Chapter 45

1955 REPLACEMENT PART

Taking Testimony of Witnesses

CROSS REFERENCES

Evidence of communication unlawfully obtained not admissible, 41.910
Rights, competency and privileges of witnesses, Ch. 44

45.050

Reference of issues in actions at law or suits in equity, 17.040, 17.705

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Consent to depositions as a condition precedent to postponement of criminal trial, 136.080 to 136.100

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Refusal to subscribe deposition as a contempt, 44.190

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Refusal to subscribe deposition as a contempt, 44.190

45.510

Right to public trial in criminal cases, Const. Art. I, § 11

45.530

Order of proof, how regulated, 17.215

MODES OF TAKING TESTIMONY

45.010 Testimony taken in three modes. The testimony of a witness is taken by three modes:

(1) Affidavit.
(2) Deposition.
(3) Oral examination.

45.020 Affidavit defined. An affidavit is a written declaration under oath, made without notice to the adverse party.

45.030 Deposition defined. A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

45.040 Oral examination defined. An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact, or act upon it, the testimony being heard by the jury or tribunal from the mouth of the witness.

45.050 Reference in equity to referee to take testimony and report. Whenever a suit is at issue upon a question of fact, the court may refer it to a referee to take the testimony in the case and report it to the court within such time as the court or judge may order; provided, that in districts composed of only one county and having more than one judge of the circuit court, no cause shall be referred to a referee without the written consent of all parties filed in the cause, except in suits involving the examination of long and complicated accounts. The court or judge may revoke a reference or change the referee. Special reference may be made to a special referee for taking the testimony of witnesses residing more than 20 miles from the place of holding the court or residing out of the state, and the testimony so taken shall be returned to the court. When an equity cause has gone to a final decree, the judge rendering it shall, within 10 days after its entry by a proper certificate, identify all the evidence taken before a referee, whether it consists of the testimony of witnesses, documentary evidence or exhibits. The referee shall have the power to require the attendance of witnesses and may issue subpenas. The testimony of witnesses so taken shall be reduced to writing; provided, that if the evidence is taken by a stenographer, he shall extend the same, and certify to its being a true and correct transcript. All documentary evidence offered shall be preserved and incorporated in the report of the evidence by the referee. Where evidence is offered by any party to the suit, and it is excluded by the ruling of the referee, the party so offering it shall be entitled to have it taken down in like manner as the testimony received. The party offering that testimony is required to pay for taking that so excluded, unless the court holds it competent.

45.060 to 45.100 [Reserved for expansion]

AFFIDAVITS AND DEPOSITIONS GENERALLY

45.110 Affidavit or deposition, how taken. In all affidavits and depositions the witness must be made to speak in the first person. Depositions shall be taken in the form of question and answer, unless the parties agree to a different mode.

45.120 Use of affidavits. An affidavit may be used to prove the service of a summons, notice or other paper in an action, suit or proceeding to obtain a provisional remedy, the examination of a witness, or a stay of proceedings or upon a motion. It may also be used in any other case provided by statute, except as provided in ORS 45.130.

45.125 Authentication of affidavits taken in another state or country. An affidavit taken in another state or territory of the United States, the District of Columbia or in a foreign county must be authenticated as follows before it can be used in this state:

(1) Certified by a commissioner appointed by the Governor of this state to take affidavits in such place; or

(2) Certified by a judge of court, having a clerk and a seal, to have been taken and subscribed before him at a time and place specified, in which case the existence of the court, the fact that the judge is a member and the genuineness of his signature shall be certified by the clerk of the court, under the seal thereof; or

(3) Made and certified before a notary public having a seal, and acting as such by authority of any state or territory of the United States or the District of Columbia, and his seal shall be affixed to the affidavit together with the date of the expiration of the notarial commission; or

