Legislative Council Note, 1969: This section is a restatement of present s. 324.12. [Bill 5-S]

879.37 History: 1969 c. 339; Stats. 1969 s. 879.37.

Legislative Council Note, 1969: This section is based upon present s. 324.13 (1). However, the section is made applicable to all contests in administration, not just will contests. [Bill 5-S]

879.39 History: 1969 c. 339; Stats. 1969 s. 879.39.

Legislative Council Note, 1969: This section is a restatement of present s. 324.14. [Bill 5-S]

879.41 History: 1969 c. 339; Stats. 1969 s. 879.41.

Legislative Council Note, 1969: This section is based upon present s. 324.27. [Bill 5-S]

879.43 History: 1969 c. 339; Stats. 1969 s. 879.43.

Legislative Council Note, 1969: This section is based upon present ss. 313.06 and 324.15 and existing case law. [Bill 5-S]

879.45 History: 1969 c. 339; Stats. 1969 s. 879.45.

Legislative Council Note, 1969: This section retains the existing statute on jury trials in probate court. [Bill 5-S]

879.47 History: 1969 c. 339; Stats. 1969 s. 879.47.

Legislative Council Note, 1969: This section is based upon present s. 324.30 and existing practice. [Bill 5-S]

879.49 History: 1969 c. 339; Stats. 1969 s. 879.49.

Legislative Council Note, 1969: This section is based upon present s. 324.30 (2nd sentence). [Bill 5-S]

879.51 History: 1969 c. 339; Stats. 1969 s. 879.51.

Legislative Council Note, 1969: This section is new. It requires prompt action on the part of the court in setting matters for hearing. [Bill 5-S]

879.53 History: 1969 c. 339; Stats. 1969 s. 879.53.

Legislative Council Note, 1969: This section is based upon present s. 324.24. However, instead of the matter being set for a term of court, the matter is to be set for a day certain. [Bill 5-S]

879.55 History: 1969 c. 339; Stats. 1969 s. 879.55.

Legislative Council Note, 1969: This provision follows existing statutes as interpreted and limited in Estate of Cudahy, 196 Wis. 260, 219 N.W. 203 (1928). [Bill 5-S]

879.57 History: 1969 c. 339; Stats. 1969 s. 879.57.

Legislative Council Note, 1969: This section is a restatement of present s. 311.16 (1) and (2). [Bill 5-S]

879.59 History: 1969 c. 339; Stats. 1969 s. 879.59.

Legislative Council Note, 1969: This section retains the existing statute on compromises which was held constitutional in Estate of Jorgenson, 267 Wis. 1, 64 N.W. 2d 430 (1954). [Bill 5-S]

879.61 History: 1969 c. 339; Stats. 1969 s. 879.61.

Legislative Council Note, 1969: This section is based upon present ss. 312.06, 312.07 and 312.08. [Bill 5-S]

879.63 History: 1969 c. 339; Stats. 1969 s. 879.63.

Legislative Council Note, 1969: This section is new. It gives all persons interested rights similar to creditors under s. 859.40. [Bill 5-S]

879.65 History: 1969 c. 339; Stats. 1969 s. 879.65.

Legislative Council Note, 1969: This section is based upon present s. 314.06. [Bill 5-S]

879.67 History: 1969 c. 339; Stats. 1969 s. 879.67.

Legislative Council Note, 1969: This section is based upon present s. 310.21. However, the provisions of s. 262.06 (1) relating to out-of-state service are made applicable. [Bill 5-S]

879.69 History: 1969 c. 339; Stats. 1969 s. 879.69.

Legislative Council Note, 1969: This section is new. It requires the court, upon petition, to rule on all matter relating to the administration of estates. [Bill 5-S]

CHAPTER 885.

Witnesses and Oral Testimony.

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.

885.01 History: R. S. 1849 c. 88 s. 261; R. S. 1849 c. 98 s. 1; R. S. 1849 c. 131 s. 57; R. S. 1849 c. 146 s. 7; R. S. 1858 c. 120 s. 231; R. S 1858 c. 133 s. 78; R. S. 1858 c. 137 s. 1; R. S. 1858 c. 177 s. 7; 1860 c. 125 s. 1; 1871 c. 137 s. 43; R. S. 1878 s. 4053; 1879 c. 194 s. 2 sub. 28; Ann. Stats. 1889 s. 4053; Stats. 1898 s. 4053; 1899 c. 351 s. 45; Supl. 1906 s. 4053; Stats. 1925 s. 325.01; 1927 c. 523 s. 2; 1943 c. 20, 229; 1945 c. 34; 1963 c. 6; 1965 c. 66 s. 2; 1965 c. 217, 617; Stats. 1965 s. 885.01; 1967 c. 276 s. 39; 1969 c. 276 s. 590 (2).

Revisor's Note, 1927: The words "may be in the form heretofore commonly used" are omitted, because the matter of form is treated in the next section (325.02), and because the meaning is doubtful. See note to section 325.02. The words "or before any magistrate" are added to subsection (2) to make it plain that the attorney general and district attorneys may subpoena witnesses to attend preliminary hearings and inquests as well as trials. Subsection (4) is added to take the place of the provisions for subpoenas contained in sections 16.05 (1), 94.49, 99.19 (1), 101.19, 102.17 (1), 152.01 (5), 195.29 (1), 298.06 and 366.06. The object is to collect and

consolidate in this chapter practically all provisions for compelling the attendance of witnesses and punishing for refusal to attend or to testify. [Bill 10-S, s. 2]

A subpoena cannot be disregarded but neither can its observance be enforced by use or by threat of use of physical force. Hadler v. Rhyner, 244 W 448, 12 NW (2d) 693.

A subpoena to a prisoner is ineffectual, since he cannot respond to it and the warden has no authority to produce him. A writ of habeas corpus ad testificandum pursuant to 292.44 and 292.45 is the only process to secure attendance. 48 Atty. Gen. 260.

885.02 History: R. S. 1849 c. 88 s. 70; R.S. 1858 c. 120 s. 69; R. S. 1878 s. 4054; Stats. 1898 s. 4054; Stats. 1925 s. 325.02; 1927 c. 523 s. 3; 1965 c. 66 s. 2; Stats. 1965 s. 885.02; 1967 c. 276 s. 39.

A subpoena duces tecum issued in connection with the proposed adverse examination was properly quashed, where the form of the subpoena failed to identify particular papers sought to be examined or to show their materiality to the issues and required the removal of the defendants' files from their offices. Stott v. Markle, 215 W 528, 255 NW 540.

885.02 (2) requires that the papers and documents be described as accurately as possible but contains no requirement that their relevancy be alleged. State ex rel. St. Mary's Hospital v. Industrial Comm. 250 W 516, 27 NW (2d) 478.

885.03 History: R. S. 1849 c. 88 s. 70; R. S. 1849 c. 98 s. 2; R. S. 1858 c. 120 s. 69; R. S. 1858 c. 137 s. 2; R. S. 1878 s. 4055; Stats. 1898 s. 4055; Stats. 1925 s. 325.03; 1927 c. 523 s. 4; 1965 c. 66 s. 2; Stats. 1965 s. 885.03.

The tender of a subpoena to a witness within his sight with information, in a general way, of its contents is a good service where the witness refused to accept it or to remain until it could be read. Gallun v. Hibernia B. & T. Co. 182 W 40, 195 NW 703.

885.04 History: 1864 c. 46 s. 1; R. S. 1878 s. 4056; Stats. 1898 s. 4056; Stats. 1925 s. 325.04; 1927 c. 523 s. 5; 1965 c. 66 s. 2; Stats. 1965 s. 885.04; 1967 c. 276 s. 39.

885.05 History: R. S. 1849 c. 131 s. 9, 51; R. S. 1858 c. 133 s. 15, 70; 1867 c. 157; 1868 c. 94 s. 2, 3; 1869 c. 146 s. 1; 1872 c. 90; R. S. 1878 s. 4067; 1885 c. 232; Ann. Stats. 1889 s. 4067; Stats. 1898 s. 4067; 1913 c. 175; 1921 c. 101; Stats. 1925 s. 325.05; 1927 c. 523 s. 6; 1931 c. 40; 1933 c. 201; 1951 c. 17; 1953 c. 314; 1955 c. 516; 1961 c. 196; 1965 c. 66 s. 2; Stats. 1965 s. 885.05; 1967 c. 276 s. 39.

The affidavit for mileage of a non-resident witness must show the actual number of miles traveled after entering the state. Leonard v. Bottomley, 210 W 411, 245 NW 849.

See note to 271.04, citing Leonard v. Bottomley, 210 W 411, 245 NW 849.

The holders of certificates secured by a trust deed who testified at the trial of the trustee's action for the foreclosure of the deed were not entitled to witness fees, since they were parties in interest. Kettenhofen v. Sterling Oil Co. 226 W 178, 275 NW 425.

Witness fees and mileage provided by 325.05 are not intended as compensation for testifying but to pay expenses of witness; and where a state employe is subpoenaed to appear in court to testify concerning matters relating to his employment he should keep such fees rather than turn them over to state, but he is entitled to no further expense money from the state if such fees are insufficient. He should not be removed from the payroll when so testifying. 30 Atty. Gen. 214.

Where it is the duty of a sheriff, deputy sheriff, county traffic officer or city police officer to enforce a state statute or a municipal ordinance he is obligated to testify without being entitled to witness fees. 56 Atty. Gen. 171.

885.06 History: R. S. 1849 c. 98 s. 3; R. S. 1849 c. 131 s. 57, 58, 59; R. S. 1858 c. 133 s. 78, 80; R. S. 1858 c. 177 s. 8; 1871 c. 137; R. S. 1878 s. 4057, 4058; Stats. 1898 s. 4057, 4058; Stats. 1925 s. 325.06; 1927 c. 523 s. 7; 1957 c. 193; 1961 c. 643; 1965 c. 66 s. 2; Stats. 1965 s. 885.06.

The provision requiring attendance of a witness is a mere enforcement of a public duty on the part of all citizens. West v. State, 1 W 209.

A witness who is in attendance on a court without the payment or tender of his fees waives the right to demand them in advance of giving his testimony. He must testify when called upon. Rozek v. Redzinski, 87 W 525, 58 NW 262.

885.07 History: R. S. 1849 c. 131 s. 58, 59; R. S. 1858 c. 133 s. 79, 80; R. S. 1878 s. 4059; Stats. 1898 s. 4059; 1913 c. 772 s. 6; 1919 c. 649 s. 2; Stats. 1925 s. 325.07; 1927 c. 523 s. 8; 1961 c. 643; 1965 c. 66 ss. 2, 8; Stats. 1965 s. 885.07.

885.08 History: R. S. 1849 c. 131 s. 56; R. S. 1858 c. 133 s. 77; 1871 c. 16 s. 1, 2; 1873 c. 43; R. S. 1878 s. 4060; Stats. 1898 s. 4060; Stats. 1925 s. 325.08; 1927 c. 523 s. 9; 1965 c. 66 s. 2; Stats. 1965 s. 885.08.

The witness is to make and present his affidavit to the clerk. If the clerk administers the oath it is for service performed for the witness and not for the county. The clerk may, however, recover for certificates issued to witnesses in criminal cases certifying their attendance and mileage. St. Croix County v. Webster, 111 W 270, 87 NW 302.

No fees may be taxed for receipts given by witnesses for services, nor is it contemplated that there should be a filing of any such receipt as a separate paper. Green Lake County v. Waupaca County, 113 W 425, 89 NW 549.

885.09 History: R. S. 1849 c. 131 s. 55; R. S. 1858 c. 133 s. 76; R. S. 1878 s. 4061; Stats. 1898 s. 4061; 1913 c. 772 s. 6; 1919 c. 649 s. 2; Stats. 1925 s. 325.09; 1927 c. 523 s. 10; 1965 c. 66 s. 2; Stats. 1965 s. 885.09.

885.10 History: 1871 c. 16 s. 1, 2; 1872 c. 142; 1873 c. 43; R. S. 1878 s. 4062; 1895 c. 360; Stats. 1898 s. 4062; Stats. 1925 s. 325.10; 1927 c. 523 s. 11; 1965 c. 66 s. 2; Stats. 1965 s. 885.10; 1967 c. 276 s. 39.

Before fees for witnesses for the defendant can be paid the court or judge must have determined that they were necessary witnesses and must have directed that process issue.

Philler v. Waukesha County, 139 W 211, 120 NW 829.

Where the defendant is acquitted the county is not liable for the fees of a constable who subpoenaed the defendant's witnesses, nor for the fees of the witnesses, if defendant has not complied with 325.08 and 325.10. 7 Atty. Gen. 249.

885.11 History: R. S. 1849 c. 88 s. 71, 260; R. S. 1849 c. 98 s. 4, 5, 6; R. S. 1858 c. 120 s. 70, 230; R. S. 1858 c. 137 s. 4, 5, 6, 58; R. S. 1878 s. 4063, 4064, 4065, 4097; Stats. 1898 s. 4063, 4064, 4065, 4097; 1911 c. 232; Stats. 1925 s. 325.11; 1927 c. 523 s. 12; 1965 c. 66 s. 2; Stats. 1965 s. 885.11.

Revisor's Note, 1927: New subsection (5) consolidates what is in the second sentence of subsection (3) and paragraph (a) of subsection (4), and extends to adverse examinations. Paragraph (b) of subsection (4) is struck out because it was held unconstitutional in Kentucky F. Corp. v. Paramount A. E. Corp. 262 US 544. Subsection (2) is amended to expressly cover all courts. Originally it did so, but the subsequent creation of courts not of record raised doubts as to the scope of the provision for compelling attendance of witnesses. Surely all courts should possess that power, and probably they do; and this is a proper place to declare such power. It is believed that the change in wording makes no change in substance. If it is desired to have some valid statute enacted along the lines of said paragraph (b), that can best be done by a separate bill. Controversies are quite likely to arise over such a bill, and it is sought to exclude controversial matters entirely from revision bills. [Bill 10-S, s. 12]

The costs of the proceedings cannot be recovered of a witness punished as for a criminal contempt. State ex rel. Lanning v. Lonsdale, 48 W 348, 4 NW 390.

Striking out the pleadings and ordering judgment is discretionary with the court and the decision will not be disturbed except upon an abuse of discretion. Eastern R. Co. v. Tuteur, 127 W 382, 105 NW 1067.

A witness is required to testify, for the ordinary witness fee, as to any facts within his knowledge or observation, even though depending upon his expert knowledge, but he is not required to equip himself with knowledge by special investigation. Philler v. Waukesha County, 139 W 211, 120 NW 829.

As to the power of a state court to compel a nonresident to appear and testify, see State ex rel. McKee v. Breidenbach, 246 W 513, 17 NW (2d) 554.

325.11 (1), Stats. 1957, applies to persons under subpoena; it cannot be applied to a contract to testify in a certain way, since such contracts are against public policy. Griffith v. Harris, 17 W (2d) 255, 116 NW (2d) 133.

885.11, Stats. 1967, which deals with the unlawful refusal or neglect of a party to appear or to testify, and provides that the court may strike the pleading and give judgment against the person disobeying the order, does not encompass a situation where a party is not prepared to try the case because of unavailability of witnesses, but is related to the suppression of evidence, and thus in such a case a presumption may be raised that the evidence is detrimental to the party. Hauer v. Christon, 43 W (2d) 147, 168 NW (2d) 81.

See notes to sec. 1, art. I, on limitations imposed by the Fourteenth Amendment, citing Hauer v. Christon, 43 W (2d) 147, 168 NW (2d) 81, and Kentucky F. Corp. v. Paramount A. E. Corp. 262 US 544.

885.12 History: 1860 c. 125 s. 2; R. S. 1878 s. 4066; Stats. 1898 s. 4066; 1911 c. 140; Stats. 1925 s. 325.12; 1927 c. 523 s. 13; 1965 c. 66 s. 2; Stats. 1965 s. 885.12.

