TITLE 4

EVIDENCE AND WITNESSES

Chapter 41. Evidence Generally
42. Execution, Formalities and Interpretation of Writings
43. Public Writings and their Admissibility
44. Witnesses Generally
45. Taking Testimony of Witnesses

Chapter 41

1963 REPLACEMENT PART

Evidence Generally

DEFINITIONS

41.010 Judicial evidence; proof
41.020 Law of evidence
41.030 Kinds of evidence
41.040 Degrees of evidence
41.050 Original evidence
41.060 Secondary evidence
41.070 Direct evidence
41.080 Indirect evidence
41.090 Primary evidence
41.100 Partial evidence
41.110 Satisfactory evidence
41.120 Indispensable evidence
41.130 Conclusive evidence
41.140 Cumulative evidence
41.150 Corroborative evidence

BURDEN AND QUANTUM OF PROOF

41.210 Burden of proof
41.220 Allegations that need be proved
41.230 Admissibility of evidence
41.240 Proof of affirmative and negative allegations
41.250 Degree of certainty
41.260 Evidence that is sufficient to prove a fact
41.270 Evidence to prove usage
41.280 Admissibility of altered writings

INDIRECT EVIDENCE

41.310 Indirect evidence of two kinds
41.320 Inference defined
41.330 Basis of inference
41.340 Presumption defined
41.350 Conclusive presumptions
41.360 Disputable presumptions

JUDICIAL NOTICE

41.410 Facts judicially noticed
41.420 Judicial notice of foreign laws
41.430 Obtaining information of foreign laws
41.440 Court to determine foreign laws
41.450 Evidence of foreign laws
41.460 Laws of foreign countries
41.470 Construction of ORS 41.420 to 41.480
41.480 Uniform Judicial Notice of Foreign Laws Act

INDISPENSABLE EVIDENCE AND STATUTE OF FRAUDS

41.510 Indispensable evidence
41.520 Evidence to prove a will
41.530 Evidence of representations as to third persons
41.540 Evidentiary effect of surveys
41.560 Grant or assignment of trust
41.570 Contracts and communications made by telegraph
41.580 Statute of frauds

BEST, SECONDARY AND PAROL EVIDENCE

41.610 Original writing to be accounted for or produced
41.615 Court order for inspection of documents and tangible things in possession of other party or permitting entry upon property of other party
41.620 Writings called for need not be offered
41.625 Admissions as to genuineness of documents and physical objects
41.640 Proof of contents of a writing
41.650 Proof of contents of liens destroyed by fire
41.660 Admissibility of objects cognizable by the senses
41.670 Books, maps and charts, as evidence
41.675 Inadmissibility of certain hospital data
41.680 Definition of business as used in ORS 41.690
41.690 Admissibility of business records
41.700 Construction of ORS 41.680 to 41.710
41.710 Uniform Business Records as Evidence Act

41.720 Admissibility of reproductions of business records
41.730 Admissibility of telegraphic copies of certified instruments
41.740 Parol evidence rule

FACTS WHICH MAY BE PROVED

41.810 Offer of compromise and admission of particular facts
41.820 Declaration, act or omission of another
41.830 Declaration, act or omission of grantor
41.840 Declaration, act or omission of a member of a family on questions of pedigree
41.850 Declaration, act or omission of decedent
41.860 Entries of deceased persons or persons without the state
41.870 Declaration, act or omission which is part of transaction
41.880 When part of transaction proved, whole admissible
41.890 Evidence relating to duty or obligation of third persons
41.900 Facts which may be proved, generally
41.910 Evidence of communication obtained in certain manner not admissible

CROSS REFERENCES

Blood tests, admissibility and evidentiary effect of, 109.252, 109.258, 109.260
Evidence law applicable to both civil and criminal cases, 136.510
Intercepted telecommunication, use of, 165.540
Juvenile proceeding, evidence in, 419.500
Motor vehicle accident reports, admissibility, 483.610
New trial as post-conviction relief, evidence of testimony at first trial, 138.670
Obscene matter, use of advertising and promotion of matter by prosecution, 167.151
Post-conviction relief proceeding, evidence of events occurring at trial of petitioner, 138.630
Record of juvenile proceeding, use as evidence, 419.567
Rules of evidence in contested cases before a state agency, 183.450
Rules of evidence in justice court same as in courts of record, 52.020
Sexually dangerous persons, commitment procedure, 426.510 to 426.670
Sobriety tests, admissibility and evidentiary effect of, 483.630
Tax court, small claims division, evidence in, 305.545

