Chapter 16

1959 REPLACEMENT PART
(1963 reprint)

Pleadings; Motions; Orders; Process; Notices; Papers

PLEADINGS IN GENERAL; APPEARANCES

16.010 Provisions applicable to suits as well as actions
16.020 Abolition of previous forms; forms and rules prescribed by statute
16.030 Kinds of pleadings allowed
16.040 Time for filing pleadings and motions
16.050 Enlarging time to plead or do other act
16.060 Designation of parties in title of pleading or motion
16.070 Subscription to and verification of pleadings
16.080 When verification may be omitted
16.090 Separate pleading of multiple causes of action or defense
16.100 Sham, frivolous, irrelevant or redundant pleadings
16.110 Making pleading more definite and certain
16.120 Pleadings liberally construed
16.130 Judgment on the pleadings
16.140 What constitutes appearance entitling defendant to be heard; notice to defendant not appearing
16.150 Special appearance not waived by subsequent general appearance

PLAINTIFF'S PLEADINGS (COMPLAINT; JOINDER OF CAUSES; REPLY; DEMURRER)

16.210 Complaint is first pleading; contents
16.220 Joinder of causes of action
16.230 Joinder of causes of suit
16.240 Reply; contents; proof under general denial
16.250 Demurrer to answer; demurrer and reply at same time

DEFENDANT'S PLEADINGS

16.260 Demurrer to complaint; grounds
16.270 Demurrer must specify grounds; demurrer to single cause
16.280 Demurrer and answer at same time
16.290 Answer; contents
16.300 Counterclaims in actions, including pleas in abatement
16.310 Counterclaims in suits
16.320 Demurrer to reply
16.330 When objections are deemed waived; effect of answer after demurrer overruled
16.340 Objections which may be made on trial of suit

SUPPLEMENTAL PLEADINGS AND AMENDMENTS

16.360 Supplemental pleadings
16.370 Amendments of course
16.380 Pleading over or amendment after ruling on demurrer
16.390 Amendments before trial or before cause submitted
16.400 Amendment or pleading over after motion to strike
16.410 How amendment made
16.420 Service of amended complaint; default
16.430 Serving amended pleading on parties in default

PARTICULAR MATTERS; HOW PLEADED

16.460 Abolition of bills of revivor, bills of review, exceptions and cross-bills; suits affecting decrees; pleading equitable matters in actions and proceedings thereon; proceedings where action is on wrong side of court
16.470 Pleading account; delivery of copy of account; further account
16.480 Performance of condition precedent, how pleaded; proof
16.490 Judgment or other determination of court or officer, how pleaded
16.500 Private statute, how pleaded
16.510 Corporate existence of city and municipal ordinances generally, how pleaded
16.530 Libel or slander action, pleadings in
16.540 Property distrained, answer in action for

MATERIAL ALLEGATIONS AND VARIANCES; ERRORS OR DEFECTS

16.610 Material allegations, what are
16.620 Material allegation not denied, deemed true; reply deemed denied
16.630 Variance; remedy when material
16.640 Immaterial variance; procedure
16.650 Failure of proof not a variance
16.660 Disregard of error or defect not affecting substantial right

MOTIONS AND ORDERS

16.710 Order and motion defined
16.720 Where and to whom motions made
16.730 Notice of motion
16.740 Renewal of motions previously denied

PROCESS, NOTICES AND PAPERS

16.760 Style of process
16.765 Process must be shown to certain persons
16.770 Notices to be in writing; service of notices and papers
16.780 Who may serve notice or paper; manner and proof of service
16.790 Service by mail
16.800 Service where party is absent from state; service on attorney or clerk
16.810 Application of foregoing provisions
16.820 Service of process or papers on district attorney where county is party
16.830 Sunday, civil process not to be served on; invalidity; penalty
16.840 Telegraphic transmission of writ, order or paper, for service; procedure
16.850 Notice or paper not invalidated by formal defects
16.860 Filing of papers
16.870 Lost papers, substitution for
16.880 Elisor, appointment of, for execution of process

