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Waiver of Objection by Trial Conduct

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Comments

WAIVER OF OBJECTION BY TRIAL CONDUCT

I. INTRODUCTION

Ordinarily, the initiative in excluding improper evidence by means of an objection is left to the opposing counsel.¹ If counsel, for one reason or another, fails to make a timely objection to improper evidence, he is said to have "waived" his right to appeal on the admission of such evidence. "A rule of Evidence not invoked is *waived*."² But there are other ways by which an objection may be waived. The purpose of this article is to consider what trial conduct constitutes an implied waiver of a valid objection.³

Broadly speaking, an objection may be impliedly waived by trial conduct in one of two ways; either by *prior* trial conduct or by *subsequent* trial conduct.⁴ This article will illustrate and discuss these two classifications of waivers, and analyze the criteria used by appellate courts in holding a valid objection waived by conduct at the trial level.

Before beginning an analysis of this question, a few observations must be noted. Even though the rules of evidence as to waivers apply to all types of inadmissible evidence,⁵ it is extremely difficult to formulate any general rule in this area because, in many instances, the cases fail to supply all the facts as to when and how the objection was raised.⁶ Even if such facts are given, the courts merely state that the objection has been waived without satisfactorily discussing why it was deemed to have been waived.⁷

¹ MCCORMICK, EVIDENCE § 55 at 130 (1954). "But such failure by the party does not of itself preclude the trial judge from excluding the evidence on his own motion if the witness is disqualified for want of capacity or the evidence is incompetent, and he considers that the interests of justice require the exclusion of the testimony."

² 1 WIGMORE, EVIDENCE § 18 at 321 (3d ed. 1940).

³ For a general discussion of the "objection" see 1 WIGMORE, EVIDENCE § 18 (3d ed. 1940).

⁴ "Such waiver or estoppel may arise from failure to object, from acts done or omitted before the evidence is offered . . . or from some affirmative act done after the ruling on the evidence." *In re Estate of Kaiser*, 150 Neb. 295, 308, 34 N.W.2d 366, 374 (1948).

⁵ Note, 35 MICH. L. REV. 636, 640 (1937).

⁶ See, e.g., *Hoagland & Co. v. Scottish Union & Nat'l Ins. Co.*, 131 Neb. 112, 267 N.W. 242 (1936).

⁷ See, e.g., *People v. Dye*, 81 Cal. App. 2d 952, 185 P.2d 624 (3d Dist. 1947); *Edgerton v. Johnson*, 217 N.C. 314, 7 S.E.2d 535 (1940).

Further, in any analysis of this problem it is imperative to determine what kind of fact the inadmissible evidence seeks to establish. The cases ordinarily do not talk in terms of "primary," "mediate," and "ultimate" facts,⁸ but speak only of the "fact" sought to be established. For example, in a negligence case, one party uses opinion evidence to establish the "primary" fact that the defendant was going sixty miles per hour, and from this he wants to establish the "mediate" fact that defendant was speeding. From this "mediate" fact he asks the jury to infer the "ultimate" fact that the defendant was negligent. In applying the waiver doctrine the courts will discuss the waiver in terms of the "fact" which was sought to be established. They fail to discuss which "fact." It will become evident that this failure to distinguish between primary, mediate, and ultimate facts explains, to some degree, the confusion in this area as to the exact limitations on permissible trial conduct. With these problems in mind let us consider the two basic classifications of waivers by trial conduct.

II. PRIOR WAIVER

A. PRIOR FAILURE TO OBJECT

As was previously stated, a failure to object will constitute a waiver as to the evidence being introduced. Assume, however, attorney A introduces inadmissible evidence and opposing counsel, B, fails to object. As to this evidence B has clearly waived any objection. Later, A introduces similar inadmissible evidence on the same primary fact in question. May B now object, or has he, by his prior silence, waived any objection? Has he, in other words, impliedly waived his objection in advance?

Often, courts reason that since the evidence was already admitted without objection it cannot be prejudicial to B's case, and B cannot subsequently object to similar evidence on the same fact.⁹ The effect of such holdings is to place the trial lawyer on the "horns of a dilemma." As a practical matter, and in the interest of trial expediency, the more experienced advocate refrains from objecting

⁸ An ultimate fact is one upon whose combined occurrence the law raises the duty, or the right in question. A primary fact, for the purposes of this article, is one from whose existence may be rationally inferred the existence of an ultimate fact. *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir. 1944).

⁹ *Boston Woven-hose & Rubber Co. v. Kendall*, 178 Mass. 232, 59 N.E. 657 (1901); *Shrimpton & Sons v. Philbrick*, 53 Minn. 366, 55 N.W. 551 (1893); *Shelton v. Southern Ry.*, 193 N.C. 670, 139 S.E. 232 (1927).

unless the evidence is damaging to his case.¹⁰ However, if he fails to object, believing that the evidence, in and of itself, is not damaging, he runs the risk of having similar inadmissible evidence admitted which may have a cumulative adverse effect on his case.

