

forcement of such decrees,<sup>28</sup> and upon analogy to child support and custody cases, where modification is generally allowed.<sup>29</sup>

Although the court in the principal case was under no constitutional obligation to recognize the modifiable New Jersey decree, it is submitted that the instant decision is based upon sound policy considerations. It seems unnecessary, unreasonable, and unfair to require plaintiff to travel 3000 miles across the continent to New Jersey from time to time in order to obtain judgments for specific sums so as to satisfy an artificial "finality" requirement. A requirement that the parties return to *F-1* to relitigate the decree because of changes in circumstances places upon the parties additional time delays and increased expenses, which could otherwise be easily obviated. By recognition and enforcement of a foreign decree as such, *F-2* is simply accomplishing the same result as theoretically would have obtained in *F-1* if suit had been brought there.<sup>30</sup> When *F-2*, instead of enforcing the foreign decree as such, adopts the decree *as its own*,<sup>31</sup> or when it takes the view that its decree supersedes<sup>32</sup> the foreign one, the only binding limitations are those which the court imposes upon itself. When a party's claim of a change in circumstances seems on the merits to justify a modification, and where the forum is one of convenience to both parties, *F-2* should recognize and modify a modifiable foreign alimony decree.

#### EVIDENCE—CONCLUSIVENESS OF A PARTY'S OWN ADVERSE TESTIMONY

##### *Snittjer Grain Co. v. Koch, 71 N.W.2d 29 (Iowa 1955)*

Plaintiff brought an action for the purchase price of a corn drier, alleging an oral contract of sale with defendant. While plaintiff's direct evidence would ordinarily have been sufficient to take the case to the jury,<sup>1</sup> he testified on cross-examination that he did not "sell" the corn drier to defendant, but rather that defendant had "ordered"

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lawful ways and means as is usual, and according to the source and practice of the court; orders so made may be revised and altered by the court from time to time as circumstances may require.

N.J. STAT. ANN. § 2:50-37 (Supp. 1951), *Robison v. Robison*, 9 N.J. 288, 88 A.2d 202 (1952), *cert. denied*, 344 U.S. 829 (1952). See also FLA. STAT. ANN. § 65.15 (1941), *Sackler v. Sackler*, 47 So. 2d 292 (Fla. 1950).

28. See note 14 *supra*.

29. *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 614-15 (1947). See also *Sampsell v. Superior Court*, 32 Cal. 2d 763, 197 P.2d 739 (1948); *Lopez v. Avery*, 66 So. 2d 689 (Fla. 1953); *Durfee v. Durfee*, 293 Mass. 472, 200 N.E. 395 (1936); *Turnage v. Tyler*, 183 Miss. 318, 184 So. 52 (1938); *Setzer v. Setzer*, 251 Wis. 234, 29 N.W.2d 62 (1947).

30. See *Jacobs, supra* note 7, at 273.

31. *Palen v. Palen*, 12 Cal. App. 2d 357, 55 P.2d 228 (1936); *Creager v. Superior Court*, 126 Cal. App. 280, 14 P.2d 552 (1932); *Sackler v. Sackler*, 47 So. 2d 292 (Fla. 1950). See *Jacobs, supra* note 7, at 266.

32. See, e.g., *Durfee v. Durfee*, 293 Mass. 472, 200 N.E. 395 (1936).

1. *Snittjer Grain Co. v. Koch*, 71 N.W.2d 29, 31 (Iowa 1955).

the drier from the manufacturer. At the conclusion of plaintiff's evidence, defendant's motion to dismiss was sustained on the ground that plaintiff's "adverse admissions" conclusively proved that he had not contracted to sell the drier to defendant. The Iowa Supreme Court reversed, holding that plaintiff's adverse admissions were not "judicial admissions," but were inaccurate legal "conclusions" as to what constituted an "order" and "sale," and therefore were not conclusive in view of other evidence presented favorable to plaintiff's case.<sup>2</sup>

When a party, preparatory to trial or during the course of trial, expressly waives the necessity of proof of a fact alleged by his adversary, such waiver is a "judicial admission" and is conclusive upon the party. He is thereafter precluded from offering evidence in contradiction of the "judicial admission," either by his own testimony or by the testimony of other witnesses.<sup>3</sup> The issue presented by the principal case is whether the testimony of a party adverse to his own cause should be given the effect of a judicial admission, *i.e.*, whether such testimony should conclusively bind the party.

