Chapter 30

Actions and Suits in Particular Cases

30.010

NOTES OF DECISIONS

The right of action under this section is confined to the minority of the child. Putnam v. So. Pac. Co., (1891) 21 Or 230, 244, 27 P 1033; Craft v. No. Pac. R. Co., (1894) 25 Or 275, 35 P 250.

The statute giving a right of action for such loss as the estate has sustained by the death of a person begins where this one ends; the estate could not be injured while the child would be supposed to continue in the service of the parent, and, on the other hand, the parent could not be injured when the child is relieved of the duty of rendering service to him, or has attained the age of majority. Schleiger v. No. Terminal Co., (1903) 43 Or 4, 72 P 324; Thompson v. Union Fishermen's Coop. Packing Co., (1926) 118 Or 436, 235 P 694, 246 P 733.

It may be presumed after verdict that proof of the father's death was made at the trial in the proof that the mother was next of kin. David v. Waters, (1884) 11 Or 448, 5 P 548.

This section and H 371 [ORS 30.020] should be construed together. Putnam v. So. Pac. Co., (1891) 21 Or 230, 27 P 1033.

The right of action under this section is unaffected by the existence of a right of action in the personal representative for wrongful death of the child. Schleiger v. No. Terminal Co., (1903) 43 Or 4, 72 P 324.

The Employers' Liability Act, giving a right of action for death caused by violation of the Act and repealing all Acts or parts of Acts inconsistent therewith, does not repeal this section. McFarland v. Ore. Elec. Ry., (1914) 70 Or 27, 32, 138 P 458, Ann Cas 1916B, 527.

Where none of the relatives named in the Employers' Liability Act survive and the child's death has resulted from a violation of duty imposed by such Act, an action may be maintained by a personal representative to recover damages for the benefit of the estate of the deceased. Thompson v. Union Fishermen's Coop. Packing Co., (1926) 118 Or 436, 235 P 694, 246 P 733.

This section merely preserves the common law right of action in the parent where a child is injured and creates an additional right in the parent when the child dies. Whang v. Hong, (1955) 206 Or 125, 290 P2d 185, 291 P2d 720.

All defenses which would lie against the child had he lived are available against the parent when pursuing his cause of action under this section. Id.

A parent cannot recover under this section for death of his child where the guest statute would preclude the child himself from recovery. Id.

The right to damages under this section is limited to the value of the services of the child during his minority less the cost of rearing the child. Escobedo v. Ward, (1970) 255 Or 85, 464 P2d 698.

Measure of damage does not include an award for the loss of the companionship and society of the child. Escobedo v. Ward, (1970) 255 Or 85, 464 P2d 698. **Distinguished** in Arrow Trans. Co. v. NW Grocery Co., (1971) 258 Or 363, 482 P2d 519.

FURTHER CITATIONS: Peters v. Johnson, (1928) 124 Or 237, 264 P 459; Ohio Cas. Ins. Co. v. Mallison, (1960) 223 Or 406, 354 P2d 800; Gunderson v. Barry, (1964) 239 Or 279, 397 P2d 196.

ATTY. GEN. OPINIONS: Right of parent of minor to waive, release or compromise claim by or against the minor, 1934-36, p 447.

LAW REVIEW CITATIONS: 1 WLJ 432, 535-538.

30.020

NOTES OF DECISIONS

1. In general
   (1) Action by personal representative
   (2) Action commenced within three years
   (3) Particular cases
2. Action for death of employe
3. Action for death of child
4. Action for death of spouse
5. Rights of heirs
6. Damages

1. In general

A new legal right and liability was created by this section. Perham v. Portland Gen. Elec. Co., (1898) 33 Or 451, 53 P 14, 72 Am St Rep 730, 40 LRA 799; Hansen v. Hayes, (1944) 175 Or 358, 154 P2d 202.

This statute does not provide that a right accruing to decedent is carried over to his personal representative; this is not a survival statute. Perham v. Portland Gen. Elec. Co., (1898) 33 Or 451, 53 P 14, 72 Am St Rep 730, 40 LRA 799; The Kain Maru, (1924) 2 Fed2d 121.

Although the decedent may have been killed instantly, a right of action exists. Perham v. Portland Gen. Elec. Co., (1898) 33 Or 451, 458, 53 P 14, 24, 72 Am St Rep 730, 40 LRA 799.

The amount recovered is the property of the decedent's estate. Olston v. Ore. Water, Power & Ry., (1908) 52 Or 343, 96 P 1095, 97 P 538, 20 LRA(NS) 915.

Statutes creating a liability for causing death, while not to be strictly construed, are not to be extended by implication, as they are in derogation of the common law. McClaugherty v. Rogue R. Elec. Co., (1914) 73 Or 135, 154, 140 P 64, 144 P 569.

No action lies under this section against him who caused an injury if decedent died as a result of an entirely different cause. Amoth v. United States, (1925) 3 Fed2d 848.

The right of action under this section is granted to the personal representative for the benefit of those specified in the statute and in that order. Ross v. Robinson, (1942) 169 Or 293, 128 P2d 956.

If any of the statutory beneficiaries are in existence there is no statutory right of action for death by wrongful act for the benefit of the estate, the only recovery being for the named beneficiaries; consequently, if the estate were required to reimburse the widow for medical and funeral expenses, the estate would have no statutory right of re-

covery against the tortfeasor, nor, in the absence of statute, would the estate have any right of action for death by wrongful act at common law. Hansen v. Hayes, (1944) 175 Or 358, 154 P2d 202.

A husband who murders his wife is not a widower qualified as a beneficiary, and there being no dependents, the personal representatives may maintain an action for the benefit of the estate. Apitz v. Dames, (1955) 205 Or 242, 287 P2d 585.

The purpose of this Act is to afford redress in wrongful death cases where no redress was obtainable at common law. Fergison v. Belmont Convalescent Hosp., (1959) 217 Or 453, 343 P2d 243.

For a case under this section to succeed, it is essential that the evidence show that the defendant owed a duty to the deceased which the latter could enforce. Id.

Recovery under this section is barred if the sole designated beneficiary under the statute was himself guilty of negligence which proximately contributed to the death of the decedent. Ditty v. Farley, (1959) 219 Or 208, 347 P2d 47.

The Oregon, rather than California, statute applied to an action between Oregon domiciliaries in an Oregon court, although the death occurred in California. DeFoor v. Lematta, (1968) 249 Or 116, 437 P2d 107.

This section does not limit recovery for wrongful death where the Oregon Employer's Liability Act applies and subjects the United States to liability for deaths. Binney v. United States, (1971) 329 F Supp 351.

(1) Action by personal representative. The personal representative represents collectively all who are interested in the continuance of the life, whether as creditors, heirs or distributees. Carlson v. Ore. Short Line Ry., (1892) 21 Or 450, 459, 28 P 497.

A foreign administrator may bring an action without qualifying under the probate law. Elliott v. Day, (1962) 218 F Supp 90. **Distinguished in** Gidinski v. McWilliams, (1970) 308 F Supp 772.

That a personal representative bring the action is a condition to the right. Richard v. Slate, (1964) 239 Or 164, 396 P2d 900. **Distinguished in** Nichols v. Wilbur, (1970) 256 Or 418, 473 P2d 1022.

A foreign administrator has no capacity to maintain an action for wrongful death in Oregon if the proceeds of any recovery go to decedent's estate. Gidinski v. McWilliams, (1970) 308 F Supp 772.

(2) Action commenced within three years. The time for commencement of the action is of the essence of the right and the right is lost if the time is disregarded. Laidlaw v. Ore. Ry. & Nav. Co., (1897) 81 Fed 876, 26 CCA 665.

The limitation for bringing an action under this section is not affected by ORS 12.150. Bengston v. Nesheim, (1958) 259 F2d 566.

The time for commencement of the action is not procedural but part of the substantive law. Richard v. Slate, (1964) 239 Or 164, 396 P2d 900.

The 1967 amendment enlarging the period of limitation applies to causes of action existing and not barred by the previous limitation. Nichols v. Wilbur, (1970) 256 Or 418, 473 P2d 1022.

(3) Particular cases. Where a death is caused by a maritime tort upon vessel in navigable waters, an action may be maintained under this section in admiralty. **In personam,** Holmes v. Ore. & Calif. Ry., (1880) 6 Sawy 262, 5 Fed 75; **in rem,** The Clatsop Chief, (1881) 7 Sawy 274, 8 Fed 163; The S.S. Oregon, (1890) 42 Fed 78; The Oregon, (1891) 45 Fed 62; The Oregon, (1896) 73 Fed 846; Laidlaw v. Ore. Ry. & Nav. Co., (1897) 81 Fed 876, 26 CCA 665; The Aurora, (1908) 163 Fed 633; The General Foy, (1910) 175 Fed 590; Aurora Shipping Co. v. Boyce, (1911) 191 Fed 960, 112 CCA 372.

An action against a county for death caused by a defective highway or bridge is within this statute. Coates v. Marion County, (1920) 96 Or 334, 189 P 903.

An admiralty court has jurisdiction of a libel against a vessel for the death of a longshoreman in consequence of injuries received on board the vessel, although the death occurred after he had been taken ashore. Vancouver S.S. Co. v. Rice, (1933) 288 US 445, 53 S Ct 420, 77 L Ed 885, aff'g 60 Fed 2d 793.

The administration by one person to another of alcoholic liquor for beverage purposes in such quantity as to cause death may constitute the basis of an action for wrongful death. Ibach v. Jackson, (1934) 148 Or 92, 35 P2d 672.

The doctrine of unseaworthiness can be a ground for recovery under this section. Tallmon v. Toko Kaium K.K. Kobe, (1967) 278 F Supp 452.

In an action by the personal representative for damages for his decedent's death caused by a collision with defendant's automobile, a demurrer to defendant's counterclaim for damage to his car was properly sustained, since any recovery by the representative would inure to the benefit of the widow who was the real party in interest. Natwick v. Moyer, (1945) 177 Or 486, 163 P2d 936.

Where there was no evidence that defendant's truck struck decedent's bicycle, that defendant stole up on decedent and frightened him so he lost control or that defendant failed to provide sufficient clearance, charge of negligently causing deceased's death was unsupported. Copenhaver v. Tripp, (1950) 187 Or 662, 213 P2d 450.

2. Action for death of employe

The Employers' Liability Act does not repeal this section, but must be construed herewith. Statts v. Twohy Bros. Co., (1912) 61 Or 602, 123 P 909; McFarland v. Ore. Elec. Ry., (1914) 70 Or 27, 138 P 458, Ann Cas 1916B, 527; Blair v. W. Cedar Co., (1915) 75 Or 276, 146 P 480; Niemi v. Stanley Smith Lbr. Co., (1915) 77 Or 221, 227, 147 P 532, 149 P 1033; Hawkins v. Anderson & Crowe, (1917) 84 Or 94, 164 P 556.

The Employers' Liability Act is exclusive of this section while the persons named survive. Evansen v. Grande Ronde Lbr. Co., (1915) 77 Or 1, 14, 149 P 1035; Niemi v. Stanley Smith Lbr. Co., (1915) 77 Or 221, 227, 147 P 532, 149 P 1033; Hawkins v. Anderson & Crowe, (1917) 84 Or 94, 100, 164 P 556.

Where none of the relatives named in the Employers' Liability Act are in existence, a personal representative may maintain an action under this section for the death of an employe. Niemi v. Stanley Smith Lbr. Co., (1915) 77 Or 221, 227, 147 P 532, 149 P 1033; Hawkins v. Anderson & Crowe, (1917) 84 Or 94, 100, 164 P 556.

Recovery under the Employers' Liability Act precludes a recovery under this section. Hawkins v. Anderson & Crowe, (1917) 84 Or 94, 164 P 556; Wilcox v. Warren Constr. Co., (1920) 95 Or 125, 186 P 13, 13 ALR 211.

The personal representative of a deceased employe covered by the Employers' Liability Act may bring an action in that capacity under this section, or in his capacity as a relative, if such is the case, named in that Act. Thompson v. Union Fishermen's Coop. Packing Co., (1926) 118 Or 436, 235 P 694, 246 P 273; Thompson v. Union Fishermen's Coop. Packing Co., (1929) 128 Or 172, 273 P 953.

An administrator may not sue for a claim under the Employers' Liability Law for the death of his intestate or settle a claim. Franciscovich v. Walton, (1915) 77 Or 36, 42, 150 P 261.

Recovery may not be had under this statute for the death of a railroad employe where the proof shows a cause of action under the Federal Employers' Liability Act. Kamboris v. Ore.-Wash. R.R. & Nav. Co., (1915) 75 Or 358, 146 P 1097.

Where any beneficiary named in the Employers' Liability Act is living and able to bring the action, no action lies by the personal representative of decedent. Fox v. Ungar, (1940) 164 Or 226, 98 P2d 717.

Amendment of complaint under death by wrongful act statute to base the claim on a violation of the Employers' Liability Act was a "new cause of action" and did not relate back to the date of the original complaint. Id.

3. Action for death of child

Negligence of infant's parents will not affect the rights of the plaintiff in an action under this section. MacDonald v. O'Reilly, (1904) 45 Or 589, 78 P 753; Bloomquist v. La-Grande, (1926) 120 Or 19, 251 P 252; Oviatt v. Camarra, (1957) 210 Or 445, 311 P2d 746.

The right of action conferred by ORS 30.010 upon the parents of a deceased child is unaffected by the right conferred upon the personal representative by this section. Schleiger v. No. Terminal Co., (1903) 43 Or 4, 72 P 324.

