Chapter 18

Judgments and Decrees

18.010

NOTES OF DECISIONS

1. Judgments

A judgment for money must be for a fixed sum. Allen v. Norton, (1877) 6 Or 344.

A joint judgment is unobjectionable in form, though a nonsuit in favor of one defendant was by consent and a nonsuit in favor of codefendant was contested. Culver v. Van Valkenburgh, (1912) 60 Or 447, 119 P 753.

A judgment by confession is a final judgment. Id.

The decision in a mandamus proceeding requiring the defendant to execute a contract and approve a bond is a judgment. In re Vinton, (1913) 65 Or 422, 132 P 1165.

An order discharging the jury is not a judgment. Portland v. Blue, (1918) 87 Or 271, 170 P 715.

An action terminates in a judgment. Salem King's Prod. Co. v. La Follette, (1921) 100 Or 11, 14, 196 P 416.

Court order in divorce suit declaring delinquent payments for maintenance, costs and attorney fees to be a final judgment is not a valid judgment but a mere personal order enforceable only by contempt proceedings. State v. Tolls, (1939) 160 Or 317, 85 P2d 366, 119 ALR 1370.

The code contemplates only one judgment in an action at law. Durkheimer Inv. Co. v. Zell, (1939) 161 Or 434, 90 P2d 213.

Provision in decree in divorce suit for payment of lump sum in specified monthly instalments as a property settlement is a judgment. Esselstyn v. Casteel, (1955) 205 Or 344, 286 P2d 665, 288 P2d 214, 215.

A motion for judgment on the pleadings is allowable only when the pleadings affirmatively show that plaintiff has no cause of action against the defendant, or when the defendant affirmatively alleges a complete defense which is admitted by the reply. King v. Jones, (1971) 258 Or 468, 483 P2d 815.

2. Decrees

A statement from the bench does not constitute a judgment until reduced to an order, decree or judgment. Barone v. Barone, (1956) 207 Or 26, 294 P2d 609; Parker v. Parker, (1965) 241 Or 623, 407 P2d 855.

On appeal the Supreme Court may modify referee's report to trial court. O'Leary v. Fargher, (1884) 11 Or 225, 4 P 330.

A final determination in a suit in equity is denominated a decree. State v. Tolls, (1939) 160 Or 317, 85 P2d 366, 119 ALR 1370.

The relief granted must be responsive to and in conformity with the pleadings and proof. Fry v. Ashley, (1961) 228 Or 61, 363 P2d 555.

The court has power to set aside or modify a decree within a reasonable time after a decree is entered. Slipp v. Amato, (1962) 231 Or 512, 373 P2d 673.

FURTHER CITATIONS: Holmes v. Cole, (1909) 51 Or 483, 94 P 964; State v. Bradshaw, (1911) 59 Or 279, 117 P 284; Kubik v. Davis, (1915) 76 Or 501, 147 P 552; Cockrum v. Graham, (1933) 143 Or 233, 242, 21 P2d 1084; Bell v. State Ind. Acc. Comm., (1937) 157 Or 653, 74 P2d 55; United States v. Bauman, (1943) 56 F Supp 109; Jarvis v. Indem. Ins. Co., (1961) 227 Or 508, 363 P2d 740.

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CASE CITATIONS: Wright v. Wimberly, (1919) 94 Or 1, 184 P 740; Lawson v. Hughes, (1928) 127 Or 16, 256 P 1043, 270 P 922; Esselstyn v. Casteel, (1955) 205 Or 344, 286 P2d 665, 288 P2d 214, 215.

18.030

NOTES OF DECISIONS

The journal is a book in which the clerk must enter the proceedings of the court in term time. Summers v. Geer, (1907) 50 Or 249, 85 P 513, 93 P 133.

The amount to be specified in a decree foreclosing a mortgage and allowing recovery on a note given as security is the full amount due on the note. Wright v. Wimberly, (1919) 94 Or 1, 184 P 740.

The court on appeal cannot presume that a decree was entered in vacation where it is not in the form prescribed for decrees entered in vacation. Peterson v. Beals, (1921) 102 Or 245, 201 P 727.

FURTHER CITATIONS: Hutchinson v. Gorham, (1900) 37 Or 347, 61 P 431; Cockrum v. Graham, (1933) 143 Or 233, 21 P2d 1084; State v. Tolls, (1939) 160 Or 317, 85 P2d 366, 119 ALR 1370; Esselstyn v. Casteel, (1955) 205 Or 344, 286 P2d 665, 288 P2d 214, 215; State Hwy. Comm. v. Fisch-Or, Inc., (1965) 241 Or 412, 399 P2d 1011.

18.040

NOTES OF DECISIONS

1. In general
2. Judgments nunc pro tunc

1. In general

This provision is directory, not mandatory. Skelton v. City of Newberg, (1915) 76 Or 126, 148 P 53; Fisher v. Portland Ry., Light & Power Co., (1915) 77 Or 529, 151 P 735; Portland v. Blue, (1918) 87 Or 271, 170 P 715; Fuller v. Blanc, (1939) 160 Or 50, 77 P2d 440, 83 P2d 434; State Hwy. Comm. v. Vella, (1958) 213 Or 386, 323 P2d 941.

The term "within the day," as used in this section, means within 24 hours. Casner v. Hoskins, (1913) 64 Or 254, 128 P 841, 130 P 55; Strickler v. Portland Ry., Light & Power Co., (1916) 79 Or 526, 144 P 1193, 155 P 1195; Fuller v. Blanc, (1939) 160 Or 50, 77 P2d 440, 83 P2d 434.

Premature entry of judgment does not deprive a party of his right to file a motion for new trial. Arrigoni v. Johnson, (1876) 6 Or 167; Jennings v. Frazier, (1905) 46 Or 470, 80 P 1011.

It is presumed on appeal that judgment was entered on the day it was given. Barde v. Wilson, (1909) 54 Or 68, 102 P 301; Yeaton v. Barnhart, (1915) 78 Or 249, 150 P 742, 152

P 1192; McFarland v. Hueners, (1920) 96 Or 579, 190 P 584; Allen v. Levens, (1921) 101 Or 466, 198 P 907, 199 P 595.

A reasonable delay after the verdict is rendered before judgment is entered does not invalidate judgment. Casner v. Hoskins, (1913) 64 Or 254, 128 P 841, 130 P 55; Skelton v. City of Newberg, (1915) 76 Or 126, 148 P 53; Fisher v. Portland Ry., Light & Power Co., (1915) 77 Or 529, 151 P 735; Portland v. Blue, (1918) 87 Or 271, 170 P 715; Rayburn v. Norton, (1935) 150 Or 140, 36 P2d 986, 43 P2d 919; Fuller v. Blanc, (1939) 160 Or 50, 77 P2d 440, 83 P2d 434.

Where a case is submitted to justice of the peace on the sixth of the month and a decision made on the 11th is entered in the record as of the sixth, the judgment is not void. Saunders v. Pike, (1877) 6 Or 312.

A judgment for want of answer should be entered by the clerk in the journal within the day it is given. Hutchinson v. Gorham, (1900) 37 Or 347, 61 P 431.

Pending a motion for nonsuit the court has no authority either to make findings or to enter a judgment on the merits. Northern Pac. R. Co. v. Spencer, (1910) 56 Or 250, 108 P 180.

In a condemnation suit the payment of the money assessed as damages is a condition precedent to the judgment in favor of the plaintiff. State v. Bradshaw, (1911) 59 Or 279, 117 P 284.

The court need not enter judgment upon the verdict as directed where the circumstances warrant a setting aside of the verdict. Hughes v. Holman, (1924) 110 Or 415, 223 P 730, 31 ALR 1108.

Signature of judge to order for judgment is not necessary. Oxman v. Baker County, (1925) 115 Or 436, 234 P 799, 236 P 1040.

A judgment entered on date of rendition of verdict is not set aside by subsequent entry during same term of order, which is but repetition of judgement first entered. Id.

Where interest is not provided for in a verdict, the court has no power to include interest on the principal sum in the judgment. Printing Industry v. Banks, (1935) 150 Or 554, 46 P2d 596.

This provision is only directory and does not prohibit the court from entering a judgment notwithstanding the verdict. Gow v. Multnomah Hotel Inc., (1951) 191 Or 45, 224 P2d 552, 228 P2d 791.

2. Judgments nunc pro tunc

Every court of record has the inherent power to cause its proceedings to be correctly set forth in its records. Grover v. Hawthorne, (1912) 62 Or 65, 71, 116 P 100, 121 P 804; In re Potter's Estate, (1936) 154 Or 167, 59 P2d 253.

Motion to correct records must be made in trial rather than appellate court. Helms Groover & Dubber Co. v. Copenhagen, (1919) 93 Or 410, 177 P 935; King v. French, (1873) 2 Sawy 441, Fed Cas No. 7,793.

The court's incorrect action or failure to make order cannot be rectified by a nunc pro tunc order. Tomkins v. Clackamas County, (1884) 11 Or 364, 4 P 1210; Nat. Council v. McGinn, (1914) 70 Or 457, 138 P 493; White v. East Side Mill Co., (1917) 84 Or 224, 161 P 969, 164 P 736.

When a judgment has been rendered or order made and the clerk has neglected to enter it of record, the court may thereafter direct the judgment or order so made to be entered nunc pro tunc. Quartz Gold Min. Co. v. Patterson, (1909) 53 Or 85, 96 P 551; Nat. Council v. McGinn, (1914) 70 Or 457, 138 P 493.

Where the fact that an order was made is undisputed, any person injured by an omission to enter such order may insist, as a matter of right, upon its entry nunc pro tunc. Douglas County Road Co. v. Douglas County, (1875) 5 Or 406.

Where a confession of judgment has been filed and there is an omission of the entry of the judgment in the journal, a nunc pro tunc order is proper. Davidson v. Richardson, (1907) 50 Or 323, 89 P 742, 91 P 1080, 126 Am St Rep 738, 17 LRA(NS) 319.

An amendment nunc pro tunc cannot be made to the prejudice of rights of third persons acquired in good faith and for value. Senkler v. Berry, (1908) 52 Or 212, 96 P 1070.

A nunc pro tunc order may be made where correction can be had by reference to some memorandum made by the court, or from the pleadings on file, without resorting to outside evidence. Id.

An order nunc pro tunc correcting a record will not be disturbed on appeal, except for an abuse or discretion or absolute want of authority to make it. Grover v. Hawthorne, (1912) 62 Or 65, 116 P 100, 121 P 804.

A journal entry of the county court not correctly reciting the order made may be corrected by an order nunc pro tunc. State v. Bay City, (1913) 65 Or 124, 131 P 1038.

The omission to make findings of fact or conclusions of law could not afterward be supplied by a nunc pro tunc order. Frederick & Nelson v. Bard, (1913) 66 Or 259, 134 P 318.

An order by the court of its own motion entered nunc pro tunc setting aside a judgment and granting a new trial is unauthorized. National Council v. McGinn, (1914) 70 Or 457, 138 P 493.

Where after an appeal from a judgment the trial court makes a nunc pro tunc entry eliminating one of the defendants against whom no verdict was rendered, the appeal will not be dismissed on the ground that the judgment appealed from has been annulled. Fisher v. Portland Ry., Light & Power Co., (1915) 74 Or 229, 137 P 763, 143 P 992, 145 P 277.

A nunc pro tunc order may be made upon the memory of the court alone. Rickey v. Robertson, (1917) 86 Or 525, 169 P 99.

After a delay of two years, the court was authorized to enter judgment nunc pro tunc where both parties assumed the judgment was entered and appealed to the Supreme Court. Portland v. Blue, (1918) 87 Or 271, 170 P 715.

FURTHER CITATIONS: Sprigg v. Stump, (1881) 7 Sawy 280, 8 Fed 207; Fisk v. Henarie, (1887) 15 Or 89, 13 P 760; Goodeve v. Thompson, (1914) 68 Or 411, 136 P 670, 137 P 744; State v. Ganong, (1919) 93 Or 440, 184 P 233; Dolph v. Speckart, (1920) 94 Or 550, 179 P 657, 186 P 32; State Hwy. Comm. v. Fisch-Or, Inc., (1965) 241 Or 412, 399 P2d 1011; Union Oil Co. v. Pacific Whaling Co., (1965) 240 Or 151, 400 P2d 509.

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CASE CITATIONS: Union Oil Co. v. Pacific Whaling Co., (1965) 240 Or 151, 400 P2d 509.

18.060

CASE CITATIONS: Hutchinson v. Gorham, (1900) 37 Or 347, 61 P 431; Koukal v. Coy, (1959) 219 Or 414, 347 P2d 602.

18.070

NOTES OF DECISIONS

Sustaining a demurrer dismisses the complaint but does not necessarily terminate the suit or action. Giant Powder Co. v. Ore. W. Ry., (1909) 54 Or 325, 101 P 209, 103 P 501.

Since unresolved issues of fact remained after the pleadings were settled, there could be no judgment on the pleadings. Steenson v. Robinson, (1964) 236 Or 414, 389 P2d 27.

FURTHER CITATIONS: Higgins v. Fields, (1935) 150 Or 528, 47 P2d 235.

18.080

NOTES OF DECISIONS

1. Constitutionality

The section authorizing the clerk to enter judgment by default is constitutional. Crawford v. Beard, (1885) 12 Or 447, 8 P 537; Talbot v. Garretson, (1897) 31 Or 256, 49 P 978.

The provision requiring assessment of damages without a jury is not unconstitutional. Deane v. Willamette Bridge R. Co., (1892) 22 Or 167, 29 P 440, 15 LRA 614.

2. In general

The former distinction between a judgment for default and a judgment on failure to answer is not recognized under the code. Ryan v. Harris, (1866) 2 Or 175; Kearns v. Follansby, (1888) 15 Or 596, 16 P 478, 479.

A judgment entered before the expiration of time for answering after service of summons is not void nor subject to collateral attack. Woodward v. Baker, (1883) 10 Or 491; Pedro v. Vey, (1935) 150 Or 415, 36 P2d 963, 46 P2d 582.

A judgment after striking the answer and in the absence of further pleading is a judgment for want of answer. Long v. Sharp, (1875) 5 Or 438.

A judgment after demurrer and refusal to plead further is not a judgment for want of an answer. Kearns v. Follansby, (1888) 15 Or 596, 16 P 478.

A judgment on refusal to plead further after denial of a motion to strike part of complaint is a judgment for want of answer. Brownell v. Salem Flouring Mills Co., (1906) 48 Or 525, 87 P 770.

A judgment in accordance with testimony taken after failure of defendant to answer is a judgment for want of answer within the meaning of the section relating to appeals. State v. Simpson, (1914) 69 Or 93, 137 P 750, 138 P 467.

Discretion in requiring proof means legal discretion, not the individual judge's ideas about the wisdom of a particular law. State ex rel. Nilsen v. Cushing, (1969) 253 Or 262, 453 P2d 945.

Where plaintiff's counsel orally moved for an order of default, the order set forth the facts of counsel's affidavit showing defendants in default, and the order and subsequently challenged judgment were signed by the judge, the procedure did not violate this section. Koukal v. Coy, (1959) 219 Or 414, 347 P2d 602.

3. Effect of default

A default in a tort action is an admission that plaintiff has a cause of action as alleged, but by reason of the statute the defendant may offer proof as to damages. Deane v. Willamette Bridge R. Co., (1892) 22 Or 167, 29 P 440, 15 LRA 614; Whipple v. So. Pac. Co., (1899) 34 Or 370, 55 P 975.

By default after service of summons and complaint and failure to answer, defendant admits the truth of every material allegation in the complaint. Philbrick v. O'Connor, (1887) 15 Or 15, 13 P 612, 3 Am St Rep 139.

In negligence action default admits negligence, injury as the result thereof and at least nominal damages. Stackpole v. No. Pac. R. Co., (1903) 121 Fed 389.

4. Service and failure to answer

A judgment by default can be taken only when it appears that the defendant has been duly served with summons and has failed to answer. Willamette Falls Co. v. Clark, (1854) 1 Or 113; Smith v. Ellendale Mill Co., (1870) 4 Or 70; Trullenger v. Todd, (1873) 5 Or 36; White v. Johnson, (1895) 27 Or 282, 40 P 511, 50 Am St Rep 726.

Where defendant's demurrer was sustained, a judgment by default on amended pleading was erroneous where no notice of amendment was given to defendant. Tolmie v. Otchin, (1854) 1 Or 95.

Where a demurrer is undisposed of, a judgment by default is erroneous. Willamette Falls Co. v. Smith, (1855) 1 Or 181.

Where process was served on right person but wrong name was used in summons, a resulting default judgment was valid. Foshier v. Narver, (1893) 24 Or 441, 34 P 21, 41 Am St Rep 874.

Where process was served on right person but wrong name was used in return, a resulting default judgment was valid. Abraham v. Miller, (1908) 52 Or 8, 95 P 814.

A defendant is not in default of answer where an amended complaint was filed and service thereof was acknowledged by defendant but no day to answer it had been fixed. Hodgdon v. Goodspeed, (1911) 60 Or 1, 118 P 167.

5. Contract action

The clerk acts ministerially in entering judgment. Graydon v. Thomas, (1870) 3 Or 250; Hodgdon v. Goodspeed, (1911) 60 Or 1, 118 P 167.

The clerk has power to enter judgment without judicial direction or intervention. Graydon v. Thomas, (1870) 3 Or 250; Crawford v. Beard, (1885) 12 Or 447, 8 P 537.

In actions on contract where defendant defaults, plaintiff is entitled to judgment for damages claimed without proof thereof. White v. NW Stage Co., (1873) 5 Or 99.

