1934 Supplement

To

Mason's Minnesota Statutes

1927

(1927 to 1934)

(Superseding Mason's 1931 Supplement)

Containing the text of the acts of the 1929, 1931, 1933 and 1933-34 Special Sessions of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state, federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota

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the imprisonment, he may be relieved by the court or officer in such manner and upon such terms as may be just. (R. L. '05, §4648; G. S. '13, §8363; Apr. 15, 1933, c. 267.)

Contempt is not a "crime" within §9934, and, in view of §9802, punishment can only be by imprisonment in county jail and not in a workhouse. 175M57, 220NW414.

9803. Indemnity to injured party.

Postnuptial agreements properly made between husband and wife after a separation, are not contrary to public policy, but the parties cannot, by a postnuptial agreement, oust the court of jurisdiction to award alimony or to punish for contempt a failure to comply with the judgment, though it followed the agreement. 178M 75, 226NW211.

9804. Imprisonment until performance.

A proceeding to coerce payment of money is for a civil contempt. Imprisonment cannot be imposed on one who is unable to pay. 173M100, 216NW606.

Payment of alimony and attorney's fees. 178M75, 226 NW701.

A lawful judicial command to a corporation is in effect a command to its officers, who may be punished for contempt for disobedience to its terms. 181M559, 233NW 586. See Dun. Dig. 1708.

9807. Hearing.

It is not against public policy to receive testimony of jurors in a proceeding for contempt of one of the jurors in obtaining her acceptance on the jury by willful concealment of her interest in the case. U. S. v. Clark, (DC-Minn), 1FSupp747. Aff'd 61F(2d)695. Certiorari granted.

CHAPTER 92

Witnesses and Evidence

WITNESSES

9808. Definition.

Testimony on former trial admissible where witness absent from state. 171M216, 213NW902.

Whether collateral matters may be proved to discredit a witness is within the discretion of the trial court. 171 M515, 213NW923.

The foundation for expert testimony is largely a matter within the discretion of the trial court. Dumbeck v. C., 177M261, 225NW111.

Where a witness is able to testify to the material facts from his own recollection, it is not prejudicial error to refuse to permit him to refer to a memorandum in order to refresh his memory. Bullock v. N., 182M192, 233NW858. See Dun. State v. Novak, 181M504, 233NW 309. See Dun. Dig. 10344a.

There was no violation of the parol evidence rule in admitting testimony to identify the party with whom defendant contracted, the written contract being ambiguous and uncertain. Drabeck v. W., 182M217, 234NW 6. See Dun. Dig. 3368.

After prima facie proof that the person who negotiated the contract the defendant signed was the agent of plaintiff, evidence of such person's declarations or statements during the negotiation was admissible. Drabeck v. W., 182M217, 234NW6. See Dun. Dig. 3393.

Letter written by expert witness contrary to his testimony, held admissible. Jensen v. M., 185M284, 240NW 656. See Dun. Dig. 3343.

9810. How served.

A subpoena issued by Senate investigation committee sent to person for whom it is intended by registered mail is of no effect. Op. Atty. Gen., Apr. 12, 1933.

Subpoena to appear before senate committee must be served by an individual and one sent by registered mail is without effect. Op. Atty. Gen., Apr. 12, 1933.

Secretary of conservation commission could not be required by subpoena to produce all of his correspondence with certain official before committee of senate making investigation. Id.

9814. Examination of clergyman restricted in certain cases.—Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as follows:

* * * * * * *

3. A clergyman or other minister of any religion shall not, without the consent of the party making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs. Nor shall a clergyman or other minister of any religion be examined as to any communication made to him by any person seeking religious or spiritual advice, aid or comfort or his advice given thereon in the course of his professional character, without the consent of such person. (Act Apr. 18, 1931, c. 206, §1.)

* * * * * *

½. In general.

A justified disbelief in the testimony of a witness does not justify a finding of a fact to the contrary without evidence in its support. State v. Novak, 181M504, 233NW309. See Dun. Dig. 10344a.

The court did not err in excluding the opinon of plaintiff's expert as to values. Carl Lindquist & Carlson, Inc., v. J., 182M529, 235NW267. See Dun. Dig. 3322.

Owner's opinion of the value of his house as it would have been if plaintiff's work had been properly done, was admissible. Carl Lindquist & Carlson, Inc., v. J., 182M529, 235NW267. See Dun. Dig. 3322(4).

There was no error in permitting the mother of the three-year-old child who was injured to testify as to the indications the child gave of injury at the time of the accident, nor as to the duration of its disability. Ball v. G., 185M105, 240NW100. See Dun. Dig. 3232.

3. Subdivision 1.

Not applicable in action by wife to set aside conveyance obtained by fraud of husband. 173M51, 216NW 311.

Prohibition of this subdivision applies in actions for alienation of affections. 175M414, 221NW639.

