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To

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1927

(1927 to 1940)

(Superseding Mason's 1931, 1934, 1936 and 1938 Supplements)

Containing the text of the acts of the *1929, 1931, 1933, 1935, 1937* and *1939* General Sessions, and the 1933-34, 1935-36, 1936 and 1937 Special Sessions of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state and federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota together with digest of all common law decisions.

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9798. Admission to bail.
Where warrant does not state whether or not person shall be admitted to bail and defendant is before court, court has jurisdiction. State v. Binder, 190M305, 251NW 665, overruling Papke v. Papke, 30 Minn. 260, 262, 15NW 117. See Dun. Dig. 1706.

9801. Hearing.
In cases of strictly criminal contempt, rules of law and evidence applied in criminal cases must be observed, and defendant's guilt must be established beyond a reasonable doubt. State v. Binder, 190M305, 251NW665. See Dun. Dig. 1705.

9802. Penalties for contempt of court.—Upon the evidence so taken, the court or officer shall determine the guilt or innocence of the person proceeded against, and, if he is adjudged guilty of the contempt charged, he shall be punished by a fine of not more than $250.00, or by imprisonment in the county jail, workhouse or work farm for not more than six months, or by both. But in case of his inability to pay the fine or endure 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.

Section 9794 authorizes a punishment for a constructive contempt whereby right or remedy of a party to an action or special proceeding is defeated or prejudiced, a fine exceeding $50 or imprisonment, or both, subject to limitations of this section. Wenger v. W., 200M515, 274NW517. See Dun. Dig. 1708.

An order discharging an order to show cause and dismissing a criminal contempt proceeding can only be reviewed by certiorari, and fact that trial court may have based its order on mistaken belief that it lacked jurisdiction does not affect mode of review. Spannaus v. L., 202M497, 279NW216. See Dun. Dig. 1391.

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.

Fines for contempt as indemnity to a party in an action. 16MinnLawRev791.

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.

Father of a bastard cannot be punished for contempt in not obeying an order to save money which it is not in his power to obey. State v. Strong, 192M420, 256NW 900. See Dun. Dig. 850, 1703.

One failing to replace lateral support as required by judgment held guilty of constructive contempt. Johnson v. F., 196M81, 264NW232. See Dun. Dig. 1702.

Habeas corpus is not to be used as substitute for an appeal or writ of error, and therefore cannot be used to determine whether or not there was an erroneous decision of issue whether relator was or was not able to pay alimony supporting order of imprisonment for contempt. State v. Gibbons, 199M445, 271NW873. See Dun. Dig. 4129.

Section relates simply to present coercing of compliance by imprisonment, which is not authorized unless it be shown that party complained of has present ability to comply. Wenger v. W., 200M436, 274NW517. See Dun. Dig. 1708.

Provisions authorizng one guilty of contempt to purge himself are proper and are within the sound discretion of the court. Id.

A commitment which embodies judgment of conviction of criminal contempt, which is unmistakably charged in commitment, is adequate to entitle sheriff to custody of defendant until sentence imposed has been served. State v. Syck, 202M252, 277NW926. Cert. den., 59SCR64. 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, aff'd 289US1, 53SCR465.

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.

9809. Subpoena, by whom issued.
Power of trial judge to summon witnesses. 15Minn LawRev350.

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. Competency of witnesses.—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.

Whether nurse operating hospital could testify as to her observations of a patient made independently of her work with doctor, discussed. State v. Voges, 197M85, 266 NW265.

1. All persons not excepted competent.

Except when essential to ends of justice, a lawyer should avoid testifying in court in behalf of his client. Ferraro v. T., 197M5, 265NW829. See Dun. Dig. 10306a.

In bastardy proceedings wherein there was no exception or objection to charge, court did not err in submitting case to jury in absence of proof that child was born alive or was still living, and no proof that defendant was not husband of complaining witness, since it is not conceivable that defendant would not attempt to deceive state by setting forth his rights under §§8579, 9814(1). State v. Van Guilder, 199M214, 271NW473. See Dun. Dig. 840.

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).

Wife cannot be examined as a witness for or against her husband without his consent. Albrecht v. P., 192M 557, 257NW377. See Dun. Dig. 10312.

Statute does not apply to cases where the testimony of mother of illegitimate child is sought to be used against man being tried under illegitimacy statutes and whom she has married prior to trial. State v. Feste, 285 NW85. See Dun. Dig. 10312.

In will contest there was no error in refusal to permit divorced wife of decedent to testify as to a conversation with testator which had occurred during marriage. Osbon's Estate, 286NW306. See Dun. Dig. 10312.

Some observations on the law of evidence: Family relations. 13MinnLawRev675.

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.

Communications by a testator to attorney drafting his will are not privileged in litigation over estate between persons, all of whom claim under testator. Hanefeld v. F., 191M547, 254NW821. See Dun. Dig. 10313.

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.

Statement of the witness held not given by way of confession or in obtaining spiritual comfort or consolation and was not privileged. Christensen v. P., 189M 548, 250NW363. See Dun. Dig. 10314a.

Privilege of confidential communications made to clergyman. 16MinnLawRev105.

5. Subdivision 4.

180M205, 230NW648.

In action on life insurance policy, testimony of dietitian who had directed diet of insured, held admissible. First Trust Co. v. K., (USCCA8), 79F(2d)48.

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., 189M 47, 248NW285. See Dun. Dig. 10314.

Admission in evidence of privileged communication to physicians was immaterial where other testimony required a directed verdict. Sorenson v. N., 195M298, 262 NW868. See Dun. Dig. 10314.

Where examination and treatment of a patient by two or more physicians or surgeons is a unitary affair and patient permits one of them, as his own witness, to testify as to whole matter, privilege is waived. Doll v. S., 201M319, 276NW281. See Dun. Dig. 10314.

Privilege of physician performing autopsy. 12MinnLaw Rev390.

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.

City clerk may withhold from public inspection letters and papers which are not a part of regular files and records prescribed or required to be kept by law, or consist of communications made to city clerk or other official in official confidence and public interest would suffer by their inspection or disclosure. Op. Atty. Gen., Oct. 26, 1933.

Confidential information given to child welfare board should be classed as privilege and its disclosure would be contrary to public interest. Op. Atty. Gen., Dec. 29, 1933.

Public records of a municipality are open to inspection by any citizen of the state. Op. Atty. Gen. (59a-6), Apr. 27, 1934.

Subject to this subdivision records of state department of education and of public schools are open to any taxpayer. Op. Atty. Gen. (8511), Apr. 2, 1935.

Records of Seed Inspection Division are open to inspection by any one having a legitimate interest therein. Op. Atty. Gen. (136e), July 29, 1936.

7. Subdivision 6.

Whether a plaintiff, committed to state hospital at Fergus Falls, might testify was a question for trial court. Ross v. D., 203M321, 281NW76. See Dun. Dig. 10310.

9815. Accused.

1. In general.

Allusion to fact that defendant did not take stand was harmless in view of strong evidence of guilt. State v. Zemple, 196M159, 264NW587. See Dun. Dig. 10307.

Prosecuting attorney cannot comment on failure of defendant to testify. State v. Bean, 199M16, 270NW918. See Dun. Dig. 10307.

Failure of defendant to testify in his own behalf or to produce evidence to meet that furnished by accomplices could not be considered against him. State v. Scott, 203M56, 279NW832. See Dun. Dig. 10307.

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.

A defendant in a criminal case, who is a witness in his own behalf, may be cross-examined upon collateral matters to affect his credibility and to discredit him, and to some extent state may inquire into his past life, and extent of the cross-examination is largely within discretion of trial court. State v. McTague, 190M449, 252 NW446. See Dun. Dig. 10307, 10309.

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.

Where summons and complaint were properly served on a minor and he interposed an answer by his attorney before any guardian ad litem had been appointed for him and on day of trial a guardian ad litem was appointed, such defendant was an actual defendant at the trial who could be called for cross-examination as an adverse

party. Wagstrom v. J., 192M220, 255NW822. See Dun. Dig. 4454, 4462.

Even though a minor defendant were not a proper party defendant, it was not prejudicial error to permit him to be called for cross-examination under the statute, as he could have been called as a witness for plaintiff and court would have permitted a cross-examination irrespective of the statute. Id. See Dun. Dig. 422, 10327.

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

3. In what actions or proceedings.

A bastardy proceeding is a civil proceeding, not a criminal action, and defendant may be called by prosecution for cross-examination. State v. Jeffrey, 188M476, 247NW692. See Dun. Dig. 10327d.

4. Scope of examination.

In action against driver of an automobile and his alleged employer for injuries sustained in a collision, in which driver admitted alleged employment in his pleadings, held it was improper to permit cross-examination of driver as an adverse party upon issue of employment. P. F. Collier & Son v. H. (USCCA8), 72F(2d)625. See Dun. Dig. 10327.

It was within discretion of trial court to restrict examination of defendant when called for cross-examination to matters within his knowledge and of which plaintiff had no proof at hand. Bylund v. C., 203M484, 281 NW873. See Dun. Dig. 10327(49).

A plaintiff may prove his cause of action by cross-examination of the defendant. Id. See Dun. Dig. 10327(49).

Statute is remedial, to be construed and applied with reasonable liberality, but this does not mean that party calling adversary for cross-examination may ask any question desired without regard to issues tried or status of trial. Id. See Dun. Dig. 10327(49).

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.

9. Error without prejudice.

Plaintiffs in taxpayers' suit to restrain construction of a power plant were not prejudiced by the ruling of the trial court refusing to allow them to call the village attorney for cross-examination under the statute. Davies v. V., 287NW1. See Dun. Dig. 10327.

9817. Conversation with deceased or insane person.

½. In general.

Whether testimony, objected to as conversation with a person since deceased, was improperly admitted, was immaterial, where only conclusion possible under all other evidence in case was that industrial commission properly denied compensation. Anderson v. R., 196M358, 267NW501. See Dun. Dig. 10316.

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., 188M429, 247NW520. See Dun. Dig. 10316b.

An executor or administrator, being merely legal representative of estate, is a party to record but is not a party to issue, and is not rendered incompetent to testify with regard to conversations with decedent. Exsted v. E., 202M521, 279NW554. See Dun. Dig. 10316(37).

Since statute operates to exclude otherwise competent evidence, it should be strictly, although fairly, construed. Id. See Dun. Dig. 10316.

Section applies to proceedings under Workmen's Compensation Act. Kayser v. C., 204M578, 282NW801. See Dun. Dig. 10316.

Trustee of a particular 100 shares of corporate stock, although a party of record, was not a party "interested in the events thereof" with respect to division of stock not involved in the trust. Keough v. S., 285NW809. See Dun. Dig. 10316.

It was technical error to permit a party to testify that he had no conversation with deceased concerning a certain matter, but this would not require a new trial where other evidence compelled conclusion that witness did not participate in corporate affairs involved. Id. See Dun. Dig. 10316.

A trustee of an express oral trust in personalty, a party to suit, but claiming no personal interest in trust, is not barred from testifying as to conversations with deceased creator of trust. Salscheider v. H., 286NW347. See Dun. Dig. 10316.

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.

In action by personal representative under Federal Employers' Liability Act to recover damages for death of employee, and also for conscious pain and suffering prior to death, an adult son employee who was in no way dependent upon him was competent to testify as to a conversation with deceased as to cause of action for wrongful death, but was incompetent to testify as to cause of action for pain and suffering. Noesen v. M., 204M233, 283 NW246. 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., 189M172, 248NW750. See Dun. Dig. 10316b.

Where so-called admission against interest of deceased person is not in respect to specific issue litigated, but rather indirectly or upon a collateral matter, evidence going to contradict or explain same should be admitted. Empenger v. E., 194M219, 261NW185. See Dun. Dig. 3298.

Wives of men dealing with decedent were competent to testify as to conversation between husbands and deceased. Anderson v. A., 197M252, 266NW841. See Dun. Dig. 10316.

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., 189M451, 249NW668. See Dun. Dig. 10316.

Where claimant introduced proof of statements of deceased in respect to a collateral matter, not in nature of a direct admission against interest upon litigated issue, it was error to exclude other statements of deceased to meet or explain the statements introduced. Empenger v. E., 194M219, 259NW795. See Dun. Dig. 3237.

Conveyances made of parts of farm on which parties lived, as one family, were properly received as having some tendency to show existence or nonexistence of a contract to will property to daughter-in-law for services rendered as claimed by claimant, but diaries of deceased containing no entries relative to any issue litigated were not admissible. Id. See Dun. Dig. 10207.

It is desirable that court be liberal in receiving evidence of collateral matter tending to prove or disprove alleged contract upon which claim against decedent is based, and while admissions against interest by deceased are admissible, self-serving statements are not. Id. See Dun. Dig. 3408.

Res Gestae. 22MinnLawRev391.

3. Written admissions and acts.

Action on life insurance policy held not required to be submitted to jury on ground evidence of decedent's fraudulent representation rested entirely on testimony of survivor to transaction with decedent, as statements of decedent were contained in application signed by him and attached to policy on which action was based. First Trust Co. v. K., (USCCA8), 79F(2d) 48.

4. Conversation with whom.

A conversation by an interested party with a third party, if otherwise competent, is not incompetent because overheard by a party since deceased. Sievers v. S., 189M 576, 250NW574. See Dun. Dig. 10316.

Insured was necessarily a participant in conversation resulting in contract that if beneficiaries were not changed, named beneficiaries would give proceeds of policy to plaintiffs. Id. 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.

