact; also to any proceeding involving such an issue which the parties, as a matter of right, are entitled to have heard on oral testimony. Strom v Montana Central, 81 M 346, 84 NW 46.

A bastardy proceeding is a civil proceeding, not a criminal action, and defendant may be called by the prosecution for cross-examination under the statute. State v Jeffrey, 188 M 476, 247 NW 692; State v Riegel, 194 M 308, 260 NW 293.

4. Range of examination

The widest scope is to be given the examination. Leading questions may be put and any admissible evidence which would tend to weaken the case of the witness or strengthen that of the party calling him may be drawn out. The whole case in all its phases may be thoroughly and minutely investigated. Objections on the ground of materiality are disfavored. Brown's Estate, 38 M 112, 35 NW 726;

Couch v Steele, 63 M 504, 65 NW 946; Pfefferkorn v Seefield, 66 M 223, 68 NW 1072; Torgerson v Crookston, 123 M 476, 144 NW 154.

Defendant, while on the stand for cross-examination under the statute, by his voluntary statement not prompted by any question asserted that his attempted removal of the tooth from the inside of the mouth was good practice, thus raising an issue. It was competent to receive evidence from qualified experts that such was not good practice. Prevey v Watzke, 182 M 332, 234 NW 470.

In an action against a driver of a car and his alleged employer for injuries sustained in an automobile accident where pleadings showed that the driver admitted he was employed by defendant, permitting cross-examination of the driver as adverse party upon issue of his employment was improper, since driver was not an "adverse" party to plaintiff on that issue. Collier v Hartfeil, 72 F(2d) 625.

5. Contradiction and impeachment

One calling the opposite party to testify under Laws 1885, Chapter 193 (section 595.03) is not concluded by any statement of fact he may make in testifying, but may show it false either by other evidence or by inferences or arguments drawn from the testimony of the party himself. Schmidt v Durnam, 50 M 96, 52 NW 277; Pfefferkorn v Seefield, 66 M 223, 68 NW 1072; Birum v Johnson, 87 M 362, 92 NW 1; Campbell v Aarstad, 124 M 284, 144 NW 956; Uhlman v Farm Stock & Home, 126 M 239, 148 NW 102; Moulton v Moulton, 178 M 178, 227 NW 896.

6. Order of examination

The time when the party examined under the statute shall be examined by his own counsel is discretionary with the trial court. Jones v Bradford, 79 M 396, 82 NW 651; Olson v Aubolee, 92 M 312, 99 NW 1128; Miller v Carnes, 95 M 179, 103 NW 877.

The record does not show that appellant, Ehlers, had any ground for complaint because of the ruling of the court denying him the right to cross-examine his co-defendant while the latter was still on the stand after cross-examination under the statute by respondent's attorney. Lund v Olson, 182 M 209, 234 NW 310.

7. Depositions

Conceding, without deciding, that the plaintiff was not entitled, under General Statutes 1894, Section 5659 (section 595.03), to examine the defendant, Wait, as if under cross-examination for the purpose of using his deposition as evidence against the defendant, Steele, still there was no error in admitting the deposition, the only objection being that some of the questions put to the witness were leading. Couch v Steele, 63 M 504, 65 NW 946.

8. Error without prejudice

Where the court incorrectly rules witness to be subject to cross-examination as adverse party, to predicate reversible error, it is necessary to show that one has been thereby prejudiced in the subsequent events of the trial. Bernick v McClure, 107 M 9, 119 NW 247; Smith v Lydick, 110 M 82, 124 NW 637; Leystrom v City of Ada, 110 M 340, 125 NW 507; Obert v Board, 122 M 23, 141 NW 810.

The attorney, named as defendant, having made no appearance in the case and not a party to the controversy, was erroneously cross-examined under the statute, but under such circumstances that no prejudice arose. Loring v Swanson, 180 M 104, 230 NW 277.

Plaintiff was permitted to call the driver of defendant's truck for cross-examination under the statute. This was not reversible error, the defendant not being prejudiced thereby. Ludwig v Haugen Co. 187 M 315, 245 NW 371.