To avoid such an implied waiver he must object to all technically inadmissible evidence introduced by his adversary. This certainly is not in the best interests of trial expediency. Further, counsel's repeated objections to technically inadmissible evidence which at the time is not damaging to his case, has a profound adverse effect on the jury¹¹ as well as the judge. The judge may become annoyed with such repeated objections, and the jury may feel counsel is trying to hide some relevant fact.

The better view would permit B to object even though previous inadmissible evidence had been admitted without objection.¹² This view takes into consideration the fact that repeated objections are annoying and do have an adverse effect upon the jury. It also recognizes that while the initial inadmissible evidence may not be damaging, repeated use of and elaboration on the same evidence will prove harmful to the opponent's case.¹³ This view clearly reconciles the interests of trial expediency with adequate protection of the objector's interests when he feels the cumulative effect of repeated admissions of inadmissible evidence will damage his case.¹⁴ It also eliminates the problem of any adverse effect on the jury in that the objector does not have to make repeated objections to technically inadmissible evidence.

¹⁰ See Ladd, *Common Mistakes in the Technique of Trial*, 22 IOWA L. REV. 609 (1937); Armstrong, *Objections to Evidence in Jury Trials: A Multiple Review*, 23 TENN. L. REV. 943 (1955).

¹¹ See Ladd, *Objections, Motions and Foundation Testimony*, 43 CORNELL L. Q. 543 (1958); Armstrong, *Objections to Evidence in Jury Trials: A Multiple Review*, 23 TENN. L. REV. 943 (1955). For an excellent discussion of the practical use of objections, see KEETON, *TRIAL TACTICS AND METHODS* ch. 4 (1954).

¹² *Bobereski v. Insurance Co.*, 105 Pa. Super. 585, 161 Atl. 412 (1932).

¹³ "[T]he fact that incompetent, irrelevant, and immaterial evidence may be introduced on a trial by one party, without objection from the other party, because he may deem it of no importance and harmless, does not prevent the latter from objecting to the further introduction and elaboration of such evidence when he is of opinion that it is both important and harmful. The principle of estoppel does not apply in such case." *Id.* at 595, 161 Atl. at 415.

¹⁴ "[F]ailure to object to illegal evidence at one time, does not waive a right to object to like evidence offered later. If these objections had been sustained, the force of the former testimony would probably have been weakened in the minds of the jury." *Lowery v. Jones*, 219 Ala. 201, 202, 121 So. 704, 706 (1929).

(1) *The Nebraska position*

While there are no cases in Nebraska specifically covering this problem, there is dicta to the effect that Nebraska follows the waiver doctrine. In *In re Estate of Kaiser*,¹⁵ proponent of a contested will was permitted, without objection, to identify the two children who were beneficiaries under the will. However, when she was asked to "call the children forward so the jury may see them"¹⁶ the contestant purported to object saying: "We object to this as incompetent and immaterial and improper conduct. I am glad to have the jury see them, but I think I should preserve the right . . ."¹⁷ The court felt there was consent to this subsequent evidence rather than objection. The court's later statement that "such waiver or estoppel may arise . . . from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence,"¹⁸ is mere dictum because, in this case, there was no valid objection to be waived.

Headnote four of *Hickman v. Layne*¹⁹ states that "error cannot be predicated on the admission of certain testimony, where ample testimony of the same nature was admitted without objection."²⁰ As a result, *Hickman* has been cited²¹ for the proposition that prior failure to object to inadmissible evidence constitutes a waiver in advance of any subsequent valid objection to similar evidence on the same matter. The headnote, however, is much broader than the actual holding of the case. In *Hickman*, the court admitted hearsay testimony of two witnesses as to the purported dissolution of the partnership in question. The court held that this was not error because the objector had "himself testified that he was cognizant of the report . . . that Layne & Krone [the partnership] had dissolved."²² Thus, *Hickman* is actually a case where the objector admits the very fact, evidence of which he seeks to have excluded. The court properly held that there was a waiver, but not because he had previously failed to object to evidence admitted by his adversary.

¹⁵ 150 Neb. 295, 34 N.W.2d 366 (1948).

¹⁶ *Id.* at 307, 34 N.W.2d at 374.

¹⁷ *Ibid.*

¹⁸ 150 Neb. 295, 308, 34 N.W.2d 366, 374 (1948).

¹⁹ 47 Neb. 177, 66 N.W. 298 (1896).

²⁰ *Id.* at 178, 66 N.W. at 298.

²¹ *Dawson v. United States*, 10 F.2d 106 (9th Cir. 1926).

²² 47 Neb. 177, 183, 66 N.W. 298, 299 (1896).

Thus, while there is dicta in the Nebraska cases indicating that Nebraska follows the waiver theory, no case may be found which specifically substantiates this proposition.

B. FIGHTING FIRE WITH FIRE

(1) *Where adversary objects*

Frequently, prior implied waiver arises when A, who initially introduces inadmissible evidence over B's objection, attempts subsequently to object when his adversary, B, introduces similar inadmissible evidence in rebuttal on the same matter. Is B entitled to "fight fire with fire?" Has A waived any subsequent objection by initially introducing inadmissible evidence?

