

EVIDENCE

SUPREME COURT REVIEW

Many of the cases decided by the Nebraska Supreme Court during the survey period involved evidentiary problems. A few clarified or changed Nebraska law. However, the importance of these decisions is overshadowed by the legislature's passage of L.B. 279, the Nebraska Evidence Rules, signed into law on May 22, 1975.¹ These Rules will be effective in all trials commenced after December 31, 1975.² Any developments in Nebraska case law will be of interest only until that date, as the Rules will supercede prior case law as well as repeal previous evidentiary statutes.

"RULE OF THE QUEEN'S CASE" DISCARDED

In a case in which a witness had been cross-examined regarding his testimony at a preliminary hearing, the Nebraska Supreme Court held that extrinsic evidence of previously recorded testimony need not be introduced before a witness may be cross-examined regarding that testimony.³ This repudiates the "rule of the Queen's case" previously in effect in Nebraska since 1879.⁴ Nebraska case law is thus now in accord with the position taken by the Nebraska Evidence Rules, which will permit examination of a witness concerning his prior statement, written or not, without showing him the statement or disclosing its contents to him at that time.⁵

MATERIAL ASSUMPTIONS CONTAINED IN A HYPOTHETICAL QUESTION

In another case decided during the survey period,⁶ the Nebraska Supreme Court refused to reverse a verdict for the plaintiff in a personal injury action. Defendant contended that a hypothetical question propounded to plaintiff's expert medical witness included several assumptions which were not supported by direct evidence in the record.⁷ The court found it sufficient that there had been substantial circumstantial evidence presented from which

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1. L.B. 279, [1975] Laws of Neb. 528.
 2. *Id.* § 74, at 557.
 3. *State v. Wilmore*, 192 Neb. 807, 814-15, 224 N.W.2d 756, 760 (1975).
 4. *Cropsey v. Averill*, 8 Neb. 151 (1879).
 5. L.B. 279, § 46(1), [1975] Laws of Neb. 543.
 6. *Bakhit v. Thomsen*, 193 Neb. 133, 225 N.W.2d 860 (1975).
 7. *Id.* at 138, 225 N.W.2d at 864.

the jury could have found the assumptions in question to be true.⁸ The court, mentioning the "modern trend", said that material facts assumed in a hypothetical question to an expert witness should be "substantially true". However, where proof of these facts is less than conclusive, or there is conflicting evidence, it should affect the weight given the expert's opinion by the jury, but not preclude admissibility.⁹ This decision places Nebraska case law in accord with the position taken by the Nebraska Evidence Rules.¹⁰

BASIS FOR OPINION TESTIMONY BY AN EXPERT WITNESS

In another case decided during the survey period,¹¹ an expert examined the decedent's car only after it had been towed from the scene of the accident and had been stored in a lot for twenty days. The expert testified at trial as to the condition of the brakes on the car at the time of his examination, and gave his opinion as to their condition at the time of the accident.¹² The plaintiff, on appeal, claimed that the admission of this opinion was error since the expert had no actual knowledge of the facts at the time of the accident.¹³

The court held "that the lack of such an examination would preclude him from testifying as to the fact there was no accident, towing, or storage-related damage to the braking system;" however, "such lack of examination does not preclude his rendering an opinion based upon his post-accident examination", as long as the expert reveals the facts upon which his opinion is based.¹⁴ The lack of examination of the car by the expert until twenty days after the accident affects only the weight and credibility to be given his testimony, not its competence or admissibility.¹⁵

EVIDENCE OF A WITNESS'S TRUTH OR VERACITY

In two cases decided during the survey period,¹⁶ the Nebraska Supreme Court reaffirmed and clarified the well-established evidentiary principle that testimony concerning the truthfulness of a witness must be confined to evidence of his reputation for truth

8. *Id.* at 142, 225 N.W.2d at 866.

9. *Id.* at 142-43, 225 N.W.2d at 866.

10. L.B. 279, § 53, [1975] Laws of Neb. 544-45.

11. *Duling v. Berryman*, 193 Neb. 409, 227 N.W.2d 584 (1975).

12. *Id.* at 412-13, 227 N.W.2d at 586-87.

13. *Id.* at 413, 227 N.W.2d at 587.

14. *Id.* at 414, 227 N.W.2d at 587.

15. *Id.* at 415, 227 N.W.2d at 588.

16. *State v. Craig*, 192 Neb. 347, 220 N.W.2d 241 (1974); *State v. Zobel*, 192 Neb. 480, 222 N.W.2d 570 (1974).

and veracity in the community. One person's personal opinion as to the witness's truth or veracity cannot be admitted, nor can evidence of specific acts or instances of conduct.¹⁷ The reason given for this rule is the avoidance of collateral issues.¹⁸

In one of these cases,¹⁹ a state undercover agent who testified for the prosecution was questioned by defense counsel on cross-examination concerning his alleged personal Satanistic beliefs and allegiance to the devil.²⁰ The supreme court upheld the trial court's limitation of this line of cross examination and rejection of an offer of proof of impeaching testimony on this issue. Repeating the rule that impeachment by specific acts bearing on the character trait of veracity is not allowed, the court found that "[t]he witness' alleged activities in the cult of Satan were clearly collateral."²¹

CONCLUSIVENESS OF JUDICIAL ADMISSIONS

In another case which clarified and reaffirmed an established point of evidentiary law, defendant contended that some allegations in the plaintiff's original pleadings constituted a judicial admission of the facts alleged, and was final and conclusive on plaintiff.²² The court, finding the alleged admission neither unequivocal nor unexplained, held that the statement was therefore not conclusive, but capable of explanation like any evidentiary admission against interest. This follows the general evidentiary principle that judicial admissions are not always conclusive if they are explained and overcome by other evidence.²³

EVIDENCE OF INCOME OF A BUSINESS OPERATED ON PROPERTY TAKEN BY EMINENT DOMAIN ADMITTED

In a case involving an award in an eminent domain proceeding,²⁴ the Nebraska Supreme Court apparently declined to follow an established evidentiary principle. When the value of property taken is at issue, net revenue arising from the use of the real estate itself is admissible, but it has consistently been held in most juris-

17. See McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 44 at 90-93 (2d ed. 1972).

18. *Id.* at 91; 192 Neb. at 353, 220 N.W.2d at 244; 192 Neb. at 484, 222 N.W.2d at 572.

