Chapter 20

Costs and Disbursements

20.010

NOTES OF DECISIONS
1. In general
2. Costs
3. Attorneys fees

1. In general

This section was adopted from the 1829 and 1853 New York Code. Carnation Lbr. Co. v. McKenney, (1960) 224 Or 541, 356 P2d 932.

2. Costs

Only by virtue of statutory provisions can costs be recovered. Wood v. Fitzgerald, (1870) 3 Or 568; State v. Estes, (1898) 34 Or 196, 213, 51 P 77; In re Pittock's Will, (1921) 102 Or 159, 199 P 633, 202 P 216, 17 ALR 218.

The allowance of costs may be reviewed on appeal in the Supreme Court. Cross v. Chichester, (1871) 4 Or 114.

A surety in an undertaking "for the payment of such sum as may from any cause be adjudged against the plaintiff" is liable for the costs of the action. Carlon v. Dixon, (1886) 14 Or 293, 12 P 394; Jordan v. La Vine, (1887) 15 Or 329, 15 P 281.

The term "costs" properly includes only the indemnity for attorney fees fixed by statute. In re Pittock's Will, (1921) 102 Or 159, 199 P 633, 202 P 216, 17 ALR 218; Livesley v. Strauss, (1922) 104 Or 356, 206 P 850, 207 P 1095; Garrett v. Hunt, (1926) 117 Or 673, 244 P 82, 245 P 321; Gleason v. Thornton, (1957) 210 Or 666, 313 P2d 776.

3. Attorneys fees

A stipulation for payment of reasonable attorneys' fees is valid and enforceable. Peyser v. Cole, (1883) 11 Or 39, 4 P 520, 50 Am Rep 451; Yulio v. Brownell, (1923) 107 Or 651, 215 P 576; Wilson Sewing-Machine Co. v. Moreno, (1879) 6 Sawy 35, 7 Fed 806; Bank of British North America v. Ellis, (1879) 6 Sawy 96, Fed Cas No. 859.

A provision which is contained in a note, and which requires payment of a certain sum or percentage of the amount of the note, will not be enforced. Balfour v. Davis, (1886) 14 Or 47, 12 P 89; Kimball v. Moir, (1887) 15 Or 427, 15 P 669; Commercial Nat. Bank v. Davidson, (1889) 18 Or 57, 22 P 517; Levens v. Briggs, (1891) 21 Or 333, 338, 28 P 15, 14 LRA 188.

Where there is no evidence as to what is a reasonable attorney's fee, the court may not allow a sum beyond the amount fixed by statute. Bradtfeldt v. Cooke, (1895) 27 Or 194, 40 P 1, 50 Am St Rep 701; Cox v. Alexander, (1897) 30 Or 438, 46 P 794; First Nat. Bank v. Mack, (1899) 35 Or 122, 57 P 326; Lassas v. McCarty, (1906) 47 Or 474, 84 P 76; Waymire v. Shipley, (1908) 52 Or 464, 97 P 807; Guernsey v. Marks, (1910) 55 Or 323, 106 P 334; Mael v. Stutsman, (1911) 60 Or 66, 117 P 1093; Sattler v. Knapp, (1912) 60 Or 466, 120 P 2; Mountain Tbr. Co. v. Case, (1913) 65 Or 417, 133 P 92.

Allegation and proof entitled party to recover attorney's fee. Wright v. Conservative Inv. Co., (1907) 49 Or 177, 89 P 387; McInnis v. Buchanan, (1909) 53 Or 533, 99 P 929; Wills v. Zanello, (1911) 59 Or 291, 117 P 291.

A stipulation that the court should fix a reasonable amount as attorneys' fees without the introduction of evidence in regard thereto was proper and trial court's determination was upheld. Wills v. Zanello, (1911) 59 Or 291, 117 P 291.

Cost and disbursement statutes with provision for attorney fees are full and adequate compensation to a successful litigant, and in the absence of interference with the person or property of the defendant, malicious prosecution will not lie. Carnation Lbr. Co. v. McKenney, (1960) 224 Or 541, 356 P2d 932.

The trial court has no right to disregard the terms of a contract providing for the payment of a reasonable attorney's fee. Gorman v. Jones, (1962) 232 Or 416, 375 P2d 821.

The sum allowed for an attorney fee, although a nominal indemnity is a cost allowable in workmen's compensation cases. McManus v. State Acc. Ins. Fund, (1970) 3 Or App 373, 474 P2d 31.

FURTHER CITATIONS: Rader v. Barr, (1900) 37 Or 453, 61 P 1027; Spicer v. Benefit Assn. of Ry. Employes, (1933) 142 Or 574, 17 P2d 1107, 21 P2d 187; Adair v. McAtee, (1964) 236 Or 391, 388 P2d 748.

ATTY. GEN. OPINIONS: Recovery of attorney fees by Commissioner of Labor in cases prosecuted by him for collection of wages, 1934-36, p 187.

LAW REVIEW CITATIONS: 39 OLR 118.

20.020

NOTES OF DECISIONS
1. Party entitled
2. Items recoverable
   (1) In general
   (2) Where more than one trail
   (3) Witness fees
   (4) Officers' fees

1. Party entitled

Unless he is allowed costs, a party cannot recover disbursements. Wood v. Fitzgerald, (1870) 3 Or 568.

Where a motion to dismiss an appeal was granted, the respondent as prevailing party was entitled to costs and necessary disbursements. Portland & Ore. City Ry. v. Doyle, (1917) 86 Or 206, 167 P 270, 168 P 291.

2. Items recoverable

(1) In general. Costs and disbursements on appeal are recoverable. Burt v. Ambrose, (1883) 11 Or 26, 4 P 465.

An item for surveying and platting land in controversy was not allowed as a disbursement. Weiss v. Meyer, (1893) 24 Or 108, 32 P 1025.

The expense of copies of a motion for rehearing was not a taxable item of disbursements. Young v. Hughes, (1901) 39 Or 586, 65 P 987, 66 P 272.

Where on appeal a party procured an original and two copies of the testimony as extended, he could not charge for the copies in his cost bill, though he may have needed them. Cunningham v. Friendly, (1915) 76 Or 16, 147 P 752.

An item for services of an interpreter was allowed where such interpreter was shown to have been necessary. Franconi v. Graham, (1918) 89 Or 619, 174 P 548.

Costs paid by appellant to its codefendants were not allowed as a necessary disbursement. Herring v. Springbrook Packing Co., (1956) 208 Or 191, 299 P2d 604, 300 P2d 473.

Costs for a discovery deposition were not allowed when case was disposed of on defendants' demurrer and deposition never entered case. Kendall v. Curl, (1960) 222 Or 329, 353 P2d 227.

(2) Where more than one trial. Cost of printing matter in the abstract that had no bearing on the question on appeal was not an allowable disbursement. Litherland v. Cohn Real Estate Co., (1909) 54 Or 71, 100 P 1, 102 P 303; Smith v. Kinney, (1914) 72 Or 514, 143 P 901, 1126.

Where plaintiff secured a judgment which on appeal was reversed and on a second trial again secured judgment which on appeal was affirmed, he was not entitled to recover as disbursements on the second trial the necessary expenses of the first trial or first appeal. Wade v. Amalgamated Sugar Co., (1914) 71 Or 75, 142 P 350; Hedges v. Riddle, (1915) 75 Or 197, 146 P 99, 964.

