# Chapter 17

## 1959 REPLACEMENT PART
(1963 reprint)

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## ISSUES; TRIAL GENERALLY; OFFER TO COMPROMISE

**17.005 When issues arise; kinds.** Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds:

(1) Of law; and,

(2) Of fact.

**17.010 When issue of law arises.** An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof.

**17.015 When issue of fact arises.** An issue of fact arises:

(1) Upon a material allegation in the complaint, controverted by the answer.

(2) Upon new matter in the answer controverted by the reply.

(3) Upon new matter in the reply, except an issue of law is joined thereon.

**17.020 Issues of both law and fact on same pleading.** Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues of law shall be first tried, unless the court otherwise directs.

**17.025 Trial defined.** A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

**17.030 By whom issues tried.** An issue of law shall be tried by the court, unless referred as provided in ORS 17.705 to 17.765. An issue of fact shall be tried by a jury, unless tried by the court or referred as provided in ORS 17.035, 17.205, 17.430, 17.435 and 17.705 to 17.765.

**17.035 Trial by jury, how waived.** Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and with the assent of the court in other actions, in the manner following:

(1) By failing to appear at the trial.

(2) By written consent, in person or by attorney, filed with the clerk.

(3) By oral consent in open court, entered in the minutes.

**17.040 Issues in suits; trial or reference to referee; use of a jury.** The provisions of ORS 17.005 to 17.030 and 17.050 shall apply to suits, except as otherwise provided in this section. Both issues of law and fact shall be tried by the court, unless referred as provided in ORS 45.050 or in subsection (2) of ORS 17.705. Whenever it becomes necessary or proper to inquire of any fact by the verdict of a jury, the court may direct a statement thereof, and that a jury be formed to inquire of the same. The statement shall be tried as an issue of fact in an action, and the verdict may be read as evidence, on the trial of the suit.

[Amended by 1957 c.376 §1]

**17.045 Taking testimony in actions and suits; reporting, transcribing and filing of testimony taken or offered.** (1) If issues of fact are tried in a suit or action, the evidence shall be presented, and at the request of any of the parties or if required by the court, shall be reported by a reporter as provided in ORS 8.340. The notes, tapes or audio records of the reporter, or, if requested by any of the parties or required by the court, a transcript thereof, shall be filed with the clerk of the court in the cause.

(2) Where evidence is offered in a suit by any of the parties, and excluded by the ruling of the court, the party offering the testimony shall be entitled to have the same reported in like manner as the testimony admitted, but it shall be marked and designated as evidence offered, excluded and excepted to. The party offering said testimony shall be required to pay for having it reported, unless the court on appeal holds the testimony was competent.

[Amended by 1955 c.497 §5; 1957 c.376 §2]

**17.050 Postponement of trial.** A motion to postpone a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, what diligence has been used to procure it, and the name and residence of the witness or witnesses. The court may also require the moving party to state upon affidavit the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed. The court, when it allows the motion, may impose such conditions or terms upon the moving party as may be just.

**17.055 Offer to compromise.** The defendant may, at any time before trial, serve upon the plaintiff an offer to allow judgment or decree to be given against him for the

sum, or the property, or to the effect therein specified. If the plaintiff accepts the offer, he shall by himself or attorney indorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon him; and thereupon judgment or decree shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the plaintiff fails to obtain a more favorable judgment or decree, he shall not recover costs, but the defendant shall recover of him costs and disbursements from the time of the service of the offer.

17.060 to 17.100 [Reserved for expansion]

## TRIAL JURY DEFINED; DRAWING; CHALLENGES; SWEARING

**17.105 Trial jury defined; number of jurors.** A trial jury in the circuit court is a body of persons drawn as provided in ORS 17.110, and sworn to try and determine a question of fact. The jury shall consist of 12 persons, unless the parties consent to a less number. Such consent shall be entered in the journal.

**17.110 Jury, how drawn.** Trial juries shall be formed as follows:

When the action is called for trial the clerk shall draw from the trial jury box of the court, one by one, the ballots containing the names of the jurors until the jury is completed or the ballots are exhausted. If the ballots become exhausted before the jury is complete, the sheriff, under the direction of the court, shall summon from the bystanders, or the body of the county, so many qualified persons as may be necessary to complete the jury. Whenever the sheriff shall summon more than one person at a time from the bystanders or the body of the county, he shall return a list of the persons so summoned to the clerk. The clerk shall write the names of such persons upon separate ballots, and deposit the same in the trial jury box, and then draw such ballots therefrom, as in the case of the panel of trial jurors for the term.