Plaintiff in action for alienation or criminal conversation could not testify to admissions made to him by his deceased wife concerning meretricious relations with defendant, though defendant requested him to ask his wife about the matter. 177M577, 226NW195.

Husband and wife are competent to give evidence that the former is not the father of a child of the wife conceived before the dissolution of the marriage by divorce. State v. Soyka, 181M502, 233NW300. See Dun. Dig. 10312.

Defendant by calling his wife as a witness waived his privilege. State v. Stearns, 184M452, 238NW895. See Dun. Dig. 10312(59).

4. Subdivision 2.

Volunteering information on the witness stand. 171M 492, 214NW666.

On application to share in grandfather's estate on ground of unintentional omission from will, communications between testator and attorney who drew will were not privileged. 177M169, 225NW109.

4½. Subdivision 3.

For a confession to a clergyman to be privileged it must be penitential in character and made to him in his professional character as such clergyman in confidence while seeking religious or spiritual advice, aid, or comfort, but the court cannot require the disclosure of the confession to determine if it is privileged. In re Swenson, 183M602, 237NW589. See Dun. Dig. 10314.

5. Subdivision 4.

180M205, 230NW648.

Information acquired by a physician in attempting to revive a patient, and opinions based thereon, are within protection of section, although patient may have been dead when such attempts were made. Palmer v. O., 187 M272, 245NW146. See Dun. Dig. 10314.

A doctor may testify that he has been consulted but he may not against objection disclose any information which he obtained at such consultation. Stone v. S., 248 NW285. See Dun. Dig. 10314.

Communications between superintendent of state hospital and patient are privileged. Op. Atty. Gen., May 9, 1933.

6. Subdivision 5.

Commercial Union Ins. Co. v. C., 183M1, 235NW634. See Dun. Dig. 10315(20).

Court properly sustained objection to question asked prosecuting attorney with respect to a disclosure made to him by an accomplice of accused who testified against defendant, though proper foundation was laid for impeachment. 172M106, 214NW782.

9815. Accused.

2. Cross-examination of accused.

Statement of defendant in cross-examination that he never robbed anybody does not put his general character in issue. 181M566, 233NW307. See Dun. Dig. 2458.

There was no error in cross-examination of defendant because it tended to subject him to prejudice on account of his associations and earlier career. State v. Quinn, 186M242, 243NW70.

9816. Examination by adverse party.

1. Object and effect of statute.

The record does not show that appellant had any ground for complaint because of the ruling of court denying him the right to cross-examine his co-defendant while the latter was still on the stand after cross-examination under the statute by respondent's attorney. Lund v. O., 182M204, 234NW310. See Dun. Dig. 10327.

2. Who may be called.

In action against railroad there was no error in permitting a district master car builder to be called by plaintiff for cross-examination, even though not occupying the same position as at the time the cause of action arose. 175M197, 220NW602.

In a proceeding for discipline and disbarment of an attorney, he may be called for cross-examination under the statute. In re Halvorson, 175M520, 221NW907.

Defendant in default of an answer could be called under the statute. 176M108, 222NW576.

A railway section foreman held properly called for cross-examination in action against railroad. 176M331, 223NW605.

Attorney involved in transaction, but not a party, held improperly called under this section. 180M104, 230NW 277.

In action against owner of truck, it was not reversible error to permit driver of truck to be called for cross-examination under statute. Ludwig v. H., 187M315, 245 NW371. See Dun. Dig. 10327.

3. In what actions or proceedings.

Defendant in bastardy proceeding may be called and examined. Op. Atty. Gen., Aug. 30, 1929.

A bastardy proceeding is a civil proceeding, not a criminal action, and defendant may be called by prosecution for cross-examination. State v. Jeffrey, 247NW 692. See Dun. Dig. 10327d.

5. Contradiction and impeachment of witness.

A party calling the adverse party under this section, and failing to obtain the proof sought, held not entitled to favorable decision on assumption that the testimony given was false. 178M568, 227NW896.

9817. Conversation with deceased or insane person.

1. Who incompetent.

175M549, 221NW908.

In action to enjoin barring of right of way claimed by prescription, defendant and her children had such an interest in the subject-matter that they could not testify as to conversations between plaintiff and their deceased husband and father regarding the right of way. 171M358, 214NW49.

Plaintiff in action for alienation or criminal conversation could not testify to admissions made to him by his deceased wife concerning meretricious relations with defendant, though defendant requested him to ask his wife about the matter. 177M577, 226NW195.

In action by wife alone to enjoin foreclosure of mortgage executed by husband and wife and cancel note and mortgage for fraud, husband could testify as to a conversation with a person since deceased. 178M452, 227 NW501.

New debtor arising by novation was competent to testify to conversation with deceased creditor. 180M 75, 230NW468.

