

## Chapter 139

### Witnesses

#### 139.010

ATTY. GEN. OPINIONS: Validity of criminal subpoena served on Sunday, 1966-68, p 306.

#### 139.020

LAW REVIEW CITATIONS: 4 WLJ 169, 170.

#### 139.030

ATTY. GEN. OPINIONS: Power of district attorney to subpoena witnesses in arson investigations, 1952-54, p 211.

LAW REVIEW CITATIONS: 4 WLJ 172.

#### 139.040

CASE CITATIONS: State v. O'Malley, (1968) 248 Or 601, 435 P2d 812.

#### 139.050

CASE CITATIONS: State ex rel. Gladden v. Lonergan, (1954) 201 Or 163, 269 P2d 491.

#### 139.060

CASE CITATIONS: State ex rel. Gladden v. Lonergan, (1954) 201 Or 163, 269 P2d 491; State v. Reyes, (1957) 209 Or 595, 303 P2d 519, 304 P2d 446, 308 P2d 182.

#### 139.070

CASE CITATIONS: State v. O'Malley, (1968) 248 Or 601, 435 P2d 812.

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

#### 139.090

ATTY. GEN. OPINIONS: County employe serving subpoenas in criminal cases, 1966-68, p 294; validity of criminal subpoena served on Sunday, 1966-68, p 306.

#### 139.100

ATTY. GEN. OPINIONS: Sufficiency of service of subpoena by exhibiting telegraphic copy, 1928-30, p 502; validity of criminal subpoena served on Sunday, 1966-68, p 306.

#### 139.140

##### NOTES OF DECISIONS

This section does not require the court to order the state to advance funds for the payment of witness fees and travel expenses for out-of-state witnesses. State v. Blount, (1953)

200 Or 35, 264 P2d 419, 280 P2d 414, cert. denied, 347 U.S. 962, 98 L Ed 1105, 74 S Ct 711.

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

#### 139.150 to 139.170

CASE CITATIONS: State v. Cook, (1966) 242 Or 509, 411 P2d 78.

#### 139.210 to 139.260

##### NOTES OF DECISIONS

Defendant made an adequate showing that the witnesses were material. State v. Gann, (1969) 254 Or 549, 463 P2d 570.

FURTHER CITATIONS: State v. Blount, (1953) 200 Or 35, 264 P2d 419; State v. Edwards, (1970) 3 Or App 179, 471 P2d 843, Sup Ct review denied.

LAW REVIEW CITATIONS: 4 WLJ 172.

#### 139.230

##### NOTES OF DECISIONS

This section does not require the court to order the state to advance funds for the payment of witness fees and travel expenses for out-of-state witnesses. State v. Blount, (1953) 200 Or 35, 264 P2d 419, 280 P2d 414, cert. denied, 347 US 962, 98 L Ed 1105, 74 S Ct 711.

Before issuing a certificate under this section the court must find that the person sought is a material witness. Id.

It is within discretion of trial judge whether a certificate under this section will be issued. State v. Smith, (1969) 1 Or App 153, 458 P2d 687, Sup Ct review denied; State v. Edwards, (1970) 3 Or App 179, 471 P2d 843, Sup Ct review denied.

FURTHER CITATIONS: State v. Vigil, (1966) 244 Or 102, 416 P2d 2.

#### 139.240

LAW REVIEW CITATIONS: 46 OLR 193.

#### 139.310

##### NOTES OF DECISIONS

1. Defendant as witness
2. Cross-examination
3. Credit attaching to testimony
  - (1) Instructions
  - (2) Impeachment
4. Failure of defendant to testify

##### 1. Defendant as witness

The disqualification of a codefendant was not removed

by the enactment of this statute. *State v. Drake*, (1884) 11 Or 396, 4 P 1204; *State v. Hale*, (1932) 141 Or 332, 18 P2d 219.

Defendant, by offering himself as a witness, does not consent to the examination of his wife. *State v. McGrath*, (1899) 35 Or 109, 57 P 321.

A defendant who elects to testify in his own behalf waives the constitutional protection guaranteed by Const. Art. 1, §11, as to all matters germane to the facts to which he has testified upon his examination in chief. *State v. Stilwell*, (1924) 109 Or 643, 221 P 174.

This section was unnecessary to render a person separately indicted for the same crime as the defendant, 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.

An instruction that the defendant is "permitted" to be a witness in his own behalf was not erroneous. *State v. Porter*, (1897) 32 Or 135, 49 P 964.

## 2. Cross-examination

Cross-examination of defendant is limited to facts to which he has testified tending to his conviction or acquittal. *State v. Saunders*, (1886) 14 Or 300, 12 P 441; *State v. McCarrroll*, (1927) 123 Or 173, 261 P 411; *Diggs v. United States*, (1915) 136 CCA 147, 220 Fed 545.

A defendant may be cross-examined in relation to all facts and matters germane to the testimony given by him on his examination in chief. *State v. Bartmess*, (1898) 33 Or 110, 54 P 167; *State v. Torbet*, (1914) 72 Or 402, 143 P 1107.

