Chapter 12

Limitations of Actions and Suits

Chapter 12

NOTES OF DECISIONS
1. Scope of limitations generally
2. Effect of statutory bar
3. Limitations in equity
4. Repeal or modification of statute

1. Scope of limitations generally

The statute of limitations does not run against the state in the absence of a statute permitting it. State v. Warner Valley Stock Co., (1910) 56 Or 283, 286, 106 P 780, 108 P 861; State Land Bd. v. Lee, (1917) 84 Or 431, 165 P 372; United States Fid. & Guar. Co. v. Bramwell, (1923) 108 Or 261, 269, 217 P 332.

The statute of limitations does not apply to disbarment proceedings. State v. Parker, (1927) 120 Or 465, 252 P 711; State v. Tarpley, (1927) 122 Or 479, 259 P 783.

Where a transaction between husband and wife is involved the statute of limitations does not apply. Banfield v. Schulderman, (1931) 137 Or 256, 299 P 323, 3 P2d 116; Cary v. Cary, (1938) 159 Or 578, 80 P2d 886; Wehoffer v. Wehoffer, (1945) 176 Or 345, 156 P2d 830.

The limitations statute cannot be urged against a defense, such as fraud. Caples v. Morgan, (1916) 81 Or 692, 696, 160 P 1154, LRA 1917B, 760.

The defense of the statute of limitations is an affirmative one and must be pleaded to be proved. Elliot v. Mosgrove, (1939) 162 Or 507, 91 P2d 852, 93 P2d 1070.

Exceptions to the operation of a statute of limitation in favor of persons under disability should be strictly construed and never extended beyond their plain import. Bock v. Collier, (1944) 175 Or 145, 151 P2d 732.

Mandamus and other "special proceeding" are not within the scope of the statute of limitations. Buell v. County Court of Jefferson County, (1944) 175 Or 402, 152 P2d 578, 154 P2d.

The general statutes of limitations provided in this chapter are intended only to apply to common law rights of action and do not affect a special statutory proceeding which sets up its own limitation. Schulmerich v. First Nat. Bank, (1960) 220 Or 528, 349 P2d 849.

2. Effect of statutory bar

A pure limitation statute affects the remedy but does not extinguish the right nor destroy the obligation. Meyer v. Beal, (1873) 5 Or 130; Goodwin v. Morris, (1881) 9 Or 322; State Land Bd. v. Lee, (1917) 84 Or 431, 441, 165 P 372.

Adverse possession of realty for the statutory period extinguishes the right and vests a perfect title in the possessor. Parker v. Metzger, (1885) 12 Or 407, 409, 7 P 518; Neal v. Davis, (1909) 53 Or 423, 425, 99 P 69, 101 P 212.

3. Limitations in equity

Equity acts by analogy to the rules of law concerning limitations. Anderson v. Baxter, (1871) 4 Or 105; Sedlack v. Sedlack, (1887) 14 Or 540, 13 P 452.

The limitations statute is a legal, not an equitable, defense. Montgomery v. Anglo-Calif. Trust Co., (1937) 157 Or 187, 68 P2d 1057.

4. Repeal or modification of statute

A demand barred by the statute is not revived by the repeal or modification thereof. Baldro v. Tolmie, (1855) 1 Or 176.

A statute changing the period of limitation includes only causes accruing after passage of the act, unless it is expressly made retroactive. Pitman v. Bump, (1873) 5 Or 17.

A state statute which extends the period of redemption beyond the time allowed at the date of the execution of the mortgage cannot constitutionally apply to a sale under a mortgage executed prior to its passage. State v. Sears, (1895) 29 Or 580, 43 P 482, 46 P 785.

FURTHER CITATIONS: McLauglin v. Hoover, (1853) 1 Or 30, 31; Anderson v. Baxter, (1871) 4 Or 105, 109; West Portland Homestead Assn. v. Lowsdale, (1883) 17 Fed 205; Baker v. Woodward, (1884) 12 Or 1, 18, 6 P 173; Estate of Houck and Meyer, (1888) 23 Or 10, 14, 17 P 461; Christian v. Eugene, (1907) 49 Or 170, 174, 89 P 419; Zeuske v. Zeuske, (1909) 55 Or 65, 68, 103 P 648, 105 P 249; Tualatin Academy v. Keene, (1911) 59 Or 496, 519, 117 P 424; Kyla-Kierola v. Stanley-Smith Lbr. Co., (1916) 81 Or 640, 160 P 542; Olds v. Olds, (1918) 88 Or 209, 214, 171 P 1046; Branch v. Lambert, (1922) 103 Or 423, 425, 205 P 995; Lough v. State Ind. Acc. Comm., (1922) 104 Or 313, 317, 207 P 354; Board of School Trustees v. Morrison, (1922) 105 Or 629, 641, 210 P 448; Robinson v. Coble, (1924) 109 Or 579, 580, 217 P 624; Estate of Bethel, (1924) 111 Or 178, 190, 209 P 311, 226 P 427; Bonnett v. Keiffer, (1925) 115 Or 244, 237 P 1; First Nat. Bank v. Buckland, (1929) 128 Or 242, 245, 273 P 393; Strong v. MacNoughton Trust Co. v. Bodley, (1932) 141 Or 36, 38, 15 P2d 470; Berger's Estate, (1933) 144 Or 631, 634, 25 P2d 138; Stout's Estate, (1935) 151 Or 411, 425, 50 P2d 768; Skinner v. Rich, (1936) 153 Or 416, 427, 55 P2d 1146; Pendleton v. Holman, (1945) 177 Or 532, 541, 164 P2d 434.

ATTY. GEN. OPINIONS: Whether limitations apply to counties in the refund of motor vehicle fuel tax, 1922-24, p 430; effect of delay by the State Land Board in foreclosing a mortgage, 1928-30, p 54; limitation period for refund of escheated money to minor, 1928-30, p 407; application to revocation of a physician's license, 1928-30, p 564; application to taxes levied by municipal taxing agencies, 1934-36, p 176; waiver of statute of limitations, 1936-38, p 51; application to foreclosure of delinquent tax liens, 1944-46, p 440; application to civil actions by the state or its agencies for recovery of public assistance improperly received, 1962-64, p 59.

12.010

NOTES OF DECISIONS
1. When statute commences to run
2. Necessity of pleading statute
3. Urging statute by demurrer or answer
4. Sufficiency of pleading

5. Effect of pleading wrong statute
6. Burden of proof

1. When statute commences to run

When a complete cause of action has accrued, that is, when the action may be maintained, the limitation statute begins to run. Zurcher v. Booth, (1916) 80 Or 335, 338, 157 P 147; Branch v. Lambert, (1922) 103 Or 423, 438, 205 P 995; Powell v. Ore. Ry., (1869) 38 Fed 187, 191.

Until a cause of action accrues, the statute of limitations does not begin to run. Stephenson v. Van Blokland, (1911) 60 Or 247, 252, 118 P 1026.

An amended complaint which does not state a different cause of action takes effect by relation to date of filing original complaint and serving summons, and is not affected by running of statute of limitations subsequent to commencement of action. Railton v. Redmar, (1956) 209 Or 80, 304 P2d 408.

A cause of action for malpractice accrues at the time plaintiff discovers or reasonably should have discovered the tortious act. Berry v. Branner, (1966) 245 Or 307, 421 P2d 996. Overruling Vaughn v. Langmack, (1964) 236 Or 542, 390 P2d 142.

Where land was charged with a lien to secure payment of money when the beneficiary should reach his majority, his previous death did not hasten the maturity of the debt to initiate the period of the statute of limitations. Pierce v. Parks, (1915) 76 Or 58, 60, 147 P 929.

The cause of action of a broker who obtained a purchaser of real estate who first executed an optional agreement and later purchased the property, accrued only at the time of the purchase. Zurcher v. Booth, (1916) 80 Or 335, 338, 157 P 147.

Where stipulated compensation was payable at the end of five years, the payment did not become due until such time, and the statute of limitations did not bar the action until six years thereafter. Tharp v. Jackson, (1917) 85 Or 78, 82, 165 P 585, 1173.

Against claim of depositor in a bank, the statute did not commence to run till his demand had been refused. Haines v. First Nat. Bank, (1918) 89 Or 42, 172 P 505.

Cause of action under wrongful death statute accrued on date of deceased's death, not from date when wrongful act was committed. Piukkula v. Pillsbury Astoria Flouring Mills Co., (1935) 150 Or 304, 42 P2d 921, 44 P2d 162.

In an action against a dentist for malpractice where the tort was a continuing one, the cause of action accrued on the last date of the continuous negligent treatment. Hotelling v. Walther, (1942) 169 Or 559, 130 P2d 944. **But see** Berry v. Branner, (1966) 245 Or 307, 421 P2d 996.

In an action against constable and his sureties for wrongful seizure of property, the cause of action accrued at time that property was wrongfully seized, since that was the source of plaintiff's injury and not the constable's delayed return. Industrial Chrome Plating Co. v. North, (1944) 175 Or 351, 153 P2d 835.

2. Necessity of pleading statute

To be taken advantage of, the statute must be pleaded. Steamer Senorita v. Simonds, (1859) 1 Or 274; Victor Land Co. v. Winters, (1911) 59 Or 420, 421, 116 P 1070.

Where not raised till after the cause of action has been tried and then by answer filed without leave of court, the defense will be stricken. Alexander v. Munroe, (1909) 54 Or 500, 511, 101 P 903, 103 P 514, 135 Am St Rep 840.

3. Urging statute by demurrer or answer

If it is apparent on the face of the complaint that the action was not commenced in time, the objection must be taken by demurrer, and if not so taken it is waived and cannot be taken by answer. Spaur v. McBee, (1890) 19 Or 76, 23 P 818; Davis v. Davis, (1890) 20 Or 78, 25 P 140; Hawkins v. Donnerberg, (1901) 40 Or 97, 66 P 691, 908; Ausplund v. Aetna Indem. Co., (1905) 47 Or 10, 18, 81 P 577, 82 P 12; Dutro v. Ladd, (1907) 50 Or 120, 121, 91 P 459; Creason v. Douglas County (1917) 86 Or 159, 167 P 796; Branch v. Lambert, (1922) 103 Or 423, 205 P 995; Eastman v. Crary, (1930) 131 Or 694, 284 P 280.

If it does not appear on the face of the complaint that the action is barred, the defense must be taken advantage of by answer, or it is deemed waived. Davis v. Davis, (1890) 20 Or 78, 25 P 140; Creason v. Douglas County, (1917) 86 Or 159, 167 P 976; Buckman v. Hill Military Academy, (1950) 190 Or 194, 223 P2d 172.

The limitation statute is an affirmative defense which must be specially pleaded, unless it appears upon the face of the complaint that the action is barred. Scott v. Christenson, (1905) 46 Or 417, 419, 80 P 731; Hewitt v. Thomas, (1957) 210 Or 273, 310 P2d 313.

Where a complaint in an action to recover unpaid subscriptions alleged that payments had been made, but contained no allegation as to the time thereof, the complaint was not demurrable, and the defense of the statute was available only by answer. Hawkins v. Donnerberg, (1901) 40 Or 97, 66 P 691, 908.

4. Sufficiency of pleading

Pleading in terms of statute is insufficient, but failure of adverse party to object is considered waiver. Zeilin v. Rogers, (1884) 21 Fed 103, 104.

A failure to deny the allegations of a complaint is an admission thereof, but such admission does not preclude the plea of the statute of limitations. Gilman v. Cochran, (1907) 49 Or 474, 475, 90 P 1001.

The allegation of an answer that "as to all acts and things alleged in the complaint which are done or happened more than two years before the commencement of this action, the said action has not been commenced within two years after the cause of action accrued," is one of fact, and not a conclusion of law. Norwood v. E. Ore. Land Co., (1932) 139 Or 25, 5 P2d 1057, 7 P2d 996.

5. Effect of pleading wrong statute

An answer averring non accruit infra sex annos, instead of within the five years prescribed by the statute, is nevertheless good; for if the cause did not accrue within six years, it certainly did not accrue within five. Boldro v. Tolmie, (1855) 1 Or 176, 177.

A plea of a shorter period of limitation than the one applicable is no plea at all. Branch v. Lambert, (1922) 103 Or 423, 205 P 995.

6. Burden of proof

The general rule is that the burden is on the defendant to sustain the defense of the bar of the statute of limitations, when pleaded. Yet when a note is barred on its face and the plaintiff claims a payment not indorsed the burden to prove it is on him. Scott v. Christenson, (1905) 46 Or 417, 419, 80 P 731.

FURTHER CITATIONS: Howe v. Taylor, (1877) 6 Or 284; Eastern Ore. Land Co. v. Cole, (1899) 92 Fed 949, 951; Tyee Consol. Min. Co. v. Jennings, (1905) 137 Fed 863, 865; Fargo v. Dickover, (1918) 87 Or 215, 170 P 289; McBride v. Farrington, (1945) 60 F Supp 92; Fullerton v. Lamm, (1946) 177 Or 655, 692, 163 P2d 941, 165 P2d 63; Grabner v. Willys Motors, Inc., (1960) 282 F.2d 644; Lang v. Hill, (1961) 226 Or 371, 360 P2d 316; Cross v. Harris, (1962) 230 Or 398, 370 P2d 703; Bell v. Quaker City Fire & Marine Ins. Co., (1962) 230 Or 615, 370 P2d 219; Closterman v. Reynolds, (1963) 236 Or 114, 386 P2d 468; Larson v. Allen, (1963) 236 Or 228, 388 P2d 115; Miculka v. Am. Mail Line, Ltd., (1964) 229 F Supp 665; Reynolds Metals Co. v. Martin, (1964) 337 F2d 780; Allen v. Lococo, (1968) 252 Or 195, 448 P2d 569.

ATTY GEN. OPINIONS: Statute of limitations commencing to run against bank stockholder liable for assessment, 1930-32, p 149; effect of repeal of limitation statute on taxes levied by municipal taxing agencies, 1934-36, p 176; validity of note waiving limitations statute, 1936-38, p 51; termination of rights to veterans' educational benefits, 1964-66, p 368.

LAW REVIEW CITATIONS: 22 OLR 381; 45 OLR 73-80; 47 OLR 94; 6 WLJ 327-334.

12.020

NOTES OF DECISIONS

This section has no application in suits in admiralty. Laidlaw v. Ore. Ry. & Nav. Co., (1897) 81 Fed 876, 26 CCA 665. Overruling, The Oregon, (1896) 76 Fed 846.

An allegation that an action was commenced was equivalent to an averment that the complaint had been filed and the summons served. Fisher v. Kelly, (1896) 30 Or 1, 11, 46 P 146.

An action to enforce the liability of directors of a bank for declaring a dividend when the bank is insolvent is commenced as to a particular director when the summons is served on him. Patterson v. Thompson, (1898) 90 Fed 647.

Suits for the foreclosure of miners' liens are commenced, as provided by the lien statute, when the complaint is filed with the clerk, not as provided by the general statute of limitations. Burns v. White Swan Min. Co., (1899) 35 Or 305, 57 P 637.

A voluntary appearance by defendant is equivalent to the commencement of suit, for the purpose of limitations. Hawkins v. Donnerberg, (1901) 40 Or 97, 66 P 691, 908.

A suit or action is commenced so as to stop the running of the statute when the defendant enters a general appearance. Dunne v. Portland St. Ry., (1901) 40 Or 295, 300, 65 P 1052.

The phrase "or otherwise united in interest with him" refers to a defendant in an action arising out of a joint contract. Lane v. Ball, (1917) 83 Or 404, 418, 160 P 144, 163 P 975.

An amended complaint which does not state a different cause of action takes effect by relation to date of filing original complaint and serving summons and is not affected by running of statute of limitations subsequent to commencement of original action. Railton v. Redmar, (1956) 209 Or 80, 304 P2d 408.

In an action on an insurance contract, when more than 60 days has elapsed after filing the complaint before service of summons, and the period of limitation in ORS 744.100 has run, the action is barred. Bell v. Quaker City Fire & Marine Ins. Co., (1962) 230 Or 615, 370 P2d 219.

In an action against joint tortfeasors in which the original summons was quashed and the cause removed to the federal court as to nonresident defendants, and an alias summons was issued for service on the resident defendant, the action was commenced as to him when the alias summons was delivered to the officer. Smith v. Day, (1901) 39 Or 531, 64 P 812, 65 P 1055.

An action for false imprisonment against joint defendants was not deemed commenced against those defendants who were only served with summons and who did not receive a copy of the complaint. Lane v. Ball, (1917) 83 Or 404, 160 P 144, 163 P 975.

FURTHER CITATIONS: Dutro v. Ladd, (1907) 50 Or 120, 91 P 459; Kelsay v. Taylor, (1910) 56 Or 13, 107 P 609; Bramwell v. Owen, (1921) 276 Fed 36; Grabner v. Willys Motors, Inc., (1960) 282 F2d 644; Schulmerich v. First Nat. Bank, (1960) 220 Or 528, 349 P2d 849; Lang v. Hill, (1961) 226 Or 371, 360 P2d 316; Brown v. Farrell, (1971) 258 Or 348, 483 P2d 453; Larson v. Allen (1963) 236 Or 228, 388 P2d 115; Loveness v. State Tax Comm., (1967) 3 OTR 25; Allen v. Lococo, (1968) 252 Or 195, 448 P2d 569; Kenner v. Schmidt, (1968) 252 Or 218, 448 P2d 537.

LAW REVIEW CITATIONS: 49 OLR 337-342.

12.030

NOTES OF DECISIONS

Under this section, action is not commenced within the time limited unless filing the complaint and delivery of the summons before expiration of the statutory period is followed within 60 days by service or, in the proper case, publication of summons. Dutro v. Ladd, (1907) 50 Or 120, 91 P 459; Lang v. Hill, (1961) 226 Or 371, 360 P2d 316; Kenner v. Schmidt, (1968) 252 Or 218, 448 P2d 537.

A summons is not issued until it is made out and signed by the plaintiff or his attorney, and placed in the hands of the sheriff, with the intention that it be served upon the defendant. White v. Johnson (1895) 27 Or 282, 40 P 511, 40 Am St Rep 726; Macleay Estate Co. v. Churchill, (1930) 132 Or 63, 284 P 286.

The person against whom the particular action must be brought is the one upon whom the summons must be served. Morrison v. Holladay, (1895) 27 Or 175, 39 P 1100.

This section and ORS 12.020 apply to those cases only which are governed by the general statute of limitations. Burns v. White Swan Min. Co., (1899) 35 Or 305, 310, 57 P 637.

This section, construed in connection with the statute fixing the time for issuance of writ of attachment, precludes an attachment issued prior to issuance of summons and delivery thereof to the sheriff for service. Macleay Estate Co. v. Churchill, (1930) 132 Or 63, 284 P 286.

An action on an insurance contract is a common law action, and this section determines when the action is commenced. Bell v. Quaker City Fire & Marine Ins. Co., (1962) 230 Or 615, 370 P2d 219.

Delivery may be made to the sheriff of the county in which the defendant last resided only when defendant no longer resides in Oregon. Larson v. Allen, (1963) 236 Or 228, 388 P2d 115.

This section was taken verbatim from the New York code and the reason for its enactment in New York is important. Kenner v. Schmidt, (1968) 252 Or 218, 448 P2d 537.

The legislative intent was to extend or toll the statute for 60 days from the filing of the complaint during which the plaintiff could effect service of either the original or subsequent summons if service was completed within the 60-day period. Id.

In an action where the first summons was quashed and the second summons not delivered to the sheriff for service until after the period of limitations had run, the action was barred. Smith v. Day, (1901) 39 Or 531, 64 P 812, 65 P 1055. **Distinguished in** Kenner v. Schmidt, (1968) 252 Or 218, 448 P2d 537.

An action for false imprisonment against joint defendants was not commenced against those defendants who were only served with summons and who did not receive a copy of the complaint. Lane v. Ball, (1917) 83 Or 404, 160 P 144, 163 P 975.

FURTHER CITATIONS: Knapp v. King, (1877) 6 Or 243; Hawkins v. Donnerberg, (1901) 40 Or 97, 66 P 691; Dunne v. Portland St. Ry. Co., (1901) 40 Or 295, 65 P 1052; Kelsay v. Taylor, (1910) 56 Or 13, 107 P 609; Harrison v. Beals, (1924) 111 Or 563, 222 P 728; Bramwell v. Owen, (1921) 276 Fed 36; Schulmerich v. First Nat. Bank, (1960) 220 Or 528, 349 P2d 849; Todd v. Bigham, (1964) 238 Or 374, 390 P2d 168, 395 P2d 163; Loveness v. State Tax Comm., (1967) 3 OTR

25; State ex rel. Kalich v. Bryson, (1969) 253 Or 418, 453 P2d 659.

LAW REVIEW CITATIONS: 46 OLR 190, 191; 49 OLR 337-342.

12.040

NOTES OF DECISIONS

1. Suits shall only be commenced within the time limited to commence an action
2. Determination of any right or claim to or interest in real property
   (1) Foreclosure and redemption
   (2) Suits between cotenants
   (3) Trust suits
3. Suits to set aside, cancel, annul patents
4. Suit upon new promise, fraud or mistake
5. Equitable defenses
6. Equitable owner in possession

1. Suits shall only be commenced within the time limited to commence an action

In purely equitable causes the statute of limitations has no application. Neppach v. Jones, (1891) 20 Or 491, 26 P 569, 23 Am St Rep 145; State v. Warner Valley Stock Co., (1910) 56 Or 283, 106 P 780, 108 P 861; City of Pendleton v. Holman, (1945) 177 Or 532, 164 P2d 434; Hall v. Russell, (1875) 3 Sawy 506, Fed Cas No. 5943.

Courts of equity are not bound strictly, like courts of law, by the statutes of limitations, yet equity will act by analogy under their restrictions. Tualatin Academy v. Keene, (1911) 59 Or 496, 519, 117 P 424; Mays v. Morrell, (1913) 65 Or 558, 132 P 714; McIver v. Norman, (1949) 187 Or 516, 213 P2d 144; Stevens v. Sharp, (1879) 6 Sawy 113, Fed Cas No. 13,410; Hickox v. Illiott, (1884) 22 Fed 13.

