Chapter 17

Conduct of Trial; Trial Jury; New Trial; Referees

Chapter 17

LAW REVIEW CITATIONS: 46 OLR 146.

17.005

NOTES OF DECISIONS

Issues defined by this section and BC 111 [ORS 17.015] are those issues upon which findings must be based. Vuilleumier v. Ore. Water Power & Ry. Co., (1909) 55 Or 129, 105 P 706.

FURTHER CITATIONS: Multnomah County v. Faling, (1909) 55 Or 45, 104 P 964; State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828; Taylor v. Nelson, (1932) 139 Or 155, 5 P2d 707, 8 P2d 1089.

ATTY. GEN OPINIONS: When a trial fee is payable, 1932-34, p 581.

17.010

CASE CITATIONS: Hume v. Woodruff, (1894) 26 Or 373, 38 P 191; Mulkey v. Day, (1907) 49 Or 312, 89 P 957; Multnomah County v. Faling, (1909) 55 Or 45, 104 P 964; Taylor v. Nelson, (1932) 139 Or 155, 5 P2d 707, 8 P2d 1089; Heider v. Bernier, (1946) 179 Or 521, 173 P2d 302.

ATTY. GEN. OPINIONS: When a trial fee is payable, 1932-34, p 581.

LAW REVIEW CITATIONS: 15 OLR 279.

17.015

NOTES OF DECISIONS

Issues defined by this section and BC 109 [ORS 17.005] are those issues upon which findings must be based. Vuilleumier v. Ore. Water Power & Ry., (1909) 55 Or 129, 105 P 706.

FURTHER CITATIONS: Taylor v. Nelson, (1932) 139 Or 155, 5 P2d 707, 8 P2d 1089; State Capitol Reconstruction Comm. v. McMahan, (1939) 160 Or 83, 83 P2d 482.

ATTY. GEN. OPINIONS: When a trial fee is payable, 1932-34, p 581.

LAW REVIEW CITATIONS: 15 OLR 278.

17.020

CASE CITATIONS: Warn v. Brooks-Scanlon, Inc., (1966) 256 F Supp 690.

17.025

NOTES OF DECISIONS

The determination of an issue raised by demurrer is a trial within the meaning of this section. Hume v. Woodruff, (1894) 26 Or 373, 38 P 191; State v. Richardson, (1906) 48 Or 309, 315, 85 P 225, 8 LRA (NS) 362; Hutchings v. Royal Bakery & Confectionery Co., (1911) 60 Or 48, 118 P 185. But see State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828.

Trial is defined in terms of this section. Mulkey v. Day, (1907) 49 Or 312, 314, 89 P 957; Taylor v. Taylor, (1912) 61 Or 257, 121 P 431, 964; Warm Springs Irr. Dist. v. Pac. Livestock Co., (1918) 89 Or 19, 173 P 265; Sprague v. City of Astoria, (1923) 106 Or 253, 204 P 956, 206 P 849; Lovell v. Potts, (1924) 112 Or 538, 207 P 1006, 226 P 1111; Mursener v. Redding, (1945) 176 Or 617, 160 P2d 307.

Before a case can be said to be ready for trial, it must be at issue on either law or fact as to all parties; no trial can be demanded when some parties have answered and others have moved or demurred. Mulkey v. Day, (1907) 49 Or 312, 89 P 957; Taylor v. Nelson, (1932) 139 Or 155, 5 P2d 707, 8 P2d 1089.

The trial in a criminal case includes the examination of the issues of fact between the state and the defendant, the decision upon those issues of fact and the receiving of the verdict of the jury. State v. Spores, (1871) 4 Or 198.

This section creates and recognizes two distinct meanings of the word trial: a trial of an issue of law and a trial of an issue of fact. State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828.

An amendment to the pleadings before a judicial examination of the issues had begun was allowed. Hillsboro Nat. Bank v. Garbarino, (1916) 82 Or 405, 161 P 703.

FURTHER CITATIONS: Pfleeger v. Swanson, (1961) 229 Or 254, 367 P2d 406, 1 ALR 3d 707; Warn v. Brooks-Scanlon, Inc., (1966) 256 F Supp 690.

ATTY. GEN. OPINIONS: When a trial fee is payable, 1932-34, p 581.

LAW REVIEW CITATIONS: 23 OLR 104.

17.030

NOTES OF DECISIONS

The determination of a demurrer to a complaint constitutes a trial by court. State v. Richardson, (1906) 48 Or 309, 85 P 225, 8 LRA (NS) 362.

This section makes clear that the two classes of trials provided for in LOL 112 [ORS 17.025] are entirely distinct and separate. State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828.

FURTHER CITATIONS: Pfleeger v. Swanson, (1961) 229 Or 254, 367 P2d 406, 1 ALR 3d 707.

LAW REVIEW CITATIONS: 5 OLR 47.

17.035

NOTES OF DECISIONS

Notwithstanding the constitutional guaranty of the right to a trial by jury, such right may be waived. Reade v. Pac. Supply Assn., (1901) 40 Or 60, 66 P 443; Clackamas So. Ry. Co. v. Vick, (1914) 72 Or 580, 144 P 84. But the waiver must be made as provided by this section. American Mtg. Co v. Hutchinson, (1890) 19 Or 334, 24 P 515; Wilkes v. Cornelius, (1891) 21 Or 341, 23 P 473; Johnson v. Shofner, (1892) 23 Or 111, 31 P 254; Puffer v. Am. Ins. Co., (1906) 48 Or 475, 87 P 523; Branch v. McCormick's Estate, (1914) 72 Or 608, 143 P 915, 144 P 425. **But see** Schnitzer v. Stein, (1920) 96 Or 343, 189 P 984.

The parties may in open court waive a trial by jury and consent to try the cause before the court. Roy v. Horsley, (1877) 6 Or 382, 25 Am Rep 537.

Actions at law are tried by the court when the parties so consent and stipulate. In re Fenstermacher v. State, (1890) 19 Or 504, 25 P 142.

Consent to trial without a jury is equivalent to a request for a special verdict, necessitating a finding by the court on the material issues involved. Moody v. Richards, (1896) 29 Or 282, 45 P 777.

A defendant who moves for a judgment of nonsuit waives his right to a trial by jury, and if he wishes to reserve that right after the nonsuit is denied, he should request the court to submit the cause to the jury. Patty v. Salem Flouring Mills Co., (1909) 53 Or 350, 96 P 1106, 98 P 521, 100 P 298.

And if after motion for nonsuit is denied, plaintiff moves for a directed verdict, he joins in the waiver. Id.

On a motion for directed verdict where defendant does not rest his case, there is no presumption from defendant's silence that he waives the right of trial by jury. Wicks v. Sanborn, (1914) 72 Or 321, 143 P 1007.

The court may not, on its own motion, withdraw the cause from a jury. Union Cent Life Ins. Co. v. Deschutes Valley Loan Co., (1932) 139 Or 222, 3 P2d 536, 8 P2d 587.

The means of waiver provided by this section are exclusive. Argonaut Ins. Co. v. Ketchan, (1966) 243 Or 376, 413 P2d 613, 19 ALR 3d 1386.

This section controls waiver of jury trial in a license suspension proceeding appealed under the Implied Consent Law. Thorp v. Dept. of Motor Vehicles, (1971) 4 Or App 552, 480 P2d 716.

Where the agreement of parties provided for arbitration, trial by jury was waived by written consent. Dowd v. Am. Sur. Co., (1914) 69 Or 418, 139 P 112.

Where a plaintiff was permitted to file an amended complaint changing the cause from one in equity to one at law, it was improper for the court to take the case from the jury in the absence of a waiver in the prescribed manner. Union Cent. Life Ins. Co. v. Deschutes Valley Loan Co., (1932) 139 Or 222, 3 P2d 536, 8 P2d 587.

FURTHER CITATIONS: Turner v. Cyrus, (1919) 91 Or 462, 179 P 279; Maeder Steel Prod. Co., v. Zanello, (1924) 109 Or 562, 220 P 155.

LAW REVIEW CITATIONS: 45 OLR 216; 4 WLJ 97-103.

17.040

NOTES OF DECISIONS

1. In general
2. By verdict of a jury
3. By reference to a referee

1. In general

If the facts are strongly controverted and the evidence nearly equally balanced, an issue of fact may be tried as at law. Swegle v. Wells, (1879) 7 Or 222.

When a suit is tried by the court without an order of reference, it is conducted in the same manner as an action at law. Verdier v. Bigne, (1888) 16 Or 208, 19 P 64.

This section declared the existing rule of equitable procedure as to the trial of issues. Raymond v. Flavel, (1895) 27 Or 219, 40 P 158.

In granting a divorce, the court must hear the testimony. Miller v. Miller, (1913) 65 Or 551, 131 P 308, 133 P 86.

In equity as well as law, a voluntary nonsuit may be taken after a trial of an issue of law on demurrer. State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828.

2. By verdict of a jury

The general equity practice should be looked to in determining whether to submit an issue to a jury. Swegle v. Wells, (1879) 7 Or 222.

On appeal, verdict of jury in an equity suit while not conclusive should not be set aside unless clearly against the evidence. Id.

Whether issues shall be referred to a jury rests in the sound legal discretion of the court. Raymond v. Flavel, (1895) 27 Or 219, 40 P 158.

The right to have equitable matters tried without a jury may be waived. Sugarman v. Olsen, (1969) 254 Or 385, 459 P2d 545.

Where plaintiff was pursuing a stale demand for declaration of a trust of real property, refusal to direct issues to a jury was held not an abuse of discretion. Raymond v. Flavel, (1895) 27 Or 219, 40 P 158.

On appeal to the circuit court from a county court order finding respondent insane, it was not error for the court to submit the issue of respondent's sanity to a jury. In re Sneddon, (1915) 74 Or 586, 144 P 676.

3. By reference to a referee

The circuit court of Multnomah County may refer an issue of fact to a referee for trial without the consent of the parties only in cases involving the examination of long and complicated accounts. Craig v. Calif. Vineyard Co., (1896) 30 Or 43, 46 P 421.

Written documents may be put in evidence at the hearing and need not be offered before the referee. Crown Point Min. Co. v. Crismon, (1901) 39 Or 364, 65 P 87.

A single judge of a district composed of more than one county has authority without consent of parties to refer a suit for taking of testimony, but not for return of findings. Anthony v. Hillsboro Gold Min. Co., (1911) 58 Or 258, 113 P 442, 114 P 95.

Decision and decree must be based on the evidence and are void if based on unauthorized findings and conclusions by a referee. In re Level, (1916) 81 Or 298, 159 P 558.

Deposition of a nonresident witness is excluded where not taken before a special referee as required by statute. Craig v. Crystal Realty Co., (1918) 89 Or 25, 173 P 322.

The circuit court does not lose jurisdiction over divorce proceedings by referring case to referee for taking testimony. Steiwer v. Steiwer, (1924) 112 Or 485, 230 P 359.

FURTHER CITATIONS: DeLashmutt v. Everson, (1879) 7 Or 212; Wadsworth v. Brigham, (1928) 125 Or 428, 487, 259 P 299, 266 P 875; Mongul Trans. Co. v. Larison, (1947) 181 Or 252, 181 P2d 139; Williams v. Stockman's Life Ins. Co., (1968) 250 Or 160, 441 P2d 608.

LAW REVIEW CITATIONS: 37 OLR 68.

17.045

NOTES OF DECISIONS

1. Subsection (1)

Stenographic notes, certified by the official reporter and

filed with the clerk may be considered on appeal; H 815 [ORS 45.050] applies only to suits in which testimony has been taken before a referee. Tallmadge v. Hooper, (1900) 37 Or 503, 61 P 349, 1127; Sanborn v. Fitzpatrick, (1909) 51 Or 457, 91 P 540.

A certificate to the reporter's transcript that it was a true and correct transcript of the shorthand notes taken at the trial and of the whole thereof, should be construed as certifying that it included the entire proceedings. Sanborn v. Fitzpatrick, (1909) 51 Or 457, 460, 91 P 540.

Parol evidence is admissible to show that a purported deed was intended as a mortgage to secure future advances. Callan v. W. Inv. & Holding Co., (1937) 157 Or 412, 72 P2d 48.

2. Subsection (2)

Where no offer was made to have excluded testimony taken and incorporated in the record, the objection could not be urged on appeal. Sutton v. Sutton, (1915) 78 Or 9, 150 P 1025, 152 P 271; Peterson v. Thompson, (1915) 78 Or 158, 151 P 721, 152 P 497; Gill v. Hewitt, (1966) 244 Or 242, 417 P2d 399.

Where court refuses to allow profferred testimony to be taken, and such rejected testimony is essential to a proper determination of the issues, the cause may be remanded. Sutherlin v. Bloomer, (1907) 50 Or 398, 93 P 135.

In equity suits in order that objections to admission of testimony may be of avail on appeal, they must be taken and noted in the trial court. Id.

FURTHER CITATIONS: Martin v. Martin, (1886) 14 Or 165, 12 P 234; Marks & Co. v. Crow, (1887) 14 Or 382, 13 P 55; Neal v. Roach, (1912) 61 Or 513, 107 P 475; Donnells v. United States Nat. Bank, (1943) 172 Or 213, 138 P2d 220; Bowns v. Bowns, (1948) 184 Or 603, 200 P2d 586; Moore v. Schermerhorn, (1957) 210 Or 23, 307 P2d 483, 308 P2d 180; Howes v. Sherlock, (1963) 233 Or 429, 378 P2d 713; Oregon Farm Bureau v. Thompson, (1963) 235 Or 162, 378 P2d 563, 384 P2d 182; Marsh v. Walters, (1965) 242 Or 210, 408 P2d 929; Pacific Coast Land Co. v. Dept. of Rev., (1971) 4 OTR 314.

LAW REVIEW CITATIONS: 37 OLR 68; 45 OLR 218.

17.050

NOTES OF DECISIONS

1. Discretion of court
2. Motions and affidavits
3. Denial of application on admission of adverse party
4. Imposition of terms

1. Discretion of court

The allowance or denial of a motion to postpone is a matter within the trial court's discretion, which discretion will not be disturbed except in case of a manifest abuse. Lew v. Lucas, (1900) 37 Or 208, 61 P 344; Linn County v. Morris, (1902) 40 Or 415, 67 P 295; State v. Mizis, (1906) 48 Or 165, 85 P 611, 86 P 361; State v. Luper, (1907) 49 Or 605, 91 P 444; State v. Mack, (1911) 57 Or 565, 112 P 1079; Cole v. Willow R. Co., (1912) 60 Or 594, 117 P 659, 118 P 176, 1030; North Am. Sec. Co. v. Cole, (1912) 61 Or 1, 118 P 1032; Obenchain v. Ransome-Crummey Co., (1914) 69 Or 547, 138 P 1078, 139 P 920; Harrison v. Pac. Ry. & Nav. Co., (1914) 72 Or 553, 144 P 91; Portland & Ore. City Ry. Co. v. Sanders, (1917) 86 Or 62, 68, 167 P 564, 566; Richter v. Derby, (1931) 135 Or 400, 295 P 457; Baker v. Jensen, (1931) 135 Or 669, 295 P 467; Taylor v. Nelson, (1932) 139 Or 155, 5 P2d 707, 8 P2d 1089; State v. Russell, (1934) 148 Or 256, 34 P2d 941; Re Losie's Estate, (1937) 156 Or 207, 65 P2d 525, 66 P2d 1175; Benson v. Madden, (1956) 206 Or 427, 293 P2d 733; Sims v. Sowle, (1964) 238 Or 329, 395 P2d 133; State ex rel. Mietzner v. Johnston, (1965) 240 Or 109, 400 P2d 254; State v. Hill, (1965) 240 Or 313, 401 P2d 43.

The judicial discretion should be exercised according to fixed legal principles in order to promote substantial justice. Linn County v. Morris, (1902) 40 Or 415, 67 P 295.

Where a continuance is necessary to enable defendant to make his defense, denial of continuance is an abuse of discretion. Elliott v. Lawson, (1918) 87 Or 450, 170 P 925.

Whether the denial of a motion of a continuance is an exercise of sound judicial discretion must be determined from the particular facts of a given case. Baker v. Jensen, (1931) 135 Or 669, 295 P 467.

Continuance may be denied where the party making the application admits that he has no defense. Benson v. Madden, (1956) 206 Or 427, 293 P2d 733.

Where in an action for defalcations of a county treasurer he refused to testify concerning certain moneys until the indictments against him were disposed of, it was held abuse of court's discretion to refuse the continuance asked for until such indictments were disposed of. Linn County v. Morris, (1902) 40 Or 415, 67 P 295.

Continuance was properly refused where there had been ample opportunity to prepare for trial. State v. Needham, (1971) 92 Or App Adv Sh 985, 484 P2d 1123.

2. Motions and affidavits

The affidavit on motion for postponement must show the source of the affiant's information and grounds of his belief that the absent witnesses will testify to the facts stated. North Am. Sec. Co. v. Cole, (1912) 61 Or 1, 118 P 1032; Taylor v. Nelson, (1932) 139 Or 155, 5 P2d 707, 8 P2d 1089.

This section does not apply to adjournments during a trial, in which case it is not necessary to move therefor upon the affidavit required by this section. Young v. Patton, (1881) 9 Or 195.

A motion to postpone a trial is sufficient only when it complies with this section. Taylor v. Nelson, (1932) 139 Or 155, 5 P2d 707, 8 P2d 1089.

If the absent witness' testimony is cumulative, a denial of a motion for postponement will not be ground for a reversal. State v. Russell, (1934) 148 Or 256, 34 P2d 941.

Materiality and admissibility of the testimony of an absent witness must be shown in the affidavit for a postponement. Id.

A continuance will be denied if not accompanied by a motion and an affidavit showing why continuance is necessary and what testimony would be produced if a continuance were granted. In re Losie's Estate, (1937) 156 Or 207, 64 P2d 525, 66 P2d 1175.

A continuance may be denied if the materiality of the evidence expected to be obtained is not shown. Benson v. Madden, (1956) 206 Or 427, 293 P2d 733.

A motion for a continuance because of absence of witnesses is premature where the case had not been set for trial. McCown v. Hannah, (1871) 3 Or 302.

Denial of an application for continuance because of lack of time for preparing case was proper where the application did not give the names of any witnesses whom defendant expected to call or what preparations were necessary. Portland & Ore. City Ry. v. Sanders, (1917) 86 Or 62, 68, 167 P 564.

3. Denial of application on admission of adverse party

A continuance may be refused where the opposite party admits that the witness would, if present, testify as claimed, and that such testimony should be considered as actually given. Lew v. Lucas, (1900) 37 Or 208, 61 P 344.

If a party opposing a motion for continuance admits that the indicated evidence be deemed given, a postponement will not be ordered. State v. Russell, (1934) 148 Or. 256, 34 P2d 941.

Denial of continuance because of absence of defendant

was not erroneous where plaintiff agreed that defendant would testify to certain facts. Clevenger v. Smith, (1928) 126 Or 384, 270 P 501.

4. Imposition of terms

Imposition of terms on granting a continuance is in the discretion of trial court, unless the other party has incurred expense in preparation of the trial in which case imposition of terms is a matter of right. Pacific Mill Co. v. Inman, Poulsen & Co., (1907) 50 Or 22, 90 P 1099.

FURTHER CITATIONS: Harrison v. Pac. Ry. & Nav. Co., (1914) 72 Or 553, 144 P 91.

17.055

NOTES OF DECISIONS

Although this section applies generally, it does not apply to a corporation whose special laws must govern. Oregon Cent. R. Co. v. Wait, (1869) 3 Or 428.

Where defendant does not make an offer as provided in this section, he should not be entitled to recover costs. Savage v. Savage, (1885) 12 Or 459, 8 P 754.

The usual practice is to make the offer in a writing separate from the answer, serve it and if accepted, file it with the clerk. Hammond v. No. Pac. R. Co., (1892) 23 Or 157, 31 P 299.

But offer of compromise may be made in the answer filed by defendant. Id.

The offer need not tender costs for entering judgment but need only offer a specific judgment as costs will follow if the offer is accepted. Id.

A judgment for a sum less than or equal to the amount offered is not a "more favorable" judgment within the meaning of this section. Id.

An offer to compromise unaccepted is not an admission and the case stands as though no offer had been made. Young v. Stickney, (1905) 46 Or 101, 79 P 345.

In fixing liability for costs, interest should not be added to the amount of offer between its date and judgment; the judgment and offer are compared as of date when offer was made. Sanborn-Cutting Co. v. Butler, (1919) 91 Or 619, 178 P 228, 179 P 573.

An unaccepted offer of judgment in replevin for an automobile claiming and reserving appliances and tools belonging to defendant, with judgment accordingly, entitles defendant to costs. Lebb v. Peabody, (1922) 103 Or 406, 205 P 819.

A tender to prevent default on notes and the operation of an acceleration clause is not an offer of compromise under this section. Garrison v. Beals, (1924) 111 Or 563, 222 P 728.

This section is not applicable where a written demand for reasonable attorney's fees is made under ORS 20.080. Colby v. Larson, (1956) 208 Or 121, 297 P2d 1073, 299 P2d 1076.

FURTHER CITATIONS: Railton v. Redmar, (1956) 209 Or 80, 304 P2d 408; Sims v. Sowle, (1964) 238 Or 329, 395 P2d 133.

LAW REVIEW CITATIONS: 13 OLR 314, 318.

17.105 to 17.190

CASE CITATIONS: State v. Anderson, (1971) 92 Or App Adv Sh 1290, 485 P2d 446, Sup Ct **review denied.**

17.105

CASE CITATIONS: Branch v. McCormick's Estate, (1914) 72 Or 608, 143 P 915, 144 P 425; State v. Putney, (1924) 110 Or 634, 224 P 279.

LAW REVIEW CITATIONS: 2 OLR 30; 21 OLR 298.

17.110

NOTES OF DECISIONS

After the entire regular panel has been discharged, this section does not apply and the court has no authority to summon another jury. Mosseau v. Veeder, (1864) 2 Or 113.

In a trial of a particular case the court may direct the sheriff to summon any number of jurors from the body of the county to be used when the regular panel is exhausted. State v. Dale, (1880) 8 Or 229.

A talesman summoned on a special venire from the body of the county is entitled to his fees, whether or not he serves on the jury; but it is otherwise with a talesman when summoned from the bystanders. Bloch v. Multnomah County, (1893) 25 Or 169, 35 P 30.

An expression of opinion as to the guilt of the defendant does not disqualify the sheriff from summoning talesmen for the jury. State v. Savage, (1899) 36 Or 191, 60 P 610, 61 P 1128.

In summoning the special venire, service of notice by persons other than the sheriff, an act purely ministerial, is not objectionable. State v. Caseday, (1911) 58 Or 429, 115 P 287.

Where it is required by statute that six jurors be women, the sheriff may be directed to summon more jurors although the names of several male jurors remain in the box. State v. Chase, (1923) 106 Or 263, 211 P 920.

A jury shall not be drawn until the action has been called for trial. State v. Wolfe, (1934) 147 Or 405, 34 P2d 304.

This section does not prohibit the trial court from excusing a prospective juror for sufficient reason made known to the court. State v. Savan, (1934) 148 Or 423, 36 P2d 594, 96 ALR 497.

FURTHER CITATIONS: Hawkins v. United States, (Alaska) (1902) 116 Fed 569, 53 CCA 663; Mowrey v. Jarvey, (1961) 228 Or 96, 363 P2d 733; State v. Stultz, (1963) 235 Or 534, 385 P2d 763.

ATTY. GEN. OPINIONS: Drawing a separate jury list to take care of cases in which, by statute, six jurors must be women, 1920-1922, p 337.

LAW REVIEW CITATIONS: 2 OLR 30; 6 OLR 396.

17.115

NOTES OF DECISIONS

The common-law "challenge to the array" is abolished by this section. State v. Fitzhugh, (1867) 2 Or 227; State v. Savage, (1899) 36 Or 191, 60 P 610, 61 P 1128.

This section applies to grand as well as to trial juries. State v. Fitzhugh, (1867) 2 Or 227.

An objection to a juror that he is drawn from a particular panel is a challenge to the panel; the objection should be that the juror was improperly and illegally drawn or summoned. State v. Dale, (1880) 8 Or 229.

These are the only challenges to a juror allowed under our procedure. State v. Ju Nun, (1908) 53 Or 1, 97 P 96, 98 P 513.

An objection to the individual jurors on the ground of the unconstitutionality of the law under which the jury was drawn is a challenge to the panel. Id.

An objection to each juror from the special venires on the ground that he was served by some person other than the sheriff amounts to a challenge to the panel. State v. Caseday, (1911) 58 Or 429, 115 P 287.

Motion to stay the proceedings "until a new jury panel was chosen" was in the nature of a challenge to the panel. State v. Howell, (1964) 237 Or 382, P2d 282.

FURTHER CITATIONS: Strickler v. Portland Ry., Light & Power Co., (1916) 79 Or 526, 144 P 1193, 155 P 1195; State v. Nagel, (1949) 185 Or 486, 202 P2d 640, cert. denied, 338 US 818, 70 S Ct 60, 94 L Ed 39; United States v. Davis, (1953) 115 F Supp 392, 398; State v. Anderson, (1965) 242 Or 368, 409 P2d 681.

LAW REVIEW CITATIONS: 21 OLR 298.

17.120

NOTES OF DECISIONS

The general rule is that if the court erroneously refuses to allow a challenge for cause and the party excludes the juror by a peremptory challenge, the error is deemed material only if the party exhausts his peremptory challenges before the jury is obtained. Ford v. Umatilla County, (1887) 15 Or 313, 16 P 33; State v. Humphrey, (1912) 63 Or 540, 128 P 824; Twitchell v. Thompson, (1915) 78 Or 285, 153 P 45; Mount v. Welsh, (1926) 118 Or 568, 247 P 815.

The defendant is entitled to examine persons called as jurors in order to enable him to properly exercise his right of peremptory challenge. State v. Steeves, (1896) 29 Or 85, 43 P 947.

The right of peremptory challenge is conferred upon a party to be used at his own discretion. State v. Humphrey, (1912) 63 Or 540, 128 P 824.

FURTHER CITATIONS: State v. Ju Nun, (1908) 53 Or 1, 97 P 96, 98 P 513; State v. Nagel, (1949) 185 Or 486, 202 P2d 640.

17.125

NOTES OF DECISIONS

The fact that a juror's name did not appear on the assessment roll of the county for the preceding year is no ground for challenge. State v. Ching Ling, (1888) 16 Or 419, 18 P 844; State v. Harding, (1888) 16 Or 493, 19 P 449.

Challenge for cause is defined in the terms of this provision. State v. Ju Nun, (1908) 53 Or 1, 97 P 96, 98 P 513.

FURTHER CITATIONS: State v. Caseday, (1911) 58 Or 429, 115 P 287.

17.130

NOTES OF DECISIONS

Prior conviction of a juror of a crime involving moral turpitude, discovered after defendant's conviction, was not grounds for a new trial. State v. Powers, (1882) 10 Or 145, 45 Am Rep 138; State v. Benson, (1963) 235 Or 291, 384 P2d 208.

Objection to a juror on the ground of incompetency is waived by failure to challenge at the proper time. State v. McDonald, (1879) 8 Or 113.

Subsection (2) does not provide a ground for challenge against one drawn as a grand juror. State v. Brown, (1895) 28 Or 147, 41 P 1042.

"In any cause" means in any civil or criminal action at issue and ready for trial. Id.

The decision of the trial court on the qualifications of a grand juror is conclusive. State v. McDonald, (1879) 8 Or 113; State v. Carlson, (1900) 39 Or 19, 62 P 1016.

No challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror, unless when made by the court for want of qualification as prescribed in H 1234 [ORS 132.030]. Id.

A challenge cannot be made on the ground that the law under which jurors were drawn is unconstitutional, since a jury, though selected in pursuance of a void law, is selected under color of law and is a de facto jury. State v. Ju Nun, (1908) 53 Or 1, 97 P 96, 98 P 513.

The disqualification of a juror on the grounds of a felony conviction is waived by failure to challenge on voir dire. State v. Benson, (1963) 235 Or 291, 384 P2d 208.

FURTHER CITATIONS: State v. Caseday, (1911) 58 Or 429, 115 P 287; Mount v. Welsh, (1926) 118 Or 568, 247 P 815; Kie v. United States, (1886) 27 Fed 357; United States v. Mitchell, (1905) 136 Fed 896.

17.135

NOTES OF DECISIONS

See also cases under ORS 17.140 for challenge for implied bias and cases under ORS 17.145 for challenge for actual bias.

FURTHER CITATIONS: State Hwy. Comm. v. Hewitt, (1962) 229 Or 582, 368 P2d 346; State v. Clipston, (1970) 3 Or App 313, 473 P2d 682.

17.140

NOTES OF DECISIONS

1. In general
2. Subsection (2)
3. Subsection (3)
4. Subsection (4)

1. In general

This section differs materially from the section relating to challenges for implied bias in criminal cases. State v. Stigers, (1927) 122 Or 113, 256 P 646.

2. Subsection (2)

Prior to 1941 amendment, the relationship of physician and patient was not grounds for challenge for implied bias. Mount v. Welsh, (1926) 118 Or 568, 247 P 815.

3. Subsection (3)

Where there is nothing in the record to show that the testimony in the two trials against different defendants was the same, the juror sitting on both trials is not disqualified. State v. Seeley, (1908) 51 Or 131, 94 P 37.

In civil cases implied bias exists only where the causes of action are the same and implied bias does not exist in a civil case merely because the action is based upon substantially the same facts or transaction. Lilley v. Gifford Phillips Wood Prod., (1957) 210 Or 278, 310 P2d 337.

