

## Chapter 8

### Court Officers and District Attorneys

#### 8.020

ATTY. GEN. OPINIONS: Bailiff's fees on a change of venue, 1944-46, p 5; auditing of bailiff's salary, 1944-46, p 384; order for payment of bailiff's salary, 1958-60, p 7; employer contribution to retirement fund for court reporter, 1966-68, p 3.

#### 8.110

ATTY. GEN. OPINIONS: Juvenile court authority to determine personnel salaries, (1970) Vol 34, p 977.

#### 8.160

#### NOTES OF DECISIONS

The filing of a transcript with the clerk instead of his deputy at Pendleton in a cause to be heard at Pendleton, is sufficient to give the Supreme Court jurisdiction. *Central Ore. Irr. Co. v. Whited*, (1915) 76 Or 255, 142 P 779, 146 P 815.

#### 8.310

ATTY. GEN. OPINIONS: Employer contribution to retirement fund for court reporter, 1966-68, p 3; employer contribution to Public Employees' Retirement Board where court reporter serves two counties, 1966-68, p 3.

#### 8.320

#### NOTES OF DECISIONS

Only temporary or substitute service is authorized by this section. *Holmes v. Gleason*, (1961) 227 Or 344, 362 P2d 332.

ATTY. GEN. OPINIONS: Court reporter's per diem, 1958-60, p 186.

#### 8.340

#### NOTES OF DECISIONS

A bill of exceptions can be drawn and properly authenticated notwithstanding the fact that the trial was not reported and the judge died before it was settled or signed. *Payn v. Richards*, (1951) 191 Or 548, 231 P2d 420.

In all criminal proceedings, the court should order a complete report, including jury voir dire, opening statements and closing arguments, unless defendant specifically waives them. *State v. Rutherford*, (1970) 1 Or App 599, 465 P2d 243, Sup Ct review denied.

FURTHER CITATIONS: *Lang v. Hill*, (1961) 226 Or 371, 360 P2d 316.

ATTY. GEN. OPINIONS: Furnishing of supplies to circuit court reporter by county, 1936-48, p 286; use of mechanical recorder in labor hearings, 1954-56, p 115; use of recording in connection with typed or written report, 1954-56, p 115; use of recording in connection with typed or written report, 1960-62, p 333.

LAW REVIEW CITATIONS: 6 WLJ 488.

#### 8.350

#### NOTES OF DECISIONS

Filing the transcript of testimony with the county clerk is essential to appeal. *Little Applegate Improvement Dist. v. Munsell*, (1930) 134 Or 132, 291 P 369.

Until payment of his fee, the official reporter is under no obligation to file the transcript. *State v. Stapleton*, (1932) 139 Or 402, 10 P2d 600.

A report of testimony may be authenticated by the court when a reporter is not used or when one is used and the shorthand notes are lost or destroyed. *Hoffart v. Lindquist*, (1948) 182 Or 611, 189 P2d 592.

A transcript of testimony certified by a reporter with nothing to indicate that such reporter was the official reporter, and not filed with the clerk of the court or authenticated by the certificate of the trial judge, was insufficient for consideration by the Supreme Court. *Nealan v. Ring*, (1921) 98 Or 490, 184 P 275, 193 P 199, 747.

A county clerk's certificate to the effect that the transcript was charged to the appellant's attorney sufficiently showed the filing of the transcript with the clerk. *Little Applegate Improvement Dist. v. Munsell*, (1930) 134 Or 132, 291 P 369.

FURTHER CITATIONS: *Lang v. Hill*, (1961) 226 Or 371, 360 P2d 316.

ATTY. GEN. OPINIONS: Use of recording in connection with typed or written report, 1954-56, p 115.

#### 8.360

#### NOTES OF DECISIONS

##### 1. In general

Official court reporter's transcript when certified by him is prima facie evidence of the facts therein stated but becomes a bill of exceptions only after certification by judge. *McQuaid v. Portland & Vancouver R. Co.*, (1890) 19 Or 535, 25 P 26; *Thomsen v. Giebisch*, (1920) 95 Or 118, 173 P 888, 186 P 10; *Berneche v. Hess*, (1928) 125 Or 118, 255 P 244; *State v. Stapleton*, (1932) 139 Or 402, 10 P2d 600.

A certificate to the reporter's transcript that it was a full, true and correct transcript of the shorthand notes taken at the trial, and of the whole thereof, should be construed as certifying that it included the entire proceedings had at the trial. *Sanborn v. Fitzpatrick*, (1909) 51 Or 457, 91 P 540.

