

## Chapter 52

### Procedure in Ordinary Actions

52.010

#### NOTES OF DECISIONS

This provision cannot be invoked to exalt a justice's court to the plane of general jurisdiction occupied by a court of record, or to give its docket recitals the same force as similar entries upon the journal of a circuit court. *Evans v. Marvin*, (1915) 76 Or 540, 148 P 1119, 1121.

Procedural conformity was applied. **Rendition of verdict**, *Nickelson v. Smith*, (1887) 15 Or 200, 14 P 40; **attachment**, *Burns v. Payne*, (1897) 31 Or 100, 49 P 884; **discharge of attachment**, *Roethler v. Cummings*, (1917) 84 Or 442, 165 P 355; **taxation of disbursement**, *Lemmons v. Huber*, (1904) 45 Or 282, 77 P 836; **time for filing pleadings**, *Mulkey v. Day*, (1907) 49 Or 312, 89 P 957; **service of summons**, *Spencer v. Small*, (1918) 87 Or 662, 171 P 409.

In an action to recover possession of real property, the justice proceeded in the proper manner. *McAnish v. Grant*, (1903) 44 Or 57, 74 P 396.

**FURTHER CITATIONS:** *Hasbrook v. Lynch*, (1934) 146 Or 363, 30 P2d 358.

**ATTY. GEN. OPINIONS:** Necessity for state agency to pay fees and costs, 1934-36, p 670; authority to renew a judgment, 1942-44, p 330; authority to use supplementary proceedings, 1944-46, p 320.

52.020

**ATTY. GEN. OPINIONS:** Authority of justice of peace to rule on questions of law, 1950-52, p 298.

52.030

#### NOTES OF DECISIONS

A justice's court can only set aside a judgment for the reasons herein prescribed or in the Code. *White v. Brown*, (1909) 54 Or 7, 101 P 900.

Section was applied. **Formation of issues**, *McAnish v. Grant*, (1903) 44 Or 57, 74 P 396; **taxation of disbursements**, *Lemmons v. Huber*, (1904) 45 Or 282, 77 P 836; **relief from judgments**, *McCabe-Duprey Tanning Co. v. Eubanks*, (1910) 57 Or 44, 102 P 795, 110 P 395.

**FURTHER CITATIONS:** *McAnish v. Grant*, (1903) 44 Or 57, 74 P 396; *Lemmons v. Huber*, (1904) 45 Or 282, 77 P 836.

**ATTY. GEN. OPINIONS:** Filing transcript of judgment of conviction with county clerk, 1940-42, p 46; authority to renew a judgment, 1942-44, p 330; authority to use supplementary proceedings, 1944-46, p 320.

52.050

**ATTY. GEN. OPINIONS:** Failure to appear as direct contempt of justice court, 1954-56, p 11, (1968) Vol 34, p 295.

52.060

#### NOTES OF DECISIONS

An attorney acting for another in a justice's court is more a counsel, and his authority is limited to the matters that occur there. *Byers v. Cook*, (1886) 13 Or 297, 10 P 417.

52.110

#### NOTES OF DECISIONS

The time for service in forcible entry and detainer actions is less than that allowed in ordinary cases. *Belfils v. Flint*, (1887) 15 Or 158, 14 P 295; *Wolfer v. Hurst*, (1905) 47 Or 156, 80 P 419, 82 P 20, 8 Ann Cas 725.

Defects in the form of summons are not available by way of collateral attack on the judgment. *North Pac. Cycle Co. v. Thomas*, (1894) 26 Or 381, 28 P 307, 46 Am St Rep 636; *Perry v. Gholson*, (1901) 39 Or 438, 65 P 601, 87 Am St Rep 685; *Stanley v. Rachofsky*, (1908) 50 Or 472, 93 P 354; *Lane v. Ball*, (1917) 83 Or 404, 160 P 144, 163 P 975.

Substantial compliance with the statute is all that is necessary. *Stanley v. Rachofsky*, (1908) 50 Or 472, 93 P 354.