4. Subsection (4)

In an action in which the county is a party, it is sufficient ground of challenge for implied bias that the juror is a taxpayer. Ford v. Umatilla County, (1887) 15 Or 313, 16 P 33; Multnomah County v. Willamette Towing Co., (1907) 49 Or 204, 89 P 389; Elliott v. Wallowa County, (1910) 57 Or 236, 109 P 130, Ann Cas 1913A, 117; West v. Hedges, (1918) 88 Or 158, 171 P 766; Wheeler v. Cobbs & Mitchell Co., (1927) 121 Or 422, 253 P 5.

Where one of the parties is the president or owner of bank, the relationship of depositor or debtor is not ground for disqualification of juror for implied bias. Harrison v. Pac. Ry. & Nav. Co., (1914) 72 Or 553, 144 P 91; Twitchell v. Thompson, (1915) 78 Or 285, 153 P 45.

It was not an abuse of discretion for the trial court to deny a motion for a mistrial because of a reference to insurance on voir dire examination of a juror. Johnson v. Hansen, (1964) 237 Or 1, 389 P2d 330; Skeeters v. Skeeters, (1964) 237 Or 204, 389 P2d 313, 391 P2d 386.

The disqualifying interest is to be determined by the common-law rule and therefore this subsection must be interpreted in the light of adjudicated cases. Garrison v. Portland, (1865) 2 Or 123.

In a suit against a county, a challenge of a juror who is a taxpayer for implied bias will not be allowed where it will result in a failure of justice, as in cases where no change of venue can be had. Elliott v. Wallowa County, (1910) 57 Or 236, 109 P 130, Ann Cas 1913A, 117.

A juror who is a stockholder or interested in an insurance company which warranted against loss by injury forming the basis of pending litigation would be subject to challenge for implied bias; but it is error for the court to allow questions to the jurors which would tend to prejudice the case in the minds of the jurors because of the existence of such insurance. Putnum v. Pac. Monthly Co., (1913) 68 Or 36, 130 P 986, 136 P 835, Ann Cas 1915C, 256, 45 LRA(NS) 338.

This rule does not apply where the county is not the real party in interest. Columbia County v. Consol. Contract Co., (1917) 83 Or 251, 163 P 438.

Where the insurance company is a proper party defendant, it is not error to permit the jurors to answer questions upon their voir dire concerning insurance companies. Askay v. Maloney, (1917) 85 Or 333, 166 P 29.

In an action by a teacher against a school district for salary, a taxpayer of the county but not of the school district was not subject to challenge for implied bias where the judgment recovered was not chargeable against the county, but against the district. West v. Hedges, (1918) 88 Or 158, 171 P 766.

FURTHER CITATIONS: Portland v. Holmes, (1962) 232 Or 505, 376 P2d 120; Davis v. Miller, (1967) 246 Or 102, 424 P2d 250; In re Zafiratos, (1971) 259 Or 276, 486 P2d 550.

LAW REVIEW CITATIONS: 20 OLR 272; 23 OLR 69, 81.

17.145

NOTES OF DECISIONS
1. Constitutionality
2. In general
3. Determination of actual bias

1. Constitutionality

This section was not unconstitutional under Ore. Const. Art. I, §11 guaranteeing the accused a right to trial by an impartial jury. Kumli v. So. Pac. Co., (1892) 21 Or 505, 28 P 637; State v. Megorden, (1907) 49 Or 259, 88 P 306, 14 Ann Cas 130.

2. In general

This section and D183 [ORS. 17.135] have somewhat modified the practice of trying challenges to jurors. State v. Tom, (1879) 8 Or 177.

This section abrogates the common-law rule for disqualification of a juror on ground of actual bias. State v. Brumfield, (1922) 104 Or 506, 209 P 120.

Right to challenge a juror for disqualification is a right which may be waived even in a capital case. State v. Nagel, (1949) 185 Or 486, 202 P2d 640, cert. denied, 338 US 818, 70 S Ct 60, 94 L Ed 39.

3. Determination of actual bias

An opinion on the merits of the cause formed or expressed by a juror from what he has heard from neighbors and newspaper reports is not of itself sufficient to sustain a challenge. State v. Saunders, (1886) 14 Or 300, 12 P 441; State v. Ingram, (1893) 23 Or 434, 31 P 1049; State v. Miller, (1905) 46 Or 485, 81 P 363; State v. Caseday, (1911) 58 Or 429, 115 P 287; State v. Steidel, (1921) 98 Or 681, 194 P 584; Mount v. Welsh, (1926) 118 Or 568, 247 P 815.

To sustain the challenge, the court must be satisfied from all the circumstances that the juror cannot disregard such opinion and try the issue impartially. State v. Tom, (1879) 8 Or. 177; State v. Megorden, (1907) 49 Or 259, 88 P 306, 14 Ann Cas 130.

On challenge for actual bias, the question is one of fact for the court and its decision will be reversed only where abuse of discretion clearly appears. State v. Kelly, (1895) 28 Or 225, 42 P 217, 52 Am St Rep 777; State v. Savage, (1899) 36 Or 191, 60 P 610, 61 P 1128; State v. Humphrey, (1912) 63 Or 540, 128 P 824; Harrison v. Pac. Ry. & Nav. Co., (1914) 72 Or 553, 144 P 91; Mount v. Welsh, (1926) 118 Or 568, 247 P 815; State v. Dixon, (1971) 5 Or App 113, 481 P2d 629.

Whether a juror in a criminal case is actually biased is a question of fact to be determined by the trial judge. State v. Stigers, (1927) 122 Or 113, 256 P 649; State v. Clipston, (1970) 3 Or App 513, 473 P2d 682.

A juror who "guessed he was more in sympathy with" the class of one party than of the other, but was sure his verdict would depend on the evidence, is not disqualified. Schwarz v. Lee Gon, (1905) 46 Or 219, 80 P 110.

A juror who states that it would require strong evidence to overthrow his opinion is incompetent for actual bias. State v. Miller, (1905) 46 Or 485, 81 P 363.

The test of the qualification of a juror is whether he is in such frame of mind as to enter on the trial prepared to form an impartial judgment from what he hears on the trial. State v. Steidel, (1921) 98 Or 681, 194 P 584.

FURTHER CITATIONS: Southern Pac. Co. v. Rauh, (1892) 49 Fed 696, 1 CCA 416; State v. Brown, (1895) 28 Or 147, 41 P 1042; State v. Olberman, (1899) 33 Or 556, 55 P 866; State v. McDaniel, (1901) 39 Or 161, 65 P 520; State v. Armstrong, (1903) 43 Or 207, 73 P 1022; Columbia County v. Consol. Contract Co., (1917) 83 Or 251, 163 P 438; State Hwy. Comm. v. Hewitt, (1962) 229 Or 582, 368 P2d 346.

17.155

CASE CITATIONS: State v. Caseday, (1911) 58 Or 429, 115 P 287; State Hwy. Comm. v. Walker, (1962) 232 Or 478, 376 P2d 96; State v. Sands, (1970) 2 Or App 575, 469 P2d 795, Sup Ct review denied.

LAW REVIEW CITATIONS: 2 OLR 30, 56.

17.160

NOTES OF DECISIONS

This section was adopted substantially from the laws of the State of Washington. State v. Caseday, (1911) 58 Or 429, 115 P 287; State Hwy. Comm. v. Walker, (1962) 232 Or 478, 376 P2d 96.

Allowing the withdrawal of a peremptory challenge before the juror retired or another was called, is not error. Garrison v. Portland, (1865) 2 Or 123.

By failing to challenge at the proper time, objections to a juror on the ground of incompetency are waived. State v. McDonald, (1879) 8 Or 113.

This section does not operate to require peremptory challenges in a criminal case to be used one by one alternately between the parties until the number allowed is exhausted. State v. Caseday, (1911) 58 Or 429, 115 P 287.

After the panel is filled and passed for cause, a party waiving a right to a peremptory challenge waives it only as to the jurors then in the jury box. State Hwy. Comm. v. Walker, (1962) 232 Or 478, 376 P2d 96.

LAW REVIEW CITATIONS: 2 OLR 30, 56; 6 OLR 396.

17.165

CASE CITATIONS: Garrison v. Portland, (1865) 2 Or 123.

17.170

NOTES OF DECISIONS

When a challenge is excepted to and ruled to be sufficient, the decision can be reviewed on appeal. Ford v. Umatilla County, (1887) 15 Or 313, 323, 16 P 33.

17.175

NOTES OF DECISIONS

The examination of a juror should be directed to the discovery of facts from which the court may determine whether he is qualified as a juror in the case or not. Southern Pac. Co. v. Rauh, (1892) 49 Fed 696, 1 CCA 416.

The state cannot question prospective jurors regarding their prejudice against the testimony of certain witnesses, obtaining information solely for purposes of prosecution. State v. Hoffman, (1917) 85 Or 276, 166 P 765, 1 ALR 1683.

FURTHER CITATIONS: Ford v. Umatilla County, (1887) 15 Or 313, 16 P 33.

17.185

NOTES OF DECISIONS

A proposed instruction on jury's right to qualify a verdict of guilty of first degree murder by recommending life imprisonment was properly refused as inviting jury to violate oath to try case according to the law and evidence. State v. Kelley, (1926) 118 Or 397, 247 P 146.

As soon as the jury is completed, the jurors shall be sworn to try the cause and when so sworn the trial shall proceed within a reasonable time thereafter. State v. Wolfe. (1934) 147 Or 405, 34 P2d 304.

Before the jury has been sworn, the excusing of a prospective juror for sufficient reason made known to the court is not error. State v. Savan, (1934) 148 Or 423, 36 P2d 594, 96 ALR 497.

FURTHER CITATIONS: Hawkins v. United States, (Alaska) (1902) 116 Fed 569, 53 CCA 663.

17.205

NOTES OF DECISIONS

Under this section, parties have a right to insist that the evidence should be taken and heard orally, but this right may be waived. Roy v. Horsley, (1877) 6 Or 382, 25 Am Rep 537.

FURTHER CITATIONS: Howe v. Patterson, (1874) 5 Or 353; Davis v. The Dalles Lbr. & Mfg. Co., (1962) 231 Or 86, 371 P2d 974; State v. Stultz, (1963) 235 Or 534, 385 P2d 763.

17.210

NOTES OF DECISIONS

1. In general
2. Opening statements
3. Introduction of evidence
4. Rebuttal
5. Argument
6. Charge to jury

1. In general

The order of producing proof before a referee is the same as in trial before a court. Stimson v. Estes, (1869) 3 Or 521.

To allow an amendment of the pleadings to conform to the proof, over objections, would have a tendency to invert the orderly mode of trial prescribed by statute. Mendenhall v. Harrisburg Water Co., (1895) 27 Or 38, 39 P 399.

A trial court may in its discretion order a trial to be conducted in a different manner from that indicated by this section. Pacific Ry. & Nav. Co. v. Elmore Packing Co., (1912) 60 Or 534, 120 P 389, Ann Cas 1914A, 371.

If it is not a manifest abuse of its discretion the court may permit the defendant to open and close the case. State Hwy. Comm. v. Superbilt Mfg. Co., (1955) 204 Or 393, 281 P2d 707.

The order of proof rests in the judicial discretion of the trial judge. State v. O'Donnell, (1962) 229 Or 487, 367 P2d 445.

It is improper for counsel to address a juror by name. Johnson v. Hansen, (1964) 237 Or 1, 389 P2d 330.

Introductory remarks by the trial judge were within the discretionary authority described by this section. State v. Tucker, (1971) 5 Or App 283, 483 P2d 825.

2. Opening statements

A party may in the opening statement of his case designate briefly the particular facts he expects to prove and detail evidence he intends to offer for that purpose, but the court may prevent any abuse of this privilege. Long v. Lander, (1882) 10 Or 175.

The opening statement is to advise the jury of the questions of fact, but is not intended to take the place of the complaint or other pleading. Lane v. Portland Ry., Light & Power Co., (1911) 58 Or 364, 114 P 940.

How complete the opening statement is rests in the discretion of the attorney, but relating the testimony at length will not be allowed. Id.

To decide a case upon the opening statement of counsel is not a safe practice. Id.

3. Introduction of evidence

A refusal to allow a party to introduce certain evidence while the adverse party is introducing his evidence is not reversible error. Dolph v. Barney, (1874) 5 Or 191, 209; State v. Stilwell, (1924) 109 Or 643, 221 P 174.

Allowing evidence which is properly rebuttal to be introduced in the case in chief, will not be disturbed except for abuse. Roberson v. Ellis, (1911) 58 Or 219, 114 P 100, 35 LRA(NS) 979.

Refusing to allow state to admit in its case in chief evidence which is properly a part of the defense of the defendant, is proper. State v. Stilwell, (1924) 109 Or 643, 221 P 174.

On cross-examination of plaintiff's witnesses, the introduction of evidence that supported a special defense of defendant was properly refused. Id.

4. Rebuttal

Where one party in rebuttal introduces new matter in evidence, it is error to exclude evidence of the other party to rebut such new matter. State v. Dilley, (1887) 15 Or 70, 13 P 648; Holden v. Coats Lbr. Co., (1917) 84 Or 605, 165 P 674.

Where the case has not been reopened or good reason shown, it is reversible error to admit evidence in rebuttal which is part of the state's case in chief. State v. Hunsaker, (1888) 16 Or 497, 19 P 605; State v. Director, (1924) 113 Or 74, 95, 227 P 298, 231 P 191.

Whether or not to admit evidence in rebuttal or upon the original cause is within the discretion of the court. Stam v. Salles, (1960) 223 Or 518, 355 P2d 93; State v. Fischer, (1962) 232 Or 558, 376 P2d 418; State v. Amory, (1970) 1 Or App 496, 464 P2d 714.

To allow a party to reopen the case to prove the original cause of action is within the discretion of the trial court. Davis v. Emmons, (1898) 32 Or 389, 51 P 652.

Although testimony offered in rebuttal is properly a part

of case in chief, its admission is within the trial court's discretion. Crosby v. Portland Ry., (1909) 53 Or 496, 100 P 300, 101 P 204.

Permission to introduce on the rebuttal evidence to support the case in chief should not be arbitrarily granted. State v. Evans, (1920) 98 Or 214, 192 P 1062, 193 P 927.

Rebuttal evidence will be excluded except for that made necessary by the opponent's case-in-chief. Freedman v. Cholick, (1963) 233 Or 569, 379 P2d 575.

5. Argument

Prior to the amendment of 1905, the court could limit the argument to a shorter time than two hours. Hurst v. Burnside, (1885) 12 Or 520, 8 P 888.

To limit the defendant's counsel's argument to 30 minutes and plaintiff's counsel's argument to 15 minutes constitutes reversible error. Kelty v. Fisher, (1922) 105 Or 696, 210 P 623.

Subsection (4) does not require that counsel be permitted a closing argument except in a jury case. Davis v. The Dalles Lbr. & Mfg. Co., (1962) 231 Or 86, 371 P2d 974.

Comment by counsel for plaintiff on the failure of defendant to call a physician, who examines plaintiff at defendant's request, is allowable. Bohle v. Matson Nav. Co., (1966) 243 Or 196, 412 P2d 367.

Counsel's statements did not amount to comments upon the credibility of witnesses. State v. Parker, (1963) 235 Or 366, 384 P2d 986, superseded by Parker v. Gladden, (1966) 385 US 363, 87 S Ct 468, 17 L Ed 2d 420, rev'g 245 Or 426, 407 P2d 246.

There was no error when the court required that the argument be kept within the confines of the record. State v. Townsend, (1964) 237 Or 527, 392 P2d 459.

6. Charge to jury

See cases under ORS 17.255.

FURTHER CITATIONS: Sink v. Allen, (1916) 79 Or 78, 154 P 415; State v. Ganong, (1919) 93 Or 440, 184 P 233; Cribbs v. Montgomery Ward & Co., (1954) 202 Or 8, 272 P2d 978; State v. Cook, (1965) 241 Or 373, 406 P2d 159; State Hwy. Comm. v. Callahan, (1966) 242 Or 551, 410 P2d 818; State v. Frazier, (1966) 245 Or 4, 418 P2d 841; Rich v. Tite-Knot Pine Mill, (1966) 245 Or 185, 421 P2d 370; McCaffrey v. Glendale Acres, (1968) 250 Or 140, 440 P2d 219.

LAW REVIEW CITATIONS: 37 OLR 68; 46 OLR 146; 4 WLJ 1-17.

17.215

NOTES OF DECISIONS

1. Discretion of court
2. Application
3. Rebuttal testimony
4. Reopening

1. Discretion of court

A judge may receive evidence which counsel produces and shows will be material by other evidence; the exercise of such discretion is not reviewable. Bennett v. Stephens, (1880) 8 Or 444; Osmun v. Winters, (1897) 30 Or 177, 188, 46 P 780.

Order of proof is within the sound discretion of the court, and rulings will not be disturbed except for abuse. McGregor v. Ore. Ry. & Nav. Co., (1908) 50 Or 527, 93 P 465; Roberson v. Ellis, (1911) 58 Or 219, 114 P 100; Dayton v. Fenno, (1921) 99 Or 137, 142, 195 P 174; State v. Stilwell, (1924) 109 Or 643, 645, 221 P 174; Cribbs v. Montgomery Ward, (1954) 202 Or 8, 272 P2d 978.

Incompetent evidence improperly admitted may be made competent by later testimony. State v. Remington, (1907) 50 Or 99, 91 P 473.

Error in admitting expert evidence before the competency of the witness was established was cured by subsequent testimony showing his competency. Farmers' & Traders' Nat. Bank v. Woodell, (1900) 38 Or 294, 303, 61 P 837, 65 P 520.

Where testimony was received that was incompetent but the adversary promised to connect it by other evidence and failed to do so, the proper practice was to make a motion to strike or ask an instruction to disregard it. Jones v. Peterson, (1903) 44 Or 161, 74 P 661.

Sustaining an objection that a question was not cross-examination and a ruling that such testimony was a part of defendant's case, did not prevent defendant from introducing the testimony as a part of his defense. State v. Stilwell, (1924) 109 Or 643, 221 P 174.

2. Application

In a prosecution for homicide, the court may admit, before proof of the corpus delicti, an alleged extrajudicial confession made by defendant. State v. Weston, (1921) 102 Or 102, 201 P 1083.

The introduction of evidence of a map showing the locus in quo of an accident may be admitted out of the regular order of proof. Mansfield v. So. Ore. Stages, (1931) 136 Or 669, 1 P2d 591.

The court has at least equal authority to regulate the order of proof in a hearing on a preliminary motion. State v. Spicer, (1970) 3 Or App 120, 473 P2d 147.

In an action for wages, it was discretionary with the court to admit evidence of an agreement for plaintiff's service made between defendant and plaintiff's cousin before showing that such agreement was entered into with plaintiff's assent. Bennett v. Stephens, (1880) 8 Or 444.

In a suit for specific performance of a parol contract to convey land, the admission of evidence of the agreement before proof of complainant's performance was not error. Barrett v. Schleich, (1900) 37 Or 613, 62 P 792.

In an action by a bank on notes transferred to it without indorsement, evidence that the original holder had agreed to cancel the notes before showing that the transferor to the bank had knowledge of the agreement, was not error. First Nat. Bank v. McCullough, (1908) 50 Or 508, 93 P 366, 126 Am St Rep 758, 17 LRA(NS) 1105.

It was not error to allow accomplice to testify about robbery before defendant was connected with the crime since he was later connected with the crime. State v. Duggan, (1958) 215 Or 151, 333 P2d 907.

3. Rebuttal testimony

To allow the state on rebuttal to give evidence of defendant's character by proof of an attempted escape and at a stage when the defendant could no longer be heard through his witnesses, was an abuse of discretion. State v. Garrand, (1874) 5 Or 156.

In an action for personal injuries caused by an electric shock from a trolley wire, the court in its discretion admitted in rebuttal plaintiff's shoe and testimony with reference thereto. Crosby v. Portland Ry., (1909) 53 Or 496, 100 P 300, 101 P 204.

Plaintiff who introduced in chief as much evidence in respect to defense as he deemed advisable, could not in rebuttal accumulate evidence on the same point. Prestbye v. Kliphardt, (1924) 113 Or 59, 231 P 187.

4. Reopening

The discretion of the trial court extends to the reopening of a case in either civil or criminal trials at the request of a party for the purpose of allowing the introduction of additional evidence. State v. Isenhart, (1897) 32 Or 170, 52 P 569; Davis v. Emmons, (1898) 32 Or 389, 51 P 652.

FURTHER CITATIONS: State v. Smith, (1961) 228 Or 340,

364 P2d 786; State v. O'Donnell, (1962) 229 Or 487, 367 P2d 445; State v. Clipston, (1964) 237 Or 634, 392 P2d 772; State v. Cole, (1968) 252 Or 146, 448 P2d 523; State v. Brown, (1971) 5 Or App 412, 485 P2d 444.

LAW REVIEW CITATIONS: 42 OLR 188, 193, 204.

17.220

NOTES OF DECISIONS

It is within the discretion of the court to permit the jury to separate upon properly admonishing them concerning their duties. State v. Shaffer, (1893) 23 Or 555, 32 P 545; State v. Morris, (1911) 58 Or 397, 114 P 476.

Failure to comply with the court's direction that the jury be kept together is not a cause for reversal where it is not shown that the verdict was improperly influenced. State v. Olberman, (1899) 33 Or 556, 55 P 366.

17.230

NOTES OF DECISIONS

1. Discretion of court
2. Purpose of view
3. Conducting the view

1. Discretion of court

It is within the discretion of the court whether a view shall be permitted. Wade v. Amalgamated Sugar Co., (1913) 65 Or 488, 492, 132 P 710; State v. Barnes, (1935) 150 Or 375, 44 P2d 1071; Cox v. Rand, (1937) 155 Or 258, 61 P2d 1240.

When it appears a view of any property which cannot be brought into the courtroom is necessary, it is a matter within the inherent powers of the court to be exercised only within its sound discretion and in accordance with the limitations applied to all views by this section. Natwick v. Moyer, (1945) 177 Or 486, 163 P2d 936; State v. Black, (1951) 193 Or 295, 236 P2d 326.

The stage of the proceedings at which the view should be taken is within the discretion of the court. State v. Barnes, (1935) 150 Or 375, 44 P2d 1071.

Where a considerable change has been made in the premises, a motion for a view may be denied. Cox v. Rand, (1937) 155 Or 258, 61 P2d 1240.

The court's refusal to order the jury to view premises will only be reviewed for abuse of discretion. Natwick v. Moyer, (1945) 177 Or 486, 163 P2d 936.

A view may be granted notwithstanding some of the conditions have changed, if the change was not material, or if the character of such change is properly brought out in the evidence at some later time. State v. Black, (1951) 193 Or 295, 236 P2d 326.

In condemnation proceedings the court is without discretion in granting a view of the property should either party request it. State Hwy. Comm. v. Sauers, (1953) 199 Or 417, 262 P2d 678.

It is within the discretion of the court whether a view shall be permitted. State v. Mershon, (1969) 1 Or App 314, 460 P2d 363, Sup Ct **review denied.**

In an action arising out of an automobile collision, the court did not abuse its discretion in denying the defendant's application to have the jury inspect the windshield of the truck driven by deceased where the trial commenced more than five months after the accident during which dirt could have accumulated. Natwick v. Moyer, (1945) 177 Or 486, 163 P2d 936.

2. Purpose of view

Since the purpose of the view in this state is not to obtain evidence, failure of the defendant to be present is not error. State v. Ah Lee, (1880) 8 Or 214; State v. Moran, (1887) 15 Or 262, 14 P 419; State v. Chee Gong, (1889) 17 Or 635, 21 P 882; State v. Sing, (1925) 114 Or 267, 229 P 921.

The purpose of a view by jury is not to take or receive evidence, but only to enable jury better to comprehend evidence adduced upon trial. Crane v. Ore. R. & Nav. Co., (1913) 66 Or 317, 133 P 810; Molalla Elec. Co. v. Wheeler, (1916) 79 Or 478, 154 P 686.

The jury cannot compute damages from information acquired in viewing the premises. Crane v. Ore. R. & Nav. Co., (1913) 66 Or 317, 133 P 810.

Where the land in suit is viewed by court or jury, verdict must be based upon evidence introduced as explained by the view and not based upon the inspection made. Molalla Elec. Co. v. Wheeler, (1916) 79 Or 478, 154 P 686.

3. Conducting the view

The act of counsel mingling with or being near the jury during the view is highly improper even though there is no showing that conversation was exchanged. Keller v. Bley, (1887) 15 Or 429, 15 P 705.

Where one of the jurors was unable to go over the premises because of lameness but went to a place where he could view them, no error was committed. Id.

Where a jury returning from viewing the premises are given refreshments by one of the attorneys, the jury should be discharged. Sandstrom v. Ore.-Wash. R. & Nav. Co., (1914) 69 Or 194, 136 P 878, 45 LRA(NS) 889.

Where the jury and the trial judge could not all make an inspection of the small rooms at one time, defendant was not harmed as there was no showing of misconduct on part of the jury while separated. State v. Barnes, (1935) 150 Or 375, 44 P2d 1071.

FURTHER CITATIONS: Wolfe v. Union R.R., (1962) 230 Or 119, 368 P2d 622.

LAW REVIEW CITATIONS: 14 OLR 277.

17.235

NOTES OF DECISIONS

This section should be construed in connection with H 215 [ORS 17.415]. Knahtla v. Ore. Short Line Ry. Co., (1891) 21 Or 136, 153, 27 P 91.

A party is here permitted to submit the conclusions of fact which he claims to be established for the purpose of informing the jury of his claim and aiding them in arriving at a general verdict. Id.

This section does not give a party an absolute right to have a jury answer particular propositions of fact, embodied in a series of questions. Id.

This section is not applicable to a trial of an issue of fact by the court. McClung v. McPherson, (1905) 47 Or 73, 81 P 567, 82 P 13.

FURTHER CITATIONS: Smith v. Shattuck, (1885) 12 Or 362, 7 P 335; Wild v. Ore. Short Line Ry. Co., (1891) 21 Or 159, 27 P 954; Whisnant v. Holland, (1956) 206 Or 392, 292 P2d 1087.

17.240

NOTES OF DECISIONS

Conclusions of fact must be submitted to the jury. Smith v. Shattuck, (1885) 12 Or 362, 7 P 335.

FURTHER CITATIONS: Hoyle v. Van Horn, (1963) 236 Or 205, 387 P2d 985; State v. Poierier, (1964) 239 Or 89, 396 P2d 576; State v. White, (1970) 4 Or App 151, 477 P2d 917; Port of Newport v. Haydon, (1970) 4 Or App 237, 478 P2d 445, Sup Ct **review denied.**

LAW REVIEW CITATIONS: 4 WLJ 92; 35 OLR 150.

17.245

NOTES OF DECISIONS
1. In general
2. Construction of writings
3. Declaring matters judicially known

1. In general

The scope of an agent's authority is a question of law. Connell v. McLoughlin, (1895) 28 Or 230, 42 P 218; Long Creek Bldg. Assn. v. State Ins. Co., (1896) 29 Or 569, 575, 46 P 366; Gilbert v. Globe & Rutgers Fire Ins. Co. (concurring opinion), (1919) 91 Or 59, 71, 174 P 1161, 178 P 358, 3 ALR 205.

When a court is asked to declare a fact established as a matter of law the evidence must so completely establish that fact as to remove all doubts. Koontz v. Ore. R. & Nav. Co., (1891) 20 Or 3, 23 P 820.

Where there is no issue by evidence, it becomes a question of law for the court as to the effect of uncontradicted testimony. State v. Carr, (1896) 28 Or 389, 396, 42 P 215.

In malicious prosecution, the question of probable cause is a mixed question of law and fact. Stamper v. Raymond, (1911) 38 Or 16, 62 P 20.

2. Construction of writings

Interpretation of written instruments is for the court. Baker County v. Huntington, (1906) 48 Or 593, 87 P 1036, 89 P 144; Hume v. Mears, (1918) 89 Or 519, 174 P 1156; Gilbert v. Globe & Rutgers Fire Ins. Co., (1919) 91 Or 59, 174 P 1161, 178 P 358, 3 ALR 205; Rosenau v. Lansing, (1925) 113 Or 638, 232 P 648, 234 P 270; Lake County Pine Lbr. Co. v. Underwood Lbr. Co., (1932) 140 Or 19, 12 P2d 324. **Agency contract,** Sharp v. Kilborn, (1913) 64 Or 371, 130 P 735; **assignment,** Harrison v. Beals, (1924) 111 Or 563, 222 P 728; **chattel mortgage,** Rutherford v. Eyre & Co., (1944) 174 Or 162, 176, 148 P2d 530; **contract,** Henry v. Harker, (1912) 61 Or 276, 118 P 205, 122 P 298; Dahlstrom v. Hudelson, (1916) 80 Or 520, 157 P 798; Gile & Co. v. Lasselle, (1918) 89 Or 107, 171 P 741; Hume v. Mears, (1918) 89 Or 519, 174 P 1156; Loveland v. Warner, (1922) 103 Or 638, 204 P 622, 206 P 298; **lease,** Calcagno v. Holcomb, (1947) 181 Or 603, 185 P2d 251; **mining claim location notice,** Banfield v. Crispen, (1924) 111 Or 388, 226 P 235; **ownership,** Waller v. New York City Ins. Co., (1917) 84 Or 284, 164 P 959, Ann Cas 1918C, 139; **tariff provisions,** Oregon R. & Nav. Co. v. Coolidge, (1911) 59 Or 5, 116 P 93; Black v. So. Pac. Co., (1918) 88 Or 533, 171 P 878; **work order to railroad employe,** Chadwick v. Ore.-Wash. R. & Nav. Co., (1914) 74 Or 19, 144 P 1165.

