hospital record pertaining to treatment of the plaintiff immediately following the accident, where it appeared that the original was received in evidence but without knowledge of plaintiff's attorney was taken back to the hospital by the custodian, and there was no showing how the adverse party was prejudiced thereby, since receipt of a copy of the record under these circumstances, although error, was harmless. Lundquist v. Western C. & S. Co. 30 W (2d) 159, 140 NW (2d) 241.

A record of investigation of an accident made 6 months after the occurrence and after action started does not qualify as a business record. Smith v. Milwaukee & S. T. Co. 33 W (2d) 269, 147 NW (2d) 233.

Medical evidence in Wisconsin, 1956-1966. Arnold, 49 MLR 657.

Admissibility of hospital records. 49 MLR 801.

Admissibility of business entries. Skogstad and Koppa, 1958 WLR 245.

889.26 History: 1881 c. 226; Ann. Stats. 1889 s. 4189a; Stats. 1898 s. 4189a; Stats. 1925 s. 327.26; 1927 c. 523 s. 86; 1965 c. 66 s. 2; Stats. 1965 s. 889.26.

Revisers' Note, 1898: Section 4189a, Ann. Stats. 1889, with the addition of the words in brackets, which are from an amendment made to the original as passed in New York by chapter 555, Laws 1888.

Editor's Note: A statute on the same subject, ch. 36, Laws of New York, 1880, was considered and applied in Peck v. Callaghan, 95 N.Y. 73 (1884).

A party denying the signature to a paper cannot cross-examine witnesses as to the writing in papers the genuineness of which has neither been admitted nor proved. Pierce v. Northey, 14 W 9.

A comparison of hands by a juxtaposition of 2 writings is wholly inadmissible as evidence of the genuineness of a signature, except when the writing is of such antiquity that it cannot be proved in the ordinary way or where the other writings to be compared with it are already in the case and before the jury. Hazleton v. Union Bank, 32 W 34.

A paper may be compared with other papers already admitted in evidence upon other grounds to prove the handwriting of the first paper, but such other paper or papers cannot be admitted solely for the purpose of such comparison. State v. Miller, 47 W 530, 3 NW 31.

It was error to permit a cross-examination of a handwriting witness respecting signatures on a document not in evidence. Alesch v. Haave, 178 W 19, 189 NW 155.

Testimony by a handwriting expert as to the genuineness of disputed handwriting, based on comparisons between photographic copies of the signature of the will and signatures in the handwriting of deceased, is admissible where the will had been either destroyed or lost subsequent to making the photographic copies. Fenelon v. State, 195 W 416, 217 NW 711, 218 NW 830.

Modes of proof of spurious and questioned documents and identity of handwriting. Spencer, 1 MLR 114.

Testing witnesses in questioned document cases. Spencer, 13 MLR 129.

Standards of proof of questioned documents. Spencer, 20 MLR 167.

889.28 History: 1937 c. 420; Stats. 1937 s. 327.28; 1941 c. 118; 1945 c. 36; 1947 c. 246; Sup. Ct. Order 262 W vi; 1965 c. 66 s. 2; Stats. 1965 s. 889.28.

Comment of Judicial Council, 1952: This prima facie certificate is not a judgment since it does not finally determine rights and is not an order since it is not a direction of a court or judge. See 270.53. The practice in many courts is to issue a duplicate instead of a certified copy for filing in the office of the register of deeds. [Re Order effective May 1, 1953]

889.29 History: 1945 c. 407; Stats. 1945 s. 327.29; 1951 c. 284, 457, 735; 1953 c. 61; 1959 c. 19; 1961 c. 567 s. 3; 1963 c. 167; 1965 c. 66 s. 2; Stats. 1965 s. 889.29.

Editor's Note: For foreign decisions construing the "Uniform Photographic Copies as Evidence Act" consult *Uniform Laws, Annotated.*

889.30 History: 1947 c. 345; Stats. 1947 s. 327.30; 1957 c. 230; 1959 c. 399; 1965 c. 66 s. 2; Stats. 1965 s. 889.30.

CHAPTER 891.

Presumptions and Judicial Notices.

Editor's Note: The sections comprising this chapter were not assigned decimal numbers by ch. 4, Laws 1925, but were renumbered by the Revisor in 1925 under his general authority.

891.01 History: 1921 c. 214; Stats. 1921 s. 4135m; Stats. 1925 s. 328.01; 1927 c. 523 s. 89; 1947 c. 363; 1949 c. 262; 1965 c. 66 s. 2; Stats. 1965 s. 891.01.

Editor's Note: For foreign decisions construing the "Uniform Judicial Notice of Foreign Law Act" consult *Uniform Laws, Annotated.*

In a prosecution for violation of the cold storage act, markings on boxes purporting to designate the time the fish were received in cold storage in Illinois, are of no probative force. While the courts of this state take judicial notice of the public laws of a sister state, the laws of Illinois could not make the markings evidence in the courts of this state. Green Bay F. Co. v. State, 186 W 330, 202 NW 667.

Courts are not bound to take actual notice of the laws of other states, in the absence of all proof, but may presume them to be in accordance with their own. (Decided without reference to 328.01) Ellis v. Gordon, 202 W 134, 231 NW 585.

As bearing on the question of negligence of an Illinois owner who had loaned his automobile to a 15-year-old boy to drive to Wisconsin, the Illinois statutes relating to the licensing of drivers and the fixing of the minimum age of drivers should be taken into consideration. Canzoneri v. Heckert, 223 W 25, 269 NW 716.