To require the defendant on cross-examination to write his own name, or that of another person, is error where he has not testified in reference thereto in his direct examination. *State v. Lurch*, (1885) 12 Or 99, 6 P 408. **Distinguished in** *State v. Bartmess*, (1898) 33 Or 110, 54 P 167.

Where the defendant has undertaken to give a general account of the occurrences preceding the commission of the alleged offense, he may be asked on cross-examination as to details that he did not give. *State v. Weaver*, (1899) 35 Or 415, 58 P 109.

The cross-examination of the defendant must be strictly confined to matters disclosed in his direct examination, subject to the qualification that he may be impeached by showing that he has been convicted of a crime, or that he has made statements inconsistent with his present testimony on material matters. *State v. Jensen*, (1914) 70 Or 156, 140 P 740.

The accused subjects himself to the same liability as that to which other witnesses subject themselves with respect to cross-examination. *State v. Wong Wen Teung*, (1921) 99 Or 95, 195 P 349.

This section permits cross-examination on all matters properly germane to and connected with the testimony in chief. *State v. Cruse*, (1962) 231 Or 326, 372 P2d 974.

Improper cross-examination is not ground for reversal, where both question and answer were immaterial, and could not have prejudiced the defendant. *State v. Moore*, (1897) 32 Or 65, 79, 48 P 468.

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

Where the accused testified to the circumstances attending the homicide, and to his presence on the premises of the deceased, cross-examination was permissible to show that accused had been ordered off the premises by the deceased, and that they were not on good terms. *State v. Miller*, (1903) 43 Or 325, 329, 74 P 658.

## 3. Credit attaching to testimony

(1) **Instructions.** The interest of defendant in the result

of the litigation is a proper matter to be considered by the jury; and it is proper for the court so to instruct them. *State v. Clements*, (1887) 15 Or 237, 14 P 410; *State v. Tarter*, (1894) 26 Or 38, 37 P 53.

The jury may consider all the facts and circumstances of the case, and give to the defendant's testimony only such weight as they, in their judgment, think it entitled to; and they may be so instructed. *State v. Clements*, (1887) 15 Or 237, 14 P 410.

An instruction that "you are not bound to believe the testimony of the accused is absolutely true, and you are to consider the great temptation which one so situated is under, so to speak, as to procure his acquittal," is erroneous. *State v. Fuller*, (1908) 52 Or 42, 96 P 456.

(2) **Impeachment.** Where proof of good character is proffered by the defendant, it is not improper to permit cross-examination of the witness, to show knowledge of particular instances of his having had trouble with others. *State v. Doris*, (1908) 51 Or 136, 94 P 44, 16 LRA(NS) 660.

Defendant may be impeached by showing a prior conviction of crime. *State v. Deal*, (1908) 52 Or 568, 570, 98 P 165.

Defendant, as a witness in his own behalf, cannot be impeached by showing his conviction for violation of a municipal ordinance. *State v. Crawford*, (1911) 58 Or 116, 113 P 440, Ann Cas 1913A, 325.

An accused, in a prosecution for horse theft, who claims to own the horse, may be discredited by showing that he attempted to induce a witness to testify as to such ownership as of his own knowledge, whereas in fact he had no knowledge. *State v. Deal*, (1908) 52 Or 568, 570, 98 P 165.

## 4. Failure of defendant to testify

Ground for unfavorable comment to the jury by the prosecution is not afforded by the defendant's failure to testify. *State v. Anderson*, (1882) 10 Or 448.

A presumption of guilt is not created by the defendant's failure to testify in his own behalf; nor is a presumption created by his failure to produce his wife as a witness. *State v. Hatcher*, (1896) 29 Or 309, 44 P 584. **Distinguished in** *State v. Dennis*, (1945) 177 Or 73, 159 P2d 838, 161 P2d 670, where it was held that there was no statute or constitutional provision which applies to the failure of a defendant to call his wife to testify.

An instruction that no presumption is created against the defendant by his failure to testify need not be given in the absence of request. *State v. Magers*, (1899) 36 Or 38, 51, 58 P 892.

It was not improper for the prosecutor on rebuttal to argue that the jury should not consider statements by defendant (acting as his own counsel) in closing argument unless supported by testimony under oath or subject to cross-examination. *State v. Polk*, (1971) 5 Or App 605, 485 P2d 1241.

FURTHER CITATIONS: *United States v. Brown*, (1871) 1 Sawyer 531, 24 Fed Cas 1273; *State v. Abrams*, (1883) 11 Or 169; *State v. Bartlett*, (1908) 50 Or 440, 93 P 243; *State v. Lem Woon*, (1910) 57 Or 482, 107 P 974, 112 P 427; *Lem Woon v. Oregon* 229 US 586, 33 S Ct 783, 57 L Ed 1340; *State v. Bilyeu*, (1913) 64 Or 177, 129 P 768; *State v. Jordan*, (1934) 146 Or 504, 26 P2d 558, 30 P2d 751; *State v. Ewing*, (1944) 174 Or 487, 149 P2d 765; *State v. Lincoln*, (1968) 250 Or 426, 443 P2d 178; *State v. Flynn*, (1968) 250 Or 428, 443 P2d 204; *State v. Howard*, (1971) 92 Or App Adv Sh 1763, 486 P2d 1301.

