# TITLE XLIII

# Provisions Common to Actions and Proceedings in All Courts

## CHAPTER 885

### WITNESSES AND ORAL TESTIMONY


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**885.01 Subpoenas, who may issue.** The subpoena 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 municipal 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, medical examiner of any county having a population of 500,000 or more, board, commission, commissioner, examiner, committee or other person authorized to take testimony, or by any member of a board, commission or committee which is 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 commissioner of taxation and the secretary of the state board of dental examiners and by any agent of the state department of agriculture.

**History:** 1963 c. 6; 1965 c. 66 s. 2; 1965 c. 217, 617; 1967 c. 276 s. 39.

**885.02 Form of subpoena.** (1) The subpoena may be in the following form:

SUBPOENA

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

THE STATE OF WISCONSIN, to ....:

You are hereby required to appear before ...., a municipal justice in and for said coun-

ty, 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 .... 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 of 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 subpoena 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).

**History:** 1965 c. 66 s. 2; 1967 c. 276 s. 39.

**885.03 Service of subpoena.** Any subpoena 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.

**History:** 1965 c. 66 s. 2.

**885.04 Justice subpoena, served in adjoining county.** A subpoena to require attendance before a municipal justice may be served in a county adjoining that of the municipal justice, and shall oblige such attendance of any witness, so served, not residing more than 30 miles from the office of such municipal justice.

**History:** 1965 c. 66 s. 2; 1967 c. 276 s. 39.

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

(a) For attending before a municipal justice, or any arbitrators or any board or committee thereof of any town, city or village, for witnesses $4 for each day, for interpreters $4 per day.

(b) For attending before any other court, officer, board or committee, for witnesses $5 for each day, for interpreters $10 per half day.

(c) For traveling, at the rate of 5 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.

**History:** 1961 c. 196; 1965 c. 66 s. 2; 1967 c. 276 s. 39.

**885.06 Witness' fees, prepayment.** (1) Except when subpoenaed on behalf of the state or on behalf of a municipality in forfeiture actions 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; provided that tender of witness fees in the form of a check drawn by the state, a political subdivision of the state, a municipal corporation of the state or a department or officer of any of them which is payable to bearer or payable to the order of the person named in such subpoena shall oblige the person named in such subpoena to attend as a witness in accordance with the lawful requirements of such subpoena.

(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, or on behalf of a municipality in forfeiture actions shall be entitled to any fee in advance, but shall be obliged to attend upon the service of a subpoena as therein lawfully required.

**History:** 1961 c. 643; 1965 c. 66 s. 2.

**885.07 State witnesses in civil actions and municipal witnesses in forfeiture 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. In forfeiture actions by municipalities the clerk shall tax witness fees; however witness fees for police officers of any such municipality when collected shall be paid by the clerk to the treasurer of the municipality.

**History:** 1961 c. 643; 1965 c. 66 ss. 2, 8.

**885.08 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.

**History:** 1965 c. 66 s. 2.

**Cross Reference:** For fees of expert witnesses, see 957.27.

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

**History:** 1965 c. 66 s. 2.

**885.10 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 municipal justice, in any criminal action or proceeding to be tried or heard before him, may direct such witnesses to be subpoenaed as he shall, upon the defendant's oath or affidavit, or that of his attorney, deem proper and necessary. And witnesses so subpoenaed shall be paid their fees in the manner that witnesses for the state therein are paid.

**History:** 1965 c. 66 s. 2; 1967 c. 276 s. 39.

**885.11 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 $20.

(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.

**History:** 1965 c. 66 s. 2.

(1) 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.

**885.12 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.

**History:** 1965 c. 66 s. 2.

**885.13 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.

**History:** 1965 c. 66 s. 2.

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 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 s. 887.12 shall not conclude the party taking the same, but he shall be allowed to rebut or impeach the same.

**History:** 1965 c. 66 s. 2.

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 butt-rotted 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 this section. 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 Immunity.** No person shall be excused from attending, testifying or producing books, papers, and documents before any court in a prosecution under s. 134.05 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.

**History:** 1965 c. 66 s. 2.

**885.16 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.

**History:** 1965 c. 66 s. 2.

Dead man's rule discussed. Estate of Kemmerer, 16 W (2d) 480, 114 NW (2d) 803.

Objections made under this section must be

to the competency of the witness to testify, not to the evidence. Estate of Chmielewski, 17 W (2d) 486, 117 NW (2d) 601.

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) 252, 145 NW (2d) 112.

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

**885.17 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.

**History:** 1965 c. 66 s. 2.

**885.18 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;

(4) Where such private communication relates to a charge of pandering or prostitution.