With reference to the statute giving a right of action to the father, mother or guardian for pecuniary loss of a minor child and that for such loss as the estate has sustained by his death, the one ends where the other begins; the estate could not be injured while the child would be supposed to continue in the service of the parent and, on the other hand, the parent could not be injured when the child is relieved of the duty of rendering service to him or has attained the age of majority. Id.

The personal representative of an unemancipated minor child may maintain an action for damages under this section against its parent when the death resulted from a wilful or malicious personal tort. Cowgill v. Boock, (1950) 189 Or 282, 218 P2d 445, 19 ALR 2d 405.

Award for death of three year old child did not render section unconstitutional for vagueness. Cox v. Remillard, (1956) 237 F2d 909.

4. Action for death of spouse

At common law the husband could maintain an action for injury to or death of his wife whereby he lost her services or consortium, but the wife could not maintain a corresponding action. Kosciolek v. Portland Ry. Light & Power Co., (1916) 81 Or 517, 160 P 132.

Where a husband brought an action for personal injuries and compromised, his widow had no right of action after his death for the consequential injury to her. Id.

Pecuniary loss consists not only of the loss of financial assistance which might reasonably be expected to have been received from the deceased had she lived, but also the loss of other things which have a pecuniary worth, such as the loss of a mother's care and attention to the physical, moral and educational welfare of her children, and a husband's loss of her services in the household. Prauss v. Adamski, (1952) 195 Or 1, 244 P2d 598.

The pecuniary loss sustained by the widower and children is fixed as of the date of death and what may have transpired subsequently is wholly immaterial. Id.

A husband who murders his wife is not a widower qualified as a beneficiary under this section. Apitz v. Dames, (1955) 205 Or 242, 287 P2d 585.

Where personal representative brought an action for the benefit of the estate while the spouse still survived, amendment of the complaint after the period for bringing the action had run so as to benefit the surviving spouse was permitted. Ross v. Robinson, (1944) 174 Or 25, 147 P2d 204.

5. Rights of heirs

Decedent's heirs acquire no remedy for decedent's wrongful death under this section. Carlson v. Ore. Short Line Ry., (1892) 21 Or 450, 28 P 497; Olston v. Ore. Water, Power & Ry. Co., (1908) 52 Or 343, 96 P 1095, 97 P 538, 20 LRA(NS) 915.

Only in the event of the nonexistence of preferred beneficiaries is there a right of action in favor of other beneficiaries. Ross v. Robinson, (1942) 169 Or 293, 128 P2d 956.

If there is a surviving spouse or surviving dependants the cause of action belongs to them rather than to the estate. Anderson v. Clough, (1951) 191 Or 292, 230 P2d 204.

6. Damages

The pecuniary loss suffered by the estate of the decedent is the probable amount of what he would save from his earnings during the residue of his life in his business or profession, taking into consideration his age, ability, disposition to labor, habits of living and expenditures. Carlson v. Ore. Short Line Ry., (1892) 21 Or 450, 456, 28 P 497, 499; Gabrielson v. Dixon, (1930) 133 Or 567, 291 P 494; Scott v. Brogan, (1937) 157 Or 549, 73 P2d 688; Holmes v. Ore. & Calif. Ry., (1880) 5 Fed 523, 6 Sawy 262, 276; Ladd v. Foster, (1887) 31 Fed 827, 832, 12 Sawy 547; Holland v. Brown, (1888) 35 Fed 43, 48, 13 Sawy 284; Meier v. Bray, (1970) 256 Or 613, 475 P2d 587; Arrow Trans. Co., v. NW Grocery Co., (1971) 258 Or 363, 482 P2d 519.

Exemplary damages are not recoverable. Holmes v. Ore. & Calif. R. Co., (1880) 5 Fed 75, 542, 6 Sawy 262, 276.

The amount specified in the section is the utmost that can be in controversy. Holmes v. Ore. & Calif. R. Co., (1881) 9 Fed 229, 246, 7 Sawy 380.

Insurance recovered cannot be set off against a claim for damages. Ladd v. Foster, (1887) 31 Fed 827, 833, 12 Sawy 547.

The personal representative is entitled to recover the amount of the present value of the decedent's estate, taking into account his expectancy of life, and his probable accumulations during that period. Oregon Round Lbr. Co. v. Portland & Asiatic S.S. Co., (1908) 162 Fed 912.

An amount which if invested at the rate of four per cent per annum would produce an annuity in the amount of the decedent's net earnings during his expectancy of life was considered as fair and equitable damages. Id.

Increased costs of living to the widow, comfort, love, consolation and affection to the bereft, the financial responsibility of the one causing the death, equal distribution of justice, or dictates of humanity do not warrant a finding of pecuniary loss where none is shown. (Alaska) The Princess Sophia, (1929) 35 Fed2d 736.

Health, earning capacity, employment, contributions to charity, "living well," and being a "good fellow," without some evidence of accumulation and saving habit, do not create a presumption to support a finding that a deceased would leave an estate. Id.

The amount of compensation is a question for the jury and is not a question of law for the court. Gabrielson v. Dixon, (1930) 133 Or 567, 291 P 494.

Damages are awarded in all cases, except where there is no widow, widower or dependents, upon the principle of compensation to repair the pecuniary loss sustained by the person or persons in the class of beneficiaries for which the action is to be brought under the statute; and the damages are the aggregate of the pecuniary losses of each of the beneficiaries of the action within the class and are measured by, and limited to the loss of the pecuniary benefits which those beneficiaries might reasonably be expected to have derived from the deceased had his life not been terminated. Hansen v. Hayes, (1944) 175 Or 358, 154 P2d 202.

If there is no widow, widower or dependents, the action is brought for the benefit of the estate and the damages would be measured by the "benefit of the estate rule" as established in the cases which arose under the death by wrongful act statute prior to its amendment in 1939. Id.

Pecuniary loss is dependent not only upon actual earnings or contributions to support but also other things, such as services, which have a pecuniary worth. Durkoop v. Mishler, (1963) 233 Or 243, 377 P2d 267.

The loss to beneficiaries of the estate should be reduced to present value. Meier v. Bray, (1970) 256 Or 613, 475 P2d 587.

In reducing a future pecuniary loss to present value, the most satisfactory method to determine the rate of return to be used is to allow the trier of facts to make a finding of a reasonable rate based on evidence introduced or judicially noticed. Id.

In an action brought for the benefit of a deceased wife's estate it was properly shown that the husband's property was acquired through the joint efforts of both the husband and wife, and also the nature of her duties in the conduct of their 18 acre home place. Ross v. Robinson, (1942) 169 Or 293, 124 P2d 918.

Evidence that the life expectancy of a 48 year old woman was 23.36 years and that she performed the ordinary work of a housewife warranted submission to the jury of the question of pecuniary loss to her estate in an action for the benefit thereof. Id.

Where a widow as beneficiary recovered damages under this section, but the trial court disallowed funeral expenses, recovery by her of such expenses in a subsequent action under the family expense statute was denied on the grounds that she should have appealed in the wrongful death action. Cowgill v. Boock, (1950) 189 Or 282, 218 P2d 445.

FURTHER CITATIONS: Miller v. So. Pac. Co., (1891) 20 Or 285, 26 P 70; Putnam v. So. Pac. Co., (1891) 21 Or 230, 27 P 1033; Nordlund v. Lewis & Clark R. Co., (1932) 141 Or 83, 15 P2d 980; The Oregon, (1898) 89 Fed 520; Wallin v. Rankin, (1949) 173 Fed 2d 488; Whang v. Hong, (1955) 206 Or 125, 290 P2d 185, 291 P2d 720; Barnes v. Union Pac. R.R., (1956) 139 F Supp 198; Clement v. Cummings, (1957) 212 Or 161, 317 P2d 579; Hess v. United States, (1958) 259 F2d 285; Hess v. United States, (1959) 361 US 314, 80 S Ct 341, 4 L Ed 2d 305; Harp v. Montgomery Ward & Co., (1963) 223 F Supp 781; Escobedo v. Ward, (1970) 255 Or 85, 464 P2d 698.

ATTY. GEN. OPINIONS: Relation of Workmen's Compensation Act to this section, 1928-30, p 107; taxability of money recovered under the wrongful death statute, 1948-50, p 271.

LAW REVIEW CITATIONS: 2 OLR 128; 6 OLR 278; 8 OLR 81; 9 OLR 199; 17 OLR 218; 21 OLR 207; 33 OLR 89; 47 OLR 383-387; 1 WLJ 35, 128-133, 616-626.

30.030

LAW REVIEW CITATIONS: 29 OLR 31.

30.040

LAW REVIEW CITATIONS: 29 OLR 31.

30.050

LAW REVIEW CITATIONS: 29 OLR 31.

30.060

LAW REVIEW CITATIONS: 29 OLR 31.

30.070

LAW REVIEW CITATIONS: 29 OLR 31.

30.080

NOTES OF DECISIONS

This section requires the injured person to present a prima facie case sufficient to go to the jury by evidence other than his own testimony before he may recover a judgment. Schnell v. Mullen, (1960) 222 Or 454, 353 P2d 567; Bush v. Johnson, (1964) 237 Or 173, 390 P2d 932; Sides v. Driscoll, (1966) 244 Or 76, 415 P2d 760.

This section is not retrospective. Wiebe v. Seely, (1959) 215 Or 331, 335 P2d 379.

This section was no limitation on the amount recoverable from the surviving spouse of the tort-feasor sued under the family car doctrine. Id.

"Competent, satisfactory evidence other than the testimony of the claimant" requires that the claimant make out a prima facie case before he is entitled to testify as a witness. DeWitt v. Rissman, (1959) 218 Or 549, 346 P2d 104.

The personal representative of a deceased wrongdoer may waive the provision requiring evidence other than the testimony of the injured person. Vancil v. Poulson, (1964) 236 Or 314, 388 P2d 444.

The limitation on a cause of action against a servant or agent does not limit respondeat superior liability of the principal or master. Bush v. Johnson, (1964) 237 Or 173, 390 P2d 932.

Evidence other than plaintiff's testimony was sufficient. Royse v. Williams, (1967) 246 Or 213, 425 P2d 163.

FURTHER CITATIONS: Cowgill v. Boock, (1950) 189 Or 282, 218 P2d 445; Apitz v. Dames, (1955) 205 Or 242, 287 P2d 585; Kaufman v. Fisher, (1962) 230 Or 626, 371 P2d 948; Wink v. Marshall, (1964) 237 Or 589, 392 P2d 768; Harrison v. Avedovech, (1968) 249 Or 584, 439 P2d 877; Fabre v. Halvorson, (1968) 250 Or 238, 441 P2d 640; Marin v. Hahn, (1969) 252 Or 585, 451 P2d 465.

LAW REVIEW CITATIONS: 40 OLR 216; 44 OLR 169-171, 239; 49 OLR 53, 61; 1 WLJ 616; 7 WLJ 277.

30.090

NOTES OF DECISIONS

Insurance carried by a deceased Washington motorist in company authorized to do business in Oregon is an asset in Oregon supporting the appointment of an administrator. In re Vilas' Estate, (1941) 166 Or 118, 110 P2d 940.

30.100

NOTES OF DECISIONS

Survival of an action is a remedial matter and is governed by the law of the forum. In re Vilas' Estate, (1941) 166 Or 115, 110 P2d 940.

The claim against an insurer for a nonresident's tortious injury to a nonresident plaintiff in this state is an asset warranting the appointment of an administrator in this state. Id.

30.115

NOTES OF DECISIONS

1. In general
2. Guest
   (1) In general
   (2) Determining status
   (3) Contributory negligence
3. Gross negligence
   (1) Definition
   (2) Evidence of gross negligence
      (a) As a question of fact or law
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   (2) Guest
      (a) In general
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(3) Gross negligence
(a) Definition
(A) In general
(B) Indifference to consequences
(C) Lack of care
(b) Sufficiency of evidence
(A) As a question of fact or law
(B) Sufficient evidence
(C) Insufficient evidence
(c) Required contents of instructions
(4) Intoxication

1. In general

The statute is in derogation of the common law and must be strictly construed. Willoughby v. Driscoll, (1942) 168 Or 187, 120 P2d 768; 121 P2d 917; Senechal v. Bauman, (1962) 232 Or 217, 375 P2d 60.

This section is designed to relieve the host-driver of the consequences of ordinary negligence to his guest. Carlson v. Wagberg, (1948) 183 Or 95, 190 P2d 926; Steenson v. Robinson, (1964) 236 Or 414, 389 P2d 27.

One who rides with no previous understanding concerning the sharing of expenses, does not change his status by the gratuitous offer of a return favor. Johnson v. Kolovos, (1960) 224 Or 266, 355 P2d 1115; Gilmore v. Schiewe, (1964) 237 Or 98, 390 P2d 624. Gilmore v. Schiewe, supra, **distinguished in** Reed v. Wilson, (1966) 244 Or 388, 418 P2d 501.

2. Guest

(1) In general. Two elements must coexist to create the host-guest relationship: (a) there must be no substantial benefit to the defendant, and (b) the invitation to the passenger must be motivated predominantly by defendant's spirit of hospitality. Spring v. Liles, (1963) 236 Or 140, 387 P2d 578; Tarbet v. Green, (1964) 236 Or 361, 388 P2d 468; Ashland v. Pac. Power & Light Co., (1964) 239 Or 241, 395 P2d 420; Guritz v. Foster, (1967) 247 Or 550, 431 P2d 6; United States Nat. Bank v. Njust, (1971) 257 Or 563, 480 P2d 420. Spring v. Liles, supra, and Tarbet v. Green, supra, **distinguished in** Zwick v. Burdin, (1965) 239 Or 629, 399 P2d 362.