9819–1. Witnesses in criminal cases.—If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in criminal actions in this state certifies under the seal of such court that there is a criminal action pending in such court, that a person being within this state is a material witness in such action, and that his presence will be required for a specified number of days at the trial of such action, upon presentation of such certificate to any judge of the district court of the county in which such person resides, or the county in which such person is found if not a resident of this state, such judge shall fix a time and place for a hearing and shall notify the witness of such time and place.

If at the hearing the judge determines that the witness is material and necessary, either for the prosecution or the defense in such criminal action, that it will not cause undue hardship to the witness to be compelled to attend and testify in the action in the other state, that the witness will not be compelled to travel more than one thousand miles to reach the place of trial by the ordinary traveled route, and that the laws of the state in which the action is pending and of any other state through which the witness may be required to pass by ordinary course of travel will give to him protection from arrest and the service of civil and criminal process, he shall make an order, with a copy of the certificate attached, directing the witness to attend and testify in the court where the action is pending at a time and place specified in the certificate.

This act has been adopted by: Arizona, Arkansas, Colorado, Idaho, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wisconsin, Wyoming.

If the witness, who is named in such order as above provided after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the action is pending and five dollars for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed by such order, he shall be guilty of constructive contempt of court and shall be punished according to law. (Act Apr. 11, 1935, c. 140, §1.)

9819–2. Nonresident witnesses.—If a person, in any state, which by its laws has made provision for commanding persons within that state to attend and testify either for the prosecution or the defense in criminal actions in this state, is a material witness in an action pending in a district court of this state, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness resides, or the county in which he is found if not a resident of that state.

If the witness is ordered by the court to attend and testify in a criminal action in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the action is pending and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the order of the court shall not be required to remain within this state a longer period of time than the period mentioned in the certificate. (Act Apr. 11, 1935, c. 140, §2.)

9819–3. Witnesses not to be subject to arrest or service of process.—If a person comes into this state in obedience to a court order directing him to attend and testify in a criminal action in this state he shall not, while in this state, pursuant to such court order, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under such order.

If a person passes through this state while going to another state in obedience to a court order requiring him to attend and testify in a criminal action in that state or while returning therefrom, he shall not, while so passing through this state, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state pursuant to such court order. (Act Apr. 11, 1935, c. 140, §3.)

9819–4. Interpretation of act.—This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it. (Act Apr. 11, 1935, c. 140, §4.)

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., 188M268, 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.

9852-1. Courts to take judicial notice.—Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States. (Act Mar. 24, 1939, c. 77, §1.)

The Uniform Judicial Notice of Foreign Law Act has been adopted by: Illinois, Indiana, Maine, Maryland, Minnesota, Montana, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota.

9852-2. Courts may obtain information—how.—The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information. (Act Mar. 24, 1939, c. 77, §2.)

9852-3. Determination to be made by court.—The determination of such laws shall be made by the court and not by the jury, and shall be reviewable. (Act Mar. 24, 1939, c. 77, §3.)

9852-4. Evidence.—Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise. (Act Mar. 24, 1939, c. 77, §4.)

9852-5. To be issue for court.—The law of a jurisdiction other than those referred to in Section 1 shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice. (Act Mar. 24, 1939, c. 77, §5.)

9852-6. Interpretation of act.—This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of these states which enact it. (Act Mar. 24, 1939, c. 77, §6.)

9852-7. Title of act.—This act may be cited as the Uniform Judicial Notice of Foreign Law Act. (Act Mar. 24, 1939, c. 77, §7.)

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.
Uniform Judicial Notice of Foreign Law Act. Laws 1937, c. 77.
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.
A judgment or order, in proceedings for appointment of a guardian of an incompetent person and taking from such person the management of his property, is admissible in evidence in any litigation whatever, but not conclusive, to prove that person's mental condition at time order or judgment is made or at any time during which judgment finds person incompetent. Champ v. B., 197M 49, 266NW94. See Dun. Dig. 3348.
Certified copies of record of mortgage foreclosure by advertisement in office of register of deeds are admissible in Iowa without complying with Mason's U. S. C. A., Title 28, §688. Bristow v. L., 221 Iowa904, 266NW808.
Records of state department of education and of public schools are open to inspection by any taxpayer. Op. Atty. Gen. (851l), Apr. 2, 1935.

UNIFORM BUSINESS RECORDS AS EVIDENCE ACT

The Uniform Business Records as Evidence Act has been adopted by: Idaho, Minnesota, Montana, North Dakota, Ohio, Pennsylvania, South Dakota, Vermont.

9870-1. Definitions.—The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not. (Act Mar. 24, 1939, c. 78, §1.)

9870-2. Business records as evidence.—A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission. (Act Mar. 24, 1939, c. 78, §2.)

9870-3. Interpretation of act.—This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (Act Mar. 24, 1939, c. 78, §3.)

9870-4. Title of Act.—This act may be cited as the Uniform Business Records as Evidence Act. (Act Mar. 24, 1939, c. 78, §4.)

9870-5. Inconsistent acts repealed.—All acts and parts of acts which are inconsistent with the provisions of this act are hereby repealed. (Act Mar. 24, 1939, c. 78, §5.)

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.
Uniform Business Records as Evidence Act. Laws 1939, c. 78.
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.
Books of account regularly and properly kept and maintained in one's business and identified to be books of original entries are admissible in evidence. Meyers v. B., 196M276, 264NW769. See Dun. Dig. 3346.
Account books kept by wife even if considered books of defendant do not conclusively impeach his testimony so as to compel findings according to all entries therein. Patterson v. R., 199M157, 271NW336. See Dun. Dig. 3345, 3410.
Ledger sheets of a bank were properly admitted in evidence, though they were not correct as to charging of certain checks, where cashier testified that they were otherwise correct and that he had omitted to enter the checks for his own purposes. Mendota State Bank v. R., 203M409, 281NW767. See Dun. Dig. 3346.
In action on fire policy covering stock of goods where only person who knew of sales and purchases was absent from trial, such person's reports of sales and purchases to another person and latter's notation thereof should not be considered where such notations were not understandable without explanation by the absent person. Foot v. Y., 286NW400. See Dun. Dig. 3346.
A party's books and records are admissible in evidence against him as admissions without statutory authentication necessary where he offers them in his favor. Wentz v. G., 287NW113. See Dun. Dig. 3345.
Books and records of a corporation the same as those of an individual may always be received in evidence against it as admissions. Id. See Dun. Dig. 3346.

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).
An order for inspection of books and papers is an intermediate order and so not reviewable by certiorari. Asplund v. B., 203M533, 282NW473. See Dun. Dig. 1396.

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.
Denial of execution of an instrument puts in issue its making, genuineness of signature, and delivery, where alleged signer is dead. O'Hara v. L., 201M618, 277NW232. See Dun. Dig. 1918.
Where plaintiff alleges a written instrument as an essential part of his case, execution of which is denied by answer, burden of proving execution is on plaintiff, and it is error to instruct jury that burden of proof is on defendant to show that instrument is a forgery or not genuine. Id. See Dun. Dig. 1918, 3468, 3469.
A note sued on its prima facie proof of its execution so as to make it admissible in evidence where answer is a verified general denial with no specific denial of execution by oath or affidavit. Christianson v. L., 203M533, 282NW273. See Dun. Dig. 1039.

9892. Federal census—Population.
Though ordinarily inmates of training schools are not to be counted as residents of county, county board should accept official returns of federal or state census as basis for determining whether or not a redistricting is required, even though inmates of such schools were counted as residents. Op. Atty. Gen. (798d), Oct. 15, 1935.
Certified copies of last federal census control for purpose of determining number of liquor stores. Op. Atty. Gen. (218G-13), May 17, 1939.

9895. Instruments, records thereof, and copies.
Certificates of births recorded under Laws 1870, c. 25, Laws 1887, c. 114, or Laws 1913, c. 579, are admissible in evidence as public records, but unregistered birth occurring before passage of Laws 1913, c. 579, cannot now be registered, and birth must be proven by other evidence, though birth occurring subsequent to that enactment may still be registered with full probative effect. Op. Atty. Gen. (225*l*), July 11, 1938.

9896. Abstracts of title to be received in evidence.
Introduction in evidence of an abstract without incorporating in settled case instruments referred to in abstract, which are claimed to create a defect or break in

chain of title, is not effective to prove a breach of a covenant of seizin in a deed. Baker v. R., 199M148, 271 NW241. See Dun. Dig. 344.

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).

Evidence of general repute or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which facts may be inferred, was competent on question of common-law marriage. Welker's Estate, 196M447, 265NW273. See Dun. Dig. 5794.

Common-law marriage in Minnesota. 22MinnLawRev 177.

9902. Confession, inadmissible when.

If statement of accused be considered as confession of driving car while intoxicated, corroboration held sufficient. State v. Winberg, 196M135, 264NW578. See Dun. Dig. 2462.

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.

Testimony of accomplice held sufficiently corroborated to sustain conviction of murder. State v. Jackson, 198M 111, 268NW924. See Dun. Dig. 2457.

Instructions relative to corroborating evidence to support testimony of an accomplice held to accurately state rule. State v. Tsiolis, 202M117, 277NW409. See Dun. Dig. 2457.

Corroboration must tend to convict person so charged and is insufficient if it merely shows commission of offense or circumstances thereof. State v. Scott, 203M56, 279NW832. See Dun. Dig. 2457.

Section requires corroboration other than testimony of another accomplice. Id.

Uncorroborated testimony of accomplices as to other crimes cannot be made basis of corroboration as to a separate offense for which a person is being tried. Id.

Failure of defendant to testify in his own behalf or to produce evidence to meet that furnished by accomplices could not be considered against him. Id.

Where defendant procured Arthur, 19 years old, to bring his friend Allen, 16 years old, to defendant's apartment, where he, in presence of Arthur, committed sodomy with Allen, and then with Arthur in presence of Allen, and was indicted for act with Allen, both boys being witnesses called by state, court charged correctly that Allen was an accomplice, but erred in charging that Arthur was not an accomplice as a matter of law. State v. Panetti, 203M150, 280NW181. See Dun. Dig. 2457.

In prosecution for forgery evidence held sufficient to corroborate testimony of an accomplice in issuance of fraudulent relief orders. State v. Stuart, 203M301, 281 NW299. See Dun. Dig. 2457.

9904. In prosecutions for libel—Right of jury.

Truth, a defense to libel. 16MinnLawRev43.

9905. Divorce—Testimony of parties.

Evidence held sufficient to establish willful desertion. Graml v. G., 184M324, 238NW683. See Dun. Dig. 2776.

9905½.

COMMON LAW DECISIONS RELATING TO WITNESSES AND EVIDENCE IN GENERAL

See §§9870-1 to 9870-5, relating to laws of other states.

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.

It is matter of common knowledge that a sterilization operation upon a male properly done in due course effects sterilization. Christensen v. T., 190M123, 255NW620. See Dun. Dig. 3451.

Courts take judicial notice of topography of state. Erickson v. C., 190M433, 252NW219. See Dun. Dig. 3459.

It is common knowledge that recuperative sources differ very much in individuals even of same age and outward appearance. Howard v. V., 191M245, 253NW766. See Dun. Dig. 3451.

The court judicially knows that mail would ordinarily be received at Morris, Minn., one day after it was deposited in St. Paul, Minn. Devenney's Estate, 192M265, 256NW104. See Dun. Dig. 3456.

District court may take judicial notice of authority of particular municipal court. Untiedt v. V., 195M239, 262 NW568. See Dun. Dig. 3452.

Court cannot take judicial notice of practical construction of city charter. State v. Goodrich, 195M644, 264NW 234. See Dun. Dig. 3452.

It is a matter or common knowledge that hazards are created likely to lead to disastrous results where a driver suddenly swerves out of his traffic lane at a point where he has no opportunity of seeing what is approaching from other direction. Cosgrove v. M., 196M6, 264NW134. See Dun. Dig. 3451.

On appeal after second trial, evidence taken at first which is no part of record at second cannot be considered by judicial notice or otherwise. Taylor v. N., 196M22, 264NW139. See Dun. Dig. 3455.

It is well known that a river often, either suddenly or gradually, varies its course and flows to a greater or lesser extent within river base or valley. Lamprey v. A., 197M112, 266NW434. See Dun. Dig. 3451.

It is common knowledge that by reason of dry and hot summers, lakes in southern part of state suffered great lowering of the water level during years prior to 1935. Meyers v. L., 197M241, 266NW861. See Dun. Dig. 3451.

Court takes judicial notice of process of distributing bottled milk at retail. Franklin Co-Op. Creamery Ass'n. v. E., 200M230, 273NW809. See Dun. Dig. 3451.

It is common knowledge that speed of street cars is reduced on approaching street intersections. Geidert v. B., 200M332, 274NW245. See Dun. Dig. 3451.

It is common knowledge that industrial insurance is frequently written on lives of children of tender age without their knowledge and consent, and that in many instances group policies are written covering lives of all employees in industry without knowledge or consent of such employees, or at least some of them. Dight v. P., 201M247, 276NW3. See Dun. Dig. 3451.

It is common knowledge that sidewalks are often laid and repaired by abutting owner after council has ordered them built or repaired. Nelson v. C., 201M305, 276NW234. See Dun. Dig. 3451.

Municipal court and supreme court on appeal must take notice of provisions of city charter. Prudential Co. v. C., 202M70, 277NW351. See Dun. Dig. 3452.