41.210

Order of proof, how regulated, 17.215

41.220

Material allegations, what are, 16.610

41.230

Evidence of good character, admissibility, 45.620
Material allegations, what are, 16.610
Variance between pleading and proof, 16.630, 16.640, 16.660

41.240

Failure of proof, 16.650

41.250

Jury as judges of the effect of evidence, 17.250

41.260

Evidence necessary to establish a rejected claim against a decedent's estate, 116.555

41.350

Acreage stated in trust deed, conclusiveness, 86.705
Authority of Congress to prescribe by general laws the manner of proving and effect of judicial records and proceedings of a sister state, U. S. Const. Art. IV, § 1
Child born of void marriage, presumption, 109.070
Child of wife cohabiting with husband, presumption, 109.070
Criminal judgment of justice court, conclusiveness, 156.240
Judicial orders, conclusiveness, 43.130

41.360

Child born of void marriage, presumption, 109.070
Child born in wedlock, presumption, 109.070
Commercial paper, presumptions as to:
Date, 73.1140
Genuineness of signature, 73.3070
Foreign judgment, effect of, 43.190
Judicial orders as disputable presumptions, 43.140
Judicial record of sister state, effect of, 43.180, U. S. Const. Art. IV, § 1
Juvenile proceeding, proof of court's jurisdiction, 419.500
Occupational disease, presumption as to cause in certain cases, 656.802
Sobriety tests as presumptive evidence, 483.630
Stray logs, boom sticks or boom chains, presumption of possession with intent to deprive owner thereof, 532.630

41.410

City charters, judicial notice of, 221.710
Declaration by court of matters judicially known, 17.245, 136.310
Ordinances, judicial notice of, 16.510
State administrative rules and orders, judicial notice upon publication, 183.360

41.420

Authority of Congress to prescribe by general laws the manner of proving public acts of other states, U. S. Const. Art. IV, § 1

41.450

Admissible evidence of unwritten law of another jurisdiction, 43.320
Admissible evidence of written laws of another jurisdiction, 43.310

41.460

Admissible evidence of unwritten law of foreign country, 43.320
Admissible evidence of written laws of foreign country, 43.310

41.520

Evidence to prove alteration or revocation of a will, 114.110

41.540

Certified copies of recorded field notes, as evidence, 209.090

41.560

Trusts concerning interest in real property, creation, transfer or declaration of, 93.020

41.580

Creation, transfer or declaration of estate in real property, 93.020
Grubstaking contracts, need for writing, 517.110
Motor vehicle retail instalment contracts, need for writing, 83.520
Sales of lands acquired by county by foreclosure of delinquent tax lien, 275.190, 275.210

41.615

Examination of and copying hospital records, 441.510
"Pending" defined, 11.040
Public writings and their admissibility, Ch.43
Right to inspect public records, 192.010
Taking testimony of witnesses, Ch.45

41.625

Documents, official, proof of, 43.330
Handwriting, admission of genuineness of, 42.070

41.675

Hospital records, access to, 179.495, 441.510

41.720
Hospital records, access to, 179.495, 441.510
41.730
Seals, manner of expressing when sent by telegram, 758.110
41.810
Offer to compromise, 17.055
41.880
Exclusion of part of deposition as excluding adverse examination relating thereto, 45.260
41.900
Admission of partner as evidence against partnership, 68.230
Evidence of handwriting, 42.060, 42.070
41.910
Criminal penalty for unlawfully obtaining evidence, 141.730, 141.990, 165.540
Definitions applicable to this section, 165.535
Recording of communication concerning operations by police or firemen at operation centers, inadmissibility of evidence so obtained, 165.545

DEFINITIONS

41.010 Judicial evidence; proof. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact. Proof is the effect of evidence, the establishment of the fact by evidence.

41.020 Law of evidence. The law of evidence is a collection of general rules established by law:

(1) For declaring what is to be taken as true without proof.

(2) For declaring presumptions of law.

(3) For producing legal evidence.

(4) For excluding whatever is not legal evidence.

(5) For determining in certain cases the value and effect of evidence.

