

Chapter 23

Enforcement of Judgments and Decrees; Executions and Exemptions

23.010

NOTES OF DECISIONS

The homestead exemption specified in LOL 221 [ORS 23.240] is applicable in the enforcement of decrees though such section is not mentioned in this section. *Davis v. Low*, (1913) 66 Or 599, 135 P 314; *Paulson v. Hurlburt*, (1919) 93 Or 419, 183 P 937.

Proceedings supplementary to execution may be used to enforce decrees. *Hodes v. Hodes*, (1945) 176 Or 102, 155 P2d 564.

FURTHER CITATIONS: *Tilton v. Barrell*, (1883) 17 Fed 59.

23.020

NOTES OF DECISIONS

1. Constitutionality
2. Decree equivalent to performance
3. Enforcement of decrees

1. Constitutionality

This section did not violate the prohibition of imprisonment for debt contained in Ore. Const. Art. I, §19. *State v. Francis*, (1928) 126 Or 253, 269 P 878.

2. Decree equivalent to performance

A decree for specific performance standing as a deed is effective by operation of law, and defendant is entitled to purchase money deposited in court, though he has not executed a deed. *Columbia R. Co. v. Smith*, (1917) 83 Or 137, 144, 162 P 831, 163 P 309.

A decree for the cancellation of an instrument affecting land ordinarily operates in personam, but under this section if the party fails to comply therewith, the decree is one in rem. *Schleef v. Purdy*, (1923) 107 Or 71, 214 P 137.

3. Enforcement of decrees

Inability to pay is a complete defense to contempt proceedings for refusal to comply with order of court unless such inability is brought about by the contumacious conduct of defendant. *Newhouse v. Newhouse*, (1886) 14 Or 290, 12 P 422; *State v. Hambrecht*, (1929) 128 Or 305, 274 P 507; *State v. Nichol*, (1933) 142 Or 235, 20 P2d 221; *State v. Hall*, (1936) 153 Or 127, 55 P2d 1102; *State v. Shannon*, (1937) 155 Or 382, 64 P2d 87; *State v. Casey*, (1944) 175 Or 328, 153 P2d 700, 172 ALR 862; *State ex rel. McKee v. McKee*, (1964) 237 Or 583, 392 P2d 645.

Alimony, as used in this section, includes money to be paid for the support of minor children. *State v. Francis*, (1928) 126 Or 253, 269 P 878; *State v. Casey*, (1944) 175 Or 328, 153 P2d 700, 172 ALR 862.

This section limits the operation of H 650(5) [ORS 33.010 (1) (e)]. *Rostel v. Morab*, (1890) 19 Or 181, 23 P 900.

A decree fixing water rights in streams may be enforced, not only through the operations of the watermaster, but

also by contempt. *Nault v. Palmer*, (1920) 96 Or 538, 190 P 346.

A decree of the appellate court entered upon appeal in an equity case should be enforced by the circuit court. *State v. Lawrence*, (1934) 148 Or 383, 36 P2d 784.

An affidavit charging failure of defendant to comply with an order to forthwith pay delinquent support money must show that the defendant was served with a copy of the order or that he had knowledge of it where such order was later than and not a part of the divorce decree. *Webster v. Webster*, (1952) 196 Or 532, 250 P2d 403.

The decree was for specific performance not an order to pay money. *Milwaukie Constr. Co. v. Glens Falls Ins. Co.*, (1968) 389 F2d 364.

FURTHER CITATIONS: *Jensen v. Jensen*, (1968) 249 Or 423, 438 P2d 1013.

LAW REVIEW CITATIONS: 9 OLR 188; 43 OLR 110.

23.030

NOTES OF DECISIONS

Entry of the judgment is a condition precedent to issuance of execution but docketing of the judgment is not necessary. *King v. French*, (1873) 2 Sawy 441, 14 Fed Cas 523; *Catlin v. Hoffman*, (1874) 2 Sawy 486, 5 Fed Cas 307.

A judgment by confession on a contingent liability can be enforced by execution. *Allen v. Norton*, (1877) 6 Or 344.

The Supreme Court may issue execution to recover costs incurred in a quo warranto proceeding initiated before it. *State v. Hodgkin*, (1915) 76 Or 480, 487, 146 P 86, 149 P 530.

Issuance of an execution is a purely ministerial act, unless expressly ordered by the judgment. *In re Barker*, (1917) 83 Or 702, 164 P 382.

A writ of execution may not be issued to enforce an order requiring the defendant in a divorce action to pay suit money and temporary alimony. *State v. Tolls*, (1938) 160 Or 317, 85 P2d 366, 119 ALR 1370.

This section did not prevent divorce judgment, which directed that husband pay a certain sum in instalments, from becoming a lien on husband's property. *Esselstyn v. Casteel*, (1955) 205 Or 344, 286 P2d 665, 288 P2d 214, 288 P2d 215.

FURTHER CITATIONS: *Watson v. Moore*, (1901) 40 Or 204, 66 P 814; *Crim v. Thompson*, (1921) 98 Or 599, 193 P 448; *Fischer v. Bayer*, (1923) 108 Or 311, 210 P 452, 211 P 162, 216 P 1028; *United States v. Griswold*, (1880) 11 Fed 807; *General Elec. Co. v. Hurd*, (1909) 171 Fed 984; *Bayley v. Davis*, (1914) 215 Fed 165.

LAW REVIEW CITATIONS: 30 OLR 95.

23.040

CASE CITATIONS: *Murphy v. Bjelik*, (1918) 87 Or 329, 169 P 520, 170 P 723.

23.050

NOTES OF DECISIONS

1. In general
2. Against the property of the judgment debtor
3. After death of judgment debtor
4. For delivery of possession of property
5. Relief from improper writ

1. In general

Variances between the execution and the judgment either in the amount of the judgment, or in the names of the parties, are treated after a sale as irregularities which are amendable. *Jones v. Dove*, (1879) 7 Or 467.

The power to amend an execution is vested in the court, but its exercise must always be in furtherance of justice. *Flint v. Phipps*, (1891) 20 Or 340, 25 P 725, 23 Am St Rep 124.

Issuance of a second execution after an attempt to levy has been made under the first and while it is still pending, is improper and the second writ will be quashed on motion. *Lampman v. Lampman*, (1915) 74 Or 386, 145 P 641.

The Supreme Court has power in the exercise of its original jurisdiction to issue execution. *State v. Hodgkin*, (1915) 76 Or 480, 487, 146 P 86, 149 P 530.

Issuance of a writ is a purely ministerial act unless expressly ordered by the terms of the judgment itself. In re *Barker*, (1917) 83 Or 702, 164 P 382.

2. Against the property of the judgment debtor

Although a judgment creditor has, upon the docketing of his judgment, a lien on all the real property of the judgment debtor within the county, such lien cannot be enforced if sufficient personal property can be found to satisfy the judgment. *Spare v. Home Mut. Ins. Co.*, (1883) 15 Fed 707, 8 Sawy 618.

The writ must require the sheriff to resort first to the personal property of the debtor and if pursuant to an understanding between the sheriff and creditor, the debtor's personal property is ignored and his real property sold such sale may be set aside by a court of equity. *Taylor Inv. Co. v. Deatsman*, (1913) 64 Or 384, 130 P 740.

Where sheriff levied on cattle but released them back to debtor and then sold real property to satisfy the judgment, the time to object to such irregularity was prior to confirmation of the sale and failure to so object was a waiver of that right. *Wright v. Young*, (1876) 6 Or 87.

An execution on a decree of foreclosure of a mortgage which directed the sheriff to satisfy the decree out of the real property belonging to the mortgagor on and after the day on which the foreclosure suit was commenced was improper. *Ulrich v. Lincoln Realty Co.*, (1947) 180 Or 380, 402, 175 P2d 149.

3. After death of judgment debtor

An execution cannot issue against the property of a deceased debtor prior to the appointment of an executor or administrator. *Watson v. Moore*, (1901) 40 Or 204, 66 P 814.

4. For delivery of possession of property

Since the execution must particularly describe the property to be delivered, the verdict is improper if it does not particularly describe the property. *Guille v. Fook*, (1886) 13 Or 577, 11 P 277.

There is but one form of execution on a judgment in an action of replevin and if the delivery of the specified property cannot be had, the sheriff may proceed under the same execution to enforce the alternative judgment against the property of the judgment debtor. *Marks v. Willis*, (1899) 36 Or 1, 58 P 326, 78 Am St Rep 752.

This subsection is merely declaratory of the law prevail-

ing generally in replevin actions. *McIntosh Livestock Co. v. Buffington*, (1923) 108 Or 358, 217 P 635.

5. Relief from improper writ

A motion to quash is the proper remedy when an execution has been improperly issued or is being irregularly or oppressively levied but not when the property of one person has been levied on under a writ against another. *Bentley v. Jones*, (1879) 8 Or 47; *Flint v. Phipps*, (1891) 20 Or 340, 25 P 725, 23 Am St Rep 124; *Marks v. Stephens*, (1900) 38 Or 65, 63 P 824, 84 Am St Rep 750; *Holmes v. Wolfard*, (1905) 47 Or 93, 81 P 819.

A judgment enjoining execution of a judgment cannot be sustained unless it appears that a timely application to recall the writ would not have been effectual. *Hume v. Rice*, (1917) 86 Or 93, 97, 167 P 578.

FURTHER CITATIONS: *Fischer v. Bayer*, (1923) 108 Or 311, 210 P 452, 211 P 162, 216 P 1028; *Gatt v. Hurlburt*, (1930) 131 Or 554, 284 P 172.

ATTY. GEN. OPINIONS: Effect of issuance of writ of execution by a clerk of a district court directing the sheriff of another county to levy upon personal property, 1948-50, p 383.

23.060

NOTES OF DECISIONS

An execution ceases to perform any function after its return unsatisfied except as the basis of a subsequent alias writ. *Marks v. Ellis*, (1899) 36 Or 1, 58 P 526, 78 Am St Rep 752; *Scott v. Platt*, (1945) 177 Or 515, 163 P2d 293, 164 P2d 255.

In an action against a sheriff for failure to enforce an execution, the failure of the sheriff to make the return within the time required is prima facie proof that plaintiff in execution lost his entire debt and sheriff has burden of showing the contrary. *Moore v. Floyd*, (1871) 4 Or 101.

Irregularity in vacating the sheriff's return on execution, furnishes no ground of complaint to the plaintiff unless he can show he was injured in some way. *Pursell v. Deal*, (1888) 16 Or 295, 18 P 461.

Failure to make a levy before expiration of the return day renders the writ functus officio, and a levy and sale by virtue of it is a nullity. *Faull v. Cooke*, (1890) 19 Or 455, 465, 26 P 662, 20 Am St Rep 836.

Under a levy made before the return day, the marshal may make a sale thereafter without new process. (*Alaska*) *Mason v. Bennett*, (1892) 52 Fed 343.

FURTHER CITATIONS: *Stephens v. Dennison*, (1853) 1 Or 20; *Kelly v. Herrall*, (1884) 20 Fed 364.

ATTY. GEN. OPINIONS: Levying execution outside county in which writ issued, 1948-50, p 383.

23.070

NOTES OF DECISIONS

Executions may issue at the same time to different counties, but only from the county in which the judgment was rendered. *Lovelady v. Burgess*, (1898) 32 Or 418, 52 P 25.

The Supreme Court may issue an execution directed to the sheriff of any county in a case of original jurisdiction. *State v. Hodgkin*, (1915) 76 Or 480, 146 P 86, 149 P 530.

ATTY. GEN. OPINIONS: Applicability to district courts, 1944-46, p 213.

LAW REVIEW CITATIONS: 1 OLR 142; 30 OLR 95.

23.080

NOTES OF DECISIONS

1. When a cause of arrest

An execution issues of course when the record shows that the cause of action is also a cause of arrest. *Lane v. Ball*, (1917) 83 Or 404, 428, 160 P 144, 163 P 975; *United States v. Walsh*, (1867) 28 Fed Cas 392; *United States v. Griswold*, (1880) 11 Fed 807, 6 Sawy 255.

