Chapter 19

Appeals

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NOTES OF DECISIONS
1. In general
2. Statutory construction
3. Constitutionality
4. Supreme Court rules

1. In general

The provisions of the criminal code for taking an appeal in the criminal case are complete within themselves and decisions in civil cases throw no light on the subject. State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295; State v. Stone, (1946) 178 Or 268, 166 P2d 980.

Ore. Const. Art. VII, §6, providing that the Supreme Court shall have jurisdiction only to review the final decisions of the circuit court, is not self-executing, but the legislature must prescribe the cases that may be appealed, and it may determine what constitutes a final decision. Blumauer-Frank Drug Co. v. Horticultural Fire Relief of Ore., (1911) 59 Or 58, 112 P 1084.

The Supreme Court is a court of limited jurisdiction aside from the instances where it may take original jurisdiction in mandamus, quo warranto and habeas corpus. McCarger v. Moore, (1918) 89 Or 597, 175 P 77.

Under our statutes appeal to the circuit court and Supreme Court in proper cases as defined by the laws is a matter of right without permission being granted by any officer or court. Libby v. So. Pac. Co., (1923) 109 Or 449, 219 P 604, 220 P 1017.

2. Statutory construction

A 60-day extension within which an appeal could be taken, given by an amendment, ran from the effective date of the amendment. Columbia City Land Co. v. Ruhl, (1914) 70 Or 246, 134 P 1035, 141 P 208; Walling v. La Follette, (1915) 76 Or 497, 134 P 1192.

A statute taking away appellate jurisdiction should be construed to apply to pending cases. Moss v. Woodcock, (1924) 109 Or 597, 220 P 1017; Drinker v. Ritter, Lowe & Co., (1924) 110 Or 431, 223 P 725; Smith v. Little, (1950) 188 Or 682, 214 P2d 345, 217 P2d 595.

The presumption against retroactive construction has no application to enactments which affect only the mode of procedure and practice of courts. Judkins v. Taffe, (1891) 21 Or 89, 27 P 221.

An appeal is a remedy and the laws and actions of courts in respect thereto should be liberally construed to make the remedy effective. White v. East Side Mill Co., (1917) 84 Or 224, 161 P 969, 164 P 736.

3. Constitutionality

A statute which proceeded to construe previous enactments and to declare their meaning validating appeals was unconstitutional under Ore. Const. Art. III, §1, prohibiting the separate departments of government from exercising the functions of another. Macartney v. Shipherd, (1911) 60 Or 133, 117 P 814.

A statute which attempted to validate appeals after the time for filing had elapsed was invalid as interfering with vested rights under a contract. Id.

4. Supreme Court rules

What the Supreme Court can do by order it can do by rule in setting and extending time for filing papers on appeal. Walker v. Fireman's Fund Ins. Co., (1927) 122 Or 179, 257 P 701.

FURTHER CITATIONS: Hall v. Pierce, (1957) 210 Or 98, 307 P2d 292, 309 P2d 997, 309 P2d 998; Berliner v. Roberts, (1961) 226 Or 350, 349 P2d 498, 360 P2d 533; Beelman v. Beelman, (1961) 227 Or 556, 361 P2d 663, 363 P2d 561; Fry v. Ashley, (1961) 228 Or 61, 363 P2d 555; Curtis v. Stone, (1963) 234 Or 481, 379 P2d 551; Todd v. Bigham, (1964) 238 Or 374, 390 P2d 168, 395 P2d 163; Knox v. Hanson, (1965) 242 Or 114, 408 P2d 76; Hulegaard v. Garrett, (1968) 251 Or 535, 446 P2d 975.

LAW REVIEW CITATIONS: 7 OLR 44; 34 OLR 73; 39 OLR 118; 43 OLR 136.

19.005

NOTES OF DECISIONS
1. Under former similar statute
   (1) A copy of the judgment or decree appealed from
   (2) Trial court file
      (a) In general
      (b) Original files or copies
      (c) Findings and conclusions
      (d) Notice of appeal, with proof of service
      (e) "The undertaking on appeal"
   (3) Testimony and evidence

1. Under former similar statute

(1) A copy of the judgment or decree appealed from. The Supreme Court did not have jurisdiction on appeal where the transcript did not contain a copy of the judgment or decree appealed from. Orman v. Baker County, (1925) 115 Or 436, 234 P 799, 236 P 1040; Derby v. Newton, (1931) 138 Or 6, 4 P2d 314.

One appealing from part of decree only had to file transcript containing certified copy of entire decree, not simply a part thereof. Greener v. Chipman, (1931) 137 Or 659, 2 P2d 1118; Lloyd v. Brown, (1931) 138 Or 58, 288 P 505, 5 P2d 83.

The object of the provisions as to the filing of a copy of the judgment or decree was to furnish evidence that a genuine bona fide controversy was tried and determined and a judgment or decree rendered thereon. Byers v. Ferguson, (1902) 41 Or 77, 65 P 1067, 68 P 5.

If the transcript showed a defect as to the time or nature of the judgment, the appeal was dismissed on motion. Lee v. Gram, (1922) 105 Or 49, 196 P 373, 209 P 474, 27 ALR 1001.

(2) Trial court file

(a) In general. A report of a referee was not part of the transcript and could not be considered on appeal unless

properly included in the bill of exceptions. Osborne v. Graves, (1884) 11 Or 526, 6 P 227; Van Bidder v. Fields, (1894) 25 Or 527, 36 P 526; Trumer v. Konrad, (1897) 32 Or 54, 51 P 447.

The minimum which could satisfy the jurisdictional requirements was the short transcript, containing a copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and the undertaking. Credit Serv. Co. v. Peters, (1923) 116 Or 138, 216 P 742; Walker v. Fireman's Fund Ins. Co., (1927) 122 Or 179, 257 P 701; Lasene v. Syvanen, (1928) 123 Or 615, 257 P 822, 263 P 59; Greener v. Chipman, (1931) 137 Or 659, 2 P2d 1118; In re Cooke's Estate, (1941) 167 Or 58, 115 P2d 302.

A mere reference in the findings of a court to a document as "plaintiff's exhibit A" does not make it a part of the record on appeal where it was simply attached to the transcript. Tatum v. Massie, (1896) 29 Or 140, 44 P 494.

Papers that were not part of the judgment roll as defined by statute were not part of the transcript and would not be considered on appeal. Farrell v. Ore. Gold Co., (1897) 31 Or 463, 49 P 876.

The transcript did not need to present matters of record relied on by respondent, who was protected by his right to ask for an additional record. Backhaus v. Buells, (1903) 43 Or 558, 72 P 976, 73 P 342.

The transcript had to show an appealable judgment rendered within the time allowed for taking an appeal. Lee v. Gram, (1922) 105 Or 49, 196 P 373, 209 P 474.

A transcript was presumed to contain all that the appellant desired to be incorporated in it. Mason, Ehrman & Co. v. Lewis' Estate, (1929) 131 Or 242, 276 P 281, 281 P 123, 282 P 772.

It was unnecessary to bring up the written opinion of the lower court on appeal from a decree. In re De Lin's Estate, (1930) 135 Or 8, 282 P 119, 294 P 600.

The pleadings in a civil action out of which a civil contempt arose were properly included in the transcript on appeal from the judgment in the contempt proceedings. State v. Mart, (1931) 135 Or 603, 283 P 23, 295 P 459.

The Supreme Court could not go beyond the record and determine from conflicting statements of counsel the final disposition of a motion. Scott v. Brogan, (1937) 157 Or 549, 73 P2d 688.

(b) Original files or copies. The transcript had to contain a certified copy of the decree or judgment, notice of appeal and proof of service thereof, and of the undertaking. Burchell v. Averill Mach. Co., (1909) 55 Or 113, 105 P 403; Lloyd v. Brown, (1931) 138 Or 58, 288 P 505, 5 P2d 83.

Copies of the notice of appeal and not the originals should be sent up on appeal. Smith v. Algona Lbr. Co., (1914) 73 Or 1, 136 P 7, 143 P 921; Winter v. Heyden, (1934) 149 Or 20, 36 P2d 183, 37 P2d 871.

On appeal from an order refusing to modify a decree with respect to alimony, the original complaint, answer and reply were a proper part of the transcript. Miller v. Miller, (1913) 65 Or 551, 131 P 308, 133 P 86.

The original files from the lower court were to be accompanied by a certificate identifying them. Mitchell v. Sturtevant, (1915) 78 Or 214, 152 P 875.

The original pleadings and bill of exceptions were sent up on appeal and were part of the transcript. State v. Laundy, (1922) 103 Or 443, 507, 204 P 958, 206 P 290.

Appellants were not allowed to substitute a sworn copy for an original exhibit that had been lost before the transcript was sent up. Corbett v. Bauer, (1882) 10 Or 340.

(c) Findings and conclusions. Findings of fact and conclusions of law were not essential in an equitable proceeding on appeal, but otherwise in a law action. In re De Lin's Estate, (1930) 135 Or 8, 282 P 119, 294 P 600.

The findings of fact in a law action tried without a jury could be included in the transcript and had to be included in the printed abstract. St. Clair v. Jelinek, (1949) 187 Or 151, 210 P2d 563.

(d) Notice of appeal, with proof of service. The transcript had to disclose notice of appeal and proof of service thereof. Streby v. State Ind. Acc. Comm., (1923) 107 Or 314, 215 P 586; Schaefer v. Montgomery Ward & Co., (1941) 167 Or 679, 120 P2d 235.

A transcript from which it was not determinable whether all adverse parties had been served with notice of appeal was insufficient. Lloyd v. Brown, (1931) 138 Or 58, 288 P 505, 5 P2d 83.

(e) "The undertaking on appeal". The appeal was not defective where the record filed in the Supreme Court failed to contain the undertaking on the appeal from the probate court to the circuit court. In re Orr's Estate, (1916) 79 Or 319, 153 P 61.

The state being an interested party in an appeal by the State Industrial Accident Commission, an undertaking was not necessary. Goss v. State Ind. Acc. Comm., (1932) 140 Or 146, 12 P2d 322, 12 P2d 1006.

(3) Testimony and evidence. The bill of exceptions was not essential or jurisdictional in an appeal from a judgment at law. Nosler v. Coos Bay Nav. Co., (1901) 40 Or 305, 63 P 1050, 64 P 855; Morrison v. Franck, (1911) 59 Or 429, 110 P 1090, 117 P 308; Meaney v. State Ind. Acc. Comm., (1925) 113 Or 371, 227 P 305, 232 P 789; Weinstein v. Wheeler, (1928) 127 Or 406, 257 P 20, 271 P 733.

Where the case comes up without a transcript of testimony or bill of exceptions, review was confined to the pleadings. Wallowa Law, Land & Abstract Co. v. McGaffee, (1939) 160 Or 298, 84 P2d 1116; In re Dugan, (1938) 158 Or 439, 76 P2d 961.

An appeal would not be dismissed for failure to file testimony and exhibits with the transcript. Leavengood v. McGee, (1907) 50 Or 233, 91 P 453.

FURTHER CITATIONS: Lang v. Hill, (1961) 226 Or 371, 360 P2d 316; State v. Clark, (1964) 237 Or 596, 392 P2d 643.

19.010

NOTES OF DECISIONS

1. In general
2. "A judgment or decree"
   (1) Void judgments and orders
   (2) Judgments entered pursuant to mandate
   (3) Nonjudicial decisions
   (4) Judgment as to part of action or parties
   (5) Cross-bills
3. "As prescribed in this chapter"
   (1) Inferior courts and special proceedings
4. "An order affecting a substantial right and which in effect determines the action or suit"
   (1) Final judgment
      (a) Motions undisposed of
      (b) Judgment on plea in abatement
      (c) Substantial right
      (d) Orders and rulings on pleadings
      (e) Attachment orders
      (f) Injunction and receivership orders
5. Interlocutory orders or decrees
   (1) Partition of land
   (2) Other than for partition of land
6. Final order made after judgment or decree
   (1) Refusal to vacate judgment and grant a new trial
   (2) Orders extending time to file appeal papers
7. Setting aside judgment and granting a new trial
   (1) Order setting aside a default judgment
8. Dismissals and nonsuits
9. Amount in controversy
10. Special statutory proceeding

1. In general

An appeal from the circuit court to the Supreme Court is a new proceeding. Kelley v. Pike, (1889) 17 Or 330, 20 P 685; Brown v. Ritterman, (1937) 156 Or 405, 67 P2d 774.

Statutes conferring the right of appeal are remedial in character and should be liberally construed. White v. East Side Mill Co., (1917) 84 Or 224, 161 P 969, 164 P 736; Spencer v. Portland, (1925) 114 Or 381, 235 P 279.

While review and appeal are concurrent remedies, a party cannot exercise both at the same time. Clubine v. Merrill, (1917) 83 Or 87, 163 P 85.

In making the 1907 and 1915 amendments the legislature undoubtedly considered certain decisions of the Supreme Court and intended to enlarge the right of appeal. Lyon v. Mazeris, (1943) 170 Or 222, 132 P2d 982.

As a general policy of judicial administration, appeal is allowed only from a final order. Bitte v. City of St. Helens, (1968) 251 Or 548, 446 P2d 978.

As a general rule, an order refusing to vacate an appealable order is not appealable. Lee v. Lee, (1971) 5 Or 74, 482 P2d 745.

2. "A judgment or decree"

An order allowing a warrant to abate a nuisance is appealable. Ankeny v. Fairview Milling Co., (1882) 10 Or 390.

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

The general rule is that a final determination of any proceeding before a court of record is a judgment or decree. Id.

A "judgment" is the first order containing all of the necessary recitals which, with finality, disposes of the cause. Cockrum v. Graham, (1933) 143 Or 233, 21 P2d 1084.

Generally the face of a judgment or decree is the test of its finality. Eena Co. v. Zosel, (1940) 164 Or 99, 95 P2d 428, 99 P2d 1022.

The substance of the order, and not the name given it, establishes its nature. Lyon v. Mazeris, (1943) 170 Or 222, 132 P2d 982.

(1) Void judgments and orders. A void judgment or decree is appealable. Trullinger v. Todd, (1873) 5 Or 36; Deering & Co. v. Quivey, (1895) 26 Or 556, 38 P 710; Hoover v. Hoover, (1901) 39 Or 456, 65 P 796; Sturgis v. Sturgis, (1908) 51 Or 10, 93 P 696, 131 Am St Rep 724, 15 LRA(NS) 1034; Salem King's Prod. Co. v. La Follette, (1921) 100 Or 11, 196 P 416; State v. Circuit Court, (1925) 114 Or 6, 233 P 563, 234 P 262; Eena Co. v. Zosel, (1940) 164 Or 99, 95 P2d 428, 99 P2d 1022.

An appeal will lie from a void default judgment or decree but not from one merely voidable or erroneous. Oregon Lbr. & Fuel Co. v. Hall, (1915) 76 Or 138, 148 P 61; Pac. Sav. & Loan Assn. v. Bekins, (1934) 146 Or 385, 29 P2d 816.

An order made after term at which judgment was rendered is not appealable as a void order where jurisdiction was reserved by an order extending time beyond the term to present a bill of exceptions. Henrichsen v. Smith, (1896) 29 Or 475, 479, 42 P 486, 44 P 496.

A void order granting a preliminary injunction is appealable. Salem King's Prod. Co. v. La Follette, (1921) 100 Or 11, 196 P 416.

Where an original order is void, an appeal will lie from an order refusing to vacate it, even though as a general rule an order refusing to vacate an appealable order is not appealable. Lee v. Lee, (1971) 5 Or App 74, 482 P2d 745.

(2) Judgments entered pursuant to mandate. A judgment of nonsuit entered in obedience to a mandate of the Supreme Court is not appealable. Apex Trans. Co. v. Garbade, (1898) 32 Or 582, 52 P 573, 54 P 367, 62 LRA 513.

An appeal does not lie from a judgment entered by the lower court pursuant to the mandate of the Supreme Court if the judgment is not broader than is essential. Bertin & Lepori v. Mattison, (1916) 81 Or 482, 159 P 1167.

When new trial is granted and on appeal is reversed, the original judgment re-entered pursuant to mandate is not appealable. Frank v. Matthiesen, (1925) 116 Or 94, 240 P 551.

(3) Nonjudicial decisions. A decision of a matter relating to the administrative department of the government is not an "order." Colvig v. Klamath County, (1888) 16 Or 244, 19 P 86.

A judgment or decree is not appealable merely because the wrong process for enforcing it is used. In re Barker, (1917) 83 Or 702, 164 P 382.

(4) Judgment as to part of action or parties. A decree in an interpleader action is not severable so as to permit a defendant to appeal from that part discharging the plaintiff from liability and leave its other provisions undisturbed. New Zealand Ins. Co. v. Smith, (1902) 41 Or 466, 69 P 268.

A judgment which determines the issues involved in six of seven causes of action is a final judgment and appealable. Taffe v. Smyth, (1912) 62 Or 227, 125 P 308.

An appeal lies only when the controversy as to all the parties to the action has been finally determined. Abrahamson v. Northwestern Pulp & Paper Co., (1933) 141 Or 339, 15 P2d 472, 17 P2d 1117.

An order dismissing four of six causes of action stated in a complaint with prejudice after a demurrer to such causes had been sustained was not a "final" order. Durkheimer Inv. Co. v. Zell, (1939) 161 Or 434, 90 P2d 213.

(5) Cross-bills. A decree dismissing a cross-bill in an action at law is appealable. Oatman v. Epps, (1887) 15 Or 437, 15 P 709; Scheiffelin v. Weatherred, (1890) 19 Or 172, 23 P 898; Donart v. Stewart, (1912) 63 Or 76, 126 P 608.

A decree dismissing a cross-bill filed in an action at law after demurrer to it has been sustained and plaintiff has not answered over is appealable. Scheiffelin v. Weatherred, (1890) 19 Or 172, 23 P 898.

3. "As prescribed in this chapter"

Appeals are not allowed as a matter of right but only in pursuance of and to the extent provided by statute. State v. Sec. Sav. Co., (1896) 28 Or 410, 43 P 162; Lovell v. Potts, (1924) 112 Or 538, 207 P 1006, 226 P 111; Brown v. Ritterman, (1937) 156 Or 405, 67 P2d 774.

An appeal is not a constitutional right but a statutory privilege which must be taken in the manner provided by statute. Lewis v. Chamberlain, (1912) 61 Or 150, 121 P 430; In re Waters of Chewaucan River, (1918) 89 Or 659, 171 P 402, 175 P 421; Larsen v. Lootens, (1922) 102 Or 579, 194 P 699, 203 P 621. **But see** Mitchell v. Powers, (1888) 16 Or 487, 19 P 647.

This section does not limit Ore. Const. Art. VII (O), §7 as to the cases that are appealable, but enlarges it. Sturgis v. Sturgis, (1908) 51 Or 10, 93 P 696, 131 Am St Rep 724, 15 LRA(NS) 1034.

(1) Inferior courts and special proceedings. An appeal does not lie from the judgment of a city court for the violation of a city ordinance in the absence of expressed authority in the city charter or some statute. La Fayette v. Clark, (1881) 9 Or 225; Corvallis v. Stock, (1885) 12 Or 391, 7 P 524; Barton v. La Grande, (1889) 17 Or 577, 22 P 111; Cunningham v. Berry, (1889) 17 Or 622, 22 P 115.

Where rules of procedure in special proceedings limit the right of appeal or specify the court or tribunal in which such proceedings shall terminate, these rules govern. Portland v. Gaston, (1901) 38 Or 533, 63 P 1051; State v. Yates, (1922) 104 Or 667, 209 P 231.

A register of state lands acting as the agent of the Board of School Land Commissioners cannot render an appealable order. Anderson v. Laughery, (1871) 3 Or 277.

Appeal is the proper method of reviewing the proceedings

of the county court in civil actions. Broback v. Huff, (1884) 11 Or 395, 4 P 1130.

An appeal lies to the Supreme Court in proceedings to determine the custody of orphan children under a statute referable to chancery powers. North Pac. Presbyterian Bd. of Missions v. Ah Won, (1890) 18 Or 339, 22 P 1105.

An appeal from a judgment rendered in a forcible entry and detainer action is not governed by a special statute. Dechenbach v. Rima, (1904) 45 Or 500, 77 P 391, 78 P 666.

Ore. Const. Art VII (O), §9 confers upon the circuit courts appellate jurisdiction but it leaves the mode and limitation of proceeding on appeal to be provided by statute. Kadderly v. Portland, (1904) 44 Or 118, 74 P 710, 75 P 222.

A circuit court judgment on review of city assessment proceedings is not appealable unless a statute makes it so. Portland v. Nottingham, (1911) 58 Or 1, 113 P 28.

No appeal in small claims actions lies beyond the circuit court. Doane v. Stein, (1918) 87 Or 97, 169 P 781.

A circuit court decree setting aside an assessment rendered on appeal from the county board of equalization cannot be appealed to the Supreme Court. Smith Sec. Co. v. Multnomah County, (1921) 98 Or 418, 192 P 654, 194 P 428.

The state cannot appeal from a bastardy proceeding where the statute by express terms restricts the right of appeal to the defendant. State v. Yates, (1922) 104 Or 667, 209 P 231.

A circuit court's order allowing certain deductions in an income tax return was not appealable where the statute providing for such action did not provide for an appeal. Cohn v. State Tax Comm., (1926) 118 Or 92, 245 P 1085.

The right to appeal from the circuit court to the Supreme Court in a special statutory proceeding is subject to the condition that the amount in controversy exceeds $250. Weir v. Mariott, (1931) 135 Or 214, 293 P 944, 295 P 449.

The right of appeal from a judgment distributing trust funds exists by virtue of the general statute irrespective of whether or not the special statute governing a change of procedure so declares. Earle v. Holman, (1936) 154 Or 578, 55 P2d 1097, 61 P2d 1242.

Although the Corrupt Practices Act makes no provision for appeal, appeal may be taken hereunder. Nickerson v. Mecklem, (1942) 169 Or 270, 126 P2d 1095.

The Liquor Control Commission may appeal from a decree of the circuit court. Perry v. Ore. Liquor Comm., (1947) 180 Or 495, 177 P2d 406.

An order which quashed service of citation in an election contest was not an appealable order under this section. Krauger v. Steelhammer, (1948) 183 Or 697, 195 P2d 982.

This section does not apply in coram nobis proceeding since coram nobis is not a statutory proceeding and subsection (4) applies only in civil cases. State v. Endsley, (1958) 214 Or 537, 331 P2d 338.

4. "An order affecting a substantial right and which in effect determines the action or suit"

(1) Final judgment. A judgment or decree is final if no further action of the court is required to dispose of the cause or if it determines the rights of the parties so that no further questions can arise except such as are necessary to be determined in carrying it into effect. Walker v. Goldsmith, (1886) 14 Or 125, 12 P 537; State v. Sec. Sav. Co., (1896) 28 Or 410, 43 P 162; Timoney v. McIntire, (1934) 146 Or 583, 31 P2d 165; Durkheimer Inv. Co. v. Zell, (1939) 161 Or 434, 90 P2d 213.

A decree ordering an accounting and enjoining defendants from assigning, transferring or disposing of certain property in which plaintiff's claim an interest is not a "final decree." Winters v. Grimes, (1928) 124 Or 214, 264 P 359; Froman v. Jones, (1932) 141 Or 42, 16 P2d 21.

Where principal issue is ownership of property, a decree determining such ownership is final and appealable notwithstanding that an accounting has also been ordered. Hall v. Bone, (1957) 210 Or 98, 307 P2d 292, 309 P2d 997, 998; Murphy v. Royce, (1958) 214 Or 626, 310 P2d 623.

An order in a divorce suit awarding custody of children is an appealable decree. Pittman v. Pittman, (1869) 3 Or 472.

An order denying a creditor's claim against one who assigned his assets for the benefit of creditors is appealable Mitchell v. Powers, (1889) 17 Or 491, 21 P 451.

Where all debts against an estate had been paid, an order of the county court refusing to compel final settlement and distribution was an appealable decree. Bellinger v. Ingalls, (1891) 21 Or 191, 27 P 1038.

A judgment is appealable notwithstanding a stay of execution. State v. Downing, (1901) 40 Or 309, 58 P 863, 66 P 917.

An order in escheat proceedings to persons not parties that they shall deliver property to a receiver is final to such parties and appealable by them. State v. O'Day, (1902) 41 Or 495, 69 P 542.

The final order in a contempt proceeding is appealable. State v. Gray, (1902) 42 Or 261, 70 P 904, 71 P 978.

Either party to a judgment in a forcible entry and detainer action in the circuit court may appeal therefrom. Deschenbach v. Rima, (1904) 45 Or 500, 77 P 391, 78 P 666.

The term "final judgment" is generally used as a synonym for an appealable order. Wolfer v. Hurst, (1905) 47 Or 156, 80 P 419, 82 P 20.

An appeal does not lie from certain findings of fact and conclusion of law upon which no final order or judgment was ever entered. Thornburg v. Gutridge, (1905) 46 Or 286, 80 P 100.

A decree adjudging the right to redeem, describing the property affected and the sum to be paid, and the costs taxed is appealable. Marquam v. Ross, (1905) 47 Or 374, 387, 78 P 698, 83 P 852, 86 P 1.

An order to pay temporary alimony was appealable by a guardian who had no personal interest in the divorce suit and no right to appeal from the final decree. Sturgis v. Sturgis, (1908) 51 Or 10, 93 P 696.

A judgment in condemnation proceedings that the land sought to be taken be appropriated and taken from defendant by plaintiff upon the deposit by plaintiff of a specific sum is appealable though plaintiff did not make the deposit. Oregon R.R. & Nav. Co. v. Eastlack, (1909) 54 Or 196, 102 P 1011.

An order in a suit by a husband to dissolve a marriage contract allowing the defendant $500 to enable her to make a defense is not appealable. Clay v. Clay, (1910) 56 Or 538, 108 P 119, 109 P 129.

The right to appeal from a final judgment is not affected by subsequent orders which were void because made at a subsequent term. Zelig v. Blue Point Oyster Co., (1912) 61 Or 535, 113 P 852, 122 P 757.

A decree ascertaining a boundary and appointing commissioners to mark the line ascertained is appealable. Columbia City Land Co. v. Ruhl, (1914) 70 Or 246, 134 P 1035, 141 P 208.

Ordinarily, an order granting or denying a preliminary injunction is not appealable. Birkemeier v. Milwaukie, (1915) 76 Or 143, 147 P 545.

Where a decree pending appeal is vacated by the trial court and a new one entered, the latter is the final decree. Oregon-Wash. R.R. & Nav. Co. v. Sch. Dist 25, (1918) 89 Or 7, 173 P 261.

An order to return corporate records to the state and to keep them there for inspection is not final and appealable. Baillie v. Columbia Gold Min. Co., (1920) 95 Or 609, 188 P 418.

A decree foreclosing a contract for the sale of land as prayed for in a cross-bill filed by defendant is appealable. Anderson v. Hurlbert, (1923) 109 Or 284, 219 P 1092.

An order dissolving a temporary injunction against an execution sale was not appealable though it affected a substantial right as the suit was not determined thereby so as to prevent judgment. Anderson v. Harju, (1925) 113 Or 552, 233 P 848.

A decree approving an account for attorney's fees against an estate was a final decree. In re Prince's Estate, (1926) 118 Or 210, 221 P 554, 246 P 713.

An order to a corporate officer to produce books and testify thereabout is not final and appealable. Damascus v. Home Coal Co., (1928) 127 Or 253, 271 P 729.

A decree of a circuit court reversing a decree of the county court and remanding the cause to the county court to be carried out in detail is "final." Young v. Lee, (1930) 132 Or 1, 271 P 994, 279 P 850, 280 P 342.

Failure of order to recite specific directions which should have been included in writ of mandamus did not prevent the order from being "final" where it directed writ to issue as prayed for in the petition and petition was sufficiently explicit. Cockrum v. Graham, (1933) 143 Or 233, 21 P2d 1084.

An appeal lies only from a final judgment or decree or from a final order as prescribed by this section. Eena Co. v. Zosel, (1940) 164 Or 99, 95 P2d 428, 99 P2d 1022.

An entry reciting that the court "finds a decree should be entered herein as follows" and setting forth the form in which it should be entered was not appealable. Id.

A decree declaring that certain property was held by defendants as trustees for plaintiff and requiring an accounting was a final decree and appealable. Lyon v. Mazeris, (1943) 170 Or 222, 132 P2d 982.

An order admitting a will to probate in common form is not appealable since it does not prevent a judgment or decree. Gulick v. Nelson, (1945) 176 Or 610, 159 P2d 817.

When separate judgments are rendered at different times on two causes of action pleaded in one complaint an appeal from the first judgment must be taken within 60 days from the rendition of that judgment. Jackman v. Jones, (1951) 191 Or 356, 229 P2d 963.

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

An order of dismissal for want of prosecution is a final order and appealable. Ebel v. Boly, (1971) 258 Or 308, 481 P2d 620.

(a) Motions undisposed of. While a motion for a new trial is pending there is no final judgment from which an appeal can be taken. Mitchell & Lewis Co. v. Downing, (1893) 23 Or 448, 32 P 394.

(b) Judgment on plea in abatement. A judgment sustaining defendant's plea in abatement and allowing plaintiff to amend is not appealable. La Grande v. Portland Public Market, (1911) 58 Or 126, 134, 113 P 25.

An order that an action abate is a final judgment and appealable. Klamath Lbr. Co. v. Bamber, (1914) 74 Or 287, 142 P 359, 145 P 650.

A judgment dismissing a plea in abatement, being interlocutory, is not appealable, though it is reviewable on appeal from the final judgment. Waterway Terminals Co. v. P. S. Lord Mechanical Contractors, (1965) 242 Or 1, 406 P2d 556, 13 ALR 3d 1.

An ordering granting a condemner immediate possession is appealable if the property could be irrevocably damaged by a condemner in possession so the award would be inadequate and if the owner contested the government's right to condemn. Portland v. Anderson, (1967) 248 Or 201, 432 P2d 1020.

(c) Substantial right. An order partially removing a case into the United States District Court from a circuit court does not affect a substantial right or prevent a judgment or decree. Fields v. Lamb, (1868) 2 Or 340.

An order of the circuit court refusing to remove the assignee of an insolvent does not affect a substantial right or determine the action so as to prevent a judgment. In re Estate of Goldsmith, (1885) 12 Or 414, 7 P 97, 9 P 565.

A decree based on a wrong reason but giving appellant all that he sought does not affect a substantial right. Hume v. Turner, (1902) 42 Or 202, 70 P 611.

An order dismissing an administrator's petition for a license to sell property of the estate affects his "substantial right." Smith's Estate, (1904) 43 Or 595, 73 P 336, 75 P 133.

Leave to insert jurisdictional allegations into complaint by amendment, over the objections of the defendant, was a final "order affecting a substantial right" and appealable even though void. Holton v. Holton, (1913) 64 Or 290, 294, 129 P 532, 48 LRA(NS) 779.

An order reinstating an action dismissed without prejudice because the statute of limitations would bar the institution of another action for the same cause is not final. Kyla-Kierola v. Stanley-Smith Lbr. Co., (1916) 81 Or 640, 160 P 542.

An order overruling a motion by a third party claimant to compel the sheriff to pay him the sum seized under an attachment was not a judgment or decree or an order affecting a substantial right reviewable on appeal. Francisco v. Stringfield, (1941) 166 Or 683, 114 P2d 1026.

An order denying a motion by a person holding a lien on land being condemned for leave to intervene in the condemnation action was not appealable. State Hwy. Comm. v. Superbilt Mfg. Co., (1954) 200 Or 478, 266 P2d 1072.

An order denying motion to amend caption was not appealable, since plaintiff had right without court's permission to file an amended petition. Schulmerich v. First Nat. Bank, (1960) 220 Or 528, 349 P2d 849.

(d) Orders and rulings on pleadings. An order sustaining a demurrer to a complaint is not appealable. State v. Brown, (1873) 5 Or 119; Giant Powder Co. v. Ore. R. Co., (1909) 54 Or 325, 101 P 209, 103 P 501; Rockwood v. Grant, (1910) 55 Or 389, 106 P 789; Lecher v. St. Johns, (1915) 74 Or 558, 146 P 87; Birkemeier v. Milwaukie, (1915) 76 Or 143, 147 P 545; Butler v. City of Ashland, (1924) 113 Or 72, 231 P 155; In re Norman's Estate, (1938) 159 Or 197, 78 P2d 346.

An order quashing the service of summons is not appealable. Ter Har v. Backus, (1970) 256 Or 288, 473 P2d 143; Weiner v. Gamma Phi Chap. of Alpha Tau Omega Fraternity, (1971) 258 Or 632, 485 P2d 18.

An order overruling a demurrer to a bill of discovery requiring defendant to answer interrogatories set forth therein is appealable. State v. Sec. Sav. Co., (1896) 28 Or 410, 43 P 162.

The granting of leave to amend a pleading is discretionary and not appealable. Sears v. Dunbar, (1907) 50 Or 36, 91 P 145.

An order was not appealable that denied defendant's motion to dismiss, sustained defendant's demurrer to the complaint for plaintiff's incapacity to sue and substituted the state as plaintiff. Id.

A denial of a motion to strike out a part of the complaint as frivolous, irrelevant and redundant is not appealable. Multnomah County v. Faling, (1909) 55 Or 45, 104 P 964.

Orders in a divorce suit overruling a demurrer and allowing suit money and alimony are appealable if void for want of jurisdiction. Matlock v. Matlock, (1918) 87 Or 307, 170 P 528.

An order sustaining demurrers to separate answers and striking parts of another separate answer is not appealable. Hubbard v. Olsen-Roe Transfer Co., (1921) 101 Or 168, 199 P 187.

An order overruling a demurrer is not appealable. Butler v. City of Ashland, (1924) 113 Or 72, 231 P 155.

An order sustaining motion to make complaint more definite and certain is not appealable. Powell Co. v. Wiest, (1926) 117 Or 18, 242 P 624.

An order striking out the plaintiffs' complaint and allowing an amendment is not appealable. Abrahamson v. Northwestern Pulp & Paper Co., (1933) 141 Or 339, 15 P2d 472, 17 P2d 1117.

An order, denying motion to quash service of process and grant defendant's leave to appear and answer, was appealable. Pacific Sav. & Loan Assn. v. Bekins, (1934) 146 Or 385, 29 P2d 816.

