Chapter 16

Pleadings; Motions; Orders; Process; Notices; Papers

16.010

NOTES OF DECISIONS

An amendment of any of the sections in regard to procedure in law actions here made applicable to suits in equity will also amend the procedure in suits in equity. Bailey v. Malheur Irr. Co., (1899) 36 Or 54, 57 P 910.

LOL 68 and 71 [ORS 16.260 and 16.290] are applicable to suits in equity. Beneke v. Tucker, (1918) 90 Or 230, 176 P 183.

FURTHER CITATIONS: Rice v. Rice, (1886) 13 Or 337, 10 P 495; Walker v. Goldsmith, (1886) 14 Or 125, 153, 12 P 537; Hume v. Woodruff, (1894) 26 Or 373, 38 P 191; North v. Union Sav. & Loan Assn., (1911) 59 Or 483, 117 P 822; State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828; Swift v. Meyers, (1888) 13 Sawy 583, 37 Fed 37.

16.020

NOTES OF DECISIONS

This section has not destroyed substance of pleading. Weber v. Rothchild, (1887) 15 Or 385, 15 P 650, 3 Am St Rep 162; Eastman v. Jennings-McRae Logging Co., (1914) 69 Or 1, 138 P 216, Ann Cas 1916A, 185.

It is the facts stated and not the form that makes a good pleading. McCarthy v. Frazier, (1920) 97 Or 493, 192 P 491.

Forms of common-law pleading have been abolished. Nadstanek v. Trask, (1929) 130 Or 669, 281 P 840, 67 ALR 599.

The rules by which the sufficiency of the pleadings is to be determined are those prescribed by statute. Norby v. Section Line Drainage Dist., (1938) 159 Or 80, 76 P2d 966.

FURTHER CITATIONS: Crane v. Larsen, (1887) 15 Or 345, 15 P 326; Keene v. Eldriedge, (1905) 47 Or 179, 82 P 803; Johnson v. Hattrem, (1929) 129 Or 32, 275 P 913; Hogan v. Aluminum Lock Shingle Corp., (1958) 214 Or 218, 329 P2d 271; Burgess v. Downing, (1960) 223 Or 235, 354 P2d 293.

16.030

NOTES OF DECISIONS

A motion for inspection of papers is not a pleading. Beede v. Stondall Land & Tbr. Co., (1920) 96 Or 590, 189 P 427; Wiggens Co. Inc. v. Fleming, (1928) 123 Or 644, 263 P 390.

A pleading is a means of bringing a cause to issue either upon a question of fact or one of law. Wiggins Co. Inc. v. Fleming, (1928) 123 Or 644, 263 P 390.

One co-defendant may cross-complain against another in a declaratory judgment proceeding if it is in the nature of a suit in equity. Burnett v. W. Pac. Ins. Co., (1970) 255 Or 547, 469 P2d 602.

A motion to strike is not a pleading. Colwell v. Chernabaeff, (1971) 258 Or 373, 482 P2d 157.

FURTHER CITATIONS: Multnomah County v. Faling, (1909) 55 Or 45, 104 P 964; St. Clair v. Jelinek, (1949) 187 Or 151, 210 P2d 563; Knudson v. Jones, (1957) 209 Or 350, 305 P2d 1061; Lessig v. Conboy, (1959) 219 Or 373, 347 P2d 98; State v. Yarbrough, (1970) 4 Or App 302, 477 P2d 232, Sup Ct **review denied.**

16.040

NOTES OF DECISIONS

1. Filing of pleading
2. Motion to strike
3. Restoration of lost pleadings

1. Filing of pleading

A petition that is not marked "filed" but which is found in the record of the court will be presumed to have been filed. Moore v. Willamette Trans. & Locks Co., (1879) 7 Or 359.

It is reversible error for the court to grant a nonsuit for want of a pleading within less time than is allowed by law to file such pleading. Mulkey v. Day, (1907) 49 Or 312, 89 P 957.

Compliance with the statutory provisions for filing of the answer is all that is required and defendant need not serve a copy of the answer on the plaintiff. Stivers v. Byrkett, (1910) 56 Or 565, 108 P 1014, 109 P 386.

Motion to file reply after time provided was properly denied as no excuse for the delay was shown. Chapman v. Multnomah County, (1912) 63 Or 180, 126 P 996.

The court properly struck from its records an answer not served as required by a rule of the circuit court. Kosher v. Stuart, (1913) 64 Or 123, 121 P 901, 129 P 491.

A rule of court which stated that time for filing pleading and motions would not be extended for a period longer than 10 days after statutory period was in conflict with this section and OL 103 [ORS 16.050]. Bank of Beaverton v. Godwin, (1928) 124 Or 166, 264 P 356.

Where defendant's second amended answer was never legally served on plaintiff and never legally filed nor accepted by the plaintiff, the court abused its discretion in not permitting plaintiff to file a reply. Alery v. Alery, (1951) 193 Or 332, 336, 238 P2d 769, 771.

2. Motion to strike

A motion to strike a complaint on the ground of defective verification is waived by pleading over. State v. Chadwick, (1882) 10 Or 423; German Sav. & Loan Socy. v. Kern, (1900) 38 Or 232, 62 P 788, 63 P 1052; Harvey v. So. Pac. Co., (1905) 46 Or 505, 80 P 1061.

A motion to strike on ground that several defenses are not separately stated is waived unless made within the time prescribed. Fleishman v. Meyer, (1905) 46 Or 267, 80 P 209; Oregonian Ry. v. Ore. R.R. & Nav. Co., (1886) 27 Fed 277; United States v. Ordway, (1887) 30 Fed 30.

If no objection for want of verification is taken to a pleading within the time prescribed, this defect is waived. Moore v. Willamette Trans. & Locks Co., (1879) 7 Or 359.

A motion to strike out a complaint must be made before answering. Harvey v. So. Pac. Co., (1905) 46 Or 505, 80 P 1061.

3. Restoration of lost pleadings

Where the original pleadings filed are lost or destroyed, copies must be substituted. Miller v. Shute, (1910) 55 Or 603, 107 P 467.

FURTHER CITATIONS: Klein v. Turner, (1913) 66 Or 369, 133 P 625; Brown v. Becker, (1931) 135 Or 353, 295 P 1113; Ash v. Kilander, (1960) 220 Or 438, 348 P2d 1099; Western Feed Co. v. Heidloff, (1962) 230 Or 324, 370 P2d 612; DeCicco v. Ober Logging Co., Inc., (1968) 251 Or 576, 447 P2d 297; State v. Yarbrough, (1970) 4 Or App 302, 477 P2d 232, Sup Ct **review denied.**

LAW REVIEW CITATIONS: 13 OLR 85.

16.050

NOTES OF DECISIONS

1. Construction of section
2. Enlarging time to plead or do other act
3. Discretion of court

1. Construction of section

The provisions of this section are remedial and should be given a liberal construction. Peters v. Dietrich, (1934) 145 Or 589, 27 P2d 1015; Snyder v. Consol. Hwy. Co., (1937) 157 Or 479, 72 P2d 932.

This section is construed liberally so that every litigant shall have his day in court and his rights and duties determined only after a trial upon the merits. Snyder v. Consol. Hwy. Co., (1937) 157 Or 479, 72 P2d 932.

2. Enlarging time to plead or do other act

This section does not apply to enlarging of the time for filing the transcript on appeal. Kelley v. Pike, (1889) 17 Or 330, 20 P 685; Whalley v. Gould, (1895) 27 Or 74, 40 P 4; Shepperd v. Latourell, (1895) 27 Or 137, 44 P 1090.

Under this section, the filing of a reply which though prepared has not been filed is properly permitted at the trial. Pope v. MacDonald, (1921) 98 Or 373, 193 P 831; Hopwood v. Hopwood, (1932) 141 Or 135, 16 P2d 638.

To extend time for filing an amended verified statement of costs is within discretion of court where application to extend is made within the five days allowed to file the statement. Willis v. Lance, (1896) 28 Or 371, 382, 43 P 384, 487.

Where the party acts in good faith to set aside a default and tenders a meritorious defense, relief should be granted under this section. McFarlane v. McFarlane, (1904) 45 Or 360, 77 P 837.

Where a party fails to deliver a verified copy of an account within the time prescribed by statute, the court may in its discretion relieve the party from his default. Raski v. Wise, (1910) 56 Or 72, 107 P 984.

On a petition for a writ of review to be directed to the county court, the circuit judge may extend the time of return of the writ beyond the original return day. Holland-Wash. Mtg. Co. v. County Court of Hood R. County, (1920) 95 Or 668, 188 P 199.

A divorce court cannot amend, revise or vacate a decree after the expiration of the term in which it is rendered, unless power to affect the decree is reserved. Zipper v. Zipper, (1951) 192 Or 568, 235 P2d 866.

In an action for money had and received the trial court did not prejudicially err in permitting plaintiffs to file their reply a day before the trial, in view of the fact the reply did not change the cause, and at most merely enlarged plaintiffs' opportunity to introduce evidence. Hogan v. Aluminum Lock Shingle Corp., (1958) 214 Or 218, 329 P2d 271; Burkholder v. State Ind. Acc. Comm., (1965) 242 Or 276, 409 P2d 342.

An order requiring the defendant to give a bond to pay any judgment the plaintiff might recover as a condition to being permitted to answer out of time, was within this section where no reasonable excuse was shown for delay. Kosher v. Stuart, (1913) 64 Or 123, 121 P 901, 129 P 491. **But see** Russell v. Piper, (1921) 101 Or 680, 201 P 436.

Where there was no showing of surprise or excusable neglect, the defendant was not allowed to file an answer out of time. Roeser v. Roeser, (1925) 116 Or 108, 239 P 541.

A rule of court prohibiting extension of time to plead was in conflict with this section. Bank of Beaverton v. Godwin, (1928) 124 Or 166, 264 P 356.

3. Discretion of court

The discretion of the court in allowing a pleading to be filed after time limited is a legal discretion to be exercised in conformity with the law, and only a manifest abuse of this discretion is reviewable on appeal. McFarlane v. McFarlane, (1904) 45 Or 360, 77 P 837; Short v. Short, (1912) 62 Or 118, 123 P 388; Brown v. Becker, (1931) 135 Or 353, 295 P 1113.

FURTHER CITATIONS: Rodda v. Rodda, (1949) 185 Or 140, 202 P2d 638; Fearey v. Zipper, (1957) 212 Or 67, 318 P2d 310; Ash v. Kilander, (1960) 220 Or 438, 348 P2d 1099.

16.070

NOTES OF DECISIONS

1. Subsection (1)

Complaint may be verified by agent having personal knowledge of all material allegations without showing that real party in interest is not within the county. Steamer Senorita v. Simonds, (1859) 1 Or 274.

The allowance of amendments to a verification rests in the sound discretion of the trial court. Blanchard v. Bennett, (1860) 1 Or 328.

Where an agent verifies an answer, the allegations therein are to be taken as a part of his statement, and it must appear therefrom that the truth or falsity of such allegations are within his personal knowledge. West v. Home Ins. Co., (1883) 18 Fed 622.

The verification for a foreign corporation may be made by the agent appointed under the Foreign Corporation Act, or by some other agent or attorney who has personal knowledge of the facts alleged. Id.

The defendant's signing of the verification of the answer is a sufficient subscription. Klein v. Turner, (1913) 66 Or 369, 133 P 625.

An answer, which is not verified as required by this section, tendered with a motion to set aside a default is equivalent to an affidavit of merits sufficient to justify exercise of the court's discretion to grant the motion. Hubble v. Hubble, (1929) 130 Or 177, 279 P 550.

A complaint by the government to recover a penalty was properly subscribed under this section. United States v. Griswold, (1877) Fed Cas No. 15,266, 26 Fed Cas 42.

A verification of a complaint by plaintiff stating that the complaint was true as he verily believed is perjury if wilfully false. State v. Luper, (1907) 49 Or 605, 91 P 444.

Where several parties pleaded together in an heirs' suit, the complaint was sufficiently verified by one of the plaintiffs. Haley v. Sprague, (1941) 166 Or 320, 111 P2d 1031.

2. Subsection (2)

If a pleading of a county is not subscribed by its district attorney, it may be stricken on motion. Moreland v. Marion County, (1875) Fed Cas No. 9,794, 17 Fed Cas 741.

An objection to a pleading on the ground it is not properly subscribed or verified is waived by pleading over. State v. Chadwick, (1882) 10 Or 423.

Where special pleas in a patent infringement case were

not verified as provided in this section, they were stricken on motion. Collier v. Stimson, (1883) 18 Fed 689.

Where an account not properly verified is furnished in accordance with demand and kept until the day of trial, an objection then to the defect in the verification is waived. Robbins v. Benson, (1884) 11 Or 514, 6 P 69.

Where a complaint has been properly stricken from the files for want of a verification without leave to amend, the plaintiff has no standing in court and the dismissal of the suit follows as a matter of course, irrespective of the reasons therefor given by the presiding judge. Clark v. Clark, (1916) 81 Or 405, 159 P 969.

It is proper to strike a pleading from the files when it is not properly verified, and permitting or refusing an amendment of the verification is within the trial court's discretion. Id.

Any defect in a verification of a pleading is waived where there is no motion to strike. Clarinda Trust & Sav. Bank v. Doty, (1917) 83 Or 214, 163 P 418.

The party whose pleadings are stricken because not verified or signed may be permitted to plead over, thereby curing the defect. Northwestern Nat. Ins. Co. v. Averill, (1935) 149 Or 672, 42 P2d 747.

FURTHER CITATIONS: Columbia Auto Works v. Yates, (1945) 176 Or 295, 156 P2d 561; Bengtson v. Hemphill, (1964) 238 Or 97, 391 P2d 626; Emerald Logging Radio Assn. v. State Tax Comm., (1964) 1 OTR 456; DeCicco v. Ober Logging Co., Inc., (1968) 251 Or 576, 447 P2d 297; State v. Yarbrough, (1970) 4 Or App 302, 477 P2d 232, Sup Ct review denied; People of Oregon ex rel. Johnson v. Debt Reducers, Inc., (1971) 5 Or App 322, 484 P2d 869.

LAW REVIEW CITATIONS: 43 OLR 82.

16.080

NOTES OF DECISIONS

When the answer to a charge against an attorney might in the judgment of the court subject the attorney to a prosecution for a felony, the verification to such answer may be omitted. State v. Winton, (1884) 11 Or 456, 5 P 337, 50 Am Rep 486.

16.090

NOTES OF DECISIONS

An objection under this section must be made by motion to strike or it will be deemed waived. Fleishman v. Meyer, (1905) 46 Or 267, 80 P 209; State v. Portland Gen. Elec. Co., (1908) 52 Or 502, 95 P 722, 98 P 160.

Where a complaint contains several causes of action not separately stated, the proper remedy is a motion to strike and not a demurrer. Boelk v. Nolan, (1910) 56 Or 229, 107 P 689; McKay v. Campbell, (1870) 1 Sawy 374, Fed Cas No. 8,839.

Even though several causes of action may properly be joined in the complaint, it will be stricken on motion if the causes are not separately stated. Portland v. Baker, (1923) 107 Or 28, 212 P 967; State v. Montag Co., (1930) 132 Or 587, 286 P 995.

A motion under this section cannot be raised during the admission of testimony. Bade v. Hibberd, (1908) 50 Or 501, 93 P 364.

Where a complaint in one count combines different causes of action which cannot properly be joined, the pleading is subject to demurrer and to motion to strike. State v. Montag Co., (1930) 132 Or 587, 286 P 995.

Where a plaintiff alleged in a single count a cause of action under an express contract and a cause of action in quantum meruit, the defendant's sole remedy was a motion to strike and not a motion to compel plaintiff to elect. Id.

An order striking a pleading under this section and allowing the pleader to amend is not an appealable order. Abrahamson v. Northwestern Pulp & Paper Co., (1933) 141 Or 339, 15 P2d 472, 17 P2d 1117.

Where an amended pleading is stricken on motion that it contains several causes not separately stated, the original pleading is restored. Id.

Where a complaint did not state a cause of action and was erroneously dismissed upon a motion to strike, the order of dismissal was affirmed as the question of sufficiency of the complaint was raised on appeal. State v. Mott, (1940) 163 Or 631, 97 P2d 950.

FURTHER CITATIONS: Oh Chow v. Hallett, (1872) 2 Sawy 259, Fed Cas No. 10,469; Pruett v Lininger, (1960) 224 Or 614, 356 P2d 547.

16.100

NOTES OF DECISIONS

1. In general
2. Subsection (1)
3. Subsection (2)

1. In general

The object of a demurrer is to test the sufficiency of a pleading and object of motion to strike is to eliminate immaterial matter therefrom; one cannot take the place of the other. Cline v. Cline, (1871) 3 Or 355; The Victorian, (1893) 24 Or 121, 32 P 1040, 41 Am St Rep 838; Multnomah County v. Faling, (1909) 55 Or 45, 104 P 964; Harrison v. Birrell, (1911) 58 Or 410, 115 P 141; Hubbard v. Olsen-Roe Transfer Co., (1924) 110 Or 618, 224 P 636.

A motion to strike is not an "answer" and a judgment entered for want of an answer after denial of the motion is not appealable. Multnomah County v. Faling, (1909) 55 Or 45, 104 P 964.

Under the procedural statutes, there is no motion to strike on the ground that the allegations are irrelevant and immaterial and do not raise any material issues. United States v. Aho, (1943) 51 F Supp 137.

Disposition of motions is a matter of discretion and is not appealable unless an abuse is shown. McGinnis v. Keen, (1950) 189 Or 445, 221 P2d 907.

The power to strike a frivolous pleading is inherent in the court whether or not authorized by statute. Crawford v. Ketett, (1953) 200 Or 169, 265 P2d 246.

Only under extraordinary circumstances should a motion to strike out a single paragraph of a complaint be treated as a demurrer. Bradfield v. Anderson, (1962) 230 Or 199, 369 P2d 274.

2. Subsection (1)

To justify the striking of an answer as sham it must be obviously false or proved to be false and in bad faith. Foren v. Dealey, (1870) 4 Or 92; Miser v. O'Shea, (1900) 37 Or 231, 62 P 491, 82 Am St Rep 751; Randall v. Simmons, (1902) 40 Or 554, 67 P 513.

When an argument is needed to prove that an answer is frivolous, it is not frivolous. The Victorian; (1893) 24 Or 121, 32 P 1040, 41 Am St Rep 838; Randall v. Simmons, (1902) 40 Or 554, 67 P 513.

A false defense may be stricken out. Torrence v. Strong, (1870) 4 Or 39.

A denial of plaintiff's citizenship pleaded with a defense to the merits is frivolous. Gager v. Harrison, (1877) Fed Cas No. 5,171.

A pleading that is but a repetition of a former one adjudged insufficient may be stricken out as frivolous. Farris v. Hayes, (1880) 9 Or 81.

A denial of any knowledge or information concerning the

truth of an allegation is sufficient and will not be stricken out as sham unless it plainly appears that the denial is false. Oregonian Ry. v. Ore. Ry. & Nav. Co., (1884) 22 Fed 245, 10 Sawy 464.

A frivolous answer is one in which the issues raised do not exhibit any cause of defense, the insufficiency being apparent from an inspection of the averments. Randall v. Simmons, (1902) 40 Or 554, 67 P 513.

Whether a pleading is sham must be determined by the pleading itself or from the whole record and not upon an affidavit. Pacific Mill Co. v. Inman, (1907) 50 Or 22, 99 P 1099.

A motion to strike a pleading on the ground that in a prior answer a demurrer to a similar defense was sustained was sufficient to present the ground that the answer was frivolous under this section. Stamm v. Wood, (1917) 86 Or 174, 168 P 69.

3. Subsection (2)

Where no motion is made to strike out irrelevant matter in a pleading, it is surplusage and should be disregarded at trial. Neis v. Whitaker, (1906) 47 Or 517, 84 P 699; Graham v. Coos Bay R.R. & Nav. Co., (1914) 71 Or 393, 139 P 337.

Where a specification in a motion to strike out included some matter not proper to be struck out, the whole motion should be denied. White v. Allen, (1869) 3 Or 103.

Averments in an answer not presenting issuable facts may be stricken out on motion. Holbrook v. Page, (1871) 3 Or 374.

Mere statements of evidence in the answer may be stricken out. Wythe v. Myers, (1876) 3 Sawy 595, Fed Cas No. 18,119.

Ambiguity and uncertainty in a denial is not a cause for striking out; the proper remedy is a motion to make more definite and certain. Gager v. Harrison, (1877) Fed Cas No. 5,171.

Where complaint contains allegations sounding in tort and contract and the plaintiff relies on contract, the allegations in tort may be stricken out on motion. Corbett v. Wrenn, (1894) 25 Or 305, 35 P 658.

A motion to strike part of an answer is waived by subsequent filing and hearing of a demurrer. Holman v. DeLin, (1897) 30 Or 428, 433, 47 P 708.

Matter disclosing an apparent defense to an action on a note should not have been stricken out as frivolous. Randall v. Simmons, (1902) 40 Or 554, 67 P 513.

Irrelevant and immaterial matter may be eliminated on motion and should be disposed of before trial. Richmond v. Ogden St. R. Co., (1903) 44 Or 48, 74 P 333.

A motion to strike may be directed to part of a pleading. Swank v. Elwert, (1910) 55 Or 487, 105 P 901.

Where proof of facts can be included under an allegation in general language, an allegation in detail may be stricken. Scibor v. Ore.-Wash. R. & Nav. Co., (1914) 70 Or 116, 140 P 629.

A motion to strike part of the complaint is waived by the defendant answering and denying that part. Beaver v. Mason, Ehrman & Co., (1914) 73 Or 36, 143 P 1000.

By going to trial, defendant does not waive his right to complain of the court's striking out, on plaintiff's motion, part of his amended answer. Everding & Farrell v. Gebhardt Lbr. Co., (1917) 86 Or 239, 168 P 304.

Motion to strike matters in a pleading admits the truth of the allegations for purpose of determining whether the motion was properly granted. Bessler v. Powder River Gold Dredging Co., (1919) 90 Or 663, 176 P 791, 178 P 237.

If admissable under the general denial, matter specially pleaded should be stricken out as redundant. Hubbard v. Olsen-Roe Transfer Co., (1924) 110 Or 618, 224 P 636.

A paragraph of an answer which does not allege any fact essential to defendant's cause should be stricken out upon motion as redundant and irrelevant. Id.

In an action at law, allegations making the contract sued on an exhibit were stricken. Oh Chow v. Hallett, (1872) 2 Sawy 259, Fed Cas No. 10,469.

When a motion to strike out immaterial matter is denied and the party answers over, the judgment will not be reversed where after the cause is tried it appears that such matter was disregarded and worked no prejudice. Thomas v. Herrall, (1890) 18 Or 546, 23 P 497.

In a suit to reform notes, allegations of estoppel in the answer were properly stricken out. Richmond v. Ogden St. R. Co., (1903) 44 Or 48, 74 P 333.

Redundancy not having been urged, a motion to strike out an allegation of evidentiary matter was properly overruled. Service Lbr. Co. v. Sumpter Valley R. Co., (1913) 67 Or 63, 135 P 539.

FURTHER CITATIONS: Witherall v. Wiberg, (1877) 4 Sawy 232, Fed Cas No. 17,917; Krewson v. Purdom, (1884) 11 Or 266, 3 P 822; McDonald v. Amer. Mtg. Co., (1889) 17 Or 626, 21 P 883; Miser v. O'Shea, (1900) 37 Or 231, 62 P 491, 82 Am St Rep 751; Brown v. Baker, (1901) 39 Or 66, 65 P 799, 66 P 193; Brownell v. Salem Flouring Mills Co., (1906) 48 Or 525, 87 P 770; Mack v. Hendricks, (1928) 126 Or 400, 270 P 476; State v. Bishop, (1942) 169 Or 448, 475, 129 P2d 276; Pruett v. Lininger, (1960) 224 Or 614, 356 P2d 547; Bartley v. Doherty, (1960) 225 Or 15, 351 P2d 71, 357 P2d 521; Klerk v. Tektronix, Inc., (1966) 244 Or 10, 415 P2d 510; Kirby v. Snow, (1969) 252 Or 592, 451 P2d 866.

16.110

NOTES OF DECISIONS

When a cause of action is alleged in such a vague and ambiguous manner that the precise nature of the charge is not apparent, the remedy is by motion to make it more definite and certain. Houghton v. Beck, (1881) 9 Or 325; Jackson v. Jackson, (1888) 17 Or 110, 19 P 847; Freeksen v. Turner, (1890) 19 Or 106, 23 P 857; Neis v. Yocum, (1883) 16 Fed 168, 9 Sawy 24.

The motion to make more definite and certain cannot be made for the first time on appeal. Osborn v. Graves, (1884) 11 Or 526, 6 P 227; McKay v. Musgrove, (1887) 15 Or 162, 13 P 770.

Objection raised by motion to make complaint more definite and certain is waived by answering and going to trial. Anderson v. No. Pac. Lbr. Co., (1891) 21 Or 281, 282, 283, 28 P 5; Crane v. Sch. Dist. 14, (1920) 95 Or 644, 651, 188 P 712; Bay Creek Lbr. & Mfg. Co. v. Cesla, (1958) 213 Or 316, 322 P2d 925, 324 P2d 244. Bay Creek Lbr. & Mfg. Co. v. Cesla, supra, overruling Cole v. Willow R. Co., (1912) 60 Or 594, 608, 118 P 176 and Moe v. Alsop, (1950) 189 Or 59, 68, 216 P2d 686.

Omission to allege time when plaintiff received injury should be raised by motion under this section, not by special demurrer. Conroy v. Ore. Constr. Co., (1885) 23 Fed 71, 10 Sawy 630.

Where matters are peculiarly within the knowledge of the defendant, a motion to make the complaint more definite and certain will be denied. Cederson v. Ore. R.R. & Nav. Co., (1900) 38 Or 343, 62 P 637, 63 P 763.

The motion to make more definite and certain applies only to a pleading that states defectively a good cause of action and to defects on the face of the pleading. Multnomah County v. Willamette Towing Co., (1907) 49 Or 204, 212, 89 P 389.

Where damages are imperfectly stated, the remedy is by motion to make more definite and certain. Reed v. Brandenburg, (1914) 72 Or 435, 143 P 989.

Defendant, deeming the itemized statement of account furnished to be insufficient, should move to make it more definite and certain. Hayden v. Astoria, (1915) 74 Or 525, 145 P 1072.

Where a party fails to comply with an order to make a pleading more definite and certain, the pleading may be stricken or the court may exclude evidence in support of the defective allegations. Jetmore v. Anderson, (1922) 103 Or 252, 204 P 499.

A motion to make more definite and certain is directed to sound discretion of trial court. Moe v. Alsop, (1950) 189 Or 59, 216 P2d 686.

FURTHER CITATIONS: Ireland v. Ward, (1908) 51 Or 102, 93 P 932; Barr v. Minto, (1913) 65 Or 522, 133 P 639; Hills v. Shaw, (1914) 69 Or 460, 137 P 229; Leiblin v. Breyman Leather Co., (1916) 82 Or 22, 160 P 1167; Witherall v. Wiberg, (1877) 4 Sawy 232, Fed Cas No. 17,917; Bryan v. Cupp, (1969) 1 Or App 52, 458 P2d 697.

LAW REVIEW CITATIONS: 46 OLR 228

16.120

NOTES OF DECISIONS
1. In general
2. On demurrer
3. On trial
4. On appeal
5. Particular pleadings

1. In general

This section has abrogated the common-law doctrine of an interpretation adverse to the pleader. Houghton v. Beck, (1881) 9 Or 325; Patterson v. Patterson, (1902) 40 Or 560, 67 P 664.

A looseness of expression should be allowed a pleader so as to make provision for uncertainty of proof. Menefee Lbr. Co. v. MacDonald, (1927) 122 Or 579, 260 P 444.

The rule of liberal construction expands as the cause progresses. Cross v. Campbell, (1944) 173 Or 477, 146 P2d 83.

When it is doubtful upon what theory a pleading is drawn, it should be construed according to that theory which is most consistent with the facts alleged. Lawrence Whse. Co. v. Best Lbr. Co., (1954) 202 Or 77, 271 P2d 661, 273 P2d 993.

2. On demurrer

Upon a demurrer to test a pleading's sufficiency, it should be construed most strongly against the pleader. Pursel v. Deal, (1888) 16 Or 295, 18 P 461; Kohn v. Hinshaw, (1889) 17 Or 308, 20 P 629; Patterson v. Patterson, (1902) 40 Or 560, 67 P 664; Keene v. Eldriedge, (1905) 47 Or 179, 82 P 803; Fishburn v. Londershausen, (1907) 50 Or 363, 92 P 1060, 15 Ann Cas 975, 14 LRA (NS) 1234; Brooks v. No. Pac. Ry. Co., (1911) 58 Or 387, 114 P 949. **But see** Jackson v. Jackson, (1888) 17 Or 118, 19 P 847; Griffith v. Hanford, (1942) 169 Or 351, 128 P2d 947.

3. On trial

If the sufficiency of the pleading has not been challenged by demurrer but is questioned for the first time on trial, it shall be liberally construed. Cederson v. Ore. Nav. Co., (1901) 38 Or 343, 62 P 637, 63 P 763; Mellott v. Downing, (1901) 39 Or 218, 64 P 393; West v. Eley, (1901) 39 Or 461, 65 P 798; Patterson v. Patterson, (1902) 40 Or 560, 67 P 664; Walker v. Harold, (1903) 44 Or 205, 74 P 705; Carlyle v. Sloan, (1904) 44 Or 357, 75 P 217; Keene v. Eldriedge, (1905) 47 Or 179, 82 P 803; Brooks v. No. Pac. R. Co., (1911) 58 Or 387, 114 P 949.

Where an objection to a pleading is not taken until trial, the pleader is entitled to the same presumptions a verdict in his favor would afford. Specht v. Allen, (1885) 12 Or 117, 6 P 494; Currey v. Butcher, (1900) 37 Or 380, 61 P 631; Creecy v. Joy, (1901) 40 Or 28, 66 P 295; McCall v. Porter, (1902) 42 Or 49, 70 P 820, 71 P 976; Bade v. Hibberd, (1908) 50 Or 501, 93 P 364; Davis v. Mitchell, (1914) 72 Or 165, 142 P 788; Weishaar v. Pendleton, (1914) 73 Or 190, 144 P 401; Smith v. Nat. Sur. Co., (1915) 77 Or 17, 149 P 1040.

When a pleading is first questioned upon the admission of evidence, the allegations of the complaint and reply not being repugnant should be liberally construed in pari materia for the purpose of ascertaining the intent of the pleader. Patterson v. Patterson, (1902) 40 Or 560, 67 P 664.

In the absence of a demurrer a pleading is to be construed liberally in favor of the pleader. Rohner v. Neville, (1961) 230 Or 31, 365 P2d 614.

4. On appeal

A pleading will be liberally construed on appeal. Willer v. Ore. Ry. & Nav. Co., (1887) 15 Or 153, 13 P 768; Gary Coast Agency v. Lawrey, (1921) 101 Or 623, 201 P 214; Robert v. Cohen, (1922) 104 Or 177, 206 P 293; Siddons v. Lauterman, (1941) 165 Or 668, 109 P2d 1049.

5. Particular Pleadings

In an action for negligent injury of plaintiff's land where the complaint did not specifically allege previous possession in the plaintiff, the court, construing the complaint within the meaning of this section, held it sufficient where such possession was indirectly alleged. Davidson v. Ore. & Calif. R. Co., (1883) 11 Or 136, 1 P 705.

Where the defendant did not demur to the complaint which contained allegations for breach of warranty and for deceit, the court was justified under this section in instructing the jury that the cause of action was breach of warranty. Corbett v. Wrenn, (1894) 25 Or 304, 35 P 658.

A complaint which alleged that defendant was owner of realty and that a third party held legal title thereto, was liberally construed to mean that the deed was intended as a mortgage. Wollenberg v. Minard, (1900) 37 Or 621, 62 P 532.

This section was applied in the construction of a notice of an election contest. Henricksen v. Clark, (1921) 102 Or 250, 201 P 1071.

In an action by a mother for wrongful death of her 17-year-old son, where the defendant objected to the complaint on petition for rehearing on the ground it failed to allege directly the nonexistence of preferred beneficiaries, the complaint was construed liberally under this section. Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 587, 232 P 561, 234 P 261.

Defendant did not make an admission by failure to deny paragraph of plaintiff's complaint containing phrase "resulting in his injury and disability hereinafter set forth," when the paragraphs setting forth the injury and disability more fully were denied. Kerby v. State Ind. Acc. Comm. (1960) 222 Or 545, 353 P2d 857.

FURTHER CITATIONS: Pilson v. Tip-Top Auto Co., (1913) 67 Or 528, 136 P 642; Rothchild Bros. v. Kennedy, (1917) 86 Or 566, 169 P 102; Johnson v. Homestead-Iron Dyke Mines Co., (1920) 98 Or 318, 193 P 1036; Stotts v. Johnson and Marshall, (1951) 192 Or 403, 234 P2d 1059, 235 P2d 560; Pruett v. Lininger, (1960) 224 Or 614, 356 P2d 547; Mowrey v. Jarvey, (1961) 228 Or 96, 363 P2d 733; Miller v. Lillard, (1961) 228 Or 202, 364 P2d 766; Tollefson v. Price, (1967) 247 Or 398, 430 P2d 990; Bryan v. Cupp, (1969) 1 Or App 52, 458 P2d 697; State Constr. Corp. v. Scoggins, (1971) 259 Or 371, 485 P2d 391.

16.130

NOTES OF DECISIONS
1. In general
2. Judgment for plaintiff
3. Judgment for defendant

1. In general

Where there is an issue of a material fact, a motion for a judgment on the pleadings cannot be allowed. Willis v. Holmes, (1895) 28 Or 265, 42 P 989; Mountain Tbr. Co. v. Case, (1913) 65 Or 417, 133 P 92; Owen v. Lever, (1924) 112 Or 136, 228 P 927; Milton v. Hare, (1929) 130 Or 590, 280 P 511; Fleming v. Woodward, (1947) 180 Or 486, 117 P2d 428.

A motion for judgment on the pleadings may not be used as a substitute for a demurrer where pleadings are amendable so as to state a good cause of action. Lytle v. Payette-Oregon Irr. Dist., (1944) 175 Or 276, 152 P2d 934; Fleming v. Woodward, (1947) 180 Or 486, 177 P2d 428; Scott & Payne v. Potomac Ins. Co., (1959) 217 Or 323, 341 P2d 1083.

A motion for judgment on the pleadings may be made after verdict. Benicia Agricultural Works v. Creighton, (1892) 21 Or 495, 28 P 775, 30 P 676.

The refusal of the party having the burden of proof to introduce evidence does not authorize a judgment on the pleadings where an issue of fact is presented. Willis v. Holmes, (1895) 28 Or 265, 42 P 989.

This section applies to actions at law in justices' courts. McAnish v. Grant, (1903) 44 Or 57, 74 P 396.

Findings of fact and conclusions of law are unnecessary in cases where the court enters judgment on the pleadings. Davis Lbr. Co. v. Coats Lbr. Co., (1917) 85 Or 542, 167 P 507.

An issue of law arises on a motion for judgment on the pleadings under this section. State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828.

Judgment on the pleadings is limited to the amount admitted by the answer. Jetmore v. Anderson, (1922) 103 Or 252, 204 P 499.

It is within power of court of record to render judgment on pleadings when warranted. Owen v. Lever, (1924) 112 Or 136, 228 P 927.

Judgment on the pleadings is properly rendered against party where pleadings taken together affirmatively show either that such party has no cause of action or no defense to cause of action alleged. Milton v. Hare, (1929) 130 Or 590, 280 P 511.

A motion for judgment on the pleadings is one not favored by the courts. Lytle v. Payette-Oregon Irr. Dist., (1944) 175 Or 276, 152 P2d 934.

A motion for judgment on the pleadings is one not favored by the courts. Scott & Payne v. Potomac Ins. Co., (1959) 217 Or 323, 341 P2d 1083.

2. Judgment for plaintiff

When an answer admits all the facts and denies only legal conclusions, a judgment on the pleadings may be allowed. Simpson v. Prather, (1873) 5 Or 86; Thompson v. Colvin, (1909) 53 Or 488, 101 P 201.

Where the only issue raised by defendant's answer was a denial of immaterial allegations in the complaint, without which a complete cause of action would remain, the plaintiff was entitled to a judgment on the pleadings. Wallace v. Baisley, (1892) 22 Or 592, 30 P 432.

Where defendant's answer admitted all the material allegations of the amended complaint and contained allegations which were insufficient to support an affirmative defense, plaintiff obtained judgment on the pleadings. Hirsch v. May, (1915) 75 Or 403, 146 P 831.

Where the defendant answered one cause of action and elected to stand on his demurrer to the other, and where plaintiff replied to the new matter in the answer, the motion for judgment on the pleadings was granted as the complaint stated a cause of action. Dant & Russell Inc. v. Pierce, (1927) 122 Or 337, 255 P 603.

Where after striking an amended answer from the files no further pleading was interposed on part of the defendant, decree was properly rendered on motion of plaintiff. Mack v. Hendricks, (1928) 126 Or 400, 270 P 476.

Defendant dealer was entitled to be heard on issue of the necessity of inspection of records by federal agency and judgment on pleading was error. Fleming v. Fossati, (1947) 180 Or 489, 177 P2d 425.

3. Judgment for defendant

The court will upon motion render a judgment or decree for the defendant on the pleadings where the complaint fails to allege sufficient facts. Heatherly v. Hadley, (1868) 2 Or 269; Morford v. Calif.-Western States Life Ins. Co., (1939) 161 Or 113, 88 P2d 303.

Where the facts set forth in a separate defense are admitted by the reply and constitute a complete defense, judgment on the pleadings in favor of defendant is proper. Heatherly v. Hadley, (1868) 2 Or 269; McDonough v. Nat. Hosp. Assn., (1930) 134 Or 451, 294 P 351; Williams v. Dale, (1932) 139 Or 105, 8 P2d 578; Morford v. Calif.-Western States Life Ins. Co., (1939) 161 Or 113, 88 P2d 303.

Where no reply has been filed to an answer, the defendant is entitled to a judgment on the pleadings if the defense is admitted by the failure to reply, the matter contained in the answer is not otherwise put in issue in the pleadings, and the answer is sufficient to justify the judgment. Watkinds v. So. Pac. R. Co., (1889) 38 Fed 711, 4 LRA 239.

Where the answer contained the defense of full settlement and payment which was not denied by the reply, defendant was allowed a judgment notwithstanding the verdict. Benicia Agricultural Works v. Creighton, (1892) 21 Or 495, 28 P 775, 30 P 676.

Where the plaintiff failed to file a reply within the time limited and no showing was made excusing the delay, the defendant was allowed a judgment on the pleadings. Chapman v. Multnomah County, (1912) 63 Or 180, 126 P 996.

Where the defenses of contributory negligence and assumption of risk were not available, under the Employers' Liability Act, there was no error in refusing judgment on the pleadings. Ramaswamy v. Hammond Lbr. Co., (1915) 78 Or 407, 152 P 223.

In an action on an insurance policy where the reply denied essential allegations of a separate defense, granting a motion for a judgment on the pleadings was erroneous. Morford v. Calif.-Western States Life Ins. Co., (1939) 161 Or 113, 88 P2d 303.

Although defendants neither demurred nor filed a plea in abatement, a motion, after the evidence was concluded, for judgment on the pleadings was properly allowed. Houston v. Briggs, (1967) 246 Or 439, 425 P2d 748.

FURTHER CITATIONS: Bowles v. Doble, (1884) 11 Or 474, 5 P 918; Currie v. So. Pac. Co., (1893) 23 Or 400, 31 P 963; Taggart v. Linn County, (1959) 218 Or 94, 343 P2d 1115; Kerby v. State Ind. Acc. Comm., (1960) 222 Or 545, 353 P2d 857; Mignot v. Parkhill, (1964) 237 Or 450, 391 P2d 755.

16.140

NOTES OF DECISIONS

See also cases under ORS 15.030 as to what constitutes a general or special appearance.

This section does not define a voluntary appearance within the meaning of H 62 [ORS 15.030] but only defines what shall constitute an appearance such as will entitle the defendant a right to be heard or to be served with notice. Belknap v. Charlton, (1893) 25 Or 41, 34 P 758; Roethler v. Cummings, (1917) 84 Or 442, 165 P 355. **But see** Spores v. Maude, (1916) 81 Or 11, 158 P 168.