The supreme court is not prepared to take judicial notice of German laws. Estate of Wieboldt, 5 W (2d) 363, 92 NW (2d) 849.

See note to 238.07, citing Estate of Hulett, 6 W (2d) 20, 94 NW (2d) 127.

Under an Illinois statute substantially the same as the Wisconsin statute, the judicial construction of the foreign statute will be presumed to be the same as Wisconsin in the absence of evidence to the contrary. Harper v. Hartford A. & I. Co. 14 W (2d) 500, 111 NW (2d) 480.

328.01 requires that, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise. Bailey v. Hagen, 25 W (2d) 386, 130 NW (2d) 773.

The changes in the established law effected by the enactment of 891.01 affect only the laws and statutes referred to in the first 4 subsections, and do not include laws of foreign countries; hence, the laws of foreign countries must be pleaded and proved as any other fact. Milwaukee Cheese Co. v. Olafsson, 40 W (2d) 575, 162 NW (2d) 609.

891.021 History: 1945 c. 139; Stats. 1945 s. 328.021; 1955 c. 221 s. 18; 1965 c. 66 s. 2; Stats. 1965 s. 891.021.

Committee Note, 1955: This is substantially a restatement of former 328.021 except that judicial notice of rules is made dependent upon the fact of publication in the Wisconsin administrative code or register, whereas under former law it is based upon their having the "force and effect of law." This revised version is more satisfactory because it is consistent with the fundamentals of judicial notice. [Bill 5-S]

Editor's Note: Sec. 328.02, Stats. 1961, which was derived from ch. 390, Laws 1921, and amendatory legislation, provided that municipal courts "shall take judicial notice of ordinances in cities in which they have jurisdiction". The statute was construed in Wergin v. Voss, 179 W 603, 192 NW 51, and in State v. Hackbarth, 256 W 545, 41 NW (2d) 594, 42 NW (2d) 358; and it was repealed by ch. 6, Laws 1963.

The supreme court may take judicial notice of the files of the public service commission showing applications before it and the actions taken thereon. Wisconsin P. & L. Co. v. Beloit, 215 W 439, 254 NW 119.

The supreme court takes judicial notice of records in the office of the secretary of state showing appointments to public office. State v. Roden, 219 W 132, 262 NW 629.

The trial court is not required to take notice of the resolutions of the firemen's pension board of a city. Horlick v. Swoboda, 221 W 373, 267 NW 38.

The supreme court takes judicial notice of the records in the office of the secretary of state, including articles of incorporation filed therein. Schoenburg v. Klapperich, 239 W 144, 300 NW 237.

The supreme court takes judicial notice of the records of proceedings before the public service commission showing that the commission interprets the term "dam" as including the entire development from flashboards to tailrace. State ex rel. Priegel v. Northern States P. Co. 242 W 345, 8 NW (2d) 350.

Correspondence and files in the office of the state treasurer and the legislative record in the office of the secretary of state relative to bills acted on by the legislature are records of which the supreme court takes judicial notice. State ex rel. Martin v. Barrett, 248 W 621, 22 NW (2d) 663.

The supreme court will take judicial notice of a motor-carrier certificate of authority on file with the public service commission. Milwaukee & S. T. Corp. v. Public Service Comm. 267 W 144, 64 NW (2d) 856.

The supreme court takes judicial notice of the Public Service Commission Reports. Milwaukee v. Public Service Comm. 268 W 116, 66 NW (2d) 716.

The supreme court takes judicial notice of a rate or fare order of the public service commission, pertinent to the decision in the instant case but not a part of the record. Milwaukee & S. T. Corp. v. Public Service Comm. 268 W 573, 68 NW (2d) 552.

The supreme court will take judicial notice of both an administrative order of the director of the department of public welfare and a manual relating to parole-board procedure and practices to be followed by the board. Tyler v. State Dept. of Public Welfare, 19 W (2d) 166, 119 NW (2d) 460.

A court may take judicial notice of county ordinances on its own volition, but this section cannot be construed as requiring the trial court to take judicial notice on its own motion of county ordinances unknown to it and not called to its attention. Bear v. Kenosha County, 22 W (2d) 92, 125 NW (2d) 375.

The supreme court will refuse to take judicial notice of a plat recorded in a register of deeds office outside of Dane county. Robison v. Borkenhagen, 25 W (2d) 408, 130 NW (2d) 770.

891.03 History: 1869 c. 157 s. 3; 1870 c. 100 s. 1; R. S. 1878 s. 4152; Stats. 1898 s. 4152; Stats. 1925 s. 328.03; 1927 c. 523 s. 91; 1965 c. 66 s. 2; Stats. 1965 s. 891.03.

891.04 History: R. S. 1858 c. 29 s. 7, 8; 1865 c. 377 s. 7; R. S. 1878 s. 244; 1891 c. 320 s. 5; Stats. 1898 s. 244; 1917 c. 282 s. 8; Stats. 1917 s. 4152a; Stats. 1925 s. 328.04; 1927 c. 523 s. 92; 1965 c. 66 s. 2; Stats. 1965 s. 891.04.

