Chapter 45

Taking Testimony of Witnesses

45.010

NOTES OF DECISIONS

Affidavits upon which a cause is tried are species of evidence. Jolliffe v. Jolliffe, (1923) 107 Or 33, 213 P 415.

FURTHER CITATIONS: Clark v. Ellis, (1881) 9 Or 128; State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389, 102 P 173; State v. Hecker, (1924) 109 Or 520, 554, 221 P 808; In re Braun's Estate, (1939) 161 Or 503, 90 P2d 484; Knudson v. Jones, (1957) 209 Or 350, 305 P2d 1061.

45.020

NOTES OF DECISIONS

A deposition is taken with notice to the adverse party, but an affidavit is taken without such notice. State v. Woolridge, (1904) 45 Or 389, 78 P 333; State v. Quartier, (1925) 114 Or 657, 236 P 746.

To make an affidavit legal in court, the oath must be administered by the officer to the affiant, or asseveration made to the truth of the matter contained 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.

An affidavit is a mode of taking evidence. State v. Hecker, (1924) 109 Or 520, 221 P 808.

FURTHER CITATIONS: Lawrey v. Sterling, (1902) 41 Or 518, 69 P 460; Sprague v. City of Astoria, (1921) 100 Or 298, 195 P 789; Obermeier v. Mtg. Co., (1924) 111 Or 14, 224 P 1089; In re Braun's Estate, (1939) 161 Or 503, 90 P2d 484.

45.030

NOTES OF DECISIONS

A deposition is taken with notice to the adverse party, but an affidavit is taken without such notice. State v. Woolridge, (1904) 45 Or 389, 78 P 333; State v. Quartier, (1925) 114 Or 657, 236 P 746.

In a prosecution for perjury, oral testimony to the statements made by deponent is admissible where the deposition was not reduced to writing, or, if written, was not signed. State v. Woolridge, (1904) 45 Or 389, 78 P 333.

On a prosecution for perjury in giving a deposition, parol evidence is admissible to show the testimony given, although it was taken by a stenographer whose notes were not shown to have been lost or destroyed. Id.

FURTHER CITATIONS: Sprague v. City of Astoria, (1921) 100 Or 298, 195 P 789.

LAW REVIEW CITATIONS: 31 OLR 197.

45.040

NOTES OF DECISIONS

The taking of oral testimony is distinct from the use to be made of it after it is given. State v. Walton, (1909) 53 Or 557, 566, 99 P 431, 101 P 389, 102 P 173.

45.050

NOTES OF DECISIONS

1. Reference and proceedings
2. Duty and certification of court
3. Objections and waiver

1. Reference and proceedings

Written documents not offered before a referee may be put into evidence at the trial. Crown Point Min. Co. v. Crismon, (1901) 39 Or 364, 65 P 87.

Except in districts having more than one judge and composed of but one county, the judge is authorized to refer cases for the taking of testimony without the consent of counsel. Anthony v. Hillsboro Gold Min. Co., (1911) 58 Or 258, 113 P 442, 114 P 95.

The deposition of a nonresident witness taken in a suit pursuant to a commission issued to a notary public in another state was inadmissible because not taken by a special referee. Craig v. Crystal Realty Co., (1918) 89 Or 25, 173 P 322.

Where the court acquired jurisdiction of the parties and subject matter in divorce proceedings, it did not lose jurisdiction by referring case to referee for taking testimony. Steiwer v. Steiwer, (1924) 112 Or 485, 230 P 359.

2. Duty and certification of court

The court must reach conclusions of fact and law from the evidence reported, uninfluenced by any opinion of the referee. Craig v. Calif. Vineyard Co., (1896) 30 Or 43, 51, 46 P 421; Anthony v. Hillsboro Gold Min. Co., (1911) 58 Or 258, 262, 113 P 442, 114 P 95; In re Level, (1916) 81 Or 298, 159 P 558.

A trial judge must certify testimony for appeal if it was taken before a referee. Tallmadge v. Hooper, (1900) 37 Or 503, 510, 61 P 349, 1127; Sanborn v. Fitzpatrick, (1909) 51 Or 457, 91 P 450.

The provision requiring that the judge within 10 days after the entry of the decree identify the evidence by a proper certificate, was not mandatory. Osgood v. Osgood, (1899) 35 Or 1, 56 P 1017; Hume v. Rogue R. Packing Co., (1909) 51 Or 237, 83 P 391, 92 P 1065, 96 P 865, 131 Am St Rep 732, 31 LRA(NS) 396.

Testimony will not be struck on appeal because it was not certified by the presiding judge within 10 days after the decree, where the testimony was before the appellate court, and the delay did not deprive respondent of any rights. Osgood v. Osgood, (1899) 35 Or 1, 56 P 1017.

Where the case was tried before the trial judge and an official stenographer, the exhibits could be properly certified by the clerk, without a certificate from the trial judge or the reporter. Sanborn v. Fitzpatrick, (1909) 51 Or 457, 91 P 450.

To establish that a copy of a judgment roll was received in evidence, and to make it part of the transcript or appeal, the same should be properly authenticated by the trial

judge's certificate. Neal v. Roach, (1912) 61 Or 513, 107 P 475.

No person other than the trial judge was authorized to authenticate evidence taken in equity cases. Johnson v. Johnson, (1929) 131 Or 235, 274 P 918, 282 P 1082.

A certificate of a stenographer who took the testimony but who was not the official stenographer was not sufficient to authenticate the testimony. Id.

3. Objections and waiver

Where a referee has without special authority taken the testimony of witnesses in another county than the one in which he was appointed, and more than twenty miles from the place of holding court, any objections to such testimony for want of jurisdiction in the referee to take it was waived by cross-examination. Sharkey v. Candiani, (1906) 48 Or 112, 117, 85 P 219, 7 LRA(NS) 791.

Error, if any, of a referee in refusing to proceed with the taking of testimony until his fees were paid or secured, was waived when not properly urged. State v. Frost, (1906) 48 Or 236, 86 P 177.

Depositions taken before a specified referee should not be suppressed because he was described as a notary public in the order of appointment, though he was in fact a United States commissioner. Owings v. Turner, (1906) 48 Or 462, 464, 87 P 160.

FURTHER CITATIONS: Marks & Co. v. Crow, (1887) 14 Or 382, 13 P 55; First Nat. Bank v. Miller, (1906) 48 Or 587, 591, 87 P 892; Nealan v. Ring, (1921) 98 Or 490, 184 P 275, 193 P 199, 747; Fry v. Ashley, (1961) 228 Or 61, 363 P2d 555.

45.110

NOTES OF DECISIONS

An affidavit for a search warrant, using possessive pronoun in third person, did not charge an offense. Smith v. McDuffee, (1914) 72 Or 276, 142 P 558, 143 P 929, Ann Cas 1916D, 947.

Where an affidavit in contempt proceedings is in the third person, judgment based thereon is void. State v. Eastman, (1915) 77 Or 522, 151 P 967; Merritt v. Merritt, (1930) 133 Or 113, 288 P 1054.

A notice of injury was considered an affidavit, and although sworn to in the third person, was sufficient. Sprague v. City of Astoria, (1921) 100 Or 298, 195 P 789.

A corporation can execute an affidavit only by and through its officers or persons acting on its behalf. Kepl v. Manzanita Corp., (1967) 246 Or 170, 424 P2d 674.

The affidavit was sufficient. Id.

FURTHER CITATIONS: Lawrey v. Sterling, (1902) 41 Or 518, 524, 69 P 460.

45.120

NOTES OF DECISIONS

In trial of issues framed by cost bill and objections thereto, affidavits were not admissible. Hill v. Hill, (1929) 128 Or 177, 270 P 911.

A sworn statement of a deceased brother who was a resident of a foreign country was inadmissible to establish heirship. In re Braun's Estate, (1939) 161 Or 503, 90 P2d 484.

FURTHER CITATIONS: Clark v. Ellis, (1881) 9 Or 128; Kothenberthal v. Salem, (1886) 11 Or 604; Pickard v. Marsh, (1912) 62 Or 192, 124 P 268; Hague v. Hague, (1916) 79 Or 646, 155 P 277; Rodda v. Rodda, (1948) 185 Or 140, 200 P2d 616, 202 P2d 638, cert. denied, 337 US 946, 69 S Ct 1504, 93 L Ed 1470; Pennoyer v. Neff, (1875) 95 US 714, 24 L Ed 565; Knudson v. Jones, (1957) 209 Or 350, 305 P2d 1061; Scarth v. Scarth, (1957) 211 Or 121, 315 P2d 141; Carson v. Brauer, (1963) 234 Or 333, 382 P2d 79.

45.125

NOTES OF DECISIONS

An affidavit taken in another state and not authenticated as required is a nullity and cannot be used. North Star Lbr. Co. v. Johnson, (1912) 196 Fed 56, aff'd, 125 CCA 118, 206 Fed 624.

Affidavits and depositions taken before notaries public need no additional authentication. Haley v. Sprague, (1941) 166 Or 320, 111 P2d 1031.

ATTY. GEN. OPINIONS: Proof of due execution of affidavits made in foreign country, 1920-22, p 609; appointment of commissioner authorized to take affidavits in a foreign country, 1922-24, p 424.

45.130

NOTES OF DECISIONS

"A provisional remedy" did not include an order by the supreme court upon the clerk of the trial court to certify a certain order. Grover v. Hawthorne Estate, (1912) 62 Or 77, 114 P 472, 121 P 808.

FURTHER CITATIONS: Hill v. Hill, (1929) 128 Or 177, 270 P 911; In re Braun's Estate, (1939) 161 Or 503, 90 P2d 484; Scarth v. Scarth, (1957) 211 Or 121, 315 P2d 141.

45.140

CASE CITATIONS: In re Braun's Estate, (1939) 161 Or 503, 90 P2d 484.

45.151 to 45.190

NOTES OF DECISIONS

These sections provide a procedure for taking on notice the depositions of witnesses in or out of the state with the right to examine the witnesses upon oral interrogatories. Richardson-Merrell, Inc. v. Main, (1965) 240 Or 533, 402 P2d 746.

The Federal Rules relating to discovery and depositions served as the model for this Act. Id.

45.151

NOTES OF DECISIONS

1. In general

Depositions of witnesses, whether in state or not, may be taken either on written or oral interrogatories. Richardson-Merrell, Inc. v. Main, (1965) 240 Or 533, 402 P2d 746.

Deposition may be taken of complaining witness in proceeding before a state board which adopts the Model Rules of Administrative Procedure. Bernard v. Board of Dental Examiners, (1970) 2 Or App 22, 465 P2d 917.

2. Under former similar statute

Either party could compel his adversary to give his deposition, Roberts v. Parrish, (1889) 17 Or 583, 587, 22 P 136; Wheeler v. Burckhardt, (1899) 34 Or 504, 507, 56 P 644; Beard v. Beard, (1913) 66 Or 526, 133 P 795.

