1941 Supplement

To

Mason's Minnesota Statutes, 1927

and

Mason's 1940 Supplement

Containing the text of the acts of the 1941 and 1943 Sessions of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state and federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota together with Law Review Articles and digest of all common law decisions.

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9794. Power to punish—Limitation.

Where husband's disobedience of an order awarding wife temporary alimony prejudices her remedy, he may, in discretion of court, be punished by imprisonment under this section. Dahl v. Dahl, 210M361, 298NW361. See Dun. Dig. 1708.

Sentence of thirty days in county jail was not excessive for willful refusal to pay temporary alimony in suit for separate maintenance. Id.

9796. Arrest—Order to show cause, etc.

An order adjudging a defendant in contempt and fining him $50 or, in case he does not pay the fine, imprisoning him for 30 days, is an adjudication of criminal contempt and is reviewable only on certiorari and not on appeal. Paulson v. Johnson, 214M202, 7NW(2d)338. See Dun. Dig. 1703a, 1708a.

If a contempt is a criminal contempt, one simply to impose a punishment, it can be reviewed only by certiorari; but if it is one to aid enforcement of a civil remedy, as by compelling one adjudged in contempt to deliver property in his possession, it is a civil contempt reviewable by appeal. Id. See Dun. Dig. 1708a.

An order requiring defendant to do a certain act and if he fail to do it to show cause why he should not be adjudged in contempt is not a final order and is not appealable. Id. See Dun. Dig. 1708a.

CHAPTER 92

Witnesses and Evidence

WITNESSES

9809. Subpoena, by whom issued.

Statutes authorize issuance of subpoenas by any clerk of court of record or by any justice of the peace of the state for witnesses in proceedings before state board of education to remove the commissioner of education for inefficiency and misconduct. State v. State Board of Education, 213M184, 6NW(2d)251, 143ALR503. See Dun. Dig. 10360.

County board has power to subpoena witnesses for hearing of charges against a veteran in removal proceedings, pursuant to this section. Op. Atty. Gen. (85E), Mar. 6, 1942.

Hearing before county board of charges against a veteran under the preference act is a "civil case". Id.

9814. Competency of witnesses.

½. In general.

The competency, as witness, of 14 year old girl with head injuries was for trial court, and rightly defendant's psychiatrist was denied an examination of girl as to competency before being placed on the witness stand, and court accorded defendant all he was entitled to when his expert was permitted to examine girl and, in defense, give an opinion as to her competency to remember what occurred at time of attack on her mother and herself. State v. Palmer, 206M185, 288NW160. See Dun. Dig. 10303.

Practice of attorneys of furnishing from their own lips and on their own oaths controlling testimony for their client is one not be condoned by judicial silence, for a lawyer occupying attitude of both witness and attorney for his client subjects his testimony to criticism if not suspicion. Stephens' Estate, 207M597, 293NW90. See Dun. Dig. 10306a.

Privilege is personal to those to whom it belongs and is waived unless asserted by them, and a party may not invoke privilege of his witness, much less that of his adversary. Esser v. Brophey, 212M194, 3NW(2d)3. See Dun. Dig. 10316.

1. All persons not excepted competent.

Where no objection was made to testimony of plaintiff's attorney at trial, error on its reception cannot be assigned or urged on appeal. Holmes v. Conter, 212M394, 4NW(2d)106. See Dun. Dig. 10313.

3. Subdivision 1.

Admissibility of testimony of one spouse against the other in cases of a crime committed by one against the other. 27MinnLawRev205.

4. Subdivision 2.

Communications between testator and attorney who drew will are not privileged in probate proceedings involving question whether omission of a child from will was intentional. Dorey's Estate, 210M136, 297NW561. See Dun. Dig. 10206e, 10313, 10316.

There is a distinction between documents prepared as records by an employee pursuant to employer's direction in regular course of business and those prepared under direction and advice of attorney as a communication for use in connection with his rendition of professional service, one being a business record without privilege of any sort, and other a communication between attorney and client. Schmitt v. Emery, 211M547, 2NW(2d)413, 139ALR 1242. See Dun. Dig. 10313.

Where a document is prepared by an agent or employee by direction of employer for purpose of obtaining advice of attorney or for use in prospective or pending litigation, agent or employee as well as attorney is prohibited from testifying with respect thereto without client's consent. Id.

Where an employer delivers to an attorney a document prepared by an agent or employee, for purpose of obtaining professional advice or for use in prospective or pending litigation, document is privileged as a communication between attorney and client. Id.

Where parties are engaged in maintaining a common cause, furnishing copy of a document privileged as a communication between attorney and client by attorney for one party to attorney for another does not affect privilege, and recipient of copy stands under same restraints arising from privileged character of document as giver. Id.

Where a party refuses to produce a document which is privileged as a communication between attorney and client, opposing party, if he has given due notice to produce, may show the contents thereof by parol testimony, but such testimony must itself not be privileged. Id.

In action to quiet title where issue was whether defendants were served with personal notice of expiration of period of redemption on lands sold for taxes, and attorney for defendants was called by plaintiff and asked whether he had in his possession a sales slip from a local store to one of defendants, court properly overruled objection to question on ground that it was incompetent, immaterial, irrelevant, and privileged, defendants' attorney answering that he did not have the slip in his possession. Holmes v. Conter, 212M394, 4NW(2d)106. See Dun. Dig. 10313(89).

Where an attorney is requested by his client to attest a deed or will prepared for client by attorney, the attorney may disclose, after death of client, statements made by latter at time of transaction relative thereto, since client in requesting attorney to witness document, by implication, waives privilege which would otherwise bar the disclosure of his statements. Larson v. Dahlstrom, 214M304, 8NW(2d)48, 146ALR245. See Dun. Dig. 10313, 10316(f).

Extent of privilege between attorney and client's agent. 26 Minn. Law Rev. 744.

5. Subdivision 4.

In motor vehicle collision case, history given by decedent several months prior to collision, when at clinic for examination, and records there made were rightly ruled inadmissible as privileged. Ost v. U., 207M500, 292 NW207. See Dun. Dig. 10314.

Plaintiff as administratrix did not waive statute by a personal letter authorizing clinic to exhibit its records to insurance company which had issued policies on life of her husband wherein she as his widow was sole beneficiary. Id. See Dun. Dig. 10314.

Statement by person injured in automobile accident to doctor at hospital that he was driving the car was not "necessary to enable the doctor to act in that capacity", communication relating wholly to a non-professional matter. Leifson v. Henning, 210M311, 298NW41. See Dun. Dig. 10314.

Where two doctors were attending defendant at a hospital, defendant by calling one of the doctors to testify that he was in a mental fog waived a right to insist that other doctor withhold his opinion. Id.

Doctor could testify that defendant appeared to be clear mentally when he was asked by defendant to serve as his doctor following an automobile accident, his observations having been made before he undertook professional services for defendant. Id.

In prosecution for murder of wife statement by prosecuting attorney in argument that deceased's physician was called as a witness by the state but that the defence would not permit the physician to speak on ground that information was confidential was not so prejudicial as to require a new trial. State v. Rediker, 214M470, 8NW (2d)527. See Dun. Dig. 10314.

Court on granting a new trial for inadequacy of damages need not consider an assignment of error as to examination of a physician concerning privileged matter. Krueger v. Henschke, 210M307, 298NW44. See Dun. Dig. 10314.

Testimony as to examination not made for purpose of treatment. Id.

6. Subdivision 5.

Reports of brewer filed with liquor control commissioner under regulation may be inspected by tax payers under reasonable rules and regulations. Op. Atty. Gen., (851r), July 25, 1941.

9815. Accused.

1. In general.

Statement of prosecuting attorney in argument to the jury, that nobody had denied portions of an extra-judicial confession of defendant, held not to transgress statutory

rule that there shall be no allusion to defendant's failure to testify. State v. McClain, 208M91, 292NW753. See Dun. Dig. 2478.

Though defendant elects not to take witness stand, statement by trial court, after summary of the evidence, that certain assertions of witnesses for the state were "not denied" did not violate this section. State v. Yurkiewicz, 212M208, 3NW(2d)775. See Dun. Dig. 10307.

2. Cross-examination of accused.

Where defendant testified that he had been convicted of crime but had not served time because of his having kept his probation, cross-examination as to keeping probation was proper. State v. Palmer, 206M185, 288NW160. See Dun. Dig. 10307.

County attorney held not given too wide range in cross-examining defendant in respect to other offenses, brought into the case by his direct examination. Id.

Evidence relating to the marital status of defendant and whether he or his former wives obtained divorce decrees is irrelevant as affecting defendant's credibility as a witness, and was improper cross-examination. State v. Clow, 215M380, 10NW(2d)359. See Dun. Dig. 2458.

Although ordinarily the extent of cross-examination of a defendant is within the discretion of the trial court, there is a limit beyond which questioning should not proceed. Id. See Dun. Dig. 10307.

9817. Conversation with deceased or insane person.

1. Who incompetent.

An executor of a prior will has no such certain or immediate interest in the disallowance of a subsequent will as to disqualify him from testifying to conversations with testator in proceedings contesting the later will. Boese's Estate, 213M440, 7NW(2d)355. See Dun. Dig. 10316(b).

Wife of a defendant in an action to cancel a deed was a proper party defendant and was incompetent to testify as to a conversation with or statement made by deceased husband of plaintiff who had conveyed the property to the plaintiff prior to his death, and she did not qualify herself as a witness by her default in failing to answer the complaint. Cocker v. Cocker, 215M565, 10NW(2d)734. See Dun. Dig. 10316(b).

1b. Heirs and beneficiaries.

Person beneficially interested in any recovery for death could not testify to res gestae statement of deceased. Arnold v. Northern States Power Co., 209M551, 297NW182. See Dun. Dig. 10316.

1f. Acts and transactions in general.

Statements of deceased are not admissible simply because they happen to be part of res gestae and not hearsay. Scott v. P., 207M131, 290NW431. See Dun. Dig. 10316.

Since statements relevant to the issue are explicitly barred, they are inadmissible to show mental condition of speaker at moment. Id. See Dun. Dig. 10316.

An interested party to an action may not disclose statements made to him by a decedent during latter's lifetime relative to subject matter in issue in such action, even though such testimony be offered under the "verbal act" theory to show mental condition of decedent at time statements were made. Larson v. Dahlstrom, 214M304, 8NW(2d)48, 146ALR245. See Dun. Dig. 10316(a).

2. Effect of conversation.

Insofar as deceased insured's conversation with beneficiary may have shown plans which related to presence or absence of motive for or intention of suicide, they were barred in an action by beneficiary against insurer who claimed suicide. Scott v. P., 207M131, 290NW431. See Dun. Dig. 10316.

4. Conversations with whom.

Widow of an employee had no interest in event of proceeding by another employee under Workmen's Compensation Act, and was not prohibited from stating conversation in which her deceased husband, claimant and employer took part. James v. Peterson, 211M481, 1NW(2d)844. See Dun. Dig. 10316.

9. Statute strictly construed.

Statute is not to be evaded or its intended effect limited by construction, and is not to be strictly construed, but on contrary is to have a fair construction which will effectuate its purpose. Scott v. P., 207M131, 290NW431. See Dun. Dig. 10316.

UNIFORM WITNESSES FROM OUT OF THE STATE ACT

9819-1. Witnesses in criminal cases.

Adopted by Florida, New Jersey, New York and Pennsylvania in 1942.

DEPOSITIONS

9827. Signing and certifying.

Signing a deposition consisting of six typewritten pages only on last page was not ground for suppression in absence of claim of inaccuracy. Wolfson v. Kohn, 210M12, 297NW109. See Dun. Dig. 2715.

9828. Return of depositions.

Delay of about five months in returning deposition to court after taken was not ground for suppression in absence of a claim that deposition was not accurate. Wolfson v. Kohn, 210M12, 297NW109. See Dun. Dig. 2714.

9832. Informalities and defects—Motion to suppress.

Delay of about five months in returning deposition to court after taken was not ground for suppression in absence of a claim that deposition was not accurate. Wolfson v. Kohn, 210M12, 297NW109. See Dun. Dig. 2714.

