THE

GENERAL STATUTES

OF THE

STATE OF MINNESOTA

As Amended by Subsequent Legislation, with which are Incorporated All General Laws of the State in Force December 31, 1894

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CHAPTER 73.

WITNESSES AND EVIDENCE.

TITLE 1.

WITNESSES.

§ 5652. Subpœnas[1] for witnesses, when and by whom to be issued.

Every clerk of a court of record and every justice of the peace may issue subpoenas for witnesses in all civil cases pending before the court, or before any magistrates, arbitrators, or other persons authorized to examine witnesses, and in all contests concerning lands before the register and receiver of any land-office in this state.

(G. S. 1866, c. 73, § 1; G. S. 1878, c. 73, § 1.)

See State v. Peterson, 50 Minn. 239, 52 N. W. Rep. 655.

§ 5653. Same—How served.

Such subpoena may be served by any person, by exhibiting and reading it to the witness, or by giving him a copy thereof, or by leaving such copy at the place of his abode.

(G. S. 1866, c. 73, § 2; G. S. 1878, c. 73, § 2.)

§ 5654. Liability for disobedience of subpœna.

If any person duly subpoenaed and obliged to attend as a witness fails to do so, without any reasonable excuse, he is liable to the aggrieved party for all damages occasioned by such failure, to be recovered in a civil action.

(G. S. 1866, c. 73, § 3; G. S. 1878, c. 73, § 3.)

§ 5655. Same—Contempt.

Such failure to attend as a witness, if the subpoena issues out of any court of record, is a contempt of the court, and may be punished by fine not exceeding twenty dollars.

(G. S. 1866, c. 73, § 4; G. S. 1878, c. 73, § 4.)

§ 5656. Attachment for delinquent witness.

The court, in such case, may issue an attachment to bring such witness before it, to answer for the contempt, and also to testify as a witness in the action or proceeding in which he was subpoenaed.

(G. S. 1866, c. 73, § 5; G. S. 1878, c. 73, § 5.)

[1] See "An act to prescribe the form of the printed blanks for district court subpœnas in Wright county." Sp. Laws 1889, c. 448.

§ 5657. "Witness" defined.

A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration is made on oral examination, or by deposition or affidavit.

(G. S. 1866, c. 73, § 6; G. S. 1878, c. 73, § 6.)

§ 5658. Who may be witnesses.

All persons, except as hereinafter provided, having the power and faculty to perceive, and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded, nor those who have been convicted of crime, nor persons on account of their religious opinions or belief; although, in every case, the credibility of the witnesses may be drawn in question. And on the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the court.

(G. S. 1866, c. 73, § 7, as amended 1868, c. 70, § 1; G. S. 1878, c. 73, § 7.)

Prior to the amendment, (Laws 1868, c. 70, § 1,) in a criminal prosecution one defendant was not competent as a witness on behalf of a co-defendant until after discharge or judgment against the defendant whose testimony was offered, whether such defendants be tried together or separately; and the rule was the same whether the offense charged be a simple assault or a graver crime. Baker v. United States, 1 Minn. 207, (Gil. 181;) State v. Dumphey, 4 Minn. 438, (Gil. 340.)

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

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

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

As to competency of witnesses to a will. In re Holt's Will (Minn.) 57 N. W. Rep. 219.

The court must not refer to failure of defendant in criminal trial to testify. State v. Pearce (Minn.) 57 N. W. Rep. 652.

See Cannady v. Lynch, 27 Minn. 435, 436, 8 N. W. Rep. 164; State v. Froiseth, 16 Minn. 296, (Gil. 260, 262;) and cases cited in note to § 5660.

§ 5659. Examination of party or officers, etc., of corporation, at instance of adverse party.

A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agents of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties or any of them, and for that purpose may be compelled in the same manner and subject to the same rules for examination as any other witness to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony.

(1885, c. 193, § 1; G. S. 1878, v. 2, c. 73, § 7a; as amended 1893, c. 105, § 1.)

In proceedings for the probate of a will, proponent, as a witness for contestant, may be interrogated concerning statements said to have been made by him to others concerning decedent's mental capacity. In re Brown, 38 Minn. 112, 35 N. W. Rep. 726.

The provisions of § 5662, subd. 1, are not affected by Laws 1885, c. 193. Wolford v. Farnham, 44 Minn. 159, 46 N. W. Rep. 295.

This section does not permit a party to introduce a part of his own case in chief by cross-examination of his opponent's witnesses. Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. Rep. 598.

One calling the opposite party under this section is not concluded by any statement of fact in his testimony. Schmidt v. Durnman, 50 Minn. 96, 52 N. W. Rep. 277.

See State v. Thaden, 43 Minn. 325, 45 N. W. Rep. 614; Wheaton v. Berg, 50 Minn. 525, 52 N. W. Rep. 926, 928.

§ 5660. Conversations between party and deceased person, etc.

It shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person, relative to any matter at issue between the parties.

(G. S. 1866, c. 73, § 8, as amended 1877, c. 40, § 1; G. S. 1878, c. 73, § 8.)

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

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

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

Upon an indictment for nuisance in obstructing a highway, neighboring land-owners are not interested in the event, within the meaning of this section. State v. Eisele, 37 Minn. 256, 33 N. W. Rep. 785.

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

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

Any parties to an action, or interested in the event thereof, are incompetent to testify to a conversation with, or admission of, any deceased or insane person, whether a party or not, relative to any matter at issue between the parties. Griswold v. Edson, 32 Minn. 436, 21 N. W. Rep. 475.

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

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

The mental capacity of the testator being in issue, the contestant may testify to his verbal acts, and what he said when violent. In re Brown, 38 Minn. 112, 35 N. W. Rep. 726.

The testimony of a party to the contents of a letter of a deceased person is admissible. Newton v. Newton, 46 Minn. 33, 48 N. W. Rep. 450.

A survivor of two contracting parties may testify to the fact that a note given for money loaned embraced a specified sum in excess of the amount loaned. Parker v. Maxwell, 51 Minn. 523, 53 N. W. Rep. 754.

Acts of a surviving interested party with a deceased person are not within the rule excluding conversations and admissions. Hall v. Northwestern Endowment & Legacy Ass'n, 47 Minn. 85.

In an action against an executor to recover for services rendered to decedent, plaintiff,

may testify as to how long he was engaged in the work, and how much his services were reasonably worth. Belden v. Scott, (Wis.) 27 N. W. Rep. 356.

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

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

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

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

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

There being evidence that the defendant made to the plaintiff (deceased since suit brought) fraudulent representations for which recovery is sought, the defendant cannot testify that in the conversation referred to he made no such representations. Redding v. Godwin, 44 Minn. 355, 46 N. W. Rep. 563.

A member of a copartnership which was a stockholder in the plaintiff corporation held interested in the event of the action. Farmers' Union Elevator Co. v. Syndicate Ins. Co., 40 Minn. 152, 41 N. W. Rep. 547.

The disqualification applies to the indorser of a certificate of deposit, who had received payment of it from the bank, the title being in issue. Beard v. First Nat. Bank,, 39 Minn. 546, 40 N. W. Rep. 842.

It does not apply to a mere agent of a party. Darwin v. Keigher, 45 Minn. 64, 47 N. W. Rep. 314.

To render a witness incompetent, he must have some legal, certain, and immediate interest in the event, or in the record, as an instrument of evidence. The burden is on the party objecting to make the incompetency clearly appear. Perine v. Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. Rep. 1022.

A "party to the action" means a party to the issue to which the testimony relates, and not merely a party to the record. Bowers v. Schuler, 54 Minn. 99, 55 N. W. Rep. 817.

An objection to testimony as to a conversation with a deceased person is waived by cross-examination upon it. Brown v. Morrill, 45 Minn. 483, 48 N. W. Rep. 328.

See Parker v. Maxwell, 45 Minn. 1, 47 N. W. Rep. 161.

§ 5661. Who are not competent witnesses.

The following persons are not competent to testify in any action or proceeding:

First.—Those who are of unsound mind, or intoxicated, at the time of their production for examination.

Second.—Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

(G. S. 1866, c. 73, § 9; G. S. 1878, c. 73, § 9.)

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

§ 5662. Privileged communications.

There are particular relations in which it is the policy of the law to encourage confidence, and preserve it inviolate; therefore a person cannot be examined as a witness in the following cases:

First. Husband and wife.

A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime

committed by one against the other, nor to proceedings supplementary to execution.

Second. **Attorneys.**

An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional duty.

Third. **Priests.**

A clergyman or priest cannot, without the consent of the person making the confession, be examined as to the confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

Fourth. **Physicians.**

A regular physician or surgeon cannot, without the consent of his patient, be examined, in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

Fifth. **Public officers.**

A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

(G. S. 1866, c. 73, § 10; G. S. 1878, c. 73, § 10; as amended 1879, c. 72, § 1.)