Error in submitting to the jury the interpretation of written instruments is harmless if jury's finding thereon is correct. Johnson v. Shively, (1881) 9 Or 333; Christenson v. Nelson, (1901) 38 Or 473, 63 P 648; Baker County v. Huntington, (1906) 48 Or 593, 87 P 1036, 89 P 144.

Exception to rule of construction stated in this section is when the meaning and construction depend upon intrinsic facts which are doubtful and disputed. Johnson v. Shively, (1881) 9 Or 333.

When a withdrawn pleading is offered in evidence as an admission its interpretation is for the jury. Johnson v. Sheridan Lbr. Co., (1908) 51 Or 35, 93 P 470.

Where language of contract is plain, duty of court is to determine its legal effect. Scales v. First State Bank, (1918) 88 Or 490, 172 P 499.

Where written contract involved in action is not in controversy it is duty of court to instruct the jury as to its legal effect. Wade v. Johnson, (1924) 111 Or 468, 227 P 466.

Where witness' construction of contract was correct, error in allowing such interpretation was harmless. Gile & Co. v. Lasselle, (1918) 89 Or 107, 171 P 741.

3. Declaring matters judicially known

Where judicial notice might be taken of facts, it is the duty of the court to declare its knowledge to the jury who are bound to accept it as conclusive. State v. Magers, (1899) 35 Or 520, 57 P 197; Scott v. Astoria R. Co., (1903) 43 Or 26, 72 P 594, 99 Am St Rep 710, 62 LRA 543.

FURTHER CITATIONS: Miller v. City of Woodburn, (1928) 126 Or 621, 270 P 781; George v. Erickson's Sunnyslope Supermarket, Inc., (1963) 236 Or 64, 386 P2d 801; Furrer v. Talent Irr. Dist., (1970) 258 Or 494, 466 P2d 605; State v. White, (1970) 4 Or App 151, 477 P2d 917.

LAW REVIEW CITATIONS: 41 OLR 282.

17.250

NOTES OF DECISIONS
1. In general
   (1) Judges of effect and value of evidence
   (2) Statutory instructions
2. Subsection (1) - power of judging effect of evidence
3. Subsection (2) - not bound to find in conformity with any number of witnesses
4. Subsection (3) - distrust of witness false in part
5. Subsection (4)
   (1) Testimony of an accomplice
   (2) Oral admissions of a party
6. Subsection (5)
   (1) Affirmative of the issue
   (2) Preponderance of evidence
   (3) Beyond a reasonable doubt
7. Subsection (6) - evidence is to be estimated
8. Subsection (7) - weaker and less satisfactory evidence

1. In general

(1) Judges of effect and value of evidence. It is not the province of the court to comment upon the evidence as the jury are the judges of the effect or value of the evidence. State v. Huffman, (1888) 16 Or 15, 16 P 640; State v. Chee Gong, (1888) 16 Or 534, 19 P 607; Willis v. Lance, (1896) 28 Or 371, 43 P 384, 487.

Where men of reason and fairness may entertain differing view as to the truth of testimony, whether it be uncontradicted, uncontroverted or even undisputed, such evidence is for the jury. Rickard v. Ellis, (1962) 230 Or 46, 368 P2d 396; Port of Newport v. Haydon, (1970) 4 Or App 237, 478 P2d 445, Sup Ct **review denied.**

Giving an instruction not supported by evidence permits the jury to speculate and is error. Dormaier v. Jesse, (1962) 230 Or 194, 369 P2d 131; Bohle v. Matson Nav. Co., (1966) 243 Or 196, 412 P2d 367.

The court should not direct as to the weight the jury shall give any evidence or instruct the jury in other respects except as provided in this section. State v. Huffman, (1888) 16 Or 15, 16 P 640.

In a criminal case where there is evidence from which a jury might find the required felonious intent, it is their province to judge the effect and value of such evidence. State v. Daly, (1888) 16 Or 240, 18 P 357.

Since a letter is generally held not a written instrument under ORS 17.245, its effect and value must be weighed by the jury. Church v. Melville, (1889) 17 Or 413, 21 P 387.

The jury are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony. McIntosh v. McNair, (1909) 53 Or 87, 99 P 74.

The jury may disregard uncontradicted testimony where it is unsatisfactory to their minds. Graham v. Coos Bay R. & Nav. Co., (1914) 71 Or 393, 416, 139 P 337.

When the court instructs the jury that the burden of proof shifts, it is interfering with the province of the jury in its capacity to act as the exclusive judge of the effect and value of the evidence. Askay v. Maloney, (1919) 92 Or 566, 179 P 899.

Any instruction which is likely to be taken by the jury as a direction to attach greater weight to one class of evidence than to another is improper. Wiebe v. Seely, (1959) 215 Or 331, 335 P2d 379.

A requested instruction is properly refused unless it ought to have been given in the terms in which proposed. State v. North, (1964) 238 Or 90, 390 P2d 637, cert. denied, 379 US 939.

Exceptions to instructions must point out wherein the instructions are in error. Brigham v. So. Pac. Co., (1964) 237 Or 120, 390 P2d 669.

(2) Statutory instructions. Instructions may properly be given only where basis is found; to instruct where instruction is not applicable is ground for a new trial. Fitze v. Am-Hawaiian S.S. Co., (1940) 167 Or 439, 117 P2d 825; Hotelling v. Walther, (1944) 174 Or 381, 148 P2d 933.

The court is not bound to give all applicable statutory instruction as the matter rests within the court's discretion; failure to give the instructions, whether requested or not is not reversible error. Fitze v. Am.-Hawaiian S.S. Co., (1941) 167 Or 439, 117 P2d 825; Godvig v. Lopez, (1949) 185 Or 301, 202 P2d 935. Fitze v. Am.-Hawaiian S.S. Co., supra, overruling Kern v. Pullen, (1931) 138 Or 222, 6 P2d 224, 82 ALR 434. **But see,** Denton v. Davis, (1951) 191 Or 646, 233 P2d 213.

It is an abuse of discretion to refuse to give a particular statutory instruction upon timely request when there is a basis in the evidence for giving it. Denton v. Davis, (1951) 191 Or 646, 233 P2d 213; Ireland v. Mitchell, (1961) 226 Or 286, 359 P2d 894.

The giving of statutory instructions is discretionary with the trial court. Ireland v. Mitchell, (1961) 226 Or 286, 359 P2d 894; Greco v. Tehan, (1970) 256 Or 595, 475 P2d 63, cert. denied, 91 S Ct 978, 28 L Ed 2 247.

The court's failure to give the instruction does not constitute reversible error unless the instruction is requested and refused. State v. Anderson, (1966) 242 Or 585, 411 P2d 259; State v. Oland, (1969) 1 Or App 272, 461 P2d 277, Sup Ct **review denied.**

The court in a criminal case is authorized to instruct on the matters set forth in this section so far as they are applicable. State v. Clements, (1887) 15 Or 237, 14 P 410.

The Supreme Court is without authority to amend the rule governing statutory instructions to juries declared by this section. Herman v. East Side Logging Co., (1931) 135 Or 279, 295 P 960.

A request that the court give the "usual statutory instructions" is insufficient request for any particular instruction. Hotelling v. Walther, (1944) 174 Or 381, 148 P2d 933.

It is the duty of trial court to determine whether it is a proper occasion to give a particular statutory instruction. Godvig v. Lopez, (1949) 185 Or 301, 202 P2d 935.

Assignment of error for the giving or failure to give the jury a statutory instruction must be based on a timely exception or a specific request, and first calling attention to the error by a motion for a new trial is without merit. Id.

Where there is contradictory evidence, the plaintiff has the burden of proof with reference to his affirmative allegations and failure of the court to so instruct the jury is error. McCaffrey v. Glendale Acres, Inc., (1968) 250 Or 140, 440 P2d 219.

An instruction that the jury must give as much effect to the favorable statements made by the accused as to the unfavorable parts was properly refused as it violated this section. State v. Ausplund, (1917) 86 Or 121, 167 P 1019.

A statement by the court that the legislature did not intend that statutory instructions were to lay down a channel for the jury to operate in, was erroneous. Haltom v. Fellows, (1937) 157 Or 514, 73 P2d 680.

2. Subsection (1) — power of judging effect of evidence

Jurors must act with legal discretion and in subordination to the rules of evidence. Rostad v. Portland Ry., Light & Power Co., (1921) 101 Or 569, 201 P 184.

Although a juror may not consider his personal knowledge of probative facts in deciding a case, he must consider them in light of that knowledge and experience which is common to all men. Id.

An instruction that the jury should "bring to your assistance your experience as men of affairs" was proper. Id.

3. Subsection (2) — not bound to find in conformity with any number of witnesses

The jury is not bound to believe the declarations of a witness, or a number of them, against a less number, or as against a presumption satisfying their minds. Bloomfield v. Buchanan, (1885) 13 Or 108, 8 P 912; Peabody v. Ore. R. & Nav. Co., (1891) 21 Or 121, 134, 26 P 1053, 12 LRA 823; Willis v. Lance, (1896) 28 Or 371, 43 P 384, 487; Graham v. Coos Bay R. & Nav. Co., (1914) 71 Or 393, 416, 139 P 337; Hancock Land Co. v. Portland, (1916) 82 Or 85, 159 P 969, 161 P 250; Craft v. No. Pac. R. Co., (1894) 62 Fed 735.

The jury are at liberty to believe the plaintiff as against several witnesses who contradicted him if his testimony produces conviction in their minds. Huber v. Miller, (1902) 41 Or 103, 68 P 400; Carlson v. Portland Ry., Light & Power Co., (1927) 121 Or 519, 254 P 809.

The incontrovertible physical facts instruction is appropriate only where the facts relied upon conflict irreconcilably with the testimony of the witnesses. Sturm v. Smelcer, (1963) 235 Or 251, 384 P2d 212; Rich v. Cooper, (1963) 234 Or 300, 380 P2d 613.

This subsection does not confer a right to be arbitrarily or wantonly exercised; if it should be unreasonably exercised, the court should set the verdict aside. Craft v. No. Pac. Ry. Co.,(1894) 62 Fed 735.

A judge hearing a case without a jury is bound by the rule of this subsection. Van De Wiele v. Garbade, (1912) 60 Or 585, 120 P 752.

It is the province of the jury to pass upon conflicting evidence. Devroe v. Portland Ry., Light & Power Co., (1913) 64 Or 547, 556, 131 P 304.

Under subsection (2), the court may submit to the jury verbal utterances where they are contrary to common experience and where it is impossible that they can be true, where no motion is made for their exclusion. Oregon Motor Stages v. Portland Traction Co., (1953) 198 Or 16, 255 P2d 558.

Where the direction of the wind was an important fact, the jury were not bound to believe the testimony of an expert witness as against lay witnesses. Willis v. Lance, (1896) 28 Or 371, 43 P 384, 487.

4. Subsection (3) — distrust of witness false in part

This subsection applies only where truth is intentionally disregarded, but an instruction substantially in the language of the subsection is sufficient without inclusion of the words "knowingly" or "wilfully." Simpson v. Miller, (1910) 57 Or 61, 110 P 485, Ann Cas 1912D, 1349, 29 LRA(NS) 680; State v. Meyers, (1911) 59 Or 537, 117 P 818; State v. Merlo, (1919) 92 Or 678, 173 P 317, 182 P 153.

A mistaken witness is not a false witness within the meaning of this subsection. Simpson v. Miller, (1910) 57 Or 61, 110 P 485, Ann Cas 1912D, 1349, 29 LRA(NS) 680; State v Weston, (1923) 109 Or 19, 219 P 180.

It is not mandatory on the jury to disregard all of the testimony of a witness who is wilfully false in part of his statement. State v. Goff, (1914) 71 Or 352, 142 P 564; Ireland v. Mitchell, (1961) 226 Or 286, 359 P2d 894; State v. Ketchum, (1970) 4 Or App 342, 479 P2d 255; State v. Seeger, (1970) 4 Or App 336, 479 P2d 240.

A false statement presently made by a witness has no other or greater effect than to cause him to be distrusted generally. United States v. Thompson, (1887) 31 Fed 331, 12 Sawy 438.

This subsection is sufficiently complied with by instruction concerning the effect of evidence contradictory to witness's sworn statement. State v. Birchard, (1899) 35 Or 484, 59 P 468.

An instruction that a witness who is intentionally false in a material part of his testimony is to be distrusted in others, is proper. State v. Weston, (1923) 109 Or 19, 219 P 180.

It was held proper instruction that the jury were at liberty to disregard the entire testimony of a witness who testified wilfully false in a material part of his testimony, except in so far as it was corroborated by some credible evidence. State v. Goff, (1917) 71 Or 352, 142 P 564.

The instruction violated this section. State v. Bonner, (1965) 241 Or 404, 406 P2d 160.

5. Subsection (4)

(1) Testimony of an accomplice. To avail himself of error in failure to give instruction under this subsection, defendant must have requested the instruction. State v. Keelen, (1923) 106 Or 331, 211 P 924; State v. Edmundson, (1927) 120 Or 297, 249 P 1098, 251 P 763, 252 P 84.

Supreme Court will presume that this subsection was complied with in the absence of a contrary showing. State v. Kelley, (1926) 118 Or 397, 247 P 146.

Where codefendant is principal witness for state, court should give instruction under this subsection without request. State v. Edmundson, (1927) 120 Or 297, 249 P 1098, 251 P 763, 252 P 84.

The instruction that the credibility of an accomplice is finally for the determination of the jury, the same as any other witness in the case excepting the testimony of an accomplice should be approached with distrust, is not in effect different from that required by this subsection. State v. Stacey, (1936) 153 Or 449, 56 P2d 1152.

It is not erroneous to instruct the jury, after stating that the testimony of an accomplice should be viewed with distrust, that the credibility of such accomplice is for the jury. State v. Dugger, (1939) 161 Or 355, 88 P2d 990.

The fact the witness has been indicted on the same charge and acquitted is not determinative on the question of accomplicity. State v. Polk, (1971) 5 Or App 605, 485 P2d 1241.

Whether a person is an accomplice must be determined on the evidence in the present trial. Id.

Where the witness was held not an accomplice, refusal of an instruction in language of this subsection was not error. State v. Walters, (1922) 105 Or 662, 209 P 349.

An instruction that accomplice testimony should be received with "great caution" or with "great care and caution" was properly refused. State v. Keelen, (1923) 106 Or 331, 211 P 924.

In a prosecution of murder by proxy, an instruction under this subsection was proper. State v. Broadhurst, (1948) 184 Or 178, 196 P2d 407, cert. denied, 337 US 906, 69 S Ct 1046, 93 L Ed 897.

Failure to give the instruction as to accomplices was not error under the circumstances. State v. Wood, (1968) 252 Or 58, 448 P2d 509.

It is not erroneous to instruct the jury, after stating that the testimony of an accomplice should be viewed with distrust, that a named witness was an accomplice. State v. Gibson, (1968) 252 Or 241, 448 P2d 534.

(2) Oral admissions of a party. Oral admissions of party or witnesses should be accepted with caution. Hawkins v. Doe, (1912) 60 Or 437, 119 P 754, Ann Cas 1914A, 765; Stalker v. Stalker, (1915) 78 Or 291, 153 P 52; Bennett v. Bennett, (1917) 83 Or 326, 163 P 814; Jones v. Bramwell, (1924) 111 Or 316, 226 P 694; State v. Bouse, (1953) 199 Or 676, 264 P2d 800.

In a murder trial where killing is admitted, an instruction in respect to oral admissions of the defendant need not be given. State v. Fiester, (1897) 32 Or 254, 50 P 561.

Although under this subsection the oral admission of a party ought to be viewed with caution, this goes to the weight of the evidence and is a matter for the jury. State v. Russell, (1913) 64 Or 247, 129 P 1051.

The giving of cautionary instructions relative to oral admissions of a party rests in the discretion of the court. Arthur v. Parish, (1935) 150 Or 582, 47 P2d 682.

An instruction adding explanation as to why oral admissions should be viewed with caution is not improper. Moe v. Alsop, (1950) 189 Or 59, 216 P2d 686.

In giving a cautionary instruction under this subsection, substitution of words "are to be" in place of "ought to be" is not error. Id.

The 1865 amendment taking away the right of the court to present the facts of the case to the jury did not impliedly repeal the court's authority to caution the jury as to oral admissions of a party. Id.

Instruction that oral admissions as evidence of oral contract should be received with caution was not erroneous. Thompson v. Purdy, (1904) 45 Or 197, 77 P 113, 83 P 139.

6. Subsection (5)

(1) Affirmative of the issue. The instruction that the party affirming a proposition has the burden of proof should be given upon request. Schumann v. Wager, (1899) 36 Or 65, 58 P 770.

On all proper occasions the court must tell the jury that in civil cases the affirmative of the issue shall be proved. Hansen v. Ore.-Wash. R. & Nav. Co., (1920) 97 Or 190, 188 P 963, 191 P 655.

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

(2) Preponderance of evidence. It is mandatory upon the court to instruct the jury that the plaintiff must prove his case by the preponderance of the testimony. Dorn v. Clarke-Woodward Drug Co., (1913) 65 Or 516, 133 P 351; Hagermann v. Chapman Tbr. Co., (1913) 65 Or 588, 133 P 342.

In a civil action to recover damages for fraud, a preponderance of the evidence controls. Carty v. McMenamin & Ward, (1923) 108 Or 489, 216 P 228; Metropolitan Cas. Ins. Co. v. Lesher, (1935) 152 Or 161, 52 P2d 1133.

An instruction that the law does not require absolute truth or certainty and that it is incumbent upon plaintiff to prove his claim by a preponderance of competent evidence is proper. Mt. Emily Tbr. Co. v. Ore.-Wash. R. & Nav. Co., (1916) 82 Or 185, 161 P 398.

An instruction in effect that before plaintiff could recover upon causes of action alleged he must satisfy jury's minds by preponderance of evidence is unobjectionable. Kelley v. Joslin, (1927) 123 Or 253, 261 P 413.

An instruction on the degree of proof necessary to establish an issue should not be confused with an instruction under this subsection concerning the finding according to the preponderance of the evidence. Metropolitan Cas. Ins. Co. v. Lesher, (1935) 152 Or 161, 52 P2d 1133.

In describing the degree of proof required to establish an issue in civil action, it is proper to charge the jury that the evidence must be clear, satisfactory and convincing.

Metropolitan Cas. Ins. Co. v. Lesher, (1935) 152 Or 161, 52 P2d 1133. Overruling Eastman v. Crary, (1930) 131 Or 694, 284 P 280 and McCredie v. Commercial Cas. Ins. Co., (1933) 142 Or 229, 20 P2d 232, 91 ALR 557.

Refusal to instruct that in order for plaintiff to recover it was necessary that jury find by a preponderance of satisfactory evidence that defendant was negligent, is reversible error. Gwin v. Crawford, (1940) 164 Or 215, 100 P2d 1012.

"Preponderance" of evidence goes to the weight, while "clear and convincing" refers to the degree of proof necessary to establish the preponderance. Hill v. United States Nat. Bank, (1949) 187 Or 635, 213 P2d 209.

In a civil case, where the burden of proof is by a preponderance of the evidence, it would be error for the trial court to give a requested instruction containing the phrase "preponderance of satisfactory evidence" and the statutory definition thereof in ORS 41.110. Cook v. Michael, (1958) 214 Or 513, 330 P2d 1026. Overruling Metropolitan Cas. Ins. Co. v. Lesher, (1935) 152 Or 161, 52 P2d 1133 and Gwin v. Crawford, (1940) 164 Or 215, 100 P2d 1012.

The word "preponderance" in this section refers only to the burden of proof and has no reference to the quality of the evidence. Id.

In an action against an administrator on a claim long standing, the court properly instructed the jury under this subsection. Branch v. Lambert, (1922) 103 Or 423, 205 P 995.

An instruction that "if the evidence was sufficient to satisfy your minds by a clear preponderance" constitutes reversible error as it goes beyond the provisions of this subsection which are conclusive. Kelley v. Joslin, (1927) 123 Or 253, 261 P 413.

An instruction that the law in no case presumes fraud and that the facts constituting fraud must be clearly and conclusively established was erroneous. Herman v. East Side Logging Co., (1931) 135 Or 279, 295 P 960.

(3) Beyond a reasonable doubt. It is doubtful if a definition of reasonable doubt is necessary, but it is not error to equate "reasonable doubt" with "establishing the truth to a moral certainty." State v. Robinson, (1963) 235 Or 524, 385 P2d 754.

An instruction which defined a reasonable doubt as one which a juror could give reason for was held proper. State v. Roberts, (1887) 15 Or 187, 13 P 896; State v. Morey, (1894) 25 Or 241, 35 P 655, 36 P 573.

In criminal case, the court properly refused to instruct jury that guilt must be established to an absolute moral certainty. State v. Glass, (1873) 5 Or 73.

7. Subsection (6) - evidence is to be estimated

Evidence is to be estimated according to the evidence which it is in the power of one side to produce. Olds v. Von der Hellen, (1928) 127 Or 276, 263 P 907, 270 P 497; Donis v. Sawyer Ser. Inc., (1933) 143 Or 433, 21 P2d 776; French v. State Ind. Acc. Comm., (1937) 156 Or 443, 68 P2d 466.

Giving the statutory instruction in a criminal case is not reversible error when the court also instructs that the jury can draw no unfavorable inference from the defendant's failure to testify. State v. Betts, (1963) 235 Or 127, 384 P2d 198.

8. Subsection (7) - weaker and less satisfactory evidence

Oral testimony as to marriage, in lieu of evidence of marriage ceremony, should be viewed with distrust. State v. Wakefield, (1924) 111 Or 615, 228 P 115.

The cautionary instructions should not be given if the tendency would be to mislead the jury. Fitze v. Am.-Hawaiian S.S. Co., (1941) 167 Or 439, 117 P2d 825.

In a criminal case caution should be exercised in giving instruction under this subsection unless limited to evidence offered by state. State v. Patton, (1956) 208 Or 610, 303 P2d 513. **But see** State v. Dixon, (1971) 5 Or App 113, 481 P2d 629.

This instruction should rarely, if ever, be given in a case in which defendant does not testify. State v. Kniss, (1969) 253 Or 450, 455 P2d 177.

Where plaintiff offered oral evidence of title when stronger and more satisfactory evidence of deeds or the record title was within plaintiff's power, the weaker evidence was to be viewed with distrust. Oliver v. Synhorst, (1911) 58 Or 582, 586, 109 P 762, 115 P 594.

In an action for seduction where there was a lack of proof of seduction and only testimony of unlawful intercourse, it was incumbent upon the court to instruct the jury in the terms of this subsection. Stamm v. Wood, (1917) 86 Or 174, 168 P 69.

In an action for malicious prosecution where the agent making the investigation was not called as a witness, an instruction based on this subsection was proper. Allen v. Burns Detective Agency, (1927) 121 Or 492, 256 P 197.

Where instruction under this subsection was not requested, failure to give instruction was not error. Hotelling v. Walther, (1944) 174 Or 381, 148 P2d 933.

In this case the instruction was merely abstract. State v. Dixon, (1971) 5 Or App 113, 481 P2d 629.

FURTHER CITATIONS: State v. Edmundson, (1927) 120 Or 297, 249 P 1098, 251 P 763, 252 P 84; Peterson v. Wright, (1948) 183 Or 223, 191 P2d 645; Larson v. State Ind. Acc. Comm., (1957) 209 Or 389, 307 P2d 314; Oien v. Bourassa, (1960) 221 Or 359, 351 P2d 703; Burghardt v. Olson, (1960) 223 Or 155, 349 P2d 792, 354 P2d 871; State v. Holleman, (1960) 225 Or 7, 357 P2d 264; State v. Clark, (1961) 227 Or 391, 362 P2d 335; Danner v. Arnsberg, (1961) 227 Or 420, 362 P2d 758; Kraxberger v. Rogers, (1962) 231 Or 440, 373 P2d 647; Whitney v. Canadian Bank of Commerce, (1962) 232 Or 1, 374 P2d 441; Raz v. Mills, (1963) 233 Or 452, 378 P2d 959; Sedello v. Portland, (1963) 234 Or 28, 380 P2d 115; State v. Jackson, (1963) 235 Or 481, 385 P2d 623; State v. Carcerano, (1964) 238 Or 208, 390 P2d 923; Fenton v. Aleshire, (1964) 238 Or 24, 393 P2d 217; State v. Jordan, (1964) 238 Or 184, 393 P2d 766; State v. Yates, (1965) 239 Or 596, 399 P2d 161; Medak v. Kekimian, (1965) 241 Or 38, 404 P2d 203; First Nat. Bank v. Malady, (1965) 242 Or 353, 408 P2d 724; State v. Dill, (1966) 244 Or 188, 416 P2d 651; State v. Carrol, (1968) 251 Or 197, 444 P2d 1006; Burbage v. Dept. of Motor Vehicles, (1969) 252 Or 486, 450 P2d 775; State v. Andrews, (1970) 2 Or App 595, 469 P2d 802, Sup Ct **review denied;** State v. White (1970) 4 Or App 151, 477 P2d 917; State v. Groyther, (1971) 4 Or App 473, 479 P2d 248, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Meaning of "false", 1964-66, p 284.

LAW REVIEW CITATIONS: 6 OLR 176; 19 OLR 265, 277, 289; 23 OLR 269, 271; 25 OLR 209; 39 OLR 27; 42 OLR 199; 43 OLR 208-210; 47 OLR 423; 5 WLJ 274.

17.255

NOTES OF DECISIONS

1. Court shall state all matters of law
   (1) Assuming existence of controverted fact
   (2) Request for instruction
      (a) Time of request
      (b) Particular matters
   (3) Included crimes
   (4) Applicability to pleadings and issues
   (5) Abstract instructions
   (6) Inconsistent instructions
   (7) Form and requisites
2. Court shall not present facts of case

3. Jury are exclusive judges of evidence
4. Subsection (2) - written charges

1. Court shall state all matters of law

Error in submitting to a jury a question of law is harmless where they have decided correctly. Johnson v. Shively, (1881) 9 Or 333; Christenson v. Nelson, (1901) 38 Or 473, 479, 63 P 648; Baker County v. Huntington, (1906) 48 Or 593, 599, 87 P 1036, 89 P 144.

Where instructions considered as a whole are substantially correct and could not mislead the jury, there is no reversible error if some instruction, considered alone, is subject to criticism. State v. Anderson, (1882) 10 Or 448; State v. Tarter, (1894) 26 Or 38, 37 P 53; Perham v. Portland Gen. Elec. Co., (1898) 33 Or 451, 481, 53 P 14, 24, 72 Am St Rep 730, 40 LRA 799; Smithson v. So. Pac. Co., (1900) 37 Or 74, 96, 60 P 907; Wadhams v. Inman, (1900) 38 Or 143, 63 P 11; Farmers' Bank v. Woodell, (1900) 38 Or 294, 61 P 837, 65 P 520; State v. Mizis, (1906) 48 Or 165, 83 P 361, 85 P 611; State v. Megorden, (1907) 49 Or 259, 88 P 306, 14 Ann Cas 130; Hinton v. Roethler, (1918) 90 Or 440, 177 P 59; Cade v. Thompson, (1950) 190 Or 242, 225 P2d 396; Hughes v. Gilsoul, (1951) 191 Or 557, 230 P2d 770.

A statement in instruction to the jury, that they would have to remain together and not separate until they agreed upon a verdict, is not objectionable. State v. Saunders, (1886) 14 Or 300, 12 P 441; State v. Hawkins, (1890) 18 Or 476, 23 P 475.

An instruction that in weighing the testimony of a defendant the same rules govern as in the case of other witnesses except that the interest the accused has in the termination of the case may be considered, is not erroneous. State v. Tarter, (1894) 26 Or 38, 37 P 53; State v. Bartlett, (1908) 50 Or 440, 93 P 243, 126 Am St Rep 751, 19 LRA(NS) 802.

An instruction which submits matters of law for the jury to decide is erroneous. Schule v. Pac. Paper Co., (1913) 67 Or 334, 337, 135 P 527, 136 P 5; Oberlin v. Ore.-Wash. R. & Nav. Co., (1914) 71 Or 177, 187, 142 P 554.

Where testimony is competent for one purpose but incompetent for another, the jury should be instructed as to the purpose for which they may consider it. Josephi v. Furnish, (1895) 27 Or 260, 41 P 424.

An instruction to the jury to apply to conflicting testimony the test of their own judgment and experience is not erroneous. Willis v. Lance, (1896) 28 Or 371, 43 P 384, 487.

A party cannot object to an instruction that he himself has suggested. Anderson v. Ore. R. Co., (1904) 45 Or 211, 77 P 119.

To bring error predicated upon instructions on appeal, timely and proper exceptions must be taken in trial court. State v. Megorden, (1907) 49 Or 259, 88 P 306, 14 Ann Cas 130.

Even without request, the court has the power to instruct the jury on all questions growing out of the facts of the cause. State v. Jennings, (1929) 131 Or 455, 282 P 560.

In instructing the jury much is left to trial court's discretion as the judge is best able to know what instructions are needed to produce a verdict in harmony with the law. Nordlund v. Lewis & Clark R. Co., (1932) 141 Or 83, 15 P2d 980.

The court may not select a single part of the evidence and instruct the jury as to its probative value. Oja v. LeBlanc, (1949) 185 Or 333, 203 P2d 267.

There is no requirement that a court instruct a jury fully upon the law of a case regardless of whether or not any party has requested instructions. Severy v. Myrmo, (1949) 186 Or 611, 207 P2d 151.