In cases of concurrent jurisdiction, equity follows the law as to the statute of limitations. Hall v. Russell, (1875) 3 Sawy 506, 514, Fed Cas No. 5943.

Where, through laches it has become doubtful whether defendant can command the evidence necessary for a fair presentation of his case, or he has been deprived of any advantage which he might have had, or will be subjected to any hardship that might have been avoided if the suit had been seasonably instituted, equity will not grant relief, though the full limitation applicable to a remedy at law may not have expired. Wilson v. Wilson, (1902) 41 Or 459, 463, 69 P 923.

Although the state is not named as a party, if it appears that it is the real party in interest, a limitation statute which does not expressly or by necessary implication include the state will not be permitted to operate. State Land Bd. v. Lee, (1917) 84 Or 431, 436, 165 P 372.

A suit by a creditor against the next of kin is subject to the limitations of this section. Harris v. Harris, (1960) 225 Or 175, 357 P2d 419.

Having established a lost official undertaking of a county clerk, recovery thereon was governed by H 6 [ORS 12.080]. Howe v. Taylor, (1877) 6 Or 284.

When creditors of a bank made no attempt to repudiate a sale of pledged stock for five years and a receiver representing the pledgor and creditors acquiesced therein, the sale was not subject to vacation. Thomas v. Gilbert, (1909) 55 Or 14, 21, 101 P 393, 104 P 888, Ann Cas 1912A, 516.

Where the owner of land adjoining a railroad did not seek relief until seven years after the railroad diverted a stream so as to cause seepage on the land he could not obtain equitable relief. Oregon-Wash. R.R. & Nav. Co. v. Reed, (1918) 87 Or 398, 419, 169 P 342, 170 P 300.

Suit on a sister state's divorce decree was governed by OCLA 1-224 [ORS 12.260] in view of this section. Cogswell v. Cogswell, (1946) 178 Or 417, 167 P2d 324.

A suit by a municipality to foreclose an assessment lien was not subject to demurrer where laches was not apparent on the face of the complaint. City of Pendleton v. Holman, (1945) 177 Or 532, 164 P2d 434.

2. Determination of any right or claim to or interest in real property

A suit by an owner in fee to determine an adverse claim on or interest in real property, or to remove cloud from title, cannot be barred by the statute, while the adverse claim or cloud exists. Meier v. Kelly, (1892) 22 Or 136, 29 P 265; Katz v. Obenchain, (1906) 48 Or 352, 358, 85 P 617, 120 Am St Rep 821.

Prior to 1898, a suit to determine interest of a mining locator was not governed by the limitations of actions for real property. Herron v. Eagle Min. Co., (1900) 37 Or 155, 157, 61 P 417.

Where a deed is executed in the owner's name without authority, lapse of time without ratification or any other circumstances will not bar a suit in equity to cancel the deed. State v. Warner Valley Stock Co., (1910) 56 Or 283, 307, 106 P 780, 108 P 861.

A suit to set aside a conveyance in fraud of creditors is a suit to determine a "right or claim to or interest in real property." First Nat. Bank v. Buckland, (1929) 128 Or 242, 273 P 393.

Where a mortgagee, who bought in at foreclosure, orally agreed to extend time for payment and to reconvey when paid, the equitable mortgage and right to redeem which arose was not barred until mortgagor delayed unduly after mortgagee disavowed his promise by refusing to accept payment and reconvey. Bickel v. Wessinger, (1911) 58 Or 98, 113 P 34.

(1) Foreclosure and redemption. A suit to foreclose a mortgage on real property is not for the determination of any right, or claim to or interest in real estate. Anderson v. Baxter, (1871) 4 Or 105.

Absence of the mortgagor or debtor from the state in no way suspends limitations on a suit to foreclose the mortgage. Eubanks v. Leveridge, (1877) 4 Sawy 274, Fed Cas No. 4,544.

The personal obligation on the note secured by the mortgage does not affect the 10-year period of limitations for foreclosure. Id.

A suit in foreclosure may be barred by laches for a period less than the statutory period where the circumstances warrant. Bower v. Stein, (1910) 101 CCA 299, 177 Fed 673.

Answering defendant claiming that a deed was a mortgage and seeking foreclosure, in a suit to quiet title, held not guilty of laches. Niehaus v. Shetter, (1916) 78 Or 447, 153 P 486.

In a suit to declare a deed a mortgage and to foreclose, with answer seeking to redeem, held that defendants, having information that plaintiff had surrendered purchase money notes and mortgage pledged as collateral and accepted a conveyance of the premises from the purchaser, were obliged to act promptly in making their election to abide by or repudiate the transaction. First Nat. Bank v. Seaweard, (1916) 78 Or 567, 578, 152 P 883.

(2) Suits between cotenants. Neither husband nor wife hold adversely to the other premises of which they are in the joint occupancy. Springer v. Young, (1886) 14 Or 280, 286, 12 P 400.

Cotenants who allowed another cotenant to occupy land for some 30 years after Supreme Court decisions against them are guilty of laches. Crowley v. Grant, (1912) 63 Or 212, 127 P 28.

A tenant who stood by for 18 years after his cotenant had purchased his moiety at execution sale, and paid all taxes and street improvements and constructed a valuable building on the land, was guilty of laches. Webster v. Rogers, (1918) 87 Or 547, 558, 171 P 197.

(3) Trust suits. The disavowal by a trustee of the trust relation, and adverse holding of real property for 10 years, the cestui que trust having notice and knowledge thereof during the entire time, will bar a right of recovery by him. Raymond v. Flavel, (1895) 27 Or 219, 238, 40 P 158.

Except when the trustee repudiates the trust and appropriates the property to his own use, limitations do not run in his favor. Baillie v. Columbia Gold Min. Co., (1917) 86 Or 1, 24, 166 P 965, 167 P 1167.

When a director or majority stockholder disavowed the trust by misappropriating funds, the statute of limitations began to run. Id.

Stockholder who knows of a transfer of corporate stock was estopped from impeaching sale as a breach of trust when he failed to question transfer for seven years after sale was made. Akin v. Bates, (1918) 89 Or 260, 173 P 889.

3. Suits to set aside, cancel, annul patents

A suit to charge defendants as trustees of patented lands was barred when begun after the lapse of the statutory period from the date of the patent. Hall v. Russell, (1875) 3 Sawy 506, Fed Cas No. 5,943; Town v. De Haven, (1878) 5 Sawy 146, Fed Cas No. 14,113.

This provision was intended to apply only to controversies arising under ORS 105.610 between rival claimants to the same tract, as patentees of the state, or of the United States. Baker v. Woodward, (1884) 12 Or 3, 18, 6 P 173; State v. Warner Valley Stock Co., (1910) 56 Or 283, 308, 106 P 780, 108 P 861.

A suit by the state to cancel deeds made by it does not fall within the 10-year limitation. State v. Warner Valley Stock Co., (1914) 68 Or 466, 137 P 746.

4. Suits upon new promise, fraud or mistake

If the injured party was ignorant of fraud, no lapse of time will be a bar to the remedy in equity. Sedlak v. Sedlak, (1887) 14 Or 540, 13 P 452; Loomis v. Rosenthal, (1899) 34 Or 585, 57 P 55; Robinson v. Phegley, (1917) 84 Or 124, 132, 163 P 1166; Nicholas v. Murray, (1878) 5 Sawy 320, Fed Cas No. 10,223; McBride v. Farrington, (1945) 60 F Supp 92.

This provision incorporates the pre-existing rule of equity that in case of fraud or mistake the statute does not run until the discovery thereof. West Portland Homestead Assn. v. Lownsdale, (1883) 9 Sawy 106, 17 Fed 205.

A party, after conveying property for what was at the time considered its fair value, cannot wait developments, and if the worth increases, then maintain a suit to annul a contract that would never have been challenged, except for cupidity. Bonelli v. Burton, (1912) 61 Or 429, 123 P 37.

Notice of acts and circumstances which would put a man of ordinary prudence and intelligence upon inquiry is equivalent in law to knowledge of all the facts a reasonable, diligent inquiry would disclose. Whitney v. Bissell, (1915) 75 Or 28, 35, 146 P 141, LRA 1915D, 257.

Rescission demands prompt action on the part of the defrauded, and any unreasonable delay in asserting disaffirmance of the contract will be considered an election to treat it as continuing. Potter Realty Co. v. Breitling, (1916) 79 Or 293, 155 P 179.

The discovery of fraud, within the statute, refers to the time fraud was known or could have been discovered by reasonable diligence. Linebaugh v. Portland Mtg. Co., (1925) 116 Or 1, 239 P 196.

Where plaintiffs in a suit to set aside a gift causa mortis knew as much about the facts 12 years before as when suit was commenced, their acquiescence in the gift for that time was laches. Baber v. Caples, (1914) 71 Or 212, 223, 138 P 472, Ann Cas 1916C, 1025.

In a suit to set aside a conveyance, brought 28 years after its execution, and after the death of all parties excepting one of the grantors, held sufficient to bar relief. Salene v. Isherwood, (1914) 74 Or 35, 38, 144 P 1175.

Remaining in possession of land and improving it was evidence of an intention to abide by the contract and constituted a forfeiture of the right to rescind. Cooper v. Hillsboro Garden Tracts, (1915) 78 Or 74, 152 P 488, Ann Cas 1917E, 840.

Where during delay in bringing suit to cancel deed until two years after discovering fraud, there had not been any change in circumstances or anything to prevent defendants from presenting their defense and defendants were not prejudiced in any way, plaintiff held not guilty of laches. First Nat. Bank v. Buckland, (1929) 128 Or 242, 273 P 393.

Assignee of mortgagee seeking subrogation to position of purchase money mortgagee was not barred when this section was considered with OC 1-204 [ORS 12.080]. Metropolitan Life Ins. Co. v. Craven, (1940) 164 Or 274, 101 P2d 237.

5. Equitable defenses

The burden is on defendant to allege and prove laches if the suit is brought within the time allowed to bring a corresponding action at law; if brought afterwards, plaintiff should explain the delay in his bill. Baillie v. Columbia Gold Min. Co., (1917) 86 Or 1, 23, 166 P 965, 167 P 1167; De Martini v. Hayhurst, (1936) 154 Or 663, 62 P2d 1.

Demurrer will raise the question as to whether a claim or demand is too stale to form the basis of a suit in equity where the complaint shows the requisite facts. Wilson v. Wilson, (1902) 41 Or 459, 463, 69 P 923.

Where laches is not apparent on the face of the complaint, it is not incumbent upon the plaintiff to explain the delay. Wills v. Nehalem Coal Co., (1908) 52 Or 70, 91, 96 P 528.

An equitable estoppel cannot be asserted defensively when defendant is guilty of laches and inequitable conduct. Urquhart v. Belloni, (1910) 57 Or 314, 111 P 692.

If parties have been equally remiss in asserting a claim, neither can claim an advantage over the other. Mays v. Morrell, (1913) 65 Or 558, 564, 132 P 714.

If a suit by a minority stockholder is brought in the corporation's right to recover money abstracted from its treasury, it cannot assert defenses of laches and limitations; the rule is otherwise if the suit is an equitable demand for plaintiff's share of a fund which should have been distributed as dividends. Baillie v. Columbia Gold Min. Co., (1917) 86 Or 1, 39, 166 P 965, 167 P 1167.

Defenses of laches and limitations can be waived, and are waived unless asserted by the litigant entitled to assert them. Id.

A minority stockholder, suing for misappropriation of corporate funds and relying on absence from state as suspending the statute, should have averred that defendant foreign corporations had never done business in Oregon, and that the individual defendants had continuously resided in a state other than Oregon since the acts complained of took place, and should have set up the aggregate amount of time they had spent in Oregon. Id.

A suit in the nature of a cross-bill to correct public records, and to enjoin the prosecution of an action at law, was in the nature of a defense and not subject to legal limitations. Hall v. O'Connell, (1908) 51 Or 225, 94 P 564.

"Speculative delay" is but a particular application of the general principle that only delay that works injury to another is laches. McIver v. Norman, (1949) 187 Or 516, 213 P2d 144.

6. Equitable owner in possession

As against an equitable owner in possession, the statute of limitations cannot run so as to prevent him from defending his possession by means of an equitable title. Zeuske v. Zeuske, (1909) 55 Or 65, 103 P 648, 105 P 294, Ann Cas 1912A, 557; Shields v. Mongolian Exploration Co., (1905) 70 CCA 123, 137 Fed 539.

A defendant sued in ejectment might under the 1878 amendment use his equitable title defensively in an action at law, but he could use it for no other purpose nor could a court of law under that provision administer complete relief by decreeing specific performance when proper or necessary. Spaur v. McBee, (1890) 19 Or 76, 80, 23 P 818.

In ejectment the defense of rightful possession and equitable title under an executory contract of purchase is a legal defense. Coles v. Meskimen, (1906) 48 Or 54, 85 P 67.

This section does not authorize an equitable defense to be set up by answer at law. Zeuske v. Zeuske, (1909) 55 Or 65, 103 P 648, 105 P 249, Ann Cas 1912A, 557.

FURTHER CITATIONS: Hood v. Seachrest, (1918) 89 Or 457, 174 P 734; Cabell v. Federal Land Bank, (1943) 173 Or 11, 144 P2d 297; Kelly v. Tracy, (1956) 209 Or 153, 305 P2d 411; Brusco v. Brusco, (1965) 241 Or 550, 407 P2d 645; West Los Angeles Institute v. Mayer, (1966) 366 F2d 220; Harris Pine Mills v. Davidson, (1967) 248 Or 528, 435 P2d 310.

12.050

NOTES OF DECISIONS

1. Principle in applying section

The principle is that the cause of action based on the adverse claim is extinguished or surrendered. Stephenson v. Van Blokland, (1911) 60 Or 247, 118 P 1026.

The purpose of the statute is not to punish the one out of possession, but to protect the person in possession. National Sur. Corp. v. Smith, (1941) 168 Or 265, 114 P2d 118, 123 P2d 203.

Where statute provides that a county is deemed to have constructive possession following execution of sheriff's deed to county in tax foreclosure proceeding failure to bring action to determine validity of tax sale within statutory period does not operate to divest taxpayer's title, absent actual physical possession, if foreclosure decree is void; but if decree is simply irregular, statute is effective to quiet title derived through tax sale. Evergreen Tbr. Co. v. Clackamas County, (1963) 235 Or 552, 385 P2d 1009.

2. Application to public property

Prior to 1903, p. 18, the statute ran against the state, the same as against a private individual, and its title to school lands could be extinguished by adverse possession. Ambrose v. Huntington, (1899) 34 Or 484, 56 P 513; Schneider v. Hutchinson, (1899) 35 Or 253, 57 P 324, 76 Am St Rep 474; Wallowa County v. Wade, (1903) 43 Or 253, 72 P 793.

The statute of limitations does not run against the right to a mining claim until the issuance of a patent. Miser v. O'Shea, (1900) 37 Or 231, 236, 62 P 491, 82 Am St Rep 751; Tyee Consol. Min. Co. v. Langstedt, (1905) 136 Fed 124, 128, 69 CCA 548.

One claiming title to land by adverse possession, but recognizing the superior title of the United States, may assert such adverse possession as against any person claiming to be the owner under a prior grant. Boe v. Arnold, (1909) 54 Or 52, 67, 102 P 290, 295, 20 Ann Cas 533; Sharpe v. Catron, (1913) 67 Or 368, 370, 136 P 20; Spath v. Sales, (1914) 70 Or 269, 272, 141 P 160; Eastern Ore. Land Co. v. Brosnan, (1909) 173 Fed 67, 97 CCA 382. Boe v. Arnold, supra, overruling, Beale v. Hite, (1899) 35 Or 176, 57 P 322, 58 P 102; Altschul v. O'Neill, (1899) 35 Or 202, 212, 58 P 95 and Altschul v. Clark, (1901) 39 Or 315, 65 P 991.

The right of a city to use a dedicated street is not cut off by adverse possession, though the city may be equitably estopped from opening the street. Oliver v. Synhorst, (1911) 58 Or 582, 109 P 762, 115 P 594; Barton v. Portland, (1914) 74 Or 75, 77, 144 P 1146; Nicholas v. Title and Trust Co., (1916) 79 Or 226, 154 P 391, Ann Cas 1917A, 1149; Killam v. Multnomah County, (1931) 137 Or 562, 4 P2d 323.

The enactment of 1895, p. 57, withdrew the right to plead the statute of limitations against a city or town as to land used for streets, highways, parks and public places. City of Newberg v. Kienle, (1912) 60 Or 486, 120 P 3; City of Silverton v. Brown, (1912) 63 Or 418, 128 P 45.

Adverse possession of public lands with a claim of exclusive title for more than 10 years, except as against the United States, vests title as against one who had obtained a patent before such occupancy. Fellows v. Evans, (1898) 33 Or 30, 32, 53 P 491.

Occupancy of one who entered upon state lands under an executory contract of purchase, as between him and the state or its grantee, inured to the benefit of the state for the purpose of perfecting title by adverse possession. Stephenson v. Van Blokland, (1911) 60 Or 247, 118 P 1026.

In case of a sale, according to plat and before dedication, the statute never began to run against the right of the successor in title from such dedicator to insist upon the highway. Nicholas v. Title & Trust Co., (1916) 79 Or 226, 154 P 391, Ann Cas 1917A, 1149.

3. Adverse possession defined

To constitute adverse possession it must be a visible, notorious and exclusive possession under a claim of ownership, continuing for 10 years, and the owner must have knowledge of such possession and claim. Ambrose v. Huntington, (1899) 34 Or 484, 488, 56 P 513; McNear v. Guistin, (1907) 50 Or 377, 92 P 1075; Anderson v. Richards, (1921) 100 Or 641, 198 P 570; Harris v. Southeast Portland Lbr. Co., (1928) 123 Or 549, 262 P 243; Houck v. Houck, (1930) 133 Or 78, 283 P 25, 288 P 213; Enright v. Meves, (1933) 142 Or 88, 18 P2d 216; Eastern Ore. Land Co. v. Cole, (1899) 92 Fed 949, 35 CCA 100.

To acquire title by adverse possession the possession must be open and notorious, exclusive, hostile, under claim of ownership and continuous for the statutory period. Chapman v. Dean, (1911) 58 Or 475, 477, 115 P 154; Stephen-

son v. Van Blokland, (1911) 60 Or 247, 118 P 1026; Thomas v. Spencer, (1913) 66 Or 359, 361, 133 P 822; Laurence v. Tucker, (1938) 160 Or 474, 85 P2d 374; Reeves v. Porta, (1944) 173 Or 147, 144 P2d 493; Scott v. Elliott, (1969) 253 Or 168, 451 P2d 474.

Possession retained by a grantor is generally treated as subordinate to the interest of the grantee, unless grantor indicates to grantee his intention to hold the land as his own. Parrish v. Minturn, (1963) 234 Or 475, 382 P2d 861.

A party claiming wharf rights through adverse possession had to show an ouster, and exclusive and actual possession under claim of right, until the statute had run. Montgomery v. Shaver, (1901) 40 Or 244, 66 P 923.

4. Necessity for possession

Claim of ownership in the absence of occupancy can never become the foundation of an adverse right. Wilson v. McEwan, (1879) 7 Or 78; Willamette Real Estate Co. v. Hendrix, (1896) 28 Or 485, 42 P 514, 52 Am St Rep 800.

Where naked possession is relied upon, there must be an actual occupancy. Joy v. Stump, (1887) 14 Or 361, 12 P 929; Anderson v. McCormick, (1890) 18 Or 301, 305, 22 P 1062.

In the absence of actual possession or color of title, a claim of title by adverse possession will not support a suit to quiet title. Muckle v. Good, (1904) 45 Or 230, 77 P 743; Gardner v. Wright, (1907) 49 Or 609, 626, 91 P 286.

Adverse possession could not begin until there had been a disseizin to constitute which there must have been an actual expulsion of the true owner for the full period prescribed. Springer v. Young, (1886) 14 Or 280, 12 P 400.

The intent of the occupant to claim in opposition to the world is to be inferred from proof of the occupancy. Willamette Real Estate Co. v. Hendrix, (1895) 28 Or 485, 42 P 514, 52 Am St Rep 800.

(1) Extent of possession. The taking possession of land under color of title, duly recorded, the boundaries being defined, is constructive notice of the extent of the claim, making the occupancy of a part include the possession of the entire tract. Swift v. Mulkey, (1886) 14 Or 59, 12 P 76; Joy v. Stump, (1887) 14 Or 361, 12 P 929; Shuffelton v. Nelson, (1874) 2 Sawy 540, Fed Cas No. 12,822; Zeilin v. Rogers, (1884) 21 Fed 103.

Where one relies on a naked possession as the foundation of an adverse claim, possession cannot be extended beyond the limits of actual possession. Joy v. Stump, (1887) 14 Or 361, 12 P 929.

When premises consisting of several known lots or tracts are conveyed by the same instrument, an entry and occupancy of one under color of title is not constructively an occupancy of all. Willamette Real Estate Co. v. Hendrix, (1896) 28 Or 485, 42 P 514, 52 Am St Rep 800.

The rule as to constructive possession is a rule of evidence merely. Bradtl v. Sharkey, (1911) 58 Or 153, 113 P 653.

The general rule as to constructive possession does not apply where the part claimed adversely is not actually occupied by anyone. Id.

Where entry is not made under color of title, title can be adversely acquired only on the ground actually occupied. Lais v. Smith, (1912) 63 Or 206, 207, 127 P 26.

(2) Possession through another. Possession of land by a lessee inures to the benefit of the lessor, for the purpose of perfecting title by adverse possession. Quinn v. Willamette Pulp & Paper Co., (1912) 62 Or 549, 552, 126 P 1.

Possession by an agent is the possession of the principal for the purpose of acquiring title by adverse possession. Strom v. Hancock Land Co., (1914) 70 Or 101, 140 P 458.

Possession of property by one as agent for the owner and after the latter's death as guardian for his children, continued in the latter capacity for more than the statutory period, was adverse to any others claiming as heirs of the owner. Westenfelder v. Green, (1896) 76 Fed 925, aff'd, (1897) 78 Fed 892.

