1-14-1987

Title 78 Judicial Code Chapter 24: Witnesses - 1987 Replacement Volume

Utah Code Annotated

COLLATERAL REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d Exemptions § 173 et seq.

C.J.S. — 35 C.J.S. Exemptions § 143 et seq.

Key Numbers. — Exemptions ⇐ 135 to 141.

78-23-14. Property held by joint tenants or tenants in common.

If an individual and another own property in this state as joint tenants or tenants in common, a creditor of the individual, subject to the individual's right to claim an exemption under this chapter, may obtain a levy on and sale of the interest of the individual in the property. A creditor who has obtained a levy, or a purchaser who has purchased the individual's interest at the sale, may have the property partitioned or the individual's interest severed.

History: C. 1953, 78-23-14, enacted by L. 1981, ch. 111, § 14.

COLLATERAL REFERENCES

Key Numbers. — Exemptions ⇐ 59, 60.

78-23-15. Exemption provisions applicable in bankruptcy proceedings.

No individual may exempt from the property of the estate in any bankruptcy proceeding the property specified in Subsection (d) of Section 522 of the Bankruptcy Reform Act (Public Law 95-598), except as may otherwise be expressly permitted under this chapter.

History: C. 1953, 78-23-15, enacted by L. 1981, ch. 111, § 15.

Section 522 of Bankruptcy Reform Act. — See 11 U.S.C. § 522(d).

CHAPTER 24
WITNESSES

78-24-1. Who may be witnesses — Jury to judge credibility.

All persons, without exception, otherwise than as specified in this chapter, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or by his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-1.

Cross-References. — Admissibility of evidence, Rules of Civil Procedure, Rule 43(a).

Competency of judge as witness, Utah Rules of Evidence, Rule 605.

Competency of juror as witness, Utah Rules of Evidence, Rule 606.

Competency of witnesses generally, Utah Rules of Evidence, Rule 601.

Jury to decide questions of fact, § 78-21-2; Rules of Civil Procedure, Rule 39(a).

Reciprocal Enforcement of Support Act, husband and wife competent, may not assert privilege, § 77-31-22.

NOTES TO DECISIONS

ANALYSIS

Attorneys as witnesses.

Under the circumstances, the trial court erred in refusing to permit the defendants' sole attorney to testify as a witness for defendants except on condition that he withdraw from the case. McLaren v. Gillispie, 19 Utah 137, 56 P. 680 (1899).

In prosecution for adultery, a county attorney who was of counsel in the case on behalf of the state and participated in the trial thereof after his term of office had expired, and to whom the defendant admitted having had sexual intercourse with the prosecutrix was held competent witness. State v. Greene, 38 Utah 389, 115 P. 181 (1910).

Bias.

—Witness with immunity.

Since mere knowledge that a witness has been granted immunity does not provide the jury with sufficient knowledge to assess the witness' bias, assessment of the witness' bias requires fuller inquiry into the terms and conditions of the grant of immunity and a full explication, where necessary, as to why the witness would not have testified without the grant of immunity. State v. Leonard, 707 P.2d 650 (Utah 1985).

Competency of witness.

Question of a witness' competency, testimony concerning which is conflicting, is a

question for the trial court. State v. Snowden, 23 Utah 318, 65 P. 479 (1901).

All persons, other than those excepted by statute, may be witnesses. State v. Greene, 38 Utah 389, 115 P. 181 (1910).

Credibility of witness.

If prosecutrix, on prosecution for assault with intent to commit rape, is of bad reputation for chastity, such fact is a proper matter for consideration of the jury as affecting her credibility as a witness. State v. McCune, 16 Utah 170, 51 P. 818 (1898).

Action to contest the probate of a will on ground of undue influence is an action at law, and the supreme court cannot pass on credibility of witnesses. Miller v. Livingstone, 31 Utah 415, 88 P. 338 (1906).

Drug addict.

Drug addict is competent to testify in a criminal case as such condition goes to his credibility but not to his competency. State v. Eaton, 569 P.2d 1114 (Utah 1977).

Expert witnesses.

Who is, and who is not, an expert, and the requisites and qualifications thereof, are matters which are relative to the facts of the particular case, and the subject upon which the witness is called to give testimony. Startin v. Madsen, 120 Utah 631, 237 P.2d 834 (1951).

Whether the testimony of an expert pertains to the very issue before the jury is not a proper test as to its admissibility. Joseph v. W.H. Groves Latter Day Saints Hosp., 7 Utah 2d 39, 318 P.2d 330 (1957).

Where the subject of inquiry is in a field beyond the knowledge generally possessed by laymen, one properly qualified therein may be permitted to testify to his opinion as an expert. Joseph v. W.H. Groves Latter Day Saints Hosp., 7 Utah 2d 39, 318 P.2d 330 (1957); Webb v. Olin Mathieson Chem. Corp., 9 Utah 2d 275, 342 P.2d 1094, 80 A.L.R.2d 476 (1959).

Inherent in the position of the trial judge is the responsibility of passing upon whether the subject justifies expert testimony and the qualifications of the expert witness. Webb v. Olin Mathieson Chem. Corp., 9 Utah 2d 275, 342 P.2d 1094, 80 A.L.R.2d 476 (1959).

In view of the importance of the function entrusted to the expert witness, it is of great importance that the court carefully scrutinize his qualifications to guard against being led astray by the pseudo-learned or charlatan. Webb v. Olin Mathieson Chem. Corp., 9 Utah 2d 275, 342 P.2d 1094, 80 A.L.R.2d 476 (1959).

Inquiry concerning the general reputation of the defendant in a criminal prosecution, who testifies as a witness or otherwise places his reputation in issue, should be confined to the date not later than that of the commission of the alleged offense or, at least, to the date not later than that when the arrest was made. State v. Marks, 16 Utah 204, 51 P. 1089 (1898).

General character and reputation.

General character of the defendant in a criminal prosecution cannot be put in issue unless defendant voluntarily places it therein. State v. Marks, 16 Utah 204, 51 P. 1089 (1898).

Character, when the fact to be established, may be proved by another fact, namely, general reputation. State v. Marks, 16 Utah 204, 51 P. 1089 (1898).

Impeachment.

Statute was intended to allow impeachment of a witness, by introduction of character evidence, only so far as the witness' general character is in issue in the case. State v. Marks, 16 Utah 204, 51 P. 1089 (1898).

In impeaching credibility of a witness, inquiry must be confined to his general—and this word should always be used in propounding the question—reputation for truth in the neighborhood or community where he is best known and resides or has resided, and be made of persons who can state what is generally said of the witness by those among whom he dwells or with whom he is chiefly acquainted. State v. Marks, 16 Utah 204, 51 P. 1089 (1898).

Where the defendant in a criminal prosecution testifies concerning an alleged offense or offers evidence of his good character for truth, the question of his truthfulness and his credibility as a witness is placed in issue, and his general reputation for truth and veracity may be shown as affecting his truthfulness and credibility as a witness, but his character for honesty and integrity, not being in issue, cannot be attacked or placed in issue by the prosecution by proof of his general reputation concerning his character in these latter respects. State v. Marks, 16 Utah 204, 51 P. 1089 (1898).