Under the circumstances disclosed by the record, it was not prejudicial error to admit evidence brought out by cross-examination, showing that the maker of the note was adjudicated a bankrupt shortly after the transfer of the note. Keyser v Roberts, 192 M 588, 257 NW 503.

Without deciding whether the court was or was not in error in refusing to allow plaintiffs to call the village attorney for cross-examination under the statute, there was no prejudice, and no ground for reversal. Davies v Village of Madelia, 205 M 526, 287 NW 1.

595.04 CONVERSATION WITH DECEASED OR INSANE PERSON.

HISTORY. R.S. 1851 c. 95 s. 51; P.S. 1858 c. 84 s. 51; 1861 c. 36 s. 1; 1862 c. 39 s. 1; Ex. 1862 c. 13 s. 1; 1863 c. 34 s. 1; G.S. 1866 c. 73 s. 8; 1874 c. 70; 1877 c. 40 s. 1; G.S. 1878 c. 73 s. 8; G.S. 1894 s. 5660; 1895 c. 27; R.L. 1905 s. 4663; G.S. 1913 s. 8378; G.S. 1923 s. 9817; M.S. 1927 s. 9817.

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1. Incompetent persons

To render a person not a party incompetent on the ground that he is interested in the event of the action, he must have some pecuniary, legal, certain, and immediate interest in the event of the cause itself, or in the record as an instrument of evidence for or against himself, and the burden is on the party objecting to the witness to make his incompetency appear clearly. Allen v Baldwin, 22 M 397; Marvin v Dutcher, 26 M 391, 4 NW 685; Harrington v Samples, 36 M 200, 30 NW 671; Beard v First National, 39 M 546, 40 NW 842; Farmers' Union v Syndicate Insurance, 40 M 152, 41 NW 547; Tretheway v Carey, 60 M 457, 62 NW 815; Manahan v Halloran, 66 M 483, 69 NW 619; Madson v Madson, 69 M 37, 71 NW 824; Towle v Sherer, 70 M 312, 73 NW 180; Kells v Webster, 71 M 276, 73 NW 962; Keigher v City of St. Paul, 73 M 21, 75 NW 732.

As to conversations with deceased or insane persons, every party to the action, and to the issues, however remote or contingent his interest may be, is incompetent. Towle v Sherer, 70 M 312, 73 NW 180.

A party to an action, or interested in the result thereof, cannot give evidence as to conversations with a deceased person, even though the witness took no part in the conversation. Comstock v Comstock, 76 M 396, 79 NW 300.

This section is applicable where the representative of a deceased person relies on conversation. Pitzl v Winter, 96 M 499, 105 NW 673.

A stockholder in a corporation, though acting in the capacity of manager, cannot be heard to give in evidence a conversation with a deceased employee upon matters material to the issues in litigation against the corporation for wrongfully causing his death. Peterson v Merchants Elevator, 111 M 105, 126 NW 534.

It was error to permit a legatee to statements made by the testator at the time he executed the will but as the will was conclusively established outside of such testimony, the error was without prejudice. Madson v Christenson, 128 M 21, 150 NW 213.

A devisee who voluntarily enters into a contest opposing the probate of a will, thereby asserts such an interest in the issue as to be precluded from testifying to conversations with testator concerning his intentions in respect to the disposition of his property. Bowler v Fahey, 136 M 408, 162 NW 515.

The president of a mercantile corporation is presumptively incompetent to give evidence concerning a conversation with a deceased person relative to a matter at issue. Caldwell v May, 141 M 255, 169 NW 797.

The statute applies in workmens compensation cases. State ex rel v Dist. Ct. 142 M 420, 172 NW 311; Johnson v W. S. Nott Co. 183 M 309, 236 NW 466; Kayser v Carson, 203 M 578, 282 NW 801.

The statute cannot be evaded by indirection. It was error to permit the witness to testify that she heard the conversation between her husband, and her deceased father. Morrow v Porter, 161 M 398, 202 NW 53.

