Chapter 11

Forms of Actions and Suits

11.010

NOTES OF DECISIONS
1. Distinction abolished
2. Substance of actions unaffected
3. Distinction between law and equity
4. Determination of nature of action

1. Distinction abolished

The common law forms of action are abolished. Suksdorff v. Bigham, (1886) 13 Or 369, 12 P 818; Weber v. Rothchild, (1887) 15 Or 385, 390, 15 P 650, 3 Am St Rep 162; Taylor v. Cohn, (1906) 47 Or 538, 84 P 388, 8 Ann Cas 527; Watkins v. Record Photo Abstr. Co., (1915) 76 Or 421, 149 P 478; Williams v. Goose Lake Valley Irr. Co., (1917) 83 Or 302, 163 P 81; Ibach v. Jackson, (1934) 148 Or 92, 35 P2d 672; Lytle v. Payette-Ore. S. Irr. Dist., (1944) 175 Or 276, 152 P2d 934.

The purpose of abolishing forms of action was to render possible relief to the victims of a wrong without regard to the form of the action. Selman v. Shirley, (1939) 161 Or 582, 627, 85 P2d 384, 91 P2d 312, 124 ALR 1.

2. Substance of actions unaffected

The substance of common law actions is unaffected. Konigsberger v. Harvey, (1885) 12 Or 286, 287, 7 P 114; Weber v. Rothchild, (1887) 15 Or 385, 390, 15 P 650, 3 Am St Rep 162; Watkins v. Record Photo Abstr. Co., (1915) 76 Or 421, 149 P 478, 479; Johnson v. Hattrem, (1929) 129 Or 32, 275 P 913.

3. Distinction between law and equity

The distinction between an action at law and a suit in equity is preserved. Beacannon v. Liebe, (1884) 11 Or 443, 5 P 273; Ming Yue v. Coos Bay R. Co., (1893) 24 Or 392, 33 P 641; Le Clare v. Thibault, (1902) 41 Or 601, 605, 69 P 552; Fireman's Ins. Co. v. Ore. R. Co., (1904) 45 Or 53, 76 P 1075, 67 LRA 161; Tillamook County v. Wilson R. Rd. Co., (1907) 49 Or 309, 312, 89 P 958; Giant Powder Co., v. Ore. W. R. Co., (1909) 54 Or 325, 101 P 209, 103 P 501; Chauncey v. Wellenberg, (1911) 59 Or 214, 222, 115 P 419; Van de Wiele v. Garbade, (1912) 60 Or 585, 588, 120 P 752; Krausse v. Greenfield, (1912) 61 Or 502, 506, 123 P 392, Ann Cas 1914B, 115; Kubik v. Davis, (1915) 76 Or 501, 147 P 552; Spores v. Maude, (1916) 81 Or 11, 14, 158 P 169; McCann v. Ore. Scenic Trips Co., (1922) 105 Or 213, 209 P 483; Waskey v. M'Naught, (1908) 163 Fed 929, 90 CCA 289.

Where a complaint was insufficient as a suit in equity but stated a cause of action, the trial court should have tried the action on the law side rather than render a decree in equity. McCann v. Ore. Scenic Trips Co., (1922) 105 Or 213, 209 P 483.

4. Determination of nature of action

The facts pleaded and the relief sought — the name given the cause of action being immaterial — determine its nature and character. Laird v. Frick, (1933) 142 Or 639, 644, 18 P2d 1029; Lytle v. Payette-Ore. S. Irr. Dist., (1944) 175 Or 276, 152 P2d 934.

Denominating a proceeding an action at law does not make it so, when, under the facts, relief can be granted only in equity. Thompson v. Hibbs, (1904) 45 Or 141, 146, 76 P 778.

FURTHER CITATIONS: Lee Tung v. Burkhart, (1911) 59 Or 194, 116 P 1066; Siverson v. Clanton, (1918) 88 Or 261, 170 P 933, 171 P 1051; Winans v. Valentine, (1936) 152 Or 462, 54 P2d 106; Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072; City of Woodburn v. Domogalla, (1964) 238 Or 401, 395 P2d 150.

LAW REVIEW CITATIONS: 4 WLJ 18, 19.