The court should instruct the jury to view all alleged oral admissions of a defendant with caution. State v. Bouse, (1953) 199 Or 676, 264 P2d 800.

It is within the discretion of the court to determine whether it should redefine terms and permit testimony to be read to the jury after the jury has retired for deliberation. State v. Vaughn, (1954) 200 Or 275, 265 P2d 249.

An instruction on the responsibility of the jury to accept the law as it comes from the court should not include a statement that a higher court will correct any error of law. State v. Clark, (1961) 227 Or 391, 362 P2d 335. **Distinguished in** State v. Hulsey, (1970) 3 Or App 64, 471 P2d 812.

It is more helpful to the jury to instruct as specifically as possible, rather than generally. Lovins v. Jackson, (1963) 233 Or 369, 378 P2d 727.

Since the presumption of innocence is a species of evidence, instructions on conclusive presumptions as to intent should never be given in a criminal case. State v. Elliott, (1963) 234 Or 522, 383 P2d 382.

For an instruction standing alone to constitute reversible error, it must be one which would prejudice the defendant when the instructions are considered as a whole. State v. Hammick, (1970) 2 Or App 470, 469 P2d 800.

Where testimony is competent for one purpose but incompetent for another, it is error if the court refuses to limit the evidence to the purpose for which it is competent. Brooks v. Bergholm, (1970) 256 Or 1, 470 P2d 154.

A party litigant is entitled to have the court instruct the jury upon his theory of the case as formulated in properly requested instructions which correctly state the law and which are founded upon the pleadings and proof in the case. Burnham v. Eshleman, (1971) 257 Or 400, 479 P2d 501.

An instruction defining reasonable doubt was held proper. State v. Glass, (1873) 5 Or 73; State v. Roberts, (1887) 15 Or 187, 13 P 896; State v. Morey, (1894) 25 Or 241, 35 P 665, 36 P 573.

(1) Assuming existence controverted fact. An instruction which assumes the existence of a fact that should be left to the jury is erroneous. Finseth v. Suburban Ry., (1897) 32 Or 1, 51 P 84, 39 LRA 517; State v. Bock, (1907) 49 Or 25, 31, 88 P 318; Kemp v. Portland Ry., Light & Power Co., (1915) 74 Or 258, 265, 145 P 274; Richey v. Robertson, (1917) 86 Or 525, 169 P 99, 101.

If an instruction contains or assumes the statement of a controverted fact, no error is committed in refusal of request for such instruction. Owens v. Snell, (1896) 29 Or 483, 44 P 827; Sorenson v. Kribs, (1916) 82 Or 130, 161 P 405.

Refusal to give an instruction which contains or assumes the existence of a controverted fact is not error. Brooks v. Bergholm, (1970) 256 Or 1, 470 P2d 154.

(2) Request for instruction. An instruction already included in the general charge may be refused. Roth v. No. Pac. Lumbering Co., (1889) 18 Or 205, 221, 22 P 842; State v. Brown, (1895) 28 Or 147, 167, 41 P 1042; State v. Branton, (1899) 33 Or 533, 549, 56 P 267; Savage v. Savage, (1899) 36 Or 268, 278, 59 P 461; State v. Tucker, (1899) 36 Or 291, 306, 61 P 894, 51 LRA 246; Marks v. Herren, (1906) 47 Or 603, 83 P 385; State v. Megorden, (1907) 49 Or 259, 269, 88 P 306, 14 Ann Cas 130; McGregor v. Ore. R. & Nav. Co., (1908) 50 Or 527, 539, 93 P 465, 14 LRA(NS) 668.

Voluminous requests are not favored as they tend to confuse the jury; a few plain propositions embracing the law upon the facts should be given. Weeklund v. So. Ore. Co., (1891) 20 Or 591, 27 P 260; Knahtla v. Ore. Short Line Ry., (1891) 21 Or 136, 27 P 91; Anderson v. No. Pac. Lbr. Co., (1891) 21 Or 281, 28 P 5; Conlon v. Ore. Short Line Ry., (1893) 23 Or 499, 32 P 397.

The court may treat the requested instructions as advisory in preparing its charge to the jury. Conlon v. Ore. Short Line Ry., (1893) 23 Or 499, 32 P 397; Morrison v. McAtee, (1893) 23 Or 530, 32 P 400.

The court's failure to submit a party's theory of the case can be considered on appeal only if it is requested and the instruction correctly states the law applicable to the case.

Sorenson v. Kribs, (1916) 82 Or 130, 161 P 405; Severy v. Myrmo, (1949) 186 Or 611, 207 P2d 151.

The court may append to requested instruction an explanation in writing of any matter pertinent to the case. Knapp v. King, (1877) 6 Or 243.

(a) Time of request. A request for an instruction should be submitted before argument and it is too late after the jury have retired to deliberate upon their verdict. State v. Smith, (1906) 47 Or 485, 83 P 865.

(b) Particular matters. If an instruction is ambiguous or defective in any particular, counsel should request a charge on that point, otherwise no error can be assigned. Schoellhamer v. Rometsch, (1894) 26 Or 394, 38 P 344; Farmers' Nat. Bank v. Woodell, (1900) 38 Or 306, 61 P 837, 65 P 520.

If a party desires an instruction as to a particular matter, he should request it to be given to the jury. State v. Smith, (1906) 47 Or 485, 83 P 865; State v. Donahue, (1915) 75 Or 409, 419, 144 P 755, 147 P 548, 5 ALR 1121.

It is not the court's duty, without request, to instruct the jury that failure of accused to testify raises no presumption of guilt. State v. Magers, (1899) 36 Or 38, 58 P 892.

It is the duty of the court to give general instructions covering the law of the case, but it need not in the absence of a special request instruct on all collateral matters. State v. Smith, (1906) 47 Or 485, 83 P 865.

To place before the jury knowledge derived from mortality tables, a party must request an instruction giving such information. Askay v. Maloney, (1917) 85 Or 333, 166 P 29.

The trial judge determines whether or not a general instruction should be supplemented by an instruction dealing specifically with the facts in issue. Barnes v. Davidson, (1951) 190 Or 508, 226 P2d 289.

The court is not required to instruct on the inference of negligence arising from the rule of res ipsa loquitur since it deals with circumstantial evidence, but it is preferable if it does. Centennial Mills, Inc. v. Benson, (1963) 234 Or 512, 383 P2d 103.

When contributory negligence is alleged and instructed upon, an instruction upon assumption of risk is improper. McIntosh v. Lawrance, (1970) 255 Or 569, 469 P2d 628.

No reviewable error was presented by an exception taken for failure of trial court to read a statute as an instruction where no request to instruct was made on trial. Severy v. Myrmo, (1949) 186 Or 611, 207 P2d 151.

It was not prejudicial error to fail to give an instruction that the indictment is not evidence, when the instructions were considered as a whole. State v. Keffer, (1970) 3 Or App 57, 471 P2d 438.

(3) Included crimes. Where evidence does not warrant a reduction of offense to a lesser one, it is not error for court to omit an instruction on lesser crime. State v. Magers, (1899) 35 Or 520, 534, 57 P 197; State v. Duffy, (1931) 135 Or 290, 295 P 953.

An instruction that the jury may find the defendant guilty of a lesser included offense, must be specially requested. State v. Reyner, (1907) 50 Or 224, 91 P 301; State v. Duffy, (1931) 135 Or 290, 295 P 953.

In the absence of a request for an instruction on a lesser included crime, it is not error for the court to fail to give it. State v. Kendrick, (1965) 239 Or 512, 398 P2d 471; State v. Miller, (1970) 2 Or App 353, 467 P2d 683, Sup Ct **review denied;** State v. Andrews, (1970) 2 Or App 595, 469 P2d 802, Sup Ct **review denied;** State v. Charles, (1970) 3 Or App 172, 469 P2d 792, Sup Ct **review denied.**

In a murder prosecution, it is not incumbent on court to charge with reference to manslaughter if there is no evidence tending to reduce the homicide to manslaughter. State v. Magers, (1899) 35 Or 520, 534, 57 P 197.

Omission to instruct upon an attempt to commit the crime charged is not error under evidence showing either guilt of the offense or entire innocence. State v. Duffy, (1931) 135 Or 290, 295 P 953.

(4) Applicability to pleadings and issues. The instructions should contain only the law arising upon the allegations in the pleadings and upon the evidence submitted to sustain them. Woodword v. Ore. R. & Nav. Co., (1890) 18 Or 289, 22 P 1076; Coos Bay Ry. Co. v. Siglin, (1894) 26 Or 387, 38 P 192; Hughes v. McCullough, (1901) 39 Or 372, 65 P 85; Carson v. Lauer, (1901) 40 Or 269, 65 P 1060; First Nat. Bank v. McDonald, (1902) 42 Or 257, 70 P 901; Williamson v. No. Pac. Lbr. Co., (1903) 43 Or 337, 73 P 7; Duff v. Willamette Steel Works, (1904) 45 Or 479, 78 P 363, 668; Godvig v. Lopez, (1948) 185 Or 301, 202 P2d 935; Hunt v. Bishop, (1951) 191 Or 541, 229 P2d 960.

Where evidence sustains the issues defined by the pleadings, a party is entitled to have the jury instructed on his theory of the case. Farmers' Nat. Bank v. Woodell, (1900) 38 Or 294, 61 P 837, 65 P 520; Lewis v. Croft, (1901) 39 Or 305, 64 P 809; Bingham v. Lipman, (1902) 40 Or 363, 67 P 98; State v. Smith, (1903) 43 Or 109, 71 P 973; State v. Teller, (1904) 45 Or 571, 78 Or 980; Richanbach v. Ruby, (1931) 135 Or 117, 293 P 430, 294 P 1098; Severy v. Myrmo, (1949) 186 Or 611, 207 P2d 151; Blair v. United Fin. Co., (1963) 235 Or 89, 383 P2d 72.

It is the duty of the court to instruct the jury upon every point relevant to the issue. Anderson v. No. Pac. Lbr. Co., (1891) 21 Or 281, 288, 28 P 5.

Although a plea of insanity was not made, it was not error to instruct on insanity as defendant offered testimony tending to show that he was insane. State v. Branton, (1899) 33 Or 533, 56 P 267.

It was not error to refuse to give a requested instruction on an unpleaded affirmative defense. Moe v. Howser, (1965) 239 Or 531, 399 P2d 22.

(5) Abstract instructions. To instruct the jury upon an abstract question of law about which there is no evidence constitutes error. Dooley v. First Nat. Bank, (1896) 29 Or 277, 45 P 780; Emison v. Owyhee Ditch Co., (1900) 37 Or 577, 581, 62 P 13; Anderson v. Ore. R. Co., (1904) 45 Or 211, 77 P 119; Geldard v Marshall, (1905) 47 Or 271, 281, 83 P 867, 84 P 803; Oberlin v. Ore.-Wash. R. & Nav. Co., (1914) 71 Or 177, 142 P 554; Fiebiger v. Rambo, (1930) 132 Or 115, 284 P 565; Karberg v. Leahy, (1933) 144 Or 687, 26 P2d 56; Godvig v. Lopez, (1949) 185 Or 301, 202 P2d 935.

Although the instruction is erroneous because it is based on an abstract question of law, judgment will not be reversed unless it appears that the jury was misled thereby. Gregoire v. Rourke, (1895) 28 Or 275, 42 P 996; Godvig v. Lopez, (1949) 185 Or 301, 202 P2d 935.

An instruction which directs the jury to base their verdict on certain specified facts and ignores other material facts in evidence, is error. Stanley v. Smith, (1887) 15 Or 505, 16 P 174; State v. Huffman, (1888) 16 Or 15, 16 P 640.

An abstract charge that states the law correctly cannot be the basis for a reversal, unless it appears that it did mislead, or may have misled, the jury to the prejudice of the appellant. State v. Townsend, (1964) 237 Or 527, 392 P2d 459; State v. Livingston, (1970) 2 Or App 587, 469 P2d 632; State v. Keffer, (1970) 3 Or App 57, 471 P2d 438.

The refusal to give an abstract instruction is not error. Godvig v. Lopez, (1949) 185 Or 301, 202 P2d 935.

In an action for wrongful death, an instruction as to damages referring to some elements not based on any evidence was abstract and, therefore, erroneous. Askay v. Maloney, (1917) 85 Or 333, 166 P 29.

(6) Inconsistent instructions. Giving of inconsistent and contradicting instructions is error and this error is not cured even though the law may have been correctly stated on one side. Morrison v. McAtee, (1893) 23 Or 530, 32 P 400; Smitson v. So. Pac. Co., (1900) 37 Or 74, 60 P 907; State v. Miller, (1903) 43 Or 325, 74 P 658; Neis v. Whitaker, (1906)

47 Or 517, 84 P 699; Malloy v. Marshall-Wells Hdw. Co., (1918) 90 Or 303, 173 P 267, 175 P 659, 176 P 589.

A party cannot complain of the inconsistency of different instructions where the inconsistency resulted from instructions proffered by him which were not germane to the issue. Mullaney v. Evans, (1898) 33 Or 330, 54 P 886; State v. Branton, (1899) 33 Or 533, 56 P 267.

Inconsistent or contradictory instructions are erroneous and ground for reversal because it cannot usually be determined from the verdict what rule as given by the court the jury adopted. Taylor v. Lawrence, (1961) 229 Or 259, 366 P2d 735; Smith v. Field Chevrolet Co., (1964) 239 Or 233, 396 P2d 200.

Inconsistent instructions are not grounds for the reversal of a judgment, unless it appears that the jury have been misled. Smitson v. So. Pac. Co., (1900) 37 Or 74, 104, 60 P 907.

Where both parties ask for an instruction on a certain subject, they waive any inconsistency in it. Oja v. LeBlanc, (1949) 185 Or 333, 203 P2d 267.

The instructions must be considered as a whole. Smith v. Field Chevrolet Co., (1964) 239 Or 233, 396 P2d 200.

(7) Form and requisites. Instructions should be clear and concise statements of the law. La Grande Nat. Bank v. Blum, (1895) 27 Or 215, 41 P 659.

The use of unusual or peculiar references for illustration is not error if it is not calculated to mislead jury. First Nat. Bank v. Fire Assn., (1898) 33 Or 172, 50 P 568, 53 P 8.

The opinion of another court should not be read to the jury. Stewart v. Hunter, (1888) 16 Or 62, 16 P 876, 8 Am St Rep 267.

2. Court shall not present facts of case

To instruct the jury upon the weight to be given to a fact is reversible error. State v. Hale, (1885) 12 Or 352, 7 P 523; State v. Bartlett, (1908) 50 Or 440, 93 P 243, 126 Am St Rep 751, 19 LRA(NS) 802.

The court may not comment upon the evidence addressed to the jury. State v. Chee Gong, (1888) 16 Or 534, 19 P 607; State v. High, (1935) 151 Or 685, 51 P2d 1044.

An instruction that there is evidence to the effect or "tending to show" a certain fact but leaving to the jury the finding of the fact does not invade the province of the jury. State v. Brown, (1895) 28 Or 147, 41 P 1042; Coos Bay Ry. Co. v. Siglin, (1898) 34 Or 80, 53 P 504; Smitson v. So. Pac. Co., (1900) 37 Or 74, 60 P 907; State v. Raper, (1944) 174 Or 252, 149 P2d 165.

An expression of opinion by the court as to motives of witnesses is reversible error. State v. Pomeroy, (1896) 30 Or 16, 46 P 797.

A comment by the court as to the credibility of a witness invades the province of the jury. State v. McDaniel, (1901) 39 Or 161, 65 P 520.

Where a comment by court is objectionable, a subsequent instruction withdrawing the objectionable words from the jury renders the remark harmless. Id.

Where there is dispute as to the testimony of a witness, statement by the court as to this testimony is not in violation of the section. State v. Lane, (1906) 47 Or 526, 84 P 804.

Statement of undisputed facts in instruction is not error. State v. Watson, (1906) 47 Or 543, 85 P 336.

An instruction that evidence of good character is sufficient to raise a reasonable doubt violates this section. State v. Bateham, (1919) 94 Or 524, 186 P 5.

Where a jury in a criminal case returns and asks for certain evidence, the trial judge under this provision and Ore. Const. Art. I, §16 may decline to state to the jury his recollection of the evidence; but if he does so state, it is not error. State v. Jennings, (1929) 131 Or 455, 282 P 560.

This section does not prevent the court from pointing out portions of the evidence for purpose of explaining the state's theory of the case. State v. High, (1935) 151 Or 685, 51 P2d 1044.

The prejudicial effect of frequent comments on the evidence cannot be wholly removed by final instruction to jury to disregard what the court has previously said. Frangos v. Edmunds, (1946) 179 Or 577, 611, 173 P2d 596.

Withdrawal of issue from consideration of jury is the determination of a question of law and not a comment upon the evidence. Lilley v. Gifford Phillips Wood Prod., (1957) 210 Or 278, 310 P2d 337.

The instruction was not a comment on the evidence because it did not instruct the jury on the probative value of the evidence. Franks v. Smith, (1968) 251 Or 98, 444 P2d 954; State v. Fitzmaurice, (1970) 3 Or App 601, 475 P2d 426, Sup Ct **review denied.**

An opinion expressed by the court that the fact the woman was lewd did not necessarily affect her veracity as a witness, was prejudicial error. State v. Lucas, (1893) 24 Or 168, 33 P 538.

A statement by the judge, preliminary to his instructions, that the parties had agreed on the law of the case and that he would give certain instructions presented by the defendant, does not give undue prominence to the defendant's case. First Nat. Bank v. Fire Assn., (1898) 33 Or 172, 190, 50 P 568, 53 P 8.

In an action for alienation of affections, a comment by the judge that a woman is not likely to be seduced unless she contributed a little was held reversible error as in violation of this section. Keen v. Keen, (1907) 49 Or 362, 90 P 147, 10 LRA(NS) 504, 14 Ann Cas 45.

In a prosecution for sodomy, an instruction concerning abnormality of a person committing such a crime, constituted reversible error. State v. McAllister, (1913) 67 Or 480, 136 P 254.

An instruction that when other corroborating evidence has been offered, "as in this case," it was for the jury to determine the weight to be given the testimony of the accomplice, was erroneous. State v. Bunyard, (1914) 73 Or 222, 144 P 449.

The instruction was objectionable as tending to "present the facts." Mayor v. Dowsett, (1965) 240 Or 196, 400 P2d 234.

An instruction that it is no defense to a hit and run charge for the defendant to voluntarily surrender himself at a place and time removed from the accident did not constitute a comment on the evidence and was proper under the circumstances. State v. Hulsey, (1970) 3 Or App 64, 471 P2d 812.

3. Jury are exclusive judges of evidence

Instructing the jury in the language of BC 695 [ORS 44.370] that they are exclusive judges of credibility of witnesses, is proper. State v. Bartlett, (1908) 50 Or 440, 93 P 243, 126 Am St Rep 751, 19 LRA(NS) 802.

The provision that the trial court shall inform the jury that they are the exclusive judges of all questions of fact has never been repealed, superseded or modified. Johnson v. Ladd, (1933) 144 Or 268, 14 P2d 280, 24 P2d 17.

4. Subsection (2) - written charges

If either party requires it, the charge of the court must be given in writing. Casto v. Murray, (1905) 47 Or 57, 81 P 388, 883; State v. Wilkinson, (1957) 212 Or 236, 319 P2d 893.

The charge to the jury may be orally given, unless a party exercise his right and require the trial court to put it in writing. Dawson v. Pogue, (1889) 18 Or 94, 22 P 637, 6 LRA 176.

If requested, this subsection is mandatory, but failure to write down the entire charge and file it is not a material error. State v. Armstrong, (1903) 43 Or 207, 73 P 1022.

It is the intent of this section that written instructions

shall be read to the jury. Hollis v. Ferguson, (1966) 244 Or 415, 417 P2d 989.

FURTHER CITATIONS: Smith v. Lownsdale, (1876) 6 Or 78; State v. Ganong, (1919) 93 Or 440, 184 P 233; State v. Butler, (1920) 96 Or 219, 274, 186 P 55, 73; Wyckoff v. Mut. Life Ins. Co., (1944) 173 Or 592, 656, 147 P2d 227; State v. Doud, (1950) 190 Or 218, 225 P2d 400; Whitehead v. Montgomery Ward & Co., (1951) 194 Or 106, 239 P2d 226; Valdin v. Holteen, (1953) 199 Or 134, 260 P2d 504; State v. Story, (1956) 208 Or 441, 301 P2d 1043; Lenchitsky v. H. J. Sandberg Co., (1959) 217 Or 483, 343 P2d 523; McBee v. Knight (1962) 233 Or 160, 377 P2d 163; Dare v. Garrett Freightlines, Inc., (1963) 234 Or 61, 380 P2d 119; Mohoff v. Northrup King & Co., (1963) 234 Or 174, 380 P2d 983; Strum v. Smelcer, (1963) 235 Or 251, 384 P2d 212; State v. Robinson, (1963) 235 Or 524, 385 P2d 754; State v. Herrera, (1963) 236 Or 1, 386 P2d 448; Flande v. Brazel, (1963) 236 Or 156, 386 P2d 920; Andrews v. Lyon, (1964) 237 Or 490, 392 P2d 247; State v. Schwensen, (1964) 237 Or 506, 392 P2d 328; Hevel v. Stangier, (1964) 238 Or 44, 393 P2d 201; State v. Jordan, (1964) 238 Or 184, 393 P2d 766; Leathers v. Snook, (1964) 238 Or 177, 393 P2d 764; State v. Murray, (1964) 238 Or 567, 395 P2d 780; State v. Johnson, (1966) 243 Or 532, 413 P2d 383; Ginter v. Handy, (1966) 244 Or 449, 419 P2d 21; Bowlds v. Taggesell Pontiac Co., (1966) 245 Or 86, 419 P2d 414; Williams v. Stockman's Life Ins. Co., (1968) 250 Or 160, 441 P2d 608; State v. Evans, (1969) 1 Or App 282, 460 P2d 1021, Sup Ct **review denied;** Eugene v. Reed, (1970) 2 Or App 196, 464 P2d 842, Sup Ct **review denied;** State v. Canaday, (1970) 2 Or App 390, 467 P2d 666, Sup Ct **review denied.**

LAW REVIEW CITATIONS: 13 OLR 303; 21 OLR 168; 35 OLR 3; 35 OLR 150; 37 OLR 243.

17.305

NOTES OF DECISIONS

By stipulation, parties may waive the provision that the jury may not separate until a verdict is reached. Freeman v. Wentworth & Irwin, Inc., (1932) 139 Or 1, 7 P2d 796; Lehl v. Hull, (1936) 152 Or 570, 53 P2d 48, 54 P2d 290.

The court has a right to communicate with the jury through the bailiff. State v. Garrand, (1874) 5 Or 216.

The judge and jury may communicate back and forth concerning the possibility of arriving at a verdict in a short time, and as to the advisability of the judge waiting and keeping the court open to receive the verdict. Id.

The court cannot allow the jury to separate and return at another day and complete their verdict. Nickelson v. Smith, (1887) 15 Or 200, 14 P 40.

After the jury have reported a disagreement, the judge, in communicating to the jury, cannot use such pronounced language in urging agreement so as to coerce the verdict. State v. Ivanhoe, (1899) 35 Or 150, 57 P 317.

A stipulation that the jury might separate if they reached a verdict does not waive right to poll jury. Freeman v. Wentworth & Irwin, Inc., (1932) 139 Or 1, 7 P2d 796.

Any doubt as to the prejudicial effect of improper communications made by the bailiff to the jury is to be resolved in favor of the accused. State v. Kristich, (1961) 226 Or 240, 359 P2d 1106. **Distinguished in** Carson v. Brauer, (1963) 234 Or 333, 382 P2d 79.

Affidavits of jurors will not be received to impeach their verdict. Carson v. Brauer, (1963) 234 Or 333, 382 P2d 79.

Misconduct by a juror must denote such a serious breach of the juror's duties that the trial judge would be justified in citing him for nothing less than a contempt of court. Id.

This section does not require reversal on account of communications by the bailiff incidental to his custodial duties which could not have any influence upon the deliberations of the jury. Id.

Statement by the judge to the jury out of court and out of the presence of counsel violates this section. Peters v. State Ind. Acc. Comm., (1963) 236 Or 27, 386 P2d 800.

Objection to separation of the jury may be taken in a motion for a new trial. Downes v. Plank, (1964) 237 Or 92, 390 P2d 622.

Where bailiff took women jurors to a toilet about 20 feet from the door of the jury room, after locking the men jurors in the jury room, this section was not violated. State v. Hecker, (1924) 109 Or 520, 221 P 808.

FURTHER CITATIONS: State v. Butler, (1920) 96 Or 219, 274, 186 P 55, 73; Oien v. Bourassa, (1960) 221 Or 359, 351 P2d 703.

17.310

NOTES OF DECISIONS

An unauthorized view of the locus in quo by a juror is grounds for setting aside a verdict and granting a new trial, unless it is clear that the misconduct could not have influenced the verdict. Wolfe v. Union Pac. R. R., (1962) 230 Or 119, 368 P2d 622.

A verdict is impeachable if justice demands it. State v. Gardner, (1962) 230 Or 569, 371 P2d 558.

A verdict will stand unless the evidence clearly establishes that misconduct constitutes a serious violation of a juror's duty and deprives complainant of a fair trial. Id.

There is no absolute rule prohibiting the use of a juror's affidavit to impeach a verdict. Id.

17.320

NOTES OF DECISIONS

The term "pleading" as used in this section means a written instrument. State v. Yarbrough, (1970) 4 Or App 302, 477 P2d 232, Sup Ct **review denied.**

It was error to allow the jury to take an affidavit for a continuance with them to the jury room. State v. Baker, (1893) 23 Or 441, 32 P 161.

Jury was allowed machine upon which to play record which was exhibit in case. State v. Reyes, (1957) 209 Or 595, 303 P2d 519, 304 P2d 446, 308 P2d 182.

FURTHER CITATIONS: Smith v. Lownsdale, (1876) 6 Or 78; DeLashmitt v. Journal Pub. Co., (1941) 166 Or 650, 114 P2d 1018.

17.325

NOTES OF DECISIONS

Statement by the judge to the jury out of court and out of the presence of counsel violates this section. Peters v. State Ind. Acc. Comm., (1963) 236 Or 27, 386 P2d 800; Young v. Crown Zellerbach Corp., (1966) 244 Or 251, 417 P2d 394.

Where court permitted jury to receive additional instruction without notice to defendant's counsel, error was harmless as court made record of what it did and defendant was allowed an exception. Grammer v. Wiggins-Meyer S.S. Co., (1928) 126 Or 694, 270 P 759.

It is within the discretion of the trial court to decide what instructions to give when the jury asks to be reinstructed. State v. Brown, (1970) 4 Or App 219, 475 P2d 973, Sup Ct **review denied.**

It is within the discretion of the court to determine whether it should redefine terms and permit testimony to be read to the jury after the jury has retired for deliberation. State v. Vaughn, (1954) 200 Or 275, 265 P2d 249; State v. Flett, (1963) 234 Or 124, 380 P2d 634.

FURTHER CITATIONS: Monner v. Starker, (1933) 145 Or 168, 26 P2d 1097; Whisnant v. Holland, (1956) 206 Or 392, 292 P2d 1087; Oien v. Bourassa, (1960) 221 Or 359, 351 P2d 703; Bowlds v. Taggesell Pontiac Co., (1966) 245 Or 86, 419 P2d 414.

17.330

NOTES OF DECISIONS

This section authorizing the court to discharge the jury without consent of defendant where jury is unable to agree on a verdict is not in conflict with Ore. Const. Art. I, §1 as putting him twice in jeopardy. State v. Shaffer, (1893) 23 Or 555, 32 P 545.

Whether or not it is possible for a jury to agree is a question for the court to be determined from the circumstances of the case. State v. Reinhart, (1894) 26 Or 466, 38 P 822.

Formerly the court had no power to discharge a jury on Sunday for failure to agree upon a verdict. Ex parte Tice, (1897) 32 Or 179, 49 P 1038.

Where the jury reported to the judge that they were unable to agree, an instruction as to the duty to agree was erroneous as it had a coercive effect upon the jury. State v. Ivanhoe, (1899) 35 Or 150, 57 P 317.

FURTHER CITATIONS: State v. Butler, (1920) 96 Or 219, 274, 186 P 55, 73; State v. Wilkinson, (1957) 212 Or 236, 319 P2d 893; State v. Paquin, (1962) 229 Or 555, 368 P2d 85; Young v. Crown Zellerbach Corp., (1966) 244 Or 251, 417 P2d 394.

17.335

CASE CITATIONS: State v. Wilkinson, (1957) 212 Or 236, 319 P2d 893.

17.340

NOTES OF DECISIONS

This section and the section dealing with legal business that may be transacted on nonjudicial days are in pari materia. Ex parte Tice, (1897) 32 Or 179, 49 P 1038.

Where court adjourned and did not reconvene for several days, the court stood adjourned for the term; the jury was thereby discharged and defendant was acquitted. State v. Turpin, (1909) 54 Or 367, 103 P 438.

17.345

CASE CITATIONS: State ex rel. Amore v. Wilkinson, (1957) 212 Or 236, 319 P2d 893.

17.355

NOTES OF DECISIONS

1. Polling of jury

The jury may be polled on the request of either party after the verdict is given and before it is filed. State v. Waymire, (1908) 52 Or 281, 287, 97 P 46, 132 Am St Rep 699, 21 LRA (NS) 56; Applegate v. Portland Gas & Coke Co., (1933) 142 Or 66, 18 P2d 211.

