Chapter 44

Witnesses Generally

44.010

CASE CITATIONS: State ex rel. Gladden v. Sloper, (1957) 209 Or 346, 306 P2d 418.

44.020

NOTES OF DECISIONS

The husband or wife of a party is a competent witness. Jacobsen v. Siddal, (1885) 12 Or 280, 283, 7 P 108, 53 Am Rep 360.

The fact that a person is a party does not deprive him of the right to introduce his own deposition in his own behalf. Roberts v. Parrish, (1889) 17 Or 583, 22 P 136.

The claimant in an action against an estate is a competent witness in his own behalf. Goltra v. Penland, (1904) 45 Or 254, 265, 77 P 129.

A party to an action may testify without any more restrictions than are imposed on any other witness. Radtke v. Taylor, (1929) 105 Or 559, 210 P 863, 27 ALR 1423.

The fact that a person is an executor does not render him incompetent as a witness for a claimant against the estate. Jamieson v. Hanna, (1945) 178 Or 214, 164 P2d 886.

A person who is separately indicted for the same crime as the person on trial is a competent witness. State v. Broadhurst, (1948) 184 Or 178, 196 P2d 407, cert denied, 337 US 906, 69 S Ct 1046, 93 L Ed 897.

In a juvenile proceeding, the right of the parents to examine the minor ward is in the discretion of the court exercised for the protection of the child. Chandler v. State, (1962) 230 Or 452, 370 P2d 626.

A defendant who had entered a plea of guilty was not rendered incompetent as a witness against his co-defendant by the fact that he was induced to testify by promises of mitigation of his punishment, or a pardon. State v. Magone, (1897) 32 Or 206, 211, 51 P 452.

FURTHER CITATIONS: State v. Lem Woon; (1910) 57 Or 482, 107 P 974, 112 P 427, aff'd on other grounds, 229 US 586, 33 S Ct 783, 57 L Ed 1340; Forrest v. Portland Ry. Light & Power Co., (1913) 64 Or 240, 129 P 1048; State v. Canton, (1915) 76 Or 51, 147 P 927; Cody v. Black, (1920) 97 Or 343, 191 P 319, 192 P 282; Corbus v. Leonhardt, (1902) 51 CCA 636, 114 Fed 10; Halla v. Cowden, (1909) 95 CCA 325, 170 Fed 559; State ex rel. Gladden v. Sloper, (1957) 209 Or 346, 306 P2d 418; State v. Duggan, (1958) 215 Or 151, 333 P2d 907; Gonyea v. Gonyea, (1962) 232 Or 367, 375 P2d 808.

LAW REVIEW CITATIONS: 41 OLR 333; 43 OLR 211; 49 OLR 52; 2 WLJ 224.

44.030

NOTES OF DECISIONS

1. Persons of unsound mind

A weak minded degenerate was not a person of unsound mind, and admission of his testimony, without objection, did not warrant a new trial. State v. Canton, (1915) 76 Or 51, 147 P 927.

A fourteen year old girl, voluntarily committed to the state hospital for the insane, but not adjudicated as insane was a competent witness. State v. Pace, (1949) 187 Or 498, 212 P2d 755.

2. Children under ten years of age

The competency of a child under ten years of age is a preliminary question of fact to be decided by the trial judge. State v. Jackson, (1881) 9 Or 457, 459; State v. Jensen, (1914) 70 Or 156, 140 P 740; State v. Bateham, (1919) 94 Or 524, 186 P 5; State v. Stich, (1971) 5 Or App 511, 484 P2d 861.

The decision of the trial court as to the competency of a child witness will not be disturbed if there is any evidence to sustain it. State v. Jensen, (1914) 70 Or 156, 140 P 740; State v. Bateham, (1919) 94 Or 524, 186 P 5.

Children of the parties, not under ten years of age, are competent witnesses in a proceeding for modification of a custody award in a divorce decree. Kreutzer v. Kreutzer, (1961) 226 Or 158, 359 P2d 536; Gonyea v. Gonyea, (1962) 232 Or 367, 375 P2d 808. **But see** Chandler v. State, (1962) 230 Or 452, 370 P2d 626.

The decision of the trial court as to competency of a child witness will not be reviewed unless there is a clear abuse of discretion, or violation of some legal principle in admitting or rejecting such witnesses. State v. Jackson, (1881) 9 Or 457, 459.

There is no precise age within which children are excluded from giving testimony. It is essential that they have sufficient intelligence to observe and narrate and possess a due sense of the nature and obligations of an oath. State v. Jackson, (1881) 9 Or 457, 459.

It is not necessarily an abuse of discretion for the judge to ask a mother to question her child, who is a prospective witness, concerning the child's duty to tell the truth. State v. Doud, (1950) 190 Or 218, 225 P2d 400.

In a juvenile proceeding, the right of the parents to examine the minor ward is in the discretion of the court exercised for the protection of the child. Chandler v. State, (1962) 230 Or 452, 370 P2d 626.

FURTHER CITATIONS: State v. Blount, (1953) 200 Or 35, 264 P2d 419; State v. Hutchison, (1960) 222 Or 533, 353 P2d 1047; State v. Herrera, (1963) 236 Or 1, 386 P2d 448; State v. Cook, (1966) 242 Or 509, 411 P2d 78; Elliott v. Callan, (1970) 255 Or 256, 466 P2d 600.

ATTY. GEN. OPINIONS: A registered elector under 21 as an official registrar of voters, (1971) Vol 35, p 769.

LAW REVIEW CITATIONS: 41 OLR 306; 43 OLR 211; 49 OLR 52; 2 WLJ 224.

44.040

NOTES OF DECISIONS

1. Husband and wife

2. Attorney and client
3. Physician and patient
4. Public officers
5. Stenographer
6. Manner and effect of consent

1. Husband and wife

Criminal proceedings are not governed by subsection (1). State v. McGrath, (1899) 35 Or 109, 57 P 321; State v. Luper, (1907) 49 Or 605, 91 P 444; State v. Mageske, (1926) 119 Or 312, 227 P 1065, 249 P 364.