(4) Made in a foreign country before any minister plenipotentiary, minister extraordinary, minister resident, charge d'af-

faires, commissioner, consul, vice consul, or consul general of the United States appointed to reside therein, and certified thereon by the signature of the officer taking it; or made before any officer authorized to administer oaths in such foreign country and certified by his signature and official seal. [Formerly 45.180]

45.130 Production of affiant for cross-examination. Whenever a provisional remedy has been allowed upon affidavit, the party against whom it is allowed may serve upon the party by whom it was obtained a notice, requiring the affiant to be produced for cross-examination before a named officer authorized to administer oaths. Thereupon the party to whom the remedy was allowed shall lose the benefit of the affidavit and all proceedings founded thereon, unless within eight days, or such other time as the court or judge may direct, upon a previous notice to his adversary of at least three days, he produces the affiant for examination before the officer mentioned in the notice, or some other of like authority, provided for in the order of the court or judge. Upon production, the affiant may be examined by either party; but a party is not obliged to make this production of a witness except within the county where the provisional remedy was allowed.

45.140 When deposition required. In all cases other than those mentioned in ORS 45.120, where a written declaration under oath is used, it must be a deposition as prescribed by statute.

45.150 [Repealed by 1955 c.611 §13]

45.151 When deposition may be taken. In addition to the cases otherwise provided by law, the testimony of any person, witness or party, in or out of this state, may be taken by deposition in an action at law or suit in equity at any time after the service of the summons or the appearance of the defendant, and in a special proceeding at any time after a question of fact has arisen. [1955 c.611 §1]

45.160 [Repealed by 1955 c.611 §13]

45.161 Persons authorized to take depositions; notice to be given. Such deposition shall be taken before a person authorized to administer oaths in the place where such deposition is taken on giving reasonable notice in writing to every other party to the action, suit or proceeding. The notice shall state the time and place for the taking of the deposition and the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. [1955 c.611 §2]

45.170 [Repealed by 1955 c.611 §13]

45.171 Manner of taking deposition. Any party may attend the examination and examine the witness upon oral interrogatories; or in lieu of participating in the oral examination any party served with notice of taking a deposition may transmit written interrogatories to the officer who shall propound them to the witness and record the answers verbatim. The deposition shall be written by the officer taking it, or by the witness, or by some disinterested person, in the presence and under the direction of the officer. When completed, it shall be read to or by the witness and subscribed by him. Before subscribing it, the witness shall be allowed, if he desires, to correct or explain any statement in the deposition, but the statement, although corrected and explained, shall remain a part of the deposition. [1955 c.611 §3]

45.180 [Renumbered 45.125]

45.181 Protection against abuse or hardship. After notice is served for taking a deposition upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action, suit or proceeding is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place or time other than that stated in the notice, or that it may be taken only on written interrogatories or by oral examination, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that secret processes, developments or research need not be disclosed, or, to prevent hardship, that the party requesting the deposition pay to the other party or parties who attend the taking of the deposition reasonable expenses or attorney's fees, or both; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression. [1955 c.611 §5]

45.190 Compelling attendance of witnesses. If a party, or an officer or managing agent of a party, wilfully fails to appear before the officer who is to take his deposition after being served with a proper notice, the court in which the action, suit or proceeding is pending, on motion and notice, may, within the limitations required by due process, strike all or any part of any pleading of that party or dismiss the action or proceeding or any part thereof. Attendance of any witness at the taking of a deposition may be compelled by subpena issued, served and enforced as provided in ORS chapter 44. Such process, however, is subject to the provisions of ORS 45.181. [1955 c.611 §6]

45.200 Payment of expenses upon failure to appear. (1) If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action, suit or proceeding is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees. [1955 c.611 §7]

45.210 [Repealed by 1955 c.611 §13]

45.220 [Repealed by 1955 c.611 §13]

45.230 Certificate of officer taking deposition. The officer taking the deposition shall append thereto his certificate, under his seal of office, if any, that the deposition was taken before him, at a place mentioned, between certain hours of a day and reduced to writing by a person named; that before proceeding to the examination, the witness was duly sworn to tell the truth, the whole truth, and nothing but the truth; that the deposition was read to or by the witness and was then subscribed by him.