This section does not apply where an owner-host who continues to ride in his car turns over to his guest the responsibility for driving the car. Prosch v. Cater, (1968) 252 Or 63, 448 P2d 380.

(2) Determining status. Any bona fide prearrangement for sharing expense will take the occupant out of the guest category. Johnson v. Kolovos, (1960) 224 Or 266, 355 P2d 1115; Skow v. Shulps, (1960) 224 Or 548, 356 P2d 521; Kaufman v. Fisher, (1962) 230 Or 626, 371 P2d 948; Sylvia v. Helfer, (1965) 241 Or 98, 404 P2d 238.

To change from a nonpaying guest passenger status there must at least be evidence that the acceptance of the gratuitous transportation was impliedly or expressly rescinded. Senechal v. Bauman, (1962) 232 Or 217, 375 P2d 60.

Status as a nonpaying guest is not terminated merely by protest against the conduct which caused the injury. Id.

A rider who confers a substantial benefit on the operator or owner is a passenger despite the fact the rider's interests are also advanced by the trip. McBee v. Knight, (1962) 233 Or 160, 377 P2d 163.

The "payment" to take a passenger out of the operation of this statute need not be by a contract enforceable at law. Steenson v. Robinson, (1964) 236 Or 414, 389 P2d 27.

The fact that the business purpose was combined with a social purpose would not preclude plaintiff from being classified as a paying guest. Sinclair v. Barker, (1964) 236 Or 599, 390 P2d 321. **Distinguished in** Zwick v. Burdin, (1965) 239 Or 629, 399 P2d 362.

The payment, or promise of payment, has to be only a substantial benefit in a material sense. Sylvia v. Helfer, (1965) 241 Or 98, 404 P2d 238.

The statute does not require that the parties be on business. Id.

Whether plaintiff's presence in defendant's automobile was motivated by a purpose to confer a benefit upon defendant (other than social) or by a purpose to participate in mutually desirable social activities was for jury to decide. Getchell v. Reilly, (1965) 242 Or 263, 409 P2d 327; Argonaut Ins. Co. v. Ketchan, (1966) 243 Or 376, 413 P2d 613, 19 ALR3d 1386. Getchell v. Reilly, supra, overruling Tarbet v. Green, (1964) 236 Or 361, 388 P2d 468.

Any business benefit involved at the start of the trip was dissipated when change of course commenced. Gunderson v. Barry, (1964) 239 Or 279, 397 P2d 196.

The benefit to the driver was the motivating factor. Zwick v. Burdin, (1965) 239 Or 629, 399 P2d 362.

(3) Contributory negligence. Guest's failure to exercise reasonable care for his own safety bars his recovery under this section. Mitchell v. Bruening, (1932) 139 Or 244, 9 P2d 811; Hartley v. Berg, (1933) 145 Or 44, 25 P2d 932; Layman v. Heard, (1937) 156 Or 94, 66 P2d 492; Peterson v. Abrams and Leatham, (1950) 188 Or 518, 216 P2d 664; Bailey v. Rhodes, (1954) 202 Or 511, 276 P2d 713; Zumwalt v. Lindland, (1964) 239 Or 26, 396 P2d 205; Nikkila v. Niemi, (1967) 248 Or 594, 433 P2d 825.

If the passenger should have reason to know of the driver's inability to drive safely, the passenger will be barred if he then accepts the ride. Zumwalt v. Lindland, (1964) 239 Or 26, 396 P2d 205; Amundson v. Hedrick, (1969) 253 Or 185, 452 P2d 308.

If a child knows or should know of the danger and consciously encounters it, he is contributorily negligent. Nikkila v. Niemi, (1967) 248 Or 594, 433 P2d 825.

Contributory negligence is a defense to a charge of wanton misconduct. Freytag v. Allen, (1967) 248 Or 416, 434 P2d 475.

Allegation in the language of the statute was sufficient. McIntosh v. Lawrence, (1970) 255 Or 569, 469 P2d 628.

The court could not say as a matter of law that plaintiff knew of defendant's intoxicated condition. Id.

3. Gross negligence

(1) Definition. Gross negligence as used in this section means reckless conduct, which is defined as conduct engaged in by one if he intentionally does an act knowing or having reason to know of facts which would lead a reasonable man to realize that his conduct very probably will result in substantial harm. Williamson v. McKenna, (1960) 223 Or 366, 354 P2d 56; Bland v. Williams, (1960) 225 Or 193, 357 P2d 258; Roehr v. Bean, (1964) 237 Or 599, 392 P2d 248; Chard v. Rios, (1964) 238 Or 74, 393 P2d 156.

Any conduct reckless enough to render a defendant liable under this section is also wanton misconduct. Zumwalt v. Lindland, (1964) 239 Or 26, 396 P2d 205.

(2) Evidence of gross negligence

(a) As a question of fact or law. Where the facts are such that reasonable minds may differ as to whether a defendant was guilty of gross negligence, determination of the matter is for the jury. Storm v. Thompson, (1937) 155 Or 686, 64 P2d 1309; Steinbock v. Schiewe, (1964) 330 F2d 510.

(b) Sufficiency of evidence. Violation of the basic rule does not in and of itself constitute gross negligence. Burrows v. Nash, (1953) 199 Or 114, 259 P2d 107; Roehr v. Bean, (1964) 237 Or 599, 392 P2d 248.

Conduct of defendant in attempting a turn of approximately 90 degrees at 35 to 40 miles per hour is evidence of negligence, but it will not suffice to establish gross negligence. Brown v. Bryant, (1968) 250 Or 196, 440 P2d 231.

The evidence did not show gross negligence. Gray v. Galantha, (1963) 235 Or 521, 385 P2d 746; Chard v. Rios, (1964) 238 Or 74, 393 P2d 156; United States Nat. Bank v. Njust, (1971) 257 Or 563, 480 P2d 420.

4. Under former similar statute

(1) In general. The degree of negligence was important where the right to recover under this statute was based upon negligence. Monner v. Starker, (1934) 147 Or 118, 31 P2d 1109.

The section was not unconstitutional as depriving a guest of a remedy by due course of law for injury done him in person, property or reputation under Ore. Const. Art. I, §10. Perozzi v. Ganiere, (1935) 149 Or 330, 40 P2d 1009.

The common-law rule making the owner liable for the negligence of his agent was not changed by the guest law except to require proof of a greater degree of negligence. Willoughby v. Driscoll, (1942) 168 Or 187, 120 P2d 768; 121 P2d 917.

Where defendant owner was present and the driver acted on her behalf and with her consent, she could be held liable for his gross negligence. Id.

The section did not authorize a wife to sue her husband for damages caused by his negligence. Smith v. Smith, (1955) 205 Or 286, 287 P2d 572. **Distinguished in** Apitz v. Dames, (1955) 205 Or 242, 287 P2d 585.

The statute denoted a social policy that one who voluntarily exposed himself to a known danger should be held to have assumed the risks thereof. Hunt v. Portland Baseball Club, (1956) 207 Or 337, 296 P2d 495.

(2) Guest

(a) In general. A guest was one who accepted a ride in any motor vehicle without payment therefor for his own pleasure or business. Albrecht v. Safeway Stores, (1938) 159 Or 331, 80 P2d 62; Kudrna v. Adamski, (1950) 188 Or 396, 216 P2d 262; George v. Stanfield, (1940) 33 F Supp 486.

Payment did not import money compensation; whether there had been payment depended upon whether a substantial benefit had been conferred upon the owner or operator as compensation for the transportation. Albrecht v. Safeway Stores, (1938) 159 Or 331, 80 P2d 62; Luebke v. Hawthorne, (1948) 183 Or 362, 192 P2d 990; George v. Stanfield, (1940) 33 F Supp 486. Luebke v. Hawthorne, supra, overruling Smith v. Laflar, (1931) 137 Or 230, 2 P2d 18.

Whether the injured occupant of a car was a guest was a question of fact. Albrecht v. Safeway Stores, (1938) 159 Or 331, 80 P2d 62.

A person conferring a substantial benefit on the owner or operator of the vehicle was not a guest, though he promoted his own advantage. Smith v. Pac. Truck Express, (1940) 164 Or 318, 100 P2d 474.

It was not necessary for plaintiff to allege transportation for the mutual benefit of herself and defendant in order to be entitled to an instruction that the guest statute would not govern if the parties were mutually benefited. Id.

A four-year old child had not the legal capacity to accept a ride, and so could not be a guest. Kudrna v. Adamski, (1950) 188 Or 396, 316 P2d 262. **Distinguished in** Welker v. Sorenson, (1957) 209 Or 402, 306 P2d 737.

Whether or not the driver and passenger had impliedly or expressly entered into an agreement regarding payment for transportation could be determined as a matter of fact by the jury or as a matter of law by the court depending on the facts. Rosa v. Briggs, (1954) 200 Or 450, 266 P2d 427.

One was not a guest who rode pursuant to any prearrangement for sharing the burdens of the journey, so long as his undertaking was not so vague or trivial as to be no real sharing. Johnson v. Kolovos, (1960) 224 Or 266, 355 P2d 1115. Overruling in part Melcher v. Adams, (1944) 174 Or 75, 146 P2d 354, Luebke v. Hawthorne, (1948) 183 Or 362, 192 P2d 990 and Rosa v. Briggs, (1954) 200 Or 450, 266 P2d 427.

Under ordinary circumstances the status of a guest would not be changed merely because he did part of the driving. Albrecht v. Safeway Stores, (1938) 159 Or 331, 80 P2d 62.

One who accompanied the driver to show him how to find a particular place was not a guest. George v. Stanfield, (1940) 33 F Supp 486.

Where plaintiff accompanied defendant, a real estate salesman, to inspect the property of which plaintiff was a potential purchaser, she bestowed a substantial benefit upon the defendant and was not a guest. Luebke v. Hawthorne, (1948) 83 Or 362, 192 P2d 990.

Where defendant drove car belonging to plaintiff's father at request of plaintiff's mother to accomplish business in which the parents were joint principals, defendant was an agent of the parents and not plaintiff's host. Kudrna v. Adamski, (1950) 118 Or 396, 216 P2d 262. **Distinguished in** Welker v. Sorenson, (1957) 209 Or 402, 306 P2d 737.

Child, 29 months old, was a guest when in an automobile in custody of mother who was a guest passenger. Welker v. Sorenson, (1957) 209 Or 402, 306 P2d 737.

(b) Determining status. A mining engineer who examined a mine and submitted a report thereon in consideration of a cash sum, transportation to the mine in the automobile of one of the owners and payment of other travelling expenses was not a guest. Haas v. Bates, (1935) 150 Or 592, 47 P2d 243.

A guest who as agent of the owner was driving the latter's automobile was entitled to the owner's immunity from liability for injuries to another guest. Herzog v. Mittleman, (1937) 155 Or 624, 65 P2d 384, 109 ALR 662.

The defendant was entitled to an instruction on plaintiff's burden of proving his status. Sinclair v. Barker, (1960) 236 Or 599, 390 P2d 321.

(c) Contributory negligence. A back seat automobile guest who knew defendant to be a careful driver was not required to keep a lookout and warn defendant of danger. Lawrence v. Troy, (1930) 133 Or 196, 289 P 491.

Where plaintiff knew the driver had been drinking but was not well acquainted with him and did not know his capacity to take hard liquor and his action prior to the accident did not indicate drunkeness, it could not be said as a matter of law that she was contributorily negligent. Willoughby v. Driscoll (1942) 168 Or 187, 120 P2d 768, 121 P2d 917.

Whether a guest was contributorily negligent because he knew or should have known that the driver was intoxicated or negligent because he did not act as a reasonable prudent man under the circumstances should have been submitted to the jury. Peterson v. Abrams and Leatham, (1950) 188 Or 518, 216 P2d 664.

(3) Gross negligence

(a) Definition

(A) In general. What constitutes gross negligence depended upon the facts and circumstances of each individual case. Herzog v. Mittleman, (1937) 155 Or 624, 65 P2d 384, 109 ALR 662; Ross v. Hayes, (1945) 176 Or 225, 157 P2d 517, 158 P2d 452.

A precise definition of gross negligence had never been formulated by the court. Turner v. McCready, (1950) 190 Or 28, 222 P2d 1010.

Section required proof of negligence bordering on wanton and wilful conduct for a guest to recover. Hess v. Bennett, (1957) 245 F2d 807.

(B) Indifference to consequences. Gross negligence was conduct which indicated an indifference to the probable consequences of the act. Rauch v. Stecklein, (1933) 142 Or 286, 20 P2d 387; Younger v. Gallagher, (1933) 145 Or 63, 26 P2d 783.

Gross negligence was generally accompanied by indifference to consequences which in turn was manifested by negligent conduct for a substantial period of time. Keefer v. Givens, (1951) 191 Or 611, 232 P2d 808.

(C) Lack of care. Total lack of care was not a requisite quality; gross negligence was great negligence, aggravated negligence, or carelessness substantially greater than

ordinary negligence. Storla v. Spokane, Portland & Seattle Trans. Co., (1931) 136 Or 315, 297 P 367, 298 P 1065.

To establish gross negligence there had to be an absence of that ordinary care which under the circumstances a prudent man ought to have taken and the evidence had to show such a degree of negligence as excluded the slightest degree of care. Storm v. Thompson, (1937) 155 Or 686, 64 P2d 1309.

The following instruction was proper: Gross negligence "is the exhibition. . . of an I-don't-care-what-happens mental attitude." Lee v. Hoff, (1940) 163 Or 374, 97 P2d 715.

(b) Sufficiency of evidence

(A) As a question of fact or law. Where reasonable minds might differ as to what degree of negligence was established by the testimony, it was always a question of fact for the jury and not one of law for the court. Herzog v. Mittleman, (1937) 155 Or 624, 65 P2d 384, 109 ALR 662.