Where defendant secured judgment which on appeal was reversed and plaintiff secured judgment on second trial, plaintiff recovered as disbursements the necessary expenses incurred at the first trial. City of Seaside v. Ore. Sur. & Cas. Co., (1918) 87 Or 624, 171 P 396.

Where the first trial resulted in a failure of agreement by the jury, plaintiff, who was successful at the second trial, was entitled to all his costs and necessary disbursements in both trials. Jones Land & Livestock Co. v. Seawell, (1918) 90 Or 236, 176 P 186.

(3) Witness fees. The mileage fees, if objected to, of witnesses who attend voluntarily and are not sworn, are not allowable unless their testimony would be not only material but also important and necessary. Crawford v. Abraham, (1866) 2 Or 163; Pugh v. Good, (1890) 19 Or 85, 23 P 827; Sugar Pine Lbr. Co. v. Garrett, (1895) 28 Or 168, 42 P 129; Perham v. Portland Gen. Elec. Co., (1898) 33 Or 451, 483, 53 P 14, 24, 72 Am St Rep 730, 40 LRA 799; Spencer v. Peterson, (1902) 41 Or 257, 68 P 519, 1108; Luckey v. Lincoln County, (1903) 42 Or 331, 70 P 509.

In two or more cases between the same parties at the same term, only one mileage should be allowed for witnesses. Crawford v. Abraham, (1866) 2 Or 163, 166.

The number of miles actually traveled by the witness must be claimed by the party. Crawford v. Abraham, (1866) 2 Or 163, 166; Sugar Pine Lbr. Co. v. Garrett, (1895) 28 Or 168, 42 P 129.

Where witnesses were sworn and examined the materiality of their testimony need not be shown to recover their fees as disbursements. Willis v. Lance, (1896) 28 Or 371, 43 P 384, 487; Spencer v. Peterson, (1902) 41 Or 257, 68 P 519, 1108.

The expense incurred by parties or their agents in notifying witnesses to attend a trial is not a taxable disbursement. Egan v. Finney, (1903) 42 Or 599, 606, 72 P 133.

Where a pure question of law is involved witnesses are not necessary and therefore witness fees are not taxable disbursements. Nicholson v. Newton, (1914) 71 Or 387, 142 P 614; Macleay Estate Co. v. Miller, (1917) 85 Or 623, 167 P 575.

Mileage for out of state witnesses may be claimed only for the miles traveled in this state. Hill v. Hill, (1929) 128 Or 177, 270 P 911.

Where witnesses voluntarily attended a trial from without the county, and from a distance of more than 20 miles, they were entitled to single fees and per diem. Egan v. Finney, (1903) 42 Or 599, 606, 72 P 133.

Additional remuneration for expert witnesses was not allowed. Legler v. Legler, (1949) 187 Or 273, 211 P2d 233.

(4) Officers' fees. An officer can recover mileage only for miles actually traveled. Howe v. Douglas County, (1869) 3 Or 488; Coleman v. Ross, (1887) 14 Or 349, 12 P 648.

The reasonable expense incurred by sheriff in keeping attached property may be taxed as a disbursement. Schneider v. Sears, (1885) 13 Or 69, 8 P 841; Mitchell & Lewis Co. v. Downing, (1893) 23 Or 448, 32 P 394.

An officer can make no charge for any act performed by him by virtue of his office unless a statute authorizes such charge. Pugh v. Good, (1890) 19 Or 85, 23 P 827.

Where sheriff performs services which a constable is authorized to perform the sheriff must charge only the fees allowed to a constable. Id.

The expense of telegrams sent by sheriff to notify witnesses to be present at a stated time could not be taxed as a disbursement. Egan v. Finney, (1903) 42 Or 599, 72 P 133.

FURTHER CITATIONS: Rader v. Barr, (1900) 37 Or 453, 61 P 1027, 1127; Burdick v. Tum-A-Lum Lbr. Co., (1920) 97 Or 459, 191 P 654; In re Pittock's Will, (1921) 102 Or 159, 199 P 633, 202 P 216, 17 ALR 218; Bing Gee v. Ah Jim, (1881) 7 Sawy 117, 7 Fed 811; Gleason v. Thornton, (1957) 210 Or 666, 313 P2d 776; Gilbert v. Hoisting & Port. Engrs., (1964) 237 Or 130, 384 P2d 136, 390 P2d 320; Gowin v. Heider, (1964) 237 Or 266, 386 P2d 1, 391 P2d 630; Cunningham v. State Comp. Dept., (1969) 1 Or App 127, 459 P2d 892.

ATTY. GEN OPINIONS: Expense of sheriff in unsuccessful levy as a disbursement, 1938-40, p 117.

20.030

NOTES OF DECISIONS

1. *In general*
2. Items recoverable
3. Exercise of discretion
4. Factors affecting award

1. In general

In equity the prevailing party is entitled to costs and disbursements unless the court otherwise orders. Portland v. Amer. Sur. Co., (1916) 79 Or 38, 153 Or 786, 154 P 121; Sears v. Orchards Water Co., (1925) 115 Or 291, 236 P 502, 237 P 1118; In re Water Rights of Willow Creek, (1925) 119 Or 155, 236 P 487, 763, 237 P 682, 239 P 123; Grebe v. Rohrer, (1934) 148 Or 177, 34 P2d 927, 35 P2d 985; Ward v. Ward, (1937) 156 Or 686, 68 P2d 763, 69 P2d 963.

A decree for costs against a defendant where no other judgment was rendered against it is void. Taylor Inv. Co. v. Deatsman, (1913) 64 Or 384, 388, 130 P 740.

Cost and disbursement statutes with provision for attorney fees are full and adequate compensation to a successful litigant, and in the absence of interference with the person or property of the defendant, malicious prosecution will not lie. Carnation Lbr. Co. v. McKenney, (1960) 224 Or 541, 356 P2d 932.

This section was adopted from the 1829 and 1853 New York Code. Id.

2. Items recoverable

The wages of employes in a suit in which a receiver has been appointed are not disbursements to be taxed to the parties. Farmers' Loan & Trust Co. v. Ore. Pac. R. Co., (1897) 31 Or 237, 48 P 706, 65 Am St Rep 822, 38 LRA 424.

The fee of a surveyor called to assist the court in designating on the ground the points necessary to make any decree intelligible, was allowed as costs. Morgan v. Cieloha, (1915) 74 Or 468, 145 P 1063.

The expense of a transcript of the testimony was taxed by the Supreme Court as a disbursement when such transcript was prepared for the appeal, and after a decision by the trial court. Henderson v. Tillamook Hotel Co., (1915) 76 Or 379, 392, 148 P 57, 149 P 473.

An allowance for an abstract of title cannot be made to a party to a foreclosure suit where the allowance is not authorized by the trust deed, mortgage or by some statutory provision. Godfrey v. Gempler, (1937) 157 Or 251, 70 P2d 551.

3. Exercise of discretion

A reversal will not be ordered unless discretion appears to have been abused. Lovejoy v. Chapman, (1893) 23 Or 571, 575, 32 P 687; Cole v. Logan, (1893) 24 Or 304, 314, 33 P 568; Nicklin v. Robertson, (1895) 28 Or 278, 42 P 993, 52 Am St Rep 790; Leick v. Beers, (1896) 28 Or 483, 43 P 658; Dimmick v. Rosenfeld, (1898) 34 Or 101, 55 P 100; Fleming v. Carson, (1900) 37 Or 252, 62 P 374; Mountain Tbr. Co. v. Case, (1913) 65 Or 417, 133 P 92; Cockerham v. First Nat. Bank, (1931) 136 Or 176, 287 P 223, 297 P 363.

