Chapter 53

Appeals in Civil Actions

Chapter 53

NOTES OF DECISIONS

Appeals from justices' courts are limited and regulated by this chapter which is complete in itself. Kennard v. Sax, (1870) 30 Or 263; Hosford v. Logus, (1885) 13 Or 130, 11 P 900; Odell v. Gotfrey, (1886) 13 Or 466, 11 P 190; Lewis v. Chamberlain, (1912) 61 Or 150, 121 P 430; Moltzner v. Cutler, (1936) 154 Or 573, 61 P2d 93.

The practice should be liberal for taking appeals from justices' court. Hosford v. Logus, (1885) 13 Or 130, 11 P 900; Brown v. Jessup, (1890) 19 Or 288, 24 P 232; Ream v. Howard, (1890) 19 Or 491, 24 P 913; Gobbi v. Refrano, (1898) 33 Or 26, 52 P 761.

There must be compliance with the statutes as to appeal or the circuit court acquires no jurisdiction. Steel v. Rees, (1886) 13 Or 428, 11 P 68; Shaw v. Hemphill, (1906) 48 Or 371, 86 P 373; State v. Rider, (1915) 78 Or 318, 145 P 1056, 152 P 497; Rugh v. Soleim, (1919) 92 Or 329, 180 P 930.

53.010

NOTES OF DECISIONS

Availability of writ of review and appeal as concurrent remedies. Shirott v. Phillippi, (1859) 3 Or 484; Evans v. Christian, (1873) 4 Or 375; Ramsey v. Pettengill, (1886) 14 Or 207, 12 P 439; Feller v. Feller, (1901) 40 Or 73, 66 P 468.

A demurrer is treated as an answer. Kearns v. Follansby, (1888) 15 Or 596, 16 P 478; Willis v. Marks, (1896) 29 Or 493, 45 P 293.

"Judgment for want of answer" exists if an answer is stricken for insufficiency and no other answer is filed. Long v. Sharp, (1875) 5 Or 438, 440.

Objection that appeal rather than a writ of review is the remedy, where the justice's judgment is void, is not sustainable. Prickett v. Cleek, (1886) 13 Or 415, 11 P 49.

It is not a party to the action who may appeal but a party to the judgment. Burns v. Payne, (1897) 31 Or 100, 49 P 884.

A garnishee against whom the plaintiff prevails is a party to the judgment. Id.

The ad damnum clause of the complaint, and not the amount awarded by the judgment, affords the test of jurisdictional amount where no counterclaim is interposed by the defendant. Troy v. Hallgarth, (1899) 35 Or 162, 57 P 374.

A motion to strike out parts of the complaint is not an answer and a judgment on failure to plead after overruling of such motion is not appealable. Brownell v. Salem Flouring Mills Co., (1906) 48 Or 525, 87 P 770.

Where an answer is filed and not demurred to or disposed of in any way, the judgment is not one for want of an answer. Jetmore v. Anderson, (1922) 103 Or 252, 204 P 499.

FURTHER CITATIONS: Ryan v. Harris, (1866) 2 Or 175; Stoll v. Hoback, (1867) 2 Or 225; Steel v. Rees, (1886) 13 Or 428, 11 P 68; Whipple v. So. Pac. Co., (1899) 34 Or 370, 55 P 975; Lemmons v. Huber, (1904) 45 Or 282, 77 P 836; State v. Dobson, (1942) 169 Or 546, 130 P2d 939.

53.020

NOTES OF DECISIONS

The period for serving written notice and taking the appeal begins to run after the judgment is entered in the docket, and not after its oral rendition. Furlong v. Tish, (1950) 189 Or 86, 218 P2d 476.

FURTHER CITATIONS: Lemmons v. Huber, (1904) 45 Or 282, 77 P 836; Columbia Auto Works v. Yates, (1945) 176 Or 295, 156 P2d 561.

