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Evidence—Directed Verdicts—Inferences from Circumstantial Evidence

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EVIDENCE—DIRECTED VERDICTS—INFERENCES FROM CIRCUMSTANTIAL EVIDENCE

In Nebraska a directed verdicts based on circumstantial evidence leading to an inference presents a difficult problem. Even the Supreme Court of the United States has hedged when called upon to formulate a rule to help guide trial judges in federal courts when they are considering what degree of circumstantial evidence is needed to allow a case to go to the jury. The court stated "... the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." The majority of the Court in refusing

[30] Sinclair v. United States, 279 U.S. 263 (1928).

[31] The author has gone through all available records on the investigations of the colleges. With the exception of a few cases, all the professors were represented by counsel. Frequently, the witness has prepared a statement before he got to the committee. In order to do this he must have had sufficient time to confer with his counsel. Also, after each question was asked, the witness was allowed ample time to confer with his lawyer before he answered the question.

to adopt a general rule concluded that the problem is one that must be solved in particular situations.[1]

The decision is ably criticized by Professor McBaine. He agrees with the Court's conclusion that the terms "substantial evidence," "some evidence," and "any evidence" are insufficient tests because they are too vague and indefinite. He concludes, however, that the problem was not solved when the Supreme Court said that the evidence needed to send the case to the jury must rise above "mere speculation" or that a different standard must be used in each case.[2]

The Nebraska cases considering the problem of a directed verdict hold that a verdict for the defendant is properly directed where the testimony affords no basis for recovery in favor of the plaintiff;[3] or where there is an entire failure of proof to sustain the plaintiff's material allegations;[4] or where no other verdict is possible under the evidence;[5] or where there is no evidence before the jury on material issues in favor of the plaintiff (or party holding the affirmative);[6] or where it would be the court's duty to set aside a different verdict if rendered.[7] The Nebraska Supreme Court has also held that where there is some evidence supporting the affirmative side of a case,[8] the case cannot be taken

[1] Galloway v. United States, 319 U.S. 372 (1943).

[2] McBaine, Trial Practice: Directed Verdicts Federal Rule, 31 Calif. L. Rev. 454 (1943).

[3] Dramse v. Modern Woodmen of America, 102 Neb. 615, 168 N.W. 358 (1918); Pollock v. Pearson, 101 Neb. 284, 163 N.W. 329 (1917); Cady v. Travelers' Ins. Co., 93 Neb. 634, 142 N.W. 107 (1913); Sellers v. Chicago, B. & Q. Ry., 87 Neb. 322, 127 N.W. 125 (1910); Ogden v. Sovereign Camp of Woodmen of the World, 84 Neb. 666, 121 N.W. 973 (1909); Holdrege v. Watson, 1 Neb. (Unofficial) 687, 96 N.W. 67 (1901).

[4] Keckler v. Modern Brotherhood of America, 77 Neb. 301, 109 N.W. 157 (1906).

[5] Nebraska Transfer Co. v. Chicago, B. & Q. Ry., 90 Neb. 488, 134 N.W. 163 (1912).

[6] Burke v. First Nat. Bank of Pender, 61 Neb. 20, 84 N.W. 408 (1900).

[7] Halsted v. Shackelton, 98 Neb. 13, 151 N.W. 954 (1915); Joseph v. Cudahy Packing Co., 95 Neb. 397, 145 N.W. 987 (1914); Ward v. Aetna Life Ins. Co., 91 Neb. 52, 135 N.W. 220 (1912).

[8] Authorities say that there are two possible tests that can be used to determine the power of a judge to direct a verdict. One gives the judge maximum control; the other test grants the least control that can be given to the judge without allowing the jury to disregard substantive law. In the former test the judge looks at all the evidence and then asks himself whether if the jury returned a verdict, he would be duty bound to set it aside. The second test compels the judge to consider only evidence favorable to the proponent. If, when viewing that evidence in its most favorable light, he finds every fact exists, he then must let the jury decide the case. McBaine, Trial Practice: Directed Verdicts Federal Rule, 31 Calif. L. Rev. 454 (1943).

from the jury and a verdict directed for the defendant.[9]

However, in considering cases in which the plaintiff relies solely upon circumstantial evidence to support his case, the Nebraska Supreme Court has attempted to set up a standard which is higher than "merely some evidence." Two recent Nebraska cases give some indication as to what this standard may be.

