Nebraska Law Review

Volume 38 | Issue 2 Article 11

1959

Torts—Automobile Accident as a Transaction within the Meaning of the Dead Man Statute

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Notes

Torts—Automobile Accident as a Transaction Within the Meaning of the Dead Man Statute

The subject case[1] involves an action for personal injuries resulting from a two car collision at a country road intersection in which Mueller, driver of one of the cars, was killed. The driver of the other car, Fincham Sr., brought the action against the decedent's estate as father and next friend of his eight year old son, Fincham Jr., who was riding with him as his guest.[2] There were no eye witnesses to the accident. At the trial, Fincham Sr. was allowed to testify as to his own vehicle and his operation thereof,[3] but not as to the action of the decedent and his vehicle, the trial judge sustaining objections to such testimony under the so called Dead Man Statute.[4] HELD: Judgment for defendant. The trial court granted defendant's motion to dismiss on the grounds that there was no showing of negligence on decedent's part, which ruling was affirmed on appeal.

Under section 25-308 of the Nebraska Revised Statutes, Fincham Sr., as next friend for his son, was liable for the costs of the action.[5] This liability has been deemed sufficient to constitute a direct legal interest so as to bar the witness from testifying

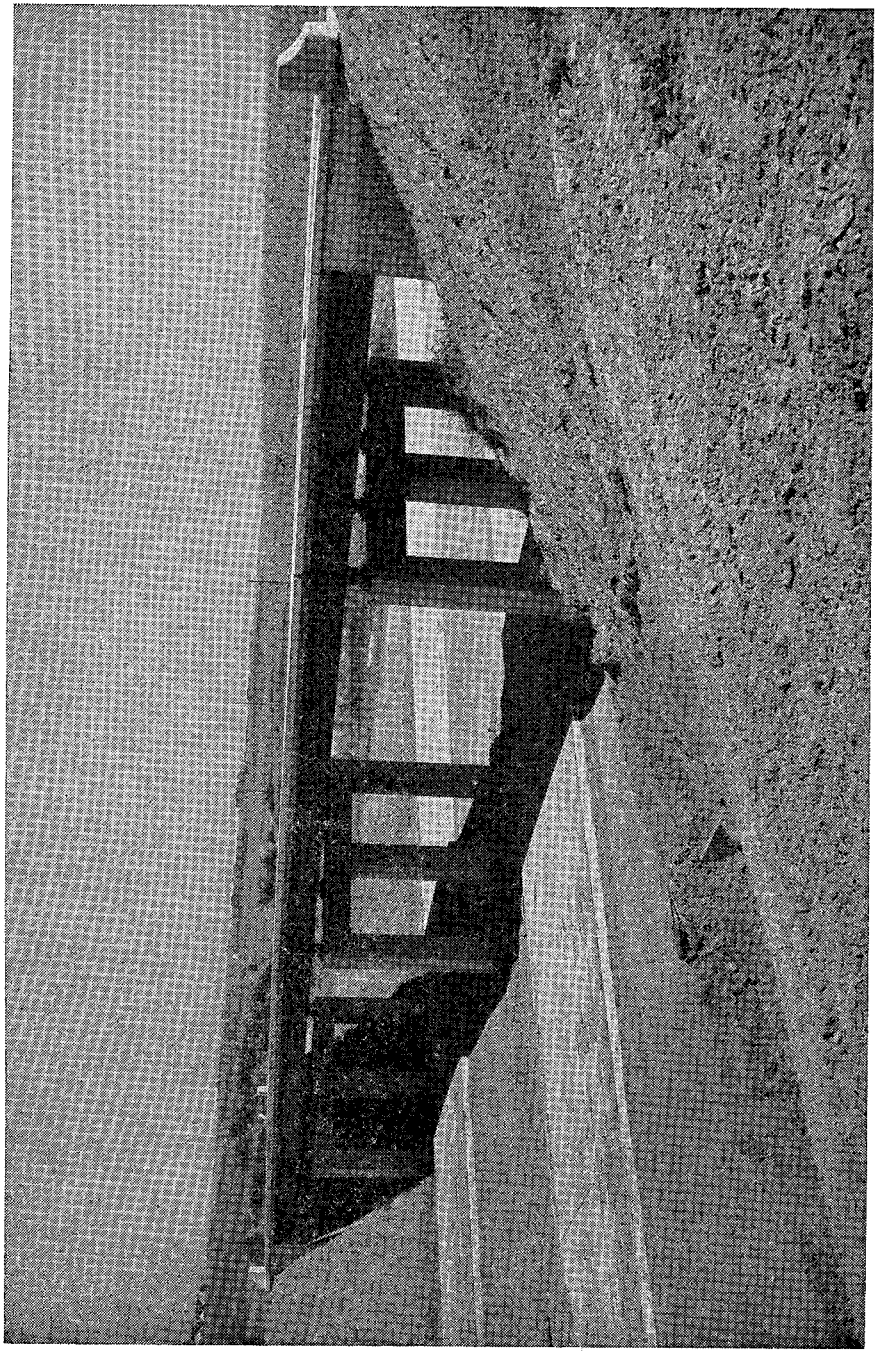
[1] Fincham v. Mueller, 166 Neb. 376, 89 N.W.2d 137 (1958).