(B) Sufficient evidence. There may have been enough evidence to go to the jury on the issue of gross negligence even though there was no direct evidence of a reckless state of mind manifested by warning given and ignored. Turner v. McCready, (1950) 190 Or 28, 222 P2d 1010; Johnston v. Leach, (1953) 197 Or 430, 253 P2d 642.

Undue speed, driving on wrong side of the road and knowledge of hazardous driving conditions could combine to equal gross negligence. Turner v. McCready, (1950) 190 Or 28, 222 P2d 1010; Burrows v. Nash, (1953) 199 Or 114, 259 P2d 107.

Driving an automobile at a speed of 35 to 40 miles an hour upon the left hand side of the highway upon a winding road with a range of vision of approaching cars of about 50 or 60 feet while racing the driver of an automobile upon the right side of the highway was gross negligence. Younger v. Gallagher, (1933) 145 Or 63, 26 P2d 783.

To approach a highway where there might be expected to be considerable traffic in a reckless and careless manner was a greater degree of negligence than to approach a road where there was very little traffic. Cockerham v. Potts, (1933) 143 Or 80, 20 P2d 423.

Approaching an intersection at a speed of 25 miles per hour on the left side of the road and proceeding on to the highway intersection at a speed of more than 15 miles per hour without looking for traffic on such highway, the intersection being partially obstructed by brush, was sufficient to constitute gross negligence on the part of the driver. Id.

Driving at speeds of 40 to 55 miles per hour over a road on which there were icy stretches could be considered gross negligence. Layman v. Heard, (1937) 156 Or 94, 66 P2d 492.

Operation at excessive speed when approaching a sharp curve upon a slippery highway without proper brakes was recklessness. George v. Stanfield, (1940) 33 F Supp 486.

Evidence that defendant drove a car over rock and gravel road at high speed at 4 a.m. while he was, and knew he was, sleepy and nevertheless continued to drive and fell asleep, permitting the car to leave road and overturn, injuring plaintiff, was sufficient to submit to jury on question of gross negligence. Smith v. Williams, (1947) 180 Or 626, 178 P2d 710, 173 ALR 1220.

Clear and convincing evidence of gross negligence did not need to be shown before a suit by a guest could go to the jury. Turner v. McCready, (1950) 190 Or 28, 222 P2d 1010.

A combination of several acts of ordinary negligence could, under the circumstances of the case, constitute gross negligence. Burrows v. Nash, (1953) 199 Or 114, 259 P2d 107.

When driver continued driving on his side of road with sun in his eyes, but had placed his foot on brake in case of emergency, jury was justified in finding ensuing accident was not the result of driver's gross negligence. Gonzalez v. Curtis, (1959) 217 Or 561, 339 P2d 713.

Defendant, whose car collided with another car when he turned into an intersection without having first looked for oncoming traffic, was not grossly negligent when there was nothing about the setting to suggest to a reasonable person anything more than the usual traffic hazards were ahead. Williamson v. McKenna, (1960) 223 Or 366, 354 P2d 56. Overruling Cockerham v. Potts, (1933) 143 Or 80, 20 P2d 423.

(C) Insufficient evidence. Proof of ordinary negligence without more would not warrant submission to the jury on the issue of gross negligence. Rauch v. Stecklein, (1933) 142 Or 286, 20 P2d 387; Callander & Stone v. Brown, (1947) 181 Or 299, 178 P2d 922.

In an action for the death of a child who was riding as a guest in a truck when it collided with a horse and rider going in the opposite direction on the same side of the highway, the evidence did not show gross negligence or reckless disregard of the rights of others permitting recovery against the owner and the driver of the truck. Lawry v. McKennie, (1945) 177 Or 604, 164 P2d 444.

A motorist who in order to pass drew up beside a truck traveling about 35 miles per hour on wet black top pavement, who then saw an approaching automobile come into view about 200 or 300 feet away, and who in order to avoid a collision increased his speed to 55 miles per hour and swung in front of the truck, thereby causing his automobile to skid and turn over, was not guilty of gross negligence under this section. Carlson v. Wagberg, (1948) 183 Or 95, 190 P2d 926.

Defendant was not grossly negligent when, while traveling at about 40 miles per hour in a 20 mile zone, he applied the brakes, but failed to avoid a collision with a truck turning into his path about 100 feet away. Baird v. Boyer, (1949) 187 Or 131, 210 P2d 118.

Fact that defendant pleaded guilty to reckless driving charge did not tend to prove gross negligence. Id.

Where defendant made a sharp, abrupt left turn and accident resulted because of inadvertence, error in judgment or failure to look, the evidence did not show gross negligence under this section. Gantenbein v. Huckleberry, (1957) 211 Or 605, 315 P2d 792.

Mere showing of excessive speed after successfully negotiating a curve was not sufficient to establish gross negligence. Burghardt v. Olson, (1960) 223 Or 155, 349 P2d 792.

(c) Required contents of instructions. When an action under the section was based upon gross negligence, if the instructions touched upon ordinary negligence, the distinction between the two types of negligence had to be brought to the attention of the jury. Smith v. Laflar, (1933) 143 Or 65, 20 P2d 391.

Omission in the instructions of mention of the indicated speeds constituted ground for a new trial in an action under this section predicating gross negligence on excessive speed. Dickson v. King, (1934) 147 Or 638, 34 P2d 664.

It was not error for the court to instruct the jury regarding negligence before defining gross negligence. Rogers v. So. Pac. Co., (1951) 190 Or 643, 227 P2d 979.

It was error for the court to attempt to define gross negligence without including in its instructions a definition of ordinary negligence. Fossi v. George, (1951) 191 Or 113, 228 P2d 798.

(4) Intoxication. Intoxication meant being under the influence of intoxicating liquor to such an extent as to affect a driver's ability to operate a motor vehicle with reasonable care. Willoughby v. Driscoll, (1942) 168 Or 187, 120 P2d 768; 121 P2d 917.

If the driver went to sleep at the wheel because of intoxication and allowed the car to go off the road thereby injuring a guest, he was guilty of gross negligence. Id.

Instructions to the jury correctly defined "intoxication" as follows: "Intoxication as used in the guest statute means being under the influence of intoxicating liquor to such an

extent as to materially affect the driver's ability to operate a motor vehicle. It means the impairment of a person's physical and mental control. A person is intoxicated within the meaning of the guest statute when he is under the influence of intoxicating liquor to such an extent to tend to prevent him from exercising the care and caution which a sober and prudent person would have exercised under the same or similar conditions." Glascock v. Anderson, (1953) 198 Or 499, 257 P2d 617.

FURTHER CITATIONS: Stewart v. Houk, (1928) 127 Or 589, 271 P 998, 272 P 893, 61 ALR 1236; Navarra v. Jones, (1946) 178 Or 683, 169 P2d 584; Weber v. Te Selle, (1951) 191 Or 85, 228 P2d 796; Quetschke v. Peterson & Zeller, (1953) 198 Or 598, 258 P2d 128; Whang v. Hong, (1955) 206 Or 125, 290 P2d 185, 291 P2d 720; Wickland v. Joliff, (1956) 208 Or 110, 298 P2d 984; Ryland v. Ryland, (1958) 214 Or 548, 330 P2d 175; Morris v. Williams, (1960) 223 Or 50, 353 P2d 865; McNabb v. DeLaunay, (1960) 223 Or 112, 353 P2d 247, 354 P2d 74; Holman v. Barksdale, (1960) 223 Or 452, 354 P2d 798; Rossman v. Forman, (1960) 224 Or 610, 356 P2d 430; Sheehan v. Appling, (1961) 227 Or 594, 363 P2d 575; Quigley v. Roath, (1961) 227 Or 336, 362 P2d 328; Stites v. Morgan, (1961) 229 Or 116, 366 P2d 324; State v. Robinson, (1963) 235 Or 524, 385 P2d 754; McBee v. Knight, (1965) 239 Or 606, 398 P2d 479; Scott v. Bothwell, (1966) 243 Or 97, 412 P2d 14; State v. Hodgdon, (1966) 244 Or 219, 416 P2d 647; Corey v. Nelson, (1966) 361 F2d 355; Brown v. Bryant, (1966) 244 Or 321, 417 P2d 1002; Dillard v. Dillard, (1966) 244 Or 597, 418 P2d 839; DeFoor v. Lematta, (1968) 249 Or 116, 437 P2d 107; State v. West, (1969) 1 Or App 41, 458 P2d 706; Quirk v. Ross, (1970) 257 Or 80, 476 P2d 559.

ATTY. GEN. OPINIONS: Liability of state as owner of motor vehicle, 1946-48, p 199.

LAW REVIEW CITATIONS: 6 OLR 202; 8 OLR 75, 278; 11 OLR 391; 12 OLR 116; 12 OLR 304; 15 OLR 258; 18 OLR 313; 30 OLR 265; 31 OLR 76; 33 OLR 216; 36 OLR 75; 40 OLR 278-283; 41 OLR 133-137, 225; 44 OLR 90, 317; 47 OLR 209, 383; 49 OLR 48; 1 WLJ 425-451, 461, 531-534, 582, 638.

30.150

LAW REVIEW CITATIONS: 36 OLR 70.

30.155 to 30.175

NOTES OF DECISIONS

Plaintiff is required to plead and prove, as a condition precedent to recovery, defendant's intent to defame or, in the absence of such intent, the failure to retract upon demand. Holden v. Pioneer Broadcasting Co., (1961) 228 Or 405, 365 P2d 845, cert. denied, 370 US 157, 82 S Ct 1253, 8 L Ed 2d 402.

These sections were constitutional. Id.

FURTHER CITATIONS: Hinkle v. Alexander, (1966) 244 Or 267, 417 P2d 586.

LAW REVIEW CITATIONS: 41 OLR 170-172; 49 OLR 136.

30.155

ATTY. GEN. OPINIONS: Validity of this section, 1954-56, p 74.

30.160

ATTY. GEN. OPINIONS: Validity of this section, 1954-56, p 74.

LAW REVIEW CITATIONS: 36 OLR 70, 74; 44 OLR 187, 203.

30.165

LAW REVIEW CITATIONS: 36 OLR 71.

30.210

NOTES OF DECISIONS

Recovery in an action on an official bond or undertaking is limited to the amount of plaintiff's loss. Howe v. Taylor, (1877) 6 Or 284; In re Ison, (1877) 6 Or 470.

An action on an official undertaking is not for the recovery of a fine, penalty or forfeiture. In re Ison, (1877) 6 Or 470.

Where an official undertaking is lost or destroyed, a person damaged by the official delinquency of the officer may sue in equity to establish the bond and obtain leave to sue on it. Howe v. Taylor, (1877) 6 Or 284.

This section provides a remedy which bars the remedy of mandamus in the absence of a showing that an action under this section would be of no avail. Habersham v. Sears, (1884) 11 Or 431, 5 P 208, 50 Am Rep 481.

The real party in interest, whether the state, a municipal or public corporation, or private individual has a direct right of action upon the undertaking. Hume v. Kelly, (1896) 28 Or 398, 43 P 380.

The omission of the county court to keep a record of the delivery and acceptance of the sheriff's bonds, to approve the bonds and enter the approval on the minutes, or to file the undertakings with the clerk is not fatal to an enforcement of such a bond actually given and accepted. Baker County v. Huntington, (1905) 46 Or 275, 79 P 187.

Parol evidence is competent to show the circumstances connected with the giving of a bond by a public officer in order to determine its nature and effect. Id.

An action on an official bond which is barred as against the principal is likewise barred as against the surety. Barnes v. Mass. Bonding Co., (1918) 89 Or 141, 172 P 95.

For the purpose of ORS 30.210 to 30.250, the distinction between a bond and an undertaking is immaterial. Fleischner v. Florey, (1924) 111 Or 35, 224 P 831.

A public official's alleged malicious acts in causing search warrant to issue and search to be made were acts done virtute officii so as to render bondsmen liable to injured party. Peterson v. Cleaver, (1928) 124 Or 547, 265 P 428.

FURTHER CITATIONS: Weber v. Empire Holding Corp., (1935) 149 Or 503, 41 P2d 1084.

ATTY. GEN. OPINIONS: Blanket surety bond for officers, 1962-64, p 368; use of blanket position bond in lieu of individual surety bond, 1966-68, p 83.

30.220

NOTES OF DECISIONS

Recovery in an action on an official bond is limited to the amount of the plaintiff's loss. Howe v. Taylor, (1877) 6 Or 284; In re Ison, (1877) 6 Or 470.

An action on an official bond or undertaking is not an action to recover a fine or forfeiture, consequently the statute of limitations governing the latter action is not applicable to the former. Howe v. Taylor, (1877) 6 Or 284.

An action on a sheriff's official bond may be maintained when his neglect or refusal to levy an execution in his hands results in injury to the creditor. Habersham v. Sears, (1884) 11 Or 431, 5 P 208, 50 Am Rep 481.

A complaint showing that the defendant received money as treasurer and failed to deliver the same to his successor in office need not allege that the money belonged to the

county whose officer he was. Crook County v. Bushnell, (1887) 15 Or 169, 13 P 886.

A county is a proper party plaintiff in an action for default of a tax collector in paying over taxes collected for state, county and school purposes. Hume v. Kelly, (1896) 28 Or 398, 43 P 380.

If the instrument is one executed by the officer whose conduct is the subject thereof, the officer and his sureties may be joined as defendants. Askay v. Maloney, (1919) 92 Or 566, 179 P 899.

For the purposes of ORS 30.210 to 30.250, the distinction between a bond and an undertaking is immaterial. Fleischner v. Florey, (1924) 111 Or 35, 224 P 831.

