TITLE XXX.

Provisions Common to Actions and Proceedings in All Courts.

CHAPTER 325.

WITNESSES AND ORAL TESTIMONY.

325.01 Subpœnas, who may issue. The subpœna need not be sealed, and may be signed and issued as follows:

(1) By any judge or clerk of a court or court commissioner or justice of the peace, or police justice within the territory in which such officer or the court of which he is such officer has jurisdiction, to require the attendance of witnesses and their production of lawful instruments of evidence in any action, matter or proceeding pending or to be examined into before any court, magistrate, officer, arbitrator, board, committee or other person authorized to take testimony in the state.

(2) By the attorney-general or any district attorney or person acting in his stead, to require the attendance of witnesses, in behalf of the state, in any court or before any magistrate and from any part of the state.

(3) By the chairman of any committee of any county board, town board, common council or village board to investigate the affairs of the county, town, city or village, or the official conduct or affairs of any officer thereof.

(4) By any arbitrator, coroner, board, commission, commissioner, examiner, committee, or other person authorized to take testimony, within their jurisdictions, to require the attendance of witnesses, and their production of documentary evidence before them, respectively, in any matter, proceeding or examination authorized by law; and likewise by the secretary of the state civil service commission, of the department of taxation, and of the state board of dental examiners, and by any agent of the state department of agriculture. [*1943 c. 20, 229*]

325.02 Form of subpœna. (1) The subpœna may be in the following form:

SUBPŒNA.

STATE OF WISCONSIN, } ss.
.... County. }

THE STATE OF WISCONSIN, to ....:

You are hereby required to appear before ...., a justice of the peace in and for said county, at his office in the town of .... (or before ...., designating the court, officer or person and place of appearance), on the .... day of ...., at .... o'clock in the .... noon of said day, to give evidence in a certain cause then and there to be tried between ...., plaintiff, and ...., defendant, on the part of the .... (or to give evidence in the matter [state sufficient to identify the matter or proceeding in which the evidence is to be given] then and there to be heard, on the part of ....).

Given under my hand this .... day of ...., 19...

....
(Give official title)

(2) For a subpœna duces tecum, the following or its equivalent may be added to the foregoing form (immediately before the attestation clause): and you are further required to bring with you the following papers and documents (describing them as accurately as possible).

Note: A subpoena duces tecum issued in connection with the proposed adverse examination is 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.

325.03 Service of subpœna. Any subpœna may be served by any person by exhibiting and reading it to the witness, or by giving him a copy thereof, or by leaving such copy at his abode.

325.04 Justice subpœna, served in adjoining county. A subpœna to require attendance before a justice of the peace may be served in a county adjoining that of the justice, and shall oblige such attendance of any witness, so served, not residing more than thirty miles from the office of such justice.

325.05 Witness' and interpreter's fees. (1) The fees of witnesses and interpreters shall be as follows:

(a) For attending before a justice of the peace, or any arbitrators or any board or committee thereof of any town, city or village, for witnesses two dollars for each day, for interpreters four dollars per day.

(b) For attending before any other court, officer, board or committee, for witnesses two dollars and fifty cents for each day, for interpreters four dollars per day.

(c) For traveling, at the rate of five cents per mile going and returning from his residence (if within the state); or, if without, from the point where he crosses the state boundary in coming to attend to the place of attendance, and returning by the usually traveled route between such points.

(2) A witness or interpreter shall be entitled to fees only for the time he shall be in actual and necessary attendance as such; and shall not be entitled to receive pay in more than one action or proceeding for the same attendance or travel on behalf of the same party. No person shall be entitled to fees as a witness or interpreter while attending court as an officer or juror; nor shall any attorney or counsel in any cause be allowed any fee as a witness or interpreter therein. [*1931 c. 40; 1933 c. 201*]

Note: 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 this section are not intended as compensation for testifying but to pay expenses of witness; and where 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 state if such fees are insufficient. He should not be removed from pay roll when so testifying. 30 Atty. Gen. 214.