**17.115 Challenges, definition and kinds.** No challenge shall be made or allowed to the panel. A challenge is an objection to a particular juror, and may be either peremptory or for cause.

**17.120 Peremptory challenge defined.** A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him.

**17.125 Challenge for cause defined.** A challenge for cause is an objection to a juror, and may be either:

(1) General; that the juror is disqualified from serving in any action; or,

(2) Particular; that he is disqualified from serving in the action on trial.

**17.130 General causes of challenge.** (1) General causes of challenge are:

(a) A conviction for felony.

(b) A want of any of the qualifications prescribed by law for a juror.

(c) Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him incapable of performing the duties of a juror.

(2) It shall be sufficient cause of challenge to any juror called to be sworn in any cause that such person has been summoned and attended said court as a juror at any term of court held within one year prior to the time of such challenge; or that such person has been summoned from the bystanders or body of the county, and has served as a juror in any cause upon such summons within one year prior to the time of such challenge.

**17.135 Particular causes of challenge.** Particular causes of challenge are of two kinds:

(1) Implied bias, which is such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror.

(2) Actual bias, which is the existence of a state of mind on the part of the juror, in reference to the action, or to either party, which satisfies the court, in the exercise of a sound discretion, that he can not try the issue impartially and without prejudice to the substantial rights of the party challenging.

**17.140 Challenge for implied bias.** A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

(1) Consanguinity or affinity within the fourth degree to either party.

(2) Standing in the relation of guardian and ward, attorney and client, physician and patient, master and servant, landlord and tenant, or debtor and creditor, to the

adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, the adverse party; or being surety or bail in the action called for trial, or otherwise, for the adverse party.

(3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.

(4) Interest on the part of the juror in the event of the action, or the principal question involved therein.

**17.145 Challenge for actual bias.** A challenge for actual bias may be taken for the cause mentioned in subsection (2) of ORS 17.135; but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

**17.150 Exemption not ground for challenge.** An exemption from service on a jury shall not be cause of challenge, but the privilege of the person exempted.

**17.155 Who may take challenges; number of peremptory challenges.** A peremptory challenge or a challenge for cause may be taken by either party. When there are two or more parties plaintiff or defendant, they must join in the challenge or it cannot be taken. Either party shall be entitled to three peremptory challenges, and no more.

**17.160 Order of examining jurors; conduct of peremptory challenges.** The full number of jurors having been called shall thereupon be examined as to their qualifications, first by the plaintiff, and then by the defendant, and having been passed for cause, peremptory challenges shall be conducted as follows: The plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors are in the jury box at the time. The refusal to challenge by either party in the said order of alternation shall not defeat the adverse party of his full number of challenges, and such refusal by a party to exercise his challenge in proper turn shall conclude him as to the jurors once accepted by him, and if his right of peremptory challenge be not exhausted, his further challenges shall be confined, in his proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted, but nothing herein shall be construed to increase the number of peremptory challenges allowed.

**17.165 Order of challenge for cause.** The challenges for cause of either party shall be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:

(1) For general disqualification.

(2) For implied bias.

(3) For actual bias.

**17.170 Trial of challenge.** The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall try the issue and determine the law and the fact.

**17.175 Rules of evidence on trial of challenge; allowance of challenge.** Upon the trial of a challenge, the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge is determined to be sufficient, or found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; otherwise, it shall be disallowed.

**17.180 Challenge proceedings may be oral; note of judge.** The challenge, the exception and the denial may be made orally. The judge shall note the same upon his minutes, and the substance of the testimony on either side.

**17.185 Oath of jury.** As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict give according to the law and evidence as given them on the trial.

17.190 to 17.200 [Reserved for expansion]

## TRIAL PROCEDURE; JURY INSTRUCTIONS

**17.205 Order of proceedings on trial by the court and in suits.** (1) The order of proceedings on a trial by the court shall be the same as provided in trials by jury.