53.030

NOTES OF DECISIONS

1. In general
2. Sufficiency of notice
3. Filing and service of notice.

1. In general

The practice should be liberal as to taking appeal. Hosford v. Logus, (1885) 13 Or 130, 11 P 900; Brown v. Jessup, (1890) 19 Or 288, 24 P 232; Gobbi v. Refrano, (1898) 33 Or 26, 52 P 761.

The provisions of ORS 19.023 do not apply to appeals from justices' courts. Odell v. Gotfrey, (1886) 13 Or 466, 11 P 190.

A disregard of the order of procedure does not render an appeal ineffectual. Brown v. Jessup, (1890) 19 Or 288, 24 P 232.

Equitable relief against enforcement of a judgment was refused to plaintiff who gave timely notice of appeal and a proper undertaking but who was unable to complete the proceedings in time because of the resignation of the justice and the vacancy of office. Galbraith v. Barnard, (1891) 21 Or 67, 26 P 1110.

2. Sufficiency of notice

Notice is sufficient if it makes known to the adverse party that an appeal is taken. Lancaster v. McDonald, (1886) 14 Or 264, 12 P 374; Starks v. Stafford, (1886) 14 Or 317, 12 P 670.

A notice giving the title of the court and cause, the nature of the action, the names of the parties, and the name of the appellant is sufficient. Allen v. Byerly, (1897) 32 Or 117, 48 P 474; Ream v. Howard, (1890) 19 Or 491, 24 P 913.

The notice should reasonably identify the case; a misdescription of the judgment is fatal. Chipman v. Bronson, (1871) 3 Or 320.

The test is whether the notice intelligibly refers to the action. Lancaster v. McDonald, (1886) 14 Or 264, 12 P 374.

Oral notice may be abandoned without losing right of appeal. Watts v. State Spiritualists' Assn., (1910) 56 Or 56, 107 P 695.

A mere clerical mistake in the notice as to the date of the judgment was not misleading and was waived by failure to object. Moorhouse v. Donica, (1886) 13 Or 435, 11 P 71.

The plaintiff was sufficiently identified in the notice where he was referred to as "A. H. Starks" but in the

original case he was named "Amanda H. Starks." Starks v. Stafford, (1886) 14 Or 317, 12 P 670.

A notice describing a judgment for the recovery of money was insufficient to bring into the appellate court a judgment in an action for the recovery of personal property. Ream v. Howard, (1890) 19 Or 491, 24 P 913.

A notice was sufficient that stated: "Defendant herein appeals from the judgment of the justice court for Portland district *** in favor of plaintiff and against defendant herein to the circuit court." Watts v. State Spiritualists' Assn., (1910) 56 Or 56, 107 P 695.

3. Filing and service of notice

Service of notice on the adverse party's attorney who appeared in the action is sufficient, if such attorney be a resident of the county in which the trial was had. Carr v. Hurd, (1869) 3 Or 160; Lewis & Dryden Printing Co. v. Reeves, (1894) 26 Or 445, 38 P 622; Hughes v. Clemens, (1895) 28 Or 440, 42 P 617.

Where the filing of notice with the justice and the service of a copy of it do not appear from the transcript, the circuit court is without jurisdiction, although the transcript discloses a formal notice. Strang v. Keith, (1860) 1 Or 313.

A party to an action may not serve or make proof of service of a notice. Williams v. Schmidt, (1887) 14 Or 470, 13 P 305.

The period for serving written notice and taking the appeal begins to run after the judgment is entered in the docket, and not after its oral rendition. Furlong v. Tish, (1950) 189 Or 86, 218 P2d 476.

Where no proof of service was indorsed on the notice of appeal filed with the justice until six days after such filing, it was insufficient. Henness v. Wells, (1888) 16 Or 266, 19 P 121.

FURTHER CITATIONS: France v. Weinstein, (1960) 224 Or 100, 355 P2d 621; Todd v. Bigham, (1964) 238 Or 374, 390 P2d 168, 395 P2d 163; Hulegaard v. Garrett, (1968) 251 Or 535, 446 P2d 975.