Revisor's Note, 1927: The wording is slightly changed to make certain that it harmonizes and is coextensive with the power given by section 325.01 (3) and (4) to issue subpoenas. The substance of the section probably is unchanged. This section has not been amended since 1878. In the meantime many boards and commissions have been created with power to take testimony. Those creative acts contain provisions substantially like this section, and hence are duplications. This doubtless was due to the draftsman of those acts having forgot or overlooked this section. Such duplications are found in sections 16.05 (2), 73.04, 94.49, 99.19 (4), 101.19, 102.17 (5) and 195.29 (1). For the sake of brevity and clearness in the law and ease and uniformity in its administration it is elsewhere proposed in this bill to strike those duplications from the statutes. [Bill 10-S, s. 13]

A judge or commissioner is not authorized to attach or punish a witness giving a deposition before him for refusing to answer proper questions. State ex rel. Lanning v. Lonsdale, 48 W 348, 4 NW 390.

A ruling that a witness subpoenaed to produce records was in contempt for refusing to produce them would be reviewable, and the validity of the request for the records described in the subpoena could then be considered. State ex rel. St. Mary's Hospital v. Industrial Comm. 250 W 516, 27 NW (2d) 478.

885.13 History: 1869 c. 72 s. 1; R. S. 1878 s. 4071; Stats. 1898 s. 4071; Stats. 1925 s. 325.13; 1927 c. 523 s. 14; 1965 c. 66 s. 2; Stats. 1965 s. 885.13.

On prosecutions (self-incrimination) see notes to sec. 8, art. I.

Voluntary testimony given by a defendant on preliminary examination may be put in evidence by the state upon his trial. State v. Glass, 50 W 218, 6 NW 500.

One who is a witness in his own behalf subjects himself to the same rules of cross-examination as other witnesses. Yanke v. State, 51 W 464, 8 NW 276.

Though the omission of a defendant charged with receiving stolen money to testify in his own behalf creates no presumption, his failure to account in any way for his possession of a large sum of money may be a significant circumstance for the consideration of the jury. Jenkins v. State, 62 W 49, 21 NW 232.

The objection that evidence will tend to criminate the party must be taken by the party on oath. Kraus v. Sentinel Co. 62 W 660, 23 NW 12.

The fact that the prosecuting attorney made reference to the absence of the accused from the witness' stand is not available, on a writ of error, as a ground for a new trial, if no

objection to his remarks was made at the time. Martin v. State, 79 W 165, 48 NW 119.

A defendant charged with murder may be required to answer on cross-examination as to whether the gun with which the killing was done would have been discharged without raising the hammer and pulling the trigger. Frank v. State, 94 W 211, 68 NW 657.

A defendant in a criminal trial may rely on failure of proof by the state; he is not required to offer testimony in his defense until prima facie proof of guilt beyond a reasonable doubt has been presented by the state. Montello v. State, 179 W 170, 190 NW 905.

A separate trial having been granted to an attendant in the office of a physician on trial charged with performing an abortion, the failure of the defendant to call her as a witness was a proper subject of comment by the district attorney, since the state could have called her as a witness, and conferred immunity upon her, and defendant could have called her to the witness stand, sec. 4071, Stats. 1923, not being applicable. Werner v. State, 189 W 26, 206 NW 898.

See note to 972.11, on arguments to the jury, citing State v. Jackson, 219 W 13, 261 NW 732.

325.13 (2) does not bar testimony that the defendant refused a request of a police officer to furnish a sample of urine for chemical analysis to determine its alcoholic content. Barron v. Covey, 271 W 10, 72 NW (2d) 387.

In the absence of a request by the accused for such an instruction, the trial court did not commit error in not instructing the jury that the omission of the accused to testify on his own behalf created no presumption against him. Johns v. State, 14 W (2d) 119, 109 NW (2d) 490.

If an attorney who drafted a will had a pecuniary interest in the admission of the will by reason of an expectation that he would be retained to complete the probate and thus earn a fee, such interest did not render him incompetent to testify in relation to objections made to admission, but could be shown to affect his credibility. Estate of Weinert, 18 W (2d) 33, 117 NW (2d) 685.

885.14 History: R. S. 1849 c. 98 s. 49, 76, 77; 1856 c. 120 s. 300; R. S. 1858 c. 137 s. 49, 50, 57, 81, 85; 1859 c. 64 s. 1; 1868 c. 176 s. 1; 1869 c. 72; 1870 c. 63 s. 1; R. S. 1878 s. 4068, 4098; Stats. 1898 s. 4068, 4098; 1907 c. 271; 1911 c. 291; Stats. 1925 s. 325.14; 1927 c. 523 s. 15; Sup. Ct. Order, 212 W xix; 1965 c. 66 s. 2; Stats. 1965 s. 885.14.

Revisor's Note, 1927: Subsection (2) of section 325.14 was section 4098, dates back to 1858 and was never amended. Sections 4068 and 4096 were companions. Formerly only parties could be adversely examined but by amendments to sections 4068 and 4096 (325.14 and 326.12) officers, agents and assignors were made subject to cross-examination. Thus section 4098 fell out of harmony with those sections. Section 325.14 is rewritten to bring these several provisions into accord. The law is not changed. The first two sentences of subsection (1) are cared for in section 325.03 (1). [Bill 10-S, s. 15]

Editor's Note: The last provision of sec. 4068, Stats. 1898, was recommended by the revisers of 1898; it was borrowed from sec. 5659, Gen. Stats. Minn. 1894.

Where a party is a witness in his own behalf the regular course of examination must be pursued. Howland v. Jencks, 7 W 57.

The policy of the statute is to allow parties to testify and at the same time to allow the court and jury to weigh their testimony from their appearance, interest, etc. It is error to charge that the testimony of both parties is of equal weight. Marnier v. Pettibone, 18 W 195.

The rule concerning evidence of an accomplice in a criminal action has no application to defendants in tort. Kalckhoff v. Zoehrlaut, 43 W 373.

If the fact that a witness is intoxicated is brought to the attention of counsel while such witness is on the stand the objection to his competency must be taken then; it will not avail if made for the first time on a motion for a new trial. Dickenson v. Buskie, 59 W 136, 17 NW 685.

In an action brought to charge members of an alleged partnership where certain defendants answered, other defendants who did not answer were not adverse parties subject to examination under sec. 4068, Stats. 1898. Moore v. May, 117 W 192, 94 NW 45.

An adverse examination as to transactions and communications with a person since deceased opens the door to the admission of the testimony of the adverse party in respect to such matters. Currie v. Michie, 123 W 120, 101 NW 370.

Where an officer of the defendant was called as an adverse witness by the plaintiff, his evidence could be contradicted by the plaintiff. Corbett v. Physicians' C. Asso. 135 W 505, 115 NW 365.

The term "adverse party" used in 4068, Stats. 1898, means a party whose interests are adverse to those of the party seeking to call him and the fact that both may be named in the pleadings as plaintiffs or defendants is immaterial. The vendor of a land contract who had assigned his interest to the plaintiff and guaranteed the payment, who was made a codefendant with the purchaser and who answered admitting the allegations of the complaint, was an adverse party to his codefendant. O'Day v. Meyers, 147 W 549, 133 NW 605.

Error in refusing to allow a person to be called as an adverse witness under sec. 4068, Stats. 1898, is not prejudicial where the court allowed counsel to treat the witness as hostile and to cross-examine him. O'Day v. Meyers, 147 W 549, 133 NW 605.

A motorman having been examined as an adverse witness and having testified that he was working for the defendant company, it was error to refuse to permit the company to cross-examine on the same subject; but nonprejudicial error, where the motorman was afterward called by the company as a witness and no effort made to go into the subject upon such later examination. Baermann v. Chicago & M. E. R. Co. 153 W 235, 140 NW 1119.

It is nonprejudicial error to refuse cross-examination of an employe of the defendant, called as an adverse witness almost at the close of the plaintiff's case, if defendant can, but does not, recall the witness in its own behalf within a few minutes after his adverse

testimony was given. Nickels v. Manitowoc S. & D. D. Co. 153 W 298, 141 NW 269.

If it was error to allow a person called as an adverse witness to testify, over defendant's objection, as an expert concerning machinery, it was not harmful to the defendant if upon the question involved the jury found in defendant's favor. O'Sullivan v. J. S. Stearns L. Co. 154 W 467, 143 NW 160.

If a party calls as an adverse witness one who had testified on a previous trial of the same action, he cannot, after getting a repetition of the former testimony, show that the witness had made a different statement before the former trial and urge such unsworn statement as evidence of the existence of the disputed fact. De Pow v. Chicago & Northwestern R. Co. 154 W 610, 143 NW 654.

An adverse witness may be cross-examined as to all matters already testified to and may be asked proper questions for the purpose of impeachment, if the party examining him does not intend to make the witness his own; and it was reversible error to deny such examination where the witness was the sole eyewitness and immediately after the accident made statements in writing which conflicted with his testimony. (O'Day v. Meyers, 147 W 549, 133 NW 605, modified.) Adams v. Bucyrus Co. 155 W 70, 143 NW 1027.

An adverse witness called under sec. 4068 may be asked impeaching questions by the party calling him, for the purpose of showing that he previously made contradictory statements. Sadowski v. Thomas F. Co. 161 W 86, 151 NW 797.

It seems that the privilege of obtaining an adverse examination under the discovery statutes and sec. 4068 is a sufficient reason for joining the person to be examined as a defendant. Ryan v. Olson, 183 W 290, 197 NW 727.

In an action by a town against its treasurer and his surety to recover embezzled money, it was proper to allow such treasurer to be called by the plaintiff and examined adversely over the objection of the surety, where the treasurer waived his privilege and willingly appeared and testified against himself and surety, his mental attitude being immaterial since he was an adverse party on the record. Knox v. Fidelity & C. Co. 184 W 104, 197 NW 733.

Where a witness called adversely by the plaintiff indicates hostility toward the defendant, the latter is entitled to re-examine the witness immediately at the close of plaintiff's examination as to all matters tending to explain the witness' testimony excepting defensive matter not brought out by the plaintiff; and the defendant may also lay a foundation for the purpose of impeaching the witness upon stating that he does not intend thereafter to make the witness his own. Breuer v. Arenz, 202 W 453, 233 NW 76.

A written statement of an employe concerning the delivery of mail from moving trains which varied from his testimony at the trial, was admissible for impeaching purposes whether it was sworn to or not; and it was not error to receive the statement in evidence, where no objection was made to its receipt when it was offered and no request was made that its effect be limited to impeaching purposes. Newberry v. Minneapolis, St. P. & S. S. M. R. Co. 214 W 547, 252 NW 579.

In connection with the plaintiff's calling the defendant railroad company's engineer adversely, the ruling of the trial court, "Why, that is always the wrong way around. He will have to go on the stand later. Put him on later. Get your own story in first," was not prejudicial. Langer v. Chicago, M. St. P. & P. R. Co. 220 W 571, 265 NW 851.

Permitting counsel for the defendant, who had been called as an adverse witness, to reexamine her immediately following the conclusion of her examination by counsel for the plaintiff, as to matters tending to explain or qualify the testimony already given, was not error. De Vries v. Dye, 222 W 501, 269 NW 270.

In an action for possessing a gambling device in violation of a city ordinance, a city had the right to call defendant adversely as a witness; the witness could claim constitutional right and not testify to anything which might tend to incriminate him. Milwaukee v. Burns, 225 W 296, 274 NW 273.

In an action to recover on an automobile liability policy, the insured, named as a party defendant but against whom no cause of action was stated or claimed, was not a proper party, and hence he could not be called as an adverse witness. Locke v. General A. F. & L. Assur. Corp. 227 W 489, 279 NW 55.

On the trial of an appeal from an award of compensation for taking property by the city, a member of the board of assessment which made the assessment, an assessor of the city for taxation purposes, and the city's real estate agent are not subject to adverse examination by the plaintiff property owner, as "agents" of the defendant city, where none acted for the city in relation to the transaction constituting the subject of the adverse examinations; and the same holds as to adverse examination under 326.12 before trial, so that his deposition taken thereon is not admissible in evidence. (Estate of Briese, 238 W 516, applied.) A. Gettelman Brewing Co. v. Milwaukee, 245 W 9, 13 NW (2d) 541.

See note to 887.12, citing Knowles v. Stargel, 261 W 106, 52 NW (2d) 387.

Where a person was called as an adverse witness by defendant and no objection was made at that time, defendant was entitled to impeach such witness with his former testimony given on adverse examination, and in connection therewith a sketch made by him of the scene of the accident was properly admitted in evidence although it was unverified and not drawn to scale. Allen v. Zabel, 261 W 172, 52 NW (2d) 393.

The right of impeachment gives a party who called an adverse witness the right to show his testimony is unreliable or contrary to fact, by proof directed against matters testified to, including the witness' prior inconsistent conduct or statements concerning such matters but, until and unless the witness takes the stand in his own behalf, it does not authorize impeachment of his character and credibility generally by the party who has called him to testify adversely. Alexander v. Meyers, 261 W 384, 52 NW (2d) 881.

A wife-guest sued only the husband's insurance carrier for less than the policy limits.

Since the husband would not be liable under any judgment obtained, he could not be called and examined as an adverse witness under 325.14 (1). Voss v. Metropolitan Cas. Ins. Co. 266 W 150, 63 NW (2d) 96.

Probate of a will is a judicial proceeding, and interests of the proponent and objectors are adverse. In proceedings on objection to admission of a will naming as sole beneficiary and sole executor a person not related to testator, objectors should have been permitted to examine proponent-beneficiary as adverse party at trial. Error in refusing such examination was not prejudicial, in view of latitude given to objectors when they then examined proponent as their own witness, and where objectors were given an opportunity to cross-examine her but declined to do so. Estate of Borzych, 267 W 526, 66 NW (2d) 164.

In a proceeding contesting an annexation of territory by a city, the circulators of the petition could not be called as adverse witnesses. Greenfield v. Milwaukee, 272 W 388, 75 NW (2d) 434.

At the time of trial, the automobile driver was not an adverse party as to the guest occupants of his automobile in their action against him, his insurer, and the other driver, where before trial the guests settled their claims with the automobile driver and his insurer and the settlement was approved by the trial court. McFarlin v. Hewitt, 5 W (2d) 488, 93 NW (2d) 445.

Counsel for defendant had the right to call a party plaintiff as an adverse witness even though counsel had previously cross-examined him when he was on the stand as a witness for plaintiffs, so that, where the giving of an unsworn statement by such witness to an insurance representative relating to the accident involved had not been gone into on prior cross-examination, it was a proper subject for interrogation when he was later called as an adverse witness by defendant. Where the facts set forth in such unsworn statement as to drinking by this party plaintiff and his companions prior to the accident constituted an admission against interest, it was substantive evidence in itself and was admissible as part of defendant's case, so that its use was not confined to impeachment purposes. Steffes v. Farmers Mut. Auto. Ins. Co. 7 W (2d) 321, 96 NW (2d) 501.

Where it was only in the plaintiff's action that any issue of the defendant's negligence was presented, in that the only issue to be tried in her host's companion action against the defendant was that of damages, the trial court properly refused to permit the host to be called as an adverse witness with respect to the negligence issue. Rude v. Algiers, 11 W (2d) 471, 105 NW (2d) 825.

Where a former janitor at the defendant abutting owner's apartment building was its employe at a time some years before the buttrotted tree fell on the plaintiff's automobile, he could be called by the plaintiff as an adverse witness and questioned as to whether the defendant property owner knew of the tree's condition during the witness' term of employment. Plesko v. Milwaukee, 19 W (2d) 210, 120 NW (2d) 130.

If during cross-examination a witness is shown a conflicting statement that purports to bear his signature and he admits it is his signature, this should be sufficient authentication to justify its admissibility into evidence, and it would then be open to the witness to offer any explanation he may have as to why he should not be bound by the statement, such as not having read it when he signed it, or that the party transcribing it incorrectly recorded what the witness had said. Jensen v. Heritage Mut. Ins. Co. 23 W (2d) 344, 127 NW (2d) 228.