A party could have his deposition taken in his own behalf. Roberts v. Parrish, (1889) 17 Or 583, 22 P 136.

When the adverse party refused to appear to have his deposition taken his pleading could be stricken out. Wheeler v. Burckhardt, (1899) 34 Or 504, 507, 56 P 644.

A deposition could be taken without proof of the existence of the preconditions if both parties were present and

raised no objections to the regularity of the proceedings. State v. Woolridge, (1904) 45 Or 389, 78 P 333.

Examination was limited to matters pertinent to the issue, and did not compel the party to disclose the names of his witnesses, the manner in which he expected to establish his case, or confidential reports or communications of his agent in relation to the controversy. Armstrong v. Portland Ry., (1908) 52 Or 437, 97 P 715.

Testimony at a former trial, as quoted by the official reporter, was substantially the deposition of the witness and could be read at any subsequent hearing of the case, provided the witness was out of the state. Beard v. Royal Neighbors of Am. (1911) 60 Or 41, 118 P 171.

FURTHER CITATIONS: Carter v. Wakeman, (1904) 45 Or 427, 78 P 362; State v. McDonald, (1911) 59 Or 520, 117 P 281; Craig v. Crystal Realty Co., (1918) 89 Or 25, 173 P 322; Pape v. Hollopeter, (1928) 125 Or 34, 265 P 445; State ex rel. So. Pac. Co. v. Duncan, (1962) 230 Or 179, 368 P2d 733, 92 ALR2d 617.

LAW REVIEW CITATIONS: 39 OLR 117; 49 OLR 191.

45.161

CASE CITATIONS: Richardson-Merrell, Inc. v. Main, (1965) 240 Or 533, 402 P2d 746.

LAW REVIEW CITATIONS: 49 OLR 191.

45.171

1. In general

Depositions of witnesses, whether in state or not, may be taken either on written or oral interrogatories. Richardson-Merrell, Inc. v. Main, (1965) 240 Or 533, 402 P2d 746.

2. Under former similar statute

The officer taking the deposition did not need to be commissioned by the court. Wheeler v. Burckhardt, (1899) 34 Or 504, 56 P 644.

It was unnecessary to procure an order from the court or judge to take the testimony of a witness in this state, unless the exigencies of the case demanded that his testimony should have been taken in a shorter period than that prescribed. Id.

The deposition of the adverse party could be taken before any officer authorized to administer oaths, upon the same condition as any other witness. Id.

Where a deposition was not reduced to writing the oral testimony made by the deponent was admissible in a prosecution for perjury. State v. Woolridge, (1904) 45 Or 389, 393, 397, 78 P 333.

FURTHER CITATIONS: Pape v. Hollopeter, (1928) 125 Or 34, 265 P 445; Mannix v. Portland Telegram, (1933) 144 Or 172, 23 P2d 138; Tycer v. Hartsell, (1948) 184 Or 310, 198 P2d 263.

LAW REVIEW CITATIONS: 49 OLR 191.

45.181

NOTES OF DECISIONS

This section invested the court with broad powers to control litigants and prevent hardship and prevent a party or witness from annoyance, embarrassment or oppression. Richardson-Merrell, Inc. v. Main, (1965) 240 Or 533, 402 P2d 746.

FURTHER CITATIONS: State ex rel. So. Pac. Co. v. Duncan, (1962) 230 Or 179, 368 P2d 733, 92 ALR 2d 617.

45.190

NOTES OF DECISIONS

The conductor and engineer of a train are not "managing agents." State ex rel. Southern Pac. Co. v. Duncan, (1962) 230 Or 179, 368 P2d 733, 92 ALR2d 617.

An assignor employe is a "party" to an action by the Commissioner of the Bureau of Labor on an assigned wage claim. State v. Dental Serv., Inc., (1962) 232 Or 474, 376 P2d 91.

It is not necessary to issue a subpena to secure the attendance of a party or officer or managing agent of a party for the taking of his deposition, after notice has been served. Richardson-Merrell, Inc. v. Main, (1965) 240 Or 533, 402 P2d 746.

The order putting defendant in default was proper. Harris v. Harris, (1967) 247 Or 479, 430 P2d 993.

LAW REVIEW CITATIONS: 49 OLR 190-194.

45.230

NOTES OF DECISIONS

A certificate of a notary public appended to a deposition, reciting that the testimony of deponent had been taken by himself in shorthand, and immediately thereafter transcribed by a person named from his direct dictation, was a sufficient showing of who reduced the testimony to writing. Minard v. Stillman, (1899) 35 Or 259, 261, 57 P 1022.

In a prosecution for perjury, defendant's statements in giving her deposition may be shown by parol where the deposition was not taken or certified in the mode prescribed. State v. Woolridge, (1904) 45 Or 389, 78 P 333.

FURTHER CITATIONS: Heirs of Clark v. Ellis, (1881) 9 Or 128, 134; Mannix v. Portland Telegram, (1933) 144 Or 172, 23 P2d 138; Jones v. Ore. Central Ry., (1875) Fed Cas No. 7,486, 3 Sawy 523.

45.240

CASE CITATIONS: State v. Woolridge, (1904) 45 Or 389, 78 P 333; Mannix v. Portland Telegram, (1933) 144 Or 172, 23 P2d 138.

45.250

NOTES OF DECISIONS

1. Under former similar statute

Objections to the time or manner of taking a deposition had to be presented by motion to suppress, and could not be made for the first time at the trial. Sugar Pine Lbr. Co. v. Garrett, (1895) 28 Or 168, 42 P 129; Foster v. Henderson, (1896) 29 Or 210, 45 P 899; Oliver v. Ore. Sugar Co., (1904) 45 Or 77, 76 P 1086.

Consent to the use of a typewritten copy of the testimony of a decrepit witness was not a waiver of proof that the witness was still infirm. Carter v. Wakeman, (1904) 45 Or 427, 78 P 362.

Determination as to whether the deposition of a witness could be read because she was too infirm to attend at the trial was within the discretion of the trial court. State v. McDonald, (1910) 55 Or 419, 103 P 512, 104 P 967, 106 P 444.

Refusal to admit in evidence depositions taken without presence of defendant was proper where the order shortening the time for taking the depositions was made without notice to the defendant and was rescinded on the same day. United States Nat. Bank v. Miller, (1926) 119 Or 682, 250 P 1098.

A deposition did not become a part of the record until

it was introduced into evidence. Mannix v. Portland Telegram, (1933) 144 Or 172, 23 P2d 138.

FURTHER CITATIONS: Rich v. Tite-Knot Pine Mill, (1966) 245 Or 185, 421 P2d 370; Yundt v. D & D Bowl, Inc., (1971) 259 Or 247, 486 P2d 553.

LAW REVIEW CITATIONS: 42 OLR 205.

45.260

CASE CITATIONS: Yundt v. D & D Bowl, Inc., (1971) 259 Or 247, 486 P2d 553.

45.270

NOTES OF DECISIONS

1. Under former similar statute

A deposition taken in another action between different parties to prove the same marriage in issue in the latter case was inadmissible. Murray v. Murray, (1876) 6 Or 26.

Depositions taken in another suit between other parties were not admissible. Walker v. Goldsmith, (1886) 14 Or 125, 12 P 537.

Testimony given by decedent at former trial upon a different subject was inadmissible. Nevada Ditch Co. v. Canyon & Sand Hollow Ditch Co., (1911) 58 Or 517, 519, 114 P 86.

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

FURTHER CITATIONS: Oregon Ry. v. Ore. Ry. & Nav. Co., (1886) 28 F 505.

45.280

NOTES OF DECISIONS

1. Under former similar statute

Objections to the time or manner of taking a deposition had to be presented by motion to suppress, and could not be made for the first time at the trial. Sugar Pine Lbr. Co. v. Garrett, (1895) 28 Or 168, 42 P 129; Foster v. Henderson, (1896) 29 Or 210, 45 P 899; Oliver v. Ore. Sugar Co., (1904) 45 Or 77, 76 P 1086.

Objection to the form of an interrogatory to be annexed to a commission, in the absence of statute, had to be made when the question was propounded. Davis v. Emmons, (1898) 32 Or 389, 393, 51 P 652.

Where depositions were taken in pursuance of a stipulation that the answers to the interrogatories could be offered in evidence subject to objections at the trial that they are incompetent, irrelevant or immaterial, they were open to any objection at the trial which might have been taken to the testimony of the deponent if he had been called as a witness. Aldrich v. Columbia Ry. Co., (1901) 39 Or 263, 274, 64 P 455.

If a deposition was not introduced it did not become a record in the case and could be excluded if the witness was available for oral examination in open court. Mannix v. Portland Telegram, (1933) 144 Or 172, 23 P2d 138.

Where only part of a deposition was material to the issue and the deposition was offered as a whole, it was properly excluded. Berkshire v. Harem, (1947) 181 Or 42, 178 P2d 133.

45.320 to 45.370

NOTES OF DECISIONS

There is no irreconcilable conflict between these sections and ORS 45.151 to 45.190. Richardson-Merrell, Inc. v. Main, (1965) 240 Or 533, 402 P2d 746.

45.320

LAW REVIEW CITATIONS: 31 OLR 197.

45.325

LAW REVIEW CITATIONS: 49 OLR 191.

45.330

CASE CITATIONS: La Grande Nat. Bank v. Blum, (1895) 27 Or 215, 41 P 659; Davis v. Emmons, (1898) 32 Or 389, 51 P 652; Jones v. Ore. Central Ry., (1875) Fed Cas No. 7,486, 3 Sawy 523.

45.340

NOTES OF DECISIONS

An objection to the form of an interrogatory should be taken at the time it is propounded. Davis v. Emmons, (1898) 32 Or 389, 393, 51 P 652.

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

LAW REVIEW CITATIONS: 39 OLR 117.

45.350

NOTES OF DECISIONS

There was sufficient certification of a deposition where the commissioner certified that the following, or foregoing, or accompanying, was the examination of the witness, given upon his oath or affirmation "by me duly administered, in answer to interrogatories hereto annexed to the commission, or as therein stated." Heirs of Clark v. Ellis, (1881) 9 Or 128.

FURTHER CITATIONS: State v. McDonald, (1911) 59 Or 520, 117 P 281; Jones v. Ore. Central Ry., (1875) Fed Cas No. 7486, 3 Sawy 523.

45.420

NOTES OF DECISIONS

The judge may, in his discretion, make or continue the order for taking testimony. In re Carter, (1871) 3 Or 293, 296.

45.430

CASE CITATIONS: Damascus v. Home Coal Co., (1928) 127 Or 253, 271 P 729.

45.510

NOTES OF DECISIONS

A party may not be excluded from the courtroom. Schneider v. Haas, (1886) 14 Or 174, 12 P 236, 58 Am Rep 296.

