Chapter 42

Execution, Formalities and Interpretation of Writings

42.020

NOTES OF DECISIONS
1. Writings in general
2. Deeds
   (1) Necessity and requirements of delivery
   (2) Sufficiency of delivery

1. Writings in general

Execution is not complete until delivery, regardless of the date of signing. Dennehy v. Watt, (1925) 116 Or 189, 239 P 814; Turner v. Jackson, (1932) 139 Or 539, 4 P2d 925, 11 P2d 1048.

The fact that a mortgage upon being delivered to the mortgagee is returned to the mortgagor for safe-keeping does not defeat the delivery. Bradtfeldt v. Cooke, (1895) 27 Or 194, 40 P 1, 50 Am St Rep 701.

An instruction that before a written contract would be binding it must be executed and delivered is erroneous where no explanation is given as to what constituted a delivery. Archambeau v. Edmunson, (1918) 87 Or 476, 171 P 186.

The execution of a contract of indorsement of mortgage note includes delivery. Ellis v. Hartmus, (1925) 113 Or 157, 231 P 149.

2. Deeds

(1) Necessity and requirements of delivery. Delivery is that part of the operation in executing a deed by which a grantor signifies his intention when and how it is to take effect; an actual handing over of the instrument is not necessary. Fain v. Smith, (1886) 14 Or 82, 12 P 365, 58 Am Rep 281; Flint v. Phipps, (1888) 16 Or 437, 19 P 543.

A deed properly executed in the possession of the grantee is presumed to have been delivered to him. Flint v. Phipps, (1888) 16 Or 437, 19 P 543; Pierson v. Fisher, (1906) 48 Or 223, 85 P 621.

A deed is ineffective as a conveyance until delivered with the knowledge and consent of the grantor to the grantee or someone in his behalf. Allen v. Ayer, (1895) 26 Or 589, 39 P 1; Burns v. Kennedy, (1907) 49 Or 588, 90 P 1102; De Bow v. Wollenberg, (1908) 52 Or 404, 96 P 536, 97 P 717; Rayburn v. Blechschmidt, (1933) 143 Or 640, 23 P2d 550.

The delivery of a deed is a question of intention and may be effected by any act or word manifesting an unequivocal intention to surrender the instrument so completely as to deprive the grantor of all authority over it or of the right of recalling it. Pierson v. Fisher, (1906) 48 Or 223, 85 P 621; Sappingfield v. King, (1907) 49 Or 102, 89 P 142, 90 P 150, 8 LRA(NS) 1066; Reeder v. Reeder, (1907) 50 Or 204, 91 P 1075.

The paramount idea respecting the delivery of a deed is that the control over the instrument shall at once pass to the grantee, but control over the premises is not an element necessary to the vesting of title. White v. White, (1898) 34 Or 141, 150, 50 P 801, 55 P 645.

(2) Sufficiency of delivery. There is a sufficient delivery where the grantor handed a deed to a person with the remark that he deeded her the land, and wanted it to go to the children at his death, which person then returned the deed to deceased, who placed it under his pillow, and later gave it to his brother, with the directions to have it recorded after his death. Payne v. Hallgarth, (1898) 33 Or 430, 54 P 162.

The giving of a deed by the grantor, after signature and acknowledgment, to one employed by the grantee to prepare it and take the acknowledgment, without direction regarding its custody or disposition, constitutes a sufficient delivery thereof, though not given to the grantee till after the grantor's death. Swank v. Swank, (1900) 37 Or 439, 61 P 846.

Where a deed is executed and placed in the hands of a third person for delivery to the grantee without the grantor reserving to himself any control over it, and it is delivered, the title passes to the grantee at the time of the last delivery, though not delivered until after the grantor's death. De Bow v. Wollenberg, (1908) 52 Or 404, 96 P 536, 97 P 717.

A grantor, when depositing a deed with a third person for delivery to a grantee, may annex such conditions thereto as he sees fit, and the grantee is entitled to a delivery only on compliance with the conditions. Id.

Where a deed, providing for a payment by the grantee as a condition precedent to delivery, was deposited with a third person for delivery on the grantee complying with the condition and the grantee had not accepted the condition at grantor's death, the agent after death of the grantor could not thereafter make a delivery to the grantee. Id.

A deed executed by husband to wife which was in the possession of the wife at her death was of no effect where the evidence showed no intent to deliver the deed on the part of the husband. Clark v. Clark, (1910) 56 Or 218, 107 P 23.

Where grantee of a deed told the grantor to give it to the officer of a bank and instruct the officer to have it recorded, the delivery of the deed to the officer was a sufficient delivery to the grantee. Savage v. Scroggin, (1917) 83 Or 51, 162 P 1061.

LAW REVIEW CITATIONS: 11 OLR 318, 320.

42.030

NOTES OF DECISIONS

By analogy the term "subscribing witness" is the equivalent of "attestation" required in the section relating to the manner of executing a will. Luper v. Werts, (1890) 19 Or 122, 23 P 850.

The signing of a will for a blind person by another at the request of the testator, where the latter can hear and speak and is present, is sufficient; and the same rule applies to the witnessing. In re Pickett's Will, (1907) 49 Or 127, 138, 89 P 377.

Where the attorney for the testator asks another in the presence of the testator to witness a will, there is a sufficient request to meet the requirement of this section. In re Ames' Will, (1902) 40 Or 495, 67 P 737; In re Skinner's

Will, (1902) 40 Or 571, 585, 62 P 523, 67 P 951; In re Christofferson's Estate, (1948) 183 Or 75, 190 P2d 928.

The statutes on wills, prescribing the requisites of a valid will, are controlling in the execution of a will, and this section does not import any new or different requirements. In re Estate of Shaff, (1928) 125 Or 288, 266 P 630; In re Christofferson's Estate, (1948) 183 Or 75, 190 P2d 928.

FURTHER CITATIONS: Wishard v. Turner, (1970) 4 Or App 278, 478 P2d 438.