An order striking out a portion of plaintiff's allegations in regard to damages although affecting a substantial right was not a final order and not appealable. Electrical Prod. Corp. v. Ziegler Drug Stores Inc., (1937) 157 Or 267, 68 P2d 135, 71 P2d 583.

An order denying motion to strike a claim from the pleadings is not appealable. In re Norman's Estate, (1938) 159 Or 197, 78 P2d 346.

An order to abate an action and to require arbitration is an appealable order, if plaintiff alleges facts sufficient to show such remedy by arbitration would be useless. Wagner v. Columbia Hosp. Dist., (1971) 259 Or 15, 485 P2d 421.

(e) Attachment orders. An order refusing to dissolve an attachment is appealable. Sheppard v. Yocum, (1884) 11 Or 234, 3 P 824. **Distinguished in** Van Voorhies v. Taylor (1893) 24 Or 247, 33 P 380.

An order dissolving an attachment when no judgment has been rendered in the main action is not appealable. Van Voorhies v. Taylor, (1893) 24 Or 247, 33 P 380; Farmers' Bank v. Key, (1898) 33 Or 443, 54 P 206; Ruby v. Whitten, (1926) 117 Or 271, 243 P 559.

(f) Injunction and receivership orders. An order granting a temporary injunction is not appealable. Basche v. Pringle, (1891) 21 Or 24, 26 P 863; Breese v. Bramwell, (1921) 102 Or 76, 201 P 729.

An order requiring a receiver to join an administrator in the sale of certain property in which the estate had an interest and which was in the hands of the receiver is not appealable. Steel v. Holladay, (1889) 18 Or 151, 22 P 535.

An order refusing an injunction does not ordinarily partake of the nature of a final decree, but where in addition to its refusal a decree settling the rights of the parties is entered the order is appealable. Holm v. Gilroy, (1891) 20 Or 517, 26 P 851.

An order refusing to grant a preliminary injunction is not appealable where the court does not pass on the merits of the case. Fowle v. House, (1895) 26 Or 587, 39 P 5.

An order allowing attorneys' fees against the receiver personally, the creditors not having had notice of the application, was appealable. Wilder v. Reed, (1905) 46 Or 54, 78 P 1027.

A peremptory mandatory injunction to perform an official act that constituted the whole relief asked was appealable. American Life Ins. Co. v. Ferguson, (1913) 66 Or 417, 420, 134 P 1029.

A void order granting a preliminary injunction is appealable. Salem King's Prod. Co. v. La Follette, (1921) 100 Or 11, 196 P 416.

The dissolution of a temporary injunction against execution sale is not appealable though it affects a substantial right. Anderson v. Harju, (1925) 113 Or 552, 233 P 848.

An order appointing receivers was not appealable. Taylor Fin. Corp. v. Ore. Logging & Timber Co., (1925) 116 Or 440, 241 P 388.

5. Interlocutory orders or decrees

(1) Partition of land. The final decree in a suit to partition land confirming the referee's report is appealable and the validity of the several intermediate orders and decrees may be reviewed. Sterling v. Sterling, (1903) 43 Or 200, 72 P 741.

(2) Other than for partition of land. The inclusion in the statute of an interlocutory decree in a suit for the partition of real property has the effect of excluding any other intermediate decree. Anderson v. Harju, (1925) 113 Or 552, 233 P 848; Froman v. Jones, (1932) 141 Or 42, 16 P2d 21; Cady v. Paulson, (1943) 171 Or 438, 137 P2d 999.

An appeal from interlocutory judgments or decrees is not authorized by the code. Houston v. Timmerman, (1889) 17 Or 499, 21 P 1037, 11 Am St Rep 848, 4 LRA 716; McEwen v. McEwen, (1955) 203 Or 460, 280 P2d 402. McEwen v. McEwen, supra, **distinguished in** Hall v. Bone, (1957) 210 Or 98, 151, 307 P2d 292, 309 P2d 997, 309 P2d 998 and Murphy v. Royce, (1958) 214 Or 626, 310 P2d 623.

An interlocutory alimony order to pay expenses of suit and support wife during its pendency is not appealable but is reviewable on appeal from final decree. Clay v. Clay, (1910) 56 Or 538, 108 P 119, 109 P 129; Jolliffe v. Jolliffe, (1923) 107 Or 33, 213 P 415; Koester v. Koester, (1928) 125 Or 60, 253 P 12.

An order providing that plaintiff shall pay the cost of a prior suit within 90 days was interlocutory and not appealable pending the expiration of the 90 days. Windsor v. Holloway, (1917) 84 Or 303, 164 P 1177.

A decree directing an occounting and enjoining transfer of certain personalty is not appealable. Winters v. Grimes, (1928) 124 Or 214, 264 P 359.

A decree adjudging a defendant a trustee and ordering him to account and enjoining the disposition of property pending determination and settlement of such account was not appealable because interlocutory. Froman v. Jones, (1932) 141 Or 42, 16 P2d 21.

An order refusing to strike an item from an administrator's final account and an order refusing to strike the contestant's claim are interlocutory and unappealable. In re Norman's Estate, (1938) 159 Or 197, 204, 78 P2d 346.

An order requiring a litigant to appear and show cause why he should not be punished for contempt is an interlocutory order and is not appealable. Cady v. Paulson, (1943) 171 Or 438, 137 P2d 999.

A decree ordering defendant to make a complete accounting of all moneys received and expended was interlocutory rather than final and not appealable notwithstanding consent, agreement or waiver of the parties. Robertson v. Henderson, (1947) 181 Or 200, 179 P2d 742.

An interlocutory decree in a foreclosure suit is a final, appealable adjudication of the right to foreclose and the amount required to redeem. Slipp v. Amato, (1962) 231 Or 512, 373 P2d 673.

A judgment in favor of some of the defendants and continuing the action against one defendant is not appealable. Martin v. City of Ashland, (1963) 233 Or 512, 378 P2d 711; Collins v. Lantz, (1963) 234 Or 268, 381 P2d 213; Steenson v. Robinson, (1963) 236 Or 414, 385 P2d 738; Dlouhy v. Simpson Tbr. Co., (1967) 247 Or 571, 431 P2d 846.

6. Final order made after judgment or decree

An order after foreclosure fixing the amount payable to redeem is appealable as a final order when all rights are determined. Marquam v. Ross, (1905) 47 Or 374, 78 P 698, 83 P 852, 86 P 1; Timoney v. McIntire, (1934) 146 Or 583, 31 P2d 165.

An order allowing a warrant to issue to the sheriff for the abatement of a private nuisance is appealable. Ankeny v. The Fairview Milling Co., (1882) 10 Or 390.

An order of confirmation or rejection of a sheriff's sale on execution is appealable. Dell v. Estes, (1882) 10 Or 359.

An order allowing a receiver reasonable compensation for his services and made after final decree is appealable. Martin v. Martin and Taggart, (1886) 14 Or 165, 12 P 234.

To come under the head of "a final order affecting a substantial right, and made in a proceeding after judgment or decree," the order must be one made in a proceeding in which a judgment or decree has been rendered. Colvig v. Klamath County, (1888) 16 Or 244, 19 P 86.

An order nunc pro tunc correcting a record is appealable.

Grover v. Hawthorne, (1912) 62 Or 65, 68, 116 P 100, 121 P 804.

The word "final" refers only to the proceedings in the court from which the appeal is taken. Crowell Elevator Co. v. Kerr Gifford & Co., Inc., (1925) 114 Or 675, 236 P 1047.

An order discharging the jury and granting a new trial was not appealable where no judgment was entered by court before the order was made. Heath v. Amore, (1956) 208 Or 533, 302 P2d 1017.

(1) Refusal to vacate judgment and grant a new trial. Denial of a new trial is not appealable order. First Nat. Bank v. McCullough, (1908) 50 Or 508, 93 P 366, 126 Am St Rep 758, 17 LRA(NS) 1105; Macartney v. Shipherd, (1911) 60 Or 133, 117 P 814; Goodeve v. Thompson, (1914) 68 Or 411, 416, 136 P 670, 137 P 744; Wallace v. Portland Ry., Light & Power Co., (1918) 88 Or 219, 159 P 974, 170 P 283.

An order denying a motion to set aside a final judgment amounts to a motion for a new trial and is not appealable. Purdy v. Winter's Estate, (1917) 85 Or 188, 159 P 1091, 166 P 536; Wallace v. Portland Ry., Light & Power Co., (1918) 88 Or 219, 159 P 974, 170 P 283.

It is doubtful whether or not an order denying a motion to set aside a judgment because it was rendered after the death of the defendant is appealable. Mitchell v. Schoonover, (1888) 16 Or 211, 17 P 867, 8 Am St Rep 282.

This section does not prevent the review of an order denying a motion for a new trial as an intermediate order on appeal from the judgment. Goodeve v. Thompson, (1914) 68 Or 411, 136 P 670, 137 P 744.

The refusal of the trial court to set aside a verdict and judgment is not appealable. In re Sneddon, (1915) 74 Or 586, 144 P 676.

A motion to vacate a divorce decree filed after the time prescribed by statute for such motions is in effect an application for a rehearing and denial is not appealable. Orr v. Orr, (1915) 75 Or 137, 143, 144 P 753, 146 P 964.

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.

The trial court should have set aside the default when it appeared that unresolved questions of fact remained in the case: Industrial Leasing Corp. v. Roberts Myrtlewood Factory, Inc., (1964) 237 Or 376, 391 P2d 744.

(2) Orders extending time to file appeal papers. An order extending beyond the term the time for presenting a bill of exceptions, made before adjournment of the term, operated to retain jurisdiction in the trial court so that a subsequent order made after the term was not appealable on the ground that it was void. Henrichsen v. Smith, (1896) 29 Or 475, 479, 42 P 486, 44 P 496.

An order vacating orders extending time to file transcript because the extending orders were invalid was not an appealable order. Johnson v. Jackson, (1928) 127 Or 300, 272 P 258.

7. Setting aside judgment and granting a new trial

An order granting a new trial is appealable. Martin v. Ore.-Wash. R.R. & Nav. Co., (1914) 73 Or 283, 144 P 104; Webb v. Isensee, (1917) 85 Or 148, 166 P 544.

The purpose of the provision allowing an appeal from an order setting aside a judgment and granting a new trial is to test the validity of the order before incurring the expense of a new trial. Goodeve v. Thompson, (1914) 68 Or 411, 136 P 670, 137 P 744; Oldland v. Ore. Coal & Nav. Co., (1909) 55 Or 340, 99 P 423, 102 P 596.

An order setting aside a judgment is deemed a final judgment for the purpose of review. Blumauer-Frank Drug Co. v. Horticultural Fire Relief, (1911) 59 Or 58, 112 P 1084; Delovage v. Old Ore. Creamery Co., (1915) 76 Or 430, 147 P 392, 149 P 317; Archambeau v. Edmunson, (1918) 87 Or 476, 171 P 186; Burke v. Beveridge, (1924) 112 Or 19, 228 P 100.

In view of this section the trial court should set aside a judgment and grant a new trial only when error appears of a nature that would require a reversal on appeal. Smith & Bros. Typewriter Co. v. McGeorge, (1914) 72 Or 523, 143 P 905; Rudolph v. Portland Ry., Light & Power Co., (1914) 72 Or 560, 144 P 93; Duniway v. Hadley, (1919) 91 Or 343, 178 P 942.

An order vacating a judgment for mistake, inadvertence or excusable neglect and allowing defendant to answer is not appealable. Bowman v. Holman, (1906) 48 Or 351, 86 P 792; Carmichael v. Carmichael, (1921) 101 Or 172, 199 P 385.

Ordinarily there is no right of appeal from a denial of a motion for a new trial. State Unemp. Comp. Comm. v. Bates, (1961) 217 Or 121, 227 Or 357, 341 P2d 119, 362 P2d 321; Clarizo v. Spada Distrib. Co., (1962) 231 Or 516, 373 P2d 689; Rough v. Lamb, (1965) 240 Or 240, 401 P2d 10; Krey v. Sarah Land Co., (1970) 256 Or 31, 470 P2d 154; State v. Newton, (1970) 1 Or App 419, 463 P2d 373.

The right to a separate appeal from an order granting a new trial does not exist where judgment has been rendered on the new trial. Oldland v. Ore. Coal & Nav. Co., (1910) 55 Or 340, 99 P 423, 102 P 596.

The provision that an order setting aside a judgment and granting a new trial shall be deemed a final judgment was not unconstitutional. Blumauer-Frank Drug Co. v. Horticultural Fire Relief (1911) 59 Or 58, 112 P 1084.

Where an order granting a new trial was modified by making the grant conditional, an order refusing to set aside the modifying order is not appealable. Davidson v. Almeda Mines Co., (1914) 71 Or 516, 142 P 778.

The provision relative to granting a new trial is not applicable to criminal actions. State v. Frazier, (1919) 94 Or 90, 180 P 521.

When an appeal is taken from an order granting a 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 County P.U.D., (1958) 213 Or 264, 323 P2d 664.

An order vacating former judgment rendered without jurisdiction over defendant and allowing defendant to answer was appealable. Finch v. Pac. Reduction and Chemical Mfg. Co., (1925) 113 Or 670, 234 P 296.

An order was not appealable that vacated a decree foreclosing an attorney's lien since it did not determine suit so as to prevent a judgment or decree therein. Mannix v. Harju, (1928) 125 Or 258, 266 P 238.

There was no statute which authorized a "new trial" in an equity suit. Id.

Where a new trial had been granted it was unnecessary to determine whether or not such an order was final. Fennell v. Hauser, (1934) 145 Or 351, 27 P2d 685, 28 P2d 245.

Defendants who acquiesced in an order granting a new trial were precluded from appealing therefrom. Id.

(1) Order setting aside a default judgment. An order which sets aside a default judgment and permits an answer to be filed is not an order granting a "new trial" within the meaning of this section. Taylor v. Taylor, (1912) 61 Or 257, 121 P 431, 964; Talbot & Casey v. Simons, (1931) 136 Or 74, 298 P 644.

An order refusing to vacate a default judgment is appealable. Nedry v. Herold, (1932) 141 Or 167, 11 P2d 548, 13 P2d 372; Pacific Sav. & Loan Assn. v. Bekins, (1934) 146 Or 385, 29 P2d 816.

As a general rule an order setting aside a default is of an intermediate character and not appealable. Flynn v. Davidson, (1916) 80 Or 502, 155 P 197, 157 P 788.

An order obtained by the plaintiff vacating and setting aside a default divorce decree is appealable by the defendant. Wade v. Wade, (1919) 92 Or 642, 176 P 192, 178 P 799, 182 P 136, 7 ALR 1143.

8. Dismissals and nonsuits

An order of dismissal ceases to be appealable after an application for leave to file an amended answer has been granted. Gaines v. Cyrus, (1893) 23 Or 403, 31 P 833.

A justice's judgment of dismissal for failure to make a case, with a subsequent order determining costs, is appealable from the time of the dismissal. Lemmons v. Huber, (1904) 45 Or 282, 284, 77 P 836.

An order dismissing a complaint upon the sustaining of a demurrer is not appealable. Giant Powder Co. v. Ore. W. Ry., (1909) 54 Or 325, 101 P 209, 103 P 501.

An order reinstating a cause after voluntary nonsuit is not appealable. First Christian Church v. Robb, (1914) 69 Or 283, 138 P 856.

An order dismissing four of the six causes of action with prejudice was not appealable. Durkheimer Inv. Co. v. Zell, (1939) 161 Or 434, 90 P2d 213.

9. Amount in controversy

Appellate jurisdication does not exist where the amount in controversy does not exceed the statutory sum. Freeman v. Cobb, (1924) 112 Or 472, 229 P 1102; Weir v. Mariott, (1931) 135 Or 214, 293 P 944, 295 P 449; State Bank v. Heider, (1932) 139 Or 185, 9 P2d 117; Ehrstrom v. Baum, (1938) 159 Or 299, 79 P2d 991.

The amount demanded in the complaint and controverted by defendant is the "amount in controversy." Libby v. So. Pac. Co., (1923) 109 Or 449, 219 P 604, 220 P 1017; Lowe v. Brown, (1925) 114 Or 426, 233 P 272, 235 P 395.

The $250 limitation refers to actions at law and is not applicable to a suit in equity. Garrett v. Hunt, (1926) 117 Or 673, 244 P 82, 245 P 321; Northwest Lbr. & Fuel Co. v. Plantz, (1928) 126 Or 69, 227 P 116, 268 P 763.

An improper counterclaim will be disregarded in ascertaining the amount in controversy. Eagle Point v. Hanscom, (1927) 121 Or 40, 252 P 399; McHugh v. Prudential Sav. & Loan Assn., (1931) 137 Or 136, 1 P2d 604.

An appeal would not lie where the amount in controversy was $250 and not in excess thereof. Libby v. So. Pac. Co., (1923) 109 Or 449, 219 P 604, 220 P 1017.

The meaning of "allowed" in this section is that the law forbids and will not permit an appeal other than in the cases described. Id.

The interposing of an equitable defense in an action at law renders the $250 limitation inapplicable. Outcault Advertising Co. v. Jones, (1925) 119 Or 214, 234 P 269, 239 P 1113.

A judgment of $50 for slander in an action demanding $5,000 was appealable. Lowe v. Brown, (1925) 114 Or 426, 233 P 272, 235 P 395.

In determining "the amount in controversy," the amount tendered is subtracted from the amount claimed in plaintiff's complaint. Vandermost v. Withrow, (1926) 117 Or 358, 243 P 1116.

The limitation of appealable claims to those exceeding $250 was to prevent the appeal of trivial cases, and the statute should be construed liberally for the purpose of carrying that purpose into effect. Weir v. Mariott, (1931) 135 Or 214, 293 P 944, 295 P 449.

The amount in controversy in garnishment proceedings must be determined from the amount sought to be garnisheed and not from the amount in the original action. Northwest Adjustment Co. v. Akers, (1933) 145 Or 341, 27 P2d 889.

10. Special statutory proceeding

Petition for review in circuit court under ORS 308.630 of assessment of utility property was a special statutory proceeding. State Tax Comm. v. Consumers' Heating Co., (1956) 207 Or 93, 294 P2d 887.

FURTHER CITATIONS: White v. East Side Mill Co., (1917) 84 Or 224, 161 P 969, 164 P 736; Scandinavian-Am. Bank v. Wentworth Lbr. Co., (1921) 101 Or 158, 199 P 626; McLean v. Sanders, (1932) 139 Or 144, 7 P2d 981; Benson v. Williams, (1943) 174 Or 404, 143 P2d 477, 149 P2d 549; Manke v. Nehalem Logging Co., (1956) 211 Or 211, 301 P2d 192, 315 P2d 539; Lenchitsky v. H. J. Sandberg Co., (1959) 217 Or 483, 343 P2d 523; Meyers v. Oasis Sanitarium, Inc., (1960) 224 Or 414, 356 P2d 159; State Hwy. Comm. v. Helliwell, (1961) 225 Or 588, 358 P2d 719; State Unemp. Comp. Comm. v. Bates, (1961) 227 Or 358, 362 P2d 321; Olman v. Prescott Corp., (1961) 228 Or 252, 364 P2d 624; Portland v. Therrow, (1962) 230 Or 275, 369 P2d 762; Dressler v. Isaacs, (1963) 236 Or 269, 387 P2d 364; Twilleager v. Modin, (1965) 240 Or 69, 398 P2d 181; State v. Horton, (1967) 248 Or 141, 432 P2d 518.

LAW REVIEW CITATIONS: 7 OLR 44; 13 OLR 258; 17 OLR 190; 36 OLR 253; 38 OLR 336; 4 WLJ 54.

19.020

NOTES OF DECISIONS

1. In general

This section constituted no limitation upon Ore. Const. Art. VII (0), §7. Sturgis v. Sturgis, (1908) 51 Or 10, 93 P 696.

This section is not applicable to a conviction in a criminal action based on a plea of guilty. Ex parte Harrell, (1910) 57 Or 95, 110 P 493.

2. "Any party to a judgment or decree"

"Any party" evidently refers to any person who is a party to the action. The Victorian, (1893) 24 Or 121, 32 P 1040, 41 Am St Rep 838.

There appears to be no limitation on the right of appeal from the circuit to the Supreme Court. Dechenbach v. Rima, (1904) 45 Or 500, 77 P 391, 78 P 666.

The state cannot appeal from refusal to vacate a divorce decree where it has no interest in the proceedings, in the absence of evidence of collusion. Orr v. Orr, (1915) 75 Or 137, 144 P 753, 146 P 964.

A claimant by deed intervening in escheat proceedings may not appeal from a judgment against the state that other defendants were heirs where no issues were decided between him and the heirs. State v. Butts, (1915) 78 Or 173, 151 P 722.

Where the state is not made a party to and does not appear in a divorce proceeding as required by law, the decree cannot be classed as one for want of an answer

described in this section. Smythe v. Smythe, (1916) 80 Or 150, 149 P 516, 156 P 785.

The state is not a party to a proceeding to adjust a claim under Workmen's Compensation Act and cannot appeal therefrom. Butterfield v. State Ind. Acc. Comm., (1924) 111 Or 149, 223 P 941, 226 P 216.

Where the Industrial Accident Commission is a party to a proceeding it has a right to appeal. Dragicevic v. State Ind. Acc. Comm., (1924) 112 Or 569, 230 P 354.

A corporation is not a party to a proceeding against its officer to produce corporate books and testify from them where it was not served. Damascus v. Home Coal Co., (1928) 127 Or 253, 271 P 729.

The word "party" must be understood in the ordinary legal sense and to embrace such persons only as become parties to the case in some mode prescribed by law so as to be bound by the proceeding. In re Grimes' Estate, (1943) 170 Or 204, 131 P2d 448.

An attorney who was engaged by claimant against an estate on a contigent fee was not a "party" to judgment denying the claim, and he had no right to appeal on his own behalf nor on his own behalf and for the benefit of the claimant. Id.

(1) A judgment or decree. The application of this section is the same whether appealing from a decree or from a judgment. Hahn v. Astoria Nat. Bank, (1912) 63 Or 1, 114 P 1134, 125 P 284.

A motion for a new trial is not a prerequisite to a right to an appeal from a judgment. National Council v. McGinn, (1914) 70 Or 457, 138 P 493.

Whether a circuit court decision on appeal from a county board of equalization is a judgment or decree within this section is doubted. Smith Sec. Co. v. Multnomah County, (1921) 98 Or 418, 192 P 654, 194 P 428.

All judgments and decrees are appealable except judgments or decrees given by confession or for want of an answer. Salem King's Prod. Co. v. La Follette, (1921) 100 Or 11, 196 P 416.

(2) Assignees. An assignee, who is assigned an interest in property after a decree has been rendered affecting the property, can appeal in the name of the assignor. Meyers v. Hot Lake Sanatorium Co., (1917) 82 Or 587, 161 P 697.

(3) Administrators, executors, guardians and trustees. A receiver may appeal from an order of the court directing him to pay over money when such order erroneously fixes the amount at more than is in his possession. Merriam v. Victory Placer Min. Co., (1900) 37 Or 321, 56 P 75, 58 P 37, 60 P 997.

An administrator has an appealable interest in an order refusing a license to sell estate land to pay debts. In re Smith's Estate, (1903) 43 Or 595, 600, 73 P 336, 75 P 133.

A guardian, against whom an order runs for the payment of suit money and alimony in a divorce suit against the ward only, is a party to the order and may appeal therefrom. Sturgis v. Sturgis, (1908) 51 Or 10, 14, 93 P 696, 131 Am St Rep 724, 15 LRA (NS) 1034.

The executor may appeal from that part of the decree settling his final account which allows and directs payment of an attorney's fee. In re Prince's Estate, (1926) 118 Or 210, 221 P 554, 246 P 713.

As a general rule an executor may appeal from a decree of probate court either refusing to admit a will to probate or disallowing or setting it aside. In re Hough's Will, (1926) 120 Or 223, 251 P 711.

In this state the right of a removed executor or administrator to appeal is well settled. State v. Tazwell, (1930) 132 Or 122, 283 P 745.

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

A judgment debtor who has been adjudged a bankrupt but who has not yet received a discharge may appeal. Id.

(4) Separate or joint appeals. Joinder of defaulting defendants as appellants with other appealing defendants does not impair the appeal if their interests are not adverse to each other but adverse to plaintiff. Commercial Nat. Bank v. Portland, (1900) 37 Or 33, 54 P 814, 60 P 563; Bronn v. Soules, (1932) 140 Or 308, 11 P2d 284, 13 P2d 623.

There may be as many separate appeals from a judgment or decree as there are different active parties to the suit or action. Crane v. Ore. R.R. & Nav. Co., (1917) 66 Or 317, 133 P 810; Everding & Farrell v. Toft, (1916) 82 Or 1, 150 P 757, 160 P 1160.

Any one of several defendants against whom a joint and several judgment has been rendered may appeal therefrom even though he is a member of a copartnership and the firm does not appeal. Cox v. Alexander, (1897) 30 Or 438, 46 P 794.

The dismissal of defendant's appeal does not necessitate a dismissal of plaintiff's cross-appeal. Crane v. Ore. R.R. & Nav. Co., (1913) 66 Or 317, 133 P 810.

Defendants who opposed grant of a new trial may appeal although others who moved for it are deemed to have acquiesced in it. Fennell v. Hauser, (1934) 145 Or 351, 27 P2d 685, 28 P2d 245.

A joint appeal of claimants seeking participation in distribution of funds deposited by indemnity company was upheld. Earle v. Holman, (1936) 154 Or 578, 55 P2d 1097, 61 P2d 1242.

(5) The effect of accepting judgment. A party cannot claim the benefit of a judgment or decree and appeal from it. Moore v. Floyd, (1872) 4 Or 260; Portland Constr. Co. v. O'Neil, (1893) 24 Or 54, 32 P 764; Roots v. Boring Junction Lbr. Co., (1907) 50 Or 298, 311, 92 P 811, 94 P 182; Plinsky v. Nolan, (1913) 65 Or 402, 133 P 71; Carpenter v. Carpenter, (1936) 153 Or 584, 56 P2d 305, 57 P2d 1098, 58 P2d 507.

In condemnation proceedings plaintiff waives right to appeal by taking possession of the land after judgment. Oregon Elec. Ry. v. Terwilliger Land Co., (1908) 51 Or 107, 93 P 930; Portland v. Schmid, (1917) 82 Or 465, 161 P 560.

The right to appeal from a decree refusing to foreclose a mechanic's lien is waived by bringing an attachment action after entry of the decree where the right of attachment is conditioned upon the claim not being secured by a lien or mortgage. Ehrman v. Astoria Ry., (1894) 26 Or 377, 38 P 306.

Defendant did not waive his right to appeal from an order granting a new trial by filing an answer to the amended complaint. Scott v. Ford, (1908) 52 Or 288, 97 P 99.

Where defendant satisfied the judgment after perfecting an appeal, the appeal was dismissed. Baker v. Stacy, (1916) 81 Or 10, 157 P 1071.

(6) Acceptance in part. Plaintiff, whose foreclosure decree also ordered that a house upon such premises be sold to satisfy a mechanic's lien, may sue out an execution upon such decree, and at the same time appeal from the order for sale of the house. Inverarity v. Stowell, (1882) 10 Or 261, 266.

A sum admitted to be due and tendered into court may be accepted without waiving appeal from the judgment. Portland Constr. Co. v. O'Neil, (1893) 24 Or 54, 32 P 764.

An appeal cannot be taken from part of a judgment and the balance of it accepted. Bush v. Mitchell, (1895) 28 Or 92, 41 P 155.

Right of appeal is not waived where the amount accepted would accrue to appellant in any event. Merriam v. Victory Placer Min. Co., (1900) 37 Or 321, 324, 56 P 75, 58 P 37, 60 P 997.

Appellant cannot accept the provisions of an interdependent judgment which is in his favor and appeal from the

remainder. State v. Wells Fargo & Co., (1913) 64 Or 421, 126 P 611, 130 P 983.

Plaintiff waived his right to appeal by assigning to the surety on his appeal bond his interest in deposit made by defendant with clerk of lower court. Hodgson v. Martin, (1918) 90 Or 105, 166 P 929, 175 P 671.

Acceptance of monthly instalment on award was not a waiver of party's right to question by appeal the decree as to cutody of the minor children. Wilson v. Wilson, (1965) 242 Or 201, 407 P2d 898, 408 P2d 940.

3. "Other than a judgment or decree given by confession or for want of an answer"

A judgment "for want of an answer" can only be taken when it appears that defendant has been duly served with summons and has failed to answer the complaint within the time allowed by law. Smith v. Ellendale Mill Co., (1870) 5 Or 70; Trullenger v. Todd, (1873) 5 Or 36; Colwell v. Chernabaeff, (1971) 258 Or 223, 482 P2d 157.

A consent decree is equivalent to a decree by "confession." Schmidt v. Ore. Gold Min. Co., (1895) 28 Or 9, 40 P 406, 1014; Schoren v. Schoren, (1924) 110 Or 272, 214 P 885, 222 P 1096.

An agreement that the court determine the issues during vacation did not preclude an appeal from the findings. Tillamook v. Tillamook County, (1911) 57 Or 558, 109 P 577, 112 P 1134.

A judgment on testimony taken after failure to answer is one "for want of an answer." State v. Simpson, (1914) 69 Or 93, 137 P 750, 138 P 467.

Where an order of default leaves nothing for court to do but enter judgment for plaintiff, such judgment is a judgment "for want of an answer." Rockwood & Co. v. Parrott & Co., (1935) 149 Or 611, 41 P2d 1081.

(1) Judgment or decree given by consent. An appeal does not lie from a judgment or decree given by consent. Rader v. Barr, (1892) 22 Or 495; Twitchell v. Risley, (1910) 56 Or 226, 107 P 459; East Side Mill Co. v. Feldman, (1915) 77 Or 644, 152 P 266; Lengele v. Moore, (1915) 77 Or 647, 152 P 267; Lombard v. Bietau, (1918) 90 Or 182, 167 P 310, 174 P 1165.

Where plaintiff filed an alternative motion for a judgment for a less amount if the larger was not allowed, they waived their right to appeal from a judgment entered for the less amount. Boyer v. Burton, (1916) 79 Or 662, 149 P 83, 156 P 281.

Where defendant's attorney states in open court that one of the two claimants was entitled to recover, the admission is equivalent to a consent decree and not appealable. Johnson v. Paulson, (1916) 83 Or 238, 154 P 685, 163 P 435.

A decree on stipulation that pro forma decree may be entered "without prejudice to either party on the appeal of this case" is not a "decree by confession." Graham v. Graham, (1919) 92 Or 6, 179 P 661.

(2) "For want of an answer." A judgment for want of an answer is not appealable. Fassman v. Baumgartner, (1869) 3 Or 469; Smith v. Ellendale Mill Co., (1870) 4 Or 70; Trullenger v. Todd, (1873) 5 Or 36; Askren v. Squire, (1896) 29 Or 228, 45 P 779; State v. Leasia, (1904) 45 Or 410, 78 P 328; State v. Simpson, (1914) 69 Or 93, 137 P 750, 138 P 467; Pillsbury v. McGarry, (1914) 69 Or 261, 138 P 836; Nedry v. Herold, (1932) 141 Or 167, 11 P2d 548, 13 P2d, 372; Pacific Sav. & Loan Assn. v. Bekins, (1934) 146 Or 385, 29 P2d 816; Rockwood & Co. v. Parrott & Co., (1935) 149 Or 611, 41 P2d 1081.

Appeal lies from void default judgment or decree but not from one merely voidable or erroneous. Trullenger v. Todd, (1873) 5 Or 36; Askren v. Squire, (1896) 29 Or 228, 45 P 779; Kerschner v. Smith, (1927) 121 Or 469, 236 P 272, 256 P 195; Pacific Sav. & Loan Assn. v. Bekins, (1934) 146 Or 385, 29 P2d 816.

Defendant may appeal from order refusing to vacate default judgment. Nedry v. Herold, (1932) 141 Or 167, 11 P2d 548, 13 P2d 372; Pacific Sav. & Loan Assn. v. Bekins, (1934) 146 Or 385, 29 P2d 816.

Sufficiency of a complaint cannot be raised on appeal from judgment for want of answer. Weaver v. So. Ore. Co., (1897) 30 Or 348, 48 P 171.

The state may appeal from a divorce decree wherein the district attorney did not answer, was not served and did not appear before the court. Smythe v. Smythe, (1916) 80 Or 150, 149 P 516, 156 P 785, Ann Cas 1918D, 1094.

(3) What constitutes an "answer." A demurrer is an answer within the meaning of this section. Kearns v. Follansby, (1888) 15 Or 596, 16 P 478; Hendy Machine Works v. Portland Sav. Bank, (1893) 24 Or 60, 32 P 1036; Willis v. Marks, (1896) 29 Or 493, 45 P 293; Brownell v. Salem Flouring Mills Co., (1906) 48 Or 525, 87 P 770.

A motion calling attention to a defective statement in a pleading does not present an issue of law or fact and is not an "answer." Brownell v. Salem Flouring Mills Co., (1906) 48 Or 525, 87 P 770; Multnomah County v. Faling, (1909) 55 Or 45, 104 P 964.

Any pleading by defendant that interposes an issue of fact or of law is an "answer." Brownell v. Salem Flouring Mills Co., (1906) 48 Or 525, 87 P 770.

Defendant is in default of answer when his answer is struck out for want of compliance with practice rules and he fails to comply with conditions imposed on leave to answer anew. Kosher v. Stuart, (1913) 64 Or 123, 121 P 901, 129 P 491.

4. Judgments in inferior courts

A judgment "for want of an answer" is not used in the statute relating to appeals from the justice court to the circuit court in the same sense as it is used in this statute. Long v. Sharp, (1875) 5 Or 438.

A default judgment in a justice's court is not appealable. Meinert v. Harder, (1901) 39 Or 609, 65 P 1056.

5. "Appellant," "respondent" and "adverse party"

An intervener in a foreclosure suit who consented to abide the result of the litigation was not a party to the decree and not an adverse party within the statute. Shirley v. Birch, (1888) 16 Or 1, 18 P 344.

Third persons may appeal from a judgment wherein they become parties by motion or such other way as in the discretion of the trial court seems proper. Scandinavian-Am. Bank v. Wentworth Lbr. Co., (1921) 101 Or 158, 199 P 626.