An officer of a corporation not shown to have any special information rendering his presence important to the protection of its rights may be excluded. Trotter v. Stayton, (1904) 45 Or 301, 306, 77 P 395.

The statute is directory, not mandatory, and intends to vest wide discretion in excluding witnesses. State v. Ede, (1941) 167 Or 64, 117 P2d 235.

The statute was not intended to deprive the court on its own motion from excluding witnesses from the courtroom

to prevent their testimony from being influenced. State v. Wilson, (1945) 177 Or 637, 164 P2d 722.

The prosecution's resistance to defendant's motion to vacate a court's ruling excluding witnesses may be considered a request for such exclusion. Id.

The court's order to exclude all witnesses for the state except one whose presence was necessary to the prosecution of the case was not an abuse of discretion. State v. Ede, (1941) 167 Or 640, 117 P2d 235.

FURTHER CITATIONS: State v. Kendrick, (1965) 239 Or 512, 398 P2d 471.

45.530

NOTES OF DECISIONS

The court cannot permit irrelevant questions to be asked a prospective juror. Putnam v. Pac. Monthly Co., (1913) 68 Or 36, 53, 130 P 986, 136 P 835, Ann Cas 1915C, 256, 45 LRA(NS) 338.

The allowance of leading questions on cross-examination is discretionary. Lee v. Hoff, (1940) 163 Or 374, 97 P2d 715.

A limitation by the court to three witnesses who gave testimony on the valuation of property in an action for damages was error. Salisbury v. Goddard, (1916) 79 Or 593, 156 P 261.

FURTHER CITATIONS: State v. Caseday, (1911) 58 Or 429, 450, 115 P 287; Forrest v. Portland Ry. Light & Power Co., (1913) 64 Or 240, 245, 129 P 1048; Lakson v. Lakson, (1928) 124 Or 219, 263 P 891; State v. White, (1970) 4 Or App 151, 477 P2d 917.

LAW REVIEW CITATIONS: 41 OLR 307.

45.550

NOTES OF DECISIONS

The matter of permitting witnesses to be recalled for further cross-examination after having been fully cross-examined and excused from the stand is within the sound discretion of the trial court. State v. Robinson (1897) 32 Or 43, 51, 48 P 357.

The court has the right, in the exercise of a sound discretion, to permit the recall of a witness and to re-examine him as to the same matter upon which he had been previously examined. State v. Goff, (1914) 71 Or 352, 142 P 564.

The recall of a witness is not an abuse of discretion if counsel gives notice at the time of his reservation of the right to recall the witness. Gerlinger v. Frank, (1915) 74 Or 517, 145 P 1069.

Leave to recall a witness being in the sound discretion of the trial court, it is only for abuse thereof that its ruling can be disturbed. State v. Merlo, (1919) 92 Or 678, 173 P 317, 182 P 153.

This section is declaratory of the common law. State v. Motley, (1928) 127 Or 415, 272 P 561.

A witness is entitled to an opportunity to admit, deny or explain an impeaching statement by re-examination as to new matter upon which he has been examined by the adverse party. Smith v. Pac. Truck Express, (1940) 164 Or 318, 100 P2d 474.

The trial court properly refused plaintiff the right to answer on re-direct examination where it permitted him to re-read a statement and call attention to discrepancies therein. Id.

FURTHER CITATIONS: State v. White, (1970) 4 Or App 151, 477 P2d 917.

45.560

NOTES OF DECISIONS

The court has discretion when to allow leading questions. State v. Chee Gong, (1889) 17 Or 635, 21 P 882; Cribbs v. Montgomery Ward, (1954) 202 Or 8, 272 P2d 978.

The discretion of the court to allow leading questions on direct examination is not arbitrary, but must be based on some special circumstance, as unwillingness, youth, infirmity, lack of memory or ignorance on the part of the witness. State v. Ogden, (1901) 39 Or 195, 202, 65 P 449.

A question which can be answered by "Yes" or "No" is not necessarily leading, and if it does not suggest one more than the other it is not leading, even though it calls attention to a subject about which testimony is desired. Coates v. Slusher, (1924) 109 Or 612, 222 P 311.

The test as to whether a question is leading is whether it suggests answer on material matters by putting words or thought in mouth of witness to be echoed back. State v. Sing, (1925) 114 Or 267, 269, 229 P 921.

Leading questions may be allowed on direct examination of an adverse party if he appears to be hostile to the examiner. Sinclair v. Barker, (1964) 236 Or 599, 390 P2d 321.

Leading questions pertaining to formal and noncontroversial matters expedite the trial. State v. Murray, (1964) 238 Or 567, 395 P2d 780.

A diagram, shown to be correct, and not admitted into evidence, but only to enable a witness to explain the position and location of different points and objects was not in the nature of a leading question. Sheppard v. Yocum, (1882) 10 Or 402, 408.

A question as to whether defendant's agent had authority to instruct plaintiff to credit a certain amount on the note as a part payment, before any attempt had been made to prove such alleged agency, was objectionable. Sloan v. Sloan, (1905) 46 Or 36, 78 P 893.

Where the circumstances surrounding the direct examination indicated a reluctant witness, and where leading questions were asked of the witness, the defendant was not entitled to a reversal. State v. Merlo, (1919) 92 Or 678, 173 P 317, 182 P 153.

Court did not abuse discretion in allowing leading questions on direct examination of plaintiff suffering from aphasia. Tucker v. State Ind. Acc. Comm., (1959) 216 Or 74, 337 P2d 979.

FURTHER CITATIONS: State v. Edy, (1926) 117 Or 430, 244 P 538; State v. Cunningham, (1943) 173 Or 25, 144 P2d 303; State v. Dixon, (1958) 212 Or 572, 321 P2d 305; State v. Caver, (1960) 222 Or 270, 352 P2d 549; State v. Nichols, (1964) 236 Or 521, 388 P2d 739.

45.570

NOTES OF DECISIONS

1. Matter of right
2. Discretion of court
3. Scope of cross-examination
   (1) Application
   (2) Consideration
   (3) Negligence
4. Criminal cases
5. Credibility matters
   (1) Inconsistent statements
   (2) Character witnesses
6. Irrelevant, remote and other matter
7. Documentary evidence
8. Redirect examination
9. Harmless error

1. Matter of right

Cross-examination with respect to testimony directly in

issue is a matter of right. Mannix v. Portland Telegram, (1931) 136 Or 474, 284 P 837, 297 P 350, 300 P 350; Stillwell v. State Ind. Acc. Comm., (1966) 243 Or 158, 411 P2d 1015.

2. Discretion of court

The extent of the cross-examination rests largely in the discretion of the trial court, and error must affirmatively appear or it will not be reviewed. Sayres v. Allen, (1894) 25 Or 211, 35 P 254; State v. Reinhart, (1894) 26 Or 466, 482, 38 P 822; State v. McGrath, (1899) 35 Or 109, 114, 57 P 321; Krebs Hop Co. v. Livesley, (1909) 55 Or 227, 104 P 3; State v. Trapp, (1910) 56 Or 588, 109 P 1094; McIntosh v. McNair, (1912) 63 Or 57, 126 P 9; Furbeck v. Gevurtz & Son, (1914) 72 Or 12, 18, 143 P 654, 922; Gerlinger v. Frank, (1915) 74 Or 517, 522, 145 P 1069.

Wide latitude should be allowed upon cross-examination. Krewson & Co. v. Purdom, (1886) 13 Or 563, 11 P 281.

The court had discretion to exclude testimony given on cross-examination on grounds that defendant attempted to establish an affirmative part of his case. Mogul Trans. Co. v. Larison, (1947) 181 Or 252, 181 P2d 139.

The admission of a police officer's sketch on cross-examination was within the court's discretion where it was introduced to impeach his direct testimony and not as substantive evidence. Austin v. Portland Traction Co., (1947) 181 Or 470, 182 P2d 412.

3. Scope of cross-examination

Cross-examination is to be liberal and not restricted to the exact facts of the direct examination; it may limit, explain, or qualify such facts connected with the direct examination. Ah Doon v. Smith, (1893) 25 Or 89, 34 P 1093; Blue v. Portland Ry. Light & Power Co., (1911) 60 Or 122, 125, 117 P 1094; McIntosh v. McNair, (1912) 63 Or 57, 65, 126 P 9; Furbeck v. Gevurtz & Son, (1914) 72 Or 12, 18, 143 P 654, 922; Speer v. Smith, (1917) 83 Or 571, 163 P 979; Benson v. Johnson, (1917) 85 Or 677, 165 P 1001, 167 P 1014; Ritchie v. Pittman, (1933) 144 Or 228, 24 P2d 328.

In the development of matters brought out on the direct examination, the practice is to permit such questions as tend to bring out the whole truth concerning them. Thompson v. Purdy, (1904) 45 Or 197, 202, 77 P 113, 83 P 139.

There is no error in refusing to allow a witness to be cross-examined as to matters to which his direct examination does not relate. Morse v. Odell, (1907) 49 Or 118, 123, 89 P 139.

Cross-examination which raises an inquiry purely argumentative and attempts to obtain an exposition of the conduct of defendant's counsel in the trial of a cause is properly refused. McIntosh v. McNair, (1912) 63 Or 57, 126 P 9.

If from the direct examination the jury can draw an inference, such deduction of fact becomes connected with the testimony in chief, rendering it a legitimate matter of cross-examination. Hayes v. Ogle, (1933) 143 Or 1, 21 P2d 223.

Where plaintiff disclosed on direct examination only so much of the transaction as raised an inference of a contract's legality, it was proper for defendant on cross-examination to show the remaining facts under which the contract arose, and its illegality. Ah Doon v. Smith, (1893) 25 Or 89, 94, 34 P 1093.

(1) Application. Cross-examination as to an admission by defendant is proper where plaintiff's witness testifies on direct examination as to such admission. Prouty Lbr. & Box Co. v. Cogan, (1921) 101 Or 382, 200 P 905.

A witness who testified that defendant had paid him money due on partnership business, a receivership, and other accounts due, was properly cross-examined as to the nature and business of such partnership, the receivership and also the collections. Sayres v. Allen, (1894) 25 Or 211, 35 P 254.

A witness who testified that he destroyed a receipt, in answer to a question asked solely to show the reason for its non-production, cannot be asked on cross-examination how he came to pay the money and get the receipt. Schreyer v. Turner Flouring Co., (1896) 29 Or 1, 16, 43 P 719.

A witness who has testified that a scow was built by a certain person and was in good condition at the time it was delivered to defendant, may be asked on cross-examination if he knew the builder before he built the scow, and whether he ever knew or heard of the scow being sunk before it was sunk in defendant's service. Oregon Pottery Co. v. Kern, (1897) 30 Or 328, 331, 47 P 917.