Signing a deposition consisting of six typewritten pages only on last page was not ground for suppression in absence of claim of inaccuracy. Id. See Dun. Dig. 2715.

JUDICIAL RECORDS

9851. Records of foreign courts.

Judgments are not evidence against strangers to the actions producing them, that is, persons who are not parties or their privies, and are therefore not admissible to establish the facts on which they are based. S. T. McKnight Co. v. Central Hanover Bank & Trust Co., (CCA 8), 120F(2d)310.

Presumptively Jefferson county court of common claims, Alabama, being a court of record with a seal, had jurisdiction to render judgment as shown by certificate, in absence of evidence demonstrating otherwise in action on such judgment in Minnesota. Patterson v. C., 209M50, 295NW401. See Dun. Dig. 5208.

Judgment entered only on docket of court of another state would be sufficient to support action in this state if such entry constituted a sufficient judgment under laws of the foreign state. Id. See Dun. Dig. 5209.

UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT

9852-1. Courts to take judicial notice.

Adopted in Rhode Island.

Adopted in Hawaii, New Jersey, Washington and Wyoming.

There is no presumption that a person knows the law of another state, and even courts are not required to take notice of the laws of other states under the Uniform Judicial Notice of Foreign Law Act. Daniel's Estate, 208M420, 294NW465. See Dun. Dig. 3453.

Congressional enactment of Uniform Judicial Notice Act. 40 Mich. Law Rev. 174.

9852-4. Evidence.

Notice to adverse parties that judicial notice will be requested should be rather specifically stated in pleadings or otherwise to prevent surprise. Patterson v. C., 209M50, 295NW401.

Court properly took judicial notice of New York law that married woman is liable on contract of guarantee or suretyship, where notice was served on her attorneys that court would be asked to take judicial notice of such law. United Factors Corp. v. M., 16Atl(2d)(Pa)735.

9854. Municipal ordinances, etc.

In action to enjoin and to recover damages for a nuisance it was unnecessary to admit into evidence an ordinance of the city making it unlawful to permit the escape of certain noxious substances and odors, since court by virtue of manner in which it was pleaded knew of its existence by judicial notice. Jedneak v. Minneapolis General Electric Co., 212M226, 4NW(2d)326. See Dun. Dig. 3452.

9855. Statutes of other states.

Foreign laws are regarded as facts the same as other facts affecting the rights of the parties. Daniel's Estate, 208M420, 294NW465. See Dun. Dig. 3789.

DOCUMENTARY EVIDENCE

9862. Official records prima facie evidence, etc.

In a workmen's compensation proceeding, members of industrial commission were not required to close their eyes to what the commission records and files showed concerning labor controversies existing in community where death of union organizer occurred. Corcoran v. Teamsters and Chauffeurs Joint Council No. 32, 209M288, 297NW4. See Dun. Dig. 3347.

City health officer is not required to use a seal upon issuance of certified copies of birth and death certificate since they have no official seals, but their certificates may be authenticated by a certificate from city clerk authenticating the certificate and signature of the health officer. Op. Atty. Gen. (225*l*), Oct. 13, 1942.

Admissibility of findings of an administrative board. 25MinnLawRev949.

9864. Instruments acknowledged—Evidence.

Duly acknowledged deed was prima facie proof of both its genuineness and delivery in favor of persons properly claiming under it. Dempsey v. Allen, 210M395, 298NW 570. See Dun. Dig. 2661a, 2663.

9865. Deposit of papers with register or clerk.

Register of deeds is not required to receive for filing a wage assignment, and filing of such an instrument has no legal effect. Op. Atty. Gen.(373B-3), June 10, 1940.

9870. Copies of record of death in certain cases.

A certified copy of a certificate of death should contain a certification pursuant to §5366 or §9862 when presented for registration or filing. Op. Atty. Gen., (225c-1), Nov. 3, 1939.

UNIFORM BUSINESS RECORDS AS EVIDENCE ACT

9870-1. Definitions.

Adopted by Hawaii, Oregon and Wyoming, 1941.

This act had no application to clinic records in an action tried before it went into effect. Ost v. U., 207M500, 292NW207.

There is a distinction between documents prepared as records by an employee pursuant to employer's direction in regular course of business and those prepared under direction and advice of attorney as a communication for use in connection with his rendition of professional service, one being a business record without privilege of any sort, and other a communication between attorney and client. Schmitt v. Emery, 211M547, 2NW(2d)413, 139ALR 1242. See Dun. Dig. 3346.

9870-2. Business records as evidence.

Hospital records as evidence. Laws 1941, c. 229.

In action against trustee of corporation in liquidation to recover for services rendered, issue being amount of plaintiff's compensation, independent audits of corporation's business annually for many years were admissible in evidence as admissions by corporation and defendant, notwithstanding that on their face they appear to have been based upon information furnished by plaintiff alone, defendant being principal stockholder, president, and general manager, and neither he nor corporation could plead ignorance. Lewin v. Proehl, 211M256, 300NW814. See Dun. Dig. 3346.

Mere notation in business records of a debtor that a certain debt has been paid is not admissible in evidence. Williams v. Caples, 20Atl(2d)302.

Office records of practicing physicians and pharmacists are admissible in evidence to show the falsity of an insured person's statement that he had not visited a physician within a certain period of time. Freedman v. Mutual Life Ins. Co., 342Pa404, 21Atl(2d)81.

Admissibility of records kept in the regular course of business. 24 MinnLawRev 958.

MISCELLANEOUS PROVISIONS

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

Admissibility of records kept in the regular course of business. 24 MinnLawRev 958.

9892. Federal census—Population.

Computation of population of cities or villages for purpose of determining number of liquor licenses is governed by last official state or federal census, and no effect may be given a private census. Op. Atty. Gen., (218g-1), Feb. 6, 1940.

County should be redistricted within a reasonable time after certified copies of census of several political divisions of states are filed in office of secretary of state, if change in population requires it. Op. Atty. Gen. (56-a), July 26, 1940.

Changes in salaries due to federal census do not become effective until this section has been complied with. Op. Atty. Gen. (347-L), July 26, 1940.

Change in population does not affect salaries of officers of sub-divisions of state until certified copies of population indicated by federal census have been filed with secretary of state, except as to cities of first class. Op. Atty. Gen. (124h), Dec. 19, 1940.

Once a certified copy of population figures of a particular county are filed by director of federal census with governor of state, such county is deemed to have population disclosed by such census for purposes of determining salaries of county officers. Op. Atty. Gen., (104a-9), Jan. 24, 1941.

Population of a village is to be determined from records of last preceding census, state or federal, notwithstanding that a new business has been set up and there is actually a large increase in population. Op. Atty. Gen., (487c-3), Mar. 5, 1941.

Population change does not become effective for purposes of state laws until governor files a certified copy of official census tables. Op. Atty. Gen. (454E), Oct. 21, 1941.

Federal census does not become effective in determining salaries of county officers until a certified copy thereof is filed with the Secretary of State. Op. Atty. Gen. (124l), Dec. 26, 1941.

Date when certified copy of federal census is filed by the governor with the secretary of state is effective at date of the census, to be taken in determining salary of a sheriff. Op. Atty. Gen., 56(a), May 20, 1943.

9899. Fact of marriage, how proved.

A common law marriage in Minnesota may be proved by admissions of parties, evidence of general repute, evidence of cohabitation as married persons, and other circumstantial or presumptive evidence from which fact of marriage may be reasonably inferred. Wilson v. Wilson, 139Neb153, 296NW766. But see Laws 1941, c. 459, abolishing common law marriages.

9902. Confession, inadmissible when.

Statutory requirement of something more than defendant's confession to support conviction is satisfied when extra-judicial written confession is corroborated by judicial admission by word and conduct. State v. McClain, 208M91, 292NW753. See Dun. Dig. 2462.

Defendant's appearance and statement to municipal judge, made day after his confession to county attorney, characterizing and confirming the confession, is admissible. Id.

9903. Uncorroborated evidence of accomplice.

Testimony to corroborate that of an accomplice is sufficient if it tends in some degree to establish guilt of accused. State v. Lemke, 207M35, 290NW307. See Dun. Dig. 2457.

Trial court erred in submitting to jury question whether witness was an accomplice whose testimony must be corroborated where evidence showed as matter of law that he was an accomplice, and such error was prejudicial because jury might have concluded that witness was not an accomplice and needed no corroboration. State v. Elsberg, 209M167, 295NW913. See Dun. Dig. 2457.

An accountant in finance division of highway department was an accomplice as a matter of law in false auditing and payment of claims on state where he assisted in having claims approved with full knowledge that they were irregular. Id.

General test to determine whether a witness is an accomplice is whether he himself could have been indicted for the offense. Id.

While an accomplice's testimony need only be corroborated on some material facts, nevertheless, if circumstances relied upon are as consistent with innocence as with guilt, they fail to satisfy rule. Id.

Fact that jury does not believe accused's denial of guilt and considers it false does not constitute sufficient evidence of fraudulent conduct on accused's part to support evidence of accomplice or constitute additional evidence against accused. Id.

Even if an accomplice be not corroborated as to any part of his story, evidence of fraudulent conduct on part of accused, such as attempted bribery of a witness or of a juror, sufficiently support accomplice's story to satisfy statute. Id.

At common law, desirability for corroboration assumed that interest of witness in shouldering blame onto somebody else tended to impeach his reliability as a witness and made desirable a rehabilitation by means of corroboration as to some part of his story. Id.

Uncorroborated testimony of an accomplice is sufficient to sustain a finding of probable cause for holding a prisoner to district court to answer for a felony. State v. Jeffrey, 211M55, 300NW7. See Dun. Dig. 2457.

At common law a conviction could be had upon uncorroborated testimony of an accomplice, but trial judge was under duty of giving a cautionary instruction concerning weight of such testimony, and statute has not changed nature of instruction, and an instruction concerning necessity of corroboration of accomplices and weight of their testimony is cautionary in its nature, and should be given as a matter of course, but failure to do so, absent a request therefor, is not error. State v. Soltau, 212M20, 2NW(2d)155. See Dun. Dig. 2457.

Absent a request, it is not reversible error not to give a cautionary instruction: as to weight of testimony of a witness previously convicted of crime; that weight of evidence is not to be determined solely by number of witnesses; and as to necessity of corroboration of accomplices and weight of their testimony. Id.

Statute prescribes a substantive rule of law concerning quality of proof necessary to convict and is based on distrust of testimony of accomplices. Id.

Conviction for perjury held not based upon uncorroborated testimony of accomplice. Id.

Laws 1875, c. 49, which provided that no conviction could be had upon uncorroborated evidence of woman upon whom abortion was performed, was repealed by the state penal code of 1885, and State v. Pearce, 56M226, 57 NW652, 1065, is overruled insofar as it holds that such statute is in force and effect. State v. Tennyson, 212M 158, 2NW(2d)833, 139ALR987. See Dun. Dig. 26, 2457.

Where purpose is to suppress a practice or transaction which results from act of several participants, statutes may provide that participants shall be guilty of separate crimes. Id. See Dun. Dig. 2415.

An accomplice must participate or be concerned in commission of specific crime with which defendant is charged, and test is whether or not alleged accomplice could be indicted and punished for the crime with which the accused is charged. Id. See Dun. Dig. 2457.

Testimony of one accomplice cannot be corroborated by that of another. Id. See Dun. Dig. 2457.

A woman upon whom an abortion is performed or attempted is not an accomplice in commission of offense, and her testimony need not be corroborated. Id. See Dun. Dig. 26, 2457.

A person upon whom the crime of sodomy is committed is not an accomplice of the perpetrator unless he consents to the act, and one who is incapable of consenting cannot be an accomplice. State v. Schwartz, 215M476, 10 NW(2d)370. See Dun. Dig. 2457.

The sodomy statute has not withheld from boys the power to consent as it has from girls. Id.

A girl under the age of consent under carnal knowledge statute is not an accomplice under the sodomy statute and corroboration of her testimony is not required. Id.