(3) Acts indicating possession. Occupancy must be evidenced by the exercise of those visible and notorious acts of use to which the land is ordinarily susceptible. Wilson v. McEwan, (1879) 7 Or 78; Quinn v. Willamette Pulp & Paper Co., (1912) 62 Or 549, 552, 126 P 1; Lais v. Smith, (1912) 63 Or 206, 207, 127 P 26; Zeilin v. Rogers, (1884) 21 Fed 103.

An occasional entry for the purpose of chopping and carrying away wood is not sufficient occupancy. Hyde v. Holland, (1890) 18 Or 331, 333, 22 P 1104; Wheeler v. Taylor, (1898) 32 Or 421, 436, 52 P 183, 67 Am St Rep 540.

Neither residence nor inclosure by artificial means is absolutely necessary to create an adverse possession, even where the premises are not claimed under color of title. Zeilin v. Rogers, (1884) 21 Fed 103.

Acts of occupancy must be so open and exclusive as to leave no inquiry as to the occupant's intention, so notorious that the owner may be presumed to have knowledge that the occupancy is adverse, and so continuous as to have furnished a cause of action every day during the required period. McNear v. Guistin, (1907) 50 Or 377, 92 P 1075.

The maintenance of a substantial inclosure, and the continued use and occupation of the land for pasturage under claim of right and title, constituted a visible and hostile possession. Ambrose v. Huntington, (1899) 34 Or 484, 56 P 513.

Adverse possession was shown where the parties occupied the premises for a period of 14 years, insured the property, erected buildings thereon and otherwise asserted title to the property absolutely as against all the world. Slater v. Reed, (1900) 37 Or 274, 60 P 709.

Adverse possession of tidelands was not shown by driving scattered piling, receiving occasional rent for a pile driver and scows tied upon the land, and paying taxes. Seabrook v. Coos Bay Ice Co., (1907) 49 Or 237, 89 P 417.

Building a shack upon land, fencing it, and visiting it four or five times a year for 10 years, pruning fruit trees, and raising a few sacks of potatoes, did not constitute adverse possession. McNear v. Guistin, (1907) 50 Or 377, 92 P 1075.

That defendant's grantor erected a fence within his own grounds, either by mistake or intentionally, did not constitute an abandonment of the land outside the fence. Bayne v. Brown, (1911) 60 Or 110, 112, 118 P 282.

Use of riparian land as a boatyard and woodyard, as a means of ingress and egress to and from the river, and assertion of right to receive pay for mooring logs in the river adjoining, and long use by claimant's tenant, showed adverse possession. Quinn v. Willamette Pulp & Paper Co., (1912) 62 Or 549, 552, 126 P 1.

The possession of land was shown by inclosure, the erection of buildings, and other improvements that clearly indicated an exclusive appropriation of the land by the claimant. Silverton v. Brown, (1912) 63 Or 418, 422, 128 P 45.

The keeping of a cutter and wagon upon a small unfenced lot in a small village, and the storing of lumber thereon while building a house on an adjoining lot, held not to work a disseisin. Hodgkin v. Boswell, (1913) 63 Or 589, 593, 127 P 985.

Fencing a lot, building thereon and occupying it exclusively sufficiently indicated an intention to claim adverse title. Smith v. Badura, (1914) 70 Or 58, 139 P 107.

An owner of riparian land who had color of title to land on the opposite bank of the stream and built a bridge connecting therewith, acquired title to the latter land by adverse possession. Seavey v. Williams, (1920) 97 Or 310, 191 P 779.

Continuous adverse possession of timber land, by clearing and cultivating the land up to a fence constructed as a boundary, ripened into title by adverse possession. Manning v. Gregoire, (1920) 97 Or 394, 191 P 657, 192 P 406.

5. Exclusiveness of possession

Possession by pasturage of stock in common with others does not constitute adverse possession. Hamilton v. Fluornoy, (1903) 44 Or 97, 74 P 483; Volckers v. Seymour, (1949) 187 Or 170, 210 P2d 484.

Where one erected a fence within his own ground, another could not acquire title to ground outside the fence, except by adverse occupancy for 10 years under claim of title. Bayne v. Brown, (1911) 60 Or 110, 112, 118 P 282.

Where a large inclosed tract was occupied by an agent for his principal till the latter sold the agent a small tract, there was no mixed possession precluding the acquisition of title by adverse possession. Strom v. Hancock Land Co., (1914) 70 Or 101, 140 P 458.

6. Hostile character of possession

Possession, to constitute a bar, must be adverse. Springer v. Young, (1886) 14 Or 280, 12 P 400.

An adverse possession must be hostile in its origin and in its continuance. Beale v. Hite, (1899) 35 Or 176, 179, 57 P 322, 58 P 102.

Adverse possession of realty may have its inception in trespass, and naked possession under a claim of right may ripen into a perfect title. Oregon Constr. Co. v. Allen Ditch Co., (1902) 41 Or 209, 69 P 455, 93 Am St Rep 701.

A probate sale and possession thereunder operated to disseise the heir, and were in hostility to his title. Mitchell v. Campbell, (1890) 19 Or 198, 213, 24 P 455.

One who entered upon land by virtue of a warranty deed from a widow who in fact had only an unassigned dower right, disseised the heirs and held adversely to them. Neal v. Davis, (1909) 53 Or 423, 99 P 69, 101 P 212.

(1) Intent of occupant. Adverse possession depends upon the intent of the occupant to claim in opposition to the world, and this intent is to be inferred from proof of the occupancy. Willamette Real Estate Co. v. Hendrix, (1895) 28 Or 485, 42 P 514, 52 Am St Rep 800.

Adverse possession is founded upon the intent with which the occupant has held possession, and this intent is to be determined by what he has done. Anderson v. Richards, (1921) 100 Or 641, 651, 198 P 570.

(2) Permissive possession. Where the use is permissive or under license, in its inception, it cannot be adverse. Springer v. Young, (1886) 14 Or 280, 285, 12 P 400; Anderson v. McCormick, (1886) 18 Or 301, 306, 22 P 1062; Curtis v. La Grande Hydraulic Water Co., (1890) 20 Or 34, 42, 23 P 808, 25 P 378, 10 LRA 484; Abraham v. Owens, (1891) 20 Or 511, 517, 26 P 1112; Altschul v. O'Neill, (1899) 33 Or 202, 211, 58 P 95; Ewing v. Rhea, (1900) 37 Or 583, 62 P 790; Stephenson v. Van Blokland, (1911) 60 Or 247, 118 P 1026; Laurence v. Tucker, (1939) 160 Or 474, 85 P2d 374; Baum v. Denn, (1949) 187 Or 401, 211 P2d 478.

Permissive use, no matter how long continued, is not adverse, and when proved, denies the adverse possession. Scott v. Elliott, (1969) 253 Or 168, 451 P2d 474.

Where a railroad company put its tracks on a parcel of land by permission of the city, continuance of possession did not give it title as against the public's rights in the street. Oregon City v. Ore. & C.R. Co., (1903) 44 Or 165, 74 P 924.

Use of a highway by a railroad company under authority of the county court did not give it any rights by adverse possession. Turney v. So. Pac. Co., (1904) 44 Or 280, 75 P 144, 76 P 1080.

Where one took possession under an agreement with another that he might inclose the land which was a part of his donation claim at any time, there was no adverse possession. Putnam v. Ray, (1912) 62 Or 159, 124 P 205.

A person claiming title to land by parol gift did not gain title by adverse possession, where the original entry was merely permissive. Thayer v. Thayer, (1914) 69 Or 138, 152, 138 P 478.

(3) Recognition of title in another. Where one recognizes title of another, his possession is not adverse. Lawrence v. Lawrence, (1886) 14 Or 77, 81, 12 P 186.

Merely expressing an intention of making a settlement with another is not such a recognition of another's title as will bar the defense of adverse possession. Rowland v. Williams, (1893) 23 Or 515, 523, 32 P 402.

No offer to purchase after the statute has fully run will bar the claim of adverse possession unless the relation of vendor and vendee under a contract to purchase, or of landlord and tenant, once existed between the parties. Coventon v. Seufert, (1893) 23 Or 548, 32 P 508.

Payment rebuts the presumption of adverse possession. Kanne v. Otty, (1894) 25 Or 531, 538, 36 P 537.

The possession of one who recognizes title in another by declarations or conduct is not adverse until changed either by express declarations or by exercising actual ownership inconsistent with a subordinate character. Crowley v. Grant, (1912) 63 Or 212, 127 P 28.

The recognition of the right of a mortgagee does not affect the claim of adverse title after the claimant has acquired the right of the mortgagee. Smith v. Badura, (1914) 70 Or 58, 61, 139 P 107.

Although an adverse claimant believes the United States owns the land he has inclosed, his adverse possession is good against all private owners. United States v. Otley, (1942) 127 F2d 988.

(4) Occupation by mistake. Where a person enters and occupies land not embraced in his title, claiming it is his own for the requisite statutory period, he acquires title thereto, though his entry was under a mistake. Caufield v. Clark, (1889) 17 Or 473, 474, 21 P 443, 11 Am St Rep 845; Ramsey v. Ogden, (1893) 23 Or 347, 350, 31 P 778; Rowland v. Williams, (1893) 23 Or 515, 520, 32 P 402; Sommer v. Compton, (1908) 52 Or 173, 180, 96 P 124, 1065; Dunnigan v. Wood, (1911) 58 Or 119, 124, 112 P 531; Moore v. Fowler, (1911) 58 Or 292, 295, 114 P 472; Stout v. Michelbook, (1911) 58 Or 372, 375, 114 P 929; Parker v. Wolf, (1914) 69 Or 446, 447, 138 P 463; Robinson v. Leverenz, (1949) 185 Or 262, 202 P2d 517.

Possession under a mistaken belief of ownership satisfies the element of hostility or adverseness in the application of the doctrine of adverse possession. Norgard v. Busher, (1960) 220 Or 297, 349 P2d 490. Overruling Caufield v. Clark, (1889) 17 Or 473, 21 P 443 and King v. Brigham, (1892) 23 Or 262, 31 P 601, 18 LRA 361.

Entry and possession under an incorrect survey ripened into title by adverse possession for the statutory period, and was not affected by a subsequent survey disclosing the error in the line. Pearson v. Dryden, (1896) 28 Or 350, 43 P 166.

Where persons agreed to a division of land purchased by pooling funds, later surveyed the separate lands and received deeds that incorrectly included in one party's deed part of the other's land, the court held that the possession of the latter for the period of the statute was adverse and hence not affected by the mistake. Cooper v. Blair, (1907) 50 Or 394, 92 P 1074.

Where a partition fence was used as a boundary, it was immaterial who constructed it; the question was whether the party claiming adverse possession claimed and continued to occupy to it. Sommer v. Compton, (1908) 52 Or 173, 96 P 124, 1065.

Occupancy of farm land up to a fence which was open, notorious, continuous and exclusive under an unconditional claim of right and adverse to defendant, and which continued for the statutory period, conferred title to the fence, without regard to its slight diversions from the original divisional line. Stout v. Michelbook, (1911) 58 Or 372, 373, 115 P 929.

7. Claim of title

There must be a holding under claim of title and with an unconditional intent to hold the land against all the world to constitute an adverse possession. Stout v. Michelbook, (1911) 58 Or 372, 373, 114 P 929; Enright v. Meves, (1933) 142 Or 88, 18 P2d 216.

There can be no tacking of occupancy until there has been a disseisin and the adverse possession originated under a claim of ownership. Bayne v. Brown, (1911) 60 Or 110, 112, 118 P 282.

To constitute disseisin, the entry and occupation must be under a claim of ownership, or right, or title to the premises. Adams v. Burke, (1875) 3 Sawy 415, 420, Fed Cas No. 49.

(1) Color of title. There must be an occupancy under a claim of ownership, though it need not be under color of title. Swift v. Mulkey, (1886) 14 Or 59, 64, 12 P 76; Willamette Real Estate Co. v. Hendrix, (1896) 28 Or 485, 42 P 514, 52 Am St Rep 800.

Color of title is only necessary where the possession is constructive. Swift v. Mulkey, (1886) 14 Or 59, 12 P 76; Shuffleton v. Nelson, (1874) 2 Sawy 540, Fed Cas No. 12,822; Zeilin v. Rogers, (1884) 21 Fed 103.

Color of title is that which in appearance is title, but which in reality is no title. Swift v. Mulkey, (1889) 17 Or 532, 21 P 871.

A deed conveying property with reference to a town site was color of title to land held by plaintiff in the platted portion, where there was a discrepancy between the description in deeds locating land with respect to the town site and those with respect to the plat. School Dist. 5 v. Neder, (1915) 76 Or 552, 149 P 535.

Deeds conveying land to a named river held to constitute color of title to land between high and low water mark. Richards v. Page Inv. Co., (1924) 112 Or 507, 228 P 937.

Tax title purchased by widow of landowner for taxes accrued prior to assignment of dower to her, was color of title. Calvary Baptist Church v. Saxton, (1926) 117 Or 125, 242 P 616.

Recording of certificate of sale and tax deed was constructive notice to any subsequent grantees when followed by open continuous possession under claim and color of title. Id.

Evidence was sufficient to constitute color of title. **Sheriff's deed,** Farris v. Hayes, (1880) 9 Or 81; Hamilton v. Fluornoy, (1903) 44 Or 97, 74 P 483; Hamm v. McKenny, (1914) 73 Or 347, 349, 144 P 435; **proceedings, though irregular, to establish a highway,** Bayard v. Standard Oil Co., (1901) 38 Or 438, 63 P 614; Nosler v. Coos Bay R.R. Co., (1901) 39 Or 331, 64 P 644, 645; **tax deed though the description was imperfect,** Smith v. Shattuck, (1885) 12 Or 362, 7 P 335; **quitclaim deed,** Swift v. Mulkey, (1886) 14 Or 59, 12 P 76; Swift v. Mulkey, (1889) 17 Or 532, 540, 21 P 871; **a deed inadequate to carry true title,** Swift v. Mulkey, (1889) 17 Or 532, 21 P 871; **deed from the state,** McKinney v. Hindman, (1917) 86 Or 545, 169 P 92, 1 ALR 1476.

(2) Good faith of claimant. That one acts in bad faith in taking possession of land under a will or deed knowing his title is bad, will not prevent his obtaining title by adverse possession. Morrison v. Holladay, (1895) 27 Or 175, 176, 39 P 1100.

Title by adverse possession may be acquired regardless of the claimants' good faith, if accompanied by claim of title. Gardner v. Wright, (1907) 49 Or 609, 610, 91 P 286.

8. Open and notorious character of possession

Acts of occupancy must be so open and exclusive as to leave no inquiry as to the occupant's intention, so notorious that the owner may be presumed to have knowledge that the occupancy is adverse, and so continuous as to furnish a cause of action every day during the required period. McNear v. Guistin, (1907) 50 Or 377, 92 P 1075.

Title by adverse possession cannot be based upon mere silent possession, no matter how long continued. Oregon & C. K. Co. v. Grubissich, (1913) 206 Fed 577, 124 CCA 375.

9. Continuity of possession

The requirement of continuity is not met by intermittent and disconnected acts of trespass. Reeves v. Porta, (1944) 173 Or 147, 144 P2d 493; Linn County v. Rozelle, (1945) 177 Or 245, 162 P2d 150.

Continuity of use is an essential element of an adverse title. Low v. Schaffer, (1893) 24 Or 239, 33 P 678.

Whenever an adverse possessor has quit possession, an entry afterwards by another, wrongfully, constitutes a new disseisin. Id.

(1) Interruption of continuity. If the administrator takes actual possession, the running of the statute against the heir is suspended during such time. Clark v. Bundy, (1896) 29 Or 190, 192, 44 P 282.

An agreement to surrender before the expiration of the statutory period, based upon a valuable consideration, stops the running of the statute. Stephenson v. Van Blokland, (1911) 60 Or 247, 118 P 1026.

When actual occupancy is temporarily prevented by flood or fire, the possessor has a reasonable time to resume possession without there being a discontinuance of his possession. Thomas v. Spencer, (1913) 66 Or 359, 361, 133 P 822.

Where title to plaintiff's and defendant's lot had united in one owner within 10 years prior to suit, the continuity of the adverse possession was broken. Joy v. Palethorpe, (1915) 77 Or 552, 555, 152 P 230.

A decree dismissing plaintiff's suit to quiet title, which determined only that plaintiff had failed to establish his claim, had no force to interrupt his adverse possession of the land. Bessler v. Powder River Gold Dredging Co., (1919) 90 Or 663, 176 P 791, 178 P 237.

(2) Interruption by action. The commencement of an action stops the running of the statute, but an unsuccessful suit leading to no change of possession does not stop the running of the statute. Barrell v. Title Guar. & Trust Co., (1895) 27 Or 77, 89, 39 P 992.

The commencement of an ejectment action that eventually ripens into possession stops the running of the statute as of the date of the commencement of the action regardless of whether the entry thereunder is before or after the expiration of the statutory period. Id.

Where a party sued to compel an alleged trustee to convey to him, but did not set up his right by adverse possession, and judgment went against him, he could not set up the right to adverse possession within 10 years of the first suit. Crow v. Abraham, (1917) 86 Or 99, 107, 167 P 590.

(3) Tacking. Several hostile holdings connected by privity may be tacked to make up the statutory period; such privity may rest in deed or in parol. Vance v. Wood, (1892) 22 Or 77, 86, 29 P 73; Rowland v. Williams, (1893) 23 Or 515, 523, 32 P 402; West v. Edwards, (1902) 41 Or 609, 69 P 992; Sommer v. Compton, (1908) 52 Or 173, 180, 96 P 124, 1065; Parker v. Wolf, (1914) 69 Or 446, 448, 138 P 463; Richards v. Page Inv. Co., (1924) 112 Or 507, 228 P 937.

The adverse possession of a party and his ancestor may be tacked together. Coventon v. Seufert, (1893) 23 Or 548, 32 P 508; Anderson v. Richards, (1921) 100 Or 641, 198 P 570.

A disseisor of land cannot tack his possession to that of a prior disseisor under whom he does not claim, and with whom he has no connection. Coventon v. Seufert, (1893) 23 Or 548, 32 P 508.

Several possessions cannot be tacked so as to make a continuity of possession unless there is a privity of estate, or the several titles are connected. Low v. Schaffer, (1893) 24 Or 239, 33 P 678.

If there is any break or interruption in the use, the several uses cannot be tacked so as to make it continuous. Id.

A sale by a referee under partition did not prevent the purchaser from tacking his possession to that of the parties whose interests were sold; nor did a variance between the name of the grantee in the deed, and the name of the purchaser as given in the decree destroy the effect of the deed establishing privity. Clark v. Bundy, (1896) 29 Or 190, 202, 44 P 282.

The possession of a cotenant grantee of a tenant holding adversely was tacked to the possession of the grantor. Wheeler v. Taylor, (1898) 32 Or 421, 434, 52 P 183, 67 Am St Rep 540.

10. Duration of possession

In computing time limited by the statute for bringing an action, the day on which the cause of action accrued should be excluded. Grant v. Paddock, (1897) 30 Or 312, 317, 42 P 712.

Where courts refused to entertain a suit because a controversy was pending between the parties in the federal land department, the statute does not begin to run until after the termination of that controversy. Frink v. Hoke, (1899) 35 Or 17, 56 P 1093.

The statute of limitations commenced to run against the allottee under a military road grant from the date its selection was approved by the Interior Department. Sharpe v. Catron, (1913) 67 Or 368, 370, 136 P 20.

The statute of limitations commenced to run against a grantee under a railroad land grant from the date the list of selected lands was filed in the general land office. McComas v. No. Pac. Ry., (1917) 82 Or 639, 642, 161 P 562, 162 P 862.

Continuous adverse possession of land for more than 10 years by a donee under a parol gift matured title in the donee as against the donor. Miller v. Conley, (1920) 96 Or 413, 190 P 301.

11. Relationship of parties

Husband and wife cannot hold adversely to each other premises of which they are in joint occupancy as a family. Springer v. Young, (1886) 14 Or 280, 286, 12 P 400.

The declarations of a guardian in possession of his ward's land were inadmissible to affect the ward's title. The law determined for whom he was holding, and his statements could not alter that determination. Westenfelder v. Green, (1893) 24 Or 448, 451, 34 P 23.

The possession by an administrator of land devised to his wife and daughters, the devise to his wife being void did not become adverse as against an heir of testator, till he had notice, that the cotenant for whom he was acting claimed to own the land absolutely. Christianson v. Talmage, (1914) 69 Or 440, 444, 138 P 452.

A husband in possession under right of curtesy and not asserting a claim hostile to his wife did not acquire a title. Rhodes v. Peery, (1933) 142 Or 165, 19 P2d 418.

Where the share of the wife of a settler on public lands under the donation act was granted to her surviving husband and children, the division by the surveyor-general as between husband and persons standing in her right was essential to start the statute against the husband's heirs. Traver v. Tribou, (1883) 15 Fed 25, 8 Sawy 511.

(1) Mortgagor and Mortgagee. As long as the relation of mortgagor and mortgagee exists between parties to a deed absolute intended as a mortgage, the statute cannot commence to run in favor of either of them. Caro v. Wollenberg, (1914) 68 Or 420, 136 P 866.

The possession of a mortgagee under agreement to satisfy his claim from rents and profits, does not become adverse until his demand is satisfied from this source or he asserts an absolute title and gives notice thereof to the mortgagor. Id.

Where mortgagee enters into possession under a void foreclosure, the statutory limitation does not run against the mortgagor until he is given actual notice that the holding is under an adverse claim. Id.

When upon default a mortgagee entered into possession, a cause of suit for redemption arose in favor of mortgagor, and the statute of limitation against such suit began to run at once. Hurlburt v. Chrisman, (1921) 100 Or 188, 197 P 261.

(2) Landlord and tenant. A tenant cannot acquire title by adverse possession, unless he openly and expressly disavows holding under his former landlord, and asserts that he is the true owner to the knowledge of the rightful owner. Nessley v. Ladd, (1896) 29 Or 354, 374, 45 P 904; Coquille Mill & Merc. Co. v. Johnson, (1908) 52 Or 547, 552, 98 P 132, 132 Am St Rep 716.