41.030 Kinds of evidence. There are four kinds of evidence:

(1) The knowledge of the court.

(2) Testimony.

(3) Writings.

(4) Other material objects presented to the senses.

41.040 Degrees of evidence. There are several degrees of evidence:

(1) Original and secondary.

(2) Direct and indirect.

(3) Primary, partial, satisfactory, indispensable, and conclusive.

41.050 Original evidence. Original evidence is an original writing or material object introduced in evidence.

41.060 Secondary evidence. Secondary evidence is a copy, or oral evidence, of an original writing or object.

41.070 Direct evidence. Direct evidence is that which proves the fact in dispute directly, without an inference or presumption, and which, if true, conclusively establishes that fact. For example, if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it is direct.

41.080 Indirect evidence. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but affords an inference or presumption of its existence. For example, a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the existence of fact in dispute is inferred.

41.090 Primary evidence. Primary evidence is that which suffices to prove a fact until contradicted and overcome by other evidence. For example, the certificate of a recording officer is primary evidence of a record; but it may be afterwards overcome upon proof that there is no such record.

41.100 Partial evidence. Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to rejection as incompetent if it is not connected with the fact in dispute by proof of other facts. For example, on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact which may or may not be afterwards connected with the main fact in dispute.

41.110 Satisfactory evidence. Satisfactory evidence is that which ordinarily produces moral certainty or conviction in an unprejudiced mind. It alone will justify a verdict. Evidence less than this is insufficient evidence.

41.120 Indispensable evidence. Indispensable evidence is that without which a particular fact cannot be proved.

41.130 Conclusive evidence. Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For

example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it.

41.140 Cumulative evidence. Cumulative evidence is additional evidence of the same character to the same point.

41.150 Corroborative evidence. Corroborative evidence is additional evidence of a different character to the same point.

41.160 to 41.200 [Reserved for expansion]

BURDEN AND QUANTUM OF PROOF

41.210 Burden of proof. The party having the affirmative of the issue shall produce the evidence to prove it. Therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

41.220 Allegations that need be proved. None but a material allegation need be proved.

41.230 Admissibility of evidence. Evidence shall correspond with the substance of the material allegations, and be relevant to the questions in dispute. Collateral questions shall be avoided. However, the court may permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

41.240 Proof of affirmative and negative allegations. Each party shall prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when the negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even then if the allegation is the denial of the existence of a document, the custody of which belongs to the adverse party.

41.250 Degree of certainty. The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

41.260 Evidence that is sufficient to prove a fact. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except usage, perjury and treason.

41.270 Evidence to prove usage. Usage shall be proved by the testimony of at least two witnesses.

41.280 Admissibility of altered writings. The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution or making, in a part material to the question in dispute, shall account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language. If he does that, he may give the writing in evidence, but not otherwise.

41.290 and 41.300 [Reserved for expansion]

INDIRECT EVIDENCE

41.310 Indirect evidence of two kinds. Indirect evidence is of two kinds:

(1) Inferences.
(2) Presumptions.

41.320 Inference defined. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

41.330 Basis of inference. An inference must be founded on:

(1) A fact legally proved; and,

(2) Such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

41.340 Presumption defined. A presumption is a deduction which the law expressly directs to be made from particular facts.

41.350 Conclusive presumptions. The following presumptions, and no others, are conclusive:

(1) An intent to murder, from the deliberate use of a deadly weapon, causing death within a year.

(2) A malicious and guilty intent, from

the deliberate commission of an unlawful act, for the purpose of injuring another.

(3) The truth of the facts recited from the recital in a written instrument, between the parties thereto, their representatives or successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.

(4) Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he shall not, in any litigation arising out of such declaration, act or omission, be permitted to falsify it.

(5) A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

(6) The issue of a wife cohabiting with her husband, who is not impotent, is legitimate.

(7) The judgment, decree or order of a court, when declared by statute to be conclusive; but the judgment, decree, or order shall be pleaded, if there be an opportunity to do so; and if there be no opportunity, it may be used as evidence with like effect.

(8) Any other presumption which by statute is expressly made conclusive.

41.360 Disputable presumptions. All presumptions other than conclusive presumptions are satisfactory, unless overcome. They are disputable presumptions, and may be controverted by other evidence, direct or indirect, but unless so overcome, the jury is bound to find according to the presumption. The following are of that kind:

(1) A person is innocent of crime or wrong.