9905. Divorce—Testimony of parties.

Testimony of cruel and inhuman treatment was corroborated by testimony of witness that he had seen black and blue marks on plaintiff on several occasions. Locksted v. L., 208M551, 295NW402. See Dun. Dig. 2795.

It is unnecessary that the plaintiff be corroborated as to each item of evidence, being sufficient if evidence tends in some degree to confirm allegations relied upon for a divorce. Id.

Since purpose of statute is to prevent collusion, greater liberality is justified where divorce is fervently contested. Id.

9905½.

COMMON LAW DECISIONS RELATING TO WITNESSES AND EVIDENCE IN GENERAL

1. Judicial notice.

Mason City P. C. Ass'n v. S., 205M537, 286NW713. Cert. den. 60SCR130. Reh. den. 60SCR178.

It is a matter of common knowledge that in Minnesota beet sugar factories, except for relatively small maintenance crews employed year around, are engaged in a seasonal industry. Bielke v. A., 206M308, 288NW584. See Dun. Dig. 3451.

It is common knowledge that it is proper for a fireman to take a position on rear step or platform of fire truck. Anderson v. G., 206M367, 288NW704. See Dun. Dig. 3451.

It is common knowledge that extensive plants equipped with various machinery to remove dust from used bags are in existence. State v. Miller, 206M345, 288NW 713. See Dun. Dig. 3451.

Judicial notice may be taken of fact that borrowing conditions have greatly improved during past few years. Shumaker v. H., 206M458, 288NW839. See Dun. Dig. 3451.

Judicial notice will not be taken that a county has adopted a local option dog regulation statute. Olson v. P., 206M415, 288NW856. See Dun. Dig. 3492.

Judicial notice can be taken that Mississippi River at Minneapolis is a navigable stream, and that city cannot use public money to alter railroad bridges to make it possible for river traffic to ply the stream following improvements made by federal government, it being the legally enforceable and uncompensable duty of railroad to alter structure pursuant to command under the police power. Bybee v. C., 208M55, 292NW617. See Dun. Dig. 3459.

It is common knowledge that large amounts of alcohol may cause death. Sworski v. C., 208M43, 293NW297. See Dun. Dig. 3451.

It is a matter of common knowledge that smaller enterprises are located in rural districts. Eldred v. D., 209M 58, 295NW412. See Dun. Dig. 3451.

Courts take notice of fact that whiskey is an intoxicating liquor. State v. Russell, 209M488, 296NW575. See Dun. Dig. 3451.

Fact that employer was classed as "an undesirable risk" by carriers writing workmen's compensation insurance was a matter of public record in office of Industrial Commission and one of which commission could take judicial notice in workmen's compensation proceeding. Corcoran v. Teamsters and Chauffeurs Joint Council No. 32, 209M289, 297NW4. See Dun. Dig. 3455.

Court took judicial notice that certain area in the City of Minneapolis ranked high in homicide and robbery, with the diversity in nature and degree of the business activity. Hanson v. Robitshek-Schneider Co., 209M596, 297 NW19. See Dun. Dig. 3451.

It is a matter of common knowledge that after inspection of gasoline it is usually loaded into tanks or tank trucks. Arneson v. W. H. Barber Co., 210M42, 297NW 335. See Dun. Dig. 3451.

Operation of law of gravity is a matter of such common knowledge that all persons of ordinary intelligence and judgment, even if they are illiterate, are required to take notice. Blomberg v. Trupukka, 210M523, 299NW 11. See Dun. Dig. 3451.

Court takes judicial notice of fact that from very early days, while municipal warrants have never been negotiable, they have been transferable by endorsement and delivery and have been treated by banks and dealers in commercial paper as having all the attributes of negotiability, except that of freedom from original defenses. State Bank of Mora v. Billstrom, 210M497, 299NW 199. See Dun. Dig. 3451.

It is common knowledge that persons while engaged in their usual work, or while walking or even while in bed resting, collapse and die, and when there are no evidences of death-producing injuries on the body, no one can determine that death resulted from external accidental violence and was not contributed to by disease. Plotke v. Metropolitan Life Ins. Co., 210M541, 299NW216. See Dun. Dig. 3451.

Court knows that value of dollar is not what it formerly was. Odegard v. Connolly, 211M342, 1NW(2d)137. See Dun. Dig. 2595, 3451.

It is a matter of common knowledge that handrails lend support and guidance and help to prevent slipping and falls to those using stairways. Judd v. Landin, 211 M465, 1NW(2d)861. See Dun. Dig. 3451.

In action to enjoin and to recover damages for a nuisance it was unnecessary to admit into evidence an ordinance of the city making it unlawful to permit the escape of certain noxious substances and odors, since court by virtue of manner in which it was pleaded knew of its existence by judicial notice. Jedneak v. Minneapolis General Electric Co., 212M226, 4NW(2d)326. See Dun. Dig. 3452.

Court will take judicial notice of fact that farm leases in Minnesota do not terminate in the summer months, but in the spring or fall. State Bank of Loretto v. Dixon, 214M39, 7NW(2d)351. See Dun. Dig. 3451.

It is a matter of common knowledge that tank cars are used to haul gasoline and other petroleum products which, if subjected to extreme heat, are likely to explode. Wiseman v. N. P. Ry. Co., 214M101, 7NW(2d) 672, 13NCCA(NS)526. See Dun. Dig. 3451.

Courts may not close their eyes to well-known fact that local agent of an insurance company is the medium through whom business of procuring insurance contracts is customarily carried on, and that as such agent he often makes parol contracts for present insurance, and hence, such contracts, if within scope of agent's authority, are valid and binding upon insurer he represents. Rommel v. New Brunswick Fire Ins. Co., 214 M251, 8NW(2d)28. See Dun. Dig. 3451.

It is a matter of common knowledge that there is an alarming and ever increasing number of deaths from auto accidents alone and that entire families have met death in a few tragic moments on the public highways. Northwestern Nat. Bank & Trust Co. v. Pirich, 215M313, 9NW(2d)773. See Dun. Dig. 3451.

Court takes judicial notice that in June 1942 the impact of war economy had effected drastic changes in the business world and particularly in the automobile business, and that automobile manufacturers, together with almost all other mechanical manufacturers, had converted their facilities and energies to war production or were in the process of so doing. Marudas v. Odegard, 215M357, 10NW(2d)233. See Dun. Dig. 3451.

2. Presumptions and burden of proof.

All persons are held to have a certain minimum of knowledge, including scientific facts commonly known in community, and danger of electricity is so widely known and appreciated that all persons are deemed by law to have knowledge of its deadly potentialities. Peterson v. M., 206M268, 288NW588. See Dun. Dig. 3440.

Presumption against suicide does not shift burden of proof. It is but a rule of law dictating decision on unopposed facts and shifting burden of going forward with evidence. Ryan v. M., 206M562, 289NW557. See Dun. Dig. 3442.

One essential prerequisite to application of res ipsa loquitur is that defendant must have exclusive control of the instrumentality causing harm. Peterson v. M., 207M387, 291NW705. See Dun. Dig. 7044.

There is no presumption that a person knows the law of another state, and even courts are not required to take notice of the laws of other states under the Uniform Judicial Notice of Foreign Law Act. Daniel's Estate, 208M420, 294NW465. See Dun. Dig. 3786.

A prima facie case shifts to opponent of one having burden of proof the burden of producing evidence to overcome it. Hanson v. Robitshek-Schneider Co., 209M 596, 297NW19. See Dun. Dig. 3470.

A presumption disappears from case when facts are shown. Kummet v. Thielen, 210M302, 298NW245. See Dun. Dig. 3430.

A prima facie case was not defeated by opposing evidence which was not such as to compel belief and was not believed by trial judge. Dempsey v. Allen, 210M395, 298NW570. See Dun. Dig. 3226.

Rebuttable presumptions should not be given to jury in a civil case. Duff v. Bemidji Motor Service Co., 210M 456, 299NW196. See Dun. Dig. 3431.

Presumption that deceased at moment of fatal injury was in exercise of due care should not be given to the jury in a civil case. Id. See Dun. Dig. 3442.

An unimpeached prima facie case should prevail as matter of law. Bass v. Ring, 210M598, 299NW679. See Dun. Dig. 3473.

Where a court of general jurisdiction has exercised its powers it is presumed, unless contrary appears as matter of record, that it had jurisdiction both of subject matter and parties, and party asserting want of jurisdiction has burden of showing such want. Goodman v. Ancient Order of United Workmen, 211M181, 300NW624. See Dun. Dig. 2347.

City bakery license is prima facie evidence of ownership of bakery, but is not conclusive. Shindelus v. Sevcik, 211M432, 1NW(2d)399. See Dun. Dig. 3782.

In absence of opposing evidence, a prima facie case prevails as matter of law. Wojtowicz v. Belden, 211M461, 1NW(2d)409. See Dun. Dig. 3226.

A prima facie case simply means one that prevails in absence of evidence invalidating it. Id.

Production by plaintiff of bearer bonds issued by a city was prima facie proof of ownership. Batchelder v. City of Faribault, 212M251, 3NW(2d)778. See Dun. Dig. 1040.

Records required by statute to be kept, when once made and recorded in unambiguous language, cannot be impeached or contradicted by extrinsic or parol evidence as a general rule. Petition of Slaughter, 213M70, 5NW (2d)64. See Dun. Dig. 3389, 3435.

Division of Employment and Security cannot be regulation invoke a conclusive presumption or estoppel against an employer who has not given notice of separation of an employee from his employment, so as to

prevent such employer from establishing actual facts as to such separation in proceedings to determine his rate of contribution to the unemployment compensation fund. Juster Bros. v. Christgau, 214M108, 7NW(2d)501. See Dun. Dig. 3220.

Legislature does not have power to declare what shall be conclusive evidence contrary to the fact. Id.

Legislature, or its administrative adjunct, may declare that certain things shall constitute prima facie evidence or create a rebuttable presumption, which is but the shifting of the burden of proof. Id.

A rebuttable presumption should not be submitted to a jury as something to which they may attach probative force where there is credible and unimpeached evidence opposed to the claimed applicable presumption. Roberts v. Metropolitan Life Ins. Co., 215M300, 9NW(2d)730. See Dun. Dig. 3431.

It would be more accurate to state that all presumptions are those of law and that, when we leave law for fact, it is better to speak of inference, or deduction, or mere argument rather than presumption. Bentson v. Ellenstein, 215M376, 10NW(2d)282. See Dun. Dig. 3430, 3431.

While a "presumption" may shift the burden of going forward with the evidence, the burden of proof does not shift. Id. See Dun. Dig. 3430.

Presumptions and burden of proof, instructions to jury, probative weight or presumption. 24MinnLawRev651.

3. ——Death from absence.

That insured was a fugitive from justice did not effect legal presumption of death from absence of seven years in absence of proof to the contrary. Stump v. N., (CCA4), 114F(2d)214.

4. ——Suppression of evidence.

There was no misconduct in plaintiff's attorney eliciting that at defendant's request plaintiff was on three different occasions examined by a doctor selected by defendant, but that only one of the three doctors was called in as a witness. Guin v. M., 206M382, 288NW716. See Dun. Dig. 3444.

Unexplained failure to produce witnesses and records which presumably would be favorable to party justifies an inference that testimony and records would, if produced, have been adverse to such party. Schultz v. Swift & Co., 210M533, 299NW7. See Dun. Dig. 3444.

In proceedings by state board of education to remove commissioner of education, board was exclusive judge of what evidence it should offer in support of its own charges, though failure to produce evidence might raise presumption against it, officer being tried having right to subpoena witnesses for himself. State v. State Board of Education, 213M184, 6NW(2d)251, 143ALR503. See Dun. Dig. 3444.

5. Admissibility in general.

Evidence of custom of railroads in general with respect to attempting to couple to moving cars was admissible. Ross v. D., 207Minn157, 290NW566; 207Minn648, 291NW610. Cert. den. 61SCR9. See Dun. Dig. 6025.

