GENERAL STATUTES

OF THE

STATE OF MINNESOTA

IN FORCE

JANUARY 1, 1889.

COMPLETE IN TWO VOLUMES.

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VOL. 2.

SUPPLEMENT, 1879-1888,

WITH

ANNOTATIONS AND GENERAL INDEX TO BOTH VOLUMES.

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knowledgment so taken and certified shall be sufficient to satisfy all requirements of law relating to the execution or recording of such instruments:

(Begin in all cases by a caption specifying the state and place where the acknowledgment is taken.)

1. In the case of natural persons acting in their own right:

On this ——— day of ———, 18—, before me personally appeared A. B., (or A. B. and C. D.,) to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed.

2. In the case of natural persons acting by attorney:

On this ——— day of ———, 18—, before me personally appeared A. B., to me known to be the person who executed the foregoing instrument in behalf of C. D., and acknowledged that he executed the same, as the free act and deed of said C. D.

3. In the case of corporations or joint-stock associations:

On this ——— day of ———, 18—, before me appeared A. B., to me personally known, who, being by me duly sworn, (or affirmed,) did say that he is the president (or other officer or agent of the corporation or association) of (describing the corporation or association,) and that the seal affixed to said instrument is the corporate seal of said corporation, (or association,) and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its board of directors, (or trustees,) and said A. B. acknowledged said instrument to be the free act and deed of said corporation, (or association.)

(In case the corporation or association has no corporate seal, omit the words, "the seal affixed to said instrument is the corporate seal of said corporation (or association) and that," and add, at the end of the affidavit clause, the words, "and that said corporation (or association) has no corporate seal.")

(In all cases add signature and title of the officer taking the acknowledgment.) (1883, *c.* 99, § 1.)

*§ 18. By married women.

When a married woman unites with her husband in the execution of any such instrument, and acknowledges the same in one of the forms above sanctioned, she shall be described in the acknowledgment as his wife, but in all other respects her acknowledgment shall be taken and certified as if she were sole; and no separate examination of a married woman in respect to the execution of any release of dower, or other instrument affecting real estate, shall be required. (*Id.* § 2.)

CHAPTER 73.

WITNESSES AND EVIDENCE.*

TITLE 1.

WITNESSES.

§ 7. Competency of witnesses.

Prior to the amendment, (Laws 1868, c. 70, § 1,) in a criminal prosecution one defendant was not competent as a witness on behalf of a co-defendant until after discharge or

* See as to probate of heirship, *c.* 49, *§§ 7*a*, 7*b*, *ante*.

judgment against the defendant whose testimony was offered, whether such defendants be tried together or separately; and the rule was the same whether the offense charged be a simple assault or a graver crime. Baker v. United States, 1 Minn. 207, (Gil. 181;) State v. Dumphey, 4 Minn. 438, (Gil. 340.)

The provision that, on the trial of all indictments, complaints, and other proceedings against persons charged with criminal offenses, the person so charged shall, at his request, but not otherwise, be deemed a competent witness, does not include a co-defendant not on trial, so as to except him from the general rule as to competency. State v. Dee, 14 Minn. 35, (Gil. 27.)

This provision, forbidding comment to be made on the omission of a defendant to be sworn in his own behalf, does not apply to proceedings under Gen. St. c. 17, the bastardy act. State v. Snure, 29 Minn. 132, 12 N. W. Rep. 347.

The silence of a defendant in a criminal proceeding, who neglects to testify, cannot, under this section, be commented upon in the argument; but if he does testify, his refusal to answer any particular question is subject for comment, the same as in the case of any other witness. State v. Staley, 14 Minn. 105, (Gil. 75.)

See Cannady v. Lynch, 27 Minn. 435, 436, 8 N. W. Rep. 164; State v. Froiseth, 16 Minn. 296, (Gil. 260, 262;) and cases cited in note to § 8, *post*.

*§ 7*a*. Examination of party at instance of adverse party.

A party to the record of any civil proceeding in law or equity, or a person for whose immediate benefit such proceeding is prosecuted or defended, may be examined as if under cross-examination at the instance of the adverse party, or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter-testimony. (1885, *c.* 193.)

In proceedings for the probate of a will, proponent, as a witness for contestant, may be interrogated concerning statements said to have been made by him to others concerning decedent's mental capacity. In re Will of Brown, 35 N. W. Rep. 726.

§ 8. Conversations, etc., with deceased party.

