Chapter 13

Parties

13.020

CASE CITATIONS: Foshier v. Narver, (1893) 24 Or 441, 34 P 21, 41 Am St Rep 874; Walters v. Dock Comm., (1928) 126 Or 487, 245 P 1117, 266 P 634, 270 P 778.

13.030

NOTES OF DECISIONS

1. Purpose of statute

This statute was enacted for the benefit of the defendant and to protect him from being harassed for the same cause. Sturgis v. Baker, (1903) 43 Or 236, 72 P 744; Pitts v. Crane, (1925) 114 Or 593, 236 P 475; Beck v. David, (1929) 128 Or 542, 274 P 914; State v. Swensk, (1939) 161 Or 281, 89 P2d 587.

If defendant is not cut off from any offset or counterclaim and a judgment in behalf of the party suing will fully protect him when discharged, his concern is at an end. Sturgis v. Baker, (1903) 43 Or 236, 72 P 744; Devlin v. Moore, (1913) 64 Or 433, 441, 130 P 35; Blaser v. Fleck, (1920) 96 Or 187, 189 P 637; Lentz v. Ore. Growers Coop. Assn., (1926) 116 Or 683, 242 P 826; Title & Trust Co. v. United States Fid. & Guar. Co., (1934) 147 Or 255, 32 P2d 1035.

This section does not alter the common law rule as to assignability of choses in action, but simply provides that the real party in interest may sue in his own name, without being required to sue in the name of his assignor, for his use. Hillman v. Shannahan, (1871) 4 Or 163.

2. "Prosecuted"

The word "prosecuted," when construed with other statutes, must be taken to mean that all actions must be commenced in the name of the real party in interest. Elliot v. Teal, (1878) Fed Cas No. 4389, 5 Sawy 188, 190; Hickox v. Elliott, (1884) 22 Fed 13, 10 Sawy 415; Dundee Mtg. & Trust Inv. Co. v. Hughes, (1898) 89 Fed 182.

3. Real party in interest

(1) In general. Where the funds have already been misapplied, the proper party to complain is the injured corporation, either in its own name, or on the relation of some proper person. Brownfield v. Houser, (1897) 30 Or 534, 537, 49 P 843; Sears v. James, (1905) 47 Or 50, 53, 82 P 14.

An action cannot be prosecuted for a principal in the name of a mere agent who has no personal interest in the subject matter. Simon v. Trummer, (1910) 57 Or 153, 110 P 786; Lentz v. Ore. Growers Coop. Assn., (1926) 116 Or 683, 242 P 826.

An individual taxpayer may sue to enjoin the illegal diversion of public funds or property when the result of such diversion will be to increase the rate of taxation to be borne by all taxpayers. Burness v. Multnomah County, (1900) 37 Or 460, 468, 60 P 1005.

When a judgment is rendered against a corporation, it is conclusive, in the absence of fraud, in a suit by the judgment creditor to enforce his remedy against the stockholders. Hawkins v. Citizens' Inv. Co., (1901) 38 Or 544, 549, 64 P 320.

An action for personal injuries to a minor must be brought in the name of the real party in interest. Everart v. Fischer, (1915) 75 Or 316, 318, 145 P 33, 147 P 189.

The stockholders of a defunct corporation having no creditors are proper parties plaintiff in an action to enforce a corporate claim. Service Lbr. Co. v. Sumpter Valley Ry., (1916) 81 Or 32, 33, 149 P 531, 152 P 262, 158 P 175.

The state is the real party in interest in a suit in the name of the State Land Board to foreclose a mortgage. State Land Bd. v. Lee, (1917) 84 Or 431, 436, 165 P 372.

The county, not the assessor, is the real party in interest to sue for a penalty for failure to furnish an assessment list of property. Allen v. Craig, (1921) 102 Or 254, 201 P 1079.

The real party in interest is the party who is to be benefited or injured by the judgment in the case. Pulkrabek v. Bankers' Mtg. Corp., (1925) 115 Or 379, 238 P 347.

An incompetent half-owner of a mortgage and the other half-owner may sue as joint plaintiffs to foreclose. Ralston v. Stone, (1925) 113 Or 506, 232 P 631.

The real party in interest is the person who has the right to pursue the remedy. Feehely v. Rogers, (1938) 159 Or 361, 76 P2d 287, 80 P2d 717.

This section has no application to a proceeding for the appointment of a guardian. Moore v. Sater, (1959) 215 Or 417, 335 P2d 843.

Where plaintiff, an insurance agent, agreed to write insurance for persons introduced by defendant, the insurance to be placed in a named insurance company, defendant to receive a commission and to pay the premiums, plaintiff was the real party in interest in an action to recover premiums for insurance written. Harrison v. Birrell, (1911) 58 Or 410, 418, 115 P 141.

A husband could not sue upon a fraternal benefit insurance certificate payable to his wife. Spande v. W. Life Indem. Co., (1912) 61 Or 220, 230, 117 P 973, 122 P 38.

A lessee was the real party in interest in an action for damages for destruction of a crop by flooding. Brown v. Jones, (1929) 130 Or 424, 278 P 981.

Suit to foreclose lien on cannery to enforce poundage fees secured by surety company bonds was not subject to attack on the ground that the state was not the "real party

in interest." State v. Swensk, (1939) 161 Or 281, 292, 89 P2d 587.

A person who wrote checks for another and delivered them to the drawee was an agent and did not benefit by the provisions of this section. Senter v. Burkhalter, (1951) 191 Or 603, 232 P2d 67.

(2) Actions by assignee. This section and H 28 [ORS, 80.020], relating to assignments of choses in action, enable the assignee to sue in his own name, but they do not change the rights of the parties in other respects. Rayburn v. Hurd, (1891) 20 Or 229, 25 P 635; First Nat. Bank v. Morgan, (1930) 132 Or 515, 284 P 582, 286 P 558.

At law a part only of an entire demand cannot be assigned so as to enable the assignee to bring an action on it without the consent of the debtor. Rule is contra in equity. McDaniel v. Maxwell, (1891) 21 Or 202, 205, 27 P 952, 28 Am St Rep 740; Little v. Portland, (1894) 26 Or 235, 243, 37 P 911.

Although he has paid no consideration therefor, an assignee of a chose in action may maintain an action therein in his own name. Gregoire v. Rourke, (1895) 28 Or 275, 277, 42 P 996; First Nat. Bank v. Miller, (1906) 48 Or 587, 592, 87 P 892; French & Co. v. Haltenhoff, (1914) 73 Or 244, 246, 144 P 480.

A partner to whom his copartner has assigned all his interest in the claim in suit, may sue in his own name, even though, under the terms of the assignment, he may also sue in the joint names of the partners for his own separate use. Levins v. Stark, (1910) 57 Or 189, 110 P 980; Beck v. David, (1929) 128 Or 542, 274 P 914.

Assignee of claim against decedent's estate was the real party in interest in suit to establish the claim. In re Morgan's Estate, (1904) 46 Or 233, 77 P 608, 78 P 1029.

(3) Actions by holder of negotiable paper. An indorsee "for collection and return" has such title to a negotiable note as to enable him to sue thereon in his own name. Smith v. Bayer, (1905) 46 Or 143, 79 P 497, 114 Am St Rep 858.

In case of transfer, without indorsement, of a promissory note payable to order, the transferee may maintain an action at law in his own name. First Nat. Bank v. McCullough, (1908) 50 Or 508, 514, 93 P 366, 126 Am St Rep 758, 17 LRA(NS) 1105.

(4) Actions on bonds or undertaking. The district attorney being authorized by statute to sue in his own name, and that statute not being repugnant to this section, he may sue in his own name on a bail bond. Hannah v. Wells, (1872) 4 Or 249, 251.