**History:** 1965 c. 66 s. 2.

**Cross Reference:** As to testimony of husband and wife in action asserting illegitimacy of child born in wedlock, see 891.39.

This section 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 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.

**History:** 1965 c. 66 s. 2.

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.

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

**885.20 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.

**History:** 1965 c. 66 s. 2.

**885.205 Privileged communications.** No dean of men, dean of women or dean of students at any institution of higher education in this state, or any school psychologist at any school in this state, shall be allowed to disclose communications made to such dean or psychologist or advice given by such dean or psychologist in the course of counseling a student, or in the course of investigating the conduct of a student enrolled at such university or school, except:

(1) This prohibition may be waived by the student.

(2) This prohibition does not include communications which such dean 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 of being made public.

(3) This prohibition does not extend to a criminal case when such dean has been regularly subpoenaed to testify.

**History:** 1967 c. 258.

**885.21 Communications to doctors.** (1) 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:

(a) In trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide,

(b) In all lunacy inquiries,

(c) In actions, civil or criminal, against the physician for malpractice,

(d) 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,

(e) In situations where a hospitalized person is adjudicated either mentally ill, mentally infirm or mentally deficient or is a voluntary mental patient in either a public or private institution and the release of medical information is necessary so that the person can qualify for either an insurance benefit or some type of federal, state or county benefit or pension for either himself or his dependents,

(f) In situations where the examination of an abused or injured child creates a reasonable ground for an opinion of the physician or surgeon that the condition was other than accidentally caused or inflicted by another.

**History:** 1961 c. 102; 1963 c. 339; 1965 c. 66 s. 2; 1965 c. 333.

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.

**885.22 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.

**History:** 1965 c. 66 s. 2.

Privilege of expert witnesses discussed. State ex rel. Reynolds v. Circuit Court, 15 W (2d) 311, 112 NW (2d) 686, 113 NW (2d) 537.

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

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 this section 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.

**885.23 Blood tests in civil actions.** Whenever it is relevant in a civil action to determine the parentage or identity of any child, person or corpse, the court, by order, shall direct any party to the action and any person involved in the controversy to submit to one or more blood tests as provided in s. 52.36. The results of said tests shall constitute conclusive evidence where exclusion is established and shall be receivable as evidence, but only in cases where a definite exclusion is established. Whenever the court orders such blood tests and one of the parties refuses to submit to such tests such fact shall be disclosed upon trial. Notwithstanding s. 52.36 (2) the court shall determine how and by whom the costs of such examination shall be paid.

**History:** 1965 c. 66 s. 2; 1965 [13.93 (1) (e)].

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.

**885.235 Chemical tests for intoxication.** (1) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant while operating or handling a vehicle or firearm, evidence of the amount of alcohol in such person's blood at the time in question as shown by chemical analysis of a sample of his breath, blood, urine or saliva is admissible on the issue of whether he was under the influence of an intoxicant if such sample was taken within 2 hours after the event to be proved. Such chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:

(a) The fact that the analysis shows that there was five-hundredths of one per cent or less by weight of alcohol in the person's blood is prima facie evidence that he was not under the influence of an intoxicant;

(b) The fact that the analysis shows that there was more than five-hundredths but less than fifteen-hundredths of one per cent by weight of alcohol in the person's blood is relevant evidence on the issue of intoxication but is not to be given any prima facie effect;

(c) The fact that the analysis shows that there was fifteen-hundredths of one per cent

or more by weight of alcohol in the person's blood is prima facie evidence that he was under the influence of an intoxicant, but shall not, without corroborating physical evidence thereof, be sufficient upon which to find the person guilty of being under the influence of intoxicants.

(2) The concentration of alcohol in the blood shall be taken prima facie to be three-fourths of the concentration of alcohol in the urine.

(3) If the sample of breath, blood, urine or saliva was not taken within 2 hours after the event to be proved, evidence of the amount of alcohol in the person's blood as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if such effect is established by expert testimony.

(4) The provisions of this section relating to the admissibility of chemical tests for intoxication shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant.

**History:** 1965 c. 66 s. 2.

Additional evidence of intoxication and instruction to jury as to effect of the statute discussed. Martell v. Klingman, 11 W (2d) 296, 105 NW (2d) 446.

Although this section 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 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.

**History:** 1965 c. 66 s. 2.

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 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 subpoena of any court or officer authorized to issue subpoenas, 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 subpoena 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 subpoena of such officer or court, or of any officer or court empowered to issue a subpoena 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 subpoena in that behalf, or in any such case or proceeding ex-

cept 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.

History: 1965 c. 66 s. 2.