Although a doctor, who examined plaintiff at defendant's request, can be examined under 885.12, he cannot be called adversely under 885.14. Kablitz v. Hoeft, 25 W (2d) 518, 131 NW (2d) 346.

A physician or surgeon, defendant in a malpractice action, can be examined adversely concerning the proper treatment of the injury or illness suffered by the plaintiff even though it calls for expert opinion; hence it was error for the trial court to preclude plaintiff from examining the surgeon as an adverse witness as to his opinions of the cause of the gas gangrene in plaintiff's arm and the proper treatment to be rendered. Within the limitation that cross-examination of a witness (as distinguished from a party) should not exceed the scope of the direct examination, there is no valid reason why an expert witness cannot be cross-examined as to his expert knowledge and opinion concerning subjects on which he expressed his opinion or stated his expert knowledge. Shurpit v. Brah, 30 W (2d) 388, 141 NW (2d) 266.

In an action by a plaintiff who has been paid workmen's compensation, agents and employes of the compensation carrier may be examined adversely since the action is for the benefit of the carrier. On a question of whether one defendant was an employe of another defendant, where the 2 take different positions, the employe in question could be examined adversely by his codefendant. Skornia v. Highway Pavers, Inc. 34 W (2d) 160, 148 NW (2d) 678.

885.15 History: 1905 c. 129 s. 2; Supl. 1906 s. 4575n; Stats. 1925 s. 325.15; 1927 c. 523 s. 16; 1965 c. 66 s. 2; Stats. 1965 s. 885.15.

885.16 History: 1858 c. 134 s. 2; R. S. 1858 c. 137 s. 51; 1868 c. 176; 1874 c. 295; 1877 c. 238; R. S. 1878 s. 4069; Stats. 1898 s. 4069; 1901 c. 181 s. 1; Supl. 1906 s. 4069; 1907 c. 197; Stats. 1925 s. 325.16; 1927 c. 523 s. 17; 1965 c. 66 s. 2; Stats. 1965 s. 885.16.

Revisor's Note, 1927: The meaning is not changed. Courts and attorneys have experienced much trouble in applying this section. Originally it was quite plain but amendments have clouded the meaning. It is rewritten to make its meaning plain. Two circuit judges collaborated with the revisor in revising this section. Attention is called to the fact that the section does not expressly apply to members of nonstock corporations. [Bill 10-S, s. 17]

Grantees cannot testify as to delivery of a deed to them by a deceased grantor or state conversation between him and themselves in relation thereto; but they may testify that they had the deed in their possession

from its date until its record. Stewart v. Stewart, 41 W 624.

The writing of a note by the maker is not a personal transaction with the payee, and the former may testify as to the kind of ink used, as to striking out words, etc. Page v. Danaher, 43 W 221.

A vendee under a parol contract from a deceased vendor cannot testify to transactions or communications with the vendor or with his ancestor through whom he obtained title. Littlefield v. Littlefield, 51 W 23, 7 NW 773.

In ejectment, where the defendant's only interest in the land was that he had acted as agent for the equitable owner thereof, he sustains his liability to the cause of action, if at all, through or under such owner; and plaintiff cannot testify to conversations with a deceased person who was the manager of such owner, and who was really his own equitable grantor or agent, such conversations relating to the capacity in which such agent held plaintiff's undelivered deed. Bill v. Stool, 55 W 216, 12 NW 444.

Where the administrator makes unauthorized advances to an heir or his agent, since deceased, the heir or his representative is the "opposite party." In re Fitzgerald, 57 W 508, 15 NW 794.

In an action upon a promissory note against the estate of a decedent testimony of the plaintiff that he handed the note to his wife and told her to collect it for him during the decedent's life is not incompetent. The wife may testify to her doings within the scope of such agency. Engmann v. Immel, 59 W 249, 18 NW 182.

In an action affecting the title to land a person claiming under a deed from the defendant, which was unrecorded when the lis pendens was filed, being bound by the proceedings, is a party within secs. 4069 and 4070, R. S. 1878, and is incompetent to testify to personal transactions or communications with a deceased person under whom the plaintiff claims. Wright v. Jackson, 59 W 569, 18 NW 486.

The grantee of land cannot testify as to personal transactions with his deceased grantor, nor to remove a latent ambiguity in his deed, when the opposite party also claims title under such decedent. Mack v. Bensley, 63 W 80, 23 NW 97.

Testimony of a party who has had transactions with a deceased person from whom the opposite party derives title may be received so far as it is merely an admission against his interest of payments made by the deceased. Crowe v. Colbeth, 63 W 643, 24 NW 478.

A widow who could not read and who, before the trial, had become insane, was shown to have seen some notes belonging to her husband's estate; such evidence was offered to show that she had knowledge of the value of the estate; it was properly excluded. Leach v. Leach, 65 W 284, 26 NW 754.

One who had softening of the brain for some months before the trial and within 2 weeks before the trial fell into a coma and was unconscious for 16 hours, and was clearly incapable of testifying on the trial, was "insane" within sec. 4069, R. S. 1878, and evidence by the opposite party of personal transactions or communications was incompetent. Whitney v. Traynor, 74 W 289, 42 NW 267.

Sec. 4069 does not exclude the testimony of an agent of the party or person whose testimony is excluded. Hanf v. Northwestern M. A. Asso. 76 W 450, 45 NW 315.

A testator devised land to his wife for life with power to dispose of it if it became necessary for her to do so for her support and comfort; whatever remained after her death was to go to his heirs. The exigency arose which authorized her to convey. In ejectment by the testator's heirs against the wife's grantee after her death it was competent for the defendant to testify as to the contract between himself and his grantor, since the plaintiffs did not derive title from her. Larsen v. Johnson, 78 W 300, 47 NW 615.

The beneficiary under a will who communicates to the draftsman the testator's wishes on the subject is incompetent to testify that the will was read and explained to the testator before he signed it. Goerke v. Goerke, 80 W 516, 50 NW 345.

In ejectment the equitable title to the land was in the plaintiff by virtue of a parol agreement made by his father and grandfather to the effect that the latter should take the deed and dispose of the land for plaintiff's benefit. This agreement plaintiff was permitted to prove by his grandfather. The defendant claimed title by virtue of a tax deed adversely to the original owner, and not through or under him. Hence the testimony did not come within the prohibition of the statute. Begole v. Hazzard, 81 W 274, 51 NW 325.

In an action against the estate of a decedent to recover for services rendered by the plaintiff he was permitted to testify in answer to the question, "What did you expect to receive for the work you did there?" that he "expected she would pay me well if I did my work well and stayed there until she died, and then the property was to be mine. That is what I expected." Estate of Kessler, 87 W 660, 59 NW 129.

After the death of a partner the son of the surviving partner, who has no interest and from whom none has been derived, may give evidence of conversations had with the deceased. Curtis Brothers & Co. v. Hoxie, 88 W 41, 59 NW 581.

A vendee cannot testify, in an action to recover the price of goods sold him by plaintiff's intestate, that he gave the vendor notice that the goods were not in accordance with the contract. Hazer v. Streich, 92 W 505, 66 NW 720.

Testimony by the makers and payees of a note in an action brought against them by the executors of an indorser who had paid the same and sought to recover the sum paid on the ground that their testator's indorsement was for the accommodation of the defendants, that such indorsement was not on the note when it was delivered to them, is not forbidden. In such a case a letter from the indorser to the maker which had been read to the latter by one of the payees, and which was lost, is not a transaction by either of them with the indorser, and its existence and genuineness may be testified to by them both and its contents by payee who read it. Sawyer v. Choate, 92 W 533, 66 NW 689.

The legatees, devisees and heirs are all parties to a proceeding to establish a lost will, are incompetent to testify to transactions or communications by them with the testator. Valentine's Will, 93 W 45, 67 NW 12.

The plaintiff in an action upon a due bill purporting to have been given him by a person since deceased cannot testify to the delivery to the deceased of a note against her husband as a consideration for the due bill. Campion v. Schinnick, 93 W 111, 67 NW 11.

In an action by a creditor to enforce collection of his judgment on realty of his debtor, upon which defendant's testator had taken a mortgage which was not recorded until after his death and the entry of judgment, the debtor in respect to any transaction by him with the deceased was incompetent. Collins v. Corwith, 94 W 514, 69 NW 349.

Where an action was brought to recover certain certificates of deposit which were in the possession of the defendant and indorsed to her with the name of the deceased, and it is claimed that such certificates were obtained by fraud, the defendant may testify that she did not herself indorse the name of the deceased upon the certificates. Murphy v. Quinn, 99 W 466, 75 NW 168.

The incompetency of a party to testify is removable only by the conduct of the adverse party in the manner indicated in the statute. The door for such party to testify is closed by the statute against any effort of his to open it. The adverse party must open the door, if opened at all. Maldaner v. Smith, 102 W 30, 78 NW 140.

Where the proponents of a will call a witness who is an adverse party because he is disinherited, they waive the right to object to his testimony. Will of Hoppe, 102 W 54, 78 NW 183.

In an action by an executrix for goods sold by the decedent where the only issue was a question of payment and the defendant introduced testimony of a person who testified that he had a contract with the decedent to erect a building for him and that the defendant worked for him in the construction of the building, and that an arrangement was had whereby goods were sold by the decedent to the defendant and payment therefor was made by taking the bills for the goods so sold from the amount due the witness upon the contract, the testimony was admissible under secs. 4069 and 4070, Stats. 1898. Laack v. Runge, 104 W 59, 80 NW 61.

Under sec. 4069, Stats. 1898, an officer of a corporation which is a party to an action was not prohibited from testifying. Twohy M. Co. v. Estate of McDonald, 108 W 21, 83 NW 1107.

An insurance company does not sustain any liability under a policy from or through the insured so as to prevent testimony by the plaintiff as to transactions with the insured. Chamberlain v. Prudential Ins. Co. 109 W 4, 85 NW 128.

Where a widow sues to recover from her husband's executor, her testimony that a note was given to her husband, although drawn by a third person in the presence of herself and her husband, was inadmissible. Also her testimony as to settlement and payment made to her husband in her presence was inadmissible. Brader v. Brader, 110 W 423, 85 NW 681.

Sec. 4069, Stats. 1898, does not apply in the case of questions which call for information merely as to the witnesses' transaction with a third person, even though the answers may be the basis for an inference as to transactions with the deceased. Brader v. Brader, 110 W 423, 85 NW 681.

Testimony as to payment of deceased is a transaction within sec. 4069, Stats. 1898. Milwaukee T. Co. v. Warren, 112 W 505, 87 NW 801.

Where parts of a deposition were introduced it was not reversible error to allow the introduction of the whole of the deposition as against the general objection, where certain parts explain the other parts previously introduced, even though other parts were inadmissible. Gutzman v. Clancy, 114 W 589, 90 NW 1081.

Sec. 4069, Stats. 1898, includes any communication or transaction between a third person and a deceased person in the presence of such party, participated in by the latter, the third person being the only medium of communication between such party and such deceased person. Morgan v. Henry, 115 W 27, 90 NW 1012.

In an action brought by children seeking to cancel a mortgage and deed on the ground of fraud, such deed having been given by the father, where the grantee was examined under sec. 4068, Stats. 1898, as to the execution of the deed and the mortgage, he could then testify as to the consideration for such deed and mortgage. Drinkwine v. Gruelle, 120 W 628, 98 NW 534.

The words "in his own behalf or interest" were added to sec. 4069 by ch. 181, Laws 1901, and were intended to restrict its operation to parties to the controversy who had a beneficial interest in or sustained some liability under its subject matter. The person named as executor in a will, who appears as a proponent in a contest proceeding with no other interest in the estate of the deceased, is not within the statute though he is a nominal party to the proceeding. Anderson v. Laugen, 122 W 57, 99 NW 437.

Where the claimant against an estate was called by the defendant and examined at the trial, and testified in regard to certain amounts, the door was thereby opened to testimony as to transactions and conversations with deceased. Currie v. Michie, 123 W 120, 101 NW 370.

A witness could testify as to the acts, conduct or transactions of the deceased within her observation, if wholly unparticipated in and uninfluenced by her. Schultz v. Culbertson, 125 W 169, 103 NW 234.

Where a claim is presented against an estate, the claimant cannot testify that decedent made the payments thereon, in order to take the case out of the statute of limitations. Pierce v. Stitt, 126 W 62, 105 NW 479.

An agent who had in his possession a release of a mortgage and who was to deliver the same to the mortgagor on payment of the debt and who delivered such release without the debt being paid is not prohibited from testifying as to the transaction after the death

of the mortgagor. Franklin v. Killilea, 126 W 88, 104 NW 993.

Where the subject of inquiry from plaintiff's witness through whom plaintiff traced title related to the question of title to land and pertained to communications with persons then deceased from whom the opposite party derived title or sustained some liability to the cause of action, the witness was incompetent under sec. 4069, Stats. 1898. Dreger v. Budde, 133 W 516, 113 NW 950.

Evidence by defendant, in an action on a promissory note due decedent, the defendant went into decedent's store with a certain amount of money and came out with another note and a less amount of money, was inadmissible as a transaction if it tended to prove the payment of the note. Jackman v. Inman, 134 W 297, 114 NW 489.

In an action to reform a mortgage, plaintiff could not testify as to transactions tending to show the consideration for the mortgage between himself and deceased parties under whom the defendant claimed. Hagan v. McDermott, 134 W 490, 115 NW 138.

Where testimony incompetent under sec. 4069 is made competent by examination of witnesses on rebuttal, such testimony should be allowed to be introduced on surrebuttal. Anderson v. Anderson, 136 W 328, 117 NW 801.

Prior to the amendment of 1907, sec. 4069 did not include stockholders in a corporation which was a party. Johnson v. Fraternal R. Asso. 136 W 528, 117 NW 1019.

Ch. 197, Laws 1907, respecting the competency of officers of a corporation to testify, deals with the status when the person is offered as a witness. Frame v. Plumb, 138 W 179, 118 NW 997.

The fact that testimony was taken by deposition prior to the death of the party does not render it admissible where it would be excluded under this section if taken at the trial. Boyd v. Gore, 143 W 531, 128 NW 68.

Testimony of third person present and constructively participating in the conversation or transaction by exerting an influence in respect thereto is excluded. Holloway v. Sanborn, 145 W 151, 130 NW 95.

In replevin by the widow as administratrix of the estate of her deceased husband against his father to recover personal property which she claimed was given by the father to the son, she was properly allowed to testify what the father said when he brought the property to the farm, in the absence of evidence that deceased was present or that the statement was any part of a communication or transaction with the deceased. Weissman v. Weissman, 156 W 26, 145 NW 230.

In an action by heirs to recover rent from assignees of a lease, a defendant who took the assignment in his own name, but for the benefit of himself and his codefendants, all of whom were stockholders in a corporation to which they caused the lease to be transferred by a further assignment, was incompetent to testify to a conversation with the deceased lessor, although he claimed to hold his stock merely as agent of a lumber company of which he was a stockholder and officer. Zwietusch v. Luehring, 156 W 96, 144 NW 284.

The mother was not incompetent to testify to the making of a contract, by a person since deceased, by which he agreed that, in consideration of the surrender of her child to him, he would leave to such child all his property after the death of himself and his wife, the child not deriving her interest from, through or under the mother. Dilger v. McQuade, 158 W 328, 148 NW 1085.

Objections to all that portion of a deposition which relates to any communication or transaction between plaintiffs personally and another party does not cover instructions given by the witness to the person who drew the contract involved in the suit; neither does an objection which is rested on the ground of the admissibility of the evidence instead of the competency of the witness. Gardner v. Young's Estate, 163 W 241, 157 NW 787.

After plaintiff's counsel had offered to go into the whole transaction between the president of the defendant bank and plaintiff's intestate, and had questioned such president in regard to some features thereof, the witness was competent thereafter to testify for the defendant generally respecting the whole transaction. Johnson v. Bank of Wisconsin, 163 W 369, 158 NW 59.