An action on an injunction bond may be maintained separately or jointly, notwithstanding the joint character of the undertaking, where the injury from the injunction is severable. Ruble v. Coyote G. & S. M. Co., (1881) 10 Or 39, 41.

Sureties in an appeal bond, who are cast in judgment by the appeal, are the real parties in interest to enjoin enforcement of the judgment against them. Lees v. Hobson, (1918) 90 Or 248, 176 P 196.

An action on a redelivery bond given in a replevin action was properly brought by plaintiff as the real party in interest. Kimball v. Bleick, (1893) 24 Or 59, 32 P 766.

Where a contract was made between defendant and United States for the benefit of "all persons supplying labor and materials in the prosecution of the work," the United States was a trustee and maintained suit in its own name without joining those persons for whom the action was prosecuted. United States v. McCann, (1901) 40 Or 13, 66 P 274.

A managing agent who had an interest in the subject matter, and who was shown to be the real party in interest, sued in his own name for damages for breach of injunction bonds. Simon v. Trummer, (1910) 57 Or 153, 110 P 786.

Where, before the dismissal of an injunction, one defendant has acquired the interests of all the other defendants, such transferee may sue alone on the injunction bond, where it creates a liability running in favor of any one of the defendants. Moore v. Lachmund, (1911) 59 Or 565, 568, 117 P 1123, Ann Cas 1913C, 1272.

Where a surety bond was given to secure an accounting for assets delivered to a trustee to whom the trustor, a guardian of the estate of a minor, had entrusted funds for investment, the minor was a proper party plaintiff in an action upon such bond. Grandy v. Williams, (1934) 147 Or 409, 34 P2d 622.

(5) Actions by subrogee. Where the property destroyed by the wrongful act of the defendant exceeds in value the amount of insurance money paid by the plaintiff, the plaintiff cannot prosecute the action in his own and separate right. Home Mut. Ins. Co. v. Ore. Ry. & Nav. Co., (1891) 20 Or 569, 578, 26 P 857, 23 Am St Rep 151.

An action by an employee for personal injury against a third party where his employer is given the right of subrogation by a foreign statute is brought in accordance with this section. Personius v. Asbury Trans. Co., (1935) 152 Or 286, 53 P2d 1065.

Upon objection by defendant, plaintiff's insurance carrier which has paid portion of loss, must be joined as a party. Waters v. Bigelow, (1957) 210 Or 317, 310 P2d 624.

Where an insurer pays under a policy a less amount than the insured's loss and takes a subrogation assignment for the sum paid, the insurer and the insured may jointly maintain an action against a wrongdoer who negligently caused the loss. Home Mut. Ins. Co. v. Ore. Ry. & Nav. Co., (1891) 20 Or 569, 26 P 857, 23 Am St Rep 151; Fireman's Ins. Co. v. Ore. Ry., (1904) 45 Or 53, 76 P 1075, 67 LRA 161, 2 Ann Cas 360.

4. Executor or administrator

Administrator cannot sue to set aside decedent's conveyance without showing necessity and leave of court. King v. Boyd, (1873) 4 Or 326.

5. Trustee of an express trust

An express trust is created by a contract, stipulating that it is made for the benefit of a third person, or designating a party as "trustee," if that word is not used as descriptio personae. Simon v. Trummer, (1910) 57 Or 153, 157, 110 P 786.

An assessor is not a trustee of an express trust authorized to sue for the penalty for failure to furnish an assessment list of property. Allen v. Craig, (1921) 102 Or 254, 201 P 1079.

The father of a minor who is the owner of property does not ipso facto become the trustee of an express trust in respect to such property. Parks v. Keeney, (1922) 105 Or 277, 209 P 497.

Where individual appropriators of water did not surrender their rights to a corporation, by analogy there existed such privity of estate as to enable it to defend in their behalf litigation affecting their rights to the use of the water. Caviness v. La Grande Irr. Co., (1911) 60 Or 410, 425, 119 P 731.

Trustee of an expressed trust in a mortgage was entitled to maintain an action upon a title insurance policy for the use and benefit of the beneficiary of the trust. Henningsen v. Title & Trust Co., (1935) 151 Or 318, 49 P2d 458.

The holders of the right of action on bonds as trustees of an express trust had the capacity to maintain an action. St. Louis Union Trust Co. v. Ore. Annual Conference, (1935) 14 F Supp 35.

The complaint alleged, and evidence supported the allegation, that plaintiff was a trustee. Cole v. Clark, (1965) 241 Or 292, 404 P2d 194, 405 P2d 632.

6. Third party beneficiary contracts

Where a person has received from another some fund

or property, in consideration of which he has made a promise to, or entered into an undertaking with, such other, but directly and primarily for the benefit of a third, such third party may maintain an action directly on such promise or undertaking for his benefit, although not a party to the transaction. Parker v. Jeffery, (1894) 26 Or 186, 188, 37 P 712; Washburn v. Interstate Inv. Co., (1894) 26 Or 436, 441, 36 P 533, 38 P 620; Brower Lbr. Co. v. Miller, (1896) 28 Or 565, 43 P 659, 52 Am St Rep 807; First Nat. Bank v. Hovey, (1898) 34 Or 162, 164, 55 P 535; Feldman v. McGuire, (1899) 34 Or 309, 311, 55 P 872; Miles v. Bowers, (1907) 49 Or 429, 434, 90 P 905; Malzer v. Schisler, (1913) 67 Or 356, 358, 136 P 14, 51 LRA(NS) 77; Baker City Mercantile Co. v. Idaho Cement Pipe Co., (1913) 67 Or 372, 377, 136 P 23; Miller v. Beck, (1914) 72 Or 140, 147, 142 P 603.

To entitle a third person to recover upon a contract made by others, there must not only be an intent to secure some benefit to such person, but the contract must have been made and entered into directly and primarily for his benefit. Parker v. Jeffery, (1894) 26 Or 186, 189, 37 P 712; Brower Lbr. Co. v. Miller, (1896) 28 Or 565, 43 P 659, 52 Am St Rep 807; Ore. Mill Co. v. Kirkpatrick, (1913) 66 Or 21, 133 P 69.

Where A for a valuable consideration agrees with B to pay his debt to C, the latter can enforce the contract against A. Baker v. Eglin, (1884) 11 Or 333, 8 P 280; Schneider v. White, (1885) 12 Or 503, 8 P 652; Ore. Mill Co. v. Kirkpatrick, (1913) 66 Or 21, 133 P 69; Davidson v. Madden, (1918) 89 Or 209, 173 P 320; Reid v. Kier, (1944) 175 Or 192, 152 P2d 417.

The fact that the beneficiary was not informed of the contract until after it was made will not affect his right to sue. Schneider v. White, (1885) 12 Or 503, 8 P 652.

An executory contract by A to discharge the indebtedness of B to C cannot be enforced by C against A where the primary intent is to benefit B and not C. Washburn v. Interstate Inv. Co., (1894) 26 Or 436, 36 P 533.

An agent who makes a contract in his own name, without disclosing the name of his principal, may maintain a suit in his own name. McLeod v. Lloyd, (1903) 43 Or 260, 71 P 795, 74 P 491.

A provision in a lease to indemnify certain persons for certain losses gave them the right to enforce it in their own name. Hughes v. Ore. Ry. & Nav. Co., (1884) 11 Or 437, 440, 5 P 206.

Where a contract was made in the name of one for the benefit of another, and a bill of sale was taken in his name, he became a trustee of an express trust. Hexter v. Schneider, (1886) 14 Or 184, 188, 12 P 668.