As a general rule, the question permitted to be asked, in attacking a witness' character for truth and veracity, is: "Do you know what the general reputation of witness [naming him] is for truth and veracity in the neighborhood in which he resides?" If this question is answered in affirmative, the next question would be: "What is that reputation—good or bad?" If answer is "it is bad," the further question may be put as follows: "From that reputation would you believe him on oath in a matter where he is personally interested?" State v. Marks, 16 Utah 204, 51 P. 1089 (1898).

Generally, the party who calls a witness vouches for his veracity and cannot afterwards impeach the witness, either by the testimony of impeaching witnesses or by argument to the jury, but such rule is subject to exceptions, notably where one party must call an adverse party as a witness. Schlatter v. McCarthy, 113 Utah 543, 196 P.2d 968, rehearing denied, 113 Utah 560, 198 P.2d 473 (1949).

Party is not bound by every statement that his witness makes and he may, by testimony of other witnesses and in argument to jury, show that facts were different from those testified to by the witness, not for the purpose of impeaching the witness but for establishing true facts; on the other hand, the party who has called the witness to help prove his case and has vouched for his credibility may not thereafter argue to the jury that such witness is unworthy of belief. Schlatter v. McCarthy, 113 Utah 543, 196 P.2d 968, rehearing denied, 113 Utah 560, 198 P.2d 473 (1949).

Interest of witness.

Interest of a witness in any particular case may always be shown, and its effect, if any, upon the weight of the testimony is always a question for the jury. State v. Cerar, 60 Utah 208, 207 P. 597 (1922).

The fact of bias alone, not the cause or grounds of it, is material. Thomas v. Spiers, 65 Utah 256, 237 P. 233 (1925).

Psychological examination.

Trial judge did not abuse his discretion in refusing to require a psychological examination of the state's witness in the defendant's trial for heroin sale, where the witness had a history of drug use and a long criminal record and had injected heroin before making a drug purchase from the defendant but these things were brought out at the preliminary hearing and at trial, and where the evidence showed the witness was able to converse about and agree on the drug-sale plan with police, drive a car, buy the drug, report back to police, and make a handwritten report. State v. Hubbard, 601 P.2d 929 (Utah 1979).

Reputation as to truth and veracity.

Every witness' general reputation for truth and veracity is open to question. State v. Marks, 16 Utah 204, 51 P. 1089 (1898).

Defendant, in prosecution for assault with intent to kill, places in issue his character for truth and veracity, but not his general moral character, when he testifies in the case. State v. Marks, 16 Utah 204, 51 P. 1089 (1898).

In carnal knowledge prosecution, where knowledge of the occurrence was in possession of the participants, it was prejudicial error to exclude evidence of the reputation of the prosecutrix for veracity. State v. Olson, 100 Utah 174, 111 P.2d 548 (1941).

Where there is a conflict in the testimony of opposing witnesses, their reputation for truth and veracity is a relevant issue upon which evidence may be presented. LeGrand Johnson Corp. v. Peterson, 18 Utah 2d 260, 420 P.2d 615 (1966).

Witness allegedly insane.

Competency of any given witness is a matter for determination by the trial court; the court did not abuse its discretion in allowing a witness, claimed to be of unsound mind by reason of prior commitment to a state mental hospital, to testify against the defendant, since the record of the witness' answers to the court's questions clearly showed that he was competent. State v. Scott, 22 Utah 2d 27, 447 P.2d 908 (1968).

Cited in State v. Rammel, 721 P.2d 498 (Utah 1986).

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 69 et seq.

C.J.S. — 97 C.J.S. Witnesses § 49 et seq.

A.L.R. — Limiting number of noncharacter witnesses in civil case, 5 A.L.R.3d 169.

Limiting number of noncharacter witnesses in criminal case, 5 A.L.R.3d 238.

Admissibility, in civil case, of expert or opinion evidence as to proposed witness' inability to testify, 11 A.L.R.3d 1360.

Signature or handwriting of deceased, competency of interested witness to testify to, 13 A.L.R.3d 404.

Necessity and admissibility of expert testimony as to credibility of witness, 20 A.L.R.3d 684.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction, 36 A.L.R.3d 820.

Competence of physician or surgeon from one locality to testify, in malpractice case, as to standard of care required of defendant practicing in another locality, 37 A.L.R.3d 420.

"Fruit of the poisonous tree" doctrine excluding testimony of witness derived from information gained in illegal search, 43 A.L.R.3d 397.

Cross-examination of witness as to his mental state or condition to impeach competency or credibility, 44 A.L.R.3d 1203.

Defense attorney as witness for his client in criminal case, 52 A.L.R.3d 887.

Prosecuting attorney as a witness in criminal case, 54 A.L.R.3d 100.

Use of drugs as affecting competency of witness, 65 A.L.R.3d 705.

Propriety, on impeaching credibility of witness in civil case by showing former conviction, of questions relating to nature and extent of punishment, 67 A.L.R.3d 761.

Propriety, on impeaching credibility of wit-

ness in criminal case by showing former conviction, of questions relating to nature and extent of punishment, 67 A.L.R.3d 775.

Use of unrelated traffic offense conviction to impeach general credibility of witness in state civil case, 88 A.L.R.3d 74.

Child as witness in criminal case, instructions to jury as to credibility of child's testimony, 32 A.L.R.4th 1196.

Propriety, and prejudicial effect of, comments by counsel vouching for credibility of witness, 45 A.L.R.4th 602; 78 A.L.R. Fed. 23.

Key Numbers. — Witnesses ⇐ 35 et seq.

78-24-2. Competency to be witness.

Every person is competent to be a witness except as otherwise provided in the Utah Rules of Evidence.

History: C. 1953, 78-24-2, enacted by L. 1984, ch. 35, § 1.

Repeals and Enactments. — Laws 1984, ch. 35, § 1 repealed former § 78-24-2 (L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-2), prohibiting certain persons as witnesses, and enacted present § 78-24-2.

Cross-References. — General rule of competency, Rules of Evidence, Rule 601.

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 69 et seq.

C.J.S. — 97 C.J.S. Witnesses § 49 et seq.

A.L.R. — Competency of interested witness to testify to signature or handwriting of deceased, 13 A.L.R.3d 404.

Statute excluding testimony of one person because of death of another as applied to testimony in respect of lost or destroyed instrument, 18 A.L.R.3d 606.

Taking deposition or serving interrogatories in civil case as waiver of incompetency of witness, 23 A.L.R.3d 389.

Statute excluding testimony of one person because of death of another as applicable to attorneys, 67 A.L.R.3d 924.

Deaf-mute as witness, 50 A.L.R.4th 1188.

Key Numbers. — Witnesses ⇐ 35 et seq.

78-24-3. Judge or juror may be witness — Procedure.

The judge himself or any juror may be called as a witness by either party; but in such case it is in the discretion of the court to order the trial to be postponed or suspended, and to take place before another judge or jury.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-3.

Cross-References. — Judge may not testify, Rules of Evidence, Rule 605.

Juror may not testify before jury of which he is a member, Rules of Evidence, Rule 606(a).

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses §§ 101, 102.

C.J.S. — 97 C.J.S. Witnesses § 105 et seq.

A.L.R. — Disqualification of judge on ground of being a witness in the case, 22 A.L.R.3d 1198.