325.06 Witness' fees, prepayment. (1) Except when subpœnaed on behalf of the state, no person shall be obliged to attend as a witness in any civil action, matter or proceeding unless his fees are paid or tendered to him for one day's attendance and for travel.

(2) No witness on behalf of the state in any civil action, matter or proceeding, or in any criminal action or proceeding, on behalf of either party, shall be entitled to any fee in advance, but shall be obliged to attend upon the service of a subpœna as therein lawfully required.

325.07 State witnesses in civil actions, how paid. Every witness on behalf of the state in any civil action or proceeding may file with the clerk of the court where the same is pending his affidavit of attendance and travel, and his fees shall, upon the certificate of such clerk, countersigned by the attorney-general, district attorney, or acting state's attorney, be paid out of the state treasury, and shall be charged to the legal expense appropriation to the attorney-general.

325.08 State witnesses in criminal cases, how paid. The fees of witnesses on the part of the state in every criminal action or proceeding, and of every person who is committed to jail in default of security for his appearance as a witness, shall be paid by the county in which the action or proceeding is had. The clerk of the court upon proof of his attendance, travel or confinement shall give each such witness or person a certificate of the number of days' attendance or confinement, the number of miles traveled, and the amount of compensation due him, which certificate shall be receipted for by such witness or person, and the county treasurer shall pay the amount thereof on surrender of the certificate.

325.09 Compensation of nonresident or poor witness. When any witness shall attend a court of record in behalf of the state, and it shall appear that he came from outside this state, or that he is poor, the court may order he be paid a specific reasonable sum for his expense and attendance, in lieu of his fees; and thereupon the clerk shall give a certifi-

cate for such sum, with a copy of such order affixed, and the same shall be paid as other court certificates are paid.

325.10 Witness for indigent defendant. Upon satisfactory proof of the inability of the defendant to procure the attendance of witnesses for his defense, the judge, court commissioner, or justice of the peace, in any criminal action or proceeding to be tried or heard before him, may direct such witnesses to be subpœnaed as he shall, upon the defendant's oath or affidavit, or that of his attorney, deem proper and necessary. And witnesses so subpœnaed shall be paid their fees in the manner that witnesses for the state therein are paid.

325.11 Disobedient witness. (1) DAMAGES RECOVERABLE. If any person obliged to attend as a witness shall fail to do so without any reasonable excuse, he shall be liable to the aggrieved party for all damages occasioned by such failure, to be recovered in an action.

(2) ATTENDANCE COMPELLED. Every court, in case of unexcused failure to appear before it, may issue an attachment to bring such witness before it for the contempt, and also to testify.

(3) PUNISHMENT IN COURTS. Inexcusable failure to attend any court of record shall be a contempt of the court, punishable by a fine not exceeding twenty dollars.

(4) SAME. Unexcused failure to attend a court not of record shall be a contempt, and the witness shall be fined all the costs of his apprehension, unless he shall show reasonable cause for his failure; in which case the party procuring him to be apprehended shall pay said costs.

(5) STRIKING OUT PLEADING. If any party to an action or proceeding shall unlawfully refuse or neglect to appear or testify or depose therein (either within or without the state), the court may, also, strike out his pleading, and give judgment against him as upon default or failure of proof.

325.12 Coercing witnesses before officers and boards. If any person shall, without reasonable excuse, fail to attend as a witness, or to testify as lawfully required before any arbitrator, coroner, board, commission, commissioner, examiner, committee, or other officer or person authorized to take, testimony, or to produce a book or paper which he was lawfully directed to bring, or to subscribe his deposition when correctly reduced to writing, any judge of a court of record or court commissioner in the county where the person was obliged to attend may, upon sworn proof of the facts, issue an attachment for him, and unless he shall purge the contempt and go and testify or do such other act as required by law, may commit him to close confinement in the county jail until he shall so testify or do such act, or be discharged according to law. The sheriff of the county shall execute the commitment.

325.13 Party may be witness, credibility. (1) No person shall be disqualified as a witness in any action or proceeding, civil or criminal, by reason of his interest therein; and every person shall, in every such case, be a competent witness, except as otherwise provided in this chapter. But his interest or connection may be shown to affect the credibility of the witness.