A bond to a city for the execution of a contract whereby the makers agreed to pay for all materials, did not give an action to those furnishing material to the contractors. Brower Lbr. Co. v. Miller, (1896) 28 Or 565, 43 P 659, 52 Am St Rep 807.

A person to whom a bond was executed conditioned to pay all expenses of a certain contract was a trustee of an express trust. United States v. McCann, (1901) 40 Or 13, 17, 66 P 274.

An alien property custodian as owner of stock seized was deemed trustee of an express trust. Sutherland v. Wickey, (1930) 133 Or 266, 289 P 375.

7. Authorized by statute to sue

ORS 30.410 is not repugnant to this section and hence authorizes a district attorney to sue in his own name to recover fines and forfeitures. Hannah v. Wells, (1872) 4 Or 249.

8. Assignment

"The claimant" against an estate who may present his rejected claim to the county court includes an assignee or successor in interest. In re Morgan's Estate, (1905) 46 Or 233, 242, 77 P 608, 78 P 1029.

Tortious acts of a party causing damage to another creating a right of action cannot be assigned so as to enable the assignee to sue for the wrong inflicted. Sperry v. Stennick, (1913) 64 Or 96, 129 P 130.

A tortious act causing damage to property, or an action of negligence producing injury to a person generally, creates an assignable cause of action. Id.

Where vendees under contract of purchase assigned their rights for the purpose of bringing action, the assignee cannot maintain the suit for a mere naked right to sue. Cooper v. Hillsboro Garden Tracts, (1915) 78 Or 74, 86, 152 P 488, Ann Cas 1917E, 840.

An assignment carries with it all the remedies which might have been available to the assignor. Id.

9. Assignment during action

The word "prosecuted" does not prevent a party from assigning his interest in the subject matter after suit has been duly commenced, or require that the assignee shall be made a party thereto, or that the suit shall be dismissed and a new one instituted in the name of the assignee. Hickox v. Elliott, (1884) 22 Fed 13, 10 Sawy 415; Dundee Mtg. & Trust Inv. Co. v. Hughes, (1898) 89 Fed 182.

In view of ORS 13.080 an action commenced by the real party in interest may be prosecuted to final judgment in his own name, notwithstanding a transfer of his interest therein. Elliot v. Teal, (1878) 5 Sawy 188, Fed Cas No. 4389.

An assignee of a cause of action pendente lite has a right to have the action continued in the name of the assignor for his benefit. King v. Miller, (1909) 53 Or 53, 97 P 542.

An assignee subsequent to decree can appeal in the name of his assignor. Meyers v. Hot Lake Sanatorium Co., (1917) 82 Or 587, 161 P 697.

An assignee of a claim against an estate pending litigation may appeal from an order rejecting the claim. In re First & Farmers Nat. Bank, (1933) 145 Or 150, 26 P2d 1103.

10. Pleading and proof

To establish that a party to the action is the real party in interest requires no higher or superior proof than to establish any other fact. Barbre v. Goodale, (1896) 28 Or 465, 474, 38 P 67, 43 P 378; Pulkrabeck v. Bankers' Mtg. Corp., (1925) 115 Or 379, 238 P 347; Lentz v. Ore. Growers Coop. Assn., (1926) 116 Or 683, 242 P 826.

The complaint of a person suing as a trustee of an express trust should show for whose benefit the action is brought. Holladay v. Davis, (1873) 5 Or 40.

Where a party brings an action on a contract to which he was not a party, he must allege his interest to maintain his action. Chrisman v. State Ins. Co., (1888) 16 Or 283, 289, 18 P 466.

The defense must state facts showing who the real party in interest may be. Overhalt v. Dietz, (1903) 43 Or 194, 72 P 695.

A defense that an action is not prosecuted by the real party in interest must state facts showing that conclusion. Triphonoff v. Sweeney, (1913) 65 Or 299, 307, 130 P 979.

An answer conceding that the plaintiff is the proper party plaintiff constitutes a waiver of the objection that he is not the proper party plaintiff. Title & Trust Co. v. United States Fid. & Guar. Co., (1934) 147 Or 255, 32 P2d 1035.

FURTHER CITATIONS: Delay v. Chapman, (1869) 3 Or 459; Trustees v. Adams, (1870) 4 Or 76; Strong v. Kamm, (1886) 13 Or 172, 9 P 331; Adair v. Lenox, (1887) 15 Or 489, 16 P 182; Chrisman v. State Ins. Co., (1888) 16 Or 283, 18 P 466; Merriam v. Victory Placer Min. Co., (1900) 37 Or 321, 56 P 75, 58 P 37, 60 P 997; Wright v. Conservative Inv. Co., (1907) 49 Or 177, 89 P 387; Kollock v. Bennett, (1909) 53 Or 395, 100 P 940, 133 Am St Rep 840; Stewart v. Templeton,

(1910) 55 Or 364, 104 P 978, 106 P 640; Stacy v. McNicholas, (1915) 76 Or 167, 144 P 96, 148 P 67; Rothchild Bros. v. Kennedy, (1917) 86 Or 566, 169 P 102; Columbia Hotel Co. v. Rosenberg, (1927) 122 Or 675, 260 P 235; Finney v. Stanfield Fraternal Assn., (1929) 131 Or 393, 283 P 415; Christman v. Scott, (1948) 183 Or 113, 191 P2d 389; Nordling v. Johnson (1955) 205 Or 315, 283 P2d 994, 287 P2d 420; Stanley v. Mueller, (1957) 211 Or 198, 315 P2d 125; Newell v. Taylor, (1958) 212 Or 522, 321 P2d 294; Medaz v. DePrez, (1963) 236 Or 31, 386 P2d 805; Laushway v. Slate, (1964) 238 Or 352, 395 P2d 110; School Dist. 4 v. Settergren, (1965) 240 Or 146, 400 P2d 559.

ATTY. GEN. OPINIONS: Procedure in action upon bond given by public warehouseman, 1920-22, p 333; powers and duties of Insurance Commissioner in connection with insolvent insurance company, 1930-32, p 797; whether administrator of estate may sue for escheated property for heirs, 1934-36, p 641.

LAW REVIEW CITATIONS: 10 OLR 198; 11 OLR 208; 12 OLR 267; 14 OLR 219.

13.041

NOTES OF DECISIONS

1. Under former similar statute

A guardian ad litem had full power to bind an infant defendant by admissions, in the absence of fraud, collusion or error. English v. Savage, (1875) 5 Or 518.

The general guardian having authority to appear for his infant ward and answer for him in the suit, there was no need for his appointment as guardian ad litem. Ankeny v. Blackiston, (1879) 7 Or 435.

Where infant was over 14 years of age the court had no jurisdiction to appoint a guardian except upon the infant's own motion. Everart v. Fischer, (1915) 75 Or 316, 323, 145 P 33, 147 P 189.

An objection that the appointment of a guardian ad litem failed to show that the minor was over 14 and nominated his own guardian could be raised only by answer or demurrer. Id.

The appointment of the mother of one of the infant heirs as its guardian, she having an interest therein, did not avoid the decree, unless there was a showing of fraud. Howell v. Howell, (1915) 77 Or 539, 152 P 217.

A guardian ad litem was a special guardian appointed by the court to prosecute or defend in behalf of an infant a suit to which such infant was a party. Benson v. Birch, (1932) 139 Or 459, 10 P2d 1050.

A guardian ad litem could not receive pay of any judgment recovered; but payment should be made to the regular guardian or to the court. Id.

A court of equity could not enter a decree against a minor unless he was represented either by a general guardian or a guardian ad litem. Kessler v. Kerr, (1935) 150 Or 447, 43 P2d 616.