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

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

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

Neither Laws 1889, c. 72, nor Laws 1885, c. 193 (§ 5659), affects, except in supplementary proceedings, the rule that a husband cannot be examined against his wife without her consent, nor the wife against the husband without his consent. Wolford v. Farnham, 44 Minn. 159, 46 N. W. Rep. 295.

The wife's refusal to consent to an examination of her husband does not preclude her from subsequently calling him. Id.

SUBD. 2. In proceedings to prove a will, the evidence of the testator's attorney of business conversations, as bearing on the sanity of the testator, held admissible. Layman's Will, 40 Minn. 371, 42 N. W. Rep. 286.

A conversation not embracing communications made to a witness as an attorney is not privileged. Hanson v. Bean, 51 Minn. 546, 53 N. W. Rep. 871.

What disclosure an attorney may be required to make of his client's papers in his possession. Stokoe v. St. Paul, M. & M. Ry. Co., 40 Minn. 545, 42 N. W. Rep. 482.

A witness may be asked on cross-examination whether he has ever communicated to his attorney a fact to which he has testified. State v. Tall, 43 Minn. 273, 45 N. W. Rep. 449.

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

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

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

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

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

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

§ 5663. Witness may affirm, when.

Every person who declares that he has conscientious scruples against taking an oath, or swearing in any form, shall be permitted to make his solemn declaration or affirmation.

(G. S. 1866, c. 73, § 11; G. S. 1878, c. 73, § 11.)

§ 5664. Mode of administering oath to suit witness.

Whenever the court before which any person is offered as a witness is satisfied that such person has any peculiar mode of swearing, which is more solemn and obligatory, in the opinion of such person, than the usual mode, the court may, in its discretion, adopt such mode of swearing such person.

(G. S. 1866, c. 73, § 12; G. S. 1878, c. 73, § 12.)

§ 5665. Witness to be sworn according to his religion.

Every person believing in any other than the christian religion shall be sworn according to the peculiar ceremonies of his religion, if there are any such ceremonies.

(G. S. 1866, c. 73, § 13; G. S. 1878, c. 73, § 13.)

§ 5666. Court to ascertain capacity of infant, etc.

The court before whom an infant, or a person apparently of weak intellect, is produced as a witness, may examine such person to ascertain his capacity, and whether he understands the nature and obligations of an oath; and any court may inquire of any person, what are the peculiar ceremonies observed by him in swearing, which he deems most obligatory.

(G. S. 1866, c. 73, § 14; G. S. 1878, c. 73, § 14.)

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

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

TITLE 2.

TAKING THE TESTIMONY OF WITNESSES WITHIN THIS STATE.

§ 5667. Depositions authorized to be taken.

Depositions may be taken in the manner, and according to the regulations, provided in this chapter, to be used before any magistrates or other persons authorized to examine witnesses, in any other than criminal cases.

(G. S. 1866, c. 73, § 15; G. S. 1878, c. 73, § 15.)

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

§ 5668. Same—In what cases.

When a witness whose testimony is wanted in any civil cause pending in this state, lives more than thirty miles from the place of trial, or is about to go out of the state, and not to return in time for trial, or is so sick, infirm or aged as to make it probable that he will not be able to attend at the trial, his deposition may be taken in the manner hereinafter provided.

(G. S. 1866, c. 73, § 16; G. S. 1878, c. 73, § 16.)

A deposition within the state can be taken only when one of the reasons specified in this section exists. If taken in accordance with § 5688, the certificate must be in the form laid down in § 5689; and then the party wishing to use it must show that a reason for taking it existed, and still exists. Atkinson v. Nash, (Minn.) 58 N. W. Rep. 39. Followed in Davidson v. Harmon, (Minn.) 59 N. W. Rep. 316.

§ 5669. Appointment of time and place—Notice.

At any time after the cause is commenced by the service of process or otherwise, or after it is submitted to arbitrators or referees, either party may apply to any justice of the peace, who shall issue a notice to the adverse

party, to appear before the said justice, or any other justice of the peace, at the time and place appointed for taking the deposition, and to put such interrogatories as he may see fit.

(G. S. 1866, c. 73, § 17; G. S. 1878, c. 73, § 17.)

§ 5670. Service of notice on agent or attorney.

The said notice may be served on the agent or attorney of the adverse party, and shall have the same effect as if served on the party himself.

(G. S. 1866, c. 73, § 18; G. S. 1878, c. 73, § 18.)

§ 5671. Service on one of several parties.

When there are several persons, plaintiffs or defendants, a notice served on either of them is sufficient.

(G. S. 1866, c. 73, § 19; G. S. 1878, c. 73, § 19.)

§ 5672. Manner of service of notice.

The notice shall be served by delivering an attested copy thereof to the person to be notified, or by leaving such copy at his place of abode, allowing in all cases not less than twenty-four hours after such notice before the time appointed for taking the depositions, and also allowing time for his travel to the place appointed after being notified, not less than at the rate of one day, Sundays excepted, for every twenty miles travel.

(G. S. 1866, c. 73, § 20; G. S. 1878, c. 73, § 20.)

§ 5673. Notice may be waived.

The written notice before prescribed may be wholly omitted, if the adverse party, or his attorney, in writing, waives the right to it.

(G. S. 1866, c. 73, § 21; G. S. 1878, c. 73, § 21.)

§ 5674. Oath of deponent—Examination.

The deponent shall be sworn to testify the whole truth, and nothing but the truth, relating to the cause for which the deposition is taken, and he shall then be examined by the parties, if they see fit, or by the justice, and his testimony shall be taken in writing.

(G. S. 1866, c. 73, § 22; G. S. 1878, c. 73, § 22.)

§ 5675. Order of examination.

The party producing the deponent shall be allowed first to examine him, either upon verbal or written interrogatories, on all points which he deems material, and then the adverse party may examine the deponent in like manner; after which either party may propose such further interrogatories as the case requires.

(G. S. 1866, c. 73, § 23; G. S. 1878, c. 73, § 23.)

§ 5676. Deposition to be written and read and signed.

The deposition shall be written by the justice or by the deponent, or by some disinterested person, in the presence and under the direction of the justice, and be carefully read to or by the deponent, and shall then be subscribed by him.

(G. S. 1866, c. 73, § 24; G. S. 1878, c. 73, § 24.)

For copy of entries in books of account and of letterpress copy of letters attached to deposition as exhibits, see §§ 5741, 5742.

§ 5677. Certificate of justice to deposition.

The justice shall annex to the deposition a certificate substantially as follows:

State of Minnesota, } ss.
County of ——. }

I, A. B., justice of the peace in and for said county, do hereby certify that the above deposition was taken before me, at my office in the —— in said county, on the —— day of ——, 18—, at —— o'clock, ——; that it was taken at the request of the plaintiff (or defendant), upon verbal (or written) interrogatories; that it was reduced to writing by myself (or by deponent, or by ——, a disinterested person, in my presence and under my

direction); that it was taken to be used in the suit of A. B. vs. C. D., now pending in —— court; and that the reason for taking it was (here state the true reason); that —— attended at the taking of said deposition (or, that a notice, of which the annexed is a copy, was served upon him, on the —— day of ——, 18—); that said deponent, before examination, was sworn to testify the whole truth, and nothing but the truth, relative to said cause, and that the said deposition was carefully read to (or by) said deponent, and then subscribed by him.

Dated at ——, the —— day of ——, one thousand eight hundred and ——.

A. B., justice of the peace.

(G. S. 1866, c. 73, § 25; G. S. 1878, c. 73, § 25.)

§ 5678. Deposition, how disposed of.

The deposition shall be delivered by the justice to the court, or arbitrators, or referees, before whom the cause is pending, or shall be inclosed and sealed by him, and directed to them, and shall remain sealed until opened by said court, or the clerk thereof, or arbitrators, or referees.

(G. S. 1866, c. 73, § 26; G. S. 1878, c. 73, § 26.)

§ 5679. Deposition may be used, when.

No deposition shall be used if it appears that the reason for taking it no longer exists: provided, that if the party producing the deposition in such case shows any sufficient cause then existing for using such deposition, it may be admitted.

(G. S. 1866, c. 73, § 27; G. S. 1878, c. 73, § 27.)

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

§ 5680. Objections, how and when to be taken.

Every objection to the competency or credibility of the deponent, and to the propriety of any question put to him, or of any answer made by him, may be made when the deposition is produced, in the same manner as if the witness was personally examined on the trial: provided, that all objections to the form of any interrogatory shall be made before it is answered, and, if the interrogatory is not withdrawn, the objection shall be noted in the deposition; otherwise the objection shall not be afterward entertained.

(G. S. 1866, c. 73, § 28; G. S. 1878, c. 73, § 28.)

§ 5681. Deposition may be used in second action, when.