A tenant without the direction, consent or knowledge of the landlord could not effect a disseisin in the landlord's favor or originate adverse possession. Bayne v. Brown, (1911) 60 Or 110, 112, 118 P 282.

(3) Tenants in common. One tenant in common may oust his cotenant and make his possession adverse, but the cotenant out of possession must have notice of such exclusive possession. Northrop v. Marquam, (1888) 16 Or 173, 188, 18 P 449; Wheeler v. Taylor, (1898) 32 Or 421, 52 P 183, 67 Am St Rep 540; Beers v. Sharpe, (1904) 44 Or 386, 75 P 717; Crowley v. Grant, (1913) 63 Or 212, 127 P 28; St. Martin v. Hendershott, (1916) 82 Or 58, 66, 151 P 706, 160 P 373.

Purchase by a cotenant of the common property sold for nonpayment of taxes and receiving the rents and profits does not entitle him to invoke the statute of three years in aid of his claim of title. Minter v. Durham, (1886) 13 Or 470, 482, 11 P 231.

The purchase by a cotenant of the common property sold for nonpayment of taxes, inured to the benefit of all. Id.

A conveyance of the whole title to a tract by one cotenant followed by adverse possession amounted to an ouster and disseisin of the other cotenants, and started the statute running. Crowley v. Grant, (1912) 63 Or 212, 216, 127 P 28.

Where the acts giving notice to a cotenant of a claim of adverse title were done about 10 or 12 years ago, the court held it was too indefinite to sustain the claim of title by adverse possession. Christianson v. Talmage, (1914) 69 Or 440, 444, 138 P 452.

The acts of one cotenant who sold timber from the land and later sold the land to a person who made valuable improvements thereon, were held sufficient to give notice and bar another cotenant after the statute of limitations had run. Curry v. Smith, (1922) 105 Or 82, 209 P 231.

Where one cotenant by his acts and the circumstances gave notice to a cotenant of his adverse possession, title by adverse possession was acquired. Richards v. Page Inv. Co., (1924) 112 Or 507, 228 P 937.

Allegations of an answer in ejectment by one claiming ownership as tenant in common against alleged cotenants constituted notice to the plaintiff of adverse possession and to start the 10-year statute running. Id.

(4) Vendor and purchaser. A person holding realty under an executory contract for its purchase cannot claim to hold adversely to his vendor. Anderson v. McCormick, (1889) 18 Or 301, 305, 22 P 1062; West v. Edwards, (1902) 41 Or 609, 69 P 992; Hamilton v. Fluornoy, (1903) 44 Or 97, 74 P 483.

Where the vendee has fully performed his agreement, his possession from that time becomes adverse to that of his vendor. Ambrose v. Huntington, (1899) 34 Or 484, 488, 56 P 513; West v. Edwards, (1902) 41 Or 609, 69 P 992; Bessler v. Powder River Gold Dredg. Co., (1920) 95 Or 271, 185 P 753, 187 P 621.

Possession under a pretended contract of purchase is not adverse. Haberly v. Treadgold, (1913) 67 Or 425, 426, 136 P 334.

(5) Trustee and beneficiary. The law will not permit the

trustee to begin to hold adversely until he shall have restored the property to the true owner and given notice of his own interest. Manaudas v. Mann, (1892) 22 Or 525, 531, 30 P 422.

Courts will not enforce a resulting trust after laches of the cestui que trust, unless he is in possession, and in such case the statute does not begin to run until he is ousted. Snider v. Johnson, (1894) 25 Or 328, 331, 35 P 846.

Where the trustee disavows his trust and assumes complete ownership, under such circumstances as to give the cestui que trust notice of the repudiation, the statute begins to run from that time, unless he is then under some statutory disability, or under influence superinduced by the trustee. Raymond v. Flavel, (1895) 27 Or 219, 235, 40 P 158; Caro v. Wollenberg, (1914) 68 Or 420, 136 P 866; John v. Smith, (1899) 91 Fed 827.

A trustee who held for life tenants and then over for a trust that failed was not deemed to hold adversely to the resulting trust beneficiaries until the death of the last life tenant, and not from the date of the trust. Pape v. Title & Trust Co., (1949) 187 Or 175, 210 P2d 490.

Where a gift over after life estates in trust failed, the period of limitation started running against the beneficiaries of the resulting trust when the last of the life annuitants died and not from the date of the decree of distribution. Id.

12. Effect of adverse possession

Adverse possession extinguishes the right, and vests title absolutely in the possessor as against the former holder. Parker v. Metzger, (1885) 12 Or 407, 7 P 518; Joy v. Stump, (1887) 14 Or 361, 12 P 929; Mitchell v. Campbell, (1890) 19 Or 198, 24 P 455; Quinn v. Willamette Pulp & Paper Co., (1912) 62 Or 549, 552, 126 P 1; Thomas v. Spencer, (1913) 66 Or 359, 361, 133 P 822; Spath v. Sales, (1914) 70 Or 269, 273, 141 P 160; Parker v. Kelsey, (1916) 82 Or 334, 343, 161 P 694; McKinney v. Hindman, (1917) 86 Or 545, 169 P 93, 1 ALR 1476; Anderson v. Richards, (1921) 100 Or 641, 198 P 570; Shuffleton v. Nelson, (1874) 2 Sawy 540, Fed Cas No. 12,822; Eastern Ore. Land Co. v. Cole, (1899) 92 Fed 949, 35 CCA 100.

Adverse possession of real estate for the statutory period confers such a title as will support an action of ejectment. Joy v. Stump, (1887) 14 Or 361, 12 P 929; Weatherford v. McKay, (1911) 59 Or 558, 117 P 969.

Adverse possession will bar a husband's life estate in wife's lands, but will not affect the wife's right to the remainder during the continuance of the life estate. Stubblefield v. Menzies, (1882) 11 Fed 268, 8 Sawy 4.

13. Prescriptive title to easements

An uninterrupted use and enjoyment of an easement in a particular way for the statutory period affords a conclusive presumption that the person who used it has a right so to do, provided the use be not by authority of law or by agreement with the owner of the inheritance. Coventon v. Seufert, (1893) 23 Or 548, 32 P 508; Feldman v. Knapp, (1952) 196 Or 453, 250 P2d 92.

A grant of the right will be presumed from the adverse use of a liberty, privilege or advantage in the land of another for a period equal to the statute of limitations. Johnson v. Knott, (1886) 13 Or 308, 10 P 418.

When a person had a prescriptive right to flood another's land to a certain depth, this did not include a right to flood it deeper unless independently acquired by the running of the statute of limitations. Tucker v. Salem Flouring Mills Co., (1885) 13 Or 28, 7 P 53.

Payment of taxes on land by the owner was not inconsistent with the acquisition of an easement by prescription. Johnson v. Knott, (1886) 13 Or 308, 10 P 418.

Where the owners of a ferry landing upon a riparian owner's land during the several months of high water, were more or less interrrupted, there was a permissive use, which might be revoked. Chapman v. Dean, (1911) 58 Or 475, 477, 115 P 154.

Mere use of vacant land by the public as a way did not suffice to establish such land as a street where such use was not shown to have been adverse to the owner or under claim of right. Parrott v. Stewart, (1913) 65 Or 254, 132 P 523.

If the grantee of an easement is prevented from enjoying it and such adverse possession continues for the period for acquiring an adverse interest in real property, the easement is lost. Hoffman v. Dorris, (1917) 83 Or 625, 629, 136 P 972.

A parol license to use a road became irrevocable by reason of plaintiff's having made permanent and valuable improvements in reliance thereon. Baum v. Denn, (1949) 187 Or 401, 211 P2d 478.

(1) Water rights. The time required to obtain water rights by adverse possession is the same as that required for real estate. Wimer v. Simmons, (1895) 27 Or 1, 7, 39 P 6, 50 Am St Rep 685; Oregon Constr. Co. v. Allen Ditch Co., (1902) 41 Or 209, 69 P 455, 93 Am St Rep 701.

A right by adverse user cannot be acquired so long as there is enough water for all claimants, and until someone's use is curtailed the statute will not run. North Powder Milling Co. v. Coughanour, (1898) 34 Or 9, 22, 54 P 223; Watts v. Spencer, (1908) 51 Or 262, 274, 94 P 39; Davis v. Chamberlain, (1908) 51 Or 304, 316, 98 P 154; Hough v. Porter, (1908) 51 Or 318, 456, 95 P 732, 98 P 1083, 102 P 728, 729; Harrington v. Demaris, (1905) 46 Or 111, 115, 77 P 603, 82 P 14, 1 LRA(NS) 756.

A water right cannot be lost by nonuser alone, short of the period of limitation of actions to recover real property. Dodge v. Marden, (1879) 7 Or 456.

Where a diversion ditch was constructed under a license in which the landowner reserved a right to use the water a part of each year, adverse use by grantees could not be established, unless it was shown that the use had been in hostility to the use by such owner. Huston v. Bybee, (1888) 17 Or 140, 20 P 51, 2 LRA 568.

A prior appropriator of water in a creek, who had diverted and used it for more than 10 years, was entitled to the use thereof unless he had lost it by an adverse user or abandonment. Low v. Schaffer, (1893) 24 Or 239, 241, 33 P 678.

The use by an upper riparian proprietor of water from a spring not tributary to a stream was not adverse to the rights of a lower owner on the same stream. Harrington v. Demaris, (1905) 46 Or 111, 115, 77 P 603, 82 P 14, 1 LRA(NS) 756.

An adverse user of water which was neither exclusive nor continuous for the required period did not defeat a water right. MacRae v. Small, (1906) 48 Or 139, 85 P 503.

Where one permitted 10 years to elapse without regaining control over water to which another had exercised an adverse claim subsequent in date, the adverse claim became a complete title. Gardner v. Wright, (1907) 49 Or 609, 626, 91 P 286.

Where defendant claiming right to all the waters of a stream did not notify prior appropriator of his claim or plead adverse user, the statute did not attach. McCoy v. Huntley, (1911) 60 Or 372, 373, 119 P 481, Ann Cas 1914A, 320.

To entitle the parties or privies to an agreement relinquishing and apportioning water rights to afterward claim such rights by adverse user, they must have made some affirmative assertion of ownership under a claim or right, open, notorious and exclusive in character. Cantrall v. Sterling Min. Co., (1912) 61 Or 516, 524, 122 P 42.

A city can lose a water right by adverse possession. Ebell v. Baker, (1931) 137 Or 427, 299 P 313. **Distinguished in** City of Pendleton v. Holman, (1945) 177 Or 532, 164 P2d 434.

Plaintiffs and their predecessors by their use of all the waters of a stream for irrigation during the spring and

summer season for 20 years acquired title thereto by prescription. Bonifacich v. Cummings, (1924) 111 Or 555, 227 P 469.

(2) Rights of way. A public road may be established by adverse user of the public for the statutory period. Douglas County Road Co. v. Abraham, (1874) 5 Or 318; Bayard v. Standard Oil Co., (1901) 38 Or 438, 446, 63 P 614; Wallowa County v. Wade, (1903) 43 Or 253, 260, 72 P 793; Ridings v. Marion County, (1907) 50 Or 30, 33, 91 P 22; Montgomery v. Somers, (1907) 50 Or 259, 267, 90 P 674.

User of private land as a public road or street is insufficient to establish an adverse title therein in the public where it has neither duration nor the character necessary to establish the bar of limitations. Burns v. Multnomah R. Co., (1883) 15 Fed 177, 8 Sawy 543.

One acquiring government land over which a public road has been located by adverse user takes subject to such easement. Wallowa County v. Wade, (1903) 43 Or 253, 260, 72 P 793.

Permissive use of private land for sidewalk purposes cannot become adverse without some unequivocal assertion of the rights of the public as inconsistent with the title on which the private owner relies. City of Clatskanie v. McDonald, (1917) 85 Or 670, 167 P 560.

Where the public's use of private property as a landing on a stream was more or less interrrupted, such use failed to meet the requirement of continuity. Chapman v. Dean, (1911) 58 Or 475, 115 P 154.

14. Pleading and proof

A plea of fee title is supported by proof of adverse possession for the statutory period. Neal v. Davis, (1909) 53 Or 423, 99 P 69, 101 P 212; Stephenson v. Van Blokland, (1911) 60 Or 247, 118 P 1026; Smith v. Algona Lbr. Co., (1914) 73 Or 1, 9, 136 P 7, 143 P 921; Mascall v. Murray, (1915) 76 Or 637, 645, 149 P 517, 521.

Where adverse possession is in issue, all the elements thereof must be alleged and established by clear and positive proof. Laurence v. Tucker, (1939) 160 Or 474, 85 P2d 374; Reeves v. Porta, (1944) 173 Or 147, 144 P2d 493.

The statute should be pleaded directly, as that the cause of action did not accrue within the prescribed period before the commencement of the action. Zeilin v. Rogers, (1884) 21 Fed 103, 10 Sawy 200.

Where a complaint to restrain occupation of premises bordering on navigable waters was amended so as to bring the whole of the disputed property into litigation for the first time, the suit so far as adverse possession was concerned was commenced at the time of the amendment. Montgomery v. Shaver, (1901) 40 Or 244, 66 P 923.

In injunction to restrain interference with the flow of water through a creek, defendant's answer, held sufficient in the absence of objection, although prior appropriation by defendant was not directly alleged. McCall v. Porter, (1902) 42 Or 49, 70 P 820, 71 P 976.

Where the complaint asserted title by adverse possession and the reply set up title by purchase at execution sale, the pleadings were construed together and were not inconsistent. Mascall v. Murray, (1915) 76 Or 637, 149 P 517, 521.

A complaint alleging that adverse possession had been "peaceable" and "hostile," held not inconsistent. Id.

A complaint not alleging in express terms that plaintiff's possession was exclusive was nevertheless sufficient, where the element of exclusive possession otherwise sufficiently appeared. Anderson v. Richards, (1921) 100 Or 641, 198 P 570.

Allegation that acts were done "with the knowledge and acquiescence of plaintiffs and to their substantial benefit" did not sustain prescriptive title. Laurance v. Tucker, (1939) 160 Or 474, 85 P2d 374.

An allegation that neither the plaintiff nor his grantor was seised or possessed of the premises during that period, and that the defendant was in the exclusive possession, was sufficient to allow proof of adverse possession by the defendant. Id.

15. Evidence

Burden of proving adverse possession is on him who claims the benefit of it. Altschul v. Casey, (1904) 45 Or 182, 76 P 1083; Gardner v. Wright, (1907) 49 Or 609, 91 P 286; Harris v. Southeast Portland Lbr. Co., (1928) 123 Or 549, 262 P 243; Masterson v. Kenard, (1932) 140 Or 288, 12 P2d 560; Shuffleton v. Nelson, (1875) 2 Sawy 540, Fed Cas No. 12,822.

To deprive others of property by adverse possession, proof must be clear and convincing. MacRae v. Small, (1906) 48 Or 139, 85 P 503; Reeves v. Porta, (1944) 173 Or 147, 144 P2d 493; Winthers v. Bertrand, (1964) 239 Or 97, 396 P2d 570.

Failure to pay taxes on property in suit is competent evidence on the issue whether a party occupied property under claim of ownership for the statutory period. Phipps v. Stancliff, (1926) 118 Or 32, 245 P 508; Security Sav. & Trust Co. v. Ogden, (1927) 123 Or 370, 261 P 69; Reeves v. Porta, (1944) 173 Or 147, 144 P2d 493; Volckers v. Seymour, (1949) 187 Or 170, 210 P2d 484.

Every possession is presumed to be rightful and adverse to the title of any other claimant until proved otherwise. Stark v. Starr, (1870) 1 Sawy 15, 23, Fed Cas No. 13,307.

Title by prescription may be proved by parol. Parker v. Wolf, (1914) 69 Or 446, 448, 138 P 463.

Plaintiff in a suit to quiet title was entitled to succeed where the evidence showed adverse possession under a claim of title for more than 10 years. Logus v. Hutson, (1893) 24 Or 528, 34 P 477.

In a suit to quiet title to land erroneously omitted from the deed to a larger tract, the evidence established adverse possession. West v. Edwards, (1902) 41 Or 609, 69 P 992.

In a suit to quiet title, evidence held to show that the state through its vendee under the contract for the purchase of the land, was in open, notorious, exclusive and adverse possession, under color of title for more than the statutory period. Stephenson v. Van Blokland, (1911) 60 Or 247, 118 P 1026.

Evidence held to show that the possession by the defendant was interrupted. Thomas v. Spencer, (1913) 66 Or 359, 361, 133 P 822.

Evidence showing continuous adverse appropriation of water by plaintiff for more than 20 years held sufficient. Allen v. Magill, (1920) 96 Or 610, 189 P 986, 190 P 726.

In injunction against maintenance of a dam whereby plaintiff's lands were flooded, evidence tending to show prior flooding of the lands for the required period was insufficient to establish prescriptive easement to flood. Harris v. Southeast Portland Lbr. Co., (1928) 123 Or 549, 262 P 243.

Plaintiff's ownership of a disputed strip of land up to an old line fence was established by evidence. Hoffman v. Jess, (1929) 128 Or 395, 274 P 918.

16. Trial and instructions

Defendant was not entitled to an instruction on adverse possession where evidence showed possession for seven years only. Rowland v. McCown, (1891) 20 Or 538, 26 P 853.

In ejectment by plaintiff claiming title by adverse possession, stipulation showing payment of taxes by defendant, together with oral admissions warranted submission of case to the jury. Phipps v. Stancliff, (1926) 118 Or 32, 245 P 508.

In a suit by United States to cancel patents to land in the bed of a nonnavigable lake, failure of the district court to make a finding on the character of defendant's adverse possession was error. United States v. Otley, (1942) 127 F2d 988.

FURTHER CITATIONS: Anderson v. Baxter, (1871) 4 Or 105; Olney v. Moore, (1886) 13 Or 238, 11 P 187; Johnson v. Knott, (1886) 13 Or 308, 10 P 418; Morrill v. Morrill, (1890) 20 Or 96, 25 P 362; Neppach v. Jones, (1891) 20 Or 491, 26 P 565, 27 P 266; Rowland v. McCown, (1891) 20 Or 538, 26 P 853; State v. Warner Valley Stock Co., (1910) 56 Or 283, 106 P 780, 108 P 861; Pacific Livestock Co. v. Davis, (1911) 60 Or 258, 119 P 147; Cruson v. City of Lebanon, (1913) 64 Or 593, 131 P 316; Mays v. Morrell, (1913) 65 Or 558, 132 P 714; Crow v. Crow, (1914) 70 Or 534, 139 P 854; Wiley v. Whitney, (1915) 76 Or 92, 146 P 1093, 147 P 938; Bernitt v. City of Marshfield, (1918) 89 Or 556, 174 P 1153; Re Water Rights of Hood R., (1924) 114 Or 112, 227 P 1065; Winslow v. Burge, (1925) 115 Or 375, 237 P 979; De Martini v. Hayhurst, (1936) 154 Or 663, 62 P2d 1; Patterson v. Horsefly Irr. Dist., (1937) 157 Or 1, 69 P2d 282, 70 P2d 33; Mumper v. Matthes, (1949) 186 Or 357, 206 P2d 86; Rose v. Denn, (1949) 188 Or 1, 213 P2d 810; Keerins Bros. v. Mauney, (1950) 189 Or 651, 219 P2d 753; Bingham v. Weber, (1953) 197 Or 501, 254 P2d 219; Hewitt v. Thomas, (1957) 210 Or 273, 310 P2d 313; Harris Pine Mills v. Davidson, (1967) 248 Or 528, 435 P2d 310; Morgan v. Bd. of Forestry, (1968) 250 Or 460, 443 P2d 236; Fry v. Woodward, (1969) 221 Or 39, 350 P2d 183; State ex rel. Thornton v. Hay, (1969) 254 Or 584, 462 P2d 671; Grimstad v. Dordan, (1970) 256 Or 135, 471 P2d 778; Eubanks v. Leveridge, (1877) 8 Fed Cas 811, 4 Sawy 274; Allen v .O'Donald, (1886) 28 Fed 17; John v. Smith, (1900) 102 Fed 218, 42 CCA 275; Tyee Consol. Min. Co. v. Jennings, (1905) 137 Fed 863, 70 CCA 393; Jasperson v. Scharnikow, (1907) 150 Fed 571, 80 CCA 373, 15 LRA (NS) 1178; Bower v. Stein, (1910) 177 Fed 673; Southern Ore. Co. v. United States, (1917) 241 Fed 16; City of Gold Hill v. Cal. Ore. Power Co., (1929) 35 F2d 317.

ATTY. GEN. OPINIONS: Title of adverse holder, 1926-28, p 18; tenant in common acquiring title adversely, 1926-28, p 420; adverse possession of tideland, 1926-28, p 434; adverse possession against the state, 1934-36, p 491, 1958-60, p 187; extinguishment of county roads by adverse possession, 1944-46, p. 435; acts constituting acceptance of a road as a county road, (1969) Vol 34, p 868.

LAW REVIEW CITATIONS: 7 OLR 329; 8 OLR 203; 12 OLR 346; 20 OLR 111.

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CASE CITATIONS: Stark v. Olney, (1869) 3 Or 88, 90; Roberts v. Sutherlin, (1872) 4 Or 219, 222; Pitnam v. Bump, (1873) 5 Or 17, 19; Gray v. Holland, (1881) 9 Or 512, 514; Beekman v. Hamlin, (1890) 19 Or 383, 385, 24 P 195; Tinsley v. Lombard, (1904) 46 Or 9, 78 P 895; Stadelman v. Miner, (1917) 83 Or 348, 395, 155 P 708, 163 P 585, 163 P 983; Hunsiker v. Gantenbein, (1935) 150 Or 22, 24, 42 P2d 766; State v. Amer. Sur. Co., (1935) 150 Or 236, 44 P2d 1079; Commercial Cred. Corp. v. Marden, (1936) 155 Or 29, 31, 62 P2d 573; Norby v. Section Line Drainage Dist. (1938) 159 Or 80, 76 P2d 966; Omicron Co. v. Williams, (1943) 172 Or 9, 139 P2d 547; Cabell v. Fed. Land Bank, (1943) 173 Or 11, 144 P2d 297; Cogswell v. Cogswell, (1946) 178 Or 417, 440, 167 P2d 324.