(2) An unlawful act was done with an unlawful intent.

(3) A person intends the ordinary consequence of his voluntary act.

(4) A person takes ordinary care of his own concerns.

(5) Evidence wilfully suppressed would be adverse to the party suppressing it, if produced.

(6) Higher evidence would be adverse from inferior being produced.

(7) Money paid by one to another was due to the latter.

(8) A thing delivered by one to another belonged to the latter.

(9) An obligation delivered to the debtor has been paid.

(10) Former rent or instalments of a debt have been paid when a receipt for latter is produced.

(11) Things in the possession of a person are owned by him.

(12) A person is the owner of property from exercising acts of ownership over it or from common reputation of his ownership.

(13) A person in possession of an order on himself, for the payment of money or the delivery of a thing, has paid the money or delivered the thing accordingly.

(14) A person acting in a public office was regularly appointed to it.

(15) Official duty has been regularly performed.

(16) A court, or judge acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction.

(17) A judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties.

(18) All matters within an issue were submitted to the jury, and passed upon by them.

(19) Private transactions have been fair and regular.

(20) The ordinary course of business has been followed.

(21) A promissory note or bill of exchange was given or indorsed for a sufficient consideration.

(22) An indorsement of a negotiable promissory note, or bill of exchange, was made at the time and place of making the note or bill.

(23) A writing is truly dated.

(24) A letter duly directed and mailed was received in the regular course of the mail.

(25) Identity of person from identity of name.

(26) A person not heard from in seven years is dead.

(27) Acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact.

(28) Things have happened according to the ordinary course of nature and the ordinary habits of life.

(29) Persons acting as copartners have entered into a contract of copartnership.

(30) A man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.

(31) A child born in lawful wedlock, there being no decree of separation from bed and board, is legitimate.

(32) A thing once proved to exist continues as long as is usual with things of that nature.

(33) The law has been obeyed.

(34) A document or writing more than 20 years old is genuine, when it has been generally acted upon as genuine by persons having an interest in the question, and its custody has been satisfactorily explained.

(35) A printed and published book purporting to be printed and published by public authority was so printed or published.

(36) A printed and published book purporting to contain reports of cases determined in the tribunals of the state or country where the book is published contains correct reports of such cases.

(37) An uninterrupted adverse possession of real property for 20 years or more has been held pursuant to a written conveyance.

(38) A trustee or other person whose duty it was to convey real property to a particular person has actually conveyed it to him, when such presumption is necessary to perfect the title of the person or his successor in interest.

(39) Except as otherwise provided in ORS 72.4020, every sale of personal property, capable of immediate delivery to the purchaser, and every assignment of such property, by way of mortgage or security, or upon any condition whatever, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as against subsequent purchasers in good faith and for a valuable consideration. This is disputable only by making it appear on the part of the person claiming under such sale or assignment that the same was made in good faith, for a sufficient consideration, and without intent to defraud such creditors or purchasers; but this presumption does not exist in the case of a mortgage filed or recorded as provided by law.

[Amended by 1957 c.679 §1; 1961 c.726 §399]

41.370 to 41.400 [Reserved for expansion]

JUDICIAL NOTICE

41.410 Facts judicially noticed. There are certain facts of such general notoriety that they are assumed to be already known to the court and evidence of them need not be produced. The following facts are assumed to be thus known but the court may resort for its aid to appropriate books or documents of reference:

(1) The true signification of all English words and phrases, and all legal expressions.

(2) Whatever is established by law.

(3) Public and private official acts of the legislative, executive, and judicial departments of this state, and of the United States.

(4) The seals of all the courts of this state, and of the United States.

(5) The accession to office, and the official signatures and seals of office of the principal officers in the legislative, executive, and judicial departments of this state, and of the United States.

(6) The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States.

(7) The seals of courts of admiralty and maritime jurisdiction, and of notaries public.

(8) The seal of any of the executive departments of the United States and of any corporation, all of the stock of which is beneficially owned by the United States.

(9) The laws of nature, the measure of time, and the geographical divisions and political history of the world.

41.420 Judicial notice of foreign laws. Every court of this state shall take judicial notice of the constitution, common law, civil law and statutes of every state, territory and other jurisdiction of the United States.