The disqualifying interest intended by this section to affect the competency of a witness to testify touching matters therein stated, is such an interest only, in the event of the action or proceeding, that the witness having it will either gain or lose by the direct legal operation of the judgment therein, or may be prejudiced in some right by the use of the judgment as evidence for or against him in some other action or proceeding. Marvin v. Dutcher, 26 Minn. 391, 4 N. W. Rep. 685. The disqualifying interest must be not merely in the question involved, but in the event of the particular action pending, such that the witness will either gain or lose by the direct legal effect and operation of the judgment, or that the record will be legal evidence for or against him in some other action. Nearpass v. Tilman, (N. Y.) 10 N. E. Rep. 894. And see McClure v. Otrich, (Ill.) 8 N. E. Rep. 784.

Under a statute declaring that "neither party to such suit" shall be a competent witness, the word "party" was held to mean a party to the issue, and not merely a party to the record. Spencer v. Robbins, (Ind.) 5 N. E. Rep. 726. But see Williams v. Barrett, (Iowa,) 3 N. W. Rep. 690.

S. executed a chattel mortgage to A., the consideration for which was furnished by F. In an action by A. against B., a creditor of S., to recover the mortgaged property which B. had caused to be levied upon under an execution in his favor against S., claiming that the chattel mortgage was fraudulent as to the creditors of S., held that, although F. had since died, S. was a competent witness for A. to prove the transaction. Foster v. Berkey, 8 Minn. 351, (Gil. 310.)

Upon an indictment for nuisance in obstructing a highway, neighboring land-owners are not interested in the event, within the meaning of this section. State v. Eisele, 33 N. W. Rep. 785.

The answer set up a contract between the plaintiff's intestate on the one side, and the defendant and M. and another on the other side. The interest of the defendant in the contract having ceased, the action, as a defense to which the contract was set up, was defended to protect the interest of M. and the other. Held, that not only the defendant, but the other parties on the same side of the contract, and who, though not parties of record, were parties in interest to the action, were incompetent to testify in their own favor to the contract. Allen v. Baldwin, 22 Minn. 397.

In an action by an executor against several defendants upon a joint debt, a defendant who has withdrawn his answer, and stipulated for judgment against himself, is no longer a party, within the meaning of the statute, and is a competent witness to personal transactions with decedent. Conger v. Bean, (Iowa,) 12 N. W. Rep. 284.

Any parties to an action, or interested in the event thereof, are incompetent to testify to a conversation with, or admission of, any deceased or insane person, whether a

party or not, relative to any matter at issue between the parties. Griswold v. Edson, 32 Minn. 436, 21 N. W. Rep. 475.

This section has reference only to spoken words. Livingston v. Ives, 35 Minn. 55, 27 N. W. Rep. 74.

A party to an action, or interested in the event, may give evidence of any acts of a deceased or insane party or person, although such acts may have in law the effect of admissions. It is only as to conversations or oral admissions that the evidence is excluded. Chadwick v. Cornish, 26 Minn. 28, 1 N. W. Rep. 55.

In an action against an executor to recover for services rendered to decedent, plaintiff may testify as to how long he was engaged in the work, and how much his services were reasonably worth. Belden v. Scott, (Wis.) 27 N. W. Rep. 356.

The words "as to such contract," as used before the amendment, construed. Johnson v. Coles, 21 Minn. 108.

For a construction of the words "is received," as used in this section before the amendment of 1868, *c.* 70, § 1, in regard to evidence of party to contract, see Bigelow v. Ames, 18 Minn. 527, (Gil. 471.)

Where the claim was for care, board, clothing, etc., in the family of one who is deceased, and the arrangement with respect to it was made by his wife, if she testifies, the testimony of the other party may also be received. McNab v. Stewart, 12 Minn. 407, (Gil. 291.)

What is not a waiver of the protection of the statute. Rhodes v. Pray, 36 Minn. 392, 32 N. W. Rep. 86.

See Harrington v. Samples, 36 Minn. 200, 30 N. W. Rep. 671; Belden v. Scott, (Wis.) 27 N. W. Rep. 356.

§ 9. Persons incompetent to testify.

Persons are competent if, when offered, they have such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong sufficient to appreciate the sanctity and binding force and obligation of an oath. Cannady v. Lynch, 27 Minn. 435, 8 N. W. Rep. 164. The trial court must determine a witness' competency when he is offered; the pleadings do not determine it. The trial court need not examine a witness as to his fitness to testify, unless, when he is offered, it see some indication of his unfitness. Id.

§ 10. Privileged communications.