##### 2. Record made by other than official reporter

Testimony at a former trial taken by a reporter but not by an official reporter is not admissible at a subsequent trial of the same action. *State v. McPherson*, (1914) 70 Or 371, 141 P 1018. **Distinguished in** *State v. Crawley*, (1966) 242 Or 601, 410 P2d 1012.

Before the certificate to the evidence by a private stenographer chosen by agreement to record testimony in a case

will have the effect of authenticating the evidence under this statute it should appear that the private stenographer took the oath prescribed by statute. *Johnson v. Johnson*, (1929) 131 Or 235, 274 P 918, 282 P 1082.

### 3. Reading as deposition

Testimony not involving the same subject given by a decedent in a former suit is inadmissible in a subsequent trial between the same parties. *Nevada Ditch Co. v. Canyon & Sand Hollow Ditch Co.*, (1911) 58 Or 517, 114 P 86.

Testimony of a witness at a former trial, as quoted by the official reporter, is substantially the deposition of the witness and may be read at any subsequent hearing of the case provided the witness is without the state. *Beard v. Royal Neighbors of America*, (1911) 60 Or 41, 118 P 171.

Where the transcript did not indicate that the reporter was an official reporter and was not certified by the trial judge, it was not sufficiently authenticated for the consideration of the Supreme Court. *Nealan v. Ring*, (1921) 98 Or 490, 184 P 275, 193 P 199, 747; *Little Applegate Improvement Dist. v. Munsell*, (1930) 134 Or 132, 291 P 369; *Dedman v. Biggs*, (1943) 170 Or 692, 121 P2d 466, 134 P2d 428.

FURTHER CITATIONS: *Tallmadge v. Hooper*, (1900) 37 Or 503, 61 P 349, 1127; *Kruckman v. Smith*, (1928) 126 Or 395, 270 P 474; *Smith v. Brandon*, (1933) 141 Or 684, 13 P2d 333; *King v. State Ind. Acc. Comm.*, (1957) 211 Or 40, 309 P2d 159, 315 P2d 148, 318 P2d 272; *Lang v. Hill*, (1961) 226 Or 371, 360 P2d 316; *Beelman v. Beelman*, (1961) 227 Or 556, 361 P2d 663, 363 P2d 561; *Fry v. Ashley*, (1961) 228 Or 61, 363 P2d 555; *State v. Christenson*, (1962) 230 Or 283, 370 P2d 240; *State v. Carcerano*, (1964) 238 Or 208, 390 P2d 923.

ATTY. GEN. OPINIONS: Use of recording in connection with typed or written report, 1954-56, p 115.

8.372

ATTY. GEN. OPINIONS: Employer contribution to retirement fund for court reporter, 1966-68, p 3.

8.375

ATTY. GEN. OPINIONS: Employer contribution to Public Employees' Retirement Board where court reporter serves two counties, 1966-68, p 3.

8.379

ATTY. GEN. OPINIONS: Employer contribution to Public Employees' Retirement Board where court reporter serves two counties, 1966-68, p 3.

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8.387

ATTY. GEN. OPINIONS: Employer contribution to Public Employees' Retirement Board where court reporter serves two counties, 1966-68, p 3.

8.390

ATTY. GEN. OPINIONS: Court reporter's per diem, 1958-60, p 186; payment of court reporter serving in judicial district not his own, 1958-60, p 186.

8.400

CASE CITATIONS: *Hubbard v. Hubbard*, (1958) 213 Or 482, 324 P2d 469.

8.410

ATTY. GEN. OPINIONS: Court reporter's per diem, 1958-60, p 186; payment of court reporter serving in judicial district not his own, 1958-60, p 186.

8.610

CASE CITATIONS: *State v. Colvig*, (1887) 15 Or 57, 13 P 639; *State v. Dillard*, (1914) 73 Or 13, 144 P 127; *State v. Hodgins*, (1915) 76 Or 480, 146 P 86, 149 P 530; *State v. Farnham*, (1925) 114 Or 32, 234 P 806.

ATTY. GEN. OPINIONS: Length of term of district attorneys, 1922-24, p 573, 1930-1932, p 465; qualifications for district attorneys, 1922-24, p 640; district attorney as state officer, 1958-60, p 88; compensation of hold-over district attorney engaged also in private practice, (1969) Vol 34, p 506.