(2) When a suit is called for trial, the trial shall proceed in the order prescribed in subsections (1) to (5) of ORS 17.210, unless the court, for special reasons, otherwise directs.

**17.210 Order of proceedings on jury trial.** When the jury has been selected and sworn, the trial, unless the court for good and sufficient reason otherwise directs, shall proceed in the following order:

(1) The plaintiff shall concisely state his cause of action and the issues to be tried; the defendant then in like manner shall state his defense or counterclaim or both.

(2) The plaintiff then shall introduce the evidence on his case in chief, and when he has concluded, the defendant shall do likewise.

(3) The parties respectively then may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense or counterclaim.

(4) Not more than two counsel shall address the jury in behalf of the plaintiff or defendant; the whole time occupied in behalf of either shall not be limited to less than two hours; and the court may extend such time beyond two hours.

(5) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive the opening argument, and if the defendant then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.

(6) The court then shall charge the jury.

**17.215 Order of proof, how regulated.** The order of proof shall be regulated by the sound discretion of the court. Ordinarily, the party beginning the case shall exhaust his evidence before the other begins.

**17.220 Separation of jury before submission of cause; admonition.** The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

**17.225 Proceedings if juror becomes sick.** If, after the formation of the jury, and before verdict, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case, unless the parties agree to proceed with the other jurors, a new juror may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards formed.

**17.230 View of premises by jury.** Whenever, in the opinion of the court, it is proper that the jury should have a view of real property which is the subject of the litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer, to the place, which shall be shown to them by the judge or by a person appointed by the court for that purpose. While the jury are thus absent, no person, other than the judge or person so appointed, shall speak to them on any subject connected with the trial.

**17.235 Party may submit conclusions of fact or law.** Any party may, when the evidence is closed, submit in distinct and concise proposition, the conclusions of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both. They may be written and handed to the court, or at the option of the court, oral, and entered in the judge's minutes.

**17.240 Questions of fact to be decided by jury.** All questions of fact, other than those mentioned in ORS 17.245, shall be de-

cided by the jury, and all evidence thereon addressed to them.

**17.245 Questions of law to be decided by court; judicial knowledge declared.** All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is by statute made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it as conclusive.

**17.250 Jury judges of the effect of evidence; instructions.** The jury, subject to the control of the court, in the cases specified by statute, are the judges of the effect or value of evidence addressed to them, except when it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

(1) That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;

(2) That they are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds;

(3) That a witness false in one part of his testimony is to be distrusted in others;

(4) That the testimony of an accomplice ought to be viewed with distrust, and the oral admissions of a party with caution;

(5) That in civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory, the finding shall be according to the preponderance of evidence; that in criminal cases guilt shall be established beyond reasonable doubt;

(6) That evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

(7) That if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

**17.255 Charging the jury; when charge to be in writing.** (1) In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact.

(2) If either party requires it, and at the commencement of the trial gave notice of his intention so to do, the charge of the court, in so far as it relates to the law and the facts of the case, shall be reduced to writing, and then given to the jury by the court, as written, without any oral explanation or addition. The charge, when so reduced to writing and given to the jury, shall be filed with the clerk. The jury shall take such written instructions with it while deliberating upon the verdict, and return them to the clerk immediately upon conclusion of its deliberations.

**17.260 to 17.300** [Reserved for expansion]

## JURY DELIBERATIONS; FORMALITIES OF VERDICT

**17.305 Deliberations of jury; custody of and communications with jury.** After hearing the charge, the jury may either decide in the jury box or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury together, separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by the order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on. Before any officer takes charge of a jury, this section shall be read to him, and he shall be then sworn to conduct himself according to its provisions to the utmost of his ability.

**17.310 Juror's use of private knowledge or information.** A juror shall not communicate any private knowledge or information that he may have of the matter in controversy to his fellow-jurors, except when called as a witness, nor shall he be governed by the same in giving his verdict.

**17.315 Food and lodging for jurors.** If, while the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court orders them to be provided with suitable and sufficient food and lodging, they shall be so provided by the sheriff, at the expense of the county.