Statements made by an injured person, since deceased, to a party or person interested in the outcome of the action, are inadmissible in evidence, and such statements are not rendered admissible in evidence by the fact that they are part of the res gestae, or excepted from the hearsay rule, or classed as verbal acts. Dougherty v. G., 184M436, 239NW153; note under §9657. See Dun. Dig. 10316.

One financially interested in result of law suit may not testify to conversations between deceased and other party. Cohoon v. L., 247NW520. See Dun. Dig. 10316b.

1b. Heirs.

A beneficiary under a will may give conversations with the testator for the purpose of laying foundation to testify as to the testator's mental condition. 177M226, 225 NW102.

Declarations of a deceased grantor are not admissible in an action by his heirs to set aside the deed because of the alleged undue influence and duress used by the grantee in its procurement; such declarations not being against the interest of the grantor. Reek v. R., 184M532, 239NW599. See Dun. Dig. 10316.

1c. Conversations between deceased and third persons.

Does not exclude testimony of husband of granddaughter and heir as to conversations with decedent. 181M217, 232NW1. See Dun. Dig. 10316.

Court rightly refused to strike as incompetent testimony of a witness not financially interested in suit, that deceased admitted he had agreed to pay his son and daughter for services they were rendering him. Holland v. M., 248NW750. See Dun. Dig. 10316b.

1f. Acts and transactions in general.

As respecting gift of notes by decedent to plaintiff, latter could not testify that deceased handed notes properly endorsed to him and that he handed them back to decedent to take care of them for him. Quarfot v. S., 249NW668. See Dun. Dig. 10316.

5. Waiving objection by cross-examination.

Question to plaintiff by defendant's counsel, held not to open the door so as to permit him to testify generally as to conversations with deceased. 175M27, 220 NW154.

7. Waiver.

Objection to competency of witness or evidence cannot be first raised on motion for new trial or on appeal. 178M452, 227NW501.

DEPOSITIONS

9832. Informalities and defects—Motion to suppress.

Suppression of deposition, held not prejudicial error. 181M217, 232NW1. See Dun. Dig. 422.

Bond was sufficiently identified in deposition of expert witness on value to make his testimony admissible. Ebacher v. F., 246NW903. See Dun. Dig. 2715.

PERPETUATION OF TESTIMONY

Act to provide for perpetuation of evidence of sales of pledged property. Laws 1931, c. 329, ante, §8359-1.

JUDICIAL RECORDS—STATUTES, ETC.

9851. Records of foreign courts.

Authenticated copy of defendant's record of conviction in another state, if under the same name, is prima facie evidence of identity. Op. Atty. Gen., Apr. 28, 1929.

9853. Printed copies of statutes, etc.

Mason's Minnesota Statutes 1927 were made prima facie evidence of the laws therein contained by Laws 1929, c. 6.

When a bill has passed both houses, is enrolled twice, and the enrolled bills are directly contradictory, in one particular, and it is necessary to determine which of the two acts the legislature intended to enact, the court may examine the legislative journals to ascertain the facts. 172M306, 215NW221.

9855. Statutes of other states.

All that is necessary to authenticate a state statute to be used in evidence is to have a copy certified by the Secretary of State under the great seal of the State. Op. Atty. Gen., Dec. 11, 1931.

DOCUMENTARY EVIDENCE

9859. Affidavit of publication.

In action by administrator to recover purchase price of land, oral testimony offered to show that in the verbal negotiations for the sale the land was described differently from the description in the deed, was properly rejected. Kehrer v. S., 182M596, 235NW386. See Dun. Dig. 3368(48).

9862. Official records prima facie evidence—Certified copies—etc.

Op. Atty. Gen., Apr. 14, 1932; note under §9880.

LOST INSTRUMENTS

9871. Proof of loss.

Evidence to establish lost deed must be clear and convincing. 181M45, 231NW414.

MISCELLANEOUS PROVISIONS

9876. Account books—Loose-leaf system, etc.

Entries or memoranda made by third parties in the regular course of business under circumstances calculated to insure accurate and precluding any motive of misrepresentation, are admissible as prima facie evidence of the facts stated. It is no longer an essential of admissibility "that the witness should be somehow unavailable." 174M558, 219NW905.

A hospital chart was properly admitted as an exhibit. Lund v. O., 182M204, 234NW310. See Dun. Dig. 3357(95).

Corporate minute books held sufficiently identified by the testimony of one who was the auditor and a director of the corporation. Johnson v. B., 182M385, 234NW590. See Dun. Dig. 3345(16).

A letter written by one party to a contract, in confirmation of it, in performance of an undisputed term calling for such a letter, accepted without question and retained by the other party, held such an integration of the agreement as to exclude parol evidence varying or contradicting the writing. Rast v. B., 182M392, 235 NW372. See Dun. Dig. 3368.

