Chapter 29

Attachment and Garnishment; Civil Arrest; Claim and Delivery (Replevin)

29.010

CASE CITATIONS: Nichols v. Ingram, (1915) 75 Or 439, 146 P 988.

29.110 to 29.400

NOTES OF DECISIONS

The Oregon garnishment statutes probably came from Missouri law as codified in Revised Statutes of Missouri, 1855. Union Oil Co. v. Pac. Whaling Co., (1965) 240 Or 151, 400 P2d 509.

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NOTES OF DECISIONS

1. In general
2. Relation to other remedies
3. Proceedings in which writ may issue
   (1) Contract actions
   (2) Tort actions
   (3) Suits in equity
4. Security precluding attachment
5. Time for issuance of writ

1. In general

Attachment proceedings are statutory, and unless the statute is pursued no rights are acquired under them. Schneider v. Sears, (1885) 13 Or 69, 8 P 841; White v. Johnson, (1895) 27 Or 282, 297, 40 P 511, 50 Am St Rep 726; Dickson v. Back, (1897) 32 Or 217, 224, 51 P 727; Price v. Boot Shop, (1915) 75 Or 343, 347, 146 P 1088; Edwards v. Case, (1915) 78 Or 220, 152 P. 880; Spores v. Maude, (1916) 81 Or 11, 158 P 169; Murphy v. Bjelik, (1918) 87 Or 329, 352, 169 P 520, 170 P 723; Macleay Estate Co. v. Churchill, (1930) 132 Or 63, 284 P 286.

An attachment is not affected by the filing of an amended complaint which does not change the cause of action. Suksdorff v. Bigham, (1886) 13 Or 369, 12 P 818; Meyer v. Brooks, (1896) 29 Or 203, 206, 44 P 281, 54 Am St Rep 790.

Attachment is a special auxiliary remedy created by statute. Bank of Colfax v. Richardson, (1899) 34 Or 518, 54 P 359, 75 Am St Rep 664; Spores v. Maude, (1916) 81 Or 11, 158 P 169.

The remedy of attachment had its origin in the customs of London and is not a common law remedy, but one exclusively authorized by statute. Edwards v. Case, (1915) 78 Or 220, 152 P 880; Bankers' Discount Corp. v. Noe, (1926) 116 Or 570, 242 P 610.

The purpose of an attachment is to make the property of the defendant security for the satisfaction of any judgment that may be rendered against him. Oliver v. Wright, (1905) 47 Or 322, 83 P 870.

Attachment is a provisional remedy granted for the purpose here stated. Nichols v. Ingram, (1915) 75 Or 439, 146 P 988.

Attachment is a provisional remedy, and a proceeding auxiliary to the main action. Jesse v. Birchell, (1953) 198 Or 393, 257 P2d 255, 37 ALR 2d 952.

The Federal Government must comply with the summons requirements of this section before it is entitled to the issuance of an attachment. United States v. Cohn, (1954) 201 Or 680, 272 P2d 892.

Attachment is only proper to recover upon an actual and bona fide debt and the debt must be liquidated in amount. Crouter v. United Adjusters, Inc., (1971) 259 Or 348, 485 P2d 1208.

Strict compliance with the attachment statutes must be pleaded and proved. Id.

2. Relation to other remedies

Equitable jurisdiction to uncover assets fraudulently concealed is not superseded by attachment or garnishment statutes. **Attachment statute,** Sabin v. Anderson, (1897) 31 Or 487, 49 P 870; **garnishment statute,** Matlock v. Babb, (1897) 31 Or 516, 49 P 873.

Seizure and control of property belonging to defendant pursuant to a bill in equity supported service by publication. Baillie v. Columbia Gold Min. Co., (1917) 86 Or 1, 42, 166 P 965, 167 P 1167.

In a law action on a promissory note, the filing of an affidavit for attachment and issuance of that writ did not constitute a waiver of the mortgage lien by which the note was secured, nor did it amount to an election of inconsistent remedies. Jesse v. Birchell, (1953) 198 Or 393, 257 P2d 255, 37 ALR 2d 952.

3. Proceedings in which writ may issue

No attachment can issue except in an action upon a contract of the kind designated by statute, and issuance of such process in any other kind of action is void. Suksdorff v. Bigham, (1886) 13 Or 369, 374, 12 P 818; Bankers' Discount Corp. v. Noe, (1926) 116 Or 570, 242 P 610.

Plaintiff in the attachment action must allege and prove that his claim against the defendant in that action is one based on a debt for which a writ of attachment can issue under the authority of the statute. Wheeler Lbr. Co. v. Shelton, (1934) 146 Or 550, 29 P2d 1013, 31 P2d 163.

Where the complaint was indefinite as to the cause of action alleged, but the facts showed an action upon which attachment could issue, the writ was good. Suksdorff v. Bigham, (1886) 13 Or 369, 12 P 818.

(1) Contract actions. An action to recover money paid under a contract that the defendant repudiated is within the attachment statute. Hanley v. Combs, (1906) 48 Or 409, 412, 87 P 143.

(2) Tort actions. Attachment may not be used as an incident to an action proceeding on a theory of tort. Sheppard v. Yokum, (1884) 11 Or 234, 3 P 824; Meyer v. Brooks, (1896) 29 Or 203, 44 P 281.

Where the facts were such that the complaint could have sounded in either tort or quasi contract and the complaint proceeded on a theory of tort, refusal to dissolve the plaintiff's writ of attachment was error. Sheppard v. Yokum, (1884) 11 Or 234, 3 P 824.

(3) Suits in equity. An action on a judgment is an action on a contract within the meaning of this section. **Domestic judgment,** Brauer v. Portland, (1900) 35 Or 371, 58 P 861,

59 P 117, 60 P 379; **foreign judgment,** Meyer v. Brooks, (1896) 29 Or 203, 44 P 281.

Prior to enactment of subparagraph (1)(b), attachment could not issue on a contract made outside the state unless it contained a stipulation that the money payable thereunder was to be paid inside the state. Trabant v. Rummell, (1886) 14 Or 17, 12 P 56.

Attachment does not lie in an action to recover damages for breach of covenant. Ruby v. Whitten, (1926) 117 Or 271, 243 P 559.

A court of equity sitting in a case based on tort is without power to evade the attachment statutes by restraining the defendant from disposing of his property. Nelson v. Smith, (1937) 157 Or 292, 69 P2d 1072.

Upon proper and justified rescission of a contract of sale, if the seller refuses to return the money, the purchaser may sue in assumpsit to recover; it is an implied contract within the meaning of this section. State v. Bain, (1952) 193 Or 688, 240 P2d 958.

Attachment by plaintiff of property upon which plaintiff held a lien that he was suing to foreclose constituted a waiver of appeal from an adverse ruling in the suit to foreclose. Ehrman v. Astoria Ry., (1894) 26 Or 377, 8 P 306.

Where a nonresident defendant owned real property within the state, attachment of the res did not confer such jurisdiction of the real property upon which the writ was levied so as to authorize the court, upon a service of the summons by publication, to condemn the land and order it sold to satisfy the sum to be recovered. Spores v. Maude, (1916) 81 Or 11, 158 P 169.

4. Security precluding attachment

The security which will preclude the right to resort to attachment must be an admitted security, and not one the validity of which is denied by the defendant, and which can only be enforced, if at all, at the end of a lawsuit. Watson v. Loewenberg, (1899) 34 Or 323, 336, 56 P 289.

A claim secured by a mortgage executed by a person non compos mentis was not a secured claim within the meaning of the statute whether such mortgage was considered void or voidable. Bowman v. Wade, (1909) 54 Or 347, 103 P 72.

5. Time for issuance of writ

A writ issued before issuance of the summons is a nullity. White v. Johnson, (1895) 27 Or 282, 40 P 511, 50 Am St Rep 726; McMaster v. Ruby, (1916) 80 Or 476, 157 P 782.

Issuance of a summons or of a writ of attachment occurs when the summons or the writ is delivered to the sheriff with the intent that it shall be served. **Summons,** White v. Johnson, (1895) 27 Or 282, 40 P 511; McMaster v. Ruby, (1916) 80 Or 476, 157 P 782; **writ of attachment,** White v. Johnson, supra; McMaster v. Ruby, supra; Macleay Estate Co. v. Churchill, (1930) 132 Or 63, 284 P 286.

Summons must issue prior to issuance of a writ of attachment, but need not precede the writ in service and filing. Ranch v. Werley, (1907) 152 Fed 509; Metropolitan Inv. & Imp. Co. v. Schouweiler, (1917) 83 Or 696, 163 P 599, 164 P 370.

Attachment may be had only after the complaint is filed and at the time of, or after, the issuance of summons. Okanogan State Bank v. Thompson, (1923) 106 Or 447, 211 P 933.

Plaintiff's intention to attach need not be communicated to defendant in the complaint. Id.

A judgment in rem against attached property was not subject to collateral attack because the record failed to show that a summons was issued on or before issuance of the writ. Bank of Colfax v. Richardson, (1899) 34 Or 518, 531, 54 P 359, 75 Am St Rep 664.

Defendants, in a suit to enjoin an execution sale of attached property, had to plead and prove issuance of summons in the action in which the attachment was sued out. Metropolitan Inv. & Imp. Co. v. Schouweiler, (1917) 83 Or 695, 701, 163 P 599, 164 P 370.

FURTHER CITATIONS: Fisher v. Gaither, (1897) 32 Or 161, 51 P 736; Willamette Coll. & Cred. Serv. v. Henry, (1932) 138 Or 460, 7 P 782; Johnson v. Curl, (1934) 147 Or 530, 33 P2d 237, 34 P2d 975; Berger v. Loomis, (1942) 169 Or 575, 131 P2d 211; Mayer v. Cahalin, (1879) 5 Sawy 355, Fed Cas No. 9,340.

ATTY. GEN. OPINIONS: Garnishment of legislator's salary, 1962-64, p 214.

LAW REVIEW CITATIONS: 8 OLR 27; 11 OLR 293; 21 OLR 106; 23 OLR 196; 36 OLR 171; 46 OLR 191; 48 OLR 153.

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NOTES OF DECISIONS

1. In general

Because of omission to state anything either as to the kind of action or the nature of the affidavit or bond filed, there was a failure of justification under the writ by virtue of which defendant professed to have acted. Trabant v. Rummell, (1886) 14 Or 17, 12 P 56; Bankers' Discount Corp. v. Noe, (1926) 116 Or 570, 242 P 610.

A writ of attachment issued on an insufficient affidavit will protect the officer serving it if it is regular on its face, but not the plaintiff or the justice issuing it. White v. Thompson, (1869) 3 Or 115.

An affidavit in the language of the statute not stating the probative facts to show fulfillment of statutory requirements is sufficient. Crawford v. Roberts, (1880) 8 Or 324.

The attachment can issue only on due proof of the claim. Hahn v. Salmon, (1884) 20 Fed 801, 805.

It is not essential that the complaint set out the facts which authorize the issuing of the attachment. Bunneman v. Wagner, (1888) 16 Or 433, 435, 18 P 841, 8 Am St Rep 306.

In a contest between an attaching creditor of a debtor and a prior grantee thereof who did not record until after the issuance of the writ, the attaching creditor's affidavit failed in that it did not show facts which established him as a purchaser in good faith and for a valuable consideration. Metropolitan Inv. & Imp. Co. v. Schouweiler, (1917) 83 Or 695, 163 P 599, 164 P 370.

2. Statement that defendant is indebted to plaintiff

The affidavit need not state the probative facts out of which the indebtedness or debt arose. Crawford v. Roberts, (1880) 8 Or 324; McMaster v. Ruby, (1916) 80 Or 476, 480, 157 P 782.

Claims which are contingent and uncertain in amount, are not bona fide existing debts in support of which attachment can be levied. Neilson v. Title Guar. & Sur. Co., (1921) 101 Or 262, 199 P 948.

An affidavit which stated that the indebtedness arose upon express contracts for the direct payment of money, that the contracts were promissory notes for stated amounts, that the contracts were unsecured and that the said sums constituted an actual bona fide debt due and owing from defendants to plaintiffs, was sufficient. McMaster v. Ruby, (1916) 80 Or 476, 157 P 782.

3. Statements as to amount

An affidavit which fails to specify the amount of indebt-

edness claimed is not void but voidable. (Alaska) Marks v. Shoup, (1901) 181 US 562, 21 S Ct 724, 45 L Ed 1002.

An affidavit otherwise regular on its face will protect the officer serving the writ, even though it fails to specify the amount of indebtedness claimed. Id.

Where the affidavit states a single claim for an amount which, in fact, consists in part of a claim for damages not subject to attachment, the attachment is completely invalid. Crouter v. United Adjusters, Inc., (1971) 259 Or 348, 485 P2d 1208.

4. Showing of lack of security

A claimant may not make an affidavit for attachment if his debt is secured by lien. Ehrman v. Astoria Ry., (1894) 26 Or 377, 379, 38 P 306.