ATTY. GEN. OPINIONS: A statute of limitations on soldier's bounty bonds, 1924-26, p 419.

LAW REVIEW CITATIONS: 11 OLR 317; 12 OLR 343.

12.070

NOTES OF DECISIONS

1. Action upon a judgment or decree

Domestic judgments do not fall within the provisions of this section. Murch v. Moore, (1866) 2 Or 189; Strong v. Barnhart, (1875) 5 Or 496; Mason v. Mason, (1934) 148 Or 34, 34 P2d 328.

A judgment of a justice's court docketed in the circuit court is affected by the statute in the same way as a judgment of the latter court. Glaze v. Lewis, (1885) 12 Or 347, 7 P 354.

An action on a foreign judgment was barred, although not barred in the state of its rendition. Fargo v. Dickover, (1918) 87 Or 215, 170 P 289.

2. Action upon a sealed instrument

Suits to foreclose mortgages are treated as suits upon sealed instruments. Anderson v. Baxter, (1871) 4 Or 105, 110; Eubanks v. Leveridge, (1877) Fed Cas No. 4544, 4 Sawy 274.

A suit to subject mortgaged premises to the payment of the debt secured by the mortgage may be maintained after the statute has run against the note. Myer v. Beal, (1873) 5 Or 130; Kaiser v. Idleman, (1910) 57 Or 224, 228, 108 P 193, 28 LRA (NS) 169.

A suit to determine an adverse claim to real estate cannot be barred by the statute of limitations while the adverse claim or cloud exists. Meier v. Kelly, (1892) 22 Or 136, 29 P 265; Katz v. Obenchain, (1906) 48 Or 352, 85 P 617, 120 Am St Rep 821.

An action on an official bond for defalcation is not an action on a sealed instrument. Oregon v. Davis, (1902) 42 Or 34, 36, 71 P 68, 72 P 317.

3. When statute commences to run

The cause of action for a breach of a warranty of title to land accrues at the date of eviction. Northern Pac. R. Co. v. Montgomery, (1891) 86 Fed 251, 30 CCA 17.

Where the mortgagee went into possession without foreclosure with consent of the mortgagor, an action to redeem was barred when not commenced within the time for commencing a suit on a sealed instrument. Hurlburt v. Chrisman, (1921) 100 Or 188, 197 P 261.

In a suit to collect a judgment against an insolvent corporation from a stockholder thereof, the statute did not commence to run in favor of the stockholder until the entry of the judgment against the corporation. Powell v. Oregonian Ry., (1889) 38 Fed 187, 13 Sawy 543.

12.080

NOTES OF DECISIONS

1. Action upon a contract or liability, express or implied
2. Action upon a liability created by statute
3. Action for waste or trespass
4. Actions as to personalty
5. Suits
6. When statute commences to run

1. Action upon a contract or liability, express or implied

In the absence of tolling facts, an action upon contract is barred unless brought within the time prescribed. Rhoten v. Mendenhall, (1888) 17 Or 199, 20 P 49; Harding v. Grim, (1894) 25 Or 506, 36 P 634; Gilman v. Cochran, (1907) 49 Or 474, 90 P 1001; Dutro v. Ladd, (1907) 50 Or 120, 91 P 459; Jamieson v. Potts, (1910) 55 Or 292, 295, 105 P 93, 25 LRA (NS) 24; Smith v. Polk County, (1911) 57 Or 551, 556, 112 P 715; Horsfall v. Logan, (1914) 72 Or 150, 142 P 760; Gilbert v. Globe and Rutgers Fire Ins. Co., (1919) 91 Or 59, 174 P 1161, 178 P 358; Marshall v. Marshall, (1921) 98 Or 500, 194 P 425; De Haven Hdw. Co. v. Gellanders, (1927) 123 Or 119, 261 P 63; Lewis v. Siegman, (1931) 135 Or 660, 296 P 51, 297 P 1118; Closterman v. Rode, (1948) 183 Or 412, 193 P2d 532; Nicholas v. Murray, (1878) 5 Sawy 320, 18 Fed Cas 176.

An action upon a note is barred in six years, where no payments have been made. Kaiser v. Idleman, (1910) 57 Or 224, 227, 108 P 193, 28 LRA(NS) 169; Koop v. Cook, (1913) 67 Or 93, 96, 135 P 317; In re Berger's Estate, (1933) 144 Or 631, 25 P2d 138.

An action to recover from an agent moneys received for his principal's use must be brought within six years. Holbrook v. Hendrick's Estate, (1944) 175 Or 159, 152 P2d 573; Chappelle v. Olney, (1870) 1 Sawy 401, Fed Cas No. 2,613.

After the corporation's right to recover unpaid subscriptions to capital stock has become barred by the statute, creditors of the corporation cannot enforce the liability of stockholders. Hawkins v. Donnerberg, (1901) 40 Or 97, 66 P 691, 908.

A cause of action for a broker's commission is governed by this section. Zurcher v. Booth, (1916) 80 Or 335, 338, 157 P 147.

An action at law to recover a dividend must be brought within six years. Baillie v. Columbia Gold Min. Co., (1917) 86 Or 1, 166 P 965, 167 P 1167.

All actions in assumpsit are embraced in the provision relating to actions "on a contract or liability, express or implied." Lipman, Wolfe & Co. v. Phoenix Assur. Co., (1919) 258 Fed 544, 169 CCA 484.

An action on a highway contractor's bond is governed by the general statute of limitations. State v. Amer. Sur. Co., (1935) 150 Or 236, 44 P2d 1079.

Where money was loaned and no time was fixed for repayment, statute of limitations commenced to run on date loan was made. Ricker v. Ricker, (1954) 201 Or 416, 270 P2d 150.

This section rather than the Workmen's Compensation Act applies to a voluntary workmen's compensation policy. Shore v. St. Paul Fire & Marine Ins. Co., (1965) 242 F Supp 164.

When a court of equity takes jurisdiction of a legal cause of action because it is ancillary to a suit in equity, the applicable statute of limitations to the legal cause of action is as binding upon the court of equity as it would have been upon a court of law. Haggerty v. Nobles, (1966) 244 Or 428, 419 P2d 9.

This section does not apply to an action for damages based on failure to properly perform professional services contracted for. Bales for Food, Inc. v. Poole, (1967) 246 Or 253, 424 P2d 892.

Action for breach of warranty is on a contract for purposes of this section. DeCicco v. Uniroyal, Inc., (1968) 293 F Supp 1190.

This section is not superseded by the Uniform Commercial Code for a cause accruing prior to enactment of the Code. Id.

The six-year limitation applied. Hollin v. Libby, McNeill & Libby, (1969) 253 Or 8, 452 P2d 555.

In an action between cotenants, the allowance of defendant's offset of half the sum expended by her in securing patent for the land more than six years before was error. St. Martin v. Hendershott, (1916) 82 Or 58, 66, 151 P 706, 160 P 373.

An action for fraudulent misrepresentation in a realty contract was not governed by this section. Schwedler v. First State Bank, (1919) 92 Or 33, 179 P 671.

An action on an express warranty by a buyer of an automobile against the seller for personal injuries suffered as a result of a defect was governed by this section. Wells v. Oldsmobile Co. of Ore. (1934) 147 Or 687, 35 P2d 232.

Suit seeking recovery for improvident bank loans, while sounding in tort, was based upon contractual obligations of directors and governed by six-year period. McCook v. Barnum, (1938) 23 F Supp 769.

Denial of defendant's right to plead the statute was error where complaint failed to state when damages first arose. Norby v. Section Line Drainage Dist., (1938) 159 Or 80, 76 P2d 966.

Period of limitation upon grantees who agreed to pay mortgage debt was six years from date of assumption unless mortgage extended. Tuthill v. Stoehr, (1940) 163 Or 461, 98 P2d 8.

An amendment to the chattel mortgage statute taking the limitation on the commencement of such suits out from under this section was constitutional as affecting only a remedy and not a right. Evans v. Finley, (1941) 166 Or 227, 111 P2d 833.

A demand based on nondelivery of flour shipped by boat was governed by this section. The Blenheim, (1878) Fed Cas No. 1, 539.

An action for money advanced under an agreement that it should be repaid within one year after the advancement of the last instalment was barred in seven years from the date of the last instalment. Hickox v. Elliott, (1884) 22 Fed 13, 17, 10 Sawy 415.

The right of suit against a stockholder to collect a judgment against an insolvent corporation was not barred until six years after entry of the judgment. Powell v. Oregonian Ry., (1889) 38 Fed 187, 13 Sawy 543.

2. Action upon a liability created by statute

A liability created by statute does not include actions arising under common law. Hoffman v. Wair, (1961) 193 F Supp 727; Hoffman v. Keller, (1961) 193 F Supp 733; Hyatt Chalet Motels, Inc. v. Carpenters Local 1065, (1970) 430 F2d 1119.

Merely because tortious injury is inflicted upon one by another in the course of the violation of a federal law does not change the liability of the wrongdoer for a tortious act under common law. Hoffman v. Wair, (1961) 193 F Supp 727; Hoffman v. Keller, (1961) 193 F Supp 733.

An action on an official undertaking of a clerk for damages sustained by his failure to properly record a mortgage was an action on a liability created by statute. Howe v. Taylor, (1877) 6 Or 284.

The obligation of a county to pay its proportion of state taxes was "a liability created by statute". State v. Baker County, (1893) 24 Or 141, 33 P 530.

An action on a sheriff's undertaking as tax collector was an action on a liability created by statute. Multnomah County v. Kelly, (1900) 37 Or 1, 4, 60 P 202.

An action on the official bond of a public officer for defalcation was an action on a liability created by statute, notwithstanding the addition of seals to the signatures. Oregon v. Davis, (1902) 42 Or 34, 38, 71 P 68, 72 P 317.

An action against a sheriff and his surety for damages for the levy of execution on the property of plaintiff, a stranger to the writ, and its sale on execution was not within the section. Barnes v. Mass. Bonding Co., (1918) 89 Or 141, 172 P 95.

An action in a federal court to recover excess carrier charges under the Interstate Commerce Act was a liability created by statute other than a penalty or forfeiture. Davis v. Parrington, (1922) 281 Fed 10.

The period of limitations applicable to mandamus actions is that section analogous to the peculiar facts of each action. Nelson v. Baker, (1924) 112 Or 79, 227 P 301, 228 P 916.

An action against the mortgagee for failure to enter record satisfaction of chattel mortgages seeking statutory damages was governed by this section. Ebbert v. First Nat. Bank, (1929) 131 Or 57, 279 P 534.

An action on a security dealer's bond must be brought within six years after the liability was created. Hartford Acc. & Indem. Co. v. Ankeny, (1953) 199 Or 310, 261 P2d 387.

The employers' liability law does not create a right of action which did not exist at common law, and actions

arising out of that legislation do not fall within this section. Shelton v. Paris, (1953) 199 Or 365, 261 P2d 856.

The statute of limitations in an action based on civil conspiracy to violate Civil Rights Act, brought to enforce a federally created right, begins to run from the overt act alleged to have caused damage. Hoffman v. Halden, (1959) 268 F2d 280, 302.

Under this section the test of whether a right is created by statute is whether such right so changed the liability imposed by common law as to create an entirely new and distinct liability. Hyatt Chalet Motels, Inc. v. Salem Bldg. & Constr. Trades Council, (1968) 298 F Supp 699.

Action under Labor Management Relations Act for damages for injuries caused by secondary boycotts is governed by this section. Hyatt Chalet Motels, Inc. v. Carpenters Local 1065, (1970) 430 F2d 1119.

3. Action for waste or trespass

An action for wrongful deprivation of water is in the nature of trespass on the case and is not governed by this section. Dalton v. Kelsey, (1911) 58 Or 244, 251, 114 P 464; Norwood v. E. Ore. Land Co., (1932) 139 Or 25, 5 P2d 1057, 7 P2d 996.

A cause of action against a stockholder to enforce payment of a judgment against a corporation that committed waste, was not governed by the limitation applicable to the waste action. Powell v. Oregonian Ry., (1889) 38 Fed 187, 13 Sawy 543.

Where the direct result of the unlawful erection of dikes was to wash away the soil of another and thereby destroyed the freehold, it amounted to a trespass within the meaning of this section, whether the obstruction was on plaintiff's land or not. Cartwright v. So. Pac. Co., (1913) 206 Fed 234.

That a decedent in his lifetime wrongfully cut and took logs from plaintiff's land, did not create a trust ex maleficio which could be impressed against his estate after the six-year period; where it did not appear that deceased did not act in good faith, believing the timber to be his own. Lee v. Gram, (1922) 105 Or 49, 196 P 373, 209 P 474.

The invasion of plaintiff's land resulting from defendant's negligent conduct constituted a trespass. Martin v. Union Pac. R.R., (1970) 256 Or 563, 474 P2d 739.

One who knowingly causes water to flow onto or beneath the land of another commits a trespass. Peter v. Talent Irr. Dist., (1971) 258 Or 140, 482 P2d 170.

4. Actions as to personalty

Any actionable act, other than personal injury or breach of contract, whereby the owner of personal property is deprived of its benefit or it is damaged or destroyed, is an injury to personal property. Deetz v. Cobbs & Mitchell Co., (1927) 120 Or 600, 253 P 542; Teren v. Howard, (1963) 322 F2d 949.

An adverse holding of personal property for a period of over six years gives the possessor no title to the same. Goodwin v. Morris, (1881) 9 Or 322.

An action for conversion of personal property is within this section. Sheppard v. Yocum, (1882) 10 Or 402, 403.

Where a plea of the statute is interposed to an entire cause of action for conversion and it appears that a portion of the property was taken more than six years prior to action, defendant is entitled to the benefit of such defense so far as applicable. Bergman v. Inman, (1903) 43 Or 456, 72 P 1086, 73 P 341, 99 Am St Rep 771.

The purpose of subsection (4) is to include all actions for torts involving personal property. Deetz v. Cobbs & Mitchell Co., (1927) 120 Or 600, 253 P 542.

Trover by a tenant whose landlord wrongfully evicted him and converted sundry of his chattels on the premises was barred only by the general statute. Eldridge v. Hoefer, (1904) 45 Or 239, 77 P 874.

An action for damages to personal property on lands flooded because of opening of defendant's dam was an injury to personal property. Deetz v. Cobbs & Mitchell Co., (1927) 120 Or 600, 253 P 542.

A lessee's action for damages for the destruction of growing grass and pasturage by flooding thereof, was governed by this section. Brown v. Jones, (1929) 130 Or 424, 278 P 981.

5. Suits

Mere lapse of time does not constitute laches in Oregon. West Los Angeles Institute v. Mayer, (1966) 366 F2d 220.

In suits of purely equitable cognizance, statutes of limitation apply only by analogy, shifting the burden to plaintiff to establish his equitable action is not barred by laches. Id.

A stockholder's suit to set aside a judgment against a corporation fraudulently obtained was brought within the limitation period. May v. Roberts, (1930) 133 Or 643, 286 P 546.

6. When statute commences to run

The liability of a bank to a depositor being continuous, the statute does not begin to run until payment of such deposit is demanded and refused. State v. First Nat. Bank, (1912) 61 Or 551, 123 P 712, Ann Cas 1914B, 153; Haines v. First Nat. Bank, (1918) 89 Or 42, 172 P 505; Blakely v. First Nat. Bank, (1935) 151 Or 655, 51 P2d 1034; First Nat. Bank v. Connolly, (1943) 172 Or 434, 138 P2d 613, 143 P2d 243.

Where a contracted for period of limitation is tolled by estoppel, upon removal of the estoppel the period of the contracted for limitation begins to run again. Gilbert v. Globe & Rutgers Fire Ins. Co., (1919) 91 Or 59, 174 P 1161, 178 P 358; Steel v. Phenix Ins. Co., (1891) 51 Fed 715.

Where a claim is made for services, the outgrowth of continuous services, the right to bring an action thereon accrues at the completion or cessation of services, unless a later date has been fixed. Branch v. Lambert, (1922) 103 Or 423, 205 P 995; Officer v. Cummings, (1928) 127 Or 320, 272 P 273; Ball v. Pioneer Trust Co., (1944) 175 Or 1, 149 P2d 976.

Where the identity of the cause of action is substantially unchanged by an amended complaint filed after expiration of the statute of limitations, it does not state a new cause of action and is commenced in time. Richardson v. Inv. Co., (1928) 124 Or 569, 264 P 458, 265 P 1117; East Side Mill & Lbr. Co. v. Southeast Portland Lbr. Co., (1937) 155 Or 367, 64 P2d 625.

A claim for services against the state is not barred until the lapse of the statutory period of six years after the Act authorizing suit against the state. Ketchum v. State, (1864) 2 Or 103.

The statute runs from the time of conversion. Sheppard v. Yocum, (1882) 10 Or 402, 403.

A promise to delay the bringing of an action does not prevent the running of the statute when made without consideration. Green v. Coos Bay Wagon Rd. Co., (1885) 23 Fed 67, 10 Sawy 625.

Under a lease containing a clause for the purchase of the demised premises within a specified time, the statute does not commence to run against an action for waste until the privilege is extinguished by lapse of time. Powell v. Dayton, Sheridan & Grand Ronde R. Co., (1888) 16 Or 33, 37, 16 P 863, 8 Am St Rep 251.

With reference to a suit to collect a judgment against an insolvent corporation from a stockholder thereof, the statute does not commence to run until entry of judgment. Powell v. Oregonian Ry., (1889) 38 Fed 187, 13 Sawy 543.

The right of action for contribution accrues when one surety has paid more than his proportion of the debt. Durbin v. Kuney, (1890) 19 Or 71, 75, 23 P 661.

Where an agreement for services embraces distinct subjects, severally performed, with compensation apportioned

to each, a cause of action accrues upon each of such matters when the services are rendered. Bartel v. Mathias, (1890) 19 Or 482, 24 P 918.

The general rule as to contribution does not apply between partners, as the statute does not begin to run until the partnership business is fully settled, and a balance ascertained in favor of one or the other of the partners. McDonald v. Holmes, (1892) 22 Or 212, 29 P 735.

In a proceeding in the nature of a creditor's bill to reach assets of a liquidated corporation, the statute does not begin to run until the return of the execution nulla bona upon plaintiff's judgment against the corporation. Williams v. Commercial Nat. Bank, (1907) 49 Or 492, 502, 90 P 1012, 91 P 443, 11 LRA(NS) 857.

While husband and wife are jointly and severally liable for family necessaries, the act of one may not toll the statute of limitations as to the several liability of the other. Dale v. Marvin, (1915) 76 Or 528, 148 P 1116, 148 P 1151.

A majority stockholder is in some sense a trustee of corporate funds, a misappropriation of which is such a disavowal as will be deemed to give notice to the minority and start the statute of limitation running immediately. Baillie v. Columbia Gold Min. Co., (1917) 86 Or 1, 166 P 965, 167 P 1167.

The period of limitations applicable to mandamus actions is that section analogous to the peculiar facts of each action. Nelson v. Baker, (1924) 112 Or 79, 227 P 301, 228 P 916.

On an account stated the statute of limitations begins to run on the day following the agreement. Meridianal Co. v. Moeck, (1927) 121 Or 133, 253 P 525.

The statute of limitations applicable to mutual open accounts accrues only from date of last item. In re Hattrem's Estate, (1943) 170 Or 613, 135 P2d 777.

This section runs on each instalment of a note payable in instalments from the time each becomes due. Buckman v. Hill Military Academy, (1948) 182 Or 621, 189 P2d 575.

Federal court will apply state statutes of limitation and saving clauses in diversity cases. Johnston v. Earle, (1958) 162 F Supp 149.

In an action based on strict liability the statute begins to run when the injury occurs. Arrow Trans. Co. v. Fruehauf Corp., (1968) 289 F Supp 170.

When the identity of the cause of action in an amended complaint is not substantially the same as in the complaint and the limitation runs between the filing of the two, the action is barred. Credit Bureaus Adjustment Dept. v. Allen, (1968) 251 Or 616, 447 P2d 300.

A cause of action against a stockholder on a judgment against the corporation for waste accrued when the creditor had exhausted his remedies against the corporation, and where the corporation was insolvent, this happened when the judgment against it was obtained. Powell v. Oregonian Ry., (1889) 38 Fed 187, 13 Sawy 543.

When a county purchased goods at a time when its indebtedness was beyond the constitutional limitation, issuing warrants declared nonenforceable, the cause of action to recover the property accrued when it was delivered to the county. Municipal Sec. Co. v. Baker County, (1901) 39 Or 396, 65 P 369.

In a suit in the nature of a creditor's bill, the filing by one creditor prevented the statute of limitation from running against any of the creditors who came in under the decree. Dunne v. Portland St. Ry., (1901) 40 Or 295, 65 P 1052.

Where defendant in a sister state took and converted logs on which plaintiff had a lien for labor and brought them into this state, the cause of action accrued when the logs were brought here. Bergman v. Inman, (1903) 43 Or 456, 72 P 1086, 73 P 341, 99 Am St Rep. 771.

A right of action under an agreement to save one harmless from any injury or damage he might suffer from judgment liens accrued on the suffering of injury from breach of the agreement. Peterson v. Creason, (1905) 47 Or 69, 81 P 574.

After county warrants have ceased to bear interest, the statute did not begin to run until the required notice of 60 days prescribed by the statutes was given. Smith v. Polk County, (1911) 57 Or 551, 557, 112 P 715.

The cause of action of a broker for nonpayment of commission, who was retained to obtain a purchaser, which person first executed an option agreement and later purchased the property, accrued only at time of the purchase. Zurcher v. Booth, (1916) 80 Or 335, 338, 157 P 147.

Where a stenographer agreed to work for decedent for a monthly wage payable at the end of five years, the statute did not run on cause of action until six years thereafter. Tharp v. Jackson, (1917) 85 Or 78, 165 P 585, 1173.

Cause of action against county to recover amounts paid for tax delinquency certificate and statutory interest payable on void delinquency certificates accrued on issuance of certificate. Creason v. Douglas County, (1917) 86 Or 159, 167 P 796.