[2] In accordance with Neb. Rev. Stat. § 25-307 (Reissue 1956) which says in part: "The action of an infant must be brought by his guardian or next friend . . ."

[3] Fincham Sr. was allowed to testify as to the speed of his vehicle; where he was when he first looked for other cars; where he was when he looked again; but on one occasion when he was asked what he did when he saw decedent's car coming, objection to his testimony was sustained.

[4] Neb. Rev. Stat. § 25-1202 (Reissue 1956). The material part provides: "No person having a direct legal interest in the result of any civil action or proceeding, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness . . ."

[5] Neb. Rev. Stat. § 25-308 (Reissue 1956). "The guardian or the next friend is liable for the costs of the action brought by him . . ." See also Kliffel v. Bullock, 8 Neb. 336, 1 N.W. 250 (1879).



County Road Spans Interstate on Unfinished Overpass

under the Nebraska Dead Man Statute.[6] Thus, the question of whether or not an automobile accident is a transaction within the meaning of section 25-1202 of the Nebraska Revised Statutes was properly before the Nebraska Supreme Court. It is interesting to note that had Fincham Jr.'s mother or a third party guardian brought the action for him, the above question would not have arisen, since whether the accident was a transaction or not, Fincham Sr. would no doubt have been a competent witness as he would not have had a direct legal interest in the result of the action.[7]

"The purpose of the Dead Man Statutes is to prevent injustice and fraud, and to put the parties on equal terms."[8] Courts have expressed the fear that an interested witness might testify falsely about a matter the deceased, if living, could contradict;[9] they feel that the admission of such testimony would place in great peril the estates of the dead;[10] and further, that the right

[6] Ransom v. Schmela, 13 Neb. 73, 12 N.W. 926 (1882); Smith v. Perry, 52 Neb. 738, 73 N.W. 282 (1897); See also Tecumseh Nat Bank v. McGee, 61 Neb. 702, 722, 85 N.W. 849 (1901) quoting Norval J. in Kroh v. Heins, 48 Neb. 691, 698, 67 N.W. 771 (1896): ". . . A direct legal interest in the event of an action disqualifies a witness from testifying to a transaction or conversation with the deceased, whether such interest be great or small."

[7] In W. E. Belcher Lumber Co. v. Harrell, 252 Ala. 392, 41 So.2d 385 (1949), the mother as next friend for her minor son brought an action for injuries the son sustained in a collision between an automobile and a truck. It was important to show that the truck driver was acting as an agent for the defendant company. The court ruled that the plaintiff's father was not disqualified under the dead mans statute, code 1940 Tit. 7, § 433, to testify to a conversation had with W. E. Belcher, the corporate defendant's president, about the agency of the truck because the father had no pecuniary interest in the outcome of the suit. In Oft v. Ohrt, 128 Neb. 848, 260 N. W. 571 (1935) an action by a mother against her daughter, the daughter as grantee of a deed from the mother and deceased father sought reformation of the deed; the other daughters and their husbands were allowed to testify as to transactions and communications with the deceased, notwithstanding the fact that they had similar contracts with the mother and deceased faher. See also, In Re Jelinek's Estate, 146 Neb. 452, 20 N.W.2d 325 (1945) where brothers and sisters with similar claims against an estate were allowed to testify for their sister. The claimant's husband was also deemed competent to testify.