Since the Declaration of Independence, the law of Great Britain and its dependencies is the law of a foreign country and, like any other foreign law, is a matter of fact with which the courts of this country cannot be presumed to be acquainted or take judicial notice of, but which must be pleaded and proved. Greer v. P., 202 M633, 279NW568. See Dun. Dig. 3453.

It is common knowledge that large department stores suffer so from depredations of shoplifters that private detectives are necessary for protection. Hallen v. M., 203M349, 281NW291. See Dun. Dig. 3451.

It is common knowledge that nothing imposes upon a motorist the duty of extra care more than icy or slippery roads. Luce v. G., 203M470, 281NW812. See Dun. Dig. 3451.

Court will take judicial notice that a snow fence of peculiar character used only by railroads constitutes a warning of presence of a railroad crossing. Massmann v. G., 204M170, 282NW815. See Dun. Dig. 3451.

It cannot be concluded as a matter of common or judicial knowledge that deflation of a left rear tire could not have caused swerving to right, whether sudden or otherwise. Lestico v. K., 204M125, 283NW122. See Dun. Dig. 3451.

It is common knowledge that persons other than those in need of poor relief are upon payrolls of government on its various projects under PWA, CWA, and WPA. Blackwell, 285NW613. See Dun. Dig. 3451.

Judicial notice is to be taken with caution and every reasonable doubt as to propriety of its exercise in a given case should be resolved against it. State v. Clousing, 285NW711. See Dun. Dig. 3448.

Admission by demurrer does not extend to facts of which court will take judicial notice. Id. See Dun. Dig. 7520.

Ordinance requiring a fee of $25 per year for license to engage in business of plastering held not so unreasonable as to justify judicial notice of the fact. Id. See Dun. Dig. 3451.

It is common knowledge that raisers and feeders of livestock for slaughter often borrow money in order to carry on and can do so only by giving as security chattel mortgages upon stock being raised and fed for the

market. Mason City Production Cr. Ass'n v. S., 286NW 713. See Dun. Dig. 3451.

It is common knowledge that short turns cannot safely be negotiated with an automobile going at 35 miles an hour. Wenger v. V., 286NW885. See Dun. Dig. 3451.

Court will not take judicial notice of health regulations. Op. Atty. Gen. (225b-4), May 21, 1935.

2. Presumptions and burden of proof.

There is a presumption that death was not suicidal. New York L. I. Co. v. A. (CCA8), 66F(2d)705.

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.

Absence of proof on a vital issue loses case for party having burden of proof on that issue, no matter how difficult or impossible it is to procure evidence on that particular point. McGerty v. N., 191M443, 254NW601. See Dun. Dig. 3469.

There is a presumption that public officers will conform to the constitution. Moses v. O., 192M173, 255NW 617. See Dun. Dig. 3435.

In absence of evidence to contrary, presumption that letter properly addressed and posted with proper postage affixed is received in due course controls. Devenney's Estate, 192M265, 256NW104. See Dun. Dig. 3445.

Legislature is presumed to have acted with knowledge of all facts necessary to make an intelligent classification of persons and things. Board of Education v. B., 192M367, 256NW894. See Dun. Dig. 1677 to 1679.

A public official is entitled to presumption that in performance of his duties he acts in good faith according to his best judgment. Kingsley v. F., 192M468, 257NW 95. See Dun. Dig. 3435.

In action for death in elevator shaft to which there were no eye witnesses, sentence at end of charge "with *reference to the presumption of due care that accompanied* the plaintiff, the burden of overcoming that presumption rests upon the defendant" held not prejudicial in view of accurate and more complete instruction in body of charge. Gross v. G., 194M23, 259NW557. See Dun. Dig. 7032(99).

In action for death by falling into elevator shaft to which there was no eye witness, it is not absolutely necessary for plaintiff to prove precise manner in which deceased came to fall into pit, even if any of alleged negligent acts or omissions have been proven, which reasonably may be found to be cause of fall. Id. See Dun. Dig. 7043.

Presumption of due care by decedent yields to credible undisputed evidence. Faber v. H., 194M321, 260NW500. See Dun. Dig. 2616, 7032.

Circumstantial evidence may rebut presumption of due care of a deceased. Id. See Dun. Dig. 2616, 7032.

One who loses his life in an accident is presumed to have exercised due care for his own safety, but presumption may be overcome by ordinary means of proof that due care was not exercised. Oxborough v. M., 194M335, 260NW305. See Dun. Dig. 3431, 7032.

Guardian of insane insured person who escaped from insane asylum and disappeared cannot continue to receive disability benefits upon a mere presumption of continuance of life and continuance of disability, but must show actual physical existence and continuing disability as required by policy. Opten v. P., 194M580. 261NW197. See Dun. Dig. 3438.

Doctrine of res ipsa loquitur does not apply in malpractice case and opinion evidence of medical experts is necessary to make out a case. Yates v. G., 198M7, 268 NW670. See Dun. Dig. 3469.

Presumption of regularity on part of public officers must necessarily prevail until there is some credible evidence to show failure in that regard. Judd v. C., 198M 590, 272NW577. See Dun. Dig. 3436.

One who purchases a municipal warrant is charged with notice of law under and by virtue of which such obligation is issued. Id. See Dun. Dig. 6718.

Those dealing with a municipal corporation in matter of public improvements are conclusively presumed to know extent of power and authority possessed by municipal officers with whom they deal. Id.

Public business transacted on a legal holiday is legal in case of necessity, existence of which will be presumed in absence of a showing to contrary. Ingelson v. O., 199M422, 272NW270. See Dun. Dig. 3433, 3436, 9064.

Presumption is that services rendered by a child to a parent in home are gratuitous. Anderson's Estate, 199 M588, 273NW89. See Dun. Dig. 7307.

Acts by a municipal officer in charge of a department are presumed to be in performance of official duties when acts relate to matters confided to his control and supervision. Theisen v. M., 200M515, 274NW617. See Dun. Dig. 3435.

A police officer is presumed to know the law and that it is malfeasance to assist gamblers. State v. Raasch, 201M158, 275NW620. See Dun. Dig. 2448a.

Neither fraud nor undue influence is presumed, but must be proved, and burden of proof rests upon him who asserts it. Berg v. B., 201M179, 275NW836. See Dun. Dig. 4035.

Pleadings generally determine upon whom is burden of proof, and party who has burden of proof carries it throughout the trial. O'Hara v. L., 201M618, 277NW232. See Dun. Dig. 3468, 3469.

Where plaintiff alleges a written instrument as an essential part of his case, execution of which is denied by answer, burden of proving execution is on plaintiff, and it is error to instruct jury that burden of proof is on defendant to show that instrument is a forgery or not genuine. Id. See Dun. Dig. 1918, 3468, 3469.

Right of defendant to have plaintiff bear burden of proof is one of substance and not of form, and denial of right in instructions is prejudicial error. Id. See Dun. Dig. 3468.

Burden of proof extends to every fact essential to recovery. Id. See Dun. Dig. 3468, 3469.

Burden of establishing causal connection between violation of statutes and injury is upon plaintiff. Fredrickson v. A., 202M12, 277NW345. See Dun. Dig. 7043.

There is a strong presumption that that which has never been done, cannot by law be done at all. First Minneapolis Trust Co., 202M187, 277NW899. See Dun. Dig. 8952.

Proposition that where a fact of a continuous nature is shown to exist at a certain time, there is a presumption of law that it continues to exist, at least for a reasonable time, does not apply to question of title and possession of a diamond ring, which is too often transferred by gift, pledge, or otherwise. Exsted v. O., 202M 644, 279NW559. See Dun. Dig. 3438.

Presumptions are indulged to supply place of facts and are never allowed against ascertained and established facts which annul them. Luce v. G., 203M470, 281NW812. See Dun. Dig. 3430.

It is to be assumed that one lawfully appointed special police officer to serve process for a justice of peace and effectively performing duties for many years qualified in accordance with law. Russ v. K., 285NW472. See Dun. Dig. 3435.

Inferences in findings of fact may properly be drawn from absence of person at trial. Foot v. Y., 286NW400. See Dun. Dig. 3444.

Distinction between risk of non-persuasion and duty of producing evidence. 15MinnLawRev600.

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., 188M43, 246NW 370. 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. Id.

There is a rebuttable common-law presumption that a person no longer lives who has disappeared and has not been heard from for a period of seven years, and in such a case burden is upon one who seeks to show death prior to expiration of seven-year period, and such a death must be shown by evidence that preponderates in favor of that solution of the disappearance. Sherman v. M., 191M607, 255NW113. See Dun. Dig. 3434.

In a disappearance case, circumstantial evidence may justify a finding of death prior to expiration of seven-year period even in absence of a showing that absentee was exposed to a specific peril at time he was last heard from. Id. See Dun. Dig. 3434.

To give rise to presumption of death after seven year's unexplained absence, such absence must be from last usual place of abode or resort. White v. P., 193M263, 258 NW519. See Dun. Dig. 3434, 4844.

Under presumption of death after seven years unexplained absence, there is no presumption as to specific time of death, and it is not filing of petition for administration or rendering of decree that fixes date of death as of any particular time. Hokanson's Estate, 198M428, 270NW689. See Dun. Dig. 3434.

Presumption of death from seven years' absence. 19 MinnLawRev777.

4. ——Suppression of evidence.

When a party fails to produce an available witness who has knowledge of facts and whose testimony presumably would be favorable to him, and fails to account for his absence, jury may indulge a presumption or draw an inference unfavorable to such party. M & M Securities Co. v. D., 190M57, 250NW801. See Dun. Dig. 3444.

Where relevant evidence is within control of a party whose interest it would be to produce it and he fails to produce it without a satisfactory explanation, jury may infer that evidence if produced would have been unfavorable to such party. Vorlicky v. M., 287NW109. See Dun. Dig. 3444.

5. Admissibility in general.

Circumstantial evidence is as competent in a personal injury action as in any other. Sears, Roebuck & Co. v. P. (USCCA8), 76F(2d)243.

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.

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.

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.

It was not error to exclude an opinion of witness already testified to by him. Supornick v. N., 190M19, 250 NW716. See Dun. Dig. 10317.

Plaintiff, in libel, could not testify as to effect of publication on his wife and daughter caused by treatment accorded them, or their conduct and actions in his presence or oral statements to him detailing remarks and conduct of others resulting in their humiliation. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 5555.

It was not error to admit in evidence fragments of bone from plaintiff's skull where there was controversy as to character of injury to her head. Johnston v. S., 190 M269, 251NW525. See Dun. Dig. 3258.

In action on life policy, court did not err in sustaining objection to question to defendant's district manager "do you know whether or not the company would have issued the policy to Mr. D., if it had known that he had been a bootlegger," such manager having nothing to do with approval of applications. Domico v. M., 191M215, 253NW538. See Dun. Dig. 3254.

Where offered testimony is competent and material, its reception is not discretionary with court; there being no objection raised as to proper foundation being laid. Taylor v. N., 192M415, 256NW674. See Dun. Dig. 9728.

Cost of manufacture or production of property is generally held admissible as tending in some degree to establish value. Fryberger v. A., 194M443, 260NW625. See Dun. Dig. 2576a.

In action for death of pedestrian killed while leading horses upon shoulder of paved highway, witnesses who examined locus in quo morning of next day were properly permitted to testify as to tracks of horses along shoulder and across the ditch about where accident occurred, and as to skid tracks of a car, it being sufficient that such foundation as situation permits be laid. Raths v. S., 195M225, 262NW563. See Dun. Dig. 3313.

Court did not err in sustaining an objection to appellant's inquiry as to plaintiff's occupation, for her attorney had in open court admitted it to be what appellant desired to prove. Paulos v. K., 195M603, 263NW913. See Dun. Dig. 3230.

Negative testimony is competent and of probative value and weight to be given thereto is for jury, considering all circumstances surrounding witnesses at time of accident. Polchow v. C., 199M1, 270NW673. See Dun. Dig. 3238.

In trial of claim by daughter against estate of mother for services rendered after 1925, contents of letter written by mother to daughter in 1918, requesting her to come home and help with farm work because sons had gone to war, were properly excluded as irrelevant and of no probative value. Anderson's Estate, 199M588, 273NW 89. See Dun. Dig. 7307.

Issue being as to cubic contents of dikes, engineers' field notes recording center heights of dikes were properly admitted as evidence, where there was testimony showing uniform slop or angle of repose of embankments so that measurement of height showed also base. Barnard-Curtiss Co. v. M., 200M327, 274NW229. See Dun. Dig. 3229.

Where there was no offer of proof that plaintiff knew or could know that defendant was under influence of intoxicants while she was his passenger, offer of proof to show that defendant was under influence of intoxicating liquors several hours after accident did not go far enough. Vondrashek v. D., 200M530, 274NW609. See Dun. Dig. 9717.

Where court held oral promise to will property void under statute of fraud, but allowed claimant reasonable value of services rendered decedent, there was no error in excluding evidence of value of estate as bearing on reasonable value of services, decedent's promise not being made with reference to value or to amount of services to be rendered by claimant. Roberts' Estate, 202M 217, 277NW549. See Dun. Dig. 2567, 3247.

In action by city employee against street railway company for personal injuries, evidence in regard to workmen's compensation received by plaintiff was properly excluded. Peterson v. M., 202M630, 279NW588. See Dun. Dig. 9033.