Although a delinquent official leaves the state or absconds, an action may be maintained against his surety. Klamath County Sch. Dist. v. Am. Sur. Co., (1929) 129 Or 248, 275 P 917.

In an action against police detectives and their surety for death from accidental shooting of deceased as the detectives were pursuing an escaping prisoner, it was not error to refuse to require plaintiff to elect the officer who caused the injury when it appeared both detectives were firing guns. Askay v. Maloney, (1917) 85 Or 333, 166 P 29.

A county payee which received and cashed a check drawn for payment of a personal obligation by and in the official capacity of an officer of another county could not defend an action by the officer's surety on the ground that it was also an "injured party," for it participated in the wrongdoing by failing to make the inquiry upon which the payee was put by the manner in which drawer signed the instrument. American Sur. Co. v. Multnomah County, (1943) 171 Or 287, 138 P2d 597.

FURTHER CITATIONS: Esselstyn v. Casteel, (1955) 205 Or 344, 286 P2d 665, 288 P2d 214, 215.

ATTY. GEN. OPINIONS: Liability of officer for depositing public funds in bank which becomes insolvent, 1920-22, p 243; blanket surety bonds for officers, 1962-64, p 368; use of blanket position bond in lieu of individual surety bond, 1966-68, p 83.

30.230

NOTES OF DECISIONS

A plaintiff will not be denied leave to begin an action on an official bond when it is impossible to produce a certified copy of the undertaking or security. Howe v. Taylor, (1877) 6 Or 284.

An objection for the first time on appeal to the absence of a grant of leave comes too late. Multnomah County v. Kelly, (1900) 37 Or 1, 60 P 202.

The dismissal of an action on an officer's bond for failure to obtain leave of court does not preclude a subsequent action against his surety when he has left the state. Klamath County Sch. Dist. v. Am. Sur. Co., (1929) 129 Or 248, 275 P 917.

FURTHER CITATIONS: In re Ison, (1877) 6 Or 469; Haversham v. Sears, (1884) 11 Or 431, 5 P 208, 50 Am Rep 481; Crook County v. Bushnell, (1887) 15 Or 169, 13 P 886; Hume v. Kelly, (1896) 28 Or 398, 43 P 380.

ATTY. GEN. OPINIONS: Blanket surety bonds for officers, 1962-64, p 368.

30.240

NOTES OF DECISIONS

The real party in interest, whether the state, a municipal or public corporation, or private individual, has a direct right of action upon the undertaking. Hume v. Kelly, (1896) 28 Or 398, 404, 43 P 380.

30.260 to 30.300

NOTES OF DECISIONS

The legislature clearly intended the Tort Liability Law to make every public body liable for its torts, subject only to the express limitations which it contains. Martin v. Coos County, (1971) 4 Or App 587, 481 P2d 375.

FURTHER CITATIONS: Vendrell v. Sch. Dist. 26C, (1961) 226 Or 263, 360 P2d 282; Vendrell v. School Dist. 26C, (1962) 233 Or 1, 376 P2d 406; Hale v. Smith, (1969) 254 Or 300, 460 P2d 351; Elmore v. Aloha Sanitary Serv., (1970) 256 Or 267, 473 P2d 130; Smith v. Cooper, (1970) 256 Or 485, 475 P2d 78; State Forester v. Umpqua R. Nav. Co., (1970) 258 Or 10, 478 P2d 631; Golden v. Smith, (1971) 324 F Supp 727; Fry v. Willamalane Park & Recreation Dist., (1971) 4 Or App 575, 481 P2d 648.

ATTY. GEN. OPINIONS: Limits on authority of county to purchase liability insurance, 1960-62, p 24; immunity of state agency, officers and employes from suit generally, 1966-68, p 117; use of facilities at state institutions by private groups, 1966-68, p 498; civil and criminal liability of National Guardsmen, 1966-68, p 556; duty of local fire officers to enforce state law, 1966-68, p 588; protection available to state agency under this Act, (1970) Vol 35, p 19; Insurer's agreement to waive defense of sovereign immunity, (1970) Vol 35, p 404.

LAW REVIEW CITATIONS: 39 OLR 130, 131; 43 OLR 274; 46 OLR 37; 47 OLR 357-376; 48 OLR 95-122; 7 WLJ 356.

30.260

CASE CITATIONS: Martin v. Coos County, (1971) 4 Or App 587, 481 P2d 375.

ATTY. GEN. OPINIONS: Payment of claims of inmates and patients of state institutions involving possible tort liability, (1968) Vol 34, p 199.

30.265

NOTES OF DECISIONS

Subsection (2)(e) relates to particular types of claims which by various statutes relating thereto are limited or made immune. Martin v. Coos County, (1971) 4 Or App 587, 481 P2d 375.

The immunity granted by subsection (2)(b) extends to claims by persons who are not employes of the public body. Granato v. Portland, (1971) 5 Or App 570, 485 P2d 1115.

ATTY. GEN. OPINIONS: Civil and criminal liability of National Guardsmen, 1966-68, p 556; insurer's agreement to waive defense of sovereign immunity, (1970) Vol 35, p 404.

LAW REVIEW CITATIONS: 7 WLJ 356-364.

30.270

ATTY. GEN. OPINIONS: Primary liability for claims in excess of the limitations, (1970) Vol 35, p 19.

30.275

NOTES OF DECISIONS

Giving notice within the time required is a condition precedent to the right to bring the action. Fry v. Willama-

lane Park & Recreation Dist., (1971) 4 Or App 575, 481 P2d 648.

The giving of notice to the public body is jurisdictional. Id.

FURTHER CITATIONS: Newlun v. Portland, (1967) 248 Or 291, 433 P2d 816.

30.280

CASE CITATIONS: Multnomah County v. Ore. Auto. Ins. Co., (1970) 256 Or 24, 470 P2d 147; State Forester v. Umpqua R. Nav. Co., (1970) 258 Or 10, 478 P2d 631.

ATTY. GEN. OPINIONS: Payment of claims of inmates and patients of state institutions involving possible tort liability, (1968) Vol 34, p 199; state liability insurance coverage for state employe reimbursed for mileage, (1969) Vol 34, p 712; insurer's agreement to waive defense of sovereign immunity, (1970) Vol 35, p 404.

LAW REVIEW CITATIONS: 7 WLJ 362.

30.300

CASE CITATIONS: Martin v. Coos County, (1971) 4 Or App 587, 481 P2d 375.

30.310 to 30.400

CASE CITATIONS: Elmore v. Aloha Sanitary Serv., (1970) 256 Or 267, 473 P2d 130.

30.310

NOTES OF DECISIONS

Money improperly paid to a county officer under a claim of right for services may be recovered under subsection (1). Grant County v. Sels, (1874) 5 Or 243.

A liability on annexation of territory to one county to a ratable proportion of the indebtedness of another county may be enforced under subsection (2). Grant County v. Lake County, (1889) 17 Or 453, 21 P 447.

A body corporate can sue and be sued so far as necessary to maintain its corporate rights and enforce its corporate duties. Id.

No limitation upon the causes of action which may be prosecuted against public corporations is prescribed by this section. Symons v. United States, (1918) 252 Fed 109, 164 CCA 221.

An action for a penalty for failure to give a tax assessor a list of taxable property should be brought in the name of the county. Allen v. Craig, (1921) 102 Or 254, 201 P 1079.

A school district may sue. Antin v. Union High Sch. Dist., (1929) 130 Or 461, 280 P 664, 66 ALR 1271.

The State Board of Higher Education was not a proper corporate defendant as provided by ORS 30.320. Bacon v. Harris, (1960) 221 Or 553, 352 P2d 472.

FURTHER CITATIONS: Vendrell v. Sch. Dist. 26C, (1961) 226 Or 263, 360 P2d 282; Vendrell v. School Dist. 26C, (1962) 233 Or 1, 376 P2d 406.

ATTY. GEN. OPINIONS: Action by grazing county to collect taxes on transient livestock, 1926-28, p 615; action by county for obstruction of drainage ditches, 1944-46, p 176.

LAW REVIEW CITATIONS: 43 OLR 303; 46 OLR 286-316; 48 OLR 118.

30.312

CASE CITATIONS: Thornton v. Johnson, (1969) 253 Or 342, 453 P2d 178.

30.320

NOTES OF DECISIONS

1. In general
2. Liability of counties
   (1) On contracts
   (2) For injury from some act or omission
3. Liability of other public corporations
   (1) Municipal corporations
      (a) On contracts
      (b) For injury from some act, omission or commission
      (c) Exemption from liability
   (2) School districts
4. Liability of state agency

1. In general

Prior to the 1887 amendment, a county or other public corporation was liable for injuries resulting from negligence in maintenance of a bridge or road. McCalla v. Multnomah County, (1869) 3 Or 424; Sheridan v. Salem, (1886) 14 Or 328, 12 P 925; Ford v. Umatilla County, (1887) 15 Or 313, 16 P 33.

The functions of a public corporation are classified by the courts as either governmental or political on the one hand, or proprietary, ministerial or corporate on the other. Wagner v. Portland, (1902) 40 Or 389, 60 P 985, 67 P 300; Pacific Paper Co. v. Portland, (1913) 68 Or 120, 137 P 871; West v. Coos County, (1925) 115 Or 409, 237 P 961; Antin v. Union High Sch. Dist. 2, (1929) 130 Or 461, 280 P 664; Hise v. City of North Bend, (1931) 138 Or 150, 6 P2d 30; Blue v. City of Union, (1938) 159 Or 5, 75 P2d 977; Noonan v. Portland, (1939) 161 Or 213, 88 P2d 808.

This section gives a remedy only when the corporation is liable in its corporate capacity as distinguished from its political or governmental capacity. Wagner v. Portland, (1902) 40 Or 389, 60 P 985, 67 P 300; Blue v. City of Union, (1938) 159 Or 5, 75 P2d 977.

The 1887 amendment did not take away the remedy of one injured before its passage. Eastman v. Clackamas County, (1887) 32 Fed 24, 12 Sawy 613.

The 1887 amendment which repealed the provision making a county liable for injuries from its acts or omissions did not deprive an injured party of a remedy by due course of law under Ore. Const. Art. I, §10. Templeton v. Linn County, (1892) 22 Or 313, 29 P 795, 15 LRA 730.

The remedy provided by this statute is comprehended in Ore. Const. Art. I, §10, and is applicable against cities incorporated by initiative charter. Coleman v. La Grande, (1914) 73 Or 521, 144 P 468.

This section may not be construed as interfering with a plaintiff's right under LOL 2861 [ORS 203.010]. Theiler v. Tillamook County, (1915) 75 Or 214, 146 P 828.

The action must be for an act or omission in the corporate character and within scope of its authority. Spencer v. Sch. Dist. 1, (1927) 121 Or 511, 254 P 357.

An action for compensation for taking private property for a public use as authorized by Ore. Const. Art. I, §18, does not depend on this section and may be maintained against a county. Morrison v. Clackamas County, (1933) 141 Or 564, 18 P2d 814.

Quasi corporations such as counties and school districts are not liable in a civil action for damages for neglect of duty unless such liability is expressly provided for by statute. Blue v. City of Union, (1938) 159 Or 5, 75 P2d 977.

Members of the district school board, the superintendent and the principal do not stand in the relation of master and servant with subordinates, and vicarious liability can-

not be imposed on them by the doctrine of respondeat superior. Vendrell v. Sch. Dist. 26C, (1961) 226 Or 263, 360 P2d 282.

The State Board of Higher Education was not a corporation within the terms of ORS 30.310 and, therefore, not a proper defendant under this section. Bacon v. Harris, (1960) 221 Or 553, 352 P2d 472.

The suit based entirely upon an alleged contract between the parties fell within the provisions of this section. City of North Bend v. County of Coos, (1971) 259 Or 147, 485 P2d 1226.

2. Liability of counties

An action or suit cannot be maintained against a county unless authorized by statute. Grant County v. Lake County, (1889) 17 Or 453, 21 P 447; Kelly v. Multnomah County, (1890) 18 Or 356, 22 P 1110.

When the law prescribes the services of the officer and the fees to be paid therefor, on refusal of the county court to audit and allow the claim, the county is liable in an action at law. Crossen v. Wasco County, (1882) 10 Or 111; Wallowa County v. Oakes, (1905) 46 Or 33, 78 P 892.

Authority to maintain an action against a county on an obligation created by law exists independently of this section. Grant County v. Lake County, (1889) 17 Or 453, 21 P 447; State v. Baker County, (1893) 24 Or 141, 33 P 530.

An action under the Employers' Liability Act for personal injuries sustained while an employe of the county cannot be maintained under this section. Rapp v. Multnomah County, (1915) 77 Or 607, 152 P 243; Clark v. Coos County (1916) 82 Or 402, 161 P 702.

When a new county is created out of part of an old one, the old county may be compelled to pay the whole of the state levy of taxes charged upon the county at the time the division took place. Gilliam County v. Wasco County, (1887) 14 Or 525, 13 P 324.

The liability of a county for its share of the state tax revenues is a corporate obligation for which an action may be brought by the state under H 2239 [ORS 203.010] and not under this section. State v. Baker County, (1893) 24 Or 141, 33 P 530.

This provision must be construed with that which subjects a county to suit or action on account of matters arising out of corporate obligations whether created by contract or otherwise. State v. Baker County, (1893) 24 Or 141, 33 P 530.

Where county officers have collected money which should have been collected by the city, the implied obligation will sustain an action without statutory authority. Salem v. Marion County, (1894) 25 Or 449, 36 P 163.

The obligation to restore money after the reversal of judgment on a forfeited bail bond may be enforced by action against the county. Metschan v. Grant County, (1899) 36 Or 117, 58 P 80.