**17.320 Papers taken to jury room.** Upon retiring for deliberation the jury may take with them the pleadings in the cause, and all exhibits received in evidence on the trial, other than depositions. Where public records or private documents have been received in evidence, the court may, in its discretion, and where so doing will not interfere with the administration of justice, submit copies of such papers to the jury for consideration, returning the originals to those entitled to their possession. They may also take with them notes of the testimony or other proceedings on the trial, taken by themselves, or any of them; but none taken by any other person.

**17.325 Return of jury for information on law.** After the jury have retired for deliberation, if they desire to be informed of any point of law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to the parties or their attorneys.

**17.330 Discharge of jury without verdict.** Except as provided in ORS 17.225 and 17.345, or in case of some accident or calamity requiring their discharge, the jury shall not be discharged after the cause is submitted to them until they have agreed upon a verdict and given it in open court, unless by the consent of both parties entered in the journal, or unless at the expiration of such period as the court deems proper, it satisfactorily appears that there is no probability of an agreement.

**17.335 New trial if jury is discharged or prevented from giving a verdict.** In all cases where a jury is discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court directs.

**17.340 Court deemed open until jury is discharged.** While the jury is absent the court may adjourn from time to time, in respect to other business, but it is nevertheless to be deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged.

[Amended by 1959 c.638 §3]

**17.345 Conducting jury to court on agreement on verdict; discharge if juror is absent.** When the jury have agreed upon their verdict, they shall be conducted into court by the officer having them in charge. Their names shall then be called, and if all do not appear, the rest shall be discharged without giving a verdict.

**17.350 Manner of giving verdict.** If the jury appear, they shall be asked by the court or the clerk whether they have agreed upon their verdict; and if the foreman answers in the affirmative, he shall, on being required, declare the same.

**17.355 Number of jurors concurring; polling jury; proceedings where verdict is informal.** (1) In civil cases three-fourths of the jury may render a verdict.

(2) When a verdict is given, and before it is filed, the jury may be polled on the request of either party, for which purpose each shall be asked whether it is his verdict; if a less number of jurors answer in the affirmative than the number required to render a verdict, the jury shall be sent out for further deliberation. If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

**17.360 Completion of verdict; form and entry.** When the verdict is given, and is such as the court may receive, and if the required number of jurors agree, and the jury is not again sent out, the clerk shall file the verdict. The verdict is then complete, and the jury shall be discharged from the case. The verdict shall be in writing, and under the direction of the court shall be substantially entered in the journal as of the day's proceedings on which it was given.

**17.365 to 17.400** [Reserved for expansion]

## VERDICTS, GENERAL AND SPECIAL; FINDINGS OF COURT

**17.405 Verdict is general or special; definitions.** The verdict of a jury is either general or special. A general verdict is that

by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

**17.410 Verdict in action for specific personal property.** In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict is in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding of such property.

**17.415 When verdict may be general or special; special findings.** In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing. The special verdict or finding shall be filed with the clerk and entered in the journal, as provided ORS 17.360.

**17.420 Special findings control.** When a special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

**17.425 Assessment of amount of recovery.** When a verdict is found for the plaintiff in an action for recovery of money, or for the defendant when a counterclaim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall also assess the amount of recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the answer.

**17.430 Findings of court; request for; service; filing; objection to.** Upon the trial of an issue of fact by the court, its decision shall be given in writing, and filed with the clerk within 30 days after the submission of the issue of fact to the court. The decision shall consist of either general or special findings without argument or reason therefor. All parties appearing in the case shall have the right to request either special or general findings. Any findings so requested by any party shall be served upon all other parties who have appeared in the case, and such adverse parties may, within 10 days after such service, present to the judge objections to such proposed findings or any part thereof and request other, different or additional findings. When the findings are prepared by the court or judge thereof without request by any party for either special or general findings, such findings shall be filed with the clerk, and the clerk forthwith shall mail a copy thereof to an attorney of record for each party appearing in the case, and any such party may, within 10 days after the filing of such findings, object thereto and request other, different or additional findings. If objections are filed to such findings and request is made for other, different or additional findings, such objections and request shall be heard and determined by the court within 50 days from the date of filing of the findings, and not thereafter, and if not so heard and determined within that time the objections and request shall be conclusively taken and determined denied. Nothing in this section shall prevent the court from either shortening or extending the time in which to file objections or request other, different or additional findings or prevent the parties to the case stipulating or agreeing to the findings to be entered. [Amended by 1953 c.580 §2; 1959 c.558 §28; 1959 c.638 §4]

**Note:** ORS 17.430 was amended twice at the 1959 regular session. The Legislative Counsel has compiled only the amendment to ORS 17.430 made by the last bill signed by the Governor. The section above compiled is as it is amended by section 4, chapter 638, Oregon Laws 1959; and the amendment made by section 28, chapter 558, Oregon Laws 1959, has not been compiled.

