

## Chapter 93

### Conveyancing and Recording

#### Chapter 93

##### NOTES OF DECISIONS

Legislation denying aliens ineligible for citizenship the right to acquire, possess or inherit real property was unconstitutional as a violation of the equal protection clause of U.S. Const. Am. 14, §1. *Namba v. McCourt and Neuner*, (1949) 185 Or 578, 204 P2d 569.

#### 93.010

##### NOTES OF DECISIONS

The provision that a deed may be "acknowledged or proved and recorded" was not intended to make either acknowledgment, proof or recording any part of the execution of an instrument. *Goodenough v. Warren*, (1879) 5 Sawy 494, 498, Fed Cas No. 5,534; *Eadie v. Chambers*, (1909) 96 CCA 561, 172 Fed 73, 76, 18 Ann Cas 1096, 24 LRA(NS) 879.

This section impliedly repeals the statute de donis for it makes all estates of inheritance alienable without the use of the common recovery. *Rowland v. Warren*, (1882) 10 Or 129; *Lytle v. Hulen*, (1929) 128 Or 483, 275 P 45, 114 ALR 587.

A lease is not a conveyance within the meaning of this section. *Edwards v. Perkins*, (1879) 7 Or 149.

This section permits transfer of estates in realty without the operation of the statute of uses and eliminates the necessity of a statement of consideration and livery of seisin. *Lambert v. Smith*, (1881) 9 Or 185.

Any words in a deed manifesting an intent to transfer an interest in land will be sufficient regardless of their effect at common law or under the statute of uses. *Id.*

A mortgage may be assigned without a formal conveyance. *Watson v. Dundee Mtg. & Trust Inv. Co.*, (1885) 12 Or 474, 8 P 548.

This enactment was adopted from the Iowa statutes. *Manaudas v. Mann*, (1887) 14 Or 450, 452, 13 P 449.

Contingent remainder can be conveyed by deed executed in accordance with the provisions of this section. *Love v. Linstedt*, (1915) 76 Or 66, 147 P 935.

Notwithstanding the provisions of this section, a deed signed by an insane person is void. *Graham v. Allen*, (1925) 116 Or 501, 241 P 1007.

When title to realty has vested in a devisee by his acceptance of the devisee, it must be conveyed by deed and cannot be transferred by waiver or renunciation even if approved by the probate court. *Blake v. Blake*, (1934) 147 Or 43, 31 P2d 768.

The use of the words "we hereby sell" in a deed does not necessarily indicate that the transferors intend to make a present conveyance of the land. *Aspinwall v. Ryan*, (1951) 190 Or 530, 226 P2d 814.

This section authorizes the conveyance of land without statement or proof of consideration. *Halleck v. Halleck*, (1959) 216 Or 23, 337 P2d 330.

FURTHER CITATIONS: *Knighon v. Smith*, (1859) 1 Or 276;

*Beebe v. McKenzie*, (1890) 19 Or 296, 24 P 236; *McLeod v. Lloyd*, (1903) 43 Or 260, 71 P 795, 74 P 491; *Tucker v. Ottenheimer*, (1905) 46 Or 585, 81 P 360; *Deckenbach v. Deckenbach*, (1913) 65 Or 160, 130 P 729; *Magness v. Kerr*, (1927) 121 Or 373, 254 P 1012, 51 ALR 1466; *Miller v. Friedman*, (1932) 139 Or 489, 9 P2d 488.

ATTY. GEN. OPINIONS: Recording a memorandum of land sale contract, (1971) Vol 35, p 694.

LAW REVIEW CITATIONS: 11 OLR 320; 18 OLR 63; 19 OLR 367; 21 OLR 172; 23 OLR 138; 28 OLR 12, 368.

#### 93.020

##### NOTES OF DECISIONS

1. Scope and purpose
2. Transfer of interests in realty
3. Leases
4. Express trusts
5. Resulting and constructive trusts
6. Specific performance

##### 1. Scope and purpose

An estate for life cannot be created, transferred, declared or reserved by parol. *Garrett v. Clark*, (1875) 5 Or 464; *Lange v. Allen*, (1926) 120 Or 96, 251 P 715.

This provision is designed to prevent the fraudulent setting up of pretended agreements. *Brown v. Lord*, (1879) 7 Or 302; *Hawkins v. Doe*, (1912) 60 Or 437, 119 P 754, Ann Cas 1914A, 765.

A contract of partnership to purchase and sell real estate does not have to be in writing. *Flower v. Barnekoff*, (1890) 20 Or 132, 25 P 370, 11 LRA 149; *Page-Dressler Co. v. Meader*, (1926) 118 Or 359, 244 P 308; *Devereaux v. Cockerline*, (1946) 179 Or 229, 170 P2d 727. *Flower v. Barnekoff*, supra, distinguished in *Dodson v. Dodson*, (1894) 26 Or 349, 37 P 542.

An oral promise to convey realty to an attorney in exchange for services is not enforceable. *Jackson v. Stearns*, (1906) 48 Or 25, 30 P 798, 5 LRA(NS) 390; *Farrin v. Matthews*, (1912) 62 Or 517, 124 P 675, 41 LRA(NS) 184.

A verbal sale of an equitable interest in land is void. *Chenoweth v. Lewis*, (1881) 9 Or 150.

The transfer of an estate in realty from one of the partners to the partnership must be in writing. *Dodson v. Dodson*, (1894) 26 Or 349, 37 P 542.

An oral contract to make a will is beyond the purview of subsection (1). *Woods v. Dunn*, (1916) 81 Or 457, 159 P 1158.