Where the cause of action is for money received as agent in a fiduciary capacity and fraudulently converted, an execution against the person is proper. *Lane v. Word*, (1913) 64 Or 389, 393, 130 P 741.

In an action for malicious abuse of process based on plaintiff's arrest under an execution issued on a money judgment in favor of defendant, plaintiff must allege the action in which the judgment was rendered was not a cause of arrest. *Lane v. Ball*, (1917) 83 Or 404, 428, 160 P 144, 163 P 975.

Upon a judgment awarding the plaintiff a recovery of sums lost to the defendant in gambling and the statutory penalty thereon, an execution against the person may issue. *Mozorosky v. Hurlburt*, (1923) 106 Or 274, 198 P 556, 211 P 893, 15 ALR 1076.

Where allegations of fraud in the complaint are denied by the answer and a judgment entered on stipulation, there is not a sufficient record to show a cause of arrest and an execution against the person issued on such judgment is void. *In re Teeters*, (1929) 130 Or 631, 280 P 660.

Where a judgment for obtaining money fraudulently was not based on any issue found in the pleadings but was based solely on the unauthorized findings of facts of a referee, an execution against the person issued thereon was unlawful. *In re Level*, (1916) 81 Or 298, 159 P 558.

2. One provisionally arrested

A writ may issue against one provisionally arrested though judgment does not recite entry of the order for the arrest, or the issuance of the writ of arrest, or direct issuance of the execution. *Banning v. Roy*, (1905) 47 Or 119, 122, 82 P 708, 114 Am St Rep 908.

3. Right of person arrested

A person arrested under an execution against the person is entitled to bail during the pendency of an appeal from a habeas corpus proceeding, provided he furnished a sufficient bond. *Mozorosky v. Hurlburt*, (1923) 106 Or 274, 198 P 556, 211 P 893, 15 ALR 1076.

23.100

NOTES OF DECISIONS

A lien on real property of a judgment against deceased debtor is not discharged by an administrator's sale of the real property unless such lien is mentioned in the petition for sale, and then the lien attaches to the proceeds. *Knott v. Shaw*, (1875) 5 Or 482; *Petke v. Pratt*, (1942) 168 Or 425, 123 P2d 797.

This provision should be construed with the provisions of the probate act adopted at the same time. *Bower v. Holladay*, (1889) 18 Or 491, 22 P 553.

The writ should be issued against the property of the deceased judgment debtor generally and not against specific property in the hands of the executor. *Id.*

An execution may be issued of course after six months from the time of granting letters testamentary or of administration. *Barrett v. Furnish*, (1891) 21 Or 17, 26 P 861.

Issuance of an execution between the time of the death of the judgment debtor and the granting of letters is not authorized by the statute. *Watson v. Moore*, (1901) 40 Or 204, 66 P 814.

The revival of judgment against the heirs of the deceased judgment debtor is not necessary to authorize the issuance of execution. *Bayley v. Davis*, (1914) 215 Fed 165.

Notice to the heirs of a motion in the county court for leave to issue execution on a judgment against their ancestor is not required. *Id.*

23.160 to 23.270

LAW REVIEW CITATIONS: 2 WLJ 449.

23.160

NOTES OF DECISIONS

1. In general
2. Property liable
3. Paragraph (1)(b)
4. Paragraph (1)(c)
5. Paragraph (1)(d)
6. Paragraph (1)(e)
7. Paragraph (1)(f)
8. Paragraph (1)(g)

1. In general

The burden of proof to substantiate a right to an exemption of property from an execution is on the claimant. *Stewart v. McClung*, (1885) 12 Or 431, 436, 8 P 447, 53 Am Rep 374; *Gollnich v. Marvin*, (1911) 60 Or 312, 316, 118 P 1016, Ann Cas 1914A, 243; *Childers v. Brown*, (1916) 81 Or 1, 8, 158 P 166, Ann Cas 1918D, 170.

A mechanic's lien cannot be enforced against exempt property unless expressly authorized by law. *Portland Lbr. & Mfg. Co. v. Sch. Dist. 1*, (1886) 13 Or 283, 10 P 350; *Bank of Idaho v. Malheur County*, (1897) 30 Or 420, 424, 45 P 781, 35 LRA 141.

The right of selection of exempt property is absolute and the debtor is under no duty to show that he has no other property like that selected or of pointing out such property. *Thibault v. Lennon*, (1901) 39 Or 280, 64 P 449, 87 Am St Rep 657; *Childers v. Brown*, (1916) 81 Or 1, 158 P 166, Ann Cas 1918D, 170.

This section is remedial in character, though in derogation of the common law, and is to be liberally construed in favor of the debtor. *Blackford v. Boak*, (1914) 73 Or 61, 143 P 1136; *Childers v. Brown*, (1916) 81 Or 1, 158 P 166, Ann Cas 1918D, 170; *In re Canutt*, (1967) 264 F Supp 919.

This section is remedial and applies to any debtor against whom an action is brought in the courts of this state whether such debtor is or is not a resident of this state. *Bond v. Turner*, (1898) 33 Or 551, 54 P 158, 44 LRA 430.

Proceeds of a sale of exempt property, if held with intent of being reinvested in other like property in a reasonable time, are exempt from all executions other than one issued on a judgment recovered for its price. *Blackford v. Boak*, (1914) 73 Or 61, 143 P 1136.

The debtor has a reasonable time after levy to claim his exemption whether he is present or absent at the time of levy. *Childers v. Brown*, (1916) 81 Or 1, 158 P 166, Ann Cas 1918D, 170.

The right of exemption is a personal privilege which may be waived by the consent of the debtor or by his failure to assert his rights. *Id.*

Conversion of money into exempt property in anticipation of bankruptcy is a fraud upon creditors. *In re Majors*, (1917) 241 Fed 538.

Purchase of exempt property by an insolvent debtor on the eve of bankruptcy will not permit trustee to disallow the exemption unless there is evidence of actual fraud. *In re Martin*, (1963) 217 F Supp 937. But see *In re Majors*, (1917) 241 Fed 538.

Prenuptial agreement that neither party would make any claim to separate property of other prevented surviving spouse from having homestead and exempt property set

aside to him. *Moore v. Schermerhorn*, (1957) 210 Or 23, 307 P2d 483, 308 P2d 180.

2. Property liable

An equitable interest in land is not subject to execution. *Smith v. Ingles*, (1862) 2 Or 43; *Bloomfield v. Humason*, (1884) 11 Or 229, 4 P 332; *Silver v. Lee*, (1901) 38 Or 508, 63 P 882; *Holmes v. Wolfard*, (1905) 47 Or 93, 81 P 819; *Budd v. Gallier*, (1907) 50 Or 42, 89 P 638; *Eldredge v. Mill Ditch Co.*, (1919) 90 Or 590, 177 P 939.

Property covered by a chattel mortgage, prior to foreclosure, is not liable to an execution issued on a judgment against the mortgagee. *Knowles v. Herbert*, (1883) 11 Or 54, 240, 4 P 126.

The property or funds of a private corporation in the hands of a stockholder, not having been declared a dividend, is subject to execution against the corporation. *Hughes v. Oregonian Ry.*, (1883) 11 Or 158, 2 P 94.

The interest of a pledgor in property pledged may be levied upon and sold under an execution against him. *Williams v. Gallick*, (1884) 11 Or 337, 3 P 469.

Money taken from a prisoner is not subject to levy. *Dahms v. Sears*, (1885) 13 Or 47, 11 P 891.

The interest of a purchaser of land at an execution sale after expiration of period of redemption but prior to receipt of a sheriff's deed is subject to levy and sale. *Pogue v. Simon*, (1905) 47 Or 6, 81 P 566, 114 Am St Rep 903, 8 Ann Cas 474.

Interests which cannot be transferred such as the franchise of a corporation are not subject to execution. *Eldredge v. Mill Ditch Co.*, (1919) 90 Or 590, 177 P 939.

The interest of the judgment debtor as tenant by the entirety with his wife may be sold on execution, subject to the right of the wife if she survives him. *Ganoe v. Ohmart*, (1927) 121 Or 116, 254 P 203.

Personal property transferred by a husband to his wife was not subject to execution for a debt of the husband. *Wyatt v. Wyatt*, (1897) 31 Or 531, 49 P 855.

3. Paragraph (1)(b)

A watch of moderate value may be exempt as "necessary wearing apparel." *Stewart v. McClung*, (1885) 12 Or 431, 8 P 447, 53 Am Rep 374.

4. Paragraph (1)(c)

The "business of a contractor" is not a "trade, occupation or profession" within the section. *Re Whetmore*, (1869) 1 Dedy 585, 29 Fed Cas 921, Fed Cas No. 17,508.

The business of warehouseman is not a "trade, occupation or profession" within the meaning of this section. *In re Parker*, (1878) 5 Sawy 58, 18 Fed Cas 1112, Fed Cas No. 10,724.

Evidence was insufficient to show that a team was necessary to enable the debtor to carry on the business of farming. *Gollnick v. Marvin*, (1911) 60 Or 312, 316, 118 P 1016, Ann Cas 1914A, 243.

The word "necessary" means reasonably necessary or convenient and does not mean indispensable. *Childers v. Brown*, (1916) 81 Or 1, 158 P 166, Ann Cas 1918D, 170.

An occasional use of the property for purposes other than to carry on the occupation by which he habitually earns his living will not defeat the right of exemption. *Id.*

The right of exemption is not lost if the owner is not actually using the property in his occupation at the time of levy nor is it lost if the owner is temporarily not engaged in his occupation. *Id.*

Debtor's allegation that the property was being used for the purpose of earning a living for the support of his family was a sufficient allegation of an occupation. *Id.*

5. Paragraph (1)(d)

The automobile house trailer of a migrant harvester was

exempt as a necessary means of transportation in carrying on his trade. *In re Williams*, (1938) 24 F Supp 440.

6. Paragraph (1)(e)

The term "domestic animals" includes horses kept for riding or "personal use" only. *In re Canutt*, (1967) 264 F Supp 919.

7. Paragraph (1)(f)

Furniture in a house owned by widow's deceased husband at the time of his death which was being rented furnished, was not in actual use by the widow and so could not be set aside as part of the homestead. *Laughlin v. Coston*, (1943) 170 Or 450, 134 P2d 961.

8. Paragraph (1)(g)

A mechanic's lien cannot be enforced against public school property or public bridges. *Portland Lbr. & Mfg. Co. v. School Dist. 1*, (1886) 13 Or 283, 10 P 350; *Bank of Idaho v. Malheur County*, (1897) 30 Or 420, 45 P 781, 35 LRA 141.

Property of a mutual water company, organized for the sole purpose of transmitting and delivering to water owners and appropriators the quantity to which each is entitled, is not subject to levy and sale under execution. *Eldredge v. Mill Ditch Co.*, (1919) 90 Or 590, 177 P 939.

FURTHER CITATIONS: *Harrisburg Lbr. Co. v. Washburn*, (1896) 29 Or 150, 44 P 390; *Smith v. Kay*, (1936) 153 Or 80, 54 P2d 1160, 55 P2d 794; *In re Baker's Estate*, (1937) 156 Or 256, 259, 67 P2d 185; *Biersdorf v. Putnam*, (1947) 181 Or 522, 182 P2d 992; *Smith v. Chipman*, (1960) 220 Or 188, 348 P2d 441; *School Dist. 1 v. Rushlight Co.*, (1962) 232 Or 341, 375 P2d 411.

ATTY. GEN. OPINIONS: Levy of execution on a judgment owned by a judgment debtor, 1948-50, p 377.

LAW REVIEW CITATIONS: 30 OLR 95; 37 OLR 80, 103; 47 OLR 304-319.

23.164

NOTES OF DECISIONS

A houseboat is a mobile home within this section. *In re Bell*, (1960) 181 F Supp 387.

LAW REVIEW CITATIONS: 37 OLR 80.

23.170

CASE CITATIONS: *Andrews v. Andrews*, (1933) 144 Or 200, 24 P2d 332.