Where a county court is authorized to audit and allow claims against the county , its refusal to pay such claims in whole or in part is the exercise of a judicial function which may not be the basis for an action under this section, but can be reviewed only by a writ of review. Flagg v. Columbia County, (1908) 51 Or 172, 94 P 184.

When plaintiff, who was a doctor subpenaed to inspect the body and testify at inquest as to cause of death, sued for balance of his fee after being allowed a smaller sum by the county court, the county's demurrer should have been sustained for his remedy was by writ of review and not by an action under this section. Pruden v. Grant County, (1885) 12 Or 308, 7 P 308.

(1) On contracts. A county can only be sued upon a contract made by it under this section. Rapp v. Multnomah County, (1915) 77 Or 607, 152 P 243; Clark v. Coos County, (1916) 82 Or 402, 161 P 702.

An action may be brought under this section against a county on a contract which, though unauthorized at the time of its making, was ratified after performance. Steiner v. Polk County, (1901) 40 Or 124, 66 P 707; Cunningham v. Umatilla County, (1910) 57 Or 517, 112 P 437; McKenna v. McHaley, (1913) 67 Or 443, 136 P 340.

An ordinary action at law may be brought to recover the amount claimed under a contract with the county which had been rejected in part by the county court where there are questions of fact as well as of law involved. Coos Bay Times Pub. Co. v. Coos County, (1916) 81 Or 626, 160 P 532.

Suit for a declaratory judgment to quiet title is not an action on a contract. Kern County Land Co. v. Lake County, (1962) 232 Or 405, 375 P2d 817. **Distinguished in** City of North Bend v. County of Coos, (1971) 259 Or 147, 485 P2d 1226.

A county can only be sued, under this section, upon contracts made by it. Martin v. Coos County, (1971) 4 Or App 587, 481 P2d 375.

A county which contracted with plaintiff that he represent the county in its efforts to obtain money equitably due it by the United States was suable without its consent for the value of plaintiff's services as provided by the contract. West v. Coos County, (1925) 115 Or 409, 237 P 961, 40 ALR 1362.

(2) For injury from some act or omission. A county is not liable for injuries resulting from defects in public highways unless made so by statute. Schroeder v. Multnomah County, (1904) 45 Or 92, 76 P 772.

A county is ordinarily not liable for the defaults of its officers in the absence of statute imposing such liability. State v. Multnomah County, (1917) 82 Or 428, 161 P 959.

Improper release of logs, trees and stumps from piers of a bridge resulting in damage to land did not render county liable. Gearin v. Marion County, (1924) 110 Or 390, 223 P 929.

3. Liability of other public corporations

(1) Municipal corporations. A charter which provides that the city can "contract and be contracted with, sue and be sued, plead and be impleaded, defend and be defended in all courts of justice and in all actions, suits and proceedings whatsoever" embraces any action against the municipality that could be brought under the law as it existed at the time the charter was adopted. Coleman v. LaGrande, (1914) 73 Or 521, 144 P 468.

In an action against a city whose charter was adopted by initiative a defense which argued that a city with such a charter was therefore not subject to legislative control, of which this section is an example, was held bad. Coleman v. LaGrande, (1914) 73 Or 521, 144 P 468; Ryder v. City of LaGrande, (1914) 73 Or 227, 144 P 471.

Since the city operated the cemetery in a proprietary capacity, it was not immune from suit. Hovis v. City of Burns, (1966) 243 Or 607, 415 P2d 29.

(a) On contracts. The holder of an unpaid city warrant may maintain an action at law and reduce his claim to judgment, although no execution can issue thereon. Goldsmith v. Baker City, (1897) 31 Or 249, 49 P 973.

(b) For injury from some act, omission or commission. Liability of a city for nonrepair of streets is provided for by this section. O'Harra v. Portland, (1869) 3 Or 525; Batdorff v. Oregon City, (1909) 53 Or 402, 100 P 937, 18 Ann Cas 287; Humphry v. Portland, (1916) 79 Or 430, 154 P 897.

A city is liable for the negligent construction or maintenance of a watermain in a system of waterworks operated by it for profit. Pacific Paper Co. v. City of Portland, (1913) 68 Or 120, 135 P 871; Blake-McFall Co. v. Portland, (1913) 68 Or 126, 135 P 873; Coleman v. LaGrande, (1914) 73 Or 521, 144 P 468.

The maintenance of streets is a corporate function. Ryder v. City of LaGrande, (1914) 73 Or 227, 144 P 471; Blue v.

City of Union, (1938) 159 Or 5, 75 P2d 977; Noonan v. Portland, (1939) 161 Or 213, 88 P2d 808.

A city engaged in repairing its fire alarm system through private and corporate agencies is liable for injuries received by a workman therein. Wagner v. Portland, (1902) 40 Or 389, 60 P 985, 67 P 300.

A municipal corporation which is a port is liable in damages under maritime law for a maritime collision resulting from the negligence of its employes in performing the duties for which it was created. United States v. Port of Portland, (1906) 147 Fed 865.

The standard of care to be observed by a municipal corporation in the execution of a ministerial function is such as a reasonably prudent man under like circumstances would use if the responsibility of damages rested on him. Giaconi v. City of Astoria, (1911) 60 Or 12, 113 P 855, 118 P 180.

A municipal corporation is not liable for consequential injuries resulting from ordinarily careful administration of a reasonably prudent plan of civic improvement, but if the municipal corporation executes such plan it acts ministerially and is liable for injuries resulting from its negligence or maladministration. Id.

Where a water system serves both governmental and proprietary functions, persons injured by negligent construction or maintenance thereof are entitled to prove delict in the municipality notwithstanding the injury arose at a point exclusively serving a governmental function. Blake-McFall v. Portland, (1913) 68 Or 126, 135 P 873.

A municipal corporation designated a port is liable for injury to an employe and subject to the provisions of the Employers' Liability Act. Mackay v. Port of Toledo, (1915) 77 Or 611, 152 P 250.

In the absence of a statute governing the matter a municipal corporation is liable to a plaintiff injured as a result of a defective street or highway, the repair of which it is incumbent on the municipal corporation to keep up if it has the means of performing the duty or the right to levy a tax for that purpose. Humphry v. Portland, (1916) 79 Or 440, 154 P 897.

Failure of the city ordering a local improvement to raise the funds to pay therefor gives rise to an action ex delicto for damages. Morris v. Sheridan, (1917) 86 Or 224, 167 P 593.

Municipal corporation contracting for laying of pavement infringing on patent process is jointly liable with contractor for damages. Reliance Constr. Co. v. Hassam Paving Co., (1918) 248 Fed 701, 160 CCA 601.

Construction and operation of an electric power plant for profit is a proprietary function and the municipal corporation so engaged is liable either in law or equity for its violation of the rights of the plaintiff. Stephens v. Eugene, (1918) 90 Or 167, 175 P 855.

For negligent acts of a fireman in the performance of his duty a city is not liable. Johnston v. City of Grants Pass, (1927) 120 Or 364, 251 P 713, 252 P 1118.

An ordinance passed pursuant to a charter provision that abutting owners may be compelled to maintain sidewalks in good repair will not provide a municipal corporation with the defense that the municipality is thereby relieved of liability for injuries incurred as a result of a defect in the sidewalk. Large v. City of St. Helens, (1932) 140 Or 564, 14 P2d 628.

Plaintiff injured by a negligent police officer acting outside the scope of his authority and not in connection with the governmental, corporate, proprietary or private capacity of a city has no action against the city. Keeney v. Salem, (1935) 150 Or 667, 47 P2d 852.

When a municipality performs a governmental function the doctrine of respondeat superior is inapplicable, but when it performs a corporate function the doctrine applies and the municipality must answer for the wrongdoings of its servants. Noonan v. Portland, (1939) 161 Or 213, 88 P2d 808.

Damages may be recovered by the surviving spouse or next of kin for the unauthorized disinterment of corpses. Hovis v. City of Burns, (1966) 243 Or 607, 415 P2d 29.

Where a city filled a street without providing for a proper foundation, it was liable for ensuing injury. Giaconi v. City of Astoria, (1911) 60 Or 12, 113 P 855, 118 P 180, 37 LRA(NS) 1150.

A municipal corporation designated a port is within the class of "other public corporations," and was liable for injury to its employe resulting from the breaking of a ladder furnished as part of the equipment of its dredger. Mackay v. Port of Toledo, (1915) 77 Or 611, 152 P 250.

Mere passage of an ordinance providing for a waterfront committee with general supervision and control of all wharves did not render the municipality liable for damages resulting from the negligence of the owner of a private wharf. Rusk v. Montgomery, (1916) 80 Or 93, 156 P 435.

A municipal corporation unless exempt by its charter is liable to a person exercising due care who was injured as a result of a defect in a sidewalk of which the municipality knew, or should have known, for a sufficient length of time in which to have the defect repaired or the sidewalk made safe. Large v. City of St. Helens, (1932) 140 Or 564, 14 P2d 628.

(c) Exemption from liability. A municipal corporation may be exempted, without depriving an injured person of a remedy by due course of law under Ore. Const. Art. I, §10, by statute or charter from liability for injuries resulting from the condition of streets, provided the injured person is left a remedy against the responsible officer. Mattson v. City of Astoria, (1901) 39 Or 577, 65 P 1066, 87 Am St Rep 687; Pullen v. Eugene, (1915) 77 Or 320, 146 P 822, 147 P 768, 1191, 151 P 474, Ann Cas 1917D, 933.

Where a city is exempted from liability by statute or charter, an action for injuries from defective streets cannot be maintained against it. O'Harra v. Portland, (1869) 3 Or 525; Rankin v. Buckman, (1881) 9 Or 253; Pullen v. Eugene, (1915) 77 Or 320, 146 P 822, 147 P 768, 1191, 151 P 474, Ann Cas 1917D, 933.

A charter provision withholding a remedy against a city for injury sustained by defective sidewalks and streets is not in violation of this section. Noonan v. Portland, (1939) 161 Or 213, 88 P2d 808.

A municipality cannot exempt itself from liability for maintaining a private nuisance upon land even though the nuisance was created by the acts of city employes engaged in city governmental functions. Levene v. City of Salem, (1951) 191 Or 182, 229 P2d 255.

A charter provision which exempted the city from liability for injuries resulting from defective streets and also made the responsible officials liable only for gross negligence or wilful misconduct was bad as depriving the plaintiff of a remedy by due course of law under Ore. Const. Art. I, §10. Batdorff v. Oregon City, (1909) 53 Or 402, 100 P 937, 18 Ann Cas 287.

Where a city charter provided for municipal immunity from liability resulting from defective condition of "sidewalks, streets, avenues, boulevards, or places," there was no such immunity for injury resulting from a defective city-owned wharf, for a "place" by ejusdem generis, applied only to governmental activities in which a wharf run for profit is not included. Hise v. City of North Bend, (1931) 138 Or 150, 6 P2d 30.

(2) School districts. For the death of a pupil caused by the explosion of a water tank in a public school a school district is not liable. Antin v. Union High Sch. Dist. 2, (1929) 130 Or 461, 280 P 664, 66 ALR 1271.

Injury arising from some public or governmental act of a school district is not actionable against the district under this section. Id.

A school district is not in the absence of statute subject to liability for injuries to pupils of public schools suffered in connection with their attendance at school. Ward v. Sch. Dist. 18, (1937) 157 Or 500, 73 P2d 379.

A school district can only act in a governmental capacity and consequently is immune from liability for the negligence of its agents. Lovell v. Sch. Dist. 13, (1943) 172 Or 500, 143 P2d 236. Overruling Lupke v. Sch. Dist. 1, (1929) 130 Or 409, 275 P 686.

When a school district is performing the duties imposed upon it by statute, it perforce is acting governmentally. Lovell v. Sch. Dist. 13, (1943) 172 Or 500, 143 P2d 236.

Prior to the 1967 amendment, ORS 332.435 operated to lift the immunity of school districts only to the extent of the liability insurance actually purchased. Vendrell v. Sch. Dist. 26 C, (1961) 226 Or 263, 360 P2d 282.

The corporate school district stands in the relationship of master-servant with the employes of the district. Id.

A school district is not immune from claims for interest. Lundgren v. Freeman, (1962) 307 F2d 104.

4. Liability of state agency

This section contemplates the state will be named defendant. DeLong v. Ore. State Hwy. Comm., (1964) 233 F Supp. 7, aff'd, 343 F2d 911.

This section waives only the common law immunity of the sovereign to be sued in its own courts and was never intended to waive the state's immunities within the 11th Amendment of the U.S. Constitution. Id.

FURTHER CITATIONS: Board of Commrs., of Multnomah County v. State, (1861) 1 Or 359; Raley v. Umatilla County, (1887) 15 Or 172, 13 P 890, 3 Am St Rep 142; Seton v. Hoyt, (1899) 34 Or 266, 55 P 967, 43 LRA 634; Esberg Cigar Co. v. Portland, (1899) 34 Or 282, 55 P 961, 43 LRA 445; Yamhill County v. Foster, 53 Or 124, 99 P 286; United Contracting Co. v. Duby, (1930) 134 Or 1, 292 P 309; Tomasek v. Ore. Hwy. Comm., (1952) 196 Or 120, 248 P2d 703; Walker v. Mackey, (1953) 197 Or 197, 251 P2d 118, 253 P2d 280; Hillman v. North. Wasco Co. PUD, (1958) 213 Or 264, 323 P2d 664; Moeller v. Multnomah County, (1959) 218 Or 413, 345 P2d 411; Vendrell v. Sch. Dist. 26 C, (1962) 233 Or 1, 376 P2d 406; Oregon State Pharmaceutical Assn. v. State Pub. Welfare Comm., (1967) 248 Or 60, 432 P2d 296.

