

JUDICIAL PROOF

CHAPTER 595

WITNESSES

595.01 WITNESS.

In the instant case there was no error in the admission of the testimony of an expert as to the speed of the Street car, notwithstanding he had not witnessed the accident, had never operated a street car, and was not familiar with the character of its brakes. *Moeller v St. Paul City Ry.* 218 M 353, 16 NW(2d) 289.

The facts were not such that lay jurors could intelligently determine from their own knowledge and experience whether the injuries, if any, which the insured sustained were the sole cause of death or whether leukemia was a contributory cause; hence, without some supporting expert medical testimony, there would have been no proper foundation for a finding of the triers of fact that the injuries were the sole cause of death, and a directed verdict would have been proper. *Kundiger v Prudential Ins. Co.* 219 M 25, 17 NW(2d) 49.

Where there is a factual basis for a medical expert's opinion that an employee sustained injury to his heart muscles as the result of attacks of angina pectoris, and the expert states that his opinion is "speculative" the opinion affords evidentiary basis for a finding of such injury, where it appears from the expert's testimony as a whole that he based his opinion upon the factual basis and regarded it as speculation only in the sense that it was incapable of demonstration. *Heber v City of St. Paul*, 219 M 87, 16 NW(2d) 878.

A witness who had owned and sold the bulls in question and had a wide experience in dealing in such bulls was qualified to an opinion as to their value before and after their castration. *Mitzel v Zachman*, 219 M 253, 16 NW(2d) 472.

Where there is a conflict in the evidence as to whether a warranty was made or not, it is a question for the jury, whose verdict will not be disturbed by this court; and there was no error in sustaining plaintiff's objection to defendant's questions relating to other contracts. *Walley v Sweet*, 220 M 545, 20 NW(2d) 528.

Evidence ordered stricken is not in the case for any purpose. *Welsh v Barnes*, 221 M 37, 21 NW(2d) 43.

In an action to set aside a deed on the ground of undue influence, trier of facts could consider testimony that after execution of deed grantor denied she had signed a deed and stated she wanted the property divided equally between grantee and a niece. *Laabs v Hagen*, 221 M 89, 21 NW(2d) 91.

Right of accused to make an unsworn statement to the jury. 5 MLR 553.

Use of books in cross-examination of medical expert. 13 MLR 732.

Proximate cause in Minnesota. 16 MLR 829.

Exceptions to the hearsay rule; statements of facts against penal interests. 21 MLR 181.

595.02 COMPETENCY OF WITNESSES.

1. Generally
2. Spouse
3. Attorney
4. Clergymen
5. Physicians

6. Officials**7. Persons incapacitated****1. Generally**

In its discretion the trial court permitted an amendment of the complaint near the close of the plaintiff's case, which alleged that it was the custom and practice on this particular railroad when making a coupling upon a downgrade to make a test to determine whether the coupling had in fact been made and, further, that good railroad practice required such test. In support of this allegation plaintiff only put in testimony that such custom had existed on this road some nine years previously. This was too remote in point of time to establish the existence of such custom at the time the plaintiff was injured, and under the circumstances disclosed by this record it was prejudicial to the defendant, and a new trial must be granted on that account. *Ross v Duluth, Missabe & Iron Range Ry.* 203 M 313, 281 NW 76, 271.

Matters concerning a witness's disposition to be untruthful go not to his competency but to his credibility. A witness may testify to the reputation of another witness for truth and veracity, but not as to his moral character. *State v Kahner*, 217 M 574, 15 NW(2d) 105.

Exclusion of expert testimony as to precautionary measures taken by defendant was proper, because the court in its discretion might determine that the jury was as competent as the expert to determine this question. *Hahn v Diamond Iron Works*. 221 M 33, 20 NW(2d) 705.

Communications made between persons who afterward became opposing parties in litigation, made in the presence of the attorneys of one of them, as well as communications made by such attorney to his client in the presence of the opposing party, are not subject to a claim of privilege by such opposing party. *Knox v Knox*, 222 M 477, 25 NW(2d) 227.