The affidavit must show that the debt is unsecured. Metroplitan Inv. & Imp. Co. v. Schouweiler, (1917) 83 Or 695, 700, 163 P 599, 164 P 370.

5. Showing of absence of bad faith

A plaintiff seeking a writ of attachment must show by affidavit that the action is not prosecuted to hinder, delay or defraud any creditor of the defendant. Metropolitan Inv. & Imp. Co. v. Schouweiler, (1917) 83 Or 695, 700, 163 P 599, 164 P 370.

FURTHER CITATIONS: Bank of Winnemucca v. Mullaney, (1896) 29 Or 268, 45 P 796; Lane v. Word, (1913) 64 Or 389, 130 P 741; Weatherly v. Hochfeld, (1930) 133 Or 136, 286 P 588; Schoeneman v. Bennett, (1963) 235 Or 257, 384 P2d 217.

ATTY. GEN. OPINIONS: Garnishing salary of state legislator, 1962-64, p 214.

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NOTES OF DECISIONS

1. The surety and his obligations

A surety undertakes that plaintiff will pay all costs, including disbursements that may be adjudged to defendant, and if the attachment is wrongful and without sufficient cause, that he will pay such damages as defendant may sustain. Drake v. Sworts, (1893) 24 Or 198, 33 P 563; Officer v. Morrison, (1909) 54 Or 459, 102 P 792; Bing Gee v. Ah Jim, (1881) 7 Sawy 115, 7 Fed 811.

Sureties on an undertaking in attachment complying with the provisions of the statute are liable to a successful defendant for all the costs in the action, and not simply for such expenses as may have been incurred on account of the attachment. Drake v. Sworts, (1893) 24 Or 198, 33 P 563.

An undertaking signed by a surety company is sufficient. Aldrich v. Columbia Ry., (1901) 39 Or 263, 64 P 455.

Insignificant deficiencies in the amounts of the undertaking and the justification of the surety, when compared with the amount for which the undertaking is given, may be disposed of as de minimis. Id.

The several obligations assumed by the surety are separate and independent of each other. Officer v. Morrison, (1909) 54 Or 459, 102 P 792.

2. Actions on the bond

Where the complaint failed to allege that the attachment was wrongful or without sufficient cause, "the defect, if any, was cured" by defendant's answering. Olds v. Cary, (1886) 13 Or 362, 10 P 786; Drake v. Sworts, (1893) 24 Or 198, 33 P 563.

A surety defending an action on an attachment bond conditioned for the payment of costs cannot show that some of the items included in the judgment for costs were erroneously included therein. Drake v. Sworts, (1893) 24 Or 198, 33 P 563; Bing Gee v. Ah Jim, (1881) 7 Fed 811, 7 Sawy 117.

In a suit on the undertaking, malice need not be alleged. Mitchell v. Silver Lake Lodge, (1896) 29 Or 294, 45 P 798.

3. Actions not based on the bond

Notwithstanding the plaintiff's undertaking, defendant may, if he so elects, proceed in an action based on malicious attachment. Mitchell v. Silver Lake Lodge, (1896) 29 Or 294, 45 P 798.

The plaintiff in an action for malicious attachment, not based on the bond, must allege and prove malice. Id.

FURTHER CITATIONS: McKinney v. Nayberger, (1931) 138 Or 203, 295 P 474, 2 P2d 1111, 6 P2d 228; United States v. Cohn, (1954) 201 Or 680, 272 P2d 982.

ATTY. GEN. OPINIONS: Necessity for undertaking by Superintendent of Banks when collecting notes due insolvent banks, 1920-22, p 196.

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NOTES OF DECISIONS

1. In general
2. Property subject to attachment
3. Property not subject to attachment

1. In general

An attaching creditor cannot acquire through his attachment any greater rights to property or assets than the defendant had when the attachment was made, in the absence of fraud or collusion. Oregon Ry. & Nav. Co. v. Gates, (1883) 10 Or 514.

Attachment defendant cannot prevent his creditor from realizing on defendant's claim against a county by refusing to present the claim for auditing and allowance. Graf v. Wilson, (1912) 62 Or 476, 125 P 1005.

2. Property subject to attachment

When the distributive share of an heir has been ascertained and ordered to be paid by the court, it may then be attached though in the hands of the personal representative. Harrington v. La Rocque, (1886) 13 Or 344, 10 P 498; Thorsen v. Hooper, (1908) 50 Or 497, 93 P 361.

A sum owing on an unpaid assessment on corporate stock may be garnished in an action against the corporation. (Alaska) Faull v. Alaska Min. Co., (1883) 14 Fed 657, 8 Sawy 420.

Property transferred by the defendant in fraud of his creditors is subject to garnishment in the hand of the transferee. Dawson v. Coffey, (1885) 12 Or 513, 8 P 838.

Debtor's interest in a partnership may be attached. Cogswell v. Wilson, (1888) 17 Or 31, 21 P 388.

The interest of defendant in property jointly owned may be attached. Sharp v. Johnson, (1900) 38 Or 246, 63 P 485.

Land conveyed by the debtor to a third person to secure an indebtedness is subject to attachment. Security Sav. & Trust Co. v. Loewenberg, (1900) 38 Or 159, 169, 62 P 647.

A chose in action in which the obligor is a foreign insurance company doing business in this state may be attached even though payable in another state. Id.

An unindorsed promissory note belonging to defendant and in his possession is subject to attachment. Fishburn v. Londershausen, (1907) 50 Or 363, 367, 92 P 1060, 15 Ann Cas 975, note, 14 LRA(NS) 1234.

The balance that the defendant has to his credit in a bank is liable to seizure under an attachment. Caldwell Banking & Trust Co. v. Porter, (1908) 52 Or 318, 323, 95 P 1, 97 P 541.

Fixtures may not be attached separately; fixtures temporarily severed from the realty with the intent that they be shortly reaffixed may not be attached; fixtures permanently severed become personalty and may be attached. Bay City Land Co. v. Craig, (1914) 72 Or 31, 143 P 911.

The plaintiff may garnish goods sold by the defendant to a third person in violation of the bulk sales law. Oregon Mill & Grain Co. v. Hyde, (1918) 87 Or 163, 169, 169 P 791.

Personal property of the defendant whether or not it be in his own possession may be attached. Murphy v. Bjelik, (1918) 87 Or 329, 169 P 520, 170 P 723.

Debts due or yet to become due the defendant may be attached. Id.

The phrase "all other property in this state of such defendant" includes choses in action as well as tangible, personal property. Pierce v. Pierce, (1936) 153 Or 248, 56 P2d 336, 337.

Credits held by a resident garnishee for a nonresident creditor are subject to garnishment in this state. Isthmian Lines, Inc. v. Canadian Stevedoring Co., (1963) 216 F Supp 856.

Money sent by the defendant to a bank to pay a mortgage, which remained in the hands of the bank after rejection of the tender, was subject to garnishment. Kelsay v. Taylor, (1910) 56 Or 13, 107 P 609.

3. Property not subject to attachment

The interest in property represented by ownership of a chattel mortgage thereon is not subject to attachment. Knowles v. Herbert, (1883) 11 Or 54, 240, 4 P 126.

Money taken from the person of the defendant after his arrest on civil process is in the custody of the law and not attachable. Dahms v. Sears, (1885) 13 Or 47, 55, 11 P 891.

Property retaken by a seller upon the defendant's breach of a condition of the sale is not subject to attachment at the instance of plaintiff. Lewis v. Birdsey, (1890) 19 Or 164, 26 P 623.

Property seized as that of the defendant but released under a redelivery bond is not subject to attachment in another action against the defendant. Coos-Bay R. Co. v. Wieder, (1894) 26 Or 453, 38 P 338.

After indorsement of a negotiable warehouse receipt by defendant, the goods described therein may not be attached. Adamson v. Frazier, (1901) 40 Or 273, 66 P 810, 67 P 300.

Property of the defendant in the hands of his guardian is not subject to attachment. Sturgis v. Sturgis, (1908) 51 Or 10, 19, 93 P 696, 131 Am St Rep 724, 15 LRA(NS) 1034.

A creditor of a landlord cannot garnishee an instalment of rent payable in the future after the tenant has accepted the landlord's order to pay it to a third person when due. Morris v. Leach, (1917) 82 Or 509, 162 P 253.

Property which is subject to an assignment for the benefit of creditors is not subject to an attachment. Liberman v. Low, (1934) 148 Or 359, 36 P2d 791.

Claim of insured against his insurance company for negligence and bad faith in failing to settle within the policy limits is not "property" subject to garnishment by judgment creditor of the insured. Pringle v. Robertson, (1970) 258 Or 389, 465 P2d 223, 483 P2d 814.

Flour made in the defendant's mill from wheat purchased by its directors for their own use and benefit was not subject to attachment in the hands of the directors as the property of the defendant. Hutchinson v. Bidwell, (1893) 24 Or 219, 228, 33 P 560.

Vendee in possession under contract for sale of land and livestock did not have an attachable interest in harvested hay. First Bank of Juntura v. Sitz, (1932) 138 Or 297, 1 P2d 126, 6 P2d 242.

FURTHER CITATIONS: Hughes v. Oregonian Ry., (1883) 11 Or 158, 2 P 94; Budd v. Multnomah Ry., (1885) 12 Or 271, 7 P 99; Jennings v. Lentz, (1908) 50 Or 483, 93 P 327;Whitney v. Day, (1917) 86 Or 268, 168 P 295; Okanogan State Bank v. Thompson, (1923) 106 Or 447, 211 P 933; Hodes v. Hodes, (1945) 176 Or 106, 155 P2d 564; Smith v. Chipman, (1960) 220 Or 188, 348 P2d 441; Isthmian Lines, Inc. v. Canadian Stevedoring Co., (1963) 216 F Supp 856.

ATTY. GEN. OPINIONS: Attachability of vested remainders, 1928-30, p 353; attachability of interest of residuary legatee in specific property in trust estate, 1928-30, p 381; garnishability of vested interests in trust estate, 1928-30, p 381; special savings accounts of prisoners, 1956-58, p 107; subjecting work release enrollee's earnings to garnishment, 1966-68, p 209.

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NOTES OF DECISIONS

1. In general

This statute was not intended to put the attaching creditor in any better position than the holder of a subsequent deed from the defendant in the attachment action. Barnes v. Spencer, (1916) 79 Or 205, 153 P 47; Metropolitan Inv. & Imp. Co. v. Schouweiler, (1917) 83 Or 695, 163 P 599, 164 P 370.

The statute does not give the attaching creditor the character of a bona fide purchaser, but merely such priority of right as a bona fide purchaser acquires by his purchase. Ford v. Henderson, (1919) 91 Or 701, 178 P 381, 179 P 558; In re Kaupisch Creamery Co., (1901) 107 Fed 93.

Prior to the adoption of this statute, the attaching creditor acquired only a lien on the actual interest that the debtor had in the property. Jennings v. Lentz, (1908) 50 Or 483, 93 P 327, 29 LRA(NS) 584.

The lien created by an attachment is dissolved by adjudication of the debtor as a bankrupt within four months thereafter, notwithstanding the provisions of this section. Ford v. Henderson, (1919) 91 Or 701, 178 P 381, 179 P 558.

2. Measure of creditor's rights

An attaching creditor has the same rights as a bona fide purchaser from the debtor. Security Sav. & Trust Co. v. Loewenberg, (1900) 38 Or 159, 62 P 647; Jennings v. Lentz, (1908) 50 Or 483, 93 P 327.

The creditor may bring suit to set aside a fraudulent transfer of the property attached. Hahn v. Salmon, (1884) 20 Fed 801.

Attaching creditors, as against the garnishee, acquire only the rights of the attachment debtor. Baker v. Eglin, (1884) 11 Or 333, 8 P 280.

An attaching creditor is deemed a purchaser in good faith only under the same circumstances in which a purchaser would be deemed such a purchaser. Rhodes v. McGarry, (1890) 19 Or 222, 23 P 971.

An attaching creditor is chargeable with only such notice as the record imparts. Security Sav. & Trust Co. v. Loewenberg, (1900) 38 Or 159, 170, 62 P 647.

The attaching creditor cannot acquire a better title than the defendant had at the time the attachment was levied. Wheeler Lbr., Bridge & Supply Co. v. Shelton, (1934) 146 Or 550, 29 P2d 1013, 31 P2d 163.

A surety on a note, though in form a principal, could show against the attaching creditor of the actual principal that he was a surety. Baker v. Eglin, (1884) 11 Or 333, 8 P 280.

3. Claims superior to that of the creditor

An attaching creditor takes subject to any adverse claims of which he has knowledge or sufficient notice to put him on inquiry. First Nat. Bank v. Gage, (1916) 71 Or 373, 142 P 539; Saling v. First Nat. Bank, (1919) 93 Or 237, 182 P 140; Matsuda v. Noble, (1948) 184 Or 686, 200 P2d 962; United States Nat. Bank v. Am. Escrow, Inc., (1965) 250 F Supp 302.

In an action before warehouse receipts were by statute made negotiable, a change of possession or delivery that passed the property was required to defeat the right of a creditor who attached the goods. Gill & Co. v. Frank, (1885) 12 Or 507, 8 P 764.