The polling of the jury is not discretionary with the judge but is a matter of absolute right. Freeman v. Wentworth & Irwin, Inc., (1932) 139 Or 1, 7 P2d 796; Rodgers Ins. Agency v. Andersen Mach., (1957) 211 Or 459, 316 P2d 497; Brooks v. Gladden, (1961) 226 Or 191, 358 P2d 1055, cert. denied, 366 US 974, 81 S Ct 1942, 6 L Ed 1263.

A stipulation for a sealed verdict, allowing the jury to disperse after the verdict is reached, does not waive the right of either party to poll the jury. Freeman v. Wentworth & Irwin, Inc., (1932) 139 Or 1, 7 P2d 796.

Where a sealed verdict is filed and jury have separated, the right to poll the jury is waived. Applegate v. Portland Gas & Coke Co., (1933) 142 Or 66, 18 P2d 211.

It is the duty of the trial court to send the jury out for further deliberation when there is an insufficient number of jurors who concur in the verdict. Lehl v. Hull, (1936) 152 Or 470, 53 P2d 48, 54 P2d 290.

The clause "if any juror answer in the negative" must be construed in the light of Ore. Const. Art. VII, §5 and Ore. Const. Art. I, §11 to mean in criminal case if more than two members answer in negative (except in first degree murder cases) and in civil cases if more than one-fourth of the members answer in the negative. Id.

Denial by a trial judge of a request to poll the jury is not a denial of due process under Oregon Constitution or the United States Constitution. Brooks v. Gladden, (1961) 226 Or 191, 358 P2d 1055.

Verdict was invalid when less than nine jurors concurred in all aspects of verdict. Clark v. Strain, (1958) 212 Or 357, 319 P2d 940; Munger v. State Ind. Acc. Comm., (1966) 243 Or 419, 414 P2d 328.

In a prosecution for murder, there was a compliance with this section in polling the jury by asking the question, "Is the verdict just read your verdict?" State v. Ogilvie, (1946) 180 Or 365, 175 P2d 454.

Defendant was held to have waived right to poll jury. Rodgers Ins. Agency v. Andersen Mach., (1957) 211 Or 459, 316 P2d 497.

2. Where verdict is informal or insufficient

Where verdict omits to fix the amount of the recovery, the courts may instruct the jury to amend the verdict. Goyne v. Tracy, (1919) 94 Or 216, 185 P 584; Printing Industry v. Banks, (1935) 150 Or 554, 46 P2d 596.

The common-law right to amend a verdict after the jury is discharged is not abrogated by this section and H212 [ORS 17.360]. Osborne & Co. v. Morris, (1891) 21 Or 367, 28 P 70.

Where a jury finds a verdict in different amounts against joint tort feasors, verdict must be corrected under this section. Chrudinsky v. Evans, (1917) 85 Or 548, 553, 167 P 562.

When the verdict is informal or insufficient, the court in its discretion may send the jury out for further deliberation. Lehl v. Hull, (1936) 152 Or 470, 53 P2d 48, 54 P2d 290.

A verdict of $1 general and $1006.40 special damages is inconsistent and indicates a compromise verdict. Hall v. Cornett, (1952) 193 Or. 634, 240 P2d 231.

If counsel was present when the verdict was returned and had an opportunity to examine the verdict before the jury was discharged, his failure to challenge the verdict's regularity or clarity constitutes a waiver of any objections which could have been made before the jury's discharge. Fischer v. Howard, (1954) 201 Or 426, 271 P2d 1059.

An integrated verdict does not differ in principal from a general verdict. Munger v. State Ind. Acc. Comm., (1966) 243 Or 419, 414 P2d 328.

Where the jury first returned a verdict against one defendant for a certain sum and against another defendant for a different amount, the court properly sent the jury out to correct the verdict. Holmboe v. Morgan, (1914) 69 Or 395, 138 P 1084.

Where the verdict was for an amount in excess of the amount possible under the pleadings, the proper remedy was to submit the case to the jury for correction of the verdict. Frederick & Nelson v. Bard, (1915) 74 Or 457, 145 P 669.

Rendering a verdict giving $1 compensatory and $35 special damages did not constitute misconduct by the jury. Fischer v. Howard, (1954) 201 Or 426, 271 P2d 1059.

The court did not abuse its discretion when there was no evidence that undue pressure would be exerted on the

juror which did not agree with the verdict. State v. Imlah, (1955) 204 Or 43, 281 P2d 973.

A verdict of $1 general and $399.55 special damages indicates a compromise verdict. Stein v. Handy, (1957) 212 Or 225, 319 P2d 935.

Right to object to verdict which allowed special damages was waived when jury returned verdict in counsel's presence. Edmonds v. Erion, (1960) 221 Or 104, 350 P2d 700.

FURTHER CITATIONS: Shell Co. v. O'Reilly, (1927) 121 Or 215, 253 P 1046; State v. Wilkinson, (1957) 212 Or 236, 319 P2d 893; Shulz v. Monterey, (1962) 232 Or 421, 375 P2d 829; Sprinkle v. Lemley, (1966) 243 Or 521, 414 P2d 797.

LAW REVIEW CITATIONS: 47 OLR 418.

17.360

NOTES OF DECISIONS

The common-law right to amend a verdict after the discharge of the jury is not abrogated by this section and H 211 [ORS 17.355]. Osborne & Co. v. Morris, (1891) 21 Or 367, 28 P 70.

After the verdict is received and jury is discharged, the court cannot amend the verdict by changing the amount. Fiore v. Ladd, (1896) 29 Or 528, 532, 46 P 144.

The verdict is not the verdict of the jury until it is received by the court and filed with the clerk. Holmboe v. Morgan, (1914) 69 Or 395, 138 P 1084.

A verdict against tort feasors in different amounts is not such a verdict as the court may receive. Chrudinsky v. Evans, (1917) 85 Or 548, 167 P 562.

The clause "if no juror disagree" must be construed in light of Ore. Const. Art. VII, §5 and Ore. Const. Art. I, §11 to mean in criminal cases if more than two members answer in the negative (except in first degree murder cases) and in civil cases if more than one-fourth of the members answer in the negative. Lehl v. Hull, (1936) 152 Or 470, 53 P2d 48, 54 P2d 290.

A verdict of $1 and $1006.40 special damages is not such as the court may receive. Hall v. Cornett, (1952) 193 Or 634, 240 P2d 231.

A verdict is impeachable if justice demands it. State v. Gardner, (1962) 230 Or 569, 371 P2d 558.

A verdict will stand unless the evidence clearly establishes that misconduct constitutes a serious violation of a juror's duty and deprives complainant of a fair trial. Id.

The court cannot speculate on the method used by the jury in arriving at its verdict. Sedello v. Portland, (1963) 234 Or 28, 380 P2d 115.

A verdict of special damages without an award of general damages is an improper verdict. Id.

Where the jury had not agreed, the paper filed was not their verdict. Nickelson v. Smith, (1887) 15 Or 200, 14 P 40.

FURTHER CITATIONS: Snyder v. Amermann, Jr., (1952) 194 Or 675, 243 P2d 1082; Heath v. Amore, (1956) 208 Or 533, 302 P2d 1017; Stein v. Handy, (1957) 212 Or 225, 319 P2d 935; State v Wilkinson, (1957) 212 Or 236, 319 P2d 893; Mullins v. Rowe, (1960) 222 Or 519, 353 P2d 861.

17.405

NOTES OF DECISIONS

A verdict in law action which requires mutual acts on part of the parties is void. Parlin v. Barnett, (1899) 35 Or 568, 57 P 625.

A verdict awarding compensation in condemnation proceedings is a general verdict and need not describe property taken. Skelton v. City of Newberg, (1915) 76 Or 126, 148 P 53.

A special verdict must state all the facts essential to recovery. Abraham v. Mack, (1929) 130 Or 32, 273 P 711, 278 P 972.

In sewer construction reassessment proceedings, verdict assessing benefits to defendants' property "the same as it set forth in" a city ordinance which was in evidence, was not too indefinite. Portland v. Blue, (1918) 87 Or 271, 170 P 715, 717.

FURTHER CITATIONS: Turner v. Cyrus, (1919) 91 Or 462, 179 P 279; Clark v. Strain, (1958) 212 Or 357, 319 P2d 940; State v. Poierier, (1958) 212 Or 369, 320 P2d 255; Munger v. State Ind. Acc. Comm., (1966) 243 Or 419, 414 P2d 328.

LAW REVIEW CITATIONS: 4 WLJ 86-96.

17.410

NOTES OF DECISIONS

1. In general
2. Value of property
3. Damages for detention

1. In general

In a replevin action, a verdict in disregard of requirements of this section is not authorized. Jones v. Snider, (1879) 8 Or 127; Smith v. Smith, (1889) 17 Or 444, 21 P 439; McCargar v. Wiley, (1924) 112 Or 215, 229 P 665.

A verdict silent as to the ownership of the property, when such ownership and right to the possession of the property are in controversy, is insufficient. Jones v. Snider, (1879) 8 Or 127; Phipps v. Taylor, (1887) 15 Or 484, 16 P 171; Smith v. Smith, (1889) 17 Or 444, 21 P 439; Yick Kee v. Dunbar, (1891) 20 Or 416, 26 P 275; Feller v. Feller, (1901) 40 Or 73, 66 P 468; McCargar v. Wiley, (1924) 112 Or 215, 217, 229 P 665.

Where property has been delivered to prevailing party, this section does not apply. Prescott v. Heilner, (1886) 13 Or 200, 9 P 403; Phipps v. Taylor, (1887) 15 Or 484, 16 P 171; Smith v. Smith, (1889) 17 Or 444, 21 P 439.

A general verdict will not raise a presumption that the jury has passed on issues not named. Jones v. Snider, (1879) 8 Or 127.

In order to recover a verdict under this section, defendant must affirmatively show his rights to return of property. Capital Lumbering Co. v. Hall, (1882) 10 Or 202.

A verdict containing what this section prescribes is sufficient and it is not necessary that the verdict follow the pleadings with particularity. Corbell v. Childers, (1889) 17 Or 528, 21 P 670.

Under a chattel mortgage where plaintiff mortgagee sued to recover possession and defendant pleaded payment, a verdict that chattels were property of defendant, that he was entitled to possession and that the value of the goods was a certain sum, is sufficient. Nunn v. Bird, (1900) 36 Or 515, 59 P 808.

This section is merely declaratory of the law prevailing generally in replevin actions. McIntosh Livestock Co. v. Buffington, (1923) 108 Or 358, 217 P 635.

This section does not prohibit a counterclaim for damages arising out of the original transaction by which the defendant acquired possession. Mack Trucks, Inc. v. Taylor, (1961) 227 Or 376, 362 P2d 364.

2. Value of property

A general verdict for damages without finding on the issue of the value of the property is insufficient. Jones v. Snider, (1879) 8 Or 127; Smith v. Smith, (1889) 17 Or 444, 21 P 439.

This section is silent as to time value of property is to be estimated and thus it may be construed so as to make it the jury's duty to determine the value either when the property was taken or at time of trial as may best promote

substantial justice. La Vie v. Crosby, (1903) 43 Or 612, 74 P 220; Farmers' Loan & Mtg. Co. v. Hansen, (1927) 123 Or 72, 260 P 999.

A verdict for plaintiff for an undivided portion of property sued for is insufficient. Phipps v. Taylor, (1887) 15 Or 484, 16 P 171.

To promote justice, value should be determined at the date of the verdict. La Vie v. Crosby, (1903) 43 Or 612, 74 P 220.

Finding of the value of each separate item is not required where they are of like character. Fox v. Tift, (1910) 57 Or 268, 111 P 51, Ann Cas 1912D, 845.

A verdict in one sum without setting forth separately the assessed value of property and amount of damages sustained is erroneous. Neppach v. Beauvais, (1932) 138 Or 524, 7 P2d 559.

Failure of the jury to assess the value of the property was error but not prejudicial in this instance. Mazama Tbr. Prod. v. Taylor, (1965) 239 Or 568, 399 P2d 26.

3. Damages for detention

The provision authorizing the assessment of damages is permissive, and a verdict not finding upon the question is not defective. Prescott v. Heilner, (1886) 13 Or 200, 9 P 403; Moorhouse v. Donaca, (1887) 14 Or 430, 13 P 112.

Damages arising out of the detention of the property should be litigated in the replevin action. Peacock v. Kirkland, (1915) 74 Or 279, 145 P 281; Gust v. Edwards Co., (1929) 129 Or 409, 274 P 919.

Where exempted property has been unlawfully seized, damages for detention may be awarded under this section. Parsons v. Hartman, (1894) 25 Or 547, 37 P 61, 42 Am St Rep 803, 30 LRA 98.

This section distinguishes between the value of the property and the damages for its detention. Gile & Co. v. Lasselle, (1918) 89 Or 107, 171 P 741.

FURTHER CITATIONS: Maxson v. Ashland Iron Works, (1917) 85 Or 345, 166 P 37, 167 P 271.

17.415

NOTES OF DECISIONS

1. Special verdict

In cases where court may direct a special verdict, such direction rests within the trial court's discretion. Knahtla v. Ore. Short Line Ry., (1891) 21 Or 136, 27 P 91.

Improper findings in a special verdict should be disregarded. Palmer v. Portland Ry., Light & Power Co., (1912) 62 Or 539, 125 P 840.

Special verdicts must contain statements of ultimate facts. Archambeau v. Edmunson, (1918) 87 Or 476, 171 P 186.

The provision for findings upon particular questions of fact must not be confused with the provision for special verdicts found in LOL 152 [ORS 17.405]. Turner v. Cyrus, (1919) 91 Or 462, 179 P 279.

A special verdict must be taken as a whole. Abraham v. Mack, (1929) 130 Or 32, 273 P 711, 278 P 972.

2. Special findings

The court may in its discretion withdraw the submission of a particular question of fact at any time before the jury have acted upon it. Rohr v. Isaacs, (1880) 8 Or 451; Herrlin v. Brown & McCabe, (1914) 71 Or 470, 142 P 772.

The object of requiring the jury to pass separately and specifically upon controverted questions of fact is to secure a more careful consideration of the evidence and disclose the precise grounds upon which the verdict is based. Knahtla v. Ore. Short Line Ry., (1891) 21 Or 136, 27 P 91; Herrlin v. Brown & McCabe, (1914) 71 Or 470, 142 P 772.

It is discretionary with the court whether or not it shall direct the jury to make a special finding of fact. Knahtla v. Ore. Short Line Ry., (1891) 21 Or 136, 27 P 91; White v. White, (1898) 34 Or 141, 55 P 645; Fox v. Tift, (1910) 57 Or 268, 275, 111 P 51, Ann Cas 1912D, 845; Palmer v. Portland Ry., Light & Power Co., (1912) 62 Or 539, 125 P 840; Herrlin v. Brown & McCabe, (1914) 71 Or 470, 142 P 772; Horn v. Elgin Whse. Co., (1920) 96 Or 403, 190 P 151; Rennewanz v. Dean, (1925) 114 Or 259, 229 P 372.

Where special findings are directed, a general verdict will not raise a presumption that jury have passed on issues not named. Jones v. Snider, (1879) 8 Or 127.

Special questions submitted to a jury should relate to some probative fact upon which the rights of the parties depend, and not to mere evidentiary facts which may be only prima facie evidence of the fact to be proved. White v. White, (1898) 34 Or 141, 50 P 801, 55 P 645.

The general verdict will stand even though the jury failed to agree upon the answer to a special question going to one of several grounds of recovery alleged. Russell v. Ore. R. & Nav. Co., (1909) 54 Or 128, 102 P 619.

The findings upon particular questions of fact constitute a "special verdict," which controls the general verdict in case of inconsistency. Parker v. Smith Lbr. & Mfg. Co., (1914) 70 Or 41, 138 P 1061.

A special interrogatory calling for a conclusion of law should not be submitted to the jury. Archambeau v. Edmunson, (1918) 87 Or 476, 171 P 186.

Objections to the form of special interrogatories are waived where they were not called to the court's attention prior to submission. Id.

A special finding which is unauthorized has no effect and thus does not control a general verdict under OL55 [ORS 17.420]. Bramwell v. Heseltine, (1927) 122 Or 519, 259 P 1063.

Interrogatories submitted to the jury must be such as permit the jury accurately to express its findings. Syler v. State Ind. Acc. Comm., (1966) 244 Or 541, 419 P2d 411.

FURTHER CITATIONS: Wallowa Valley Stages v. Oregonian, (1963) 235 Or 594, 386 P2d 430; Pedersen v. Pete Wilson Realty, Inc., (1970) 256 Or 622, 475 P2d 413.

LAW REVIEW CITATIONS: 4 WLJ 87-96.

17.420

NOTES OF DECISIONS

Special findings of fact control the general verdict when the two are inconsistent. Stewart v. Perkins, (1869) 3 Or 508; Archambeau v. Edmunson, (1918) 87 Or 476, 483, 171 P 186; Columbia R. Door Co. v. Priest, (1929) 128 Or 359, 274 P 116; Abraham v. Mack, (1929) 130 Or 32, 273 P 711, 278 P 972.

Special findings are inconsistent if they would authorize a different judgment on the action than the general verdict. Loewenberg v. Rosenthal, (1889) 18 Or 178, 22 P 601.

The general verdict must prevail unless the special finding is inconsistent. Horn v. Elgin Whse. Co., (1920) 96 Or 403, 190 P 151.

A special finding which is unauthorized has no effect and thus does not control a general verdict. Bramwell v. Heseltine, (1927) 122 Or 519, 259 P 1063.

Where special findings established that the plaintiff was guilty of contributory negligence, a judgment was properly entered for the defendant in spite of a general verdict for plaintiff. Palmer v. Portland Ry., Light & Power Co., (1912) 62 Or 539, 125 P 840.

When the jury found that the defendant's decedent died prior to the occurrence of the accident, a general finding for the plaintiff was inconsistent and the special finding controlled. Whelpley v. Frye, (1953) 199 Or 530, 263 P2d 295.

FURTHER CITATIONS: Ask v. Wood, (1925) 113 Or 498, 233 P 253.

17.425

NOTES OF DECISIONS

It is the duty of the judge, when the verdict for plaintiff fails to assess the amount of recovery, to cause the jury to correct it or send the jury out again. Goyne v. Tracy, (1919) 94 Or 216, 185 P 584; McLean v. Sanders, (1932) 139 Or 144, 7 P2d 981. **But see** Fischer v. Howard, (1954) 201 Or 426, 271 P2d 1059.

A verdict in an action for a money judgment, whether by way of liquidated or unliquidated damages, which does not state specifically the amount to which the successful party is entitled, is not a verdict on which a valid judgment can be entered. McLean v. Sanders, (1932) 139 Or 144, 7 P2d 981; Klein v. Miller, (1938) 159 Or 27 , 77 P2d 1103.

It is the duty of the jury to find the amount of the recovery. Fiore v. Ladd, (1896) 29 Or 528, 533, 46 P 144.

After jury is discharged, the court has no power to amend the verdict by changing the amount of recovery. Id.

When the jury fails to include any allowance for the attorney's fees provided for by the terms of the note, the court cannot make a finding upon the issue and render judgment for such fee. Cox v. Alexander, (1896) 30 Or 438, 46 P 794.

Where interest is not provided for in a verdict, the court has no power to include interest on the principal sum in the judgment. Printing Industry v. Banks, (1935) 150 Or 554, 46 P2d 596. Overruling Hill v. Wilson, (1927) 123 Or 193, 261 P 422.

A verdict which assesses general damages at the sum of "$ no damages" is insufficient. Klein v. Miller, (1938) 159 Or 27, 77 P2d 1103. **But see** Fischer v. Howard, (1954) 201 Or 426, 271 P2d 1059.

A verdict of $1 or "$ none" for the plaintiff is virtually a verdict for the defendant. Fischer v. Howard, (1954) 201 Or 426, 271 P2d 1059.

If counsel was present when the verdict was returned and had an opportunity to examine the verdict before the jury was discharged, his failure to challenge the verdict's regularity or clarity constitutes a waiver of any objections which could have been made before the jury's discharge. Id.

Rendering a verdict giving $1 compensatory damages and $35 special damages did not constitute misconduct by the jury. Id.

FURTHER CITATIONS: Pedersen v. Pete Wilson Realty, Inc., (1970) 256 Or 622, 475 P2d 413.

LAW REVIEW CITATIONS: 17 OLR 348.

17.431

NOTES OF DECISIONS

1. In general

There is no provision for filing objections to general findings in the absence of a demand for special findings. Pietz v. Del Mar Investment Co., (1967) 247 Or 468, 431 P2d 275.

A finding of fact is not turned into a conclusion of law by so designating it. Leo v. Heller, (1970) 255 Or 390, 467 P2d 439.

2. Under former similar statute

(1) In general. The object of the statute was to enable the parties to have placed upon the record the facts upon which the right litigated depended as well as the conclusions of law. Drainage Dist. v. Crow, (1891) 20 Or 535, 26 P 845; Darling v. Miles, (1911) 57 Or 593, 111 P 702, 112 P 1084.

Findings by the court were in nature of special verdict. Drainage Dist. v. Crow, (1891) 20 Or 535, 26 P 845; Turner v. Cyrus, (1919) 91 Or 462, 179 P 279; Maeder Steel Products Co. v. Zanello, (1924) 109 Or 562, 220 P 155.

When the language of a finding was equivocal, the construction which accorded with the pleadings and supported the judgment was adopted. Whitlock v. Manciet, (1882) 10 Or 166.

The court could not on its own motion set aside its findings. Scott v. Ford, (1908) 52 Or 288, 97 P 99.

Where no findings had been made, a dismissal of the action was not an adjudication on the merits. Northern Pac. Ry. Co. v. Spencer, (1910) 56 Or 250, 108 Or 180.

Where the court reserved decision on a motion for nonsuit for insufficiency of evidence, the court had no power to make findings without disposing of the motion. Id.

In contempt proceedings, if findings were made they should have embraced every issue. State v. Stillwell, (1916) 80 Or 610, 157 P 970.

In contempt proceedings, findings had to be made. State v. Bassett, (1941) 166 Or 628, 113 P2d 432, 114 P2d 546.

The Supreme Court would not consider questions not raised in the manner required by the former section. Carlson v. Steiner, (1950) 189 Or 255, 220 P2d 100.

Objections to findings had to be filed within the statutory time allowed or extended. Gordon Creek Tree Farms, Inc. v. Lyne, (1962) 230 Or 204, 358 P2d 1062, 368 P2d 737.

(2) Necessity for findings. Findings covering facts admitted by the pleadings were not required. Moody v. Richards, (1896) 29 Or 282, 45 P 777; Reade v. Pac. Supply Assn., (1901) 40 Or 60, 66 P 443; Jennings v. Frazier, (1905) 46 Or 470, 472, 80 P 1011.

Where judgment was rendered on pleadings, findings of fact are neither required nor proper. Davis Lbr. Co. v. Coats Lbr. Co., (1917) 85 Or 542, 167 P 507; Owen v. Leber, (1924) 112 Or 136, 228 P 927.

Where findings were not made as required, judgment would be reversed and cause remanded with direction to make such findings and enter judgment again in accordance therewith. Glickman v. Solomon, (1932) 140 Or 358, 12 P2d 1017; Larsen v. Martin, (1943) 172 Or 605, 143 P2d 239.

Where the parties had stipulated the facts, findings were not necessary. Frush v. East Portland, (1877) 6 Or 281. **But see** Moody v. Richards, (1896) 29 Or 282, 45 P 777.

Facts admitted by the pleadings were tantamount to findings duly made. Miller v. Head Camp, (1904) 45 Or 192, 77 P 83.

On demurrer where the only issue was one of law, the court was not required to make findings. Kime v. Thompson, (1911) 60 Or 183, 118 P 174.

Allegations of new matter in an answer not controverted by a reply required no findings of fact. Siverson v. Clanton, (1918) 88 Or 261, 170 P 933, 171 P 1051.

It was error to make a finding of fact with no satisfactory evidence to support it. Consolidated Freightways v. West Coast Freight, (1950) 188 Or 117, 212 P2d 1075, 214 P2d 475.

Where defendant did not file an answer, there were no issues raised upon which the findings could be based except a finding as to amount of damages. Vuilleumier v. Ore. Water Power & R. Co., (1909) 55 Or 129, 105 P 706, 708.

In case of the assessment of damages on default of defendant, special findings as to items and amounts of damages were not required. Id.

Defendant was not entitled to a finding on an issue which his answer was insufficient to raise. Zuccala v. Suncrest Orchards, Inc., (1929) 130 Or 612, 280 P 344.

There was no error for failure to enter findings concerning the defendant's alleged careless, wanton and wilful conduct, since the theory of recovery was trespass. Martin v. Reynolds Metals Co., (1959) 221 Or 86, 342 P2d 790, cert. denied, 362 US 918, 80 S Ct 672, 4 L Ed 2d 739.

(3) Form and requisites. The findings were required to be sufficient to sustain the judgment. Fink v. Canyon Rd. Co., (1874) 5 Or 301; Drainage Dist. v. Crow, (1891) 20 Or 535, 26 P 845; Maeder Steel Products v. Zanello, (1924) 109 Or 562, 220 P 155.

If the findings supported the judgment and conformed to the theory of the prevailing party, they were sufficient. Freeman v. Trummer, (1907) 50 Or 287, 91 P 1077; Clackamas So. Ry. Co. v. Vick, (1914) 72 Or 580, 144 P 84.

If findings were vague, uncertain and indefinite, they were insufficient to support the judgment. Maeder Steel Products v. Zanello, (1924) 109 Or 562, 220 P 155; Larsen v. Martin, (1943) 172 Or 605, 143 P2d 239.

A finding outside of the issues made by the pleadings was a mere nullity. Male v. Schaut, (1902) 41 Or 425, 69 P 137.

If a party desired findings on issues outside pleading a request had to be made therefor. Jennings v. Frazier, (1905) 46 Or 470, 80 P 1011.

Court's refusal to amend findings to conform to facts admitted was erroneous unless requesting party was not injured thereby. Boothe v. Farmers' & Traders' Nat. Bank, (1909) 53 Or 576, 98 P 509, 101 P 390.

Findings which merely announced certain legal conclusions deducible from facts not stated were not sufficient to support a judgment. Henderson v. Reynolds, (1910) 57 Or 186, 110 P 979.

A statement of the ultimate facts on which the law must determine the parties' rights satisfied the statute. Maeder Steel Products Co. v. Zanello, (1924) 109 Or 562, 220 P 155.

Where findings were outside the issues made by the pleadings, judgment based thereon had to be reversed and remanded. Larsen v. Martin, (1943) 172 Or 605, 143 P2d 239.

Though the lower court merely found for plaintiff, the findings were not so vague as to cause doubt. Miller Lbr. Corp. v. Miller, (1960) 225 Or 427, 357 P2d 503, 100 ALR 2d 376.

(4) General or special findings. The court could find generally in favor of one party. School Dist. 106 v. New Amsterdam Cas. Co., (1930) 132 Or 673, 288 P 196; Du Mond v. Byron Jackson Co., (1932) 139 Or 57, 6 P2d 1096; Larsen v. Martin, (1943) 172 Or 605, 143 P2d 239.

Findings could not be both general and special. Larsen v. Martin, (1943) 172 Or 605, 143 P2d 239.

A "special finding" was a statement of the ultimate conclusions of trial court upon issues of fact raised by pleadings. Id.

(a) Request for and objections to. Where defendant made no objection to the findings and no request for different or additional findings, he could not successfully predicate error upon the court's failure to find in accordance with his theory. School Dist. 106 v. New Amsterdam Cas. Co., (1930) 132 Or 673, 288 P 196; McPherson v. State Ind. Acc. Comm., (1942) 169 Or 196, 127 P2d 344; Consolidated Freightways v. West Coast Freight, (1950) 188 Or 117, 212 P2d 1075, 214 P2d 475; Howard v. Klamath County, (1950) 188 Or 205, 215 P2d 362; Thompson and Georgeson, Inc. v. Ward, (1965) 240 Or 429, 400 P2d 557.

If no objections were taken to findings of fact, where the court tried the case without a jury, the findings of fact were conclusive. Mullennex v. Draper, (1959) 220 Or 1, 3, 347 P2d 990; Scott v. Lawrence Whse. Co., (1961) 227 Or 78, 360 P2d 610.

If no objections were taken to findings of fact erroneous rulings on questions of law could be appealed only on the ground that the established facts could not support the judgment. Scott v. Lawrence Whse. Co., (1961) 227 Or 78, 360 P2d 610; Imperial Inv. Co. v. Rouse, (1962) 231 Or 7, 371 P2d 962.

If findings were sufficient to support a judgment for one party and the other party failed to object to them or request additional findings, the findings would stand. McPheeters v. Smith, (1917) 85 Or 595, 167 P 575.

A motion to substitute other findings was an appropriate way to raise the point that the findings were not responsive to the issues. Annand v. Austin, (1917) 86 Or 403, 167 P 1017, 168 P 725.

Where the trial court made special findings covering the material issue that plaintiff had performed services as county surveyor for a certain number of days, the court was not required to make separate findings as to what particular days plaintiff performed statutory services, and what days, routine work. Howard v. Klamath County, (1950) 188 Or 205, 215 P2d 362.

It was reversible error for trial judge to adopt and sign plaintiff's requested findings without a hearing, when defendants had timely filed request for findings and objections to plaintiff's requested findings. Twin Falls Bank v. City Elec. Co., (1959) 218 Or 542, 346 P2d 84.

(5) Serving copy of findings. Failure to serve findings on a party was harmless error where such party filed objections thereto and the court acted upon the objections as though they had been properly presented. Zuccala v. Suncrest Orchards, (1929) 130 Or 612, 280 P 344; DuMond v. Byron Jackson Co., (1932) 139 Or 57, 6 P2d 1096.