53.040

NOTES OF DECISIONS

The filing of the undertaking and within the time specified is jurisdictional. Odell v. Gotfrey, (1886) 13 Or 466, 11 P 190; Gobbi v. Refrano, (1898) 33 Or 26, 52 P 761; Heiney v. Heiney, (1903) 43 Or 577, 73 P 1038; Watts v. State Spiritualists' Assn., (1910) 56 Or 56, 107 P 695; Nicholson v. Newton, (1914) 71 Or 387, 142 P 614; Moltzner v. Cutler, (1936) 154 Or 573, 61 P2d 93; Hulegaard v. Garrett, (1968) 251 Or 535, 446 P2d 975.

The execution of the undertaking before service of notice does not render it insufficient where it was not executed until after judgment. Byers v. Cook, (1886) 13 Or 297, 10 P 417.

The appellant need not sign the undertaking. Drouilhat v. Rottner, (1886) 13 Or 493, 11 P 221.

Undertaking must be filed after notice of appeal. Hulegaard v. Garrett, (1968) 251 Or 535, 446 P2d 975.

FURTHER CITATIONS: Brown v. Jessup, (1890) 19 Or 288, 24 P 232.

53.060

NOTES OF DECISIONS

Mandamus will lie to compel the justice to allow appeal and stay execution. Burgtorf v. Bentley, (1895) 27 Or 268, 41 P 163.

Failure to make a docket statement as to stay of the proceedings will not defeat an appeal. Jacobs v. Oren, (1897) 30 Or 593, 48 P 431.

Before allowing the appeal the justice may wait till expiration of the time given respondent to except to the sureties. Eareckson v. Chandler, (1913) 64 Or 126, 129 P 491.

FURTHER CITATIONS: Hosford v. Logus, (1885) 13 Or 130, 11 P 900; Hughes v. Clemens, (1895) 28 Or 440, 42 P 617; Feller v. Gates, (1902) 40 Or 543, 67 P 416, 91 Am St Rep 492, 56 LRA 630; Latourette v. Kruse, (1932) 139 Or 422, 10 P2d 592; France v. Weinstein, (1960) 224 Or 100, 355 P2d 621; State ex rel. Hemphill v. Rafferty, (1967) 247 Or 475, 430 P2d 1017.

53.070

NOTES OF DECISIONS

The undertaking must not omit both the sureties name and the amount. Starks v. Stafford, (1886) 14 Or 317, 12 P 670.

The name of the surety need not be inserted in the body of the undertaking. Brown v. Jessup, (1890) 19 Or 288, 290, 24 P 232.

In the absence of a demand by the adverse party, the sureties need not justify. Jacobs v. Oren, (1897) 30 Or 593, 596, 48 P 431.

There was no reversible error where the surety, after having been excepted to, failed to appear and justify because of an excusable mistake. Gobbi v. Refrano, (1898) 33 Or 26, 52 P 761.

Appellees waived the right to have justification where they made no exception to the sufficiency of the surety and did not require justification. Rugh v. Soleim, (1919) 92 Or 329, 180 P 930.

FURTHER CITATIONS: Eareckson v. Chandler, (1913) 64 Or 126, 128, 129 P 491; France v. Weinstein, (1960) 224 Or 100, 355 P2d 621; Hulegaard v. Garrett, (1968) 251 Or 535, 446 P2d 975.

53.090

NOTES OF DECISIONS

1. In general
2. Transcripts and authentication
3. Record completion and amendment
4. Jurisdiction and proceedings in circuit court
5. Judgment and disposal

1. In general

The trial anew in the circuit court is not a new action, but simply a retrial of the action for the purpose, theoretically, of correcting errors of the inferior court. Nurse v. Justus, (1876) 6 Or 75.