An attachment is subject to all latent equities in favor of third persons that were known to the creditor. Osgood v. Osgood, (1899) 35 Or 1, 16, 56 P 1017.

Where the attaching creditor had notice of an outstanding record title, he could not be deemed a purchaser in good faith. Smith v. Farmers' & Merchants' Nat. Bank, (1910) 57 Or 82, 110 P 410.

One who without actual knowledge of the pending appeal purchases property which had been attached pursuant to a proceeding in which defendant prevailed takes free from any rights of the attaching creditor. Nichols v. Ingram, (1915) 75 Or 439, 146 P 988.

Occupancy by third parties of premises sought to be attached constitutes notice to the attaching creditor and prevents him from being a purchaser in good faith as against the third party. Marvin & Co. v. Piazza, (1929) 129 Or 128, 276 P 680.

Where debtor and his grantee made a mutual mistake by describing the wrong premises, a creditor who attached the premises intended to be conveyed was not permitted to take advantage of this section in the absence of allegations and proofs establishing his status as a purchaser in good faith. Rhodes v. McGarry, (1890) 19 Or 222, 23 P 971.

4. Claims inferior to that of creditor

An attaching creditor is not affected by an unrecorded conveyance of the property of which he had no notice. Boehreinger v. Creighton, (1881) 10 Or 42, 45; Riddle v. Miller, (1890) 19 Or 468, 23 P 807; Security Sav. & Trust Co. v. Loewenberg, (1900) 38 Or 159, 62 P 647; Haines v. Connell, (1906) 48 Or 469, 473, 87 P 265, 88 P 872, 120 Am St Rep 835; Mertens v. No. State Bank, (1913) 68 Or 273, 278, 135 P 885; Nevael Inv. Co. v. Schrunk, (1955) 203 Or 268, 279 P2d 518.

The rights of an attaching creditor are superior to those of the holder of an unrecorded chattel mortgage if the mortgaged property remains in the possession of the mortgagor. Pattee v. Harbaugh, (1918) 87 Or 612, 171 P 221.

5. What attaching creditor must allege and prove

The attaching creditor must allege and prove all the facts necessary to establish his status as a good faith purchaser. Rhodes v. McGarry, (1890) 19 Or 222, 23 P 971; Metropolitan Inv. & Imp. Co. v. Schouweiler, (1917) 83 Or 695, 163 P 599, 164 P 370; Wheeler Lbr. Co. v. Shelton, (1934) 146 Or 550, 29 P2d 1013, 31 P2d 163; United States Nat. Bank v. Am. Escrow, Inc., (1965) 250 F Supp 302.

The burden is on the attaching creditor to prove he had no knowledge or sufficient notice to put him on inquiry of any adverse claims. First Nat. Bank v. Gage, (1916) 71 Or 373, 142 P 539; Matsuda v. Noble, (1948) 184 Or 686, 200 P2d 962.

Attaching creditor's reply in an action on the undertaking for redelivery was insufficient in that it merely denied the claim of ownership made by a third party that had filed the undertaking. Flegel v. Koss, (1905) 47 Or 366, 83 P 847.

That the attaching creditor's claim is founded upon a valuable consideration must be proved by him. Barnes v. Spencer, (1916) 79 Or 205, 153 P 47.

Proof that the attachment was duly levied is required from the attaching creditor when the priority of his rights is challenged. Metropolitan Inv. & Imp. Co. v. Schouweiler, (1917) 83 Or 695, 163 P 599, 164 P 370.

Where public records showed debtor had mortgaged to a third person and that legal title was in the third person, who was known by the creditor to be a former owner of the property attached, and where former owner stated to creditor that the property had been conveyed to debtor, creditor could not be deemed a purchaser in good faith. Jennings v. Lentz, (1908) 50 Or 483, 93 P 327.

Evidence held insufficient to show that the attaching creditor did not have knowledge of a prior conveyance of the property. First Nat. Bank v. Gage, (1916) 71 Or 373, 142 P 539.

FURTHER CITATIONS: Dickey v. Henarie, (1887) 15 Or 351, 15 P 464; Dimmick v. Rosenfeld, (1898) 34 Or 101, 55 P 100; Bailey v. Hickey, (1921) 99 Or 251, 195 P 372.

ATTY. GEN. OPINIONS: Garnishment of unpaid soldiers' bonus in hands of Secretary of State, 1920-22, p 536.

LAW REVIEW CITATIONS: 1 OLR 220; 10 OLR 275; 15 OLR 181; 28 OLR 382; 31 OLR 330; 36 OLR 344; 37 OLR 111; 2 WLJ 468.

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NOTES OF DECISIONS

The sheriff is required to attach all or sufficient property of defendant to satisfy plaintiff's claim and costs and make his return within a reasonable time after receiving the writ. Gerdes v. Sears, (1886) 13 Or 358, 10 P 631.

A writ directed to a particular sheriff is of no force or effect outside of his county. Edwards v. Case, (1915) 78 Or 220, 152 P 880.

If the writ is invalid, there can be no valid attachment. Macleay Estate Co. v. Churchill, (1930) 132 Or 63, 284 P 286.

Plaintiff garnished personal property not an unliquidated tort claim. Davis v. Bar T Cattle Co., (1967) 247 Or 437, 431 P2d 825.

FURTHER CITATIONS: Fishburn v. Londershausen, (1907) 50 Or 363, 92 P 1060; Starkey v. Lunz, (1910) 57 Or 147, 110 P 702, Ann Cas 1912D, 783.

ATTY. GEN. OPINIONS: Garnishing salary of state legislator, 1962-64, p 214; impoundment connected with traffic offense, 1966-68, p 420.

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NOTES OF DECISIONS

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11. Effect of garnishment
12. Return of officer

1. In general

Seizures to enforce internal revenue are not controlled by this provision. United States v. Hess, (1879) 5 Sawy 533, Fed Cas No. 15,358.

A writ of attachment against a partner can only be levied upon his interest in the partnership property in the same manner as levies are made upon individual property by virtue of such writ. Cogswell v. Wilson, (1888) 17 Or 31, 21 P 388.

A summons, published or served personally in another state, must notify the nonresident defendant that the property belonging to him has been attached. Okanogan State Bank v. Thompson, (1923) 106 Or 447, 211 P 933.

On the annulling of the bond to release an attachment, the attaching creditor must have a new writ issued or by order of the court have the original writ reinstated and the property retaken by the officer. Hall v. Cutler Binder Co., (1934) 145 Or 565, 26 P2d 1109.

Where the return of the garnishee shows that debt has been evidenced by a negotiable instrument, an attachment of the debt does not confer quasi-in-rem jurisdiction upon the court until the instrument itself is reduced to the possession of the sheriff. Hobgood v. Sylvester, (1965) 242 Or 162, 408 P2d 925.

2. When writ is fully executed

A writ of attachment is fully executed when the officer has attached sufficient property to satisfy the plaintiff's demand and costs and expenses. Gerdes v. Sears, (1886) 13 Or 358, 10 P 631.

A writ of attachment upon personal property is fully executed when the property is taken into the sheriff's possession, although the sheriff's return is not made promptly. Albert Weinbrenner, Inc. v. Finne, (1939) 105 F2d 272.

3. By whom service is made

A sheriff is not authorized to serve a writ of attachment directed to the sheriff of another county. Edwards v. Case, (1915) 78 Or 220, 152 P 880.

4. Attachment of realty

The names of the parties must be correctly stated in the certificate. McDowell v. Parry, (1904) 45 Or 99, 76 P 1081; Haines v. Connell, (1906) 48 Or 469, 474, 87 P 265, 88 P 872, 120 Am St Rep 835.

A certificate appearing to have been changed by having written on it different initials, in pencil, above some of those originally written, is prima facie correct as first prepared. McDowell v. Parry, (1904) 45 Or 99, 76 P 1081.

An error in the names of the parties in the caption is not cured by a subsequent recital in the body of the certificate. Id.

The absence, as a caption, of the title of the cause or the names of the parties is not fatal if such matters appear in the body of the certificate. Haines v. Connell, (1906) 48 Or 469, 87 P 265, 88 P 872, 120 Am St Rep 835.

The court acquires jurisdiction and control over real property attached in the method prescribed by this section to the same extent as resulted under the former procedure of performing acts equivalent to seizure. Okanogan State Bank v. Thompson, (1923) 106 Or 447, 211 P 933.

5. Attachment of personalty

(1) Personalty capable of manual delivery. No lien is created unless the officer levying upon personal property capable of manual delivery, and not in the hands of a third person, takes the same into his custody. State v. Cornelius, (1873) 5 Or 46; Cogswell v. Wilson, (1888) 17 Or 31, 21 P 388; Maxwell v. Bolles, (1895) 28 Or 1, 7, 41 P 661.

When the property is in several parcels, the lien as to each attaches only as of the time of its actual seizure. Maxwell v. Bolles, (1895) 28 Or 1, 7, 41 P 661.

An officer attaching an undivided interest in property capable of manual delivery may take such property into his possession without being liable to the debtor's co-owner. Sharp v. Johnson, (1900) 38 Or 246, 63 P 485, 84 Am St Rep 788.

(2) "Other personal property." Whether a physical taking to the sheriff's office is necessary, or whether a chattel may be attached by leaving a copy of the writ with the person in possession of the chattel with a notice specifying the property attached, is a question to be determined at the trial. Schneider v. Sears, (1885) 13 Or 69, 8 P 841.

A safe should be attached by that method of putting it in the possession and control of the sheriff that involves the least expense. Id.

In a proceeding on a motion to quash an execution sale, failure of judgment creditor to allege and prove a levy in the manner required by the statute invalidates the sale. Brunswick Corp. v. Playmor Enterprises, Inc., (1969) 253 Or 162, 452 P2d 553.

6. Property previously attached

A sheriff in levying an attachment on property of which he had possession under prior attachment may forward the papers to his deputy and make return that the property was attached, provided the return shows that he then held the possession. Palmer-Haworth Logging Co. v. Henderson, (1918) 90 Or 192, 174 P 531.

7. Property in possession of third person

An officer cannot take property into his custody which is in the possession of another, but he must attach it in the manner pointed out in the statute. Spaulding v. Kennedy, (1876) 6 Or 209; Lewis v. Birdsey, (1890) 19 Or 164, 26 P 623.

Personal property in hands of a third person is attached by leaving a certified copy of the writ and a notice specifying the property with such person. Adamson v. Frazier, (1901) 40 Or 273, 66 P 810, 67 P 300; Whitney v. Day, (1917) 86 Or 268, 274, 168 P 295.

Although defendant as chattel mortgagee has a right to possession of a chattel, it, when in the hands of a third person, cannot be taken into the levying officer's possession. Spaulding v. Kennedy, (1876) 6 Or 208.

Property on which an equitable lien exists in favor of a third party in possession thereof cannot be attached. Dufur Oil Co. v. Enos, (1911) 59 Or 528, 117 P 457.

Service of the writ of attachment and notice cannot be waived by a person in possession of the debtor's goods. Price v. Boot Shop, (1915) 75 Or 343, 345, 146 P 1088.

Property transferred to a third person in violation of the Bulk Sales Act may be attached as property of the transferor. Oregon Mill & Grain Co. v. Hyde, (1918) 87 Or 163, 169 P 791.

Redemption money on the counter in auditor's office which was properly receipted for was in auditor's possession as a third person, and it was necessary to levy upon the money as here required. Barbur v. Courtwright, (1919) 260 Fed 728, 171 CCA 466.

(1) Persons subject to garnishment. A judgment debtor cannot be garnished by a creditor of the judgment creditor. Norton v. Winter, (1853) 1 Or 47, 62 Am Dec 297; Despain v. Crow, (1887) 14 Or 404, 12 P 806.

An individual stockholder may be garnished for an unpaid assessment on his capital stock. (Alaska) Faull v. Alaska Min. Co., (1883) 14 Fed 657, 8 Sawy 420.

A creditor of a corporation may garnish another corporation which is a stockholder in the debtor corporation. Hughes v. Ore. Ry., (1883) 11 Or 158, 2 P 94.

A person who for a valuable consideration promised another to pay the latter's debts to certain third parties, cannot be made liable to creditors of such other by process of garnishment. Baker v. Eglin, (1884) 11 Or 333, 8 P 280.

A debt due from a decedent's estate is not subject to garnishment until the share of the creditor, heir, or legatee, has been ascertained and ordered paid by the court. Thorsen v. Hooper, (1908) 50 Or 497, 93 P 361.

The usual, though not the decisive, test as to whether garnishment will lie, is whether the defendant is able to maintain an action or suit against the garnishee. Graf v. Wilson, (1912) 62 Or 476, 481, 125 P 1005, Ann Cas 1914C, 462.

Property in hands of garnishee having possession under a purported bill of sale, where such possession was solely to prevent seizure by plaintiff and to favor other creditors, was validly attached by serving a writ of garnishment personally upon the garnishee together with "notice to garnishee." Sabin v. Mitchell, (1895) 27 Or 67, 39 P 635.