SUBD. 1. A wife may be a witness against her husband, without his consent, only in the cases specified in the statute. She cannot be in an action by him against a defendant for enticing her away, though the defense be based on alleged ill-treatment of the wife by her husband. Huot v. Wise, 27 Minn. 68, 6 N. W. Rep. 425.

This section includes all private conversations between husband and wife, though on subjects not confidential in their nature. Leppla v. Tribune Co., 35 Minn. 310, 29 N. W. Rep. 127.

A wife cannot testify against her husband on a prosecution against him for adultery. State v. Armstrong, 4 Minn. 335, (Gil. 251.)

SUBD. 4. Information acquired by a physician otherwise than in a professional capacity, and not necessary to enable him to prescribe or act for the patient, is not privileged. Jacobs v. Cross, 19 Minn. 523, (Gil. 454.)

It is not necessary, in order to bring the case within the statute, that the physician should have been employed by the patient. It is sufficient if he attended the patient in his professional capacity. Reinhan v. Dennin, (N. Y.) 9 N. E. Rep. 320. And the statute is not limited to information of a confidential nature. Id.

A communication between a patient and her physician in relation to producing a miscarriage is privileged, in the absence of any showing that it was for an unlawful purpose. Guptill v. Verback, (Iowa,) 12 N. W. Rep. 125.

An executor is not authorized to waive the privilege; and, in an action brought by him as executor, a physician who attended decedent professionally is incompetent as a witness for plaintiff to testify to matters which would be privileged as against the patient were he living. Westover v. Ætna Ins. Co., (N. Y.) 1 N. E. Rep. 104. But see Fraser v. Jennison, (Mich.) 3 N. W. Rep 882.

See, as to waiver of the privilege, McKinney v. Railroad Co., (N. Y.) 10 N. E. Rep. 544; Smith's Appeal, (Mich.) 18 N. W. Rep. 195; Luehrsmann v. Hoings, (Iowa,) 15 N. W. Rep. 671.

As to what is privileged and as to waiver, see Williams v. Johnson, (Ind.) 13 N. E. Rep. 872.

§ 14. Preliminary examination as to competency.

The decision of the trial court upon an objection to a witness on the ground of nonage or want of intelligence, cannot be reviewed unless there is a clear abuse of discretion, or the court admits or rejects the witness upon an erroneous view of a legal principle. State v. Levy, 23 Minn. 104.

A witness who understands that he is brought to court to tell the truth, that it is wrongful to tell a lie, and that he will be punished if he tells a lie, has, under the statute, sufficient understanding of the obligation of an oath to be competent. Id.

TITLE 2.

TAKING THE DEPOSITION OF WITNESSES WITHIN THIS STATE.

§ 15. Depositions authorized.

It is error in the district court to make an order requiring a party to answer written interrogatories prepared by the opposite party. Leuthold v. Fairchild, 35 Minn. 99, 27 N. W. Rep. 503, 28 N. W. Rep. 218.

§ 27. When deposition may be used.

The deposition, taken in the action of a witness since deceased, may be read, although after it was taken, and on the first trial of the action, he was sworn and examined as a witness. Lamberton v. Windom, 18 Minn. 506, (Gil. 455.)

§ 29. Using deposition in second action.

Depositions taken in a cause may be used on a retrial of the cause, without any order of court. Chouteau v. Parker, 2 Minn. 119, (Gil. 96.)

TITLE 3.

TAKING THE TESTIMONY OF WITNESSES OUT OF THIS STATE.

§ 32. Depositions authorized.

The testimony of a party to a suit may be taken on commission. Claflin v. Lawler, 1 Minn. 297, (Gil. 231.) Same point, Hart v. Eastman, 7 Minn. 74, (Gil. 50.)

*§ 36. Manner of taking depositions—Notice, etc.

Whenever the testimony of any person within or without this state, or in any other portion of the United States, is wanted in any civil action or proceeding in any court of this state, the same may be taken by and before any officer authorized to administer an oath in the state or territory or district of the United States in which the testimony of such person may be taken, upon notice to the adverse party of the time and place of taking the same. Such notice shall be in writing, and shall be served as other notices in civil actions are required to be served, and shall be served so as to allow the adverse party sufficient time, by the usual route of travel, allowing one day for every one hundred miles of distance between the place of the service of the notice and the place of the taking of such testimony, and one day for preparation, exclusive of Sundays and the day of service; and the examination may, if so stated in the notice, be adjourned from day to day: *provided*, that the justice of the peace, or judge of the court before which, or the court commissioner of the county in which, the action is pending, may, on motion, and by order in the cause, designate the time and place for the taking of the testimony, and the time within which a copy of the order shall be served on the adverse party or his attorney: *and provided, further*, that whenever the defendant in any action or proceeding is in default for want of an answer or other defense, such notice or order need not be served upon him. (1873, *c.* 61, § 1, *as amended* 1876, *c.* 68, § 1; 1885, *c.* 53; 1887, *c.* 185.)