An agreement to purchase a mining claim interest must be in writing. *Hinderliter v. McDonald*, (1917) 84 Or 251, 164 P 378.

A mortgage or lien on land is not "real property or interest therein," within the meaning of the statute of frauds. *Aya v. Morson*, (1919) 90 Or 647, 178 P 207. *Contra*, *Tucker v. Ottenheimer*, (1905) 46 Or 585, 81 P 360.

Incorporeal hereditaments come within the purview of

subsection (1). *David v. Brokaw*, (1927) 121 Or 591, 256 P 186.

A license is not an interest in land and is not within the purview of this section. *Forsyth v. Nathansohn*, (1932) 139 Or 632, 9 P2d 1036, 11 P2d 1065.

## 2. Transfer of interests in realty

A plea of ownership by a grantee is not demurrable for failure to produce the transferring instrument since the statute of frauds is a matter of evidence rather than pleading. *Lamb v. Starr*, (1868) 14 Fed Cas 1026, Fed Cas No. 8021; *Lewis v. Ore. Cent. R. Co.*, (1879) 15 Fed Cas 490, Fed Cas No. 8329.

An agreement for the sale of realty required by the statute of frauds to be in writing cannot be modified by an oral executory contract unless an estoppel is raised. *Neppach v. Ore. & Calif. R. Co.*, (1905) 46 Or 374, 80 P 482; *Kingsley v. Kressly*, (1911) 60 Or 167, 111 P 385, 118 P 678, Ann Cas 1913E, 746; *Scott v. Hubbard*, (1913) 67 Or 498, 136 P 653.

Title to real property cannot be conveyed by parol gift, but may be acquired by the proposed donee if the elements of estoppel or adverse possession are present. *Parker v. Kelsey*, (1916) 82 Or 334, 161 P 694; *Holohan v. McCarthy*, (1929) 130 Or 577, 281 P 178.

An executed promise made in consideration of an agreement to make a will takes the case out of the statute of frauds. *Stephens v. Tipton*, (1929) 128 Or 115, 268 P 1014; *Matthews v. Taylor*, (1933) 142 Or 483, 29 P2d 806.

A deed deposited in escrow is insufficient to take an oral contract for the sale of land out of the statute of frauds, unless such deed contains a memorandum of the agreement. *Cooper v. Thomason*, (1896) 30 Or 161, 174, 45 P 296.

A parol contract for the sale of lands is not aided by a further parol agreement to reduce the principal agreement to writing. *M'Kinley v. Lloyd*, (1904) 128 Fed 519.

The writing must clearly describe the land involved to meet the requirements of this section. *Jackson v. Stearns*, (1911) 58 Or 57, 113 P 30, Ann Cas 1913A, 284, 37 LRA(NS) 639.

The writing must manifest an intent on the part of the vendor to sell the realty to a specified purchaser for a definite amount to meet the requirements of the statute of frauds. *Mossie v. Cyrus*, (1912) 61 Or 17, 119 P 485.

An agent must have written authority to transfer the identical lot that he purports to convey before he is a "lawful agent" within the meaning of this section. *Roberts v. Lombard*, (1915) 78 Or 100, 152 P 499.

A parol partition agreement is binding if one of the parties makes improvements on land allocated to him by the agreement. *Marvin & Co. v. Piazza*, (1929) 129 Or 128, 276 P 680.

One cannot lose title to land by an oral admission that it is the property of another. *Powers v. Coos Bay Lbr. Co.*, (1953) 200 Or 329, 263 P2d 913.

The parol evidence rule presents no impediment to the establishment of a trust where the deed neither affirms nor negates the intention to create a trust. *Presbytery of Wilamette v. Hammer*, (1963) 235 Or 564, 385 P2d 1013.

If the subject of an alleged trust is land, this section requires the trust be evidenced by a memorandum. *Id.*

An irrevocable parol license resulted when a road was constructed by a logging company across land with the consent of the owner. *Powers v. Coos Bay Lbr. Co.*, (1953) 200 Or 329, 263 P2d 913.

## 3. Leases

A lease of real property for the term of one year or for a shorter period can be executed orally, but a lease for a longer term must be in writing to be enforceable. *Wallace v. Scoggins*, (1889) 17 Or 476, 21 P 558; *State v. McGinnis*, (1910) 56 Or 163, 108 P 132; *Boyer v. Anduiza*, (1918) 90

Or 163, 175 P 853; *Hopka v. Forbes*, (1931) 135 Or 91, 294 P 342; *Bennett v. Whitlock*, (1946) 178 Or 253, 166 P2d 129.

The making of improvements by the lessee during an enforceable five-year lease does not take an oral extension agreement out of the statute of frauds unless the lessee acted with reference to the oral contract. *Hopka v. Forbes*, (1931) 135 Or 91, 294 P 342; *Blackburn v. Maloney*, (1950) 189 Or 76, 218 P2d 459.

The assignment of an interest in realty including a leasehold exceeding one year must be in writing in order to make the assignee liable on the covenants of the lease. *Culver v. Van Valkenburgh*, (1912) 60 Or 447, 119 P 753; *Society of Independent Doukhobors v. Hecker*, (1917) 83 Or 65, 162 P 851.

If a party alleges that a lease for more than a year was executed he must produce a writing and cannot prevail by introducing oral evidence of a lease for the term of one year. *Noyes v. Stauff*, (1875) 5 Or 455.