ATTY. GEN. OPINIONS: County clerk as subscribing witness, 1950-52, p 202.

42.040

LAW REVIEW CITATIONS: 42 OLR 263.

42.060

NOTES OF DECISIONS

The testimony contemplated by this section extends to crosses or marks made as signatures, but the peculiarities of such marks and the circumstances surrounding their execution should be carefully considered in determining the value and weight to be given thereto. State v. Tice, (1897) 30 Or 457, 48 P 367.

Where two witnesses testified they knew defendant's handwriting and believed the letter to have been written by him, this with other evidence was sufficient to permit introduction of the letter in evidence. State v. McDaniel, (1901) 39 Or 161, 65 P 520.

A bank president who had seen signatures on checks which had been charged against an accused possessed the qualification required by this section. State v. Bailey, (1919) 90 Or 627, 178 P 201.

A witness to the genuineness of a disputed signature to a note may be further asked if he would act upon it if it came to him in ordinary business transactions. Holmes v. Goldsmith & Co., (1893) 147 US 150, 163, 13 S Ct 288, 37 L Ed 118.

FURTHER CITATIONS: State v. Cahill, (1956) 208 Or 538, 293 P2d 169, 298 P2d 214.

LAW REVIEW CITATIONS: 41 OLR 155.

42.070

NOTES OF DECISIONS

Under this section the testimony of expert witnesses based on the comparison of handwritings is clearly admissible. Green v. Terwilliger, (1892) 56 Fed 384; Richardson v. Green, (1894) 61 Fed 423, 9 CCA 565.

A writing not admitted or treated as genuine by the party against whom it is offered cannot be received in evidence as a standard with which to compare a writing charged to be forged. Munkers v. Farmers' Ins. Co., (1896) 30 Or 211, 46 P 850; State v. Tice, (1897) 30 Or 457, 461, 48 P 367; State v. Cahill, (1956) 208 Or 538, 293 P2d 169, 298 P2d 214; State v. White, (1970) 4 Or App 151, 477 P2d 917.

Writings admitted or treated as genuine by the party against whom the evidence is offered may be used as a standard of comparison although they would not be admissible for any other purpose and do not refer to the matter in issue. Munkers v. Farmers' Ins. Co., (1896) 30 Or 211, 46 P 850; State v. Tice, (1897) 30 Or 457, 48 P 367; State v. Branton, (1907) 49 Or 86, 87 P 535; State v. Scott, (1912) 63 Or 444, 128 P 441; Holmes v. Goldsmith & Co., (1893) 147 U S 150, 163, 13 S Ct 288, 37 L Ed 118. **Contra,** United States v. North, (1911) 184 Fed 151.

The tests of the standard prescribed by this section must be held to exclude any other test that might be permissible elsewhere. State v. Tice, (1897) 30 Or 457, 48 P 367; State v. Cahill, (1956) 208 Or 538, 293 P2d 169, 298 P2d 214.

Proof that a defendant authored a writing is sufficient to establish that he treated it as genuine. State v. White, (1970) 4 Or App 151, 477 P2d 917.

The fact of sending a letter through the mails cannot be said to be a treatment of the letter as genuine where the mailing as well as the writing and signing was disputed. United States v. North, (1911) 184 Fed 151.

FURTHER CITATIONS: Osmun v. Winters, (1896) 30 Or 177, 46 P 780; In re Kries' Estate, (1947) 182 Or 311, 187 P2d 670.

LAW REVIEW CITATIONS: 41 OLR 154-159.

42.080

NOTES OF DECISIONS

A written agreement executed over 20 years before suit was brought was admissible in evidence where it appeared from other evidence that it had been acted upon as genuine, and the court was personally familiar with the signature of the attesting witness and had personal knowledge that such witness was dead. Dannells v. United States Nat. Bank, (1943) 172 Or 213, 234, 138 P2d 220.

LAW REVIEW CITATIONS: 42 OLR 252.

42.115

CASE CITATIONS: Wilson v. McEwan, (1879) 7 Or 87; West Portland Homestead Assn. v. Lawnsdale, (1884) 19 Fed 291, 9 Sawy 120; Taylor v. Fleckenstein, (1887) 30 Fed 99; Osborne & Co. v. Hubbard, (1891) 20 Or 318, 25 P 1021, 11 LRA 833; Rector of St. David's v. Wood, (1893) 24 Or 396, 34 P 18, 41 Am St Rep 860; Johnson v. Wadsworth, (1893) 24 Or 494, 502, 34 P 13; Barbre v. Goodale, (1896) 28 Or 465, 38 P 67, 43 P 378; Thayer v. Nehalem Mill Co., (1897) 31 Or 437, 51 P 202; Dickey v. Jackson, (1906) 47 Or 531, 84 P 701; Olston v. Ore. Water Power & Ry., (1908) 52 Or 343, 96 P 1095, 97 P 538, 20 LRA(NS) 915; Miles v. Hemenway, (1911) 59 Or 318, 111 P 696, 117 P 273; Mossie v. Cyrus, (1912) 61 Or 17, 119 P 485, 624; Cooper v. Keady, (1914) 73 Or 66, 144 P 99; Wilson v. Prettyman, (1919) 94 Or 275, 185 P 587; Title & Trust Co. v. Nelson, (1937) 157 Or 585, 71 P2d 1081, 114 ALR 1196; Dannells v. United States Nat. Bank, (1943) 172 Or 213, 241, 138 P2d 220; Beauchamp v. Jordan, (1945) 176 Or 320, 157 P2d 504; Card v. Stirnweis, (1962) 232 Or 123, 374 P2d 472; Van Domelen v. Westinghouse Elec. Corp., (1967) 382 F2d 385.

ATTY. GEN. OPINIONS: Requisites of a notarial seal, 1962-64, p 392; requirement that seals make an impression in the paper, 1966-68, p 173.