891.05 History: 1864 c. 286 s. 1; 1866 c. 58 s. 1, 2; 1873 c. 44 s. 1, 2; R. S. 1878 s. 4153; 1880 c. 18; Ann. Stats. 1889 s. 4153; Stats. 1898 s. 4153; Stats. 1925 s. 328.05; 1927 c. 523 s. 93; 1965 c. 66 s. 2; Stats. 1965 s. 891.05.

Ch. 58, Laws 1866, makes a patent issued by the commissioners of school and university lands prima facie evidence of title in the state, preliminary proofs of such title not being required, whether the patent was issued before or after the statute took effect. Reynolds v. Weiss, 27 W 450.

A patent is prima facie evidence of title and of the regularity of proceedings previous to its issue. Sexton v. Appleyard, 34 W 235.

891.06 History: 1869 c. 40 s. 1, 3; R. S. 1878 s. 4154; Stats. 1898 s. 4154; Stats. 1925 s. 328.06; 1927 c. 523 s. 94; 1965 c. 66 s. 2; Stats. 1965 s. 891.06.

A deed purporting to be executed by an administrator in pursuance of an order or license of the probate court is prima facie evi-

dence that the title of the intestate has passed to the grantee in such deed. Chase v. Whiting, 30 W 544.

Production of a deed purporting to have been issued by a sheriff, upon sale pursuant to a judgment, is prima facie evidence that the judgment and sale were valid and that the conveyance was executed by the proper officer. Ehle v. Brown, 31 W 405.

Ch. 40, Laws 1869, includes deeds executed by the grantor as "late sheriff." Seeley v. Manning, 37 W 574.

A deed by a sheriff upon a sale in pursuance of a judgment is prima facie evidence of title in the grantee; but if the party claiming under such deed attempts to support the deed by evidence he takes upon himself the burden of showing that the sheriff's proceedings were regular. Claflin v. Robinhorst, 40 W 482.

Though fraudulently given an administrator's deed is prima facie evidence of the regularity of the proceedings before sale and creates a cloud upon the title of the heirs. Hoffman v. Wheelock, 62 W 434, 22 NW 713, 716.

A sheriff's deed is prima facie evidence of title and the judgment need not be shown. Morse v. Stockman, 73 W 89, 40 NW 679.

891.07 History: R. S. 1849 c. 102 s. 83; R. S. 1858 c. 134 s. 53; R. S. 1878 s. 4155; Stats. 1898 s. 4155; Stats. 1925 s. 328.07; 1927 c. 523 s. 95; 1965 c. 66 s. 2; Stats. 1965 s. 891.07.

891.08 History: 1863 c. 161 s. 1; R. S. 1878 s. 4158; Stats. 1898 s. 4158; Stats. 1925 s. 328.08; 1965 c. 66 s. 2; Stats. 1965 s. 891.08.

891.09 History: 1852 c. 492 s. 6; R. S. 1858 c. 110 s. 6, 14; 1867 c. 129 s. 2; 1877 c. 191; R. S. 1878 s. 4160, 4172; Stats. 1898 s. 4160, 4172; Stats. 1925 s. 328.09; 1927 c. 523 s. 97; 1943 c. 503 s. 70; 1953 c. 631; 1965 c. 66 s. 2; Stats. 1965 s. 891.09.

In the absence of a statute making the baptismal certificate evidence such certificate could not supersede the testimony of the mother as to the exact age of her child. Hermann v. State, 73 W 248, 41 NW 171.

A certificate of baptism which incidentally mentions or recites the age of the infant baptized is not admissible to prove the age of such person. Lavin v. Mutual A. Society, 74 W 349, 43 NW 143.

Copies of parish registers of births and deaths kept in a foreign country in accordance with its laws may be admitted in evidence under a stipulation that they should have the same effect as the originals. The marital status of the mother and the legitimacy of the child are material facts which such records establish prima facie. Sandberg v. State, 113 W 578, 89 NW 504.

A death certificate may be admitted in evidence and is not excluded because the knowledge was obtained in a professional capacity. State v. Pabst, 139 W 561, 121 NW 351.

A physician's certificate of death is a matter for public record and is not privileged. McGinty v. Brotherhood of Ry. Trainmen, 166 W 83, 164 NW 249.

See note to 69.23, citing Milwaukee E. R. & L. Co. v. Industrial Comm. 222 W 111, 267 NW 62.

See note to 889.18, citing Estate of Eannelli, 269 W 192, 68 NW (2d) 791.

A "family tree report", executed in Yugoslavia, consisting of entries purporting to reflect births, marriages, deaths, and relationships of the family of a decedent, offered as proof of heirship, which did not state that the facts therein recited were taken from officially recognized records or if taken from private family records the same were considered correct and accepted as official in that country, did not constitute an official certificate of births, marriages, and deaths contemplated by 891.09 (3), Stats. 1965. Estate of Shega, 38 W (2d) 269, 156 NW (2d) 392.

891.10 History: R. S. 1849 c. 52 s. 65; R. S. 1858 c. 70 s. 65; R. S. 1878 s. 4161; Stats. 1898 s. 4161; Stats. 1925 s. 328.10; 1965 c. 66 s. 2; Stats. 1965 s. 891.10.

891.11 History: R. S. 1849 c. 15 s. 130; R. S. 1858 c. 18 s. 178; 1872 c. 15; R. S. 1878 s. 4162, 4171; Stats. 1898 s. 4162, 4171; Stats. 1925 s. 328.11; 1927 c. 523 s. 98; 1965 c. 66 s. 2; Stats. 1965 s. 891.11; 1969 c. 55.