Oral communications between husband and wife overheard by a third party may be given in evidence from the mouth of the witness to whom they were thus imparted. State v. Wilkins, (1914) 72 Or 77, 142 P 589; Coles v. Harsch, (1929) 129 Or 11, 23, 276 P 248.

The privilege set forth in paragraph (1) (a) applies to all communications, whether of a confidential nature or not, between husband and wife during marriage. Pugsley v. Smyth, (1921) 98 Or 448, 194 P 686; Patterson v. Skoglund, (1947) 181 Or 167, 180 P2d 108.

A court may properly exclude privileged communications upon its own motion, when it appears that a witness is about to testify to some protected fact without a waiver of the privilege having been made. Coles v. Harsch, (1929) 129 Or 11, 31, 276 P 248; McKinnon v. Chenoweth, (1945) 176 Or 74, 155 P2d 944.

The privilege does not attach to a written communication which falls into the hands of a third person. State v. Wilkins, (1914) 72 Or 77, 142 P 589.

The privilege belongs to the spouse of the witness. An improper ruling by the court on a question of privilege does not entitle a party to a reversal if the party urging reversal is not the spouse of the witness. Coles v. Harsch, (1929) 129 Or 11, 276 P 248.

In an action for alienation of affections of plaintiff's wife, failure of the wife to object to evidence of privileged statements made by her did not amount to a waiver of the privilege. McKinnon v. Chenoweth, (1945) 176 Or 74, 155 P2d 944.

Although a husband expressly refused to waive his privilege as to a certain communication when called by plaintiff wife as an adverse witness, he waived the privilege by testifying concerning this communication as a witness for defendant. Patterson v. Skoglund, (1947) 181 Or 167, 180 P2d 108.

2. Attorney and client

Paragraph (1) (b) is declaratory of the common law. State v. Gleason, (1890) 19 Or 159, 23 P 817.

The privilege may attach even though no suit or action is pending or contemplated at the time the communication is made. Bryant v. Dukehart, (1923) 106 Or 359, 210 P 454.

Neither the client nor a third person can be compelled to disclose a communication which the attorney is precluded from disclosing. Id.

The subject matter of the communication made by the client must relate to the business and interest of the client in order to be privileged. Sitton v. Peyree, (1926) 117 Or 107, 241 P 62, 242 P 1112.

The privilege attaches while the attorney client relationship exists, or during a conference held for the purpose of forming such relationship. Id.

The privilege may attach to a communication made before the payment of a retaining fee. Id.

Where a client authorizes his attorney to speak for him in dealing with third persons, he cannot then undertake to claim it was a confidential communication. Baum v. Denn, (1949) 187 Or 401, 211 P2d 478.

A communication by any form of agency employed or set in motion by the client is within the privilege. Brink v. Multnomah County, (1960) 224 Or 507, 356 P2d 536.

The fact that the district attorney and his staff are in effect "house counsel" for the county does not preclude the assertion of the privilege. Id.

The extent of the cross-examination must, of necessity, rest with the trial court. State v. Sullivan, (1962) 230 Or 136, 368 P2d 81, cert. denied, 370 US 957, 82 S Ct 1610, 8 L Ed 2d 823.

When a defendant calls his attorney as a witness, he waives the privilege in respect to the specific subject matter what he calls the attorney to testify about. Id.

This privilege does not apply to litigation after the death of the client between parties who claim under the client. Tanner v. Farmer, (1966) 243 Or 431, 414 P2d 340.

In proceedings supplementary to execution, when an attorney for the defendant was called as a witness and testified that he had property of the defendant in his possession after commencement of the action, he could be required to state in detail what property he had had in his possession and what he had done with it. State v. Gleason, (1890) 19 Or 159, 23 P 817.

In an action against an attorney for money which defendant alleged he had paid to others at plaintiff's direction, defendant should not have been excused from testifying to whom he had made the payments, though the payments were considered communications, and the defendant was attorney not only for plaintiff but for the parties to whom the payments were made. Minard v. Stillman, (1897) 31 Or 164, 166, 49 P 976, 65 Am St Rep 815.

3. Physician and patient

It is improper for counsel on argument before the jury to refer to a party's refusal to consent to examination of his physician. Kelley v. Highfield, (1887) 15 Or 277, 283, 14 P 744.

Paragraph (1)(d) creates a privilege that did not exist at common law. Forrest v. Portland Ry. Light & Power Co., (1913) 64 Or 240, 129 P 1048.

A doctor who examined plaintiff at defendant's request may be required to testify on behalf of plaintiff. Nielsen v. Brown, (1962) 232 Or 426, 374 P2d 896.

The physician-patient privilege is limited to civil proceedings. State v. Betts, (1963) 235 Or 127, 384 P2d 198.

The privilege applies to the physician's records as well as an oral examination. Nielson v. Bryson, (1970) 256 Or 179, 477 P2d 714.

This is a statutory privilege and the legislature can subsequently limit the application of the privilege. Id.

Plaintiff did not offer herself as a witness by answering interrogatories in a deposition under the Federal Rules concerning her treatment by physicians. Reynolds Metals Co. v. Yturbide, (1958) 258 F2d 321, cert. denied, 258 US 40, 79 S Ct 66, 3 L Ed 2d 76.

4. Public officers

The prerogative to waive this privilege rests with the public officer. State v. Yee Guck, (1921) 99 Or 231, 195 P 363.

Letters written to a district attorney dealing with legal remedies are privileged under paragraphs (1)(b) and (1)(e). State v. Ayer, (1927) 122 Or 537, 259 P 427.

Communications between jurors during retirement are privileged under paragraph (1)(e). State v. Morrow, (1938) 158 Or 412, 75 P2d 737, 76 P2d 971.

5. Stenographer

A witness who held the title of president and acted as manager of the company was not a stenographer. State v. Bengston, (1961) 230 Or 19, 367 P2d 363, 96 ALR2d 150.

6. Manner and effect of consent

A party, by voluntarily testifying upon a subject, consents to the examination of the persons enumerated in subsection

(2) upon the same general subject. In re Young's Estate, (1911) 59 Or 348, 116 P 95, 1060, Ann Cas 1913B, 1310; Forrest v. Portland Ry. Light & Power Co., (1913) 64 Or 240, 129 P 1048.