(2) In all criminal actions and proceedings the party charged shall, at his own request, but not otherwise, be a competent witness; but his refusal or omission to testify shall create no presumption against him or any other party thereto.

Note: Court should have promptly condemned district attorney's improper reference to defendant's failure to take witness stand, specifically instructed jury as to defendant's rights to take stand or not as he saw fit, and admonished jury to ignore remark, and simply sustaining objection to such unfair comment was not sufficient to counteract its prejudicial effect. State v. Jackson, 219 W 13, 261 NW 732.

325.14 Adverse examination at trial; deposition as evidence; rebuttal. (1) Any party or any person for whose immediate benefit any civil action or proceeding is prosecuted or defended, or his or its assignor, officer, agent or employe, or the person who was such officer, agent or employe at the time of the occurrence of the facts made the subject of the examination, may be examined upon the trial as if under cross-examination, at the instance of any adverse party. Any other party adverse in interest may then re-examine such witness as to all matters tending to explain or qualify testimony given by him and if he does not intend thereafter to make the witness his witness may ask him questions proper for the purpose of impeachment.

(2) The testimony so taken on the trial or pursuant to section 326.12 shall not conclude the party taking the same, but he shall be allowed to rebut or impeach the same. [*Supreme Court Order, effective Jan. 1, 1934*]

Note: Where a witness called adversely by the plaintiff indicate 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 re-examine 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 action for possessing a gambling device in violation of city ordinance, city had right to call defendant adversely as witness; 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.

325.15 Immunity. No person shall be excused from attending, testifying or producing books, papers, and documents before any court in a prosecution under section 348.486 on the ground or for the reason that the testimony or evidence required of him may tend to criminate him, or to subject him to a penalty or forfeiture. But no person who testifies or produces evidence in obedience to the command of the court in such prosecution shall be liable to any suit or prosecution, civil or criminal, for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence; provided, that no person shall be exempted from prosecution and punishment for perjury committed in so testifying.

325.16 Transactions with deceased or insane persons. No party or person in his own behalf or interest, and no person from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his title or sustains his liability to the cause of action from, through or under such deceased or insane person, or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his own behalf, introduce testimony of himself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates. And no stockholder, officer or trustee of a corporation in its behalf or interest, and no stockholder, officer or trustee of a corporation from, through or under whom a party derives his or its interest or title, shall be so examined, except as aforesaid.

Note: 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 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 the automobile driven by the deceased does not involve 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.

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

In action by 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 this section. 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 plaintiff'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 this section, 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 certain 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 or valid claim to 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 interest or title so as to be rendered incompetent, under this section, 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 by 325.16 as a "personal communication" with a deceased person through whom the defendant liability 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.

This section 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.

325.17 Transactions with deceased agent. No party, and no person from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with an agent of the adverse party or an agent of the person from, through or under whom such adverse party derives his interest or title, when such agent is dead or insane, or otherwise legally incompetent as a witness unless the opposite party shall first be examined or examine some other witness in his behalf in respect to some transaction or communication between such agent and such other party or person; or unless the testimony of such agent, at any time taken, be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates.

Note: 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 cash-

ier's authority. Markgraf v. Columbia Bank of Lodi, 203 W 429, 233 NW 782.

Evidence in action to remove cloud of laborer's lien from title to securities, deposited with corporation for which plaintiff constructed building addition, as to admission by defendant construction superintendent after death of plaintiff's agent that defendant had no profit-sharing contract with such agent held not to warrant admission of evidence of defendant's personal transactions with 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. In re Rahn's Estate, 230 W 108, 283 NW 285.

325.18 Husband and wife. A husband or wife shall be a competent witness for or against the other in all cases, except that neither one without the consent of the other, during marriage, nor afterwards, shall be permitted to disclose a private communication, made during marriage, by one to the other, when such private communication is privileged. Such private communication shall be privileged in all except the following cases:

(1) Where both husband and wife were parties to the action;

(2) Where such private communication relates to a charge of personal violence by one upon the other;

(3) Where one has acted as the agent of the other and such private communication relates to matters within the scope of such agency.