6. Other actions

After striking the answer in an action for conversion, the only remaining issue is the value of the property converted. Wheeler v. Burckhardt, (1899) 34 Or 504, 56 P 644.

In a suit for injunction, court should hear evidence and determine damages although the allegations of damages is unanswered. Gohres v. Ill. Min. Co., (1902) 40 Or 516, 67 P 666.

The question for trial in an action for personal injuries is how much plaintiff is damaged. Vuilleumier v. Ore. Water Power & Ry., (1909) 55 Or 129, 105 P 706.

Special findings as to the items of damages are not required on an assessment of damages under paragraph (1)(b) of this section. Id.

To enter a judgment by default in an action for damages for assault and battery without assessing damages is error. McAuliffe v. McAuliffe, (1931) 136 Or 168, 298 P 239.

A local rule, requiring an attorney intending to move for a default to serve on the adverse party a copy of the form of order he proposes to ask for, has the effect of law if consistent with statutes. Id.

7. Relief; effect of judgment; vacation

A default judgment results in the same legal consequences as where plaintiff has verdict. Neil v. Tolman, (1885) 12 Or 289, 7 P 103.

A default judgment entered on day defendant died is valid. Mitchell v. Schoonover, (1888) 16 Or 211, 17 P 867, 8 Am St. Rep 282. **Distinguished in** In re Young's Estate, (1911) 59 Or 348, 116 P 95, 1060, Ann Cas 1913B, 1310.

A final order for divorce entered for want of answer

operates at once to terminate the marriage relation. State v. Leasia, (1904) 45 Or 410, 78 P 328.

Where clerk entering default judgment makes mistake as to amount due plaintiff, the judgment is not void. Hodgdon v. Goodspeed, (1911) 60 Or 1, 118 P 167.

Where clerk enters a wholly unauthorized default judgment, it is void. Id.

A default judgment against defendant who was deceased when complaint was filed is a nullity. Robinson v. Scott, (1916) 81 Or 20, 158 P 268.

Where the pleadings do not mention a mortgage securing the note sued on, the court on default cannot enter a decree determining the amount due plaintiff and declaring his interest in the mortgaged premises. Lutz v. Blackwell, (1929) 128 Or 39, 273 P 705.

Defendant who promptly moved for vacation was entitled to relief from default judgment taken when he thought settlement negotiations were still pending. McAuliffe v. McAuliffe, (1931) 136 Or 168, 298 P 239.

Defendant who promptly moved for vacation was entitled to relief from default judgment taken when he thought agreement to delay proceedings was still effective. Leonard v. Bennett, (1940) 165 Or 157, 103 P2d 732, 106 P2d 542.

An order of default and decree should be vacated where the amount awarded was greater than prayed for and no notice was given defendant of intention to apply for an additional allowance. Id.

FURTHER CITATIONS: Hunsaker v. Coffin, (1864) 2 Or 107; Mascall v. Murray, (1915) 76 Or 637, 149 P 517.

LAW REVIEW CITATIONS: 5 OLR 41; 12 OLR 96, 105.

18.090

NOTES OF DECISIONS

Entering an order extending the time within which to file a transcript on appeal nunc pro tunc is within the power of the court. Grover v. Hawthorne, (1912) 62 Or 65, 116 P 100, 121 P 804.

Journal entry of judgment order blank as to amount of recovery is void and court may disregard it and make new order. School Dist. 1 v. Astoria Constr. Co., (1920) 97 Or 238, 190 P 969.

Judgment may be entered on day following rendition of verdict. Rayburn v. Norton, (1935) 150 Or 140, 36 P2d 986, 43 P2d 919.

This section does not restrict or limit the inherent power of the court to make a nunc pro tunc order. In re Potter's Estate, (1936) 154 Or 167, 59 P2d 253.

This provision is directory. Fuller v. Blanc, (1939) 160 Or 50, 77 P2d 440, 83 P2d 434.

FURTHER CITATIONS: Lawson v. Hughes, (1928) 127 Or 16, 256 P 1043, 270 P 922; Sprigg v. Stump, (1881) 7 Sawy 280, 8 Fed 207.

18.110

NOTES OF DECISIONS

A plaintiff is only entitled to an alternative judgment upon a verdict in his favor where the property has not been delivered to him. Phipps v. Taylor, (1887) 15 Or 484, 16 P 171; McCargar v. Wiley, (1924) 112 Or 215, 229 P 665.

When property has been taken from the prevailing defendant in replevin and he demands a return thereof with damages, he is entitled to have the property restored to him and damages for its detention; if possession cannot be restored, he may recover the value of the property and damages for taking and withholding the same. La Vie v. Crosby, (1903) 43 Or 612, 74 P 220; McIntosh Livestock Co. v. Buffington, (1923) 108 Or 358, 217 P 635.

The only judgment which can be entered for the plaintiff is one for the recovery of the property or its value in case delivery cannot be had together with reasonable damages for the retention thereof. McCargar v. Wiley, (1924) 112 Or 215, 229 P 665; Hicks v. Hill Aeronautical Sch., (1930) 132 Or 545, 286 P 553.

Costs may not be allowed both parties. McDonald v. Evans, (1869) 3 Or 474.

Where the plaintiff fails to prosecute an action to recover personal property after delivery of property to him, defendant is entitled to judgment of dismissal with costs but cannot have judgment for return of property or its value without affirmatively establishing such right. Capital Lumbering Co. v. Hall, (1882) 10 Or 202.

The value of the property in case possession cannot be restored should be fixed as of the date of the verdict. La Vie v. Crosby, (1903) 43 Or 612, 74 P 220.

A mortgagee suing for possession because of condition broken can recover the property or, in case recovery cannot be had, a judgment for the value of his property, which value is measured by the amount which would make him whole for what he has suffered. McNeff v. So. Pac. Co., (1912) 61 Or 22, 120 P 6.

A judgment for return is an essential condition precedent for an alternative judgment for value. Peacock v. Kirkland, (1915) 74 Or 279, 145 P 281.

A judgment for the return of a battery placed in the replevied automobile by defendant and for damages for the detention of the battery after the automobile was taken from the defendant's possession is authorized. Lebb v. Peabody, (1922) 103 Or 405, 205 P 819.

This section is merely declaratory of the law prevailing generally in replevin actions. McIntosh Livestock Co. v. Buffington, (1923) 108 Or 358, 217 P 635.

The verdict and judgment in an action for recovery of personal property must conform to statutory requirements. McCargar v. Wiley, (1924) 112 Or 215, 229 P 665.

A judgment returning replevied property to defendant is bar to subsequent suit by defendant for damages for wrongful taking and detention. Gust v. Edwards Co., (1929) 129 Or 409, 274 P 919.

This section does not prohibit a counterclaim for damages arising out of the original transaction by which the defendant acquired possession. Mack Trucks, Inc. v. Taylor, (1961) 227 Or 376, 362 P2d 364.

FURTHER CITATIONS: Coos Bay R. Co. v. Wieder, (1894) 26 Or 453, 38 P 338; Kelley v. Ness, (1948) 182 Or 661, 189 P2d 570.

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NOTES OF DECISIONS

1. In general
2. Joint liability
3. Joint and several liability; tort actions
4. Dismissal and nonsuit

1. In general

In action against several defendants jointly where evidence establishes liability of part of defendants only, judgment may be given against those found liable. Ah Lep v. Gong Choy & Gong Wing, (1886) 13 Or 205, 9 P 483; Tillamook Dairy Assn. v. Schermerhorn, (1897) 31 Or 308, 51 P 438; Krebs Hop Co. v. Taylor, (1908) 52 Or 627, 97 P 44, 98 P 494; Hewey v. Andrews, (1917) 82 Or 448, 159 P 1149, 161 P 108; Fischer v. Bayer, (1923) 108 Or 311, 210 P 452, 211 P 162, 216 P 1028.

A judgment against only a part of the defendants if all are liable is not authorized. Fisk v. Henarie, (1886) 14 Or 29, 13 P 193; Thomas v. Barnes, (1899) 34 Or 416, 56 P 73.

This section and the next one give to courts of law as

full power to try the issues, adjust and settle the various rights of the parties as courts of equity could have. Ruble v. Coyote Gold & Silver Min. Co., (1881) 10 Or 39.

This section is but a formal declaration of the general power of the court without in any way defining or declaring what constitutes a case for the exercise of its power. Coleman v. Elmore, (1887) 31 Fed 391, 12 Sawy 463.

A joint judgment against some of the defendants for one part of the claim and against others for another part is unauthorized. Hayden v. Pierce, (1898) 33 Or 89, 52 P 1049.

The default of some defendants to assert their rights cannot affect the interest of others in the proceedings. Hough v. Porter, (1909) 51 Or 318, 374, 95 P 732, 98 P 1083, 102 P 728.

The common-law rule that only one judgment, namely a judgment in favor of all the defendants or all the plaintiffs, could be given is abrogated by this section. Williams v. Pac. Sur. Co., (1913) 60 Or 151, 127 P 145, 131 P 1021, 132 P 959, 133 P 1186.

When a verdict is returned against one surety only and a judgment of dismissal is rendered as to the principal and other surety, the surety against whom the verdict was returned is not entitled to judgment notwithstanding the verdict on the theory that he was released. Bertin & Lepori v. Mattison, (1916) 80 Or 354, 157 P 153.

A plaintiff who has assigned a part of his claim to coplaintiff may recover for unassigned portion of the claim even though the coplaintiff does not recover. Strang v. Ore.-Wash. R.R. & Nav. Co., (1917) 83 Or 644, 163 P 1181.

Judgment may be given against two of three joint defendants where service could not be made on third. Babcock Co. v. Katz, (1927) 121 Or 64, 253 P 373.

A judgment for different amounts may be rendered by court in the same case against several defendants. Closset v. Portland Amusement Co., (1930) 134 Or 414, 290 P 556, 293 P 720.

If the sum for which judgment is sought is free from dispute the court will enter a judgment for that amount even though the plaintiff has failed to sustain the validity of a lien or the right to equitable relief through its foreclosure. Ward v. Town Tavern, (1951) 191 Or 1, 228 P2d 216.

In equity our statutes permit judgments between codefendants arising out of equitable counterclaims. Cottage Grove Lbr. Co. v. Lillegren, (1961) 227 Or 24, 360 P2d 927.

2. Joint liability

A several judgment cannot be given between any of the defendants and the plaintiff or either of them where the cause of action is joint and not several. Coleman v. Elmore, (1887) 31 Fed 391, 12 Sawy 463.

In an action to recover a partnership debt, there cannot be a several judgment between any of the parties. Id.

The liability of partners for firm debts being joint, such a judgment should be entered when that relationship is established. North Pac. Lbr. Co. v. Spore, (1904) 44 Or 462, 75 P 890.

The common-law rule that in an action on an alleged joint contract recovery must be had against all the defendants or none is superseded by this section. Bertin & Lepori v. Mattison, (1916) 80 Or 354, 157 P 153.

The entire debt on a joint contract is merged in a judgment against part of joint obligors. Anderson v. Stayton State Bk., (1916) 82 Or 357, 159 P 1033.

3. Joint and several liability; tort actions

When the cause of action stated in the complaint is joint and several, a several judgment may be given between either of the defendants and the plaintiff. Sears v. McGrew, (1881) 10 Or 48; Sabin v. Mitchell, (1895) 27 Or 66, 39 P 635; Coleman v. Elmore, (1887) 31 Fed 391, 12 Sawy 463.

In an action of tort against a corporation and its managing agent, on whose conduct its liability depends, a verdict against the corporation only is not void. Bingham v. Lipman, (1902) 40 Or 363, 67 P 98.

A judgment in different amounts against joint tort feasors is not authorized. Chrudinsky v. Evans, (1917) 85 Or 548, 167 P 562.

Judgment may be given for or against one or more of the defendants in a tort action. Stull v. Porter, (1921) 100 Or 514, 184 P 260, 196 P 1116.

Although joint tort was alleged, judgment could be rendered against one defendant although other defendant prevails. Anderson v. Maloney, (1924) 111 Or 84, 225 P 318.

4. Dismissal and nonsuit

A plaintiff may dismiss his action as to some defendants and prosecute it to final judgment as to the others in all cases wherein a separate action might have been maintained. Hamm v. Basche, (1892) 22 Or 513, 30 P 501; Krebs Hop Co. v. Taylor, (1908) 52 Or 627, 97 P 44, 98 P 494; Bertin & Lepori v. Mattison, (1916) 80 Or 354, 157 P 153, 5 ALR 590.

A judgment against one defendant in negligence action, treated during trial as against such defendant alone, amounts to dismissal as to codefendant. Ferrari v. Beaver Hill Coal Co., (1909) 54 Or 210, 94 P 181, 95 P 498, 102 P 175, 102 P 1016.

Though a nonsuit in favor of the one defendant was by consent and a nonsuit in favor of codefendant was contested, a joint judgment is not objectionable in form. Culver v. Van Valkenburg, (1912) 60 Or 447, 119 P 753.

In a tort action dismissal as to one defendant with the consent of plaintiff is not error as to the other defendant. Furbeck v. Gevurtz & Son, (1914) 72 Or 12, 143 P 654, 922.

Transfer to a law court is waived if the defendant asks equity to determine the rights of the parties after attacking equity's jurisdiction in the litigation. Ward v. Town Tavern, (1951) 191 Or 1, 228 P2d 216.

FURTHER CITATIONS: Cox v. Alexander, (1897) 30 Or 438, 46 P 794; Le Vee v. Le Vee, (1919) 93 Or 370, 181 P 351, 183 P 773; Lidfors v. Pflaum, (1925) 115 Or 142, 205 P 277, 236 P 1059; Nadstanek v. Trask, (1929) 130 Or 669, 281 P 840, 67 ALR 599; Associated Oil Co. v. La Branch, (1932) 139 Or 410, 10 P2d 597.

LAW REVIEW CITATIONS: 12 OLR 96, 201.

18.130

NOTES OF DECISIONS

This section and the preceding one give courts of law as full power to try the issues in a case against several parties and adjust and settle the various rights of the parties as courts of equity could have. Ruble v. Coyote Gold & Silver Min. Co., (1881) 10 Or 39.

In an action on a joint and several contract, a judgment may be rendered against one or more of the parties without waiting for final trial. Sears v. McGrew, (1881) 10 Or 48.

This section is but a formal declaration of the general power of the court without in any way defining or declaring what constitutes a case for the exercise of its power. Coleman v. Elmore, (1887) 31 Fed 391, 12 Sawy 463.

The court may proceed to trial as to the defendants sued on an alleged joint obligation who have answered and joined issue without first entering default and judgment against others who had been served but did not appear. Hewey v. Andrews, (1917) 82 Or 448, 159 P 1149, 161 P 108.

In a tort action, the court may in its discretion render a several judgment against one or more of the defendants leaving the action to proceed against the other. Stull v. Porter, (1921) 100 Or 514, 184 P 260, 196 P 1116.

FURTHER CITATIONS: Tillamook Dairy Assn. v. Schermerhorn, (1897) 31 Or 308, 51 P 438; Nadstanek v. Trask,

(1929) 130 Or 669, 281 P 840, 67 ALR 599; Closset v. Portland Amusement Co., (1930) 134 Or 414, 290 P 556, 293 P 720; Associated Oil Co. v. La Branch, (1932) 139 Or 410, 10 P2d 597.

LAW REVIEW CITATIONS: 12 OLR 96, 201.

18.140

NOTES OF DECISIONS

1. In general
2. When court does not have jurisdiction
3. When facts do not constitute cause of action or defense
4. Directed verdicts; new trial

1. In general

A party urging at the trial the insufficiency of the pleading not previously urged should be compelled to resort to a motion for judgment notwithstanding the verdict. Specht v. Allen, (1885) 12 Or 117, 6 P 494; Baker City v. Murphy, (1895) 30 Or 405, 42 P 133, 35 LRA 88; Jackson v. Sumpter Valley Ry., (1908) 50 Or 455, 93 P 356.

Where the reply does not deny the allegations in an answer which constitutes a complete defense, judgment will be rendered for the defendant upon motion therefor, notwithstanding a verdict for the plaintiff. Benicia Agricultural Works v. Creighton, (1892) 21 Or 495, 28 P 775, 30 P 676; Wyatt v. Henderson, (1897) 31 Or 48, 48 P 790.

The motion for judgment notwithstanding the verdict must be determined from the pleadings. Houser v. West, (1901) 39 Or 392, 65 P 82, 84; Bertin & Lepori v. Mattison, (1916) 80 Or 354, 359, 157 P 153, 5 ALR 590; Borg v. Utah Constr. Co., (1926) 117 Or 222, 242 P 600.

A motion for a directed verdict is a prerequisite to a motion for judgment notwithstanding the verdict based on insufficiency of the evidence. Carey v. Leonard, (1963) 235 Or 107, 383 P2d 1011; Merritt v. State Ind. Acc. Comm., (1963) 235 Or 121, 384 P2d 140; German v. Kienow's Food Stores, (1967) 246 Or 334, 425 P2d 523; Stark v. Henneman, (1968) 250 Or 34, 440 P2d 364.

Only in very clear cases will a judgment notwithstanding the verdict be granted. Friendly v. Lee, (1890) 20 Or 202, 25 P 396.

Objection to sufficiency of complaint is never waived so on appeal it is immaterial whether the trial court was correct in overruling a motion for judgment notwithstanding the verdict after disposing of a demurrer which raised the same point. Hargett v. Beardsley, (1898) 33 Or 301, 54 P 203.

A motion for judgment notwithstanding verdict is only to permit a party to take advantage of error which has not before been assigned; a question raised by a motion for nonsuit cannot again be raised by this motion. Scibor v. Ore.-Wash. R.R. & Nav. Co., (1914) 70 Or 116, 140 P 629.