11.020

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1. "Suits" and "actions" distinguished

The distinction between "action at law" and "suit in equity" is maintained. Ming Yue v. Coos Bay R.R., (1893) 24 Or 392, 33 P 641; Tillamook County v. Wilson R. Rd. Co., (1907) 49 Or 309, 89 P 958; Giant Powder Co. v. Ore. W. R. Co., (1909) 54 Or 325, 101 P 209, 103 P 501; Chauncey v. Wollenberg, (1911) 59 Or 214, 115 P 419; Van de Wiele v. Garbade, (1912) 60 Or 585, 120 P 752; Krausse v. Greenfield, (1912) 61 Or 502, 123 P 392, Ann Cas 1914B, 115; Dose v. Beatie, (1912) 62 Or 308, 123 P 383, 125 P 277; Kubik v. Davis, (1915) 76 Or 501, 147 P 552; Tooze v. Heighton, (1916) 79 Or 545, 156 P 245; Spores v. Maude, (1916) 81 Or 11, 158 P 169.

Courts of law and equity have separate jurisdictions. Abernethy v. Orton, (1903) 42 Or 437, 71 P 327, 95 Am St Rep 774; Spores v. Maude, (1916) 81 Or 11, 158 P 169.

A proceeding entitled an action may be amended and carried on as an equitable suit where the facts pleaded and the relief sought make the proceeding one of exclusively equitable cognizance. Thompson v. Hibbs, (1904) 45 Or 141, 76 P 778.

Equity jurisdiction in this state covers a wider field than that of the federal courts. Crocker v. Gentry, (1928) 127 Or 168, 271 P 38.

An action to recover the price of worthless corporate stock which plaintiff had been induced to purchase by defendant's false representations was not a suit for rescission, though plaintiff tendered back the stock. Van de Wiele v. Garbade, (1912) 60 Or 585, 120 P 752.

The lawsuit was an action at law not a suit in equity, because the relief sought was a judgment for a sum of money determinable without an accounting and the equitable relief was merely ancillary to the law cause. Carey v. Hays, (1965) 243 Or 73, 409 P2d 899.

2. Particular rights cognizable

(1) Accounting. Accounting is in equity whenever a fiduciary relation exists and the duty to account to one of the parties rests on the other. Davis v. Hofer, (1900) 38 Or 150, 63 P 56; Templeton v. Bockler, (1914) 73 Or 494, 507, 144 P 405; Campbell's Gas Burner Co. v. Hammer, (1916) 78 Or 612, 153 P 475.

A suit for money on an account is outside of equity jurisdiction unless the account is too long and complicated to be submitted to a jury. Willis v. Crawford, (1901) 38 Or 522, 530, 63 P 985, 64 P 866, 53 LRA 904; Kaston v. Paxton, (1905) 46 Or 308, 310, 80 P 209, 114 Am St Rep 871.

A "fiduciary capacity" exists where the business which he transacts or the money or property which he handles is not his own or for his own benefit, and the term is not restricted to technical or express trusts. Templeton v. Bockler, (1914) 73 Or 494, 507, 144 P 405.

A complaint against a building and loan association seeking recovery of payments on a loan in excess of principal and interest on the ground of fraudulent representations with respect to the payments and premiums on the stock and the interests of other stockholders was a suit in equity for an accounting. Beach v. Guar. Sav. Assn., (1904) 44 Or 530, 76 P 16, 1 Ann Cas 418.

(2) Reformation: mistakes of law and fact. The party asking reformation must show clearly and satisfactorily not only that the alleged mistake exists but that it was mutual, and was not caused by his own negligence. Shively v. Welch, (1868) 2 Or 288; Evarts v. Steger, (1874) 5 Or 147; Lewis v. Lewis, (1874) 5 Or 169; Remillard v. Prescott, (1879) 8 Or 37; Smith v. Butler, (1883) 11 Or 46, 4 P 517; Mitchell v. Holman, (1897) 30 Or 280, 284, 47 P 616; Gorsline v. Gore, (1918) 90 Or 389, 176 P 603.