Expenses in the trial court may be assessed against one party, and the expenses of the appeal against the other. Kane v. Littlefield, (1906) 48 Or 299, 86 P 544; Grant v. Ore. Nav. Co., (1907) 49 Or 324, 90 P 178, 1099.

Each party may be required to bear his own costs. White v. Price, (1910) 56 Or 376, 381, 108 P 776; Title & Trust Co. v. Durkheimer Inv. Co., (1937) 155 Or 427, 63 P2d 909, 64 P2d 834.

The allowance of costs is confided to the court's discretion in equity cases. In re Water Rights of Willow Creek, (1925) 119 Or 155, 236 P 487, 763, 237 P 682, 239 P 123; Henry v. Henry, (1937) 156 Or 569, 69 P2d 280.

Under this section, the trial court may allow or deny costs in its discretion and upon appeal the exercise of such discretion will not be disturbed except for a manifest abuse thereof. Ruth v. Hickman, (1958) 214 Or 490, 330 P2d 722.

Where an administrator in good faith unsuccessfully defended a suit to protect the interests of the estate, it was an abuse of discretion to charge costs against him in his individual capacity. De Bow v. Wollenberg, (1908) 52 Or 404, 430, 96 P 536, 97 P 717.

Where both parties appealed and each failed on his appeal, neither party recovered costs in the appellate court. Stadelman v. Miner, (1917) 83 Or 348, 155 P 708, 163 P 585, 983.

Where defendant was brought into court simply because he held money which plaintiff and other defendant claimed, it was an abuse of discretion to refuse him recovery of costs. Runnells v. Leffel, (1919) 93 Or 342, 176 P 802, 183 P 756.

Decreeing payment out of decedent's estate was not an abuse of discretion in a will contest. In re Moore's Estate, (1925) 114 Or 444, 236 P 265.

In second trial of mortgage for foreclosure suit, modification of original decree as to attorney's fee and costs was an abuse of discretion, where such modification was not sought by motion or petition. Lachele v. Ore. Realty Exch. Inv. Co., (1927) 121 Or 582, 256 P 646.

The awarding of costs and attorney's fees in a divorce action was within the sound discretion of the trial court. Blake v. Blake, (1934) 147 Or 43, 31 P2d 768.

Awarding costs to all defendants although only one asked for them was not an abuse of discretion. Reeves v. Porta, (1944) 173 Or 147, 144 P2d 293.

In defendant's appeal from divorce action, though lower court's decree was modified, the plaintiff was allowed her costs on appeal. Miles v. Miles, (1949) 185 Or 230, 202 P2d 485.

4. Factors affecting award

In a suit to dissolve a partnership, the costs would ordinarily be chargeable against the assets unless one partner was at fault so that he should be charged with costs as a punishment. Fleming v. Carson, (1900) 37 Or 252, 255, 62 P 374.

Where wrongful acts of a party have given rise to the suit, costs should be taxed against him in favor of the parties directly injured thereby; but, where it appears that parties have been benefited, the court may adjudge that each pay his own cost. Hough v. Porter, (1909) 51 Or 318, 444, 95 P 732, 98 P 1083, 102 P 728.

Where a defendant's interest is a small part of the matter involved, it would be inequitable for defendant suffering an adverse judgment to bear the costs. Central Ore. Irr. Co. v. Whited, (1915) 76 Or 255, 271, 142 P 779, 146 P 815.

Where in a suit involving water rights all the parties were to some extent in the wrong, each party was properly required to pay his own costs. Ison v. Sturgill, (1910) 57 Or 109, 125, 109 P 579, 110 P 535.

In a suit to determine water rights, costs and disbursements were awarded against the parties whose conduct in the control and management of the water company was the primary cause of the litigation. In re Water Rights of Willow Creek, (1925) 119 Or 155, 236 P 487, 763, 237 P 682, 239 P 123.

FURTHER CITATIONS: Moore v. Schermerhorn, (1957) 210 Or 23, 307 P2d 483, 308 P2d 180; Dixon v. Schoonover, (1961) 226 Or 443, 359 P2d 115, 360 P2d 274; Gowin v. Heider, (1964) 237 Or 266, 386 P2d 1, 391 P2d 630.

20.040

NOTES OF DECISIONS

1. In general
2. Claim of title, interest in, or right to possession of real property
3. Open mutual account
4. Action for the recovery of money or damages

1. In general

Under this section and D 541 [ORS 20.060] costs may not be divided between the parties but must be recovered by one party or the other. McDonald v. Evans, (1869) 3 Or 474; Phipps v. Taylor, (1887) 15 Or 484, 16 P 171.

This section does not govern the allowance of costs in appeals from the justice, county or district court to the circuit court. Nurse v. Justus, (1876) 6 Or 75; Burt v. Ambrose, (1883) 11 Or 26, 4 P 465; Hasbrook v. Lynch, (1934) 146 Or 363, 30 P2d 358.

No provision for costs in election contests having been made, they cannot be recovered. Wood v. Fitzgerald, (1870) 3 Or 568.

Where a special proceeding for the condemnation of land is provided by statute and no provision is made for the recovery of costs none can be awarded, but where the question of damages had to be tried as in an ordinary action at law respondent was entitled to costs. Yoran v. Sage, (1909) 54 Or 587, 104 P 428.

Law actions only are affected by this section, costs in equity being discretionary with the court. Ison v. Sturgill, (1910) 57 Or 109, 124, 109 P 579, 110 P 535.

2. Claim of title, interest in, or right to possession of real property

Where the allegations put the question of title directly in issue, the plaintiff was entitled to costs though he recovered less than $50 by the judgment. Crossman v. Lander, (1869) 3 Or 495.

In an action to recover for a nuisance where plaintiffs alleged their right to possession of real property affected by the nuisance and defendant denied such right to possession, plaintiffs were entitled to costs and disbursements

though they recovered judgment for less than $50. Bentley v. Jones, (1879) 7 Or 108.

In an action of trespass where defendant admitted plaintiff's title and right to possession and relied on a license, plaintiff was not entitled to costs where he recovered judgment for an amount less than $50. Schiffman v. Hickey, (1921) 101 Or 596, 200 P 1035.

No claim of title or right to possession of real property arose on the pleadings so plaintiff could not recover costs under this subsection. Ethridge v. Jackson, (1874) 2 Sawy 598, 8 Fed Cas 801.

3. Open mutual account

Where one performs services for another and charges him with the reasonable worth of the same, and the latter expends money for and lends money to the former and charges him therewith, the account between them is "an open mutual account." Hayden v. Waymire, (1882) 10 Or 367.

An open account is one in which some item of the contract is not settled by the parties, whether the account consists of one item or many. Purvis v. Kroner, (1890) 18 Or 414, 416, 23 P 260.

A mutual account is one having original charges by persons against each other. Id.

A mere payment by one party to a contract was not sufficient to constitute the transaction an open mutual account. Lockwood v. Hansen, (1888) 16 Or 102, 17 P 575; Altree v. Gregson, (1902) 40 Or 599, 67 P 921.

A claim for a blanace due for work after deducting a payment made was not on an open mutual account. Lockwood v. Hansen, (1888) 16 Or 102, 17 P 575.

Where plaintiff alleged a breach of contract and recovered judgment for less than $50 he was not entitled to costs though a counterclaim based on an open mutual account was pleaded by defendant. Mason v. Riner, (1889) 18 Or 153, 22 P 532.