Plaintiff cannot have a judgment notwithstanding the verdict for greater amount than verdict. Snyder v. Portland Ry., Light & Power Co., (1923) 107 Or 673, 215 P 887.

The sufficiency of the evidence cannot be tested by a motion for judgment notwithstanding the verdict. Kelley v. Stout Lbr. Co., (1928) 123 Or 647, 263 P 881.

Where damages were segregated in verdict, court may give judgment notwithstanding the verdict for portion of damages not supported by evidence. Parker v. Pettit, (1943) 171 Or 481, 138 P2d 592.

Error in admission of evidence is not proper grounds to support a motion notwithstanding the verdict. Edvalson v. Swick, (1951) 190 Or 473, 227 P2d 183.

Ore. Const. Art. VII (A), §3 does not deprive the trial courts of their common law power to order a new trial because of misconduct of a party or juror even if the injured party does not make an objection or move for a mistrial when the error occurs. Strandholm v. General Constr. Co., (1963) 235 Or 145, 382 P2d 843.

Appellant cannot assert on appeal grounds for his motion which were not asserted at the trial. Vancie v. Poulson, (1964) 236 Or 314, 388 P2d 444.

A judgment notwithstanding the verdict should not be granted if there is any substantial evidence to support the verdict. Austin v. Sisters of Charity of Providence, (1970) 256 Or 179, 470 P2d 939.

Judgment notwithstanding the verdict based on res judicata was proper, although objection to defendant's offer of this evidence had been sustained, since plaintiff's reply incorporated the res judicata plea in the former suit. Nusom v. Fromm, (1959) 217 Or 36, 340 P2d 186.

The Supreme Court would not consider assignment of error for judgment notwithstanding the verdict based upon denial of motion for involuntary nonsuit rather than denial of motion for directed verdict, when no exception had been taken in the lower court. Barr v. Linnton Plywood Assn., (1960) 223 Or 541, 352 P2d 596, 355 P2d 256, aff'd, (1962) 232 Or 298, 375 P2d 84.

The court did not err in granting judgment notwithstanding the verdict. Twilleager v. North Am. Acc. Ins. Co., (1964) 239 Or 256, 397 P2d 193.

2. When court does not have jurisdiction

Where a service of summons by publication was fatally defective, it was the duty of the court to vacate the judgment even though the term in which it was rendered had expired and even though more than a year passed after the entry of a judgment. Anderson v. Guenther, (1933) 144 Or 446, 22 P2d 339, 25 P2d 146.

3. When facts do not constitute cause of action or defense

If a demurrer would not lie to a pleading, a motion for a judgment notwithstanding the verdict ought not to be allowed against the party filing such pleading. Andros v. Childers, (1887) 14 Or 447, 13 P 65.

Where the sheriff's answer in an action for conversion alleges ownership, but not possession, of the property in the debtor, plaintiff's motion for judgment notwithstanding the verdict is properly denied. Wheeler v. McFerron, (1900) 38 Or 105, 62 P 1015.

An answer denying negligence of defendant and alleging negligence of plaintiff pleads a good defense precluding a motion for judgment notwithstanding the verdict. Snyder v. Portland Ry., Light & Power Co., (1923) 107 Or 673, 215 P 887.

Where there is an issue under pleadings relative to question of damages for submission to jury, denial of plaintiff's motion for judgment notwithstanding the verdict is proper. Bernstein v. Berg, (1927) 123 Or 343, 262 P 247.

Where the facts are defectively stated but the complaint states a good cause of action, a motion for judgment notwithstanding the verdict should be denied. Clarkson v. Wong, (1935) 150 Or 406, 42 P2d 763, 45 P2d 914.

When the motion for judgment notwithstanding the verdict is made following a denial of a motion for directed verdict, the court should examine the record in the light most unfavorable to the movant. Edvalson v. Swick, (1951) 190 Or 473, 227 P2d 183.

After a verdict for defendant where defense was defectively pleaded, judgment notwithstanding the verdict should not be given unless defense was totally defective in an essential particular. Andros v. Childers, (1887) 14 Or 447, 13 P 65.

4. Directed verdicts; new trial

When both parties move for a directed verdict the correct procedure is for the court to discharge the jury and decide the case. Hudelson v. Sanders Swafford Co., (1924) 111 Or 600, 227 P 310; Richardson v. Doherty Motor Co., (1961)

226 Or 344, 359 P2d 1104. **But see** Godell v. Johnson, (1966) 244 Or 587, 418 P2d 505.

On a motion for a directed verdict and judgment notwithstanding the verdict the evidence must be viewed in the light most favorable to the judgment. Durkoop v. Mishler, (1962) 233 Or 243, 377 P2d 267; Austin v. Sisters of Charity of Providence, (1970) 256 Or 179, 470 P2d 939.

When both parties move for a directed verdict the trial court's decision will not be upset if there is evidence to support it. Hudelson v. Sanders Swafford Co., (1924) 111 Or 600, 227 P 310.

A motion for judgment notwithstanding the verdict presents same question to court as motion for directed verdict. Allister v. Knaupp, (1942) 168 Or 630, 126 P2d 317.

Motion for judgment notwithstanding the verdict should be denied where motion by same party for directed verdict should not have been granted. Smith v. Carleton, (1949) 185 Or 672, 205 P2d 160.

Denying a motion for directed verdict does not prevent court from later entering judgment notwithstanding the verdict. Callender & Stone v. Brown, (1947) 181 Or 279, 178 P2d 922.

Where court grants judgment notwithstanding the verdict and also motion for new trial, and judgment notwithstanding the verdict is affirmed on appeal, the award of new trial has no further authority. Edwards v. Hoevet, (1949) 185 Or 284, 200 P2d 955.

This section authorizes the court to submit the case to the jury following a motion for directed verdict with leave to the moving party to move for a judgment notwithstanding verdict. Gow v. Multnomah Hotel Inc., (1951) 191 Or 45, 224 P2d 552, 228 P2d 791.

Under this section, even though the trial court is of the opinion at the close of the case that a motion for a directed verdict ought to be granted and submits the case to the jury with leave to the moving party to move for judgment in his favor if the verdict is otherwise than as would have been directed, it does not follow that the court must sustain the motion for judgment notwithstanding verdict. Tomasek v. Ore. Hwy. Comm., (1952) 196 Or 120, 248 P2d 703.

If a motion in the alternative for a new trial was denied after a motion for judgment notwithstanding the verdict was granted, the merits of the motion for a new trial may be considered on appeal when the appellate court reverses the ruling of the trial court on the motion for judgment notwithstanding the verdict. Fowler v. Courtemanche, (1954) 202 Or 413, 274 P2d 258.

When an appeal is taken from an order granting new trial, the right to cross-appeal from an adverse decision on a motion for judgment notwithstanding the verdict is also granted by implication and the Supreme Court is authorized to consider the merits of that motion. Hillman v. No. Wasco Co. P.U.D., (1958) 213 Or 264, 323 P2d 664.

A motion for a directed verdict calls in question the evidence and not the pleading. Amca Lbr. Co. v. Buckeye-Pac. Lbr. Co., (1963) 233 Or 611, 378 P2d 738.

An order allowing judgment notwithstanding the verdict entered more than 55 days after entry of the original order was void. Clark v. Auto Wholesale Co. Inc., (1964) 237 Or 446, 391 P2d 754. **Distinguished in** Charco Inc. v. Cohn, (1966) 242 Or 566, 411 P2d 264.

A requested instruction which directs the jury to return a certain verdict is tantamount to a motion for a directed verdict. Becker v. Pearson, (1965) 241 Or 215, 405 P2d 534.

Denial of a motion for a directed verdict will not generally be reversed on a ground not specified in such motion. Jepsen v. Magill, (1966) 243 Or 34, 411 P2d 267.

When each party moves for a directed verdict or when opposing parties "join in" a motion for a directed verdict, and neither party is entitled to a directed verdict in his own right, it is the duty of the trial court to submit the cause to the jury unless both parties expressly waive jury trial or unless from circumstances other than the making or joining in the motion waiver can be implied in fact. Godell v. Johnson, (1966) 244 Or 587, 418 P2d 505.

FURTHER CITATIONS: Hemenway v. Francis, (1891) 20 Or 455, 26 P 301; Varley v. Consol. Tbr. Co., (1943) 172 Or 157, 139 P2d 584; Jasper v. Wells, (1943) 173 Or 114, 144 P2d 505; Lunbke v. Hawthorne, (1948) 183 Or 362, 192 P2d 990; Schafer v. Fraser, (1956) 206 Or 446, 290 P2d 190, 294 P2d 609; Hopfer v. Staudt, (1956) 207 Or 487, 298 P2d 186; Hall v. Work, (1960) 223 Or 347, 354 P2d 837, 366 P2d 533; Barr v. Linnton Plywood Assn., (1960) 223 Or 541, 352 P2d 596, 355 P2d 256; Meyers v. Oasis Sanitarium, Inc., (1960) 224 Or 414, 356 P2d 159; Thomas v. Foglio, (1961) 225 Or 540, 358 P2d 1066; Forster v. Knapple, (1961) 226 Or 327, 360 P2d 311; Stephens v. St. Helens, (1962) 231 Or 1, 371 P2d 686; Clarizo v. Spada Distrib. Co., (1962) 231 Or 516, 373 P2d 689; Coburn v. Utah Home Fire Ins. Co., (1962) 233 Or 20, 375 P2d 1022; Whitlock v. State Ind. Acc. Comm., (1962) 233 Or 166, 377 P2d 148; Brown v. Hayden Island Amusement Co., (1963) 233 Or 416, 378 P2d 953; Dorr v. Janssen, (1963) 233 Or 505, 378 P2d 999; Headley v. United Fid. Hosp. Assur. Co., (1963) 23 Or 302, 384 P2d 1007; State v. Nichols, (1964) 236 Or 521, 388 P2d 739; Butler v. Wilhelm, (1964) 238 Or 487, 395 P2d 447; Edison v. Interstate Tractor and Equip. Co., (1964) 238 Or 553, 395 P2d 779; McFadden v. McFadden, (1964) 239 Or 76, 396 P2d 202; Edgren v. Reissner, (1964) 239 Or 212, 396 P2d 564; Thompson and Georgeson, Inc. v. Ward, (1965) 240 Or 429, 400 P2d 557; Young v. Crown Zellerbach Corp. (1966) 244 Or 251, 417 P2d 394; Lithia Lumber Co. v. Lamb, (1968) 250 Or 444, 443 P2d 647; Wilson v. Portland Gen. Elec. Co., (1968) 252 Or 385, 448 P2d 562; Church v. Portland Gen. Elec. Co., (1969) 254 Or 464, 461 P2d 64; Chance v. Ringling Bros. Barnum & Bailey, Combined Shows, Inc., (1970) 257 Or 319, 478 P2d 613.

LAW REVIEW CITATIONS: 20 OLR 269, 271; 37 OLR 68; 4 WLJ 4.

18.160

NOTES OF DECISIONS

1. Relief from a judgment, decree, order or other proceeding
   (1) In general
   (2) Construction of section
   (3) Authority of courts
   (4) Particular judgments, decrees or orders
2. Discretion of the court
3. Grounds for relief
   (1) Mistake
   (2) Inadvertence
   (3) Surprise
   (4) Excusable neglect
   (5) Judgment on publication of summons
4. Within one year after notice
5. Showing of defenses
6. Hearing and determining motion
   (1) Terms
   (2) Review
7. Relief in equity

1. Relief from a judgment, decree, order or other proceeding

(1) In general. After the term at which the judgment was rendered, the court cannot vacate a valid judgment in the same action except in a manner provided by this section, unless the matter was retained in the court by appropriate motion or other proceeding. Deering & Co. v. Quivey, (1895) 26 Or 556, 38 P 710; Alexander v. Ling, (1897) 31 Or 222, 50 P 915; Brand v. Baker, (1903) 42 Or 426, 71 P 320; Stivers v. Byrkett, (1910) 56 Or 565, 108 P 1014, 109 P 386; Grover v. Hawthorne, (1912) 62 Or 65, 116 P 100, 121 P 804; First

Christian Church v. Robb, (1914) 69 Or 283, 138 P 356; Finch v. Pac. Reduction Co., (1925) 113 Or 670, 234 P 296; Rosumny v. Marks, (1926) 118 Or 248, 246 P 723; Western Land & Irr. Co. v. Humfeld, (1926) 118 Or 416, 247 P 143; Travelers Ins. Co. v. Staiger, (1937) 157 Or 143, 69 P2d 1069; Barone v. Barone, (1956) 207 Or 26, 294 P2d 609.

A court has inherent power to vacate either during the term or at a subsequent term a void judgment rendered without jurisdiction. Ladd v. Mason, (1882) 10 Or 308; Finch v. Pac. Reduction Co., (1925) 113 Or 670, 234 P 296.

The proceeding under this section is a direct proceeding. Crabill v. Crabill, (1892) 22 Or 588, 590, 30 P 320; State v. Locke, (1915) 77 Or 492, 151 P 717.

This section includes motions to vacate a decree or order. Travelers Inc. Co. v. Staiger, (1937) 157 Or 143, 69 P2d 1069; Chaney v. Chaney, (1945) 176 Or 203, 156 P2d 559.

Where a party elects to stand on a demurrer, the court cannot at a subsequent term vacate the judgment under this section and permit the defendant to answer. Deering & Co. v. Quivey, (1895) 26 Or 556, 38 P 710. **But see** Lawson v. Hughes, (1928) 127 Or 16, 256 P 1043, 270 P 922.

A judgment will not be vacated under this section where motion is made solely that the defendant might except to findings of the court and prosecute an appeal. Tongue v. Brewster, (1899) 35 Or 228, 58 P 38.

An amendment of this section in regard to procedure in law actions made applicable to suits in equity will also amend the procedure in suits in equity. Bailey v. Malheur Irr. Co., (1899) 36 Or 54, 57 P 910.

Where the parties consent to a decree, it cannot be vacated under this section although consent was given through mutual mistake. Stites v. McGee, (1900) 37 Or 574, 61 P 1129.

Where a default judgment is vacated upon defendant's application under this section, the order is not appealable. Bowman v. Holman, (1906) 48 Or 351, 86 P 792.

A motion to vacate a decree for want of service of complaint and summons is not an appeal to the discretion of the court for relief under this section. Peterson v. Hutton, (1930) 132 Or 252, 284 P 279.

An oral decision from the bench does not constitute a judgment until reduced to an order, decree or judgment. Barone v. Barone, (1956) 207 Or 26, 294 P2d 609.

A trustee in bankruptcy cannot avoid a state court judgment to which he was not a party. Dudley v. Dickie, (1960) 281 F2d 360.

The action of the trial court in refusing to set aside a decree will not be reviewed except for a manifest abuse of discretion. Peake v. Peake, (1965) 242 Or 386, 408 P2d 206.

For the trial court to exercise its legal discretion in setting aside a previous default, the applicant must tender pleadings which disclose a meritorious defense. Schrader v. Schrader, (1966) 242 Or 526, 410 P2d 1017.

The court did not abuse its discretion. Williamson v. Allen, (1966) 244 Or 55, 415 P2d 733.

This section is intended to be an exclusive remedy. Ebel v. Boly, (1971) 258 Or 308, 481 P2d 620.

(2) Construction of section. The provisions of this section are remedial and should be given a liberal construction. Fildew v. Milner, (1910) 57 Or 16, 109 P 1092; Peters v. Dietrich, (1934) 145 Or 589, 27 P2d 1015; Snyder v. Consol. Hwy. Co., (1937) 157 Or 479, 72 P2d 932; Bailey v. Universal Underwriters Ins. Co., (1970) 258 Or 201, 474 P2d 746. **Contra,** this section is in derogation of the common law and must be strictly construed. Nicklin v. Robertson, (1895) 28 Or 278, 42 P 993.

This section is construed liberally so that every litigant shall have his day in court and his rights and duties determined only after a trial on the merits. Snyder v. Consol. Hwy. Co., (1937) 157 Or 479, 72 P2d 932.

(3) Authority of the courts. The Supreme Court has power under this section to vacate a decree and remand the cause for further proceedings. Branson v. Oregonian Ry., (1882) 10 Or 278.

The trial court has power to make an order to vacate a default judgment. Bowman v. Holman, (1906) 48 Or 351, 86 P 792.

A justice court is powerless to set aside a valid judgment except for the reasons specified in this section. White v. Brown, (1909) 54 Or 7, 101 P 900.

The right of a justice to vacate a judgment under this section exists regardless of the filing of the transcript in the circuit court. McCabe-Duprey Tanning Co. v. Eubanks, (1910) 57 Or 44, 102 P 795, 110 P 395.

The court cannot in a contempt proceeding issue an opinion interpreting its decree. Harris v. Harris, (1951) 192 Or 361, 232 P2d 818.

(4) Particular judgments, decrees or orders. Plaintiff is not entitled to relief from an order dismissing an action for want of prosecution when action is not taken within the time required. Longyear v. Edwards, (1959) 217 Or 314, 342 P2d 762; Ebel v. Boly, (1971) 258 Or 308, 481 P2d 620.

Where plaintiff obtained a divorce by fraud, his subsequent remarriage is not ground for refusing to vacate the decree. Evans v. Evans, (1911) 60 Or 195, 118 P177.

A motion to vacate an order extending the time for filing a transcript is addressed to the sound discretion of the court. Grover v. Hawthorne, (1912) 62 Or 65, 116 P 100, 121 P 804.

A refusal to vacate an order for an administrator's sale on the ground that it was made without actual notice to part of the petitioners is not an abuse of discretion. In re Marks' Estate, (1916) 81 Or 632, 160 P 540.