In *Koutsky v. Bowman*[10] the plaintiff, the owner of a lot, sued an adjacent lot owner and an excavation company for piling dirt against his building. At the trial the plaintiff was unable to present direct evidence that the defendant excavation company piled dirt against his building. The plaintiff did present evidence that the defendant property owner gave the company an exclusive contract to dump dirt on his property. The company dumped some dirt but not against plaintiff's building. After the plaintiff warned the company not to dump any more dirt, the company stopped. However, someone had dumped some dirt against plaintiff's building. There had been a continuous procession of trucks from the company's loading area which had been moving in the general direction of the plaintiff's property the day the alleged incident occured. A trail of dirt led from the company's loading area to the property the company was filling. The trial court sustained the company's motion to dismiss for "want of evidence." In reversing the lower court the Supreme Court said:

> ... The plaintiffs as against a motion for a directed verdict ... are entitled to have every controverted fact resolved in their favor and to have the benefit of every inference that can be reasonably deduced from the evidence.[11]

In *Shamblen v. Great Lakes Pipe Line Co.*,[12] decided in the same term, the plaintiff alleged that a truck from the defendant company was responsible for destroying an overhead powerline that supplied the plaintiff with power. The plaintiff was unable to present direct evidence that an agent of the defendant had torn down the power lines. The defendant introduced evidence that the agent of defendant had come on the plaintiff's land and laid out stakes to aid in construction of the pipeline. The defendant company's truck had been on the plaintiff's property just

[9] Haight v. Nelson, 157 Neb. 641, 59 N.W.2d 576 (1953); Gunn v. Coca-Cola Bottling Co., 154 Neb. 150, 47 N.W.2d 397 (1951); Schmidbauer v. Omaha & C.B. St. Ry., 104 Neb. 250, 177 N.W. 336 (1920); Allen v. Cerny, 68 Neb. 211, 94 N.W. 151 (1903); Rogers v. Kansas City & Omaha Ry., 52 Neb. 86, 71 N.W. 977 (1897).

[10] 157 Neb. 919, 62 N.W.2d 114 (1954).

[11] Id. at 921.

[12] 158 Neb. 752, 64 N.W.2d 728 (1954).

prior to the alleged incident. The truck that tore down the lines followed the path of the stakes, turned around, and drove out. The plaintiff heard the truck drive on his land but did not investigate because he though it was "just a truck from the pipeline company." The lower court found for the plaintiff and on appeal the Supreme Court reversed, maintaining that the trial judge should have sustained the several defense motions that the plaintiff had not sustained his case. The court stated the proposition that was the basis for the holding in the *Koutsky* case but then went on to say:

> When several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by reliance alone on an inference which would entitle him to recover. It is patent that this evidence is clearly insufficient to sustain a finding that a truck for which the defendant was responsible entered the plaintiff's property, struck the power line and tore it down. The plaintiff's evidence is solely one of suspicion and conjecture. The trial court erred . . .[13]

If the Supreme Court had not been reversing the lower court, the decision in both cases might be attributed to two factors. It might be argued that the court would not reverse because of mere difference of opinion between the Supreme Court and the trial judge or jury regarding the weight and sufficiency of evidence.[14] Or it could be argued that because the trial court had an opportunity to see and hear the witnesses, the Supreme Court must accept the trial court's decision on the credibility of evidence.[15] But because the cases were reversed they should act as a guide to determine the burden of proof the plaintiff must meet to get the case to the jury when he relies on circumstantial evidence.

In the *Koutsky* case the court said in effect that there was only one reasonable inference that could be drawn from the facts. In the *Shamblen* case the court stated that there were several equally consisted inferences that could be drawn from the facts and therefore merely because one of the inferences which could have been drawn supported the plaintiff's case, the circumstantial evidence was not sufficient to send the case to the jury. The court did not say that the inferences were reasonable, or that one inference was more reasonable than the others. The implication in the case is that a reasonable inference may be presented by

[13] Id. at 755, 756.