ATTY. GEN. OPINIONS: Exemption of amounts due under soldier's bonus law, 1920-22, p 536; liability of pension of incompetent veteran confined in state institution for maintenance and care, 1932-34, p 589; exemption of social security payments, 1936-38, p 590.

23.185

CASE CITATIONS: *Opitz v. Winn*, (1867) 3 Or 9; *Crites v. Bede*, (1917) 86 Or 460, 160 P 941.

LAW REVIEW CITATIONS: 37 OLR 80; 47 OLR 146.

23.190

NOTES OF DECISIONS

A garnishment is in the nature of a separate action by the plaintiff and against the garnishee. *Case v. Noyes*, (1888) 16 Or 329, 19 P 104; *Keene v. Smith*, (1904) 44 Or 525, 75

P 1065; *Northwest Adjustment Co. v. Akers*, (1933) 145 Or 341, 27 P2d 889.

In the absence of statutory authorization, the state is not subject to garnishment. *Keene v. Smith*, (1904) 44 Or 525, 75 P 1065.

Property taken from the person of a prisoner is not subject to attachment. *Dahms v. Sears*, (1885) 13 Or 47, 56, 11 P 891.

Where county employe had, some months prior to the garnishment proceeding, assigned his future wages to another, such assignment was invalid but recovery was not allowed against county for sums paid to assignee, though sums earned by employe and not yet paid to assignee were subject to garnishment. *Kaminsky v. Good*, (1928) 124 Or 618, 265 P 786.

FURTHER CITATIONS: *Graf v. Wilson*, (1912) 62 Or 476, 125 P 1005, Ann Cas 1914C, 462.

ATTY. GEN. OPINIONS: Amounts due under soldier's bonus law, 1920-22, p 536; salaries of employes of State Board of Higher Education, 1930-32, p 497; salaries of University of Oregon employes, 1930-32, p 622; wages due employes collected by Commissioner of Labor, 1932-34, p 73; salaries of employes of State Relief Committee, 1934-36, p 67; funds held by employers to purchase war savings bonds for employes, 1942-44, p 136; effect of sale of state warrants at an execution sale, 1948-50, p 224; special savings accounts of prisoners, 1956-58, p 107; garnishment of legislator's salary, 1962-64, p 214; subjecting work release enrollee's earnings to garnishment, 1966-68, p 209.

23.200

CASE CITATIONS: *In re Martin*, (1963) 217 F Supp 937.

23.220

NOTES OF DECISIONS

Proceeds of a sale of exempt personal property, if received with the intent of being reinvested in a reasonable time in like property, are exempt from all executions other than one issued on a judgment recovered for the price of the property sold. *Blackford v. Boak*, (1914) 73 Or 61, 143 P 1136.

Proceeds means a sum of money paid, or the acknowledgment of a debt created, to evidence the consideration for the sale and includes promissory notes taken for the purchase price. *Id.*

Subsection (2) does not make the exempt property of a party to a joint venture subject to execution issued on a judgment, in favor of another party to such venture, for labor performed in furtherance of such venture. *Parrington v. Weinberger*, (1917) 86 Or 49, 166 P 442, 528.

23.230

NOTES OF DECISIONS

This section does not authorize an injured employee to sue an insurer of his employer under an employer's liability policy of insurance for an injury sustained in the course of his employment. *Blessing v. Ocean Acc. & Guar. Corp.*, (1936) 152 Or 632, 54 P2d 300.

Under this section, direct action against the insurer is not allowed until after claimant has secured final judgment against the insured. *Tashire v. State Farm Fire & Cas. Co.*, (1966) 363 F2d 7.

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.

FURTHER CITATIONS: *State Farm Fire & Cas. Co. v. Tashire*, (1966) 386 US 523, 539; 87 S Ct 1199; 18 L Ed 2d 270.

LAW REVIEW CITATIONS: 9 OLR 57.

23.240

NOTES OF DECISIONS

1. In general
2. Persons entitled to claim
3. Amount of exemption
4. Property claimable
5. Abandonment
6. Proceeds of sale

1. In general

The word "homestead" signifies the place where the family dwells, and does not designate any particular estate in the property. *Mansfield v. Hill*, (1910) 56 Or 400, 107 P 471, 108 P 1007; *Marvin & Co. v. Piazza*, (1929) 129 Or 128, 276 P 680.

This section is remedial and should be liberally construed to carry out the policy of the legislature. *Wilson v. Peterson*, (1914) 68 Or 525, 136 P 1187; *Watson v. Hurlburt*, (1918) 87 Or 297, 170 P 541; *Allison v. Breneman*, (1927) 121 Or 102, 254 P 201; *DeHaven & Son Hdw. Co. v. Schultz*, (1927) 122 Or 493, 257 P 778; *Sterrett v. Hurlburt*, (1929) 129 Or 520, 275 P 689, 278 P 986; *Banfield v. Schulderman*, (1931) 137 Or 167, 296 P 1066, 298 P 905; *Laughlin v. Coston*, (1943) 170 Or 450, 134 P2d 961; *Fleischhauer v. Bilstad*, (1963) 233 Or 578, 379 P2d 880.

A purchaser takes the homestead free from a judgment creditor's lien unless the seller had abandoned the homestead. *Willamette Coll. & Cred. Serv. v. Henry*, (1932) 138 Or 460, 7 P2d 261; *Fleischhauer v. Bilstad*, (1963) 233 Or 578, 379 P2d 880. *Fleischhauer v. Bilstad*, *supra*, overruling *Bush v. Shepherd*, (1949) 186 Or 105, 205 P2d 842.

If a purported transfer of homestead is in fraud of creditors, upon the setting aside of the conveyance, the owner may assert his claim of homestead in the property. *Stewart v. Black*, (1933) 143 Or 291, 22 P2d 336; *Smith v. Kay*, (1936) 153 Or 80, 54 P2d 1160, 55 P2d 794.

The forced sale of a homestead, with certain exceptions, is void. *Allison v. Breneman*, (1927) 121 Or 102, 254 P201.

The right of exemption from levy of a homestead is a personal privilege. *Willamette Coll. & Cred. Serv. v. Henry*, (1932) 138 Or 460, 7 P2d 261.

An agreement waiving a homestead right cannot be said to be without consideration where the evidence shows that the value of the homestead is more than \$3,000. *In re Clymer's Estate*, (1939) 160 Or 359, 85 P2d 365.

Homestead was viewed as a parcel of land and since a houseboat cannot be viewed as land or real property, it was not subject to homestead exemption. *In re Bell*, (1960) 181 F Supp 387.

The right to a homestead exemption exists solely by reason of statute. *United States Nat. Bank of Portland v. United States*, (1960) 188 F Supp 332.

This statute should be read with a stop (punctuation) after "execution." *Fleischhauer v. Bilstad*, (1963) 233 Or 578, 379 P2d 880.

There is convincing evidence that the 1919 Act was copied in relevant part from a Wisconsin statute. *Id.*

The determination of exemption by the bankruptcy court is res judicata with reference to existence of lienable value above the exempt homestead as of the date of the petition in bankruptcy. *Boyd v. Ore.*, (1968) 249 Or 513, 439 P2d 862.

This section creates a limitation on the rights of creditors, not a right of one spouse as against the other. *McFerron v. Trask*, (1970) 3 Or App 111, 472 P2d 847.

Prenuptial agreement that neither party would make any claim to separate property of other prevented surviving spouse from having homestead and exempt property set aside to him. *Moore v. Schermerhorn*, (1957) 210 Or 23, 307 P2d 483, 308 P2d 180.

2. Persons entitled to claim

The owner of the land is the one entitled to claim the homestead therein. **Tenant by the entirety**, *Allison v. Breneman*, (1927) 121 Or 102, 254 P 201; *Breneman v. Corrigan*, (1925) 4 F2d 225; **tenant in common**, *Marvin & Co. v. Piazza*, (1929) 129 Or 128, 276 P 680; **equitable owner, Id.**; **life tenant**, *Banfield v. Schulderman*, (1931) 137 Or 167, 296 P 1066, 298 P 905.

The owner need not be the head of a family, so a single or divorced person may claim a homestead. *Kaller v. Spady*, (1934) 148 Or 65, 34 P2d 663; *Smith v. Kay*, (1936) 153 Or 80, 54 P2d 1160, 55 P2d 794.

3. Amount of exemption

The burden of proving that the homestead is worth more than the statutory amount rests on the person seeking to subject it to his claim. *Davis v. Low*, (1913) 66 Or 599, 135 P 314.

The value of land claimed as a homestead is an issue of fact which cannot be determined from the pleadings. In *re Clymer's Estate*, (1935) 150 Or 351, 44 P2d 1082.

4. Property claimable

If a house or building is the actual abode of the owner, renting a portion of it for business purposes does not preclude him from claiming such house or building as his homestead. *Moody v. Baker*, (1933) 142 Or 559, 20 P2d 1069; *Smith v. Kay*, (1936) 153 Or 80, 54 P2d 1160, 55 P2d 794; *In re Potter's Estate*, (1936) 154 Or 167, 59 P2d 253; *Laughlin v. Coston*, (1943) 170 Or 450, 134 P2d 961.

"Abode," as used in this section, signifies habitation, dwelling or place of residence. *In re Barklow*, (1922) 282 Fed 892.

A tract containing no dwelling and not contiguous to the owner's abode cannot be exempted as a homestead. *Id.*

The statute does not give a homestead right in noncontiguous parcels of land, and the fact that parcels, separated by intervening lands of another, abut on the same street does not make them contiguous. *Cabler v. Alexander*, (1924) 111 Or 257, 224 P 1076.

A lot which is not a part of the actual abode of the homestead claimant, is not homestead property. *In re Potter's Estate*, (1936) 154 Or 167, 59 P2d 253.

Mere fact that decedent never occupied premises as a home would not, in itself, preclude his widow from claiming such premises as her homestead. *Laughlin v. Coston*, (1943) 170 Or 450, 134 P2d 961.

5. Abandonment

Temporary absence or removal is not an abandonment if there is a constant and abiding intention to return and occupy the premises as a home. *Watson v. Hurlburt*, (1918) 87 Or 297, 170 P 541; *DeHaven & Son Hdw. Co. v. Schultz*, (1927) 122 Or 493, 259 P 778; *In re Dunlap's Estate*, (1939) 161 Or 93, 87 P2d 225.

Abandonment of a homestead is not shown by the mere fact that the owner leased it from year to year and offered to sell it. *DeHaven & Son Hdw. Co. v. Schultz*, (1927) 122 Or 493, 259 P 778.

Whether a homestead has been abandoned is to be determined by the intention and in the light of all facts and circumstances. *Id.*

The burden of proving relinquishment of a homestead

is on the judgment creditor seeking to subject it to execution. *Id.*

Cessation of occupancy raises a presumption of abandonment which devolves upon the claimant the duty of overcoming the presumption. *Fleischhauer v. Bilstad*, (1963) 233 Or 578, 379 P2d 880. **But see** *DeHaven & Son Hdw. Co. v. Schultz*, (1927) 122 Or 493, 259 P 778.

The "temporary removal or absence" which will not impair the exemption is one which is accompanied by "the intention to reoccupy the same as a homestead." *Fleischhauer v. Bilstad*, (1963) 233 Or 578, 379 P2d 880.

Evidence was sufficient to support plaintiff's claim of homestead under the temporary absence clause of this section, as against the theory of abandonment. *Sterrett v. Hurlburt*, (1929) 129 Or 520, 275 P 689, 278 P 986.

6. Proceeds of sale

The judgment lien should attach to the extent that the value of the land exceeds the statutory amount of the exemption whether the surplus amount existed at the time of the sale by the homestead owner or arose later. *Shepard & Morse Lbr. Co. v. Clawson*, (1971) 259 Or 154, 486 P2d 542.

On a sale of a homestead under a mortgage, wherein mortgagor waived his homestead rights, the mortgagor was entitled to the statutory sum from the surplus after satisfaction of the mortgage debt and costs. *In re Barrett's Estate*, (1905) 140 Fed 569.