The incidents of the judgment, costs, disbursements, etc., as to cases appealed from justices' courts and tried de novo in the circuit court, are not controlled by the provisions governing the incidents of a judgment as to actions originally begun in the circuit court. Id.

Where the verdict and judgment in the justice's court cures an omission from the complaint, the circuit court may treat the same as supplied or waived by the defendant. Kirk v. Matlock, (1885) 12 Or 319, 7 P 322.

An appeal from a judgment of the justice court by one party does not bring up the case as to parties not served with notice, notwithstanding that the cause is heard anew upon the appeal. Stull v. Porter, (1921) 100 Or 514, 184 P 260, 196 P 1116.

2. Transcripts and authentication

Immediately after the appeal is allowed, the transcript may be filed; it is not necessary to wait till the time for justification of appeal sureties has elapsed. Hughes v. Cle-

mens, (1895) 28 Or 440, 42 P 617; Jacobs v. Oren, (1897) 30 Or 593, 48 P 431.

An appeal transcript cannot be the basis of a judgment lien, and of an execution out of the circuit court. Chapman v. Raleigh, (1868) 3 Or 34.

A transcript filed by respondent after appellant fails to appeal is unauthorized and gives no jurisdiction. Steel v. Rees, (1886) 13 Or 428, 11 P 68.

It is immaterial that an entry staying the proceedings is omitted in the transcript. Jacobs v. Oren, (1897) 30 Or 593, 48 P 431.

Failure of defendant to give the required bond does not prejudice his right to take a new appeal within the time allowed. Watts v. State Spiritualists' Assn., (1910) 56 Or 56, 107 P 695.

Where the period for excepting to sureties elapses before the justice allows the appeal, the transcript may be filed within the statutory period thereafter. Eareckson v. Chandler, (1913) 64 Or 126, 129 P 491.

That no entry of allowance of appeal is shown by the transcript does not defeat the appeal. St. Helens Lbr. Co. v. Evans, (1918) 90 Or 71, 175 P 612.

For the purpose of establishing when the transcript of an appeal from district court should be filed, the allowance of the appeal and the taking of the appeal are synonymous. Both are determined by the time of the giving of notice of appeal and the filing of the undertaking. France v. Weinstein, (1960) 224 Or 100, 355 P2d 621.

Where the justice did not sign the certificate of authentication of the transcript, but his name was signed by an unauthorized person, no jurisdiction attached. Shaw v. Hemphill, (1906) 48 Or 371, 86 P 373.

3. Record completion and amendment

Omissions or defects in the transcript do not prevent the circuit court from acquiring jurisdiction, and that court may, on suggestion of a diminution of the record, permit the omission or defect to be corrected. Jacobs v. Oren, (1897) 30 Or 593, 48 P 431; Hager v. Knapp, (1904) 45 Or 512, 78 P 671; Woods v. Ore. Short Line R. Co., (1905) 46 Or 514, 81 P 235; Shaw v. Hemphill, (1906) 48 Or 371, 86 P 373; St. Helens Lbr. Co. v. Evans, (1918) 90 Or 71, 175 P 612.

Substitution of an amended complaint, lost or not filed below, cannot be allowed on appeal. West Coast Lbr. Co. v. Brady, (1914) 69 Or 39, 137 P 764.

4. Jurisdiction and proceedings in circuit court

No change in the issues as made below may be allowed by the circuit court. Currie v. So. Pac. Co., (1892) 21 Or 566, 28 P 884; Forbes v. Inman, (1892) 23 Or 68, 31 P 204; Waggy v. Scott, (1896) 29 Or 386, 45 P 774.

The circuit court is not limited to the errors alleged to have been committed below. Troy v. Hallgarth, (1899) 35 Or 162, 57 P 374.

The trial anew in the circuit court on appeal means a new trial by introduction of original evidence upon the issue as made below. Byers v. Ferguson, (1902) 41 Or 77, 65 P 1067, 68 P 5.

