Chapter 41

Evidence and Witnesses

Chapter 41

The footnote at page 315, Deady's General Laws of Oregon, 1845-64, states that the rules and principles of evidence as embodied and codified in specified chapters of that code (most of which are now compiled in ORS chapter 41) "are mainly condensed and extracted from Greenleaf's Treatise on the Law of Evidence. Where there were conflicting adjudications in regard to a particular rule or principle, those deemed by that author to be most approved or reasonable, have been adopted."

CASE CITATIONS: United States Nat. Bank v. Underwriter's at Lloyd's, London, (1964) 239 Or 298, 396 P2d 765.

41.010

CASE CITATIONS: Metropolitan Cas. Ins. Co. v. Lesher, Inc., (1935) 152 Or 161, 52 P2d 1133; Wyckoff v. Mut. Life Ins. Co., (1944) 173 Or 592, 147 P2d 227.

ATTY. GEN. OPINIONS: Evidence of ownership of boat, 1964-66, p 318; defining "competent evidence" of name of candidate by which commonly known, 1964-66, p 455.

41.030

NOTES OF DECISIONS

Certain facts are of such general notoriety that they are assumed to be known to the court and no evidence thereof need be produced. State v. Magers, (1899) 35 Or 520, 524, 57 P 197; Scott v. Astoria R. R., (1903) 43 Or 26, 40, 72 P 594, 99 Am St Rep 710, 62 LRA 543.

Demonstrative evidence should demonstrate something material to the case. Christensen v. Powell, (1964) 236 Or 480, 389 P2d 456.

Admission of demonstrative evidence is in the discretion of the trial judge. State v. Harris, (1965) 241 Or 224, 405 P2d 492.

It is not necessary that an item of physical evidence be absolutely identified by each and every witness in order for it to be admissible. State v. Howard, (1971) 92 Or App Adv Sh 1763, 486 P2d 1301.

FURTHER CITATIONS: Metropolitan Cas. Ins. Co. v. Lesher Inc., (1935) 152 Or 161, 52 P2d 1133.

ATTY. GEN. OPINIONS: Defining "competent evidence" of name of candidate by which commonly known, 1964-66, p 455.

41.040

CASE CITATIONS: Doherty v. Hazelwood Co., (1919) 90 Or 475, 175 P 849, 177 P 432.

ATTY. GEN. OPINIONS: Defining "competent evidence" of name of candidate by which commonly known, 1964-66, p 455.

41.060

LAW REVIEW CITATIONS: 41 OLR 144.

41.070

NOTES OF DECISIONS

Direct evidence is evidence which leaves no room for deduction or inference. Lake County v. Neilon, (1903) 44 Or 14, 74 P 212; Sullivan v. Mountain States Co., (1932) 139 Or 282, 9 P2d 1038.

FURTHER CITATIONS: Oregon Box & Mfg. Co. v. Jones Lbr. Co., (1926) 117 Or 411, 244 P 313.

41.080

NOTES OF DECISIONS

Circumstantial evidence is evidence which presents a series of facts related to the alleged principal fact and suggests that they together with the ordinary experiences of mankind demand a conclusion that the alleged principal fact occurred. Sullivan v. Mountain States Power Co., (1932) 139 Or 282, 9 P2d 1038.

Circumstantial evidence may be admitted which tends to show defendant's capacity to commit the crime or the possibility that he did commit it. State v. Hancock, (1966) 245 Or 240, 421 P2d 687; State v. Roisland, (1969) 1 Or App 68, 459 P2d 555.

FURTHER CITATIONS: Wychgel v. States S.S. Co., (1931) 135 Or 475, 296 P 863.

LAW REVIEW CITATIONS: 31 OLR 267.

41.090

NOTES OF DECISIONS

A decree approving a final account of an executor is only primary evidence of the correctness of the account. Cross v. Baskett, (1888) 17 Or 84, 88, 21 P 47.

A seal is only prima facie evidence of a consideration. Olston v. Ore. Water Power & Ry. (1908) 52 Or 343, 353, 96 P 1095, 97 P 538, 20 LRA(NS) 915.

Proof of delivery in good condition and return in bad condition, plus the disputable presumption of negligence, make a prima facie case. Hansen v. Ore.-Wash. R.R. & Nav. Co., (1920) 97 Or 190, 225, 188 P 963, 191 P 655.

An enrolled bill is prima facie evidence of regularity. Boyd v. Olcott, (1921) 102 Or 327, 350, 202 P 431, 438.

Prima facie evidence is evidence which is sufficient to establish a fact and which, if not rebutted, remains sufficient for that purpose. Woodburn Lodge v. Wilson, (1934) 148 Or 150, 34 P2d 611.

ATTY. GEN. OPINIONS: Prima facie evidence of practice of chiropody, 1940-42, p 264.

41.110

NOTES OF DECISIONS

Although use of the word "satisfactory" is unnecessary in instructing the jury, it is not reversible error. Steward v. Pulido, (1960) 223 Or 136, 354 P2d 298; State v. St. Pierre, (1960) 224 Or 395, 356 P2d 432.

The mere existence in a criminal case of any competent evidence however inconclusive, which a jury would have a right to consider if submitted along with other evidence, is not "evidence to support the verdict" within the constitutional provision, in view of this section. State v. Moss, (1920) 95 Or 616, 182 P 149, 188 P 702.

The evidence must be convincing and, where the effect of it is to overcome a disputable presumption, the evidence ought to be sufficient to produce a conviction in the minds of the jurors that the evidence and not the presumption, ought to be followed. Metropolitan Cas. Ins. Co. v. Lesher, Inc., (1935) 152 Or 161, 52 P2d 1133.

Since a higher degree of evidence is required to prove some issues, a court may point out, upon an issue of that character, that the evidence should be clear, satisfactory and convincing. Id.

This section is a legislative attempt to define more specifically the term "reasonable doubt" in ORS 17.250 and should, therefore, be applied only in criminal cases. Cook v. Michael, (1958) 214 Or 513, 330 P2d 1026.

In a civil case, where the burden of proof is by a preponderance of the evidence, it is error for the trial court to give a requested instruction containing the phrase "preponderance of satisfactory evidence" and the definition contained herein. Cook v. Michael, (1958) 214 Or 513, 330 P2d 1026. Overruling Gwin v. Crawford, (1940) 164 Or 215, 100 P2d 1012.

It was not reversible error to give a "preponderance" instruction rather than an instruction containing the provisions of this section. Southern Pac. Co. v. Raish, (1953) 205 F 2d 389.

FURTHER CITATIONS: Wyckoff v. Mut. Life Ins. Co., (1944) 173 Or 592, 147 P2d 227; Bogle v. Paulson, (1949) 185 Or 211, 201 P2d 733; Hubbard v. Lamford Lbr. Co., (1956) 209 Or 145, 304 P2d 943; Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398; Oien v. Bourassa, (1960) 221 Or 359, 351 P2d 703.

ATTY. GEN. OPINIONS: Evidence of ownership of boat, 1964-66, p 318; evidence sufficient to prove serviceman's residence, 1964-66, p 455.

LAW REVIEW CITATIONS: 39 OLR 26, 28; 43 OLR 208-210.

41.130

NOTES OF DECISIONS

A decree, made at the same time as an order settling the final account, declaring a paragraph of a will adeemed was a final decree made by a court of competent jurisdiction and was not allowed to be contradicted by the parties. Woodburn Lodge v. Wilson, (1934) 148 Or 150, 34 P2d 611.

FURTHER CITATIONS: Boyd v. Olcott, (1921) 102 Or 327, 202 P 431.

41.140

NOTES OF DECISIONS

In a criminal prosecution where defendant relied on alibi, newly discovered evidence of a traveler tending to show that defendant was not at the place of crime on the date specified was not merely cumulative, even though defendant must have known of his whereabouts and might have testified thereto. State v. Evans, (1920) 98 Or 214, 192 P 1062, 193 P 927.

41.150

NOTES OF DECISIONS

In a trial for incest it was proper to exhibit to the jury a child which the prosecutrix testified was the issue of the illicit intercourse in order to corroborate her testimony by means of the resemblance. State v. Russell, (1913) 64 Or 247, 129 P 1051.

Evidence concerning a crime other than the one charged is admissible to fortify the credibility of state's witnesses. State v. Hancock, (1966) 245 Or 240, 421 P2d 687.

41.210

NOTES OF DECISIONS

1. In general
2. Application of rule

1. In general

An instruction that the burden of proof shifts interferes with the province of the jury. Askay v. Maloney, (1919) 92 Or 566, 179 P 899.

Actions against executors and administrators are governed by this section. Branch v. Lambert, (1922) 103 Or 423, 205 P 995.

The provisions of this section are plain and need no construction. Gray v. Wassell, (1932) 138 Or 274, 4 P2d 625.

2. Application of rule

Burden of proving fraud is generally on party alleging it. Anderson v. Palmer, (1924) 111 Or 137, 224 P 629; Mills v. Williams, (1925) 113 Or 528, 233 P 542.

Where the party accused of fraudulent conduct occupies a fiduciary relationship to the party defrauded and the latter makes a prima facie case, the burden of producing evidence shifts to the accused party but the burden of proving the fraud remains with the party alleging it. Anderson v. Palmer, (1924) 111 Or 137, 224 P 629.

The burden of proof in income tax cases is on the taxpayer. Sproul v. State Tax Comm., (1962) 1 OTR 31, rev'd on other grounds, 234 Or 567, 382 P2d 99.

To defeat a claim of permanent disability if evidence of degree of obvious physical impairment, coupled with other factors such as claimant's mental capacity, education, training or age, place claimant prima facie in the odd-lot category, the burden is on the employer to show that some kind of suitable work is regularly and continuously available to claimant. Swanson v. Westport Lbr. Co., (1971) 4 Or App 417, 479 P2d 1005.

Where defendant alleged a breach of warranty he had burden of proof of the breach and the damages resulting from the breach. Schumann v. Wager, (1899) 36 Or 65, 58 P 770; Lenz v. Blake, (1904) 44 Or 569, 76 P 356.

In a suit to reform a contract on the ground of mutual mistake, the burden of proof was on plaintiff to show mistake and that it was mutual. School Dist. 4 v. Hartong, (1918) 89 Or 155, 173 P 570; Miller v. Fisher, (1918) 90 Or 111, 174 P 1152.

Burden of proving performance of an agreement which was the consideration for the note sued on was on plaintiff. Briscoe v. Jones, (1881) 10 Or 63.

In a suit to foreclose a mortgage the burden of proving tender was on the defendant. Ladd v. Mason, (1882) 10 Or 308.

Where ground of recovery was false representations, plaintiff had burden of proving the false representations and the reliance thereon. Wimer v. Smith, (1892) 22 Or 469, 30 P 416.

In a suit to recover payment under a contract induced

by false representations of the defendant, the burden was on him to show that the plaintiff with full knowledge of the facts ratified the contract. Schoellhamer v. Rometsch, (1894) 26 Or 394, 38 P 344.

One who seeks to surcharge and falsify a settled account had the burden of proof to establish the facts alleged. Fisk v. Basche, (1897) 31 Or 178, 49 P 981.

However, in a suit by a client to set aside a mortgage given to his attorney, the latter was required to show by a preponderance of the evidence that the transaction was supported by a valuable consideration and was free from fraud. Phipps v. Willis, (1909) 53 Or 190, 96 P 866, 99 P 935, 18 Ann Cas 119.

In an action to reform a deed the burden of proof was on grantor to show that there was a mutual mistake and that the conveyance executed by him to grantee was not in accordance with the agreement of the parties. Furuset v. Aaby, (1918) 88 Or 278, 170 P 1180, 171 P 1054.

Where plaintiff was injured by the negligent act of the driver of car owned by defendant, plaintiff had burden of proving defendant responsible for the acts of the driver, but proof of defendant's ownership of car makes out a prima facie case for such responsibility. West v. Kern, (1918) 88 Or 247, 171 P 413, 171 P 1050, LRA 1918D, 920.

In an action against warehouseman for damage to goods, plaintiff made out a prima facie case of negligence by showing delivery of goods in good condition, but the burden of proof of defendant's negligence remained with plaintiff. Hansen v. Ore.-Wash. R.R. & Nav. Co., (1920) 97 Or 190, 188 P 963, 191 P 655.

In a divorce action defendant had burden of proving the affirmative allegations in his cross complaint. Hawley v. Hawley, (1921) 101 Or 649, 199 P 589.

In an action against defendant-seller for damages due to defective ice machine, defendant had burden of proving the defense that damage was caused by plaintiff's negligent operation of the machine. Pendergrass v. Fairchild, (1923) 106 Or 537, 212 P 963.

Where cashier's check given by defendant in exchange for assignment of mortgage was not good by reason of failure of bank, burden was on defendant to show that check was accepted in satisfaction of debt. Smith v. Mills, (1924) 112 Or 496, 230 P 350.

A contestant alleging undue influence in the execution of a will had the burden of proof thereon. Wayne v. Huber, (1930) 134 Or 464, 291 P 356, 294 P 590, 79 ALR 1427.

In bicyclist's action for injury sustained when struck by automobile, where bicyclist admitted negligence, burden of proving that negligence of bicyclist was contributing cause of injury was on defendant-motorist. Landis v. Wick, (1936) 154 Or 199, 57 P2d 759, 59 P2d 403.

Instruction that plaintiff in Workmen's Compensation Act case had no burden of proof was contrary to law and prejudicial to defendant. Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398.

When a will was duly executed and was in possession of testator but could not be found upon his death, burden was upon person submitting copy of will to prove will was in existence when testator died. Salter v. Salter, (1957) 209 Or 536, 307 P2d 515.

FURTHER CITATIONS: Bogle v. Paulson, (1948) 185 Or 211, 201 P2d 733; Cook v. Michael, (1958) 214 Or 513, 330 P2d 1026; Strawn v. State Tax Comm., (1962) 1 OTR 98; State Hwy. Comm. v. Kliks (1964) 238 Or 281, 393 P2d 763; Portland Canning Co. v. State Tax Comm., (1964) 1 OTR 600; First Nat. Bank v. Malady, (1965) 242 Or 353, 408 P2d 724; McCaffrey v. Glendale Acres, Inc., (1968) 250 Or 140, 440 P2d 219.

LAW REVIEW CITATIONS: 4 WLF 81.

41.220

NOTES OF DECISIONS

Ordinarily immaterial and nonessential allegations need not be proven, but a party must prevail upon substantially the case made in his pleadings. Thompson v. Rathbun, (1889) 18 Or 202, 22 P 837.

41.230

NOTES OF DECISIONS

1. "Evidence shall correspond with the substance of the material allegations"
   (1) Contract actions
   (2) Negligence cases
   (3) Other actions and suits
   (4) Defensive matters
2. Evidence shall "be relevant to the questions in dispute"
3. "Collateral questions shall be avoided"
4. Inquiry into collateral fact directly connected with question in dispute
5. Collateral questions affecting "credibility of witness"

1. "Evidence shall correspond with the substance of the material allegations"

(1) Contract actions. A note which did not name or identify the payee was not admissible under an allegation that defendant executed the note to a certain bank. Thompson v. Rathbun, (1889) 18 Or 202, 22 P 837.

Where the substance of plaintiff's material allegations was that plaintiff sold land to defendant on defendant's promise to pay a certain sum for it, evidence of the time and mode of payment was admissible though it did not support the allegation of time and mode of payment in the complaint. Denn v. Peters, (1900) 36 Or 486, 59 P 1109.

Where a buyer of timber alleged that he was allowed the time specified in the contract for the removal without pleading any modification of the contract, evidence of a subsequent extension of time was not admissible. Boring Lbr. Co. v. Roots, (1907) 49 Or 569, 90 P 487.

(2) Negligence cases. Where the plaintiff specifies the particular negligence relied on, evidence of other acts of negligence is irrelevant. Knahtla v. Ore. Short-Line Ry., (1891) 21 Or 136, 27 P 91; Lieuallen v. Mosgrove, (1898) 33 Or 282, 54 P 200, 664; Martini v. Ore.-Wash. R.R. & Nav. Co., (1914) 73 Or 283, 144 P 104.

In an action against a city for negligently allowing a sewer intake to become clogged with drift, evidence concerning the construction of a drift dam above the intake and the accumulation of debris above the dam was admissible, after proof that the city had been warned of this condition, on the question of the exercise of due care by the city. Chan Sing v. Portland, (1900) 37 Or 68, 60 P 718.

An allegation that defendant negligently placed a pole against a sidewalk in such manner that it fell on an employee did not admit evidence of the insecurity of the sidewalk as a support for the pole. Sullivan v. Wakefield, (1911) 59 Or 401, 117 P 311.

(3) Other actions and suits. Where plaintiff by her pleadings in a trespass action limited her claim to a certain donation land claim, she could not prove a trespass committed on a different donation land claim. Jennings v. Meldrum, (1888) 15 Or 629, 16 P 646.

Where a complaint sought recovery for the destruction by fire of standing and growing timber admission of evidence of the burning of dead and down timber was reversible error. Eastman v. Jennings-McRae Logging Co., (1914) 69 Or 1, 138 P 216, Ann Cas 1916A, 185.

In a suit against a former partner for an accounting, evidence of fraud, neglect or misfeasance was not admissible where none of them were alleged. Runnells v. Leffel, (1919) 93 Or 342, 176 P 802.

(4) Defensive matters. Where defendant in replevin admitted plaintiff's ownership on a given date, evidence that plaintiff had executed a bill of sale of a part of the property prior to such date was inadmissible. Dillery v. Borwick, (1899) 36 Or 255, 59 P 183.

2. Evidence shall "be relevant to the questions in dispute"

This section prohibits questions which call on a witness for a critical review of the testimony given by other witnesses. Netter v. Edmunson, (1914) 71 Or 604, 143 P 636.

In murder trial evidence showing that certain disreputable individuals contributed to the defense of case was inadmissible. State v. Olds, (1889) 18 Or 440, 22 P 940.

Where defendant alleged a contract of settlement as a defense and the reply denied making such contract, plaintiff could not introduce evidence to prove duress or undue influence in making the contract since that was not in issue. Horn v. Davis, (1914) 70 Or 498, 142 P 544.

In a prosecution for manslaughter by a motorist charged with driving while under the influence of liquor, bottles of liquor found in his possession were admissible. State v. Lockwood, (1928) 126 Or 118, 268 P 1016.

In an action to recover damages as a result of an assault, testimony as to declaration of defendant made after fight that he had attempted to scratch out eyes of some one described by profanity, was admissible because there was an inference that defendant referred to plaintiff. Trook v. Sagert, (1943) 171 Or 680, 138 P2d 900.

In an assault and battery case on the question of who was the first aggressor evidence of reputation in the community for pugnaciousness was admissible. Brooks v. Bergholm, (1970) 256 Or 1, 470 P2d 154.

In an assault and battery case, evidence of prior threats was admissible on the question of who was the first aggressor. Id.

3. "Collateral questions shall be avoided"

In a murder prosecution in which accused claimed that his confession had been induced by the fact that another prisoner had showed him wounds allegedly received in a severe beating by an officer which beating induced that prisoner to confess to another crime, the refusal to permit accused's counsel to cross-examine the officer as to whether he beat the other prisoner to make him confess was not error. State v. Cunningham, (1943) 173 Or 25, 144 P2d 303.

4. Inquiry into collateral fact directly connected with question in dispute

In an action by an executor to recover certain stock certificates, evidence of a conversation between decedent and defendant to show that decedent was the real owner of the certificates was admissible. Beard v. Beard, (1913) 66 Or 526, 133 P 795.

In an action to foreclose a lien on logs for services, defendant could not under a general denial show that plaintiff had become a member in a partnership which previously had agreed to save defendant harmless from labor liens. Wisdom v. Arnold, (1919) 90 Or 601, 177 P 958.

In an action for services, exclusion of testimony as to plaintiff's end of a telephone conversation with the defendant was not an abuse of discretion under this section, where the evidence was cumulative of an admitted fact. Johnston v. Fitzhugh, (1919) 91 Or 247, 178 P 230.

In a prosecution for larceny involving the theft of whiskey, evidence regarding the taking of the whiskey from the premises of the prosecuting witness, possession of whiskey by defendant and the finding of a keg which recently contained whiskey was admissible. State v. Ince, (1929) 130 Or 379, 280 P 335.

5. Collateral questions affecting "credibility of witness"

Cross-examination of a witness as to his conduct from the time he ate supper until his arrest was proper as having a bearing on his credibility. State v. Lem Woon, (1910) 57 Or 482, 107 P 974, 112 P 427.

FURTHER CITATIONS: Mattock v. Wheeler, (1896) 29 Or 64, 40 P 5, 43 P 867; Normile v. Ore. Nav. Co., (1902) 41 Or 177, 61 P 928; Stanley v. Topping, (1914) 71 Or 590, 143 P 632; State v. Rader, (1919) 94 Or 432, 186 P 79; Wells v. Morrison, (1927) 121 Or 604, 256 P 641; Sylvis v. Hays, (1932) 138 Or 418, 6 P2d 1098.

LAW REVIEW CITATIONS: 3 OLR 103; 41 OLR 340.

41.240

NOTES OF DECISIONS

Where plaintiff alleged performance of an express contract but his proof sustained a quantum meruit he could not recover because he had failed to prove his allegation. Richardson v. Inv. Co., (1913) 66 Or 353, 133 P 773; Maynard v. Lange, (1914) 71 Or 560, 143 P 648, Ann Cas 1916E, 547; Wolke v. Schmidt, (1924) 112 Or 99, 228 P 921; Hollemon v. Lakeside Lbr. Co., (1948) 184 Or 290, 197 P2d 679.

In replevin action, defendant was required to establish his affirmative allegation of ownership. Wheeler v. Steadman, (1921) 99 Or 414, 195 P 818.

In a suit to quiet title, where defendant alleged plaintiff's deed was obtained by undue influence, defendant must prove that affirmative allegation. Grenz v. Anders, (1926) 119 Or 277, 241 P 46.

The fact that defendant must prove his affirmative allegations of contributory negligence does not relieve the plaintiff from the necessity of establishing the allegations of his complaint by evidence of such facts and conduct on his part, free from inferences that might reasonably have been drawn therefrom tending to show that he had been negligent in connection with the acts complained of. Riley v. Good, (1933) 142 Or 155, 18 P2d 222.

Instruction that plaintiff in Workmen's Compensation Act case had no burden of proof was contrary to law and prejudicial to defendant. Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398.

When a will was duly executed and was in possession of testator but cannot be found upon his death, burden was upon person submitting copy of will to prove will was in existence when testator died. Salter v. Salter, (1957) 209 Or 536, 307 P2d 515.

Burden of proof was on defendant to prove his allegations of payment on the contract made under circumstances to require application of payment to contract debt. Boyer v. Dawson, (1959) 216 Or 393, 337 P2d 785.

FURTHER CITATIONS: Eastman v. Jennings-McRae Lbr. Co., (1914) 69 Or 1, 138 P 216, Ann Cas 1916A, 185; Gray v. Wassell, (1932) 138 Or 274, 4 P2d 625; McCaffrey v. Glendale Acres, Inc., (1968) 250 Or 140, 440 P2d 219.

LAW REVIEW CITATIONS: 37 OLR 68; 46 OLR 229.

41.250

NOTES OF DECISIONS

The last sentence of this section should not be applied in a civil case. Cook v. Michael, (1958) 214 Or 513, 330 P2d 1026; State Hwy. Comm. v. Kromwall, (1961) 226 Or 235, 359 P2d 907. Cook v. Michael, supra, overruling Gwin v. Crawford, (1940) 164 Or 215, 100 P2d 1012.

While proof of fraud must be clear and convincing, the rule that issues of fact in civil cases are determined by a preponderance of testimony applies as well to issues of fraud. Hill v. U.S. Nat. Bank, (1949) 187 Or 635, 213 P2d 209.

In an action for damages for fire alleged to have been caused by a locomotive, an instruction that the law did not require absolute proof or absolute certainty was proper. Mt. Emily Tbr. Co. v. Ore.-Wash. R. R. & Nav. Co., (1916) 82 Or 185, 161 P 398.

Evidence that amounted to demonstration was not necessary to prove that defendant's fire ignited plaintiff's property in an action for damages for destruction of property by fire. Silver Falls Tbr. Co. v. E. & W. Lbr. Co., (1935) 149 Or 126, 40 P2d 703.

In describing the degree of proof required to establish fraud in civil actions, it was proper to instruct the jury that the fraud charged had to be established by clear and satisfactory evidence. Metropolitan Cas. Ins. Co. v. Lesher Inc., (1935) 152 Or 161, 52 P2d 1133.

Where a plane on a combat patrol over the ocean failed to return and no trace of it or its occupants was found thereafter, it was held that the occupants of the plane met their death at or about the time of the disappearance of the plane. Pearson v. Coulter, (1949) 186 Or 570, 208 P2d 349.

FURTHER CITATIONS: Hubbard v. Lamford Lbr. Co., (1956) 209 Or 145, 304 P2d 943; State v. White, (1970) 4 Or App 151, 477 P2d 917.

LAW REVIEW CITATIONS: 39 OLR 27; 43 OLR 208-210.

41.260

NOTES OF DECISIONS

A crime may be proved solely by circumstantial evidence in Oregon. Colson v. Cupp, (1970) 318 F Supp 1381.

In a prosecution for rape, corroboration of a prosecutrix was not absolutely essential. State v. Friddles, (1912) 62 Or 209, 123 P 904; State v. Edison, (1951) 191 Or 588, 232 P2d 73.

In a prosecution for murder, an instruction substantially a copy of the section was proper. State v. Howard, (1921) 102 Or 431, 203 P 311.

In a prosecution for sale of intoxicating liquor, the testimony of one witness was sufficient to sustain a conviction. State v. Edwards, (1922) 106 Or 58, 210 P 1079.

In a negligence action, the testimony of a single eye witness called by the plaintiff was sufficient to establish any facts in issue. Riley v. Good, (1933) 142 Or 155, 18 P2d 222.

The uncorroborated testimony of an adulterous spouse was sufficient to sustain a case of criminal conversation. Adkins v. Campbell, (1963) 234 Or 369, 381 P2d 96.

The beneficiary of the agreement was not disqualified. Fabre v. Halverson, (1968) 250 Or 238, 441 P2d 640.

The testimony of one witness was sufficient evidence of the gambling device and the "payoff" money. State v. Wheelhouse, (1971) 92 Or App Adv Sh 1837, 486 P2d 1292.

FURTHER CITATIONS: State v. Leasia, (1904) 45 Or 410, 78 P 328; State v. Cummings, (1955) 205 Or 500, 288 P2d 1036, 289 P2d 1083; Klarr v. Heckart, (1959) 218 Or 1, 341 P2d 535; Foxton v. Woodmansee, (1964) 236 Or 271, 388 P2d 275; State v. White, (1970) 4 Or App 151, 477 P2d 917; Dorr v. Dept. of Motor Vehicles, (1971) 5 Or App 170, 483 P2d 105; State v. Washington, (1971) 5 Or App 347, 483 P2d 465.

ATTY. GEN. OPINIONS: Evidence to prove mental suffering in divorce case, 1944-46, p 361.

LAW REVIEW CITATIONS: 49 OLR 64.

41.270

NOTES OF DECISIONS

The testimony of one witness only is insufficient to establish a usage or custom. Prement v. Wells, (1913) 65 Or 336, 133 P 647; Denny v. Wolff, (1921) 101 Or 255, 199 P 603, 17 ALR 535; Loland v. Nelson, (1932) 139 Or 581, 8 P2d 82.

The evidence of only one witness as to usage is not incompetent so as to make its admission reversible error, where no request that the evidence be withdrawn or that the jury be instructed to disregard it has been made and refused. Aldrich v. Columbia R. Co., (1901) 39 Or 263, 64 P 455.

Notwithstanding this section the court may take judicial notice of a custom as to the method of appropriating water. Parkersville Drainage Dist. v. Wattier, (1906) 48 Or 332, 86 P 775.

FURTHER CITATIONS: Rhodes v. Moore, (1965) 239 Or 454, 398 P2d 189.

LAW REVIEW CITATIONS: 12 OLR 157.

41.280

NOTES OF DECISIONS

1. In general
2. What is an alteration
3. Time of alteration
4. Materiality of alteration
5. Sufficiency of explanation

1. In general

It is incumbent on the party producing a writing to explain any apparent alteration in it. Simpkins v. Windsor, (1891) 21 Or 382, 28 P 72; Palomaki v. Laurell, (1917) 86 Or 491, 168 P 935; Kirchner v. Clostermann, (1931) 136 Or 557, 299 P 995.

Parol evidence is admissible to explain under what circumstances, when and by whom an apparent alteration was made. Wren v. Fargo, (1860) 2 Or 19.

Where a record offered in evidence is interlined, erased and mutilated, the interlineations, erasures and mutilations should be fully and satisfactorily explained. Dolph v. Barney, (1874) 5 Or 191.

Where the execution and delivery of a note was admitted its production was unnecessary, and when offered in evidence an alteration was immaterial and did not have to be explained. First Nat. Bank v. Mack, (1899) 35 Or 122, 57 P 326; Brown v. Feldwert, (1905) 46 Or 363, 80 P 414.

It was not error to admit evidence explaining a change made in the books of a corporation where there was no appearance of alteration. Zobrist v. Estes, (1913) 65 Or 573, 133 P 644.

On an appeal from a judgment in an action upon a note where the note was not brought up with bill of exceptions and the plaintiff testified that it was not altered after delivery to him, it must be inferred that there was no error in the trial court's failure to make the plaintiff explain the appearance of the note. Palomaki v. Laurell, (1917) 86 Or 491, 168 P 935.

Where typewritten rider was attached to a printed form of mortgage, there was no appearance of alteration and this section was inapplicable. Bramwell v. Sparks, (1927) 123 Or 88, 259 P 295.

Where there was no apparent alteration, the burden was on defendant-mortgagors to show the truth of their allegation that typewritten slip attached to mortgage describing additional land as subject thereto was an alteration made by plaintiff. Id.

2. What is an alteration

An attestation of the signature of a surety on a bond by a person not authorized to do so was not an alteration within this provision. Hall v. Weaver, (1888) 34 Fed 104, 13 Sawy 188.

3. Time of alteration

The time when an alteration was made is for the jury. Palomaki v. Laurell, (1917) 86 Or 491, 168 P 935; Kirchner v. Clostermann, (1931) 136 Or 557, 299 P 995.

Where apparently altered receipt was admitted in evidence without explanation, subsequent testimony showing alteration was made before execution was sufficient to cure the objection. Nickum v. Gaston, (1895) 28 Or 322, 42 P 130.

The fact that there was an erasure in a sheriff's return did not render it inadmissible in evidence where it was shown that the erasure was in the sheriff's handwriting and was made before the return was filed. Crossen v. Oliver, (1900) 37 Or 514, 61 P 885.

4. Materiality of alteration

Letters with alterations in immaterial parts are admissible in evidence without explaining the alterations. Hornefius v. Wilkinson, (1908) 51 Or 45, 93 P 474.

Alteration in maturity date of promissory note is material. Palomaki v. Laurell, (1917) 86 Or 491, 168 P 935.

The question of whether an alteration is or is not material is for the court. Id.

Unauthorized alteration of mortgage by adding to the property subject thereto an additional 163.2 acres would be material. Bramwell v. Sparks, (1927) 123 Or 88, 259 P 295.

Changing date of note from August 11 to August 12 by payee was a material alteration. Wallace v. Tice, (1898) 32 Or 283, 51 P 733.

5. Sufficiency of explanation

A promissory note with a cut through the signature of the makers was admitted into evidence without explanation where pleadings disclosed that the cut was made by a stranger to the instrument. Whitlock v. Manciet, (1882) 10 Or 166.

Where payee of a note payable "on or before" a certain date extended time of payment to a later day certain, it was presumed to have been "innocently made" and no explanation was needed since it was apparent that such extension could not result in injury to the maker. Drexler v. Smith, (1887) 30 Fed 754.

Alteration of a promissory note by the payee was shown to have been innocently made. Wallace v. Tice, (1898) 32 Or 283, 51 P 733.

Testimony of plaintiff explaining interlineations was sufficient to justify admission of contract. Schucking v. Young, (1915) 78 Or 483, 153 P 803.

FURTHER CITATIONS: Savage v. Savage, (1899) 36 Or 268, 59 P 461; King v. State Ind. Acc. Comm., (1957) 211 Or 40, 309 P2d 159, 315 P2d 148, 318 P2d 272.

41.310

NOTES OF DECISIONS

A presumption or inference is a species of evidence. Caraduc v. Schanen-Blair Co., (1913) 66 Or 310, 133 P 636; Ward v. Queen City Fire Ins. Co., (1914) 69 Or 347, 138 P 1067; Hansen v. Ore.-Wash. R.R. & Nav. Co., (1920) 97 Or 190, 224, 188 P 963, 191 P 655; Sather v. Giaconi, (1924) 110 Or 433, 220 P 740; Judson v. Bee Hive Auto Serv. Co., (1931) 136 Or 1, 294 P 588, 297 P 1050, 74 ALR 944; Bunnell v. Parelius, (1941) 166 Or 174, 111 P2d 88; Mogul Trans. Co. v. Larison, (1947) 181 Or 252, 181 P2d 139.

Notwithstanding the fact that an inference is a species of evidence, where the plaintiff has the burden of proof of agency and relies solely upon the inference which arises from proof of ownership, evidence offered by the defendant in contradiction of the inference may sometimes be of such conclusive character as to require the court to direct a verdict for the defendant. Judson v. Bee Hive Auto Serv. Co., (1931) 136 Or 1, 294 P 588, 297 P 1050, 74 ALR 944; Lehl v. Hull, (1936) 152 Or 570, 53 P2d 48, 54 P2d 290; Kantola v. Lovell Auto Co., (1937) 157 Or 534, 72 P2d 61; Brown v. Fields, (1938) 160 Or 23, 83 P2d 144; Bunnell v. Parelius, (1941) 166 Or 174, 111 P2d 88; Allum v. Ball, (1942) 168 Or 577, 124 P2d 533; Jasper v. Wells, (1943) 173 Or 114, 144 P2d 505.

While a presumption in the strict sense of the word is not evidence, it has probative value and stands in lieu of evidence and does not necessarily disappear when evidence is offered in opposition thereto, but only disappears when the facts upon which it is based have been overcome by evidence to the contrary. Wyckoff v. Mut. Life Ins. Co., (1944) 173 Or 592, 147 P2d 227; Freytag v. Vitas, (1958) 213 Or 462, 326 P2d 110.

While an inference or presumption is a species of evidence, it is not such evidence as will prevent setting aside a verdict under Ore. Const. Art. VII(A), §3, providing that no fact tried by a jury shall be otherwise re-examined in any court unless the court can affirmatively say that there is no evidence to support the verdict. Consor v. Andrew, (1912) 61 Or 483, 123 P 46.

Since a presumption is evidence, in an otherwise equally balanced case the party with the presumption prevails. Templeton v. Bockler, (1914) 73 Or 494, 144 P 405.

Lack of direct evidence will not preclude recovery where facts create reasonable inference that defendant was negligent. Gillilan v. Portland Crematorium Assn., (1927) 120 Or 286, 249 P 627.

A common carrier's extraordinary duty to inspect and maintain its equipment in a safe condition may invoke the application of res ipsa loquitur. Simpson v. The Gray Line Co., (1961) 226 Or 71, 358 P2d 516.

If the doctrine of res ipsa loquitur applies, it gives rise to an inference of negligence and not a presumption thereof. Id.

Proof of defendant's ownership of the instrumentality causing damage to plaintiff created an inference that the operator was the agent of defendant, and notwithstanding strong testimony showing that the operator was not the agent of defendant, this inference was evidence to be weighed by the jury so that defendant's motion for a directed verdict was properly denied. Doherty v. Hazelwood Co., (1919) 90 Or 475, 175 P 849, 177 P 432; Sather v. Giaconi, (1924) 110 Or 433, 220 P 740.

Where a prerequisite to recovery from the county for damages due to a defective road was that plaintiff was lawfully traveling on the road, the presumption that the law has been obeyed was sufficient evidence so that motions for judgment of nonsuit and directed verdict were properly denied. Coates v. Marion County, (1920) 96 Or 334, 189 P 903.

Presumption had evidentiary value and the failure to instruct jury as to its existence was reversible error. Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398.

FURTHER CITATIONS: State v. Ellison, (1957) 209 Or 672, 307 P2d 1050.

ATTY. GEN. OPINIONS: Presumption of intent to injure competition, (1970) Vol 35, p 393.

LAW REVIEW CITATIONS: 11 OLR 350; 23 OLR 271.

41.320

NOTES OF DECISIONS

A criminal intent may be inferred from proof of conversion. State v. Humphreys, (1903) 43 Or 44, 58, 70 P 824.

An unreasonable inference made by the jury will not support a verdict. Judson v. Bee Hive Auto Serv. Co., (1931) 136 Or 1, 294 P 588, 297 P 1050, 74 ALR 944.

Although res ipsa loquitur may create a legal presumption of negligence in common carrier cases, in all other litigation it raises a permissive inference of negligence which gives the plaintiff a prima facie case but never necessitates an instruction by the court or a finding in accordance with the inference. Ritchie v. Thomas, (1950) 190 Or 95, 224 P2d 543.

A common carrier's extraordinary duty to inspect and maintain its equipment in a safe condition may invoke the application of res ipsa loquitur. Simpson v. The Gray Line Co., (1961) 226 Or 71, 358 P2d 516.

If the doctrine of res ipsa loquitur applies, it gives rise to an inference of negligence and not a presumption thereof. Id.

An inference of intention to defraud creditors was not warranted. Weaver v. Owens, (1888) 16 Or 301, 18 P 579.

An inference that defendant cut the brand from the hide of a steer based on proof of delivery of the steer by defendant and proof that the brand was removed subsequent to delivery, was unreasonable and therefore improper. State v. Huffman, (1888) 16 Or 15, 16 P 640.

To withdraw from the jury pertinent evidence from which an inference might be deducible was improper. Lake County v. Neilon, (1903) 44 Or 14, 74 P 212.

A comment by the trial court that the facts created an inference was reversible error. Keen v. Keen, (1907) 49 Or 362, 90 P 147, 14 Ann Cas 45, 10 LRA(NS) 504; Roundtree v. Mount Hood R. R., (1917) 86 Or 147, 168 P 61.

Where accused's sexual intercourse with his daughter was not legally proved as a fact, it would not support an inference of motive for the killing of his daughter and wife. State v. Hembree, (1909) 54 Or 463, 103 P 1008.

Where decedent's age was legally proved to be 17 years an inference that he was unmarried based on that fact was proper, so that plaintiff, decedent's mother, had a legal right of action for his death under the Employers' Liability Act. Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 232 P 637, 233 P 561, 234 P 261.

It was a reasonable inference that a gun was loaded where it was proved that defendant, attempting to rob another, deliberately pointed the gun at him at close range and said, "stick 'em up." State v. Milo, (1928) 126 Or 238, 269 P 225.

An inference of guilt drawn by jury was justified. State v. Burke, (1928) 126 Or 651, 269 P 869, 270 P 756.

The jury's deduction from proof of defendant's ownership of automobile that operator was the owner's agent acting within the scope of such agency was an inference and not a presumption. Judson v. Bee Hive Auto Serv. Co., (1931) 136 Or 1, 294 P 588, 297 P 1050, 74 ALR 944.

Where the fact of defendant's ownership or automobile was not legally proved, no inference that driver of the automobile was the agent of defendant existed, and defendant's motion for directed verdict was properly allowed. Hayes v. Ogle, (1933) 143 Or 1, 21 P2d 223.

Where the only reasonable deduction that could be made from the facts proved was that the driver of the automobile causing damage to plaintiff was not the agent of defendant, it was reversible error to deny defendant's motion for directed verdict. Bunnell v. Parelius, (1941) 166 Or 174, 111 P2d 88.

An inference that plaintiff's car was equipped with defective and insufficient lights was reasonable from the facts proved. Kiddle v. Schnitzer, (1941) 167 Or 316, 114 P2d 109, 117 P2d 983.

FURTHER CITATIONS: Thompson v. Larsen, (1926) 118 Or 421, 247 P 139; Wyckoff v. Mut. Life Ins. Co., (1944) 173 Or 592, 147 P2d 227; Rickard v. Ellis, (1962) 230 Or 46, 368 P2d 396; State v. Parker, (1963) 235 Or 366, 384 P2d 986; State v. Gann, (1969) 254 Or 549, 463 P2d 570.

ATTY. GEN. OPINIONS: Presumption of intent to injure competition, (1970) Vol 35, p 393.

LAW REVIEW CITATIONS: 11 OLR 350; 43 OLR 211.

41.330

NOTES OF DECISIONS

1. "On a fact legally proved"
2. Nature of deduction

1. "On a fact legally proved"

An inference cannot be founded on an inference. State v. Hembree, (1909) 54 Or 463, 103 P 1008; Lintner v. Wiles, (1914) 70 Or 350, 141 P 871; Miller v. Weaver, (1916) 78 Or 594, 153 P 465; Oregon Box & Mfg. Co. v. Jones Lbr. Co., (1926) 117 Or 411, 244 P 313.

An inference cannot be predicated upon a presumption. Ball v. Danton, (1913) 64 Or 184, 199, 129 P 1032; Stamm v. Wood, (1917) 86 Or 174, 168 P 69.

This section does not inhibit inveterate reasoning processes and does not forbid judgment based on circumstantial evidence. McKay v. State Ind. Acc. Comm., (1939) 161 Or 191, 87 P2d 202; State v. Dennis, (1945) 177 Or 73, 159 P2d 838; Eitel v. Times, Inc., (1960) 221 Or 585, 352 P2d 485, 5 ALR3d 86.

It is error to instruct the jury that an inference may be founded either on a fact legally proved or, in the alternative, upon a deduction therefrom. State v. Rader, (1919) 94 Or 432, 186 P 79.

Where guilt is proved by circumstantial evidence alone the proof must be incapable of explanation upon any rational hypothesis other than that of guilt. State v. Harris, (1965) 241 Or 224, 405 P2d 492.

Proof of the corpus delicti in a prosecution for larceny of a calf was held not to rest upon an inference deduced from an inference. State v. Brinkley, (1909) 55 Or 134, 104 P 893, 105 P 708.

In an action for breach of promise to marry where plaintiff testified to sexual intercourse between herself and defendant and defendant denied same, an instruction to the jury that they might infer that the acts of intercourse occurred in reliance on the promise to marry was improper since the act of intercourse was not a legally proved fact. Stamm v. Wood, (1917) 86 Or 174, 168 P 69.

2. Nature of deduction

Ownership of an automobile operated by an agent constitutes a prima facie case for the jury of the principal's liability for injuries inflicted by the agent in driving the machine of which he had general charge, although for a purpose of his own, since this section authorizes an inference of fact to be founded on the course of business. Fleming v. Ambulance Co., (1937) 155 Or 351, 62 P2d 1331, 64 P2d 519.

An intent to defraud creditors could not be inferred from the facts proved. Weaver v. Owens, (1888) 16 Or 301, 18 P 579.

In an action to set aside a default judgment against a county, the mere fact that the county clerk was an ex officio clerk of the court that entered the default judgment did not permit the inference that the county had knowledge

of the judgment at the time it was entered. Chapman v. Multnomah County, (1912) 63 Or 180, 126 P 996.

Proof of defendant's ownership of automobile and custody of automobile in employe of defendant created an inference that automobile was being used in furtherance of defendant's business. Doherty v. Hazelwood Co., (1919) 90 Or 475, 175 P 849, 177 P 432; Fleming v. Ambulance Co., (1937) 155 Or 351, 62 P2d 1331, 64 P2d 519.

An inference predicated upon a letterhead that defendant was the charterer of the vessel on which plaintiff was injured could not furnish the basis for a further inference that the contract between the defendant and the owner of the vessel contained terms making defendant liable as an operator of the vessel. Deniff v. McCormick Co., (1922) 105 Or 697, 210 P 703.

Proof that decedent suffered an electric shock did not create an inference that the shock caused an injury to his heart capable of producing death. McKay v. State Ind. Acc. Comm., (1939) 161 Or 191, 87 P2d 202.

Where plaintiff testified that he did not see the truck in time to avoid collision, the jury was permitted to infer that his failure to do so was due to insufficient or defective headlights on his car. Kiddle v. Schnitzer, (1941) 167 Or 316, 323, 114 P2d 109, 117 P2d 983.

FURTHER CITATIONS: State v. Lem Woon, (1910) 57 Or 482, 107 P 984, 112 P 427; State v. Owen, (1926) 119 Or 15, 40, 244 P 516; Roundtree v. Mount Hood R.R., (1917) 86 Or 147, 168 P 61; State v. Watts, (1956) 208 Or 407, 301 P2d 1035; Strubhar v. So. Pac. Co., (1963) 234 Or 12, 379 P2d 1014.

ATTY. GEN. OPINIONS: Presumption of intent to injure competition, (1970) Vol 35, p 393.

LAW REVIEW CITATIONS: 31 OLR 267.

41.340

NOTES OF DECISIONS

The only presumptions of law are those enumerated in the statutes. Judson v. Bee Hive Auto Serv. Co., (1931) 136 Or 1, 294 P 588, 297 P 1050, 74 ALR 944; Bunnell v. Parelius, (1941) 166 Or 174, 111 P2d 88.

A presumption cannot be founded on an inference. State v. Magers, (1899) 35 Or 520, 537, 57 P 197.

A presumption can be legally indulged only when the facts from which the presumption arises are proved by direct evidence; and one presumption cannot be deduced from another. Hayes v. Ogle, (1933) 143 Or 1, 21 P2d 223.

The presumption against suicide comes within the statutory presumption that a person is innocent of crime or wrong. Wyckoff v. Mut. Life Ins. Co., (1944) 173 Or 592, 147 P2d 227.

Although res ipsa loquitur may create a legal presumption of negligence in common carrier cases, in all other litigation it raises a permissive inference of negligence which gives the plaintiff a prima facie case but never necessitates an instruction by the court or a finding in accordance with the inference. Ritchie v. Thomas, (1950) 190 Or 95, 224 P2d 543.

Presumptions have probative value and do not necessarily disappear when evidence is offered in opposition, but only when evidence to the contrary has overcome the presumption. State v. St. Pierre, (1960) 224 Or 395, 356 P2d 432.

A common carrier's extraordinary duty to inspect and maintain the equipment in a safe condition may invoke the application of res ipsa loquitur. Simpson v. The Gray Line Co., (1961) 226 Or 71, 358 P2d 516.

If the doctrine of res ipsa loquitur applies, it gives rise to an inference of negligence and not a presumption thereof, Id.

When an assault with intent to commit robbery was made with a pistol, a presumption arose under this section that the pistol was loaded. State v. Parr, (1909) 54 Or 316, 103 P 434.

When plaintiff offered evidence to establish the fact that a fire was caused by sparks emitted from defendant's engine, a presumption arose that the engine was improperly equipped or negligently operated. Roundtree v. Mount Hood R.R., (1917) 86 Or 147, 168 P 61.

Where the evidence established that plaintiff and deceased had lived together but did not establish that they lived together as husband and wife, the presumption that they had entered into a lawful contract of marriage did not arise. French v. State Ind. Acc. Comm., (1937) 156 Or 443, 68 P2d 466.

Proof of defendant's ownership of automobile causing injury creates an inference and not a presumption that the driver was defendant's agent and was acting within the scope of such agency. Bunnell v. Parelius, (1941) 166 Or 174, 111 P2d 88.

FURTHER CITATIONS: State v. Buck, (1953) 200 Or 87, 262 P2d 495; State v. Ellison, (1957) 209 Or 672, 307 P2d 1050; Sproul v. State Tax Comm., (1962) 1 OTR 31; State v. Byrd, (1965) 240 Or 159, 400 P2d 522.

ATTY. GEN. OPINIONS: Presumption of intent to injure competition, (1970) Vol 35, p 393.

LAW REVIEW CITATIONS: 11 OLR 350; 13 OLR 340; 23 OLR 269; 28 OLR 157; 41 OLR 297.

41.350

NOTES OF DECISIONS

1. An intent to murder
2. A malicious and guilty intent
3. The truth of the facts recited
   (1) Recitals in general
   (2) Recital of a consideration
4. Estoppel
   (1) In general
   (2) By acquiescence or silence
   (3) Failure to assert title
   (4) Intent of representor
   (5) Necessity of acting on representations
   (6) Persons affected
   (7) As affected by statute of frauds
5. Denial of landlord's title
6. Legitimacy
7. Judgments, decrees or orders
8. Other presumptions

1. An intent to murder

The conclusive presumption of an intent to murder arising from the deliberate use of a deadly weapon causing death within a year, standing alone, will sustain a conviction for murder in the second degree but there must be some other proof of deliberation and premeditation to sustain a conviction for murder in the first degree. State v. Carver, (1892) 22 Or 602, 30 P 315; State v. Bartmess, (1898) 33 Or 110, 54 P 167; State v. Jancigaj, (1909) 54 Or 361, 103 P 54; State v. Cody, (1925) 116 Or 509, 241 P 983; State v. Cunningham, (1943) 173 Or 25, 144 P2d 303.

