defendant falsely represented through the medium of a speedometer that a used car had been driven only 8000 miles. The court held that: "Representations with reference to the mileage of a car constitute representations of a material fact. . . . The second hand value is largely dependent upon the number of miles it (the car) has gone." In the case of *Fosburg v. Couture*[5] the appellant misrepresented that his automobile was new and had not been operated more than 512 miles, as indicated by the speedometer on the car. In the *Fosburg* case the factual set-up differed slightly from those in the *Nash* case and in the *West Side Buick* case as in the former case the defendant made his representation orally and used the speedometer reading to prove his statement. In the Mississippi and the Missouri cases the representations were made solely through the use of the speedometer, no statements as to the mileage being given. In the *Fosburg* case the court said, "We cannot say, as a matter of law, that because a purchaser makes an independent investigation before purchasing an automobile he may not rely upon representations as to the distance the car has been operated, particularly when that representation agrees with the reading on the speedometer. Nor can we say, as a matter of law, that one has not been defrauded who purchases a car upon representation that it has traveled but 500 miles, when the testimony tends to show that it has been driven several thousand miles, and that such driving has damaged it."

In both the *Nash* case and the *West Side Buick* case the defendants tried to justify setting back the speedometer by maintaining that after the cars had been reconditioned they were as good as cars which had been run only as much as the speedometers indicated. The court in the instant case disposed of this purported defense by saying that the plaintiff is not "induced to buy a car upon which the speedometer reading has been admittedly lowered so as to represent the value of the improvements put upon the car, but instead that he is given or left to believe that he is buying a car which has been repaired and reconditioned after having been run only the number of miles shown on the speedometer."

In the aforementioned cases the courts worked out their solutions on the basis of the law of deceit. In the *Nash* and *Buick* cases the plaintiffs actually inspected the cars before buying them. Neither of the plaintiffs was in a position to inspect the truth of the speedometer reading while making the cursory examination of the car that a reasonably prudent man would make. Where the inspection cannot reveal the defect, it would seem that proper reliance on the seller is not excluded by inspection, and the warranty of fitness would be applicable.[6] W. B. M. '38.

EVIDENCE—PRIVILEGE—HOSPITAL RECORDS AS PRIMA FACIE CONFIDENTIAL COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.—In a recent case, the widow brought suit on an insurance policy issued to her deceased husband. At the trial the defendant company, after proper identification, offered in

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[5] (1923) 126 Wash. 181, 217 Pac. 1001, 1002.

[6] Priest v. Last (1903) 2 K. B. 148; Flynn v. Bedell Co. of Massachusetts (1922) 242 Mass. 450, 136 N. E. 252, 27 A. L. R. 1504.

evidence certain records of the St. Louis City Hospital consisting of (1) the case history, not signed by any attending physician, and (2) the entire hospital record of the deceased. The plaintiff objected to the offer on the ground that both entries were confidential communications between physician and patient and were therefore privileged, and that the privilege had not been waived. The defendant countered with the propositions that the burden rested on the plaintiff to show the privileged character of the evidence, and that if any privilege existed it had been waived by the opening statement of plaintiff's counsel. The evidence was excluded. *Held,* on appeal, affirmed: (1) The entries in the hospital record itself constituted a prima facie showing that the information contained therein was of a confidential and privileged character placing the burden on the defendant to convince the judge to the contrary; (2) The opening statement as to what the testimony will show will not constitute a waiver where no testimony whatever is introduced by the party asserting and claiming the privilege. *Vermillion v. Prudential Insurance Co. of America* (1936 Mo. App.) 93 S. W. (2d) 45.

Under the general rule all records required by law to be kept are competent evidence to establish such facts as the law requires to be recorded therein.[1] This for the reasons that public business would be deranged by insisting on a strict enforcement of the hearsay rule, and such evidence is likely to be trustworthy.[2] In the light of the adjudicated cases, statutes of the State, and the charter and ordinances of the City of St. Louis, the records of the City Hospital fall within this classification,[3] unless made incompetent by virtue of another statute.[4] This qualification was unknown to the common law where the rule was that whatever silence might be enjoined upon the physician outside of a court of law by the ethics of his profession, that yet, within a court of law, he must unbosom himself of the facts within his knowledge, present the other requisites of admissibility.[5]

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[1] City of St. Louis v. Arnot (1888) 94 Mo. 275, 7 S. W. 15; Priddy v. Brice (1907) 201 Mo. 309, 99 S. W. 1055, 9 L. R. A. (N. S.) 718; St. Louis Gas Light Company v. St. Louis (1885) 86 Mo. 495.