Upon withdrawal of an entered appearance, this section was applicable and no notice of the subsequent proceedings needed to be served upon the defendant. Wilson v. Blakeslee, (1888) 16 Or 43, 16 P 872.

Where the defendant appeared in court by an attorney but did not file an answer, demur or give written notice of appearance to plaintiff, a judgment for want of answer was rendered against defendant. Whipple v. So. Pac. Co., (1899) 34 Or 370, 55 P 975.

Where the district attorney was served with summons and complaint and did not appear in a divorce suit, the state was in default and could not be heard on appeal. Orr v. Orr, (1915) 75 Or 137, 144 P 753, 146 P 964.

Parties served with citation in a will contest who did not file an answer or give written notice of appearance were not entitled to service of notice of further proceedings or to notice of appeal. In re Failing's Will, (1922) 105 Or 365, 208 P 715.

Defendant in default was not entitled to be heard on plaintiff's motion to set aside the divorce decree and for leave to file an amended complaint. Barnes v. Barnes, (1932) 139 Or 536, 11 P2d 547.

Notice of plaintiff's motion to vacate divorce and for leave to file an amended complaint did not have to be served upon the defendant in default. Id.

FURTHER CITATIONS: Rice & Co. v. Koshland, (1885) 12 Or 492, 8 P 556; Hawkins v. Donnerburg, (1901) 40 Or 97, 68 P 691, 908; Multnomah Lbr. Co. v. Weston Basket Co., (1909) 54 Or 22, 99 P 1046, 102 P 1; Crim v. Crim, (1916) 80 Or 88, 155 P 175, 1176; State v. Almeda Consol. Mines Co., (1923) 107 Or 18, 212 P 789; State v. Crawford, (1938) 159 Or 377, 80 P2d 873; Clatsop County v. Taylor, (1941) 167 Or 563, 119 P2d 285; Lung Chung v. No. Pac. R. Co., (1884) 19 Fed 254.

ATTY. GEN. OPINIONS: Complaint and bill of particulars under Conciliation Service Act, 1964-66, p 50.

LAW REVIEW CITATIONS: 13 OLR 88; 36 OLR 61, 67.

16.150

CASE CITATIONS: In re Miller Estate, (1962) 229 Or 618, 368 P2d 327; State ex rel. Knapp v. Sloper, (1970) 256 Or 299, 473 P2d 140.

LAW REVIEW CITATIONS: 36 OLR 67.

16.210

NOTES OF DECISIONS

1. In general

A court cannot disregard the direct command of this statute as to what the complaint shall contain. Newport Constr. Co. v. Porter, (1926) 118 Or 127, 246 P 211.

This section enunciates the general rule. Bird v. Ellingsworth, (1937) 156 Or 103, 59 P2d 261, 65 P2d 674.

2. "Title"

The object of requiring a title upon a pleading is to identify it with the action and the court. Adams v. Kelly, (1903) 44 Or 66, 74 P 399; State v. Mart, (1931) 135 Or 603, 283 P 23, 295 P 459.

The omission of the title is not fatal where the facts alleged constitute a good cause of action. Adams v. Kelly, (1903) 44 Or 66, 74 P 399.

Incorrect statement of the name of the court is a formal defect. Id.

Under this section it is immaterial what the plaintiff designates as his cause of action so long as the complaint contains a clear and concise statement of the facts on which he bases his right to recover. Winans v. Valentine, (1936) 152 Or 462, 54 P2d 106.

3. Statement of facts

(1) "Plain and concise statement." The facts pleaded should be stated in a direct manner so that issue may be taken by direct denial. Heatherly v. Hadley, (1868) 2 Or 269.

The facts are specifically stated in the pleading so that the opposing party may be apprised of what is intended to be proved, that the facts may be brought before the court and that a foundation may be laid for recording that which shall be adjudged. Groslouis v. Northcut, (1872) 3 Or 394; Troy Laundry Co. v. Henry, (1892) 23 Or 232, 31 P 484; Murray v. Lamb, (1942) 168 Or 596, 115 P2d 336, 124 P2d 531.

The object of the requirement that the complaint should state the facts concisely is to compel the plaintiff to place on record the specific facts which he claims entitle him to recover. Woodward v. Ore. Ry. & Nav. Co., (1889) 18 Or 289, 22 P 1076.

Statement as here used means an affirmative allegation of a material probative fact constituting a cause of action. Meyer v. Edwards, (1897) 31 Or 23, 48 P 696.

The facts should be stated affirmatively. North v. Union Sav. & Loan Assn., (1911) 59 Or 483, 117 P 822.

This requirement is in common with all the code states. Hoag v. Wash.-Ore. Corp., (1915) 75 Or 588, 144 P 574, 147 P 756.

The statement of facts need not conform to a common-law form of action. Lun v. Mahaffey, (1919) 94 Or 292, 185 P 746.

Plain and concise statement is a relative term and requires no greater plainness of statement than can reasonably be expected of the pleader. Jones v. Howe-Thompson Inc., (1933) 143 Or 337, 22 P2d 502.

The complaint is sufficient if the pleading as a whole may be said to contain each of the necessary elements. McGill v. Huling Buick Co., (1971) 259 Or 413, 487 P2d 656.

Although the answer did not contain a plain and concise statement of facts, it was sufficient to inform the plaintiff of the defense. Why v. City of Marshfield, (1931) 138 Or 167, 5 P2d 696.

(2) Alternative statement. Where the plaintiff knows that the defendant committed one of two negligent acts which caused the plaintiff's injury but he is unable to determine which one was committed, the plaintiff may state the acts in the alternative. Jones v. Howe-Thompson Inc., (1933) 143 Or 337, 22 P2d 502.

(3) "Facts." Common courts are permitted in pleading in this state. Hammons v. English, (1929) 129 Or 511, 277 P 823. **But see** Buchanan v. Beck, (1888) 15 Or 563, 16 P

422 and Hammer v. Downing, (1901) 39 Or 504, 520, 64 P 651, 65 P 17, 990, 67 P 30.

A pleading should not contain the evidence. Smith v. Foster, (1873) 5 Or 44.

An allegation that the plaintiff is the owner and holder of a note is an averment of an ultimate fact and not a legal conclusion. Columbia Hotel Co. v. Rosenburg, (1927) 122 Or 675, 260 P 235.

An allegation that a ball was thrown at a high and dangerous rate of speed is a statement of fact. Boardman v. Ottinger, (1939) 161 Or 202, 88 P2d 967.

The following allegations were held to be mere conclusions of law; **That no notice was given as provided by law,** State v. Malheur County Ct., (1909) 54 Or 255, 101 P 907, 103 P 446; Kirkpatrick v. City of Dallas, (1911) 58 Or 511, 115 P 424; Splonskofsky v. Minto, (1912) 62 Or 560, 126 P 15; Purdin v. Hancock, (1913) 67 Or 164, 135 P 515; **that the defendant was the adopted daughter and heir at law of the deceased,** Long v. Dufur, (1911) 58 Or 162, 113 P 59; **that a particular tenancy was a tenancy at sufferance,** Cook v. Howard, (1911) 59 Or 372, 117 P 320; **that an agreement was a chattel mortgage,** McDaniel v. Chiaramonte, (1912) 61 Or 403, 122 P 33; **that a foreign corporation had not complied with the laws of this state permitting a foreign corporation to do business within the state,** Shipman v. Portland Const. Co., (1913) 64 Or 1, 128 P 989; **that except for a mutual mistake the lease would not have been executed,** Hughey v. Smith, (1913) 65 Or 323, 133 P 68; **that the defendant failed, neglected and refused to deliver the goods according to terms of the contract,** Barnard & Bunker v. Houser, (1913) 68 Or 240, 137 P 227; **that one of the two sureties on an undertaking was primarily liable,** Templeton v. Cook, (1914) 69 Or 313, 138 P 230; **that the amount the plaintiff was seeking to collect was usurious,** Farrell v Kirkwood, (1914) 69 Or 413, 139 P 110; **that the proceedings by the city were illegal,** Hockfeld v. Portland, (1914) 72 Or 190, 142 P 824; **that the services were performed for the defendants as a family expense,** Chamberlain v. Townsend, (1914) 72 Or 207, 142 P 782, 143 P 924; **that the corporation had dissolved and was bringing an action to wind up its business,** Klamath Lbr. Co. v. Bamber, (1915) 74 Or 287, 142 P 359, 145 P 650; **that a company was asserting some rights or interest in property which was subordinate in time and inferior to plaintiff's right,** Giesy v. Aurora State Bank, (1927) 122 Or 1, 255 P 467, 256 P 763.

An allegation that the act which causes the injury was negligent is not a conclusion of law but a statement of an ultimate fact which forms a basis for damages. Cederson v. Ore. Nav. Co., (1900) 38 Or 343, 62 P 637, 63 P 763.

Common count for money had and received, supported by evidence that the money had been paid under inducement of fraudulent representations, was permitted in absence of motion to make pleadings more definite and certain. Snow v. Tompkins, (1955) 205 Or 60, 286 P2d 119.

In suit for specific performance of written contract to exchange property, provision stating "swimming pool to be completed" was too indefinite to enforce. Landgraver v. DeShazer, (1965) 239 Or 446, 398 P2d 193.

(4) "Cause of action." A cause of action consists of a legal right on the part of the plaintiff and a breach of a corresponding duty on the part of the defendant. Hoag v. Wash.-Ore. Corp., (1915) 75 Or 588, 144 P 574, 147 P 756.

All breaches of legal duty arising out of one transaction whether flowing from common law or statute constitute but one cause of action, unless the statutory remedy is so inconsistent with that of the common law that the same judgment could not be rendered upon recovery. Hoag v. Wash.-Ore. Corp., (1915) 75 Or 588, 144 P 574, 147 P 756; Silver Falls Tbr. Co. v. E. & W. Lbr. Co., (1935) 149 Or 126, 40 P2d 703.

Although the complaint contained a meager statement of the plaintiff's cause of action and would have been stricken upon demurrer, it was upheld on appeal. Washington Inv. Assn. v. Stanley, (1900) 38 Or 319, 63 P 489, 84 Am St Rep 793, 58 LRA 816.

Where the question was not raised whether an amended complaint stated a cause of action and it was so defective as to be almost unintelligible, it was held a defective statement of a good cause of action and leave was given to apply to the circuit court for an amendment. Murray v. Lamb, (1942) 168 Or 596, 115 P2d 336, 124 P2d 531.

(5) "Repetition." A pleader is required to avoid unnecessary repetition. Kaller v. Spady, (1933) 144 Or 206, 10 P2d 1119, 24 P2d 351.

A complaint may state a good cause of action although it contains unnecessary repetition. Clarkson v. Wong, (1935) 150 Or 406, 42 P2d 763, 45 P2d 914.

In an action for negligence where the complaint contained unnecessary repetition, it was not reversible error to deny defendant's motion to strike as the jury was not misled or confused. Moe v. Alsop, (1950) 189 Or 59, 216 P2d 686.

(6) Particular allegations. A promise to pay need not be alleged in a complaint for money had and received to plaintiff's use. Keene v. Eldriedge, (1905) 47 Or 179, 82 P 803; Hammer v. Downing, (1901) 39 Or 504, 64 P 651, 65 P 17, 990, 67 P 30; Waite v. Willis, (1902) 42 Or 288, 70 P 1034.

A statement of the time and place when and where each of the facts occurred is not required, unless time or place is a material element of the cause of action. Conroy v. Ore. Constr. Co., (1899) 23 Fed 71, 10 Sawy 630.

In bringing an action a foreign corporation does not need to plead compliance with the laws regulating the doing of business by a foreign corporation. Big Basin Lbr. Co. v. Crater Lake Co., (1912) 63 Or 359, 127 P 982.

A party relying on a custom must plead it and state that it was known to the party to be affected or state facts from which such knowledge would be presumed. Oregon Fisheries Co. v. Elmore Packing Co., (1914) 69 Or 340, 138 P 862.

In an action under an ordinance prohibiting speed which endangers life or limb, the initiative city charter need not be alleged. Weygandt v. Bartle, (1918) 88 Or 310, 171 P 587.

In an action for libel, an averment of falsity is necessary to enable the complaint to state a cause of action. Fowler v. Donnelly, (1960) 225 Or 287, 358 P2d 485, 85 ALR2d 452.

The allegations relating to punitive damages need not be set out separately from other allegations of the complaint. McGill v. Huling Buick Co., (1971) 259 Or 413, 487 P2d 656.

An allegation that a mortgage was made, executed and delivered is broad enough to include the signing, sealing, attestation and acknowledgment. Laurent v. Lanning, (1897) 32 Or 11, 51 P 80.

Complaint in an action for wrongful death of a fireman, killed while fighting a fire at defendant's factory, was insufficient because it did not allege that the injury was the result of an unusual, serious, hidden danger which could not have been anticipated. Spencer v. B. P. John Furniture Corp., (1970) 255 Or 359, 467 P2d 429.

(a) Ownership. An allegation that a party made his promissory note and thereby promised to pay the plaintiff, sufficiently shows plaintiff's ownership of the note. Moss v. Cully, (1855) 1 Or 147, 62 Am Dec 301.

In an action for money had and received by one for the use of another, the complaint must contain facts showing that the money justly belonged to the plaintiff. Buchanan v. Beck, (1888) 15 Or 563, 16 P 422.

In an action on an insurance policy the plaintiff's complaint must allege that he had an interest in the property covered by the policy. Chrisman v. State Ins. Co., (1888) 16 Or 283, 18 P 466.

An allegation that warrants were issued to a certain person is sufficient to show that he is the owner thereof. Dorothy v. Pierce, (1895) 27 Or 373, 41 P 668.

An allegation that the defendant acquired the property from the bankrupt does not plead that title was in the defendant. Goodwin v. Tuttle, (1914) 70 Or 424, 141 P 1120.

To assert a title by prescription a party must allege the essential elements necessary to an effective adverse possession. Rasmussen v. Winters, (1917) 82 Or 672, 162 P 849.

Plaintiff in an action for conversion must allege some kind of property in himself at the time of conversion. Hunt v. First Nat. Bank, (1921) 102 Or 398, 202 P 564.

(b) Conditions precedent. Compliance with conditions of a contract pleaded must be alleged. Ball v. Doud, (1894) 26 Or 14, 37 P 70; Koop v. Cook, (1913) 67 Or 93, 135 P 317; Davis Lbr. Co. v. Coats Lbr. Co., (1917) 85 Or 542, 167 P 507.

Warranties being conditions precedent their truth must be pleaded by the assured upon whom the burden of proving them rests. Buford v. New York Life Ins. Co., (1874) 5 Or 334.

Compliance with a contractual provision for reference of disputes to a third person or a reasonable effort to comply with it before action must be alleged. Meyers v. Pac. Constr. Co., (1891) 20 Or 603, 27 P 584.

(c) Damages. Aggravation of previous injuries must be alleged. Dorn v. Clarke-Woodward Drug Co., (1913) 65 Or 516, 133 P 351; Boatright v. Portland Light & Power Co., (1913) 68 Or 26, 135 P 771.

Where the facts alleged show damage, no specific allegation to that effect is necessary. Burggraf v. Brocha, (1915) 74 Or 381, 145 P 639.

In a complaint for personal injury it is not necessary to allege the reasonableness of amounts paid for special damages. Pinder v. Wickstrom, (1916) 80 Or 118, 156 P 583.

4. "Demand of the relief"

The notice of election contest being in the nature of a complaint should contain a demand for the relief. Whitney v. Blackburn, (1889) 17 Or 564, 21 P 874, 11 Am St Rep 857.

The intention to attach property need not be stated in the demand for relief. Okanogan State Bank v. Thompson, (1923) 106 Or 447, 211 P 933.

A complaint averring that plaintiffs have suffered large damages but not stating amount is insufficient. Newport Constr. Co. v. Porter, (1926) 118 Or 127, 246 P 211.

In actions at law, the statutes require a pleading foundation for any sum included in the judgment, whether the right to recover arises from statute or from another source. Lithia Lbr. Co. v. Lamb, (1968) 250 Or 444, 443 P2d 647.

It was error to allow an attorney fee larger than the amount alleged by plaintiff to be reasonable. Parker v. State Ind. Acc. Comm., (1965) 242 Or 78, 408 P2d 94.

5. Construction of pleadings

Where no demurrer is interposed, averments of the complaint will be more liberally construed than when they are formally challenged at the proper time. Cederson v. Ore. Nav. Co., (1900) 38 Or 343, 62 P 637, 63 P 763; Keene v. Eldriedge, (1905) 47 Or 179, 82 P 803; Cooper v. Hillsboro Garden Tracts, (1915) 78 Or 74, 152 P 488, Ann Cas 1917E, 840; Siverson v. Clanton, (1918) 88 Or 261, 170 P 933, 171 P 1051; Clarkson v. Wong, (1935) 150 Or 406, 42 P2d 763, 45 P2d 914.

When both general and specific allegations are made respecting the same matter, the latter control. Morton v. Wessinger, (1911) 58 Or 80, 113 P 7.

All reasonable intendments in favor of the allegations will be invoked on appeal in the absence of a demurrer. Templeton v. Lloyd, (1911) 59 Or 52, 109 P 1119, 115 P 1068.

Where a copy of any writing or exhibit is attached to a pleading and is sufficiently identified therein so as to become a part thereof, the exhibit controls in determining its legal effect if there is any discrepancy between the allegations in the pleading and the terms of the attached exhibit. Somers v. Hanson, (1915) 78 Or 429, 153 P 43.

Pleadings are to be liberally construed. Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 232 P 637, 233 P 561, 234 P 261.

Where it is doubtful upon what theory a pleading is drawn, it should be construed according to that theory most consistent with the facts alleged and allegations not in harmony therewith may be disregarded as surplusage. Lytle v. Payette-Ore. Irr. Dist., (1944) 175 Or 276, 152 P2d 934, 156 ALR 894.

6. Recovery as confined to cause alleged

Plaintiff cannot aver one ground of action and on the trial prove another and different one. Knahtla v. Ore. Short Line Ry., (1891) 21 Or 136, 27 P 91; Lieuallen v. Mosgrove, (1898) 33 Or 282, 286, 54 P 200, 664; Eastman v. Jennings-McRae Logging Co., (1914) 69 Or 1, 138 P 216, Ann Cas 1916A, 185.

Allegations in the pleadings with the proof corresponding thereto constitutes the foundation for the judgment or decree, and a judgment or decree not based on such allegations must fail. Goldsmith v. Elwert, (1897) 31 Or 539, 50 P 867.

A plaintiff cannot set up one cause of action in his complaint and recover upon a different ground alleged in his reply. Leiter v. Dwyer Plumbing Co., (1913) 66 Or 474, 133 P 1180.

Where a complaint sought recovery for the destruction by fire of standing and growing timber only, 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.

Where a buyer's complaint averred that cattle sold were infected with a disease known as "black leg," he could not recover damages sustained from other diseases. Fitzhugh v. Nirschl, (1915) 77 Or 514, 151 P 735.

Plaintiff's recovery rests on the allegations of his complaint. Austin v. Sisters of Charity of Providence, (1970) 256 Or 179, 470 P2d 939.

7. Defective pleadings

Where the omission of a necessary averment is objected to by the adverse party at the outset and nothing in subsequent proceedings cured it, the defect is fatal. Society of Doukhobors v. Hecker, (1917) 83 Or 65, 162 P 851.

(1) Waiver of defects. Defects in pleading are waived by taking issue on the facts alleged. Davis v. Wait, (1885) 12 Or 425, 8 P 356.

(2) Adverse pleading supplying omitted allegations. Where necessary averments are omitted from the pleading but the adverse party supplies them in his pleading, the defect is cured. Treadgold v. Willard, (1916) 81 Or 658, 160 P 803; Easton v. Quackenbush, (1917) 86 Or 374, 168 P 631.

An averment of answer which is denied by reply is of no effect by way of aider to the defects of the complaint. Greenberg v. German-Amer. Ins. Co., (1917) 83 Or 662, 160 P 536, 163 P 820.

Where the allegations of the defendant's answer excuses the failure of the plaintiff to make the tender of release as required by statute, the complaint is not defective if it contains no allegation of tender. McLemore v. Western Union Tel. Co., (1918) 88 Or 228, 171 P 390, 1049.

In an action for duress of personal property, the complaint was sufficient although it alleged that defendant deprived the plaintiff of his title to the property, as the answer cured this defect by conceding title to be in the plaintiff. Siverson v. Clanton, (1918) 88 Or 261, 170 P 933, 171 P 1051.

(3) Aider by supplemental pleading. An original complaint which states no cause of action cannot be remedied by a

supplemental pleading setting up matters which have occurred since the commencement of the action. Clark v. Morrison, (1916) 80 Or 240, 156 P 429.

(4) Sufficiency after verdict. Where the complaint is not attacked by motion or demurrer and it contains allegations from which a fact necessary to be alleged may be inferred, it will be held good after verdict. Nicolai v. Krimbel, (1896) 29 Or 76, 43 P 865; Davis v. Mitchell, (1914) 72 Or 165, 142 P 788; Weishaar v. Pendleton, (1914) 73 Or 190, 144 P 401; Minter v. Minter, (1916) 80 Or 369, 157 P 157; Hill v. McCrow, (1918) 88 Or 299, 170 P 306.

Although a general verdict will cure a defective statement in a pleading, it will not cure the omission of a material allegation. Booth v. Moody, (1896) 30 Or 222, 46 P 884, Hannan v. Greenfield, (1899) 36 Or 97, 58 P 888; McHargue v. Calchina, (1915) 78 Or 326, 153 P 99; Lindstrom v. Nat. Life Ins. Co., (1917) 84 Or 588, 165 P 675.

The omission of the defendant's true name in the complaint does not render the subsequent decree or judgment void, provided the summons contains his name. Harriman v. Linn County, (1953) 200 Or 1, 264 P2d 816; McGill v. Huling Buick Co., (1971) 259 Or 413, 487 P2d 656.

A complaint can be attacked for the first time in the appellate court on the ground that it fails to state a cause of action. Webster v. Harris, (1950) 189 Or 671, 222 P2d 644.

Where no objection is made to the sufficiency of the complaint until after verdict, the complaint is liberally construed and plaintiff is entitled to any fair intendment comprehended in the language used. Carey v. Leonard, (1963) 235 Or 107, 383 P2d 1011.

In an action for an unlawful attachment, the omission to allege that the writ was sued out maliciously or without probable cause was not cured by verdict. Mitchell v. Silver Lake Lodge, (1896) 29 Or 294, 45 P 798.

In an action for insurance commissions where plaintiff alleged the rate of the commissions and the amount due for acting as defendant's agent, the failure to allege whether any insurance was effected or any sum was collected was cured by a verdict. Foste v. Standard Ins. Co., (1898) 34 Or 125, 54 P 811.

Where the complaint alleged that the defendants had not paid the note except for $2 paid in January 1899, the allegation of part payment was defective but was sufficient after verdict to overcome statute of limitations defense. Scott v. Christenson, (1907) 49 Or 223, 89 P 376, 124 Am St Rep 1041.

8. Illustrations of complaints

A complaint to establish the right to property as a result of a divorce suit was insufficient. Weiss v. Bethel, (1880) 8 Or 522.

Complaint to recover damages for unlawful use and occupation of certain premises was sufficient. Zelig v. Blue Point Oyster Co., (1912) 61 Or 535, 113 P 852, 122 P 756.

Complaint in replevin for a dwelling house was insufficient as no facts were alleged to overcome the presumption that the building was real property. Enterprise Mercantile & Milling Co. v. Cunningham, (1917) 84 Or 319, 165 P 224.

Complaint in tort for duress of personal property stated facts sufficient to constitute a cause of action. Siverson v. Clanton, (1918) 88 Or 261, 170 P 933, 171 P 1051.

In an action to recover damages for an unlawful ouster, the complaint sounding partly in trover and partly in trespass was sufficient. Lun v. Mahaffey, (1919) 94 Or 292, 185 P 746.

A complaint for conversion of an automobile retaken by the defendant under a conditional sales contract was insufficient under this section. Jeffries v. Pankow, (1924) 112 Or 439, 223 P 745, 229 P 903.

Complaint to reform a mortgage and for foreclosure was sufficient. Young v. Clay, (1932) 139 Or 427, 10 P2d 602.

A complaint to rescind a contract on the ground of fraud contained the necessary elements of a suit for rescission. Wilson v. Empire Holding Corp., (1934) 145 Or 598, 28 P2d 843.

A complaint for alienation of affections was sufficient. Bird v. Ellingsworth, (1937) 156 Or 103, 59 P2d 261, 65 P2d 674.

The complaint was sufficient to state a cause of action based upon strict liability. McLane v. NW Natural Gas Co., (1970) 255 Or 324, 467 P2d 635.

(1) Contract. In an action on an employers' liability insurance policy which excepted losses resulting from certain causes, the insurer must allege that the loss was one excepted by the policy. Bridal Veil Lumbering Co. v. Pac. Coast Cas. Co., (1915) 75 Or 57, 145 P 671.

Averment of the complaint that defendant has refused to render an account implies a previous demand and is equivalent to an allegation of demand and refusal. Heidel v. Shute, (1917) 86 Or 210, 167 P 586, 168 P 298.

Purchaser suing for breach of warranty must allege he relied on the warranty and was injured thereby. Feeney & Bremer Co. v. Stone, (1918) 89 Or 360, 171 P 569, 174 P 152.

A complaint alleging that the plaintiffs deposited with a bank money to be sent to banks named therein, but the defendants converted the same to their own use, stated an action on contract. Suksdorff v. Bigham, (1886) 13 Or 369, 12 P 818.

The complaint on a contract of fire insurance must allege an insurable interest in the property insured when the contract was made and when the loss occurred. Hardwick v. State Ins. Co., (1891) 20 Or 547, 26 P 840.

A complaint for the recovery of the amount due on stock subscribed for was insufficient. Giroux Amalgamator Co. v. White, (1891) 21 Or 435, 28 P 390.

A complaint alleging that plaintiffs sold and delivered for a stated consideration their right and interest in certain property and that the defendants took possession of it in pursuance of such sale, stated a cause of action. Duzan v. Meserve, (1893) 24 Or 523, 34 P 548.

A complaint alleging an agreement whereby the defendants were to sell certain goods and to account for the proceeds and alleging that the defendants converted the goods to their own use, stated a cause of action in contract and not tort. Hutchcroft v. Herren, (1898) 33 Or 1, 52 P 692.

In an action for money had and received, the complaint alleging that defendant as plaintiff's agent received certain sums of money belonging to and on account of plaintiff was sufficient in absence of a motion to make more definite and certain. Keene v. Eldriedge, (1905) 47 Or 179, 82 P 803.

A complaint alleging purchase of theatre tickets by plaintiff and refusal by defendant to permit plaintiff to enter theatre or to occupy a seat therein, sufficiently stated a cause of action in contract and not in tort. Taylor v. Cohn, (1906) 47 Or 538, 84 P 388, 8 Ann Cas 527.

A complaint for breach of contract was insufficient where it contained no allegation that the plaintiff sustained damage. Pacific Bridge Co. v. Ore. Hassam Co., (1913) 67 Or 576, 134 P 1184.

Complaint on a constable's bond was insufficient as it failed to allege a breach of the terms and that plaintiff suffered damages on account thereof. Davis v. Hall, (1914) 72 Or 220, 143 P 893, Ann Cas 1916D, 922.

Complaint on an injunction bond was sufficient. Reed v. Brandenburg, (1914) 72 Or 435, 143 P 989.

An account stated was insufficiently alleged. Smith v. Kinney, (1914) 72 Or 514, 143 P 96, 1126.

Complaint alleging an offer of guaranty but no acceptance and notice thereof was insufficient. Rothchild Bros. v. Lomax, (1915) 75 Or 395, 146 P 479.

Complaint alleging a contract which defendants prevented plaintiff from completing and asking reasonable value

of work done was sufficient. Wuchter v. Fitzgerald, (1917) 83 Or 672, 163 P 819.

A complaint alleging a contract, full performance by plaintiff and nonpayment of the price except a certain amount credited thereon stated a cause of action. Easton v. Quackenbush, (1917) 86 Or 374, 168 P 631.

Although it was not clear from all the facts whether plaintiff was suing for injury to his property, for breach of contract of hire or on a promise to pay, the complaint was held sufficient. McCarthy v. Frazier, (1920) 97 Or 493, 192 P 491.

In an action for restitution for quasi contract, the complaint was sufficient although it alleged that the defendants were "wrongfully" in possession of the property. Lytle v. Payette-Ore. Irr. Dist., (1944) 175 Or 276, 152 P2d 934, 156 ALR 894.

An action on a negotiable instrument where defendants did not sign instrument nor assume liability otherwise on instrument was a single cause of action and not both an action on the note and an action for money lent where no direct averment that money was lent was made. Ausplund v. Haralampus, (1951) 193 Or 438, 238 P2d 734.

(2) Negligence. The negligent acts or omissions constituting the cause of action must be alleged. Heilner v. Union County, (1879) 7 Or 83, 33 Am Rep 703; Woodward v. Ore. Ry. & Nav. Co., (1889) 18 Or 289, 22 P 1076; Martini v. Ore.-Wash. R.R. & Nav. Co., (1914) 73 Or 283, 144 P 104.

Where the act complained of is sufficiently stated, it is only necessary to allege generally that it was negligently done without stating particular facts which establish negligence. Cederson v. Ore. Nav. Co., (1900) 38 Or 343, 62 P 637, 63 P 763.

In case of a general charge of negligence followed by a statement of the specific facts, the facts specified govern the conclusion of negligence. Gynther v. Brown & McCabe, (1913) 67 Or 310, 134 P 1186.

A complaint for injury from escaping gas which alleged the company did not properly maintain the main and allowed the gas to escape was sufficient although it did not specifically charge that the acts were negligent. Sharkey v. Portland Gas & Coke Co., (1915) 74 Or 327, 144 P 1152, 145 P 660.

(3) Fraud. Facts constituting fraud must be alleged. Snyder v. Vannoy, (1861) 1 Or 344; Misner v. Knapp, (1885) 13 Or 135, 9 P 65, 57 Am Rep 6; Leasure v. Forquer, (1895) 27 Or 334, 41 P 665.

Each component of fraud must be alleged. **That the representations made were false,** Specht v. Allen, (1885) 12 Or 117, 6 P 494; Anderson v. Adams, (1903) 43 Or 621, 74 P 215; **that the defendant knew them to be false,** Rolfes v. Russell, (1875) 5 Or 400; Britt v. Marks, (1891) 20 Or 223, 25 P 636; Cobb v. Peters, (1913) 68 Or 14, 136 P 656; Lindstrom v. Nat. Life Ins. Co., (1917) 84 Or 588, 165 P 675; **that they were made with intent to defraud,** Schoellhamer v. Rometsch, (1894) 26 Or 394, 38 P 344; Wheelwright v. Vanderbilt, (1914) 69 Or 326, 138 P 857; Lindstrom v. Nat. Life Ins. Co., (1917) 84 Or 588, 165 P 675; and **that the plaintiff, relying on the representations, was damaged,** Harrell v. Manning, (1877) 6 Or 413; Wheelwright v. Vanderbilt, (1914) 69 Or 326, 138 P 857; Waller v. New York Ins. Co., (1917) 84 Or 284, 164 P 959.

Fraud cannot be charged upon information and belief unless the grounds upon which the belief rests or facts from which the court can infer that it is well founded are stated. North v. Union Sav. & Loan Assn., (1911) 59 Or 483, 117 P 822.

A complaint containing some statements not constituting fraud and some indefinite allegations was held sufficient. McFarland v. Carlsbad Sanatorium Co., (1914) 68 Or 530, 137 P 209, Ann Cas 1915C, 555.

A complaint for damages for fraud in the sale of an automobile was sufficient. McGill v Huling Buick Co., (1971) 92 Adv Sh 1745, 487 P2d 656.

FURTHER CITATIONS: Bender v. Bender, (1887) 14 Or 353, 12 P 713; McDowell v. Parry, (1904) 45 Or 99, 76 P 1081; Dose v. Beatie, (1912) 62 Or 308, 123 P 383, 125 P 277; Rosenwald v. Oregon City Trans. Co., (1917) 84 Or 15, 163 P 831, 164 P 189; Johnson v. Homestead-Iron Dyke Mines Co., (1920) 98 Or 318, 193 P 1036; Hubbard v. Olsen-Roe Trans. Co., (1924) 110 Or 618, 224 P 636; Pacific Export Lbr. Co. v. Clatskanie State Bank, (1928) 127 Or 204, 270 P 499; Windle v. Flinn, (1952) 196 Or 654, 251 P2d 136; Hill v. Carlstrom, (1959) 216 Or 300, 338 P2d 645; Blue River Sawmills v. Gates, (1960) 225 Or 439, 358 P2d 239; Sunshine Dairy v. Jolly Joan, (1963) 234 Or 84, 380 P2d 637; Perkins v. Standard Oil Co. of Calif., (1963) 235 Or 7, 383 P2d 107, 383 P2d 1002.

ATTY. GEN. OPINIONS: Complaint and bill of particulars under Conciliation Service Act, 1964-66, p 50.

LAW REVIEW CITATIONS: 4 WLJ 19.

16.220

NOTES OF DECISIONS

1. In general

This section is permissive not mandatory. Winters v. Bisaillon, (1936) 153 Or 509, 57 P2d 1095, 104 ALR 968.

Where there is an improper joinder of causes, the remedy is by demurrer unless the defect does not appear on the face of the complaint, then the defense may be presented by answer. State v. Montag Co., (1930) 132 Or 587, 286 P 995.

The remedy for commingling causes of action properly joinable is by motion for an order requiring plaintiff to state them separately, not a motion to require an election between them. Jackman v. Jones, (1951) 191 Or 356, 299 P2d 963.

The remedy where two causes of action not legally joinable are commingled in a complaint is by demurrer or motion to strike the pleading. State v. Montag Co., (1930) 132 Or 587, 286 P 995.

When separate judgments are rendered at different times on two causes of action pleaded in one complaint an appeal from the first judgment must be taken within sixty days from the rendition of that judgment. Id.

Equity will not enjoin separate actions and may require joinder. Guy F. Atkinson Corp. v. Lumbermen's Mut. Cas. Co., (1964) 236 Or 405, 389 P2d 32.

2. Single cause of action

All breaches of legal duty arising out of one transaction whether flowing from the common law or statute constitute but one cause of action, unless the statutory remedy is so inconsistent with the common-law remedy that the same judgment could not be rendered upon recovery. Hoag v. Wash.-Ore. Corp., (1915) 75 Or 588, 144 P 574, 147 P 756.

Where the complaint contained a duplicate statement of

the same transaction to recover on two distinct grounds, one for common-law negligence and one for breach of statutory duty to fence, there was but one cause of action and the plaintiff was required to elect his remedy. Harvey v. So. Pac. Co., (1905) 46 Or 505, 80 P 1061.

A complaint alleging breach of a contract for delivery of wheat contained a single cause of action in contract and was not subject to the objection that it had been joined with a cause of action for conversion. Savage v. Salem Mills Co., (1906) 48 Or 1, 85 P 69.

A complaint alleging that plaintiff, who was compelled to ship his lumber over defendant's road, was charged excessive, unreasonable and discriminating rates was not objectionable as stating two causes of action or joining them in one count. Service Lbr. Co. v. Sumpter Valley R. Co., (1913) 67 Or 63, 135 P 539.

A complaint which alleges the execution and delivery of deed by the plaintiff, acceptance by the defendant, breach of covenant by the defendant and consequent damage to the plaintiff stated but a single cause of action in contract. Norby v. Section Line Drainage Dist., (1938) 159 Or 80, 76 P2d 966.

3. Paragraph (1)(a)

A cause of action for goods sold and delivered by the plaintiff may be joined with causes of action on similar contracts assigned to plaintiff. Hammond v. Cleaveland, (1885) 23 Fed 1, 10 Sawy 621.

A claim for rent under a lease and one for expense money provided for therein may be joined. Oregonian Ry. v. Ore. Ry. & Nav. Co., (1886) 28 Fed 505.

Different claims against a boat arising under the boat lien law and assigned to one person may be joined in one complaint. The Victorian Number Two, (1894) 26 Or 194, 41 P 1103, 46 Am St Rep 616.

A cause of action for breach of a contract for lumber and one for goods sold and delivered may be joined. Waggy v. Scott, (1896) 29 Or 386, 45 P 774.

More than one cause of action arising out of contract may be united in the same complaint, if stated separately. Bade v. Hibberd, (1908) 50 Or 501, 93 P 364.

Actions for labor in cutting grain and money due for sale of grain may be properly joined in the same complaint. Id.

Causes of action for money advanced to defendant and commissions agreed to be paid on sales are properly joined. Sayles v. Daniels Sales Agency, (1921) 100 Or 37, 196 P 465.

Causes of action upon an expressed contract for an agreed price and upon quantum meruit for a reasonable value may be joined in one complaint if separately stated. State v. Montag Co., (1930) 132 Or 587, 286 P 995.

An action on negotiable instruments and an action for money had and received may be joined. St. Louis Union Trust Co. v. Ore. Annual Conference, (1935) 14 F Supp 35.

Where a suit for reformation and a cause for a money judgment are pleaded, they may be properly joined when the money judgment is to be recovered on the contract to be reformed. Lewis v. Miller, (1952) 197 Or 354, 251 P2d 876.

A suit for a declaratory decree may be united with an action for a money judgment as supplemental or incidental relief. Id.

4. Paragraph (1)(b)

Causes of action for criminal conversation and alienation of affections may be joined. Disch v. Closset, (1926) 118 Or 111, 244 P 71.

Where the acts of assault and battery and false imprisonment could have been treated as one transaction but the plaintiff alleged them separately, the complaint was sufficient because if treated as two causes of action they were properly joined and if treated as one no harm was done in alleging it two counts. Lowell v. Cordes, (1929) 129 Or 224, 277 P 101.

5. Paragraph (1)(c)

The word "property," used in this paragraph includes both real and personal property. Irwin v. McElroy, (1919) 91 Or 232, 178 P 791; Winans v. Valentine, (1936) 152 Or 462, 54 P2d 106.

Causes of action for damages for conversion of rents and profits, for conversion of mowing machine, for unlawful cutting of timber and for permitting noxious weeds to grow may be properly joined. Irwin v. McElroy, (1919) 91 Or 232, 178 P 791.

A cause of action for damages for waste to realty, a cause of action for damages to personal property, and a cause of action for ordinary damages to realty caused by loss of rental of real and personal property while the same was being repaired may be joined. Winans v. Valentine, (1936) 152 Or 462, 54 P2d 106.

6. Paragraph (1)(e)

A cause of action for damages for withholding the possession of real property may be joined with a cause of action to regain possession thereof. Wythe v. Myers, (1876) 3 Sawy 595, Fed Cas No. 18,119.

To recover possession, an owner of realty has a separate cause of action against each of several tenants in common claiming the property on which he may sue them separately or jointly. Hardenberg v. Ray, (1888) 33 Fed 812, 13 Sawy 158.

This paragraph has no application to escheat proceedings involving real and personal property. State v. McDonald, (1910) 55 Or 419, 103 P 512, 104 P 967, 106 P 444.

7. Paragraph (1)(f)

This paragraph has no application to escheat proceedings. State v. McDonald, (1910) 55 Or 419, 103 P 512, 104 P 967, 106 P 444.

8. Paragraph (1)(h)

Since it is not mandatory to join causes of action under this section, separate actions may be brought to recover for injury to person and injury to property caused by the same wrongful act or omission. Winters v. Bisaillon, (1936) 153 Or 509, 57 P2d 1095, 104 ALR 968.

9. Subsection (2)

(1) Must all belong to one only of these classes. A cause of action based on contract and a cause of action based on tort may not be joined in the same complaint. Smith v. Day, (1901) 39 Or 531, 538, 64 P 812, 65 P 1055; Irwin v. McElroy, (1919) 91 Or 232, 178 P 791; Norby v. Section Line Drainage Dist., (1938) 159 Or 80, 76 P2d 966; Union Assur. Socy. v. Ore.-Wash. R.R. & Nav. Co., (1924) 299 Fed 263.

Causes of action for deceit and covenant cannot be joined in the same complaint. Corbett v. Wrenn, (1894) 25 Or 305, 35 P 658.

