Chapter 43

Public Writings and their Admissibility

Chapter 43

NOTES OF DECISIONS

No person can testify as a witness unless first sworn, but this may be waived by consent of the parties. State v. Tom, (1879) 8 Or 177.

43.010

CASE CITATIONS: MacEwan v. Holm, (1961) 226 Or 27, 359 P2d 413.

ATTY. GEN. OPINIONS: Initiative petition, 1956-58, p 313; State Marine Board boat owner list, 1956-58, p 343; Attorney General findings in labor management proceedings as a public record, 1960-62, p 355; authority of agency to charge for record copying, 1966-68, p 57.

43.020

CASE CITATIONS: MacEwan v. Holm, (1961) 226 Or 27, 359 P2d 413.

ATTY. GEN. OPINIONS: Meaning of "public writing," 1954-56, p 206; initiative petition, 1956-58, p 313; hospital records of state institutions, 1958-60, p 280; Attorney General findings in labor management proceedings as a public record, 1960-62, p 355; assessment roll as a public record, 1962-64, p 155.

43.070

NOTES OF DECISIONS

The common law is the source of jurisprudence in Oregon. Cressey v. Tatom, (1881) 9 Or 541; Shively v. Bowlby, (1894) 152 US 1, 52, 14 S Ct 548, 38 L Ed 331.

43.080

NOTES OF DECISIONS

Proceedings and orders of a county court in the matter of a decedent's estate are judicial records. Russell v. Lewis, (1871) 3 Or 380; Tustin v. Gaunt, (1873) 4 Or 305.

A final decree and its exhibits brought up by the transcript on appeal to the Supreme Court constitutes a judicial record. First Nat. Bank v. Miller, (1906) 48 Or 587, 591, 87 P 892.

The judgment roll was properly admitted in evidence in a prosecution for perjury to prove the record of the judicial proceedings in which the alleged perjury was committed. State v. Stilwell, (1924) 109 Or 644, 221 P 174.

FURTHER CITATIONS: Neff v. Pennoyer, (1875) Fed Cas No. 10,083, 3 Sawy 274; Neal v. Haight, (1949) 187 Or 13, 206 P2d 1197; State v. Davis, (1952) 194 Or 248, 241 P2d 869.

43.110

NOTES OF DECISIONS

1. Oregon records
2. Certified copies
3. Parol evidence
4. Records and certificates from sister states
5. Foreign country records
6. Proof for perjury

1. Oregon records

Proceedings of probate are proved by the production of a certified copy. Jones v. Dove, (1876) 6 Or 188, 191.

A judicial record can be established by a writing the identity of which is acknowledged without objection. First Nat. Bank v. Miller, (1906) 48 Or 587, 87 P 892.

Proof of a judgment of disbarment should be made in accordance with this provision. Mannix v. Portland Telegram, (1933) 144 Or 172, 23 P2d 138.

2. Certified copies

The certificate of the clerk is not evidence of the character or legal effect of the paper to which it is appended, but only that it is a true copy of the original; as to what it is, it must speak for itself. Alexander v. Knox, (1879) Fed Cas No. 170, 6 Sawy 54.

A certified copy of a certified copy is not evidence, unless expressly made so by statute. Goddard v. Parker, (1882) 10 Or 102.

In a prosecution for murder, an uncertified paper, being the deputy county clerk's memorandum, purporting to show that defendant, when arraigned, stated his true name to be another than that under which he was indicted, was incompetent. State v. Louie Hing, (1915) 77 Or 462, 464, 151 P 706.

Photostatic copy of an assignment, bearing a certificate signed by the court clerk and the seal of the court, was admissible. Hult v. Ebinger, (1960) 222 Or 169, 352 P2d 583.

3. Parol evidence

The existence of a judgment or execution cannot be proved by parol, but only in the statutory manner. Bowick v. Miller, (1891) 21 Or 25, 27, 26 P 861.

Parol evidence is admissible to supplement the records of a county court when it is transacting county business. Stout v. Yamhill County, (1897) 31 Or 314, 319, 51 P 442.

While the record of a county court is the best evidence of the delivery and acceptance of a sheriff's bond, yet, where the proper foundation is laid, such delivery and acceptance may be shown by parol testimony. Baker County v. Huntington, (1905) 46 Or 275, 280, 79 P 187.

4. Records and certificates from sister states

Where the judge's certificate to a transcript of a judgment did not show that he was the sole judge, or the chief judge or presiding magistrate of the court, such transcript was not rendered inadmissible, unless it affirmatively appeared from the record that such court was composed of

more than one judge or magistrate. Keyes v. Mooney, (1886) 13 Or 179, 9 P 400.

Where a judge's certificate bore a date anterior to the date of the attestation by the clerk, but referred to the latter as then in existence, it was presumed that the discrepancy was a clerical error, and should be disregarded. Id.

5. Foreign country records

A copy of the record of a foreign probate of a will was not properly authenticated so as to be admissible in evidence. In re Clayson's Will, (1893) 24 Or 542, 34 P 358.

6. Proof for perjury

The cause and issue wherein the perjury was committed must be proved by the record, if any was made; and where the perjury is assigned to have been committed in the evidence given in the cause, it is still necessary to produce the record. State v. Kalyton, (1896) 29 Or 375, 379, 45 P 756.

The judgment roll is properly admitted in evidence in a prosecution for perjury to prove the record of the judicial proceedings in which the alleged perjury was committed. State v. Stilwell, (1924) 109 Or 643, 221 P 174.

FURTHER CITATIONS: Montague v. Schieffelin, (1905) 46 Or 413, 80 P 654; Peake v. Peake, (1965) 242 Or 386, 408 P2d 206; State v. Anderson, (1965) 242 Or 186, 408 P2d 212.

LAW REVIEW CITATIONS: 42 OLR 232, 254.

43.120

LAW REVIEW CITATIONS: 42 OLR 254.

43.130

NOTES OF DECISIONS

1. Judgments and decrees

A judgment or decree, rendered by a court having jurisdiction of the parties and of the subject-matter, although erroneous, is conclusive on the parties until reversed by some direct proceedings. Crabill v. Crabill, (1892) 22 Or 588, 30 P 320; Richards v. Page Inv. Co., (1924) 112 Or 507, 534, 228 P 937.