Key Numbers. — Witnesses ⇐ 68 et seq.

78-24-4. Interpreters — Subpoena — Contempt.

When a witness does not understand and speak the English language, an interpreter must be sworn in to interpret for him. Any person may be subpoenaed by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. Any person so subpoenaed who fails to attend at the time and place named is guilty of a contempt.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-4.

Cross-References. — Criminal procedure, appointment, compensation and subpoena of interpreter, §§ 77-35-14, 77-35-15.

Fees of interpreters taxed as costs, § 21-5-17.

Hearing-impaired persons, interpreters for, § 78-24a-1 et seq.

Qualifications and oath of interpreters, Rules of Evidence, Rule 604.

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses §§ 9 et seq., 418.

C.J.S. — 97 C.J.S. Witnesses § 19 et seq.

A.L.R. — Right of accused to have evidence or court proceedings interpreted, 36 A.L.R.3d 276.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter, 12 A.L.R.4th 1016.

Key Numbers. — Witnesses ⇐ 7 et seq., 230.

78-24-5. Subpoena defined.

The process by which the attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents or other things under his control which he is bound by law to produce in evidence.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-5.

Cross-References. — Attorney general's power to issue subpoenas for criminal investigations, § 77-22-2.

Criminal investigations, power of prosecuting officers to issue subpoenas, § 77-22-2.

Indigent defendant's witnesses subpoenaed at public expense, § 21-5-14.

Subpoenas in civil cases generally, Rules of Civil Procedure, Rule 45.

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 9.

C.J.S. — 97 C.J.S. Witnesses § 19 et seq.

A.L.R. — Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 A.L.R.3d 1373.

Who has possession, custody, or control of corporate books or records for purposes of order to produce, 47 A.L.R.3d 676.

Right of member, officer, agent, or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records, 52 A.L.R.3d 636.

Key Numbers. — Witnesses ⇐ 8.

78-24-6. Duty of witness served with subpoena.

A witness served with a subpoena must attend at the time appointed with any papers under his control required by the subpoena, and answer all pertinent and legal questions; and, unless sooner discharged, must remain until the testimony is closed.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-6.

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 28.

C.J.S. — 97 C.J.S. Witnesses § 2 et seq.
Key Numbers. — Witnesses ⇐ 8.

78-24-7. Liability to forfeiture and damages.

A witness disobeying a subpoena shall, in addition to any penalty imposed for contempt, be liable to the party aggrieved in the sum of $100, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-7.

Cross-References. — Acts and omissions constituting contempt, § 78-32-1.

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 28.5.

C.J.S. — 97 C.J.S. Witnesses §§ 27, 28.
Key Numbers. — Witnesses ⇐ 21, 22.

78-24-8. Privileged communications.

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

(1) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor for the crime of deserting or neglecting to support a spouse or child, nor where it is otherwise specially provided by law.

(2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given therein, in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact, the knowledge of which has been acquired in such capacity.

(3) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

(4) A physician or surgeon cannot, without the consent of his patient, be examined, in a civil action, as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

(5) A public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure.

(6) A sexual assault counselor as defined in § 78-3c-3 cannot, without the consent of the victim be examined in a civil or criminal proceeding as

to any confidential communication as defined in § 78-3c-3 made by the victim.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-8; L. 1977, ch. 140, § 2; 1983, ch. 158, § 2; 1984, ch. 17, § 2.

Amendment Notes. — The 1983 amendment added Subsection (6).

The 1984 amendment substituted "consent of the victim" in Subsection (6) for "written consent of the victim or his or her guardian if the victim is unable to write."

Cross-References. — Attorney's duty to preserve confidence of client, § 78-51-26.

Child abuse, physician-patient privilege inapplicable, §§ 78-36-3, 78-36-13.

Domestic relations counselors, proceedings before, § 30-3-17.1.

Evidentiary rule regarding privilege, Utah Rules of Evidence, Rule 501.

Marriage and family counselors, privileged communications, § 58-39-10.

Patient records, inspection and copying by patient's attorney, § 78-25-25.

Premarital counseling, information obtained confidential, § 30-1-37.

Psychologist-client privilege, § 58-25-8.

Public officers and employees not to disclose confidential information, § 67-16-4.

Social workers, privileged communications, § 58-35-10.

Speech pathologists and audiologists, privileged communications, § 58-41-16.

Uniform Civil Liability for Support Act, privilege inapplicable, § 78-45-11.

Uniform Reciprocal Enforcement of Support Act, privilege inapplicable, § 77-31-22.

NOTES TO DECISIONS

Analysis

Attorney and client.

Attorney's secretary's testimony was not barred by privilege where the attorney had testified, the attorney was acting as a participant in transactions and the nature of consultation was pursuant to an interest other than that of an attorney. Young v. Taylor, 466 F.2d 1329 (10th Cir. 1972).

Where an attorney was employed by the plaintiff "merely to straighten out an account," the relationship of attorney and client, in ordinary acceptation of terms, did not exist, but the attorney was merely the plaintiff's agent, and statements by the attorney in the plaintiff's presence, expressive of satisfaction with account, were admissible in evidence as tending to support the defendant's plea of account stated. Burraston v. First Nat'l Bank, 22 Utah 328, 62 P. 425 (1900).

Statutory protection extends to conversations had with an attorney during negotiations for his employment. State v. Snowden, 23 Utah 318, 65 P. 479 (1901).

Mere fact that the common-law attorney-client privilege is declared in statutory form does not extend scope of its operation. In re Young's Estate, 33 Utah 382, 94 P. 731, 17 L.R.A. (n.s.) 108, 126 Am. St. R. 843, 14 Ann. Cas. 596 (1908).

In a will contest between heirs and beneficiaries of a deceased person, where undue influence or want of capacity are in issue, neither side can invoke privilege as against the testimony of the attorney who prepared the will under the direction of the deceased, and the attorney should be required to disclose all matters relevant to such issues the same as any other persons cognizant of facts would be. In re Young's Estate, 33 Utah 382, 94 P. 731, 17 L.R.A. (n.s.) 108, 126 Am. St. R. 843, 14 Ann. Cas. 596 (1908).

Attorney was competent to testify with reference to the contents of a lost deed which he prepared for a client, since such contents were not a part of a communication made to the attorney by the client. Dineris v. Phelan, 62 Utah 387, 219 P. 1114 (1923).

No express request for secrecy, to be sure, is necessary; but the mere relation of attorney and client does not raise a presumption of confidentiality, and the circumstances are to indicate whether by implication the communication was of a sort intended to be confidential. These circumstances will of course vary in in-

dividual cases, and the rule must therefore depend much on the case in hand. Anderson v. Thomas, 108 Utah 252, 159 P.2d 142 (1945).

Even in a will contest case the attorney cannot testify regarding distinct professional transactions totally unrelated to the preparation of the will. Anderson v. Thomas, 108 Utah 252, 159 P.2d 142 (1945).

Attorney attesting to a deed was competent and compellable to testify on behalf of the decedent's grantee in a suit to cancel a deed because of the decedent's alleged mental incapacity and exposure to undue influence. Anderson v. Thomas, 108 Utah 252, 159 P.2d 142 (1945).