In an action against the purchaser of personal property at a tax sale, proof of the regularity of the sale and the production in evidence of the assessment roll and tax warrants, showing a tax against the plaintiff, makes out a prima facie defense and the burden is upon plaintiff to show irregularities invalidating the tax and sale. Standish v. Flowers, 16 W 110.

Tax rolls are not admissible in evidence against a party to show the amount of his property, but are evidence only in a proceeding to enforce the tax levied against him. Tuckwood v. Hanthorn, 67 W 326, 30 NW 705.

Tax rolls showing payment are admissible. McIntosh v. Marathon L. Co. 110 W 296, 85 NW 976.

The provision in 328.11 that all books and files in the office of any county treasurer or county clerk, all assessments and tax rolls and certificates and warrants thereto attached, shall be presumptive evidence of the facts therein stated, makes assessment rolls admissible as against a party in a proceeding to enforce the property tax levied against him, but such provision has no application to a proceeding in the county court to determine the value of property for inheritance tax purposes. Estate of Ryerson, 239 W 120, 300 NW 782.

891.12 History: R. S. 1849 c. 98 s. 95; R. S. 1858 c. 137 s. 103; R. S. 1878 s. 4165; Stats. 1898 s. 4165; Stats. 1925 s. 328.12; 1965 c. 66 s. 2; Stats. 1965 s. 891.12.

A receiver's receipt for land patented, showing that it was entered anterior to the date of patent, is not evidence to defeat an action of ejectment by patentee. Parkinson v. Bracken, 1 Pin. 174.

As between individuals a receiver's receipt is sufficient evidence of title. Bracken v. Preston, 1 Pin. 584.

A certificate of entry of land is evidence of the fact. Burdick v. Briggs, 11 W 126.

A certificate by the receiver that it appears from the books and records of his office that certain lands were entered, purchased and paid for is not such a certificate as is intended by sec. 103, ch. 137, R. S. 1858, and is inadmissible as evidence. Bigelow v. Blake, 18 W 520.

After a lapse of 20 years from entry and purchase it will be presumed that a patent was issued. Culbertson v. Coleman, 47 W 193, 2 NW 124.

An assignment of a land warrant before it is issued is void. Week v. Bosworth, 61 W 78, 20 NW 657.

891.14 History: 1867 c. 29 s. 1; R. S. 1878 s. 4167; Stats. 1898 s. 4167; 1909 c. 219; Stats. 1925 s. 328.14; 1965 c. 66 s. 2; Stats. 1965 s. 891.14; 1969 c. 55.

891.16 History: 1873 c. 44 s. 3; R. S. 1878 s. 4169; Stats. 1898 s. 4169; Stats. 1925 s. 328.16; 1965 c. 66 s. 2; Stats. 1965 s. 891.16.

891.17 History: 1867 c. 10 s. 1, 2; R. S. 1878 s. 4170; Stats. 1898 s. 4170; Stats. 1925 s. 328.17; 1965 c. 66 s. 2; Stats. 1965 s. 891.17.

891.18 History: 1891 c. 286; Stats. 1898 s. 4173a; Stats. 1925 s. 328.18; 1965 c. 66 s. 2; Stats. 1965 s. 891.18.

891.20 History: 1854 c. 49 s. 2; R. S. 1858 c. 69 s. 4; R. S. 1858 c. 137 s. 87; 1870 c. 56 s. 10; 1872 c. 119 s. 2; 1872 c. 144 s. 24, 25; 1872 c. 146 s. 3; 1874 c. 113 s. 4; 1875 c. 25; 1875 c. 221 s. 2; R. S. 1878 s. 4181; Stats. 1898 s. 4181; Stats. 1925 s. 328.20; 1965 c. 66 s. 2; Stats. 1965 s. 891.20.

891.21 History: 1885 c. 280; Ann. Stats. 1889 s. 4181a; Stats. 1898 s. 4181a; Stats. 1925 s. 328.21; 1927 c. 523 s. 102; 1965 c. 66 s. 2; Stats. 1965 s. 891.21.

891.22 History: 1854 c. 49 s. 1; R. S. 1858 c. 137 s. 86; R. S. 1878 s. 4182; 1889 c. 524 s. 7; Ann. Stats. 1889 s. 1941n, 4182; Stats. 1898 s. 4182; Stats. 1925 s. 328.22; 1927 c. 523 s. 103; 1965 c. 66 s. 2; Stats. 1965 s. 891.22.

Assessment by a foreign court is conclusive upon a member of a company in this state. Parker v. Stoughton M. Co. 91 W 174, 64 NW 751.

The certificate of the secretary of the plaintiff mutual insurance company specifying the assessment, the amount due the company by means thereof, and that notice thereof was given the persons liable therefor, should have been given the effect as presumptive evidence to which it was entitled under 328.22, and on the basis thereof the plantiff was entitled to recover for the amount owing by each defendant to the plaintiff on the assessment in question, in the absence of proof by the defendants that the levy was invalid. Lisbon Town Fire Ins. Co. v. Tracy, 236 W 651, 296 NW 126.

891.23 History: 1889 c. 473; Ann. Stats. 1889 s. 4182a; Stats. 1898 s. 4182a; Stats. 1925 s. 328.23; 1927 c. 523 s. 104; 1965 c. 66 s. 2; Stats. 1965 s. 891.23.