Objection to the competency of a witness may be made at the time when a deposition taken to perpetuate testimony is offered in evidence. Sioux L. Co. v. Erwing, 165 W 40, 160 NW 1059.

A mere officer of a subordinate lodge of a fraternal benefit society is not a stockholder or officer of the corporation itself within sec. 4069, and is not disqualified to testify as to conversations between himself and the beneficiary of a policy issued by the society. McGinty v. Brotherhood of R. Trainmen, 166 W 83, 164 NW 249.

The examination adversely of a defendant under sec. 4068, as to transactions had by him with third persons relating to business done by him for a deceased person under whom he or the other defendant (a corporation controlled by him) claimed title to land in controversy, did not render him competent to testify as to transactions had directly with the deceased. Patulski v. Bellmont R. Co. 166 W 188, 164 NW 841.

A claim against an estate was based on guaranties signed by the deceased and others, including K. Claimant had been present and overheard negotiations between the deceased who was acting in claimant's behalf, and K. A partial settlement was then effected and claimant had acquiesced therein and received the fruits thereof. He thereby became a party to such negotiations and was incompetent to testify to the transactions as against the estate of the deceased. Will of Pullen, 166 W 254, 165 NW 25.

A daughter prosecuting a claim against her mother's estate for services under an express contract called as a witness a sister who was also a claimant against the estate to testify to a conversation relating to the contract in question between the witness and a third sister and the mother when the plaintiff was not present; and she called another witness to testify respecting a conversation between the witness and the deceased at which the claimant was present but in which she did not participate. Neither witness was incompe-

tent. McHatton v. Estate of McDonnell, 166 W 323, 165 NW 468.

Members of a deceased person's family are not incapacitated by sec. 4069 to testify to conduct on his part from which an inference that he was deranged at a specified time might well be drawn, where the facts detailed were not participated in or influenced by such witnesses. Casson v. Schoenfeld, 166 W 401, 166 NW 23.

E entered into an oral contract with his parents to take possession of a farm and the personal property thereon, and to care for and support them during their lives in consideration of a promise by the parents that the farm and personal property should be conveyed to him as compensation. E fully performed his oral contract. The father conveyed the land to the mother and the mother to one of E's brothers. In an action by E's heirs after the death of E's parents to declare and enforce a trust in their favor and against the uncle who held the title to the farm, it was held that E's widow, the mother of some of the plaintiffs, was not incompetent to testify to the making of said oral agreement because the plaintiffs did not claim from, through or under her and because she was not an actual or necessary party to the action. Glander v. Glander, 167 W 12, 166 NW 446.

In a controversy between the legal representatives of a deceased father and his deceased son, the representative of the father, claiming that certain notes executed by the son to the father still constituted valid claims against the son's estate, called one of the appraisers of the father's estate as a witness to a conversation between such appraiser and the son relative to the disposition and destruction of the notes, but presented only a part of the conversation. Thereupon the representative of the son's estate drew from the witness upon cross-examination the remainder of the conversation. A motion to strike out the cross-examination on the ground that the witness was incompetent to testify was properly denied. Estate of Gilbert, 167 W 291, 166 NW 442.

Letters written by a member of a firm for the firm containing evidence of the making of an alleged contract are admissible under sec. 4069 after the writer's death; and the widow of such deceased is not excluded as a witness to his signature. The letters could not be contradicted by the deceased if he were still living, and such testimony of the widow did not involve any "transaction or communication" by her with a deceased person. Jones v. Citizens S. & T. Co. 168 W 646, 171 NW 648.

Testimony of a husband, in a proceeding to contest his wife's will, respecting a payment by him, during coverture, upon a note which he had given to her before their marriage, was admissible when offered by her administratrix in an action against him on the note; and after the admission of such testimony it was competent for the husband, to explain or contradict it. Enwright v. Griffith, 169 W 284, 172 NW 156.

Declarations of a wife in her husband's presence, that her father had given her a note and mortgage executed by the husband, were not transactions or communications with the husband and were admissible in proving a claim against the husband's estate made by the wife and based upon such note and mortgage; and such widow dying during the settlement of the husband's estate, a daughter was competent to testify, in a continuation of the controversy by the mother's estate against the father's estate, to conversations between her father and mother in which she did not participate. Flanagan's Estate v. Flanagan's Estate, 169 W 537, 173 NW 297.

Sec. 4069 is not applicable to subscribing witnesses to a will. Estate of Johnson, 170 W 436, 175 NW 917.

When a decedent made certain statements respecting his will to and in the presence and hearing of several persons, all of whom were interested in his estate, such persons were disqualified to testify as to those statements; but permitting one of said persons so to testify was not reversible error where the facts testified to were proved by the uncontradicted testimony of competent witnesses. Will of Lauburg, 170 W 502, 175 NW 925.

Testimony as to the contents of a letter alleged to have been received from a deceased person by a claimant against her estate, and since lost by him, is inadmissible, because the sending and receipt of the letter constituted a transaction with a deceased person. Felz v. Estate of Felz, 170 W 550, 174 NW 908.

An interested witness cannot be permitted to testify that deceased testator burned the will in question in her presence in a basin which she procured for the deceased. Will of Oswald, 172 W 345, 178 NW 462.

Where plaintiff's deposition was taken under sec. 4096 before trial and he was then fully examined and at the trial was cross-examined as to portions of his deposition, and defendant made the deposition a part of the record without qualification, plaintiff's testimony therein concerning transactions with a deceased person from whom he derived title became admissible. Lamberson v. Lamberson, 175 W 398, 184 NW 708.

The testamentary trustee of property, the income of which was devised to the testator's wife for life, and on her death to go to testator's children, is competent to testify that he acted as interpreter for the testator, an illiterate foreigner, at the execution of the will. Estate of Novak, 181 W 16, 193 NW 1000.

In order to prove that a daughter prevented her mother from filing a claim against an estate on a promissory note by promising to pay it if not filed, another daughter was not an incompetent witness, after the death of the daughter so promising, to testify that she overheard such promise. Day v. Morgan, 184 W 595, 200 N 382.

An objection "I object to that" does not raise the question of the competency of a witness to testify to transactions with third persons. Estate of Menzner, 189 W 340, 207 NW 703.

A claimant is not incompetent to testify in support of a claim against the estate of a deceased person that he performed services for the deceased and about their nature and reasonable value. Will of Fuller, 190 W 445, 209 NW 683.

An heir is a "party" to an action by the administrator against other heirs, within the

meaning of 325.16, providing that no party or person shall be examined as a witness in his own behalf in respect to any transaction or communication by him personally with a deceased person. Such heir, however, is a competent witness to a transaction between the deceased and his sons, where the witness took no part in the transaction, was not a party to it, and where her presence in no way affected it. Stuart v. Crowley, 195 W 47, 217 NW 719.

Although the defendant had died during the pendency of the action, the parents of the plaintiff were competent to testify as to conversations had between them and the defendant while he was treating the plaintiff. Nelson v. Ziegler, 196 W 426, 220 NW 194.

The predecessor in title of the plaintiff is an incompetent witness to testify as to an understanding that he had with the predecessor in title of defendant, since deceased, relative to an agreement concerning a boundary line. Litel v. First Nat. Bank, 196 W 625, 220 NW 651.

A safety deposit box was leased in the name of both the father and the son. In an action by the son's administratrix against the father to compel the latter to account for securities in the safety deposit box, the father was properly permitted to testify that the keys to the safety deposit box from the time of the lease were in his exclusive possession. McComb v. McComb, 204 W 293, 234 NW 707.

In an action by an automobile guest to recover for injury from the estate of deceased automobile host, the guest was incompetent to testify to a protest made against fast driving by the host. Waters v. Markham, 204 W 332, 235 NW 797.

In trials before the courts evidence which is clearly incompetent or improper ought not to be received even subject to objection. Nelson v. Newman's Estate, 205 W 91, 236 NW 556.

The testimony of a motorist involved in a collision regarding movements of an automobile driven by the deceased does not involve a transaction with the deceased. Seligman v. Hammond, 205 W 199, 236 NW 115.

Reception of testimony of the wife of the executor claiming as a donee regarding a communication with the testatrix in support of the claim, while error, was not prejudicial where such testimony was not controlling in the case. Estate of Southard, 208 W 150, 242 NW 584.

The mere fact that the donor's agent for delivery of property to donees was a party to an action by the administratrix of the donor's estate to recover property did not render the agent incompetent to testify concerning the transaction. Lowry v. Lowry, 211 W 385, 247 NW 323, 248 NW 472.

In an action by an administrator to recover for the wrongful killing of his decedent, a defendant in the action does not sustain his liability to the cause of action from, through or under the decedent, and hence the plaintiff is not rendered incompetent to testify to transactions with the decedent. Bump v. Voights, 212 W 256, 249 NW 508.

On a claim by a son against the estate of his deceased father for specific performance of an oral agreement to convey a half interest in land, adverse examinations of the claimant containing evidence by him as to transactions between him and the decedent which were not specifically offered in evidence by claimant cannot be considered as in evidence, where the door to their admission had not been opened by the contestant but he had objected to the omnibus offer of the evidence which comprised the examinations and to similar evidence relating to transactions between claimant and decedent, as being incompetent under 325.16. Estate of Shinoe, 212 W 481, 250 NW 505.

In a proceeding by a legatee to have notes signed by him as maker stricken from the inventory of the estate, the legatee became a competent witness as to the whole transaction with the testatrix concerning the notes, after the executors, opposing his petition, had examined a witness regarding the entire matter. Estate of Flierl, 225 W 493, 274 NW 422.

In an action based on the theory that the occupant of a truck was the driver's principal and therefore liable for the driver's negligence, the death of the occupant did not render the driver incompetent to testify regarding a conversation with the occupant resulting in the driver's transportation of the occupant. Renich v. Klein, 230 W 123, 283 NW 288.

Not having made objection in the trial court that testimony given by the claimant was incompetent as concerning transactions with a deceased person, the executrix cannot raise such question on appeal to the supreme court. Estate of Johnson, 232 W 556, 288 NW 290.

In an action to recover from an executor a note claimed by the plaintiff as his property as a gift from the decedent and claimed by the executor as property of the estate, a person, not an interested party, who had been the decedent's agent in the transactions relating to the note, was a competent witness to testify concerning the transactions with her principal. Roseman v. Sauber, 232 W 581, 288 NW 173.

In a proceeding for death benefits under the workmen's compensation act, the secretary of the party from whom recovery was sought was not barred from testifying as to any transaction or conversation with the deceased, the secretary not being a "person from, through or under whom" any party derived his interest, and the applicant, as the "opposite party," not deriving his right to death benefits, in case the deceased had the status of an employe, "from, through or under" the deceased but from express provisions of the act. J. Romberger Co. v. Industrial Comm. 234 W 226, 290 NW 639.

In an action against a bank and its cashier for the conversion of bonds owned by the plantiff's decedent and loaned by the decedent to the cashier for use by him as collateral security, the cashier was incompetent to testify to conversations had between him and the decedent concerning transactions relating to the bonds and was not rendered competent by the fact that the conversations took place in the presence of the decedent's son who had an interest in the cause of action and was available as a witness. Gulbrandsen v. Chaseburg State Bank, 236 W 391, 295 NW 729.

Where it appeared that at the time of the collision the defendant's car salesman, driving the defendant's car in which the plaintiff's decedent was riding, had departed from the

route he would take in bringing the car to a certain place, and that the decedent was taken into the car by him, and the defendant, because of the plaintiff's objection under 325.16 to the salesman's testifying to any conversation or transaction with the decedent, was prevented from showing the fact as to the purpose of the decedent's presence in the car, but the plaintiff was not so prevented from examining the salesman, the burden rested on the plaintiff, in order to impose liability on the defendant, to prove that the salesman took the decedent into the car as a prospective purchaser. The plaintiff could not thus preclude the defendant from proving whether the decedent was a prospective purchaser of a car when riding with the defendant's car salesman at the time of the collision, and then, by failing to present proof herself when the source thereby closed to the defendant was open to her, support her case against the defendant by a mere presumption that the salesman was not violating his duty as an employe. Hanson v. Engebretson, 237 W 126, 294 NW 817.

In an action by a niece of a decedent to recover from the decedent's administrator personal property alleged to have been the subject of a gift causa mortis to the plaintiff by the decedent, a brother of the decedent who had no interest in any part of the alleged gift, and who took no part in the transactions or communications had between the decedent and the plaintiff, was not a "person through or under whom" the plaintiff derived her title so as to be rendered incompetent to testify as to conversations which he overheard between the decedent and the plaintiff bearing on the making of the alleged gift. Salmon v. First Nat. Bank of Madison, 237 W 153, 294 NW 866.

In proceedings to establish notes from a legatee to the testator as an offset against the legatee's share under the will, other legatees were parties in interest so that their testimony as to conversations with the testator concerning the signing or existence of the notes was barred. Estate of Pardee, 240 W 19, 1 NW (2d) 803.

The plaintiff's testimony, that when she was attempting to pass the stopped truck and the driver, since deceased, was mounting the cab she called to him to wait, and that when he was picking her up after the truck struck her he said to her that he had heard her call, was barred as a "personal communication" with a deceased person through whom the defendant liablity insurer and the personal representative of the deceased, as the opposite parties, sustained their liability. Where the defendants had objected that the plaintiff was incompetent to testify, but the plaintiff was permitted to testify concerning communications with the deceased, there was no "waiver" of the objection by the defendants' cross-examination which in no way broadened the extent of the communications to which the plaintiff had first testified in her own behalf in her direct examination. Jackowska-Peterson v. D. Reik & Sons Co. 240 W 197, 2 NW (2d) 873.

A widow, claiming against her husband's estate that the husband had made her a gift of the amount of a bank deposit made by him in her name and represented by a passbook, was incompetent to testify that she had had the passbook in her possession during the husband's lifetime and thus establish a basis for an inference that the husband had delivered the passbook to her. Estate of Krause, 241 W 41, 4 NW (2d) 122.

325.16 does not exclude, on the ground of "interest," testimony of persons who are not parties to and have no legal interest whatever in the subject matter of the action, although they may remotely be interested, in some other sense of that term, in the outcome of the litigation. Nolan v. Standard Fire Ins. Co. 243 W 30, 9 NW (2d) 74.

In an action for the death of the plaintiff's husband in a collision which occurred while the husband was riding in an automobile owned by him and driven by a son and covered as to liability of a driver thereof by a policy issued to the husband by the defendant insurer, the son was not incompetent to testify to the deceased's failure to protest as to the manner in which the car was being operated, since the plaintiff, the "opposite party" referred to in 325.16, did not derive her title to the cause of action from, through, or under the deceased, but was suing under 331.03 and 331.04 for a cause of action created by the statute and did not devolve from the deceased by virtue of the statute. Olson v. State Farm Mut. Auto. Ins. Co. 252 W 37, 30 NW (2d) 196.

A husband, claiming that his deceased wife had no actual interest in property held in their joint names, and that no interest passed to him on her death, was incompetent to testify to transactions with the wife in a proceeding to determine inheritance taxes in the estate of the wife, just as he would be incompetent to testify as to transactions with her in any other type of proceeding seeking in effect to reform the evidences of title. Estate of Hounsell, 252 W 138, 31 NW (2d) 203.

In a proceeding relating to a will devising the testator's homestead to his daughter, the testator's son was not incompetent to testify in behalf of the daughter. Will of Schultz, 253 W 86, 33 NW (2d) 169.

In an action for injuries sustained by the plaintiff when struck by an automobile operated by a since deceased driver, the plaintiff's wife, not a party to the action and securing no direct benefits therefrom, was not incompetent to testify as to statements made to her by such driver after the accident. Carlsen v. Hardware Mut. Cas. Co. 255 W 407, 39 NW (2d) 442.