A complaint alleging a breach of contract arising out of the purchase of tickets to a theater and assault and battery resulting from a removal to the lobby by the use of force was demurrable for misjoinder of causes of action. Allen v. People's Amusement Co., (1917) 85 Or 636, 167 P 272.

Where the complaint contained allegations against a patrolman for an alleged unlawful killing and allegations against city officials and a surety company on official bonds, complaint contained more than one cause of action which could not be joined. Portland v. Baker, (1923) 107 Or 28, 212 P 967.

(2) Must affect all the parties to the action. This provision is declaratory of the common law and prohibits a joinder of separate and distinct causes against persons severally

liable. Hayden v. Pearce, (1898) 33 Or 89, 52 P 1049; DeCicco v. Ober Logging Co., Inc., (1968) 251 Or 576, 447 P2d 297.

Plaintiff may not join causes of action to recover possession of a tract of land brought against persons occupying in severalty distinct portions of the land. Gibbons v. Martin, (1877) 4 Sawy 206, Fed Cas No. 5,381.

Cause of action for goods sold and delivered to the defendants jointly cannot be united with a cause of action for goods sold and delivered to one of them individually. Hayden v. Pearce, (1898) 33 Or 89, 52 P 1049.

Where two parties acting separately, without concert or common design, cause an injury to the plaintiff, their liability is not joint and the causes of action may not be joined. Smith v. Day, (1901) 39 Or 531, 64 P 812, 65 P 1055.

All joined causes must have the same defendants. McGrath v. White Motor Corp., (1971) 258 Or 583, 484 P2d 838.

A complaint by partners against another partner after dissolution to recover a share of moneys collected for partnership property was a proper joinder of causes of action as the promise to pay was to them jointly. Tieman v. Sachs, (1908) 52 Or 560, 98 P 163.

(3) Must be stated separately. Causes of action were held separately stated although allegations of defendant's corporate existence and ownership were not repeated in the second count but reference to them was made to the first count. Eaton v. Ore. Ry. & Nav. Co., (1890) 19 Or 391, 24 P 415.

Causes of action for damages for breach of contract for lumber and for recovery for goods sold and delivered, were separately stated. Waggy v. Scott, (1896) 29 Or 386, 45 P 774.

Causes of action against a patrolman for unlawful killing and against city officials and a surety company on separate official bonds should have been separately stated. Portland v. Baker, (1923) 107 Or 28, 212 P 967.

FURTHER CITATIONS: Cohen v. Ottenheimer, (1886) 13 Or 220, 10 P 20; High v. So. Pac. Co., (1907) 49 Or 98, 88 P 961; Wilson v. Portland, (1936) 153 Or 679, 58 P2d 257; Cook v. Kinzua Pine Mills Co., (1956) 207 Or 34, 293 P2d 717; Hollin v. Libby, McNeill & Libby, (1969) 253 Or 8, 452 P2d 555.

LAW REVIEW CITATIONS: 2 OLR 106; 48 OLR 193; 4 WLJ 19.

16.230

NOTES OF DECISIONS

Where several causes of suit are not separately stated, the proper attack is by motion to strike; if the motion is not made, the objection is waived. State v. Portland Gen. Elec. Co., (1902) 52 Or 502, 95 P 722, 98 P 160; Harvey v. Getchell, (1950) 190 Or 205, 225 P2d 391.

If the representations respecting claims are made to the plaintiffs as a class jointly and they act upon them in a collective capacity, the plaintiffs may join their causes of suit in one complaint. Powell v. Dayton, Sheridan, and Grand Ronde R.R., (1886) 13 Or 446, 11 P 222.

A cause of suit to cancel a warranty deed as a cloud on title may be united with a cause of suit to quiet title so long as they are not stated in the complaint as one cause of suit. Harvey v. Getchell, (1950) 190 Or 205, 225 P2d 391.

Where a suit for reformation and a cause for a money judgment are pleaded, they may be properly joined when the money judgment is to be recovered on the contract to be reformed. Lewis v. Miller, (1952) 197 Or 354, 251 P2d 876.

A suit for a declaratory decree may be united with an action for a money judgment as supplemental or incidental relief. Id.

In a suit to remove a cloud on a title, the complaint which alleged several reasons why a deed in the chain of title was invalid stated but one cause of suit, and therefore a demurrer to the complaint for improper joinder of causes of suit was erroneously sustained. Day v. Schnider, (1896) 28 Or 457, 43 P 650.

16.240

NOTES OF DECISIONS

1. Necessity for reply
2. Denials
3. Alleging "new matter constituting a defense to such new matter in the answer"
   (1) Departure
   (2) Illustrations
      (a) Contract actions
      (b) Tort actions
      (c) Suits in equity
4. Aider of complaint by reply
5. Reply to counterclaim
6. Waiver of objection by filing reply

1. Necessity for reply

A plea of payment is new matter and is admitted when not denied by the reply. Benicia Agricultural Works v. Creighton, (1892) 21 Or 495, 28 P 775, 30 P 676; Minard v. McBee, (1896) 29 Or 225, 44 P 491.

New matter in an answer which constitutes a complete defense to the cause of action, not denied by the reply, is taken as true and judgment may be given for the defendant notwithstanding the verdict for the plaintiff. Benicia Agricultural Works v. Creighton, (1892) 21 Or 495, 28 P 775, 30 P 676; Wyatt v. Henderson, (1897) 31 Or 48, 48 P 790.

Where new matter in the answer merely negatives the allegations of the complaint, no reply is necessary. Kabat v. Moore, (1906) 48 Or 191, 85 P 506; Larsen v. Duke, (1925) 116 Or 25, 240 P 227.

Where the plaintiff neglects to file a reply but the case is tried upon the theory that a reply was filed, it is proper for the court to permit a reply to be filed. Short v. Short, (1912) 62 Or 118, 123 P 388.

Every material fact that is well pleaded as new matter stands admitted by a failure to reply. Siverson v. Clanton, (1918) 88 Or 261, 170 P 933, 171 P 1051.

Where defendant sets up qualified denial admitting the wrongful act, the plaintiff is not required to reply. Boyd v. Grove, (1918) 89 Or 80, 173 P 310.

Where plaintiff in an action on a note pleads facts to toll the statute of limitations and defendant alleged facts to invoke the statute as a bar, the plaintiff does not need to file a reply denying the new material in the answer. Larsen v. Duke, (1925) 116 Or 25, 240 P 227.

Where a defendant voluntarily proceeds throughout the trial as if the affirmative allegations in his answer have been denied and he does not raise the question of a reply until on appeal, he has waived the necessity for filing a reply. Landers v. Landers, (1961) 226 Or 380, 360 P2d 552.

2. Denials

A reply denying each and every "material" allegation of the answer is insufficient. Kabat v. Moore, (1906) 48 Or 191, 85 P 506; Ready v. Schmith, (1908) 52 Or 196, 95 P 817; Clarinda T. & Sav. Bank v. Doty, (1917) 83 Or 214, 163 P 418.

A denial of an immaterial allegation raises no issue. Ramaswamy v. Hammond Lbr. Co., (1915) 78 Or 407, 152 P 223.

Where the answer consists of conjunctive allegations of contributory negligence, the denial in the reply must be disjunctively stated. White v. East Side Mill Co., (1916) 81 Or 107, 155 P 364, 158 P 173, 527.

A denial that plaintiff's decedent carelessly and negligently stepped in front of defendant's truck and failed to look out for his safety came within the negative pregnant rule and was insufficient. Id.

Fraud in the execution of an exhibit claimed by defendant in his answer to be the contract was provable by plaintiff under the general denial. O'Neill v. Keith & Co., (1909) 55 Or 122, 104 P 725.

Where the complaint for the specific performance of an oral agreement to convey land did not allege that the taking of possession was in pursuance of the contract, but the answer alleged possession was taken without any contract and without consent of defendants, the plaintiff under a denial in her reply was allowed to prove the contract and possession pursuant thereto. Skinner v. Furnas, (1916) 82 Or 414, 161 P 962.

3. Alleging "new matter constituting a defense to such new matter in the answer"

Matter which would be cause for an original action cannot be pleaded in the reply; the reply can only be used to controvert or avoid new matter in the answer. Lillienthal v. Hotaling Co., (1887) 15 Or 371, 15 P 630.

A reply cannot change nor enlarge the character of the action alleged in the complaint. Van Bibber v. Fields, (1894) 25 Or 527, 36 P 526.

The defense of new matter raised in a reply to allegations of new matter in an answer constituting a defense or counterclaim should be averred with the same degree of care as the cause of action in a complaint. Tracy v. City of Astoria, (1951) 193 Or 118, 237 P2d 954.

Reply was sufficient in detail to present an issue of former adjudication. Seaweard v. First Nat. Bank, (1917) 84 Or 678, 165 P 232.

An estoppel pleaded only in the reply was not available to plaintiff. Mercer v. Germania Ins. Co., (1918) 88 Or 410, 171 P 412.

(1) Departure. A reply designed to affirm the averments of the complaint by controverting or avoiding new matter in the answer is not subject to the objection of departure; but this is not true of a reply alleging matter constituting a new cause of action. Mayes v. Stephens, (1901) 38 Or 512, 63 P 760, 64 P 319; Kiernan v. Kratz, (1903) 42 Or 474, 69 P 1027, 70 P 506; Holmes v. Wolfard, (1905) 47 Or 93, 81 P 819; Skinner v. Furnas, (1916) 82 Or 414, 161 P 962.

Although the matter alleged in the reply might have been set out in the complaint, there is no departure if the reply sustains the complaint, as these pleadings should be read together to determine the pleader's intent. Mayes v. Stephens, (1901) 38 Or 512, 63 P 760, 64 P 319.

New matter in a reply intended to reassert the averment of the complaint does not constitute a departure. Pioneer Hdw. Co. v. Farrin, (1910) 55 Or 590, 107 P 456.

(2) Illustrations

(a) Contract Actions. A party to a contract may not allege performance in his complaint, and when such allegation is denied by the answer, set up a waiver in his reply. Cranston v. West Coast Life Ins. Co., (1912) 63 Or 427, 128 P 427; Decker v. Jordan, (1916) 79 Or 109, 154 P 431; Waller v. City of New York Ins. Co., (1917) 84 Or 284, 164 P 959, Ann Cas 1918C, 139.

Where the answer to a complaint for goods sold and delivered defended that the goods were sold on a special contract of credit, the reply alleging that the special contract was void because of fraud was not a departure. Crown Cycle Co. v. Brown, (1901) 39 Or 285, 64 P 451.

A reply setting up fraud and mistake as a defense to allegations of accounting and settlement in the answer was not a departure. Hammer v. Downing, (1901) 39 Or 504, 64 P 651, 65 P 17, 990, 67 P 30.

Where the complaint alleged an express guaranty and the guaranty set out in the reply was implied, there was a departure. Kiernan v. Kratz, (1903) 42 Or 474, 69 P 1027, 70 P 506.

Where a complaint for goods sold and delivered contained no allegation of a promise to pay but contained facts from which such promise could be implied, the reply alleging the promise was not a departure. Pioneer Hdw. Co. v. Farrin, (1910) 55 Or 590, 107 P 456.

Where the complaint against a surety set out the original contract in general terms, the reply which stated in detail the provisions of the original contract was not a departure. Leiter v. Dwyer Plumbing Co., (1913) 66 Or 474, 133 P 1180.

Reply that defendant's plea of settlement was based on an unperformed agreement was not inconsistent with the complaint for payment of money. Pennings v. Giboni, (1917) 86 Or 110, 167 P 598, 1014.

In an action on a secured note where the answer alleged a sale of the property under a power in the mortgage, the reply which set forth in detail the money expended in securing a release of the property from liens, the cost of sale and the remainder endorsed on the note was not a departure. Ashley & Kumelin v. Lance, (1918) 88 Or 109, 171 P 561, 564.

In an action by a buyer to recover money paid on a contract where defendant's answer alleged rescission of such contract, a reply avering defendant's abandonment of the contract was not a departure. Massey v. Becker, (1919) 90 Or 461, 176 P 425.

(b) Tort actions. Where the complaint for wrongful death alleged the deceased was rightfully at the place of the accident by reason of his employers' ownership of the locus in quo, a reply of license to pass over the place was not a departure. Cederson v. Ore. Nav. Co., (1900) 38 Or 343, 62 P 637, 63 P 763.

In an action to recover possession of a boiler where the complaint alleged ownership and prior possession, the reply which alleged detachment of the boiler from realty and its delivery to plaintiff was held not a departure. Mayes v. Stephans, (1901) 38 Or 512, 63 P 760, 64 P 319.

In a complaint by a chattel mortgagee against the mortgagor's purchaser for conversion where the allegations were uncertain as to the coverage of the mortgage, the reply setting out the matter more in detail was held not a departure. Zorn v. Livesley, (1904) 44 Or 501, 75 P 1057.

In a replevin action by a trustee in bankruptcy where the complaint alleged plaintiff's ownership, the reply to an allegation of title in the answer was not a departure where the reply alleged invalidity of defendant's title under the bulk sales law. Goodwin v. Tuttle, (1914) 70 Or 424, 141 P 1120.

In a replevin action, the reply alleging how title was acquired by plaintiff was not a departure from the complaint alleging that plaintiff was the owner and entitled to immediate possession. Seufert v. Simonton, (1915) 75 Or 422, 146 P 520.

(c) Suits in equity. In a suit to enjoin interference with the flow of water where the complaint alleged ownership in the plaintiff by prior appropriation, the reply was held a departure where it alleged riparian ownership. Brown v. Baker, (1901) 39 Or 66, 65 P 799, 66 P 193.

In a suit to determine an adverse interest in real estate, a reply setting out the chain of title under which the plaintiff claimed and alleging transfer of title by way of security was held not a departure. Holmes v. Wolfard, (1905) 47 Or 93, 81 P 819.

In a suit to enjoin the defendant from cutting and removing cord wood from plaintiff's land where the answer justified the defendant's acts by pleading a contract in its legal effect, the reply was not a departure which set out the contract to show that wood in question did not come within its provisions. Roots v. Boring Junction Lbr. Co., (1908) 50 Or 298, 92 P 811, 94 P 182.

Where the complaint in a suit to enjoin the building of

a trestle on the plaintiff's land alleged his ownership of all the land, a reply conceding the existence of a street between the platted lines was held not a departure. Tooze v. Willamette Valley So. Ry., (1915) 77 Or 157, 150 P 252.

In a suit to quiet title where the answer denied plaintiff's allegations of ownership and alleged ownership in the defendant, a reply setting up a boundary agreement settling the title to the disputed land was not a departure. McCully v. Heaverne, (1917) 82 Or 650, 160 P 1166, 162 P 863.

4. Aider of complaint by reply

A reply cannot be used to supply omissions of necessary averments in the complaint. Van Bibber v. Fields, (1894) 25 Or 527, 36 P 526; Wyatt v. Henderson, (1897) 31 Or 48, 48 P 790.

Where an essential allegation has been omitted from the complaint, an issue as to such fact raised by the answer and reply cures the defect. Easton v. Quackenbush, (1917) 86 Or 374, 168 P 631.

If the matter of reasonable value for work and services had been suggested for the first time in the reply, it would have been a fatal departure; but it was not a departure where the reply merely followed the answer which supplied the omitted allegation and thus raised an issue on that subject. Id.

5. Reply to counterclaim

A reply alleging that the amounts of the items are less than the amount set forth in the counterclaim and that these amounts have been paid, without asking affirmative relief, was not a departure. Van Bibber v. Fields, (1894) 25 Or 527, 36 P 526.

In an action for money had and received where defendant pleaded as a set-off sums plaintiff had and received to the use of the defendant, the reply setting up repayment of such sums to defendant was a departure. Hammer v. Downing, (1901) 39 Or 504, 64 P 651, 65 P 17, 990, 67 P 30.

Where the defendants to a suit to quiet title file a counterclaim to foreclose a mortgage on the realty, the plaintiff may set up in the reply any defensive matter he could have pleaded to a complaint for foreclosure. Hanna v. Hope, (1917) 86 Or 303, 168 P 618.

6. Waiver of objection by filing reply

By denying in the reply allegations of new matter in the answer, plaintiff waives an objection that defenses are not separately stated in the answer. Fleishman v. Meyer, (1905) 46 Or 267, 80 P 209.

In a suit to quiet title where the defendants filed a counterclaim seeking to foreclose their mortgage on the realty, the plaintiff in replying to the counterclaim waived the objection to the propriety of relief asked by defendants. Hanna v. Hope, (1917) 86 Or 303, 168 P 618.

FURTHER CITATIONS: Burkholder v. State Ind. Acc. Comm., (1965) 242 Or 276, 409 P2d 342; Ray v. Davis (1969) 254 Or 155, 458 P2d 679.

16.250

NOTES OF DECISIONS

A demurrer to a whole answer on the ground that it does not constitute a defense will be overruled if part of the answer constitutes a defense. Toby v. Ferguson, (1868) 3 Or 27; Miller v. Cunningham, (1914) 71 Or 518, 139 P 927.

When challenged by demurrer, averments of new matter in the answer are to be most strongly construed against the pleader. LeClare v. Thibault, (1902) 41 Or 601, 69 P 552.

Where a complaint on a contract contained facts sufficient to excuse plaintiff's delay in not instituting the action within the time limited in the contract, a demurrer to a separate answer alleging that the action was not commenced within the time limited was properly sustained. Ausplund v. Aetna Indem. Co., (1905) 47 Or 10, 81 P 577, 82 P 12.

A demurrer is the only pleading by which the sufficiency of the answer can be tested and it must be directed to the whole defense. Multnomah County v. Faling, (1909) 55 Or 45, 104 P 964.

Where a demurrer to an answer is erroneously overruled, the error is waived by filing a reply. Stanchfield Co. v. Central R.R., (1913) 67 Or 396, 136 P 34.

An objection that the answer does not state facts sufficient to constitute a defense is not waived by pleading over after demurrer. Id.

A demurrer to an answer joining a plea in abatement and a plea to the merits was properly sustained. Hopwood v. Patterson, (1862) 2 Or 49.

Plea of the statute of limitations was not demurrable. Torrence v. Strong, (1870) 4 Or 39.

Incapacity of defendant to maintain a cross-complaint in replevin was waived when not objected to by demurrer or reply. Benson v. Johnson, (1917) 85 Or 677, 165 P 1001, 167 P 1014.

Failure to demur to a counterclaim because it did not separately allege fraud and breach of warranty waived the defect. Gary Coast Agency v. Lawrey, (1921) 101 Or 623, 201 P 214.

A second answer, that plaintiff had been fully compensated by a joint tort feasor, was not subject to demurrer. Kirby v. Snow, (1969) 252 Or 592, 451 P2d 866.

FURTHER CITATIONS: Gardner v. McWilliams, (1902) 42 Or 14, 69 P 915; Title Guar. & Abstract Co. v. Nasburg, (1911) 58 Or 190, 113 P 2; United States v. Aho, (1943) 51 F Supp 137.

16.260

NOTES OF DECISIONS

1. In general

Parol demurrer is not recognized in this state. English v. Savage, (1875) 5 Or 518.

A demurrer cannot be stricken out on motion. Cohen v. Ottenheimer, (1886) 13 Or 220, 10 P 20.

A demurrer is not available to question any part of the pleading less than a cause of action. State v. Portland Gen. Elec. Co., (1908) 52 Or 502, 95 P 722, 98 P 160.

A joint demurrer will be overruled if the complaint is good against one defendant. Columbia R. Co. v. Smith, (1917) 83 Or 137, 162 P 831, 163 P 309.

If the jurisdiction of the court can be readily challenged by a demurrer, a failure to do so will be deemed a waiver unless the court was wholly lacking in jurisdiction. Oregon Farm Bureau v. Thompson, (1963) 235 Or 162, 384 P2d 182.

(1) Admissions by demurrer. Material allegations of a pleading are admitted on demurrer. Hoffman v. Toft, (1914) 70 Or 488, 142 P 365, 52 LRA(NS) 944; Fields v. Crowley, (1914) 71 Or 141, 142 P 360; and every reasonable and proper inference deducible therefrom is also admitted. Wills v.

Nehalem Coal Co., (1908) 52 Or 70, 96 P 528; Oregon Home Builders v. Eisman, (1918) 88 Or 611, 172 P 114.

Statement of conclusions of fact or of law are not admitted by demurrer. Longshore Printing Co. v. Howell, (1894) 26 Or 527, 38 P 547, 46 Am St Rep 640, 28 LRA 464; O'Hara v. Parker, (1895) 27 Or 156, 39 P 1004; State v. Williams, (1904) 45 Or 314, 330, 77 P 965, 67 LRA 166.

The demurrer is not an absolute admission; it admits the facts for the sole purpose of presenting their sufficiency to the court for determination. Rice v. Rice, (1886) 13 Or 337, 10 P 495.

Demurrers to an amended alternative writ of mandamus admit all the material allegations thereof to be true. Crawford v. Sch. Dist. 7, (1913) 68 Or 388, 137 P 217, Ann Cas 1915C, 477, 50 LRA(NS) 147.

(2) Special demurrer: Uncertainty. Although the sufficiency of a pleading must be tried on demurrer, the remedy is by motion where only the manner of stating the facts is defective. Brownell v. Salem Flouring Mills Co., (1906) 48 Or 525, 87 P 770; Clarkson v. Wong, (1935) 150 Or 406, 42 P2d 763, 45 P2d 914.

Special demurrers are not allowed by the statutes. Neis v. Yocum, (1883) 16 Fed 168, 9 Sawy 24.

The mere manner of stating a fact or the defective statement of a material matter cannot be reached by demurrer. Id.

That the allegations of the complaint are insufficient or irrelevant cannot be reached by demurrer as long as the other parts of the complaint contain a sufficient statement. Sunnyside Land Co. v. Willamette Bridge Ry., (1891) 20 Or 544, 26 P 835.

2. Subsection (2)

Where the pleading of a party doing business under an assumed name does not allege that he has complied with the law by filing the certificate required, the objection should be made by a demurrer. Beamish v. Noon, (1915) 76 Or 415, 149 P 522; Benson v. Johnson, (1917) 85 Or 677, 165 P 1001, 167 P 1014.

This subsection has reference to some legal disability of the plaintiff such as infancy, idiocy or coverture and not to the fact that the complaint fails to show on its face a right of action in the plaintiff. Crowder v. Yovovich, (1917) 84 Or 41, 164 P 576; Service v. Sumpter Valley Ry. Co., (1918) 88 Or 554, 587, 171 P 202.

Where an incompetent plaintiff is represented in a suit by a next friend, the question of plaintiff's capacity to sue should be raised by a demurrer under this subsection. Owings v. Turner, (1906) 48 Or 462, 87 P 160.

Objection to the incapacity of plaintiff, as administratrix, to sue to quiet title should be taken by demurrer when the defect appears on the face of the complaint. Butts v. Purdy, (1912) 63 Or 150, 168, 125 P 313, 127 P 25.

An objection that the appointment of a guardian ad litem failed to show that the minor was over 14 and nominated his own guardian could be raised only by answer or demurrer. Everart v. Fischer, (1915) 75 Or 316, 145 P 33, 147 P 189.

A demurrer under this subsection must be directed to some disability of the plaintiff appearing on the face of the complaint. Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 232 P 637, 233 P 561, 234 P 261.

Failure to aver facts showing capacity to sue does not render complaint demurrable. Id.

If objection on this ground is not taken it is deemed waived. Cockerham v. Potts, (1933) 143 Or 80, 20 P2d 423.

Where it appeared from the complaint that only two directors, the bond of neither of whom had been approved by the county judge, had authorized a proceeding to test the organization of an irrigation district, the defect was waived by failure to demur. Harney Valley Irr. Dist. v. Weittenhiller, (1921) 101 Or 1, 198 P 1093.

Whether or not the plaintiff had capacity to sue for the death of her daughter should have been questioned by demurrer. Thompson v. Union Fishermen's Coop. Packing Co., (1926) 118 Or 436, 235 P 694, 246 P 733, 737.

3. Subsection (3)

This subsection constitutes a statutory prohibition against the commencement of a second action until the first is disposed of. Hutchings v. Royal Bakery, (1913) 66 Or 301, 131 P 514, 132 P 960, 134 P 1033.

An action is pending until an appeal from the nonsuit is disposed of. Id.

The nature of a plea of another action pending is not changed by this section. Beneke v. Tucker, (1918) 90 Or 230, 176 P 183.

Both actions must be pending in courts of the same state. Id.

Termination of prior action even after filing of a plea in abatement in the second cause may be sufficient to defeat the plea. Wolfe Invs., Inc. v. Shroyer, (1965) 240 Or 549, 402 P2d 516.

If it appears that the second action was brought for the purpose of vexation rather than to seek legal rights, the plea should be sustained. Id.

4. Subsection (4)

This subsection refers to nonjoinder not misjoinder, of parties. Paulson v. Portland, (1888) 16 Or 450, 19 P 450, 1 LRA 673; Tieman v. Sachs, (1908) 52 Or 560, 98 P 163; Stewart v. Templeton (1910) 55 Or 364, 104 P 978, 106 P 640; State v. Duniway, (1912) 63 Or 555, 128 P 853; Wolf v. Eppenstein, (1914) 71 Or 1, 140 P 751; State v. Hawk, (1922) 105 Or 319, 208 P 709, 209 P 607; Fisher v. Collver, (1927) 121 Or 173, 254 P 815; Lowell v. Pendleton Auto Co., (1927) 123 Or 383, 261 P 415; Porter Constr. Co. v. Berry, (1931) 136 Or 80, 298 P 179; Hunt v. Ketell, (1953) 197 Or 659, 253 P2d 272.

Defect of parties appearing on the face of the complaint must be objected to by demurrer or the defect is waived. Osborn v. Logus, (1894) 28 Or 302, 37 P 456, 38 P 190, 42 P 997; Cooper v. Thomason, (1896) 30 Or 161, 45 P 296; Thompson v. Hibbs, (1904) 45 Or 141, 76 P 778; North v. Union Sav. & Loan Assn., (1911) 59 Or 483, 117 P 822; Portland v. Coffey, (1913) 67 Or 507, 135 P 358; Anderson v. E. Ore. Lbr. Co., (1923) 106 Or 459, 211 P 937, 941; Pulkrabek v. Bankers' Mtg. Corp., (1925) 115 Or 379, 238 P 347.

A defect of parties means that the presence of other parties is necessary to a complete determination of the case. Cohen v. Ottenheimer, (1886) 13 Or 220, 10 P 20; Wolf v. Eppenstein, (1914) 71 Or 1, 140 P 751; State v. Hawk, (1922) 105 Or 319, 208 P 709, 209 P 607.

The common-law rule that the demurrer must point out by name or some other definite way those who should have been made parties to the pleading has not been abrogated by this section. State v. Metschan, (1896) 32 Or 372, 46 P 791, 53 P 1071.

Demurrer to complaint on ground of defect of parties defendant is equivalent to a plea in abatement. Liberty Inc. v. Columbia T. & Sav. Bank, (1927) 121 Or 289, 254 P 1016.

Where defendants failed to demur for defect of parties, they may not later raise the point on motion to dismiss. Murray v. Lamb, (1942) 168 Or 596, 115 P2d 336, 124 P2d 531.

If necessary and indispensable parties have not been joined the court may direct that they be brought in even though defect of parties was not asserted by demurrer or in the answer. Beers v. Beers, (1955) 204 Or 636, 283 P2d 666.

Where the owner of a warrant was a necessary party to a suit, a demurrer in the language of this subsection was insufficient. State v. Metschan, (1896) 32 Or 372, 46 P 791, 53 P 1071.

In mandamus, the objection should have been taken by demurrer where the defect of parties was apparent on the face of the alternative writ. Portland v. Coffey, (1913) 67 Or 507, 135 P 358.

5. Subsection (5)

The objection that several causes of action have not been severally stated should be taken by motion to strike and not by demurrer. Boelk v. Nolan, (1910) 56 Or 229, 107 P 689; McKay v. Campbell, (1870) 1 Sawy 374, Fed Cas No. 8, 839.

In case of commingling of joinable causes of action, the remedy is a motion to require plaintiff to state them separately and not a motion to require him to elect between them; in case of commingling of causes not legally joinable, the pleading is subject to demurrer and motion to strike. State v. Montag Co., (1930) 132 Or 587, 286 P 995. Overruling Cohen v. Ottenheimer, (1886) 13 Or 220, 10 P 20.

The defendant must demur when two causes not legally joinable are separately stated in a complaint, unless the defect does not appear upon the face of the pleading, when the defense may be presented by answer. State v. Montag Co., (1930) 132 Or 587, 286 P 995. Overruling Cohen v. Ottenheimer, (1886) 13 Or 220, 10 P 20.

Sustaining a demurrer on the ground that several causes of action have been improperly united overthrows the complaint and the plaintiff can only proceed by filing an amended complaint. Cohen v. Ottenheimer, (1886) 13 Or 220, 10 P 20; State v. Williams, (1904) 45 Or 314, 334, 77 P 965, 67 LRA 166.

When a misjoinder does not appear until judgment, a writ of review may be had for the correction of the error. Heyden v. Pearce, (1898) 33 Or 89, 52 P 1049.

An objection that the complaint improperly joined a cause of action for loss of consortium of the wife and a cause of action for personal injuries to the plaintiff was waived when not taken by demurrer. Elling v. Blake-McFall Co., (1917) 85 Or 91, 166 P 57.

Where the demurrer to the complaint containing two causes of suit improperly joined was erroneously overruled, the error was held harmless where the case proceeded as a suit on one cause only. Stennick v. J.K. Lbr. Co., (1917) 85 Or 444, 480, 161 P 97, 166 P 951.

A demurrer to a complaint containing a cause of action for breach of contract arising out of purchase of theater tickets and a cause of action in tort for removal to the lobby by use of force, was properly sustained. Allen v. Peoples Amusement Co., (1917) 85 Or 636, 167 P 272.

Complaint of three minor children, alleging alienation of their father's affections, was demurrable. Pick v. Pick, (1959) 219 Or 247, 345 P2d 805.

Each cause of action did not affect all the defendants. Lithia Lbr. Co. v. Lamb, (1968) 250 Or 444, 443 P2d 647.

6. Subsection (6)

Demurrer is the only pleading by which the sufficiency of a complaint to state a cause of action can be tested. Cline v. Cline, (1871) 3 Or 355; The Victorian, (1893) 24 Or 121, 32 P 1040, 41 Am St Rep 838; Multnomah County v. Faling, (1909) 55 Or 45, 104 P 964; Hubbard v. Olsen-Roe Transfer Co., (1924) 110 Or 618, 224 P 636.

If any portion of a pleading states a cause of action, it is not subject to a demurrer. Ketchum v. State, (1864) 2 Or 103; Simpson v. Prather, (1873) 5 Or 86; Barbre v. Goodale, (1896) 28 Or 465, 38 P 67, 43 P 378; Waggy v. Scott, (1896) 29 Or 386, 45 P 774; Gabel v. Armstrong, (1918) 88 Or 84, 171 P 190.

Where the ambiguity in the description of the mortgaged premises did not appear on the face of complaint to foreclose, a demurrer thereto was properly overruled. Ladd v. Mason, (1882) 10 Or 308.

To be a good complaint, immune from a demurrer under this subsection, the plaintiff must show in himself legal connection with the matter involved in litigation and a right in himself to recover the amount demanded. Service v. Sumpter Valley Ry., (1918) 88 Or 554, 171 P 202.

In a contract action a complaint that does not allege consideration is demurrable. Lewis v. Siegman, (1931) 135 Or 660, 296 P 51, 297 P 1118.

In a suit for rescission, it is incumbent upon plaintiffs to allege facts indicating a breach of a material character. Reynolds v. Janzen, (1962) 232 Or 548, 376 P2d 415.

The proper procedure to raise the issue of immunity should be by the filing of a demurrer. Smith v. Cooper, (1970) 256 Or 485, 475 P2d 78.

In an action to recover personal property, the complaint which did not allege that the property was in the county when the action was commenced, was not demurrable. Ward v. Hamlin, (1914) 71 Or 248, 142 P 621.

Where it appeared in the complaint that there existed a trust relationship between the parties, the complaint was not demurrable on the ground that facts did not disclose a cause of suit in equity. Marshall v. Gustin, (1918) 89 Or 53, 170 P 312, 173 P 461.

Where it appeared from the face of the complaint that the advertisement in question was in violation of the law, the demurrer was properly sustained. Donohue v. Andrews, (1935) 150 Or 652, 47 P2d 940.

The allegation that plaintiff was allowed to participate in a varsity football game without proper or sufficient instruction is sufficient to state a cause of action against the school district. Vendrell v. Sch. Dist. 26 C, (1961) 226 Or 263, 360 P2d 282.

Where a complaint challenging increased parking meter fees didn't contain an allegation that increased revenue would be in excess of that necessary for traffic regulation, demurrer was properly sustained. Terry v. Portland, (1970) 256 Or 47, 470 P2d 951.

7. Subsection (7)

When it does not appear on the face of the complaint that the suit was not commenced within the time limited, a demurrer is not tenable. Weiss v. Bethel, (1880) 8 Or 522; Hawkins v. Donnerberg, (1901) 40 Or 97, 66 P 691, 908.

When it appears on the face of the complaint that the action is barred, the objection must be taken by demurrer or it is waived. Spaur v. McBee, (1890) 19 Or 76, 23 P 818; Ausplund v. Aetna Indemnity Co., (1905) 47 Or 10, 81 P 577, 82 P 12; Eastman v. Crary, (1929) 131 Or 694, 284 P 280.

In determining on demurrer whether a cause of action is barred by the statute of limitations, the complaint and the return of service on the summons may be considered. Smith v. Day, (1901) 39 Or 531, 64 P 812, 65 P 1055; Patterson v. Thompson, (1898) 90 Fed 647.

An allegation in the complaint that the injury occurred "on or about" a certain day did not show the time of accrual of the cause of action and thus the demurrer would not lie. Conroy v. Ore. Constr. Co., (1885) 23 Fed 71, 10 Sawy 630.

Where in a suit to revive a judgment the objection of the statute of limitations was apparent on the face of the pleading, it should have been taken by demurrer. Beekman v. Hamlin, (1893) 19 Or 383, 24 P 195, 20 Am St Rep 827, 10 LRA 454.

In an action for tort committed in December, 1895 where complaint was filed March, 1896 and return of service of summons was made in January, 1898, a demurrer to complaint was held properly sustained. Smith v. Day, (1901) 39 Or 531, 64 P 812, 65 P 1055.

In a suit for discovery and accounting of partnership funds where the complaint did not show when defendant collected the money sued for, a demurrer on the ground

in this subsection was properly overruled. Spencer v. Wolff, (1926) 119 Or 237, 43 P 548.

Where it appeared on the face of a complaint on a contract to devise that the action was not brought within six years after death of promisor, the demurrer thereto was properly sustained. Lewis v. Siegman, (1931) 135 Or 660, 296 P 51, 297 P 1118.

The general rule is that if it appears from the face of the pleading that the action is barred by the statute of limitations, the objection must be taken by demurrer or it is waived. Dixon v. Schoonover, (1961) 226 Or 443, 359 P2d 115, 360 P2d 274.

8. Amendment after demurrer sustained

See cases under ORS 16.380.

9. Pleading over after demurrer overruled

See cases under ORS 16.330 and 16.380.

10. Appeal

The affirmance of a judgment overruling a demurrer is ordinarily final unless the Supreme Court in its discretion remands the cause for further proceedings, which it will not do unless it appears from the record that conditions imperatively call for the exercise of such discretion. Hutchings v. Royal Bakery, (1913) 66 Or 301, 307, 131 P 514, 132 P 960, 134 P 1033.

Where a general demurrer to a complaint was filed but without argument thereon defendant answered, the case on appeal is to be determined as upon the sufficiency of a pleading after verdict. Minter v. Minter, (1916) 80 Or 369, 157 P 157.

FURTHER CITATIONS: Drake v. Sworts, (1893) 24 Or 198, 33 P 563; Durkee v. Carr, (1900) 38 Or 189, 63 P 117; Triphonoff v. Sweeney, (1913) 65 Or 299, 130 P 970; Gary Coast Agency v. Lawrey, (1921) 101 Or 623, 201 P 214; Chandler v. Hultgren, (1937) 156 Or 142, 66 P2d 268; Gibbons v. Martin, (1877) 4 Sawy 206, Fed Cas No. 5, 381; Green v. Coos Bay Wagon R. Co., (1885) 23 Fed 71, 10 Sawy 630; Ricker v. Ricker, (1954) 201 Or 416, 270 P2d 150; Nordling v. Johnson, (1955) 205 Or 315, 283 P2d 994, 287 P2d 420; Barnes v. E. & W. Lbr. Co., (1955) 205 Or 553, 287 P2d 929; Hewitt v. Thomas, (1957) 210 Or 273, 310 P2d 313; Schultz v. First Nat. Bank, (1959) 219 Or 491, 348 P2d 28; Spaulding v. Miller, (1960) 221 Or 503, 350 P2d 1073; Dowell v. Mossberg, (1961) 226 Or 173, 355 P2d 624, 359 P2d 541; Fowler v. Donnelly, (1960) 225 Or 287, 385 P2d 485, 85 ALR 2d 452; Houston v. Pomeroy, (1961) 227 Or 499, 362 P2d 708; Isenhart v. Gen. Cas. Co., (1962) 233 Or 49, 377 P2d 26; Hann v. Nored, (1963) 233 Or 302, 378 P2d 569; Murphy v. Harty, (1964) 238 Or 228, 393 P2d 206; Coast Business Brokers, Inc. v. Hickman, (1964) 239 Or 121, 396 P2d 756; Burnett v. W. Pac. Ins. Co., (1970) 255 Or 547, 469 P2d 602; State Constr. Corp. v. Scoggins, (1971) 259 Or 371, 485 P2d 391; People of Oregon ex rel. Johnson v. Debt Reducers, Inc., (1971) 5 Or App 322, 484 P2d 869.

LAW REVIEW CITATIONS: 1 OLR (2) 38; 28 OLR 412; 45 OLR 217.

16.270

NOTES OF DECISIONS

A demurrer in language of OCLA 1-705(4) [ORS 16.260(4)] is insufficient. State v. Metschan, (1896) 32 Or 372, 46 P 791, 53 P 1071, 41 LRA 692; Crawford v. School Dist. 7, (1913) 68 Or 388, 137 P 217, Ann Cas 1915C, 477, 50 LRA(NS) 147; Wolf v. Eppenstein, (1914) 71 Or 1, 140 P 751; Anderson v. E. Ore. Lbr. Co., (1923) 106 Or 459, 211 P 937.

Although the common-law special demurrer has been abolished in this state, the demurrer must specify the grounds of objection. Marx v. Croisan, (1889) 17 Or 393, 21 P 310.

A demurrer cannot attack a part of the recovery sought by a complaint stating one cause of action. State v. Portland Gen. Elec. Co., (1908) 52 Or 502, 513, 95 P 722, 98 P 160.

A general demurrer is sufficient when it states in the language of the statute the defect in the attacked pleading. Petty v. Hibbs, (1934) 147 Or 77, 31 P2d 655.

Where the answer contained a denial and statement of new matter, a demurrer to the whole answer was erroneously sustained. Miller v. Cunningham, (1914) 71 Or 518, 139 P 927.

FURTHER CITATIONS: Hughes v. Pratt, (1900) 37 Or 45, 60 P 707; Dowell v. Mossberg, (1960) 226 Or 173, 355 P2d 624, 359 P2d 541.

16.280

CASE CITATIONS: Kirby v. Snow, (1969) 252 Or 592, 451 P2d 866.

16.290

NOTES OF DECISIONS

1. Subsection (1)
2. Subsection (2)
   (1) In general
   (2) Paragraph (2)(a)
      (a) Form and sufficiency of denials
         (A) Argumentative denials
         (B) Conjunctive denials
         (C) Negative pregnant
         (D) General denials
         (E) Denial of knowledge or information sufficient to form a belief
      (b) Proof under denial
   (3) Paragraph (2)(b)
      (a) In general
      (b) Pleas in abatement
      (c) Counterclaims
      (d) Affirmative defenses
      (e) Sufficiency of pleading new matter

1. Subsection (1)

See also cases under ORS 16.260.

Only where the objection does not appear on the face of the complaint may it be taken by answer. Spaur v. McBee, (1890) 19 Or 76, 23 P 818.