(2) Notice of garnishment. The property attached is sufficiently identified where the notice delivered to the garnishee is to the effect that the sheriff has attached all the debts, property, etc., mentioned in the notice. Carter, Rice & Co. v. Koshland, (1885) 12 Or 492, 8 P 556; Barr v. Warner, (1900) 38 Or 109, 62 P 899.

The notice of garnishment should warn the garnishee that the goods and chattels or choses in action are attached and garnished to answer the plaintiff's demand when evidenced by a judgment. Edwards v. Case, (1915) 78 Or 220, 152 P 880.

A notice of garnishment should be directed to the person, firm or corporation having possession of the property of, or owing a debt to, the defendant named in the writ of attachment. Id.

A notice of garnishment of a note should be served upon the indorsee having possession, together with a copy of the writ, specifying the property attached. Whitney v. Day, (1917) 86 Or 268, 274, 168 P 295.

Officers of corporation issuing stock need not be notified when stock is garnished by actual seizure of the certificate. Nevael Inv. Co. v. Schrunk, (1955) 203 Or 268, 279 P2d 518.

It is essential that the notice be directed to and served on that person who will be directly amenable to judgment if the notice is not complied with. Peet v. Briggs, (1967) 248 Or 50, 432 P2d 310.

Where a certified copy of a writ of execution was served on defendant, there was no reversible error where the notice of garnishment stated that the debt was levied on by virtue of a writ of attachment rather than a writ of execution. Barr v. Warner, (1900) 38 Or 109, 62 P 899.

8. Custody of property

The test for an allowance for expenses in keeping attached property is its reasonableness, and of this the court is the proper judge. Schneider v. Sears, (1885) 13 Or 69, 8 P 841; Mitchell & Lewis v. Downing, (1893) 23 Or 448, 32 P 394.

A sheriff has no authority to decide that his levy is subordinate to that of another officer and to pay over the money except as commanded in his writ. Schneider v. Sears, (1885) 13 Or 69, 8 P 841.

Expenses incurred in caring for attached property are to be paid to the sheriff above the ordinary caption fee. Id.

The expense of a keeper of attached property is in the nature of a disbursement, for which the sheriff is not personally responsible. Hawley v. Dawson, (1888) 16 Or 344, 18 P 592.

9. Effect of execution of the writ

The execution of the writ creates a lien upon the property in favor of the attaching creditor, but does not affect title. State v. Cornelius, (1873) 5 Or 46; Dickson v. Back, (1897) 32 Or 217, 51 P 727.

Where a note belonging to the defendant was attached and sold under execution, the purchaser may sue thereon in his own name. Fishburn v. Londershausen, (1907) 50 Or 363, 371, 92 P 1060, 15 Ann Cas 975, note, 14 LRA(NS) 1234.

A constable was not guilty of conversion where he levied on a mortgaged automobile and placed a lock upon it, but did not remove same. Hart v. Ore. Laundry Co., (1919) 91 Or 324, 178 P 932.

10. Lien

The failure of the judgment entry ordering a sale of the attached property to specifically describe it, does not operate as a waiver of the lien of the attachment. Gerdes v. Sears, (1886) 13 Or 358, 10 P 631.

The amount stated in the summons delivered to defendant limits the attachment lien. Klein v. Turner, (1913) 66 Or 369, 376, 133 P 625.

A judgment for the defendant releases the attached real property. Nichols v. Ingram, (1915) 75 Or 439, 443, 146 P 988.

A judgment for the amount demanded, not ordering a sale of the attached property operates as a waiver of the lien. Smith v. Dwight, (1916) 80 Or 1, 148 P 477, 156 P 573, Ann Cas 1918D, 563.

Service of notice of garnishment of debtor's interest in partnership did not create a lien where return, to which no objection was made, merely acknowledged that debtor was a member of partnership without mentioning any specific item of property or disclosing whether partnership assets were realty or personalty. Scott v. Platt, (1945) 177 Or 515, 163 P2d 293, 164 P2d 255.

11. Effect of garnishment

Property attached in the hands of a garnishee is in the custody of the law and the garnishee cannot dispose of it. Carter, Rice & Co. v. Koshland, (1886) 13 Or 615, 12 P 58.

Garnishment does not create a lien but gives rise to a contingent personal liability to respond to any judgment that may afterward be recovered by plaintiff against the garnishee's creditors. Murphy v. Bjelik, (1918) 87 Or 329, 350, 169 P 520, 170 P 723.

A judgment for the plaintiff, in the action in which a garnishee files an answer satisfactory to plaintiff, does not create a lien upon any property of the garnishee. Id.

12. Return of officer

When a writ of attachment is fully executed, the officer must return the writ, retaining in his custody the property attached. Gerdes v. Sears, (1886) 13 Or 358, 10 P 631.

The only legal evidence of a levy having been made is the sheriff's return which must directly certify the fact. Batchellor v. Richardson, (1889) 17 Or 334, 343, 21 P 392.

FURTHER CITATIONS: Hall v. Stevenson, (1890) 19 Or 153, 23 P 887, 20 Am St Rep 803; White v. Ladd, (1902) 41 Or 324, 68 P 739, 93 Am St Rep 732; Advance Thresher Co. v. Esteb, (1902) 41 Or 469, 69 P 447; Brand v. Baker, (1903) 42 Or 426, 71 P 320; Fireman's Fund Ins. Co. v. Walker, (1930) 132 Or 73, 282 P 230; Mickey v. Stratton, (1879) 5 Sawy 475, Fed Cas No. 9,530; Rock v. Gadberry, (1956) 206 Or 313, 292 P2d 1085; Ezell v. Equity Gen. Ins. Co., (1962) 219 F Supp 51; Isthmian Lines, Inc. v. Canadian Stevedoring Co., (1963) 216 F Supp 856; Davis v. Bar T Cattle Co., (1967) 247 Or 437, 431 P2d 825; Pringle v. Robertson, (1970) 258 Or 389, 465 P2d 223, 483 P2d 814.

ATTY. GEN. OPINIONS: Failure of county clerk to make proper record of attachment, 1920-22, p 313; garnishing special savings accounts of prisoners, 1956-58, p 107; garnishing salary of state legislator, 1962-64, p 214; procedure when county court executes writ for delinquent assessments, 1966-68, p 59; impoundment connected with traffic offense, 1966-68, p 420; authority to exact fee for performance of duties of clerk, (1971) Vol 35, p 454.

LAW REVIEW CITATIONS: 15 OLR 285; 36 OLR 169, 341.

29.175

NOTES OF DECISIONS

The words "by virtue of an order of court, or otherwise" are so clear and unequivocal that the ejusdem generis rule has no application. In re Freitag's Estate, (1940) 165 Or 427, 107 P2d 978.

Where a husband and wife were individually indebted under a judgment and the husband was the administrator of an estate of which he was also a distributee, an attempted levy on their distributive shares of the estate after payment to them in their individual capacities was a nullity, notwithstanding the distribution was made before the service of the writ of garnishment upon the administrator and was without a previous order of the probate court. Id.

FURTHER CITATIONS: United States Nat. Bank v. Rawson, (1935) 150 Or 358, 43 P2d 184; Shelley v. Shelley, (1960) 223 Or 328, 354 P2d 282, 91 ALR 2d 250.

LAW REVIEW CITATIONS: 11 OLR 311.

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NOTES OF DECISIONS

A failure to make such return within a reasonable time would render the officer liable. Gerdes v. Sears, (1886) 13 Or 358, 361, 10 P 631.

The only legal evidence of the execution of the writ is the sheriff's return, which must certify the fact. Batchellor v. Richardson, (1889) 17 Or 334, 21 P 392.

Garnishment proceedings fall within the operation of this section. McLaughlin v. Aumsville Mercantile Co., (1914) 74 Or 80, 144 P 1154.

The return of attachment may be amended to supply an omission, except when the right of third persons depending on the defective return have intervened. Palmer-Haworth Logging Co. v. Henderson, (1918) 90 Or 192, 174 P 531.

A prompt return of the execution of a writ of attachment is required of the sheriff. Albert Weinbrenner, Inc. v. Finne, (1939) 105 F2d 272.

FURTHER CITATIONS: Bank of Colfax v. Richardson, (1899) 34 Or 518, 54 P 359; Mickey v. Stratton, (1879) 5 Sawy 475, Fed Cas No. 9,530.

29.190

NOTES OF DECISIONS

1. The certificate
2. When lien attaches
3. Discharge of lien

1. The certificate

See also cases under ORS 29.170 on attachment of realty.

The answer in a suit to restrain sale of attached property should allege facts showing the attachment proceedings, including matters relating to sheriff's certificate. Rhodes v. McGarry, (1890) 19 Or 222, 23 P 971.

The only evidence to establish the existence of the attachment lien as against third persons is the certificate itself or a properly authenticated copy thereof. Dickson v. Back, (1897) 32 Or 217, 223, 51 P 727.

A clerical mistake of the clerk in recording the certificate in substituting the name of one county for another in the title of the cause, will not defeat the lien. Schlosser v. Beemer, (1902) 40 Or 412, 67 P 299.

In a suit between a creditor of a grantee who did not record and subsequent grantees of a grantee who did record, sheriff's certificate of the levy of execution pursuant to creditor's judgment did not impart notice sufficient to cause the subsequent grantees to make inquiry respecting the creditor's claim. Advance Thresher Co. v. Esteb, (1902) 41 Or 469, 69 P 447.

2. When lien attaches

The effect of the levy and recording of the certificate is to create a lien upon the real property in favor of the party suing. State v. Cornelius, (1873) 5 Or 46; Bank of Calif. v. Cowan, (1894) 61 Fed 871.

As against the owner and those in privity with him the lien attaches to real property from the time they have knowledge of the attachment if prior to the record of the certificate; as against third persons the lien attaches from the date of the attachment providing the certificate is properly filed within the prescribed time. Dickson v. Back, (1897) 32 Or 217, 51 P 727.

The lien of an attachment depends on the date of the filing of the certificate. Schlosser v. Beemer, (1902) 40 Or 412, 67 P 299.

The attaching creditor acquires a specific lien upon the property, which ripens into a judgment against the res, when the order of sale is made. Katz v. Obenchain, (1906) 48 Or 352, 85 P 617, 120 Am St Rep 821.

3. Discharge of lien

The attachment lien is not merged in or lost by the judgment. In re Beaver Coal Co., (1902) 113 Fed 889, 51 CCA 519.

The failure of the county clerk to perform the ministerial duty of noting the discharge of the attachment does not affect the validity of the discharge. Nichols v. Ingram, (1915) 75 Or 439, 444, 146 P 988.

A judgment for defendant operates as a release of the attached real property. Id.

FURTHER CITATIONS: Klein v. Turner, (1913) 66 Or 369, 133 P 625.

ATTY. GEN. OPINIONS: Failure of clerk to make proper record of attachment, 1920-22, p 313; authority to exact fee for performance of duties of clerk, (1971) Vol 35, p 454.

LAW REVIEW CITATIONS: 31 OLR 330; 3 WLJ 90.

29.210

NOTES OF DECISIONS

If verdict of the sheriff's jury is in favor of the claimant, it is a complete defense to an action by plaintiff in the writ; if it is against the claimant, he cannot maintain an action against the sheriff for the taking. Capital Lumbering Co., (1881) 9 Or 93; Vulcan Iron Works v. Edwards, (1894) 27 Or 563, 36 P 22, 39 P 403; Sommer v. Oliver, (1901) 39 Or 453, 65 P 600.

An adverse verdict bars the claimant from maintaining a subsequent action to recover the property. Capital Lumbering Co. v. Hall, (1881) 9 Or 93; Vulcan Iron Works v. Edwards, (1894) 27 Or 563, 36 P 22, 39 P 403.

This section should be construed in pari materia with H 286 [ORS 23.320]. 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.

Until notice of the claim is given, the sheriff has no power to summon a jury. Vulcan Iron Works v. Edwards, (1894) 27 Or 563, 36 P 22, 39 P 403.

No particular form of notice of claim is prescribed or required. Id.

Reasonable notice of the trial before the sheriff is all that the claimant is entitled to. Id.

Discontinuance of the trial can be effected only by withdrawal of the claim. Id.

The purpose of amending this and OCLA 6-1402 [ORS 23.320] and not amending OCLA 6-1403 [ORS 23.330] was to permit the adverse claimant to have his claim determined before the court issuing the attachment rather than before a sheriff's jury, and not to change the effect or result of the trial. Francisco v. Stringfield, (1941) 166 Or 683, 114 P2d 1026.

Where sheriff notified claimant of the trial by sheriff's jury three times, namely, five days before, one day before, and again on the morning of the trial, the action against the sheriff to recover the property attached as belonging to another failed. Sommer v. Oliver, (1901) 39 Or 453, 65 P 600.

In an independent suit laying claim to a fund in hands of garnishor, plaintiff was not estopped by reason of not having pursued his remedy under this section as he was under no obligation to so proceed. Matsuda v. Noble, (1948) 184 Or 686, 200 P2d 962.