[8] 97 C.J.S. Witnesses § 132b p. 558 (1957)

[9] Bankers Trust v. Bank of Rockville Center, 114 N.J.Eq. 391, 168 A. 733 (1933).

[10] Owens v. Owens, 14 W.Va. 88 (1878).

and privilege of testifying must be mutual.[11] With these reasons in mind, the Nebraska court found ample authority for determining an accident a transaction.

Several Nebraska cases in referring to the Dead Man Statute have said that: "The word 'transaction', as used in this section, embraces every variety of affairs, the subject of negotiations, actions, or contracts between the parties."[12] A transaction has also been defined as an action in which both the witness and the decedent have participated and to which the decedent, if alive, could testify of his own personal knowlege.[13] In 1956 a Nebraska District Court ruled that a surviving defendant driver, when sued by the administratrix of the other driver, was barred from testifying about the facts of the accident; but as the defendant prevailed, the Supreme Court did not review this ruling.[14]

Authority from other states with statutes which do not qualify the word transaction with the term "personal" or " personally," supports the Nebraska holding. These cases illustrate two views as to the admission of testimony when a collision between two vehicles or a vehicle and a pedestrian is involved: (1) The survivor may be barred from testifying both to his own acts and those of the decedent;[15] (2) The survivor may be allowed to testify as to his own acts but not as to the decedent's.[16]

Our Supreme Court, in disagreement with the trial court in the subject case,[17] is of the opinion that testimony as to both per-

[11] Newman v. Tipton, 191 Tenn. 461, 234 S.W.2d 994 (1950); Wamsley et. al. v. Crook, 3 Neb. 344 (1874), quoting at page 351: "Death having sealed the lips of the one, the law seals the lips of the other."

[12] Wilson v. Wilson, 83 Neb. 562, 563, 120 N.W. 147 (1909), citing Smith v. Perry, 52 Neb. 738, 73 N.W. 282 (1897) and Kroh v. Heins, 48 Neb. 691, 67 N.W. 771 (1896).

[13] Nelson v. Janssen, 144 Neb. 811, 14 N.W.2d 662 (1944) citing Hlavaty v. Blair, 101 Neb. 414, 163 N.W. 330 (1917), with approval.

[14] Judge John H. Kuns ruling in Wolcott v. Drake, 162 Neb. 56, 75 N.W.2d 107 (1956).

[15] Andreades v. McMillan, 256 S.W.2d 477 (1953). The Texas court expressed grave doubts that an automobile accident ought to be within the meaning of the word transaction but it felt constrained from the rulings in prior cases to include such an occurrence. Between pedestrians and autos, Miller v. Walsh's Administratrix, 240 Ky. 822, 43 S.W.2d 42 (1931); Wright v. Wilson, 154 F2d 616 (1946), Van Meter v. Goldfarb, 317 Ill. 620, 148 N.E. 391 (1925).

[16] Strode v. Dyer, 115 W.Va. 733, 177 S.E. 878 (1934); Kilmer v. Gustafson, 211 F.2d 781 (1954); USAC Transport v. Corley, 202 F.2d 8 (1953).

[17] See footnote 3 supra.

sons actions should be excluded.[18] It appears that it made slight difference to Fincham's case which view was taken. Even if Fincham Sr.'s testimony as to his own actions proved he was free from negligence, there is no presumption that the decedent was negligent, nor does the mere happening of an accident prove there was negligence.[19] As the burden of proof was on the plaintiff, Fincham Jr., the admission of Fincham Sr.'s testimony about his own acts put the plaintiff's case in little better position than if this testimony had been completely barred. Similarly, a survivor as a defendant would gain no substantial advantage if his testimony about his own action was held not to be within the Statute. Some evidence of his actions would necessarily have to be introduced by the representative of the deceased, and the surviving defendant's incompetency as to this evidence would be removed under the waiver provisions of the Dead Man Statute.[20] But the admission of his testimony under the waiver provision of the Statute would not help the surviving defendant on the issue of the decedent's contributory negligence because his testimony is circumscribed by the evidence introduced by the deceased's representative.