The "matters" referred to are statutory grounds of demurrer. Harney Valley Irr. Dist. v. Weittenhiller, (1921) 101 Or 1, 198 P 1093.

2. Subsection (2)

(1) In general. The purpose of the answer is to notify the plaintiff of the facts relied on for a defense so that he may prepare to meet them on the trial, and also to confine the inquiry to the issues actually made. Troy Laundry Co. v. Henry, (1892) 23 Or 232, 31 P 474; Duff v. Willamette Steel Works, (1904) 45 Or 479, 78 P 363, 668.

There is but one answer although the pleading contains several defenses. Wilson v. Fine, (1889) 40 Fed 52, 5 LRA 141.

An answer is in the name of the defendant and puts in issue the allegations of the complaint or presents in orderly form an affirmative defense. Beedle v. Stondall Land & Timber Co., (1902) 96 Or 590, 189 P 427.

This subsection is strictly construed. Duff v. Willamette Steel Works, (1904) 45 Or 479, 78 P 363, 668.

A statement by defendant that he has no defense at law

is not an answer. Fire Assn. v. Allesina, (1904) 45 Or 154, 77 P 123.

It is not required that service of the answer be made on plaintiff, but he is bound to take notice of the filing thereof within the time specified. Stivers v. Byrkett, (1910) 56 Or 565, 108 P 1014, 109 P 386.

Defendant's admission of the truth of allegations relieves plaintiff from proving the allegation admitted. Schucking & Co. v. Young, (1915) 78 Or 483, 494, 153 P 803.

When the complaint states a supposed cause of action defendant must either demur or controvert the facts averred, or set forth other facts which exonerate him. Edlefson v. Portland Ry., Light & Power Co., (1918) 69 Or 18, 136 P 832.

A plea in bar is an answer to the merits. Winters v. Grimes, (1928) 124 Or 214, 264 P 359.

Admissions prevail over denials when the answer contains both pleas respecting the same fact. Turner v. McCready, (1950) 190 Or 28, 222 P2d 1010.

The plaintiff waives an admission in an answer if he proceeds as though the admitted fact was in issue. Id.

(2) Paragraph (2)(a)

(a) Form and sufficiency of denials. A denial of "material" allegations in a pleading raises no issue. Kabat v. Moore, (1908) 48 Or 191, 85 P 506; Clarinda Trust & Sav. Bank v. Doty, (1917) 83 Or 214, 163 P 418.

The denial need not be absolute nor in any particular form. Gee v. Culver (concurring opinion), (1885) 12 Or 228, 6 P 775.

A denial must be sufficient in itself, without reference to any other allegation of pleading. Drexler v. Smith, (1887) 30 Fed 754.

Immaterial matters need not be denied. Fleishman v. Meyer, (1905) 46 Or 267, 80 P 209.

A general denial of "each and every allegation of the complaint except as hereinafter admitted, qualified or stated," is a proper form of denial. Seffert v. No. Pac. Ry., (1907) 49 Or 95, 88 P 962.

A denial of each allegation in the pleading is sufficient as it implies that the facts set forth are controverted. Dose v. Beatie, (1912) 62 Or 308, 123 P 383, 125 P 277.

A denial of an immaterial allegation raises no issue. Graham v. Coos Bay R. Co., (1914) 71 Or 393, 139 P 337.

No particular form of denial is necessary as long as the adversary is informed of matters denied. Miller v. Cunningham, (1914) 71 Or 518, 139 P 927.

A denial of specific paragraphs of the complaint by number is sufficient. Id.

A denial "except as hereinafter admitted, stated or qualified" amounts to a complete traverse, unless the new matter makes a case for the plaintiff. Lueddemann v. Rudolf, (1916) 79 Or 249, 254, 154 P 116, 155 P 172.

A general denial of allegations of the complaint "except as hereinafter alleged" is sufficient. Oliver v. Crane, (1916) 82 Or 166, 161 P 254.

An answer consisting only of denials serves the purpose only of raising a direct issue upon the averments of the complaint. Hubbard v. Olsen-Roe Transfer Co., (1924) 110 Or 618, 224 P 636.

An allegation that a person "made, executed, and delivered" the note was not put in issue by the denial that he "delivered" the note. Cogswell v. Hayden, (1873) 5 Or 22.

A denial of promise to pay the reasonable value of the work raised no issue as it admitted the work was performed, and a promise to pay the reasonable value was implied. Louis & Co. v. Brown, (1879) 7 Or 326.

(A) Argumentative denials. New matter which merely negatives the averments of the complaint is an argumentative denial and requires no reply. Kabat v. Moore, (1906) 48 Or 191, 85 P 506; Edlefson v. Portland Ry., Light & Power Co., (1914) 69 Or 18, 22, 136 P 832.

(B) Conjunctive denials. Facts stated conjunctively in the complaint must be denied disjunctively to raise an issue. Scovill v. Barney, (1872) 4 Or 288; Moser v. Jenkins, (1875) 5 Or 447; Minter v. Minter, (1916) 80 Or 369, 374, 157 P 157; White v. E. Side Mill Co., (1916) 81 Or 107, 155 P 364, 158 P 173, 527; Palmberg v. City of Astoria, (1924) 112 Or 353, 228 P 107; 229 P 380.

Denial that plaintiff's decedent carelessly and negligently stepped in front of a truck and failed to look out for his safety, is a denial only of the manner of doing. White v. E. Side Mill Co., (1916) 81 Or 107, 155 P 364, 158 P 173, 527.

(C) Negative pregnant. A literal denial is a "negative pregnant" and is insufficient to raise any issue. Scovill v. Barney, (1872) 4 Or 288; Moser v. Jenkins, (1875) 5 Or 447; Minter v. Minter, (1916) 80 Or 369, 157 P 157.

The denial that the property sued for is of the exact value alleged in the complaint is an admission of any less value. Scovill v. Barney, (1872) 4 Or 288; Hewitt v. Huffman, (1909) 55 Or 57, 105 P 98.

Where a complaint alleges plaintiff's ownership on and after a certain date, a denial that he has been the owner since such date is an admission that he was the owner at that date. Dillery v. Borwick, (1899) 36 Or 255, 59 P 183.

A denial that plaintiff is a corporation organized under and by virtue of the laws of Illinois is pregnant with the admission that plaintiff is nevertheless a corporation. McCormick Harvesting Mach. Co. v. Hovey, (1899) 36 Or 259, 260, 59 P 189.

(D) General denials. Prior to the amendment of this paragraph, it was required that an answer contain a specific denial of the material allegations intended to be controverted. Coos Bay R. Co. v. Siglin, (1894) 26 Or 387, 38 P 192.

A general denial raises the issues that would be raised by a specific denial. Hall v. Dartt, (1912) 62 Or 97, 122 P 898.

The amendment only permits a general denial to take place of former specific contradiction of material allegations, but does not enlarge original scope of the answer. Hickey v. Coffey, (1917) 85 Or 383, 166 P 959.

A general denial puts in issue all the material allegations of the petition. Re Application of Riggs, (1922) 105 Or 531, 207 P 175, 1005, 210 P 217.

If matter specially pleaded is admissible under the general denial, the matter should be stricken as redundant. Hubbard v. Olsen-Roe Transfer Co., (1924) 110 Or 618, 224 P 636.

(E) Denial of knowledge or information sufficient to form a belief. A statement that pleader has no knowledge or information sufficient to form a belief and therefore denies said allegation, is a sufficient denial. Robbins v. Baker, (1862) 2 Or 52; Sherman v. Osborn, (1879) 8 Or 66; Wilson v. Allen, (1883) 11 Or 154, 2 P 91. Sherman v. Osborn, supra, **distinguished in** Law Trust Socy. v. Hogue, (1900) 37 Or 544, 62 P 380, 63 P 690.

A defendant is not bound to inform himself concerning the truth of an allegation of which he never had any knowledge or he is not presumed to know, and a denial on information and belief is sufficient. Oregonian R. Co. v. Ore. R. Co., (1884) 22 Fed 245.

One of two forms may be used in a denial on information and belief; one follows the statute literally, and the other states that the pleader has no knowledge or information concerning the fact and therefore denies the same. Law Trust Society v. Hogue, (1900) 37 Or 544, 560, 62 P 380, 63 P 690.

A mere affirmative averment of defendant's want of knowledge or information sufficient to form a belief concerning a material matter alleged in the complaint is not a good denial. Id.

A denial of a party's own acts, or the acts of his agent, on information and belief raises no issue. Peters v. Queen City Ins. Co., (1912) 63 Or 382, 126 P 1005.

If a party denies on information and belief a fact presumed to be in his knowledge, the denial is sham and the fact is admitted. Id.

(b) Proof under denial. This section abrogates the common-law rule of proof allowed under a general issue. Buchtel v. Evans, (1891) 21 Or 309, 28 P 67; Springer v. Jenkins, (1906) 47 Or 502, 84 P 479.

Under a denial, the defendant is not allowed to prove any fact that does not go directly to disprove the fact denied. Buchtel v. Evans, (1891) 21 Or 309, 28 P 67; Springer v. Jenkins, (1906) 47 Or 502, 84 P 479.

Fraud is inadmissible under a general denial. Coos Bay R. Co. v. Siglin, (1894) 26 Or 387, 38 P 192; Hickey v. Coffey, (1917) 85 Or 383, 166 P 959; Palmer-Haworth Logging Co. v. Henderson, (1918) 90 Or 192, 174 P 531.

The defendant, under a general denial, has the right to give evidence controverting any fact necessary to be established by plaintiff to authorize recovery. Multnomah County v. Willamette Towing Co., (1907) 49 Or 204, 89 P 389; Denham v. Cuddeback, (1957) 210 Or 485, 311 P2d 1014; Head v. Lawrence, (1965) 240 Or 572, 403 P2d 17; Marsh v. Walters, (1965) 242 Or 210, 408 P2d 929. Head v. Lawrence, supra, overruling Hughes v. Flier, (1955) 203 Or 612, 280 P2d 992.

Alteration of a note may be proved under a general denial. Palomaki v. Laurell, (1917) 86 Or 491, 168 P 935.

In an action in quantum meruit for services rendered, it is competent for defendant to show, under a general denial, any matter affecting the value of the services, such as the fact that the work was unskillfully performed. Beemer v. Lenske, (1965) 241 Or 47, 402 P2d 90. Overruling Albee v. Albee, (1871) 3 Or 321.

In a trespass action, or a suit to enjoin a continuing trespass, defendant may prove a prescriptive easement under a general denial. Marsh v. Walters, (1965) 242 Or 210, 408 P2d 929.

Where no facts are alleged showing the grounds of the indebtedness, proof of payment may be admitted under a general denial. Petty v. Eveland, (1966) 243 Or 556, 414 P2d 349.

Under a denial of the contract, defendant could not prove illegality of the agreement. Buchtel v. Evans, (1891) 21 Or 309, 28 P 67.

That services sued for were rendered gratuitously may not be proved under a general denial. Purdy v. Van Keuren, (1911) 60 Or 263, 119 P 149.

In an action to foreclose a lien where the plaintiff alleged that defendants had or claimed some interest in the land, a general denial precluded defendants from proving any title to the premises. Hall v. Dartt, (1912) 62 Or 97, 122 P 898.

Evidence that the deed was given as a mortgage was admissible under a general denial. Head v. Lawrence, (1965) 240 Or 572, 403 P2d 17. Overruling Hughes v. Flier, (1955) 203 Or 612, 280 P2d 992.

(3) Paragraph (2)(b)

(a) In general. New matter is matter extrinsic to that set up in the complaint. Hubbard v. Olsen-Roe Transfer Co., (1924) 110 Or 618, 224 P 636; Brown v. Jones, (1931) 137 Or 520, 3 P2d 768.

A defense which, admitting the apparent validity of the transaction set out in the complaint, seeks to avoid its effect is new matter. Buchtel v. Evans, (1891) 21 Or 309, 28 P 67; Veasey v. Humphreys, (1895) 27 Or 515, 41 Or 8; Multnomah County v. Willamette Towing Co., (1907) 49 Or 204, 89 P 389.

A partial defense may be set up in the answer if pleaded as a partial defense. Webb v. Nickerson, (1884) 11 Or 382, 4 P 1126; Case Threshing Machine Co. v. Campbell, (1887) 14 Or 460, 469, 13 P 324; United States v. Ordway, (1887) 30 Fed 30.

To be available as a defense, illegality of contract is new matter which must be pleaded in the answer. Buchtel v. Evans, (1891) 21 Or 309, 28 P 67.

The defense of mitigation of damages is new matter which must be pleaded. Springer v. Jenkins, (1906) 47 Or 502, 84 P 479.

Where the answer denies negligence and avers specially that the injury complained of was caused by the negligence of the person hurt, without alleging that such negligence was contributory, the special plea is not equivalent to a confession and avoidance. Edlefsen v. Portland Ry., Light & Power Co., (1914) 69 Or 18, 136 P 832.

Where the contract sued upon is under seal or expresses consideration, the defense of want of consideration is new matter which must be pleaded. Tuthill v. Stoehr, (1940) 163 Or 461, 98 P2d 8.

(b) Pleas in abatement. See cases under ORS 16.300.

(c) Counterclaims. See also cases under ORS 16.300.

Counterclaim differs from setoff or recoupment; only counterclaim permits affirmative relief. Rogue R. Management Co. v. Shaw, (1966) 243 Or 54, 411 P2d 440.

Plaintiff's demurrer to a counterclaim of one alleged joint tortfeasor alleging a claim against the co-defendant should have been sustained. Lessig v. Conboy, (1959) 219 Or 373, 347 P2d 98.

(d) Affirmative defenses. The affirmative defenses must be pleaded to be available. **"Act of God,"** Hubbard v. Olsen-Roe Transfer Co., (1924) 110 Or 618, 224 P 636; **assumption of risk,** Olsen v. Silverton Lbr. Co., (1913) 67 Or 167, 135 P 752; **contributory negligence,** Grant v. Baker, (1885) 12 Or 329, 7 P 318; Johnson v. Ore. Short Line Ry., (1892) 23 Or 94, 31 P 283; Edlefson v. Portland Ry., Light & Power Co., (1914) 69 Or 18, 136 P 832; Lynn v. Stinnette, (1934) 147 Or 105, 31 P2d 764; **duress,** Horn v. Davis, (1914) 70 Or 498, 142 P 544; **estoppel,** Rugh v. Ottenheimer, (1877) 6 Or 231, 25 Am Rep 513; Remillard v. Prescott, (1879) 8 Or 37; Bruce v. Phoenix Ins. Co., (1893) 24 Or 486, 34 P 16; Bays v. Trulson, (1893) 25 Or 109, 35 P 26; Gladstone Lbr. Co. v. Kelly, (1913) 64 Or 163, 129 P 763; Joy v. Palethorpe, (1915) 77 Or 552, 152 P 230; McCully v. Heaverne, (1917) 82 Or 650, 160 P 1166, 162 P 863; Couch v. Scandinavian-Am. Bank, (1922) 103 Or 48, 197 P 284, 202 P 558, 203 P 890.

Former adjudication, Jenkins v. Jenkins, (1926) 119 Or 292, 247 P 145, 248 P 1095; **fraud,** Coos Bay R. Co. v. Siglin, (1894) 26 Or 387, 38 P 192; Hickey v. Coffey, (1917) 85 Or 383, 166 P 959; Tuthill v. Stoehr, (1940) 163 Or 461, 98 P2d 8; **illegality of contract,** Buchtel v. Evans, (1891) 21 Or 309, 28 P 67; Jameson v. Coldwell, (1885) 23 Or 144, 31 P 279; **mitigation of damages,** Springer v. Jenkins, (1906) 47 Or 502, 84 P 479; Morgan v. Johns, (1917) 84 Or 557, 165 P 369; **negligence of fellow-servant,** Duff v. Willamette Steel Works, (1904) 45 Or 479, 78 P 363, 668; Millen v. Pac. Bridge Co., (1909) 51 Or 538, 95 P 196; **payment,** Benicia Agricultural Works v. Creighton, (1892) 21 Or 495, 28 P 775, 30 P 676; Clark v. Wick, (1894) 25 Or 446, 36 P 165; Farmers & Traders Nat. Bank v. Hunter, (1899) 35 Or 188, 57 P 424; Western Rebuilders & Tractor Parts, Inc. v. Felmley, (1963) 237 Or 191, 386 P2d 813; **self-defense,** Konigsberger v. Harvey, (1885) 12 Or 286, 7 P 114; **statute of limitations,** Dutro v. Ladd, (1907) 50 Or 120, 91 P 459; Caro v. Wollenberg, (1914) 68 Or 420, 136 P 866; **Sunday contract,** Triphonoff v. Sweeney, (1913) 65 Or 299, 130 P 979; **that a trustee in bankruptcy is a bona fide purchaser,** Coates v. Smith, (1916) 81 Or 556, 160 P 517.

In claim and delivery against a warehouseman, he may set up as a defense his special interest in the property. Finn v. Erickson, (1928) 127 Or 107, 269 P 232, 270 P 767.

(e) Sufficiency of pleading new matter. Facts constituting the defense must be fully alleged. **"Act of God,"** Hubbard v. Olsen-Roe Transfer Co., (1924) 110 Or 618, 224 P 636; **bona fide purchaser,** Weber v. Rothchild, (1887) 15 Or 385, 15 P 650, 3 Am St Rep 162; **estoppel,** Ashley v. Pick,

(1909) 53 Or 410, 100 P 1103; Sabin v. Phoenix Stone Co., (1911) 60 Or 378, 118 P 494, 119 P 724; Wallace v. Amer. Life Ins. Co., (1925) 116 Or 195, 237 P 974; **former adjudication,** Heatherly v. Hadley, (1868) 2 Or 269; **fraud,** Brown v. Feldwert, (1905) 46 Or 363, 80 P 414; Gleason v. Denson, (1913) 65 Or 199, 132 P 530; **mitigation of damages,** Springer v. Jenkins, (1906) 47 Or 502, 84 P 479; **noncompliance by plaintiff with laws permitting a foreign corporation to do business,** Shipman v. Portland Constr. Co., (1913) 64 Or 1, 128 P 989; **statute of limitations,** Hill v. Wilson, (1927) 123 Or 193, 261 P 422; **tender of full amount due,** Proebstel v. Trout, (1911) 60 Or 145, 118 P 551; **usury,** Farrell v. Kirkwood, (1914) 69 Or 413, 139 P 110.

The answer should set forth the facts relied on as a defense and not merely conclusions deduced therefrom. Crane v. Larsen, (1887) 15 Or 345, 15 P 326.

New matter should be alleged in concise language without repetition; and each defense should be complete within itself. Casner v. Hoskins, (1913) 64 Or 254, 128 P 841, 130 P 55.

A defense of new matter should be averred with the same degree of care as that which is exercised in alleging in the complaint the facts which constitute the cause of action. Hubbard v. Olsen-Roe Transfer Co., (1924) 110 Or 618, 224 P 636.

FURTHER CITATIONS: White v. Allen, (1869) 3 Or 103; Meyer v. Edwards, (1897) 31 Or 23, 48 P 696; Cohn v. Wemme, (1905) 47 Or 146, 81 P 981, 8 Ann Cas 508; Swank v. Elwert, (1910) 55 Or 487, 504, 105 P 901; Benson v. Johnson, (1917) 85 Or 677, 165 P 1001, 167 P 1014; United States v. Aho, (1943) 51 F Supp 137; Jacobson v. Wheeler, (1951) 191 Or 384, 230 P2d 550; Hewitt v. Thomas, (1957) 210 Or 273, 310 P2d 313; Hill v. Carlstrom, (1959) 216 Or 300, 338 P2d 5; Pruett v. Lininger, (1960) 224 Or 614, 356 P2d 547; Fowler v. Donnelly, (1960) 225 Or 287, 358 P2d 485, 85 ALR2d 452; Cottage Grove Lbr. Co. v. Lillegren, (1961) 227 Or 24, 360 P2d 927; Lewis v. Merrill, (1961) 228 Or 541, 365 P2d 1052; Brusco v. Brusco, (1965) 241 Or 550, 407 P2d 645; Burnett v. W. Pac. Ins. Co., (1970) 255 Or 547, 469 P2d 602.

LAW REVIEW CITATIONS: 11 OLR 405.

16.300

NOTES OF DECISIONS

1. In general

This section does not permit interposition of equitable defenses in law actions. Cohn v. Wemme, (1905) 47 Or 146, 81 P 981; Donart v. Stewart, (1912) 63 Or 76, 126 P 608.

It is not required that answer containing counterclaim be served on plaintiff, but he is bound to take notice of the filing thereof within the time specified. Stivers v. Byrkett, (1910) 56 Or 565, 108 P 1014, 109 P 386.

A counterclaim is in effect a suit prosecuted by the defendant against the plaintiff. State v. Pac. Live Stock Co., (1911) 93 Or 196, 182 P 828.

The counterclaim is an enlargement of the scope of set-off and recoupment. Krausse v. Greenfield, (1912) 61 Or 502, 123 P 392, Ann Cas 1914B, 115.

An affirmative judgment, without limit, may be had on a counterclaim. Williams v. Pac. Sur. Co., (1913) 66 Or 151, 127 P 145, 131 P 1021, 132 P 959, 133 P 1186.

Defendant must set forth all his defenses in one answer. Wright v. Morton, (1928) 125 Or 563, 267 P 818.

In order to be available as a counterclaim, damages need not be liquidated. Hackett Digger Co. v. Carlson, (1928) 127 Or 386, 272 P 260.

(1) Construction. The provisions permitting counterclaim should be liberally construed to effectuate the purpose to prevent circuity of action, multiplicity of suits, unnecessary delay and expense to litigants. Wait v. Wheeler & Wilson Mfg. Co., (1892) 23 Or 297, 31 P 661; McCargar v. Wiley, (1924) 112 Or 215, 229 P 665.

The purpose of this section is to permit the expeditious and economical disposition of various claims between the litigants in a single suit unless the issues are so unrelated the consolidation of them would unduly complicate the trial. Wait v. Wheeler & Wilson Mfg. Co., (1892) 23 Or 297, 31 P 661; McCargar v. Wiley, (1924) 112 Or 215, 229 P 665; Mack Trucks Inc. v. Taylor, (1961) 227 Or 376, 362 P2d 364.

Although this section should be liberally construed, it should not be construed to include a counterclaim that does not fairly come within its terms. McCargar v. Wiley, (1924) 112 Or 215, 229 P 665.

In a declaratory judgment proceeding which is in the nature of a suit in equity one co-defendant may cross-complain against another. Burnett v. W. Pac. Ins. Co., (1970) 255 Or 547, 469 P2d 602.

(2) Sufficiency of pleading. The counterclaim should contain facts sufficient to constitute a cause of action by defendant against plaintiff, and it should be pleaded with same particularity required in a complaint. Le Clare v. Thibault, (1902) 41 Or 601, 69 P 552; Watson v. McLench, (1910) 57 Or 446, 110 P 482, 112 P 416; Hammer v. Campbell Gas Burner Co., (1914) 74 Or 126, 144 P 396; Chance v. Carter, (1916) 81 Or 229, 158 P 947; Farmers' State Bank v. Forsstrom, (1918) 89 Or 97, 173 P 935; Hackett Digger Co. v. Carlson, (1928) 127 Or 386, 272 P 260.

Objection to the sufficiency of the counterclaim is not waived by failure to demur. Kondo v. Aylsworth, (1916) 81 Or 225, 158 P 946; McCargar v. Wiley, (1924) 112 Or 215, 229 P 665.

A defendant cannot prove a counterclaim or any other affirmative defense without first tendering an issue in his answer. Farmers' & Traders' Nat. Bank v. Hunter, (1899) 35 Or 188, 57 P 424.

A counterclaim which refers to part of answer where matters referred to are sufficiently set forth is sufficient. Casner v. Hoskins, (1913) 64 Or 254, 128 P 841, 130 P 55.

New matter does not constitute a good counterclaim unless, if standing alone, it would contain all elements necessary for cause of action. Chance v. Carter, (1916) 81 Or 229, 158 P 947.

A counterclaim alleging that notes were procured by false representations, but not alleging that plaintiff's agent who made the false representations was then acting within the scope of his authority, did not state a defense. Meadow Valley Land Co. v. Manerud, (1916) 81 Or 303, 159 P 559.

A counterclaim on a note not stating who executed the note was fatally defective. Hammer v. Campbell Gas Burner Co., (1914) 74 Or 126, 144 P 396.

Special defense was insufficient because it was not

pleaded as a counterclaim with a demand for judgment. Mael v. Stutsman, (1911) 60 Or 66, 117 P 1093.

2. Subsection (1)

(1) One existing in favor of defendant and against the plaintiff. A claim in favor of one partner cannot be set-off against a partnership obligation, in the absence of agreement by all parties that the set-off shall be available. McDonald v. Mackenzie, (1893) 24 Or 573, 14 P 866, 868; Sanford v. Pike, (1918) 87 Or 614, 170 P 731, 171 P 394; Coleman v. Elmore, (1887) 31 Fed 391.

Where an action is brought by a partnership on a claim due the firm, no demand in favor of the defendant against some or one of its members can be used as a counterclaim. Coleman v. Elmore, (1887) 31 Fed 391.

A codefendant may not set-off a separate judgment acquired against the plaintiff and another who is not a party to prevent action. Richmond v. Bloch, (1900) 38 Or 317, 60 P 388.

If it would be necessary to bring in other parties in an action on a joint note, it cannot be set up as a counterclaim. Hammer v. Campbell Gas Burner Co., (1914) 74 Or 126, 144 P 396.

A set-off must be based on a claim held by defendant in the same capacity as that in which he is sued. Sanford v. Pike, (1918) 87 Or 614, 170 P 729, 731, 171 P 394.

In a suit to redeem from a mortgage sale, the sheriff could not abate the amount required for redemption by a counterclaim for waste committed by purchaser. Hansen v. Day, (1921) 99 Or 387, 195 P 344.

In an action by a municipality for trespass, an answer alleging malicious prosecution by mayor for the trespass was not a proper counterclaim. Eagle Point v. Hanscom, (1927) 121 Or 40, 252 P 399.

A defendant may not set up as a counterclaim a joint cause of action in favor of himself and his wife against the plaintiff and others. McGilchrist v. Fiedler, (1937) 155 Or 616, 65 P2d 388.

In an action on a note by an indorsee against the maker, the maker could not set up as a counterclaim a demand due him from the payee for money paid to use of the latter and for labor performed prior to maturity of the note. Drexler v. Smith, (1887) 30 Fed 754.

The indebtedness of a son to a corporation on a subscription to its stock was not a counterclaim in its favor against its debt on notes to the father arising out of an independent transaction. Waterbury v. United Telephone Co., (1914) 69 Or 49, 51, 138 P 232.

(2) Paragraph (1)(a). The counterclaim here authorized is designed as a substitute for recoupment. Krausse v. Greenfield, (1912) 61 Or 502, 123 P 392, Ann Cas 1914B, 115.

"Recoupment" is the keeping back or stopping of something which is due and is invoked when defendant has sustained damages from plaintiff's breach of the contract sued on. Krausse v. Greenfield, (1912) 61 Or 502, 123 P 392, Ann Cas 1914B, 115; Caples v. Morgan, (1916) 81 Or 692, 160 P 702, 1154, LRA 1917B, 760; Rogue R. Management Co. v. Shaw, (1966) 243 Or 54, 411 P2d 440.

A counterclaim is allowed when it arises out of the contract or transaction which is the subject of the original complaint. Wait v. Wheeler & Wilson Mfg. Co., (1892) 23 Or 297, 31 P 661.

A counterclaim under this paragraph may be allowed though not matured at the commencement of plaintiff's action. Sturtevant v. Dowson, (1924) 110 Or 155, 219 P 802, 222 P 294.

The purpose of the enactment is to enable parties to determine in a single action their claims against one another so far as they arise out of the same transaction. Benton County State Bank v. Nichols, (1936) 153 Or 73, 54 P2d 1166.

(a) "Transaction". At law, a counterclaim is not sufficient if it is only connected with the subject of action. Wait v. Wheeler & Wilson Mfg. Co., (1892) 23 Or 287, 31 P 661; Krausse v. Greenfield, (1912) 61 Or 502, 123 P 392, Ann Cas 1914B, 115; Chance v. Carter, (1916) 81 Or 229, 158 P 947; McCargar v. Wiley, (1924) 112 Or 215, 229 P 665; Eagle Point v. Hanscom, (1927) 121 Or 40, 252 P 399.

The word "transaction" embraces more than the word "contract," for a transaction may be a tort; it is an occurrence, and it includes all that takes place in the conducting of any item of business or affair. Chance v. Carter, (1916) 81 Or 299, 158 P 947; Benton County State Bank v. Nichols, (1936) 153 Or 73, 54 P2d 1166.

The transaction must be some business affair between the parties whereby mutual and reciprocal relations are created. Loewenberg v. Rosenthal, (1889) 18 Or 178, 22 P 601.

The term "transaction" should be liberally construed and a comprehensive meaning should be attached to it. Benton County State Bank v. Nichols, (1936) 153 Or 73, 54 P2d 1166.

In determining the extent and the nature of the transaction, the court is not restricted to the averments of the complaint but may also resort to the averments of the counterclaim itself. Id.

(b) Actions in tort. In an action in tort, a counterclaim in contract may be maintained only if it arises out of the same transaction. McCargar v. Wiley, (1924) 112 Or 215, 229 P 665; Parker v. Reid, (1928) 127 Or 578, 273 P 334.

In replevin where plaintiff's right to recover possession arises on contract, any matter which tends to defeat this right to possession may be pleaded as a counterclaim. Zimmerman v. Sunset Lbr. Co., (1910) 57 Or 309, 111 P 690, Ann Cas 1913A, 103, 32 LRA(NS) 123; Mack Trucks Inc. v. Taylor, (1961) 227 Or 376, 362 P2d 364. Mack Trucks Inc. v. Taylor, supra, overruling McCargar v. Wiley, (1924) 112 Or 215, 229 P 665.

In replevin where possession of property by defendant is obtained otherwise than by virtue of some contract no counterclaim is available as a defense. Zimmerman v. Sunset Lbr. Co., (1910) 57 Or 309, 111 P 690, Ann Cas 1913A, 103, 32 LRA(NS) 123.

A counterclaim cannot arise out of a mere trespass committed by a defendant wrongfully taking and carrying away the property of the plaintiff. Loewenberg v. Rosenthal, (1889) 18 Or 178, 22 P 601.

An independent trespass cannot be used as a counterclaim against another trespass consequent upon it. Miser v. O'Shea, (1900) 37 Or 231, 62 P 491, 82 Am St Rep 751.

In an action in tort, a counterclaim arising ex contractu cannot be maintained. Kondo v. Aylsworth, (1916) 81 Or 225, 228, 158 P 946.

Where plaintiff's right of possession arises from defendant's default in payment of debt under contract, no set-off is available to defeat such right unless amount of set-off equals or exceeds debt due; and defendant cannot recover judgment for excess unless facts pleaded as set-off constitute counterclaim. McCarger v. Wiley, (1924) 112 Or 215, 229 P 665.

It is only a cause of action growing out of the same transaction that may be pleaded as counterclaim in an action in tort. Eagle Point v. Hanscom, (1927) 121 Or 40, 252 P 399.

A claim for compensation for warehouse charges or for a lien for such compensation was allowed in an action for claim and delivery. Finn v. Erickson, (1928) 127 Or 107, 269 P 232, 270 P 767.

A cause of action for alienation of affections could not be set up as a counterclaim to an action for libel. Pitts v. King, (1932) 141 Or 23, 15 P2d 379, 472.

Where a counterclaim arising out of the transaction alleged in the complaint is in existence at the time the complaint is filed and is not then barred by the statute of limitations, it is not barred thereafter, but the statute will

be suspended until the counterclaim is filed. Lewis v. Merrill, (1961) 228 Or 541, 365 P2d 1052.

(c) Actions in contract. Where a tort is part of the transaction, a counterclaim may be pleaded in actions on contract. Zigler v. McClellan, (1887) 15 Or 499, 16 P 179; Everding & Farrell v. Gebhardt Lbr. Co., (1917) 86 Or 239, 168 P 304.

A tort cannot be used as a counterclaim to an action on a contract arising out of an independent transaction. Title Abstract Co. v. Nasburn, (1911) 58 Or 190, 113 P 2; Hackett Digger Co. v. Carlson, (1921) 127 Or 386, 272 P 260; McGilchrist v. Fiedler, (1937) 155 Or 616, 65 P2d 388.

In an action on a bill of exchange where partial failure of consideration was a defense, the defendant was allowed to recoup his damages though they were unliquidated. Davis v. Wait, (1885) 12 Or 425, 8 P 356.

In an action upon a contract for money expended by tenant in repairing a hotel, a counterclaim was allowed for damages to hotel as a result of tenant's carelessness in his occupancy. Zigler v. McClellan, (1887) 15 Or 499, 16 P 179.

Fraud or breach of warranty in sale of goods may be set up by way of counterclaim in an action on the note for the purchase price where note has not been transferred to an innocent holder. Scheiffelin v. Weatherred, (1890) 19 Or 172, 175, 23 P 898.

In an action on a note, a defendant cannot plead a counterclaim in conversion; he may however, waive the tort and plead a counterclaim in assumpsit for the purchase price. Casner v. Hoskins, (1913) 64 Or 254, 128 P 841, 130 P 55.

In an action for labor, causes of action for conversion and damages to personal property were not proper subject of counterclaim. Chamberlain v. Townsend, (1914) 72 Or 207, 213, 142 P 782, 143 P 924.

Purchaser at foreclosure sale may set-off against a claim for reasonable value of use and occupation of premises while in his possession money spent in care and protection of property together with reasonable value of his own services. Reichert v. Sooy-Smith, (1917) 85 Or 251, 165 P 1174, 1184.

In action against agent for money received for the sale of automobiles, the agent cannot recover on counterclaim expenses of trips to the principal office to adjust alleged overcharges made by plaintiff. Leavitt & Co. v. Dimmick, (1917) 86 Or 278, 168 P 292.

In an action against him for purchase price, purchaser can counterclaim for damages where his business did not increase to amount agreed. Loveland v. Warner, (1922) 103 Or 638, 204 P 622, 206 P 298.

In an action for rent, the defense of fraud at the inception of a lease was held not available under a plea of set-off or counterclaim. Kiernan v. Terry, (1894) 26 Or 494, 38 P 671.

A claim for an instalment of the price for raising a crop was subject to a set-off of defendant's damages, existing at the maturity of the instalment, and caused by the failure to properly care for the crop. Farmers' & Traders' Nat. Bank v. Woodell, (1900) 38 Or 294, 61 P 837, 65 P 520.

In an action by an abstracter to recover for services, a counterclaim for conversion of contents of defendant's abstracts was insufficient where the causes of action arose out of different transactions. Title Abstract Co. v. Nasburg, (1911) 58 Or 190, 113 P 2.

An answer alleging that defendant leased a horse to plaintiff, which was injured and died through plaintiff's want of care, stated a counterclaim on contract not on tort. Meadow Valley Land Co. v. Manerud, (1916) 81 Or 303, 159 P 559.

In an action for rent, the tenant could set up by way of recoupment a claim for damages for false representations which induced the defendant to lease at a higher price. Caples v. Morgan, (1916) 81 Or 692, 160 P 1154, LRA 1917B, 760.

In an action to recover instalments on a contract under which defendant was to have possession of the premises for the removal of timber, an answer setting up dispossession by a wrongful attachment when there was nothing due plaintiff constituted a proper counterclaim within this paragraph. Everding & Farrell v. Gebhardt Lbr. Co., (1917) 86 Or 239, 247, 168 P 304.

Action for services for carpenter work and for money loaned was not subject to counterclaim for damages to defendant's automobile, and unrelated tort. Ognjinovich v. Skulje, (1926) 119 Or 481, 250 P 238.

In an action on a promissory note, a counterclaim based upon charges that the plaintiff, by fraudulent representations, induced the defendant to sign the note and employ its proceeds in the purchase of corporate stock was held to arise out of the same transaction. Benton County State Bank v. Nichols, (1936) 153 Or 73, 54 P2d 1166.

In an action for value of services, a counterclaim for reasonable value of certain articles taken was proper as it arose out of same transaction. Siegman v. Siegman, (1936) 155 Or 173, 62 P2d 16.

(3) Paragraph (1)(b). A debt so certain that an action in indebitatus assumpsit would lie is a proper set-off. Rayburn v. Hurd, (1891) 20 Or 229, 25 P 635.

An account for goods sold and delivered may be pleaded as a set-off. Id.

An action upon a judgment of another state is an action in contract within the meaning of this paragraph. Rose v. NW Fire & Marine Ins. Co., (1896) 71 Fed 649.

A defendant is entitled to set-off his damages, growing out of contract, against a claim by assignee of such contract. Farmers' Traders' Nat. Bank v. Woodell, (1900) 38 Or 294, 61 P 837, 65 P 520.

This paragraph takes the place of set-off. Krausse v. Greenfield, (1912) 61 Or 502, 123 P 392, Ann Cas 1914B, 115.

A "set-off" is a money demand by defendant against plaintiff, arising on contract and constituting a debt independent of and unconnected with the cause of action set forth in the complaint. Id.

A cause of action in assumpsit for the value of property taken may be pleaded as a counterclaim in an action on a note. Casner v. Hoskins, (1913) 64 Or 254, 272, 128 P 841, 130 P 55.

Depositor may set-off his deposit against his indebtedness to insolvent bank. Upham v. Bramwell, (1922) 105 Or 597, 209 P 100, 210 P 706.

In an action to recover the price of tires, breach of the seller's agreement to sell on credit in return for additional guaranty constitutes a valid counterclaim. Michelin Tire Co. v. Williams, (1928) 125 Or 689, 268 P 56.

In an action on a note, a counterclaim for unliquidated damages did not stop the running of interest on the note from the time the claim accrued. Smith v. Turner, (1898) 33 Or 379, 54 P 166.

The value of improvements placed by defendant upon property of decedent was a proper counterclaim in an action by administratrix to recover the amount testatrix was compelled to pay as defendant's surety on notes. Watson v. McLench, (1910) 57 Or 446, 110 P 482, 112 P 416.

The damages sustained by a buyer for the wrongful interruption of his business by the seller in retaking the goods were not allowed as a counterclaim in an action on the contract for the stipulated damages from deterioration. Krausse v. Greenfield, (1912) 61 Or 502, 123 P 392, Ann Cas 1914B, 115.

In a suit by a bank upon a note where proceeds of a crop were paid bank with notice of defendant's lien, he was entitled to a counterclaim upon an implied contract for money had and received. LaGrande Nat. Bank v. Oliver, (1917) 84 Or 582, 165 P 682.

In an action on a promissory note, a counterclaim based on the premise that defendant was the purchaser of a truck

and that plaintiff breached the contract by wrongfully seizing the truck, was authorized. Heider v. Bernier, (1946) 179 Or 516, 173 P2d 302.

(a) Existing at the commencement of the action. Cause of action not existing at the time suit was commenced is not pleadable by way of counterclaim under this paragraph. Steelman v. Ore. Dairymen's League, (1920) 97 Or 535, 192 P 790; Sturtevant v. Dowson, (1924) 110 Or 155, 219 P 802, 222 P 294.

3. Subsection (2)

Defendant may set up as many defenses as he may have. Stanley v. Topping, (1914) 71 Or 590, 143 P 632; Hawkins v. Rodgers, (1919) 91 Or 483, 179 P 563, 905; In re Ouimette, (1870) 1 Sawy 47, Fed Cas No. 10,622.

Admissions prevail over denials when the answer contains both pleas to the same fact. Veasey v. Humphreys, (1895) 27 Or 515, 41 P 8; Peters v. Queen City Ins. Co., (1912) 63 Or 382, 126 P 1005; Duncan Lbr. Co. v. Willapa Lbr. Co., (1918) 93 Or 386, 401, 182 P 172, 183 P 476; Turner v. McCready, (1950) 190 Or 28, 222 P2d 1010.

Denials may be joined with defenses if the two are not inconsistent. McDonald v. Am. Mtg. Co., (1889) 17 Or 626; 21 P 883; Snodgrass v. Andross, (1890) 19 Or 236, 23 P 969; Veasey v. Humphreys, (1895) 27 Or 515, 41 P 8.