Questions asked plaintiff's wife with obvious purpose of arousing sympathy of jury by showing that she was in bad health should have been excluded and answers stricken. Ross v. D., 203M321, 281NW76. See Dun. Dig. 3228.

In action for damages for personal injuries to a boy burned by electricity when taking hold of a cable which came in contact with a high power line, court properly permitted plaintiff to show customary practice of insulating non-current metallic wires on power poles that came within reach of person standing on the ground. Schorr v. M., 203M384, 281NW523. See Dun. Dig. 7049.

Evidence before administrative tribunals. 23MinnLaw Rev68.

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.

Statements of physicians furnished by beneficiary to insurer as part of proof of death of insured are receivable in evidence as admissions of beneficiary. Elness v. P., 190M169, 251NW183. See Dun. Dig. 3410.

Statements made by a physician in proof by husband of his disability, three months before his death, nature of which wife did not know, were not admissible against her when she sued on policy as a beneficiary. Id.

A statement made to plaintiff by a mere clerk or salesman in store, immediately after an accident, as to position of a platform, did not bind store or establish any negligence on its part. Smith v. E., 190M294, 251NW265. See Dun. Dig. 3410.

Plaintiff suing employee of garage who at time of accident was driving car of third person on his own private business held not estopped in garnishment to claim liability of liability insurers of such third party by allegations in main action that defendant was operating automobile in business of garage. Barry v. S., 191M71, 253 NW14. See Dun. Dig. 3208.

Effect of an admission by one representing a corporation depends upon whether individual has authority to speak for it. Peterson v. S., 192M315, 256NW308. See Dun. Dig. 3418.

Admissions, if material, are always admissible. Hork v. M., 193M366, 258NW576. See Dun. Dig. 3408.

While it is ordinarily improper for either court or counsel to read pleadings to jury, yet, even without its introduction in evidence, an admission in a pleading may be read to jury in argument for adversary of pleader. Id. See Dun. Dig. 3424, 9783a.

Allegation in answer of an agreement between deceased and husband of claimant, under which parties lived as one family on farm of deceased, cannot be construed into an admission of a contract between deceased and claimant to pay her for services rendered him as a member of household. Empenger v. E., 194M219, 259NW 795. See Dun. Dig. 3424.

Bank suing co-owners of a farm as partners on a note, purporting to be signed by them as a partnership, was not thereafter estopped in a suit by a third party to claim that there was no partnership and that certain co-owner was alone liable on theory of having signed under an assumed name, first action being settled and there being no findings or judgment. Campbell v. S., 194M502, 261NW1. See Dun. Dig. 3218.

Pleadings of a party may be offered in evidence by his opponent to show admission. Id. See Dun. Dig. 3424.

Where complaint in another action was introduced to impeach witness, it was proper to permit attorney who prepared complaint to testify that witness had not made statement alleged in complaint and that allegations therein were of attorney's own origination. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 3424.

An admission of a town in its pleading does not preclude interveners from that town to prove that facts are to contrary in proceeding involving validity of organization and boundaries of a city. State v. City of Chisholm, 199M403, 273NW235. See Dun. Dig. 3424.

Court erroneously refused to permit cross-examination of landowner to show that he had made verified application for reduction of taxes on claim that land had been assessed in amounts exceeding true and actual value. Minneapolis-St. Paul Sanitary Dist. v. F., 201M 442, 277NW394. See Dun. Dig. 3424a.

Sworn statement of car dealer in registration of a car that it was absolute owner of a car in possession of salesman was a persuasive admission that would credit claim that salesman was absolute owner under a conditional sales contract, as affecting liability of sales agency arising out of negligence. Flaugh v. E., 202M 615, 279NW582. See Dun. Dig. 3408.

Admissions of a grantee in a deed as to intention of parties are admissible. Papke v. P., 203M130, 280NW183. See Dun. Dig. 3306, 3409.

Copies of a party's income tax statements are admissible as admissions of the facts therein stated. Wentz v. G., 287NW113. See Dun. Dig. 3408.

A party's books and records are admissible in evidence against him as admissions without statutory authentication necessary where he offers them in his favor. Id. See Dun. Dig. 3345.

7. Declarations.

In action against railroad for death of brakeman, conductor's report to railroad and statements by him at investigation following accident as to facts thereof, inconsistent with his testimony, held admissible as substantive evidence of declarations of his principal. Chicago, St. P. M. & O. R. Co. v. K., (CCA8), 102F(2d)352.

Once a trust is established the subsequent acts or declarations of the donor are not admissible in derogation of the title of the beneficiary. Bingen v. F., (CCA8), 103F (2d)260, rev'g (DC-Minn), 23FSupp958.

Statements of good health in applications for reinstatement of government insurance and for drivers license are statements against interest and admissible in action on war risk policy for total disability. Walsh v. U. S., (DC-Minn), 24FSupp877.

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., 189M210, 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. Id. See Dun. Dig. 3301.

Trial court properly ruled out evidence of declarations of deceased grantor whose deed had been placed in escrow to effect that contract under which it had been so placed had been abandoned and that he had resumed possession and control of premises. Merchants' & Farmers' State Bank v. O., 189M528, 250NW366.

Exclusion from evidence of a self-serving letter written by plaintiff was proper. Pettersen v. F., 194M265, 260NW225. See Dun. Dig. 3287a.

Where, in action for personal injuries caused by moving a one-man street car on a curve so that plaintiff was struck by swinging rear end of car while he was seeking passage thereon, a passenger on car stated that she informed motorman-conductor of presence of plaintiff coming to car, it was error to exclude her following statement that plaintiff must "have gone the other way"; night being dark and rainy, and she being in a position for observation superior to that of motorman. Mardorf v. D., 196M347, 265NW32. See Dun. Dig. 3237.

Court properly excluded a self-serving paragraph in a letter. Kolars v. D., 197M183, 266NW705. See Dun. Dig. 3305a.

There was no error on accounting of guardian in admission of evidence as to a statement made by guardian, before his appointment, as to what fees he would charge, if appointed. Fredrick v. K., 197M524, 267NW473. See Dun. Dig. 3286.

Letter from a railroad claim department to a claim agent containing self-serving declarations held inadmissible. Marino v. N., 199M369, 272NW267. See Dun. Dig. 3286, 3287a.

Evidence as to conversations relating to a compromise or settlement, between parties to action and relating to one of issues to be litigated, is inadmissible. Schmitt v. E., 199M382, 272NW277. See Dun. Dig. 3425.

Statement of deceased that child would get what was coming to her was too ambiguous to support a finding that deceased intended that daughter should receive compensation for her services. Anderson's Estate, 199M588, 273NW89. See Dun. Dig. 7307.

In action by one claiming a parol gift of land from his father, court erred in excluding plaintiff's offer to explain why he stated in bankruptcy proceedings that he was only a tenant and not owner. Henslin v. W., 203M 166, 280NW281. See Dun. Dig. 10351.

A party has a right to explain contradictory statements made by him which have been received in evidence. Id.

Declarations of an insured shortly before his death appearing to have been made in a natural manner and not under circumstances of suspicion concerning his plans and designs are admissible to show his condition of mind. Scott v. P., 203M547, 282NW467. See Dun. Dig. 3293.

Admissibility of extra-judicial confessions of third parties. 16MinnLawRev437.

Statements of facts against penal interests. 21Minn LawRev181.

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., 188M404, 247NW512. 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., 188M557, 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., 189M26, 248NW288. See Dun. Dig. 3405.

In action to recover for injuries received in a fall in defendant's salesroom, based on its alleged negligence in permitting waxed linoleum floor to become wet and sloppy, rendering it slippery and dangerous to users thereof, it was competent and material to prove that shortly after plaintiff slipped and fell thereon, another person slipped and almost fell at substantially same place. Taylor v. N., 192M415, 256NW674. See Dun. Dig. 3253.

Where so-called admission against interest of deceased person is not in respect to specific issue litigated, but rather indirectly or upon a collateral matter, evidence going to contradict or explain same should be admitted. Empenger v. E., 194M219, 261NW185. See Dun. Dig. 3233.

On issue of fraud, court properly admitted transactions between parties tending to prove that one was taking undue advantage of other whenever he could. Chamberlin v. T., 195M58, 261NW577. See Dun. Dig. 3252.

In action for personal injuries received when slipping on floor in place of business, court erred in refusing to permit testimony of one of plaintiff's witnesses to effect that a short time after plaintiff had fallen witness entered same room and slipped and nearly fell at substantially same place. Taylor v. N., 196M22, 264NW139. See Dun. Dig. 3253.

In order to prove incompetency at time of a particular transaction, it is proper to show a subsequent adjudication of incompetency. Johnson v. H., 197M496, 267NW486. See Dun. Dig. 3438, 3440.

Evidence was properly admitted of other sales of stock with the same provision, for repurchase on demand, made with the knowledge and sanction of the president and officials of defendant. Thomsen v. U., 198M137, 269NW 109. See Dun. Dig. 3253.

Where an important issue in automobile case was whether defendant and his witness were intoxicated, it was not error to allow defendant to show that unfitting conduct of witness resulted from injuries in accident, as against contention that defendant had no right to bring out fact that witness had been injured in accident. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 3237a.

There can be no valid objection to defendant's bolstering his own case by making most of a matter partly developed by plaintiffs. Id. See Dun. Dig. 9799.

In action for injuries suffered by car owner when he attempted to enter car on request of garage mechanic while it was several feet from floor on hydraulic hoist, court did not err in receiving plaintiff's testimony that at a prior time he had at same mechanic's request safely entered same car on same hoist at same elevation. Bisping v. K., 202M19, 277NW255. See Dun. Dig. 3252, 3253.

Trial court has a large discretion in admitting evidence of collateral or similar matter to issues on trial, as an aid to jury, where, as to such issues, the oral testimony is in irreconcilable conflict. Id.

Witness was correctly permitted to state what particular fact caused her to remember testimony regarding her interview with owner of car when he called at

her employer's garage where car was taken for repairs after accident. Neeson v. M., 202M234, 277NW916. See Dun. Dig. 3233.

In proceeding under workmen's compensation act for death of motorman suffering heat stroke, it was not error to exclude offer of proof that no other claim for heat stroke had been made against street railway during its long operation of its street cars by electricity. Ruud v. M., 202M480, 279NW224. See Dun. Dig. 3229.

Where there is no direct evidence of cause of death and finding of suicide or accident is an inference determined by probabilities of the evidence, practice or habit of insured in doing a certain act is relevant and admissible to support or rebut inferences suggested by evidence. Scott v. P., 203M547, 282NW467. See Dun. Dig. 3243.

Evidence that a person is of careful and prudent habits is inadmissible to prove that he was not negligent upon a particular occasion. Ryan v. I., 204M177, 283NW129. See Dun. Dig. 7051(99).

In automobile collision case court properly sustained objections to question to defendant as to whether in all of his driving he had ever had a collision with anybody. Id. See Dun. Dig. 7051(99).

In action to determine validity of ordinance requiring fuel dealers to carry liability insurance, court did not err in excluding evidence of certain persons engaged in such business that they had never had an accident. Sverkerson v. C., 204M388, 283NW555. See Dun. Dig. 3241.

Admissibility of evidence of a collateral fact depends upon whether it has a direct, logical tendency to prove or disprove facts in issue, and question is not so much a question of law as of sound, practical judgment to be determined with reference to facts of particular case. Laughren v. L., 285NW531. See Dun. Dig. 3252.

8½. Mental operation, state of condition.

In libel case, it was competent for plaintiff to testify relative to his own mental suffering the cause and extent thereof. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 5555.

Where motive, belief or intention with which an act is done is material, a party may show fact directly by his own testimony. Henslin v. W., 203M166, 280NW281. See Dun. Dig. 3231.

A party in possession of land under parol gift may testify directly to the fact that he made improvements on the land and paid the taxes in reliance upon the gift. Id.

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.

Expressions of pain are admissible on the issue of physical disability, as against the objection of hearsay. Proechel v. U., (CCA8), 59F(2d)648. Cert. den., 287US658, 53SCR122. 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., 189M451, 249NW668. See Dun. Dig. 3291.

Repetition of signals between engineer and his fireman, when approaching crossing, where collision occurred, was hearsay and properly excluded. O'Connor v. C., 190M277, 251NW674. See Dun. Dig. 3286.

Purpose of hearsay rule, and its only proper use, is to exclude what otherwise would be testimony untested by cross-examination and unvouched for as to trustworthiness by oath. Lepak v. L., 195M24, 261NW484. See Dun. Dig. 3286.

Making of an alleged oral contract being within issues and relevant, it was prejudicial error to exclude as hearsay otherwise competent testimony of terms of such contract. Id.

In contest between two groups claiming to be heir of escheated estate, testimony of one of petitioners as to what he had learned from his father respecting death of a near relative was properly received, relating to a matter of family history. Gravunder's Estate, 195M487, 263NW458. See Dun. Dig. 3295.

Foundation being properly laid, hospital records were admissible against objection that they were hearsay. Schmidt v. R., 196M612, 265NW816. See Dun. Dig. 3357.

Certificate of undertaker was rightly excluded as of no probative force on issue tried—it being palpably hearsay of deputy coroner not a physician. Miller v. M., 198M497, 270NW559. See Dun. Dig. 3286.

Lost section and quarter corners may be proven by reputation. Lenzmeier v. E., 199M10, 270NW677. See Dun. Dig. 8010.