9877. Entries by a person deceased, admissible when.

This section adds nothing to admissibility but declares only what foundation shall be laid. 174M558, 219NW 905.

9880. Minutes of conviction and judgment.

In abatement proceedings in district court, where one has been convicted of violation of city liquor ordinance,

certified copies of records of municipal court are admissible. Op. Atty. Gen., Apr. 14, 1932.

9884. Certificate of conviction.
Op. Atty. Gen., Apr. 14, 1932; note under §9880.

9886. Inspection of documents.
An order granting or refusing inspection of books and documents in hands or under control of an adverse party is not appealable. Melgaard, 187M632, 246NW478. See Dun. Dig. 296a, 298(49).

9887. Bills and notes.—Indorsement, etc.
Promissory note could be introduced in evidence without proof of signature. 176M254, 223NW142.
Verified general denial is insufficient to require other proof than the note itself. 180M279, 230NW785.

9899. Fact of marriage, how proved.
Oral or written admissions of other party that marriage exists are admissible in evidence to show common-law marriage. Ghelin v. J., 186M405, 243NW443. See Dun. Dig. 5794(79).

9903. Uncorroborated evidence of accomplice.
Testimony of accomplices was sufficiently corroborated. 173M598, 218NW117.
Sufficiency of corroboration of accomplice. 176M175, 222NW906.
Where it is in fact present, it is not error to instruct that there is evidence to corroborate an accomplice. 176 M175, 222NW906.
A witness is an accomplice if he himself could be convicted as a principal or accessory. One who gives a bribe is not an accomplice to the crime of receiving a bribe. 180M450, 231NW225.
Evidence held not to show that a witness was an accomplice and the court properly refused to charge as to corroboration. 181M303, 232NW335. See Dun. Dig. 2457.
Submitting to the jury as a question of fact the question whether two witnesses for the state were accomplices held not error. State v. Leuzinger, 182M302, 234 NW308. See Dun. Dig. 2457(9).
Evidence corroborating testimony of accomplices held sufficient to support the conviction of bank officer for larceny. State v. Leuzinger; 182M302, 234NW308. See Dun. Dig. 2457(1).
In absence of request, instruction on necessity of corroboration of accomplice was properly omitted, under evidence. State v. Quinn, 186M242, 243NW70.
Evidence held not to show witnesses were accomplices. State v. Quinn, 186M242, 243NW70.
Testimony of accomplice held sufficiently corroborated connecting defendant with the crime of arson. State v. Padares, 187M622, 246NW369. See Dun. Dig. 2457.

9905. Divorce—Testimony of parties.
Evidence held sufficient to establish willful desertion. Graml v. G., 184M324, 238NW683. See Dun. Dig. 2776.

9905½.

DECISIONS RELATING TO WITNESSES AND EVIDENCE IN GENERAL

1. Judicial notice.
The courts recognize the fact that tuberculosis in its incipient stage is usually not an incurable malady. Eggen v. U. S. (CCA8), 58F(2d)616.
It is common knowledge that standard automobiles are held for sale by dealers for schedule prices, even when old or used cars are traded in. Baltrusch v. B., 183M470, 236NW924. See Dun. Dig. 3451.

2. Presumptions and burden of proof.
In action against city for flooding of basement, court properly charged that burden of proving that storm or cloud burst was an act of God or vis major was upon the defendant. National Weeklies v. J., 183M150, 235 NW905. See Dun. Dig. 7043.
Consumer of bread discovering a dead larva in a slice, which she did not put in her mouth must prove the baker's negligence, and court properly directed verdict for the defendant. Swenson v. P., 183M289, 236NW310. See Dun. Dig. 3782, 7044.
It will be presumed that county officials proceeded to spread and collect taxes as was their duty under statute, though record in suit does not so show. Republic I. & S. Co. v. B., 187M373, 245NW615. See Dun. Dig. 3435.

3. ——Death from absence.
After seven years' unexplained absence without tidings, absentee is presumed to be no longer living, but there is no presumption that he died at any particular time during seven years, and death at an earlier date than expiration of period must be proved like any other fact by party asserting it. Carlson v. E., 246NW370. See Dun. Dig. 3434.
Where absentee's marital relations were extremely unhappy, he was insolvent and a drunkard, and had announced his intention of seeking employment elsewhere, jury was not justified in finding death occurred prior to expiration of seven-year period. Carlson v. E., 246NW370. See Dun. Dig. 3434.