The intent to murder under this subsection is conclusive only when no circumstances of justification or excuse appear in the evidence. State v. Gibson, (1903) 43 Or 184, 73 P 333; State v. Davis, (1914) 70 Or 93, 140 P 448; State v. Nodine, (1953) 198 Or 679, 259 P2d 1056.

Since the presumption of innocence is a species of evidence, instructions on conclusive presumptions as to intent should never be given in a criminal case. State v. Elliott,

(1963) 234 Or 522, 383 P2d 382; State v. Jones, (1963) 235 Or 538, 385 P2d 759; State v. Steimle, (1969) 253 Or 54, 453 P2d 171.

In cases in which this presumption is not conclusive, an instruction to the effect that it is conclusive, with exceptions, should not be given. State v. Nodine, (1953) 198 Or 679, 259 P2d 1056.

The instruction given defining the deliberate use of a deadly weapon was correct. State v. Abrams, (1883) 11 Or 169, 8 P 327.

It could be reasonably inferred from the wounds on victim's body and the fact that he died within a year that he was killed by means of a deadly weapon, but a further inference that such weapon was deliberately used would be improper, therefore no presumption of intent to murder was present. State v. Magers, (1899) 35 Or 520, 537, 57 P 197.

In a prosecution for manslaughter an instruction embodying subsection (1) was improper but not prejudicial. State v. Gray, (1905) 46 Or 24, 79 P 53.

An instruction embodying subsection (1) did not impose on defendant the burden of showing that the killing was in self-defense. Id.

In a prosecution for producing an abortion the necessary intent was conclusively presumed where it was proved that defendant thrust a sharp instrument into the foetus, and therefor evidence of other abortions committed by defendant was not admissible on the ground that such evidence was necessary to prove intent. State v. Willson, (1925) 113 Or 450, 487, 230 P 810, 233 P 259, 39 ALR 84.

2. A malicious and guilty intent

In view of subsection (2), an allegation of the complaint that defendant assaulted and actually battered plaintiff was a sufficient allegation of malice so as to authorize exemplary damages. State v. Eppler, (1911) 59 Or 262, 117 P 276.

This presumption will sustain a conviction of murder in the second degree but not of murder in the first degree. State v. Cunningham, (1943) 173 Or 25, 144 P2d 303.

In a prosecution for murder in the first degree, it is relevant for the state to show that defendant bore malice toward the deceased and the presumption of malice created by this subsection was properly called to the attention of the jury. State v. Dennis, (1945) 177 Or 73, 159 P2d 838.

3. The truth of the facts recited

(1) Recitals in general. This presumption is of no effect where a deed is vitiated because of fraud. Parrish v. Parrish, (1899) 33 Or 486, 504, 54 P 352.

An agreement stating that one is the owner of a lot is conclusive as between the parties. Ward v. Klamath County, (1923) 108 Or 574, 218 P 927.

The recitals of a bill of sale are conclusive on the parties where fraud is not shown. Long v. Smith Hotel Co., (1925) 115 Or 306, 237 P 671.

A grantor may not controvert the habendum clause in his deed. Kane v. Kane, (1930) 134 Or 79, 291 P 785.

This subsection does not preclude admission of evidence to show fraud in the inducement. Claude v. Claude, (1946) 180 Or 62, 174 P2d 179.

"Recital" means a statement of fact which is material and on which the transaction is founded. Emmons v. Sanders, (1959) 217 Or 234, 342 P2d 125.

A recital in a deed that cograntees are husband and wife is not conclusive upon the heirs of one of the cograntees notwithstanding this subsection. Pierce v. Hall, (1960) 223 Or 563, 355 P2d 259.

This subsection does not prevent a court of equity from finding that, whatever the parties may have intended when they signed a document, their intent thereafter changed. Davis v. Davis, (1967) 247 Or 352, 429 P2d 808.

Where a contract recited that the property was more particularly described in certain deeds which were recorded, there was a conclusive presumption between the parties that such deeds were so recorded. House v. Jackson, (1893) 24 Or 89, 32 P 1027.

Where a contract of sale stated the consideration to be a specific amount of cash plus payment by purchaser of certain named debts of seller, it was conclusive on plaintiff, an unnamed creditor of seller, since it was more than a mere recital of consideration. Oregon Mill Co. v. Kirkpatrick, (1913) 66 Or 21, 133 P 69.

In an action for recovery of bail where undertaking admittedly executed by defendants stated that accused was duly admitted to bail, defendants were precluded from claiming that accused was not duly admitted to bail. State v. Hohnstein, (1925) 115 Or 466, 238 P 1112.

Where land on which a lodge had constructed a meeting hall was conveyed to the owner's son in trust for the lodge, and such deed was not recorded but kept secret by the trustee, who gave the lodge the impression that he was the owner of the land and building, and later executed a deed conveying the upper portion of the building to the lodge, such former deed was void, and the lodge was not estopped from challenging the recitals in this latter deed. State v. Endsley, (1958) 214 Or 537, 331 P2d 338.

In the absence of estoppel or other grounds, cograntee's heir could contradict the recital of deed that cograntees were married and could show the true estate created. Emmons v. Sanders, (1959) 217 Or 234, 342 P2d 125. Overruling Twigger v. Twigger, (1924) 110 Or 520, 223 P 934.

(2) Recital of a consideration. A recital of consideration in a written instrument may be contradicted or explained by parol or extrinsic evidence unless such contradiction would have the effect of rendering nugatory some substantial and contractual provision of a valid written instrument. Marks v. Twohy Bros. Co., (1921) 98 Or 514, 194 P 675.

A grantor may not dispute the recital of consideration so as to vitiate his deed. Kane v. Kane, (1930) 134 Or 79, 291 P 785.

The consideration exemption in subsection (3) does not apply where the grantor seeks to contradict the consideration recited in the instrument by parol or extrinsic evidence that tends to defeat the operation, or lessens the effect of the deed, or engrafts into the instrument an additional executory or contractual consideration. Weatherford v. Weatherford, (1953) 199 Or 290, 257 P2d 263, 260 P2d 1097.

In an action on a promissory note evidence showing a want of consideration was admissible. Vincent v. Russell, (1921) 101 Or 672, 201 P 432.

Where a deed recited a consideration of $2,000 the grantee was permitted to show that the deed was intended as a gift. Fletcher v. Yates, (1922) 105 Or 680, 211 P 179.

Evidence of verbal promise of grantee to give grantor life estate in land as part inducement for deed thereto was not admissible under this clause in suit by purchaser from grantee against grantor. Lange v. Allen, (1926) 120 Or 96, 251 P 715.

Recital in broker's contract that customer agreed to pay him money "in consideration of services performed by said broker in negotiating and bringing about the foregoing sale" was conclusive proof that broker had performed such services. Thomson v. Silsby, (1927) 120 Or 501, 252 P 712.

4. Estoppel

(1) In general. To constitute estoppel by conduct there must be a false representation made with knowledge of the facts and with the intent that it should be acted upon by the other party who is ignorant of the truth and is induced to act on the representation. State v. Portland Gen. Elec. Co., (1908) 52 Or 502, 527, 95 P 722, 98 P 160.

This subsection is a definition of estoppel in pais. Second

Northwestern Fin. Corp. v. Mansfield, (1927) 121 Or 236, 252 P 400, 254 P 1022.

Where plaintiff had knowledge of proposed street improvements but waited until completion to object, he was not estopped from so objecting where he did not derive any special benefit from the improvements. Mutual Irr. Co. v. Baker City, (1911) 58 Or 306, 110 P 392, 113 P 9.

(2) By acquiescence or silence. Property owners who had notice and an opportunity to be heard in regard to an assessment for a public improvement but did not appear will be granted relief only if their objection attacks the jurisdiction of the common council from the beginning. Wilson v. Salem, (1893) 24 Or 504, 34 P 9, 34 P 691; Barkley v. Oregon City, (1893) 24 Or 515, 33 P 978; Strout v. Portland, (1894) 26 Or 294, 38 P 126; Smith v. Minto, (1897) 30 Or 351, 48 P 166.

Passive acquiescense by defendant while plaintiff constructed irrigating ditch across defendant's land does not estop defendant from cutting off the supply of water. Lavery v. Arnold, (1899) 36 Or 84, 57 P 906, 58 P 524; Halleck v. Suitor, (1900) 37 Or 9, 60 P 384; Ewing v. Rhea, (1900) 37 Or 583, 62 P 790, 82 Am St Rep 783, 52 LRA 140; Bolter v. Garrett, (1904) 44 Or 304, 75 P 142. Ewing v. Rhea, supra, overruling Curtis v. La Grande Water Co., (1890) 20 Or 34, 23 P 808, 25 P 378, 10 LRA 484.

Borrower was not estopped by delay from demanding a proper application of his payments. Johnson v. Wash. Loan Assn., (1904) 44 Or 603, 77 P 872.

Where the grantor of an easement acquiesced in a change of the point of use of the right granted and relying thereon the grantee expended appreciable sums of money, the grantor could not afterwards object to the making of repairs at the new point of use. Sweetland v. Grants Pass Power Co., (1905) 46 Or 85, 95, 79 P 337.

A person who assisted the owner of a tract of land to lay out a highway upon it, having at the time a contract of purchase on the tract opposite which he afterwards abandoned, was not estopped on subsequently acquiring the tract to dispute the correctness of the highway as a boundary. Christenson v. Simmons, (1905) 47 Or 184, 82 P 805.

Where experienced miners saw a subsequent locator, who was ignorant of the usual modes of marking the boundaries of mining claims, driving a tunnel and did not object but encouraged him to proceed, they were estopped to claim after he discovered a valuable vein of ore that he was trespassing on their location. Sharkey v. Candiani, (1906) 48 Or 112, 85 P 219, 7 LRA(NS) 791.

(3) Failure to assert title. One who places title to land in another cannot assert his title as against a bona fide mortgagee from such other without notice. Alliance Trust Co. v. O'Brien, (1897) 32 Or 333, 50 P 801, 51 P 640.

One who advised another to purchase property without mentioning a vendor's lien which he himself claimed thereon was estopped from asserting it after the negotiations were completed and the consideration paid. Jones v. Gates, (1893) 24 Or 411, 33 P 989.

Where a widow did nothing to lead a purchaser at an administrator's sale to believe that he would acquire title free from her dower, she was not estopped to claim dower. Whiteaker v. Belt, (1894) 25 Or 490, 36 P 534.

(4) Intent of representor. A person may be estopped by his conduct, whether or not he intended that others should act upon the strength of it, if it induced the belief that his intention was compatible with his conduct. Ashley v. Pick, (1909) 53 Or 410, 100 P 1103.

Bailor's painting of bailee's name on a safe was not an intentional and deliberate representation that bailee was the owner and bailor was not precluded from asserting ownership as against a purchaser on execution sale. Page & Co. v. Smith, (1886) 13 Or 410, 10 P 833.

Where there was no allegation or proof that mortgagee of certain hops intentionally and deliberately led a purchaser to believe that the mortgagor was the owner of such hops, the mere fact that the mortgagor was permitted to retain possession did not estop mortgagee from asserting his lien against the purchaser. Born v. Livesley, (1904) 44 Or 501, 75 P 1057.

An owner of goods standing by and voluntarily allowing another to treat them as his own whereby a third person was induced to buy them bona fide could not recover them from the purchaser. Id.

(5) Necessity of acting on representations. If a vendor intentionally induces his purchaser to believe the title to the property involved in the contract is bad and vendee in reliance thereon rescinds the contract and brings an action to recover his down payment, the vendor will not be permitted to say the title was good. Collins v. Delashmutt, (1876) 6 Or 51.

There is no estoppel where the party invoking same has not acted on the alleged representations. Panhey v. Ore., Calif. & E. R. Co., (1929) 129 Or 292, 276 P 277.

Where a street in a tract was dedicated but not opened and a purchaser in the tract in good faith erected valuable improvements on part of the unopened street, which improvements were undisturbed for 13 years and the removal of which would appreciably injure his lots, the city was estopped from claiming that part of the street so improved. Oliver v. Synhorst, (1906) 48 Or 292, 86 P 376, 76 LRA(NS) 243.

Where defendants sold a number of lots and represented to purchasers that a strip adjacent thereto would be opened as a street and received an increased price for the lots because of their proximity to the proposed street, defendants were estopped to deny that the strip was dedicated as a public street. Morse v. Whitcomb, (1909) 54 Or 412, 102 P 788, 103 P 775, 135 Am St Rep 832.

Where plaintiff did not allege injury as a result of the conduct of defendant, this subsection was not applicable. Second Northwestern Fin. Co. v. Mansfield, (1927) 121 Or 236, 252 P 400, 254 P 1022.

Where defendant led plaintiff to believe that he was in partnership with another party and plaintiff in reliance thereon extended credit to the other party, defendant was not permitted to deny the existence of such partnership. Babcock v. Katy, (1927) 121 Or 64, 253 P 373.

(6) Persons affected. Only parties and their privies are bound by an estoppel by conduct. Clark v. Handman, (1905) 46 Or 67, 79 P 56; Falls City Lbr. Co. v. Watkins, (1909) 53 Or 212, 99 P 884.

An agent having authority to collect and remit money is not estopped in an action by his principal for the money collected to show that he paid it to another under a paramount title. Moss Mercantile Co. v. First Nat. Bank, (1905) 47 Or 361, 82 P 8, 8 Ann Cas 569, 2 LRA(NS) 657.

Estoppel in pais against the state will not arise from the laches of its officers. State v. Portland Gen. Elec. Co., (1908) 52 Or 502, 527, 95 P 722, 98 P 160.

Only those whose conduct the representations were intended to influence, or their privies, may take advantage of an estoppel. Falls City Lbr. Co. v. Watkins, (1909) 53 Or 212, 99 P 884.

Where a corporation officer was the efficient cause of the defendant's making large expenditures of money, he could not later in an action for usurpation of his franchise set up his own acts as the identical wrong committed by the defendant of which he complained. Budd v. Multnomah St. R. R., (1887) 15 Or 404, 411, 15 P 654.

A bank which induced plaintiff to forego levying an attachment on the property of their common debtor by its promises to take no steps to secure itself until another meeting could be had was estopped to deny the priority of a chattel mortgage procured over the debtor's subsequent

assignment for the benefit of creditors. Snell v. Baker City Bank, (1896) 29 Or 250, 45 P 783.

Stockholders were not as such estopped to assert a claim on certain property of the corporation which they had sold to it, as against a mortgagee of the corporation with notice of the claim. Martin v. Eagle Dev. Co., (1902) 41 Or 448, 458, 69 P 216.

In a prosecution against a public tax collector for embezzling taxes, he was estopped by his conduct to deny the enforceability of the rolls delivered to him by the proper officials, though they may not have been properly certified or have had attached the statutory warrants. State v. Neilon, (1903) 43 Or 168, 73 P 321.

In an action to recover money said to have been collected by defendant as agent for plaintiff and retained without authority, defendant was not estopped from denying receipt of money by the fact that he was present in court during the trial of another action to which he was not a party and remained silent when testimony was given that the money in dispute had been paid to him as now claimed. Caseday v. Lindstrom, (1904) 44 Or 309, 75 P 222.

Selling land by plat estopped the vendor from disputing the boundaries shown thereon. Carlyle v. Sloan, (1904) 44 Or 357, 75 P 217.

A grantor who had by his own conduct influenced his grantee to so act with relation to the property conveyed that he would have been injured if the grantor changed his position in the matter was estopped to claim otherwise. Clark v. Hindman, (1905) 46 Or 67, 76, 79 P 56.

Where a wholesale dealer permits a salesman to hold himself out as an independent dealer, he will be estopped from denying the salesman's right to assign notes taken for the goods. Gardner v. Wiley, (1905) 46 Or 96, 79 P 341.

A surety is estopped to deny the validity of a bond where he signed and delivered it to the principal on condition that another surety be obtained but the bond was nevertheless delivered to the obligee without notice of the condition. Wollenberg v. Sykes, (1907) 49 Or 163, 89 P 148.

(7) As affected by statute of frauds. In a suit for an accounting of the profits under an executed agreement, a partner who received the entire profits is estopped from claiming that the agreement is void under the statute of frauds. Flower v. Barnekoff, (1890) 20 Or 132, 25 P 370, 11 LRA 149.

Where the promise of plaintiff was void under the statute of frauds, plaintiff was not estopped in an action at law from asserting such invalidity even though defendant had acted on the promise to his detriment. Dechenbach v. Rima, (1904) 45 Or 500, 77 P 391, 78 P 666; Zeuske v. Zeuske, (1909) 55 Or 65, 103 P 648, 105 P 249, Ann Cas 1912A, 557.

Where the vendor of a contract for the sale of land gave his oral consent to an extension of the time of performance and the purchaser acted on such consent, the vendor was not permitted to say such consent was invalid because it was not in writing. Neppach v. Ore. & Calif. R.R., (1905) 46 Or 374, 394, 80 P 482, 7 Ann Cas 1035.

5. Denial of landlord's title

A tenant is not estopped from asserting that since his entry into possession the landlord's title has expired by his own act or by operation of law. West Shore Mills Co. v. Edwards, (1893) 24 Or 475, 33 P 987; Bobell v. Wagenaar, (1923) 106 Or 232, 210 P 711; Portland Trust & Sav. Bank v. Lincoln Realty Co., (1946) 180 Or 96, 170 P2d 568.

A tenant's estoppel to deny his landlord's title ceases upon a complete and good faith surrender of the possession of the demised premises to the landlord. Treadgold v. Willard, (1916) 81 Or 658, 160 P 803.

This section merely prevents the tenant from challenging the title of his landlord up to and including the time of execution of the lease. Seivert v. Powell, (1951) 191 Or 637, 231 P2d 791, 232 P2d 806.

6. Legitimacy

Prior to the 1971 amendment, the testimony of neither husband nor wife was competent to prove the nonaccess of the husband for the purpose of overcoming the presumption of legitimacy. Westfall v. Westfall, (1921) 100 Or 224, 197 P 271, 13 ALR 1428.

Prior to the 1971 amendment, it was no abuse of judicial discretion for the court to refuse to order a blood test demanded by husband for the purpose of bastardizing a child born to his wife in lawful wedlock when the claim of illegitimacy was based upon mere suspicion of adultery. Parsons v. Parsons, (1953) 197 Or 420, 253 P2d 914.

Prior to the 1971 amendment, this presumption arises only where wife is cohabiting with husband at the time of child's conception. Burke v. Burke, (1959) 216 Or 691, 340 P2d 948.

7. Judgments, decrees or orders

Before the plaintiff in an action of trespass can avail himself of the judgment as an estoppel in another proceeding, he must show on what part of the premises the trespass was committed. Hume v. Burns, (1907) 50 Or 124, 90 P 1009.

8. Other presumptions

Where a patent in due form of law is sufficient to convey title to the land described, it will be conclusively presumed by courts of law that all prerequisites to the issuance of a valid patent were complied with. Warner Valley Stock Co. v. Morrow, (1906) 48 Or 258, 86 P 369.

The enrolled bill rule is a rule of evidence and involves a conclusive presumption of regularity. Boyd v. Olcott, (1921) 102 Or 327, 202 P 431.

FURTHER CITATIONS: Multnomah County v. White, (1906) 48 Or 183, 85 P 78; Coquille Mill & Mercantile Co. v. Johnson, (1908) 52 Or 547, 98 P 132, 132 Am St Rep 716; Lawrence Whse., Inc. v. Best Lbr., Inc., (1954) 202 Or 77, 271 P2d 661, 273 P2d 993; State v. Avent, (1956) 209 Or 181, 302 P2d 549; Bristol v. State Tax Comm., (1962) 1 OTR 81; Yandell v. United States, (1962) 208 F Supp 306, 315 F2d 141; Robinson v. Manning, (1963) 233 Or 392, 378 P2d 277; State v. Nichols, (1964) 236 Or 521, 388 P2d 739; State v. Jones, (1965) 241 Or 142, 405 P2d 514; Haggerty v. Nobles, (1966) 244 Or 428, 419 P2d 9; Van Domelen v. Westinghouse Elec. Corp., (1967) 382 F2d 385.

LAW REVIEW CITATIONS: 5 OLR 154; 11 OLR 188; 12 OLR 316; 17 OLR 211; 28 OLR 368; 32 OLR 254; 33 OLR 161; 34 OLR 199; 39 OLR 42; 40 OLR 247; 41 OLR 297; 50 OLR 44.

41.360

NOTES OF DECISIONS

1. In general
   (1) Meaning of "overcome"
   (2) Other disputable presumptions
   (3) Instructions on presumptions
   (4) Conflicting presumptions
   (5) Effect on prima facie case
   (6) Pleading
2. Subsection (1)
3. Subsection (2)
4. Subsection (3)
5. Subsection (4)
6. Subsection (5)
7. Subsection (6)
8. Subsection (7)
9. Subsection (8)
10. Subsection (9)
11. Subsection (10)
12. Subsection (11)

1. In general

(1) Meaning of "overcome". The question of whether a presumption is overcome or not is, in the first instance, for the jury. Doherty v. Hazelwood Co., (1919) 90 Or 475, 175 P 849, 177 P 432; Sather v. Giaconi, (1924) 110 Or 433, 220 P 740.

Ordinarily, whether an inference or presumption is overcome is a question for the jury, but if the evidence is of such a character that but one reasonable deduction can be made therefrom the court may so declare as a matter of law. Judson v. Bee Hive Auto Serv. Co., (1931) 136 Or 1, 294 P 588, 297 P 1050, 74 ALR 944; Bunnell v. Parelius, (1941) 166 Or 174, 111 P2d 88.

The meaning of the term "overcome" is made plain by other provisions of the code. Hansen v. Ore.-Wash. R.R. & Nav. Co., (1920) 97 Or 190, 188 P 963, 191 P 655.

Presumptions have probative value and do not necessarily disappear when evidence is offered in opposition, but only when evidence to the contrary has overcome the presumption. State v. St. Pierre, (1960) 224 Or 395, 356 P2d 432.

Presumptions founded on reasonable probability must prevail against mere possibilities. Kankkonen v. Hendrickson, (1962) 232 Or 49, 374 P2d 393, 99 ALR 2d 296.

The word "overcome" is construed to mean equal or outweigh. United States Nat. Bank v. Underwriter's at Lloyd's, London, (1964) 239 Or 298, 396 P2d 765.

Presumptions created by subsections (1), (18), (19) and (33) [now (32)] were overcome by the evidence. Milliorn v. Clow, (1902) 42 Or 169, 70 P 398.

Presumption of special agency from proof of general agency was not overcome by other evidence. Thomas v. Smith-Waggoner Co., (1925) 114 Or 69, 234 P 814.

(2) Other disputable presumptions. The only presumptions of law are those enumerated in the statutes. Judson v. Bee Hive Auto Serv. Co., (1931) 136 Or 1, 294 P 588, 297 P 1050, 74 ALR 944; Bunnell v. Parelius, (1941) 166 Or 174, 111 P2d 88.

This section was not intended to constitute an exhaustive list of all possible rebuttal presumptions. Bunnell v. Parelius (concurring opinion), (1941) 166 Or 174, 111 P2d 88; Rich v. Cooper, (1963) 234 Or 300, 380 P2d 613.

The journal entry rule involves a disputable presumption and is a rule of evidence. Boyd v. Olcott, (1921) 102 Or 327, 202 P 431.

The appointment of a guardian creates a disputable presumption of mental incapacity to make a will. Lettiken v. Provolt, (1944) 175 Or 128, 151 P2d 736.

A police officer is presumed to act in good faith in determining the amount of force to be used. Rich v. Cooper, (1963) 234 Or 300, 380 P2d 613.

The presumptions of this section apply with equal force to tax cases. Sproul v. State Tax Comm., (1963) 1 OTR 31, rev'd on other grounds, 234 Or 567, 382 P2d 99.

Presumption that every man knows the law is not applicable to zoning ordinances. Farnsworth v. Feller, (1970) 256 Or 56, 471 P2d 792.

(3) Instructions on presumptions. In order that a jury may determine when a presumption has been overcome by other evidence, it must be instructed as to the existence of the presumption. Wyckoff v. Mut. Life Ins. Co., (1944) 173 Or 592, 147 P2d 227.

It would be error for the trial court to instruct the jury on the strength of a presumption of fact and on the amount of proof necessary to overcome it. Wehoffer v. Wehoffer, (1945) 176 Or 345, 156 P2d 830.

Strictly a presumption is not evidence but the facts upon which a presumption is based may be treated as evidence. United States Nat. Bank v. Underwriter's at Lloyd's, London, (1964) 239 Or 298, 396 P2d 765.

It was error to instruct the jury that a disputable presumption could be overcome only by direct evidence. Lake County v. Neilon, (1903) 44 Or 14, 74 P 212.

Instruction that a prima facie case was to be credited by the jury unless the contrary was established did not invade the province of the jury in view of this section. State v. Robinson, (1927) 120 Or 508, 252 P 951.

An instruction as to the existence of a presumption of innocence was properly given. State v. Dennis, (1945) 177 Or 73, 159 P2d 838.

It was error to instruct the jury that the presumption against suicide stands unless overcome by opposing evidence. United States Nat. Bank v. Underwriter's at Lloyd's, London, (1964) 239 Or 298, 396 P2d 765.

(4) Conflicting presumptions. The presumption of innocence and presumption of identity of a person from identity of name are of equal weight. State v. Olcott, (1913) 67 Or 214, 135 P 95, 135 P 902; State v. Kozer, (1922) 105 Or 509, 526, 210 P 172.

In a prosecution for adultery the presumption of innocence of subsection (1) overcomes the presumption of marriage of subsection (29) [now (30)]. State v. Wakefield, (1924) 111 Or 615, 228 P 115.

If the presumption of innocence encounters proof of identity of name, the courts nevertheless engage in a presumption of identity. State v. Black, (1935) 150 Or 269, 42 P2d 171, 44 P2d 162.

(5) Effect on prima facie case. Proof of defendant's ownership of the automobile causing injury, which was negligently operated by his son who was under 16 years, makes out a prima facie case for defendant's liability for such injury, and defendant may not invoke the presumption of innocence to rebut such prima facie case since before a prima facie case can be established every inference or presumption must be overcome. Millar v. Semler, (1931) 137 Or 610, 2 P2d 233, 3 P2d 987.

(6) Pleading. Facts which the law presumes exist need not be pleaded. Wolfgang v. Thiele Catering Co., (1929) 128 Or 433, 275 P 33; State v. Smith, (1948) 182 Or 497, 188 P2d 998.

Facts which are presumed need not be pleaded, but to raise an issue on facts which are presumed the contrary

averment must be made by the opposing party. State v. Clatsop County, (1912) 63 Or 377, 125 P 271.

Where a complaint should have alleged that defendant was innocent of a crime but did not, the presumptions under subsections (1), (19) and (20) cured the defect. Turney v. Tillman Co., (1924) 112 Or 122, 228 P 933.

2. Subsection (1)

Where fraud is charged, to overcome the presumption provided by this subsection the evidence and proof of the fraud should be clear and satisfactory in cases both at law and in equity. Wimer v. Smith, (1892) 22 Or 469, 486, 30 P 416; Woodward v. Barbur, (1911) 59 Or 70, 76, 116 P 101; Metropolitan Cas. Ins. Co. v. Lesher Inc., (1935) 152 Or 161, 52 P2d 1133.

Where the erroneous admission of evidence of a distinct crime is relied on for reversal, it will not be presumed that the facts shown constitute a crime in order to reverse the case where no criminal intent was proved. State v. Roberts, (1887) 15 Or 187, 194, 13 P 896.

Where in an action for libel the publication charges plaintiff with the crime of larceny, the presumption of innocence is prima facie evidence of want of probable cause and is sufficient to compel the defendants to allege and prove the truth of the charge. Thomas v. Bowen, (1896) 29 Or 258, 266, 45 P 768.

Where the defense to an action on an insurance policy is that the property was intentionally burned, it is proper to charge the jury that the person charged with the crime is presumably innocent and that such presumption should be considered in arriving at a verdict. First Nat. Bank v. Commercial Assur. Co., (1898) 33 Or 43, 52 P 1050.

This presumption is a substantial part of the law and remains with the defendant from the beginning of the trial until a verdict is found. State v. Rosasco, (1922) 103 Or 343, 205 P 290.

That property was obtained by a son from his mother lawfully is presumed in the absence of contrary allegation and proof. Holder v. Harris, (1927) 121 Or 432, 248 P 145, 253 P 869, 254 P 1021.

This presumption is comprehensive enough to include a presumption against suicide. Wyckoff v. Mut. Life Ins. Co., (1944) 173 Or 592, 147 P2d 227.

This presumption is not taken away by a statute which requires a defendant relying on a defense of insanity to prove his insanity beyond a reasonable doubt. State v. Grieco, (1948) 184 Or 253, 195 P2d 183.

The word "wrong" includes negligent as well as intentional acts. State v. St. Pierre, (1960) 224 Or 395, 356 P2d 432.

An instruction as to the presumption of innocence was sufficient. State v. Anthony, (1912) 62 Or 141, 124 P 475; State v. Dennis, (1945) 177 Or 73, 159 P2d 838.

In an action for injuries due to defendant's negligence, it was error not to instruct the jury that the defendant was presumed innocent of crime or wrong. Dorn v. Clarke-Woodward Drug Co., (1913) 65 Or 516, 133 P 351.

In an action to set aside a deed from mother to son, this presumption was evidence and with other testimony was sufficient to sustain a finding for the son. Rowe v. Freeman, (1918) 89 Or 428, 456, 172 P 508, 174 P 727.

3. Subsection (2)

In a prosecution for arson an unlawful intent will be presumed from the unlawful act of setting fire to the structure and therefore evidence of other crimes to show intent is not admissible. State v. Smith, (1910) 55 Or 408, 106 P 797.

Intent to injure one assailed may be inferred from the assault. State v. Hood, (1960) 225 Or 40, 356 P2d 1100.

This presumption aided the indictment so that an allegation of intent to injure was not necessary. State v. Hosmer, (1914) 72 Or 57, 142 P 581.

In a prosecution for assault with a dangerous weapon it was not necessary to prove an unlawful intent in view of this presumption. State v. Selby, (1914) 73 Or 378, 144 P 657.

In a prosecution for assault the instruction given grounded on this subsection was not correct. State v. Cancelmo, (1917) 86 Or 379, 168 P 721.

Where defendant beat his wife over the head with an ax, the presumptions in subsections (2) and (3) apply. State v. Butchek, (1927) 121 Or 141, 143, 253 P 367, 264 P 805.

4. Subsection (3)

A person is presumed to intend the ordinary consequences of his voluntary act. Nicolai-Neppach Co. v. Abrams, (1925) 116 Or 424, 433, 240 P 870; State v. Hattrem, (1932) 140 Or 371, 13 P2d 618.

An intent to defraud the government would not be presumed from the mere fact of an omission to sufficiently stamp a conveyance. Dowell v. Applegate, (1881) 7 Fed 881, 7 Sawy 232.

Where a deadly weapon is used with violence upon a person of another and such act has a direct tendency to do some great bodily injury to the person assailed, the intent to injure him may be reasonably inferred from the act. State v. Bock, (1907) 49 Or 25, 88 P 318.

The ordinary consequences of defendant's taking of a child from its parents would be to vex, annoy and injure the parents and therefore this subsection furnished a presumption that such taking was malicious. State v. Metcalf, (1929) 129 Or 577, 278 P 974.

Instruction given was not a proper application of this subsection. State v. Davis, (1914) 70 Or 93, 140 P 448.

The motive for picketing a theatre was unlawful where there was no bona fide dispute concerning terms or conditions of employment and where the natural consequence of the picketing was to damage the business of the theatre and not benefit the union. Moreland Theatres Corp. v. Portland Moving Picture Mach. Operators' Protective Union, (1932) 140 Or 35, 12 P2d 333.

Where the ordinary consequences of a transfer are to hinder another and prevent him from realizing on his judgment, the intent to so hinder was presumed. Orr v. Bauer, (1937) 156 Or 409, 67 P2d 770.

Where defendant threw a bomb on another's property this subsection furnished a presumption that it was done with a specific intent to injure that other's property. State v. Estabrook, (1939) 162 Or 476, 91 P2d 838.

Where defendant left inflammable debris on his property which was ignited by the negligence of a stranger and caused damage to plaintiff, the neighbor of defendant, this subsection furnished a presumption that defendant intended such damage to plaintiff. Arneil v. Schnitzer, (1944) 173 Or 179, 207, 144 P2d 707.

5. Subsection (4)

Upon the execution of an absolute deed this subsection creates a presumption that the conveyance evidences the intention of the parties. Harmon v. Grants Pass Banking & Trust Co., (1911) 60 Or 69, 118 P 188.

This subsection creates a presumption that a married woman takes ordinary care to reduce to possession what she has acquired by her own efforts. Bosma v. Harder, (1919) 94 Or 219, 185 P 741.

In actions against a vessel on claims arising out of torts committed by the vessel, the rule that mere seizure of the vessel is a sufficient notice to the owner to satisfy due process of law is grounded partly on the presumption created by this subsection. Cordrey v. The Bee, (1922) 102 Or 636, 201 P 202, 20 ALR 1079.

The rule that a complaint in a negligence case need not

plead the absence of contributory negligence is based partly on this presumption. Wolfgang v. Thiele Catering Co., (1929) 128 Or 433, 275 P 33.

Failure to demand payment of debt in full for five years did not raise a presumption of payment. Thompson v. Larsen, (1926) 118 Or 421, 247 P 139.

6. Subsection (5)

Failure or refusal of a party to produce certain documents in accordance with a notice by his opponent raises a presumption that secondary evidence if introduced is less harmful than the original documents would have been, unless some sufficient excuse is given for failing to produce them. Schreyer v. Turner Flouring Mills Co., (1896) 29 Or 1, 9, 43 P 719.

Where a party charged in an equitable proceeding with bad faith holds back proof exclusively within its control or fails to produce it on demand, the law puts the interpretation upon such conduct most unfavorable to such party. Williams v. Commercial Nat. Bank, (1907) 49 Or 492, 495, 90 P 1012, 91 P 443, 111 LRA(NS) 857.

In an action for the reformation of a deed for mistake failure of plaintiff to produce original parties to the deed did not raise a presumption that their testimony was adverse to plaintiff where the uncontradicted evidence clearly established the alleged mistake. Mooney v. Holcomb, (1888) 15 Or 639, 16 P 716.

The failure of a party alleging fraud to produce persons who he testified were present when the representations were made raised the presumption that the testimony of such person would be adverse. Wimer v. Smith, (1892) 22 Or 469, 477, 30 P 416.

Where the authority of an agent to execute a note in an action thereon against the principal was in issue, the failure of the agent who was an unwilling witness to produce his power of attorney did not without other evidence raise a presumption that he was authorized to execute the note. Connell v. McLoughlin, (1895) 28 Or 230, 237, 42 P 218.

No presumption against defendant arose where a witness previously convicted for the same crime refused to testify on behalf of the state on the ground that it would incriminate him, as no understanding between the witness and defendant was shown whereby the witness agreed not to testify at defendant's trial. State v. Harper, (1899) 33 Or 524, 55 P 1075.

Concealment of the body of a homicide victim would be presumed to be adverse to the accused but the suppression of the evidence of the offense did not necessarily prove that the killing was done with malice. State v. Magers, (1899) 35 Or 520, 528, 57 P 197.

Plaintiff's destruction of her prior written statement describing the manner in which she was hurt did not raise a presumption that it would be adverse since such statement would be admissible only to impeach her testimony and this could be done by proving the contents of the statement and defendant made no effort to do so. Smitson v. So. Pac. Co., (1900) 37 Or 74, 60 P 907.

Failure of plaintiff to offer in evidence an X-ray taken several months after the accident not showing the injuries alleged was not to be a suppression of evidence. Caldwell v. Hoskins, (1920) 94 Or 567, 186 P 50.

In prosecution for causing death of unborn child by unlawful abortion, failure of state to offer in evidence object claimed to be the foetus and scraping of the woman's uterus raised an adverse presumption. State v. Willson, (1926) 116 Or 615, 241 P 843.

There was no basis for saying that evidence had been suppressed. French v. State Ind. Acc. Comm., (1937) 156 Or 443, 68 P2d 466.

7. Subsection (6)

A party is expected to furnish the best evidence obtainable so as to avoid the presumption that higher evidence would be adverse. Harmon v. Decker, (1902) 41 Or 587, 68 P 11; 1111, 93 Am St Rep 748; Scott v. Astoria R. R. (1903) 43 Or 26, 34, 72 P 594, 99 Am St Rep 710, 62 LRA 543; Anderson v. Adams, (1903) 43 Or 621, 631, 74 P 215.

The best evidence to prove a joint bank account would be the records of the bank where the funds are on deposit. Evans v. Trude, (1952) 193 Or 648, 240 P2d 940.

In an action to reform a deed on grounds of mistake the testimony of the original parties to the deed was not higher evidence than the acts done by such parties following the execution of the deed. Mooney v. Holcomb, (1888) 15 Or 639, 16 P 716.

Where secondary evidence was admitted because of defendant's refusal to produce on notice primary evidence and such secondary evidence created a reasonable inference that plaintiff's claims were true, the failure of defendant to produce the primary evidence strengthened that inference. Schreyer v. Turner Flouring Co., (1896) 29 Or 1, 43 P 719.

Where oral evidence as to a written agreement was introduced, it is presumed that the written agreement if produced would have been adverse. Reid v. Wentworth & Irwin, (1937) 155 Or 265, 63 P2d 210.

This presumption could not be used as affirmative or substantive evidence to make out a prima facie case for plaintiff when he had otherwise failed to sustain the burden of proof. Epton v. Moskee Inv. Co., (1946) 180 Or 86, 174 P2d 418.

8. Subsection (7)

Where the issue was whether $35 sent monthly by plaintiff to defendant's testator was a loan or payment of a debt and there was a conflict in the evidence, a refusal to give an instruction predicated on this presumption was error. Consor v. Andrew, (1912) 61 Or 483, 123 P 46.

9. Subsection (8)

In a creditor's bill to set aside a transfer of bonds by defendant to another, defendant failed to prove his affirmative allegations that the bonds belonged to such other by relying solely on this presumption. Orr v. Bauer, (1937) 156 Or 409, 67 P2d 770.

10. Subsection (9)

This presumption is but a declaration of the commonlaw rule. Dencer v. Jory, (1930) 131 Or 653, 284 P 163, 70 ALR 855.

Possession by mortgagor of note secured by a mortgage and the abstract of the premises mortgaged raised a presumption that the debt had been paid. Jones v. Hill, (1912) 62 Or 53, 124 P 206.

In an executor's action on a note payable to the decedent executed by the latter's husband, where the defendant offered no evidence as to how he obtained possession of the instrument but relied on the presumption of payment and of ownership from possession, the issue of payment was properly submitted to the jury in view of the inference of his access to the decedent's property after her death. Dencer v. Jory, (1930) 131 Or 653, 284 P 163, 70 ALR 855.

11. Subsection (10)

This presumption was overcome by proof that former instalments of rent were not fully paid. Leadbetter v. Pewtherer, (1912) 61 Or 168, 121 P 799.

12. Subsection (11)

Possession of note is presumptive evidence of ownership. Sturgis v. Baker, (1901) 39 Or 541, 65 P 810; Dean v. Felton, (1928) 125 Or 122, 266 P 236.

Logical sequence of this presumption is that declarations of a person in possession of property are competent evidence to show the true ownership of the property. Jones Land & Livestock Co. v. Seawell, (1918) 90 Or 236, 176 P

186; Keller v. Johnson, (1921) 99 Or 113, 194 P 185; Tracy v. Juanto, (1922) 103 Or 416, 205 P 822.

A deed in the possession of the grantee is presumed to have been delivered. Flint v. Phipps, (1888) 16 Or 437, 448, 19 P 543.

Possession of property and the exercising of acts of ownership over it raise a presumption of ownership. Winklebleck v. Portland, (1934) 147 Or 226, 31 P2d 637.

A presumption is created by this section notwithstanding the fact that another person may have a certificate of title to the property involved. Dicillo v. Osborn, (1955) 204 Or 171, 282 P2d 611.

Vendor's possession of personal property created a presumption of ownership so that a sale by him while so possessed carried with it an implied warranty of valid title. Balte v. Bedemiller, (1900) 37 Or 27, 60 P 601, 82 Am St Rep 737.

Where plaintiff sought to recover for the theft of jewelry from her apartment, an allegation that the jewelry was taken from her apartment is with the aid of this presumption a sufficient allegation of her ownership of the jewelry. Smith v. Nat. Sur. Co., (1915) 77 Or 17, 149 P 1040.

An instruction that until this presumption was overcome by other evidence the jury was to accept it as binding so far as it applied to the facts of the case was properly refused. Benson v. Johnson, (1917) 85 Or 677, 165 P 1001, 167 P 1014.

In an action to declare a certain fund to be community property, the deposit by the husband of the fund in a bank to his own account raised a presumption that it was his separate property. Bosma v. Harder, (1919) 94 Or 219, 185 P 741.

The possession of a note by the holder and original payee after the death of the maker raised the statutory presumption of ownership. Johnston v. Apple, (1920) 98 Or 278, 193 P 1024.

An assignee of a mortgage who did not require the delivery of the note and mortgage to him at the time of the assignment must bear the loss from the mortgagee's pledging the note and mortgage, having vested him with possession giving rise to a presumption of ownership. United States Nat. Bank v. Holton, (1921) 99 Or 419, 195 P 823.

Declaration by one in possession of herd of sheep that the herd was owned by another was sufficient to overcome this presumption. Tracy v. Juanto, (1922) 103 Or 416, 205 P 822.

In an executor's action on a note payable to decedent executed by the latter's husband, where the defendant offered no evidence as to how he obtained possession of the instrument but relied on the presumption of payment and of ownership from possession, the issue of payment was properly submitted to the jury in view of the defendant's access to decedent's property after her death. Dencer v. Jory, (1930) 131 Or 653, 284 P 163, 70 ALR 855.

Where bonds in the possession of the defendant were alleged to have been transferred in fraud of his creditors to another and defendant relied solely on the presumption of subsection (8), his failure to sustain the burden of proof was partly due to this subsection. Orr v. Bauer, (1937) 156 Or 409, 67 P2d 770.

Proprietors of repair shop were not required to surrender possession of truck immediately to the holder of the certificate of title where truck had been delivered to them for repairs by a third person. Mogul Trans. Co. v. Larison, (1947) 181 Or 252, 181 P2d 139.

13. Subsection (12)

(1) Acts of ownership. Making repairs on a structure raises a presumption that the premises belong to or are under the control of the party making the repairs. Friendly v. Ruff, (1912) 61 Or 42, 47, 120 P 745.

The evidence that the defendant built the fence and kept it in repair raised disputable presumption of ownership under this subsection. Siglin v. Coos Bay R. R., (1899) 35 Or 79, 82, 56 P 1011, 76 Am St Rep 463.

An instruction that until this presumption was overcome by other evidence the jury was to accept it as binding so far as it applied to the facts of the case was properly refused. Benson v. Johnson, (1917) 85 Or 677, 165 P 1001, 167 P 1014.

In an action to declare a certain fund to be community property, the fact that husband deposited the money in his own name raised a presumption that it was his separate property. Bosma v. Harder, (1919) 94 Or 219, 185 P 741.

In replevin the defendant was permitted to testify that he had given mortgages on the property thus creating a presumption of ownership. Wheeler v. Steadman, (1921) 99 Or 414, 195 P 818.

(2) Common reputation. Evidence of reputed ownership is inadmissible where the character of plaintiff's rights are set out in the pleadings and undisputed. Heckela v. Coos Bay Liquor Co., (1914) 71 Or 149, 142 P 547.

Common reputation is admissible in evidence to prove the ownership of property in dispute and this section changes the general rule in this respect. Wilson v. Maddock, (1875) 5 Or 480; Bartel v. Lope, (1877) 6 Or 321.

Common reputation as to the ownership of the land was not constructive notice of the reputed owner's title to a purchaser who was living in a town five miles distant from the land. Raymond v. Flavel, (1895) 27 Or 219, 248, 40 P 158.

Evidence that defendant was commonly reputed to be the proprietor of the gambling game at which plaintiff lost money was admissible to prove ownership. Meyers v. Dillon, (1901) 39 Or 581, 65 P 867, 66 P 814.

In a suit to enjoin the closing of an alleged street that had never been dedicated, evidence that this strip of land was commonly thought to be reserved for a street was admissible. Morse v. Whitcomb, (1909) 54 Or 412, 102 P 788, 103 P 775, 135 Am St Rep 832.

In an ejectment action evidence that plaintiff and her predecessors had claimed, occupied and cultivated the contested land up to a certain fence was admissible. Parker v. Wolf, (1914) 69 Or 446, 138 P 463.

In a suit to enjoin a trespass by the defendant over certain land, proof of plaintiff's cultivation of that land was sufficient evidence to prove plaintiff's ownership of that land. Hanns v. Friedly, (1947) 181 Or 631, 184 P2d 855.

14. Subsection (13)

Where county orders drawn in favor of a particular person were afterwards found in the possession of the county treasurer indorsed with the name of such person and canceled, a presumption arose that they were received and indorsed by such party in the usual course of business and that payment had been made. Portland v. Besser, (1882) 10 Or 242, 248.

Where defendant was in possession of orders for the payment of money drawn on himself by plaintiff their payment would be presumed. Raski v. Wise, (1910) 56 Or 72, 107 P 984.

15. Subsection (14)

In view of this presumption a deed executed by Superintendent of Schools was admissible in evidence without first establishing his authority to execute the deed. Dolph v. Barney, (1874) 5 Or 191, 209.

In proceedings for habeas corpus against a sheriff who held petitioner in custody under a commitment by a justice of the peace, it was presumed that the appointment of the justice was regular and that he was acting in the lawful exercise of his jurisdiction. Douros v. Hurlburt, (1920) 97 Or 39, 191 P 319.

16. Subsection (15)

(1) In general. The presumption of official rectitude presumes performance of official acts in a proper manner not the accuracy of officials in matters of judgment. Strawn v. State Tax Comm., (1963) 1 OTR 98, modified, 236 Or 299, 388 P 2d 286; Sproul v. State Tax Comm., (1963) 1 OTR 31 rev'd on other grounds, 234 Or 567, 382 P2d 99.

There is a presumption that if a final act can be done only after the performance of a prior act, proof of the final act carries with it a presumption of proper performance of the prior act. Barclay v. State Bd. of Educ., (1966) 244 Or 294, 417 P2d 986; State v. Devore, (1971) 4 Or App 425, 479 P2d 1013.

The journal entry rule involves a disputable presumption of regularity. Boyd v. Olcott, (1921) 102 Or 327, 202 P 431.

A disputable presumption that the public officer has reasonably exercised his discretionary power is included in this presumption. Ring v. Patterson, (1931) 137 Or 234, 1 P2d 1105.

The presumption of this subsection is not applicable to the performance of tests on equipment by the State Board of Health as required under ORS 483.644 (2) (c). State v. Fogle, (1969) 254 Or 268, 459 P2d 873.

Abuse of discretion is never presumed and on the contrary, this section informs us that the presumption is that "official duty has been regularly performed." Oregon Printing Ind. v. Chamberlain, (1970) 2 Or App 401, 467 P2d 657, Sup Ct review denied.

A disputable presumption that the public officer has reasonably exercised his discretionary power is included in this presumption. Feves v. Dept. of Rev., (1971) 4 OTR 302.

In view of this presumption, a deed executed by Superintendent of Schools was admissible in evidence without first showing that he had fully complied with all the requirements of the statutes in relation thereto. Dolph v. Barney, (1874) 5 Or 191, 209.

Where county orders drawn in favor of defendant were afterwards found in the possession of the county treasurer indorsed with the name of defendant and canceled, this presumption furnished sufficient evidence, in the absence of anything to the contrary, that such orders had been delivered to defendant. Portland v. Besser, (1882) 10 Or 242.

From the fact that the county court made provision for the erection of a bridge and the payment therefor it is presumed that it was built on a county road. Bank of Idaho v. Malheur County, (1897) 30 Or 420, 425, 45 P 781, 35 LRA 141.

A presumption that official duty was regularly performed in making a survey cannot be invoked where it does not appear that an official surveyor made the survey. Albert v. Salem, (1901) 39 Or 466, 65 P 1068, 66 P 233.