FURTHER CITATIONS: Wade v. Northrup, (1914) 70 Or 569, 140 P 541; Gray v. Hammond Lbr. Co., (1925) 113 Or 570, 232 P 637, 233 P 561, 234 P 261; Oregon Mut. Ins. Co. v. Hollopeter, (1968) 251 Or 619, 447 P2d 391.

ATTY. GEN. OPINIONS: General guardian voluntarily appearing for minor, 1920-22, p 41; collection of fee for filing answer of guardian ad litem, 1934-36, p 219; whether guardian ad litem may sue for escheated land, 1934-36, p 641; guardian for minor petitioning for delayed birth certificate, 1934-36, p 280.

LAW REVIEW CITATIONS: 8 OLR 203.

13.051

NOTES OF DECISIONS

1. Under former similar statute

The section had no reference to the manner in which service should be made upon an insane person, nor did it attempt to limit the court's jurisdiction over the person of such insane person. Bobell v. Wagenaar, (1923) 106 Or 232, 210 P 711.

A plea of dismissal for incapacity to sue was a plea in abatement. Marchand v. Marchand, (1931) 137 Or 335, 2 P2d 927.

The appointment of guardians ad litem in proceedings relating to the defrayal of the cost of maintaining persons committed to state institutions in a slightly different manner from that provided for under the former section was within the power of the legislature. In Re Idleman, (1934) 146 Or 13, 27 P2d 305.

The lack of the appointment of a guardian ad litem was an irregularity in procedure of which a party could not complain after judgment. Round v. State Ind. Acc. Comm., (1936) 154 Or 400, 60 P2d 601.

When an adult prosecuted an action, he was bound thereby even though he had theretofore been declared insane. Id.

A guardian ad litem should have been appointed in an action by an alleged insane person against the person who instituted the original insanity proceedings. First Nat. Bank v. Wall, (1939) 161 Or 152, 88 P2d 311.

A general allegation that a guardian had been duly appointed was sufficient. Christman v. Scott, (1948) 183 Or 113, 191 P2d 389.

An action was properly prosecuted in the name of an insane person who was the real party in interest, "by and through" the guardian. Id.

ATTY. GEN. OPINIONS: Incompetent's guardian suing for escheated land, 1934-36, p 641; service upon incompetent, 1936-38, p 281.

13.060

NOTES OF DECISIONS

A notice or citation "To Whom It May Concern" does not conform to the statute and is a nullity. Gregory v. Keenan, (1919) 256 Fed 949.

FURTHER CITATIONS: Flint v. Koplin, (1922) 104 Or 193, 207 P 468; Northwestern Clearance Co. v. Jennings, (1923) 106 Or 291, 209 P 875, 210 P 884.

13.080

NOTES OF DECISIONS

1. No abatement of actions
   (1) Death of party
   (2) Transfer of interest
2. Status of action after death
3. Necessity for substitution
4. Jurisdiction to order substitution
   (1) Substitution on appeal
5. Persons that may be substituted
6. Time for motion or order
7. Presentation of claim against decedent's estate
8. Procedure in substituting parties

1. No abatement of actions

(1) Death of party. In a criminal action, the sole purpose of the proceeding being to punish the defendant in person, the action must necessarily abate on his death. State v. Martin, (1896) 30 Or 108, 110, 47 P 196.

This section should be considered with other statutes passed to secure orderly procedure in the administration of estates of decedents. Brown v. Drake, (1922) 103 Or 607, 205 P 1002.

Where a corporation conveyed its realty to defendant within the time allowed to wind up its affairs, and before expiration of the additional time allowed for suits against it concerning realty, defendant was substituted in the county's action to foreclose tax certificates, the corporation at the time of the substitution was not the victim of "death" or "other disability." Clatsop County v. Taylor, (1941) 167 Or 563, 119 P2d 285.

Where breach of a city ordinance may be punished by fine and/or imprisonment, the action is criminal in nature and death of defendant pending appeal abates the action. Salem v. Read, (1949) 187 Or 437, 211 P2d 481.

(2) Transfer of interest. A conveyance of his interest by the plaintiff in a suit to quiet title, during the pendency of the case, does not require the purchaser to be substituted on the record. Burns v. Kennedy, (1907) 49 Or 588, 590, 90 P 1102; Harvey v. Getchell, (1950) 190 Or 205, 225 P2d 391.

This section abrogates the common-law rule that an action abated by the termination or transfer of the plaintiff's interest therein pendente lite. Elliot v. Teal, (1878) 5 Sawy 188, Fed Cas No. 4389.

A judgment, assigned without reservation necessarily carries with it the cause of action. King v. Miller, (1909) 53 Or 53, 97 P 542.

2. Status of action after death

Death of the defendant after the levy of the attachment does not vacate or dissolve it. Mitchell v. Schoonover, (1888) 16 Or 211, 17 P 867, 8 Am St Rep 282; Bunneman v. Wagner, (1888) 16 Or 433, 435, 18 P 841, 8 Am St Rep 306.

An action is suspended during the period between the death and the order allowing the continuance of the action, and that period is not to be deemed a part of the time limited for taking an appeal. McBride v. No. Pac. R. Co., (1890) 19 Or 64, 65, 23 P 814; Oregon Auto-Dispatch v. Cadwell, (1913) 67 Or 301, 135 P 880.

The death of a party pending an appeal from a decree of divorce which determines property rights does not abate the action and appeal as to such property rights. Nickerson v. Nickerson, (1898) 34 Or 1, 3, 48 P 423, 54 P 277.

The death of a party pending an appeal does not abate the appeal notwithstanding no application was made for a substitution within a year as required by this section. Long v. Thompson, (1899) 34 Or 359, 362, 55 P 978; Re Water Rights of Burnt R., (1925) 116 Or 525, 241 P 988.

Upon the death of a party this section suspends the action until substitution is made. In re Young's Estate, (1911) 59 Or 348, 363, 116 P 95, 1060, Ann Cas 1913B, 1310.

The court has no jurisdiction of the estate of a defendant dying pending suit, or of its representatives, until the substitution is made and notice given to them. Oregon Auto-Dispatch v. Cadwell, (1913) 67 Or 301, 303, 135 P 880.

Where the party named as sole defendant died before the filing of the complaint, the court has no jurisdiction to order a substitution. Robinson v. Scott, (1916) 81 Or 20, 158 P 268.

Where property rights are not involved, an appeal from a divorce, perfected before the death of the appellant, abates; but the decree of the lower court remains in full effect. Mignot v. Mignot, (1949) 187 Or 142, 210 P2d 111.

A judgment for reasonable attorney's fees is not such a property right as to prevent the abatement of an appeal of a deceased defendant from a divorce decree. Id.

3. Necessity for substitution

In case of transfer of interest after the commencement of the action or suit, no order of substitution is required, and the action may be continued in the name of the original party. Fildew v. Milner, (1910) 57 Or 16, 21, 109 P 1092; Meyers v. Hot Lake Sanatorium Co., (1917) 82 Or 587, 161 P 697; Metzger v. Guynup, (1928) 125 Or 507, 265 P 420; Dundee Mtg. & Trust Inv. Co. v. Hughes, (1898) 89 Fed 182.

The substitution of a party after the rendition of a judgment or decree, except in cases of death or disability, is not necessary to the prosecution or defense of an appeal. Culver v. Randle, (1904) 45 Or 491, 496, 78 P 394.

The statute does not provide for substitution in case of a transfer of the subject of litigation pending action. Oregon Auto-Dispatch v. Cadwell, (1913) 67 Or 301, 303, 135 P 880.