Where a check was delivered and accepted in the city where the drawee bank was situated, the statute started to run at the close of the next business day in favor of the drawer of the check, although it was not presented to the drawee bank until later. Colwell v. Colwell, (1919) 92 Or 103, 179 P 916, 4 ALR 876.

A claim for services payable when the employer's farm was sold was payable at the expiration of a reasonable time for effecting the sale, and where such reasonable time elapsed before the services ceased, the right of action accrued on the completion of the services. Branch v. Lambert, (1922) 103 Or 423, 205 P 995.

As against a cause of action on decedent's contract to devise property in consideration of services, the statute did not begin to run until the services had been fully performed. Brennen v. Derby, (1928) 124 Or 574, 265 P 425.

Action by assignee of mortgagee seeking subrogation to position of first mortgage lienholder was not barred by this section considered with ORS 12.040. Metropolitan Life Ins. Co. v. Craven, (1940) 164 Or 274, 101 P2d 237.

An oral agreement void under the Statute of Frauds did not act to toll the running of the statute. Reynolds v. United States Nat. Bank, (1943) 173 Or 96, 144 P2d 490.

Where a party paid current and delinquent taxes on property under an agreement with the owner to be reimbursed upon sale thereof, the obligation was a continuing one and the cause of action accrued on the date of the death of the owner. Richter's Estate, (1947) 181 Or 360, 175 P2d 997, 181 P2d 133, 182 P2d 378.

FURTHER CITATIONS: McLaughlin v. Hoover, (1853) 1 or 32; Baldro v. Tolmie, (1855) 1 Or 162; Torrence v. Strong, (1870) 4 Or 39; Pitman v. Bump, (1873) 5 Or 19; McCormick v. Blanchard, (1879) 7 Or 233; Sayles v. Ore. Cent. Ry., (1879) Fed Cas No. 12,423, 6 Sawy 31; Bennett v. Stephens, (1880) 8 Or 444; State v. Chadwick, (1882) 10 Or 525; Davis v. Davis, (1890) 20 Or 78, 25 P 140; Cross v. Allen, (1891) 141 US 528, 125 S Ct 67, 35 L Ed 843; State v. Dunn, (1893) 23 Or 562, 32 P 621, 37 Am St Rep 704; Patterson v. Thompson, (1898) 90 Fed 647; Smith v. Day, (1901) 39 Or 531, 64 P 812, 65 P 1055; Nodine v. First Nat. Bank, (1902) 41 Or 386, 68 P 1109; Carroll v. Nodine, (1902) 41 Or 412, 69 P 51; Sloan v. Sloan, (1904) 46 Or 36, 78 P 893; Casner v. Hoskins, (1913) 64 Or 254, 128 P 841, 130 P 55; Paulson v. Weeks, (1916) 80 Or 468, 157 P 590; Robinson v. Phegley, (1917) 84 Or 124, 163 P 1166; McLaughlin v. Head, (1917) 86 Or 361, 168 P 614; Brown v. Portland, (1920) 97 Or 600, 190 P 722; Banzer Estate, (1923) 106 Or 654, 213 P 406; Ford v. Schall, (1924) 110 Or 21, 221 P 1052, 222 P 1094; Ford v. Schall, (1925) 114 Or 688, 236 P 745; Larsen v. Duke, (1925) 116 Or 25, 240 P 227; Spencer v. Wolff, (1926) 119 Or 237,

243 P 548; Fisher v. Collver, (1927) 121 Or 173, 254 P 815; Hill v. Wilson, (1927) 123 Or 193, 261 P 422; Abraham v. Mock, (1929) 130 Or 32, 273 P 711, 278 P 972; Eastman v. Crary, (1930) 131 Or 694, 284 P 280; Brady v. Hodler, (1931) 135 Or 514, 295 P 502; Banfield v. Schulderman, (1931) 137 Or 256, 299 P 323, 3 P2d 116; Metropolitan Cas. Ins. Co. v. N.B. Lesher, Inc., (1935) 152 Or 161, 52 P2d 1133; Goodman v. Fernald, (1936) 154 Or 654, 61 P2d 1253; Massachusetts Bonding & Ins. Co. v. Anderegg, (1936) 83 F2d 622; Akin v. Sec. Sav. & Trust Co., (1937) 157 Or 172, 68 P2d 1047, 71 P2d 321; Scotte v. Hood, (1943) 170 Or 370, 133 P2d 897; Schwarzenback v. Miller, (1943) 171 Or 220, 137 P2d 283; Omicron Co. v. Williams, (1943) 172 Or 9, 139 P2d 547; Cabell v. Fed. Land Bank, (1943) 173 Or 11, 144 P2d 297; Hefford v. Metropolitan Life Ins. Co., (1944) 173 Or 353, 144 P2d 695; First Nat. Bank v. Benton County, (1944) 175 Or 485, 154 P2d 841; Wehoffer v. Wehoffer, (1945) 176 Or 345, 156 P2d 830; Fehl v. Jackson County, (1945) 177 Or 200, 161 P2d 782; City of Pendleton v. Holman, (1945) 177 Or 532, 164 P2d 434; Fullerton v. Lamm, (1945) 177 Or 655, 163 P2d 941, 165 P2d 63; Douglas Cred. Assn. v. Padelford, (1947) 181 Or 345, 182 P2d 390; Wilder v. Haworth, (1950) 187 Or 688, 213 P2d 797; Fairview Farms, Inc., v. Reynolds Metal Co., (1959) 176 F Supp 178; Kelly v. Tracy, (1965) 209 Or 153, 305 P2d 411; Martin v. Reynolds Metals Co., (1959) 221 Or 86, 342 P2d 790; Hoffman v. Halden, (1959) 268 F2d 280; Dowell v. Mossberg, (1960) 226 Or 173, 355 P2d 624, 359 P2d 541; Harmon v. Martin Bros. Container & Tbr. Prod. Corp., (1964) 227 F Supp. 9; Reynolds Metals Co. v. Martin, (1964) 337 F2d 780; Commercial Sec. Inc. v. Gen. Ins. Co., (1966) 269 F Supp 398; Eustis v. Park-O-Lator Corp., (1967) 249 Or 194, 435 P2d 802, 437 P2d 734; Brown v. First Ins. Co. of Hawaii, (1968) 295 F Supp 164.

ATTY. GEN. OPINIONS: Statute of limitations application to municipal corporations, 1932-34, p 77; suspension of statute for disability, 1934-36, p 799; waiver of statute of limitations in notes, 1936-38, p 51; statute of limitations application to lien of personal property tax, 1940-42, p 460; State Land Board's right to unclaimed wages or uncashed checks held by foreign corporations, 1964-66, p 208; termination of rights to veterans' education benefits, 1964-66, p 368.

LAW REVIEW CITATIONS: 2 OLR 187; 9 OLR 507; 11 OLR 230, 317; 12 OLR 346; 22 OLR 381; 37 OLR 69; 42 OLR 277; 47 OLR 278; 1 WLJ 303; 1 EL 53.

12.090

NOTES OF DECISIONS

A mutual account is usually considered to be one in which each party to the account has extended credit to the other and in which there have been reciprocal demands by the parties. Van de Wiele v. Koch, (1970) 256 Or 349, 472 P2d 803.

FURTHER CITATIONS: DeCicco v. Uniroyal, Inc., (1968) 293 F Supp 1190.

12.100

NOTES OF DECISIONS

1. Action against a sheriff or constable

An action on a sheriff's bond for damages being an adequate remedy at law, mandamus cannot be founded upon a refusal of the sheriff to levy. Habersham v. Sears, (1884) 11 Or 431, 5 P 208, 50 Am St Rep 481.

The duties imposed upon the sheriff acting in the capacity of tax collector are not such as pertain to the ordinary functions of that officer and are not governed by this section. Multnomah County v. Kelly (1900) 37 Or 1, 60 P 202.

A sheriff may execute a conveyance to the purchaser at a foreclosure sale, though he could not, at the time, have been compelled by mandamus to execute a deed, because of the statute. Talbot v. Cook, (1911) 57 Or 535, 537, 112 P 709.

An action against a surety on a sheriff's or constable's bond is governed by this section. Barnes v. Mass. Bonding Co., (1918) 89 Or 141, 172 P 95.

The period of limitation for an action for damages for levy of execution on the property of a stranger to the writ and sale is fixed by this section. Id.

Action against sheriff and his sureties for malicious prosecution is not controlled by this section. Murray v. Low, (1925) 8 Fed 2d 352.

The cause of action on a sheriff's bond for wrongfully levying on property foreign to the writ accrued at the time of the breach of official duty, namely date of seizure. Industrial Chrome Plating Co. v. North, (1944) 175 Or 351, 153 P2d 835, 156 ALR 250.

2. Action upon a statute for penalty of forfeiture

A statutory action against a director of a corporation to enforce the statutory liability for declaring and paying dividends while the corporation was insolvent is a penalty within this section. Patterson v. Thompson, (1898) 86 Fed 85; Paterson v. Wade, (1902) 115 Fed 770, 53 CCA 1.

The distinction between the actions governed by this subsection and by ORS 12.130, is that when the action is given to the party aggrieved to recover a forfeiture the limitation is three years; whereas if the action is given to a mere informer, one year is the limitation. Howe v. Taylor, (1877) 6 Or 284.

The cause of action for the sum assessed against a chattel mortgagee who fails to enter satisfaction within 10 days after request for discharge of mortgagor is penal in nature and is governed by this section. Ebbert v. First Nat. Bank, (1929) 131 Or 57, 279 P 534.

An action against a surety on a county clerk's bond for damages suffered as result of official delinquency of the clerk was not an action on a penalty or forfeiture within this section. Howe v. Taylor, (1877) 6 Or 284.

An action against a railway company for freight overcharges was an action for money had and received, and not an action for a penalty or forfeiture. Service Lbr. Co. v. Sumpter Valley Ry. Co., (1913) 67 Or 63, 75, 135 P 539.

FURTHER CITATIONS: Bowles v. Barde Steel Co., (1945) 177 Or 421, 164 P2d 692; Fullerton v. Lamm, (1946) 177 Or 655, 163 P2d 941, 165 P2d 63; McCook v. Barnum, (1938) 23 F Supp 769; Hoffman v. Halden, (1959) 268 F2d 280.

LAW REVIEW CITATIONS: 37 OLR 69; 47 OLR 278.

12.110

NOTES OF DECISIONS

1. False imprisonment
2. Criminal conversation
3. Injury to the person
4. Injury to the person or rights of another, not on contract and not enumerated in this chapter
5. Action at law based upon fraud or deceit
6. Overtime or premium pay
7. When statute commences to run
8. Pleading and effect of appeal

1. False imprisonment

An action for false imprisonment does not accrue until the suit out of which the alleged illegal imprisonment arose, has terminated in favor of plaintiff and he has been discharged from the alleged restraint. Lane v. Ball, (1917) 83 Or 404, 412, 160 P 144.

2. Criminal conversation

A cause of action for criminal conversation, accruing before the passage of a law limiting the period for commencing such is not within the operation of the limitation. Pitman v. Bump, (1873) 5 Or 17, 19.

When the evidence does not conclusively show that an action for criminal conversation and alienation of affections is barred, the matter is for the jury. Disch v. Closset, (1926) 118 Or 111, 121, 244 P 71.

3. Injury to the person

A malpractice action for negligent treatment is governed by this section. Shives v. Chamberlain, (1942) 168 Or 676, 126 P2d 28; Hotelling v. Walther, (1942) 169 Or 559, 130 P2d 944; Wilder v. Haworth, (1950) 187 Or 688, 213 P2d 797.

Limitation in a malpractice action begins to run when the tortious act is discovered or reasonably should have been discovered. Berry v. Branner, (1966) 245 Or 307, 421 P2d 996; Frohs v. Greene, (1969) 253 Or 1, 452 P2d 564. Berry v. Branner, supra, overruling Vaughn v. Langmack, (1964) 236 Or 542, 390 P2d 142.

A servant's action for negligent injuries is governed by this section. Conroy v. Ore. Constr. Co., (1885) 23 Fed 71, 73, 10 Sawy 630.

An action against a city for injuries caused by a defective street is barred two years after the date of the injury where a charter provision requiring the filing of a claim does not prohibit action within the time for such filing. Colby v. Portland, (1918) 89 Or 566, 568, 174 P 1159, 3 ALR 819.

An action for injuries due to a defect in a building, which defendant as agent for landlord had agreed to repair, was governed by this section. Goodman v. Fernald, (1936) 154 Or 654, 662, 61 P2d 1253.

4. Injury to the person or rights of another, not on contract and not enumerated in this chapter

An action for interference with water rights constituting trespass on the case is governed by this section. Dalton v. Kelsey, (1911) 58 Or 244, 114 P 464; Norwood v. E. Ore. Land Co., (1932) 139 Or 25, 5 P2d 1057, 7 P2d 996.

A liability created by statute does not include actions which arise under common law. Hoffman v. Wair, (1961) 193 F Supp 727; Hoffman v. Keller, (1961) 193 F Supp 733; Hyatt Chalet Motels, Inc v. Carpenters Local 1065, (1970) 430 F2d 1119.

Tortious injury inflicted upon one by another in the course of the violation of a federal law does not change the liability of the wrongdoer for a tortious act under common law. Hoffman v. Wair, (1961) 193 F Supp 727; Hoffman v. Keller, (1961) 193 F Supp 733.

Actions of trespass, trover, detinue and replevin are not governed by the two years' statute but by the six years' period. Sheppard v. Yocum, (1882) 10 Or 402, 418.

The 1870 amendment of this section being in direct conflict with the earlier statute, impliedly repealed the earlier section governing the period of limitation applicable to personal injuries. Smith v. Day, (1901) 39 Or 531, 535, 64 P 812, 65 P 1055.

An action against a sheriff and his deputy for malicious prosecution is governed by this section. Murray v. Low, (1925) 8 F2d 352.

An action by a lower riparian owner for damages caused by the maintenance of a sewer system, so as to prevent drainage and reclamation of land, is controlled by this section. Miller v. City of Woodburn, (1928) 126 Or 621, 630, 270 P 781.

An action for crop damage by flooding of land is not governed by this section. Brown v. Jones, (1929) 130 Or 424, 431, 278 P 981.

An action by a buyer of an automobile against the seller for damages for personal injury suffered as a result of a defect in such automobile, based upon a breach of an express warranty, is not governed by this section. Wells v. Oldsmobile Co., (1934) 147 Or 687, 35 P2d 232.

An action for wrongful death does not arise where the cause of action of the deceased was barred by this statute at the time of his death. Piukkula v. Pillsbury Astoria Flouring Mills Co., (1935) 150 Or 304, 318, 42P2d 921, 44 P2d 162, 99 ALR 244.

An action for slander of title is not governed by this section. Woodard v. Pac. Fruit & Prod. Co., (1940) 165 Or 250, 106 P2d 1043.

Actions arising under the employers' liability law must be brought within the time limitations of this section. Shelton v. Paris, (1953) 199 Or 365, 261 P2d 856.

This section applies to an action for damages based on failure to properly perform professional services contracted for. Bales for Food, Inc. v. Poole, (1967) 246 Or 253, 424 P2d 892.

If statute of limitations defense is partial, defendant has burden of proving which part of damage occurred before running of the statute. Furrer v. Talent Irr. Dist., (1970) 258 Or 494, 466 P2d 605.

Action under Labor Management Relations Act for damages for injuries caused by secondary boycotts is governed by ORS 12.080 applicable to actions upon liabilities created by statute rather than by this section. Hyatt Chalet Motels, Inc. v. Carpenters Local 1065, (1970) 430 F2d 1119.

An action for damages to personal property on lands flooded because of opening of defendant's dam was a trespass "especially enumerated". Deetz v. Cobbs & Mitchell Co., (1927) 120 Or 600, 253 P 542.

Although plaintiffs were first poisoned by the emanation of flourides from defendant's plant more than two years before action was brought, since the tort was continuing the action was not barred by this section. Reynolds Metals Co. v. Yturbide, (1958) 258 F2d 321, cert. denied, 358 US 840, 79 S Ct 66, 3 L Ed 2d 76.

This section did not bar an action for damages based upon the deposit of particulates upon plaintiff's land by the operation of defendant's factory, since the action properly was based upon trespass. Fairview Farms, Inc. v. Reynolds Metals Co., (1959) 176 F Supp 178.

5. Action at law based upon fraud or deceit

Prior to the 1919 amendment the court construed this section to include actions for fraud and deceit. Hood v. Seachrest, (1918) 89 Or 457, 174 P 734; Schwedler v. First State Bank, (1919) 92 Or 33, 179 P 671.

The provision as to "discovery" of the fraud means from the time the fraud was known or could have been discovered through the exercise of reasonable diligence. Linebaugh v. Portland Mtg. Co., (1925) 116 Or 1, 8, 239 P 196; Huycke v. Latourette, (1958) 215 Or 173, 332 P2d 606; Dilley v. Farmers Ins. Group, (1968) 250 Or 207, 441 P2d 594.

Questions as to the time of discovery of the fraud and the exercise of reasonable diligence starting the running of the statute are for the jury, except where only one conclusion can reasonably be drawn. Linebaugh v. Portland Mtg. Co., (1925) 116 Or 1, 8, 239 P 196; Carey v. Hays, (1967) 248 Or 444, 434 P2d 331.

An action for breach of a contract fraudulently induced is not governed by this section. Smith v. Jackson, (1920) 97 Or 479, 192 P 412.

An action founded upon fraudulent inducements to loan money is governed by this section. Murray v. Lamb, (1944) 174 Or 239, 148 P2d 797, 801.

Notice of one specification of fraud is not as a matter of law necessarily notice as to all, and action may be based upon any not barred by the statute. Wood v. Baker, (1959) 217 Or 279, 341 P2d 134.

The limitation on actions based on fraud applies to counterclaims seeking affirmative relief. Dixon v. Schoonover, (1961) 226 Or 443, 359 P2d 115, 360 P2d 274.

The defense of fraud is available as recoupment to cancel out plaintiffs' claim, even though an affirmative action for fraud is barred by this section. Id.

Limitations on actions for fraud are to be liberally construed. Equitable Life & Cas. Ins. Co. v. Lee, (1962) 310 F2d 262.

Where the evidence is in doubt, it is for the trier of facts to determine when the statute commences to run. Carey v. Hays, (1967) 248 Or 444, 434 P2d 331.

An action for fraudulent representations as to soil and water supply was barred where the evidence showed that more than two years prior to the action plaintiffs and their agent had inspected the land and had knowledge of crop failures. Linebaugh v. Portland Mtg. Co., (1925) 116 Or 1, 8, 239 P 196.

A suit to set aside a conveyance by defendant to his wife in fraud of creditors was not governed by this section. First Nat. Bank v. Buckland, (1929) 128 Or 242, 273 P 373.

An action for fraud in the exchange of realty brought within the period prescribed by this section as tolled by OC 1-214 [ORS 12.150] and OC 1-219 [ORS 12.220], was not barred. Rayburn v. Norton, (1935) 150 Or 140, 151, 36 P2d 986, 43 P2d 919.

An action for misrepresenting the ownership of a power shovel was barred where more than two years prior to the action plaintiff had knowledge of facts sufficient to put him upon notice of the truth. Feak v. Marion Steam Shovel Co., (1936) 84 F2d 670.

A suit against a fiduciary for fraudulently concealing conversion of trust funds was governed by this section. First Nat. Bank v. Connolly, (1943) 172 Or 434, 138 P2d 613, 143 P2d 243.

A bankruptcy trustee's action against defendant for fraudulently depriving the bankrupt corporation of certain assets was barred by this section where trustee had knowledge of material facts more than two years before action was begun. McBride v. Farrington, (1945) 60 F Supp 92.

A suit by a trustee in bankruptcy against a former president of the bankrupt corporation, who was alleged to have procured without consideration the transfer to himself of assets of the bankrupt, was barred when instituted more than two years after the trustee had knowledge of the fraud, or facts sufficient to excite inquiry. McBride v. Farrington, (1946) 156 F2d 971.

6. Overtime or premium pay

Premium pay does not include vacation pay, but is a term describing a rate of pay. Massey v. Oregon-Wash. Plywood Co., (1960) 223 Or 139, 353 P2d 1039.

A bonus is not overtime or premium pay as contemplated by this section. Rake v. City Lbr. Co., (1967) 283 F Supp 870.

7. When statute commences to run

In a negligence action by an employe for failure of employer to provide a dust-free workroom, the limitation begins to run when the plaintiff became aware of the accumulative effects of the harmful dust. Hutchison v. Semler, (1961) 227 Or 437, 361 P2d 803, 362 P2d 704; Vaughn v. Langmack (dissenting opinion), (1964) 236 Or 542, 578, 390 P2d 142.

The running of the statute of limitations is tolled until a person reaches 21 even though he marries before reaching that age. Tavenier v. Weyerhaeuser Co., (1962) 309 F2d 87. **Distinguishing** Bock v. Collier, (1944) 175 Or 145, 151 P2d 732, and Highland v. Tollisen, (1915) 75 Or 578, 147 P 558.

An allegation that an injury occurred "on or about" a certain day does not allege that it occurred upon any distinct day, and therefore the day mentioned cannot be taken as the day upon which the statute began to run. Conroy v. Ore. Constr. Co., (1885) 23 Fed 71, 73, 10 Sawy 630.

The distinction between an action for false imprisonment and one for malicious abuse of process is that as to the former the time prescribed does not begin to run until the prior action has finally terminated in plaintiff's favor, while as to the latter the cause of action arises when the plaintiff is apprehended under a valid writ for some collateral purpose. Lane v. Ball, (1917) 83 Or 404, 425, 160 P 144, 163 P 975.

The running of the statute against an action for personal injuries is not interrupted by an action against the servant of the real party in interest. Colby v. Portland, (1918) 89 Or 566, 174 P 1159, 3 ALR 819.

In the presence of contradictory evidence as to when personal injuries were suffered, it is for the jury to decide and hence determine when the cause of action accrues. Joyner v. Crown Willamette Paper Co., (1919) 94 Or 207, 185 P 299.