45.240 Delivery or forwarding of deposition. The officer taking the deposition shall inclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action, suit or proceeding is pending, or such other person as may by writing be agreed upon, and deliver or forward it accordingly, by mail or other usual channel of conveyance.

45.250 Use of deposition. (1) At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions of this subsection:

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(b) The deposition of a party, or of anyone who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership or association which is a party, may be used by an adverse party for any purpose.

(2) At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party for any purpose, if the party was present or represented at the taking of the deposition or had due notice thereof, and if the court finds that:

(a) The witness is dead; or

(b) The witness' residence or present location is such that he is not obliged to attend in obedience to a subpena as provided in ORS 44.170, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(c) The witness is unable to attend or testify because of age, sickness, infirmity or imprisonment; or

(d) The party offering the deposition has been unable to procure the attendance of the witness by subpena; or

(e) Upon application and notice, such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. [1955 c.611 §§8, 9]

45.260 Introduction, or exclusion, of part of deposition. If only part of a deposition is

offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced and any party may introduce any other parts, so far as admissible under the rules of evidence. When any portion of a deposition is excluded from a case, so much of the adverse examination as relates thereto is excluded also. [1955 c.611 §10]

45.270 Use of deposition in same or other proceedings. Substitution of parties shall not affect the right to use the depositions previously taken; and when an action, suit or proceeding has been dismissed and another action, suit or proceeding involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, any deposition lawfully taken and duly filed in the former action, suit or proceeding may be used in the latter as if originally taken therefor, and is then to be deemed the evidence of the party reading it. [1955 c.611 §11]

45.280 Objections, when waived. (1) Objections to the competency of a witness or to the competency or relevancy or materiality of testimony are not waived by failure to make them before or during the taking of a deposition unless the ground of objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of questions or answers, in the identification of exhibits, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed or cured if promptly presented, are waived unless seasonable objection is made at the taking of the deposition.

(3) Objections to the form of written interrogatories are waived unless made prior to the settling of such interrogatories. [1955 c.611 §12]

45.290 and 45.300 [Reserved for expansion]

TAKING DEPOSITIONS UPON COMMISSION OR BEFORE COMMISSIONER

45.310 [Repealed by 1955 c.611 §13]

45.320 Deposition of witness out of state, how taken. The deposition of a witness out of the state may be taken upon commission issued from the court, or without commission before a commissioner appointed by the Governor of this state pursuant to ORS 194.210.

45.325 Taking deposition in this state on written interrogatories. Any party may also take the deposition of any person, witness or party in this state on written interrogatories attached to a commission, the same as provided for in ORS 45.330 and 45.340, but when such deposition is taken on written interrogatories no party shall be represented by counsel at the time of taking such deposition. [1955 c.611 §4]

45.330 Issuance of commission. The commission may be issued by the clerk of the court, or by a justice of the peace in a cause in his own court, on the application of either party, upon five days' previous notice to the other. It shall be issued to a person agreed upon by the parties, or if they do not agree, to a judge, justice of the peace, notary public or clerk of a court, selected by the officer issuing it.

45.340 Written and oral interrogatories. Such interrogatories, direct and cross, as the parties may prepare, to be settled by the clerk or justice in a summary manner as to form, if the parties disagree, may be annexed to the commission. The examination may be without written interrogatories when the parties agree to that mode.

45.350 Contents of commission. The commission shall authorize the commissioner to administer an oath to the witness and to take his deposition in answer to the interrogatories, or when the examination is to be without them, in respect to the question in dispute. It shall also authorize him to certify the deposition to the court in a sealed envelope, directed to the clerk or justice who issued the commission, or other person designated and agreed upon, and forwarded to him by mail or other usual channel of conveyance.