[18] Fincham v. Mueller, 166 Neb. 376, 386, 89 N.W.2d 137 (1958). "We can see no logical reason for such a holding for if the factual situation brings it within the statute then the statute necessarily excludes all of the testimony relating thereto."

In the recent case of Olsen v. Best, 167 Neb. 198 (1958), our court makes the loose statement at page 200 that: "Any evidence by the plaintiff relative to and tending to destroy the effect of that transaction is incompetent under the Dead Man's Statute."

[19] Price v. King, 161 Neb. 123, 72 N.W.2d 603 (1955); Wolcott v. Drake, 162 Neb. 56, 75 N.W.2d 107 (1956); Schroeder v. Sharp, 153 Neb. 73, 43 N.W.2d 572 (1950).

[20] Neb. Rev. Stat. § 25-1202 (Reissue 1956) ". . . unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness .. . ."

Note how the court used this waiver clause in Van Meter v. Goldfarb, 317 Ill. 620, 148 N.E. 391 (1925). A boy was struck and killed by defendant's car. The boy's brother as next of kin was one of those for whom the suit was brought. The court held that the accident was a transaction within the Illinois Dead Man Statute, thus allowing the defendant to testify as to the occurrence since the deceased boy's brother had testified to what he had observed.

The majority stated in their opinion that any change in the severity of the statute should come through legislation. In 1940 the New York Legislature acted to remove a claim of negligence, based on the operation of a motor vehicle, from the purview of the New York Dead Man Statute.[21] The writer believes that not only would Nebraska benefit from removing auto accidents from the scope of the Dead Man Statute, but that the adoption of a statute which removes all interest disqualifications would cure many of the difficulties which arise in practice. A statute along the following lines is suggested:

> No person shall be disqualified as a witness in any action, suit, or proceeding by reason of his interest in the event of the same as a party or otherwise. In actions, suits, or proceedings by or against the representatives of deceased persons, any statement of the deceased, whether written or oral, shall not be excluded as hearsay, provided that the trial judge shall first find as a fact that the statement was made by the decedent, and that it was made in good faith and on the decedent's personal knowledge.[22]

Notwithstanding the need for legislation, the writer, in agreement with the dissent in the subject case, is not convinced that the court, in order to avoid judicial legislation, was required

[21] N.Y. Civil Practice Act, Evidence § 347 as amended by L. 1940, ch. 620 provides that a person shall not be incompetent to testify to the facts of an accident which involves a claim of negligence based upon the operation of a motor vehicle.

[22] The admission of statements of the decedent is the counterpart of the abolishment of the unenlightened and unpractical disqualification of the survivor as a witness. The admission of the statements of the deceased is justified as an exception to the Hearsay rule as it unites the essential requirements of such an exception (See Wigmore on Evidence §§ 1420-1424, 1940).

The suggested exception to the Hearsay rule has met with favor of the bar and ease of interpretation in the states in which it has been adopted. In Massachusetts the statute reads: MGLA c. 233 § 65, "In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant." In 1937-38, The American Bar Associations Committee on the Improvement of the Law of Evidence recommended the enactment of a law similar to the Massachusetts law by a vote of 48 to 1. Rhode Island (G.L. 1956, 9-19-11) has a statute similar to that of Massachusetts; and in Oregon (ORS 41-850) and Alaska (c. 6 comp. L. 1949, § 58-6-1), when a party to a civil action or suit by or against an executor or administrator appears as a witness in his own behalf, statements of the deceased concerning the same matter may also be proven.

to construe the word "transaction" so broadly as to include an automobile accident.