Parties appealing from an order removing them as administrator and administratrix should be designated as appellants and the opposing parties as respondents. In re Winters' Estate, (1938) 159 Or 637, 80 P2d 714, 81 P2d 140.

6. "Title of the action or suit"

The object of the title is to identify the parties with the cause of action and is treated as formal in character. Butterfield v. State Ind. Acc. Comm., (1924) 111 Or 149, 233 P 941, 226 P 216.

FURTHER CITATIONS: Whipple v. So. Pac. Co., (1899) 34 Or 370, 55 P 975; In re Young's Estate, (1911) 59 Or 348, 116 P 95, 1060 Ann Cas 1913B, 1310; Macartney v. Shipherd, (1911) 60 Or 133, 117 P 814, Ann Cas 1913D, 1257; First Christian Church v. Robb, (1914) 69 Or 283, 138 P 856; Barton v. Young, (1915) 78 Or 215, 152 P 876; Ter Har v. Backus, (1970) 256 Or 288, 473 P2d 143.

ATTY. GEN. OPINIONS: Who is authorized to appeal from a modification of divorce decree relative to payment of alimony to one committed to the Oregon State Hospital, 1946-48, p 193.

LAW REVIEW CITATIONS: 3 OLR 259; 13 OLR 258, 346; 36 OLR 253.

19.023

NOTES OF DECISIONS

1. In general

Under this section a defendant cannot appeal from part of a judgment rendered in a proceeding to improve streets, but he must appeal from the whole thereof. Portland v. Kamm, (1874) 5 Or 362.

Notice of appeals from findings of the Industrial Accident Commission is not governed by this section. Streby v. State Ind. Acc. Comm., (1923) 107 Or 314, 215 P 586.

The procedure outlined in the Civil Code where applicable is made a part of the Criminal Code by reference to specific sections or chapters. State v. Archerd, (1933) 144 Or 309, 24 P2d 5.

A notice of appeal from a judgment or decree prevents the trial court from amending such judgment or decree so as to substantially affect the rights of the parties without their consent, even though a stay of proceedings has not been ordered. Caveny v. Asheim, (1954) 202 Or 195, 274 P2d 281.

Circuit court cannot dismiss an appeal to the Supreme Court. Peterson v. Peterson, (1956) 208 Or 131, 292 P2d 130, 300 P2d 443.

Dismissal of appeal because of petitioner's financial inability to furnish bond, filing fees or transcript is deprival of equal protection under Federal Constitution. Daugharty v. Gladden, (1957) 257 F2d 750.

2. "In a manner prescribed in this section"

The right of appeal is statutory and the requirements of the statute must be strictly followd. Keeley v. Keeley, (1920) 97 Or 596, 192 P 490; Ewen v. Smith, (1937) 156 Or 669, 69 P2d 523.

It is not the policy of the courts to dismiss appeals upon merely technical grounds. In re Water Rights of Willow Creek, (1926) 119 Or 155, 236 P 487, 239 P 123.

Substantial compliance with the statute is required. Brown v. Ritterman, (1937) 156 Or 405, 67 P2d 774.

3. Notice in writing

Notice and the serving and filing thereof in time are jurisdictional and prerequisite to appeal. Dowell v. Bolt, (1904) 45 Or 89, 75 P 714; Fisher v. Portland Ry., Light & Power Co., (1915) 74 Or 229, 137 P 763, 143 P 992, 145 P 277; McCargar v. Moore, (1918) 89 Or 597, 175 P 77; Everding & Farrell v. Gebhardt Lbr. Co., (1918) 90 Or 207, 175 P 611, 176 P 186; Haas v. Scott, (1925) 115 Or 580, 239 P 202; Union Central Life Ins. Co. v. Deschutes Valley Loan Co., (1932) 139 Or 222, 3 P2d 536, 8 P2d 587.

The 1943 amendment substituted the notice of appeal for the filing of the transcript as the event which confers jurisdiction on appeal. Martin v. Harrison, (1947) 182 Or 121, 180 P2d 119, 186 P2d 534; Pond v. Jantzen Knitting Mills, (1947) 187 Or 697, 180 P2d 115.

Waiver will not dispense with service and filing of notice. Oliver v. Harvey, (1874) 5 Or 360; Wolf v. Smith, (1876) 6 Or 73; Rodman v. Manning, (1908) 50 Or 506, 508, 93 P 366; Barde v. Wilson, (1909) 54 Or 68, 102 P 301.

Neither party can evade the provisions as to service of notice of appeal within the prescribed time. Orr v. Orr, (1915) 75 Or 137, 144 P 753, 146 P 964.

The notice of appeal must show on its face that all parties whose interests may be affected have been joined as appellants or named and served as adverse parties. Silbaugh v. Guardian Bldg. & Loan Assn., (1940) 164 Or 286, 97 P2d 943, 99 P2d 1017, 101 P2d 420.

Notice of appeal is not effective until filed. Taylor v. Lapham, (1902) 41 Or 479, 69 P 439; Union Central Life Ins. Co. v. Deschutes Valley Loan Co., (1932) 139 Or 22, 3 P2d 536, 8 P2d 587.

Filing of a transcript of testimony was not a jurisdictional requirement; timely service and filing of a notice of appeal were sufficient to confer jurisdiction on the Supreme Court. In re Clark, (1958) 214 Or 24, 323 P2d 334.

4. "Adverse party or parties" to be served

An "adverse party" is one whose interest is in conflict with the modification or reversal sought by the appeal. Stuller v. Baker County, (1897) 30 Or 294, 47 P 705; Alliance Trust Co. v. O'Brien, (1897) 32 Or 333, 50 P 801, 51 P 640; Conrad v. Pac. Packing Co., (1899) 34 Or 337, 49 P 659, 52 P 1134, 57 P 1021; Templeton v. Morrison, (1913) 66 Or 493, 131 P 319, 135 P 95; Barton v. Young, (1915) 78 Or 215, 152 P 876; In re Prince's Estate, (1926) 118 Or 210, 221 P 554, 246 P 713; Perry v. Mount, (1932) 139 Or 694, 10 P2d 606; Silbaugh v. Guardian Bldg. & Loan Assn., (1940) 164 Or 286, 97 P2d 943, 99 P2d 1017, 101 P2d 420; In re Brooks' Estate, (1941) 167 Or 428, 118 P2d 103.

All parties who are adverse must be served with notice. In re Waters of Chewaucan R., (1918) 89 Or 659, 171 P 402, 175 P 421; Temminck v. Doering, (1920) 97 Or 145, 191 P 348; Masters v. Bidler, (1921) 101 Or 322, 198 P 912.

Where the only possible modification would be favorable to the one not served or if the situation cannot be made worse for him on appeal, it is not necessary to serve him with notice as provided by this section. Oliver v. Jordan Valley Land & Cattle Co., (1933) 143 Or 249, 16 P2d 17, 22 P2d 206; Vaughan v. Kolb, (1934) 148 Or 491, 37 P2d 435.

A mortgagee is not an adverse party in an appeal from the latter part of a decree declaring a mortgage void and fixing the priority of several lien holders. Lillienthal & Co. v. Caravita, (1887) 15 Or 339, 15 P 280.

An intervenor in a suit for foreclosure, having entered into a stipulation which precludes him from being heard, is not an adverse party. Shirley v. Birch, (1888) 16 Or 1, 18 P 344.

All depositors of grain in a warehouse are necessary parties to an appeal in a suit in equity to determine their respective rights. Hamilton v. Blair, (1892) 23 Or 64, 31 P 197.

One is not an adverse party whose interests are identical with those of the appellant. The Victorian, (1893) 24 Or 121, 32 P 1040.

The state is not an adverse party where a contract is found to be usurious and a decree rendered forfeiting the

principal of the loan to the state for the school fund. Barger v. Taylor, (1895) 30 Or 228, 42 P 615, 47 P 618.

Who are adverse parties is determined from conditions as they exist when the appeal is taken. Osborn v. Logus, (1896) 28 Or 302, 304, 37 P 456, 38 P 190, 42 P 997.

A receiver is not an adverse party. Medynski v. Thesis, (1900) 36 Or 397, 59 P 871.

One who has taken an assignment during litigation of the claim of an adverse party is not thereby made an adverse party. Id.

One who was not a proper or necessary party to the action in the first instance is not an adverse party to the appeal from the judgment. In re Smith's Estate, (1904) 43 Or 595, 73 P 336, 75 P 133.

"Adverse party" means one adverse on the record. In re Young's Estate, (1911) 59 Or 348, 116 P 95, 1060, Ann Cas 1913B, 1310.

On appeal from an order making allowances for witness fees, traveling expenses and attorney's fees, notice should be given to all parties in whose favor allowances were made. State v. McDonald, (1912) 63 Or 467, 128 P 835, Ann Cas 1915A, 201.

Defendants who are debtors on a note and against whom a personal judgment is rendered are not "adverse parties" of codefendant-appellants. United States Nat. Bank v. Shefler, (1915) 77 Or 579, 143 P 51, 152 P 234.

One whose discharge in bankruptcy would be affected by a modification is adverse to appellant. Van Zandt v. Parson, (1916) 81 Or 453, 455, 159 P 1153.

Notice of appeal need not be served upon the district attorney in a divorce action where the state has not intervened by answer or otherwise and the only effect of a reversal would be to prevent a divorce. De Foe v. De Foe, (1918) 88 Or 549, 169 P 128, 172 P 980.

The Supreme Court cannot admit interveners who were strangers to the proceedings below. In re Waters of Chewaucan R., (1918) 89 Or 659, 171 P 402, 175 P 421.

The district attorney is an "adverse party" in a divorce suit in which the defendant fails to appear. Keeley v. Keeley, (1920) 97 Or 596, 192 P 490.

In suit to set aside fraudulent conveyance from mother to son, the mother is an "adverse party" in respect to son on appeal. First Nat. Bank v. Halliday, (1921) 98 Or 649, 193 P 1029.

Where the reversal of a judgment would not injuriously affect a party, he need not be served with notice of appeal. Masters v. Bidler, (1921) 101 Or 322, 198 P 912.

Only adverse parties are necessary parties in an appeal. In re Water Rights of Burnt R., (1925) 116 Or 525, 241 P 988.

One who is merely a nominal party in the lower court is not an "adverse party" on appeal. Laur v. Walla Walla Irr. Co., (1926) 118 Or 520, 247 P 753.

Notice of appeal must be served upon every adverse party in water right adjudications. Lloyd v. Brown, (1931) 138 Or 58, 288 P 505, 5 P2d 83.

The service of notice of appeal on a party does not in itself make such party "adverse." French v. Christner, (1944) 173 Or 158, 135 P2d 464, 143 P2d 674.

Codefendants who have been granted an involuntary nonsuit are not adverse parties within the meaning of this section. Morey v. Redifer, (1953) 204 Or 194, 264 P2d 418, 282 P2d 1062.

In appeal from post-conviction proceeding Supreme Court did not acquire jurisdiction where service of notice of appeal was made on counsel and not on prisoner. Holland v. Gladden, (1962) 229 Or 573, 368 P2d 331.

(1) "Party" as related to judgment or decree. To be entitled to notice of appeal, a person must have become a party in some manner recognized by law. Hafer v. Medford & Crater Lake R. Co., (1911) 60 Or 354, 117 P 1122, 119 P 337; In re Brooks' Estate, (1941) 167 Or 428, 118 P2d 103; French v. Christner, (1943) 173 Or 158, 135 P2d 464; Graves v. Shippely, (1959) 215 Or 616, 300 P2d 442, 337 P2d 347.

Anyone not a party to the proceeding cannot be made so by serving a notice of appeal upon him, nor is one who is not a party entitled to prosecute an appeal. In re Water Rights of Burnt R., (1925) 116 Or 525, 241 P 988.

An attorney who represents a party in litigation and claims an attorney's lien for such services is not a party to the judgment rendered in such litigation. French v. Christner, (1943) 173 Or 158, 135 P2d 464, 143 P2d 674.

(2) "As have appeared in the action or suit." Only those adverse parties who have appeared in the action or suit need be served with notice of appeal. United States Inv. Corp. v. Portland Hospital, (1902) 40 Or 523, 64 P 644, 67 P 194, 56 LRA 627; In re Mendenhall's Will, (1903) 43 Or 542, 72 P 318, 73 P 1033; Williams v. Pac. Sur. Co., (1914) 70 Or 203, 139 P 914; Anderson v. Morse, (1924) 110 Or 39, 222 P 1083; Holder v. Harris, (1927) 121 Or 432, 248 P 145, 253 P 869, 254 P 1021; Heider v. Unicume, (1933) 142 Or 410, 14 P2d 456, 20 P2d 384; Drake Lbr. Co. v. Lindquist, (1946) 179 Or 402, 170 P2d 712.

Parties who appeared by counsel and resisted the granting of an order will be assumed to be adverse parties, entitled to notice of appeal from such order. State v. McDonald, (1912) 63 Or 467, 471, 128 P 835, Ann Cas 1915A, 201.

Service of notice of appeal upon a party who did not appear creates no additional rights in him. State v. Simpson, (1914) 69 Or 93, 137 P 750, 138 P 467.

Parties who did not file an answer or give written notice of appearance are not entitled to notice of appeal, even though they appeared as witnesses. In re Failing Will, (1922) 105 Or 365, 208 P 715.

In proceedings for an extension of time to perfect water rights, appropriators failing to contest application could not be considered as having appeared, and it was unnecessary to serve them with notice of appeal from a circuit court decision setting aside an order of the State Engineer. Broughton's Estate v. Central Ore. Irr. Dist., (1940) 165 Or 435, 101 P2d 425, 108 P2d 276.

Where the State Industrial Accident Commission made payments to plaintiff who brought suit against the persons responsible for the injury and the commission was given a lien for such advances on any money recovered by plaintiff, the commission was not an "adverse party" since it did not appear in the case. French v. Christner, (1944) 173 Or 158, 135 P2d 464, 143 P2d 674.

Where society to which child was committed as a dependent made no appearance and there was nothing to indicate that the society was adverse to the defendant parents of the child, service of notice of appeal on the society was not necessary. State v. Young, (1947) 180 Or 187, 174 P2d 189.

(3) Death of party. Failure to cause substitution for an adverse party deceased before appeal and to serve the substitute, does not impair the appeal where other jointly adverse parties were served and the decree must be affirmed or reversed as to all. In re Young's Estate, (1911) 59 Or 348, 116 P 95, 1060, Ann Cas 1913B, 1310.

Successor or representative of deceased trustee under a mortgage was necessary party to mortgagor's appeal from order overruling motion to vacate foreclosure decree. Prudential Loan Co. v. Smith, (1935) 150 Or 27, 41 P2d 1083, 42 P2d 919.

(4) Coparties with appellant. Where one of two plaintiffs or defendants appeals the other is an adverse party if an appeal would unfavorably affect his rights. Lane v. Wentworth, (1914) 69 Or 242, 133 P 348, 138 P 468; Darcy v. Sanford, (1916) 81 Or 323, 159 P 567; French v. McKean, (1916) 81 Or 683, 160 P 1151; Colby v. Portland, (1917) 85 Or 359, 166 P 537.

Where no right of contribution existed between joint

tortfeasors, nonappealing defendants were not "adverse parties" as to appealing defendants. French v. Christner, (1944) 173 Or 158, 135 P2d 464, 143 P2d 674; Graves v. Shippely, (1959) 215 Or 616, 300 P2d 442, 337 P2d 347.

Service of notice of appeal upon one of two persons who appear in the suit as partners is service upon the firm. Shirley v. Birch, (1888) 16 Or 1, 18 P 344.

In suit to enjoin a county and its officers from enforcing a tax to pay illegal warrants, the county is an adverse party to be served with the notice of appeal by the defendant officers from a decree granting the injunction. Stuller v. Baker County, (1897) 30 Or 294, 47 P 705.

Notice to nonappealing joint defendants is not required where some of them appeal from a joint decree quieting title against all. South Portland Land Co. v. Munger, (1900) 36 Or 457, 460, 54 P 815, 60 P 5.

One of two defendants against whom a joint judgment for personal injuries has been rendered is not an adverse party in appeal by his codefendant. Smith v. Burns, (1914) 71 Or 133, 135 P 200, 142 P 352.

An appeal by one partner necessitated the service of notice on his copartner where both were defendants in the lower court and the right of contribution existed between them. Southwestern Sur. Ins. Co. v. Foster, (1917) 85 Or 206, 165 P 1176.

A codefendant who is nonsuited is not an adverse party upon appeal by the other codefendant. Colby v. Portland, (1917) 85 Or 359, 166 P 537.

Codefendants of vendee were entitled to notice of an appeal taken from a decree forfeiting a contract for the sale of land. Temminck v. Doering, (1920) 97 Or 145, 191 P 348.

Where verdict and judgment were rendered against one of two defendants and silent as to the other, the latter was not an adverse party in an appeal by the former. Lidfors v. Pflaum, (1925) 115 Or 142, 205 P 277, 236 P 1059.

A defendant appealing from the whole of a decree should serve notice on codefendants who are interested in preserving it as it affects them. Adams v. Kennard, (1927) 122 Or 84, 222 P 1092, 227 P 738, 253 P 1048.

A codefendant is not an adverse party to the other defendants to whom he has sold his interest. Van Lydegraf v. Tyler, (1929) 128 Or 236, 271 P 740, 273 P 719.

Where joint and several judgment in favor of plaintiff was entered against two defendants and a third defendant was rendered liable on the same obligation in the same suit, an appeal by the third defendant necessitated service of notice of appeal on one of the first two defendants. Parson v. Ranes, (1934) 148 Or 197, 35 P2d 986.

Codefendants are adverse parties where defendant appeals from order overruling his motion to vacate decree foreclosing mortgage securing codefendants' claims. Prudential Loan Co. v. Smith, (1935) 150 Or 27, 41 P2d 1083, 42 P2d 919.

If the record shows that judgment as to nonappealing defendants is void, they are not adverse parties. Silbaugh v. Guardian Bldg. & Loan Assn., (1940) 164 Or 286, 97 P2d 943, 99 P2d 1017, 101 P2d 420.

Necessity for service upon nonappealing defendants is not dispensed with because they are represented by the same attorneys as the appealing defendant. Id.

Where apellant and nonappealing parties were jointly and severally liable, the latter were "adverse parties." Silbaugh v. Guardian Bldg. & Loan Assn., (1940) 164 Or 286, 97 P2d 943, 99 P2d 1017, 101 P2d 420. **But see** Davis v. First Nat. Bank, (1917) 86 Or 474, 161 P 931, 168 P 929.

(5) Parties' sureties. Sureties on a bond given in an action to release property seized are not adverse parties on an appeal from a judgment against both the principal and sureties taken by the principal. The Victorian, (1893) 24 Or 121, 32 P 1040, 41 Am St Rep 838; Spitzer v. The Annette Rolph, (1924) 110 Or 461, 218 P 748, 223 P 253.

A joint surety upon a redelivery bond is an adverse party to an appeal taken by his cosurety from a judgment against both sureties and their principal. Templeton v. Morrison, (1913) 66 Or 493, 131 P 319, 135 P 95.

Appellant's surety on a former appeal of the same case and against whom judgment was entered is not an adverse party since his interests are in common with those of the appellant. Williams v. Pac. Sur. Co., (1914) 70 Or 203, 139 P 914.

(6) Administrative and probate appeals. In a proceeding for accounting under will and to establish right as sole residuary beneficiary, where the executor appealed from decree for claimant, contestants of claimant's right as residuary beneficiary need not be served. In re Neil's Estate, (1923) 107 Or 156, 214 P 338.

Participation in the trial in the circuit court by a surety on an administrator's bond, after the denial of its motion to dismiss the appeal from an order approving the final account of an administrator, confers upon the circuit court jurisdiction over the surety. In re Mannix Estate, (1934) 146 Or 187, 29 P2d 364.

The surety of an administrator is not an adverse party to an appeal by a claimant from the settlement of final account. Id.

An only heir's assignee, who petitioned for removal of claimant as administrator and opposed his claim against the estate, became a "party" in a manner recognized by law and was entitled to notice of claimant's appeal from the order disallowing his claim. In re Brooks' Estate, (1941) 167 Or 428, 118 P2d 103.

(7) Stockholder. A stockholder is an adverse party in an appeal taken from a judgment disallowing a claim against the corporation in the hands of a receiver, who was appointed in a suit commenced by stockholder, praying for dissolution of the corporation. Hafer v. Medford & Crater Lake R. Co., (1911) 60 Or 354, 117 P 1122, 119 P 337.

(8) Lien suits. Where one appeals from a decree declaring his lien invalid, all other parties to the suit claiming an interest in the property and whose claims have not been declared invalid are adverse parties. Osborn v. Logus, (1894) 28 Or 302, 37 P 456, 38 P 190, 42 P 997; Barton v. Young, (1915) 78 Or 215, 152 P 876.

Where a property owner appeals from a decree foreclosing several liens of equal rank, the failure to include one of the lien holders in the appeal does not require a dismissal on appeal. Watson v. Noonday Min. Co., (1900) 37 Or 287, 55 P 867, 58 P 36, 60 P 994.

A contractor for a property owner was not an adverse party in an appeal taken by the latter from a decree foreclosing a mechanic's lien in a suit instituted by a material man. Cooper Mfg. Co. v. Delahunt, (1900) 36 Or 402, 51 P 649, 60 P 1.

5. Appeal from "some specified part thereof"

A decree of interpleader is not severable so as to permit the defendant to appeal from the part discharging the plaintiff from liability. New Zealand Ins. Co. v. Smith, (1902) 41 Or 466, 69 P 268.

A party to a judgment may appeal from some specified part thereof. Oregon Elec. Ry. v. Terwilliger Land Co., (1908) 51 Or 107, 93 P 334, 93 P 930.

An appeal will lie from a part of a judgment or decree when an issue distinct, entire and complete has been formed between some of the parties upon which a final judgment or decree has been given affecting only the interest and rights of such parties. Everding & Farrell v. Toft, (1916) 82 Or 1, 150 P 757, 160 P 1160.

Plaintiff in divorce action may appeal from that part of the decree relating to property rights without appealing from the whole thereof. Crumbley v. Crumbley, (1920) 94 Or 617, 186 P 423.

6. Upon whom notice may be served, and mode, time and place of service

Notices of appeal to the Supreme Court are served by copy. Vedder v. Marion County, (1892) 22 Or 264, 29 P 619.

Service of a notice of appeal on an agent of a corporation on whom a summons could legally have been served is sufficient. Oregon Ry. & Nav. Co. v. Swinburne, (1894) 26 Or 262, 38 P 1030.

A sheriff cannot serve the notice of appeal in a case in which he is an appellant. Muckle v. Columbia County, (1910) 56 Or 146, 108 P 120.

Notice of appeal from a decree dismissing a proceeding to review the action of the county court in establishing a county road is sufficiently served when served on the county clerk to whom directed, service on the district attorney being unnecessary. Palmer Lbr. Co. v. Wallowa County, (1911) 60 Or 342, 118 P 1013.

Plaintiff's service of notice of appeal upon one of defendant's attorneys was sufficient. Ogden v. Hoffman, (1918) 88 Or 503, 172 P 503.

A notice of appeal may be served by mail on attorney residing in another county though parties themselves reside in same place. First Nat. Bank. v. Wegener, (1919) 94 Or 318, 181 P 990, 186 P 41.

An attempted service by mail on attorneys residing without the state representing a corporation within the state is of no avail. Temminck v Doering, (1920) 97 Or 145, 191 P 348.

A notice of appeal served on and accepted by an associate attorney hired for trial of cause is sufficient. Lehman v. Knott, (1921) 100 Or 240, 187 P 1109.

It is not the date on which judgment is rendered but the date it is entered from which time is reckoned for serving notice. Haberly v. Farmers' Mut. Fire Relief Assn., (1930) 135 Or 32, 287 P 222, 293 P 590, 294 P 594.

Service of notice of appeal before entry of judgment is not premature. Banfield v. Schulderman, (1931) 137 Or 256, 299 P 323, 3 P2d 116. **But see** Haberly v. Farmers' Mut. Fire Relief Assn., (1930) 135 Or 33, 287 P 222, 293 P 590, 294 P 594.

The delivery by an agent of an express company of a notice of appeal may constitute a valid service of the notice. Storm v. Thompson, (1937) 155 Or 686, 64 P2d 1309.

This section does not require written endorsement of acceptance of service but delivery alone constitutes valid service. Id.

This section must be construed with OCLA 10-603 [ORS 16.780] as to who may serve a notice of appeal. Welch v. Arney, (1950) 189 Or 277, 219 P2d 1086.

ORS 16.770 and 16.800 are applicable to this section, allowing service upon adverse party's attorney. Bartley v. Doherty, (1960) 225 Or 15, 351 P2d 71, 357 P2d 521.

When a party may "cause a notice" to be served, it is reasonable to infer he is authorized to do it himself. Curtis v. Stone, (1963) 234 Or 481, 379 P2d 551.

7. Proof of service

The notice of appeal must be accompanied by proof of service indorsed thereon. Briney v. Starr, (1876) 6 Or 207; Henness v. Wells, (1888) 16 Or 266, 19 P 121; Muckle v. Columbia County, (1910) 56 Or 146, 108 P 120.

The transcript must disclose notice of appeal and proof of service thereof. Smith v. Director, (1917) 84 Or 631, 165 P 1171; Everding & Farrell v. Gebhardt Lbr. Co., (1918) 90 Or 207, 175 P 611, 176 P 186; Streby v. State Ind. Acc. Comm., (1923) 107 Or 314, 215 P 586.

The filing of a notice of appeal without proof of service indorsed thereon required dismissal of the appeal, notwithstanding the subsequent filing of an affidavit containing proof of service. Cooke v. Traver, (1947) 181 Or 643, 184 P2d 866; Knapp v. Olson, (1958) 214 Or 206, 328 P2d 772; Hartman v. Hartman, (1970) 2 Or App 335; 468 P2d 551.

The return of service of appeal included in the transcript cannot be contradicted or impeached by extraneous evidence. Rodman v. Manning, (1908) 50 Or 506, 93 P 366; Mitchell v. Coach, (1917) 83 Or 45, 153 P 478, 162 P 1058.

A constable's return of the service of notice of appeal is insufficient where it specifies that the service was made within a certain county but fails to state that it was made in his precinct. Hermann v. Hutcheson, (1898) 33 Or 239, 52 P 489.

The only evidence of service of notice is either the record entry of notice orally given in open court or the indorsed proofs upon a written notice served on adverse parties. Catlin v. Jones, (1910) 56 Or 492, 495, 108 P 633.

Proof of service of a notice of appeal made by one who is a party to the action is invalid. Keeley v. Keeley, (1920) 97 Or 596, 192 P 490.

In determining whether notices of appeal were served upon clerk of circuit court in which criminal cases were tried, appellate court may look only to record. State v. Berg, (1931) 138 Or 20, 3 P2d 783, 4 P2d 628.

Acceptance of service endorsed for one specified defendant by his attorney does not suffice for another defendant whom the attorney also represented. State v. Mount, (1932) 139 Or 694, 10 P2d 606.

Notice of appeal served by a party to the action or suit is a nullity. Welch v. Arney, (1950) 189 Or 277, 219 P2d 1086.

(1) What constitutes "filing." The act of laying notice of appeal on a deputy county clerk's desk does not constitute a "filing"; the paper must be both delivered to and received by the clerk. In re Wagner's Estate, (1947) 182 Or 340, 187 P2d 699.

(2) Address. Failure to address a notice of appeal to adverse party or his attorney is not fatal to its validity. In re Dixon's Estate, (1925) 116 Or 411, 241 P 333; Drake Lbr. Co. v. Lindquist, (1946) 179 Or 402, 170 P2d 712.

Good practice demands that the notice should be addressed to those whom appealing party contemplates shall become the respondents. Santiam Reclamation Co. v. Porter, (1928) 126 Or 91, 267 P 820, 268 P 980.

(3) "Signed by himself or attorney." The notice of appeal if signed by an attorney must be signed by an attorney admitted to practice in this state. In re Nelson's Estate, (1921) 101 Or 14, 198 P 892; Northwestern Nat. Ins. Co. v. Averill, (1935) 149 Or 672, 42 P2d 747.

A notice of appeal is sufficient although signed by attorneys who were not the attorneys of the appellant in the court below. Shirley v. Birch, (1888) 16 Or 1, 18 P 344.

The prosecuting attorney is the "attorney" for a county and a notice of appeal signed by private counsel for a county is insufficient to give the Supreme Court jurisdiction. Baskin v. Marion County, (1914) 70 Or 363, 141 P 1014. **But see** State v. Fendall, (1931) 135 Or 142, 295 P 194.

The appellant with the approval of his attorney or the attorney himself may authorize another person to sign the attorney's name to a notice of appeal. Howard v. Hartford Fire Ins. Co., (1915) 77 Or 341, 144 P 450.

The party appealing may sign the notice of appeal. Robinson v. Phegley, (1919) 93 Or 299, 177 P 942, 178 P 799, 182 P 373.

A notice not signed by the party or by a regularly admitted attorney of the court is ineffectual for any purpose. In re Nelson's Estate, (1921) 101 Or 14, 198 P 892.

A private attorney acting in cooperation with the district attorney can sign the notice of an appeal taken on behalf of the state. State v. Fendall, (1931) 135 Or 142, 295 P 194.

8. Appeals taken to circuit court

This section has no application to appeals from the district or justice court to the circuit court. Moltzner v. Cutler, (1936) 154 Or 573, 61 P2d 93.

This section is applicable to appeals from the county to the circuit court, except as to decisions made in the trans-

action of county business. In re Cooke's Estate, (1941) 167 Or 58, 115 P2d 302.

Appeals to the circuit court from the district court, when not taken at the time of the entry of judgment, must be taken within 30 days thereafter. Columbia Auto Works v. Yates, (1945) 176 Or 295, 156 P2d 561.

9. Successive attempts to take an appeal

If appeal has been perfected, the right of appeal is exhausted and another appeal is barred. Nestucca Wagon Road Co. v. Landingham, (1893) 24 Or 439, 33 P 983; Moon v. Richelderfer, (1910) 56 Or 246, 108 P 178; Columbia City Land Co. v. Ruhl, (1914) 70 Or 246, 250, 134 P 1035, 141 P 208; Hill v. Lewis, (1918) 87 Or 239, 170 P 316; Ogden v. Hoffman, (1918) 88 Or 503, 172 P 503.

10. Abandonment of appeal

Where two notices of appeal are filed and a transcript is filed within the proper time under the first notice, the appeal is not abandoned. McKinney v. Nayberger, (1931) 138 Or 203, 295 P 474, 2 P2d 1111, 6 P2d 228, 229.

An attempted appeal may be abandoned before it is perfected, and the appellant may give a new notice and undertaking at any time within the period limited by law for taking appeals. Id.

The scope of the neglected acts which constitutes abandonment includes every act this and other sections require of an appellant. Pond v. Jantzen Knitting Mills, (1947) 187 Or 697, 180 P2d 115.

An appeal is not abandoned unless an act which the appellant should have performed remains neglected for 30 days after notice is served. Id.

11. Estoppel by appeal

Appealing with a stay bond does not estop appellant from suing subsequently to impeach the judgment for fraud. Oregon-Wash. R. & Nav. Co. v. Reid, (1937) 155 Or 602, 65 P2d 664.

FURTHER CITATIONS: Carr v. Hurd, (1869) 3 Or 160; Cook v. Albina, (1890) 20 Or 190, 25 P 386; Butler v. Smith, (1890) 20 Or 126, 25 P 381; In re Crawford's Estate, (1908) 51 Or 76, 90 P 147, 93 P 820; State v. Berger, (1908) 51 Or 166, 94 P 181; Watts v. State Spiritualists' Assn., (1910) 56 Or 56, 107 P 695; Hart v. Prather, (1912) 61 Or 7, 119 P 489; State v. Olcott, (1913) 67 Or 214, 135 P 95, 135 P 902; DeLore v. Smith, (1913) 67 Or 304, 132 P 521, 136 P 13, 49 LRA(NS) 555; Orr v. Orr, (1915) 75 Or 137, 144 P 753, 146 P 964; Stacy v. McNicholas, (1915) 76 Or 167, 144 P 96, 148 P 67; Johnson v. Paulsen, (1917) 83 Or 238, 154 P 685, 163 P 435; Enneberg v. State Ind. Acc. Comm., (1918) 88 Or 436, 167 P 310, 171 P 765; Everding & Farrell v. Gebhardt Lbr. Co., (1918) 90 Or 207, 175 P 611, 176 P 186; State v. Bemrose, (1919) 94 Or 305, 185 P 765; Barde v. Wilson, (1919) 54 Or 68, 102 P 301; Lasene v. Syvanen, (1928) 123 Or 615, 257 P 822, 263 P 59; Phillips v. Elliott, (1933) 144 Or 694, 17 P2d 1119, 25 P2d 557; Jairl v. Jairl, (1940) 163 Or 529, 97 P2d 103; Williams v. Ragan, (1944) 174 Or 328, 143 P2d 209; State v. Stone, (1946) 178 Or 268, 166 P2d 980; Morrow v. Morrow, (1949) 187 Or 161, 210 P2d 101; Wills v. Wills, (1955) 203 Or 479, 280 P2d 410; McCarty v. Seaboard Fire & Marine Ins. Co., (1956) 208 Or 238, 300 P2d 409; Valley Concrete Pipe Co. v. Albany, (1959) 215 Or 666, 300 P2d 411, 303 P2d 503; Daugharty v. Gladden, (1959) 179 F Supp 151; State Unemp. Comp. Comm. v. Bates, (1961) 227 Or 358, 362 P2d 321; United States v. Smith, (1962) 200 F. Supp 885; Whitney v. Canadian Bank of Commerce, (1962) 232 Or 1, 374 P2d 441; Bengston v. Hemphill, (1964) 238 Or 97, 391 P2d 626; Todd v. Bigham, (1964) 238 Or 374, 390 P2d 168, 395 P2d 163; Hofer v. Hofer, (1966) 244 Or 88, 415 P2d 753.

LAW REVIEW CITATIONS: 26 OLR 202; 34 OLR 73; 36 OLR 253; 38 OLR 336; 39 OLR 119.