45.360 Postponement of trial for nonreturn of commission. A trial or other proceeding shall not be postponed by reason of a commission not being returned except if it appears by affidavit that the testimony of the witness is material and necessary and that proper diligence has been used to obtain it.

45.370 Taking deposition before commissioner appointed by Governor. The deposition of a witness in any other state or territory of the United States, or the District of Columbia, may also be taken before a commissioner appointed by the Governor of this state to take depositions in that place. It may be taken upon giving the adverse party eight days' notice of the time and place of examination, and the name of the commissioner and the witness, if the distance of the place of examination from the place where the testimony is to be used does not exceed 50 miles, and one day in addition for every additional 25 miles. Either party may attend the examination and examine the witness upon oral interrogatories, but if either party by written notice to the other, within three days from the service of the original notice, requires it, it shall be taken upon written interrogatories, to be settled, if not agreed upon, by the same officer and in the same manner as in case of a deposition upon commission; and in that case the deposition shall be taken, certified and directed by the commissioner in the same manner as a deposition upon commission.

45.380 [Repealed by 1955 c.611 §13]

45.390 and 45.400 [Reserved for expansion]

PERPETUATION OF TESTIMONY

45.410 Testimony of a witness may be perpetuated. The testimony of a witness may be taken conditionally and perpetuated, as provided in ORS 45.410 to 45.470.

45.420 Order for examination, when granted. The order for taking the testimony may be made by any judge of the circuit or supreme courts, upon the application of the party desiring it, when it appears from the petition of that party, verified as a complaint, that:

(1) The applicant is a party or expects to be a party to an action, suit or proceeding in a court in this state, or that he has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such an action, suit or proceeding;

(2) The testimony of a witness, whose name and place of residence is stated, is material to the prosecution or defense of the action, suit or proceeding, or possible controversy, and generally the question involved, and the facts expected to be proved by the witness; and

(3) The names and residence of the adverse parties or persons adversely interested, so far as the applicant knows or can ascertain them are stated therein. The judge may thereupon in his discretion make an order allowing the examination, prescribing therein the place of examination and how long before the examination the order and notice of the time and place shall be served.

45.430 Service by publication; by whom deposition taken. If it appears that any of the adverse parties or persons adversely interested reside out of the state, or are unknown, the judge shall direct that, as to them, service of the order and notice shall be made by publication in the same manner as a summons. Upon proof of the service, the deposition may be taken conditionally by the judge who made the order of examination, or by any other person therein designated.

45.440 Deposition, how taken; certification and filing; papers as evidence. Every interrogatory, answer or declaration of the witness shall be taken down, unless the parties otherwise agree. The deposition, when completed, shall be carefully read to and subscribed by the witness, and then certified by the person taking it. Immediately thereafter it shall be filed in the office of the clerk of the county where it was taken, together with the order for the examination of the witness, the petition on which it was granted, the notice and the proof of service of the order and notice. These papers filed with the deposition, or a certified copy thereof, are primary evidence of the facts stated to show compliance with the provisions of ORS 45.410 to 45.470.

45.450 When deposition or copy may be given in evidence. If thereafter a trial is had between the persons named in the petition as parties actual, expectant, or possible, or their representatives or successors in interest, upon proof of the death or insanity of the witness or that he is beyond the state and his residence unknown, or of his inability to attend the trial by reason of age, sickness or settled infirmity, the deposition or a certified copy may be given in evidence by either party; but in a trial in a suit it may be given in evidence without that proof.

45.460 Objection to deposition when produced in evidence. The deposition so taken, when produced in evidence, may be objected to as if it were the oral testimony of the witness, except that the form of the interrogatory shall not be objected to.

45.470 Power and duty of the person taking the deposition. The person taking the deposition shall control the examination to the end that the whole truth may be declared by the witness. If no one appears other than the applicant, the person taking the deposition shall prevent leading and suggestive interrogatories by the applicant, except when they may be necessary or merely formal, and shall himself cross-examine the witness, concluding with the general interrogatory whether the witness knows anything further of the matter which would be of benefit to either party.