5. Admissibility in general.
A witness for plaintiffs was not permitted to testify to declarations of the living grantor impugning the grantees' title, except insofar as such testimony refuted or impeached that given by such grantor. Reek v. R., 184M532, 239NW599. See Dun. Dig. 3417.
Testimony of incidents of dissatisfaction and animosity between grantors and grantees months and years prior to the execution of the deed was properly excluded as immaterial and too remote to affect the issue of duress. Reek v. R., 184M532, 239NW599. See Dun. Dig. 2848.
Evidence of violation of a statute or ordinance which has not been enacted for the protection of the injured person is immaterial. Mechler v. M., 184M476, 239NW605. See Dun. Dig. 6976.
Testimony to show that one defendant had said plaintiff was crazy or foolish was hearsay as to the other defendant, and irrelevant, under the pleadings, as to both defendants. Kallusch v. K., 185M3, 240NW108. See Dun. Dig. 3286, 3287.

6. Admissions.
Oral or written admissions by claimant that she is single and not married are admissible against her on question of common-law marriage. Ghelin v. J. 186M405, 243NW443. See Dun. Dig. 5794(79).
Admissions made by an insured after he had transferred to plaintiff's all of his interest in fire insurance policies, covering certain property against loss by fire, are not admissible in evidence to establish defense that insured willfully set fire to property. True v. C., 187M 636, 246NW474. See Dun. Dig. 3417.

7. Declarations.
Income tax returns made by deceased in which he reported that he was single were admissible as declarations against interest in a proceeding by one against his estate as common-law wife. Ghelin v. J., 186M405, 243 NW443. See Dun. Dig. 5794(79).
Declarations made to hospital and in application for passport and in the execution of a void holographic will were not admissible as evidence of pedigree or as part of res gestae in a controversy by one claiming a common-law marriage with decedent. Ghelin v. J., 186M405, 243NW443. See Dun. Dig. 5794(79).
Declarations in denial of marriage made by other party to third persons not in presence of or acquiesced in by person claiming common-law marriage are inadmissible. Ghelin v. J., 186M405, 243NW443.
One claiming common-law marriage cannot introduce in evidence her own declarations to third persons not made in the presence of or acquiesced in by other party. Ghelin v. J., 186M405, 243NW443. See Dun. Dig. 3287a, 5794(79).
In action under "double indemnity" provision of life policy, court erred in permitting physician to testify to statement made by deceased relative to past occurrences resulting in injury. Strommen v. P., 187M381, 245NW632. See Dun. Dig. 3292.
In workmen's compensation case, explanation by deceased of cause of his limping was incompetent. Bliss v. S., 248NW754. See Dun. Dig. 3300.
In workmen's compensation case, history given physician called to treat deceased employee, insofar as it included recitals of past events, was inadmissible. Bliss v. S., 248NW754. See Dun. Dig. 3301.

8. Collateral facts, occurrences, and transactions.
In an action for fraud, where the value of the assets of a financial corporation at a given time is in issue, its record books and history, both before and after the time in question, may be examined and received as bearing upon such value at the time of the transaction involved. Watson v. G., 183M233, 236NW213. See Dun. Dig. 3247.
Where agreed price of automobile was in dispute, and it was seller's word against buyer's, trial court had a large discretion in admitting testimony of collateral matters tending to show which of the two conflicting stories is the more probable. Baltrusch v. B., 183M470, 236NW 924. See Dun. Dig. 3228(52).
Competent evidence tending to show defendant's guilt is admissible even though it proves his participation in some other offense. State v. Reilly, 184M266, 238NW492. See Dun. Dig. 2459(53).
In action against city for damages growing out of car going through railing on bridge, held not error to exclude proof of other cars going on sidewalk on such bridge. Tracey v. C., 185M380, 241NW390. See Dun. Dig. 3253, 7052.
In action to recover installment upon land contract wherein defendant counter-claimed and sought to enjoin termination of contract by statutory notice on ground that conveyance and contract constituted a mortgage, court did not err in excluding verified complaint in action brought by defendant to enforce contract to convey other land made at same time. Jeddeloh v. A., 247NW 512. See Dun. Dig. 6155.
Where there is conflict in testimony of witnesses relevant to issue, evidence of collateral facts having direct tendency to show that statements of witnesses on one side are more reasonable is admissible, but this rule should be applied with great caution. Patzwald v. P., 248NW43. See Dun. Dig. 3228(52).
In action to recover license fee from holder of gas franchise, evidence of practical construction of similar ordinance granting electricity franchise was admissible. City of South St. Paul v. N., 248NW288. See Dun. Dig. 3405.

9. Agency.
While agency may be proved by the testimony of the

agent as a witness, evidence of the agent's statements made out of court are not admissible against his alleged principals before establishing the agent's authority. Farnum v. P., 182M338, 234NW646. See Dun. Dig. 3410(36), 149(71).

One to whom another was introduced as vice-president of a corporation held entitled to testify as to his conversation to prove agency. National Radiator Corp. v. S., 182M342, 234NW648. See Dun. Dig. 149(77).

A prima facie case of agency is sufficient to authorize receiving in evidence a statement of the agent. State v. Irish, 183M49, 235NW625. See Dun. Dig. 241.