Revisor's Note, 1927: The last sentence is a duplication of other criminal provisions and may well be struck out, section 346.01 and 346.02. "Legal proceedings" is changed to "proceedings" to make it plain that copies may be used wherever originals would be admissible and because the meaning of "legal" is uncertain. [Bill 10-S, s. 104]

891.24 History: 1881 c. 324; Ann Stats. 1889 s. 4189b; Stats. 1898 s. 4189b; Stats. 1925 s. 328.24; 1927 c. 523 s. 105; 1965 c. 66 s. 2; Stats. 1965 s. 891.24.

Revisor's Note, 1927: No change of meaning. The language is changed to make it clear that the bank has an option to produce its books or a copy of the items called for; that the evidence "required" must be disclosed to the bank by a served subpoena. This will avoid controversy in court as to the proper way to "require evidence from bank books" and enable the bank to know whether it may elect to produce its books "unless specially ordered so to do by the court." See note to section 328.23. [Bill 10-S, s. 105]

Entries made in a bank book are admissible only insofar as they are transactions of the plaintiffs. Kuenster v. Woodhouse, 101 W 216, 77 NW 165.

See note to 943.24, on expressing the consideration, citing Merkel v. State, 167 W 512, 167 NW 802.

Presumptions as to the existence of facts are applied to compel the production of evidence to the contrary if any exists, not to exclude its production, and this is done to further the administration of justice, not to thwart it. Hanson v. Engebretson, 237 W 126, 294 NW 817.

891.25 History: R. S. 1849 c. 98 s. 92; R. S. 1858 c. 137 s. 92; R. S. 1878 s. 4192; Stats. 1898 s. 4192; Stats. 1925 s. 328.25; 1927 c. 523 s. 106; Sup. Ct. Order, 241 W vii; 1965 c. 66 s. 2; Stats. 1965 s. 891.25.

Revisor's Note, 1927: The amendment is to make certain that the defendant may, by a verified answer, compel the plaintiff to prove the genuineness of a signature, to a writing, even though the defendant is not the "person by whom it purports to have been" signed. That practice seems to be proper now. It was followed in Murphy v. Estate of Skinner, 160 W 554, 563, 564. "The person by whom it purports to have been signed" might be absent or he might be unwilling to make affidavit. [Bill 10-S, s. 106]

Comment of Advisory Committee: This section is amended so that it plainly expresses the meaning which the committee understands was given to it in Nielson v. Schuckman, 53 W 638, 645 and Estate of Dick, 204 W 89, 92. [Re Order effective July 1, 1943]

Editor's Note: Sec. 328.26, Stats. 1961, which had its origin in sec. 100, ch. 137, R. S. 1858, provided that in all actions brought on promissory notes or bills of exchange by the indorsee "the possession of the note shall be presumptive evidence that the same was indorsed by the persons by whom it purports to be indorsed". The provision was construed in Murphy v. Estate of Skinner, 160 W 554, 152 NW 172, and Implement Credit Corp. v. Eslinger, 268 W 143, 66 NW (2d) 657; and it was repealed by ch. 158, Laws 1963, which created the uniform commercial code (including ch. 403).

A party can show subsequent alteration of a written instrument without having denied its execution. Schwalm v. McIntyre, 17 W 232.

Conveyances are not included in sec. 92, ch. 137, R. S. 1858. Hinchliff v. Hinman, 18 W 130.

An affidavit that a bail bond was misread

and misexpounded and was not executed so as to become his bond does not make preliminary proof of execution necessary. State v. Homey, 44 W 615.

Denial of execution is insufficient; the signature must be denied. Snyder v. Van Doren, 46 W 602, 1 NW 285.

An allegation upon information and belief that a note is a forgery is insufficient. Smith v. Ehnert, 47 W 479, 3 NW 26.

The object of sec. 4192, R. S. 1878, is to dispense with proof of signature where it is not denied under oath. Executed and execution are used as synonymous with signed and signature. Nielson v. Schuckman, 53 W 638, 11 NW 44.

In an action upon a joint and several note a verified answer that defendant had never made or joined in the making of the note, and that if his name appeared thereon either as maker or indorser, or both, the signature was a forgery, is sufficient. Ludlow v. Berry, 62 W 78, 22 NW 140.

If the signature to a note is not denied and it shows on its face that defendant signed it and that it is due, its production is sufficient proof of its execution, and that it has not been paid. Studebaker Brothers M. Co. v. Langson, 89 W 200, 61 NW 773.

When the denial of a signature under sec. 4192, Stats. 1898, is by affidavit it need not be filed within the usual time for pleading, but may, in the discretion of the court, be filed at the trial. Withee v. Simon, 104 W 116, 80 NW 77.

Where an instrument is signed by a mark, it is prima facie proof that the signer was unable to sign his name and made the mark instead of his signature and that the mark was made by the person by whom it was purported to have been made. Finlay v. Prescott, 104 W 614, 80 NW 930.

Denial by defendant that he ever signed an instrument as it reads above his name is not sufficient to put plaintiff to proof of its execution. Ellis v. Hof, 123 W 201, 101 NW 368.

Sec. 4192 applies to signatures of parties and of persons not parties to the action. Vogel v. Delaware, L. & W. R. Co. 168 W 567, 171 NW 198.