Where a witness has testified that he calked the scow just before its delivery to defendant, and that it was then in good condition and worth a certain sum, defendant may, on cross-examination, ask: "Did you ever know anything about that scow before you were called to repair it? Did you ever examine it?" Id.

Where a witness testified that floods brought down driftwood, a question whether they also brought down boulders and rocks was not proper cross-examination. Oldenburg v. Ore. Sugar Co., (1901) 39 Or 564, 65 P 869.

A witness who testified that a name had been signed to certain papers by the defendant's employees may be asked if such employees did not have authority to sign the name of their employer. State v. Humphreys, (1903) 43 Or 44, 62, 70 P 824.

Where an attorney, on direct examination, testified as to the presentation of a claim for allowance, it was not proper cross-examination to elicit testimony as to a conversation between said attorney and the decedent in which decedent had denied being indebted to plaintiff. Goltra v. Penland, (1904) 45 Or 254, 258, 77 P 129.

To ask a witness concerning matters stated in a pleading that he had never seen and was not bound by, and about which he had not been asked in chief was not proper. Multnomah County v. Willamette Towing Co., (1907) 49 Or 204, 221, 89 P 389.

Where plaintiff testified that he was the owner of a note and defendants desired to show fraud in the transfer, it was error to refuse cross-examination as to the method by which he acquired the note. Speer v. Smith, (1917) 83 Or 571, 163 P 979.

In ejectment the defendant was not required to answer on cross-examination as to the character and nature of his possession, a matter not touched on direct. Dayton v. Fenno, (1921) 99 Or 137, 195 P 154.

It was not error to permit testimony concerning lights in front of an elevator on cross-examination even though the direct examination was limited to questions regarding the elevator door. Garrett v. Eugene Medical Center, (1950) 190 Or 17, 224 P2d 563.

(2) Consideration. Where a mortgagee testified in chief that consideration for the mortgage was work and labor the mortgagor was entitled to cross-examine on the details of such work and labor. Maxwell v. Bolles, (1895) 28 Or 1, 6, 41 P 661.

Where the holder of a note alleged to be illegal testified in chief that he gave a consideration for the note, the defendant was entitled to cross-examine in regard to the consideration. Kenny v. Walker, (1896) 29 Or 41, 43, 44 P 501.

Where a holder of a note claimed to be without notice of infirmities in payee's title, there was no abuse of discretion to permit cross-examination to show want of consideration and knowledge of the infirmity. Second Northwestern Fin. Corp. v. Mansfield, (1927) 121 Or 236, 252 P 400, 254 P 1022.

(3) Negligence. In an action for injury from a fire alleged to have been kindled by the defendant, cross-examination as to a custom to back-fire for the purpose of proving his negligence could not be made when he had neither admitted

he set the fire nor testified to such a custom. Willis V. Lance, (1896) 28 Or 371, 373, 43 P 384, 487.

Where an engineer had testified to the exercise of exceptional care in extinguishing fire when ashes were dumped because of a previous fire that day from the same engine, it was proper to permit a cross-examination as to the location of the previous fire. Lieuallen v. Mosgrove, (1900) 37 Or 446, 452, 61 P 1022.

One who had testified merely that a pulley and belt had been running four years without accident, could not, on cross-examination, be asked whether several men had not been killed in the mill in that time. Duntley v. Inman, (1902) 42 Or 334, 344, 70 P 529, 59 LRA 785.

Where a physician had stated that a certain physician had an X-ray machine, it was proper cross-examination to inquire whether it was usual in that locality for surgeons to have such appliances. Beadle v. Paine, (1905) 46 Or 424, 80 P 903.

Where a witness was not examined as to other fires having been set by defendant's engines, he was not subject to cross-examination with reference thereto. Chenoweth v. So. Pac. Co., (1909) 53 Or 111, 99 P 86.

An engineer who testified to an inspection of an elevator subsequent to an accident may be cross-examined as to inspections prior thereto. Kelly v. Lewis Inv. Co., (1913) 66 Or 1, 133 P 826, Ann Cas 1915B, 568.

4. Criminal cases

An accused who offers himself as a witness is subject to the same rules of cross-examination as any other witness. State v. Abrams, (1883) 11 Or 169, 8 P 327.

It is proper cross-examination in a criminal case to enquire whether the witness had discussed the facts of the case with anyone, and if so with whom and under what circumstances. State v. Yost, (1965) 241 Or 362, 405 P2d 851.

A juror on a previous trial who testified to statements of a deceased witness could not be asked on cross-examination questions touching his conduct as a juror in said cause. State v. Huffman, (1888) 16 Or 15, 16 P 640.

In a prosecution for gambling, it was not proper cross-examination of the state's witness to introduce evidence tending to prove that the particular act of gambling investigated by the grand jury was different from the one then being investigated before the trial jury. State v. Adams, (1891) 20 Or 525, 26 P 837.

The defendant may be cross-examined as to statements made on his preliminary examination contrary to his testimony on the trial. State v. Bartmess, (1898) 33 Or 110, 120, 54 P 167.

Where the accused on direct gave a general account of occurrences preceding the alleged offense, cross-examination as to omitted details was permissible. State v. Weaver, (1899) 35 Or 415, 58 P 109.

Where the accused stated on direct that a pistol was in his possession at the homicide it was proper on cross-examination to inquire where he obtained it. Id.

Where a witness testified that he had found money on the premises of the co-defendant, but nothing was said about how he happened to be searching on such premises, he cannot be asked on cross-examination to explain why he made such search. State v. Savage, (1899) 36 Or 191, 60 P 610, 61 P 1128.

Where one accused of murder related circumstances leading up to the difficulty, and to his presence on the premises of the deceased, cross-examination was permissible to show that he had been ordered off the premises by the deceased two months previous to the killing, and that they were not on good terms. State v. Miller, (1903) 43 Or 325, 329, 74 P 658.

On trial for larceny of a horse it was error to ask the accused on cross-examination, questions as to his testimony at another trial for larceny of a horse, where such answer could not be used for impeachment. State v. Deal, (1903) 43 Or 17, 21, 70 P 534.

A witness who testified in a murder trial to being present when a dying declaration was made and written out, and who signed it as a witness, could not be cross-questioned as to whether the writing contained all that was said by deceased. State v. Gray, (1905) 46 Or 24, 79 P 53.

Where a witness in a prosecution for murder had given testimony that the victim was either alone responsible for quarrels with defendant or an aggressive participant, he may be asked on cross-examination whether the quarrels began when defendant discovered that her husband did not have "lots of money." State v. Merlo, (1919) 92 Or 678, 173 P 317, 182 P 153.

5. Credibility matters

Matters not connected with the direct examination of the witness may be inquired into for the purpose of testing the accuracy, veracity, and credibility of a witness. State v. Mah Jim, (1886) 13 Or 235, 10 P 306; State v. Savage, (1899) 36 Or 191, 209, 60 P 610, 61 P 1128; Smitson v. So. Pac. Co., (1900) 37 Or 74, 88, 60 P 907; Goldstein v. Pac. Home Mut. Fire Ins. Co., (1915) 74 Or 247, 249, 145 P 267; Linkhart v. Savely, (1951) 190 Or 484, 227 P2d 187.

Inquiries for the sole object of disgracing a witness are not sanctioned. State v. Bacon, (1886) 13 Or 143, 9 P 393, 57 Am St Rep 8.

A refusal to allow a witness to be asked on cross-examination whether or not he killed a man in a named city and fled is within the court's discretion. State v. Chee Gong, (1889) 17 Or 635, 21 P 882.

A witness for the accused may be asked as to anything that would show his interest in the result of the trial, and anything he did in aid of the defendant about the trial. State v. Olds, (1889) 18 Or 440, 442, 22 P 940.

The rule for laying the foundation is the same where it is intended to show the hostility of a witness as where it is intended to impeach him. State v. Ellsworth, (1896) 30 Or 145, 47 P 199.

To show bias a witness may be asked on cross-examination if he had not expressed a certain feeling or used a given expression concerning the case. State v. Ellsworth, (1896) 30 Or 145, 47 P 199.

In showing the hostility entertained by a witness toward a person about whom he is testifying, such inquiry must be limited to the feeling for or against that person and not his family. State v. Welch, (1898) 33 Or 33, 38, 54 P 213.

A witness who admits an ill feeling against defendant should not be allowed to say that it is because of the general supposition that defendant has been stealing cattle. State v. Lee, (1905) 46 Or 40, 79 P 577.

Questions to show whether a witness had a fair opportunity to observe the matters to which he testified are proper upon cross-examination. Stotts v. Wagner, (1931) 135 Or 243, 295 P 497.

It was prejudicial error to show on cross-examination the names and occupations of persons giving financial assistance for the defense of the accused. State v. Olds, (1889) 18 Or 440, 442, 22 P 940.

A question on cross-examination of a witness found in the room with defendant at the time of his arrest as to why he did not open the door when the officers knocked, was proper as tending to show the interest of the witness. 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.

Questions seeking to elicit from a witness a statement of his customary duties and the hour when he observed an automobile accident were proper. Stotts v. Wagner, (1931) 135 Or 243, 295 P 497.

(1) Inconsistent statements. A witness who testified that a pedestrian's death resulted from defendant's speed was properly cross-examined as to statements made shortly after the accident to the effect that the defendant was not negligent. Ritchie v. Pittman, (1933) 144 Or 228, 24 P2d 328.

(2) Character witnesses. Where a witness has testified to the good reputation of the accused, cross-examination is permissible as to rumors of particular instances of the accused having had trouble with others. State v. Doris, (1908) 51 Or 136, 94 P 44, 16 LRA(NS) 660.

A witness who testified to the good reputation of prosecutrix for chastity in a prosecution for rape may be asked on cross-examination if the witness had heard of her having been discharged from different places because of immoral conduct. State v. Ogden, (1901) 39 Or 195, 202, 65 P 449.

Where a witness testified that the character of another witness was bad, specific acts of the person so accused could not be shown on cross-examination for the purpose of rebutting such character evidence. State v. Osborne, (1909) 54 Or 289, 103 P 62, 20 Ann Cas 627.

Where plaintiff in an action for malicious prosecution confined the direct examination of his witness to general reputation for financial honesty, exclusion, on cross-examination, of evidence that plaintiff was cohabiting with a woman not his wife, held error. Marshall v. Brown, (1923) 108 Or 658, 218 P 923.

6. Irrelevant, remote and other matter

Where a person on cross-examination is interrogated regarding pertinent matters outside, and not connected with his direct examination, the examiner makes him his own witness, subject to direct examination rules and to the court's discretion if to admit such testimony at that time. Long v. Lander, (1882) 10 Or 175; Osmun v. Winters, (1896) 30 Or 177, 188, 46 P 780.

Extension of cross-examination to issues irrelevant under the pleadings may be prevented. Crossen v. Grandy, (1902) 42 Or 282, 287, 70 P 906.