A mistake must be mutual to authorize equitable relief. Richmond v. Ogden St. R. Co., (1903) 44 Or 48, 74 P 333; Turner v. Hartog, (1918) 88 Or 477, 172 P 484; Miller v. Fisher, (1918) 90 Or 111, 174 P 1152.

In cases of mistakes in judgment, decrees or other matters of record, equity will grant relief when the mistake is not judicial and there is no other means of obtaining relief. Smith v. Butler, (1883) 11 Or 46, 48, 4 P 517.

A mistake which would operate to the prejudice of the party, and which did not occur through the party's carelessness or negligence, may be corrected. Foster v. Schmeer, (1887) 15 Or 363, 369, 15 P 626.

Mutual mistake in describing property other than that purchased renders void a sale on execution against the vendee; and equity cannot, at the instance of a grantee of a purchaser at the execution sale, correct the error. Burrows v. Parker, (1897) 31 Or 57, 59, 48 P 1100, 65 Am St Rep 812.

Equity will not relieve from a mutual mistake of law as to the legal effect of what has been agreed on. Richmond v. Ogden St. R. Co., (1903) 44 Or 48, 55, 74 P 333.

A deed may be reformed to insert a material matter omitted by mistake. Heltzel v. Baird, (1918) 90 Or 156, 175 P 851.

An agreement to pay part of the cost of a building to be constructed on a designated lot was a sufficient consideration to sustain a suit to reform an error in the description. Clark v. Hindman, (1905) 46 Or 67, 69, 79 P 56.

(3) Fraud and illegality. Enforcement of a judgment procured through fraud, unavoidable accident or excusable mistake of defendant in the action may be restrained. Marsh v. Perrin, (1882) 10 Or 364; Bowsman v. Anderson, (1912) 62 Or 431, 440, 123 P 1092, 125 P 270.

Equity may relieve a divorced wife against a conveyance by her husband in fraud of her rights, if she had no knowledge of his title or the fraud until after the divorce decree. Barrett v. Failing, (1883) 111 US 523, 4 S Ct 598, 28 L Ed 505.

A general assignment for the benefit of creditors, when made in fraud of the insolvent law, may be set aside in equity. Dawson v. Coffey, (1885) 12 Or 513, 8 P 838.

One seeking reformation of a deed procured by fraud must establish his case by a clear preponderance of the evidence, but it need not be conclusive beyond doubt. Archer v. Calif. Lbr. Co., (1893) 24 Or 341, 344, 33 P 526.

Equity will not undertake to aid either party to an illegal contract in any way. It is sometimes necessary to enter a judgment against one of the parties for the value of property received during the litigation. Horseman v. Horseman, (1903) 43 Or 83, 94, 72 P 698.

Equity will relieve from a contract obtained by fraud, but will not construct a new contract for the parties. Hyde v. Kirkpatrick, (1915) 78 Or 466, 475, 153 P 41, 488.

(4) Trusts. On breach of a contract to bequeath and devise property, equity will impress a trust upon the property in the hands of the executor under a will made in violation of the contract. Kelley v. Devin, (1913) 65 Or 211, 132 P 535.

3. Plain, adequate and complete remedy at law

The main requisite of equitable jurisdiction is the absence of a proper remedy at law. King v. Portland, (1865) 2 Or 146; Dose v. Beatie, (1912) 62 Or 308, 315, 123 P 383, 125 P 277.

Subsequent legislation giving a legal remedy will not oust equity, when the court originally had jurisdiction in any class of cases for which the ordinary proceeding at common law did not then afford an adequate remedy. Phipps v. Kelly, (1885) 12 Or 213, 218, 6 P 707; Fleischner v. Citizens' Inv. Co., (1893) 25 Or 119, 129, 35 P 174; Baer v. Ballingall, (1900) 37 Or 416, 422, 61 P 852.

Jurisdiction is not ousted by acts of defendants prior to decree which would make it possible to obtain relief at law. Crossen v. Murphy, (1897) 31 Or 114, 126, 49 P 858.

Unless the remedy at law is as adequate and complete as that which equity affords, it would be contrary to the dictates of justice to require a resort thereto. Benson v. Keller, (1900) 37 Or 120, 129, 60 P 918.