An account on which payments have been made but against which there are no counter demands, is an open but not a mutual account and a judgment for less than $50 on such claim did not carry costs. Altree v. Gregson, (1902) 40 Or 599, 67 P 921.

4. Action for the recovery of money or damages

In an action for conversion of oats and the sacks containing the same, plaintiff was not entitled to costs where he recovered less than $50. Ethridge v. Jackson, (1874) 2 Sawy 598, Fed Cas No. 4,541.

Where the parties stipulated that plaintiff take judgment of $100 against one defendant, plaintiff was entitled to costs though costs were not mentioned in the stipulation. Stewart v. Corbus, (1887) 15 Or 68, 13 P 647.

Where defendant's counterclaim reduced the amount recovered by plaintiff to a less sum than $50 plaintiff was not entitled to costs. Rayburn v. Hurd, (1890) 19 Or 59, 23 P 669. Overruling Roberts v. Carland, (1861) 1 Or 333.

Where plaintiff recovered a judgment of $269 in a law action, he was entitled to costs. Nob Hill Garage & Auto Co. v. Barde, (1914) 69 Or 260, 138 P 836.

FURTHER CITATIONS: Burdick v. Tum-A-Lum Lbr. Co., (1920) 97 Or 459, 191 P 654; Bing Gee v. Ah Jim, (1881) 7 Sawy 117, 7 Fed 811; Hill v. Carlstrom, (1959) 216 Or 300, 338 P2d 645; Dixon v. Schoonover, (1961) 226 Or 443, 359 P2d 115, 360 P2d 274.

ATTY. GEN. OPINIONS: Payment of costs in proceedings before committing magistrate on a charge of excessive drinking of alcoholic liquor, 1938-40, p 750.

LAW REVIEW CITATIONS: 35 OLR 23.

20.050

NOTES OF DECISIONS

In a proceeding to foreclose tax certificates against about 175 defendants, the allowance to prevailing party of an attorney's fee of $5 against each of the defendants rendered the foreclosure sale void. Watson v. Jantzer, (1935) 151 Or 1, 47 P2d 239.

FURTHER CITATIONS: Bing Gee v. Ah Jim, (1881) 7 Sawy 117, 7 Fed 811.

20.060

NOTES OF DECISIONS

Under this section and D 539 [ORS 20.040] costs may not be divided between the parties but must be recovered by one party or the other. McDonald v. Evans, (1869) 3 Or 474; Phipps v. Taylor, (1887) 15 Or 484, 16 P 171; Nob Hill Garage & Auto Co. v. Barde, (1914) 69 Or 260, 138 P 836; Lemler v. Bord, (1916) 80 Or 224, 156 P 427, 1034.

In an action not embraced by the first six subsections of H 549 [ORS 20.040], where plaintiff recovers judgment for less than $50, defendant is entitled to costs as a matter of course. Lockwood v. Hansen, (1888) 16 Or 102, 17 P 575; Altree v. Gregson, (1902) 40 Or 599, 67 P 921; United States Mtg. Co. v. Willis, (1902) 41 Or 481, 69 P 266.

This section does not apply to actions in federal courts. Ethridge v. Jackson, (1874) 2 Sawy 598, 8 Fed Cas 802.

Where no severance is made by defendants in their defense, but one bill of costs can be allowed. Tyler v. Trustees of Tualatin Academy & Pac. Univ., (1887) 14 Or 485, 13 P 329.

Defendant is entitled to costs although not requested in his answer and plaintiff did not obtain judgment as specified in ORS 20.040. Hill v. Carlstrom, (1959) 216 Or 300, 338 P2d 645.

This section was adopted from the 1829 and 1853 New York Code. Carnation Lbr. Co. v. McKenney, (1960) 224 Or 541, 356 P2d 932.

Cost and disbursement statutes with provision for attorney fees are full and adequate compensation to a successful litigant, and in the absence of interference with the person or property of the defendant, malicious prosecution will not lie. Id.

Where on appeal a judgment for plaintiff was reversed, the costs and disbursements of the former trial became a charge against plaintiff but the trial court did not abuse its discretion in permitting plaintiff to file an amended complaint without paying such costs and disbursements. Nye v. Nye Milling Co., (1905) 46 Or 302, 80 P 94.

On judgment of voluntary nonsuit defendant was entitled to costs. Clark v. Morrison, (1916) 80 Or 240, 156 P 429.

Where the verdict and judgment were adverse to plaintiff, judgment for the defendant for costs and disbursements followed as a necessary consequence. Hurst v. Larson, (1919) 94 Or 211, 184 P 258.

Where judgment of lower court was affirmed, respondents were entitled to their costs and disbursements. First Nat. Bank v. Bell, (1928) 126 Or 250, 269 P 490.

ATTY. GEN. OPINIONS: Payment of costs in proceeding before committing magistrate on a charge of excessive drinking of alcoholic liquor, 1938-40, p 750.

20.070

NOTES OF DECISIONS

1. In general
2. Circuit Court
3. Supreme Court

1. In general

Attorney fees are not allowable in the absence of statute or some agreement expressly authorizing the allowance of attorney fees in addition to ordinary costs. Draper v. Mullennex, (1960) 225 Or 267, 357 P2d 519; Hollopeter v. Ore. Mut. Ins. Co., (1970) 255 Or 73, 464 P2d 316.

The amounts specified are taxed as a matter of right without filing a cost bill therefor. Sommer v. Compton, (1909) 53 Or 341, 100 P 289.

This section was adopted from the 1829 and 1853 New York Code. Carnation Lbr. Co. v. McKenney, (1960) 224 Or 541, 356 P2d 932.

Cost and disbursement statutes with provision for attorney fees are full and adequate compensation to a successful litigant, and in the absence of interference with the person or property of the defendant, malicious prosecution will not lie. Id.

2. Circuit Court

In an action on a note which contained a stipulation for reasonable attorney's fees in case of suit, judgment was given for $2,000 and $50 attorney's fees; a motion for new trial, which assigned as error the granting of a sum greater than that fixed by this section as attorney's fees, was overruled. Gaston v. McLeran, (1872) 3 Or 389.

The amount of a judgment in the circuit court on appeal from the justice's court need not be in excess of $50 before costs and disbursements can be adjudged to the prevailing party. Nurse v. Justus, (1876) 6 Or 75.

On the dismissal of an appeal from a justice of the peace on motion, the respondent was entitled to an attorney's fee of $10 for the trial of an issue of law. Nicholson v. Newton, (1914) 71 Or 387, 142 P 614.

Where plaintiff recovered judgment for $176 in the district court and on appeal to the circuit court only recovered judgment for $30, he was nevertheless entitled to costs and disbursements in the circuit court. Hasbrook v. Lynch, (1934) 146 Or 363, 30 P2d 358.

3. Supreme Court

Costs and disbursements are allowed as a matter of course to the prevailing party on the affirmance or reversal of a judgment. Gowin v. Heider, (1964) 237 Or 266, 386 P2d 1, 391 P2d 630.

Whether a modification of a judgment is of sufficient importance to put the party securing it in the position of the prevailing party must be determined from the facts of each case. Id.

Where judgment was modified on appeal, appellant was entitled as of course to costs and disbursements on appeal. Gardner v. Kinney, (1911) 60 Or 292, 117 P 971; Lemler v. Bord, (1916) 80 Or 224, 156 P 427, 1034.

Where both parties appealed and both failed on their appeal, neither party recovered costs in the appellate court. Stadelman v. Miner, (1917) 83 Or 348, 378, 155 P 708, 163 P 585, 983.