As to sufficiency of the notice, see Osgood v. Sutherland, 36 Minn. 243, 31 N. W. Rep. 211.

*§ 37. Same—Authentication of deposition, etc.

As to attaching notarial seal to certificate, see Osgood v. Sutherland, 36 Minn. 243, 31 N. W. Rep. 211.

See Tancre v. Reynolds, 35 Minn. 476, 478, 29 N. W. Rep. 171; Everett v. Boyington, 29 Minn. 264, 268, 13 N. W. Rep. 45.

*§ 38. Admissibility of deposition—Objections.

When the parties to a legal proceeding stipulate that depositions "may be taken, to be introduced in evidence * * * on behalf of" one of them, they may be introduced by the other, if the party in whose behalf they were taken fails to use them. In re Smith, 34 Minn. 436, 26 N. W. Rep. 234. When a party thus uses a deposition taken on behalf of, but not used by, his opponent, he makes it his own, and, as respects matter of substance, such opponent has the same right of objection to interrogatories and answers as if the deposition had been taken on behalf of the party offering it. Id.

The effect of failure to give notice of return of deposition is not to render it inadmissible, but simply to leave the adverse party to make at the trial such objections as he could have made on a motion to suppress. Osgood v. Sutherland, 36 Minn. 243, 31 N. W. Rep. 211.

*§ 39. Informalities, etc., in deposition.

Where the time elapsing between notice of the filing and the trial is less than ten days, the adverse party may take at the trial all the objections he could have taken upon a motion to suppress. Tancre v. Reynolds, 35 Minn. 476, 29 N. W. Rep. 171.

Where R. & H. appeared as plaintiff's attorneys, and the complaint was verified by R. as one of the attorneys for plaintiff, and the notice of taking depositions was signed. "R., Attorney for the Plaintiff," the notice, though irregular, is no ground for excluding the deposition. Osgood v. Sutherland, 36 Minn. 243, 31 N. W. Rep. 211.

An error in the notice of the taking of a deposition in the name of a witness proposed to be examined, held no ground for excluding the deposition, the adverse party having appeared and cross-examined the witness. Waldron v. City of St. Paul, 33 Minn. 87, 22 N. W. Rep. 4.

The presumption of the truth of the statement in the notarial certificate that the notary was authorized to administer the oath is not overcome by the fact that the deposition was taken upon territory belonging to the United States and used as a soldier's home. Id.

See Tancre v. Reynolds, 35 Minn. 476, 29 N. W. Rep. 171.

TITLE 7.

THE PRINTED STATUTES OF THIS STATE, THE RECORDS AND PROCEEDINGS OF COURTS, AND THE LAWS OF OTHER STATES, AND OF FOREIGN LAWS, AS EVIDENCE.

§ 54. (Sec. 49.) Records of foreign courts.

The copy of a foreign will, and the probate thereof, as the same appear of record, duly authenticated under the act of congress, (May 27, 1790,) and this section, are competent evidence to prove the existence of the original will, the probate thereof, and the appointment, acceptance, and qualification of the executors of the same. First Nat. Bank Memphis v. Kidd, 20 Minn. 234, (Gil. 212.) Under Gen. St. *c.* 77, § 6; *c.* 73, § 66; and Gen. Laws 1869, *c.* 63,—the duly-authenticated copy of the copies of the letters testamentary, and the certificate authenticating the same, filed in the office of the judge of probate and the register of deeds, are admissible in evidence to prove the filing of the aforesaid copies. (Id.)

An exemplification of a judgment rendered by a justice of the peace in another state, made by another justice, in whose custody under the laws of the state the docket and papers of said first justice are, is not evidence under this section. Bryan v. Farnsworth, 19 Minn. 239, (Gil. 198.)

See Gribble v. Pioneer Press Co., 15 Fed. Rep. 689.

§ 55. (Sec. 50.) Printed copies of statutes.

An act passed in 1852 is no evidence of what the law was in 1845. State v. Armstrong, 4 Minn. 335, (Gil. 251.)

*§ 56*a*. Statutes prepared by George B. Young.