**885.27 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.

History: 1965 c. 66 s. 2.

**885.28 Statement of injured; admissibility, copies.** (1) In actions for damages caused by personal injury, no statement made or writing signed by the injured person within 72 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 gestae.

(2) Every person who takes a written statement from any injured person or person sustaining damage with respect to any accident or with respect to any injury to person or property, shall, at the time of taking such statement, furnish to the person making such statement, a true, correct and complete copy thereof. Any person taking or having possession of any written statement or a copy of said statement, by any injured person, or by any person claiming damage to property with respect to any accident or with respect to any injury to person or property, shall, at the request of the person who made such statement or his personal representative, furnish the person who made such statement or his personal representative, a true, honest and complete copy thereof within 20 days after written demand. No written statement by any injured person or any person sustaining damage to property shall be admissible in evidence or otherwise used or referred to in any way or manner whatsoever in any civil action relating to the subject matter thereof, if it is made to appear that a person having possession of such statement refused, upon the request of the person who made the statement or his personal representatives, to furnish such true, correct and complete copy thereof as herein required. This subsection does not apply to any statement taken by any officer having the power to make arrests.

History: 1965 c. 66 s. 2.

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 Fidelity & Guaranty Co. 10 W (2d) 176, 102 NW (2d) 243.

**885.29 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.

History: 1965 c. 66 s. 2.

**885.30 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.

History: 1965 c. 66 s. 2.

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 Cooperative, 13 W (2d) 342, 108 NW (2d) 652.

**885.31 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.

History: 1965 c. 66 s. 2.

**885.32 Extradition of prisoners as witnesses.** (1) DEFINITIONS. As used in this section:

(a) "Witness" means a person who is confined in a penal institution in any state and whose testimony is desired in another state in any criminal proceeding or investigation by a grand jury or in any criminal action before a court.

(b) "Penal institutions" includes a jail, prison, penitentiary, house of correction, or other place of penal detention.

(2) SUMMONING WITNESS IN THIS STATE TO TESTIFY IN ANOTHER STATE. A judge of a

state court of record in another state, which by its laws has made provision for commanding persons confined in penal institutions within that state to attend and testify in this state, may certify (a) that there is a criminal proceeding or investigation by a grand jury or a criminal action pending in the court, (b) that a person who is confined in a penal institution in this state may be a material witness in the proceeding, investigation, or action, and (c) that his presence will be required during a specified time. Upon presentation of the certificate to any judge having jurisdiction over the person confined, and upon notice to the attorney general, the judge in this state shall fix a time and place for a hearing and shall make an order directed to the person having custody of the prisoner requiring that the prisoner be produced before him at the hearing.

(3) COURT ORDER. If at the hearing the judge determines (a) that the witness may be material and necessary, (b) that his attending and testifying are not adverse to the interests of this state or to the health or legal rights of the witness, (c) that the laws of the state in which he is requested to testify will give him protection from arrest and the service of civil and criminal process because of any act committed prior to his arrival in the state under the order, and (d) that as a practical matter the possibility is negligible that the witness may be subject to arrest or to the service of civil or criminal process in any state through which he will be required to pass, the judge shall issue an order, with a copy of the certificate attached, directing the witness to attend and testify, directing the person having custody of the witness to produce him, in the court where the criminal action is pending, or where the grand jury investigation is pending, at a time and place specified in the order, and prescribing such conditions as the judge determines.

(4) TERMS AND CONDITIONS. The order to the witness and to the person having custody of the witness shall provide for the return of the witness at the conclusion of his testimony, proper safeguards on his custody, and proper financial reimbursement or prepayment by the requesting jurisdiction for all expenses incurred in the production and return of the witness, and may prescribe such other conditions as the judge thinks proper or necessary. The order shall not become effective until the judge of the state requesting the witness enters an order directing compliance with the conditions prescribed.

(5) EXCEPTIONS. This act does not apply to any person in this state confined as insane or mentally ill or as a defective delinquent.

(6) PRISONER FROM ANOTHER STATE SUMMONED TO TESTIFY IN THIS STATE. If a person confined in a penal institution in any other state may be a material witness in a criminal action pending in a court of record or in a grand jury investigation in this state, a judge of the court may certify (a) that there is a criminal proceeding or investigation by a grand jury or a criminal action pending in the court, (b) that a person who is confined in a penal institution in the other state may be a material witness in the proceeding, investigation, or action, and (c) that his presence will be required during a specified time. The certificate shall be presented to a judge of a court of record in the other state having jurisdiction over the prisoner confined, and a notice shall be given to the attorney general of the state in which the prisoner is confined.