The remedy by "writ of review" does not necessarily exclude a remedy in equity where the validity of proceedings is questioned. Hall v. Dunn, (1908) 52 Or 475, 97 P 811, 25 LRA(NS) 193.

The remedy for obstruction of a highway by a criminal prosecution does not prevent equitable relief by injunction. Bernard v. Willamette Box & Lbr. Co., (1913) 64 Or 223, 226, 129 P 1039.

The existence of any confidential or fiduciary relation is sufficient to invoke equity jurisdiction whenever the duty rests upon one party to render an account to the other. Campbell's Gas Burner Co. v. Hammer, (1916) 78 Or 612, 618, 153 P 475.

The remedy at law which will defeat the maintenance of a suit in equity must be as full, adequate, complete and efficient as is the means by which the violation of the right is prevented, redressed or compensated in the latter forum. Id.

Where adequate remedy at law precludes jurisdiction of

equity court, damages will not be considered. Cartwright v. Ore. Elec. Co., (1918) 88 Or 596, 171 P 1055.

(1) In general. Garnishment and attachment do not afford an adequate remedy at law to uncover assets fraudulently concealed, and to compel an accounting. Sabin v. Anderson, (1897) 31 Or 487, 495, 49 P 870.

In case of private nuisances, it is the inadequacy of the legal remedy that confers jurisdiction on equity to interfere on behalf of the injured party. Blagen v. Smith, (1899) 34 Or 394, 56 P 292, 44 LRA 522.

The remedy, where one co-surety is insolvent and contribution is sought from the solvent ones, is in equity only. Thompson v. Hibbs, (1904) 45 Or 141, 76 P 778.

Prosecution of a criminal action will not usually be enjoined. Sherod v. Aitchison, (1914) 71 Or 446, 449, 142 P 351, Ann Cas 1961C, 1151.

A sale of corporate stock for an illegal assessment may be enjoined. First Nat. Bank v. Multnomah State Bank, (1918) 87 Or 423, 425, 170 P 534.

An action for deceit in procuring due bills to negotiate and pay debts of plaintiff, and then misappropriating proceeds, was not so adequate as to exclude a suit to recover the bills. Benson v. Keller, (1900) 37 Or 120, 129, 60 P 918.

A continuing trespass was remediable in equity where a railroad in changing its roadbed diverted the water of a brook so that it seeped through the embankment and damaged adjoining land. Oregon-Wash. R. & Nav. Co. v. Reed, (1918) 87 Or 398, 418, 169 P 342, 170 P 300.

(2) Multiplicity and multifariousness. When plaintiffs' rights are purely legal and entirely distinct, and each one claims a separate judgment, the granting or refusing of which does not depend upon the rights of his co-plaintiffs, the legal remedies are adequate. Van Auken v. Dammeier, (1895) 27 Or 150, 154, 40 P 89.

Multifariousness, whether arising from misjoinder of causes or of defendants, is not an inflexible rule but is founded in general convenience, resting on consideration of administration of justice without multiplying litigation and needless expense. Benson v. Keller, (1900) 37 Or 120, 60 P 918.

The demurrer for multifariousness does not go to the merits but calls upon plaintiff to go out of court, split up his demands, and begin anew. Id.

Multiplicity of criminal or civil actions alone is not always deemed sufficient to authorize equity to assume jurisdiction. Hall v. Dunn, (1908) 52 Or 475, 97 P 811.

To avoid multiplicity equity relieved one who had made a conveyance of property in consideration of her future support, although the plaintiff had a remedy at law. Patton v. Nixon, (1898) 33 Or 159, 162, 52 P 1048.

A bill by a minority stockholder against a corporation and the holders of the majority stock, alleging a series of frauds, and praying for an injunction and money judgment, was not multifarious. Baillie v. Columbia Gold Min. Co., (1917) 86 Or 1, 15, 166 P 965, 167 P 1167.

(3) Arbitration and awards. While a suit in equity may be maintained to set aside an award for misconduct of the arbitrators, yet the defense of misconduct is not available in a law action to recover the amount of the award. Cohn v. Wemme, (1905) 47 Or 146, 148, 81 P 981, 8 Ann Cas 508.