In action between children of an intestate for an accounting of profits following death of life tenant in 1938, court did not err in using figures for last six months of 1930, in view of fact that defendants were actively engaged in running the business and in a position to account to their coheirs and failed to do so, even though it worked a hardship on defendants. Lewis v. Lewis, 211M587, 2NW(2d)134. See Dun. Dig. 2734a.

Where tsetimony is admissible as to one of several defendants, it should be received with right of other defendants upon a proper request to have jury instructed to disregard it as to them. Schmitt v. Emery, 211M547, 2NW(2d)413, 139ALR1242. See Dun. Dig. 3237a.

Since modern tendency is to admit evidence freely and to give as wide a scope as possible to investigation of facts, court should be slow to set up technical rules to exclude as evidence what would be accepted as relevant in the ordinary affairs of life. Greene v. Mathiowetz, 212M171, 3NW(2d)97. See Dun. Dig. 3251.

In action against a power plant emitting smoke and cinders to enjoin and recover damages for a nuisance, it was not error to fail to admit into evidence an ordinance of city making it unlawful to permit the escape of certain noxious substances and odors. Jedneak v. Minneapolis General Electric Co., 212M226, 4NW(2d)326. See Dun. Dig. 3452, 7282.

Evidence given at a former trial in which the party objecting was not a party is not permissible. Elsenpeter v. Potvin, 213M129, 5NW(2d)499. See Dun. Dig. 3306a.

Appointment by a state board of special counsel who represented in a proceeding to remove an appointed officer, if unauthorized, would not taint proof submitted or otherwise affect validity of the proceedings, and its sole effect would be to deprive attorney of his right to compensation from the state, and no prejudice could result to officer being tried, since evidence is not rendered incompetent by fact that it was wrongfully or illegally procured. State v. Board of Education, 213M184, 6NW(2d)251, 143ALR503. See Dun. Dig. 3239.

Where at a highway intersection driver of a motor vehicle sees a street car approaching and is aware of risks incident to crossing in front of it, it is not error to exclude evidence of failure of motorman to warn of street car's approach. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW(2d)665. See Dun. Dig. 3241.

In action for death by a boy struck by streetcar while on an errand, specific instructions given by mother concerning crossing of street were not admissible. Deach v. St. Paul City Ry. Co., 215M171, 9NW(2d)735. See Dun. Dig. 9033.

5½. Insurance of party.

Evidence that plaintiff had liability insurance but did not have collision insurance is clearly inadmissible in an action to recover for property damage to plaintiff's vehicle. Lee v. O., 206M487, 289NW63. See Dun. Dig. 3241.

Overruling of objection to question to witness on cross-examination with reference to statement given by witness to an insurance agent was not an abuse of the discretion where such witness had also testified concerning a statement given to insurance agent, and insurance was mentioned several times during the trial by, perhaps unintentionally, elicitation by defendant's counsel. Jaenisch v. Vigen, 209M543, 297NW29. See Dun. Dig. 10317.

Where court excluded a question as part of cross-examination by plaintiff whether witness talked with a representative of an insurance company and matter was dropped, mere asking of question was not reversible error, such cross-examination taking place after it appeared that testimony of witness was different from his written statement. Schultz v. Swift & Co., 210M533, 299 NW7. See Dun. Dig. 424.

So long as liability insurance is not featured or made basis at trial for an appeal to increase or decrease damages, information that parties to automobile accident carry insurance would seem to be without prejudice, at least where question did not call for such information and defendants did not object and themselves asked questions concerning insurance. Odegard v. Connolly, 211M 342, 1NW(2d)137. See Dun. Dig. 419, 424.

6. Admissions.

In action for injuries in collision suffered by motorcyclist and his ward who was riding with him, it was error, so far as guardian was concerned to exclude his pleading as to how accident happened where it was inconsistent with testimony on behalf of plaintiffs, but such exclusion was not erroneous as to ward, since guardian could not make admissions affecting substantial rights of minor. Stolte v. L., (CCA8), 110F(2d)226.

In action for damages for breach of contract to give certain sales rights wherein a specific contract was alleged and sought to be established it was prejudicial error to permit proof of a subsequent agreement which in nature closely parllels an offer to settle. Foster v. B., 207M286, 291NW505. See Dun. Dig. 3425.

In action in federal court for death of one riding with defendant's employee in Minnesota, evidence of payment or settlement of claim based upon death of such employee was inadmissible both under federal rule and Minnesota rules of evidence. National Battery Co. v. Levy, (CCA8), 126F(2d)33. Cert. den. 316US697, 62SCR 1294. See Dun. Dig. 3425.

Where insurance claim adjuster wrote down story of an automobile collision as it was given to him by driver of defendant's car, his testimony that he gave it to the driver, who was a party defendant, and that he read it over and acknowledged it as "true and correct" provided a proper foundation for admission of the written statement in evidence as an admission and for purpose of impeaching his testimony on the trial, though he refused to sign statement upon advice of a third person. Johnson v. Farrell, 210M351, 298NW256. See Dun. Dig. 3409.

Where impeachment of an ordinary witness by prior inconsistent statements is attempted more particularity in laying a foundation is necessary, but contradictory statements by a party can be shown without his attention having first been called to them. Id. See Dun. Dig. 10351(b).

An admission made by a party to an action in relation to a relevant matter is admissible against him, whenever made, and without laying any foundation therefor. Id. See Dun. Dig. 3409.

Where impeachment of a party who is also a witness consists of his own inconsistent declarations, they are ordinarily admissible as admissions and as such are substantive evidence. Williams v. Jayne, 210M594, 299NW853. See Dun. Dig. 3409.

No foundation need be laid for impeachment of a party who is a witness in his own behalf. Id.

A party's admissions by declarations and conduct are substantive evidence of facts to which they relate. Doyen v. Bauer, 211M140, 300NW451. See Dun. Dig. 3409.

In action against trustee of corporation in liquidation to recover for services rendered, issue being amount of plaintiff's compensation, independent audits of corporation's business annually for many years were admissible in evidence as admissions by corporation and defendant, notwithstanding that on their face they appear to have been based upon information furnished by plaintiff alone, defendant being principal stockholder, president, and general manager, and neither he nor corporation could plead ignorance. Lewin v. Proehl, 211M256, 300NW814. See Dun. Dig. 3346.

Conversation and conduct of drivers in two car collision are admissible, and courts in other jurisdictions have so held as to statements as to insurance. Odegard v. Connolly, 211M342, 1NW(2d)137. See Dun. Dig. 3300, 3409.

Where testimony of a highway patrolman concerning statement of one defendant was excluded, and testimony to same effect by another partolman was admitted, together with a report signed by both partolmen, it was incumbent on plaintiff to recall first witness and renew

offer of his testimony, if he deemed it important. Schmitt v. Emery, 211M547, 2NW(2d)413, 139ALR1242. See Dun. Dig. 9717.

Statement of facts by one of several defendants is substantive evidence against him as admission. Id. See Dun. Dig. 3409.

Failure to assert a fact, when it would have been natural to assert it, permits an inference of its nonexistence. Erickson v. Erickson & Co., 212M119, 2NW(2d)824. See Dun. Dig. 3420.

The exclusion of evidence of a compromise or an offer of compromise is put on one of three grounds, privilege, contract or relevancy; theory of privilege is that compromise negotiations are privileged communications; contract theory resting upon basis of contract, express or implied, that the negotiations are "without prejudice"; test of relevancy depending on tendency to prove an admission by conduct. Esser v. Brophey, 212M194, 3NW(2d) 3. See Dun. Dig. 1526, 3425.

An unaccepted offer to compromise is inadmissible in a subsequent action against party making it. Id.

Where there is no compromise, but a payment of a claim asserted, the payment permits an inference of admission of liability. Id. See Dun. Dig. 3425.

Where an admission of liability is made, it is admissible, although it is embraced in an offer of compromise, as where liability is admitted and the dispute relates to the amount due. Id. See Dun. Dig. 3425.

By the test of relevancy, admissibility of a compromise is made to depend on its tendency to prove an admission by conduct, and true reason for excluding an offer of compromise is that it does not ordinarily proceed from and imply a specific belief that the adversary's claim is well founded, but rather a belief that further prosecution of that claim would in any event cause such annoyance as is preferably avoided by payment of sum offered. Id. See Dun. Dig. 3425.

Rule that an unanswered letter is not evidence of truth of statements made therein is to be distinguished from rule that when a statement is made in the presence and hearing of another, incriminating in character, and such statement is not denied, contradicted, or objected to by him, both the statement and fact of his failure to deny are admissible on a criminal trial, as evidence of his acquiescence in its truth, though an evasive answer to a letter or one unresponsive to the declaration, is tantamount to absolute silence and competent evidence of acquiescence. State v. Yurkiewicz, 212M208, 3NW(2d) 775. See Dun. Dig. 3286, 3420.

In action for damages for wrongful discharge from employment, there could be no estoppel from letters of plaintiff to defendant that he had "made a mess of things" and had disobeyed instructions in several particulars to deny that there had been improper discharge of plaintiff, plaintiff explaining in testimony that he thought he would acknowledge the errors and disobedience as a technique for holding his job. Bang v. International Sisal Co., 212M135, 4NW(2d)113, 141ALR657. See Dun. Dig. 3429.

An admission by the complaining witness in an assault and battery case that she had been bruised in an accident some 18 months before the alleged assault upon her was too remote to be relevant in the trial of the assault case. State v. Bresky, 213M323, 6NW(2d) 464. See Dun. Dig. 3408.

Evidence of subsequent repairs is inadmissible as an admission of previous neglect of duty, but where landlord had requested that jury view premises, and this was permitted by the court at the end of the trial and with consent of plaintiff, it was proper to receive evidence of changed condition and that change was made after the accident on which suit was based. Lunde v. Nat. Cit. Bank, 213M278, 6NW(2d)809. See Dun. Dig. 3419, 7055.

In action by farm employee for injuries received in barn when truck driven by farmer backed upon him, it could not be said that plaintiff was guilty of contributory negligence as a matter of law, though he stated on the trial that he told defendant that he was in a hurry and guessed it was as much his fault as it was defendant's. Narjes v. Litzau, 214M21, 7NW(2d)312. See Dun. Dig. 3429.

In action for wrongful death in automobile collision, where sole evidence for plaintiff consisted of certain statements made by defendant's employee at scene of collision and his admissions later to a witness in presence of plaintiff's attorney, both of whom were investigating the accident, weight to be attached to such admissions was for jury, though contrary to testimony of such employee on the trial. Litman v. Peper, 214M127, 7NW(2d)334. See Dun. Dig. 3428.

An admission of fact is affirmative evidence, and its weight with the jury depends on the circumstances under which it is made and character of admission. Id. See Dun. Dig. 3409, 3428.

Architect on school gymnasium under a contract containing a distinct provision that he was not the agent of the owner but "the interpreter of the conditions of the contract and the judge of its performance" did not make an admission, "on the part of school district by writing a letter expressing doubt as to success of equal action against contractor because a careful visual examination of the mortgage suggests an A-1 job." Independent School Dist. No. 35 v. A. Hedenberg & Co., 214M82, 7NW(2d)511. See Dun. Dig. 3410.

An admission, if believed by trier of a fact, is substantive evidence of the facts to which it relates, but jury is not bound to believe statement. Aide v. Taylor, 214M212, 7NW(2d)757, 145ALR530. See Dun. Dig. 3409, 3428, 10344.

A statement is an admission of facts therein asserted. Id. See Dun. Dig. 3409.

If it conclusively appears that party was incapacitated from making a rational admission at the time he made a statement in a hospital, question becomes one of admissibility, and statement should be ruled out entirely. Id. See Dun. Dig. 3409a.

Where there is evidence to show that a party making an admission or written statement was at the time in such a mental or physical condition, due to pain caused by physical injury or to the administration of drugs interfering with the free use of his mental faculties, as not to be able to recollect and to voluntarily state the facts, the probative value and weight of admission is for the trier of fact. Id. See Dun. Dig. 3428.

A party's extrajudicial admissions, absent an estoppel to deny their truth, are not conclusive against him and may be explained, limited, qualified and contradicted. Id. See Dun. Dig. 3429.