Most courts hold that where allegedly inadmissible evidence is introduced *over objection*, the opposing counsel may introduce similar evidence on the same matter.²³ These courts place emphasis upon the original party's voluntary action in offering the evidence.²⁴ A is the guilty party in that he first introduced the inadmissible evidence. He induced the court to set a rule of evidence for the trial and should not object if his adversary relies on the same rule of evidence to introduce similar evidence to rebut or deny.

(2) *Adversary fails to object*

Suppose, however, that B fails to object when A initially introduced the inadmissible evidence. Should this, in any way, affect B's right to "fight fire with fire" and enable A to object even though he initially introduced the inadmissible evidence?

Some courts²⁵ take the rigid position that regardless of whether B objects or not, A is still the culpable party in that he initially introduced the inadmissible evidence and should, therefore, be precluded from objecting if B acts accordingly. This position has some merit logically in that it bases the question of A's waiver on A's actions rather than on some action of his adversary. Here again the emphasis is placed on the original party's voluntary action in offering the evidence.

²³ See, e.g., *Albertson v. Chicago, M., St. P. & P. R.R.*, 242 Minn. 50, 64 N.W.2d 175 (1954).

²⁴ 1 WIGMORE, EVIDENCE § 15 at 309 (3d ed. 1940).

²⁵ See cases collected 1 WIGMORE, EVIDENCE § 15 at 306, n.2 (3d ed. 1940). See also *McNab v. Jeppesen*, 258 Minn. 15, 102 N.W.2d 709 (1960); *Krider v. Hempftling*, 137 S.W.2d 83 (Tex. Civ. App. 1940).

Other courts²⁶ take the position that if A's inadmissible evidence is admitted *without* objection, B is not authorized by way of rebuttal to put in inadmissible evidence over timely objection by A. The courts adopting this view place greater emphasis on the fact that B did not object initially, and therefore cannot maintain that A's initial introduction was a wrong which estops A from now objecting.²⁷ Thus, these cases purport to talk of A's prior waiver, but are actually predicating the prior waiver as to A on some action or inaction of his adversary, B. The argument that there can be no equalization of errors²⁸ or that "neither can complain of a ruling either admitted or rejected—a waiver being predicable to both,"²⁹ assumes that it is "error" for B to fail to object. It further assumes that B's initial failure to object waives any objection he may subsequently have. But as was previously stated, B may decide not to object initially because of the possible adverse effect it may have on the judge and jury. Further, it is in the interest of trial expediency for B to withhold objection unless the original evidence is clearly damaging to his case. However, under this rule, B must continually object to all technically inadmissible evidence if he hopes to rebut or deny it.

A much more flexible principle is the so-called Massachusetts rule³⁰ which gives the trial court the discretionary right to determine if B should be permitted to introduce similar inadmissible evidence in rebuttal. Under this rule it is immaterial whether B initially objects to A's evidence or not. The emphasis is placed, not upon B's objection or failure to object, but upon the effect of A's initial inadmissible evidence. If the original evidence is immaterial and not prejudicial to B's case, the court will say no waiver attaches to A, and B may not rebut with similar evidence. This is in the interest of trial expediency and, as long as the initial evidence is not prejudicial to B's case, sound judicial practice. On the other hand, if A's original evidence is prejudicial to B's case, the court will say A has waived in advance any objection to similar evidence subsequently introduced by B in rebuttal. Thus, under this rule, the prior waiver doctrine, as to A, is used merely as a means to

²⁶ See cases collected 1 WIGMORE, EVIDENCE § 15 at 304 n.1 (3d ed. 1940). See also *Laursen v. Tidewater Associated Oil Co.*, 123 Cal. App. 2d 813, 268 P.2d 104 (2d Dist. 1954); *Keene v. Commonwealth*, 307 Ky. 308, 210 S.W.2d 926 (1948).

²⁷ 1 WIGMORE, EVIDENCE § 15 at 309 (3d ed. 1940).

²⁸ *Stapleton v. Monroe*, 111 Ga. 848, 36 S.E. 428 (1900).

²⁹ 1 WIGMORE, EVIDENCE § 15 at 309 (3d ed. 1940).

³⁰ Note, 35 MICH. L. REV. 636 (1937).

an end. If B, however, goes beyond mere "rebuttal," the reason for attaching a prior waiver to A disappears because, while A could foresee a possible attack for rebuttal purposes, he could not foresee an attack which ranges beyond mere rebuttal and directly attacks the ultimate fact. The important question then becomes: What "facts" may B rebut, and what is meant by "rebuttal"?

For the sake of discussion, suppose A attempts to establish a primary fact by opinion testimony.³¹ From this primary fact A wants the jury to infer an ultimate fact. B, his opponent, fails to object.³² Under the Massachusetts rule, this failure to object does not preclude B from introducing similar inadmissible evidence for rebuttal purposes. What fact may B rebut, and how may he do it? Various possibilities are available to B and, unfortunately, the cases fail to provide adequate answers because they fail to go beyond merely stating that B can rebut the same "fact" in question.