CROSS REFERENCES

16.020

Forms of action, 11.010

16.030

Application or proceeding to a judge, manner of addressing, 1.140
Intervention is made by complaint, 13.130
Pleadings as part of trial court file, 19.005
Statement of costs and objections thereto constitute pleadings, 20.210

16.040

Amended complaint, time for answering, 16.420
Answer, time allowed for, 15.040
Intervention, time within which to answer or demur to, 13.130
Time for answering in case of personal service outside the state, or by publication, 15.110, 15.140

16.050

Defense after judgment in case of service by publication, 15.150
Relief from judgment or order taken through mistake, inadvertence, surprise or neglect, 18.160

16.060

Designation of parties, form of, 13.010
Designation of parties in complaint, 16.210
Unknown parties, designation of, 13.020, 13.060, 13.070

16.070

Amendment or pleading over after motion to strike, 16.400
Proceedings in nature of quo warranto, verification of pleadings in, 30.610
Public corporations, actions by or against, verification of pleadings in, 30.350

16.090

Amendment or pleading over after motion to strike, 16.400

16.100

Amendment or pleading over after motion to strike, 16.400

16.130

Judgment on failure to answer, 18.080

16.140

Intervention, 13.130
Jurisdiction, how affected by appearance, 14.010, 14.020

16.150

Jurisdiction, how affected by appearance, 14.010, 14.020

16.210

Cooperative corporation, action by member for, complaint, 62.335
Domestic relations, complaint, content, 107.440, 107.450
Forcible entry and detainer, complaint in, 105.125
Guardian, petition for appointment, 126.126
Intervention is made by complaint, 13.130
License, allegation of, in action by:
- Assumed name, person doing business under, 648.090
- Collection agency, 697.290
- Electrician, 479.670
- Plumber or sewage cesspool worker, 447.070
- Realty broker, 697.710
- Vocational school, 345.210

Lis pendens notice, 93.740
Partition suit, complaint in, 105.215
Real estate, action to recover, complaint in, 105.010

16.220

Consolidation of actions, 11.040
Striking pleading when causes not stated separately, 16.090
Uniting causes of negligence in connection with action for cost of controlling fire, 477.069

16.230

Consolidation of suits, 11.040
Joinder of suits involving same realty, 88.020
Uniting causes of negligence in connection with action for cost of controlling fire, 477.069

16.240

Allegations in answer not controverted by reply deemed admitted, 16.620
Allegations in reply deemed controverted, 16.620

16.260

Answer, time within which to, 15.040, 15.110, 15.140
Statute of limitations, when must be pleaded by answer, 12.010

16.290

Allegations not answered deemed admitted, 16.620
Equitable answer in action at law, 16.460
Partition suit, answer in, 105.235
Real estate, action to recover, answer in, 105.015
Statute of limitations, when must be pleaded by answer, 12.010
Time within which to answer, 15.040, 15.110, 15.140

16.300

Equitable counterclaim in action at law, 16.460

16.330

Pleading over or amendment, after ruling on demurrer, 16.380

16.380

Objection not waived by answering after demurrer to complaint overruled, 16.330

16.400

Striking of pleadings, 16.090, 16.100

16.460

Equitable defenses of owner of realty not affected by statute of limitations, 12.040
When suit in equity may be brought, 11.020

16.510

Evidence as to ordinances, 221.912, 221.927

16.530

Defamation by radio station, how pleaded, 30.150

16.710

Application or proceeding to a court or judge, manner of addressing, 1.140
Costs on motion, 20.100
Designation of parties in motions, 16.060
Motion and orders as part of trial court file, 19.005
Motions to pleadings, time for filing of, 16.040
Order is intermediate determination in a suit, 18.010

16.740

Motion to disqualify judge, 14.260, 14.270

16.770

Appeals, service of papers on, 19.104

Assumed business name, foreign party having, service of process and pleadings on Corporation Commissioner, 648.060, 648.070

Citation of heirs, devisees and unknown heirs, 116.745, 116.750

Cooperative corporation, dissolved, service on, 62.710

Cooperative corporation, service on, 62.155

Corporation, dissolved, service on, 57.630

Corporation, foreign, merged or consolidated, service on, 57.485

Corporation, foreign, service of process and writs on, 57.700, 57.721, 57.822

Corporation, nonprofit, service of process, writs or summons on agent, 61.086, 61.690