FURTHER CITATIONS: *McKinnon v. Cotner*, (1897) 30 Or 588, 49 P 956; *Walker v. Harold*, (1903) 44 Or 205, 74 P 705; *Groves v. Osburn*, (1905) 46 Or 173, 79 P 500; *Wycoff v. Snapp*, (1914) 72 Or 234, 143 P 902; *Ferguson v. Holborn*, (1922) 106 Or 566, 211 P 953; *Glover v. Glover*, (1923) 108 Or 61, 215 P 990; *In re Barde*, (1915) 225 Fed 715, 140 CCA 589; *In re Williams*, (1938) 24 F Supp 440; *Brown v. Miles*, (1951) 193 Or 466, 238 P2d 761; *Benedict v. Lee*, (1953) 198 Or 378, 256 P2d 507; *Varner v. Portland Trust Bank*, (1957) 210 Or 658, 313 P2d 444; *Oregon Mut. Ins. Co. v. Cornelison*, (1958) 214 Or 501, 330 P2d 161.

ATTY. GEN. OPINIONS: Deduction of homestead from gross estate for inheritance tax purposes, 1920-22, p 561, 1940-42, p 278; enforcement of double liability of bank stockholders against homestead property, 1930-32, p 811.

LAW REVIEW CITATIONS: 20 OLR 328; 34 OLR 1; 37 OLR 80.

23.250

NOTES OF DECISIONS

In determining how much land is appurtenant to a dwelling house, it is necessary to consider the use to which the land is put, rather than the amount owned. *Smith v. Kay*, (1936) 153 Or 80, 54 P2d 1160, 55 P2d 794; *In re Potter's Estate*, (1936) 154 Or 167, 59 P2d 253.

FURTHER CITATIONS: *Watson v. Hurlburt*, (1918) 87 Or 297, 170 P 541; *Glover v. Glover*, (1923) 108 Or 61, 215 P 990; *In re Barde*, (1915) 225 Fed 715, 140 CCA 589; *Varner v. Portland Trust Bank*, (1957) 210 Or 658, 313 P2d 444; *Clawson v. Anderson*, (1967) 248 Or 347, 434 P2d 462.

LAW REVIEW CITATIONS: 20 OLR 328; 34 OLR 1.

23.260

NOTES OF DECISIONS

Prior to enactment of this section, a family homestead was not subject to a mechanic's lien, there being no exception in favor of such lien. *Davis v. Low*, (1913) 66 Or 599,

601, 135 P 314; Johnson v. Tucker, (1917) 85 Or 646, 649, 167 P 787; Paulson v. Hurlburt, (1919) 93 Or 419, 183 P 937.

On foreclosure of a mortgage on a homestead, the owner is entitled to claim exemption of any proceeds over and above the mortgage debt and costs. In re Barrett's Estate, (1905) 140 Fed 569.

Joinder by a married woman in the execution of a mortgage on property owned by her husband may result in abandonment of her homestead right. Hunt v. Hunt, (1913) 67 Or 178, 132 P 958, 134 P 1180.

LAW REVIEW CITATIONS: 20 OLR 328; 34 OLR 1.

23.270

NOTES OF DECISIONS

The function of the notice herein required is to stay the sale. Wilson v. Peterson, (1914) 68 Or 525, 136 P 1187.

Mandamus does not lie to revoke an order enjoining a sale after a claim of exemption. Johnson v. Tucker, (1917) 85 Or 646, 650, 167 P 787.

A claim asserted the day after the property was attached is timely, and service of a similar claim thereafter does not nullify it. Watson v. Hurlburt, (1918) 87 Or 297, 300, 170 P 541.

There is no waiver of the right of homestead by the failure of the claimant to appear in the action and object to the order of sale. Id.

It is not necessary to follow any particular form in asserting the claim of homestead to an officer holding an execution. Paulson v. Hurlburt, (1919) 93 Or 419, 183 P 937.

Assertion of a claim in respect of noncontiguous parcels of land, which as a matter of law cannot be a homestead, does not require the sheriff to stay the sale. Cabler v. Alexander, (1924) 111 Or 257, 224 P 1076.

Failure of a claim to allege the levy on the property does not make it defective. Sterrett v. Hurlburt, (1929) 129 Or 520, 275 P 689, 278 P 986.

It seems that a claim of exemption must be made every time that a levy is made in a separate proceeding. Willamette Coll. & Cred. Serv. v. Henry, (1932) 138 Or 460, 7 P2d 261.

The homestead exemption is not an estate but a personal privilege which must be claimed in order to be effective. United States Nat. Bank of Portland v. United States, (1960) 188 F Supp 332.

This section does not provide a procedure for a lien creditor to execute on the excess over the homestead exemption once the property has been conveyed by the homestead claimant. Clawson v. Anderson, (1967) 248 Or 347, 434 P2d 462.

FURTHER CITATIONS: Mansfield v. Hill, (1910) 56 Or 400, 107 P 471, 108 P 1007; Hansen v. Jones, (1910) 57 Or 416, 109 P 868; Davis v. Low, (1913) 66 Or 599, 135 P 314; Allison v. Breneman, (1927) 121 Or 102, 254 P 201; Stewart v. Black, (1933) 143 Or 291, 22 P2d 336; Bush v. Shepherd, (1949) 186 Or 105, 205 P2d 842; Benedict v. Lee, (1953) 198 Or 378, 256 P2d 507; Varner v. Portland Trust Bank, (1957) 210 Or 658, 313 P2d 444; Fleischhauer v. Bilstad, (1963) 233 Or 578, 379 P2d 880; In re Barde, (1915) 225 Fed 715, 140 CCA 589; In re Barklow, (1922) 282 Fed 892.

ATTY. GEN. OPINIONS: Sale by sheriff of real property claimed as homestead, 1920-22, p 360.

LAW REVIEW CITATIONS: 20 OLR 328; 31 OLR 258; 34 OLR 1.

23.310 to 23.350

ATTY. GEN. OPINIONS: Evidence of ownership of boat, 1964-66, p 318.

23.310

ATTY. GEN. OPINIONS: Applicability to state agencies, 1934-36, p 794; proceeding against judgment owned by judgment debtor, 1948-50, p 377; requiring indemnity bond to execute distraint warrant, 1960-62, p 210.

LAW REVIEW CITATIONS: 30 OLR 95.

23.320

NOTES OF DECISIONS

1. In general

Neither the trial before the sheriff's jury nor the adjudication by the court in a summary manner is in the nature of a judicial proceeding. Vulcan Iron Works v. Edwards, (1894) 27 Or 563, 36 P 22, 39 P 403; Tallman v. Havill, (1930) 133 Or 407, 291 P 387; Francisco v. Stringfield, (1941) 166 Or 683, 114 P2d 1026.

This section should be construed in pari materia with OCLA 7-213 [ORS 29.210]. Vulcan Iron Works v. Edwards, (1894) 27 Or 563, 36 P 22, 39 P 403; Francisco v. Stringfield, (1941) 166 Or 683, 114 P2d 1026; Matsuda v. Noble, (1948) 184 Or 686, 200 P2d 962.

If the claimant does not choose to give notice of his claim, he may resort at once to his common law remedy against the sheriff. Vulcan Iron Works v. Edwards, (1894) 27 Or 563, 36 P 22, 39 P 403.

An order overruling motion by claimant to compel sheriff to turn over property seized to him is not a final order and is not reviewable on appeal. Francisco v. Stringfield, (1941) 166 Or 683, 114 P2d 1026.

2. "Claim"

The word "claim" means any assertion of ownership or demand for possession. Vulcan Iron Works v. Edwards, (1894) 27 Or 563, 36 P 22, 39 P 403.

3. Notice by claimant

No particular form is prescribed for the notice of claim. Vulcan Iron Works v. Edwards, (1894) 27 Or 563, 36 P 22, 39 P 403.

There is no provision for notice to the claimant of the place of trial before the sheriff's jury so reasonable notice to the claimant is all that could possibly be required. Sommer v. Oliver, (1901) 39 Or 453, 65 P 600.

4. Sheriff may summon jurors

Although no formal request is made for a jury, when claimant notifies the sheriff in writing that he is the owner of the property seized, he thereby authorizes the determination of claim by a jury. Vulcan Iron Works v. Edwards, (1894) 27 Or 563, 36 P 22, 39 P 403.

Mere notification, by claimant, to the sheriff not to proceed with the trial does not deprive the sheriff of the right to try the validity of the claim before a sheriff's jury. Id.

5. Adjudication by court

The purpose of the 1931 amendments to this section and OCLA 7-213 [ORS 29.210] was to permit the adverse claimant to have his claim determined before the court issuing the attachment or execution rather than before a sheriff's jury, and not to give a different effect to such an adjudication than to the verdict of the sheriff's jury. Francisco v. Stringfield, (1941) 166 Or 683, 114 P2d 1026.

23.330

NOTES OF DECISIONS

The verdict of the sheriff's jury does not preclude the claimant from bringing an action at law for possession of the property or damages against anyone other than the sheriff. *Remdell v. Swackhamer*, (1880) 8 Or 502; *Capital Lbr. Co. v. Hall*, (1881) 9 Or 93; *Hexter v. Schneider*, (1886) 14 Or 184, 12 P 668; *Vulcan Iron Works v. Edwards*, (1894) 27 Or 563, 36 P 22, 39 P 403; *Tallman v. Havill*, (1930) 133 Or 407, 291 P 387; *Francisco v. Stringfield*, (1941) 166 Or 683, 114 P2d 1026.

The proceeding provided for by this section is not judicial in nature. *Tallman v. Havill*, (1930) 133 Or 407, 291 P 387.

The adjudication of the adverse claim in a summary manner in the court out of which the execution or attachment issued has the same effect as the verdict of the sheriff's jury. *Francisco v. Stringfield*, (1941) 166 Or 683, 114 P2d 1026.

23.340

NOTES OF DECISIONS

After withdrawal of the claim the matter stands as if no claim had been made and claimant may bring an action against the sheriff prior to the sale of the property for its recovery or its value, unless other facts are pleaded which constitute an estoppel. *Vulcan Iron Works v. Edwards*, (1894) 27 Or 563, 36 P 22, 39 P 403; *Singer Mfg. Co. v. Driver*, (1902) 40 Or 333, 67 P 111.

The costs and disbursements in the proceeding have no connection with the costs and disbursements in the action. *Schneider v. Sears*, (1885) 13 Or 69, 8 P 841.

Claimant's notification to sheriff, without withdrawing the claim, not to proceed with the trial does not prevent sheriff from proceeding with the trial. *Vulcan Iron Works v. Edwards*, (1894) 27 Or 563, 36 P 22, 39 P 403.

23.350

NOTES OF DECISIONS

The undertaking has the two fold purpose of indemnifying the sheriff and also the claimant. *Howard v. Conde*, (1892) 22 Or 581, 30 P 454.

The remedy on the undertaking is cumulative with claimant's right of action against the sheriff for wrongful seizure of his property. *Id.*

The sheriff's right of indemnity under the undertaking only arises after he has paid the true owner the damages sustained for the wrongful levy. *Id.*

FURTHER CITATIONS: *Summer v. Harrington*, (1887) 14 Or 480, 13 P 300; *Coos Bay R. Co. v. Wieder*, (1894) 26 Or 453, 38 P 338.

LAW REVIEW CITATIONS: 12 OLR 109, 121.

23.410

NOTES OF DECISIONS

1. In general
2. Necessity of levy
3. Manner of levy
4. Effect of wrongful levy
5. Execution creditors as purchasers

See also cases under ORS 29.170

1. In general

One levy will not prevent another levy under the same execution if the property first levied on was not applied on the judgment. *Wright v. Young*, (1876) 6 Or 87.

Seizures to enforce internal revenues do not fall within

the provision. *United States v. Hess*, (1879) 5 Sawy 533, Fed Cas No. 15,358, 26 Fed 295.