Upon issue of whether driver had consent of owner to operate at time and place an accident occurred, a witness who heard instruction of owner, given to operator at time latter took motor vehicle, may testify as to what they were for purpose of showing extent of consent given, and such instructions are not hearsay, but are part of issue of consent and admissible as original evidence. Patterson-Stocking, Inc. v. D., 201M308, 276NW 737. See Dun. Dig. 3287.

In action by car owner against garage for injuries received when plaintiff attempted to enter car on request of mechanic while it was elevated several feet upon hydraulic hoist, car tipping over, court did not err in excluding testimony that rules and instructions of garage corporation strictly prohibited any one from entering a car when elevated on a hoist, plaintiff having no knowledge of such rules or instructions. Bisping v. K., 202M 19, 277NW255. See Dun. Dig. 5839a.

That part of hearsay report of a crime commission was received when offered by plaintiff is not good reason for admitting another portion thereof later offered by plaintiff. Clancy v. D., 202M1, 277NW264. See Dun. Dig. 3237, 3286.

In action by candidate for city councilman against newspaper for libel, grand jury report, crime commission reports, and reports or resolutions of local associations, were inadmissible as hearsay. Id. See Dun. Dig. 3286.

Statements of facts against penal interests. 21Minn LawRev181.

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 gestae. Bliss v. S., 189M210, 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., 189M262, 249NW39. See Dun. Dig. 3306.

In a collision of passenger train of one defendant with freight train of other defendant, where crossing of their roads was governed by an automatic signal system, there was no abuse of judicial discretion in excluding testimony of a declaration made by engineer of Great Northern to third parties, four or five minutes after collision; said engineer having fully testified to what he said and did prior to collision. O'Connor v. C., 190M277, 251NW674. See Dun. Dig. 3301.

Court did not err in refusing to permit plaintiff to testify to a statement he overheard his brother make more than half an hour after he set fire involved in action on fire policy. Zane v. H., 191M382, 254NW453. See Dun. Dig. 3301.

Plaintiff may not bolster up his case by testifying as to self-serving declarations made by him as a part of res gestae. Fischer v. C., 193M73, 258NW4. See Dun. Dig. 3305a.

Testimony of witness that driver of car made statement, "I just came from Rochester where I have been on business for the company," shortly after and at place of accident, was a recital of past events, not connected with accident, and was not a part of res gestae or competent to prove agency. Wendell v. S., 194M368, 260NW 503. See Dun. Dig. 3301.

Time element is sometimes considered in determining whether declarations are res gestæ or narrative, but it is not considered controlling. Jacobs v. V., 199M572, 273 NW245. See Dun. Dig. 3300.

As affecting admissibility of statement of employee as a part of the res gestæ, consideration should be given to facts that at time statement was made there was an entire lack of motive for the employee to misrepresent, as where injury appeared so insignificant that employee could not have given a thought to subsequent application for compensation. Id.

In workmen's compensation cases a liberal policy should be followed in admission of declarations as part

of res gestæ in order that purpose of compensation act be carried out. Certain statements made by deceased approximately forty-five minutes after accident held properly admitted as part of res gestæ. Id. See Dun. Dig. 3301.

In action for injuries to building due to fall of water tank in process of repair, statement of dying helper that building was rotten, shoring held, and tank was full of water, was inadmissible as a conclusion rather than statement of fact. Pacific Fire Ins. Co. v. K., 201M500, 277NW226. See Dun. Dig. 3311.

A res gestae statement is inadmissible if it is a mere conclusion rather than statement of fact. Id. See Dun. Dig. 3300.

Whether statements following an accident are res gestae is primarily for the trial court. Noesen v. M., 204M 233, 283NW246. See Dun. Dig. 3300, 3301.

With evidence of agency in record, declarations of agent in course of principal's business become admissible against latter as part of res gestae. Schlick v. B., 286NW 356. See Dun. Dig. 3300.

Res Gestae. 22MinnLawRev391.

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., 188M69, 247NW8. See Dun. Dig. 3258.

It was not error to receive in evidence a revolver found in path plaintiff's brother took when fleeing from scene of arson, in action on fire policy. Zane v. H., 191 M382, 254NW453. See Dun. Dig. 3258.

Use of a human skull on examination of an expert witness on question whether insured committed suicide or accidentally was shot was not improper. Backstrom v. N., 194M67, 259NW681. See Dun. Dig. 3258.

It was not improper for defendant to mark statements belonging to plaintiff as defendant's exhibits, and then offer all of it in evidence where offer was made only for purpose of getting into record exception to court ruling that entire statement was not admissible. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 9721a.

In action for injuries from electricity it was not error to receive in evidence shoes and trousers worn by injured person, showing holes burned by current, even though counsel in open court admitted that plaintiff received burns. Schorr v. M., 203M384, 281NW523. See Dun. Dig. 2996, 3258.

In laying foundation for receipt in evidence of object claimed to have been cause of accident, it is ordinarily enough that witness can identify such object. Lestico v. K., 204M125, 283NW122. See Dun. Dig. 3258.

12. Documentary evidence.

See §§9852-1 to 9852-7 relating to business records.

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, 236NW468. 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.

Court did not err in holding that there was sufficient foundation for introduction of a photograph of place of accident. Kouri v. O., 191M101, 253NW98. See Dun. Dig. 3363.

Matter of sufficiency of foundation for introduction of photograph is largely for trial court. Id.

Testimony of life insurance agent that he was familiar with instructions given him by insurer, was sufficient foundation for introduction in evidence of instruction that agents should not furnish claim blanks unless policy is in force. Kassmir v. P., 191M340, 254NW446. See Dun. Dig. 3244, 3251.

Unsigned writing of deceased widow that daughter was to have all property after her death, held inadmissible as evidence of contractual obligation, there being nothing to indicate that writing was complete or that it would not contain much more if and when completed. Hanefeld v. F., 191M547, 254NW821. See Dun. Dig. 1734.

Record of affidavits filed pursuant to §9648 was competent proof of taxes and insurance paid subsequent to foreclosure sale by holder of sheriff's certificate. Young v. P., 192M446, 256NW906. See Dun. Dig. 3355.

In a death action wherein it appeared mother of decedent was sole beneficiary, mortality tables were admissible to show life expectancy of the mother, even if not admissible to show life expectancy of decedent, who was in ill health. Albrecht v. P., 192M557, 257NW377. See Dun. Dig. 3353.

Mortality tables were admissible in evidence in action for death though evidence indicated that decedent had a weak heart. Id.

It was error to receive in evidence a copy of a police report made by officer called to the scene of accident. Duffey v. C., 193M358, 258NW744. See Dun. Dig. 3348.

Certain accommodation notes were so connected with testimony relating to note involved in action by accommodation maker for damages for breach of agreement to hold him harmless that evidence touching thereon was properly received. Cashman v. B., 195M195, 262NW216. See Dun. Dig. 3237.

Court was justified in holding that foundation for introduction of hospital records was properly laid by stipulation and conduct. Schmidt v. R., 196M612, 265NW816. See Dun. Dig. 3357.

There is no parallel between hearsay reports of police officers and hospital charts kept by an attending nurse for information of physician in charge of patient. Draxten v. B., 197M511, 267NW498. See Dun. Dig. 3286.

There was no error in permitting injured plaintiff's doctor to refresh his recollection from hospital chart identified by him as one made during his treatment of her at hospital. Id. See Dun. Dig. 10328.

Certificate of undertaker was rightly excluded as of no probative force on issue tried—it being palpably hearsay of deputy coroner not a physician. Miller v. M., 198M497, 270NW559. See Dun. Dig. 3348.

Falsity of allegations in a reply may be established by affidavit. Berger v. F., 198M513, 270NW589. See Dun. Dig. 7664.

A pleading in one action may be used as an admission against same party in another action. Tri-State Transfer Co. v. N., 198M537, 270NW684. See Dun. Dig. 3424.

Admission of hospital chart in evidence was proper under doctrine enunciated in Schmidt v. Riemenschneider 196M612, 265NW816. Taaje v. S., 199M113, 271NW109. See Dun. Dig. 3357.

When signatures are proved it is presumed that an affidavit was actually sworn to by person who signed as affiant, and if proof does not embrace a fact necessary to negative taking of affidavit, presumption will save it. Siewert v. O., 202M314, 278NW162. See Dun. Dig. 139.

Instruction as to purpose, weight, and use to be made of mortality tables in connection with death of a person in ill health held correct. Paine v. G., 202M462, 279NW 257. See Dun. Dig. 3354.

Admission of mortality tables in evidence was not error, although deceased was not in normal health at time he was killed. Id. See Dun. Dig. 3353.

In proceedings under Workmen's Compensation Act to recover compensation for death of motorman suffering a heat stroke, it was not error to exclude from evidence records in office of vital statistics showing a high death rate due to extreme heat during the month involved. Ruud v. M., 202M480, 279NW224. See Dun. Dig. 3347.

In action for rent against one claiming that he was only acting as agent for his son in renting store containing stock of goods purchased from third person, bills advertising a sale of stock purchased, circulated by a certain company of which defendant was president, were admissible in evidence as bearing on defendant's interest in business. Gates v. H., 202M610, 279NW711. See Dun. Dig. 3232.

In action for injuries caused by nuisance at oil station wherein issue was whether defendant was in possession of station, court did not err in admitting in evidence defendant's application to city authorities to operate the station as well as a stamp used on sales slips at station, indicating or characterizing manner of conducting station. Noetzelman v. W., 204M26, 283NW481. See Dun. Dig. 3347.

12¼. Photographs.

Where defendant was permitted to introduce four photographs of two street cars after they had been jacked up to permit release of occupants of automobile, it could not be said that it was error to admit one photograph introduced by plaintiff and described by witness as "the way it looked when they were jacked up." Luck v. M., 191M503, 254NW609. See Dun. Dig. 3233.

There was no error in receiving in evidence for purposes of illustration and comparison an X-ray of pelvis of a female two years older than injured plaintiff, X-rays of whose pelvis went in evidence without objection. Draxten v. B., 197M511, 267NW498. See Dun. Dig. 3260, 9728.

12½. Best and secondary evidence.

A naturalization certificate lost or destroyed by fire, may be proved by oral testimony where there is no court record of its issuance and no better evidence available. Miller v. B., 190M352, 251NW682. See Dun. Dig. 3277, 3389.

Testimony of a witness of his own knowledge as to rental income of certain property was erroneously stricken as not best evidence, though he had books of account which were available. State v. Walso, 196M525, 265NW345. See Dun. Dig. 3263.

Admissibility of parol evidence to prove a divorce. 16 MinnLawRev711.

12¾. Demonstrations and experiments in court.

There was no error in permitting a sheriff to demonstrate by lying on floor position and posture of deceased's

body when found. Backstrom v. N., 194M67, 259NW681. See Dun. Dig. 3255.

Use of skeleton and hammock to demonstrate nature of injuries held not prejudicial. Timmerman v. M., 199M 376, 271NW697. See Dun. Dig. 9722.

In proceeding to obtain compensation for death of motorman suffering heat stroke, refusal to admit in evidence experiment made with car operated by employee in respect to heat discharged in motorman's cab from operation of car, made several months after injury in question, was matter resting largely in discretion of commission to admit or reject. Bruce v. M., 202M480, 279NW 234. See Dun. Dig. 3246.

13. Parol evidence affecting writings.

Where from letter itself, in which writer expressed an intention to give certain mortgages to plaintiff, intention of writer could not be determined with reasonable certainty, evidence of surrounding circumstances at time of writing and subsequent acts with respect to the mortgagor was admissible to show intention of alleged settlor of trust at time of writing. Bingen v. F., (DC-Minn), 23FSupp958. Rev'd on other grounds, (CCA8), 103 F(2d)260.

Receipts on checks can be explained by parol evidence, unless receipt embodies a contract. Wunderlich v. N., (DC-Minn), 24FSupp640.

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. Helder 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., 188M109, 246NW663. See Dun. Dig. 1012, 3368.

Extrinsic evidence is not admissible as bearing on intent of insurer where policy is unambiguous. Wendt v. W., 188M488, 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., 188M612, 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., 189M461, 250NW43. See Dun. Dig. 3373.

Parol evidence is admissible to show fraud in inducement of a written contract. National Equipment Corp. v. V., 190M596, 252NW444. See Dun. Dig. 3376.

To be justified in setting aside a written contract and holding it abandoned or substituted by a subsequent parol contract at variance with its written terms, evidence must be clear and convincing, a mere preponderance being insufficient. Dwyer v. I., 190M616, 252NW 837. See Dun. Dig. 1774, 1777.

Even if it be supposed that a signed writing is but partial integration of a contract, a parol, contemporaneous agreement is inoperative to vary or contradict the terms which have been reduced to writing. McCreight v. D., 191M489, 254NW623. See Dun. Dig. 3392.

Proof of promissory fraud, inducing a written contract, cannot be made by representations contradictory of the terms of the integration. Id. See Dun. Dig. 3376, 3827.

Oral agreement of real estate mortgagee to extend time of payment to certain date in consideration of mortgagor giving chattel mortgage on crops to secure payment of taxes was not void as an attempt to vary terms of written instrument, which instrument was within statute of frauds. Hawkins v. H., 191M543, 254 NW809. See Dun. Dig. 8855.

Parol evidence rule prohibits proof of a contemporaneous parol agreement in contradiction of terms of writing. Crosby v. C., 192M98, 255NW853. See Dun. Dig. 3368.