A person named as an executor and a trustee in a will, and authorized to make reasonable charges for his legal services in addition to the statutory executor's fees, is not barred from testifying in a contested proceeding for the probate of the will as to observations and his opinion as to mental capacity of the testator, based on such observations. Will of Williams, 256 W 338, 41 NW (2d) 191.

See note to 238.16, citing Will of Repush; 257 W 528, 44 NW (2d) 240.

A claimant is competent to testify, in support of a claim against the estate of a deceased person, that he performed services for the deceased, and as to their nature and reasonable value. Kirkpatrick v. Milks, 257 W 549, 44 NW (2d) 574.

Permitting a beneficiary of a larger bequest under a previous will to testify as to transactions and conversations with the testatrix is deemed of no consequence, in respect to the judge's conclusion as to the existence of undue influence, which was supported by sufficient other and concededly competent evidence. Estate of Maxcy, 258 W 360, 46 NW (2d) 479.

In proceedings on claims against an estate for board, lodging, nursing services, and other care rendered to an invalided and helpless decedent by the decedent's son and the son's wife, who was a practical nurse, the evidence sustained findings that the decedent had promised that the claimants would be paid therefor after the decedent's death, that the claimants had performed the agreement, and that the reasonable value of the services rendered was, respectively $20 and $30 per week. The protection of 325.16 against the testimony of a claimant concerning his transactions with the decedent is waived by the failure of the decedent's representative to make timely objection thereto, and also by cross-examination of the otherwise incompetent witness regarding the transactions. Once the competency of the witness is established by the waiver, the weight to be given his testimony is a matter for the trial court. Estate of Schaefer, 261 W 431, 53 NW (2d) 427.

Where an objection to the competency of a witness to testify as to conversations with a deceased person is sustained, but there is no showing by offer of proof as to what the witness would have testified, the supreme court cannot determine on appeal whether the ruling was prejudicial, unless prejudice is self-apparent. Pick Foundry, Inc. v. General Door Mfg. Co. 262 W 311, 55 NW (2d) 407.

The words "by him personally," which immediately follow the words "transaction or communication," qualify such latter words wherever they thereafter appear. In an action of unlawful detainer by corporation lessors against a corporation lessee, 325.16 applies to a witness-officer of the plaintiffs in relation to conversations with a deceased officer of the defendant; and the defendant's offering of a letter from its deceased officer to another officer of the plaintiffs (not the witness) did not open the door so as to make the witness competent to testify as to conversations had by him with the defendant's deceased officer, since such letter was not a transaction or communication in which the witness personally participated. Pick Foundry, Inc. v. General Door Mfg. Co. 262 W 311, 55 NW (2d) 407.

Where there was sufficient competent and credible evidence to support the findings of the trial court as to the paternity of a child born to the decedent's mother before the mother's marriage, the admission of the testimony of certain interested parties who were or may have been incompetent to testify relative to conversations with deceased persons, bearing on such issue of paternity, was not prejudicial. Estate of Engelhardt, 272 W 275, 75 NW (2d) 631.

A daughter-in-law of a prior owner who had no interest in the property in question, from whom neither party derived his interest, and who had no interest in the lawsuit, was competent to testify as to conversations between deceased prior owners. Rohr v. Schoemer, 1 W (2d) 283, 83 NW (2d) 679.

Where each litigant was necessarily prevented from testifying in his own behalf as to transactions with the deceased mother, but there was competent testimony on the issue raised by the brother's claim that the sister held title as constructive trustee for the estate of the deceased mother, it was unnecessary for the brother to prove that the mother was a party to the arrangement whereby the sister obtained title if the brother was able to prove that the sister knew, when the brother conveyed to her, that his own title was nominal rather than beneficial. Nehls v. Meyer, 7 W (2d) 37, 95 NW (2d) 780.

A defendant driver of an automobile involved in a collision was incompetent to testify as to a conversation with the since deceased driver of the other automobile involved, insofar as the since deceased driver had said that he was sorry but that his foot slipped off the brake and hit the accelerator, and hence the plaintiff's proper objection to the admission of such testimony should have been sustained. Kading v. Roark, 7 W (2d) 483, 97 NW (2d) 187.

An objection to testimony on the ground that it involves a transaction with a deceased person is not proper; the objection should be to the competency of the witness to testify. Estate of Rohde, 8 W (2d) 50, 98 NW (2d) 440. See also Estate of Chmielewski, 17 W (2d) 486, 117 NW (2d) 601.

At least 2 requisites are necessary to disqualify a witness under 325.16: (1) that the witness has a certain type of interest, and (2) that the testimony relates to a transaction or communication had by the witness personally with the deceased. Either one alone is not sufficient to disqualify the witness. Estate of Kemmerer, 16 W (2d) 480, 114 NW (2d) 803.

This section does not authorize an interested survivor to testify as to conversations or transactions with or in the presence of an agent of the deceased. The door was not opened simply because of adverse examination of the survivor before trial. Estate of Ford, 23 W (2d) 60, 126 NW (2d) 573.

In an action to enforce a materialman's lien the claimant derives his interest by operation of the lien statute, not from, through or under the deceased owner, and the executrix-widow of the owner was competent as a witness. This is also true because there was no effort to elicit testimony in her behalf or interest. Fullerton Lumber Co. v. Korth, 23 W (2d) 253, 127 NW (2d) 1.

A nurse's aid is competent to testify as to conversation with a deceased patient in an action against the hospital. Carson v. Beloit, 32 W (2d) 282, 145 NW (2d) 112.

Testimony of interested parties concerning their transactions with deceased persons, even if received without objection, must be carefully scanned and received with caution. Wustum v. Kradwell, 270 F 546.

In a dispute between an employe's executor and a corporate employer involving disposition of proceeds of a life policy procured by the employer, the employer's works manager who was a brother-in-law of the deceased em-

ploye was not an "officer" of the employer within 885.16, Stats. 1965, and his testimony was admissible. American Cas. Co. v. M.S.L. Industries, Inc. 283 F Supp. 757, reversed (on other grounds) American Cas. Co. v. M.S.L. Industries, Inc. 406 F (2d) 1219.

Who may claim protection. Canright, 1 MLR 65.

Effect of interest in the event on evidence of transaction with deceased. 17 MLR 304.

The dead man's rule in Wisconsin. Berry, 43 MLR 73.

Transactions with deceased persons. 8 WLR 374; 1940 WLR 407; 1948 WLR 491.

885.17 History: R. S. 1858 c. 137 s. 51; 1865 c. 305 s. 1; 1867 c. 41 s. 1; R. S. 1878 s. 4070; Stats. 1898 s. 4070; Stats. 1925 s. 325.17; 1965 c. 66 s. 2; Stats. 1965 s. 885.17.

In an action upon a joint and several note against the survivor of 2 makers, plaintiff may testify in rebuttal that proceeds of property alleged to have been received from the deceased obligor were applied, with his consent, to the payment of other indebtedness. Ward v. Bowen, 14 W 405.

In an action for money loaned through the lender's agent, since dead, defendant is incompetent to testify as to statements of such agent. Cornell v. Barnes, 26 W 473.

Evidence by defendant to prove a transaction between himself and plaintiff's agent, since deceased, is inadmissible, notwithstanding a deposition of such deceased agent, taken on part of the plaintiff, was put in evidence by the defendant. It is only when the testimony of the deceased agent is given in evidence by the opposite party that opposing evidence of the other party can be given. McIndoe v. Clarke, 57 W 165, 15 NW 17.

A party who does not object to the admission of evidence as to transactions with his deceased agent and then testifies concerning transactions between himself and such agent cannot afterwards have such evidence stricken out. Phillips v. McGrath, 62 W 124, 22 NW 169.

The question being as to the quantity of lumber sawed by plaintiff under a contract made with defendant's agent, since deceased, plaintiff's testimony as to the sawing and measurement of the lumber and the entry of the amount thereof on his books was competent. Sucke v. Hutchinson, 97 W 373, 72 NW 880.

In an action brought to hold persons as partners the articles of partnership were pasted in a book and such book was signed by the defendants. One of the defendants testified that he had paid an agent of the partnership (dead at the time of trial) $1 for the privilege of trading at a store maintained by the partnership and that he had signed such list at that time. On examination by plaintiff a defendant was competent to testify to transactions with the agent, because the agent was not the agent of the adverse party or the agent of the person from whom such adverse party derived his interest or title. Moore v. Macy, 117 W 192, 94 NW 45.

The defendant was incompetent to testify to transactions between himself and plaintiff's attorney since deceased. Meyer v. Hafemeister, 119 W 539, 79 NW 165.

Where the defendant, in an action on a promissory note, testified in support of his counterclaim that he was entitled to compensation for effecting a reconciliation between plaintiff and plaintiff's wife, stating the interviews he had had with the wife, and the plaintiff called his wife to rebut the statement, she was an incompetent witness because she did not in those interviews act as her husband's agent; but she was competent to testify as to conversations with and admissions by the defendant upon an occasion when, as agent of her husband, she endeavored to collect the balance due on the note. Keipert v. Hugent, 153 W 127, 140 NW 1123.

In an action against a bank for the conversion of bonds, the admission of testimony of the plaintiff as to transactions with the deceased cashier was prejudicial error; and an instruction that the evidence of such transaction with other customers may bear on whether the cashier received the bonds for safekeeping from the plaintiff was prejudicial error. His transactions with others was relevant only on the question of the custom and scope of the cashier's authority. Markgraf v. Columbia Bank of Lodi, 203 W 429, 233 NW 782.

Evidence in an action to remove the cloud of a laborer's lien from title to securities, deposited with the corporation for which plaintiff constructed a building addition, as to an admission by defendant construction superintendent after the death of plaintiff's agent that defendant had no profit-sharing contract with such agent, did not warrant admission of evidence of defendant's personal transactions with the agent concerning such contract. Walter W. Oeflein, Inc. v. Voell, 217 W 131, 258 NW 362.

The grantee is incompetent to testify to a conversation and transaction with the notary who held the deed as agent of the deceased grantor respecting the delivery of the deed by the notary. Estate of Rahn, 230 W 108, 283 NW 285.

885.18 History: R. S. 1878 s. 4072; Stats. 1898 s. 4072; 1917 c. 433; Stats. 1925 s. 325.18; 1955 c. 696 s. 60; 1965 c. 66 s. 2; Stats. 1965 s. 885.18.

Revisers' Note, 1878: A declaration of the rule as to confidential communications, generally regarded as existing on grounds of public policy, but which has been thought in New York to have been repealed by the declaration that a party could be a witness except in specified cases, and the same apprehension has been felt by the profession here. The provision in respect to actions for criminal conversation needs no explanation. Its omission has been notably a gross injustice. The whole section has been borrowed from New York.

Editor's Note: Sec. 4072, R. S. 1878, was repealed by ch. 433, Laws 1917, and a new sec. 4072 (renumbered 325.18) was thereby created which changed the law.

One competent to testify when a deposition is taken is not disqualified by marrying a party to the action so as to make the deposition inadmissible. Cameron v. Cameron, 15 W 1.

Testimony of a husband in a suit to which the wife was not a party, was not evidence against her in a suit against both. Yager v. Larsen, 22 W 184.

In an action by husband and wife to recover for injuries to the latter, general objection to the competency of either as a witness is bad. Holmes v. Fond du Lac, 42 W 282.

A wife can be witness for or against her husband in an action to which she is a party. Getzlaff v. Seliger, 43 W 297.

Letters written by the husband to his wife are not admissible to convict the husband of perjury. Selden v. State, 74 W 271, 42 NW 218.

A divorced husband is a competent witness against his former wife as to facts which came to his knowledge during the marriage by means equally accessible to other persons and not disclosed to him in conversations with her. Bigelow v. Sickles, 75 W 427, 44 NW 761.

In an action for the alienation of the affections of plaintiff's wife, letters written from her to him prior to the alleged alienation, showing her affection and regard for him as her husband, are admissible on the question of damages. An objection to such letters on the ground that some of them were written after the alleged alienation and were privileged is too general; the objection should be specific. Horner v. Yance, 93 W 352, 67 NW 725.

Letters purporting to be from a husband to his wife cannot be introduced in evidence to show the marriage of the parties upon the criminal prosecution of one of them. Lanctot v. State, 98 W 136, 73 NW 575.

A wife is not a competent witness against her husband in a prosecution for adultery. Crawford v. State, 98 W 623, 74 NW 537.

A surviving husband is competent to testify that he saw certain securities in question in a box in a room occupied by himself and deceased on the day before her death, since his knowledge was not acquired by any confidential or private communication from his wife. Brown v. Johnson, 101 W 661, 77 NW 900.

A defendant's wife is not a competent witness either for or against him upon a prosecution for assault upon a third person, without showing her agency. Kraimer v. State, 117 W 350, 93 NW 1097.

The rule of incompetency is confined to cases where the testimony would be by one directly for or against the other, such other being a party. State v. West, 118 W 469, 95 NW 521.

Where the district attorney and the accused offered to waive the question of the wife's incompetency, it was error to refuse to accept such waiver. Grabowski v. State, 126 W 447, 105 NW 805.

Where several parties, including the plaintiff and his wife, were liable on a contract for the support of a person for life, and an action was brought by the plaintiff for contribution, the wife was not a competent witness against her husband on the theory that she acted as agent in furnishing the support, she having performed certain duties in the household merely incidental to the ordinary household affairs. Payne v. Payne, 129 W 450, 109 NW 105.

The wife of an insured was a competent witness to matters in which she acted as his agent. Bloch v. American Ins. Co. 132 W 150, 112 NW 45.

A husband or wife may be a witness on behalf of a codefendant of the other when such other has only a representative or nominal interest in the action, even though subject to costs in case of defeat. Robinson v. McGinnis, 145 W 476, 130 NW 473.

Proof that plaintiff's wife in another state was in possession of some of his personal effects, a portion of which she had purchased as his agent, and that she delivered them to a carrier consigned to the plaintiff in Wisconsin, shows her agency sufficiently to qualify her as a witness concerning these facts. Tradewell v. Chicago & Northwestern R. Co. 150 W 259, 136 NW 794.

A divorced wife was not a competent witness for or against her husband during the year next following the entry of the judgment, because under sec. 2374, Stats. 1913, their marital status remains unchanged during that time. Hiller v. Johnson, 162 W 19, 154 NW 845.

The widow of a deceased person is not incapacitated by sec. 4072 to testify to conduct on his part from which an inference that he was deranged at a specified time might well be drawn, where nothing in the nature of a confidential communication was disclosed. Casson v. Schoenfeld, 166 W 401, 166 NW 23.

Statements by a husband to his wife, no one else being present, are privileged, and cannot be testified to by her, without his consent, to impeach him as a witness, even in an action to which neither is a party nor interested. Kaspar v. Murray, 171 W 295, 176 NW 1021.

Under sec. 4072 a husband of an interested party to a will contest is competent to testify for his wife concerning a destruction of the will by the decedent. Will of Oswald, 172 W 345, 178 NW 462.

The substitution in sec. 4072 of the words "private communications" for the words "confidential communications" by ch. 433, Laws 1917, restricted rather than enlarged the class of communications between husband and wife that may be inquired into, and excluded statements by the former to the latter as to occurrences out of which a prosecution for assault with intent to rape arose. Barber v. State, 172 W 542, 179 NW 798.

The admission of privileged communications between husband and wife is not prejudicial error where other evidence sufficiently proves the same facts. Kellar v. State, 174 W 67, 182 NW 321.

Letters written by a bookkeeper shortly before he committed suicide, admitting the theft of his employer's money and the concealment thereof by false book entries, were admissible in an action by the employer to impress a trust on life insurance policies of the employe, and the fact that one of the letters admitting the theft was to the employe's wife and inclosed the other letter, containing similar statements and addressed to a third person, did not render the communications privileged. Truelsch v. Miller, 186 W 239, 202 NW 352.

A wife's diary, kept from her husband, showing guilt of adultery, was not a "private communication, made during marriage." Ware v. State, 201 W 425, 230 NW 80.