The edition of the General Statutes and other public laws of this state in force at the close of the legislative session of eighteen hundred and seventy-eight, prepared by George B. Young, pursuant to chapter sixty-seven of the General Laws of eighteen hundred and seventy-eight, shall be competent evidence of the several acts and resolutions therein contained, in all courts of this state, without further proof or authentication. (1879, *c.* 67, § 1.)

*§ 56*b*. Same—How to be cited.

Said compilation shall be known and cited as "General Statutes 1878." (*Id.* § 2.)

*§ 56*c*. Same—Supplement of 1881.

The supplement comprising the changes in the General Statutes A. D. one thousand eight hundred and seventy-eight, as made by the General Laws of the years A. D. one thousand eight hundred and seventy-nine and one thousand eight hundred and eighty-one, arranged with reference to the chapter and section of said General Statutes A. D. one thousand eight hundred and seventy-eight, in the edition thereof published in 1881, shall be and hereby is made *prima facie* evidence of the several acts therein contained in all the courts of this state, without further proof or authentication. (1881, *Ex. Sess.* c. 75, § 1.)

*§ 56*d*. Same—Manner of citing.

Said supplement may be cited and designated as "1881 Supplement General Statutes 1878." (*Id.* § 2.)

*§ 58*a*. Certified copies of decisions.

The state librarian, upon the application of any person, may make out and certify, under his official seal, a copy or copies of any judicial decision, of any report or proceeding contained in any of the laws or equity reports in his office or under his charge, as such librarian, and of any other document or paper in his custody, and any such certified copy may be used and read before any judge or court, or in any legal proceeding, to the same effect as the original book, report, document, or paper could or might be used if produced before such judge, court, or other authority, and he shall be entitled to charge for the same at the rate of fifteen cents per folio. (1879, c. 89, § 1.)

TITLE 8.

DOCUMENTARY EVIDENCE AND THE PRESERVATION THEREOF.

§ 61. (Sec. 54.) Affidavit of publication.

[Under §§ 61, 62, see curative acts, *post*, c. 123.]

When the notice required was to be given by publication in two designated newspapers once in each week for ten successive weeks, an affidavit of publication for ten weeks, without stating that it was once in each week, is insufficient. So is an affidavit that is not made by the printer of the paper, or his foreman or principal clerk, or which does not state that the notice annexed to it was taken from the paper. Ullman v. Lion, 8 Minn. 381, (Gil. 338.)

§§ 61 and 62 are not applicable to a sheriff's certificate or affidavit on foreclosure by advertisement. Following Goenen v. Schroeder, 18 Minn. 66, (Gil. 51.) Merrill v. Nelson, Id. 366, (Gil. 335.)

§ 65. (Sec. 58.) Form of certificate to copies.

A copy of a letter on file in the office of the commissioner of the general land-office, if admissible at all, is not admissible unless authenticated as required by this section. Kelley v. Wallace, 14 Minn. 236, (Gil. 173.)

See In re Gazett, 35 Minn. 532, 29 N. W. Rep. 347.

§ 67. (Sec. 60.) Instruments may be acknowledged.

This section merely dispenses with other proof of the execution of an instrument when it is proved or acknowledged in the manner provided for proving or acknowledging conveyances of real estate. It does not make the instrument competent as evidence for any purpose for which it would not be competent at common law. Ferris v. Boxell, 34 Minn. 262, 25 N. W. Rep. 592.

See Ellingboe v. Brakken, 36 Minn. 156, 30 N. W. Rep. 659.

§ 73. (Sec. 66.) Certified copies of records, etc.

See Williams v. McGrade, 13 Minn. 46, (Gil. 39, 47.)

TITLE 9.

THE LOSS OF INSTRUMENTS, AND PROCEEDINGS THEREON.

§ 76. (Sec. 68.) Evidence of contents of lost bill, etc.—Recovery.

In any action founded upon any negotiable promissory note, bill of exchange, bond, or other instrument for the payment of money, or in which such note, bill, bond, or other instrument might be allowed as a set-off in the defense of any action, if it appears on the trial that such note, bill, bond, or other instrument was lost while it belonged to the party claiming the amount due thereon, parol or other evidence of the contents thereof may be given on such trial, and, notwithstanding such note, bill, bond, or other instrument was negotiable, such party shall be entitled to receive the amount due thereon, as if such note, bill, bond, or other instrument had been produced. (*As amended* 1879, *c.* 52, § 1.)

See Armstrong v. Lewis, 14 Minn. 406, (Gil 308, 309.)

§ 77. (Sec. 69.) Same—Bond to be given.