[14] Missouri Pac. Ry. v. Palmer, 55 Neb. 559, 76 N.W. 169 (1898); City of Harvard v. Crouch, 47 Neb. 133, 66 N.W. 276 (1896).

[15] Teresi v. Filley, 146 Neb. 797, 21 N.W.2d 699 (1946).

the plaintiff; but if any other reasonable inference can be drawn than the inference which supports the plaintiff's case, the plaintiff's inference ceases to be a reasonable inference, and his circumstantial evidence merely reaches the standard of suspicion and conjecture.

The problem is further illustrated by *Bedford v. Herman* a recent case involving tort-liability in a head-on highway collision. The plaintiff owned a refrigerator tractor and the defendant owned a gasoline transport. There was no evidence that either vehicle crossed the center line, but evidence was presented that the defendant was as close as four inches according to tire marks, while the plaintiff did not come any closer than nine to twelve inches. In the collision the plaintiff's left drive wheels connected with the tandem wheels to the rear of the defendant's transport.[16] In sustaining the district court's directed verdict for defendant, the court said:

> In order for circumstantial evidence to be sufficient to require the submission of the issue of negligence to a jury it must be such that a reasonable inference of negligence arises from the circumstances established. If such evidence is susceptible to any other reasonable inference, inconsistent with the inference of negligence on the party charged, it is insufficient to carry the case to the jury.[17]

In a civil action the plaintiff has the burden of proving his case by a preponderance of the evidence.[18] In a criminal case the guilt of the defendant must be proved beyond a reasonable doubt.[19] In the *Shamblen* and the *Bedford* cases the plaintiff did not sustain the burden necessary to get to the jury by presenting a reasonable inference that supported his case, but he was required to present a reasonable inference that excluded every other reasonable inference. By indirection this placed upon the plaintiff the duty of sustaining his case "beyond a reasonable doubt" and not merely by a preponderance of evidence. Whenever a plaintiff relies on circumstantial evidence in a civil action, it would seem that he has to meet the criminal law burden of proof.

[16] 158 Neb. 400, 63 N.W.2d 772 (1954).

[17] Id. at 403.

[18] The plaintiff must prove all material allegations of his case by a preponderance of evidence; if he fails to establish any one allegation by a preponderance, a verdict should be for the defendant. Danner v. Walters, 154 Neb. 506, 48 N.W.2d 635 (1951); Kristifek v. Rapp, 154 Neb. 343, 47 N.W.2d 923 (1951); Altshuler v. Coburn, 38 Neb. 881, 57 N.W. 836 (1894).

[19] Bourne v. State, 116 Neb. 141, 216 N.W. 173 (1927). The rule is discussed in Underhill's Criminal Evidence § 17 (4th ed. 1935).

There has always been much controversy, some of which may be traced to sentimentality about conviction of crime and capital punishment upon circumstantial evidence, as to the relative probative value of "direct" and of "circumstantial" evidence.[20] Some authorities maintain that it is wrong to place an arbitrary value on either type of evidence. If the probative value outweighs the risk that its admission will create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury, then, they argue, it should be admitted.[21]

In the *Koutsky, Shamblen,* and *Bedford* cases the Nebraska Supreme Court by requiring the circumstantial evidence to create an inference that excludes every other inference places a greater burden on a plaintiff who depends on circumstantial evidence than on a plaintiff who depends upon direct evidence. The difference in treatment of the two does not seem justified.

The Nebraska Supreme Court has held that in a probate proceeding it was not error to let the jury decide which of two reasonable inferences to accept. In the case of *In re Farr's Estate*[22] a will was contested by the plaintiff and the jury found for the plaintiff, relying principally on the plaintiff's circumstantial evidence that the defendant used undue influence. The trial court refused to give the jury the following instruction:

> You are further instructed that if you can reasonably draw contrary or opposing inferences from the facts as you find them on the evidence, one inference which might lead to the supposition of undue influence and a contrary inference that no undue influence was exerted by . . . [the proponent] your verdict should be for the proponent.[23]

The Supreme Court recognized the issue raised by the defendant on appeal but answered it by saying:

> The substantial contention . . . is that . . . if they . . . [the jury] . . . could reasonably infer that there was undue influence and they could infer there was not that they were required to accept the latter and reject the former inference . . .
>
> . . . It is made clear by these cases that in a case where a will is being contested on the ground of undue influence the contestant is entitled to have considered by the jury all evidence and all in-

[20] See Jones, Commentaries on Evidence 16-23 (1926).