Where it appeared that a county treasurer at the close of his first term had money of the county in his possession, it was presumed that he paid this sum over to himself as his successor in office. Linn County v. Morris, (1902) 40 Or 415, 67 P 295.

It was presumed that a patent, referred to as having been recorded in the county deed records, was executed by the government officials with all the formalities required by law. McLeod v. Lloyd, (1903) 43 Or 260, 71 P 795, 74 P 491.

It was presumed that a deed to the state duly recorded was regularly accepted pursuant to law by the proper authorities of the state. Stephenson v. Van Blokland, (1911) 60 Or 247, 118 P 1026.

It was presumed that the Secretary of State had properly checked a petition for a referendum before causing it to be submitted to the electors. State v. Olcott, (1913) 67 Or 214, 221, 135 P 95, 135 P 902.

The State Industrial Accident Commission was entitled to this presumption and was not required to file an affidavit of merits to have defaulted judgment by circuit court set aside. Bratt v. State Ind. Acc. Comm., (1925) 114 Or 644, 236 P 478.

Where defendant city alleged and plaintiff admitted that the official action in the execution of the contract upon which the suit was based was not regularly performed, this presumption could not be relied on. Kernin v. City of Coquille, (1933) 143 Or 127, 21 P2d 1078.

It was presumed that the District Boundary Board notified each of the school boards concerned that the proposition to consolidate was defeated. School Dist. 1 v. Sch. Dist. 45, (1934) 148 Or 554, 576, 37 P2d 873.

A receiver was presumed to have armed himself with the required authority to effect compromise of an indebtedness to the bank since it was his official duty to do so. Lothstein v. Fitzpatrick, (1943) 171 Or 648, 138 P2d 919.

The statutory presumption was not applicable to the final estimate by the commission of work performed. State Hwy. Comm. v. Heintz Constr. Co., (1967) 245 Or 530, 423 P2d 175.

An instruction under this section was inappropriate in a de novo proceeding on review under the implied consent law. Garcia v. Dept. of Motor Vehicles, (1969) 253 Or 505, 456 P2d 85.

(2) Elections. All officers engaged in conducting an election are presumed to have acted in accordance with the law until the contrary shall be specifically alleged and fully proved. Re Application of Riggs, (1922) 105 Or 531, 207 P 175, 1005, 210 P 217.

It was presumed that election notices had been properly posted. State v. Sengstacken, (1912) 61 Or 455, 122 P 292, Ann Cas 1914B, 230; State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637, Ann Cas 1914C, 483; Latourette v. Kruse, (1932) 139 Or 422, 10 P2d 592.

Conviction of accused for violation of a local option law was reversed where it was not alleged or proved that an election adopting that law had been held and this presumption was not sufficient to cure that defect. State v. Townsend, (1911) 60 Or 223, 118 P 1020.

(3) Assessments. In an action to enjoin collection of a special assessment where the complaint did not allege that notice to property holders was not given, it was presumed that proper notice was given. Barkley v. Oregon City, (1893) 24 Or 515, 33 P 978; Hendry v. Salem, (1913) 64 Or 152, 129 P 531.

The presumption that a city council did its duty in fixing assessments was overcome by proof of facts showing an abuse of discretion. Oregon & Calif. R. R. v. Portland, (1894) 25 Or 229, 236, 35 P 452, 22 LRA 713.

It was presumed that the city recorder took the names of plaintiffs from the last annual city assessment as the owners of certain lots. Clinton v. Portland, (1894) 26 Or 410, 38 P 407.

Where a taxpayer was notified to show cause before a county court why his assessment should not be increased and he appeared at the hearing, it was presumed that the judgment was rendered on sufficient evidence though the record did not show on what the judgment was predicated. Godfrey v. Douglas County, (1896) 28 Or 446, 43 P 171.

In an action to set aside a special assessment it was presumed that the adjournments of the council were regularly taken. Duniway v. Portland, (1905) 47 Or 103, 117, 81 P 945.

Where there was an issue of fact as to whether or not an assessment had been entered in the lien docket of the defendant, this presumption did not aid the defendant. Clark v. Salem, (1912) 61 Or 116, 121 P 416, Ann Cas 1914B, 205.

The record of proceedings of city council to levy special assessment was presumed to be true. Dillon v. Beacom, (1913) 67 Or 118, 121, 134 P 778, 135 P 336.

Since the city auditor was the proper person to make a reassessment for a street improvement, his certificate

stating how such reassessment was made was presumed to be true. Reiff v. Portland, (1914) 71 Or 421, 141 P 167, 142 P 827.

In the absence of evidence to the contrary it was presumed that the assessor made the apportionment of tax. Linn County v. Rozelle, (1945) 177 Or 245, 279, 162 P2d 150.

Description of real property on the assessment roll and foreclosure list was presumed to properly identify the property. Champ v. Stewart, (1949) 186 Or 656, 208 P2d 454.

(4) Tax matters. Proceedings for raising public revenues by taxes are entitled to the benefit of the presumption that official duty has been regularly performed. Kelly v. Herrall, (1884) 20 Fed 364.

Failure by a sheriff to make the monthly settlement of tax collections required is not of itself sufficient as a matter of law to dispel the presumption that official duty has been done. Lake County v. Neilon, (1903) 44 Or 14, 74 P 212.

Where no substantial error is proven in the assessor's methods of valuation and the ultimate fact of true cash value is left in doubt, evidential value of the presumption of assessment validity continues. Feves v. Dept. of Rev., (1971) 4 OTR 302.

Taxpayer has the burden of proving his case by a preponderance of the evidence in the face of this presumption. J. R. Widmer, Inc. v. Dept. of Rev., (1971) 4 OTR 361.

It was presumed that if a tax was paid to a deputy sheriff he gave the party a receipt therefor and made a corresponding entry on the stub thereof. Tracy v. Reed, (1889) 38 Fed 69, 13 Sawy 622, 2 LRA 773.

Where it appeared that deputy tax collectors placed their collections with the other funds of the office, it was presumed in a criminal case for embezzlement that such funds came into the hands of the principal, and in a settlement of his accounts he was charged with such sums. State v. Neilon, (1903) 43 Or 168, 173, 73 P 321.

In an action by the state against a county for the county's proportion of state taxes, it was presumed that the necessary steps in the proceedings by the state board in making the apportionment were taken and such steps did not have to be pleaded. State v. Clatsop County, (1912) 63 Or 377, 125 P 271.

It was presumed by the Supreme Court that property upon which an inheritance tax was exacted was within the jurisdiction of the state. D'Arcy v. Snell, (1939) 162 Or 351, 91 P2d 537.

(5) Judicial matters. Since official duty is presumed to be regularly performed, a sheriff's deed is prima facie evidence of title. Keerims Bros. v. Mauney, (1950) 189 Or 651, 219 P2d 753, 222 P2d 730.

Where a confession of judgment was made by the proper officer, it was presumed that he was duly authorized. Miller v. Bank of British Columbia, (1868) 2 Or 291.

Where there was a certificate in the record in due form signed by an officer showing service of process, the court presumed that the officer did his duty and made the service. Ladd v. Higley, (1874) 5 Or 296.

On an appeal it was presumed that execution was issued in accordance with the law where issue on that point was not raised in trial court and a copy of the execution had not been annexed to the complaint. Whitley v. Murphy, (1874) 5 Or 328, 20 Am Rep 741.

A complaint against a sheriff, to recover the surplus realized from a foreclosure sale, was demurrable for failing to allege that the sheriff neglected or failed to pay such money to the clerk at the time his writ was returnable. Butler v. Smith, (1890) 20 Or 126, 130, 25 P 381.

In a mandamus proceeding to compel the apportionment of school funds under the law of 1889, it was unnecessary to allege the manner in which the county school superintendent arrived at the conclusion of the number of persons of school age within a given district. School Dist. v. Lambert, (1895) 28 Or 209, 220, 42 P 221.

That the trial court instructed the jury that they should find for the plaintiff in the amount admitted by defendant to be due was presumed. Jacobs v. Oren, (1897) 30 Or 593, 48 P 431.

It was presumed that a law action was properly referred to a referee and that the amount allowed as an attorney's fee on a note was reasonable. Trummer v. Konrad, (1897) 32 Or 54, 56, 51 P 447.

In appointing viewers of a proposed road it was presumed that the county court appointed disinterested freeholders as the law required. Towne v. Klamath County, (1898) 33 Or 225, 53 P 604.

In a mandamus action to compel the issuance of bench warrants by municipal judge, it was presumed that he had performed his duty so that the issuance of the bench warrants devolved on the clerk of the municipal court and therefore the writ of mandamus was improperly directed. State v. Williams, (1904) 45 Or 314, 77 P 965, 67 LRA 166.

An indictment though not under oath was sufficient in view of this presumption. State v. Guglielmo, (1905) 46 Or 250, 79 P 577, 80 P 103, 7 Ann Cas 976, 69 LRA 466.

It was presumed that the trustee in bankruptcy took possession of the property upon qualifying. Goodnough Mercantile Co. v. Galloway, (1906) 48 Or 239, 243, 84 P 1049.

Where the trial court made findings in accordance with the averments of the original complaint, ignoring an amended answer, it was presumed that no permission was granted to file the amended answer. Freeman v. Preston, (1907) 49 Or 175, 89 P 375.

It was presumed that the jury did its duty and reached their verdict on the basis of the facts proved together with the instructions of law. State v. Reed, (1908) 52 Or 377, 389, 97 P 627.

It was presumed that the justice to whom the cause was transferred was the nearest justice. White v. Brown, (1909) 54 Or 7, 11, 101 P 900.

Where it affirmatively appeared that justice of the peace had not complied with the statute this presumption was overcome. Smith v. McDuffer, (1914) 72 Or 276, 142 P 558, 143 P 929, Ann Cas 1916D, 947.

The existence of sufficient reasons for a circuit judge taking the place of a county judge was presumed. State v. Holman, (1914) 73 Or 18, 26, 144 P 429.

It was presumed that referees considered the value of the house, barn and other improvements in making a division of property as between a husband and wife in partition proceedings. Gillard v. Gillard, (1918) 88 Or 95, 171 P 557.

X-ray plates showing the wound on defendant's arm, taken while he was under arrest, were not incompetent as having been taken without defendant's consent. State v. Casey, (1923) 108 Or 386, 388, 213 P 771, 217 P 632.

The presumption of the performance of official duty in appointing a guardian for an insane person is a sufficient showing that the county health officer was regularly sworn. In re Lyon, (1929) 128 Or 94, 265 P 1087.

Where a writ of attachment and summons were issued on the same day, it will be presumed that the summons was actually placed in the hands of the sheriff at or before the issuance of the writ. Weinbrenner Inc. v. Finne, (1939) 105 F2d 272.

It was presumed that the proper procedure had been followed by the committing magistrate. State v. Lillie, (1943) 172 Or 194, 139 P2d 576.

In view of this presumption, the Supreme Court was warranted in believing that since the mandatory sentence required by the Habitual Criminal Act was not imposed on respondent, the trial judge was unaware of respondent's previous felony conviction. Macomber v. State, (1947) 181 Or 208, 180 P2d 793.

Return stating that defendant named cannot be found placed upon plaintiff suing sheriff for misfeasance the bur-

den of producing evidence to overcome that presumption. Hammons v. Schrunk, (1956) 209 Or 127, 305 P2d 405.

It was a reversible error for the trial court not to instruct the jury that there was a disputable presumption that the State Industrial Accident Commission had properly determined the amount of disability suffered by plaintiff. Dimitroff v. State Ind. Acc. Comm., (1957) 209 Or 316, 306 P2d 398.

In the absence of evidence to contrary, entry of order of continuance in criminal case presumes that court found facts necessary to support it. State v. Ellison, (1957) 209 Or 672, 307 P2d 1050.

It is presumed that the jury followed the court's instructions. State v. Elkins, (1967) 248 Or 322, 432 P2d 794.

17. Subsection (16)

An adjudication of the jurisdictional fact of residence upon proper allegations and proofs presents a case, not of presumption under this section, but of res adjudicata. Holmes v. Ore. & Calif. R.R., (1881) 9 Fed 229, 7 Sawy 380.

It will be presumed that a justice of the peace acted in the lawful exercise of his jurisdiction in committing a person to jail. Douros v. Hurlburt, (1920) 97 Or 39, 191 P 319.

The presumption of legality attaching to the acts of a court of general jurisdiction over the subject matter renders it unnecessary that every fact essential to jurisdiction should expressly appear on the face of the record. In re Lyon, (1928) 128 Or 94, 265 P 1087.

In the absence of evidence to contrary, entry of order of continuance in criminal case presumes that court found facts necessary to support it. State v. Ellison, (1957) 209 Or 672, 307 P2d 1050.

In absence of evidence, presumption exists that circuit court obtains jurisdiction over juvenile through a proper remand. State v. Saunders, (1970) 1 Or App 620, 464 P2d 712, Sup Ct **review denied.**

The presumption that the order vacating a judgment was properly entered was not overcome by a mere statement in the alternative writ of mandamus that the court was without jurisdiction to enter said order. State v. Beveridge, (1924) 112 Or 19, 228 P 100.

Though record on appeal did not disclose any evidence taken before trial court, appellate court presumed that there was evidence to support finding. In re Davenport, (1925) 114 Or 650, 236 P 758.

18. Subsection (17)

Where it does not affirmatively appear that the bill of exceptions contains all the evidence, it will be presumed that the judgment is correct, provided the pleadings sustain the judgment. Schaefer v. Stein, (1896) 29 Or 147, 45 P 301; First Nat. Bank v. Linn County Bank, (1897) 30 Or 296, 300, 47 P 614; State v. Gardner, (1898) 33 Or 149, 152, 54 P 809; Ausplund v. Aetna Indem. Co., (1905) 47 Or 10, 81 P 577, 82 P 12.

In the absence of evidence to contrary, entry of order of continuance in criminal case presumes that court found facts necessary to support it. State v. Ellison, (1957) 209 Or 672, 307 P2d 1050.

Where the bill of exceptions did not purport to contain all the evidence it was presumed that there was other evidence rendering admissible certain documents objected to. State v. Childers, (1897) 32 Or 119, 49 P 801; Davis v. Emmons, (1898) 32 Or 389, 51 P 652.

Consent of a husband to his wife's testifying was presumed where the record did not show the contrary. Long v. Lander, (1882) 10 Or 175.

Where the record on appeal did not purport to contain all the evidence, it was presumed that the necessary preliminary questions were asked to render an impeaching question proper. State v. Brown, (1895) 28 Or 147, 162, 41 P 1042.

In a proceeding to review a judgment of a justice court it was presumed that the evidence taken by the justice was sufficient to warrant conviction since evidence taken by a justice is not required to be part of the record on review. Tyler v. State, (1895) 28 Or 238, 42 P 518.

Where the amended complaint on which an injunction decree was based was lost and no appeal taken from the decree, it was presumed in a later proceeding against defendants for violation of such decree that the allegations and prayer of the amended complaint were sufficient to support the decree. State v. Lavery, (1897) 31 Or 77, 49 P 852.

Where the only record properly before the appellate court was the judgment of the trial court, it was presumed that it was supported by the findings of fact. Trummer v. Konrad, (1897) 32 Or 54, 51 P 447.

The regularity of proceedings referred to in a return of a writ of habeas corpus was presumed in the absence of a showing to the contrary. Ex parte Stacey, (1904) 45 Or 85, 88, 75 P 1060.

A decree reciting that it was entered on the stated date controlled a statement in the abstract that it was entered on a later date. Allen v. Levens, (1921) 101 Or 466, 198 P 907, 199 P 595.

Where the abstract of record did not disclose the steps taken to have a default set aside and appellants set out only the order setting aside the default, it was not presumed that the order was properly made. Anderson v. Morse, (1924) 110 Or 39, 53, 222 P 1083.

19. Subsection (18)

Under a general verdict for one party against the other, every material allegation of the complaint will be presumed to be true. Shmit v. Day, (1895) 27 Or 110, 116, 39 P 870.

Where the issue was joined as to the reasonableness of attorney's fees and the verdict was for the amount of the note only, it was presumed that the jury refused to allow any attorney fees. Cox v. Alexander, (1897) 30 Or 438, 444, 46 P 794.

20. Subsection (19)

When the execution of a note is denied there is no presumption as to the fairness and regularity of the transaction. Long v. Hoedle, (1911) 60 Or 377, 119 P 484.

Clear and convincing direct or circumstantial evidence must be produced to sustain an allegation of fraud. Conzelmann v. NW Poultry & Dairy Prod. Co., (1950) 190 Or 332, 225 P2d 757.

The presumptions of this subsection and subsection (20) were invoked in favor of the regularity of the action of a company in declaring a dividend. Stipe v. First Nat. Bank, (1956) 208 Or 251, 301 P2d 175.

Evidence rebutted the presumption that a warehouseman acted with regularity and fairness in issuing receipts for property as collateral security for his own debts. Milliorn v. Clow, (1902) 42 Or 169, 70 P 398.

Presumption was that the drawing of a check was fair and regular. State v. Hinton, (1910) 56 Or 428, 109 P 24.

In a suit to foreclose a mortgage where a defendant sought reformation for mistake, plaintiff was entitled to the benefit of this presumption. Manley v. Smith, (1918) 88 Or 176, 171 P 897.

Deed to son with reservation of life estate was presumed fair and regular. Rowe v. Freeman, (1918) 89 Or 428, 172 P 508, 174 P 727.

Presumption was that the husband's acts in withdrawing money from a bank and dealing with it as his own were fair and regular. Bosma v. Harder, (1919) 94 Or 219, 185 P 741.

Presumption was that the obtaining of property by a son

from his mother was fair and regular. Holder v. Harris, (1927) 121 Or 432, 248 P 145, 253 P 869, 254 P 1021.

This presumption was evidence against plaintiff so that she failed to prove false representation by defendant. Cameron v. Edgemont Inv. Co., (1931) 136 Or 385, 299 P 698.

This presumption was invoked in favor of the clearness of a written instrument so that reformation of a mortgage was refused. Teachers' Retirement Fund Assn. v. Pirie, (1934) 147 Or 629, 34 P2d 660.

21. Subsection (20)

That an illegal act by an agent, as accepting usury, was done without the principal's consent is always assumed. Barger v. Taylor, (1896) 30 Or 228, 236, 42 P 615, 47 P 618.

Where a general deposit of money of an estate in a bank is conclusively shown, there is no occasion for invoking the presumption that the deposit was a general one. Shute v. Hinman, (1899) 34 Or 578, 56 P 412, 58 P 882, 47 LRA 265.

Where county orders drawn in favor of defendant were afterwards found in the possession of the county treasurer indorsed with the name of defendant and canceled, it was presumed that they were delivered to defendant and indorsed by him. Portland v. Besser, (1882) 10 Or 242.

The presumptions in the case of a warehouseman who has issued receipts for property as collateral security for his own debts were overcome by the evidence. Milliorn v. Clow, (1902) 42 Or 169, 176, 70 P 398.

Where there was no evidence as to what was done by defendant with the checks and drafts, the jury was justified in finding that they were converted by the defendant into money. State v. Neilon, (1903) 43 Or 168, 173, 73 P 321; State v. Ross, (1910) 55 Or 450, 104 P 596, 106 P 1022, 42 LRA(NS) 601.

Where the record showed that a prior mortgage had been satisfied without showing by whom payment was made, a subsequent purchaser having no other notice than the record could assume that payment was made by the party owing the primary duty to pay. Stitt v. Stringham, (1909) 55 Or 89, 105 P 252.

It was presumed that the drawer of a check in favor of another had deposits sufficient to pay the check. State v. Hinton, (1910) 56 Or 428, 109 P 24.

It was presumed that goods received by forwarder were shipped to defendants and were received by defendants in the same condition in which they were delivered to the forwarder. Lacey v. Ore. R. R. & Nav. Co., (1913) 63 Or 596, 128 P 999.

Where defendant's agent was driving car owned by defendant it was presumed that it was within the apparent scope of the agent's authority. Doherty v. Hazelwood Co., (1919) 90 Or 475, 175 P 849, 177 P 432.

In a suit to reform a fire insurance policy by striking out a certain clause, the insured was entitled to the aid of the presumption that in the ordinary course of insurance business the building in question could not be covered at the rate specified without employing such clause. Spexarth v. Rhode Island Ins. Co., (1926) 118 Or 22, 245 P 515.

Where a mortgage by a corporation recited that it was executed pursuant to a resolution of the board of directors, it was presumed that the execution thereof was regular and that the ordinary course of business was followed in such execution. First Nat. Bank v. Frazier, (1933) 143 Or 662, 19 P2d 1091, 22 P2d 325.

Evidence to the effect that an employer gave material to his stenographer to inclose in a letter and mail to a customer was admissible to prove that the customer received the material. Start v. Shell Oil Co., (1954) 202 Or 99, 260 P2d 468, 273 P2d 225.

The presumptions of this subsection and subsection (19) were invoked in favor of the regularity of the action of a company in declaring a dividend. Stipe v. First Nat. Bank, (1956) 208 Or 251, 301 P2d 175.

22. Subsection (23)

A promissory note is presumed to have been given or transferred at the place and date stated therein. Kenny v. Walker, (1896) 29 Or 41, 45, 44 P 501; Owens v. Snell, (1896) 29 Or 483, 489, 44 P 827.

An insurance policy was presumed to be truly dated. Boardman v. Ins. Co., (1917) 84 Or 60, 164 P 558.

Parol evidence was admissible to establish the true date of a stock certificate and overcome this presumption. Cannon v. Farmers' Union Grain Agency, (1922) 103 Or 26, 41, 202 P 725.

23. Subsection (24)

That a letter duly directed and mailed was received in the regular course of the mail is generally an inference of fact but this subsection makes it a presumption of law. Williams v. Culver, (1901) 39 Or 337, 64 P 763.

This presumption, one of antiquity, is based upon daily routine. Koukal v. Coy, (1959) 219 Or 414, 347 P2d 602.

Presumption was that a letter giving notice of the issuance of a vacancy permit on an insurance policy was received. Frasier v. New Zealand Ins. Co., (1901) 39 Or 342, 64 P 814.

Testimony that plaintiff wrote defendant a letter which was mailed to him in the ordinary course of the mail was sufficient to raise a presumption that the letter was received. Sloan v. Sloan, (1905) 46 Or 36, 78 P 893.

Whether or not this presumption was overcome was a question of fact for the jury. Coffey v. Northwestern Hosp. Assn., (1920) 96 Or 100, 183 P 762, 189 P 407.

This presumption aided by other evidence established the fact that defendant received a letter although she denied it. Alpha Phi of Sigma Kappa v. Kincaid, (1947) 180 Or 568, 178 P2d 156.

The presumption that the plaintiff received the letter suspending his driver's license was overcome by his denial that he received it. Hall v. Dept. of Motor Vehicles, (1970) 2 Or App 248, 467 P2d 975.

24. Subsection (25)

In an action to convict defendant of a crime for signing a referendum petition twice, proof of the appearance of defendant's name twice on the petition raised a presumption that defendant signed it twice but this presumption is balanced by the presumption of innocence and in the absence of other proof plaintiff, on whom the burden of proof rests, must fail. State v. Olcott, (1913) 67 Or 214, 135 P 95, 135 P 902; State v. Kozer, (1922) 105 Or 509, 210 P 172.

Identity of person arraigned and of person indicted and convicted is presumed from identity of name. State v. Black, (1935) 150 Or 269, 42 P2d 171, 44 P2d 162; State v. Cunningham, (1943) 173 Or 25, 53, 144 P2d 303.

A defect in a notice of appeal arising from the failure to state that the person named as appealing is the plaintiff in the action is not fatal in view of the presumption of identity. Summers v. Geer, (1907) 50 Or 249, 85 P 513, 93 P 133.

Identity of the person through identity of names is evidence which must be overcome by other evidence to destroy the presumption. State v. Byrd, (1965) 240 Or 159, 400 P2d 522, cert. denied, 382 US 865; State v. Anderson, (1965) 242 Or 186, 408 P2d 212.

It was presumed that defendant was the person mentioned in a marriage certificate where his name was identi-

cal with the name and the certificate. State v. Locke, (1915) 77 Or 492, 151 P 717.

Where the name of the corporation in the indorsement of a note was the same as that of the payee, a subsequent indorsee was entitled to the the benefit of the presumption of identity of person. Dean v. Felton, (1928) 125 Or 122, 266 P 236.

It was presumed that decedent was the brother of claimants where the name of the brother and that of the decedent were identical. In re Braun's Estate, (1941) 167 Or 218, 117 P2d 238.

Although there was not complete identity of names, there was sufficient other evidence to support a finding of identity of persons. State v. Adkins, (1968) 250 Or 418, 443 P2d 170.

25. Subsection (26)

The extent to which a search should be conducted is an issue for the jury unless the evidence shows that no reasonable mind could say that it was conducted with the required degree of diligence. Arden v. United Artisans, (1928) 124 Or 225, 264 P 373; Fink v. Prudential Ins. Co., (1939) 162 Or 37, 90 P2d 762.

This common-law presumption has been enacted into statute. Fink v. Prudential Ins. Co., (1939) 162 Or 37, 90 P2d 762; Pearson v. Coulter, (1949) 186 Or 570, 208 P2d 349.

In the absence of other evidence, under this subsection and subsection (32), it may be presumed that a person who is not heard from in seven years died at the expiration of the seven years. Arden v. United Artisans, (1928) 124 Or 225, 264 P 373.

Before this presumption may be invoked, search and inquiry promptly instituted and prosecuted with reasonable diligence must be established, in the absence of special circumstances such as old age. Fink v. Prudential Ins. Co., (1939) 162 Or 37, 90 P2d 762.

Where absence and lack of tidings can be explained without belief of death, the law will indulge in no presumption of death. Id.

Exposure to imminent peril in a disappearance case is not an indispensable requisite of proof that a person who has been absent without tidings for more than seven years died at or about the time of his disappearance. Hefford v. Metropolitan Life Ins. Co., (1944) 173 Or 353, 144 P2d 695.

To raise this presumption, it must be shown that (1) the person has been absent from his place of residence or usual place of abode, (2) the absence is unexplained, (3) there are persons who would have been likely to have heard from him during that period if he were alive, (4) these persons have not heard from him, and (5) a diligent search and all inquiries appropriate to the circumstances have been made. Kankkonen v. Hendrickson, (1962) 232 Or 49, 374 P2d 393, 99 ALR2d 269.

A person not heard from by any members of his family or acquaintances for more than seven years was presumed to be dead. St. Martin v. Hendershott, (1916) 82 Or 58, 151 P 706, 160 P 373.

One who has gone away and has not been heard from for 10 years may be presumed dead. Rowe v. Freeman, (1918) 89 Or 428, 172 P 508, 174 P 727.

In an action to recover on a benefit certificate where insured had not been heard from for over seven years, the evidence was sufficient to support a verdict that insured died some time between the date he was last heard from and a date 14 months subsequent thereto. Arden v. United Artisans, (1928) 124 Or 225, 264 P 373.

In an action on insurance policies the evidence was insufficient to warrant the application of the presumption of death from seven years of absence. Fink v. Prudential Ins. Co., (1939) 162 Or 37, 90 P2d 762.

Proof that naval flier flew a land based airplane on a combat patrol over vast stretches of ocean and never returned together with other evidence created an inference of immediate death. Pearson v. Coulter, (1949) 186 Or 570, 208 P2d 349.

26. Subsection (27)

A silence for 20 years without asserting any claim to a valuable piece of property in regard to property transferred by deed is prima facie evidence that the party failing to object believed the deed transferred the property. Lovejoy v. Willamette Falls Elec. Co., (1897) 31 Or 181, 193, 51 P 197.

27. Subsection (28)

Presumption is that things have happened in the ordinary course of nature. Van Dusen Inv. Co. v. W. Fishing Co., (1912) 63 Or 7, 13, 124 P 677, 126 P 604.

Unseaworthiness of a lost vessel may be presumed where there is no other evidence of the cause of its loss. City Motor Trucking Co. v. Franklin Ins. Co., (1925) 116 Or 102, 239 P 812.

In a prosecution for abortion the presumption under this section that a pregnant woman in ordinary good health would give birth to a child and survive afterwards was sufficient to go to the jury on the question of whether or not defendant's action was necessary to preserve the life of the mother. State v. Auspland, (1917) 86 Or 121, 167 P 1019.

It may be presumed that an owner, who was standing by idle, helped repairman with installation of an unwieldy TV mast and antenna. Jamerson v. Witt, (1958) 215 Or 227, 332 P2d 1054.

28. Subsection (29)

Evidence in a suit in equity for an accounting was held to show the existence of a partnership in a mercantile business. Eilers Music House v. Reine, (1913) 65 Or 598, 604, 133 P 788.

Persons acting as partners were presumed to have entered into a contract of copartnership. Burke Mach. Co. v. Copenhagen, (1932) 138 Or 314, 6 P2d 886.

29. Subsection (30)

On showing of cohabitation and being reputed and received as man and wife, entry into lawful marriage contract is presumed. Murray v. Murray, (1876) 6 Or 26.

Where relations were meretricious in inception, the presumption of a lawful marriage does not arise. McBean v. McBean, (1900) 37 Or 195, 205 P 418; French v. State Ind. Acc. Comm., (1937) 156 Or 443, 68 P2d 466. French v. State Ind. Acc. Comm., supra, **distinguished in** Boykin v. State Ind. Acc. Comm., (1960) 224 Or 76, 355 P2d 724.

In a prosecution for adultery the presumption of marriage under this subsection is overcome by the stronger presumption of innocence. State v. Wakefield, (1924) 111 Or 615, 228 P 115.

Only when the evidence indicates that the parties deported themselves as husband and wife is there a presumption of marriage. French v. State Ind. Acc. Comm., (1937) 156 Or 443, 68 P2d 466.

A relationship recognized as a marriage in another state where it was consummated will be recognized in Oregon even though such relationship would not be a marriage if the same facts had been relied upon to create a marriage in Oregon. Boykin v. State Ind. Acc. Comm., (1960) 224 Or 76, 355 P2d 724.

If a marriage is void where consummated, it will remain invalid elsewhere unless affirmative action is taken to cure the defect. Id.

Where it was not established that the first relations between the parties were meretricious, the presumption of valid marriage was proper. Ollschlager's Estate v. Widmer, (1909) 55 Or 145, 105 P 717.

Plaintiff's evidence that cograntees, under a deed pur-

porting to transfer to them as husband and wife, subsequently were married dispelled this presumption at time of execution of the deed. Emmons v. Sanders, (1959) 217 Or 234, 342 P2d 125.

30. Subsection (31)

This presumption obtains even though the birth happens so soon after marriage as to render certain that there has been coition prior thereto. Westfall v. Westfall, (1921) 100 Or 224, 197 P 271, 13 ALR 1428. **Distinguished in** Burke v. Burke, (1959) 216 Or 691, 340 P2d 948.

A wife's admission of sexual intercourse with a third person does not overcome this presumption. Westfall v. Westfall, (1921) 100 Or 224, 197 P 271, 13 ALR 1428.

This presumption is a very strong one and may not be overcome by less than clear, satisfactory and convincing evidence. Rowe v. Rowe, (1943) 172 Or 293, 141 P2d 832.

The presumption was disputed by clear evidence that wife was pregnant at time husband met and married her. Burke v. Burke, (1959) 216 Or 691, 340 P2d 948.

31. Subsection (32)

It will not be presumed that money shown to be in a man's possession once is still in his possession at some subsequent date though he has made no satisfactory showing as to what he has done with it. Hammer v. Downing, (1902) 41 Or 234, 66 P 916; State v. Gutridge, (1905) 46 Or 215, 80 P 98; State v. Rider, (1915) 78 Or 318, 145 P 1056, 152 P 497; Weigar v. Steen, (1916) 81 Or 72, 158 P 280.

Until a search reveals the contrary a statement of account filed in the courthouse must be presumed to be still there. Harmon v. Decker, (1902) 41 Or 587, 68 P 11, 68 P 1111, 93 Am St Rep 748.

A marriage shown to have existed is presumed to continue until the contrary appears. State v. Egleston, (1904) 45 Or 346, 356, 77 P 738.

Title shown in a person at a certain date will be presumed to continue until the contrary appears. Templeton v. Bockler, (1914) 73 Or 494, 144 P 405.

So far as this presumption applies to a bill of exchange, it goes merely to the existence of the instrument itself and does not in any way tend to identify the holder or establish the ownership of the paper. Tillamook County Bank v. Intl. Lbr. Co., (1923) 106 Or 339, 211 P 183, 941.

From the mere fact that a dealer in used automobiles owns a certain automobile one day there is no presumption that his ownership thereof continues for any definite time. Hayes v. Ogle, (1933) 143 Or 1, 21 P2d 223.

Upon its admittance to the Union the state became the owner of the beds below high water marks of all navigable streams within its borders, and such ownership is presumed to continue until the state is shown to have parted with its title. State v. McVey, (1942) 168 Or 337, 121 P2d 461, 123 P2d 181.

The court should instruct the jury that insanity is presumed to exist if it was present at one time and there is no evidence to indicate the termination of the condition. State v. Garver, (1950) 190 Or 291, 225 P2d 771, 27 ALR2d 105.

A presumption of death may overcome this presumption when (1) a person whose age, were he alive, would be beyond human expectation or experience, (2) the person was exposed to a specific peril at the time he was last heard from, (3) there is proof of an unexplained absence plus evidence that the character and habits of the missing person are inconsistent with a voluntary absence for the time involved, or (4) a person has been neither seen nor heard from in seven years. Kankkonen v. Hendrickson, (1962) 232 Or 49, 374 P2d 393, 99 ALR2d 296.

This section authorizes a presumption that when once a person is shown to be alive, he continues to be alive until evidence is brought which shows the contrary. Id.

Residence out of the state presumed to continue where nothing to the contrary was shown. Wheeler v. McFerron, (1900) 38 Or 105, 62 P 1015; State v. Meyers (1911) 59 Or 537, 117 P 818.

From the proof of the execution of a note, the presumption is that it is still in force where six years have not elapsed since it was given. Mayes v. Stephens, (1901) 38 Or 512, 521, 63 P 760, 64 P 319.

A contract once proved to have been executed was presumed to be in force until its completion. Shmit v. Day, (1895) 27 Or 110, 115, 39 P 870.

That a surveyor's boundary stake set 10 years prior continued to exist was presumed. Albert v. Salem, (1901) 39 Or 466, 65 P 1068, 66 P 233.

The provision that before a deposition of an infirm witness can be used it must be shown that the infirmity continues was not affected by this presumption, so that before such deposition could be read, proof of continued infirmity had to be made. Carter v. Wakeman, (1904) 45 Or 427, 78 P 362.

Where at the time a note secured by a second mortgage on certain real estate was executed the property was subject to a first mortgage, it was presumed that the first mortgage remained undischarged when plaintiff became the holder of the note and so payment of less than full value for the note did not prevent plaintiff from being a holder in due course. Lassas v. McCarty, (1906) 47 Or 474, 84 P 76.

Where sheriff attached and took possession of property of debtor, his possession of such property should not be presumed to continue after the debtor was declared a bankrupt. Goodnough Mercantile Co. v. Galloway, (1906) 48 Or 239, 84 P 1049.

Where the mortgagor testified that the mortgage to plaintiff had never been paid or discharged, it was presumed that the plaintiff continued to be the owner. Marsters v. Umpqua Oil Co., (1907) 49 Or 374, 379, 90 P 151, 12 LRA(NS) 825.

In replevin action where plaintiff alleged that defendants took the property from the possession of plaintiff's employe, it was presumed that the right to possession remained with the employe and plaintiff was required to overcome the presumption and show right to possession in himself in order to maintain the action. Krebs Hop Co. v. Taylor, (1908) 52 Or 627, 97 P 44, 98 P 494.

An agent's lack of authority was presumed to continue until such a time as his principal conferred it upon him. Sorenson v. Kribs, (1916) 82 Or 130, 138, 161 P 405.

This presumption was not applicable to the relation of a stockholder with a bank since duration of ownership is not an attribute of the ownership of shares of stock. Sargent v. Waterbury, (1917) 83 Or 159, 161 P 443, 163 P 416.

It was presumed that sawmill machinery shown to be of a certain value in money continued to be of that value over a year later. Maxson v. Ashland Iron Works, (1917) 85 Or 345, 166 P 37, 167 P 271.

In an action for conversion where plaintiff must allege some property in himself in the property converted at the time the act of conversion was performed, this presumption did not aid an allegation that plaintiff was the owner of the property converted 30 days prior to the time it was converted so as to make the complaint good against demurrer. Hunt v. First Nat. Bank, (1921) 102 Or 398, 202 P 564.

Partnership shown to have been created was presumed to continue where no dissolution was proved. Burke Mach. Co. v. Copenhagen, (1932) 138 Or 314, 6 P2d 886.

Where insured was living on the day following his departure from home, it was presumed he was still living eight years later and the burden of proof rested on plaintiff to overcome this presumption. Fink v. Prudential Ins. Co., (1939) 162 Or 37, 90 P2d 762.

Proof that gravel bar was an island in 1852 presumed to continue to 1878 in the absence of proof to the contrary. Freytag v. Vitas, (1958) 213 Or 462, 326 P2d 110.

This presumption was unavailable for inference that decedent, observed to be idle before the installation of a TV mast, remained idle when the mast was put up by another, coming into contact with electric wires and killing both. Jamerson v. Witt, (1958) 215 Or 277, 332 P2d 1054.

It was not reversible error to fail to give an instruction that insanity once shown is presumed to continue, when defendant failed to request such an instruction and no exception was taken to the failure to give it. State v. Canaday, (1970) 2 Or App 390, 467 P2d 666, Sup Ct **review denied**.

The presumption did not apply to find a well water supply sufficient, even though when last tested it was, when the well had a history of going dry. Souza v. Jackson County Fed. Sav. & Loan Assn., (1970) 256 Or 220, 472 P2d 272.

32. Subsection (33)

The chance of intervening circumstances must be considered in determining the effect of this presumption. Nevens v. United States, (1954) 212 F2d 670.

It is presumed that the jury followed the court's instructions. State v. Elkins, (1967) 248 Or 322, 432 P2d 794.

This presumption was rebutted by the evidence. Milliorn v. Clow, (1902) 42 Or 169, 70 P 398.

On appeal where a purported copy of a plat was sent up with the record and such copy did not show that original was properly executed, it was presumed that original was properly executed. Bernard v. Willamette Box & Lbr. Co., (1913) 64 Or 223, 129 P 1039.

Where it appeared that a holographic will was regular on its face, it was presumed to have been properly executed notwithstanding the absence of an attestation clause. Simpson v. Durbin, (1914) 68 Or 518, 136 P 347.

Where insurance company's "covering note" provided that the insurance was subject to all the conditions of a certain kind of policy used by insurer, it was presumed that the policy contained the provisions enjoined by the standard policy law. Cranston v. Calif. Ins. Co., (1919) 94 Or 369, 185 P 292.

This presumption was evidence so that it was not necessary to show that decedent had complied with the requirements of the motor vehicle law, and nonsuit and directed verdict were properly denied. Coates v. Marion County, (1920) 96 Or 334, 189 P 903.

It was presumed that notes executed to decedent and not paid at his death remained unpaid since the administrator had not reported any payment to the probate court. Reid v. Multnomah County, (1921) 100 Or 310, 196 P 394.

Where it was not shown that an executor borrowed any money on behalf of an estate, there was no presumption that he had borrowed money in a lawful way. Mahon v. Harney County Nat. Bank, (1922) 104 Or 323, 206 P 224.

In an action for damages from fire caused by defendant where he urged that it was reasonable to infer that fire was caused by other means, this presumption negatived such inferences since those means involved a violation of the law. Sullivan v. Mountain States Power Co., (1932) 139 Or 282, 9 P2d 1038.

Because of this section a person who signed a document as "M.D." was presumed to be a duly licensed physician. State v. Brady, (1960) 223 Or 433, 354 P2d 811.

33. Subsection (34)

It was presumed from its use for over 50 years that a constitution of a religious organization was genuine. Philomath College v. Wyatt, (1893) 27 Or 390, 31 P 206, 37 P 1022, 26 LRA 68.

The authority of a corporate grantor to execute a deed was presumed where the deed was recognized as valid for more than 30 years. Altschul v. Casey, (1904) 45 Or 182, 76 P 1083.

34. Subsection (35)

A pamphlet purporting to be printed by the New Zealand government was presumed to be printed and published by the authority of said government. State v. McDonald, (1910) 55 Or 419, 443, 103 P 512, 104 P 967, 106 P 444.

35. Subsection (37)

It was presumed that an uninterrupted adverse possession of real property for more than 20 years was held pursuant to a written conveyance. Quinn v. Willamette Pulp & Paper Co., (1912) 62 Or 549, 126 P 1.

36. Subsection (39)

This presumption has no application to mortgages which have been recorded. Orton v. Orton, (1879) 7 Or 478, 33 Am Rep 717.

An unrecorded equitable lien created by a lease is presumptively fraudulent as to creditors but the presumption may be overcome by the evidence. Marquam v. Sengfelder, (1893) 24 Or 2, 32 P 676.

The change of possession necessary to overcome the presumption must be actual and not merely constructive or legal. Pierce v. Kelly, (1893) 25 Or 95, 34 P 963.

As between recorded and unrecorded mortgage if the holder of the unrecorded mortgage can overcome this presumption, priority will be determined by the time of execution. Davis v. Bowman, (1894) 25 Or 189, 35 P 264.

Where there was conflicting evidence on the question of whether or not the sale was made in good faith, it was reversible error not to submit that question to the jury. McCully v. Swackhammer, (1877) 6 Or 438.

Where vendor retained possession of property after he had given a bill of sale intended as a mortgage to vendee and the bill of sale was filed as a chattel mortgage, the vendee was preferred over execution creditors of the vendor. Nicklin v. Betts Spring Co., (1884) 11 Or 406, 5 P 51, 50 Am Rep 477.

An assignment of a chose in action without notice to the obligor was presumed to be fraudulent as to a creditor of the assignor who subsequently garnished the obligor, but the evidence was sufficient to overcome the presumption so that the assignee prevailed and the garnishment was of no effect. Meier v. Hess, (1893) 23 Or 599, 32 P 755.

Where mortgagee's agents took possession of the mortgaged stock of goods and put a man in charge who hired the mortgagor as clerk, there was an actual change of possession and execution creditors of mortgagor were not preferred. Re Fisher's Estate, (1893) 25 Or 64, 34 P 1024.

A certified copy of the record of plaintiff's brand was admissible to show plaintiff's possession of animals so branded, so that a change of possession did occur and this presumption did not apply. Rule v. Bolles, (1895) 27 Or 368, 41 P 691.

An unrecorded mortgage was void as against attaching creditors of mortgagor where there was no change of possession of the mortgaged property and mortgagee did not show that the mortgage was taken in good faith. Fisher v. Kelly, (1896) 30 Or 1, 46 P 146.

The transfer of possession from husband to wife was valid and this presumption did not apply. Wyatt v. Wyatt, (1897) 31 Or 531, 49 P 855.

Where property levied on under an execution was in the possession of the execution debtor and plaintiff claimed to have previously purchased such property from the debtor, this presumption was applicable and plaintiff failed to overcome it. Dose v. Beatie, (1912) 62 Or 308, 123 P 383, 125 P 277.

An instruction embodying this subsection was properly

refused where no issue of fraud was raised by the pleadings. Benson v. Johnson, (1917) 85 Or 677, 165 P 1001, 167 P 1014.

A recorded mortgage on a stock of goods where mortgagor was given right to dispose of the mortgaged goods was void as against trustee in bankruptcy without regard to the good faith of the parties. Catlin v. Currier, (1870) 5 Fed Cas 301, 1 Sawy 7.

A complaint claiming a lien on bankrupt's property based on an oral agreement alleged to have been entered into in good faith and alleging that creditors had notice of same was good on demurrer as against trustee in bankruptcy. Goodnough Mercantile Co. v. Galloway, (1906) 156 Fed 504.

FURTHER CITATIONS: Marks v. Miller, (1891) 21 Or 317, 28 P 14; Pattee v. Harbaugh, (1918) 87 Or 612, 171 P 221; Allen v. Levens, (1921) 101 Or 466, 198 P 907, 199 P 595; Cunning v. Locke, (1927) 122 Or 225, 258 P 192; Neal v. Haight, (1949) 187 Or 13, 206 P2d 1197; Nichols v. Union Pac. R.R., (1952) 196 Or 488, 250 P2d 379; Ashford v. Ashford, (1954) 201 Or 206, 249 P2d 968, 268 P2d 382; Schoenborn v. Broderick, (1954) 202 Or 634, 277 P2d 787; School Dist. 17 v. Powell, (1955) 203 Or 168, 279 P2d 492; Dicillo v. Osborn, (1955) 204 Or 171, 282 P2d 611; Cook v. Michael, (1958) 214 Or 513, 330 P2d 1926; United States Nat. Bank v. Guiss, (1958) 214 Or 563, 331 P2d 865; Kehoe v. State Ind. Acc. Comm., (1958) 214 Or 629, 332 P2d 91; Lemon v. Madden, (1959) 216 Or 539, 339 P2d 432; State v. Koenig, (1959) 218 Or 86, 342 P2d 139; Miller v. Gladden, (1959) 219 Or 538, 348 P2d 44; State Hwy. Comm. v. Nelson, (1960) 222 Or 458, 353 P2d 616; Secanti v. Jones, (1960) 223 Or 598, 349 P2d 274, 355 P2d 601; Jensen v. Westenskow, (1960) 225 Or 189, 357 P2d 383; Blue River Sawmills v. Gates, (1960) 225 Or 439, 358 P2d 239; Landers v. Landers, (1961) 226 Or 380, 360 P2d 552; State ex rel. Overhulse v. Appling, (1961) 226 Or 575, 361 P2d 86; State Hwy. Comm. v. Hurliman, (1962) 230 Or 98, 368 P2d 724; Syphers v. Gladden, (1962) 230 Or 148, 368 P2d 942; Volmer v. Volmer, (1962) 231 Or 57, 371 P2d 70; Whitney v. Canadian Bank of Commerce, (1962) 232 Or 1, 374 P2d 441; Teeples v. Tolson, (1962) 207 F Supp 212; Strubhar v. So. Pac. Co., (1963) 234 Or 12, 379 P2d 1014; In re Estate of Stack, (1963) 234 Or 384, 383 P2d 74; Soumie v. McLean,(1963) 234 Or 485, 382 P2d 1; State v. Elliott, (1963) 234 Or 522, 383 P2d 382; State v. Stultz, (1963) 235 Or 534, 385 P2d 763; Bristol v. State Tax Comm., (1963) 1 OTR 81; White v. Lewis, (1964) 236 Or 518, 388 P2d 750; State Farm Mut. Auto Ins. Co. v. Farmers Ins. Exch., (1964) 238 Or 285, 387 P2d 825, 393 P2d 768; Rusho v. Miller, (1965) 239 Or 475, 398 P2d 191; State Hwy. Comm. v. Fisch-Or, Inc., (1965) 241 Or 412, 399 P2d 1011; Union High Sch. Dist. 1 v. Linn County Dist. Boundary Bd., (1966) 244 Or 207, 416 P2d 656; State Bd. of Control v. Loprinzi, (1967) 246 Or 206, 424 P2d 889; Fletcher v. Walters, (1967) 246 Or 362, 425 P2d 539; City of Burns v. Northwestern Mut. Ins. Co., (1967) 248 Or 364, 434 P2d 465; State v. Steimle, (1969) 253 Or 54, 453 P2d 171; Jentzen v. State Comp. Dept., (1969) 254 Or 65, 456 P2d 499; Nicholson v. Sisters of Charity, (1970) 255 Or 251, 463 P2d 861; Daboling v. Beck, (1970) 256 Or 355, 474 P2d 322; Williamson v. State Acc. Ins. Fund, (1971) 92 Adv Sh 1775, 487 P2d 110.

ATTY. GEN. OPINIONS: Continuance of insanity, 1950-52, p 208; refusal of blood test in filiation proceeding, 1952-54, p 233; filing for elective office, 1954-56, p 200; presumed date of death for person absent seven years, 1956-58, p 264; release from Fairview Home, 1958-60, p 256; classifying ground water, 1960-62, p 426; diversion of appropriated county moneys from original purpose, 1962-64, p 127; evidence sufficient to prove serviceman's residence, 1964-66, p 455; presuming planning commission acted in accordance with authority, 1964-66, p 461.

LAW REVIEW CITATIONS: Whole section: 28 OLR 157; 41 OLR 297; 42 OLR 253; 43 OLR 80; 43 OLR 249; 50 OLR 44; 6 WLJ 497-513.

Subsection (1): 4 OLR 126; 41 OLR 299.

Subsection (6): 41 OLR 144, 149-151.

Subsection (11): 13 OLR 169; 21 OLR 308; 1 WLJ 578, 580.