10. Hearsay.

Proechel v. U. S., (CCA8), 59F(2d)648. Certiorari denied 53SCR122.

Expressions of pain are admissible on the issue of physical disability, as against the objection of hearsay. Proechel v. U., (CCA8), 59F(2d)648. See Dun. Dig. 3292.

Testimony that deceased wife of decedent said that she had given plaintiff certain notes by having decedent husband endorse them over to plaintiff, held admissible as exception to hearsay rule. Quarfot v. S., 249NW668. See Dun. Dig. 3291.

11. Res gestæ.

The statement of an employee, a city salesman soliciting orders, when in the course of his employment he entered the place of business of his employer near the close of his day's work, that he had fallen on the street as he came in, coupled with the statement that he was going home, was properly held competent as res gestæ. Johnston v. N., 183M309, 236NW466. See Dun. Dig. 3300.

Statement of one defendant is admissible against her, but not against a co-defendant. Dell v. M., 184M147, 238 NW1. See Dun. Dig. 3421(83).

A statement of the plaintiff's client, the defendant Ada Marckel, to her father a few hours after it was claimed that a settlement was made of two causes of action brought by her against her father-in-law and co-defendant Amos Marckel, that she was to receive $10,000 was not a part of the res gestæ and was not proof of a settlement nor of the receipt of money. Dell v. M., 184M 147, 238NW1. See Dun. Dig. 3300.

Defendant's talk and conduct near commission of offense was admissible in prosecution for driving while drunk. State v. Reilly, 184M266, 238NW492. See Dun. Dig. 3300.

Testimony of conversation between deceased wife and witness wherein wife complained of her husband's drinking was admissible as part of res gestæ in action by husband for wrongful death of wife. Peterson v. P., 186 M583, 244NW68. See Dun. Dig. 3300.

Where one joint adventurer sold out to another a letter written by one of them to bank acting as escrow agent held admissible as res gestæ. Mid-West Public Utilities v. D., 187M580, 246NW257. See Dun. Dig. 3300.

Statement of deceased employee to another employee that he had bumped his leg held admissible as part of res gestæ. Bliss v. S., 248NW754. See Dun. Dig. 3300.

Testimony as to the declaration of persons in possession of property tending to characterize their possession is admissible under res gestæ doctrine. Pennig v. S., 249NW39. See Dun. Dig. 3306.

11½. Articles or objects connected with occurrence or transaction.

Where car owner's son was in car, at time companion was killed, and disappeared same night, it was error not to receive such son's hat in evidence as a circumstance bearing upon who was driving car. Nicol v. G., 247NW8. See Dun. Dig. 3258.

12. Documentary evidence.

The record books of banks and financial corporations subject to the supervision of the superintendent of banks, when shown to be the regular record books of such a corporation, are admissible in evidence without further proof of the correctness of the entries therein. Watson v. G., 183M233, 236NW213. See Dun. Dig. 3346.

A letter from the defendant to the plaintiff, written after suit was brought, was not erroneously received when the objection came from the defendant. Harris v. A., 183M292, 236NW458. See Dun. Dig. 3409.

Recital in lieu bond as to making of note and mortgage was evidence of such fact in action on bond. Danielski v. P., 186M24, 242NW342. See Dun. Dig. 1730a, 3204b.

In unlawful detainer against lessee, admission in evidence of unsigned pamphlet containing plaintiff's plan or organization, held error. Oakland Motor Car Co. v. K., 186M455, 243NW673. See Dun. Dig. 3363.

Records of life insurance company made and kept in usual course of business were admissible in evidence, and sufficiency of foundation therefor was for trial court. Schoonover v. P., 187M343, 245NW476. See Dun. Dig. 3346. 4741.

13. Parol evidence affecting writings.

Where a contract uses the phrase to give a deed and "take a mortage back," parol evidence is admissible in aid of construction in determining whose note was to be secured by such mortgage. Spielman v. A., 183M282, 236NW319. See Dun. Dig. 3397.

Parol evidence held inadmissible to vary the terms of a written contract. Nygaard v. M., 183M388, 237NW7. See Dun. Dig. 3368.

Parol evidence is inadmissible to show that a legislative bill was passed at a time other than that stated in the legislative journals. Op. Atty. Gen., May 1, 1931.

In replevin where defendants counterclaimed for damages for misrepresentations of plaintiff and defendants' own agent, parol evidence was inadmissible to vary or destroy the written stipulation and release by which the cause of action against the agent was settled and joint tort-feasors discharged. Martin v. S., 184M457, 239NW 219. See Dun. Dig. 3368.

An unconditional bond of a corporation, agreeing to pay to the holder therein named a stated sum of money on a fixed date, lawfully issued and sold for full value, cannot be varied by parol. Heider v. H., 186M494, 243NW 699. See Dun. Dig. 3368.