Although the name of plaintiff's husband was signed to conditional sales contract by which plaintiff procured an automobile from dealer, parol evidence was admissible to show that she was real purchaser of car. Saunders v. C., 192M272, 256NW142. See Dun. Dig. 3371.

It being admitted that the conditional sales contract was blank as to price and terms when signed by the vendee, oral testimony was admissible, as between the parties to the contract, to prove that the price and terms thereafter inserted by the vendor were not those agreed to or authorized. Id. See Dun. Dig. 3370.

Cause of action being for fraud and deceit, parties were not restricted by rule that parol evidence may not be received to vary or contradict written contracts. Nelson v. M., 193M455, 258NW828. See Dun. Dig. 3376.

Intent of parties to a written instrument must be gathered from words thereof after consideration of whole instrument, and evidence as to intent should not be resorted to unless there is some uncertainty or ambiguity arising from words used. Towle v. F., 194M 520, 261NW5. See Dun. Dig. 3399(84).

In action on promissory note by payee, defendant could testify and defend on ground that it was orally agreed that diamond for which note was given could be returned if not satisfactory to woman. Hendrickson v. B., 194M528, 261NW189. See Dun. Dig. 3377.

Parol evidence is admissible to show that an instrument was delivered to take effect and become operative only on happening of a certain contingent future event. Id.

A parol contemporaneous agreement is inoperative to vary or contradict terms which have been reduced to writing. Id.

On a claim against his father's estate for services rendered, it was not error to admit evidence of value of a farm deeded to son upon payment by son's wife of an amount much less than value of farm, upon issue of whether or not there was a promise to pay for such services in addition to value of farm over amount so paid. Delva's Estate, 195M192, 262NW209. See Dun. Dig. 3232.

Conversations prior to or at time deed was given in which father indicated his intentions in regard to claimant, were admissible. Id. See Dun. Dig. 3403.

Evidence that a note was given by the son to the father long after the deed was given was admissible as showing a situation inconsistent with the claimed debt. Id. See Dun. Dig. 3232.

Printed "Rural Service Agreement" entered into between farmer and power company was incomplete and did not prevent plaintiff from showing by oral evidence a collateral agreement as to price to be paid by defendant for transfer to it of service line and time when payment was to be made. Bjornstad v. N., 195M439, 263NW289. See Dun. Dig. 3392.

Rule forbids adding to instrument by parol where writing is silent, as well as varying it where it speaks. Taylor v. M., 195M448, 263NW537. See Dun. Dig. 3368.

Before evidence of oral agreement is received to supplement a written contract it must appear that at least three conditions exist: (1) oral agreement sought to be proved must in form be a collateral one; (2) it must not contradict express or implied provisions of written contract; and (3) it must be one that parties would not ordinarily be expected to embody in writing and it must not be so clearly connected with principal transaction as to be part and parcel of it. Id.

Question whether proper interpretation of contract, in light of surrounding circumstances and purposes of parties, admits parol evidence to prove a collateral oral agreement, is for court. Id.

A document acknowledging receipt of bank stock is construed to be contractual in character and not a mere receipt, and not subject to parol proof of additional contract by defendants to purchase stock not mentioned therein. Id. See Dun. Dig. 3391.

Parol evidence held admissible with regard to pledging of stock to secure debt of a third person. Stewart v. B., 195M543, 263NW618. See Dun. Dig. 3385.

Parol evidence rule was not violated by resort to extrinsic circumstances to show that apparent wife rather than real wife was beneficiary under a life insurance trust. Soper's Estate, 196M60, 264NW427. See Dun. Dig. 3368.

Where a person signs a promissory note in lower left-hand corner thereof, and two makers sign in lower right-hand corner, below whose signatures there is a vacant line, and mortgage securing note recites that note is signed by two makers who signed in lower right-hand corner, there is an ambiguity and parol evidence is admissible to show whether he signed as a maker. Union Cent. Life Ins. Co. v. F., 196M260, 264NW786. See Dun. Dig. 3406.

Parol evidence rule has no application where witness testified as of his own knowledge as to facts also set forth in books of account. State v. Walso, 196M525, 265 NW345. See Dun. Dig. 3368.

A mere oral promise or agreement to pay a promissory note, having a fixed due date, in installments before due, is invalid, and cannot be shown to vary terms of note for purpose of showing usury, where no usury has actually been taken or received by lender. Blindman v. I., 197M93, 266NW455. See Dun. Dig. 3382.

Plaintiff is not in position to prove an error on admission in evidence of conversations between parties at time contract and deed were made, having opened up that subject himself. Priebe v. S., 197M453, 267NW376. See Dun. Dig. 3237, 3368.

From written documents and facts and circumstances shown to exist at time of transaction, whereby one bank contracted with another bank, there appears sufficient ambiguity in written instruments to admit oral evidence on question of plaintiff's duty to exercise efforts and diligence to collect and secure bills receivable. State Bank of Monticello v. L., 198M98, 268NW918. See Dun. Dig. 3406.

Where individual in business organizes a corporation to take it over, transferring all his assets, subject to his liabilities and obligations, corporation becomes obligated to fulfill written contract of individual whereby he employed a superintendent for business for a term of years, and fact that corporation assumed employment contract may be proven by parol. McGahn v. C., 198M328, 269 NW830. See Dun. Dig. 3395.

Acceptance and recording of deed acted as waiver of any rights that might have existed by virtue of claimed prior contract for the latter. Berger v. F., 198M513, 270 NW589. See Dun. Dig. 10019.

Where a deed absolute in form is alleged to have been given for purpose of securing a loan, court will look through form of the transaction to determine its character and will regard it merely as a mortgage if parties so intended. Nitkey v. W., 199M334, 271NW873. See Dun. Dig. 6155.

Whether deed absolute is mortgage will be ascertained from written memorials of transaction and all attendant facts and circumstances, although documents evidencing transaction make a prima facie case for what they purport to be. Id.

Parol testimony will be admitted to explain meaning of word other than that meaning generally accepted only when proof shows a uniform use of word in particular business in a sense entirely different from its still generally prevailing signification. Franklin Co-Op. Creamery Assn. v. E., 200M230, 273NW809. See Dun. Dig. 3368.

A release of damages, plain and unambiguous, cannot be shown by parol to be other than what it purports to be on its face. Ahlsted v. H., 201M82, 275NW404. See Dun. Dig. 3391.

It is not contradicting terms of a bill of sale or conveyance to prove by parol that it was intended to transfer title merely as security. Holmes v. L., 201M44, 275NW 416.

Registration of a motor vehicle does not establish and determine title to a vehicle registered, and parol evidence is admissible to show that title is different than that appearing from registration. Bolton-Swanby Co. v. O., 201M162, 275NW855. See Dun. Dig. 3390.

Report of sale filed by dealer with secretary of state may be varied and contradicted by parol evidence to show true ownership of vehicle referred to in report. Id.

Where promissory notes executed by a partnership and surviving partners were "payable out of funds to be received from S. and M. matters", parol evidence was admissible to show meaning of "S. and M. matters." Selover v. S., 201M562, 277NW205. See Dun. Dig. 3369.

Parol evidence is admissible to show that a contract not under seal, delivered by maker to party in whose favor it runs, was not intended to be operative as a contract from its delivery, but only on happening of some future contingent event, though that be not expressed by its terms. Minar Rodelius Co. v. L., 202M149, 277NW 523. See Dun. Dig. 3377.

Extrinsic evidence or parol testimony may be received to disclose a latent ambiguity as to identity of a legatee or beneficiary in a will, and same sort of evidence is admissible to remove ambiguity disclosed. Peterson's Estate, 202M31, 277NW529. See Dun. Dig. 10260.

Absent fraud or mistake, parol evidence is inadmissible to show that words used in a lease had some other and different meaning than writing portrayed. Jennison v. P., 202M338, 278NW517. See Dun. Dig. 3368.

An oral "explanation" of meaning of clause in a contract, made at time of its execution, is inadmissible if it destroys that which is written. Id. See Dun. Dig. 3369.

Where alleged title in a party appears to be part of an arrangement between the parties for purposes other than bona fide ownership by person ostensibly holding the title, trier of fact may look through form to substance of transaction and say that semblance of ownership is not the reality. Flaugh v. E., 202M615, 279NW582. See Dun. Dig. 4167a.

Admissions of a grantee in a deed as to intention of parties are admissible. Papke v. P., 203M130, 280NW183. See Dun. Dig. 3306, 3409.

Rule that written agreement may not be varied or added to parol evidence of antecedent or contemporaneous negotiations is one not merely of evidence but is one of substantive law, and rule applies in equity as well as in law. Seifert v. M., 203M415, 281NW770. See Dun. Dig. 3369.

Mortgagor giving grant to mortgagee and making him a mortgagee in possession could not be shown to create a trust based on constructive fraud where evidence necessary to entitle mortgagor to recovery of rents and profits would violate parol evidence rule. Id. See Dun. Dig. 9915, 9916.

Where decision hinges upon oral evidence of that which statute of frauds and statute of wills require to be in writing, oral evidence to establish facts claimed must be clear, unequivocal, and convincing. Ives v. P., 204M 142, 283NW140. See Dun. Dig. 3368.

The unity of the parol evidence rule. 14MinnLawRev 20.

Parol evidence to contradict or vary a writing—"Test of reasonable consequences." 18MinnLawRev570.

Parol evidence rule and warranties of goods sold. 19 MinnLawRev725.

14. Expert and opinion testimony.

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., (USCCA8), 59F(2d)648. Cert. den., 287US658, 53SCR 122. See Dun. Dig. 3337.

Whether application for life insurance policy was readable, held not matter for expert testimony. First Trust Co. v. K., (USCCA8), 79F(2d) 48.

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, 188M252, 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., 189M205, 248NW733. See Dun. Dig. 3069, 3073.

In libel case, plaintiff could testify that he believed newspaper publication affected his family and friends. Thorson v. A., 190M200, 251NW177. See Dun. Dig. 5555.

That a hypothetical question to an expert is based upon subjective symptoms goes to weight of his answer, not to its admissibility. Johnston v. S., 190M269, 251NW 525. See Dun. Dig. 3337.

Trial court's determination of qualification of an expert witness should stand, unless it clearly appears that knowledge and experience of witness is no aid to triers of fact. Palmer v. O., 191M204, 253NW543. See Dun. Dig. 3325.

A coroner and undertaker held qualified to testify as to cause of death in action on accident policy. Id. See Dun. Dig. 3327, 3335.

Expert testimony to the effect that it was improper to treat a delirious patient in a hospital by applying restraints and administering hypodermic injections of strychnine, a stimulant, and that such treatment was responsible for patient's death, held to justify verdict. Brase v. W., 192M304, 256NW176. See Dun. Dig. 3332.

Plaintiff's expert witnesses were not disqualified from testifying as to cause of death because they had not examined deceased's skull and brain, but had examined other vital organs. Id. See Dun. Dig. 3336.

Whether one who had not seen a farm for 12 years was qualified to testify to its value was for trial court to determine. Peterson v. S., 192M315, 256NW308. See Dun. Dig. 3335.

Refusal to strike out testimony of physician that it was possible that decedent had a fracture of the skull was without prejudice where skull fracture was not included as one of facts upon which physician based his opinion that accident aggravated weak heart condition and contributed to cause death. Albrecht v. P., 192M557, 257NW377. See Dun. Dig. 422(94), 3337.

Question of qualification of expert witness is one of fact for trial court whose action in this respect will not be reversed unless clearly contrary to evidence. Backstrom v. N., 194M67, 259NW681 See Dun. Dig. 3335.

Opinion of expert based upon facts not in possession of hospital authorities is of no probative value upon issue of negligence of hospital in not taking steps to prevent nervous patient from jumping out of window. Mesedahl v. S., 194M198, 259NW819. See Dun. Dig. 3324.

There was no error in reception of diagnosis of attending doctor, where it is not made to appear that he took into consideration any improper factor. Paulos v. K., 195M603, 263NW913. See Dun. Dig. 3339.

Wide discretion is given trial court in matter of receiving opinion testimony of experts. State v. St. Paul City Ry. Co., 196M456, 265NW434. See Dun. Dig. 3325.

Fact that testimony of an expert goes to very issue before court as an opinion does not necessarily call for exclusion. Id. See Dun. Dig. 3326.

Trial court did not abuse its discretion in a street car rate controversy in permitting experts to testify as to the effect of requiring street railway to sell two car tokens for fifteen cents, instead of one token for ten cents and six tokens for forty-five cents, as against objection that testimony was conjectural and speculative. Id. See Dun. Dig. 3332.

Where there are definite, related, and connected events leading up to a death, it cannot be said as a matter of law that medical testimony fixing such events as proximate and primary cause of death is speculative and conjectural. Jorstad v. B., 196M568, 265NW814. See Dun. Dig. 3327.

Question is for jury where experts disagree. Id. See Dun. Dig. 3334.

Where facts are disputed, either party may put to an expert questions embodying disputed facts as his construction of evidence would show them to be. Id. See Dun. Dig. 3337.

One who had been personal physician of deceased in childhood was competent to testify as to cause of death. Id. See Dun. Dig. 3335.

Expert medical testimony as to extent of injury, based in part on history of case as related by plaintiff, held inadmissible, where examination was made solely for purpose of qualifying physician as expert and not for purpose of treatment. Faltico v. M., 198M88, 268NW857. See Dun. Dig. 3340.