Where the deceased had asked an attorney to help her in withdrawal of money from a bank because of her failing eyesight, the attorney could properly testify to that fact, since he had not been consulted in "the course of professional employment." Anderson v. Thomas, 108 Utah 252, 159 P.2d 142 (1945).

Where the communication received by the attorney had already been made public and the communicator was not, at the time, a client, the testimony of the attorney could be admitted. Randall v. Tracy Collins Trust Co., 6 Utah 2d 18, 305 P.2d 480 (1956).

It is necessary that the communication by the client be confidential, and be intended as confidential. State v. Gay, 6 Utah 2d 122, 307 P.2d 885 (1956).

If two or more persons consult an attorney for their mutual benefit, and make statements in his presence, he may disclose those statements in any controversy between them or their personal representatives or successors in interest. Evans v. Evans, 8 Utah 2d 26, 327 P.2d 260 (1958).

Defendant's records of air pollution emissions were not privileged even though maintained in counsel's files in anticipation of possible litigation; the material was not communicated in relation to specific litigation nor for legal analysis and advice. Jackson v. Kennecott Copper Corp., 27 Utah 2d 310, 495 P.2d 1254 (1972).

—Waiver.

The standard determining when the presence of a third party during communications between a lawayer and client results in a waiver of the attorney-client privilege is whether the third person's presence is reasonably necessary under the circumstances, not whether the presence of the third person is necessary for urgent or life saving procedures. Hofmann v. Conder, 712 P.2d 216 (Utah 1985).

Communications made to public officers.

This subdivision relates especially to matters pertaining to affairs of state or nation, or concerning state secrets, and communications by informers to public officials; evidence is excluded because it would prejudice interests of the public and because public safety is best subserved by keeping out such evidence. State v. Hoben, 36 Utah 186, 102 P. 1000 (1909).

Where the state invites disclosure of matters privileged within this section, and itself inquires about matters claimed to be privileged, and acquiesces in such inquiry without objection, it may not have disclosure of part of the truth, and then be heard to assert that "public interests" will suffer if the whole truth is disclosed. State v. Hoben, 36 Utah 186, 102 P. 1000 (1909).

Husband and wife.

In a rape case in which defendant's defense was that he was at home with his wife at time offense was committed, it was prejudicial error for prosecutor to remark to jury that defendant's wife had failed to testify in his behalf, as this remark had effect of destroying the privilege granted under this section. State v. Brown, 14 Utah 2d 324, 383 P.2d 930 (1963), explained, 28 Utah 2d 317, 502 P.2d 113 (1972).

Prosecuting attorney did not commit prejudicial error by commenting at second trial, at which wife testified in support of defendant's alibi, that although wife attended at first trial, she asserted privilege and did not testify. State v. Brown, 16 Utah 2d 57, 395 P.2d 727 (1964).

Where both spouses are charged with a crime, one spouse may voluntarily testify in his own behalf even though his testimony brings out some evidence against the other spouse. State v. Trevino, 574 P.2d 1157 (Utah 1978).

Physician and patient.

Patient records, to the extent that they contain narcotics records required to be kept by the doctor, were not privileged under provisions of this section. Anderson v. Reynolds, 476 F.2d 665 (10th Cir. 1973).

Physician, who was sent by a street railroad company to examine a passenger who had been injured as the result of negligent operation of the company's car, was held not entitled to testify, as the company's witness in the injured passenger's action for damages, concerning information acquired by him while attending the injured passenger. Munz v. Salt Lake City R.R., 25 Utah 220, 70 P. 852 (1902).

The legislature did not intend that all information, whether by communication or otherwise, which is obtained by physicians from their patients should be privileged, but such information only as may reasonably be necessary to enable physicians to apply their full professional skill for benefit of their patients. Madsen v. Utah Light & Ry., 36 Utah 528, 105 P. 799 (1909).

Any information acquired while attending the patient, which was necessary to enable the physician to prescribe or to act for the patient,

would be privileged, but not all communications made to an attending physician were excluded. Lombard v. Columbia Nat'l Life Ins. Co., 50 Utah 554, 168 P. 269 (1917).

Where questions propounded did not seek to elicit any information acquired by doctor in attending patient which was necessary to enable him to prescribe or act for him, there was no privileged communication. Dovich v. Chief Consol. Mining Co., 53 Utah 522, 174 P. 627 (1918).

Physician-patient privilege did not exist at common law, and in order to be available, claim of privilege must be brought within the clear meaning and spirit of the statute. Chadwick v. Beneficial Life Ins. Co., 54 Utah 443, 181 P. 448 (1919).

This section does not exclude death certificates from evidence in actions between private persons. Bozicevich v. Kenilworth Mercantile Co., 58 Utah 458, 199 P. 406, 17 A.L.R. 346 (1921).

Doctor who operates on a patient cannot without the latter's consent testify in a civil action as to any information acquired in attending that patient. Moutzoukos v. Mut. Benefit Health & Accident Ass'n, 69 Utah 309, 254 P. 1005 (1927).

Privilege is only co-extensive with the relationship of doctor and patient, and does not extend to examination of a prospective employee by the employer's physician for purpose of determining physical fitness for employment. Moutzoukos v. Mut. Benefit Health & Accident Ass'n, 69 Utah 309, 254 P. 1005 (1927).

Where the plaintiff in a personal injury suit confined himself to describing the nature and extent of his injuries as he saw and felt them, and did not testify concerning anything which his physicians told him, the privilege afforded was not waived. Clawson v. Walgreen Drug Co., 108 Utah 577, 162 P.2d 759 (1945).

Testimony of a physician as to the fact of employment by a patient; that he treated or attended the patient; that he examined the patient and took X-rays of him; that he performed an operation on the patient; the number of visits and dates thereof; the place of attendance; duration of treatment and when it ceased; and similar testimony does not violate either the letter or the spirit of this section. Eklund v. Metropolitan Life Ins. Co., 89 Utah 273, 57 P.2d 362 (1936).

In an action on a life insurance policy, a physician may testify to information acquired while treating an assured provided the testimony does not include information acquired in attending the assured which was necessary to enable him to treat or act for the assured. Eklund v. Metropolitan Life Ins. Co., 89 Utah 273, 57 P.2d 362 (1936).

In action on a life insurance policy, privileged testimony of a family physician was shown to have been waived by the insured in his application for insurance, and by the defendant beneficiary in writing to the doctor. New York Life Ins. Co. v. Grow, 103 Utah 285, 135 P.2d 120 (1943).

Where an insured had waived the physician-patient privilege in his application for a policy providing for double indemnity in the event of accidental death, the court erred in exclusion of testimony of the insured's doctor that the deceased had been suffering from chronic infection of inner ear, which might have caused his fatal accident. Hassing v. Mutual Life Ins. Co., 108 Utah 198, 159 P.2d 117 (1945).

Testimony of a physician that he performed an autopsy on the body of the deceased and that he had died of a certain disease was not barred. Chadwick v. Beneficial Life Ins. Co., 54 Utah 443, 181 P. 448 (1919).

Waiver of privilege.

Attorney-client privilege given under this section, as at common law, is purely personal, and belongs to the client, and if the client waives the privilege, neither the attorney nor anyone else may invoke it. In re Young's Estate, 33 Utah 382, 94 P. 731, 17 L.R.A. (n.s.) 108, 126 Am. St. R. 843, 14 Ann. Cas. 596 (1908).