It was not error to exclude an offer of proof to effect that, upon failure of a lessee to effect joint insurance, lessor took out insurance payable to himself only, purpose being to show a modification of lease and substitution of another tenant. Wilcox v. H., 186M500, 243NW 711. See Dun. Dig. 3375.

Oral testimony is inadmissible to show that parties meant is an unambiguous written contract. Burnett v. H., 187M7, 244NW254. See Dun. Dig. 3407.

Oral evidence was admissible to show true consideration for assignments of contract and notes reciting consideration as "value received." Adams v. R., 187M209, 244NW810. See Dun. Dig. 3373.

Parol evidence is inadmissible to show that indorsement on negotiable instrument was intended to be "without recourse." Johnson Hardware Co. v. K., 246NW663. See Dun. Dig. 1012, 3368.

Extrinsic evidence is not admissible as bearing on intent of insurer where policy is unambiguous. Wendt v. W., 247NW569. See Dun. Dig. 3368.

Parol evidence is inadmissible to show that a promissory note, which by its express terms is payable on demand, is not payable until happening of a condition subsequent. Fljozdal v. J., 248NW215. See Dun. Dig. 3374n(92).

Assignment of rents to mortgagee reciting consideration of one dollar contained no contractual consideration and real consideration could be shown. Flower v. K., 250NW43. See Dun. Dig. 3373.

14. Expert and opinion testimony.

Proechel v. U. S., (CCA8), 59F(2d)648. Certiorari denied 53SCR122.

Answer to hypothetical question propounded to a physician, held proper where the facts connecting the hypothesis with the case were later supplied. Proechel v. U., (CCA8), 59F(2d)648. See Dun. Dig. 3337.

In action for damages for sale to plaintiff of cows infected with contagious abortion, testimony of farmers and dairymen, familiar with the disease and qualified to give an opinion, should have been received. Alford v. K., 183M158, 235NW903. See Dun. Dig. 3327(47), 3335 (58).

An expert accountant, after examination of books and records and with the books in evidence, may testify to and present in evidence *summaries and computations* made by him therefrom. The foundation for such evidence is within the discretion of the court. Watson v. G., 183M233, 236NW213. See Dun. Dig. 3329.

In malpractice case, questions to plaintiff's expert as to what the witness would do and as to what kind of a cast he would use in treating the plaintiff, not based on any other foundation, should not be permitted to be answered. Schmit v. E., 183M354, 236NW622. See Dun. Dig. 7494.

In malpractice case, court erred in permitting plaintiff's witness to testify as to what stand or action certain medical associations had taken in reference to the right of a physician to testify in a malpractice case. Schmit v. E., 183M354, 236NW622. See Dun. Dig. 7494.

Expert witness in malpractice case should not have been permitted to testify as to degrees of negligence, to state that certain facts, assumed to be true on plaintiff's evidence, showed that plaintiff was highly negligent, very negligent in his treatment. Schmit v. E., 183M354, 236NW622. See Dun. Dig. 7494.

In action for death in automobile collision, opinions of plaintiff's medical experts that injuries received in collision where primary cause of death were properly admitted. Kieffer v. S., 184M205, 238NW331. See Dun. Dig. 3326, 3327.

Determination as to which of two successive employers was liable for occupational blindness held to be determined from conflicting medical expert testimony. Farley v. N., 184M277, 238NW485. See Dun. Dig. 3326(36), 10398.

Whether a witness has qualified to give an opinion as to the value of housework is largely for the trial court's discretion or judgment. Anderson's Estate, 184 M560, 239NW602. See Dun. Dig. 3313(76).

The record discloses a sufficient qualification of a witness to testify as to the market value of automobile. Quinn v. Z., 184M589, 239NW902. See Dun. Dig. 3335, 3336.

It was not error to sustain an objection to a question to a physician as to whether he found in examining plaintiff any symptoms of senility. Kallusch v. K., 185 M3, 240NW108. See Dun. Dig. 3326, 3328.

The opinions of expert witnesses are admissible whenever the subject of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. Tracey v. C., 185M380, 241NW390. See Dun. Dig. 3325.

Where conditions at place of automobile collision, because of darkness, were such that it was impossible for witness to describe same so as to enable jury to determine visibility of objects, it was not error to permit witness to express opinion as to whether he would have seen a certain object had it been there. Olson v. P., 185M571, 242NW283. See Dun. Dig. 3315.

Expert may properly be asked to assume fact, asserted by opposing party, to be true, and then give opinion as to whether or not such fact would produce result contended for by such party. Milliren v. F., 185M614, 242NW290. See Dun. Dig. 3337.

Medical expert may give opinion as to accidental and resultant injury causing premature delivery of child. Milliren v. F., 185M614, 242NW290. See Dun. Dig. 3327

Medical expert may properly give reasons for opinion expressed as to cause of death. Milliren v. F., 185M614, 242NW290. See. Dun. Dig. 3327.