A divorce decree is within this section, but a court should vacate it only after due consideration of the effect of such order on innocent third persons. Carmichael v. Carmichael, (1921) 101 Or 172, 199 P 385; 106 Or 198, 211 P 916.

If a default is improperly rendered against the State Industrial Accident Commission in the circuit court to which appeal is taken from order of commission, it should apply under this section to vacate default. Butterfield v. State Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216.

Criminal cases are not within this section. State v. Lewis, (1925) 113 Or 359, 230 P 543, 232 P 1013.

A decree rendered on findings of fact and conclusions of law will not be set aside because it would result in no advantage to the parties. Haas v. Scott, (1925) 115 Or 580, 239 P 202.

This section applies to an application to open a decree adjudicating water rights. In re Water Rights of Silvies River, (1927) 122 Or 45, 257 P 693.

The vacation of an order of dismissal of an appeal upon the ground of lack of notice to the appellant of the intention to dismiss, is not an abuse of discretion under this statute. Gamble v. Menefee Lbr. Co., (1934) 149 Or 79, 39 P2d 667.

Where an attorney confesses a judgment without express authorization, it may be vacated under this section. Galbraith v. Monarch Gold Dredging Co., (1939) 160 Or 282, 84 P2d 1110.

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

2. Discretion of the court

The court's discretion is to be exercised in conformity to the spirit of the laws and not to defeat the substantial ends of justice. White v. NW Stage Co., (1873) 5 Or 99; Lovejoy v. Willamette Locks Co., (1893) 24 Or 569, 34 P 660; Askren v. Squire, (1896) 29 Or 228, 45 P 779; Thompson

v. Connell, (1897) 31 Or 231, 48 P 467, 65 Am St Rep 818; Hanthorn v. Oliver, (1897) 32 Or 57, 51 P 440, 67 Am St Rep 518; Coos Bay Nav. Co. v. Endicott, (1899) 34 Or 593, 57 P 61; Schneider v. Hutchinson, (1899) 35 Or 253, 57 P 324, 76 Am St Rep 474; Nye v. Bill Nye Mill. Co., (1905) 46 Or 302, 80 P 94; Horn v. United Sec. Co., (1905) 47 Or 35, 81 P 1009; Voorhees v. Geiser-Hendryx Inv. Co., (1908) 52 Or 602, 98 P 324; McCoy v. Huntley, (1909) 53 Or 229, 99 P 932; Anderson v. McClellan, (1909) 54 Or 206, 102 P 1015; Chapman v. Multnomah Co., (1912) 63 Or 180, 126 P 996; Fretland v. Cantrall, (1915) 78 Or 439, 153 P 479; Wallace v. Portland Ry., Light & Power Co., (1918) 88 Or 219, 159 P 974, 170 P 283; Carlson v. Bankers' Discount Corp., (1923) 107 Or 686, 215 P 986; Bratt v. State Ind. Acc. Comm., (1925) 114 Or 644, 236 P 478; Bronn v. Soules, (1932) 140 Or 308, 11 P2d 284, 13 P2d 623; Gamble v. Menefree Lbr. Co., (1934) 149 Or 79, 39 P2d 667.

The discretion of the court must not be arbitrarily exercised. Carmichael v. Carmichael, (1921) 101 Or 172, 199 P 385; Peters v. Dietrich, (1934) 145 Or 589, 27 P2d 1015.

A motion to vacate is addressed to the sound discretion of the trial judge. Jaeger v. Jaeger, (1960) 224 Or 281, 356 P2d 93; Day v. Day, (1961) 226 Or 499, 359 P2d 538; Colwell v. Chernabaeff, (1971) 258 Or 353, 482 P2d 157.

It was an abuse of discretion to grant a motion to vacate a judgment on the ground that the moving party believes it expedient to introduce further testimony. Shevlin Co. v. United States, (1944) 146 F2d 613.

One seeking to set aside default judgment must act promptly and denial to set aside judgment for unexplained delays was not an abuse of discretion. Koukal v. Coy, (1959) 219 Or 414, 347 P2d 602.

3. Grounds for relief

The affidavit must show mistake, inadvertence, surprise or excusable neglect to authorize the court to vacate a judgment. Nicklin v. Robertson, (1895) 28 Or 278, 42 P 993, 52 Am St Rep 790.

Where the court has established rules, counsel is not guilty of inexcusable neglect in relying on such rules. Ainsworth v. Dunham, (1963) 235 Or 225, 384 P2d 214.

Where two of the joint obligors withdrew their answer, the default judgment entered against them was vacatable upon motion of the plaintiff. Wilson v. Blakeslee, (1888) 16 Or 43, 16 P 872.

A judgment for costs and disbursements was vacated where failure to file a cost bill within the proper time was due to illness of counsel. Weiss v. Meyer, (1893) 24 Or 108, 32 P 1025.

A plaintiff who went into equity to set aside the judgment procured by fraud in violation of a compromise agreement was not estopped for his failure to file a motion under this section. Froebrich v. Lane, (1904) 45 Or 13, 76 P 351, 106 Am St Rep 634.

Where defendant failed to avail himself of an order allowing an extension of time to file an answer and did not attempt to excuse the default, he was not entitled to have the judgment vacated. Nye v. Bill Nye Mill. Co., (1905) 46 Or 302, 80 P 94.

Where the defendant's counsel failed to attend the court to argue a motion and his failure was not excusable under this section, the court did not err in denying a motion to vacate the judgment. Horn v. United Sec. Co., (1905) 47 Or 35, 81 P 1009.

A motion to vacate a default decree taken upon a demurrer prior to the time agreed for argument was properly denied. Dietzel v. Conroy, (1909) 53 Or 446, 101 P 215.

Where the plaintiffs knew of the counterclaim and did not show that it was impossible to attend to the litigation, the judgment was not vacated for want of a reply. Stivers v. Byrkett, (1910) 56 Or 565, 108 P 1014, 109 P 386.

Perjury of a witness was not grounds for setting aside a judgment under this section. Wallace v. Portland Ry., Light & Power Co., (1918) 88 Or 219, 159 P 974, 170 P 283.

It was an abuse of discretion for the circuit court to deny a motion to vacate a default judgment against a county where there was some showing of surprise. Irwin v. Klamath County, (1924) 110 Or 374, 210 P 159, 223 P 736.

Where the defendant's attorney relied upon the county clerk's information that the decree had not been entered and the attorney did not examine the record, relief was not allowed under this section. Western Land & Irr. Co. v. Humfeld, (1926) 118 Or 416, 247 P 143.

Where defendants' attorney withdrew and they did not substitute other counsel nor advise plaintiffs of their addresses, the trial court in refusing to set aside a default judgment thereafter entered did not abuse its discretion. Merryman v. Colonial Realty Co., (1941) 168 Or 12, 120 P2d 230.

The court erred in denying a motion to vacate a default judgment against a defendant employe who justifiably left the matters of defense in his employer's hands. King v. Mitchell, (1950) 188 Or 434, 214 P2d 993, 216 P2d 269.

(1) Mistake. Where a plaintiff moved the court to vacate the judgment because of a mistake as to the locus in quo, the denial of the motion was not an abuse of discretion as the judge visited the locus to better qualify himself to rule on the application. Lovejoy v. Willamette Locks Co., (1893) 24 Or. 569, 34 P 660.

Where a defendant with an imperfect understanding of the English language misunderstood a notification of the date of the trial but was ready for trial on the date he understood the trial was to take place, the refusal to vacate the judgment by default was an abuse of discretion. Hanthorn v. Oliver, (1897) 32 Or 57, 51 P 440, 67 Am St Rep 518.

Mistake as to retaining of counsel justified relief under this section. McCoy v. Huntley, (1909) 53 Or 229, 99 P 932.

Where the plaintiff's counsel were absent by mistake as to date of the trial, it was an abuse of discretion to deny a motion to vacate the judgment. Fretland v. Cantrall, (1915) 78 Or 439, 153 P 479.

(2) Inadvertence. Where judgment was obtained ex parte after notice that the other party could not appear for sufficient reasons, it was vacated on terms. Paabo v. Hanson, (1917) 82 Or 512, 162 P 256.

Where an attorney made an inadvertent entry of a wrong date in his record regarding time for answering, judgment was vacated under this section. Astoria Sav. Bank v. Normand, (1928) 125 Or 347, 267 P 524.

(3) Surprise. A judgment contrary to a stipulation between the parties is taken by surprise within the meaning of this section. Thompson v. Connell, (1897) 31 Or 231, 48 P 467, 65 Am St Rep 818; Durham v. Commercial Nat. Bank, (1904) 45 Or 385, 77 P 902; Voorhees v. Geiser-Hendryx Inv. Co., (1908) 52 Or 602, 98 P 324.

(4) Excusable neglect. The neglect of an attorney to notice an exception in a deed and to ask the court to rule thereon is not such excusable neglect within the section. Hicklin v. McClear, (1890) 19 Or 508, 24 P 992.

Where a defendant seeks relief from a divorce decree under this section on grounds of excusable neglect, it must be shown that she acted in good faith and that she could not have protected herself by reasonable diligence against the duress and intimidation by which she seeks to excuse herself. Carmichael v. Carmichael, (1921) 101 Or 172, 199 P 385.

A trial judge has authority to vacate a decree under this section sua sponte upon hearing that a party was misled and without representation at the time the decree was entered. Milton v. Hare, (1929) 130 Or 590, 280 P 511.

Where a judgment is entered without defendant's knowledge when he thought negotiations for a settlement were pending, his negligence is excusable. Li Sai Cheuk v. Lee Lung, (1916) 79 Or 563, 146 P 94, 156 P 254; McAuliffe v.

McAuliffe, (1931) 136 Or 168, 298 P 239; Peters v. Dietrich, (1934) 145 Or 589, 27 P2d 1015.

Where the plaintiff's counsel did not receive notice of the setting of the case for trial, the default judgment was set aside under this section. Oeder v. Watt, (1923) 107 Or 600, 214 P 591.

Neglect to consult an attorney and appear because of assurances of strangers that arrangements were being made for payment was not excusable neglect. Marsters v. Ashton, (1940) 165 Or 507, 107 P2d 981.

(5) Judgment on publication of summons. Where service by publication was made on a city officer generally known throughout the state, the default decree was vacated under this section. Fildew v. Milner, (1910) 57 Or 16, 109 P 1092.

Where plaintiff in his affidavit for an order of publication in a divorce action falsely stated his belief as to the place of defendant's residence, refusing to vacate a default decree on timely application was an abuse of discretion. Evans v. Evans, (1911) 60 Or 195, 118 P 177.

4. Within one year after notice

The motion must be made, heard and determined within the year after notice. Nicklin v. Robertson, (1895) 28 Or 278, 42 P 993, 52 Am St Rep 790; Lawson v. Hughes, (1928) 127 Or 16, 256 P 1043, 270 P 922.

Notice as used in this section means knowledge. Fildew v. Milner, (1910) 57 Or 16, 21, 109 P 1092; Evans v. Evans, (1911) 60 Or 195, 118 P 177; Chapman v. Multnomah County, (1912) 63 Or 180, 183, 126 P 996.

A defendant must show reasonable vigilance notwithstanding the statute gives him a year within which to assert his rights. Carmichael v. Carmichael, (1921) 101 Or 172, 199 P 385; Reeder v. Reeder, (1951) 191 Or 598, 232 P2d 78.

The motion is not governed by the time requirements prescribed by ORS 17.615. Oeder v. Watt, (1923) 107 Or 600, 214 P 591.

The statutory period of one year starts at the time when the judgment debtor discovers the judgment and not from the time of its entry. Anderson v. Guenther, (1933) 144 Or 446, 22 P2d 339, 25 P2d 146.

A judgment debtor was not relieved from an order confirming an execution sale where his attorney had notice of the sale more than a year before motion to vacate was made. Brand v. Baker, (1903) 42 Or 426, 71 P 320.

A county was not charged with knowledge of the entering of a default decree against it merely because the county clerk was ex-officio clerk of the court that rendered the decree. Chapman v. Multnomah County, (1912) 63 Or 180, 126 P 996.

Where a motion to vacate a divorce decree for irregularities was not filed within a year after the decree was rendered and there was no showing that all of the grounds alleged were not known to the state's authorities at the time they occurred, the motion could not be sustained under this section. Orr v. Orr, (1915) 75 Or 137, 144 P 753, 146 P 964.

The court did not err in denying defendant's motion to set aside a divorce decree where motion was not made within a year after notice. Cook v. Cook, (1941) 167 Or 474, 111 P2d 840, 118 P2d 1070.

5. Showing of defenses

A motion to vacate a valid judgment must be accompanied by an answer to the merits. Mayer v. Mayer, (1895) 27 Or 133, 39 P 1002; Egan v. North Amer. Loan Co., (1904) 45 Or 131, 76 P 774, 77 P 392; In re Marks' Estate, (1916) 81 Or 632, 160 P 540; Oregon Inv. & Mtg. Co. v. Keller, (1917) 85 Or 262, 166 P 762; Finch v. Pac. Reduction Co., (1925) 113 Or 670, 234 P 296; Johnston v. Braymill White Pine Co., (1933) 142 Or 95, 19 P2d 93.

It is not always essential that a party moving to vacate a default judgment must accompany his motion with the proposed answer. Bronn v. Soules, (1932) 140 Or 308, 11 P2d 284, 13 P2d 623.

Where a foreclosure decree against tenants in common is for a greater amount against nonanswering defendants than against answering defendants, costs and taxes against former defendants and not against the latter, the error appearing on the face of the record, it is unnecessary for nonanswering defendants moving to vacate judgment to accompany their motion with an answer. Id.

Where a defendant in default in a negligence action made a prompt application under this section and had a meritorious defense of contributory negligence, relief was granted. Snyder v. Consol. Hwy. Co., (1937) 157 Or 479, 72 P2d 932.

6. Hearing and determining motion

The courts are more inclined to open a default decree under this section than to set aside a decree under ORS 16.460. Hartley v. Rice,(1927) 123 Or 237, 261 P 689.

The court generally looks with more favor upon the application for relief of a defendant in default than upon a similar application by a defaulted plaintiff. Snyder v. Consol. Hwy. Co., (1937) 157 Or 479, 72 P2d 932.

(1) Terms. The waiver of a good defense cannot be required as a condition for vacating a judgment on default. Mitchell v. Campbell, (1887) 14 Or 454, 13 P 190.

A defendant, who without delay moved to vacate the default judgment and answered to the merits, is not required to give a bond to pay any judgment the plaintiff might recover as a condition to relief under this section. Russell v. Piper, (1921) 101 Or 680, 201 P 436. **But see** Kosher v. Stuart, (1913) 64 Or 123, 121 P 901, 129 P 491.

Where a decree was vacated upon defendant's motion, he had to pay costs and disbursements incurred by the plaintiff. Higgins v. Seaman, (1912) 61 Or 240, 122 P 40.

(2) Review. Only a plain abuse of discretion in refusing or granting relief under this section will be disturbed on appeal. Lovejoy v. Willamette Locks Co., (1893) 24 Or 569, 34 P 660; Askren v. Squire, (1896) 29 Or 228, 45 P 779; Nye v. Bill Nye Milling Co., (1905) 46 Or 302, 80 P 94; Wallace v. Portland Ry., Light & Power Co., (1918) 88 Or 219, 159 P 974, 170 P 283; Carmichael v. Carmichael, (1921) 101 Or 172, 199 P 385; Merryman v. Colonial Realty Co., (1941) 168 Or 12, 120 P2d 230; Jaeger v. Jaeger, (1960) 224 Or 281, 356 P2d 93; Day v. Day, (1961) 226 Or 499, 359 P2d 538.

Order vacating judgment under this section is not final and not appealable. Walker v. Clyde, (1956) 206 Or 322, 292 P2d 1083; Hughes v. Pea, (1957) 212 Or 259, 319 P2d 584.

Order vacating judgment under this section may be reviewed only upon an appeal from a final judgment. Walker v. Clyde, (1956) 206 Or 322, 292 P2d 1083.

7. Relief in equity

A denial of an application to vacate a judgment under this section is a bar to a suit in equity for the same relief on the same ground Thompson v. Connell, (1897) 31 Or 231, 48 P 467, 65 Am St Rep 818.

Where no application is made under this section, a party is not precluded from filing a suit in equity to set aside a judgment for fraud. Froebrich v. Lane, (1904) 45 Or 13, 76 P 351, 106 Am St Rep 634.

One moving to set aside a judgment under this section is bound to pursue that remedy to a final determination and is barred from filing suit in equity for the same relief on the same ground. Miller v. Shute, (1910) 55 Or 603, 107 P 467.

Where a judgment was procured by fraud, the plaintiff's equitable remedy was not barred by this section as the remedy under this section was not adequate. Fain v. Amend, (1940) 164 Or 123, 100 P2d 481.

Loss of right of appeal without defendant's fault because his motion to vacate the decree was not determined within

one year did not entitle him to equitable relief where grounds for the motion were insufficient to compel a favorable determination. Masters v. Ashton, (1940) 165 Or 507, 107 P2d 981.

Whether this section applies where a decree is procured through fraud or whether an independent suit in equity is necessary will not be decided by the Supreme Court where no objection was raised in the lower court. Cook v. Cook, (1941) 167 Or 474, 111 P2d 840, 118 P2d 1070.