**17.435 Court's findings deemed verdict; new trial.** The finding of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reasons, as far as applicable, and a new trial granted.

**17.440 Findings of court in suits; trial de novo on appeal.** It shall not be necessary for the court, in equity suits, to make special findings of fact. If special findings are made, the court, in rendering its decision, shall set out in writing its findings of fact upon all the material issues of fact presented by the

pleadings, together with its conclusions of law thereon, but such findings and conclusions shall be separate from the decree, and shall be filed with the clerk and incorporated in and constitute a part of the judgment roll of the cause. The findings of fact shall have the same force and effect and be equally conclusive as the verdict of a jury in an action at law, except that on appeal to the Supreme Court the cause shall be tried anew without reference to such findings.

17.445 to 17.500 [Reserved for expansion]

## OBJECTIONS AND EXCEPTIONS

**17.505 Exception defined; materiality.** An exception is an objection taken at the trial to a decision upon matter of law, whether the trial is by jury or court, and whether the decision is made during the formation of a jury, or in the admission of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. No exception shall be regarded on a motion for a new trial, or on an appeal, unless the exception is material and affects the substantial rights of the parties.

**17.510 Error in instruction, necessity of noting exception; all other exceptions automatic.** No instruction given to a jury in the circuit court shall be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception was made in the circuit court. It shall be unnecessary to note an exception in the circuit court to any other ruling made. All adverse rulings except those contained in instructions given shall import an exception in favor of the party against whom the ruling was made.

**17.515 Notation of exception; proceedings where statement is not agreed on.** (1) Any point of exception of which a notation is required by ORS 17.510 shall be particularly stated, and shall be delivered, in writing, to the judge, or entered in his minutes, or taken down by an official stenographer, or by any competent stenographer, at the time it is made, and at the time or afterwards, be corrected until made conformable to the truth.

(2) If, at the time the exception is made, the truth of the statement thereof is not agreed upon between the counsel and the court, and the court refuses the exception, the counsel may verify his statement of the point of exception by his own oath and that of two respectable and disinterested persons, or by his own oath and that of the stenographer who took the same down, and file the same as an exception to the ruling objected to. Such statement must be filed within 10 days of the time that the objection is made. Within 10 days thereafter the adverse party may file a statement of objection as prepared or approved by the court, together with the affidavits of not more than three respectable and disinterested persons, or the affidavits of himself and the stenographer who took the same down, concerning the truth or falsity of the statement of the exception as filed by the counsel, and prepared or approved by the court. The court must allow the counsel a reasonable time to procure the verification of his statement as required in this subsection; and all affidavits shall be taken by the clerk of the court, who must certify thereon, if he is satisfied of the fact that the person is respectable and disinterested.

17.520 [Repealed by 1955 c.611 §13]

17.525 [Repealed by 1955 c.611 §13]

17.530 to 17.600 [Reserved for expansion]

## NEW TRIAL, IN ACTIONS AT LAW

**17.605 New trial defined.** A new trial is a re-examination of an issue of fact in the same court after judgment.

**17.610 Causes for granting new trial.** A former judgment may be set aside and a new trial granted on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of the jury or prevailing party.

(3) Accident or surprise which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

(5) Excessive damages, appearing to

have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law occurring at the trial, and excepted to by the party making the application.

**17.615 Time of motion; counteraffidavits; hearing and determination.** A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed within 10 days after the filing of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits, he shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the entry of judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

**17.620 Specification of grounds of motion; when motion must be on affidavits.** In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no cause of new trial not so stated shall be considered or regarded by the court. When the motion is made for a cause mentioned in subsections (1) to (4) of ORS 17.610, it shall be upon affidavit, setting forth the facts upon which the motion is based.

