

TITLE 4

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1977 REPLACEMENT PART

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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.

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.

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 was not impotent or sterile at the time of conception of the child is legitimate.

(7) The judgment, decree or order of a court, when declared by statute to be conclu-

sive; 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.

[Amended by 1971 c 127 §1]

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]

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."

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 will shall be the written instrument itself, or secondary evidence of the contents of the will, in the cases prescribed by law.

[Amended by 1969 c.591 §271]

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 [Repealed by 1977 c 479 §1]

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]

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 [1959 c.353 §§1, 3 (subsection (2) enacted in lieu of 41.630); 1973 c 231 §1, repealed by 1977 c.358 §1 (41.616 enacted in lieu of 41.615)]

41.616 Request for inspection of documents and tangible things in possession of other party or for entry upon property of other party; manner and time of request. (1) After commencement of an action, suit or proceeding, any party may serve on any other party a request:

(a) To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test or sample any tangible things which constitute or contain matters within the scope of ORS 41.635 and which are in the possession, custody or control of the party upon whom the request is served; or

(b) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon, within the scope of ORS 41.635.

(2) The request shall describe the items to be inspected with reasonable particularity and shall specify a reasonable time, place and manner of making the inspection, copy, test or sample or entry upon the land.

(3) The request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The party upon whom a request has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection, within 30 days after the service of the request. The court may allow a shorter or longer time. If objection is made to part of an item or category, the part shall be specified.

(4) Requests for documents and tangible things otherwise obtainable under subsection (1) of this section, prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent, may be obtained only upon a showing that the party seeking the request has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

[1977 c.358 §2 (enacted in lieu of 41 615)]

41.617 Court order for inspection after refusal by party; expenses and attorney fees; enforcement of court order. (1) If a party, in response to a request for inspection, objects to or fails to permit inspection as requested, or fails to respond, that inspection will be permitted as requested, the party serving the request, upon reasonable notice to other parties, may move for an order compelling compliance in the court in which the action, suit or proceeding is pending. If the court denies the motion in whole or in part, it may make such protective order as it would

have been empowered to make on a motion pursuant to ORS 41.618.

(2) (a) If the motion is granted, the court may, after opportunity for hearing, require the party whose conduct necessitated the motion or the attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

(b) If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(c) If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(3) If a party fails to comply with any order made pursuant to subsection (1) of this section, the court in which the action, suit or proceeding is pending may make such orders in regard to the failure as are just, including:

(a) An order excluding such matters as the court may designate from being given in evidence;

(b) An order directing the jury to presume those matters sought by discovery to be established in accordance with the claim of the party seeking the order;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action, suit or proceeding or any part thereof, or rendering a judgment by default against the noncompliant party; and

(d) An order treating as a contempt of court the failure to comply with any order.

(4) In addition to any other order authorized by this section the court shall require the party who fails to comply with any order or the attorney advising such conduct or both of them to pay the reasonable expenses, including attorney fees, caused by the failure, unless

the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

[1977 c.358 §3]

41.618 Court order limiting extent of disclosure; expenses and attorney fees. (1) Upon motion by a party, and for good cause shown, the court in which the action, suit or proceeding is pending may make any order which justice requires to protect a party upon whom a request for any type of discovery has been made from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:

(a) That the discovery not be had;

(b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(e) That discovery be conducted with no one present except persons designated by the court;

(f) That a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way;

(g) That the parties simultaneously file specified documents or information inclosed in sealed envelopes to be opened as directed by the court; or

(h) That to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

(2) If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party provide or permit discovery. The provisions of subsection (2) of ORS 41.617 apply to the award of expenses incurred in relation to the motion.

[1977 c.358 §4]

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.

41.622 Disclosure of insurance agreement; time and manner of disclosure; protective orders; admissibility. (1) In a civil action, a party, upon the request of an adverse party, shall disclose the existence and contents of any insurance agreement or policy under which a person transacting insurance may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(2) The obligation to disclose under this section shall be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this section as provided in ORS 41.631.

(3) Information concerning the insurance agreement or policy is not by reason of disclosure under this section admissible in evidence at trial.

(4) As used in this section, "disclose" means to afford the adverse party an opportunity to inspect or copy the insurance agreement or policy.