41.430 Obtaining information of foreign laws. The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

41.440 Court to determine foreign laws. The determination of such laws shall be made by the court and not by the jury and shall be reviewable.

41.450 Evidence of foreign laws. Any party also may present to the trial court any admissible evidence of such laws.

41.460 Laws of foreign countries. The law of any jurisdiction other than a state, territory or other jurisdiction of the United

States shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.

41.470 Construction of ORS 41.420 to 41.480. ORS 41.420 to 41.480 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact the Uniform Judicial Notice of Foreign Laws Act.

41.480 Uniform Judicial Notice of Foreign Laws Act. ORS 41.420 to ORS 41.480 may be cited as the "Uniform Judicial Notice of Foreign Laws Act."

41.490 and 41.500 [Reserved for expansion]

INDISPENSABLE EVIDENCE AND STATUTE OF FRAUDS

41.510 Indispensable evidence. Certain evidence is necessary to the validity of particular acts or the proof of particular facts.

41.520 Evidence to prove a will. Evidence of a last will and testament, except when made pursuant to ORS 114.050, shall not be received, other than the written instrument itself, or secondary evidence of its contents, in the cases prescribed by law.

41.530 Evidence of representations as to third persons. No evidence is admissible to charge a person upon a representation as to the credit, skill or character of a third person, unless the representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be charged.

41.540 Evidentiary effect of surveys. No surveys or resurveys shall be considered as evidence in any court unless attested by two competent surveyors, except surveys made by the county surveyor or his deputy and except surveys made by authority of the United States, the State of Oregon or by mutual consent of the parties. This section shall not be construed to prevent a surveyor from testifying to a survey made by him of property in controversy, although the survey was not attested or not made by mutual consent of the parties.

41.550 [Repealed by 1961 c.726 §427]

41.560 Grant or assignment of trust. Every grant or assignment of any existing trust in lands, tenements, hereditaments, goods or things in action is void, unless it is in writing and subscribed by the party making it or by his lawfully authorized agent.

41.570 Contracts and communications made by telegraph. Contracts made by telegraph shall be held to be in writing; and all communications sent by telegraph, and signed by the sender, or by his authority, shall be held to be in writing.

41.580 Statute of frauds. In the following cases the agreement is void unless it, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents in the cases prescribed by law:

(1) An agreement that by its terms is not to be performed within a year from the making.

(2) An agreement to answer for the debt, default or miscarriage of another.

(3) An agreement by an executor or administrator to pay the debts of his testator or intestate out of his own estate.

(4) An agreement made upon consideration of marriage, other than a mutual promise to marry.

(5) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of any interest therein.

(6) An agreement concerning real property made by an agent of the party sought to be charged unless the authority of the agent is in writing.

(7) An agreement authorizing or employing an agent or broker to sell or purchase real estate for a compensation or commission; but if the note or memorandum of the agreement is in writing and subscribed by the party to be charged, or by his lawfully authorized agent, and contains a description of the property sufficient for identification, and authorizes or employs the agent or broker to sell the property, and expresses with reasonable certainty the amount of the commission or compensation to be paid, the agreement shall not be void for failure to state a consideration.

41.590 [Repealed by 1961 c.726 §427]

41.600 [Reserved for expansion]

BEST, SECONDARY AND PAROL EVIDENCE

41.610 Original writing to be accounted for or produced. The original writing shall be produced and proved except as provided in ORS 41.640. If the writing is in the custody of the adverse party and he fails to produce it after reasonable notice to do so, the contents of the writing may be proved as in the case of its loss. However the notice to produce it is not necessary where the writing itself is a notice or where it has been wrongfully obtained or withheld by the adverse party.

41.615 Court order for inspection of documents and tangible things in possession of other party or permitting entry upon property of other party. (1) Upon motion of any party showing good cause therefor, and upon notice to all other parties, and subject to the provisions of ORS 45.181, the court in which a proceeding is pending may:

(a) Order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by ORS 45.151 and which are in his possession, custody or control; or

(b) Order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying or photographing the property or any designated object or operation thereon within the scope of the examination permitted by ORS 45.151. The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

(2) If the order is neglected or disobeyed, the court may exclude the document, papers, books, accounts, letters, photographs, objects or tangible things from being given in evidence, or if wanted as evidence by the party applying therefor, may direct the jury to presume it to be such as the party applying therefor alleges it to be. The court may, also, punish the party so neglecting or disobeying as for a contempt.