Subsection (12): 42 OLR 242; 1 WLJ 578.

Subsection (15): 42 OLR 303; 1 WLJ 191; 2 WLJ 11.

Subsection (24): 44 OLR 86-90.

Subsection (25): 41 OLR 301.

Subsection (28): 39 OLR 31; 41 OLR 302.

Subsection (30): 41 OLR 303.

Subsection (31): 17 OLR 212; 41 OLR 302.

Subsection (32): 39 OLR 31; 41 OLR 302.

Subsection (33): 2 WLJ 11.

Subsection (34): 42 OLR 244, 252.

Subsection (39): 1 OLR 220; 5 OLR 249; 10 OLR 275; 15 OLR 206.

Subsection (40): 31 OLR 162; 37 OLR 85; 42 OLR 243-253; 45 OLR 140-144.

41.410

NOTES OF DECISIONS

1. Subsection (1)
2. Subsection (2)
3. Subsection (3)
   (1) Legislative department
   (2) Executive department
   (3) Judicial department
   (4) Municipalities
4. Subsection (5)
5. Subsection (7)
6. Subsection (9)
   (1) Laws of nature
   (2) Measure of time
   (3) Geographical divisions
   (4) Political history
7. Customs

1. Subsection (1)

The ordinary meaning of words and phrases of the English language is judicially noticed and if an unusual meaning is sought to be attached to them when used in pleading such meaning must be explained therein. Martin v. Eagle Dev. Co., (1902) 41 Or 448, 69 P 216.

The expression "from the grass roots down" ordinarily means to the center of the earth and not merely to bedrock. Id.

The word "prospected" ordinarily means to do experimental work to ascertain the probable value of a mining claim. Id.

2. Subsection (2)

Regular terms of court are judicially noticed. Holcomb v. Teal, (1873) 4 Or 352; Deering & Co. v. Quivey, (1895) 26 Or 556, 38 P 710.

The laws by which school superintendents sell school land to individuals are judicially known. Dolph v. Barney, (1874) 5 Or 191.

The lack of jurisdiction of a lower court appearing on the face of the record will be judicially noticed. State v. McKinnon, (1880) 8 Or 487.

Courts will take judicial notice of general state elections but not of special elections unless their result is required by law to be made a matter of record in a court originally having jurisdiction of a cause involving such election. Gay v. Eugene, (1909) 53 Or 289, 295, 100 P 306, 18 Ann Cas 188.

The state need not plead a matter of law in its accusation. State v. Stone, (1924) 111 Or 227, 226 P 430.

That a corporation given a franchise to construct a canal

and toll locks in a navigable river could acquire a fee simple to such property only by legislative grant was judicially noticed. State v. Portland Gen. Elec. Co., (1908) 52 Or 502, 506, 95 P 722, 98 P 160.

The court took judicial notice of a legislative act known as the Local Option Law but refused to take judicial notice of its adoption by the voters of Lane County. Gay v. Eugene, (1909) 53 Or 289, 295, 100 P 306, 18 Ann Cas 188.

The court took judicial notice of the boundaries of a county established by public law. State v. Casey, (1923) 108 Or 386, 213 P 771, 217 P 632.

The court took judicial notice of the fact that the Governor was compelled to veto bills for capital investment in new buildings as a result of the constitutional limitations on state revenues. Eastern & W. Lbr. Co. v. Patterson, (1928) 124 Or 112, 258 P 193, 264 P 441.

3. Subsection (3)

(1) Legislative department. The courts take judicial notice of a city charter passed by Act of the legislature. Ex parte Wygant, (1901) 39 Or 429, 64 P 867, 87 Am St Rep 673, 54 LRA 636; Naylor v. McColloch, (1909) 54 Or 305, 103 P 68; Simmons v. Holm, (1961) 229 Or 373, 367 P2d 368.

Courts take judicial notice of the public and private official Acts of the legislature. Corvallis & E.R.R. v. Benson, (1912) 61 Or 359, 367, 121 P 418.

Acts of the legislative assembly applicable to the organization of irrigation districts will be judicially noticed. Herrett v. Warmsprings Irr. Dist., (1917) 86 Or 343, 168 P 609.

The court took judicial notice of the Carey Act liens. Aya v. Morson, (1919) 90 Or 647, 178 P 207.

Court took judicial notice of statutes governing sales by the State Forester. Eugene Stud & Veneer, Inc. v. State Bd. of Forestry, (1970) 3 Or App 20, 469 P2d 635.

The dates of the enactment of the various statutes relating to the Port of Portland was judicially noticed by the court. State v. Banfield, (1903) 43 Or 287, 292, 72 P 1093.

This court took judicial notice that an Act of the legislature was presented to the Governor and that he did not return it within five days to the house in which it originated. Bennett Trust Co. v. Sengstacken, (1911) 58 Or 333, 113 P 863.

The fact that a university was incorporated by special Act of the legislature was judicially noticed. Hill v. Tualatin Academy, (1912) 61 Or 190, 121 P 901.

The court took judicial notice that the United States granted certain lands to the state which in turn granted them to plaintiff's predecessor in interest by a special Act. Altschul v. State, (1914) 72 Or 591, 144 P 124.

(2) Executive department. Government surveys of public lands will be judicially noticed. Shaw v. Oswego Iron Co., (1882) 10 Or 371, 45 Am Rep 146; Richards v. Snider, (1883) 11 Or 197, 3 P 177; Albert v. Salem, (1901) 39 Or 466, 65 P 1068, 66 P 233; Micelli v. Andrus, (1912) 61 Or 78, 120 P 737; VanDusen Inv. Co. v. W. Fishing Co., (1912) 63 Or 7, 124 P 677, 126 P 604; Stoppenback v. Multnomah County, (1914) 71 Or 493, 142 P 832.

The population of a town as shown by the official census of the state or the United States is judicially known. Stratton v. Oregon City, (1899) 35 Or 409, 60 P 905; Smith v. Jefferson, (1915) 74 Or 179, 146 P 809.

The court takes judicial notice of the government surveys and the manner in which they are made, but not of the character of the territory surveyed unless it is a part of the prominent geographical features of the country. Western Inv. Co. v. Farmers' Nat. Bank, (1899) 35 Or 298, 57 P 912.

The court judicially knows that a township is divided into 36 sections and that donation land claims are numbered by the surveyor general consecutively in the order in which they are surveyed, beginning with 37 in each township. Albert v. Salem, (1901) 39 Or 466, 65 P 1068, 66 P 233.

The court took judicial notice of an executive proclamation of the creation of a new county. State v. Deschutes County, (1918) 88 Or 661, 173 P 158.

The court took judicial notice of the proceedings before the Public Service Commission [now Public Utility Commissioner]. Crown Mills v. Ore. Elec. R. R. Co., (1933) 144 Or 25, 21 P2d 214.

The Governor's proclamation dissolving a corporation was judicially noticed. Clatsop County v. Taylor, (1941) 167 Or 563, 119 P2d 285.

The court took judicial notice of the regulations promulgated under the Emergency Price Control Act. State v. Olson, (1944) 175 Or 98, 151 P2d 723.

The Supreme Court took judicial notice of the official opinions of the Attorney General. Allen v. Multnomah County, (1946) 179 Or 548, 173 P2d 475.

The trial court was not required to take judicial notice, on its own motion, of the maximum sale price of a used truck established by the Federal Price Administrator. Mogul Trans. Co. v. Larison, (1947) 181 Or 252, 181 P2d 139.

The court took judicial notice of regulations adopted by a state agency. **The State Forester,** Eugene Stud & Veneer, Inc. v. State Bd of Forestry, (1970) 3 Or App 20, 469 P2d 635; **the Civil Service Commission,** Beistel v. Pub Emp Relations Bd, (1971) 92 Or App Adv Sh 1794, 486 P2d 1305.

(3) Judicial department. What another record in an entirely different case may contain cannot be judicially noticed by the Supreme Court. Simon v. Durham, (1881) 10 Or 52; Ollschlager's Estate, (1907) 50 Or 55, 89 P 1049.

Judicial notice of information acquired at previous hearings of the same cause will be taken. State v. Richardson, (1906) 48 Or 309, 313, 85 P 225, 8 LRA(NS) 362.

The Supreme Court will not take judicial notice of the rules of a circuit court. Stivers v. Byrkett, (1910) 56 Or 565, 108 P 1014, 109 P 386.

The Supreme Court will take judicial notice of a former opinion in an action between the same parties so that matters passed on in such opinion will not be again examined, although the former judgment is not pleaded as a bar. Kiernan v. Portland, (1912) 61 Or 398, 122 P 764.

Before judicial notice will be taken of the records and prior proceedings in a cause it must be shown to be the same cause. Oden v. Oden, (1937) 157 Or 73, 69 P2d 967.

The court will take judicial notice of the county in which a named Oregon judge presided. State v. Taylor, (1960) 224 Or 106, 355 P2d 603.

The court cannot take judicial notice of the records in a different case than the case before it. Hood v. Hatfield, (1963) 235 Or 38, 383 P2d 1021.

(4) Municipalities. Since the adoption of the initiative system the courts will not take judicial notice of the initiative charters of cities and towns. Birnie v. LaGrande, (1916) 78 Or 531, 153 P 415; Chan Sing v. City of Astoria, (1916) 79 Or 411, 155 P 378; Rusk v. Montgomery, (1916) 80 Or 93, 156 P 435; Dennis v. City of Willamina, (1916) 80 Or 486, 157 P 799.

Municipal courts, and the circuit courts on trials de novo on appeal from the municipal courts, will take judicial notice not only of the ordinances of a city but of such journals and records of the common council as affect ordinances' validity, meaning and construction, just as the state courts take official notice of the public statutes of the state and the journals of the legislature. Portland v. Yick, (1904) 44 Or 439, 444, 75 P 706, 102 Am St Rep 633.

The court will not take judicial notice of the rules of the civil service commission of a city. Kay v. Portland, (1916) 79 Or 146, 154 P 750.

4. Subsection (5)

The Supreme Court will take judicial notice of the acces-

sion of a notary public, his official seal and his continuance in office, and to inform itself respecting such facts it will refer to the official records of the state department. Butts v. Purdy, (1912) 63 Or 150, 164, 125 P 313, 127 P 25.

Members of the Board of Medical Examiners are state officers and therefore within this subsection. State v. Lee Chue, (1929) 130 Or 99, 279 P 285.

A justice of the peace is a judicial officer of the state and therefore within this subsection. Kuhnhausen v. Stadelman, (1944) 174 Or 290, 148 P2d 239, 149 P2d 168.

5. Subsection (7)

The court took judicial notice of the seal of a notary public of another state. Haley v. Sprague, (1941) 166 Or 320, 111 P2d 1031.

6. Subsection (9)

(1) Laws of nature. Testimony contrary to known physical laws should be rejected. Smithson v. So. Pac. Co., (1900) 37 Or 74, 60 P 907; Wolf v. City Ry. Co., (1907) 50 Or 64, 85 P 620, 91 P 460, 15 Ann Cas 1181.

The habits and instincts of domestic animals will be judicially noticed. Hill v. Tualatin Academy, (1912) 61 Or 190, 200, 121 P 901.

In prosecution for causing death of unborn child by unlawful abortion, court may take judicial notice of laws of nature and resort to appropriate books or documents for reference. State v. Willson, (1926) 116 Or 615, 241 P 843.

The existence of accurate tests for determining the condition of eyes is judicially known. Linkhart v. Savely, (1950) 190 Or 484, 227 P2d 187.

Scientific data on the rate of dissipation of alcohol from the blood is not of such a nature as to require the trial court to take judicial notice of it sua sponte. Stites v. Morgan, (1961) 229 Or 116, 366 P2d 324.

Judicial notice was taken of the period in which the wet season occurs in Oregon. Blackford v. Boak, (1914) 73 Or 61, 65, 143 P 1136; Schukart v. Gerousbeck, (1952) 194 Or 320, 241 P2d 882.

The court took judicial notice that a native of China working for an English speaking family in Oregon for 20 years was able to comprehend ordinary conversation in the English language. Ah Foe v. Bennett, (1899) 35 Or 231, 58 P 508.

The court refused to take judicial notice of the probability of a landslide. Scott v. Astoria R.R. Co., (1903) 43 Or 26, 72 P 594, 99 Am St Rep 710, 62 LRA 543.

The court took judicial notice of the fact that a record of rainfall for eighteen years would contain so many entries that an examination of each would occasion great loss of time to the court. Id.

The court took judicial notice that plaintiff's premises would be injured if a certain stream overflowed its banks. Morton v. Ore. Short Line R.R. Co., (1906) 48 Or 444, 87 P 151, 87 P 1046, 120 Am St Rep 827, 7 LRA(NS) 344.

The court took judicial notice that a potato is a vegetable and subject to decay. Higgins Co. v. Torvick, (1910) 55 Or 274, 106 P 22.

The court took judicial notice of the dangerous character of distillate. Peterson v. Standard Oil Co., (1910) 55 Or 511, 106 P 337, Ann Cas 1912A, 625.

The court took judicial notice of the dangerous character of a circular ripsaw. Buchanan v. Hicks Co., (1913) 66 Or 503, 133 P 780, 134 P 1191.

Judicial notice was taken of the fact that ordinary gas used for fuel is so inflammable that, if present in any volume, the moment a flame is applied it will ignite with an instant explosion. Holmberg v. Jacobs, (1915) 77 Or 246, 150 P 284, Ann Cas 1917D, 496.

Where testimony was not so unreasonable as to be contrary to the laws of nature it was entitled to be considered by the jury. Kelly v. Weaver, (1915) 77 Or 267, 150 P 166, 151 P 463, Ann Cas 1917D, 611.

The court took judicial notice of the average duration of the life of a healthy person at a given age. Askay v. Maloney, (1917) 85 Or 333, 166 P 29.

It was error for the trial court to take judicial notice that the acts alleged in the indictment tended to cause a child to become delinquent. State v. Stone, (1924) 111 Or 227, 226 P 430.

It was judicially noticed that the "fall" season embraces the three months commencing with the first day of September and terminating with the last day of November. Rosenau v. Lansing, (1925) 113 Or 638, 232 P 648, 234 P 270.

The court refused to take judicial notice that a hop house would always be useless without a hop yard. Livesay v. Lee Hing, (1932) 139 Or 450, 9 P2d 133, 84 ALR 118.

(2) Measure of time. The trial court should have taken judicial notice of the hour of sunset on a particular day and so declared to the jury. State v. Magers, (1899) 35 Or 520, 57 P 197.

(3) Geographical divisions. Courts judicially notice the navigability of streams. Shaw v. Oswego Iron Co., (1882) 10 Or 371, 45 Am Rep 146.

That the Tualatin River is not a navigable stream and that the United States has sold and surveyed the bed of that river by the acre as though it was dry land is judicially known. Id.

That Portland is the commercial metropolis of the state is judicially known. Cook v. Port of Portland, (1891) 20 Or 580, 27 P 263, 13 LRA 533.

The court took judicial notice of the location of the State University at Eugene in determining the validity of a city ordinance declaring the unlawful sale of intoxicating liquor to be a nuisance. Mayhew v. Eugene, (1910) 56 Or 102, 108, 104 P 727, Ann Cas 1912C, 33.

The courts do not judicially know the boundaries of a precinct established by a county court since they are subject to change every year. State v. Carmody, (1911) 60 Or 143, 144, 91 P 441.

County boundaries and the distance of a boundary from a city are judicially noticed in determining venue of a prosecution. State v. Eppers, (1932) 138 Or 340, 3 P2d 989, 6 P2d 1086.

The court can take judicial notice of the location of counties in regard to their direction from base lines and meridians. Knapp v. Josephine County, (1951) 192 Or 327, 235 P2d 564.

The court took judicial notice that Salem was within Marion County and the county seat of such county. Marx v. Croisan, (1889) 17 Or 393, 21 P 310.

Courts will take judicial notice of boundary of cities incorporated by act of legislative assembly. Rosenau v. Lansing, (1925) 113 Or 638, 232 P 648, 234 P 270.

(4) Political history. The court may take judicial notice of the fact that Hitler ruled by decree as the supreme legislative, executive and judicial authority. State Land Bd. v. Brownell, (1953) 199 Or 448, 263 P2d 769.

The court took judicial notice of the fact that Bulgarians are citizens of Bulgaria and are not nationals of Russia. Franciscovich v. Walton, (1915) 77 Or 36, 40, 150 P 261.

The fact that the assessed valuation of the taxable wealth within the boundary of the Port of Astoria declined in value in a certain amount during particular years and that approximately 50 per cent of all taxes in the county were delinquent was judicially noticed. Morris, Mather & Co. v. Port of Astoria, (1932) 141 Or 251, 15 P2d 385.

It was judicially noticed by the Supreme Court that Astoria and Warrenton had defaulted on substantially all of its bonded indebtedness. Id.

The court took judicial notice of the depression, when all mortgagees were urged to be lenient and to refrain from

foreclosing mortgages upon the homes of contract buyers and mortgagors. Marsh v. Marsh Co., (1936) 153 Or 134, 55 P2d 1111, 104 ALR 981.

7. Customs

The court took judicial notice of the local customs as to the right and the method of appropriation of water on the public domain. Speake v. Hamilton, (1891) 21 Or 3, 26 P 885; Brown v. Baker, (1901) 39 Or 66, 65 P 799, 66 P 193; Parkersville Drainage Dist. v. Wattier, (1906) 48 Or 332, 86 P 775. Parkersville Drainage Dist. v. Wattier, supra, overruling Lewis v. McClure, (1880) 8 Or 273.

The custom of voluntary unincorporated associations to keep a record of their proceedings was judicially noticed. Norwich Ins. Soc. v. Ore. R.R. Co., (1905) 46 Or 123, 78 P 1025.

The court took judicial notice that it is a custom of insurance companies on final approval and execution of a policy to forward the policy to an agent in the vicinity of the applicant's residence for delivery to him. Francis v. Mut. Life Ins. Co., (1910) 55 Or 280, 106 P 323.

FURTHER CITATIONS: In re Patterson, (1957) 353 US 952, 77 S Ct 869, 1 L Ed 2d 906; In re Frank Victor Patterson, (1958) 213 Or 398, 318 P2d 907; Blue River Sawmills v. Gates, (1960) 225 Or 439, 358 P2d 239; Jarrett v. Wills, (1963) 235 Or 51, 383 P2d 995; State v. Cooksey, (1965) 242 Or 250, 409 P2d 335; State v. Gowdy, (1969) 1 Or App 424, 462 P2d 461; Meier v. Bray, (1970) 256 Or 613, 475 P2d 587.

ATTY. GEN. OPINIONS: Fees for expert witnesses, 1954-56, p 222.

LAW REVIEW CITATIONS: 17 OLR 177; 40 OLR 222; 41 OLR 284, 285; 49 OLR 201; 1 WLJ 153; 2 EL 191.

41.420

NOTES OF DECISIONS

Prior to this Act a court would not take judicial notice of the laws of other states or territories and in the absence of proof to the contrary it was presumed that the common law was in force in such state or territory. Scott v. Ford, (1908) 52 Or 288, 97 P 99; DeVall v. DeVall, (1910) 57 Or 128, 109 P 755, 110 P 705; Long v. Dufur, (1911) 58 Or 162, 113 P 59; Casner v. Hoskins, (1913) 64 Or 254, 128 P 841, 130 P 55.

The court took judicial notice of the statutes of a sister state. Haley v. Sprague, (1941) 166 Or 320, 111 P2d 1031; Ex Parte Paulson, (1942) 168 Or 457, 124 P2d 297; Omicron Co. v. Williams, (1943) 172 Or 9, 139 P2d 547; Bartlett v. Bartlett, (1944) 175 Or 215, 152 P2d 402.

FURTHER CITATIONS: Laux v. Woodworth, (1942) 169 Or 528, 129 P2d 290; Schultz v. First Nat. Bank, (1959) 220 Or 350, 348 P2d 22, 28, 81 ALR2d 1121, Bristol v. State Tax Comm., (1962) 1 OTR 81; Weber v. Mutual of Omaha Ins. Co., (1963) 215 F Supp 105; State v. Anderson, (1965) 242 Or 186, 408 P2d 212.

LAW REVIEW CITATIONS: 17 OLR 259; 41 OLR 284.

41.430

CASE CITATIONS: Schultz v. First Nat. Bank, (1959) 220 Or 350, 348 P2d 22, 28, 81 ALR 2d 1121.

LAW REVIEW CITATIONS: 41 OLR 290.

41.440

LAW REVIEW CITATIONS: 41 OLR 293.

41.450

NOTES OF DECISIONS

Under the prior statute the court refused to take judicial notice of the existence of a statute of the State of Washington where it was not pleaded and the required notice was not given. Laux v. Woodworth, (1942) 169 Or 528, 129 P2d 290.

LAW REVIEW CITATIONS: 41 OLR 290.

41.460

NOTES OF DECISIONS

Prior to this Act where proof of the foreign law consisted only of parol testimony of experts the jury had to determine what the law was, but where proof was by written documents it was for the court. State v. Looke, (1879) 7 Or 54.

LAW REVIEW CITATIONS: 41 OLR 285.

41.470

NOTES OF DECISIONS

Failure of the trial court to take judicial notice of facts not brought to its attention ordinarily is not grounds for reversal. Stites v. Morgan, (1961) 229 Or 116, 366 P2d 324.

41.520

NOTES OF DECISIONS

In an action for the recovery of real property the certified copies of the record of the proceedings in probating a will were admissible to show plaintiff's title to such real property. Jones v. Dove, (1876) 6 Or 188.

This section authorizes admission of secondary evidence of the contents of a lost will or of one improperly destroyed or the like. Id.

In a proceeding to probate a lost will the burden is on the proponent to clearly establish its execution and once established the burden is on the contestant to prove its revocation. In re Miller's Will, (1907) 49 Or 452, 90 P 1002, 124 Am St Rep 1051, 14 Ann Cas 277.

In a proceeding to probate a lost will the declarations of testatrix were admissible to show that the will had not been returned to her possession or canceled. Id.

In a suit to specifically enforce an agreement to execute mutual wills, parol testimony was admissible to prove execution and the contents of one of the wills where it was alleged to have been improperly destroyed. Stevens v. Myers, (1919) 91 Or 114, 177 P 37, 2 ALR 1155.

Parol testimony was not admissible to vary the terms of joint wills. Cooke v. King, (1936) 154 Or 621, 61 P2d 429, 62 P2d 20, 107 ALR 881.

41.530

NOTES OF DECISIONS

The signature of a bank cashier with his official title to a letter bearing the bank's name at its head, wherein a representation as to credit was made, was a signature of the bank within the meaning of this section. Nevada Bank v. Portland Nat. Bank, (1893) 59 Fed 338.

A representation made by the president of a bank to a depositor as to the solvency of the bank inducing the depositor to leave money in the bank was a "representation as to credit" or "character" within this section. Brown v. Siemens, (1926) 117 Or 583, 245 P 510.

Since this section says "no evidence is admissible" rather than "no action can be maintained," it was not necessary to allege that a representation within this section was in writing; and the complaint was good on demurrer. Id.

Where the person who made the alleged statement benefited directly and personally from the representation, and where the evidence proves that the statement, if made, was deliberately fraudulent, and where there is, apart from the statement, evidence of scienter on the part of the defendant, the offer of proof was admissible as an exception to this section. Boothe v. Bennet, (1968) 249 Or 31, 436 P2d 746.

41.540

NOTES OF DECISIONS

Even before the 1929 amendment this section did not prevent a competent surveyor who had made a survey of the disputed land from disputing the survey made by the county surveyor. Sommer v. Compton, (1908) 52 Or 173, 96 P 124, 96 P 1065; Cody v. Black, (1920) 97 Or 343, 191 P 319, 192 P 282.

A survey and field notes of but one surveyor was properly excluded from evidence. Oregon Mesabi Corp. v. Johnson Lbr. Corp., (1947) 166 F2d 997.

A surveyer who directed another surveyor to make a survey but who was not present when it was made was not a surveyor within the meaning of this section, and objection to the admission of such surveyor should have been sustained. Id.

FURTHER CITATIONS: Longview Fibre Co. v. Johnston, (1951) 193 Or 385, 238 P2d 722.

41.560

NOTES OF DECISIONS

See cases on trusts under ORS 93.020.

41.580

NOTES OF DECISIONS

1. In general

(1) "Void." The word "void" as used in this section is synonymous with voidable. Barton v. Simmons, (1929) 129 Or 457, 278 P 83. **But see** Webster v. Harris, (1950) 189 Or 671, 222 P2d 644.

(2) "Subscribed." The requirement that the writing be "subscribed" by the party to be charged means the signature of the party to be bound must be affixed at the end of the agreement or memorandum. Commercial Cred. Corp. v. Marden, (1936) 155 Or 29, 62 P2d 573, 112 ALR 931.

(3) "Party to be charged." "The party to be charged" is the party charged in the action. Davis v. Brigham, (1910) 56 Or 41, 107 P 961, Ann Cas 1912B, 1340.

(4) Secondary evidence admissible in certain cases. Secondary evidence of the contents of a writing is admissible when it is shown that the writing is lost or in the possession of the adverse party who refuses to produce it on proper notice. Great W. Land Co. v. Waite, (1918) 87 Or 488, 168 P 927, 171 P 193; Atckison v. Triplett, (1966) 244 Or 475, 419 P2d 4.

In an action to recover a commission on the sale of land where defendant's employment of plaintiff was by letter and such letter was lost, plaintiff's testimony of the negotiations prior to confirmation by such letter was admissible. Taggart v. Hunter, (1915) 78 Or 139, 150 P 738, 152 P 871, Ann Cas 1918A, 128.

(5) Pleading. A complaint on a contract required by this section to be in writing need not allege that such contract was in writing. Albee v. Albee, (1871) 3 Or 321; Smith v. Jackson, (1920) 97 Or 479, 192 P 412; Ingerslev v. Goodman, (1925) 116 Or 210, 240 P 877. **But see** Webster v. Harris, (1950) 189 Or 671, 222 P2d 644.

(6) Who may assert defense. A personal representative of a decedent may interpose the defense of the statute of frauds if such defense would have been available to decedent. Clarke v. Philomath College, (1921) 99 Or 366, 193 P 470, 195 P 822.

Successor to a party to the contract may assert noncompliance with statute of frauds only where party's interest would be adversely affected if successor were not given that right. City of Medford v. Bessonette, (1970) 255 Or 53, 463 P2d 865.

In broker's action for damages for alleged interference by defendant with performance of contract between broker and another, objection that alleged contract was void under subsection (7) was not available to defendant, a stranger to the alleged contract. Ringler v. Ruby, (1926) 117 Or 455, 244 P 509.

(7) Waiver of defense. The defense of the statute of frauds

may be waived by not raising it in the lower court. Hawley v. Dawson, (1888) 16 Or 344, 18 P 592.

Failure of defendant to set out in his answer the affirmative defense of the Statute of Frauds operates as a waiver of such defense under the Federal Rules of Civil Procedure. Wineberg v. Park, (1963) 321 F2d 214.

The defense of the statute of frauds may be waived by not raising it in the lower court. Fabre v. Halverson, (1968) 250 Or 238, 441 P2d 640.

(8) Recovery on quantum meruit. A recovery upon quantum meruit may be had by a person who has performed services under a contract which cannot be enforced because within the statute of frauds. Jackson v. Stearns, (1911) 58 Or 57, 113 P 30, Ann Cas 1913A, 284, 37 LRA(NS) 639; Richter v. Derby, (1931) 135 Or 400, 295 P 457; McGilchrist v. Woolworth Co., (1932) 138 Or 679, 7 P2d 982.

In order that a broker may recover reasonable value of services in quantum meruit rendered under a contract void under subsection (7) he must show that the services were of some value to the principal and an exclusive agency is evidence of such value. Taylor v. Peterson, (1912) 76 Or 77, 147 P 520.

In an action to recover in quantum meruit for services rendered to decedent under an oral contract unenforceable because within the statute of frauds, evidence of the oral contract was admissible. Richter v. Derby, (1931) 135 Or 400, 295 P 457.

In an action to recover for the reasonable value of services rendered under an oral contract that was void because of the statute of frauds, evidence of the contract was admissible to prove the value of the services but was not conclusive and a verdict in excess of contract price was affirmed. McGilchrist v. Woolworth Co., (1932) 138 Or 679, 7 P2d 982.

When a person promises orally to pay for materials delivered to another, and the promise was made not as a guarantor but as a principal obligor, and seller relies exclusively on promisor's credit, the oral agreement is outside the statute of frauds. Copenhagen, Inc. v. Kramer, (1960) 224 Or 535, 356 P2d 1064.

(9) What may be shown by parol evidence. In a suit to quiet title by adverse possession, oral agreement to turn property over to disseisor was admissible to show knowledge of owner that disseisor held adversely. Knecht v. Spake, (1959) 218 Or 601, 346 P2d 98.

(10) Sufficiency of memorandum is a question of law. It is the sole province of the court to determine from the writing constituting an agreement whether it meets the requirements of the statute of frauds. Commercial Cred. Corp. v. Marden, (1936) 155 Or 29, 62 P2d 573, 112 ALR 931.

2. Subsection (1)

(1) Scope. It must appear that the agreement is necessarily incapable of performance within a year to fall within this statute. Hedges v. Strong, (1868) 3 Or 18; Southwell v. Beezley, (1875) 5 Or 458; Bickel v. Wessinger, (1911) 58 Or 98, 113 P 34; Duniway v. Wiley, (1917) 85 Or 86, 166 P 45; Condon Nat. Bank v. Cameron, (1924) 110 Or 475, 216 P 558.

A lease of land for a year to commence in futuro must be in writing. White v. Holland, (1888) 17 Or 3, 3 P 573.

A promise to pay a sum of money "inside a year from now" is not within the statute. Denn v. Peters, (1900) 36 Or 486, 491, 59 P 1109.

An agreement not to engage in a certain business is not within the statute of frauds although the time specified is for a period longer than one year. Krause v. Bell Potato Chip Co., (1935) 149 Or 388, 39 P2d 363.

An oral agreement to pay a person money when he should arrive at the age of 21 years, being impossible of performance within one year, was void. Brown v. Austin, (1921) 102 Or 53, 201 P 543.

An oral agreement whereby a contract of employment was to be renewed for an additional year under like terms on its expiration was embraced by the statute. Moore v. Willamette Iron & Steel Works, (1928) 127 Or 134, 271 P 49.

An oral agreement to pay for services previously rendered to promisor from an estate which promisor would acquire in about six years was unenforceable. In re Woodward's Guardianship, (1943) 173 Or 93, 144 P2d 490.

A written contract which failed to express the consideration was not within this subsection when one party had performed in full within one year but the other party's performance by payment of money was not to be completed for several years. Kneeland v. Shroyer, (1958) 214 Or 67, 328 P2d 753.

(2) Expression of consideration. A written agreement entered into between a lessor and others stating that if such others acquired an assignment of the lease and were in possession of the premises at the expiration of such lease they were to have a renewal for five years was void because it did not express any consideration, since the expiration of the lease would not occur for more than a year from the date of such agreement. Webb v. Isenee, (1916) 79 Or 114, 153 P 800.

(3) Part performance. Part performance as a defense against the application of the statute of frauds to an oral contract may not be invoked when no ground of equitable jurisdiction has first been established. Hearn v. May, (1956) 207 Or 514, 298 P2d 177.

The doctrine of part performance is not applicable unless the acts of part performance are exclusively referable to the oral agreement. Atckison v. Triplett, (1966) 244 Or 475, 419 P2d 4.

(4) Oral modification. In an action to recover the reasonable value of work and labor where a written contract had been modified by an oral agreement and as modified was not to be performed within one year, evidence of the oral modification was admissible. Keller v. Bley, (1887) 15 Or 429.

Where plaintiff was employed by defendant under a written contract for a period of three years and alleged an oral modification thereof at a time when the contract had more than a year to run, such modification was invalid except to the extent that the contract as modified had been executed and the conduct of the parties thereunder had constituted an accord and satisfaction. Osburn v. De Force, (1927) 122 Or 360, 257 P 685, 258 P 823.

An oral modification of the time for paying a real estate commission, being an agreement to pay annual installments for a fixed period of years, was within the statute and invalid. United Farm Agency v. McFarland, (1966) 243 Or 124, 411 P2d 1017.

(5) Evidence of oral agreement admissible in certain cases. In an action for money had and received where in accordance with a verbal agreement plaintiff loaned money to defendant to be repaid with interest in three years, evidence of such agreement was admissible. Bowman v. Wade, (1909) 54 Or 347, 103 P 72.

In an action of deceit evidence of an oral promise within the statute was admissible. Burgdorfer v. Thielemann, (1936) 153 Or 354, 55 P2d 1122.

3. Subsection (2)

(1) Scope. An agreement by a purchaser to pay the balance of the purchase price to a stranger to the contract is not within the statute. Strong v. Kamm, (1886) 13 Or 172, 9 P 331; Riddle State Bank v. Link, (1915) 78 Or 498, 153 P 1192.

The defense can only be asserted by the parties to the

contract or their privies. Jenks Hatchery, Inc. v. Elliott, (1968) 252 Or 25, 448 P2d 370.

This section has no application where the oral promise has been performed. Grover v. Sturgeon, (1970) 255 Or 578, 469 P2d 617.

Where plaintiff performed work for one who contracted with defendants to do it and after the work was completed defendants orally promised to pay therefor, plaintiff could not recover though such promise was unconditional. Bixby v. Church, (1895) 28 Or 242, 244, 42 P 613.

A contract between sureties fixing the proportion of their several liabilities was not, as between themselves, within the statute of frauds. Rose v. Wollenberg, (1897) 31 Or 269, 44 P 382, 65 Am St Rep 826, 39 LRA 378.

Where defendant purchased a flour mill from plaintiff and in part payment assigned to plaintiff certificates of deposit of a bank with a written guaranty of their payment, and plaintiff subsequently at defendant's request surrendered said certificates to the bank in exchange for new certificates of the bank which defendant orally guaranteed, such oral guaranty was not void as it was merely a modification of the original written guaranty which would have been valid if oral. Kiernan v. Kratz, (1902) 42 Or 474, 69 P 1027, 70 P 506.

Where plaintiff alleged a written agreement made with another that was subsequently orally assumed by defendant, this statute prevented plaintiff from enforcing it against the defendant. Turnham v. Calumet & Ore. Min. Co., (1911) 58 Or 453, 112 P 711, 115 P 157.

Where defendant purchased land subject to a land contract wherein plaintiff was vendee and defendant orally agreed with plaintiff's vendor to perform the conditions of such land contract, such oral agreement was not within the statute and could be enforced by plaintiff. Miller v. Beck, (1914) 72 Or 140, 142 P 603.

An implied promise to assume the debts of a corporation on the transfer of the corporation's stock to the promisor was not within the statute. Weinhard v. Thompson Estate Co., (1917) 242 Fed 315.

An oral agreement by defendant to guarantee payment to plaintiff of any money it might loan to another to enable such other to carry out his contract with defendant was unenforceable. Condon Nat. Bank v. Cameron, (1924) 110 Or 475, 216 P 558.

Where under a written contract plaintiff sold defendant merchandise and agreed to accept in payment accounts receivable of not less than a stated amount of 75 percent of their face value, and thereafter by oral agreement plaintiff accepted less than the stated amount and defendant guaranteed those accounts, such oral guaranty was not within the statute. Glickman v. Bowman, (1933) 143 Or 229, 21 P2d 1082.

An extension agreement wherein defendants assumed and agreed to pay mortgage executed by their grantor to plaintiff was within this subsection. Title & Trust Co. v. Nelson, (1937) 157 Or 585, 71 P2d 1081.

A contract of suretyship is within the statute of frauds and therefore an oral modification thereof was void. Craswell v. Biggs, (1939) 160 Or 547, 86 P2d 71.

(2) Collateral or original promise

(a) Collateral. A verbal promise by defendant to pay the debt of another to plaintiff if plaintiff discontinued a suit against such other, which plaintiff did, was collateral and void since the original debtor was not discharged and defendant received no benefit from the discontinuance. Gump v. Halberstadt, (1887) 15 Or 356, 15 P 467.

An oral guaranty by a contractor to an employe of a subcontractor was void as the guaranty was merely a collateral agreement. Slade v. Utah Constr. Co., (1910) 57 Or 525, 112 P 433.

In an action on defendant's oral promise to pay for automobile to be furnished his son-in-law, the evidence showed that credit was in part given to the son-in-law so defendant's promise was collateral and therefore defendant was entitled to directed verdict. Masters v. Bidler, (1921) 101 Or 322, 198 P 912, 199 P 920.

Oral agreement by mortgagee of sheep to pay note executed by mortgagor for feed was void under this subsection as a collateral agreement, the mortgagee's incidental interest in having the sheep fed being insufficient to constitute a consideration for an original promise. Bank of Jordan Valley v. Oliver, (1924) 109 Or 605, 221 P 1067.

Where defendant contractor orally promised to see that plaintiff was paid for materials sold to subcontractor, it was a collateral promise and therefore void since it appeared that plaintiff did not rely exclusively on credit of defendant but merely looked to him as a guarantor. McMillan v. Dickover, (1926) 119 Or 116, 248 P 154.

In an action on defendant's oral promise to pay for automobile to be furnished his son-in-law, the evidence showed that credit was in part given to the son-in-law so defendant's promise was collateral. Masters v. Bidler, (1921) 101 Or 322, 198 P 912, 199 P 920. **Distinguished in** Bonneville Equip. Co. v. Tuttle, (1967) 246 Or 153, 424 P2d 231.

(b) Original. Where a person receives a fund or property from a debtor and at the time promises to pay the debt of the debtor to a third person who is a stranger to the agreement, such promise is valid though oral because it is an original undertaking although the original debt is still in force. Feldman v. McGuire, (1899) 34 Or 309, 55 P 872; Bean v. Tripp, (1921) 99 Or 216, 195 P 355; Sandgren v. Cain Lbr. Co., (1928) 125 Or 376, 264 P 865.

This subsection does not extend to an agreement whereby two persons become joint promisors to a seller, because the promise of one of the joint promisors is not collateral to the other but the joint oral promise of both is original as to both. Bryant v. Panter, (1919) 91 Or 686, 178 P 989; Bonneville Equip. Co. v. Tuttle, (1967) 246 Or 153, 424 P2d 231.

A promise to pay another's debt if the creditor discharged the debtor is a new and original agreement. Miller v. Lynch, (1888) 17 Or 61, 19 P 845.

A subsequent promisor may be bound by his oral promise to answer for the antecedent debt, default or miscarriage of another when it can be said that there is a direct benefit moving to the promisor. Eilertsen v. Weber, (1953) 198 Or 1, 255 P2d 150.

When a person promises orally to pay for materials delivered to another, and the promise was made not as a guarantor but as a principal obligor, and seller relies exclusively on promisor's credit, the oral agreement is outside the statute of frauds. Copenhagen, Inc. v. Kramer, (1960) 224 Or 535, 356 P2d 1064.

An oral promise of defendant stockholder to pay notes of insolvent corporation was an original promise and therefore not within the statute since it was made for the purpose of subserving a direct pecuniary interest of his own. Umpqua Valley Bank v. Wilson, (1927) 120 Or 396, 252 P 563; Eilertsen v. Weber, (1953) 198 Or 1, 255 P2d 150.

Where plaintiff sold materials on credit to another who was a subcontractor of defendant, but on a certain date refused to extend any more credit and defendant orally promised to be responsible for sales to such other, such oral promise was original and therefore valid. Mackey v. Smith, (1892) 21 Or 598, 28 P 974.

Where the mortgagee of certain property orally promised to indemnify a purchaser of a part thereof against certain judgment liens in consideration of his paying the purchase price to such mortgagee, such oral promise was an original undertaking and therefore valid. Peterson v. Creason, (1905) 47 Or 69, 81 P 574.

Where in an agreement between the parties the defendant was to receive a commission on all insurance written by plaintiff for persons introduced by defendant and defendant

was to pay the premiums on all insurance so written, the agreement did not involve a promise by the defendant to answer for the debt of another where it appeared that the entire credit was given to him. Harrison v. Birrell, (1911) 58 Or 410, 115 P 141.

The promise made by defendant corporation, a creditor of an insolvent corporation of which plaintiff was a stockholder, to pay plaintiff $500 for his consent to the sale of certain property of the insolvent corporation to another was for the purpose of promoting an interest of defendant so it was an original promise. Bauer v. NW Blowpipe Co., (1915) 75 Or 1, 146 P 129.

Where defendant orally promises with his son to pay for a car sold to son by plaintiff after plaintiff had refused to sell the car on the son's credit alone, the promise was original and valid. Bryant v. Panter, (1919) 91 Or 686, 178 P 989.

An oral agreement whereby defendant advanced money to a third person at plaintiff's request was an original liability of plaintiff and not within the statute. Fenlason v. Pac. Fruit Package Co., (1924) 112 Or 633, 230 P 547.

Where a contract for the sale of land provides that the purchaser shall pay the taxes, an assignee of the contract although he did not sign it could not escape liability on the ground that it was an undertaking to pay the debt of another as he accepted the benefits of the assignment. Oregon & W. Colonization Co. v. Strang, (1927) 123 Or 377, 260 P 1002.

(3) Expression of consideration. In a written contract to answer for the debt of another a seal alone was a sufficient expression of consideration. Paddock v. Hume, (1876) 6 Or 82; Taylor v. Fleckenstein, (1887) 30 Fed 99; Van Domelen v. Westinghouse Elec. Corp., (1967) 382 F2d 385.

An agreement by defendant insurance company to take over the policies of a fraternal benefit company and assume its liability upon payment of dues by the members was, as between such members and defendant, an agreement to answer for the debt of another and void because no consideration was expressed. Spande v. W. Life Indem. Co., (1912) 61 Or 220, 117 P 973, 122 P 38.

Where defendants signed their names on the back of another's note prior to delivery to plaintiff guaranteeing payment "for value received," there was a sufficient expression of consideration for the guaranty to satisfy the statute. First Nat. Bank v. Hawkins, (1914) 43 Or 186, 144 P 131.

Where the majority stockholders of a hotel corporation signed a writing wherein they agreed in consideration of the forebearance of the plaintiff to foreclose a mortgage against the corporation to pay the debt individually at a certain date, there was a sufficient expression of consideration. Davies v. Rea, (1915) 77 Or 648, 152 P 267.

A writing wherein defendants guaranteed plaintiff against loss for printing done for corporation of which defendants were officers was void for not expressing the consideration where it did not appear on the face or by necessary inference. Pioneer Show & Commercial Printing Co. v. Zetosh, (1920) 96 Or 194, 189 P 644.

Where plaintiff's ward was induced to loan money to defendant's son by defendant's oral promise to see that such loans were repaid, there was a constructive trust created and this statute did not apply. Templeton v. Hollinshead, (1926) 119 Or 620, 250 P 747.

Defendant's written guaranty of payment of balances due plaintiff insurance company over specified periods was not void since the consideration was necessarily inferable from the contents of the writing. Public Fire Ins. Co. v. Weatherly, (1934) 148 Or 407, 36 P2d 989.

4. Subsection (4)

Actual consummation of a marriage by itself does not take an oral agreement void under this subsection out of the statute. Adams v. Adams, (1889) 17 Or 247.

An oral agreement prior to marriage to transfer certain property to defendant in consideration of her marriage to plaintiff was void and actual consummation of the marriage did not take it out of the statute so a deed to such property delivered to defendant after marriage was a gift and not a performance of such alleged agreement. Matlock v. Matlock, (1914) 72 Or 330, 143 P 1010.

An oral promise by decedent not to make a will but to permit all his property to descend to plaintiff if she would marry him was not established by the testimony. Shepherd v. Allingham, (1930) 132 Or 684, 288 P 210.

5. Subsection (5)

(1) Leases

(a) Scope. A lease for one year need not be in writing and so a relinquishment of such lease need not be in writing. McDaniels v. Harrington, (1916) 80 Or 628, 157 P 1068; Boyer v. Anduza, (1918) 90 Or 163, 175 P 853.

A written lease for a term exceeding one year may be terminated by operation of law such as a surrender of the premises by the lessee and their acceptance by the lessor. Roberts Inv. Co. v. Hardie Mfg. Co., (1933) 142 Or 179, 19 P2d 429.

A tenant holding over after the expiration of his written lease could not enjoin action of forcible entry and detainer on the ground that landlord orally agreed to renew lease, since such oral agreement is an adequate defense at law. Donart v. Stewart, (1912) 61 Or 396, 122 P 763.

In an action for rent on five-year lease where defendant sought recoupment for damages from false representation of plaintiff's agent made during oral negotiations prior to the execution of the lease, such oral representations were inadmissible as evidence of damages. Caples v. Morgan, (1916) 81 Or 692, 160 P 1154, LRA 1917B, 760.

Where complaint alleged premises were leased on August 15 for a term of one year in accordance with a prior oral agreement, it was presumed on appeal when there was no bill of exceptions that the agreement was made on August 15 and therefore was not a lease for a longer period than one year and was valid. Thomas v. Peebler, (1918) 89 Or 255, 172 P 648.

The assignee under an oral assignment of a written lease exceeding one year who actually occupied the premises was liable to the landlord for use of such premises though the provisions of the lease could not be enforced. Ling v. Richfield Oil Co., (1932) 141 Or 128, 16 P2d 643.

(b) Parol modification. A lease in writing may be modified orally as to the rate of rental for the remainder of the terms when such remainder is less than one year. Sherman-Clay Co. v. Buffum & Pendleton, (1919) 91 Or 352, 179 P 241.

Where a parol modification of a written lease for four years was acted upon by the lessee to his disadvantage, the lessor could not assert its invalidity. Rogers v. Maloney, (1917) 85 Or 61, 165 P 357.

(c) Part performance. Mere possession alone to constitute sufficient part performance to take an oral lease for a period exceeding one year out of the statute must be referable soley to such oral lease. Jenning v. Miller, (1906) 48 Or 201, 85 P 517; Dunis v. Director, (1927) 121 Or 500, 255 P 474.

A collateral act, though prejudicial, done in reliance on the contract is not a part performance that will take the contract out of the statute. Id.

An oral lease for a period exceeding one year must be unequivocally established before the sufficiency of the acts relied on as part performance to take the alleged oral lease out of the statute will be considered. Dodge v. Davies, (1947) 181 Or 13, 179 P2d 735.

Taking possession and paying rent in reliance upon an oral lease will not necessarily be sufficient part performance

since all factors must be considered to see if there has been an adequate change of position. Young v. Neill, (1950) 190 Or 161, 220 P2d 89, 225 P2d 66.

The change of position required for part performance does not have to result in improvements to the land. Id.

Part performance must be in reliance on the oral agreement and related to and referable solely to the contract. Bennett v. Pratt, (1961) 228 Or 474, 365 P2d 622.

Where plaintiff entered into the possession of premises under a parol lease for two years, made substantial expenditures and paid rent thereon there was a sufficient part performance to take the parol lease out of the operation of the statute and specific performance of the parol lease was permitted. Wallace v. Scoggins, (1889) 17 Or 476, 18 Or 502, 21 P 558, 17 Am St Rep 749. **Distinguished in** Dechenbach v. Rima, (1904) 45 Or 500, 77 P 391, 78 P 666, where defendant entered into possession of premises owned by plaintiff during unexpired term of plaintiff's tenant and purchased the business of said tenant in reliance on plaintiff's oral promise that he would execute a written lease to defendant for a term of two and one half years, such oral promise was void and there was not sufficient part performance to take the oral promise out of the statute since defendant's entry into possession was by virtue of the tenant's possession and not under the oral promise.

Where a lessee entered in the possession of real property under a verbal lease for 32 months and remained in possession and paid rent for over a year, which rent was accepted by the lessor, a tenancy from year to year was created. Rosenblat v. Perkins, (1889) 18 Or 156, 22 P 598.

Possession by a tenant under an oral lease within the statute and the making of valuable improvements took the oral lease out of the operation of the statute. Friberg v. Bjelland, (1920) 95 Or 320, 186 P 1113; Dunis v. Director, (1927) 121 Or 500, 255 P 474.

A parol lease for 10 years with option to purchase was removed from the statute where lessee took possession, paid rent for over a year and erected permanent improvements under the parol lease. West v. Wash. Ry. Co., (1907) 49 Or 436, 90 P 666.

Where defendant was an assignee under an oral assignment from plaintiff's lessee of a written lease exceeding one year, part performance by defendant did not make defendant liable on the covenants of the written lease, since the rule that part performance takes a case out of the statute is cognizable only in equity for the purpose of obtaining specific performance. Culver v. Van Valkenburgh, (1912) 60 Or 447, 119 P 753.