Conceivably, B could attack the truthfulness of the primary fact by introducing similar inadmissible evidence on the same fact, hoping to discredit the primary fact in the eyes of the jury. Thus, if A, in an automobile negligence case, introduced opinion testimony that B was going sixty miles per hour, it seems fair to permit B to introduce similar evidence that he was only going forty miles per hour. Here B is attacking the primary fact introduced by A's inadmissible evidence.

On the other hand, B may decide to indirectly attack the ultimate fact by showing that the inference drawn from the primary fact is untrue. If the evidence used by B to attack the inference is admissible, clearly there is no question as to his right to do so. Likewise, if B uses similar inadmissible evidence to attack the inference, this should still be within his right to rebut. In *State v. Wit- ham*,³³ the birth of a child to an unmarried woman was admitted without objection as evidence to infer adultery on the part of the defendant. The defendant accepted the primary fact but attacked the inference drawn from it by producing counter-evidence of other men's intercourse with the woman. Thus, while an attack was made upon the ultimate fact by inadmissible evidence in rebuttal, it was only a collateral attack. The rebuttal was directed towards the inference drawn from the primary fact. The court allowed this rebuttal saying "[I]f one side introduces evidence irrelevant to the

³¹ Other types of inadmissible evidence could be substituted at this point. Opinion testimony is used merely as an example.

³² The situation where B objects but is overruled will be discussed *infra*.

³³ 72 Me. 531 (1881).

issue, which is prejudicial and harmful to the other party, then, although it come in without objection, the other party is entitled to introduce evidence which will directly and strictly contradict it."³⁴

Since the cases fail to distinguish between primary and ultimate facts, it is extremely difficult to define the exact limitations of the rebuttal. It is submitted that inadmissible evidence should be limited to denying or attacking the primary fact, or to attacking the inferences drawn from the primary facts. Since B's case is prejudiced solely because of A's original evidence as to the primary fact and the inferences which may be drawn from it, B's rebuttal should be limited to those aspects of the initial inadmissible evidence. In any event, rebuttal should not be extended to permit B to use inadmissible evidence to attack directly the ultimate fact. To permit B to introduce all sorts of inadmissible evidence to attack directly the ultimate fact would "open the door" too far.³⁵

(3) *The Nebraska position*

Nebraska apparently takes the position that if one party initially introduces inadmissible evidence, he waives any objection to subsequent inadmissible evidence introduced by his adversary. In *Serratore v. Miller*,³⁶ defendant had inadvertently made it known on his voir dire examination and opening statement to the jury that he was covered by insurance. Subsequently, the plaintiff, by testimony on two occasions, made it clear that the defendant was covered by liability insurance. The court admitted that the manner in which this was done was "highly improper,"³⁷ but felt defendant had waived any objection by initially introducing the same subject matter.³⁸ Nebraska apparently takes the view, under this case, that if one party admits the fact as true, it makes no difference if the opposing party subsequently introduces it in a "highly improper" manner. Further, no consideration of the prejudicial effect of such fact is apparently made. In *Serratore* the initial introduction of the fact of insurance coverage was in no way prejudicial to the plaintiff's case. In fact it was prejudicial to the defendant's case! The

³⁴ *Id.* at 536.

³⁵ See McCORMICK, EVIDENCE § 57 at 133 (1954).

³⁶ 130 Neb. 908, 267 N.W. 159 (1936).

³⁷ *Id.* at 912, 267 N.W. at 161.

³⁸ "A defendant may not predicate error on plaintiff's introduction of evidence as to a fact irrelevant to any issue in the case, where such fact has been first brought to the attention of the jury by defendant." 130 Neb. 908, 912, 267 N.W. 159, 161 (1936).

plaintiff subsequently re-introduced the same evidence and used it for his own case with no pretense of using it for rebuttal purposes. But the court held firmly to the doctrine that the party initially introducing the evidence waives any subsequent introduction of similar evidence by the opposing party.

Nebraska fails to define the exact limitations of rebuttal of inadmissible evidence by the party who fails to object. The *Serratore* case indicates that he may have a broad latitude of permissible action. If the court permits him to use the inadmissible evidence for his own purposes when it initially is not, to any degree, prejudicial, it is difficult to predict what the court would allow him to do for rebuttal purposes.

III. SUBSEQUENT WAIVER

A. THE GENERAL RULE AND ITS EXCEPTION

Frequently, the question of subsequent waiver arises when one party, who previously objected to inadmissible evidence, subsequently introduces similar inadmissible evidence on the same fact. The general rule is: The previous error of admission is cured by the opponent's subsequent use of evidence similar to that which had previously been challenged.³⁹ In other words, the objecting party waives his previous valid objection by subsequently introducing similar admissible evidence. The reasoning behind such a rule is simply that if the opponent duly objected and was erroneously overruled, this objection would theoretically save him on appeal, and he does not have to resort to presenting similar inadmissible evidence.⁴⁰ If he chooses to present similar inadmissible evidence, he has waived his right to resort to appeal on that particular issue.