When the plaintiff in any action discontinues it, or it is dismissed for any cause, and another action is afterward commenced for the same cause between the same parties, or their respective representatives, all depositions lawfully taken for the first action may be used in the second, in the same manner, and subject to the same conditions and objections, as if originally taken for the second action: provided, that the deposition has been duly filed in the court where the first action was pending, and remained in the custody of the court, from the termination of the first action until the commencement of the second.

(G. S. 1866, c. 73, § 29; G. S. 1878, c. 73, § 29.)

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

A deposition taken in behalf of one intervener held admissible in favor of another. Lougee v. Bray, 42 Minn. 323, 44 N. W. Rep. 194.

§ 5682. Deposition used on appeal of action, how.

When an action is appealed from one court to another, all depositions lawfully taken to be used in the court below may be used in the appellate court, in the same manner, and subject to the same exceptions for informality or irregularity, as were taken to such depositions in writing in the court below.

(G. S. 1866, c. 73, § 30; G. S. 1878, c. 73, § 30.)

§ 5683. Witness compelled to give deposition, when.

Any witness may be subpoenaed and compelled to give his deposition, at any place within twenty miles of his abode, in like manner, and under the

same penalties, as he may be subpoenaed and compelled to attend as a witness in any court.

(G. S. 1866, c. 73, § 31; G. S. 1878, c. 73, § 31.)

TITLE 3.

TAKING THE TESTIMONY OF WITNESSES OUT OF THIS STATE.

§ 5684. Depositions, how taken and when used.

The deposition of any witness without this state may be taken under a commission issued to any competent person in any state or country, by the court in which the cause is pending, or upon a reference as hereinafter provided; and the deposition may be used in the same manner, and subject to the same conditions and objections, as if it had been taken in this state.

(G. S. 1866, c. 73, § 32; G. S. 1878, c. 73, § 32.)

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

§ 5685. Commission may issue in what cases.

No commission shall be issued to take testimony out of this state, except in the following cases:

First. When an issue has been joined in an action in a court of record in this state, and it shall appear, on the application of either party, that any witness not residing in this state is material in the prosecution or defence of such action, and that due notice of such application was served upon the adverse party at least eight days before the application was made;

Second. When, in an action commenced in a court of record in this state, the time of answering the complaint has expired, and the defendant has not answered or demurred to the said complaint, and it appears, upon the application of the plaintiff, that the testimony of any witness not residing in this state is material and necessary to establish the facts stated in the complaint, and to enable the court to render judgment in such action.

(G. S. 1866, c. 73, § 33; G. S. 1878, c. 73, § 33.)

§ 5686. Interrogatories and cross-interrogatories, how settled.

When the application is made by the plaintiff, and there has been no appearance for the defendant in the action, it may be made ex parte and without notice; and the deposition may be taken upon interrogatories filed by the plaintiff, and annexed to the commission. In all other cases, such depositions shall be taken under a commission, and upon written interrogatories, to be exhibited to the adverse party or his attorney, and cross-interrogatories, to be filed by him, if he sees fit: provided, that the parties may, by stipulation in writing, agree upon any other mode of taking depositions, and, when taken pursuant to such stipulations, they may be used upon the trial, with like force and effect, in all respects, as if taken upon the commission and written interrogatories as herein provided.

(G. S. 1866, c. 73, § 34; G. S. 1878, c. 73, § 34.)

§ 5687. Affidavits, etc., taken out of state to be used on motion.

All oaths or affidavits taken out of the state, before any officer authorized to administer oaths, and certified by the clerk of a court of record, may be used and read upon the argument of any motion, to the same extent, and with like effect, as if taken within this state: provided, that if such affidavit is taken before a notary public, or commissioner for this state, no such certificate shall be required.

(G. S. 1866, c. 73, § 35; G. S. 1878, c. 73, § 35.)

See Hickey v. Cullom, 47 Minn. 565, 568, 50 N. W. Rep. 918.

§ 5688. Manner of taking depositions—Notice, etc.

Whenever the testimony of any person within or without this state, or in any other portion of the United States, is wanted in any civil action or pro-

ceeding in any court of this state, the same may be taken by and before any officer authorized to administer an oath in the state or territory or district of the United States in which the testimony of such person may be taken, upon notice to the adverse party of the time and place of taking the same. Such notice shall be in writing, and shall be served as other notices in civil actions are required to be served, and shall be served so as to allow the adverse party sufficient time, by the usual route of travel, allowing one day for every one hundred miles of distance between the place of the service of the notice and the place of the taking of such testimony, and one day for preparation, exclusive of Sundays and the day of service; and the examination may, if so stated in the notice, be adjourned from day to day: *provided*, that the justice of the peace, or judge of the court before which, or the court commissioner of the county in which, the action is pending, may, on motion, and by order in the cause, designate the time and place for the taking of the testimony, and the time within which a copy of the order shall be served on the adverse party or his attorney: *and provided, further*, that whenever the defendant in any action or proceeding is in default for want of an answer or other defense, such notice or order need not be served upon him.

(1873, c. 61, § 1, as amended 1876, c. 68, § 1; G. S. 1878, c. 73, § 36; 1885, c. 53; 1887, c. 185.)

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

Laws 1885, c. 53, held constitutional. Carner v. Chicago, St. P., M. & O. Ry. Co., 43 Minn. 375, 377, 45 N. W. Rep. 713.

The objection that a notice of taking depositions was defective in not naming all whose depositions were taken, held waived by failure to move to suppress. Thompson v. St. Paul City Ry. Co., 45 Minn. 13, 47 N. W. Rep. 259.

See Atkinson v. Nash and Davidson v. Harmon, cited in note to § 5668.

§ 5689. Same—Certificate of officer—Return.

At the time and place specified in the notice or order, or within one hour thereafter, the examination shall commence. Each witness shall, before testifying, be sworn by the officer to testify the whole truth and nothing but the truth relative to the cause specified in the notice or order. The testimony shall be written by the officer. The proceeding may be adjourned from day to day until the examinations are closed. Either party may appear in person, or by an agent or attorney, and take part in the examination. The testimony of each witness, when completed, shall be carefully read over by the officer to him, whereupon he may add thereto or qualify the same as he may desire. When the deposition is completed, the witness shall sign his name, or make his mark, at the end thereof, as well as upon each piece of paper on which any portion of his testimony is written. Thereupon the officer taking such deposition shall annex thereto a copy of the notice or order, and a certificate, under his hand and official seal (if he have one), stating what office he held and exercised when taking such depositions, and that, by virtue thereof, he was then and there authorized to administer an oath, and that each witness, before testifying, was duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in the notice or order, and that each of such depositions were taken pursuant to such notice or order, and who, if any one, examined for the parties respectively. Such certificate shall be prima facie evidence of the matters therein stated, and it may be substantially in the following form:

State of ——, }
County of ——. } ss.

Be it known, that I took the annexed depositions pursuant to the annexed notice (or order); that I was then and there (state the title of the officer); that I exercised the power of that office in taking such deposition; that, by virtue thereof, I was then and there authorized to administer an oath; that each witness, before testifying, was duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in the annexed notice (or order); that the testimony of each witness was correctly read over to him by me before he signed the same; that the examination was conducted on

behalf of the plaintiff by ——; that the examination was conducted on behalf of the defendant by ——.

Witness my hand and seal —— this —— day of ——, A. D. 187—.

Such depositions shall be returned by mail to the justice of the peace before whom the cause is pending, or, if it be pending in a probate court, to the judge thereof, or if it be pending in any other court of record, then to the clerk thereof; and upon their return, they shall be opened and subject to the inspection of either party.

(1873, c. 61, § 2; G. S. 1878, c. 73, § 37.)

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

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

The failure of a witness to sign each sheet is an irregularity, and ordinarily not a ground for suppressing the deposition. Smith v. Groneweg, 40 Minn. 178, 41 N. W Rep. 939.

As to the omission of the notary's seal. Rachac v. Spencer, cited in note to § 5691.

See Atkinson v. Nash and Davidson v. Harmon, cited in note to § 5668.

§ 5690. How used on the trial—Objections.

Such deposition may be read in evidence at the trial of the action or proceeding; but when the same is offered in evidence, objection may be interposed to the competency of the witness, or to any question put to him, or to the whole or any part of his testimony, in like manner, upon the same grounds, and with the like effect, as if the witness was there testifying in open court: provided, that no objection to the form of any question, can be made, unless such objection was made before, and noted by the officer taking such deposition.

(1873, c. 61, § 3; G. S. 1878, c. 73, § 38.)

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

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

A party putting questions for the deposition may decline to read any of them and the answers; but the other party may read them. Byers v. Orensstein, 42 Minn. 386, 44 N W. Rep. 129.

§ 5691. Effect of informalities and defects.