Where plaintiff, assignee of the lessee, entered into possession of premises owned by defendant induced by defendant's oral promise to renew lease for a period exceeding one year, the oral promise was void and plaintiff's possession was by virtue of the assignment of the lease and therefore was not a part performance of the oral agreement. Ramsey v. Wellington Co., (1925) 114 Or 355, 235 P 297.

Where defendant refused to execute a written lease for five years unless plaintiff gave him an option to renew for another five years and plaintiff orally agreed to give him such option but it was never incorporated into the writing, such oral promise was void and though defendant made valuable improvements during the term of the lease, such expenditures were referable to the written lease and were not of such a permanent nature as to take the oral promise for the option out of the statute of frauds. Hopka v. Forbes, (1931) 135 Or 91, 294 P 342.

(2) Sale of real property or any interest therein

(a) Scope. The grant of a right to kill and take game on the lands of the grantor is a grant of an interest of land and within the statute of frauds. Bingham v. Salene, (1887) 15 Or 208, 14 P 523, 3 Am St Rep 152; Forsyth v. Nathansohn, (1932) 139 Or 632, 9 P2d 1036, 11 P2d 1065.

A partnership for the purpose of dealing in real estate may be created by parol. Flower v. Barnekoff, (1890) 20 Or 132, 25 P 370; Huson v. Portland & Southeastern R.R., (1923) 107 Or 187, 211 P 897, 213 P 408; Devereaux v. Cockerline, (1946) 179 Or 229, 170 P2d 727.

An oral agreement to devise real property is within the statute. Richardson v. Orth, (1901) 40 Or 252, 66 P 925, 69 P 455; Matthews v. Tobias, (1921) 101 Or 605, 201 P 199; Holder v. Harris, (1927) 121 Or 432, 248 P 145, 253 P 869, 254 P 1021; Lewis v. Siegman, (1931) 135 Or 660, 296 P 51, 297 P 1118.

A parol agreement made by proprietors of adjacent lands settling a disputed boundary line, if followed by corresponding possession is binding on the parties and their privies. Thiessen v. Worthington, (1902) 41 Or 145, 68 P 424; Satchell v. Dunsmoor, (1946) 179 Or 463, 172 P2d 826.

A lien or mortgage on land is not real property or an interest therein within the meaning of this statute. Aya v. Morson, (1919) 90 Or 647, 178 P 207. **Contra,** Tucker v. Ottenheimer, (1905) 46 Or 585, 81 P 360.

Adjoining owners may verbally agree as to the true boundary line, but to affect title the agreement must be followed by the exercise of acts of ownership up to the line agreed upon on each side continued for 10 years. Cooley v. Henderson, (1924) 112 Or 258, 228 P 923.

An estate for years in real property is an interest in real property. Flett v. Willeford, (1925) 114 Or 80, 234 P 802.

Instrument granting use of certain lands only for access to trapping marshes and not permitting the trapping to be done on the land is a license and not a profit a prendre so not within the statute of frauds. Forsyth v. Nathansohn, (1932) 139 Or 632, 9 P2d 1036, 11 P2d 1065.

The sale of burial lots is a sale of an interest in real property. Brown v. Belcrest Memorial Park Assn., (1935) 149 Or 625, 42 P2d 184.

Condemnor is not a successor of a party within scope of the statute of frauds. City of Medford v. Bessonette, (1970) 255 Or 53, 463 P2d 865.

Verbal contracts to convey mining claims were void. Kelly v. Ruble, (1883) 11 Or 75, 4 P 593; Hinderliter v. McDonald, (1917) 84 Or 251, 164 P 378.

An easement, as a right of way, is an interest in land within the meaning of the statute and can only be created by writing. Foss v. Newbury, (1891) 20 Or 257, 25 P 669; Lewis v. Ore. Cent. R. Co., (1879) 15 Fed Cas 491.

Parol evidence was not admissible to add to or contradict the terms of a written agreement for the sale of realty. Wurzweiler v. Cox, (1931) 138 Or 110, 5 P2d 699; Reddick v. Magel, (1948) 184 Or 270, 195 P2d 713.

A verbal agreement for the transfer of an equitable interest in land was void. Chenoweth & Johnson v. Lewis, (1881) 9 Or 150.

Where the boundary line between adjacent tracts of land was not honestly in dispute, a parol agreement as to the true boundary line though acquiesced in by both parties was invalid. Lennox v. Hendricks, (1883) 11 Or 33, 4 P 515.

Where defendant was induced to purchase timberland by plaintiff's false representations that he would give defendant an easement over certain logging roads, defendant was entitled to damages for plaintiff's failure to give him such easement though such oral representation was within the statute. Foss v. Newbury, (1891) 20 Or 257, 25 P 669.

An oral agreement to convey to an attorney as compensation a half interest in land which was the subject of action was invalid. Farrin v. Matthews, (1912) 62 Or 517, 124 P 675, 41 LRA(NS) 184.

An escrow agreement for the deposit of a deed with a third person to be delivered to the vendee upon performance of conditions was not a contract of sale of real property. Foulkes v. Sengstacken, (1917) 83 Or 118, 158 P 952, 163 P 311.

Where plaintiff alleged a purchase of a half interest in partnership property consisting of personalty and a lease

for years of land but did not produce written evidence of such purchase, it was concluded that he was not the owner of any part of the lease. Flett v. Willeford, (1925) 114 Or 80, 234 P 802.

Where plaintiff, a lessee of land under a written lease for a term of five years, alleged a sale of such lease to defendant for a period of four months, it was a sale of an interest in real property and void because not in writing. Dennehy v. Watt, (1925) 116 Or 189, 239 P 814.

A contract to pay a person doing work on property a percentage of the proceeds on a contemplated sale thereof was not within the statute. Bailey v. Opp, (1938) 159 Or 301, 77 P2d 826, 80 P2d 40.

An oral agreement between daughter and deceased mother whereby daughter paid taxes and made repairs on mother's rental property and daughter was to receive on the sale of such property all proceeds over $3,000, was unenforceable so long as the property was not sold. In re Richter's Estate, (1947) 181 Or 360, 175 P2d 997, 181 P2d 133, 182 P2d 378.

In an action on a contract of indemnity occasioned by defendant's alleged misrepresentation that property was included in an oral contract for sale of land, plaintiff's action was not objectionable for attempting to prove an oral contract in violation of this statute. Kennedy v. Colt, (1959) 216 Or 647, 339 P2d 450.

An agreement by seller to furnish a well to buyer suitable for domestic use was a collateral dependent agreement for services not destroyed by the execution of the deed. Caldwell v. Wells, (1961) 228 Or 389, 365 P2d 505.

(b) Establishing oral contract. An oral contract to devise real property must be established by clear, concise, convincing and satisfactory evidence and must be just, reasonable and mutual in its terms. Hunter v. Allen, (1944) 174 Or 261, 147 P2d 213, 148 P2d 936.

For equity to compel specific performance of an alleged contract to devise real property there should be evidence corroborating testimony of the claimant. Tigglebeck v. Russell, (1949) 187 Or 554, 213 P2d 156.

A parol contract will not be specifically enforced unless the terms of the contract are shown by full, complete, and satisfactory proof, precise beyond reasonable misunderstanding. Eugene Pioneer Cemetery Assn. v. Spencer Butte Lodge No. 9, (1961) 228 Or 13, 363 P2d 1083.

Specific performance of alleged oral agreement to devise realty in consideration of performance by plaintiff of certain services should have been denied on ground that evidence was not sufficiently clear, satisfactory and convincing to establish contract or to establish that services rendered could not be adequately compensated in money. Benson v. Williams, (1944) 174 Or 404, 143 P2d 477, 149 P2d 549.

An oral contract to devise and bequeath real and personal property in consideration of personal services was sufficiently certain, was supported by valuable consideration and was corroborated by testimony and a mutual but invalid will. Tigglebeck v. Russell, (1949) 187 Or 554, 213 P2d 156.

(c) Note or memorandum

(A) Sufficiency of memorandum. The memorandum must show the parties to the agreement by some reference sufficient to identify them. Flegel v. Dowling, (1909) 54 Or 40, 102 P 178, 135 Am St Rep 812, 19 Ann Cas 1159.

The signing of an earnest money receipt by the party to be charged satisfies the statute. Alpha Phi of Sigma Kappa v. Kincaid, (1947) 180 Or 568, 178 P2d 156.

The memorandum was sufficient to satisfy the statute. Stubblefield v. Imbler, (1898) 33 Or 446, 54 P 198; Champion v. Hammer, (1946) 178 Or 595, 169 P2d 119.

A deed deposited in escrow was not sufficient to take an oral contract for the sale of the land out of the statute where the deed did not contain a memorandum of the agreement. Cooper v. Thomason, (1896) 30 Or 161, 45 P 295.

A signed memorandum of agreement as to the sale of land was held indefinite where it stated "Price $6,000. C. pays note for $200. Deed to be special warranty, and C. pays for cablegrams. Money to be paid on or before 40 days. Possession when money paid and deed given to W., farm 297 acres more or less as shown by deed. Abstract furnished." Catterlin v. Bush, (1901) 39 Or 496, 59 P 706, 65 P 1064.

Parol evidence was admissible to connect several writings so that together they constituted a sufficient memorandum to satisfy the statute. Flegel v. Dowling, (1909) 54 Or 40, 102 P 178, 135 Am St Rep 812, 19 Ann Cas 1159.

The failure to specify in the memorandum of a contract the place where it was executed did not render it nugatory. Burns v. Witter, (1910) 56 Or 368, 108 P 129.

A written option to purchase land was sufficient to satisfy the statute as against the grantor though the acceptance which constituted the agreement was not written. Friendly v. Elwert, (1911) 57 Or 599, 105 P 404, 111 P 690, 112 P 1085, Ann Cas 1913A, 357.

An agreement to sell real property to two named persons, or either of them, was merely an option not a sufficient memorandum of a contract to sell. Mossie v. Cyrus, (1912) 61 Or 17, 119 P 485, 624.

A memorandum agreement for the sale of real property which did not disclose who was the buyer or the seller in the transaction nor negative the fact that the parties might have been brokers was unenforceable. Collins v. Keller, (1912) 62 Or 169, 171, 124 P 681.

Letters introduced did not prove a contract to well land but merely an option and there was not a sufficient memorandum to satisfy the statute. Brown v. Farmers & Merchants Nat. Bank, (1915) 76 Or 113, 147 P 537, Ann Cas 1917B, 1041.

Numerous letters and telegrams were not a sufficient contract for the sale of land to satisfy the statute. Dodge v. Root, (1917) 83 Or 21, 162 P 254.

(B) Description of property. Where a surveyor with the deed or other instrument before him can, with or without the aid of extrinsic evidence, locate the land and establish the boundaries, the description of the property is sufficient. Bogard v. Barhan, (1908) 52 Or 121, 96 P 673, 132 Am St Rep 676; Kallstrom v. O'Callaghan, (1971) 259 Or 210, 485 P2d 1200.

A failure to specify the township, range, county and state in the memorandum does not render the contract nugatory. Burns v. Witter, (1910) 56 Or 368, 108 P 129; Wurzweiler v. Cox, (1931) 138 Or 110, 5 P2d 699.

A latent ambiguity in the description of property in a writing subject to the statute may be clarified by parol evidence, but a patent ambiguity may not. Hertel v. Woodard, (1948) 183 Or 99, 191 P2d 400; Coast Business Brokers, Inc. v. Hickman, (1964) 239 Or 121, 396 P2d 756. Coast Business Brokers, Inc. v. Hickman, supra, **distinguished in** Kallstrom v. O'Callaghan, (1971) 259 Or 210, 485 P2d 1200.

A description of premises to be exchanged as "the brick store building occupied by B. & W., located in W., M. county, Oregon" is sufficient. Bogard v. Barhan, (1908) 52 Or 121, 96 P 673, 132 Am St Rep 676.

A description of premises to be exchanged as "lot 7, block 2, T's addition to W." is on its face sufficient. Id.

A description of premises to be exchanged as "his five-acre residence property lying west of the Catholic church" is sufficient. Id.

A description of premises to be exchanged as "my 15 acre farm, located one mile north of W., M. County, Oregon" is sufficient. Id.

Evidence showing that both parties clearly understood what land was intended will cure uncertainties in the de-

scription of the land. Kallstrom v. O'Callaghan, (1971) 259 Or 210, 485 P2d 1200.

Where the memorandum of a sale of realty identified the property so that it could apply to only one particular tract of land it was sufficient. Woolsey v. Draper, (1922) 103 Or 103, 201 P 730, 203 P 582; Kallstrom v. O'Callaghan, (1971) 259 Or 210, 485 P2d 1200.

Writings referring to vendor's seven lots in a certain town were not sufficient for enforcement of a contract to sell seven lots where the vendor owned eight lots, any seven of which might have been subject to the contract. Woolsey v. Draper, (1922) 103 Or 103, 201 P 730, 203 P 582.

A description in a memorandum of sale of real estate was insufficient which gave the number and street but not the city, county or state of the location where no evidence was contained within the writing or indicated by aliunde; nor could the word "my" be inserted by implication in front of "house and lot" although the alleged subject matter was the vendor's only realty. Hertel v. Woodard, (1948) 183 Or 99, 191 P2d 400.

(C) Subscribed by party to be charged. An oral acceptance of a written offer to sell property on certain definite terms signed by the party to be charged is sufficient. Alpha Phi of Sigma Kappa v. Kincaid, (1947) 180 Or 568, 178 P2d 156.

Specific performance of a contract within the statute was granted to one who did not sign the contract against the other party who did sign it. Flegel v. Dowling, (1909) 54 Or 40, 102 P 178, 135 Am St Rep 812, 19 Ann Cas 1159.

A letter promising to sign an agreement for the transfer of land if a certain provision was inserted did not satisfy this requirement. Jackson v. Stearns, (1911) 58 Or 57, 113 P 30, Ann Cas 1913A, 284, 37 LRA(NS) 639.

Where a surety failed to sign immediately at the end of the undertaking but did sign the affidavit of qualification, the instrument was not "subscribed" within the meaning of the statute of frauds. Commercial Cred. Corp. v. Marden, (1936) 155 Or 29, 62 P2d 573, 12 ALR 931.

(D) Expression of consideration. When an option to buy or sell is given as part of a larger contract, a consideration sufficient to make the option binding and irrevocable may be found in the consideration that the optionee gives in that larger contract. Kallstrom v. O'Callaghan, (1971) 259 Or 210, 485 P2d 1200.

A seal on an agreement for the sale of land was of itself the expression of a consideration sufficient to satisfy that requirement of this section. Johnston v. Wadsworth, (1893) 24 Or 494, 34 P 13.

A mutual agreement to exchange land was a sufficient consideration to satisfy the statute. Bogard v. Barhan, (1910) 56 Or 269, 108 P 214.

(d) Execution of contract void under statute. Agreements either oral or written are not subject to the statute of frauds, after being executed. McLeod v. Despain, (1907) 49 Or 536, 563, 90 P 492, 92 P 1088, 124 Am St Rep 1066, 19 LRA(NS) 276.

An oral agreement for the extinguishment or creation of an easement was taken out of the statute by complete performance. Baldock v. Atwood, (1891) 21 Or 73, 26 P 1058; Tusi v. Jacobson, (1930) 134 Or 505, 293 P 587, 939, 71 ALR 1364.

An oral agreement for mutual wills was valid and binding as a contract where such wills were made and the surviving party had accepted the fruits of the agreement. In re Burke's Estate, (1913) 66 Or 252, 134 P 11; Schramm v. Burkhart, (1931) 137 Or 208, 2 P2d 14; Taylor v. Wait, (1932) 140 Or 680, 14 P2d 283.

The statute of frauds is no defense to an action against the purchaser of land for the purchase price where the deed has been executed, delivered and accepted, though at direction of the purchaser the deed was to a third person. Malzer v. Schisler, (1913) 67 Or 356, 136 P 14, 51 LRA(NS) 77.

Where interest in property was conveyed pursuant to oral agreement by grantee to make will in grantor's favor, the agreement became executed on grantor's part and was removed from the operation of the statute. Matthews v. Taylor, (1933) 142 Or 483, 20 P2d 806.

(e) Part performance of contract void under statute

(A) Oral contract to convey. In order that a parol agreement to convey real property may be taken out of the statute it must be certain and definite in its terms, the acts of part performance must be referable solely to the parol agreement and it must be so far executed that refusal to enforce it would operate as a fraud on the party. Plymale v. Comstock, (1881) 9 Or 318; Wagonblast v. Whitney, (1885) 12 Or 83, 6 P 399; Cooper v. Thomason, (1896) 30 Or 161, 45 P 295.

Payment of the purchase price in money or services is not a sufficient part performance to take an oral agreement to convey land out of the statute. Farrin v. Matthews, (1912) 62 Or 517, 124 P 675, 41 LRA(NS) 184; Roadman v. Harding, (1912) 63 Or 122, 126 P 993.

Part payment of purchase price or payment of taxes does not take the case out of the statute. Cunningham v. Friendly, (1914) 70 Or 222, 139 P 928, 140 P 989; Trowbridge v. Gillette, (1915) 76 Or 228, 148 P 876; Foulkes v. Sengstacken, (1917) 83 Or 118, 153 P 952, 163 P 311.

The taking possession of real estate pursuant to an oral contract for the sale thereof is such part performance as will take the contract out of the statute, unless the relation of affinity or consanguinity exists between the vendor and purchaser, in which case the making of valuable improvements in addition is essential to specific performance of the contract. Stalker v. Stalker, (1915) 78 Or 291, 296, 153 P 52; Goff v. Kelsey, (1915) 78 Or 337, 153 P 103; Alery v. Alery, (1954) 203 Or 101, 277 P2d 764.

Part performance must be exclusively referable to the contract. Eugene Pioneer Cemetery Assn. v. Spencer Butte Lodge No. 9, (1961) 227 Or 614, 363 P2d 1083; Strong v. Hall, (1969) 253 Or 61, 453 P2d 425.

Evidence was insufficient to show that plaintiff went into possession under the agreement. Hawkins v. Doe, (1912) 60 Or 437, 446, 119 P 754, Ann Cas 1914A, 765.

When any relation of affinity or consanguinity exists between the parties to an oral agreement to convey land, possession alone by purchaser will not take case out of the statute but valuable improvements are also necessary. Skinner v. Furnas, (1916) 82 Or 414, 161 P 962.

Payment of $140 on purchase price of $750 plus entering into possession of the property to cut timber and build a house thereon is sufficient part performance to entitle plaintiff to specific performance of a land contract. Kemmerer v. Title & Trust Co., (1918) 90 Or 137, 175 P 865.

A parol license to divert water for irrigating purposes was not revocable by the licensor after the licensee had expended his money and labor in digging a ditch and preparing his land for the use of the water upon the faith of such parol license. McBroom v. Thompson, (1894) 25 Or 559, 37 P 57; Heisley v. Eastman, (1921) 102 Or 137, 201 P 872.

Where the purchaser went into possession, made valuable improvements and paid the purchase price, the contract was not within the statute. Cantwell v. Barker, (1912) 62 Or 12, 15, 124 P 264; Zeuske v. Zeuske, (1912) 62 Or 46, 51, 124 P 203; Dwight v. Giebisch, (1915) 77 Or 254, 150 P 749.

In suit by son to enforce parol agreement of his deceased father to convey part of a farm to him, possession by the son of the farm was not so exclusive to constitute part performance of the agreement and thereby take it out of the statute where after the date of the oral agreement the father to all appearances exercised as much authority or control over the premises as he had before. Brown v. Lord, (1879) 7 Or 302. **Distinguished in** Hayes v. Hayes, (1918) 89 Or 630, 174 P 579, where, in a suit to enforce parol agreement by deceased father to convey part of a farm to

plaintiff, the taking of possession and making improvements on such part by plaintiff and the father's marking off the boundary was a sufficient part performance to take it out of the statute.

Possession by a daughter of real property of her mother and part performance of a parol agreement to convey the property in consideration of services takes the case out of the statute even though such possession antedated the contract. Pugh v. Spicknall, (1903) 43 Or 489, 73 P 1020, 74 P 485.

An oral agreement to convey mining claims between one cotenant and purchaser, who was in possession under a contract with another cotenant, was not taken out of the statute by purchaser's possession because such possession was not exclusively referable to the oral agreement. Roberts v. Templeton, (1905) 48 Or 65, 80 P 481, 3 LRA(NS) 790.

Possession of realty by the purchaser under a parol contract and payment of a part of the purchase price with a tender of the balance satisfied the statute. Sprague v. Jessup, (1905) 48 Or 211, 83 P 145, 84 P 802, 4 LRA(NS) 410.

Where plaintiff paid taxes but made no valuable improvements and his possession was not exclusively referable to the oral agreement of defendant to convey land to plaintiff, plaintiff was not entitled to specific performance. Tonseth v. Larsen, (1914) 69 Or 387, 138 P 1080.

Where a deed deposited with a third person to be delivered to vendee upon compliance with oral contract of sale did not contain all the terms of such oral contract it did not satisy this section. Foulkes v. Sengstacken, (1917) 83 Or 118, 158 P 952, 163 P 311.

Sufficient part performance of an agreement for the division of a water right was shown to take it out of the operation of the statute. Tucker v. Kirkpatrick, (1917) 86 Or 677, 169 P 117.

In suit by son to enforce mother's parol contract to convey her interest in land owned by mother and son as tenants in common, the evidence of son's possession of land under the contract was not of that degree of clearness and certainty as to constitute part performance and thereby take the case out of the statute. LeVee v. LeVee, (1919) 93 Or 370, 181 P 351.

An oral agreement to convey lands was not taken out of the statute where the possession of the alleged purchasers remained the same after the alleged agreement as it had before. Riggs v. Adkins, (1920) 95 Or 414, 187 P 303.

The evidence of an oral agreement to convey real property and the evidence of the improvements claimed to have been made in reliance thereon was not of that degree of clearness and certainty required to overcome the effect of the statute. Killgreen v. W. Loan & Bldg. Co., (1937) 155 Or 408, 64 P2d 526.

The facts did not show an oral contract. Johnson v. Davis, (1969) 252 Or 472, 450 P2d 758.

(B) Oral contract to devise. In an action to enforce an oral contract to devise land where the consideration did not consist of personal care and services not measurable in money, the failure to allege possession of the premises under the oral contract was fatal. Matthews v. Tobias, (1921) 101 Or 605, 201 P 199; Holder v. Harris, (1927) 121 Or 432, 248 P 145, 253 P 869, 254 P 1021.

Care of the decedent for four months was not a sufficient part performance to take an oral contract to devise land out of the statute. Richardson v. Orth, (1902) 40 Or 252, 66 P 925, 69 P 455.

Evidence of possession by plaintiff, the making of substantial improvements and other valuable considerations all being referable to an oral agreement of decedent to devise land to plaintiff was sufficient to remove the case from the statute. Goodin v. Cornelius, (1921) 101 Or 422, 200 P 915.

Service consisting of general housework performed by plaintiff for decedent allegedly under decedent's oral promise to devise his property to plaintiff was not a sufficient part performance to take the case out of the statute since such service was not exclusively referable to the oral promise. Brennan v. Derby, (1928) 124 Or 574, 265 P 425.

A parol contract to devise realty for rendition of certain services was not enforced where the rendition of services was not wholly referable to such parol contract and where it did not appear that adequate compensation for such services could not otherwise be made. Hunter v. Allen, (1944) 174 Or 261, 147 P2d 213, 148 P2d 936.

Part performance consisting of promisee's changing the course of her life, restricting her freedom of movement for the life of the promisor and entering into a family relationship in which she performed services of an extraordinary character not capable of pecuniary measurement took oral contract to devise real property out of the statute. Tiggleback v. Russell, (1949) 187 Or 554, 213 P2d 156.

Where services rendered by plaintiff children to decedent were not exclusively referable to an alleged oral promise to devise property, such services did not constitute such a part performance so as to remove the oral promise from the statute. Majovski v. Slavoff, (1950) 188 Or 357, 215 P2d 674.

Specific performance of oral contract to will property was not granted when services rendered could be adequately compensated in action at law. Moore v. Fritsche, (1958) 213 Or 103, 322 P2d 114.

(C) Oral contract to execute mortgage. Delivery of the money by mortgagee to the mortgagor, in the full amount agreed upon, was sufficient to take an oral agreement to execute a mortgage out of the statute where the mortgagor used the money in accordance with the agreement between the parties to pay the existing mortgage and relieve himself of the payment of interest. Smith v. Portland Sav. & Loan, (1956) 207 Or 546, 296 P2d 481, 298 P2d 185.

(D) Parol gifts. Oral promise to give land is specifically enforceable where the possession taken and improvements made by donee are exclusively referable to the gift. Thayer v. Thayer, (1914) 69 Or 138, 138 P 478; Tonseth v. Larsen, (1914) 69 Or 387, 138 P 1080.

(f) Trusts. A trust arising ex maleficio is not within the statute. Dray v. Dray, (1891) 21 Or 59; Kroll v. Coach, (1904) 45 Or 459, 475, 78 P 397, 80 P 900.

Parol evidence is admissible to show that grantee of land under an absolute deed held the proceeds of the land as trustee since parol evidence is admissible to enforce a trust in personal property. Cooper v. Thomason, (1896) 30 Or 161, 45 P 295.

An agreement by one who purchases land with his own money and takes title in his own name to hold in trust for another is within the statute. Dennis v. City of McMinnville, (1928) 128 Or 101, 269 P 221.

Secrecy and the violation of a duty imposed under a fiduciary or confidential relationship are the elements of a trust arising ex maleficio. Hughes v. Helzer, (1947) 182 Or 205, 185 P2d 537.

Where grantee had platted and sold part of the land, oral testimony was admissible to prove that grantee under an absolute deed held it under a trust to sell the same, apply the proceeds on an indebtedness and account to grantors for balance. Kollock v. Bennett, (1909) 53 Or 395, 100 P 940, 133 Am St Rep 840.

A parol agreement that plaintiff convey land to defendant which he was to sell, reimburse himself for advances and pay the balance to plaintiff was void. Johnson v. McKenzie, (1916) 80 Or 160, 154 P 885, 156 P 791.

When a trustee who held real estate under a parol trust acknowledged and executed such trust, parol testimony was admissible to prove such trust. De Vol v. Citizens Bank, (1919) 92 Or 606, 179 P 282, 181 P 985.

(g) Parol modification or abandonment. An oral extension of time of performance made by vendor of a land contract is valid where it is acted upon by the vendee.

Neppach v. Ore. & Calif. R. Co., (1905) 46 Or 374, 80 P 482, 7 Ann Cas 1035; Kingsley v. Kressly, (1911) 60 Or 167, 111 P 385, 118 P 678, Ann Cas 1913E, 746; Scott v. Hubbard, (1913) 67 Or 498, 136 P 653.

A contract required to be in writing under the statute of frauds cannot be altered or modified except in writing, but the performance of the contract may be changed by verbal agreement. Osborne v. Eldriedge, (1929) 130 Or 385, 280 P 497.

A written contract for the sale of land may be abandoned by parol. Hughes v. Helzer, (1947) 182 Or 205, 185 P2d 537.

Where contract for the sale of land specified payment by purchaser was to be made in Salem, a subsequent parol agreement stating payment was to be made at a certain place in said city was valid. Sayre v. Mohney, (1899) 35 Or 141, 56 P 526.

The defense that a parol agreement to extend the time of performance of a contract to sell land was void was waived by defendant where such delay was caused by a defect in the record title of defendant. McCarty v. Helbling, (1914) 73 Or 356, 144 P 499.

(h) Retention of down payment by vendor. The vendor under a void oral contract to convey land who is not ready and willing to perform the contract may not retain the purchase money paid. Helgeson v. Northwestern Trust Co., (1922) 103 Or 1, 203 P 586.

A purchaser under an agreement for the sale of land, which agreement does not satisfy the statute, cannot recover payment on purchase price if vendor is ready, able and willing to perform his part of the contract. Lanham v. Reimann, (1945) 177 Or 193, 160 P2d 318.

Where the purchaser under an oral contract within the statute deposited a stock certificate to guaranty payment of first installment of purchase price and then defaulted, the vendor was entitled to said certificate though the oral contract was unenforceable. Barton v. Simmons, (1929) 129 Or 457, 278 P 83.

6. Subsection (6)

Since the right of preserving and enforcing a mechanic's lien is not an interest in land, an agent's authority to act with reference to it need not be in writing. Hughes v. Lansing, (1898) 34 Or 118, 124, 55 P 95, 75 Am St Rep 574.

A real estate broker's authority generally empowers him only to find a purchaser, not to execute a contract of sale. Flegel v. Dowling, (1909) 54 Or 40, 102 P 178.

The authority of an agent to accept an option to purchase land for another must be in writing. Davis v. Brigham, (1910) 56 Or 41, 107 P 961, Ann Cas 1912B, 1340.

A written agreement authorizing an agent to sell land does not empower him to agree to restrictions on the remaining property of the vendor. Roberts v. Lombard, (1915) 78 Or 100, 152 P 499.

An agent's authority to execute a lease of real property for one year or less or to reduce the rent under a sublease for one year need not be in writing. Sherman-Clay Co. v. Buffum & Pendleton, (1919) 91 Or 352, 179 P 241.

The writing demanded by the statute which will warrant an agent to bind his principal by a memorandum stipulating for the sale of real property, though not required to be sealed, witnessed or acknowledged, must in specifying the authority delegated be more in the nature of a power of attorney, the terms of which should be strictly construed. Marshall v. Strauss, (1939) 160 Or 265, 84 P2d 502.

Where the agent's authority is limited to the finding of a purchaser, the agent does not have authority to execute a contract of sale. Id.

The authority of an agent to sell shares of stock in a corporation, though all property of corporation is real estate, need not be in writing. Silvertooth v. Kelley, (1939) 162 Or 381, 91 P2d 1112.

An agreement to pay a commission, contingent upon a sale or purchase of real property, is not "an agreement concerning real property." Kneeland v. Shroyer, (1958) 214 Or 67, 328 P2d 753.

A letter by the owner of land allowing a timber broker two and one half percent commission if he made a sale within 20 days did not authorize the broker to sign a contract of sale for such land. Chick v. Bridges, (1910) 56 Or 1, 107 P 478, Ann Cas 1912B, 1293.

The wife of a vendor could not enforce an agreement by the agent of the purchaser to pay her a specified sum for joining in a deed where the agent's authority was not in writing. Walk v. Hibberd, (1913) 65 Or 497, 504, 133 P 95.

The authority of an agent to renew a lease of real property for a period exceeding one year must be in writing and the authority of the agent could not be proved by the agent's statements or acts. Toomey v. Casey, (1914) 72 Or 290, 142 P 621.

Where agent of corporation had no written authority to execute contract for sale of land and the plaintiff knew it, the fact that plaintiff entered into possession of land and made improvements under a contract executed by such agent did not render the contract enforceable against the corporation. Bessler v. Derby, (1916) 80 Or 513, 157 P 791.

Where a corporate agent without authority executed a contract of sale of land belonging to corporation and the officers of the corporation when notified disavowed the sale, the fact that the purchaser allowed the corporation to retain the money, though the agent offered to return it, did not effect a ratification of the contract. Id.

The evidence was insufficient to show authority of agent of defendant corporation to renew a lease for a period exceeding one year since no written authority was shown. Ramsey v. Wellington Co., (1925) 114 Or 355, 235 P 297.

An oral promise to give a partial release of a mortgage made by an alleged agent of the mortgagee was void where the agent's authority to do so was not in writing. Union Cent. Life Ins. Co. v. Toliver, (1936) 152 Or 185, 52 P2d 1129.

Lawyer had no authority to buy real property or make contract concerning real property unless express authority is conferred by client upon lawyer in writing. Hage v. Harvey, (1957) 210 Or 652, 313 P2d 448.

The alleged agent did not have written authority. Johnson v. Davis, (1969) 252 Or 472, 450 P2d 758.

7. Subsection (7)

(1) Scope. An oral agreement employing a broker to sell real and personal property for one lump sum is entire and since it includes services within the statute of frauds, it cannot be enforced as to the personal property. Rugh v. Soleim, (1919) 92 Or 329, 180 P 930; Pettigrove v. Corvallis Lbr. Mfg. Co., (1933) 143 Or 33, 21 P2d 198.

A contract by a real estate broker to procure a loan for the purchase of real estate is not within the statute. Hill v. Wilson, (1923) 108 Or 621, 216 P 751.

An option to purchase whether with or without consideration is not a contract for the sale of land within this paragraph. Richanbach v. Ruby, (1929) 127 Or 612, 271 P 600, 61 ALR 1441.

Contract of employment to sell corporate stock need not be in writing even where the property of a corporation consists wholly of real estate. Silvertooth v. Kelley, (1939) 162 Or 381, 91 P2d 1112.

An oral agreement as to the division of commissions between broker and broker or broker and salesman is enforceable. Sorenson v. Brice Realty Co., (1955) 204 Or 223, 282 P2d 1057.

An agreement by defendant to pay certain sum to plaintiff real estate brokers if plaintiffs would forego attempting to sell certain property listed with them to a prospective purchaser so that defendant might trade his property to such purchaser was not within the statute since plaintiffs were

not required to make any effort to sell defendant's property. Kincart v. Shambrook, (1913) 64 Or 27, 128 P 1003.

A contract employing a sales manager to organize a selling department, select suitable agents and manage the company's selling force was not within the statute. Sherman v. Clear View Orchard Co., (1915) 74 Or 240, 245, 145 P 264.

Where complaint alleged the sale of a store by plaintiff broker, the agreement for sale was invalid because oral, a store being presumed to be real property and the presumption was not overcome. Van Orsdol v. Hutchcroft, (1917) 83 Or 567, 163 P 978.

In an action by realtor for commission on sale of land the correspondence did not show a contract between the parties and since this section precluded the admission of other evidence the plaintiff failed. Great W. Land Co. v. Waite, (1918) 87 Or 488, 168 P 927, 171 P 193.

No equity can arise from an oral agreement for the tenant to act for the sale of the property void under the statute, especially where tenant fails to show any assent or adoption by landlord of his acts in attempting to sell the land. Shaw v. Corbett, (1919) 94 Or 270, 185 P 585.

A person employed by the owner of timber land to assist in developing and managing the property and in devising ways to secure the best returns therefrom with no authority to sell except under directions of the owner was not a real estate broker within the meaning of this paragraph. Bates v. Ore.-Am. Lbr. Co., (1922) 285 Fed 666.

An oral contract by the vendor of real estate with a broker agreeing to compensate the broker to get rid of the vendee in possession who had title was void under the statute. Hill v. Wilson, (1923) 108 Or 621, 216 P 751.

A lease of property containing option to purchase within the leasing period was not contract for sale of interest in real estate within this subsection. Richanbach v. Ruby, (1929) 127 Or 612, 271 P 600 61 ALR 1441.

In an action by broker to recover commission for exchange of land under a written contract, evidence tending to vary the terms of the written contract or to show that defendants did not know contents thereof was properly excluded. Kight v. Orchard-Hays, (1929) 128 Or 668, 275 P 682.

Oral contract between plaintiff and the agent of the defendant whereby plaintiff was to sell certain cemetery lots for a commission was not enforceable against defendant. Brown v. Belcrest Memorial Park Assn., (1935) 149 Or 625, 42 P2d 184.

A written agreement whereby a husband and wife were to provide funds for investment in timber lands and plaintiff, a real estate broker, was to give his services in buying and selling such lands for a share of the profits was a real estate brokerage contract and not binding on the wife, who did not sign it, or on her heirs. Devereaux v. Cockerline, (1946) 179 Or 229, 170 P2d 727.

Agreement of real estate broker, who had been acting for owner, not to interfere in negotiations between the owner and prospective buyer in return for prospective buyer's agreement to pay the commission, was not within this subsection. Kneeland v. Shroyer, (1958) 214 Or 67, 328 P2d 753.

(2) Note or memorandum

(a) In general. A written agreement which satisfies this subsection is valid even though executed after the services were performed and the sale completed. Puffer v. Badley, (1919) 92 Or 360, 181 P 1.

Where a written agreement to pay brokerage fees was supplemented by telegrams and a letter, it was a question for the jury whether there was a sufficient memorandum within the statute. Hewey v. Andrews, (1917) 82 Or 448, 159 P 1149, 161 P 108.

A contract for the exchange of land signed by the broker's principal and the other party to the exchange, providing for a commission to be figured in regular manner and for the payment of the customary sum but not stating to whom payable, was not a sufficient memorandum. Rugh v. Soleim, (1919) 92 Or 329, 180 P 930.

(b) Identification of property. The contract need not state the sum to be paid for the property nor the exact description of the property, it only need be identified. Henderson v. Lemke, (1911) 60 Or 363, 119 P 482.

A broker's agreement to sell land on commission which does not identify the property to be sold does not satisfy the statute. Hughes v. Evans, (1913) 64 Or 368, 130 P 639. **But see** Sherwood v. Gerking, (1957) 209 Or 493, 306 P2d 386.

Written memorandum authorizing plaintiff broker to sell 237 acres of realty in certain district owned by defendant was not sufficient to identify the property where defendant owned 316.96 acres in such district. Trumbly v. Fixley, (1946) 178 Or 458, 168 P2d 571. **Distinguished in** Sherwood v. Gerking, (1957) 209 Or 493, 306 P2d 386.

A description which failed to indicate what section in a township was involved and what road was intended was inadequate. Hink v. Bowlsby, (1953) 199 Or 238, 260 P2d 1091.

Property description on listing agreement having references to extrinsic facts by which property could be identified, was sufficient. Sherwood v. Gerking, (1957) 209 Or 493, 306 P2d 386.

(c) Expression of consideration. It was not necessary that the consideration be stated in exact terms where it could be made out clearly from the whole writing. Henderson v. Lemke, (1911) 60 Or 363, 119 P 482.

An agreement within this subsection was void because it did not state the compensation to be paid the real estate broker. Taggart v. Hunter, (1915) 78 Or 139, 150 P 738, 152 P 871, Ann Cas 1918A, 128.

Correspondence not expressing a consideration was not a compliance with the statute. Lueddemann v. Rudolf, (1916) 79 Or 249, 154 P 116, 155 P 172.

An owner's written offer to a realtor to pay a certain commission for the sale or exchange of realty was a sufficient expression of consideration to satisfy this subsection since it was necessarily inferable that the broker's services was the consideration for the owner's promise. Oregon Home Builders v. Crowley, (1918) 87 Or 517, 170 P 718, 171 P 214.

In an action for commissions earned by plaintiff as broker in the sale of real estate, the memorandum was not sufficient in that it failed to express the consideration. Miller v. Payette Valley Land Co., (1919) 91 Or 680, 178 P 987.

(3) Oral acceptance, modification or abandonment. The time limit of a brokerage contract may be waived or impliedly extended by the seller. Widing v. Jensen, (1962) 231 Or 541, 373 P2d 661; Ferris v. Meeker Fertilizer Co., (1971) 258 Or 377, 482 P2d 523.

Written authority to find a purchaser for real estate may be withdrawn by parol. Peterson v. Bogner, (1911) 59 Or 555, 117 P 805.

Where a written option to purchase real property expired on January 15, an oral agreement extending the expiration date is valid if entered into prior to January 15. Slotboom v. Simpson Lbr. Co., (1913) 67 Or 516, 135 P 889, 136 P 641, Ann Cas 1915C, 339.

Unless an exception to the general rule applies, a listing contract may subsequently be modified only by an agreement also in writing. United Farm Agency v. McFarland, (1966) 243 Or 124, 411 P2d 1017. **Distinguished in** Ferris v. Meeker Fertilizer Co., (1971) 258 Or 377, 482 P2d 523.

An owner's written offer to a corporate realtor to pay a commission for the sale or exchange of his property was sufficient under this subsection where it was accepted by parol. Oregon Home Builders v. Crowley, (1918) 87 Or 517, 170 P 718, 171 P 214.

A claimed modification of a contract between broker and owner of land which modification provided for additional compensation to broker was not in writing and therefore void. Callaghan v. Scandling, (1946) 178 Or 448, 167 P2d 119.

A listing contract with a real estate broker was within the statute. United Farm Agency v. McFarland, (1966) 243 Or 124, 411 P2d 1017.

An oral modification of the time for paying the commission, being an agreement to pay annual instalments for a fixed period of years, was within the statute and invalid. Id.

(4) Effect of full performance by broker. Performance by broker requires that he either bring the vendor and vendee into direct communication or he must furnish the vendor with a binding contract executed by the vendee. Henry v. Harker, (1912) 61 Or 276, 118 P 205, 122 P 298; Taylor v. Peterson, (1915) 76 Or 77, 147 P 520; Anderson v. Wallowa Nat. Bank, (1921) 100 Or 679, 198 P 560.

A full performance of the services by the broker does not take an oral agreement to pay a commission for securing a purchaser of land out of the statute. Sorenson v. Smith, (1913) 65 Or 78, 129 P 757, 131 P 1022, Ann Cas 1915A, 1127, 51 LRA(NS) 612; Taylor v. Peterson, (1915) 76 Or 77, 147 P 520; Pettigrove v. Corvallis Lbr. Mfg. Co., (1933) 143 Or 33, 21 P2d 198.

Where real estate broker employed by vendor under oral contract to sell land brought the vendor and purchaser together and the purchaser made a part payment but then refused to purchase, though the title was good in law, the broker was not entitled to commission since owner could not enforce specific performance against the purchaser., Cunningham v. Friendly, (1914) 70 Or 222, 139 P 928, 140 P 989.

(5) Ratification. A ratification of an oral contract within this subsection must be in writing. Sorenson v. Smith, (1913) 65 Or 78, 129 P 757, 131 P 1022, Ann Cas 1915A, 1127, 51 LRA(NS) 612; Slotboom v. Simpson Lbr. Co., (1913) 67 Or 516, 135 P 889, 136 P 641, Ann Cas 1915C, 339.

FURTHER CITATIONS: Hayward v. Morrison, (1952) 194 Or 335, 241 P2d 888; Rands v. Ewing, (1953) 197 Or 454, 250 P2d 921, 253 P2d 908; Hink v. Bowlsby, (1953) 199 Or 238, 260 P2d 1091; Putnam v. Jenkins, (1955) 204 Or 691, 285 P2d 532; Shipe v. Hillman, (1956) 206 Or 556, 292 P2d 123; Smith v. Portland Fed. Sav. & Loan Assn., (1956) 207 Or 546, 296 P2d 481, 298 P2d 185; Jones v. Jones, (1957) 237 F2d 454; Kretz v. Howard, (1959) 220 Or 73, 346 P2d 93; Brady v. East Portland Sheet Metal Works, (1960) 222 Or 584, 352 P2d 144; Columbia Brick Works v. Freeman, (1960) 223 Or 109, 353 P2d 620; Brady v. Ray, (1960) 223 Or 613, 353 P2d 554, 355 P2d 258; Hanks v. Baillie, (1961) 229 Or 160, 367 P2d 359; Barchus v. Pioneer Trust Co., (1961) 229 Or 268, 366 P2d 890; Vermeer v. Hickman, (1962) 229 Or 569, 368 P2d 77; Yandell v. United States, (1962) 208 F Supp 306, 315 F2d 141; Hojem v. Burres, (1963) 233 Or 300, 378 P2d 286; Amca Lbr. Co. v. Buckeye-Pacific Lbr. Co., (1963) 233 Or 611, 378 P2d 738; Jordan v. Tanana Corp., (1963) 236 Or 15, 386 P2d 463; Belton v. Vuesing, (1965) 240 Or 399, 402 P2d 98; Lemire v. McCollum, (1967) 246 Or 418, 425 P2d 755; National Labor Relation Bd. v. Weber, (1967) 382 F2d 387; Keppel v. Bennett, (1968) 249 Or 133, 437 P2d 826; Huffstutter v. Lind, (1968) 250 Or 295, 442 P2d 227; Automotive Equip. Co. v. 3 Bees Logging Co., (1968) 251 Or 105, 444 P2d 1019; Ford v. Allum, (1968) 251 Or 346, 445 P2d 511; Palmer v. Wheeler, (1971) 258 Or 41, 481 P2d 68.

ATTY. GEN. OPINIONS: Applicability to insurance contracts, 1954-56, p 130.

LAW REVIEW CITATIONS: Whole section: 7 OLR 183; 8 OLR 121, 123, 138; 11 OLR 194; 32 OLR 361; 40 OLR 208; 42 OLR 133-175; 43 OLR 168; 2 WLJ 509; 5 WLJ 283.

Subsection (2): 6 OLR 281; 10 OLR 277.

Subsection (5): 1 OLR 34, 85, 114; 8 OLR 362; 10 OLR 181, 281; 11 OLR 394; 25 OLR 192, 217.

41.610

NOTES OF DECISIONS

1. Original writing shall be produced
2. Notice to produce
3. Copy must be identified

1. Original writing shall be produced

By admitting that a writing offered in evidence was a correct copy of a public record, the requirement that the original or a certified copy be produced was waived. First Nat. Bank v. Miller, (1906) 48 Or 587, 87 P 892.

The duplicate of a printed plat of a city was admissible without any effort to produce the original since a duplicate is more than a mere copy and is identical not only verbally but in legal import. Nicholas v. Title & Trust Co., (1916) 79 Or 226, 154 P 391, Ann Cas 1917A, 1149.

2. Notice to produce

A notice to produce papers given on a nonjudicial day is good. Sugar Pine Lbr. Co. v. Garrett, (1895) 28 Or 168, 171, 42 P 129.

A one day's notice to produce papers at a trial may be considered sufficient in the absence of any showing to the contrary. Id.

A mere demand in the midst of trial is not a compliance with the section. Reimers v. Pierson, (1911) 58 Or 86, 88, 113 P 436.

Where the plaintiff denies the existence of an alleged written order or that it ever came into his possession, it is not necessary to serve him with notice to produce such order. Michelin Tire Co. v. Williams, (1931) 135 Or 158, 293 P 938.

Where an indictment set out the substance of a false telegram used in the commission of a crime, which defendant retained, it was proper to admit secondary evidence of the contents of the telegram without giving defendant notice to produce it. State v. Hanscom, (1896) 28 Or 427, 432, 43 P 167.

It was presumed on appeal, where the record did not show the contrary, that notice to produce a license was duly given so as to authorize proof of the contents of the license. State v. Kline, (1908) 50 Or 426, 430, 93 P 237.

Where it was apparent from the face of the pleadings that a proof of loss was in the custody of defendant and that it would be required at the trial, the pleadings themselves were sufficient notice to produce the original. Peters v. Queen City Ins. Co., (1912) 63 Or 382, 126 P 1005.

In an action by lessor against his lessees whom lessor claimed had assigned their lease to a third person, a notice to lessees to produce the assignment did not warrant the introduction of secondary evidence since it was presumed the assignment was in the possession of the assignee. Toomey v. Casey, (1916) 82 Or 71, 160 P 583.

Unsworn declarations of counsel do not constitute the requisite proof that notice to produce was given. Oregon Art Tile Co. v. Hegele, (1917) 84 Or 82, 164 P 548.

3. Copy must be identified

Copy of letter was admissible where plaintiff failed to produce the original after notice to do so and the evidence sufficiently identified it to be a copy of the original. Sugar Pine Lbr. Co. v. Garrett, (1895) 28 Or 168, 42 P 129; Gerking v. Laidlaw, (1911) 59 Or 116, 114 P 922.

FURTHER CITATIONS: State v. Broadhurst, (1948) 184 Or

178, 196 P2d 407, cert. denied, 337 US 906, 69 S Ct 1046, 93 L Ed 897; Hammons v. Schrunk, (1956) 209 Or 127, 305 P2d 405; Atckison v. Triplett, (1966) 244 Or 475, 419 P2d 4; Lumbermens Mut. Cas. Co. v. Jamieson, (1968) 251 Or 608, 447 P2d 384; State v. White, (1970) 4 Or App 151, 477 P2d 917.

LAW REVIEW CITATIONS: 41 OLR 138-153; 42 OLR 255-262.

41.615

NOTES OF DECISIONS

1. In general

The trial court should be liberal in ruling upon a motion permitted by this section. Oregon Orchards, Inc. v. Insurance Co. of No. Am., (1964) 239 Or 192, 397 P2d 75.

This section is identical to a portion of the Federal Rules of Civil Procedure, and interpretations of the federal rule are highly persuasive in interpreting this section. Southern Pac. Co. v. Bryson, (1969) 254 Or 478, 459 P2d 881.

It was not error for court order to limit right of inspection by defendant's counsel to those portions of the state's investigation reports that related to witnesses called by the state. State v. Foster, (1965) 242 Or 101, 407 P2d 901; State v. McLean, (1970) 255 Or 464, 468 P2d 521.

Good cause for granting the motion was shown. Southern Pac. Co. v. Bryson, (1969) 254 Or 978, 459 P2d 881.