8.620

### NOTES OF DECISIONS

A delay in qualifying does not work a forfeiture but merely prevents the person elected from entering upon the duties of the office. *State v. Colvig*, (1887) 15 Or 57, 13 P 639.

Though a deputy does not take an oath of office, an information filed and signed by him in the name of the district attorney is supported by an oath. *State v. Guglielmo*, (1905) 46 Or 250, 79 P 577, 80 P 103, 7 Ann Cas 976, 69 LRA 466; *State v. Walton*, (1909) 53 Or 557, 99 P 431, 101 P 389, 102 P 173.

ATTY. GEN. OPINIONS: Failure to file certificate of election and oath as affecting compensation, 1926-28, p 61, 1932-34, p 211.

8.630

ATTY. GEN. OPINIONS: Relinquishment of office by district attorney serving under an appointment, 1926-28, p 57; term of office of person appointed district attorney to fill a vacancy, 1928-30, p 478; term of office of person elected district attorney at first general election following vacancy, 1930-32, p 465.

8.650

### NOTES OF DECISIONS

It is as much the duty of prosecuting attorneys to see that a person on trial is not deprived of any of his constitutional or statutory rights as it is to prosecute him for the crime with which he is charged. *State v. Osborne*, (1909) 54 Or 289, 103 P 62, 20 Ann Cas 627.

A district attorney may be liable for a malicious prosecution where he institutes proceedings against a person for a crime which he knows has not been committed. *Watts v. Gerking*, (1924) 111 Or 641, 222 P 318, 228 P 135, 34 ALR 1489.

The hiring of a detective by a district attorney on advice of the county judge was irregular, but the employment may be ratified by the county court in allowing the bill and directing its payment. *Cunningham v. Umatilla County*, (1910) 57 Or 517, 112 P 437, 37 LRA (N.S.) 1051.

FURTHER CITATIONS: *State v. Farrell*, (1944) 175 Or 87, 151 P2d 636; *State v. Sieckman*, (1970) 3 Or App 454, 474 P2d 367.

## 8.650

ATTY. GEN. OPINIONS: District attorney as state officer, 1920-22, p 535; 1928-30, p 585; 1950-52, p 265; 1958-60, p 88; 1958-60, p 396; 1960-62, p 335; 1966-68, p 294; when district attorney can represent resident dependents in obtaining support money from persons outside of state owing a duty of support, 1950-52, p 252; powers of district attorney in arson investigations, 1952-54, p 211; employment of attorney by a state board, 1960-62, p 368; availability of in rem proceeding against obscene literature, 1964-66, p 132.

## 8.660

## NOTES OF DECISIONS

On change of venue to another county it is the duty of the district attorney of the county where the offense was committed to prosecute the cause in the place of change. *State v. Anderson*, (1956) 207 Or 675, 298 P2d 195.

FURTHER CITATIONS: *State v. Farrell*, (1944) 175 Or 87, 151 P2d 636; *State v. Johnson*, (1969) 1 Or App 363, 462 P2d 687.

ATTY. GEN. OPINIONS: District attorney as state officer, 1920-22, p 535; 1928-30, p 585; 1950-52, p 265; 1958-1960, p 88; 1958-60, p 396; 1960-1962, p 335; 1966-68, p 294; duty to enforce anti-price discrimination statutes, 1956-58, p 141; employment of attorney by a state board, 1960-62, p 368; witness fees for public officers and employes, 1962-64, p 97; availability of in rem proceeding against obscene literature, 1964-66, p 132.

## 8.670

## NOTES OF DECISIONS

The hiring of a private detective by a district attorney on advice of the court is irregular. *Cunningham v. Umatilla County*, (1910) 57 Or 517, 112 P 437, 37 LRA (N.S.) 1051.

A district attorney is liable for malicious prosecution where he institutes proceedings against a person for a crime he knows has not been committed. *Watts v. Gerking*, (1924) 111 Or 641, 222 P 318, 228 P 135, 34 ALR 1489.

A district attorney is a quasi-judicial officer possessing certain discretion in determining whether to institute a proceeding and he need not prosecute. *Id.*

District attorney was convicted of nonfeasance for failure to prosecute gamblers. *State v. Langley*, (1958) 214 Or 445, 315 P2d 560, 323 P2d 301, cert. denied, 358 US 826, 79 S Ct 45, 3 LEd2d 66.