Where an appeal was dismissed on respondent's motion, respondent was the "prevailing party." Portland & Ore. City Ry. Co. v. Doyle, (1917) 86 Or 206, 167 P 270, 168 P 291.

Although the judgment for costs was reversed, appellant was not entitled to costs in the Supreme Court where the principal judgment was affirmed. School Dist. 30 v. Alameda Const. Co., (1918) 87 Or 132, 144, 169 P 507, 788.

On appeal to the Supreme Court, the prevailing party fee was allowed where the appeal was separate and distinct from another, in which the brief was used, and which were heard together. Shaughnessy v. Kimball, (1923) 106 Or 587, 212 P 485, 213 P 135.

Where a judgment was modified on appeal to the Supreme Court the question of costs was in the sound discretion of that court. Obermeier v. Mtg. Co. Holland-America, (1927) 123 Or 469, 259 P 1064, 260 P 1099, 262 P 261.

FURTHER CITATIONS: Burt v. Ambrose, (1883) 11 Or 26, 4 P 465; In re Pittock's Will, (1921) 102 Or 159, 199 P 633, 202 P 216, 17 ALR 218; Spicer v. Benefit Assn. of Ry. Employes, (1933) 142 Or 574, 17 P2d 1107, 21 P2d 187; Bing Gee v. Ah Jim, (1881) 7 Sawy 117, 7 Fed 811; Gleason v. Thornton, (1957) 210 Or 666, 313 P2d 776; McManus v. State Acc. Ins. Fund, (1970) 3 Or App 373, 474 P2d 31.

20.080

NOTES OF DECISIONS

The purpose of this section is to prevent those having liability for torts from refusing to settle and pay just claims therefor. Johnson v. White, (1968) 249 Or 461, 439 P2d 8; Heen v. Kaufman, (1971) 258 Or 6, 480 P2d 701.

This section applies if the total demand, regardless of the number of causes of action, is $1,000 or less. Johnson v. White, (1968) 249 Or 61, 439 P2d 8.

Where written demand has been duly made, defendant could not avoid payment of a reasonable attorney's fee and other costs by offering to allow judgment to be entered against him after the commencement of the action and ORS 17.055 was not applicable. Colby v. Larson, (1956) 208 Or 121, 297 P2d 1073, 299 P2d 1076.

FURTHER CITATIONS: Railton v. Redmar, (1956) 209 Or 80, 304 P2d 408; State v. Hudson House, Inc., (1962) 231 Or 164, 371 P2d 675; Guy F. Atkinson Corp. v. Lumbermen's Mut. Cas. Co., (1964) 236 Or 405, 389 P2d 32; State ex rel. Nilsen v. Oregon State Motor Assn., (1967) 248 Or 133, 432 P2d 512; Capps v. Georgia-Pac. Corp., (1969) 253 Or 248, 453 P2d 935; State ex rel. Nilsen v. Cushing, (1969) 253 Or 262, 453 P2d 945.

20.085

NOTES OF DECISIONS

The reason for this section was to provide substantial equality to landowners whether their lands were taken by condemnation or inverse condemnation. Hewitt v. Lane County, (1969) 253 Or 669, 456 P2d 967.

This section allows attorney fees and costs to a landowner who "must seek his remedy in court," whatever the procedure may be, if he prevails. Boggs v. Multnomah Co., (1970) 2 Or App 517, 470 P2d 159.

LAW REVIEW CITATIONS: 46 OLR 157.

20.100

NOTES OF DECISIONS

Allowance of costs in a proceeding for a writ of prohibition falls within this section. Willamette Valley Lbr. Co. v. State Tax Comm., (1961) 226 Or 543, 359 P2d 98, 360 P2d 926.

In a mandamus proceeding the allowance of costs is governed by ORS 34.210 and successful plaintiff was entitled to costs though he recovered no damages. Bush v. Geisy, (1888) 16 Or 355, 19 P 123.

In a disbarment proceeding this section did not apply and since the sections regulating such proceedings did not provide for the recovery of costs to either party none were allowed. In re King, (1940) 165 Or 103, 105 P2d 870.

Where the reversal of a contempt decree was based solely on the lower court's failure to make findings of fact, the court in its discretion refused to allow defendant costs. State v. Bassett, (1941) 166 Or 628, 113 P2d 432, 114 P2d 546.

20.110

NOTES OF DECISIONS

It is a matter of discretion whether the trial court shall impose reasonable terms on granting a continuance and in the absence of a showing that the other party has incurred expense in preparation for trial the refusal to grant terms was not an abuse of discretion. Pacific Mill Co. v. Inman, Poulsen & Co., (1907) 50 Or 22, 90 P 1099.

20.120

NOTES OF DECISIONS

Review provided for by ORS 656.298 of decisions of Workmen's Compensation Board is a review of decisions of a tribunal. Cunningham v. State Comp. Dept., (1969) 1 Or App 127, 459 P2d 892.

Since the statute relating to the review of a decision of Board of Medical Examiners provided that if the decision was reversed no costs be assessed against the Board, this section had no application and defendant was not entitled to costs though he was the prevailing party. State v. Estes, (1898) 34 Or 196, 213, 51 P 77, 52 P 571, 55 P 25.

20.130

NOTES OF DECISIONS

This section refers to cases where a public corporation sues or is sued for the enforcement of property rights and does not apply to criminal proceedings. Eisen v. Multnomah County, (1897) 31 Or 134, 49 P 730; State v. Amsden, (1917) 86 Or 55, 166 P 942, 167 P 1014; State v Keelen, (1922) 103 Or 172, 203 P 306, 204 P 162; State v. Hubble, (1929) 128 Or 667, 275 P 679.

In an appeal to the circuit court from an assessment of damages in a proceeding brought to establish a public highway, if the appellant recovers a more favorable judgment he is entitled to costs against the county. McCall v. Marion County, (1903) 43 Or 536, 73 P 1031, 75 P 140.

Where statute as to a special proceeding for condemnation of land made no provision for recovery of costs, none could be awarded; but where the question of damages had been tried out as in an ordinary action at law, the general laws on the subject of the costs prevailed. In re Sage, (1909) 54 Or 587, 104 P 428.

Where the section relating to review of the decision of the Board of Medical Examiners provided that no costs could be assessed against the board, this section had no application. State v. Estes, (1898) 34 Or 196, 213, 51 P 77, 52 P 571, 55 P 25.

FURTHER CITATIONS: State v. Cummings, (1955) 205 Or 500, 288 P2d 1036, 289 P2d 1083.

ATTY. GEN. OPINIONS: Liability of county for costs when change of venue is taken to another county, 1924-26, p 384; payment of fees to county clerk for preparation of transcript on appeal by state, 1930-32, p 487; payment of fees to sheriff by Corporation Commissioner, 1930-32, p 793; relation of this section to proceedings before Public Utilities Commissioner, 1932-34, p 731; recovery of costs and attorneys fees in cases brought by Commissioner of Labor, 1934-36, p 186; payment of costs on appeal in escheat, 1938-40, p 313.

20.140

ATTY. GEN. OPINIONS: Requirement of state agencies to advance or pay filing fees and costs, 1920-22, p 419, 1922-24, p 815, 1930-32, pp 760, 790, 792, 1932-34, p 408, 1934-36, p 82, 1936-38, p 598, 1938-40, p 421, 1944-46, p 26.

Liability of State Highway Commission for fees in appearance before Public Utilities Commissioner, 1932-34, p 731; authority of county clerk to collect fee for filing regulations of Public Utilities Commissioner, 1934-36, p 159; requirement of state agency to pay fees of justice of the peace, 1934-36, p 670; duty of state agencies to pay trial and reporter fees, 1966-68, p 257.