LAW REVIEW CITATIONS: 8 OLR 117; 9 OLR 148; 11 OLR 317, 318; 18 OLR 147; 27 OLR 78.

42.210

NOTES OF DECISIONS

In construing timber deeds, evidence of a different intention of the parties derived from circumstances surrounding execution of the deeds, evidence of local custom and usage prevailing at the time, or any practical construction placed upon the instruments by parties initially interested therein was admissible. Arbogast v. Pilot Rock Lbr. Co., (1959) 215 Or 579, 336 P2d 329, 72 ALR2d 712.

FURTHER CITATIONS: In re Swindle, (1960) 188 F Supp 601; Teeples v. Tolson, (1962) 207 F Supp 212.

ATTY. GEN. OPINIONS: Effect of suspending residence requirement for institutions for the mentally retarded, 1964-66, p 305.

42.220

NOTES OF DECISIONS

1. The circumstances under which a contract was made may be shown
2. Application of rule
3. Deeds

1. The circumstances under which a contract was made may be shown

The language of the contract must determine to what the parties have bound themselves, notwithstanding the right of the court to take into consideration the situation of the parties, the object they must have had in view and the circumstances. Christensen v. Pac. Coast Borax Co., (1894) 26 Or 302, 305, 38 P 127.

Where the language of a written instrument is ambiguous, equivocal or susceptible of conflicting interpretations, it is competent to ascertain by parol evidence the purpose and object of the parties from the surrounding circumstances, and thereafter to enforce it in accordance with such intention. Baker County v. Huntington, (1905) 46 Or 275, 79 P 187; Wade v. Northup, (1914) 70 Or 569, 140 P 451; Allen v. Hendrick, (1922) 104 Or 202, 212, 206 P 733; Stubbs v. Abel, (1925) 114 Or 610, 233 P 852, 236 P 505; Jaloff v. United Auto Indem. Exch., (1927) 120 Or 381, 250 P 717.

The right to offer evidence, when necessary, to show the circumstances under which a contract was made does not mean that an unambiguous writing can be made ambiguous by extraneous evidence. Sund & Co. v. Flagg & Standifer Co., (1917) 86 Or 289, 168 P 300.

In construing an agreement between parties the circumstances under which it was made, including the situation of the subject matter of the instrument and of the parties to it, may be shown, so that the court may be placed in the position of those whose language is to be interpreted. McDonald v. Supple, (1920) 96 Or 486, 190 P 315; Salem King's Prod. Co. v. Ramp, (1921) 100 Or 329, 196 P 401; Crowell Elevator Co. v. Kerr Gifford & Co., (1925) 114 Or 675, 236 P 1047; Haynes v. Douglas Fir Exploitation & Export Co., (1939) 161 Or 538, 90 P2d 207, 761.

So far as evidence showing the circumstances surrounding the formation of a contract tends to show not the meaning of the writing but an intention wholly unexpressed in the writing, it is irrelevant. Crowell Elevator Co. v. Kerr Gifford & Co., (1925) 114 Or 675, 236 P 1047.

Manifest injustice resulting from the application of this section does not authorize its violation. United States Nat. Bank v. Miller, (1927) 122 Or 285, 258 P 205, 58 ALR 339.

It is the purpose of the statute, as applied to the construction of a will, to enable the judge to fit himself into the position of the testator, in order to think as he thought, and to understand as he understood. Chambers v. Studebaker, (1946) 188 Or 1, 175 P2d 156.

The contract must be ambiguous before evidence is admissible as provided in this section. Webster v. Harris, (1950) 189 Or 671, 222 P2d 644.

2. Application of rule

In wills the intent of the testator is the prime consideration and extrinsic evidence is permissible to aid in the implementation of that intent. Putnam v. Jenkins, (1955) 204 Or 691, 285 P2d 532.

Parol evidence cannot be used to change, vary or contradict the terms of the written instrument; and all prior and contemporaneous agreements are merged therein and cannot be shown by parol evidence. Pacific Tel. & Tel. Co. v. Communications Workers of America, (1961) 199 F Supp 689.

It is sometimes necessary to resort to extrinsic proof, not for the purpose of altering the terms of the writing but in order to determine the scope and object of the intended contract. Card v. Stirnweis, (1962) 232 Or 123, 374 P2d 472.

That a purported agreement was never delivered to take effect as an actual agreement might be proved by parol evidence. Branson v. Oregonian Ry., (1883) 11 Or 161, 2 P 86.

Where various letters concerning a sale of lands left the intention of the parties in doubt, evidence of the previous understanding in relation to the subject-matter was competent to explain their meaning. Fisk v. Henarie, (1886) 13 Or 156, 171, 9 P 322.

Where a contract was not originally in writing, and the terms of the oral agreement were imperfect and indefinite, the real contract had to be largely inferred from the subsequent course of dealing. Whale v. Gatch, (1902) 42 Or 251, 70 P 832.

Parol evidence was competent to show that the giving of a bond filed by a sheriff, who was ex officio tax collector, was intended to cover his special liability for tax money, although it purported to be his ordinary official undertaking. Baker County v. Huntington, (1905) 46 Or 275, 79 P 187.

Where an attorney in fact made certain conveyances in consideration of $10 and $1, respectively, the circumstances under which the power was conferred should be considered to determine whether such conveyances were within the power of attorney which did not authorize a gift. Wade v. Northup, (1914) 70 Or 569, 140 P 451.

Where writing stated that the "seller" had sold certain fruit, extrinsic evidence was admitted to show that the seller at time of execution of contract did not have title to the property and therefore the contract was a contract for future delivery. Gile & Co. v. Lasselle, (1918) 89 Or 107, 171 P 741.

Where a contract for the sale of lambs provided that they should be of "good size and merchantable condition" and the seller had sold his crop of lambs for the previous year to the buyer, evidence as to the sort of lambs delivered the year before was admissible as tending to show what the parties meant by the quoted expression. Stanfield v. Arnwine, (1921) 102 Or 289, 202 P 559.