885.18, Stats. 1965, does not render privileged the testimony of a wife as to intercourse

before marriage where her husband is being prosecuted for intercourse with her (as a child) under 944.10 (1). State v. Pratt, 36 W (2d) 312, 153 NW (2d) 18.

885.19 History: R. S. 1849 c. 98 s. 51; R. S. 1858 c. 137 s. 60; R. S. 1878 s. 4073; Stats. 1898 s. 4073; Stats. 1925 s. 325.19; 1965 c. 66 s. 2; Stats. 1965 s. 885.19.

Revisers' Note, 1878: This section is taken from section 832 of the New York code of 1877, and substituted for section 60, chapter 137, R. S. 1858; and the suggestions in the published note to that section are referred to as satisfactory reasons for its adoption. The injustice of punishing a party who may need the testimony of such a witness in a matter where he ought to be credited is alone sufficient to condemn the old rule.

Editor's Note: For note of New York revisors, see Wis. Annotations, 1930, to 325.19.

A charge of crime is not in itself impeaching evidence. McKesson v. Sherman, 51 W 303, 8 NW 200.

Sec. 4073, R. S. 1878, applies to all convicts, including those whose sentences have not expired. Sutton v. Fox, 55 W 531, 13 NW 477.

In an action of divorce it was error to instruct that the testimony of a female witness, who had testified directly to acts of adultery by the plaintiff wife and who admitted that she had served a term in the state prison on a conviction for a like crime, was not sufficient in law to sustain the charge against the plaintiff, but, uncorroborated, was utterly insufficient to sustain the verdict. Poertner v. Poertner, 66 W 644, 29 NW 528.

Evidence of prior convictions of the accused is only admissible as tending to affect the accused's credibility as a witness. Fossdahl v. State, 89 W 482, 62 NW 185.

Proof of the witness having been in jail cannot be admitted under sec. 4073, Stats. 1898. Cullen v. Hanisch, 114 W 24, 89 NW 900.

Sec. 4073 permits only proof of the fact of conviction and that only by cross-examination of the accused himself or by the record. Paulson v. State, 118 W 89, 94 NW 771.

Where it has been proved that defendant may have been in a certain place at a certain time, record of conviction of a person by the name by which she was known in that place is prima facie sufficient to show her conviction. Colbert v. State, 125 W 423, 104 NW 61.

The term "criminal offense" within sec. 4073 includes misdemeanors as well as felonies but not a conviction under a municipal ordinance. Koch v. State, 126 W 470, 106 NW 531.

A former conviction of an accused may be proved either by the record or by his own cross-examination for the purpose of affecting his credibility; but after he had admitted such conviction it was improper for the state to introduce the decision of the supreme court of another state discharging him from imprisonment under such conviction. Hamilton v. State, 171 W 203, 176 NW 773.

Defendant in an action to recover damages for an assault upon plaintiff may be asked on cross-examination whether he has been convicted of the assault in order to affect his credibility, even though his answer may be irrelevant to the question whether the assault was committed. Bruno v. Hickman, 174 W 63, 182 NW 356.

It is improper to interrogate a witness concerning a conviction which had been set aside. Benedict v. State, 190 W 266, 208 NW 934.

If 325.19 is to be construed so as to require a defendant to answer as to the nature of a previous offense, such authority extends only when the evidence of a previous conviction has been brought out on the cross-examination of the defendant or by the record, and not where the defendant testifies on his direct-examination to previous convictions. State v. Adams, 257 W 433, 43 NW (2d) 446.

When the defendant, on trial for incest, took the stand as a witness in his own behalf, the district attorney could properly cross-examine him as to prior convictions, as affecting his credibility, but permitting the district attorney, over objection, to cross-examine him as to arrests and as to the nature of such offenses, was prejudicial error, requiring a new trial. State v. Raether, 259 W 391, 48 NW (2d) 483.

Where a defendant testified on the merits and testified on direct examination as to previous convictions, and the district attorney cross-examined him as to such previous convictions, but defense counsel did not object to such cross-examination until later in the trial, and the trial court then struck such cross-examination and instructed the jury to disregard the testimony and further instructed that previous convictions might be considered by the jury only for the purpose of enabling them to determine the credibility of such defendant as a witness, no prejudicial error was committed. State v. Kopacka, 260 W 505, 50 NW (2d) 917.

A minor witness cannot be impeached by the introduction of his juvenile court record, since juvenile court proceedings do not result in a conviction of crime. Banas v. State, 34 W (2d) 468, 149 NW (2d) 571. See also Deja v. State, 43 W (2d) 488, 168 NW (2d) 856.

The purpose of 885.19, Stats. 1967, which permits proof of a defendant's prior convictions either by the record or by his own cross-examination, is not to show that he had a propensity for committing crimes, but goes to the issue of his credibility, for under the statute such a person is considered to be less credible than the ordinary witness. Liphford v. State, 43 W (2d) 367, 168 NW (2d) 549.

Impeachment of witness' credibility by proof of prior criminal conviction. Fowler, 1959 WLR 312.

885.20 History: R. S. 1878 s. 4074; Stats. 1898 s. 4074; Stats. 1925 s. 325.20; 1965 c. 66 s. 2; Stats. 1965 s. 885.20.

Revisers' Note, 1878: This section is taken from section 833 of the New York Code, 1877. It declares a just rule and one which practically prevails, whatever may be the statute.

A priest who has received an anonymous letter concerning a fire, which he read to the defendant, is not disqualified from testifying as to what defendant stated at such time. Colbert v. State, 125 W 423, 104 NW 61.

Answers by defendants to questions respecting the clergyman of their church by another clergyman of their faith who was

seeking information as to the situation in the congregation, which were given without knowledge of the purpose of the questions, were conditionally privileged and there was no presumption of malice. But the privilege did not extend to false or malicious statements. Kile v. Anderson, 182 W 467, 196 NW 762.

885.205 History: 1967 c. 258; Stats. 1967 s. 885.205.

885.21 History: R. S. 1839 p. 249 s. 71; R. S. 1849 c. 98 s. 75; R. S. 1858 c. 137 s. 80; R. S. 1878 s. 4075; Stats. 1898 s. 4075; 1911 c. 322; 1911 c. 664 s. 44; 1913 c. 349; 1921 c. 122; Stats. 1925 s. 325.21; 1927 c. 334; 1961 c. 102; 1963 c. 339; 1965 c. 66 s. 2; 1965 c. 333; Stats. 1965 s. 885.21.

The statute makes the privilege that of the patient, and the physician can neither be compelled nor allowed to disclose the information he has obtained against the will or without the patient's consent. Boyle v. Northwestern M. R. Asso. 95 W 312, 70 NW 351; Kenyon v. Mondovi, 98 W 50, 73 NW 314.

All facts are privileged which it is necessary for a physician to know in order that he may treat his patient intelligently. Kenyon v. Mondovi, 98 W 50, 73 NW 314.

It is error to allow a physician who treated a person after an accident to testify to what was disclosed to him and what he discovered by an examination which was made for the purpose of prescribing. Shafer v. Eau Claire, 105 W 239, 81 NW 409.

A physician who is called in by the regular physician and who is present at the examination of a patient but takes no part and does not prescribe is precluded from testifying. Green v. Nebagamain, 113 W 508, 89 NW 520.

Testimony of a physician who treated the decedent is inadmissible on a contest in the probate of a will where such testimony is based on information obtained by such treatment. Will of Hunt, 122 W 460, 100 NW 874.

A physician who signed a deed as a witness is competent and may testify as to the mental competency of the grantor, where the questions did not involve disclosure of any communications received by him while attending as a physician. Boyle v. Robinson, 129 W 567, 109 NW 623.

A physician employed by a street railway company who attends a person injured is incompetent to testify as to information received by him. The giving of testimony by the plaintiff as to her injuries did not operate as a waiver. Cohodes v. Menominee & M. L. & T. Co. 140 W 308, 135 NW 879.

In order to prevent a physician from testifying it must appear that the information was acquired while the physician was attending the patient in his professional capacity and that it was necessary in order to enable the physician to prescribe. Smits v. State, 145 W 601, 130 NW 525.

In an action to recover damages for causing the death of a person, the record of his examinations by the superintendent of a sanitarium, containing information obtained for the purpose of treating him, was properly excluded. Mehegan v. Faber, 158 W 645, 149 NW 397.

In a personal injury action a physician who treated the plaintiff after the injury was properly not permitted to state whether he treated the plaintiff at that time for hernia or rupture, or whether the plaintiff complained to him of hernia or rupture. Dreyfus v. Milwaukee E. R. & L. Co. 161 W 524, 154 NW 840.

An objection to allowing a doctor to testify what a patient had said when first calling upon him for treatment was sustained. Then the patient was examined to show that the visit was for treatment and not with a view of using the doctor as a witness. Then the latter was recalled and gave the testimony he was not permitted to give when previously interrogated, no objection being then interposed. That was not error because the particular question was not objected to. Glasheen v. Wisconsin T., L., H. & P. Co. 165 W 24, 160 NW 1055.

Sec. 4075 does not exclude the testimony of a physician respecting an applicant for life insurance who consults the physician in order to procure a certificate of fitness for insurance; and collusion between the applicant and the physician constitutes a waiver of any privileges the former might otherwise have in this statute. McGinty v. Brotherhood of Ry. Trainmen, 166 W 83, 164 NW 249.

The examining physician at one of the state hospitals for the insane could not testify to the results of his examination of plaintiff's decedent at the time of his commitment to the hospital. No person other than the patient himself was authorized to waive the protection intended by the statute. Casson v. Schoenfeld, 166 W 401, 166 NW 23.

In an action on a life insurance policy the court properly refused to permit a physician to testify that he told insured's mother that her husband had cancer, the mother having testified that the physician had made no such statement; for the physician's knowledge in this respect was obtained in a confidential communication which the statutes prohibit him to reveal and such prohibition could be waived by none other than the husband. McGinty v. Brotherhood, etc. 169 W 366, 172 NW 714.

The privilege granted by the statute is the privilege of the patient, and when waived by him the physician cannot refuse to testify. Markham v. Hipke, 169 W 37, 171 NW 300; Angerstein v. Milwaukee M. Co. 169 W 502, 173 NW 215.

Where a doctor visited an injured woman upon the request of her attorneys, he could testify that he took the history of her ailment that she gave him into consideration, but could not testify to the facts she stated, except as to facts describing the existence of pain. Ogodzinski v. Gara, 173 W 371, 181 NW 227.

The statute should be liberally construed to effect its purpose, but not so strictly as to exclude the opinion of a physician as to the mental condition of a person based upon observation alone, during a given period, because the physician rendered professional services for that person at an earlier or later time. Will of Williams, 186 W 160, 202 NW 314.

The testimony of physicians who performed an autopsy is not barred. Borosich v. Metropolitan Life Ins. Co. 191 W 239, 210 NW 829.

Objections to the competency of the testimony of a physician, instead of to the competency of the physician to be a witness, will be considered on appeal where it appears that both the trial court and counsel were apprised of the statute relied upon and that the competency of the witness was squarely presented by the objection. The statute was enacted for the benefit of the patient, and prior to the amendment of 1927 such protection could not be waived by administrators, executors, or personal representatives of the patient, nor by a beneficiary under his insurance policy. In an action on an accident policy, upon the question whether the death was the result of an accident, the testimony of a physician who attended him is incompetent, the protection of the statute not having been impliedly waived by the insured by his act of taking out the policy and because of the possible need of such testimony. Maine v. Maryland Cas. Co. 172 W 350, 179 NW 754; Borosich v. Metropolitan Life Ins. Co. 191 W 239, 210 NW 829.

Where a party or his heirs waive the privilege attaching to the testimony of a physician who is favorable to his or their interest, the benefit of the privilege cannot be claimed as to a physician who also attended the patient and whose testimony would be adverse. Cretney v. Woodmen A. Co. 196 W 29, 219 NW 448.

The testimony of a physician concerning a diagnosis based in part upon statements made to him by the plaintiff with reference to her experience in the accident was properly admitted where the plaintiff during the trial testified fully to the facts which she had stated to her physician. Mader v. Boehm, 213 W 55, 250 NW 854.

Testimony of the personal physician of the deceased donor as to her physical condition was admissible against the objection of the state on the issue whether gifts made by her during her lifetime were made in contemplation of death, where such testimony was consented to by the executor of her estate. Estate of Gallun, 215 W 314, 254 NW 542.

325.21 will not be extended beyond its letter, and it is inapplicable as to nurses and technicians. Prudential Ins. Co. v. Kozlowski, 226 W 641, 276 NW 300. See also Borosich v. Metropolitan Life Ins. Co. 191 W 239, 210 NW 829.

Statements made by a defendant charged with criminal offenses to a physician appointed by the trial court on application of defendant's counsel to examine and report whether the defendant was insane at the time of the trial were properly required by the court to be disclosed. Simecek v. State, 243 W 439, 10 NW (2d) 161.

Where a testator requests a physician to become a witness to his will, the testator thereby waives any privilege which would otherwise exist between him and his physician, and in such case 325.21 does not render the physician incompetent to testify to the execution of the will and the condition of the patient. Estate of Peterson, 250 W 158, 26 NW (2d) 553.

In 325.21, prohibiting a physician from testifying as to information acquired professionally from a patient, the words "personal representative" mean the executor or administrator of the deceased, so that in a will case such consent cannot be given by the father of the deceased as the sole heir of the deceased. Will of King, 251 W 269, 29 NW (2d) 69.

325.21 did not render a physician incompetent to testify in a prosecution for drunken driving as to information acquired in examining the defendant, at the request of police officers after the defendant's arrest, to determine whether the defendant was intoxicated and not for the purpose of treatment. Racine v. Woiteshek, 251 W 404, 29 NW (2d) 752.

A special administrator is the personal representative of the decedent and may waive the privilege so as to permit a physician to testify in a will case as to the decedent's mental capacity to make a will. Will of Bernhard, 253 W 521, 34 NW (2d) 664.

See note to 269.57, on scope of inspection, citing Leusink v. O'Donnell, 255 W 627, 39 NW (2d) 675.

The decedent's attending physician, who was a witness to a note payable to a claimant who had worked on decedent's farm and took part in the transaction resulting in its execution, was competent to testify concerning the transaction, so far as his testimony related to information not acquired by him in a professional character to enable him professionally to serve such patient. Kirkpatrick v. Milks, 257 W 549, 44 NW (2d) 574.

See note to 269.57, on scope of inspection, citing Thompson v. Roberts, 269 W 472, 69 NW (2d) 482.

Where a physician, with the consent of the party, took a blood sample which the coroner wanted taken for the purpose of having the same examined for alcoholic content, and the physician testified that it was not necessary for him to take the sample in order to treat the party as a patient, and the taking of the sample was completed before he treated the injuries of the party, the physician was not incompetent to testify as to matters relating to the taking of the sample. Schwartz v. Schneuriger, 269 W 535, 69 NW (2d) 756.

Whether it was error for the trial court to hold, on the ground of privileged communications between patient and physician, that a physician was forbidden to disclose an alleged talk with the testator which may have related to the disposition of the testator's estate, will not be decided by the supreme court in the absence of an offer of proof thereon below. Will of Ganchoff, 12 W (2d) 503, 107 NW (2d) 474.

See note to 269.57, on scope of inspection, citing Alexander v. Farmers Mut. Auto. Ins. Co. 25 W (2d) 623, 131 NW (2d) 373.

A complaint against a doctor, based on breach of privilege, which alleged that he relayed confidential information without the consent of the plaintiff contrary to 885.21, Stats. 1965, and diagnosed the plaintiff's "illness" as being drunk when he was not drunk, was, as the trial court properly ruled, legally insufficient, in that it did not spell out a cause of action under 885.21, which constitutes a rule of evidence, giving rise to no actionable

claim. Dick v. Shawano Municipal Hospital, 43 W (2d) 430, 168 NW (2d) 824.

In determining whether a doctor's acts and revelations of things learned and his use of specimens obtained from his patients while in his care were within or without the privilege of the statute, the court has a broad discretion as to the extent of the cross-examination of the doctor. Richter v. Hoglund, 132 F (2d) 748.