Corporation, service on, 57.075

Extradited person not subject to civil process, exceptions, 147.250

Fraternal benefit societies, Lloyd's underwriters and reciprocal insurance subscribers, service of process on, 740.170, 749.050, 749.330

Insurance carrier, foreign, writing motor vehicle liability policy, service of notice and process on, 486.521

Insurance Commissioner as attorney to receive process for foreign or alien insurer, 736.252

Insurance companies, foreign, service of process and writs on, 736.210

Legal notices generally, Ch. 193

Legislative proceeding, process, 171.510

Motions or pleadings by foreign or alien insurer, conditions for, 736.256

Motor carriers, foreign, service of process and writs on, 767.495

Realtors, nonresident, service of process or pleadings on, 696.260

Savings and loan associations, foreign, service of process on, 722.830

Securities, nonresident issuer of or dealer in, service of process or pleadings on, 59.211, 59.310

State and county public welfare commissions, service of process on, 15.085

Tax court proceedings, service by mail if not otherwise specified, 305.415

Witness in state in obedience to summons not subject to civil process, exception, 139.240

16.870

Judgment or decree, substitution of copy when lost, 7.140, 7.150

16.880

Election of coroner only in counties of 400,000 persons or more, 204.005

PLEADINGS IN GENERAL; APPEARANCES

16.010 Provisions applicable to suits as well as actions. The provisions of ORS 16.020 to 16.050, 16.070 to 16.140, 16.210, 16.240 to 16.300, 16.320, 16.330, 16.360 to 16.430, 16.470 to 16.510, 16.610 to 16.660, 16.710 to 16.740, 16.770 to 16.810, and 16.850 to 16.870 apply to and govern the mode of proceedings in suits as well as actions, except as otherwise specially provided. The provisions of ORS 16.220, 16.530 and 16.540 shall not apply to suits.

16.020 Abolition of previous forms; forms and rules prescribed by statute. All the forms of pleading heretofore existing in actions at law are abolished; and hereafter the forms of pleading in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, shall be those prescribed by the procedural statutes.

16.030 Kinds of pleadings allowed. The only pleadings on the part of the plaintiff shall be the complaint, the demurrer or the reply; and on the part of the defendant, the demurrer or the answer.

16.040 Time for filing pleadings and motions. A motion, demurrer or answer to the complaint shall be filed with the clerk by the time required to answer, and a motion, demurrer or reply, to the answer shall in like manner be filed within 10 days after the filing of the answer; provided, however, that the time for filing a reply may be shortened by order of the court, made in the presence of the attorney thereby affected, or upon one day's notice by the court to such attorney. A motion or demurrer to a reply must be filed in the manner and within the time required to file a motion or demurrer to an answer.

16.050 Enlarging time to plead or do other act. The court may, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by the procedural statutes, or by an order enlarge such time.

16.060 Designation of parties in title of pleading or motion. In all pleadings other than the complaint, and in all motions, only the name of the first party on each side need be set forth in the title of the cause, provided such title contains an appropriate indication of the existence of other parties, if any, not therein named, and the register number of the cause.

16.070 Subscription to and verification of pleadings. (1) Every pleading shall be subscribed by the party if he is a resident of the state, or by a resident attorney of the state, and, except a demurrer, shall also be verified by the party, his agent or attorney, to the effect that he believes it to be true. The verification must be made by the affidavit of the party, or, if there are several parties united in interest and pleading together, by at least one of such parties, if such party is within the county and capable of making the affidavit; otherwise, the affidavit may be made by the agent or attorney of the party. The affidavit may also be made by the agent or attorney if the action or defense is founded on a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney, or if all the material allegations of the pleading are within the personal knowledge of the agent or attorney. When the affidavit is made by the agent or attorney, it must set forth the reason of his making it. When a corporation is a party, the verification may be made by any officer thereof upon whom service of a summons might be made, and when the state or any officer thereof in its behalf is a party, the verification may be made by any person to whom all the material allegations of the pleading are known.

(2) Any pleading not duly verified and subscribed may, on motion of the adverse party, be stricken out of the case.