But to entitle a party to a recovery on a negotiable promissory note, bill of exchange, bond, or other instrument for the payment of money which has been lost, he shall, before judgment is entered, execute a bond to the adverse party, in a penalty at least double the amount of such note, bill, bond, or other instrument, with at least two sureties, to be approved by the court in which the recovery is had, or the clerk thereof, in case no trial is had, conditioned to indemnify the adverse party, his heirs and personal representatives, against all claims by any other persons on account of such note, bill, or other instrument, and against all costs and expenses by reason of such claims: *provided*, that in case the statute of limitations shall have run against such note, bill, bond, or other instrument while the action is pending, and before a recovery is had thereon, the court in which the action is pending may, in its discretion, reduce the amount of the penalty of such indemnity bond, or permit judgment to be entered without such bond. (*As amended* 1879, *c.* 52, § 1.)

To entitle one to recover on a promissory note it must be produced and filed, unless it is lost or destroyed, and then the bond required by this section must be filed. Armstrong v. Lewis, 14 Minn. 406, (Gil. 308.)

*§ 77*a*. Limitation.

The provisions of this act [*ante*, §§ 76, 77] shall apply to all actions now pending in any of the courts of this state, as well as to actions which may be hereafter commenced. (1879, *c.* 52, § 2.)

TITLE 10.

ACCOUNT-BOOKS, RECORDS, INSTRUMENTS, AND JUSTICES' DOCKETS AS EVIDENCE.

§ 78. (Sec. 70.) Account-books.

When a witness testifies that entries made by him are the original entries of the transactions; that they were made by him at the time of the transactions; that they are just and true; and that he has no present recollection of the transactions,—the entries are competent as evidence of the transactions. Newell v. Houlton, 22 Minn. 19.

It is no longer necessary to authenticate account-books by the suppletory oath of the person who actually made the entries. Webb v. Michener, 32 Minn. 48, 19 N. W. Rep. 82.

It is not enough, to make a book of accounts admissible in evidence, that the party

making the entries swears to all that is required by this section, if, on cross-examination, it appears that material parts of his testimony are merely hearsay. Paine v. Sherwood, 21 Minn. 225.

See Branch v. Dawson, 36 Minn. 193, 30 N. W. Rep. 545; Hernote v. Kersey, (Iowa,) 28 N. W. Rep. 468.

§ 84. (Sec. 77.) Transcript from justice's docket—Certificate.

See Herrick v. Ammerman, cited in note to *c.* 65, § 72, *supra.*

§ 87. (Sec. 80.) Foreign justice's judgment.

A judgment was rendered by a justice of the peace of another state, who afterwards died. *Held*, that an exemplification of such judgment, certified to by another justice of such state, entitled by the laws thereof to the custody of the docket and papers of such deceased justice, was not admissible as evidence of such judgment in the courts of this state, by virtue of this section; and, such court not being one of record, such exemplification did not come within the provisions of the act of congress of 1790, or section 49, *c.* 73, Gen. St. Bryan v. Farnsworth, 19 Minn. 239, (Gil. 198.)

§ 88. (Sec. 81.) Inspection of documents.

Cited, O'Gorman v. Richter, 31 Minn. 28, 16 N. W. Rep. 417.

§ 89. (Sec. 82.) Bills and notes—Presumption as to signature, etc.

The latter portion of this section, relating to proof of signatures of written instruments, applies only to an instrument upon which an action is brought against the maker thereof, or to an instrument upon which a counter-claim or defense against the maker thereof is founded. Mast v. Matthews, 30 Minn. 441, 16 N. W. Rep. 155.

This provision applies to indorsements purporting to be made by corporations as well as to those purporting to be made by natural persons. First Nat. Bank of Rock Island v. Loyhed, 28 Minn. 397, 10 N. W. Rep. 421. Possession of a note, purporting to be indorsed by a corporation, is *prima facie* evidence that it was so indorsed, without proof of the authority of the person making the indorsement. Bank v. Mallan, 34 N. W. Rep. 901.

By force of statute, in an action upon a promissory note by one claiming as indorsee, the possession of the note, purporting to be indorsed by the payee in blank, is *prima facie* evidence that it was so indorsed, and hence evidence of title in the plaintiff. Tarbox v. Gorman, 31 Minn. 62, 16 N. W. Rep. 466. Where the indorsement purports to be that of the payee, made by the hand of an agent, it is not necessary to prove the authority of the agent. Id. Such *prima facie* proof of title in plaintiff is rebutted by proof that plaintiff acquired the note, with knowledge of the facts, from one to whom it had been indorsed by the payee as collateral security merely, and that, after the transfer to plaintiff, the obligation for which it had been held as collateral had been discharged. Id. An answer denying that the note was ever transferred to the plaintiff, and alleging that the payee is still owner of it, puts in issue an alleged sale and indorsement to the plaintiff. Id.