No informality, error or defect in any proceeding under this statute shall be sufficient ground for excluding the deposition, unless the party making objection thereto shall make it appear, to the satisfaction of the court, that the officer taking such deposition was not authorized to administer an oath then and there, or that such party was, by such informality, error or defect, precluded from appearing and cross-examining the witness; and every objection to the sufficiency of the notice, or to the manner of taking, or certifying, or returning such depositions, shall be deemed to have been forever waived, unless such objections are taken by motion to suppress such depositions, which motion shall be made within ten days after service of such notice in writing of the the return thereof.

(1873, c. 61, § 4; G. S. 1878, c. 73, § 39.)

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

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

An error in the notice of the taking of a deposition in the name of a witness proposed to be examined, held no ground for excluding the deposition, the adverse party having

appeared and cross-examined the witness. Waldron v. City of St. Paul, 35 Minn. 87, 22 N. W. Rep. 4.

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

The omission of the official seal to the certificate held to be an informality merely, and not alone sufficient to warrant the rejection of the deposition on the trial, though no notice of its return was served. Rachac v. Spencer, 49 Minn. 235, 51 N. W. Rep. 920.

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

§ 5692. Costs when party giving notice fails to appear.

Whenever any party shall, under the provisions of this act, serve notice of the taking of the testimony of any person, and the adverse party shall, by himself or attorney, in pursuance of such notice, attend at the time and place therein named, and the party serving such notice shall fail or neglect to appear and proceed with the taking of such testimony, the justice of the peace, or judge of the court, before whom, or in which, [the] action is pending, shall allow such adverse party such sum for expenses and for attorney's fees incurred in making such attendance as he shall deem proper, which sum shall be collected in the same manner as other costs and disbursements in the action or proceeding.

(1876, c. 68, § 2; G. S. 1878, c. 73, § 40.)

TITLE 4.

PROCEEDINGS TO PERPETUATE THE TESTIMONY OF WITNESSES WITHIN THIS STATE.

§ 5693. Testimony of witness may be perpetuated—Application, how made.

When any person is desirous to perpetuate the testimony of any witness, he shall make a statement in writing, setting forth briefly and substantially his title, claim or interest, in or to the subject concerning which he desires to perpetuate the evidence, and the names of all other persons interested or supposed to be interested therein, their residences, if known, and if unknown it shall be so stated, and also the name of the witness proposed to be examined, and shall deliver the said statement to the judge of a court of record, requesting him to take the deposition of the said witness.

(G. S. 1866, c. 73, § 36; G. S. 1878, c. 73, § 41.)

§ 5694. Notice to be given—Publication.

The said judge shall thereupon cause notice to be given of the time and place appointed for taking the deposition, to all persons mentioned in the said statement as interested in the case, which notice shall be given in the same manner as is prescribed in this chapter respecting notice upon taking a deposition in this state, to be used in any cause here pending: provided, that in all cases where the judge is satisfied that, by reason of the non-residence of any of the persons in this state, or for any other cause, it will be impossible to serve the notice as aforesaid, he may direct notice to be given by publishing the same for three successive weeks in a newspaper printed and published in the county where the applicant resides, or if there is none, then in a newspaper printed and published at the capital of the state.

(G. S. 1866, c. 73, § 37; G. S. 1878, c. 73, § 42.)

§ 5695. Testimony, how taken—Judge to annex certificate.

The deponent shall be sworn and examined, and his deposition shall be written, read and subscribed, in the same manner as is prescribed respecting the other depositions before mentioned; and the judge shall annex thereto a certificate, under his hand, of the time and manner of taking it, and that

it was taken in perpetual remembrance of the thing, and he shall also insert in the certificate the names of the persons at whose request it was taken, and of all those who were notified to attend, and of all those who did attend the taking thereof.

(G. S. 1866, c. 73, § 38; G. S. 1878, c. 73, § 43.)

§ 5696. Deposition and certificate to be recorded.

The deposition, with the certificate, and also the written statement of the party at whose request it was taken, shall, within ninety days after the taking thereof, be recorded in the registry of deeds in the county where the land lies, if the deposition relates to real estate; otherwise in the county where the party applying for such deposition resides.

(G. S. 1866, c. 73, § 39; G. S. 1878, c. 73, § 44.)

§ 5697. Deposition may be used, when.

If any action, either at the time of taking such deposition, or at any time afterward, is pending between the person at whose request it was taken, and the persons named in the written statement, or any of them, or any person claiming under either of the said parties respectively, concerning the title, claim or interest set forth in the statement, the deposition so taken, or a certified copy of it from the registry of deeds, may be used in such action, in the same manner, and subject to the same conditions and objections, as if it had been originally taken for the said action.

(G. S. 1866, c. 73, § 40; G. S. 1878, c. 73, § 45.)

§ 5698. Witness may be compelled to give deposition.

Any witness may be subpoenaed and compelled to give his deposition in perpetual remembrance of the thing, as before prescribed, in like manner, and under the same penalties, as are provided in this chapter respecting other depositions taken in this state.

(G. S. 1866, c. 73, § 41; G. S. 1878, c. 73, § 46.)

TITLE 5.

PROCEEDINGS TO PERPETUATE THE TESTIMONY OF WITNESSES OUT OF THIS STATE.

§ 5699. Depositions to perpetuate testimony out of the state.

Depositions to perpetuate the testimony of witnesses living without this state may be taken in any state, or in any foreign country, upon a commission to be issued by any court of record, in the manner hereinafter provided.

(G. S. 1866, c. 73, § 42; G. S. 1878, c. 73, § 47.)

§ 5700. Proceedings in such case—Statement to be filed.

The person who proposes to take the deposition shall apply to the judge of any such court, and deliver to him a statement like that before prescribed to be delivered to the judge or justice of the peace upon taking such a deposition within this state; and if the subject of the proposed deposition relates to real estate within this state, the statement shall be filed in the county where the lands, or any part thereof lies; otherwise, in the county where the applicant resides.

(G. S. 1866, c. 73, § 43; G. S. 1878, c. 73, § 48.)

§ 5701. Notice to be given—Service—Publication.

The court shall order notice of such application to be served on all the persons mentioned in such statement, and living within the state, which notice shall be served fourteen days, at least, before the time appointed for hearing the parties: provided, that if any of said parties reside out of this state, or if their residence is unknown to the applicant, the judge shall order notice to be served on them by publishing the same, for three successive weeks, in a newspaper printed and published in the county where the applicant resides,

or if there is none, then in a newspaper printed and published at the capital of the state.

(G. S. 1866, c. 73, § 44; G. S. 1878, c. 73, § 49.)

§ 5702. Judge to issue commission, when.

If, upon such hearing of the parties, or of the applicant alone, should no adverse party appear, the judge is satisfied that there is sufficient cause for taking the deposition, he shall issue a commission therefor, in like manner as for taking a deposition to be used in any cause pending in the same court.

(G. S. 1866, c. 73, § 45; G. S. 1878, c. 73, § 50.)

§ 5703. Deposition, how taken and returned.

The deposition shall be taken upon written interrogatories, filed by the applicant, and cross-interrogatories filed by any party adversely interested, if he sees fit; and it shall be taken and returned substantially in the same manner as if taken to be used in any cause pending in said court.

(G. S. 1866, c. 73, § 46; G. S. 1878, c. 73, § 51.)

§ 5704. Such deposition, how used, filed, and recorded.

All depositions to perpetuate the testimony of witnesses taken at any place without this state, according to the provisions of this chapter, may be used in like manner as if taken within this state, and shall be filed and recorded within the same time, and in the same manner.

(G. S. 1866, c. 73, § 47; G. S. 1878, c. 73, § 52.)

TITLE 6.

DEPOSITIONS TAKEN IN THIS STATE TO BE USED IN COURTS OF OTHER STATES AND COUNTRIES.

§ 5705. Witness may be compelled to give deposition to be used in another state, etc.

Any witness may be subpoenaed and compelled, in like manner, and under the same penalties, as are prescribed in this chapter, to give his deposition in any cause pending in a court in any state or government, which deposition may be taken before any justice of the peace in this state, or before any commissioners that may be appointed under the authority of the state or government in which the action is pending; and if the deposition is taken before such commissioners, the witness may be subpoenaed and compelled to appear before them, by process from any justice of the peace in this state.

(G. S. 1866, c. 73, § 48; G. S. 1878, c. 73, § 53.)

TITLE 7.

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

§ 5706. Records of foreign courts, when.

The records and judicial proceedings of any court of any state or territory, or of the United States, shall be admissible in evidence, in all cases in this state, when authenticated by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of such court annexed.

(G. S. 1866, c. 73, § 49; G. S. 1878, c. 73, § 54.)