Few courts, however, are willing to apply strictly this general rule, feeling that it is unfair, in effect, to preclude the objector from fighting his case at the trial level. Further, the theoretical solution that the objection will save the objector on appeal, in many cases, is unsatisfactory as a practical matter. It forces the objector to the added expense of an appeal without any assurance, where appeal is not a matter of right, that his case will even be heard. Consequently, an exception is made to the general waiver rule. No waiver of his previous objection results if he subsequently introduces responsive evidence merely to offset or explain, so far

³⁹ 1 WIGMORE, EVIDENCE § 18(D) at 344 (3d ed. 1940). See also *United States v. Gruber*, 123 F.2d 307 (2d Cir. 1941); *Franklin v. United States*, 193 Fed. 334 (3d Cir. 1912).

⁴⁰ 1 WIGMORE, EVIDENCE § 15 at 304 (3d ed. 1940).

as is possible, the erroneously admitted evidence.⁴¹ In *Hoel v. City of Los Angeles*,⁴² defendant subsequently introduced the remainder of a police report, portions of which had been admitted earlier over his objection. The court held this did not constitute a waiver and said:⁴³

If the appellant makes his objection to what he deems . . . inadmissible evidence . . . and is unsuccessful, it is hardly safe for him to stand firm, risking everything on the objection. Usually he will proceed, despite the error, to meet the opposing case on the merits. This necessary precaution on his part does not indicate acquiescence in the ruling and does not result in a waiver of the error.

Generally, therefore, the courts hold no waiver results from acts which are "defensive or precautionary."⁴⁴ However, the cases cited in support of this exception again fail to define the limits of these "defensive or precautionary" measures.

(1) *Limitations on rebuttal*

The difficulty encountered in analyzing the general rule and its exception again comes when we attempt to determine what constitutes "rebuttal," and what "facts" the objector may attack. Suppose that A introduces inadmissible evidence to prove a primary fact from which the jury is to infer the ultimate fact. B objects but is overruled. Under the exception to the general rule B may subsequently introduce similar evidence solely for "rebuttal" purposes. Again it becomes extremely important to determine the limitations of his rebuttal privilege because if B exceeds these limits, he is deemed to have waived his previous objection.

Some cases attempt to define the limits of rebuttal by saying that a waiver attaches when the subsequent evidence is "offered . . . not in defense as to the improper testimony, but is offered in defense against the original charge."⁴⁵ This is nothing more than saying the objector can attack the primary fact but may not directly attack the ultimate fact.

Clearly, he can directly deny the truthfulness of the primary fact by similar inadmissible evidence. However, if he decides to

⁴¹ 1 WIGMORE, EVIDENCE § 18(D) at 344 (3d ed. 1940). See also *Salt Lake City v. Smith*, 104 Fed. 457 (8th Cir. 1900); *Chicago City Ry. v. Uhter*, 212 Ill. 174, 72 N.E. 195 (1904); *State v. Beckner*, 194 Mo. App. 281, 91 S.W. 892 (1906).

⁴² 136 Cal. App. 2d 295, 288 P.2d 989 (2d Dist. 1955).

⁴³ *Id.* at 311, 288 P.2d at 998.

⁴⁴ *Ibid.*

⁴⁵ *State v. Pattison*, 135 Wash. 392, 397, 241 Pac. 966, 967 (1925).

attack the ultimate fact by adopting the primary fact, there are two possible alternatives. In one case he adopts the primary fact for purposes of his own; in the other he adopts it merely for the purpose of drawing a different inference from it.

Suppose B, even though he objected to the manner in which the primary fact was proven by A, adopts it for his own purposes. If he does this, the primary fact itself should not be considered objectionable, and further, B should be held to have waived the objection to the manner in which it was proven. Thus, in *Dell-Wood Tires, Inc. v. Riss & Co.*,⁴⁶ defendant objected to the admission of plaintiff's ledger sheet and invoice on the ground that they were not properly identified. The court held that the objection was waived when both the ledger sheet and the invoices were freely used by defendant in making its defense. Likewise, in *Miles v. State*,⁴⁷ where the accused objected to the state's use of portions of a witness' deposition against him, the court felt he had waived his objection because he subsequently used the same portions of the deposition to connect up his defense. Thus, actual use of the objectionable evidence for one's own purpose goes beyond mere rebuttal and results in a waiver of the previous objection.⁴⁸ If a waiver results from subsequent use of the same evidence, a waiver of the objectionable manner by which a primary fact is proven should also result if the objector subsequently adopts the same primary fact for his own purposes.

However, this is not the case where B intends to adopt the primary fact solely for the purpose of drawing a different inference from that primary fact. When B's original objection is overruled, he is forced into a rather weak argument — namely, he must argue that a different inference may be drawn from the primary fact. His position is especially hazardous if the primary fact is highly prejudicial. In *United States ex rel. Scoleri v. Banmiller*,⁴⁹ the defendant was on trial for felony murder and objected when the prosecution introduced defendant's prior prison record. He was overruled and the prior prison record was established. Subsequently, defendant attempted to show the jury that because he had a prison record, he wouldn't want to get involved in a felony. This reasoning was used to substantiate defendant's alibi. The court held that the initial primary fact was so prejudicial that it

⁴⁶ 198 S.W.2d 347 (Mo. App. 1946).