16.080 When verification may be omitted. When, in the judgment of the court, an answer to an allegation in any pleading might subject the party answering to a prosecution for felony, the verification of the answer to such allegation may be omitted.

16.090 Separate pleading of multiple causes of action or defense. When any pleading contains more than one cause of action or defense, not pleaded separately, such pleading may, on motion of the adverse party, be stricken out of the case.

16.100 Sham, frivolous, irrelevant or redundant pleadings. (1) Sham, frivolous and irrelevant answers, defenses or replies

may be stricken out on motion, and upon such terms as the court may in its discretion impose.

(2) If sham, frivolous, irrelevant or redundant matter is inserted in a pleading, such matter may be stricken out on motion of the adverse party.

16.110 Making pleading more definite and certain. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense or reply is not apparent, the court may require the pleading to be made definite and certain by amendment.

16.120 Pleadings liberally construed. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties.

16.130 Judgment on the pleadings. If the answer contains a statement of new matter constituting a defense or counterclaim, and the plaintiff fails to reply or demur thereto within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings; and if the case requires it, he may have a jury called to assess the damages. At any time when the pleadings are complete, or either party fails or declines to plead further, the court may, upon motion, grant such judgment or decree as it may appear to the court the moving party is entitled to upon the pleadings.

16.140 What constitutes appearance entitling defendant to be heard; notice to defendant not appearing. A defendant appears in an action or suit when he answers, demurs or files a motion therein, and until he does so appear he shall not be heard in such action or suit, or in any proceeding pertaining thereto, except the giving of the undertakings allowed to the defendant in the provisional remedies of arrest, attachment and the delivery of personal property. When the defendant has not appeared, notice of a motion or other proceeding need not be served upon him unless he is imprisoned for want of bail, or unless directed by the court or judge thereof in pursuance of the procedural statutes.

16.150 Special appearance not waived by subsequent general appearance. If a motion or other form of application on special appearance is interposed and denied, the objection thereby taken shall not be waived by the subsequent entering of a general appearance; and the court's ruling thereon shall be subject to review on appeal from the final judgment, decree or other determinative appealable order in the cause or matter.

16.160 to 16.200 [Reserved for expansion]

PLAINTIFF'S PLEADINGS (Complaint; Joinder of Causes; Reply; Demurrer)

16.210 Complaint is first pleading; contents. (1) The first pleading on the part of the plaintiff shall be the complaint.

(2) The complaint shall contain:

(a) The title of the cause, specifying the name of the court, and the names of all the parties to the action, plaintiff and defendant.

(b) A plain and concise statement of the facts constituting the cause of action, without unnecessary repetition.

(c) A demand of the relief which the plaintiff claims. If the recovery of money or damages is demanded, the amount thereof shall be stated.

16.220 Joinder of causes of action. (1) The plaintiff may unite several causes of action in the same complaint when they all arise out of:

(a) Contract, express or implied.

(b) Injuries, with or without force, to the person.

(c) Injuries, with or without force, to property.

(d) Injuries to character.

(e) Claims to recover real property, with or without damages for the withholding thereof.

(f) Claims to recover personal property, with or without damages for the withholding thereof.

(g) Claims against a trustee, by virtue of a contract, or by operation of law.

(h) Injuries both to the person and property, when caused by the same wrongful act or omission.

(i) An action of forcible entry and detainer and an action for the rental due on the premises involved at the time of the filing of the complaint. Where such actions are joined, the defendant shall have the same time to answer, or otherwise plead, as

is now provided by law in actions for the recovery of rental due.

(2) The causes of action so united must all belong to one only of these classes, must affect all the parties to the action, not require different places of trial, and must be stated separately.

16.230 Joinder of causes of suit. (1) The plaintiff in a suit may unite several causes of suit in the same complaint, when they all arise out of:

(a) The same transaction, or transactions connected with the same subject of suit.

(b) Contract, express or implied.

(c) Injuries, with or without force, to property.

(d) Claims to real property, or any interest therein, with or without an account for the rents and profits thereof.

(e) Claims to personal property, or any interest therein, with or without an account for the use thereof.

(f) Claims against a trustee by virtue of a contract, or by operation of law.