An arbitration clause in a lease to determine rentals, if not made the exclusive remedy, does not exclude a suit in equity to determine the amount payable and to enforce the arbitration clause by appointing an appraiser upon failure of the parties to do so. Houston v. Barnett, (1918) 90 Or 94, 175 P 619.

(4) Elections and rights in office. Equity has jurisdiction to determine the legality of an election, where no method of contest is provided by statute. Marsden v. Harlocker, (1906) 48 Or 90, 98, 85 P 328, 120 Am St Rep 786.

Equity will not usually interfere to decide which of two claimants is entitled to an office, but where the question arises as an incident to some other equitable matter, it will do so. Umatilla Water Users' Assn. v. Irvin, (1910) 56 Or 414, 108 P 1016.

(5) Judgments injurious to a party. Jurisdiction to restrain the enforcement of a judgment at law will not be exercised if the party has an adequate remedy at law, or has failed to exercise due diligence. Hume v. Rice, (1917) 86 Or 93, 97, 167 P 578.

Where a party who was ignorant of an essential fact at the time of the trial in the court below seeks to be relieved of a judgment, his remedy at law is adequate. Wells, Fargo & Co. v. Wall, (1860) 1 Or 295.

Where a judgment was based solely on a decree, void because it had been amended without jurisdiction, the defendant had an adequate remedy at law. Hoover v. Bartlett, (1902) 42 Or 145, 70 P 378.

(6) Rights and titles to personalty. A suit to enjoin the sale of personal property under execution because it is exempt by law, will not lie, unless the property possesses a special value to the judgment debtor alone. Parsons v. Hartman, (1894) 25 Or 547, 37 P 61, 42 Am St Rep 803, 30 LRA 98.

Specific performance will lie on contract in respect to personalty where there is no plain, adequate or speedy remedy at law. American Smelting & R. Co. v. Bunker Hill & Sullivan Min. & C. Co., (1918) 248 Fed 172.

Allegations in a suit for a partnership accounting, that two of the defendants were wrongfully in possession of the personalty involved without title or right, required a dismissal as to such defendants on the ground that the remedy as to them was at law. Haworth v. Jackson, (1916) 80 Or 132, 136, 156 P 590.

An award of a remainder due on a conditional sale contract could not be determined in replevin. Maxson v. Ashland Iron Works, (1917) 85 Or 345, 358, 166 P 37, 167 P 271.

The pledgee of stock could maintain suit to enjoin execution sale of it against the pledgor. First Nat. Bank v. Multnomah State Bank, (1918) 87 Or 423, 425, 170 P 534.

(7) Rights and titles to realty. Where only controversy between parties is the legal title to land rather than a boundary dispute, the parties will be required to try the legal title at law. Love v. Morrill, (1890) 19 Or 545, 24 P 916; Miner v. Caples, (1892) 23 Or 303, 31 P 655; Nolan v. Cook, (1916) 81 Or 287, 158 P 810.

Equity has jurisdiction of a suit to determine a disputed boundary, though the title to the land between the controverted lines is incidentally determined thereby. McDowell v. Carothers, (1915) 75 Or 126, 129, 146 P 800; Nolan v. Cook, (1916) 81 Or 287, 158 P 810.

A state grantee of swamp lands, vested in the state by Congressional grant, may assert his title fully at law against a junior patentee from the United States. Miller v. Tobin, (1887) 16 Or 540, 16 P 161.

A suit for strict foreclosure of a contract to convey land is not a claim of forfeiture. Flanagan Estate v. Great Cent. Land Co., (1904) 45 Or 335, 338, 77 P 485.

A forcible entry bond for double damages bars an injunction to prevent removing a crop before the final determination of the law action. Wolfer v. Hurst, (1907) 50 Or 218, 223, 91 P 366.

An action for breach of warranty of title being a law action, equitable defenses cannot be interposed. Cobb v. Klosterman, (1911) 58 Or 211, 114 P 96.

The rights of occupants of unpatented public lands will be protected without sending them in the first instance to a court of law. Borman v. Blackmon, (1911) 60 Or 304, 118 P 848.

Ejectment does not afford an adequate remedy to determine the right of an upland owner to have access to the water upon which his land fronts and the wharf out to the harbor line. Rasmussen v. Walker Whse. Co., (1913) 68 Or 316, 136 P 661.