Cross-examination as to statements contained in medical works must be confined to legitimate impeachment of what witness has testified to. Hill v. R., 198M199, 269 NW397. See Dun. Dig. 3343.

Where there has not been sufficient sales to establish market price for land, court may permit introduction of opinions of men acquainted with property, their adaptability for use, and all other facts and circumstances having to do with value. State v. Oliver Iron Mining Co., 198M385, 270NW609. See Dun. Dig. 9210.

Reception of expert opinion evidence as to infectious character of tuberculosis held proper. Taaje v. S., 199M 113, 271NW109. See Dun. Dig. 3327.

Non expert witness may give an opinion as to mental capacity only after having first stated facts and circumstances upon which opinion is based. Bird v. J., 199 M252, 272NW168. See Dun. Dig. 3316.

Motion at close of evidence to strike testimony of medical expert relative to results to be anticipated from injury to pubis bone on ground he did not testify that anticipated future disability was reasonably certain to be suffered held properly denied. Timmerman v. M., 199 M376, 271NW697. See Dun. Dig. 3332.

Admission of expert testimony is largely within discretion of trial court. Miller v. M., 199M497, 270NW559. See Dun. Dig. 3324.

Experience of undertaker was such that he was properly permitted to testify whether or not water bubbling from mouth of a body found submerged came from lungs; and remark of court in referring to fact of no water issuing from mouth should not result in a new trial because of the addition of words "or lungs." Id. See Dun. Dig. 3327.

Medical expert may give his opinion as to duration and permanency of personal injuries and nature and extent of disability caused by such injuries. Piche v. H., 199M 526, 272NW591. See Dun. Dig. 3325, 3326, 3327(40).

A sufficient foundation is laid for an opinion of a medical expert as to cause of plaintiff's injuries by showing that he was present in court and heard testimony of plaintiff and his witnesses that plaintiff was well and able-bodied before an automobile accident and injured and disabled immediately thereafter, and that expert had examined plaintiff and had taken X-rays of injuries; and such opinion is not inadmissible because it bears directly on an issue to be decided by jury. Id. See Dun. Dig. 3338.

Expert opinion evidence is admissible whenever subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without assistance of an expert. Wyatt v. W., 200M106, 273NW600. See Dun. Dig. 3324.

Opinion evidence should not be accepted unless consistent with reason and common sense as applied to situation presented. Id. See Dun. Dig. 3324(31).

Verdict based on testimony of two medical witnesses, contradicted by five medical witnesses, to effect that there was a fracture of lamina of second cervical vertebra and a crushing fracture of odontoid process, could not be held unsupported by evidence, though injured person walked around and went about his affairs for a day before calling upon a doctor. Id.

It was not error to exclude expert testimony that it was a practical route to drive from 1900 Princeton avenue, St. Paul, to the St. Paul Hotel, through intersection of Colborne and West Seventh streets, where decedent met with fatal accident. Bronson v. N., 200M237, 273NW 681. See Dun. Dig. 3325.

Value of services of an attorney may be shown by opinion of practicing attorney, including opinion of claimant, but such opinion is not conclusive upon the jury. Daly v. D., 200M323, 273NW814. See Dun. Dig. 701, 3247.

The opinion of a physician or surgeon as to condition of injured or diseased person, based wholly or in part on history of case as told to him by latter on a personal examination, is inadmissible where examination was made for purpose of qualifying physician or surgeon to testify as a medical expert. Preveden v. M., 200M523, 274 NW685. See Dun. Dig. 3340.

On cross-examination of an expert, a hypothetical question may be so framed as to test reliability of opinions expressed on direct, and scope of cross-examination is within trial court's discretion. Schaedler v. N., 201M 327, 276NW235. See Dun. Dig. 3342.

Knowledge on part of a witness of specific sales of property of similar character to that under consideration in a condemnation proceeding may be employed by him in forming an opinion of value of other lands equally circumstanced, but other specific sales of similar lands and prices paid therefor may not be introduced as substantive evidence of value of particular tract involved in condemnation. Minneapolis-St. Paul Sanitary Dist. v. F., 201M442, 277NW394. See Dun. Dig. 3071.

Expert testimony is admissible to aid triers of fact in cases in which subject of inquiry is such that inexperienced persons are unlikely to prove capable of forming correct judgment upon it without such assistance. Golden v. L., 203M211, 281NW249. See Dun. Dig. 3325.

Mechanic with "lots of experience with tires, due to wrecks," on which he was able to form an opinion whether air had suddenly or gradually escaped from an automobile tire, should have been permitted to state that opinion. Lestico v. K., 204M125, 283NW122. See Dun. Dig. 3323.

In rulings on opinion testimony trial judge has a wide discretion, but it is a judicial discretion to be exercised favorably to any honest course capable of eliciting relevant truth. Id. See Dun. Dig. 3325.

Opinion testimony, whether expert or nonexpert, is not objectionable simply because it goes to a controlling question of fact. Id. See Dun. Dig. 3326.

Opinion of experts as to value of an attorney's services is not in ordinary cases conclusive although not directly

contradicted. Pye v. D., 204M319, 283NW487. See Dun. Dig. 701.

Whether a witness offered as an expert possesses requisite qualifications involves so much of element of fact that great consideration must necessarily be given to decision of trial judge. Detroit Lakes Realty Co. v. M., 204M490, 284NW60. See Dun. Dig. 3335.

Opinion of experts as to value of services, even though not directly contradicted, is not in ordinary cases conclusive. Becker County Nat. Bank v. D., 204M603, 284 NW789. See Dun. Dig. 3334.

Expert testimony as to value of a lawyer's services is not in ordinary cases conclusive. Fitzgerald's Estate, 285 NW285. See Dun. Dig. 3334.

Opinions of experts are admitted in order to assist trier of facts in arriving at truth, and are admissible whenever subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. Westereng v. C., 285NW717. See Dun. Dig. 3325.

Fact that medical expert for employer is exceptionally qualified does not permit court to pass aside less experienced physician testifying for employee. Id. See Dun. Dig. 3334.

Trial court primarily determines qualifications of a witness offered as an expert, and it did not err in determining that certain witnesses were competent to testify as to value of services of children of president of corporation doing certain specified work for corporation. Keough v. S., 285NW809. See Dun. Dig. 3335, 10303.

It was not error to receive testimony of an accountant as to amount of working capital and surplus necessary for particular corporation to have. Id. See Dun. Dig. 3335.

Offered testimony as to condition of tail lights of truck after accident ought to have been received for what it was worth, even though offer was not satisfactory in respect to foundation of witness's knowledge of mechanism of lighting arrangement. Johnson v. K., 285NW 881. See Dun. Dig. 3335.

Court was not bound to accept testimony of an adjuster, employed by insured to prepare an inventory and proof of loss of stock of merchandise damages by fire, as to market value thereof before and after fire, as such inventory could not be made without assistance of insured who had handled the same, but who did not attend trial. Foot v. Y., 286NW400. See Dun. Dig. 3336.

Blood-grouping tests and the law. 21MinnLawRev671.

Blood-grouping tests. 22MinnLawRev836.

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., 188M69, 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., 189M451, 249NW 668. See Dun. Dig. 3311.

A lay witness may state facts within his own knowledge and observation as to another's health, but may not express mere opinion. Fryklind v. J., 190M356, 252 NW232. See Dun. Dig. 3311(63).

A farmer, acquainted with a farm in his neighborhood and having an opinion as to its value, may give his opinion without further foundation. Grimm v. G., 190M 474, 252NW231. See Dun. Dig. 3313, 3322, 3335.

Admission of testimony as to what witness understood was meaning of conversation and words used in negotiations, though conclusions of witness was without prejudice where trial was before court without jury and court heard what words used in claimed conversation were. Hawkins v. H., 191M543, 254NW809. See Dun. Dig. 3311.

In action for conversion of automobile, plaintiff could testify as to value of automobile. Saunders v. C., 192M 272, 256NW142. See Dun. Dig. 3322.

Proffered testimony of insurance agent that he would not have written policies had he known of the existence of a contract to destroy building in 10 years held properly excluded as conclusion of ultimate fact. Romain v. T., 193M1, 258NW289. See Dun. Dig. 3311.

In action to recover damages from occupant of premises abutting a sidewalk for fall on an icy driveway over sidewalk, opinion of witnesses that clumps or hummocks of ice, upon which plaintiff fell, had been caused by occupant in an attempt to clean driveway was properly excluded within discretion of trial court. Abar v. R., 195M 597, 263NW917. See Dun. Dig. 3312.

There was no reversible error in refusing witnesses who have testified fully as to facts they observed to be recalled to testify as to conclusions they drew from such facts. Id.

To what extent a witness, not an expert, may express an opinion as to what caused condition which he testified to is for trial court. Id. See Dun. Dig. 3315.

Where a nonexpert witness was allowed to express an opinion on mental capacity without first detailing facts upon which his opinion was based, and record is such that trial court could have found for either party, admission of opinion testimony was reversible error even though trial was before a court without a jury. Johnson v. H., 197M496, 267NW486. See Dun. Dig. 3316.

It is not error to strike an answer of a witness, not responsive to question. Nelson v. N., 201M505, 276NW801. See Dun. Dig. 9742.

A statement which is merely a conclusion is inadmissible. Pacific Fire Ins. Co. v. K., 201M500, 277NW226. See Dun. Dig. 3311.

Objections were properly sustained to questions calling for conclusions of witnesses. Clancy v. D., 202M1, 277NW264. See Dun. Dig. 3311.

Where it appeared in record that husband of witness had owned and operated an automobile for 12 years, it could not be said that witness did not have some knowledge of speed of traveling automobiles. Shuster v. V., 203M76, 279NW841. See Dun. Dig. 3322a.

Industrial commission did not err in excluding as conclusion of witness testimony that injured employee was not able to hoe some corn he had planted, or walk, or lift a pail. McGrath v. B., 203M326, 281NW73. See Dun. Dig. 3311.

It was not error to receive in evidence testimony of a witness who did not see the collision as to speed of the defendant's automobile a second or two before accident and at a point a block from place of collision. Spencer v. J., 203M402, 281NW879. See Dun. Dig. 3322a.

Opinion evidence as to value of a mother's work and care to her three year old son by a person familiar with facts was admissible. Olstad v. F., 204M118, 282NW694. See Dun. Dig. 3322.

Testimony of witness who has observed facts of which he speaks is not open to attack as a mere conclusion, if in essence it is a narration of fact. Lestico v. K., 204M 125, 283NW122. See Dun. Dig. 3311.

Statement of experienced foreman as to cause of accident was a statement of fact and not a mere conclusion. Noesen v. M., 204M233, 283NW246. See Dun. Dig. 3315.

Owner of a stock of merchandise could not testify to its market value where he had no knowledge of stock which another had purchased in job lots, and from which sales had been made by such other. Foot v. Y., 286NW 400. See Dun. Dig. 3322.

16. Weight and sufficiency.

Neither court nor jury may credit testimony positively contradicted by physical facts. Liggett & Myers Tob. Co. v. D. (CCA8), 66F(2d)678.

Testimony in conflict with the physical facts and scientific principles is lacking in all probative force. Jacobson v. C. (CCA8), 66F(2d)688.

Where evidence is equally consistent with two hypotheses, it tends to prove neither. P. F. Collier & Son v. H. (USCCA8), 72F(2d)625. See Dun. Dig. 3473.

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.

Testimony of a disinterested and unimpeached witness may not be disregarded. Allen v. P., 192M459, 257NW84. See Dun. Dig. 10344a.

Credibility and weight of testimony is peculiarly for the jury and in absence of substantial error, court will not interfere. State v. Chick, 192M539, 257NW280. See Dun. Dig. 2477, 2490.

Where plaintiff's entire case for recovery of substantial damages for personal injuries depended upon testimony of medical expert who testified that he treated plaintiff for injuries supposed to have been sustained in spring of 1930, and thereafter complaint was amended to conform to proof showing that accident occurred in November 1930, and medical witness was not recalled, there was no evidence to sustain recovery of damages awarded. Neuleib v. A., 193M248, 258NW309. See Dun. Dig. 2591.

A verdict of a jury upon specific questions of fact submitted to them in an equity action is as binding on court as a general verdict in a legal action, and it is subject to same rules as to setting aside for insufficiency of evidence. Ydstie's Estate, 195M501, 263NW447. See Dun. Dig. 415.

Plaintiff is not entitled to have his case submitted to jury with but a scintilla of evidence to support his allegations. Carney v. F., 196M1, 263NW901. See Dun. Dig. 9764.

Uncontradicted testimony of an unimpeached witness given with apparent fairness, not containing within itself contradictions or inherent weakness or improbabilities and not shown by other circumstances to be false, cannot be disregarded by jury or court. Cogin v. I., 196 M493, 265NW315. See Dun. Dig. 9764.

No credence need be given to testimony of a witness who knowingly testifies falsely as to a material fact. Segerstrom v. N., 198M298, 269NW641. See Dun. Dig. 10345.

Credible uncontradicted and unimpeached evidence cannot be disregarded although given by interested witnesses. Ewer v. C., 199M78, 271NW101. See Dun. Dig. 10344a.

Where defendant rented a hall on third floor of its building to company in order that latter might display its wares, and also furnished chairs for occasion, and a chair collapsed, doctrine of res ipsa loquitur is not applicable, since chair was not under control of defendant. Szyca v. N., 199M99, 271NW102. See Dun. Dig. 3431.