Where defendant's verified answer denied the genuineness of his alleged signature to a note, the burden was on the plaintiff to prove that it was genuine and that the note was a binding obligation. References in a mortgage to a note secured by it do not dispense with proof of the execution of the note. Such a mortgage, though proving indebtedness, does not prove its maturity, nor is its maturity established by a note not proved to have been executed by the mortgagor. Wiesner v. Kosiedowski, 182 W 521, 193 NW 374, 197 NW 208.

In an action on a guaranty, the letter containing the contract is admissible in evidence without proof that it was signed by the defendant if the genuineness of the signature was not put in issue. O'Neill v. Russell, 192 W 141, 212 NW 278.

328.25 applies only to instruments which constitute the subject of the action or the execution of which is tendered or placed in issue by the pleadings. The defendant should have some opportunity of denying the genuineness of a written document with which he is to be confronted on the trial if he is to be barred from challenging the genuineness of such instrument. In a contest for a claim against an estate for services, a receipt signed by the claimant is inadmissible without proof of execution for genuineness of his signature. Estate of Dick, 204 W 89, 235 NW 401.

There is no presumption under 328.25 that the deceased executed the note by mark, it appearing that he could write. Cushman v. Estate of Cushman, 213 W 74, 250 NW 873.

A wage release, introduced in evidence by the defendants, as an instrument purporting to have been signed by the plaintiff, constituted proof that it was so signed until denied by her oath, but in view of such denial by her testimony on the trial, there was an issue for the jury as to whether the instrument was in fact signed by her, and on that issue the burden of proof was on the defendants. Thoma v. Class Mineral Fume Health Bath Co. 244 W 347, 12 NW (2d) 29.

891.27 History: R. S. 1878 s. 4195; Stats. 1898 s. 4195; Stats. 1925 s. 328.27; 1927 c. 523 s. 107; 1965 c. 66 s. 2; Stats. 1965 s. 891.27.

Revisers' Note, 1878: New, taken from section 840 of the New York Code, 1877.

The recital in an assignment under seal of capital stock to the assignor's creditor that it was given "for a good and valuable consideration to me in hand paid by * * *, the receipt whereof is hereby acknowledged," is presumptive evidence of a sufficient consideration even though it was in fact security for a past debt which was at the time no consideration. Merrill v. Focht, 172 W 575, 179 NW 813.

A contract of guaranty under seal within 235.17 imports consideration and is good, even though no consideration therefor is stated; the true consideration may be shown, but not for the purpose of defeating the contract. Bradley Bank v. Pride, 208 W 134, 242 NW 505.

One who has executed under seal a release of a cause of action upon an accident policy for the purpose of compromising a dispute cannot rescind the contract of release upon breach constituting failure of consideration, since, in view of the conclusive presumption of consideration, the true consideration of an executed contract under seal, or its failure, cannot be inquired into for the purpose of defeating the instrument. Singer v. General A. F. & L. Assur. Corp. 219 W 508, 262 NW 702.

In an action for specific performance of a contract, the fact that the contract was under seal did not prevent showing the true consideration, the contract being executory. Spankus v. West, 222 W 238, 267 NW 910.

Although an option for the sale of a farm was under seal and recited a consideration of $1, the seal afforded only presumptive evidence of the consideration. The true consideration may be proved to enable the court to determine whether there has been such performance as to entitle a party to specific performance. Helbig v. Bonsness, 227 W 52, 277 NW 634.

A seal is conclusive of consideration in the case of an executed contract but a seal is merely presumptive evidence of consideration in the case of an executory contract. In an action by a bondholder against a guarantor on

a guaranty which was under seal, the defendant could set up and show that there was no consideration for the guaranty, the contract of guaranty being executory. Frank v. Schroeder, 239 W 159, 300 NW 254.

See note to 241.02, on expressing the consideration, citing Jacobi v. Cielinski, 262 W 100, 53 NW (2d) 718.

A mortgage being under seal and constituting an executed and not executory instrument, the trial court correctly concluded that want of consideration was no defense against foreclosure in the absence of allegation and proof of fraud. Security Nat. Bank v. Cohen, 41 W (2d) 710, 165 NW (2d) 140.

891.28 History: 1858 c. 44 s. 1, 2; R. S. 1858 p. 818; R. S. 1878 s. 4196; Stats. 1898 s. 4196; Stats. 1925 s. 328.28; 1927 c. 523 s. 108; 1965 c. 66 s. 2; Stats. 1965 s. 891.28.

Judicial notice may be taken of the dimensions of towns. South Shore U. Co. v. Railroad Comm. 207 W 95, 240 NW 784.

891.29 History: R. S. 1849 c. 98 s. 90; R. S. 1858 c. 137 s. 98; R. S. 1878 s. 4197; Stats. 1898 s. 4197; Stats. 1925 s. 328.29; 1927 c. 523 s. 109; 1965 c. 66 s. 2; Stats. 1965 s. 891.29.

Where a note is payable to a partnership by firm name it is necessary to prove that plaintiffs are the persons composing the firm unless it is so alleged and not denied by affidavit of defendant. Barnes v. Elmbinger, 1 W 56.

If the question of partnership is litigated on the trial without objection the party who might have insisted upon the filing of an affidavit waives the right to claim any advantage because of its absence from the record. Stuckey v. Fritsche, 77 W 329, 46 NW 59.

A general denial does not put the question of partnership in issue where it is alleged in the complaint that the defendants were partners. Lago v. Walsh, 98 W 348, 74 NW 212; Woolsey v. Henke, 125 W 134, 103 NW 267.