19.026

NOTES OF DECISIONS

1. In general
2. Under former similar statute
   (1) Within 60 days from entry of judgment
   (2) Judgments modified or changed
   (3) Death of party
   (4) Computation of time
   (5) Mailed notice

1. In general

This section was not retroactive, so an appeal filed within time formerly allowed and within time allowed after effective date of this section was timely. Berliner v. Roberts, (1960) 226 Or 350, 349 P2d 498, 360 P2d 533.

The enactment of this section did not result in a repeal of ORS 539.150 (4) by express provision or implication. Appleton v. Ore. Iron & Steel Co., (1960) 229 Or 81, 358 P2d 260, 366 P2d 174.

Subsection (2) does not authorize appeal from order denying motion for new trial but simply extends time for appealing from judgment. State Unemp. Comp. Comm. v. Bates, (1961) 227 Or 357, 362 P2d 321.

Even though no motion is filed under subsection (2), the 10-day provision applies where more than one party appeals. Crow v. Junior Bootshops, (1965) 241 Or 135, 404 P2d 789.

The appeal was not timely filed. Pietz v. Del Mar Inv. Co., (1967) 247 Or 468, 431 P2d 275.

2. Under former similar statute

(1) Within 60 days from entry of judgment. The 60 days provided by statute for taking of appeals did not commence to run until judgment was actually rendered. Fuller v. Blanc, (1938) 160 Or 50, 77 P2d 440, 83 P2d 434.

An appeal taken before entry of judgment was irregular but was not fatal. Haberly v. Farmers' Mut. Fire Relief Assn., (1930) 135 Or 32, 287 P 222, 293 P 590, 294 P 594.

Time to appeal ran from the date of the appealable order and not from a subsequent order settling costs. Lemons v. Huber, (1904) 45 Or 282, 77 P 836; Wadhams v. Allen, (1904) 45 Or 485, 78 P 362.

If there was no entry in the journal of a judgment, order or decree there could be no appeal. Neal v. Haight, (1949) 187 Or 13, 206 P2d 1197.

An appeal could be taken from a decree rendered against a defendant standing on his demurrer after it was overruled at any time within the statutory period from the entry thereof. Hendy Mach. Works v. Portland Sav. Bank, (1893) 24 Or 60, 32 P 1036.

Time ran from date valid judgment was signed. State Hwy. Comm. v. Vella, (1958) 213 Or 386, 323 P2d 941.

(2) Judgments modified or changed. Modification of judgment non obstante veredicto by dismissing one defendant resulted in a new judgment from which appeal time ran as to another defendant. Hewey v. Andrews, (1917) 82 Or 448, 451, 159 P 1149, 161 P 108.

When corrected nunc pro tunc, it seems that the right of appeal of any party affected thereby ran from the entry of the nunc pro tunc order. Lee v. Imbire, (1886) 13 Or 510, 11 P 270. **But see** Fisher v. Portland Ry., Light & Power Co., (1915) 74 Or 229, 232, 137 P 763, 143 P 992, 145 P 277.

(3) Death of party. The time intervening between the death of the party and the order allowing his representatives to continue the proceedings was not deemed any part of the time limited for taking an appeal. McCann v. Burns, (1914) 73 Or 167, 136 P 659, 143 P 1099, 143 P 916, 143 P 1100.

(4) Computation of time. In computing time within which an appeal could be prosecuted, the day following entry of judgment was to be excluded. United States Nat. Bank v. Shepler, (1915) 77 Or 579, 143 P 51, 152 P 234; Nealan v. Ring, (1921) 98 Or 490, 184 P 275, 193 P 199, 747; In re Andersen's Estate, (1921) 101 Or 94, 188 P 164, 198 P 236; Payne v. State Ind. Acc. Comm., (1935) 150 Or 520, 46 P2d 581.

Appeal notice served and filed May 18, 1914 from a decree entered December 10, 1913 and amended March 16, 1914 was too late. Page v. Sherman, (1914) 72 Or 533, 143 P 1115.

Time to appeal from an order ran from its rendition rather than from a later formally entered judgment in the same terms as the order. Cockrum v. Graham, (1933) 143 Or 233, 21 P2d 1084.

(5) Mailed notice. Service of notice of appeal by mail was in time where the day after the deposit was within the 60 days from the time of the entry of the decree. Lawson v. Hughes, (1928) 127 Or 16, 256 P 1043, 270 P 922.

Appellate court was bound by the clerk's official indorsement of date of filing notice of appeal, as against affidavit of counsel that he mailed it in time to arrive in due course of mail within time prescribed by statute. Wapinitia Irr. Dist. v. Pac. Power & Light Co., (1924) 112 Or 36, 228 P 810.

FURTHER CITATIONS: McCartney v. Shipherd, (1911) 60 Or 133, 117 P 814, Ann Cas 1913D, 1257; Gearin v. Portland Ry., Light & Power Co., (1912) 62 Or 162, 124 P 256; Hahn v. Astoria Nat. Bank, (1912) 63 Or 1, 144 P 1134, 125 P 284; Tucker v. Davidson, (1916) 80 Or 254, 156 P 1037; Stanfield v. Mahan, (1916) 82 Or 299, 161 P 561; Lee v. Gram, (1922) 105 Or 49, 196 P 373, 209 P 474; Libby v. So. Pac. Co., (1923) 109 Or 449, 219 P 604, 220 P 1017; Frank v. Matthiesen, (1925) 116 Or 94, 240 P 251; Scott v. Lawrence Whse. Co., (1961) 227 Or 78, 360 P2d 610; Holland v. Gladden, (1962) 229 Or 573, 368 P2d 331; Curtis v. Stone, (1963) 234 Or 481, 379 P2d 551; United States Nat. Bank v. Underwriters at Lloyd's London, (1963) 239 Or 298, 382 P2d 851.

LAW REVIEW CITATIONS: 39 OLR 118; 4 WLJ 27.

19.029

NOTES OF DECISIONS

1. In general

Petitioner's name in the title of the case contained in the appeal was sufficient compliance with subsection (2). State ex rel. Maizels v. Juba, (1969) 254 Or 323, 460 P2d 850.

The Supreme Court has uniformly given a broad construction to this section and whenever reasonably possible has refused to dismiss an appeal for insufficiency of the notice to identify the judgment appealed from. State Unemp. Comp. Comm. v. Bates, (1961) 227 Or 358, 362 P2d 321.

2. Under former similar statute

(1) Requisites and sufficiency of written notice. The notice of appeal was a species of judicial process whose sufficiency had to appear on its face. Neppach v. Jordan, (1886) 13 Or 246, 10 P 341; In re Water Rights of Willow Creek, (1926) 119 Or 155, 236 P 487, 763, 237 P 682, 239 P 123.

Notice was sufficient if it described with reasonable certainty the decree complained of, the court and the time at which such decree was given, the names of the parties to the suit, and the fact that one or more of them intend to appeal to the Supreme Court. Ream v. Howard, (1890) 19 Or 491, 24 P 913; Fraley v. Hoban, (1914) 69 Or 180, 133 P 1190, 137 P 751; Tucker v. Nuding, (1919) 92 Or 319, 180 P 903; Farmers & Fruit-Growers' Bank v. Davis, (1919) 93 Or 655, 184 P 275; Student v. Goldapp, (1927) 124 Or 102, 259 P 207.

Great liberality was indulged in, in judging the sufficiency of the notice of appeal. McFarland v. Hueners, (1920) 96 Or 579, 190 P 584.

Notice of appeal in name of an association was sufficient although members were not named therein if their names were ascertainable by referring to the transcript. In re Water Rights of Willow Creek, (1926) 119 Or 155, 236 P 487, 237 P 682, 239 P 123.

A notice of appeal entitled in the name of a substituted defendant and mentioning the order of substitution was sufficient to prevent dismissal of the appeal. Heider v. Unicume, (1933) 142 Or 410, 14 P2d 456, 20 P2d 384.

A notice of appeal was not defective for failure to name as defendant one who was named as such in the pleadings but did not appear and defaulted. Id.

An erroneous statement that appeal was taken to the circuit court instead of to the Supreme Court required dismissal of appeal. In re Dixon's Estate, (1925) 116 Or 411, 241 P 333.

Notice was sufficient after court authorized correction of unimportant mistakes in notice where respondent was not misled or prejudiced by mistakes. Peterson v. Peterson, (1956) 208 Or 131, 292 P2d 130, 300 P2d 443.

(2) Description of judgment or decree. All language in a notice of appeal which was descriptive of an order not appealable could be rejected as surplusage. Oldland v. Ore. Coal & Nav. Co., (1909) 55 Or 340, 99 P 423, 102 P 596; Lee v. Gram, (1922) 105 Or 49, 196 P 373, 209 P 474; Ekerson v. Ekerson, (1927) 121 Or 402, 245 P 1086, 255 P 480; In re Mead's Estate, (1933) 145 Or 150, 26 P2d 1103.

If the notice of appeal was too indefinite and uncertain to describe the judgment or decree, the appeal would be dismissed. Christian v. Evans, (1874) 5 Or 253; Luse v. Luse, (1880) 9 Or 149; Crawford v. Wist, (1895) 26 Or 596, 39 P 218; Duffy v. McMahon, (1897) 30 Or 306, 47 P 787; Hamilton v. Butler, (1898) 33 Or 370, 54 P 200.

A notice sufficiently described the judgment which gave the name of the court in which it was rendered, the names of the parties and the date of the judgment. Neppach v. Gordan, (1886) 13 Or 246, 10 P 341; Fraley v. Hoban, (1914) 69 Or 180, 133 P 1190, 137 P 751.

The date of judgment did not need to be specified in the notice of appeal. Allen v. Byerly, (1897) 32 Or 117, 48 P 474; Ekerson v. Ekerson, (1927) 121 Or 402, 245 P 1086, 255 P 480.

A notice which described a judgment as one for a sum of money was not sufficient to bring into the appellate court a judgment for the recovery of specific personal property. Ream v. Howard, (1890) 19 Or 491, 24 P 913.

The notice did not need to state the amount of costs and disbursements. Thomas v. Bowen, (1896) 29 Or 258, 45 P 768.

The notice of appeal by a fair construction thereof and without resort to other evidence than that contained in the transcript needed to be sufficient to enable the court to determine that the appeal was taken from the judgment in a particular case. Keady v. United Rys. Co., (1910) 57 Or 325, 327, 100 P 658, 108 P 197.

A notice which erroneously stated the day of entry of judgment was sufficient where there was no suggestion that any other judgment was rendered between the parties and the notice informed the respondent that the appeal was taken from the judgment in the case. Fuller v. Blanc, (1938) 160 Or 50, 77 P2d 440, 83 P2d 434.

A notice of appeal describing the decree by date identified

it although the notice did not specify that it was one of final settlement of an executor's account, this being evident upon examination of the transcript. In re Prince's Estate, (1926) 118 Or 210, 221 P 554, 246 P 713.

A description of the judgment as "substantially" as follows did not vitiate a notice otherwise made certain and particular. Summers v. Geer, (1907) 50 Or 249, 251, 85 P 513, 93 P 133.

The failure to state that the judgment was rendered in the "cause" was not a defect warranting dismissal where other particulars were stated and judgment was recited. Id.

A reference in the notice of appeal to the entry of the judgment in the "Judgment Docket" could be disregarded as surplusage. Id.

Notice of appeal sufficiently described judgment appealed from. Watt's v. State Spiritualists' Assn., (1910) 56 Or 56, 107 P 964; Fisher v. Portland Ry., Light & Power Co., (1915) 74 Or 229, 137 P 763, 143 P 992, 145 P 277; Robinson v. Phegley, (1919) 93 Or 299, 177 P 942, 178 P 799, 182 P 373.

Notice of appeal was insufficient that referred to judgment entered in the Circuit Court of the State of Oregon for Multnomah County since there were several departments of that court of such county. Lecher v. St. Johns, (1915) 74 Or 558, 146 P 87.

(3) Assignment of error. An "assignment of error" within Supreme Court rule was in the nature of a pleading; its purpose was to point out specific errors to enable the appellate court to see on what point a reversal was asked. Salene v. Isherwood, (1914) 74 Or 35, 39, 144 P 1175.

Where an appeal was taken from a decree entered on the pleadings, formal assignments of error were not necessary though it was the better practice to have them.

(4) Designation of part appealed from. A decree could be modified only in the manner specified in the notice of appeal. Shook v. Colohan, (1885) 12 Or 239, 6 P 503; Barber v. Toomey, (1913) 67 Or 452, 136 P 343; Perkins v. Perkins, (1914) 72 Or 302, 143 P 995.

A notice of appeal from all the judgment and decree except certain portions described was sufficient. Anderson v. Phegley, (1909) 54 Or 102, 102 P 603.

(5) Aided by other parts of record. Aided by the transcript the notice needed to be sufficient to enable the court to determine the judgment from which the appeal was taken. Keady v. United Rys. Co., (1910) 57 Or 325, 100 P 658, 108 P 197; Raiha v. Coos Bay Coal & Fuel Co., (1915) 77 Or 275, 143 P 892, 149 P 940, 151 P 471; McFarland v. Hueners, (1920) 96 Or 579, 190 P 584; In re Prince's Estate, (1926) 118 Or 210, 221 P 554, 246 P 713.

The undertaking on appeal could be read in connection with the notice for the purpose of identifying the judgment or decree complained of. Keady v. United Rys. Co., (1910) 57 Or 325, 100 P 658, 108 P 197; MacMahon v. Hull, (1912) 63 Or 133, 119 P 348, 124 P 474, 126 P 3; Holton v. Holton, (1913) 64 Or 290, 129 P 532, 48 LRA(NS) 779; Meridianal Co. v. Bourne, (1918) 87 Or 324, 160 P 1151, 170 P 521.

The transcript could be used to determine the sufficiency of the notice of appeal where the latter was ambiguous or defective. In re Water Rights of Willow Creek, (1925) 119 Or 155, 236 P 487, 763, 237 P 682, 239 P 123.

FURTHER CITATIONS: Wagner v. Portland, (1902) 40 Or 389, 60 P 985, 67 P 300; Holland v. Gladden, (1962) 229 Or 573, 368 P2d 331.

LAW REVIEW CITATIONS: 39 OLR 121.

19.033

NOTES OF DECISIONS

1. In general
2. Under former similar statute
   (1) When an appeal was perfected
      (a) Computation
   (2) Could "permit an amendment or performance of such act"
      (a) Through mistake
      (b) Defects in notice of appeal or the return attached thereto
      (c) Proper court

1. In general

The trial judge has no jurisdiction to strike appellant's designation. Gordon Creek Tree Farms, Inc. v. Layne, (1961) 230 Or 204, 358 P2d 1062, 368 P2d 737.

This section gives the Supreme Court plenary power to relieve from an untimely performance of any of the required acts except serving and filing of the notice of appeal. Id.

An appeal taken from an order refusing to dismiss the indictment vests jurisdiction in the appellate court. State v. Jackson, (1961) 228 Or 371, 365 P2d 294, 89 ALR 2d 1225.

During an appeal the lower court cannot proceed in any manner so as to affect the jurisdiction acquired by the appellate court or defeat the right of appellants to prosecute the appeal with effect. State v. Jackson, (1961) 228 Or 371, 365 P2d 294, 89 ALR 2d 1225. Overruling Johnston v. Circuit Court, (1932) 140 Or 100, 12 P2d 1027 and State v. DeGrace, (1933) 144 Or 159, 22 P2d 896, 90 ALR 232.

Validity of appeal documents is not governed by payment of the filing fee in advance. United States Nat. Bank v. Underwriters at Lloyd's London, (1963) 239 Or 298, 382 P2d 851. Overruling Citron v. Hazeltine, (1961) 227 Or 330, 361 P2d 1011.

This section does not deprive trial court of jurisdiction to conduct habitual criminal proceedings pending an appeal. State v. Steffes, (1970) 2 Or App 163, 465 P2d 905, Sup Ct **review denied.**

2. Under former similar statute

(1) When an appeal was perfected. An appeal was not perfected until after five days' time allowed for excepting to the sureties upon the undertaking had expired. MacMahon v. Hull, (1912) 63 Or 133, 119 P 348, 124 P 474, 126 P 3; Gross v. Gage, (1915) 77 Or 421, 149 P 939, 151 P 655; Hansen v. Robbins, (1916) 80 Or 659, 157 P 1112, 158 P 403; Sitton v. Goodwin, (1926) 119 Or 74, 248 P 163; Pedro v. Vey, (1935) 150 Or 415, 39 P2d 963, 46 P2d 582.

The time when an appeal was deemed perfected was not changed by respondent's filing a written waiver of all exceptions to the sufficiency of the sureties. Callahan v. Portland & W.V.R.R. Co., (1889) 17 Or 556, 21 P 870.

A joint appeal was perfected by joint notice of appeal signed by each appellant by their attorneys and a joint undertaking executed by one of the appellants and sureties. Elliott v. Bozorth, (1908) 52 Or 391, 395, 97 P 632.

If the adverse party did not except to the sufficiency of the sureties, the appeal was perfected within five days after service of said undertaking and not from the filing thereof. Burchell v. Averill Mach. Co., (1909) 55 Or 113, 105 P 403.

Where the undertaking was excepted to, the appeal was not perfected until the examination of the surety was completed and indorsed by the clerk. Moorehouse v. Weister, (1910) 56 Or 126, 95 P 497, 107 P 470, 108 P 121; McDonald v. McDonald, (1921) 99 Or 225, 195 P 361.

Ordinarily a transcript was not required to be filed in until time for objecting to sufficiency of the surety had expired. French v. C.F. & T. Co., (1925) 116 Or 532, 241 P 1010.

Filing a transcript in the Supreme Court before expiration of the time allowed for excepting to sureties was not premature where application was made for restraining order pending the appeal. Id.

Where a second undertaking was filed after one under-

taking was stricken because of defects, the appeal was perfected five days after the filing of the second undertaking. First Nat. Bank v. Frazier, (1933) 143 Or 662, 19 P2d 1091, 22 P2d 325.

An exception to the sureties on the undertaking by some of the respondents served to extend the time for filing the transcript of the appellant as to all the respondents. In re Skinner's Will, (1902) 40 Or 571, 62 P 523, 67 P 951.

State not being required to file undertaking, its appeal was perfected when notice of appeal was served and filed. State v. Vincent, (1932) 141 Or 107, 16 P2d 636.

Where undertaking was filed within allotted time and demand made that the surety justify, appeal was not perfected because surety failed to justify. Peterson v. Peterson, (1956) 208 Or 131, 292 P2d 130, 300 P2d 443.

Filing of a transcript of testimony was not a jurisdictional requirement; timely service and filing of a notice of appeal were sufficient to confer jurisdiction on the Supreme Court. In re Clark, (1958) 214 Or 24, 323 P2d 334.

(a) Computation. The five days for excepting to the sureties were computed by excluding the first day and including the last. Bush v. Geisey, (1888) 16 Or 267, 19 P 122; Boothe v. Scriber, (1906) 48 Or 561, 87 P 887, 90 P 1002; McCabe-Duprey Tanning Co. v. Eubanks, (1910) 57 Or 44, 102 P 795, 110 P 395; In re Riggs, (1922) 105 Or 531, 207 P 175, 207 P 1005, 210 P 217.

Where the last day for perfecting appeal fell on Sunday notice was properly filed the next day. Hewey v. Andrews, (1917) 82 Or 448, 159 P 1149, 161 P 108; Cauldwell v. Bingham & Shelley Co., (1917) 84 Or 257, 155 P 190, 163 P 827.

(2) Could "permit an amendment or performance of such act." The provision allowing the appellate court to relieve a party from his failure to comply with the statute as related to an undertaking was not applicable to justices' courts. Odell v. Gotfrey, (1886) 13 Or 466, 11 P 190; Lewis & Dryden Printing Co. v. Reeves, (1894) 26 Or 445, 38 P 622.

Leave to file a new undertaking in place of an insufficient one could be given and motion to dismiss denied. Fildew v. Milner, (1910) 57 Or 16, 109 P 1092; Sutton v. Sutton, (1915) 78 Or 9, 150 P 1025, 152 P 271.

The Supreme Court by virtue of the 1943 amendment had wide discretionary power concerning the progress of appealed cases to be exercised only where "good cause" was shown by an appellant resisting a motion to dismiss. Martin v. Harrison, (1947) 182 Or 121, 180 P2d 119, 186 P2d 534; Pond v. Jantzen Knitting Mills, (1947) 187 Or 697, 180 P2d 115.

Appellants were permitted to submit a new undertaking where the sureties on the original failed to justify. Matlock v. Wheeler, (1896) 29 Or 64, 43 P 867.

When a challenge to the sufficiency of an undertaking had been sustained, the appellant could file a new one without a cross motion therefor. Elwert v. Norton, (1899) 34 Or 567, 51 P 1097, 59 P 1118. Overruling Alberson v. Mahaffey, (1877) 6 Or 412 and State v. Mahoney, (1880) 8 Or 207.

Where appellants had acted in good faith and with fair diligence in their efforts to file a proper undertaking, they would be permitted to file a perfected undertaking out of time. Nottingham v. McKendrick, (1901) 38 Or 495, 57 P 195, 63 P 822.

An appeal could be abandoned and a new undertaking given instead of producing sureties for justification. In re Skinner's Will, (1902) 40 Or 571, 62 P 523, 67 P 951.

It was better practice for the substituted appellant to tender a new undertaking where death of appellant and objections to his sureties had caused confusion and irregularity. Id.

The section was broad enough to permit the correction of any omission occurring by mistake which did not go to the jurisdiction where the appealing party was ready to correct it when brought to his attention. Boehmer v. Silvestone, (1920) 95 Or 154, 174 P 1176, 186 P 26, 31.

On appeal from a judgment dismissing a writ of review of conviction before a justice of the peace, an undertaking conditioned as for bail on appeal, instead of as required in civil actions, could be cured by a proper undertaking before the appeal was dismissed. Davenport v. Justice Court, (1921) 101 Or 507, 199 P 621.

The trail court had no power to extend time for filing undertaking. Miller v. Arenz, (1922) 103 Or 592, 193 P 439, 206 P 299.

The effect of the provision allowing the appellate court to relieve a party from his failure to comply with the statute as related to an undertaking, was to take away the mandatory jurisdictional character of those requirements upon appeal and to retain in the court jurisdiction of the appeal. Iltz v. Krieger, (1922) 104 Or 59, 202 P 409, 206 P 550.

An undertaking which erroneously stated that "plaintiff" appealed instead of "defendant" could be corrected. Oxman v. Baker County, (1925) 115 Or 436, 234 P 799, 236 P 1040.

Where the original undertaking was claimed to be insufficient, an appellant could file an amended undertaking on appeal. Dibble v. David Hodes Co., (1930) 132 Or 596, 277 P 820, 286 P 554.

Where appellant did not serve undertaking on appeal nor file amended undertaking nor excuse failure to serve, the appeal was dismissed. LaFollett v. LaFollett, (1931) 136 Or 332, 288 P 507, 299 P 299.

Where undertaking on appeal was irregularly served, the appeal was not dismissed but appellant was allowed to serve and file substituted undertaking. Union Central Life Ins. Co. v. Deschutes Valley Loan Co., (1932) 139 Or 222, 3 P2d 536, 8 P2d 587.

The provision which authorized the appellate court to "permit an amendment or performance of such act on such terms as may be just" did not include the presentation of a bill of exceptions to the clerk of the circuit court. Williams v. Ragan, (1944) 174 Or 328, 143 P2d 209.

Where appellant had not complied with the statute relative to filing an undertaking, the Supreme Court could not permit appellant to justify sureties on the ground that she was without an attorney and unfamiliar with the statute. Dodd v. Dodd, (1944) 175 Or 323, 153 P2d 530.

The provision which authorized the appellate court to "permit an amendment or performance of such act on such terms as may be just" was not applicable to criminal cases. State v. Stone, (1946) 178 Or 268, 166 P2d 980.

Where appellant failed to file transcript within time but bill of exceptions was completed and no prejudice was claimed, Supreme Court allowed motion to cure defect and refused motion for dismissal. Martin v. Harrison, (1947) 182 Or 121, 180 P2d 119, 186 P2d 534.

Where an order extending time to file transcript on appeal was void because based on an oral ex parte application, Supreme Court relieved from failure to file transcript within time limited. Moberg v. Baker, (1957) 217 Or 551, 342 P2d 828.

Where appellant failed to file transcript within time but bill of exceptions was completed and no prejudice was claimed, Supreme Court allowed motion to cure defect and refused motion for dismissal. Miller v. Safeway Stores, (1959) 219 Or 139, 312 P2d 577, 346 P2d 647.

(a) Through mistake. An appellant could obtain leave to file a new undertaking on appeal without making it appear to the satisfaction of the court that the omission to file a sufficient undertaking within the time allowed was occasioned through unavoidable accident or excusable mistake. Pencinse v. Burton, (1881) 9 Or 178; De Lashmutt v. Sellwood, (1881) 10 Or 51; Mendenhall v. Elwert, (1900) 36 Or 375, 52 P 22, 59 P 805; Harris v. Lebb, (1924) 113 Or 41, 231 P 186.

The rule permitting appellate to file a new undertaking

if the error was due to a mistake applied only to some patent omission in the execution of the instrument, and could have no application to a difference of opinion as to what constituted a performance of the statutory requirements. Mendenhall v. Elwert, (1900) 36 Or 375, 52 P 22, 59 P 805.

Diligence in remedying a mistake after discovering it could be a condition of leave to file a new undertaking. Newberg Orchard Assn. v. Osborn, (1900) 39 Or 370, 65 P 81.

Failure to serve the undertaking could be excused when it was shown that such failure was due to a mistake, regardless of whether it was a mistake of law or of fact. Dowell v. Bolt, (1904) 45 Or 89, 75 P 714.

Where due to mistaken interpretation of an order extending time in which to perfect an appeal appellant filed an undertaking without leave of court, he was permitted to file a new undertaking. Quartz Gold Min. Co. v. Patterson, (1909) 53 Or 85, 96 P 551.

An appeal was perfected upon filing the undertaking, notwithstanding the fact that appellant's attorney mistakenly assumed it had not been filed and served the adverse party with a second undertaking. Harrington v. Snyder, (1909) 53 Or 573, 101 P 392.

Where the mistake in the undertaking was clearly an unintentional oversight, the appellant was allowed to file a sufficient undertaking. Steed v. Cavanaugh, (1916) 80 Or 62, 151 P 968.

Omission by mistake to file an undertaking in time was corrected by leave. Hodgson v. Curtin, (1918) 90 Or 105, 166 P 929, 175 P 671.

The appellant was permitted to serve a new undertaking where his attorney had in good faith attempted to serve the adverse party but was mistaken as to the location of his residence. McKissick v. McKissick, (1919) 93 Or 644, 174 P 721, 184 P 272.

Where the undertaking on appeal from a judgment of the county court was insufficient as a result of a mistake, it was proper for the circuit court in view of this section to allow an amended undertaking to be filed. In re Andersen's Estate, (1921) 101 Or 94, 188 P 164, 198 P 236.

Affidavit of appellant's attorney setting out the reasons for not serving and filing undertaking within statutory period, showed such excusable mistake and good faith as to permit appellant to file undertaking. Stone v. First Nat. Bank, (1921) 100 Or 528, 193 P 1023, 197 P 304, 198 P 244.

Where appellant mistakenly thought the trial court could extend the time to file undertaking on appeal, the Supreme Court relieved him of default. Miller v. Arenz, (1922) 103 Or 592, 193 P 439, 206 P 299.

(b) Defects in notice of appeal or the return attached thereto. Where the return of service of notice of appeal did not conform to the facts, it could on motion be amended. Dolph v. Nickum, (1867) 2 Or 202; Seeley v. Sebastian, (1870) 3 Or 563; Barbre v. Goodale, (1896) 28 Or 465, 38 P 67, 43 P 378; Mitchell v Coach, (1917) 83 Or 45, 153 P 478, 162 P 1058; Boehmer v. Silvestone, (1920) 95 Or 154, 174 P 1176, 186 P 26, 31; Earle v. Holman, (1936) 154 Or 578, 55 P2d 1097, 61 P2d 1242.

Only by leave first obtained from the trial court could proof of service of notice of appeal be amended. Briney v. Starr, (1876) 6 Or 207; Rodman v. Manning, (1908) 50 Or 506, 93 P 366.

The Supreme Court did not have the power to authorize the amendment of a notice of appeal. Lee v. Gram, (1922) 105 Or 49, 196 P 373, 209 P 474; In re Water Rights of Burnt River, (1925) 116 Or 525, 241 P 988.

A party asking the dismissal of an appeal by reason of a technical defect in the proof of service of the notice had to specify definitely and with certainty the point of irregularity. Hermann v. Hutcheson, (1898) 33 Or 239, 52 P 489.

The trial court was not authorized to pass on the sufficiency of any jurisdictional proceedings required to perfect the appeal. Elwert v. Norton, (1899) 34 Or 567, 51 P 1097, 59 P 1118.

An order by the trial court setting aside a notice of appeal after the appeal had been perfected was a nullity. Hanley v. Stewart, (1909) 54 Or 38, 102 P 2.

By nunc pro tunc order a trial court could correct the omission by its clerk to record oral notice of appeal. Catlin v. Jones, (1910) 56 Or 492, 495, 108 P 633.

The appellate court's authority to permit an amendment or performance of the act omitted was dependent upon the giving of notice of appeal. Id.

The Supreme Court had neither the power to extend the time, nor the right to excuse a failure to file the notice of appeal within the legal period. Everding & Farrell v. Gebhardt Lbr. Co., (1918) 90 Or 207, 175 P 611, 176 P 186.

A motion to dismiss an appeal not served upon the defendant would be denied. State v. Foster, (1932) 140 Or 200, 13 P2d 609.

The statutory requirement for filing notice of appeal with proof of service indorsed thereon was jurisdictional, and requisite proof could not be supplied by affidavit or in any other manner. Cooke v. Traver, (1947) 181 Or 643, 184 P2d 868.

Supreme Court authorized correction of unimportant mistakes in notice of appeal where respondent was not misled or prejudiced by mistakes. Peterson v. Peterson, (1956) 208 Or 131, 292 P2d 130, 300 P2d 443.

(c) Proper court. When the appeal was perfected, the trial court's power to allow alteration for completing some act relating to the filing of a proper undertaking ceased. Hanley v. Stewart, (1909) 54 Or 38, 102 P 2.

The trial court, with or without hearing, could permit appellant to substitute a new undertaking when the sureties on the original after exception failed to justify provided no bad faith could be charged against appellant. Chambers v. Everding & Farrell, (1914) 71 Or 521, 524, 136 P 885, 143 P 616.

A motion for an order directing a clerk of the circuit court to change a filing date on a notice of appeal on ground of error had to be addressed to the court below since the record could not be impeached on appeal. Wagner v. Wagner, (1947) 182 Or 340, 187 P2d 669.

FURTHER CITATIONS: Daugharty v. Gladden, (1958) 257 F2d 750; Valley Pipe Co. v. City of Albany, (1959) 215 Or 666, 300 P2d 411, 303 P2d 503; State v. Bloor, (1961) 229 Or 49, 365 P2d 103, 1075; In re Miller Estate, (1962) 229 Or 618, 368 P2d 327; Rogers v. Day, (1962) 232 Or 185, 375 P2d 63; Strandholm v. General Const. Co., (1963) 222 F Supp 12; State v. Gilmore, (1964) 236 Or 349, 388 P2d 451; Hulegaard v. Garrett, (1968) 251 Or 535, 446 P2d 975; Bryan v. Cupp (1969) 1 Or App 52, 458 P2d 697; Hartman v. Hartman, (1970) 2 Or App 335, 468 P2d 551.

LAW REVIEW CITATIONS: 39 OLR 118.

19.035

NOTES OF DECISIONS

Validity of appeal documents is not governed by payment of the filing fee in advance. United States Nat. Bank v. Underwriters at Lloyd's London, (1963) 239 Or 298, 382 P2d 851. Overruling Citron v. Hazeltine, (1961) 227 Or 330, 361 P2d 1011.

LAW REVIEW CITATIONS: 39 OLR 121.

19.038

NOTES OF DECISIONS

1. In general

The procedure for justification is prescribed in the statutes on civil arrest. Rogers v. Day, (1962) 232 Or 185, 375 P2d 63.

An undertaking on appeal filed before notice of appeal has been given is without statutory efficacy. Rogers v. King, (1967) 245 Or 627, 423 P2d 761.

2. Under former similar statute

(1) Serving undertaking on adverse party and filing. In the absence of an excuse for failure to serve the undertaking, the appeal would be dismissed. Morrison v. St. Johns Sanitarium, (1918) 89 Or 427, 174 P 721; La Follett v. La Follett, (1931) 136 Or 332, 288 P 507, 299 P 299.

The appeal would be dismissed on motion if the undertaking was not filed within the time prescribed by this section. Canyon Road Co. v. Lawrence, (1869) 3 Or 519; Cross v. Chichester, (1871) 4 Or 114; North Pac. Terminal Co. v. Lowenberg, (1884) 11 Or 286, 3 P 683.

Filing undertaking before service of notice of appeal was ineffectual, but when due to an excusable mistake leave to file an amended undertaking could be allowed. Weiss v. Jackson County, (1880) 8 Or 529; Hawthorne v. East Portland, (1885) 12 Or 210, 6 P 685; Union Cent. Life Ins. Co. v. Deschutes Valley Loan Co., (1932) 139 Or 222, 3 P2d 536, 8 P2d 587.

If the appellant failed to file a sufficient undertaking within the time allowed, he had to apply for leave of the court to file if he wished to perfect his appeal. Simison v. Simison, (1881) 9 Or 335; Graf v. Pearcy, (1915) 76 Or 488, 149 P 532; Hodgson v. Martin, (1918) 90 Or 105, 166 P 929, 175 P 671.

The filing of an undertaking was not jurisdictional. Union Cent. Life Ins. Co. v. Deschutes Valley Loan Co., (1932) 139 Or 222, 3 P2d 536, 8 P2d 587.

The purpose of the 1899 and 1901 amendments was to require the undertaking to be served on the adverse party and not to revise the subject of undertakings on appeal or the qualification of sureties therein. Small v. Lutz, (1902) 41 Or 570, 67 P 421, 69 P 825.

The purpose of an undertaking was to require the appellant to secure the opposing litigant against costs or damages in case the appeal proved unsuccessful. Portland Trust Co. v. Havely, (1899) 36 Or 234, 59 P 466, 61 P 346.