Subsection (2) has no application to the cross-examination of a party to an action. Bryant v. Dukehart, (1923) 106 Or 359, 210 P 454.

Subsection (2) does not apply to the husband-wife privilege in criminal proceedings. State v. McGrath, (1899) 35 Or 109, 57 P 321; State v. Mageske, (1926) 119 Or 312, 319, 227 P 1065, 249 P 364.

A person offers himself as a witness by the act of voluntarily offering testimony as a witness either on trial or on deposition, rather than by the act of either filing an action or verifying a written complaint in an action. Nielson v. Bryson, (1970) 256 Or 179, 477 P2d 714.

A person does not offer himself as a witness when called involuntarily to testify on trial or on deposition. Id.

The error in permitting an attorney to testify concerning privileged communications made by the defendants was rendered harmless when defendants later testified in their own behalf regarding the subject matter of the communication. Cole v. Johnson, (1922) 103 Or 319, 205 P 282.

FURTHER CITATIONS: Long v. Lander, (1882) 10 Or 175; State v. Carr, (1895) 28 Or 389; Fowler v. Phoenix Ins. Co., (1899) 35 Or 559, 57 P 421; Gerlinger v. Frank, (1915) 74 Or 517, 520, 145 P 1069; McNamee v. First Nat. Bank, (1918) 88 Or 636, 172 P 801; Pugsley v. Smyth, (1921) 98 Or 448, 468, 194 P 686; Sitton v. Peyree, (1926) 117 Or 107, 241 P 62, 242 P 1112; In re J. Kelly Farris, (1961) 229 Or 209, 367 P2d 387; Hampton v. Hampton, (1965) 241 Or 277, 405 P2d 549; State v. Buchanan, (1968) 250 Or 244, 436 P2d 729.

ATTY. GEN. OPINIONS: Disclosure by physician of a confession by a mental patient, 1954-56, p 24; conciliation agreements filed with the Bureau of Labor as public records, 1964-66, p 218; duty of officer to divulge confidential information in records, 1966-68, p 55; when patient or inmate records at state institutions may be inspected or copied, 1966-68, p 388; confidentiality of student records at higher education institutions, (1968) Vol 34, p 70; right of inmate or patient of state institution to see records, (1969) Vol 34, p 456.

LAW REVIEW CITATIONS: Whole section: 36 OLR 132; 46 OLR 100, 109.
Paragraph (1)(a): 41 OLR 314, 331, 332.
Paragraph (1)(b): 41 OLR 321.
Paragraph (1)(c): 41 OLR 332.
Paragraph (1)(d): 41 OLR 326-328; 5 WLJ 134.
Paragraph (1)(e): 40 OLR 226; 41 OLR 334.
Paragraph (1)(f): 41 OLR 333.
Paragraph (1)(g): 41 OLR 326.
Subsection (2): 42 OLR 315, 329, 330, 332, 336.

44.050

NOTES OF DECISIONS

This section is applicable in criminal as well as civil cases. State v. Houghton, (1904) 45 Or 110, 114, 75 P 887; State v. Finch, (1909) 54 Or 482, 103 P 505; State v. Nagel, (1949) 185 Or 486, 202 P2d 640, cert. den. 338 US 818, 70 S Ct 60, 94 L Ed 39.

A trial judge was a competent witness in a criminal case to testify that there had been no inconsistency between the testimony of a witness at the trial in question and that given by him at a prior trial. State v. Houghton, (1904) 45 Or 110, 114, 75 P 887.

Calling the judge and a jury by defendant to testify on trivial matters during the progress of a trial, and afterwards proceeding with the trial before the same court and jury was not ground for reversal. State v. Finch, (1909) 54 Or 482, 103 P 505.

FURTHER CITATIONS: In re Krie's Estate, (1947) 182 Or 311, 187 P2d 670.

LAW REVIEW CITATIONS: 41 OLR 338.

44.060

NOTES OF DECISIONS
1. Confining testimony to witness' "own knowledge"
2. Res gestae
3. Opinion evidence of nonexpert witnesses
4. Opinion evidence of expert witnesses
   (1) Instances
5. Opinion as to value and cost
6. Qualifications of witness
7. Hypothetical questions and answers

1. Confining testimony to witness' "own knowledge"

Evidence of a witness' understanding of a conversation, though incompetent, was not held ground for reversal where it appeared that his understanding had been correct. Aikin v. Leonard, (1856) 1 Or 224.

In a prosecution for manslaughter caused by producing abortion, proof that the deceased said to a witness that the doctor had used instruments upon her was hearsay. State v. Clements, (1887) 15 Or 237, 249, 14 P 410.

In a criminal trial when it became material to prove when a certain row occurred it was not competent for the State to ask a cab driver, who was shown to have been elsewhere at the time, if he had heard of the row from a passenger in his cab. State v. Ah Lee, (1889) 18 Or 540, 23 P 424.

Declarations of a stranger in relation to the departure or movements of the defendant's trains were inadmissible. Haase v. Ore. Ry. & Nav. Co., (1890) 19 Or 354, 24 P 238.

Evidence that another person than defendant the day after the killing said that he had killed the deceased, that at the time he had on clothing corresponding to that worn by the murderer as described by a witness, and was seen coming from that direction four or five hours after the crime was committed was inadmissible. State v. Fletcher, (1893) 24 Or 295, 300, 33 P 575.

In proof of an assault with intent to rape, the mother of prosecutrix was allowed to testify that shortly after the alleged assault, the prosecutrix made a disclosure, but she was not allowed to state what the injured girl and her companion had told her about the alleged assault. State v. Sargent, (1897) 32 Or 110, 112, 49 P 889.

Affidavits of depositors as to the deposit in a warehouse, made on ex parte examinations, and without opportunity of defendants to cross-examine were hearsay. Tobin v. Portland Mills Co., (1902) 41 Or 269, 68 P 743, 1108.

In a prosecution for conduct tending to lead a child to become a delinquent, testimony by the child's sister as to accused's conduct known only from statements by the child, was inadmissible hearsay. State v. Dunn, (1909) 53 Or 304, 311, 99 P 278, 100 P 258.