An appeal can be taken in the name of the assignor by an assignee, to whom a party has assigned his interest in the property affected by the decree subsequent to its rendition. Meyers v. Hot Lake Sanatorium Co., (1917) 82 Or 587, 161 P 697.

In action by the state through a particular board a substitution of parties is not made necessary by a change in the board. State v. Hawk, (1922) 105 Or 319, 208 P 709.

In a proceeding adjudicating water rights, the substitution of a party claimant upon transfer of the water rights is unnecessary. Re Water Rights of Deschutes R., (1930) 134 Or 623, 286 P 563, 294 P 1049.

Where a necessary party defendant dies before trial a substitution of his personal representative within one year after the death is necessary in order to give the court jurisdiction. Linster v. E. Lake Health Resort, Inc., (1933) 143 Or 63, 18 P2d 592.

A trustee in bankruptcy may prosecute an appeal from a judgment against a bankrupt or take command over an appeal already instituted by the latter. Falstrom v. Denk, (1933) 143 Or 514, 21 P2d 1093, 23 P2d 325.

In order that appellate jurisdiction may be acquired following death of a party after the final order by the trial court, there must be appointment of an executor or administrator and service or admission of service of notice of appeal by such representative. Adams v. Perry, (1941) 168 Or 132, 111 P2d 838, 119 P2d 581.

That a dissolved corporation conveyed its realty to defendant within the time allowed to wind up its affairs did not authorize an abatement of the county's action to foreclose tax certificates, and the defendant could defend in the name of the corporate grantor without substitution. Clatsop County v. Taylor, (1941) 167 Or 563, 119 P2d 285.

Where one of two parties having a joint right dies pending suit, the whole cause survives to the other and no substitution is necessary. Orson v. Siegle, (1942) 170 Or 153, 132 P2d 409.

The requirement that tax certificate foreclosure proceedings be against the person appearing on the latest tax roll as owner did not prevent the real owner from defending in his own name and his substitution as a dissolved corporation's grantee was valid, although unnecessary to his defense in the grantor's name. Clatsop County v. Taylor, (1941) 167 Or 563, 119 P2d 409.

4. Jurisdiction to order substitution

A motion to substitute parties is not sustainable under this section where not made in the court in which the suit is pending or within one year after the death of the party for whom new parties are sought to be substituted. Boon v. McClane, (1868) 2 Or 331.

The court acquires, by the allowance of a provisional remedy, jurisdiction to make substitution, and to order the action continued in the name of the personal representatives of the deceased party. White v. Johnson, (1895) 27 Or 282, 291, 40 P 511, 50 Am St Rep 726.

Unless the writ is properly and legally issued, the court acquires no jurisdiction to make the order of substitution requiring the cause to be continued. Id.

(1) Substitution on appeal. The Supreme Court has no

jurisdiction to grant a motion to substitute parties. Boon v. McClane, (1868) 2 Or 331.

The substitution in the appellate court of stockholders for plaintiff corporation, because of the expiration of the five years after its dissolution within which it could wind up its affairs, is only for the purpose of appeal; after reversal there must be a substitution in the trial court. Service v. Sumpter Valley Ry., (1918) 88 Or 554, 171 P 202.

Motion to substitute deceased defendant's son was denied and ruling upon motion to dismiss was reserved by Supreme Court to afford plaintiffs an opportunity to procure an order of substitution of a proper party. Adams v. Perry, (1941) 168 Or 132, 111 P2d 838, 119 P2d 581.

5. Persons that may be substituted

"Personal representative" means executor or administrator and does not mean legatee. Murphy v. Tillson, (1913) 64 Or 558, 130 P 637.

Where the proceeding is one involving only realty the heirs of the deceased party may be substituted. Dowd v. Amer. Sur. Co., (1914) 69 Or 418, 139 P 112.

An administrator de bonis non may be considered a successor in interest. Adams v. Perry, (1941) 168 Or 132, 111 P2d 838, 119 P2d 581.

A person who was both legatee and executor was deemed a successor in interest and properly substituted. Murray v. Murray, (1876) 6 Or 26.

Where in a condemnation proceeding, the plaintiff corporation had taken possession on the giving of security and the defendant died pending the litigation, his personal representatives were properly substituted as parties. Dowd v. Amer. Sur. Co., (1914) 69 Or 418, 425, 139 P 112.

Stockholders of a defunct corporation were substituted as parties plaintiff in an action where an appeal had been taken before dissolution of the corporation. Service Lbr. Co. v. Sumpter Valley Ry., (1916) 81 Or 32, 149 P 531, 152 P 262, 158 P 175.

Successor in interest to a chose in action was not decedent's child or successor in office. Adams v. Perry, (1941) 168 Or 132, 111 P2d 838, 119 P2d 581.

6. Time for motion or order

The order need not be made within the year, if the application was in time. Dick v. Kendall, (1876) 6 Or 166.

A revival of an action may be made at any time, if the application is made within a year from the death. White v. Ladd, (1899) 34 Or 422, 427, 56 P 515.

The section is a statute of limitations, and the right to move for substitution not exercised within one year is taken away. Stivers v. Byrkett, (1910) 56 Or 565, 570, 108 P 1014, 109 P 386.

After entry of default decree in a suit to determine title to land, and upon a subsequent motion to vacate the decree, it was proper to permit the grantees, upon their request, to be made parties defendant, if not to be substituted. Fildew v. Milner, (1910) 57 Or 16, 21, 109 P 1092.

If an appeal has been taken before the disability arises, motion to substitute parties plaintiff, the original plaintiff corporation being defunct, need not be made within one year. Service Lbr. Co. v. Sumpter Valley Ry., (1916) 81 Or 32, 149 P 531, 152 P 262, 158 P 175.

Substitution of personal representative was timely although made more than one year after death of party when made within one year after disposition of original appeal. Wright v. Bauman, (1969) 254 Or 175, 458 P2d 674.

7. Presentation of claim against decedent's estate

Failure of mortgagee to present a claim to the guardian or executor of the mortgagor's grantee, who assumed the mortgage, was no defense to an action on the mortgage note, the grantee having died after commencement of the action. The Home v. Selling, (1919) 91 Or 428, 179 P 261, 21 ALR 403.

Where after the death of a defendant no claim was presented during the administration of his estate by plaintiff, and he did not seek to have his action revived until after the discharge of the executor, the heirs could not then be substituted as parties defendant. Brown v. Drake, (1922) 103 Or 607, 210 P 710.

8. Procedure in substituting parties

By the making of an order allowing the amended complaint to be filed in which the representative is named as defendant, and directing service on her of the order, the amended complaint and an alias summons, the personal representative of a deceased defendant who died before being served with summons is substituted in his stead. White v. Johnson, (1895) 27 Or 282, 283, 40 P 511, 50 Am St Rep 726; White v. Ladd, (1899) 34 Or 422, 428, 56 P 515.

An objection that a substituted person is not a proper party should be taken by plea in abatement and is waived by proceeding to trial without interposition of an objection. Murray v. Murray, (1876) 6 Or 26.

Unless required by statute, or rule of court, notice need not be given of a motion to substitute a personal representative for the deceased party to a pending cause. In re Skinner's Will, (1902) 40 Or 571, 574, 62 P 523, 67 P 951.

Substitution in the trial court of stockholders of defunct plaintiff corporation must not be merely by inserting their names in the complaint but by allegations showing their right to recover, to which defendant may demur for failure to state a cause of action. Service v. Sumpter Valley Ry., (1918) 88 Or 554, 171 P 202.

Substitution of a party as successor in interest of plaintiff in pending litigation is invalid in the absence of proper service of notice of motion upon it, or any authority by it to be so substituted. Western Land & Irr. Co. v. Humfeld, (1925) 114 Or 53, 234 P 796.