Plaintiff could not testify to admissions made to him by his deceased wife concerning relations with defendant. Conrad v Peloquin, 177 M 578, 226 NW 195.

Plaintiff's daughter, riding as a guest with defendants, was killed. Testimony of defendants that the deceased made no protest concerning the manner in which the car was driven was correctly excluded. Waggoner v Gummerum, 180 M 391, 231 NW 10; Keough v St. Paul Milk Co. 205 M 110, 285 NW 809.

Statements made by an injured person, since deceased, to a party or person interested in the outcome of the action are inadmissible as evidence. Such statements are not part of the res gestae, or excepted from the hearsay rule or classed as verbal acts. Dougherty v Garrick, 184 M 436, 239 NW 153.

A witness may not testify to declarations made by the grantor in his lifetime, impugning the grantee's title, except in so far as such testimony refuted that given by the grantor. Reek v Reek, 184 M 532, 239 NW 599.

Although decedent's adult son was not interested in the first of two causes of action, he was interested in the second cause, and was precluded from testifying as to conversations with his deceased father. Noesen v Mpls. St. Paul, 204 M 233, 283 NW 246.

The issue was suicide. Decedent's plans for the day were not relevant except as they related to that issue so that any acts or conversation between plaintiff and decedent were barred. Scott v Prudential, 207 M 134, 290 NW 431.

An interested party to an action may not disclose statements made to such party by a decedent relative to the subject matter in issue in such action, even though offered under the "verbal act" theory to show mental condition of decedent. Larson v Dahlstrom, 214 M 311, 8 NW(2d) 48.

The wife of one of the defendants was joined as a defendant. She filed no answer, but as she was still interested in the suit, it was incompetent for her to testify to a conversation with a deceased grantor. Cocker v Cocker, 215 M 565, 10 NW(2d) 734.

Trial court, in action for personal injuries against administrator of estate of decedent, did not err in admitting testimony of plaintiff's wife as to conversations between her and decedent, since she was not a party to nor interested in the action. (Cocker v Cocker, 215 M 565, 10 NW(2d) 734, distinguished). Johnson v Whitney, 217 M 468, 14 NW(2d) 765.

2. Testimony held competent

Upon an indictment for a nuisance in obstructing a highway, persons owning land near or abutting on the alleged highway are not interested in the event, so as to render them incompetent to testify to admissions of the alleged dedicator, he being dead. State v Eisele, 37 M 256, 33 NW 785.

The statute does not apply to an agent of a party to the action, such agent not being a party to the action nor having a legal interest in the event of it. Darwin v Keigher, 45 M 64, 47 NW 314.

St. Cyr, who became a member of a subordinate lodge after the death of Perine, was a competent witness, and his testimony should not have been excluded. Perine v Grand Lodge, 48 M 82, 50 NW 1022; Bost v Supreme Council, 87 M 417, 92 NW 337.

Although of record a party to the action for partition, Tischer had no interest in the issue between plaintiff and the real defendant, and there was no reason why his testimony was not admissible. Bowers v Schuler, 54 M 99, 55 NW 817; Suter v Page, 64 M 444, 67 NW 67.

The trial court did not err in permitting plaintiff to testify to conversations with deceased defendant who had testified as to such conversations on a former trial and whose testimony had been preserved. Myrick v Purcell, 99 M 457, 109 NW 995.

Executor is competent, though he petitions for probate to testify as to the execution of the will, including what testator said relevant thereto. Geraghty v Kilroy, 103 M 286, 114 NW 838; Burmeister v Gust, 117 M 247, 135 NW 980.

Evidence as to transactions with decedent held not inadmissible. Peters v Schultz, 107 M 29, 119 NW 385; Svensson v Lindgren, 124 M 386, 145 NW 116.

The legatee was not prohibited from testifying in support of a gift, where it was not only against her interest to do so, but she had no direct interest in the result of the controversy adverse to the estate. Nelson v. Olson, 108 M 109, 121 NW 609.

Alleged incompetency of the sons of Charles H. Upton, deceased, to testify to certain conversations does not appear in the record. Upton v Merriman, 116 M 358, 133 NW 977.