Testimony based on newspaper items, business cards, and common rumor was incompetent to prove a partnership. Gettins v. Hennessey, (1912) 60 Or 566, 573, 120 P 369.

Where, in a suit by a judgment creditor to set aside a conveyance of the debtor as fraudulent, the debtor was made a party defendant, the default or confession of the debtor was hearsay as against the grantee. Ball v. Danton, (1913) 64 Or 184, 198, 129 P 1032.

2. Res gestae

In an action for damages for injuries resulting from ejectment from a railroad train, the declarations of the plaintiff after the event, narrating the occurrence, were not

part of the res gestae. Sullivan v. Ore. Ry. & Nav. Co., (1885) 12 Or 392, 7 P 508.

The statement of an employe after the accident, that certain machinery was out of order, was inadmissible. Fredenthal v. Brown, (1908) 52 Or 33, 95 P 1114.

3. Opinion evidence of nonexpert witnesses

Except on questions of skill or science, witnesses are not allowed to give their opinions as evidence, where they have no personal knowledge of the facts. Zachary v. Swanger, (1854) 1 Or 92.

A witness cannot give his opinion concerning the amount of damage resulting from any given act or omission. Burton v. Severance, (1892) 22 Or 91, 94, 29 P 200; United States v. McCann, (1901) 40 Or 13, 66 P 274.

The necessity for opinion evidence only exists where the facts in controversy are incapable of being detailed or described, and the jury able to understand them and draw conclusions from them without such opinion evidence. Nutt v. So. Pac. Co., (1894) 25 Or 291, 296, 35 P 653.

An eye witness can express an opinion as to the speed of an approaching automobile. Turner v. McCready, (1950) 190 Or 28, 22 P2d 1010.

Whether it was proper for a railroad switchman to ride upon the ladder of a freight-car could not be stated by a witness. Johnson v. Ore. Short Line Ry., (1892) 23 Or 94, 101, 31 P 283.

Opinion evidence as to the age of a child was not admissible when she was present and testified. State v. Robinson, (1897) 32 Or 43, 48 P 357.

Skilled firemen could state whether a fire was burning naturally or whether some inflammable substance had been distributed about the premises. First Nat. Bank v. Fire Assn., (1898) 33 Or 172, 183, 50 P 568, 53 P 8.

Evidence as to who had the advantage in a fight the details of which were described was inadmissible. State v. Mims, (1899) 36 Or 315, 61 P 888.

Opinion evidence that the overflow of a sewer was caused by improperly guarding the head of the sewer, was improperly admitted. Chan Sing v. Portland, (1900) 37 Or 68, 72, 60 P 718.

Testimony of lay witnesses that plaintiff's health had become impaired since receiving an electric shock was properly admitted. Crosby v. Portland Ry., (1909) 53 Or 496, 100 P 300, 101 P 204.

The speed of an automobile truck deducible from marks made by the truck on the pavement was not a matter for opinion or expert evidence, but the jury alone could make the deduction from the facts proved. Everart v. Fischer, (1915) 75 Or 316, 330, 145 P 33, 147 P 189.

4. Opinion evidence of expert witnesses

When the matter under consideration before a jury is of that character about which anyone of ordinary intelligence, without any peculiar habits or course of study is able to form a correct opinion, expert testimony as to such matters is inadmissible. Fisher v. Ore. Short Line Ry. Co., (1892) 22 Or 533, 540, 30 P 425, 16 LRA 519.

(1) Instances. An expert witness can express an opinion on the issues before the jury. Schweiger v. Solbeck, (1951) 191 Or 454, 230 P2d 195, 29 ALR2d 435.

A qualified physician can express his opinion concerning the legal sanity of a person. State v. Leland, (1951) 190 Or 598, 227 P2d 785, aff'd on other grounds, 343 US 790, 72 S Ct 1002, 96 L Ed 1302.

Testimony of a cultivator of sugar beets as to when sugar beets should be thinned and the number of tons that could be raised per acre, was competent. Farmers' Bank v. Woodell, (1900) 38 Or 294, 61 P 837, 65 P 520.

The opinion of expert millmen as to the safety of certain fastenings was not necessary or competent, where the construction of the device was fully explained to the jury, and no particular skill was required to determine its safety. Trickey v. Clark, (1908) 50 Or 516, 526, 93 P 457.

As to whether it was necessary for members of the crew of a logging train to travel over the cars when in motion in the discharge of their duties, could be stated by superintendent of railway. Evansen v. Grande Ronde Lbr. Co., (1915) 77 Or 1, 149 P 1035.

5. Opinion as to value and cost

A witness cannot be permitted to testify to his opinion as to the value of property without first laying a foundation for such testimony by showing that he is possessed of sufficient knowledge upon the subject to form an intelligent opinion. Townley v. Ore. R.R., (1898) 33 Or 323, 54 P 150.

The owner of a dog could prove its special value to him by showing its qualities, characteristics and pedigree, and could offer the opinions of witnesses who were familiar with such qualities. McCallister v. Sappingfield, (1914) 72 Or 422, 144 P 432.

Opinion evidence as to what the value of land would have been if a railway had been constructed in accordance with a contract, was admissible on the question of damages for breach of the contract. Blagen v. Thompson, (1892) 23 Or 239, 31 P 647, 18 LRA 315.

The testimony of farmers as to cost of eradicating mustard from fields was admissible. Wade v. Amalgamated Sugar Co., (1914) 71 Or 75, 77, 142 P 350.

6. Qualifications of witness

The qualification of a witness to express an opinion is a question of fact for the trial judge. Multnomah County v. Willamette Towing Co., (1907) 49 Or 204, 89 P 389.

Plaintiff struck by an electric car was competent to testify as to the speed of the car. Oberstock v. United Rys. Co., (1913) 68 Or 197, 206, 137 P 195.

That a physician was not regularly licensed to practice in the state did not militate against his competency as an expert witness. Rugenstein v. Ottenheimer, (1914) 70 Or 600, 604, 140 P 747.

A witness qualified to testify on the subject could testify that a street-car was running faster than the ordinary rate. Macchi v. Portland Ry., Light & Power Co., (1915) 76 Or 215, 218, 148 P 72.