(2) The causes of suit so united must all belong to one of these classes, must affect all the parties to the suit, not require different places of trial, and must be stated separately.

16.240 Reply; contents; proof under general denial. When the answer contains new matter constituting a defense or counterclaim, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint constituting a defense to such new matter in the answer; however, nothing can be proved under a general denial that could not be proved under a specific denial of the same allegation or allegations.

16.250 Demurrer to answer; demurrer and reply at same time. The plaintiff may demur to an answer containing new matter when it appears upon the face thereof that such new matter does not constitute a defense or counterclaim; or he may, for like cause, demur to one or more of such defenses or counterclaims, and reply to the residue.

DEFENDANT'S PLEADINGS

16.260 Demurrer to complaint; grounds. The defendant may demur to the complaint within the time required by law to appear and answer, when it appears upon the face thereof:

(1) That the court has no jurisdiction of the person of the defendant, or the subject of the action;

(2) That the plaintiff has not legal capacity to sue;

(3) That there is another action pending between the same parties for the same cause;

(4) That there is a defect of parties, plaintiff or defendant;

(5) That several causes of action have been improperly united;

(6) That the complaint does not state facts sufficient to constitute a cause of action; or

(7) That the action has not been commenced within the time limited by statute.

16.270 Demurrer must specify grounds; demurrer to single cause. The demurrer shall distinctly specify the grounds of objection to the complaint; unless it does so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

16.280 Demurrer and answer at same time. The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue.

16.290 Answer; contents. (1) When any of the matters enumerated in ORS 16.260 do not appear upon the face of the complaint, the objection may be taken by answer.

(2) The answer of the defendant shall contain:

(a) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; however, nothing can be proved under a general denial that could not be proved under a specific denial of the same allegation or allegations.

(b) A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.

16.300 Counterclaims in actions, including pleas in abatement. (1) The counterclaim mentioned in subsection (2) (b) of

ORS 16.290 must be one existing in favor of the defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

(a) A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim.

(b) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

(2) The defendant may set forth by answer as many counterclaims as he may have, including pleas in abatement. Such defenses shall each be separately stated and shall refer to the causes of action which they are intended to answer, in such manner that they may be intelligently distinguished. The defendant shall not be required to admit in his answer any liability or indebtedness to the plaintiff in order to be permitted to plead a counterclaim.

16.310 Counterclaims in suits. The counterclaim of the defendant in a suit shall be one upon which a suit might be maintained by the defendant against the plaintiff in the suit; and in addition to the cases specified in the paragraphs of ORS 16.300 (1), it is sufficient if it is connected with the subject of the suit.

16.320 Demurrer to reply. The defendant may demur to any new matter contained in the reply when it appears upon the face thereof that such matter is not a sufficient reply to the facts stated in the answer.

16.330 When objections are deemed waived; effect of answer after demurrer overruled. If no objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived any objection, save for the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. If, however, a demurrer is interposed and overruled, the objection thereby taken shall not be waived by answering over, and the court's ruling thereon shall be subject to review on appeal from final judgment in the cause.

16.340 Objections which may be made on trial of suit. In a suit, the objection to the jurisdiction of the court, or that the complaint does not state facts sufficient to constitute a cause of suit, if not taken by demurrer or answer, may be made on the trial.

16.350 [Reserved for expansion]

SUPPLEMENTAL PLEADINGS AND AMENDMENTS

16.360 Supplemental pleadings. The plaintiff and defendant, respectively, may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case, occurring after the former complaint, answer or reply.

16.370 Amendments of course. Any pleading may be once amended by the party of course, without costs and without prejudice to the proceedings already had, at any time before the period for answering it shall expire; in such case, a copy of the amended pleading shall be served on the adverse party before the expiration of said period.

16.380 Pleading over or amendment after ruling on demurrer. After a decision upon a demurrer, if it is overruled, and it appears that the demurrer was interposed in good faith, the court may in its discretion allow the party to plead over upon such terms as may be proper. If the demurrer is sustained, the court may in its discretion allow the party to amend the pleading demurred to, upon such terms as may be proper.