Privilege belongs to the client who may waive it, and after it has been waived by the client, the attorney cannot claim it. State v. Hoben, 36 Utah 186, 102 P. 1000 (1909).

If a client himself testifies to conversations with his attorney in respect of matters claimed to be privileged, the privilege is waived, and the client may not thereafter be heard to claim the privilege when the attorney is called to impeach him. State v. Hoben, 36 Utah 186, 102 P. 1000 (1909).

Personal representative of a deceased person may waive the privilege and demand that the physician who attended the deceased prior to his death be permitted to testify concerning information acquired necessary to enable him to prescribe or act for patient. Grieve v. Howard, 54 Utah 225, 180 P. 423 (1919).

Privilege may be waived by a patient testifying as to his doctor's findings; doctor may then be examined in respect thereto by the opposing party. Moutzoukos v. Mut. Benefit Health & Accident Ass'n, 69 Utah 309, 254 P. 1005 (1927).

Patient waived his privilege when he voluntarily testified concerning conduct, statements, and opinions of his physician. Dahlquist v. Denver & R.G.R.R., 52 Utah 438, 174 P. 833 (1918).

Cited in State v. Benson, 712 P.2d 256 (Utah 1985); State v. Smith, 726 P.2d 1232 (Utah 1986).

COLLATERAL REFERENCES

Utah Law Review. — Confidentiality and the Lawyer-Client Relationship, 1980 Utah L. Rev. 765.

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 141 et seq.

C.J.S. — 97 C.J.S. Witnesses § 252 et seq.

A.L.R. — Applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 A.L.R.3d 861.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 A.L.R.3d 1244.

Applicability in criminal proceedings of privilege as to communications between physician and patient, 7 A.L.R.3d 1458.

Implied obligation not to use trade secrets or similar confidential information disclosed during unsuccessful negotiations for sale, license, or the like, 9 A.L.R.3d 665.

Attorney-client privilege as affected by communications between several attorneys, 9 A.L.R.3d 1420.

Attorney-client privilege as affected by its assertion as to communications, or transmission of evidence, relating to crime already committed, 16 A.L.R.3d 1029.

Disclosure of name, identity, address, occupation, or business of client as violation of attorney-client privilege, 16 A.L.R.3d 1047.

Physician's tort liability, apart from defamation, for unauthorized disclosure of confidential information about plaintiff, 20 A.L.R.3d 1109.

Power of trustee in bankruptcy to waive privilege of communications available to bankrupt, 31 A.L.R.3d 557.

Propriety and prejudicial effect of comment or instruction by court with respect to party's refusal to permit introduction of privileged testimony, 34 A.L.R.3d 775.

Communications by corporation as privileged in stockholders' action, 34 A.L.R.3d 1106.

Competency of one spouse to testify against another in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction, 36 A.L.R.3d 820.

Admissibility of physician's testimony as to patient's statements or declarations, other than res gestae, during medical examinations, 37 A.L.R.3d 778.

Privilege, in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient, 44 A.L.R.3d 24.

Rule as regards competency of husband or wife to testify as to nonaccess, 49 A.L.R.3d 212.

Who is "clergyman" or the like entitled to assert privilege attaching to communications to clergymen or spiritual advisers, 49 A.L.R.3d 1205.

Communications to social workers as privileged, 50 A.L.R.3d 563.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 A.L.R.3d 548.

Defense attorney as witness for his client in criminal case, 52 A.L.R.3d 887.

Confidentiality of records as to recipients of public welfare, 54 A.L.R.3d 768.

Applicability of attorney-client privilege to communications relating to drafting of documents, 55 A.L.R.3d 1322.

Admissibility of defense communications made in connection with plea bargaining, 59 A.L.R.3d 441.

Matters to which the privilege covering communications to clergyman or spiritual adviser extends, 71 A.L.R.3d 794.

Privilege of news gatherer against disclosure of confidential sources or information, 99 A.L.R.3d 37.

Testimonial privilege for confidential communications between relatives other than husband and wife—state cases, 6 A.L.R.4th 544.

Privileged communications between accountant and client, 33 A.L.R.4th 539.

Presence of child at communication between husband and wife as destroying confidentiality of otherwise privileged communication between them, 39 A.L.R.4th 480.

Propriety of governmental eavesdropping on communications between accused and his attorney, 44 A.L.R.4th 841.

Physician's tort liability for unauthorized disclosure of confidential information about patient, 48 A.L.R.4th 668.

Discovery: right to ex parte interview with injured party's treating physician, 50 A.L.R.4th 714.

Key Numbers. — Witnesses ⇐ 184 et seq.

78-24-9. Duty to answer questions — Privilege.

A witness must answer questions legal and pertinent to the matter in issue, although his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it is to the very fact in issue or to a fact from

which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction of felony.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-9.

Cross-References. — Privilege against self-incrimination, Utah Const., Art. I, Sec. 12; § 77-1-6.

NOTES TO DECISIONS

Analysis

Construction and application of section.

"Pertinent to the matter in issue," as used in predecessor section relative to questions witness must answer, included those collateral matters, if any, in regard to which witness might be examined to test the credit the jury should give him. State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).

This section applies to defendants who testify in their own behalf. State v. Simmons, 28 Utah 2d 301, 501 P.2d 1206 (1972).

Character of witness.

Where defendant's counsel sought to establish the defendant's good nature and good character, the state could cross-examine him regarding his assertions even though some questions went to details which ordinarily could not be raised including a guilty plea to a negligent homicide charge involving his wife's death, fights for which he had not been booked or charged, and a shoot-out at a lodge. State v. Adams, 26 Utah 2d 377, 489 P.2d 1191 (1971).

Answers tending to degrade the character of witness but not tending to subject him to punishment for a felony, or tending to subject him to punishment for a felony if not excluded by the court in its discretion on a general objection, are always subject to exclusion by the witness exercising his personal privilege, and this may be suggested to the court by the attorney, and the court, before the witness answers, should inform him as to his rights in that regard. State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).

Claim of privilege.

If a witness in a criminal case submits himself as a witness in his own behalf, he himself must claim the immunity from answering degrading or criminative interrogatories or cross-interrogatories. It is a personal privilege which he, and not his counsel, can claim or waive at his pleasure. People v. Larsen, 10 Utah 143, 37 P. 258 (1894).

Degrading character.

Witness cannot be compelled to answer a question which will have a direct tendency to degrade his character under the guise of affecting his credibility. Testimony must be to the fact in issue or to a fact from which the fact in issue would be presumed. State v. Reese, 43 Utah 447, 135 P. 270 (1913).

Where questions of a cross-examiner call for isolated or sporadic acts or conduct tending to degrade a witness or show moral turpitude, whether they would tend to subject a witness to punishment for a felony or not, but which could not be said to mark the witness as one of low or dissolute character and which do not present any reasonable basis for an assumption that the witness was not telling the truth in the case, objection on the ground of irrelevancy and incompetency should be sustained. State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).

Witness may be asked a question, the answer to which has the direct tendency to degrade his or her character, if it is pertinent to establish an ultimate fact in issue or to a fact from which such a fact may be presumed or inferred. State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).