[1959 c.353 §§1, 3 (subsection (2) of ORS 41.615 enacted in lieu of ORS 41.630)]

41.620 Writings called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, he is not obliged to offer it in evidence.

41.625 Admissions as to genuineness of documents and physical objects. (1) After commencement of a proceeding, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents or physical objects described in and exhibited with the request. If a plaintiff desires to serve a request within 20 days after service of summons, leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters concerning which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 20 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either:

(a) A sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters; or

(b) Written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(2) If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission; and, when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

[1959 c.349 §1]

41.630 [Repealed by 1959 c.353 §2 (subsection (2) of ORS 41.615 enacted in lieu of ORS 41.630)]

41.640 Proof of contents of a writing. (1) There shall be no evidence of the contents of a writing, other than the writing itself, except:

(a) When the original is in the possession of the party against whom the evidence is offered, and he withholds it under the circumstances mentioned in ORS 41.610.

(b) When the original cannot be pro-

duced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default.

(c) When the original is a record or other document in the custody of a public officer.

(d) When the original is a record or other document of which a certified copy, or of which a photostatic, microphotographic or photographic reproduction, is expressly made evidence by statute.

(e) When the originals consist of numerous accounts, or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

(2) In the cases mentioned in paragraphs (c) and (d) of subsection (1), a copy or reproduction of the original shall be produced; in those mentioned in paragraphs (a) and (b) of subsection (1), either a copy or oral evidence of the contents.

41.650 Proof of contents of liens destroyed by fire. In any action or suit for the foreclosure of any liens, required by law to be filed with the county clerk, where the liens have been so filed prior to March 11, 1937, and destroyed by fire, secondary evidence as to their contents shall be admitted to prove the contents of such liens, and secondary evidence shall also be admitted to prove that such liens were filed with the county clerk.

41.660 Admissibility of objects cognizable by the senses. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, the object may be exhibited to the jury, or its existence, situation and character may be proved by witnesses. The exhibition of the object to the jury shall be regulated by the sound discretion of the court.

41.670 Books, maps and charts, as evidence. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are primary evidence of facts of general notoriety and interest.

41.675 Inadmissibility of certain hospital data. (1) As used in subsection (2) of this section "data" means written reports, notes or records of tissue committees or other medical staff committees in connection with the professional training, supervision or discipline of the medical staff of hospitals.

(2) All data shall be confidential and shall not be admissible in evidence in any judicial proceeding, but this section shall not affect the admissibility in evidence of records dealing with a patient's hospital care and treatment.
[1963 c.181 §1]

41.680 Definition of business as used in ORS 41.690. The term "business," as used in ORS 41.690, shall include every kind of business, profession, occupation, calling or operating of institutions, whether carried on for profit or not.

41.690 Admissibility of business records. A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

41.700 Construction of ORS 41.680 to 41.710. ORS 41.680 to 41.710 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact the Uniform Business Records as Evidence Act.

41.710 Uniform Business Records as Evidence Act. ORS 41.680 to 41.710 may be cited as the "Uniform Business Records as Evidence Act."

41.720 Admissibility of reproductions of business records. Any photostatic, microphotographic or photographic reproduction of a writing, book entry or record made on film in the regular course of any business as a memorandum or record of an act, transaction, occurrence or event, whether made at or near the time of the act, transaction or event or made subsequently, prior to the time of destruction or removal of the original records, shall be admissible in evidence in place of the original. The reproduction shall, in so far as relevant, be competent evidence if the custodian or other qualified witness

testifies to its identity and if it is the practice of that business to make and keep such reproductions to replace original memoranda, records or documents.

41.730 Admissibility of telegraphic copies of certified instruments. Any instrument in writing certified under the hand and official seal of a notary public, commissioner of deeds, or clerk of a court of record, to be genuine within his personal knowledge, may, together with such certificate, be sent by telegraph, and the telegraphic copy, as defined in ORS 758.090, shall, prima facie only, have the same validity in all respects as the original, and the burden of proof shall rest with the party denying the genuineness or due execution of the original.

41.740 Parol evidence rule. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except where a mistake or imperfection of the writing is put in issue by the pleadings or where the validity of the agreement is the fact in dispute. However this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term "agreement" includes deeds and wills as well as contracts between parties.