16.390 Amendments before trial or before cause submitted. The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause; and in like manner and for like reasons may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming the pleading or proceeding to the facts proved.

16.400 Amendment or pleading over after motion to strike. (1) When a motion to strike out an entire pleading is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading, or, if the motion is disallowed, and

it appears to have been made in good faith, the court may upon like terms allow the party to plead over.

(2) In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. By complying with the court's order, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling upon the motion to strike, and such ruling shall be subject to review on appeal from final judgment in the cause.

16.410 How amendment made. When any pleading or proceeding is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended complaint, or otherwise, as the case may be. Such amended pleading shall be complete in itself, without reference to the original or any preceding amended one.

16.420 Service of amended complaint; default. If the complaint is amended, a copy thereof shall be served on the defendant or his attorney, and the defendant shall answer the same within 10 days after service thereof, if served within the county where the action is brought, or within 20 days after service thereof if served in any other county in this state, unless the court shall prescribe a different time; and if the defendant omits so to do, the plaintiff may obtain judgment as in other cases of failure to answer.

16.430 Serving amended pleading on parties in default. Whenever an amended pleading is filed, it shall be served upon all parties who are not in default, but as to all parties who are in default or against whom a default previously has been entered, judgment may be rendered in accordance with the prayer of the original pleading served upon them; and neither the amended pleading nor the process thereon need be served upon such parties in default unless the amended pleading asks for additional relief against the parties in default.

16.440 and 16.450 [Reserved for expansion]

PARTICULAR MATTERS; HOW PLEADED

16.460 Abolition of bills of revivor, bills of review, exceptions and cross-bills; suits affecting decrees; pleading equitable matters in actions and proceedings thereon; proceedings where action is on wrong side of court. (1) Bills of revivor and bills of review, of whatever nature, exceptions for insufficiency, impertinence or irrelevancy, and cross-bills are abolished; but a decree in equity may be impeached and set aside, suspended, avoided or carried into execution by an original suit.

(2) In an action at law where the defendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material to his defense, he may set such matter up by answer, without the necessity of filing a complaint on the equity side of the court; and the plaintiff may, by reply, set up equitable matter, not inconsistent with the complaint and constituting a defense to new matter in the answer. Said reply may be filed to an answer containing either legal or equitable defenses. The parties shall have the same rights in such case as if an original bill embodying the defense or seeking the relief prayed for in such answer or reply had been filed. Equitable relief respecting the subject matter of the suit may thus be obtained by answer, and equitable defenses to new matter contained in the answer may thus be asserted by reply. When such an equitable matter is interposed, the proceedings at law shall be stayed and the case shall thereafter proceed, until the determination of the issues thus raised, as a suit in equity by which the proceedings at law may be perpetually enjoined or allowed to proceed in accordance with the final decree; or such equitable relief as is proper may be given to either party. If, after determining the equities, as interposed by answer or reply, the case is allowed to proceed at law, the pleadings containing the equitable matter shall be considered withdrawn from the case, and the court shall allow such pleadings in the law action as are provided for in actions of law.

(3) No cause shall be dismissed for having been brought on the wrong side of the court. The plaintiff shall have the right to amend his pleadings to obviate any objection on that account. Testimony taken before the amendment and relevant to the issue in the the law actions shall stand with like effect as if the pleadings had been originally in the amended form.

16.470 Pleading account; delivery of copy of account; further account. A party

may set forth in a pleading the items of an account therein alleged, or file a copy thereof, with the pleading verified by himself, or his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true. If he does neither, he shall deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, verified as in this section provided, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one filed or delivered is defective.

16.480 Performance of condition precedent, how pleaded; proof. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part. If such allegation is controverted, the party pleading is bound to establish on the trial the facts showing such performance.

16.490 Judgment or other determination of court or officer, how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

16.500 Private statute, how pleaded. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

16.510 Corporate existence of city and municipal ordinances generally, how pleaded. (1) In pleading the corporate existence of any city, it shall be sufficient to state in the pleading that the city is existing and duly incorporated and organized under the laws of the State of Oregon.

(2) In pleading an ordinance or enactment of any incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance or enactment by its title and the date of its passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof.