An oral lease for a term exceeding one year is enforceable if the lessee takes possession of the premises and makes improvements thereon. *Wallace v. Scoggins*, (1889) 17 Or 476, 21 P 558.

The assignee of a lessee is liable for rent reserved in the lease for the period he occupies the premises even though the assignment was oral. *Leadbetter v. Pewtherer*, (1912) 61 Or 168, 121 P 799.

Relinquishment of a leasehold for a period of one year need not be in writing. *McDaniels v. Harrington*, (1916) 80 Or 628, 157 P 1068.

An agreement reducing the rate of rental of a sublease for one year need not be in writing. *Sherman-Clay & Co. v. Buffum & Pendleton*, (1919) 91 Or 352, 179 P 241.

If the lessor accepts an offer to surrender by the lessee the leasehold reverts to the lessor by operation of law and a writing is not necessary to terminate the lease. *Roberts Inv. Co. v. Hardie Mfg. Co.*, (1933) 142 Or 179, 19 P2d 429.

An oral lease must be established unequivocally, and acts of part performance be exclusively referable to it to take the alleged lease out of the statute. *Dodge v. Davies*, (1947) 181 Or 13, 179 P2d 735.

Possession and payment of rent by the lessees constituted part performance of an unsigned written lease, and made the lease binding on the husband and wife who held the land by the entirety. *Young v. Neill*, (1950) 190 Or 161, 220 P2d 89, 225 P2d 66.

## 4. Express trusts

The interest of a cestui que trust in realty cannot be orally conveyed. *Chenoweth v. Lewis*, (1881) 9 Or 150; *Chance v. Weston*, (1920) 96 Or 390, 190 P 155.

An express trust in land cannot be created by parol. *Cooper v. Thomason*, (1896) 30 Or 161, 170, 45 P 296; *Barger v. Barger*, (1897) 30 Or 268, 275, 47 P 702; *Parrish v. Parrish*, (1899) 33 Or 486, 490, 54 P 352; *Richmond v. Bloch*, (1900) 36 Or 590, 595, 60 P 385; *Chance v. Weston*, (1920) 96 Or 390, 190 P 155; *Howard v. Foskett*, (1920) 96 Or 446, 189 P 396; *Hornbeck v. Crawford*, (1929) 130 Or 230, 279 P 870; *Callan v. W. Inv. & Holding Co.*, (1937) 157 Or 412, 72 P2d 48.

An oral promise by a grantee to hold realty for the benefit of the grantor does not create a trust. *Dennis v. City of McMinnville*, (1929) 128 Or 101, 269 P 221; *Hornbeck v. Crawford*, (1929) 130 Or 230, 279 P 870.

An oral trust involving realty will become enforceable if the trustee performs in accordance with the provisions of the trust. *Kollock v. Bennett*, (1909) 53 Or 395, 100 P 940, 133 Am St Rep 840; *Gray v. Beard*, (1913) 66 Or 59, 133 P 791.

Express trusts can be created by various unconnected writings if the written matter meets the requirements of this section. *Heitkemper v. Schmeer*, (1929) 130 Or 644, 275

P 55, 281 P 169; *Platt v. Jones*, (1935) 149 Or 246, 38 P2d 703, 39 P2d 955.

An oral declaration of trust made by a grantee after he has converted the res into personalty is admissible to prove the existence of a trust, and permits declarations made prior to the conversion to be admitted for the same purpose. *Cooper v. Thomason*, (1896) 30 Or 161, 45 P 296.

Although an express trust is not created by an oral promise to hold realty for the benefit of another, the promisor can convey the realty to the proposed beneficiaries to the detriment of his creditors. *Richmond v. Block*, (1900) 36 Or 590, 60 P 385.

Parol evidence is admissible to prove that the transferee of personalty is holding the property in trust even though the transfer to the trustee was in writing. *Martin v. Martin*, (1903) 43 Or 119, 72 P 639.

An oral promise by a grantee to sell the realty and to hold the proceeds for the grantor does not create an express trust. *Johnson v. McKenzie*, (1916) 80 Or 160, 154 P 900.

An oral promise to pay the proceeds from a contemplated sale of realty to another for a consideration is unenforceable so long as the agreement remains unexecuted. In re *Richter's Estate*, (1947) 181 Or 360, 175 P2d 997, 181 P2d 133, 182 P2d 378. But see *Bailey v. Opp*, (1938) 159 Or 301, 77 P2d 826.

#### 5. Resulting and constructive trusts

Constructive trusts or trusts ex maleficio, which are created by operation of law and do not fall within the purview of this section, arise when legal title is held under circumstances which render it unconscionable for the title holder to enjoy the benefits of the property. *Parrish v. Parrish*, (1899) 33 Or 486, 54 P 352; *Kroll v. Coach*, (1904) 45 Or 459, 78 P 397, 80 P 900; *Grigsby v. Miller*, (1917) 240 Fed 188; *Harrington v. Harrington*, (1968) 252 Or 39, 448 P2d 364.

Clear and convincing evidence must be presented to overcome the presumption that a conveyance from a husband to his wife is a gift and to establish a resulting or constructive trust. *Neppach v. Norval*, (1926) 116 Or 593, 240 P 883, 242 P 605; *Bowns v. Bowns*, (1948) 184 Or 603, 200 P2d 586; *Hanscom v. Irwin*, (1949) 186 Or 541, 208 P2d 330.