Questions whose only object could be to call for answers to affect the credibility of a witness and which answers could tend to degrade his or her character, but not tend to subject such wit-

ness to punishment for a felony, are permissible over general objection to their relevancy or competency, in the sound discretion of the court. State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).

If a cross-examiner desires to show a witness as one of low morality or a dissolute person by questions showing such facts, conduct or associations with disreputable characters as would tend to so stamp the witness as not worthy of credit, the court should in the absence of the jury take offer of such questions and determine if they would so tend to show such character that the jury should have it in order to judge the credibility of the witness and, if so, permit such questions to be asked in the jury's presence. State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).

On trial of a defendant charged with profiting from earnings of a fallen woman, it was prejudicial error to overrule the defendant's objections to questions the answers to which had a tendency to degrade his character, where the answers did not relate to the fact in issue or to a fact from which the fact in issue might be presumed. State v. Edwards, 13 Utah 2d 51, 368 P.2d 464 (1962).

Witness was justified in asserting privilege and refusing to answer the question whether the witness and the defendant had indulged in homosexual relations with each other where the question, if answered, could have a direct tendency to degrade the character of the witness, yet if answered in the affirmative would not be a fact from which homicide, the fact in issue, would be presumed. In re Peterson, 15 Utah 2d 27, 386 P.2d 726 (1963).

Determination of existence of privilege.

Witness is not the judge of whether his testimony will tend to incriminate him; it is for the court to determine whether his testimony will tend to incriminate him; if the court has any doubt whether a witness might be incriminated by answering question, the witness should not be held in contempt until he has first been given the opportunity to explain by such noncriminatory evidence as he may have why he claims privilege. In re Petty, 18 Utah 2d 320, 422 P.2d 659 (1967).

Discretion of court.

Cross-examination is largely in the discretion of the trial court and may be permitted with respect to extraneous matters for purpose of testing the recollection of a witness. Mulliner v. McCornick & Co., Bankers, 69 Utah 557, 257 P. 658 (1927).

Discretion of the court, in deciding whether questions calling for answers affecting the credibility of a witness and either tending to degrade his character but not tending to subject him to prosecution for a felony, or tending to subject him to prosecution for a felony, are permissible over general objection to their relevancy or competency, is to be exercised in view of varying circumstances of each particular case and not limited by intrinsic and immediate considerations arising out of the cross-examination. State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).

In exercise of discretion relative to the permissibility of cross-examination for the purpose of affecting credibility of a witness, the court should consider the effect of questions in their tendency to prejudice a jury against a defendant or divert its attention from main issues as weighed against the effect of such questions in affecting the credibility of a witness, keeping in mind that such questions as to a defendant may directly prejudice a jury, whereas in the case of a witness not a defendant they do no more than prejudice the jury against such witness and thus less directly affect case. State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).

Forcing witness to invoke privilege.

If counsel, knowing a witness should not be compelled to answer, ask questions implying immorality, the Supreme Court may reverse the case with censure on counsel, whether or not the witness claimed privilege. State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).

In a criminal prosecution, the state's calling of witnesses which it knew would claim a privilege against self-incrimination did not constitute reversible error where the jury was instructed not to speculate or draw inferences as to what testimony might have been. State v. Boyland, 27 Utah 2d 268, 495 P.2d 315 (1972).

Prior convictions.

A witness, as affecting his credibility, may be asked if he had not been previously convicted of a felony, and the kind or name of the felony, but not the details or circumstances of it. Where the witness denies conviction, he may be contradicted by the record of a court of competent jurisdiction showing the conviction. State v. Johnson, 76 Utah 84, 287 P. 909 (1930), distinguished sub nom. State v. Younglove, 17 Utah 2d 268, 409 P.2d 125 (1965).

Witness may be asked on cross-examination whether he has been convicted of a felony. State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).

Although a witness is not required to answer questions as to details or circumstances of his prior conviction for felony, such information as the nature and date of the felony, the date of sentence, and where he lived at that time does not fall within this protective rule and must be provided upon proper questioning. State v. Younglove, 17 Utah 2d 268, 409 P.2d 125 (1965).

While the prosecution was sanctioned by this

section to require a defendant charged with assault with intent to commit murder and robbery to testify as to the number and nature of felonies of which he had been previously convicted, it was error to allow an F.B.I. agent to testify as to his conversation with the defendant concerning other unproved crimes charged against the defendant, and the case was reversed for a new trial even though the trial court had admonished the jury to disregard such prejudicial testimony. State v. Kazda, 14 Utah 2d 166, 382 P.2d 407 (1963), distinguished sub nom. State v. Hodges, Utah 2d 367, 517 P.2d 1322 (1974).

Testimony concerning defendant's prior incarceration was properly elicited on cross-examination, as being within the scope of his direct examination, under the statute, since the defendant had testified on direct examination that he had lived at a specific residence continuously for a number of years when in fact he had spent six months of that time in the state prison and since on direct examination the defendant had sought to create an impression with the jury that he was a man of substance who would not issue a bad check. State v. Hansen, 22 Utah 2d 63, 448 P.2d 720 (1968), cert. denied, 394 U.S. 992, 89 S. Ct. 1483, 22 L. Ed. 2d 768 (1969).

Witness may not be impeached on a prior conviction where the record of the conviction has been expunged. State v. Jones, 581 P.2d 141 (Utah 1978).

Criminal defendant who voluntarily takes the witness stand must answer on cross-examination as to the fact of a prior conviction of a felony. State v. McCumber, 622 P.2d 353 (Utah 1980).

When impeaching a defendant, or any other witness, by conviction of a prior felony, it is permissible to inquire only into the fact and nature of the prior conviction, but not, except in unusual circumstances, the surrounding details or circumstances. State v. Williams, 656 P.2d 450 (Utah 1982).

Where a defendant charged with several felonies refused to take the stand after the trial court denied his motion to suppress evidence of a prior guilty plea, there was no error, since a prior guilty plea is a prior conviction and can be used to impeach a defendant who takes the witness stand in his own defense. State v. Delashmutt, 676 P.2d 383 (Utah 1983).

—Rule of evidence.

To the extent the last sentence in this section is inconsistent with Rule 609, U.R.E. (impeachment), it is superseded. State v. Banner, 717 P.2d 1325 (Utah 1986).

Scope and effect of privilege.

Accused in criminal case will not be heard to object that an adverse witness be not allowed to testify on the ground that he will thereby incriminate himself. State v. Cox, 74 Utah 149, 277 P. 972 (1929).

Questions whose only object could be to call for an answer to affect the credibility of a witness, and which would tend to subject such witness to punishment for a felony, are permissible over general objection to their relevancy or competency, in the sound discretion of the court. State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 29 et seq.

C.J.S. — 97 C.J.S. Witnesses § 430 et seq.

A.L.R. — Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question, 4 A.L.R.3d 545.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question, 9 A.L.R.3d 990.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 A.L.R.3d 1373.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family, 88 A.L.R.3d 304.

Right of independent expert to refuse to testify as to expert opinion, 50 A.L.R.4th 680.

Key Numbers. — Witnesses ⇐ 292 et seq.

78-24-10. Proceedings in aid of or supplemental to attachment, garnishment, or execution.