Where the original defendant had never been served, nor appeared in the action, the personal representative was not entitled to notice of an application for an order of continuance. White v. Ladd, (1899) 34 Or 422, 425, 56 P 515.

Where on motion of plaintiff the court entered an order requiring defendant's executor to show cause why she should not be substituted, and a copy of the order and a summons were served, the executor's default authorized the court to enter the order of substitution. Hughes v. Honeyman, (1949) 186 Or 616, 208 P2d 355.

FURTHER CITATIONS: Kelly v. Herral, (1884) 20 Fed 364; Sperry v. Stennick, (1913) 64 Or 96, 129 P 130; Re Waters of Chewaucan R., (1918) 89 Or 659, 171 P 402, 175 P 421; Smith v. Cram, (1925) 113 Or 313, 320 P 812; Nichols v. Jackson County Bank, (1931) 136 Or 302, 298 P 908; Versteeg v. Pratt, (1933) 144 Or 485, 25 P2d 387; Re Potter's Estate, (1936) 154 Or 167, 59 P2d 253; Tudor v. Jaca, (1946) 178 Or 126, 164 P2d 680, 165 P2d 770; Wilson v. Crimmins, (1943) 172 Or 616, 143 P2d 665.

13.090

NOTES OF DECISIONS

"Wrong" does not include torts affecting only the feelings or reputation, but rather applies to injuries of a physical character. First Nat. Bank v. Wall, (1939) 161 Or 152, 88 P2d 311.

This section prevents abatement only when the verdict is for plaintiff who dies pending an appeal. Rogers v. Lehman, (1964) 238 Or 550, 395 P2d 777.

FURTHER CITATIONS: Nickerson v. Nickerson, (1898) 34 Or 1, 3, 48 P 423, 54 P 277; Amoth v. United States, (1925) 3 F2d 848.

ATTY. GEN. OPINIONS: Recovery of old age assistance improperly granted from estate of recipient, 1940-42, p 412.

13.110

NOTES OF DECISIONS

1. Controversy

"Controversy" means the action pending before the court when the motion to add parties is filed. Continental Guar. Corp. v. Chrisman, (1930) 134 Or 524, 294 P 596; Hanson v. Johnson, (1933) 143 Or 532, 23 P2d 333; Brune v. McDonald, (1938) 158 Or 364, 75 P2d 10.

2. Bringing in parties

Courts of law as well as courts of equity are authorized to bring in parties when their presence is necessary to the complete determination of the controversy. Ruble v. Coyote Gold & Silver Min. Co., (1881) 10 Or 39.

All those who have an interest in the controversy or the subject matter must be brought in. Goldsmith v. Gilliland, (1885) 24 Fed 154, 10 Sawy 606.

A joint obligee who refuses to join as plaintiff may be joined as defendant. Williams v. Pac. Sur. Co., (1913) 66 Or 151, 127 P 145, 131 P 1021, 132 P 959, 133 P 1186.

Where the United States cannot be brought in as an interested party, the only alternative is to dismiss the suit. Phipps v. Stancliff, (1924) 110 Or 299, 214 P 335, 222 P 328.

A defendant sued by either the mortgagee or mortgagor for injury to the mortgaged property may, if he desires to be protected from a second action, cause the other interested party or parties to be brought into court. Commercial Sec. Inc. v. Mast, (1934) 145 Or 394, 28 P2d 635, 92 ALR 194.

Claims to an escheated estate can be joined in one complaint. Haley v. Sprague, (1941) 166 Or 320, 111 P2d 1031.

When a decree would affect parties not joined in a suit or leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience, it is the court's duty to cause additional parties to be brought in. Marston v. Myers, (1954) 201 Or 259, 270 P2d 147.

In a condemnation proceeding pursuant to ORS 376.510, the parties who are before the court may have their rights adjudicated, but the absence of interested parties does not invalidate the proceeding as to those who are made parties. Moore Mill & Lbr. Co. v. Foster, (1959) 216 Or 204, 336 P2d 39, 337 P2d 810.

(1) Necessary parties. In a suit to determine water rights in a stream used for irrigation purposes the court has power to make an order requiring all parties interested to submit their claims for determination. Hough v. Porter, (1909) 51 Or 318, 367, 374, 439, 95 P 732, 98 P 1083, 102 P 728; Pacific Livestock Co. v. Balcombe, (1921) 101 Or 233, 199 P 587.

Where the ownership of a mortgage being foreclosed is in dispute, the court may make the contesting owner a party defendant and have his claim decided. Batchelor v. Richardson, (1889) 17 Or 334, 338, 21 P 392.

Where equity is to distribute a fund, all persons who are known to have an interest must be brought in. Wheeler v. Lack, (1900) 37 Or 238, 246, 61 P 849.

In a divorce suit where there were issues respecting the husband's pecuniary condition that could not be determined without prejudice to the rights of others the court had power to have them brought in. Bamford v. Bamford, (1870) 4 Or 30, 37.

The original owner and mortgagee was a necessary party to a foreclosure suit where he held title by an unrecorded reconveyance. Hawkenson v. Rostad, (1917) 86 Or 704, 169 P 350.

Assignee of certificate of sheriff's sale was a necessary party to a suit to declare a trust in the certificate, who could be brought in, although certificate had not been recorded. Watt v. Reeves, (1918) 89 Or 151, 173 P 463.

Surety on broker's bond was properly brought into action by broker, where defendant counterclaimed for fraud. Hanson v. Johnson, (1933) 143 Or 532, 23 P2d 333.

In a suit to oust a trustee and, as ancillary relief, secure an accounting, a judgment for sums not accounted for and the appointment of a successor trustee, the trial court did not err in permitting amendments to the complaint which, after the last witness had testified, but before the decree was signed, added as defendants two beneficiaries and sought an adjudication of their interests in the remaining assets of the trusts. Wood v. Honeyman, (1946) 178 Or 484, 169 P2d 131, 171 ALR 587.

(2) Parties not necessary. If the action can be determined without prejudicing them, other parties cannot be brought in. Tichenor v. Coggins, (1880) 8 Or 270; McGilchrist v. Fiedler, (1937) 155 Or 616, 65 P2d 388.

Where several persons have a superior right to the use of water, and there is an interference with the rights of one of them, he may sue therefor without making the others parties, if a determination of their rights is not essential to the determination of the controversy. Carnes v. Dalton, (1910) 56 Or 596, 605, 110 P 170, 174.

Seller is not an indispensable party to an action on a promissory note given to a real estate broker as an earnest money deposit. Medaz v. DePrez, (1963) 236 Or 31, 386 P2d 805.

One without interest in deposit in escrow was not a necessary party in suit for recovery of the deposit. J. & V. Liberty, Inc. v. Columbia Trust & Sav. Bank, (1927) 121 Or 289, 254 P 1016.

In an action upon a note given in payment for the services of a broker, in which the defendant counterclaimed for damages resulting from the fraud of the plaintiff's partner, the court was not warranted in bringing in the plaintiff's partner or the sureties upon the broker's bonds. McGilchrist v. Fiedler, (1937) 155 Or 616, 65 P2d 388.

The personal representatives of two deceased beneficiaries were not necessary parties to a suit by a trustee seeking a decree holding a certain sum to be that due defendant, where the omission in no way prejudiced defendant. Portland Trust & Sav. Bank v. Lincoln Realty, (1950) 187 Or 443, 211 P2d 736.

In a suit to impose a constructive trust upon a grazing lease, mortgagees were not necessary parties. Stirewalt v. Chilcott, (1963) 236 Or 128, 387 P2d 351.