The heirs of a deceased person are not incompetent to give in evidence declarations or conversations of the deceased, where neither they, nor the estate, can be made liable for the result of the action. Pabst v Ferch, 126 M 58, 147 NW 714.

The agent who wrote the policy and to whom the insured made and delivered the note for the first premium, and to whom the company sent the policy for delivery, was not so interested a party as to prevent his testifying as to conversations with the insured, now deceased. Ikenberry v New York Life, 127 M 215, 149 NW 292; Haley v Sharon Mutual, 147 M 190, 179 NW 895.

The wife of the respondent was competent to testify to conversations had with the deceased. Malley v Quinn, 132 M 255, 156 NW 263.

A witness having no direct interest, though the daughter of the deceased donor, and a sister of the donee was not disqualified from testifying relative to conversations had with the deceased relative to the gift. Drager v Seegert, 138 M 7, 163 NW 756.

In an action on a policy of insurance, the secretary of the local lodge was not an incompetent witness. Havlicek v Western Assoc. 138 M 62, 163 NW 985.

To make error of the exclusion of the widow's proposed testimony, it was necessary that plaintiff make an offer of proof showing its materiality. Thaden v Bagan, 139 M 46, 165 NW 864.

Respondent, an interested party, is not disqualified by this section from testifying as to the contents of a lost letter. Berdell's Estate, 143 M 328, 173 NW 665.

Since section 525.184 annuls the interest of a devisee or legatee in a will where he is an attesting witness thereto, and there is but one other attesting witness, such devisee or legatee is a competent witness to prove the will. Knutson's Estate, 144 M 111, 174 NW 617.

In an action to set aside a fraudulent conveyance, conversations between grantor and grantee admissible on question of intent, even when agreement was with person now dead. State Bank v Strandberg, 148 M 108, 180 NW 1006.

An officer of plaintiff, a congregation owning a cemetery is not precluded from testifying therein as to conversations with a deceased person. Sacred Heart Church v Soklowski, 159 M 331, 199 NW 81.

This statute does not prevent an heir interested in the estate from giving evidence of family history or tradition, or declarations of a deceased member of the family, tending to show illegitimacy of a claimant. Geisler v Geisler, 160 M 465, 200 NW 742.

A beneficiary under a will may give conversations with testator for the purpose of laying a foundation to testify as to the testator's mental condition. Mumm's Estate, 177 M 226, 225 NW 102.

The wife alone brought suit to cancel a note and mortgage signed by her and her husband. As the husband was not a party, and as he would not be affected by the judgment, he is not incompetent to testify as to a conversation with a person deceased. Dale v First National, 178 M 452, 227 NW 501.

In the instant case, the new debtor in a novation was not an incompetent witness under the statute relating to conversations with deceased persons, and he was properly permitted to disclose the conversation with the deceased creditor. Fikkan v Holter, 180 M 77, 230 NW 468.

The husband of a granddaughter of the decedent, the granddaughter being an heir, may testify. Mollan's Estate, 181 M 217, 232 NW 1.

The court rightfully refused to strike as incompetent the testimony of a witness not financially interested in the suit, that the deceased admitted he had agreed to pay his son and daughter for services they were rendering him. Holland's Estate, 189 M 172, 248 NW 750.

Claimant introduced proof of statements of the deceased in respect to a collateral matter not in the nature of a direct admission against interest upon the litigated issue. It was error to exclude other statements of deceased to meet or explain the statements introduced. Empenger's Estate, 194 M 220, 259 NW 795, 261 NW 185.

In the instant case wives may testify as to conversations heard by them between their husbands and the decedent. Anderson v Anderson, 197 M 252, 266 NW 841.

An executor or administrator, though a party of record, is not a party to the issue and may testify as to conversations with the deceased person. Exsted v Exsted, 202 M 522, 279 NW 554.

A trustee of an express oral trust in personalty, a party to the suit but claiming no personal interest in the trust, is not barred from testifying as to conversations with deceased creator of the trust. Solschneider v Holmes, 205 M 459, 286 NW 347.