Error in overruling a demurrer in the justice court is waived by defendant's answering over, and the circuit court on appeal cannot hear and sustain the demurrer. Id.

A motion to require a party to elect which cause of action will be pursued may be made after an appeal and at any time before the examination of witnesses. Harvey v. So. Pac. Co., (1905) 46 Or 505, 80 P 1061.

Imperfections in the justice's certificate may be corrected by amendment. Woods v. Ore. Short Line R. Co., (1905) 46 Or 514, 81 P 235.

Inadequacies of the proceeding, if any, in municipal court are no longer material once the case has been tried in circuit court. State v. Knighten, (1964) 236 Or 634, 390 P2d 166.

The record could not be impeached by ex parte affidavits contradicting a statement therein that a reply was filed, such reply being attached to the transcript and returned as one of the original papers in the cause. Bade v. Hibberd, (1908) 50 Or 501, 93 P 364.

Where no affidavit was filed showing that the omission to attach to the transcript original papers filed with the justice was injurious, or attempting to excuse the neglect, or showing when the neglect was first discovered, the court did not abuse its discretion in refusing to permit amendment of the record. Hager v. Knapp, (1904) 45 Or 512, 78 P 671.

5. Judgment and disposal

The cause cannot be remanded to the justice's court for further action. Forbis v. Inman, (1892) 23 Or 68, 31 P 204.

On dismissal of an appeal, the circuit court cannot render judgment for the appellee. Whipple v. So. Pac. Co., (1899) 34 Or 370, 55 P 975.

A judgment for the amount of plaintiff's demand may be rendered on appeal from a judgment for a part only of the demand. Troy v. Hallgarth, (1899) 35 Or 162, 57 P 374.

FURTHER CITATIONS: Feller v. Feller, (1901) 40 Or 73, 66 P 468; Ferguson v. Reiger, (1903) 43 Or 505, 73 P 1040; McAnish v. Grant, (1903) 44 Or 57, 74 P 396; State v. Rider, (1915) 78 Or 318, 145 P 1056, 152 P 497; State v. Fetsch, (1917) 85 Or 45, 165 P 1179; Rugh v. Soleim, (1919) 92 Or 329, 180 P 930; Bend v. Allen, (1933) 141 Or 329, 18 P2d 215; Higgins v. Fields, (1935) 150 Or 528, 47 P2d 235.

53.100

NOTES OF DECISIONS

Upon an appeal from the justice's court the circuit court is controlled by the pleadings as to the issues that were before the lower court. Cauthorn v. King, (1879) 8 Or 138.

The court should be liberal in allowing amendments of the pleadings to present the issues tried below. Rohr v. Isaacs, (1880) 8 Or 451.

The place where property was taken may be shown by amendment of the pleadings in replevin actions. Kirk v. Matlock, (1885) 12 Or 319, 321, 7 P 322.

An accord and satisfaction entered into subsequent to the judgment below and prior to the appeal may be pleaded in the circuit court. Robinson v. Carlon, (1899) 34 Or 319, 55 P 959.

A complaint defectively stating a good cause of action may be amended to state it properly. Dixon v. Johnson, (1903) 44 Or 43, 74 P 394.

An amendment rearranging or more fully setting forth the facts originally stated, is proper. Id.

A substantial change in the pleading is such as necessitates different proof than that originally demanded. Morrison v. Gardner, (1910) 57 Or 438, 111 P 243.

It is not contemplated that the same precision in pleading will be observed in a justice's court as in a court of record. Jetmore v. Anderson, (1922) 103 Or 252, 204 P 499.

Defendant has no pleading to amend when he fails to answer. Higgins v. Field, (1935) 150 Or 528, 47 P2d 235.