An interlocutory order, does not bind the parties. Bybee v. Summers, (1873) 4 Or 354.

Decree from which appeal has been taken is not admissible to bind parties. Trotter v. Town of Stayton, (1904) 45 Or 301, 77 P 395.

A determination in a lunacy inquisition finding the respondent insane is a judgment. In re Sneddon, (1915) 74 Or 586, 589, 144 P 676.

A judgment rendered in the federal court is conclusive as to all matters actually determined by the court. Sitton v Peyree, (1926) 117 Or 107, 118, 241 P 62, 242 P 1112.

A former adjudication is the decision of the court in a prior suit between the same parties involving the same facts and rendered upon the merits. Fletcher v. So. Ore. Truck Co., (1930) 132 Or 338, 285 P 813.

The doctrine of res judicata always applies where the parties are the same and a subsequent action is sought to be maintained on the same claim or demand. Grant v. Yok, (1963) 233 Or 491, 378 P2d 962.

An order for sale of attached property was no bar to an action for recovery of property exempt from execution and claimed as such. Berry v. Charlton, (1882) 10 Or 362.

A judgment and order for sale of attached homestead property was not a conclusive adjudication that it was not exempt from execution in a recovery action by the homesteader. Schultz v. Levy, (1898) 33 Or 373, 54 P 184.

County court proceedings for organization of irrigation district was conclusive. Harney Valley Irr. Dist. v. Weittenhiller, (1921) 101 Or 1, 198 P 1093.

Where court had jurisdiction over the parties, cause and thing, finding that sale and order confirming sale were void, when voidness appeared on the face of the order, was conclusive on the parties in the absence of appeal and could not be attacked collaterally. Clawson v. Prouty, (1959) 215 Or 244, 333 P2d 1104.

(1) As a bar. An issue once determined in a court of competent jurisdiction cannot be again litigated, and may be opposed as an effectual bar to any further litigation of the same matter by parties and privies. Glenn v. Savage, (1887) 14 Or 567, 573, 13 P 442; Applegate v. Dowell, (1887) 15 Or 513, 16 P 651; Caseday v. Lindstrom, (1904) 44 Or 309, 314, 75 P 222; Spence v. Hull, (1915) 75 Or 267, 271, 146 P 95, 98.

A difference exists between the effect of a judgment as a bar or estoppel against the prosecution of a second action on the same claim or demand, and its effect in another action between the same parties, upon a different grounds. Applegate v. Dowell, (1887) 15 Or 513, 16 P 651.

For a judgment to be a bar to a second action with the same parties upon a different claim, it is essential that the issue in the second action was a material issue in the first action. Id.

An acquittal on one count charging statutory rape is not res judicata on a second count arising out of the same occasion charging contributing to the delinquency of a minor. State v. Hoffman, (1963) 236 Or 98, 385 P2d 741.

Collateral estoppel is established when it is shown that the issues sought to be litigated have already been litigated and reduced to judgment in an earlier action between the same parties or their privies. Carter v. Ricker, (1965) 241 Or 342, 405 P2d 854.

A decree canceling a deed did not bar a suit to quiet title even though a decree quieting title was requested in the first suit. Harvey v. Getchell, (1950) 190 Or 205, 225 P2d 391.

The plaintiff was estopped to relitigate the case. Betker v. Oppel, (1966) 243 Or 359, 413 P2d 426.

(2) Necessity of jurisdiction. The court must have jurisdiction to make a decree binding. Dowell v. Applegate, (1893) 24 Or 440, 33 P 937; State v. Lavery, (1897) 31 Or 77, 82, 49 P 852.

The consent of the parties does not confer jurisdiction. Applegate v. Dowell, (1887) 15 Or 513, 16 P 651.

A judgment without citation to appear and opportunity to be heard lacks all the attributes of a judical determination. Furgeson v. Jones, (1888) 17 Or 204, 20 P 842, 11 Am St Rep 808, 3 LRA 620.

A court rendering a judgment void on its face has the

inherent power, even on its own motion, to set aside the judgment at any time. White v. Ladd, (1902) 41 Or 324, 326, 68 P 739, 93 Am St Rep 732.

(3) On the merits. The conclusive element in a final order that gives rise to an estoppel is a decision on the merits. Hoover v. King, (1903) 43 Or 281, 72 P 880, 99 Am St Rep 754, 65 LRA 790.

A decision on a motion to quash improperly made by one whose property had been seized under a writ against another, is not conclusive in a subsequent appropriate proceeding to determine title. Holmes v. Wolfard, (1905) 47 Or 93, 97, 81 P 819.

A judgment not on the merits is no bar to another action or suit on the same issues. Spence v. Hull, (1915) 75 Or 267, 271, 146 P 95, 98.

(4) Defaults and dismissals. A judgment for want of an answer is conclusive on all matter well pleaded, and necessary to such judgment. Oregon Ry. v. Ore. Ry. & Nav. Co., (1886) 28 Fed 505, 508.

A dismissal of plaintiff's action, without trial and without evidence does not support a plea of former adjudication. Hughes v. Walker, (1887) 14 Or 481, 483, 13 P 450.

Dismissal of a replevin action because it would not lie for an undivided interest is not a bar to an action for trover. Huffman v. Knight, (1900) 36 Or 581, 583, 60 P 207.

A decree dismissing a bill charging fraud in procuring a note and asking for an accounting is conclusive. Sanford v. Hanan, (1916) 80 Or 266, 156 P 1040.

A judgment against a husband and wife in a mechanic's lien foreclosure suit was conclusive where the court acquired jurisdiction over them and the property involved, and where they did not appear in the proceeding or contest the suit. Winters v. Falls Lbr. Co., (1934) 146 Or 592, 31 P2d 177.

(5) "In respect to personal, political, or legal conditions." A person in custody under a judgment convicting and sentencing him cannot be delivered up to another state until legally discharged. Carpenter v. Lord, (1918) 88 Or 128, 171 P 577, LRA 1918D, 674.

The adjudication of insanity is conclusive as to the subject's condition at that time. State v. Garver, (1950) 190 Or 291, 225 P2d 771, 27 ALR2d 105.