325.19 Convict. A person who has been convicted of a criminal offense is, notwithstanding, a competent witness, but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining him is not concluded by his answer.

Note: Ordinarily, instructions as to rules of law for determining credibility of witnesses or weight of evidence should not single out or discredit any particular witness or item of evidence. Koss v. State, 217 W 325, 258 NW 860.

325.20 Confessions to clergymen. A clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs, without consent thereto by the party confessing.

325.21 Communications to doctors. No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in all lunacy inquiries, (3) in actions, civil or criminal, against the physician for malpractice, (4) with the express consent of the patient, or in case of his death or disability, of his personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his life, health, or physical condition.

Note: See note to 325.26, citing Bonich v. State, 202 W 523, 232 NW 873.

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.

This section must be complied with as to physicians and surgeons, but it will not be extended beyond its letter, and it is inapplicable as to nurses and technicians. In an action against the beneficiary to cancel a life policy for breach of a warranty that the insured was in sound health when the policy was issued, testimony of a nurse and an X-ray operator, a hospital record made by the nurse and used by the physician, and an X-ray plate made by the operator at the direction of the physician were admissible in evidence. Prudential Ins. Co. v. Kozlowski, 226 W 641, 276 NW 300.

Information obtained by 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.

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.

325.22 Communications to attorneys. An attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon in the course of his professional employment. This prohibition may be waived by the client, and does not include communications which the attorney needs to divulge for his own protection, or the protection of those with whom he deals, or which were made to him for the express purpose of being communicated to another, or being made public.

Note: Statements by a donor to an attorney, acting for both donor and donee, made in the presence and hearing 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.

An attorney is under a duty of loyalty to his client and is forbidden to disclose confidential statements made to him in that capacity, but where, as here, 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 this section, as to the attorney's reporting his communi-

cations to the other whenever those communications affected the interests of the other, and each waived it as to the attorney's testifying in court as to such communications. Hoffman v. Labutzke, 233 W 365, 289 NW 652.

325.23 Blood tests in civil actions. Whenever it shall be relevant in a civil action to determine the parentage or identity of any child, person or corpse the court, by order, may direct any party to the action and the person involved in the controversy to submit to one or more blood tests, to be made by duly qualified physicians or other duly qualified persons, under such restrictions and directions as the court or judge shall deem proper. Whenever such test is ordered and made the results thereof shall be receivable in evidence, but only in cases where definite exclusion is established. The order for such blood tests also may direct that the testimony of such experts and of the persons so examined may be taken by deposition. The court shall determine how and by whom the costs of such examinations shall be paid. [*1935 c. 351*]

325.24 Actions for public moneys, immunity. No witness or party in an action brought upon the bond of a public officer, or in an action by the state or any municipality to recover public money received by or deposited with the defendant, or in any action, proceeding or examination, instituted by or in behalf of the state or any municipality, involving the official conduct of any officer thereof, shall be excused from testifying on the ground that his testimony may expose him to prosecution for any crime, misdemeanor or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, in such action, proceeding or examination, except a prosecution for perjury committed in giving such testimony.

Note: 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.

325.25 State actions vs. corporations. (1) No corporation shall be excused from producing books, papers, tariffs, contracts, agreements, records, files or documents, in its possession, or under its control, in obedience to the subpœna of any court or officer authorized to issue subpœnas, in any civil action which is now or hereafter may be pending, brought by the state against it to recover license fees, taxes, penalties or forfeitures, or to enforce forfeitures, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of it, may subject it to a penalty or forfeiture, or be excused from making a true answer under oath, by and through its properly authorized officer or agent, when required by law to make such answer to any pleading in any such civil action upon any such ground or for such reason.