Where the language of a letter relied on to create a trust was not, when standing alone, free from ambiguity, prior letters and oral statements of the decedent and acts done by him were admissible to ascertain the meaning of the words used by the testator. Allen v. Hendrick, (1922) 104 Or 202, 206 P 733.

Testimony as to the circumstance under which notes in suit were made, including the situation of the parties thereto, were admissible in construing a written agreement made shortly before notes were given and relating to the same transaction. Macomber v. Goldthwaite, (1927) 22 F 2d 638.

Where the provisions of a policy of automobile insurance were ambigious, parol evidence was admissible to explain the ambiguities. Whitlock v. United States Interinsurance Assn., (1932) 138 Or 383, 6 P2d 1088.

The circumstances of the giving of a bond for the dissolution of a temporary injunction might be shown by introducing in evidence the record in the suit. Title & Trust Co. v. United States Fid. & Guar. Co., (1932) 138 Or 467, 1 P2d 1100, 7 P2d 805.

In action for balance allegedly due on purchase price of railroad ties purchased under contract providing for delivery "f.a.s. vessel at S.P. open dock, Portland harbor, Oregon," testimony of general custom and usage prevailing in

Portland harbor relative to shipment of lumber products was competent. Haynes v. Douglas Fir Exploitation & Export Co., (1939).161 Or 538, 90 P2d 207, 761.

In view of evidence as to the meaning of the term to those who used it, a will describing property as "1516 S.W. Fourth Ave" meant the building and property which bore that address and did not include a separate adjoining building connected therewith by a passageway but bearing a separate street number. Chambers v. Studebaker, (1946) 180 Or 1, 175 P2d 156.

"Result of towing" in insurance contract was sufficiently ambiguous to allow parol evidence to establish intent. Upper Columbia R. Towing Co. v. Glenn Falls Ins. Co., (1959) 179 F Supp 705.

In a contract for the sale of "merchantable timber," although that term was not ambiguous, the trial court properly received parol evidence concerning the surrounding circumstances and property in order to determine if timber had "commercial value." Seaver v. United States Plywood Corp., (1959) 273 F2d 36.

3. Deeds

The circumstances under which a deed to real property is made may be shown by parol evidence. Hicklin v. McClear, (1889) 18 Or 126, 137, 22 P 1057.

Where the description in a deed is not clear and intelligent, the intention of the parties and the circumstances surrounding the transaction may be considered in connection with its provisions to ascertain the intention and give it practical effect. Wills v. Leverich, (1890) 20 Or 168, 25 P 398.

A deed absolute on its face may be shown to have been intended as a mortgage to secure the payment of money. Swegle v. Belle, (1891) 20 Or 323, 25 P 633.

Parol evidence rule does not bar evidence to show circumstances under which agreement was made. West Los Angeles Institute v. Mayer, (1966) 366 F2d 220.

Where deed was executed pursuant to agreement that defendant should use one-fourth of land conveyed by deed as a cemetery, such deed conveyed an absolute estate. Portland v. Terwilliger, (1888) 16 Or 465, 19 P 90.

A deed of a certain part of grantor's tract having irrigation water rights, granting "also 80 inches of water," conveyed 80 inches of the grantor's water rather than merely a part of the water proportional to the part of the defendant's land conveyed to plaintiff. Harvey v. Campbell, (1923) 107 Or 373, 209 P 107, 214 P 348.

In construing timber deeds, evidence of a different intention of the parties derived from circumstances surrounding execution of the deeds, evidence of local custom and usage prevailing at the time, or any practical construction placed upon the instruments by parties initially interested therein was admissible. Arbogast v. Pilot Rock Lbr. Co., (1959) 215 Or 579, 336 P2d 329. 72 ALR2d 712.

Parol evidence was admissible to explain ambiguous phrase. Van Domelen v. Westinghouse Elec. Corp., (1967) 382 F2d 385.

FURTHER CITATIONS: Balfour v. Wilkins, (1879) 5 Sawy 429, 2 Fed Cas 539; Rosenau v. Lansing, (1925) 113 Or 638, 232 P 648, 234 P 270; Niles v. So. Pac. Ry., (1945) 176 Or 118, 155 P2d 938; Biersdorf v. Putnam, (1947) 181 Or 522, 182 P2d 992; Gamet v. Coop, (1947) 182 Or 78, 185 P2d 670; Moore v. Schermerhorn, (1957) 210 Or 23, 307 P2d 483, 308 P2d 180; Doherty v. Harris Pine Mills, Inc., (1957) 211 Or 378, 315 P2d 566; United States Nat. Bank v. Guiss, (1958) 214 Or 563, 331 P2d 865; Roberts v. Union Ins. Soc., (1958) 215 Or 183, 332 P2d 600; O'Gorman v. Baker, (1959) 219 Or 170, 347 P2d 85, 338 P2d 638; In re Swindle, (1960) 188 F Supp 601; Unander v. United States Nat. Bank, (1960) 224 Or 144, 355 P2d 729; United States Nat. Bank v. United States, (1960) 188 F Supp 332; Perkins v. Standard Oil Co. of Calif., (1963) 235 Or 7, 383 P2d 107, 383 P2d 1002; C. N. Close-Smith v. Conley, (1964) 230 F Supp 411; Oregon-Wash. Vegetable & Fruit Growers Assn. v. Sunset Packing Co., (1969) 254 Or 33, 456 P2d 1002.

LAW REVIEW CITATIONS: 32 OLR 361.

42.230

NOTES OF DECISIONS

1. The office of the judge
2. To ascertain and declare what is contained in the instrument
3. Particular contracts or instruments
4. "Where there are several provisions or particulars"

1. The office of the judge

The construction of a written instrument is for the court. Wallace v. Am. Life Ins. Co., (1924) 111 Or 510, 225 P 192, 227 P 465; Columbia Digger Sand & Gravel Co. v. Ross Island Sand & Gravel Co., (1933) 145 Or 96, 25 P2d 911.