(6) Proof. In an action for trespass where the defendant pleads liberum tenementum, and there is a judgment for the plaintiff in another action between the same parties, where said judgment is relied upon as an estoppel, it is for the party setting up the estoppel to show by evidence in what part of the close the trespass was committed, and thus apply the issue and judgment to the premises now in controversy. Abraham v. Owens, (1891) 20 Or 511, 26 P 1112.

Extrinsic proof and parol evidence is inadmissible to explain what was formerly adjudicated in a prior decree respecting matters not there in issue. Taylor v. Taylor, (1909) 54 Or 560, 103 P 524.

2. Scope of adjudication

The matter adjudicated, to become, as a plea, a bar, or, as conclusive evidence, must have been directly in issue, and not merely collaterally litigated; it must be a fact in issue, as distinct from a fact in controversy. Hill v. Cooper, (1876) 6 Or 181; Caseday v. Lindstrom, (1904) 44 Or 309, 314, 75 P 222.

Judgments and decrees are conclusive as to what was actually litigated. Hall v. Zeller, (1889) 17 Or 381, 21 P 192; Finley v. Houser, (1892) 22 Or 562, 30 P 494; Belle v. Brown, (1900) 37 Or 588, 592, 61 P 1024.

A judgment or decree is conclusive as to every matter actually litigated, and, with certain exceptions, as to every matter which might have been litigated or decided as an incident thereof. Taylor v. Taylor, (1909) 54 Or 560, 103 P 524.

Equity will not set aside decree confirming execution sale because a judgment creditor paid an excessive sum as a result of miscalculation as to the balance due on the judgment. Churchill v. Meade, (1919) 92 Or 626, 182 P 368.

(1) Determination. If records are lost, it will be presumed that the decree follows the allegations and prayer of the complaint. State v. Lavery, (1897) 31 Or 77, 81, 49 P 852.

Findings of fact leading to a decree, affirmed by the supreme court, in a prior action between the parties, could not be considered in a subsequent proceeding, so far as they are in any manner inconsistent with the decree affirmed. Taylor v. Taylor, (1909) 54 Or 560, 103 P 524, 525.

Where a decree, affirmed on a prior appeal, was ambiguous, or failed to show on which of several issues it was founded, the opinion of the supreme court may be examined to determine the point actually decided. Id.

(2) Matters that might have been litigated. Judgments and decrees are conclusive not only as to what was actually litigated, but also as to what might have been properly litigated in the proceeding, unless the failure to urge the point in question was caused by the adversary's fraud, and was without negligence of the losing party. Neil v. Tolman, (1885) 12 Or 289, 7 P 103; Belle v. Brown, (1900) 37 Or 588, 592, 61 P 1024; White v. Ladd, (1902) 41 Or 324, 332, 68 P 739, 93 Am St Rep 732; Reid v. Stanley, (1912) 62 Or 151, 156, 124 P 646; Spence v. Hull, (1915) 75 Or 267, 271, 146 P 95; United States Fid. Co. v. Martin, (1915) 77 Or 369, 375, 149 P 1023; Spain v. Oregon-Wash. R. & Nav. Co., (1915) 78 Or 355, 364, 153 P 470, Ann Cas 1917E, 1104.

Where the second action is upon a different claim, the former judgment will operate as an estoppel only against those matters actually litigated. Applegate v. Dowell, (1887) 15 Or 513, 16 P 651; La Follett v. Mitchell, (1903) 42 Or 465, 69 P 916, 95 Am St Rep 780; Caseday v. Lindstrom, (1904) 44 Or 309, 314, 75 P 222, Ruckman v. Union Ry., (1904) 45 Or 578, 581, 78 P 748, 69 LRA 480; Roots v. Boring Junc. Lbr. Co., (1907) 50 Or 298, 319, 92 P 811, 94 P 182; Taylor v. Taylor, (1909) 54 Or 560, 103 P 524.

A judgment on the merits is a bar to a subsequent proceeding between the parties on the same claim or cause of suit, not only as to the matter actually determined, but also as to everything else which the parties might have litigated, and had decided as an incident to or essentially connected therewith, either as a claim or defense. La Follett v. Mitchell, (1903) 42 Or 465, 69 P 916, 95 Am St Rep 780; Roots v. Boring Junc. Lbr. Co., (1907) 50 Or 298, 319, 92 P 811, 94 P 182; Taylor v. Taylor, (1909) 54 Or 560, 103 P 524; Spence v. Hull, (1915) 75 Or 267, 146 P 95, 98; Smith v. Boothe, (1918) 90 Or 360, 175 P 709, 176 P 793.

The decree of a court of general jurisdiction is unimpeachable in a collateral proceeding. Claypool v. O'Neill, (1913) 65 Or 511, 133 P 349.

(3) Matters neither decided nor in issue. A judgment in forcible entry or detainer does not bar a suit to cancel a deed to quiet title or remove cloud. Burns v. Kennedy, (1907) 49 Or 588, 590, 90 P 1102.

The foreclosure of a contract of exchange of property for failure to pay a balance due thereon does not prevent bringing an action for fraudulent representations in making the exchange. Dean v. Cole, (1922) 103 Or 570, 204 P 952.

A decree in a former suit for specific performance, showing on its face only that the equities were in favor of defendant, is not res adjudicata respecting the existence of a contract or the performance of services alleged in a later action in quantum meruit. Wagner v. Savage, (1952) 195 Or 128, 244 P2d 161. **Distinguished in** Jarvy v. Mowrey, (1963) 235 Or 579, 385 P2d 336.

There is no prior adjudication of issues submitted in a suit to determine water rights by a former decree which expressly omitted to decide such issues. Haney v. Neace-Stark Co., (1923) 109 Or 93, 216 P 757, 219 P 190.

A decree in a suit to enjoin a diversion of water is not

a bar to an action for damages caused by the diversion, no damages having been asked for in the injunction suit. Norwood v. E. Ore. Land Co., (1932) 139 Or 25, 5 P2d 1057, 7 P2d 996.