**17.625 When counteraffidavits are allowed; affidavits as to newly discovered evidence; former proceedings considered.** If the motion is supported by affidavits, counteraffidavits may be offered by the adverse party. If the cause is newly discovered evidence, the affidavits of any witness or witnesses showing what their testimony will be, shall be produced, or good reasons shown for their nonproduction. In the consideration of any motion for a new trial, reference may be had to any proceedings in the case, prior to the verdict or other decision sought to be set aside.

**17.630 New trial on court's own motion; review.** If a new trial is granted by the court on its own motion, the order shall so state and shall be made within 30 days after the filing of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case. In event an appeal is taken from such an order, the order shall be affirmed only on grounds set forth in the order or because of reversible error affirmatively appearing in the record.

**17.635 to 17.700** [Reserved for expansion]

## REFEREES

**17.705 Referee defined.** (1) A referee is a person appointed by the court or a judicial officer, with power:

(a) To try an issue of law or of fact in a civil action or proceeding, and report thereon.

(b) To ascertain any other fact in a civil action or proceeding, when necessary for the information of the court, and report the fact.

(c) To execute an order or judgment, or to exercise any other power or perform any other duty expressly authorized by statute.

(2) ORS 17.710 to 17.765 do not apply to suits in equity, except that an issue of law or fact, or both, in a suit may, upon written consent of the parties, be referred in accordance with those sections.

**17.710 Reference defined.** The appointment of a referee is denominated a reference.

**17.720 Reference on consent of parties.** All or any of the issues in the action, whether of fact or law, or both, may be referred upon the written consent of the parties.

**17.725 Reference on motion.** When the parties do not consent, the court may, upon the application of either, or on its own motion, direct a reference in any of the following cases:

(1) When the trial of an issue of fact requires the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.

(2) When the taking of an account is necessary for the information of the court, before judgment upon an issue of law, or for carrying a judgment or order into effect.

(3) When a question of fact, other than

upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action.

(4) When it is necessary for the information of the court in a special proceeding.

**17.730 Selection of referees; number.** A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge may appoint one or more, not exceeding three.

**17.735 Qualifications of referee appointed by the court.** When the appointment of referees is made by the court or judge, each referee shall be:

(1) Qualified as a juror as provided by statute; and

(2) Competent as a juror between the parties.

**17.740 Challenge to referees.** When the referees are chosen by the court, each party shall have the same right of challenge, to be made and determined in the same manner and with like effect as in the formation of juries, except that neither party shall be entitled to a peremptory challenge.

**17.745 Trial by referees.** Subject to the limitations and directions prescribed in the order of reference, the trial by referees shall be conducted in the same manner as a trial by the court. They shall have the same power to grant adjournments, administer oaths, preserve order, and punish all violations thereof upon such trial, and to compel the attendance of witnesses, and to punish them for nonattendance, or refusal to be sworn or testify, as is possessed by the court.

**17.750 Action by majority of referees.** Whenever there is more than one referee, all must meet, but a majority of them may do any act which might be done by all.

**17.755 Requisites of referees' report; filing evidence; costs.** The report of the referees shall state the facts found, and when the order of reference includes an issue of law, it shall state the conclusions of law separately from the facts. The referees shall file with their report the evidence received upon the trial. If evidence offered by either party is not admitted on the trial, and the party offering the same excepts at the time to the decision rejecting such evidence, the exception shall be noted by the referees, and they shall take and receive such testimony, and file it with the report. Whatever judgment the court may give upon the report, it shall, when it appears that such evidence was frivolous or inadmissable, require the party at whose instance it was taken and reported to pay all costs and disbursements thereby incurred.

**17.760 Filing report; proceedings thereon.** The report shall be filed with the clerk. Either party, within such time as may be prescribed by the rules of the court or by special order, may move to set the report aside or for judgment thereon, or such order or proceeding as the nature of the case may require.

[Amended by 1959 c.638 §5]

**17.765 Affirmance or setting aside of report; weight of report.** The court may affirm or set aside the report either in whole or in part. If it affirms the report, it shall give judgment accordingly. If the report is set aside, either in whole or in part, the court may make another order of reference, as to all, or so much of the report as is set aside, to the original referees, or others, or it may find the facts and determine the law itself, and give judgment accordingly. Upon a motion to set aside a report, the conclusions thereof shall be deemed and considered as the verdict of a jury.

**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