[21] The probative value v. risk rule is stated in the Model Code of Evidence, Rule 303 (1942). An excellent discussion of the relative value which should be given real and circumstantial evidence is found in A.L.I., Basic Problems in Evidence 160-190 (1954).

[22] 150 Neb. 615, 35 N.W.2d 489 (1949).

[23] Id. at 618.

> ferences reasonably to be drawn from the evidence. We think this should be the proper and accepted rule.
>
> To hold that a hypothesis or inference that there was no undue influence is sufficient to defeat a contest of a will on the ground of undue influence would be to deny to a contestant the right to have his evidence weighed in its own light and in the light of reasonable inferences to be drawn from it.[24]

The court recognized strong policy factors against requiring the plaintiff to present an inference that excludes all other reasonable inferences in probate litigation. However, in the light of subsequent cases concerning the effect of circumstantial evidence which supports conflicting inferences, it seems that the rule set out in the *Farr* case has had no effect on litigation in other phases of the law.[25] Another distinguishing factor in the *Farr* case may have been that the Supreme Court was passing upon the validity of an instruction which the trial court had given to the jury rather than upon the question of whether the judge had a duty to direct a verdict. However, the distinction does not appear to be material, because when the supreme court approves an instruction to the jury, the implication is that it has already approved the submission of the case to the jury.

The Supreme Court of Nebraska has recognized the difference between the burden of proof necessary to sustain a plaintiff's case by circumstantial evidence in criminal and civil proceedings. In *O'Connor v. State*[26] the defendant was charged with the criminal offense of uttering a false will. Proof of the charge was based entirely on circumstantial evidence which did not lead to a conclusive inference of guilt. This criminal case was the result of the civil case of *In re O'Connor's Estate*[27] in which the supreme court said that it was error to admit the will to probate, basing its decision on substantially the same evidence presented in the subsequent criminal case. The court said in the criminal case:

> Being a civil case [*In re O'Connor's Estate*] this question turned on the preponderance of evidence alone, and did not require proof beyond a reasonable doubt as is required in such prosecution as this . . . When it is sought to establish the guilt of the accused in

[24] Id. at 618, 622.

[25] The court did not follow the rule in the Farr case in a subsequent probate case, In re Bingaman's Estate, 155 Neb. 24, 50 N.W.2d 523 (1951). The action, however, was to determine the validity of a contract between the deceased and the plaintiff and not the validity of the will. However, the policy factors which favor the contestant in each case appear to be about the same.

[26] 110 Neb. 822, 195 N.W. 125 (1923).

[27] 105 Neb. 88, 179 N.W. 401; Note, 12 A.L.R. 199 (1920).

> a criminal case by circumstantial evidence, it is not sufficient that the facts create a probability though a strong one. If, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails.[28]

The case presents an excellent comparison of the different burdens necessary for a plaintiff to substantiate his position in criminal and civil proceedings when the proof depends almost entirely upon circumstantial evidence. However, the effect of these two cases may be limited since they involve probate of wills.

In determining the civil cases which adopt the criminal law rule that the plaintiff must present an inference that excludes every other reasonable inference, the Nebraska Supreme Court does not discuss the policy behind the decisions but merely cites previous cases reaching the same conclusion.[29] The rule appears to have been originally adopted from Iowa cases.[30] However, recently Iowa has deviated from the stringent requirements of the rule.[31] One court commented that it did not think the Iowa court fully understood the rule.[32] Other jurisdictions have also cited the rule that the plaintiff must present a reasonable inference, theory, or hypothesis to the exclusion of every other inference, theory, or hypothesis.[33]

[28] 110 Neb. at 828, 829; 195 N.W. at 127.