19. *State v. Zobel*, 192 Neb. 480, 222 N.W.2d 570 (1974).

20. *Id.* at 481, 222 N.W.2d at 571.

21. *Id.* at 484, 222 N.W.2d at 572-73.

22. *Modern Plumbing & Heating v. Journey West Campground, Inc.*, 193 Neb. 781, — N.W.2d — (1975).

23. See 30 AM. JUR. 2d *Evidence* § 1099 at 263-64 (1967).

24. *Y Motel, Inc. v. State*, 193 Neb. 526, — N.W.2d — (1975).

dictions that evidence as to the earnings of a business conducted on that property is not admissible to establish the value of the land taken.²⁵

The court allowed an expert witness to use gross rental revenue as one factor upon which he based his opinion as to the value of motel property taken. The majority opinion, while noting the general rule as stated above, cryptically found that the analogy of gross rental revenue to net profits of a business was "clearly inappropriate and inapplicable"²⁶ and thus admitted the evidence. A vigorous dissent by Justices Newton and Boslaugh failed to see why this case should not have been subject to the general rule that evidence as to the income from the real estate itself is admissible to establish the value of property, but evidence as to the income of a business operated on the property is not.²⁷

The Nebraska Supreme Court in this case may have been influenced by the fact that under the Nebraska Evidence Rules governing relevancy, such evidence will probably be admissible.²⁸

LEGISLATION

One important result of the first session of the eighty-fourth legislature was the enactment of L.B. 279, the Nebraska Evidence Rules.¹ This codification of the rules of evidence is patterned closely after the Federal Rules of Evidence,² also recently enacted. Like the Federal Rules, the Nebraska Evidence Rules embody a liberal attitude toward admissibility, stating that except where expressly expected, "all relevant evidence is admissible."³

The few points at which the Nebraska Evidence Rules differ from the Federal Rules are minor, and can be quickly summarized.

PENDENCY OF AN APPEAL

Under the Nebraska Rules, pendency of an appeal makes

25. See 31A C.J.S.2d *Evidence* § 182(5) at 475-76 (1964).

26. 193 Neb. at 531, — N.W.2d at —.

27. *Id.* at 535-39, — N.W.2d at —.

28. *Id.* at 531, — N.W.2d at —. See L.B. 279, §§ 11-21 [1975], Laws of Neb. 531.

1. See generally *Symposium—The Proposed Nebraska Rules of Evidence*, 53 NEB. L. REV. 331 (1974).

2. Pub. L. No. 93-595 (Jan. 2, 1975).

3. L.B. 279, § 12, [1975] Laws of Neb. 531.

evidence of a conviction inadmissible.⁴ The Federal Rules take the opposite position, and admit evidence of a conviction pending appeal.⁵

ANCIENT DOCUMENTS EXCEPTION

The Nebraska Rules provide an exception to the hearsay rule for documents shown to have been in existence more than thirty years.⁶ Documents this old would be difficult or impossible to authenticate by direct evidence—this exception admits them as evidence on proof that they are at least thirty years old, unsuspecting in appearance, and produced from a natural place of custody.⁷ The Federal Rules differ only in that the period specified is twenty rather than thirty years.⁸

COSTS OF COURT APPOINTED EXPERT WITNESSES

Both the Nebraska Rules and the Federal Rules provide that the judge may appoint expert witnesses on his own motion or on the motion of any party.⁹ There is a difference between the two sets of Rules, however, concerning the compensation of expert witnesses so appointed. The Nebraska Rules specify that the cost of such witnesses in civil cases shall be borne *equally* by the opposing parties.¹⁰ The Federal Rules are less specific, leaving the costs to be paid by the parties in such proportion as the court directs.¹¹

The discrepancies between the Nebraska Evidence Rules and the Federal Rules are quite minor. The substantial uniformity of the two should simplify practice between the two court systems. The liberal approach of both should lead to achievement of the stated goal of each:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.¹²

4. *Id.* § 42(5), at 542. See Burke, *Witness Rules Change, Codify Nebraska Law*, 53 NEB. L. REV. 406, 412 (1974).

5. Pub. L. No. 93-595, Rule 609(e) (Jan. 2, 1975).

6. L.B. 279, § 57(15), [1975] Laws of Neb. 548.

7. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 323 at 747 (1972).

8. Pub. L. No. 93-595, Rule 803(16) (Jan. 2, 1975).

9. *Id.* Rule 706(a); L.B. 279, § 54(1), [1975] Laws of Neb. 545.

10. *Id.* § 54(2), at 545. See Mitchell, *Opinion, Expert Testimony Rules Have Major Impact on State Law*, 53 NEB. L. REV. 417, 423 (1974).

11. Pub. L. No. 93-595, Rule 706(b) (Jan. 2, 1975).

12. *Id.* Rule 102, L.B. 279, § 2, [1975] Laws of Neb. 528.