Under the earlier view, testimony given by a party adverse to his own cause is not given the effect of a judicial admission, but rather is treated the same as the testimony of an ordinary witness.<sup>5</sup> Since a party is not bound as a matter of law by the adverse testimony of an ordinary witness, he is not bound, under this view, by his own adverse testimony. The jury is allowed to consider his damaging testimony with all the other evidence presented.

A relatively recent view<sup>6</sup> adheres to the approach that testimony given by a party adverse to his own cause has the same effect as a judicial admission. The party is conclusively bound by such testimony<sup>7</sup> on the theory that a litigant cannot ask the court to believe he

2. *Id.* at 34.

3. The term "waiver" is used broadly here. Thus, a party who by failing to deny an allegation in the pleading of his adversary is deemed to admit such allegation would be considered to have "waived" the necessity of proof.

4. 9 WIGMORE, EVIDENCE §§ 2588, 2590 (3d ed. 1940).

5. *Alamo v. Del Rosario*, 98 F.2d 328 (D.C. Cir. 1938); *Kanopka v. Kanopka*, 113 Conn. 30, 154 Atl. 144 (1931); *Wallach v. Paddock*, 49 N.M. 317, 163 P.2d 632 (1945). See also MCCORMICK, EVIDENCE § 243 (1954).

6. 9 WIGMORE, EVIDENCE § 2594a (3d ed. 1940); MCCORMICK, EVIDENCE § 243 (1954).

7. *Kansas Transp. Co. v. Browning*, 219 F.2d 890 (10th Cir. 1955); *Feary v. Metropolitan Street Ry.*, 162 Mo. 75, 62 S.W. 452 (1901); *Winkler v. City of Columbus*, 149 Ohio St. 39, 77 N.E.2d 461 (1948); *Massie v. Firmstone*, 134 Va. 450, 114 S.E. 652 (1922).

McCormick's statement [MCCORMICK, EVIDENCE 515 (1954)] that a "party is free to contradict, and thus correct, his own testimony," does not appear to be fully supported by the cases. The party can contradict his own testimony only when he can show that it comes within one of the qualifications of the rule-of-conclusiveness relating to mistake and the like. See text supported by notes 9-14 *infra*.

has not told the truth.<sup>8</sup> To avoid the inevitable injustice of a rigid application of this "rule-of-conclusiveness" there appears to be a tendency among the courts to allow a party to change his own adverse testimony where there is a likelihood there may have been a mistake,<sup>9</sup> e.g., where comprehension may have been inaccurate because of a physical defect,<sup>10</sup> or where testimony was given in response to a misinterpreted question,<sup>11</sup> through oversight,<sup>12</sup> through lack of definite recollection,<sup>13</sup> or in answer to a misleading question.<sup>14</sup> Nor does the rule apply to matters about which the party could easily have been mistaken, e.g., testimony concerning estimates,<sup>15</sup> opinions,<sup>16</sup> or conclusions.<sup>17</sup> The "rule-of-conclusiveness" courts tend to apply the rule more rigidly when a party gives adverse testimony relating to subjective matters within his own special knowledge,<sup>18</sup> such as his motives, purposes, and emotions,<sup>19</sup> since the possibility of mistake is largely eliminated in this area.<sup>20</sup>

8. *Massie v. Firmstone*, 134 Va. 450, 462, 114 S.E. 652, 656 (1922). See also *Harlow v. Leclair*, 82 N.H. 506, 511, 136 Atl. 128, 130 (1927).

9. See, e.g., *Coursen v. Goodloe*, 267 S.W.2d 259 (Tex. Civ. App. 1954); *Burruss v. Suddith*, 187 Va. 473, 47 S.E.2d 546 (1948).

10. *Phillips v. Vrooman*, 361 Mo. 1098, 238 S.W.2d 355 (1951).

11. *Hughes v. Greider*, 194 Iowa 726, 190 N.W. 420 (1922); *Smith v. Siercks*, 277 S.W.2d 521 (Mo. 1955) (dictum).

12. *Hewitt v. Katz Drug Co.*, 99 S.W.2d 872 (Mo. App. 1947) (party did not notice that counsel's question misquoted her direct testimony); *Smith v. Siercks*, 277 S.W.2d 521 (Mo. 1955) (dictum).

13. *Burruss v. Suddith*, 187 Va. 473, 47 S.E.2d 546 (1948); *Smith v. Siercks*, 277 S.W.2d 521 (Mo. 1955) (dictum).