LAW REVIEW CITATIONS: 35 OLR 52; 41 OLR 310.

CASE CITATIONS: *State v. Drake*, (1884) 11 Or 396, 4 P 1204; *State v. Steeves*, (1896) 29 Or 85, 43 P 947; *State v.*

Magone, (1897) 32 Or 206, 51 P 452; State v. White, (1906) 48 Or 416, 87 P 137; State v. Goff, (1914) 71 Or 352, 142 P 564; State v. Chapin, (1915) 74 Or 346, 354, 144 P 1187; State v. Chin Ping, (1919) 91 Or 593, 176 P 188; State v. Hale, (1933) 141 Or 332, 18 P2d 219; State v. Allen, (1936) 152 Or 422, 53 P2d 1054; State v. Moore, (1947) 180 Or 502, 511, 176 P2d 631, 177 P2d 413; State v. Broadhurst, (1948) 184 Or 178, 196 P2d 407, cert. denied, 337 US 906, 69 S Ct 1046, 93 L Ed 897.

## 139.320

## NOTES OF DECISIONS

1. Competency of husband or wife
2. Consent to spouse's testimony
3. Prior to 1971 amendment, adultery or polygamy

**1. Competency of husband or wife**

The statute providing that if a party offer himself as a witness it shall be deemed a consent to the examination of his wife, does not apply to criminal proceedings. State v. McGrath, (1899) 35 Or 109, 111, 57 P 321.

The statute providing that neither husband nor wife shall be examined as to any communication made by one to the other, does not apply to criminal proceedings. State v. Luper, (1907) 49 Or 605, 607, 91 P 444.

In a trial for perjury committed by a husband in the action in which they were divorced, the former wife is not prevented by this section from testifying. *Id.*

On a hearing before a United States commissioner in the District of Oregon this section need not be observed. Cohen v. United States, (1914) 130 CCA 417, 214 Fed 23.

The effect of this section is to remove the subject matter from the field of incompetency of witnesses as at common law and to transfer it to the field of privilege. State v. LeFils, (1957) 209 Or 666, 307 P2d 1048.

A marriage by proxy was not subject to collateral attack, and either spouse was entitled to the benefits of this section. State v. Anderson, (1964) 239 Or 200, 396 P2d 558.

In criminal prosecution for attempted assault upon a minor daughter, a wife could not be compelled to testify against her husband even though she had signed complaint. State v. LeFils, (1957) 209 Or 666, 307 P2d 1048.

**2. Consent to spouse's testimony**

"Consent" of the spouse within the purview of the statute is active consent, and not such as may be implied from the fact that the other spouse has testified. State v. Mc-

Grath, (1899) 35 Or 109, 112, 57 P 321; State v. Mageske, (1926) 119 Or 312, 227 P 1065, 249 P 364.

It is not error to call the witness and, thereby, require the defendant to express lack of consent before the jury. State v. Hixon, (1964) 237 Or 402, 391 P2d 388.

Argument by the prosecuting attorney on a prosecution for homicide, allowed over the objection of the accused, to the effect that failure to call the wife of the accused, was proof of the fact that she would have testified adversely to him if called, constitutes reversible error. State v. Hatcher, (1896) 29 Or 309, 44 P 584. *Distinguished in* State v. Dennis, (1945) 177 Or 73, 159 P2d 838, 161 P2d 670, where it was not reversible error for the prosecutor to call defendant's wife to the stand and request his consent to her examination.

Where defendant testified that he was looking for his son when arrested and charged with possessing mash, testimony of his wife, who was living apart from him, that he knew his son was working in a certain mill, was error and prejudicial. State v. Mageske, (1926) 119 Or 312, 227 P 1065, 249 P 364.

Where testimony of defendant's wife related the entire incident constituting the alleged crime in two counts, testimony was admissible even though the second count did not involve aggression against the wife. State v. Wilson, (1959) 218 Or 575, 346 P2d 115, 79 ALR2d 587.

**3. Prior to 1971 amendment, adultery or polygamy**

This section, providing that in a prosecution for polygamy the wife of accused shall be a competent witness, and could testify against him without his consent, as to the fact of marriage, did not limit her testimony as to the marriage ceremony. State v. Locke, (1915) 77 Or 492, 495, 151 P 717.

In adultery prosecution, the spouse of the paramour of the defendant was competent to testify. State v. Wakefield, (1924) 111 Or 615, 228 P 115.

An objection to the testimony of the wife of accused in a prosecution for polygamy, before she gave any evidence except her name and place of residence, was properly overruled, her testimony as to the fact of marriage being admissible. State v. Von Klein, (1914) 71 Or 159, 169, 142 P 549, Ann Cas 1916C, 1054.

FURTHER CITATIONS: State v. LaFollett, (1930) 134 Or 218, 292 P 98; Kowaleski v. Kowaleski, (1961) 227 Or 45, 361 P2d 64.

LAW REVIEW CITATIONS: 36 OLR 133; 41 OLR 314; 46 OLR 118.