FURTHER CITATIONS: Smith v. Wilkins, (1897) 31 Or 421, 51 P 438; Payne v. Savage, (1909) 51 Or 463, 94 P 750; Taylor v. Taylor, (1912) 61 Or 257, 121 P 431, 121 P 964; Felts v. Boyer, (1914) 73 Or 83, 144 P 420; Coates v. Smith, (1916) 81 Or 556, 160 P 517; Adjustment Bureau v. Staats, (1918) 90 Or 125, 175 P 847; Olsen v. Crow, (1930) 133 Or 310, 290 P 233; Nedry v. Herold, (1932) 141 Or 167, 11 P2d 548, 13 P2d 372; Malloon v. Cole, (1943) 172 Or 664, 143 P2d 679; Nichols v. Nichols, (1943) 174 Or 390, 143 P2d 663, 149 P2d 572; Jenkins v. Jenkins, (1948) 184 Or 525, 198 P2d 985; Marston v. Marston, (1949) 187 Or 243, 210 P2d 832; Reeder v. Marshall, (1958) 214 Or 154, 328 P2d 773; In re Adoption of Lauless, (1959) 216 Or 188, 338 P2d 660; Cole v. Granquist, (1959) 179 F Supp 440; Clawson v. Prouty, (1959) 215 Or 244, 333 P2d 1104; Dudley v. Dickie, (1960) 281 F2d 360, 363; Miller v. Miller, (1961) 228 Or 301, 365 P2d 86; In re Estate of Nelson, (1963) 234 Or 426, 383 P2d 55; Korlann v. Belton, (1963) 236 Or 23, 384 P2d 210; McKebbin v. Lenton, (1965) 240 Or 367, 400 P2d 1; Brunswick Corp. v. Playmor Enterprises, Inc., (1969) 253 Or 162, 452 P2d 553; State ex rel. Nilsen v. Cushing, (1969) 253 Or 262, 453 P2d 945; Lee v. Lee, (1969) 1 Or App 115, 459 P2d 442, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Whether a district attorney may apply under this section for relief from a default divorce decree, 1942-44, p 232.

LAW REVIEW CITATIONS: 13 OLR 346.

18.210

NOTES OF DECISIONS

The right to dismiss a suit is not an absolute one that plaintiff can exercise without leave of court; the court can compel the plaintiff to pay the costs of a suit before dismissing it. Taylor v. Taylor, (1914) 70 Or 510, 134 P 1183, 140 P 999.

This section makes LOL 182 [ORS 18.230] applicable to suits in equity. State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828.

A determination of an issue presented by general demurrer is not a "trial" and thereafter plaintiff will be entitled to a voluntary nonsuit. State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828. **But see** Hume v. Woodruff, (1894) 26 Or 373, 38 P 191.

A voluntary dismissal by a plaintiff before trial will not bar another suit for the same cause or any part thereof. Fletcher v. So. Ore. Truck Co., (1930) 132 Or 338, 285 P 813.

There is no such thing as a motion to dismiss a petition or complaint under Oregon practice. In re Miller Estate, (1962) 229 Or 618, 368 P2d 327.

When the court passes upon a motion for involuntary nonsuit made before presentation of the evidence at trial, plaintiff is entitled to every reasonable conjecture as to what the evidence might show as long as it is consistent with the evidence described in the opening statement. Beck v. Aichele, (1971) 258 Or 245, 482 P2d 184.

FURTHER CITATIONS: Dent v. Dolan, (1960) 220 Or 313, 349 P2d 500; Strawn v. State Tax Comm., (1962) 1 OTR 98.

18.220

NOTES OF DECISIONS

1. In general
2. Dismissal as bar
3. Dismissal without prejudice

1. In general

A suit in equity either passes to a decree or is dismissed, while at law the case goes to judgment or nonsuit; but a judgment of dismissal is unknown to the statute. Hoover v. King, (1903) 43 Or 281, 72 P 880, 99 Am St Rep 754, 65 LRA 790; Mulkey v. Day, (1907) 49 Or 312, 89 P 957; Hall v. Pettibone (1947) 182 Or 334; 187 P2d 166; Rayson v. Rush, (1971) 258 Or 315, 483 P2d 73.

A defendant pleading nul tiel corporation must specifically deny corporation's existence to gain dismissal. Law Guar. & Trust Socy. v. Hogue, (1900) 37 Or 544, 62 P 380.

Where the plaintiff has the burden of proof and fails to make a prima facie case, motion to dismiss is proper. Haney v. Parkison, (1914) 72 Or 249, 143 P 926, Ann Cas 1916D, 1035.

Where the cross-bill in an action at law states a good cause of suit for equitable relief and the parties stipulate to submit to equity jurisdiction of the court to try their cause, the court properly proceeds to a determination of all the matters at issue. Cody Lbr. Co. v. Coach, (1915) 76 Or 106, 146 P 973.

Where there is a remedy at law a suit in equity must be dismissed. Spores v. Maude, (1916) 81 Or 11, 158 P 169.

Where the equity on which suit was predicated is found to be nonexistent, the suit is terminated. Oregon-Wash. R.R. & Nav. Co. v. Reed, (1918) 87 Or 398, 169 P 342, 170 P 300.

Where after full hearing in lien suit it appears that plaintiff did not substantially perform his contract, dismissal should be with effect of preventing lien foreclosure or judgment as on express contract performed. Wolke v. Schmidt, (1924) 112 Or 99, 228 P 921.

Where the findings show a want of equity in plaintiff's suit a decree of dismissal is proper. Haas v. Scott, (1925) 115 Or 580, 239 P 202.

In action at law where defendant files equitable cross complaint, dismissal of cross complaint is proper where court finds defendant not entitled to equitable relief. Portland Mtg. Co. v. Elder, (1936) 152 Or 406, 53 P2d 1045.

Trial court should conduct a full hearing on the merits rather than dismiss a suit in equity with prejudice at the conclusion of plaintiff's evidence. Newman v. Stover, (1950) 187 Or 641, 213 P2d 137.

A motion to dismiss is proper if will contestants fail to sustain the burden of proof of undue influence. Postelle and Running v. Shuholm, (1951) 192 Or 441, 235 P2d 869.

Appellant cannot assert on appeal grounds for his motion which were not asserted at the trial. Vancie v. Poulson, (1964) 236 Or 314, 388 P2d 444.

2. Dismissal as bar

An unqualified decree dismissing on the merits is a bar. Toy v. Gong, (1918) 87 Or 454, 170 P 936.

To be a bar the judgment or decree must have been rendered on the merits. Haney v. Neace-Stark Co., (1923) 109 Or 93, 216 P 757, 219 P 190.

A dismissal, although unqualified, is not a bar unless the material issues made by the pleadings are determined. Id.

Where a dismissal would bar another suit for same cause, the use of words "with prejudice" is not error but mere surplusage. Roles v. Roles Shingle Co., (1934) 147 Or 365, 31 P2d 180.

When the court dismisses on motion of both parties it

is with prejudice. Kelly v. Mallory, (1954) 202 Or 690, 277 P2d 767.

The second suit for accounting on the same contract was barred. Kelly v. Mallory, (1954) 202 Or 690, 277 P2d 767.

3. Dismissal without prejudice

In action at law where defendant pleads equitable cross complaint but facts set up constituted good defense at law, dismissal of cross complaint without prejudice is proper and not bar to using defense at law. Dose v. Beatie, (1912) 62 Or 308, 123 P 383, 125 P 277.

In a divorce case tried on short notice to both parties wherein it was suggested that the plaintiff could secure additional witnesses if given time, a decree denying divorce without prejudice to another suit was proper. Cox v. Cox, (1920) 98 Or 148, 193 P 482.

Dismissal without prejudice is authorized only on motion of plaintiff. Wolke v. Schmidt, (1924) 112 Or 99, 228 P 921; Kelly v. Mallory, (1954) 202 Or 690, 277 P2d 767.

"Failure of proof" on part of plaintiff does not mean failure to convince court by preponderance of evidence but failure to make prima facie case. Crim v. Thompson, (1924) 112 Or 399, 229 P 916.

A decree which is given with prejudice as to another suit and not the result of a failure of proof will bar another suit for the same cause. Oliver v. Skinner and Lodge, (1951) 190 Or 423, 226 P2d 507.

FURTHER CITATIONS: Gellert v. Bank of Calif., Nat. Assn., (1923) 107 Or 162, 214 P 377; Dent v. Dolan, (1960) 220 Or 313, 349 P2d 500.

18.230

NOTES OF DECISIONS

1. In general

A motion for nonsuit by the adverse party must specify the grounds relied upon; there will be no review of denial of nonsuit in absence of such specification. Ferguson v. Ingle, (1900) 38 Or 43, 62 P 760; Meier v. No. Pac. Ry., (1908) 51 Or 69, 93 P 691; Hammer v. Campbell Gas Burner Co., (1914) 74 Or 126, 144 P 396; Carlson v. Steiner, (1950) 189 Or 255, 220 P2d 100.

On a motion for nonsuit the court has no authority to pass upon the merits and an attempt to do so is a nullity. Carroll v. Grande Ronde Elec. Co., (1907) 49 Or 477, 90 P 903; Wiedeman v. Campbell, (1923) 108 Or 55, 215 P 885.

Upon dismissing an action on the plaintiff's motion, it is ordinarily the duty of the court to see that the costs are paid or to render a judgment against the plaintiff for costs. Mitchell & Lewis Co. v. Downing, (1893) 23 Or 448, 32 P 394.

The dismissal of a complaint in an equitable suit after filing of an answer containing a counterclaim does not operate as a nonsuit but leaves the case to proceed on the counterclaim. Maffett v. Thompson, (1898) 32 Or 546, 52 P 565, 53 P 854.

Ruling on motion for nonsuit will not be reviewed on appeal unless it affirmatively appears that all evidence that was before trial court is in the record. Adkins v. Monmouth, (1902) 41 Or 266, 68 P 737.

A judgment of nonsuit is the only way for dismissal of an action at law. Mulkey v. Day, (1907) 49 Or 312, 89 P 957.

A judgment of voluntary nonsuit not awarding costs is erroneous. Clark v. Morrison, (1916) 80 Or 240, 156 P 429.

Neither a motion for a nonsuit nor a motion for a directed verdict performs the function of a demurrer to a pleading. Ridley v. Portland Taxicab Co., (1919) 90 Or 529, 177 P 429.

Since this section is in derogation of the common law, it must be strictly construed. Bobillot v. Clackamas County, (1947) 181 Or 30, 179 P2d 545.

The propriety of granting a motion for nonsuit depends upon the situation at the time a motion is made. Carlson v. Steiner, (1950) 189 Or 255, 220 P2d 100.

There is no such thing as a motion to dismiss a petition or complaint under Oregon practice. In re Miller Estate, (1962) 229 Or 618, 368 P2d 327.

This section is in pari materia with ORS 12.110 and 12.220. Warn v. Brooks-Scanlon, Inc., (1966) 256 F Supp 690.

A nonsuit, in the discretion of the trial court, granted plaintiff must be granted after start of the trial to be a dismissal under ORS 12.220. Haworth v. Ruckman, (1968) 249 Or 28, 436 P2d 733.

When action is tried to the court without a jury, the same rules as those applied in jury cases govern motions for involuntary nonsuits. Boston Ins. Co. v. Carey, (1970) 256 Or 226, 471 P2d 782.

The court's discretion to grant the voluntary nonsuit was not abused. Taylor v. Eagle Point Irr. Dist., (1970) 3 Or App 545, 474 P2d 774, Sup Ct **review denied.**

2. On motion of plaintiff

The plaintiff has an absolute right to a voluntary nonsuit within statutory period unless a counterclaim has been pleaded as a defense. Chance v. Carter, (1916) 81 Or 229, 158 P 947.

Plaintiff can dismiss his action against some of joint tortfeasors without affecting the merits of the cause as to the others. Lane v. Ball, (1917) 83 Or 404, 160 P 144, 163 P 975.

A motion by plaintiff to dismiss without prejudice is a motion for a nonsuit, and a judgment entered is a judgment of nonsuit. Sgobel & Day v. Craven, (1926) 15 F2d 364.

The privilege of becoming nonsuit is corollary to the rule that no one is required to sue another unless he chooses. Goin v. Chute, (1928) 126 Or 466, 260 P 998, 270 P 492.

If plaintiff takes a nonsuit because of a ruling which precludes recovery, the judgment is not in fact voluntarily requested. Steenson v. Robinson, (1963) 236 Or 414, 385 P2d 738.

(1) Time for motion. Prior to 1941 amendment, the determination of a demurrer to a complaint did not constitute a trial which would bar plaintiff's voluntary nonsuit. State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828. **Contra,** Hume v. Woodruff, (1894) 26 Or 373, 38 P 191; Ferguson v. Ingle, (1900) 38 Or 43, 62 P 760 and State v. Richardson, (1906) 48 Or 309, 85 P 225, 8 LRA(NS) 362.

Prior to 1941 amendment, plaintiff could take voluntary nonsuit after "trial by demurrer" if he were allowed to amend his complaint. Hume v. Woodruff, (1894) 26 Or 373, 38 P 191; Ferguson v. Ingle, (1900) 38 Or 43, 62 P 760.

A plaintiff may have a nonsuit after an appeal and reversal. Currie v. So. Pac. Co., (1893) 23 Or 400, 31 P 963.

In habeas corpus proceeding for custody of child where judgment was for defendant in county court, plaintiff may

take voluntary nonsuit on appeal to circuit court. Goin v. Chute, (1928) 126 Or 466, 260 P 998, 270 P 492.

The circuit court had authority to grant a nonsuit to plaintiff although all the evidence was in and defendant had moved for a directed verdict on the grounds that plaintiff had failed to plead certain necessary matters. Bobillot v. Clackamas County, (1947) 181 Or 30, 179 P2d 545.

Prior to the 1967 amendment, plaintiff was entitled to a voluntary nonsuit as a matter of right until after the jury had been selected and the actual trial of the facts commenced. Pfleeger v. Swanson, (1961) 229 Or 254, 367 P2d 406, 1 ALR3d 707; Warn v. Brooks-Scanlon, Inc., (1966) 256 F Supp 690.

(2) Grounds of motion. No reason need be assigned in the motion of plaintiff for a nonsuit. Ferguson v. Ingle, (1900) 38 Or 43, 62 P 760.

The court is not authorized to deny a motion of the plaintiff for nonsuit merely because the grounds stated appear to the court to be unsatisfactory. Goin v. Chute, (1928) 126 Or 466, 260 P 998, 270 P 492.

(3) Counterclaims. Where legal title is in defendant and plaintiff claims equitable title, defendant's allegations that he expended money in making improvements on land is not such counterclaim as will defeat motion for nonsuit. Dove v. Hayden, (1875) 5 Or 500.

An affirmative defense which is insufficient, when considered independently of the original bill, to warrant affirmative relief is not such a counterclaim as will prevent plaintiff from taking a voluntary nonsuit. State v. Pac. Live Stock Co., (1919) 93 Or 196, 182 P 828.

A plea of usury in a mortgage foreclosure is not a counterclaim within this section. Vermont Loan & Trust Co. v. Bramel, (1924) 111 Or 50, 224 P 1085.

An order granting plaintiff's motion for a nonsuit will not be set aside as erroneous on the theory that a counterclaim had been pleaded, where the record fails to disclose a counterclaim. Goin v. Chute, (1928) 126 Or 466, 260 P 998, 270 P 492.

A counterclaim, based on a cause of action arising out of a contract or transaction set forth in the complaint as the foundation of plaintiff's claim, prevents the granting of a voluntary nonsuit. Seigman v. Siegman, (1936) 155 Or 173, 62 P2d 16.

A judgment of involuntary nonsuit is not allowable against a counterclaim. Western Feed Co. v. Heidloff, (1962) 230 Or 324, 370 P2d 612.

3. On motion of either party, upon consent

A dismissal, ordered after plaintiff has moved for a voluntary nonsuit following a motion by defendant for nonsuit, may be regarded as nonsuit by written consent of the parties. Northern Pac. Ry. v. Spencer, (1910) 56 Or 250, 108 P 180.

4. On motion of defendant

In suit on note where defendant admits execution and delivery but denies that any sum is owing, nonsuit on defendant's motion is not authorized. Rader v. McElvane, (1891) 21 Or 56, 27 P 97; Creecy v. Joy, (1901) 40 Or 28, 66 P 295.

Defendants improperly joined may be entitled to a nonsuit if the evidence shows a cause of action against each and the plaintiff fails to elect which he will proceed against. Tyler v. Trustees of Tualatin Academy & Pac. Univ., (1887) 14 Or 485, 13 P 329.

A motion for an involuntary judgment of nonsuit is in the nature of a demurrer to the evidence for plaintiff, and the court must decide whether there would be a want of evidence to support a verdict for plaintiff though all his evidence be assumed true. Huber v. Miller, (1902) 41 Or 103, 68 P 400.

A motion for nonsuit is the only proceeding for insufficiency of evidence open to defendant at the close of plaintiff's case. Brown v. Lewis, (1907) 50 Or 358, 92 P 1058.

Where the court erroneously has denied a motion for nonsuit at the close of plaintiff's case, its action in granting a motion made at the close of all the evidence is not prejudicial to plaintiff. Fredenthal v. Brown, (1908) 52 Or 33, 95 P 1114.

When it is sought to take advantage of a defect in a pleading by a motion for nonsuit, the pleading should be construed liberally as if on a motion by defendant for judgment notwithstanding the verdict. Jackson v. Sumpter Valley Ry., (1908) 50 Or 455, 93 P 356.

A motion for judgment of nonsuit made at the close of plaintiff's evidence, specifying certain grounds, ought not to be granted on other grounds. Dayton v. Fenno, (1921) 99 Or 137, 195 P 154.

In reviewing the issue raised in a motion for nonsuit the evidence will be considered in the light most favorable to the plaintiff. Carlson v. Steiner, (1950) 189 Or 255, 220 P2d 100.