Information obtained by a physician who is local health officer in his capacity as such officer in making examination under 143.07 (2) is not privileged. 28 Atty. Gen. 307.

Records of patients at a state mental hospital may not be divulged to anyone without the consent of the patient, or, if he is still under disability, his guardian or, in the case of a minor, his parent. 35 Atty. Gen. 116.

A physician or other person connected with a state mental institution is not precluded by 325.21, Stats. 1947, from testifying as to the mental condition of a person detained for observation under 51.03 or 51.04, although the superintendent of Mendota or Winnebago hospital may refuse to obey a subpoena except as provided in 51.16 (2). 37 Atty. Gen. 282.

It is proper for the superintendent of the Winnebago state hospital to release as much information as is necessary to an insurance company to establish proof of loss and meet the requirements of a hospitalization policy, upon the consent of the beneficiary. 39 Atty. Gen. 346.

Restrictions on the scope of privileged communications between patient, physician and medical assistants. 22 MLR 211.

Waiver of the physician-patient privilege in personal injury litigation. Hogan, 52 MLR 75.

Attorneys and physicians, privileged communications. Platz, 1939 WLR 339.

885.22 History: R. S. 1878 s. 4076; Stats. 1898 s. 4076; Stats. 1925 s. 325.22; 1927 c. 523 s. 19; 1965 c. 66 s. 2; Stats. 1965 s. 885.22.

Revisers' Note, 1878: Section 835, New York Code, 1877. This section is included because it may be necessary to declare it in order, to prevent the declaration that a party may be a witness except in the specified cases, from overriding in some instances this settled rule of public policy.

Revisor's Note, 1927: At present, the statute fails to express important and well established exceptions to this rule of privilege to clients. It seems eminently proper that the statute should state the entire rule relating to this matter, including the exceptions. At present the exceptions are to be found in the decisions of the courts. The amendment is here expressed in the language of Justice Dodge in Koeber v. Somers, 108 W 497, 84 NW 991, near the bottom of page 507. [Bill 10-S, s. 19]

An attorney cannot be compelled to disclose, at the instance of a third person, any matters which come to his knowledge in consequence of his employment as such, even though such business has no reference to legal proceedings. Dudley v. Beck, 3 W 274.

In order to give the privilege to a party's disclosures they must be made to the attorney acting in the character of a legal adviser. If made to a nonprofessional person employed to assist an attorney at a trial they are not privileged. Brayton v. Chase, 3 W 456.

An attorney is competent to testify to fraud in a conveyance, when neither party retained him, but he had previously been employed to draw writings for each of them, was not paid for his advice as to the deed and expected to charge nothing. Dunn v. Amos, 14 W 106.

An attorney is competent to testify as to who owned the note in suit when he sold it to the plaintiff, the payee not being a party, and the question not calling for any communication from the plaintiff to the attorney. De Witt v. Perkins, 22 W 473.

Where a party makes an admission to an attorney respecting a note which the latter holds for collection against such party and subsequently employs such attorney in reference to a matter entirely disconnected with said note, such admission is not privileged. Plano M. Co. v. Frawley, 68 W 577, 32 NW 768.

In a divorce suit the plaintiff testified that he did not know the whereabouts of his wife. After divorce granted the wife instituted proceedings to have the decree set aside and for that purpose delivered to her attorney a number of letters to her from her husband written before and after the commencement of the divorce suit. In the prosecution against the husband for perjury the wife's attorney, without her consent and against her protest, was permitted to put in evidence the date and place from which each letter appeared to have been written, the address to the wife, and the signature of the husband, together with the envelope and postmarks and address thereon. The admission of such parts of letters was error, because they were confidential communications between husband and wife, and because they were communications made by a client to an attorney. Selden v. State, 74 W 271, 42 NW 218.

In order to entitle a client to the privilege under sec. 4076, Stats. 1898, it is not essential that a fee should have been paid or that there should have been an actual retainer. Bruley v. Garvin, 105 W 625, 81 NW 1038.

Where a client gives an attorney authority to act as his agent in making a contract with a third person, he may testify as to the giving of such authority. Koeber v. Somers, 108 W 497, 84 NW 991.

A person who procures his attorney to sign as subscribing witness an instrument setting out an agreement or transaction between such person and a third party, in the making out of which and reduction thereof to writing such attorney acted in his professional capacity, does not waive his privilege. Where there are several clients all must join in waiving the privilege before any disclosure can be made. Herman v. Schlesinger, 114 W 382, 90 NW 460.

Where an attorney drew a deed and the agreement to pay certain sums in consideration thereof and signed the papers as a witness, he was competent to testify as to the mental competency of the grantor. Boyle v. Robinson, 129 W 567, 109 NW 623.

Testimony of an attorney in violation of sec. 4076 will be disregarded by the supreme court on appeal and that court will assume that the trial court also disregarded it. Beilfuss v. Dinnauer, 174 W 507, 183 NW 700.

A letter by an administrator of an estate to his attorney concerning an inventory was not privileged, as the attorney was acting in a semipublic capacity, it being his duty to serve the estate and court, as well as the administrator. Estate of Hoehl, 181 W 190, 193 NW 514.

An attorney of a testatrix was incompetent to testify as to reasons given him by her for proposed changes in her will. Will of Cramer, 183 W 525, 198 NW 386.

A lawyer who had previously represented testatrix, and who had a conversation with her about the disposal of her property and gave her advice concerning the same, is incompetent to testify to statements made during such conversation. The relation of attorney and client does not depend on the charge made for the services or the payment thereof by the client. When one calls on an attorney for advice as to the disposition of his property, and the attorney gives such advice, it will be presumed that the relation of attorney and client existed. Will of Mangan, 185 W 328, 200 NW 386.

An attorney, consulted by persons making mutual wills, may testify as to the mutual agreement in a suit to enforce the mutual agreement that the survivor's property should go to plaintiff. Allen v. Ross, 199 W 162, 225 NW 831.

Statements by a donor to an attorney, acting for both donor and donee, made in the presence of the donee, were admissible in evidence in an action by the donor to recover the gift. Johnson v. Andreassen, 227 W 415, 278 NW 877.

Where an insured and his automobile liability insurer each consented that the same attorney should represent them both in the defense of the action, each waived the privilege of the statute, as to the attorney's reporting his communications to the other whenever those communications affected the interests of the other, and each waived it as to the attorney's testifying to such communications. Hoffman v. Labutzke, 233 W 365, 289 NW 652.

Testimony of an attorney, although received without objection, is incompetent if it relates to a communication embraced within 325.22, Stats. 1945. Testimony of an attorney as to a statement made to him by the testatrix's husband in the presence of the testatrix, bearing on the testatrix's intention in destroying her will, was not incompetent as a communication within 325.22 when made on the occasion of a social visit and not made in the course of the attorney's professional employment. Estate of Callahan, 251 W 247, 29 NW (2d) 352.

Where all the details to which an attorney who was the scrivener and a witness to the will testified, which by any possibility might be considered as not admissible, were brought out by the objectors to the will on cross-examination, the objectors cannot complain on appeal that the attorney's testimony should be stricken because he was incompetent to testify as to communications between attorney and client. Will of Schultz, 254 W 490, 36 NW (2d) 698.

Even testimony received without objection is incompetent if it relates to a communication embraced within 325.22, but an attorney who draws a will is not barred from testifying, as to observations, opinion as to sanity, and the basis therefor, and circumstances, directions, and any other matters made known to him for the purpose of being communicated to another or being made public. Will of Williams, 256 W 338, 41 NW (2d) 191.

When litigation arises between an attorney and client and the disclosure of privileged communications becomes necessary to protect the attorney's rights, the attorney is released from those obligations of secrecy which the law places on him, but only to the extent that it is necessary to disclose such communications for his own protection. State v. Markey, 259 W 527, 49 NW (2d) 437.

Where an attorney, who had drawn the last will as well as several previous wills of a testator, signed the last will as well as the previous ones as an attesting witness, the privilege must be deemed to have been waived by the testator. The attorney should be required to testify to any relevant and material matter regarding such will, including any former wills in his possession. Estate of Landauer, 261 W 314, 52 NW (2d) 890, 53 NW (2d) 627.

If former wills and codicils had been found among the papers of a testatrix, which were in her possession at the time of her death, such wills and codicils would be admissible in evidence in proceedings in her estate if their contents were otherwise material or relevant to the issue of the controversy being tried, irrespective of the coincidence that the executor who took over the custody of such instruments after the death of the testatrix was an attorney and they had been drafted either by him or by one of his law partners since, under such a state of facts, the question of whether they constituted privileged communications between client and attorney would not be presented. Where it appeared that all of various former wills and codicils of the testatrix, drafted either by a certain attorney or by one of his law partners, were in the possession of himself and his law partners as the testatrix's attorneys, the fact that they had been drafted by him or by one of his law partners would not be material on the issue of whether such former wills and codicils in the possession of himself, or his law firm, constituted privileged communications on the part of the testatrix, since the privilege extends to written instruments held by counsel or attorneys on behalf of clients. Estate of Smith, 263 W 441, 57 NW (2d) 727.

325.22 as amended by ch. 523, Laws 1927, is a reenactment of the common law. The reasons of the rule apply in cases of conflict between the client or those claiming under him, and third persons, although not applying in cases of testamentary dispositions by the client as between different parties, all of whom claim under him. Where, in proceedings brought in the estate of a testatrix by the nieces of the predeceased husband of the testatrix, they claimed half of the property which the testatrix had received from the husband by his will, but their claim was based on the testatrix's breach of an alleged con-

tract made between the husband and her under which he bequeathed practically all of his estate to her in return for her promise to bequeath half thereof to these claimants, they were not claiming under or through the testatrix but were asserting an adverse claim against her estate represented by the executor, who did claim under her, so that the rule of privileged communications between client and attorney applied to former wills and codicils of the testatrix in the possession of an attorney as her attorney at the time of her death and not in his possession in his capacity as executor, and he was not required to produce them, or to testify to their contents, including whether he was named as executor in such former wills and codicils. (Estate of Landauer, 261 W 314, distinguished.) Estate of Smith, 263 W 441, 57 NW (2d) 727.

Prior wills of a testator, in the possession of an attorney who had drafted them, were the testator's property and, on the attorney's death, it was the duty of his executor to return them to the testator's executors and, in proceedings on objections made to the probate of a later will, they were admissible so far as material or relevant to the controversy being tried. Estate of Landauer, 264 W 456, 59 NW (2d) 676.

The rule of privilege of communications between attorney and client does not apply in litigation, after the client's death, between parties all of whom claim under the client, so that, where the controversy is to determine who shall take the property of the deceased person, and where both parties claim under him, neither can set up a claim of privilege against the other as regards communications of the deceased with his attorney. Estate of Brzowsky, 267 W 510, 66 NW (2d) 145, 67 NW (2d) 384.

325.22 does not preclude an attorney from testifying as to transactions had with or communications made to him by third persons even though those matters came to his knowledge in consequence of his retainer as an attorney. Tomek v. Farmers Mut. Auto. Ins. Co. 268 W 566, 68 NW (2d) 573.

In an action by an insurer against a codefendant to recover the amount paid in settlement of a claim, plus attorney fees, an opinion of the attorneys was privileged, and the disclosure of it was not shown to be necessary to a defense of the issue involved, which was whether the fees were reasonable. Continental Cas. Co. v. Pogorzelski, 275 W 350, 82 NW (2d) 183.

See State ex rel. Reynolds v. Circuit Court, 15 W (2d) 311, 112 NW (2d) 686, 113 NW (2d) 537, as to the privilege of expert witnesses.

See note to 269.57, on scope of inspection, citing Jacobi v. Podevels, 23 W (2d) 152, 127 NW (2d) 73.

A disclosure made by the attorney that his clients had given their daughter permission to use the vehicle which she in turn had delegated to the driver did not necessarily violate 325.22, since it would appear that the disclosures he received were not antagonistic to the purpose for which he was employed, i. e., to prosecute a claim for injuries which their daughter received while an occupant of the accident vehicle. Foryan v. Firemen's Fund Ins. Co. 27 W (2d) 133, 133 NW (2d) 724.

885.22, Stats. 1965, embodies the rule that communications from a client to his attorney, and the attorney's advice to his client in the course of the professional relationship is privileged from disclosure unless the privilege is waived by the client or unless disclosure is required for the protection of the attorney, the client, or the client's interests. State ex rel. Dudek v. Circuit Court, 34 W (2d) 559, 150 NW (2d) 387.

Defendant could not validly claim breach of a privileged communication because his attorney, with whom he had conferred after being apprehended for drunk driving, indicated where the body could be found, in light of testimony by the attorney that the information was received from defendant with intent that it be communicated to the authorities. State v. Dombrowski, 44 W (2d) 486, 171 NW (2d) 349.

A client's communication to his attorney in pursuit of a criminal or fraudulent act to be performed is not privileged in any judicial proceeding. In re Sawyer's Petition, 229 F (2d) 805.

An attorney who swears his client to an answer in a case can testify to the fact that such answer was sworn to by his client before him as a notary. 1 Atty. Gen. 397.

Attorneys and physicians, privileged communications. Platz, 1939 WLR 339.

885.23 History: 1935 c. 351; Stats. 1935 s. 325.23; 1957 c. 180; 1965 c. 66 s. 2; Stats. 1965 s. 885.23.

Where the issue of the paternity of an unborn child is raised in a divorce action and the party raising such issue desires to have blood tests made, the trial court may properly adjourn the action on its own motion until after the birth of the child, but it is the duty of the party raising such issue to make the motion; and where the child is born after judgment of divorce has been entered, the proper procedure is to move timely to open the judgment for the purpose of obtaining an order for blood tests and presenting the results of the tests. Limberg v. Limberg, 10 W (2d) 63, 102 NW (2d) 103.

The statute gives express recognition to the validity of blood tests excluding alleged parent-child relationship. Suey Fong v. Dulles, 169 F Supp. 537.

885.235 History: 1949 c. 534; Stats. 1949 s. 85.13 (2); 1953 c. 340; Stats. 1953 s. 85.13 (4); 1955 c. 510; Stats. 1955 s. 325.235; 1965 c. 66 s. 2; Stats. 1965 s. 885.235; 1969 c. 383.

On prosecutions (self-incrimination) see notes to sec. 8, art. I; and on searches and seizures see notes to sec. 11, art. I.

In civil actions, expert testimony based on the percentage of alcohol in the blood is admissible to determine intoxication, and in civil actions arising out of automobile collisions, where the allegedly intoxicated person was not arrested on any charge, the results of the blood tests are not rendered inadmissible by the fact that the tests were not taken within the time limited by 85.13 (4), Stats. 1953. Testimony of witnesses that

they smelled intoxicating liquor on the breath of a party after the collision, together with evidence as to the party's method of driving before the collision, was sufficient corroborating physical evidence of intoxication, if such corroborating evidence was necessary to the admissibility of the results of the blood tests. Schwartz v. Schneuriger, 269 W 535, 69 NW (2d) 756.

See note to 885.13, citing Barron v. Covey, 271 W 10, 72 NW (2d) 387.

Where, in an action for injuries suffered in an automobile collision, evidence of the chemical analysis of a specimen of urine obtained from one motorist was offered and considered under 325.235, testimony as to his erratic driving just before the collision, together with testimony that at the hospital after the accident his speech was slurred and he was slow in reacting, constituted sufficient corroborating physical evidence of his having been under the influence of intoxicants at the time of the collision. Martell v. Klingman, 11 W (2d) 296, 105 NW (2d) 446.

Although 325.235 specifically provides that blood tests for intoxication have certain evidentiary materiality, such tests are not in and of themselves conclusive but constitute certain elements of proof to be weighed with other facts and circumstances by the jury in determining whether intoxication existed, and whether it was sufficient to have the effect of minimizing the abilities of the subjects of the test to exercise due care. Baird v. Cornelius, 12 W (2d) 284, 107 NW (2d) 278.