The copy of a foreign will, and the probate thereof, as the same appear of record, duly authenticated under the act of congress, (May 27, 1790,) and this section, are competent evidence to prove the existence of the original will, the probate thereof, and the appointment, acceptance, and qualification of the executors of the same. First Nat. Bank Memphis v. Kidd, 20 Minn. 234, (Gil. 212.) Under G. S. c. 77, § 6 (§ 5917;) c. 73, § 66 (§ 5733;) and Gen. Laws 1859, c. 63,—the duly-authenticated copy of the copies of the

letters testamentary, and the certificate authenticating the same, filed in the office of the judge of probate and the register of deeds, are admissible in evidence to prove the filing of the aforesaid copies. (Id.)

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

The authentication is sufficient if according to the Minnesota statute, though not according to the act of congress. Ellis v. Ellis (Minn.) 56 N. W. Rep. 1056.

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

§ 5707. Printed copies of statutes.

The printed copies of all statutes, acts and resolves of this state, whether of a public or private nature, which are published under the authority of the state, are admissible, as sufficient evidence thereof, in all courts of law, and on all occasions whatsoever.

(G. S. 1866, c. 73, § 50; G. S. 1878, c. 73, § 55.)

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

§ 5708. Statutes at Large compiled by A. H. Bissell.

That the work commonly known and designated as the Statutes at Large of Minnesota of one thousand eight hundred and seventy-three, compiled by A. H. Bissell and published by Callaghan and Company, printed and bound in two volumes, and containing a compilation of the general and statute laws of this state, shall be admissible in all the courts of law of this state, and on all occasions, as prima facie evidence of such laws: provided, however, that the publisher of said compilation shall file with the secretary of state an agreement, to the satisfaction of said secretary of state, to furnish, for the use of the state, or of the counties of the state, any number of copies of said compilation required for the next ten years, at not more than ten dollars per set.

(1874, c. 79, § 1; G. S. 1878, c. 73, § 56.)

§ 5709. General Statutes 1878 prepared by George B. Young.

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

(1879, c. 67, § 1; G. S. 1878, v. 2, c. 73, § 56a.)

§ 5710. Same—How to be cited.

Said compilation shall be known and cited as "General Statutes 1878."

(1879, c. 67, § 2; G. S. 1878, v. 2, c. 73, § 56b.)

§ 5711. Same—Supplement of 1881.

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

(1881, Ex. S. c. 75, § 1; G. S. 1878, v. 2, c. 73, § 56c.)

§ 5712. Same—Manner of citing.

Said supplement may be cited and designated as "1881 Supplement General Statutes 1878."

(1881, Ex. S. c. 75, § 2; G. S. 1878, v. 2, c. 73, § 56d.)

§ 5713. General Statutes 1891 published by John F. Kelly —Proviso.

The edition of the General Statutes of one thousand eight hundred and ninety-one containing the general laws in force January first one thousand eight hundred and ninety-one, compiled and published by John F. Kelly, of St. Paul, shall be competent evidence of the laws therein contained, in all courts of this state and in all proceedings, without further proof or authentication. Provided, however, That the compiler and publisher shall file with the secretary of state an agreement to furnish the state any number of copies of said compilation at not more than ten dollars for the two volumes of said General Statutes of one thousand eight hundred and ninety-one.

(1891, c. 37, § 1.[2])

§ 5714. Same—How cited.

The sections of this compilation being numbered consecutively, the same may be cited in judicial proceedings as the General Statutes, giving the section number only.

(Id. § 2.)

§ 5715. Printed copies of statutes of other states.

Printed copies of the statute laws of any state or territory of the United States, if purporting to be published under the authority of their respective governments, or if commonly admitted and read as evidence in their courts, are admissible in all courts of law, and on all other occasions, in this state, as prima facie evidence of such laws.

(G. S. 1866, c. 73, § 51; G. S. 1878, c. 73, § 57.)

§ 5716. Common law of other states, how proved.

The unwritten or common law of any state or territory of the United States may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts may also be admitted as evidence of such law.

(G. S. 1866, c. 73, § 52; G. S. 1878, c. 73, § 58.)

Where the evidence of the law of another state consists of judicial opinions, their construction and effect is for the court. Thompson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. Rep. 1137.

The laws of another state, as to pleading and proof, stand on the same footing as other facts, and need not be pleaded when mere matters of evidence. Under a plea of payment by note, a party may introduce in evidence the laws of the state where the note was given and payable, to show that in that state the note extinguished the debt. Id.

§ 5717. State library—Certified copies of judicial decisions —Evidence.

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

(1879, c. 89, § 1; G. S. 1878, v. 2, c. 73, § 58a.)

§ 5718. Existence and effect of foreign laws, how proved.

The existence, and the tenor or effect of all foreign laws may be proved as facts, by parol evidence; but if it appears that the law in question is contained in a written statute or code, the court may, in its discretion, reject any evidence of such law that is not accompanied by a copy thereof.

(G. S. 1866, c. 73, § 53; G. S. 1878, c. 73, § 59.)

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[2] An act in relation to the one thousand eight hundred and ninety-one edition of the General Statutes. Approved March 17, 1891.

§ 5719. City ordinances published by authority.

Whenever the by-laws, ordinances, rules and regulations of any city of this state, incorporated under the provisions of chapter thirty-one of the laws of one thousand eight hundred and seventy, entitled "An act to authorize the incorporation of cities," or by any special act prior to or subsequent to that date, have been or shall hereafter be printed and published by authority of the corporation, the same shall be received in evidence in all courts and places, without further proof.

(1873, c. 68, § 1; G. S. 1878, c. 73, § 60.)

TITLE 8.

DOCUMENTARY EVIDENCE AND THE PRESERVATION THEREOF.

§ 5720. Affidavit of publication of notice of application to court—Filing.

When notice of any application to any court or judicial officer, for any proceeding authorized by law, is required to be published in one or more newspapers, an affidavit of the printer of such newspaper, or of his foreman or principal clerk, annexed to a printed copy of such notice, taken from the paper in which it was published, and specifying the time when and the paper in which such notice was published, may be filed with the proper officer of the court, or with the judicial officer before whom such proceeding is pending, at any time within six months after the last day of the publication of such notice, unless sooner specially required.

(G. S. 1866, c. 73, § 54; G. S. 1878, c. 73, § 61.)

See curative acts, §§ 7608–7629.

When the notice required was to be given by publication in two designated newspapers once in each week for ten successive weeks, an affidavit of publication for ten weeks, without stating that it was once in each week, is insufficient. So is an affidavit that is not made by the printer of the paper, or his foreman or principal clerk, or which does not state that the notice annexed to it was taken from the paper. Ullman v. Lion, 8 Minn. 331, (Gil. 338.)

§§ 5720 and 5721 are not applicable to a sheriff's certificate or affidavit on foreclosure by advertisement. Following Goenen v. Schroeder, 18 Minn. 66, (Gil. 51.) Merrill v. Nelson, Id. 366, (Gil. 335.)

§ 5721. Affidavit of publication of notice of sale of real estate—Filing.

When any notice of a sale of real property is required by law to be published in any newspaper, an affidavit of the printer of such newspaper, or of his foreman or principal clerk, annexed to a printed copy of such notice, taken from the paper in which it was published, and specifying the times when and the paper in which such notice was published, may be filed, at any time within six months after the last day of such publication, with the register of deeds in the county in which the premises sold are situated.

(G. S. 1866, c. 73, § 55; G. S. 1878, c. 73, § 62.)

§ 5722. Such affidavits or certified copies to be evidence.

The original affidavit so filed pursuant to the two preceding sections, and copies thereof, duly certified by the officer in whose custody the same may be, is evidence in all cases, and in every court or judicial proceeding, of the facts contained in such affidavit.

(G. S. 1866, c. 73, § 56; G. S. 1878, c. 73, § 63.)

§ 5723. Affidavit of printer—Evidence, when.

The affidavit of the printer, or foreman of such printer, of any newspaper published in this state, of the publication of any notice or advertisement which by any law of this state is required to be published in such newspaper, is prima facie evidence of such publication, and of the facts stated therein.

(G. S. 1866, c. 73, § 57; G. S. 1878, c. 73, § 64.)

§ 5724. Affidavit of officer of State Historical Society—Evidence, when.

When any legal notice appears in any printed newspaper purporting to be published in this state prior to the year eighteen hundred and seventy, filed with the State Historical Society of this state, the secretary or other officer of such society may make an affidavit setting forth a copy of such notice and stating that the same is a true copy of such notice contained in such printed newspaper, the name, place where it purports to have been published, and the date or dates of the different issues or numbers thereof containing such notice, and so on file. Such affidavit may be recorded in the office of register of deeds of any county in which any real estate affected by such notice is situated, and shall be evidence that such newspaper, with such notice therein, was regularly published at the times and at the place so stated. If the sheriff's certificate of any foreclosure sale was made and recorded prior to the year eighteen hundred and seventy and if any copy of the notice of such foreclosure sale, or of any adjournment thereof is contained, in any newspaper so on file, and the numbers or issues so on file are of the proper date or dates for the publication of such notice or adjournment, but some of the numbers or issues, or parts of numbers or issues of such paper, of the proper date or dates for the publication of such notice or adjournment are missing from, or cannot be found amongst the papers of said society, such affidavit may state the dates of such numbers or issues so on file, and of such numbers or issues which cannot be found on file with said society, and such affidavit when so recorded shall be evidence so far as such certificate shows such publication of such notice in said paper.