On an issue as to the residence of a party with two furnished houses it was not error to exclude evidence on cross-examination tending to show at which place he had the most furniture. Weidert v. State Ins. Co., (1890) 19 Or 261, 274, 24 P 242, 20 Am St Rep 809.

In an action for damages resulting from the overflow of plaintiff's land, the refusal to permit his cross-examination concerning the manner in which he irrigated his land, or whether he promised his tenant to protect him from water by a levee, was not error. Crossen v. Grandy, (1902) 42 Or 282, 287, 70 P 906.

7. Documentary evidence

Where a witness had referred to a document, the opposite party had a right to have such documents identified and marked as a part of the cross-examination. Hildebrand v. United Artisans, (1907) 50 Or 159, 163, 91 P 542.

In an action on an accident indemnity policy, a written report of the accident by plaintiff's president and plaintiff's answer in a suit by an injured employe were admissible on cross-examination when connected with the direct examination. Western Whse. Co. v. New Amsterdam Cas. Co., (1917) 85 Or 597, 167 P 572.

8. Redirect examination

Where a party on cross-examination brings out matters not testified to on direct, he cannot complain of examination as to such matters on redirect. Farmers' Bank v. Saling, (1898) 33 Or 394, 54 P 190.

But a witness cannot on redirect examination be asked whether he had any reason to doubt that a specified defendant was a partner in the firm which executed the notes in suit, where there was nothing in the cross-examination to call out such a question. Id.

9. Harmless error

Cross-examination on an immaterial point is harmless where the facts were stated on direct examination. Capital Lumbering Co. v. Learned, (1900) 36 Or 544, 551, 59 P 454, 78 Am St Rep 792.

Permitting the reading of certain letters as part of cross-examination, was without prejudice to defendant, where they were mere repetition of final estimates already in evidence. Hanson v. Johnson Contract Co., (1926) 117 Or 541, 244 P 875.

FURTHER CITATIONS: State v. Bartmess, (1898) 33 Or 110, 123, 54 P 167; State v. Caver, (1960) 222 Or 270, 352 P2d 549; Miller v. Lillard, (1961) 228 Or 202, 364 P2d 766; State Hwy. Comm. v. Hewitt, (1962) 229 Or 582, 368 P2d 346; Sinclair v. Barker, (1964) 236 Or 599, 390 P2d 321; State v. Rush, (1968) 248 Or 568, 436 P2d 266; State v. Williams, (1971) 92 Or App Adv Sh 1674, 487 P2d 100, Sup Ct **review denied.**

45.580

NOTES OF DECISIONS

1. In general
2. The memorandum
3. By whom memorandum is made
4. When the memorandum was made
5. Production, inspection and admissibility
6. Reading memorandum to the jury
7. Objections

1. In general

The courts have been very liberal in permitting the use of memoranda to refresh memory. McDaniels v. Harrington, (1916) 80 Or 628, 157 P 1068.

In an action for misrepresentation of business receipts, testimony relating to such receipts was admissible without reference to any memorandum, and exclusion of the plaintiff's books on defendant's objection was not error. Fitzpatrick v. Sletter, (1926) 117 Or 173, 242 P 1114.

Objection that state was impeaching its own witness was properly overruled when witness changed her testimony after refreshing her present memory from her prior written statement. State v. Dugan, (1958) 215 Or 151, 333 P2d 907.

2. The memorandum

Stenographic notes made at a preliminary examination may be used to refresh the memory of the person who made them to contradict the testimony of a witness. State v. Bartmess, (1898) 33 Or 110, 118, 54 P 167.

A clerk who knows entries to be correct, may refresh his memory by consulting memoranda copied from the books, and carefully compared by him, if after so using it, he is enabled to testify from memory of the original transactions. Haines v. Cadwell, (1901) 40 Or 229, 233, 66 P 910.

It is the original memorandum from which a witness testifies, unless it be lost, or its absence excused. Manchester Assur. Co. v. Ore. R. & Nav. Co., (1905) 46 Or 162, 79 P 60, 114 Am St Rep 863, 69 LRA 475.

A map is not a memorandum and may not be classed as substantive evidence. Walling v. Van Pelt, (1930) 132 Or 243, 285 P 262.

This section was not applicable to a transcript of notes of an interview or an oral statement given by the witness soon after the incident. Waterway Terminals Co. v. P.S. Lord Mechanical Contractors, (1965) 242 Or 1, 406 P2d 556, 13 ALR3d 1.

3. By whom memorandum is made

It was competent for a witness, before testifying, to refresh his memory from memoranda of a conversation, though they were not made by him but by another person

who was also present. State v. Magers, (1899) 35 Or 520, 538, 57 P 197.

A memorandum not made by the witness or under his direction could not be referred to, even though the witness saw it soon after it was made, and then knew of his own knowledge that it conformed to the facts. Manchester Assur. Co. v. Ore. R. & Nav. Co., (1905) 46 Or 162, 79 P 60, 114 Am St Rep 863, 69 LRA 475.

Plaintiff was permitted to refresh his memory as to value of work done and goods furnished by reference to memoranda entered by his wife at his direction at the time itemized statements were rendered the defendant. McDaniels v. Harrington, (1916) 80 Or 628, 157 P 1068.

A witness may not refresh his memory as to the quantity of grain he raised by reference to a memorandum of threshers and not made under his direction; nor may such memorandum be admitted in evidence. Hall v. Brown, (1921) 102 Or 389, 202 P 719.

4. When the memorandum was made

A witness while testifying in an action to recover the contents of her trunk, used what she swore was a correct list of articles in the trunk, made by her two months after the trunk was taken. Oyler v. Dautoff, (1899) 36 Or 357, 361, 59 P 474.

A letter by a doctor written two years after his examination was properly used to refresh his memory. United States v. Smith, (1941) 117 F2d 911.

5. Production, inspection and admissibility

If the witness' recollection is so revived by the writing that he is able to state the facts of his own knowledge independently of the writing, opposing counsel is not entitled to have it produced for inspection. State v. Magers, (1899) 36 Or 38, 42, 58 P 892; State v. Yee Guck, (1921) 99 Or 231, 195 P 363; State v. Kader, (1954) 201 Or 300, 270 P2d 160.

If, after examining the writing, the witness cannot recall the events, and is dependent on the memorandum, which he believes states the truth, the writing must be produced and submitted for inspection. State v. Magers, (1899) 36 Or 38, 42, 58 P 892.

Memoranda are not competent evidence per se, and will be admitted only when they independently refresh the memory, or when the originals are lost or legally excused. Manchester Assur. Co. v. Ore. R. & Nav. Co., (1905) 46 Or 162, 79 P 60, 114 Am St Rep 863, 69 LRA 475.

When a transcript of a statement given by witness is read by counsel for the purpose of refreshing the witness' recollection, opposing counsel, on request, has the right to inspect the transcript whether or not it is shown to the witness. Waterway Terminals Co. v. P.S. Lord Mechanical Contractors, (1965) 242 Or 1, 406 P2d 556, 13 ALR3d. 1.

Where the memory of a witness was not refreshed by the writing, but he testified that he knew it correctly stated the facts, it was admissible as the best evidence. Susewind v. Lever, (1900) 37 Or 365, 368, 61 P 644.

The memorandum cannot be introduced as part of the witness' testimony. Accordingly, a label affixed to a bottle of liquor by a purchaser to identify it as that bought from defendant was inadmissible without proper instructions that it was not evidence of guilt. State v. Edmunson, (1927) 120 Or 297, 249 P 1098, 251 P 763, 252 P 84.

6. Reading memorandum to the jury

Where a witness testified without looking at the entry book, of a distinct recollection to the essential fact stated therein, there was no necessity of reading the entry to the jury. Friendly v. Lee, (1890) 20 Or 202, 205, 25 P 396.

A court reporter was properly permitted to read from his shorthand notes of previous testimony. State v. Reynolds, (1940) 164 Or 446, 100 P2d 593.

7. Objections

Where an objection was that the record of the transaction afforded the best evidence, the court on appeal will not consider the objection that error was committed in permitting the witness to refresh his memory without first establishing the preliminary facts essential. Rumble v. Cummings, (1908) 52 Or 203, 209, 95 P 1111.

FURTHER CITATIONS: Lintner v. Wiles, (1914) 70 Or 350, 141 P 871; State v. Merlo, (1919) 92 Or 678, 720, 173 P 317, 182 P 163; Hall v. Brown, (1921) 102 Or 389, 202 P 719; Mansfield v. So. Ore. Stages, (1931) 136 Or 669, 1 P2d 591; Jenkins v. Jenkins, (1943) 171 Or 629, 138 P2d 904; State v. Crater, (1962) 230 Or 513, 370 P2d 700.

LAW REVIEW CITATIONS: 3 OLR 154; 17 OLR 78; 46 OLR 232, 233; 49 OLR 194-198.

45.590

NOTES OF DECISIONS

1. In general
2. Testimony to be material and prejudicial
3. Contradiction by other evidence
4. Statements inconsistent with testimony

1. In general

This section is declaratory of the common law. Leverich v. Frank, (1876) 6 Or 212; State v. Hunsaker, (1888) 16 Or 497, 19 P 605.

A party cannot attack the general reputation of his witness for veracity. State v. Bartmess, (1898) 33 Or 110, 54 P 167; State v. Merlo, (1919) 92 Or 678, 173 P 317, 182 P 153.

Questions by the state to a witness which tend to impeach the defendant's witness do not come within this rule. State v. Hunsaker, (1888) 16 Or 497, 19 P 605.

A court may properly refuse to permit a defendant to recall a witness to lay the foundation for impeachment of his own witness. State v. Gulliford, (1915) 76 Or 231, 148 P 876.

Witnesses are vouched for by the party calling them as credible, or at least not too infamous as to be wholly unworthy. Gowen-Lenning Brown Co. v. Kingman, (1926) 116 Or 650, 242 P 351.

The purpose of this statute was to remove the roadblock which prevented the party who called his adversary from impeaching the latter. State v. Cummings, (1955) 205 Or 500, 288 P2d 1036, 289 P2d 1083.

There is no requirement of surprise or that the witness be adverse under this section. State v. Gardner, (1970) 2 Or App 265, 467 P2d 125, Sup Ct **review denied.**

Refusal to allow defendant to testify on direct examination concerning his prior criminal record is not error. State v. Howard, (1971) 92 Or App Adv Sh 1763, 486 P2d 1301.

2. Testimony to be material and prejudicial

The testimony of a witness must be material and prejudicial to him before he may be impeached by the party calling him. Langford v. Jones, (1890) 18 Or 307, 326, 22 P 1064; State v. Steeves, (1896) 29 Or 85, 104, 43 P 947; State v. Yee Gueng, (1910) 57 Or 509, 112 P 424; State v. Merlo, (1919) 92 Or 678, 173 P 317, 182 P 153; Tauscher v. Doernbecher Mfg. Co., (1936) 153 Or 152, 56 P2d 318; State v. Gardner, (1970) 2 Or App 265, 467 P2d 125, Sup Ct **review denied.**

Negative testimony does not authorize a party to impeach his own witness, but it is otherwise where testimony is contradictory of that given. State v. McDaniel, (1901) 39 Or 161, 176, 65 P 520.