Testimony that defendant's "blood alcohol reading was seventeen-hundredths per cent" was not sufficient, since the statutory test specifies that the percentage must be by weight. State v. Rodell, 17 W (2d) 451, 117 NW (2d) 278.

An expert witness is not required to interpret the results of the enumerated chemical tests, but a nonexpert cannot explain or interpret them. A nonexpert can state the reading he saw on the machine. A defendant may challenge the experience and training of the operator and the procedure used in conducting the test, as well as inspect the machine. West Allis v. Rainey, 36 W (2d) 489, 153 NW (2d) 514.

885.24 History: 1860 c. 329 s. 1, 2; 1876 c. 190; R. S. 1878 s. 4078; Stats. 1898 s. 4078; 1901 c. 85 s. 1; Supl. 1906 s. 4078; Stats. 1925 s. 325.24; 1965 c. 66 s. 2; Stats. 1965 s. 885.24.

On prosecutions (self-incrimination) see notes to sec. 8, art. I.

Minutes of a grand jury are admissible to show the defendant's immunity from prosecution under sec. 4078, Stats. 1898, as amended. Havenor v. State, 125 W 444, 104 NW 116.

The minutes of the clerk of a grand jury are not a public record and are not open to inspection by one accused of crime for the purpose of allowing him to prepare for the trial of his case. The stenographic reports of the proceedings are merely memoranda to refresh the recollection of the jurors. Havenor v. State, 125 W 444, 104 NW 116.

Sec. 4078 takes away the privilege against self-incrimination and also the professional privilege of a physician. State v. Law, 150 W 313, 136 NW 803.

A person who testified without objection at an investigation conducted by a committee of the county board was not entitled to claim immunity from prosecution for embezzlement and making false entries, arising out of transactions so testified to and an audit of the books of account, since the statute merely creates an immunity coextensive with the constitutional privilege against self-incrimination, and, so considered, requires a claim of the privilege as a condition to immunity. State v. Davidson, 242 W 406, 8 NW (2d) 275.

The immunity from testifying is applicable only when the defendant claims his constitutional privilege against self-incrimination, and the privilege was lost where as here defendant failed to claim his privilege. Wolke v. Fleming, 24 W (2d) 606, 129 NW (2d) 841.

885.25 History: 1905 c. 447 s. 1, 2, 3; Supl. 1906 s. 4078a, 4078b, 4078c; 1911 c. 663 s. 450; Stats. 1925 s. 325.25; 1927 c. 296; 1965 c. 66 s. 2; Stats. 1965 s. 885.25.

885.27 History: R. S. 1849 c. 98 s. 79; 1852 c. 197 s. 1; R. S. 1858 c. 137 s. 84; R. S. 1878 s. 4079; Stats. 1898 s. 4079; Stats. 1925 s. 325.27; 1927 c. 523 s. 23; 1965 c. 66 s. 2; Stats. 1965 s. 885.27.

885.28 History: 1911 c. 123; Stats. 1911 s. 4079m; Stats. 1925 s. 325.28; 1927 c. 523 s. 24; 1959 c. 449; 1959 c. 660 s. 77; 1965 c. 66 s. 2; Stats. 1965 s. 885.28.

In an action for a personal injury, statements made by an injured person immediately after the accident, or while leaving the scene of the accident and within 100 feet thereof, to the effect that it was his own fault are admissible as part of the res gestae. Dixon v. Russell, 156 W 161, 145 NW 761.

It was not the purpose of ch. 123, Laws 1911, to forbid the making either orally or in writing of such a settlement with an injured party within 72 hours after the injury as would be, when fully executed, a defense to an action thereafter brought for such injury. Its purpose was to make written statements of facts against interest signed within that time by the injured person unavailable as evidence against him in any action he might thereafter bring. Buckland v. Chicago, St. P., M. & O. R. Co. 160 W 484, 152 NW 289.

An injured truck driver's answer, made 30 minutes after the collision causing an automobile driver's death, to the question why he did not keep on his side of the road was admissible in an action by the widow against him for damages. Zastrow v. Schaumburger, 210 W 116, 245 NW 202.

325.28 is not an absolute bar to the admissibility of all statements made by the injured party within such time, even though not admissible as part of the res gestae, the statute is intended to apply to and cover statements procured for purposes of defense, for use as evidence against the injured party in any action he might thereafter bring, and procured so shortly after his injury that his physical and mental condition then might be such as to prevent him from properly safeguarding his rights. Statements as to how the accident occurred, made by plaintiff at the scene of the accident about 45 minutes

after its occurrence, to a traffic officer who was making an investigation thereof in the line of his duty, even though not admissible in evidence as part of the res gestae, were not barred, nor were statements voluntarily made by him within 72 hours of the accident to a disinterested person barred. Kirsch v. Pomisal, 236 W 264, 294 NW 865.

If it had been conclusively shown that the injuries received by the plaintiff or that a drug administered to him prior to the giving of the statement had such an effect on him that he could not intelligently answer the questions asked of him and protect his rights, then such statement would not be receivable in evidence no matter to whom made. Musha v. United States F. & G. Co. 10 W (2d) 176, 102 NW (2d) 243.

Admission of statements made by plaintiff to an investigating officer at the scene of the accident was not error, for 885.28, Stats. 1961, which precludes admission in evidence of a statement in an action for damages caused by personal injury signed by the injured person within 72 hours of the time the injury was sustained, unless part of the res gestae, is not applicable to police officers investigating an accident. (Keplin v. Hardware Mut. Cas. Co. 24 W (2d) 319, cited.) Hack v. State Farm Mut. Cas. Co. 37 W (2d) 1, 154 NW (2d) 320.

885.29 History: 1917 c. 529; Stats. 1917 s. 4079n; Stats. 1925 s. 325.29; 1927 c. 523 s. 25; 1965 c. 66 s. 2; Stats. 1965 s. 885.29.

885.30 History: R. S. 1849 c. 99 s. 5; R. S. 1858 c. 137 s. 112; R. S. 1878 s. 4085; Stats. 1898 s. 4085; Stats. 1925 s. 325.30; 1927 c. 523 s. 26; 1965 c. 66 s. 2; Stats. 1965 s. 885.30.

A child who has sufficient mental capacity, in the opinion of the trial court, and who comprehends the difference between truth and falsehood and who solemnly promises to tell the truth, may be permitted to testify without being formally sworn. De Groot v. Van Akkeren, 225 W 105, 273 NW 725.

The trial court's examination of a witness under oath to ascertain her capacity to testify was correct procedure and in connection therewith the court's refusal to receive proof which might impeach the credibility of such witness, but which would have been of no aid to the court in determining the question at issue, was not error. State v. Wrosch, 262 W 104, 53 NW (2d) 779.

A witness may be competent to testify although in some respects mentally unsound or impaired, but where so impaired that he does not understand the obligation of an oath or has no respect for the truth, he is not competent. Short of such substantial total impairment, an infirmity goes to credibility of the testimony and not competency of the witness. Competency has 2 aspects, (1) the mental capacity to understand the nature of the questions and to form and communicate intelligent answers thereto, and (2) the moral responsibility to speak the truth, which is the essence of the nature and obligation of an oath. The determination of competency of a witness is for the trial court, which determination will not be reversed unless clearly and manifestly wrong. State v. Schweider, 5 W (2d) 627, 94 NW (2d) 154.

The true test of a child's competency to testify is his ability to receive accurate impressions of the facts to which his testimony relates and to relate truly the impressions received; and if he has this understanding and intelligence and appreciates the obligation to speak the truth, he is competent. Musil v. Barron Electrical Co-operative, 13 W (2d) 342, 108 NW (2d) 652.

885.31 History: 1909 c. 107; 1911 c. 65; Stats. 1911 s. 4141a; Stats. 1925 s. 325.31; 1927 c. 523 s. 27; 1965 c. 66 s. 2; Stats. 1965 s. 885.31.

The testimony of a witness, then absent from the state, which he had given upon the first trial was admissible, where the issues were the same at both trials. Szeliwicki v. Connor L. & L. Co. 163 W 20, 156 NW 622.

The "other action or proceeding" in which the testimony of a deceased witness or witness who is absent from the state is admissible is not limited to actions or proceedings in which the parties are the same as in the action wherein the testimony was taken, if the party against whom such testimony is offered had a full and adequate opportunity to cross-examine the witness on substantially the same issue and had the same interest and motive to cross-examine that he has on the pending trial. (Pfeiffer v. Chicago & M. E. R. Co. 163 W 317, 156 NW 952, overruled.) Illinois S. Co. v. Muza, 164 W 247, 159 NW 908.

The testimony of a witness on a trial in justice's court was admissible upon the trial of the case on appeal to the circuit court, if at the time of the later trial he was out of the state. The question whether or not the witness was out of the state was a fact for the circuit court to decide. Lambrecht v. Holsaple, 164 W 465, 160 NW 168.

Where a witness examined in a contested will case went to France before a retrial of the case, his testimony might be introduced on such retrial. Will of Bilty, 171 W 20, 176 NW 220.

Evidence given by a witness on a former trial was not receivable in evidence on a subsequent trial of a similar action in the absence of evidence that the presence of such witness at the subsequent trial could not be procured. Schofield v. Rideout, 233 W 550, 290 NW 155.

Where a witness testified on the issue of whether the plaintiff was a creditor of a decedent in proceedings in county court on his claim against the decedent's estate, the testimony of such witness, since deceased, was admissible on the same issue in a subsequent action by the same plaintiff to set aside as fraudulent a deed conveying all of the decedent's property to himself and wife as joint tenants, the defendant wife, as administratrix of her husband's estate, having had opportunity to cross-examine such witness on the first trial. Zimdars v. Zimdars, 236 W 484, 295 NW 675.

Where the county court admitted testimony as to the contents of the alleged subsequent will over proper objection to admission at the time, but reserved to the proponents of the former will the right to cross-examine at a resumed hearing to be held after the subsequent will was offered for probate and the proceedings consolidated, and where, by rea-

son of the death of the witness during the intervening period, the exercise of the reserved right of cross-examination by the parties entitled thereto was prevented, without any fault on their part, the testimony in question was inadmissible. Estate of Sweeney, 248 W 607, 22 NW (2d) 657, 24 NW (2d) 406.

Testimony given by the testator, while under guardianship, in proceedings involving a controversy between the same parties over certain deeds executed by the testator, should have been received in evidence as having a definite bearing on the issues involved in the instant proceedings. Estate of Brzowsky, 267 W 510, 66 NW (2d) 145, 67 NW (2d) 384.

See note to sec. 7, art. I, on rights of accused (meet the witnesses), citing State v. La Fernier, 44 W (2d) 440, 171 NW (2d) 408.

To invoke 885.31, Stats. 1967, on a retrial, the state must show that the witness is absent from the state, that a good-faith attempt to secure his attendance has been made, and that the good-faith effort is in effect an affirmative showing that due diligence has been used to obtain the presence of the absent witness. State v. La Fernier, 44 W (2d) 440, 171 NW (2d) 408.

885.365 History: 1965 c. 506; Stats. 1965 s. 885.365; 1969 c. 427.

CHAPTER 887.

Depositions, Oaths and Affidavits.

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.

887.01 History: R. S. 1849 c. 99 s. 1; R. S. 1858 c. 137 s. 108; 1860 c. 125 s. 1; 1864 c. 79 s. 1; R. S. 1878 s. 4080, 4203; 1880 c. 9; 1883 c. 119; Ann. Stats. 1889 s. 2216a, 4080, 4203; 1893 c. 312 s. 20; Stats. 1898 s. 4080, 4203; 1901 c. 145 s. 1; Supl. 1906 s. 4080; 1921 c. 200; Stats. 1925 s. 326.01; 1927 c. 523 s. 39; 1933 c. 253; 1933 c. 454 s. 11; 1943 c. 289; Stats. 1943 s. 326.01, 329.13; 1951 c. 703 s. 14; Stats. 1951 s. 326.01; 1953 c. 61 s. 136; 1961 c. 495; 1965 c. 66 s. 2; 1965 c. 617; Stats. 1965 s. 887.01; 1967 c. 276 s. 39.

Revisor's Note, 1927: (1) Verbal changes in subsection (1) are made for the purpose of making plain that the power to administer the oath is as broad as the power to subpoena and hear witnesses. That is probably the law now.

(2) The language "or other proper certifying officer" is indefinite and no way is provided for arriving at certainty. Then there is a lack of precision as to both thought and expression in the language—"he believes the signature of such officer to be genuine." If a writing is the signature of an officer, it is necessarily genuine and nobody's belief about it is important. It is the written name that needs authentication. Our courts take judicial notice of the public acts of other states and of the United States. Section 328.01. As a rule clerks of courts administer oaths. That makes obvious the reason for exempting his oaths, as are the notaries, from a further certification. [Bill 10-S, s. 39]

Affidavits made before an officer of another state must be authenticated as provided by sec. 4203, R. S. 1878. Sloane v. Anderson, 57 W 123, 13 NW 684.

If the verification to a complaint be made in another state and before an officer of such state a copy of the certificate required by sec. 4203, R. S. 1878, must be attached. Knowles v. Fritz, 58 W 216, 16 NW 621.

Witnesses on the trial of a charge against a city officer before the common council thereof may be sworn by the chairman of the committee of the whole appointed by the council to take evidence upon such charges. State ex rel. Starkweather v. Common Council, 90 W 612, 64 NW 304.

A certificate by a notary public of the verification before him of an accusation against a municipal officer created a presumption that the accusation was in fact sworn to, which could not be overcome by uncertain, unreliable and conflicting testimony to the contrary. State ex rel. Cleveland v. Common Council, 177 W 537, 188 NW 601.

887.02 History: R. S. 1849 c. 131 s. 39, 53; R. S. 1858 c. 133 s. 74; R. S. 1878 s. 2964; Stats. 1898 s. 2964; 1911 c. 537; Stats. 1911 s. 2964, 4080m; 1925 c. 4; Stats. 1925 s. 271.50, 326.02; 1927 c. 523 s. 40; Stats. 1927 s. 326.02; 1965 c. 66 ss. 2, 8; Stats. 1965 s. 887.02.

326.02 (2) does not prohibit charging of a fee for administering an oath under 5.05 (5) (b), Stats. 1937. 27 Atty. Gen. 187.

887.025 History: Sup. Ct. Order, 221 W vi; Stats. 1937 s. 326.025; Sup. Ct. Order, 236 W vi; Stats. 1941 s. 326.03; Sup. Ct. Order, 241 W vi; Stats. 1943 s. 326.025; 1965 c. 66 s. 2; Stats. 1965 s. 887.025.

887.03 History: R. S. 1849 c. 99 s. 6; R. S. 1858 c. 137 s. 113; R. S. 1878 s. 4081; Stats. 1898 s. 4081; Stats. 1925 s. 326.03; 1927 c. 523 s. 41; Sup. Ct. Order, 236 W vi; Sup. Ct. Order, 241 W vi; 1965 c. 66 s. 2; Stats. 1965 s. 887.03.

The record of a 7-year-old child's examination and her answers to the questions put to her both by the magistrate to determine her competency and by counsel to ascertain the facts connected with the collision, in which her companion was struck and killed by the defendant's car, sufficiently showed that she was capable of understanding the obligation to make truthful answers to questions asked, and in the circumstances the receiving of her testimony in the preliminary examination, without administering an oath, was not error. State ex rel. Shields v. Portman, 242 W 5, 6 NW (2d) 713.

Although the first sentence in affidavits ordinarily recites that the affiant is swearing under oath, the absence of such recital does not necessarily render an affidavit fatally defective; likewise as to the jurat's failure to specify the notary's venue; and the statement in the jurat, "sworn to before me," in the absence of proof to the contrary, necessarily presumes that the notary duly administered the proper oath to the affiant. Dunlavy v. Dairyland Mut. Ins. Co. 21 W (2d) 105, 124 NW (2d) 73.