20.150

NOTES OF DECISIONS

Where an administrator in good faith unsuccessfully defended a suit to protect the interests of the estate, it was an abuse of discretion to charge costs against him in his individual capacity. De Bow v. Wollenberg, (1908) 52 Or 404, 430, 96 P 536, 97 P 717.

In an action by a county for the benefit of an employe on highway work, against the contractor for such work and the surety on its bond, in the event the defendant was successful costs would be assessed against the employe. Columbia County v Consol. Contract Co., (1917) 83 Or 251, 163 P 438.

Where executor sold estate property to a firm of which he was a member and made a profit for the firm, costs in a proceeding to set aside the sale were assessed against the executor individually. Young v. Lee, (1929) 132 Or 1, 271 P 994, 279 P 850, 280 P 342.

The cost of appeal by an executor from a probate court order not to sell realty but to use accrued rents to pay charges and expenses was properly charged to the estate where the probate court had ruled twice for the executor and the question was novel. In re Feeheley's Estate, (1947) 182 Or 246, 187 P2d 156, 173 ALR 1334.

20.180

NOTES OF DECISIONS

In order to avoid payment of costs defendant must show that the tender had been kept good by alleging a deposit in court. Welch v. City of Astoria, (1894) 26 Or 89, 37 P 66; Jacobs v. Oren, (1897) 30 Or 593, 48 P 431; Equitable Life Assur. Socy. v. Boothe, (1939) 160 Or 679, 86 P2d 960.

Where defendant alleges a tender and deposit in court, the jury must make a special finding that the allegations of tender and deposit are true to entitle defendant to costs. Jacobs v. Oren, (1897) 30 Or 593, 48 P 431; McGee v. Beckley, (1909) 54 Or 250, 102 P 303, 103 P 61.

A judgment for the plaintiff is not justified by a tender on the part of the defendant unless the pleadings show a cause of action. City of Philomath v. Ingle, (1902) 41 Or 289, 291, 68 P 803.

Eminent domain proceedings are not within this section. Warm Springs Irr. Dist. v. Pac. Livestock Co., (1918) 89 Or 19, 173 P 265.

In an action on a note payable at a certain bank, against the maker, where maker alleged a deposit at such bank to pay the note when due, there was a sufficient tender and a judgment entitling maker to costs was proper. Maddock v. McDonald, (1924) 111 Or 448, 227 P 463.

Tender after institution of suit was too late to entitle defendant to costs. Harrison v. Beals, (1924) 111 Or 563, 222 P 728.

In a proceeding to foreclose a mechanic's lien where plaintiff recovered judgment for the amount tendered by the defendant, plaintiff was entitled to disbursements prior to tender and defendant was entitled to costs and disbursements subsequent to tender. Struntz Planing Mill v. Paget, (1928) 123 Or 651, 262 P 263, 263 P 389.

Failure to tender sum alleged as reasonable attorneys' fees in suit by beneficiary under insurance policy made the whole tender of no effect. Dolan v. Continental Cas. Co., (1930) 133 Or 252, 289 P 1057.

In foreclosure of mortgage, where mortgage provided for payment of reasonable attorneys' fees by defendant in case

suit was brought, tender by defendant was not sufficient to avoid payment of costs where tender did not include the amount alleged as reasonable attorneys' fees. Equitable Life Assur. Socy. v. Boothe, (1939) 160 Or 679, 86 P2d 960.

FURTHER CITATIONS: Portland Trust & Sav. Bank v. Lincoln Realty Co., (1946) 180 Or 96, 170 P2d 568; Woods v. Dixon, (1952) 193 Or 681, 240 P2d 520.

LAW REVIEW CITATIONS: 43 OLR 321.

20.210

NOTES OF DECISIONS
1. In general
2. Time for filing statement
3. Verification
4. Objections

1. In general

The procedure governing settlement of costs and disbursements is separate from the principal matter in dispute. School Dist. 30 v. Alameda Constr. Co., (1918) 87 Or 132, 169 P 507, 788; State v. Way, (1926) 120 Or 134, 249 P 1045, 251 P 761.

2. Time for filing statement

Costs are allowed whether or not a cost bill is filed. Anderson v. Adams, (1904) 44 Or 529, 76 P 16; Shaughnessy v. Kimball, (1923) 106 Or 587, 212 P 485, 213 P 135; Empire Holding Corp. v. Coshow, (1935) 150 Or 252, 41 P2d 426, 43 P2d 907, 45 P2d 167.

The statement of disbursements need not be served on anyone if filed within five days after rendition of judgment or decree, but if filed after such time it must be served on the adverse party whether he appeared or not. Egan v. No. Am. Loan Co., (1904) 45 Or 131, 76 P 774, 77 P 392; In re Pittock's Will, (1921) 102 Or 159, 199 P 633, 202 P 216, 17 ALR 218; State v. Way, (1926) 120 Or 134, 249 P 1045, 251 P 761; Empire Holding Corp. v. Coshow, (1935) 150 Or 252, 41 P2d 426, 43 P2d 907, 45 P2d 167.

The time for filing cost bills and objections thereto should be computed by excluding the first day and also the last day when it falls on Sunday. Nicklin v. Robertson, (1895) 28 Or 278, 284, 42 P 993, 52 Am St Rep 790.

Under a former similar statute it was within the discretion of the court to extend the time for filing an amended verified statement of costs where the application to extend was made within five days following the filing of objections. Willis v. Lance, (1896) 28 Or 371, 43 P 384, 487.

Disbursements were not allowed where cost bill was not filed within time required. McFarlane v. McFarlane, (1903) 43 Or 477, 73 P 203, 75 P 139; State v. Hodgin, (1915) 76 Or 480, 146 P 86, 149 P 530; Barber v. Newbegin, (1936) 154 Or 55, 58 P2d 1254.

The court restrained collection of a cost bill filed after the time allowed and not served on the adversary. Rader v. Barr, (1900) 37 Or 453, 60 P 1027, 1127.

Where there was no proof of service on a cost bill filed five days after the rendition of the judgment, the judgment to the extent of such disbursements was void. Miller v. Shute, (1909) 55 Or 603, 610, 107 P 467.

Where a cost bill was served and filed before the first day of the next regular term of court, although not within five days from the date of rendition of the judgment, disbursements were properly allowable. Latture Equip. Co. v. Gruendler Patent Crusher & Pulverizer Co., (1930) 133 Or 421, 289 P 1067.

3. Verification

Verification of a cost bill should specify each item separately. Cross v. Chichester, (1871) 4 Or 114; Walker v. Goldsmith, (1888) 16 Or 161, 17 P 865.

The verification may be made by the attorney of the party, if he has knowledge of the facts. Morris v. Rodgers, (1895) 26 Or 577, 38 P 931; Cunningham v. Friendly, (1915) 76 Or 16, 147 P 752; Coker & Bellamy v. Richey, (1922) 104 Or 14, 202 P 551, 204 P 945, 947, 22 ALR 744.

The verification is sufficient if the party deposes that the items of the statement are correct as the deponent verily believes and the liability has been necessarily incurred. Cross v. Chichester, (1871) 4 Or 114.