**ATTY. GEN. OPINIONS:** Jurisdiction in an action against a resident of another county, 1942-44, p 303.

52.120

#### NOTES OF DECISIONS

The constable is an executive officer of the court for this purpose. *Hume v. Norris*, (1875) 5 Or 478.

A constable of the precinct in which the action is brought may make service in the county. *Taylor v. Jenkins*, (1884) 11 Or 274, 3 P 681.

The sheriff of the county in which the court sits may not serve a summons in another county. *Pierce v. Rock Creek Min. Co.*, (1900) 37 Or 342, 61 P 348.

**FURTHER CITATIONS:** *Schoeneman v. Bennett*, (1963) 235 Or 257, 384 P2d 217.

**ATTY. GEN. OPINIONS:** Appointment of same person as constable for service of process in more than one justice of the peace district, 1948-50, p 282.

52.130

#### NOTES OF DECISIONS

Before a third person is appointed the unavailability of the sheriff, his deputies and the constable must be shown. *Pickard v. Marsh*, (1912) 62 Or 192, 124 P 268; *Smith v. McDuffee*, (1914) 72 Or 276, 142 P 558, 143 P 929, Ann Cas 1916D, 947.

It is necessary to indorse the appointment on the process or writ. *Pickard v. Marsh*, (1912) 62 Or 192, 124 P 268; *Smith v. McDuffee*, (1914) 72 Or 276, 142 P 558, 143 P 929, Ann Cas 1916D, 947.

**FURTHER CITATIONS:** *White v. Thompson*, (1869) 3 Or

115; *North Pac. Cycle Co. v. Thomas*, (1894) 26 Or 381, 38 P 307, 46 Am St Rep 636.

ATTY. GEN. OPINIONS: Appointment of same person as constable for service of process in more than one justice of the peace district, 1948-50, p 282; procedure, other than change of venue, when justice of the peace is disqualified, 1966-68, p 250.

52.140

## NOTES OF DECISIONS

A return is insufficient to confer jurisdiction if it fails to show that a certified copy of the complaint was served. *Belfils v. Flint*, (1887) 15 Or 158, 14 P 295; *Spencer v. Small*, (1918) 87 Or 662, 171 P 409.

No jurisdiction is acquired when summons is not properly served. *Munroe v. Thomas*, (1899) 35 Or 174, 57 P 419.

The delivery of a copy of the summons to the defendant is mandatory. *Id.*

Irregularity in service is not available by way of collateral attack. *Stanley v. Rachofsky*, (1908) 50 Or 472, 93 P 354.

52.160

ATTY. GEN. OPINIONS: Personal service without the state where jurisdiction of subject matter exists, 1942-44, p 268.

52.170

## NOTES OF DECISIONS

Assignment of a judgment does not carry with it the undertaking so as to affect the rights of the surety. *Dray v. Mayer*, (1874) 5 Or 185.

52.210

## NOTES OF DECISIONS

Strict compliance with the statutory requisites for provisional remedies is required. *Carlton v. Dixon*, (1885) 12 Or 144, 6 P 500.

In claim and delivery the affidavit may be made by any-one acquainted with the facts. *Id.*

Plaintiff may sign the affidavit in claim and delivery. *Id.*

Where the direction to the sheriff in claim and delivery is signed by the plaintiff instead of the justice, plaintiff's sureties will not be exonerated. *Id.*

Return of the summons is not necessary to the issuance of attachment. *Perry v. Gholson*, (1901) 39 Or 438, 65 P 601.

FURTHER CITATIONS: *Hume v. Norris*, (1875) 5 Or 478; *Burns v. Payne*, (1897) 31 Or 100, 49 P 884.

52.230

## NOTES OF DECISIONS

Upon surrender of defendant to the constable by his sureties, the constable must acknowledge it by a certificate in writing upon the certified copy of the undertaking of bail presented by the sureties. *Hume v. Norris*, (1875) 5 Or 478.