(2) No officer, clerk, agent, employe or servant of any corporation in any such action shall be excused from attending or testifying or from producing books, papers, tariffs, contracts, agreements, records, files or documents, in his possession or under his control, in obedience to the subpœna of any court in which any such civil action is pending or before any officer or court empowered or authorized to take deposition or testimony in any such action, in obedience to the subpœna of such officer or court, or of any officer or court empowered to issue a subpœna in that behalf, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or a forfeiture, but no such officer, clerk, agent, employe or servant shall be prosecuted, or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before such court or officer, or any court or officer empowered to issue subpœna in that behalf, or in any such case or proceeding except a prosecution for perjury or false swearing in giving such testimony.

(3) In case of the failure or neglect of any corporation, or of any such officer, clerk, agent, employe or servant, to produce any such book, paper, tariff, contract, agreement, record, file or document, secondary evidence of the contents of any or either of the same may be given, and such secondary evidence shall be of the same force and effect as the original.

325.26 Abortion, immunity. No person, except the defendant, shall be excused or privileged from testifying fully in any prosecution brought under the provisions of section 340.16 or 351.22, when ordered to testify by a court of record or any judge thereof; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which such person may so testify or produce evidence, except for perjury committed in giving such testimony.

Note: In a prosecution for assault with intent to produce abortion, a medical witness' testimony respecting pregnancy of the victim is not privileged. Bonich v. State, 202 W 523, 232 NW 873.

325.27 Admission by member of corporation. In actions or proceedings by or against a corporation, the admission of any member thereof who is not a party to the action or proceeding shall not be received as evidence against such corporation unless such admission was made concerning some transaction in which such member was the authorized agent of the corporation.

325.28 Statement of injured, admissibility. In actions for damages caused by personal injury, no statement made or writing signed by the injured person within seventy-two hours of the time the injury happened or accident occurred, shall be received in evidence unless such evidence would be admissible as part of the res gestæ.

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

Sec. 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 being 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 the 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 by 325.28 nor were statements voluntarily made by the plaintiff within 72 hours of the accident to a disinterested acquaintance barred by the statute. Kirsch v. Pomisal, 236 W 264, 294 NW 865.

325.29 Testimony of judge of kin to attorney. No judge of any court of record shall testify as to any matter of opinion in any action or proceeding in which any person related to such judge in the first degree shall be an attorney of record.

325.30 Capacity to testify. The court may examine a person produced as a witness to ascertain his capacity and whether he understands the nature and obligations of an oath.

Note: 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.

325.31 Testimony of deceased or absent witness. The testimony of a deceased witness, or a witness absent from the state, taken in any action or proceeding (except in a default action or proceeding where service of process was obtained by publication), shall be admissible in evidence in any retrial, or in any other action or proceeding where the party against whom it is offered shall have had an opportunity to cross-examine said witness, and where the issue upon which it is offered is substantially the same as the one upon which it was taken.

Note: 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.

325.32 [*Repealed by 1927 c. 523 s. 28*]

325.33 Subpoena of nonresidents in criminal cases. (1) SUMMONING WITNESS IN THIS STATE TO TESTIFY IN ANOTHER STATE. (a) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in criminal actions in this state certifies under the seal of such court that there is a criminal action pending in such court, that a person being within this state is a material witness in such action, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing and shall notify the witness of such time and place.

(b) If at the hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the action in the other state, that the witness will not be compelled to travel more than one thousand miles to reach the place of trial by the ordinary traveled route, and that the laws of the state in which the action is pending and of any other state through which the witness may be required to pass by ordinary course of travel will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the action is pending at a time and place specified in the summons.

(c) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the action is pending and five dollars for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

(2) WITNESS FROM ANOTHER STATE SUMMONED TO TESTIFY IN THIS STATE. (a) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal actions in this state, is a material witness in an action pending in a court of record in this state, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(b) If the witness is summoned to attend and testify in the criminal action in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the action is pending and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate.

(3) EXEMPTION FROM ARREST AND SERVICE OF PROCESS. (a) If a person comes into this state in obedience to a summons directing him to attend and testify in a criminal action in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

(b) If a person passes through this state while going to another state in obedience to a summons to attend and testify in a criminal action in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

(4) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it. [*1933 c. 48 s. 2*]