In a former suit, which was dismissed, for specific performance of an oral agreement to compensate plaintiff by giving her all the property owned by defendant at his death, proof of services, alone, would not determine the matter so that plaintiff could not proceed at law in quantum meruit for the reasonable value of services performed. Wagner v. Savage, (1952) 195 Or 128, 244 P2d 161.

(4) Defenses and counterclaims. A judgment is conclusive as to all defenses arising prior to its rendition, but it does not conclude a defense which did not exist at the time. Ward v. Warren, (1903) 44 Or 102, 105, 74 P 482.

A justice's judgment does not conclude a defendant as to defenses which he could not interpose in that court. McMahan v. Whelan, (1904) 44 Or 402, 75 P 715.

Defendant's failure to present certain facts by cross-bill, as an equitable defense to a law action, does not estop him from subsequently asserting the same facts as an independent suit. Clark v. Hindman, (1905) 46 Or 67, 70, 79 P 56.

An equitable defense against the cause of action on which judgment was rendered, if litigated, is concluded by the judgment. Taylor v. Winn, (1922) 104 Or 383, 207 P 1096.

The principle can apply to matters pleaded originally as a defense when used subsequently as a basis for affirmative relief. Jarvy v. Mowrey, (1963) 235 Or 579, 385 P2d 336.

Where a railway failed to compel cancellation of certain bonds, it was estopped in another suit by a third person, who was foreclosing the mortgage securing the bonds, to set up the prior suit or other defenses against the bonds which existed during the former suit but were not urged. Ruckman v. Union Ry., (1904) 45 Or 578, 78 P 748, 69 LRA 480.

A federal court decree dismissing a bill for cancellation of a mortgage did not bar a later suit to foreclose because of failure to assert a counterclaim for such foreclosure when there was no legal requirement to interpose such counterclaim. Scroggin v. Beckett, (1927) 120 Or 687, 252 P 948.

3. Contracts

A decision in a former action between the same parties for a breach of contract is res judicata in a subsequent action for a different breach in which issues related to that decided were raised. Krebs Hop Co. v. Livesley, (1909) 55 Or 227, 104 P 3.

Failure to prove an express contract will not always bar an action upon an implied contract where no court has ever passed upon the facts necessary to prove the implied obligation. Jarvy v. Mowrey, (1963) 235 Or 579, 385 P2d 336.

4. Property interests

A party is not estopped from setting up an after-acquired title by reason of having litigated for the title to property which he did not own. Knott v. Stephens, (1874) 5 Or 235.

Where the location of a boundary line has been settled in a former suit, and not the title to the strip of land lying between the different lines, it is no bar to a subsequent suit to quiet title. King v. Brigham, (1892) 23 Or 262, 280, 31 P 601, 18 LRA 361.

A decree of a circuit court declaring the ownership of money is conclusive in the county court. Re Mannix Estate, (1905) 146 Or 187, 29 P2d 364.

A partition decree is treated as an adjudication. French v. Goin, (1915) 75 Or 255, 264, 146 P 91, 94.

5. Wills

Where a county court has jurisdiction and admits a will to probate, the execution by the testator cannot be called in question. Jones v. Dove, (1876) 6 Or 188, 191.

A county court in probate matters is a court of general jurisdiction and its decrees import verity. In re Slate's Estate, (1902) 40 Or 349, 68 P 399.

A county court's probate decree for a resident testator of that county is conclusive in a collateral proceeding to set aside a conveyance by the testator. Sappingfield v. Sappingfield, (1913) 67 Or 156, 159, 135 P 333.

A judgment or decree probating a will is conclusive until vacated by appeal or impeached in a direct proceeding and is not subject to collateral attack. Thomas Kay Woolen Mill Co. v. Sprague, (1919) 259 Fed 338.

Judgments and decrees of probate courts are final and conclusive upon all parties before the court, including creditors. Lothstein v. Fitzpatrick, (1943) 171 Or 648, 138 P2d 919.

Since state court had not adjudicated validity of testamentary trust provisions, federal court did not undertake construction and declaration of their validity. Jackson v. United States Nat. Bank, (1957) 153 F Supp 104.

Absent an appeal, the decision of the district court in probate was final and res judicata on identical issues. In re Wheeler Estate, (1964) 238 Or 306, 393 P2d 196.

6. Corporations

A judgment for defendant in an action by a receiver of a corporation against an alleged stock subscriber, involving whether or not he was a subscriber at the date of the attempted organization, is not an estoppel against the receiver in a subsequent action to recover an unpaid subscription from another alleged stockholder. Nickum v. Burckhardt, (1897) 30 Or 464, 468, 47 P 788, 48 P 474, 60 Am St Rep 822.

7. Divorce and custody

An alimony decree is not res judicata so as to preclude subsequent modification. Henderson v. Henderson, (1900) 37 Or 141, 60 P 597, 61 P 136, 82 Am St Rep 741, 48 LRA 766.

An adjudication that the plaintiff was not without fault is conclusive in a subsequent suit for separate maintenance. Matlock v. Matlock, (1917) 86 Or 78, 167 P 311.

An order refusing to modify a custody decree based on matters occurring after divorce is reviewable. McKissick v. McKissick, (1919) 93 Or 644, 174 P 721, 184 P 272.

A decree giving a wife half of property bars her subsequent assertion of sole ownership. Shaveland v. Shaveland, (1924) 112 Or 173, 228 P 1090.

A divorce decree, adjudicating the custody of a child, is final so long as conditions then existing remain unchanged. Rasmussen v. Rasmussen, (1924) 113 Or 146, 231 P 964.

8. Parties

(1) Identity. "Privity" includes those who control an action although not parties to it; those whose interests are represented by a party to the action; and successors in interest to those having derivative claims. Wolff v. Du Puis, (1963) 233 Or 317, 378 P2d 707; Carter v. Ricker, (1965) 241 Or 342, 405 P2d 854.

In an action for wrongful death, an indictment and judgment of conviction for the killing of plaintiff's intestate is not admissible. Miller v. So. Pac. Co., (1891) 20 Or 285, 306, 26 P 70.

The judgment must be between the same parties in order to be binding in a subsequent proceeding. Dowell v. Applegate, (1893) 24 Or 440, 33 P 937.