When the relationship between the parties to a transfer of realty is confidential, as that of husband and wife, the grantee making an oral declaration of trust holds the property as a constructive trustee even though he has no intent to defraud at the time of the transfer. *Meek v. Meek*, (1916) 79 Or 579, 156 P 250; *Tate v. Emery*, (1932) 139 Or 214, 9 P2d 136; *Hanscom v. Irwin*, (1949) 186 Or 541, 208 P2d 330. But see *Parrish v. Parrish*, (1898) 33 Or 486, 54 P 352 and *Chance v. Graham*, (1915) 76 Or 199, 148 P 63.

When the purchase price is paid by one person and title is taken in another, a resulting trust arises by operation of law which is exempt from the operation of the statute of frauds. *Di Roboam v. Schmidtlin*, (1907) 50 Or 388, 92 P 1082.

Resulting and constructive trusts cannot be created by acts of the parties involved subsequent to the conveyance. *Chance v. Graham*, (1915) 76 Or 199, 203, 148 P 63.

A trust was created by operation of law when a partner conveyed realty to his copartner who made an oral declaration of trust. *Minter v. Minter*, (1916) 80 Or 369, 157 P 157.

A resulting trust is not created when a conveyance is made without consideration. *Hornbeck v. Crawford*, (1929) 130 Or 230, 279 P 870. But see *Gray v. Beard*, (1913) 66 Or 59, 133 P 791.

Equity will not create a constructive trust in favor of a grantor if the transfer was fraudulent as to his creditors. *Hanscom v. Irwin*, (1949) 186 Or 541, 208 P2d 330.

#### 6. Specific performance

See also cases under ORS 41.580.

The terms of an oral contract must be satisfactorily shown to be certain and unambiguous to justify specific performance. *Sprague v. Jessup*, (1906) 48 Or 211, 218, 83 P 145, 84 P 802, 4 LRA(NS) 410; *Hawkins v. Doe*, (1912) 60 Or 437, 440, 119 P 754, Ann Cas 1914A, 765.

A purchaser need not tender payment before suing for specific performance if a contract vendor denies the existence of the agreement or has previously refused tender. *West v. Wash. Ry.*, (1907) 49 Or 436, 90 P 666; *Whitney Co. v. Smith*, (1912) 63 Or 187, 126 P 1000.

The court will refuse to grant partial performance with compensation for a purchaser who knows that the vendor is married and fails to have the vendor's spouse join in the contract of sale. *Kuratli v. Jackson*, (1911) 60 Or 203, 118 P 192, 1013, Ann Cas 1914A, 203, 38 LRA(NS) 1195; *Leo v. Deitz*, (1912) 63 Or 261, 127 P 550.

An oral contract to make a will is enforceable if the prospective devisees have performed in full. *Kelley v. Devin*, (1913) 65 Or 211, 132 P 535; *Stephens v. Tipton*, (1928) 128 Or 115, 268 P 1014.

The description of the land and the estate in the land to be conveyed must be unequivocal in order to justify a decree of specific performance. *Knight v. Alexander*, (1903) 42 Or 521, 71 P 657.

One seeking the specific performance of an oral contract need not establish a clear and definite contract beyond a reasonable doubt. *West v. Wash. Ry.*, (1907) 49 Or 436, 90 P 666.

Though a vendor is not able to perform in full, the purchaser is entitled to compel specific performance of such part of the contract as can be performed. *Lockhart v. Ferrey*, (1911) 59 Or 179, 185, 115 P 431.

A plaintiff who has a plain, adequate, and complete remedy at law to recover the value of his services, cannot have specific performance of an oral agreement to convey land. *Roadman v. Harding*, (1912) 63 Or 122, 126 P 993.

If the purchaser has the fee and wants possession his remedy is ejectment rather than specific performance. *Whitney Co. v. Smith*, (1912) 63 Or 187, 126 P 1000.

Equity will grant specific performance of an oral contract to convey an interest in land if the purchaser has performed with reference to the agreement to such an extent as to render it inequitable to deny relief. *Roadman v. Harding*, (1912) 63 Or 122, 126 P 993.

A vendor cannot enforce specific performance where the contract calls for a deed before, or concurrent with, further payments, unless he has executed a sufficient deed and tendered it to the vendee or brought it into court. *Knolhoff v. Mark*, (1914) 68 Or 437, 448, 136 P 893, Ann Cas 1915D, 1229.

The granting of specific performance is not a matter of right, but rests in the sound and reasonable discretion of the court. *Wetherby v. Griswold*, (1915) 75 Or 468, 147 P 388.

FURTHER CITATIONS: *Banks v. Crow*, (1869) 3 Or 477; *Holcomb v. Mooney*, (1886) 13 Or 503, 11 P 274; *Barrett v. Schliech*, (1900) 37 Or 613, 62 P 792; *Bogard v. Barham*, (1910) 56 Or 269, 108 P 214; *Jerman v. Misner*, (1910) 56 Or 390, 108 P 179; *Ford v. Ore. Elec. Ry.*, (1911) 60 Or 278, 117 P 809, Ann Cas 1914A, 280, 36 LRA(NS) 358; *Zeuske v. Zeuske*, (1912) 62 Or 46, 124 P 203; *Cantwell v. Barker*, (1912) 62 Or 12, 124 P 264; *Malzer v. Schisler*, (1913) 67 Or 356, 136 P 14, 51 LRA(NS) 77; *Baker v. Uglow*, (1914) 73 Or 546, 144 P 758; *Martin v. Thomas*, (1915) 74 Or 206, 144 P 684; *Stalker v. Stalker*, (1915) 78 Or 291, 153 P 52; *Carlson v. O'Connor*, (1916) 79 Or 333, 154 P 755; *Stewart v. King*, (1917) 85 Or 14, 166 P 55; *Rogers v. Maloney*, (1917) 85 Or 61, 165 P 357; *Dennehy v. Watts*, (1925) 116 Or 189, 239 P 814; *Bloech v. Hyland Homes Co.*, (1926) 119 Or 297, 247