A cause of action for malicious prosecution is complete when the prosectution is terminated in favor of the plaintiff, and the statute of limitations begins to run at that time. White v. Pac. Tel. & Tel. Co., (1942) 168 Or 371, 123 P2d 193.

A counterclaim based on a cause of action which is not barred at the time of the commencement of plaintiff's action is not thereafter barred because not pleaded before the expiration of the full statutory time. Lewis v. Merrill, (1961) 228 Or 541, 365 P2d 1052.

This section is in pari materia with ORS 12.220 and 18.230. Warn v. Brooks-Scanlon, Inc., (1966) 256 F Supp 690.

In an action against a city for damages for nonpayment of warrants issued by the defendant upon a special fund to be raised, the statute had not run against the warrants as the money had not yet been provided for the special fund with which to pay them. Tillman Co. v. City of Seaside, (1933) 145 Or 239, 25 P2d 917.

In case of an occupational ailment, the statute commences to run not later than the time when an employe experienced difficulty in breathing and left his employment on advice of a physician. Piukkula v. Pillsbury Astoria Flouring Mills Co., (1935) 150 Or 304, 42 P2d 921, 44 P2d 162, 99 ALR 244.

Where liability sought to be recovered upon in a federal court in another state had its origin in Oregon and was governed by the two-year statute of limitation, the further provisions relative to tolling during a party's absence from the state had no application, since federal court's process at all times could have been invoked whether defendant was within or without the State of Oregon. Stevens v. Walker, (1945) 61 F Supp 441.

8. Pleading and effect of appeal

During the pendency of an appeal from a judgment of nonsuit, the time for bringing an action is suspended, and a new action after the affirmance within two years from the accrual of the cause, excluding such period, is in time. Hutchings v. Royal Bakery, (1913) 66 Or 301, 131 P 514, 132 P 960, 134 P 1033.

In an action for death caused by a policeman, an amended complaint after reversal of the judgment did not change cause of action by omission of surety company and was not barred by this section, the original action having been filed in time. Anderson v. Maloney, (1924) 111 Or 84, 88, 225 P 318.

In admiralty cases when the libel discloses that the statute has run it becomes incumbent on the libellant to plead and prove facts negativing laches or tolling the statute. Wilson v. NW Marine Iron Works, (1954) 212 F2d 510.

In an action for damages caused by seepage and the rising of a dam which prevented proper drainage, the defendants were not prejudiced by the sustaining of demurrers to pleas of the statute where they were permitted to introduce evidence of these defenses. Patterson v. Horsefly Irr. Dist., (1937) 157 Or 1, 15, 69 P2d 282, 286, 70 P2d 36.

Objection that part of a claim was barred was waived where objection was not made by answer or demurrer, even though the objectionable matter was incorporated after the answer was filed. Elliott v. Mosgrove, (1939) 162 Or 507, 91 P2d 852, 93 P2d 1070, 1076.

Plaintiff's complaint alleging discovery of defendant's fraud more than two years after the transaction, was demurrable since no reason was alleged for not discovering the fraud sooner. Huycke v. Latourette, (1958) 215 Or 173, 332 P2d 606; Heard v. Coffey, (1959) 218 Or 275, 344 P2d 751.

When an amendment to correct the name of the defendant sought to impose liability on a different "entity" after the limitation period had expired, when the quantum of assets amenable to execution might have been materially changed, the substituted defendant's defense in bar was properly sustained. Maslov v. Manning, (1964) 239 Or 393, 397 P2d 833.

FURTHER CITATIONS: Sayles v. Ore. Cent. Ry , (1872) Fed Cas No. 1243, 6 Sawy 31; Gregory v. So. Pac. Co., (1907) 157 Fed 113; Hamilton v. No. Pac. S.S. Co., (1917) 84 Or 71, 164 P 579; Lipman, Wolfe & Co. v. Phoenix Assur. Co., (1919) 258 Fed 544, 169 CCA 484; Keadle v. Padden, (1933) 143 Or 350, 20 P2d 403, 22 P2d 892; Meikle v. Drain, (1934) 69 F2d 290; Massachusetts Bonding & Ins. Co. v. Anderegg, (1936) 83 F2d 622; Patterson v. W. Loan and Bldg. Co., (1936) 155 Or 140, 62 P2d 946; McCook v. Barnum, (1938) 23 F Supp 769; Hansen v. Hayes, (1944) 175 Or 358, 154 P2d 202; McIver v. Norman, (1949) 187 Or 516, 205 P2d 137; Duniway v. Barton, (1951) 193 Or 69, 237 P2d 930; Wilson v. Edwards Transp. Co., (1954) 120 F Supp 742; Hall v. Copco Pac., Ltd., (1955) 224 F2d 884; Railton v. Redmar, (1956) 209 Or 80, 304 P2d 408; Kelly v. Tracy, (1956) 209 Or 153, 305 P2d 411; Bridgmon v. Walker, (1959) 218 Or 130, 344 P2d 233; Martin v. Reynolds Metals Co., (1959) 221 Or 86, 342 P2d 790; Grabner v. Willys Motors, Inc., (1960) 282 F2d 644; Heise v. Pilot Rock Lbr. Co., (1960) 222 Or 78, 352 P2d 1072; Hoffman v. Halden, (1959) 268 F2d 280; Dowell v. Mossberg, (1961) 226 Or 173, 355 P2d 624, 359 P2d 541; Lang v. Hill, (1961) 226 Or 371, 360 P2d 316; Conner v. Spencer, (1962) 304 F2d 485; Larson v. Allen, (1963) 236 Or 228, 388 P2d 115; Teren v. Howard, (1963) 322 F2d 949; Harmon v. Martin Bros. Container & Tbr. Prod. Corp., (1964) 227 F Supp 9; Carey v. Hays, (1965) 243 Or 73, 409 P2d 899; Commercial Sec. Inc. v. Gen. Ins. Co., (1966) 269 F Supp 398; West Los Angeles Institute v. Mayer, (1966) 366 F2d 220; Newlun v. Portland, (1967) 248 Or 291, 433 P2d 816; State ex rel. Western Seed Prod. Corp. v. Campbell, (1968) 250 Or 262, 442 P2d 215; Hyatt Chalet Motels, Inc. v. Salem Bldg & Constr. Trades Council, (1968) 298 F Supp 699; DeCicco v. Uniroyal, Inc., (1968) 293 F Supp 1190; Allen v. Lococo, (1968) 252 Or 195, 448 P2d 569; Kenner v. Schmidt, (1968) 252 Or 218, 448 P2d 537; Hollin v. Libby, McNeill & Libby, (1969) 253 Or 8, 452, P2d 555; Martin v. Union Pac. R.R., (1970) 256 Or 563, 474 P2d 739; Fuller v. Safeway Stores, Inc., (1971) 258 Or 131, 481 P2d 616.

ATTY. GEN. OPINIONS: Statute of limitations running against certain claims of state, 1920-22, p 25.

LAW REVIEW CITATIONS: 13 OLR 176; 37 OLR 68, 69; 42 OLR 277; 45 OLR 73-80; 47 OLR 94; 48 OLR 204; 49 OLR 337-342; 1 WLJ 303; 6 WLJ 327-334, 533; 7 WLJ 157; 1 EL 53.

12.120

NOTES OF DECISIONS

It is not necessary to prove that the slanderous words were spoken on the day laid in the complaint, but only that they were spoken before the commencement of the action and are not barred by this section. Quigley v. McKee, (1885) 12 Or 22, 5 P 347.

Whether the slander involves property or the person the limitation is the same. Woodard v. Pac. Fruit & Prod. Co., (1940) 165 Or 250, 106 P2d 1043.

The right of action accrues from the time of publication of the slander. Bock v. Collier, (1944) 175 Or 145, 151 P2d 732.

FURTHER CITATIONS: Pitman v. Bump, (1873) 5 Or 17; Warn v. Brooks-Scanlon, Inc., (1966) 256 F Supp 690.

LAW REVIEW CITATIONS: 37 OLR 68, 69.

12.130

NOTES OF DECISIONS

The distinction between the different limitations on actions of the same general class as are covered by this section is that when the action is given to the party aggrieved to recover a forfeiture under a statute, or to the state with such party, three years is the limitation, and when it is given generally to an informer, one year is the limitation. Howe v. Taylor, (1877) 6 Or 284, 294.

An action by a mortgagee against the sureties of a county clerk for damages for recording a mortgage in the record of deeds was not governed by this section. Id.

FURTHER CITATIONS: Bowles v. Barde Steel Co., (1945) 177 Or 421, 164 P2d 692.

12.140

NOTES OF DECISIONS

An action by the state against a county to recover unpaid taxes is not subject to this section but to the six-year period prescribed for action upon a liability created by statute. State v. Baker County, (1893) 24 Or 141, 33 P 530.

Mere lapse of time does not constitute laches in Oregon. West Los Angeles Institute v. Mayer, (1966) 366 F2d 220.

In suits of purely equitable cognizance, statutes of limitation apply only by analogy, shifting the burden to plaintiff to establish that his equitable action is not barred laches. Id.

A proceeding to enforce a domestic judgment was not governed by this section, where plaintiff proceeded by moving for leave to issue execution on the judgment, as provided by the statute. Strong v. Barnhart, (1875) 5 Or 496.

FURTHER CITATIONS: City of Pendleton v. Holman, (1945) 177 Or 532, 164 P2d 434; Calvin v. West Coast Power Co., (1942) F Supp 783; Kelly v. Tracy, (1956) 209 Or 153, 305 P2d 411; Teren v. Howard, (1963) 322 F2d 949.

ATTY. GEN. OPINIONS: Action to recover escheated money as within section, 1928-30, p 407.

12.150

NOTES OF DECISIONS

1. In general
2. Out of the state
3. Concealment
4. Nonresidence

1 In general

This section does not toll the statute as to a defendant motorist since he can be served pursuant to ORS 15.190. Whittington v. Davis, (1960) 221 Or 209, 350 P2d 913; Winters v. Jacobson, (1960) 221 Or 214, 350 P2d 1078.

2. Out of the state

Where the remedy is in rem, the absence of the debtor does not effect limitations. Anderson v. Baxter, (1871) 4 Or 105; Eubanks v. Leveridge, (1877) 4 Sawy 274, Fed Cas No. 4544.

This section is intended only to apply to common law rights of action and, since a mechanic's lien is of statutory origin, the general statute of limitations has no application to it. Burns v. White Swan Min. Co., (1899) 35 Or 305, 57 P 637.

A foreign corporation maintaining an agent within the state upon whom service of summons may be made is not "out of the state" within this section. Hamilton v. No. Pac. S.S. Co., (1917) 84 Or 71, 164 P 579.

This section and ORS 12.220 are in pari materia and should be construed together. Rayburn v. Norton, (1935) 150 Or 140, 36 P2d 986, 43 P2d 919.

Since the tolling provisions were only intended to apply to common law causes of action, this section has no effect on the limitations set forth in ORS 30.020. Bengston v. Nesheim, (1958) 259 F2d 566.

A party was not "out of the state" within the statute where prior to the accrual of the cause of action he had removed to Oregon. Rhoton v. Mendenhall, (1888) 17 Or 199, 201, 20 P 49.

3. "Concealment"

The word "conceal" means some affirmative action, such as passing under an assumed name, change of occupation or any act which tends to prevent the community in which he lives from knowing who he is, or whence he came. Rhoton v. Mendenhall, (1888) 17 Or 199, 20 P 49.

When a question of concealment arises in an action at law, either party is entitled to a jury trial on that issue. Lang v. Hill, (1961) 226 Or 371, 360 P2d 316.

4. Nonresidence

When construed in pari materia with ORS 12.260 this section does not apply to causes of action arising in another state between parties who at that time were nonresidents of Oregon. McCormick v. Blanchard, (1879) 7 Or 240; Crane v. Jones, (1893) 24 Or 419, 33 P 869; VanSantvoord v. Roethler, (1899) 35 Or 250, 57 P 628, 76 Am St Rep 472; Fargo v. Dickover, (1918) 87 Or 215, 170 P 289; Re Wemple's Estate, (1919) 92 Or 41, 179 P 674.

This section does not apply to a cause of action arising in this state between parties one of whom is a nonresident. Jamieson v. Potts, (1910) 55 Or 292, 105 P 93, 25 LRA(NS) 24; Baillie v. Columbia Gold Min. Co., (1917) 86 Or 1, 166 P 965, 167 P 1167.

FURTHER CITATIONS: Tioga R.R. v. Blossburg & Corn R.R., (1874) 87 US 137, 22 L Ed 331; Allen v. O'Donald, (1886) 28 Fed 346; Alaska Cred. Bureau v. Fenner, (1948) 80 F Supp 7 (Alaska); Conner v. Spencer, (1962) 304 F2d 485.

ATTY. GEN. OPINIONS: When statute of limitations does not run against warrant issued by abandoned school district, 1924-26, p 656; application of statute to note given by student, 1938-40, p 772.

LAW REVIEW CITATIONS: 8 OLR 24; 39 OLR 381.

12.160

NOTES OF DECISIONS

1. Person within the age of 21 years

An infant has 15 years after a cause of action accrues in which to commence his action to recover real property, unless he should become of age after 10 years have elapsed and before the expiration of five years thereafter, in which case the time would be one year after the disability ceased. Northrop v. Marquam, (1888) 16 Or 173, 189, 18 P 449; Cobb v. Klosterman, (1911) 58 Or 211, 114 P 96.

The statute of limitations is tolled until a person reaches 21 even though he marries before reaching that age. Tavenier v. Weyerhaeuser Co., (1962) 309 F2d 87. **Distinguishing** Bock v. Collier, (1944) 175 Or 145, 151 P2d 732, and Highland v. Tollisen, (1915) 75 Or 578, 147 P 558.

Purchaser at foreclosure sale held vested with title by prescription where children of the mortgagor had arrived at the age of majority and were subject to all the burdens of the statute, which had commenced to run against them and had expired so as to preclude any claim to title. Hamm v. McKenny, (1914) 73 Or 347, 353, 144 P 435.

2. Insane

Having once begun to run, the statute of limitations is not tolled by disabilities subsequently arising. Richards v. Page Inv. Co., (1924) 112 Or 507, 228 P 937.

The discharge of a guardian appointed when one was adjudged mentally incompetent will remove whatever disability may have existed, and restore the operation if it has been interrupted. Id.

The term "insane" means such a condition of mental derangement as actually to bar the sufferer from comprehending rights which he is otherwise bound to know. Hoffman v. Keller, (1961) 193 F Supp 733.

3. Imprisonment

This section does not toll the limitation period for filing an appeal from the Industrial Accident Commission to the circuit court. Boatwright v. State Ind. Acc. Comm., (1966) 244 Or 140, 416 P2d 328; Hinch v. State Comp. Dept., (1970) 4 Or App 76, 475 P2d 976, Sup Ct **review denied.**

This section has no application to a cause of action to enforce the right to redeem from a mortgage foreclosure until an offer to redeem is made and refused. Grasser v. Jones, (1921) 102 Or 214, 201 P 1069, 18 ALR 529.

A person imprisoned on a criminal charge is one who, having been charged with a criminal offense, has been actually incarcerated in a prison or jail or, at the least, has been taken into actual custody by officers of the law, and has not been released on bail or recognizance. Bock v. Collier, (1944) 175 Or 145, 151 P2d 732.

4. Coverture

Prior to the amendment of 1915 a married woman was under a disability. Mitchell v. Campbell, (1890) 19 Or 198, 24 P 455; Morrison v. Halladay, (1895) 27 Or 175, 39 P 1100; Stubblefield v. Menzies, (1882) 11 Fed 268, 8 Sawy 41.

The amendment of this section in 1915 did not change the rule that where a transaction between husband and wife is involved the statute of limitations does not apply. Cary v. Cary, (1938) 159 Or 578, 80 P2d 886.

FURTHER CITATIONS: Raymond v. Flavel, (1895) 27 Or 219, 40 P 158; Hood v. Seachrest, (1918) 89 Or 457, 174 P 734; Hoffman v. Halden, (1959) 268 F2d 280, 302; Fry v. Willamalane Park & Recreation Dist., (1971) 4 Or App 575, 481 P2d 648.

ATTY. GEN. OPINIONS: Filing for bonus where incompetency did not exist at accrual of claim, 1920-22, p 662; limitation period for refund of escheated money to minor, 1928-30, p 407; convict recovering escheated property during imprisonment, 1934-36, p 106; running of statute on bank draft where payee later became insane, 1934-36, p 799.

LAW REVIEW CITATIONS: 8 OLR 203; 6 WLJ 528, 533.

12.170

NOTES OF DECISIONS

The running of the statute once begun, is not stopped by the subsequent mental disability of the person in whose favor it runs. Richards v. Page Inv. Co., (1924) 112 Or 507, 228 P 937.

War suspends the statute of limitation as to enemy aliens residing in enemy territory, which provision is attached to or read into statutes of limitation though it is not expressed in them. Peters v. McKay, (1951) 195 Or 412, 238 P2d 225, 246 P2d 535.

When the cause of action arose, the plaintiff not having been under the disability of being imprisoned on a criminal charge or other legal disability, it is immaterial that subsequently he was confined to the state penitentiary for a term less than his natural life and, having served a portion of his sentence, was released on parole. Bock v. Collier, (1944) 175 Or 145, 151 P2d 732.

FURTHER CITATIONS: Hutchings v. Royal Bakery, (1913) 66 Or 301, 131 P 514, 132 P 960, 134 P 1033.

12.190

NOTES OF DECISIONS

This section preserves to a creditor the right to bring an action within the prescribed period after the appointment of an executor or administrator, when the time limited would otherwise expire subsequent to the death of the debtor, and before the appointment of his personal representative. Blaskower v. Steel, (1892) 23 Or 106, 31 P 253; Branch v. Lambert, (1922) 103 Or 423, 205 P 995.

This section may, in cases falling within its terms, prolong the time originally limited, but does not in any case operate to shorten it. Blaskower v. Steel, (1892) 23 Or 106, 31 P 253.

Probate proceedings are substantially a suit in equity; therefore the court proceeds in analogy to the statute of limitations and will withhold its aid to enforce a stale claim. Luce v. Webster, (1915) 74 Or 489, 145 P 1063.

FURTHER CITATIONS: In re Morgan's Estate, (1904) 46 Or 233, 77 P 608, 78 P 1029.

ATTY. GEN. OPINIONS: Running of statute of limitations on bank draft where payee later became insane and died, 1934-36, p 799.

12.200

NOTES OF DECISIONS

The period from and after an Act of Congress, declaring the inhabitants of a state to be in a state of insurrection against the United States, and until the termination of such insurrection, was not to be counted as a part of the time limited for the commencement of an action by an inhabitant of such state against a resident of Oregon. Chappelle v. Onley, (1870) Fed Cas No. 2613, 1 Sawy 401.

War suspends the statute of limitations as to enemy aliens residing in enemy territory, which provision is attached to or read into statutes of limitation though it is not expressed in them. Peters v. McKay, (1951) 195 Or 412, 238 P2d 225, 246 P2d 535.

FURTHER CITATIONS: Bingham v. Weber, (1953) 197 Or 501, 254 P2d 219.

12.210

NOTES OF DECISIONS

1. Statutory prohibition
2. Stayed by injunction

1. Statutory prohibition

The statutory period prescribed after issuance of letters testamentary or of administration before an executor or administrator can be sued is a statutory prohibition within this section. Blaskower v. Steel, (1892) 23 Or 106, 31 P 253; Branch v. Lambert, (1922) 103 Or 423, 205 P 995; Ball v. Pioneer Trust Co., (1944) 175 Or 1, 149 P2d 796.

During the actual possession by the administrator the running of the statute against the heir is suspended, though the mere appointment of the administrator does not have that effect. Clark v. Bundy, (1896) 29 Or 190, 199, 44 P 282.

When the executor procured indulgence from the claimant by a promise to notify him of his action on the claim and no legal notice was given until the period of limitations had run, the claim was not barred. In re Morgan's Estate, (1904) 46 Or 233, 77 P 608, 78 P 1029.

The time that an appeal from a judgment of nonsuit is pending is not a part of the time limited for the commencement of the action. Hutchings v. Royal Bakery, (1913) 66 Or 301, 303, 131 P 514, 132 P 960, 134 P 1033.

A provision of a city charter for presentation of claims for damages against the city and suspending the right of action on such a claim for a specified period is not a statutory prohibition within this section where the claim is for personal injuries sustained by reason of a defective sidewalk. Colby v. Portland, (1918) 89 Or 566, 174 P 1159, 3 ALR 819.

2. Stayed by injunction

A judgment in ejectment is not within this provision where there is no injunction in any phase of the proceedings and no statutory prohibition is involved. Richards v. Page Inv. Co., (1924) 112 Or 507, 228 P 937.

ATTY. GEN. OPINIONS: Statute of limitations application to claim against state highway fund, 1920-22, p 157; when statute does not run against warrant issued by abandoned school district, 1924-26, p 656.

12.220

NOTES OF DECISIONS

1. Dismissal

A nonsuit is within the meaning of dismissal. Feak v. Marion Steam Shovel Co., (1936) 84 F2d 670; Quick v. Andresen, (1964) 288 Or 433, 395 P2d 154; Warn v. Brooks-Scanlon, Inc., (1966) 256 F Supp 690; Hardy v. Janssen, (1969) 252 Or 608, 451 P2d 486.

An action dismissed for lack of prosecution is not within the saving clause of this section. Pakos v. Warner, (1968) 250 Or 203, 441 P2d 593; Fuller v. Safeway Stores, Inc., (1971) 258 Or 308, 481 P2d 620. Fuller v. Safeway Stores, Inc., supra, overruling White v. Pac. Tel. & Tel. Co., (1942) 168 Or 371, 123 P2d 193.

The word "dismissed" is used in the sense of an order or judgment disposing of the action by sending it out of court, though without a trial of the issues involved. Colby v. Portland, (1918) 89 Or 566, 174 P 1159, 3 ALR 819.

The section applies only when an action has been commenced within the time limited by statute and has been dismissed without a trial on the merits. White v. Pac. Tel. & Tel. Co., (1942) 168 Or 371, 123 P2d 193.

This section applies to actions brought under the Workmen's Compensation Act. Burkholder v. State Ind. Acc. Comm., (1965) 242 Or 276, 409 P2d 342.