A judgment or decree in personam or quasi in rem in a suit between A. and B. cannot be introduced in a suit between C. and B. as an estoppel against B. Morrison v. Holladay, (1895) 27 Or 175, 181, 39 P 1100.

To be res judicata, there must be an identity of real parties who have interests to be affected by the decision. Neppach v. Jones, (1895) 28 Or 286, 39 P 999, 42 P 519.

A judgment or decree to be an estoppel barring subse-

quent proceedings, must have been between the same parties, or others in privity with them. Parkersville Drainage Dist. v. Wattier, (1906) 48 Or 332, 336, 86 P 775.

Privity, in the collateral estoppel context, does not necessarily exist between a husband and wife. Wolff v. Du Puis, (1963) 233 Or 317, 378 P2d 707.

It was error to apply the doctrine of collateral estoppel to a plaintiff whose interest had not been represented in the former action. McFadden v. McFadden, (1964) 239 Or 76, 396 P2d 202. But see Bahler v. Fletcher, (1970) 257 Or 1, 474 P2d 329.

(2) Parties or persons concluded. A decree in no manner affects strangers. Savage v. McCorkle, (1888) 17 Or 42, 49, 21 P 444; Peacock v. Kirkland, (1915) 74 Or 279, 285, 145 P 281.

One not a party to a foreclosure suit may attack the mortgage as though such decree had not been entered. Landigan v. Mayer, (1897) 32 Or 245, 253, 51 P 649, 67 Am St Rep 521; Crow v. Crow, (1914) 70 Or 534, 546, 139 P 854.

A decree entered on stipulation of a guardian entered into by way of compromise, with consent of court, was binding on the minor to the same extent and has the same effect as if he were of full age. Savage v. McCorkle, (1888) 17 Or 42, 48, 21 P 444.

An assignee who acquires title to the subject-matter of litigation after the filing of the complaint, takes subject to the fortunes of litigation, and is bound by the proceedings against his assignor. Possom v. Guar. Loan Assn., (1903) 44 Or 106, 74 P 923.

A decree fixing the priority of parties to waters, entered prior to the water code, was conclusive not only on the parties, but on the successors in interest. Claypool v. O'Neill, (1913) 65 Or 511, 133 P 349.

A decree in a suit to quiet title that the plaintiff is the owner in fee simple was not evidence of title in her as against one holding title under conveyance by her. Elwert v. Reid, (1914) 70 Or 318, 139 P 918, 141 P 540.

A decree setting aside as fraudulent as to plaintiff, a conveyance between codefendants in a suit in which the codefendants joined in the answer and agreed in their evidence was not competent evidence in a subsequent suit between the codefendants. Crow v. Crow, (1914) 70 Or 534, 139 P 854.

A decree between E. and R. denying E. an interest in land estopped E. in a suit to enjoin defendant city from paying R. the purchase price. Elwert v. Knapp, (1916) 81 Or 525, 159 P 1027.

FURTHER CITATIONS: Walker v. Goldsmith, (1886) 14 Or 125, 12 P 537; State v. O'Day, (1902) 41 Or 495, 69 P 542; Ex parte Bowers, (1915) 78 Or 390, 153 P 412; Merges v. Merges (1919) 94 Or 246, 186 P 36; In re Water Rights on Grande Ronde River, (1925) 113 Or 211, 232 P 626; Woodburn Lodge v. Wilson, (1934) 148 Or 150, 34 P2d 611; Hendrickson v. Hendrickson, (1961) 225 Or 398, 358 P2d 507; Raz v. Mills, (1963) 233 Or 452, 378 P2d 959; Oregon Farm Bureau v. Thompson, (1963) 235 Or 162, 378 P2d 563; Ladd v. Gen. Ins. Co., (1963) 236 Or 260, 387 P2d 572; Van Natta v. Columbia County, (1963) 236 Or 214, 388 P2d 18; Smith v. McMahon, (1964) 236 Or 310, 388 P2d 280; Payne v. Griffin, (1964) 239 Or 91, 396 P2d 573; Corkum v. Lenske, (1964) 239 Or 290, 397 P2d 542; Hendricks v. Botten, (1965) 241 Or 118, 404 P2d 242; Henderson v. Morey, (1965) 241 Or 164, 405 P2d 359; Mittleman v. State Tax Comm., (1965) 2 OTR 105; Swint v. Brugger, (1966) 243 Or 473, 414 P2d 433; Williams v. Farmers Mut. of Enumclaw, (1967) 245 Or 557, 423 P2d 518; Reese v. Maddox, (1967) 246 Or 53, 423 P2d 948.

LAW REVIEW CITATIONS: 13 OLR 346.

43.150

NOTES OF DECISIONS

The identity of parties requirement was met. Western Baptist Home Mission Bd. v. Griggs, (1967) 248 Or 204, 433 P2d 252.

FURTHER CITATIONS: Jarvis v. Indem. Ins. Co., (1961) 227 Or 508, 363 P2d 740.

43.160

NOTES OF DECISIONS

1. In general
2. In civil cases
3. In criminal cases

1. In general

Judgment not based upon the merits of an action is no bar to another action or suit on the same issues. Spence v. Hull, (1915) 75 Or 267, 146 P 95.

A decree not res judicata as to a claim for damages is not available as a counterclaim in equity. Gamble v. Menefee Lbr. Co., (1934) 149 Or 79, 39 P2d 667.

The burden to prove res judicata or collateral estoppel is on the estoppel asserter. Jarvis v. Indem. Ins. Co., (1961) 227 Or 508, 363 P2d 740.

The relief granted must necessarily conform to the pleadings and proof. Id.

In applying the doctrine of collateral estoppel, there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action and there must have been a full and fair opportunity to contest the decision now said to be controlling. Bahler v. Fletcher, (1970) 257 Or 1, 474 P2d 329.

2. In civil cases

The doctrine of res judicata applies not only to what is actually litigated but also to all matters within the issues of the case which could or should have been urged to sustain or defeat the rights, title or interests adjudicated. Willamette Title Co. v. Northern, (1961) 229 Or 1, 365 P2d 1065; Jarvy v. Mowrey, (1963) 235 Or 579, 385 P2d 336.