FURTHER CITATIONS: Bank of Winnemucca v. Mullaney, (1896) 29 Or 268, 45 P 796.

29.220

NOTES OF DECISIONS

The undertaking does not discharge the attached property from the custody of the law or relieve it from the lien of the attachment if it is in existence and can be identified. Drake v. Sworts, (1893) 24 Or 198, 33 P 563; Coos Bay R. Co. v. Wieder, (1894) 26 Or 453, 38 P 338; Dickson v. Back, (1897) 32 Or 217, 232, 51 P 727; Winter v. Union Packing Co., (1908) 51 Or 97, 93 P 930.

The obligors on a redelivery bond are discharged by seizure of the same property by the same sheriff under an attachment in another suit. Duncan v. Thomas, (1860) 1 Or 314.

Defendant does not affirm the attachment by having the property redelivered to him. Correy v. Lake, (1868) Deady 469, Fed Cas No. 3,253.

The right of action on the attachment undertaking is not waived by giving a redelivery bond. Drake v. Sworts, (1893) 24 Or 198, 33 P 563.

The giving of a redelivery bond does not amount to a general appearance on the part of the defendant. Winter v. Union Packing Co., (1908) 51 Or 97, 93 P 930.

The undertaking is not satisfied by tendering a portion of the property, and offering to pay the value of the remainder, though the remainder has been sold because perishable. Jones v. Short, (1909) 53 Or 525, 101 P 209.

If the defendant fails to redeliver the property on rendition of a judgment against him, plaintiff may sue on the bond. Id.

An order for the sale of attached property is a condition precedent to liability on a redelivery bond. Lonogan v. Jackson, (1961) 229 Or 205, 366 P2d 725.

FURTHER CITATIONS: Kohn v. Hinshaw, (1889) 17 Or 308, 20 P 629; Roethler v. Cummings, (1917) 84 Or 442, 165 P 355; Ash v. Kilander, (1960) 220 Or 438, 348 P2d 1099.

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NOTES OF DECISIONS

Although the undertaking is a substitute for property attached, a surety thereon cannot be summarily held to payment of judgment for plaintiff; a separate action is contemplated by this section. Humphrey v. United States Fid. & Guar. Co., (1940) 38 F Supp 224.

FURTHER CITATIONS: Dickson v. Back, (1897) 32 Or 217, 51 P 727.

29.240

NOTES OF DECISIONS

The undertaking under this section operates as an absolute discharge of the property from attachment. Bunneman v. Wagner, (1888) 16 Or 433, 18 P 841, 8 Am St Rep 306; Hill v. Wilson, (1927) 123 Or 193, 261 P 422.

A defendant makes a general appearance where he procures the release of his property under this section. Winter v. Union Packing Co., (1908) 51 Or 97, 93 P 930; Roethler v. Cummings, (1917) 84 Or 442, 448, 165 P 355.

Moving to dissolve the attachment is not prevented by the redelivery of the property to defendant upon an undertaking. Correy v. Lake, (1868) Deady 469, Fed Cas No. 3,253.

Upon the giving of the undertaking, the attachment is dissolved and ceases to be an action in rem. Bunneman v. Wagner, (1888) 16 Or 433, 18 P 841, 8 Am St Rep 306.

The subsequent annulling of the bond does not in itself reinstate the attachment. Hall v. Cutler Bindery Co., (1934) 145 Or 565, 26 P2d 1109.

An undertaking was a valid statutory undertaking, though formal application was not made to court for discharge of attachment and court did not approve it. Credit Serv. Co. v. Payne, (1926) 117 Or 547, 244 P 879.

FURTHER CITATIONS: Norton v. Winter, (1854) 1 Or 98; Duncan v. Thomas, (1860) 1 Or 314; Kohn v. Hinshaw, (1889) 17 Or 308, 20 P 629; Drake v. Sworts, (1893) 24 Or 198, 33 P 563; Lonogan v. Jackson, (1961) 229 Or 205, 366 P2d 725.

LAW REVIEW CITATIONS: 31 OLR 330.

29.250

NOTES OF DECISIONS

The attachment is dissolved by the giving of a dissolution undertaking. Bunneman v. Wagner, (1888) 16 Or 433, 18 P 841, 8 Am St Rep 306; Hill v. Wilson, (1927) 123 Or 193, 261 P 422.

A substantial compliance with this provision is sufficient. (Alaska) Ebner v. Heid, (1903) 125 Fed 680, 60 CCA 370.

The form of the undertaking is not material if it assumes the obligation provided by this section. Id.

An agreement that defendant would pay the judgment, on demand, if one is recovered in the action, is equivalent to an agreement to pay a judgment recovered against the defendant. Id.

A surety on this undertaking is not estopped by the judgment to show that the property proposed to be discharged was never released to the defendant. McGargar v. Moore, (1918) 88 Or 682, 157 P 1107, 171 P 587, 173 P 258.

The liability of a surety cannot be extended to other actions against the same defendant by the latter's subsequent agreement, or by action of the court. Id.

The provision relating to justification of sureties may be waived. Credit Serv. Co. v. Payne, (1926) 117 Or 547, 244 P 879.

The undertaking, though not approved by the court, was a good common-law obligation where the property was released from the attachment. Id.

The surety is not released from liability on a dissolution bond where on the second trial there was no change in the cause of action but in the statement thereof. Hill v. Wilson, (1927) 123 Or 193, 261 P 422.

FURTHER CITATIONS: Duncan v. Thomas, (1860) 1 Or 314; Kohn v. Hinshaw, (1889) 17 Or 308, 20 P 629; Drake v. Sworts, (1893) 24 Or 198, 33 P 563; Continental Guar. Corp. v. Chrisman, (1930) 134 Or 524, 294 P 596; Commercial

Cred. Corp. v. Marden, (1936) 155 Or 29, 62 P2d 573, 112 ALR 931.

29.260

NOTES OF DECISIONS

A traversing affidavit must deny every statutory ground alleged in the procuring affidavit in as direct and explicit terms as if it were an answer to a complaint, and must be tested by the same rules of pleading. Watson v. Loewenberg, (1899) 34 Or 323, 335, 56 P 289; Bowman v. Wade, (1909) 54 Or 347, 103 P 72.

That the property seized did not belong to the defendant is not ground for dissolving an attachment. Bank of Winnemucca v. Mullaney, (1896) 29 Or 268, 45 P 796.

A motion to discharge an attachment is based on defects apparent on the face of the proceedings. Id.

An attachment will not be set aside on the ground that the indebtedness sued upon is secured, if the traversing affidavit merely states that plaintiff's assignor claims the right to hold certain property as collateral security for the indebtedness sued on. Watson v. Loewenberg, (1899) 34 Or 323, 56 P 289.

The failure to move to discharge the attachment does not necessarily preclude an attack on the judgment. United States Nat. Bank v. Rawson, (1935) 150 Or 358, 43 P2d 184.

Fraud and want of title alleged in the attachment affidavit as invalidating the mortgage given to secure the contract sued on were not sufficiently refuted by defendant's affidavit for discharge of attachment. Bowman v. Wade, (1909) 54 Or 347, 103 P 72.

A nonresident whose property was attached, but who has not been served with process, appeared specially to contest the attachment on the ground the property was not subject to attachment, despite having asked, "With costs?" when the court announced its decision. Spores v. Maude, (1916) 81 Or 11, 158 P 169.

FURTHER CITATIONS: Starkey v. Lunz, (1910) 57 Or 147, 110 P 702, Ann Cas 1912D, 783.

29.270

NOTES OF DECISIONS

1. Liability of garnishee

A garnishment does not give the plaintiff any greater rights against the garnishee than the defendant himself possesses, except in case of fraud. Oregon Ry. & Nav. Co. v. Gates, (1883) 10 Or 514; Baker v. Eglin, (1884) 11 Or 333, 8 P 280; Phipps v. Rieley, (1887) 15 Or 494, 497, 16 P 185; Case v. Noyes, (1888) 16 Or 329, 19 P 104; Meier v. Hess, (1893) 23 Or 599, 32 P 755; Coastal Adjustment Bureau, Inc. v. Hutchins, (1961) 229 Or 418, 367 P2d 430.

Jurisdiction to enter a judgment against a garnishee who either refuses to give a certificate or gives an unsatisfactory certificate is not acquired until the order prescribed in ORS 29.250 is obtained and served. McLaughlin v. Aumsville Merc. Co., (1914) 74 Or 80, 144 P 1154; Murphy v. Bjelik, (1918) 87 Or 329, 169 P 520, 170 P 723.

Garnishment proceedings are purely statutory and the requirements of the statute must be substantially complied with. McLaughlin v. Aumsville Merc. Co., (1914) 74 Or 80, 144 P 1154.

Waiver of service of the writ and notice by the possessor of a debtor's property is not authorized by this section. Price v. Boot Shop, (1915) 75 Or 343, 146 P 1088.

Upon filing a certificate satisfactory to plaintiff, garnishee stands in the position of a disinterested stakeholder. Id.

A contingent personal liability to respond to any judgment that may be recovered against the garnishee's creditor, to the extent of the garnishee's debt, is created by the garnishment. Murphy v. Bjelik, (1918) 87 Or 329, 169 P 520, 170 P 723.

A garnishment does not create a lien in favor of plaintiff upon money in the garnishee's hands nor upon property owned by him. Id.

If the certificate is unsatisfactory to plaintiff or if one is not filed, garnishee stands in the position of the defendant in an action on his debt to the debtor of the attaching creditor in which the latter is standing in the debtor's shoes. Overturff v. Carroll, (1923) 109 Or 326, 219 P 1081.

The employer is not liable to creditors of the employe upon a notice of garnishment returned "nothing owing." If the return honestly reflects the account and it is a bona fide account reflecting transactions directly and necessarily connected with the employment relationship. Coastal Adjustment Bureau, Inc. v. Hutchins, (1961) 229 Or 418, 367 P2d 430, 93 ALR2d 992.

2. Delivery to sheriff of attached property by garnishee

A receipt which acknowledged that receiptors, who were garnished in an action against a third party, had "received from sheriff all hops raised on the land" was an admission that sheriff had possession thereof in his official capacity and that the third party owned them. Colbath v. Hoefer, (1903) 43 Or 366, 73 P 10.

FURTHER CITATIONS: Davidhizar v. Elgin Forwarding Co., (1918) 89 Or 89, 173 P 893; Crites v. Associated Frozen Food Packers, (1951) 190 Or 585, 227 P2d 821; Davis v. Bar T Cattle Co., (1967) 247 Or 437, 431 P2d 825.

29.280

NOTES OF DECISIONS

1. In general
2. Certificate of garnishee
3. Where certificate is satisfactory to plaintiff
4. Where certificate is not satisfactory or none is filed

1. In general

A proceeding against a garnishee is a proceeding at law. Williams v. Gallick, (1884) 11 Or 337, 3 P 469; Case v. Noyes, (1888) 16 Or 329, 19 P 104; Burns v. Payne, (1897) 31 Or 100, 49 P 884; Caldwell Banking & Trust Co. v. Porter, (1908) 52 Or 318, 323, 95 P 1, 97 P 541.

The court cannot enlarge or extend the requirements of the statute. Case v. Noyes, (1888) 16 Or 329, 19 P 104; Smith v. Conrad, (1892) 23 Or 206, 211, 31 P 398; McLaughlin v. Aumsville Merc. Co., (1914) 74 Or 80, 87, 144 P 1154.

The garnishment in effect subrogates the plaintiff to the rights of the defendant in the main action and empowers the plaintiff to sue the defendant's garnished debtor. Case v. Noyes, (1888) 16 Or 329, 19 P 104; Keene v. Smith, (1904) 44 Or 525, 75 P 1065.

Garnishment is a proceeding in rem to invest plaintiff with power to appropriate to the satisfaction of a debt, property of defendant in the garnishee's hands, or a debt due from the garnishee to defendant. McLaughlin v. Aumsville Merc. Co., (1914) 74 Or 80, 83, 144 P 1154.

A garnishee is liable only because he is indebted to, or has property in his possession belonging to, the debtor, either in fact or in contemplation of law. Oregon Mill & Grain Co. v. Hyde, (1918) 87 Or 163, 169, 169 P 791.

The proceeding against the garnishee is a separate action in all essentials. Overturff v. Carroll, (1923) 109 Or 326, 219 P 1081.

A plaintiff who procures the order provided for and files allegations and interrogatories institutes an auxiliary proceeding, which is in effect an action at law against the garnishee. Id.

2. Certificate of garnishee

A certificate by a warehouseman garnishee that he has in his care 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, 66 P 810, 67 P 300.

In the provision requiring a certificate designating any property, the word property includes "goods, effects and credits." Fireman's Fund Ins. Co. v. Walker, (1930) 132 Or 73, 282 P 230.

In the provision requiring a certificate designating any debt owing, the word "debt" includes claims not matured as well as those matured. Id.