Where a witness testified that the accused had stated that the deceased's father was "a savage old bulldog," it

was competent to ask if he had not also stated that he was afraid to go with the deceased girl on that account. Id.

In a prosecution for murder, a state's witness, who testified that defendant and deceased quarreled, that he did not know who started the quarrels, was not affirmatively prejudicial to the state, so as to authorize impeaching him. State v. Merlo, (1919) 92 Or 678, 173 P 317, 182 P 153.

3. Contradiction by other evidence

The state, in a prosecution for arson, had the right to contradict one of its witnesses who was reluctant and unreliable. State v. Rosser, (1939) 162 Or 293, 91 P2d 295.

4. Statements inconsistent with testimony

A party surprised by unfavorable testimony of his witness on a material point, may, for the purpose of refreshing his recollection, and inducing him to correct his testimony or explain his apparent inconsistency, repeat to such witness, with the circumstances of time, place and persons present, declarations and statements previously made by him, which are inconsistent with his present sworn testimony, and he may be asked whether he made them. If the witness denies or does not remember having made the statements, the party may then offer testimony thereof. State v. Steeves, (1896) 29 Or 85, 104, 43 P 947; State v. Bartmess, (1898) 33 Or 110, 114, 54 P 167; State v. Merlo, (1919) 92 Or 678, 173 P 317, 318, 182 P 153.

Inconsistent statements of a witness should not be allowed to go to the jury as substantive evidence. State v. Steeves, (1896) 29 Or 85, 104, 43 P 947; State v. Merlo, (1919) 92 Or 678, 173 P 317, 182 P 153.

Impeachment by prior inconsistent statements was proper. State v. Young, (1970) 1 Or App 562, 463 P2d 374, Sup Ct **review denied**; State v. Green, (1970) 3 Or App 411, 474 P2d 9.

The state, being surprised, was entitled to contradict its witness by asking him if he did not have the conversation referred to when he was previously examined in addition to what he had already testified to at the trial. State v. McDaniel, (1901) 39 Or 161, 65 P 520, 521.

Where a witness gives evidence palpably adverse to the party calling him, affidavits executed by him in the past, and inconsistent with his present testimony, are admissible for the sole purpose of explaining such inconsistency. City of Woodburn v. Aplin, (1913) 64 Or 610, 622, 131 P 516.

Where plaintiff's witness in an action to recover money advanced on the sale of hops testified to the condition of the hops, plaintiff was entitled to introduce other evidence showing that witness had at another time made statements inconsistent with his present testimony. Wigan v. La Follett, (1917) 84 Or 488, 165 P 579.

In an action against employer for the death of a servant, it was proper to ask a witness about his testimony at a coroner's inquest relative to the accident, for the purpose of impeachment, where there was an apparent inconsistency. Garvin v. W. Cooperage Co., (1919) 94 Or 487, 184 P 555.

A leading question to refresh the memory of a witness propounded by the party calling him and surprised by his testimony was proper. Mace v. Timberman, (1926) 120 Or 144, 153, 251 P 763.

Where a witness on direct failed to give the expected answer, it was proper to call another witness to testify concerning contradictory statements made by the first witness at other times. Lynn v. Stinnette, (1934) 147 Or 105, 31 P2d 764.

Where defendant's witness denied plaintiff's employment, his report to the industrial accident commission admitting the employment was admissible to contradict and impeach his testimony. Bennett v. Spagele, (1941) 166 Or 449, 113 P2d 207.

Accomplice's testimony as state's witness that he struck deceased only one blow, decided to stop, then shot in self-defense, was effectively contradicted by other state evidence. State v. Broadhurst, (1948) 184 Or 178, 196 P2d 407, cert. denied, 337 US 906, 69 S Ct 1046, 93 L Ed 897.

FURTHER CITATIONS: State v. Jennings, (1906) 48 Or 483, 488, 87 P 524, 89 P 421; Mace v. Timberman, (1926) 120 Or 144, 153, 251 P 763; Arthur v. Parish, (1935) 150 Or 582, 47 P2d 682; Chatfield v. Zeller, (1944) 174 Or 59, 147 P2d 222; McKinnon v. Chenoweth, (1945) 176 Or 74, 155 P2d 944; Cameron v. Goree, (1948) 182 Or 581, 189 P2d 596; Hutchison v. Aetna Life Ins. Co., (1948) 182 Or 639, 189 P2d 586; State v. Holleman, (1960) 225 Or 1, 357 P2d 262; State v. Nichols, (1964) 236 Or 521, 388 P2d 739; State v. Meidel, (1965) 241 Or 367, 405 P2d 844; State v. Miller, (1969) 1 Or App 460, 460 P2d 874, Sup Ct **review denied**; State v. Amory, (1970) 1 Or App 496, 464 P2d 714; State v. Hamilton, (1970) 4 Or App 214, 476 P2d 207, Sup Ct **review denied**; Hutchinson v. Toews, (1970) 4 Or App 19, 476 P2d 811.

LAW REVIEW CITATIONS: 41 OLR 308; 49 OLR 196.

45.600

NOTES OF DECISIONS

1. In general

This section is declaratory of the common law. Sheppard v. Yocum, (1882) 10 Or 402, 410; State v. Hunsaker, (1888) 16 Or 497, 499, 19 P 605; State v. Edwards, (1922) 106 Or 58, 210 P 1079; State v. Motley, (1928) 127 Or 415, 272 P 561; State v. Gilbert, (1932) 138 Or 291, 4 P2d 923.

Statutory methods must be pursued to impeach a witness. State v. Holbrook, (1920) 98 Or 43, 188 P 947, 192 P 640, 193 P 434.

Evidence of prior conviction may only be introduced for the purpose of impeachment. State v. Miller, (1969) 1 Or App 460, 460 P2d 874, Sup Ct **review denied**.

The mere fact the witness called by defendant was an accomplice did not entitle defendant to impeach the witness. State v. Briggs, (1966) 245 Or 503, 420 P2d 71.

2. Contradictory evidence

A witness may not be impeached by contradiction of collateral matter; the test of collateralness is: "Could the fact, as to which the prior self-contradiction is predicated have been shown in evidence for any purpose independently of the self-contradiction." Coles v. Harsch, (1929) 129 Or 11, 276 P 248.

A witness can not be impeached upon an immaterial matter. Foster v. Lake County, (1930) 132 Or 374, 284 P 830.

Where an impeaching witness testifies as to statements by him to the impeached witness, contrary to the testimony of the latter, this section governs. Heider v. Barendrick, (1935) 149 Or 220, 39 P2d 957.

3. Evidence of bad reputation

The regular mode of examining into the general reputation is to inquire whether the witness knows the general reputation of the person in question, and if his answer is in the affirmative, he may be asked what that reputation is. Page v. Finley, (1879) 8 Or 45.

Bad reputation for truth does not entirely destroy the

witness' testimony where it is intrinsically probable or is corroborated by other evidence; it must be considered for what it is worth with other evidence; but where it is not supported, it may be utterly disregarded. Wimer v. Smith, (1892) 22 Or 469, 476, 30 P 416.

A witness cannot be impeached by showing that his general reputation for integrity is bad. McIntosh v. McNair, (1909) 53 Or 87, 99 P 74.

The method of examining into the general reputation of a fifteen-year-old youth is no different from that prescribed for adult witnesses. State v. Bailey, (1919) 90 Or 627, 178 P 201.

Testimony as to the general reputation of the defendant for truth in the community in which he lives is competent for impeachment. Lucas v. Kaylor, (1931) 136 Or 541, 299 P 297.

Admission of evidence of general reputation as a law-abiding citizen was error where witness on cross-examination had admitted conviction of crime. State v. Cameron, (1940) 165 Or 176, 106 P2d 563.

4. Particular wrongful acts

The moral character of a witness cannot be impeached by showing particular acts of immoral conduct. Leverich v. Frank, (1876) 6 Or 212; State v. White, (1906) 48 Or 416, 426, 87 P 137.

A letter containing language which would indicate unchastity of a witness is not admissible to impeach him. Leverich v. Frank, (1876) 6 Or 212.

Testimony regarding the desertion of certain witnesses from a ship is inadmissible. State v. White, (1906) 48 Or 416, 426, 87 P 137.

To permit examination as to cause of the revocation of a parole would be the equivalent of granting the right to inquire into arrests and particular wrongdoing. State v. Townsend, (1964) 237 Or 527, 392 P2d 459.

Evidence may be received concerning conviction of a crime which would not by its nature be thought of as a basis for questioning credibility. State v. Rush, (1968) 248 Or 568, 436 P2d 266.

Although error, there was no cause for reversal where improper testimony attacking witness' credibility was allowed, since witness had by his admissions completely destroyed his credibility. Davis v. Dean, (1960) 221 Or 110, 350 P2d 910.

5. Indictments and commission of crimes

An accused as witness cannot be cross-examined at large as to other offenses. State v. Lurch, (1885) 12 Or 99, 6 P 408; State v. Saunders, (1886) 14 Or 300, 12 P 441; State v. Bartmess, (1898) 33 Or 110, 123, 54 P 167; State v. Deal, (1908) 52 Or 568, 98 P 165; State v. Motley, (1928) 127 Or 415, 272 P 561.

Cross-examination of the prosecuting witness as to whether he had been indicted for murder was not permitted, it not being contended that he was convicted. State v. Bailey, (1919) 90 Or 627, 178 P 201.

Sustaining objections to questions showing state's witness had been dealing in moonshine whiskey was not error, in absence of showing a prior conviction. State v. Broom, (1927) 121 Or 202, 253 P 1042, 1044.

In a liquor prosecution, defendant witness cannot be cross-examined as to whether he was not under indictment in another county on a liquor charge. State v. Motley, (1928) 127 Or 415, 272 P 561.

6. Convictions

Judgment of former convictions may properly be admitted in evidence for the purpose of impeaching a witness. State v. Bacon, (1886) 13 Or 143, 9 P 393, 57 Am Rep 8; State v. Isley, (1912) 62 Or 241, 124 P 626; Redsecker v. Wade, (1914) 69 Or 153, 164, 134 P 5, 138 P 485, Ann Cas 1916A, 269; State v. Goodloe, (1933) 144 Or 193, 24 P2d 28; State v. Peppie, (1946) 174 Or 532, 173 P2d 468.

An accused as witness in his own behalf, may be asked on cross-examination whether he has ever been convicted of a crime for the purpose of impeachment. State v. Deal, (1908) 52 Or 568, 98 P 165; State v. Gilbert, (1932) 138 Or 291, 4 P2d 923; State v. Peppie, (1946) 174 Or 532, 173 P2d 468.