P 761; Heitkemper v. Schmeer, (1934) 146 Or 304, 29 P2d 540, 30 P2d 1119; Union Cent. Life Ins. Co. v. Toliver, (1936) 152 Or 185, 52 P2d 1129; Hunter v. Allen, (1944) 174 Or 261, 147 P2d 213; Smith-Powers Co. v. Bernitt, (1916) 237 Fed 570; Alery v. Alery, (1955) 203 Or 101, 277 P2d 764; Shipe v. Hillman, (1956) 206 Or 556, 292 P2d 123; Cole v. Fogel, (1957) 210 Or 257, 310 P2d 315; Herron v. Millers Nat. Ins. Co., (1960) 185 F Supp 851; Smoke v. Palumbo, (1963) 234 Or 50, 379 P2d 1007; Belton v. Buesing, (1965) 240 Or 399, 402 P2d 98; Head v. Lawrence, (1965) 240 Or 572, 403 P2d 17; Gilfry v. Gilfry, (1967) 248 Or 359, 434 P2d 348; Huffstutter v. Lind, (1968) 250 Or 295, 442 P2d 227; Palmer v. Wheeler (1971) 258 Or 41, 481 P2d 68.

ATTY. GEN. OPINIONS: Creation of express trusts, 1940-42, p 64; recording a memorandum of land sale contract, (1971) Vol 35, p 694.

LAW REVIEW CITATIONS: 5 OLR 154; 6 OLR 185; 9 OLR 380; 10 OLR 181; 11 OLR 393; 17 OLR 330.

#### 93.030

ATTY. GEN. OPINIONS: Recording a "Notice of Sale," (1968) Vol 34, p 172; recording a memorandum of land sale contract, (1971) Vol 35, p 694.

#### 93.110

#### NOTES OF DECISIONS

A quitclaim deed is not a mere release but passes all of the estate that a grantor has in real property as effectually as would a warranty deed. Guild v. Wallis, (1929) 130 Or 148, 279 P 546; Kane v. Kane, (1930) 134 Or 79, 291 P 785.

FURTHER CITATIONS: Taggart v. Risley, (1872) 4 Or 235; Dolph v. Barney, (1874) 5 Or 191; American Mtg. Co. v. Hutchinson, (1890) 19 Or 334, 343, 24 P 515; Wagner v. Wallowa County, (1915) 76 Or 464, 148 P 1140, LRA 1916F, 303; Gregory v. Keenan, (1919) 256 Fed 949.

ATTY. GEN. OPINIONS: Effect of a quitclaim deed, 1932-34, p 488, 1940-42, p 449.

LAW REVIEW CITATIONS: 28 OLR 23, 258.

#### 93.120

#### NOTES OF DECISIONS

The word "heirs" is not necessary to convey a fee simple estate, and a fee is presumed to have been conveyed unless a contrary intent appears in express terms or is necessarily implied from the grant. Ruhnke v. Aubert, (1911) 58 Or 6, 113 P 38; Tone v. Tillamook City, (1911) 58 Or 382, 114 P 938; Love v. Walker, (1911) 59 Or 95, 115 P 296; Ford v. Ore. Elec. Ry., (1911) 60 Or 278, 117 P 809, Ann Cas 1914A, 280, 36 LRA(NS) 358; Irvine v. Irvine, (1914) 69 Or 187, 136 P 18; Robinson v. Hicks, (1915) 76 Or 19, 146 P 1099; Wagner v. Wallowa County, (1915) 76 Or 453, 148 P 1140; Crown Co. v. Cohn, (1918) 88 Or 642, 172 P 804; Imbrie v. Hartrampf, (1921) 100 Or 589, 198 P 521; Friswold v. United States Nat. Bank, (1927) 122 Or 246, 257 P 818; Gregory v. Keenan, (1919) 256 Fed 949; Bouche v. Wagner, (1956) 206 Or 621, 293 P2d 203.

Inheritable easements can be created by grant or reservation in a deed without the word "heirs." Ruhnke v. Aubert, (1911) 58 Or 6, 113 P 38; Tone v. Tillamook City, (1911) 58 Or 382, 114 P 938; Salem Capital Flour Mills Co. v. Stayton Water-Ditch & Canal Co., (1887) 13 Sawy 99, 33 Fed 146.

A grantor is presumed to convey all of the interest that he has in the real property described unless he clearly

indicates an intent to transfer a lesser estate. Palmateer v. Reid, (1927) 121 Or 179, 254 P 359; Bigler v. Nunan, (1912) 186 Fed 665, 118 CCA 23, 199 Fed 549.

A granting clause, in the form "convey unto the party of the second part the following described real property," was sufficient to convey a fee simple estate under this section. Palmateer v. Reid, (1927) 121 Or 179, 254 P 359.

Deed conveying property to grantee "and the heirs of her body only, forever," gave conditional fee which became absolute on birth of issue and enabled grantee to convey and encumber land to exclusion of her children and grandchildren. Lytle v. Hulen, (1929) 128 Or 483, 485, 275 P 45, 114 ALR 587.

The words "all of our undivided interest" were sufficient to convey a complete fee simple in the realty involved when the grantor had a complete fee but believed that she only owned an undivided interest. Lemon v. Madden, (1955) 205 Or 107, 284 P2d 1037.