ATTY. GEN. OPINIONS: Prosecution by district attorney without a complaint being filed and without a prosecuting witness, 1922-24, p 297; availability of in rem proceeding against obscene literature, 1964-66, p 132.

LAW REVIEW CITATIONS: 4 OLR 154; 4 OLR 314; 1 EL 78.

## 8.675

ATTY. GEN. OPINIONS: Duty of district attorney to institute proceedings on behalf of resident dependent seeking to enforce duty of support against a nonresident, 1950-52, p 252.

## 8.680

## NOTES OF DECISIONS

A suit to foreclose a mortgage given to the school land commissioners is to be prosecuted by the district attorney. *In re Ison*, (1877) 6 Or 465.

To intervene in a suit between private parties on a note and mortgage and allege an usurious rate of interest is not a right of a district attorney; he is limited to an action after the contract has been declared usurious. *Holladay v. Holladay*, (1886) 13 Or 523, 11 P 260, 12 P 821.

A district attorney has no authority outside his county to maintain an action as relator on behalf of the state. *State v. Farrell*, (1944) 175 Or 87, 151 P2d 636.

On change of venue to another county it is the duty of the district attorney of the county where the offense was committed to prosecute the cause in the place of change. *State v. Anderson*, (1956) 207 Or 675, 298 P2d 195.

FURTHER CITATIONS: *State v. Johnson*, (1969) 1 Or App 363, 462 P2d 687.

ATTY. GEN. OPINIONS: District attorney as state officer, 1920-22, p 535; 1928-30, p 585; 1950-52, p 265; 1958-60, p 88; 1958-60, p 396; 1960-62, p 335; 1966-68, p 294; foreclosure of mortgages given to secure loans from sinking funds of school districts, 1930-32, p 730; institution of injunction proceedings to restrain cutting of timber on tax delinquent lands, 1930-32, p 794; institution of guardianship proceedings for the insane or feeble minded, 1934-36, p 542; probating estates of recipients of old age assistance, 1938-40, p 83; duty of district attorney to collect amounts due state for maintenance of insane and feeble minded persons, 1938-1940, p 302; duty of district attorney to represent school districts, 1938-40, p 440; duty of district attorney to institute proceedings on behalf of resident dependent seeking to enforce duty of support against a nonresident, 1950-52, p 252; forfeiture and destruction of slot machines which may be used for other than gambling purposes, 1952-54, p 197; availability of in rem proceeding against obscene literature, 1964-66, p 132; authority to prosecute or restrain persons violating irrigation district law, 1964-66, p 418.

## 8.690

## NOTES OF DECISIONS

On change of venue to another county it is the duty of the district attorney of the county where the offense was committed to prosecute the cause in the place of change. *State v. Anderson*, (1956) 207 Or 675, 298 P2d 195.

ATTY. GEN. OPINIONS: District attorney as state officer, 1920-22, p 535; 1928-30, p 585; 1950-52, p 265; 1958-60, p 88; 1958-60, p 396; 1960-62, p 335; 1966-68, p 294; authority of county court to employ special counsel to assist district attorney, 1920-22, p 664, 1924-26, p 190; authority of county court to provide office space for district attorney, 1934-36, p 592; probating estates of recipients of old age assistance, 1938-40, p 83; advising district school boards or representing school districts, 1938-40, p 440; district attorney representing purchaser at tax sale when he assisted tax collector in foreclosure, 1940-42, p 261; duty of district attorney to advise county courts, 1950-52, p 104; county court's authority to supplement a deputy district attorney's salary, 1952-54, p 158; defense of county official on contract claim, 1956-58, p 282; district attorney advising county school superintendent and rural school boards, 1960-62, p 217; district attorney as legal advisor of district boundary board, 1960-62, p 316; availability of in rem proceeding against obscene literature, 1964-66, p 132; authority to prosecute or restrain persons violating irrigation district law, 1964-66, p 418; em-

ployment of counsel or district attorney as counsel for sheriff, 1966-68, p 4; district attorney as legal adviser for county service districts, 1966-68, p 432; county's rights and duties when zoning district is dissolved, (1968) Vol 34, p 44; appearance at tax hearing by nonlawyer representative, (1968) Vol 34, p 91; conflict of interest when district attorney prosecutes assessor's appeal from board of equalization decision, (1971) Vol 35, p 448.

## 8.710

## NOTES OF DECISIONS

When district attorney is ill and his deputies disqualified, a special prosecuting attorney may be appointed by the trial court. *State v. Gauthier*, (1925) 113 Or 297, 231 P 141.