4. Objections

Objections to any item of disbursement must particularly specify in what respect the claim is wrong. Walker v. Goldsmith, (1888) 16 Or 161, 17 P 865; Ferguson v. Byers, (1902) 40 Or 468, 67 P 1115, 69 P 32; Spencer v. Peterson, (1902) 41 Or 257, 68 P 519, 1108; Sandstrom v. Ore.-Wash. R.R. & Nav. Co., (1915) 75 Or 159, 146 P 803; Latture Equip. Co. v. Gruendler Patent Crusher & Pulverizer Co., (1930) 133 Or 421, 289 P 1067.

Where a party has served and filed a statement of costs and disbursements and no written objections have been interposed the clerk has no authority to disallow any item unless it is in excess of an amount prescribed by statute. Rader v. Barr, (1900) 37 Or 453, 61 P 1027, 1127; Hammer v. Downing, (1901) 39 Or 504, 64 P 651, 65 P 17, 990, 67 P 30; In re Pittock's Will, (1921) 102 Or 159, 199 P 633, 202 P 216, 17 ALR 218; Empire Holding Corp. v. Coshow, (1935) 150 Or 252, 40 P2d 426, 43 P2d 907, 45 P 167.

After the lapse of the period specified by this section for filing such objections, objections should not be entertained unless it is shown that the delay resulted from mistake, inadvertence, surprise or excusable neglect. Hislop v. Moldenhauer, (1893) 24 Or 106, 32 P 1026.

A party entitled to costs and disbursements has until and including the first day of the next regular term following the rendition of the judgment within which to file his statement, and the opposite party has five days from the date of such filing to file objections thereto, and not five days after the first day of the next regular term. Basim v. Wade, (1906) 47 Or 524, 526, 84 P 387.

Where objections to a cost bill were not verified, an affidavit by counsel filed at the same time, explaining the objections, was sufficient to cure the defect. Heywood v. Doernbecher Mfg. Co., (1906) 48 Or 359, 86 P 357, 87 P 530.

Verification of an objection to an item in a cost bill was not necessary where it was objected that the charge was improper as a matter of law. Oregon Elec. Ry. v. Terwilliger Land Co., (1908) 51 Or 107, 93 P 334, 930.

The objection that a cost bill was not properly served was waived by the party's appearing and objecting to the bill. Cunningham v. Friendly, (1915)76 Or 16, 147 P 752.

Filing the objections to a cost bill before the cost bill itself was filed did not, in the absence of a motion to strike them out, prevent the court from determining the question of allowance of costs and disbursements on its merits. Macleay Estate Co. v. Miller, (1917) 85 Or 623, 167 P 575.

The expense of transcribing the testimony for purposes of appeal was erroneously entered as part of the judgment appealed from. Shepard v. Inman, Poulsen Lbr. Co., (1917) 85 Or 639, 167 P 758.

In foreclosure proceedings disbursements which were not included in the cost bill served upon the adverse party were not allowed, except disbursements allowed as a result of a covenant in the mortgage and not as statutory disbursements. Travelers Ins. Co. v. Staiger, (1937) 157 Or 143, 69 P2d 1069.

FURTHER CITATIONS: Crawford v. Abraham, (1866) 2 Or 163; State v. Munds, (1879) 7 Or 80; Young v. Hughes, (1901) 39 Or 586; 65 P 987, 66 P 272; Colby v. Larson, (1956) 208

Or 121, 297 P2d 1073, 299 P2d 1076; Railton v. Redmar, (1956) 209 Or 80, 304 P2d 408.

ATTY. GEN. OPINIONS: Assessment of costs against violator of game code, 1920-22, p 611; expenses of sheriff in unsuccessful levy as costs, 1938-40, p 117; officer's fee for serving notice in small claims department of justice court as costs, 1940-42, p 194.

LAW REVIEW CITATIONS: 39 OLR 118.

20.220

NOTES OF DECISIONS
1. In general
2. Itemized statement by the court
3. Appeal

1. In general

The procedure governing the settlement of costs and disbursements is separate from the principal matter in dispute, though ancilliary thereto. School Dist. 30 v. Alameda Constr. Co., (1918) 87 Or 132, 169 P 507, 788; State v. Way, (1926) 120 Or 134, 249 P 1045, 251 P 761.

The party that files a statement of costs and disbursements has the burden of showing the reasonableness of the items when there are objections filed thereto. Young v. Hughes, (1901) 39 Or 586, 65 P 987, 66 P 272.

Ex parte affidavits are not admissible as evidence in a hearing on a cost bill. Hill v. Hill, (1929) 128 Or 177, 270 P 911.

2. Itemized statement by the court

Where the court did not make an itemized statement of the costs and disbursements allowed, the case was remanded with directions to make such statement. Thomas v. Thomas, (1893) 24 Or 251, 33 P 565; Willis v. Lance, (1896) 28 Or 371, 43 P 384, 487.

Failure to make a detailed statement of costs and disbursements rendered the judgment erroneous and subject to correction in this respect on review. In re Young's Estate, (1911) 59 Or 348, 116 P 95, 1060, Ann Cas 1913B, 1310; Macleay Estate Co. v. Miller, (1917) 85 Or 623, 167 P 575; Sch. Dist. 30 v. Alameda Constr. Co., (1918) 87 Or 132, 169 P 507, 788; Caples v. Ditchburn, (1918) 87 Or 264, 169 P 510.

3. Appeal

In an appeal from the principal judgment the question of which party is entitled to costs is properly before the court, but to present the question of what items are allowable there must be an appeal from the hearing on the cost bill. Burt v. Ambrose, (1883) 11 Or 26, 4 P 465; Purvis v. Kroner, (1890) 18 Or 414, 23 P 260; Perkins v. Perkins, (1914) 72 Or 302, 143 P 995; Morris v. Leach, (1917) 82 Or 509, 162 P 253; In re Moore's Estate, (1925) 114 Or 444, 236 P 265.

Objections to items of costs or disbursements made for the first time in the Supreme Court cannot be considered. Walker v. Goldsmith, (1888) 16 Or 161, 17 P 865; Meagher v. Eilers Music House, (1915) 77 Or 70, 150 P 266.

Only questions of law are presented in an appeal from a judgment on a cost bill. School Dist 30 v. Alameda Constr. Co., (1918) 87 Or 132, 169 P 507, 788; Hill v. Hill, (1929) 128 Or 177, 270 P 911.

When a party appealed from the whole judgment and the bill of exceptions covered the merits and the objections to the cost bill, the objections to the cost bill may be considered, a separate appeal from the taxation of costs being provided when a losing party desires to appeal from only that part of the judgment. Wade v. Amalgamated Sugar Co., (1914) 71 Or 75, 142 P 350.

In an appeal from the principal judgment an item of costs was modified where it appeared from the record that it was in excess of the amount legally allowable. Burt v. Ambrose, (1883) 11 Or 26, 4 P 465.

Errors of law in allowance of costs and disbursements, when a matter of record, were corrected on appeal without a bill of exceptions. Ogilvie v. Stackland, (1919) 92 Or 352, 179 P 669.

FURTHER CITATIONS: Colby v. Larson, (1956) 208 Or 121, 297 P2d 1073, 299 P2d 1076; Railton v. Redmar, (1956) 209 Or 80, 304 P2d 408.

20.230

NOTES OF DECISIONS

Where a judgment which included a cost bill was entered and satisfied, the clerk of court had no authority to enter a subsequent judgment for the amount of an additional cost bill filed more than four months later. Snipes v. Beezley, (1875) 5 Or 420.

FURTHER CITATIONS: Rader v. Barr, (1900) 37 Or 453, 61 P 1027, 1127.

ATTY. GEN. OPINIONS: Duty of sheriff to collect expenses in advance, 1938-40, p 117.