Testimony properly admitted under the res gestae rule. Arnold v Northern States, 209 M 553, 297 NW 182.

The witness, Saxton, had no interest in the event of this proceeding and was not prohibited from stating the conversation in which her deceased husband and respondent took part. James v Peterson, 211 M 482, 1 NW(2d) 844.

An executor of a prior will has no such certain or immediate interest in the disallowance of a subsequent will as to disqualify him from testifying to conversations with the testator in proceedings contesting the later will. Boese' Estate, 213 M 446, 7 NW(2d) 355.

In an action against administrator for injuries to plaintiff who fell from a ladder because of decedent's negligence, plaintiff's wife was not incompetent to testify regarding her conversations with decedents, she not being a party to the action, and not immediately interested in the outcome of the suit. Johnson v Whitney, 217 M 468, 14 NW(2d) 765.

In an action by a surety company against a bank to recover loss sustained on bond written on application obtained by a bank employee, such employee's possible liability to the bank for any recovery against it did not exclude him from testifying to a conversation with a representative of the surety company, since deceased. Fidelity v Drover's Bank, 15 F(2d) 306.

Statute relating to privilege of communications between physician and patient does not extend to a hospital dietition and nurse so as to render inadmissible in action on life policy their testimony as to treatment accorded deceased prior to the time the insured filed application for policy. First Trust v Kansas Life, 79 F(2d) 49.

3. Effect of, or inference drawn from conversation

The statute cannot be evaded by allowing a witness to testify as to the effect of a conversation with a deceased person or as to an inference from such conversation. Vandall v St. Martin, 42 M 167, 44 NW 525; Madson v Madson, 69 M 37, 71 NW 824; Babcock v Murray, 69 M 199, 71 NW 913; Robbins v Legg, 80 M 419, 83 NW 379; Merhoff v Merhoff, 84 M 263, 87 NW 781; Reeves v Sawyer, 88 M 218, 92 NW 962; Veum v Sheeran, 88 M 257, 92 NW 965; Larson v Lund, 109 M 372, 123 NW 1070.

Nor is it permissible for a witness to testify as to what was not said in such conversation. Redding v Godwin, 44 M 355, 46 NW 563.

Where a party to an action is prohibited by statute from testifying "of or concerning any conversation with" a deceased party, he is equally prohibited from

giving his conclusions or deductions drawn from such conversations. Wetmore v Thurman, 121 M 352, 141 NW 481.

4. Written admissions and acts

The statute does not forbid evidence of written admissions or acts, either of the deceased or the surviving party. Chadwick v Cornish, 26 M 28, 1 NW 55.

Thus a survivor has been allowed to testify: As to the fact of payment. Chadwick v Cornish, 26 M 28, 1 NW 55; Robbins v Legg, 80 M 419, 83 NW 379; Merhoff v Merhoff, 84 M 263, 87 NW 781; Krost v Moyer, 166 M 153, 207 NW 311;

The angry exclamation of a testator, his sanity being in question. Brown's Estate, 38 M 112, 35 NW 726;

The fact that the surviving witness got a letter from the post office, read it to the deceased and gave it to him. Hall v Northwestern Endowment, 47 M 85, 49 NW 524;

The consideration of a note or mortgage. Parker v Maxwell, 51 M 523, 53 NW 754;

As to an indebtedness of the witness to the deceased person at the time of making a payment to him. Veum v Sheeran, 95 M 315, 104 NW 135.

Evidence may be given as to letters of a deceased person. Livingston v Ives, 35 M 55, 27 NW 74; Newton v Newton, 46 M 33, 48 NW 450; Hulett v Carey, 66 M 327, 69 NW 31.

In the instant case the circumstances were deemed "conversations" and not "acts", and the evidence was properly excluded. Cady v Cady, 91 M 137, 97 NW 580.

The statute does not forbid evidence of a fact within the knowledge of the witness irrespective of any conversation with the deceased. Veum v Sheeran, 95 M 315, 104 NW 135.