⁴⁷ 268 P.2d 290 (Okla. Crim. 1954).

⁴⁸ See also *People v. Workman*, 131 N.Y.S.2d 100 (App. Div. 1954).

⁴⁹ 310 F.2d 720 (3d Cir. 1962).

denied the defendant due process of law, and that his subsequent adoption of that fact did not constitute a waiver. The dissent took the position that the defendant had subsequently used the primary fact for his own purposes, and therefore had waived any previous objection. It is submitted that the majority position is correct because defendant did not *voluntarily* use the primary fact for his own purposes. When his initial objection was overruled, he was *forced* to either deny the primary fact, which in this case was impossible, or he could adopt the primary fact, not for his own purposes, but to convince the jury that another inference should be drawn from the fact that he had a prison record.

Thus, a waiver will result if the objectionable evidence or primary fact established by such evidence is subsequently adopted by the objector for his own purposes. Although the cases do not talk in these terms, a waiver will not, or should not, result if the objector is forced to adopt the primary fact because his objection has been overruled, and forced to argue that a different inference should be drawn from such primary fact. It may be a different case if he fails to object and voluntarily adopts the primary fact, hoping to convince the jury that a different inference should be drawn. In that case, he is voluntarily running the risk that the jury will accept his version of the inference to be drawn, and he should not then be able to complain on appeal if the jury disagrees with his inference.

(2) *The Nebraska position*

In *In re Cheney's Estate*,⁵⁰ witnesses were permitted, over objection, to testify that the deceased, in their opinion, was of sound mind when he executed the will in question. Later, the objector introduced other witnesses and asked them similar questions concerning the deceased's mental soundness at time of execution. The Nebraska Supreme Court *held* there was no waiver by the subsequent introduction of similar evidence for rebuttal purposes. The court said:⁵¹

It is true the general rule is that error in the admission of evidence is waived where the party aggrieved thereby subsequently introduces the same evidence. . . . But a different rule obtains where a party, after objecting to evidence, and excepting to the ruling thereof, introduces similar evidence, as in this case, solely for the

⁵⁰ 78 Neb. 274, 110 N.W. 731 (1907).

⁵¹ *Id.* at 277, 110 N.W. at 732. See also *Macke v. Wagener*, 106 Neb. 282, 288, 183 N.W. 360, 362 (1921) (objector held to be able to offer evidence of a similar character to rebut inferences which might be drawn from adversary's evidence without waiving the objection).

purpose of meeting his adversary's case, rebutting or combatting the evidence to which he excepted, but without any intention of abandoning his exceptions.

However, in *Sump v. Omaha Public Power Dist.*,⁵² plaintiff introduced, over objection, inadmissible evidence as to the value of the land to be condemned, and defendant countered with similar evidence. The Nebraska Supreme Court completely disregarded the exception to the general rule and stated that "a party may not successfully complain of the introduction of evidence of a like character to that which it subsequently introduced."⁵³ Why the defendant was not permitted to rebut plaintiff's evidence as to value with similar evidence, under the exception to the general rule, is not discussed. The *Sump* case, clearly a subsequent waiver case, cites *Allen v. Massachusetts Mut. Life Ins Co.*,⁵⁴ as authority for its holding. *Allen*, also a subsequent waiver case, held that "a party may not successfully complain of the introduction of evidence of a like character to that which it has introduced."⁵⁵ However, as authority for its holding the court cites *Serratore v. Miller*,⁵⁶ clearly a *prior* waiver case. The ultimate effect of this error is to eliminate, at least as far as *Allen* and *Sump* are concerned, the exception to the general rule. Consequently, under *Sump* and the more recent cases⁵⁷ Nebraska's position appears to be that a subsequent introduction of inadmissible evidence is a waiver of prior valid objections. Why these recent cases do not speak of the exception is unclear. Perhaps, through inadvertence, the earlier *Cheney* case has not been cited to the court. Nevertheless, the *Cheney* case has never been overruled, and the doctrine which it enunciates is clearly in line with the majority of other jurisdictions — namely, that if inadmissible evidence is introduced over objection, the objector has the right to attack the inference drawn from that evidence without waiving his objection. Further, the statutes provide that "when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence."⁵⁸ Consequently,

⁵² 168 Neb. 120, 95 N.W.2d 209 (1959).

⁵³ *Id.* at 126, 95 N.W.2d at 214.

⁵⁴ 149 Neb. 233, 30 N.W.2d 885 (1948).

⁵⁵ *Id.* at 240, 30 N.W.2d at 888.

⁵⁶ 130 Neb. 908, 267 N.W. 159 (1936).