The additional undertaking for appeal in forcible entry and detainer was a condition precedent to such an appeal and no excuse could be entertained for failure to file it . Zelig v. Blue Point Oyster Co., (1909) 54 Or 543, 104 P 193.

Time to file undertaking could not be extended by the trial court before default therein, though the Supreme Court could relieve appellant of the default. Miller v. Arenz, (1922) 103 Or 592, 193 P 439, 206 P 299.

The state was interested in an appeal by the Industrial Accident Commission so that no appeal bond had to be filed. Miller v. State Ind. Acc. Comm., (1917) 84 Or 507, 159 P 1150, 165 P 576.

It was not necessary that the undertaking be signed by the appellants. Doehler v. Lansdon, (1931) 135 Or 687, 291 P 392, 298 P 200.

The state was excused from giving an undertaking on appeal. State v. Vincent, (1932) 141 Or 107, 16 P2d 636.

Under Supreme Court Rule 23 it was the duty of the respondent to file a motion to dismiss within 10 days after the appellant's failure to file the undertaking had come to his knowledge. Paul v. Livestock State Bank, (1926) 116 Or 626, 239 P 108, 241 P 56.

Requirement that undertaking be filed, as applied to pauper in habeas corpus action, was unconstitutional. Barber v. Gladden, (1957) 210 Or 46, 298 P2d 986, 309 P2d 192.

Service of an undertaking on appeal by a party himself was not authorized. Veden v. McFall, (1958) 214 Or 199, 288 P2d 217, 327 P2d 1113.

(2) Exceptions to and justification of sureties. Appellant had 10 days after notice of exception to his sureties to give notice of justification of the same or other sureties, to be justified within 10 days thereafter, in all, 20 days after the original objection to his sureties. McDonald v. McDonald, (1921) 99 Or 225, 195 P 361.

Exceptions to the sufficiency of the sureties had to be made within five days from the filing of the undertaking. Lewis v. Lewis, (1871) 4 Or 209; Ewen v. Smith, (1937) 156 Or 669, 69 P2d 523.

The objection that authority for subscribing the name of a surety company was not shown amounts simply to an exception to the sufficiency of the surety, which was waived by failure to except in time. Doehler v. Lansdon, (1931) 135 Or 687, 291 P 392, 298 P 200.

The order of the court allowing the undertaking after the sureties were required to justify stood in place of an indorsement required. Corbin Co. v. Preston, (1923) 109 Or 230, 212 P 541, 218 P 917.

The justification of the sureties had to be evidenced by an indorsement on the undertaking by the judge or clerk or by some written memorandum indicating that the undertaking was approved. Id.

A United States commissioner being an officer of a court was disqualified to become a surety on an appeal bond. Paxton v. Lively, (1906) 48 Or 135, 85 P 501.

Where the affidavit failed to state that the sureties were not such officers as are disqualified by law, the undertaking was insufficient. Sutton v. Sutton, (1915) 78 Or 9, 150 P 1025, 152 P 271.

An undertaking which limited the surety's liability to a specific amount was insufficient. Id.

A deposit by appellant and waiver of exception to sureties by other party was equivalent to a justification by the sureties. Fleming v. Gerlinger Motor Car Co., (1917) 86 Or 195, 159 P 1153, 168 P 289.

Affidavits showing the qualifications of sureties to an undertaking had to be filed contemporaneously with the filing of the undertaking. Holcomb v. Teal, (1873) 4 Or 352; Alberson v. Marshall, (1877) 6 Or 412; State v. McKinmore, (1880) 8 Or 207.

The personal presence of the surety before the court or clerk thereof was required for justification. Logan v. Cross, (1920) 98 Or 274, 192 P 656, 1119.

Where exceptions to the surety had been filed, a waiver of justification was tantamount to a justification. Cantrall v. Sterling Min. Co., (1912) 61 Or 516, 122 P 42.

The proper place and time for excepting to the surety was in the circuit court within five days after service of the undertaking. Doehler v. Lansdon, (1931) 135 Or 687, 291 P 392, 298 P 200.

The court below had no power to shorten the time allowed for the justification of sureties. Chemin v. East Portland, (1890) 19 Or 512, 24 P 1038.

Surety companies were authorized to become sureties on undertakings on appeal. Small v. Lutz, (1902) 41 Or 570, 67 P 421, 69 P 825.

Substituting a new bond when the sureties on the original bond failed to justify did not infringe respondent's right to except to the sufficiency of the new bond. Chambers v. Everding & Farrell, (1914) 71 Or 521, 524, 136 P 885, 143 P 616.

Filing of the undertaking not being jurisdictional, a motion attacking it for defect in time of filing had to filed within the time required by Supreme Court rule or it was deemed waived. Mitchell v. Coach, (1917) 83 Or 45, 153 P 478, 162 P 1058.

Mandamus was the appropriate remedy to compel the clerk to approve an undertaking on appeal. Riesland v. Bailey, (1934) 146 Or 574, 31 P2d 183.

Justification of sureties upon an undertaking on appeal did not need to be made in appellate court. Dodd v. Dodd, (1944) 175 Or 323, 153 P2d 530.

The waiver of objections to the undertaking prior to the expiration of the five days after service, where appellant was not served with notice of such waiver, did not curtail or change the time allowed to except to the sureties or hasten the date when the appeal was deemed perfected. Losie v. Losie, (1937) 156 Or 207, 64 P2d 525, 66 P2d 1175.

If required to justify, sureties had to justify before a judge or clerk of the court in which the action was pending. Larsen v. Lootens, (1922) 102 Or 579, 194 P 699, 203 P 621.

(3) Operative date of undertaking. An undertaking on appeal operated from the day of its timely filing, subject to be defeated on failure of the sureties to justify as against exceptions to their sufficiency. Hansen v. Robbins, (1916) 80 Or 659, 157 P 1112, 158 P 403.

FURTHER CITATIONS: Bartley v. Doherty, (1960) 225 Or 15, 351 P2d 71, 357 P2d 521.

LAW REVIEW CITATIONS: 39 OLR 122.

19.040

NOTES OF DECISIONS

See also cases under ORS 19.050.

1. In general

An execution may be recalled and set aside upon motion when proceedings have been stayed by an appeal and the giving of an undertaking. Bentley v. Jones, (1879) 8 Or 47.

An appeal from a judgment setting aside a conveyance of land in fraud of creditors is not one within this section but BC 551 [ORS 19.050]. Stubling v. Wilson, (1907) 50 Or 282, 90 P 1011, 92 P 810.

In the absence of objections the undertaking must be presumed sufficient and is effective for all purposes until final determination. Wolfer v. Hurst, (1907) 50 Or 218, 91 P 366.

The bond operates as a stay from the time of filing though appeal would only be perfected from the expiration of the time required to object to the sufficiency of the sureties. Anderson v. Phegley, (1909) 54 Or 102, 102 P 603.

The statutory methods and requirements for obtaining a stay are binding upon the Supreme Court. Northwest Townsite Co. v. Conn, (1915) 74 Or 484, 145 P 1058.

An undertaking on appeal from a judgment dismissing a writ of review against a justice, determining the sufficiency of a conviction of a crime, is governed by this section. Davenport v. Justice Court, (1921) 101 Or 507, 199 P 621.

A party will not be permitted to use his privilege of appeal as a means of harassing and annoying the opposite party or to obtain undue advantage in respect to jurisdictional matters. Claggett v. Claggett, (1925) 115 Or 520, 236 P 482, 238 P 1119.

The express provision that "such undertaking does not stay the proceedings, unless the undertaking further provides, etc.," clearly implies that if the undertaking provided for is given the proceedings are to be stayed. State v. Tazwell, (1930) 132 Or 122, 283 P 745.

The state is not required to file an undertaking. State v. Vincent, (1932) 141 Or 107, 16 P2d 636.

The purpose of this section was to abrogate the old common-law rule whereby judgments and decrees were superseded by an appeal. In re Workman's Estate, (1937) 156 Or 333, 65 P2d 1395, 68 P2d 479.

A notice of appeal from a judgment or decree prevents the trial court from amending such judgment or decree so as to substantially affect the rights of the parties without their consent, even though a stay of proceedings has not been ordered. Caveny v. Asheim, (1954) 202 Or 195, 274 P2d 281.

Although requirements of payment of fees for appeal bond, transcript and notice of appeal are an unconstitutional requirement barring the appeal of an impoverished applicant on a state writ of habeas corpus, an applicant cannot apply for habeas corpus in the federal courts until he has exhausted all of his state remedies, including an original proceeding of habeas corpus in forma pauperis in the state Supreme Court. Daugharty v. Gladden, (1957) 150 F Supp 887, aff'd, 257 F2d 750, 760.

Requirement of filing of appeal bond, as a condition to right to appeal, was unconstitutional, under Equal Protection Clause of the United States Constitution, as applied to prisoner who brought habeas corpus action against warden to be released from confinement under allegedly void judgment, and who was unable, on account of poverty, to post bond for costs on appeal from dismissal of his action. Barber v. Gladden, (1957) 210 Or 46, 298 P2d 986, 309 P2d 192.

Interest on the judgment is a part of damages. Western Bank v. Morrill, (1967) 246 Or 88, 424 P2d 243.

2. Who must sign the undertaking

Appellant need not sign the undertaking. O'Connor v. Towey, (1914) 70 Or 399, 401, 140 P 625; Doehler v. Lansdon, (1931) 135 Or 687, 291 P 392, 298 P 200.

A joint undertaking with sureties is sufficient for a joint appeal though signed by one appellant only. Elliott v. Bozorth, (1908) 52 Or 391, 395, 97 P 632.

The fact that the undertaking on appeal was signed by an attorney for the appellant without authority is immaterial. Doehler v. Lansdon, (1931) 135 Or 687, 291 P 392, 298 P 200.

3. Qualification of sureties

Affidavits showing the qualifications of sureties to an undertaking must be filed contemporaneously with the undertaking. State v. McKinmore, (1880) 8 Or 207.

Where the sureties only qualified in the sum of $500, their liability was not thereby limited. Sanborn v. Fitzpatrick, (1907) 51 Or 457, 91 P 540.

4. Limited undertaking

The amount of liability should not be limited in the undertaking. State v. McKinmore, (1880) 8 Or 207; Sanborn v. Fitzpatrick, (1909) 51 Or 457, 91 P 540; Sutton v. Sutton, (1915) 78 Or 9, 150 P 1025, 152 P 271; In re Andersen's Estate, (1921) 101 Or 94, 188 P 164, 198 P 236; Daly v. Wolfard Bros., (1953) 204 Or 240, 261 P2d 679, 262 P2d 917, 282 P2d 627.

An undertaking not providing that appellant would pay all the damages, costs and disbursements which might be awarded against him on appeal was invalid. Steed v. Cavanaugh, (1916) 80 Or 62, 151 P 968.

The omission of the word "damages" from the specific statement of appellant's obligation rendered the undertaking insufficient. Doehler v. Lansdon, (1931) 135 Or 687, 291 P 392, 298 P 200.

An undertaking which obligated the appellant and his surety for the payment of costs only was not in compliance with subsection (1). First Nat. Bank v. Frazier, (1933) 143 Or 662, 19 P2d 1091, 22 P2d 325.

Where garnishee insurance company served and filed an appeal bond, limited to $20,000, the appeal bond did not stay levy of execution on the judgment. Hecht v. James, (1959) 218 Or 251, 345 P2d 246.

5. "Judgments" and "decrees"

In applying this section the distinctions between judgments in actions at law, decrees in equity and judgments in special proceedings are important, the latter including mandamus, habeas corpus and contempt. In re Vinton, (1913) 65 Or 422, 426, 132 P 1165.

6. Appeal from judgment or decree for the recovery of money or of personal property

An undertaking by defendant appealing from a money judgment under this section binds the sureties to pay it if affirmed. Braver v. Portland, (1899) 35 Or 471, 58 P 861, 59 P 117, 60 P 379.

An appeal from an order in supplemental proceedings requiring the judgment debtor to satisfy the judgment comes under paragraph (1)(a). State v. Downing, (1901) 40 Or 309, 58 P 863, 66 P 917.

An undertaking not stating to whom payment will be made is sufficient if literally complying with this section. Metzler Lbr. Co. v. Farmers' Mercantile Co., (1916) 78 Or 551, 153 P 56.

A stay of execution on a judgment against the principal of a redelivery bond, pending appeal, suspends the right to issue execution against the sureties. State v. Beveridge, (1923) 109 Or 69, 218 P 112.

A surety was not bound for the payment of accrued alimony where the appeal was from a decree dismissing a motion for a modification of an original decree granting a divorce and alimony. Henderson v. Henderson, (1900) 37 Or 141, 60 P 597, 61 P 136, 48 LRA 766, 82 Am St. Rep 741.

An undertaking on appeal to satisfy a decree to deliver personal property was sufficient and not limited to a specific amount. Helms Groover & Dubber Co. v. Copenhagen, (1919) 93 Or 410, 177 P 935.

Grantee's undertaking on appeal from decree setting aside conveyance as fraudulent did not stay enforcement of judgment entered against grantor. American Sur. Co. of New York v. Hattrem, (1932) 138 Or 358, 3 P2d 1109, 6 P2d 1087.

Grantee's undertaking on appeal from decree setting aside allegedly fraudulent conveyance did not require grantee, upon affirmance, to pay money judgment against grantor. Id.

7. Undertaking against waste and for use and occupation of land

The instances in which the undertaking should provide for the payment of the use and occupation of the property are confined to the cases specified in paragraph (1)(b). Bank of British Columbia v. Harlow, (1881) 9 Or 338.

An order confirming a foreclosure sale is not embraced by paragraph (1)(b). Bank of British Columbia v. Harlow, (1881) 9 Or 338. **Distinguished in** German Sav. Socy. v. Kern, (1902) 42 Or 532, 70 P 709.

The surety is not liable for the face of the undertaking without regard to the reasonable value of the use and occupation of the premises. German Loan Socy. v. Kern, (1900) 38 Or 232, 62 P 788, 63 P 1052.

Paragraph (1)(b) does not contemplate that the value of the use and occupation of the premises shall be fixed in advance by the trial judge. Id.

Under paragraph (1)(b) an appealing mortgagor is entitled to remain in possession pending appeal although the filing of such a bond might not have the effect of ousting the purchaser if he had already entered into possession. German Sav. Socy. v. Kern, (1902) 42 Or 532, 70 P 709.

On appeal from a decree foreclosing liens on mining claims, an undertaking in an amount sufficient to cover any loss by possible forfeiture of the property for failure to perform the required assessment work may not be required. Anderson v. Phegley, (1909) 54 Or 102, 102 P 603.

An undertaking on appeal in a proceeding to adjudicate water rights should conform to paragraph (1)(b). Porter v. Small, (1912) 62 Or 574, 120 P 393, 124 P 649, Ann Cas 1914C, 536, 40 LRA(NS) 1197.

Paragraph (1)(b) in referring to the foreclosure of a lien upon real property contemplates a lien existing independent of any personal obligation to pay the debt. Northwest Townsite Co. v. Conn, (1915) 74 Or 484, 145 P 1058.

In an appeal from a mortgage foreclosure suit with a money decree against defendant, paragraph (1)(d) applies. Id.

A suit to enjoin diversion of waters to the injury of plaintiff was assumed not to be one for the recovery of real property under paragraph (1)(b). State v. Small, (1907) 49 Or 595, 90 P 1110.

In a suit to foreclose a mortgage on mining property, an appeal perfected before sale required the sheriff to continue the sale until after time limited for objections to appellant's sureties. Anderson v. Phegley, (1909) 54 Or 102, 102 P 603.

An appeal from the dismissal of a cross-bill in forcible entry and detainer action, where no provisions were made as to the latter, was not governed by paragraph (1)(b). Donart v. Stewart, (1912) 63 Or 76, 126 P 608.

The Supreme Court could not stay a sale under foreclosure in aid of a defendant who appealed from a personal decree with an undertaking according to paragraph (1)(b) instead of (1)(d). Northwest Townsite Co. v. Conn, (1915) 74 Or 484, 145 P 1058.

Suit to rescind lease and for possession of realty and personalty and for accounting of rents was not an action of forcible entry and detainer as regards necessity of filing special undertaking. Peck v. Ross, (1932) 139 Or 323, 3 P2d 126, 8 P2d 780.

Paragraph (1)(b) was applicable where a mortgage was foreclosed but there was no personal judgment entered against the mortgagor. Equitable Life Assur. Socy. v. Boothe, (1941) 166 Or 197, 110 P2d 932.

8. Undertaking on decree for transfer or delivery of personal property

Paragraph (1)(c) governed where executrix appealed from decree revoking her appointment. State v. Tazwell, (1930) 132 Or 122, 283 P 745.

Under this section the trial court is bound to allow supersedeas or stay as a matter of right where executrix appeals from decree revoking her appointment. Id.

Where the decree provided for the transfer of certain

personal property it was appropriate for the trial court to fix the amount of the undertaking under paragraph (1)(c). Helms Groover & Dubber Co. v. Copenhagen, (1919) 93 Or 410, 177 P 935.

9. Appeal from decree foreclosing a lien with personal judgment

On a bond conditioned to pay any deficiency, if the decree should be affirmed, and the value of the use and occupation of the mortgaged premises until delivery of possession, signers are liable for the value of such use and occupation in addition to the deficiency. German Sav. Socy. v. Kern, (1903) 42 Or 532, 536, 70 P 709.

Paragraph (1)(d) governs where a mortgagor appeals from a foreclosure wherein a personal judgment is rendered against him. Northwest Townsite Co. v. Conn, (1915) 74 Or 484, 145 P 1058.

A lien claimant cannot issue execution where the hands of several claimants are stayed by an undertaking on appeal. Johnson v. Paulson, (1917) 83 Or 238, 154 P 685, 163 P 435.

10. Appeal by one of several defendants

A stay of execution in favor of one defendant pending appeal by him does not suspend the right to issue execution against those defendants not appealing. State v. Beveridge, (1923) 109 Or 69, 218 P 1112.

11. "Conveyance or other instrument"

LOL 552 [ORS 19.050], and not subsection (2), governs the operation and requirements of an undertaking in an appeal from a mandamus litigation. In re Vinton, (1913) 65 Or 422, 132 P 1165.

A decree is not stayed if the defendant delivers to the plaintiff the instrument as ordered by decree and receives the balance of the purchase price. Cottrell v. Prier, (1951) 191 Or 571, 231 P2d 788.

Compliance with subsection (2) for the purpose of obtaining a stay of execution on appeal cannot be considered acquiescense in the decree. Kelly v. Tracy, (1956) 209 Or 153, 305 P2d 411.

12. Appeal to circuit court

Sureties on appeal bond from inferior court to the circuit court are not liable for expenses incurred by further appeal to the Supreme Court. In re John's Will, (1897) 30 Or 494, 47 P 341, 50 P 226, 36 LRA 242.

13. Supreme Court's inherent power to grant a stay of proceedings

The appellate court has power, as incidental to its jurisdiction, to grant a temporary injunction when necessary to aid or protect its appellate jurisdiction. Livesley v. Krebs Hop Co., (1910) 57 Or 352, 97 P 718, 107 P 460, 112 P1; Lais v. Silverton, (1915) 77 Or 434, 147 P 398, 150 P 269, 151 P 712; Kollock & Co. v. Leyde, (1915) 77 Or 569, 143 P 621, 151 P 733; Blair v. Blair, (1952) 199 Or 273, 247 P2d 883, 260 P2d 960.

A writ of supersedeas is unknown in this state, though a certificate of probable cause in a criminal action is tantamount thereto and in effect suspends the enforcement of the judgment until reviewed on appeal. State v. Small, (1907) 49 Or 595, 90 P 1110.

Violation of a stay of a decree, obtained by filing an undertaking, is treated as an original contempt proceeding in the Supreme Court. Id.

The Supreme Court's power to issue an injunction in a case pending before it is only incidental to its appellate jurisdiction to the extent necessary to maintain it. Kellaher v. Portland, (1911) 57 Or 575, 110 P 492, 112 P 1076.

The Supreme Court cannot by injunction protect property rights or enjoin acts that might result in damage to a litigant. Id.

Where it is not apparent that the rights of either party would be prejudiced beyond repair the Supreme Court may dissolve a temporary injunction pending appeal. Noyes-Holland Logging Co. v. Pac. Live Stock & Lbr. Co., (1917) 84 Or 386, 165 P 236.

The Supreme Court will deny a motion to dissolve its temporary injunction, where a dissolution order would enable the owner to dispose of property and would decide the main question involved. Malagamba v. McLean, (1918) 89 Or 302, 161 P 560, 173 P 1177.

Mandamus will issue to compel the trial court to allow a supersedeas or stay as a matter of right when the proper undertaking is given. State v. Tazwell, (1930) 132 Or 122, 283 P 745.

The inherent appellate power to stay proceedings is not limited to protecting a party from irreparable loss of a monetary nature; the Supreme Court can stay an order for transfer of custody of a ward of court pending an appeal as incidental to protecting its appellate jurisdiction. Blair v. Blair, (1952) 199 Or 273, 247 P2d 883, 260 P2d 960.

Where a good and sufficient bond is provided it may stay further proceedings notwithstanding a levy. Daly v. Wolfard Bros., (1953) 204 Or 241, 261 P2d 679, 262 P2d 917, 282 P2d 627.

Where the continuance of a restraining order would not have caused defendants any great inconvenience and plaintiff had given an undertaking for damages that might be caused by the injunction, the order was not vacated. Coopey v. Keady, (1914) 81 Or 218, 139 P 108.

Where appellant in a divorce proceeding removed his child from the state pending appeal, the Supreme Court ordered the child returned or, if appellant should fail to comply, the decree appealed from would be affirmed. Claggett v. Claggett, (1925) 115 Or 520, 236 P 482, 238 P 1119.

14. Discharge of sureties

The court will not on motion of appellant undertake to release the sureties or affect the rights and liabilities of the respective parties thereto on an interlocutory motion. Watson v. Noonday Min. Co., (1900) 37 Or 287, 55 P 867, 58 P 36, 60 P 994.

No surety upon an appeal undertaking is at liberty at his pleasure or whim to renounce his liability and, in that manner, rescind his obligation. Aldrich v. Forbes, (1963) 237 Or 559, 385 P2d 618.

A motion of surety to require the appellant to file a new undertaking and relieve the surety from further liability because of false and fraudulent representations inducing him to sign the undertaking, was denied. Edgar v. Golden, (1900) 36 Or 448, 48 P 1118, 60 P 2.

15. Attachments

Where an attachment was sued out in aid of an action but the sale of the attached property was adjourned from time to time causing expenses which would have been collected but for the appeal and stay, upon affirmance plaintiff was entitled to an additional judgment for the amount of the expenses. Mee v. Bowden Milling Co., (1905) 47 Or 143, 81 P 980.

An attachment discharged by judgment for defendant was not revived by an undertaking on appeal. Nichols v. Ingram, (1915) 75 Or 439, 146 P 988.

16. Appointment of a receiver

Supersedeas of an order appointing a receiver suspends the power of the lower court to hear and settle the receiver's report, and outlays already sanctioned and paid by the receiver should be investigated upon his final settlement. Henderson v. Tillamook Hotel Co., (1915) 78 Or 444, 153 P 481.

An order appointing a receiver for defendant and directing that its property be taken and sold was stayed by an undertaking under paragraph (1)(a). French v. C.F. & T. Co., (1925) 116 Or 532, 241 P 1010.

17. Entry of judgment by appellate court against the parties and their sureties

Where the appeal has been abandoned, dismissal of appeal and affirmance of judgment is proper. Moore v. Packwood, (1874) 5 Or 325; Booth v. Block, (1925) 114 Or 19, 234 P 288; Edwards v. Thorne, (1934) 146 Or 669, 29 P2d 1118.

Where respondent secures enforcement of a judgment by giving an undertaking on appeal, the appellate court may enter judgment against the sureties upon reversing the judgment. Ah Lep v. Gong Choy, (1886) 13 Or 429, 11 P 72; Holbrook v. Inv. Co., (1897) 32 Or 104, 51 P 451.

Where an appeal is dismissed for failure to file a transcript within time, judgment will be enforced against the appellant and his sureties. Chandler v. Todd, (1920) 95 Or 430, 188 P 161; Russell v. Smith, (1920) 96 Or 629, 190 P 715; Walker v. Fireman's Fund Ins. Co., (1927) 122 Or 179, 257 P 701.

When appeal is perfected and appellant defaults, respondent should bring into appellate court a copy of the notice of appeal and the bond along with the judgment entry and ask for affirmance of the judgment. Heatherly v. Hadley & Owen, (1865) 2 Or 117.

When both appellant and respondent give an undertaking and judgment is affirmed, respondent is entitled only to costs where judgment has been enforced, but he is entitled to entry of judgment against the sureties if it has not been enforced. Ah Lep v. Gong Choy, (1886) 13 Or 429, 11 P 72.

The clerk should certify both the undertaking for stay on appeal and the counter undertaking of respondent to enforce the judgment, when both are given. Id.

Where the judgment is set aside after an appeal has been initiated, the appellate court cannot affirm the judgment due to appellant's failure to file a transcript. Henrichsen v. Smith, (1896) 29 Or 475, 42 P 486, 44 P 496.

The clerk must certify as to undertakings so that the record may enable the court to enter judgment against the surety upon the undertaking on appeal upon affirmance of the judgment. Portland Trust Co. v. Havely, (1900) 36 Or 234, 59 P 466, 61 P 346.

ORS 53.110 as applied to appeals from justices' courts was intended to have the same effect as this section relative to liability of sureties on appeal. Id.

Where the surety refuses to justify within the required time and no transcript has been filed, the judgment may be affirmed. United States Trust Co. v. Marquam, (1902) 41 Or 371, 64 P 643. **But see** State v. McKinnon, (1880) 8 Or 485.

Where notice of appeal is not served in time, the Supreme Court has no jurisdiction to enter judgment against the surety but can only dismiss the appeal. McCarger v. Moore, (1918) 89 Or 597, 175 P 77.

An insufficient transcript, notice of appeal and undertaking were appropriate only as data from which the court might determine that it was proper to enforce the judgment against the surety. Sitton v. Goodwin, (1926) 119 Or 74, 248 P 163.

Under Supreme Court rule a motion to enter judgment against sureties was not allowed where notice to the opposite party was not given. McCarty v. Wintler, (1889) 17 Or 391, 21 P 195.

Where plaintiffs' appeal was dismissed, judgment was entered against them and their sureties for the cost of the proceeding. Ogden v. Hoffman, (1918) 88 Or 503, 172 P 503.

FURTHER CITATIONS: Howe v. Taylor, (1881) 9 Or 288; Oregon Elec. R. Co. v. Terwilliger Land Co., (1908) 51 Or 107, 93 P 334; Zelig v. Blue Point Oyster Co., (1909) 54 Or 543, 104 P 193; Sitton v. Goodwin, (1926) 119 Or 354, 249 P 362; Meyers v. Pac. States Lbr. Co., (1927) 122 Or 315, 259 P 203; Veden v. McFall, (1958) 214 Or 199, 288 P2d 217, 327 P2d 1113; Priester v. Thrall, (1961) 229 Or 184, 349 P2d 866, 365 P2d 1050; Gordon Creek Tree Farms v. Layne, (1962) 230 Or 204, 358 P2d 1062, 368 P2d 737; Rogers v. Day, (1962) 232 Or 185, 375 P2d 63; Driver v. Barker, (1966) 243 Or 280, 413 P2d 59; Rogers v. King, (1967) 245 Or 627, 423 P2d 761.

ATTY. GEN. OPINIONS: Effect of an appeal from a decree of circuit court enjoining the State Game Commission from enforcing an order made by said commission, 1922-24, p 351.

LAW REVIEW CITATIONS: 34 OLR 75; 36 OLR 253; 38 OLR 336-350.

19.045

LAW REVIEW CITATIONS: 39 OLR 122.

19.050

NOTES OF DECISIONS

1. In general
2. Perishable property
3. Cases not provided for in ORS 19.040
4. "Undertaking for the appeal only"
5. Effect and extent of stay

See also cases under ORS 19.040.

1. In general

This section is an elaboration upon exceptions mentioned in OL 7-504 [ORS 19.040]. In re Workman's Estate, (1937) 156 Or 333, 65 P2d 1395, 68 P2d 479.

2. Perishable property.

The trial court has jurisdiction to order sale of property under attachment if it is perishable, notwithstanding appeal with stay. Bank of Kenton v. Preble, (1918) 87 Or 230, 167 P 578, 170 P 302.

3. Cases not provided for in ORS 19.040

An appeal from a judgment creditor's suit to set aside a conveyance of land on the ground of fraud is governed by this section and not by ORS 19.040. Stubling v. Wilson, (1907) 50 Or 282, 90 P 1011, 92 P 810.

This section rather than subsection (2) of ORS 19.040 was applicable where defendant in a mandamus proceeding was required to execute a contract. In re Vinton, (1913) 65 Or 422, 132 P 1165.

4. "Undertaking for the appeal only"

Neither this section nor ORS 19.040 indicates a purpose that a mere cost bond shall stay proceedings in cases not affecting money, property or the execution of a conveyance. In re Workman's Estate, (1937) 156 Or 333, 65 P2d 1395, 68 P2d 479; Blair v. Blair, (1952) 199 Or 273, 247 P2d 883, 260 P2d 960.

An order changing the custody of a ward of court is not governed by the last sentence of this section. Blair v. Blair, (1952) 199 Or 273, 247 P2d 883, 260 P2d 960. Overruling Bestel v. Bestel, (1936) 153 Or 100, 44 P2d 1078, 53 P2d 525.

The Supreme Court has the inherent power to stay an order for transfer of custody of a ward of court pending an appeal as incidental to protecting its appellate jurisdiction. Blair v. Blair, (1952) 199 Or 273, 247 P2d 883, 260 P2d 960.

On appeal from a decree enjoining diversion of waters of a stream it was assumed that under this section an undertaking only for damages, costs and disbursements

awardable on appeal worked a stay. State v. Small, (1907) 49 Or 595, 90 P 1110.

An undertaking on an appeal from a decree in a creditor's suit to set aside a conveyance for fraud did not cover the judgment against the debtor. Stubling v. Wilson, (1907) 50 Or 282, 90 P 1011, 92 P 810.

The cost bond furnished by an executor on appeal from probate court order appointing another as administrator did not operate as a supersedeas. In re Workman's Estate, (1937) 156 Or 333, 65 P2d 1395, 68 P2d 479; Blair v. Blair, (1952) 199 Or 273, 247 P2d 883, 260 P2d 960.

An order in a divorce suit awarding custody of minor children was not stayed by the giving of the notice of appeal and cost bond. Blair v. Blair, (1952) 199 Or 273, 247 P2d 883, 260 P2d 960. Overruling Bestel v. Bestel, (1936) 153 Or 100, 44 P2d 1078, 53 P2d 525.

5. Effect and extent of stay

An appeal does not suspend the operation of a judgment but only its execution. Day v. Holland, (1887) 15 Or 464, 15 P 855.

An appeal by an administrator from an order removing him does not continue or revive his authority or letters. Knight v. Hamaker, (1898) 33 Or 154, 54 P 277, 659.

An undertaking on appeal does not revive an attachment which has been discharged by judgment. Nichols v. Ingram, (1915) 75 Or 439, 146 P 988.

FURTHER CITATIONS: Western Bank v. Morrill, (1967) 246 Or 88, 424 P2d 243.

LAW REVIEW CITATIONS: 34 OLR 1, 75; 38 OLR 339-342.

19.060

NOTES OF DECISIONS

1. "Action or suit upon a contract"
2. "Notwithstanding an appeal and undertaking for stay"
3. "If within 10 days from the time the appeal is perfected"
4. Operation and effect of restitution undertaking
5. "Such restitution as the appellate court may direct"

1. "Action or suit upon a contract"

A suit to foreclose a mechanic's lien is not a suit upon a contract within this section. Kollock & Co. v. Leyde, (1915) 77 Or 569, 571, 143 P 621, 151 P 733.

An action for damages for breach of a contract is a suit on a contract within this section. Rogue River Fruit & Produce Assn. v. Gillen-Chambers Co., (1917) 85 Or 113, 151 P 728, 165 P 679, 1183.

A mortgage is a contract and execution to enforce a decree of foreclosure is within this section. Gearin v. Fleckenstein, (1918) 89 Or 146, 173 P 569.

2. "Notwithstanding an appeal and undertaking for stay"

In the absence of objections to a supersedeas bond, it is effective to prevent a sale of property. Hansen v. Robbins, (1916) 80 Or 659, 157 P 1112, 158 P 403, 405.

The words "to stay" do not contemplate any affirmative action such as returning an execution unsatisfied. Gearin v. Fleckenstein, (1918) 89 Or 146, 173 P 569.

3. "If within 10 days from the time the appeal is perfected"

An undertaking for restitution on appeal is premature when filed before the beginning of the 10-day period. Hansen v. Robbins, (1916) 80 Or 659, 157 P 1112, 158 P 405; Hume v. Rice, (1917) 86 Or 93, 167 P 578.

A restitution undertaking cannot be filed after the 10 days of grace have elapsed. Hansen v. Robbins, (1916) 80 Or 659, 157 P 1112, 158 P 403.

4. Operation and effect of restitution undertaking

The restitution undertaking does not discharge the supersedeas undertaking; both continue in force. Ah Lep v. Gong Choy, (1886) 13 Or 429, 431, 11 P 72.

The consideration for the restitution undertaking is the privilege of enforcing the stayed judgment. Id.

Enforcement of the judgment in part is sufficient consideration for the restitution undertaking Holbrook v. Inv. Co., (1897) 32 Or 104, 51 P 451.

A restitution undertaking operates from the day of filing, subject to defeasance on exceptions and failure of the sureties to justify. Hansen v. Robbins, (1916) 80 Or 659, 157 P 1112, 158 P 403, 405.

Plaintiff upon giving the counter bond was not compelled to take out a new execution. Gearin v. Fleckenstein, (1918) 89 Or 146, 173 P 569.

5. "Such restitution as the appellate court may direct"

The appellate court has jurisdiction if it reverses or modifies the judgment to enter judgment against the sureties on the restitution bond. Ah Lep v. Gong Choy, (1886) 13 Or 429, 11 P 72; Holbrook v. Inv. Co., (1897) 32 Or 104, 51 P 451; Stuart v. Univ. Lbr. Co., (1913) 66 Or 546, 132 P 1, 1164, 135 P 165.