14. *Bagwell v. Susman*, 165 F.2d 412 (6th Cir. 1947). The rule does not apply to adverse testimony given in a previous trial, *Steele v. Kansas City So. Ry.*, 302 Mo. 207, 257 S.W. 756 (1924), or in a deposition, *Leonard v. City of Manchester*, 96 N.H. 115, 70 A.2d 915 (1950); *Short v. White*, 234 Mo. App. 499, 133 S.W.2d 1039 (1939).

15. *Gulf, M. & O.R.R. v. Williamson*, 191 F.2d 887 (8th Cir. 1951); *Harry v. Thompson*, 166 S.W.2d 795 (Mo. App. 1942). *But see Jackson v. Mannor*, 90 Ohio App. 424, 107 N.E.2d 151 (1951) (defendant bound by his own testimony as to the plaintiff's speed).

16. *Shearron v. Shearron*, 219 Miss. 27, 68 So. 2d 71 (1953).

17. *Sheffield v. Chicago*, 328 Ill. App. 321, 65 N.E.2d 486 (1946); *Grammar Inv. Co. v. Cumberworth*, 120 Ind. App. 379, 92 N.E.2d 736 (1950); *Smith v. Siercks*, 277 S.W.2d 521 (Mo. 1955) (party not bound where testimony related to his impressions when at time of observation he was in imminent peril).

18. *McCormick* treats the "special knowledge" qualification as a category distinct from the rule-of-conclusiveness category. *MCCORMICK, EVIDENCE* § 243 (1954). It would seem, however, that the special knowledge aspect is also recognized by courts applying the rule-of-conclusiveness. See *Mollman v. Pub. Serv. Co.*, 192 S.W.2d 618 (Mo. App. 1946).

19. *Harlow v. Leclair*, 82 N.H. 506, 136 Atl. 128 (1927). The *Harlow* case sets out five considerations to be used in determining the conclusiveness of a party's own adverse testimony:

- 1) Was the party at the time when the occurrence about which he testified took place, and when he testified, in full possession of his mental faculties?
- 2) Was his intelligence and command of English such that he fully understood the purport of the questions and his answers thereto?
- 3) What was the nature of the facts to which he testified? . . . .
- 4) Is his testimony contradicted by that of other witnesses?
- 5) Is the effect of his testimony clear and unequivocal, or are his statements inconsistent and conflicting?

Since the adverse testimony related by the plaintiff in the principal case was in the nature of a legal conclusion, the case may be explained simply as an application of one of the accepted qualifications of the rule-of-conclusiveness.<sup>21</sup> To this extent the case is consistent with earlier Iowa law.<sup>22</sup> In its decision, however, the court adopted as the proper approach in determining the effect of an adverse admission the language of a Connecticut case: "[T]estimony of a party to a fact is ordinarily no more conclusive upon him than the evidence given by any other witness. . . ."<sup>23</sup> This language is a clear indication that the court intends to discard the rule-of-conclusiveness that had been accepted in prior Iowa decisions. Subsequent cases may attempt to characterize this portion of the opinion as obiter dictum, but the clear import of the decision indicates that the Iowa Supreme Court is definitely committed to rejecting the rule-of-conclusiveness.

It would seem that the court has correctly determined that damaging statements made by a party on the witness stand should not be treated as a judicial admission.<sup>24</sup> When a party makes a judicial admission<sup>25</sup> he realizes that he will be unable to subsequently controvert the admission. In most cases he acts with the advice of counsel and can carefully consider the effect the admission will have on his case. When a party makes an adverse admission while testifying, however, the rapid-fire question-answer experience of testifying seldom allows adequate time to thoroughly consider a question. In most instances the adverse statements are developed on cross-examination, where the untrained, responsive witness is often maneuvered by a skillful cross-examiner into damaging testimony which often does not accurately portray the actual happening of events.<sup>26</sup> Even when the adverse statements are made on direct examination, the possibility of inadvertent mistake may cast doubt on the validity of such testimony. It is not proposed, of course, that such adverse statements should not be considered by the jury; indeed, such testimony, unless adequately ex-

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*Id.* at 512, 136 Atl. at 131. See also *Reynolds v. Sullivan*, 330 Mass. 549, 116 N.E.2d 128 (1953); *Zamora v. Thompson*, 250 S.W.2d 626 (Tex. Civ. App. 1952).