FURTHER CITATIONS: Brown v. So. Pac. Ry., (1899) 36 Or 128, 58 P 1104, 47 LRA 409; Fields v. Fields, (1932) 139 Or 41, 3 P2d 771, 7 P2d 975; Hawkins & Roberts v. Jerman, (1934) 147 Or 657, 35 P2d 248; Howell v. Deady, (1943) 48 F Supp 104.

ATTY. GEN. OPINIONS: When rule in Shelley's case applies in deed, 1920-22, p 677.

LAW REVIEW CITATIONS: 21 OLR 172.

#### 93.130

CASE CITATIONS: Hardenberg v. Ray, (1888) 13 Sawy 158, 33 Fed 812.

LAW REVIEW CITATIONS: 12 OLR 354; 28 OLR 12.

#### 93.140

#### NOTES OF DECISIONS

The covenant of quiet enjoyment is implied in leases notwithstanding this section since a lease is not a "conveyance of real property." Edwards v. Perkins, (1879) 7 Or 149; Northern Brewery Co. v. Princess Hotel, (1915) 78 Or 453, 153 P 37, 37 Ann Cas 1917C, 621. But see State Sav. & Loan Assn. v. Bryant, (1938) 159 Or 601, 81 P2d 116.

This section abolishes all implied covenants in deed. Taggart v. Risley, (1872) 4 Or 235.

A conveyance of lots with reference to a plat, implies a covenant that the streets designated shall never be appropriated by the owner to an inconsistent use. Mutual Irr. Co. v. Baker City, (1911) 58 Or 306, 110 P 392, 113 P 9.

Involuntary nonsuit was proper in an action based upon implied warranty of good quality in sale of land and house. Steiber v. Palumbo, (1959) 219 Or 479, 347 P2d 978, 78 ALR2d 440.

FURTHER CITATIONS: Menstell v. Johnson, (1928) 125 Or 150, 164, 262 P 853, 266 P 891, 57 ALR 311; Caldwell v. Wells, (1961) 228 Or 389, 365 P2d 505.

LAW REVIEW CITATIONS: 30 OLR 180; 36 OLR 282; 48 OLR 424, 425; 1 WLJ 369; 2 WLJ 509.

#### 93.150

CASE CITATIONS: Hawkins & Roberts v. Jerman, (1934) 147 Or 657, 35 P2d 248.

LAW REVIEW CITATIONS: 23 OLR 138; 28 OLR 12.

93.160

LAW REVIEW CITATIONS: 23 OLR 144; 30 OLR 1.

93.180

## NOTES OF DECISIONS

This statute does not abolish estates by the entirety and unless a different intention is manifested a transfer of land to husband and wife will constitute them tenants by the entirety. *Noblitt v. Beebe*, (1882) 23 Or 4, 35 P 248; *Myers v. Reed*, (1883) 17 Fed 401; *Howell v. Folsom*, (1900) 38 Or 184, 63 P 116, 84 Am St Rep 785; *Hayes v. Horton*, (1905) 46 Or 597, 81 P 386; *Oliver v. Wright*, (1905) 47 Or 322, 83 P 870; *Chase v. McKenzie*, (1916) 81 Or 429, 159 P 1025; *Stout v. Van Zante*, (1923) 109 Or 430, 219 P 804, 220 P 414; *Twigger v. Twigger*, (1924) 110 Or 520, 223 P 934; *Ganoe v. Ohmart*, (1927) 121 Or 116, 254 P 203; *Schafer v. Schafer*, (1927) 122 Or 620, 260 P 206; *Webb v. Woodcock*, (1930) 134 Or 319, 290 P 751; *Pfaffinger v. Seely*, (1930) 134 Or 542, 291 P 1015.

This statute abrogates joint tenancies in personalty as well as in realty. *Stout v. Van Zante*, (1923) 109 Or 430, 219 P 804, 220 P 414; *Nunner v. Erickson*, (1935) 151 Or 575, 617, 51 P2d 839.

Personal property can not be held by the entirety. *Stout v. Van Zante*, (1923) 109 Or 430, 219 P 804, 220 P 414; *Ganoe v. Ohmart*, (1927) 121 Or 116, 254 P 203; *McInnis v. Atlantic Inv. Corp.*, (1931) 137 Or 648, 3 P2d 118, 4 P2d 314; *In re Edwards' Estate*, (1932) 140 Or 431, 14 P2d 274; *Holman v. Mays*, (1936) 154 Or 241, 59 P2d 392.

An estate by the entirety can be created in land even though the wife purchases the property with her own funds. *Smith v. Durkee*, (1927) 121 Or 86, 254 P 207; *Carpenter v. Carpenter* (1936) 153 Or 584, 604, 56 P2d 1098, 58 P2d 507, 105 ALR 386.

Despite the provisions of this statute it is possible to create interests in real and personal property with rights of survivorship. **Conveyance of realty**, *Erickson v. Erickson*, (1941) 167 Or 1, 115 P2d 172; **joint bank accounts**, *In re Edwards' Estate*, (1932) 140 Or 431, 14 P2d 274; *Beach v. Holland*, 172 Or 396, 142 P2d 990, 149 ALR 866; *Manning v. United States Nat. Bank*, (1944) 174 Or 118, 148 P2d 255, 153 ALR 922; *Holbrook v. Hendricks' Estate*, (1944) 175 Or 159, 152 P2d 573; *State v. Gralewski's Estate* (1945) 176 Or 448, 159 P2d 211. *But see*, *Webb v. Woodcock*, (1930) 134 Or 319, 290 P 751.