⁵⁷ See *Tyrrell v. State*, 173 Neb. 859, 115 N.W.2d 459 (1962); *Hoagland & Co. v. Scottish Union & Nat'l Ins. Co.*, 131 Neb. 112, 267 N.W. 242 (1936) (facts unclear as to whether it is a prior or subsequent waiver cause).

⁵⁸ NEB. REV. STAT. § 25-1215 (Reissue 1956).

under the Nebraska statutes and the *Cheney* case, the objector has the right to introduce similar inadmissible evidence to rebut or explain the initially introduced inadmissible evidence.

(3) *Cross Examinations*

Deserving special attention is the corollary problem of subsequent waiver by cross-examination. After inadmissible testimony has been admitted over objection, the objector, in most jurisdictions, may rebut with similar inadmissible evidence. Cross-examination is merely one means of rebuttal. Suppose A's witness gives inadmissible testimony over B's objection. B cross-examines hoping to break the force of the testimony, but elicits the same testimony. Has B waived his previous valid objection by subsequently eliciting the same evidence on cross-examination?

Some courts merely apply the general rule that an objection is waived where the same or similar evidence is subsequently elicited by the objector.⁵⁹ These courts apparently refuse to permit the objector the right to rebut altogether. Other courts permit cross-examination without waiver if the objector "reserves his objection"⁶⁰ before cross-examining. This seems a rather needless and overly technical requirement.

The more reasoned cases say that if the cross-examination is used to rebut or to break the effect of the previously admitted testimony, it does not constitute a waiver even if the same testimony is elicited. This is a more suitable solution to the waiver problem in the cross-examination situation. Ordinarily, the same testimony will be repeated on cross-examination⁶¹ and, if the objector is to be permitted the right to rebut the original testimony, he must be free to cross-examine without fear of waiving his prior valid objection if he is unfortunate enough to elicit the same information. To hold that a waiver may result any time the same information is elicited on cross-examination would greatly impair

⁵⁹ *Powell v. Weld*, 410 Ill. 198, 101 N.E.2d 581 (1951).

⁶⁰ *State v. Puckett*, 237 S.C. 369, 117 S.E.2d 369 (1960).

⁶¹ "It would indeed be a strange doctrine, and a rule utterly destructive of the right and all the benefits of cross-examination, to hold a litigant to have waived his objection to improper testimony because, by further inquiry, he sought on cross-examination to break the force or demonstrate the untruthfulness of the evidence given in chief, in the event, as would most usually occur, that the witness should on cross-examination repeat or restate some or all of his evidence given on his direct examination." *Levin v. Hilliard*, 266 S.W.2d 573, 577 (Mo. App. 1954). See also *Great Am. Indem. Co. v. Dabney*, 128 S.W.2d 496 (Tex. Civ. App. 1939).

the usefulness of cross-examination and make attorneys hesitant to cross-examine the witness for fear of waiving the previous valid objection.

(a) *The Nebraska position*

Consistent with the recent cases which fail to give the objector the right to rebut with similar inadmissible evidence, Nebraska holds that if the same or similar evidence is subsequently introduced by the objector, he waives his objection. No allowance is made for the fact that the similar evidence was elicited by cross-examination. In *Johnson v. Airport Authority*,⁶² testimony as to the value of condemned land was given over objection. Subsequently, the objector on cross-examination elicited evidence on the same subject. The court held this to be a waiver of his previous valid objection.⁶³ No mention is made of *Cheney*, the Nebraska statutes, or the exception to the general rule. Consequently, despite *Cheney*, it appears that Nebraska, unfortunately, refuses to recognize the exception to the general rule even in the area of cross-examination.

Under the *Johnson* case, if a party attempts to cross-examine after a valid objection, he runs the risk of waiving the objection if he fortuitously elicits the same information on cross-examination. The practical effect of the Nebraska position under *Johnson* is to seriously hamper the effective use of the cross-examination, and if the objector cannot rely on *Cheney* and the right to rebut, he must rely solely on his objection to "save him on appeal." As was mentioned earlier, this theoretical salvation alone is inadequate.

B. SUBSEQUENT FAILURE TO OBJECT

As previously stated, failure to object at the time the inadmissible evidence is offered will result in a waiver of any objection the party may have had. Suppose, however, that after first objecting to inadmissible evidence, the objector is silent when similar evidence on the same primary fact is later introduced. Has he, by his subsequent failure to object, waived his previous objection?

⁶² 173 Neb. 801, 115 N.W.2d 426 (1962).

⁶³ "Assuming that error was involved, it was waived by the appellant. After the testimony was given, the appellant adduced evidence on the subject. This evidence of the appellant, it is true, was elicited by cross-examination, but the rule is the same whether it was elicited either on direct or cross-examination. The rule is: 'Ordinarily a party may not successfully complain of the introduction of evidence of a like character to that which it subsequently introduced.' " (Emphasis added.) *Id.* at 812, 115 N.W.2d at 433.