2. Under former similar statute

The power of court to order a party to give the other permission to take a copy of any book or document was clearly discretionary, the language not being mandatory. Davis v. Hofer, (1900) 38 Or 150, 157, 63 P 56; State v. Yee Guck, (1921) 99 Or 231, 195 P 363.

A memorandum of agreement to purchase land described therein was capable of inspection under the section in a suit to reform a purchase money note on ground of mistake as to the description. Fagan v. Wiley, (1907) 49 Or 480, 486, 90 P 910.

It was only on neglect or refusal to allow inspection that the presumption arose and it did not arise where a copy was tendered and the only indication that such copy did not conform to the original was the unsworn declarations of counsel to that effect. Oregon Art Tile Co. v. Hegele, (1917) 84 Or 82, 164 P 548.

Unless the paper or document contained evidence relating to the merits, the court had no discretion to compel inspection. State v. Yee Guck, (1921) 99 Or 231, 195 P 363.

A stenographer's transcript of an accomplice's confession exonerating defendant was not a paper relating to the merits of the action within the section. State v. Brake, (1921) 99 Or 310, 195 P 583.

Discovery as granted in equity would be denied where all the necessary documents could be adequately examined in the law action under the section. State v. Am. Sur. Co., (1934) 148 Or 1, 35 P2d 487.

Before an instruction had to be given to the jury to presume a document to be as alleged, the party applying for the document and not his attorney had to allege its character under oath. Fine v. Harney County Nat. Bank, (1947) 181 Or 411, 170 P2d 365, 182 P2d 379.

The trial court could in its discretion sustain or deny a motion made by the defendant in a criminal case requesting permission to inspect his confession in the custody of the prosecution. State v. Leland, (1951) 190 Or 598, 227 P2d 785, aff'd on other grounds, 343 US 790, 72 S Ct 1002, 96 L Ed 1302.

FURTHER CITATIONS: Huebner v. Chinn, (1949) 186 Or 508, 207 P2d 1136; State v. Tranchell, (1966) 243 Or 215, 412 P2d 520; State v. Little, (1967) 249 Or 297, 431 P2d 810; Foles v. U.S. Fid. & Guar. Co., (1971) 259 Or 337, 486 P2d 537.

LAW REVIEW CITATIONS: 39 OLR 114-118; 40 OLR 95; 43 OLR 19; 46 OLR 233; 4 WLJ 178, 179.

41.625

LAW REVIEW CITATIONS: 39 OLR 117; 41 OLR 158.

41.640

NOTES OF DECISIONS

1. In general
2. No evidence of the contents of a writing other than the writing itself
3. When adverse party withholds original
4. When the original cannot be produced
   (1) Proof of loss of original
   (2) Extent of search
5. When original is a record or other document in custody of public officer
6. Production of copy or "reproduction" of original
7. When the originals consist of numerous accounts or other documents
8. Printed duplicates

1. In general

This section does not apply to physical objects other than "writings." Heneky v. Smith, (1882) 10 Or 349, 45 Am Rep 143.

This section does not authorize the receipt in evidence of written summaries of oral statements. State v. Monk, (1953) 199 Or 165, 260 P2d 474.

The facts of payment, the amount paid and to whom the payment is made can be established without introduction of the draft or check by which payment is made. Lumbermens Mut. Cas. Co. v. Jamieson, (1968) 251 Or 608, 447 P2d 384.

Carbon copies of original letters in sender's file were admissible as original memoranda. Hall v. Pierce, (1957) 210 Or 98, 307 P2d 292, 309 P2d 997, 309 P2d 998.

Erroneous omission of secondary evidence of contract between plaintiff and a third person was not reversible error where the action was not on that contract and other evidence of this contract was received without objection. Kneeland v. Shroyer, (1958) 214 Or 67, 328 P2d 753.

2. No evidence of the contents of a writing other than the writing itself

Secondary evidence is inadmissible in the absence of a showing of proper diligence. Atckison v. Triplett, (1966) 244 Or 475, 419 P2d 4.

Secondary evidence of a plat was excluded where no effort was made to produce the original plat. Jones v. Teller, (1913) 65 Or 328, 133 P 354.

Secondary evidence of an assignment of a lease was held inadmissible where notice to produce such assignment was given assignor rather than assignee. Toomey v. Casey, (1916) 82 Or 71, 160 P 583.

Secondary evidence of contents of insurance policy was inadmissible where no showing was made why policy could not be produced. Hammons v. Schrunk, (1956) 209 Or 127, 305 P2d 405.

3. When adverse party withholds original

Where it is apparent from pleadings that a writing in the custody of one party will be required at the trial of a cause by the other party, the pleadings themselves are sufficient notice to the adverse party to produce the document at the trial and, if he fails to do so, secondary evidence as

to its contents is admissible. Stipe v. First Nat. Bank, (1956) 208 Or 251, 301 P2d 175.

It will be presumed on appeal where the only objection to secondary evidence was that it was incompetent, immaterial, irrelevant and not the the best evidence that testimony as to the demand to produce the license was duly given. State v. Kline, (1908) 50 Or 426, 93 P 237.

An engineer who served a demand on the railroad company to produce work orders issued to him and his conductor on the date of the accident which the company did not produce, may prove the contents thereof. Pfeiffer v. Oregon-Wash. R. R. & Nav. Co., (1915) 74 Or 307, 144 P 762.

Secondary evidence of a lease was not admissible where notice to produce original was not given. Oregon Art Tile Co. v. Hegele, (1917) 84 Or 82, 164 P 548.

4. When the original cannot be produced

Because of the loss or destruction of a plat, parol evidence was permissible to prove its contents and to show that it was identical with a plat of the townsite which had been recorded under another name. Hicklin v. McClear, (1889) 18 Or 126, 137, 22 P 1057.

(1) Proof of loss of original. Before a party can give secondary evidence of the contents of a writing, he must show that he cannot produce the original in a reasonable time by the exercise of reasonable diligence. Jones v. Teller, (1913) 65 Or 328, 133 P 354; Velasquez v. Freeman, (1966) 244 Or 40, 415 P2d 514.

Parol evidence of contents of a deed not admissible where nonproduction of the deed not accounted for. Smith v. Cox, (1881) 9 Or 327.

Where a court admitted oral proof of a writing where no effort had been made to find or produce the original, such error was not cured by the court charging the jury that if the contract was reduced to writing they were not at liberty to consider any oral evidence of its terms. Krewson v. Purdom, (1888) 15 Or 589, 16 P 480.

A copy of the record of a directors' meeting was not admissible where no attempt was made to account for the original. Bowick v. Miller, (1891) 21 Or 25, 26 P 861.

Subsequent testimony showing the loss of an instrument cures the omission of such proof before secondary evidence was introduced. Maxwell v. Bolles, (1895) 28 Or 1, 4, 41 P 661.

Where an agent's authority was created by a written instrument, parol evidence of the scope of such agency was inadmissible until the absence of the instrument had been accounted for. Wicktorwitz v. Farmers' Ins. Co., (1897) 31 Or 569, 576, 51 P 75.

Secondary evidence of the transfer of personal property by a bill of sale was not admissible where a reasonable excuse was given for not producing the writing. Price v. Wolfer, (1898) 33 Or 15, 52 P 759.

Testimony of one witness that she had heard the defendant read a letter he had hidden, and that she had not been able to find it was sufficient evidence of the letter to justify oral proof of its contents. State v. Leasia, (1904) 45 Or 410, 78 P 328.

Secondary evidence of a building bond was not admissible in absence of proper foundation. Gladstone Lbr. Co. v. Kelly, (1913) 64 Or 163, 129 P 763.

A blue-print purporting to represent a locus in quo was not admissible where no proof was offered of any effort to produce the original map or plat. Jones v. Teller, (1913) 65 Or 328, 133 P 354.

(2) Extent of search. No rule can be laid down as to what shall be considered a reasonable effort to produce the original. Wiseman v. No. Pac. R. R. Co., (1891) 20 Or 425, 26 P 272, 23 Am St Rep 135.

The party alleging the loss or destruction of a document is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest and which are accessible to him. Id.

The degree of diligence necessary in any case depends on the circumstances of the particular case, the character and importance of the paper, the purposes for which it is proposed to use it and the place where a paper of that kind may naturally be supposed to be found. Id.

Testimony of possessor of an instrument that she had searched in several places where she thought it might probably be but had not been able to find it and believed it to be lost was sufficient to justify the admission of secondary evidence of its contents. Sperry v. Wesco, (1894) 26 Or 483, 492, 38 P 623.

Where plaintiff wrote to an insurance company asking for the return of a certificate and received no answer and made no further effort to procure the certificate before the trial two months later, sufficient diligence was not shown to authorize the admission of secondary evidence. Parker v. Smith Lbr. Co., (1914) 70 Or 41, 48, 138 P 1061.

5. When original is a record or other document in custody of public officer

Parol evidence was not admissible to prove the meeting and action of the pilot commissioner concerning the licensing of a pilot when the Pilot Act required a record of the same to be made by the secretary. The California, (1871) Fed Cas No. 2,313.

Testimony as to contents of a certified copy of an answer in another action was properly admitted where the answer was a record and it was shown that both the copy and the original were lost. Williams v. Gallick, (1884) 11 Or 337, 3 P 469.

An agent of the U.S. Weather Bureau could state the general results of the observations made at his station for a series of years where such results had been compiled from entries made officially in the required records of the various persons who had been in charge of the station. Scott v. Astoria R. R. Co., (1903) 43 Or 26, 72 P 594, 99 Am St Rep 710, 62 LRA 543.

A decision of the U.S. Secretary of the Interior should not have been received in evidence where it was not accompanied by any competent proof that it was the original nor of its genuineness, and it was not authenticated by certificate of the proper officer that it was a copy. Pacific Live Stock Co. v. Isaacs, (1908) 52 Or 54, 62, 96 P 460.

6. Production of copy or "reproduction" of original

The purpose of the best evidence rule is to secure the most reliable information as to the contents of documents when those contents are in dispute. State v. White, (1970) 4 Or App 151, 477 P2d 917.

By admitting that a writing offered in evidence was a correct copy of a public record, the requirement of producing the original or certified copy was waived. First Nat. Bank v. Miller, (1906) 48 Or 587, 87 P 892.

7. When the originals consist of numerous accounts or other documents

An expert accountant could testify as to the result of his examination of books of account. Salem Traction Co. v. Anson, (1902) 41 Or 562, 67 P 1015, 69 P 675.

An itemized invoice or bill rendered at the conclusion of the performance was not the original book or ledger entry nor "the general result of the whole." Loggers & Contrs. Mach. Co. v. Owen, (1951) 193 Or 9, 236 P2d 309.

A group of expense items were not considered "numerous accounts" within the meaning of paragraph (e) of subsection (1). State v. Monk, (1953) 199 Or 165, 260 P2d 474.

8. Printed duplicates.

Duplicates of plat were admissible although no effort was made to produce the original. Nicholas v. Title & Trust Co., (1916) 79 Or 226, 154 P 391, Ann Cas 1917A, 1149.

FURTHER CITATIONS: Bowick v. Miller, (1891) 21 Or 25, 26 P 861; Gilbert v. Globe & Rutgers Fire Ins. Co., (1919) 91 Or 59, 174 P 1161, 178 P 358, 3 ALR 205; Stevens v. Myers, (1919) 91 Or 114, 177 P 37, 2 ALR 1155; Kight v. Orchard-Hays, (1929) 128 Or 668, 275 P 682; Booher v. Brown, (1944) 173 Or 464, 146 P2d 71; Smith v. Abel, (1957) 211 Or 571, 316 P2d 793; United States Nat. Bank v. Guiss, (1958) 214 Or 563, 331 P2d 865; George H. Buckler Co. v. Am. Met. Chem. Corp., (1958) 214 Or 639, 332 P2d 614.

LAW REVIEW CITATIONS: 41 OLR 138-153; 42 OLR 255-262, 264.

41.660

NOTES OF DECISIONS

Experiments and demonstrations used in evidence should be made under conditions similar to those attending the fact to be illustrated; when this rule is observed, the discretion of the trial court in allowing the result of such experiments to go to the jury will not be reviewed in the absence of abuse thereof. Leonard v. So. Pac. Co., (1892) 21 Or 555, 28 P 887, 15 LRA 221.

The change in condition must not be of sufficient moment to make the exhibit misleading. State v. Hood, (1960) 225 Or 40, 356 P2d 1100.

It is not necessary that an object should be in precisely the same condition when offered as when it played a part in the occurrence which gave rise to its offer. State v. Olsen, (1965) 241 Or 212, 405 P2d 358.

It was reversible error to admit the results of experiments by nonexpert witnesses in shooting at paste board targets, at different distances, to show powder burns for the purpose of showing that deceased came to his death from the effect of a near gun shot. State v. Justus, (1883) 11 Or 178, 8 P 337.

The result of experiments with a pistol and some cartridges found on a defendant, made for the purpose of showing that a ball from such pistol would penetrate further into the woodwork than would balls fired from the pistol with which the killing is claimed to have been done, cannot be admitted in evidence unless it is shown that the conditions were the same in both cases. State v. Fletcher, (1893) 24 Or 295, 299, 33 P 575.

The clothing worn by two deceased persons at the time they were killed may be offered in evidence in a trial for the murder of a third person who was killed with them at the same time by the defendant for the purpose of showing the direction of gunshot wounds upon their persons. State v. Porter, (1897) 32 Or 135, 49 P 964.

The admissibility of a proferred demonstration of a lantern similar to the one used by plaintiff brakeman just before he was injured is within the discretion of the court and the refusal to admit such was not reversible error. Adskim v. Ore.-Wash. R.R. & Nav. Co., (1930) 134 Or 574, 294 P 605.

The spring and axle of defendant's car obtained several months after accident were inadmissible where plaintiff did not show them to be substantially in the same condition as at the time of accident. White v. Keller, (1950) 188 Or 389, 215 P2d 917.

FURTHER CITATIONS: State v. Sack, (1957) 210 Or 552, 300 P2d 427.

41.670

NOTES OF DECISIONS

This section did not apply to the method of proving the unwritten law of a foreign country. State v. Looke, (1879) 7 Or 54.

The degree of slope that may be safely given to an earth embankment is not a fact of such "general notoriety and interest" so as to render books on civil engineering primary evidence thereof. Scott v. Astoria R.R. Co., (1903) 43 Or 26, 40 72 P 594, 99 Am St Rep 710, 62 LRA 543.

A map made from miscellaneous sources of information without an actual survey on the ground is not competent evidence of the location of the objects or of the distances shown thereon. Seabrook v. Coos Bay Ice Co., (1907) 49 Or 237, 243, 89 P 417.

A map shown to be substantially correct is admissible in an action arising out of an automobile collision, although the map is so crude as a matter of drawing that it would not be adopted as a model by a civil engineer or map draftsman. Walling v. Van Pelt, (1930) 132 Or 243, 285 P 262.

Recordation is prima facie evidence of delivery but does not constitute delivery as a matter of law. Branchfield v. McCulley, (1951) 192 Or 270, 231 P2d 771, 235 P2d 334.

Extracts from medical works may not be used as probative evidence of the truth of statements contained therein. Eckleberry v. Kaiser Foundation No. Hosp. (1961) 226 Or 616, 359 P2d 1090, 84 ALR 2d 1327.

Published works made evidence by this section are only admissible to prove facts of a general and public nature, not those of a private nature existing within the knowledge of living men. Id.

41.680 to 41.710

CASE CITATIONS: Smith v. Abel, (1957) 211 Or 571, 316 P2d 793; Miller v. Lillard, (1961) 228 Or 202, 364 P2d 766; Bucholz v. Ford, (1967) 246 Or 386, 425 P2d 746; Wynn v. Sundquist, (1971) 259 Or 125, 485 P2d 1085.

LAW REVIEW CITATIONS: 39 OLR 21, 104; 42 OLR 228; 43 OLR 250.

41.680

NOTES OF DECISIONS

One of the purposes of the Uniform Act is to enlarge the operation of the business records exception to the hearsay evidence rule. Douglas Cred. Assn. v. Padelford, (1947) 181 Or 345, 182 P2d 390; Gallagher v. Portland Traction Co., (1947) 181 Or 385, 182 P2d 354, D.N. & E. Walter & Co. v. Van Domelen, (1967) 246 Or 275, 425 P2d 166.

The county jail is a business. State v. Roisland, (1969) 1 Or App 68, 455 P2d 555.

FURTHER CITATIONS: Mayor v. Dowsett, (1965) 240 Or 196, 400 P2d 234.

LAW REVIEW CITATIONS: 42 OLR 228.

41.690

NOTES OF DECISIONS

1. In general
2. Hospital and medical records
3. Time cards
4. Ledger entries

1. In general

The admission of records under this section is within the sound discretion of the trial judge. Cascade Lbr. Terminal Inc. v. Critanovich, (1958) 215 Or 111, 332 P2d 1061; Stam v. Salles, (1960) 223 Or 518, 355 P2d 93.

The complete absence of a motive to misrepresent need not be shown by the offeror before an exhibit is admissible; the presence of a positive counter motive to misrepresent must be shown to exclude an exhibit. Sullivan v. Carpenter, (1948) 184 Or 485, 199 P2d 655.

A traffic accident report made by police officer who did not witness the collision was hearsay and inadmissible under this section. Snyder v. Portland Traction Co., (1947) 182 Or 344, 185 P2d 563.

In action in assumpsit for work, labor and materials, lists of materials furnished and used by plaintiffs were admissible where the requirements herein were met. Sullivan v. Carpenter, (1948) 184 Or 485, 199 P2d 655.

In a claim against an estate the court erred in admitting paper in deceased claimant's handwriting containing notations of claim where there was no compliance with the requirements of this section. Brackett v. United States Nat. Bank, (1949) 185 Or 642, 205 P2d 167.

An abstract prepared by the Federal Security Agency-Public Health Service was not admissible where it was made one year after the examination and the custodian did not identify the abstract. Allan v. Oceanside Lbr. Co., (1958) 214 Or 27, 328 P2d 327.

A summary of the books, made for the purpose of segregating work and material expended on personal property from that expended on real property and made long after the work was done, was inadmissible since the summarizer made conclusions of law concerning what was real and what was personal property. George H. Buckler Co. v. Am. Met. Chem. Corp., (1958) 214 Or 639, 332 P2d 614.

An investigative report by a livestock officer was not admissible as a business record. Miller v. Lillard, (1961) 228 Or 202, 364 P2d 766.

Prison record card was properly received as a business record. State v. Roisland, (1969) 1 Or App 68, 459 P2d 555.

2. Hospital and medical records

Hospital records relevant to the controversy are admissible if compliance with the conditions of the statute is shown. Natwick v. Moyer, (1945) 177 Or 486, 163 P2d 936; McReynolds v. Howland, (1959) 218 Or 566, 346 P2d 127; Mayor v. Dowsett, (1965) 240 Or 196, 400 P2d 234.

In a proper case, relevant medical history of a patient in a hospital, furnished by someone other than the patient and recorded in compliance with the Uniform Act, may be received in evidence. Mayor v. Dowsett, (1965) 240 Or 196, 400 P2d 234.

An index card containing entry of part payment for services was admissible as evidence of such payment for the purpose of tolling the statute of limitations where doctor testified it was the original card and that he made the entry the day immediately after payment, and it was not necessary that he have personal knowledge of the payment at the time of entry. Douglas Cred. Assn. v. Padelford, (1947) 181 Or 345, 182 P2d 390.

Relevant portions of hospital records covering 15 years were admissible to show that plaintiff's physical condition allegedly caused by negligence of defendant bus company existed prior to the time of the accident. Gallagher v. Portland Traction Co., (1947) 181 Or 385, 182 P2d 354.

Although certain portions of hospital records were improperly admitted, where such error did not substantially affect plaintiff's rights reversal was not necessary. Id.

3. Time cards

Time cards filled out by workmen, sufficiently authenticated under this section, were admissible in evidence in assumpsit action for work, labor and materials. Sullivan v. Carpenter, (1948) 184 Or 485, 199 P2d 655.

4. Ledger entries

An entry in a ledger is admissible to prove that the person charged is the debtor. Moore v. State Fin. Co., (1954) 202 Or 265, 274 P2d 559.

A subsidiary ledger of the plaintiff's charges against the defendant and credits to him entered from the check register and scale sheets was admissible upon bookkeeper's testimony satisfying requirements of this section. Cascade Lbr. Terminal, Inc. v. Cvitanovich, (1958) 215 Or 111, 332 P2d 1061.

FURTHER CITATIONS: Raski v. Wise, (1910) 56 Or 72, 107 P 984; Radtke v. Taylor, (1922) 105 Or 559, 210 P 863, 27 ALR 1423; Smith v. Abel, (1957) 211 Or 571, 316 P2d 793; United States Nat. Bank v. Guiss, (1958) 214 Or 563, 331 P2d 865; Heise v. Pilot Rock Lbr. Co., (1960) 222 Or 78, 352 P2d 1072; Lewis v. Merrill, (1961) 228 Or 541, 365 P2d 1052; State v. Betts, (1963) 235 Or 127, 384 P2d 198; Johnson v. Lewis, (1965) 239 Or 601, 398 P2d 744; State v. White, (1970) 4 Or App 151, 477 P2d 917.

LAW REVIEW CITATIONS: 3 OLR 154; 15 OLR 286; 27 OLR 188; 49 OLR 199.

41.720

NOTES OF DECISIONS

Erroneous admission of secondary evidence of contract between plaintiff and a third person was not reversible error where the action was not on that contract and other evidence of this contract was received without objection. Kneeland v. Shroyer, (1958) 214 Or 67, 328 P2d 753.

A photostatic copy of a check, drawn on a bank in another state, cashed at a bank in this state who made the copy and then returned the check, was properly admitted. State v. Peden, (1960) 220 Or 205, 348 P2d 451.

LAW REVIEW CITATIONS: 41 OLR 141; 42 OLR 264.

41.740

NOTES OF DECISIONS

1. In general
2. Nature of rule
3. Writing "is to be considered as containing all" the terms of the agreement
4. Particular instruments and agreements
5. Showing intent or understanding
6. Collateral oral agreements
7. Subsequent contract
8. "Where a mistake or imperfection of the writing is put in issue"
9. "Evidence of the circumstances"
10. Evidence "to establish illegality or fraud"
11. Evidence "to explain ambiguity"
    (1) Patent ambiguity
    (2) Latent ambiguity
    (3) Identifying persons or things described
    (4) Identifying land
12. Parties to contract
13. Consideration as subject of proof
    (1) Contractual consideration
14. Showing instrument to be mortgage or security
15. Proof of custom and usage
16. Evidence to show trust
17. Execution and delivery of instrument
18. When writing does not embody entire contract
19. Deeds
20. Wills
21. Application of section where third person is party

1. In general

Injustice resulting from the application of this section does not authorize its violation. United States Nat. Bank v. Miller, (1927) 122 Or 285, 258 P 205, 58 ALR 339.

The rule expounded in this section is not inflexible. Ramirez v. Ringo, (1954) 202 Or 1, 271 P2d 657.

This section applies to wills. Putnam v. Jenkins, (1955) 204 Or 691, 285 P2d 532.

This rule is one of substantive law rather than one of evidence. Oregon-Pac. Prod. Co. v. Welsh Panel Co., (1965) 248 F Supp 903.

In an action upon a bond conditioned to repay reasonable sums expended for lands, a memorandum signed by several of the defendants approving a selection of lands at a designated price was admissible to show that the amount paid was reasonable, there being no tendency to vary the terms of the bond or substitute another agreement therefor. Oregon R. R. & Nav. Co. v. Swinburne, (1894) 26 Or 262, 266, 37 P 1030.

Evidence showing the existence of an unsettled account in favor of the maker of a note against the payee which it was agreed should be credited on the new note when adjusted, and that the account was afterwards adjusted did not tend to vary the terms of a written instrument. Williams v. Culver, (1897) 30 Or 375, 48 P 365.

The validity of the agreement was in dispute. Story v. Hamaker, (1967) 245 Or 584, 423 P2d 185.

2. Nature of rule

According to the better view, the rule which prohibits the modification of a written instrument by parol is one of substantive law. Marks v. Twohy Bros. Co., (1921) 98 Or 514, 194 P 675; Taylor v. Wells, (1950) 188 Or 648, 217 P2d 236; Webster v. Harris, (1950) 189 Or 671, 222 P2d 644; Ruff v. Boltz, (1968) 252 Or 236, 448 P2d 549.

3. Writing "is to be considered as containing all" the terms of the agreement

Where a written contract appears on its face to be complete, no addition to or contradiction of its legal effect by parol stipulation, preceding or accompanying its execution, can be admitted. Langell v. Langell, (1888) 17 Or 220, 229, 20 P 286; Tallmadge v. Hooper, (1900) 37 Or 503, 61 P 349, 1127.

Verbal negotiations preceding the execution of a contract are deemed merged therein. Leavitt & Co. v. Dimmick, (1917) 86 Or 278, 168 P 292; John Deere Plow Co. v. Silver Mfg. Co., (1926) 118 Or 62, 216 P 743, 245 P 1083.

Where agreement had been reduced to writing and is complete on its face, parol evidence will not be received to vary its terms. Huston v. Dickson, (1958) 213 Or 115, 322 P2d 920; Oregon-Pac. Prod. Co. v. Welsh Panel Co., (1965) 248 F Supp 903.

When a contract in writing is clear and explicit without latent ambiguities, parol evidence is not admissible either to contradict, add to or detract from or vary its terms. Sutherlin v. Bloomer, (1907) 50 Or 398, 406, 93 P 135.

A written contract may not be varied by a parol agreement entered into prior to the signing of the writing. Williams v. Mount Hood Ry. & Power Co., (1910) 57 Or 251, 110 P 490, 111 P 17, Ann Cas 1913A, 177.

When the parties put into writing the means by which a deed could be obviated and the title returned to the grantor, those writings superseded any oral understanding, in the absence of attack for fraud or mistake. Carter v. Simpson Estate Co., (1922) 103 Or 383, 193 P 913, 203 P 580.

A deed merges oral negotiations leading up to its execution and delivery. Harvey v. Campbell, (1923) 107 Or 373, 209 P 107, 214 P 348.

The parol evidence rule does not apply until a writing is executed which is intended by the parties to be an integration of the entire agreement. Dorsey v. Tisby, (1951) 192 Or 163, 234 P2d 557.

When, following an oral agreement, a written memorandum is prepared, it supplants all the bargainings, discussions and oral agreements which preceded it. State v. Cummings, (1955) 205 Or 500, 288 P2d 1036, 289 P2d 1083.

One of the exceptions to this rule permits parol evidence to show facts concerning payment of consideration. Wassom v. State Tax Comm., (1964) 1 OTR 468, aff'd, 241 Or 388, 406 P2d 151.

In an action upon a note and a written lease a contemporaneous parol agreement that plaintiff would take back from the defendant such goods as he might have left at the expiration of the lease could not be proved. Hindman v. Edgar, (1893) 24 Or 581, 583, 17 P 862.

In a written escrow agreement which provided that if defendant should care for decedent during his life defendant would receive certain realty therefor, evidence of what the contracting parties may have said prior to the consummation of their contract was inadmissible. Hilgar v. Miller, (1903) 42 Or 552, 72 P 319.

The admission of parol evidence which virtually contradicted an unambiguous building contract whereby the builder was to complete a house according to plans furnished by him to be a duplicate of one built by him for another was error. Ramsdell v. Ramsdell, (1913) 65 Or 428, 132 P 1167.

Where an agreement of "stationmen" to do certain construction work was reduced to writing, no oral evidence of an alleged oral agreement that the contracting parties should be bound by estimates of a third party was admissible. Sund & Co. v. Flagg & Standifer Co., (1917) 86 Or 289, 168 P 300.

In an action on a bond conditioned that the obligors erect a sawmill on the property, parol evidence that a sawmill could not be erected there unless certain streets were vacated was held inadmissible. Learned v. Holbrook, (1918) 87 Or 576, 170 P 530, 171 P 222.

What was said by plaintiff's agent in negotiation prior to a sale contract as to water rights from a well was not admissible. Ontario Advancement Co. v. Stevens, (1925) 113 Or 564, 231 P 127.

Conversations had before a written contract was signed as to whether there would be any necessity for figuring overtime charges in the progress of the work were held inadmissible. Graef v. Bowles, (1926) 119 Or 498, 248 P 1090.

Evidence of negotiations leading up to making of the contract in writing was properly excluded. Houk v. Gilmore, (1927) 122 Or 498, 259 P 891.

Where a deed was not ambiguous, testimony of negotiations leading up to the execution and delivery of the deed, contradicting the effect of the latter, was prohibited. Kane v. Kane, (1930) 134 Or 79, 291 P 785.

In a prosecution for making false financial statement for the purpose of securing an extension of credit from a bank, in which the state introduced in evidence demand notes executed in place of outstanding obligations, oral evidence that the bank promised for balance forbearance of such note was incompetent. State v. Bosch, (1932) 139 Or 150, 7 P2d 554.

Where release agreement provided for release of all claims and demands, a provision could not be inserted into the contract that the release was not intended to cover any damages that might have been incurred prior to its execution. Glickman v. Weston, (1932) 140 Or 117, 11 P2d 281, 12 P2d 1005.

Evidence that defendant told the plaintiff before the extension agreement was signed "that he would pay the said note and mortgage" was inadmissible. Hulin v. Veatch, (1934) 148 Or 119, 35 P2d 253, 94 ALR 1319.

A provision of milkman's contract with dairy company that if milkman should become dissatisfied with milk route he should return it to dairy company without compensation did not mean that after milkman quit he could not solicit customers upon such route for himself or others. Snow Cap Dairy v. Robanske, (1935) 151 Or 59, 47 P2d 977.

Where at the time the agreement to lease theater was being discussed the attorney wrote down the terms of agreement as discussion proceeded and had each of the parties affix his initials to the memoranda, and thereafter

the attorney prepared an instrument which was signed by the parties in which the lessor agreed to the precise rental terms which were incorporated in lease, parol evidence to vary, add to or contradict the terms of written agreement was inadmissible. Temple Enterprises v. Combs, (1940) 164 Or 133, 100 P2d 613, 128 ALR 856.

In a suit to foreclose a chattel mortgage securing payment of mortgagor's note and any additional sum not exceeding a stated amount thereafter advanced by mortgagee to mortgagor during life of mortgage, parol evidence of prior or contemporaneous additional stipulations for advancement of sum sufficient to cultivate and harvest mortgagor's hop crop was inadmissible to vary terms of mortgage. Willamette Prod. Cred. Assn. v. Day, (1941) 167 Or 451, 118 P2d 1058.

Where written contract provided that the defendant would indorse and deliver to the plaintiffs certain promissory notes in consideration of the performance of certain services that plaintiffs would perform, parol evidence was inadmissible to show that the notes delivered by the defendant were not taken in payment but only as security for payment for the work to be performed by the plaintiffs. Brown v. Marion Fin. Co., (1942) 168 Or 358, 123 P2d 187.

Evidence tending to show a contemporaneous oral agreement inharmonious with written agreement for the sale of realty was inadmissible. Reddick v. Magel, (1948) 184 Or 270, 195 P2d 713.

4. Particular instruments and agreements

In an action upon a note parol contemporaneous evidence was inadmissible for the purpose of changing, varying or in any manner altering the terms of such note. Hoxie v. Hodges, (1859) 1 Or 252; Smith v. Caro, (1881) 9 Or 278.

A written contract of sale of land was not subject to contradiction by parol. Lee v. Summers, (1868) 2 Or 260.

Where several writings of even date relating to the sale of a farm constituted one complete contract, no parol evidence could be introduced to show that the parties had entered into a contemporaneous parol agreement to pay the plaintiff $600 for certain services performed for defendant. Looney v. Rankin, (1887) 15 Or 617, 16 P 660.

Written lease was not subject to variation or contradiction by extrinsic evidence. Stoddard v. Nelson, (1889) 17 Or 417, 21 P 456.

When insurance contract was clear and explicit and contained no latent ambiguity, parol evidence was not admissible to vary its terms. Weidert v. State Ins. Co., (1890) 19 Or 261, 269, 24 P 242, 20 Am St Rep 809.

Evidence of a parol agreement made at the time of the delivery of a note and mortgage to the effect that payment should be contingent on a certain event was not admissible. Edgar v. Golden, (1900) 36 Or 448, 48 P 1118, 60 P 2.

Where a receipt for certain property embodied the terms of a contract, parol evidence that other property was also to be conveyed was not admissible to vary its provisions. Milos v. Covacevich, (1901) 40 Or 239, 242, 66 P 914.

In a written contract for the sale of stock of goods, evidence of other debts assumed by the purchaser of the business than those recited in the written contract was inadmissible. Oregon Mill Co. v. Kirkpatrick, (1913) 66 Or 21, 133 P 69.

In an action to recover the amount of a mortgage on property conveyed from defendant to plaintiff, where defendant had assigned plaintiff the note of a third party the proceeds of which were to extinguish the mortgage and the note was now in default, plaintiff could not introduce evidence to show that the note was to operate merely as security. Schroeder v. Tillman, (1914) 73 Or 538, 144 P 751.

Evidence between the maker and payee of a note that the liability of the former should be conditional was inadmissible, unless the condition affected the consideration so that as a result of its failure there was a total or partial failure of consideration. Colvin v. Goff, (1916) 82 Or 314, 161 P 568, LRA 1917C, 300.

That a land contract included an additional strip could not be shown by parol. Hawkins v. Rodgers, (1919) 91 Or 483, 179 P 563, 905.

A contract for the sale of shares of stock opening with a statement made by sellers and accepted by plaintiffs that "This confirms our verbal agreement which we now understand as follows" was held to evidence a completed transaction which could not be evidenced by parol. Feenaughty v. Beall, (1919) 91 Or 654, 178 P 600.

That a stock subscription or agreement was for collateral purposes could not be shown by parol. Myrtle Point Mill Co. v. Clarke, (1922) 102 Or 533, 203 P 588.

A statement "all the pianos, piano-players," in a contract of sale of a music business could not be varied by parol. Coker & Bellamy v. Richey, (1922) 104 Or 14, 202 P 551, 204 P 945, 204 P 947, 22 ALR 744.

Where a lease of a farm excepted nothing but the residence, parol evidence excepting other buildings or stock was not admissible. De Wolfe v. Kupers, (1923) 106 Or 176, 211 P 927.

In a deed conveying a certain part of defendant's land and "80 inches" of water for irrigation purposes, extrinsic evidence was not admissible to show that plaintiff should receive merely a part of the water proportional to the part of the defendant's land conveyed to plaintiff. Harvey v. Campbell, (1923) 107 Or 373, 209 P 107, 214 P 348.

Where an insurance contract was ambiguous or susceptible of conflicting interpretations, parol evidence was admissible for the purpose of aiding the court in giving the instrument a proper construction. Jaloff v. Auto Indem. Exch., (1927) 120 Or 381, 250 P 717.

Where a written employment contract was made out in duplicate one copy of which was signed by the employe and the unsigned copy sent to employer and the parties operated under such agreement four months, the law presumed that the entire agreement between the parties was embodied therein and parol evidence to contradict the agreement was inadmissible. Houk v. Gilmore, (1927) 122 Or 498, 259 P 891.

A penciled memorandum of an agreement signed by seller's salesman that he would personally sell for buyer the amount of goods purchased was inadmissible in an action on a trade acceptance given therefor. Elastic Paint & Mfg. Co. v. Johnson, (1929) 127 Or 647, 271 P 996.

Written contract for broker's commission was not variable by parol. Kight v. Orchard-Hays, (1929) 128 Or 668, 275 P 682.

A written stock subscription contract could not be changed by vague oral expressions between subscribers of which the architect suing the corporation for services had no knowledge. Laing v. Hutton, (1932) 138 Or 307, 6 P2d 884.

Contractors to whom a bond guaranteeing subcontractors' performance of highway construction work had been furnished were not entitled to a recovery thereon based upon agent's alleged oral extension of coverage of bond where there was no consideration for the oral extension. Craswell v. Biggs, (1939) 160 Or 547, 86 P2d 71.

Testimony to the effect that an attorney promised not to practice was not admissible to contradict the contract for the sale of office equipment. Ramirez v. Ringo, (1954) 202 Or 1, 271 P2d 657.

Written contract for broker's commission was not variable by parol, without pleading and proving fraud. Ruff v. Boltz, (1968) 252 Or 236, 448 P2d 549.

5. Showing intent or understanding

The intention of the parties must be gathered from the instrument itself, giving consideration to circumstances

existing at time of execution. Oregon-Pac. Prod. Co. v. Welsh Panel Co., (1965) 248 F Supp 903.

Where a deed conveyed land "for all legitimate railroad, depot and warehouse purposes," parol evidence of the understanding of the parties was not admissible to show that the words were used with a particular or special meaning. Abraham v. Ore. & Calif. R. R. Co., (1900) 37 Or 495, 500, 60 P 899, 82 Am St Rep 779, 64 LRA 391.

An unambiguous agreement to purchase personalty could not be varied by parol evidence of an understanding by plaintiff to secure a release of liens thereon. Ruckman v. Imbler Lbr. Co., (1902) 42 Or 231, 70 P 811.

Where a mortgage recited that it was intended to secure the mortgagee in any sum he might be required to pay on a note made by the mortgagor and mortgagee to a third person, parol evidence that it was understood that a part of the claim should be settled from a loan obtained by the mortgagor from a third person was admissible. Phipps v. Willis, (1909) 53 Or 190, 96 P 866.

Evidence to show that a scrivener mistakenly inserted the word "possession" instead of the word "title" in a writing was held inadmissible. Maxson v. Ashland Iron Works, (1917) 85 Or 345, 166 P 37, 167 P 271.

Testimony that to build rooms of a size fixed by the contract would require work not contemplated when the contract was signed was inadmissible. Valder v. Berg, (1927) 122 Or 661, 260 P 240.

In a suit by corporation against city for a decree specifically enforcing a contract by which the corporation was to construct a market building for the city, oral evidence was admissible to determine the intention of the parties as shown by the negotiations leading up to the execution of the contract. Public Mkt. Co. v. Portland, (1943) 171 Or 522, 130 P2d 624, 138 P2d 916.

In construing deeds conveying "all timber now standing," parol evidence was not admissible to show that the parties intended any timber other than that existing at the time of executing deeds. Arbogast v. Pilot Rock Lbr. Co., (1959) 215 Or 579, 336 P2d 329, 72 ALR2d 712.

6. Collateral oral agreements

The parol evidence rule does not affect a parol collateral contract independent of a written agreement. Thorne v. Edwards, (1934) 147 Or 443, 34 P2d 640; Barnstable v. United States Nat. Bank, (1962) 236 Or 36, 374 P2d 386. Barnstable v. United States Nat. Bank, supra, **distinguished in** Card v. Stirnweis, (1962) 232 Or 123, 129, 374 P2d 472.

An oral agreement will not be deemed collateral so as not to be affected by the parol evidence rule if it contradicts provisions of the written agreement. Thorne v. Edwards, (1934) 147 Or 443, 34 P2d 640; Barnstable v. United States Nat. Bank, (1962) 236 Or 36, 374 P2d 386.

A test to determine whether an oral agreement is collateral is to ascertain whether, in view of the circumstances of the parties, the subject matter and the nature of the writing, it would have been natural for the contracting parties to have embodied it in their writing had they intended to make it a part of their contractual obligations. Id.

An oral agreement placing a condition precedent on the effectiveness of a written contract is operative unless such condition is inconsistent with the language in the writing. De Graw v. Grindrod, (1950) 189 Or 684, 222 P2d 649; Sternes v. Tucker, (1964) 239 Or 105, 395 P2d 881; J & J Constr. Co. v. Mayernik, (1965) 241 Or 537, 407 P2d 625.

An oral agreement to be deemed collateral to a written agreement must concern a subject distinct from that to which the written contract applies. Thorne v. Edwards, (1934) 147 Or 443, 34 P2d 640.

The absence of a covenant to repair in a lease does not necessarily indicate that the lease is incomplete or warrant the reception of evidence of a collateral agreement. Garrett v. Eugene Medical Center, (1950) 190 Or 117, 224 P2d 563.

Evidence of an oral renewal agreement entered into at the time of a written contract for the purchase of realty stating amount and time for installment payments and the results that should occur in the event of a default violated the parol evidence rule. Thorne v. Edwards, (1934) 147 Or 443, 34 P2d 640.

7. Subsequent contract

A written agreement may be modified by a subsequent parol contract. Propst v. Hanley Co., (1919) 94 Or 397, 185 P 766.

An agreement of release and settlement for personal injuries was not variable by a subsequent oral agreement with defendant's superintendent. Smith Lbr. Co. v. Parker, (1915) 140 CCA 32, 224 Fed 347.

8. "Where a mistake or imperfection of the writing is put in issue"

The rule as to correcting mistakes and imperfections does not conflict with the principle as to varying and contradicting instruments by parol. Lee v. Summers, (1868) 2 Or 260.

Unless the evidence shows clearly the alleged mistake, it will not suffice for the correction of a deed. Lewis v. Lewis, (1871) 4 Or 177.

Failure to read an instrument before signing it is not conclusive evidence of mistake so as to admit extrinsic evidence. Long v. Smith Hotel Co., (1925) 115 Or 306, 237 P 671.

Evidence was held to show that statements by the parties constituted an agreement which by mistake of the scrivener was not set forth in the written lease, so that such statements were admissible. Bott v. Campbell, (1917) 82 Or 468, 161 P 955.

In suit to reform a mortgage oral evidence was admissible to show circumstances concerning the loan. Smith v. Cram, (1925) 113 Or 313, 230 P 812.

Where by deliberate choice the parties left the quantity of rock to be delivered indefinite, there was no mistake justifying evidence to show the particular quantity. Hagman v. Webber, (1926) 117 Or 350, 243 P 91, 244 P 83.

9. "Evidence of the circumstances"

Extrinsic circumstances surrounding execution of a will may be considered in revealing more clearly the motive or intention which may be reasonably supposed to have influenced the testator in the disposition of his property. Jasper v. Jasper, (1889) 17 Or 590, 22 P 152.

Where the language of a written instrument is ambiguous, it is competent to ascertain by parol evidence the purpose and object of the parties from the surrounding circumstances. Baker County v. Huntington, (1905) 46 Or 275, 279, 79 P 187; Salem King's Prod. Co. v. Ramp, (1921) 100 Or 329, 196 P 401; Stubbs v. Abel, (1925) 114 Or 610, 233 P 852, 236 P 505.

A contract includes not only what is expressly stated but also what is necessarily implied from the language used. Card v. Stirnweis, (1962) 232 Or 123, 374 P2d 472.

Parol evidence rule does not bar evidence to show circumstances under which agreement was made. West Los Angeles Institute v. Mayer, (1966) 366 F2d 220.

Parol evidence was competent to show the circumstances connected with the giving of a bond by a public officer in order to determine its nature and effect. Baker County v. Huntington, (1905) 46 Or 275, 279, 79 P 187.

Statements by plaintiff's agent prior and subsequent to a written contract for sale of hops on a farm to effect that the contract would be void if defendant sold the farm were admissible. Lilienthal v. Cartwright, (1909) 97 CCA 530, 173 Fed 580.

Parol evidence as to the circumstances of the sale of an

automobile and the kind of machine intended to be purchased was held admissible where the written contract did not contain the entire agreement. Bouchet v. Ore. Motor Car Co., (1915) 78 Or 230, 152 P 888.

10. Evidence "to establish illegality or fraud"

The evidence to vitiate a contract for fraud must be clear and satisfactory. Hoy v. Robinson, (1892) 23 Or 47, 31 P 62.

The presumption that a deed expresses the intent of the parties cannot prevail where fraud vitiates the conveyance itself. Parrish v. Parrish, (1899) 33 Or 486, 492, 54 P 352.

The validity of a written agreement may be attacked on the ground of fraud inducing its execution. Myrtle Point Mill Co. v. Clarke, (1922) 102 Or 533, 203 P 588.

Misrepresentations in reliance on which a contract for the purchase of a truck was entered into may be shown. Hetrick v. Gerlinger Motor Car Co., (1917) 84 Or 133, 164 P 379.

Parol testimony of fraudulent representation inducing a contract was admissible in an action in equity to rescind it. Sharkey v. Burlingame Co., (1929) 131 Or 185, 282 P 546.

In an action on a renewal note the answer, which alleged that the original note was an accommodation note to circumvent the Emergency Farm Mortgage Act, put in issue the validity of the original note and laid the foundation for introduction of parol evidence of conditions under which such note was signed. Northwest Adjustment Co. v. Payne, (1944) 173 Or 229, 144 P2d 718.

In a suit for divorce the court properly admitted evidence to prove that a written property settlement agreement was induced by the wife's fraudulent representations that she would abandon relations with another man and return home and resume her marital duties. Claude v. Claude, (1946) 180 Or 62, 174 P2d 179.

Evidence did not establish fraud and so parol evidence was not admissible to vary the contents of writing. Berry v. Richfield Oil Co., (1950) 189 Or 568, 220 P2d 106, 222 P2d 224.

Oral evidence denying validity of written document was inadmissible when document was executed to defraud or mislead a third party. Kergil v. Central Ore. Fir Supply Co., (1958) 213 Or 186, 323 P2d 947, 71 ALR2d 378; Carolina Cas. Ins. Co. v. Ore. Auto. Ins. Co., (1965) 242 Or 407, 408 P2d 198.

11. Evidence "to explain ambiguity"

Ambiguous promissory note may be explained by parol evidence. Guthrie v. Imbrie, (1885) 12 Or 182, 6 P 664, 53 Am Rep 331.

If the provisions of a policy of insurance are ambiguous, parol evidence is permissible to explain such ambiguity. Whitlock v. United States Interinsurance Assn., (1932) 138 Or 383, 6 P2d 1088.

There is an intermediate class of cases which partake of the nature of both latent and patent ambiguity. Putnam v. Jenkins, (1955) 204 Or 691, 285 P2d 532.

Parol evidence was admissible to show purposes for which a sheriff's bond was given where it was ambiguous in this respect. Baker County v. Huntington, (1905) 46 Or 275, 79 P 187.

Extrinsic evidence of the practical interpretation given by the parties to an ambiguous written contract was admissible to explain it. Harlow v. Oregonian Pub. Co., (1909) 53 Or 272, 100 P 7.

Parol evidence was competent to explain ambiguity in a plat. Bernitt v. City of Marshfield, (1918) 89 Or 556, 174 P 1153.

Where mutual wills of husband and wife disposed of their joint estate one item of which was described as "life insurance," the will was ambiguous so that testimony was admissible to identify life insurance referred to. Prime v. Prime, (1943) 172 Or 34, 139 P2d 550.

(1) Patent ambiguity. In cases of patent ambiguity parol testimony is admissible only to explain technical terms. Brauns v. Stearns, (1861) 1 Or 368.

If the ambiguity is patent on the face of the instrument, extrinsic evidence is inadmissible to explain it. Tallmadge v. Hooper, (1900) 37 Or 503, 513, 61 P 349, 1127.

A patent ambiguity in a lease in failing to identify the property was not subject to explanation by parol. Noyes v. Stauff, (1875) 5 Or 455.

Parol evidence was admissible when the only writing that indicated the existence of a contract said "as agreed upon." De Graw v. Grindrod, (1950) 189 Or 684, 222 P2d 649.

(2) Latent ambiguity. A latent ambiguity in a deed may be explained by parol. Holcomb v. Mooney, (1886) 13 Or 503, 11 P 274.

An ambiguity is latent where the instrument is apparently complete and clear, yet it appears in the course of applying or executing it that its words are applicable to different things or persons and there is nothing in it to show which is meant. Id.

When a clause in a lease describing a certain stairway could have applied to either one of two stairways which existed at the time of plaintiff's injury, parol evidence was admissible to determine whether stairway where the plaintiff met with her accident was identical with the stairway described in the lease. Wilkens v. W. States Grocery Co., (1941) 167 Or 103, 114 P2d 542.

The ambiguity was extrinsic and evidence was properly received to explain the intent of the parties. Kinnaman v. Bailey, (1965) 241 Or 635, 406 P2d 145.

Parol evidence was admissible to explain ambiguous phrase. Van Domelen v. Westinghouse Elec. Corp., (1967) 382 F2d 385.

(3) Identifying persons or things described. Where a promissory note was signed "A. B., Pres. and C.D., Sec...G.M. Co." and on its face was marked an impression bearing the words "Granger Market Co., " the uncertainty whether the principal or agent was liable could be removed by extraneous proof. Guthrie v. Imbrie, (1885) 12 Or 182, 6 P 664.

Where a chattel mortgage described certain chattels as being a given number of feet of good merchantable lumber in the yard of a designated company in a given county, oral evidence was competent to identify the lumber. Sommer v. Island Mercantile Co., (1893) 24 Or 214, 33 P 559.