A conviction under a municipal ordinance is not a conviction for impeachment purposes. State v. Crawford, (1911) 58 Or 116, 113 P 440, Ann Cas 1913A, 325; Triphonoff v. Sweeney, (1913) 65 Or 299, 308, 130 P 979; Redsecker v. Wade, (1914) 69 Or 153, 164, 134 P 5, 138 P 485, Ann Cas 1916A, 269.

Where a defendant testifies that he has been convicted of a crime but once, the state may properly show in rebuttal that he has been convicted more than once. State v. Newlin, (1917) 84 Or 323, 165 P 225; State v. Ede, (1941) 167 Or 640, 117 P2d 235.

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, 9 P 393, 57 Am Rep 8.

To constitute a crime, the act committed must be a violation of a state law, and be punishable capitally, by imprisonment, or by fine, in a criminal action, in which the state is the plaintiff. Redsecker v. Wade, (1914) 69 Or 153, 164, 134 P 5, 138 P 485.

The record of a prior conviction of defendant is admissible as primary evidence of that fact for purpose of impeaching him, though the defendant had not previously been questioned concerning it. State v. Brennan, (1924) 111 Or 479, 227 P 275.

The general practice to impeach a witness by a prior conviction is to ask if he has ever been conficted of a crime. If the answer is affirmative the witness may explain the nature of the crime, if not, then a record of judgment may be introduced. State v. Gilbert, (1932) 138 Or 291, 4 P2d 923.

The opinion of the court or any other part of the proceedings is not admissible in order to show the grounds of conviction. Mannix v. Portland Telegram, (1933) 144 Or 172, 23 P2d 138, 90 ALR 55.

The names and nature of crimes of which the accused has been convicted, and the places committed, may be shown in impeaching the accused as a witness, by cross-examination. State v. Wilson, (1948) 182 Or 681, 189 P2d 403.

The general practice to impeach a witness by a prior conviction is to ask if he has ever been convicted of a crime; if the answer is in the affirmative, the witness may explain the nature of the crime; if not, then a record of judgment may be introduced. State v. Gustafson, (1967) 248 Or 1, 432 P2d 323.

Proper evidence of the prior conviction is the record of a judgment of conviction. State v. Bouthillier, (1970) 4 Or App 145, 476 P2d 209, Sup Ct **review denied.**

A verdict of a jury is not a final determination. Id.

It is improper to explain former convictions when the opposing party uses evidence of them for impeachment purposes. State v. Hamilton, (1970) 4 Or App 214, 476 P2d 207, Sup Ct **review denied.**

7. Instructions

A court may properly instruct the jury that the record of a prior conviction may be considered in determining the weight to be given to the testimony of a defendant. State v. Isley, (1912) 62 Or 241, 124 P 636; State v. Reyner, (1907) 50 Or 224, 232, 91 P 301.

FURTHER CITATIONS: Glaze v. Whitley, (1874) 5 Or 164; Steeples v. Newton, (1879) 7 Or 110, 33 Am Rep 705; Krewson Co. v. Purdom, (1886) 13 Or 563, 11 P 281; State v. Chee Gong, (1889) 17 Or 635, 21 P 882; First Nat. Bank v. Assur.

Co., (1898) 33 Or 43, 52 P 1052; Bottom v. Portland Elec. Power Co., (1932) 139 Or 209, 9 P2d 129; Kern v. Pullen, (1932) 138 Or 222, 6 P2d 224, 82 ALR 434; State v. Cunningham, (1933) 173 Or 25, 144 P2d 303; State v. Ewing, (1944) 174 Or 487, 149 P2d 765; State v. Moore, (1947) 180 Or 502, 176 P2d 631, 177 P2d 413, cert. denied, 332 US 763, 68 S Ct 68, 92 L Ed 349; State v. Doud, (1950) 190 Or 218, 225 P2d 400; Smith v. Abel, (1957) 211 Or 571, 316 P2d 793; State v. Rollo, (1960) 221 Or 428, 351 P2d 422; State v. Herrera, (1963) 236 Or 1, 368 P2d 448; State v. Ponton, (1965) 240 Or 30, 399 P2d 30; Otten v. Gladden, (1966) 244 Or 327, 417 P2d 1017; State v. Hale, (1967) 248 Or 159, 432 P2d 694; State v. Kuykendall, (1970) 3 Or App 362, 473 P2d 670, Sup Ct **review denied;** State v. Obremski, (1971) 5 Or App 302, 483 P2d 467, Sup Ct **review denied;** State v. Howard, (1971) 92 Or App Adv Sh 1763, 486 P2d 1301.

LAW REVIEW CITATIONS: 19 OLR 265; 41 OLR 309; 49 OLR 196, 211.

45.610

NOTES OF DECISIONS

1. In general

This section is declaratory of the common law. Sheppard v. Yocum, (1882) 10 Or 402; State v. Hunsaker, (1888) 16 Or 497, 19 P 605; State v. Deal, (1902) 41 Or 437, 70 P 532; State v. Edwards, (1922) 106 Or 58, 210 P 1079; State v. Patrick, (1929) 131 Or 209, 282 P 233; State v. Nortin, (1943) 178 Or 297, 133 P2d 252.

Testimony that a witness has at other times made inconsistent statements is not an impeachment of his general character for truth and veracity. Sheppard v. Yocum, (1882) 10 Or 402; State v. Louie Hing, (1915) 77 Or 462, 151 P 706. Sheppard v. Yocum, supra overruling Glaze v. Whitley, (1874) 5 Or 164.

Dying declarations are not within the purview of this section. State v. Fuller, (1908) 52 Or 42, 53, 96 P 456.

Contradictory statements of a witness for defendant may be shown by defendant through another witness for purposes of impeachment. Reimers v. Brennan, (1917) 84 Or 53, 164 P 552.

The exclusion of evidence of inconsistent statements is harmless where the witness himself admits having made such statements. State v. Fletcher, (1893) 24 Or 295, 33 P 575.

It is proper to cross-examine prosecuting witness for purposes of impeachment as to a statement made by him in the presence of other named persons to the accused. State v. Morse, (1899) 35 Or 462, 57 P 631.

Where an impeaching witness testifies to facts contrary to statements made by the impeached witness, this statute does not apply. Heider v. Barendrick, (1935) 149 Or 220, 39 P2d 957.

Failure of strict compliance does not necessarily constitute error. State v. Nortin, (1943) 170 Or 297, 133 P2d 252.

Where a witness, on cross-examination, made contradictory statements as to the position of the plaintiff when she fell from a train, questions as to statements made by him out of court concerning how the accident occurred, inconsistent with his testimony in chief, were properly allowed. Smitson v. So. Pac. Co., (1900) 37 Or 74, 88, 60 P 907.

Affidavits containing declarations inconsistent with present testimony of witnesses were properly received in evidence. City of Woodburn v. Aplin, (1913) 64 Or 610, 131 P 516.

A witness for plaintiff testifying to the condition of hops was impeached by plaintiff by showing inconsistent statements made by witness in respect to the same matter. Wigan v. La Follett, (1917) 84 Or 488, 165 P 579.

Defendant in a prosecution for rape was entitled to show statements made by the prosecuting witness relative to the time, place and manner of the commission of the crime inconsistent with her testimony. State v. McKiel, (1927) 122 Or 504, 259 P 917.

A witness' report to the industrial accident commission was admissible to impeach his testimony on the stand. Bennet v. Spagele, (1941) 166 Or 449, 113 P2d 207.

When the specific occasion in question had been called to the witness' attention and it clearly appeared that it was identified in his mind, and he was then asked concerning the specific inconsistent statement with which he was to be impeached, the purpose of the law was fulfilled. State v. Nortin, (1943) 170 Or 297, 133 P2d 252.

Impeachment by prior inconsistent statements was proper. State v. Young, (1970) 1 Or App 562, 463 P2d 374, Sup Ct **review denied.**

2. Impeaching statements

To impeach a witness by means of contradictory statements, they must be material. State v. Edwards, (1922) 106 Or 58, 210 P 1079; State v. Patrick, (1929) 131 Or 209, 282 P 233.

Statements contained in an involuntary confession of a witness cannot be used to impeach him. State v. Steeves, (1896) 29 Or 85, 43 P 947.

Impeaching testimony is competent although only a part of it as given by the impeaching witness differs from that of the impeached witness. State v. Gray, (1903) 43 Or 446, 452, 74 P 927.

The state for the purpose of impeachment may question a witness in respect to inconsistent statements before the grand jury. State v. Merlo, (1919) 92 Or 678, 173 P 317, 182 P 153.

An accused may be cross-examined as to statements on his preliminary examination contrary to his testimony although he did not in his direct examination refer to the preliminary examination. State v. Bartmess, (1898) 33 Or 110, 54 P 167.

In an action for personal injuries occasioned by falling from a passenger train, where defendant's brakeman testified as to the manner in which the accident occurred, such testimony was material and no error was committed in permitting a foundation to be laid for impeaching testimony. Smitson v. So. Pac. Co., (1900) 37 Or 74, 60 P 907.

Cross-examination of defendant was fair when made regarding inconsistent statements made, under oath in mitigation of punishment, at a hearing after which defendant changed his plea to not guilty. State v. Atkison, (1971) 92 Or App Adv Sh 1380, 485 P2d 1117, Sup Ct **review denied.**

3. Foundation essential

The object of making the question definite as to time, places and persons is to protect the witness and give him an opportunity to recollect the facts, and correct the statements when immediately brought to his mind. Sheppard v. Yocum, (1882) 10 Or 402; State v. Deal, (1902) 41 Or 437, 70 P 532; State v. Patrick, (1929) 131 Or 209, 282 P 233.

Compliance with this section is necessary to authorize proof of statements of a witness inconsistent with his present testimony. Krewson v. Purdom, (1888) 13 Or 563, 11 P 281.

The requirements as to mention of time, place and circumstances, do not apply to cross-examination of a witness

for the purpose of testing his recollection or credibility, when it is not intended to prove such contradictory statements by independent evidence. State v. Coss, (1909) 53 Or 462, 101 P 193.

4. Laying the foundation

Questions must be definite and certain to be a basis for impeachment. State v. McDonald, (1879) 8 Or 113, 116; Gabel v. Oliver, (1929) 130 Or 392, 280 P 496.

As a foundation for impeachment it is competent on cross-examination to ask a witness with particulars of time, place and circumstance whether he has not made other specified statements inconsistent with his present testimony. Krewson v. Purdom, (1886) 13 Or 563, 11 P 281; Smitson v. So. Pac. Co., (1900) 37 Or 74, 60 P 907; State v. Sing, (1925) 114 Or 267, 269, 229 P 921.