A party may always explain the circumstances under which inconsistent statements or claims were made and reconcile them with his testimony. Id. See Dun. Dig. 3429, 10351(e).

A party is bound by his direct allegations of fact. Faunce v. Schueller, 214M412, 8NW(2d)523. See Dun. Dig. 3424.

Accusations made directly to defendant, coupled with unresponsiveness or evasiveness on his part, are admissible as admissions although defendant does not in fact admit the truth thereof. State v. Rediker, 214M470, 8NW (2d)527. See Dun. Dig. 3420.

Where alleged agent of defendant was evasive in his testimony about facts of agency, it was within discretion of court to permit plaintiff to examine alleged agent with aid of a letter written by him with reference to the facts establishing the agency, the witness finally testifying that the facts recited in the letter were true. Katzmarek v. Weber Brokerage Co., 214M580, 8NW(2d)822. See Dun. Dig. 3410.

In action to recover severance pay under an employment contract, a contract between defendant and a group life insurance company in which defendant recited that it had terminated the employment of all employees engaged in the newspaper publishing business was admissible against the defendant as an admission against interest. Matthews v. Minnesota Tribune Co., 215M369, 10NW (2d)230, 147ALR147. See Dun. Dig. 3409(17).

Undenied charges made in the presence of defendant are admissible as an implied admission of facts involved. State v. Postal, 215M427, 10NW(2d)373. See Dun. Dig. 3420.

Although income taxpayer had a right to amend, its statements in original objections to additional assessments were admissible upon same theory as are admissions in a pleading. Cargill v. Spaeth, 215M540, 10NW (2d)728. See Dun. Dig. 3424.

7. Declarations.

Walsh v. U. S., (DC-Minn), 24FSupp877. App. dism'd, (CCA8), 106F(2d)1021.

Statements and declarations of a person after he had transferred his rights to another in disparity of title transferred are inadmissible. Peterson v. Johnson Nut Co., 209M470, 297NW178. See Dun. Dig. 3417.

Declarations of an official or agent of a corporation are inadmissible against corporation unless made within scope of authority of official or agent and while transacting business of corporation. Id. See Dun. Dig. 3418.

In trial of claim against estate of decedent for personal services in quantum meruit, court properly refused to instruct jury to disregard testimony of nurses as to statements made by decedent during her last illness, on showing by administrator that decedent had periods of irrationality, matter going to credibility rather than to admissibility. Superior's Estate, 211M108, 300NW393. See Dun. Dig. 3409.

Resolution of corporation authorizing another corporation to pay certain indebtedness to individual officers of both corporations was not inadmissible as self-serving, such corporation not being a party. Savory v. Berkey, 212M1, 2NW(2d)146. See Dun. Dig. 3287a, 3409.

Declarations made more than five years after execution of conveyance were inadmissible as immaterial in so far as establishing either undue influence or mental capacity at time of conveyance. Larson v. Dahlstrom, 214M304, 8NW(2d)48, 146ALR245. See Dun. Dig. 3287, 3292a.

8. Collateral facts, occurrences, and transactions.

In action to recover damages for breach of contract to give plaintiff certain sales rights, wherein plaintiff pleaded a specific contract, it was error to admit evidence concerning an agreement entered into after the one pleaded, which by its nature gave a strong suggestion of liability upon the contract sued upon. Foster v. B., 207M286, 291NW505. See Dun. Dig. 3230.

In action by bank holding warrants unlawfully issued by county auditor upon official bond of auditor, manner in which banks and county treasurer had handled auditor's salary warrants over a period of several years bore on issue of negligence of bank in purchasing warrants, and it was proper to receive in evidence all other war-

rants issued by and to auditor. State Bank of Mora v. Billstrom, 210M497, 299NW199. See Dun. Dig. 3253.

Admission of evidence on a collateral issue rests largely in discretion of trial judge. Lewin v. Proehl, 211M256, 300NW814. See Dun. Dig. 3252.

In a proceeding to condemn land for highway purposes, an option obtained by commissioner of highways but never exercised, for purchase of land designated and located by his order, is not relevant evidence on issue of damages for taking of land covered by option. State v. Nelson, 212M62, 2NW(2d)572. See Dun. Dig. 3070.

In action by farmer who was injured when lamb fell from upper deck while he was attempting to close rear gate of truck on sudden request of trucker who was entering lower deck to get lambs upon their feet, court did not err in admitting and refusing to strike evidence showing that six lambs were dead and one crippled when they arrived at market, because it provided the basis for an inference that animals were overcrowded, which in turn was an important circumstance to be considered in deciding whether defendant was negligent in requesting plaintiff to close rear gate without giving him a chance to get hold of it before entering lower deck. Anderson v. Hegna, 212M147, 2NW(2d)820. See Dun. Dig. 3232.

In action arising out of automobile collision at 9:00 P. M., wherein defendant alleged that plaintiff had been drinking in the afternoon and that this had so affected his mentality and capacity to function normally as to lead to view that his careless behavior was a contributing cause of collision, it was proper to interrogate plaintiff on cross-examination for purpose of impeachment as to whether he was at a certain farm at 2 or 3 o'clock P. M., and was intoxicated at that time, as against contention that it related to matters collateral to main issue. Greene v. Mathiowetz, 212M171, 3NW(2d)97. See Dun. Dig. 3252.

If evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy it should go to the jury. Id. See Dun. Dig. 3232, 3251(52).

"Inefficiency" denotes incapability for office, and in proceeding to remove an appointive officer any evidence tending to show such incapability is relevant to issue of present inefficiency, even though period to which evidence relates may have been a prior term in office. State v. State Board of Education, 213M184, 6NW(2d)251, 143 ALR503. See Dun. Dig. 3253.

8½. Mental operation, state or condition.

Since admissibility of evidence of a compromise or offer to compromise depends on whether offer or payment was intended as an admission of liability or an effort to settle a dispute, and as object of offer or payment could not be a matter of law, and person making offer knows what it was, he may testify directly on that point. Esser v. Brophey, 212M194, 3NW(2d)3. See Dun. Dig. 3231.

Evidence of plaintiff's mental condition, his change of personality, and his change of attitude toward others was properly admissible on issue of damages resulting from personal injury. Fjellman v. Weller, 213 M457, 7NW(2d)521. See Dun. Dig. 3292, et seq.

A plaintiff in a negligence action who has been severely burned may testify as to his consciousness of and reactions to his facial scars and disfigurement therefrom and as to what he imagined others thought or said about him when they observed him. Id. See Dun. Dig. 3293, 3294.

Where the motive, belief or intention with which an act is done is material, a party may show the fact directly by his own testimony. Id. See Dun. Dig. 3293, 3294.

8¾. Value.

Ordinarily the cost of an article can be shown as an item of evidence on the market value unless it is too remote in time. Hafiz v. M., 206M76, 287NW677. See Dun. Dig. 3247.

Admissibility of tax assessment on question of value of farm in an action for damages for fraud in sale. Rother v. H., 208M405, 294NW644. See Dun. Dig. 3247.

Cost price of a used car is never a controlling or even an influential factor in arriving at its value. Hayward v. State Farm Mut. Automobile Ins. Co., 212M500, 4NW (2d)316, 140ALR1236. See Dun. Dig. 3247.

Many considerations may give rise to tax delinquency, and if such delinquencies exist uniformly in a district of which the property under consideration is a part, it might be error to exclude from evidence a list of tax delinquent property, but court was justified in rejecting such evidence where the lands listed therein were rather remote, in hearing on objections to valuation of land for tax purposes. Kalscheuer v. State, 214M441, 8NW(2d) 624. See Dun. Dig. 3247.

Income from property is one factor to be considered in arriving at its sales value for taxation purposes. Id.

9. Agency.

See also notes under ch. 49A, note 24.

10. Hearsay.

Theory that ex parte statements made when not under oath or subject to cross-examination are not hearsay when party making such statements is examined with reference thereto in court has been rejected in this state. State v. Lemke, 207M35, 290NW307. See Dun. Dig. 3286.

Whether employment of deceased union organizer was extrahazardous was material in determining whether death arose out of and in course of employment, deceased being shot by an unknown person, and witnesses who heard threats made to decedent could testify thereto, but could not testify to statements made to them by decedent to effect that he had been threatened. Corcoran v. Teamsters and Chauffeurs Joint Council No. 32, 209M 289, 297NW4. See Dun. Dig. 3287.

Where fact to be proved was extrahazardous character of employment, statements threatening personal safety of employee and others employed in similar capacity were admissible as tending to prove that fact in proceeding to obtain compensation for his death. Id.

It is only when a witness attempts to prove the truth of a given proposition by repeating what another said that his testimony is deemed hearsay. Id.

Character of a place claimed to be a house of ill fame may be proved by showing how it was conducted, and what was said by occupants at time of a raid was not inadmissible as hearsay. State v. Palmersten, 210M476, 299NW669. See Dun. Dig. 3294a.

Reputation in the community is admissible under many circumstances to characterize a place as a house of ill fame. Id. See Dun. Dig. 3299.

In action against vendor for damages for false representation as to condition of well, wherein one of plaintiffs testified that she told defendant that a third person had guaranteed the water and that there was sufficient amount and that defendant had said "That's right, because we never had any trouble out there with water, you don't have to worry about the water on the place", court properly refused to strike out evidence of several witnesses of both parties relative to conversations with such third person, court making his ruling on ground that testimony bore on probability that plaintiff had told defendant of representation, as testified by her. Forsberg v. Baker, 211M59, 300NW371. See Dun. Dig. 3287.

In proceeding for compensation for death of president and organizer of a truck drivers union, who was found dead in an automobile from bullet wounds, issue being whether death arose out of and in course of employment, court rightly excluded as hearsay and irrelevant a magazine article issued two months before death and headed "Marked for death * * * another labor leader, who was marked for death but escaped." Brown v. General Drivers Union, 212M265, 3NW(2d)423. See Dun. Dig. 3287.

Statements to a third party by a jury that the juror did not agree to the verdict of guilty could not be used to impeach the verdict. State v. Bresky, 213M323, 6NW (2d)464, following State v. Talcott, 178M564, 227NW 893. See Dun. Dig. 3286.

If fact that a statement was made is material to an issue in the case, the statement is admissible, since it is only when a witness attempts to prove truth of a given proposition by repeating what another said that his testimony is deemed hearsay. Fjellman v. Weller, 213M457, 7NW(2d)521. See Dun. Dig. 3291.

An affidavit obviously founded upon mere hearsay is of no evidentiary worth. State v. Pennebaker, 215M75, 9NW(2d)257. See Dun. Dig. 3286, 5776.

In prosecution for keeping a "disorderly (tippling) house", evidence obtained in search of defendant's premises and reputation evidence was admissible. State v. Siporen, 215M438, 10NW(2d)353. See Dun. Dig. 3299.

11. Res gestae.

In action under Federal Employers' Liability Act statement by fireman to widow of switchman killed in accident that engine was brought to a stop 20 feet before reaching the point of accident was no part of the res gestae, it being made long after the accident, and was admissible in cross-examination of the fireman only as bearing upon his credibility. Chicago St. P. M. and O. Ry. Co. v. Muldowney, (CCA8), 130F(2d)971. Cert. den. 63SCR526. See Dun. Dig. 3301.

Conversation and conduct of drivers in two car collision are admissible, and courts in other jurisdictions have so held as to statements as to insurance. Odegard v. Connolly, 211M342, 1NW(2d)137. See Dun. Dig. 3300, 3409.

Decedent's statements made at hospital 11 hours after accident in response to questions propounded to her by state's witness were not spontaneous in nature and were too far removed in point of time to be considered as part of the res gestae in a prosecution for criminal negligence. State v. Clow, 215M380, 10NW(2d)359. See Dun. Dig. 3300, 3301.

Some discretion is allowed the trial court in admitting testimony under the res gestae rule, and there is no arbitrary limit as to time. Id.

11½. Articles or objects connected with occurence or transaction.