Notwithstanding the provisions of the preceding section [§ 78-24-9], a party or a witness examined in proceedings in aid of or supplemental to attachment, garnishment, or execution is not excused from answering a question on the ground that his answer will tend to convict him of the commission of a fraud, or to prove that he has been a party or privy to, or has acknowledge [knowl-

edge] of, a conveyance, assignment, transfer or other disposition of property concerned for any purpose; or on the ground that he or any other person claims to be entitled, as against the judgment creditor or a receiver appointed or to be appointed in the proceedings, to hold property derived from or through the judgment debtor or to be discharged from the payment of a debt which was due to the judgment debtor or to a person in his behalf. But an answer cannot be used as evidence against the person so answering in a criminal action or proceeding, except in an action for perjury against him for falsely testifying.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-10.

Cross-References. — Attachment, Rules of Civil Procedure, Rule 64C.

Execution and proceedings supplemental thereto, Rules of Civil Procedure, Rule 69.

Garnishment, Rules of Civil Procedure, Rule 64D.

Witnesses in proceedings examining judgment debtor or debtor of judgment debtor, Rules of Civil Procedure, Rule 69(n).

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 32.

C.J.S. — 98 C.J.S. Witnesses §§ 439, 446.

Key Numbers. — Witnesses ⇐ 294, 304(1).

78-24-11. Rights of witnesses.

It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor, to be detained only so long as the interests of justice require it, and to be examined only as to matters legal and pertinent to the issue.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-11.

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 417.

C.J.S. — 98 C.J.S. Witnesses §§ 316, 343.

Key Numbers. — Witnesses ⇐ 236.

78-24-12. Witnesses — Exempt from arrest in civil action.

Every person who has been in good faith served with a subpoena to attend as a witness before a court, judge, commissioner, referee or other person, in a case where the disobedience of the witness may be punished as a contempt, is exempt from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-12.

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Arrest § 108.

C.J.S. — 6A C.J.S. Arrest § 84.

Key Numbers. — Arrest ⇐ 9.

78-24-13. Unlawful arrest — Void — Damages recoverable.

The arrest of a witness contrary to the preceding section [§ 78-24-12] is void, and when willfully made is a contempt of the court, and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with the subpoena for the damages sustained by him in consequence of the arrest.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-13.

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Arrest § 112.
C.J.S. — 6A C.J.S. Arrest §§ 84, 111.
A.L.R. — Modern status of rules as to right to forcefully resist illegal arrest, 44 A.L.R.3d 1078.
Key Numbers. — Arrest ⇐ 9, 57.

78-24-14. Liability of officer making arrest.

An officer is not liable for making the arrest in ignorance of the facts creating the exemption, but is liable for any subsequent detention of the witness, if such witness claims the exemption and makes an affidavit stating:

(1) That he has been served with a subpoena to attend as a witness before a court, officer or other person, specifying the same, the place of attendance and the action or proceeding in which the subpoena was issued;

(2) That he has not thus been served by his own procurement, with the intention of avoiding an arrest; and,

(3) That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena.

The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-14.

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Arrest § 114.
C.J.S. — 6A C.J.S. Arrest §§ 84, 111.
Key Numbers. — Arrest ⇐ 9, 57.

78-24-15. Discharge of witness unlawfully arrested.

The court or officer issuing the subpoena, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of § 78-24-12. If the court has adjourned before the arrest or before application for the discharge, a judge of the court may grant the discharge.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-15.

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Arrest § 116.
C.J.S. — 6A C.J.S. Arrest §§ 84, 107, 111.
Key Numbers. — Arrest ⇐ 9, 46 et seq.

78-24-16. Oaths — Who may administer.

Every court, every judge, clerk and deputy clerk of any court, every justice, every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-16.

Cross-References. — Judicial officers' power to administer oaths, § 78-7-17.

NOTES TO DECISIONS

Deputy county clerk.
A deputy county clerk is also a deputy court clerk, under § 17-20-1, authorized to administer oaths under this section. Baker v. Schwendiman, 714 P.2d 675 (Utah 1986).

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 413 et seq.

C.J.S. — 98 C.J.S. Witnesses § 320.
Key Numbers. — Witnesses ⇐ 227.

78-24-17. Form.

An oath or affirmation in an action or proceeding may be administered, the person who swears or affirms expressing his assent when addressed, in the following form:

You do solemnly swear (or affirm) that the evidence you shall give in this issue (or matter) pending between _____ and _____ shall be the truth, the whole truth and nothing but the truth, so help you God (or, under the pains and penalties of perjury).

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-17.

Cross-References. — Requirement of oath or affirmation, Rules of Evidence, Rule 603.

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 415.

C.J.S. — 98 C.J.S. Witnesses § 320.
Key Numbers. — Witnesses ⇐ 227.

78-24-18. Affirmation or declaration instead of oath allowed.

Any person may at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting, when addressed in the following form:

"You do solemnly affirm (or declare) that," etc., as in the preceding section [§ 78-24-17].

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-18.

Cross-References. — Affirmation acceptable in lieu of oath, Rules of Civil Procedure, Rule 43(d).

"Oath" includes "affirmation"; "swear" includes "affirm," § 68-3-12.

Oath or affirmation, Rules of Evidence, Rule 603.

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 415.

C.J.S. — 98 C.J.S. Witnesses § 320.

Key Numbers. — Witnesses ⇐ 227.

78-24-19. Variance in form of swearing to suit witness' belief.

Whenever the court before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing, connected with or in addition to the usual form, which in his opinion is more solemn or obligatory, the court may in its discretion adopt that mode.

If a person who is sworn believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there are any.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-19.

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Witnesses § 415.

C.J.S. — 98 C.J.S. Witnesses § 320.

Key Numbers. — Witnesses ⇐ 227.

CHAPTER 24a
INTERPRETERS FOR HEARING-IMPAIRED

78-24a-1. Definitions.

As used in this chapter:

(1) "Appointing authority" means the presiding officer or similar official of any court, board, commission, authority, department, agency, legislative body, or of any proceeding of any nature where a qualified interpreter is required under this act.

(2) "Hearing-impaired person" and "hearing impaired parent" means a deaf or hard of hearing person who, because of sensory or environmental conditions, requires the assistance of a qualified interpreter for communicative purposes.

(3) "Qualified interpreter" means a sign language or oral interpreter as provided in §§ 78-24a-3 and 78-24a-6 of this act.

History: L. 1983, ch. 288, § 1.

Meaning of "this act". — The term "this act," referred to in this section, means Laws 1983, Chapter 288, which appears as §§ 78-24a-1 to 78-24a-11. The reference probably should be "this chapter".

COLLATERAL REFERENCES

A.L.R. — Deaf-mute as witness, 50 A.L.R.4th 1188.

78-24a-2. Proceedings at which interpreter is to be provided for hearing impaired.

(1) If a hearing-impaired person is a party or witness at any stage of any judicial or quasi-judicial proceeding in this state or in its political subdivisions (including but not limited to civil and criminal court proceedings, grand jury proceedings, proceedings before a magistrate, juvenile proceedings, adoption proceedings, mental health commitment proceedings, and any proceeding in which a hearing-impaired person may be subjected to confinement or criminal sanction) the appointing authority shall appoint and pay for a qualified interpreter to interpret the proceedings to the hearing-impaired person and to interpret the hearing-impaired person's testimony.