An easement may be protected by injunction when it is shown the injury complained of is irreparable, or the intermeddling is continuous, or that the remedy at law to recover damages for such injury is inadequate. Nicholas v. Title & Trust Co., (1916) 79 Or 226, 236, 154 P 391, Ann Cas 1917A, 1149.

A decree that is entered by a court of another jurisdiction can not have any effect per se to impress a trust upon the title to land in this state. Williams v. Williams, (1917) 83 Or 59, 162 P 834.

(8) Setoffs and demands. Jurisdiction to set off one judgment against another depends upon the inadequacy of the remedy at law, resulting from the existence of some supervening equity, such as insolvency, nonresidence or the like. Whelan v. McMahan, (1905) 47 Or 37, 39, 82 P 19, 114 Am St Rep 906.

Where insolvency is alleged as a ground to set off cross-judgments, the allegation must be sustained by proof. Id.

In a conversion action by a legal representative against an executor de son tort, defendant could not cross-suit in equity to recover payments made because his remedy at law by set-off was adequate. Slate v. Henkle, (1904) 45 Or 430, 78 P 325.

4. Concurrent jurisdiction

A denial of an application to vacate a judgment on the ground of inadvertence, surprise or excusable neglect bars a suit for the same relief on the same ground. Thompson v. Connell, (1897) 31 Or 231, 236, 48 P 467, 65 Am St Rep 818; Froebrich v. Lane, (1904) 45 Or 13, 76 P 351, 106 Am St Rep 634.

The right of equity to hear and determine a cause, of which a court of law may have jurisdiction, is not defeated unless the legal remedy, in respect to the final relief and the mode of securing it, is as efficient as the redress which a court of equity can afford under the same circumstances. Davis v. Hofer, (1900) 38 Or 150, 63 P 56; Hall v. Dunn, (1908) 52 Or 475, 479, 97 P 811, 25 LRA(N.S.) 193; Campbell's Gas Burner Co. v. Hammer, (1916) 78 Or 612, 619 153 P 475.

Where a new power is conferred upon law courts, unless the statute conferring it contains negative words, the prior existing equitable jurisdiction continues as affording a concurrent remedy. Sabin v. Anderson, (1897) 31 Or 487, 49 P 870.

The remedy in the nature of a creditor's bill to uncover assets fraudulently concealed is not superseded by statutory proceedings supplementary to execution. Matlock v. Babb, (1897) 31 Or 516, 520, 49 P 873.

A suit to quiet title or remove a cloud may be maintained in equity, where the land is unoccupied and no one in possession, by virtue of the enlarged power of equity concurrent with law. McLeod v. Lloyd, (1903) 43 Or 260, 275, 71 P 795, 74 P 491.

This section was not repealed by the later enacted OCLA 6-1001, [ORS 18.410], as regards suits to remove clouds, so that such suits may be maintained even though there is an adequate remedy at law. Anderson v. Guenther, (1933) 144 Or 446, 460, 22 P2d 339, 25 P2d 146.

5. Complete relief in equity

Where equity has jurisdiction for one purpose, it may retain the case for all purposes necessary to grant complete relief. Howe v. Taylor, (1877) 6 Or 284, 292; Phipps v. Kelly, (1885) 12 Or 213, 221, 6 P 707; Fleischner v. Citizens' Inv. Co., (1893) 25 Or 119, 132, 35 P 174; Shultz v. Shively, (1913) 72 Or 450, 460, 143 P 1115; Oregon-Wash. R. & Nav. Co. v. Reed, (1918) 87 Or 415, 169 P 342, 170 P 300.

Where nonexistence of the equity upon which the case was predicated is found, the suit cannot be tried for the purpose of ascertaining any alleged legal right between the parties. Ming Yue v. Coos Bay R. & E.R. & Nav. Co., (1893) 24 Or 392, 33 P 641; Allen v. Elwert, (1896) 29 Or 428, 44 P 823, 48 P 54; Denny v. McCown, (1898) 34 Or 47, 54 P 952; Multnomah County v. Portland Cracker Co., (1907) 49 Or 345, 90 P 155; Hetrick v. Gerlinger Motor Car Co., (1917) 84 Or 133, 164 P 379; Oregon-Wash. R. & Nav. Co. v. Reed, (1918) 87 Or 398, 400, 169 P 342, 170 P 300; Powell v. Sheets, (1952) 196 Or 682, 251 P2d 108; Walker v. Mackey, (1953) 197 Or 197, 251 P2d 118, 253 P2d 280.