In action against a power plant to enjoin and recover damages for a nuisance, court did not err in refusing to admit in evidence a bottle containing materials said to have been removed from a plant using competitive devices, to establish the superiority of such system, no proper foundation having been made and its probative value being too speculative to be relevant unless identity of operating conditions between the two plants was established in considerable detail. Jedneak v. Minneapolis General Electric Co., 212M226, 4NW(2d)326. See Dun. Dig. 3244.

Alteration of label on bottle of whiskey offered in evidence at the trial was immaterial where it was clearly a matter of mistake as to address of drugstore involved.

State v. McBride, 215M123, 9NW(2d)416. See Dun. Dig. 3258.

12. Documentary evidence.

It is not error to receive a writing in evidence, contents of which have been shown by testimony previously given. Rice v. N., 207M268, 290NW798. See Dun. Dig. 3237.

Mortality tables are received to show probable life expectancy, and trier of facts is not bound by them and may find that life expectancy of a particular person is greater or less than that shown in tables. Thoirs v. Pounsford, 210M462, 299NW16. See Dun. Dig. 3353.

An answer to a letter "I have taken the time to thoroughly grasp the import of the several threats enumerated therein. I am, however, satisfied that there is a good reply to all, or any of your arguments were it necessary to do so," though somewhat evasive, was enough of denial to preclude reasonable claim of tacit admission of truth of statements made in letter replied to. State v. Yurkiewicz, 212M208, 3NW(2d)775. See Dun. Dig. 3420.

A letter, not part of a mutual correspondence, which is sent to another regarding the character of dealings between them or the liability of the party to whom it is addressed and to which no answer is made, is not admissible in favor of writer as evidence of truth of statements made therein. Id. See Dun. Dig. 3286, 3420.

To the rule that an unanswered letter is not evidence of truth of statements made therein, a well-settled exception is that such letters are admissible when their subject-matter relates to an existing contract between parties. Id. See Dun. Dig. 3286, 3420.

12¼. Photographs.

Admissibility of photograph in evidence. State v. Andrews, 209M578, 297NW848. See Dun. Dig. 3260.

12½. Best and secondary evidence.

Evidence of execution of contract to make a will and the will and of placing them in safety deposit box by decedent and of their absence from box after his death held sufficient to warrant admission of secondary evidence of contents, consisting of carbon copies in lawyer's file, in suit for specific performance. Herman v. Kelehan, 212M349. 3NW(2d)587. See Dun. Dig. 3275.

13. Parol evidence affecting writings.

Nat'l Sur. Corp. v. Wunderlich, (CCA8)111F(2d)622, rev'g on other grounds 24FSupp640.

Parol evidence rule is not violated by proof of an oral agreement entered into subsequent to written contract. Hafiz v. M., 206M76, 287NW677. See Dun. Dig. 1774, 3368, 3375.

Parol evidence is admissible as between a bank and the drawer of a check procuring its certification before delivery, that delivery of the certified check was made under a contract for a special purpose only. Gilbert v. P., 206M213, 288NW153. See Dun. Dig. 977.

Where note and chattel mortgage evidencing a loan were signed in blank and were filled in in terms and figures differing from those agreed upon, parol evidence was admissible to show usury. Bearl v. E., 206M479, 288 NW844. See Dun. Dig. 3376.

Rule that oral testimony may not be received to vary or contradict a written instrument evidencing transaction is inapplicable where, in order to evade usury law, a certain printed form of contract is filled in by obligee in such fashion as to show no usury on its face. Midland Loan Finance Co. v. L., 209M278, 296NW911. See Dun. Dig. 3403.

A clear and unambiguous written contract is not open to construction and oral testimony to vary or alter meaning is incompetent and inadmissible. Peterson v. Johnson Nut Co., 209M470, 297NW178. See Dun. Dig. 3368.

Where intent does not appear from will failing to provide for a child, oral testimony is admissible to show whether or not omission was intentional. Dorey's Estate, 210M136, 297NW561. See Dun. Dig. 10206e.

Evidence of all circumstances prior to and contemporaneous with execution of contract was admissible, but oral statements by parties of what they intended language to mean were not. Miller v. O. B. McClintock Co., 210M152, 297NW724. See Dun. Dig. 3399.

In action by realtor to recover commission wherein it appeared plaintiff procured a purchaser for two lots, for a price and on terms agreeable to defendant, and defendant signed and delivered to plaintiff an earnest money contract of sale, it was error to strike evidence tending to show that contract of sale was signed and delivered upon condition that it should not become a contract unless and until effective consent of daughter of defendant was procured. Gustafson v. Elmgren, 211M82, 300NW203. See Dun. Dig. 1737, 3377.

Where agent to sell land and purchase other land for principal fraudulently obtained signature to principal for exchange of property, agent's liability to principal for secret profit is not based on contract for exchange but on a fraudulent breach of his duties under contract of agency, which is a tort, and parol evidence is admissible to show secret profit. Doyen v. Bauer, 211M140, 300 NW451. See Dun. Dig. 3368, 3376.

In action on a note given for part of purchase price of an electric fan court did not err in receiving in evidence order for installation of fan containing a guarantee, though guarantee was not incorporated in conditional sales contract executed when order had been filled by installation of fan, which also provided that no warranties or representations not appearing therein existed, and no reformation of conditional sales contract was sought. Reliance Engineers Co. v. Flaherty, 211M233, 300NW603. See Dun. Dig. 3387, 8550, 8582.

Parol evidence as to a prior or contemporaneous oral agreement cannot be introduced to alter terms of a written contract. Skogberg v. Hjelm, 211M392, 1NW(2d)599. See Dun. Dig. 3368.

Evidence that promissory note bearing no maturity date was to be paid only on payee's demand and was to be noncollectible after her death was barred by parol evidence rule. Id. See Dun. Dig. 3382.

If circumstances are such that, despite wording of release construed as covering unknown injuries, parties cannot be said to have contracted with reference to unknown injuries, and a material, unknown injury subsequently develops, mutual mistake exists and parol evidence may be introduced to show it. Larson v. Sventek, 211M385, 1NW(2d)608. See Dun. Dig. 3402.

Where a party refuses to produce a document which is privileged as a communication between attorney and client, opposing party, if he has given due notice to produce, may show the contents thereof by parol testimony, but such testimony must itself not be privileged. Schmitt v. Emery, 211M547, 2NW(2d)413, 139ALR1242. See Dun. Dig. 3285.

Extrinsic evidence is admissible to show that homestead is subject to payment of a particular claim. Keys v. Schultz, 212M109, 2NW(2d)549. See Dun. Dig. 4209, 4210, 4996.

Record of county board levying an annual assessment against land to provide funds to keep ditches "in proper repair and free from obstruction" could not be impeached by showing that assessment in question was levied for improper purpose of obtaining funds to pay interest on ditch bonds previously issued by county, there being nothing in the record to sustain assertion that act of the board was fraudulent. Petition of Slaughter, 213M 70, 5NW(2d)64. See Dun. Dig. 3389, 3435.

Records required by statute to be kept, when once made and recorded in unambiguous language, cannot be impeached or contradicted by extrinsic or parol evidence as a general rule. Id.

A written contract may be changed by parol. Trovatten v. Minea, 213M544, 7NW(2d)390, 144ALR263. See Dun. Dig. 3375.

On petition for instructions as to testamentary trust which was not ambiguous or equivocal, trial court's order striking out paragraphs alleging extrinsic evidence of an intent contrary to that expressed in the will was justified. Silverson's Will, 214M313, 8NW(2d)21. See Dun. Dig. 3407.

Evidence concerning an implied warranty is not in violation of parol evidence rule because the warranty is created by law and not by parties' agreement, and an implied warranty could only be negatived by inconsistent express warranty or condition in the written contract of sale. Valley Refrigeration Co. v. Lange Co., 242Wis466, 8NW(2d)294. See Dun. Dig. 3387, 8572, 8582.

Trial court properly sustained objections to questions which would in effect modify or enlarge upon terms of a mortgage plain and unambiguous on its face. Faunce v. Schueller, 214M412, 8NW(2d)523. See Dun. Dig. 3407.

If second contract for a deed superseded an earlier one, anything relating to the first contract which might conflict with terms or provisions of the second one would clearly be inadmissible. McReavy v. Zelmes, 215M239, 9 NW(2d)924. See Dun. Dig. 3368.

Where a contract is clear and unambiguous on its face, nothing can be gained by attempting to show the facts and circumstances surrounding its execution or in any other way attempt to modify or alter its terms. Id. See Dun. Dig. 3400, 3407.

In action for declaratory judgment to determine rights under contract for deed, evidence relative to motives of the parties in executing the contract, consideration thereof, or circumstances surrounding its execution, where inadmissible, where contract was plain and unambiguous on its face. Id. See Dun. Dig. 3407.

An employment contract providing for severance pay "upon dismissal, except for drunkenness, proven dishonesty or gross neglect of duty" was clear and unambiguous and evidence was properly excluded to show the meaning of the word "dismissal", since adding another exception would modify the contract. Matthews v. Minnesota Tribune Co., 215M369, 10NW(2d)230, 147ALR147. See Dun. Dig. 3407.

Where there was no claim of fraud or mistake, and reformation was not sought, court did not err in excluding evidence to show the purpose of an employment severance pay contract which was plain and unambiguous. Id.

Where the contractual language is clear and unambiguous there is no room for construction. Id.

14. Expert and opinion testimony.

Answer of witness as to whether he could tell market value of automobile that "Yes, I could if I saw the car" was a disclaimer of ability to estimate market value without seeing car. Hafiz v. M., 206M76, 287NW677. See Dun. Dig. 3322.

"Good condition" as applied to a used automobile is too vague and indefinite to be used as a standard for an opinion as to the market value of an automobile. Id.

Permitting expert to examine hospital records, but not their receipt into evidence was not error to defendant's prejudice. State v. Palmer, 206M185, 288NW 160. See Dun. Dig. 3340.

There was no error in permitting medical witnesses to express opinion on assumption that testimony of defendant's assistant in an abortion was true, opinion evi-

dence not being objectionable ordinarily because it goes to ultimate issue. State v. Lemke, 207M35, 290NW307. See Dun. Dig. 3326.

In prosecution for manslaughter by abortion question to medical witness as to whether he was "able to determine from the examination of this body of this girl, and the different things that you saw, as to whether in your opinion that induced abortion was necessary to save the life of this woman?" was not accurately worded, but there was no prejudicial error where, read in its context, it clearly refers to observations made by witness in course of an autopsy which had been previously detailed. Id. See Dun. Dig. 3336.

A physician as an expert may testify as to a person's physical condition, where hypothetical question eliciting his opinion is based on all facts admitted or established, or which, if controverted, might reasonably be found from evidence. Rice v. N., 207M268, 290NW798. See Dun. Dig. 3337, 3338.

Proper foundation held not laid for opinion given at trial by physician to effect that defendant in malpractice case did not exercise proper skill in treating varicose veins by an injection. Simon v. L., 207M605, 292NW270. See Dun. Dig. 3335.

The admission of expert testimony is largely a matter of descretion for the trial judge, and he may upon motion for a new trial decide that he abused that discretion and order a new trial on the ground of error of law occurring at the trial. Id. See Dun. Dig. 3325.

Reception of medical testimony based on part of patient's statement as to "past transactions" is not ground for reversal where facts asserted in statement were already in evidence. Ferch v. G., 208M9, 292NW424. See Dun. Dig. 424.

There was not reversible error in excluding expert opinion evidence where a specialist in field was permitted to give his expert favorable opinion on the subject. Rhoads v. R., 208M61, 292NW760. See Dun. Dig. 3344.

Expert testimony is not necessary to show that death resulted from drinking alcohol. Sworski v. C., 208M43, 293NW297. See Dun. Dig. 3327.

Any error which existed in overruling objection to reference by physician to a medical textbook was harmless in absence of motion to strike reference to textbook in previous answer. Wolfangel v. P., 209M439, 296NW576. See Dun. Dig. 3336.