Where a power of attorney appointed C.K. and .....K., composing the firm of K. Bros., as the plaintiff's lawful attorneys, parol evidence was admissible to supply the Christian name of the person whose Christian name was left blank. La Vie v. Tooze, (1903) 43 Or 590, 74 P 210.

(4) Identifying land. The location of a stake mentioned in a deed may be established by parol. Boehreinger v. Creighton, (1881) 10 Or 42.

Where the description of land conveyed is clear and unambiguous, resort cannot be had to parol evidence to show an intent to convey a different tract. Holcomb v. Mooney, (1886) 13 Or 503, 11 P 274.

Parol evidence is admissible to determine the property included in a lease when such fact is not clearly defined in the writing. Garrett v. Eugene Medical Center, (1950) 190 Or 117, 224 P2d 563.

Parol evidence to fix a boundary line which was in dispute did not contradict the deed. Raymond v. Coffey, (1873) 5 Or 132.

Where the testator devised "real estate situated in a certain county, and being the north half of a specified donation claim," parol evidence to identify the real estate mentioned was admissible. Jones v. Dove, (1876) 6 Or 188.

In case of a deed purporting to convey certain lots in the town of B., it was competent to prove by parol evidence

what was understood at the time to be the town of B., what land it included, the facts concerning the platting of it and what land was understood to be included in such lots according to such plat. Hicklin v. McClear, (1889) 18 Or 126, 136, 22 P 1057.

Where a description in a deed stated that the property was situated on a certain island, was known by a special name and was more particularly described in certain deeds between parties named which were recorded in certain counties, oral evidence was admissible to show the location of the land. House v. Jackson, (1893) 24 Or 89, 32 P 1027.

An ambiguity in description justifying parol evidence existed where a boundary line of a government patent was not in fact surveyed on the line indicated. Kanne v. Otty, (1894) 25 Or 531, 537, 36 P 537.

Where an insurance policy described the property as "a frame dwelling house situated in Harlington Addition to Mt. Tabor" but there was no such place, the correct description being in "Harlem Addition to East Portland," there was a latent ambiguity and evidence offered was competent to explain it. Baker v. State Ins. Co., (1897) 31 Or 41, 48 P 699.

Where the only description of land in a lease was as a strip commencing at the north line of a specified person's claim, then running up to the south line of another specified claim, and no township, range, county or state was specified, parol evidence was inadmissible to show the location of the land. Bingham v. Honeyman, (1898) 32 Or 129, 51 P 735.

A chattel mortgage on a crop of hops described as growing upon three parcels of land situated upon a part of a donation land claim which was referred to by the name of the claimant, the number of the notification and claim and its township and range, was sufficiently definite in description to let in parol testimony to identify the property. Reinstein v. Roberts, (1898) 34 Or 87, 55 P 90.

Where the contract was for the sale and purchase of "all of lot 8 in Block 41 in Taylors Astoria," parol evidence was admissible to identify the land to which the description applied. Bloech v. Hyland Homes Co., (1926) 119 Or 297, 247 P 761.

12. Parties to contract

Although an agent is precluded from introducing oral evidence of the existence of a principal so as to avoid primary liability on a contract, parol evidence can be introduced to show that a party not named is the real party in interest and is bound by the agreement. Weiss v. Gumbert, (1951) 191 Or 119, 227 P2d 812, 228 P2d 800.

That one or more of parties signed a contract as surety could be shown in an action thereon. Thompson v. Coffman, (1888) 15 Or 631, 635, 16 P 713.

That a contract unnecessarily under seal was the contract of an unnamed principal, might be shown although the principal was known to the other contracting party at the date of its execution. Barbre v. Goodale, (1896) 28 Or 465, 472, 38 P 67, 43 P 378.

That an accommodation party was by separate verbal agreement a cosurety with one who signed upon the face thereof as a joint and several maker but who was really a surety, was admissible in an action for contribution. Montgomery v. Page, (1896) 29 Or 320, 326, 44 P 689.

That certain signers of a note were sureties, might be shown by parol as against a holder with knowledge of the facts. Hoffman v. Habighorst, (1900) 38 Or 261, 266, 63 P 610, 53 LRA 908.

Parol evidence to establish that a certain contract executed by one L. was in fact the contract of two other defendants was admissible. Riddle State Bank v. Link, (1915) 78 Or 498, 501, 153 P 1192.

13. Consideration as subject of proof

The consideration named in a deed might be shown by parol evidence to be not the actual consideration. Brown v. Cahalin, (1868) 3 Or 45.

When the consideration expressed in a deed is money, a larger or different consideration may be proved. Scoggin v. Schloath, (1887) 15 Or 380, 383, 15 P 635.

A consideration different in kind from that expressed in a deed can not be proven by parol. Id.

A recital of payment of a consideration is merely in the nature of a receipt and may be contradicted or explained by extrinsic evidence unless such contradiction would render nugatory some contractual provision of the instrument. Marks v. Twohy Bros. Co., (1921) 98 Or 514, 194 P 675.

A consideration grossly inadequate may become evidence of fraud. Long v. Smith Hotel Co., (1925) 115 Or 306, 237 P 671.

Want of consideration could not be shown where a deed recited the receipt of a consideration. Finlayson v. Finlayson, (1889) 17 Or 347, 21 P 57, 11 Am St Rep 836, 3 LRA 801.

Where one gave a promissory note to his retiring partner for firm funds advanced by the latter which were used in the business, failure of consideration, based upon the alleged facts that no final settlement of the firm affairs had ever been made and that upon such settlement there would be nothing due the payee, was no defense to an action at law upon said note and parol evidence was incompetent to show this failure of consideration in a court of law. Wilson v. Wilson, (1894) 26 Or 251, 38 P 185.

Where a written agreement recited the release of attachments as a consideration but stated no basis for an inference that a pending foreclosure suit was to be dismissed, parol evidence was inadmissible to show the latter fact. Sutherlin v. Bloomer, (1907) 50 Or 398, 93 P 135.

In determining whether conveyances by an attorney in consideration of $10 and $1 were within the power of attorney which did not authorize a gift, parol testimony was admissible. Wade v. Northup, (1914) 70 Or 569, 140 P 451.

A third person could not enlarge the consideration recited in an instrument transferring stock by showing a parol agreement beneficial to himself. Muir v. Morris, (1916) 80 Or 378, 154 P 117, 157 P 785.

Evidence as to inadequate consideration for sale of hotel furnishings was excluded. Long v. Smith Hotel Co. (1925) 115 Or 306, 237 P 671.

(1) Contractual consideration. The consideration subject to explanation is a monetary not a contractual one. Coker & Bellamy v. Richey, (1922) 104 Or 14, 202 P 551, 204 P 945, 947, 22 ALR 744; Lange v. Allen, (1926) 120 Or 96, 251 P 715.

Written recital of a contractual consideration generally excludes the idea of there being any other consideration. Muir v. Morris, (1916) 80 Or 378, 154 P 117, 157 P 785.

A written contract of sale of a grocery business could not be varied by parol evidence of debts assumed by the purchaser other than those mentioned in the written contract. Oregon Mill Co. v. Kirkpatrick, (1913) 66 Or 21, 133 P 69.

Where the consideration provisions were contractual in their nature, plaintiff could not as a privy show that the real consideration was different from that expressed. Muir v. Morris, (1916) 80 Or 378, 154 P 117, 157 P 785.

Plaintiff, who agreed to furnish materials and construct pavement and also to "pay the city for so much base course stone now in stock piles on the drive as may be incorporated into the pavement" at a stipulated price, could not import into the agreement any additional stipulation of the city to furnish all the rock required on the pretense of inquiring into the consideration, such provision being con-

tractual. Elliott Contracting Co. v. Portland, (1918) 88 Or 150, 171 P 760.

An alleged oral agreement pleaded as part of the consideration for a deed and hence a contractual consideration was inadmissible to vary or add to the deed. O'Neil v. Twohy Bros. Co., (1921) 98 Or 481, 190 P 306.

A defense that part of consideration for deed was a reservation of a life estate was held an attempt to vary the terms of the writing embodied in such deed. Lange v. Allen, (1926) 120 Or 96, 251 P 715.

Oral evidence that grantee suing for breach of covenant against encumbrances agreed to accept defendant's tenants was inadmissible. Western Grain Co. v. Beaver Land Stock Co., (1927) 120 Or 678, 230 P 103, 253 P 539.

14. Showing instrument to be mortgage or security

A deed absolute on its face may be shown to be a mortgage. Hurford v. Harned, (1877) 6 Or 362; Swegle v. Belle, (1891) 20 Or 323, 327, 25 P 633; Adair v. Adair, (1892) 22 Or 115, 29 P 193; Kramer v. Wilson, (1907) 49 Or 333, 341, 90 P 183; Umpqua Forest Ind. v. Neenah-Ore. Land Co., (1950) 188 Or 605, 217 P2d 219; Kohler v. Gilbert, (1959) 216 Or 483, 339 P2d 1102.

Evidence to show that a deed is a mortgage must be clear and satisfactory, and sufficient to overcome the presumption that the instrument is what it purports to be. Albany Canal Co. v. Crawford, (1884) 11 Or 243, 4 P 113.

A bill of sale becomes a chattel mortgage upon proof that it was made to secure a debt. Nicklin v. Betts Spring Co., (1884) 11 Or 406, 5 P 51, 50 Am Rep 477.

The maker of a note as against the payee may show that the note was security for the performance of a contract by him and that he has performed his contract. La Grande Nat. Bank v. Blum, (1894) 26 Or 49, 52, 37 P 48.

An instrument conveying property as a security for a debt is in equity a mortgage whatever may be its form. Marquam v. Ross, (1905) 47 Or 374, 407, 78 P 698, 83 P 852, 86 P 1.

Assignment of contract of sale of land may be shown by parol evidence to be a mortgage. Gress v. Wessinger, (1918) 88 Or 625, 172 P 495.

Whether a deed absolute was intended as a mortgage depends on the intention of the parties as determined from a consideration of the circumstances, their pecuniary relation, their previous negotiations, their contemporaneous acts and declarations, and subsequent acts and admissions. Elliott v. Bozorth, (1908) 52 Or 391, 97 P 632.

15. Proof of custom and usage

Extrinsic evidence of custom and usage is admissible to ascertain the intention and meaning of a contract when the same cannot be ascertained from the language used, provided such usage or custom was known to the parties at the time of making the contract, but it is never admissible to vary or contradict the express terms of the contract. McCulsky v. Klosterman, (1890) 20 Or 108, 25 P 366; Holmes v. Whitaker, (1892) 23 Or 319, 31 P 705; Durkee v. Carr, (1900) 38 Or 189, 63 P 117; Savage v. Salem Mills Co., (1906) 48 Or 1, 85 P 69; Williams v. Ledbetter, (1930) 132 Or 145, 285 P 214.

The usage or custom of a particular business enters into and forms a part of a contract made by a person engaged in that business and other persons dealing with him with knowledge of that custom, in the absence of an agreement to the contrary. Savage v. Salem Mills Co., (1906) 48 Or 1, 11, 85 P 69, 10 Ann Cas 1065.

Where in a contract to ascertain the net profits of a firm it was provided that from the outstanding accounts five percent be deducted to cover losses and bad accounts, usage was admitted to show the meaning of outstanding accounts. McCulsky v. Klosterman, (1890) 20 Or 108, 25 P 366, 10 LRA 785.

16. Evidence to show trust

It is indispensable to the establishment of a resulting trust that the payment should be actually made by the beneficiary or that an absolute obligation to pay should be incurred by him, as a part of the original transaction of purchase at or before the time of the conveyance. Sisemore v. Pelton, (1889) 17 Or 546, 21 P 667.

A resulting trust may be established by parol evidence. Parker v. Newitt, (1889) 18 Or 274, 277, 23 P 246.

A party claiming to be the beneficial owner who has made no payments cannot show by parol evidence that the purchase was made for his benefit. Taylor v. Miles, (1890) 19 Or 550, 553, 25 P 143.

Parol evidence is admissible to establish a resulting trust in land in favor of one paying the purchase price therefor where another takes the legal title, notwithstanding a recital in the deed that the consideration was paid by the grantee. Snider v. Johnson, (1894) 25 Or 328, 332, 35 P 846.

A constructive trust ensues where the purchase is made and the title acquired secretly and in violation of some duty to the cestui que trust; and in such case the evidence that the money was furnished and expended for the alleged beneficiary must be clear and convincing. Barger v. Barger, (1897) 30 Or 268, 47 P 702.

17. Execution and delivery of instrument

A parol agreement made at the time of delivery of the written agreement that such written agreement should not become operative without the assent of the defendant could be shown by parol evidence. Simpson v. Carson, (1884) 11 Or 361, 8 P 325.

Parol evidence that a note was not to become a binding obligation except upon the happening of a certain future event was admissible especially if such event affected the consideration. Vincent v. Russell, (1921) 101 Or 672, 201 P 433, 20 ALR 417.

The date upon which an instrument was executed may be shown to be different from that stated thereon. Turner v. Jackson, (1932) 139 Or 539, 4 P2d 925, 11 P2d 1048.

18. When writing does not embody entire contract

Parol evidence is admissible to prove a part of an agreement not included in the writing. Stuart v. Univ. Lbr. Co., (1913) 66 Or 546, 554, 132 P 1, 1164, 135 P 165; Johns-Manville Corp. v. Heckart, (1929) 129 Or 505, 277 P 821.

Parts of a contract not contained in the writing may be shown by parol where the contract is not required by the statute of frauds to be in writing. Holmboe v. Morgan, (1914) 69 Or 395, 138 P 1084.

The circumstances of a contract of sale, the defendant's representations, the kind of machine intended to be purchased and defendant's warranty may be shown. Bouchet v. Ore. Motor Car Co., (1915) 78 Or 230, 152 P 888.

It is competent to introduce testimony to supply those terms actually agreed upon by the parties to a written contract but not contained in nor conflicting with an incomplete written contract. McDonald v. Supple, (1920) 96 Or 486, 190 P 315.

Where one party offered in writing to "furnish crushed rock at a certain place and price" and the written answer stated "your proposal to furnish crushed rock is accepted," the writings did not constitute a complete contract and parol evidence was allowed to show the amount of rock meant by plaintiff. American Bridge Co. v. Bullen Bridge Co., (1896) 29 Or 549, 46 P 138.

Where a memorandum did not purport to contain all the terms of an agreement, parol evidence was admissible to show the agreement. Haines v. Cadwell, (1901) 40 Or 229, 66 P 910.

The rule against parol evidence did not exclude evidence to show that what appeared to be a contract was merely a part of a larger transaction. Hillyard v. Hewitt, (1912) 61 Or 58, 120 P 750.

Where there were terms of an agreement to buy and sell an automobile not contained in the writing, parol evidence could be given to establish the part thereof that was not embraced in the writing and not in conflict with it. Holmboe v. Morgan, (1914) 69 Or 395, 138 P 1084.

A fruit tree agreement in printed form and properly signed was held to contain all the terms of the contract. Rosenau v. Lansing, (1925) 113 Or 638, 232 P 648, 234 P 270.

A contract for the sale of foxes which did not make clear the quality of foxes to be sold was imperfect so as to permit parol evidence. Klinge v. Farris, (1929) 128 Or 142, 268 P 748, 273 P 954.

Oral evidence denying validity of written document was inadmissible when document was executed to defraud or mislead a third party. Kergil v. Cent. Ore. Fir Supply Co., (1958) 213 Or 186, 323 P2d 947.

19. Deeds

That the object of a deed was different from that implied by its terms cannot be shown unless it was executed as security. Finlayson v. Finlayson, (1889) 17 Or 347, 21 P 57, 11 Am St Rep 836, 3 LRA 801.

Recitals in deed were held conclusive as to validity of marriage on party claiming under such deed. Twigger v. Twigger, (1924) 110 Or 520, 223 P 934.

Intention to convey also an after-acquired interest could not be shown by parol where the deed is unambiguous. United States Nat. Bank v. Miller, (1927) 122 Or 285, 258 P 205, 58 ALR 339.

Evidence of a parol agreement that grantor's other property should be subject to the same building restrictions as that acquired by plaintiff was not admissible. Roberts v. Lombard, (1915) 78 Or 100, 152 P 499.

20. Wills

Where a will contains no ambiguity as to beneficiaries or as to things bequeathed or devised, resort will not be had to surrounding circumstances to import into the will an intention not therein expressed. Stubbs v. Abel, (1925) 114 Or 610, 233 P 852, 236 P 505.

This section does not bar the admissibility of evidence to show the meaning of the language employed by a testator or to apply the description to the land actually covered in the writing, but does exclude evidence offered to show an intention not otherwise expressed in the writing. Putnam v. Jenkins, (1955) 204 Or 691, 285 P2d 532.

21. Application of section where third person is party

Between strangers to an instrument or between one of the parties thereto and such stranger, the precept embodied in this statute is not applicable. King v. Miller, (1909) 53 Or 53, 63, 97 P 542; Smith v. Farmers' & Merchants' Nat. Bank, (1910) 57 Or 82, 110 P 410; Bagley Co. v. International Harvester Co., (1921) 99 Or 519, 195 P 348; Commercial Sec. v. Mast, (1934) 145 Or 394, 28 P2d 635, 92 ALR 194; Consolidated Ranches, Inc. v. Chase Land & Cattle Co., Inc., (1965) 242 Or 95, 408 P2d 203; Cranford v. McNiece, (1969) 252 Or 446, 450 P2d 529.

In a suit by purchaser of fruit against growers based on contract of growers with union, to which plaintiff was not party, this section did not apply. Phez Co. v. Salem Fruit Union, (1925) 113 Or 398, 233 P 547.

One furnishing goods to defendants in reliance of their representations that they were partners was not a party to agreement between defendants stating that they were not partners and was not bound thereby, but could prove partnership or holding out as a partnership by any competent testimony. Babcock Co. v. Katz, (1927) 121 Or 64, 253 P 373.

Defendant in an action for malpractice could not invoke the inhibition of the statute with reference to testimony by the plaintiff as to a release executed by the latter with his employer and employer's insurer. Keadle v. Padden, (1933) 143 Or 350, 20 P2d 403, 22 P2d 892.

A mortgagee of an automobile was not the representative or successor in interest of the mortgagor within this statute as to a release entered into by such mortgagor with the insured of a person who damaged such automobile. Commercial Sec. v. Mast, (1934) 145 Or 394, 28 P2d 635, 92 ALR 194.

FURTHER CITATIONS: Barbour v. Johnson, (1954) 201 Or 375, 269 P2d 531, 270 P2d 633; Collins v. Collins, (1955) 203 Or 450, 280 P2d 364; Gray v. Gray, (1955) 205 Or 116, 286 P2d 138; Moore v. Schermerhorn, (1957) 210 Or 23, 307 P2d 483, 308 P2d 180; Doherty v. Harris Pine Mills, Inc., (1957) 211 Or 378, 315 P2d 566; Comer v. World Ins. Co., (1957) 212 Or 105, 318 P2d 916; Searer v. United States Plywood Corp., (1959) 273 F2d 36; O'Gorman v. Baker, (1959) 219 Or 170, 347 P2d 85, 338 P2d 638; Seaver v. United States Plywood Corp., (1959) 273 F2d 36; Wiggins v. Southwood Park Corp., (1960) 221 Or 61, 350 P2d 436; Fry v. Ashley, (1961) 228 Or 61, 363 P2d 555; Yandell v. United States, (1962) 208 F Supp 306, 315 F2d 141; Shell Oil Co. v. Boyer, (1963) 234 Or 270, 381 P2d 494; Grell v. State Tax Comm., (1964) 1 OTR 493; Knox v. Hanson, (1965) 242 Or 114, 408 P2d 76; Union Bond & Trust Co. v. M & M Woodworking Co., (1965) 242 Or 451, 410 P2d 224.

LAW REVIEW CITATIONS: 4 OLR 91; 9 OLR 513; 46 OLR 115.

41.810

NOTES OF DECISIONS

1. Offer of compromise inadmissible
2. Admissions of particular facts

1. Offer of compromise inadmissible

An offer of compromise is regarded as a privileged communication and is inadmissible. Wallace v. Am. Life Ins. Co., (1924) 111 Or 510, 225 P 192, 227 P 465; Dalk v. Lachmund, (1937) 157 Or 152, 70 P2d 558; Blue v. City of Union, (1938) 159 Or 5, 75 P2d 977.

An offer to compromise the claim under suit is not an undisputed admission of the amount due where the offer was qualified and never accepted. Lake v. Patty, (1933) 142 Or 543, 20 P2d 1078.

Whether an offer to accept a named sum in payment of a claim is an admission that the sum is the extent of one's damage or an offer to compromise for the purpose of averting litigation, is primarily a question of fact for the trial court and is a question of intention. Blue v. City of Union, (1938) 159 Or 5, 75 P2d 977.

A statement by a third person that in an interview he had with defendant, the defendant evidenced a desire to settle the case was not admissible. State v. McLennan, (1917) 82 Or 621, 162 P 838.

Court erred in permitting plaintiff in personal injury case to ask the wife of defendant whether she did not offer to settle for a certain amount, there being no admission of any particular facts. Marshall v. Olson, (1922) 102 Or 502, 202 P 736.

A letter accompanying a claim in which the plaintiff virtually informed defendant city that plaintiff had been damaged in a greater sum than that which he was willing to accept in order to avoid litigation was properly excluded as an offer of compromise. Blue v. City of Union, (1938) 159 Or 5, 75 P2d 977.

2. Admissions of particular facts

Where at the time certain admissions were made the

parties were not engaged in any direct endeavor to compromise the matters in dispute, such admissions were admissible. Cochran v. Baker, (1899) 34 Or 555, 52 P 520, 56 P 641.

Specific sums claimed as the cost of medical services due to defendant's injury to plaintiff made in an offer to compromise were admissible. Blue v. City of Union, (1938) 159 Or 5, 75 P2d 977.

A statement in a letter, where the letter was one step in a contemplated compromise, was admissible to show a particular fact since the letter contained no reference to the offer of compromise. Dunning v. Northwestern Elec. Co., (1948) 186 Or 379, 199 P2d 648.

FURTHER CITATIONS: Broadway Fin., Inc. v. Tadorovich, (1959) 216 Or 475, 339 P2d 436.

LAW REVIEW CITATIONS: 36 OLR 159; 41 OLR 346; 42 OLR 245.

41.820

NOTES OF DECISIONS

1. Declaration, act or omission of another
2. Acts and declarations of agents
3. Declarations of vendor
4. Declarations of guardian

1. Declaration, act or omission of another

A conversation between the porter at a hotel and a third person in relation to certain goods then being delivered was not competent evidence in an action against the purchaser for the price of the goods, no agency having been shown to exist between the purchaser and the porter. Du Bois v. Perkins, (1891) 21 Or 189, 27 P 1044.

Declaration of a third party who lived with plaintiff was not admissible as against him, there being no proof of general agency. Mattis v. Hosmer, (1900) 37 Or 523, 527, 62 P 17, 632.

Statements made by an ex-councilman as to what knowledge he had of the defect while a member of the city council were not admissible against the city. Adkins v. City of Monmouth, (1902) 41 Or 266, 268, 68 P 737.

Brokers suing for commission could not prove declaration of a third person without proof of an agency relationship between the third person and the defendant. Reimers v. Pierson, (1911) 58 Or 86, 113 P 436.

A declaration made by an officer of a corporation not within the scope of the officer's authority was not binding on the corporation. Parker v. Smith Lbr. Co., (1914) 70 Or 41, 138 P 1061.

Evidence of statements by a person as attorney for the adverse party was not admissible since an attorney has no implied power to bind his client by contract. Toomey v. Casey, (1914) 72 Or 290, 297, 142 P 621.

Lessees could not be held to have exercised an option to extend a lease by reason of the acts of their alleged assignee where the assignment was not established. Id.

On the trial of a man charged with death caused in an attempt to produce an abortion, it was competent to show that the deceased on the day before the night of the crime had stated her expectation of meeting the defendant that night. State v. Farnam, (1916) 82 Or 211, 161 P 417, Ann Cas 1918A, 318.

The declaration of one officer of a corporation made out of the presence of another could not be received to bind that other. State v. German, (1939) 162 Or 166, 90 P2d 185.

2. Acts and declarations of agents

The statements of a general superintendent of a company trying to acquire certain land, that the occupant thereof was in the employ of the company and acting in its interest, made in the course of an inquiry respecting his qualities of character are competent evidence against the company. Pacific Live Stock Co. v. Gentry, (1900) 38 Or 275, 61 P 422, 65 P 597.

The declarations of an administrator made while negotiations culminating in the execution of a writing were taking place, as to whether the writing was intended as a deed or mortgage, were admissible as part of the res gestae of the main transaction. Grover v. Hawthorne Estate, (1912) 62 Or 77, 114 P 472, 121 P 808.

3. Declarations of vendor

Declarations of a vendor after he had parted with his interest and possession, in the absence of fraud or collusion, were inadmissible to impeach the title of his vendee. Krewson v. Purdom, (1884) 11 Or 266, 3 P 822.

The purchaser of a stock of goods was not bound by subsequent admissions of the seller to a third person, unless he heard them and had an opportunity to correct any statement inconsistent with the facts as they existed. Josephi v. Furnish, (1895) 27 Or 260, 41 P 424.

Where the evidence showed a dishonest combination between the parties to a conveyance, the declarations and admissions of the grantor, made after the execution of the deed, are admissible against the grantee to prove fraudulent intent. Walker v. Harold, (1903) 44 Or 205, 211, 74 P 705.

4. Declarations of guardian

Declarations of a guardian regarding his ward's lands were inadmissible to affect the latter's title or to defeat adverse possession on their part. Westenfelder v. Green, (1893) 24 Or 448, 34 P 23.

FURTHER CITATIONS: Thayer v. Thayer, (1914) 69 Or 138, 138 P 478; Portland v. Am. Sur. Co., (1916) 79 Or 38, 153 P 786, 154 P 121; Robison v. Ore.-Wash. R.R. & Nav. Co., (1919) 90 Or 490, 176 P 594.

41.830

NOTES OF DECISIONS

Declarations of a grantor impeaching his own title to real property in his possession were admissible against his grantee. Besser v. Joyce, (1881) 9 Or 310.

Statements made by one in possession of land in assertion of his own title were inadmissible against another claiming title thereto if made in the latter's absence. Low v. Schaffer, (1893) 24 Or 239, 244, 33 P 678.

Where an owner of two adjoining tracts while in possession and holding title deeded one of them, the description in such deed was admissible in an action against such owner's grantee to show the location of the boundary line of the tract that was retained. Sperry v. Wesco, (1894) 26 Or 483, 489, 38 P 623.

In an action by legatees under the will of the wife claimed to be irrevocable in view of an alleged contract between husband and wife to make mutual wills, declaration of the husband of an intention to leave property to his wife who could distribute the estate to suit her wishes was admissible as an admission which tended to show an inconsistency with plaintiff's claim of ownership. Holman v. Lutz, (1930) 132 Or 185, 282 P 241, 284 P 825.

FURTHER CITATIONS: Stevens v. Myers, (1919) 91 Or 114, 177 P 37, 2 ALR 1155; Howell v. Deady, (1943) 48 F Supp 116.

LAW REVIEW CITATIONS: 4 OLR 222.

41.840

NOTES OF DECISIONS

The relationship of the declarant to the family must be proved by evidence other than his declarations. Thompson v. Woolf, (1880) 8 Or 454; State v. McDonald, (1910) 55 Or 419, 103 P 512, 104 P 967, 106 P 444.

Declarations made by a man as to his own history and family relations were admissible after his death, for the purpose of identifying him in an action by his relatives against the state to recover the proceeds of his estate which had been escheated. Young v. State, (1900) 36 Or 417, 421, 59 P 812, 60 P 711, 47 LRA 548.

The declaration of a nonresident claiming a share in decedent's estate on the theory that he was decedent's full brother, that decedent was his illegitimate half-brother, was admissible against the declarant as an admission against interest. State v. McDonald, (1910) 55 Or 419, 421, 103 P 512, 104 P 967, 106 P 444.

On an issue of pedigree, testimony of declarations of decedent's administrator who was not connected with the M. family, that there was an existing tradition in that family as to decedent's relationship to it was inadmissible. Id.

Where after deceased was born as the alleged illegitimate son of F. he was placed in the family of the sister of his father who raised him until he was 16 or 17 years old, declarations of the sister as to decedent's parentage were competent on an issue of pedigree though the sister's relationship to deceased was de facto and not de jure. Id.

Testimony of deceased's supposed sister was admissible to prove pedigree of his brothers and sisters. In re Braun's Estate, (1941) 167 Or 218, 117 P2d 238.

FURTHER CITATIONS: Pratt v. State Ind. Acc. Comm., (1954) 201 Or 658, 271 P2d 659; King v. State Ind. Acc. Comm., (1957) 211 Or 40, 309 P2d 159, 315 P2d 148, 318 P2d 272; Mullart v. State Land Bd. (1960) 222 Or 463, 353 P2d 531.

LAW REVIEW CITATIONS: 42 OLR 238, 240; 49 OLR 53-64.

41.850

NOTES OF DECISIONS

In an action for specific performance of an oral contract to devise land, evidence of declarations against interest made by decedent during his lifetime is relevant and admissible. Goff v. Kelsey, (1915) 78 Or 337, 342, 153 P 103; Goodin v. Cornelius, (1921) 101 Or 422, 200 P 915.

Declarations of a deceased agent of deceased are not admissible. Sargent v. Foland, (1922) 104 Or 296, 207 P 349.

Executors sued in their individual capacity cannot avail themselves of the second sentence of this statute. Fredenburg v. Horn, (1923) 108 Or 672, 674, 218 P 939, 30 ALR 1153.

A will of the deceased which contained no statements as to the matter in dispute was not admissible. Grubbe v. Grubbe, (1894) 26 Or 363, 368, 38 P 182.

In an action brought by an executor where the deposition of the defendant had been taken and it was understood that the defendant would testify in his own behalf, admission of statements of the deceased offered by the plaintiff was not reversible error. Brand v. Brand, (1913) 66 Or 526, 532, 133 P 103.

In an action on a quantum meruit for services rendered a decedent, testimony as to the contract of employment was admissible. Tharp v. Jackson, (1917) 85 Or 78, 165 P 585, 1173.

Statement of decedent on supplementary proceedings against him that he did not have a dollar in money or property was admissible against his heir suing for a partnership accounting. Moore v. Moore, (1920) 96 Or 134, 188 P 696.

Where defendant was called as a witness by plaintiff administrator and testified as to statements of the deceased, this statute was applicable. Mace v. Timberman, (1926) 120 Or 144, 251 P 763.

Declarations of decedent that he paid claimants all that he thought they were entitled to were admissible. In re Estate of Fisher, (1929) 128 Or 415, 274 P 1098.

Declarations of decedent and entries in his account book were against his interest and therefore admissible to prove a gift from decedent to plaintiff. Carpenter v. Carpenter, (1936) 153 Or 584, 56 P2d 305, 57 P2d 1098, 58 P2d 507, 105 ALR 386.

Declarations of a decedent concerning the cause of an injury which later caused his death were not admissible to establish a workmen's compensation claim. Pratt v. State Ind. Acc. Comm., (1954) 201 Or 658, 271 P2d 659.

It may be shown by independent evidence that declarations were against the pecuniary interests of the declarant. Hagberg v. Haas, (1964) 237 Or 34, 390 P2d 361.

FURTHER CITATIONS: Hearn v. Louttit, (1903) 42 Or 572, 72 P 132; Jones v. Hill, (1912) 62 Or 53, 124 P 206; Hall v. Pierce, (1957) 210 Or 98, 307 P2d 292, 309 P2d 997, 309 P2d 998; King v. State Ind. Acc. Comm., (1957) 211 Or 40, 309 P2d 159, 315 P2d 148, 318 P2d 272; Wiebe v. Seely, (1959) 215 Or 331, 335 P2d 379; Patechy v. Friend, (1960) 220 Or 612, 350 P2d 170.

LAW REVIEW CITATIONS: 4 OLR 222; 37 OLR 291; 39 OLR 21; 41 OLR 273; 42 OLR 151, 209, 224; 44 OLR 170; 49 OLR 53-64.

41.860

NOTES OF DECISIONS

Private writings adverse to the interest of the person making them are not admissible as evidence of the facts stated therein when such person is present at the trial unless his memory cannot be refreshed by inspection and he testifies that he knew the writing was correct when made. Susewind v. Lever, (1900) 37 Or 365, 61 P 644.

Entries by a plumber in his books of account showing amount due him from patrons are entries in favor of his interest and not admissible. Caro v. Wollenberg, (1917) 83 Or 311, 163 P 94.

This section does not affect the admission of evidence under the shopbook rule which permits evidence of entries whether the entrant is dead or alive. Radtke v. Taylor, (1922) 105 Or 559, 210 P 863, 27 ALR 1423.

In ejectment, ex parte affidavit of predecessor in title made more than 24 years after execution of deed by himself and wife to plaintiff's immediate predecessor was inadmissible. Miller v. Fisher, (1918) 90 Or 111, 174 P 1152.

Parol evidence was admissible to show that entries in the book of accounts of an attorney were in his handwriting and were made at a certain time and under certain circumstances, in an action by his executrix to recover for services rendered. O'Day v. Spencer, (1920) 96 Or 73, 189 P 394.

LAW REVIEW CITATIONS: 4 OLR 222; 37 OLR 291.

41.870

NOTES OF DECISIONS

1. In general
2. Acts forming part of res gestae
   (1) Non verbal
   (2) Verbal
3. Material objects forming part of res gestae
4. Writings forming part of res gestae

5. Person making statement
   (1) In general
   (2) Agent
   (3) Conspirators
6. Statements prior to act
7. Subject matter of declaration

1. In general

Declarations to become a part of the res gestae must be contemporaneous with the main fact, but in order to be contemporaneous they are not required to be precisely concurrent in time. State v. Garrand, (1874) 5 Or 216.

When acts and declarations of parties constitute a part of the transaction which bars or disproves the claim made against them or a part of a material fact in the case, they are competent evidence. Dawson v. Pogue, (1889) 18 Or 94, 22 P 637, 6 LRA 176.

This section is declaratory of the common law, a legislative definition of res gestae. Humphrey v. Chilcat Canning Co., (1890) 20 Or 209, 25 P 389.

This section recognizes two cases of res gestae; one is the res gestae of the fact in dispute and the other the res gestae of some act that becomes important as evidence of the fact in dispute. State v. Butler, (1920) 96 Or 219, 186 P 55.

In a prosecution for libel consisting of the publication of statements of an escaped nun relating to a convent, evidence of statements of the nun showing that her action in entering the convent was voluntary was admissible as part of the res gestae. State v. Hosmer, (1914) 72 Or 57, 73, 142 P 581.

2. Acts forming part of res gestae

(1) Non verbal. Where the evidence tended to prove that the powder and fuse used to burn the barn were obtained from the powder house of a third person, it was competent to prove all the facts, though in doing so the evidence offered tended to prove another crime. State v. Roberts, (1887) 15 Or 187, 13 P 896.

In an action against railroad by foreman who was injured and lost his property at a collision, evidence that belongings of crew were gathered up, put into bundles and checked to a point as baggage was properly submitted to jury as part of the res gestae on issue of the destruction of the property. Andrew v. Ore.-Wash. R.R. & Nav. Co., (1919) 90 Or 611, 178 P 181.

In a prosecution for breaking glass in a window not belonging to the accused, evidence that after the window was broken the perpetrators of the crime returned and broke the windows a second time in fulfillment of their agreement with the defendant to do a good job was admissible as part of the res gestae. State v. Reynolds, (1939) 160 Or 445, 86 P2d 413.

(2) Verbal. In an action for damages for injuries, the declarations of the plaintiff soon after the event, in the absence of the defendant, narrating the occurrence were not part of the res gestae. Sullivan v. Ore. Ry. & Nav. Co., (1885) 12 Or 392, 7 P 508, 53 Am Rep 364; Johnston v. Ore. Short Line Ry., (1892) 23 Or 94, 31 P 283.

The representation of a sick person of the nature, symptoms and effects of the malady under which he was laboring at the time could be received as original evidence when made to a person other than a medical attendant, if they related to the present and not to the past. Thomas v. Herrall, (1890) 18 Or 546, 23 P 497.

The remarks made by a defendant as he was hurrying from the scene of his crime and immediately after its commission were admissible as part of the res gestae. State v. Brown, (1895) 28 Or 147, 41 P 1042.

Statements of child immediately after an alleged criminal assault were held to be narrative. State v. Sargent, (1897) 32 Or 110, 49 P 889.

A declaration by a person charged with a crime, made after his arrest and when sufficient time had elapsed to formulate a plan of defense, was not part of the res gestae. State v. Smith, (1903) 43 Or 109, 71 P 973.

Statements made by a prosecuting witness after the assault had occurred and after the witness had removed from the scene, were not competent as part of the res gestae. State v. McCann, (1903) 43 Or 155, 72 P 137.

In an action to recover for injury to a bridge by a vessel passing through under its own steam, defended by the tugboat company on the ground that the injury was caused by interference with the navigation of the vessel by her captain without consulting the pilot, testimony as to what the captain said at the time or immediately after giving the order was competent as a part of the res gestae. Multnomah County v. Willamette Towing Co., (1907) 49 Or 204, 89 P 389.

The declarations of an employe made after an accident resulting in injury to a coemploye were not part of the res gestae. Fredenthal v. Brown, (1908) 52 Or 33, 95 P 1114.

Where plaintiff, in a second or two after he had fallen and as soon as he could speak, asked his foreman, "What kind of a trap this was to set for a man?" the remark was admissible as res gestae. Moulton v. St. Johns Lbr. Co., (1912) 61 Or 62, 68, 120 P 1057.

In an action on a contract of employment evidence that, immediately after the interview at which the contract was assented to by defendant's president, the latter said that plaintiff wanted five percent on all sales and had been told that there was "nothing doing," was admissible as res gestae. Sherman v. Clear View Orchard Co., (1915) 74 Or 240, 246, 145 P 264.

A physician or attendant could testify to the injured party's statement as to his symptoms, ills and the locality and character of his pain, when made for the purpose of medical advice and treatment. Weygandt v. Bartle, (1918) 88 Or 310, 171 P 587.

The plan and purpose for which deceased went to a place where he was killed could be shown by his declarations at the time. State v. Butler, (1920) 96 Or 219, 186 P 55.

A statement by assignee's manager that an assignment for creditors was accompanied with a provision for a release was held admissible as a verbal act. Southeast Portland Lbr. Co. v. Heacock, (1929) 128 Or 248, 275 P 28.

Testimony of mother, relating statements made to her by five-year old son after an exciting and unusual experience, were admissible. State v. Hutchison, (1960) 222 Or 533, 353 P2d 1047.

3. Material objects forming part of res gestae

The clothing worn by two deceased persons at the time they were killed could be offered in evidence in a trial for the murder of a third person who was killed with them at the same time by the defendant, for the purpose of showing the direction of the gunshot wounds upon their persons and thereby fixing the direction from which the accused fired when such third person was shot. State v. Porter, (1897) 32 Or 135, 152, 49 P 964.

4. Writings forming part of res gestae

A void judicial proceeding was admissible in evidence as a private writing and part of the res gestae to show the inducement to a deed made to cure the defect in such proceedings. Stinson v. Porter, (1885) 12 Or 444, 8 P 454.

A memorandum read at the time parties enter into a parol contract, which substantially contained the terms assented to, was competent evidence in an action on the contract as a part of the res gestae. Humphrey v. Chilcat Canning Co., (1890) 20 Or 209, 25 P 389.

A certificate of marriage was admissible as part of the res gestae, in connection with proof of the identity of the

parties, to establish the fact of marriage. State v. Isenhart, (1897) 32 Or 170, 52 P 569.

Ledger entries made in the regular course of business were admissible. State v. Cooke, (1929) 130 Or 552, 278 P 936.

Books of account were admissible in embezzlement prosecution of corporation president who had supervision of the books and duty to see they were correct. State v. German, (1939) 163 Or 342, 96 P2d 1085.

A sheet from a bookkeeping system showing that payments were not transmitted to owners after date of commission of crime alleged in indictment was properly admitted. Id.

5. Person making statement

(1) In general. On a trial for murder the declarations of the deceased made at the time and during the affray were admissible as part of the res gestae. State v. Henderson, (1893) 24 Or 100, 32 P 1030.

The grantor's declarations to the notary at the time the conveyance was executed as to intent were admissible as res gestae in a suit to set aside a deed as in fraud of creditors. Robson v. Hamilton, (1902) 41 Or 239, 242, 69 P 651.

In a prosecution for murder, an exclamation of decedent's daughter during a scuffle at the time of the killing that defendant had killed her mother was admissible as part of the res gestae. State v. Davis, (1914) 70 Or 93, 97, 140 P 448.

(2) Agent. Where the acts of an agent are binding on the principal, what was said by the agent at the time is admissible as part of the res gestae; but where the declarations do not accompany the act, they are not admissible to charge the principal. First Nat. Bank v. Linn County Bank, (1897) 30 Or 296, 47 P 614.

A statement by a general manager of a corporation not made in the course of his employment was not competent evidence against the principal of the matter stated. Wicktorwitz v. Farmers' Ins. Co., (1897) 31 Or 569, 576, 51 P 75.

The statement of the president of a corporation in response to an inquiry that he had authority to execute a note, together with the subsequent production of a note so executed, was admissible. Markham v. Loveland, (1914) 69 Or 451, 138 P 483.

(3) Conspirators. Declarations and acts of every member of a conspiracy said and done during the existence of such conspiracy and in furtherance of its purposes are competent evidence against all the conspirators. State v. Tice, (1897) 30 Or 457, 48 P 367; State v. Ryan, (1905) 47 Or 338, 82 P 703, 1 LRA(NS) 862.

Statements made by a coconspirator after the common enterprise has ended and not in the presence of the accused are not competent evidence against the latter. State v. Magone, (1897) 32 Or 206, 51 P 453; State v. Hinkle, (1898) 33 Or 93, 97, 54 P 155.

Statements made by conspirators after the alleged crime has been accomplished are not admissible against a coconspirator for any purpose, and a general objection that the testimony is incompetent sufficiently indicates the ground for objection. State v. Magone, (1897) 32 Or 206, 51 P 453.

Where in a suit to restrain a trespass it appeared that the parties had conspired to acquire title in violation of the laws of the United States, the declarations of other of plaintiff's agents, after the defendant had commenced occupying the land and before the title had been obtained, concerning the terms of defendant's employment and possession were competent as part of the res gestae. Pacific Live Stock Co. v. Gentry, (1900) 38 Or 275, 61 P 422, 65 P 597.

Where evidence tended to show that defendants procured the arrest of plaintiff in pursuance of a conspiracy to extort money, the acts and statements of the defendants and of the officers who made the arrest, done and said in the course of the arrest and resulting detention, were competent as part of the res gestae. Jester v. Lipman, (1902) 40 Or 408, 410, 67 P 102.

6. Statements prior to act

In an action for injury to an employe caused while he was out of his regular line of employment, testimony that when he took up the new work the timekeeper and the assistant engineer told him that the superintendent had ordered him to do the new work was admissible as part of the res gestae. Elliff v. Ore. R.R. & Nav. Co., (1909) 53 Or 66, 99 P 76.

That the foreman of the defendant directed a teamster to move to another place because the pole might fall down on the team, was admissible as a part of the res gestae. Lang v. Camden Iron Works, (1915) 77 Or 137, 148, 146 P 964.

7. Subject matter of declaration

Where the question was the good faith of a sale of goods, whatever was said and done by the parties to that transaction, contemporary with it and which tend to explain or elucidate its character, were parts of that transaction and admissible in evidence. Bergman v. Twilight, (1882) 10 Or 337.

A statement by defendant that he intended to pay a certain mortgage held by plaintiff against a third person, made a few hours before it is claimed he agreed with plaintiff to pay this mortgage, was admissible as part of the res gestae to illustrate the subsequent agreement. Garrison v. Goodale, (1892) 23 Or 307, 311, 31 P 709.

On an issue as to whether a deed to defendant from plaintiff's intestate is a forgery, declarations of intestate while in possession of the property as to its ownership were admissible. Butts v. Purdy, (1912) 63 Or 150, 163, 125 P 313, 127 P 25.

Testimony of attorney preparing mortgage as to what was done, including instructions from parties, being fact in issue and showing disposition of loaned money was admissible in an action for foreclosure and reformation. Smith v. Cram, (1925) 113 Or 313, 230 P 812.

FURTHER CITATIONS: Sullivan v. Ore. Ry. & Nav. Co., (1885) 12 Or 392, 7 P 508, 53 Am Rep 364; State v. Ching Ling, (1888) 16 Or 419, 18 P 844; Klever v. Elliott, (1958) 212 Or 490, 320 P2d 263; State v. O'Brien, (1971) 92 Or App Adv Sh 1238, 485 P2d 434, 486 P2d 592, Sup Ct review allowed.

LAW REVIEW CITATIONS: 11 OLR 259; 42 OLR 208; 47 OLR 109.

41.880

NOTES OF DECISIONS

1. In general
2. Limitation on rule
3. Admission of other writings
4. Admissibility of answer to letter

1. In general

This section makes no mention as to the weight to be given to the matters therein contained. State v. Ausplund, (1917) 86 Or 121, 167 P 1019.

The account of an act need not come entirely from any single witness. Johnston v. Fitzhugh, (1919) 91 Or 247, 178 P 230.

A medical witness for defendant having testified to part of declarations, plaintiff was entitled to bring out the whole. Elliff v. Ore. R.R. & Nav. Co., (1909) 53 Or 66, 99 P 76.

Where plaintiff offered a statement by defendant to a certain person as to what defendant was to pay plaintiff,

defendant had the right to state all that was said at the time on the same subject. Mahon v. Rankin, (1909) 54 Or 328, 102 P 608, 103 P 53.

Where plaintiff's witness testified as to an admission by defendants, the defendants were required to confine their cross-examination of such witness to the subject of the direct examination. Prouty Lbr. & Box Co. v. Cogan, (1921) 101 Or 382, 200 P 905.

2. Limitation on rule

The rest of the conversation or writing must be material and affect in some way the part already given in evidence to be admissible under this section. Mahon v. Rankin, (1909) 54 Or 328, 102 P 608, 103 P 53; State v. Mack, (1911) 57 Or 565, 112 P 1079; Richey v. Robertson, (1917) 86 Or 525, 169 P 99; State v. Weston, (1923) 109 Or 19, 219 P 180; Wells v. Morrison, (1927) 121 Or 604, 256 P 641.

In an action for the price of a piano the part of a conversation as to a threat to whip plaintiff was held immaterial. Richey v. Robertson, (1917) 86 Or 525, 169 P 99.

A statement made by a witness before trial when under arrest, which contained much matter prejudicial to accused, was held improperly read, notwithstanding part was read by defendant on cross-examination of the witness. State v. Weston, (1923) 109 Or 19, 219 P 180.

The fact of insurance on plaintiff's car was not material or competent in an action for injury thereto and could not be elicited by way of completing a conversation. Wells v. Morrison, (1927) 121 Or 604, 256 P 641.

Irrelevant portions of conversation are not admissible on a criminal trial merely because the opponent has been permitted to introduce a relevant portion of the conversation; but where the objection to the conversation was of a very general type and entirely failed to point out that the balance of the conversation was irrelevant to a correct understanding of that already admitted, the trial court committed no error in admitting the irrelevant portions of the conversation. State v. Wye, (1928) 123 Or 595, 263 P 60.

In a prosecution for the unauthorized taking of a calf, the state was not authorized to produce evidence of a conversation where the defense, upon cross-examination, brought out the fact of the conversation but elicited no part thereof and dropped the matter upon receiving a negative answer to the question whether a certain statement had been made. State v. Opie, (1946) 179 Or 187, 170 P2d 736.

The rest of the conversation or writing must be material and affect in some way the part already given in evidence to be admissible under this section. Black v. Nelson, (1967) 246 Or 161, 424 P2d 251.

3. Admission of other writings

Where a note was admitted in evidence accompanied by proof of its possession by plaintiff's intestate at the time of his death and bearing certain memoranda in the handwriting of the deceased, it was competent to introduce the private books of deceased containing writings appearing to have been made about the time the memoranda were made and on the same subject. Sturgis v. Baker, (1901) 39 Or 541, 545, 65 P 810.

Where a complaint in another proceeding, in which the plaintiff in the present proceeding was the party defendant, had been put in evidence, the answer could also be put in evidence for the proper explanation of the complaint. Western Whse. Co. v. New Amsterdam Cas. Co., (1917) 85 Or 597, 167 P 572.

4. Admissibility of answer to letter

Material and relevant portions of buyer's reply letters to seller were admissible where seller's letters were already in evidence. American Oil Co. v. Foust, (1929) 128 Or 263, 274 P 322.