41.750 to 41.800 [Reserved for expansion]

FACTS WHICH MAY BE PROVED

41.810 Offer of compromise and admission of particular facts. An offer of compromise is not an admission that anything is due; but admissions of particular facts, made in negotiations for compromise, may be proved, unless otherwise specially agreed at the time.

41.820 Declaration, act or omission of another. The rights of a party cannot be prejudiced by the declaration, act or omission of another, except by virtue of a particular relation between them.

41.830 Declaration, act or omission of grantor. Where one derives title to real property from another, the declaration, act or omission of the latter, while holding the title, in relation to the property, is evidence against the former.

41.840 Declaration, act or omission of a member of a family on questions of pedigree. The declaration, act or omission of a member of a family, who is deceased or out of the state, is admissible as evidence of common reputation in cases where, on questions of pedigree, such reputation is admissible.

41.850 Declaration, act or omission of decedent. The declaration, act or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is admissible as evidence to that extent against his successor in interest. When a party to an action, suit or proceeding by or against an executor or administrator appears as a witness in his own behalf, or offers evidence of statements made by deceased against the interest of the deceased, statements of the deceased concerning the same matter in his own favor may also be proven.

41.860 Entries of deceased persons or persons without the state. Entries or other writings of like character of a person deceased or without the state, made at or near the time of the transaction and in a position to know the facts stated therein, may be read as primary evidence of those facts when it was made:

(1) Against the interest of the person making it;

(2) In a professional capacity, and in the ordinary course of professional conduct; or

(3) In the performance of a duty specially enjoined by law.

41.870 Declaration, act or omission which is part of transaction. Where the declaration, act or omission forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence as part of the transaction.

41.880 When part of transaction proved, whole admissible. When part of an act, declaration, conversation or writing is given in evidence by one party, the whole, on the same subject, may be inquired into by the other; when a letter is read, the

answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

41.890 Evidence relating to duty or obligation of third persons. When the question in dispute between the parties is the obligation or duty of a third person, whatever would be evidence for or against that third person is primary evidence between the parties.

41.900 Facts which may be proved, generally. Evidence may be given of the following facts:

(1) The precise facts in dispute.

(2) The declaration, act, or omission of a party as evidence against such party.

(3) A declaration or act of another, in the presence and within the observation of a party, and his conduct in relation thereto.

(4) The declaration or act, verbal or written, of a deceased person, in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the declaration or act of a deceased person, made or done against his interest in respect to his real property; and also the declaration or act of a dying person, made or done under a sense of impending death, respecting the cause of his death.

(5) After proof of a partnership or agency, the declaration or act of a partner or agent of the party, within the scope of the partnership or agency, and during its existence; the same rule applies to the declaration or act of a joint owner, joint debtor, or other person jointly interested with the party.

(6) After proof of a conspiracy, the declaration or act of a conspirator against his coconspirator, and relating to the conspiracy.

(7) The declaration, act, or omission forming part of the transaction, as explained in ORS 41.870.

(8) The testimony of a witness, deceased, or out of the state, or unable to testify, given in a former action, suit, or proceeding, or trial thereof, between the same parties, relating to the same matter.

(9) The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein.

(10) The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given.

(11) Common reputation, existing previous to the controversy, respecting facts of a public or general interest, more than 30 years old, and in cases of pedigree and boundary.

(12) Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible except as a means of interpretation.

(13) Monuments and inscriptions in public places as evidence of common reputation, and entries in family Bibles or other family books or charts, engravings or rings, family portraits, and the like as evidence of pedigree.

(14) The contents of a writing when oral evidence thereof is admissible.

(15) Any other facts from which the facts in issue are presumed or are logically inferable.

(16) Such facts as serve to show the credibility of a witness, as explained in ORS 44.370.

41.910 Evidence of communications obtained in certain manner not admissible. Evidence of the contents of any telecommunication, radio communication or conversation obtained:

(1) By violation of ORS 165.540 and without a court order under ORS 141.720 shall not be admissible in any court of this state.

(2) Under paragraph (a) of subsection (2) of ORS 165.540 shall not be admissible in any court of this state.

[1955 c.675 §6; 1959 c.681 §5]

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 December 1, 1963.

Sam R. Haley
Legislative Counsel