Rule that where admitted physical facts disprove existence of alleged fact upon which cause of action depends, *there can be no recovery, does not apply where* alleged fact disproved is not one upon which cause of action depends. Lacheck v. D., 199M519, 273NW366. See Dun. Dig. 3227b.

Proof of plaintiff's cause of action is not in equilibrio merely because defendant contradicts it and claims that it was caused in some manner other than claimed by plaintiff. Benson v. N., 200M445, 274NW532. See Dun. Dig. 3473.

Weight of evidence is not determined by number of witnesses. Id. See Dun. Dig. 10343a.

Credible, uncontradicted, and unimpeached testimony cannot be disregarded, even though given by an interested witness. Krahmer v. V., 201M272, 276NW218. See Dun. Dig. 3473.

Though a parol modification of a written contract must be proved by clear and convincing evidence, test of "clear and convincing" proof has to do with character *of testimony itself and not number of witnesses from* whom it comes. Butterick Pub. Co. v. J., 201M345, 276NW 277. See Dun. Dig. 1774.

Unequivocal and uncontradicted testimony of one witness held to be of clear and convincing quality necessary to prove parol modification of written contract. Id.

Testimony by persons who listened for them that statutory signals were not given by train, held, sufficient to make question of negligence one for jury despite positive testimony by others that whistle was blown and bell rung. Doll v. S., 201M319, 276NW281. See Dun. Dig. 3238.

Causal connection between unlawful act and injury cannot be established by testimony which is conjectural and speculative. Fredrickson v. A., 202M12, 277NW345. See Dun. Dig. 7047.

Number of witnesses does not establish weight of evidence and a verdict may be based upon testimony of a single witness. State v. Hanke, 202M47, 277NW364. See Dun. Dig. 10344.

Verdict may not be founded on mere speculation. Collings v. N., 202M139, 277NW910. See Dun. Dig. 3473.

It is for jury to determine weight of evidence and to choose between conflicting inferences. Paine v. G., 202M 462, 279NW257. See Dun. Dig. 9707.

Circumstantial evidence need not exclude every reasonable conclusion other than that arrived at by jury. Id. See Dun. Dig. 3234, 9707.

Plaintiff seeking to recover damages for negligence upon circumstantial evidence must establish connection as cause between alleged negligence and her injury by circumstances something more than consistent with her theory of case. Reasonable minds must be able to conclude that theory of plaintiff outweighs and preponderates over other theory though it need not exclude every reasonable conclusion other than that contended for or arrived at by the jury. Smock v. M., 203M265, 280NW 851. See Dun. Dig. 3234, 3473.

Opinions founded upon expert knowledge in many cases go directly to main issue and may be only form of evidence by which issue can be determined. Golden v. L., 203M211, 281NW249. See Dun. Dig. 3326.

Evidence of fraud in procuring a signature to a paper at one time, even if true, is not proof that signature to other papers at other times were procured by fraud. Bowen v. W., 203M289, 281NW256. See Dun. Dig. 3252.

Even though testimony of a witness is without extraneous contradiction, it need not be believed by a jury where other circumstances in evidence are such as to discredit it. Weinstein v. S., 204M189, 283NW127. See Dun. Dig. 10344a.

Inherent weakness in uncontradicted evidence for affirmative of issue held sufficient to support negative finding by triers of fact. Spies v. S., 284NW887. See Dun. Dig. 3469.

Proof of crime in a civil proceeding. 13MinnLawRev 556.

16½. Examination of witnesses.

In action for injuries received in collision of automobile and two street cars, court did not err in permitting motorman after recess of court to testify on cross-examination as to conversation with conductor, relative to his stated desire to change his testimony as to one fact. Luck v. M., 191M503, 254NW609. See Dun. Dig. 9715.

In action by passenger for injuries in collision between car and truck, court did not err in sustaining objection to question to driver of car on cross-examination as to whether there was anything to prevent him turning around on the street and going back, there being no testimony of any intention to turn around at that place. Erickson v. K., 195M623, 262NW56. See Dun. Dig. 10317.

Leading questions are proper when the testimony sought is merely preliminary to matters in dispute. Lestico v. K., 204M125, 283NW122. See Dun. Dig. 10317.

Where testimony of witnesses was inconsistent and in many respects unbelievable it was proper to permit cross-examination of witness as to collateral matters to test credibility. Foot v. Y., 286NW400. See Dun. Dig. 10317.

There was no error in refusal to allow will contestants to recall a witness after he had testified that he had fully related conversation which he had had with sister who was charged with having used undue influence. Osbon's Estate, 286NW306. See Dun. Dig. 10321.

Cross-examination of character witnesses as to having heard of particular acts of misconduct. 15MinnLaw Rev240.

17. Impeachment of witnesses.

The plaintiff's case depends upon evidence elicited from defense witnesses, the impeachment of such witnesses on other matters does not bar recovery, on theory that testimony of discredited witnesses must be rejected in toto. Chicago, St. P. M. & O. R. Co. v. K., (CCA8), 102F (2d)352.

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., 189M131, 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, 189M280, 249NW40. See Dun. Dig. 10356 (8).

Answer of a witness to an impeaching question is not evidence of a substantive fact and can be used only to discredit witness impeached. Christensen v. P., 189M548, 250NW363. See Dun. Dig. 10351g, n. 82.

Where an admitted accomplice in crime is called by state as a witness and, on cross-examination, statements contradicting his testimony for state are introduced, state may introduce other statements, made by witness at about same time, consistent with his testimony on direct examination. State v. Lynch, 192M534, 257NW278. See Dun. Dig. 10356.

In automobile accident case where police officer admitted that plaintiff had left scene of accident before he arrived, which was contrary to his statement on direct examination that he saw people involved in the collision, police report made by officer was not admissible to impeach his testimony by showing that report stated that it was based upon what others had seen at accident had told officer. Duffey v. C., 193M358, 258NW744. See Dun. Dig. 10351.

Evidence that plaintiff collected money on insurance carried on life of decedent and that she received at his death personal and real property from his estate, although not to be considered in arriving at amount of damages for his wrongful death, was admissible in refutation of testimony of plaintiff that she had no money with which to redeem certain real property of her husband sold under foreclosure. Wright v. E., 193M509, 259NW75. See Dun. Dig. 2570b, 7193, 7202.

In cross-examination of an impeaching witness, statements made by principal witness in connection with or in explanation of contradictory statements elicited are admissible. Tri-State Transfer Co. v. N., 198M537, 270NW 684. See Dun. Dig. 10348.

Where complaint in another case was introduced to impeach witness, court did not err in permitting attorney *who drew complaint to testify as to what witness actual*ly told him rather than to limit his testimony to relating what witness did not tell him. Id.

Third parties may be called to prove that purportedly contradictory statement used to impeach witness was never made. Id. See Dun. Dig. 10351.

In impeachment, form or nature of contradictory assertion is immaterial, and it may be oral or written. Id.

Any statement contradictory to one made by a witness on the stand may be used for purpose of impeachment, but impeached witness may always explain away the inconsistent. Id.

Where witness admitted fact sought to be shown by certain testimony and exhibits, same were not admissible

for purposes of impeachment. Jache's Estate, 199M177, 271NW452. See Dun. Dig. 10348.

While a party may not impeach a witness called by him or his own testimony, he may contradict such testimony, especially narration of events, by other witnesses; but it was not error of which defendant may complain to exclude offer of evidence to contradict testimony of defendant given understandingly of a fact peculiarly within his own knowledge and apparently honestly and in good faith. Vondrashek v. D., 200M530, 274NW609. See Dun. Dig. 10351, 10356.

Facts tending to show that a witness is interested in result of litigation or is biased in favor of, or against, one of parties, or has a motive for favoring one party against the other, may be shown, as bearing on weight to be given testimony. Timm v. S., 203M1, 279NW754. See Dun. Dig. 3232.

It is competent to show that a witness was under influence of liquor at time of occurrences which he assumes to relate, in order to show impairment of his powers of observation and recollection. Olstad v. F., 204M118, 282 NW694. See Dun. Dig. 10343a.

It was error to exclude evidence of previous statements contradictory to those made by a witness upon trial. Id. See Dun. Dig. 10351.

A party is not bound by evidence of a witness to extent that he may not show a different state of facts by other witnesses. Keough v. S., 285NW809. See Dun. Dig. 10356.

Whether claim of surprise, made in support of a litigant's request for leave to impeach his own witness, is well founded in fact, is a preliminary question for the trial judge, and his ruling thereon will not be disturbed unless abuse of discretion appears. State v. Saporen, 285 NW898. See Dun. Dig. 10356.

There is no occasion for impeachment of a witness by party who calls him unless to caller's surprise he testifies adversely on some material point; and then impeachment must be confined to subject matter of surprising adverse statement. Id. See Dun. Dig. 10356.

Only function of impeaching testimony (consisting of previous contradictory statement of a witness) is negative, extrajudicial statement so used not being affirmative evidence of facts. Id. See Dun. Dig. 10351.

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, 188M252, 247 NW4. See Dun. Dig. 9745.

Court did not err in denying defendant's motion to strike out all evidence as to injury to plaintiff's kidney as a result of accident in question. Orth v. W., 190M193, 251NW127. See Dun. Dig. 2528.

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., 188M130, 246NW669. See Dun. Dig. 2735.

Where request of an autopsy in action on life policy was delayed until a few days before day set for trial, refusal to grant same cannot be held an abuse of discretion. Miller v. M., 198M497, 270NW559. See Dun. Dig. 4872(88).

20. Telephone conversations.

Use of transcripts of pamograph recorded conversations by court and counsel for their convenience while records reproduced conversations in court, transcriptions being identified as correct, but not introduced in evidence, was not prejudicial to defendant. State v. Raasch, 201M158, 275NW620. See Dun. Dig. 3245.

Part IV. Crimes, Criminal Procedure, Imprisonment and Prisons

CHAPTER 93

General Provisions

9906. Crimes defined and classified.

1. Definition of "crime," "offense," "misdemeanor."

Where defendant was permitted but not induced to complete the offense charged, the defense of entrapment is not available. State v. McKenzie, 182M513, 235NW274. See Dun. Dig. 2448b.

A penal statute creating a new offense must plainly inform those upon whom it operates where line of duty is drawn and what law will do if it is overpassed. State v. Northwest Poultry & Egg Co., 203M438, 281NW753. See Dun. Dig. 2417a.

An uncontrollable and insane impulse to commit crime, in mind of one who is conscious of nature and quality of act, is not allowed to relieve a person of criminal liability. State v. Probate Court, 287NW297. See Dun. Dig. 2406.

4. Acts constituting different offenses.

Multiple consequences of a single criminal act. 21 MinnLawRev805.

9907. Meaning of words and terms.

Op. Atty. Gen., Jan. 11, 1930.

9908. Rules of construction.

The provisions of the game law are to be construed according to the fair import of their terms, viewed in the light of the purpose of the law. 177M483, 225NW 430.

Where the Legislature declares an offense in terms so indefinite that they may embrace, not only acts commonly recognized as reprehensible, but also others which it is unreasonable to believe were intended to be made unlawful, the statute is void for uncertainty. State v. Parker, 183M588, 237NW409. See Dun. Dig. 8989.

Courts will favor conclusion that terms of a statute are reasonably certain if they are widely used in same sense in legislative enactment, and also language which has been a part of a statute for a long term of years. State v. Northwest Poultry & Egg Co., 203M438, 281NW 753. See Dun. Dig. 2417.

Courts are obliged to sustain legislative enactments as reasonably certain when possible and will resort to all acceptable rules of construction to discover a competent and efficient expression of legislative will, but are not free to substitute amendment for construction and thereby supply omissions of legislature. Id. See Dun. Dig. 2417.

9909. Persons punishable.

Indians are not subject to state prosecution for crimes on Bois Fort Indian Reservation, but non-Indians are. Op. Atty. Gen. (494b-19), May 31, 1935.

9912. Duress—How constituted.

176M175, 222NW906.

9914. Intoxication or criminal propensity no defense.

1. Intoxication.

Defendant in homicide case held not so intoxicated as to make that a defense. State v. Norton, 194M410, 260 NW502. See Dun. Dig. 2447.

9915. Criminal responsibility of insane persons.

Acts of cruel and inhuman treatment which result from a diseased mind are no cause for divorce. 171M 258, 213NW906.

Statute directing district court not to try a person for crime while he is in state of insanity, imposes a duty on, but does not go to jurisdiction of, the court, and failure to comply with the statute is no ground for collateral attack, as by habeas corpus, on judgment of conviction. State v. Utecht, 203M448, 281NW775. See Dun. Dig. 2476a.

Fact that one is subject to epileptic fits does not exempt him from being tried for crime. Op. Atty. Gen., Jan. 16, 1933.

9916. Conviction of lesser crime, when.

Where entire course of trial not only indicates but compels conclusion that the only offense charged and involved at trial was that of sodomy, court did not err in refusing to submit to jury lesser offenses of indecent assault and assault in third degree. State v. Nelson, 199 M86, 271NW114. See Dun. Dig. 544.

9917. Principal defined.

Owner of business maintaining sign over sidewalk was liable for punishment for maintaining sign in violation of ordinance, although the sign was installed by a sign hanger and though ordinance provided that no one unless a licensed sign hanger should install any sign and should obtain a permit before installing one. 176M151, 222NW639.

Evidence sustains a conviction of manslaughter in the second degree. State v. Stevens, 184M286, 238NW673. See Dun. Dig. 4241.