Defenses are not inconsistent when they may all be true; they are only inconsistent when some of them must necessarily be false if others are true, in such a case they cannot be united. McDonald v. Amer. Mtg. Co., (1889) 17 Or 626, 21 P 883; Susznick v. Alger Logging Co., (1915) 76 Or 189, 147 P 922, Ann Cas 1917C, 700; Swank v. Moisan, (1917) 85 Or 662, 166 P 962.

Denials of the execution of a note and a defense that the note was made with intent to hinder and delay creditors cannot be pleaded together unless the denials are qualified. Veasey v. Humphreys, (1895) 27 Or 515, 41 P 8; Maxwell v. Bolles, (1895) 28 Or 1, 41 P 661. Veasey v. Humphreys, supra, **distinguished in** Peters v. Queen City Ins. Co., (1912) 63 Or 382, 126 P 1005.

The counterclaims must be consistent one with the other. Duncan Lbr. Co. v. Willapa Lbr. Co., (1919) 93 Or 386, 182 P 172, 183 P 476; Gary Coast Agency, Inc. v. Lawrey, (1921) 101 Or 623, 201 P 214.

The defenses of ownership of the fee, and also ownership in another other than himself or the plaintiff may be pleaded together. Moore v. Willamette Trans. & Locks Co., (1879) 7 Or 355.

The defenses that the defendant never employed the plaintiffs and that they were guilty of gross negligence in the management of the business may be joined. McDonald v. Amer. Mtg. Co., (1889) 17 Or 626, 21 P 883.

A denial that defendant never agreed to pay and a defense of payment were properly joined. Snodgrass v. Andross, (1890) 19 Or 236, 23 P 969.

A qualified denial may be joined with an inconsistent defense. Veasey v. Humphreys, (1895) 27 Or 515, 41 P 8.

Defense that plaintiff, knowing defendants were sureties, relieved them from liability by an unauthorized extension of time is not inconsistent with a denial that anything was due on the note. Randall v. Simmons, (1902) 40 Or 554, 67 P 513.

Failure to deny the allegations of a complaint and a defense of the statute of limitations are not inconsistent. Gilman v. Cochran, (1907) 49 Or 474, 90 P 1001.

If defendant establishes either defense at the trial, he is entitled to a verdict though the other wholly fails. Id.

A defendant having pleaded a general denial may plead statute of limitations as an affirmative defense. Dutro v. Ladd, (1907) 50 Or 120, 91 P 459.

The test of inconsistency in defenses is whether proof of one necessarily disproves the other. Peters v. Queen City Ins. Co., (1912) 63 Or 382, 386, 126 P 1005.

Denials of execution of a policy is inconsistent with a separate defense which is based upon its existence, though the latter allegations are qualified by the clause "if the plaintiff is in possession of the said policy." Id.

The common-law rule that the different defenses must not be inconsistent is not abrogated by this section. Duncan Lbr. Co. v. Willapa Lbr. Co., (1919) 93 Or 386, 401, 182 P 172, 183 P 476.

Counterclaims for fraud and for breach of warranty are not inconsistent. Gary Coast Agency v. Lawrey, (1921) 101 Or 623, 201 P 214.

An answer setting up the Workmen's Compensation Act as affording the remedies for plaintiff, and alleging that plaintiff was guilty of negligence, did set forth inconsistent defenses. Susznick v. Alger Logging Co., (1915) 76 Or 189, 147 P 922, Ann Cas 1917C, 700.

Defenses that vendee bought on consignment and that he was agent with right to collect are inconsistent with a third defense that the sale was unconditional and without reservation. Pelton Water Wheel Co. v. Ore. Iron Co., (1918) 87 Or 248, 170 P 317.

(1) Pleas in abatement. The following are matters in abatement. **That the suit was premature,** McClung v. McPherson, (1905) 47 Or 73, 85, 81 P 567, 82 P 13; Barnum v. Lockhart, (1915) 75 Or 528, 540, 146 P 975; **irregularity in assignment of a note and mortgage,** Lassas v. McCarty, (1906) 47 Or 474, 84 P 76; **want of legal capacity in plaintiff to sue,** Scholl v. Belcher, (1912) 63 Or 310, 127 P 968; Peters v. Queen City Ins. Co., (1912) 63 Or 382, 126 P 1005; McIntosh Livestock Co. v. Buffington, (1925) 116 Or 399, 241 P 393. Prior to amendment in 1915, a plea in abatement could not be joined with a plea in bar; pleas in abatement had to be pleaded and tried before answering to the merits or they were waived. LaGrande v. Portland Public Market, (1911) 58 Or 126, 113 P 25; Harrison v. Birrell, (1911) 58 Or 410, 115 P 141; Scholl v. Belcher, (1912) 63 Or 310, 127 P 968; Peters v. Queen City Ins. Co., (1912) 63 Or 382, 126 P 1005; Devlin v. Moore, (1913) 64 Or 433, 130 P 35; Klamath Lbr. Co. v. Bamber, (1915) 74 Or 287, 142 P 359, 145 P 650.

Although a plea in abatement and a plea in bar may now be joined under this section, the matters in abatement must be tried separately prior to a hearing on the merits or the matters in abatement are waived. Vermont Farm Mach. Co. v. Hall, (1916) 80 Or 308, 156 P 1073; McIntosh Livestock Co. v. Buffington, (1925) 116 Or 399, 241 P 393; Credit Serv. Co. v. Korn, (1927) 121 Or 685, 256 P 1047.

Where they are heard together without objection, the plea in abatement should be separately submitted to the jury. Vermont Farm Mach. Co. v. Hall, (1916) 80 Or 308, 316, 156 P 1073.

The statute makes no change in the common-law requisites of pleas in abatement, except that it allows such pleas in the same answer with pleas to the merits. Walker v. Hewitt, (1923) 109 Or 366, 220 P 147, 35 ALR 100; Credit Serv. Co. v. Korn, (1927) 121 Or 685, 256 P 1047.

A pleader must allege the facts with particularity and conclude with a prayer asking for abatement of the action. Walker v. Hewitt, (1923) 109 Or 366, 220 P 147, 35 ALR 100; Credit Serv. Co. v. Korn, (1927) 121 Or 685, 256 P 1047.

Facts showing an action is prematurely brought are not available in bar, but such objection must be raised by plea or answer in abatement, unless the facts appear on the face of the complaint, when the objection may be raised by demurrer. Fay v. McConnell, (1961) 229 Or 128, 366 P2d 327; Cole v. Clark, (1965) 241 Or 292, 404 P2d 194, 405 P2d 632.

A plea in abatement must not only point out plaintiff's error, but the plea must show him how the error may be corrected. Walker v. Hewitt, (1923) 109 Or 366, 220 P 147, 35 ALR 100.

A plea in abatement is strictly construed. McIntosh Livestock Co. v. Buffington, (1925) 116 Or 399, 241 P 393.

A plea in abatement only delays the right to sue by

defeating the particular action. Winter v. Grimes, (1928) 124 Or 214, 264 P 359.

A plea in abatement that jurisdiction of the person had not been acquired is overcome by a plea to the merits which in effect is an allegation of general voluntary appearance. Duncan Lbr. Co. v. Willapa Lbr. Co., (1919) 93 Or 386, 401, 182 P 172, 183 P 476.

In an action for divorce based upon cruelty, the defendant may deny the acts of cruelty alleged and also plead in abatement. Marchand v. Marchand, (1931) 137 Or 335, 2 P2d 927.

A plea in abatement must be disregarded unless it is definite, certain, complete in itself, and demands a judgment of abatement. Mowrey v. Jarvey, (1961) 228 Or 96, 363 P2d 733.

Failure to allege lack of special capacity or authority as a plea in abatement waives any objection defendant might have had. Hann v. Nored, (1963) 233 Or 302, 378 P2d 569.

If it appears that the second action was brought for the purpose of vexation rather than to seek legal rights, the plea should be sustained. Wolfe Invs., Inc. v. Shroyer, (1965) 240 Or 549, 402 P2d 516.

Termination of a prior action even after filing of a plea in abatement in the second cause may be sufficient to defeat plea. Id.

Where a plea in abatement was not joined but was filed concurrently with the answer, the plea was not waived. Klamath Lbr. Co. v. Bamber, (1915) 74 Or 287, 142 P 359, 145 P 650.

Where a plea in abatement was heard and erroneously overruled, it was not waived by a subsequent answer. Weiser Land Co. v. Bohrer, (1915) 78 Or 202, 152 P 869.

Where a plea in abatement contained no prayer, the demurrable defect was waived when no objection was made until after verdict. Credit Serv. Co. v. Korn, (1927) 121 Or 685, 256 P 1047.

(2) Defenses separately stated. Defenses and counterclaims must be separately stated. LeClare v. Thibault, (1902) 41 Or 601, 69 P 552; Fleishman v. Meyer, (1905) 46 Or 267, 80 P 209; Hawkins v. Rodgers, (1919) 91 Or 483, 179 P 563, 905; In re Ouimette, (1870) 1 Sawy 47, Fed Cas No. 10,622; McKay v. Campbell, (1870) 1 Sawy 274, Fed Cas No. 8, 839.

The new matter constituting a defense must be complete in itself and must contain all that is necessary to answer the whole cause of action or that part of it to which it is addressed, but reference to matters of inducement or explanation, after such facts have been once set out, is sufficient to make them a part of the subsequent count. Gardner v. McWilliams, (1902) 42 Or 14, 69 P 915.

(3) Reference to the cause of action. Each of several defenses pleaded should refer to the cause of action which it is intended to answer. Hindman v. Edgar, (1893) 24 Or 581, 17 P 862; Wythe v. Myers, (1876) Fed Cas No. 18,119.

(4) Objections. The objection that defenses are not separately stated must be made by motion to strike or it will be deemed waived. Fleishman v. Meyer, (1905) 46 Or 267, 270, 80 P 209; In re Ouimette, (1870) Fed Cas No. 10,622.

The defect that the counterclaims are not separately stated is waived by not demurring to the new matter in the answer. Gary Coast Agency, Inc. v. Lawrey, (1921) 101 Or 623, 201 P 214.

Election of defenses cannot be required unless the defenses are so inconsistent that the proof of one disproves another. Fleishman v. Meyer, (1905) 46 Or 267, 80 P 209.

The circuit court has power to require an election between affirmative defenses, provided the application of plaintiff is made seasonably and the action of the court is based on some good reason shown by the record. Swank v. Moisan, (1917) 85 Or 662, 166 P 962; Pelton Water Wheel Co. v. Ore. Iron Co., (1918) 87 Or 248, 170 P 317.

An objection on the grounds of inconsistent defenses came too late when made after the jury had been impaneled. Rosenwald v. Ore. City Trans. Co., (1917) 84 Or 15, 163 P 831, 164 P 189.

(5) Admission of liability. Prior to the amendment of 1913, a defendant could not plead a counterclaim unless he admitted by his answer at least a part of the plaintiff's demand. Chance v. Carter, (1916) 81 Or 229, 158 P 947.

FURTHER CITATIONS: Rutenic v. Hamakar, (1902) 40 Or 444, 67 P 196; Montgomery v. Hall, (1961) 229 Or 428, 366 P2d 909; Burnett v. Western Pac. Ins. Co., (1970) 255 Or 547, 469 P2d 602.

LAW REVIEW CITATIONS: 3 OLR 253; 8 OLR 377; 11 OLR 405; 4 WLJ 24.

16.310

NOTES OF DECISIONS

1. In general

The counterclaim under this section is substantially the same as the cross-bill in chancery; it can only contain matter touching the original claim. Dove v. Hayden, (1875) 5 Or 500; Maffett v. Thompson, (1898) 32 Or 546, 52 P 565, 53 P 854; Hanna v. Hope, (1917) 86 Or 303, 168 P 618.

There is no such pleading as a cross-bill or cross-complaint in a suit in equity; it is contemplated that the relief by counterclaim will be ample. Templeton v. Cook, (1914) 69 Or 313, 316, 138 P 230; Rouse v. Riverton Coal Co., (1914) 71 Or 154, 156, 142 P 343.

There is a distinction between law and equity as to what may be set up as a counterclaim. Chance v. Carter, (1916) 81 Or 229, 158 P 947; McGilchrist v. Fiedler, (1937) 155 Or 616, 65 P2d 388.

Plaintiff by replying instead of demurring waives objection to propriety of relief demanded by counterclaim seeking to foreclose mortgage on same real estate sued for. Hanna v. Hope, (1917) 86 Or 303, 168 P 618.

A tax cannot be paid or discharged by a counterclaim against the taxing district or against the collector. Klamath Irr. Dist. v. Carlson, (1945) 176 Or 336, 157 P2d 514.

The defendant cannot recover a money judgment in excess of plaintiff's lien in a lien foreclosure proceeding. Wiggins v. Hendrickson, (1951) 191 Or 285, 229 P2d 652.

2. A suit by defendant against plaintiff

The counterclaim must state a cause which would support a suit by defendant against plaintiff. LeClare v. Thibault, (1902) 41 Or 601, 606, 69 P 552; Templeton v. Cook, (1914) 69 Or 313, 317, 138 P 230.

A claim in favor of one partner cannot be set-off against a partnership obligation in absence of an agreement of all parties that such a set-off should be available. Barnes v. Esch, (1917) 87 Or 1, 169 P 512; Sanford v. Pike, (1918) 87 Or 614, 170 P 729, 171 P 394.

An agreement between a trustee and the bank that a claim of the trustee be set-off against a claim against him in his individual capacity would be unlawful in the absence of consent by the beneficiaries. Sanford v. Pike, (1918) 87 Or 614, 170 P 729, 171 P 394.

A bank account which is jointly owned by defendants and others, and which has not been segregated, cannot be used by way of set-off. Id.

A lawful set-off must be based on a claim held by defendant in the same capacity as that in which he is sued. Id.

In a suit to redeem from the foreclosure sale, as distinguished from a suit to redeem from the mortgage, a counterclaim based on purchaser's demand against the judgment debtor will not be allowed. Hansen v. Day, (1921) 99 Or 387, 195 P 344.

In a suit where the plaintiff is a married woman, a claim in the answer for damages for cutting growing timber on the premises in dispute was held not a valid counterclaim because it was not maintainable against the plaintiff alone. Dove v. Hayden, (1875) 5 Or 500.

In a suit to compel the execution of a mortgage, a demand by one codefendant that his title be quieted against a defendant minor was not a proper counterclaim. Howe v. Kern, (1912) 63 Or 487, 125 P 834, 128 P 818.

(1) Equitable character of counterclaim. A counterclaim in an equity suit must contain the essential allegations to state a cause of suit. LeClare v. Thibault, (1902) 41 Or 601, 606, 69 P 552; Templeton v. Cook, (1914) 69 Or 313, 317, 138 P 230.

In a suit to enforce payment of a note and mortgage given for the purchase of land, defendant may set up in a counterclaim damage resulting from plaintiff's fraud in procurement of the note and mortgage. Foss v. Newbury, (1891) 20 Or 257, 25 P 669; Kreinbring v. Mathews, (1916) 81 Or 243, 159 P 75; Hanna v. Hope, (1917) 86 Or 303, 168 P 618; Gabel v. Armstrong, (1918) 88 Or 84, 171 P 190.

In a suit to foreclose, mortgagor cannot recover money judgment by way of counterclaim for damages arising out of a purely legal claim. Sears v. Martin, (1892) 22 Or 311, 313, 29 P 890; Hanna v. Hope, (1917) 86 Or 303, 168 P 618.

Independent of this section, defendant may recoup or set-off reciprocal demands where plaintiff is a nonresident or insolvent, if a denial of such privilege would work such hardship as to amount to a substantial denial of justice. LeClare v. Thibault, (1902) 41 Or 601, 69 P 552; Smith v. Willis, (1917) 84 Or 270, 163 P 810; Barnes v. Esch, (1917) 87 Or 1, 169 P 512; Hansen v. Day, (1921) 99 Or 387, 195 P 344; Pearson v. Richards, (1922) 106 Or 78, 93, 211 P 167.

A counterclaim is not a defense within the meaning of ORS 16.460. Haaland v. Miller, (1913) 67 Or 346, 350, 136 P 9; Tooze v. Heighton, (1916) 79 Or 545, 549, 156 P 245; Heidel v. Shute, (1917) 86 Or 210, 219, 167 P 586, 168 P 298.

A demand for damages for cutting timber on land involved in the suit is legal and not a proper counterclaim. Dove v. Hayden, (1875) 5 Or 500.

In a suit for divorce, the defendant may obtain the affirmative relief of a divorce. Dodd v. Dodd, (1887) 14 Or 338, 13 P 509.

The counterclaim, on which a defendant may have affirmative relief, must contain matters of equitable cognizance. Hanna v. Hope, (1917) 86 Or 303, 168 P 618.

In a suit to quiet title, foreclosure of a mortgage may be counterclaimed. Id.

A counterclaim is not demurrable although the damages alleged to have resulted from plaintiff's fraud were less than the amount of plaintiff's demand. Gabel v. Armstrong, (1918) 88 Or 84, 171 P 190.

In a suit to foreclose deed of trust, plaintiffs' conversion of cash and bonds after beginning of suit cannot be maintained as a counterclaim. Title Ins. & Trust Co. v. Northwestern Long Distance Telephone Co., (1918) 88 Or 666, 173 P 251.

A state of facts may constitute an equitable defense although falling short of a counterclaim. Pearson v. Richards, (1922) 106 Or 78, 211 P 167.

Usury in a note and mortgage is a defense to foreclosure but not a counterclaim. Vermont Loan & Trust Co. v. Bramel, (1924) 111 Or 50, 224 P 1085.

In a foreclosure suit a demand for the reasonable value of services under an agreement to credit them on the mortgage debt is defense of part payment and not a counterclaim. Hattrem v. Burdick, (1932) 138 Or 660, 6 P2d 18.

In a mortgage foreclosure action, defendant's claim that plaintiff failed to furnish water for irrigating the land pursuant to a contract made as part of the mortgage transaction was allowed as an equitable defense, although not strictly a counterclaim. Smith v. Willis, (1917) 84 Or 270, 163 P 810.

In a suit for reformation of contract, a claim for damages for breach was held not to be a proper counterclaim. Gamble v. Menefee Lbr. Co., (1934) 149 Or 79, 39 P2d 667.

Where defendant filed a legal counterclaim and plaintiff neither demurred to the counterclaim nor objected to introduction of evidence, judgment for defendant on legal counterclaims was affirmed. Chadwick v. Lakeview Mfg. Co., (1956) 208 Or 452, 301 P2d 1042.

(2) Against assignees of plaintiff. A judgment against plaintiff's assignor subsequent to transfer of a purchase price mortgage note to plaintiff may not be set-off against plaintiff suing to foreclose where plaintiff was not the real party in interest in the land. French & Co. v. Haltenhoff, (1914) 73 Or 244, 144 P 480.

In a suit to foreclose by an assignee of a note and mortgage, the mortgagor cannot counterclaim a judgment obtained against the mortgagee-assignor. Taylor v. Bickner, (1921) 100 Or 75, 176 P 839.

3. "Connected with the subject of suit"

Matters of purely legal cognizance which are in no way connected with the subject of the suit and not arising out of transactions upon which the plaintiff bases his claim, cannot be pleaded as counterclaim in equity. Burrage v. Bonanza Gold & Quicksilver Min. Co., (1885) 12 Or 169, 6 P 766; Sears v. Martin, (1892) 22 Or 311, 29 P 890; Conn v. Conn, (1892) 22 Or 452, 455, 30 P 230; Hattrem v. Burdick, (1932) 138 Or 660, 6 P2d 18.

To be connected with the subject of suit, defendant must be able to trace the origin of his right or claim for relief to the transaction which furnishes the plaintiff the ground of his suit. Burrage v. Bonanza Gold & Quicksilver Min. Co., (1885) 12 Or 169, 174, 6 P 766.

In a suit to enjoin the depositing of debris on plaintiff's land, defendant was not allowed to counterclaim for independent trespass of back-up water from plaintiff's dam. Miser v. O'Shea, (1900) 37 Or 231, 62 P 491, 82 Am St Rep 751.

The connection of a counterclaim with the subject of suit must be direct and immediate, and such that the parties had the counterclaim in contemplation when dealing with each other. LeClare v. Thibault, (1902) 41 Or 601, 69 P 552.

Connection with the subject of the suit renders the counterclaim sufficient in equity but not at law. Krausse v. Greenfield, (1912) 61 Or 502, 123 P 392.

Defendant's counterclaim for an accounting of secret profits, connected with the subject of suit, should have been allowed regardless of the year in which the profits were earned. Marnon v. Vaughn Motor Co., (1948) 184 Or 103, 194 P2d 992.

In a suit to cancel a lease, an answer setting up performance by defendants and asking specific performance of a covenant of sale of the leased premises was so connected with the contract alleged as to form a proper counterclaim. Merrill v. Hexter, (1908) 52 Or 138, 94 P 972, 96 P 865.

4. Effect of dismissal by plaintiff

A counterclaim implies a cause of action in plaintiff, and an answer wholly denying any cause and setting up claims for money expended for the benefit of the land claimed by plaintiff, states no counterclaim which avoids voluntary nonsuit. Dove v. Hayden, (1875) 5 Or 500.

The dismissal of a complaint in an equitable suit after an answer containing a counterclaim has been filed leaves the case to be tried upon the counterclaim. Maffett v. Thompson, (1898) 32 Or 546, 52 P 565, 53 P 854.

In a suit to foreclose a mortgage, a plea of usury was held not a "counterclaim," precluding a voluntary nonsuit. Vermont Loan & Trust Co. v. Brämel, (1924) 111 Or 50, 224 P 1085.

FURTHER CITATIONS: First Nat. Bank v. Seaweard, (1916) 78 Or 567, 152 P 883; State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828; Goin v. Chute, (1928) 126 Or 446, 260 P 998, 270 P 492, 493, 494; Jacobson v. Wheeler, (1951) 191 Or 384, 230 P2d 550; Cole v. Fogel, (1957) 210 Or 257, 310 P2d 315; Cottage Grove Lbr. Co. v. Lillegren, (1961) 227 Or 24, 360 P2d 927.

LAW REVIEW CITATIONS: 8 OLR 377; 4 WLJ 28.

16.320

NOTES OF DECISIONS

A departure from the complaint is not a ground for demurrer to the reply. Compton v. Perkins, (1933) 144 Or 346, 24 P2d 670.

FURTHER CITATIONS: Miller v. Hirchberg, (1895) 27 Or 522, 40 P 506; Capps v. Geo. Pac. Corp., (1969) 253 Or 248, 453 P2d 935.

16.330

NOTES OF DECISIONS

1. In general
2. Want of jurisdiction
3. Failure to state cause of action
4. Waiver of objection by answering over

1. In general

Except as to jurisdiction of the court and sufficiency of facts to state a cause of action, the other defects specified in ORS 16.260 must be taken by demurrer or answer, or they are waived. **Capacity to sue,** Butts v. Purdy, (1912) 63 Or 150, 125 P 313, 127 P 25; Beamish v. Noon, (1915) 76 Or 415, 149 P 522; Harney Valley Irr. Dist. v. Weittenhiller, (1921) 101 Or 1, 198 P 1093; Cockerham v. Potts, (1933) 143 Or 80, 20 P2d 423; Chandler v. Hultgren, (1937) 156 Or 142, 66 P2d 268; **defect of parties,** Thompson v. Hibbs, (1904) 45 Or 141, 76 P 778; North v. Union Sav. & Loan Assn., (1911) 59 Or 483, 177 P 822, 825; Triphonoff v. Sweeney, (1913) 65 Or 299, 130 P 979; Wolf v. Eppenstein, (1914) 71 Or 1, 140 P 751; Portland v. Coffey, (1913) 67 Or 507, 135 P 358; Burggraf v. Brocha, (1915) 74 Or 381, 145 P 639; Schultz v. Selberg, (1916) 80 Or 668, 157 P 1114; Pulkrabek v. Bankers' Mtg. Corp., (1925) 115 Or 379, 238 P 347; Thompson v. Union Fishermen's Coop. Packing Co., (1926) 118 Or 436, 235 P 694, 246 P 733; Liberty Inc. v. Columbia Trust & Sav. Bank, (1927) 121 Or 289, 254 P 1016; McInnis v. Atlantic Inv. Corp., (1931) 137 Or 648, 3 P2d 118, 4 P2d 314; De Carli v. O'Brien, (1935) 150 Or 35, 41 P2d 411, 97 ALR 693; Nordling v. Johnston, (1955) 205 Or 315, 283 P2d 994, 287 P2d 420; Hann v. Nored, (1963) 233 Or 302, 378 P2d 569; Aspuria v. Mello, (1970) 255 Or 128, 464 P2d 680.

Misjoinder of causes of action, Corbett v. Wrenn, (1894) 25 Or 305, 35 P 658; Bohn v. Wilson, (1909) 53 Or 490, 101 P 202; Short v. Short, (1912) 62 Or 118, 123 P 388; Roethler v. Cummings, (1917) 84 Or 442, 165 P 355; Sayles v. Daniels Sales Agency, (1921) 100 Or 37, 196 P 465; Gary Coast Agency, Inc., v. Lawrey, (1921) 101 Or 623, 201 P 214; Christman v. Salway, (1922) 103 Or 666, 205 P 541; State v. Montag, (1930) 132 Or 587, 286 P 995; **bar of statute of limitations,** Goodwin v. Morris, (1881) 9 Or 322; Branch v. Lambert, (1922) 103 Or 423, 205 P 995; Elliott v. Mosgrove, (1939) 162 Or 507, 91 P2d 852; Darling v. Christensen, (1941) 166 Or 17, 109 P2d 585.

2. Want of jurisdiction

The objection that the court is without jurisdiction is not waived by failure to urge it by demurrer or answer. King v. Boyd, (1873) 4 Or 326; Evarts v. Steger, (1874) 5 Or 147; Willits v. Walter, (1898) 32 Or 411, 52 P 24; Richardson's Guardianship, (1901) 39 Or 246, 64 P 390; Adams v. Kelly, (1903) 44 Or 66, 74 P 399; Kalyton v. Kalyton, (1904) 45 Or 116, 128, 74 P 491, 78 P 332; Woolley v. Plaindealer Pub. Co., (1906) 47 Or 619, 84 P 473, 5 LRA(NS) 498; Parrish v. Parrish, (1908) 52 Or 160, 96 P 1066; Maxwell v. Frazier, (1908) 52 Or 183, 96 P 548, 18 LRA(NS) 102; Montesano Lbr. Co. v. Portland Iron Works, (1915) 78 Or 53, 152 P 244; Duncan Lbr. Co. v. Willapa Lbr. Co., (1919) 93 Or 386, 182 P 172, 183 P 476; Dippold v. Cathlamet Tbr. Co., (1920) 98 Or 183, 193 P 909.

3. Failure to state a cause of action

The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by failure to demur or answer. Askren v. Squire, (1896) 29 Or 228, 45 P 779; Hargett v. Beardsley, (1898) 33 Or 301, 54 P 203; Moore v. Halliday, (1903) 43 Or 243, 72 P 801, 99 Am St Rep 724; David v. Moore, (1905) 46 Or 148, 79 P 415; Horn v. U.S. Min. Co., (1905) 47 Or 124, 81 P 1009; Whitney Co. v. Smith, (1912) 63 Or 187, 126 P 1000; Pratt v. Gibson, (1918) 87 Or 609, 171 P 223; Iwanicki v. State Ind. Acc. Comm., (1922) 104 Or 650, 205 P 990, 29 ALR 682; Duby v. Hicks, (1922) 105 Or 27, 209 P 156; Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 232 P 637, 233 P 561, 234 P 261; Thompson v. Union Fishermen's Coop. Packing Co., (1926) 118 Or 436, 235 P 694, 246 P 733; Sterrett v. Hurlburt, (1929) 129 Or 520, 275 P 689, 278 P 986; Milton v. Hare, (1929) 130 Or 590, 380 P 511; McCargar v. Fed. Sec. Co., (1930) 134 Or 342, 284 P 179, 293 P 595; State v. Mott, (1940) 163 Or 631, 97 P2d 950; Ross v. Robinson, (1942) 166 Or 293, 128 P2d 956; The Alpha Corp. v. Multnomah County, (1948) 182 Or 671, 189 P2d 988; Johnson v. Sch. Dist. 12, (1957) 210 Or 585, 312 P2d 591.

Although the rule is that the objection to the sufficiency of the complaint to state a cause of action is not waived by failure to demurrer, every reasonable inference will be resolved in support of the pleading if not so questioned. Siverson v. Clanton, (1918) 88 Or 261, 170 P 933, 171 P 1051; Sterrett v. Hurlburt, (1929) 129 Or 520, 275 P 689, 278 P 986.

4. Waiver of objection by answering over

See also cases under ORS 16.260.

Prior to the 1949 amendment, where defendant answered over after his demurrer was overruled, he was held to have waived his objection except in cases involving want of jurisdiction of the court, failure of complaint to state cause of action and bar by statute of limitations. Wells v. Applegate, (1885) 12 Or 208, 6 P 770; Hughes v. McCullough, (1901) 39 Or 372, 65 P 85; Byers v. Ferguson, (1902) 41 Or 77, 65 P 1067, 68 P 5; Hillman v. Young, (1913) 64 Or 73, 127 P 793, 129 P 124; Graham v. Corvallis & E. R. Co., (1914) 71 Or 477, 142 P 774; Williams v. Pac. Sur Co., (1913) 66 Or 151, 127 P 145, 131 P 1021, 132 P 959, 133 P 1186; Craft v. Flesher, (1936) 153 Or 348, 55 P2d 1101, 56 P2d 1141; Buckman v. Hill Military Academy, (1948) 182 Or 621, 189 P2d 575.

A defendant-executrix does not waive the defense of the statute of limitations by failing to make the proper demurrer. Ricker v. Ricker, (1954) 201 Or 416, 270 P2d 150.

Objection that the complaint does not constitute a cause of action may be first raised on appeal. Johnson v. Sch. Dist. 12, (1957) 210 Or 585, 312 P2d 591.

Misjoinder is a pleading defect that is waived if not raised by demurrer. DeCicco v. Ober Logging Co., Inc., (1968) 251 Or 576, 447 P2d 297.

FURTHER CITATIONS: Hewitt v. Thomas, (1957) 210 Or

273, 310 P2d 313; Standley v. Mueller, (1957) 211 Or 198, 315 P2d 125; Salitan v. Dashney, (1959) 219 Or 553, 347 P2d 974; Spaulding v. Miller, (1960) 221 Or 503, 350 P2d 1073; Dowell v. Mossberg, (1960) 226 Or 173, 355 P2d 624, 359 P2d 541; Houston v. Pomeroy, (1961) 227 Or 499, 362 P2d 708; Fay v. McConnell, (1961) 229 Or 128, 366 P2d 327; Owen v. Bradley, (1962) 231 Or 94, 371 P2d 966; 81 ALR 2d 532; Steenson v. Robinson, (1964) 236 Or 414, 389 P2d 27; Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614; State Constr. Corp. v. Scoggins, (1971) 259 Or 371, 485 P2d 391.

LAW REVIEW CITATIONS: 1 (2) OLR 39; 8 OLR 294; 28 OLR 412.

16.340

NOTES OF DECISIONS

Where a defendant in a suit answers to the merits and asks for equitable relief, he cannot then question the jurisdiction of the subject-matter on the ground that there is an adequate remedy at law. Kitcherside v. Myers, (1881) 10 Or 21; Municipal Sec. Co. v. Baker County, (1898) 33 Or 338, 54 P 174; Larch Mountain Inv. Co. v. Garbade, (1902) 41 Or 123, 68 P 6; Nicholas v. Title & Trust Co., (1916) 79 Or 226, 154 P 391, Ann Cas 1917A, 1149.

In a suit to remove a cloud from title, an objection that plaintiff is not in actual possession is waived by defendant where he does not challenge the plaintiff's right in equity by an appropriate plea or demurrer and defendant prays for equitable relief. O'Hara v. Parker, (1895) 27 Or 156, 39 P 1004; State v. Blize, (1900) 37 Or 404, 61 P 735; Bradtl v. Sharkey, (1911) 58 Or 153, 155, 113 P 653; Carroll v. McLaren, (1911) 60 Or 233, 235, 118 P 1034; Bowsman v. Anderson, (1912) 62 Or 431, 436, 123 P 1092, 125 P 270.

Where complaint alleges facts giving an equity court jurisdiction, and the answer denies the same, the issue thus raised is not waived by answering to the merits where defendant does not ask for affirmative relief. Moore v. Shofner, (1902) 40 Or 488, 67 P 511; Hume v. Burns, (1907) 50 Or 124, 90 P 1009.

Where defendant in a boundary suit admitted the dispute and prayed that the boundary be established on the line claimed by him, he waived any objection to the jurisdiction to establish the boundary. Kilgore v. Carmichel, (1903) 42 Or 618, 72 P 637; McDowell v. Carothers, (1915) 75 Or 126, 130, 146 P 800.

Where the subject of the controversy is within the field of equity jurisdiction, an objection to the lack of some element essential to complete jurisdiction is waived by answering to the merits. Maxwell v. Frazier, (1908) 52 Or 183, 96 P 548, 18 LRA(NS) 102.

An entire lack of matter of equitable cognizance is not waived by answering to the merits. Maxwell v. Frazier, (1908) 52 Or 183, 96 P 548, 18 LRA(NS) 102; Bowsman v. Anderson, (1912) 62 Or 431, 123 P 1092, 125 P 270.

Where defendants brought a separate suit, lacking in equity, to which the plaintiff in the first suit answered without asking relief, the rule precluding objection after answer was held not to apply. Oregon-Wash. R.R. & Nav. Co. v. Reed, (1918) 87 Or 398, 414, 169 P 342, 170 P 300.

FURTHER CITATIONS: State Constr. Corp. v. Scoggins, (1971) 259 Or 371, 485 P2d 391.

LAW REVIEW CITATIONS: 4 WLJ 22.

16.360

NOTES OF DECISIONS

1. In general
2. Facts occurring after the former pleading
3. Supplemental pleadings

1. In general

The common-law rule is adopted by this section. Holladay v. Elliott, (1871) 3 Or 340; Noble v. Beeman-Spaulding-Woodward Co., (1913) 65 Or 93, 131 P 1006, 46 LRA(NS) 162.

The objection that a supplemental complaint has been filed without leave of court should be taken by motion to strike from the files, and is waived by answering to the merits. Osgood v. Osgood, (1899) 35 Or 1, 56 P 1017; Fleischner v. First Nat. Bank, (1900) 36 Or 553, 54 P 884, 60 P 603, 61 P 345.

Events occurring after pleadings are joined are not admissible in evidence if not alleged in supplemental pleadings. Trotter v. Stayton, (1904) 45 Or 301, 77 P 395; Ream v. Ream, (1916) 81 Or 175, 158 P 670.

It is largely in the discretion of the trial court whether a party should be permitted to file a supplemental pleading. May Stores v. Bishop, (1930) 131 Or 670, 282 P 1080; Suetter v. Kern & Co., (1934) 146 Or 96, 29 P2d 534; Christman v. Scott, (1948) 183 Or 113, 191 P2d 389.

The purpose of the supplemental pleading is to bring into the record new facts which will enlarge or change the kind of relief to which the plaintiff is entitled, and such facts are allowable even though they of themselves constitute a right of action. May Stores v. Bishop, (1930) 131 Or 670, 282 P 1080.

2. Facts occurring after the former pleading

This section has no application to a defense or cause of action which was in existence, though unknown, at the time of the former pleading. Holladay v. Elliott, (1871) 3 Or 340; Continental Guar. Corp. v. Chrisman, (1930) 134 Or 524, 294 P 596.

A supplemental answer sets up facts occurring subsequently to the former answer and an amendment sets up a defense which was in existence at the time of the original answer; facts of the former class are admissible from the bare circumstance of having occurred after the party had an opportunity to plead, but in the latter case the court has no right to admit the facts unless the neglect or delay is shown to be excusable. White v. Allen, (1869) 3 Or 103; Holladay v. Elliott, (1871) 3 Or 340.

An original complaint which states no cause of action cannot be remedied by supplemental pleading. Fleischner v. First Nat. Bank, (1900) 36 Or 553, 54 P 884, 60 P 603, 61 P 345; Clark v. Morrison, (1916) 80 Or 240, 156 P 429.

A defense arising after commencement of the action but before filing of the answer may be properly set forth in the answer. O'Connor v. Van Hoy, (1896) 29 Or 505, 45 P 762.

Where, pending an appeal, the conditions change so that a decree predicated on the facts existing at the time of trial would be inequitable, the cause will be remanded so that supplemental pleadings may be filed. Royal v. Royal, (1897) 30 Or 448, 47 P 828, 48 P 695.

Matters occurring after the filing of the original complaint and germane to the cause of suit may not be set out by amendment instead of supplemental pleading except where no answer has been filed at the time the amendment is made. Jennings v. Jennings, (1906) 48 Or 69, 85 P 65.

An additional pleading was not necessary in a divorce proceedings when cohabitation of the parties occurred after filing of the complaint and before service of summons. State ex rel. Pearcy v. Long, (1963) 234 Or 630, 383 P2d 377.

3. Supplemental pleadings

In bringing in new parties supplemental pleadings must be filed showing the new party's connection with the case;

these supplemental pleadings with a new or additional summons should be served on new party. White v. Johnson, (1895) 27 Or 282, 292, 40 P 511, 50 Am St Rep 726; Hughes v. Honeyman, (1949) 186 Or 616, 208 P2d 355.

An answering defendant cannot rely on a default judgment taken against his codefendant as a bar to a recovery against him unless he pleads it by a supplemental answer. Noble v. Beeman-Spaulding-Woodward Co., (1913) 65 Or 93, 131 P 1006, 46 LRA(NS) 162; Wagenaar v. Beeman-Woodward Co., (1913) 65 Or 109, 131 P 1023.

A supplemental answer is not a waiver of all former pleas unless they are inconsistent. Hamlin v. Kinney, (1863) 2 Or 91.

After an assignment of the cause of action pendente lite, the action may be continued in the name of the assignor for the benefit of the assignee without filing a supplemental complaint. King v. Miller, (1909) 53 Or 53, 97 P 542.

A supplemental answer need not be a complete defense; it may be pleaded, although constituting a partial defense, so that the facts alleged therein strengthen the material allegations of the answer already filed. Suetter v. Kern & Co., (1934) 146 Or 96, 29 P2d 534.

But where no new facts have occurred subsequent to filing amended complaint which would tend to change the kind of relief asked for, supplemental complaint is not necessary and order of substitution is sufficient. Hughes v. Honeyman, (1949) 186 Or 616, 208 P2d 355.

A supplemental complaint, setting up accord and satisfaction entered after judgment was rendered, filed in circuit court after defendant had appealed was sufficient without setting up the original cause of action. Robinson v. Carlon, (1899) 34 Or 319, 55 P 959.

It was proper under this section to permit the filing of a supplemental pleading for instalments of rent due in addition to those alleged in original complaint. May Stores v. Bishop, (1930) 131 Or 670, 282 P 1080.

Averment of appointment of guardian ad litem in an amended complaint rather than supplemental pleading did not make complaint demurrable. Christman v. Scott, (1948) 183 Or 113, 191 P2d 389.

FURTHER CITATIONS: Elliot v. Teal, (1878) 5 Sawy 188, Fed Cas No. 4,389; United States v. Bauman, (1943) 56 F Supp 109; Todd v. Occidental Life Ins. Co., (1956) 208 Or 634, 295 P2d 870, 303 P2d 492; Cascade Whse. Co. v. Dyer, (1970) 256 Or 377, 474 P2d 325.

16.370

NOTES OF DECISIONS

When a pleading is amended, the original pleading ceases to be a part of the record, as do all motions and demurrers relating thereto. Wells v. Applegate, (1885) 12 Or 208, 6 P 770; Condon Nat. Bank v. Rogers, (1911) 60 Or 189, 118 P 846, Ann Cas 1914A, 101; Everding & Farrell v. Gebhardt, (1917) 86 Or 239, 168 P 304.

Where a complaint so indefinite and uncertain that its real character as being in tort or in contract cannot be determined, it may be amended so as to uphold an attachment that has already been issued in the action. Suksdorff v. Bigham, (1886) 13 Or 369, 12 P 818.

An amendment of a pleading cannot be made except by filing and serving a copy of the amended pleading upon the adverse parties. Goodale v. Coffee, (1893) 24 Or 346, 33 P 990.