If the defendant fails to rest his case a motion for nonsuit is proper rather than a motion for a directed verdict. Laing v. Sch. Dist. 10, (1950) 190 Or 358, 224 P2d 923.

Nonsuit was not warranted by facts. Walsh v. Ore. Ry. & Nav. Co., (1882) 10 Or 250; Hartman v. Ore. Elec. Ry., (1915) 77 Or 310, 149 P 893, 151 P 472; Siskel v. Calhoun, (1934) 147 Or 606, 34 P2d 659.

Nonsuit was warranted by facts. McPherson v. Pac. Bridge Co., (1891) 20 Or 486, 26 P 560; Coughtry v. Willamette St. Ry., (1891) 21 Or 245, 27 P 1031; La Vigne v. Portland Traction Co., (1946) 179 Or 221, 170 P2d 709.

Defendant's motion for nonsuit on grounds that there was no substantial evidence of breach of contract or consequential damages was properly denied where lessee showed lessor had failed to provide hot water and heat, and introduced substantial evidence of loss of business resulting therefrom. Carlson v. Steiner, (1950) 189 Or 255, 220 P2d 100.

(1) On failure of plaintiff to appear. The appropriate remedy of the defendant when plaintiff fails to appear at the trial and no good reason is shown for final determination of the cause, is a motion for a nonsuit and not to impanel a jury and take judgment for the defendant. Fretland v. Cantrall, (1915) 78 Or 439, 153 P 479.

(2) On failure of plaintiff's proof. A motion by defendant for nonsuit should be granted if there is no evidence at all in support of the complaint, but not when there is enough evidence to warrant submission of the cause to the triers of fact. Southwell v. Beezley, (1875) 5 Or 458; Grant v. Baker, (1885) 12 Or 329, 7 P 318; Buchanan v. Beck, (1888) 15 Or 563, 571, 16 P 422; Sovern v. Yoran, (1888), 15 Or 644, 15 P 395; Peabody v. Ore. R.R. & Nav. Co., (1891) 21 Or 121, 26 P 1053, 12 LRA 823; Anderson v. No. Pac. Lbr. Co., (1891) 21 Or 281, 28 P 5; Herbert v. Dufur, (1893) 23 Or 462, 32 P 302; Brown v. Ore. Lbr. Co., (1893) 24 Or 315, 33 P 557; Barr v. Rader, (1898) 33 Or 375, 54 P 210; Feldman v. McGuire, (1899) 34 Or 309, 55 P 872; Perkins v. McCullough, (1899) 36 Or 146, 59 P 182; Currey v. Butcher, (1900) 37 Or 380, 61 P 631; Huber v. Miller, (1902) 41 Or 103, 68 P 400; North Pac. Lbr. Co. v. Spore, (1904) 44 Or 462, 75 P 890; In re Morgan's Estate, (1905) 46 Or 233, 77 P 608, 78 P 1029; Jackson v. Sumpter Valley Ry., (1908) 50 Or 455, 93 P 356; Johnson v. Underwood, (1922) 102 Or 680, 203 P 879; Derrick v. Portland Eye, Ear, Nose & Throat Hosp., (1922) 105 Or 90, 209 P 344; Reed v. Nat. Hosp. Assn., (1923) 106 Or 471, 212 P 537; Moe v. Jolly Joan, (1965) 239 Or 537, 399 P2d 25.

To authorize a judgment of nonsuit on defendant's motion there must be such a total failure of proof as would require the trial court to set side a verdict for the plaintiff. Cogswell v. Ore. & Calif. R. Co., (1877) 6 Or 417; Grant v. Baker, (1885) 12 Or 329, 7 P 318; Ferrera v. Parke, (1890)

19 Or 141, 23 P 883; Perkins v. McCullough, (1899) 36 Or 146, 59 P 182.

Where plaintiff in libel action makes out a prima facie case entitling her to nominal damages at least, it is error to grant defendant nonsuit. Thomas v. Bowen, (1896) 29 Or 258, 45 P 768.

When the plaintiff in an action for malicious prosecution fails to prove want of probable cause, a nonsuit is warranted. Eastman v. Monastes, (1897) 32 Or 291, 51 P 1095, 67 Am St Rep 531.

The fact that plaintiff has failed to prove incorporation of the defendant does not warrant grant of a nonsuit if the defendant has admitted its corporate existence. Hartford Fire Ins. Co. v. Central R. Co., (1914) 74 Or 144, 144 P 417.

Where the corporate existence of a plaintiff is not proved, a nonsuit is proper. Strang v. Ore.-Wash. R.R. & Nav. Co., (1917) 83 Or 644, 163 P 1181.

If the facts proved are as consistent with the defendant's theory as with the plaintiff's, the plaintiff should be nonsuited. Goldfoot v. Lofgren, (1931) 135 Or 533, 296 P 843.

A motion for nonsuit is controlled by the evidence favorable to the plaintiff. Sullivan v. Mountain States Power Co., (1932) 139 Or 282, 9 P2d 1038.

When the defendant admits a liability in a given amount, a motion for involuntary nonsuit is properly denied. King v. Amalgamated Min. Corp., (1934) 146 Or 376, 30 P2d 6.

The reasons given by the trial court for sustaining the motion are immaterial if the court's action was right on any ground. Russell v. Congregation Neveh Zedeck, (1964) 236 Or 291, 388 P2d 272.

(a) Evidence. On motion for an involuntary nonsuit, the testimony must be considered in its light most favorable to the plaintiff. Lammers v. Hinsdale, (1934) 146 Or 355, 30 P2d 335; Pakos v. Clark, (1969) 253 Or 113, 453 P2d 682.

The motion was properly granted. Smith v. Brown, (1964) 237 Or 23, 390 P2d 364; Hagberg v. Haas, (1964) 237 Or 34, 390 P2d 361; Blanchette v. Arrow Towing Co., (1966) 242 Or 590, 410 P2d 1010; Kruse v. Warren Northwest, Inc., (1966) 245 Or 63, 420 P2d 63; Peltier v. Dahlke, (1970) 256 Or 84, 471 P2d 434.

Incompetent testimony admitted without objection may be treated as competent on motion for nonsuit. Jacobsen v. Siddal, (1885) 12 Or 280, 7 P 108, 53 Am Rep 360.

Only from an examination of all the evidence can it be determined whether plaintiff should be nonsuited. Adkins v. Monmouth, (1902) 41 Or 266, 68 P 737.

The motion should have been granted. Boston Ins. Co. v. Carey, (1970) 256 Or 226, 471 P2d 782.

(b) Motion as admission. A motion for nonsuit admits the truth of the plaintiff's evidence, together with any inference of fact which the jury may draw from it. Brown v. Ore. Lbr. Co., (1893) 24 Or 315, 33 P 557; Barr v. Rader, (1898) 33 Or 375, 54 P 210; Perkins v. McCullough, (1899) 36 Or 146, 59 P 182; In re Morgan's Estate, (1905) 46 Or 233, 77 P 608, 78 P 1029; Jackson v. Sumpter Valley Ry., (1908) 50 Or 455, 93 P 356; Woods v. Wikstrom, (1913) 67 Or 581, 135 P 192; Thienes v. Francis, (1914) 69 Or 165, 138 P 490; Corby v. Hull, (1914) 72 Or 429, 143 P 639; Myrtle Point Trans. Co. v. Port of Coquille R., (1917) 86 Or 311, 168 P 625; Watts v. Spokane, Portland & Seattle Ry., (1918) 88 Or 192, 171 P 901; Brown v. Sheedy, (1918) 90 Or 74, 175 P 613; Cram v. Powell, (1921) 100 Or 708, 197 P 280; Johnson v. Underwood, (1922) 102 Or 680, 203 P 879; Reed v. Nat. Hosp. Assn., (1923) 106 Or 471, 212 P 537; Johnson v. Hoffman, (1930) 132 Or 46, 284 P 567.

That a counterclaim is without merit is not admitted by a motion for nonsuit. Davenport v. Dose, (1902) 40 Or 336, 67 P 112.

(c) Negligence. The court is justified in taking a negligence case away from the jury only when the plaintiff's showing is overcome by undisputed evidence. Caraduc v. Schanen-Blair Co., (1913) 66 Or 310, 133 P 636; Watts v. Spokane, Portland & Seattle Ry., (1918) 88 Or 192, 171 P 901.

Failure of plaintiff to prove the absence of contributory negligence will not justify a nonsuit. Grant v. Baker, (1885) 12 Or 329, 7 P 318.

A nonsuit is allowable in a negligence case only when the uncontradicted facts show the omission of acts which the law adjudges negligent. Durbin v. Ore. R.R. & Nav. Co., (1888) 17 Or 5, 17 P 5, 11 Am St Rep 778.

In malpractice case court should grant nonsuit unless plaintiff fairly shows by competent proof that defendant is guilty. Langford v. Jones, (1890) 18 Or 307, 22 P 1064.

Where the testimony leaves the cause of an accident to mere speculation, a nonsuit should be entered. Holmberg v. Jacobs, (1915) 77 Or 246, 150 P 284, Ann Cas 1917D, 496.

Where the evidence shows that the plaintiff was contributorily negligent as a matter of law, a nonsuit should be granted. Cathcart v. Ore.-Wash. R.R. & Nav. Co., (1917) 86 Or 250, 168 P 308.

On motion for involuntary nonsuit based on plaintiff's opening statement and made before presentation of evidence, plaintiff is entitled to every reasonable conjecture consistent with the opening statement as to what the evidence might show. Palmer v. Murdock, (1963) 233 Or 334, 378 P2d 271.

Case presented a question of fact whether plaintiff invitee should have realized the risk involved in the conditions he observed. Fitzpatrick v. Marastoni, (1963) 234 Or 192, 379 P2d 1022.

(d) Waiver and cure of defect. A motion by defendant for nonsuit is not ordinarily waived by introduction of evidence after the motion has been overruled. Carney v. Duniway, (1899) 35 Or 131, 57 P 192, 58 P 105; Dryden v. Pelton Armstrong Co., (1909) 53 Or 418, 101 P 190; Dayton v. Fenno, (1921) 99 Or 137, 195 P 154.

A motion for a nonsuit may be waived by the defendant by introduction of evidence that cures the defect in plaintiff's case. Patty v. Salem Flouring Mills Co., (1909) 53 Or 350, 96 P 1106, 98 P 521, 100 P 298; Dayton v. Fenno, (1921) 99 Or 137, 195 P 154.

The rule which precludes review of the denial of a nonsuit if the defect in plaintiff's case is thereafter cured by the defendant's evidence is inapplicable when the bill of exceptions fails to show that defendant offered any evidence, or if he did, what the evidence was. Carney v. Duniway, (1899) 35 Or 131, 57 P 192, 58 P 105.

The introduction of evidence by defendant before disposal of a motion based on insufficiency of proof, does not waive his motion. Northern Pac. Ry. v. Spencer, (1910) 56 Or 250, 108 P 180.

When defendant does not rest upon his motion but adduces proof in support of his own contentions, such proof may be considered in order to sustain a recovery on the part of the plaintiff. Johnson v. Underwood, (1922) 102 Or 680, 203 P 879.

(3) On abandonment by plaintiff. After sustaining defendant's objection, plaintiff's statement that this would necessitate a nonsuit or dismissal constituted plaintiff's abandonment of his suit within subsection (3), and court should have ordered dismissal under subsection (3). Dent v. Dolan, (1960) 220 Or 313, 349 P2d 500.

5. Directed verdicts

After a defect in plaintiff's case which would have warranted a judgment of nonsuit has been cured, the defendant is not entitled to a directed verdict. Caraduc v. Schanen-Blair Co., (1913) 66 Or 310, 133 P 636; Roundtree v. Mt. Hood R. Co., (1917) 86 Or 147, 168 P 61.

Where there is no conflict in the evidence and no dispute as to the material facts, the question is for the court and it should direct a verdict in accordance with the undisputed evidence. Merrill v. Missouri Bridge & Iron Co., (1914) 69

Or 585, 592, 140 P 439; Smith v. Robinson, (1918) 87 Or 100, 167 P 569.

A motion for an instructed verdict for a defendant, who demands no affirmative relief, presents the same question as a motion for a judgment of nonsuit. Merrill v. Missouri Bridge & Iron Co., (1914) 69 Or 585, 140 P 439; Johnson v. Hoffman, (1930) 132 Or 46, 284 P 567.

If there is any evidence that the jury is entitled to consider against the movant, a motion for a directed verdict must be overruled. Doherty v. Hazelwood Co., (1919) 90 Or 475, 175 P 849, 177 P 432; Robison v. Ore.-Wash. R.R. & Nav. Co., (1919) 90 Or 490, 176 P 594.

A motion for a verdict is equivalent to a demurrer to the evidence, and is governed by the rules applicable to a motion for a nonsuit. First Nat. Bank v. Fire Assn., (1898) 33 Or 172, 50 P 568, 53 P 8.

A directed verdict will estop plaintiff from maintaining another action for the same cause. Wicks v. Sanborn, (1914) 72 Or 321, 143 P 1007.

Where the defendant presented no evidence on the issue of attorney fees to be allowed for collection of a note according to stipulation of note, the court properly directed a verdict for the plaintiff. Sanford v. Hanan, (1916) 80 Or 266, 156 P 1040.

Where the party on whom the burden of proof rests fails to produce any evidence, direction of verdict for the adverse party is proper. Wells v. First Nat. Bank, (1916) 80 Or 329, 157 P 145.

Both a motion for a nonsuit and a motion for a directed verdict challenge the legal sufficiency of the evidence. Ridley v. Portland Taxicab Co., (1919) 90 Or 529, 177 P 429.

A motion for a directed verdict based upon a defective complaint should be denied if the defect can be cured by amendment, and plaintiff's evidence if true makes a case against the defendant. Id.

On motion for directed verdict, the plaintiff is entitled to the benefit not only of his own evidence but also to that of any evidence favorable to him introduced by the defendant. Johnson v. Hoffman, (1930) 132 Or 46, 284 P 567.

FURTHER CITATIONS: Hutchings v. Royal Bakery, (1911) 60 Or 48, 118 P 185; American Central Ins. Co. v. Weller, (1923) 106 Or 484, 212 P 803; Johnson v Bailey, (1894) 59 Fed 670; State v. McKenzie, (1962) 232 Or 633, 377 P2d 18; Mennis v. Cheffings, (1962) 233 Or 215, 376 P2d 672; Strubhar v. Southern Pac. Co., (1963) 234 Or 12, 379 P2d 1014; Moyer v. Graham, (1964) 238 Or 522, 395 P2d 175; Quick v. Andresen, (1964) 238 Or 433, 395 P2d 154; Parker v. Parker, (1965) 241 Or 623, 407 P2d 855; Turner v. Jentzen, (1966) 243 Or 427, 414 P2d 316; German v. Kienow's Food Stores, (1967) 246 Or 334, 425 P2d 523; Oregon Post Office Bldg. Corp. v. McVicker, (1967) 246 Or 526, 426 P2d 458.

LAW REVIEW CITATIONS: 20 OLR 269; 4 WLJ 4, 13.

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NOTES OF DECISIONS

A cause not sufficient to be submitted to a jury is such that if the jury were to find a verdict for the plaintiff, the court would be required to set it aside for the want of evidence to support it. Cogswell v. Ore. & Calif. R. Co., (1877) 6 Or 417; Grant v. Baker, (1885) 12 Or 329, 7 P 318; Ferrera v. Parke, (1890) 19 Or 141, 23 P 883; Rader v. McElvane, (1891) 21 Or 56, 27 P 97; Wasiljeff v. Hawley Paper Co., (1914) 68 Or 487, 137 P 755; State v. Pender, (1914) 72 Or 94, 142 P 615.

A motion for a judgment of nonsuit should be allowed only when the court can say affirmatively that there is no evidence to support a verdict for the plaintiff. Domurat v. Ore.-Wash. R.R. & Nav. Co., (1913) 66 Or 135, 134 P 313; Woods v. Wikstrom, (1913) 67 Or 581, 135 P 192; Wasiljeff v. Hawley Paper Co., (1914) 68 Or 487, 137 P 755; Richter v. Derby, (1931) 135 Or 400, 295 P 457.

Upon motion of defendant for a nonsuit plaintiff's evidence is assumed to be true. Ridley v. Portland Taxicab Co., (1919) 90 Or 529, 177 P 429; Hudelson v. Sanders-Swafford Co., (1924) 111 Or 600, 227 P 310.

It is error to grant a motion for nonsuit in an action to recover damages for conversion of chattels where plaintiff has made out a prima facie case by showing delivery of the property to defendants, its value, a demand for its return and a failure to return it. Ferrera v. Parke, (1890) 19 Or 141, 23 P 883.

On motion for nonsuit court cannot consider evidence introduced by defendant after his motion was made. Woods v. Wikstrom, (1913) 67 Or 581, 135 P 192.

The term "evidence" means legal evidence tending to support plaintiff's case. Domurat v. Ore.-Wash. R.R. & Nav. Co., (1913) 66 Or 135, 134 P 313.

FURTHER CITATIONS: Raz v. Mills, (1962) 231 Or 220, 372 P2d 955.

LAW REVIEW CITATIONS: 10 OLR 269.

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NOTES OF DECISIONS

1. In general
2. Judgment of nonsuit
3. Directed verdicts

1. In general

A judgment entered on a stipulation for dismissal with prejudice is a judgment on the merits, and a bar to any subsequent action until set aside. Johnstone v. Chapman Timber Co., (1916) 79 Or 674, 156 P 286.

A dismissal as to part of the defendants exonerates them from liability in negligence action. Humphry v. Portland, (1916) 79 Or 430, 154 P 897.

A recital in the entry of a judgment of nonsuit that the dismissal was without prejudice is surplusage. Portland & Oregon City Ry. v. Doyle, (1917) 86 Or 206, 167 P 270, 168 P 291.