[2] Galli v. Wells (1922) 209 Mo. App. 460, 239 S. W. 894; 3 Wigmore, *On Evidence,* secs. 1631, 1632, 1634; 1 Greenleaf, *On Evidence,* (16th ed.) sec. 483, 162 M.

[3] R. S. Mo. 1929, sec. 9056; sec. 14, Art. 13, Charter of the City of St. Louis, (Wagner's Code of the City of St. Louis, 1914 ed. p. 589); Ordinance of the City of St. Louis (sec. 1820 Wagner's Code, 1914 ed. of the City of St. Louis); Galli v. Wells (1922) 209 Mo. App. 460, 239 S. W. 894; Marx v. Parks (1931 Mo. App.) 39 S. W. (2d) 570; Knickerbocker v. Athletic Tea Co. (1926 Mo. App.) 285 S. W. 797.

[4] R. S. Mo. 1929, sec. 1731, which provides, among other things that a physician or surgeon shall be incompetent to testify concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon.

[5] Mahoney v. Insurance Co., (1870) L. R. 6 C. P. 252; Green v. Terminal Railroad Ass'n (1908) 211 Mo. 18, 109 S. W. 715; Epstein v. Pennsylvania Railroad Co. (1913) 250 Mo. 1, 156 S. W. 699, 48 L. R. A. (N. S.) 394.

The present statute[6] now provides a means whereby the evidence may be excluded, yet where there is no desire on the part of the persons concerned to suppress, the privilege afforded can be waived.[7] The case history part of the record is within the fair contemplation of the statute which applies to records kept by hospitals;[8] it will therefore be considered with the entire record.[9]

When the evidence is offered by the patient or his representative it is competent and admissible, but, when offered by the opposing party the evidence can be excluded on objection.[10] In Missouri the widow is a proper party to assert the privilege,[11] but whoever asserts it has the duty of showing the incompetency.[12] This for the reason that the physician is not incompetent to testify to all communications made to him by his patient, but only to such information as he may have acquired while attending him in a professional capacity, and which was necessary to enable him to prescribe for the patient as a physician or do any act for him as a surgeon.[13] However when the statute provides that in case of persons admitted for "medical

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[6] R. S. Mo. 1929, sec. 1731; Mo. St. Ann. sec. 1731, p. 4011.

[7] Groll v. Tower (1884) 85 Mo. 249; Thompson v. Ish (1889) 99 Mo. 160, 12 S. W. 510.

[8] Schaefer v. Lowell-Krekeler Grocery Co. (1932 Mo. App.) 49 S. W. (2d) 209.

[9] Rush v. Metropolitan Life Insurance Co. (1933 Mo. App.) 63 S. W. (2d) 453; Smart v. Kansas City (1907) 208 Mo. 162, 105 S. W. 709, 14 L. R. A. (N. S.) 566. It has been held however to be harmless error for the trial court to refuse to strike out the case history, where no objection was made to the almost identical history set out in the record in another place. Marx v. Parks (1931 Mo. App.) 39 S. W. (2d) 570. Where the only objection urged at the trial was that of privilege, and no showing that the records were actually made by the attending physician, the records were admitted. Schaefer v. Lowell-Krekeler Grocery Co. (1932 Mo. App.) 49 S. W. (2d) 209.

[10] Epstein v. Penn. Railroad Co. (1913) 250 Mo. 1, 156 S. W. 699, 48 L. R. A. (N. S.) 394; Thompson v. Ish (1889) 99 Mo. 160, 12 S. W. 510; Canty v. Halpin (1922) 294 Mo. 96, 242 S. W. 94; Baker v. Mardis (1928) 221 Mo. App. 1185, 1 S. W. (2d) 223.