Where the terms of chattel mortgages were clearly expressed, the question of intention of the parties was a question of law for the court and not a question of fact for the jury. Rutherford v. Eyre & Co., (1944) 174 Or 162, 148 P2d 530.

Where all relevant documents in action on contract were contained in the pleadings, it was proper for court to construe the contracts and rule on the pleadings. Commerce and Ind. Ins. Co. v. Orth, (1969) 254 Or 226, 458 P2d 926.

2. To ascertain and declare what is contained in the instrument

In interpreting broker's bond, court could only ascertain and declare terms of instrument, and could not substitute or add conditions to which obligor did not agree. New Amsterdam Cas. Co. v. Hyde, (1934) 148 Or 229, 34 P2d 930, 35 P2d 980.

Where a memorandum of sale of realty described realty by street and house number but did not mention the city, county or state in which the realty was located, the word "my" could not be inserted by implication in front of "lot and house" to sustain the writing as against vendor's demurrer, although the alleged subject matter was the vendor's only realty. Hertel v. Woodard, (1948) 183 Or 99, 191 P2d 400.

3. Particular contracts or instruments

In construing a will, words of common use must be given their ordinary natural meaning. In re Hale's Estate, (1933) 142 Or 23, 18 P2d 808.

When there is no ambiguity in the terms of the will itself, extrinsic evidence showing a contrary intent of the testator is not admissible. Roehr v. Pittman, (1970) 256 Or 193, 472 P2d 278.

Where mortgage convenant provided that mortgagee would, under certain conditions, release from the lien of the mortgage portions of the land therein described, the mortgagor on complying with the conditions was entitled to have the land released. Wallowa Lake Amusement Co. v. Hamilton, (1914) 70 Or 433, 142 P 321.

Contract between members of a grain association providing decisions of a committee should be final, construed in light of this section and 2-218 and 2-219, held not to show an intention to arbitrate differences between contracting parties in accordance with rules of association. Crowell

Elevator Co. v. Kerr Gifford & Co., (1925) 114 Or 675, 236 P 1047.

A grantor was estopped by this section from denying the effect of his own deed. Kane v. Kane, (1930) 134 Or 79, 291 P 785.

To have construed the word "theft" in an insurance policy to have meant "larceny" as defined by the criminal code would have been inserting what had been omitted. Nugent v. Union Automobile Ins. Co., (1932) 140 Or 61, 13 P2d 343.

Where release agreement provided for release of all claims and demands, court could not insert provisions that release should not cover damages that might have been incurred for an alleged slander before its execution. Glickman v. Weston, (1932) 140 Or 117, 11 P2d 281, 12 P2d 1005.

Provision of contract between driver of milk delivery route and dairy as to the return of the route to the dairy without compensation upon the driver becoming dissatisfied with the same, was not to be construed to mean that after the driver's discharge he should refrain from soliciting customers upon such route for another dairy. Snow Cap Dairy v. Robanske, (1935) 151 Or 59, 47 P2d 977.

Where will directed distribution of one-half of all trust property "then remaining" in the trustee's hands, the language was plain and unequivocal and did not allow a reading so as to mean all trust property that had come into trustee's hands. Quick v. Hayter, (1950) 188 Or 218, 215 P2d 374.

4. "Where there are several provisions or particulars"

Where a deed contemporaneous with a realty contract warranted against all encumbrances, and the contract covenanted against delinquent taxes, "delinquent taxes" was held to mean taxes which were due and unpaid as of the time of conveyance and not taxes declared delinquent by statute if unpaid as of a statutory date. Portland Terminal Co. v. Porter Ind. Co., (1930) 133 Or 205, 289 P 1048.

FURTHER CITATIONS: Neilson v. Masters, (1914) 72 Or 463, 143 P 1132; Coopey v. Keady, (1914) 73 Or 66, 144 P 99; Scheuerman v. Mathison, (1914) 74 Or 40, 144 P 1177; United States Nat. Bank v. Miller, (1927) 122 Or 285, 258 P 205, 58 ALR 339; Public Market Co. v. Portland, (1939) 160 Or 155, 83 P2d 440; Chambers v. Studebaker, (1946) 180 Or 1, 175 P2d 156; Smith v. Industrial Hosp. Assn., (1952) 194 Or 525, 242 P2d 592; State v. Buck, (1953) 200 Or 87, 262 P2d 495; Olson v. Chuck, (1953) 199 Or 90, 259 P2d 128; Moore v. Schermerhorn, (1957) 210 Or 23, 307 P2d 483, 308 P2d 180; Johnson v. Sch. Dist. 12, (1957) 210 Or 585, 312 P2d 591; United States Nat. Bank v. Guiss, (1958) 214 Or 563, 331 P2d 865; Arbogast v. Pilot Rock Lbr. Co., (1959) 215 Or 579, 336 P2d 329, 72 ALR2d 712; Pacific Tel. & Tel. Co. v. Communications Workers of Amer., (1961) 199 F Supp 689; Teeples v. Tolson, (1962) 207 F Supp 212; Presbytery of Willamette v. Hammer, (1963) 235 Or 564, 385 P2d 1013.

42.240

NOTES OF DECISIONS

1. In general

Written contracts should be considered from the standpoint of the parties when they were contracting, and be so construed as to give effect to all the provisions, if possible. Arment v. Yamhill County, (1896) 28 Or 474, 43 P 653.

Where the language of the contract is plain and unambiguous, and can have but one meaning, there is no room for construction. Egan v. Oakland Home Ins. Co., (1896) 29 Or 403, 411, 42 P 990, 54 Am St Rep 798.

The court will place itself in the position of the contracting parties in order to ascertain their intention. Pinnacle Packing Co. v. Herbert, (1937) 157 Or 96, 70 P2d 31, 111 ALR 1055.

In every contract there is an implied covenant of good faith and fair dealing. Perkins v. Standard Oil Co. of Calif., (1963) 235 Or 7, 383 P2d 107, 383 P2d 1002.