[1977 c 744 §2]

41.625 [1959 c 349 §1, repealed by 1977 c.240 §1, (41.626 enacted in lieu of 41.625)]

41.626 Admissions as to genuineness of documents and physical objects; manner of admission or denial; effect of admission. (1) After commencement of an action, suit or proceeding, a party may serve upon any other party a request for the admission by the latter of the truth of relevant matters within the scope of ORS 41.635 specified in the request or of the genuineness of any relevant documents or physical objects described in or 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 matter of which admission is requested shall be separately set forth.

(2) The matter shall be deemed admitted, unless within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed shall serve upon the party requesting admission a statement signed by the party or by his attorney, either denying specifically the matters of which an admission

is requested or setting forth in detail the reasons why he cannot truthfully admit or deny such matters, or objecting 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.

(3) Admissions, denials and objections to requests for admissions shall identify and quote each request for admission in full immediately preceding the statement of any admission, denial or objection thereto.

(4) If objections are made to a part of a request, the remainder shall be answered within the time allowed. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of subsection (6) of this section, deny the matter or set forth reasons why he cannot admit or deny it.

(5) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. If the court determines that the motion for such an order or the opposition to the request for admission lacks any substantial basis, or that the failure to file an answer in compliance with such an order is wilful, the court may impose upon either party the requirement to pay such reasonable expenses or attorney fees, or both, as the court may deem reasonable.

(6) If a party fails to admit the genuineness of any document or the truth of any matter as requested under ORS 41.626 to 41.635, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including

reasonable attorney fees. The court shall make the order unless it finds that:

(a) The request was held improper and objectionable; or

(b) The admission sought was of no substantial importance; or

(c) The party failing to admit had reasonable ground to believe that he might prevail on the matter; or

(d) There was other good reason for the failure to admit.

(7) Any matter admitted pursuant to ORS 41.626 to 41.635 is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the case will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his case or his defense on the merits. Any admission made by a party pursuant to ORS 41.626 to 41.635 is for the purpose of the pending proceeding only, and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

[1977 c.240 §2 (enacted in lieu of 41.625)]

41.630 [Repealed by 1959 c 353 §2 (subsection (2) of 41 615 enacted in lieu of 41.630)]

41.631 Court order limiting extent of disclosure; expenses and attorney fees. (1) Upon motion by a party, and for good cause shown, the court in which the action, suit or proceeding is pending may make any order which justice requires to protect a party or a witness upon whom a request for any type of discovery has been made from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:

(a) That the discovery not be had;

(b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(e) That discovery be conducted with no one present except persons designated by the court;

(f) That a trade secret or other confidential research, development or commercial

information not be disclosed or be disclosed only in a designated way;

(g) That the parties simultaneously file specified documents or information inclosed in sealed envelopes to be opened as directed by the court; or

(h) That to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

(2) If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party provide or permit discovery. The provisions of subsection (3) of this section apply to the award of expenses incurred in relation to the motion.

(3) (a) If the motion is granted, the court may, after opportunity for hearing, require the party whose conduct necessitated the motion or the attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

(b) If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(c) If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

[1977 c.240 §4]

41.635 Scope of disclosure. For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, suit or proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discovera-

ble matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

[1977 c.240 §3 and 1977 c.358 §5]

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 produced 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) of this section, a copy or reproduction of the original shall be produced; in those mentioned in paragraphs (a) and (b) of subsection (1) of this section, 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, and any written reports, notes or records of similar committees of professional societies in connection with training, supervision or discipline of physicians. The term includes the written reports, notes or records of utilization review and professional standards review organizations.

(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.

(3) A person serving on or appearing before any medical review committee shall not be examined as to any communication made before that committee or the findings thereof.

(4) A person serving on a medical review committee shall not be subject to an action for civil damages for affirmative actions taken in good faith as a member of the committee.

[1963 c 181 §1, 1971 c 412 §1, 1975 c 796 §11, 1977 c 448 §9]

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 757.631, 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.

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.

41.905 Admissibility of certain traffic offense procedures in subsequent civil action. (1) A judgment of conviction or acquittal of a person charged with a traffic offense is not admissible in the trial of a subsequent civil action arising out of the same accident or occurrence to prove or negate the facts upon which such judgment was rendered.