Joint property of joint obligors served with summons need not be exhausted before seizing the separate property of the individual promisors. *Anderson v. Stayton State Bank*, (1916) 82 Or 357, 373, 159 P 1033.

An injunction will not issue to restrain execution of a writ, if there is no showing that it was wrongfully issued or that the sheriff had acted in excess of his authority. *Gatt v. Hurlburt*, (1930) 131 Or 554, 284 P 172.

The law of the district controls the right of the judgment creditor to garnishee. *Ezell v. Equity Gen. Ins. Co.*, (1962) 219 F Supp 51.

2. Necessity of levy

Where the judgment is a lien on the property to be sold the levy of a writ is not necessary. *Bank of British Columbia v. Page*, (1879) 7 Or 454; *Smith v. Dwight*, (1916) 80 Or 1, 148 P 477, 156 P 573, Ann Cas 1918D, 563.

If, when property is attached, the judgment in the action does not specify that the attached property should be sold to satisfy the judgment, the attachment lien is waived and a new levy must be made on such property under the execution before it can be sold. *Smith v. Dwight*, (1916) 80 Or 1, 148 P 477, 156 P 573, Ann Cas 1918D, 563.

Failure to allege and prove a levy in the manner required by statute is fatal to the proceedings. *Brunswick Corp. v. Playmor Enterprises, Inc.*, (1969) 253 Or 162, 452 P2d 553.

3. Manner of levy

Property shall be levied on in like manner as simi; property is attached. *Real property*, *Brand v. Baker*, (1903) 42 Or 326, 71 P 320; *Barnes v. Esch*, (1917) 87 Or 1, 169 P 512; *property in possession of third person*, *Matlock v. Babb*, (1897) 31 Or 516, 49 P 873; *Barr v. Warner*, (1900) 38 Or 109, 62 P 899; *Dufur Oil Co. v. Enos*, (1911) 59 Or 528, 117 P 457; *Whitney v. Day*, (1917) 86 Or 268, 168 P 295; *Barbur v. Courtright*, (1919) 260 Fed 728, 171 CCA 466; *Hodes v. Hodes*, (1945) 176 Or 102, 155 P2d 564.

4. Effect of wrongful levy

A levy on the property of a stranger, directed by the execution creditor, renders the creditor and the sheriff liable for the damages although the property may not be actually taken or removed. *Barnes v. Esch*, (1917) 87 Or 1, 169 P 512; *Sabin v. Chrisman*, (1918) 90 Or 85, 175 P 622.

5. Execution creditors as purchasers

The effect of subsection (4) and H 150 [ORS 29.150] is to put an execution creditor after levy on the same footing as purchasers from the debtor. *Riddle v. Miller*, (1890) 19 Or 468, 23 P 807; *Dimmick v. Rosenfeld*, (1898) 34 Or 101, 55 P 100; *Smith v. Farmers & Merchants Nat. Bank*, (1910) 57 Or 82, 110 P 410; *Barnes v. Spencer*, (1916) 79 Or 205, 153 P 47; *Pattee v. Harbaugh*, (1918) 87 Or 612, 171 P 221.

FURTHER CITATIONS: *Batchellor v. Richardson*, (1889) 17 Or 334, 21 P 392; *Advance Thresher Co. v. Esteb*, (1902) 41 Or 469, 69 P 447; *Murphy v. Bjelik*, (1918) 87 Or 329, 169 P 520, 170 P 723.

ATTY. GEN. OPINIONS: Levy of execution on a judgment owned by a judgment debtor, 1948-50, p 377; procedure when county court executes writ for delinquent assessments, 1966-68, p 59.

LAW REVIEW CITATIONS: 31 OLR 330.

23.420

NOTES OF DECISIONS

1. In general

2. Matured debts
3. Shares of stock
4. Other property

1. In general

The requirements of the statute must be strictly followed. *Batchellor v. Richardson*, (1889) 17 Or 334, 21 P 392; *Murphy v. Bjelik*, (1918) 87 Or 329, 169 P 520, 170 P 723.

Property is placed in custodia legis by a levy under this section. *Matlock v. Babb*, (1897) 31 Or 516, 49 P 873.

Service of notice of garnishment on one indebted to the plaintiff's debtor does not create a lien on the money in the hands of the garnishee. *Barr v. Warner*, (1900) 38 Or 109, 62 P 899; *Murphy v. Bjelik*, (1918) 87 Or 329, 353, 169 P 520, 170 P 723.

2. Matured debts

The sale of a matured debt owned by the garnishee, as certified by garnishee, to judgment debtor is void. *Batchellor v. Richardson*, (1889) 17 Or 334, 21 P 392; *Murphy v. Bjelik*, (1918) 87 Or 329, 169 P 520, 170 P 723; *Hudelson v. Sanders-Swofford Co.*, (1924) 111 Or 600, 227 P 310.

Where garnishee certifies that he owes a matured debt to the judgment debtor but refuses to pay such debt to the sheriff on demand, the sheriff may levy execution against the property of such garnishee but there is no provision in the statutes authorizing a judgment against such garnishee. *Adamson v. Frazier*, (1901) 40 Or 273, 66 P 810, 67 P 300; *Murphy v. Bjelik*, (1918) 87 Or 329, 359, 169 P 520, 170 P 723. *Adamson v. Frazier*, supra, modifying *Barr v. Warner*, (1900) 38 Or 109, 62 P 899.

The demand on the garnishee to pay a matured debt owing to the judgment debtor is jurisdictional and in the absence thereof a sale of the garnishee's property to satisfy such debt is void. *Murphy v. Bjelik*, (1918) 87 Or 329, 169 P 520, 170 P 723.

3. Shares of stock

Defendant's shares in stock of the garnishee corporation can be subjected to the payment of the judgment against defendant only by an order to sell upon execution. *Henry v. Allen*, (1943) 171 Or 676, 138 P2d 591.

4. Other property

A debt need not be due before it is subject to garnishment. *Graf v. Wilson*, (1912) 62 Or 476, 125 P 1005, Ann Cas 1914C, 462; *Firemen's Fund Ins. Co. v. Walker*, (1930) 132 Or 73, 282 P 230.

Where judgment debtor has pledged property to another with limited power of sale such property is subject to garnishment under subsection (3). *Williams v. Gallick*, (1884) 11 Or 337, 3 P 469.

An answer by a garnishee that he has certain property stored by the defendant in the writ, for which he has issued negotiable warehouse receipts, is not a statement that such property still belongs to the person who stored it. *Adamson v. Frazier*, (1901) 40 Or 273, 278, 66 P 810, 67 P 300.

The debtor's claim against the county for wages is subject to garnishment though such claim has not been presented to the county for auditing and allowance. *Graf v. Wilson*, (1912) 62 Or 476, 125 P 1005, Ann Cas 1914C, 462.

The service of notice of garnishment upon makers of a note did not give the officer any authority over the note itself, where the note was not in their possession. *Whitney v. Day*, (1917) 86 Or 268, 275, 168 P 295.

The debtor's right to proceeds of a fire insurance policy is subject to garnishment prior to filing proof of loss. *Firemen's Fund Ins. Co. v. Walker*, (1930) 132 Or 73, 282 P 230.

FURTHER CITATIONS: *Dufernoy v. Stitzel*, (1868) 3 Or

58; *De Witt v. Kelly*, (1890) 18 Or 557, 23 P 666; *Davis v. Bar T Cattle Co.*, (1967) 247 Or 437, 431 P2d 825.

LAW REVIEW CITATIONS: 8 OLR 299, 300; 44 OLR 174.

23.430

NOTES OF DECISIONS

An assessment on corporate stock, due and unpaid, is a debt within the meaning of this provision. *Faull v. Alaska Gold & Silver Min. Co.*, (1883) 14 Fed 657, 660, 8 Sawy 420.

FURTHER CITATIONS: *Matlock v. Babb*, (1897) 31 Or 516, 49 P 873.

23.440

NOTES OF DECISIONS

On failure to redeliver the property according to the terms of the undertaking, the execution becomes functus officio, and the plaintiff in the writ is remitted to an action on the undertakings. *Miller v. Shute*, (1910) 55 Or 603, 608, 107 P 467.

23.450

NOTES OF DECISIONS

1. In general
2. Personal property
3. Real property
4. Return of sale

1. In general

A notice of sale stating the sale is to be at the courthouse door in Lafayette without stating the county was sufficient. *Gager v. Henry*, (1878) 5 Sawy 237, 9 Fed Cas 1031.

2. Personal Property

Execution sales of personal property are subject to collateral attack and such a sale made by publishing the notice of sale in a newspaper rather than posting it in public places was void. *Meno v. Otto*, (1921) 100 Or 722, 198 P 250.

3. Real property

An execution sale of real property is not subject to collateral attack, after confirmation of sale, because of failure to give proper notice. *Matthews v. Eddy*, (1872) 4 Or 225; *Davis v. Magnes*, (1911) 58 Or 69, 113 P 1; *Mt. Vernon Nat. Bank v. Morse*, (1928) 128 Or 64, 264 P 439.

On a sale of real property on execution the failure to mention certain personal property thereon in the notice of sale was immaterial since the title to such personal property did not pass by such sale. *Patterson v. Portland Smelting Works*, (1899) 35 Or 96, 56 P 407.

A newspaper, entitled the "Sunday Welcome," published on Saturday in each week, bearing date and being delivered to subscribers on that day, is not a Sunday newspaper, so as to invalidate notices published in it. *United States Mtg. Co. v. Marquam*, (1902) 41 Or 391, 69 P 37, 41.

The newspaper in which the publication is made must be of general circulation. *Id.*

Where the description of the real property sold on execution was erroneous and the record did not show a confirmation of the sale, it was set aside by collateral attack. *Bunch v. Thomblison*, (1913) 67 Or 254, 135 P 879.

4. Return of sale

The sheriff's return need not set forth the date of posting or facts to show that the places where the notice was posted were public places. *German Sav. & Loan Socy. v. Kern*, (1900) 38 Or 232, 62 P 788, 63 P 1052; *United States Mtg. Co. v. Marquam*, (1902) 41 Or 391, 69 P 37, 41.

Clerical mistakes in the return will not render the sale void. *Walker v. Goldsmith*, (1886) 14 Or 125, 12 P 537.

In an appeal from an order confirming the sale of real property the objection that the sheriff's return did not show sufficient proof of publication cannot be raised for the first time in the Supreme Court. *United States Mtg. Co. v. Marquam*, (1902) 41 Or 391, 69 P 37, 41.

FURTHER CITATIONS: *Bank of British Columbia v. Page*, (1879) 7 Or 454; *O'Hara v. Parker*, (1895) 27 Or 156, 174, 39 P 1004; *Mallatt v. Luihan*, (1956) 206 Or 678, 294 P2d 871; *State Constr. Corp. v. Scoggins*, (1971) 259 Or 371, 485 P2d 391.

ATTY. GEN. OPINIONS: Contents of notice of sale, 1932-34, pp 182, 531; effect of confirmation of sale, 1934-36, p 121; certificate of title to motor vehicle sold on execution, 1944-46, p 469; procedure when county court executes writ for delinquent assessments, 1966-68, p 59.

LAW REVIEW CITATIONS: 30 OLR 95.

23.460

NOTES OF DECISIONS

1. In general

Caveat emptor is the rule of all execution sales, and whoever buys at such sale does so at his peril. *Hexter v. Schneider*, (1886) 14 Or 184, 187, 12 P 668; *House v. Fowle*, (1892) 22 Or 303, 308, 29 P 890; *Burrows v. Parker*, (1897) 31 Or 57, 61, 48 P 1100, 65 Am St Rep 812.

The purchaser may recover back the money paid where the execution was issued without any judgment to sustain it. *Hoxter v. Poppleton*, (1881) 9 Or 481, 484.

Real property subject to the lien of a judgment, and sold off in parcels by the judgment debtor, will, if levied upon to satisfy the judgment, be sold in the inverse order of alienation. *Oliver v. Wright*, (1905) 47 Or 322, 83 P 870.

The personalty must be sold separately from the realty. *Roseburg Nat. Bank v. Camp*, (1918) 89 Or 67, 173 P 313.