In an action in justice's court upon a written instrument, purporting to have been signed by the defendant, an answer denying such execution, verified by the attorney of the defendant, to the effect that he believes it to be true, is not such a denial upon oath of the execution of the instrument as is required by statute to put the plaintiff to other proof of the fact than such as the instrument itself affords. Johnston Harvester Co. v. Clark, 30 Minn. 308, 15 N. W. Rep. 252.

A contract embracing, in addition to the elements of a simple promissory note, contract stipulations respecting the title and possession of personal property, is not, within the statute making a "promissory note, bill of exchange, or other written instrument for the payment of money only," *prima facie* evidence of the incorporation of the plaintiff to whom such instrument was executed. Id.

A general denial, though verified, is not a denial, under oath or affidavit, of the signature or execution of the written contract alleged in the opposite pleading. The denial must be specific. Cowing v. Peterson, 36 Minn. 130, 30 N. W. Rep. 461.

See Young v. Perkins, 29 Minn. 173, 176, 12 N. W. Rep. 515; Schwartz v. Germania Life Ins. Co., 21 Minn. 215, 223.

§ 90. (Sec. 83.) Indorsement of payment—Effect.

To make an indorsement upon a promissory note of a partial payment thereon evidence so as to prevent the bar of the statute of limitations, it must appear by evidence *dehors* the indorsement that it was made at a time when it was against the interest of the holder of the note to make it. Young v. Perkins, 29 Minn. 173, 12 N. W. Rep. 515.

§ 91. (Sec. 84.) Land-office receipt as evidence.

Proof of an entry or location of a tract of government land belonging to the United States is sufficient, *prima facie*, to show a legal title to such tract in the party making the entry or location. Tidd v. Rines, 26 Minn. 201, 2 N. W. Rep. 497. Such facts of entry and location by any one may be shown by a certified abstract taken from the books and records of the local land-office of the district wherein the tract is situate, properly authenticated by the register of such office. Id.

The township plats from the United States land-office, certified by the register and receiver, are not admissible to prove title to lands in the United States. Walsh v. Kattenburgh, 8 Minn. 127, (Gil. 99.)

See Winona & St. P. R. Co. v. Randall, 29 Minn. 283, 286, 13 N. W. Rep. 127.

*§ 92. Land-office certificate of entry.

Defendant's pre-emption settlement was made May, 1868, and his entry June 1, 1872, as shown by certificates such as are provided for in §§ 91, 92, and are thereby made *prima facie* evidence of his title. Held, that these certificates are *prima facie* evidence of a pre-emption right commenced in May, 1868, and consummated in June, 1872. Winona & St. Peter R. Co. v. Randall, 29 Minn. 283, 13 N. W. Rep. 127.

§ 95. (Sec. 86.) Plats of surveys, etc., from land-office.

The certificate of the register of the land-office is competent evidence of the filing of the declaratory statement by a pre-emptor upon public lands of the United States. Dorman v. Ames, 12 Minn. 451, (Gil. 347.)

See, also, Washburn v. Mendenhall, 21 Minn. 332; Tidd v. Rines, 26 Minn. 201, 206, 2 N. W. Rep. 497.

§ 96. (Sec. 87.) Conveyances, etc., records and copies as evidence.

Where a deed of conveyance has been incorrectly recorded, and the original has been lost, it is competent to prove, by parol or other competent evidence, the contents of the lost instrument, and that it was incorrectly recorded. Gaston v. Merriam, 33 Minn. 271, 22 N. W. Rep. 614. The fact that no title in a party appears of record is competent evidence to prove that he has no title in fact. Id.

A power of attorney to convey land in this state, executed in Massachusetts, and acknowledged there before a justice of the peace, but with no certificate of the proper officer that it was executed according to the laws of that state, is not entitled to record here, and the record of it is not evidence. Lowry v. Harris, 12 Minn. 255, (Gil. 166.)

A certified copy of the record of a deed in another state is not entitled to be recorded here. Lund v. Rice, 9 Minn. 230, (Gil. 215.)

The certificate of acknowledgment of a deed is only *prima facie* evidence of the facts recited in it, and may be rebutted by parol. Dodge v. Hollinshead, 6 Minn. 25, (Gil. 1.)