2. "The intention of the parties is to be pursued if possible"

The parties' intention must control and must be gathered from the language used, if unambiguous; the court's office being to ascertain and enforce such language according to its legal effect. Weidert v. State Ins. Co., (1890) 19 Or 261, 24 P 242, 20 Am St Rep 809; Krebs Hop Co. v. Livesley, (1909) 55 Or 227, 104 P 3; Rowley v. Hager, (1912) 63 Or 246, 127 P 36; Spande v. W. Life Idem. Co., (1913) 68 Or 171, 136 P 1189.

3. Practical and contemporaneous construction

Contemporaneous written agreements concerning the same matter are to be construed together. Krus v. Prindle, (1879) 8 Or 158.

Where the language of the contract will admit it, justice and convenience will incline to the construction of a simultaneous performance. Powell v. Dayton, Sheridan & Grande Ronde R. R. Co., (1887) 14 Or 356, 12 P 665.

Where the meaning of a contract is clear, it is the duty of the court to so declare without reference to the construction which the parties to it have themselves put upon it. Heywood v. Doernbecher Mfg. Co., (1907) 48 Or 359, 365, 86 P 375, 87 P 530.

Where a written contract is ambiguous, extrinsic evidence of the practical interpretation given it by the parties is admissible to explain it. Harlow v. Oregonian Pub. Co., (1909) 53 Or 272, 276, 100 P 7.

4. Preference of construction rendering contract legal

If a contract is susceptible of two constructions, one legal, the other not, the legal is preferred. Arment v. Yamhill County, (1896) 28 Or 474, 43 P 653; Olympia Bottling Works v. Olympia Brewing Co., (1910) 56 Or 87, 107 P 969; Keady v. United Rys., (1910) 57 Or 325, 100 P 658, 108 P 197.

5. When a general and particular provision are inconsistent

When a general and a particular provision are inconsistent the latter is paramount to the former. Public Market Co. v. Portland, (1939) 160 Or 155, 83 P2d 440.

Where a general assignment for the benefit of creditors conveyed "all the property, real and personal," such assignment could not be declared fraudulent because of mistakes or omissions from the attached inventory. Sabin v. Lebenbaum, (1894) 26 Or 420, 38 P 434.

6. Several instruments

A deed, and note and mortgage given for the purchase price which were executed by the same parties and at the same time, were construed as one instrument. Bradtfeldt v. Cooke, (1895) 27 Or 194, 40 P 1, 50 Am St Rep 701.

Where two or more instruments are executed at the same time and together they are to be construed as one, and effect given to all the provisions, as far as possible. Ladd v. Johnson, (1897) 32 Or 195, 49 P 756.

Papers related to a stated transaction are all to be considered together, and the dates are not controlling. McLeod v. Despain, (1907) 49 Or 536, 90 P 492, 92 P 1088, 124 Am St Rep 1066, 19 LRA(NS) 276.

A reference in a subcontract to the general contract for a particular purpose makes it a part of the subcontract only for the purpose specified. Wallace v. Ore. Engineering Co., (1918) 90 Or 31, 174 P 156, 175 P 445.

Where two instruments are executed at the same time between the same parties, covering the same subject matter, they will be construed together as constituting one agreement. Temple v. Harrington, (1918) 90 Or 295, 176 P 430.

A note and a mortgage given to secure it were construed as one instrument. Id.

7. Particular words and phrases

If the meaning to be given a word is not ascertainable from the context, resort may be had to parol testimony to ascertain the surrounding circumstances and thereby determine the intention of the parties. Loomis v. MacFarland, (1907) 50 Or 129, 133, 91 P 466.

8. Particular instruments

The grant of general power in a power of attorney is limited to the acts authorized by the particular grant, and power will be strictly construed. Coulter v. Portland Trust Co., (1891) 20 Or 469, 26 P 565, 27 P 266.

In construing a deed the intention of the parties is to be pursued if possible, and if the expressed meaning is plain on the face of the deed it will control. Harvey v. Campbell, (1923) 107 Or 373, 209 P 107, 214 P 348.

Although an exclusion clause in an insurance policy must be strictly construed against the insurer, such clause cannot add to the express risk assumed by the insurer in the insuring clause. Teeples v. Tolson, (1962) 207 F Supp 212.

Where power of attorney empowered agent to "sell or transfer" principal's realty, this did not authorize agent to transfer realty for the consideration that the grantee provide a home for a third person. Coulter v. Portland Trust Co. (1891) 20 Or 469, 26 P 565, 27 P 266.

A contract by which one party agreed to mine, clean, sack, and store ore, and timber any ground worked by him was a contract of employment for an indefinite time. Christensen v. Pac. Coast Borax Co., (1894) 26 Or 302, 38 P 127.

Intention to convey the premises as they openly and visibly appeared at the time the sale thereof was consummated may be presumed in the circumstances. North Powder Milling Co. v. Coughanour, (1898) 34 Or 9, 17, 54 P 223.

Power of attorney from a married woman authorizing the attorney in fact to mortgage "any part of my lands or interest in lands," related only to the lands of the wife, and did not empower the agent, by joining with the husband in a mortgage of his lands, to bar the wife's inchoate right of dower therein. Security Sav. Bank v. Smith, (1900) 38 Or 72, 62 P 794.

Mortgage covenant for release of portions of mortgaged lands on payment of specified sum were to entitle mortgagor to release of the lands on payment or tender of payment thereof at the specified rate. Wallowa Lake Amusement Co. v. Hamilton, (1914) 70 Or 433, 142 P 321.

Lease provisions that the lessee's liability should be confined to forfeiting the lease, and that the lessor might reenter without prejudicing his remedies for rental arrears were, when construed together, not to prevent the collections of unpaid rent. Gearin v. Rothchild Bros., (1918) 88 Or 403, 170 P 923.