ATTY. GEN. OPINIONS: Liability of county on implied contract, 1926-28, p 294; liability of school district, 1928-30, p 218, 1938-40, p 187; liability of county to insure county vehicles, 1936-38, p 653; state's liability for acts of its agents, 1954-56, p 39; action against irrigation district for flood damage, 1960-62, p 204; sovereign immunity of county, 1960-62, p 24; effect of liability insurance on school district immunity, 1960-62, p 259; authority to sue state agencies on contracts, 1966-68, p 117.

LAW REVIEW CITATIONS: 17 OLR 252, 303; 18 OLR 226; 38 OLR 140; 43 OLR 274; 46 OLR 286-316; 47 OLR 361, 362, 368; 48 OLR 99, 117.

30.330

LAW REVIEW CITATIONS: 26 OLR 287.

30.340

NOTES OF DECISIONS

The county court, representing the county, may control and direct the conduct of a cause to which it is a party the same as a natural person might do. Moreland v. Marion County (1875) Fed Cas No. 9,794.

Unless there is a vacancy in the office of the district attorney, the county court must appear in court by him. Id.

The county court may, with or without the assent of the district attorney, employ counsel to assist him in the prosecution or defense of a proceeding to which the county is a party. Id.

The determination of the county court to end an action in the name of the assessor for the benefit of the county to collect a penalty for failure to list taxable property is binding on the assessor. Allen v. Craig, (1921) 102 Or 254, 201 P 1079.

The county court has power to settle with a taxpayer a controversy as to an assessment where there is doubt as to its validity. Jackson County v. Ulrich, (1926) 118 Or 47, 244 P 535.

FURTHER CITATIONS: Weiss v. Jackson County, (1881) 9 Or 470; Multnomah County v. Title Guar. Co., (1905) 46 Or 523, 80 P 409; Alexander v. Knox, (1879) 6 Sawy 54, Fed Cas No. 170.

ATTY GEN. OPINIONS: Authority of county court to compromise amount of taxes due, 1922-24, p 108, 1932-34, p 539.

30.350

NOTES OF DECISIONS

Even if the secretary of the Dock Commission of Portland is an officer within the statute, his verification of an answer is not an appearance of the city for he has no control over the city's litigation. Walters v. Dock Comm., (1928) 126 Or 487, 245 P 1117, 266 P 634, 270 P 778.

30.360

ATTY. GEN. OPINIONS: Liability of state for taxes against lands in irrigation districts, 1936-38, p 479; liability for taxes on realty on which State Land Board holds a mortgage, 1936-38, p 555; effect of foreclosure of tax lien on realty covered by mortgage to world war veterans' state aid commission (predecessor of the State Land Board), 1938-40, p 60; effect of suit to quiet title to realty for which state has sheriff's deed based on judgment for costs in criminal action, 1942-44, p 66; authority of city to sue the state to foreclose lien on escheated property, 1966-68, p 171.

LAW REVIEW CITATIONS: 39 OLR 127.

30.390

NOTES OF DECISIONS

The holder of an unpaid city warrant may maintain an action at law and reduce his claim to judgment, although no execution can be issued against a city on any judgment recovered. Goldsmith v. Baker City, (1897) 31 Or 249, 49 P 973.

In mandamus to compel municipality to issue warrants to satisfy judgment it is no defense that the city is without funds to pay them. Symons v. United States, (1918) 252 Fed 109, 164 CCA 221.

Upon failure to pay warrant obtained pursuant to this section, plaintiff was entitled to compel school district by writ of mandamus to levy a tax to cover the warrant. Cole v. Sch. Dist. 30, (1935) 151 Or 12, 47 P2d 229.

FURTHER CITATIONS: Brauer v. Portland, (1899) 35 Or 471, 58 P 861, 59 P 117, 60 P 378; Barrow v. Sch. Dist. 8, (1917) 83 Or 272, 162 P 789; Dougan v. Van Riper, (1923) 109 Or 254, 198 P 897.

30.400

NOTES OF DECISIONS

Public officers are not liable for the acts of their predecessors. Mohler v. Fish Comm., (1929) 129 Or 302, 276 P 691.

Highway contractors may not maintain an action against the highway commission to impeach a final award of the state highway engineer approved by the commission and to recover a judgment for a balance due without the state's consent, as the suit is in effect against the state. United Contracting Co. v. Duby, (1930) 134 Or 1, 292 P 309.

It is not the purpose of this statute to permit action or suit, without consent of the state, against public officers for acts within their official capacity. Schrader v. Veatch, (1959) 216 Or 105, 337 P2d 814.

LAW REVIEW CITATIONS: 11 OLR 123; 46 OLR 286-316.

30.410

NOTES OF DECISIONS

A fine or forfeiture cannot be recovered by the district attorney intervening in a suit between other parties. Holladay v. Holladay, (1886) 13 Or 523, 11 P 260, 12 P 821.

The district attorney may bring an action in his own name against bail under this section. Hannah v. Wells, (1872) 4 Or 249.

An action against bail will fail in the absence of a showing that the principal was charged with a crime. Malheur County v. Carter, (1908) 52 Or 616, 98 P 489.

FURTHER CITATIONS: In re Ison, (1877) 6 Or 469.

ATTY. GEN. OPINIONS: Procedure in confiscating scales violative of weights and measures legislation, 1920-22, p 209; procedure in confiscating property used by persons fishing illegally, 1920-22, p 213; destruction of slot machines which may be used for other than gambling purposes, 1952-54, p 197.

30.450

NOTES OF DECISIONS

A county is liable for restitution after reversal of a judgment on an undertaking of bail where the property of a surety was sold to satisfy the judgment and the money paid to the county. Metschan v. Grant County (1899) 36 Or 117, 58 P 80.

An action on a bail bond to secure the appearance of one charged with larceny may be brought by the county in the circuit court of which the accused was to appear for trial, although the bond runs to the state. Malheur County v. Carter, (1908) 52 Or 616, 98 P 489.

ATTY. GEN. OPINIONS: Disposition of fines for statutory violations: Traffic laws, 1928-30, p 375, 1954-56, p. 142; egg law and sanitary regulations, 1930-32, p 413; Motor Transportation Act, 1932-34, p 696, 1934-36, p 26; cosmetic therapy laws, 1938-40, p 359; Civilian Defense Act, 1942-44, p 229.

Disposition of forfeited bail, 1944-46, p 78; disposition of money acquired from fines for violation of school traffic laws, 1948-50, p 357; disposition of money when undertaking for bail is given and forfeited for violation of ORS 483.992, 1954-56, p 142.

30.510

NOTES OF DECISIONS

1. In general
2. Relation to other remedies
3. Pleading
4. The proceeding
5. Evidence

1. In general

A provision in a city charter that the board of trustees "shall judge of the qualifications and election of their own members" does not oust the jurisdiction of the circuit court over usurpation of such office. Robertson v. Groves, (1871) 4 Or 210; State v. McKinnon, (1880) 8 Or 493.

The remedies formerly had under the writ of quo warranto and the quo warranto information are now had under this section and ORS 30.580. State v. Douglas County Road Co., (1882) 10 Or 198; State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637, Ann Cas 1914C, 483.

The action under this section lies only for franchises exercised without or in violation of legislative grant. State v. Douglas County Road Co., (1882) 10 Or 198.

A policeman who has been removed from office upon insufficient cause and another appointed in his place, may maintain an action under this section against the intruder. Selby v. City of Portland, (1886) 14 Or 243, 12 P 377, 58 Am Rep 307.

Failure of a duly elected public officer to qualify within the prescribed time will not insure success in an action under this section. State v. Colvig, (1887) 15 Or 57, 13 P 639.

The validity of an attempted annexation of territory to a municipality is properly tested by an action under this section. State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637, Ann Cas 1914C, 483.

Persons who desire to object to the inclusion of their land within the limits of a municipality and have a right to present their objections at the hearing on the petition for incorporation cannot subsequently urge such matters in an action under this section. State v. Bay City, (1913) 65 Or 124, 131 P 1038.

The proceeding provided is to compel disclosure by defendant of the claim under which he exercises a franchise as well as to determine whether the franchise in question is being legally exercised. State v. Sch. Dist. 9, (1934) 148 Or 273, 31 P2d 751, 36 P2d 179.

A proceeding erroneously labeled a quo warranto information will be construed as an action at law in the name of the state. State v. Standard Optical Co., (1947) 182 Or 452, 188 P2d 309.

This section is the statutory equivalent on the common-law writ of quo warranto, and an action commenced under it is generally referred to as a proceeding in quo warranto. State ex rel. Madden v. Crawford, (1956) 207 Or 76, 295 P2d 174.

The action under this section is the exclusive remedy to determine the legality of a claim to exercise an office and oust the holder from its enjoyment if his claim is not well founded. Id.

An original proceeding in the nature of quo warranto could not be brought under this section to determine which of two candidates for district judge was nominated at the primary election. State ex rel. Reeder v. Danielson, (1958) 215 Or 5, 328 P2d 868.

An action under this section on the relation of a property owner challenging the validity of a consolidated school district could not be maintained where the relief sought was not sought by the state but by the relator who, with knowledge of all the proceedings, paid a tax levied by the new district, failed to challenge the district before it had held a number of elections, was apparently interested in the validity of a proposed bond issue rather than in the validity of the district, and was guilty of laches. State v. Sch. Dist. 23, (1946) 179 Or 443, 172 P2d 655.

An action under this section was the proper method to challenge the right of a circuit judge to sit temporarily as

a member of the Supreme Court. State ex rel. Madden v. Crawford, (1956) 207 Or 76, 295 P2d 174.

2. Relation to other remedies

An action under this section, and not mandamus, is the proper remedy to try the disputed title to a corporate office. Stevens v. Carter, (1895) 27 Or 553, 40 P 1074, 31 LRA 342; Beard v. Beard, (1913) 66 Or 512, 133 P 797, 134 P 1196.

But mandamus is the proper method for one who holds a certificate of election and has qualified, to obtain the insignia of office. Stevens v. Carter, (1895) 27 Or 553, 40 P 1074, 31 LRA 342.

A suit in behalf of the state for an injunction can only be instituted by the proper law officer in his official capacity and is not contemplated by this section. State v. Lord, (1896) 28 Or 498, 43 P 471, 31 LRA 473.

An adequate remedy at law to determine whether commissioners of incorporated ports appointed by the Governor have title to their offices is provided for by this section; and hence a suit in equity for an injunction will not lie. Bennett Trust Co. v. Sengstacken, (1911) 58 Or 333, 352, 113 P 863.

Though the action contemplated by this is at law, the equitable nature of it renders advisory only and not conclusive on appeal the findings of the trial court. State v. Sch. Dist. 9, (1934) 148 Or 273, 31 P2d 751, 36 P2d 179.

3. Pleading

A complaint predicated upon an officer's promise to reward a voter must show that such promise, if performed, would inure to the benefit of such voter. State v. Dustin, (1875) 5 Or 375, 20 Am Rep 746.

The district attorney has a discretion whether he will institute a prosecution to try the title to an office which is not controllable by mandamus. Everding v. McGinn, (1889) 23 Or 15, 35 P 178.

A complaint to oust a person from an office, the right to which depends upon the constitutionality of a statute, need not set out the statute nor allege unconstitutionality; a general allegation that the defendant unlawfully intrudes into and usurps the office calls upon him to disclose his title. State v. Stevens, (1896) 29 Or 464, 44 P 898.

This statute is sufficiently complied with where the complaint in an action by the state on relation of a private person is signed by the prosecuting attorney in his official capacity. Id.

When an action under this section is on the relation of a private party there must be a showing, either by appropriate allegations or by official signature, that the action has been commenced and is being prosecuted by the district attorney. State v. Cook, (1901) 39 Or 377, 65 P 89.

In an action to oust an occupant of a public office and to declare another person entitled thereto, it must appear from the complaint that the person claiming the office is legally qualified to hold it. Id.

The action should be in the name of the state and prosecuted by the district attorney whether it is only to oust an intruder from office or, in addition, to instate the person entitled thereto. Id.

The district attorney has the exclusive authority to commence an action under this section; the Attorney General does not have this power, notwithstanding he had it at common law. State v. Millis, (1912) 61 Or 245, 119 P 763.

The existence of a municipal corporation is not admitted by the use of its corporate name in the title of the complaint when it is described as a pretended corporation. State v. Port of Bayocean, (1913) 65 Or 506, 133 P 85.

The defendants in an action based on alleged illegality in annexation of a school district must allege facts necessary to show a legal annexation. State v. Evans, (1916) 82 Or 46, 160 P 140.

Where the complaint under this section contained the signature of the district attorney in his official capacity and the action was brought with his consent, this was sufficient to entitle the action to proceed to a final determination. State v. Sch. Dist. 9, (1934) 148 Or 273, 31 P2d 751, 36 P2d 179.

4. The proceeding

The right to a trial by jury does not exist in proceedings under subsection (3). State v. Sengstacken, (1912) 61 Or 455, 122 P 292, Ann Cas 1914B, 230.

A collateral attack upon a de facto union high school district in a suit brought by taxpayers to enjoin collection of taxes is not permissible. Splonskofsky v. Minto, (1912) 62 Or 560, 126 P 15.

Where a union of school districts was ordered after the necessary elections, a proceeding under this section was a direct attack upon the order. State v. Evans, (1916) 82 Or 46, 160 P 140.

The corporate existence of an irrigation district which at least has a de facto status is not subject to collateral attack but must be tried in an action under this section. Northern Pac. Ry. v. John Day Irr. Dist., (1923) 106 Or 140, 211 P 781.