(2) A plea of guilty by a person to a traffic offense may be admitted as evidence in the trial of a subsequent civil action arising out of

the same accident or occurrence as an admission against the interest of the person entering the plea, and for no other purpose.

(3) Evidence of forfeiture of bail posted by a person as a result of a charge of a traffic offense shall not be admitted as evidence in the trial of a subsequent civil action arising out of the same accident or occurrence.

[1975 c.542 §1]

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 133.725 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]

HOSPITAL RECORDS

41.915 Definition for ORS 41.915 to 41.945. As used in ORS 41.915 TO 41.945, unless the context requires otherwise, "hospital" means a hospital licensed under ORS 441.015 to 441.087, 441.525 to 441.595, 441.810 to 441.820, 441.990, 442.300, 442.320, 442.330 and 442.340 to 442.450.

[1973 c 263 §1]

41.920 Mode of compliance with subpoena of hospital records. (1) Except as provided in subsection (1) of ORS 41.940, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in ORS 41.925. The copy may be photographic or microphotographic reproduction.

(2) The copy of the records shall be separately inclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be inclosed in an outer envelope or wrapper and sealed. The

outer envelope or wrapper shall be addressed as follows:

(a) If the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk.

(b) If the subpoena directs attendance at a deposition or other hearing, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business.

(c) In other cases, to the officer or body conducting the hearing at the official place of business.

(3) Unless the parties to the proceedings otherwise agree, or unless the sealed envelope or wrapper is returned to a custodian of hospital records who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition or other hearing, at the direction of the judge, officer or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

[1973 c 263 §2]

41.925 Affidavit of custodian of records. (1) The records described in ORS 41.920 shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following:

(a) That the affiant is a duly authorized custodian of the records and has authority to certify records.

(b) That the copy is a true copy of all the records described in the subpoena.

(c) The records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition or event described or referred to therein.

(2) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which he has custody.

(3) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

[1973 c.263 §3]

41.930 Admissibility of copies of original records. The copy of the records described in ORS 41.920 is admissible in evidence to the same extent as though the original thereof were offered and a custodian of hospital records had been present and testified to the matters stated in the affidavit. The affidavit is admissible as evidence of the matters stated therein. The matters stated therein are presumed to be true. The presumption established by this section is a presumption affecting the burden of producing evidence.

[1973 c 263 §4]

41.935 Tender and payment of fees. Nothing in ORS 41.915 to 41.945 requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

[1973 c 263 §5]

41.940 Personal attendance of custodian of records may be required. (1) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to ORS 41.920 shall not be deemed sufficient compliance with this subpoena.

(2) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to subsection (1) of this section, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

[1973 c 263 §§6, 7]

41.945 Application of ORS 41.915 to 41.945. ORS 41.915 to 41.945 apply in any proceedings in which testimony may be compelled.

[1973 c 263 §8]

ADVANCE PAYMENTS

41.950 "Advance payment" defined. As used in ORS 12.155, 18.510, 41.950 to 41.980, "advance payment" means compensation for the injury or death of a person or the injury or destruction of property prior to the determination of legal liability therefor.

[1971 c 331 §1]

41.960 Advance payment for death or personal injury not admission of liability; when advance payment made. (1)

Advance payment made for damages arising from the death or injury of a person is not an admission of liability for the death or injury by the person making the payment unless the parties to the payment agree to the contrary in writing.

(2) For the purpose of subsection (1) of this section, advance payment is made when payment is made with or to:

- (a) The injured person;
- (b) A person acting on behalf of the injured person with the consent of the injured person; or
- (c) Any other person entitled to recover

damages on account of the injury or death of the injured or deceased person.

[1971 c 331 §2]

41.970 Advance payment for property damage not admission of liability. Any advance payment made for damages arising from injury or destruction of property is not an admission of liability for the injury or destruction by the person making the payment unless the parties to the payment agree to the contrary in writing.

[1971 c 331 §3]

41.980 Advance payment not admissible. No advance payment referred to in ORS 41.960 or 41.970 is admissible in evidence in any action for damages arising from a death, injury or destruction for which any such advance payment has been made.

[1971 c 331 §4]

CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173 170, I, Thomas G Clifford, 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,
October 1, 1977

Thomas G Clifford
Legislative Counsel