A certain instrument was a bill of sale of business and assets of a partnership rather than an assignment for the benefit of creditors. St. Helens Quarry Co. v. Crowe & Co., (1918) 90 Or 284, 176 P 427.

A contract for sale of fruit trees to be delivered in the "fall" of a specified year, required delivery between the first day of September and the last day of November. Rosenau v. Lansing, (1925) 113 Or 638, 232 P 648, 234 P 270.

Where husband deeded certain realty to himself and wife, with intent to create such an estate that survivor would take entire estate in fee, the deed conveyed one-half interest to wife and remainder in other half in case of his death, which remainder would be subject to any debts of the husband's estate. Dutton v. Buckley, (1926) 116 Or 661, 242 P 626.

An insurance policy construed to include a make of car not specifically mentioned therein. Whitlock v. United States Interinsurance Assn., (1932) 138 Or 383, 6 P2d 1088.

Where release agreement provided for release of all claims and demands, court could not insert provisions that release should not cover damages for slander that might have been incurred prior to its execution. Glickman v. Weston, (1932) 140 Or 117, 11 P2d 281, 12 P2d 1005.

The principal and surety upon a bond, held to have understood that the conditions of the same conform to the intent, purpose and object of the Blue Sky Law. Hyde v. Peirce & Co., (1934) 147 Or 5, 31 P2d 755.

FURTHER CITATIONS: Longfellow v. Huffman, (1910) 57 Or 338, 112 P 8; Brown v. Marion Fin. Co., (1942) 168 Or 358, 123 P2d 187; Gamet v. Coop, (1947) 182 Or 78, 185 P2d 670; McGinnis v. Keen, (1950) 189 Or 445, 221 P2d 907; Eggen v. Wetterborg, (1951) 193 Or 145, 237 P2d 970; State v. Buck, (1953) 200 Or 87, 262 P2d 495; Roberts v. Union Ins. Soc., (1958) 215 Or 183, 332 P2d 600; Arbogast v. Pilot Rock Lbr. Co., (1959) 215 Or 579, 336 P2d 329, 72 ALR2d 712; In re Swindle, (1960) 188 F Supp 601; Howes v. Sherlock, (1963) 233 Or 429, 378 P2d 713; United States Fid. & Guar. Co. v. Long, (1963) 214 F Supp 307; Oregon-Wash. Vegetable & Fruit Growers Assn. v. Sunset Packing Co., (1969) 254 Or 33, 456 P2d 1002.

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NOTES OF DECISIONS

See also cases on custom and usage under ORS 41.740.

1. Presumption that terms were "used in their primary and general acceptation"
2. Particular words and phrases
3. Evidence of "a technical, local, or otherwise peculiar signification"

1. Presumption that terms were "used in their primary and general acceptation"

If a contract is made in ordinary and popular language, to which no local or technical and peculiar meaning is attached, parol evidence is not admissible to show that in that particular case the words were used in any other than their ordinary and popular sense. Abraham v. Ore. & Calif. R. Co., (1900) 37 Or 495, 60 P 899, 82 Am St Rep 779, 64 LRA 391.

Words found in an instrument are to be interpreted and understood in their most natural and obvious meaning, unless it appears from the subject or the text that they have been used in a technical sense. Boyd v. Olcott, (1921) 102 Or 327, 363, 202 P 431.

The word "year" in a statute was interpreted to mean a calendar year. Norton v. Coos County, (1925) 113 Or 618, 233 P 864.

Words are to be given their common and ordinary meaning. A strained or unusual meaning is not presumed. Boling v. Nork, (1962) 232 Or 461; 375 P2d 548.

2. Particular words and phrases

The term "their heirs" in its ordinary meaning in an instrument refers to those individuals favored by will or by the statute of descent and distribution. Nunner v. Erickson, (1935) 151 Or 575, 51 P2d 839.

If the words "commercial purposes" and "suitable and usual sawlogs," had by usage or custom a local or particular

signification, and were so used and understood by the parties to the contract, it would have been competent for the defendant to have shown that fact. Johnson v. Hamilton, (1893) 24 Or 320, 325, 33 P 571.

A warranty that the insured had title in her name was not broken by the fact that legal title had not been conveyed to the insured where she had gone into possession under a contract of purchase. Baker v. State Ins. Co., (1897) 31 Or 41, 48 P 699, 65 Am St Rep 807.

Where a deed conveyed land "for all legitimate railroad, depot, and warehouse purposes," parol evidence of the understanding of the parties at the time the instrument was executed was not admissible to show that the words "legitimate railroad purposes" were used with a particular or special meaning. Abraham v. Ore. & Calif. R. R. Co., (1900) 37 Or 495, 60 P 899, 82 Am St Rep 779, 64 LRA 391.

Contract of employment to make "designs" of machinery for the employer, held to have been intended by parties as referring to "designs" in its ordinary and generally accepted sense, not "ornamental designs" as specified by the patent laws. Portland Iron Works v. Willett, (1907) 49 Or 245, 89 P 421, 90 P 1000.

Where owner promised to pay a real estate broker $750 of the price if the broker found a buyer ready and willing to "consummate a deal," the broker was entitled to the commission only on the actual completion and carrying out of a contract of exchange of properties with a buyer procured by the broker. Oregon Home Builders v. Montgomery Inv. Co., (1919) 94 Or 349, 184 P 487.

The words "entered in" in the constitutional provision which required that a resolution be "entered in" the journal meant that only an identifying reference of the resolution need be recorded in the journal. Boyd v. Olcott, (1921) 102 Or 327, 202 P 431.

Where a contract for the sale of lambs provided that they should be of "good size and merchantable condition" and the seller had sold his crop of lambs for the previous year to the buyer, evidence as to the sort of lambs delivered the year before was admissible. Stanfield v. Arnwine, (1921) 102 Or 289, 202 P 559.

The words "theft" and "robbery" used in an insurance policy covering an automobile included the obtaining of the automobile by a pretended purchaser paying for the same with a worthless check upon a bank in which he had no funds. Nugent v. Union Automobile Ins. Co., (1932) 140 Or 61, 13 P2d 343.