An experienced motorman could, in response to a hypothetical question, give his opinion as to the speed of the car. Id.

Witnesses who have operated or had occasion to observe the velocity of automobiles were permitted to give their opinion as to speed of an automobile which ran down and injured a person in a highway. Kelly v. Weaver, (1915) 77 Or 267, 150 P 166, 151 P 463, Ann Cas 1971D, 611.

An experienced furniture dealer who had inspected in a store a stock of furniture insured was competent to testify as to its value. Willis v. Horticultural Fire Relief, (1915) 77 Or 621, 626, 152 P 259.

A passenger in an automobile was competent to testify as to its speed. Weygandt v. Bartle, (1918) 88 Or 310, 171 P 587.

7. Hypothetical questions and answers

To be available, a hypothetical question must be based upon some other evidence in the case corresponding with the hypothesis advanced. Holmberg v. Jacobs, (1915) 77 Or 246, 1150 P 284.

If an expert witness is present in court and has heard the testimony given, and there was no controversy, his opinion may be given upon the assumption of the truth of such testimony without the necessity of stating a hypothetical question which restates all the material facts that have already been stated in the testimony. Latourette v. Miller, (1913) 67 Or 141, 135 P 327.

FURTHER CITATIONS: State v. Clements, (1887) 15 Or 237, 14 P 410; State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389, 102 P 173; Reimers v. Pierson, (1911) 58 Or 86, 113 P 436; Cunningham v. Friendly, (1914) 70 Or 222, 139 P 928, 140 P 989; West v. McDonald, (1915) 74 Or 421, 144 P 655; Adams v. Corvallis & E. R. Co., (1915) 78 Or 117, 152 P 504; Ramaswamy v. Hammond Lbr. Co., (1915) 78 Or 407, 152 P 223; State v. Reynolds, (1940) 164 Or 446, 100 P2d 593; Robertson v. Coca Cola Bottling Co., (1952) 195 Or 668, 247 P2d 217; State v. Nichols, (1964) 236 Or 521, 388 P2d 739.

LAW REVIEW CITATIONS: 33 OLR 263; 41 OLR 308; 42 OLR 182-184.

44.070

NOTES OF DECISIONS

1. In general

Inquiries for the sole purpose of disgracing a witness are never sanctioned. State v. Bacon, (1886) 13 Or 143, 155, 9 P 393, 57 Am Rep 8.

A defendant in a criminal case who testifies in his own behalf may not be asked whether he has not committed a crime. State v. Saunders, (1886) 14 Or 300, 12 P 441.

An accused, as a witness in his own behalf, may be impeached by showing a prior conviction. State v. Deal, (1908) 52 Or 568, 98 P 165.

2. Self-incrimination

The privilege against self-incrimination is a personal one, incapable of assignment. In re Jennings, (1936) 154 Or 482, 59 P2d 702.

The court is to judge whether any direct answers will furnish evidence against the witness. Id.

If the question be of such a description that an answer to it may or may not incriminate the witness according to the purport of that answer, it must rest with the witness who alone can tell what it would be to answer the question or not. Id.

The privilege against self-incrimination was available only when the witness was in danger of being forced to give testimony which later could be used for his own prosecution, or to disclose sources of such evidence. Id.

The claim of privilege was subject to judicial scrutiny, and it was the duty of the court to see that such claim was not a mere pretense but that the witness had reasonable grounds for his apprehension of danger; if he had not, it was the duty of the judge to point out his mistake. Id.

A witness' oath that he was in danger of being subjected to self-incrimination was entitled to much weight, especially when the court could not know what the answer to the question would be. Id.

An inquiry whether the witness was at the scene of a crime did not entitle him to the privilege of silence, unless it was indicated that the place was a public nuisance and he was there unlawfully, or that he was a participant in the crime. Id.

FURTHER CITATIONS: State v. Crawford, (1911) 58 Or 116, 113 P 440; Coles v. Harsch, (1929) 129 Or 11, 276 P 248.

LAW REVIEW CITATIONS: 41 OLR 316.

44.110

NOTES OF DECISIONS

A writ issued by the clerk of court and served on the party for whom it is intended requiring him to attend as a witness is considered a subpena. State v. Bourne, (1891) 21 Or 218, 27 P 1048.

FURTHER CITATIONS: Wheeler v. Burckhardt, (1899) 34 Or 504, 56 P 644.

ATTY. GEN. OPINIONS: Fees and mileage for witnesses before State Civil Service Commission [now Public Employe Relations Board], 1948-50, p 70.

LAW REVIEW CITATIONS: 31 OLR 197; 4 WLJ 170.

44.120

NOTES OF DECISIONS

The clerk of a court of record may issue a subpena requiring the attendance of a witness before a resident commissioner appointed by a court of a sister state to take testimony for use in that state. State v. Bourne, (1891) 21 Or 218, 227, 27 P 1048.

A subpena may be issued to any person to appear before an officer authorized to administer oaths in order that such officer may take his deposition. Wheeler v. Burckhardt, (1899) 34 Or 504, 507, 56 P 644.

FURTHER CITATIONS: Kohlhagen v. Cardwell, (1919) 93 Or 610, 184 P 261.

ATTY. GEN. OPINIONS: Power of state agencies to issue subpenas: Board of Engineering Examiners, 1920-22, p 150; Real Estate Commissioner, 1926-28, p 240; Insurance Commissioner, 1928-30, p 598.

44.140

NOTES OF DECISIONS

Fees paid a witness to compel his attendance in obedience to an ordinary subpena include mileage and per diem. Lombard v. Smith, (1900) 37 Or 23, 26, 60 P 388, 707; Burrows v. Balfour, (1901) 39 Or 488, 65 P 1062.

The word "fees" in this section is used in the same sense as in related statute. Id.

A witness residing out of the county is not entitled to double mileage and per diem where the subpena has not been served in the manner prescribed. Egan v. Finney, (1903) 42 Or 599, 603, 72 P 133.

FURTHER CITATIONS: Wheeler v. Burckhardt, (1899) 34 Or 504, 56 P 644.

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

44.171

NOTES OF DECISIONS

Prior to amendment, criminal cases were not governed by the provision for double mileage. Sargent v. Umatilla County, (1886) 13 Or 442, 11 P 225.