Although joint tenancies are abolished, a deed may create indestructible contingent remainders in the cotenants who are vested with concurrent life estates. *Halleck v. Halleck*, (1959) 216 Or 23, 337 P2d 330; *Holbrook v. Holbrook*, (1965) 240 Or 567, 403 P2d 12.

An estate by entirety may exist in an equitable interest in real property. *Ganoe v. Ohmart*, (1927) 121 Or 116, 254 P 203.

Persons having an undivided interest in realty are tenants in common of the entire estate unless the right of survivorship is expressly declared. *Erickson v. Erickson*, (1941) 167 Or 1, 115 P2d 172.

This statute abolishes the common law rule of construction favoring joint tenancy and substitutes a new constructional rule to be applied in all transfers of realty to two or more persons. *Manning v. United States Nat. Bank*, (1944) 174 Or 118, 148 P2d 255, 153 ALR 922.

Extrinsic evidence is admissible to determine the nature of the tenancy that the parties intended to create when they entered into a joint deposit contract. *Holbrook v. Hendricks' Estate*, (1944) 175 Or 159, 152 P2d 573.

The joint character of funds in a joint bank account was not altered by the withdrawal of the funds by one codepositor without the consent of the other and with the manifest

intent to defeat the right of survivorship. *State v. Gralewski's Estate*, (1945) 176 Or 448, 159 P2d 211.

FURTHER CITATIONS: *Le Vee v. Le Vee*, (1919) 93 Or 370, 382, 181 P 351, 183 P 773; *Alexander v. Alexander*, (1936) 154 Or 317, 58 P2d 1265; *Bowers v. United States*, (1955) 226 F2d 424.

ATTY. GEN. OPINIONS: Joint ownership of personal property, 1924-26, p 564, 1942-44, p 382; taxability of joint bank accounts, 1942-44, p 382; effect of conveyance to husband and wife, 1944-46, p 22.

LAW REVIEW CITATIONS: 3 OLR 163; 10 OLR 388; 21 OLR 159; 26 OLR 114; 39 OLR 40, 41.

93.190

## NOTES OF DECISIONS

Unless otherwise provided in the trust instrument, the surviving trustee becomes sole administrator of the trust having title to all property included in the res and power to function as trustee. *Mattison v. Mattison*, (1909) 53 Or 254, 100 P 4, 133 Am St Rep 829, 18 Ann Cas 218.

Special trustees appointed by a religious society conveyed good title to property abandoned by the transferees who were also trustees of the church. *Andrews v. Sercombe*, (1917) 82 Or 616, 162 P 836.

FURTHER CITATIONS: *Stout v. Van Zante*, (1923) 109 Or 430, 219 P 804, 220 P 414.

93.200

## NOTES OF DECISIONS

See cases under ORS 93.190.

93.210

## NOTES OF DECISIONS

This statute is remedial in its nature and should be liberally construed to effectuate its purpose. *Heitkemper v. Schmeer*, (1929) 130 Or 644, 275 P 55, 281 P 169.

93.240

## NOTES OF DECISIONS

This section attempts to overrule prior decisions. *Irwin v. First Nat. Bank*, (1958) 212 Or 534, 321 P2d 299.

FURTHER CITATIONS: *Panushka v. Panushka*, (1960) 221 Or 145, 349 P2d 450.

LAW REVIEW CITATIONS: 37 OLR 70; 5 WLJ 229-251.

93.290 to 93.300

CASE CITATIONS: *Heider v. Dietz*, (1963) 234 Or 105, 380 P2d 619.

LAW REVIEW CITATIONS: 36 OLR 106, 185, 279.

93.290

## NOTES OF DECISIONS

Under this section purchaser assumes the risk of destruction of the property and therefore has an insurable interest in the property. *Higgins v. Ins. Co. of N. America*, (1970) 256 Or 151, 469 P2d 766.

## 93.310

## NOTES OF DECISIONS

1. In general
2. Permanent boundaries, monuments, angles, surfaces and lines
3. Road or stream boundary
4. Tidewater boundary

**1. In general**

This section is declaratory of the common law. *Buell v. Mathes*, (1949) 186 Or 160, 205 P2d 551.

A description of land is sufficiently definite and certain if it is possible for a surveyor to ascertain from the description "aided by extrinsic evidence," what property was intended to be conveyed. *Sequin v. Maloney-Chambers*, (1953) 198 Or 272, 281, 253 P2d 252; *O'Hara v. Brace*, (1971) 258 Or 416, 482 P2d 726.

The courts will be liberal in construing descriptions of premises conveyed by deed. *O'Hara v. Brace*, (1971) 258 Or 416, 482 P2d 726.

Where, by omitting one part of a false or impossible description in a deed a perfect description remains, the false part should be rejected and the instrument upheld. *Raymond v. Coffer*, (1873) 5 Or 132; *Commissioners v. Wiley*, (1881) 10 Or 86; *Hayden v. Brown*, (1898) 33 Or 221, 53 P 490.

Unless a contrary intent is expressed in the deed, quantity is subordinate to monuments, boundaries, angles, surfaces and distances. *Weniger v. Ripley*, (1930) 134 Or 265, 293 P 425.

A description was sufficient when evidence indicated that a surveyor could find the land described notwithstanding the errors in the description. *Gubser v. Town*, (1954) 202 Or 55, 273 P2d 430.