52.240

## NOTES OF DECISIONS

This provision does not apply to criminal actions. *State v. Harris*, (1921) 101 Or 410, 200 P 926.

52.310

## NOTES OF DECISIONS

A plea or answer must be in writing and filed with the justice. *Stanley v. Rachofsky*, (1908) 50 Or 472, 93 P 354.

Error in overruling a demurrer, defective in its statement of venue, was waived by defendant's answering over. *Byers v. Ferguson*, (1902) 41 Or 77, 65 P 1067, 68 P 5.

FURTHER CITATIONS: *McAnish v. Grant*, (1903) 44 Or 57, 74 P 396.

52.410

## NOTES OF DECISIONS

A sum specified by a statute is allowed and taxed as a matter of right without filing a bill therefor. *Sommer v. Compton*, (1909) 53 Or 341, 100 P 289.

ATTY. GEN. OPINIONS: Trial fee in divorce proceedings, 1932-34, p 500; collection of trial fee in defaults other than divorce proceedings, 1932-34, p 581; whether excess amount above the trial fee for payment of jurors can be assessed against a party, 1932-34, p 614; disposition of trial fees in justice's courts, 1942-44, p 389.

52.420

ATTY. GEN. OPINIONS: Collection of court costs by the justice of the peace, 1948-50, p 192.

52.440

ATTY. GEN. OPINIONS: Whether excess amount above the trial fee for the payment of jurors can be assessed against a party, 1932-34, p 614.

52.530

## NOTES OF DECISIONS

This provision is also applicable to criminal trials. *Packwood v. State*, (1893) 24 Or 261, 33 P 674; *Straub v. State*, (1927) 121 Or 451, 255 P 897.

A broad and liberal construction should be given the statute. *Packwood v. State*, (1893) 24 Or 261, 33 P 674.

Irregularities in the affidavit are waived where the party appears without objection in the court to which the case is transferred. *Woldenberg v. Haines*, (1899) 35 Or 246, 57 P 627.

That the case was transferred to the nearest justice will be presumed on writ of review where nothing to the contrary is shown by the transcript. *White v. Brown*, (1909) 54 Or 7, 101 P 900.

Motion for change of venue comes too late if made after the case is tried on its merits. *Mack Trucks Inc. v. Taylor*, (1961) 227 Or 376, 362 P2d 364.

Bail is an essential part of the record that must be transmitted. *State ex rel. Hemphill v. Rafferty*, (1967) 247 Or 475, 430 P2d 1017.

That the justice was directly interested in the lands upon which a trespass was committed was grounds for changing venue. *Packwood v. State*, (1893) 24 Or 261, 33 P 674.

An affidavit stating by way of conclusion that the justice was so prejudiced that a fair and impartial trial before him could not be had was sufficient. *Best v. Parks*, (1916) 82 Or 171, 161 P 255.

ATTY. GEN. OPINIONS: Authority to change county of venue, 1920-22, p 222; procedure, other than change of venue, when justice of the peace is disqualified, 1966-68, p 250.

LAW REVIEW CITATIONS: 48 OLR 373.

## 52.560

## NOTES OF DECISIONS

Where an action of forcible entry and detainer is before a justice, title cannot be litigated. *Shortness v. Wirt*, (1853) 1 Or 91.

Where title to real property comes in question by defense or plea, the court is ousted of jurisdiction. *Sweek v. Galbreath*, (1884) 11 Or 516, 6 P 220.

An action to recover possession of a mining claim need not be transferred to the circuit court where no title to realty is involved. *Duffy v. Mix*, (1893) 24 Or 265, 33 P 807.

Where the answer in forcible detainer does not deny the ownership as pleaded in the complaint, the justice has jurisdiction. *Heiney v. Heiney*, (1903) 43 Or 577, 73 P 1038.

"Proceedings" embrace only those steps leading up to and concerning the issues at trial. *Fish v. Bishop*, (1945) 176 Or 210, 156 P2d 204.