2. "Made by auction"

A tax sale is void when not made at public auction as required by this section. *O'Hara v. Parker*, (1895) 27 Or 156, 39 P 1004.

3. Real property consisting of several lots

The sheriff has a discretion as to selling several known lots separately or together. *Griswold v. Stoughton*, (1863) 2 Or 61, 84 Am Dec 409; *Dolph v. Barney*, (1874) 5 Or 191, 211; *Bank of British Columbia v. Page*, (1879) 7 Or 454; *Bays v. Trulson*, (1893) 25 Or 109, 35 P 26; *Balfour v. Burnett*, (1895) 28 Or 72, 41 P 1.

"Third person" means one who was not a party to the judgment or decree but who has acquired a title to a portion of the judgment debtor's real property subsequent to the rendition of the judgment or decree and is privy to and bound by it. *Balfour v. Burnett*, (1895) 28 Or 72, 41 P 1.

In case of tax sales, the officer has no discretion to sell separate parcels en masse. *Brentano v. Brentano*, (1902) 41 Or 15, 67 P 922.

Where the decree directs the manner and mode of sale, the officer has no discretion in determining whether real property shall be sold in parcels or en masse. *Bruckman v. Healy*, (1928) 126 Or 129, 268 P 1001.

An execution sale of a tract divided into four lots and sold as a whole, was set aside where there was fraud on the part of the attorney seeking to obtain the entire tract for a nominal sum. *Arnold v. Ness*, (1914) 212 Fed 290, 293.

4. Bidding

Any purchaser other than the judgment creditor must

pay cash. *Patterson v. Portland Smelting Works*, (1899) 35 Or 96, 104, 56 P 407.

A purchaser cannot withdraw his bid after property is stricken off to him, and can be excused only by an order of the court. *Miller v. Achurch*, (1908) 50 Or 478, 93 P 332.

23.470

NOTES OF DECISIONS

Postponement of the sale for 30 days can only be made with the consent of the plaintiff indorsed on the writ, and for cause thereon stated. *Faull v. Cooke*, (1890) 19 Or 455, 26 P 662, 20 Am St. Rep 836; *Kelly v. Herall*, (1884) 20 Fed 364.

In a guardian's sale a single postponement of a sale for four weeks instead of four postponements for four weeks was not such an irregularity as to vitiate the sale after confirmation. *Gager v. Henry*, (1878) 9 Fed Cas 1031, 5 Sawy 237.

If this provision be applicable to a warrant for the collection of taxes, the county as represented by the county court ought to be considered the plaintiff in the writ and give consent to the postponement. *Kelly v. Herall*, (1884) 20 Fed 364, 371.

FURTHER CITATIONS: *Kriss v. Lenske*, (1966) 245 Or 147, 418 P2d 837.

ATTY. GEN. OPINIONS: Procedure when county court executes writ for delinquent assessments, 1966-68, p 59.

23.480

NOTES OF DECISIONS

A judgment debtor cannot redeem personalty. *Roseburg Nat. Bank v. Camp*, (1918) 89 Or 67, 173 P 313.

FURTHER CITATIONS: *Brunswick Corp. v. Playmor Enterprises, Inc.*, (1969) 253 Or 162, 452 P2d 553.

23.490

NOTES OF DECISIONS

1. In general
2. Motion to confirm
3. Objections to confirmation
4. Grounds for disallowing confirmation
5. Effect of confirmation
6. Resale
7. Application of proceeds

1. In general

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

A sale of real property on execution is conditional on confirmation by the court. *Marx v. Hanthorn*, (1887) 30 Fed 579.

The legal title to real property remains in the judgment debtor notwithstanding the giving of a certificate of sale, in the absence of an order of confirmation and deed. *Mascall v. Murray*, (1915) 76 Or 637, 649, 149 P 517, 521.

Before a deed can issue an execution sale must be confirmed. *Schultz v. Selberg*, (1916) 80 Or 668, 674, 157 P 1114.

The silence and acquiescence of the judgment debtors in the circumstances was an equitable confirmation of the void sale under execution, operating to validate what was in point of law no sale at all. *Mascall v. Murray*, (1915) 76 Or 637, 649, 149 P 517, 521.

2. Motion to confirm

This section does not deprive any interested person from making a motion for confirmation who by common law

had such right. *Miller v. Achurch*, (1908) 50 Or 478, 93 P 332.

Where judgment debtor has not filed objections to the sale, service of a motion to confirm on the judgment debtor is not required. *Roseburg Nat. Bank v. Camp*, (1919) 93 Or 339, 183 P 655.

3. Objections to confirmation

Objections to confirmation cannot be filed after the time prescribed, without leave of the court. *Dell v. Estes*, (1882) 10 Or 359.

This section does not deprive any interested person from objecting to the motion for confirmation who by common law had such right. *Miller v. Achurch*, (1908) 50 Or 478, 93 P 332.

4. Grounds for disallowing confirmation

Mere inadequacy of price, unless so gross as to shock the conscience, is not enough to set aside a sale, but when there is a great inadequacy, slight circumstances indicating an unfairness will be sufficient to justify a decree setting aside the sale. *Farmers Loan Co. v. Ore. Pac. R. Co.*, (1895) 28 Or 44, 71, 40 P 1089; *Nodine v. Richmond*, (1906) 48 Or 527, 544, 87 P 775; *Webster v. Rogers*, (1918) 87 Or 547, 171 P 197; *Manning v. Hayden*, (1879) 5 Sawy 360, 16 Fed Cas 645; *Arnold v. Ness*, (1914) 212 Fed 290. *Manning v. Hayden*, supra, rev'd on other grounds in 106 U.S. 586, 1 S Ct 617, 27 L Ed 306.

Where an execution is radically defective in failing to follow the judgment, and a sale realizes about two-fifths of what the property brought on the first sale, the court should quash the writ. *Flint v. Phipps*, (1891) 20 Or 340, 344, 25 P 725, 23 Am St Rep 124.

An execution creditor's statement that the lands were being sold subject to mortgages thereon, being truthful, does not warrant setting the sale aside. *Nodine v. Richmond*, (1906) 48 Or 527, 87 P 775.

Inadequacy of price which results from a period of depression and renders the sale inequitable is ground for setting aside a mortgage foreclosure sale. *Teacher's Retirement Fund Assn. v. Pirie*, (1935) 150 Or 435, 46 P2d 105.

Improper allowance of disbursements in a judgment did not necessitate setting aside the execution sale. *Travelers Ins. Co. v. Staiger*, (1937) 157 Or 143, 69 P2d 1069.

5. Effect of confirmation

The order of confirmation is a conclusive determination of the regularity of the proceedings under execution. *Matthews v. Eddy*, (1872) 4 Or 225; *Dolph v. Barney*, (1874) 5 Or 191; *Wright v. Young*, (1876) 6 Or 87; *McRae v. Daviner*, (1879) 8 Or 63; *Leinenweber v. Brown*, (1893) 24 Or 548, 34 P 475, 38 P 4; *Davis v. Magnes*, (1911) 58 Or 69, 113 P 1; *Bobell v. Wagenaar*, (1923) 106 Or 232, 210 P 711; *Skinner v. Silver*, (1938) 158 Or 81, 75 P2d 21; *Ulrich v. Lincoln Realty Co.*, (1944) 175 Or 296, 153 P2d 255.

The question of the capacity of the purchaser to contract or receive title is not settled by an order of confirmation. *Semple v. Bank of British Columbia*, (1878) 5 Sawy 88, 21 Fed Cas 1063.

As against fraud, the order of confirmation is not conclusive. *Arnold v. Ness*, (1914) 212 Fed 290.

Error as to the given name of the judgment debtor in one place in the notice of sale does not after confirmation invalidate the sale. *Brown v. Farmers & Merchants Nat. Bank*, (1915) 76 Or 113, 147 P 537, Ann Cas 1917B, 1041.

Failure of sheriff to levy on homestead is not fatal to sale thereof under execution, where owner does not object to confirmation of sale. *Crim v. Thompson*, (1924) 112 Or 399, 229 P 916.

6. Resale

A new execution must issue upon resale which will recite

the order of resale and be directed to the sheriff in office at the time it is issued. *Moore v. Willamette Trans. & Locks Co.*, (1879) 7 Or 359.

A second sale for less than the bid at the first sale may be set aside. *Miller v. Achurch*, (1908) 50 Or 478, 93 P 332.

A minimum price on resale cannot be ordered by the court. *California Joint Stock Land Bank v. Gore*, (1936) 153 Or 267, 55 P2d 1118.

7. Application of proceeds

In an action against the sheriff to recover the surplus realized above the sum due on a decree of foreclosure, the complaint must allege that the sheriff neglected or failed to pay such money to the clerk at the time his writ was returnable. *Butler v. Smith*, (1890) 20 Or 126, 25 P 381.

A wife's inchoate right of dower attaches to the surplus moneys realized upon a sale of the husband's lands upon a decree of foreclosure. *Id.*

A bid of the judgment creditor may be credited on the judgment debt. *Patterson v. Portland Smelting Works*, (1899) 35 Or 96, 104, 56 P 407.

Where the judgment creditor had bid a sum equal to the judgment, with the accrued interest, costs and disbursements, the debtor is entitled on motion, in the absence of a showing that the creditor is entitled to be relieved from his bid, to have the judgment canceled. *Vaughan v. Canby Canal Co.*, (1914) 68 Or 566, 137 P 784.

A direction in a mortgage foreclosure proceeding that the excess of the proceeds of the sale be deposited in court subject to its final order was not reversible error. *Close v. Riddle*, (1902) 40 Or 592, 598, 67 P 932, 91 Am St Rep 580.

FURTHER CITATIONS: *Moore v. Frazier*, (1888) 15 Or 635, 16 P 869; *White v. Ladd*, (1902) 41 Or 324, 68 P 739, 93 Am St Rep 732; *Kriss v. Lenske*, (1966) 245 Or 147, 418 P2d 837.

ATTY. GEN. OPINIONS: Time when confirmation of sale shall be made, 1924-26, p 499; authority of court of equity to fix valuation of mortgaged property in foreclosure proceedings, 1934-36, p 264; procedure when county court executes writ for delinquent assessments, 1966-68, p 59.

LAW REVIEW CITATIONS: 20 OLR 328, 359; 30 OLR 95.

23.500

CASE CITATIONS: *Pillsbury v. McGarry*, (1914) 69 Or 261, 138 P 836; *Caro v. Wollenberg*, (1917) 83 Or 311, 163 P 94.

23.510

ATTY. GEN. OPINIONS: Recording certificate of sale, 1930-32, p 616.

23.520 to 23.590

LAW REVIEW CITATIONS: 47 OLR 464.

23.520

NOTES OF DECISIONS

The legal title of real property sold on execution remains in the judgment debtor or his successor until delivery of the sheriff's deed. *Dray v. Dray*, (1891) 21 Or 59, 27 P 223; *Kaston v. Storey*, (1905) 47 Or 150, 80 P 217, 114 Am St Rep 912; *Higgs v. McDuffie*, (1916) 81 Or 256, 157 P 794, 158 P 953; *Semple v. Bank of British Columbia*, (1878) 5 Sawy 88, Fed Cas No. 12,659.

A judgment debtor has no statutory right to redeem personality sold on execution. *Roseburg Nat. Bank v. Camp*, (1918) 89 Or 67, 173 P 313.

This section does not control in receivership proceedings

to wind up the affairs of a corporation and dispose of all of its assets. *Home Mtg. Co. v. Sitka Spruce Pulp & Paper Co.*, (1934) 148 Or 502, 36 P2d 1038.

A lien on timber rights was properly foreclosed by an absolute sale free from redemption rights. *United States Plywood Corp. v. Alexander*, (1946) 180 Or 174, 175 P2d 460.

FURTHER CITATIONS: *Marx v. Hanthorn* (1887) 30 Fed 579.