In action against railroad and engineer wherein counsel for plaintiff by cross-examination under the statute qualified engineer as a man of long experience and well versed in his duties as an engineer, in fact making him an expert, it would seem that his conclusion that he did all that could be done when brakeman's light disappeared was admissible. Hill v. Northern Pac. R. Co., 210M190, 297NW627. See Dun. Dig. 3331.

There may be some force to contention that medical authority is not always necessary in malpractice cases, but where certain facts of medical science have been established by uncontradicted testimony of experts, those facts cannot be ignored in passing upon question whether plaintiff can make case for jury. Simon v. Larson, 210M 317, 298NW33. See Dun. Dig. 7494.

In action for double indemnity under life policy upon insured who fell and died while cranking a car, court did not err in sustaining objection to question asking opinion of son of insured, a physician, as to cause of death based upon testimony of physician that he had examined insured several weeks before his death and found blood pressure and heart action unimpaired and observed a bruise on the cheek after his death. Plotke v. Metropolitan Life Ins. Co., 210M541, 299NW216. See Dun. Dig. 3327.

In action for personal injuries expert testimony held sufficient to establish that injuries to brain were proximate result of collision. Larson v. Sventek, 211M385, 1NW(2d)608. See Dun. Dig. 3327.

Damage to an ordinary popularly known and priced car wrecked in a collision can be proved by showing the nature of the damage done to it without opinion evidence as to its value before and after the collision. Hayward v. State Farm Mut. Automobile Ins. Co., 212M500, 4NW(2d)316, 140ALR1236. See Dun. Dig. 3247.

Assessors, who were farmers, were properly permitted to testify as experts as to value of land. Delinquent Real Estate Taxes, 212M562, 4NW(2d)783. See Dun. Dig. 3335(57).

Testimony of expert that from 85 to 90% of pollution of stream was caused by materials coming from canning factory through city sewer and that from 10 to 15% was created by drainage from stalk pile not passing through city sewer was sufficient to enable jury to apportion harm caused by each source and confine city's liability to that portion for which it was responsible. Huber v. City of Blue Earth, 213M319, 6NW (2d)471. See Dun. Dig. 3324.

One who had completed a 4-year course and held degree of bachelor of science for building construction, and a 3-year university extension work confined largely to courses in studying behavior of various building materials, particularly concrete, and had many years of experience in construction work, was qualified to testify as an expert as to cause of leaks in the walls of a building. Independent School Dist. No. 35 v. A. Hedenberg & Co., 214M82, 7NW(2d)511. See Dun. Dig. 3335.

It is for examining counsel to decide whether the expert's opinion should be based upon facts within his personal knowledge and testified to by him, or upon a hypothetical presentation of the testimony of other witnesses as to facts they observed, or in part upon each form of data. Id. See Dun. Dig. 3336-3340.

Even where a hypothetical form of question is used, it need not include any particular number of facts. Id. See Dun. Dig. 3337.

A qualified expert witness who has personal knowledge or has made personal observations may state his opinion or conclusion therefrom in response to direct interrogation without use of hypothetical questions. Id. See Dun. Dig. 3337-3340.

Error in excluding opinion testimony of a qualified expert based on his own observations is not cured by permitting him to testify as to his opinion based in part upon a hypothetical presentation of the testimony of others as to facts they observed. Id. See Dun. Dig. 3337.

In valuing land for tax purposes when no sales have occurred for a long time, the value may be determined by judgment and opinion of men whose experience and knowledge of the lands and their surrounding circumstances qualify them in the court's view to give reliable opinions as to fair value. Kalscheuer v. State, 214M441, 8NW(2d)624. See Dun. Dig. 3247, 3322.

Where only two medical experts testified and both testified for the state, trial court was warranted in adopting the views of the expert who stated that person tried for having a psychopathic personality was dangerous to others and in rejecting those of the other expert to the contrary. Dittrich v. Brown County, 215M234, 9NW(2d) 510. See Dun. Dig. 3324.

An expert witness may not include the opinion of another expert witness as the basis for his own opinion. Hobenstein v. Dodds, 215M348, 10NW(2d)236. See Dun. Dig. 3336.

A hypothetical question must make it plain to jury as well as to the expert what facts he bases his opinion on. Id. See Dun. Dig. 3337.

The better practice is to question an expert witness by means of hypothetical questions. Id. See Dun. Dig. 3337.

Where facts are disputed, neither party may put to an expert questions embodying the disputed facts as his construction of the evidence would show them to be. Id. See Dun. Dig. 3338.

An expert witness's opinion based on conflicting evidence which he is called upon to weigh is inadmissible. Id. See Dun. Dig. 3338.

15. Nonexpert opinions and conclusions.

A plaintiff who has testified to business activities may properly state the value of lost time because of injuries sustained in an automobile accident, and loss sustained in commissions by failure of delivery of property sold on commission. Guin v. M., 206M382, 288NW716. See Dun. Dig. 3322.

Owner of land may express an estimate of value without laying a foundation. Smith v. T., 207M349, 291NW516. See Dun. Dig. 3322.

Testimony of witnesses that coal used in heating plant contained not less than 13,000 B.T.U. was not competent, being opinion of witnesses based exclusively on statements made to them by others and not upon any personal investigation, analysis, or experience of their own. Kavli v. L., 207M549, 292NW210. See Dun. Dig. 3311.

Court did not abuse discretion in permitting witness to give opinion of speed of automobile about one-half mile from scene of accident where it appeared that witness watched car from a point of vantage almost until collision. Johnson v. Farrell, 210M351, 298NW256. See Dun. Dig. 3322a.

Question of adequate foundation being first laid by a character witness for defendant lies largely within discretion of trial court. State v. Palmersten, 210M476, 299 NW669. See Dun. Dig. 2458, 3242.

Questions of credibility of testimony of a witness as to substance of a conversation, objected to as an opinion of witness, is for jury, and question of admissibility is for court, which must decide whether testimony is a real effort to reproduce substance or mere conclusion of witness unsupported by any recollection of what substance was. Lewin v. Proehl, 211M256, 300NW814. See Dun. Dig. 3312.

While a witness may not state his mere conclusion as to meaning of a conversation from which a contract is claimed to have resulted, he is not held to verbal precision as condition precedent to admission of his testimony, and it is enough if he states substance of it. Id. See Dun. Dig. 3311.

Admissibility of testimony of a witness as to substance of a conversation concerning a contract, rather than exact wording thereof, rests largely in discretion of trial judge. Id. See Dun. Dig. 3312.

Whether a sufficient foundation had been laid for admission of opinion of passenger injured in automobile accident as to speed at which car was traveling was within the discretion of trial court. Marsh v. Henriksen, 213M500, 7NW(2d)387. See Dun. Dig. 3322a.

The admission of opinion evidence of lay witnesses on mental condition is substantially a matter of discretion for trial court. Larson v. Dahlstrom, 214M304, 8NW (2d)48, 146ALR245. See Dun. Dig. 3316.

One having long acquaintance with another is qualified to state his opinion from personal knowledge regarding competency of such person to transact business. Parrish v. Peoples, 214M589, 9NW(2d)225. See Dun. Dig. 3316.

16. Weight and sufficiency.

There is no arbitrary rule for weighing testimony of a witness, and jury should consider all of his testimony as brought out both on direct and cross-examination. Sankiewicz v. S., 209M528, 296NW909. See Dun. Dig. 10343a.

Mere fact that a witness' testimony may be shaken on cross-examination does not, as a matter of law, remove from consideration of jury all testimony of such witness. Id.

"Inference" is a truth or proposition drawn from another which is supposed or admitted to be true, or process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. Corcoran v. Teamsters and Chauffeurs Joint Council No. 32, 209M289, 297NW4. See Dun. Dig. 3227b.

Instruction that "circumstantial evidence is not sufficient if it is merely consistent with the claim which the party makes and is also consistent with some other theory" was not subject to objection when considered together with entire paragraph of which it was a part. Hill v. Northern Pac. R. Co., 210M190, 297NW627. See Dun. Dig. 3234.

Circumstantial evidence may be more convincing than direct testimony, particularly when foundation of inference is real evidence. Dege v. Produce Exchange Bank, 212M44, 2NW(2d)423. See Dun. Dig. 3234.

Circumstantial evidence will support a verdict in a civil case where reasonable minds functioning judicially must be able to conclude from circumstances that theory adopted by verdict outweighs and preponderates over any other theory. Id.

Rule of O'Leary v. Wangensteen, 175M368, 221NW430, does not apply where circumstances and other facts tend to contradict direct testimony. Id. See Dun. Dig. 10344a.

One's testimony is subject to the infirmity of any self-serving declaration, and may frequently lack persausiveness. Brennan v. Friedell, 212M115, 2NW(2d)547. See Dun. Dig. 10344a.

The nonexistence of a fact established by inference arising from an omisson to assert it when it would have been natural to do so may be used to contradict testimony of its existence. Erickson v. Erickson & Co., 212M 119, 2NW(2d)824. See Dun. Dig. 10352.

In action for wrongful death, testimony of only living witness to head-on collision need not be accepted as true where jury could not only find inconsistencies in his testimony, but there were circumstances of physical facts impeaching verity of witness's story. Malmgren v. Foldesi, 212M354, 3NW(2d)669. See Dun. Dig. 10344a.

Fact that witness is related to one of parties is not sufficient, in itself, to discredit him, under the rule that positive testimony of an unimpeached witness may not be disregarded unless its improbability or inconsistency appears from record. State v. Riley, 213M448, 7NW(2d) 770. See Dun. Dig. 10344a.

The court or jury cannot disregard positive testimony of an unimpeached witness unless its improbability or inconsistency appears from the record. Id.

In action for wrongful death in automobile collision, where sole evidence for plaintiff consisted of certain statements made by defendant's employee at scene of collision and his admissions later to a witness in presence of plaintiff's attorney, both of whom were investigating the accident, weight to be attached to such admissions was for jury, though contrary to testimony of such employee on the trial. Litman v. Peper, 214M127, 7NW(2d)334. See Dun. Dig. 3410.

Jury cannot be permitted to ignore uncontradicted facts and base its verdict on bald statement that a party was acting on its own behalf in a certain matter and not on behalf of another. State Bank of Madison v. Joyce, 213M380, 7NW(2d)385. See Dun. Dig. 9707.

Testimony of a single witness, the plaintiff, although opposed by testimony of several witnesses, no matter what the issue or who the person, may legally suffice as evidence upon which jury may found a verdict. Aide v. Taylor, 214M212, 7NW(2d)757, 145ALR530. See Dun. Dig. 3473, 10344.

Where evidence was in conflict and there was evidence to impeach witnesses on both sides, fact issues were for the jury, and rule of O'Leary v. Wangensteen, 175M368, 221NW430, did not apply. Id. See Dun. Dig. 10344.

Where the only person who can directly dispute a witness is dead, the testimony of that witness should be carefully scrutinized, its reasonable probability should be considered, and for this purpose attention should be given to the circumstances surrounding any transaction which the witness may narrate and his testimony compared with all the inferences derivable from the established facts. Calich's Estate, 214M292, 8NW(2d)337. See Dun. Dig. 10343a.

Where the positive testimony of witnesses is uncontradicted or unimpeached, either by other positive testimony or by circumstantial evidence, either extrinsic or intrinsic of its falsity, a trier of fact has no right to disregard it, but he is not bound to accept testimony as true merely because uncontradicted if it is improbable or the surrounding facts and circumstances furnish reasonable grounds for doubting its credibility. Id. See Dun. Dig. 10344a.

Positive unimpeached testimony of credible witnesses, which is not inherently improbable or rendered so by facts and circumstances disclosed in the course of the hearing, must be accepted as true by the trier of facts. Haller v. Northern Pump Co., 214M404, 8NW(2d)464. See Dun. Dig. 10344a.

Trial court was not at liberty to disregard testimony of a banker that party to an action and grantor in a deed was not competent to transact business, the testimony not being controverted. Parrish v. Peoples, 214M 589, 9NW(2d)225. See Dun. Dig. 10344a.