The employer is not liable to creditors of the employe upon a notice of garnishment returned "Nothing owing," if the return honestly reflects the account and it is a bona fide account reflecting transactions directly and necessarily connected with the employment relationship. Coastal Adjustment Bureau, Inc. v. Hutchins, (1961) 229 Or 418, 367 P2d 430, 93 ALR2d 992.

3. Where certificate is satisfactory to plaintiff

A judgment, where a garnishee admits an indebtedness, may be entered that the officer collect such debt out of the property of the garnishee if he refuses to pay the debt on demand; but no personal judgment can be entered against him. Adamson v. Frazier, (1901) 40 Or 273, 66 P 810, 67 P 300.

When a garnishee files an answer satisfactory to plaintiff, the only judgment to which plaintiff is entitled is a judgment against the defendants in the action. Murphy v. Bjelik, (1918) 87 Or 329, 352, 169 P 520, 170 P 723.

An attempted judgment against a garnishee which had given a certificate of indebtedness is a nullity. Id.

The demand on the garnishee prescribed by LOL 234 [ORS 23.420] is as essential to a levy on garnishee's property in order to pay the judgment against his creditor as a judgment is to a levy on any execution. Id.

4. Where certificate is not satisfactory or none is filed.

By voluntary appearance the garnishee may waive service of proceedings instituted for the purpose of ascertaining the truth or falsity of the garnishee's certificate. Carter, Rice & Co. v. Koshland, (1885) 12 Or 492, 8 P 556; Altona v. Dabney, (1900) 37 Or 334, 336, 62 P 521.

A judgment against the garnishee can be taken only where no certificate or an unsatisfactory one is furnished. DeWitt v. Kelly, (1890) 18 Or 557, 23 P 666; Murphy v. Bjelik, (1918) 87 Or 329, 169 P 520, 170 P 723.

Personal service of the order in garnishment proceedings is required. Carter, Rice & Co. v. Koshland, (1885) 12 Or 492, 8 P 556.

A plaintiff who is dissatisfied with the certificate of the garnishee must obtain an order requiring the garnishee to appear for examination and file and serve on the garnishee written allegations and interrogatories. McLaughlin v. Aumsville Merc. Co., (1914) 74 Or 80, 83, 144 P 1154.

The order prescribed must be obtained and served before the court acquires jurisdiction to render judgment against a garnishee who either refuses to give a certificate that he owes a matured debt or gives an unsatisfactory certificate. Murphy v. Bjelik, (1918) 87 Or 329, 352, 169 P 520, 170 P 723.

FURTHER CITATIONS: Batchellor v. Richardson, (1889) 17 Or 334, 21 P 392; Barr v. Warner, (1900) 38 Or 109, 62 P 899; Whitney v. Day, (1917) 86 Or 268, 168 P 295; Scott v. Platt, (1945) 177 Or 524, 163 P2d 293, 164 P2d 255; Imperial Inv. Co. v. Rouse, (1962) 231 Or 7, 371 P2d 962; Ezell v. Equity Gen. Ins. Co., (1962) 219 F Supp 51; Union Oil Co. v. Pac. Whaling Co., (1965) 240 Or 151, 400 P2d 509.

ATTY. GEN. OPINIONS: Certificate of Secretary of State when garnished as holder of unpaid soldier's bonus, 1920-22, p 536; procedure by Public Utility Commissioner when notice of garnishment has been served in case of policy of indemnity insurance indorsed in favor of the commissioner, 1926-28, p 118; attachment of undelivered state warrant, 1948-50, p 224; garnishment of work enrollee's earnings, 1966-68, p 209.

LAW REVIEW CITATIONS: 9 OLR 527.

29.290

NOTES OF DECISIONS

The only remedy against a garnishee who makes no admission of indebtedness to the defendant is that provided in this section and in OL 315 [ORS 29.310]. Adamson v. Frazier, (1901) 40 Or 273, 66 P 810, 67 P 300.

An auxiliary proceeding which is in effect an action at law against the third person is provided for by this section and OL 315 [ORS 29.310]. Overturff v. Carroll, (1923) 109 Or 326, 219 P 1081.

FURTHER CITATIONS: DeWitt v. Kelly, (1890) 18 Or 557, 23 P 666; Burns v. Payne, (1897) 31 Or 100, 49 P 884; McLaughlin v. Aumsville Merc. Co., (1914) 74 Or 80, 144 P 1154.

29.300

CASE CITATIONS: Union Oil Co. v. Pac. Whaling Co., (1965) 240 Or 151, 400 P2d 509; Carey v. Hays, (1965) 243 Or 73, 409 P2d 899.

29.310

NOTES OF DECISIONS

1. Nature and function of allegations
2. Sufficiency of allegations
3. Interrogatories
4. Time for serving allegations and interrogatories
5. Objections

1. Nature and function of allegations

The allegations are in the nature of a complaint. Smith v. Conrad, (1892) 23 Or 206, 31 P 398; Willis v. Holmes, (1895) 28 Or 265, 42 P 989; Overturff v. Carroll, (1923) 109 Or 326, 219 P 1081; Oregon Cred., Inc. v. Oliver, (1928) 125 Or 307, 267 P 52; Eisele v. Knight, (1963) 234 Or 468, 382 P2d 416.

Filing of allegations is necessary to confer upon the court jurisdiction of the subject matter; nor can any waiver by the garnishee of the allegations confer jurisdiction upon the court. Smith v. Conrad, (1892) 23 Or 206, 31 P 398; McLaughlin v. Aumsville Merc. Co., (1914) 74 Or 80, 144 P 1154.

The allegations are designed to enable the plaintiff to bring upon the record the cause of action which the original defendant had against the garnishee, and to which the plaintiff has become subrogated by virtue of the attachment. Case v. Noyes, (1888) 16 Or 329, 19 P 104.

The appearance of a garnishee at the time judgment was rendered against him did not confer jurisdiction to render judgment against him, in the absence of service of allegations and interrogatories upon him. Fraley v. Hoban, (1914) 69 Or 180, 185, 133 P 1190, 137 P 751.

Where on appeal the abstract of record does not show whether allegations and interrogatories were served, it must be determined that they were not served. Id.

2. Sufficiency of allegations

Plaintiff's allegations must contain the elements of a good cause of action in favor of the defendant against the garnishee. Overturff v. Carroll, (1923) 109 Or 326, 219 P 1081; Solomon v. Kenner, (1927) 121 Or 407, 255 P 471; Oregon Creditors, Inc. v. Oliver, (1928) 125 Or 307, 267 P 52.

The affidavit used to obtain the order on the garnishee to answer cannot be treated as the allegations. Case v. Noyes, (1888) 16 Or 539, 21 P 46.

The garnishee's answer may cure a defect in the allegations. Overturff v. Carroll, (1923) 109 Or 326, 219 P 1081.

The sufficiency of the allegations may be determined by considering them with the interrogatories. Id.

The allegations should show plaintiff's right to impound, and have applied to satisfaction of judgment, funds or property in the hands of the garnishee. Oregon Creditors v. Oliver, (1928) 125 Or 307, 267 P 52.

3. Interrogatories

Where plaintiff submitted allegations, but labeled them "Allegations and Interrogatories," the allegations were sufficient to give the court jurisdiction notwithstanding no interragotories were filed. Mann v. Gordon Co., (1915) 77 Or 457, 151 P 704.

4. Time for serving allegations and interrogatories

After the time has expired, the plaintiff cannot file his allegations and interrogatories. Case v. Noyes, (1888) 16 Or 539, 21 P 46.

5. Objections

The allegations in garnishment are subject to the same objections as a complaint in an original action. Credit Serv. Co. v. Peters, (1925) 115 Or 633, 239 P 810.

FURTHER CITATIONS: Carter, Rice & Co. v. Koshland, (1885) 12 Or 492, 8 P 556; Burns v. Payne, (1897) 31 Or 100, 49 P 884; Adamson v. Frazier, (1901) 40 Or 273, 66 P 810, 67 P 300; Rice v. West, (1916) 80 Or 640, 157 P 1105; Oregon Mill & Grain Co. v. Hyde, (1918) 87 Or 163, 169 P 791; Berliner v. Brown, (1960) 221 Or 475, 351 P2d 692; Union Oil Co. v. Pac. Whaling Co., (1965) 240 Or 151, 400 P2d 509.

29.320

NOTES OF DECISIONS

No demurrer by the garnishee is authorized. (Alaska) Faull v. Alaska Min. Co., (1883) 14 Fed 657, 8 Sawy 420.

Whenever garnishee has reason to believe his debt, which is evidenced by an overdue or demand negotiable instrument, has been assigned, he must set these facts up by way of defense in his answer. Phipps v. Rieley, (1887) 15 Or 494, 16 P 185.

The answer of the garnishee may be used as evidence upon the trial against the garnishee. Case v. Noyes, (1888) 16 Or 329, 19 P 104.

Garnishee must make candid and straightforward answers to the allegations presented; answers in the precise language of the allegations are held to deny the immaterial, and to confess the material facts. Dawson v. Maria, (1888) 15 Or 556, 16 P 413.

Doubtful and evasive answers are construed strictly against the garnishee. Id.

The response by the garnishee to the allegations and interrogatories constitutes his answer. Overturff v. Carroll, (1923) 109 Or 326, 219 P 1081.

The garnishee's answer may cure a defect in the allegations. Id.

FURTHER CITATIONS: Carter, Rice & Co. v. Koshland, (1885) 12 Or 492, 8 P 556; McLaughlin v. Aumsville Merc. Co., (1914) 74 Or 80, 144 P 1154; Oregon Mill & Grain Co. v. Hyde, (1918) 87 Or 163, 169 P 791; Union Oil Co. v. Pac. Whaling Co., (1965) 240 Or 151, 400 P2d 509.

29.330

NOTES OF DECISIONS

In the absence of allegations served or filed, no answer is required, and no judgment may be rendered against the garnishee. Case v. Noyes, (1888) 16 Or 329, 19 P 104.

Only where the garnishee refuses to furnish the required certificate or it is unsatisfactory may the proceedings provided for in this section be invoked. DeWitt v. Kelly, (1890) 18 Or 557, 23 P 666.

FURTHER CITATIONS: Murphy v. Bjelik, (1918) 87 Or 329, 169 P 520, 170 P 723; Union Oil Co. v. Pac. Whaling Co., (1965) 240 Or 151, 400 P2d 509.

29.340

NOTES OF DECISIONS

Plaintiff may except or reply to the garnishee's answer under oath for insufficiency. (Alaska) Faull v. Alaska Min. Co., (1883) 14 Fed 657, 8 Sawy 420.

A demurrer to the plaintiff's allegation by the garnishee is not provided for. Id.

Where plaintiff does not file a reply to the garnishee's answer, the allegations therein are considered admitted. Rice v. West, (1916) 80 Or 640, 157 P 1105.

A purported reply to an unsatisfactory certificate was insufficient to confer jurisdiction upon the court, no order of examination having been obtained and no allegations filed. McLaughlin v. Aumsville Merc. Co., (1914) 74 Or 80, 144 P 1154.

FURTHER CITATIONS: Case v. Noyes, (1888) 16 Or 329, 19 P 104; Burns v. Payne, (1897) 31 Or 100, 49 P 884; Ezell v. Equity Gen. Ins. Co., (1962) 219 F Supp 51.

29.350

NOTES OF DECISIONS

Issues of fact are tried as in ordinary law actions in proceedings against the garnishee. Overturff v. Carroll, (1923) 109 Or 326, 219 P 1081. Argonaut Ins. Co. v. Ketchan, (1966) 243 Or 376, 413 P2d 613, 19 ALR 3d 1386.

A garnishee alleging payment, denied by the plaintiff, has the burden of proof of this issue. Willis v. Holmes, (1895) 28 Or 265, 42 P 989.

Where the ownership of the funds in the garnishee's hands was the only issue raised, the burden of proof was on plaintiff. Prudential Trust Co. v. Merchants' Nat. Bank, (1913) 66 Or 224, 227, 133 P 1191.

The burden of proving a counterclaim alleged by the garnishee is upon him. Overturff v. Carroll, (1923) 109 Or 326, 219 P 1081.

The burden of proof is on the plaintiff. Id.

FURTHER CITATIONS: Case v. Noyes, (1888) 16 Or 329, 19 P 104; Eisele v. Knight, (1963) 234 Or 468, 382 P2d 416; Redwine v. Cedco Co., Inc., (1963) 235 Or 76, 382 P2d 855.

29.360

NOTES OF DECISIONS

The garnishment statutes do not permit a judgment against a garnishee for an amount of money or authorize the issuance of execution until a judgment has been had against the primary defendant. Union Oil Co. v. Pac. Whaling Co., (1965) 240 Or 151, 400 P2d 509.

The pleadings alleged that the garnishee bank had property "beyond the amount admitted in the certificate." Davis v. Bar T Cattle Co., (1967) 247 Or 437, 431 P2d 825.

29.370

NOTES OF DECISIONS

Judgment against a garnishee is unauthorized except upon refusal to furnish a certificate or upon the furnishing of a certificate that is unsatisfactory. DeWitt v. Kelly, (1890) 18 Or 557, 23 P 666; Murphy v. Bjelik, (1918) 87 Or 329, 169 P 520, 170 P 723.