23.530

NOTES OF DECISIONS

1. In general
2. Who may redeem
3. Effect of redemption

1. In general

A junior mortgagee who was made a defendant in foreclosure of the senior mortgage does not have the right to redeem. *Lauriat v. Stratton*, (1880) 11 Fed 107, 6 Sawy 339.

The right to redeem is not merely a privilege but is a right of property and subject to bargain and sale. *Rosenberg v. Croisan*, (1890) 18 Or 470, 23 P 847.

An owner of land cannot say that a redemption by his agent was unauthorized so long as he remains in possession and retains the redemption certificate. *Brand v. Baker*, (1903) 42 Or 426, 437, 71 P 320.

There is a distinction between the estate remaining in the mortgagor after encumbering his lands with a lien by mortgage, known as the equity of redemption, and the statutory right to redeem after foreclosure decree. *Higgs v. McDuffie*, (1916) 81 Or 256, 157 P 794, 158 P 953.

Federal law, not local law, controls rights of redemption after sale in foreclosure of mortgage issued pursuant to National Housing Act. *United States v. Forest Glen Senior Residence*, (1967) 278 F Supp 343.

2. Who may redeem

A grantee of the mortgagor has the right to redeem from the sale of the property on foreclosure of the mortgage. *Willis v. Miller*, (1893) 23 Or 352, 31 P 827; *Ulrich v. Lincoln Realty Co.*, (1946) 180 Or 380, 168 P2d 582, 175 P2d 149. *Ulrich v. Lincoln Realty Co.*, *supra*, overruling *Higgs v. McDuffie*, (1916) 81 Or 256, 157 P 794, 158 P 953.

The owner of an easement in premises that have been sold under foreclosure, who was not made a party to the suit, may redeem the easement on payment of such part of the mortgage debt as corresponds to the ratio between the value of the easement and the value of the premises as a whole. *Monese v. Struve*, (1936) 155 Or 68, 62 P2d 822.

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

3. Effect of redemption

Land redeemed by a grantee of the judgment debtor for an amount less than the judgment debt may be sold a second time for the balance due on the judgment. *Settlemyre v. Newsome*, (1882) 10 Or 446; *Flanders v. Aumack*, (1897) 32 Or 19, 21, 51 P 447, 67 Am St Rep 504.

The mortgagor's grantee, who acquires title prior to the completion of the suit to foreclose the mortgage, and who redeems, takes the premises free from the mortgage lien or the lien of a deficiency judgment. *Willis v. Miller*, (1893) 23 Or 352, 31 P 827; *Ulrich v. Lincoln Realty Co.*, (1946) 180 Or 380, 168 P2d 582, 175 P2d 149.

The proviso in subsection (1) is void in so far as it relates to one acquiring title after the institution of a suit to foreclose a mortgage. *Ulrich v. Lincoln Realty Co.*, (1946) 180 Or 380, 168 P2d 582, 175 P2d 149.

A grantee of mortgaged premises prior to foreclosure, where deed was not recorded until after confirmation of sale under foreclosure, who redeemed land from such sale took same free from lien of his grantor's creditors, who were made parties to the foreclosure suit and who did not get a personal decree against the grantor. *Williams v. Wilson*, (1902) 42 Or 299, 70 P 1031, 95 Am St Rep 745.

Where grantee of mortgaged premises, after confirmation of sale on foreclosure of such mortgage, redeemed from such sale, a judgment obtained against grantor after the sale but prior to confirmation was a lien on the premises in the hands of the grantee. *Kaston v. Storey*, (1905) 47 Or 150, 80 P 217, 114 Am St Rep 912.

FURTHER CITATIONS: *Abraham v. Chenoweth*, (1881) 9 Or 348; *Sellwood v. Gray*, (1884) 11 Or 534, 5 P 196.

ATTY. GEN. OPINIONS: Taxability of land purchased at sale under foreclosure of mortgage, 1922-24, p 681, 1930-32, p 48, 1936-1938, p 77; mortgage of the right to redeem, 1924-26, p 177; right of county, as purchaser from mortgagor, to redeem, 1940-42, p 192.

LAW REVIEW CITATIONS: 27 OLR 139.

23.540

NOTES OF DECISIONS

If the purchaser is the execution creditor, a subsequent lien creditor who redeems is not required to pay the unpaid balance of the judgment. *Chavener v. Wood*, (1866) 2 Or 182.

The burden of the redemptioner can be neither increased nor lessened by the court. *Doerhoefer v. Farrell*, (1896) 29 Or 304, 45 P 797.

An act enlarging the time for redeeming real property sold on execution is inapplicable to sales on mortgages executed prior to the passage of such act. *State v. Sears*, (1896) 29 Or 580, 582, 43 P 482, 46 P 785, 54 Am St Rep 808.

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

FURTHER CITATIONS: *Murray v. Wiley*, (1942) 169 Or 381, 127 P2d 112, 129 P2d 66.

ATTY. GEN. OPINIONS: Period of redemption, 1928-30, p 376; payment of delinquent taxes by one who redeems, 1928-30, p 604; right of county, due to tax lien, to redeem from foreclosure of mortgage by State Land Board, 1932-34, p 43, 1936-38, p 303, 1940-42, p 164.

23.550

CASE CITATIONS: *Murray v. Wiley*, (1947) 180 Or 257, 176 P2d 243.

23.560

NOTES OF DECISIONS

1. In general
2. Tender by redemption
3. Accounting between parties

1. In general

An act extending the time for redemption cannot be applied to sales under mortgages executed prior to its enactment. *State v. Sears*, (1896) 29 Or 580, 43 P 482, 46 P 785; 54 Am St Rep 808; *State v. Hurlburt*, (1919) 93 Or 34, 182 P 169.

A redemption by the judgment debtor or his successors in interest puts an end to the proceedings and the one who redeems holds the property as if the sale had not occurred. *Lauriat v. Stratton*, (1880) 11 Fed 107, 6 Sawy 339.

The right to redeem from an execution sale is a statutory right and the court can neither increase nor lessen the burden of the redemptioner. *Doerhoefer v. Farrell*, (1896) 29 Or 304, 45 P 797.

An agreement between a judgment creditor of a mortgagor and the mortgagee may create a trust which will operate to prevent the creditor from losing his rights in the property by failure to redeem after the foreclosure. *Anderson v. Phlegley*, (1914) 71 Or 331, 142 P 593.

The fact that the mortgagor was serving a felony sentence during the period of redemption does not entitle him to redeem after expiration of the year mentioned in this section. *Grasser v. Jones*, (1921) 102 Or 214, 201 P 1069, 18 ALR 529.

When writ of execution was issued and a sale of the property was made by the sheriff on March 11, 1958, mortgagor's notice of intention to redeem, given on March 9, 1959, was within the time limitation. *Kirk v. Rose*, (1959) 218 Or 593, 346 P2d 90.

2. Tender by redemptioner

One who redeems from a purchaser in possession need not tender the amount due. *Wilson v. Crimmins*, (1943) 172 Or 616, 143 P2d 665.

3. Accounting between parties

The redemptioner is entitled to recover the rents or profits actually received by the purchaser in possession. *Cartwright v. Savage*, (1875) 5 Or 397; *Fields v. Crowley*, (1914) 71 Or 141, 142 P 360; *Reichert v. Sooy-Smith*, (1917) 85 Or 251, 165 P 1174, 1184; *Wilson v. Crimmins*, (1943) 172 Or 616, 143 P2d 665; *Haskin v. Greene*, (1955) 205 Or 140, 286 P2d 128, 137; *Miller v. Engelson*, (1960) 225 Or 300, 358 P2d 276.

Prior to the amendment relating to the filing of an account of rents accruing from the property, the redemptioner's only recourse was by an independent action for their recovery. *Timoney v. McIntire*, (1934) 146 Or 583, 31 P2d 165.

Only the original purchaser or one to whom he has transferred or conveyed his right to receive redemption money is required to account for the rents, issues and profits received pending redemption. *Alpha Corp. v. McCredie*, (1937) 157 Or 88, 70 P2d 46.

The redemptioner must pay the stated interest on the full amount of the bid and on taxes or liens paid by purchaser in possession, though such purchaser might have paid such items from the rents of the property. *Ulrich v. Lincoln Realty Co.*, (1944) 175 Or 296, 153 P2d 255.

"Rents, issues and profits" did not include the proceeds of a policy of fire insurance. *Haskin v. Greene*, (1955) 205 Or 140, 286 P2d 128, 137.

When accounting was necessary, time for redemption was extended where appeal was taken by purchaser in possession. *Id.*

A tenant of a purchaser is a "successor in interest" and permitted to file a claim. *Miller v. Engelson*, (1960) 225 Or 300, 358 P2d 276.

A tenant of a purchaser must be a party in the redemption proceedings to be bound by the order approving the accounting. *Id.*

If the purchaser rents the property, he must exercise reasonable diligence and prudence to obtain a reasonable rental and if he fails to do so he is charged with the latter amount. *Id.*

This section does not preclude the institution of a separate suit for rents and profits. *Engelson v. Miller*, (1966) 245 Or 105, 420 P2d 623.

Where by agreement between mortgagor and mortgagee

personal property and real property were sold en masse on execution and the personal property was to be subject to redemption, the purchaser was required to account to the redemptioner for rents from such personal property. *Ulrich v. Lincoln Realty Co.*, (1944) 175 Or 296, 153 P2d 255.

FURTHER CITATIONS: *Smith v. Boothe*, (1918) 90 Or 360, 175 P 709, 176 P 793; *Murray v. Wiley*, (1947) 180 Or 257, 176 P2d 243, 170 ALR 169; *Stamate v. Peterson*, (1968) 250 Or 532, 444 P2d 30.

ATTY. GEN. OPINIONS: Right of state, as purchaser at foreclosure sale, to reimbursement for taxes paid, 1924-26 p 624, 1928-30, p 604; commencement of period of redemption, 1928-1930, p 6; change in statutory period of redemption as affecting prior mortgages, 1928-30, p 376, 1942-44, p 315; taxation of real property acquired by state by mortgage foreclosure, 1934-36, p 509, 1936-38, p 77; redemption by county as grantee of mortgagor, 1940-1942, p 192; taxation of property acquired by municipality by foreclosure for street assessments, 1940-42, p 359.

LAW REVIEW CITATIONS: 43 OLR 350.

23.570

NOTES OF DECISIONS

An affidavit in lieu of service is the only alternative to notice. *Stamate v. Peterson*, (1968) 250 Or 532, 444 P2d 30.

The right to redeem is strictly statutory. *Id.*

Failure to file affidavits required by subparagraph (2) (c) within the time designated for redemption was not fatal where they were filed before redemptioner was permitted to redeem. *Ulrich v. Lincoln Realty Co.*, (1944) 175 Or 296, 305, 153 P2d 255.

Failure of the purchasers to protest or object to the notice because it failed to specify the time and place of redemption was a waiver of these defects. *Kirk v. Rose*, (1959) 218 Or 593, 346 P2d 90.

FURTHER CITATIONS: *Engelson v. Miller*, (1966) 245 Or 105, 420 P2d 623.

23.580

NOTES OF DECISIONS

A judgment debtor, on redemption, has no right of action against the purchaser for mere use and occupation but only for the actual profit he has made out of the property through use. *Reichert v. Sooy-Smith*, (1917) 85 Or 251, 260, 165 P 1174, 1184.

Grass may be cut and converted into hay by the foreclosure purchaser and the redemptioner has no right to recover such hay in specie. *Smith v. Howell*, (1919) 91 Or 279, 176 P 805.

23.590

NOTES OF DECISIONS

1. In general
2. Possession of purchaser
3. Effect of appeal
4. Possession of tenant
5. Enforcement of right to possession

1. In general

The purchaser's right to receive the rents and profits is subject to an accounting therefor in case of redemption. *Cartwright v. Savage*, (1875) 5 Or 397; *Fields v. Crowley*, (1914) 71 Or 141, 142 P 360; *Balfour v. Rogers*, (1894) 64 Fed 925.