When statements of a witness are called to his mind, together with such circumstances of time and place and persons present as to enable him to readily understand the particular statements alluded to by the questioner, and he then denies making any or attempts to qualify them, other persons having knowledge of the fact may be called to contradict him. State v. Deal, (1902) 41 Or 437, 441, 70 P 532; State v. Patrick, (1929) 131 Or 209, 282 P 233.

Directing attention to any particular place in a small hamlet in a foundation question is not required, especially where the witness admits meeting there the person to whom the contradictory statements were made. State v. Welch, (1898) 33 Or 33, 40, 54 P 213.

The omission from the impeaching question of the date of the statements is cured by the answer of the witness showing that he understands the question. Id.

A witness is not entitled to a recital of the names of all the persons present before evidence of his contradictory statements can be resumed. State v. Bartmess, (1898) 33 Or 110, 54 P 167.

Though the person to whom the contradictory statement was made should ordinarily be named in the preliminary question propounded for the purpose of laying a foundation for impeachment, the reason fails when the statement consists of testimony given at a preliminary examination. Id.

Without reciting the alleged statements, a witness cannot be asked if he did not make contradictory statements during the preliminary hearing. State v. Ogden, (1901) 39 Or 195, 65 P 449.

A question about a conversation had on "street or somewhere," is not sufficiently definite. State v. Miller, (1926) 119 Or 409, 243 P 72.

The trial judge determines the sufficiency of the foundation for impeachment. State v. Patrick, (1929) 131 Or 209, 282 P 233.

Where a witness for the prosecution testified that defendant called the murdered girl's father a "savage old bulldog," foundation for his impeachment could be laid by asking him as to statements made by him in reference to the same matter at the time he signed an affidavit in the office of the district attorney. State v. McDaniel, (1901) 39 Or 161, 65 P 520.

No sufficient foundation was laid where on cross-examination a witness was asked whether he recalled talking to a named person about a trip to a specific place. Coles v. Harsch, (1929) 129 Or 11, 276 P 248.

Notwithstanding that perhaps all of the persons present, at the time one of the statements of the witness was made, were not mentioned in laying the foundation, and it was not shown at another time when one of the statements was made that no one else was present except the witness and the individual to whom the statement was made, it was held that the statute was substantially complied with. State v. Patrick, (1929) 131 Or 209, 282 P 233.

The foundation for impeachment was sufficient when the time and place and the persons present or involved in the statement were mentioned thereby calling the incident and conversation to the attention of the witness sought to be impeached. Ritchie v. Pittman, (1933) 144 Or 228, 24 P2d 328.

Where the witness himself designated the time, place and persons present when the conversation occurred, the requirements were met. Heider v. Barendrick, (1935) 149 Or 220, 39 P2d 957.

It was not error to exclude the evidence when no proper foundation was made. State v. Hale, (1967) 248 Or 159, 432 P2d 694.

5. Proof of inconsistent statements

A witness may be impeached by members of the grand jury as to the testimony given before such jury where the proper foundation has been laid. State v. Brown, (1895) 28 Or 147, 41 P 1042.

A letter written by a co-defendant, who later turned state's evidence, could be introduced to impeach his prior testimony. State v. Moore, (1947) 180 Or 502, 176 P2d 413, cert. denied, 332 US 763, 68 S Ct 68, 92 L Ed 349.

The admission of a police officer's sketch on cross-examination was within the court's discretion where introduced to impeach his direct testimony and not as substantive evidence. Austin v. Portland Traction Co., (1947) 181 Or 470, 182 P2d 412.

A witness could not be impeached by the production of a transcript of the testimony given by him at the inquest, or by the reading of the stenographer's notes of such testimony where the stenographer was unable to say that his notes contained all that the witness stated at the inquest. State v. Martin, (1905) 47 Or 282, 289, 83 P 849, 8 Ann Cas 769.

Where minutes of testimony given by a witness on preliminary examination were not signed by him, the witness could not be interrogated on the trial concerning them. State v. Goodager, (1910) 56 Or 198, 106 P 638, 108 P 185.

A coroner's synopsis of testimony or the stenographer's transcript was not sufficient to impeach, though the coroner or the stenographer could be called to testify if the witness made statements inconsistent with his present testimony. State v. Davis, (1914) 70 Or 93, 98, 140 P 448.

Evidence at a coroner's inquest could be used for impeachment purposes if it was written or signed by him and properly identified. Id.

In an action on an accident indemnity policy, a report of the accident and plaintiff's answer in a suit by the injured employee were admissible in evidence to impeach witnesses who signed them. Western Whse. Co. v. New Amsterdam Cas. Co., (1917) 85 Or 597, 167 P 572.

A report by doctors who made a physical examination of the plaintiff after sustaining the injury which was the cause of suit, was not admissible for purposes of impeaching the testimony of the plaintiff. Bottom v. Portland Elec. Power Co., (1932) 139 Or 209, 9 P2d 129.

6. Showing written statements

That statements were made in the presence of others before being written does not obviate showing the writing to the witness before interrogating him with reference to them. State v. Steeves, (1896) 29 Or 85, 43 P 947.

A witness cannot be impeached by introducing his testimony given at a coroner's inquest, which was reduced to writing, without first showing him the writing. State v. Crockett, (1901) 39 Or 76, 65 P 447.

The transcript of stenographer's notes of a confession need not be exhibited as a foundation for impeachment if it appears that the witness did not sign the transcript of the notes. State v. Brake, (1921) 99 Or 310, 195 P 583.

The requirement that the writing be shown to the witness while on the stand was waived in the absence of objection

on that ground. State v. Chandler, (1911) 57 Or 561, 112 P 1087.

Refusal to allow the plaintiff to examine a writing before he was interrogated respecting it was error. Tonseth v. Portland Ry., Light & Power Co., (1914) 70 Or 341, 141 P 868.

7. Explanations

If in an attempt to impeach a witness, he admits making the statement imputed to him, he must, if he then seeks to vary, qualify or contradict, be allowed immediately to explain the declaration. Tonseth v. Portland Ry., Light & Power Co., (1914) 70 Or 341, 141 P 868.

Where the testimony of a witness is directly attacked by an attempt to show inconsistent statements, the witness must be given an opportunity to explain the statements. State v. Harris, (1923) 106 Or 211, 211 P 944.

Permitting plaintiff over objection to testify in rebuttal to statements alleged made to her by a doctor inconsistent with his testimony constituted prejudicial error where this statute was not complied with. Peters v. Hockley, (1936) 152 Or 434, 53 P2d 1059, 103 ALR 1347.

Where the evidence did not explain anything, particularly if it was likely to arouse prejudices, it was rejected. Smith v. Pac. Truck Express, (1940) 164 Or 318, 100 P2d 474.

8. Instructions

Instruction as to impeachment by evidence of statements inconsistent with the testimony of a witness, was proper. State v. Chandler, (1911) 57 Or 561, 112 P 1087.

FURTHER CITATIONS: State v. Stewart, (1883) 11 Or 52, 238, 4 P 128; State v. Lurch, (1885) 12 Or 104, 107, 6 P 411; State v. Mackey, (1885) 12 Or 154, 6 P 648; State v. Ellsworth, (1896) 30 Or 145, 47 P 199; State v. Crockett, (1901) 39 Or 76, 65 P 447; State v. Martin, (1905) 47 Or 282, 290, 83 P 849, 8 Ann Cas 769; Dillard v. Olalla Min. Co., (1908) 52 Or 126, 94 P 966, 96 P 678; State v. Goodager, (1910) 56 Or 198, 202, 106 P 638, 108 P 185; State v. Ryan, (1910) 56 Or 524, 108 P 1009; State v. Goodall, (1919) 90 Or 485, 487, 175 P 857; State v. Holbrook, (1920) 98 Or 43, 188 P 947, 192 P 640, 193 P 434; First Nat. Bank v. Anderson, (1924) 112 Or 167, 228 P 929; State v. Sing, (1925) 114 Or 267, 269, 229 P 921; State v. Holleman, (1960) 225 Or 1, 357 P2d 262; State v. Nichols, (1964) 236 Or 521, 388 P2d 739; State v. Hambleton, (1964) 238 Or 79, 390 P2d 284; State v. Meidel, (1965) 241 Or 367, 405 P2d 844; Stillwell v. State Ind. Acc. Comm., (1966) 243 Or 158, 411 P2d 1015; Kruse v. Coos Head Timber Co., (1967) 248 Or 294, 432 P2d 1009; State v. Smith, (1970) 1 Or App 153, 458 P2d 687; State v. Capitan, (1970) 2 Or App 338, 468 P2d 533; State v. Kuykendall, (1970) 3 Or App 362, 473 P2d 670, Sup Ct review denied; State v. Obremski, (1971) 5 Or App 302, 483 P2d 467.

LAW REVIEW CITATIONS: 19 OLR 265; 41 OLR 273, 310; 42 OLR 248, 249; 49 OLR 196.

45.620

NOTES OF DECISIONS

Evidence showing the plaintiff's reputation for truth and veracity to be good is not competent in a civil action until such character has been attacked. Sheppard v. Yocum, (1882) 10 Or 402; Cooper v. Phipps, (1893) 24 Or 357, 33 P 985, 22 LRA 836; Osmun v. Winters, (1894) 25 Or 260, 272, 35 P 250; Munkers v. Farmers' Ins. Co., (1896) 30 Or 211, 214, 46 P 850; First Nat. Bank v. Commercial Assur. Co., (1898) 33 Or 43, 52 P 1050; State v. Louie Hing, (1915) 77 Or 462, 466, 151 P 706.

The witness must first be asked of his knowledge of the party's general reputation, and he may then be asked whether it is good or bad, if he is found to possess sufficient knowledge on that subject. State v. Clark, (1881) 9 Or 466; Kelley v. Highfield, (1887) 15 Or 277, 14 P 744.

In an action for seduction of a daughter, plaintiff may prove the good character of his and the defendant's families. Parker v. Monteith, (1879) 7 Or 277.

Evidence of good character of a defendant in a criminal action is always admissible, and should be weighed and considered in connection with all the other evidence. State v. Porter, (1897) 32 Or 135, 158, 49 P 964.

FURTHER CITATIONS: Stamper v. Raymond, (1900) 38 Or 16, 32, 62 P 20; State v. Fong, (1957) 211 Or 1, 314 P2d 243.

LAW REVIEW CITATIONS: 31 OLR 267; 41 OLR 342.

45.630

NOTES OF DECISIONS

A plaintiff is not authorized to read as part of his testimony exhibits already in the record, not proved by him or introduced while he was on the stand. Shepherd v. Inman-Poulsen Lbr. Co., (1917) 86 Or 652, 168 P 601.

A photograph is a "writing" within the meaning of this statute. Spence v. Rasmussen, (1951) 190 Or 662, 226 P2d 819.

45.910

LAW REVIEW CITATIONS: 39 OLR 117.