20.310

NOTES OF DECISIONS
1. When costs are allowed
2. Items recoverable

1. When costs are allowed

Where there is a reversal on appeal the prevailing party is ordinarily entitled to costs and disbursements. McKinney v. Nayberger, (1931) 138 Or 203, 295 P 474, 2 P2d 1111, 6 P2d 228; Patterson v. Horsefly Irr. Dist., (1937) 157 Or 1, 29, 69 P2d 282, 70 P2d 36; State v. Cummings, (1955) 205 Or 500, 288 P2d 1036, 289 P2d 1083.

Cases holding that taxation of costs upon appeal in law actions is subject to discretion of Supreme Court were superseded by this section (chapter 322, Oregon Laws 1921); State v. Cummings, (1955) 205 Or 500, 288 P2d 1036, 289 P2d 1083.

The provisions of Ore. Const. Art. VII (A), §3 make it clear that power to award costs on appeal is within the discretion of the court. Stabler v. Melvin, (1918) 89 Or 226, 173 P 896. **But see** State v. Cummings, (1955) 205 Or 500, 288 P2d 1036, 289 P2d 1083.

It was ordered that neither party recover costs in the Supreme Court. Denny v. Bean, (1908) 51 Or 180, 93 P 693, 94 P 503; Levine v. Levine, (1920) 95 Or 94, 187 P 609; Dippold v. Cathlamet Tbr. Co., (1920) 98 Or 183, 193 P 909; Ward v. Ward, (1937) 156 Or 686, 68 P2d 763, 69 P2d 963.

2. Items recoverable

The amount recoverable by the prevailing party for printing the abstract may not exceed the limit per page as prescribed by rules of court. Couch v. Scandinavian-Am. Bank, (1922) 103 Or 48, 197 P 284, 202 P 558, 203 P 890; Howland v. Fenner Mfg. Co., (1922) 104 Or 373, 206 P 730, 207 P 1096.

Costs of a transcript of the testimony, such transcript being necessary for trial of the cause in the Supreme Court, may be taxed in that court. Couch v. Scandinavian-Am. Bank, (1922) 103 Or 48, 197 P 284, 202 P 558, 203 P 890; Livesley v. Strauss, (1922) 104 Or 356, 206 P 850, 207 P 1095; Howland v. Fenner Mfg. Co., (1922) 104 Or 373, 206 P 730, 207 P 1096; Bell v. Hanover Fire Ins. Co., (1923) 107 Or 513, 214 P 340, 215 P 171; Fischer v. Bayer, (1923) 108 Or 311,

210 P 452, 211 P 162, 216 P 1028; Tou Velle v. Farm Bureau Coop. Exch., (1924) 112 Or 476, 229 P 83, 1103; State v. Way, (1926) 120 Or 134, 249 P 1045, 251 P 761.

The expense of extra copies of the transcript or bill of exceptions was not allowed as costs. Livesley v. Strauss, (1922) 104 Or 356, 206 P 730, 207 P 1096; Bell v. Spain, (1924) 110 Or 114, 222 P 322, 223 P 235; McGowan v. City of Burns, (1943) 172 Or 63, 137 P2d 994, 139 P2d 785; Herring v. Springbrook Packing Co., (1956) 208 Or 191, 299 P2d 604, 300 P2d 473.

The transcript must form a part of the record on appeal before the expense thereof can be taxed and allowed as costs. Bell v. Spain, (1924) 110 Or 114, 222 P 322, 223 P 235.

Pages in a brief which contain unadmitted evidence are not taxable as costs but pages reciting a memorandum opinion filed by the trial judge are taxable items. Berry v. Richfield Oil Corp., (1950) 189 Or 568, 220 P2d 106, 222 P2d 224.

The premium on appeal bond was properly included in appellant's cost bill. Bell v. Hanover Fire Ins. Co., (1923) 107 Or 513, 214 P 340, 215 P 171; Fischer v. Bayer, (1923) 108 Or 311, 210 P 452, 211 P 162, 216 P 1028; Menefee v. Blitz, (1947) 181 Or 100, 143, 179 P2d 550.

Where the appeal in a criminal case resulted in a reversal and defendant was entitled to costs he could not recover a trial fee since he is not liable for such fee. State v. Way, (1926) 120 Or 134, 249 P 1045, 251 P 761.

Where the appellant in good faith assigned as error the failure of the lower court to grant a nonsuit and directed verdict a preparation of entire transcript of testimony was a necessary disbursement. Patterson v. Horsefly Irr. Dist., (1937) 157 Or 1, 31, 69 P2d 282, 70 P2d 36.

The opinion of the lower court is properly a part of the brief but not of the transcript so the prevailing party was allowed the expense of printing such opinion as if it had been included in the brief. McGowan v. City of Burns, (1943) 172 Or 63, 137 P2d 994, 139 P2d 785.

The postage for forwarding abstract and briefs to the Supreme Court was improperly included in appellant's cost bill. Menefee v. Blitz, (1947) 181 Or 100, 143, 179 P2d 550.

Since plaintiff did not prevail on cross-appeal, they are entitled only to costs incurred in resisting appeal of defendant and sustaining the lower court judgment. Dixon v. Schoonover, (1961) 226 Or 443, 359 P2d 115, 360 P2d 274.

Attorney fees were not allowed on appeal in the absence of a statute so providing or of an agreement between the parties. Adair v. McAtee, (1964) 236 Or 391, 388 P2d 748.

FURTHER CITATIONS: In re Pittock's Will, (1921) 102 Or 159, 199 P 633, 202 P 216, 17 ALR 218; Gorman v. Jones, (1962) 232 Or 416, 375 P2d 821; Gowin v. Heider, (1964) 237 Or 266, 386 P2d 1, 391 P2d 630.

ATTY. GEN. OPINIONS: Fee of county clerk for preparing and certifying a transcript on appeal to Supreme Court, 1926-28, p 329.

20.320

NOTES OF DECISIONS

The time for computing the 20-day period within which to file a cost bill begins on the date when the opinion is handed down and is not extended by the pendency of a petition for rehearing. Empire Holding Corp. v. Coshow, (1935) 150 Or 252, 41 P2d 426, 43 P2d 907, 45 P2d 167; Rodda v. Rodda, (1949) 185 Or 140, 202 P2d 638, cert. denied, 337 U.S. 946, 69 S Ct 1504, 93 L Ed 1470.

Prior to the enactment of this section, OL 569 and 570 [ORS 20.210 and 20.220] were applicable to the taxation of costs in the Supreme Court and the clerk had no authority to disallow any item of disbursements to which no objections were filed. In re Pittock's Will, (1921) 102 Or 159, 199 P 633, 202 P 216, 17 ALR 218.

The word "further" means additional, and the order allowing further time need not be made within the 20-day period. Rodda v. Rodda, (1949) 185 Or 140, 202 P2d 638, cert denied, 337 U.S. 946, 69 S Ct 1504, 93 L Ed 1470.

Where due to attorney's misinterpretation of this section the party entitled to costs did not file a statement of disbursements until after the 20-day period had expired, the mandate was recalled and such party given additional time to file her statement. Id.

20.330

NOTES OF DECISIONS

Prior to this section, in cases where the Supreme Court took original jurisdiction the allowance of costs was determined as if the case was instituted in the circuit court. Phy v. Wright, (1915) 75 Or 428, 146 P 138, 147 P 381; State v. Hodgin, (1915) 76 Or 480, 146 P 86, 149 P 530.