In action for death of motorcycle driver striking a truck emerging from private driveway, in which defendant and a helper were the only eyewitnesses, jury was not bound to accept defendant's estimate of his own speed, but could consider all the surrounding circumstances in determining at what rate of speed his truck was actually traveling, as bearing upon question whether deceased was guilty of contributory negligence. Merritt v. Stuve, 215M44, 9NW(2d)329. See Dun. Dig. 10344, 10344a.

The trier of facts is the sole judge of the credibility of witnesses testifying in relation to an issuable fact, not only where there is a conflict in the testimony of witnesses called by different parties, but also where it exists btween the witnesses of a party or even in the versions given by a single witness. Dittrich v. Brown County, 215M234, 9NW(2d)510. See Dun. Dig. 10344.

The rule that trier of a fact is sole judge of credibility of witnesses applies where the facts are established by expert testimony. Id.

Even though the testimony of a witness is without extraneous contradiction, it need not be believed by the jury where other circumstances in evidence are such as to discredit it. Roberts v. Metropolitan Life Ins. Co., 215 M300, 9NW(2d)730. See Dun. Dig. 10344a.

Triers of fact cannot disregard the positive testimony of an unimpeached witness unless and until its improbability or inconsistency furnishes a reasonable ground for so doing. Id.

In an action for a specific performance of an oral promise to make a will, the fact that decedent was a lawyer does not impeach evidence of his oral contract. Downing v. Maag, 215M506, 10NW(2d)778. See Dun. Dig. 8789a, 10344a.

The fact that witnesses were acquainted with or related to a party to the action does not, in itself, impeach their testimony. Id. See Dun. Dig. 10343a.

Testimony which is uncontradicted and unimpeached and is not improbable or inconsistent with facts and circumstances disclosed by the record cannot be disregarded by the trial court. Id. See Dun. Dig. 10344a.

16½. Examination of witnesses.

Chief purpose of cross- examination is to enable trier of facts to determine what evidence is credible and what is not, and for that purpose it is important to show relation of witness to cause and parties, his bias or interest or any other fact which may bear on his truthfulness. State v. Elijah, 206M619, 289NW575. See Dun. Dig. 10348.

Where witnesses are unwilling and disclose a disposition to suppress the facts, trial court has power to facilitate examinations and aid in eliciting facts, and rulings should not be unnecessarily technical. Sworski v. S., 208M201, 293NW309. See Dun. Dig. 10326.

Where witness answered question in a straight-forward manner, repetition of question should be ruled out. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW (2d)665. See Dun. Dig. 9717.

17. Impeachment of witnesses.

Record held to sufficiently show that offer of pleading in evidence was for impeachment purposes and to show admission. Stolte v. L., (CCA8), 110F(2d)226.

Cross-examination to show illicit and other relations between a witness and prosecuting witness is a matter of right, denial of which is abuse of discretion and prejudicial. State v. Elijah, 206M619, 289NW575. See Dun. Dig. 10348.

Impeached on cross-examination by reception in evidence, without objection, of witness' verified complaint in an action against both parties hereto, extent witness on redirect may explain conditions and circumstances under which verification was made is largely within discretion of trial court. Brusletten v. R., 207M375, 291NW 608. See Dun. Dig. 10351(80).

Impeaching testimony is negative and is admitted only for purpose of impairing credibility of witness who made a prior and inconsistent statement on same subject. Klingman v. L., 209M449, 296NW528. Se Dun. Dig. 10351.

In all cases where there is a fact issue for jury, truthfulness of testimony of the particular witness is to be determined upon his whole evidence as brought out both on direct and cross-examination. Id.

Court did not abuse its discretion in permitting defendant to cross-examine his own witnesses with respect to prior written inconsistent statement, on claim of surprise. Id. See Dun. Dig. 10356.

Cross-examination of defendant's witness by counsel for plaintiff concerning a conversation with plaintiff's counsel and his associate containing statement inconsistent with testimony on direct examination, without requiring counsel to assure court that counsel or his associate would take witness stand for purpose of impeaching witness as requested by defendant's counsel, was not an abuse of discretion, and cross-examination was not improper where witness testified that conversation was

substantially as claimed by plaintiff's counsel. Jaenisch v. Vigen, 209M543, 297NW29. See Dun. Dig. 10317, 10351.

Although statement written by claim adjuster as story of accident was related by defendant, and admitted by him to be "true and correct", was offered and received solely for the purpose of impeaching his testimony at trial, it was an admission, and as such was evidence of facts in issue. Johnson v. Farrell, 210M351, 298NW256. See Dun. Dig. 3409, 10351.

Where insurance claim adjuster wrote down story of an automobile collision as it was given to him by driver of defendant's car, his testimony that he gave it to the driver, who was a party defendant, and that he read it over and acknowledged it as "true and correct" provided a proper foundation for admission of the written statement in evidence as an admission and for purpose of impeaching his testimony on the trial, though he refused to sign statement upon advice of a third person. Id. See Dun. Dig. 10351.

Where impeachment of an ordinary witness by prior inconsistent statements is attempted more particularity in laying a foundation is necessary, but contradictory statements by a party can be shown without his attention having first been called to them. Id. See Dun. Dig. 10351(b).

Variance in statement made prior to trial from statement as given by witness was a fact for consideration of jury. Id. See Dun. Dig. 10351.

It is necessary that impeaching witness first be asked if he is acquainted with reputation of witness as to truthfulness in community in which latter resides, and if he is, he should next be asked what that reputation is, and, finally, if answer is that reputation is bad, he should be asked whether from his knowledge of such reputation he would believe the witness under oath. State v. Palmersten, 210M476, 299NW669. See Dun. Dig. 10353(b).

Where impeachment of a party who is also a witness consists of his own inconsistent declarations, they are ordinarily admissible as admissions and as such are substantive evidence. Williams v. Jayne, 210M594, 299 NW853. See Dun. Dig. 3409.

Testimony that is impeached and subject to much self-contradiction may be rejected by trier of facts even though it is unopposed by other evidence. Id. See Dun. Dig. 10351.

No foundation need be laid for impeachment of a party who is a witness in his own behalf. Id. See Dun. Dig. 10351.

A witness may be impeached by a prior statement, either written or oral, purporting to narrate all facts with respect to a particular event, which omitted to refer to a vital or important fact to which he testified. Erickson v. Erickson & Co., 212M119, 2NW(2d)824. See Dun. Dig. 10351.

A witness may be impeached by contradicting his testimony. Id.

A witness may be discredited by showing his hostility to party against whom he testified, and where hostility is denied, it may be proved by acts and declarations showing animosity, but not by showing that witness had been sued by party seeking to discredit him and that he had settled the lawsuit. Esser v. Brophey, 212M 194, 3NW(2d)3. See Dun. Dig. 10350.

It always is permissible to show bias of a witness as affecting his credibility by such circumstances as family relationship, association, employment, and other facts showing a disposition to give testimony favorable to the party calling him, although such matters may not have independent relevancy. Id.

Testimony that a witness for plaintiff in an automobile accident case settled an action brought against him by the defendant for damages arising out of same accident is irrelevant to show an admission of liability by the witness or the witness's hostility to defendant. Id. See Dun. Dig. 10350, 10352.

In action arising out of automobile collision at 9:00 P. M., wherein defendant alleged that plaintiff had been drinking in the afternoon and that this had so affected his mentality and capacity to function normally as to lead to view that his careless behavior was a contributing cause of collision, it was proper to interrogate plaintiff on cross-examination for purpose of impeachment as to whether he was at a certain farm at 2 or 3 o'clock P. M., and was intoxicated at that time, as against contention that it related to matters collateral to main issue. Greene v. Mathiowetz, 212M171, 3NW(2d)97. See Dun. Dig. 10352.

Witness cannot be interrogated as to matters collateral to main issue merely for purpose of contradicting him for impeachment purposes, and to determine whether matters are collateral, test is whether cross-examining party would be entitled to prove fact as a part of his case tending to establish his cause of action or defense. Id. See Dun. Dig. 10348.

It was competent on plaintiff's cross-examination to show conduct and statements of his own, inconsistent with his evidence on the stand, and, upon his denying it, to contradict him by way of impeachment. Id. See Dun. Dig. 10351, 10352.

In proceeding by state board to remove an appointee, wherein a referee was appointed, upon failure of board to produce certain department heads as witnesses, officer could have been subpoenaed and subjected to examination, and if testimony was adverse could establish that he was surprised thereby, and referee could permit impeachment of witness by proof of contradictory statements, a proper foundation being laid. State v. State Board of Education, 213M184, 6NW(2d)251, 143ALR503. See Dun. Dig. 10351.

Where defendant's explanation might well have been regarded as a fabrication, jury was justified in disbelieving his entire testimony. State v. Lytle, 214M171, 7 NW(2d)305. See Dun. Dig. 10345.

Where a party claims surprise at the testimony of his own witness on cross-examination, trial court in its discretion may permit impeachment of witness by showing prior contradictory statements. Fjellman v. Weller, 213M457, 7NW(2d)521. See Dun. Dig. 10356.

Whether testimony of a witness is in fact inconsistent with his prior statement should be determined not from isolated answers, but from his testimony as a whole. O'Neill v. Minneapolis St. Ry. Co., 213M514, 7NW(2d) 665. See Dun. Dig. 10351.

A prior statement can be used to impeach a witness' testimony as contradictory only where there is some inconsistency between the statement and the testimony. Id. See Dun. Dig. 10351(a).

A prior contradictory statement is always admissible to impeach a witness. Id. See Dun. Dig. 10351(a).

Whether a prior statement does in fact impeach a witness does not depend upon the degree of inconsistency between his testimony and his prior statement, and if there is any variance between them, statement should be received and its effect upon the credibility of witness should be left to jury. Id. See Dun. Dig. 10351(c).

A party may always explain the circumstances under which inconsistent statements or claims were made and reconcile them with his testimony. Aide v. Taylor, 214M205, 7NW(2d)757, 145ALR530. See Dun. Dig. 3429, 10351(e).

Plaintiff's testimony cannot be rejected simply because at the hospital following accident he gave statement containing a contrary version. Id. See Dun. Dig. 10345, 10351(g).

In prosecution of a pharmacist for sale of intoxicating liquor without a license in violation of a city ordinance, there was no abuse of discretion in denying defendant's motion to add to his settled case the testimony of an officer as given in a separate prosecution against the manager of the drugstore arising out of the same sale, inconsistency of testimony of the officer in the two trials being inconsequential. State v. McBride, 215M123, 9NW (2d)416. See Dun. Dig. 10351.

Evidence relating to the marital status of defendant and whether he or his former wives obtained divorce decrees is irrelevant as affecting defendant's credibility as a witness, and was improper cross-examination. State v. Clow, 215M380, 10NW(2d)359. See Dun. Dig. 10348(a).

18. Striking out evidence.

If evidence was properly admissible when received, fact that court subsequently, by its instructions, withdrew it does not leave party objecting to admission of evidence in a position to complain. Greene v. Mathiowetz, 212M171, 3NW(2d)97. See Dun. Dig. 9742.

20. Telephone conversations.

Conversations had over the telephone are admissible in evidence if the identity of the person called can be established with reasonable certainty by means of the surrounding facts and circumstances. Katzmarek v. Weber Brokerage Co., 214M580, 8NW(2d)822. See Dun. Dig. 3245.

Circumstantial trustworthiness of the modern telephone system is safe enough to treat testimony of telephone conversation in law as at least sufficient evidence to go to the jury. Id.

A telephone conversation between agent and principal heard by plaintiff over an extension was properly admissible. Id.

Conversations had over the telephone are admissible in evidence where the witness testifies that he recognized the voice over the phone. Id.

21. Customs and usages.

A custom to have force of law must be known, or must be so uniform and notorious that no person of ordinary intelligence who has to do with subject to which it relates and who exercises reasonable care would be ignorant of it. Rhine v. Duluth, M. & I. R. Ry. Co., 210M 281, 297NW852. See Dun. Dig. 2511.

A custom must be clearly proved and where evidence is uncertain and contradictory, custom is not established. Id. See Dun. Dig. 2517.