(6) Filing of decision. Where the court failed to give a decision in writing, the judgment could be set aside by the court in which it was entered or by Supreme Court on appeal. Bush v. Geisy, (1888) 16 Or 355, 19 P 123.

Failure to enter the findings in the record within time required did not affect substantial rights of parties and thus was not reversible error. Kerns v. Lee, (1904) 44 Or 263, 75 P 140.

The provision as to time for filing findings was merely directory and delay beyond specified time did not defeat jurisdiction to render judgment. Maddox v. McHattan, (1924) 111 Or 324, 224 P 833, 226 P 427.

The circuit court during the same term set aside the judgment and made findings of fact and rendered judgment thereon. Brewster v. Springer, (1916) 79 Or 88, 154 P 418.

FURTHER CITATIONS: Howe v. Patterson, (1874) 5 Or 353; Weissman v. Russell, (1881) 10 Or 73; Reade v. Pac. Supply Assn., (1901) 40 Or 60, 66 P 443; State v. Gutridge, (1905) 46 Or 215, 80 P 98; Sears v. Multnomah County, (1907) 49 Or 42, 88 P 522; Collis v. Cone, (1913) 64 Or 157, 129 P 753, Ann Cas 1914D, 795; Frederick & Nelson v. Bard, (1913) 66 Or 259, 134 P 318; School Dist. 30 v. Alameda Constr. Co., (1918) 87 Or 132, 169 P 507, 778; Winters v. Bisaillon, (1936) 153 Or 509, 57 P2d 1095, 104 ALR 968; Ervast v. Sterling, (1937) 156 Or 432, 68 P2d 137; Tully v. Tully, (1958) 213 Or 124, 322 P2d 1085; Ryland v. Ryland, (1958) 214 Or 548, 330 P2d 175; Mullennex v. Draper, (1959) 220 Or 1, 347 P2d 990; Jarvis v. Indem. Ins. Co., (1961) 227 Or 508, 363 P2d 740; State Hwy. Comm. v. Brassfield, (1961) 228 Or 145, 363 P2d 1075; Collins v. Lantz, (1966) 244 Or 62, 415 P2d 763; Bither v. Baker Rock Crushing Co., (1968) 249 Or 640, 438 P2d 988, 440 P2d 368; Norris v. Norris, (1969) 1 Or App

122, 459 P2d 890; California-Pac. Util. Co. v. Barry, (1969) 254 Or 344, 460 P2d 847; Hawke v. Hawke, (1970) 3 Or App 514, 475 P2d 591.

LAW REVIEW CITATIONS: 34 OLR 73; 39 OLR 119, 120.

17.435

NOTES OF DECISIONS
1. In general
2. Findings as aiding pleadings
3. Conclusiveness of findings on appeal

1. In general

This section does not apply to suits in equity. Howe v. Patterson, (1874) 5 Or 353; Bailey v. Hickey, (1921) 99 Or 251, 195 P 372.

Under Ore. Const. Art. VII, §3 and this section, the Supreme Court has no authority to weigh conflicting evidence in an action at law. Bank of Kenton v. Preble, (1918) 87 Or 230, 167 P 578, 170 P 302; Nirschl v. Nirschl, (1926) 119 Or 478, 249 P 1099; Christensen Inc. v. Hansen Constr. Co., (1933) 142 Or 549, 21 P2d 195.

If there is evidence to support the findings, the Supreme Court will not review the weight or sufficiency of such evidence. Seffert v. No. Pac. Ry., (1907) 49 Or 95, 88 P 962, 13 Ann Cas 883.

The court cannot, on its own motion, set aside its findings and grant a new trial. Scott v. Ford, (1908) 52 Or 288, 97 P 99.

Where there is no bill of exceptions in the record, the court on appeal must take the findings of the court as a verdict. Reid v. Stanley, (1912) 62 Or 151, 124 P 646.

In a habeas corpus proceeding for the custody of a child, findings by the court upon the facts are not conclusive. Turner v. Hendryx, (1917) 86 Or 590, 167 P 1019, 169 P 109.

This section is satisfied by a statement of ultimate facts. Maeder Steel Prod. Co. v. Zanello, (1924) 109 Or 562, 220 P 155.

Upon the death of a trial judge, his successor is authorized to enter a judgment based on the findings of fact and conclusions of law bearing deceased's signature. Case v. Fox, (1932) 138 Or 453, 7 P2d 267.

Findings supported by a mere scintilla of evidence are not binding upon the Supreme Court. State Sav. & Loan Assn. v. Bryant, (1938) 159 Or 601, 81 P2d 116.

2. Findings as aiding pleadings

As findings made by the court without a jury are deemed a verdict, they will cure all formal defects in a complaint, but will not supply necessary allegations. Ferguson v. Reiger, (1903) 43 Or 505, 73 P 1040; Shaw Wholesale Co. v. Hackbarth, (1921) 102 Or 80, 198 P 908; Duby v. Hicks, (1922) 105 Or 27, 209 P 156.

Findings should be made covering all material issues raised by the pleadings. Moody v. Richards, (1896) 29 Or 282, 45 P 777.

3. Conclusiveness of findings on appeal

Findings of the trial court in a law action have the force and effect of a verdict, and such findings cannot be re-examined or set aside if there is any competent evidence to support them. Kyle v. Rippy, (1890) 19 Or 186, 25 P 141; Smith v. Good, (1904) 44 Or 578, 67 P 354; Freeman v. Trummer, (1907) 50 Or 287, 91 P 1077; Haveland v. Johnson, (1914) 70 Or 83, 139 P 720; Norman v. Ellis, (1915) 74 Or 168, 143 P 1112; United States Fid. Co. v. Martin, (1915) 77 Or 369, 149 P 1023; Bank of Kenton v. Preble, (1918) 87 Or 230, 167 P 578, 170 P 302; Cannon v. Farmers' Union Grain Agency, (1922) 102 Or 26, 202 P 725; Anderson v. State Ind. Acc. Comm., (1923) 107 Or 304, 215 P 582; Meader Steel Prod. Co. v. Zanello, (1924) 109 Or 562, 220 P 155; Lowenstein & Sons v. Noon Bag Co., (1924) 111 Or 421, 226 P 222; Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 232 P 637, 233 P 561, 234 P 261; City Motor Trucking Co. v. Franklin Fire Ins. Co. (1925) 116 Or 102, 239 P 812; Rosetto v. Miller, (1927) 120 Or 490, 252 P 707; Leonard v. King, (1929) 128 Or 216, 274 P 116; State v. Warren Constr. Co., (1929) 129 Or 58, 276 P 260; Zuccala v. Suncrest Orchards, Inc., (1929) 130 Or 612, 280 P 344; Salway v. Multnomah Lbr. & Box Co., (1930) 134 Or 428, 293 P 420; Bannon v. Thompson, (1931) 136 Or 311, 298 P 907; Burke Mach. Co. v. Copenhagen, (1932) 138 Or 314, 6 P2d 886; Greve v. Portland Remedial Loan Assn., (1934) 147 Or 384, 34 P2d 303; Cameron v. Edgemont Inv. Co., (1935) 149 Or 396, 41 P2d 249; Harcombe v. Rubenstein, (1938) 158 Or 78, 74 P2d 982; Easley v. Bottemiller, (1939) 162 Or 90, 90 P2d 481; Shaver Co. v. Eagle Star Ins. Co., (1945) 177 Or 410, 162 P2d 789; St. Clair v. Jelinek, (1949) 187 Or 151, 210 P2d 563; Brazeale v. State Ind. Acc. Comm., (1951) 190 Or 565, 227 P2d 804; Ryland v. Ryland, (1958) 214 Or 548, 330 P2d 175; Duzmanich v. United Fire and Cas. Co., (1966) 242 Or 529, 410 P2d 812; Fabre v. Halvorson, (1968) 250 Or 238, 441 P2d 640; State ex rel. Salem Pac. Corp. v. Combo Const. Co., (1969) 254 Or 89, 458 P2d 410; Harty v. Bye, (1971) 258 Or 398, 483 P2d 458.

FURTHER CITATIONS: Simmons v. Jarvis, (1939) 163 Or 117, 95 P2d 725; Northwest Oil Co. v. Haslett Whse. Co., (1942) 168 Or 570, 123 P2d 985; Butts v. State Ind. Acc. Comm., (1951) 193 Or 417, 239 P2d 238; Miller Constr. Co., v. D. M. Drake Co., (1960) 221 Or 249, 351 P2d 41; Brady v. East Portland Sheet Metal Works, (1960) 222 Or 584, 352 P2d 144; State Hwy. Comm v. Kendrick, (1961) 227 Or 608, 363 P2d 1078; Davis v. The Dalles Lbr. & Mfg. Co., (1962) 231 Or 86, 371 P2d 974; Thompson and Georgeson, Inc. v. Ward, (1965) 240 Or 429, 400 P2d 557; Cochran v. Brooke, (1965) 243 Or 89, 409 P2d 904; Brownsville Particle Bd., Inc. v. Overhead Door Co., (1966) 244 Or 424, 417 P2d 1019; Lloyd Corp. v. O'Connor, (1971) 258 Or 33, 479 P2d 744.

LAW REVIEW CITATIONS: 35 OLR 16; 4 WLJ 96.

17.441

NOTES OF DECISIONS
1. Under former similar statute
   (1) In general
   (2) Necessity of making findings
   (3) Review on appeal

See also annotations under ORS 17.431.

1. Under former similar statute

(1) In general. A referee's report could not be treated as a special verdict on the facts at the trial of the cause on appeal. O'Leary v. Fargher, (1884) 11 Or 225, 4 P 330.

Exceptions to findings of fact were necessary to review of such findings. Verdier v. Bigne, (1888) 16 Or 208, 19 P 64.

Where findings by the court were based on testimony introduced on an immaterial matter not in issue, they could not be considered on appeal de novo even though no exception was taken to admission. Blagen v. Smith, (1899) 34 Or 394, 56 P 292, 44 LRA 522.

The findings and conclusions formed no part of the decree unless incorporated in or made a part of it by reference. Gentry v. Pac. Livestock Co., (1904) 45 Or 233, 77 P 115.

In a suit to foreclose a mechanic's lien, the insufficiency of the court's findings to support the decree could not be a ground for reversal. Edmunds v. Welling, (1910) 57 Or 103, 110 P 533.

Where a referee's reported findings were adopted by the court, the court's action on the findings was not reversible

error. Anthony v. Hillsboro Gold Min. Co., (1911) 58 Or 258, 262, 113 P 442, 114 P 95.

A decree until reversed or modified sustained a plea of res judicata as to findings of fact and conclusions of law, and the pendency of appeal did not prevent the plea. Toy v. Gong, (1918) 87 Or 454, 170 P 936.

(2) Necessity of making findings. Failure to make findings was not ground for reversal on appeal. Sutherlin v. Bloomer, (1907) 50 Or 398, 93 P 135; Kubik v. Davis, (1915) 76 Or 501, 504, 147 P 552; Beno v. Norris, (1915) 77 Or 506, 509, 151 P 731.

Where no fact issues were tried, it was not contemplated by this section that findings should be made. Sutherlin v. Bloomer, (1907) 50 Or 398, 93 P 135.

In the absence of an issue of fact, findings were not necessary. Kime v. Thompson, (1911) 60 Or 183, 118 P 174; Columbia River Co. v. Smith, (1917) 83 Or 137, 162 P 831, 163 P 309.

Making findings when not required constituted harmless error. Columbia River Co. v. Smith, (1917) 83 Or 137, 145, 162 P 831, 163 P 309.

Making of special findings of fact was not required in an equity suit. Wickwire v. King, (1939) 161 Or 369, 88 P2d 803.

(3) Review on appeal. The appeal being tried de novo, the rights of the parties and the questions adjudicated had to be ascertained from the decree on appeal and not from the findings of fact of the court below. Gentry v. Pac. Livestock Co., (1904) 45 Or 233, 237, 77 P 115; Powers v. Powers, (1905) 46 Or 479, 80 P 1058.

The case was tried anew in the appellate court upon the transcript and the evidence accompanying it. State v. Small, (1907) 49 Or 595, 90 P 1110; Raber v. Clark, (1924) 110 Or 81, 222 P 1100; Schoren v. Schoren, (1924) 110 Or 272, 214 P 885, 222 P 1096.

Findings although not conclusive were entitled to much weight. Edmunds v. Welling, (1910) 57 Or 103, 110 P 533; Mutual Benefit Ins. Co. v. Cummings, (1913) 66 Or 272, 126 P 982, 133 P 1169, Ann Cas 1915B, 535; Martin v. Thomas, (1915) 74 Or 206, 144 P 684; Goff v. Kelsey, (1915) 78 Or 337, 153 P 103; Metropolitan Inv. & Imp. Co. v. Schouweiler, (1917) 83 Or 695, 163 P 599, 164 P 370; Bailey v. Hickey, (1921) 99 Or 251, 195 P 372; Bogle v. Paulson, (1948) 185 Or 211, 201 P2d 733; Nygord v. Baker Distribution Yard, (1960) 226 Or 63, 357 P2d 270.

On appeal in equity the court would review the exercise of the trial court's discretion in denying leave to amend the complaint. Hodgkin v. Boswell, (1910) 57 Or 88, 110 P 487.

The disqualification of the trial judge would not prevent the Supreme Court from reviewing the case de novo on appeal. Henderson v. Tillamook Hotel Co., (1915) 76 Or 379, 148 P 57, 149 P 473.

In a suit for divorce findings below were not binding on appeal; the court had to try the cause without reference to such findings. Bickner v. Bickner, (1925) 114 Or 48, 233 P 252.

In a declaratory judgment proceeding, if the relief sought was equitable and the issues of fact were tried as in equity, equitable procedure would be followed on appeal. Oregon Farm Bureau v. Thompson, (1963) 235 Or 162, 384 P2d 182.

FURTHER CITATIONS: Applegate v. Dowell, (1887) 15 Or 513, 16 P 651; Robson v. Hamilton, (1902) 41 Or 239, 69 P 651; Ward v. Town Tavern, (1951) 191 Or 1, 228 P2d 216; Beelman v. Beelman, (1961) 227 Or 556, 361 P2d 663, 363 P2d 561; Fry v. Ashley, (1961) 228 Or 61, 363 P2d 555; Ray v. Ricketts, (1963) 235 Or 243, 383 P2d 52; Industrial Air Prods. v. State Tax Comm., (1964) 236 Or 338, 388 P2d 470; Mohr v. Lear, (1964) 239 Or 41, 395 P2d 117; Scott v. Fredericksen, (1964) 239 Or 225, 396 P2d 219; Winthers v. Bertrand, (1964) 239 Or 97, 396 P2d 570; Johnson v. Lewis, (1965) 239 Or 601, 398 P2d 744; Bollenback v. Continental Cas. Co., (1966) 243 Or 498, 414 P2d 802, 34 ALR 3d 228.

LAW REVIEW CITATIONS: 34 OLR 73; 5 WLJ 10.

17.505

NOTES OF DECISIONS

1. Exceptions
2. Time of taking exception
3. Exception to court's charge

1. Exceptions

Exceptions are necessary for errors to be reviewed. Morgan v. Johns, (1917) 84 Or 557, 165 P 369; Olson v. Saxton, (1917) 86 Or 670, 169 P 119.

With reference to matters apparent on the face of the record, no exception need be taken. Chung v. Stephenson, (1907) 50 Or 244, 247, 89 P 386, 805.

No particular form is required for expressing an exception. State v. Laundy, (1922) 103 Or 443, 503, 204 P 958, 206 P 290.

An exception is a protest and notice of nonacquiescence to the ruling of the court. Id.

No exception can be taken to order overruling motion for new trial. Benson v. Birch, (1932) 139 Or 459, 10 P2d 1050.

Failure of one defendant to except to court's ruling did not preclude review of point where exception was taken by codefendant. McCarthy v. Gen. Elec. Co., (1935) 151 Or 519, 49 P2d 993.

2. Time of taking exception

The requirement that the exception must be noted during the trial is absolute and its subsequent allowance by a trial judge will not cure the omission. State v. Zorn, (1892) 22 Or 591, 30 P 317; Annans v. Sewell, (1905) 47 Or 372, 84 P 395.

The object of requiring an exception to be taken at the time of trial is to enable the court to correct any error which may have been committed. State v. Zorn, (1892) 22 Or 591, 30 P 317; Green Mountain Log Co. v. Columbia & Nehalem River R.R., (1932) 141 Or 188, 16 P2d 1106.

In order to save for review the direction of a verdict by the court, an exception must be taken at the trial. Bailey v. Sec. Ins. Co., (1921) 100 Or 163, 196 P 252.

An exception must be taken before verdict. Benson v. Birch, (1932) 139 Or 459, 10 P2d 1050.

The granting of several days' time to except instructions after the same have been given is not in keeping with the proper administration of justice. Green Mountain Log Co. v. Columbia & Nehalem River R.R., (1932) 141 Or 188, 16 P2d 1106.

3. Exception to court's charge

A general exception to an instruction is sufficient if it challenges on the ground that the instruction is erroneous as applied to the facts of the case. Nickum v. Gaston, (1893) 24 Or 380, 33 P 671, 35 P 31; Provo v. Spokane, Portland & Seattle Ry., (1918) 87 Or 467, 170 P 522.

An exception to a charge must point out the particular portion to which it is directed; if one part is sound, a general exception to the whole charge cannot be sustained. McAlister v. Long, (1898) 33 Or 368, 54 P 194; Anderson v. Aupperle, (1908) 51 Or 556, 95 P 330; Carroll v. Grand Ronde Elec. Co., (1908) 52 Or 370, 97 P 552.

An exception to a series of instructions is sufficient to secure their consideration on appeal where they in effect assert but one proposition of law. Nickum v. Gaston, (1893) 24 Or 380, 390, 33 P 671, 35 P 31.

An omnibus objection to the giving or the refusal of requested instructions is not sufficient to require a review

of alleged error. Michelin Tire Co. v. Williams, (1931) 135 Or 158, 293 P 938.

When a party excepts to the giving of a particular instruction, the fault in the instruction should be pointed out; but where an exception is taken to the refusal of an instruction the merits of such instruction need not be given. Smith v. Pac. NW Public Serv. Co., (1934) 146 Or 422, 29 P2d 819.

FURTHER CITATIONS: Nosler v. Coos Bay Nav. Co., (1901) 40 Or 305, 63 P 1050, 64 P 855; Hayes v. Clifford, (1903) 42 Or 568, 72 P 1; State v. Ridder, (1949) 185 Or 134, 202 P2d 482; State v. Anderson, (1956) 207 Or 675, 298 P2d 195; State v. Braley, (1960) 224 Or 1, 355 P2d 467; State v. Sanders, (1962) 232 Or 631, 376 P2d 668; State v. Hedrick, (1962) 233 Or 131, 377 P2d 323; State v. Munson, (1964) 239 Or 130, 396 P2d 696; State v. Williams, (1965) 242 Or 192, 408 P2d 936; State v. Dayton, (1965) 242 Or 269, 409 P2d 189; Brice v. Danisch, (1966) 244 Or 505, 419 P2d 18; State v. Hollingsworth, (1970) 2 Or App 186, 465 P2d 490, Sup Ct review denied.

17.510

NOTES OF DECISIONS

1. In general
2. "Instructions given to a jury"
3. Rulings on evidence and motions
4. Stipulation of facts
5. Offer of proof
6. Directed verdict

1. In general

Except as provided in this section the errors relied upon must be raised by appropriate objections and exceptions interposed on the trial. Bailey v. Sec. Ins. Co., (1921) 100 Or 163, 196 P 252; Tanner v. Fowells, (1966) 243 Or 624, 415 P2d 162; Crawford v. Jackson, (1969) 252 Or 552, 451 P2d 115.

Except in rare cases, the court will not consider on appeal an alleged error to which no proper objection was made. State v. Brewton, (1964) 238 Or 590, 395 P2d 874; State v. Shannon, (1965) 241 Or 450, 405 P2d 837; State v. Hollingsworth, (1970) 2 Or App 186, 465 P2d 490, Sup Ct review denied.

The rule (that it is not error only, but error legally excepted to which affords grounds for reversal) is relaxed only when the court, upon examination of the entire record, can say that the error is manifest and that the ends of justice will not otherwise be satisfied. State v. Ragghianti, (1971) 5 Or App 498, 484 P2d 1125; State v. Williams, (1971) 5 Or App 508, 484 P2d 1113.

This section relates wholly to trials in actions at law and is inapplicable to proceedings in equity. Howe v. Patterson, (1874) 5 Or 353.

Depending on the evidence establishing intoxication, the possibility the jury would have decided another way, if it had been instructed on the legal significance of intoxication in adjudging intent, is not enough for a new trial when an exception has not been taken at the trial. State v. Braley, (1960) 224 Or 1, 355 P2d 467.

2. "Instructions given to a jury"

An instruction is not reviewable upon appeal unless excepted to by the complaining party. State v. Ogilvie, (1947) 180 Or 365, 175 P2d 454; Poulsen v. Johnson, (1947) 182 Or 297, 186 P2d 521.

"Instruction" is not limited to the charge to the jury but applies to all directions given to the jury as to their conduct in the course of the trial. State v. Anderson, (1956) 207 Or 675, 298 P2d 195; Tanner v. Fowells, (1966) 243 Or 624, 415 P2d 162.

A general exception to every instruction given or refused is not an exception at all, if any one of the instructions objected to is correct or any one of those refused is unsound. York v. Nash, (1903) 42 Or 321, 71 P 59.

The general rule requires a party to except to any instruction which he intends to challenge on appeal whether the charge is oral or in writing. Brown v. Jones, (1931) 137 Or 520, 3 P2d 768.

The 1941 amendment did not change the law pertaining to requested instructions; such requests must be specific, and accurate in form and substance. Hotelling v. Walther, (1944) 174 Or 381, 148 P2d 933.

The ruling of the court, which limited evidence to identification of a chattel but should have been received for the purpose of impeachment only, was in the nature of an instruction to the jury and should have been excepted to. State v. Opie, (1946) 179 Or 187, 170 P2d 736.

As a general rule an exception to the court's failure to give an instruction concerning a lesser included offense is insufficient to raise a question for consideration on appeal when the instruction was not requested. State v. Nodine, (1953) 198 Or 679, 259 P2d 1056.

Exceptions to the charge of the court must point out specifically and definitely indicate the alleged defects in an offending instruction. Miller v. Lillard, (1961) 228 Or 202, 364 P2d 766.

It is not necessary to except to the court's failure to give a requested instruction. Crow v. Junior Bootshops, (1965) 241 Or 135, 404 P2d 789.

An instruction is not reviewable upon appeal unless excepted to by the complaining party. Lundquist v. West, (1967) 248 Or 494, 435 P2d 309.

Failure to give an instruction does not constitute error unless the instruction is requested and refused. State v. Hanna, (1970) 1 Or App 439, 463 P2d 605.

Cases should not be reversed upon instructions, despite technical imperfections, unless the appellate court can fairly say that the instructions probably created an erroneous impression of law in the minds of the jury which affected the outcome of the case. Waterway Terminals Co. v. P.S. Lord Mechanical Contractors, (1970) 256 Or 361, 474 P2d 309.

3. Rulings on evidence and motions

Unless the ruling complained of is an instruction given to jury, the law imports the exception which once had to be taken in a formal manner. Williams v. Ragan, (1944) 174 Or 328, 143 P2d 209.

It is still the rule that if counsel would avail himself on appeal of an error of the trial court, he must advise the judge of his position by some offer, objection, motion or other appropriate action, in order that the trial court may avoid the error. Frangos v. Edmunds, (1946) 179 Or 577, 173 P2d 596.

Counsel made no objection to the introduction of the testimony. State v. Dayton, (1965) 242 Or 269, 409 P2d 189; State v. Griffin, (1965) 242 Or 284, 409 P2d 326.

4. Stipulation of facts

Where the facts were all stipulated, exception to the court's decision was not necessary. Grice v. Ore.-Wash. R. & Nav. Co., (1915) 78 Or 17, 150 P 862, 152 P 509.

Where the question was whether the conclusions of law and the judgment were proper deductions from facts found, a bill of exceptions was not necessary. Montague-O'Reilly v. Milwaukie, (1921) 101 Or 478, 193 P 824, 199 P 605.

5. Offer of proof

An offer of proof must follow a ruling excluding evidence before a ground for reversal is presented. Burgess v. Wing Agency, (1932) 139 Or 614, 11 P2d 811; O'Brien v. Dunigan, (1949) 187 Or 227, 210 P2d 567.

6. Directed verdict

This section was not applicable to a peremptory instruction of a trial judge directing the jury to return a particular verdict. Bailey v. Sec. Ins. Co., (1921) 100 Or 163, 196 P 252.

FURTHER CITATIONS: State v. Lee, (1954) 202 Or 592, 276 P2d 946; Clevenger v. Schallhorn, (1955) 205 Or 209, 286 P2d 651; Lilley v. Gifford Phillips, Inc., (1957) 210 Or 278, 310 P2d 337; Enco, Inc. v. F. C. Russell Co., (1957) 210 Or 324, 311 P2d 737; Ira v. Columbia Food Co., (1961) 226 Or 566, 360 P2d 622; State v. Ellis, (1962) 232 Or 70, 374 P2d 461; State v. English, (1963) 233 Or 500, 378 P2d 997; Meyers v. Munro, (1963) 236 Or 68, 386 P2d 808; Flande v. Brazel, (1963) 236 Or 156, 386 P2d 920; State v. North, (1964) 238 Or 90, 390 P2d 637; Leathers v. Snook, (1964) 238 Or 177, 393 P2d 764; State v. Munson, (1964) 239 Or 130, 396 P2d 696; Smith v. Field Chevrolet Co., (1964) 239 Or 233, 396 P2d 200; State v. Varney, (1966) 244 Or 583, 419 P2d 430; State v. Manni, (1970) 1 Or App 589, 465 P2d 493; Furrer v. Talent Irr. Dist., (1970) 258 Or 494, 466 P2d 605.

LAW REVIEW CITATIONS: 20 OLR 269; 34 OLR 73.

17.515

NOTES OF DECISIONS

1. In general
2. "Any point of exception shall be particularly stated"
3. If "the truth of the statement thereof is not agreed upon"
4. Time within which statement must be filed
5. Necessity of writing
6. "Disinterested persons"

1. In general

The provisions of this section are mandatory and unless complied with the error cannot be considered. Fitzhugh v. Nirschl, (1915) 77 Or 514, 151 P 735; Gary Coast Agency v. Lawrey, (1921) 101 Or 623, 201 P 214; Benson v. Birch, (1932) 139 Or 459, 465, 10 P2d 1050; Green Mountain Log Co. v. Columbia & Nehalem River R.R., (1934) 146 Or 461, 30 P2d 1047.

2. "Any point of exception shall be particularly stated"

An exception to an instruction not pointing out the particular objection will be disregarded. Lott v. De Luxe Cab Co., (1931) 136 Or 349, 299 P 303; Blanchard v. Makinster, (1931) 137 Or 58, 290 P 1098, 1 P2d 583; Smith v. Pac. NW Pub. Serv. Co., (1934) 146 Or 422, 29 P2d 819.

An omnibus exception to a series of instructions, some of which are correct, will avail an appellant nothing. Hahn v. Mackay, (1912) 63 Or 100, 126 P 12, 991.

Merely to object without giving any reason does not present any question for review in the Supreme Court. Brosnan v. Boggs, (1921) 101 Or 472, 198 P 890.

When a requested instruction was given, a general exception did not suffice. Lee v. Hoff, (1940) 163 Or 374, 97 P2d 715.

Exceptions were sufficient where each specific instruction was excepted to and there was no doubt but that the court was clearly informed about defendant's complaint concerning the charge. Hahn v. Mackay, (1912) 63 Or 100, 126 P 12, 991.

Where exceptions taken below failed to disclose wherein instructions were insufficient, objections were not reviewable. Davis v. Puckett, (1933) 144 Or 332, 23 P2d 909.

3. If "the truth of the statement thereof is not agreed upon"

The necessity of according to accused a public trial is evidenced by the right given by this provision to call upon bystanders to evidence what occurred. State v. Osborne, (1909) 54 Or 289, 103 P 62, 20 Ann Cas 627.

Where no attempt is made to procure a bill of exceptions in the manner prescribed in this section, the formal written statements of the objections and exceptions certified by the trial judge is controlling. Colgan v. Farmers' & Mechanics' Bank, (1911) 59 Or 469, 106 P 1134, 114 P 460, 117 P 807.

This section outlines the course of procedure for proving what has occurred at the hearing where a reporter was not present. In re Baker's Estate, (1937) 156 Or 256, 67 P2d 185.

4. Time within which statement must be filed

The "statement" must be filed within the time required by this section. State v. Butler, (1920) 96 Or 219, 186 P 55.

Affidavits of trial judge and of defendant's attorney made after motion to vacate default was denied, and after bill of exceptions was settled, had no place in record on appeal. Nedry v. Herald, (1932) 141 Or 167, 11 P2d 548, 13 P2d 372.

5. Necessity of writing

Exceptions resting only in an attorney's memory is insufficient, since they are required to be in writing. State v. Ekwall, (1931) 135 Or 439, 296 P 57.

6. "Disinterested persons"

The brother of a party to the action is not a "disinterested witness" competent to verify counsel's oath. Fitzhugh v. Nirschl, (1915) 77 Or 514, 517, 151 P 735.

Whether a stenographer in the employ of a defendant in the particular matter is a disinterested witness within the meaning of this provision is doubtful. State v. Butler, (1920) 96 Or 219, 186 P 55.