The only distinction between an amendment under this section and amendment under H 101 [ORS 16.390] is that under the former, amendment is made as a matter of course while in the latter it can be done only by leave of court in furtherance of justice; under both sections a new cause of action or defense may be set up. Talbot v. Garretson, (1897) 31 Or 256, 49 P 978.

A decree entered upon an amended complaint that was not served cannot be sustained. Tolmie v. Otchin, (1854) 1 Or 95; Nodine v. Richmond, (1906) 48 Or 527, 87 P 775.

In passing on a demurrer to the amended pleading, the court can look only to the facts alleged in such pleading. Condon Nat. Bank v. Rogers, (1911) 60 Or 189, 118 P 846, Ann Cas 1914A, 101.

The code is liberal in permitting amendments to pleadings. Eastman v. Jennings-McRae Logging Co., (1914) 69 Or 1, 138 P 216, Ann Cas 1916A, 185.

An order denying motion to amend caption was not appealable, since plaintiff had right without court's permission to file an amended petition. Schulmerich v. First Nat. Bank, (1960) 220 Or 528, 349 P2d 849.

FURTHER CITATIONS: United States v. Bauman, (1943) 56 F Supp 109; Mazama Tbr. Prod. v. Taylor, (1965) 239 Or 568, 399 P2d 26.

16.380

NOTES OF DECISIONS

1. Pleading over after demurrer overruled

An application to plead over after demurrer overruled is addressed to the sound discretion of the trial court. Powell v. Dayton R. Co., (1886) 14 Or 22, 12 P 83.

Upon appeal from a judgment overruling a demurrer, the Supreme Court will not entertain a motion to plead over. Id.

Where the court in its discretion granted leave to defendant to answer after the overruling of his demurrer, the court in its descretion could, during trial, grant a nonsuit on plaintiff's motion. Hutchings v. Royal Bakery & Confectionery Co., (1911) 60 Or 48, 118 P 185.

2. Amendment after demurrer sustained

An order sustaining a demurrer does not deprive the court of jurisdiction, but leaves it with authority to allow an amendment or the filing of a new pleading. Sears v. Dunbar, (1907) 50 Or 36, 91 P 145; Giant Powder Co. v. Ore. W. Ry., (1909) 54 Or 325, 101 P 209, 103 P 501; Rockwood v. Grout, (1910) 55 Or 389, 106 P 789.

After the affirmance of a decree sustaining a demurrer to a complaint and remand of the cause for further proceedings, the court below is at liberty to determine in the first instance whether the plaintiff should be allowed to amend his complaint. Fowle v. House, (1897) 30 Or 305, 47 P 787; State v. Metschan, (1898) 32 Or 372, 388, 46 P 791, 53 P 1071, 41 LRA 692; Lieuallen v. Mosgrove, (1898) 33 Or 282, 291, 54 P 200, 664.

The power of the court to allow amendments to the pleadings after the remand of cause is the same as it was before the appeal was taken. Branson v. Oregonian Ry. Co., (1883) 11 Or 161, 2 P 86; Lieuallen v. Mosgrove, (1900) 37 Or 446, 448, 61 P 1022; Nye v. Bill Nye Mill. Co., (1905) 46 Or 302, 304, 80 P 94.

Allowance of an amendment to a pleading is in the sound discretion of the trial judge; his rulings are reviewable only for an abuse of such discretion. Wallace v. Baisley, (1892) 22 Or 572, 30 P 432; Hall v. Cutler Bindery Co., (1934) 145 Or 565, 26 P2d 1109.

The power to amend should be liberally exercised in furtherance of justice, but care should be taken that the opposite party is not misled to his prejudice. Swift v. Mulkey, (1886) 14 Or 59, 12 P 76; Baldock v. Atwood, (1891) 21 Or 73, 26 P 1058; Garrison v. Goodale, (1892) 23 Or 307, 31 P 709.

The granting of an amendment is not a matter of right, and the trial court may strike out an amended answer filed without leave. West v. McDonald, (1915) 74 Or 421, 144 P 655; Wiggins Co. v. Fleming, (1928) 123 Or 644, 263 P 390.

Following the sustaining of a demurrer, a motion for an order permitting the filing of a fourth amended complaint was properly denied, where the plaintiff tendered his pleading after the time limited, without explanation for his tardiness. Timmer v. Leonard, (1932) 139 Or 274, 9 P2d 1048.

3. Subject matter of amendments

See cases under ORS 16.390.

FURTHER CITATIONS: Saylor v. Commonwealth Inv. & Banking Co., (1900) 38 Or 204, 62 P 652; McFarlane v. McFarlane, (1904) 45 Or 360, 77 P 837; Sears v. Dunbar, (1907) 50 Or 36, 91 P 145; La Grande v. Portland Public Market, (1911) 58 Or 126, 113 P 25; State v. Clatsop County, (1912) 63 Or 377, 125 P 271; Johnston v. City of Grants Pass, (1927) 120 Or 364, 251 P 713, 252 P 1118; In re Miller Estate, (1962) 229 Or 618, 368 P2d 327.

16.390

NOTES OF DECISIONS

1. In general

Amendments to pleadings should be allowed with great liberality if they are essential to a fair trial on the merits of the case. **Before trial,** Swift v. Mulkey, (1886) 14 Or 59, 12 P 76; York v. Nash, (1902) 42 Or 321, 71 P 59; Eaid v. Nat. Cas. Co., (1927) 122 Or 547, 259 P 902; Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072; **during trial,** Pacific Co. v. Cronan, (1916) 82 Or 388, 161 P 692.

Courts should be more liberal in allowing amendments asked for by defendants, for if denied to them, they would forever lose their defense. Garrison v. Goodale, (1892) 23 Or 307, 31 P 709; Pacific Co. v. Cronan, (1916) 82 Or 388, 161 P 692.

A copy of the complaint as amended must be served on the defendant before judgment for failure to answer the same can be taken against him. Tolmie v. Otchin, (1854) 1 Or 95.

An application to amend should be supported by affidavit showing some reasonable excuse. Garrison v. Goodale, (1892) 23 Or 307, 31 P 709.

In permitting the filing of an amendment, the court does not pass on amendment's sufficiency as to preclude a demurrer or motion to strike; the amended pleading is subject to such tests as is an original pleading. Pacific Mill Co. v. Inman, Poulsen & Co., (1907) 50 Or 22, 90 P 1099.

The provision of this section permitting amendment of "proceedings" in furtherance of justice does not authorize amendment of a writ of attachment. Starkey v. Lunz, (1910) 57 Or 147, 110 P 702, Ann Cas 1912D, 783.

The court may strike out an amended pleading filed without leave. West v. McDonald, (1915) 74 Or 421, 144 P 655.

Where the opposing party has not been misled, this section should be liberally construed. Ford v. Schall, (1924) 110 Or 21, 221 P 1052, 222 P 1094.

At any stage of the proceeding, a pleading may be amended if it does not so substantially change the issues as to take the other party by surprise. Davis v. Springer, (1929) 128 Or 582, 275 P 600.

In order to secure leave to amend, a formal application should be made containing specifically the amendment proposed. Powell v. Powell, (1947) 181 Or 675, 184 P2d 373.

The court has no authority to permit an amended pleading to be filed retroactively where the amended pleading was not legally served or accepted. Alery v. Alery, (1951) 193 Or 332, 336, 238 P2d 769.

(1) Discretion of court. The allowance of amendments is within the sound discretion of the court, and only for an abuse of such discretion will the appellate court reverse the judgment. Henderson v. Morris, (1873) 5 Or 24; Watson v. Buckler, (1896) 29 Or 235, 45 P 765; Osmun v. Winters, (1896) 30 Or 177, 179, 46 P 780; Nunn v. Bird, (1900) 36 Or 515, 59 P 808; Lieuallen v. Mosgrove, (1900) 37 Or 446, 61 P 1022; Nye v. Bill Nye Mill. Co., (1905) 46 Or 302, 80 P 94; Horn v. Davis, (1914) 70 Or 498, 503, 142 P 544; Filkins v. Portland Lbr. Co., (1914) 71 Or 249, 251, 142 P 578; Kimball v. Horticultural Fire Relief, (1916) 79 Or 133, 154 P 578; Johnson v. Portland Ry., Light & Power Co., (1916) 79 Or 403, 155 P 375; Pacific Co. v. Cronan, (1916) 82 Or 388, 161 P 692; Vermont Loan & Trust Co. v. Bramel, (1924) 111 Or 50, 224 P 1085; Ingerslev v. Goodman, (1925) 116 Or 210, 240 P 877; Klingback v. Mendiola, (1931) 138 Or 234, 6 P2d 237; Schamoni v. Semler, (1934) 147 Or 353, 31 P2d 776; Quirk v. Ross, (1970) 257 Or 80, 476 P2d 559; Rankin v. White, (1971) 258 Or 252, 482 P2d 530.

Where an amendment, if allowed, would leave the complaint subject to objections that it was intended to obviate, the amendment should not be granted. Hume v. Kelly, (1896) 28 Or 398, 43 P 380.

The court's discretion to allow amendments does not extend to setting aside its proceedings for the purpose of giving either party permission to apply for an amendment. Scott v. Ford, (1908) 52 Or 288, 97 P 99.

The court's discretion is limited by this section. Beard v. Royal Neighbors of America, (1911) 60 Or 41, 118 P 171.

Permitting or refusing an amendment of verification is discretionary. Clark v. Clark, (1916) 81 Or 405, 159 P 969.

It is within the trial court's discretion to allow an amendment after the expiration of the time limited for that purpose. McCully v. Heaverne, (1917) 82 Or 650, 160 P 1166, 162 P 863.

The court has discretion at any time before the cause is submitted to allow a complaint to be amended to conform to the facts proved, provided the amendment does not substantially change the cause of action, and evidence upon which to base it has been received without objection. Tracy v. City of Astoria, (1951) 193 Or 118, 237 P2d 954.

The court may abuse its discretionary powers relating to amendments by allowing an amendment without notice to the adverse party, but such abuse would merely make the subsequent decree voidable and subject to direct attack. Burnett v. Hatch, (1954) 200 Or 291, 266 P2d 414.

When the initial answer is sufficient to embrace the issue to be raised by an amended answer, it is not an abuse of discretion for the court to deny defendant's motion to amend. Maerz v. J-C Co., (1960) 233 Or 536, 355 P2d 94.

Delayed amendments are subject to the discretion of the court exercised to prevent abuse and permit only those tardy amendments which will promote the administration of justice. McKee v. McKee, (1962) 232 Or 377, 375 P2d 826.

Amendment is allowed with reasonable liberality when the matter in the amendment is sufficiently brought to the notice of the adversary in the original pleading and during trial so that he can prepare to meet the issue. Beard v. Beard, (1962) 232 Or 552, 376 P2d 404.

The discretion of the trial court to allow amendments must be exercised in the furtherance of justice. Morrill v. Rountree, (1965) 242 Or 320, 408 P2d 932.

Supreme Court determined whether amendment should have been allowed where lower court failed to exercise its discretion. Perdue v. Pac. Tel. & Tel. Co., (1958) 213 Or 596, 326 P2d 1026.

Omission to exercise discretion was reviewable by Supreme Court. Id.

(2) Effect of amendment. When a pleading is amended, the original pleading ceases to be a part of the record. Wells v. Applegate, (1885) 12 Or 208, 6 P 770; Hume v. Woodruff, (1894) 26 Or 373, 38 P 191; Everding & Farrell v. Gebhardt Lbr. Co., (1917) 86 Or 239, 249, 168 P 304; Mount v. Welsh, (1926) 118 Or 568, 247 P 815; Noonan v. Portland, (1939) 161 Or 213, 88 P2d 808.

The filing of an amended answer is a waiver by the defendant of any objection to a ruling of the court on the original answer. Hexter v. Schneider, (1886) 14 Or 184, 12 P 668.

After the filing of an amended complaint, plaintiff may take a voluntary nonsuit. Ferguson v. Ingle, (1900) 38 Or 43, 62 P 760, 762.

Except where an original pleading is introduced in evidence as an admission against interest of the pleader, the original pleading cannot be considered when superseded by an amendment. Union Central Life Ins. Co. v. La Follette, (1935) 150 Or 455, 44 P2d 165.

2. Amendment before trial

The words "before trial" as used in this section refer to a trial upon issues of fact. State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828; Hurst v. Merrifield, (1933) 144 Or 78, 23 P2d 124.

Before trial, it is within the power of the trial court to allow an amendment to be filed containing a new cause of action or defense if germane to controversy before the court. Talbot v. Garretson, (1897) 31 Or 256, 49 P 978; Lieuallen v. Mosgrove, (1900) 37 Or 446, 61 P 1022; Zimmerle v. Childers, (1913) 67 Or 465, 136 P 349; Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072; Perkins v. Standard Oil Co. of Calif., (1963) 235 Or 7, 383 P2d 107, 383 P2d 1002; Oregon Post Office Bldg. Corp. v. McVicker, (1967) 246 Or 526, 426 P2d 458; Wells v. Davis, (1970) 258 Or 93, 480 P2d 699.

Where there is no affidavit setting forth the reason for delay in tendering late a motion to amend, the court does not abuse its discretion in denying the motion. Baker v. Brookmead Dairy, Inc., (1962) 230 Or 384, 370 P2d 235; Oregon Post Office Bldg. Corp. v. McVicker, (1967) 246 Or 526, 426 P2d 458.

The original cause of action may not be abolished and an entirely different one substituted by amendment before trial. Talbot v. Garretson, (1897) 31 Or 256, 49 P 978.

A complaint in replevin may be amended before trial by excluding some chattels mentioned and including others. Zimmerle v. Childers, (1913) 67 Or 465, 136 P 349.

Provision that amendment of pleading shall not substantially change cause of action or defense does not apply to amendments made before trial. Id.

The allowance of an amendment to the complaint before any judicial examination of issues of law or fact is permissible although changing both the cause of suit and the quantum of proof required. Hillsboro Nat. Bank v. Garbarino, (1916) 82 Or 405, 161 P 703.

An amendment adding the name of a party plaintiff should be proposed before the jury is impaneled. Walters v. Dock Comm., (1928) 126 Or 487, 245 P 1117, 266 P 634, 270 P 778.

The right to amend is not absolute but is to be allowed in the furtherance of justice under sound discretion. Baker v. Brookmead Dairy, Inc., (1962) 230 Or 384, 370 P2d 235.

Where the complaint in equity sought to restrain a threatened transfer of property during the pendency of an action at law, an amended complaint which set up the issue of negligence as set forth in the action at law and which in addition prayed that the amount of damages be impressed as a lien upon real property was properly allowed. Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072.

3. Amendment during or after trial

During trial amendments substantially changing the cause of action or the defense cannot be allowed. Foste v. Standard Life & Acc. Ins. Co., (1894) 26 Or 449, 38 P 617; Hume v. Kelly, (1896) 28 Or 398, 43 P 380; Talbot v. Garretson, (1897) 31 Or 256, 49 P 978; Horn v. Davis, (1914) 70 Or 498, 504, 142 P 544; Carnahan Mfg. Co. v. Beebe-Bowles Co., (1916) 80 Or 124, 156 P 584.

If the same evidence would support the action after amendment as before, the change is an amendment; but if different evidence is required after amendment, a new cause of action is instituted. Liggett v. Ladd, (1892) 23 Or 26, 31 P 81; Foste v. Standard Life & Acc. Ins. Co., (1894) 26 Or 449, 452, 38 P 617.

At trial, any amendment to a pleading which will further support the cause of action or defense may be allowed. Baldock v. Atwood, (1891) 21 Or 73, 26 P 1058.

A reply may be filed on trial if it does not change the cause of action alleged in the complaint. Pope v. McDonald, (1921) 98 Or 373, 193 P 831.

An amendment to the complaint offered at the close of plaintiff's testimony is timely offered. Keadle v. Padden, (1933) 143 Or 350, 20 P2d 403, 22 P2d 892.

Court may allow amendment after presentation of evidence where evidence is within the scope of the pleadings and is sufficient to support the amendment. Furrer v. Talent Irr. Dist., (1970) 258 Or 494, 466 P2d 605.

In a personal injuries action, a trial amendment alleging that the railroad negligently failed to keep a lookout for persons on the track did not change the original cause of action. Doyle v. So. Pac. Co., (1910) 56 Or 495, 108 P 201.

Inserting an allegation of the residence of the plaintiff in a divorce complaint after the submission of the cause substantially changed the cause of suit. Holton v. Holton, (1913) 64 Or 290, 129 P 532, 48 LRA(NS) 779.

An amendment which divided the amount claimed in the original complaint into items aggregating the same sum did not change the cause of action pleaded. Willey v. Herrett, (1913) 66 Or 348, 133 P 630.

Where the amended complaint restates the cause of action in the original complaint and adds a new one, a motion to strike the whole amended complaint was properly denied. Id.

An amendment of a complaint for personal injuries by adding allegation of plaintiff's profession and earning capacity was held not to bring in a new cause of action. Davis v. Springer, (1929) 128 Or 582, 275 P 600.

An amendment seeking to change the cause of suit from fraud to mutual mistake upon conclusion of evidence could not be allowed by the court. Newton v. Peay, (1952) 196 Or 76, 245 P2d 870.

It was error for court to allow amendment of complaint relating to injuries to left arm which were not alleged in the complaint or before trial, after defendant objected to the introduction of this evidence and amendment. Wood v. So. Pac. Co., (1959) 216 Or 61, 337 P2d 779. **Distinguished in,** Furrer v. Talent Irr. Dist., (1970) 258 Or 494, 466 P2d 605. **But see** Beard v. Beard, (1962) 232 Or 552, 376 P2d 404.

(1) Conforming pleadings to facts proved. If on trial evidence discloses a material variance, the court may allow an amendment before submission of the cause so as to make the complaint conform to the facts established. Miller v. Lynch, (1888) 17 Or 61, 19 P 845; La Grande v. Portland Public Market, (1911) 58 Or 126, 113 P 25.

Amendment of a complaint to conform to the proof should be liberally allowed. Goff v. Elde, (1930) 132 Or 689, 288 P 212; Morrill v. Rountree, (1965) 242 Or 302, 408 P2d 932

Where the evidence is received without objection as to material matters not set up in the pleadings, an amendment to conform the pleadings to the real issue tried should be allowed. Cook v. Croisan, (1894) 25 Or 475, 36 P 532; Lamb v. Woodry, (1936) 154 Or 30, 58 P2d 1257, 105 ALR 914.

Where objection is made to the introduction of evidence, such amendment should not be allowed. Mendenhall v. Harrisburg Water Co., (1895) 27 Or 38, 39 P 399; Bishop v. Baisley, (1895) 28 Or 119, 127, 41 P 936. **But see** Beard v. Beard, (1962) 232 Or 552, 376 P2d 404.

A motion to amend during trial should normally be allowed unless the other party will be prejudiced in some respect. Morrill v. Rountree, (1965) 242 Or 320, 408 P2d 932; Quirk v. Ross, (1970) 257 Or 80, 476 P2d 559.

Although the evidence was objected to when offered, it is within the discretion of the court to allow such amendment where the cause is referred back to the referee to allow the parties to introduce other evidence upon the new issues raised by the amended pleadings. Bishop v. Baisley, (1895) 28 Or 119, 41 P 936.

An amendment which changes the complaint to conform with evidence proved on trial does not introduce a new cause of action. Hammer v. Downing, (1901) 39 Or 504, 64 P 651, 65 P 17, 990, 67 P 30.

If plaintiff fails to prove the joint tort as alleged, he may move to amend the complaint and proceed against one or more of the parties. Krebs Hop Co. v. Taylor, (1908) 52 Or 627, 97 P 44, 98 P 494.

A complaint in slander may be amended to conform with proof that words published were different than those alleged, if the words convey to the mind of a reasonable man practically the same meaning. Lowe v. Brown, (1925) 114 Or 426, 233 P 272, 235 P 395.

In absence of a transcript of testimony, the Supreme Court will assume that any amendments authorized by the court were made to conform to the facts proved. Barr v. Woodbury, (1931) 136 Or 647, 300 P 497.

Amendment to conform the pleadings to the facts proved is permissible only if evidence upon which to base it has been received without objection. Smith v. Jacobsen, (1960) 224 Or 627, 356 P2d 421. **But see** Beard v. Beard, (1962) 232 Or 552, 376 P2d 404.

Amendment may be made to conform pleadings to proof if the proof is properly in the record. Beard v. Beard, (1962) 232 Or 552, 376 P2d 404.

The court had discretionary power to allow an amendment that would allege a new specification of negligence. Watson v. Dodson, (1964) 238 Or 621, 395 P2d 866; Von Bergen v. Kuykendall, (1965) 240 Or 191, 400 P2d 553.

When the party seeking amendment has reasonable means of learning or has knowledge prior to trial of circumstances which make it desirable for him to amend, a slight chance that the other party will be prejudiced will justify refusal of the requested amendment. Quirk v. Ross, (1970) 257 Or 80, 476 P2d 559.

A trial amendment changing the allegation of joint employment of plaintiff by defendants to an allegation of employment by one defendant only was proper. Strauhal v. Asiatic Steamship Co., (1906) 48 Or 100, 85 P 230.

The fact that objection was made to the admission of testimony as to the plaintiff's knowledge of the defect in the bridge, was held not to deprive the court of the power to allow an amendment. Ridings v. Marion County, (1907) 50 Or 30, 91 P 22.

Conforming a complaint to the amount shown to be due was proper. Hayes v. Cummings, (1925) 115 Or 13, 235 P 304, 236 P 756.

Where there was no evidence of law of Washington, an amended answer pleading a defense under Washington law was not admissible. Hersey v. Gegenheimer, (1925) 116 Or 464, 241 P 976.

In an action for money loaned, the trial court properly allowed the filing of an amended complaint for money had and received to conform to the proof. Asher v. Pitchford, (1941) 167 Or 70, 115 P2d 337.

(2) After trial. Power of the court to allow amendments to the pleading after reversal and remand of the cause is the same as it was before the trial. Branson v. Oregonian Ry., (1883) 11 Or 161, 2 P 86; Lieuallen v. Mosgrove, (1900) 37 Or 446, 61 P 1022; Nye v. Bill Nye Mill Co., (1905) 46 Or 302, 8 P 94; LaGrande v. Portland Public Market, (1911) 58 Or 126, 113 P 25; Ross v. Robinson, (1944) 174 Or 25, 147 P2d 204.

This section does not give the court power to allow an amendment to a pleading after final decree. La Grande v. Portland Public Market, (1911) 58 Or 126, 113 P 25; Holton v. Holton, (1913) 64 Or 290, 129 P 532, 48 LRA(NS) 779.

An amendment may properly be made after a motion for a nonsuit. Koshland v. Fire Assn., (1897) 31 Or 362, 49 P 865.

It is not an abuse of discretion, after reversal of a judgment, to permit plaintiff to amend his complaint without imposing as a condition the payment of costs and disbursements incurred on the former trial and appeal. Nye v. Bill Nye Mill Co., (1905) 46 Or 302, 80 P 94.

The right to amend after trial is limited by this section. Scott v. Ford, (1908) 52 Or 288, 97 P 99.

If the issue of fact raised on a plea in abatement has been submitted for determination, the court has no authority to allow an amendment of the complaint. La Grande v. Portland Public Market, (1911) 58 Or 126, 113 P 25.

Jurisdiction over the subject matter cannot be acquired by a mere amendment subsequent to the final submission of the cause. Holton v. Holton, (1913) 64 Or 290, 129 P 532, 48 LRA(NS) 779.

Amendment of complaint to allege filing of notice of claim, while vital, did not substantially change the cause of action. State v. United States Fid. & Guar. Co., (1963) 234 Or 554, 380 P2d 795.

After the case was submitted, it was improper to allow an amendment of the complaint to increase amount of damages asked for. Cordrey v. The Bee, (1922) 102 Or 636, 201 P 202, 20 ALR 1079.

An application to file an amended answer made long after the cause had been submitted was properly refused. Newton v. McKeel, (1933) 142 Or 674, 21 P2d 206.

4. Amendment as to parties

Plaintiff may amend by omitting the name of a defendant when it appears he is not liable. **Before trial,** Tillamook Dairy Assn. v. Schermerhorn, (1897) 31 Or 308, 51 P 438; **at trial,** Cooper v. Blair, (1886) 14 Or 255, 12 P 307.

Changing a party from party defendant to party plaintiff is a permissible amendment under this section. Liggett v. Ladd, (1892) 23 Or 26, 31 P 81.

The name of the county which is the real party in interest may be added to the complaint by amendment. Hume v. Kelly, (1896) 28 Or 398, 43 P 380.

In a civil contempt proceeding, the substitution of the state as party plaintiff is permissible under this section. State v. Downing, (1901) 40 Or 309, 58 P 863, 66 P 917.

Where an action is brought in firm name on a cause of action belonging to one member of the firm, an amendment will be allowed substituting the name of real party in interest. York v. Nash, (1902) 42 Or 321, 71 P 59.

Granting leave to amend complaint by eliminating an unnecessary and improper party and substituting the state, is within the power and jurisdiction of the court, even

though such power is erroneously exercised. Sears v. Dunbar, (1907) 50 Or 36, 91 P 145.

Permitting amendment changing the name of the plaintiff from that of a corporation to individual trustees of an association was proper. Hall v. Cutler Bindery Co., (1934) 145 Or 565, 26 P2d 1109.

In a suit to oust a trustee and to secure an accounting, an amendment to add two beneficiaries as defendants was proper. Wood v. Honeyman, (1946) 178 Or 484, 169 P2d 131, 171 ALR 587.

5. Correcting a mistake

Under this section, a court may permit a party to correct a mistake in his pleadings if the rights of the adversary are not prejudiced. Christenson v. Nelson, (1901) 38 Or 473, 63 P 648; Bramwell v. Rowland, (1927) 123 Or 33, 261 P 57.

Where defendant was not misled, the complaint was properly amended to correct an error in the date of the note sued on. Farmers' Bank v. Saling, (1898) 33 Or 394, 54 P 190.

Where defendant by evident clerical error failed to deny material allegations, the rule against amendment changing the cause of action does not prevent amendment especially where both parties went to trial on the theory that such matters were at issue. Pacific Co. v. Cronan, (1916) 82 Or 388, 161 P 692.

6. Amendment of complaint

Any amendment which will aid the complaint to state a cause of action as originally intended by the pleader is permissible if sufficient facts are alleged to indicate such intention. Foste v. Standard Life & Acc. Ins. Co., (1894) 26 Or 449, 38 P 617; Bailey v. Wilson, (1898) 34 Or 186, 55 P 973; Bramwell v. Rowland, (1927) 123 Or 33, 261 P 57.

A complaint may be amended on trial to more fully set forth the facts. Domurat v. Ore.-Wash. R.R. & Nav. Co., (1913) 66 Or 135, 134 P 313; Arstill v. Fletcher, (1920) 95 Or 308, 187 P 854.

Where the original complaint stated a cause of action defectively, it may be amended to correct the defect although the statute of limitations has run before amendment. Ibach v. Jackson, (1934) 148 Or 92, 35 P2d 672; Grubb v. Johnson, (1955) 205 Or 624, 289 P2d 1067.

A complaint failing to state facts which would make the wife liable may be amended on leave of court. Smith v. Sherwin, (1884) 11 Or 269, 3 P 686.

A complaint so indefinite and uncertain that its character as in contract cannot be determined can be amended so as to uphold an attachment already issued in the action. Suksdorff v. Bigham, (1886) 13 Or 369, 12 P 818.

Where amendment is made before trial, there is not enough inconsistency between an express agreement and an implied promise to preclude a change from one to the other. McDonald v. Supple, (1920) 96 Or 486, 190 P 315.

A broker's complaint for a commission for the sale of real estate may be amended so as to seek a commission for the sale of stock. Arnett v. Scherer, (1933) 142 Or 494, 20 P2d 803.

Where the complaint states a cause of action, it may be amended although the statute of limitations has run before amendment. Keadle v. Padden, (1933) 143 Or 350, 20 P2d 403, 22 P2d 892.

An amended complaint which pertains more to a change of form then to one of substance is properly allowed. Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072.

An allegation of incorporation was amendable on trial when the existence of the corporation was not in issue. Wild v. Ore. Short Line Ry., (1891) 21 Or 159, 27 P 954.

After defendant had moved for a nonsuit, it was proper to allow plaintiff to amend by alleging an insurable interest in plaintiff's assignor. Koshland v. Fire Assn., (1897) 31 Or 362, 49 P 865.

An allegation that the streetcar was operated at a dangerous rate of speed was amendable on trial by adding that such rate was in excess of that permitted by city ordinance. Wade v. City Ry. Co., (1899) 36 Or 311, 59 P 875.

In an action for commissions on sale of property, an amendment on trial to show the name of owner of property was allowable. Good v. Smith, (1904) 44 Or 578, 26 P 354.

Before trial, an amendment increasing the amount of damages claimed did not make such a change that its allowance would be error. Filkins v. Portland Lbr. Co., (1914) 71 Or 249, 251, 142 P 578.

An amendment alleging a waiver of the terms of an insurance policy was proper. Kimball v. Horticultural Fire Relief, (1916) 79 Or 133, 154 P 578.

Where complaint alleges full performance of plaintiff, an amendment during trial which alleged incomplete performance due to wrongful acts of defendant was improper. Carnahan Mfg. Co. v. Beebe-Bowles Co., (1916) 80 Or 124, 156 P 584.

Allowing an amendment pleading city's knowledge of defect in a sidewalk, was within discretion of court. Dodson v. City of Bend, (1926) 117 Or 231, 242 P 821, 243 P 76.

An amended complaint alleging a different consideration than that in the original complaint was properly stricken. Stoop v. U.S. Nat. Bank, (1926) 119 Or 645, 250 P 760.

Amending complaint at close of evidence by adding an allegation of pain suffered, was permissible. Hively v. Higgs, (1927) 120 Or 588, 253 P 363, 53 ALR 1052.

The complaint of a superintendent of banks was properly amended to allege insolvency of the bank. Bramwell v. Rowland, (1927) 123 Or 33, 261 P 57.

Where complaint was based on two causes of action, one in favor of each of two partners, an amendment adding the allegation of partnership was proper. Sandgren v. Cain Lbr. Co., (1928) 125 Or 375, 264 P 865.

In a suit to establish a claim against a decedent, an amendment alleging that the deceased could have collected the note by exercise of reasonable diligence was proper. Elliott v. Mosgrove, (1939) 162 Or 507, 91 P2d 852, 93 P2d 1070.

7. Amendment of answer

Mere inartificiality in the manner of pleading limitations as a defense was curable by amendment under this section. Zeilin v. Rogers, (1884) 21 Fed 103.

Allowance of a proposed amendment, tendering a new issue, on the day before the trial is within the discretion of the court. Osmun v. Winters, (1896) 30 Or 177, 46 P 780.

Where an officer was sued for selling property of plaintiff on an execution against another, the answer which merely denied plaintiff's ownership was properly amended during trial by alleging that plaintiff fraudulently took and held the property. Davis v. Hannon, (1896) 30 Or 192, 146 P 785.

The court may allow a further answer to be filed after determination of a plea denying the validity of plaintiff's title to the claim sued on. Saylor v. Commonwealth Inv. & Banking Co., (1900) 38 Or 204, 62 P 652.

After trial, an answer pleading violation of bulk sales law may not be amended to allege actual fraud in the transfer. Golden Rod Milling Co. v. Connell, (1917) 84 Or 551, 164 P 588.

Discretion in permitting defendant to set up an additional defense in amended answer will not be reviewed except in case of abuse. Pollock v. Lumberman's Nat. Bank, (1917) 86 Or 324, 168 P 616, LRA 1918B, 402.

An answer cannot be treated as amended so as to introduce accord and satisfaction as a new defense after trial which would, in effect, be a violation of this section. Guthrie v. J.K. Lbr. Co., (1921) 99 Or 158, 195 P 173.

On trial, substitution of the word "signing" for the word

"execution" in a denial of consideration for the execution of the note may be allowed. Heider v. Unicume, (1933) 142 Or 410, 14 P2d 456, 20 P2d 384.

In exercising discretion in allowing an amended answer, the court must take into consideration the facts and circumstances of that particular case. Schamoni v. Semler, (1934) 147 Or 353, 31 P2d 776.

The Board of Medical Examiners can permit the amending of a complaint in the proper case. Bd. of Medical Examiners v. Buck, (1951) 192 Or 66, 200 Or 488, 232 P2d 791, 258 P2d 124, app. dismissed, 346 US 919, 98 L Ed 202, 74 S Ct 1029.

At trial, an amendment to the answer that the usurious character of the instrument was well known to the plaintiff was held proper. Nunn v. Bird, (1900) 36 Or 515, 59 P 808.

An amendment to an answer, during trial, to change the prayer to one that plaintiff take nothing and defendant be dismissed was properly allowed. Caples v. Morgan, (1916) 81 Or 692, 160 P 1154, LRA 1917B, 760.

A motion made after judgment to file a second amended answer was properly denied. Craig v. Maher, (1937) 158 Or 40, 74 P2d 396.

Where the proposed amendment to the answer substantially changed the defense alleged in the original answer, the amendment was properly refused. Powell v. Powell, (1947) 181 Or 675, 184 P2d 373.

(1) Amendment after amendment to complaint. Where a material amendment to a complaint is made, the right to serve or file a new answer exists, irrespective of the responsiveness of the original answer. Ayre v. Hixson, (1909) 53 Or 19, 98 P 515, 133 Am St Rep 819, Ann Cas 1913E, 659; Hillsboro Nat. Bank v. Garbarino, (1916) 82 Or 405, 161 P 703.

When an immaterial amendment is made to the complaint the defendant is not entitled to serve a new answer. Wild v. Ore. Short Line Ry., (1891) 21 Or 159, 27 P 954.

Where defendant deemed himself injured or misled by an amendment to the complaint before trial, he should have taken leave to amend his answer to meet the new situation. Hillsboro Nat. Bank v. Garbarino, (1916) 82 Or 405, 161 P 703.

8. Amendment of reply

The refusal to allow plaintiff to amend his reply upon a second trial so as to set up an estoppel was not an abuse of discretion. Beard v. Royal Neighbors of America, (1911) 60 Or 41, 118 P 171.

A reply which professed to deny the material allegations of the answer is amendable. Clarinda Trust & Sav. Bank v. Doty, (1917) 83 Or 214, 163 P 418.

It was error to allow an amendment of the denial in a reply on information and belief of allegations which were matters of record. Crim v. Thompson, (1924) 112 Or 399, 229 P 916.

FURTHER CITATIONS: Zeilin v. Rogers, (1884) 21 Fed 103; United States v. Bauman, (1943) 56 F Supp 109; Putnam v. Jenkins, (1955) 204 Or 691, 285 P2d 532; Clement v. Cummings, (1957) 212 Or 161, 317 P2d 579; Schulmerich v. First Nat. Bank, (1960) 220 Or 528, 349 P2d 849; Thomas v. Foglio, (1962) 231 Or 187, 371 P2d 693; State v. English, (1963) 233 Or 500, 378 P2d 997; Dorr v. Janssen, (1963) 233 Or 505, 378 P2d 999; Hansell v. Douglass, (1963) 234 Or 315, 380 P2d 977; State ex rel. Kronen Constr. Co. v. United States Fid. & Guar. Co., (1963) 234 Or 554, 382 P2d 858; Sternes v. Tucker, (1964) 239 Or 105, 395 P2d 881; Maslov v. Manning, (1964) 239 Or 393, 397 P2d 833; Manzama Timber Prod. v. Taylor, (1965) 239 Or 568, 399 P2d 26; State ex rel. Kronen Constr. Co. v. United States Fid. & Guar. Co., (1965) 240 Or 295, 401 P2d 48; Marsh v. Walters, (1965) 242 Or 210, 408 P2d 929; Wells v. Washington County, (1966) 243 Or 246, 412 P2d 798; Roskop v. Trent, (1968) 250 Or 397, 443 P2d 174.

16.400

NOTES OF DECISIONS

An order striking a pleading and allowing the pleader to amend is not an appealable order. Abrahamson v. Northwestern Pulp & Paper Co., (1933) 141 Or 339, 15 P2d 472, 17 P2d 1117.

A party whose pleadings are stricken because not verified or signed may be permitted to plead over to cure the defect. Northwestern Nat. Ins. Co. v. Averill, (1935) 149 Or 672, 42 P2d 747.

Subsection (2) , as amended in 1943, authorizes review by the Supreme Court of an order striking part of a pleading where the party filed an amended pleading which omitted the matter ordered stricken. Lane County v. Bristow, (1946) 179 Or 653, 173 P2d 954.

An order striking part of an answer and further ordering that defendant may have 10 days in which to file an amended answer, though permissive in form, requires defendant to file the amended answer eliminating the matter stricken. Id.

This section applies whether or not the trial is before a jury. Prince v. Dierks, (1966) 244 Or 145, 416 P2d 318.

FURTHER CITATIONS: Lawrence Whse., Inc. v. Best Lbr. Co., Inc., (1954) 202 Or 77, 271 P2d 661, 273 P2d 993; Bay Creek Lbr. Co. v. Cesla, (1958) 213 Or 316, 322 P2d 925, 324 P2d 244; Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614; Robinson v. Trinity Episcopal Church, (1964) 238 Or 441, 395 P2d 282.

16.410

NOTES OF DECISIONS

When a new pleading is filed, the former pleading is in effect withdrawn and ceases to be a part of the record, and all motions and demurrers relating thereto accompany it. Wells v. Applegate, (1885) 12 Or 208, 6 P 770; Hexter v. Schneider, (1886) 14 Or 184, 12 P 668; Hume v. Woodruff, (1894) 26 Or 373, 38 P 191; Condon Nat. Bank v. Rogers, (1911) 60 Or 189, 118 P 846, Ann Cas 1914A, 101; Everding & Farrell v. Gebhardt Lbr. Co., (1917) 86 Or 239, 168 P 304.

The words "before trial" refer to a trial upon the issues of fact. State v. Pac. Livestock Co., (1919) 93 Or 196, 182 P 828.

FURTHER CITATIONS: Bartley v. Doherty, (1960) 225 Or 15, 351 P2d 71, 357 P2d 521.

16.420

NOTES OF DECISIONS

Judgment for failure to answer an amended complaint is erroneous where defendant has not been served as provided by this section. Tolmie v. Otchin, (1854) 1 Or 95; Cohen v. Ottenheimer, (1886) 13 Or 220, 10 P 20.

While a motion to strike out an amended complaint is pending, the defendant is not in default. Mitchell v. Campbell, (1887) 14 Or 454, 13 P 190.

FURTHER CITATIONS: Hodgdon v. Goodspeed, (1911) 60 Or 1, 118 P 167; Gillard v. Gillard, (1918) 88 Or 95, 171 P 557.

16.430

CASE CITATIONS: Cram v. Tippery, (1945) 175 Or 575, 155 P2d 558; Alery v. Alery, (1951) 193 Or 332, 336, 238 P2d 769, 771; Burnett v. Hatch, (1954) 200 Or 291, 266 P2d 414.

16.460

NOTES OF DECISIONS

1. Subsection (1); Original suit to impeach or set aside a decree

(1) In general. A suit in equity may be maintained to set aside the final judicial determination reached in another cause. Crews v. Richards, (1887) 14 Or 442, 13 P 67; Friese v. Hummel, (1894) 26 Or 145, 37 P 458, 46 Am St Rep 610; Campbell v. Snyder, (1895) 27 Or 249, 41 P 659; Nessley v. Ladd, (1897) 30 Or 564, 48 P 420; Hilts v. Ladd, (1899) 35 Or 237, 58 P 32; McLeod v. Lloyd, (1904) 45 Or 67, 75 P 702; Livesley v. Johnston, (1906) 48 Or 40, 84 P 1044; Stadelman v. Miner, (1917) 83 Or 348, 388, 155 P 708, 163 P 585, 983.

By original suit defendant may present whatever subject matter could formerly have been presented by any of the various formal chancery bills. White v. Allen, (1869) 3 Or 103.

Plaintiff, after an unreasonable delay, may not revive a partition suit by an original bill under this section where the decree was an interlocutory order. Bybee v. Summers, (1873) 4 Or 354.

Granting relief under this subsection is within the discretion of the court of equity. Crews v. Richards, (1887) 14 Or 442, 13 P 67.