In an action upon a contract relating to horse meat scraps evidence was admissible to explain the meaning of the term "minimum 50 percent protein" and "less than 50 percent protein" used in such contract as trade terms. Hurst v. Lake & Co., (1933) 141 Or 306, 16 P2d 627, 89 ALR 1222.

An occasional or casual use of a term in an unorthodox sense by a person could not justify a court in placing that meaning upon it when interpreting his will. Chambers v. Studebaker, (1946) 180 Or 1, 175 P2d 156.

3. Evidence of "a technical, local, or otherwise peculiar signification"

The word "filtration," meaningless if taken in its literal sense, was construed to mean leakage or escape of water. Pendleton v. Saunders, (1889) 19 Or 9, 24 P 506.

Evidence is admissible to show that the terms of a written contract have a technical, local or peculiar significance. McDonald v. Supple, (1920) 96 Or 486, 190 P 315.

Particular customs or usages generally must be specially pleaded as a basis of recovery or defense, and cannot in the latter case be shown under a general issue or denial. Yreka Lbr. Co. v. Lystul-Stuveland Lbr. Co., (1921) 99 Or 291, 195 P 378.

Members of a trade or business group who have employed in their contracts trade terms are entitled to prove that fact in their litigation, and show the meaning of those terms to assist the court in the interpretation of their language. Hurst v. Lake & Co., (1933) 141 Or 306, 16 P2d 627, 89 ALR 1222.

FURTHER CITATIONS: Crowell Elevator Co. v. Kerr Gifford & Co., (1925) 114 Or 675, 236 P 1047; Everson v. Phelps, (1925) 115 Or 523, 239 P 102; Dorsey v. Ore. Motor Stages, (1948) 183 Or 494, 194 P2d 967; Schweigert v. Beneficial Standard Life Ins. Co., (1955) 204 Or 294, 282 P2d 621; Roberts v. Union Ins. Soc., (1958) 215 Or 183, 332 P2d 600; Buckler v. Hood River County, (1959) 218 Or 293, 341 P2d 555; Voden v. Yates, (1968) 252 Or 110, 447 P2d 94; Schmidt v. Bollons, (1969) 254 Or 377, 460 P2d 859.

LAW REVIEW CITATIONS: 2 OLR 187; 12 OLR 157.

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NOTES OF DECISIONS

Where there is doubt in the meaning of a contract, or any part thereof, the doubt shall be resolved in favor of the promisee and against the party who prepared the contract. **Contract of guaranty,** Loomis v. MacFarlane, (1907) 50 Or 129, 91 P 466; **to sell,** Salem King's Products Co. v. Ramp, (1921) 100 Or 329, 196 P 401; **of indemnity,** Jaloff v. United Auto Indem. Exch., (1927) 120 Or 381, 250 P 717; Zurich Gen. Acc. & Liab. Ins. Co. v. Carlton & Coast R. Co., (1930) 133 Or 398, 291 P 349; Whitlock v. United States Interinsurance Assn., (1932) 138 Or 383, 6 P2d 1088; Nugent v. Union Automobile Ins. Co., (1932) 140 Or 61, 13 P2d 343; Purcell v. Wash. Fid. Nat. Ins. Co., (1934) 146 Or 475, 38 P2d 742; Tillamook Lumbering Co. v. Liverpool & London & Globe, (1909) 175 Fed 508; **of release,** Glickman v. Weston, (1932) 140 Or 117, 11 P2d 281, 12 P2d 1005.

This section does not establish a statutory rule of construction to the effect that ambiguous provisions in insurance contracts must be construed against the insurer. I. L. Logging Co. v. Indem. Exch., (1954) 202 Or 277, 273 P2d 212, 275 P2d 226.

Surety's letter, consenting to highway contractor's assignment of sums earned to bank, was construed most favorably to bank in determining whether surety's consent was conditional. Oregon Sur. & Cas. Co. v. United States Nat. Bank, (1931) 136 Or 573, 300 P 336.

Where representatives of a company which had entered into an ambiguous contract with the city for construction of a building knew that the members of the city council understood that the contract was not intended to be an agreement imposing a general obligation on the city, the contract was construed according to the understanding of the city council. Public Market Co. v. Portland, (1943) 171 Or 522, 130 P2d 624, 138 P2d 916.

The definition of "flood (meaning rising waters)" was construed to include the rising of the ocean tide, favorable to the insured. Roberts v. Union Ins. Soc., (1958) 215 Or 183, 332 P2d 600.

FURTHER CITATIONS: Town of Pendleton v. Saunders, (1889) 19 Or 9, 24 P 506; Portland Iron Works v. Willett, (1907) 49 Or 245, 89 P 421, 90 P 1000; Pierce v. No. Pac. Ry. Co., (1928) 127 Or 461, 271 P 976, 62 ALR 644; Dorsey v. Ore. Motor Stages, (1948) 183 Or 494, 194 P2d 967; Consolidated Freightways v. Wilhelm, (1964) 238 Or 518, 395 P2d 555.

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NOTES OF DECISIONS

Handwritten clause stating sellers were to pay half of title insurance premium or bring abstract up to date prevailed over printed clause implying that sellers were to

furnish the policy at their expense. Davis v. Dunigan, (1949) 186 Or 147, 205 P2d 839.

FURTHER CITATIONS: Cordrey v. Steamship "Bee" (1922) 102 Or 636, 201 P 202; Pierce v. No. Pac. Ry. Co., (1928) 127 Or 461, 271 P 976, 62 ALR 644; Perkins v. Standard Oil Co. of Calif., (1963) 235 Or 7, 383 P2d 107, 383 P2d 1002.

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NOTES OF DECISIONS

A witness was permitted to translate a document offered in evidence which was in a foreign language without having been sworn as an interpreter. Krewson v. Purdom, (1886) 13 Or 563, 572, 11 P 281.