Section 25-1201 of the Nebraska Revised Statutes states who is competent to testify as a witness. This section is a general statute which removes the old common law disqualification of the parties to a lawsuit and all persons having a direct interest in the outcome.[23] As the Dead Man Statute, section 25-1202, is an exception to the general qualification statute, section 25-1201, it should be strictly construed.[24]

The dictum in prior Nebraska cases suggests that a transaction means a mutual personal transaction in which each party is an active participant, rather than an involuntary, fortuitous collision.[25] The language of the Nebraska Dead Man Statute does not demand that a survivor be prohibited from giving his unilateral observations as to a physical situation or event.

An Arkansas case, Rankin v. Morgan,[26] which is in point on fact and statute, held that a collision did not constitute a transaction with the testator or intestate. Although the decision was apparently reached without consulting any authority that was apposite to the problem, at least the Arkansas court did not feel constrained by its statute to hold a collision to be a transaction. Cases from Iowa, Maryland, and Wisconsin have held that an automobile accident is not a transaction within their respective Dead Man Statutes.[27] It is true that the statutes in these states qualify the word transaction with the term personal or person-

[23] Neb. Rev. Stat. § 25-1201 (Reissue 1956) quoting in part: "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil or criminal, except as otherwise herein declared . . ." The exceptions declared are: (1) Persons of unsound mind, (2) certain communications between husband and wife, (3) privileged communications of attorney and client, (4) clergy or priest concerning a confession.

[24] Sorensen v. Sorensen, 56 Neb. 729, 733, 77 N.W. 68 (1898): "In other words, the reason for disqualifying the witness must be found in express provisions of law, and the witness is not to be disqualified by a strained or strict construction." See the cases cited on page 734 of the Sorensen opinion, and also In re Jelinek, 146 Neb. 452, 20 N.W. 2d 325 (1945), and 82 C.J.S. Statutes § 387 p. 917 (1953).

[25] Harnett v. Holdrege, 5 Neb. (Unoff.) 114, 97 N.W. 443 (1903). In re House, 145 Neb. 886, 18 N.W.2d 500 (1945).

[26] Rankin v. Morgan, 193 Ark. 751, 102 S.W.2d 552 (1937).

[27] Turbot v. Repp, 72 N.W.2d 565 (1955); Shaneybrook v. Blizzard, 209 Md 304, 121 A.2d 218 (1956); Seligman v. Orth, 205 Wis. 199, 236 N.W. 115 (1931).

ally and are therefore more restrictive than Nebraska's statute, but the final determination of the scope rests in the courts broad or strict construction of the words used, as West Virginia also has a "personal" statute and its courts have held an auto accident to be a transaction.[28] Perhaps our court would have been forced to construe broadly the word transaction if Nebraska had an equal knowledge rule such as found in Michigan's statute;[29] but as the Nebraska statute is not bound up by such a rule, there was room for the court to give a stricter construction to the word transaction.

Several of the cases relied upon by the defendant and cited by the court dealt with actions between either the estate of a decedent driver and a surviving passenger or the estate of a decedent passenger and a surviving driver.[30] The significant factual difference makes these cases dubious authority for holding a two car collision to be a transaction as even Wisconsin recognizes that there is a transaction between a driver and his own passenger.[31]

Reference to text writers supports the contention that not only should the Dead Man Statutes be construed strictly, but that they should be abolished completely. Authorities such as McCormick, Wigmore, and Morgan have attacked the statutes as anomalies which breed injustice and uncertainty.[32] Professor Wigmore in his treatise on Evidence asserts that the Dead Man Statutes are open to every one of the objections successfully urged against the common law interest rule in general. These objections are set out in Section 578 of his treatise as follows:

1) That the supposed danger of interested persons testifying falsely exists to a limited extent only;

[28] See Strode v. Dyer, 115 W.Va. 733, 177 S.E. 878 (1934) interpreting Code 1931 57-3-1.

[29] (Mich. Statute) chap. 266, § 27-914 (1938) ". . . the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person . . ."

[30] Davis v. Pearson, 220 N.C. 163, 16 S.E.2d 655 (1941); Stephens v. Short, 41 Wyo. 324, 285 P. 797 (1930); Boyd v. Williams, 207 N.C. 30, 175 S.E. 832 (1934); McCarthy v. Woolston, 210 App. Div. 152, 205 N.Y.S. 507 (1924).