The court in which the decree was rendered may entertain an original bill to restrain its enforcement. McDonald v. Mackenzie, (1893) 24 Or 573, 14 P 866, 868.

A motion will not lie in Supreme Court for a rehearing and for an order opening a decree that has been affirmed on appeal; the proper remedy is an original suit under this section. Nessley v. Ladd, (1897) 30 Or 564, 48 P 420.

After the expiration of the term during which it has been entered, a consent decree cannot be attacked or impeached in any manner except by an original bill. Stites v. McGee, (1900) 37 Or 574, 61 P 1129.

Relief cannot be obtained by a motion to recall or modify the mandate; the proper remedy is an original bill under this subsection. McLeod v. Lloyd, (1904) 45 Or 67, 75 P 702.

The bill of review abolished by this statute is supplanted by an original suit to set aside a decree for any of the causes that would have sustained such a bill. Smith v. Nelson, (1905) 46 Or 1, 78 P 740.

An appeal will not be dismissed because of newly discovered evidence, the proper procedure being a suit to annul the decree appealed from. Livesley v. Johnston, (1906) 48 Or 40, 84 P 1044.

An application to vacate a divorce decree, made by a motion without pleadings or summons, could not be sustained as an original suit under this section. Orr v. Orr, (1915) 75 Or 137, 142, 144 P 753, 146 P 964.

It is only the form of the bill of review that has been abolished; the result is obtained upon application by motion or petition to correct obvious mistakes, or by original suit where error is not apparent on record. Lachele v. Ore. Realty Exch. Inv. Co., (1927) 121 Or 582, 256 P 646.

Where property has been fraudulently secreted by one of the parties to a divorce, the remedy of the injured party after the divorce decree settling the property rights has become final is by an original suit under this section. Isler v. Isler, (1935) 149 Or 554, 41 P2d 451.

Where a decree in a partnership dissolution and accounting suit was affirmed on appeal and a subsequent order was given to distribute the assets of the firm in accordance with the decree, the order could not be reversed on appeal as this would be in effect an impeachment of the decree without compliance with this section. Knott v. Knott, (1877) 6 Or 334.

An order of the county court directing a sale of land belonging to the estate of a decedent could not be attacked in a suit to quiet title to the land. Stadelman v. Miner, (1917) 83 Or 348, 155 P 708, 163 P 585, 983.

(2) Grounds. An original suit lies for errors in law apparent upon the face of such decree, or on account of newly discovered facts, unknown to the parties seeking relief at the time of the rendition of the decree and which could not by the exercise of due diligence have been ascertained or then utilized. Heatherly v. Hadley, (1869) 4 Or 1; Crews v. Richards, (1887) 14 Or 442, 13 P 67; Campbell v. Snyder, (1895) 27 Or 249, 41 P 659; Hilts v. Ladd, (1899) 35 Or 237, 241, 58 P 32; Smith v. Nelson, (1905) 46 Or 1, 78 P 740.

Cumulative testimony to a fact in issue in the original suit cannot be the foundation of a bill under this subsection. Crews v. Richards, (1887) 14 Or 442, 13 P 67; Hilts v. Ladd, (1899) 35 Or 237, 58 P 32.

Equity has original jurisdiction to set aside judgments and decrees procured by fraud. Froebrick v. Lane, (1904) 45 Or 13, 76 P 351, 106 Am St Rep 634; Bowsman v. Anderson, (1912) 62 Or 431, 123 P 1092, 125 P 270.

Where the plaintiffs knew and could have used at the former trial the matters upon which they seek to set aside the decree, and merely claim that they were misled by the allegations of the adverse party, the suit to set aside the decree is not maintainable. Crews v. Richards, (1887) 14 Or 442, 13 P 67.

Newly discovered evidence must be of so clear and decisive character as to leave no doubt that it would of itself compel a reversal of the former ruling. Hilts v. Ladd, (1899) 35 Or 237, 58 P 32.

A former judgment or decree will not be set aside for fraud unless fraud was extrinsic to questions examined in the former proceedings. Friese v. Hummel, (1894) 26 Or 145, 37 P 458.

An original suit to set aside a decree for error of law can only be sustained if error is apparent upon the face of the decree; in order to show that there was such error it is necessary to set out in the bill, either in full or in substance, the proceedings in the former case. Garbade v. Frazier, (1903) 42 Or 384, 71 P 136.

Equity has jurisdiction to set aside decree of a county court, approving and settling administrator's final account, where decree was procured by fraud. Froebrick v. Lane, (1904) 45 Or 13, 76 P 351, 106 Am St Rep 634.

Allegations that a decree was procured by perjured testimony do not justify impeachment of a decree. Windsor v. Holloway, (1917) 84 Or 303, 164 P 1177.

In a suit to set aside a decree on ground of mistake, a defense that another action is pending in which the same relief might be had is not maintainable. Churchill v. Meade, (1919) 92 Or 626, 182 P 368.

The burden of proof is on the party suing to show that the decree was obtained either by fraud or as result of his excusable neglect. Hartley v. Rice, (1927) 123 Or 237, 261 P 689.

Fraud, inadvertence, mistake, neglect or surprise are

grounds for impeachment of a decree under this section. Id.

Courts are more inclined to open a default decree under OL 103 [ORS 18.160] then vacate or set aside the decree under this subsection. Id.

2. Collateral and direct attacks

An original suit under this section is not necessarily a direct attack. Stadelman v. Miner, (1917) 83 Or 348, 388, 155 P 708, 163 P 585, 983. **But see** Heatherly v. Hadley, (1869) 4 Or 1.

A suit to vacate or set aside decree is a direct attack and a suit to restrain the proceedings or prevent enforcement thereof is a collateral attack. Acton v. Lamberson, (1922) 102 Or 472, 202 P 421, 732.

Where the answer in a quiet title suit attacked the probate proceedings, the answer was, under subsection (2), in nature of a complaint in equity and a direct attack against the probate proceedings. Id.

In an action in ejectment by purchaser at foreclosure sale, answer challenging plaintiff's title on ground of invalidity of foreclosure proceedings was held to involve direct attack upon the proceedings. Gordon v. Adams, (1928) 125 Or 662, 268 P 60.

3. Subsection (2); Equitable defenses in actions at law

(1) Prior to 1917 amendment. Prior to the 1917 amendment, in order to plead equitable defenses in an action at law, defendant was required to file a complaint in equity in nature of a cross-bill. Moore v. Frazier, (1888) 15 Or 635, 16 P 869; Wood v. Fisk, (1904) 45 Or 276, 77 P 128, 738; Hough v. Porter, (1909) 51 Or 318, 95 P 732, 98 P 1083, 102 P 728; Zeuske v. Zeuske, (1909) 55 Or 65, 103 P 648, 105 P 249, Ann Cas 1912A, 557; Carroll v. Bowne, (1910) 55 Or 316, 106 P 331; Watson v. McLench, (1910) 57 Or 446, 110 P 482, 112 P 416; Lumbermen's Nat. Bank v. Campbell, (1912) 61 Or 123, 121 P 427; Miller v. Fisher, (1915) 77 Or 532, 151 P 971; Columbia R. Co. v. Smith, (1917) 83 Or 137, 162 P 831, 163 P 309; Maxson v. Ashland Iron Works, (1917) 85 Or 345, 166 P 37, 167 P 271; Jones v. Skiles, (1917) 85 Or 554, 167 P 505.

The cross-bill had to set up an entire or partial defense, equitable in nature, with no adequate remedy at law. Scheifflin v. Weathered, (1890) 19 Or 172, 23 P 898; Tooze v. Heighton, (1916) 79 Or 545, 56 P 245; Davis v. First Nat. Bank, (1917) 86 Or 474, 161 P 93, 186 P 929.

Jurisdiction obtained through a cross-bill was the same as the original chancery jurisdiction. South Portland Land Co. v. Munger, (1900) 36 Or 457, 54 P 815, 60 P 5.

Defendant was not restricted to the averment of merely defensive matter, but might set forth any facts entitling him to affirmative relief. Carroll v. Bowne, (1910) 55 Or 316, 106 P 331.

(a) Stay of proceedings by cross-bill. Defendant's suit must have been determined before further proceedings in plaintiff's action. Oatman v. Epps, (1887) 15 Or 437, 439, 15 P 709; Bear v. Luse, (1879) 6 Sawy 148, Fed Cas No. 1,179.

By answering defendant's cross-bill after demurrer overruled, the right to insist that the action be tried at law was waived. South Portland Land Co. v. Munger, (1900) 36 Or 457, 54 P 815, 60 P 5; Wollenberg v. Rose, (1902) 41 Or 314, 68 P 804.

After the suit in equity had been dismissed, the plaintiff in the action at law could proceed with his action even though an appeal from the dismissal of the equity suit was pending. Oregon Sur. & Cas. Co. v. Paulson, (1914) 73 Or 163, 165, 144 P 571; Toy v. Gong, (1918) 87 Or 454, 170 P 936.

A stipulation that the findings on the cross-bill should be filed in the law action and judgment entered accordingly was of no effect where the court dismissed the cross-bill for want of jurisdiction; the law action must then proceed as if the cross-bill had never been filed. Small v. Lutz, (1898) 34 Or 131, 141, 55 P 529, 58 P 79.

The equity court did not obtain jurisdiction over the original action under this section; in the absence of a restraining clause in the decree, the law action continued until final determination. Finney v. Egan, (1903) 43 Or 1, 72 P 136.

In the law action when resumed after defendant's cross-bill was determined, the party to the law action was entitled to have the issues therein tried by a jury. Parker v. Daly, (1911) 58 Or 564, 571, 114 P 926, 115 P 723, 34 LRA(NS) 545.

By stipulation a law action and an equitable cross-bill may be tried together; in such case, trial by jury in law action is waived. Oregon-Wash. R.R. & Nav. Co. v. Reed, (1918) 87 Or 398, 169 P 342, 170 P 300.

Where parties stipulated to submit to equity jurisdiction of the court, the court properly proceeded to a determination of all the matters at issue though evidence did not support the cross-bill. Cody Lbr. Co. v. Coach, (1915) 76 Or 106, 146 P 973.

Where the defendant cross-complained in the law action, the decree therein was conclusive in the law action proceeding thereafter. Sanford v. Hanan, (1916) 80 Or 266, 156 P 1040.

(2) 1917 Amendment. Since 1917 amendment to this section, the filing of a cross-bill by a defendant in a law action, interposing an equitable defense, is not permissible. Hopka v. Forbes, (1931) 135 Or 91, 294 P 342.

There is no cross-bill in an equity suit. Howe v. Kern, (1912) 63 Or 487, 125 P 834, 128 P 818; Templeton v. Cook, (1914) 69 Or 313, 138 P 230; Rouse v. Riverton Coal Co., (1914) 71 Or 154, 142 P 343.

Where defendant in a law action files an answer which entitles him to relief in equity, the result is the same as if he had filed a complaint in nature of a cross-bill as provided prior to 1917. James v. Ward, (1920) 96 Or 667, 190 P 1105; Mendelsohn v. Mendelsohn, (1922) 104 Or 281, 207 P 158.

The amended section is permissive and not mandatory. Churchill v. Meade, (1919) 92 Or 626, 182 P 368.

The distinction between actions at law and suits in equity is not abolished by the 1917 amendment; although the formal requirement of filing a complaint in equity is avoided, the case proceeds as a suit in equity when equitable matter is pleaded. Gellert v. Bank of Calif. Nat. Assn., (1923) 107 Or 162, 214 P 377.

The distinction between actions at law and suits in equity is deprived of any practical importance by this section. Cockrum v. Graham, (1933) 143 Or 233, 21 P2d 1084.

The purpose of the 1917 amendment was to permit either party to amend their pleadings when entitled to equitable relief, to avoid a miscarriage of justice. Kroschel v. Martineau Hotels, (1933) 142 Or 31, 18 P2d 818.

This section does not abolish the distinction between law and equity. Corvallis Sand & Gravel Co. v. State Land Bd., (1968) 250 Or 319, 439 P2d 575.

(3) Matters which may be set up by answer. The failure of a defendant to present facts by a cross-bill as an equitable defense to a law action does not estop him from subsequently asserting the same facts in a suit to obtain appropriate relief. Clark v. Hindman, (1905) 46 Or 67, 79 P 56; Bowsman v. Anderson, (1912) 62 Or 431, 438, 123 P 1092, 125 P 270; Campbell's Gas Burner Co. v. Hammer, (1916) 78 Or 612, 153 P 475; Jakel v. Seeck, (1916) 79 Or 489, 154 P 424, 155 P 1192; Tooze v. Heighton, (1916) 79 Or 545, 156 P 245.

A counterclaim is not a defense within the meaning of this section. Haaland v. Miller, (1913) 67 Or 346, 136 P 9; Hamilton v. Hamilton Mammoth Mines, Inc., (1924) 110 Or 546, 223 P 926.

The 1917 amendment abrogates the rule that defendant may try his legal defenses and, if unsuccessful, sue in equity for proper equitable relief. Hopka v. Forbes, (1931) 135 Or 91, 294 P 342 and Corvallis Sand & Gravel Co. v. State Land Bd., (1968) 250 Or 319, 439 P2d 575. Overruling Churchill v. Meade, (1919) 92 Or 626, 182 P 368.

This subsection applies to special proceedings, except that an equitable defense of itself does not stay such special proceedings. Friedenthal v. Thompson, (1934) 146 Or 640, 31 P2d 643; State v. Fitzgerald, (1936) 154 Or 182, 58 P2d 508.

When the defendant can set forth his entire defense in an answer at law, equitable relief is not necessary. Hunt v. Bishop, (1951) 191 Or 541, 229 P2d 960; Jacobson v. Wheeler, (1951) 191 Or 384, 230 P2d 550.

In an action in ejectment, if defendant wants relief arising out of facts requiring the interposition of a court of equity, he must plead the equitable matter in the answer pursuant to this section. Hughes v. Flier, (1955) 203 Or 612, 280 P2d 992; Corvallis Sand & Gravel Co. v. State Land Bd. (1968) 250 Or 319, 439 P2d 575.

A defendant may not set up an equitable defense in a justice's court as that court is without equitable jurisdiction. McMahan v. Whelan, (1904) 44 Or 402, 75 P 715.

An equitable defense must consist of equities in favor of defendants and against the plaintiff. Bell v. Spain, (1924) 110 Or 114, 222 P 322, 223 P 235.

This section permits matters cognizable in equity only when material to the defense of the cause of action alleged in the complaint. Hamilton v. Hamilton Mammoth Mines, Inc., (1924) 110 Or 546, 223 P 926.

Where remedy under OC 6-102 [ORS 18.160] for relief against a judgment was inadequate, plaintiff's remedy is the imposition of equitable defense under this subsection. Fain v. Amend, (1940) 164 Or 123, 100 P2d 481.

No particular form or label is required to be attached to an answer seeking equitable relief where the prayer leaves no doubt as to relief sought. Prueitt v. Sound Constr. & Engr. Co., (1946) 178 Or 380, 167 P2d 698.

An answer asserting a breach of contract and requesting return of consideration paid does not necessitate the interposition of the court of equity. Hunt v. Bishop, (1951) 191 Or 541, 229 P2d 960.

In a vendee's action to recover part payment on ground of mutual rescission, an answer seeking specific performance of agreement to reinstate the sale contract was held sufficient. Coppock v. Roberts, (1925) 116 Or 253, 240 P 886.

In an action for conversion where defendant filed an equitable answer stating facts requiring an accounting to determine what was due on a chattel mortgage, a decision by the court without a jury was proper under this subsection. Nash v. Jaynes, (1928) 126 Or 64, 268 P 746.

In an action to recover consideration for quitting premises, a reply alleging fraud in procuring a judgment presented a question of equitable cognizance. Prueitt v. Sound Constr. & Engr. Co., (1946) 178 Or 380, 167 P2d 698.

In a special proceeding, forcible entry and detainer, where an equitable defense was interposed by answer, and the hearing was considered both by the parties and court as a proceeding in equity, the controversy should be fully determined by a final decree adjusting the rights and equities of the parties. Leathers v. Peterson, (1952) 195 Or 62, 244 P2d 619.

(4) Disposal of equitable issues and proceeding at law. Where an answer in a law action contains equitable defenses, the court proceeds as a suit in equity until a determination of the issues thus raised. James v. Ward, (1920) 96 Or 667, 190 P 1105; Rae v. Morgan, (1928) 125 Or 644, 266 P 1069, 267 P 1072; Portland Mtg. Co. v. Elder, (1936) 152 Or 406, 53 P2d 1045.

The court first determines the equitable defense and if well taken the action at law may be perpetually enjoined; if the facts do not constitute or establish an equitable defense, the court then proceeds to determine the action at law. Bell v. Spain, (1924) 110 Or 114, 222 P 322, 223 P 235; Montgomery v. Anglo-Calif. Trust Co., (1937) 157 Or 187, 68 P2d 1057.

Where the equitable issues raised under this section are determined and the proceedings at law are perpetually enjoined, there is no necessity that the law action be allowed to proceed. Kraemer v. Alvord, (1920) 97 Or 227, 189 P 990; Anderson v. Hurlburt, (1923) 109 Or 284, 219 P 1092; Phillips v. Elliott, (1933) 144 Or 694, 17 P2d 1119, 25 P2d 557.

The court in administering equity will not refuse relief simply because there seems to be no other way of reparation than by rendering a money judgment. Topolos v. Skotheim, (1928) 126 Or 683, 250 P 235, 270 P 753; Ruby v. West Coast Lbr. Co., (1932) 139 Or 388, 10 P2d 358.

Where plaintiff interposes a reply claiming equitable relief by reformation of a release, equity may give complete relief instead of transferring the case back to the law side. Mendelsohn v. Mendelsohn, (1922) 104 Or 281, 207 P 158.

Both the equitable and legal issues may be determined by the court without a jury where parties so stipulate. Crossen v. Campbell, (1922) 102 Or 666, 202 P 745.

Remand of the case to the law side of the court after finding against the equitable defense is not required where there is no further issue to be tried. Bell v. Spain, (1924) 110 Or 114, 222 P 322, 223 P 235.

Transfer to a law court is waived if the defendant asks equity to determine the rights of the parties after attacking equity's jurisdiction in the litigation. Id.

Where defendant fails to allege or prove facts bringing the controversy within the cognizance of equity, the equitable defense may be dismissed. Johnson v. Curl, (1934) 147 Or 530, 33 P2d 237, 34 P2d 975.

If the sum for which judgment is sought is free from dispute the court will enter a judgment for that amount even though the plaintiff has failed to sustain the validity of a lien or the right to equitable relief through its foreclosure. Ward v. Town Tavern, (1951) 191 Or 1, 228 P2d 1.

If counsel agree by stipulation to depart from the statutory procedure, it is presumed, unless there is a clear indication to the contrary, that what commences as a suit in equity will continue to be so until the end. Supove v. Densmoor, (1961) 225 Or 365, 358 P2d 510.

In an action to recover payments by a purchaser of land, a decree determining that there was no repudiation and giving plaintiff 60 days to pay the amount due, whereupon defendant should deliver a deed, was in effect a final determination of the equity suit and law action. Anderson v. Hurlburt, (1923) 109 Or 284, 219 P 1092.

In a suit begun in equity to cancel a stock certificate and rescind a purchase of stock, equity had jurisdiction to determine all issues whether equitable or legal arising on answers and counterclaims. Coughlin v. State Bank, (1926) 117 Or 83, 243 P 78.

In an action for the possession of land where the defendant set up that the deed of plaintiff was in effect a mortgage, the court properly granted a decree determining the case. Colahan v. Smyth, (1938) 159 Or 569, 81 P2d 112.

Although defendant's cross-complaint did not present a situation where he was entitled to relief, arising out of facts requiring the interposition of a court of equity, and material to his defense in the law action, which is necessary to equitable jurisdiction, the subject was not wholly outside of equity jurisdiction because the foreclosure of a lien is of equitable cognizance. Yellow Mfg. Corp. v. Bristol, (1951) 193 Or 24, 236 P2d 939.

In the same proceeding the plaintiff obtained possession of real property through forcible entry and detainer and the defendant received a judgment of restitution of certain purchase money on the theory that equity assumed juris-

diction when an equitable defense was asserted and equity would proceed to a full adjudication of the rights of the parties. Share v. Williams, (1955) 204 Or 664, 277 P2d 775, 285 P2d 523.

Although error, it was not cause for reversal when court heard disposition of legal issues before the equitable issues raised by the answer, but did not announce its judgment until both had been heard. Vincent v. Thompson, (1959) 218 Or 100, 343 P2d 904.

4. Subsection (3); Action brought on wrong side of court

Where court has jurisdiction, whether the suit be in equity or in law, it will not be dismissed because addressed to the wrong side of the court. Cole v. Canadian Bank of Commerce, (1925) 115 Or 456, 239 P 98; Spencer v. Wolff, (1926) 119 Or 237, 243 P 548; Johnson v. Shasta View Lbr. & Box Co., (1929) 129 Or 469, 278 P 588.

An amended complaint stating a cause of suit or an action at law is not vulnerable to demurrer nor subject to dismissal on motion of the defendant. Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072; Huebener v. Chinn, (1949) 186 Or 508, 207 P2d 1136.

Since the 1917 amendment a plaintiff cannot be turned out of court where there is enough in his initial pleading to support a judgment at law but not enough to serve as a foundation for a decree in equity. McCann v. Ore. Scenic Trips Co., (1922) 105 Or 213, 209 P 483.

Where plaintiff's pleading in a suit to foreclose a lien on an automobile states a cause of action at law, he cannot be turned out of court for failure to state a cause for relief in equity. Id.

In action by one partner against another to recover share in profits of business, the circuit court has jurisdiction though the proceeding was addressed to equity jurisdiction of the court. Hansen v. Bogan, (1928) 127 Or 399, 272 P 668.

The provision against dismissal applies to both parties. Kroschel v. Martineau Hotels, (1933) 142 Or 31, 18 P2d 818.

Dismissal of a suit because of mistake of remedy is error where the defendants pray for equitable relief without asking for a jury trial and submit their cause to the court. Oldenburg v. Claggett, (1933) 142 Or 238, 20 P2d 234.

Although an action is on the wrong side of the court, when the allegations support a suit for specific performance and they are sustained by proof, plaintiff is entitled to the aid of equity. Thorp v. Rutherford, (1935) 150 Or 157, 43 P2d 907.

The court has jurisdiction to hear and determine the cause even though both parties ask for general equitable relief when their remedy is at law. Loe v. Klein, (1951) 191 Or 654, 233 P2d 209.

When the court tries the law action first it loses jurisdiction over the equitable aspect of the case. Jacobson v. Wheeler, (1951) 191 Or 384, 230 P2d 550.

A suit to cancel certificates of stock and recover consideration paid from officers should not have been dismissed as to such officers whether plaintiff relied on tort or contract. Coughlin v. State Bank of Portland, (1926) 117 Or 83, 243 P 78.

Under a complaint in equity against a receiver for work and labor performed, the court could not dismiss the cause but must remand it to the law side of the court. Brakebush v. Aasen, (1928) 126 Or 1, 267 P 1035.

Where plaintiff sued in equity for damages from a tort, and defendant made a personal appearance and waived trial by jury, the action should have been prosecuted as an action at law. Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072.

(1) Prior to 1917. Prior to 1917 amendment, a suit or action brought on wrong side of court had to be dismissed. Ming Yue v. Coos Bay R.R. & Nav. Co., (1893) 24 Or 392, 33 P 641.

(2) Amendment of pleadings. Where an equitable defense has been interposed, it is proper to require defendants to amend their answers to omit the equitable matter before proceeding with the trial before jury. State v. Fitzgerald, (1936) 154 Or 182, 58 P2d 508.

A remark of counsel predicated upon equitable pleadings which have been withdrawn may properly be taken from the jury. Id.

Merely withdrawing the pleadings containing equitable matter from the case does not constitute error. Id.

In a suit to foreclose a mortgage, denial of defendant's motion to file cross-complaint was not abuse of discretion where defendant under this subsection could have set up the same matter in his answer. Vermont Loan & Trust Co. v. Bramel, (1924) 111 Or 50, 224 P 1085.

Where plaintiff refused to amend to obviate objection, assuming the unalterable position that equity did have jurisdiction of the cause, the court properly entered judgment of dismissal. Pacific Export Lbr. Co. v. Clatskanie State Bank, (1928) 127 Or 204, 270 P 499.

Where complaint was in the form of a complaint at an action at law, the court properly permitted the plaintiff to amend so as to make it appear plainly that it was a suit to foreclose conditional sales contract. Cook v. Van Buskirk, (1928) 127 Or 206, 271 P 728.

Where original complaint alleged some grounds for equitable relief, amendment of complaint to state cause of action in law was properly disallowed after dismissal and ruling in favor of defendant both in law and equity. Weith v. Klein, (1931) 136 Or 201, 298 P 902.

No amendments are needed to transfer the cause from the equitable to the law side of the court. Id.

(3) Testimony taken before amendment. This provision contemplates that amendments by either party may be made after testimony has been introduced. Kroschel v. Martineau Hotels, (1933) 142 Or 31, 18 P2d 818.

5. Appeals

Now, as before 1917 amendment, to secure a review of either the decree in equity or the judgment at law rendered after determination of the equitable matters, an appeal must be taken from either and an appeal from one will not operate as an appeal from the other so as to permit a review of both. Oatman v. Epps, (1887) 15 Or 437, 15 P 709; Donart v. Stewart, (1912) 63 Or 76, 126 P 608; Gellert v. Bank of Calif., (1923) 107 Or 162, 214 P 377.

Where complaint in equity failed to state cause of suit but stated a cause of action, Supreme Court will remand the cause to be considered as an action at law. Burr v. Mutual Life Ins. Co., (1920) 96 Or 14, 187 P 850, 188 P 962; Scobey v. Swartz, (1945) 176 Or 654, 160 P2d 280.

Where an appeal is taken after dismissal of a cross-bill, Supreme Court will not enjoin a proceeding at law pending such appeal. Brice v. Younger, (1912) 63 Or 4, 123 P 905.

Where judgment was rendered against plaintiff at law pending an appeal from a decree dismissing the equity suit, he must appeal to protect his interest. Donart v. Stewart, (1912) 63 Or 76, 126 P 608.

Supreme Court will remand the cause with permission for plaintiff to amend complaint to entitle him to relief in equity. Simpson v. First Nat. Bank, (1919) 94 Or 147, 185 P 913.

Where a case was erroneously tried as one in replevin instead of suit in equity, the Supreme Court will dispose of the case as a suit in equity where satisfied that correct result was reached in lower court. Geary v. Prudhomme, (1926) 117 Or 165, 243 P 101.

Interposition of equitable defense in action at law involving less than minimum amount required as condition to right to appeal was held to preclude dismissal of appeal. Outcault Advertising Co. v. Jones, (1926) 119 Or 214, 234 P 269, 239 P 1113, 1119.

Defendant may appeal from a decree denying equitable relief without waiting for a determination of the law action. Simmons v. Wash. Fid. Nat. Ins. Co., (1931) 136 Or 400, 299 P 294.

FURTHER CITATIONS: Wright v. Wimberly, (1919) 94 Or 1, 184 P 740; Lind v. Boulin, (1920) 97 Or 232, 190 P 1103; Coos Bay Lbr. Co. v. Collier, (1939) 104 F2d 722; Quinn v. Hanks, (1951) 192 Or 254, 233 P2d 767; Pacific General Contractors v. Slate Constr. Co., (1952) 196 Or 608, 251 P2d 454; State Hwy. Comm. v. State Constr. Co., (1955) 203 Or 414, 280 P2d 370; Quine v. Sconce, (1957) 209 Or 486, 306 P2d 420; Denham v. Cuddeback, (1957) 210 Or 485, 311 P2d 1014; Sink v. Raptor, (1960) 220 Or 601, 349 P2d 1104; Mowrey v. Jarvey, (1961) 228 Or 96, 363 P2d 733; Miller v. Miller, (1961) 228 Or 301, 365 P2d 86; Cutts v. Cutts, (1961) 229 Or 33, 366 P2d 179; Priester v. Thrall, (1961) 229 Or 184, 365 P2d 1050; Rogers v. Day, (1962) 230 Or 564, 370 P2d 624; Aldrich v. Forbes, (1964) 237 Or 559, 391 P2d 748; Waterway Terminals Co. v. P.S. Lord Mechanical Contractors, (1965) 242 Or 1, 406 P2d 556, 13 ALR3d 1; Schalek v. Salem Title Co., (1968) 250 Or 150, 435 P2d 1019, 441 P2d 80; Comer v. Roberts, (1968) 252 Or 189, 448 P2d 543; Fleming v. Wineberg, (1969) 253 Or 472, 455 P2d 600; Sugarman v. Olsen, (1969) 254 Or 385, 459 P2d 545; Olson v. Roop, (1970) 255 Or 368, 467 P2d 437; Insurance Co. of No. Am. v. Brehm, (1970) 257 Or 385, 478 P2d 387; Blakely v. Schulz, (1971) 257 Or 527, 480 P2d 428.

LAW REVIEW CITATIONS: 8 OLR 287; 13 OLR 346; 34 OLR 55; 37 OLR 163; 38 OLR 341; 48 OLR 224, 305; 4 WLJ 21, 23, 26.

16.470

NOTES OF DECISIONS
1. In general
2. Filing defective account
3. Filing after expiration of time prescribed
4. Proof of account

1. In general

In an action for conversion, schedules of personal property alleged to have been converted are not within this section. Caspary v. Portland, (1890) 19 Or 496, 24 P 1036, 20 Am St Rep 842.

Where the defendants do not allege an accounting and it does not appear that any demand was made on them for a copy of their account, the plaintiffs cannot insist as a matter of right on the filing of a bill of particulars. Davis v. Hofer, (1900) 38 Or 150, 63 P 56.

A party will not be required to be more definite in a bill of particulars in regard to matters concerning which he has no further knowledge. Stocklen v. Barrett, (1911) 58 Or 281, 114 P 108.

Pleading all the evidence and conclusion that the result is "an account stated," does not constitute a plea of account stated. Smith v. Kinney, (1914) 72 Or 514, 143 P 901, 1126.

A bill of particulars is demandable only under this section. Hayden v. Astoria, (1917) 84 Or 205, 217, 164 P 729.

Unless the complaint alleges an account, a bill of particulars is not demandable under this section. Id.

The term "account" refers to items of debit and credit arising out of the performance of a contract. Williams v. Ingle, (1921) 99 Or 358, 195 P 570.

An itemized statement of damages claimed in suit for breach of contract, sounding in tort, is not within this section. Id.

Where plaintiff, general manager of defendant corporation, furnished an itemized account of his transactions with the defendant, plaintiff was bound thereby. Sullivan v. Welch, (1924) 111 Or 119, 225 P 189.

This section provides for an itemized statement of account in a suit to foreclose a mechanic's lien. Paget v. Peters, (1930) 133 Or 608, 630, 286 P 983, 289 P 1119.

2. Filing defective account

If the account is insufficient or defective, the remedy is a motion to make more definite and certain. Catlin v. Knott, (1868) 2 Or 321; Hayden v. City of Astoria, (1915) 74 Or 525, 145 P 1072.

Failure to make timely objection to defective verification of account precludes the objecting party from raising the question at trial. Robbins v. Benson, (1884) 11 Or 514, 6 P 69.

3. Filing after expiration of time prescribed

It is within the court's discretion to allow an account to be filed after expiration of time prescribed. Rayburn v. Hurd, (1891) 20 Or 229, 25 P 635; Davis v. Hofer, (1900) 38 Or 150, 63 P 56; Raski v. Wise, (1910) 56 Or 72, 107 P 984.

Where plaintiff went to trial two days after receiving copy of an account and did not ask for a continuance, court did not abuse its discretion in relieving defendant from default in furnishing the copy of account. Raski v. Wise, (1910) 56 Or 72, 107 P 984.

Where there was a part compliance with a demand for a statement of account, whether plaintiff should be required to furnish a further bill was in the discretion of the court. Stocklen v. Barrett, (1911) 58 Or 281, 114 P 108.

The failure to furnish statements of account within five days did not preclude evidence of the accounts where the information called for was furnished before the trial and the owner was not injured by the delay. Christman v. Salway, (1922) 103 Or 666, 205 P 541.

4. Proof of account

If a party refuses to specify the items of an account, the court will refuse to allow him to give evidence thereof. Parker v. Monteith, (1879) 7 Or 277.

A bill of particulars confines the party in his proof to the items alleged therein, though he may offer proof of the value of the items along other lines than those alleged in the bill. Hayden v. City of Astoria, (1917) 84 Or 205, 164 P 729.

Where an account is furnished on demand of adverse party in a case where account is not demandable, proof will not be so confined in absence of showing that adverse party has been misled. Id.

FURTHER CITATIONS: Jetmore v. Anderson, (1922) 103 Or 252, 204 P 499; Culver v. Rendahl, (1957) 211 Or 682, 318 P2d 275; Oregon Auto. Ins. Co. v. Bateman, (1971) 258 Or 360, 482 P2d 744.

16.480

NOTES OF DECISIONS

1. Alleging performance of conditions

A general allegation that the party duly performed all the conditions of the contract is sufficient. **Building contract,** McInnis v. Buchanan, (1909) 53 Or 533, 99 P 929; **insurance policy,** Long Creek Bldg. Assn. v. State Ins. Co., (1896) 29 Or 569, 46 P 366; Squires v. Modern Brotherhood, (1913) 68 Or 336, 135 P 774; Kendall v. Travelers' Protective Assn, (1918) 87 Or 179, 169 P 751, 754; Morford v. Calif.-Western States Life Ins. Co., (1939) 161 Or 113, 88 P2d 303; **pasturage contract,** Stilwell v. McDonald, (1921) 100 Or 673, 198 P 567; **racing contract,** Tongue v. State Bd. of Agriculture, (1909) 55 Or 61, 105 P 250; **real estate commissions,** Fisk v. Henarie, (1886) 13 Or 156, 9 P 322; **specific perfor-**

mance of land sale contract, Larrabee v. Bjorkman, (1916) 79 Or 467, 155 P 974; **work and services contract,** Easton v. Quackenbush, (1917) 86 Or 374, 168 P 631.

Where 66 or more laborers are to be furnished under contract to defendant, a general averment of performance is insufficient. Toy William v. Hallett, (1872) 2 Sawy 261, Fed Cas No. 14,123.

Where the condition precedent is not definitely limited and settled in the contract, the rule here stated does not apply. Id.

Performance of an independent promise or covenant need not be alleged. Hawley v. Bingham, (1876) 6 Or 76.

An allegation "that the work was performed according to contract" is equivalent to stating that the plaintiff duly performed all the conditions on his part. Griffin v. Pitman, (1880) 8 Or 342, 343.

Demand by purchaser for performance was not condition precedent within this section, where contract is silent as to time for demand. Neis v. Yocum, (1883) 16 Fed 168, 9 Sawy 24.

Mutual and dependent undertakings of parties to sales contract to be performed concurrently, are not conditions precedent within this section. Id.

In an action on a contract containing mutually dependent covenants, plaintiff must allege full performance or readiness and ability to perform before he can put defendant in default and claim damages. Davis Lbr. Co. v. Coats Lbr. Co., (1917) 85 Or 542, 167 P 507.

Where defendant by its answer sought to excuse nonperformance of a contract of sale but did not repudiate it, the complaint which failed to aver performance or readiness to perform by plaintiff could not be sustained on the theory that it was unnecessary for plaintiff to tender performance of a vain thing. Id.

This section does not authorize pleading breach of contract as a legal conclusion. Oeder v. Watt, (1923) 107 Or 600, 214 P 591.

In suit to enforce mechanic's lien, plaintiff, having pleaded contract, must allege its terms and compliance therewith or some excuse for failure to perform. Graf v. Petry, (1926) 118 Or 511, 247 P 315.

A complaint for services rendered to decedent was insufficient where it contained no allegation of performance. Lewis v. Siegman, (1931) 135 Or 660, 296 P 51, 297 P 1118.

2. Waiver of performance

If a party relies on a waiver of performance of the conditions by the adverse party, he should aver the facts constituting such waiver in order to admit evidence thereof. Weidert v. State Ins. Co., (1890) 19 Or 261, 24 P 242, 20 Am St Rep 809; Long Creek Bldg. Assn. v. State Ins. Co., (1896) 29 Or 569, 46 P 366; Hannan v. Greenfield, (1899) 36 Or 97, 58 P 888; Durkee v. Carr, (1900) 38 Or 189, 199, 63 P 117; Young v. Stickney, (1905) 46 Or 101, 104, 79 P 345; Cranston v. West Coast Life Ins. Co., (1912) 63 Or 427, 443, 128 P 427.

FURTHER CITATIONS: Star Sand Co. v. Portland, (1920) 96 Or 323, 189 P 217; Austin v. Tillman Co., (1922) 104 Or 541, 584, 209 P 131; Smith v. Abel, (1957) 211 Or 571, 316 P2d 793; Houston v. Briggs, (1967) 246 Or 439, 425 P2d 748; Doyle v. Mathis Gen. Contractors, (1969) 253 Or 57, 453 P2d 174.

LAW REVIEW CITATIONS: 6 OLR 293, 299.

16.490

NOTES OF DECISIONS

At common law it was necessary in alleging the judgment of an inferior court to set forth facts showing that the court had had jurisdiction to hear and determine the cause. Dick v. Wilson, (1883) 10 Or 490; Ashley v. Pick, (1909) 53 Or 410, 100 P 1103.

Under this section a formal allegation that a judgment of a justice's court was "duly given" or "duly made" is sufficient. Ashley v. Pick, (1909) 53 Or 410, 100 P 1103. Overruling Page v. Smith, (1886) 13 Or 410, 10 P 833. **Distinguishing** Willits v. Walter, (1898) 32 Or 411, 52 P 24.

This section is to be strictly construed. Ashley v. Pick, (1909) 53 Or 410, 100 P 1103; Canuto v. Weinberger, (1916) 79 Or 342, 155 P 190.

Although it is sufficient under this section to aver that a judgment of a justice's court was "duly given, made and entered," the facts conferring power on an inferior court must be proved when its determination is challenged. Evans v. Marvin, (1915) 76 Or 540, 148 P 1119; State v. Baird, (1954) 201 Or 240, 269 P2d 535.

This statute applies only to courts of limited and special jurisdiction. Crocker v. Russell, (1930) 133 Or 213, 287 P 224; Faist v. Faist, (1934) 147 Or 623, 34 P2d 937.

The county court in probate matters is a court of general and superior jurisdiction, rendering it unnecessary to allege jurisdiction, a fact which the law will presume. Rutenic v. Hamaker, (1902) 40 Or 444, 67 P 196.

In pleading the judgment of a county court it should be alleged that the judgment was rendered in a probate matter to raise the presumption. Nolan v. Hughes, (1908) 51 Or 187, 189, 93 P 362, 94 P 504.

A complaint which alleges that the lien was duly foreclosed in a suit instituted for that purpose need not allege the facts showing the validity of the lien. Willett v. Kinney, (1909) 54 Or 594, 104 P 719.

When a party elects to set forth facts conferring jurisdiction, the pleading must be complete in this respect. De Vall v. De Vall, (1910) 57 Or 128, 109 P 755, 110 P 705.

A petition in a district court for a writ of mandate is within this section. Canuto v. Weinberger, (1916) 79 Or 342, 155 P 190.

Where a party alleging a judgment of a subordinate tribunal of a sister state elected to set forth the facts conferring power to hear and determine the case, he should have stated all the facts necessary to give jurisdiction. De Vall v. De Vall, (1910) 57 Or 128, 109 P 755, 110 P 705.

A complaint for malicious prosecution was insufficient where it did not comply with this section or state the facts necessary to give the justice jurisdiction. Nally v. Richmond, (1922) 105 Or 462, 209 P 871.

FURTHER CITATIONS: Toby v. Ferguson, (1868) 3 Or 27; Fisher v. Kelley, (1896) 30 Or 1, 46 P 146; Schultz v. Selberg, (1916) 80 Or 668, 157 P 1114; Kuhnhausen v. Stadelman, (1944) 174 Or 290, 148 P2d 239, 149 P2d 168.

16.500

CASE CITATIONS: Dryden v. Daly, (1918) 89 Or 218, 173 P 667.

16.510

NOTES OF DECISIONS

Under this section, before the 1951 amendment, it was sufficient to refer to the ordinance by its title and the date of its approval. Nodine v. City of Union, (1886) 13 Or 587, 11 P 298; Nichols v. Salem, (1907) 49 Or 298, 89 P 804.