891.30 History: R. S. 1849 c. 98 s. 91; R. S. 1858 c. 137 s. 99; R. S. 1878 s. 4198; Stats. 1898 s. 4198; Stats. 1925 s. 328.30; 1927 c. 523 s. 110; 1965 c. 66 s. 2; Stats. 1965 s. 891.30.

891.31 History: R. S. 1858 c. 148 s. 3; R. S. 1878 s. 4199; Stats. 1898 s. 4199; Stats. 1925 s. 328.31; 1927 c. 523 s. 111; 1965 c. 66 s. 2; Stats. 1965 s. 891.31.

Sec. 3, ch. 148, R. S. 1858, applies to a foreign corporation, whose capacity must be denied under oath. A general denial does not raise the issue. Williams M. Co. v. Smith, 33 W 530.

An express denial that the plaintiff is a corporation is not the less specific because made upon information and belief. Such a denial puts in issue the existence of the corporation. Michigan Ins. Bank v. Eldred, 143 US 293.

891.32 History: 1875 c. 265 s. 2; 1876 c. 14 s. 2; R. S. 1878 s. 4200; Stats. 1898 s. 4200; Stats. 1925 s. 328.32; 1965 c. 66 s. 2; Stats. 1965 s. 891.32.

Where there was no denial under oath in the answers of any fact or matter stated in the complaint, the allegations in regard to the appointment and the filing of the authenticated copy of the same were properly taken as true without proof. Murray v. Norwood, 77 W 405, 46 NW 499.

The effect of 328.32 is to create certain results as to proof where allegations relative to the appointment of the plaintiff as executor, etc., are not specifically denied. Lawver v. Lynch, 191 W 99, 210 NW 410.

891.33 History: R. S. 1849 c. 105 s. 1; R. S. 1858 c. 140 s. 18; R. S. 1878 s. 4201; Stats. 1898 s. 4201; Stats. 1925 s. 328.33; 1927 c. 523 s. 112; 1965 c. 66 s. 2; Stats. 1965 s. 891.33.

Refusing an instruction, in a libel action, that an allegation in the answer that a libelous charge was true was no evidence of malice, was prejudicial error where plantiff stated such allegation was evidence of malice. Where there are 2 or more defendants in a tort action wherein exemplary damages are allowable, evidence of wealth of one is prejudicial error, as against others. Lehner v. Berlin P. Co. 211 W 119, 246 NW 579.

891.34 History: 1919 c. 141; 1919 c. 671 s. 3; Stats. 1919 s. 4201m; Stats. 1925 s. 328.34; 1965 c. 66 s. 2; Stats. 1965 s. 891.34.

891.345 History: 1935 c. 419; Stats. 1935 s. 328.345; 1965 c. 66 s. 2; Stats. 1965 s. 891.345.

891.35 History: R. S. 1849 c. 80 s. 95; R. S. 1858 c. 15 s. 97; R. S. 1858 c. 23 s. 97; 1863 c. 155 s. 137; R. S. 1878 s. 4202; Stats. 1898 s. 4202; Stats. 1925 s. 328.35; 1965 c. 66 s. 2; Stats. 1965 s. 891.35.

891.36 History: 1889 c. 296; Ann. Stats. 1889 s. 4713a; Stats. 1898 s. 4713a; Stats. 1925 s. 328.36; 1927 c. 523 s. 113; 1965 c. 66 s. 2; Stats. 1965 s. 891.36.

891.37 History: R. S. 1849 c. 131 s. 24; R. S. 1858 c. 133 s. 29; R. S. 1878 s. 3780; Stats. 1898 s. 3780; Stats. 1925 s. 328.37; 1965 c. 66 s. 2; Stats. 1965 s. 891.37.

891.38 History: 1873 c. 138; R. S. 1878 s. 4241; Stats. 1898 s. 4241; Stats. 1925 s. 328.38; 1965 c. 66 s. 2; Stats. 1965 s. 891.38.

891.39 History: 1945 c. 38; Stats. 1945 s. 328.39; 1947 c. 399; 1949 c. 191; 1955 c. 660; 1959 c. 595 s. 75; 1965 c. 66 s. 2; Stats. 1965 s. 891.39; 1969 c. 255 s. 65.

Editor's Note: Ch. 38, Laws 1945, creating 328.39, was enacted during the pendency of State ex rel. Briggs v. Kellner, 247 W 425, 20 NW (2d) 106, and was not applied in that case. See also Koenig v. State, 215 W 658, 255 NW 727.

Where the husband in making his case for annulment of marriage questioned the wife as to the paternity of the child born to the wife during the marriage, the child's guardian ad litem might properly cross-examine the wife, whether or not the wife was technically subject to examination as a party adverse to the child. Vorvilas v. Vorvilas, 252 W 333, 31 NW (2d) 586.

An action by a husband for annulment of marriage on the ground that the marriage was fraudulently procured by the wife, through concealing from the husband that at the time of the marriage she was pregnant by another man, was an action in which the paternity of the child born during marriage was questioned

and had to be determined. The husband and wife were competent to testify relative thereto. Vorvilas v. Vorvilas, 252 W 333, 31 NW (2d) 586.

Under 328.39 (1), where a child was born to the plaintiff while she was the lawful wife of the defendant, the burden was on him, as the party asserting the illegitimacy of the child in the wife's action for divorce, of proving that he was not the father of the child. Mader v. Mader, 258 W 117, 44 NW (2d) 924.