As used in this section, "trial" means a proceeding on all issues of fact. Warn v. Brooks-Scanlon, Inc., (1966) 256 F Supp 690.

This section is in pari materia with ORS 12.110 and 18.230. Id.

This section applies to actions against executors. Stevens v. Scanlon, (1967) 248 Or 229, 430 P2d 1019.

The one year commences to run from the date the affirming mandate of the Supreme Court is entered in the circuit court journal. Wolfe Inv., Inc. v. Shroyer, (1968) 249 Or 23, 436 P2d 554.

A nonsuit, in the discretion of the trial court, granted plaintiff must be granted after start of the trial to be a dismissal under this section. Haworth v. Ruckman, (1968) 249 Or 28, 436 P2d 733.

The legislative policy expressed in this section is limited by the language used. Allen v. Lococo, (1968) 252 Or 195, 448 P2d 569.

2. Reversal on appeal

The reversal contemplated by the section is one which finally disposes of the action beyond repair, as to that action; a reversal for new trial is not within the purview of that section of the statute. Anderson v. Maloney, (1924) 111 Or 84, 225 P 318.

The amendment of a complaint following a reversal for misjoinder of causes of action in tort and contract, so as to set forth a cause of action for tort, is not the commencement of a new action within the terms of the section. Id.

The law tolling the statute during the time the defendant is out of the state, applies to this section and tolls the statute within the one-year limitation. Rayburn v. Norton, (1935) 150 Or 140, 36 P2d 986, 43 P2d 919.

An amended complaint on a quantum meruit, filed after reversal of the judgment for plaintiff in an action on an express contract, did not introduce a new cause of action barred by the statute, since the change was only in form. Richardson v. Inv. Co., (1928) 124 Or 569, 264 P 458, 265 P 1117.

FURTHER CITATIONS: Johnston v. Earle, (1958) 162 F Supp 149; Burnett v. New York Cent. R. R., (1964) 380 US 424, 85 S Ct 1050, 13 L Ed 2d 941.

12.230

NOTES OF DECISIONS
1. Acknowledgment
2. Promise
3. Effect of payment
4. Pleading

1. Acknowledgment

An acknowledgment, to toll the statute, must be an unqualified and direct admission of a present subsisting debt on which a party making the acknowledgment is liable, and which he is willing to pay. Koop v. Cook, (1913) 67 Or 93, 97, 135 P 317; Closterman v. Rode, (1948) 183 Or 412, 193 P2d 532.

An agreement between the creditor and debtor to extend the time of payment, though void for want of consideration, may, so far as the debtor is concerned, be the equivalent of an acknowledgment of the debt. Green v. Coos Bay W. R. Co., (1885) 23 Fed 67, 10 Sawy 625.

An acknowledgment does not take the case out of the operation of the statute prospectively, but rather the statute commences to run again simultaneously with the new promise. Id.

A consideration need not be expressed in a written acknowledgment signed by the debtor. Meridianal Co. v. Moeck, (1927) 121 Or 133, 253 P 525.

An acknowledgment, to toll the statute, must be made to the creditor or someone acting for him. Buell v. Deschutes County Municipal Imp. Dist., (1956) 208 Or 56, 298 P2d 1000.

2. Promise

A mortgagor has no authority to make a new promise to the prejudice of his grantee. Kaiser v. Idleman, (1910) 57 Or 224, 235, 108 P 193, 28 LRA(NS) 169.

A promise to toll the statute must be absolute or if conditional there must be proof that the condition has been performed. Koop v. Cook, (1913) 67 Or 93, 97, 135 P 317.

The moral obligation to pay a valid debt or account is a sufficient consideration for a subsequent new promise in writing to pay it, made either before or after the bar of the statute is complete. Meridianal Co. v. Moeck, (1927) 121 Or 133, 253 P 525.

Recovery can be had upon renewal note in the absence of fraud, regardless of whether the original notes were barred by limitation. Brady v. Hodler, (1931) 135 Or 514, 295 P 502.

An oral promise to devise real estate in consideration of not suing to recover for services rendered is not sufficient to toll the limitation in respect to a cause of action for services rendered. Lewis v. Siegman, (1931) 135 Or 660, 296 P 51, 297 P 1118.

A promise, to toll the statute, must be made to the creditor or someone acting for him. Buell v. Deschutes County Municipal Imp. Dist., (1956) 208 Or 56, 298 P2d 1000.

3. Effect of payment

Payment by a debtor of a certain sum to his creditor, with the understanding that it shall be treated as a payment on his debt, will be sufficient to revive the cause of action barred by the statute. Creighton v. Vincent, (1881) 10 Or 56; Marshall v. Marshall, (1921) 98 Or 500, 194 P 425.

Payment operates as an acknowledgment of the continued existence of the demand, and as a waiver of any right to take advantage of any such lapse of time as may have occurred previous to the payment being made. Blaskower v. Steel, (1892) 23 Or 106, 31 P 253.

An indorsement of credit on a promissory note, made after the statute had run against it, was insufficient evidence that the payment representing such credit was made where the claim was presented in probate proceedings. Harding v. Grim, (1894) 25 Or 506, 36 P 634.

This section prescribes the evidence by which acknowledgment or promise shall be proved, but in no way affects the legal consequences of part payment. Dundee Inv. Co. v. Horner, (1897) 30 Or 558, 48 P 175.

A part payment, to take a case out of the operation of the statute, must be made by the party to be charged with the effect of it, or by his authority. Id.

The operation of the statute whereby the running of the limitation may be tolled by payment is not affected by the method, prescribed in this section, of tolling the statute by a written acknowledgment or promise. Horsfall v. Logan, (1914) 72 Or 150, 152, 142 P 760.

A voluntary payment made on a debt after the statute has fully run revives the obligation, and an action may be maintained by virtue of this section, regardless of the construction which has been given to ORS 12.240. Eastman v. Crary, (1930) 131 Or 694, 284 P 280.

Payment by the administrator of a comaker of a joint note which was barred did not revive the debt as against the comaker. McLaughlin v. Head, (1917) 86 Or 361, 362, 168 P 614, LRA 1918B, 303.

Where the payee of a note in her will provided that the maker should pay funeral expenses, and that such payment should be credited as interest on the note, such payment and credit amounted to a payment sufficient to revive the cause of action on the note after the expiration of the period

of limitations. Marshall v. Marshall, (1921) 98 Or 500, 194 P 425.

4. Pleading

In pleading an acknowledgment or promise to take a case out of the statute, it was sufficient to allege the matter according to its tenor or legal effect, without stating that it was in writing. Green v. Coos Bay W. R. Co., (1885) 23 Fed 67, 10 Sawy 625.

FURTHER CITATIONS: Partlow v. Singer, (1868) 2 Or 307; Torrence v. Strong, (1870) 4 Or 39; Sutherlin v. Roberts, (1873) 4 Or 378; Sheak v. Wilbur, (1906) 48 Or 376, 86 P 375, 11 Ann Cas 58; Ford v. Schall, (1924) 110 Or 21, 221 P 1052, 222 P 1094; Douglas Cred. Assn. v. Padelford, (1947) 181 Or 345, 182 P2d 390; Ricker v. Ricker, (1954) 201 Or 416, 270 P2d 150; Sunshine Dairy v. Jolly Joan, (1963) 234 Or 84, 380 P2d 637.

LAW REVIEW CITATIONS: 9 OLR 507; 11 OLR 233; 17 OLR 64.

12.240

NOTES OF DECISIONS

1. In general

This section revives the old rule that payment by one joint debtor or contractor revives the liability as to all. Partlow v. Singer, (1868) 2 Or 307, 308.

The effect of this section is to make the fact of part payment the test for ascertaining whether the action or suit is barred, in cases to which it applies, and if it is not barred, the action then is founded, not on a new promise arising from the facts of part payment, but upon the original promise. Sutherlin v. Roberts, (1873) 4 Or 378.

ORS 12.230 does not affect this section. Horsfall v. Logan, (1914) 72 Or 150, 152, 142 P 760.

It appears from the face of a complaint on a note that the action was not barred where it recites the amount and times of payments, the last of which was made less than six years prior to commencement of the action. Fisher v. Collver, (1927) 121 Or 173, 254 P 815.

2. By whom payment made

Payment by any person liable, directly or in a representative capacity, will keep the debt alive as to all persons liable thereon, whether such payment was made by their authority or not. **Payment by joint maker,** Partlow v. Singer, (1868) 2 Or 307; In re Smith's Estate, (1903) 43 Or 595, 73 P 336, 75 P 133; Scott v. Christenson, (1907) 49 Or 223, 89 P 376, 124 Am St Rep 1041; Ford v. Schall, (1924) 110 Or 21, 221 P 1052, 222 P 1094; **administrator,** Sutherlin v. Roberts, (1873) 4 Or 378; **grantee of mortgagor,** Dundee Inv. Co. v. Horner, (1897) 30 Or 558, 48 P 175; **trustee in bankruptcy,** Sheak v. Wilbur, (1906) 48 Or 376, 86 P 375, 11 Ann Cas 58; **mortgagor or surety,** Kaiser v. Idleman, (1910) 57 Or 224, 108 P 193, 28 LRA(NS) 169; Cross v. Allen (1891) 141 US 528, 12 S Ct 67, 35 L Ed 843; **maker or indorser,** Fisher v. Collver, (1927) 121 Or 173, 254 P 815.

Payment by an attorney prevented a bar of the client's right to sue him for collections which he had made and wrongfully retained. Torrence v. Strong, (1870) 4 Or 39.

3. Requisites of payment

This section refers only to payments made on contracts before the statute has run against them and fixes, by such payment, a new date for the running of the statute. Creighton v. Vincent, (1881) 10 Or 56; Dundee Inv. Co. v. Horner, (1897) 30 Or 558, 48 P 175; Marshall v. Marshall, (1921) 98 Or 500, 194 P 425; Eastman v. Crary, (1930) 131 Or 694, 284 P 280; Allen v. O'Donald, (1886) 28 Fed 17.

A payment by operation of law, or acknowledgment by the creditor on account of an equitable setoff or counterclaim which the debtor might insist upon, but which he has never claimed to have applied as such, is not such a payment as will operate to prevent the statute from running. Anderson v. Baxter, (1871) 4 Or 105, 113.

A part payment of a debt must have been made and intended by the debtor as a payment on that particular debt, to toll the statute; the application of such payment by the creditor without direction by the debtor will be insufficient. Gilman v. Cochran, (1907) 49 Or 474, 476, 90 P 1001.

The fact that the conditional seller retakes and resells the property, and applies the proceeds on the conditional purchaser's note, is not equivalent to a voluntary payment on the note by the purchaser, sufficient to toll the statute. De Haven Hdw. Co. v. Gellanders, (1927) 123 Or 119, 261 P 63, 55 ALR 269.

Where payment is made before the claim is barred, it need not be made and accepted under circumstances such as to constitute an "absolute and unqualified acknowledgment of more being due, with an inferred promise to pay the remainder." Douglas Cred. Assn. v. Padelford, (1947) 181 Or 345, 182 P2d 390.

4. Indorsements of credit

An indorsement of credit on a promissory note, made after the statute had run against it, was insufficient evidence that the payment representing such credit was made where the claim was presented in probate proceedings. Harding v. Grim, (1894) 25 Or 506, 36 P 634.

When a payment is indorsed on a promissory note by the holder at the request of the maker, proof of such fact removes the bar, and the note with the indorsement is admissible in evidence. Scott v. Christenson, (1907) 49 Or 223, 89 P 376, 124 Am St Rep 1041.

It is not the mere right to credit payment on a note, but the exercise thereof by actual application of payment, that tolls the statute. Larsen v. Duke, (1925) 116 Or 25, 240 P 227.

5. Existing contract

A payment on the note for which the mortgage is given as security will prolong the time within which a suit may be maintained on the mortgage. Allen v. O'Donald, (1886) 28 Fed 346.

A debt, arising upon an express contract to pay a definite sum for the services of a physician, is kept alive, with respect to the statute of limitations, by part payment. Horsfall v. Logan, (1914) 72 Or 150, 151, 142 P 760.

Payments by the borrower on a note secured by deed executed as a mortgage tolls the statute of limitations under this section, notwithstanding the amendment of 1917 relating to mortgage foreclosures. Hydraulic Min. Co. v. Smith, (1921) 100 Or 86, 196 P 811.

The statute of limitations against foreclosure of a mortgage is tolled by the payment of interest on the mortgage debt as against a purchaser of the mortgaged premises who purchased prior to the expiration of the statutory period. Day v. Celoria, (1925) 116 Or 250, 241 P 58.

6. Proceedings in action

In an action against an administrator upon a promissory note of the intestate, evidence consisting of the testimony of plaintiff and indorsements on the note, was insufficient to show part payment removing the bar of the statute. Harding v. Grim, (1894) 25 Or 506, 36 P 634.

Evidence in an action on a note was sufficient to carry to the jury the question whether defendant had ratified plaintiff's appropriation of his money in part payment of his note so as to take the case out of the statute of limitations. Sloan v. Sloan, (1905) 46 Or 36, 78 P 893.

An instruction in an action on a note was proper which charged that the note in suit was barred by the statute, unless there had been a payment thereon by defendant within six years prior to the commencement of the action, and the burden of proof to establish such payment was upon the plaintiff. Gilman v. Cochran, (1907) 49 Or 474, 90 P 1001.

Findings that payments credited on notes sued on, in amounts stipulated as considerations for transfer of property by maker and his wife were not made voluntarily by them or under their direction, were not sustained by the evidence. Meyer v. Barde, (1924) 112 Or 197, 228 P 121.

A directed verdict was upheld where the issue whether the note was barred by the statute depended upon whether a comaker made alleged interest payments within six years of suit, and plaintiff specifically testified as to such payments and defendant offered no testimony. Ford v. Schall, (1925) 114 Or 688, 236 P 745.

A motion to dismiss was properly denied where plaintiff testified that he indorsed the last payment on the note in suit on a date before bar of the statute, though there was expert testimony that plaintiff did not make such indorsement. Larsen v. Duke, (1925) 116 Or 25, 240 P 227.

An entry of part payment for services made by a physician on an index card before the statute of limitations had run was admissible under the Business Records as Evidence Act. Douglas Cred. Assn. v. Padelford, (1947) 181 Or 345, 182 P2d 390.

FURTHER CITATIONS: State Land Bd. v. Lee, (1917) 84 Or 431, 165 P 372.

LAW REVIEW CITATIONS: 9 OLR 507; 11 OLR 233; 12 OLR 210; 12 OLR 343; 27 OLR 344.

12.250

NOTES OF DECISIONS

1. In general

The Act of 1895 took away the right to plead the statute of limitations against the state as to streets, highways, parks and other public places. Silverton v. Brown, (1912) 63 Or 418, 128 P 45.

Even in the absence of a statute like this section, the court will examine the record to ascertain whether the state, although not a party eo nomine, is the real party in interest. State Land Bd. v. Lee, (1917) 84 Or 431, 165 P 372.

The state's subrogee enjoys the same exemption as the state under this section. American Sur. Co. v. Multnomah County, (1943) 171 Or 287, 138 P2d 597.

The statute exempts all actions brought in the name of a municipality regardless of whether the city was acting in a governmental or proprietary function in the transaction giving rise to the action. City of Pendleton v. Holman, (1945) 177 Or 532, 164 P2d 434.

2. Particular cases

As to suits in equity the state is not barred by limitations. State v. Warner Valley Stock Co., (1910) 56 Or 283, 308, 106 P 780, 108 P 861.

A quo warranto proceeding is not subject to statutes of limitation. State v. Sch. Dist. 9, (1934) 148 Or 273, 31 P2d 751, 36 P2d 179.

Despite this section a period of limitation in a city's charter governing the bringing of suits to foreclose tax liens was assumed to apply. Seeck v. City of Lebanon, (1934) 148 Or 291, 36 P2d 334.

In a suit by a city to foreclose the lien of street improvement assessments brought more than 20 years after the last installment became due, a claim of laches could not be sustained, since the defense was based on the applicability the statute of limitations and the complaint contained nothing other than the apparent lapse of time suggestive of laches. City of Pendleton v. Holman, (1945) 177 Or 532, 164 P2d 434.

FURTHER CITATIONS: Parker v. Welch, (1879) 7 Or 466; State v. Baker County, (1893) 24 Or 141, 146, 33 P 530; Ambrose v. Huntington, (1899) 34 Or 484, 56 P 513; Schneider v. Hutchinson, (1899) 35 Or 253, 72 P 793; Wallowa County v. Wade, (1903) 43 Or 253, 72 P 793; State v. Portland Gen. Elec. Co., (1908) 52 Or 502, 515, 95 P 722, 98 P 160; Stephenson v. Van Blokland, (1911) 60 Or 247, 118 P 1026; Killam v. Multnomah County, (1931) 137 Or 562, 4 P2d 323; State Land Bd. v. McVey, (1942) 168 Or 337, 123 P2d 181, 121 P2d 461; Corvallis Sand & Gravel Co. v. State Land Bd., (1968) 250 Or 319, 439 P2d 575; Chizek v. Port of Newport, (1969) 252 Or 570, 450 P2d 749.

ATTY. GEN. OPINIONS: Action upon money claims due State of Oregon for inspection fees, 1920-22, p 25; collection of license fees from foreign corporation, 1920-22, p 401; refund of motor vehicle fuel tax to counties, 1922-24, p 430; recovery for gravel taken from state land, 1926-28, p 245; action by state agency to collect notes, 1928-30, p 147; claims between municipal corporations, 1932-34, p 77; lien of state arising through fines, 1934-36, p 732; rule as to judgment obtained by state, 1936-38, p 65; effect of section on certain tax claims of state and its political subdivisions, 1936-38, p 355; action upon promissory notes escheated to state, 1938-40, p 606; contesting will by State Land Board in order that land escheat, 1938-40, p 617; action on note given for loan to student, 1938-40, p 772; collection of judgment lien for costs in criminal case, 1942-44, p 376; foreclosure of delinquent tax liens, 1944-46, p 440.

Adverse possession to school district, 1926-28, p 261; nonappearance of state in foreclosure suit, 1926-28, p 299; effect of delay of State Land Board in foreclosing mortgage, 1928-1930, p 54; adverse possession perfected before statute, 1934-36, p 491; collection of promissory notes secured by crop mortgages to State Land Board, 1938-40, p 586.

Adverse possession against state, 1958-60, p 187; application of section to soil conservation districts, 1958-60, p 293; limitation on actions for welfare recovery, 1962-64, p 58; limitation on collection of gross premium tax, 1964-66, p 28; propriety of limitation in position bond for state officer, 1966-68, p 83.

12.260

NOTES OF DECISIONS

When a debt is contracted in another state by a person who afterward removes to this state, the statute begins to run against the debt at the time when the cause of action accrued where the debt was created. McCormick v. Blanchard, (1879) 7 Or 240; Crane v. Jones, (1893) 24 Or 419, 33 P 869; Van Santvoord v. Roethler, (1899) 35 Or 250, 57 P 628, 76 Am St Rep 472. McCormick, Crane and Van Santvoord, supra, **distinguished in** Jamieson v. Potts, (1910) 55 OR 292, 105 P 93, 25 LRA(NS) 24 and Fargo v. Dickover, (1918) 87 Or 215, 170 P 289.

In pleading the statute of limitation in force in another state in bar of an action, it must be averred that the cause of action arose in that state, and was between nonresidents of Oregon. Crawford v. Roberts, (1880) 8 Or 324.

This section operates as a limitation on the tolling statute so as to make the latter inapplicable to a defendant who

was a nonresident of the state at the time of accrual of the cause of action. Crane v. Jones, (1893) 24 Or 419, 33 P 869.

This section does not change previous interpretations but takes foreign contracts out of the domain of its operation, and makes the law of the place of contract applicable in respect to the remedy. Jamieson v. Potts, (1910) 55 Or 292, 293, 300, 105 P 93, 25 LRA(NS) 24.

"Resident" does not include a foreign corporation "found within the jurisdiction." Hamilton v. No. Pac. S.S. Co., (1917) 84 Or 71, 164 P 579.

Where by way of answer this statute was set up, the plaintiff's reply in the words, "But, whether the defendant was at the time a nonresident of this state, plaintiff has no knowledge or information thereof sufficient to form a belief, and therefore denies said allegation," sufficiently denied the allegation of nonresidence. Sherman v. Osborn, (1879) 8 Or 66.

A claimant against the estate of decedent, was on the evidence, not a nonresident of the state, within the meaning of this section, when the cause of action or claim arose. Smith's Estate, (1903) 43 Or 595, 73 P 336, 75 P 133.

The court properly instructed the jury, in an action on notes made and payable in another state, where a counterclaim for an indebtedness arising in a third state was interposed by defendant, that in the absence of any averment or proof as to the statute of the state where the counterclaim arose, it will be presumed that that statute is the same as that of Oregon. Casner v. Hoskins, (1913) 64 Or 254, 128 P 841, 130 P 55.

Where employe, resident of Washington, sued his employer, a California corporation, for injuries sustained on the high seas on a steamship owned by employer in California, the employer could plead the California statute as a bar. Hamilton v. No. Pac. S. S. Co., (1917) 84 Or 71, 73, 164 P 579.

In an action to enforce an interlocutory divorce decree, which was rendered in California and awarded the plaintiff monthly installments for alimony and the support of a minor child, the California statute of limitations governed, and each installment which matured more than five years prior to the institution of the instant action was treated as a judgment and was barred. Cogswell v. Cogswell, (1946) 178 Or 417, 167 P2d 324.

FURTHER CITATIONS: State v. Tazwell, (1928) 125 Or 528, 266 P 238, 59 ALR 1436; Calvin v. W. Coast Power Co., (1942) 44 F Supp 783; Alaska Cred. Bureau v. Fenner, (1948) 80 F Supp 10 (Alaska); Shannon v. Shannon, (1951) 193 Or 575, 238 P2d 744, 239 P2d 993; Conner v. Spencer, (1962) 304 F2d 485; Brown v. First Ins. Co. of Hawaii, (1968) 295 F Supp 164.

LAW REVIEW CITATIONS: 8 OLR 24.