[29] See Bedford v. Herman, 158 Neb. 400, 63 N.W.2d 772 (1954); Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N.W.2d 728 (1954); Ulrich v. Batchelder, 143 Neb. 697, 10 N.W.2d 637 (1943); Jones v. Union Pac. Ry., 141 Neb 112, 2 N.W.2d 624 (1942); Bixby v. Ayers, 139 Neb. 652, 298 N.W. 533 (1941); Anderson v. Interstate Transit Lines, 129 Neb. 612, 262 N.W. 445 (1935); Katskee v. City of Omaha, 110 Neb. 380, 193 N.W. 752 (1923); Blid v. Chicago & N.W. Ry., 89 Neb. 689, 131 N.W. 1027 (1911).

[30] Blid v. Chicago & N.W. Ry., 89 Neb. 689, 131 N.W. 1027 (1911) appears to be the first Nebraska case stating the rule. It merely cited the conclusion and gave as authority Asbach v. Chicago B. & Q. Ry., 74 Iowa 248, 37 N.W. 182 (1888).

[31] Haverly v. Union Const. Co., 236 Iowa 278, 18 N.W.2d 629 (1945); Central Nat. Bank & Trust Co. v. Lederer Strauss & Co., 236 Iowa 16, 17 N.W.2d 817 (1945). In both cases the Iowa court said that the inference drawn from the circumstantial evidence need not be the only possible inference, but must be merely the most probable inference that can be drawn from the facts.

[32] Northwest States Utilities Co. v. Ashton, 51 Wyo. 158, 65 P.2d 235, 239 (1937).

[33] Christie v. Callahan, 124 F.2d 825 (D.C. Cir. 1941) Wagner v. Somerset County Mem. Park, 372 Pa. 338, 93 A.2d 440 (1953); Boyce Motor Lines Inc. v. State, 280 App. Div. 693, 117 N.Y.S.2d 289 (3d Dep't 1952); Sturgeon v. Quarton, 316 Ill. App. 308, 44 N.E.2d 766 (1942); McGill v. Walnut Realty Co., 148 S.W.2d 131 (Mo. App. 1941); Erickson v. Todd, 62 S.D. 280, 252 N.W. 879 (1934).

However, the rule is by no means universally accepted. Authorities are in conflict as to what the correct rule should be, and the argument has been made that they do not actually conflict.[34] The "beyond a reasonable doubt rule" has been rejected by many jurisdictions. The rejection of the rule takes two forms. Some courts say that more than one reasonable inference is possible and the plaintiff merely needs to present an inference that sustains his burden of proving liability a preponderance of the evidence.[35] These decisions specifically repudiate the opposite rule, which the courts refer to as the criminal law rule. The other cases reject the rule indirectly by holding that the plaintiff has the burden of proving his case by a preponderance of the evidence, even though his case is based on circumstantial evidence, and he sustains this burden by presenting the most reasonable inference or a reasonable inference.[36]

Examination of the facts in the *Koutsky, Shamblen,* and *Bedford* cases may well lead to the conclusion that the decisions were proper on the merits. However, the Court's language and reasoning cause confusion. In the *Koutsky* case it would have been sufficient if the court had said that the circumstantial evidence presented a reasonable inference and the jury should have been

[34] Jones dealt with the problem in two different works an evidence and cited opposing rules. He said in Jones, Commentaries On Evidence 23 (1926), "In a civil case, circumstantial evidence need not exclude every reasonable conclusion other than that arrived at by the jury." In the note scpporting this conclusion, the author cites cases which hold that the inference must exclude every other reasonable inference and says that this theory does not really conflict because if the probabilities are equal there is no preponderance of evidence and the burden of proof has not been sustained. However, in his later work, Jones, Evidence, Civil Cases 1680 (1944) the author cites the rule that the evidence supporting the plaintiff's theory cannot be inconsistent with any other rational theory and cites the same cases cited in the previous work to substantiate that conclusion. In 9 Wigmore, Evidence § 2498 (3d ed. 1940), the author discusses the problem and decides that the criminal law rule only applies in civil cases when a criminal act is charged.