20. Even in this situation, however, the courts are reluctant to apply the rule if there exists a likelihood of mistake. See *McHardy v. Standard Oil Co.*, 231 Minn. 493, 44 N.W.2d 90 (1950). See also *Waldo v. St. Paul City Ry.*, 70 N.W.2d 289 (Minn. 1955); *Cote v. Stafford*, 94 N.H. 251, 51 A.2d 144 (1947) (stating that when testimony relates to matters within a party's special knowledge the rule-of-conclusiveness does not apply if the jury can find the party was *honestly mistaken*); *Isabelle v. Crystal Laundry, Inc.*, 93 N.H. 264, 41 A.2d 241 (1945). See *McCORMICK, EVIDENCE* § 243 (1954), criticizing the assumption that a party is not likely to be mistaken as to facts in his own special knowledge.

21. See text supported by note 17 *supra*.

22. See *Hinkson v. Morrison*, 47 Iowa 167 (1877).

23. *Kanopka v. Kanopka*, 113 Conn. 30, 154 Atl. 144 (1931).

24. 9 WIGMORE, *EVIDENCE* § 2594a (3d ed. 1940). See also *Alamo v. Del Rosario*, 98 F.2d 328 (D.C. Cir. 1938).

25. See text supported by note 3 *supra*.

26. *McCORMICK, EVIDENCE* § 243 (1954).

plained, will generally weigh heavily against the party in the minds of the jury. But it does not seem that a party's adverse testimony should be automatically considered conclusive. The many qualifications recognized by courts applying the rule-of-conclusiveness are adequate indications of the weakness of the rule itself. The continued use of a rule that is encompassed by so many qualifications can only produce protracted litigation, as losing parties seek appellate rulings on whether a particular admission was or was not within a recognized exception to the rule. The earlier approach, treating a party's adverse statements the same as those of any other witness, seems to provide a more flexible and desirable method of dealing with a party's adverse testimony. It is to be hoped that more courts will pursue the course indicated by the court in the principal case and reject the rule-of-conclusiveness, for "The truth of the case depends on a comparison of what *all* the witnesses say and *all* the circumstances indicate."<sup>27</sup>

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TORTS—GUEST STATUTE—STATUS OF RIDER LEGALLY OBLIGATED  
TO PAY FOR TRANSPORTATION

*In re Dikeman's Estate, 178 Kan. 188, 284 P.2d 622 (1955)*

Plaintiff and defendant's decedent agreed that plaintiff would ride in decedent's car and pay a reasonable sum for transportation to and from a fraternal meeting. The amount to be paid was to be determined after the return home. On the return trip decedent's car collided with a train, causing decedent's death and injury to the plaintiff. Plaintiff sued decedent's estate, alleging ordinary negligence, and the trial court sustained the defendant's demurrer. The Kansas Supreme Court, three justices dissenting, affirmed the judgment of the trial court, holding that plaintiff was within the Kansas "guest" statute and, therefore, was precluded from recovery on the basis of ordinary negligence.<sup>1</sup>

At common law the driver of an automobile has a duty to exercise ordinary and reasonable care for the protection of a guest.<sup>2</sup> Since

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27. 9 WIGMORE, EVIDENCE § 2594a n.16 (3d ed. 1940). For an extensive review of the cases on the subject, see Annot., 169 A.L.R. 798 (1947).

The courts in Missouri have followed the rule-of-conclusiveness in dealing with a party's own adverse testimony. *Smith v. Siercks*, 277 S.W.2d 521 (Mo. 1955); *Steele v. Kansas City So. Ry.*, 265 Mo. 97, 175 S.W. 177 (1915). See also *Mollman v. Pub. Serv. Co.*, 192 S.W.2d 618 (Mo. App. 1946) (refusing to recognize exception to rule because testimony related to evidence in party's own special knowledge). 9 WIGMORE, EVIDENCE § 2594a (Supp. 1955) lists the many exceptions to the rule recognized by Missouri courts.

1. *In re Dikeman's Estate*, 178 Kan. 188, 284 P.2d 622 (1955).

2. PROSSER, TORTS 451 (2d ed. 1955). Missouri by statute requires the operator of a motor vehicle to "exercise the highest degree of care." MO. REV. STAT. § 304.010 (1949). This standard of care represents the driver's duty to his guest. *Kaley v. Huntley*, 333 Mo. 771, 63 S.W.2d 21 (1933).