After sustaining an arbitration award in a suit to set it aside and recover on a policy, the court cannot decree a recovery as to items not submitted to arbitration, there being adequate remedy at law. Stemmer v. Scottish Union & Nat. Ins. Co., (1898) 33 Or 65, 82, 49 P 588, 53 P 498.

When equity jurisdiction has been invoked for any equitable purpose, any other equities existing between the parties connected with the main object of the suit may be determined with all relief necessary to an entire adjustment of such subject, provided it is authorized by the pleadings. Templeton v. Bockler, (1914) 73 Or 494, 510, 144 P 405.

Assertion in a suit of a claim legal in nature does not deprive the equity court of its jurisdiction unless the legal remedy is plain, adequate and complete. Benson v. Williams, (1943) 174 Or 404, 143 P2d 477, 149 P2d 549.

Where plaintiff in foreclosing a mechanic's lien included claims for nonlienable charges equity lacked jurisdiction to grant a personal judgment for any claims over the amount of the lien. Allen v. Alwert, (1896) 29 Or 428, 44 P 823, 48 P 54.

Jurisdiction cannot be retained to procure a money judgment in a foreclosure suit where the mortgage was adjudged void. Denny v. McCown, (1898) 34 Or 47, 53, 54 P 952.

Where a railroad had been constructed under a grant subject to forfeiture for its default, the court may instead of forfeiture adjudge the railroad to be entitled to the land on payment of the damages occasioned by taking it. Oregon R. & Nav. Co. v. McDonald, (1911) 58 Or 228, 236, 112 P 413, 32 LRA (NS) 117.

In a suit to compel the removal of an obstruction from a street which was removed after the institution of the suit, equity retained jurisdiction to determine damages. Bernard v. Willamette Box & Lbr. Co., (1913) 64 Or 223, 233, 129 P 1039.

In a suit to rescind a contract of purchase and to cancel a note given for the purchase price and recover damages, when it later appeared that the note had been negotiated, but such facts were not known when the suit was brought, equity retained the suit for the purpose of awarding money damages. Hetrick v. Gerlinger Motor Car Co., (1917) 84 Or 133, 140, 164 P 379.

Where borrower sued on usurious note to force surrender of collateral but failed to make tender, equity retained jurisdiction to grant equitable relief. Crisman v. Corbin, (1942) 169 Or 332, 128 P2d 959.

6. Consent to jurisdiction

Where the facts give jurisdiction and are stated in the complaint and denied by the answer, the question of jurisdiction becomes one of fact, and is not waived by answering to the merits; if the want of jurisdiction appears during the trial, the suit should be dismissed. Love v. Morrill, (1890) 19 Or 545, 550, 24 P 916; Union Power Co. v. Lichty, (1903) 42 Or 563, 71 P 1044; Hume v. Burns, (1907) 50 Or 124, 90 P 1009; Tokstad v. Daws, (1913) 68 Or 86, 136 P 844.

Consent of parties cannot confer jurisdiction on equity court where it does not otherwise exist. Small v. Lutz, (1898) 34 Or 131, 55 P 529, 58 P 79.

A final decree in equity in a case wherein the court is without jurisdiction of the cause of suit cannot terminate the controversy, but is appealable. Whelan v. McMahan, (1905) 47 Or 39, 82 P 19, 114 Am St Rep 906.

7. Counterclaims and cross-bills

A counterclaim must contain the substantial requisites of a complaint and allege facts which legally entitle the defendant to recover in a suit instituted by him for that purpose against the plaintiff. Burrage v. Bonanza Min. Co., (1885) 12 Or 169, 6 P 766; LeClare v. Thibault, (1902) 41 Or 601, 608, 69 P 552; State v. Pac. Livestock Co., (1919) 93 Or 196, 182 P 828.