Collection of a water district tax may not be restrained on the ground of invalidity of incorporation of the district for that is a collateral attack on the incorporation; the remedy is under this section. Smith v. Hurlburt, (1923) 108 Or 690, 217 P 1093.

In exercising its discretion in considering a proceeding under this section, a court may consider all the circumstances of the case, the motives of the relator, the time which has elapsed since the cause of complaint occurred and whether public interest will be served in granting the relief prayed for. State v. Sch. Dist. 9, (1934) 148 Or 273, 31 P2d 751, 36 P2d 179.

An action under this section to test the validity of orders adding property to a school district was barred by statute where the landowner acquiesced in the orders for over 19 years. Id.

5. Evidence

In an action under this section the burden is on the defendant to show his title to the office or, in the case of a corporation, to establish its right to exist as such. **Title to office,** State v. Stevens, (1896) 29 Or 464, 44 P 898; **corporate existence,** State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637; State v. Deschutes County, (1918) 88 Or 661, 173 P 158.

In search of the true result of an election, the inquiry in proceedings under this section may be extended behind the returns even to the ballots themselves. State v. Deschutes County, (1918) 88 Or 661, 173 P 158.

In proceedings under this section based on alleged irregularities in election held in process of creating a new county, a prima facie case for defendant was made out by the executive proclamation creating the new county. Id.

In proceedings under this section predicated upon the claim of insufficiency of a petition for the election on the question of annexation, complainants could offer evidence dehors the record that the petition was not signed by the requisite number of legal voters. State v. Evans, (1916) 82 Or 46, 160 P 140.

FURTHER CITATIONS: State v. Hall, (1914) 73 Or 231, 144 P 475; Van Brakle v. State, (1915) 74 Or 367, 144 P 1170; Smith v. Tazwell, (1941) 166 Or 349, 111 P2d 1021; State v. Ostrander, (1957) 212 Or 177, 318 P2d 283; Corvallis Sand & Gravel Co. v. State Land Bd., (1968) 249 Or 611, 439 P2d 7.

ATTY. GEN. OPINIONS: Duty of district attorney to insti-

tute proceedings on relation of private party in connection with election and tax levy, 1924-26, p 193; procedure for testing title of office holder having another lucrative position, 1932-1934, p 176; procedure for testing title to his office of unqualified notary public, 1938-40, p 360; liability for fees of attorney engaged by public officer to try title to his office, 1938-40, p 583; legislator holding office as mayor or councilman, 1954-56, p 3; assumed business name that is not a corporate name but uses "corp." or "inc.", 1964-66, p 55.

30.520

ATTY. GEN. OPINIONS: Assumed business name that is not a corporate name but uses "corp." or "inc.," 1964-66, p 55.

30.530

NOTES OF DECISIONS

Whether the action is only to oust an intruder from office or, in addition, to instate the person entitled thereto, it should be brought in the name of the state and commenced and prosecuted by the district attorney. State v. Cook, (1901) 39 Or 377, 65 P 89.

The complaint in a proceeding to oust an occupant of a public office and to declare another person entitled thereto must show that the person claiming the office is legally qualified. Id.

30.540

NOTES OF DECISIONS

This section refers to the ancient writ of quo warranto, hence a jury trial is not allowable. State v. Sengstacken, (1912) 61 Or 455, 122 P 292, Ann Cas 1914B, 230.

FURTHER CITATIONS: State v. Stevens, (1896) 29 Or 464, 44 P 898.

30.560

NOTES OF DECISIONS

This section refers to proceedings by information in the nature of quo warranto and the defendant is entitled to a jury trial as at common law. State v. Sengstacken, (1912) 61 Or 463, 122 P 292, Ann Cas 1914B, 230.

ATTY. GEN. OPINIONS: Assumed business name that is not a corporate name but uses "corp." or "inc.," 1964-66, p 55.

30.570

NOTES OF DECISIONS

The corporate existence of school districts cannot be annulled on ground of alleged irregularities except as provided in this statute. State v. Hulin, (1868) 2 Or 306.

FURTHER CITATIONS: Marsters v. Umpqua Oil Co., (1907) 49 Or 374, 90 P 151, 12 LRA(NS) 825.

ATTY. GEN. OPINIONS: Discretion of executive in bringing an action under this section, 1926-28, p 408; function of district attorney under this section, 1932-34, p 671.

30.580

NOTES OF DECISIONS

The district attorney given leave to sue has full control over the proceeding both in the circuit court and on appeal. State v. Douglas County Road Co., (1882) 10 Or 198, 201; Everding v. McGinn, (1889) 23 Or 15, 35 P 178; State v. School Dist. 9, (1934) 148 Or 273, 31 P2d 751, 36 P2d 179.

An order refusing leave to sue is not appealable. State v. Ore. Cent. R. Co., (1868) 2 Or 255.

The waiver of the forfeiture of a charter by the state acting through its attorney cannot be controlled by the court. State v. Douglas County Rd. Co., (1882) 10 Or 198.

The name of a relator in a proceeding under this section is surplusage. Id.

The remedies formerly obtainable under the writ of quo warranto and the quo warranto information may now be had in an action in the name of the state under this section. State v. Standard Optical Co., (1947) 182 Or 452, 188 P2d 309.

A proceeding erroneously labeled a quo warranto information will be construed as an action in the name of the state. Id.

FURTHER CITATIONS: Oregon Cent. R. Co. v. Scoggin, (1869) 3 Or 161; Kelly v. People's Trans. Co., (1870) 3 Or 189.

ATTY. GEN. OPINIONS: When and by whom an action may be prosecuted against a corporation, 1926-28, p 408; failure of corporation to comply with statute pertinent to its business, 1934-36, p 572.

30.600

NOTES OF DECISIONS

The state cannot lend the power of its name for the purpose of settling rights or titles in controversy between private parties in which it has no interest. State v. Shively, (1882) 10 Or 267; State v. Warner Stock Co., (1906) 48 Or 378, 86 P 780, 87 P 534.

An action lies to annul letters patent fradulently obtained notwithstanding patentee had prior to the commencement of the action met the requirements as to which the misrepresentations were made. State v. Carlson, (1902) 40 Or 565, 67 P 516.

FURTHER CITATIONS: Wilson v. Welch, (1885) 12 Or 353, 7 P 341.

30.610

NOTES OF DECISIONS

There must be some showing either by appropriate allegations or by official signature that the action has been commenced and is being prosecuted by the district attorney. State v. Cook, (1901) 39 Or 379, 65 P 89.

Whether the action is only to oust an intruder from office or, in addition, to instate the person entitled thereto, it should be brought in the name of the state and commenced and prosecuted by the district attorney. Id.

District attorneys are not deprived of the powers conferred by this section by the subsequent creation of the office of the Attorney General. State ex rel. Sheridan v. Millis, (1912) 61 Or 245, 119 P 763.

The district attorney has exclusive authority to commence the actions mentioned in the statute. Id.

Error in commencing an action by the Attorney General could be taken advantage of by demurrer. Id.

The association of other counsel with the district attorney is within his right in this class of cases. State ex rel. Dethlefs v. Fendall, (1931) 135 Or 142, 295 P 191, 194.

The district attorney has absolute control of this class of cases. Id.

A district attorney who has consented to the commencement of an action under OC 5-604 [ORS 30.510] cannot thereafter arbitrarily block the further prosecution of the action either by moving to dismiss or by refusing to join

in an appeal. State v. Sch. Dist. 9, (1934) 148 Or 273, 31 P2d 751, 36 P2d 179.

Even though the district attorney has refused to sign a notice of appeal in an action brought under OC 5-604 [ORS 30.510] the court nevertheless may refuse to dismiss the appeal. Id.

FURTHER CITATIONS: State v. Douglas County Rd. Co., (1882) 10 Or 198; State v. Sch. Dist. 23, (1946) 179 Or 441, 172 P2d 655.

ATTY. GEN. OPINIONS: Duty of district attorney to institute proceedings upon relation of private person in connection with election and tax levy, 1924-26, p 193; when and by whom an action may be prosecuted against a corporation, 1926-28, p 408; reference of complaint against a corporation to district attorney, 1932-34, p 671; failure of corporation to comply with statute pertinent to its business, 1934-36, p 570.

30.620

NOTES OF DECISIONS

The district attorney has exclusive authority to commence the actions mentioned in the statute. State v. Millis, (1912) 61 Or 245, 119 P 763.

Without a showing that the organization of a union high school district was attacked by an attempt to commence or of the district attorney's refusal to commence quo warranto proceedings, taxpayers may not enjoin a collection of taxes levied by the district. Splonskofsky v. Minto, (1912) 62 Or 560, 126 P 15.

A district attorney who has consented to an action under OC 5-604 [ORS 30.510] cannot thereafter arbitrarily block the further prosecution of the action either by moving to dismiss or by refusing to join in an appeal. State v. Sch. Dist. 9, (1934) 148 Or 273, 31 P2d 751, 36 P2d 179.

FURTHER CITATIONS: State v. Shiveley, (1882) 10 Or 267.

ATTY. GEN. OPINIONS: When and by whom an action may be prosecuted against a corporation, 1926-28, p 408; reference of complaint against a corporation to district attorney, 1932-34, p 671.

30.670 to 30.680

CASE CITATIONS: Atlanta Motel v. United States, (1964) 379 US 241, 259, 85 S Ct 348, 13 L Ed 2d 258.

30.670

ATTY. GEN. OPINIONS: Segregation of restaurant patrons as a violation of this section, 1952-54, p 208.

30.675

ATTY. GEN. OPINIONS: Restaurant as place of public accommodation, 1952-54, p 208.

LAW REVIEW CITATIONS: 44 OLR 123,131.

30.680

CASE CITATIONS: Atlanta Motel v. United States, (1964) 379 US 241, 259, 85 S Ct 348, 13 L Ed 2d 258.

LAW REVIEW CITATIONS: 44 OLR 123,131.

30.710

NOTES OF DECISIONS

It was error to refuse to give an instruction that seduction is not proved merely by proof of illicit sexual intercourse, but by showing that plaintiff's daughter was chaste and was overcome by the use of some artifice or promise, which due to her relations with and confidence in the defendant, she could not resist. Patterson v. Hayden, (1889) 17 Or 238, 21 P 129, 11 Am St Rep 822, 3 LRA 529.

The common-law action of seduction for the loss of services of an unmarried female in the name of the person having the right to her services is not superseded by this section. Anderson v. Aupperle, (1909) 51 Or 556, 95 P 330.

The introduction into evidence of the baby conceived at the time of the seduction was proper. Id.

LAW REVIEW CITATIONS: 4 OLR 244; 26 OLR 64.

30.720

NOTES OF DECISIONS

Not withstanding this section, in an action for breach of promise, seduction under the promise of marriage may be shown in aggravation of damages. Osmun v. Winters, (1894) 25 Or 260, 35 P 250; Stamm v. Wood, (1917) 86 Or 174, 168 P 69.

This section was not intended to allow a recovery where the parties are equally guilty. Breon v. Henkle, (1887) 14 Or 494, 13 P 289.

Error on account of vagueness was made by giving an instruction that plaintiff should have a verdict if her reluctance and scruples were overcome by enticement, persuasion or artifice resulting in unlawful intercourse with defendant. Id.

It was error to refuse to give an instruction that plaintiff could not recover for defendant's having sexual intercourse with her if it was without her consent or if with consent, not obtained by false promises or by some artifice or device by which she was deceived. Id.

30.730

NOTES OF DECISIONS

A complaint setting forth a cause of action for serving intoxicating liquors to another whereby the latter became sick and subsequently died does not state a cause of action under this provision. Ibach v. Jackson, (1934) 148 Or 92, 35 P2d 672.

FURTHER CITATIONS: Weiner v. Gamma Phi Chap. of Alpha Tau Omega Fraternity, (1971) 258 Or 632, 485 P2d 18.

LAW REVIEW CITATIONS: 4 OLR 233.

30.740

NOTES OF DECISIONS

This section is remedial and not penal. O'Keefe v. Weber, (1886) 14 Or 55, 12 P 74.

An action based on this statute is civil in nature. Id.

The record of conviction on a plea of guilty to conducting a game is admissible as evidence of an admission of proprietorship. Meyers v. Dillon, (1901) 39 Or 581, 65 P 867, 66 P 814.

The verdict is in the nature of a special finding and authorizes the court to render judgment for double the sum so found. Id.

An arrest after judgment for plaintiff in an action for money lost at gambling on execution against the person does not violate the constitutional inhibition against im-

prisonment for debt under Ore. Const. Art. I, §19. Mozorosky v. Hurlburt, (1923) 106 Or 274, 198 P 556, 211 P 893, 15 ALR 1076.

The willingness of a gambler to play does not preclude recovery of losses. Id.

The right to recover losses is statutory. Id.

The word "and" may not be substituted for the word "or" before "such money or thing of value won," for the legislature did not mean a proprietor was not to be liable unless the money won in the game was won for his benefit. Lairmore v. Drake, (1949) 185 Or 239, 202 P2d 473.

A proprietor who takes a percentage of the pot representing the money bet is as a matter of law liable as a proprietor for whose benefit the games were played and dealt. Id.

Evidence that defendant had the reputation of being the proprietor of the game at which plaintiff lost his money was admissible. Meyers v. Dillon, (1901) 39 Or 581, 65 P 867, 66 P 814.

LAW REVIEW CITATIONS: 8 OLR 116; 28 OLR 391.

30.770

LAW REVIEW CITATIONS: 39 OLR 132.

30.800

LAW REVIEW CITATIONS: 6 WLJ 198.