16.520 [Reserved for expansion]

16.530 Libel or slander action, pleadings in. (1) In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken.

(2) The defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

16.540 Property distrained, answer in action for. In an action to recover the possession of property, distrained doing damage, an answer that the defendant or person by whose command he acted was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good without setting forth the title to such real property.

16.550 to 16.600 [Reserved for expansion]

MATERIAL ALLEGATIONS AND VARIANCES; ERRORS OR DEFECTS

16.610 Material allegations, what are. A material allegation in a pleading is one essential to a claim or defense, and which could not be stricken from the pleading without leaving it insufficient as to such claim or defense.

16.620 Material allegation not denied, deemed true; reply deemed denied. Every material allegation of the complaint, not specifically controverted by the answer, and every material allegation of new matter in the answer, not specifically controverted by the reply, shall, for the purpose of the action, be taken as true; but the allegation of new matter in a reply is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.

16.630 Variance; remedy when material. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just.

16.640 Immaterial variance; procedure. When the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

16.650 Failure of proof not a variance. When the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof.

16.660 Disregard of error or defect not affecting substantial right. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.

16.670 to 16.700 [Reserved for expansion]

MOTIONS AND ORDERS

16.710 Order and motion defined. Every direction of a court or judge made or entered in writing in an action, suit or special proceeding, and not included in a judgment or decree, is denominated an order. An application for an order is a motion.

16.720 Where and to whom motions made. Motions shall be made to the court or judge as provided by statute. They shall be made within the circuit where the action or suit is triable, except when made to a judge of the court before whom the action is pending, and without notice, in which case an order may be made by such judge in any part of the state.

16.730 Notice of motion. When a notice of a motion is necessary, it shall be served 10 days before the time appointed for the hearing; but the court or judge thereof may prescribe, by order indorsed upon the notice, a shorter time. Notice of a motion is not necessary except when required by statute, or when directed by the court or judge in pursuance thereof.

16.740 Renewal of motions previously denied. If a motion made to a judge of the court in which the action, suit or proceeding is pending is refused in whole or in part, or is granted conditionally, no subsequent motion for the same order shall be made to any other judge. A violation of this section is punishable as a contempt, and an order made contrary thereto may be revoked by the judge who made it, or vacated by the court or judge thereof in which the action, suit or proceeding is pending.

16.750 [Reserved for expansion]

PROCESS, NOTICES AND PAPERS

16.760 Style of process. All process authorized to be issued by any court or officer thereof shall run in the name of the State of Oregon, and be signed by the officer issuing the same; and if such process is issued by a clerk of a court, he shall affix thereto his seal of office. In all actions, suits or proceedings by or against the state, it is to be styled the State of Oregon.

16.765 Process must be shown to certain persons. Any person executing process of any kind is then, and at all times subsequent, so long as he retains it, bound to show the same, with all papers attached, to any person legally interested therein.

16.770 Notices to be in writing; service of notices and papers. Notices shall be in writing, and notices and other papers shall be served on the party or attorney in the manner prescribed in ORS 16.780 to 16.800, where not otherwise provided by statute.

16.780 Who may serve notice or paper; manner and proof of service. The service, or when served by mail, the deposit in the post office, may be made by any person other than the party himself. If service is made by an attorney in the action, suit or proceeding, proof thereof may be made by his certificate. Otherwise, the proof of service shall be the same as the proof of service of a summons, and shall be returned with the original notice, or other paper of which service is made, at the time and place therein prescribed for the hearing or other proceeding to be had thereon. The service may be per-

sonal, by delivery of a copy of the notice or other paper to the party or attorney on whom the service is required to be made, or it may be as follows:

(1) If upon an attorney, it may be made during his absence from his office by leaving the copy with his clerk therein, or with a person having charge therof; or when there is no person in the office, by leaving it between 6 a.m. and 9 p.m. in a conspicuous place in the office, or if it is not open to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion.

(2) If upon a party, it may be made by leaving the copy at his residence between 6 a.m. and 9 p.m. with some person of suitable age and discretion.

16.790 Service by mail. (1) Service by mail may be made where the person on whom it is to be made resides or has his office at a place where there is a regular communication by mail.