A judgment against the garnishee, in the absence of filing of allegations and an order for his examination, is void. McLaughlin v. Aumsville Merc. Co., (1914) 74 Or 80, 144 P 1154; Fraley v. Hoban, (1914) 69 Or 180, 185, 133 P 1190, 137 P 751.

If garnishee had in his possession property belonging to the debtor at the time of service of attachment, and garnishee does not give a satisfactory certificate, the creditor is entitled to a judgment against the garnishee for the value of the property to the extent of the amount of the judgment against the debtor, with costs. Carter, Rice & Co. v. Koshland, (1886) 13 Or 615, 12 P 58.

Judgment against the garnishee is subject to the restriction that it shall not be for a greater amount than that recovered against the defendant in the action. Burns v. Payne, (1897) 31 Or 100, 102, 49 P 884.

Generally a creditor has no greater rights against a garnishee than the defendant had before the writ was served; an exception exists where the debtor must perform a mere formality in order to fix the garnishee's liability to the debtor, in which case the garnishee may be garnished in the absence of the performance of the formalities. Id.

The garnishee cannot be held liable unless he is indebted to the defendant at the time of the commencement of the garnishment proceeding. Scheuerman v. Mathison, (1914) 74 Or 40, 46, 144 P 1177.

Where an employer is insured against losses incurred from the payment of a judgment to an employe injured in performance of his employment, the insurer may not be garnished until such a judgment has been paid. Id.

FURTHER CITATIONS: Norton v. Winter, (1853) 1 Or 47; Prudential Trust Co. v. Merchants' Nat. Bank, (1913) 66 Or 224, 133 P 1191; Rice v. West, (1916) 80 Or 640, 157 P 1105; Overturff v. Carroll, (1923) 109 Or 326, 219 P 1081; Union Oil Co. v. Pac. Whaling Co., (1965) 240 Or 151, 400 P2d 509.

29.380

NOTES OF DECISIONS

1. In general

The rendition of a judgment for defendant operates as a release of the attached real property. Nichols v. Ingram, (1915) 75 Or 439, 444, 146 P 988; Willamette Coll. & Cred. Serv. v. Henry, (1932) 138 Or 460, 7 P2d 261.

Judgments are not taken on attachments, but are given in actions wherein attachments may be or have been issued. Mayer v. Cahalin, (1879) 5 Sawy 355, Fed Cas No. 9,340.

The legislative intent was to make property attached applicable to payment of the judgment. Carter, Rice & Co. v. Koshland, (1886) 13 Or 615, 12 P 58.

This section, as amended, has no application to the law of executions on judgments or decrees. Miller v. Shute, (1910) 55 Or 603, 107 P 467.

One who purchases attached property after rendition of a judgment in favor of the defendant, though pending an appeal which was not disclosed by the record, takes it free from any rights of the attaching creditor. Nichols v. Ingram, (1915) 75 Or 444, 146 P 988.

2. Order to sell attached property

There need be no order directing sale of the attached property if that property consists of a debt that has matured and is due. Murphy v. Bjelik, (1918) 87 Or 329, 169 P 520, 170 P 723; Hudelson v. Sanders-Swafford Co., (1924) 111 Or 600, 227 P 310.

An order for sale of attached property is not required when nothing that was attached remains to be sold. Credit Serv. Co. v. Furney, (1929) 128 Or 21, 271 P 738.

3. Prerequisites

The writ must be executed and the return made before the requirement of an order can be met. Gerdes v. Sears, (1886) 13 Or 358, 10 P 631.

There can be no valid order of sale if the court has not acquired jurisdiction over the res. Starkey v. Lunz, (1910) 57 Or 147, 110 P 702, Ann Cas 1912D, 783.

4. Time for making

The order for sale of attached property must be made when judgment is given. Bremer v. Fleckenstein, (1881) 9 Or 266, 261 P 422; Hudelson v. Sanders-Swafford Co., (1924) 111 Or 600, 227 P 310.

The judgment may be amended so as to include an order for sale of attached property where all the parties whose rights could be affected by the amendment are before the court, have notice of the proposed amendment, and have not changed their position in reliance on the original judgment entry. Hudelson v. Sanders-Swafford Co., (1924) 111 Or 600, 227 P 310.

5. Effect

An order for the sale of attached property is no bar to an action for the recovery of the property which is exempt from execution, and duly claimed as such. Berry v. Charlton, (1882) 10 Or 362.

The lien of the attachment ripens into a judgment against the res when the order of sale is made. Katz v. Obenchain, (1906) 48 Or 352, 85 P 617, 120 Am St Rep 821.

6. Validity

An order of sale is not invalidated by the fact that the judgment debtor was theretofore adjudged a bankrupt, if the property ordered sold was attached more than four months prior to the adjudgment. Pelton v. Sheridan, (1915) 74 Or 176, 144 P 410.

7. Effect of plaintiff's failure to take order

An attachment lien is waived by plaintiff's failure to take an order for the sale of the attached property. Bremer v. Fleckenstein, (1881) 9 Or 266; Mertens v. No. State Bank, (1913) 68 Or 273, 135 P 885; Smith v. Dwight, (1916) 80 Or 1, 148 P 477, 156 P 573; Hudelson v. Sanders-Swafford Co., (1924) 111 Or 600, 227 P 310; Hill v. Wilson, (1927) 123 Or 193, 261 P 422; Liberman v. Low, (1934) 148 Or 359, 36 P2d 791; Henry v. Allen, (1943) 171 Or 676, 138 P2d 591.

Issuance of an attachment execution is unauthorized if the judgment does not order sale of the attached property. Smith v. Dwight, (1916) 80 Or 1, 148 P 477, 156 P 573, Ann Cas 1918D, 563.

8. Judgment against surety on dissolution bond

The surety is not discharged by failure to take judgment against it on dissolution bond. Hill v. Wilson, (1927) 123 Or 193, 261 P 422; First Nat. Bank v. M'Kean, (1922) 285 Fed 557.

The right to enter a judgment against the surety is not

lost or waived by omission to do so in a previous trial. Hill v. Wilson, (1927) 123 Or 193, 261 P 422.

If the surety by his undertaking consents that a judgment be rendered against him, in the absence of fraud or collusion, it may be entered without notice. McCargar v. Moore, (1918) 88 Or 682, 157 P 1107, 171 P 587, 173 P 258.

FURTHER CITATIONS: Dufernoy v. Stitzel, (1868) 3 Or 58; Williams v. Gallick, (1884) 11 Or 337, 3 P 469; Burns v. Payne, (1897) 31 Or 100, 49 P 884; McLaughlin v. Aumsville Merc. Co., (1914) 74 Or 80, 144 P 1154; Murphy v. Bjelik, (1918) 87 Or 329, 169 P 520, 170 P 723; Rogers v. King, (1967) 245 Or 627, 423 P2d 761.

29.510

NOTES OF DECISIONS

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

29.520

NOTES OF DECISIONS

This section was not unconstitutional as in violation of Ore. Const. Art. I, §19 abolishing imprisonment for debt. United States v. Walsh, (1867) Deady 281, Fed Cas No. 16,635; Norman v. Manciette, (1871) I Sawy 484, Fed Cas No. 10,300.

The provisions of this section, when used in conjunction with LOL 218 [ORS 23.080], spell out when civil arrest lies after judgment, i.e., body execution. Lane v. Word, (1913) 64 Or 389, 130 P 741; In re Level, (1916) 81 Or 298, 159 P 558; Mozorosky v. Hurlburt, (1923) 106 Or 274, 198 P 556, 211 P 893; In re Teeters, (1929) 130 Or 631, 280 P 660.

The United States suing for a penalty for selling unstamped matches may have defendant arrested. United States v. Walsh, (1867) Deady 281, Fed Cas No. 16,635.

Paragraphs (b), (d) and (e) of subsection (1) specifically point out the kinds and instances of fraud that will justify an arrest. Norman v. Zieber, (1870) 3 Or 197, 204.

The object of arrest before judgment is to hold the person of the defendant so that if he does not satisfy a judgment which may be obtained against him, his body may be taken upon execution to enforce the same. United States v. Griswold, (1880) 11 Fed 807, 6 Sawy 255.

One obtaining money on false claims against the government may be arrested when sued for the penalties and damages incurred. Id.

Where the affidavit merely alleges that the defendant fraudulently contracted the debt sued on, the process is voidable. Barton v. Saunders, (1888) 16 Or 51, 55, 16 P 921, 8 Am St Rep 261.

Where no fraudulent action is shown on the part of defendant from whom it is sought to recover trust funds, his imprisonment under an execution against his person is unlawful. In re Level, (1916) 81 Or 298, 159 P 558.

In an action to recover money lost at gaming, defendant may be arrested. Mozorosky v. Hurlburt, (1923) 106 Or 274, 198 P 556, 211 P 893, 15 ALR 1076.

FURTHER CITATIONS: Toby v. Ferguson, (1868) 3 Or 27; In re Teeters, (1929) 130 Or 631, 280 P 660; Walker v. Sutherland, (1930) 133 Or 457, 289 P 387; Hanson v. Fowle, (1871) I Sawy 497, Fed Cas No. 6,041.

LAW REVIEW CITATIONS: 30 OLR 95.

29.530

NOTES OF DECISIONS

1. Affidavit

The verified complaint is an affidavit as to the facts stated therein where the cause of action and arrest are identical. United States v. Walsh, (1867) Deady 281, Fed Cas No. 16,635; United States v. Griswold, (1877) 5 Sawy 25, Fed Cas No. 15,266.

An affidavit in the language of the statute is voidable, not void, and a writ of habeas corpus will not issue when such is the case. Norman v. Zeiber, (1870) 3 Or 197; Barton v. Saunders, (1888) 16 Or 51, 16 P 921, 8 Am St Rep 261.

Failure to state the kind of matches sold without being stamped does not render affidavit for arrest insufficient in action for penalty. United States v. Walsh, (1867) Deady 281, Fed Cas No. 16,635.

The affidavit should state such facts as would show that the case is clearly within the meaning of the statute. Norman v. Zeiber, (1870) 3 Or 197.

Jurisdiction of the court to issue the writ is made to depend on the affidavit. Id.

An affidavit stating in the language of the statute that the defendant has been guilty of fraud in contracting the debt and that he has removed and disposed of his property with intent to defraud his creditors is not defective in substance. Barton v. Saunders, (1888) 16 Or 51, 16 P 921, 8 Am St Rep 261.

That the probative facts of the fraud in contracting the obligation are not stated in the affidavit for arrest is not a defect of substance. Id.

2. Undertaking

The United States as plaintiff need not furnish an undertaking. United States v. Walsh, (1867) Deady 281, Fed Cas No. 16,635; United States v. Griswold, (1877) 5 Sawy 25, Fed Cas No. 15,266.

3. Writ of arrest

All the facts that confer jurisdiction need not be recited in the writ of arrest, although they should appear in the record and files of the court. Norman v. Zieber, (1870) 3 Or 197.

FURTHER CITATIONS: Lane v. Ball, (1917) 83 Or 404, 160 P 144, 163 P 975; United States v. Griswold, (1880) 6 Sawy 255, 11 Fed 807; Hanson v. Fowle, (1871) Fed Cas No. 6041.

29.540

NOTES OF DECISIONS

Where a process is voidable, a party must correct it by motion if it is attacked. Barton v. Saunders, (1888) 16 Or 51, 16 P 921, 8 Am St Rep 261.

Want of prior affidavit or undertaking urged in support of motion to vacate arrest in qui tam action for money paid on false claim was not cause for sustaining the motion. United States v. Griswold, (1877) 5 Sawy 25, Fed Cas No. 15,266.

FURTHER CITATIONS: In re Teeters, (1929) 130 Or 631, 280 P 660; Mayer v. Cahalin, (1879) 5 Sawy 355, Fed Cas No. 9,340.

29.550

CASE CITATIONS: Barton v. Saunders, (1888) 16 Or 51, 16 P 921, 8 Am St Rep 261; Mayer v. Cahalin, (1879) 5 Sawy 355, Fed Cas No. 9,340.

29.560

NOTES OF DECISIONS

No agreement to pay the judgment which might be recovered against the defendant need appear in the bond or undertaking. Paddock v. Hume, (1876) 6 Or 82; Taylor v. Fleckenstein, (1887) 30 Fed 99.

Holding defendant's case over to the next term of court is one of the activities of the court for which surety undertakes to keep defendant available. Waldron v. Harrison, (1863) 2 Or 87.

The omission of the word "dollars" in the undertaking is not fatal. Whitney v. Darrow, (1875) 5 Or 442.

The bail is not merely the special bail of the common law given to the sheriff for the appearance of the defendant, but is also the equivalent in operation and effect of the common-law bail to the action. United States v. Griswold, (1880) 11 Fed 807, 6 Sawy 255.

If the arrested defendant is not charged in execution within a certain time after judgment, the court may order his discharge. Id.