When title to real property is disputed the justice court's disposition is not *res judicata*. *Norton v. Van Voorst*, (1951) 191 Or 577, 231 P2d 947.

FURTHER CITATIONS: *Church v. Schindler*, (1910) 56 Or 247, 108 P 178; *Brosius v. Hazelwood*, (1929) 127 Or 635, 271 P 992.

ATTY. GEN. OPINIONS: Liability for fees for filing transcript in circuit court when issue of title is raised by defendant, 1940-42, p 340.

## 52.590

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

## 52.610

ATTY. GEN. OPINIONS: Enforcement of fines imposed by predecessor, 1928-30, p 268.

## 52.620

ATTY. GEN. OPINIONS: Judgments of conviction by justices' courts as liens upon defendants realty in other county, 1940-42, p 46; effect of issuance of writ of execution by a clerk of a district court directing the sheriff of another county to levy upon personal property, 1948-50, p 383; fee for filing transcripts of judgments transferred from one justice's court to another, 1956-58, p 70.

## 52.630

## NOTES OF DECISIONS

Where jurisdiction of the justice to render the judgment is not shown by the transcript, it is insufficient. *Dearborn v. Patton*, (1869) 4 Or 58; *White v. Espey*, (1891) 21 Or 328, 28 P 71; *Armstrong v. Travis*, (1920) 97 Or 587, 192 P 649.

Filing a mere abstract of the judgment is insufficient.

*Dearborn v. Patton*, (1869) 4 Or 58; *White v. Espey*, (1891) 21 Or 328, 28 P 71.

That the certifying officer has compared the copy with the original must be shown by the certificate of authentication. *Evans v. Marvin*, (1915) 76 Or 540, 148 P 1119, 1121; *Yeaton v. Barnhart*, (1915) 78 Or 249, 150 P 742, 152 P 1192.

A transcript on appeal is insufficient. *Chapman v. Raleigh*, (1868) 3 Or 34.

Filing a transcript with the clerk of the circuit court is not a compliance with the requirement that it be filed with the county clerk although both offices are united in the same person. *Id.*

Jurisdiction of the justice is not necessarily terminated by the docketing in the circuit court. *McCabe-Duprey Tanning Co. v. Eubanks*, (1910) 57 Or 44, 49, 102 P 795, 110 P 395.

A lien on the debtor's homestead, enforceable while it remains a homestead, is not created by the docketing. *Hansen v. Jones*, (1910) 57 Or 416, 109 P 868.

FURTHER CITATIONS: *Hage v. Lewis*, (1885) 12 Or 347, 7 P 354; *Denny v. Bean*, (1908) 51 Or 180, 93 P 693, 94 P 503.

## 52.640

## NOTES OF DECISIONS

This section evinces a legislative policy, in the absence of any statute regulating equitable setoffs in courts of record, of requiring that the demands shall be mutual and exist between the same parties before they can be employed to extinguish, wholly or in part the rightful claim of the adverse party. *Barnes v. Esch*, (1917) 87 Or 1, 169 P 512.

## 52.670

## NOTES OF DECISIONS

A wife's judgment may not be used as a set-off for one against her husband. *Barnes v. Esch*, (1917) 87 Or 1, 169 P 512.

## 52.690

## NOTES OF DECISIONS

Execution may be issued by the clerk of the circuit court on a docketed justice's judgment. *Lovelady v. Burgess*, (1898) 32 Or 418, 52 P 25.

FURTHER CITATIONS: *Glaze v. Lewis*, (1885) 12 Or 347, 7 P 354; *Yeaton v. Barnhart*, (1915) 78 Or 249, 150 P 742, 152 P 1192.

ATTY. GEN. OPINIONS: Filing transcript of judgment of conviction with county clerk as creating lien on realty of defendant, 1940-42, p 46; effect of issuance of writ of execution by a clerk of a district court directing the sheriff of another county to levy upon personal property, 1948-50, p 383.