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

Testimonial competency of an infant. 4 MLR 549.

Communications between physician and patient, waiver of privilege by beneficiaries and personal representatives. 5 MLR 157.

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

Impanelling juries. 7 MLR 7.

Evidence, witnesses, wills, probate proceedings not a civil action, statutes excluding testimony by an interested party of conversations with a deceased person not applicable in probate proceedings. 7 MLR 414.

Testimony of interested party regarding conversations with deceased. 9 MLR 170.

Competency of attorney to testify in behalf of client. 10 MLR 60.

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

Privilege or competency of physician performing autopsy to testify as to cause of death. 12 MLR 417.

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

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

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

Relationship of the principles of exclusionary rules of evidence to the problem of proof. 18 MLR 506.

Disqualifications of witnesses. 18 MLR 518.

Parol evidence to contradict or vary a writing. "Test of reasonable consequences." 18 MLR 570.

Competency of wife to testify for husband in criminal cases. 19 MLR 256.

Minnesota probate practice, minor as witness to will. 20 MLR 707, 716.

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.

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

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

Instructions to jury with regard to burden of proof. Probative weight of presumption. 24 MLR 651.

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

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

Methods and procedures now employed in settlement of legal disputes are inadequate vehicles for justice. The quest for truth involves getting the truth. But essential facts are often illusive and witnesses obscure in their testimony. It is here that the man of science may make a valuable contribution. 30 MLR 410.

Duty of agent not to reveal principal's wrongful acts to third party prejudicially affected by them. 31 MLR 293.

3. Attorney

Under section 525.201 parol testimony is admissible to show that omission from the will was intentional or otherwise; and communications between a testator and his attorney who drew the will were properly received in evidence and were not privileged. *Jones v Bemidji Hospital*, 210 M 136, 297 NW 561.

Plaintiff called defendants' attorney in the first trial and, over the objection that it was immaterial, irrelevant and privileged, he was permitted to answer that he did not have in his possession a certain sales slip, dated July 26, 1937, and issued to one of the defendants. The ruling was right. *Holmes v Conter*, 212 M 394, 4 NW(2d) 106.

Where an attorney is requested by his client to attest a deed or will prepared for the client by the attorney, the attorney may disclose, after the death of the client, statements made by the latter at the time of the transaction relative thereto since the client in requesting the attorney to witness the document waives the privilege which would otherwise bar the disclosure of his statements. *Larson v Dahlstrom*, 214 M 304, 8 NW(2d) 48.

Any evidence which shows an opportunity and disposition to exert undue influence, the degree of the susceptibility of the testator to undue influence, or a result which suggests that undue influence by the chief beneficiary under a will made prior to the making thereof to the effect that she would "take care of" getting something from the testatrix, showed merely a disposition to exercise influence upon the testatrix, and while admissible as evidence, is not sufficient to prove that undue influence was in fact exercised. *Marsden v Puck*, 217 M 1, 13 NW(2d) 765.

Where, in reliance upon the confidential relation of marriage, property is conveyed without consideration by the husband to his wife, subject to a promise that she will subsequently reconvey the property to him, equity, in order to prevent unjust enrichment, will decree the wife to be a constructive trustee holding the property for the use and benefit of the husband where she repudiates her oral promise to reconvey. *Knox v Knox*, 222 M 477, 25 NW(2d) 225.

5. Physicians

A railroad physician called in another railroad physician for consultation. The service of the two was not unitary; and waiving of privilege by plaintiff calling one of the physicians as an adverse witness was not a waiver as to the other physician. *Twerth v Duluth & Iron Range*, 66 F. Supp. 427.

State board of health may by rule require physicians and others having knowledge of cancer cases to report facts. No claim for damages because of such report is justified by law. OAG July 24, 1947 (225).

6. Officials

Where defendant was under indictment for murder and arson, in view of the defendant's testimony and other evidence in the case, including his written statement, there was no error in the court's refusal to require a deputy fire marshal to produce the original notes taken by him prior to the exclusion by the defendant of the statements referred to. *State v Poelaert*, 200 M 30, 273 NW 641.