(2) In case of service by mail, the copy of the notice or other paper to be served must be deposited in the post office, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at his regular office address, or his address as last given by him on any document which he has filed in the cause and served on the party making service by mail; and if he does not maintain a regular office or if the filed documents do not contain his address he may be addressed at his usual place of abode. The service shall be deemed to be made on the day of the deposit in the post office, and not otherwise.

16.800 Service where party is absent from state; service on attorney or clerk. When a party is absent from the state, and has no attorney in the action or suit, service may be made by mail, if his residence is known. When a party, whether absent or not from the state, has an attorney in the action or suit, service of notice or other papers shall be made upon the attorney if the address of his office is known. If the residence and place of business of the party and his attorney are unknown, service may be made upon the clerk of the court for either of them.

16.810 Application of foregoing provisions. The provisions of ORS 16.770 to 16.800 do not apply to the service of a summons or process, nor so much thereof as allows service to be made of any notice or other paper to bring a party into contempt, otherwise than upon such party personally.

16.820 Service of process or papers on district attorney where county is party. Whenever there is pending in any court of this state a suit or action to which any county of the state is a party, and any process, notice or document therein is required by law to be served upon the county clerk, an additional copy shall also be served upon the district attorney of the county in the same manner as required to be served upon the county clerk.

16.830 Sunday, civil process not to be served on; invalidity; penalty. If any person shall serve or execute any civil process on a Sunday, the service shall be void, and such person, upon conviction thereof, shall be fined not less than $5 nor more than $50.

16.840 Telegraphic transmission of writ, order or paper, for service; procedure. Any writ or order in any civil action, suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy, as defined in ORS 758.090, of such writ, order or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him if any return be requisite, in the same manner and with the same force and effect in all respects as the original might be if delivered to him. The officer or person serving or executing the same shall have the same authority and be subject to the same liabilities as if the copy were the original. The original, if a writ or order, shall also be filed in the court from which it was issued, and a certified copy thereof shall be preserved in the telegraph office from which it was sent. In sending it, either the original or a certified copy may be used by the operator for that purpose.

16.850 Notice or paper not invalidated by formal defects. A notice or other paper is valid and effectual, although defective either in respect to the title of the action or suit in which it is made, or the name of the court or the parties, if it intelligently refers to such action or suit.

16.860 Filing of papers. All undertakings, affidavits or other papers required by or provided for in the procedural statutes

shall be filed with the clerk, except when the statute otherwise provides. A pleading or paper shall be filed by delivering it to the clerk at his office, who shall indorse upon it the day of the month and the year, and subscribe his name thereto. The clerk is not required to receive for filing any paper unless the name of the court, the title of the cause and the paper, and the names of the parties, and the attorney, if there be one, is intelligibly indorsed on the back of it, nor unless the contents thereof can be read by a person of ordinary skill.

16.870 Lost papers, substitution for. If an original paper or pleading is lost, or withheld by any person, the court or judge thereof may order a copy thereof to be filed and used instead of the original.

16.880 Elisor, appointment of, for execution of process. (1) Process in any action, suit or proceeding may be executed by a person specially appointed by the court or judge thereof, who is denominated an elisor, in any of the following cases:

(a) When the sheriff and coroner are parties.

(b) When either of those officers is a party, and the process is against one of them for a disobedience of an order or process against the other.

(c) When the office of sheriff and coroner are vacant, or when it appears to the satisfaction of the court or judge that the process should be executed immediately, and before the sheriff or coroner could be reached.

(d) When the sheriff is a party and there is no office of coroner in that county.

(2) An elisor may be required to give security in such manner as the court may direct. He is vested with the same powers, duties and responsibilities as the sheriff with respect to execution of process delivered to him.

[Amended by 1959 c.628 §6]

CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173.170, I, Sam R. Haley, Legislative Counsel, do hereby certify that I have compared each section printed in this chapter with the original section in the enrolled bill, and that the sections in this chapter are correct copies of the enrolled sections, with the exception of the changes in form permitted by ORS 173.160 and other changes specifically authorized by law.

Done at Salem, Oregon,
on November 1, 1959.

Sam R. Haley
Legislative Counsel