A prebankruptcy state court decision adjudging title in the about-to-be bankrupt's creditor is not res judicata as to the trustee later asserting a preference in the transfer. Dudley v. Dickie, (1960) 281 F2d 360.

If the earlier action rested upon a fact fatal to recovery in the later action, the latter cannot be successfully maintained. Jarvis v. Idem. Ins. Co., (1961) 227 Or 508, 363 P2d 740.

If the pleadings only, and not the transcript, supporting the former judgment, are introduced, the pleadings in the absence of conflicting evidence are conclusive. Id.

Failure to prove agency relationship between plaintiff and defendant as a defense in a former case for conversion is not binding on plaintiff in an action to indemnify. Blair v. United Fin. Co., (1961) 228 Or 632, 365 P2d 1077.

In determining whether certain facts were adjudicated in the first case, it is proper and often necessary to examine the evidence in that case and not merely the judgment order and pleadings. Burnett v. W. Pac. Ins. Co., (1970) 255 Or 547, 469 P2d 602.

Judgment in a suit by the assignee of one of two obligees in a bond for the conveyance of real estate was not a bar to a subsequent suit for specific performance between the same parties. Knott v. Stephens, (1874) 5 Or 235.

A judgment on demurrer in an action for rent did not conclude the parties as to the authority of the corporate officers to execute the lease where that matter was not adjudicated. Oregon Ry. v. Ore. R. & Nav. Co., (1886) 28 Fed 505.

A judgment of dismissal in ejectment does not conclude title where the question of title was not adjudicated. Hoover v. King, (1903) 43 Or 281, 72 P 880, 99 Am St Rep 754, 65 LRA 790.

Where rights and title to a crop grown on disputed premises was not in issue in divorce proceedings, the divorced parties are not concluded as to such matters. Taylor v. Taylor, (1909) 54 Or 560, 108 P 524.

Where a mortgagee of land was not made a party in an action to replevy a building as personalty, the mortgagee's paramount right to have the building remain on the land could not be adjudicated. Lees v. Hobson, (1918) 90 Or 248, 176 P 196.

An order in a bankruptcy proceeding setting aside a homestead exemption was res judicata of the issue of the homestead in a subsequent proceeding involving the parties and their privies. Allison v. Breneman, (1927) 121 Or 102, 254 P 201.

A decree canceling a deed did not bar a suit to quiet title even though a decree quieting title was requested in the first suit. Harvey v. Getchell, (1950) 190 Or 205, 225 P2d 391.

A decree of the trial court in a former suit for specific performance showing only on its face that the equities were in favor of the defendants and that plaintiff was not entitled to recover, is not res adjudicata respecting the existence or nonexistence of the contract nor as to the performance of services she alleged in her later action in quantum meruit for the reasonable value of services performed. Wagner v. Savage, (1952) 195 Or 128, 244 P2d 161.

Where court had jurisdiction over the parties, cause and thing, finding that sale and order confirming sale were void, when voidness appeared on the face of the order, was conclusive on the parties in the absence of appeal and could not be attacked collaterally. Clawson v. Prouty, (1959) 215 Or 244, 333 P2d 1104.

3. In criminal cases

The doctrine of res judicata or estoppel by judgment is applicable in criminal cases. State v. Dewey, (1956) 206 Or 496, 292 P2d 799; Western Baptist Home Mission Bd. v. Griggs, (1967) 248 Or 204, 433 P2d 252.

Where the second criminal prosecution is for another offense the previous judgment is conclusive only as to those matters which were in fact in issue and actually or necessarily adjudicated. State v. Dewey, (1956) 206 Or 496, 292 P2d 799; State v. George, (1969) 253 Or 458, 455 P2d 609; State v. Harp, (1971) 92 Or App Adv Sh 1396, 485 P2d 1123.

FURTHER CITATIONS: Finley v. Houser, (1892) 22 Or 562, 30 P 494; Toy v. Gong, (1918) 87 Or 454, 170 P 936; Rowe v. Rowe, (1943) 172 Or 293, 141 P2d 832; Kelley v. Kelley, (1948) 183 Or 169, 191 P2d 656; Fitch v. Cornell, (1870) Fed Cas No. 4,834, 1 Sawy 156; Kelley v. Mallory, (1954) 202 Or 690, 277 P2d 767; State v. Thomas, (1967) 248 Or 283, 433 P2d 814; Fleming v. Wineberg, (1969) 253 Or 472, 455 P2d 600.

LAW REVIEW CITATIONS: 2 WLJ 86-89; 7 WLJ 151-167.

43.170

LAW REVIEW CITATIONS: 42 OLR 236.

43.180

NOTES OF DECISIONS

A memorandum of a sister-state judgment cannot be effectively recorded under a lien docket. De Vall v. De Vall, (1910) 57 Or 128, 133, 109 P 755, 110 P 705.

A foreign divorce decree which is subject to modification is not entitled to full faith and credit. Rowe v. Rowe, (1915) 76 Or 491, 149 P 533. **Compare with** Picker v. Vollenhover, (1955) 206 Or 45, 290 P2d 789.

A judgment recovered in another state by an administrator for defendant's refusal to deliver intestate's funds and securities could be made the basis of a cause of action. Reed v. Hollister, (1920) 95 Or 656, 188 P 170.

A money decree rendered in a sister state for an accounting of decedent's property is conclusive here. Id.

A judgment of a sister state rendered by a court having jurisdiction may be impeached in Oregon by evidence of want of jurisdiction, collusion or fraud; the force and effect to be given to it is determined by the U.S. Const. Art. IV, §1, and Acts of Congress. Id.

A sister state divorce decree will be considered final as to all unpaid alimony and support money. Cousineau v. Cousineau, (1936) 155 Or 184, 63 P2d 897, 109 ALR 643.

Where a domiciliary executor also administered assets in a sister state and submitted a claim for attorney fees, the objection to such allowance for services claimed rendered in that sister state was precluded. Re Prince Estate, (1926) 118 Or 210, 221 P 554, 246 P 713.

A California interlocutory divorce decree providing for a monthly allowance to plaintiff until her remarriage was effective in Oregon. Cogswell v. Cogswell, (1946) 178 Or 417, 167 P2d 324.