Under former similar statute a witness entitled to double fees could demand them in advance, but the demand was not essential to their collection. Brown v. McCloud, (1920) 96 Or 549, 190 P 578.

The objection to the mileage fee for a witness who lived beyond the reach of an ordinary subpena, and whose presence was procured at the request of a party, was not sustained because of the evidence necessary for the special subpena. Crawford v. Abraham, (1866) 2 Or 163; Luckey v. Lincoln County, (1902) 42 Or 331, 70 P 509.

The objection to a witness' mileage fee because he voluntarily appeared from outside the county without a court order, raised neither the question that his oral examination was unnecessary, nor required the prevailing party to make an affidavit concerning such fact. Spencer v. Peterson, (1902) 41 Or 257, 263, 68 P 519, 1108.

Where witnesses voluntarily attended a trial from without the county, and from a distance of more than the required number of miles, and gave desirable and important oral testimony, they were entitled to single fees and per diem, but not double fees. Egan v. Finney, (1903) 42 Or 599, 72 P 133.

FURTHER CITATIONS: Roberts v. Parrish, (1889) 17 Or 583, 22 P 136; Burrows v. Balfour, (1901) 39 Or 488, 65 P 1062; State v. Woolridge, (1904) 45 Or 389, 78 P 333; Ogilvie v. Stackland, (1919) 92 Or 352, 179 P 669; Pape v. Hollopeter, (1928) 125 Or 34, 265 P 445.

ATTY. GEN. OPINIONS: Fees for expert witnesses, contract to pay witness more than regular fee, 1954-56, p 222.

44.190

NOTES OF DECISIONS

The validity of an order striking a pleading pursuant to this section is restricted to those cases where the answer obviously withholds a fact material to his adversary's case and is limited to the effect that ensues from any reasonable presumption which may be drawn from the refusal to disclose that fact. Anderson v. Stanwood, (1946) 178 Or 306, 167 P2d 315.

In an action to recover money which defendant admitted receiving, the action of the trial court in striking his answer and entering judgment against him upon his refusal to answer questions to show the whereabouts of the money was an unconstitutional application of the statute, and deprived him of his remedy in due course of law. Id.

FURTHER CITATIONS: Wheeler v. Burckhardt, (1899) 34 Or 504, 56 P 644.

44.200

NOTES OF DECISIONS

To recover the penalty for nonattendance, it was necessary to show payment to a witness of his fees and mileage and also that the witness was material, and that damage other than the loss of such fees and mileage resulted. Lombard v. Smith, (1900) 37 Or 23, 60 P 388, 707.

44.210

CASE CITATIONS: State v. Birchard, (1899) 35 Or 584, 59 P 468.

44.230

NOTES OF DECISIONS

As applied to criminal prosecutions this section is unconstitutional. State v. Lonergan, (1954) 201 Or 163, 269 P2d 491.

In criminal prosecutions the production of a person confined in the penitentiary may be required. State v. Lonergan, (1954) 201 Or 163, 269 P2d 491. **Distinguished in** State ex rel. Gladden v. Sloper, (1957) 209 Or 346, 306 P2d 418.

In divorce case, the production of the husband who was confined in the penitentiary may not be required. State ex rel Gladden v. Sloper, (1957) 209 Or 346, 306 P2d 418.

ATTY. GEN. OPINIONS: Warden's duty to produce prisoner as a witness in a circuit court, 1952-54, p 217; order to produce prisoner-parent in juvenile proceedings, 1960-62, p 297.

LAW REVIEW CITATIONS: 4 WLJ 182.

44.240

ATTY. GEN. OPINIONS: Order to produce prisoner-parent in juvenile proceedings, 1960-62, p 297.

44.310

CASE CITATIONS: State v. Tom, (1879) 8 Or 177; State v. Doud, (1950) 190 Or 219, 225 P2d 400.

ATTY. GEN. OPINIONS: A registered elector under 21 as an official registrar of voters, (1971) Vol 35, p 746.

LAW REVIEW CITATIONS: 41 OLR 307.

44.320

NOTES OF DECISIONS

Courts take official knowledge of the existence and qualifications of officers having authority to administer oaths within the particular judicial district in which they reside and have authority. Dennison v. Story, (1859) 1 Or 272.

In the certificate of an officer administering an oath, his jurisdiction and authority must appear. Blanchard v. Bennett, (1861) 1 Or 328.

The county clerk is an officer authorized to administer oaths. United States v. Shinn, (1882) 14 Fed 447, 8 Sawy 403.

Authority to administer oaths is, in every instance, expressly given and not left to implication. State v. Craig, (1919) 94 Or 302, 185 P 764.

A county assessor is not authorized to administer oaths. Id.

The court may take judicial notice of the authority of the clerk of the court to administer an oath. State v. Christenson, (1962) 230 Or 283, 370 P2d 240.

It was presumed, when a verification to a pleading was taken by a known and recognized officer, having authority within the district, in a cause pending in such district, that such verification was taken within the local jurisdiction of such officer. Dennison v. Story, (1859) 1 Or 272.

FURTHER CITATIONS: State v. Tom, (1879) 8 Or 177.

ATTY. GEN. OPINIONS: Power of Superintendent of Banks to administer oaths, 1920-22, p 684; authority of deputy county clerk to take affidavits, 1930-32, p 278; authority to administer oath of office to members of legislature, 1942-44, p 109; district attorney's power to examine witnesses under oath in making an arson investigation, 1952-54, p 211.

44.330

NOTES OF DECISIONS

To make an affidavit legal in court, the oath must be either administered by the officer to the affiant, or asseveration made to the truth of the matters in the affidavit by the party making it, to the officer with his sanction. Ex parte Finn, (1898) 32 Or 519, 525, 52 P 756, 67 Am St Rep 550.

Invariable observance of the mechanics of administering an oath set forth in the statute is not required. Andros v. Dept. of Motor Vehicles, (1971) 5 Or App 418, 485 P2d 635.

ATTY. GEN. OPINIONS: Applicability to oath on application for public assistance, 1964-66, p 130.

44.340

CASE CITATIONS: Ex parte Finn, (1898) 32 Or 519, 52 P 756, 67 Am St Rep 550.