Where ordinances have been pleaded, it is error to submit to the jury the question whether or not there was such an ordinance. Emmons v. So. Pac. Co., (1920) 97 Or 263, 191 P 333; Johnson v. Underwood, (1922) 102 Or 680, 203 P 879.

Before the enactment of this section the ordinance had to be set forth in the pleading the same as any other fact. Pomeroy v. Lappeus, (1881) 9 Or 363.

A complaint for violating an ordinance, giving the title of the ordinance, its number and the number of the particular section which defendant was claimed to have violated, was sufficient after verdict. Mayhew v. Eugene, (1910) 56 Or 102, 104 P 727, Ann Cas 1912C, 33.

When an ordinance is pleaded in the manner authorized by this section, it becomes as much a part of the complaint as though set out verbatim. Dillon v. Beacon, (1913) 67 Or 118, 125, 134 P 778, 135 P 336.

This section does not provide an exclusive rule of pleading; pleader may state the provisions of either a charter or ordinance about which a question is raised. Chan Sing v. Astoria,(1916) 79 Or 411, 415, 155 P 378.

Pleading a conclusion as to the effect of city enactments does not satisfy this section. Dryden v. Daly, (1918) 89 Or 218, 173 P 667.

An allegation that the acts done were in accordance with the law covering such cases is not a compliance with this section. Askay v. Maloney, (1919) 92 Or 566, 179 P 899.

This section requires ordinances to be pleaded; the proposition that every man is presumed to know the law does not apply to city ordinances. Palmiter v. Hackett, (1920) 95 Or 12, 185 P 1105, 186 P 581.

An objection that public improvements were not constructed according to the city ordinances could not be considered where the ordinances were not pleaded as required by this section. Dailey v. Cremen, (1916) 80 Or 183, 156 P 797.

A court will not take judicial notice of municipal enactments by initiative process. Dryden v. Daly, (1918) 89 Or 218, 173 P 667.

FURTHER CITATIONS: Wagoner v. City of La Grande, (1918) 89 Or 192, 173 P 305; Simmons v. Holm, (1961) 229 Or 373, 367 P2d 368; Grayson v. State, (1968) 249 Or 92, 436 P2d 261; Washington County v. Stearns, (1970) 3 Or App 366, 474 P2d 360.

16.530

NOTES OF DECISIONS

1. Subsection (1)

In actions for libel if the words are actionable per se, it is not necessary to allege any extrinsic facts for the purpose of showing the application of the defamatory matter to the plaintiff. Cole v. Neustadter, (1892) 22 Or 191, 29 P 550; Woolley v. Plaindealer Pub. Co., (1906) 47 Or 619, 84 P 473, 5 LRA(NS) 498.

The code has not dispensed with the necessity of inducement or innuendoes to show the defamatory meaning of the words. Cole v. Neustadter, (1892) 22 Or 191, 29 P 550.

Where the language alleged in a complaint for libel is not libelous per se, and there is no innuendo, a demurrer is properly sustained. Lafky v. Albert, (1913) 68 Or 373, 137 P 209.

A complaint for slander which does not aver special damage is not sufficient unless it discloses a situation within one of the four classifications authorizing such action. Reiman v. Pac. Dev. Socy., (1930) 132 Or 82, 284 P 575.

The complaint in an action for libel is sufficient if the alleged defamatory words bring the plaintiff into the public hatred, contempt or ridicule. Reiman v. Pac. Dev. Socy., (1930) 132 Or 82, 284 P 275. **But see** Hinkel v. Alexander, (1966) 244 Or 267, 417 P2d 586.

Where the allegation that the libel was published of and concerning the plaintiffs was denied, the plaintiffs have the burden of showing that the libel applied to them. Marr v. Putnam, (1952) 196 Or 1, 246 P2d 509.

2. Subsection (2)

Failure to make good a plea of justification does not necessarily affect the damages; it depends upon the motive with which the plea was interposed. Upton v. Hume, (1893) 24 Or 420, 33 P 810, 21 LRA 493.

Under this subsection, a person charged with libel may defend on the ground that the alleged libelous words were true. Willetts v. Scudder, (1914) 72 Or 535, 144 P 87.

The purpose of this subsection is to give defendant, erring honestly and in good faith, the benefit of mitigating circumstances. Mount v. Welsh, (1926) 118 Or 568, 247 P 815.

The defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages. Mannix v. Portland Telegram, (1933) 144 Or 172, 23 P2d 138, 90 ALR 55.

This subsection enlarges not limits the defenses to such actions. Israel v. Portland News Pub. Co., (1936) 152 Or 225, 53 P2d 529, 103 ALR 470.

Truth was not a defense where it was admitted that alleged libelous article was not true as applied to plaintiffs. Marr v. Putnam, (1958) 213 Or 17, 321 P2d 1061.

FURTHER CITATIONS: Kilgore v. Koen, (1930) 133 Or 1, 288 P 192; Golden No. Airways v. Tanana Pub. Co., (1955) 218 F2d 612, 623.

16.540

NOTES OF DECISIONS

The principles of common law granting to the owner or possessor of land the right to distrain animals doing damage on the land is adapted by this section. Hall v. Marshall, (1933) 145 Or 221, 27 P2d 193.

16.610

NOTES OF DECISIONS

A pleading after verdict will not be deemed defective unless it lack a material allegation as defined in this section. McKay v. Musgrove, (1887) 15 Or 162, 13 P 770; Hannan v. Greenfield, (1899) 36 Or 97, 58 P 888.

The test of the materiality of an allegation is whether it may be stricken from the pleading without leaving it insufficient. Moody v. Richards, (1896) 29 Or 282, 45 P 777; Fisher v. Kelly, (1896) 30 Or 1, 46 P 146; Edgren v. Reissner, (1964) 239 Or 212, 396 P2d 564.

FURTHER CITATIONS: Zeuske v. Zeuske, (1909) 55 Or 65, 103 P 648, 105 P 249, Ann Cas 1912A, 557; Eastern & Western Lbr. Co. v. Williams, (1929) 129 Or 1, 276 P 257; Lanberg v. State Ind. Acc. Comm., (1923) 107 Or 498, 215 P 594; Brandtjen & Kluge, Inc. v. Biggs, (1955) 205 Or 473, 288 P2d 1025; State v. Russell, (1962) 231 Or 317, 372 P2d 770.

16.620

NOTES OF DECISIONS

Material allegations of complaint or answer not specifically controverted are taken as true. Cogswell v. Wilson, (1884) 11 Or 371, 4 P 1130; State v. Lavery, (1897) 31 Or 77, 49 P 852; Farmers' & Traders' Nat. Bank v. Hunter, (1899) 35 Or 188, 57 P 424; Davenport v. Dose, (1902) 40 Or 336, 67 P 112; Randall v. Simmons, (1902) 40 Or 554, 67 P 513; Haines v. Connell, (1906) 48 Or 469, 87 P 265, 88 P 872, 120 Am St Rep 835; Wright v. Conservative Inv. Co., (1907) 49 Or 177, 89 P 387; Stanley v. Topping, (1914) 71 Or 590, 143 P 632; Patterson v. Wade, (1902) 115 Fed 770, 53 CCA 1.

Allegations of new matter in the reply are deemed controverted as upon a direct denial. Mayes v. Stephens, (1901) 38 Or 512, 63 P 760, 64 P 319; Vasquez v. Pettit, (1915) 74 Or 496, 145 P 1066, Ann Cas 1917A, 439; Oregonian Ry. v. Ore. Ry. & Nav. Co., (1886) 27 Fed 277.

Failure to deny is an admission only of matter well plead-

ed. Windsor v. Collinson, (1897) 32 Or 297, 52 P 26; Schultz v. Selberg, (1916) 80 Or 668, 157 P 1114.

Failure to deny legal conclusions in an answer does not admit them. Larsen v. Ore. Ry. & Nav. Co., (1890) 19 Or 240, 23 P 974.

An admission cannot be insisted on for the first time on appeal where the question has been litigated without objection. Minard v. McBee, (1896) 29 Or 225, 44 P 491.

It is proper to strike an affirmative allegation of the answer inconsistent with an allegation in the complaint which is admitted by failure to deny. Capital Lumbering Co. v. Learned, (1900) 36 Or 544, 59 P 454, 78 Am St Rep 792.

Where plaintiff amends reply on trial to introduce evidence rebutting defendant's counterclaim, new matter in reply will be deemed controverted. Casner v. Hoskins, (1913) 64 Or 254, 128 P 841, 130 P 55.

By proceeding to trial after demurrer to reply was overruled, the defendant avails himself of the provision that all affirmative matter in the reply is deemed denied. Craft v. Flesher, (1936) 153 Or 348, 55 P2d 1101, 56 P2d 1141.

This statute does not create a mere presumption that may be overcome by evidence, but rather acts to establish the fact. Goorman v. Estate of Heniken, (1966) 244 Or 200, 416 P2d 662.

Where defendant denied only immaterial allegations, thus admitting the material allegations, plaintiff was entitled to a judgment on the pleadings. Wallace v. Baisley, (1892) 22 Or 572, 30 P 432.

FURTHER CITATIONS: Edgren v. Reissner, (1964) 239 Or 212, 396 P2d 564.

16.630

NOTES OF DECISIONS
1. Material variance
2. Objections
3. Amendment of pleading

1. Material variance

To be material, the variance must be proved to have misled the adverse party to his prejudice. Hill v. Melon, (1870) 3 Or 542; Dodd & Co. v. Denny, (1876) 6 Or 156; Denn v. Peters, (1900) 36 Or 486, 59 P 1109; Wehrung v. Portland Country Club, (1912) 69 Or 48, 120 P 747; Nelson v. Dowgiallo, (1914) 73 Or 342, 143 P 924, 1199; Pitts v. Crane, (1925) 114 Or 593, 236 P 475; De Young v. Crooks, (1928) 124 Or 19, 263 P 918; Sullivan v. Carpenter, (1948) 184 Or 485, 199 P2d 655; Brooke v. Amuchastegui, (1961) 226 Or 335, 360 P2d 275.

Plaintiff cannot allege negligence in one particular and prove it in another. Knahtla v. Ore. R.R. & Nav. Co., (1891) 21 Or 136, 142, 27 P 91; Troy Laundry Co. v. Henry, (1892) 23 Or 232, 31 P 484; Lieuallen v. Mosgrove, (1898) 33 Or 282, 54 P 200, 664; High v. So. Pac. Co., (1907) 49 Or 98, 88 P 961.

But where the complaint contains a general allegation of negligence, proof of any negligence within the scope and purpose of the allegation may be the basis of a recovery. Jones v. Portland, (1899) 35 Or 512, 58 P 657; Kennedy v. Hawkins, (1909) 54 Or 164, 102 P 733, 25 LRA(NS) 606.

A variance between the pleadings and proof is not material unless it amounts to a failure of proof. Eastern & Western Lbr. Co. v. Williams, (1929) 129 Or 1, 276 P 257; Johnson v. Steele, (1936) 154 Or 137, 59 P2d 237.

A plaintiff cannot deny that a certain person ever owned the articles in question and then prove title in himself through that person. Simonds v. Wrightman, (1899) 36 Or 120, 125, 58 P 1100.

No proof of materiality need be given where it is apparent from an inspection of the pleadings. Denn v. Peters, (1900) 36 Or 486, 59 P 1109.

Where complaint alleges a cause of action under state statutes and proof shows a cause under federal statutes, there is a material variance. Kamboris v. Ore.-Wash. R.R. & Nav. Co., (1915) 75 Or 358, 146 P 1097.

No variance warrants acquittal unless it is material and prejudicial to the accused. State v. Wilson, (1962) 230 Or 251, 369 P2d 739.

It was held that there was no material variance between allegations and proof. **Carrier actions,** Honeyman v. Ore. & Calif. R. Co., (1886) 13 Or 352, 10 P 628, 57 Am Rep 20; Normile v. Ore. Nav. Co., (1902) 41 Or 177, 69 P 928; **contract,** Lee v. Summers, (1868) 2 Or 260; Denn v. Peters, (1900) 36 Or 486, 59 P 1109; Creecy v. Joy, (1901) 40 Or 28, 66 P 295; Lazelle v. Miller, (1902) 40 Or 549, 67 P 307; Keene v. Eldridge, (1905) 47 Or 179, 82 P 803; Schucking & Co. v. Young, (1915) 78 Or 483, 153 P 803; Martin v. Gauld Co., (1920) 96 Or 635, 190 P 717; Winn v. Taylor, (1921) 98 Or 556, 190 P 342, 194 P 857; Williams v. Ingle, (1921) 99 Or 358, 195 P 570; Benninghoff v. Benninghoff, (1946) 179 Or 161, 170 P2d 379; **conversion,** Cross v. Campbell, (1944) 173 Or 477, 146 P2d 83; **description,** Baker v. State Ins. Co., (1897) 31 Or 41, 48 P 699, 65 Am St Rep 807; Hartford Fire Ins. Co. v. Central R.R. of Ore., (1914) 74 Or 144, 144 P 417; Mitchell v. Curtis, (1931) 135 Or 595, 296 P 1078.

Liens, Hendy Machinery Works v. Pac. Cable Constr. Co., (1893) 24 Or 152, 33 P 403; Kelsay v. Taylor, (1910) 56 Or 13, 107 P 609; Tait & Co. v. Stryker, (1926) 117 Or 338, 243 P 104; **name,** Thompson v. Rathbun, (1889) 18 Or 202, 22 P 837; Stokes v. Brown, (1891) 20 Or 530, 26 P 561; Osborn v. Logus, (1895) 28 Or 302, 37 P 456, 38 P 190, 42 P 997; **negligence,** Ahern v. Ore. Telephone Co., (1893) 24 Or 276, 33 P 403, 35 P 549, 22 LRA 635; Heiser v. Shasta Water Co., (1914) 71 Or 566, 143 P 917; Stool v. So. Pac. Co., (1918) 88 Or 350, 172 P 101; Ziegler v. Alaska Portland Packers' Assn., (1931) 135 Or 359, 296 P 39; **representations,** Turk v. Botsford, (1914) 70 Or 198, 139 P 925; Meek v. Meek, (1916) 79 Or 579, 156 P 250; **time,** Delsman v. Friedlander, (1901) 40 Or 33, 66 P 297; Kitchen v. Holmes, (1902) 42 Or 252, 70 P 830; Johnson v. Jennings-McRae Logging Co., (1914) 70 Or 16, 138 P 236; Jones Land & Livestock Co. v. Seawell, (1918) 90 Or 236, 176 P 186; **title,** Moore v. Frazer, (1888) 15 Or 635, 16 P 869; Winter v. Falls Lbr. Co., (1934) 146 Or 592, 31 P2d 177.

2. Objections

The objection that the proof varies from the pleading must be taken at trial. Hill v. Mellon, (1870) 3 Or 542.

It is within the discretion of the court to disregard variance between allegation and proof, and nothing short of an abuse of such discretion can be assigned as error on appeal. Wehrung v. Portland Country Club, (1912) 61 Or 48, 120 P 747.

Where defendant simply objects to the admission of evidence on the ground of variance but produces no proof that he has been misled, the court must declare the variance immaterial. Nelson v. Dowgiallo, (1914) 73 Or 342, 143 P 924, 1199.

Where no objection is made in trial court, a variance is of no avail to a party unless the same amounts to a failure of proof. Downs v. Nat. Share Corp., (1936) 152 Or 546, 55 P2d 27.

3. Amendment of pleading

Where a party has not proved that he has been misled, the variance is immaterial and the court may direct the fact to be found according to the evidence or may order an immediate amendment without costs. Moore v. Frazer, (1888) 15 Or 635, 16 P 869; Stokes v. Brown, (1891) 20 Or 530, 26 P 561; Denn v. Peters, (1900) 36 Or 486, 490, 59 P 1109; West v. Eley, (1901) 39 Or 461, 65 P 798; Creecy v.

Joy, (1901) 40 Or 28, 66 P 295; Wehrung v. Portland Country Club, (1912) 61 Or 48, 120 P 747.

This section must be read in connection with LOL 98 and 99 [ORS 16.640 and 16.650] in determining whether a fatal variance is equivalent to a failure of proof. Rosenwald v. Ore. City Trans. Co., (1917) 84 Or 15, 163 P 831, 164 P 189.

Where the fatal variance amounts to a failure of proof, the variance cannot be cured by amendment. Id.

FURTHER CITATIONS: Bishop v. Baisley, (1895) 28 Or 119, 41 P 936; La Grande v. Portland Public Market, (1911) 58 Or 126, 113 P 25; Randolph v. Christensen, (1928) 124 Or 661, 265 P 797; State v. Union High Sch. Dist. 7, (1939) 161 Or 410, 90 P2d 202; Brandtjen & Kluge, Inc. v. Biggs, (1955) 205 Or 473, 288 P2d 1025; LaBarge v. United Ins. Co., (1956) 209 Or 282, 303 P2d 498, 306 P2d 380; State v. Russell, (1962) 231 Or 317, 372 P2d 770.

16.640

NOTES OF DECISIONS

Where the variance is immaterial, the court may direct the facts to be found according to the evidence or order an immediate amendment. Henderson v. Morris, (1873) 5 Or 24; Stokes v. Brown, (1891) 20 Or 530, 26 P 561; Denn v. Peters, (1900) 36 Or 486, 491, 59 P 1109; West v. Eley, (1901) 39 Or 461, 463, 65 P 798; Wehrung v. Portland Country Club, (1912) 61 Or 48, 54, 120 P 747; Winn v. Taylor, (1921) 98 Or 566, 190 P 342, 194 P 857.

Under this section nothing short of an abuse of discretion is assignable as error. Brown v. Moore, (1869) 3 Or 435; Wehrung v. Portland Country Club, (1912) 61 Or 48, 120 P 747.

Under DL 104 [ORS 16.660], the court is authorized to disregard immaterial variances. Henderson v. Morris, (1873) 5 Or 24.

Where a party fails to object to a variance, it will be deemed immaterial so as to bring it within the application of this section. Denn v. Peters, (1900) 36 Or 486, 59 P 1109.

A variance between the pleadings and proof is not material unless it amounts to a failure of proof. Johnson v. Steele, (1936) 154 Or 137, 59 P2d 237.

FURTHER CITATIONS: Rosenwald v. Oregon City Trans. Co., (1917) 84 Or 15, 163 P 831, 164 P 189; Williams v. Ingle, (1921) 99 Or 358, 195 P 570; Eastern & W. Lbr. Co. v. Williams, (1929) 129 Or 1, 276 P 257; Zeigler v. Alaska Portland Packers' Assn., (1931) 135 Or 359, 296 P 38; Benninghoff v. Benninghoff, (1946) 179 Or 154, 170 P2d 379.

16.650

NOTES OF DECISIONS

Variance in some particulars only is not within this section. Hill v. Melon, (1870) 3 Or 543. **Date of contract,** Stokes v. Brown, (1891) 20 Or 530, 26 P 561; **detail as to how the injury occurred,** Ahern v. Ore. Telephone Co., (1893) 24 Or 276, 33 P 403, 35 P 549, 22 LRA 635; Stool v. So. Pac. Co., (1918) 88 Or 350, 172 P 101; **date of fire,** Johnson v. Jennings-McRae Logging Co., (1914) 70 Or 16, 138 P 236; **description of same property,** Nelson v Dowgiallo, (1914) 73 Or 342, 143 P 924, 1199.

Unless a party seeking relief on the ground of fraud proves that he was misled by fraudulent statements of the other party, there is failure of proof. Pearce v. Buell, (1892) 22 Or 29, 29 P 78.

Where the evidence shows a wholly different state of facts from that alleged in the complaint, there is a failure of proof. West v. Eley, (1901) 39 Or 461, 65 P 798.

Variance which does not amount to a failure of proof is not fatal. Schwary v. Schwary, (1932) 138 Or 690, 7 P2d 986.

A variance between the pleadings and proof is not material unless it amounts to a failure of proof. Johnson v. Steele, (1936) 154 Or 137, 59 P2d 237.

FURTHER CITATIONS: Thompson v. Rathbun, (1889) 18 Or 202, 22 P 837; Rosenwald v. Ore. City Trans. Co., (1917) 84 Or 15, 163 P 831, 164 P 189; Randolph v. Christensen, (1928) 124 Or 661, 265 P 797.

16.660

NOTES OF DECISIONS

Defect will be disregarded where it does not affect the substantial rights of the adverse party. **Immaterial variances,** Henderson v. Morris, (1873) 5 Or 24; **defect in notice of appeal,** Gregory v. No. Pac. Lbr. Co., (1887) 15 Or 447, 17 P 143; **misstatement of conclusion of law derived from facts pleaded,** Williams v. Culver, (1897) 30 Or 375, 48 P 365; **pleading a cause of action in several counts,** Johnson v. Homestead-Iron Dyke Mines Co., (1920) 98 Or 318, 193 P 1036; **amendment to conform to proof,** Dodson v City of Bend, (1926) 117 Or 231, 242 P 821, 243 P 76; **adding party by amendment during trial,** Walters v. Dock Comm., (1928) 126 Or 487, 245 P 1117, 266 P 634, 270 P 778; **improper cross-examination,** Johnson v. Hattrem, (1929) 129 Or 32, 295 P 913; **refusal of motion for judgment on special findings,** Abraham v. Mack, (1929) 130 Or 32, 273 P 711, 278 P 972; **failure to itemize a ground of negligence,** Weinstein v. Wheeler, (1931) 135 Or 518, 295 P 1096, 296 P 1079; **defects in answer,** Turner v. Jackson, (1932) 139 Or 539, 4 P2d 925, 11 P2d 1048; **supplying by reply of an essential allegation to complaint,** Compton v. Perkins, (1933) 144 Or 346, 24 P2d 670; **erroneous allegation that defendants were joint adventurers,** Johnson v. Steele, (1936) 154 Or 137, 59 P2d 237; **erroneous instructions,** Gilman v. Burlingham, (1950) 188 Or 418, 216 P2d 252; **pleading express contract and proving implied contract,** Schroeder v. Schaeffer, (1971) 258 Or 444, 483 P2d 818; **violation of practice statutes in products liability case,** McGrath v. White Motor Corp., (1971) 258 Or 583, 484 P2d 838; **alleging waste and proving damage for fixtures removed,** Johnson v. NW Acceptance Corp., (1971) 259 Or 1, 485 P2d 12.

A reversal for an infraction of tne rules of pleading is warranted only when it appears that such violation has prejudiced the substantial rights of the appellant. Kaller v. Spady, (1933) 144 Or 206, 10 P2d 1119, 24 P2d 351.

This section is not applicable to a question of jurisdiction. McCain v. State Tax Comm. (1961) 227 Or 486, 360 P2d 778, 363 P2d 775.

FURTHER CITATIONS: Quinn v. Hanks, (1951) 192 Or 254, 233 P2d 767; Hogan v. Aluminum Lock Shingle Corp., (1958) 214 Or 218, 329 P2d 271; Burkholder v. State Ind. Acc. Comm., (1965) 242 Or 276, 409 P2d 342; Cascade Whse. Co. v. Dyer, (1970) 256 Or 377, 474 P2d 325.

16.710

NOTES OF DECISIONS

An application for an order is a motion. Brownell v. Salem Flouring Mill Co., (1906) 48 Or 525, 87 P 770; Harju v. Anderson, (1924) 111 Or 414, 225 P 1100.

Where an order is made but not delivered, person injured by such omission may insist upon its entry nunc pro tunc. Douglas County Road Co. v. Douglas County, (1875) 5 Or 406.

In a special proceeding for a writ of review, a motion is the proper method of bringing into question the propriety of issuing the writ. Holmes v. Cole, (1909) 51 Or 483, 94 P 964.

Motion should state what relief is desired and grounds

for asking the relief. Hammer v. Campbell Gas Burner Co., (1914) 74 Or 126, 144 P 396.

A motion is not required to make defense to a writ of review; the return to the writ being the only pleading required. Roethler v. Cummings, (1917) 84 Or 442, 446, 165 P 355.

An order is made when signed by the judge, but is not effective until delivery to the clerk. Robinson v. Phegley, (1919) 93 Or 299, 177 P 942, 178 P 799, 182 P 373.

Administrator's application for resale of realty is motion within this section. In re Dixon's Estate, (1925) 114 Or 349, 234 P 1106.

Opinion of circuit judge is not an order. Goodman v. Goodman, (1940) 165 Or 141, 105 P2d 1091.

Words "made" and"entered" are in the alternative; an unsigned direction for a new trial which was entered in writing by the clerk constituted an order. Neal v. Haight, (1949) 187 Or 13, 206 P2d 1197.

The county court was acting in a nonjudicial capacity in setting aside park land by order and this section was not applicable. Jaquith v. Hartley, (1966) 243 Or 27, 411 P2d 274.

FURTHER CITATIONS: Holton v. Holton, (1913) 64 Or 390, 129 P 532, 48 LRA(NS) 779; Salem King Prod. Co. v. La Follette, (1921) 100 Or 11, 196 P 416.

ATTY. GEN. OPINIONS: Impoundment procedure, 1966-1968, p 461.

16.720

NOTES OF DECISIONS

Filing a motion with the clerk is not equivalent to making the motion to the judge. Harju v. Anderson, (1924) 111 Or 414, 225 P 1100.

16.730

NOTES OF DECISIONS

The code does not require a notice to be given of every motion. Hosford v. Logus, (1885) 13 Or 130, 11 P 900; Bush v. Geisey, (1888) 16 Or 267, 19 P 122.

The object of notice is to inform the opposite party of the nature of the motion that he may prepare to meet it. Hosford v. Logus, (1885) 13 Or 130, 11 P 900.

Where required notice is not given or waived, order will be disregarded upon objection. Bush v. Geisey, (1888) 16 Or 267, 19 P 922.

The power to shorten time for notice of motion does not apply to time allowed by law for the justification of sureties on appeal. Chemin v. East Portland, (1890) 19 Or 512, 24 P 1038.

Notice is unnecessary unless directed by the court. **Application to substitute administrator as party,** In re Skinner's Will, (1902) 40 Or 571, 62 P 523, 67 P 951; **Administrator's application for resale,** In re Dixon's Estate, (1925) 114 Or 349, 234 P 1106; **motion to withdraw a stipulation of facts,** Robinson v. Oregon City Sand & Gravel Co., (1933) 143 Or 177, 20 P2d 1073; **application to issue execution against decedent judgment debtor,** Bayley v. Davis, (1914) 215 Fed 165.

This section does not require that an application for extension of time to present bill of exceptions be served on adverse counsel. Miller v. Safeway Stores, (1959) 219 Or 139, 312 P2d 577, 346 P2d 647.

It is not necessary to give notice of a motion to renew a judgment. Shepard & Morse Lbr. Co. v. Clawson, (1971) 259 Or 154, 486 P2d 542.

16.740

NOTES OF DECISIONS

This section has no application except to the specific pleading moved against. Rogue R. Management Co. v. Shaw, (1966) 243 Or 54, 411 P2d 440.

FURTHER CITATIONS: State v. Reid, (1956) 207 Or 617, 298 P2d 990; Howser v. Howser, (1970) 2 Or App 474, 469 P2d 790.

16.760

NOTES OF DECISIONS

A summons is not within this section. Bailey v. Williams, (1876) 6 Or 71; Lane v. Ball, (1917) 83 Or 404, 160 P 144, 163 P 975; In re Water Rights of Burnt R., (1925) 116 Or 525, 241 P 988.

A writ of attachment is a process which must bear the seal of the clerk; a writ without a seal is void since there is no statutory provision authorizing affixation by amendment. Sharkey v. Lunz, (1910) 57 Or 147, 110 P 702, Ann Cas 1912D, 783.

Neither notice of appeal nor undertaking on appeal is a "process" within meaning of this section. In re Water Rights of Burnt R., (1925) 116 Or 525, 241 P 988.

A notice of a tax foreclosure by publication of foreclosure list does not come within this section. Champ v. Stewart, (1949) 186 Or 656, 208 P2d 454.

FURTHER CITATIONS: Whitney v. Blackburn, (1889) 17 Or 564, 21 P 874, 11 Am St Rep 857.

LAW REVIEW CITATIONS: 46 OLR 192.

16.770

NOTES OF DECISIONS

This section does not apply to notices of school meetings. Amort v. Sch. Dist. 80, (1906) 48 Or 522, 87 P 761.

Matters occurring in the progress of the cause and relating to the issues are not within the scope of this section. In re Crawford's Estate, (1908) 51 Or 76, 90 P 147, 93 P 820.

Notice for an order enlarging the time to file a transcript must be in writing. Portland v. Richardson, (1928) 127 Or 455, 272 P 259.

An undertaking on appeal is within the scope of this section. Veden v. McFall, (1955) 214 Or 199, 288 P2d 217, 327 P2d 1113.

Notice under this section is not available for service of notice to redeem under ORS 23.570. Stamate v. Peterson, (1968) 250 Or 532, 444 P2d 30.

FURTHER CITATIONS: Lewis & Dryden Printing Co. v. Reeves, (1894) 26 Or 445, 38 P 622; Fraley v. Hoban, (1914) 69 Or 180, 133 P 1190, 137 P 751; Bartley v. Doherty, (1960) 225 Or 15, 351 P2d 71, 357 P2d 521.

LAW REVIEW CITATIONS: 39 OLR 119.

16.780

NOTES OF DECISIONS

1. Application of section
2. Who may serve
3. Proof of service
4. Amendment of proof of service
5. Personal service

1. Application of section

This section applies only to notices given in judicial pro-

ceedings. Chung Yow v. Hop Chong, (1884) 11 Or 220. It does not apply to service of notice to quit upon tenant in forcible entry and detainer action, Chung Yow v. Hop Chong, (1884) 11 Or 220; or, posting notices of school meetings, Amort v. Sch. Dist. 80, (1906) 48 Or 522, 87 P 761; or, notice of claim of mechanic's lien, Nicolai-Neppach Co. v. Poore, (1926) 120 Or 163, 251 P 268.

2. Who may serve

Persons who may serve a notice are designated by this section as any person other than the party himself. Williams v. Schmidt, (1887) 14 Or 470, 13 P 305; Muckle v. Columbia Co., (1910) 56 Or 146, 108 P 120; Keeley v. Keeley, (1920) 97 Or 596, 192 P 490; Welch v. Arney, (1950) 189 Or 277, 219 P2d 1086; **attorney,** Wheeler v. Cragin, (1893) 25 Or 602, 38 P 308; Northwestern Clearance Co. v. Jennings, (1923) 106 Or 291, 209 P 875, 210 P 884; **officer of the law,** Sloper v. Carey, (1881) 9 Or 511; La Grande Nat. Bank v. Blum, (1895) 27 Or 215, 41 P 659; Bennett v. Minott, (1896) 28 Or 339, 39 P 997, 44 P 288.

Service of an undertaking on appeal by a party himself is not authorized. Veden v. McFall, (1955) 214 Or 199, 288 P2d 217, 327 P2d 1113.

3. Proof of service

A written admission of the county clerk is sufficient proof of service of notice upon the county. Read v. Benton County, (1882) 10 Or 154.

A party's attorney may acknowledge service of notice. Lillienthal v. Caravita, (1887) 15 Or 339, 15 P 280.

A party's written admission of service of a notice is insufficient without proof of the authenticity of the signature. Moffitt v. McGrath, (1894) 25 Or 478, 36 P 578.

A town marshal's certificate is sufficient proof of service of notice. La Grande Nat. Bank v. Blum, (1895) 27 Or 215, 41 P 659.

A constable's return of the service of a notice of appeal must show that it was made within his own precinct. Hermann v. Hutcheson, (1898) 33 Or 239, 52 P 489.

Where there is no showing that the papers were in fact served, presumption is against service. Fraley v. Hoban, (1914) 69 Or 180, 133 P 1190, 137 P 751.

Proof of service by a party is expressly prohibited by this section. Keeley v. Keeley, (1920) 97 Or 596, 192 P 490.

Proof of service of notice is insufficient where no copies are furnished as required in proof of service of summons under OC 7-402 [ORS 15.080]. State v. Berg, (1931) 138 Or 20, 3 P2d 783, 4 P2d 628.

4. Amendment of proof of service

An imperfect proof of service may be amended on motion so as to conform to the fact. Barbre v. Goodale, (1896) 28 Or 465, 38 P 67, 43 P 378.

Amendment of returns of service should be liberally allowed. Weaver v. So. Ore. Co., (1897) 30 Or 348, 48 P 171.

5. Personal service

When service of notice is made by leaving a copy at office of attorney or residence of the party, the return must show that service was made according to this section. Lindley v. Wallis, (1867) 2 Or 204; Rees v. Rees, (1879) 7 Or 78; Howard v. Hartford Ins. Co., (1915) 77 Or 341, 144 P 450.

Under subsection (1), acceptance of notice in name of attorney "by J.H." was held insufficient. Holder v. Harris, (1927) 127 Or 432, 248 P 145, 253 P 869, 254 P 1021.

Service under subsection (2) was insufficient where it did not appear to have been made within prescribed times on a person described and appearing to be of proper age and discretion. Wallace v. Campbell, (1930) 135 Or 1, 280 P 659.

FURTHER CITATIONS: Curtis v. Stone, (1963) 234 Or 481, 379 P2d 551; Stamate v. Peterson, (1968) 250 Or 532, 444 P2d 30.

16.790

NOTES OF DECISIONS

1. In general

This section is in derogation of the common law and should be strictly followed. Fisk v. Hunt, (1898) 33 Or 424, 54 P 660.

Service of an abstract of record by mail in accordance with this section is sufficient notwithstanding the opposing party did not receive the same. Goss v. State Ind. Acc. Comm., (1932) 140 Or 146, 12 P2d 322, 1006.

Service of a copy of a printed abstract of the record was held properly served by mail. Nicholas v. Yamhill County, (1922) 102 Or 615, 192 P 410, 203 P 593.

2. Subsection (1)

Prior to 1945 amendment, there could be no service by mail unless the parties resided at different places. Fisk v. Hunt, (1898) 33 Or 424, 54 P 660; Schultz v. Walrad, (1919) 92 Or 315, 179 P 904, 991; First Nat. Bank v. Wegener, (1919) 94 Or 318, 181 P 990, 186 P 41; Northwestern Clearance Co. v. Jennings, (1923) 106 Or 291, 209 P 875, 210 P 844.

3. Subsection (2)

Prior to 1933 amendment, service was deemed to be made on the first day after deposit in post office. Hutchinson v. Crandall, (1916) 82 Or 27, 160 P 124; Lawson v. Hughes, (1928) 127 Or 16, 256 P 1043, 270 P 922; Goss v. State Ind. Acc. Comm., (1932) 140 Or 146, 12 P2d 322, 1006; Payne v. State Ind. Acc. Comm., (1935) 150 Or 520, 46 P2d 581.

Notices are served by copy. Vedder v. Marion County, (1892) 22 Or 264, 29 P 619.

Since return of service by mail of notice may be amended, it is not fatal to omit from the return the phrase "at his office or place of residence." Earle v. Holman, (1936) 154 Or 578, 55 P2d 1097, 61 P2d 1242.

The date of mailing is the date of service. Sherwood v. State Inc. Acc. Comm., (1940) 164 Or 674, 103 P2d 714.

FURTHER CITATIONS: Haberly v. Farmers' Mutual Fire Relief Assn, (1930) 135 Or 32, 287 P 222, 293 P 590, 294 P 594; Stamate v. Peterson, (1968) 250 Or 532, 444 P2d 30; Lewis & Clark College v. State Tax Comm., (1968) 3 OTR 169.

ATTY. GEN. OPINIONS: Whether documents required by law to be filed with state officials come within this section, 1930-32, p 687, 1938-40, p 721.

16.800

NOTES OF DECISIONS

Prior to 1927 amendment, service could be made upon attorney only if he were a resident of county where action was pending. Butler v. Smith, (1890) 20 Or 126, 25 P 381; Bennett v. Minott, (1896) 28 Or 339, 39 P 997, 44 P 288; Neuberger v. Boyce, (1896) 29 Or 458, 45 P 908; Long Creek Bldg. Assn. v. State Ins. Co., (1896) 29 Or 569, 46 P 366.

Where parties are absent from the state and residences are unknown, notice of appeal from a judgment settling water rights may be served on the clerk. In re Water Rights of Burnt R. (1925) 116 Or 525, 241 P 988.

Admission of service of notice of appeal by the attorney of a party who died prior to such admission was insufficient. Holt v. Idleman, (1898) 34 Or 114, 54 P 279.

FURTHER CITATIONS: Bartley v. Doherty, (1960) 225 Or

15, 351 P2d 71, 357 P2d 521; Stamate v. Peterson, (1968) 250 Or 532, 444 P2d 30.

16.810

CASE CITATIONS: In re Water Rights of Burnt R., (1925) 116 Or 525, 241 P 988.

16.830

NOTES OF DECISIONS

This section did not apply in a bankruptcy suit because federal equity procedure was not governed by state law. In re Cunningham, (1930) 40 F2d 270.

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

LAW REVIEW CITATIONS: 46 OLR 192.

16.840

NOTES OF DECISIONS

It could not be presumed that a subpena was sent by telegraph if the original subpena contained more than 100 words and the company's charge was for less than that number. Egan v. Finney, (1903) 42 Or 599, 72 P 133.

16.850

NOTES OF DECISIONS

A mere clerical oversight or mistake which in no way misleads the other party will be disregarded. Moorhouse v. Donica, (1886) 13 Or 435, 11 P 71; Lancaster v. McDonald, (1886) 14 Or 264, 12 P 374.

A notice of appeal intelligently referring to the action in which the appeal is taken is valid notwithstanding the mistake in the name of the court in the title. Ferrari v. Beaver Hill Coal Co., (1909) 54 Or 210, 94 P 181, 95 P 498, 102 P 175, 1016.

Misstatement in summons that judgment would be taken as prayed for, instead of definite sum as provided by statute, was cured by attached complaint containing proper prayer. First Nat. Bank v. Rusk, (1913) 64 Or 35, 127 P 780, 129 P 121, 44 LRA(NS) 138.

16.860

NOTES OF DECISIONS

A paper is filed when it has been delivered to proper officer, except where the payment of a stated fee is a condition precedent; in the latter case the paper is not filed until fee has been paid. Hilts v. Hilts, (1903) 43 Or 163, 72 P 697; Hart v. Prather, (1912) 61 Or 7, 119 P 489.

A clerk may demand his fees before filing a paper, but if he receives the paper and places it on file with the date of its reception and his name indorsed thereon, it is a good filing though his fees are not paid. McDonald v. Crusen, (1868) 2 Or 258. **Distinguished in** Hart v. Prather, (1912) 61 Or 7, 119 P 489.

A petition not marked filed in the usual form but which is found in the records of the court, will be presumed to have been filed. Moore v. Willamette Trans. & Locks Co., (1879) 7 Or 359, 367.

Validity of filing is not affected by clerk's failure to indorse the document. In re Conant's Estate, (1903) 43 Or 530, 73 P 1018; State v. Astoria, (1912) 63 Or 171, 126 P 999.

The clerk cannot waive the payment of the transcript filing fee. Hart v. Prather, (1912) 61 Or 7, 119 P 489.

Validity of filing is not affected by clerk's failure to indorse the document. Scarth v. Scarth, (1957) 211 Or 121, 315 P2d 141.

ATTY. GEN. OPINIONS: Application of this section to appeals from Board of Medical Examiners, 1936-38, p 130; filing certificate of payment or satisfaction of judgment, 1942-44, p 210; whether this section is mandatory, 1942-44, p 402; changing venue from district court, 1960-62, p 352.

16.870

NOTES OF DECISIONS

If lost or destroyed papers have not been supplied, the appeal must be dismissed. Wolf v. Smith, (1876) 6 Or 73; Close v. Close, (1895) 28 Or 108, 42 P 128; In re Plunkett's Estate, (1898) 33 Or 414, 54 P 152.

Where pleadings are lost or destroyed, copies must be substituted. Miller v. Shute, (1910) 55 Or 603, 107 P 467.

FURTHER CITATIONS: Corbitt v. Bauer, (1882) 10 Or 340.

16.880

NOTES OF DECISIONS

Appointing elisors to summon talesmen for a jury on the ground that the sheriff is interested and prejudiced was in the court's discretion. State v. Savage, (1899) 36 Or 191, 60 P 610, 61 P 1128.