FURTHER CITATIONS: Pacific Lbr. Co. v. Prescott, (1902) 40 Or 374, 385, 67 P 207, 416; United States Fid. Co. v. Martin, (1915) 77 Or 369, 382, 149 P 1023; Lantis v. Lantis, (1964) 239 Or 126, 396 P2d 755.

LAW REVIEW CITATIONS: 17 OLR 244.

43.190

NOTES OF DECISIONS

A collusive and fraudulent foreign judgment by default based on a similar Oregon judgment is not res judicata. May v. Roberts, (1930) 133 Or 643, 286 P 546.

In an action on a foreign judgment, the only question to be tried was the validity of the process of the foreign court; the question of liability on the original case was not involved. Foshier v. Narver, (1893) 24 Or 441, 446, 34 P 21, 41 Am St Rep 874.

LAW REVIEW CITATIONS: 13 OLR 346.

43.220

NOTES OF DECISIONS

Orders and judgments of a county court in estate matters are conclusive where want of jurisdiction does not appear on the record. Tustin v. Gaunt, (1873) 4 Or 305.

Decrees of federal courts are not open to collateral attack unless it affirmatively appears by the record that they had no jurisdiction. Dowell v. Applegate, (1893) 24 Or 440, 33 P 937.

Fictitious court proceedings by which land of an infant is transferred to a mortgagee may be collaterally attacked in a suit to foreclose the mortgage. Conklin v. La Dow, (1898) 33 Or 354, 360, 54 P 218.

Decrees of county courts in probate matters cannot be collaterally attacked except for want of jurisdiction apparent on the face of the record. In re Slate's Estate, (1902) 40 Or 349, 351, 68 P 399.

Jurisdiction over the person is conclusively presumed if there is a recital of due service in the judgment. Knapp v. Wallace, (1907) 50 Or 348, 353, 92 P 1054, 126 Am St Rep 742.

Where court had jurisdiction over the parties, cause and thing, finding that sale and order confirming sale were void, when voidness appeared on the face of the order, was

conclusive on the parties in the absence of appeal and could not be attacked collaterally. Clawson v. Prouty, (1959) 215 Or 244, 333 P2d 1104.

FURTHER CITATIONS: Russell v. Lewis, (1871) 3 Or 380; Huffman v. Huffman, (1906) 47 Or 610, 86 P 593, 114 Am St Rep 943; Bowers v. Grant, (1915) 78 Or 390, 153 P 412; Reed v. Hollister, (1923) 106 Or 407, 212 P 367.

LAW REVIEW CITATIONS: 13 OLR 346, 17 OLR 244.

43.310

NOTES OF DECISIONS

To prove the existence of a foreign corporation, the law authorizing its incorporation should be produced; it is sufficient to prove it by a book of the statutes of such other state which purports on its face to be published by the authority of such state. State v. Savage, (1899) 36 Or 191, 213, 60 P 610, 61 P 1128; Law Trust Socy. v. Hogue, (1900) 37 Or 544, 556, 62 P 380, 63 P 690.

Before the Uniform Judicial Notice of Foreign Laws Act the courts presumed that the common law prevailed in other states, except if it were shown to have been changed by statute. Cressey v. Tatom, (1881) 9 Or 541.

A pamphlet purporting to have been printed by authority of a foreign government, containing a complete statute, was not objectionable because it was not a book containing all the statutes of the country. State v. McDonald, (1910) 55 Or 419, 103 P 512, 104 P 967, 968, 106 P 444.

FURTHER CITATIONS: State v. Anderson, (1965) 242 Or 186, 408 P2d 212.

43.320

NOTES OF DECISIONS

The unwritten law of a foreign country must be shown by the oral testimony of witnesses skilled therein, or the published reports of the decisions of such country, and not by historical works. State v. Looke, (1879) 7 Or 55.

A party relying upon the law of another state must plead it, and then allege such facts to bring the case within such law. Balfour v. Davis, (1886) 14 Or 47, 12 P 89.

LAW REVIEW CITATIONS: 17 OLR 259.

43.330

NOTES OF DECISIONS

The statute law of a foreign country may be shown by books of acknowledged or proven reputation or credit. Dundee Mtg. & Trust Inc. Co. v. Cooper, (1886) 26 Fed 665.

The word "certified" in subsection (8) means certified according to law of the place recorded. State v. McDonald, (1910) 55 Or 419, 445, 103 P 512, 104 P 967, 106 P 444.

Public records when properly certified are evidence not only of the main fact but of additional or collateral facts required to be set forth. Id.

The testimony of a credible witness, having ordinary means of information, that a certain publication was commonly received as a true copy of a statute in the country of its enactment was satisfactory evidence of its existence. Dundee Mtg. & Trust Inv. Co. v. Cooper, (1886) 26 Fed 665.

The certificate of the city recorder that he had not annexed a copy of a certain ordinance because he could not find the original in his office, was not sufficient to overcome the presumption that it was in existence when the case was tried. Nichols v. Salem, (1907) 49 Or 298, 302, 89 P 804.

Where a brand was recorded as required, the record was primary evidence of the facts stated, and could be proved by a copy. Brown v. Moss, (1909) 53 Or 518, 522, 101 P 207, 18 Ann Cas 541.

There was compliance with subsection (8) where the authentication by the governor of a foreign country to a copy of a death record recited that the record of deaths from which the copy was taken was required and authorized by law, made at the time and prior to the death of the deceased. State v. McDonald, (1910) 55 Or 419, 103 P 512, 104 P 967, 106 P 444.

A history of certain members of a family by the chief alienist of an insane asylum in a foreign country, compiled from the records of the asylum, journals of the family and their oral statements was inadmissible. State v. Hassing, (1911) 60 Or 81, 118 P 195.

Certification of a copy of the record of a marriage license in a sister state was sufficient under subsection (7). State v. Locke, (1915) 77 Or 492, 151 P 717.

A certified copy of a record of the certificate of title and assignment of a motor vehicle filed with the Secretary of State was admissible. Hayes v. Ogle, (1933) 143 Or 1, 21 P2d 223.