[35] Richardson v. Butler, 206 Okla. 79, 240 P.2d 1058 (1952); Booker v. Kansas Power & Light Co., 167 Kan. 322, 205 P.2d 984 (1949); Johnson v. Ely, 30 Tenn. App. 294, 205 S.W.2d 759 (1947); Leek v. New South Express Lines, 192 S.C. 527, 7 S.E.2d 459 (1940); Northwest States Utilities Co. v. Ashton, 51 Wyo. 168, 65 P.2d 235 (1937); King v. Weis-Patterson Lumber Co. 124 Fla. 272, 168 So. 858 (1936).

[36] Schultz v. Henry Vaughans Sons & Co., 24 N.J. Super. 492, 94 A.2d 873 (1953); Manteuffel v. Theo. Hamm Brewing Co., 56 N.W.2d 310 (Minn. 1952); Patton v. Ballam, 115 Vt. 308, 58 A.2d 817 (1948); Vaccarezza v. Sanguinetti, 71 Cal. App.2d 687, 163 P.2d 470 (1946); Cox v. Metropolitan Life Ins. Co., 139 Me. 167, 28 A.2d 143 (1942); Exchange Bank v. Occident Elevator Co., 95 Mont. 78, 24 P.2d 126 (1933).

allowed to determine whether it was sufficient to allow recovery. In the *Shamblen* and the *Bedford* cases the court could have said that the evidence presented by the plaintiff did not lead to a reasonable inference or that the plaintiff's evidence was merely suspicion and conjecture and therefore the plaintiff did not satisfy the burden of proof necessary to get to the jury.[37]

This standard would have allowed the trial court to reach the same results and would have resulted in a clearer standard for future application. Consequently, it would have solved the two major conflicting policy problems—consistency of results and justice in individual cases.

Despite the fact that most of the Nebraska cases hold that the plaintiff must prove his case by a reasonable inference that excludes every other reasonable inference,[38] the Nebraska Supreme Court would not be reversing overwhelming previous Nebraska case authority if it adopted the most reasonable inference theory or the preponderance of the evidence theory. The reasons for this conclusion are twofold: (1) The Nebraska court has never made a complete discussion of the two theories, and (2) the *Farr*[39] case can be used as authority for the proposition that circumstantial evidence leading to more than one reasonable inference should be allowed to reach the jury. Moreover, the United States District Court for Nebraska has expressed doubt as to which rule would be applicable in this jurisdiction.[40]

CONCLUSION

In deciding whether a directed verdict is proper in a case in which the plaintiff depends upon cirmustantial evidence, the Nebraska Supreme Court appears to be setting a standard which requires the plaintiff to satisfy a higher burden of proof than the civil law ordinarily requires. The present state of the law also

[37] The Nebraska court has consistently held that verdicts will not be allowed to rest on conjecture, possibility, or unsupported probability. McCullough v. Omaha Coliseum Corp., 144 Neb. 92, 12 N.W.2d 639 (1944); Bowerman v. Greenberg, 142 Neb. 721, 7 N.W.2d 711 (1943); Bowers v. Kugler, 140 Neb. 684, 1 N.W.2d 299 (1941); Painter v. Chicago B. & Q. Ry., 93 Neb. 419, 140 N.W. 787 (1913).

[38] Supra note 29.

[39] In re Farr's Estate, 150 Neb. 615, 35 N.W.2d 489 (1949).

[40] The United District Court for Nebraska recognized the split of authority between the "criminal law rule" and what it termed the "more liberal" preponderance of evidence rule. However, the court did not base its decision on a distinction between the two rules. It merely said that the plaintiff did not sustain his burden of proof by reliance on either rule. Maryland Cas. Co. v. Independent Metal Products Co., 99 F. Supp. 862, 867 (D. Neb. 1951), aff'd 203 F.2d 838 (8th Cir. 1951).

seems to leave trial judges in considerable confusion as to just what standards should be followed. It is submitted that a workable standard would call for a directed verdict where the party having the affirmative does not present by circumstantial evidence a reasonable inference that would satisfy the requirement that he must sustain his case by a preponderance of the evidence. Therefore, if the inference created by the circumstantial evidence is the most reasonable inference to the jury from all those inferences which might be drawn, and the jury determines that the preponderance of the evidence is in favor of such inference, then the jury should be permitted to determine the case accordingly. This appears to be the most workable solution to the problem and is consistent with standard rules on burden of proof in civil cases.

Robert Berkshire, '55