The testimony of a police officer which was to be based on memoranda taken in preparation for a report to the commissioner of highways was, under the provisions of section 169.09, rightfully excluded. *Lowen v Patęs*, 219 M 566, 18 NW(2d) 455; *Hickok v Margolis*, 221 M 480, 22 NW(2d) 850.

Where plaintiff makes application under Rule 34 for leave to inspect and copy a statement or transcript of statements made by plaintiff to defendant's claim agent a few days after the accident, there appears to be no reason for the protection of such statement as a privileged communication from inspection by plaintiff. The fact that the statement is not evidence is no bar to inspection. The statement might be used by the defendant as impeaching evidence, or under certain circumstances as substantive evidence. *Blank v Gt. Northern*, 4 Federal Rules Decisions 213.

Ordinarily, records in the office of the director of public institutions are not open for public inspection; but when in the interest of the state, records kept by the director of public institutions may be disclosed to selective service organization but not to private charity organization. OAG June 11, 1943 (88-A-27-D); OAG Sept. 10, 1943 (851-B).

The length of time a person has been a member of, and his standing with, a public retirement association is a public record which may be disclosed, as may also a list of the members of the association. OAG May 22, 1944 (331-B).

7. Persons incapacitated

In the trial of a murder prosecution the competency, as a witness, of 15-year-old Bernice Rosen, a daughter of the deceased, and who was injured at the time the mother was killed, was for the trial court. The court rightfully denied a psychiatrist, called by defendant as a witness, the right of examination of Bernice as to her competency before she was placed on the witness stand. The court accorded defendant all that he was entitled to when his expert was permitted to examine Bernice and, in defense, give an opinion as to her competency to remember what occurred at the time of the attack on her mother and herself. In permitting the expert to examine hospital records, but not their receipt in evidence, it was not error to defendant's prejudice. *State v Palmer*, 206 M 185, 288 NW 160.

Where a witness is in fact competent at the time he is offered as a witness, his testimony should not be excluded because at some prior time he had been adjudged to be insane and was not as yet restored to capacity. If the competency of a witness is challenged on the ground of unsoundness of mind, it is the duty of the trial court to conduct a preliminary inquiry to enable it to determine as to the facts of the witness' competency. *State v Connor*, 217 M 574, 15 NW(2d) 105.

595.03 EXAMINATION BY ADVERSE PARTY.

Section 595.03 is remedial and must be liberally construed. Any cross-examination of the adverse party is within the control of the trial court. *Bylund v Carroll*, 203 M 484, 281 NW 873; *Lyman v Hermann*, 203 M 225, 280 NW 862.

Section 595.03 is not applicable to officers of municipal corporation, and it was error for the court to permit cross-examination of the county engineer under such statute over objection of defendant. *Poynter v County of Otter Tail*, 223 M 121, 25 NW(2d) 710.

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Right of trial judge to comment on evidence in charge to jury in civil and criminal cases. 18 MLR 441.

595.04 CONVERSATION WITH DECEASED OR INSANE PERSON.

It is a general rule that a tavern keeper is required to use reasonable care to protect its guests and patrons from injury at the hands of vicious or lawless persons whom it knowingly permitted to be in or about the premises. Plaintiff's administrator's testimony that the bartender, since deceased, told him that the assault was unprovoked and that earlier on the same evening the bartender had warned the offending patron to desist from threatening other customers was competent. *Windorski v Doyle*, 219 M 402, 18 NW(2d) 142.

In action for reformation of life policy on the ground that insured prior to his death had effected a change of beneficiary whereby plaintiff, his intended wife, became beneficiary instead of his parents, insurer's soliciting agent and its cashier were competent to testify as to conversations had by them with insured relative to proposed change of beneficiary. *Boehne v Guardian Life*, 224 M 57, 28 NW(2d) 55.

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

Reasons for demanding identification and receipt. 13 MLR 281, 298.

Disqualification of witness because of interest. 18 MLR 506, 516.

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