44.350

CASE CITATIONS: Jones v. Ore. Central Ry., (1875) Fed Cas No. 7486, 3 Sawy 523.

ATTY. GEN. OPINIONS: Loyalty oath or affirmation, 1952-54, p 251.

44.360

ATTY. GEN. OPINIONS: Loyalty oath or affirmation, 1952-54, p 251.

44.370

NOTES OF DECISIONS

1. Evidence affecting character

The regular mode of examining into the general reputation is to inquire of the witness first whether he knew the general reputation of the person in question among his neighbors, and, if his answer is in the affirmative, then he may be asked what that reputation is. Page v. Finley, (1879) 8 Or 45; Kelley v. Highfield, (1887) 15 Or 277, 283, 14 P 744.

Particular facts brought out on cross-examination of character witnesses, though not provable by the party calling such witness, may be considered by the jury as affecting the credibility of the witness attempted to be impeached. Steeples v. Newton, (1879) 7 Or 110, 33 Am Rep 705.

The omission of the word "general," when the question is directed to the general reputation, was reversible error. State v. Clark, (1881) 9 Or 466, 469.

2. Evidence affecting motives

In weighing the credibility of a witness, the jury and not the judge must determine whether a motive exists, its nature, and whether or not the testimony of the witness has been colored or warped by it. State v. Pomeroy (1896) 30 Or 16, 28, 46 P 797.

Evidence affecting witness' motives is receivable to overcome the presumption that he speaks the truth. State v. Weston, (1921) 102 Or 102, 201 P 1083.

3. Hostility of witness toward party

Where a witness' testimony is attacked because of his hostile declarations, it is necessary to lay the same foundation as that prescribed for impeachment by contradictory statements. State v. Stewart, (1883) 11 Or 52, 238, 4 P 128; State v. Mackey, (1885) 12 Or 154, 6 P 648; State v. Ellsworth, (1896) 30 Or 145, 47 P 199.

To ask a witness for defendant on cross-examination whether he and the defendant had not at one time been arrested on a charge of robbery was held proper to show witness' feeling toward a party for whom he testified. State v. Bacon, (1886) 13 Or 143, 21 P2d 223.

It was proper to ask on cross-examination if a witness had not expressed a certain feeling or used a given expression concerning the case. State v. Ellsworth, (1896) 30 Or 145, 150, 47 P 199.

The defendant's counsel on cross-examination of the plaintiff's witness was not allowed to inform the court that he was proceeding to impeach the plaintiff's witness and then proceed to discredit the motives of the plaintiff's witness. State v. Holbrook, (1920) 98 Or 43, 188 P 947, 192 P 640, 193 P 434.

4. Interest of witness in result

The interest of a witness in the result of the litigation, whether in civil or criminal cases, is a matter to be considered by the jury. State v. Tarter, (1894) 26 Or 38, 44, 37 P 53.

A defendant who had entered a plea of guilty was not rendered incompetent as a witness against his codefendant by the fact that he was induced to testify by promises of mitigation of his punishment, or a pardon. State v. Magone, (1897) 32 Or 206, 51 P 453.

The mere fact that a witness in a will contest was interested in the result did not require that her testimony be disregarded. In re Miller's Will, (1907) 49 Or 452, 464, 90 P 1002, 124 Am St Rep 1051, 14 Ann Cas 277.

5. Conviction of crime

It may be shown by the examination of a witness that he has been convicted either of a felony or misdemeanor. State v. Bacon, (1886) 13 Or 143, 145, 9 P 393, 57 Am Rep 8.

6. Contradictory evidence

In a prosecution for murder, the State impeached one of its own witnesses by showing contradictory evidence. State v. Broadhurst, (1948) 184 Or 178, 196 P2d 407, cert. denied 337 US 906, 69 S Ct 1046, 93 L Ed 897.

Where the word "Kearns" was mistakenly inserted in a letter where "Keerins" was intended and the word "Kearns" would have contradicted testimony of the plaintiff, the lower court was justified in holding that the use of the word "Kearns" did not constitute contradictory evidence. Bogle v. Paulson, (1949) 185 Or 211, 201 P2d 733.

7. Other matters affecting credibility

A witness could not be impeached by showing particular acts of immoral conduct. Leverich v. Frank, (1876) 6 Or 212.

In a prosecution for murder, the result of a feud in a tong society, evidence that it was characteristic of the Chinese to be revengeful, etc., as bearing on the bona fides of the identification of defendant, was admissible. State v. Lem Woon, (1910) 57 Or 482, 107 P 974, 112 P 427.

8. Defendant in criminal prosecution

A defendant in a criminal case may not be cross examined as to other offenses for the purpose of humiliating him or raising a presumption of his guilt of the charge. State v. Deal, (1908) 52 Or 568, 570, 98 P 165.

A defendant in a criminal case who testifies as a witness in his own behalf may be impeached; he may, for the purpose of impeachment, be asked if he has been convicted of a crime, and required to answer, or his conviction be shown by the record. Id.

9. Sustaining impeached witness

The impeachment of the credit of a witness, by showing that he had made statements at other times contradictory of his testimony given on the trial, did not lay the foundation for sustaining him by proof of his reputation for truth and veracity. Sheppard v. Yocum, (1882) 10 Or 402.

An opportunity should have been given the witness to explain declarations of hostility and contradictory statements. State v. Mackey, (1885) 12 Or 154, 156, 6 P 648.

It is not competent to show the reputation for truth and veracity, unless such reputation has been attacked. Osmun v. Winters, (1894) 25 Or 260, 264, 35 P 250.

Where impeaching witnesses have given their version of

a statement of conversation it is competent to show, by another person who was present, that such witnesses had not correctly repeated what was said. State v. Mims, (1900) 36 Or 315, 318, 61 P 888; State v. Houghton, (1904) 45 Or 110, 75 P 887.

10. Instructions

An instruction that an accused, as a witness in his own behalf, is interested in any verdict which the jury might return may be given. State v. Tarter, (1894) 26 Or 38, 37 P 53; State v. Bartlett, (1908) 50 Or 440, 93 P 243, 126 Am St Rep 751, 19 LRA(NS) 802; State v. Jordan, (1964) 238 Or 184, 393 P2d 766.