The Supreme Court on reversing the judgment appealed from, where an undertaking was given under this section, will order restitution of the amount paid thereon. Howland v. Fenner Mfg. Co., (1922) 104 Or 373, 206 P 730, 207 P 1096.

FURTHER CITATIONS: Culver v. Randle, (1904) 45 Or 491, 78 P 394.

LAW REVIEW CITATIONS: 38 OLR 344.

19.074

NOTES OF DECISIONS

When less than a total transcript was designated, the points on which an appellant intended to rely had to be stated in the designation of the record. Freedman v. Cholick, (1963) 233 Or 569, 379 P2d 575; Wynn v. Sundquist, (1971) 259 Or 125, 485 P2d 1085.

The trial judge had no jurisdiction, under this section prior to the 1971 amendment, to strike appellant's designation. Gordon Creek Tree Farms, Inc. v. Layne, (1961) 230 Or. 204, 358 P2d 1062, 368 P2d 737.

FURTHER CITATIONS: Lang v. Hill, (1961) 226 Or 371, 360 P2d 316; Dent v. Pollard, (1961) 227 Or 399, 362 P2d 324; Fry v. Ashley, (1961) 228 Or 61, 363 P2d 555; State v. Gilmore, (1964) 236 Or 349, 388 P2d 451; Steenson v. Robinson, (1964) 236 Or 414, 389 P2d 27; Sinclair v. Barker, (1964) 236 Or 599, 390 P2d 321; In re Coon Estate, (1964) 238 Or 172, 393 P2d 655; Sims v. Sowle, (1964) 238 Or 329, 395 P2d 133; Green v. Haugen, (1969) 1 Or App 1, 457 P2d 655; Brown v. Brown, (1970) 2 Or App 123, 467 P2d 119.

LAW REVIEW CITATIONS: 39 OLR 119; 39 OLR 361.

19.078

NOTES OF DECISIONS

1. In general
2. Under former similar statute
   (1) In general
   (2) Construction of section
   (3) "After the appeal is perfected"
   (4) "The appellant shall" file transcript
   (5) "Within 30 days after the appeal is perfected"
      (a) Filing before appeal perfected
      (b) Commencement and computation of period
   (6) Filing transcript at Pendleton or at Salem

(7) Jurisdictional requirements
(8) "If the appeal is from a decree"

1. In general

The order of the court settling the transcript is conclusive of all questions relating to its accuracy and completeness. Fry v. Ashley, (1961) 228 Or 61, 363 P2d 555; State v. Smith, (1964) 238 Or 195, 394 P2d 429.

When the transcript is settled and certified to the Supreme Court, it must be presumed it is correct and complete. Beelman v. Beelman, (1961) 227 Or 556, 361 P2d 663, 363 P2d 561.

The trial judge has no jurisdiction to strike appellant's designation. Gordon Creek Tree Farms, Inc. v. Layne, (1961) 230 Or 204, 358 P2d 1062, 368 P2d 737.

The trial court retains jurisdiction to correct the transcript until the disposition of case by the appellate court. State v. Hecket, (1970) 2 Or App 273, 467 P2d 122, Sup Ct review denied.

Affidavits not presented during the trial in any manner were not "additional parts of the proceedings" and not includable in the record. State v. Rutledge, (1970) 2 Or App 374, 468 P2d 913.

2. Under former similar statute

(1) In general. This section was applicable to an appeal from the county court to the circuit court. Mason, Ehrman & Co. v. Lewis' Estate, (1929) 131 Or 242, 276 P 281, 281 P 123, 282 P 772; In re Cooke's Estate, (1941) 167 Or 58, 115 P2d 302.

Appeals in criminal cases were not affected by this section. State v. Bovee, (1883) 11 Or 57, 4 P 520.

(2) Construction of section. A retrospective construction of amendment of the section which would cut off a subsisting right of appeal was disfavored. Catterlin v. Bush, (1901) 39 Or 496, 59 P 706, 65 P 1064.

The word "appeal" had the same meaning that it has in ORS 19.023. Lasene v. Syvanen, (1928) 123 Or 615, 257 P 822, 263 P 59.

The section was mandatory when a failure to comply therewith would injure the public or a third party. Pedro v. Vey, (1935) 150 Or 415, 39 P2d 963, 46 P2d 582.

The requirement that appellant file a transcript and proof of service with the clerk of the appellate court was plain, unambiguous and mandatory. Schaefer v. Montgomery Ward & Co., (1941) 167 Or 679, 120 P2d 235.

(3) "After the appeal is perfected". The filing of a transcript within 30 days from the justification of sureties on exceptions filed by some respondents was sufficient as to all the respondents. In re Skinner's Will, (1902) 40 Or 571, 62 P 523, 67 P 951.

After an appeal was perfected, an order setting aside the notice of appeal was a nullity and failure to file a transcript within the time prescribed after perfecting the appeal operated as an abandonment. Hanley v. Stewart, (1909) 54 Or 38, 102 P2.

The time allowed for filing a transcript did not begin to run until after the time allowed for excepting to the undertaking had expired. Irwin v. Klamath County (1924) 110 Or 374, 210 P 159, 223 P 736.

Since the state was not required to file undertaking, its appeal was perfected when notice of appeal was served and filed, and time for filing transcript ran from such filing. State v. Vincent, (1932) 141 Or 107, 16 P2d 636.

Where a nunc pro tunc entry of judgment was ordered after notice of appeal had been served and filed, the time for filing transcript was not changed. Gardner v. Pac. & E. Ry., (1912) 61 Or 103, 121 P 6.

Where one surety had been examined and examination of another waived, the appeal was not perfected until some record of approval of the undertaking was made. Corbin Co. v. Preston, (1923) 109 Or 230, 212 P 541, 218 P 917.

(4) "The appellant shall" file transcript. It was appellant's responsibility to file the transcript or cause it to be filed. Mason, Ehrman & Co. v. Lewis' Estate, (1929) 131 Or 242, 276 P 281, 281 P 123, 282 P 772; In re Cooke's Estate, (1941) 167 Or 58, 115 P2d 302.

The secretary of the Board of Medical Examiners being required to file a transcript of the appeal, the appellant was not responsible for irregularities attending same. State v. Estes, (1898) 34 Or 196, 51 P 77, 52 P 571, 55 P 25.

It was the right of the appellant to have as much of the record as he saw fit certified by the clerk and delivered to him. Mason, Ehrman & Co. v. Lewis' Estate, (1929) 131 Or 242, 276 P 281, 281 P 123, 282 P 772.

(5) "Within 30 days after the appeal is perfected." Thirty days were allowed to file the transcript regardless of whether the period terminated before or after the commencement of a new term of court. Cauldwell v. Bingham & Shelley Co., (1917) 84 Or 257, 155 P 190, 163 P 827.

The word "within," relating to filing transcript, meant not beyond 30 days from time appeal was perfected. Dibble v. Hodes Co., (1930) 132 Or 596, 277 P 820, 286 P 554.

(a) Filing before appeal perfected. Ordinarily a transcript was not to be filed until time for objecting to sufficiency of the surety had expired. Cook v. Albina, (1890) 20 Or 190, 25 P 386; French v. C.F. & T. Co., (1925) 116 Or 532, 241 P 1010.

The proper practice was to move to strike a premature transcript from the files rather than to ask for a dismissal. Nottingham v. McKendrick, (1901) 38 Or 495, 497, 57 P 195, 63 P 822.

Filing the transcript before the appeal was perfected was premature. Graf v. Pearcy, (1915) 76 Or 488, 149 P 532.

A transcript necessarily required in the consideration of an application for a restraining order, though filed two days after the undertaking was filed, was not premature. Grand Prize Hydraulic Mines v. Boswell, (1917) 83 Or 1, 151 P 368, 162 P 1063.

A transcript filed two days after the undertaking was filed was not premature where no exceptions were taken to the undertaking. Id.

(b) Commencement and computation of period. Time to file transcript began to run on the day following the last day for excepting to sureties on the undertaking. Boothe v. Scriber, (1916) 48 Or 561, 87 P 887, 90 P 1002; Martin v. Moreland, (1919) 93 Or 61, 174 P 722, 180 P 933; Chandler v. Todd, (1920) 95 Or 430, 188 P 161; Irwin v. Klamath County, (1924) 110 Or 374, 210 P 159, 223 P 736.

When the 30th day fell on Sunday or a holiday, the day following was included. McCabe-Duprey Tanning Co. v. Eubanks, (1910) 57 Or 44, 102 P 795, 110 P 395; Pringle Falls Power Co. v. Patterson, (1913) 65 Or 474, 128 P 820, 132 P 527; In re Riggs, (1922) 105 Or 531, 207 P 175, 1005, 210 P 217; Turnbow v. Keller, (1933) 142 Or 200, 12 P2d 558, 19 P2d 1089.

Where justification of sureties was postponed from time to time and finally waived, the 30 days began to run from the date of waiver of justification. Cantrall v. Sterling Mining Co., (1912) 61 Or 516, 122 P 42; Fleming v. Gerlinger Motor Car Co., (1917) 86 Or 195, 159 P 1153, 168 P 289.

Stipulated time to a day certain, which fell on Sunday, did not include the next day. Zelig v. Blue Point Oyster Co., (1912) 61 Or 535, 539, 113 P 852, 122 P 756.

The fact that a transcript was mailed to the clerk for filing and in due course should have arrived in time, did not save a belated arrival. Sabin v. Owens Const. Co., (1914) 69 Or 269, 138 P 844.

A transcript filed within 30 days after the clerk had indorsed the undertaking was filed in time where respondent excepted to the sufficiency of the surety. Moorehouse v. Weister, (1910) 56 Or 126, 95 P 497, 107 P 470, 108 P 121.

Where there was a waiver of objections to the undertaking but there was no notice of such waiver served on appellant, the appeal was not perfected until after time allowed to object to sureties. Losie v. Losie, (1937) 156 Or 207, 64 P2d 525, 66 P2d 1175.

(6) Filing transcript at Pendleton or at Salem. Until the filing fee had been paid, the transcript was not filed notwithstanding its delivery into the possession of the officer. Hilts v. Hilts, (1903) 43 Or 162, 164, 72 P 697.

Where there was some delay in the payment of fees, a motion to dismiss for such nonpayment was denied where such payment was made before hearing of the motion. Templeton v. Lloyd, (1911) 59 Or 52, 55, 109 P 1119, 115 P 1068.

The clerk of the circuit court could not waive the payment of the prescribed fee and consent to appellant paying the fee after the transcript was filed because he did not then know the exact amount of the fee. Hart v. Prather, (1912) 61 Or 7, 9, 119 P 489.

(7) Jurisdictional requirements. The 1943 amendment substituted the notice of appeal for the filing of the transcript as the event which conferred jurisdiction upon the Supreme Court. Martin v. Harrison, (1947) 182 Or 121, 180 P2d 119, 186 P2d 534; Pond v. Jantzen Knitting Mills, (1947) 187 Or 697, 180 P2d 115.

Defects or errors in a transcript which were not jurisdictional in character, were amendable in the discretion of the court. Burchell v. Averill Mach. Co., (1909) 55 Or 113, 105 P 403.

(8) "If the appeal is from a decree." An appeal would not be dismissed in an equity case although the transcript of the testimony was not sent up since the question of the sufficiency of the complaint could nevertheless be considered. St. Martin v. Hendershott, (1916) 82 Or 58, 151 P 706, 160 P 373.

On an appeal from a decree where the transcript of testimony was lacking, the only question to be considered was whether the pleadings were sufficient to uphold the decree, and where they were sufficient the decree of the trial court had to be affirmed. Wood v. School Dist. 13, (1923) 107 Or 280, 214 P 589.

Where the purported transcript was stricken, appellant would not be permitted to have the case tried on the correct copy of the stenographer's transcript furnished by appellee's attorney. Martin v. Brownsville, (1913) 68 Or 115, 131 P 512.

Equity cases were tried de novo in the Supreme Court and no question of fact could be reviewed without a duly authenticated transcript of all the evidence. Little Applegate Imp. Dist. v. Munsell, (1930) 134 Or 132, 291 P 369.

Filing the transcript of evidence with the county clerk was essential to appeal. Id.

The sufficiency of the title to land could not be inquired into where the abstract of title was not in the transcript. Jerman v. Misner, (1910) 56 Or 390, 108 P 179.

The provision relative to attaching the papers together was directory and not mandatory. Sanborn v. Fitzpatrick, (1907) 51 Or 457, 91 P 540.

It was not requisite that the exhibits which were properly identified by the stenographer as they were introduced in evidence be filed with the clerk of the trial court. Id.

When the case was tried before the trial judge and an official stenographer, the exhibits could be properly certified by the clerk without a certificate from the judge or the reporter. Id.

Where the cause was tried before a referee in the absence of the court, the exhibits filed with the transcript had to be identified by the judge. Id.

In absence of properly authenticated evidence, the only question to be considered on appeal was whether the pleadings were sufficient to uphold the decree. Nealan v. Ring, (1921) 98 Or 490, 184 P 275, 193 P 199.

It was competent for the trial judge to authenticate a report of the testimony, whether there was an official reporter or not. Id.

The evidence when taken in shorthand and transcribed had to be certified by the official reporter. Johnson v. Johnson, (1929) 131 Or 235, 274 P 918, 282 P 1082.

The affidavit of the clerk of the trial court that a copy of the judgment roll in a former suit was received in evidence was not sufficient to make it a part of the transcript but should have been authenticated by the trial judge. Neal v. Roach, (1910) 61 Or 513, 107 P 475.

Where transcript of testimony was certified by a reporter with nothing to indicate that such reporter was the official reporter or one appointed protem, and was not filed with the clerk of the court or authenticated by the certificate of the trial judge, the transcript was not sufficiently authenticated. Nealan v. Ring, (1921) 98 Or 490, 184 P 275, 193 P 199, 747.

FURTHER CITATIONS: State v. Carcerano, (1964) 238 Or 208, 390 P2d 923; Skultety v. Humphreys, (1967) 247 Or 50, 431 P2d 278.

LAW REVIEW CITATIONS: 39 OLR 122.

19.084

CASE CITATIONS: Scott v. Lawrence Whse. Co., (1961) 227 Or 78, 360 P2d 610.

19.088

CASE CITATIONS: Lang v. Hill, (1961) 226 Or 371, 360 P2d 316; Mattila v. Olsvick, (1961) 228 Or 606, 365 P2d 1072; State Bd. of Control v. Loprinzi, (1967) 246 Or 206, 424 P2d 889; Grayson v. State, (1968) 249 Or 92, 436 P2d 261; Ferguson v. Birmingham Fire Ins. Co., (1969) 254 Or 496, 460 P2d 342; State v. Woodward, (1969) 1 Or App 338, 462 P2d 685; State v. Leaton, (1970) 3 Or App 475, 474 P2d 768.

LAW REVIEW CITATIONS: 39 OLR 122.

19.095

NOTES OF DECISIONS

1. Under former similar statute

(1) Extension of time to file transcript. "Time allowed" to file the transcript meant the original 30 days allowed by the section and any extension thereof that may have been granted before the previous one had expired. Tallmadge v. Hooper, (1900) 37 Or 503, 61 P 349, 1127; Cantrall v. Sterling Min. Co., (1912) 61 Or 516, 122 P 42.

In case there was not time to complete the transcript and file it within the time prescribed, an extension of time could be obtained. Lindley v. Wallis, (1867) 2 Or 203.

An order of the trial court made after the expiration of the 30 days following the perfection of the appeal, purporting to extend the time for filing transcript, was void. Bell v. Fleming, (1916) 81 Or 682, 160 P 1150.

Where order extending time for filing transcript was entered prematurely, responsdents by failing to move to set aside same were precluded from raising point in appellate court. Pedro v. Vey, (1935) 150 Or 415, 39 P2d 963, 46 P2d 582.

Within time limits set by statute the court by its rules

could extend the time for filing papers whenever it could do so by order. Walker v. Fireman's Fund Ins. Co., (1927) 122 Or 179, 257 P 701.

Application for extension of time to file transcript had to be in writing and an oral ex parte application was authorized and void. Miller v. Safeway Stores, (1959) 219 Or 139, 312 P2d 577, 346 P2d 647.

(a) Proper court or judge and powers. Unless the disqualification of a judge appeared of record, an extending order made by him imported verity and would not be disregarded. Sprague v. Astoria, (1923) 106 Or 253, 204 P 956, 206 P 849.

A judge disqualified from taking part in the trial of a cause had jurisdiction to grant an order extending time for filing the transcript. Lovell v. Potts, (1924) 112 Or 538, 207 P 1006, 226 P 111.

After Supreme Court acquired jurisdiction it alone could extend time for filing abstracts and briefs. Lane v. First Nat. Bank, (1929) 131 Or 350, 270 P 476, 281 P 172, 283 P 17.

(b) Application and notice. An extension of time for filing transcript was not effective where the adverse party was not given notice of same. Edwards v. Thorne, (1934) 146 Or 669, 29 P2d 1118.

An extending order made without notice was invalid and appeal was dismissed when transcript was filed in extended time. Simpson v. Winegar, (1927) 122 Or 297, 258 P 562; Guenther v. Headrick, (1934) 145 Or 701, 28 P2d 1088; Jairl v. Jairl, (1940) 163 Or 529, 97 P2d 949; Eena Co. v. Zosel, (1940) 164 Or 99, 95 P2d 428, 99 P2d 1022.

(c) Order. An order extending the time in which to file "a transcript of the testimony and proceeding," the word "proceedings" was broad enough to cover the entire transcript. Freeman v. Southern Pac. Co., (1917) 85 Or 330, 151 P 654.

An extending order was made when it was in writing and signed by the judge, but was not effective until delivered to the clerk. Robinson v. Phegley, (1919) 93 Or 299, 177 P 942, 178 P 799, 182 P 373.

A memorandum entered on the bench docket that appellant was given 60 days to file a bill of exceptions did not amount to an order enlarging the time to file a transcript. Robinson v. Robinson Cheese Co., (1908) 50 Or 453, 93 P 253.

(d) Time for making order. A subsequent order had to be made before a former extending order expires. Chandler v. Todd, (1920) 95 Or 430, 188 P 161; Sitton v. Goodwin, (1926) 119 Or 354, 249 P 362.

An order enlarging time could be entered before appeal had been perfected. White v. East Side Mill Co., (1917) 84 Or 224, 230, 161 P 969, 164 P 736; Dibble v. Hodes Co., (1930) 132 Or 596, 277 P 820, 286 P 554.

An extending order could be made before the undertaking was filed, provided it be made before time to file transcript had expired. Wolf v. City Ry. Co., (1907) 50 Or 64, 85 P 620, 91 P 460, 15 Ann Cas 1181; Vincent v. First Nat. Bank, (1915) 76 Or 579, 143 P 1100, 149 P 938.

An order extending time for filing transcript "from day to day" was self-executing to extend the time from one day to another. White v. East Side Mill Co., (1917) 84 Or 224, 161 P 969, 164 P 736.

Until notice of appeal had been served the circuit court had no jurisdiction to extend time for filing transcript. Schultz v. Walrad, (1919) 92 Or 315, 179 P 904, 991.

An order for an extension of time for filing the transcript on appeal had to be made before the time to take an appeal expired. Handy v. Thews, (1929) 129 Or 116, 276 P 683.

An extending order by the court after expiration of the statutory period for filing but within time as extended by stipulation was valid. Kaller v. Spady, (1933) 144 Or 206, 10 P2d 1119, 24 P2d 351.

The serving and filing of a motion for extension of time was of no avail where the order extending was not made within 10 days thereafter or at all. In re Cooke's Estate, (1941) 167 Or 58, 115 P2d 302.

(e) Nunc pro tunc extending orders. An extending order could be entered nunc pro tunc if one was made within proper time, and would be effective from time of making. Quartz Gold Min. Co. v. Patterson, (1909) 53 Or 85, 96 P 551; Grover v. Hawthorne, (1912) 62 Or 65, 72, 116 P 100, 121 P 804.

In criminal cases after the expiration of the statutory time for filing copies of the transcript, neither the trial court nor appellate court could extend the time by order nunc pro tunc. State v. Keeney, (1916) 82 Or 400, 161 P 701.

Absolute verity was imparted by a recital in a nunc pro tunc order as to an order previously made. Grover v. Hawthorne Estate, (1912) 62 Or 77, 114 P 472, 121 P 808; White v. East Side Mill Co., (1917) 84 Or 224, 161 P 969, 164 P 736.

An extending order made within time but dated by mistake after time allowed could be corrected nunc pro tunc. Overton v. Stocker, (1926) 118 Or 122, 239 P 816, 246 P 209.

An order reciting that the court previously orally ordered that time for filing transcript on appeal be extended from day to day and ordering that appellant have an extension of 10 days after testimony was filed, operated not only as a nunc pro tunc ordered but also as a new order further declaring the limits within which the transcript might be filed. White v. East Side Mill Co., (1917) 84 Or 224, 161 P 969, 164 P 736.

The circuit court had no power to order the transcript filed as of a date within the expired 30 days. In re Ryan's Estate, (1917) 84 Or 102, 164 P 586.

FURTHER CITATIONS: Kelly v. Pike, (1889) 17 Or 330, 20 P 685; Davidson v. Columbia Tbr. Co., (1907) 49 Or 577, 91 P 441; Zelig v. Blue Point Oyster Co., (1912) 61 Or 535, 539, 113 P 852, 122 P 756; Gross v. Gage, (1915) 77 Or 421, 149 P 939, 151 P 655; Chandler v. Todd, (1920) 95 Or 430, 188 P 161; Kallunki v. City of Astoria, (1923) 109 Or 363, 220 P 145; Meyers v. Pac. States Lbr. Co., (1927) 122 Or 315, 259 P 203; Portland v. Richardson, (1928) 127 Or 455, 272 P 259; State v. Mart, (1931) 135 Or 603, 283 P 23, 295 P 459; Hay v. Yokell, (1934) 147 Or 148, 32 P2d 578; Ewen v. Smith, (1937) 156 Or 669, 69 P2d 523.

19.104

NOTES OF DECISIONS

This section concerns who must be served, rather than manner of service, and is not a prohibition against service of adverse party's attorney on appeal under ORS 19.023. Bartley v. Doherty, (1960) 225 Or 15, 351 P2d 71, 357 P2d 521.

FURTHER CITATIONS: Curtis v. Stone, (1963) 234 Or 481, 379 P2d 551.

19.108

NOTES OF DECISIONS

1. Under former similar statute
   - (1) In general
   - (2) "Any particular, substantially affecting the merits"
   - (3) "Incomplete in any particular"
     - (a) Omission of copies of judgment or decree, notice of appeal and undertaking
     - (b) Evidence, exhibits or other instruments
     - (c) Defective bill of exceptions
     - (d) Abstract deficient or lacking
     - (e) Failure to file brief
   - (4) Appeal to circuit court
   - (5) Grounds and scope of motion to dismiss
   - (6) "On motion of the appellant, may dismiss"

(a) Motions and practice
(7) When it appears by affidavit to the satisfaction of the court"
(8) Discretion of court
(a) Second or new appeal

1. Under former similar statute

(1) In general. The section was not applicable to appeal from justice's court to circuit court. Hager v. Knapp, (1904) 45 Or 512, 78 P 671.

The section contemplated that the correction or enlargement of the transcript should be initiated in the appellate court. Sitton v. Goodwin, (1926) 119 Or 74, 248 P 163.

The requirements as to the time element were strictly construed. Campbell v. Portland, (1953) 204 Or 654, 260 P2d 1094, 285 P2d 529.

The Supreme Court had power to relieve from an untimely performance of any of the required acts except serving and filing of the notice of appeal. Gordon Creek Tree Farms, Inc. v. Layne, (1961) 230 Or 204, 358 P2d 1062, 368 P2d 737.

(2) "Any particular, substantially affecting the merits". Omission of a copy of the notice of appeal did not substantially affect the merits, but was a required paper which appellant was entitled to have when the omission was not his fault. Thibault v. Lennon, (1901) 39 Or 280, 282, 64 P 449, 87 Am St Rep 657.

The absence of a copy of the proof of service of a notice of appeal was not such an omission as substantially affected the merits of the judgment appealed from. Schaefer v. Montgomery Ward & Co., (1941) 167 Or 679, 120 P2d 235.

(3) "Incomplete in any particular." The Supreme Court could require the clerk of the trial court to transmit the omitted paper when the transcript was incomplete in any particular. Mutual Irr. Co. v. Baker, (1911) 58 Or 306, 110 P 392, 113 P 9; Schaefer v. Montgomery Ward & Co., (1941) 167 Or 679, 120 P2d 235.

The correction or enlargement of the transcript was to be made up from matter omitted therefrom and in existence when the transcript was made up and not from subsequent material. Sitton v. Goodwin, (1926) 119 Or 74, 248 P 163.

Where the dates of filing of notice and acknowledgment of service thereof as they appeared on the transcript were erroneous, the remedy was by application to the court below to correct the same. Rodman v. Manning, (1908) 50 Or 506, 93 P 366.

If the filing of some nonjurisdictional portion of the transcript was omitted, a nunc pro tunc order was unnecessary as an order under the other statute would suffice. In re Cooke's Estate, (1941) 167 Or 58, 115 P2d 302.

A motion based on a technical defect in the proceedings had to specify definitely and with certainty the point of irregularity complained of. Bilyeau v. Smith, (1890) 18 Or 335, 22 P 1073; Hermann v. Hutcheson, (1898) 33 Or 239, 52 P 489.

(a) Omissions of copies of judgment or decree, notice of appeal and undertaking. The court could call up copies of the judgment, notice of appeal and undertaking where originals were sent up instead, and consequently would not dismiss. Smith v. Algona Lbr. Co., (1914) 73 Or 1, 5, 136 P 7, 143 P 921. **Distinguished in** Schaefer v. Montgomery Ward & Co., (1941) 167 Or 679, 120 P2d 235.

Where the clerk of the lower court sent up a transcript of the judgment lien docket instead of the judgment, an order issued requiring him to send up the judgment. Byers v. Ferguson, (1902) 41 Or 77, 65 P 1067, 68 P 5.

A copy of the decree unintentionally omitted from the transcript could be supplied on application by directing the clerk of the trial court to send up a certified copy thereof. Mutual Irr. Co. v. Baker, (1911) 58 Or 306, 309, 110 P 392, 113 P 9.

A copy of a notice of appeal could not be supplied after the time for filing transcript had expired. Schaefer v. Montgomery Ward & Co., (1941) 167 Or 679, 120 P2d 235.

(b) Evidence, exhibits or other instruments. Where there was some confusion touching the evidence, exhibits and documents proper to be brought up in an equity transcript, a motion to strike out such evidence because not identified by the judge would be granted with permission to apply to the trial judge for a proper certificate. Hume v. Rogue River Packing Co., (1908) 51 Or 237, 241, 83 P 391, 92 P 1065, 96 P 865, 131 Am St Rep 732, 31 LRA(NS) 396.

A failure to send up all the testimony in an equity suit was not ground for the dismissal of an appeal. Kiefer v. Victor Land Co., (1909) 53 Or 174, 90 P 582, 98 P 877.

Where it was shown that delay in supplying transcript of evidence was not appellant's fault, the clerk of the lower court was ordered to supply the transcript. Oberlin v. Ore.-Wash. R. & Nav. Co., (1915) 78 Or 301, 151 P 367.

An amendment was allowed making a transcript of the evidence a part of the bill of exceptions. United Brokers Co. v. So. Pac. Co., (1917) 86 Or 607, 169 P 114.

In habeas corpus where demurrer was overruled and petitioner appealed to the circuit court for sole purpose of taking a voluntary nonsuit, dismissal because transcript from county court was not accompanied by evidence was properly denied. Goin v. Chute, (1928) 126 Or 466, 260 P 998, 270 P 492.

The appeal was not dismissed due to failure to include all the testimony in the transcript where the omission was not appellant's fault. Peck v. Ross, (1932) 139 Or 323, 3 P2d 126, 8 P2d 780.

Upon motion to dismiss the appeal because certified copies of instruments were not included in the transcript, appellant was allowed to supply same. Johnson v. Berns, (1924) 111 Or 165, 209 P 94, 224 P 624, 225 P 727.

(c) Defective bill of exceptions. The bill of exceptions could be corrected in the court below, notwithstanding the cause was pending on appeal. State v. Estes, (1898) 34 Or 196, 51 P 77, 52 P 571, 55 P 25; Bloch v. Sammons, (1900) 37 Or 600, 55 P 438, 62 P 290; Nosler v. Coos Bay Nav. Co., (1901) 40 Or 305, 63 P 1050, 64 P 855; McGregor v. Ore. R. & Nav. Co., (1908) 50 Or 527, 93 P 465, 14 LRA(NS) 668; Brewster v. Springer, (1916) 79 Or 88, 154 P 418; State v. Ekwall, (1931) 135 Or 439, 296 P 57.

Dismissal for failure to file a bill of exceptions within time for transcript was denied and cross-motion for leave to file it was granted where such bill was prepared and submitted to the trial judge for allowance within time but was not settled and signed until after such time had expired. Washburn v. Interstate Inv. Co., (1894) 26 Or 436, 440, 36 P 533, 38 P 620.

Defects in the bill of exceptions did not constitute grounds for striking transcript and dismissing appeal where questions could be raised without exceptions or the bill could be amended. Nosler v. Coos Bay Nav. Co., (1901) 40 Or 305, 63 P 1050, 64 P 855.

After submission and decision above, amendment of a bill of exceptions could not be had to show on rehearing that an error was harmless. State v. Jennings, (1906) 48 Or 483, 87 P 524, 89 P 421.

An amended bill of exceptions allowed on ex parte application after argument on appeal and raising new questions would be stricken out on motion. McCann v. Burns, (1914) 73 Or 167, 171, 136 P 659, 143 P 916, 1099.

(d) Abstract deficient or lacking. Appellant was allowed to file assignments of error, inadvertently omitted, as a supplemental abstract where respondent was not affected by the omission. Salene v. Isherwood, (1914) 74 Or 35, 144 P 1175.

Where through an honest mistake in calculating the time appellant failed to file abstract within time allowed by court rule, the appeal was not dismissed. Flynn v. Davidson, (1916) 80 Or 502, 155 P 197, 157 P 788.

Although an abstract was not filed within time, the ap-

peal was not dismissed where appellant showed no disposition to delay the hearing. St. Martin v. Hendershott, (1916) 82 Or 58, 151 P 706, 160 P 373.

Supreme Court would allow time in which to file abstract and assignment of error after filing of transcript where delay would not injure other party. In re Riggs, (1922) 105 Or 531, 207 P 175, 207 P 1005, 210 P 217.

(e) Failure to file brief. Judgment was affirmed on motion where appellant had not filed his abstract or brief within the time required and there had been no extension granted or an excuse offered for the failure. Yamhill Sanitary Public Market Co. v. Strowbridge, (1916) 82 Or 80, 161 P 93; Van Tassel v. Jefferson County, (1919) 90 Or 600, 177 P 955; Berg v. Goldstone, (1927) 123 Or 19, 259 P 916.

After the transcript on appeal was filed the court had the power to dismiss for appellant's failure to file brief within the time provided by rule of court. Cole v. Willow River Co., (1912) 60 Or 594, 117 P 659, 118 P 176, 1030.

(4) Appeal to circuit court. Where no affidavit was filed in circuit court pointing out in what manner transcript on appeal from county court was defective or what documents were lacking, circuit court did not err in refusing to dismiss appeal. Goin v. Chute, (1928) 126 Or 466, 260 P 998, 270 P 492.

(5) Grounds and scope of motion to dismiss. The merits would not be considered on a motion to dismiss. Corder v. Speake, (1900) 37 Or 105, 107, 51 P 647; Sears v. Dunbar, (1907) 50 Or 36, 39, 91 P 145.

A motion to dismiss appeal or to affirm judgment proceeds on the theory that the appellate court was without jurisdiction, or that the appellant had not complied with some rule of court, and must be overruled unless one of these conditions was made to appear. Corder v. Speake, (1900) 37 Or 105, 107, 51 P 647.

(6) "On motion of the appellant, may dismiss." The dismissal of defendant's appeal did not necessitate a dismissal of plaintiff's cross-appeal. Crane v. Ore. R. & Nav. Co., (1913) 66 Or 317, 133 P 810.

Where the public was interested in an action brought by appellant, the appeal should not be dismissed at his instance but should be disposed of on the merits, his original attorneys not having withdrawn or consented to such dismissal. Russell v. Crook County Court, (1915) 75 Or 168, 170, 145 P 653, 146 P 806.

On appellant's motion to dismiss, judgment would be affirmed, notwithstanding conflicting affidavits as to settlement. Kaufman v. Culbertson, (1927) 121 Or 338, 255 P 330.

The right of several parties in a case of joint appeal to dismiss as to themselves and leave the remaining appellants to prosecute the appeal, were limited to the period prescribed by the statute. Horner v. Pleasant Creek Min. Corp., (1941) 165 Or 683, 107 P2d 985, 109 P2d 1044.

(a) Motions and practice. On motion to dismiss an appeal, the objection that the transcript did not intelligibly present any question to be decided would not be considered. St. Martin v. Hendershott, (1916) 82 Or 58, 151 P 706, 106 P 373.

The 1943 amendment not only authorized the appellate court to dismiss an appeal upon motion if appellant did not comply with the statutes but also empowered the court to deny such motions whenever appellant submitted good cause in explanation of his inadvertence. Pond v. Jantzen Knitting Mills, (1947) 187 Or 697, 180 P2d 115.

Prior to the 1943 amendment, a motion to dismiss on ground that transcript was not filed within 30 days was not waived when overruled with leave to renew it at the hearing. Spokane Merchant's Assn. v. Gollihur, (1927) 122 Or 146, 257 P 812.

The proper practice, where a transcript had been filed before the appeal had been perfected, was to move to strike the transcript from the files rather than to ask for a dismissal. Nottingham v. McKendrick, (1901) 38 Or 495, 57 P 195, 63 P 822.

Failure to file a transcript in time could be taken advantage of by motion to dismiss the appeal, as a motion to affirm the judgment was not the exclusive remedy. Hilts v. Hilts, (1903) 43 Or 162, 72 P 697.

Where no prejudice resulted from appellant's failure to file transcript within time, respondent's motion to dismiss was denied. Martin v. Harrison, (1947) 182 Or 121, 180 P2d 119, 186 P2d 534.