FURTHER CITATIONS: Moser v. Jenkins, (1875) 5 Or 450; Monroe v. No. Pac. Coal Min. Co., (1875) 5 Or 509; State v. Jones, (1889) 18 Or 256, 22 P 840; Currie v. So. Pac. Co., (1892) 21 Or 566, 28 P 884; Forbis v. Inman, (1892) 23 Or 68, 31 P 204; Waggy v. Scott, (1896) 29 Or 386, 45 P 774; Meyer v. Edwards, (1897) 31 Or 23, 48 P 696; Byers v. Ferguson, (1902) 41 Or 77, 65 P 1067, 68 P 5; West Coast Lbr. Co. v. Brady, (1914) 69 Or 39, 137 P 764; State v. Rush, (1969) 253 Or 560, 456 P2d 496.

53.110

NOTES OF DECISIONS

Judgment for costs may be given on dismissal of appeal. Hager v. Knapp, (1904) 45 Or 512, 78 P 671; Nicholson v. Newton, (1914) 71 Or 387, 142 P 614.

Entry of a judgment on dismissal of an appeal or affirmation of a justice's judgment is proper. Currier v. Anderson, (1931) 136 Or 440, 299 P 704; State Bank v. Heider, (1932) 139 Or 185, 9 P2d 117.

Insufficiency of notice of appeal will justify dismissal. Neppach v. Jordan, (1886) 13 Or 246, 10 P 341.

Dismissal of a second appeal taken after the first appeal is perfected and abandoned is proper. Hughes v. Clemens, (1895) 28 Or 440, 42 P 617.

FURTHER CITATIONS: Charman v. McLane, (1861) 1 Or 339; Moltzner v. Cutler, (1936) 154 Or 573, 61 P2d 93.

53.120

NOTES OF DECISIONS

Failure to file an undertaking within the time required by law cannot be remedied by the filing of a new undertaking when motion is made to dismiss the appeal. Nicholson v. Newton, (1914) 71 Or 387, 142 P 614; Heiney v. Heiney, (1903) 43 Or 577, 73 P 1038.

Service of the new undertaking upon the adverse party is not a condition to its filing. Hosford v. Logus, (1885) 13 Or 130, 11 P 900.

By filing a second undertaking where the first is defective, appellant protects the adverse party and secures to himself a trial on the merits. Hughes v. Clemens, (1895) 28 Or 440, 42 P 617.

This section applies only if the undertaking is defective, not if there is a failure to file. Hulegaard v. Garrett, (1968) 251 Or 535, 446 P2d 975.

That the affidavit of a surety was made prior to service of notice of appeal was a trifling defect, and a motion to dismiss on that ground should have been overruled or a new undertaking allowed. Hosford v. Logus, (1885) 13 Or 130, 11 P 900.

FURTHER CITATIONS: Gobbi v. Refrano, (1898) 33 Or 26, 52 P 761.

53.130

NOTES OF DECISIONS

See also cases under ORS 34.040.

A judgment for want of answer should be reviewed by writ of review and not by appeal. Long v. Sharp, (1875) 5 Or 438.

This section does not widen the scope of the writ of review as construed under OCLA 11-204 [ORS 34.040] but makes an exception to the statute abolishing writs of error and certiorari in criminal actions. Bechtold v. Wilson, (1947) 182 Or 360, 186 P2d 525, 187 P2d 675.

Where a judgment was rendered by a justice of the peace in a case where there was no appearance and no service except by a person styling himself deputy constable, and where the record disclosed no special appointment of a deputy to serve the summons, the judgment was void and a writ of review was the proper remedy for having the judgment vacated. Prickett v. Cleek, (1886) 13 Or 415, 11 P 49.

Writ of review was allowed where the circuit court had not acquired jurisdiction of an appeal because no transcript was filed. Feller v. Feller, (1901) 40 Or 73, 66 P 468.

FURTHER CITATIONS: Shirott v. Phillippi, (1859) 3 Or 484; Evans v. Christian, (1873) 4 Or 375; Ramsey v. Pettengill, (1886) 14 Or 207, 12 P 439.