(7) COMPLIANCE. The judge of the court in this state may enter an order directing compliance with the terms and conditions prescribed by the judge of the state in which the witness is confined.

(8) EXEMPTION FROM ARREST AND SERVICE OF PROCESS. If a witness from another state comes into or passes through this state under an order directing him to attend and testify in this or another state, he shall not while in this state pursuant to the order be subject to arrest or the service of process, civil or criminal, because of any act committed prior to his arrival in this state under the order.

(9) UNIFORMITY OF INTERPRETATION. This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**History:** 1965 c. 66 s. 2.

**885.33 Extradition of witnesses in criminal actions.** (1) DEFINITIONS. "Witness" as used in this section shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding. The word "state" shall include any territory of the United States and the District of Columbia. The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

(2) 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 this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution or grand jury investigation, 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 make an order directing the witness to appear at a time and place certain for the hearing.

(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 prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, 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 prosecution is pending, or where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(c) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability, may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

(d) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and $5 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.

(3) 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 prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, 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. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. 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 this state he shall be tendered the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and $5 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, unless otherwise ordered by the court. If such witness, after coming into this state, 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.

(4) 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 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 that state or while returning therefrom, he shall not while so passing through this state be sub-

ject 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.

(5) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted as to make uniform the law of the states which enact it.

History: 1965 c. 66 s. 2.

**885.34 Incriminating testimony compelled; immunity.** Whenever any person shall refuse to testify or to produce books, papers or documents when required to do so in any criminal examination, hearing or prosecution for the reason that the testimony or evidence required of him may tend to criminate him or subject him to a forfeiture or penalty, he may nevertheless be compelled to testify or produce such evidence by order of the court on motion of the district attorney. But no person who testifies or produces evidence in obedience to the command of the court in such case shall be liable to any forfeiture or penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence; but no person shall be exempted from prosecution and punishment for perjury committed in so testifying.

History: 1965 c. 66 s. 2.

This section is broad enough to cover a John Doe investigation, a preliminary examination under 954.08 and an inquiry by a grand jury as well as an actual criminal trial. The compulsion to testify must be by order of a court, and since a John Doe proceeding is conducted by a magistrate, he has no power to grant immunity although the magistrate is in fact a circuit judge. State ex rel. Jackson v. Coffey, 18 W (2d) 529, 118 NW (2d) 939.

Although the attorney general has no common law powers, he can prosecute a John Doe proceeding when requested by the governor, and in such case can move for an order compelling self-incriminating testimony. The witness can be compelled to testify even though his evidence might incriminate him under federal law. State ex rel. Jackson v. Coffey, 18 W (2d) 529, 118 NW (2d) 939.

Principles with regard to immunity discussed. Where defendant answered some questions under compulsion, he is not immune to prosecution based on answers to other questions before a grand jury. The burden is on hm to show that his compelled answers were used as a link in the evidence supporting prosecution. State ex rel. Rizzo v. County Court, 32 W (2d) 642, 146 NW (2d) 499, 148 NW (2d) 86.

**885.35 Hostile witness in criminal cases.** Where testimony of a witness on the trial in a criminal action is inconsistent with a statement previously made by him and reduced to writing and approved by him or taken by a phonographic reporter, he may, in the discretion of the court, be regarded as a hostile witness and examined as an adverse witness, and the party producing him may impeach him by evidence of such prior contradictory statement.

History: 1965 c. 66 s. 2.

**885.36 Wire tapping.** Evidence obtained directly or indirectly as a result of the interception of a communication, by telephone or telegraph, shall be totally inadmissible in the courts of this state.

History: 1961 c. 215; 1965 c. 66 s. 2.

**885.365 Recorded telephone conversation.** (1) Evidence obtained as the result of the use of voice recording equipment for recording of telephone conversations, by way of interception of a communication or in any other manner, shall be totally inadmissible in the courts of this state.

(2) Subsection (1) shall not apply where:

(a) Such recording is made in a manner other than by interception and the person whose conversation is being recorded is informed at that time that the conversation is being recorded and that any evidence thereby obtained may be used in a court of law; or such recording is made through a recorder connector provided by the telephone public utility in accordance with its tariffs and which automatically produces a distinctive recorder tone that is repeated at intervals of approximately 15 seconds;

(b) The recording is made by a telephone public utility as defined in s. 196.01 or its officers or employes for the purpose of or incident to the construction, maintenance, conduct or operation of the services and facilities of such public utilities, or to the normal use by such public utilities of the services and facilities furnished to the public by such public utility; or

(c) The recording is made by a fire department or law enforcement agency to determine violations of, and in the enforcement of, s. 941.13 (1).

History: 1965 c. 506.