Where the cross-bill states a good cause of suit, and the parties stipulate to submit to equity jurisdiction, the court properly proceeds to determine the matters at issue. Cody Lbr. Co. v. Coach, (1915) 76 Or 106, 110, 146 P 973.

8. Maxims of equity

A party can get relief in equity from a judgment at law only when he has been deprived of a legal right by fraud, accident or mistake, unmixed with negligence or fault on his part. Brenner v. Alexander, (1888) 16 Or 349, 19 P 9, 8 Am St Rep 301.

To entitle a party to equitable relief, he should be required to do equity. Bagley v. Bloch, (1917) 83 Or 607, 621, 163 P 425.

FURTHER CITATIONS: Harker v. Fahie, (1863) 2 Or 89; Delay v. Chapman, (1867) 2 Or 242; Hatcher v. Briggs, (1876) 6 Or 31; Comegys v. Hendricks, (1910) 55 Or 533, 106 P 1016; Gabel v. Armstrong (1918) 88 Or 84, 171 P 190; Burr v. Mut. Life Ins. Co., (1920) 96 Or 14, 187 P 850, 188 P 962; Heitkemper v. Cen. Labor Council (1921) 99 Or 1, 192 P 765; Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072; Mutzig v. Hope, (1945) 176 Or 368, 158 P2d 110; Pittenger Equip. Co. v. Timber Structures, Inc., (1950) 189 Or 1, 217 P2d 770; Union Pac. R.R. v. Mason, (1962) 232 Or 486, 376 P2d 61; City of Woodburn v. Domagalla, (1964) 238 Or 401, 395 P2d 150; Fleming v. Wineberg, (1969) 253 Or 472, 455 P2d 600.

LAW REVIEW CITATIONS: 22 OLR 297; 1 WLJ 309; 4 WLJ 18, 19.

11.040

NOTES OF DECISIONS

1. In general

The court may not consolidate actions on its own motion. Webb v. Isensee, (1916) 79 Or 114, 153 P 800.

Suit to enforce renewal of a lease could not be consolidated with an action for recovery of unpaid rent or for recovery of possession of premises. Id.

Trial of two cases at the same time is not necessarily a consolidation of them. State v. Stillwell, (1924) 109 Or 643, 221 P 17.

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

The order of a court consolidating an action pending before another court was erroneous. Webb v. Isensee, (1916) 79 Or 114, 153 P 800.

Refusal of trial court to consolidate an interpleader suit brought by a warehouseman with a partition suit relating to title of goods deposited in a warehouse was not an abuse of discretion. Milton Whse. Co. v. Basche-Sage Hdw. Co., (1934) 147 Or 563, 34 P2d 338, 978.

2. When action or suit is pending

The last provision of the section is declaratory of the common law which must be looked to for its construction. Day v. Holland, (1887) 15 Or 464, 468, 15 P 855; Shirley v. Birch, (1888) 16 Or 1, 18 P 344.

A judgment or decree is binding and conclusive on parties and privies until annulled or reversed; this section does not suspend the judgment or decree during the time allowed for appeal. Day v. Holland, (1887) 15 Or 464, 15 P 855; Shirley v. Birch (1888) 16 Or 1, 18 P 344; Toy v. Gong, (1918) 87 Or 454, 170 P 936; Neal v. Foster, (1888) 13 Sawy 236, 34 Fed 496.

This section does not apply so as to prevent a final judgment of a federal court from being pleaded as a bar to an action during the pendency of a writ of error on the original judgment. Oregonian Ry., v. Ore. R.R. & Nav. Co., (1886) 27 Fed 277; Hughes v. Dundee Mtg. & Trust Inv. Co., (1886) 28 Fed 40.

An action is deemed pending, within the statute, for all incidental or ancillary purposes. Shirley v. Birch, (1888) 16 Or 1, 18 P 344.

A divorce suit was deemed pending when the complaint was filed although summons was not served and the other spouse was barred from bringing a like suit in another county. Matlock v. Matlock, (1918) 87 Or 307, 170 P 528.

FURTHER CITATIONS: Dick v. Kendall, (1876) 6 Or 166; Hutchings v. Royal Bakery, (1913) 66 Or 301, 131 P 514, 132 P 960, 134 P 1033.