There is no error in giving the instruction that a witness is presumed to tell the truth if it is accompanied by an explanation of how the presumption may be overcome. State v. Kessler, (1969) 254 Or 124, 458 P2d 432; State v. Cathey, (1969) 1 Or App 356, 462 P2d 465; State v. Blank, (1970) 1 Or App 550, 464 P2d 836; State v. Miller, (1970) 2 Or App 408, 467 P2d 973, Sup Ct **review denied.**

An instruction that the jury has no right to reject the testimony of the wife and daughter of the accused, simply because it came from a source from which there would be strong motives to give "the most favorable coloring possible" to the facts on behalf of the accused, was prejudicial error. State v. Pomeroy, (1896) 30 Or 16, 28, 46 P 797.

An instruction that the jury might consider whether the testimony of the accused was true and made in good faith or only for the purpose of avoiding a conviction, was erroneous. State v. Fuller, (1908) 52 Or 42, 54, 96 P 456.

An instruction that a witness may be false intentionally or by mistake, and that a mistaken witness is a false witness, was erroneous, since the jury must believe the evidence willfully false in some particular before they may discredit the whole of the witness' testimony. Simpson v. Miller, (1910) 57 Or 61, 110 P 485, Ann Cas 1912D, 1349, 29 LRA(NS) 680.

An instruction that the jury might consider all the evidence and actions of the defendant upon the stand, in a prosecution for operating a distillery, was not erroneous where the defendant was a witness. State v. Frohnhofer, (1930) 134 Or 378, 293 P 921.

An instruction in criminal prosecution that a witness is presumed to speak the truth did not nullify the presumption of defendant's innocence where defendant put on a case. State v. Smith, (1969) 1 Or App 153, 458 P2d 687, Sup Ct **review denied;** State v Cathey, (1969) 1 Or App 356, 462 P2d 465.

11. Jurors as judges of credibility

The jury is the judge of the credibility of a witness and the weight of his testimony. Koontz v. O. R. & N. Co., (1890) 20 Or 3, 21, 23 P 820; Herbert v. Dufur, (1893) 23 Or 462, 469, 32 P 302; Graham v. Coos Bay R. & N. Co., (1914) 71 Or 393, 417, 139 P 337; Kaiser v. States S. S. Co., (1954) 203 Or 91, 276 P2d 410; State v. Jackson, (1963) 235 Or 481, 385 P2d 623.

The jury may disregard uncontradicted testimony where it is unsatisfactory to their minds. Graham v. Coos Bay R. & Nav. Co., (1914) 71 Or 393, 139 P 337; Craft v. No. Pac. R. Co., (1894) 62 Fed 735, 739.

FURTHER CITATIONS: State v. Clements, (1887) 15 Or 237, 14 P 410; State v. Chee Gong, (1889) 17 Or 635, 21 P 882; State v. Olds, (1889) 18 Or 440, 22 P 940; Wimer v Smith, (1892) 22 Or 469, 30 P 416; In re Miller's Will, (1907) 49 Or 452, 90 P 1002, 124 Am St Rep 1051, 14 Ann Cas 277; Pereira v. Star Sand Co., (1908) 51 Or 477, 94 P 835; State v. Coleman, (1926) 119 Or 430, 249 P 1049; Fleishhacker v. Portland News Pub. Co., (1938) 158 Or 476, 77 P2d 141; Truck Ins. Exch. v. Truck Ins. Exch., (1940) 165 Or 332, 107 P2d 511; Wyckoff v. Mut. Life Ins. Co., (1944) 173 Or 592, 147 P2d 227, State v. Clipston, (1964) 237 Or 634, 392 P2d 772; State v. Yates, (1965) 239 Or 596, 399 P2d 161; State v. Gill, (1970) 3 Or App 488, 474 P2d 23, Sup Ct **review denied;** State v. Williams, (1971) 92 Adv Sh 1674, 487 P2d 100, Sup Ct **review denied.**

LAW REVIEW CITATIONS: 31 OLR 267; 41 OLR 308; 49 OLR 64.

44.410

NOTES OF DECISIONS

The questions as to how many days a witness attended and how many miles he traveled were questions of fact to be settled by the court. State v. Ganong, (1919) 93 Or 440, 184 P 233.

A professional person may be compelled to testify as to what he knows for the same statutory fee as any other witness. Mount v. Welsh, (1926) 118 Or 568, 247 P 815.

A witness appearing for the statutory fees cannot be obliged to give expert testimony based on his professional knowledge and skill. Id.

FURTHER CITATIONS: State v. Combs, (1970) 3 Or App 260, 473 P2d 672.

ATTY. GEN. OPINIONS: Fees and mileage for witnesses before State Civil Service Commission [now Public Employe Relations Board] 1948-50, p 70; contract to pay witness more than regular fee, 1954-56, p 222; witness fee for State Hospital psychiatrist, 1958-60, p 22; witness fees for public officers and employes, 1962-64, p 97; witness fees for Oregon State Hospital physicians, 1966-68, p 551.

44.430

NOTES OF DECISIONS

The compensation for mileage is only for the miles actually traveled. Howe v. Douglas County, (1869) 3 Or 488.

FURTHER CITATIONS: Seaside v. Ore. Sur. & Cas. Co., (1918) 87 Or 624, 636, 171 P 396; Ogilvie v. Stackland, (1919) 92 Or 352, 358, 179 P 669; State v. Combs, (1970) 3 Or App 260, 473 P2d 672.

ATTY. GEN. OPINIONS: Fees and mileage for witnesses before State Civil Service Commission [now Public Employe Relations Board], 1948-50, p 70; fees for expert witnesses, contract to pay witness more than regular fee, 1954-56, p 222; witness fee for State Hospital psychiatrist, 1958-60, p 22.

44.450

NOTES OF DECISIONS

This section was not unconstitutional as demanding services without compensation under Ore. Const. Art. I, §18. Lannahan v. Multnomah County, (1870) 3 Or 187.

ATTY. GEN. OPINIONS: Interpretation of the words "necessarily traveled," 1922-24, p 350.