[31] Waters v. Markham, 204 Wis. 332, 235 N.W. 797 (1931).

[32] See Wigmore on Evidence, § 578 and 578a (1940); McCormick on Evidence, § 65 (1954); Morgan and others, The Law of Evidence, Some Proposals for its Reform, chap. 3, p. 31 (Yale Univ. Press, 1927).

2) That, even so, yet, so far as they testify truly, the exclusion is an intolerable injustice;

3) That no exclusion can be so defined as to be rational, consistent, and workable;

4) That in any case the test of cross-examination and the other safeguards for truth are a sufficient guaranty against frequent false decision.

Are greater chances to obtain the truth gained by omission or admission? It is contrary to experience that people are so corrupt as to perjure and at the same time so adroit as to deceive courts and juries. "In the great majority of instances the witnesses are honest, however much interested, and in most cases of dishonesty the falsehood of the testimony is detected, and deceives none."[33] In addition, a claimant so corrupt as to commit perjury would not hesitate to suborn a third person, who would not be disqualified, to swear to a false story.

The demand for removal of disqualification for interest under the Dead Man Statutes is not merely the result of Law Professors theorizing with their usual eloquence. In 1922 a committee was appointed by the Commonwealth Trust Fund of New York to inquire in to the possibilities of reform in the rules of evidence. The committee put the survivor rule to a pragmatic test, selecting the state of Connecticut whose statute admits the survivors testimony and also declarations and memoranda of the deceased on a ruling by the trial judge that they were made in good faith and on the decedent's personal knowledge.[34] A poll was taken of over two hundred members of the bar and bench of Connecticut. The results of the poll showed that 89% of the higher court Judges and 85% of the Practitioners having experience with the statute in six or more cases were in favor of permitting testimony of survivors under the statute and felt it

[33] New York Commissioners on Practice and Pleading, 1st report, 1848. For an interesting commentary on human nature, human ingenuity, and the weapon of cross-examination, See Corliss J., in St. John v. Lofland, 5 N.D. 140, 143, 64 N.W. 930 (1895).

[34] G.S. Conn. c. 387 § 7868 (Revision 1949) "No person shall be dsiqualified as a witness in any action by reason of his interest in the event of the same as a party or otherwise . . ." and § 7895 "In actions by or against the representatives of deceased persons, . . . the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence . . ."

aided in the ascertainment of truth.[35] The opposition to this liberal statute was in inverse ratio to experience with it.

With the above objections to the Dead Man Statute in mind, the writer suggests that the Nebraska court should have narrowed their range when construing the Nebraska statute. As the Nebraska law now stands, a man, alone, carefully and lawfully driving his automobile, who collides with a carload of drunken rowdies and kills one of them, is barred from testifying in a suit against the deceased person's estate. Of course, if the careful driver is sued, his disqualification is removed in regard to facts of the transaction testified to by a witness for the deceased since the statute can only be used as a shield and not a sword; but still, the entire direction of the prudent driver's case is in the hands of the drunken louts. Does our statute demand such consequences or are they the result of judicial construction of the word transaction?

No testimony was offered by Fincham Jr., therefore, the court was not faced with the question of whether or not there was a transaction between the decedent, driver of the one car, and the plaintiff, guest in the other car. But as the court defines a transaction as every variety of affairs, the subject of actions between the parties; all methods by which one person can derive impressions from another; and an occurrrence of which both the decedent and the other party had knowledge, they would no doubt hold that such a relation existed.[36]

If such would be the holding, a logical sequence of events would raise many difficult questions such as the competency of passengers in buses or trains in a suit against the estate of the deceased driver of a vehicle in collision with the bus or train. These questions would be solved and injustice avoided if the court had not placed a broad definition on the word transaction; perhaps, however, the question now is not what the court should have done, but rather, how far will the court go.

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[35] The committee report was published in 1927; Morgan "The Law of Evidence, Some Proposals for its reform" (Yale Univ. Pres) see chap. 3, p. 31.

[36] See definitions of transaction on p. 383 of the subject case, Fincham v. Mueller, 166 Neb. 376, 89 N.W.2d 137 (1958); and the cases cited in footnotes 11 and 12.