(7) "When it appears by affidavit to the satisfaction of the court." A supporting affidavit was necessary on motion by respondent to compel appellant to incorporate additional papers in the record. Mutual Benefit Life Ins. Co. v. Cummings, (1913) 66 Or 272, 126 P 982, 133 P 1169, Ann Cas 1915B, 535.

In absence of showing that lower court was in possession of documents which would make a better record, refusal of motion suggesting a diminution of record did not constitute error. Santiam Reclamation Co. v. Porter, (1928) 126 Or 91, 267 P 820, 268 P 980.

(8) Discretion of court. Cross-appellant was deemed to have abandoned his appeal where he failed to file a transcript or obtain an extension of time. Bank of Commerce v. Bertrum, (1910) 55 Or 349, 104 P 963, 106 P 444; Crumbley v. Crumbley, (1920) 94 Or 617, 186 P 423.

Defects or errors in a transcript or abstract, if nonjurisdictional, were generally amendable in discretion of the court. Burchell v. Averill Mach. Co., (1909) 55 Or 113, 105 P 403.

The state by failing to appear for more than two months after having filed transcript or to ask for additional time in which to appear, abandoned appeal in contested divorce suit. Stark v. Stark, (1929) 128 Or 683, 275 P 692.

The failure to file a transcript within the time or exact manner prescribed could be cause for dismissal of the appeal, but it was not necessarily so, provided good cause for the omission was shown. Williams v. Ragan, (1944) 174 Or 328, 143 P2d 209.

The section was clearly intended to vest the appellate court with wide discretionary power concerning the progress of appealed cases but to be exercised only where "good cause" was shown by appellant in resisting a motion to dismiss. Martin v. Harrison, (1947) 182 Or 121, 180 P2d 119, 186 P2d 534.

As a result of the 1943 amendment the scope of the neglected acts which constitutes abandonment includes every act the statute required of an appellant. Pond v. Jantzen Knitting Mills, (1947) 187 Or 697, 180 P2d 115.

Defendant who failed to appeal in contested divorce suit had no standing in Supreme Court on appeal by state. Id.

(a) Second or new appeal. If an appeal was not perfected because of some lack in procedure, it could be abandoned and a new appeal begun. Holladay v. Elliott, (1879) 7 Or 484; State v. McKinnon, (1880) 8 Or 485; Schmeer v. Schmeer, (1888) 16 Or 243, 17 P 864; McCarty v. Wintler, (1889) 17 Or 391, 21 P 195; Fisher v. Tomlinson, (1901) 40 Or 111, 60 P 390, 66 P 696; Columbia City Land Co. v. Ruhl, (1914) 70 Or 246, 134 P 1035, 141 P 208.

When a party perfected an appeal and then abandoned it, his right of appeal was exhausted. Nestucca Wagon Road Co. v. Landingham, (1893) 24 Or 439, 33 P 983; Moon v. Richelderfer, (1910) 56 Or 246, 108 P 178; Hill v. Lewis, (1918) 87 Or 239, 170 P 316; Ogden v. Hoffman, (1918) 88 Or 503, 172 P 503; State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

Though the clerk below mislaid the file notice and undertaking, appellant could not take a second appeal by a new notice and undertaking where knowing the facts he failed to file a transcript or to obtain an extending order. Harrington v. Snyder, (1909) 53 Or 573, 101 P 392.

The appeal was not abandoned merely because a second notice of appeal was given after the appeal has been perfected. McKinney v. Nayberger, (1931) 138 Or 203, 295 P 474, 2 P2d 1111, 6 P2d 228.

FURTHER CITATIONS: Garbade v. Larch Mountain Inv. Co., (1900) 360 Or 368, 59 P 711; Lengele v. Moore, (1915) 77 Or 647, 152 P 267; Russell v. Smith, (1920) 96 Or 629, 190 P 715; McKinney v. Nayberger, (1931) 138 Or 203, 295 P 474, 2 P2d 1111, 6 P2d 228; Oxman & Harrington v. Baker County, (1925) 115 Or 436, 234 P 799, 236 P 1040; Pond v. Jantzen Knitting Mills, (1947) 187 Or 697, 180 P2d 115; Lambert v. Multnomah County Civil Serv. Comm., (1961) 227 Or 432, 363 P2d 54; State v. Smith, (1967) 245 Or 461, 422 P2d 576; Bryan v. Cupp, (1969) 1 Or App 52, 458 P2d 697; State v. Miller, (1970) 2 Or App 408, 467 P2d 973, Sup Ct review denied; Department of Rev. v. First Nat. Bank, (1971) 5 Or App 65, 482 P2d 750.

LAW REVIEW CITATIONS: 2 OLR 70.

19.114

NOTES OF DECISIONS

The bill of exceptions is abolished. Gordon Creek Tree Farms v. Layne, (1962) 230 Or 204, 358 P2d 1062, 368 P2d 737.

FURTHER CITATIONS: Steenson v. Robinson, (1964) 236 Or 414, 389 P2d 27; State v. Clark, (1964) 237 Or 596, 392 P2d 643.

19.118

NOTES OF DECISIONS

Filing of the transcript with the clerk at Salem instead of the deputy clerk at Pendleton in a cause to be heard at Pendleton is sufficient. Pringle Falls Power Co. v. Patterson, (1913) 65 Or 474, 477, 128 P 820, 132 P 527; Allen v. Angus, (1914) 69 Or 494, 133 P 1190, 138 P 1074, 139 P 721; Central Ore. Irr. Co. v. Whited, (1915) 76 Or 255, 257, 142 P 779, 146 P 815.

Under a former statute where parties stipulated that the cause might be tried at Pendleton, they could not thereafter by stipulation transfer the appeal to Salem. Connor v. Clark, (1897) 30 Or 382, 48 P 364.

FURTHER CITATIONS: Gibbons v. Moody, (1898) 33 Or 593, 55 P 23; Hayes v. Cummings, (1925) 115 Or 13, 235 P 304, 236 P 756.

19.125

NOTES OF DECISIONS

See also annotations under ORS 17.441.

1. In general
2. Under former similar statute
   (1) A judgment "shall only be reviewed as to questions of law appearing upon the transcript"
      (a) Record of evidence
   (2) "Errors substantially affecting the rights of the appellant"
      (a) Prejudicial remarks by attorney or judge
      (b) Rulings on pleadings
      (c) Rulings on admission of evidence
      (d) Instruction
      (e) Affirmance notwithstanding error under Ore. Const. Art. VII (A), §3.
      (f) Jurors
   (3) Upon an appeal from a decree "the suit shall be tried anew"
      (a) "Upon the transcript and evidence accompanying it"
      (b) Weight given findings of trial court
   (4) Presumptions
   (5) Affidavits and certificates

1. In general

Denial of a right to a peremptory challenge is prejudicial automatically. State Hwy. Comm. v. Walker, (1962) 232 Or 478, 376 P2d 96.

The findings are binding if sustained by evidence. Bollenback v. Continental Cas. Co., (1966) 243 Or 498, 414 P2d 802, 34 ALR 3d 228.

A trial court ruling that is manifestly correct will be affirmed whether or not the point was urged by the prevailing party. Baumann v. Wright, (1968) 249 Or 212, 437 P2d 488.

A reviewing court should not, merely because hearsay evidence was received, reverse a judgment unless it is prepared to say that if the challenged evidence had been excluded the result of the trial might have been different. Pearson v. Galvin, (1969) 253 Or 331, 454 P2d 638.

A de novo review in Oregon is a trial anew in the fullest sense, with the findings of the trial court, subject to one exception, being given no weight. Hannon v. Good Samaritan Hosp., (1970) 4 Or App 178, 471 P2d 831, 476 P2d 931.

On de novo review, great weight will be given to the findings of the tribunal who had the opportunity to see and hear the witnesses and thus be able to weight their credibility on disputed issues of fact. Id.

Appellate practice restricts appellant to the theory he pursued in the trial court. Chaney v. Fields Chevrolet Co., (1971) 258 Or 606, 484 P2d 824.

The title given to the complaint does not determine whether a matter is one of law or in equity. Lieuallen Land & Livestock Corp. v. Heindenrich, (1971) 259 Or 333, 485 P2d 1230.

The usual basis for distinguishing between matters at law or in equity is the nature of the relief sought. Id.

It was not reversible error for the court to refuse to hear testimony of a child over 10 years of age when the facts material to the issue were not in dispute. Gonyea v. Gonyea, (1962) 232 Or 367, 375 P2d 808.

For the trial court to refuse to exercise its discretion to allow an amendment to the complaint substantially affected the rights of the plaintiff and was reversible error. Watson v. Dodson, (1964) 238 Or 621, 395 P2d 866.

Since the defendant could not have been prejudiced by the receipt of evidence which he challenged, the error, if there was one would fall within the admonition that harmless error may be disregarded. State v. Thomas, (1965) 240 Or 181, 400 P2d 549.

The Supreme Court could not review de novo the findings of the trial court. Cornelison v. Seabold, (1969) 255 Or 401, 460 P2d 1009.

2. Under former similar statute

(1) A judgment "shall only be reviewed as to questions of law appearing upon the transcript." Errors not appearing on the record presented no question for review. Umatilla Irr. Co. v. Barnhart, (1892) 22 Or 389, 30 P 37; Noland v. Bull, (1893) 24 Or 479, 33 P 983; O'Connor v. Van Hoy, (1896) 29 Or 505, 45 P 762; Union Pac. Life Ins. Co. v. Ferguson, (1913) 64 Or 395, 129 P 529, 130 P 978, 43 LRA(NS) 958; Columbia Realty Inv. Co. v. Alameda Land Co., (1918) 87 Or 277, 168 P 64; Amer. Cent. Inc. Co. v. Weller, (1923) 106 Or 494, 212 P 803; Kulisch v. Stewart, (1937) 157 Or 382, 71 P2d 796.

In actions at law the Supreme Court had no original jurisdiction but could only review the decisions of the trial court on questions of law appearing in the transcript, sub-

ject to Ore. Const. Art. VII, §3. Service v. Sumpter Valley R. Co., (1918) 88 Or 554, 171 P 202.

An appeal from a judgment would not permit a review of a decree entered in the same case. Gellert v. Bank of Calif. Nat. Assn., (1923) 107 Or 162, 214 P 377.

A bill of exceptions consisting of all the testimony and all the proceedings had at the trial was a part of the transcript. State v. Laundy, (1922) 103 Or 443, 204 P 958, 206 P 290.

Where appellate court found no motion for new trial in the record, it could not consider alleged error in denying such motion. Albright v. Keats Auto Co., (1917) 85 Or 134, 137, 166 P 758.

The Supreme Court would not determine mere academic questions for the general information of the public but would only decide the case presented by the record. Tyree v. Crystal Dist. Imp. Co., (1913) 64 Or 251, 126 P 605.

Disposal of a motion not shown by the record would not be determined from conflicting statements of counsel. Scott v. Brogan, (1937) 157 Or 549, 73 P2d 688.

Where the only question that could be raised on the record was whether findings supported judgment and appellant did not raise such question, judgment was affirmed. McPherson v. State Ind. Acc. Comm., (1942) 169 Or 190, 127 P2d 344.

(a) Record of evidence. Error in permitting cross examination could not be considered when the bill of exceptions did not contain all testimony on direct examination. First Nat. Bank v. McCullough, (1908) 50 Or 508, 93 P 366, 126 Am St Rep 758, 17 LRA(NS) 1105.

Alleged improper argument of counsel, not made a part of the bill of exceptions, would not be considered on appeal. Kahn v. Home Tel. & Tel. Co., (1915) 78 Or 308, 318, 152 P 240.

A document had to appear in the record or be identified therein to admit of review of a refusal to instruct respecting it. Pennings v. Giboni, (1917) 86 Or 110, 118, 167 P 598, 1014.

Where stenographer's notes did not show statements set forth in supplemental affidavits for a new trial, they were nevertheless a part of the record on appeal where the court found them to be true, and incorporated them in the bill of exceptions. Webb v. Isensee, (1917) 85 Or 148, 152, 166 P 544.

The propriety of sustaining an objection to a question could not be reviewed where the record did not disclose what the answer of a witness would have been. Hill v. McCrow, (1918) 88 Or 299, 170 P 306.

(2) "Errors substantially affecting the rights of the appellant". A harmless or invited error could not be assigned as error for reversal. Weygandt v. Bartle, (1918) 88 Or 310, 171 P 587.

The section prohibited the appellate court from disposing of cases on mere technical errors. State v. Moore, (1928) 124 Or 61, 262 P 859.

(a) Prejudicial remarks by attorney or judge. Unless at least a prima facie case was presented by testimony offered by plaintiff, his rights were not substantially affected by the remarks of defendant's attorney. Jones v. Setera, (1945) 177 Or 615, 164 P2d 448.

Where the judge prejudged the case by statements in favor of the plaintiff, refusal to change venue required reversal though the record failed to disclose any prejudice in the trial. Rugenstein v. Ottenheimer, (1915) 78 Or 371, 152 P 215, Ann Cas 1917E, 953.

Argument of district attorney in prosecution for statutory rape, that out of all facts in district attorney's office only evidence which was admissible could be presented, was prejudicial. State v. Newburn, (1946) 178 Or 238, 166 P2d 470.

The language and conduct of counsel would justify a reversal only when connected with some judicial error on the part of the trial judge. Watts v. Spokane, Portland & Seattle Ry. Co., (1918) 88 Or 192, 171 P 901.

(b) Rulings on pleadings. Where a defective defense which should have been attacked by demurrer was struck out on motion and no injury resulted, the error was harmless. Morse v. Odell, (1907) 49 Or 118, 89 P 139.

Where a demurrer to a defense was erroneously sustained but the evidence which would have been admitted to sustain the defense was admitted in connection with another issue, the error was harmless. Id.

An error in denying a party the right to cross examine a witness was harmless unless it substantially affects his rights. Goldstein v. Pac. Home Ins. Co., (1915) 74 Or 247, 145 P 267.

A reversal for an infraction of the rules of pleading and practice was warranted only when it appeared that such violation had prejudiced the substantial rights of the appellant. Kaller v. Spady, (1933) 144 Or 206, 10 P2d 1119, 24 P2d 351.

Refusal to strike out of an answer certain allegations that constituted an argumentive denial was harmless where the allegations were such as could have been proved under the specific denials. Willis v. Abraham, (1897) 31 Or 562, 51 P 79.

Defendant was not prejudiced by refusal to compel plaintiff to elect upon which description of the matter or cause of action he would rely until close of his case. Ramaswamy v. Hammond Lbr. Co., (1915) 78 Or 407, 152 P 223.

Error in overruling a demurrer for misjoinder of causes was harmless where the case proceeded as a suit on one cause only. Stennick v. J. K. Lbr. Co., (1917) 85 Or 444, 161 P 97, 166 P 951.

Rulings on pleadings were not cause for reversal where appellant was not entitled to succeed in any event. Twigger v. Twigger, (1924) 110 Or 520, 223 P 934.

Judgment for defendant was not reversed on ground of insufficiency of answer to present the defense of payment where plaintiff had not been misled by the pleadings. Fid. Reserve & Loan Co. v. Lincoln County Logging Co., (1933) 144 Or 45, 23 P2d 905.

Where there was no showing that the absence of an averment from the complaint which was supplied by the reply misled the defendants or prevented them from having a fair trial, the error was harmless. Compton v. Perkins, (1933) 144 Or 346, 24 P2d 670.

Where a demurrer to plaintiff's reply was overruled, defendant's rights were not thereby substantially affected. Craft v. Flesher, (1936) 153 Or 348, 55 P2d 1101, 56 P2d 1141.

Repetition of permanent before each allegation of injury in addition to general allegation that all injuries were permanent was not reversible error. Moe v. Alsop, (1950) 189 Or 59, 216 P2d 686.

(c) Rulings on admission of evidence. Irregularities in procedure which did not affect the substantial rights of the appellant were insufficient as grounds for a reversal. Richer v. Burke, (1934) 147 Or 465, 34 P2d 317.

On appeal from a judgment a finding of fact was not open to review simply on a question as to the preponderance of evidence. Fulton v. Earhart, (1870) 4 Or 61.

The erroneous admission of evidence offered in support of an allegation in the complaint which was not denied in the answer was not prejudicial. Koshland v Hartford Ins. Co., (1897) 31 Or 402, 49 P 866.

Error in admitting evidence was cured by directing the jury to disregard the particular evidence, but a general statement that a certain kind of testimony was not to be considered was insufficient. State v. Aiken, (1902) 41 Or 294, 69 P 683.

Error in excluding evidence was harmless where other equally strong evidence to the same effect was received. Norwich Ins. Socy. v. Ore. R. Co., (1905) 46 Or 123, 78 P 1025.

Error in admitting hearsay evidence was harmless where the same information was given by other witnesses without objection. State v. White, (1907) 48 Or 416, 87 P 137.

Admission of evidence out of due order of proof was harmless error. Beard v. Beard, (1913) 66 Or 526, 133 P 795.

Erroneous admission of parol evidence which was cured by proof of rescission of contract was harmless. Woodward v. Willamette Valley Irr. Land Co., (1918) 89 Or 10, 173 P 262.

Admission of evidence would not justify reversal of the case where other evidence to similar effect was in the record without objection, or was brought out by cross examination or by other witnesses. Saunders v. Williams & Co., (1936) 155 Or 1, 62 P2d 260.

An error in admission of evidence that could not have prejudiced appellant was harmless. Krewson v. Purdom, (1888) 15 Or 589, 16 P 480; State v. Kraft, (1890) 18 Or 550, 23 P 663.

Evidence admitted conditionally and then withdrawn was harmless. State v. Foot You, (1893) 24 Or 61, 66, 32 P 1031, 33 P 537.

The admission of evidence to prove an issue not made in the pleadings was immaterial and harmless. Currey v. Butcher, (1900) 37 Or 380, 61 P 631.

Admission of testimony by only one witness as to custom and usage was harmless where the jury was instructed to disregard same if it was testified to by only one witness. Prement v. Wells, (1913) 65 Or 336, 133 P 647.

Erroneous admission of evidence that raised issues which were not mentioned in the charge was harmless. Astoria Ry. Co. v. Pac. Sur. Co., (1914) 68 Or 569, 137 P 857.

Where testimony was admitted in rebuttal that might have been introduced in chief, defendant's rights were not abused where it had an opportunity to and did oppose the testimony when offered. Metzler Lbr. Co. v. Farmer's Mercantile Co., (1916) 78 Or 551, 153 P 56.

An error in excluding testimony did not substantially affect appellant's rights. Bertschinger v. N.Y. Life Ins. Co., (1941) 166 Or 307, 111 P2d 1016.

(d) Instruction. The charge to the jury was not to be examined with a legal microscope for technical flaws or inexact, inadvertent or contradictory statements. Dixon v. Raven Dairy, (1938) 158 Or 186, 75 P2d 347.

Erroneous instructions which worked no prejudice were harmless. Briscoe v. Jones, (1881) 10 Or 63; Howell v. Johnson, (1901) 38 Or 571, 64 P 659; Collins v. United Brokers Co., (1921) 99 Or 556, 194 P 458; McNab v. O'Flynn, (1928) 127 Or 490, 272 P 670; Hornby v. Wiper, (1936) 155 Or 203, 63 P2d 204; Voyt v. Bekins Moving & Storage Co., (1942) 169 Or 30, 119 P2d 586, 127 P2d 360.

Instructions favorable to appellant were considered harmless on appeal. Moorehouse v. Donaca, (1887) 14 Or 430, 13 P 112.

Where a question of law had been improperly submitted to the jury but correctly decided by them, the error was harmless. Christenson v. Nelson, (1901) 38 Or 473, 63 P 648.

Erroneous instruction relating to imputation of driver's negligence to passenger was harmless. Holzhauser v. Portland Traction Co., (1946) 178 Or 607, 169 P2d 127.

(e) Affirmance notwithstanding error under Ore. Const. Art. VII(A), §3. Under Ore. Const. Art. VII(A), §3, the Supreme Court could disregard any error and not the mere trivial and unsubstantial errors. Hoag v. Wash.-Ore. Corp., (1915) 75 Or 588, 144 P 574, 147 P 756; First Nat. Bank v. Rusk, (1913) 64 Or 35, 127 P 780, 129 P 121.

(f) Jurors. Where the court wrongfully overruled a challenge to a juror for cause, the error was harmless if an unexercised peremptory challenge was not used. Twitchell v. Thompson, (1915) 78 Or 285, 153 P 45.

In a larceny case an irregularity in calling a juryman to the box before defendant was in courtroom was harmless error. State v. Moore, (1928) 124 Or 61, 262 P 859.

(3) Upon an appeal from a decree "the suit shall be tried anew." A suit in equity was tried in the Supreme Court de novo. Heatherly v. Hadley, (1869) 4 Or 1; Robson v. Hamilton, (1902) 41 Or 239, 69 P 651; Powers v. Powers, (1905) 46 Or 479, 80 P 1058; Stevens v. Myers, (1919) 91 Or 114, 177 P 37, 2 ALR 1155; Portland Mtg. Co. v. Elder, (1936) 152 Or 406, 53 P2d 1045; Marshall v. Frazier, (1938) 159 Or 491, 80 P2d 42, 81 P2d 132; In re Braun's Estate, (1939) 161 Or 503, 90 P2d 484; Levene v. Salem, (1951) 191 Or 182, 229 P2d 255.

On appeal from part of a decree, the trial de novo was confined to the part of the decree specified in the notice of appeal. Shook v. Colohan, (1885) 12 Or 239, 242, 6 P 503; Bush v. Mitchell, (1895) 28 Or 92, 95, 41 P 155.

Though an equity suit was tried de novo on appeal, respondent could not urge inadequacy of the award in his favor in the absence of a cross-appeal. Flinn v. Vaughn, (1910) 55 Or 372, 106 P 642; In re Waters of Umatilla River, (1918) 88 Or 376, 168 P 922, 172 P 97.

Decree rendered by Supreme Court on appeal from decree in equity was final without reference to trial court's findings or conclusions. Gentry v. Pac. Livestock Co., (1904) 45 Or 233, 77 P 115; State v. Lawrence, (1934) 148 Or 383, 36 P2d 784.

The insufficiency of the findings made by the trial court in an equity suit could not be ground for reversal on appeal. Edmunds v. Welling, (1910) 57 Or 103, 110 P 533.

In a suit to enjoin interference with flow of a stream, the Supreme Court was in the same situation as the circuit court and could give such decree as might have been given at any stage of the contest. Oregon Lbr. Co. v. E. Fork Irr. Dist., (1916) 80 Or 568, 157 P 963.

Habeas corpus for custody of infant was equitable in nature and the review on appeal was de novo despite ORS 34.710. Turner v. Hendryx, (1917) 86 Or 590, 167 P 1019, 169 P 109.

Trial de novo of a decree determining water rights in a stream required examination of the whole proceeding and readjustment to such extent that all parties had to be notified of appeal and brought into the appeal. In re Waters of Chewaucan R., (1918) 89 Or 659, 171 P 402, 175 P 421.

The Supreme Court upon an appeal from a decree could not reopen the case and allow additional testimony to be taken upon either side for the first time in that court. Merges v. Merges, (1919) 94 Or 246, 186 P 36.

On an appeal from part of a decree, the whole record could be considered to determine whether that portion of the decree ought to have been rendered. Crumbley v. Crumbley, (1920) 94 Or 617, 186 P 423.

On an appeal from a decree the Supreme Court tried the cause anew both on the law and on the facts. Wood v. Sch. Dist. 13, (1923) 107 Or 280, 214 P 589.

It was the duty of the appellate court in equity suits to try the case anew. Ohlsen v. Ohlsen, (1926) 117 Or 519, 243 P 565, 244 P 665.

A proceeding to escheat property was heard de novo on appeal and the Supreme Court was not bound by the findings of the trial court, although the same are persuasive. In re Wakefield's Estate, (1939) 161 Or 330, 87 P2d 794, 89 P2d 592.

On appeal in equity the Supreme Court did not exercise original jurisdiction in determining and declaring the rule of damages to be applied by the court below. Public Market Co. v. Portland, (1946) 179 Or 367, 170 P2d 586, cert. denied, 330 US 829, 67 S Ct 861, 91 L Ed 1278.

When the parties in an action to change the custody of a minor child consented to or knowingly acquiesced to an independent investigation to determine custody, it could properly be construed to constitute a waiver of objection to such independent investigation, and consequently, to be a waiver of the right to trial de novo on the specific issue of custody. Rea v. Rea, (1952) 195 Or 252, 245 P2d 884.

A motion to dismiss on appeal on the sole ground that no statement of the case had been made could not be entertained. Rickey v. Ford, (1868) 2 Or 251.

Though a confirmation order in foreclosure was void, the Supreme Court on appeal upon finding for plaintiff entered a decree of foreclosure. Waymire v. Shipley, (1908) 52 Or 464, 475, 97 P 807.

(a) "Upon the transcript and evidence accompanying it." On appeal from a decree in equity, it was impossible to modify the findings of facts or to correct conclusions of law not properly deducible therefrom without having the evidence upon which they are predicated. Matthews v. Matthews, (1912) 60 Or 451, 119 P 766; Norton v. Jensen, (1937) 156 Or 694, 69 P2d 948.

The failure to bring up the evidence on appeal renders it impossible to try the suit anew and leaves only the sufficiency of the pleadings to be considered. Wyatt v. Wyatt, (1897) 31 Or 531, 49 P 855; In re Morrison's Estate, (1906) 48 Or 612, 87 P 1043; Wood v. School Dist. 13, (1923) 107 Or 280, 214 P 589; Portland Mtg. Co. v. Elder, (1936) 152 Or 406, 53 P2d 1045; Andersen v. Turpin, (1943) 172 Or 420, 142 P2d 999.

The trial court's findings or conclusions were not a part of the decree of the appellate court in an equity suit unless incorporated therein or made a part thereof by appropriate reference. Gentry v. Pac. Livestock Co., (1904) 45 Or 233, 77 P 115.

The pleadings and other papers giving jurisdiction to the court rendering the decision had to accompany the testimony taken in the lower court. Seaweard v. Malheur Drainage Dist., (1918) 89 Or 40, 173 P 462.

A decree could be affirmed on reasons differing from those of the trial court, being based on a de novo hearing. Sweeney v. Jackson County, (1919) 93 Or 96, 178 P 365, 182 P 380.

In order to determine whether there was an error in the decree of the circuit court, it was necessary that the Supreme Court consider all the testimony. Portland Mtg. Co. v. Elder, (1936) 152 Or 406, 53 P2d 1045.

Where only a small part of the transcript of the evidence had been brought up on appeal from an order committing defendant to a hospital for insane, no question of fact could be determined. In re Sneddon, (1915) 74 Or 586, 144 P 676; In re Fehl, (1938) 159 Or 545, 81 P2d 130.

(b) Weight given findings of trial court. While the findings of the trial judge were not binding on appeal from a decree, they were not without weight especially when the evidence in the record was conflicting. Goff v. Kelsey, (1915) 78 Or 337, 153 P 103; Hamlin v. Tharp, (1918) 88 Or 169, 171 P 894; Hendry v. Hendry, (1918) 88 Or 321, 171 P 1051; Wilhelm v. Wilhelm, (1918) 90 Or 435, 177 P 57; Maidment v. Russell, (1938) 159 Or 653, 81 P2d 136, 82 P2d 692; Nelson v. Cohen, (1938) 160 Or 336, 84 P2d 658; In re Norman's Estate, (1939) 161 Or 450, 88 P2d 977.

The findings of a referee or of the trial court were not binding on appeal and did not relieve the appellate court of the duty of deciding the case for itself. Howe v. Patterson, (1874) 5 Or 353; Nessley v. Ladd, (1896) 29 Or 354, 45 P 904; Wollenberg v. Minard, (1900) 37 Or 621, 62 P 532; Yokota v. Lindsay, (1926) 116 Or 641, 242 P 613; In re Wakefield's Estate, (1939) 161 Or 330, 87 P2d 794, 89 P2d 592.

The findings of the trial court were only advisory on an appeal from a decree, though they might be persuasive. Nessley v. Ladd, (1896) 29 Or 354, 45 P 904; Larch Mountain Inv. Co. v. Garbade, (1902) 41 Or 123, 68 P 6. **But see** Justice v. Elwert, (1896) 28 Or 460, 43 P 649.

The doctrine that a decree based on a referee's report would not be reversed unless the findings were clearly against the weight of the evidence, was rejected. O'Leary v. Fargher, (1884) 11 Or 225, 4 P 330. Overruling Fahie v. Lindsay, (1880) 8 Or 474.

In an equity suit the failure of the trial court to file findings of fact and conclusions of law did not constitute error. Sutherlin v. Bloomer, (1907) 50 Or 398, 93 P 135; Kubik v. Davis, (1915) 76 Or 501, 147 P 552; Beno v. Norris, (1915) 77 Or 506, 151 P 731.

The findings of a referee would rarely be disturbed on appeal when there were circumstances tending to weaken the testimony of the defeated party or to sustain the findings as made. Bruce v. Phoenix Ins. Co., (1893) 24 Or 486, 34 P 16.

Insufficiency of the court's findings to support the decree could not be a ground for reversal on appeal. Edmunds v. Welling, (1910) 57 Or 103, 105, 110 P 533.

The findings of the judge in an equity suit were not of the same force on appeal as those of the judge without a jury in a law action, which would not be disturbed if there was any evidence to support them. Id.

The findings of fact in a suit were conclusive on review unless from an examination of the testimony it appeared that a different conclusion should have been reached. Neal v. Roach, (1912) 61 Or 513, 107 P 475.

Findings based on the trial judge's view of the premises in a suit for partition were not conclusive. Thompson Estate Co. v. Kamm, (1923) 107 Or 61, 213 P 417, 28 ALR 722.

When the trial judge personally examined the locus in quo, his findings of fact and decree predicated thereon were entitled to careful consideration upon appeal. Molalla Elec. Co. v. Wheeler, (1916) 79 Or 478, 154 P 686.

When the evidence in an equity suit was conflicting, some weight should be accorded to the findings of the trial judge as he had the advantage of seeing the witnesses testify. Ruddy v. Ore. Automobile Cred. Corp., (1946) 179 Or 688, 174 P2d 603.

The chancellor's findings as to credibility of witnesses, although not binding on appeal, were entitled to much weight. Bogle v. Paulson, (1948) 185 Or 211, 201 P2d 733.

The fact that the trial judge saw the witnesses was not given weight where it could not be determined whether the decree was based on assumption that plaintiff's evidence was incompetent or that it preponderated in favor of defendant. Gress v. Wessinger, (1918) 88 Or 625, 172 P 495, 498.

(4) Presumptions. Error was not presumed on appeal to the Supreme Court. Portland Mtg. Co. v. Elder, (1936) 152 Or 406, 53 P2d 1045; Jensen v. Rosumny, (1936) 153 Or 111, 54 P2d 307; Zeek v. Bicknell, (1938) 159 Or 167, 78 P2d 620; In re Fehl, (1938) 159 Or 545, 81 P2d 130.

The Supreme Court had to presume that the findings and conclusions of the lower court were supported by the evidence where the evidence was not before the court. Whitlock v. United States Inter-Ins. Assn., (1932) 138 Or 383, 6 P2d 1088; Jensen v. Rosumny, (1936) 153 Or 111, 54 P2d 307; Alpha Corp. v. McCredie, (1937) 157 Or 88, 70 P2d 46; Nelson v Smith, (1937) 157 Or 292, 69 P2d 1072.

Where a bill of exceptions was not contained in the record it would be presumed that the proof supported the findings. Scandinavian Amer. Bank v. Wentworth Lbr. Co., (1921) 101 Or 151, 199 P 624; Irwin v. Horsefly Irr. Dist., (1935) 152 Or 101, 51 P2d 1043.

When error appeared on the transcript, there was no presumption that it was rendered harmless or obviated during the trial. Aldrich v. Columbia Ry. Co., (1901) 39 Or 263, 64 P 455.

It could not be presumed that an instruction was harmless where it submitted to the jury an issue not made by the pleadings or presented by competent evidence. Smith v. Bayer, (1905) 46 Or 143, 148, 79 P 497, 114 Am St Rep 858.

Where bill of exceptions was certified to contain evidence necessary for the presentation of the exceptions and it affirmatively appeared that there was error, the presump-

tion was that the error was not cured and was harmful. Provo v. Spokane, Portland & Seattle R. Co., (1918) 87 Or 467, 475, 170 P 522.

There was no presumption that misconduct in argument of respondent's attorney was justified or had been invited by virtue of omission from record of appellant's arguments. Halton v. Fellows, (1937) 157 Or 514, 73 P2d 680.

(5) Affidavits and certificates. Evidence dehors the record to establish certain facts was admissible in appellate court if the evidence affected proceedings before the court upon appeal. Ehrman v. Astoria Ry. Co., (1894) 26 Or 377, 38 P 306; Merriam v. Victory Min. Co., (1900) 37 Or 321, 56 P 75, 58 P 37, 60 P 997.

The record of the court below upon which the appeal was based could not be contradicted or varied by an ex parte showing in the appellate court. Merriam v. Victory Min. Co., (1900) 37 Or 321, 56 P 75, 58 P 37, 60 P 997; In re Ollschlager's Estate, (1907) 50 Or 55, 89 P 1049.

The appellate court had no right to examine any papers in the transcript unless it was legally made a part thereof. Osborn v. Graves, (1884) 11 Or 526, 6 P 227.

The fact that appellant by some act had waived his right of appeal or terminated the controversy could be shown by the evidence dehors the record, and the appeal would be dismissed. Livesley v. Johnston, (1906) 48 Or 40, 48, 84 P 1044.

Affidavits filed with the clerk of the Supreme Court, not identified by the trial judge as having been received or offered in evidence, were not before the court for review. State v. Rider, (1915) 78 Or 318, 323, 145 P 1056, 152 P 497.