ATTY. GEN. OPINIONS: District attorney holding office of director of a federal land bank, 1932-34, pp 120, 176; acting as counsel for defendants in divorce proceedings, 1942-44, p 37.

## 8.720

ATTY. GEN. OPINIONS: District attorneys acting as counsel for defendants in divorce proceedings in which the district attorneys are required to appear for the state, 1942-44, p 37; representation by a district attorney of a party in an action to enforce a divorce decree, 1954-56, p 38.

## 8.728

ATTY. GEN. OPINIONS: Compensation of hold-over district attorney engaged also in private practice, (1969) Vol 34, p 506.

## 8.730

ATTY. GEN. OPINIONS: When partner of district attorney may defend criminal in circuit court, and when he may act as counsel for plaintiff in divorce suit, 1920-22, p 324; propriety of district attorney representing a divorced person in an action to enforce a property settlement, 1954-56, p 13.

## 8.760

## NOTES OF DECISIONS

An information signed by a deputy district attorney in the name of the district attorney is in effect the act of the district attorney and therefore performed under oath, though the deputy is not a sworn officer. *State v. Guglielmo*, (1905) 46 Or 250, 79 P 577, 80 P 103, 7 Ann. Cas 976, 69 LRA 466; *State v. Walton*, (1909) 53 Or 557, 99 P 531, 101 P 389, 102 P 173.

The order employing the deputy need not be in writing. *Rae v. Morgan*, (1928) 125 Or 644, 266 P 1069, 267 P 1072.

FURTHER CITATIONS: *McKenna v. McHaley*, (1912) 62 Or 1, 123 P 1069.

ATTY. GEN. OPINIONS: Compensation of deputy, 1920-22, p 648; appointment of deputy, 1920-22, p 664; authority of district attorney to employ assistants to enforce prohibition

law, 1922-24, pp 273, 582; qualifications of deputy, 1924-26, p 80; holding office of city attorney and deputy district attorney simultaneously, 1942-44, p 226; authority of county court to supplement salary of deputy, 1952-54, p 158; employment by county of special district attorney to be paid out of the emergency fund, 1954-56, p 19; validity of this section, 1954-56, p 85; appointment and compensation of deputy by district attorney without county authorization, 1960-62, p 67; salary of deputies serving overtime until vacancy filled, 1962-64, p 400; employer contribution to retirement fund for court reporter, 1966-68; p 3; county employe serving subpoenas in criminal cases, 1966-68, p 294; district attorney as legal adviser for county service districts, 1966-68, p 432.

## 8.780

## NOTES OF DECISIONS

In issuing process in criminal matters a deputy is presumed to be acting subject to the direction of the district attorney until the contrary is shown. *State v. O'Malley*, (1968) 248 Or 601, 435 P2d 812.

ATTY. GEN. OPINIONS: Appointment and compensation of deputy by district attorney without county authorization, 1960-62, p 67.

## 8.790

## NOTES OF DECISIONS

A former provision for fees in divorce cases was repealed by implication by this section. *Howard v. Clatsop County* (1902) 41 Or 149, 68 P 425.

FURTHER CITATIONS: *In re Ison*, (1877) 6 Or 465; *Union County v. Hyde*, (1894) 26 Or 24, 37 P 76; *Young v. State*, (1900) 36 Or 417, 425, 59 P 812, 60 P 711, 47 LRA 548.

ATTY. GEN. OPINIONS: Fees of district attorney in collecting fines and delinquent license fees, 1922-24, p 549; payment of deputy, 1922-24, p 582; fees of district attorney for services in connection with guardianship proceedings for insane or feeble minded persons, 1934-36, p 542, 1942-44, p 464; authority of county court to secure office space and pay rent for district attorney, 1934-36, p 592; private counsel employed by State Board of Engineer Examiners to aid district attorney in prosecutions, 1956-58, p 253; employment of attorney by a state board, 1960-62, p 368; salary of deputies serving overtime until vacancy filled, 1962-64, p 400.

## 8.830

ATTY. GEN. OPINIONS: Validity of 1955 amendment to this section, 1954-56, p 85; use of county road funds to pay additional compensation, 1956-58, p 201; paying additional compensation, 1960-62, p 335; salary of deputies serving overtime until vacancy filled, 1962-64, p 400.

## 8.850

ATTY. GEN. OPINIONS: County employe serving subpoenas in criminal cases, 1966-68, p 294.