An agreement to pay the judgment is not prohibited and where the surety undertakes to do so he will be liable thereon. Taylor v. Fleckenstein, (1887) 30 Fed 99.

FURTHER CITATIONS: United States v. Griswold, (1877) 5 Sawy 25, Fed Cas No. 15,266.

29.570

CASE CITATIONS: Taylor v. Fleckenstein, (1887) 30 Fed 99.

29.580

NOTES OF DECISIONS

On failure of the sureties to justify within 10 days after objection, a party is not entitled to substitute a new undertaking on appeal with different sureties, despite the language of D 527 [now ORS 19.023]. Simison v. Simison, (1881) 9 Or 335.

Justification of sureties on appeal, according to OL550 [now ORS 19.023], should be in accordance with this section; where notice of such justification is not timely the appeal may be dismissed. McDonald v. McDonald, (1921) 99 Or 225, 195 P 361.

The justification must be before a judge or clerk of the court in which the action is pending; where the sureties on an appeal undertaking live in another county the court cannot order the justification to be had there. Larsen v. Lootens, (1922) 102 Or 579, 194 P 699, 203 P 621.

FURTHER CITATIONS: Iltz v. Krieger, (1922) 104 Or 59, 202 P 409, 206 P 550; Rogers v. Day, (1962) 232 Or 185, 375 P2d 63.

29.590

NOTES OF DECISIONS

The justification need only be made after exception to the sufficiency of the sureties. Holcomb v. Teal, (1873) 4 Or 352.

A justification is not completed until a finding that the surety is sufficient is indorsed on the undertaking. Moorehouse v. Weister, (1910) 56 Or 126, 95 P 497, 107 P 470, 108 P 121.

The personal presence of the surety before one of the designated officers is required on justification. Logan v. Cross, (1920) 98 Or 274, 192 P 656, 1119.

An examination upon written interrogatories of a surety who does not appear before the judge or clerk is not sufficient. Id.

FURTHER CITATIONS: Hughes v. Clemens, (1895) 28 Or 440, 42 P 617; Corbin Co. v. Preston, (1923) 109 Or 230, 212 P 541, 218 P 917; Rogers v. Day, (1962) 232 Or 185, 375 P2d 63.

29.600

NOTES OF DECISIONS

A negation that the sureties do not belong to the class prohibited from becoming sureties need not appear in the affidavit of the sureties to their qualifications. Holcomb v. Teal, (1873) 4 Or 352.

Sureties in an undertaking on appeal must have the qualifications here prescribed. Brown v. Jessup, (1890) 19 Or 288, 290, 24 P 232.

If sufficiency of surety is excepted to and surety fails to justify, he is released from liability. Rogers v. Day, (1962) 232 Or 185, 375 P2d 63. **Distinguished in** Aldrich v. Forbes, (1963) 237 Or 559, 385 P2d 618 and Rogers v. King, (1967) 245 Or 627, 423 P2d 761.

LAW REVIEW CITATIONS: 8 OLR 31.

29.610

NOTES OF DECISIONS

The finding that the surety is sufficient is evidenced by the indorsement on the undertaking. Moorehouse v. Weister, (1910) 56 Or 126, 95 P 497, 107 P 470, 108 P 121.

The proceedings for justification should be evidenced by an indorsement on the undertaking by the officer before whom the examination is made, or by some written memorandum indicating that the undertaking is approved. Corbin Co. v. Preston, (1923) 109 Or 230, 212 P 541, 218 P 917.

Justification is not complete until after the examination of one of the sureties, and waiver of examination of the other surety, and the reduction of such examination to writing, the signing of the same by the sureties when requested, and the finding of the judge that the sureties were sufficient. Id.

29.620

NOTES OF DECISIONS

The word "sheriff" in subsection (1) includes a constable. Hume v. Norris, (1875) 5 Or 478.

29.650

ATTY. GEN. OPINIONS: Jurisdiction of county court to refund amount of judgment to bondsmen, 1926-28, p 381.

29.660

ATTY. GEN. OPINIONS: Deposit of bail with clerk of court, 1942-44, p 309.

29.670

ATTY. GEN. OPINIONS: Deposit of bail with clerk of court, 1942-44, p 309; authority to exact fee for performance of duties of clerk, (1971) Vol 35, p 454.

29.700

LAW REVIEW CITATIONS: 8 OLR 118.

29.810 to 29.910

CASE CITATIONS: Mazama Tbr. Prod. v. Taylor, (1965) 239 Or 568, 399 P2d 26; Denny v. Alder, (1971) 258 Or 295, 482 P2d 723.

LAW REVIEW CITATIONS: 47 OLR 268.

29.810

NOTES OF DECISIONS

The remedy provided by this section is substantially the ancient remedy of replevin. Moser v. Jenkins, (1875) 5 Or 447; Surles v. Sweeney, (1883) 11 Or 21, 4 P 469; Guille v. Wong Fook, (1886) 13 Or 577, 585, 11 P 277; Kimball Co. v. Redfield, (1898) 33 Or 292, 294, 54 P 216; Casto v. Murray, (1905) 47 Or 57, 65, 81 P 388, 883; Freeman v. Trummer, (1907) 50 Or 287, 292, 91 P 1077; Krebs Hop Co. v. Taylor, (1908) 52 Or 627, 97 P 44, 98 P 494; O'Sullivan v. Blakely, (1909) 54 Or 551, 104 P 297; Reed.v. Mills, (1916) 78 Or 558, 154 P 113; Ylvich v. Kalafate, (1939) 162 Or 365, 92 P2d 178.

In this action, prevailing party's judgment is in the alternative, for the return of the property, or its value if return in specie cannot be had. Coos Bay R. Co. v. Siglin, (1898) 34 Or 81, 53 P 504; McNeff v. So. Pac. Co., (1912) 61 Or 22, 120 P 6.

Exempt property wrongfully seized is recoverable by an action under the statute, although ordered sold. Berry v. Charlton, (1882) 10 Or 362.

In an action for recovery of personalty, if defendant remains in possession of the property claimed under a claim property bond, upon verdict and judgment for plaintiff, defendant cannot object to indefiniteness of description in the complaint. Foredice v. Rinehart, (1883) 11 Or 209.

The nature of claim and delivery is auxiliary. Carlon v. Dixon, (1885) 12 Or 144, 6 P 500.

This statutory action is a substitute for the common-law remedy of replevin. Mayes v. Stephens, (1901) 38 Or 512, 63 P 760, 64 P 319.

Right of possession is the issue usually tried in the action under the statute; ownership being important only to establish that right. Id.

Any person having an interest in personal property, coupled with a right to immediate possession, acquires such an ownership as entitles him to invoke the remedy the action affords. Backhaus v. Buells, (1903) 43 Or 558, 570, 72 P 976, 73 P 342.

The provisional remedy of claim and delivery is not entirely coordinate with common law replevin, but it conforms to the rule that where property is seized for a tax on a warrant not void on its face, such property cannot be replevied by defendant in the tax warrant. O'Sullivan v. Blakely, (1909) 54 Or 551, 104 P 500.

An action of claim and delivery sounds in tort. Parish v. Columbia Nat. Bank, (1932) 139 Or 126, 8 P2d 584.

Either party to a chattel mortgage, even after condition broken and before mortgagee has taken possession, may maintain this action to recover possession for conversion. Commercial Sec., Inc. v. Mast, (1934) 145 Or 394, 28 P2d 635.

A corporation seeking to recover corporate records in the possession of a former officer of the corporation may do so by mandamus as replevin or claim and delivery would be inadequate. Hunt v. Ketell, (1953) 197 Or 659, 253 P2d 272.

FURTHER CITATIONS: Dober v. Ukase Inv. Co., (1932) 139 Or 626, 10 P2d 356; Ashbaugh v. McKinney, (1948) 182 Or 652, 189 P2d 583; South Seattle Auto Auction, Inc. v. Ladd, (1962) 230 Or 350, 370 P2d 630; White v. Lewis, (1964) 236 Or 518, 388 P2d 750.

29.820

NOTES OF DECISIONS

The affidavit is no part of the pleadings, and the facts therein set forth form no part of the issues in the case. Moser v. Jenkins, (1875) 5 Or 447; Taylor v. Brown, (1907) 49 Or 423, 90 P 673.

The term "owner," as used in replevin statutes, refers to a right to the possession. Lewis v. Birdsey, (1890) 19 Or 164, 26 P 623; Kimball Co. v. Redfield, (1898) 33 Or 292, 299, 54 P 216; Backhaus v. Buells, (1903) 43 Or 558, 72 P 976, 73 P 342.

Sureties' demurrer to plaintiff's action on claim and delivery bond on ground that affidavit was signed by principal instead of the justice, as required by statute, was bad where principal had got and kept possession of the property by virtue of the bond, but had lost in his replevin action against plaintiff. Carlon v. Dixon, (1885) 12 Or 144, 6 P 500.

The affidavit is the foundation of the jurisdiction of the court to order delivery. Id.

Any party having an interest in personalty, coupled with a right to immediate possession thereof, is entitled to invoke the remedy provided by this action. Backhaus v. Buells, (1903) 43 Or 558, 72 P 976, 73 P 342.

The affidavit cannot aid a defective answer. Taylor v. Brown, (1907) 49 Or 423, 425, 90 P 673.

The affidavit need not be made when an immediate delivery is not claimed. O'Sullivan v. Blakely, (1909) 54 Or 551, 104 P 297.

FURTHER CITATIONS: Allen v. Agee, (1888) 15 Or 551, 16 P 637, 3 Am St Rep 206; Kee v. Dunbar, (1891) 20 Or 416, 26 P 275; Higgins v. Field, (1935) 150 Or 528, 47 P2d 235; McConnaughy v. Wiley, (1888) 13 Sawy 148, 33 Fed 449.

29.830

NOTES OF DECISIONS

A defect or informality in the order for delivery does not void the proceedings where the required affidavit has been given. Carlon v. Dixon, (1885) 12 Or 144, 6 P 500.

FURTHER CITATIONS: Foredice v. Rinehart, (1883) 11 Or 208, 8 P 285; Ashbaugh v. McKinney, (1948) 182 Or 652, 189 P2d 583.

29.840

NOTES OF DECISIONS

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

The property must be described with reasonable certainty. Foredice v. Rinehart, (1883) 11 Or 208, 8 P 285.

The sureties and the plaintiff are not exonerated by an irregularity in the proceeding where the property has been obtained. Carlon v. Dixon, (1885) 12 Or 144, 146, 6 P 500.

Sureties are not exonerated because the order for delivery was improperly signed by the plaintiff instead of a justice. Id.

Property taken from the sheriff under a replevin bond still remains in custodia legis. Coos Bay R. Co. v. Wieder, (1894) 26 Or 453, 456, 38 P 338.

A recital in a replevin bond as to the value of the property is binding on all the signers of such bond in an action thereon. Capital Lumbering Co. v. Learned, (1900) 36 Or 544, 552, 59 P 454, 78 Am St Rep 792.

To avoid liability on the replevin bond, the plaintiff must seek defendant and there tender the property to him in the same condition as when received; but where such a course is difficult because of the bulk or weight of the property, it is sufficient to offer to redeliver it. Id.

A tender in satisfaction of a replevin judgment should be made to the holder of the judgment. Id.

A delivery of the property to one member of a partnership satisfies the judgment. Leve v. Frazier, (1902) 42 Or 141, 70 P 376.

Failure to prosecute the action with effect is not a breach of the undertaking. Peacock v. Kirkland, (1915) 74 Or 279, 145 P 281.

FURTHER CITATIONS: Mishler v. Edmundson, (1919) 92 Or 347, 180 P 934; Burkitt v. Vail, (1928) 123 Or 461, 238 P 1114, 260 P 1014; Ashbaugh v. McKinney, (1948) 182 Or 652, 189 P2d 583.

29.860

NOTES OF DECISIONS

The redelivery bond may be made payable to the plaintiff. Kimball Co. v. Bleick, (1893) 24 Or 59, 32 P 766.

The plaintiff in the claim and delivery action, as the real party in interest, may maintain an action in his own name on a redelivery bond made payable to the sheriff. Id.

Costs in the trial and appellate courts are within the terms of a redelivery bond to pay any sum recovered. Mishler v. Edmunson, (1919) 92 Or 347, 180 P 934.

Sureties upon a redelivery bond are not exonerated by the execution of a supersedeas bond by the defendant on appeal from the judgment. Id.

An action on a redelivery bond may be instituted without plaintiff exhausting his right by execution and without a previous demand. Burkitt v. Vail, (1928) 123 Or 461, 238 P 1114, 260 P 1014.

A return, in substantially the same condition, of property taken under a redelivery bond is a satisfaction of a judgment pro tanto. Id.

A defendant may, but is under no duty to, post bond when his property has been replevined. Ash v. Kilander, (1960) 220 Or 438, 348 P2d 1099.

LAW REVIEW CITATIONS: 47 OLR 268.

29.870

LAW REVIEW CITATIONS: 8 OLR 31.