The clerk must certify the bystanders to be respectable and disinterested. State v. London, (1920) 97 Or 423, 192 P 489.

Where evidence was not taken down by stenographer and affidavits supporting the proposed bill of exceptions were not made "by disinterested persons," the questions attempted to be raised could not be considered. State v. Bassett, (1941) 166 Or 628, 113 P2d 432, 114 P2d 546.

FURTHER CITATIONS: Thomsen v. Giebisch, (1920) 95 Or 118, 173 P 888, 186 P 10; Dedman v. Biggs, (1943) 170 Or 692, 121 P2d 466, 134 P2d 428; Poulsen v. Johnson, (1947) 182 Or 297, 186 P2d 521; Tellkamp v. McIlvaine, (1948) 184 Or 474, 199 P2d 246; State v. Yates, (1956) 208 Or 491, 302 P2d 719; Beelman v. Beelman, (1961) 227 Or 556, 361 P2d 663, 363 P2d 561; Fry v. Ashley, (1961) 228 Or 61, 363 P2d 555.

17.605 to 17.630

NOTES OF DECISIONS

Motion for new trial is not proper way to question validity of plea of guilty; the proper remedy is a motion to vacate the judgment and withdraw the plea. State v. Voshell, (1967) 247 Or 534, 430 P2d 1010.

17.605

NOTES OF DECISIONS

Provisions relating to granting a new trial are not applicable to suits in equity. In re Seidel's Estate, (1913) 64 Or 321, 130 P 53; Lachele v. Ore. Realty Exch. Inv. Co., (1927) 121 Or 582, 256 P 646; Mannix v. Harju, (1928) 125 Or 258, 266 P 238.

Where a party moved for a new trial and then a judgment notwithstanding the verdict, the motion for a new trial was not waived where judgment was reversed on appeal. Fisk v. Henarie, (1887) 15 Or 89, 13 P 760.

The statutory definition of a new trial should be construed liberally. State v. Eddy, (1905) 46 Or 625, 81 P 941, 82 P 707.

The cause is deemed tried when the verdict or findings are filed. Scott v. Ford, (1908) 52 Or 288, 97 P 99.

An order reinstating a cause after voluntary nonsuit is not an order granting a new trial. First Christian Church v. Robb, (1914) 69 Or 283, 138 P 856.

Failure of plaintiff on the first trial to sustain one cause of action does not preclude him from introducing evidence in support thereof on the second trial. Elling v. Blake-McFall Co., (1917) 85 Or 91, 166 P 57.

A new trial is had just as though there had not been a previous trial. Id.

Partial new trials in criminal cases are not recognized in this state. State v. Roderick, (1966) 243 Or 438, 414 P2d 351.

In criminal case, it was held that the granting of a new trial does not place the parties in the same position as if no trial had been had. State v. Steeves, (1896) 29 Or 85, 43 P 947.

FURTHER CITATIONS: Taylor v. Taylor, (1912) 61 Or 257, 121 P 431, 964; Hoyle v. Van Horn, (1963) 236 Or 205, 387 P2d 985; Drosch v. Kato, (1965) 240 Or 78, 400 P2d 8; State v. Voshell, (1967) 248 Or 494, 430 P2d 1010.

17.610

NOTES OF DECISIONS

1. In general

This section does not apply to suits in equity. Lachele v. Ore. Realty Exch. Inv. Co., (1927) 121 Or 582, 256 P 646; Mannix v. Harju, (1928) 125 Or 258, 266 P 238; Waldow v. Waldow, (1950) 189 Or 600, 221 P2d 576.

Purpose of statute is not to punish for improper conduct, but to insure a fair and impartial trial. Hays v. Herman, (1958) 213 Or 140, 322 P2d 119; Johnson v. Hansen, (1964) 237 Or 1, 389 P2d 330.

If any grounds set forth in the motion for a new trial is tenable, on appeal the court must sustain the order for a new trial, but if none of the grounds can be sustained, the judgment must be reinstated. Cederoth v. Cowles, (1960) 224 Or 403, 356 P2d 542; Shultz v. Monterey, (1962) 232 Or 421, 375 P2d 829; State Hwy. Comm. v. Fisch-Or, Inc., (1965) 241 Or 412, 399 P2d 1011; Goggan v. Consol. Millinery Co., (1965) 242 Or 328, 409 P2d 174.

A defect in the answer is no cause for granting a new trial. Hemenway v. Francis, (1891) 20 Or 455, 26 P 301.

Although to set aside a verdict and enter a final judgment without a new trial is error, the judgment will not be reversed where a verdict should have been directed. Herndobler v. Rippen, (1915) 75 Or 22, 146 P 140.

Grounds for a new trial are not restricted to those specified in this section. Pullen v. Eugene, (1915) 77 Or 320, 146 P 822, 147 P 768, 1191, 151 P 474, Ann Cas 1917D, 933.

Although it is better practice to point out the grounds, the court's action in granting a new trial will be upheld on appeal if there is any good reason therefor shown in the record. Karberg v. Leahy, (1933) 144 Or 687, 26 P2d 56.

As a general rule, a new trial will not be granted to enable a party to recover nominal damages. Rainer v. Masters, (1916) 79 Or 534, 154 P 426, 155 P 1107, LRA 1916E, 1175.

Where Supreme Court directs what judgment shall be entered, the lower court has no authority to grant a new trial. Bertin & Lepori v. Mattison, (1916) 81 Or 482, 159 P 1167.

Granting a new trial by court without a jury is no different from authority excercisable after a trial by a jury. Speer v. Smith, (1917) 83 Or 571, 163 P 979.

Where a new trial was granted, question on appeal is whether there was any error in relation to matters referred to in this section which materially affected the substantial rights of the moving party. Vanderpool v. Burkitt, (1925) 113 Or 656, 234 P 289.

Where a party joins a motion for a new trial with a motion for a judgment notwithstanding the verdict and the court grants the latter motion and denies the former without passing on its merits, on reversal of the judgment, the motion for a new trial may be presented as though no ruling had been made thereon. Varley v. Consol. Timber Co., (1943) 172 Or 157, 139 P2d 584.

In an action against joint tort-feasors it is permissible to grant a new trial to one defendant and deny it as to the other. Correia v. Bennett, (1953) 199 Or 374, 261 P2d 851.

The trial court does not have discretion to set aside a verdict unless there is error. Foxton v. Woodmansee, (1964) 236 Or 271, 388 P2d 275.

Second guessing trial tactics of the prior attorney is not grounds for a new trial. State v. Daris, (1965) 243 Or 70, 409 P2d 679.

Denial of a motion for a new trial is subject to review if the motion was based on misconduct of jury known only after trial or on newly discovered evidence. State v. Truxall, (1970) 2 Or App 214, 467 P2d 643.

(1) Constitution. Ore. Const. Art. VII (A), §3, relating to right of court to re-examine facts, has made no change in power of court to grant a new trial on grounds stated in subsections (1), (2), (3), (4) and (6). State v. Evans, (1920) 98 Or 214, 192 P 1062, 193 P 927; Veazie v. Columbia & Nehalem River R. Co., (1924) 111 Or 1, 224 P 1094.

Subsections (5) and (6) have been modified in their application by Ore. Const. Art. VII (A), §3. Buchanan v. Lewis A. Hicks Co., (1913) 66 Or 503, 133 P 780, 134 P 1191; Johnson v. Ladd, (1933) 144 Or 268, 280, 14 P2d 280, 24 P2d 17.

The Oregon Constitution prohibits the reexamination by any court of a fact tried by a jury. Foxton v. Woodmansee, (1964) 236 Or 271, 388 P2d 275.

(2) Discretion of court. Granting a motion for a new trial is largely within the discretion of the trial court. Stern v. Volz, (1909) 52 Or 598, 98 P 148; Barclay v. Ore.-Wash. R. & Nav. Co., (1915) 75 Or 559, 147 P 54; Goldfoot v. Lofgren, (1931) 135 Or 533, 296 P 843; Veazie v. Columbia & Nehalem River R. Co., (1924) 111 Or 1, 224 P 1094; Shain v. Meier & Frank Co., (1932) 140 Or 518, 13 P2d 360; Cicrich v. State Ind. Acc. Comm., (1933) 143 Or 627, 23 P2d 534; Erven v. Eagy, (1936) 152 Or 219, 53 P2d 53.

(3) Necessity for objection. Objections to misconduct of jurors must generally be made as soon as it comes to the knowledge of counsel. Osmun v. Winters, (1896) 30 Or 177, 46 P 780; Veazie v. Columbia & Nehalem River R. Co., (1924) 111 Or 1, 224 P 1094.

It is not necessary that there be a ruling by the trial court and an exception reserved thereto, to authorize the granting of a new trial. Archambeau v. Edmunson, (1918) 87 Or 476, 486, 171 P 186; Timmins v. Hale, (1927) 122 Or 24 , 256 P 770; Cicrich v. State Ind. Acc. Comm., (1933) 143 Or 627, 23 P2d 534; Arthur v. Parish, (1935) 150 Or 582, 47 P2d 682; Hillman v. North Wasco County P.U.D., (1958) 213 Or 264, 323 P2d 664; Hays v. Herman, (1958) 213 Or 140, 322 P2d 119.

Burden is on party seeking to reverse order granting new

trial to show none of grounds specified in motion is well taken. Hillman v. No. Wasco County P.U.D., (1958) 213 Or. 264, 323 P2d 664; Stanich v. Buckley, (1962) 230 Or 126, 368 P2d 618.

If a party has opportunity to object and has knowledge of the conduct when it occurs, he cannot after defeat raise the objection by a motion for a new trial. Colgan v. Farmers' & Mechanics' Bank, (1911) 59 Or 469, 106 P 1134, 114 P 460, 117 P 807.

The trial judge in his consideration of a motion for a new trial is not limited by the status of the record indicating that the objection overruled was inadequate. Christianson v. Muller, (1952) 193 Or 548, 239 P2d 835.

When a party having knowledge of an error or an irregularity during trial fails to call it to the attention of the court and remains silent, speculating on the result, he is considered to have waived the error. Transamerica Title Ins. Co. v. Ted L. Millar, Inc., (1971) 258 Or 258, 482 P2d 163.

The failure to object to misconduct of a juror or move to discharge the jury did not preclude a new trial where in the situation objection would have been unavailing. Veazie v. Columbia & Nehalem River R. Co., (1924) 111 Or 1, 224 P 1094.

(4) Court's own motion. A court may grant a new trial on its own motion for causes other than those assigned in a motion. De Vall v. De Vall, (1912) 60 Or 493, 118 P 843, 120 P 13, Ann Cas 1914A, 409, 40 LRA(NS) 291; Cathcart v. Marshfield, (1918) 89 Or 401, 174 P 138.

A new trial may be granted by the court on its own motion whenever the trial court discovers that reversible error has been committed. Smith & Bros. Typewriter Co. v. McGeorge, (1914) 72 Or 523, 143 P 905; Frederick & Nelson v. Bard, (1915) 74 Or 457, 145 P 669; Pullen v. Eugene, (1915) 77 Or 320, 146 P 822, 147 P 768, 1191, 151 P 474, Ann Cas 1917D, 933; Archambeau v. Edmunson, (1918) 87 Or 476, 486, 171, P 186; Duniway v. Hadley, (1919) 91 Or 343, 178 P 942; Obermeier v. Mtg. Co., (1924) 111 Or 14, 224 P 1089; Karberg v. Leahy, (1933) 144 Or 687, 26 P2d 56; Seipp v. Howells, (1934) 146 Or 637, 31 P2d 188; Stein v. Handy, (1957) 212 Or 225, 319 P2d 395; Hays v. Herman, (1958) 213 Or 140, 322 P2d 119.

In a trial without a jury, a court cannot on its own motion set aside its findings and grant a new trial. Scott v. Ford, (1908) 52 Or 288, 97 P 99. **Distinguished in** De Vall v. De Vall, (1912) 60 Or 493, 118 P 843, 120 P 13, Ann Cas 1914A, 409, 40 LRA (NS) 291.

These sections providing for the granting of a new trial do not restrict the common-law power of courts to correct their own mistakes. De Vall v. De Vall, (1912) 60 Or 493, 118 P 843, 120 P 13, Ann Cas 1914A, 409, 40 LRA(NS) 291.

Where a demurrer to an answer was erroneously sustained, the court may grant a new trial on its own motion. Pullen v. Eugene, (1915) 77 Or 320, 146 P 822, 147 P 768, 1191, 151 P 474, Ann Cas 1917D, 933.

2. Subsection (1) — irregularity in proceedings

Improper remarks of counsel must be presented as provided in this section and D 235 [ORS 17.620] in order to be available on appeal. State v. Abrams, (1883) 11 Or 169, 8 P 327; State v. Kapsales, (1918) 90 Or 56, 175 P 433.

Remarks of the court invading the province of the jury constitute ground for a new trial. State v. Clements, (1887) 15 Or 237, 14 P 410; State v. Lucas, (1893) 24 Or 168, 174, 33 P 538.

Any exercise of the court's discretion from empaneling jury until verdict, although unknown to the party at the time, may be brought up by motion for new trial. Colgan v. Farmers' & Mechanics' Bank, (1911) 59 Or 469, 106 P 1134, 114 P 460, 117 P 807.

For failure to file findings of fact, a new trial may be granted. Brewster v. Springer, (1916) 79 Or 88, 154 P 418.

A motion for a new trial and supporting affidavits based on improper argument to the jury are insufficient if the particular remarks are not specified. State v. Kapsales, (1918) 90 Or 56, 175 P 433.

Where the verdict granted relief on a cause of action on which the plaintiff was not entitled to recover, a new trial was properly allowed. Vanderpool v. Burkitt, (1925) 113 Or 656, 234 P 289.

Overemphasis of certain instructions was sufficient grounds for granting a new trial. Correia v. Bennett, (1953) 199 Or 374, 261 P2d 851.

The trial court may grant a new trial for the reason that the jury was permitted to separate before it reached its verdict. Downes v. Plank, (1964) 237 Or 92, 390 P2d 622.

An instruction on unavoidable accident should not be given in any case. Fenton v. Aleshire, (1964) 238 Or 24, 393 P2d 217.

Language and conduct of counsel will justify reversal only when connected with some judicial error on the part of the trial judge. State v. Seeger, (1970) 4 Or App 336, 479 P2d 240.

New trial was granted for prejudicial errors at trial. Marshall v. Mullin, (1958) 212 Or 420, 320 P2d 258; State v. Amory, (1970) 1 Or App 496, 464 P2d 714.

Permitting photographers within bar of court was not reversible error. State v. Langley, (1958) 214 Or 445, 315 P2d 560, 323 P2d 301, cert. denied, 358 US 826, 79 S Ct 45, 3 L Ed 2d 66.

Motion was properly granted for improper procedure in instructing jury. Peters v. State Ind. Acc. Comm., (1963) 236 Or 27, 386 P2d 800.

Permitting counsel to argue law not applicable to the case was error. Fenton v. Aleshire, (1964) 238 Or 24, 393 P2d 217.

The court did not err in instructing on sudden emergency. Id.

3. Subsection (2) — misconduct of jury or prevailing party

The granting of a new trial for misconduct of a juror is within the discretion of the trial court. State v. Magers, (1899) 36 Or 38, 52, 58 P 892; State v. Smith, (1903) 43 Or 109, 118, 71 P 973; Mount v. Welsh, (1926) 118 Or 568, 247 P 815; Egli v. Hutton, (1931) 135 Or 175, 294 P 347; State v. Tracy, (1967) 246 Or 349, 425 P2d 171; State v. Rutherford, (1970) 1 Or App 599, 465 P2d 243, Sup Ct **review denied**; State v. Tucker, (1971) 5 Or App 283, 483 P2d 825.

Remarks by prevailing party to the jury concerning the case is ground for granting new trial. Tucker v. Salem Flouring Mills Co., (1885) 13 Or 28, 7 P 53.

Falsity of a juror's testimony on voir dire examination as to material matters is ground for a new trial. Hinkel v. Ore. Chair Co., (1916) 80 Or 404, 408, 156 P 438, 157 P 789.

A new trial may be granted when the attorney for the plaintiff argues that the defendant had perjured himself "because I was there and heard him say it." Webb v. Isensee, (1917) 85 Or 148, 166 P 544.

Wilful suppression of evidence by prevailing party amounts to misconduct under this subsection. Caldwell v. Hoskins, (1920) 94 Or 567, 186 P 50.

When the motion for a new trial is based upon misconduct of a juror which does not come to the knowledge of the party making the motion until after the verdict is returned, the denial of the motion will be considered on appeal. Thomas v. Dad's Root Beer, (1960) 225 Or 166, 356 P2d 418, 357 P2d 418.

It is improper for counsel to address a juror by name. Johnson v. Hansen, (1964) 237 Or 1, 389 P2d 330.

The court did not err in granting a new trial when, after returning a verdict for special damages only and after being reinstructed, the jury returned a verdict for general damages in the exact amount as previously found for special damages. Flansberg v. Paulson, (1965) 239 Or 610, 399 P2d 356.

A verdict should not be set aside except where enforcement of the rule would violate the plainest principles of justice. Zeiszler v. Fields, (1970) 255 Or 540, 469 P2d 34.

Conversation between plaintiff and a juror was ground for new trial. Goodeve v. Thompson, (1914) 68 Or 411, 136 P 670, 137 P 744.

Rendering a verdict giving $1 compensatory damages and $35 special damages did not constitute misconduct by the jury. Fischer v. Howard, (1954) 201 Or 426, 271 P2d 1059.

Verdict awarding nominal damages indicated jury resorted to compromise and failed to decide basic issues and was grounds for new trial. Stein v. Handy, (1957) 212 Or 225, 319 P2d 935.

Failure of jury to correctly understand written instructions did not constitute misconduct. State v. Wilkinson, (1957) 212 Or 236, 319 P2d 893.

Undue emotional outburst on part of defendant amounted to misconduct under this section. Hays v. Herman, (1958) 213 Or 140, 322 P2d 119.

Intentional mention of insurance by plaintiff was grounds for a new trial. Guthrie v. Muller, (1958) 213 Or 436, 325 P2d 883.

Trial court did not err in refusing to grant a new trial for misconduct of a material witness. Larson v. Heintz Constr. Co., (1959) 219 Or 25, 345 P2d 835.

It was not an abuse of discretion for the trial court to deny a motion for a mistrial because of a reference to insurance on voir dire examination of a juror. Johnson v. Hansen, (1964) 237 Or 1, 389 P2d 330.

In this case it was not misconduct for the jury to return a verdict of $25 general damages for, as a matter of law, it cannot be said $25 was a nominal sum. Frazee v. Brazda, (1965) 239 Or 624, 399 P2d 346.

It was not misconduct for defendant to call a welfare worker as a witness. Groff v. State Ind. Acc. Comm., (1967) 246 Or 557, 426 P2d 738.

4. Subsection (3) — accident or surprise

If the surprise was owing to the least want of diligence of the applicant, the motion for new trial will be denied. United States v. Smith, (1870) Fed Cas No. 16,341, 1 Sawy 277, 303.

A party must move for a continuance when the surprise occurred or waive the right to have a new trial granted on this ground. State v. Gardner, (1898) 33 Or 149, 54 P 809.

When the plaintiff amended his complaint on the day of trial to include an allegation of injury not theretofore set up, the grant of a new trial is not an abuse of discretion. Barclay v. Ore.-Wash. R. & Nav. Co., (1915) 75 Or 559, 562, 147 P 541.

5. Subsection (4) — newly discovered evidence

Newly discovered evidence which will justify a new trial (1) must be such as will probably change the result if a new trial is granted; (2) must have been discovered since the trial; (3) must be such as could not have been discovered before the trial by the exercise of due diligence; (4) must be material to the issue; (5) must not be merely impeaching or contradictory; or (6) must not be merely cumulative. Lander v. Miles, (1868) 3 Or 40; State v. Gardner, (1898) 33 Or 149, 54 P 809; State v. Magers, (1899) 36 Or 38, 58 P 892; State v. Hill, (1901) 39 Or 90, 94, 65 P 518; Stern v. Volz, (1908) 52 Or 597, 98 P 148; Portland & Ore. City Ry. Co. v. Sanders, (1917) 86 Or 62, 167 P 564; State v. Ausplund, (1917) 86 Or 121, 167 P 1019; State v. Evans, (1920) 98 Or 214, 192 P 1062, 193 P 927; Seaton v. Security Sav. & Trust Co., (1929) 131 Or 261, 282 P 556; Goldfoot v. Lofgren, (1931) 135 Or 533, 296 P 843; Watrous v. Salem Brewery Assn., (1935) 151 Or 294, 49 P2d 375; State v. Woodmansee, (1937) 156 Or 607, 69 P2d 298; Smith v. Little, (1950) 188 Or 682, 214 P2d 345, 217 P2d 595; State v. Edison, (1951) 191 Or 588, 232 P2d 73; Newbern v. Exley Produce Express, (1956) 208 Or 622, 303 P2d 231; Livingston v. Portland Gen. Hosp., (1960) 225 Or 416, 357 P2d 543; State v. Ellis, (1962) 232 Or 70, 374 P2d 461; State v. Oland, (1969) 1 Or App 272, 461 P2d 277, Sup Ct **review denied;** State v. Truxall, (1970) 2 Or App 214, 467 P2d 643.

A motion based on newly discovered evidence is addressed to the sound discretion of the trial court. State v. Mims, (1899) 36 Or 315, 61 P 888; Stern v. Volz, (1908) 52 Or 597, 98 P 148; State v. Evans, (1920) 98 Or 214, 192 P 1062, 193 P 927; Goldfoot v. Lofgren, (1931) 135 Or 533, 296 P 843; Northwestern Ice & Cold Storage Co. v. Multnomah County, (1961) 228 Or 507, 365 P2d 876.

A new trial cannot be allowed under this subsection where movant has not shown that the alleged newly discovered evidence could not have been discovered with reasonable diligence. Lewis v. Nichols, (1940) 164 Or 555, 103 P2d 284; Smith v. Little, (1950) 188 Or 682, 214 P2d 345, 217 P2d 595.

Applications for new trial based on newly discovered evidence are viewed with distrust and construed with great strictness. Lewis v. Nichols, (1940) 164 Or 555, 103 P2d 284; State v. Davis, (1951) 192 Or 575, 235 P2d 761.

Applications for new trial based on newly discovered evidence are viewed with distrust and construed with great strictness. State v. Walker, (1966) 244 Or 404, 417 P2d 1004; State ex rel. Nilsen v. Adams, (1967) 248 Or 269, 431 P2d 270.

If newly discovered evidence would probably change the results of the trial, the motion should be granted even though the new evidence is immaterial to the main issue, is cumulative or is merely impeaching or contradictory. State v. Williams, (1970) 2 Or App 367, 468 P2d 909; State v. Gardner, (1971) 5 Or App 493, 484 P2d 851, Sup Ct **review denied.**

The reasonable diligence to justify the setting aside of a verdict on the ground of newly discovered evidence is a question of degree, to be determined from the facts in the affidavit. State v. Hill, (1901) 39 Or 90, 65 P 518.

Each motion for a new trial on the ground of newly discovered evidence must rest on its own particular facts and circumstances. Watrous v. Salem Brewery Assn., (1935) 151 Or 294, 49 P2d 375.

Motion for new trial under this subsection is sufficient even though it does not show that the party could and would produce the newly discovered evidence at a new trial. Id.

If the affidavit shows facts leading a reasonable person to a different conclusion than that arrived at by the jury, other necessary elements being present, the court should grant a new trial. Watrous v. Salem Brewery Assn., (1935) 151 Or 294, 49 P2d 375.

Persons of whom a movant had express or constructive knowledge cannot be deemed newly discovered witnesses after the trial. Lewis v. Nichols, (1940) 164 Or 555, 103 P2d 284.

The presumption that movant failed to exercise due diligence before the trial was not rebutted by an avowal that "by accident" he discovered a witness. Id.

Medical testimony as to impotency was not newly discovered evidence which would justify the granting of a new trial following a conviction for rape. State v. Edison, (1951) 191 Or 588, 232 P2d 73.

An affidavit showing due diligence in attempting to discover the evidence before trial must accompany a motion for a new trial based on newly discovered evidence. State v. Davis, (1951) 192 Or 575, 235 P2d 761.

Newly discovered evidence as a grounds for a new trial has no application to suits in equity. Freytag v. Vitas, (1958) 213 Or 462, 326 P2d 110.

Failure to seek out available material evidence is not due

diligence. Northwestern Ice & Cold Storage Co. v. Multnomah County, (1961) 228 Or 507, 365 P2d 876.

There is a presumption that if due diligence had been exercised the evidence could and would have been discovered before trial. State v. Walker, (1966) 244 Or 404, 417 P2d 1004.

Persons of whom a movant had had express or constructive knowledge cannot be deemed newly discovered witnesses after the trial. Id.

A presumption exists that the moving party failed to exercise due diligence before trial. State ex rel. Nilsen v. Adams, (1967) 248 Or 269, 431 P2d 270.

The trial judge did not abuse his discretion in refusing new trial upon material witness' recantation of prior testimony since judge concluded it would not change the outcome. Larson v. Heintz Constr. Co., (1959) 219 Or 25, 345 P2d 835.

Evidence of previous injury could have been discovered by diligent search. Smith v. Jacobsen, (1960) 224 Or 627, 356 P2d 421.

Defendant's vasectomy was known to him prior to his trial for rape. State v. Rutledge, (1970) 2 Or App 374, 468 P2d 913.

The evidence obtained by the defendant was not the kind which would "probably change the result" if a new trial were granted. State v. Simms, (1970) 3 Or App 153, 471 P2d 821, Sup Ct **review denied.**

The mental condition of defendant could have been discovered before or during trial. State v. Bennett, (1971) 5 Or App 367, 484 P2d 1111.

6. Subsection (5) — excessive damages

Refusal of trial court to set aside an excessive verdict and grant a new trial is not reversible on appeal. Nelson v. Ore. R. & Nav. Co., (1886) 13 Or 141, 9 P 321; McQuaid v. Portland & Vancouver Ry., (1890) 19 Or 535, 25 P 26; Kumli v. So. Pac. Co., (1892) 21 Or 505, 28 P 637; Coos Bay Nav. Co. v. Endicott, (1899) 34 Or 573, 57 P 61; Adcock v. Ore. Ry., (1904) 45 Or 173, 77 P 78; Sorenson v. Ore. Power Co., (1905) 47 Or 24, 82 P 10; Johnson v. Ladd, (1933) 144 Or 268, 280, 14 P2d 280, 24 P2d 17.

The application of this subsection is modified by Ore. Const. Art. VII (A), §3 if there is any evidence to support the verdict complained of. Buchanan v. Lewis A. Hicks Co., (1913) 66 Or 503, 133 P 780, 134 P 1191; Nelson v. St. Helens Tbr. Co., (1913) 66 Or 570, 133 P 1167, 135 P 169; Segel v. Portland Ry., Light & Power Co., (1913) 67 Or 285, 135 P 866; Timmins v. Hale, (1927) 122 Or 24, 256 P 770; Johnson v. Ladd, (1933) 144 Or 268, 280, 14 P2d 280, 24 P2d 17.

A court has no authority under this section as modified by Ore. Const. Art. VII (A), §3, to grant a new trial if no error is committed but the verdict is excessive. Timmins v. Hale, (1927) 122 Or 24, 256 P 770; Johnson v. Ladd, (1933) 144 Or 268, 280, 14 P2d 280, 24 P2d 17.

In view of Ore. Const. Art. VII (A), §3, a trial court can no longer grant a new trial under this subsection in absence of any showing of misconduct on the part of jury. Timmins v. Hale, (1927) 122 Or 24, 256 P 770.

7. Subsection (6) — insufficiency of the evidence

A motion on this ground was addressed to the sound discretion of the court. State v. Gardner, (1898) 33 Or 149, 54 P 809; Ruckman v. Ormond, (1902) 42 Or 209, 70 P 707; Multnomah County v. Willamette Towing Co., (1907) 49 Or 204, 89 P 389.

Before constitutional amendment, the trial court had to weigh the evidence and if the verdict was against the clear weight, grant a new trial. Serles v. Serles, (1899) 35 Or 289, 57 P 634; Multnomah County v. Willamette Towing Co., (1907) 49 Or 204, 89 P 389; Johnson v. Ladd, (1933) 144 Or 268, 280, 14 P2d 280, 24 P2d 17.

It is competent legal evidence to which the constitutional amendment refers. State v. Rader, (1912) 62 Or 37, 124 P 195; Sullivan v. Wakefield, (1913) 65 Or 528, 133 P 641.

This subsection has been modified by Ore. Const. Art. VII (A), §3, which prohibits the setting aside of a verdict if there is any evidence to support it; the verdict cannot be set aside in absence of errors of law unless there is an affirmative finding that there is no evidence to support the verdict. Sullivan v. Wakefield, (1913) 65 Or 528, 133 P 641; Buchanan v. Lewis A. Hicks Co., (1913) 66 Or 503, 133 P 780, 134 P 1191; Martini v. Ore.-Wash. R. & Nav. Co., (1914) 73 Or 283, 144 P 104; McNamee v. First Nat. Bank, (1913) 88 Or 636, 172 P 801; Arthur v. Parish, (1935) 150 Or 582, 47 P2d 682; Bean v. Hostettler, (1948) 182 Or 510, 188 P2d, 636; Williams v. Clement's Forest Prod., (1950) 188 Or 572, 216 P2d 241, 217 P2d 252; State v. Moore, (1952) 194 Or 235, 241 P2d 455.

The order granting a new trial should state the grounds. Martini v. Ore.-Wash. R. & Nav. Co., (1914) 73 Or 283, 144 P 104.