(2) If a juvenile whose parent or parents are hearing-impaired is brought before a court for any reason whatsoever, the court shall appoint and pay for a qualified interpreter to interpret the proceedings to the hearing-impaired parent and to interpret the hearing-impaired parent's testimony.

(3) In any hearing, proceeding, or other program or activity of any department, board, licensing authority, commission, or administrative agency of the state or of its political subdivisions, the appointing authority shall appoint and pay for a qualified interpreter for the hearing-impaired participants if the interpreter is not otherwise compensated for those services.

(4) If a hearing-impaired person is a witness before any legislative committee or subcommittee, or legislative research or interim committee or subcommittee or commission authorized by the state Legislature or by the legislative body of any political subdivision of the state, the appointing authority shall

appoint and pay for a qualified interpreter to interpret the proceedings to the hearing-impaired person and to interpret the hearing-impaired person's testimony.

(5) If a hearing-impaired person is arrested for an alleged violation of a criminal law, including a local ordinance, the arresting officer shall procure a qualified interpreter for any interrogation, warning, notification of rights, or taking of a statement. No answer, statement, or admission, written or oral, made by a hearing-impaired person in reply to a question of a law enforcement officer or any other person having a prosecutorial function in any criminal or quasi-criminal proceeding may be used against that hearing-impaired person unless either the statement was made or elicited through a qualified interpreter and was made knowingly, voluntarily, and intelligently or, in the case of waiver of interpreters, unless the court makes a special finding that any statement made by the hearing-impaired person was made knowingly, voluntarily, and intelligently.

(6) If it is the policy and practice of a court of this state or of its political subdivisions to appoint counsel for indigent people, the appointing authority shall appoint and pay for a qualified interpreter for hearing-impaired indigent people to assist in communication with counsel in all phases of the preparation and presentation of the case.

(7) If a hearing-impaired person is involved in administrative, legislative, or judicial proceedings, the appointing authority shall recognize that family relationship between the particular hearing-impaired person and an interpreter may constitute a possible conflict of interest and select a qualified interpreter who will be impartial in the proceedings.

History: L. 1983, ch. 288, § 2; 1985, ch. 47, § 15.

Amendment Notes. — The 1985 amendment substituted "interim" for "study" in Subsection (4).

COLLATERAL REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d Affidavits § 11; 21 Am. Jur. 2d Criminal Law § 338; 23 Am. Jur. 2d Depositions and Discovery §§ 51, 74; 29 Am. Jur. 2d Evidence § 501; 41 Am. Jur. 2d Indictments and Informations § 251; 75 Am. Jur. 2d Trial §§ 57, 58; 81 Am. Jur. 2d Witnesses § 506.

C.J.S. — 21 C.J.S. Courts § 141; 26A C.J.S. Depositions § 67; 31A C.J.S. Evidence § 207; 39 C.J.S. Habeas Corpus § 61; 88 C.J.S. Trial §§ 42, 214; 97 C.J.S. Witnesses § 141; 98 C.J.S. Witnesses §§ 320, 326.

A.L.R. — Court proceedings or evidence, right of interpretation, 36 A.L.R.3d 276.

Disqualification, for bias, of one offered as interpreter of testimony, 6 A.L.R.4th 158.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter, 12 A.L.R.4th 1016.

Key Numbers. — Criminal Law ⇐ 642.

78-24a-3. Effectiveness of interpreter determined.

Before appointing an interpreter, the appointing authority shall make a preliminary determination, on the basis of the proficiency level established by the Utah division of rehabilitation services and on the basis of the hearing-impaired person's testimony, that the interpreter is able to accurately communicate with and translate information to and from the hearing-impaired person involved. If the interpreter is not able to provide effective communication with the hearing-impaired person, the appointing authority shall appoint another qualified interpreter.

History: L. 1983, ch. 288, § 3.

78-24a-4. Appointment of more qualified interpreter.

If a qualified interpreter is unable to render a satisfactory interpretation, the appointing authority shall appoint a more qualified interpreter.

History: L. 1983, ch. 288, § 4.

78-24a-5. Readiness of interpreter prerequisite to commencement of proceeding.

If an interpreter is required to be appointed under this act, the appointing authority may not commence proceedings until the appointed interpreter is in full view of and spatially situated to assure effective communication with the hearing-impaired participants.

History: L. 1983, ch. 288, § 5.
Meaning of "this act". — See the note under the same catchline following § 78-24a-1.

78-24a-6. List of qualified interpreters — Use — Appointment of another.

(1) The Utah division of rehabilitation services shall establish, maintain, update, and distribute a list of qualified interpreters.

(2) When an interpreter is required under this act, the appointing authority shall use one of the interpreters on the list provided by the Utah division of rehabilitation services. If none of the listed interpreters are available or are able to provide effective interpreting with the particular hearing-impaired person, then the appointing authority shall appoint another qualified interpreter who is able to accurately and simultaneously communicate with and translate information to and from the particular hearing-impaired person involved.

History: L. 1983, ch. 288, § 6.
Meaning of "this act". — See the note under the same catchline following § 78-24a-1.

78-24a-7. Oath of interpreter.

Before he or she begins to interpret, every interpreter appointed under this act shall take an oath that he or she will make a true interpretation in an understandable manner to the best of his or her skills and judgment.

History: L. 1983, ch. 288, § 7.
Meaning of "this act". — See the note under the same catchline following § 78-24a-1.

78-24a-8. Compensation of interpreter.

An interpreter appointed under this act is entitled to a reasonable fee for his or her services, including waiting time and reimbursement for necessary travel and subsistence expenses. The fee shall be based on a fee schedule for interpreters recommended by the division of rehabilitation services or on prevailing market rates. Reimbursement for necessary travel and subsistence expenses shall be at rates provided by law for state employees generally. Compensation for interpreter services shall be paid by the appointing authority if the interpreter is not otherwise compensated for those services.

History: L. 1983, ch. 288, § 8.

Meaning of "this act". — See the note under the same catchline following § 78-24a-1.

Cross-References. — Court costs, interpreters' fees taxed as, § 21-5-17.

78-24a-9. Waiver of right to interpreter.

The right of a hearing-impaired person to an interpreter may not be waived, except by a hearing-impaired person who requests a waiver in writing. The waiver is subject to the approval of counsel to the hearing-impaired person, if existent, and is subject to the approval of the appointing authority. In no event may the failure of the hearing-impaired person to request an interpreter be considered a waiver of that right.

History: L. 1983, ch. 288, § 9.

78-24a-10. Privileged communications.

If a hearing-impaired person communicates through an interpreter to any person under such circumstances that the communication would be privileged and the person could not be compelled to testify as to the communications, this privilege shall apply to the interpreter as well.

History: L. 1983, ch. 288, § 10.

78-24a-11. Video recording of testimony of hearing-impaired person.

The appointing authority, on his or her own motion or on the motion of a party to the proceedings, may order that the testimony of the hearing-impaired person and its interpretation be electronically recorded by a video recording device for use in verification of the official transcript of the proceedings.

History: L. 1983, ch. 288, § 11.