A certified copy of a California birth certificate which was certified to by the proper officers was admissible to prove the age of a prosecutrix in a rape case, where her mother testified as to identity. State v. Poole, (1939) 161 Or 481, 90 P2d 472.

A photostatic copy of an extract from a family register in a foreign country, which was not certified was not admissible. In re Braun's Estate, (1939) 161 Or 503, 90 P2d 484.

Letters under a United States Navy letterhead and purportedly signed by naval officers, taken from defendant's files, were properly excluded as hearsay since they did not come from government files and were not authenticated. W. D. Miller Constr. Co. v. Donald M. Drake Co., (1960) 221 Or 249, 351 P2d 41.

This section has equal application to both civil and criminal cases. State v. Woodward, (1969) 1 Or App 338, 462 P2d 685.

The primary consideration in the development and application of the rule is that of the reliability of the evidence. Id.

Reports of pathologists were proved as required by subsection (7) and admissible. Finchum v. Lyons, (1967) 247 Or 255, 428 P2d 890.

Certified copy of a record of certification of alcohol breath testing equipment was admissible. State v. Woodward, (1969) 1 Or App 338, 462 P2d 685.

FURTHER CITATIONS: Fletcher v. Walters, (1967) 246 Or 362, 425 P2d 539.

LAW REVIEW CITATIONS: 49 OLR 200; 42 OLR 232, 254.

43.340

NOTES OF DECISIONS

A certified copy of a certified copy of a record is not admissible. Goddard v. Parker, (1882) 10 Or 102.

Several copies annexed from the records of one custodian may be authenticated by one certificate. Portland v. Besser, (1882) 10 Or 242.

FURTHER CITATIONS: Baker v. Woodward, (1884) 12 Or 3, 6 P 173; State v. Byam, (1893) 23 Or 568, 32 P 623; Brown v. Moss, (1909) 53 Or 518, 101 P 207, 18 Ann Cas 541.

43.350

CASE CITATIONS: State v. Gowdy, (1969) 1 Or App 424, 462 P2d 461.

LAW REVIEW CITATIONS: 42 OLR 231, 232.

43.360

NOTES OF DECISIONS

Certified or office copies from books are not evidence, unless the officer in charge is authorized to certify copies. Brown v. Corson, (1888) 16 Or 388, 397, 19 P 66, 21 P 47.

The recital of a journal entry as to the day on which a judgment was rendered could not be contradicted by a certified memorandum kept by the clerk of the trial court. Hislop v. Moldenhauer, (1893) 24 Or 106, 32 P 1026.

A proclamation dissolving a corporation reciting the filing of a report of delinquency, constituted prima facie evidence thereof. Smyth v. Kenwood Land Co., (1920) 97 Or 19, 190 P 962.

Letters under a United States Navy letterhead and purportedly signed by naval officers, taken from defendant's files, were properly excluded as hearsay since they did not come from government files and were not authenticated. W. D. Miller Constr. Co., v. Donald M. Drake Co., (1961) 221 Or 249, 351 P2d 41.

43.370

NOTES OF DECISIONS

It was the intention of the legislature that death certificates should be received in controversies between private parties as evidence of all the facts stated therein. Seater v. Penn. Mut. Life Ins. Co., (1945) 176 Or 542, 156 P2d 386; State Land Bd. v. Long, (1950) 189 Or 537, 221 P2d 892, 20 ALR2d 219.

For a statement in a report to be admissible, the person making the report must have had firsthand knowledge of the facts or a duty to ascertain the truth of the facts recorded. Allen v. Oceanside Lbr. Co., (1958) 214 Or 27, 328 P2d 327; Finchum v. Lyons, (1970) 255 Or 216, 465 P2d 708; Wynn v. Sundquist, (1971) 259 Or 125; 485 P2d 1085.

FURTHER CITATIONS: Finchum v. Lyons, (1967) 247 Or 259, 428 P2d 890; State v. Woodward, (1969) 1 Or App 338, 462 P2d 685.

LAW REVIEW CITATIONS: 39 OLR 134; 42 OLR 229, 231; 49 OLR 200.

43.380

LAW REVIEW CITATIONS: 42 OLR 230, 231.

43.390

LAW REVIEW CITATIONS: 42 OLR 232.

43.400

LAW REVIEW CITATIONS: 42 OLR 230.

43.410

LAW REVIEW CITATIONS: 42 OLR 232.

43.420

LAW REVIEW CITATIONS: 42 OLR 234, 245.

43.430

NOTES OF DECISIONS

An abstract prepared by an officer of the Federal Security Agency-Public Health Service was not a copy but a summary. Allan v. Oceanside Lbr. Co., (1958) 214 Or 27, 328 P2d 327.

LAW REVIEW CITATIONS: 42 OLR 232.

43.440

LAW REVIEW CITATIONS: 42 OLR 230.

43.450

NOTES OF DECISIONS

Findings as to date of death of missing service personnel by a federal official was not conclusive upon the state courts but was only presumptive. Pearson v. Coulter, (1949) 186 Or 570, 208 P2d 349.

LAW REVIEW CITATIONS: 42 OLR 230.

43.460

LAW REVIEW CITATIONS: 42 OLR 232.

43.470

NOTES OF DECISIONS

Where a transcript of judgment is not properly certified, no lien on real property is created. Evans v. Marvin, (1915) 76 Or 540, 148 P 1119; Yeaton v. Barnhart, (1915) 78 Or 249, 260, 150 P 742, 152 P 1192.

The certificate of a clerk is not evidence of the character or legal effect of that paper to which it is appended. Alexander v. Knox, (1879) Fed Cas No. 170, 6 Sawy 54.

Different copies may be certified together by one certificate. City of Portland v. Besser, (1882) 10 Or 242, 249.

A certificate authenticating a transcript on appeal should recite that the copies have been compared with the original. State v. Estes, (1898) 34 Or 196, 51 P 77, 52 P 571, 55 P 25.

FURTHER CITATIONS: Bloomfield v. Humason, (1884) 11 Or 229, 4 P 332; State v. McDonald, (1910) 55 Or 419, 103 P 512, 104 P 967, 106 P 444; Oregon R. & N. Co. v. Coolidge, (1911) 59 Or 5, 116 P 93.