When the evidence received on an issue is wholly insufficient to warrant submission thereof to the jury, the grant of a new trial is proper. Wakefield v. Supple, (1917) 82 Or 595, 160 P 376.

If the evidence is conflicting, the judge is not authorized to set aside the verdict because he disagrees with the jury as to the weight of evidence. McNamee v. First Nat. Bank, (1918) 88 Or 636, 172 P 801.

(1) Verdict or decision against law. In a criminal case where a verdict of not guilty has been rendered, the court may not grant a new trial however clear the evidence of guilt. State v. Reed, (1908) 52 Or 377, 97 P 627.

A verdict will not be set aside on the theory that it is against the law if there is some evidence to support the jury's findings. McNamee v. First Nat. Bank, (1918) 88 Or 636, 172 P 801.

Where the verdict is not consistent with the pleadings and there could be no evidence to support the findings, a new trial may be granted. British Empire Ins. Co. v. Hasenmayer, (1919) 90 Or 608, 178 P 180.

8. Subsection (7) — error in law

Where such a mistake of law has been made which would cause the judgment to be reversed if allowed to remain in force, a new trial may be granted. Wakefield v. Supple, (1917) 82 Or 595, 160 P 376; Webb v. Isensee, (1917) 85 Or 148, 166 P 544. **Erroneous instructions,** Smith & Bros. Typewriter Co. v. McGeorge, (1914) 72 Or 523, 143 P 905; Archambeau v. Edmunson, (1918) 87 Or 476, 171 P 186; Shain v. Meier & Frank Co., (1932) 140 Or 518, 13 P2d 360; Seipp v. Howells, (1934) 146 Or 637, 31 P2d 188; Erven v. Eagy, (1936) 152 Or 219, 53 P2d 53; **erroneous limitation of cross-examination,** Speer v. Smith, (1917) 83 Or 571, 163 P 979; **erroneous granting of a nonsuit,** Smith v. Campbell, (1917) 85 Or 420, 166 P 546.

In granting a new trial under this subsection, the court exercises no discretionary power as it is controlled by positive rules of law. Timmins v. Hale, (1927) 122 Or 24, 256 P 770; Arthur v. Parish, (1935) 150 Or 582, 47 P2d 682.

Where the jury fails to find for plaintiff for a certain sum admitted to be due by the answer, a verdict for defendant is properly set aside and a new trial granted. Jacobs v. Oren, (1897) 30 Or 593, 48 P 431; Duniway v. Hadley, (1919) 91 Or 343, 178 P 942.

Before the court is authorized to act under this subsection, the error must have been prejudicial. Timmins v. Hale, (1927) 122 Or 24, 256 P 770.

This subsection is limited by its own terms to cases in which the moving party excepted to the alleged error at the time. State v. Ellis, (1962) 232 Or 70, 374 P2d 461.

Where prosecution engages in unfair tactics, followed by inadequate correction of prejudicial error, there must be

reversal based upon cumulative error. State v. Hiteshew, (1970) 4 Or App 58, 476 P2d 935.

Where the motion failed to indicate in what respect the court erred except as to its refusal to instruct the jury as requested, the denial of a new trial was proper as the court's instructions were substantially the same as requested. Johnson v. Roberts Bros., (1935) 151 Or 311, 49 P2d 455.

The court did not err in failing to instruct the jury on proximate cause when causation was not a question for the jury. Stoneburner v. Greyhound Corp., (1962) 232 Or 567, 375 P2d 812.

FURTHER CITATIONS: Fassett v. Boswell, (1911) 59 Or 288, 117 P 302; Goodeve v. Thompson, (1914) 68 Or 611, 136 P 670, 137 P 744; McGinnis v. Studebaker Corp., (1915) 75 Or 519, 146 P 825, 147 P 525, Ann Cas 1917B, 1190, LRA 1916B, 868; Round v. State Ind. Acc. Comm., (1936) 154 Or 400, 60 P2d 601; Jones v. Imperial Garages, (1944) 174 Or 49, 145 P2d 469; Van Lom v. Schneiderman, (1949) 187 Or 89, 210 P2d 461; State v. Avent, (1956) 209 Or 181, 302 P2d 549; Hryciuk v. Robinson, (1958) 213 Or 542, 326 P2d 424; State Hwy. Comm. v. Kromwell, (1961) 226 Or 235, 359, P2d 907; Miller v. Miller, (1961) 228 Or 301, 365 P2d 86; Sherrick v. Landstrom, (1961) 229 Or 415, 367 P2d 432; State v. Gardner, (1962) 230 Or 569, 371 P2d 558; State v. Cole, (1962) 233 Or 141, 377 P2d 168; Martin v. Dretsch, (1963) 234 Or 138, 380 P2d 788; State v. Otten, (1963) 234 Or 219, 380 P2d 812; Rich v. Cooper, (1963) 234 Or 300, 380 P2d 613; Carson v. Brauer, (1963) 234 Or 333, 382 P2d 79; Anderson v. Gladden, (1963) 234 Or 614, 383 P2d 986; Jenck v. Taylor, (1963) 235 Or 348, 385 P2d 179; State v. Hoffman, (1963) 236 Or 98, 385 P2d 741; Rough v. Lamb, (1965) 240 Or 240, 401 P2d 10; State v. Tranchell, (1966) 243 Or 215, 412 P2d 520; Young v. Crown Zellerbach Corp., (1966) 244 Or 251, 417 P2d 394; Parker v. Gladden, (1967) 245 Or 426, 407 P2d 246; German v. Kienow's Food Stores, (1967) 246 Or 334, 425 P2d 523; Armstrong v. Stegen, (1968) 251 Or 340, 445 P2d 509; State v. Glisan, (1970) 2 Or App 314, 465 P2d 253, 468 P2d 653; State v. Steffes, (1970) 2 Or App 163, 465 P2d 905, Sup Ct **review denied;** McIntosh v. Lawrance, (1970) 255 Or 569, 469 P2d 628; Austin v. Sisters of Charity of Providence, (1970) 256 Or 179, 470 P2d 939; State v. Tremblay, (1971) 4 Or App 512, 479 P2d 507, Sup Ct **review denied;** Parrot v. Spear, (1971) 259 Or 503, 487 P2d 71.

LAW REVIEW CITATIONS: 13 OLR 54; 15 OLR 160, 161; 19 OLR 380; 35 OLR 4; 39 OLR 346.

17.615

NOTES OF DECISIONS
1. Constitutionality
2. In general
3. Writ of error coram nobis

1. Constitutionality

This section is not unconstitutional. Nendel v. Meyers, (1939) 162 Or 661, 94 P2d 680.

2. In general

The motion must be filed within time prescribed to give court jurisdiction to consider question of new trial; once the court has acquired jurisdiction, it may in its discretion allow the counter-affidavits to be filed after time prescribed in this section. State v. Hecker, (1924) 109 Or 520, 221 P 808; Boyles v. Ore.-Wash. R. & Nav. Co., (1936) 153 Or 70, 55 P2d 20.

Court may strike counter-affidavits not filed in time. Barclay v. Ore. Wash. R. & Nav. Co., (1915) 75 Or 559, 147 P 541.

It is the date of the entry of the judgment from which the 55 days period is to be computed. State v. Banks, (1934) 147 Or 157, 32 P2d 571; State Hwy. Comm. v. Fisch-Or, Inc., (1965) 241 Or 412, 399 P2d 1011.

Where a motion for a new trial is too late, equity will grant relief in the proper cases. Oregon-Wash. R. & Nav. Co. v. Reid, (1937) 155 Or 602, 65 P2d 664.

This section is mandatory and the court has no jurisdiction to hear a motion for new trial more than 55 days after entry of the judgment. Nendel v. Meyers, (1939) 162 Or 661, 94 P2d 680.

Jurisdiction cannot be conferred on the ground that defendant waived objection by appearing and arguing the motion for new trial. Id.

An order granting a motion for a new trial need not be entered in the same term in which the judgment was rendered. Correia v. Bennett, (1953) 199 Or 374, 261 P2d 851.

Statute contemplates entry of final appealable order within 55 days from entry of judgment. Ernst v. Logan Oldsmobile Co., (1956) 208 Or 449, 302 P2d 220. **Distinguished in** Leahy v. Leahy, (1956) 208 Or 659, 303 P2d 952.

When the motion for a new trial is based upon misconduct of a juror which does not come to the knowledge of the party making the motion until after the verdict is returned, the denial of the motion will be considered on appeal. Thomas v. Dad's Root Beer, (1960) 225 Or 166, 356 P2d 418, 357 P2d 418.

The 55-day limit is mandatory. Clark v. Auto Wholesale Co., Inc., (1964) 237 Or 446, 391 P2d 754.

The date of delivery to the clerk is the date of entry, in the absence of evidence to the contrary. State Hwy. Comm. v. Fisch-Or, Inc., (1965) 241 Or 412, 399 P2d 1011.

This section does not make void a motion filed before entry of the judgment. Id.

Where the Supreme Court remanded the cause for a hearing on a motion for new trial, the motion would be deemed denied if no action was taken on the mandate within 55 days. Varley v. Consol. Timber Co., (1943) 172 Or 157, 139 P2d 584.

Court was without jurisdiction to enter order for new trial on 59th day after entry of judgment. Ernst v. Logan Oldsmobile Co., (1956) 208 Or 449, 302 P2d 220; Crow v. Junior Bootshops of Portland, (1965) 241 Or 135, 404 P2d 789. Ernst v. Logan Oldsmobile Co., supra, **distinguished in** Leahy v. Leahy, (1956) 208 Or 659, 303 P2d 952.

Judgment notwithstanding the verdict was timely when entered before the term had expired but 52 days after the original judgment. Nusom v. Fromm, (1959) 217 Or 36, 340 P2d 186.

The order setting aside the judgment was filed within the time limited when it was delivered to the clerk with the intent that it be filed. Charco, Inc. v. Cohn, (1966) 242 Or 566, 411 P2d 264.

3. Writ of error coram nobis

The writ of error coram nobis is not available in Oregon to one who has been convicted of a crime. Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289.

The trial court has the inherent power to correct its own erroneous judgment of conviction upon a motion in the nature of a coram nobis. (concurring opinion) Id.

FURTHER CITATIONS: Purdy v. Van Keuren, (1912) 62 Or 34, 123 P 1070; Bearin v. Portland Ry., Light & Power Co., (1912) 62 Or 162, 124 P 256; MacMahon v. Hull, (1912) 63 Or 133, 119 P 348, 124 P 474, 126 P 3; White v. Geinger, (1914) 70 Or 81, 139 P 572; Sanders v. Taber, (1916) 79 Or 522, 155 P 1194; Tucker v. Davidson, (1916) 80 Or 254, 156 P 1037; Oeder v. Watt, (1923) 107 Or 600, 214 P 591; Frank v. Matthiesen, (1925) 115 Or 349, 236 P 754; Rosumny v. Marks, (1926) 118 Or 248, 246 P 723; Erickson v. Lovegren, (1933) 141 Or 319, 18 P2d 214; Jackson v. United Rys. Co., (1934) 145 Or 546, 28 P2d 836; Israel v. Portland News Pub. Co., (1936) 152 Or 225, 53 P2d 529, 103 ALR 470; Hays v.

Herman, (1958) 213 Or 140; 322 P2d 119; Beardsley v. Hill, (1959) 219 Or 440, 348 P2d 58; Unemp. Comp. v. Bates, (1961) 227 Or 357, 362 P2d 321; State v. Cloran, (1962) 233 Or 400, 377 P2d 911; Crow v. Junior Bootshops, (1965) 241 Or 135, 404 P2d 789; State v. Meidel, (1965) 241 Or 367, 405 P2d 844; Rogers v. King, (1967) 245 Or 627, 423 P2d 761; Norton v. State Comp. Dept., (1968) 252 Or 75, 448 P2d 382; City of Portland v. Olson, (1971) 4 Or App 380, 481 P2d 641; State v. Penland, (1971) 92 Or App Adv Sh 1766, 486 P2d 1314, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Whether affidavit made in Oregon in support of motion for new trial in Washington constitutes perjury, 1926-28, p 442.

LAW REVIEW CITATIONS: 13 OLR 85; 35 OLR 175; 37 OLR 68; 39 OLR 121, 346.

17.620

NOTES OF DECISIONS

1. In general

A motion in language of LOL 174 [ORS 17.610] without pointing out the particular facts is insufficient unless the parties are not misled thereby. Easton v. Quackenbush, (1917) 86 Or 374, 168 P 631; Karberg v. Leahy, (1933) 144 Or 687, 26 P2d 56; Johnson v. Roberts Bros., (1935) 151 Or 311, 49 P2d 455.

The court is limited to the grounds set forth in the motion. Lundquist v. Irvine, (1966) 243 Or 274, 413 P2d 416; Johnson v. Field, (1969) 253 Or 654, 456 P2d 483.

An order will not be reversed if it can be sustained on any ground in the motion whether referred to in the order or not. Id.

On hearing of motion for new trial, court is not required to have persons brought before it and examined concerning grounds of the motion. State v. Magers, (1899) 36 Or 38, 58 P 892.

Though a motion for new trial does not specifically state that there was no evidence to sustain the verdict, the court may properly grant a new trial on its own motion where such was the fact. Rudolph v. Portland Ry., Light & Power Co., (1914) 72 Or 560, 569, 144 P 93.

A motion for new trial for improper remarks of attorney and supporting affidavit must specify the particular remarks complained of. State v. Kapsales, (1918) 90 Or 56, 175 P 433.

Giving an instruction not supported by evidence permits the jury to speculate and is error. Dormaier v. Jesse, (1962) 230 Or 194, 369 P2d 131.

On motion of a party the trial judge in the exercise of his sound discretion, without exception having been taken, may grant a new trial for erroneous instructions resulting in prejudicial error. Lundquist v. Irvine, (1966) 243 Or 274, 413 P2d 416.

2. Affidavits

Although the general rule is that the applicant for a new trial must personally make the supporting affidavit, the attorney may make such affidavit where the party is a corporation. Barclay v. Ore.-Wash. R. & Nav. Co., (1915) 75 Or 559, 147 P 541; Jones v. Imperial Garages, (1944) 174 Or 49, 145 P2d 469.

Affidavits or statements of jurors will not be received to impeach their verdict on a motion for new trial. Cline v. Broy, (1854) 1 Or 89; State v. Smith, (1903) 43 Or 109, 118, 71 P 973; Spain v. Ore.-Wash. R. & Nav. Co., (1915) 78 Or 355, 153 P 470, Ann Cas 1917E, 1104; Hinkel v. Ore. Chair Co., (1916) 80 Or 404, 156 P 438, 157 P 789; State v. Ausplund, (1917) 86 Or 121, 167 P 1019; Shepherd v. Inman-Poulsen Lbr. Co., (1917) 86 Or 652, 168 P 601.

The part of a motion which assigns irregularity in proceedings and misconduct of a jury as grounds for a new trial, will be disregarded if there is no affidavit filed in support of the motion. Karberg v. Leahy, (1933) 144 Or 687, 26 P2d 56; Arthur v. Parish, (1935) 150 Or 582, 47 P2d 682.

The affidavit supporting a motion for a new trial on ground of newly discovered evidence should state facts from which the question of diligence may be determined. Lander v. Miles, (1868) 3 Or 40.

A motion for new trial because of newly discovered evidence is properly denied where not based on an affidavit setting forth the facts. Fassett v. Boswell, (1911) 59 Or 288, 117 P 302.

Affidavits of the plaintiff and his counsel as to misconduct of the jury during deliberation are inadmissible as hearsay. Hinkel v. Ore. Chair Co., (1916) 80 Or 404, 156 P 438, 157 P 789.

A motion based on the ground of misconduct of a juror may be denied if there is no affidavit by the movant as to the time he learned of the misconduct even though there is such affidavit by his counsel. Hooton v. Jarman Chevrolet Co., (1931) 135 Or 269, 293 P 604, 296 P 36.

There is no statutory provision requiring more than one affidavit. Jones v. Imperial Garages, (1944) 174 Or 49, 145 P2d 469.

A motion for a new trial upon the ground of newly discovered evidence is not insufficient because it fails to show that the movant could and would produce the newly discovered evidence at a new trial. Watrous v. Salem Brewery Assn. (1935) 151 Or 294, 49 P2d 375. **But see** Portland & Ore. City Ry. v. Sanders, (1917) 86 Or 62, 167, P 564.

Motion, when accompanied by affidavit and affidavit read in conjunction with the motion, satisfied this section. Eckel v. Breeze, (1960) 221 Or 572, 352 P2d 460.

FURTHER CITATIONS: Sullivan v. Wakefield, (1913) 65 Or 528, 133 P 641; Bartholomew v. Oregonian Pub. Co., (1950) 188 Or 407, 216 P2d 257; Denham v. Cuddeback, (1957) 210 Or 485, 311 P2d 1014; Hays v. Herman, (1958) 213 Or 140, 322 P2d 119; Marchant v. Clark, (1960) 225 Or 273, 357 P2d 541; Jones v. Burns, (1970) 257 Or 312, 478 P2d 611; Bevens v. Becker, (1971) 257 Or 366, 479 P2d 236.

LAW REVIEW CITATIONS: 15 OLR 160.

17.625

NOTES OF DECISIONS

Where the testimony of a new witness is not in the form of an affidavit and there is no good reason shown for the nonproduction of the affidavit, a motion for a new trial will be denied. Wieder v. Lorenz, (1940) 164 Or 10, 99 P2d 38.

An executor's motion was properly denied for failure to comply with this section where only his own affidavit was filed to the effect that he was informed and believed a claimant on a note could not read or write English. In re Kries' Estate, (1947) 182 Or 311, 187 P2d 670.

It is improper for counsel to recite what a person would testify without filing an affidavit or counter-affidavit or a statement satisfactorily explaining the absence of such affidavit. State v. Edison, (1951) 191 Or 588, 232 P2d 73.

LAW REVIEW CITATIONS: 15 OLR 160.

17.630

NOTES OF DECISIONS

1. In general

When the court grants a new trial on its own motion, the order must specify the reason for this action; but when

it does so upon the motion of the unsuccessful litigant, no such statement is required. Halsan v. Johnson, (1937) 155 Or 583, 65 P2d 661.

A court may not set aside a verdict on its own motion because it believes the verdict manifestly wrong despite substantial evidence in the record to support it. Bean v. Hostettler, (1948) 182 Or 510, 188 P2d 636.

A new trial may be granted by a judge in his chambers on his own motion. Neal v. Haight, (1949) 187 Or 13, 206 P2d 1197.

An order granting a motion for a new trial need not be entered in the same term in which the judgment was rendered. Correia v. Bennett, (1953) 199 Or 374, 261 P2d 851.

Ore. Const. Art. VII (A), §3 does not deprive the trial courts of their common law power to order a new trial because of misconduct of a party or juror even if the injured party does not make an objection or move for a mistrial when the error occurs. Strandholm v. Gen. Constr. Co., (1963) 235 Or 145, 382 P2d 843.

Where there was no substantial evidence of contributory negligence but the trial court gave instructions to the jury on such negligence, the court properly on its own motion granted a new trial. Neal v. Haight, (1949) 187 Or 13, 206 P2d 1197.

The court did not grant a new trial on its own motion when the defendant requested a new trial and assigned certain errors at law made by the court as grounds. Correia v. Bennett, (1953) 199 Or 374, 261 P2d 851.

There was insufficient grounds for the new trial ordered by the court on its own motion. Schmitz v. Yant, (1965) 242 Or 308, 409 P2d 346.

2. Writ of error coram nobis

The writ of error coram nobis is not available in Oregon to one who has been convicted of a crime. Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289.

The trial court has the inherent power to correct its own erroneous judgment of conviction upon a motion in the nature of a coram nobis. (concurring opinion) Id.

FURTHER CITATIONS: Rosencrans v. Bennett, (1951) 193 Or 45, 236 P2d 798; Stein v. Handy, (1957) 212 Or 225, 319 P2d 935; Hays v. Herman, (1958) 213 Or 140, 322 P2d 119; Larson v. Heintz Const. Co., (1959) 219 Or 25, 345 P2d 835; Dormaier v. Jesse, (1962) 230 Or 194, 369 P2d 131; Flansberg v. Paulson, (1965) 239 Or 610, 399 P2d 356; Johnson v. Field, (1969) 253 Or 654, 456 P2d 483; Jones v. Burns, (1970) 257 Or 312, 478 P2d 611; Bevens v. Becker, (1971) 257 Or 366, 479 P2d 236.

LAW REVIEW CITATIONS: 13 OLR 85, 86.

17.705

NOTES OF DECISIONS

Defendant waived any objection when, through his counsel, he stipulated that he had consented and did consent to trial by referee. Delp v. Schiel, (1960) 223 Or 267, 354 P2d 299.

FURTHER CITATIONS: Salem v. Salem Flouring Mills Co., (1885) 12 Or 374, 387, 7 P 497; Craig v. Crystal Realty Co., (1918) 89 Or 25, 173 P 322.

17.720

NOTES OF DECISIONS

Where there was no written consent to submission of cause to referee and no stipulation waiving a jury, it was error to set aside the report of the referee and proceed with a new trial. Dundee Mtg. & Trust Inv. Co. v. Hughes, (1887) 124 US 157, 8 S Ct 377, 31 L Ed 357.

Where a cause is referred by stipulation, the referee should make findings on all material issues made by the pleadings and should not make findings on matters not in issue. Sutton v. Clarke, (1902) 40 Or 508, 67 P 742.

It is not required that an oath be taken by the referees or notice of the meetings be given. Meyer v. Eichler, (1919) 92 Or 1, 179 P 659.

Arbitration in condemnation proceedings was substantially a trial by referees upon written consent of parties. Dowd v. Am. Sur. Co., (1914) 69 Or 418, 139 P 112.

FURTHER CITATIONS: Tribou v. Strowbridge, (1897) 7 Or 156.

17.725

NOTES OF DECISIONS

1. In general

Where a referee heard testimony outside the territorial jurisdiction of the court that appointed him, an objection to the lack of jurisdiction was waived by the objector cross-examing the witnesses. Sharkey v. Candiani, (1906) 48 Or 112, 85 P 219, 7 LRA(NS) 791.

2. Subsection (1) — examination of a long account

The constitutional guaranty of the right of a jury trial is not violated by this subsection. Tribou v. Strowbridge, (1879) 7 Or 156; McDonald v. Amer. Mtg. Co., (1889) 17 Or 626, 21 P 883; Trummer v. Konrad, (1897) 32 Or 54, 56, 51 P 447; Salem Traction Co. v. Anson, (1902) 41 Or 562, 67 P 1015, 69 P 675; Pearson v. Ore.-Wash. R. & Nav. Co., (1931) 135 Or 336, 295 P 201, 296 P 50.

In actions at law, the court has power to refer causes which involve the examination of long accounts, whether the parties assent or not. Tribou v. Strowbridge, (1879) 7 Or 156; McDonald v. Am. Mtg. Co., (1889) 17 Or 626, 21 P 883; Trummer v. Konrad, (1897) 32 Or 54, 51 P 447; Salem Traction Co. v. Anson, (1902) 41 Or 562, 67 P 1015, 69 P 675.

What constitutes such an account within the meaning of this subsection depends upon the facts of each case. Mitchell v. Ore. Flax Assn., (1901) 38 Or 503, 63 P 881; Salem Traction Co. v. Anson, (1902) 41 Or 562, 67 P 1015, 69 P 675.

The referee should, when examining long and complicated accounts, find the facts and state the effect between the parties. Bigne v. David, (1889) 17 Or 362, 21 P 52.

It must appear that the number of items to be litigated will be greater than the jury can properly consider before reference may be ordered against objection of one of the parties. Mitchell v. Ore. Flax Assn., (1901) 38 Or 503, 63 P 881.

This subsection applies to both actions on contract and actions of tort. Salem Traction Co. v. Anson, (1902) 41 Or 562, 67 P 1015, 69 P 675.

Where the trial involved a long account and the referee appointed did not make any findings of fact, the court could not on its own motion against protest of defendant try the cause and make findings. Puffer v. Am. Ins. Co., (1906) 48 Or 475, 87 P 523.

Where the value of an invention required an analysis of long and complicated accounts, the court did not abuse its discretion by appointing a referee. Pearson v. Ore.-Wash. R. & Nav. Co., (1931) 135 Or 336, 295 P 201, 296 P 50.

FURTHER CITATIONS: Shell Co. v. O'Reilly, (1927) 121 Or 215, 253 P 1046; Flaherty v. Bookhultz, (1955) 207 Or 462, 291 P2d 221.

17.730

NOTES OF DECISIONS

A trial judge has no authority to act as referee in a law action without the consent of the parties. Puffer v. Amer. Ins. Co., (1906) 48 Or 475, 478, 87 P 523.

Where the report of the referee did not include findings of fact and was unreasonably delayed, the court, without the consent of the parties, could not make findings on the testimony taken by the referee. Id.

17.735

NOTES OF DECISIONS

The fact that the person named as a referee in the stipulation of the parties was not a notary public was not ground for excluding the testimony taken by him. Owings v. Turner, (1906) 48 Or 462, 87 P 160.

LAW REVIEW CITATIONS: 23 OLR 69, 81.

17.745

NOTES OF DECISIONS

A trial before a referee proceeds in the same manner as a trial before a court, and a referee is clothed with the same authority in directing the progress of the trial and deciding matters which may arise. Stimson v. Estes, (1869) 3 Or 521.

The practice of excepting to the rulings on evidence and of embodying the testimony offered in a bill of exceptions extends to hearings before referees. Id.

It is not necessary that documentary evidence be given before referee but it may be put in evidence on the hearing. Crown Point Min. Co. v. Crismon, (1901) 39 Or 364, 65 P 87.

When a cause is referred to a referee he has the office of a judge in regard to the litigation in question. Ward v. Town Tavern, (1951) 191 Or 1, 228 P2d 216.

FURTHER CITATIONS: Bohlman v. Coffin, (1873) 4 Or 313; Craig v. Crystal Realty Co., (1918) 89 Or 25, 173 P 322.

17.750

NOTES OF DECISIONS

Where three persons were appointed to view the route of a proposed county road and only two met, the report was a nullity as less than all had no authority to act. Beekman v. Jackson County, (1889) 18 Or 283, 22 P 1074.

17.755

NOTES OF DECISIONS

The referee must make and file a report as required by this section. Roy v. Horsley, (1877) 6 Or 382, 25 Am Rep 537.

Findings should be made on all material issues in the pleadings and should not be made on matters not in issue. Sutton v. Clarke, (1902) 49 Or 508, 67 P 742.

Since trial by referee is deemed like a trial before a court without a jury, the Supreme Court can only look to the report of testimony to determine whether the evidence is sufficient to support the conclusions. Shell Co. v. O'Reilly, (1927) 121 Or 215, 253 P 1046.

The report must separately state conclusions of law. Bartlett v. Nab, (1956) 207 Or 358, 296 P2d 928.

The referee must file with his report the evidence which he received. Id.

FURTHER CITATIONS: Dundee Mtg. & Trust Inv. Co. v. Hughes, (1887) 124 US 157, 8 S Ct 377, 31 L Ed 357; Liggett v. Lester, (1964) 237 Or 52, 390 P2d 351.

17.760

NOTES OF DECISIONS

A report is not a journal entry as it is only required to be filed. Osborn v. Graves, (1884) 11 Or 526, 6 P 227.

FURTHER CITATIONS: Shell Co. v. O'Reilly, (1927) 121 Or 215, 253 P 1046; Bartlett v. Nab, (1956) 207 Or 358, 296 P2d 928.

17.765

NOTES OF DECISIONS

The court is authorized to set aside the findings of a referee under the same circumstances in which it is authorized to set aside the verdict of a jury. Merchants' Nat. Bank v. Pope, (1890) 19 Or 35, 26 P 622; Liebe v. Nicolai, (1897) 30 Or 364, 371, 48 P 172; Puffer v. Am. Ins. Co., (1906) 48 Or 475, 479, 87 P 523.

Unless the findings are manifestly erroneous, the court should accept them as true and give judgment thereon. Tribou v. Strowbridge, (1879) 7 Or 156.

On appeal, the equity case is tried anew whether the findings were made by the court or by a referee. O'Leary v. Fargher, (1884) 11 Or 225, 4 P 330.

Where there is no written consent to an order for trial by referee, the court may not, if objection is made, proceed with a new trial of the case after the report of the referee is set aside. Dundee Mtg. & Trust Inv. Co. v. Hughes, (1887) 124 US 157, 8 S Ct 377, 31 L Ed 357.

Where the court sets aside the findings of a referee, it may order a new reference or make findings itself; and in the latter case, it must make its findings as it is required to do when it tries a case without a jury. Merchants' Nat. Bank v. Pope, (1890) 19 Or 35, 26 P 622.

In an equity suit, the report of referee may be considered as advisory where the evidence was conflicting. Nessley v. Ladd, (1896) 29 Or 354, 45 P 904.

Where a court sets aside referee's report and makes its own findings of fact, its findings, though based on the same evidence reported by the referee, are to be treated as if made on an original trial by the court. Liebe v. Nicolai, (1897) 30 Or 364, 48 P 172.

Where evidence is conflicting and credibility of witnesses involved, referee's findings will not be disturbed unless palpably wrong. Puffer v. Am. Ins. Co., (1906) 48 Or 475, 87 P 523.

The Supreme Court can only look into the report of the testimony to determine whether the evidence was sufficient to support the conclusions of the referee. Shell Co. v. O'Reilly, (1927) 121 Or 215, 253 P 1046.

FURTHER CITATIONS: Ward v. Town Tavern, (1951) 191 Or 1, 228 P2d 216.