Proper foundation held laid for admission of opinion of physician as to cause of death. Milliren v. F., 185M 614, 242NW546. See Dun. Dig. 3325.

For want of sufficient foundation, it was error to receive in evidence testimony of thirteen year old boy as to speed of defendant's car. Campbell v. S., 186M293, 243NW142. See Dun. Dig. 3313.

In framing hypothetical questions to expert to give an opinion as to reasonable value of attorney's services, question was proper if it embraced facts which evidence might justify jury in finding, even though it did not assume all of testimony of plaintiff to be true. Lee v. W., 187M659, 246NW25. See Dun. Dig. 3337.

It is legitimate cross-examination to inquire of a witness, giving opinion evidence as to damage, concerning his relations with litigant for whom he testifies, and amount of compensation to be paid him as a witness. State v. Horman, 247NW4. See Dun. Dig. 3342.

Real estate agent held competent to testify as to values in eminent domain proceeding where in filling station owner sought damages occassioned by change of grade of highway by state highway department. Apitz v. C., 248NW733. See Dun. Dig. 3069, 3073.

15. Nonexpert opinions and conclusions.

It is improper to permit witness to give his conclusion that he was in a position to have seen a person in a certain location had he been there. Newton v. M., 186M439, 243NW684. See Dun. Dig. 3311.

In action for death of guest in automobile, driving companion of decedent having disappeared, one intimately associated with decedent in life could not give his conclusion that decedent could not drive an automobile but may only state facts and let jury draw its own conclusion. Nicol v. G., 247NW8. See Dun. Dig. 3311.

As respecting gift of notes endorsed to plaintiff, testimony of plaintiff that decedent handed notes to him and he handed them back because it was more convenient for decedent to take care of them was admissible as conclusion of witness. Quarfot v. S., 249NW668. See Dun. Dig. 3311.

16. Weight and sufficiency.

Evidence held not to sustain a holding that defrauded vendees had received any valid extension of time of payment, or that they had accepted favors from defendants such as to prevent recovery. Osborn v. W., 183 M205, 236NW197. See Dun. Dig. 10100(55).

The evidence sustains the finding that the defendant's intestate promised to give the plaintiff his property upon his death in consideration of services rendered and to be rendered himself and his wife, and that services were rendered. Simonson v. M., 183M525, 237NW413. See Dun. Dig. 8789a(21).

Trier of fact cannot arbitrarily disregard a witness' testimony which is clear, positive and unimpeached, and not improbable or contradictory. First Nat. Bank v. V., 187M96, 244NW416. See Dun. Dig. 10344a.

17. Impeachment of witnesses.

Evidence brought out on cross-examination of one of defendant's witnesses, after plaintiff had rested, which was competent for the purpose of impeaching the witness, but related to a matter not in issue under the pleadings, and not presented as a part of plaintiff's case, goes only to the credibility of such witness. Buro v. M., 183M518, 237NW186. See Dun. Dig. 3237a.

An unverified complaint in a previous action by this plaintiff against this and another defendant, charging them both with negligence, was admissible against plaintiff for the purpose of impeachment. Bakkensen v. M., 184M274, 238NW489. See Dun. Dig. 3424.

Where attempted impeaching evidence was contained in writing of witness, writing should have been produced and shown to him. Milliren v. F., 186M115, 242 NW546. See Dun. Dig. 10351.

Impeaching testimony concerning statement by witness held improperly stricken out as lacking foundation. Newton v. M., 186M439, 243NW684. See Dun. Dig. 10351.

Where plaintiff testified that damage to his automobile was $625, it was error to reject defendant's offer to prove on cross-examination that plaintiff had estimated and stated his damages to be $450. Flor v. B., 248NW743. See Dun. Dig. 3342.

Where state's main witness has by her answer taken prosecuting attorney by surprise, there was no abuse of judicial discretion in permitting state to cross-examine witness and impeach her as to truth of answer given. State v. Bauer., 249NW40. See Dun. Dig. 10356(8).

18. Striking out evidence.

Where plaintiff testified on direct examination that insured would have been plowing all afternoon in order to finish; and on cross-examination, she testified that her husband had told her that he was going to finish plowing that afternoon, denial of defendant's motion to strike answer given on direct examination as hearsay was not error. Pankonin v. F., 187M479, 246NW14. See Dun. Dig. 3290.

It was error to deny a motion to strike opinion evidence which cross-examination had shown to be based, insubstantial degree, upon an element improper to be considered in determining damage arising from establishment of a highway. State v. Horman, 247NW4. See Dun. Dig. 9745.

19. Discovery.

In automobile collision case, court properly excluded notice served by plaintiffs upon defendant requiring him to state what information he had obtained at scene of accident. Dickinson v. L., 246NW669. See Dun. Dig. 2735.