45.480 to 45.500 [Reserved for expansion]

GENERAL RULES OF EXAMINATION AND IMPEACHMENT

45.510 Exclusion of witnesses from courtroom. If either party requires it, the judge may exclude from the courtroom any witness of the adverse party not at the time under examination, so that he may not hear the testimony of other witnesses.

45.520 Interpreters. When a witness does not understand and speak the English language, an interpreter shall be sworn to interpret for him.

45.530 Court control over interrogation and production of evidence. The court may exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness and as effective for the extraction of the truth as may be; but subject to this rule, the parties may put such legal and pertinent questions as they see fit. The court, however, may stop the production of further evidence, upon any particular point, when the evidence upon it is already so full as to preclude reasonable doubt.

45.540 Direct examination and cross-examination defined. The examination of a witness by the party producing him is denominated the direct examination. The examination of that witness upon the same matter, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins unless the court otherwise directs.

45.550 Re-examination of witness; recall. A witness once examined shall not be re-examined as to the same matter without leave of the court; but he may be re-examined as to any new matter upon which he has been examined by the adverse party. After the examinations on both sides are concluded, the witness shall not be recalled without leave of the court. Leave is granted or withheld in the exercise of a sound discretion.

45.560 Leading questions. A question which suggests to the witness the answer which the examining party desires is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, unless merely formal or preliminary, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it.

45.570 Extent of cross-examination; leading questions. The adverse party may cross-examine the witness as to any matter stated in his direct examination, or connected therewith, and in so doing may put leading questions; but if he examines him as to other matters, the examination is subject to the same rules as a direct examination.

45.580 Refreshing memory. A witness is allowed to refresh his memory respecting a fact by anything written by himself, or under his direction, at the time when the fact occurred or immediately thereafter or at any other time when the fact was fresh in his memory and he knew that it was correctly stated in the writing; but in either case the writing must be produced, and may be inspected by the adverse party, who may, if he chooses, cross-examine the witness upon it, and read it to the jury. The witness may testify from that writing, though he retains no recollection of the particular facts; but the evidence shall be received with caution.

45.590 Impeachment of own witness. The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as pro-

vided in ORS 45.610. However, when a party calls as a witness either an adverse party or the assignor, agent, officer or employe of an adverse party, he shall not be deemed to have vouched for the credit of that witness and he may impeach the credit of that witness in the same manner as in the case of a witness produced by an adverse party.

45.600 Impeachment of adverse witness. A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth is bad or that his moral character is such as to render him unworthy of belief; but he may not be impeached by evidence of particular wrongful acts, except that it may be shown by his examination or by the record of the judgment, that he has been convicted of a crime.

45.610 Impeachment by evidence of inconsistent statements. A witness may be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places and persons present, and he shall be asked whether he made the statements, and if so, allowed to explain them. If the statements be in writing, they shall be shown to the witness before any question is put to him concerning them.

45.620 Evidence of good character. Evidence of the good character of a party is not admissible in a civil action, suit or proceeding, unless the issue involves his character, nor of a witness until the character of the witness has been impeached.

45.630 Inspection of writing shown witness; reading to jury. Whenever a writing is shown to a witness it may be inspected by the adverse party, and if proved by the witness shall be read to the jury before his testimony is closed, or it shall not be read except on recalling the witness.

CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173.170, I, Sam R. Haley, Legislative Counsel, do hereby certify that I have compared each section printed in this chapter with the original section in the enrolled bill, and that the sections in this chapter are correct copies of the enrolled sections, with the exception of the changes in form permitted by ORS 173.160 and other changes specifically authorized by law.

Done at Salem, Oregon,
on October 15, 1955.

Sam R. Haley
Legislative Counsel