(1889, c. 270, § 1.[3])

§ 5725. Form of certificate to copies of papers—Seal.

Whenever a certified copy of an affidavit, record, document or other paper, is allowed by law to be evidence, such copy shall be certified by the officer in whose custody the same is required by law to be, to have been compared by him with the original, and to be a correct transcript therefrom; and if such officer have any official seal by law, such certificate shall be authenticated by such seal; but this section shall not apply to any record, document or any papers kept in the departments or offices of the United States government.

(G. S. 1866, c. 73, § 58, as amended 1876, c. 70, § 1; G. S. 1878, c. 73, § 65.)

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

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

§ 5726. Limitation of preceding section as to seals.

But the preceding section shall not be construed to require the affixing of the seal of the court to any certified copy of a rule or order made by such court, or of any paper filed therein, when such copy is used in the same court, or before any officer thereof.

(G. S. 1866, c. 73, § 59; G. S. 1878, c. 73, § 66.)

§ 5727. Instruments may be acknowledged and made evidence.

Every written instrument, except promissory notes and bills of exchange, and except the last wills of deceased persons, may be proved or acknowledged in the manner now provided by law for taking the proof or acknowledgment of conveyances of real estate; and the certificate of the proper officer indorsed thereon shall entitle such instrument to be read in evidence in all courts of justice, and all proceedings before any officer, body or board, with the same

[3] An act for procuring evidence of the publication of legal notices in newspapers filed with the State Historical Society. Approved March 9, 1889. By § 2, act is not to apply to pending actions.

effect, and in the same manner, as if such instrument was a conveyance of real estate.

(G. S. 1866, c. 73, § 60; G. S. 1878, c. 73, § 67.)

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

A certificate of acknowledgment of an indemnity bond constitutes prima facie proof of its execution. Romer v. Conter, 53 Minn. 171, 54 N. W. Rep. 1052.

See Ellingboe v. Brakken, 36 Minn. 156, 30 N. W. Rep. 659; McMillan v. Edfast, 50 Minn. 414, 52 N. W. Rep. 907.

§ 5728. Deposit of instruments with register of deeds and clerk of court.

The register of deeds and the clerk of any court of record in every county of this state, upon being paid the fees allowed therefor by law, shall receive and deposit in their offices, respectively, any instruments or papers which any person shall offer them for that purpose, and, if required, shall give such person a written receipt therefor.

(G. S. 1866, c. 73, § 61; G. S. 1878, c. 73, § 68.)

§ 5729. Such instruments to be indorsed and filed.

Such instruments or papers shall be properly indorsed, so as to indicate their general nature and the names of the parties thereto, shall be filed by the officer receiving the same, stating the time when received, and shall be deposited and kept by him and his successors in office in the same manner as his official papers, in some place separate and distinct from such papers.

(G. S. 1866, c. 73, § 62; G. S. 1878, c. 73, § 69.)

§ 5730. Instruments on file, how withdrawn.

The instruments and papers so received and deposited shall not be withdrawn from such office, except on the order of some court, for the purpose of being read in evidence in such court, and then to be returned to such office; nor shall they be delivered, without such order, to any person, unless upon the written order of the person who deposited the same, or his executors or administrators.

(G. S. 1866, c. 73, § 63; G. S. 1878, c. 73, § 70.)

§ 5731. Instruments open to examination.

Such instruments or papers so deposited shall be open to the examination of any person desiring the same, upon the payment of the fees allowed by law.

(G. S. 1866, c. 73, § 64; G. S. 1878, c. 73, § 71.)

§ 5732. Certificate of officer that paper is not in his office.

When any officer to whom the legal custody of any documents, instrument or paper belongs, shall certify, under his official seal, that he has made diligent examination in his office for such paper, instrument or document, and that it can not be found, such certificate is presumptive evidence of the fact so certified, in all causes, matters and proceedings, in the same manner, and with like effect, as if such officer had personally testified to the same in the court or before the officer before whom such cause, matter or proceeding may be pending.

(G. S. 1866, c. 73, § 65; G. S. 1878, c. 73, § 72.)

§ 5733. Certified copies of records and files in public offices.

Copies of all papers, documents or writings required by law to be filed or left in any public office in this state, and transcripts of any public records kept therein, certified by the officer having custody of the same, under his official seal, if he has one, are admissible in evidence, with the like effect and to the same extent as the originals.

(G. S. 1866, c. 73, § 66; G. S. 1878, c. 73, § 73.)

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

§ 5734. Copies of papers on file in United States government offices.

That copies of all or any records, papers or documents belonging to and being in any of the governmental departments of the United States, authenticated as such, and in accordance with the laws of the United States to entitle such records, papers or documents to be received as evidence in the courts of the United States, shall be received and admitted as evidence in all the courts of the state of Minnesota.

(1878, c. 52, § 1; G. S. 1878, c. 73, § 74.)

See § 5755.

TITLE 9.

THE LOSS OF INSTRUMENTS AND PROCEEDINGS THEREON.

§ 5735. Evidence on question of loss of instrument.

Whenever a party to an action is permitted to prove by his own oath the loss of any instrument, in order to admit other proof of the contents thereof, the adverse party may also be examined by the court, on oath, to disprove such loss, and to account for such instrument.

(G. S. 1866, c. 73, § 67; G. S. 1878, c. 73, § 75.)

§ 5736. Evidence of contents of lost bill, etc.—Recovery.

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

(G. S. 1866, c. 73, § 68; G. S. 1878, c. 73, § 76; as amended 1879, c. 52, § 1.)

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

§ 5737. Same—Bond to be given.

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

(G. S. 1866, c. 76, § 69; G. S. 1878, c. 76, § 77; as amended 1879, c. 52, § 1.)

By § 2 of the amendment, provisions of the act are to apply to actions then pending in any of the courts of the state, as well as to actions which may be commenced thereafter.

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

TITLE 10.

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

§ 5738. Account books prima facie evidence, when.

Whenever a party in any cause or proceeding produces at the trial his account books, and proves that said books are his books of account kept for that purpose, that they contain the original entries of charges for moneys paid, or goods or other articles delivered, or work and labor or other services performed, or materials furnished; that the charges therein were made at the time of the transactions therein entered; that they were in the handwriting of some person authorized to make charges in said books, and are just and true as the person making such proof verily believes, the witness by whom said books are sought to be proved being subject to all the rules of cross-examination, and said books subject to all just exceptions as to their credibility, said books shall be received as prima facie evidence of the charges therein contained.

(G. S. 1866, c. 73, § 70, as amended 1876, c. 52, § 1; G. S. 1878, c. 73, § 78.)

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

It is no longer necessary to authenticate account-books by the suppletory oath of the person who actually made the entries. Webb v. Michener, 32 Minn. 43, 19 N. W. Rep. 82.

It is not enough, to make a book of accounts admissible in evidence, that the party making the entries swears to all that is required by this section, if, on cross-examination, it appears that material parts of his testimony are merely hearsay. Paine v. Sherwood, 21 Minn. 225.

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

Cash books kept in the ordinary way are admissible after the proof prescribed as to books of account, though the entries are not in terms charged against the persons named as money paid to them. Account books called "journals," consisting of transcripts from stubs of check books, and made several days after the giving of the checks, the check books and checks having been preserved, are not admissible. Woolsey v. Bohn, 41 Minn. 235, 42 N. W. Rep. 1022.

An expert may state the summaries from account books, they being in court, the objection not being that they had not been put in evidence. Wolford v. Farnham, 47 Minn. 95, 49 N. W. Rep. 528.

§ 5739. Ledger to be produced, when.

Where a book has marks which show that the items have been transferred to a ledger, the book shall not be testimony unless the ledger is produced.

(G. S. 1866, c. 73, § 72; G. S. 1878, c. 73, § 79.)

§ 5740. Entries by person deceased admissible.

Any entries made in a book by a person authorized to make the same, he being dead, may be received as evidence, in a case proper for the admission of such book as evidence, on proof that the same are in his handwriting, and in a book kept for such entries, without further verification.

(G. S. 1866, c. 73, § 73; G. S. 1878, c. 73, § 80.)

§ 5741. Books of account—Deposition.

In case of the proof by deposition of any of the books mentioned in sections 78, 79 and 80 of title 10, chapter 73, general statutes of 1878 of Minnesota or of any of the entries or things therein contained, the production of said books before the officer or person taking the deposition shall be held to be equivalent to producing the same at the trial within the meaning of said section 78, and copies of the entries or other things therein contained desired to be introduced in evidence may be made and attached to the deposition as an exhibit or exhibits and shall be evidence of like force and effect as the books themselves.