An agreement between the execution purchaser and the

former owner whereby the latter is permitted to retain possession at a stipulated rent and to redeem the property after expiration of the statutory period creates the relation of landlord and tenant between them. *Eldridge v. Hoefer*, (1904) 45 Or 239, 243, 77 P 874.

If the purchaser rents the property, he must exercise reasonable diligence and prudence to obtain a reasonable rental and if he fails to do so he is charged with the latter amount. *Miller v. Engelson*, (1960) 225 Or 300, 358 P2d 276.

The redemptioner is entitled to recover the rents or profits actually received by the purchaser in possession. *Id.*

2. Possession of purchaser

Title to annual crops not severed prior to the sale passes to the foreclosure purchaser as against the mortgagor or those claiming under him. *Jones v. Adams*, (1900) 37 Or 473, 59 P 811, 62 P 16, 82 Am St Rep 766, 50 LRA 388.

The purchaser on foreclosure of a junior mortgage is entitled to possession until the property is sold under the prior mortgage. *Pillsbury v. McGarry*, (1914) 69 Or 261, 138 P 836.

Where the first sale on execution is set aside and a resale ordered the purchaser at the first sale is entitled to possession until the resale takes place. *California Joint Stock Land Bank v. Gore*, (1936) 153 Or 267, 55 P2d 1118.

3. Effect of appeal

An undertaking on appeal from the order of confirmation does not suspend the right of a purchaser at a judicial sale to possession. *Bank of British Columbia v. Harlow*, (1881) 9 Or 338.

A proper undertaking on appeal from the decree of foreclosure suspends the right of a purchaser at a judicial sale to possession. *German Sav. Socy. v. Kern*, (1903) 42 Or 532, 70 P 709.

4. Possession of tenant

Rent that becomes payable by the tenant of the mortgagor after the foreclosure sale must be paid to the foreclosure purchaser. *Jones v. Adams*, (1900) 37 Or 473, 59 P 811, 62 P 16, 82 Am St Rep 766, 50 LRA 388.

A tenant holding under an unexpired lease, executed subsequent to the mortgage, must pay the foreclosure purchaser the value of the use and occupation notwithstanding he has paid the rent in advance to the mortgagor. *United States Mtg. Co. v. Willis*, (1902) 41 Or 481, 69 P 266.

A tenant in possession must pay the purchaser the rent or the value of the occupation between the date of the sale and the date of expiration of the redemption period. *Foley v. Bouvy*, (1938) 158 Or 327, 75 P2d 14.

A tenant in possession is not entitled to prolong his occupation beyond the period of redemption. *Id.*

Where a landlord's estate is sold on execution his tenant becomes the tenant of the execution purchaser. *Lytle v. Payette-Ore. Slope Irr. Dist.* (1944) 175 Or 276, 291, 152 P2d 934, 156 ALR 894.

5. Enforcement of right to possession

A writ of assistance may issue in a proper case to enforce the purchaser's right of possession. *German Sav. Socy. v. Kern*, (1903) 42 Or 532, 70 P 709; *Pillsbury v. McGarry*, (1914) 69 Or 261, 138 P 836.

FURTHER CITATIONS: *Bernards v. Johnson*, (1941) 314 US 19, 62 S Ct 30, 86 L Ed 11.

NOTES OF DECISIONS

1. Effect of redemption.

A redemption by the judgment debtor or his successor in interest puts an end to the proceedings and the property is held as if no sale had taken place. *Cartwright v. Savage*, (1875) 5 Or 397; *Willis v. Miller*, (1893) 23 Or 352, 31 P 827; *Flanders v. Aumack*, (1897) 32 Or 19, 51 P 447, 67 Am St Rep 504; *Brand v. Baker*, (1903) 42 Or 426, 71 P 320; *Kaston v. Storey*, (1905) 47 Or 150, 80 P 217, 114 Am St Rep 912; *Lauriat v. Stratton*, (1880) 11 Fed 107.

Redemption by judgment debtor or his grantee after judgment will reinstate the lien of the unpaid balance of the judgment under which the property was sold. *Settlemyre v. Newsome*, (1882) 10 Or 446; *Flanders v. Aumack*, (1897) 32 Or 19, 51 P 447, 67 Am St Rep 504.

2. Sheriff's deed.

A sheriff's deed is evidence of title in the grantee and the recitals therein are prima facie proof of the facts recited. *Dolph v. Barney*, (1874) 5 Or 191, 193; *Willamette Real Estate Co. v. Hendrix*, (1896) 28 Or 485, 493, 42 P 514, 52 Am St Rep 800.

The sheriff who is in office at the time the deed is due is the proper officer to execute it. *Moore v. Willamette Trans. & Locks Co.*, (1879) 7 Or 359; *Faul v. Cooke*, (1890) 19 Or 455, 26 P 662, 20 Am St Rep 836; *Marx v. Hanthorn*, (1887) 30 Fed 579.

The deed may be issued to the transferee of the purchaser. *Gest v. Packwood*, (1889) 39 Fed 525, 532.

No one but a "redemptioner," as defined by statute, or the purchaser at the execution sale can acquire a deed from the sheriff. *Murray v. Wiley*, (1947) 180 Or 380, 396, 168 P2d 582, 175 P2d 149.

FURTHER CITATIONS: *Wright v. Young*, (1876) 6 Or 87; *Semple v. Bank of British Columbia*, (1878) 5 Sawy 88, Fed Cas No. 12,659; *Bernards v. Johnson*, (1941) 314 US 19, 62 S Ct 30, 86 L Ed 11; *Call v. Jeremiah*, (1967) 246 Or 568, 425 P2d 502.

ATTY. GEN. OPINIONS: Reinstatement of tax lien on redemption by mortgagor, 1934-36, p 714.

LAW REVIEW CITATIONS: 27 OLR 139.

NOTES OF DECISIONS

1. In general

The equitable remedy by creditor's bill is not superseded by the remedy of proceedings supplementary to execution. *Matlock v. Babb*, (1897) 31 Or 516, 49 P 873; *Berger v. Loomis*, (1942) 169 Or 575, 131 P2d 211.

Proceedings supplemental to execution are purely legal. *Knowles v. Herbert*, (1883) 11 Or 54, 240, 4 P 126.

A chattel mortgage held by the debtor is not enforceable by proceedings supplementary to execution but must be foreclosed. *Id.*

On appeal from a judgment on supplementary proceedings only the errors assigned in the notice of appeal are reviewable. *Williams v. Gallick*, (1884) 11 Or 337, 3 P 469.

A tax warrant is not an execution in the sense that supplemental proceedings may be based thereon. *Kirkwood v. Washington County*, (1898) 32 Or 568, 52 P 568.

The fact that an appeal from the judgment in the original action is pending does not deprive a judgment creditor of his right to examine the judgment debtor. *State v. Dobson*, (1943) 171 Or 492, 135 P2d 794.

Where judge issued order for examination and then va-

cated it without any apparent reason mandamus would lie to compel issuance of the order for examination. *Id.*

2. Appearance of debtor.

The court is not ousted of jurisdiction by the failure of the judgment debtor to appear before a referee for examination. *State v. Downing*, (1901) 40 Or 309, 319, 58 P 863, 66 P 917.

3. Conditions precedent

A levy on and sale of tangible property or sale of attached tangible property of judgment debtor is not required before invoking the aid of supplementary proceedings. *State v. Downing*, (1901) 40 Or 309, 58 P 863, 66 P 917.

FURTHER CITATIONS: *Clawson v. Anderson*, (1967) 248 Or 347, 434 P2d 462.

ATTY. GEN. OPINIONS: Authority of justice court to make use of supplementary proceedings, 1944-46, p 320.

23.720

NOTES OF DECISIONS

A finding that the debtor had money in his possession at some time prior to the order for examination will not support an order that debtor apply such money on the judgment. *Hammer v. Downing*, (1902) 41 Or 234, 66 P 916; *State v. Gutridge*, (1905) 46 Or 215, 80 P 98; *State v. Rider*, (1915) 78 Or 318, 145 P 1056, 152 P 497; *Weigar v. Steen*, (1916) 81 Or 72, 158 P 280.

The property or funds of a private corporation, not having been declared a dividend, in the hands of a stockholder may be reached by proceedings supplementary to execution. *Hughes v. Oregonian Ry.*, (1883) 11 Or 158, 2 P 94.

The nonappearance of the judgment debtor does not defeat or suspend the power of the court to conduct the examination in his absence. *State v. Downing*, (1901) 40 Or 309, 58 P 863, 66 P 917.

The validity of the judgment in the original action is of no concern in the proceedings supplemental to execution. *State v. Dobson*, (1943) 171 Or 492, 135 P2d 794.

A judgment debtor may be required to apply on the judgment shares in stock of an Oregon corporation though such shares are in a safety deposit box in another state. *Hodes v. Hodes*, (1945) 176 Or 102, 155 P2d 564.

FURTHER CITATIONS: *Blackford v. Boak*, (1914) 73 Or 61, 143 P 1136; *Kirk v. Kirk*, (1969) 254 Or 44, 456 P2d 1009.

23.730

NOTES OF DECISIONS

Though an order for examination is voidable because not supported by the evidence, the debtor must comply, until it is set aside by direct proceedings, or be punished for contempt. *State v. Downing*, (1901) 40 Or 309, 58 P 863, 66 P 917.

If debtor appeals from the order requiring him to satisfy the judgment, the undertaking must provide that if the order is affirmed he will satisfy the same, in order to prevent contempt proceedings being instituted against him. *Id.*

This section confers on courts of law jurisdiction to grant injunctive relief. *Hodes v. Hodes*, (1945) 176 Or 102, 155 P2d 564.

23.750

NOTES OF DECISIONS

The plaintiff must either accept the certificate of the

garnishee as made or pursue the remedy provided by this section. *Batchellor v. Richardson*, (1889) 17 Or 334, 345, 21 P 392.

The equitable remedy of a creditor's bill is not superseded by the remedy provided by this section. *Matlock v. Babb*, (1897) 31 Or 516, 49 P 873.

This section makes LOL 313 to 332 [ORS 29.180 to 29.300] applicable to garnishment proceedings where the levy is made upon a writ of execution. *McLaughlin v. Aumsville Mercantile Co.*, (1914) 74 Or 80, 144 P 1154.

FURTHER CITATIONS: *Barrett v. Failing*, (1879) 8 Or 152.

23.775 to 23.805

ATTY. GEN. OPINIONS: Fee for handling support payments received or sent under the Uniform Reciprocal Enforcement of Support Act, (1971) Vol 35, p 773.

LAW REVIEW CITATIONS: 43 OLR 105.

23.775

ATTY. GEN. OPINIONS: Fee for handling support payments, (1971) Vol 35, p 454; fee for handling support payments received or sent under the Uniform Reciprocal Enforcement of Support Act, (1971) Vol 35, p 773.

23.785

CASE CITATIONS: *State ex rel. McKee v. McKee*, (1964) 237 Or 583, 392 P2d 645.

23.810

NOTES OF DECISIONS

This section applies to discharges from imprisonment on execution issued by federal courts. *Hanson v. Fowle*, (1871) 1 Sawy 497, Fed Cas No. 6,041.

The discharge from arrest of a defendant who is not charged in execution should be granted, unless the plaintiff, within a reasonable time, should charge him in execution. *United States v. Griswold*, (1880) 11 Fed 807, 812, 6 Sawy 255.

It is the duty of the court, where a party imprisoned under execution is destitute of any means that could be applied to the satisfaction of the judgment, to administer the debtor's oath prescribed and grant him a certificate of discharge. *Heckinger v. Swank*, (1915) 78 Or 526, 153 P 784.

FURTHER CITATIONS: *In re Teeters*, (1929) 130 Or 631, 280 P 660; *Norman v. Manciette*, (1871) 18 Fed Cas 307.

23.860

NOTES OF DECISIONS

Evidence was clear that judgment debtor had no property liable to execution and the oath prescribed by this section should have been given. *Heckinger v. Swank*, (1915) 78 Or 526, 153 P 784.

23.910

CASE CITATIONS: *United States v. Griswold*, (1880) 11 Fed 807, 6 Sawy 255.