In federal court a judgment of nonsuit is a bar when merits were considered. Muir v. Morris, (1920) 268 Fed 101.

A judgment of the Supreme Court, declaring that defendant's motion for a nonsuit should have been sustained and reversing trial court's judgment on the theory of laches on the part of the plaintiff, is not a bar to a subsequent suit on the same cause of action. Rayburn v. Norton, (1935) 150 Or 140, 36 P2d 986, 43 P2d 919.

When a motion for directed verdict or nonsuit is denied, the moving party cannot successfully urge on appeal that there should have been a directed verdict or nonsuit for reasons not stated in the motion. Edvalson v. Swick, (1951) 190 Or 473, 227 P2d 183.

In an action previously nonsuited for insufficient evidence, the decision of appellate court in directing the original nonsuit is binding unless the evidence is different. Peltier v. Dahlke, (1970) 256 Or 84, 471 P2d 434.

2. Judgment of nonsuit

A judgment of nonsuit does not bar another action for the same cause. Carroll v. Grande Ronde Elec. Co., (1907) 49 Or 477, 90 P 903; Northern Pac. Ry. v. Spencer, (1910) 56 Or 250, 108 P 180; Fretland v. Cantrall, (1915) 78 Or 439, 153 P 479; Kuntz v. Emerson Hdw. Co., (1919) 93 Or 565, 184 P 253; Weidmann v. Campbell, (1923) 108 Or 55, 215 P 885; Conn v. Ore. Elec. Ry., (1931) 137 Or 75, 300 P 342.

On a motion for nonsuit, a court cannot enter a judgment on the merits. Carroll v. Grande Ronde Elec. Co., (1907) 49 Or 477, 90 P 903.

A dismissal before final submission of an action cannot be taken as an adjudication on the merits, if no findings on the issue presented by the pleadings are made. Northern Pac. Ry. v. Spencer, (1910) 56 Or 250, 108 P 180.

A judgment on motion made by the defendant after plaintiff had rested "for findings of the court for judgment for the defendant and that it recover of the plaintiff its costs and disbursements" is a nonsuit and does not bar a subsequent action based on the same claim. Hanna v. Alluvial Farm Co., (1916) 79 Or 557, 152 P 103, 156 P 265.

An involuntary nonsuit in an action brought by a servant against his master to recover for injuries, does not bar a subsequent action against both the master and the foreman. Malloy v. Marshall-Wells Hdw. Co., (1918) 90 Or 303, 173 P 267, 175 P 659, 176 P 589.

A judgment of nonsuit operates merely as a dismissal of the action. Carty v. McMenamin & Ward, (1923) 108 Or 489, 216 P 228.

A judgment of voluntary nonsuit leaves the plaintiff where he was before he filed his action. Beals v. Harrison, (1924) 111 Or 147, 222 P 736.

A surety as to whom voluntary nonsuit was granted in action against him and his principal, is not entitled to judgment on pleadings in subsequent action on same contract against him alone. Rawleigh Co. v. Krueger, (1934) 148 Or 403, 36P2d 987.

3. Directed verdicts

A judgment on a directed verdict concludes the controversy. Ridley v. Portland Taxicab Co., (1919) 90 Or 529, 177 P 429; Carty v. McMenamin & Ward, (1923) 108 Or 489, 216 P 228.

A directed verdict precludes another action for same cause. Huber v. Miller, (1902) 41 Or 103, 68 P 400; Wicks v. Sanborn, (1914) 72 Or 321, 143 P 1007.

FURTHER CITATIONS: Maslov v. Manning, (1964) 239 Or 393, 397 P2d 833; Burkholder v. State Ind. Acc. Comm., (1965) 242 Or 276, 409 P2d 342; Fleming v. Wineberg, (1969) 253 Or 472, 455 P2d 600; German v. Kienow's Food Stores, (1967) 246 Or 334, 425 P2d 523.

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NOTES OF DECISIONS

Prior to 1949 amendment, a cause improperly dismissed under this section had to be reinstated. Western Grain Co. v. Beaver Land-Stock Co., (1927) 120 Or 678, 230 P 103, 253 P 539.

The court may proceed under this section or it may of its own motion dismiss the action for want of prosecution; in acting on its own motion, the court must proceed with judicial discretion. Reed v. First Nat. Bank of Gardiner, (1952) 194 Or 45, 241 P2d 45.

Mailing of notice to the last known post office address of the attorney is required. Id.

The court should dismiss a suit when the plaintiff does not prosecute it with diligence. Reedsport v. Hubbard, (1954) 202 Or 370, 274 P2d 248.

This section does not restrict the power of the court to dismiss an action for lack of prosecution. Bock v. Portland Gas & Coke Co., (1954) 202 Or 609, 277 P2d 758.

Court erred in dismissing action for want of prosecution after court had been notified that plaintiff had a just cause and was ready to go to trial. Hyde v. Velvin, (1957) 212 Or 73, 318 P2d 269.

FURTHER CITATIONS: Longyear v. Edwards, (1959) 217 Or 314, 342 P2d 762; Horn v. Calif.-Ore. Power Co., (1960) 221 Or 328, 351 P2d 80; Pemberton v. Pemberton, (1962) 230 Or 190, 369 P2d 276; Bevel v. Gladden, (1962) 232 Or 578, 376 P2d 117; Ebel v. Boly, (1971) 258 Or 308, 481 P2d 620.

ATTY. GEN. OPINIONS: Authority of Child Welfare Commission to request court to dismiss adoption petitions filed for more than year without action, 1936-38, p 409.

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CASE CITATIONS: Willis v. Miller, (1893) 23 Or 352, 31 P 827; Wright v. Wimberly, (1919) 94 Or 1, 33, 184 P 740; Forbes v. Jennings, (1928) 124 Or 497, 264 P 856; Mason v. Mason, (1934) 148 Or 34, 34 P2d 328; Ulrich v. Lincoln Realty Co., (1947) 182 Or 380, 168 P2d 582, 175 P2d 149; Esselstyn v. Casteel (1955) 205 Or 344, 286 P2d 665, 288 P2d 214, 215.

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NOTES OF DECISIONS

Date that judgments are docketed must be shown in judgment docket. Hutchinson v. Gorham, (1900) 37 Or 347, 61 P 431; Western Savings Co. v. Currey, (1901) 39 Or 407, 65 P 360, 87 Am St Rep 660.

The judgment is complete without being docketed. Catlin v. Hoffman, (1874) 2 Sawy 486, Fed Cas No. 2,521.

The docket entry must be complete in itself. In re Boyd, (1877) 4 Sawy 262, Fed Case No. 1,746.

The transcript must show all the facts which a purchaser of the property need ascertain. Hutchinson v. Gorham, (1900) 37 Or 347, 61 P 431.

The requirement of docketing "immediately" after entry of judgment is directory merely. Budd v. Gallier, (1907) 50 Or 42, 89 P 638.

The enforcement of a judgment imposing a fine is not authorized by this section after it has been satisfied either by payment or imprisonment for the required time. Application of Murphy, (1926) 119 Or 658, 250 P 834, 49 ALR 384.

This provision does not waive the state's immunity from suit, and does not authorize the joinder of the state in an action to foreclose a mortgage on land on which the state has a lien by virtue of a judgment in a criminal case against the mortgagor. Federal Land Bank v. Schermerhorn, (1937) 155 Or 533, 64 P2d 1337.

Only a judgment or decree must be docketed in the judgment docket. State v. Tolls, (1939) 160 Or 317, 85 P2d 366, 119 ALR 1370.

Although an order decreeing accrued payments of alimony to be a final judgment and ordering the clerk to docket the same was invalid, it was the clerk's duty to docket the judgment and his refusal to do so is contempt of court. Id.

Provision in decree in divorce suit for payment of lump sum in specified monthly installments as a property settlement constitutes a judgment entitled to be docketed. Esselstyn v. Casteel, (1955) 205 Or 344, 286 P2d 214, 215.

FURTHER CITATIONS: Heider v. Dietz, (1963) 234 Or 105, 380 P2d 619.

ATTY. GEN. OPINIONS: Docketing of child support decree calling for monthly payments by the father, 1948-50, p 182; duty of clerk to docket judgment although its execution is suspended, 1952-54, p 64.

LAW REVIEW CITATIONS: 30 OLR 95; 31 OLR 330; 36 OLR 316.

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NOTES OF DECISIONS

1. Under former similar statute
   (1) In general
   (2) Where complaint had not been answered

(3) All other cases
(4) Papers not part of judgment roll
(5) Appeal

1. Under former similar statute

(1) In general. The judgment roll was only a collection of papers and entries selected from the record for convenience and economy, and sufficient in the opinion of the legislature to prima facie prove the judgment of the court and its jurisdiction to give it. Neff v. Pennoyer, (1875) 3 Sawy 274, Fed Cas No. 10,083.

The record was a history of all the acts and proceedings in the action from its initiation to final judgment, which included all the papers filed in the case, and upon which the court acted in any step of the proceedings; this record was of the same verity as the judgment roll which is made up from it. Id.

The loss of a material paper from the judgment roll would not affect the judgment so as to prevent the judgment creditor from enforcing his judgment by execution, where the recitals in the records were in due form. Carland v. Heineborg, (1863) 2 Or 75.

The clerk had no power to make the judgment roll beyond the next term of court unless perhaps upon order of the court. Alexander v. Knox, (1879) 6 Sawy 54, Fed Cas No. 170.

A judgment existed before the judgment roll, and was valid without it. Id.

When an action resulted in a judgment or a suit in a decree, the clerk was required to prepare a judgment roll. Turner v. Hendryx, (1917) 86 Or 590, 167 P 1019, 169 P 590.

Unless identified, attached together and marked as a judgment roll, the complaint, summons, proof of service and entry of judgment should not constitute such roll. Alexander v. Knox, (1879) 6 Sawy 54, Fed Cas No. 170.

The section did not prescribe what the judgment roll should contain in proceedings resulting in "final orders" which are neither judgments nor decrees. Ankeny v. Fairview Milling Co., (1882) 10 Or 390.

(2) Where complaint had not been answered. In case of service by publication, to show proof of service judgment roll should have contained proof of publication of summons and authority for publication. Neff v. Pennoyer, (1875) 3 Sawy 274, Fed Cas No. 10,083.

A judgment was not void because the original summons did not appear in the judgment roll, where proof of publication of the summons as well as the findings and recitals in the judgment showed that a summons was in fact issued. Bank of Colfax v. Richardson, (1899) 34 Or 518, 540, 54 P 359, 75 Am St Rep 664.

(3) All other cases. The return to a writ of review formed part of the judgment roll and was included in the transcript without a statement or bill of exceptions. Johns v. Marion County, (1870) 4 Or 46.

The section made the bill of exceptions a part of the judgment roll. Ah Lep v. Gong Choy & Gong Wing, (1886) 13 Or 205, 9 P 483; State v. Laundy, (1922) 103 Or 443, 508, 204 P 958, 206 P 290; Walker v. Fireman's Fund Ins. Co., (1927) 122 Or 179, 206, 257 P 701.

A bill of exceptions could not have been a part of the judgment roll, as required, where the judgment was made and entered in November, the certificate of the clerk annexed in May following and the bill of exceptions allowed and signed by the judge in July following. Holcomb v. Teal, (1873) 4 Or 352.

(4) Papers not part of judgment roll. A motion for new trial and the record of the proceedings thereon formed no part of the judgment roll. Oregonian Ry. v. Wright, (1882) 10 Or 162.

A referee's report was not a part of the judgment roll. Osborn v. Graves, (1884) 11 Or 526, 6 P 227.

A reference in the findings to a document as "plaintiff's exhibit A" did not make it a part of the judgment roll where it was not embodied in the pleadings or made a part of the findings. Tatum v. Massie, (1896) 29 Or 140, 145, 44 P 494.

An affidavit of prejudice was not part of the judgment roll. Shaughnessy v. Kimball, (1923) 106 Or 484, 212 P 483.

An opinion of the court was not a part of the judgment roll. Mannix v. Portland Telegram, (1933) 144 Or 172, 23 P2d 138, 90 ALR 55.

(5) Appeal. Papers filed in a law action other than those constituting the judgment roll could not be considered by the appellate court unless incorporated in a bill of exceptions. Farrell v. Ore. Gold Min. Co., (1897) 31 Or 463, 49 P 876; Sit You Gune v. Hurd, (1912) 61 Or 182, 120 P 737, 1135.

Upon appeals from judgments and decrees, only the technical record or judgment roll prescribed by the section could be considered. Ankeny v. Fairview Milling Co., (1882) 10 Or 390.

FURTHER CITATIONS: Hanna v. Alluvial Farm Co., (1916) 79 Or 557, 152 P 103, 156 P 265; State v. Stilwell, (1924) 109 Or 643, 221 P 174; St. Clair v. Jelinek, (1949) 187 Or 151, 210 P2d 563; Nedry v. Herold, (1932) 141 Or 167, 11 P2d 548, 13 P2d 372; Tellkamp v. McIlvaine, (1948) 184 Or 474, 199 P2d 246; Harper v. Wilson, (1948) 185 Or 23, 200 P2d 600; Knudson v. Jones, (1957) 209 Or 350, 305 P2d 1061; McCarthy v. Hedges, (1958) 212 Or 497, 309 P2d 186, 321 P2d 285.

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NOTES OF DECISIONS
1. In general
2. Creation of lien
3. Commencement of lien
4. Duration of lien
5. Property subject to lien
6. Interests affected by lien
7. Priority
8. Liens in divorce suits

1. In general

A judgment lien of a confessed judgment against an insolvent may give rise to a preference. Catlin v. Hoffman, (1874) 2 Sawy 486, Fed Cas No 2,521.

The lien of a judgment must stand or fall by the statute which gives it. In re Boyd, (1877) 4 Sawy 262, Fed Cas No. 1746.

Judgment liens on realty are a creation of statute. Western Sav. Co. v. Currey, (1901) 39 Or 407, 65 P 360, 87 Am St Rep 660.

This provision does not waive the state's immunity from suit, and does not authorize the joinder of the state in an action to foreclose a mortgage on land on which the state has a lien by virtue of a judgment in a criminal case against the mortgagor. Federal Land Bank v. Schermerhorn, (1937) 155 Or 533, 64 P2d 1337.

2. Creation of lien

The levy of an execution creates a lien though the judgment is not entered on the lien docket. Clark v. Salem, (1912) 61 Or 116, 121 P 416, Ann Cas 1914B, 205; Bank of Calif. v. Cowan, (1894) 61 Fed 871.

A docket entry will be held sufficient if the amount and date of the judgment, the parties to it and the court in which it was rendered appear in the entry. In re Boyd, (1877) 4 Sawy 262, Fed Cas No. 1746.

Although amount of judgment was entered as "785.00" without a dollar or other mark, the docket entry is good if amount can be ascertained from whole entry. Id.

A judgment which by its terms cannot be enforced

against the separate property of a party cannot become a lien thereon. Id.

No execution or levy is necessary to the existence of the lien. Id.

Although amount of judgment was entered without a dollar mark, the docket entry is good if amount can be ascertained from lines and spaces in common usage. DeLashmutt v. Sellwood, (1882) 10 Or 319.

The omission to enter the names of all the judgment debtors in the docket does not prevent the judgment from becoming a lien on the realty of those whose names are properly entered. Id.

The levy of attachment creates a lien though the judgment is not entered on the lien docket. Bank of Calif. v. Cowan, (1894) 61 Fed 871.

A judgment is not a lien on real property if the time "when docketed" is omitted in judgment lien docket. Wood v. Fisk, (1904) 45 Or 276, 77 P 128, 738.

Where the judgment did not become a lien because the judgment docket did not show the date when it was entered therein, the filing of the transcript of such docket entry in another county does not create a lien on realty in such other county. Id.

Calling the book from which the transcript is taken "judgment lien docket" instead of judgment docket, in the certificate to a transcript, does not invalidate the lien. Budd v. Gallier, (1907) 50 Or 42, 89 P 638. **Contra**, Western Sav. Co. v. Currey, (1901) 39 Or 407, 65 P 360, 87 Am St Rep 660.

3. Commencement of lien

From the date the judgment is docketed it becomes a lien upon all the real property of the defendant within the county where docketed. Creighton v. Leeds, Palmer & Co., (1881) 9 Or 215; Baker v. Woodward, (1884) 12 Or 3, 6 P 173; Kaston v. Storey, (1905) 47 Or 150, 80 P 217, 114 Am St Rep 912; Oliver v. Wright, (1905) 47 Or 322, 327, 83 P 870; Spare v. Home Mut. Ins. Co., (1883) 15 Fed 707; General Elec. Co. v. Hurd, (1909) 171 Fed 984; Northwestern Pulp & Paper Co. v. Finnish Lutheran Book Concern, (1931) 51 F2d 340.

Until entered in the judgment docket of the proper court a judgment does not become a lien on the judgment debtor's real estate. Stannis v. Nicholson, (1868) 2 Or 332; Western Sav. Co. v. Currey, (1901) 39 Or 407, 65 P 360, 87 Am St Rep 660; Mason v. Mason, (1934) 148 Or 34, 34 P2d 328.

From the time of filing and docketing a certified judgment of a justice court in circuit court docket the judgment becomes a lien. Glaze v. Lewis, (1885) 12 Or 347, 7 P 354; Lovelady v. Burgess, (1898) 32 Or 418, 52 P 25.

Only when the judgment is docketed in the county where the real property is located does the lien arise. Catlin v. Hoffman, (1874) 2 Sawy 486, Fed Cas No. 2521.