(1893, c. 56, § 1.[1])

[1] An act regulating the manner of proving books of account and entries therein, and contents of letters by deposition. Approved April 17, 1893.

§ 5742. Letterpress copy of letters—Deposition.

That in all cases where a foundation is laid for the introduction of secondary evidence of the contents of a letter, and where a letterpress copy of such letter properly verified is competent as such evidence, the production of such letterpress copy before the officer or person taking the deposition shall be held equivalent to producing the same at the trial, and a copy or copies of such letterpress copy or copies desired to be introduced in evidence may be attached to the deposition as an exhibit or exhibits, and shall be evidence of like force and effect as the letterpress copy itself; provided, however, that upon the production at the time of trial in court of the originals from which the exhibits mentioned in section one and two hereof have been copied, then, and in that event, the said originals shall become evidence in the place and stead of said exhibits.

(Id. § 2.)

§ 5743. Minutes of conviction and judgment.

A copy of the minutes of any conviction and judgment, duly certified by the clerk in whose custody such minutes are, under his official seal, together with a copy of the indictment on which the conviction was had, certified in the same manner, shall be evidence, in all courts and places, of such conviction and judgment, without the production of the judgment-roll.

(G. S. 1866, c. 73, § 74; G. S. 1878, c. 73, § 81.)

§ 5744. Docket of justice of the peace.

Whenever it becomes necessary, in an action before a justice of the peace, to give evidence of a judgment or other proceedings had before him, the docket of such judgment or other proceeding, or a transcript thereof certified by him, shall be good evidence thereof before such justice.

(G. S. 1866, c. 73, § 75; G. S. 1878, c. 73, § 82.)

§ 5745. Transcript from justice's docket.

A transcript from the docket of any justice of the peace of any judgment had before him, of the proceedings in the case previous to such judgment, of the execution issued thereon, if any, and of the return to such execution, if any, when certified by such justice, is evidence to prove the facts contained in such transcript, in any court in the county where such judgment was rendered.

(G. S. 1866, c. 73, § 76; G. S. 1878, c. 73, § 83.)

§ 5746. Same—To have certificate of clerk of court.

To entitle such transcript to be read in evidence in a different county than that in which the judgment was rendered, or the proceedings originated, there shall be attached thereto, or indorsed thereon, a certificate of the clerk of the district court of the county in which such justice resides, under the seal of said court, specifying that the person subscribing such transcript was, at the date of the judgment therein mentioned, a justice of the peace of such county.

(G. S. 1866, c. 73, § 77; G. S. 1878, c. 73, § 84.)

See Herrick v. Ammerman, cited in note to § 5026.

§ 5747. Proceedings before justice not reduced to writing, how proved.

The proceedings in any cause had before a justice, not reduced to writing by said justice, nor being the contents of any paper or document produced before said justice, unless such paper or document is lost or destroyed, may be proved by the oath of the justice. In case of his death or absence, they may be proved by producing the original minutes of such proceeding entered in a book kept by such justice, accompanied by proof of his handwriting; or they may be proved by producing copies of such minutes, sworn to by a competent witness as having been compared by him with the original entries, with proof that such entries were in the handwriting of the justice.

(G. S. 1866, c. 73, § 78; G. S. 1878, c. 73, § 85.)

§ 5748. Certificate of conviction before justice.

Every certificate of conviction made and filed by a justice under the provisions of law, or a duly certified copy thereof, is evidence, in all courts and places, of the facts therein contained.

(G. S. 1866, c. 73, § 79; G. S. 1878, c. 73, § 86.)

§ 5749. Exemplification of judgment of justice in another state.

An exemplification of a judgment rendered by any justice of the peace, in any state or territory of the United States, officially certified by such justice or his successor in office as a full and correct copy of all the proceedings in that case from his docket, with a certificate of magistracy thereon, signed and authenticated by a clerk of a court of record in the county where such judgment was rendered, with the seal thereof attached, is evidence, in any court in this state, to prove the facts contained in such exemplification.

(G. S. 1866, c. 73, § 80; G. S. 1878, c. 73, § 87; as amended 1889, c. 107, § 1.)

A judgment was rendered by a justice of the peace of another state, who afterwards died. *Held*, that an exemplification of such judgment, certified to by another justice of such state, entitled by the laws thereof to the custody of the docket and papers of such deceased justice, was not admissible as evidence of such judgment in the courts of this state, by virtue of this section; and, such court not being one of record, such exemplification did not come within the provisions of the act of congress of 1790, or section 49, c. 73, Gen. St. (§ 5706.) Bryan v. Farnsworth, 19 Minn. 239, (Gil. 198.)

§ 5750. Court may order inspection of documents, when.

The court before which an action is pending, or a judge thereof, may order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document or paper in his possession or under his control, containing evidence relating to the merits of the action, or the defence therein; if compliance with the order is refused, the court may exclude the book, document or paper from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing. This section is not to be construed to prevent a party from compelling another to produce books, papers or documents, when he is examined as a witness.

(G. S. 1866, c. 73, § 81; G. S. 1878, c. 73, § 88.)

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

Production of books, etc., before trial will not be ordered unless they contain evidence that may be used on trial, and not if they contain merely hearsay. Powell v. Northern Pac. R. Co., 46 Minn. 249, 48 N. W. Rep. 907.

§ 5751. Bills and notes—Signatures presumed genuine.

In actions brought on promissory notes or bills of exchange by the indorsee, the possession of the note or bill is prima facie evidence that the same was endorsed by the person by whom it purports to be endorsed; and every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed, until the person by whom it purports to have been signed or executed shall deny the signature or execution of the same by his oath or affidavit; but this section shall not extend to instruments purporting to have been signed or executed by any person who shall have died previous to the requirement of such proof.

(G. S. 1866, c. 73, § 82, as amended 1875, c. 67, § 1; G. S. 1878, c. 73, § 89.)

As to signature to note or bill obtained by artifice, see § 2239.

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

This provision applies to indorsements purporting to be made by corporations as well as to those purporting to be made by natural persons. First Nat. Bank of Rock Island v. Loyhed, 28 Minn. 397, 10 N. W. Rep. 421. Possession of a note, purporting to be indorsed by a corporation, is *prima facie* evidence that it was so indorsed, without proof of the authority of the person making the indorsement. Bank v. Mallan, 37 Minn. 404, 34 N. W. Rep. 901.

By force of statute, in an action upon a promissory note by one claiming as indorsee,

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

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

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

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

A general denial in a verified answer does not put in issue the execution of a written contract on which the action is brought. Such an answer admits the power of the corporation to make the contract, and the authority of the agent by whom it was executed. Bausman v. Credit Guarantee Co., 47 Minn. 377, 50 N. W. Rep. 496.

See Burr v. Crichton, 51 Minn. 343, 53 N. W. Rep. 645.

A deed not made by the defendant, and not executed and acknowledged in the manner prescribed by the statutes of this state, is inadmissible in evidence without proof of its execution aliunde. Lydiard v. Chute, 45 Minn. 277, 47 N. W. Rep. 967.

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

§ 5752. Effect of indorsement of money received on note.

An indorsement of money received, on any promissory note, which appears to have been made when it was against the interest of the holder to make it, is prima facie evidence of the facts therein contained.

(G. S. 1866, c. 73, § 83; G. S. 1878, c. 73, § 90.)

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

§ 5753. Land-office receipt, etc.—Evidence of title.

The receipt or certificate, signed by the register or receiver of any United States land-office, of the entry or purchase of any tract of land, or of the location of any tract by a military land warrant, is prima facie evidence, in the courts of this state, that the title of the lands mentioned or described in said receipt or certificate is in the person named therein, his heirs or assigns.

(G. S. 1866, c. 73, § 84; G. S. 1878, c. 73, § 91.)

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

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

See Winona & St. P. R. Co. v. Randall, 29 Minn. 283, 286, 13 N. W. Rep. 127; County of Polk v. Hunter, 42 Minn. 312, 314, 44 N. W. Rep. 201.

§ 5754. Land-office certificate of entry, etc.—Evidence of title.

That the certificate of the register or receiver of any of the United States land-offices within this state, showing by whom, when and how, any lands

within this state were entered under the homestead, pre-emption or timber-culture laws of the United States, shall be prima facie evidence, in all the courts of this state, that the person named therein was, at the date of such entry, the owner in fee of such lands.

(1878, c. 52, § 2; G. S. 1878, c. 73, § 92.)

Defendant's pre-emption settlement was made May, 1868, and his entry June 1, 1872, as shown by certificates such as are provided for in §§ 5753, 5754, and are thereby made *prima facie* evidence of his title. Held, that these certificates are *prima facie* evidence of a pre-emption right commenced in May, 1868, and consummated in June, 1872. Winona & St. Peter R. Co. v. Randall, 29 Minn. 283, 13 N. W. Rep. 127.