3. Intervention

An assignee for the benefit of creditors was not entitled to intervene in an attachment suit against a debtor. Tichenor v. Coggins, (1880) 8 Or 270.

In a suit against a municipal contractor to enjoin a trespass upon the plaintiff's premises, the city was allowed to intervene, where the contractor was acting under its direction. Hunter v. Clark & Henery Constr. Co., (1914) 69 Or 34, 38, 137 P 743.

Parties intervening under this section are adverse parties to be served with notice of appeal. Thomas v. Thurston, (1918) 87 Or 650, 171 P 404.

4. Rule on appeal

The Supreme Court will remand or dismiss the complaint for want of proper parties where the merits of the suit cannot be determined without essentially affecting the rights of persons who are not parties. Beasley v. Shively,

(1891) 20 Or 508, 26 P 846; Beers v. Beers, (1955) 204 Or 636, 283 P2d 666.

Where any person known to have an interest in a fund was not made a party, the case will be reversed with instructions to bring him on to the record so that the rights of the claimants may be settled in one decree. Wheeler v. Lack, (1900) 37 Or 238, 246, 61 P 849.

FURTHER CITATIONS: Cook v. Kane (1886) 13 Or 482, 491, 11 P 226; Gellert v. Bank of Cal. Nat. Assn. (1923) 107 Or 162, 214 P 377; Herald Pub. Co. v. Klamath Falls Pub. Co., (1925) 116 Or 62, 240 P 244; Schafer v. Fraser, (1955) 206 Or 446, 290 P2d 190, 294 P2d 609; Stanley v. Mueller, (1957) 211 Or 198, 315 P2d 125; Mowrey v. Jarvey, (1961) 228 Or 96, 363 P2d 733; Phillips v. Perrin, (1969) 253 Or 540, 450 P2d 767.

LAW REVIEW CITATIONS: 12 OLR 213; 13 OLR 72; 14 OLR 225.

13.120

NOTES OF DECISIONS

An action to recover a specific sum of money is not one to recover specific personal property. Henderson v. Backus, (1910) 56 Or 550, 553, 109 P 577.

This section does not oust equity of its jurisdiction of interpleader, but it merely provides a concurrent and cumulative remedy. Mogul Trans. Co. v. Larison, (1947) 181 Or 252, 181 P2d 139.

When interpleader is allowed ordinarily plaintiff is entitled to an award of a reasonable attorney's fee and reasonable costs and disbursements. Gresham State Bank v. O & K Constr. Co., (1962) 231 Or 106, 370 P2d 726, 231 Or 106, 372 P2d 187.

FURTHER CITATIONS: New York Life Ins. Co. v. Hannon, (1967) 280 F Supp 291.

LAW REVIEW CITATIONS: 43 OLR 330; 44 OLR 155.

13.130

NOTES OF DECISIONS

Interest to justify intervention must be so direct and immediate that the intervener will gain or lose by direct operation of the judgment. Brune v. McDonald, (1938) 158 Or 364, 75 P2d 10; Lambert v. Multnomah County Civil Serv. Comm., (1961) 227 Or 432, 363 P2d 54.

This section is not intended to deprive equity of its existing power to permit an interested party to intervene after the trial has begun. Duke v. Franklin, (1945) 177 Or 297, 162 P2d 141; Barendrecht v. Clark (1966) 244 Or 524, 419 P2d 603.

An independent controversy may not be injected into an action by intervention. Brune v. McDonald, (1938) 158 Or 364, 75 P2d 10.

The matter in litigation is shown by the pleadings. Matsuda v. Noble, (1948) 184 Or 686, 200 P2d 962.

Intervening taxpayer, objecting to contract of land sale, has no standing to intervene in suit to quiet title to land. Hannon v. Union High Sch. Dist. 2, (1959) 218 Or 493, 344 P2d 769.

An indemnitor has a sufficient interest in litigation between his indemnitee and third persons to permit his intervention. Barendrecht v. Clark (1966) 244 Or 524, 419 P2d 603.

Intervention by insurer in guest's action for damages for injuries while riding in an automobile driven by defendant was unwarranted. Brune v. McDonald, (1938) 158 Or 364, 75 P2d 10.

In a suit for an accounting and recovery of funds, brought by a member of a local association on behalf of himself and other members, the court properly permitted the president and secretary of the association to intervene and demand the same relief sought by the plaintiff, as authorized by the officers of the association, though the complaint in intervention was filed after the trial had commenced. Duke v. Franklin, (1945) 177 Or 297, 162 P2d 141.

Where a person had no direct and immediate interest in the matter in litigation the statute did not impose a duty to intervene. Matsuda v. Noble, (1948) 184 Or 686, 200 P2d 962.

FURTHER CITATIONS: Washington v. United States, (1936) 87 F2d 421; First EUB Church v. Commission, (1963) 1 OTR 249; Taylor v. Pearl, (1966) 244 Or 81, 415 P2d 757; New York Life Ins. Co. v. Hannon, (1967) 280 F Supp 291.

ATTY. GEN. OPINIONS: Necessary interest of state before it can intervene, 1924-26, p 232; state intervention in suit to vacate adoption decree, 1936-38, p 315.

LAW REVIEW CITATIONS: 23 OLR 209; 43 OLR 330.

13.140

NOTES OF DECISIONS

A principal and guarantor, though severally liable, cannot be joined as parties to the same action. Tyler v. Trustees of Tualatin Academy, (1887) 14 Or 485, 488, 13 P 329; Bowen v. Clarke, (1894) 25 Or 592, 595, 37 P 74; Smith v. Day, (1901) 39 Or 531, 539, 64 P 812, 65 P 1055.

This section does not relate to cases of a joint liability. Kamm v. Harker, (1870) 3 Or 208, 210.

When one, after its delivery, signs his name to a joint and several note, for a valuable consideration, he may be sued as maker. First Nat. Bank v. Cecil, (1892) 23 Or 58, 60, 31 P 61, 32 P 393.

The liability of a third party who indorses a note before delivery is the same as if he had signed such note upon its face, that is, joint or several according to the form of the note. Wade v. Creighton, (1894) 25 Or 455, 456, 36 P 289.

A principal and his sureties may be sued together. Bowen v. Clarke, (1894) 25 Or 592, 37 P 74; Scandinavian-Am. Bank v. Wentworth Lbr. Co., (1921) 101 Or 151, 199 P 624; Grandy v. Williams, (1934) 147 Or 409, 34 P2d 622.

A guarantor cannot, over his objection properly taken, be joined with lessee in an action for rent. Wolf v. Eppenstein, (1914) 71 Or 1, 140 P 751.

The liability of a maker and an indorser is several. Fischer v. Collver, (1927) 121 Or 173, 254 P 815.

In an action for rent, it was proper to join as defendants the lessee, his assignee, the transferee of stock who dissolved the corporation to which the lease was assigned, and sureties on the bond securing the rent. Closset v. Portland Amusement Co., (1930) 134 Or 414, 290 P 556, 293 P 720.

FURTHER CITATIONS: First Nat. Bank v. Dodd, (1926) 118 Or 1, 245 P 503.

ATTY. GEN. OPINIONS: Recovery of public assistance grants from persons severally liable to support recipient, 1942-44, p 134.

LAW REVIEW CITATIONS: 12 OLR 96; 43 OLR 330.

13.160

NOTES OF DECISIONS

1. All persons having an interest in the subject of the suit may be joined as plaintiffs

2. Any person may be made a defendant who has or claims an interest adverse to plaintiff
3. May be made defendant if necessary to complete determination
4. Effect of want of necessary parties

1. All persons having an interest in the subject of the suit may be joined as plaintiffs

Taxpayers whose property will be affected by the levy of a tax may join as plaintiffs in enjoining its collection. Stingle v. Nevel, (1880) 9 Or 62, 65.