The plaintiff was competent to testify that he was present at the examination of the insured, and that the physician did not ask her the questions. Finn v Modern Brotherhood, 118 M 307, 136 NW 850.

Where plaintiff claimed a gift of notes from a person now deceased, plaintiff cannot be permitted that where he handed them back to decedent, it was more convenient to have them kept in decedent's safe. Quarfot v Security Trust, 189 M 451, 249 NW 668.

5. Conversations allowed or prohibited

The section makes any parties an action or interested in the event thereof incompetent to testify to a conversation with, or admission of, any deceased or insane person, whether a party or not, relative to any matter at issue between the parties. Griswold v Edson, 32 M 436, 21 NW 475; Farmers Union v Syndicate Ins. 40 M 152, 41 NW 547; Lowe v Lowe, 83 M 206, 86 NW 11.

A party to an action or interested in the event thereof is not competent to testify to conversations with or admissions of a deceased party had with or made to a third party in his presence. Pederson v Christofferson, 97 M 491, 106 NW 958.

This section should have a fair construction though somewhat against a resultant exclusion of testimony, otherwise competent; and a conversation by an interested party with a third party, if otherwise competent, is not incompetent because overheard by a party since deceased. Sievers v Sievers, 189 M 576, 250 NW 574.

6. Waiver

Proof by plaintiff, an executor, of an admission by the defendant of a liability in favor of the estate does not waive the protection of the statute, so as to enable the defendant to testify as to conversations with, or admissions of, the deceased party. Rhodes v Pray, 36 M 392, 32 NW 86.

When it appears, upon the examination of a party to an action as a witness, that his testimony relative to conversations with another is incompetent because

such person is deceased, the opposite party waives his right to have the evidence struck out by proceeding, without objection or motion to cross-examine the witness as to such conversations. Brown v Morrill, 45 M 483, 48 NW 328; Hess' Estate, 57 M 282, 59 NW 193; First National v Strait, 75 M 399, 78 NW 101; Moe v Paulson, 128 M 281, 150 NW 914; Stair v McNulty, 133 M 136, 157 NW 1073.

Where the cross-examination is merely for the purpose of finding the facts as to the incompetency of the witness and does not go to the merits of the issue, there is no waiver, Thretheway v Carey, 60 M 457, 62 NW 815.

General Statutes 1894, Section 5662 (section 595.02) is for the protection of the patient, and he may waive it, and as a general rule those who represent him after his death may also waive the privilege for the protection of interests which they claim under him. Olson v Court of Honor, 100 M 117, 110 NW 374.

Where a party who has the right to exclude a conversation with a deceased person on cross-examination elicits conclusions and deductions drawn from such conversation, he waives his right, and the other party may give the conversation. Schwantz v Kleiber, 141 M 332, 170 NW 210.

The court received plaintiff's testimony subject to the objection without thereafter making a formal ruling thereon. If the deposition of the father is given effect as removing the bar of the statute from plaintiff's testimony, it must also be given effect as evidence. Sheehan v Nelson, 168 M 429, 210 NW 284.

Because defendant by a question on cross-examination of plaintiff had elicited without objection some matter in respect to a conversation with defendant's deceased husband, concerning the right of way, the bar was not opened to allow defendant and her children to testify to such conversation. Stopf v Wobbrock, 171 M 363, 214 NW 49.

Defendant's counsel asked plaintiff on cross-examination why he did not pay rent. No motion was made to strike out the answer. Plaintiff had the benefit of the answer, but it did not open the door to permit him to testify generally of conversations with the deceased. Varty v Christ, 175 M 29, 220 NW 154.

7. Generally

See history of early statutes on matters covered by this section, and the change made by enactment of Laws 1877, Chapter 40. Chadwick v Cornish, 26 M 28, 1 NW 55; Griswold v Edson, 32 M 436, 21 NW 475.

The statute is strictly construed. Chadwick v Cornish, 26 M 28, 1 NW 55; Brown's Estate, 38 M 112, 35 NW 726; Keigher v City of St. Paul, 73 M 21, 75 NW 732.