FURTHER CITATIONS: Verdier v. Bigne, (1888) 16 Or 208, 19 P 64; Furbeck v. Gevurtz & Son, (1914) 72 Or 12, 143 P 654, 922; Ex parte Turner, (1917) 86 Or 590, 167 P 1019; Portland Trust & Sav. Bk. v. Lincoln Realty, (1949) 187 Or 443, 211 P2d 736; State v. Jensen, (1957) 209 Or 239, 289 P2d 687, 296 P2d 618; State v. Reyes, (1957) 209 Or 595, 303 P2d 519, 304 P2d 446, 308 P2d 182; Califf v. Norman, (1957) 210 Or 198, 310 P2d 319; Layne v. Portland Traction Co., (1958) 212 Or 658, 319 P2d 884, 321 P2d 312; Baden v. Sunset Fuel Co., (1960) 225 Or 116, 357 P2d 410; Houston v. Pomeroy, (1961) 227 Or 499, 362 P2d 708; Rogers v. Day, (1962) 230 Or 564, 370 P2d 624; State v. English, (1963) 233 Or 500, 378 P2d 997; Lantis v. Lantis, (1964) 239 Or 126, 396 P2d 755; Sims v. Sowle, (1964) 238 Or 329, 395 P2d 133; Smith v. Field Chevrolet Co., (1964) 239 Or 233, 396 P2d 200; Mazama Tbr. Prod. v. Taylor, (1965) 239 Or 568, 399 P2d 26; McBee v. Knight, (1965) 239 Or 606, 398 P2d 479; Medak v. Kekimian, (1965) 241 Or 38, 404 P2d 203; State v. Jones, (1965) 242 Or 427, 410 P2d 219; Malcow v. Malcow, (1966) 243 Or 552, 414 P2d 813; Stacy v. Smith, (1966) 244 Or 336, 418 P2d 32; Houston v. Briggs, (1967) 246 Or 439, 425 P2d 748; Savage v. Peter Kiewit Sons' Co., (1967) 249 Or 147, 432 P2d 519; Bither v. Baker Rock Crushing Co., (1968) 249 Or 640, 438 P2d 988, 440 P2d 368; Kightlinger v. Kightlinger, (1968) 249 Or 521, 439 P2d 614; Tingen v. Tingen, (1968) 251 Or 458, 446 P2d 185; Green v. Haugen, (1969) 1 Or App 1, 457 P2d 655; Hannan v. Good Samaritan Hosp., (1970) 4 Or App 178, 471 P2d 831, 476 P2d 931; Politte v. Vanderzee, (1970) 256 Or 461, 473 P2d 1013; State Constr. Corp. v. Scoggins, (1971) 259 Or 371, 485 P2d 391.

ATTY. GEN. OPINIONS: Circuit court's jurisdiction in juvenile matters after trial de novo on appeal, 1944-46, p 248; insanity hearings, 1944-46, p 430.

LAW REVIEW CITATIONS: 49 OLR 210; 5 WLJ 10.

19.130

NOTES OF DECISIONS

1. "May affirm, reverse or modify"
   (1) Findings made by the Supreme Court
   (2) New trial
   (3) Nonsuit and judgment on demurrer
2. Appeals to circuit court
3. "In the respect mentioned in the notice, and not otherwise"
4. "Any or all of the parties"
5. "Except a codefendant of the appellant"
6. Equity appeals
7. Loss or destruction of matter necessary to the prosecution of appeal.

1. "May affirm, reverse or modify"

The case must be remanded where record is too incomplete to permit appellate court to render final judgment. Hayden v. City of Astoria, (1915) 74 Or 525, 145 P 1072; Clifford v. Smith Meat Co., (1917) 84 Or 1, 163 P 808.

The power to reverse, affirm or modify judgments appealed and direct a new trial when proper to do so gives no power to pass upon questions in advance of the lower court and must be confined to determinations already had. Fisk v. Henarie, (1886) 14 Or 29, 31, 13 P 193.

Where there is no dispute as to the facts but only as to the rule of law applicable, the cause will be sent back with instructions to enter the proper judgment. Boothe v. Farmers' & Traders' Nat. Bank, (1909) 53 Or 576, 98 P 509, 101 P 390.

Amendment to the complaint cannot be permitted in the Supreme Court. Kennedy v. Fid. & Deposit Co., (1936) 153 Or 646, 58 P2d 625.

(1) Findings made by the Supreme Court. Where the judgment is excessive in a certain sum and no dispute exists concerning the facts, the Supreme Court may remand the cause with directions to enter a particular judgment or send it back for a new trial. Cochran v. Baker, (1899) 34 Or 555, 52 P 520, 56 P 641; Graham v. Merchant, (1903) 43 Or 294, 72 P 1088.

Affirmance may be ordered on condition that plaintiff remit the amount erroneously awarded by judgment in a contract action if that amount be certainly ascertainable. Gardner v. Kinney, (1911) 60 Or 292, 296, 117 P 971; Ely v. Wilde, (1912) 62 Or 111, 117, 122 P 1122.

On appeal from a judgment where it can be determined from the record what judgment should have been entered, the appellate court will direct the entry thereof. Willis v. Horticultural Fire Relief, (1914) 69 Or 293, 137 P 761, Ann Cas 1916A, 449; McDaniels v. Harrington, (1916) 80 Or 628, 157 P 1068; Oliver v. Crane, (1916) 82 Or 166, 161 P 254; Rosenwald v. Ore. City Trans. Co., (1917) 84 Or 15, 163 P 831, 164 P 189; Hayden v. City of Astoria, (1917) 84 Or 205, 164 P 729; Learned v. Holbrook, (1918) 87 Or 576, 170 P 530, 171 P 222.

A finding of a material fact, such as the amount due, cannot be supplied by the Supreme Court on appeal from a law judgment of the court trying the case without a jury. Pacific Lbr. Co. v. Prescott, (1902) 40 Or 374, 388, 67 P 207, 416.

In case of an erroneous instruction on a point which did not affect the real controversy, a new trial may be granted unless the erroneous part of the judgment is remitted. Eaton v. Blackburn, (1908) 52 Or 300, 96 P 870, 97 P 539, 132 Am St Rep 705, 16 Ann Cas 1198, 20 LRA(NS) 53.

Where the Supreme Court by its mandate directs specifically what judgment shall be entered by the lower court, that judgment when entered is in effect the judgment of the Supreme Court. Fischer v. Bayer, (1923) 108 Or 311, 210 P 452, 211 P 162, 216 P 1028.

Where the trial court failed to find on an issue, the Supreme Court with the whole testimony being before it examined the testimony and made a conslusion of the fact as to the issue in question. Taffe v. Smyth, (1912) 62 Or 227, 125 P 308.

(2) New trial. When a judgment rendered on an issue of fact in a law action is reversed on appeal, a new trial is generally ordered unless the court below should have sustained a motion for a judgment of nonsuit because of an entire lack of evidence. State v. Richardson, (1906) 48 Or 309, 85 P 225.

Upon reversal of a judgment of condemnation the cause is remanded for retrial on all the issues. Oregon Elec. Ry. v. Terwilliger Land Co., (1908) 51 Or 107, 93 P 334, 93 P 930.

Where exception to instructions was general and might not have been sufficient basis on which to predicate error, case would not be remanded solely for further inquiry as to damages but for retrial of all issues. Scott v. Brogan, (1937) 157 Or 549, 73 P2d 688.

(3) Nonsuit and judgment on demurrer. Upon appeal from a judgment on demurrer, it is the general rule that judgment of affirmance is final, but the Supreme Court may hold a discretionary control in cases where cause is alleged for rehearing or further proceedings below. McDonald v. Cruzen, (1868) 2 Or 259; Williams v. Pac. Sur. Co., (1913) 66 Or 151, 127 P 145, 131 P 1021, 132 P 959, 133 P 1186; Hutchings v. Royal Bakery, (1913) 66 Or 301, 131 P 514, 132 P 960, 134 P 1033.

Where judgment of nonsuit is reversed the case will be remanded notwithstanding plaintiff has made out a prima facie case. Wallace v. Ore. Engr. Co., (1918) 90 Or 31, 174 P 156, 175 P 445.

Although plaintiff refused to plead over after demurrer was sustained, he was allowed to amend his complaint after judgment had been affirmed on appeal and the cause remanded. State v. Richardson, (1906) 48 Or 309, 85 P 225.

2. Appeals to circuit court

This section, being limited to appeals to Supreme Court, does not apply to appeals to circuit court. In re Roache's Estate, (1907) 50 Or 179, 92 P 118; Goin v. Chute, (1928) 126 Or 466, 260 P 998, 270 P 492.

3. "In the respect mentioned in the notice, and not otherwise"

The review of a judgment or decree is confined to a consideration of the part of the case specified in the notice of appeal. Dolph v. Nickum, (1867) 2 Or 202; Roy v. Horsley, (1877) 6 Or 382; Shook v. Colohan, (1885) 12 Or 239, 6 P 503; Brauer v. Portland, (1899) 35 Or 471, 58 P 861, 59 P 117, 60 P 379; Oregon Elec. Ry. v. Terwilliger Land Co., (1908) 51 Or 107, 93 P 334, 93 P 930; Barber v. Toomey, (1913) 67 Or 452, 136 P 343.

A party not appealing from a judgment or decree must be deemed satisfied with it and cannot be given further relief on appeal taken by the adverse party. Williams v. Gallick, (1884) 11 Or 337, 3 P 469; Barber v. Toomey, (1913) 67 Or 452, 136 P 343; Johnson v. Prineville, (1921) 100 Or 105, 196 P 817; Marchall v. Frazier, (1938) 159 Or 491, 80 P2d 42 81 P2d 132.

In actions at law an appeal cannot be taken from a part of a judgment and the remainder of it accepted. Bush v. Mitchell, (1895) 28 Or 92, 41 P 155; Farmer's Bank v. Key, (1898) 33 Or 443, 54 P 206.

An appeal from part of a decree brings up the whole decree with the result that the part not appealed is affirmed but that part appealed may be affirmed, modified or reversed. Bush v. Mitchell, (1895) 28 Or 92, 96, 41 P 155.

Where appellant did not refer in her notice of appeal to the circuit court's failure to allow alimony, the question was not before the Supreme Court. Morrow v. Morrow, (1949) 187 Or 161, 210 P2d 101.

4. "Any or all of the parties"

The Supreme Court is a court of appellate jurisdiction only and cannot admit interveners who were strangers to the proceedings below. In re Waters of Chewaucan R., (1918) 89 Or 659, 171 P 402, 175 P 421.

Judgment was affirmed as against one of three defendants who joined in the appeal though it was reversed as against the others. Fischer v. Bayer, (1923) 108 Or 311, 210 P 452, 211 P 162, 216 P 1028.

5. "Except a codefendant of the appellant"

Separate decrees as to three codefendants divorced their interests so that notice to two of them on appeal by the third was not necessary. Adams v. Kennard, (1927) 122 Or 84, 222 P 1092, 227 P 738, 253 P 1048.

An appeal from a judgment foreclosing a lien was dismissed where an adverse party defendant interested in maintaining the judgment was not made a party. Johnson v. Shasta View Lbr. & Box Co., (1929) 129 Or 469, 278 P 588.

The appeal was dismissed where a codefendant against whom a several judgment and decree had been entered was not served with notice. Parson v. Ranes, (1934) 148 Or 197, 35 P2d 986.

6. Equity appeals

Where on appeal it is found that the trial court acted properly in sustaining a demurrer to the complaint, the cause will be remanded for further proceedings within the discretion of the trial court. Powell v. Dayton, Sheridan & Grande Ronde R. Co., (1886) 14 Or 22, 12 P 83; Fowle v. House, (1897) 30 Or 305, 47 P 787; State v. Metscham, (1898) 32 Or 372, 46 P 791, 53 P 1071, 41 LRA 692; State v. Warner Valley Stock Co., (1910) 56 Or 283, 106 P 780, 108 P 861.

Where the proceeding is equitable and all the testimony is before the court on appeal, the cause will not be remanded for new trial. Kenworthy v. Slooman, (1912) 62 Or 604, 125 P 273; Shepperd v. Holmes, (1918) 89 Or 626, 174 P 530.

Upon setting aside a decree taken by mistake, inadvertence, surprise or excusable neglect and appealed before opportunity to seek relief below, the Supreme Court has power upon application to give relief and power to remand the cause for further proceedings. Branson v. Oregonian Ry., (1882) 10 Or 278, 388.

When on appeal from a decree in equity the cause is sent back because the complaint is considered insufficient or the evidence inadequate to support a material averment, the decree is set aside and the lower court ordered to take further proceedings. State v. Richardson, (1906) 48 Or 309, 85 P 225.

In a suit by one for himself and others not united in interest, on affirmance on his appeal from dismissal upon demurrer to complaint, the cause will not be remanded to permit plaintiff to apply for leave to amend by substituting a cause of action in his own favor only. Oregon v. Warner Stock Co., (1906) 48 Or 378, 86 P 780, 87 P 534.

In equity the Supreme Court is in the same situation as the circuit court and as far as possible upon the record may do what the circuit court might have done at any stage of the contest. Oregon Lbr. Co. v. E. Fork Irr. Dist., (1916) 80 Or 568, 157 P 963.

The Supreme Court has the power to set aside a decree of the circuit court and remand the cause for further proceedings although ordinarily the issues will be tried anew on appeals from a decree. Adams v. Kennard, (1927) 122 Or 84, 222 P 1092, 227 P 738, 253 P 1048.

On appeal in equity where an issue was left undisposed of, the cause was remanded to the lower court for further proceedings. Knapp v. Wallace, (1917) 50 Or 348, 92 P 1054; Kreinbring v. Mathews, (1916) 81 Or 243, 159 P 75.

Where defendants did not introduce evidence because the court excluded competent evidence offered by plaintiff, the cause was remanded on appeal instead of entering final judgment for plaintiff. Robson v. Hamilton, (1902) 41 Or 239, 69 P 651.

Where the case as made by the record had been fully adjudicated, the Supreme Court could not remand the cause for the purpose of framing what would be equivalent to a new case. Anderson v. Phegley, (1915) 74 Or 388, 145 P 642.

Decree in a suit to adjudicate water rights that would affect rights of persons not parties was reversed for new trial with directions to transfer the suit to the State Water Board. Pacific Livestock Co. v. Balcombe, (1921) 101 Or 233, 199 P 587.

7. Loss or destruction of matter necessary to the prosecution of the appeal

To secure the benefits of this section where exhibits and reporter's shorthand notes of trial have been lost, the appellant must show both that it was impossible to secure an authentic report of the testimony and that there was some prima facie failure of justice. Hoffart v. Lindquist & Paget Mtg. Co., (1948) 182 Or 611, 189 P2d 592.

This section grants exclusive and wide discretionary power to the Supreme Court to award new trials where notes and exhibits are lost. Id.

Affidavits relative to the question of an appellant's diligence and to the merits of the appeal should be filed with the Supreme Court in support of a petition to reverse a judgment or decree and to order a new trial under this section where exhibits and reporter's notes of trial have been lost. Id.

Waiver of right to make record below constitutes waiver of right to trial de novo in Supreme Court on issue of custody. Beelman v. Beelman, (1961) 227 Or 556, 361 P2d 663, 363 P2d 561.

The Supreme Court refused to order a new trial due to the trial court's inability to make a record of the proceedings below where the alleged error was harmless. Portland Trust & Sav. Bank v. Gallin, (1950) 188 Or 526, 216 P2d 681.

FURTHER CITATIONS: Territory v. Latshaw, (1854) 1 Or 146; Wagner v. Portland, (1902) 40 Or 389, 60 P 985, 67 P 300; State v. Hamilton, (1916) 80 Or 562, 157 P 796; United States Fid. & Guar. Co. v. Smith, (1933) 142 Or 1, 18 P2d 1032; Brooks v. Mack, (1960) 222 Or 139, 352 P2d 474; Bonnevier v. Dairy Coop. Assn., (1961) 227 Or 123, 361 P2d 262; Anderson v. Anderson, (1962) 232 Or 160, 374 P2d 479; Dunn v. Gray, (1964) 238 Or 71, 392 P2d 1018; Jepsen v. Magill, (1966) 243 Or 34, 411 P2d 267; German v. Kienow's Food Store, (1967) 246 Or 334, 425 P2d 523; Stark v. Henneman, (1968) 250 Or 34, 440 P2d 364; Chance v. Ringling Bros. Barnum & Bailey, Combined Shows, Inc., (1970) 257 Or 319, 478 P2d 613.

LAW REVIEW CITATIONS: 7 OLR 349.

19.140

NOTES OF DECISIONS

1. In general

The extent that intermediate orders can be reviewed is not a proper question to be considered on motion to dismiss appeal but is a proper question for consideration on the trial on the merits. Stacy v. McNicholas, (1915) 76 Or 167, 144 P 96, 148 P 67.

2. "May review any intermediate order"

A ruling on a demurrer may be reviewed on appeal from the final judgment regardless of the time that may have elapsed since the entry thereof. State v. Portland Gen. Elec. Co., (1908) 52 Or 502, 95 P 722, 98 P 160; Hubbard v. Olsen-Roe Transfer Co., (1921) 101 Or 168, 199 P 187; Butler v. City of Ashland, (1924) 113 Or 72, 231 P 155.

Dissolution of attachment is reviewable only with and upon appeal from the main judgment in the action. Van Voorhies v. Taylor, (1893) 24 Or 247, 33 P 380; Ruby v. Whitten, (1926) 117 Or 271, 243 P 559.

Since a law judgment is not severable, appeal must be from the entire judgment and the Supreme Court will make such orders as may be appropriate concerning both final and interlocutory proceedings. Farmers' Bank v. Key, (1898) 33 Or 443, 54 P 206.

Intermediate orders and decrees in partition proceedings may be reviewed on appeal from a decree confirming the report of referees. Sterling v. Sterling, (1903) 43 Or 200, 72 P 741.

An allowance of suit money to the wife to defend in divorce is not reviewable on direct appeal though it would be reviewable on appeal from the final decree. Clay v. Clay, (1910) 56 Or 538, 108 P 119, 109 P 129.

Orders refusing to vacate the appointment of a receiver, overruling objections to his account and authorizing the issuance of receiver's certificates for money actually furnished and paid out by the receiver, are interlocutory and reviewable on appeal from the final decree. Anderson v. Robinson, (1912) 63 Or 228, 235, 126 P 988, 127 P 546.

An order dismissing a plea in abatement was reviewable on appeal from the judgment. Hirschfield v. McCullagh, (1913) 64 Or 502, 127 P 541, 130 P 1131.

If the party interposing demurrer does not desire to plead over, judgment should be entered and appeal be taken from the judgment. Birkemeier v. Milwaukie, (1915) 76 Or 143, 149, 147 P 545.

An order setting aside a divorce decree and permitting defendant to file an answer is reviewable only by appeal from the final decree. Carmichael v. Carmichael, (1921) 101 Or 172, 199 P 385.

Dissolution of a preliminary injunction may be brought up by appeal from judgment or decree. Anderson v. Harju, (1925) 113 Or 552, 233 P 848.

The denial of a motion for change of judge is reviewable on appeal from order granting a new trial. State ex rel. Johnson v. Circuit Court for Deschutes County, (1925) 114 Or 6, 233 P 563, 234 P 262.

Mandamus would not lie where rulings on venue and jurisdiction were reviewable on appeal under this section. State v. Norton, (1929) 131 Or 382, 283 P 12.

Without a sufficiently complete record an intermediate order cannot be reviewed. Laurance v. Tucker, (1939) 160 Or 474, 85 P2d 374.

3. "Involving the merits or necessarily affecting the judgment or decree"

The granting or refusing of a continuance does not involve "the merits or necessarily affect the judgment." Pacific Mill Co. v. Inman, Poulsen & Co., (1907) 50 Or 22, 90 P 1099.

Every intermediate order made by the trial court affecting a substantial right may be reviewed upon appeal from the final decree. Taylor v. Taylor, (1912) 61 Or 257, 121 P 431, 964; Thomas v. Thurston, (1918) 87 Or 650, 171 P 404.

4. New trial

Although one may appeal from an order granting a new trial, the order denying such motion as well as one allowing it is reviewable as an intermediate order. Oldland v. Ore. Coal & Nav. Co., (1909) 55 Or 340, 99 P 423, 102 P 596; Goodeve v. Thompson, (1914) 68 Or 411, 136 P 670, 137 P

744. **But see** Kearney v. Snodgrass, (1885) 12 Or 311, 7 P 309.

5. "May direct complete restitution"

The provision relative to restitution of "all property and rights" probably contemplates a final judgment of restitution only in cases where the facts appear of record and not where it is necessary to make proof aliunde by ex parte affidavits. McFadden v. Swineton, (1900) 36 Or 336, 59 P 816, 62 P 12.

Damages for delay necessitated by an appeal cannot be allowed where the Supreme Court is unable to say from the record that the appeal was not taken in good faith. Manary v. Runyon, (1903) 43 Or 495, 73 P 1028.

This section does not deprive the circuit court of the power of ordering restitution upon a motion if the appellate court has not decided that the movant is without the right of restitution. Coker v. Richey, (1923) 108 Or 479, 217 P 638.

When the necessary facts appear of record, the court may in its final judgment direct that restitution be made. Lytle v. Payette-Ore. Slope Irr. Dist., (1944) 175 Or 276, 152 P2d 934.

The right of restitution under this section is merely cumulative and the party entitled to restitution may prosecute an independent action analogous to an action for money had and received. Id.

In addition to restoration of the specific property, the judgment debtor may be allowed to recover compensation for being deprived of the use thereof, less expenses necessarily incurred in its protection. Id.

If the judgment is modified, in the absence of fraud or other equitable basis for relief, the judgment debtor's relief is limited to a recovery of the amount by which the judgment is reduced. Thompson v. Thompson, (1963) 233 Or 262, 378 P2d 281.

FURTHER CITATIONS: Sheppart v. Yocum, (1884) 11 Or 234, 3 P 824; Hewey v. Andrews, (1917) 82 Or 448, 159 P 1149, 161 P 108; Dirkheimer Inv. Co. v. Zell, (1939) 161 Or 434, 90 P2d 213; Arnold v. Arnold, (1952) 193 Or 480, 237 P2d 963, 239 P2d 595; Barber v. Gladden, (1956) 210 Or 46, 298 P2d 986, 309 P2d 192; Manke v. Nehalem Logging Co., (1956) 211 Or 211, 301 P2d 192, 315 P2d 539; Ebel v. Boly, (1971) 258 Or 308, 481 P2d 620.

19.160

NOTES OF DECISIONS

1. Purpose of section

The purpose of this section is to prevent the taking of an appeal where there is no probable cause therefor and to impose a penalty where the purpose of the appeal is for delay. Erb v. Shope, (1932) 140 Or 253, 12 P2d 308.

2. Amount of damages recoverable

The power to allow 10 per cent implies the power to allow any less sum, hence the court may allow any amount less than 10 percent. Hawkins v. Jones, (1892) 21 Or 502, 28 P 548.

3. Abandoned appeals

Except when appellant has abandoned his appeal, damages will not be allowed respondent unless it is very clear that the appeal was for the purpose of delay. Nelson v. Ore. Ry. & Nav. Co., (1886) 13 Or 141, 9 P 321.

This section relates entirely to causes that are heard in this court on appeal and not to cases that may be affirmed where the appeal is abandoned. Hawkins v. Jones, (1892) 21 Or 502, 28 P 548.

Damages for having taken an appeal in bad faith was not allowed where the appellant offered to pay the judgment before time for appeal had expired and appeal was abandoned. Lester v. Elwert, (1893) 25 Or 102, 35 P 29.

4. "Probable cause for taking the appeal"

Where there is probable cause for taking an appeal which apparently is taken in good faith, damages will not be awarded. Manary v. Runyon, (1903) 43 Or 495, 73 P 1028; State v. Elliott, (1925) 113 Or 632, 233 P 867; Lewis v. Continental Cas. Co., (1931) 135 Or 170, 295 P 450; McCulley v. Homestead Bakery, (1933) 141 Or 460, 18 P2d 226; Lovett v. Gill, (1933) 142 Or 534, 20 P2d 1070; Christensen, Inc., v. Hansen Constr. Co., (1933) 142 Or 549, 21 P2d 195; Gobb v. Spokane, Portland & Seattle R. Co., (1935) 150 Or 226, 44 P2d 731; Shaw v. Pac. Supply Coop., (1941) 166 Or 508, 113 P2d 627.

When it is uncertain whether or not appeal was taken in bad faith damages will not be allowed. Coffin v. Hanner, (1857) 1 Or 236.

The evidence of an appeal in bad faith must be clear and convincing to authorize the statutory penalty. Morrison v. Hall, (1909) 55 Or 243, 104 P 963.

This section was not intended to apply in cases involving debatable legal questions, the failure to obtain a review of which is solely due to some defect arising from failure to observe a rule of practice. Martin v. Glenbrook Farms Corp., (1924) 110 Or 87, 222 P 1102.

Where the legal problems presented were not easily solved and were of a class concerning which eminent counsel might differ, damages were not allowed. Livesley v. Krebs Hop Co., (1910) 57 Or 352, 97 P 718, 107 P 460, 112 P 1.

That there is slight merit in an appeal does not necessarily make it proper to assess damages under this section. Hobson v. Beall, (1929) 130 Or 240, 279 P 645.

The court disfavors the imposition of the statutory penalty. Haas v. Bates, (1935) 150 Or 592, 47 P2d 243.

Appellant had probable cause for taking appeal in case involving issue whether respondent was a guest when injured while riding in automobile belonging to appellant. Id.

A judgment was not increased upon the ground that an appeal was frivolous where the appellant, a poor woman, had been subjected to a judgment for over $3,000 on a counterclaim. Ervast v. Sterling, (1937) 156 Or 432, 68 P2d 137.

The Supreme Court was unwilling to say the appeal was without probable cause, even though no error was found and the award did not seem excessive. Sherrard v. Werline, (1929) 162 Or 135, 91 P2d 344.

Where question as to correctness of instructions was attempted to be raised on appeal, the appeal was not frivolous. Cook v. Retzlaff, (1940) 163 Or 683, 99 P2d 22.

5. Damages for delay

Where record clearly disclosed that purpose of appeal was for delay, 10 per cent of amount of judgment was added to award. Loveland v. Plant, (1930) 132 Or 619, 287 P 219; Erb v. Shope, (1932) 140 Or 253, 12 P2d 308; Harlow v. Chenoweth, (1938) 158 Or 343, 75 P2d 937.

6. Affidavits

Affidavits to show bad faith should be served and filed with the notice of the motion for affirmance. Lester v. Elwert, (1893) 25 Or 102, 35 P 29.

A general averment of bad faith does not suffice but facts should be stated in the affidavits evidencing bad faith. Osborn v. Newberg Orchard Assn., (1900) 36 Or 444, 59 P 711, 60 P 994.

FURTHER CITATIONS: Burgdorfer v. Thielemann, (1936) 153 Or 354, 55 P2d 1122, 104 ALR 1407; East Side Mill & Lbr Co. v. SE Portland Lbr. Co., (1937) 155 Or 367, 64 P2d 625; Baker v. Brookmead Dairy, Inc., (1962) 230 Or 384, 370 P2d 235.

19.180

CASE CITATIONS: State v. Herried, Gray and Clagget, (1970) 3 Or App 462, 474 P2d 358, Sup Ct **review denied**.

19.190

NOTES OF DECISIONS

1. In general

When party fails to comply with the mandate of the Supreme Court when spread on the lower courts record, dismissal in accordance with mandate is proper. Reid v. Reid, (1961) 219 Or 500, 226 Or 480, 348 P2d 29, 360 P2d 555.

An action on the common law bond was not excluded where the Supreme Court had not entered a judgment against the surety. Rogers v. King, (1967) 245 Or 627, 423 P2d 761.

2. Under former similar statute

(1) In general. The purpose of a mandate was to apprise the lower court of the disposition of the cause on appeal and to direct proceedings in accordance therewith. Dickson v. King, (1935) 151 Or 512, 49 P2d 367.

(2) Recall or correction of mandate. The Supreme Court could recall a mandate after it had been received in the court below for the purpose of correcting an error or irregularity therein or an inadvertence in issuing it where the motion to recall the mandate was filed during the term at which the decree was entered. Livesley v. Johnston, (1905) 47 Or 193, 82 P 854; Williams v. Pac. Sur. Co., (1913) 66 Or 151, 127 P 145, 131 P 1021, 132 P 959, 133 P 1186.

If the mandate ought to have directed a new trial instead of a nonsuit, the matter should have been called to the attention of the appellate court by some appropriate proceeding and could not be raised by a second appeal. Apex Trans. Co. v. Garbade, (1898) 32 Or 582, 52 P 573, 54 P 367, 882, 62 LRA 513; Bertin & Lepori v. Mattison, (1916) 81 Or 482, 159 P 1167.

The court would hold a discretionary control where cause was alleged for rehearing or for further proceedings. McDonald v. Cruzen, (1868) 2 Or 259.

The Supreme Court had power after the term to recall the mandate to correct misprision of the clerk, settle the cost-bill or to determine any other matter relating to its enforcement, but had no power to qualify or modify. Krause v. Ore. Steel Co., (1907) 50 Or 88, 91 P 442, 92 P 810.

The Supreme Court could substitute parties only for the purposes of its own jurisdiction and if any further proceeding was required before the circuit court additional substitution had to be accomplished there. Ahonen v. Hryszko, (1919) 90 Or 451, 175 P 616, 177 P 63.

(3) Duty and power of trial court upon remand. It was the duty of the clerk upon the receipt of the mandate to enter the same in the journal; neither he nor the lower court had any discretion in the matter. Dickson v. King, (1935) 151 Or 512, 49 P2d 367.

It was the duty of the circuit court to obey the mandate. Simmons v. Wash. Fid. Nat. Ins. Co., (1932) 140 Or 164, 13 P2d 366; Bank of Commerce v. Ryan, (1937) 157 Or 231, 69 P2d 964.

A judgment entered by the lower court pursuant to a mandate of the Supreme Court became in effect the judgment of the Supreme Court. Bertin & Lepori v. Mattison, (1916) 81 Or 482, 159 P 1167; Fischer v. Bayer, (1923) 108 Or 311, 210 P 452, 211 P 162, 216 P 1028.

Until entered in the journal of the lower court as provided by this section the decision of the Supreme Court could not have the force and effect of a decree or judgment where a new trial was not ordered. The Holladay Case, (1886) 29 Fed 226, 229.

The circuit court did not have the power to modify a decree of the Supreme Court which upon mandate was entered there. Krause v. Ore. Steel Co., (1907) 50 Or 89, 91 P 442, 92 P 810.

Where the mandate directed specifically what judgment should be entered by the lower court, its duty was to follow the direction implicitly. Bertin & Lepori v. Mattison, (1916) 81 Or 482, 159 P 1167.

Provisions of Supreme Court's decree entered by lower court pursuant to Supreme Court's mandate in equity suit, had to be enforced by lower court. State v. Lawrence, (1934) 148 Or 383, 36 P2d 784.

While it was irregular to proceed with trial before mandate of Supreme Court was entered in the journal, it did not prevent the trial court from getting jurisdiction. Dickson v. King, (1935) 151 Or 512, 49 P2d 367.

(a) Amendment after remand. In equity appeals when the case had been remanded for further proceedings, the trial court could allow amendments. State v. Richardson, (1906) 48 Or 309, 85 P 225, 8 LRA(NS) 362.

Where a judgment sustaining a demurrer was affirmed on appeal and the cause remanded with directions to enter a judgment accordingly, the trial court had the power to permit an amendment. Id.

(4) Entry of judgment or decree against appellant's sureties. When the surety signed an undertaking on appeal he became a party to and was bound by the judgment. Holbrook v. Inv. Co., (1897) 32 Or 104, 51 P 45; Portland Trust Co. v. Havely, (1899) 36 Or 234, 59 P 466, 61 P 346.

The provision relative to the entry of judgment against appellant's sureties was peremptory and was subject to no exceptions. Ah Lep v. Gong Choy, (1886) 13 Or 429, 11 P 72; Fischer v. Bayer, (1923) 108 Or 311, 210 P 452, 211 P 162, 216 P 1028.

Where a surety died after the Supreme Court affirmed a judgment on appeal, a motion to have the circuit court enter judgment against the sureties upon the bond nunc pro tunc as of the date of the affirmance was denied. Ahonen v. Hryszko, (1919) 90 Or 451, 175 P 616, 177 P 63.

The surety on a supersedeas bond was liable for the amount of the judgment where it was affirmed as against one of three defendants joining in the appeal though it was reversed as against the others. Fischer v. Bayer, (1923) 108 Or 311, 210 P 452, 211 P 162, 216 P 1028.

When supersedeas and restitution bonds were given, the respondent was entitled to judgment against the sureties if the case was affirmed, and the appellant was entitled to judgment against the sureties on the restitution bond if the judgment had been enforced and the case was reversed. Ah Lep v. Gong Choy, (1886) 13 Or 429, 11 P 72; Holbrook v. Inv. Co., (1897) 32 Or 104, 51 P 451; Stuart v. Union Lbr. Co., (1913) 66 Or 546, 132 P 1, 1164, 135 P 165.

A judgment against the sureties on a city's appeal bond

was properly entered although judgment against the city could not be enforced until a warrant was demanded. Brauer v. Portland, (1899) 35 Or 471, 58 P 861, 59 P 117, 60 P 378.

The judgment or decree to be rendered against the appellant's surety was in its nature several. Portland Trust Co. v. Havely, (1900) 36 Or 234, 59 P 466, 61 P 346.

The words "according to the nature and extent of their undertaking" had no reference to the form of the bond but was concerned with whether or not it was given for a stay of execution. Id.

Although the undertaking was joint in form judgment could be entered against the surety's personal representative after his death. Id.

Grantee's undertaking on appeal from decree setting aside fraudulent conveyance did not render grantee or her surety, upon affirmance, liable for money judgment against grantor. American Sur. Co. v. Hattrem, (1932) 138 Or 358, 3 P2d 1109, 6 P2d 1087.

FURTHER CITATIONS: Schirott & Groner v. Phillippi & Coleman, (1869) 3 Or 484; State v. Jacobs, (1884) 11 Or 314, 8 P 332; Nadstanek v. Trask, (1929) 130 Or 669, 281 P 840, 67 ALR 599; Hasbrook v. Lynch, (1934) 146 Or 363, 30 P2d 358; Rogers v. Day, (1962) 232 Or 185, 375 P2d 63; Wolfe Invs., Inc. v. Shroyer, (1968) 249 Or 23, 436 P2d 554.

ATTY. GEN. OPINIONS: Disposition of fines imposed by circuit court upon appeal from municipal court and county court, 1924-26, p 468; jurisdiction of circuit court in juvenile matter after trial de novo on appeal, 1944-46, p 248.

LAW REVIEW CITATIONS: 12 OLR 208.