See, also, Conklin v. Hinds, 16 Minn. 457, (Gil. 411.)

*§ 98. Incorporation and copartnership—Evidence.

See Johnston Harvester Co. v. Clark, 30 Minn. 308, 15 N. W. Rep. 252.

TITLE 11

CHARACTER, COMPETENCY, AND EFFECT OF EVIDENCE.

§ 99. (Sec. 89.) Evidence of marriage.

This section, authorizing, in prosecutions for bigamy, indirect evidence to establish fact of marriage, changes the rules of evidence in such actions, and, as to offenses committed before its passage, is *ex post facto*. State v. Johnson, 12 Minn. 476, (Gil. 378.) Upon trial upon an indictment for polygamy, committed prior to July 1, 1866, marriage in fact must be proved by direct evidence, and it cannot be established by admission, reputation, cohabitation, or circumstances of this character; nor (McMillan, J., dissenting) is such evidence admissible as corroborative of direct evidence of marriage. Id.

A prior legal marriage, in a prosecution for bigamy, may, under this section, be proved by admissions of the party against whom proceedings are instituted, or circumstantial or presumptive evidence from which the fact of the marriage may be inferred. State v. Armington, 25 Minn. 29.

Whenever, upon an issue of bastardy, a question arises concerning the existence of a marriage between the parents of the alleged bastard, direct proof of a marriage in fact, as contradistinguished from one inferable from circumstances, is not required. State v. Worthingham, 23 Minn. 529.

§ 103. (Sec. 93.) Confessions—Admissibility.

The confessions cannot properly be admitted until there is evidence from which the jury might reasonably infer that the offense charged has been committed. State v. Laliyer, 4 Minn. 368, (Gil. 277.)

Evidence that the offense charged has been committed by some person is all that is required in order that the confession of the defendant may be sufficient to warrant his conviction. It is not necessary that such evidence should be introduced before the confession is received. State v. Grear, 29 Minn. 221, 13 N. W. Rep. 140.

See State v. New, 22 Minn. 76, 80.

§ 104. (Sec. 94.) Testimony of accomplice.

The purchaser of beer unlawfully sold on Sunday, though in pursuit of evidence against persons violating the law prohibiting such sales, is not an accomplice. State v. Baden, 34 N. W. Rep. 24.

Bastardy proceedings, under the statute, are not properly criminal in their nature, and it is not necessary that the testimony of the complainant (the mother) be corroborated by other evidence. State v. Nichols, 29 Minn. 357, 13 N. W. Rep. 153.

Whether a witness is an accomplice in the commission of the crime for which the defendant is on trial, is a question for the jury, and not for the court. In order to a conviction upon the testimony of an accomplice, the corroborating evidence is sufficient if, independently of the testimony of the accomplice, it tends in some degree to establish the guilt of the accused, and it need not be sufficiently weighty or full as, standing alone, to make out a *prima facie* case. State v. Lawlor, 28 Minn. 217, 9 N. W. Rep. 698.

See, also, State v. Brin, 30 Minn. 522, 16 N. W. Rep. 406.

CHAPTER 74.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

§ 1. Who may bring partition.

Where lands leased for a term of years are in the actual possession of the lessee, and owned by several persons as tenants in common, both of the rents and the reversionary estate, they may be partitioned, under this chapter, in an action brought by one of such owners and tenants in common. Cook v. Webb, 19 Minn. 167, (Gil. 129.) Actual possession of premises, or right to the actual possession thereof, is not necessary to enable one tenant in common to maintain an action for partition, under this chapter. Id.

§ 2. Address of summons.

If the complaint shows that the only persons having or claiming an interest in the property are the plaintiffs and defendants, the summons, the title to the action being given, is sufficient if addressed "to the above-named defendants," without being addressed to "all persons unknown having or claiming an interest in the property." Martin v. Parker, 14 Minn. 13, (Gil. 1.)

§ 5. Title to be established before judgment—Dispute between defendants no defense.

Judgment of partition shall not be rendered in any case until the title to the property and the rights of the parties are established by evidence, unless upon written stipulation of the parties to be affected thereby: *provided*, that it shall be no defense to an action for partition, in which the title of the plaintiff or plaintiffs to a certain undivided share or shares of the property is proved or admitted, that there is a dispute or litigation undetermined between some of the defendants as to the title or right of such defendants, or any of them, in or to any undivided share or shares of such property claimed by them, or any of them; but in such case the court shall proceed to render judgment that partition be made, or to order a sale of such property as in other cases, and shall cause the portion of such property or of the proceeds thereof pertaining