The effect of the statute is not to render the surviving party an incompetent witness generally, but only as to conversations with or admissions by the deceased party. *Harrington* v *Samples*, 36 M 200, 30 NW 671; *Rhodes* v *Pray*, 36 M 392, 32 NW 86.

The statute has no application to conversations which do not bear on the issues. Brown's Estate, 38 M 112, 35 NW 726.

The rule that a party objecting to evidence must state the ground of his objection applies to an objection based on this section. Mousseau v Mosseau, 42 M 212, 44 NW 193.

It is an open question whether the statute is applicable when the witness is called to give evidence against his interest. Newstrom v St. Paul & Duluth, 61 M 82, 63 NW 253.

The statute must be strictly construed. Wheeler v McKeon, 137 M 92, 162 NW 1070; Chapel v Chapel, 137 M 420, 163 NW 771.

It is doubtful if this section has any proper application to criminal prosecutions. State v Heurionnet, 142 M 1, 170 NW 699.

If evidence is admitted subject to a future ruling on its admissibility, the party wishing to avail himself thereof should renew his objection at the proper time and secure a ruling thereon. Ross v Minn. Mutual, 154 M 191, 191 NW 428.

Whether testimony objected to as conversation with a person deceased by one interested was improperly admitted is, in this case, immaterial because the

only conclusion possible under all the other evidence was a denial of compensation. Anderson v Russell, 196 M 358, 267 NW 501.

Testimony of interested party regarding conversation with deceased. Admissibility of pedigree evidence. 9 MLR 170.

Reasons for demanding identification and receipt. 13 MLR 298.

Disqualification of witness because of interest. 18 MLR 516.

Hearsay evidence; res gestae; spontaneous exclamations. 22 MLR 391, 402.

8. Cases under former statutes

See cases prior to the enactment of Laws 1877, Chapter 40. Foster v Berkey, 8 M 351 (310); McNob's Estate, 12 M 407 (291); Bigelow v Ames, 18 M 527 (471); Johnson v Coles, 21 M 108; Allen v Baldwin, 22 M 397.

595.05 MODES OF TAKING OATH.

HISTORY. R.S. 1851 c. 95 ss. 93, 94; P.S. 1858 c. 84 ss. 93, 94; G.S. 1866 c. 73 ss. 12, 13; G.S. 1878 c. 73 ss. 12, 13; G.S. 1894 ss. 5664, 5665; R.L. 1905 s. 4664; G.S. 1913 s. 8379; G.S. 1923 s. 9818; M.S. 1927 s. 9818.

Court and counsel for nearly two days searched for a Chinese form of oath. If the method of administering an oath to a witness from a foreign country cannot be readily ascertained, the court would be fully justified in admonishing the witness and proceed under our own forms of procedure. Mar v Shew Fan Qui, 108 M 441, 122 NW 321.

There being no showing nor sufficient offer as to the necessity of administering a Jewish oath, and not reversible in proceeding under usual court procedure. State v Friedman, 146 M 374, 178 NW 895.

A person may be a competent witness even though he is dissatisfied with our government, its administration of justice, and does not believe in God. State v Peterson, 167 M 223, 208 NW 761.

595.06 CAPACITY OF WITNESS.

HISTORY. R.S. 1851 c. 84 s. 95; P.S. 1858 c. 84 s. 95; G.S. 1866 c. 73 s. 14; G.S. 1878 c. 73 s. 14; G.S.1894 s. 5666; R.L. 1905 s. 4665; G.S. 1913 s. 8380; G.S. 1923 s. 9819; M.S 1927 s. 9819.

A witness who understands that he is brought to court to tell the truth, that it is wrongful to tell a lie, and that he will be punished if he tells a lie, has, under our statute, sufficient understanding of the obligation of an oath to be competent. State v Levy, 23 M 104.

A trial court need not examine a witness as to his fitness to testify unless, when he is offered, the court see some indication of unfitness. Cannady v Lynch, 27 M 435, 8 NW 164.

Capacity to testify under oath. Kalz v Winona & St. Peter, 76 M 351, 79 NW 310.