If the initial objection is overruled, it is clear that the judge is going to allow subsequent similar evidence on this same primary fact. To force repeated objections to the same type of evidence on the same primary fact merely impedes the progress of the trial, to say nothing of the adverse effect it has on the jury. The cases generally say that if the objector is initially overruled, the objecting party need not object every time similar inadmissible evidence is subsequently introduced to establish the same primary fact.⁶⁴ The initial objection, if overruled, is treated as a continuing objection to all subsequent similar evidence on the same primary fact. However, if the initial objection is sustained, the objector must repeat the objection if his adversary subsequently attempts to introduce similar evidence on the same primary fact. Failure to repeat the objection will not waive the objector's right to appeal on the admissibility of the subsequently introduced evidence under the rule of evidence — a rule not invoked is waived.

(1) *The Nebraska position*

A Nebraska statute provides:⁶⁵

Where an objection has once been made to the admission of testimony and overruled by the court it shall be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received.

This statute has been construed by the Nebraska Supreme Court in *Triplett v. Western Public Service Co.*,⁶⁶ to mean it is not necessary to repeat the objection to further testimony of the same nature *by the same witness* in order to save the error on appeal. This statute has also been cited for the much broader proposition that objections to the repetition of *any* testimony on which the court has once ruled need not be repeated.⁶⁷ While this position is in line with the majority of cases in other jurisdictions, it is not warranted by the wording of the statute. Further, the Nebraska Supreme Court has refused to go beyond the statute and allow one objection, if overruled, to stand for *all* subsequent evidence on the same

⁶⁴ *State v. Monninger*, 182 N.E.2d 426 (Ind. 1962); *Gardner's Adm'r v. Dale*, 309 Ky. 869, 219 S.W.2d 40 (1949); *State v. Taylor*, 130 W. Va. 74, 42 S.E.2d 549 (1947). *Contra*, *Everett v. Sanderson*, 238 N.C. 564, 78 S.E.2d 408 (1953).

⁶⁵ NEB. REV. STAT. § 25-1141 (Reissue 1956).

⁶⁶ 129 Neb. 799, 263 N.W. 229 (1935).

⁶⁷ *FISHER, COURTS OF LIMITED JURISDICTION* § 429 at 792 (1950).

primary fact. In *Rakes v. State*,⁶⁸ the court stated that the statute "has no application to further testimony of the same nature by other witnesses to which no objection has been made."⁶⁹ The court reasoned that since subsequent evidence by other witnesses was admitted without objection, the initial admission "could not have been prejudicially erroneous."⁷⁰ Therefore, the initial objection was waived by failure to object to subsequent testimony on the same primary fact.

Thus, in Nebraska, the objection, if overruled, need not be repeated as to the *same witness*, but apparently must be repeated if the same type of evidence is elucidated by another witness. If this means that repeated objections must be made to the same manner of proof on other primary facts, the Nebraska position seems defensible. Merely objecting, for example, to hearsay evidence offered to establish one primary fact should not permit the objector to relax and assume that this objection will carry over to all other hearsay evidence on other primary facts. It is submitted that it is not the manner of proof that is important, but rather the primary fact sought to be established. If the primary fact is inadmissible, and is admitted erroneously over proper objection, the objection should not have to be repeated when other evidence is subsequently introduced to establish the same primary fact. The judge, by his initial ruling, has made it clear that he will admit evidence on that particular fact. To force repeated objections would impede trial progress and generate an unfavorable impression on the jury.

IV. CONCLUSION

In both prior and subsequent waiver cases, difficulties arise in attempting to define the permissible limits of rebuttal. The cases do not clearly prescribe any such limits and, as a result, the trial lawyer, who must act on the spur of the moment, may inadvertently transgress these nebulous boundaries and waive a valid objection. It is difficult to lay down any specific rules because the cases, while purporting to give the right to rebut, fail to enlighten the bar on what may be rebutted. This explains to a large degree the confusing language found in some of the decisions,⁷¹ and permits

⁶⁸ 158 Neb. 55, 62 N.W.2d 273 (1954).

⁶⁹ *Id.* at 64, 62 N.W.2d at 279.

⁷⁰ *Ibid.*

⁷¹ See, e.g., *Vermaas v. Fagan*, 167 Neb. 465, 469, 93 N.W.2d 381, 384 (1958). "Declarations against interest cannot be annulled or explained away by counter declarations."

the courts to use whatever textbook rule will allow them to affirm the holding of the lower court.⁷² It is submitted, although the cases fail to make the distinction or talk in these terms, that the rule should be that similar inadmissible evidence should be allowed to deny or explain the initially established primary fact,⁷³ or to attack the inference that may be drawn from that primary fact, but should not be allowed to *directly* attack the ultimate fact in question.

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⁷² 1 WIGMORE, EVIDENCE § 15 at 309 (3d ed. 1940).

⁷³ *But see* Vermaas v. Fagan, 167 Neb. 465, 93 N.W.2d 381 (1958). Plaintiff's witnesses gave testimony as to deceased's statements to the effect that plaintiff would get deceased's land when he died. The court held that this testimony could not be rebutted by defendant's witness' testimony that deceased had made other statements indicating that he didn't know what to do with his property.