The provisions in 328.39 (1) relating to the guardian's fee do not limit the court to applying the schedule of fees set out in 357.26. The evidence in this case was insufficient to sustain burden of proof required under 328.39 (1). Shewalter v. Shewalter, 259 W 636, 49 NW (2d) 727.

At common law there is a rebuttable presumption of the legitimacy of a child born during wedlock. Under 328.39 (1), there must be proof that the husband is not the father of a child born to a woman during wedlock, in order to establish the illegitimacy of such a child but, when the evidence in such a case does establish that the husband is not the father, it is the duty of the court so to find. Evidence disclosing that the mother of the child in the instant case was cohabiting with a man other than her husband during the inception of and throughout the normal gestation period, coupled with the known nonaccess of the husband for at least 321 days, established that the husband was not the father of the child, and such evidence, together with the testimony of both the mother and the other man that the latter was the father, established that he was the father. In re Aronson, 263 W 604, 58 NW (2d) 553.

328.39 (1) applies only in cases where the child has been born and where proper assertion of illegitimacy has been advanced. Limberg v. Limberg, 5 W (2d) 327, 92 NW (2d) 767.

See note to 52.25, citing 48 Atty. Gen. 248.

Admissibility of testimony of married woman as to illegitimacy of child. 29 MLR 125.

The doubtful status of the child produced through artificial insemination. Radler, 39 MLR 146.

891.395 History: 1957 c. 296; Stats. 1957 s. 328.395; 1965 c. 66 s. 2; Stats. 1965 s. 891.395.

891.43 History: 1878 c. 252; R. S. 1878 s. 661a; 1879 c. 177; 1879 c. 194 s. 2 sub. 6; Ann. Stats. 1889 s. 661a, 661b; Stats. 1898 s. 661a, 661o; 1919 c. 679 s. 40; 1919 c. 695 s. 10; Stats. 1923 s. 4151c to 4151q; Stats. 1925 s. 328.43; 1927 c. 523 s. 115; 1965 c. 66 s. 2; Stats. 1965 s. 891.43.

891.44 History: 1959 c. 291; Stats. 1959 s. 328.44; 1965 c. 66 s. 2; Stats. 1965 s. 891.44.

328.44 does not apply retroactively. Bair v. Staats, 10 W (2d) 70, 102 NW (2d) 267.

328.44 does not warrant the conclusion that a driver of an automobile must necessarily be negligent as a matter of law if he strikes and injures such a child. Binsfeld v. Curran, 22 W (2d) 610, 126 NW (2d) 509.

328.44 should not be read to the jury where the plaintiff is a child over 7 years of age. Gremban v. Burke, 33 W (2d) 1, 146 NW (2d) 453.

891.45 History: 1961 c. 341; Stats. 1961 s. 328.45; 1965 c. 66 s. 2; Stats. 1965 s. 891.45.

CHAPTER 893.

Limitations of Commencement of Actions and Proceedings.

893.01 History: R. S. 1849 c. 127 s. 4; R. S. 1858 c. 138 s. 1; R. S. 1878 s. 4206; Stats. 1898 s. 4206; 1925 c. 4; Stats. 1925 s. 330.01; 1965 c. 66 s. 2; Stats. 1965 s. 893.01.

On remedy for wrongs see notes to sec. 9, art. I.

The state may plead the statute of limitations to an action against it, and is entitled to this defense the same as any other defendant. Baxter v. State, 10 W 454. See also Baxter v. State, 17 W 588.

Where the county board rejected a claim against the county, which was barred by the statute it was not an abuse of discretion to permit the supervisors to file an answer pleading the statute on appeal from their decision. Baker v. Columbia County, 39 W 444.

Nine months is a reasonable time in which to bring action for money paid on illegal tax certificates. Eaton v. Manitowoc County, 40 W 668.

Nine months was reasonable time for writ of error after enactment of law shortening period for suing. Hyde v. Kenosha County, 43 W 129.

It is not error to open a default against a county and allow it to plead the statute. Wisconsin C. R. Co. v. Lincoln County, 57 W 137, 15 NW 121.

In the case of nonpresentation of claims against the estate of a deceased person they are absolutely extinguished and no relief can be had by way of affirmative judgment, setoff or otherwise whether or not the statute be insisted on. Carpenter v. Murphey, 57 W 541, 15 NW 798.

It is discretionary with the trial court to permit the statute to be pleaded by amendment. If such court decides that it has no such power its order denying the amendment will be reversed. Smith v. Dragert, 61 W 222, 21 NW 46.

In the absence of any denial or repudiation of the trust created by a will charging a legacy upon land, the statute of limitations does not apply nor does any presumption of payment arise from the lapse of time. Williams v. Williams, 82 W 393, 52 NW 429.

The heirs have no equities superior to those of the trustee when he was living; and the time within which an action must be commenced does not begin to run until there has been a repudiation of the trust. Fawcett v. Fawcett, 85 W 332, 55 NW 405.

Acquiescence by defendant's counsel in a statement made by the court to the jury at the close of the charge that "there is a question raised here by the pleadings as to whether this cause of action accrued within 6 years, but, inasmuch as it has not been insisted on on the trial, I don't think it is necessary to say anything to this jury about it, and I will let what I have said stand as my charge to the jury," waives the defense of the statute. Hall v. Stevens, 89 W 447, 62 NW 81.