4. Duration of lien

The redemption of real property from an execution sale by a grantee of the judgment debtor, where property was bid in for less than the judgment, reinstates the lien for the unpaid balance. Settlemire v. Newsome, (1882) 10 Or 446; Flanders v. Aumack, (1897) 32 Or 19, 51 P 447, 67 Am St Rep 504; Kaston v. Storey, (1905) 47 Or 150, 80 P 217, 114 Am St Rep 912.

A judgment lien cannot be displaced or affected by the death of the judgment debtor. Barrett v. Furnish, (1891) 21 Or 17, 26 P 861.

5. Property subject to lien

Personal property is not subject to the judgment lien. Catlin v. Hoffman, (1874) 2 Sawy 486, Fed Cas No. 2521.

Property previously conveyed in fraud of creditors is not subject to a judgment lien under this section. In re Estes, (1880) 3 Fed 134.

After-acquired property of a judgment debtor is subject to the lien of a judgment regularly docketed. Creighton v. Leeds, Palmer & Co., (1881) 9 Or 215; Dyke v. Currey, (1901) 39 Or 608, 65 P 1118.

When a partnership creditor has acquired a lien by judgment upon the property of a partner, equity will not at the instance of any creditor of such individual partner compel the partnership creditor to postpone proceedings until the individual creditors of the partner have first received satisfaction. Barrett v. Furnish, (1891) 21 Or 17, 26 P 861.

The interest of an entryman under the United States homestead law is not subject to his debts contracted prior to the issuance of a patent. Wallowa Nat. Bank v. Riley, (1896) 29 Or 289, 45 P 766, 54 Am St Rep 794.

The interest of a purchaser of United States' land before patent issues, but after the entryman has completed all acts required of him and received a final receipt, is subject to the lien of a judgment properly docketed. Budd v. Gallier, (1907) 50 Or 42, 89 P 638.

When homestead is conveyed, lien of judgment creditor of vendor becomes enforceable by execution against land. Hansen v. Jones, (1910) 57 Or 416, 109 P 868.

A homestead is exempt from the judgment lien. Fleischhauer v. Bilstad, (1963) 233 Or 578, 379 P2d 880. Overruling Bush v. Shepherd, (1949) 186 Or 105, 205 P2d 842.

Under equitable conversion the vendor's security interest in land is treated as personalty not reached by docketing of judgment against vendor, and vendee's equitable interest is treated as realty. Heider v. Dietz, (1963) 234 Or 105, 380 P2d 619.

6. Interests affected by lien

A judgment attaches to the actual interest of the judgment debtor in the land and will not cut off outstanding equities. Stannis v. Nicholson, (1868) 2 Or 332; Meier v. Kelly, (1892) 22 Or 136, 29 P 265; Dimmick v. Rosenfeld, (1898) 34 Or 101, 55 P 100; Smith v. Farmers' & Merchants' Bank, (1910) 57 Or 82, 110 P 410; Gladstone Lbr. Co. v. Kelly, (1913) 64 Or 163, 129 P 763; Hawkenson v. Rostad, (1917) 86 Or 704, 169 P 350.

A judgment is not a lien on a mere right or interest which can only be enforced in equity. Smith v. Ingles, (1862) 2 Or 43; Bloomfield v. Humason, (1884) 11 Or 229, 4 P 332; Pogue v. Simon, (1905) 47 Or 6, 81 P 566, 114 Am St Rep 903, 8 Ann Cas 474; Holmes v. Wolfard, (1905) 47 Or 93, 81 P 819; Holladay Case, (1886) 28 Fed 117.

The bankruptcy discharge did act to bar this claim of judgment lien on the homestead. Boyd v. Oregon, (1968) 249 Or 513, 439 P2d 862.

The interest of an heir became subject to a judgment lien where the judgment was rendered and duly docketed prior to the day when she, as administratrix, applied for leave to sell the realty to pay the debts of the intestate. Yeaton v. Barnhart, (1915) 78 Or 249, 150 P 742, 152 P 1192.

An administrator's sale to pay indebtedness of the intestate destroys the lien upon the land of any judgment rendered against the heir. Id.

Where a creditor had acquired a lien against the heir's interest and he had no actual notice of sale proceedings by the administrator, his lien must be decreed against the interest the heir had in the lands. Id.

7. Priority

One who claims priority for a judgment over a mortgage must allege and prove affirmatively not only that he had no notice or knowledge of the mortgage, but that it was unrecorded at the time he obtained his judgment. Laurent v. Lanning, (1897) 32 Or 11, 51 P 80; Belcher v. La Grande Nat. Bank, (1918) 87 Or 665, 171 P 410.

Where there are several judgments, the lien of the one first docketed takes precedence. Creighton v. Leeds, Palmer & Co., (1881) 9 Or 215.

The first docketed judgment takes lien preference on after acquired property as lien dates back to time of docketing judgment. Id.

Where a mortgagee releases his mortgage and takes a new one in lieu thereof in ignorance of an intervening judgment lien, equity will reinstate the lien of the mortgage as prior to the judgment. Pearce v. Buell, (1892) 22 Or 29, 29 P 78.

Where judgment creditor gets lien on property of mortgagor after foreclosure proceedings have started, such lien has priority over interest of grantee of mortgagor who redeems. Kaston v. Storey, (1905) 47 Or 150, 80 P 217.

The lien of a mortgage on property which the mortgagor may "hereafter acquire" is superior to the lien of a subsequent judgment on such property. Clarke-Woodward Drug Co. v. Hot Lake Sanatorium Co., (1918) 88 Or 284, 169 P 796.

The lien of a judgment creditor is subject to a prior unrecorded deed if facts show that the judgment creditor had actual or constructive notice of the outstanding interest. Chaffin v. Solomon, (1970) 255 Or 141, 465 P2d 217.

8. Liens in divorce suits

A divorce decree awarding judgment for attorney's fees and costs is a lien from the date of docketing. Mansfield v. Hill, (1910) 56 Or 400, 107 P 471, 108 P 1007.

Decree for monthly alimony payments under further order of court is not definite liability or judgment which may become a lien. Id.

Docketed decree for alimony is lien on husband's land as to accrued and unpaid instalments. Forbes v. Jennings, (1928) 124 Or 497, 264 P 856. **But see** Mason v. Mason, (1934) 148 Or 34, 34 P2d 328 and State v. Tolls, (1938) 160 Or 317, 85 P2d 366, 119 ALR 1370.

Provision in decree in divorce suit for payment of lump sum in specified monthly instalments as a property settlement constituted a judgment which when docketed constituted a lien upon the real estate of the judgment debtor, both as to past and future instalment. Esselstyn v. Casteel, (1955) 205 Or 344, 286 P2d 214, 215.

Lien arising from docketing of judgment against husband's interest in tenancy by entireties prior to divorce continued in force as against the wife's interest upon award of the entire estate to her by divorce decree. Brownley v. Lincoln County, (1959) 218 Or 7, 343 P2d 529.

When divorce decree providing for alimony was entered before amendment providing that such decree should be final in certain respects and decree was never modified or docketed, it was not final decree; accrued and unpaid alimony was not lien and docketing 13 years later was ineffective. Mason v. Mason, (1934) 148 Or 34, 34 P2d 328.

FURTHER CITATIONS: Lovelady v. Burgess, (1898) 32 Or 418, 52 P 25; Hutchinson v. Gorham, (1900) 37 Or 347, 61 P 431; Western Sav. Co. v. Currey, (1901) 39 Or 407, 65 P 360, 87 Am St Rep 660; Ulrich v. Lincoln Realty Co., (1946) 180 Or 380, 175 P2d 149; Thom v. Laird, (1955) 205 Or 465, 289 P2d 418.

ATTY. GEN. OPINIONS: Extent of liens where property is in counties other than where judgment was rendered, 1924-26, p 451; criminal judgments as liens, 1924-26, p 553; necessary conditions precedent for judgment to become lien, 1924-26, p 553; liens from transcripts from justice's courts, 1940-42, p 46; docketing of maintenance decrees in divorce suits and liens arising therefrom, 1940-42, p 224; judgment liens against state property, 1940-42, p 316.

LAW REVIEW CITATIONS: 27 OLR 139; 34 OLR 1; 37 OLR 80; 44 OLR 171; 3 WLJ 89.

18.360

NOTES OF DECISIONS

This section extended judgment liens, not having expired at the time the statute took effect, from five to 10 years. Dearborn v. Patton, (1869) 3 Or 420.

The lien of the judgment expired where no execution issued upon the judgment within 10 years from the date of entry of the judgment. General Elec. Co. v. Hurd, (1909) 171 Fed 984.

Notwithstanding renewal order reciting that lien was to continue for full 10-year period after expiration of original judgment lien by limitation, the lien expires 10 years from the date of reentry. Delsman v. Wilcox, (1925) 115 Or 501, 237 P 973.

The 10-year period of lien on property of father who is delinquent in maintenance payments arising from divorce suit is computed from date that the first unpaid instalment accrues and is entered as judgment, and not from date of divorce decree. Stephens v. Stephens & Wilkes, (1942) 170 Or 363, 132 P2d 992.

The 1943 amendment limits the permissible number of renewals to one. Security Inv. Co. v. Miller, (1950) 189 Or 247, 218 P2d 966.

It is not necessary to give notice of a motion to renew a judgment. Shepard & Morse Lbr. Co. v. Clawson, (1971) 259 Or 154, 486 P2d 542.

ATTY. GEN. OPINIONS: Application of statute to liens secured by state, 1928-1930, p 504, 1936-38, p 64, 1938-40, p 277, 1942-44, p 376; liens after period has run, 1936-38, p 580; renewal of judgment by justice of the peace, 1942-44, p 330; liens arising out of personal property tax warrants, 1956-58, p 126.

LAW REVIEW CITATIONS: 13 OLR 85.

18.370

NOTES OF DECISIONS

1. In general

A judgment creditor who is informed of an outstanding equity or of facts sufficient to put him on inquiry at the time his lien attached takes subject thereto. Stannis v. Nicholson, (1868) 2 Or 332; Riddle v. Miller, (1890) 19 Or 468, 23 P 807; Chaffin v. Solomon, (1970) 255 Or 141, 465 P2d 217.

The lien of a judgment will not prevail over a prior unrecorded conveyance unless it also appears that the lien was taken or acquired in good faith without knowledge or notice of such prior unrecorded conveyance. Baker v. Woodward, (1884) 12 Or 3, 6 P 173; Laurent v. Lanning, (1897) 32 Or 11, 51 P 80; Crossen v. Oliver, (1900) 37 Or 514, 61 P 885; Western Sav. Co. v. Currey, (1901) 39 Or 407, 65 P 360, 87 Am St Rep 660; Belcher v. La Grande Nat. Bank, (1918) 87 Or 665, 171 P 410; Thompson v. Hendricks, (1926) 118 Or 39, 245 P 724; United States v. Griswold, (1881) 8 Fed 556, 571, 7 Sawy 311; Chaffin v. Solomon, (1970) 255 Or 141, 465 P2d 217.

This section materially abrogated the prior equity doctrine that the judgment lien was subject to all existing equities which were valid as against such debtors. Baker v. Woodward, (1884) 12 Or 3, 6 P 173.

The intention of the legislature was to give a creditor under an attachment, judgment or execution the same standing in regard to his right in or to the property which he would gain by a purchase of the property from the debtor. Riddle v. Miller, (1890) 19 Or 468, 23 P 807.

The lien of judgment will not prevail over a prior unrecorded mortgage, unless it also appears that lien was taken in good faith without knowledge or notice of such prior

unrecorded mortgage. Laurent v. Lanning, (1897) 32 Or 11, 51 P 80.

Failure to record trust agreement by which one creditor obtained legal title to the debtor's land, which was made before a judgment was docketed, does not render the conveyance void under this section. People's Bank v. Rostad, (1918) 86 Or 695, 169 P 347.

A judgment creditor of one who accepted a voluntary conveyance of land and immediately mortgaged it to the grantor and also made a reconveyance, not recorded, cannot defeat the mortgage. Hawkenson v. Rostad, (1918) 86 Or 704, 169 P 350.

2. Notice and possession

The recording in the records of deeds of a conveyance absolute in form but which is intended to operate as a mortgage, is sufficient to impart notice of the rights of grantee and establishes priority over subsequent judgment lien. Haseltine v. Espey, (1886) 13 Or 301, 10 P 423.

This section only applies to conveyances which if recorded would give notice and not to equities not entitled to record. Meier v. Kelly, (1892) 22 Or 136, 29 P 265.

A party in possession under a defective deed with an equitable lien for the purchase price paid, being otherwise without notice, is not affected by a subsequent suit to subject the land to the payment of a judgment against one who is alleged to have advanced the money for the conveyance to the grantor of the defective deed. Davisson v. Mackay, (1892) 22 Or 247, 29 P 791.

The title of a vendor who has made a deed and deposited it in escrow before the judgment was recovered is subject to the lien of the judgment only from the time the vendee has actual notice of it. May v. Emerson, (1908) 52 Or 262, 96 P 454, 1065, 16 Ann Cas 1129.

Possession of purchaser under unrecorded deed charges the judgment creditor with notice of the grantee's rights, though the premises were in possession of the same persons before and after conveyance. Belcher v. LaGrande Nat. Bank, (1918) 87 Or 665, 171 P 410.

One purchasing land from one of the defendants in a properly docketed judgment is charged with notice of the judgment. Seaweed v. De Armond, (1921) 101 Or 30, 198 P 916.

Purchaser in possession under unrecorded deed is entitled to prevail as against judgment recovered against grantor in another county notwithstanding the prior recording of the certified transcript. Thompson v. Hendricks, (1926) 118 Or 39, 245 P 724, 727.

Facts were sufficient to give judgment creditor notice of grantee's rights under prior unrecorded deed. Chaffin v. Solomon,(1970) 255 Or 141, 465 P2d 217.

FURTHER CITATIONS: In re Boyd, (1877) 4 Sawy 262, Fed Cas No. 1,746; Brownley v. Lincoln County, (1959) 218 Or 7, 343 P2d 529; Walker v. Fairbanks Inv. Co., (1959) 268 F2d 48.

LAW REVIEW CITATIONS: 31 OLR 330.

18.380

NOTES OF DECISIONS

Lien of federal court judgment expires after 10-year period of no execution. General Elec. Co. v. Hurd, (1909) 171 Fed 984.

Where a federal court judgment was not docketed in the county where the land was situated until long after a conveyance from the judgment debtor, there was no imputed notice to the purchaser. Sabin v. Kyniston, (1916) 81 Or 358, 159 P 69.

18.390

NOTES OF DECISIONS

Where a federal court judgment was not docketed in the county where the land was situated until long after a conveyance from the judgment debtor, there was no imputed notice to the purchaser. Sabin v. Kyniston, (1916) 81 Or 358, 159 P 69.

18.400

ATTY. GEN. OPINIONS: Authority of clerk to enter marginal satisfactions of judgments, 1922-24, p 474; authority of district attorney to enter satisfaction of state's lien on property of criminal defendant, 1936-38, p 490; satisfaction of state's judgment liens, 1938-40, p 277; duty of clerk to note satisfaction of judgment when certificate of satisfaction is not recorded, 1942-44, p 211.

18.410

NOTES OF DECISIONS

The mere levy on personal property where the property is subsequently returned is not a satisfaction of the judgment and furnishes no valid objection to the issue of another execution. Wright v. Young, (1876) 6 Or 87.

A junior lien creditor who was not joined in the foreclosure proceedings loses his right to redeem when the purchaser at the sale satisfies his claim. Portland Mtg. Co. v. Cred. Protective Assn., (1953) 199 Or 432, 262 P2d 918.

ATTY. GEN. OPINIONS: Authority of district attorney to enter satisfaction of state's lien on property of a criminal defendant, 1936-38, p 490; satisfaction of state's judgment liens, 1938-40, p 277; duty of clerk to note satisfaction of judgment when certificate of satisfaction is not recorded. 1942-44, p 211.

18.420

NOTES OF DECISIONS

This section requires the motion for discharge of judgment to be filed in the suit, action or proceedings wherein the judgment was rendered. Duke v. Low, (1931) 135 Or 460, 296 P 45.

A judgment against employer for unpaid and overdue contributions under Workmen's Compensation Act is not discharged by bankruptcy. State Ind. Acc. Comm. v. Aebi, (1945) 177 Or 361, 162 P2d 513.

Debtor, who has notice that claim against him has been assigned and fails to schedule assignee as a creditor, is not entitled to a discharge of judgment obtained by the assignee who had no notice or knowledge of bankruptcy. State v. Bean, (1959) 218 Or 506, 346 P2d 652.

A judgment recovered by a guest passenger on complaint alleging both driver's intoxication and gross negligence did not establish that the injury was maliciously and wilfully inflicted and therefore it was discharged in bankruptcy. Dillard v. Dillard, (1966) 244 Or 597, 418 P2d 839, cert. denied, 386 U.S. 983.

Real estate was not exempt from a judgment lien acquired more than four months prior to an order in bankruptcy holding the property exempt as a homestead, where not claimed as a homestead at the time the judgment became a lien. Bush v. Shepard, Admr., (1949) 186 Or 105, 205 P2d 842.

The bankruptcy discharge did act to bar this claim of judgment lien on the homestead. Boyd v. Oregon, (1968) 249 Or 513, 439 P2d 862.

LAW REVIEW CITATIONS: 19 OLR 196; 34 OLR 1.

18.430

NOTES OF DECISIONS

Where a cosurety on a bond pays a judgment against himself and the other sureties he may claim contribution. Davis v. First Nat. Bank, (1917) 86 Or 474, 161 P 93, 168 P 929; Dowell v. Applegate, (1883) 15 Fed 419, 8 Sawy 427.