See Schultz v. Hadler, 39 Minn. 191, 39 N. W. Rep. 97.

§ 5755. Certificate of officer of any department of United States—Evidence.

That the certificate of any officer or acting officer of any department of the United States government to any fact appearing of record in his department authenticated by the seal of his office, if he have seal, shall be prima facie evidence of the fact so certified and authenticated.

(1893, c. 57, § 1.[5])

See § 5734.

§ 5756. Patents and duplicates may be recorded—Effect of record.

Patents issued by the United States of land in the state, or duplicates thereof from the records in the general land-office of the United States, certified by the commissioner of such land-office, may be recorded in the registry of deeds of the county in which the land described in the patent is situated; and the record of such patents or duplicates, or copies of such records certified by the register of deeds, are evidence, in like manner and to the same extent, as the records, or transcripts thereof, of other conveyances of real estate.

(G. S. 1866, c. 73, § 85; G. S. 1878, c. 73, § 93.)

§ 5757. Land-office receipts may be recorded—Effect of record.

That the duplicate, or receiver's final receipt, issued from the respective United States land-offices in this state, shall be entitled to record in the office of the register of deeds of the county in which the land therein described is located; and all such records shall have the same force and effect in law, with respect to notice and title, as the record of the patent to such land would have.

(1878, c. 51, § 1; G. S. 1878, c. 73, § 94.)

See County of Polk v. Hunter, 42 Minn. 312, 314, 44 N. W. Rep. 201.

§ 5758. Plats of surveys, etc., from land-office—Certificate of county surveyor.

All plats of surveys of public lands, certified by the register of the land-office of the district in which such land is situated, to be a true copy of the certified copy on file in his office of the original plat thereof, and all certificates, by the register of such land-office, of the surveys or entry and location of, or other facts in relation to, such lands, taken from the books of such land-office, or from the certificate indorsed on the copy of the original plat on file therein, are prima facie evidence of the facts therein stated. The certificate of the county surveyor, or any of his deputies, shall be admitted as legal evidence; but the same may be explained or rebutted by other evidence.

(G. S. 1866, c. 73, § 86; G. S. 1878, c. 73, § 95.)

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

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

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[5] An act making the certificates of the officers, or acting officers, of the departments of the United States government to facts appearing of record in their departments, prima facie evidence of such facts. Approved April 18, 1893.

§ 5759. Conveyances, etc., records thereof and copies of records.

All conveyances of real estate, and other instruments authorized by law to be recorded, and which are acknowledged or proved as provided by law, and, if the same have been recorded, the record or a transcript thereof, certified by the register in whose office the same is recorded, may be read in evidence without further proof; but the effect of such evidence may be rebutted by other competent testimony.

(G. S. 1866, c. 73, § 87; G. S. 1878, c. 73, § 96.)

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

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

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

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

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

See Lydiard v. Chute, cited in note to § 5751; Stinson v. Doolittle, cited in note to § 4180; Romer v. Conter, cited in note to § 5727.

§ 5760. Certificates and records of marriage.

The original certificates and records of marriage, made by the judge, justice or minister, as prescribed by law, and the record thereof by the clerk of the district court, or a copy of such record duly certified by such clerk, shall be received, in all courts and places, as presumptive evidence of the fact of such marriage.

(G. S. 1866, c. 73, § 88; G. S. 1878, c. 73, § 97.)

See State v. Brecht, 41 Minn. 50, 54, 42 N. W Rep. 602.

§ 5761. Evidence of existence of corporation or partnership.

In all actions brought by any corporation, or by any persons as copartners, or by the endorsers of any such corporation or copartners, upon any promissory note, bill of exchange, or other written instrument for the payment of money only, executed and delivered by the defendant to such corporation by its corporate name, or to such plaintiffs or copartners by their firm name, the production in evidence of the instrument upon which such action is brought shall be prima facie evidence of the existence of such corporation, and that the persons named as payees in such written instrument are, and at the time of the execution of said instrument were, such copartners.

(1876, c. 32, § 3; G. S. 1878, c. 73, § 98.)

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

TITLE 11.

CHARACTER, COMPETENCY, AND EFFECT OF EVIDENCE.

§ 5762. Fact of marriage, how proved.

When the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the party against whom the proceeding is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent.

(G. S. 1866, c. 73, § 89; G. S. 1878, c. 73, § 99.)

This section, authorizing, in prosecutions for bigamy, indirect evidence to establish fact of marriage, changes the rules of evidence in such actions, and, as to offenses committed before its passage, is *ex post facto*. State v. Johnson, 12 Minn. 476, (Gil. 378.)

Upon trial upon an indictment for polygamy, committed prior to July 1, 1866, marriage in fact must be proved by direct evidence, and it cannot be established by admission, reputation, cohabitation, or circumstances of this character; nor (McMillan, J., dissenting) is such evidence admissible as corroborative of direct evidence of marriage. Id.

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

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

§ 5763. Evidence in prosecutions for counterfeiting bank-notes, etc.

In all prosecutions for forging or counterfeiting any notes or bills of any banking company or corporation, or for uttering, publishing or tendering in payment as true, any forged or counterfeit bank-bills or notes, or for being possessed thereof with the intent to utter and pass them as true, the testimony of the president and cashier of such banks may be dispensed with, if their place of residence is without this state, or more than forty miles from the place of trial; and the testimony of any person acquainted with the signature of the president or cashier of such banks, or who has knowledge of the difference in the appearance of the true and counterfeit bills or notes thereof, may be admitted to prove that any such bills or notes are counterfeit.

(G. S. 1866, c. 73, § 90; G. S. 1878, c. 73, § 100.)

§ 5764. In prosecutions for uttering counterfeit treasury notes, etc.

In all prosecutions for forging or counterfeiting any note, certificate, bill of credit, or security issued on behalf of the United States, or on behalf of any state or territory, or for uttering, publishing, or tendering in payment as true, any such forged or counterfeit note, certificate, bill of credit, or security, or for being possessed thereof with intent to utter and pass the same as true, the certificate under oath of the secretary of the treasury, or of the treasurer of the United States, or of the secretary or treasurer of any state or territory on whose behalf such note, certificate, bill of credit or security purports to have been issued, shall be admitted as evidence for the purpose of proving the same to be forged or counterfeit.

(G. S. 1866, c. 73, § 91; G. S. 1878, c. 73, § 101.)

§ 5765. In prosecutions for rape.

Proof of actual penetration into the body is sufficient to sustain an indictment for rape, or for the crime against nature.

(G. S. 1866, c. 73, § 92; G. S. 1878, c. 73, § 102.)

See §§ 6527, 6554.

§ 5766. Confession, when inadmissible as evidence.

A confession of a defendant, whether made in the course of judicial proceedings, or to a private person, cannot be given in evidence against him, when made under the influence of fear produced by threats; nor is it sufficient to warrant his conviction, without evidence that the offence charged has been committed.

(G. S. 1866, c. 73, § 93; G. S. 1878, c. 73, § 103.)

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

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

See State v. New, 22 Minn. 76, 80; State v. Holden, 42 Minn. 350, 44 N. W. Rep. 123.

§ 5767. Uncorroborated testimony of accomplice.

A conviction cannot be had upon the testimony of an accomplice, unless he is corroborated by such other evidence as tends to convict the defendant of the commission of the offence, and the corroboration is not sufficient if it merely shows the commission of the offence or the circumstances thereof.

(G. S. 1866, c. 73, § 94; G. S. 1878, c. 73, § 104.)

The purchaser of beer unlawfully sold on Sunday, though in pursuit of evidence against persons violating the law prohibiting such sales, is not an accomplice. State v. Baden, 37 Minn. 212, 34 N. W. Rep. 24.

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

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

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

In a prosecution for taking money to withhold evidence of a crime, the person who makes the agreement, and pays the money to the accused, is not an accomplice, and his testimony need not be corroborated. State v. Quinlan, 40 Minn. 55, 41 N. W. Rep. 299.

On an indictment for manslaughter of a woman, her dying declaration held admissible to corroborate the evidence of her husband, who was an accomplice. State v. Pearce, (Minn.) 57 N. W. Rep. 652, 1065.

§ 5768. Evidence in prosecutions for libel—Rights of jury.

In all criminal prosecutions or indictments for libel, the truth may be given in evidence; and if it appears to the jury that the matter charged as libellous is true, and was published with good motives and justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

(G. S. 1866, c. 73, § 95; G. S. 1878, c. 73, § 105.)

See §§ 6496-6506.

§ 5769. Divorces not granted on sole testimony of parties.

Divorces shall not be granted on the sole confessions, admissions or testimony of the parties, either in or out of court.

(G. S. 1866, c. 73, § 96; G. S. 1878, c. 73, § 106.)