In an action based on refusal to accept delivery of goods, a letter from the seller in response to a letter of the buyer requesting seller to hold up delivery of lumber purchased was admissible. Lake County Pine Lbr. Co. v. Underwood Lbr. Co., (1932) 140 Or 19, 12 P2d 324.

FURTHER CITATIONS: State v. Mack, (1911) 57 Or 565, 112 P 1079; Bottom v. Portland Elec. Power Co., (1932) 139 Or 209, 9 P2d 129; Paine v. Meier & Frank Co., (1934) 146 Or 40, 27 P2d 315, 29 P2d 531; State v. Williams, (1971) 92 Or App Adv Sh 1674, 487 P2d 100, Sup Ct review denied.

41.890

NOTES OF DECISIONS

A declaration against interest was competent when relevant, though declarant was not a party, or in privity with any party, to the action. Mace v. Timberman, (1926) 120 Or 144, 251 P 763.

A judgment against a foreign corporation rendered in a foreign state was not admissible in an action against a shareholder, resident in Oregon, to recover a proportionate part of the judgment from the shareholder. Bartholmae Oil Corp. v. Booth, (1934) 146 Or 155, 28 P2d 1083.

FURTHER CITATIONS: Carpenter v. Carpenter, (1936) 153 Or 584, 56 P2d 305, 1098, 58 P2d 507, 105 ALR 386; Howell v. Deady, (1943) 48 F Supp 116.

LAW REVIEW CITATIONS: 42 OLR 223.

41.900

NOTES OF DECISIONS

1. The precise facts in dispute
2. The declaration, act or omission of a party
3. Declaration or act of another and the party's conduct in relation thereto
4. Declarations of deceased persons
5. The declaration or act of a dying person
6. The declaration or act of a partner or agent of the party
7. Proof of partnership or agency
8. Declaration or act of a conspirator
9. Proof of conspiracy
10. The declaration, act or omission forming part of the transaction
11. Testimony at former trial
12. The opinion of a witness
13. Expert witnesses; qualifications
14. Proof and determination of qualifications
15. Medical experts
16. The opinion of a subscribing witness
17. The opinion of an intimate acquaintance
18. Common reputation
19. Usage
20. Monuments, inscriptions, entries in family Bibles, etc.
21. Facts from which the facts in issue are presumed or inferable

1. The precise facts in dispute

Though witness may testify to observations but not impressions, when fact in issue is intention of parties, a witness in position to know may testify to such intention as to any other observed fact. Smith v. Cram, (1925) 113 Or 313, 230 P 812.

Any evidence of employe's negligence acting within the scope of his employment is, by operation of the doctrine of respondeat superior, relevant to the issue of the employer's liability. Madron v. Thomson, (1966) 245 Or 513, 419 P2d 611, 27 ALR3d 953.

In a breach of promise suit evidence tending to show immoral character of plaintiff was held admissible. Kelley v. Highfield, (1887) 15 Or 277, 14 P 744.

In an action upon a contract to convey land "in fee simple clear of all incumbrances whatsoever," an abstract of title was competent evidence to show that such a title as was required by the contract was not offered to be conveyed. Kane v. Rippey, (1892) 22 Or 296, 23 P 180.

2. The declaration, act or omission of a party

The terms "admission" and "declaration" are distinguished from "confession." State v. Weston, (1921) 102 Or 102, 201 P 1083; State v. Bouse, (1953) 199 Or 676, 264 P2d 800.

Employer's statements to injured employe in a hospital as to his having fixed the machine which caused the injury were admitted in evidence. Franklin v. Webber, (1919) 93 Or 151, 182 P 819.

In a prosecution for embezzlement, certain ledgers were held admissible, the entries having been made under supervision of the defendant and in the regular course of business. State v. Cooke, (1929) 130 Or 552, 569, 278 P 936; State v. German, (1940) 163 Or 342, 96 P2d 1085.

Evidence tending to prove a motive for falsehood in making declarations in disparagement of title was admissible to impeach the credit otherwise due them. Long v. Lander, (1882) 10 Or 175, 178.

A printed notice offering a reward for the recovery of the goods, posted in conspicuous places, was competent evidence as an admission of liability on the part of the company. Bennett v. No. Pac. Express Co., (1885) 12 Or 49, 69, 6 P 160.

The voluntary statements of a defendant before the grand jury that indicted him were admissible so far as they were against his interest. State v. Robinson, (1897) 32 Or 43, 51, 48 P 357.

Testimony of accused taken on a former trial on the same indictment, tending to prove guilt, was admissible as a declaration against his interest. State v. Childers, (1897) 32 Or 119, 125, 49 P 801.

Answers filed by defendant making admissions against his interest were admissible against him in a subsequent suit between the same parties. Feldman v. McGuire, (1899) 34 Or 309, 314, 55 P 872.

In an action against an agent for breach of implied warranty of authority to make a contract, the declarations of the agent, after the contract was made, that he had no authority to make it were admissible. Anderson v. Adams, (1903) 43 Or 621, 74 P 215.

In a proceeding to establish a claim against a decedent based on a contract whereby decedent, on claimant's conveying to him a mining claim, agreed to sell it and pay claimant a specified sum, evidence that subsequent to the sale decedent orally agreed to pay claimant a specified sum and to convey a farm on perfecting the title thereto was admissible as showing that decedent recognized some liability to claimant. Bull v. Payne, (1906) 47 Or 580, 84 P 697.

Question asked by judge at the trial in municipal court and the defendant's answer thereto was admissible in the trial in circuit court under this subsection. Stark v. Epler, (1911) 59 Or 262, 117 P 276.

Statements of accused when confronted with a newspaper article charging him with commission of the crime were admissible. State v. Wilkins, (1914) 72 Or 77, 142 P 589.

In a prosecution for murder of a wife killed with defendant's own gun where defendant claimed that his wife was killed while he was away from the house, evidence that defendant stated he did not question his two young boys upon his returning to the house was admissible. State v. Zullig, (1920) 97 Or 427, 190 P 580.

Admissions by defendant when arrested were held competent though defendant was not informed of right to counsel and warned as required in case of confession. State v. Fisher, (1930) 132 Or 693, 288 P 215.

Statements of accused overheard by witness were admissible. State v. Hulsey, (1970) 3 Or App 64, 471 P2d 812.

3. Declaration or act of another and the party's conduct in relation thereto

Allegations made in a letter responded to by the other party, are considered in the light of declarations or conversations between the parties and as such are properly admissible in evidence. Lee v. Cooley, (1886) 13 Or 433, 11 P 70; Frame v. Ore. Liquor Co., (1906) 48 Or 272, 275, 85 P 1009, 86 P 791.

A party to a suit is not bound by, or held to admit as true, every statement made by his witnesses during the trial of a cause because he does not deny or contradict them at the time. Patty v. Salem Flouring Mills Co., (1909) 53 Or 350, 96 P 1106, 98 P 521, 100 P 298.

This section does not apply to conduct of a witness in relation to declarations of another made in his presence. State v. Ryan, (1910) 56 Or 524, 108 P 1009.

Subsection (3) of this section is based upon the rule that the silence or omission to act by the party with reference to a certain assertion that is adverse to the known interests of such party is equivalent to an admission of the truth of the assertion. Johnson v. Underwood, (1922) 102 Or 680, 203 P 879.

Generally, where two persons have carried on correspondence in reference to a particular subject and one of the parties has written a letter to the other making statements concerning subject matter of correspondence which person receiving letter would naturally deny if not true, latter's failure to answer letter is evidence which tends to show that statements in letter are true. Wieder v. Lorenz, (1940) 164 Or 10, 99 P2d 38.

Statements made to a third party by one spouse in the presence and against the interest of the other spouse, and not denied by the latter, are admissible. Ross v. Hayes, (1945) 176 Or 225, 157 P2d 517.

Silence or acquiescence is a species of evidence to be received with caution; and proof of a statement made in the presence of the party should be stricken out if it is not followed by proof of the party's conduct on the occasion. Brown v. Bryant, (1966) 244 Or 321, 417 P2d 1002.

Exclusion of evidence regarding implied admission of liability based on failure to respond to an accusatory statement was within discretion of trial court. Klever v. Elliott, (1958) 212 Or 490, 320 P2d 263; Brown v. Bryant, (1966) 244 Or 321, 417 P2d 1002.

A conversation between a porter and another in relation to goods being delivered for a certain buyer, who was not present, was not competent evidence in an action against the buyer for the price of the goods. Du Bois v. Perkins, (1891) 21 Or 189, 27 P 1044.

Where defendant denied having made the offer of marriage, evidence that plaintiff in the absence of defendant, told other persons of the engagement was inadmissible. Osmun v. Winters, (1894) 25 Or 260, 269, 35 P 250.

The purchaser of a stock of goods was not bound by subsequent admissions of the seller to third persons unless he heard them and had an opportunity to correct any statements inconsistent with the facts as they existed. Josephi v. Furnish, (1895) 27 Or 260, 266, 41 P 424.

Statements as to the number of defendant's automobile and as to the time of his arrival home on the night of the accident were admissible when made in his presence. Stowell v. Hall, (1910) 56 Or 256, 108 P 182.

Accused's protestation of innocence when identified as a robber by the prosecuting witness was not admissible to show identification of the defendant by the prosecuting witness. State v. Evans, (1920) 98 Or 214, 192 P 1062, 193 P 927.

In an action for assault and battery, testimony as to declaration by defendant's father in defendant's presence

that the declarant proposed to have defendant arrested and to make him pay for the injuries inflicted was held admissible. Harris v. Hindman, (1929) 130 Or 15, 278 P 954.

Evidence that passenger or his wife stated before leaving the bus after collision that bus driver was not at fault, was properly admitted in passenger's action against bus company where passenger did not deny that he had so stated and had opportunity at time of accident of repudiating any statement made by wife and there was no proof that he did so. Swain v. Ore. Motor Stages, (1938) 160 Or 1, 82 P2d 1084, 118 ALR 1225.

Books of account over which the defendant had general supervision and responsibility for correctness were admissible in a prosecution for embezzlement. State v. German, (1940) 163 Or 342, 96 P2d 1085.

A letter of complaint from plaintiffs to defendants which caused a conference among the parties at which the letter was read was admissible in an action for breach of contract. Stubblefield v. Montgomery Ward & Co., (1940) 163 Or 432, 96 P2d 774, 98 P2d 14.

Statements of third person to accused, overheard by witness, were admissible. State v. Hulsey, (1970) 3 Or App 64, 471 P2d 812.

The hearsay testimony was admissible to show the intent of the defendant. State v. O'Brien, (1971) 92 Or App Adv Sh. 1238, 485 P2d 434, 486 P2d 592, Sup Ct **review allowed.**

4. Declarations of deceased persons

Declarations against interest made by deceased during his lifetime are admissible but should be considered by the court with caution. Goodin v. Cornelius, (1921) 101 Or 422, 200 P 915.

In an action for the specific performance of an alleged oral contract to convey land brought against the vendor's executrix, declarations of the deceased vendor against his interest were admissible. Goff v. Kelsey, (1915) 78 Or 337, 342, 153 P 103.

Declarations of deceased, made in a perfectly natural manner on the evening of the homicide, that she was about to meet the accused though not admissible as dying declarations were admitted in a prosecution for homicide. State v. Farnam, (1916) 82 Or 211, 161 P 417, Ann Cas 1918A, 318.

Declaration of decedents concerning their intention to engage in work for their employer at the time of their deaths were admissible in a workmen's compensation claim case. King v. State Ind. Acc. Comm., (1957) 211 Or 40, 309 P2d 159, 315 P2d 148, 318 P2d 272.

Declarations of a decedent concerning the cause of an injury which later caused his death were not admissible to establish a workmen's compensation claim. Pratt v. State Ind. Acc. Comm., (1954) 201 Or 658, 271 P2d 659. **Distinguished in** King v. State Ind. Acc. Comm., (1957) 211 Or 40, 309 P2d 159, 315 P2d 148, 318 P2d 272.

5. The declaration or act of a dying person

The test to be applied to dying declarations to determine their admissibility is whether the deceased, if living, would have been permitted to testify to the things contained in the declarations. State v. Saunders, (1886) 14 Or 300, 12 P 441; State v. Foot You, (1893) 24 Or 61, 75, 32 P 1031, 33 P 537.

The credibility of a dying declaration is a question for the jury; the credit of the deceased may be impeached by showing that he made contradictory statements as to the homicide and its cause. State v. Shaffer, (1893) 23 Or 555, 32 P 545; State v. Foot You, (1893) 24 Or 61, 65, 32 P 1031, 33 P 537; State v. Doris, (1908) 51 Or 136, 94 P 44, 16 LRA(NS) 660.

The admissibility of a dying declaration is a preliminary question addressed to the court, and this preliminary inquiry may under certain circumstances be conducted either in the presence and hearing of the jury or otherwise. State v. Shaffer, (1893) 23 Or 555, 557, 32 P 545; State v. Foot You, (1893) 24 Or 61, 32 P 1031, 33 P 537; State v. Doris, (1908) 51 Or 136, 94 P 44; State v. Fuller, (1908) 52 Or 42, 96 P 456.

Two conditions must exist to render dying declarations admissible: (1) The declarant must have been in extremis, and (2) they must have been made in the consciousness that death was impending and without hope or expectation of recovery. State v. Gray, (1903) 43 Or 446, 450, 74 P 927; Mercep v. State Ind. Acc. Comm., (1941) 167 Or 460, 118 P2d 1061.

Dying declarations concerning the cause of death made under a sense of impending death are admissible in both civil and criminal cases. State v. Casey, (1923) 108 Or 386, 213 P 771, 217 P 632; McCarty v. Sirianni, (1930) 132 Or 290, 285 P 825; Mercep v. State Ind. Acc. Comm., (1941) 167 Or 460, 118 P2d 1061.

A trial court exercises a certain discretion in admitting dying declarations. State v. Ah Lee, (1879) 7 Or 237.

That the deceased should have been a believer in the Christian religion at the time the declarations were made is not requisite. Id.

The constitutional provision as to right of confrontation by witnesses does not prohibit evidence of dying declarations. State v. Saunders, (1886) 14 Or 300, 12 P 441.

The belief in impending death may be inferred from circumstances and need not be expressly stated by the deceased. State v. Fletcher, (1893) 24 Or 295, 33 P 575.

Where a dying declaration is partly oral and partly written, the written declaration should not be taken to the jury box and only such portions thereof as may be deemed material and competent should be read to the jury. State v. Doris, (1908) 51 Or 136, 154, 94 P 44, 16 LRA(NS) 660.

A prima facie case is all that is required to authorize a submission of dying declarations to the jury. State v. Fuller, (1908) 52 Or 42, 47, 96 P 456.

The trial court's discretion in passing upon the admissibility of dying declarations is not lightly to be disturbed. Mercep v. State Ind. Acc. Comm., (1941) 167 Or 460, 118 P2d 1061.

The court by proper instruction can ask the jury to determine the qualification of a statement as a dying declaration. State v. Garver, (1950) 190 Or 291, 225 P2d 771, 27 ALR2d 105.

Statements made by one in a semicomotose but conscious condition suffering from a mortal gunshot wound from which he never rallied, who had declared at intervals that he could not live and had previously said that he could not because he was "hurt too bad," were admissible. State v. Pool, (1890) 20 Or 150, 153, 25 P 375; State v. Fletcher, (1893) 24 Or 295, 33 P 575.

The dying declarations of a woman on whom an abortion had been performed were not admissible unless her death was an essential ingredient of the offense and the declarations were made under a sense of impending death. State v. Fuller, (1908) 52 Or 42, 96 P 456; Board of Medical Examiners v. Eisen, (1912) 61 Or 492, 123 P 52.

For the purpose of discrediting the dying declaration, it was competent to show that the deceased was a disbeliever in a future state of reward or punishment. Goodall v. State, (1861) 1 Or 335, 80 Am Dec 396.

A statement that "he shot me down like a dog," was not such a conclusion as to be excluded. State v. Saunders, (1886) 14 Or 300, 12 P 441.

The fact that at times other than when the declarations were made the deceased expressed a hope or belief of his recovery was not an impeachment, for he might still have considered death impending at the time the declarations were made. State v. Shaffer, (1893) 23 Or 555, 32 P 545.

The fact that declarations were the result of questions propounded by an attorney, the absence of cross-examina-

tion, the use of an interpreter, the presence of friends and prosecuting officers only and that accused was unrepresented by counsel, were matters not affecting the competency of such declarations. State v. Foot You, (1893) 24 Or 61, 65, 32 P 1031, 33 P 537.

The statement of a person shot that he got a glimpse as he fell of the person who shot him, followed by a statement on the following day when the defendant was presented to him for identification that he fully recognized the defendant as the one who shot him, was admissible as a dying declaration. Id.

Where a statement as to the circumstances of an affray was made by the injured person after being told by his physician that he could not recover unless by a rare chance through a surgical operation, and within a few minutes the person died from the wounds received, the statement was admissible. State v. Thompson, (1907) 49 Or 46, 88 P 583.

Where statements were made under a sense of impending death, and on the same occasion, they were admissible as dying declarations although partly oral and partly written. State v. Doris, (1908) 51 Or 136, 94 P 44, 16 LRA(NS) 660.

A statement added to a signed declaration by a third person was held part of the res gestae rather than part of the dying declaration. Id.

Evidence of the dying declaration of a person injured in a collision respecting the cause of the injury resulting in his death was admissible. McCarty v. Sirianni, (1930) 132 Or 290, 285 P 825.

In an action for accident insurance, a dying declaration by the insured as to the cause of his death was admissible, although not offered against the person charged with having been responsible for his death. McCredie v. Commercial Cas. Ins. Co., (1933) 142 Or 229, 20 P2d 232, 91 ALR 557.

Deceased's statement after an operation for hernia were not admissible to prove the cause of his injury where at the time he was not in extremis and his condition was not critical except for the danger that a blood clot might become dislodged. Mercep v. State Ind. Acc. Comm., (1941) 167 Or 460, 118 P2d 1061.

Deceased's statement in criminal case about shooting was admissible. State v. Reyes, (1957) 209 Or 595, 303 P2d 519, 304 P2d 446, 308 P2d 182.

6. The declaration or act of a partner or agent of the party

When the right of an agent to act in a particular matter has ceased, or the declarations do not accompany the act or are concerning a matter not within the scope of the agent's authority, the principal cannot be affected by them in any way. First Nat. Bank v. Linn County Bank, (1897) 30 Or 296, 47 P 614; Goltra v. Penland, (1904) 45 Or 254, 77 P 129.

A principal is chargeable with notice of every fact coming to the knowledge of his agent when the information obtained by the latter is received in connection with the particular business in which the agent is employed. Meier & Frank Co. v. Mitlehner, (1915) 75 Or 331, 146 P 796.

For an admission in an answer of a parol agreement to be available against a codefendant, there must be a privity of estate, partnership or agency between the defendants existing at the time of the filing of the answer. Dodge v. Davies, (1947) 181 Or 13, 179 P2d 735.

Time checks given by a contractor to laborers were declarations of the owner's agent in the line of his employment and were admissible. Forbes v. Willamette Falls Elec. Co., (1890) 19 Or 61, 23 P 670, 20 Am St Rep 793.

The declaration of a ticket inspector on examining a ticket that he rejected it on the ground that it was not presented by the original purchaser, was admissible against the company as evidence that, not being objected to otherwise, it was genuine. Nichols v. So. Pac. Co., (1892) 23 Or 123, 130, 31 P 296, 37 Am St Rep 664, 18 LRA 55.

The admission of an agent authorized to settle and adjust the accounts of his principal, made in the attempted adjustment of an account, was admissible against the principal. North Pac. Lbr. Co. v. Willamette Mill Co., (1896) 29 Or 219, 44 P 286.

A statement by a general manager of a corporation, not made in connection with or as part of any official duty, was not competent evidence against the principal. Wicktorwitz v. Farmers' Ins. Co., (1897) 31 Or 569, 576, 51 P 75.

Where the declarations were concerning a matter not within the scope of the agent's authority, the principal was not affected by them in any way even though they were made at the time when the agent was lawfully transacting some business for him. Goltra v. Penland, (1904) 45 Or 254, 257, 77 P 129.

Declarations as to ownership of sheep made by an agent employed simply to haul wool to a warehouse were inadmissible. Id.

Admission of local officers of a mutual benefit society, made against the interests of the general society, was competent evidence against it in an action on the benefit certificate. Hilderbrand v. United Artisans, (1907) 50 Or 159, 91 P 542.

A certificate by the vice-president of a corporation used in obtaining insurance on the life of the decedent stating that his death, or the accident which caused it, was not attributable to the excessive use of intoxicating liquors was not admissible against the company. Parker v. Smith Lbr. Co., (1914) 70 Or 41, 49, 138 P 1061.

The report of physician who made a physical examination of a plaintiff in an action for personal injuries was not admissible for any purpose where the report contained much that was hearsay and there was no way to determine just what part of it was a repetition of what the plaintiff told the physician and what part his opinion derived from the examination. Bottom v. Portland Elec. Power Co., (1932) 139 Or 209, 9 P2d 129.

7. Proof of partnership or agency

The rule that the statements of an agent are not competent to prove his own agency applies to statements when made out of court, and does not restrict the right of a person to testify concerning the nature and extent of his agency for another. Wicktorwitz v. Farmers' Ins. Co., (1897) 31 Or 569, 575, 51 P 75; Larkin v. Carstens Packing Co., (1916) 80 Or 104, 156 P 578; Hinton v. Roethler, (1918) 90 Or 440, 177 P 59.

The authority of an agent cannot be proved by the alleged agent's own statements or acts unless it be also shown that the principal knowingly acquiesced therein. Connell v. McLoughlin, (1895) 28 Or 230, 42 P 218.

Until the facts of agency are established directly or inferentially, the acts of the agent are inadmissible as against his principal. Hannan v. Greenfield, (1899) 36 Or 97, 103, 58 P 888.

Foundation for admission of declarations of an agent was not shown where his agency was shown by the declaration of another claiming to be an agent of the party to be charged. Wade v. Amalgamated Sugar Co., (1913) 65 Or 490, 132 P 710.

The fact that a firm took possession of property that one of the partnership had purchased tended to show his authority to bind the firm, or at least their ratification of his acts. Duzan v. Meserve, (1893) 24 Or 523, 34 P 548.

Where agent after bill of sale of factory was executed, continued to operate the factory for his principal which included buying and disposing of materials, such acts did not establish inferentially that the agent had authority from his principal to execute a note in the name of his principal. Connell v. McLoughlin, (1895) 28 Or 230, 42 P 218.

A real estate broker suing for a commission could not show declaration of a third person to bind the defendant without proof of a partnership or agency between such

person and defendant. Reimers v. Pierson, (1911) 58 Or 86, 113 P 436.

8. Declaration or act of a conspirator

Admissions by a conspirator are not admissible in evidence against his coconspirators until after proof of the conspiracy has been given. Pacific Livestock Co. v. Gentry, (1900) 38 Or 275, 61 P 422, 65 P 597; State v. Thomas, (1965) 240 Or 181, 400 P2d 549; State v. Van Nostrand, (1970) 2 Or App 173, 465 P2d 909, Sup Ct **review denied.**

When the state shows that the defendants were acting in conjunction to accomplish an unlawful purpose, the acts or statements of any member of the combination are binding on all. State v. Keller, (1933) 143 Or 589, 21 P2d 807; State v. Reynolds, (1939) 160 Or 445, 86 P2d 413.

The effect of one's entry into a conspiracy is to make the acts and declarations of his associates, while engaged in the furtherance or execution of the common design, his own acts and words even though he is unaware of their identity. State v. Boloff, (1932) 138 Or 568, 596, 4 P2d 326, 7 P2d 775.

Declarations of conspirator before the actual commission of the alleged crime, and tending to prove the guilt of that conspirator, were equally admissible in evidence against any one of his confederates in a separate trial of the latter. State v. Johnston, (1933) 143 Or 395, 22 P2d 879.

Statements by conspirators after the proposed crime has been accomplished were not admissible against a coconspirator for any purpose. State v. Magone, (1897) 32 Or 206, 209, 51 P 452; Sheppard v. Yocum, (1882) 10 Or 402; State v. Hinkle, (1898) 33 Or 93, 54 P 155.

Where a conspiracy to rob did not terminate until the loot was divided, any statements by a conspirator during this time would be admissible against all. State v. Goodloe, (1933) 144 Or 193, 24 P2d 28.

9. Proof of conspiracy

While discretionary with the court to admit evidence of acts or declarations of alleged conspirators before sufficient evidence is given of the conspiracy, the conspiracy must be shown to have existed and the defendant must be connected with it by subsequent evidence. State v. Ryan, (1905) 47 Or 338, 343, 82 P 703, 1 LRA(NS) 862; State v. White, (1906) 48 Or 416, 87 P 137; State v. Lewis, (1908) 51 Or 467, 94 P 831; State v. Caseday, (1911) 58 Or 429, 447, 115 P 287; State v. Gagnon, (1970) 2 Or App 261, 465 P2d 737, Sup Ct **review denied.**

Conspiracies are usually established by circumstantial evidence. State v. Ryan, (1905) 47 Or 338, 82 P 703, 1 LRA(NS) 862; State v. Gagnon, (1970) 2 Or App 261, 465 P2d 737, Sup Ct **review denied.**

The degree of proof required to prove the existence of a conspiracy, or evidence from which it might be reasonably inferred, to render admissible declarations of a coconspirator is largely discretionary with the trial court. State v. Moore, (1897) 32 Or 65, 48 P 468.

The testimony of a coconspirator is only admissible if there is prima facie evidence of a conspiracy. State v. Parker, (1960) 225 Or 88, 356 P2d 88.

There must be some evidence to show that the minds of the parties met understandingly to prove a conspiracy. Id.

The courts are liberal in permitting very slight evidence to be sufficient to permit a jury to find a conspiracy. State v. Van Nostrand, (1970) 2 Or App 173, 465 P2d 909, Sup Ct **review denied.**

In the absence of evidence of a conspiracy between the defendant and a person making a threat against the prosecuting witness, though in the presence of the defendant, such evidence was inadmissible. State v. Quen, (1906) 48 Or 347, 86 P 791; State v. Booth, (1916) 82 Or 394, 161 P 700.

The admission of evidence of acts and declarations of an alleged coconspirator without a sufficient preliminary showing of a conspiracy was not prejudicial where such acts and declarations were insufficient to connect such alleged coconspirator with the crime. State v. Moore, (1897) 32 Or 65, 77, 48 P 468.

Evidence of the conduct of several alleged conspirators at different times and places not in the presence of each other was competent on the question of conspiracy, if the acts shown reasonably seemed to tend to the accomplishment of a common purpose. State v. Ryan, (1905) 47 Or 338, 82 P 703, 1 LRA(NS) 862.

Evidence was admissible to prove a conspiracy to commit a crime with which the defendant was charged, although the conspiracy was not charged in the indictment. State v. Smith, (1910) 55 Or 408, 106 P 797.

10. The declaration, act or omission forming part of the transaction

Declarations made by a wife to her husband concerning their property rights, while they were conferring about that subject, could not be said to constitute a natural and spontaneous verbal manifestation of emotion and were therefore inadmissible as verbal acts. Coles v. Harsch, (1929) 129 Or 11, 22, 276 P 248.

11. Testimony at former trial

Testimony of a witness in a criminal trial, given orally in the presence of the court or jury, may be read on a subsequent trial of the same defendant on the same criminal charge where the witness is dead or out of the jurisdiction of the court. State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389, 102 P 173; State v. Meyers, (1911) 59 Or 537, 117 P 818; State v. Crawley, (1966) 242 Or 601, 410 P2d 1012.

The requirement as to issue is satisfied where the issue on which former evidence is offered is common to both cases, it being immaterial that there were other issues in either case, or that subject matter of two actions be different or that one be criminal and other civil. In re Silvies River, (1925) 115 Or 27, 29, 237 P 322.

The fact the former testimony was given at a preliminary hearing is not important when defendant was afforded the opportunity at the hearing to confront and cross-examine the witness. State v. Crawley, (1966) 242 Or 601, 410 P2d 1012.

The fact that the testimony given was the recollection of a participant in the proceedings would make no constitutional difference. Id.

When the privilege against self-incrimination is claimed, former testimony may be repeated or read to the court and jury. State v. Rawls, (1969) 252 Or 556, 451 P2d 127.

This subsection is declaratory of the common law. Id.

Evidence that a witness a few months prior to the trial left for Alaska with the intention of staying two years, and that plaintiff had received a letter from him dated in Alaska, was sufficient to satsify this section. Wheeler v. McFerron, (1900) 38 Or 105, 62 P 1015.

Where the present action was not between the same parties as the former one, testimony given in the latter was not admissible even though the issues involved in the two cases were the same. Patty v. Salem Flouring Mills Co., (1909) 53 Or 350, 96 P 1106, 98 P 521, 100 P 298.

The preliminary question of the absence of the witness from the state was sufficiently satisfied by the testimony of a witness that he knew the absent witness's residence was in a foreign state. Beard v. Royal Neighbors of Am., (1911) 60 Or 41, 118 P 171.

Former testimony not taken or certified by the official reporter was held not admissible in a subsequent trial. State v. McPherson, (1914) 70 Or 371, 141 P 1018. **Distinguished in** State v. Crawley, (1966) 242 Or 601, 410 P2d 1012.

Testimony given at a former prosecution for larceny by

witness now out of the state was admissible in a prosecution of the same defendant for polygamy. State v. Von Klein, (1914) 71 Or 159, 142 P 549, Ann Cas 1916C, 1054.

Where the witness though absent from the place of trial was within the state and could be subpenaed, testimony given by the witness at a former trial was not admissible. Hansen-Rynning v. Ore.-Wash. R.R. & Nav. Co., (1922) 105 Or 67, 209 P 462.

Where witness was unable by reason of sickness and inability to leave his home to testify at the second trial, though no physician's certificate was produced, his testimony at a former trial was admissible. Laam v. Green, (1923) 106 Or 311, 211 P 791.

In an action for damages for breach of covenants contained in a lease where in the original complaint a mere reference was made to a fraudulent misrepresentation as inducing the lessee to assent to a certain settlement and where the amended complaint set up the fraud of the lessors in full, lessee should have had an opportunity to cross-examine a witness unable to testify whose testimony on the first trial had had a bearing upon the alleged fraud. Obermeier v. Mtg. Co., (1924) 111 Or 14, 224 P 1089.

In absence of showing that witnesses were not available, record of testimony given by them in prior proceedings was incompetent. In re Silvies River, (1925) 115 Or 27, 29, 237 P 322.

In proceeding for determination of adverse water claims, it was competent to read in evidence testimony which witness, dead at time of trial, had given in prior suit in federal court. Id.

There being sufficient evidence to show absence of the witness from state at second trial, it was the duty of the judge to admit his testimony given at the former trial. State v. Edmunson, (1927) 120 Or 297, 249 P 1098, 251 P 763, 252 P 84.

Subsection (8) had no application requiring proof that witnesses were dead or out of state where reporter's testimony was not used to evidence truth of testimony on former trial but was used to serve some purpose in which the truth or falsity of the testimony was immaterial. State v. Reynolds, (1940) 164 Or 446, 100 P2d 593.

Where an opposing party refused to stipulate that a witness's testimony given at the first trial should be read, an order certifying such testimony for use in the second trial was justified where it was shown that the witness was outside the state. Penn v. Automobile Ins. Co., (1939) 27 F Supp 337.

When the expert witness was available but not called, it was reversible error to admit, over defendant's objection testimony as to the expert's opinion given at the hearing on defendant's mental condition. State v. Unsworth, (1963) 235 Or 234, 384 P2d 207.

12. The opinion of a witness

An opinion of witness as to the amount of damages is not competent. Burton v. Severance, (1892) 22 Or 91, 29 P 200; Pacific Livestock Co. v. Murray, (1904) 45 Or 103, 76 P 1079.

An opinion respecting a subject-matter about which persons of common knowledge, having no peculiar training or special study, are capable of forming accurate opinions and deducing correct conclusions is inadmissible. Fisher v. Ore. Short Line Ry., (1892) 22 Or 533, 30 P 425, 16 LRA 519; Farmers' Nat. Bank v. Woodell, (1900) 38 Or 294, 299, 61 P 837, 65 P 520.

Nonprofessional witnesses will not be permitted to prove through the instrumentality of experiments matters not within the range of their observation and experience. State v. Justus, (1883) 11 Or 178, 8 P 337, 50 Am St Rep 470.

A witness can not express an opinion when he is not an expert and when he can convey his knowledge of the facts by other means. State Land Bd. v. Long, (1950) 189 Or 537, 221 P2d 892, 20 ALR2d 219.

Opinion of railroad man as to what constituted a dangerous rate of speed was incompetent. Fisher v. Ore. Short Line Ry., (1892) 22 Or 533, 30 P 425, 16 LRA 519.

The question as to whether the lowering of heavy tiles from a flatcar to the ground by rolling them down skids with a rope placed around them and snubbed to a post or stake was a safe method of unloading the tiles was not a proper subject of expert testimony. Nutt v. So. Pac. Co., (1894) 25 Or 291, 296, 35 P 653.

An opinion that the body of deceased at the time witness first saw it did not lie in the position in which it fell when the fatal wound was inflicted was excluded. State v. Barrett, (1898) 33 Or 194, 54 P 807.

A witness was not permitted to state which party to an altercation had the advantage where he had detailed the facts and circumstances. State v. Mims, (1900) 36 Or 315, 61 P 888.

The length of time tamarack timbers will remain sound in a bridge in a particular locality was a matter upon which the opinion of a witness who qualified properly might be given. Rice v. Wallowa County, (1905) 46 Or 574, 81 P 358.

In action for personal injuries resulting from breach of implied warranty of fitness of automobile bumper jack, testimony of expert witness that jack was made of cheap soft metal was admissible. Stonebrink v. Highland Motors Inc., (1943) 171 Or 415, 137 P2d 986.

13. Expert witnesses; qualifications

An expert is one instructed by experience, and to become such requires a course of previous habit, practice and study so as to be familiar with the subject. Pendleton v. Saunders, (1889) 19 Or 9, 25, 24 P 506.

A qualified expert can express his opinion regarding the cost of labor and materials even though he does not personally observe the performance of the job in question. Timbers Structures v. C.W.S. Grinding & Mach. Works, (1951) 191 Or 231, 229 P2d 623, 25 ALR2d 1358.

An expert witness can express an opinion on the issues before the jury. Schweiger v. Solbeck, (1951) 191 Or 454, 230 P2d 195, 29 ALR2d 435.

Certain stone and brick masons were qualified to give opinions as to the kind of a wall that would be water tight in a reservoir. Pendleton v. Saunders, (1889) 19 Or 9, 25, 24 P 506.

Where the preliminary examination of a witness showed that he cultivated sugar beets in one year and observed their growth in the following year, a ruling that he was competent to state when they should be thinned and how many tons could be raised per acre was not disturbed. Farmers' Nat. Bank v. Woodell, (1900) 38 Or 294, 61 P 837, 65 P 520.

Where a witness's examination showed that he had two years' experience raising sugar beets and that he had known defendant's farm for 35 years, he was competent to testify that it was suitable for raising sugar beets. Id.

In action for personal injuries resulting from breach of implied warranty of fitness of automobile bumper jack sold to plaintiff by defendant, cause of collapse of jack was proper matter for expression of opinion by expert witnesses. Stonebrink v. Highland Motors Inc., (1943) 171 Or 415, 137 P2d 986.

Experience as a mortician did not qualify a witness as an expert on time of death. State Land Board v. Long, (1950) 189 Or 537, 221 P2d 892, 20 ALR2d 219.

It was error for trial judge to instruct that expert's testimony should be viewed with caution. Kennedy v. State Ind. Acc. Comm., (1959) 218 Or 432, 345 P2d 801, 86 ALR2d 1032.

14. Proof and determination of qualifications

A witness cannot be permitted to testify to his opinion

as to the value of property without first laying a foundation for such testimony by showing that he is possessed of sufficient knowledge upon the subject to form an intelligent opinion. Oregon Pottery Co. v. Kern, (1897) 30 Or 328, 47 P 917; Townley v. Ore. R.R. & Nav. Co., (1898) 33 Or 323, 329, 54 P 150.

Error in admitting expert testimony before the competency of the witness is established is cured by subsequent testimony showing his competency. Farmers' Nat. Bank v. Woodell, (1900) 38 Or 294, 61 P 837, 65 P 520.

The range and extent of the examination to determine the qualifications of a witness offered as an expert is not subject to review on appeal except in case of an abuse of discretion. Id.

The court must determine the qualifications of an alleged expert from a preliminary examination concerning his knowledge, experience or skill respecting the subject-matter in relation to which his opinion is desired, and if it reasonably appear therefrom that he is so qualified to form an intelligent opinion, he is competent. Id.

Whether an alleged expert possesses sufficient experience to render his opinions valuable and therefore admissible, is generally entrusted to the discretion of the trial court. Goldfoot v. Lofgren, (1931) 135 Or 533, 296 P 843.

Hypothetical questions posed to expert witnesses must contain all the material facts in evidence when the witness has not heard the testimony in the litigation. State v. Garver, (1950) 190 Or 291, 225 P2d 771, 27 ALR2d 105.

15. Medical experts

The opinions of medical experts, though based on hypothetical statements of facts, stand upon the same footing as other evidence. Langford v. Jones, (1890) 18 Or 307, 22 P 1064.

An opinion upon facts not communicated to the jury may not be given by a physician qualified as an expert witness; he is first required to detail the symptoms, and then, if qualified, may be allowed to express an opinion based thereon. State v. Simonis, (1901) 39 Or 111, 116, 65 P 595.

The mere proof that the witness was a licensed practicing physician without evidence of actual experience or deliberate study of the subject, was insufficient to qualify him to testify as an expert on the subject of poisoning in a criminal prosecution. Id.

The mere fact that a physician had never seen exactly such a case as the one in question did not disqualify him as an expert. State v. Megorden, (1907) 49 Or 259, 88 P 306, 14 Ann Cas 130.

16. The opinion of a subscribing witness

A subscribing witness to will, when its validity is questioned, may testify to his opinion respecting mental sanity of person signing will. In re Riggs' Estate, (1926) 120 Or 38, 241 P 70, 250 P 753.

It is improper for a witness to give his opinion regarding the testator's capacity to make a will, but an opinion may be expressed by a witness concerning each of the elements required for mental sanity to constitute testamentary capacity. Banta v. Leffler, (1955) 204 Or 538, 284 P2d 348.

17. The opinion of an intimate acquaintance

It is within the discretion of the trial court to say when the witness has shown himself competent and qualified to express an opinion upon the subject. State v. Hansen, (1894) 25 Or 391, 395, 35 P 976, 36 P 296; State v. Peare, (1925) 113 Or 441, 233 P 256; State v. Skerl, (1968) 250 Or 346, 442 P2d 610.

Witnesses who are intimate acquaintances of a person can properly express their opinion as to his sanity and give their reasons for it. Owings v. Turner, (1906) 48 Or 462, 87 P 160; In re Sturtevant's Estate, (1919) 92 Or 269, 178 P 192, 180 P 595; In re Faling Will, (1922) 105 Or 365, 208 P 715; State v. Garver, (1950) 190 Or 291, 225 P2d 771, 27 ALR2d 105.

The inquiry is first whether the witness is acquainted with the person and the character of that acquaintance; second, what the opinion of the witness is respecting the mental sanity of the person; and third, the witness's reason for his opinion. State v. Murray, (1884) 11 Or 413, 5 P 55.

The inquiry does not necessarily extend to the subject of conversations between witness and the person as to whom he is testifying or to words used in such conversation, unless called out upon cross-examination. Id.

The reason for the opinion may be based upon the peculiar appearance of the person, his change of demeanor, the strange manner of his conversation or any other singular feature he exhibits. Id.

The reason for the belief entertained by the witness must be given. Lassas v. McCarty, (1906) 47 Or 474, 84 P 76.

The degree of familiarity prescribed by the statute requires a personal knowledge of the facts upon which the opinion is based. Id.

The weight to be attached to witness's opinion is for the court or jury to determine by considering whether or not the facts testified to by witness as a basis for his conclusions justified the opinion expressed. Id.

Opinion evidence as to whether testator had mental capacity to make a will is incompetent. In re Sturtevant's Estate, (1919) 92 Or 269, 178 P 192, 180 P 595.

Mere casual acquaintance does not qualify witness to speak about a person's sanity. State v. Grayson, (1928) 126 Or 560, 270 P 404.

An officer who had the custody of defendant for four months prior to the trial, though he had no previous acquaintance with him, was competent to testify that he had observed no indication of insanity. State v. Hansen, (1894) 25 Or 391, 35 P 976, 36 P 296; State v. Fiester, (1897) 32 Or 254, 263, 50 P 561.

18. Common reputation

To prove the ownership of property in dispute common reputation is admissible. Wilson v. Maddock, (1875) 5 Or 480; Bartel v. Lope, (1877) 6 Or 321, 327.

Common reputation is competent evidence on questions of boundary. Goddard v. Parker, (1882) 10 Or 102.

To show a fact in which the public have an interest or which directly affects the mass of the people in a locality, common or general reputation is admissible. Morse v. Whitcomb, (1909) 54 Or 412, 418, 102 P 788, 103 P 775, 135 Am St Rep 832.

Letters written before the inception of a controversy tending to prove claimant's heirship were admissible as evidence of common reputation on the question of pedigree. In re Braun's Estate, (1941) 167 Or 218, 117 P2d 238; In re Rowe's Estate, (1943) 172 Or 293, 141 P2d 832.

Where plaintiff's title dates back eight years only, it was error to admit evidence of reputation to support title in an action to recover real property. McEwan v. Portland, (1860) 1 Or 300.

On an issue as to the pedigree of a decedent, an alleged illegitimate son, a neighbor not related to decedent's alleged family who knew both branches of his putative relations from long recollection was competent to testify that it was common knowledge that F. was decedent's mother. State v. McDonald, (1910) 55 Or 419, 103 P 512, 104 P 967, 106 P 444.

19. Usage

To vary or contradict explicit terms of a contract evidence of usage is not admissible. McCulsky v. Klosterman, (1890) 20 Or 108, 25 P 366, 10 LRA 785; Holmes v. Whitaker, (1892) 23 Or 319, 31 P 705; Russell Miller Mill. Co. v. Bastasch, (1914) 70 Or 475, 478, 142 P 355; Coates v. Smith,

(1916) 81 Or 556, 160 P 517; Hurst v. Larson, (1919) 94 Or 211, 184 P 258.

The custom must be general in the business involved and must be either known to the party or of such general notoriety as to support the presumption that it was thus understood. Manerud v. Eugene, (1912) 62 Or 196, 124 P 662; Barnard & Bunker v. Houser, (1913) 68 Or 240, 137 P 227.

Custom must be pleaded in order to warrant proof thereof. Oregon Fisheries Co. v. Elmore Packing Co., (1914) 69 Or 340, 138 P 862; Smith v. Laflar, (1931) 137 Or 230, 2 P2d 18.

To add new terms or stipulations to contract evidence of usage is not admissible. Coates v. Smith, (1916) 81 Or 556, 160 P 517; Hurst v. Larson, (1919) 94 Or 211, 184 P 258.

To aid in the interpretation of a contract evidence of a general custom is admissible. Holmes v. Whitaker, (1892) 23 Or 319, 31 P 705.

The usual method and custom of piling up merchandise contained in boxes might be testified to in an action for injuries from the falling of a pile of boxes. Anderson v. Meier & Frank Co., (1913) 68 Or 21, 136 P 660.

Custom cannot be admitted to contradict explicit rules and positive orders of a railroad. Chadwick v. Ore.-Wash. R.R. & Nav. Co., (1914) 74 Or 19, 144 P 1165.

Where the making of an express contract is admitted and its terms are disputed, such terms cannot be established by evidence of usage. Williams v. Ledbetter, (1930) 132 Or 145, 285 P 214.

Members of a trade or business group who have employed in their contracts trade terms are entitled to show the meaning of those terms to assist the court in the interpretation of their language. Hurst v. Lake & Co. Inc., (1933) 141 Or 306, 16 P2d 627, 89 ALR 1222.

Failure to comply with recognized customs does not necessarily constitute negligence. Barnes v. Davidson, (1951) 190 Or 508, 226 P2d 289.

A general custom or usage need not be pleaded; where a local custom is relied on, it must be pleaded. Cox v. Ohio Nat. Life Ins. Co., (1968) 250 Or 7, 438 P2d 998.

Where a contract to ascertain the net profits of a firm provided that from the outstanding accounts five percent be deducted to cover losses and bad accounts, usage was admitted to show in such case that outstanding accounts meant those from which the bad accounts had been segregated and charged to profit and loss. McCulsky v. Klosterman, (1890) 20 Or 108, 25 P 366, 10 LRA 785.

If the words "commercial purposes" and "suitable and usual sawlogs" had by usage or custom a local or peculiar signification and had been so used and understood by the parties to the contract, it would have been competent to have shown such fact. Johnson v. Hamilton, (1893) 24 Or 320, 325, 33 P 571.

Evidence of a custom among employers requiring the workmen to select appliances was inadmissible. Geldard v. Marshall, (1905) 47 Or 271, 83 P 867, 84 P 803.

Evidence of custom was properly admitted to prove circumstances of contract. Harrison v. Birrell, (1911) 58 Or 410, 115 P 141.

Where contract for sale of potatoes did not specify who was to furnish the means of transportation, evidence of a custom requiring buyer of less than a carload of potatoes to furnish car was admissible. Hurst v. Larson, (1919) 94 Or 211, 184 P 258.

Usage held not admissible to prove a contract. Smith v. Laflar, (1931) 137 Or 230, 2 P2d 18.

Customs and usages of truck drivers were admitted as evidence. Barnes v. Davidson, (1951) 190 Or 508, 226 P2d 289.

In construing timber deeds, evidence of a different intention of the parties derived from circumstances surrounding execution of the deeds, evidence of local custom and usage prevailing at the time, or any practical construction placed upon the instruments by parties initially interested therein was admissible. Arbogast v. Pilot Rock Lbr. Co., (1959) 215 Or 579, 336 P2d 329, 72 ALR2d 712.

20. Monuments, inscriptions, entries in family Bibles, etc.

In a prosecution for statutory rape an entry in the family Bible was admissible to show the age of the prosecutrix, regardless of whether the person who wrote it was dead. State v. Goddard, (1914) 69 Or 73, 133 P 90, 138 P 243.

21. Facts from which the facts in issue are presumed or inferable

Evidence concerning the turbulent character of the plaintiff is admissible if self-defense is in issue. Linkhart v. Savely, (1950) 190 Or 484, 227 P2d 187.

Generally an experiment is admissible only if the experiment is performed under conditions substantially similar to those existing in the case being tried. Foster v. Agri-Chem, Inc., (1963) 235 Or 570, 385 P2d 184.

Request for a courtroom demonstration creates a problem peculiarly directed to the trial judge. Hassebroek v. Norman, (1963) 236 Or 209, 387 P2d 824.

Value of water powers distant some miles from the water power in question could not be shown to prove the value of latter. Dallas v. Boise, (1904) 44 Or 302, 75 P 208.

Evidence of commission of alleged crimes separate and distinct from the crime charged in the indictment subsequent to the crime charged was permitted. State v. German, (1939) 164 Or 342, 96 P2d 1085.

FURTHER CITATIONS: State ex rel. Gladden v. Lonergan, (1954) 201 Or 163, 269 P2d 491; King v. State Ind. Acc. Comm., (1957) 211 Or 40, 309 P2d 159, 315 P2d 148, 318 P2d 272; State v. Koenig, (1959) 218 Or 86, 342 P2d 139; Kennedy v. State Ind. Acc. Comm., (1959) 218 Or 432, 345 P2d 801; Mullart v. State Land Bd., (1960) 222 Or 463, 353 P2d 531; Badden v. British Am. Assur. Co., (1962) 203 F Supp 894; Still v. Benton, (1968) 251 Or 463, 445 P2d 492; Beemer v. Lenske, (1970) 257 Or 149, 477 P2d 886.

ATTY. GEN. OPINIONS: Fees for expert witnesses, 1954-56, p 222; appearance at tax hearing by non-lawyer representative, (1968) Vol 34, p 91.

LAW REVIEW CITATIONS: 4 OLR 222; 9 OLR 174; 12 OLR 326; 16 OLR 422; 19 OLR 265; 31 OLR 267; 33 OLR 243, 262; 37 OLR 291; 40 OLR 214; 41 OLR 31, 281, 282; 42 OLR 182-187, 200-250; 49 OLR 21, 53-64.

41.910

CASE CITATIONS: In re William M. Langley, (1962) 230 Or 319, 370 P2d 228.

ATTY. GEN. OPINIONS: Recording of administrative proceeding, 1958-60, p 389.