Two mortgagees of the same premises, holding separate notes to secure the indebtedness, may join as plaintiffs in a suit to foreclose. Stewart v. Templeton, (1910) 55 Or 364, 104 P 978, 106 P 640.

In a suit to enjoin a public nuisance several property owners may join as plaintiffs, if they are all specially injured in different manner than that of other members of community. Lowell v. Pendleton Auto Co., (1927) 123 Or 383, 261 P 415.

In a proceeding to determine riparian rights to water for irrigation purposes, the joinder as plaintiff of one who claimed riparian rights on the stream was proper. Hill v. Amer. Land & Livestock Co., (1916) 82 Or 202, 210, 161 P 403.

Transferee of part of notes secured by purchase-money mortgage was properly a co-plaintiff in foreclosure. Roth v. Troutdale Land Co., (1917) 83 Or 500, 506, 162 P 1069.

Complaint of three minor children, alleging alienation of their father's affections, was demurrable. Pick v. Pick, (1959) 219 Or 247, 345 P2d 805.

2. Any person may be made a defendant who has or claims an interest adverse to plaintiff

In suit to enforce right to land, and obtain the legal title from one party, any other parties who may be in possession claiming adversely to plaintiff may be joined. Weiss v. Bethel, (1880) 8 Or 522, 527.

Consent to the institution of suits against the state is not given by this section. Federal Land Bank v. Schermerhorn, (1937) 155 Or 533, 64 P2d 1337.

An allegation that certain defendants have or claim some right to the waters of a stream, the exact nature of which is to plaintiff unknown, and that such rights are inferior to plaintiff's, was sufficient pleading. Hough v. Porter, (1909) 51 Or 318, 95 P 732, 98 P 1083, 102 P 728.

Where a grantee of the right to use an irrigation ditch to convey excess water insisted on depleting the flow in the ditch to the injury of the grantor, the latter could sue to restrain the continued interruption. Carnes v. Dalton, (1910) 56 Or 596, 606, 110 P 170, 174.

In a suit for specific performance, the heirs of a deceased person who had contracted to convey the property to the plaintiff's vendors were proper parties. Lockhart v. Ferrey, (1911) 59 Or 179, 184, 115 P 431.

3. May be made defendant if necessary to complete determination

In a suit to determine relative rights and priorities to the waters of a stream all users of water on the stream may be brought in when their interests will be affected by the decree. Williams v. Altnow, (1908) 51 Or 275, 95 P 200, 97 P 539; Hough v. Porter, (1909) 51 Or 318, 95 P 732, 98 P 1083, 102 P 728; Pacific Livestock Co. v. Balcombe, (1921) 101 Or 233, 199 P 587.

A person who is necessary to a complete determination of the suit may be joined though plaintiff can show no injury by the party. Williams v. Altnow, (1908) 51 Or 275, 295, 95 P 200, 97 P 539; Whited v. Cavin, (1909) 55 Or 98, 111, 105 P 396.

Heirs of a deceased mortgagor are necessary parties to a suit to foreclose. Renshaw v. Taylor, (1879) 7 Or 315.

The owner of a state or county warrant is a necessary party to a suit to enjoin its payment. State v. Metschan, (1896) 32 Or 372, 46 P 791, 53 P 1071, 41 LRA 692.

Whether necessary parties be named as plaintiffs or defendants is immaterial, if they have rights to be determined. Williams v. Altnow, (1908) 51 Or 275, 295, 95 P 200, 97 P 539.

In a contractor's suit against a county on a road contract, a bank to which the indebtedness to the contractor had been assigned as collateral security was held a necessary party. Sweeney v. Jackson County, (1919) 93 Or 96, 178 P 365, 182 P 380.

4. Effect of want of necessary parties

When it appears from the record that the real merits of the suit cannot be determined without essentially affecting the rights of persons in the subject matter who are not parties, and whose names nowhere appear in the record, the Supreme Court will refuse to examine the facts, but on its own motion dismiss the complaint for want of parties. Beasley v. Shively, (1891) 20 Or 508, 510, 26 P 846.

FURTHER CITATIONS: Medak v. DePrez, (1963) 236 Or 31, 386 P2d 805.

LAW REVIEW CITATIONS: 43 OLR 330; 4 WLJ 26.

13.170

NOTES OF DECISIONS
1. In general
2. Those united in interest must be joined as plaintiffs or defendants
3. Nonconsenting plaintiffs made defendants
4. Class suits

1. In general

There is no provision in our code in actions at law to compel unwilling parties to join. State Ins. Co. v. Ore. Ry. & Nav. Co., (1891) 20 Or 563, 568, 26 P 838; Williams v. Pac. Sur. Co., (1914) 70 Or 203, 209, 139 P 934.

A taxpayers' suit to enjoin collection of a tax is within this section, and persons whose property has been levied upon to enforce the tax may join as plaintiffs. Stingle v. Nevel, (1880) 9 Or 62.

2. Those united in interest must be joined as plaintiffs or defendants

Co-mortagees are necessary parties to an action to foreclose such mortgage. Lund v. Lund, (1936) 152 Or 377, 51 P2d 1031.

In an action by a stockholder against other stockholders of a corporation for permitting the foreclosure of a mortgage upon the assets of the corporation, a stockholder who succeeded to all the rights of the mortgagee in the mortgage was a necessary party. Linster v. E. Lake Health Resort, (1933) 143 Or 63, 18 P2d 592.

3. Nonconsenting plaintiffs made defendants

Unwilling plaintiffs can be joined as defendants at law as well as equity. Williams v. Pac. Sur. Co., (1913) 66 Or 151, 158, 127 P 145, 131 P 1021, 132 P 959, 133 P 1186; Williams v. Pac. Sur. Co., (1914) 70 Or 203, 139 P 934; Waters v. Bigelow, (1957) 210 Or 317, 310 P2d 624.

Co-mortgagees should be made defendants in foreclosure where they refuse to join as plaintiffs. Stewart v. Templeton, (1910) 55 Or 364, 104 P 978, 106 P 640.

A party joined as plaintiff without her consent ratifies the act by relying on the decree. Ralston v. Stone, (1925) 113 Or 506, 232 P 631.

4. Class suits

One or more of the members of an unincorporated association may sue for the benefit of the whole to enforce a right in favor of the association, which is cognizable in equity, where the members comprising it are so numerous that it would be impracticable to bring them before the court. Trustees of M.E. Protestant Church v. Adams, (1870) 4 Or 76, 88; Liggett v. Ladd, (1888) 17 Or 89, 21 P 133; Duke v. Franklin, (1945) 177 Or 297, 162 P2d 141.

Ten out of a hundred persons jointly interested in a fund could not bring a suit on behalf of all to recover and distribute such fund, where as many as 34 of the interested parties stated in court that they were not willing to contribute to the expense of the suit. Tobin v. Portland Mills Co., (1902) 41 Or 269, 278, 68 P 743, 1108.

The interest of persons represented in class suits must be identical to the interest of the representing parties. Lonsford v. Burton, (1954) 200 Or 497, 267 P2d 208.

Secretary of a labor union may maintain a class suit, it being apparent that the parties are numerous and it would be impractical to bring them all before the court. International Longshoremen's and Warehousemen's Union v. Harvey Aluminum, (1961) 226 Or 94, 359 P2d 112.

FURTHER CITATIONS: People of Oregon ex rel. Johnson v. Debt Reducers, Inc., (1971) 5 Or App 322, 484 P2d 869.

LAW REVIEW CITATIONS: 12 OLR 96; 50 OLR 3-40; 4 WLJ 26.