[11] Groll v. Tower (1884) 85 Mo. 249. It is well to note in this connection that there is respectable authority in other jurisdictions which hold that an objection to testimony as violating such privilege may be made by the patient, and after his death by his personal representative, but no other person has the right to object to such testimony. Scott v. Harris (1885), 113 Ill. 447; McNulty's Appeal (1890), 135 Pa. 210, 19 Atl. 936; In re Hunt's Will (1904), 122 Wis. 460, 100 N. W. 874; Smith v. Wilson et al. (1892), 1 Tex. Civ. App. 115, 20 S. W. 1119.

[12] Bowles v. Kansas City (1892) 51 Mo. App. 416; Allen v. Allen (1933 Mo. App.) 60 S. W. (2d) 709.

[13] R. S. Mo. 1929, sec. 1731; Allen v. Allen (1933 Mo. App.) 63 S. W. (2d) 709. The rule is otherwise in the case of confidential communications between husband and wife, since it is presumed that all communications between husband and wife are of a confidential nature, and the party asserting the contrary must satisfy the court by the circumstances of the case that grounds for exclusion do not exist. Allen v. Allen, supra, note 12; Sexton v. Sexton (1905) 129 Iowa 487, 105 N. W. 314, 2 L. R. A. (N. S.) 708; 28 R. C. L. par. 116, pp. 527, 528.

treatment of disease," the "physician" in charge shall specify, for entry in the record, the nature of the disease, and where in his opinion it was contracted; the court takes the position that the information is confidential.[14] This is sound since there is always a presumption that municipal authorities lawfully discharge their official duties in compliance with the statutes,[15] and for the further reason that information obtained from a person admitted to the hospital for the "medical treatment of disease," is obviously information necessary to enable the physician to prescribe for the patient, such as the statute makes confidential.[16] Indeed, where the relation is established, it will be presumed that any information imparted to the physician by the patient is necessary for proper treatment in a professional capacity.[17]

The remaining contention is that the question of privilege was waived by plaintiff's opening statement at the trial. Parties are bound by the admissions of their counsel during trial, of facts material to the issue, as such admissions dispense with the necessity of proving the doubtful fact.[18] But a mere preliminary outline by counsel of what he expects the evidence will be, is not a solemn admission to take the place of proof.[19] The principal case is within this rule since no reference was made, or evidence introduced, to show the treatment received or condition of the insured as a patient in the hospital.[20] Indeed the issues in a case are made by the pleadings and not by opening statements, and the fact that counsel does not object does not enlarge or change the pleadings.[21] If such were not the rule, it would be often difficult to know what were the real issues in the case.[22]

It is submitted that the principal case is a step forward in Missouri practice and well within the language of the statutes involved and the adjudicated cases.

J. L. A. '37.

FOODS—FOREIGN SUBSTANCE—NEGLIGENCE.—In a recent case the plaintiff became ill from drinking part of a bottle of Cocoa-Cola which was found to contain glass. The Arkansas Supreme Court held it to be a question of

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[14] Vermillion v. Prudential Insurance Co. of America, (1936 Mo. App.) 93 S. W. (2d) 45; R. S. Mo. 1929, sec. 9056; Mo. St. Ann. par. 9056, p. 4196.

[15] Wiget v. City of St. Louis, (1935 Mo. Sup.) 85 S. W. (2d) 1038; State ex rel Ball v. State Board of Health (1930 Mo. Sup.) 26 S. W. (2d) 773.

[16] R. S. Mo. 1929, sec. 1731; Mo. St. Ann. par. 1731, p. 4011.

[17] State v. Kennedy (1903) 177 Mo. 98, 75 S. W. 979.

[18] Pratt v. Conway (1898) 148 Mo. 291, 49 S. W. 1028; Fillingham v. St. Louis Transit Co. (1903) 102 Mo. App. 573, 77 S. W. 314; Oscanyan v. Winchester Arms Co. (1880) 103 U. S. 261.

[19] Russ v. Railroad Co. (1892) 112 Mo. 45, 20 S. W. 472; Fillingham v. St. Louis Transit Co. supra, note 18.

[20] Vermillion v. Prudential Insurance Co., supra, note 14.

[21] Moore v. Dawson (1925) 220 Mo. App. 791, 277 S. W. 58.

[22] Supra, note 20; Davis v. Calvert, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282 l. c. 299; Fox v. Peninsular Works, (1891) 84 Mich. 676, l. c. 680, 48 N. W. 203; Minchin v. Minchin, (1892) 157 Mass. 265, 32 N. E. 164.