This section did not apply to a deed conveying land south to Longcoy Road, when a county road intended to be Longcoy Road and conforming to the measurements had been vacated, and there was an existing, more southerly road popularly known as Longcoy Road, without a clear showing that the parties intended the existing road as the southern terminus. *O'Gorman v. Baker*, (1959) 219 Or 170, 347 P2d 85, 338 P2d 638.

**2. Permanent boundaries, monuments, angles, surfaces and lines**

Where the description as to courses and distances is inconsistent with the boundaries or monuments therein referred to, the boundaries or monuments are to control. *Lewis v. Lewis*, (1871) 4 Or 177; *Goodman v. Myrick*, (1871) 5 Or 65; *Weiss v. Ore. Iron & Steel Co.*, (1886) 13 Or 496, 11 P 255; *Anderson v. McCormick*, (1889) 18 Or 301, 22 P 1062; *King v. Brigham*, (1890) 19 Or 560, 23 Or 262, 25 P 150, 31 P 601, 18 LRA 361; *Vandusen v. Shively*, (1892) 22 Or 64, 29 P 76; *Kanne v. Otty*, (1894) 25 Or 531, 36 P 537; *McDowell v. Carothers*, (1915) 75 Or 126, 146 P 800; *Hennigan v. Mathews*, (1916) 79 Or 622, 155 P 169; *Hickey v. Daniel*, (1921) 99 Or 525, 195 P 812; *Wyckoff v. Mayfield*, (1929) 130 Or 687, 280 P 340.

If their position at the time the deed was executed can be clearly proven, monuments prevail over courses and distances even though they are no longer visible. *Lewis v. Lewis*, (1871) 4 Or 177; *Schmidtke v. Keller*, (1903) 44 Or 23, 73 P 332, 74 P 222.

The actual location of monuments and lines must be proven by clear and satisfactory testimony to prevail over courses and distances. *King v. Brigham*, (1890) 19 Or 560, 23 Or 262, 25 P 150, 31 P 601, 18 LRA 361; *McDowell v. Carothers*, (1915) 75 Or 126, 146 P 800.

After considering all of the evidence, if it appears that the courses and distances as given correctly describe the

land, they will control. *Hale v. Cottle*, (1892) 21 Or 580, 28 P 901; *Baker County v. Benson*, (1901) 40 Or 207, 66 P 815.

Monuments not mentioned in the deed are not affected by this section. *Talbot v. Smith*, (1910) 56 Or 117, 107 P 480, 108 P 125; *Hennigan v. Mathews*, (1916) 79 Or 622, 155 P 169.

Although a specific description of a certain line should prevail over a general description of the area in ascertaining the position of the line, the general description should govern if the specific call is uncertain or obscure. *Rayburn v. Winant*, (1888) 16 Or 318, 18 P 588.

Monuments subsequently erected do not control a description of land by courses and distances without mentioning monuments: *Talbot v. Smith*, (1910) 56 Or 117, 107 P 480, 108 P 125.

A call to an object which is clearly described and easily identified takes precedence over a call to an uncertain boundary line. *Hanns v. Friedly*, (1947) 181 Or 631, 184 P2d 855.

**3. Road or stream boundary**

A grant describing the land as extending to the banks of a nonnavigable stream or lake, thence with its meanders, conveys title to the center of the stream or lake. *Michelli v. Andrus*, (1912) 61 Or 78, 120 P 737; *Luscher v. Reynolds*, (1936) 153 Or 625, 56 P2d 1158; *Kingsley v. Jacobs*, (1944) 174 Or 514, 149 P2d 950.

Where a party conveys a parcel of land bounded by water, although it lies in shallow water and is intended to be reclaimed by filling, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed. *Rasmussen v. Walker Whse. Co.*, (1913) 68 Or 316, 136 P 661.

Since the bed of a navigable stream constitutes a separate tract of land, the conveyance of land "to the bank" of the river by a party owning to the low water mark is presumed to convey only to the high water mark. *Richards v. Page Inv. Co.*, (1924) 112 Or 507, 228 P 937.

An inland lake, one mile long and one-eighth mile wide is not navigable. *Luscher v. Reynolds*, (1936) 153 Or 625, 56 P2d 1158.

**4. Tidewater boundary**

Subsection (5) is not a grant on the part of the state. *Astoria Exch. Co. v. Shively*, (1895) 27 Or 104, 109, 39 P 398, 40 P 92.

Subsection (5) is not limited to situation where tidewater is described as boundary, but includes cases where upland abuts tidewater, although not expressly so described in the deed. *McAdam v. Smith*, (1960) 221 Or 48, 350 P2d 698.

FURTHER CITATIONS: *Robinson v. Laurer*, (1895) 27 Or 315, 40 P 1012; *Christenson v. Simmons*, (1905) 47 Or 184, 82 P 805; *Cawfield v. Smyth*, (1914) 69 Or 41, 138 P 227; *Oregon Home Builders v. Eisman*, (1918) 88 Or 611, 172 P 114; *McBee v. Sch. Dist. 48*, (1939) 163 Or 121, 69 P2d 207.

ATTY. GEN. OPINIONS: Defect in boundary description of rural fire protection district, 1948-50, p 193.

LAW REVIEW CITATIONS: 39 OLR 36; 3 WLJ 356.

## 93.320

ATTY. GEN. OPINIONS: Effect on description of land, 1944-46, p 119.

## 93.370

ATTY. GEN. OPINIONS: Effect on description of land, 1944-46, p 119.

## 93.410

## NOTES OF DECISIONS

Compliance with this section is not necessary to the validity of the deed as between the parties, but is a formality necessary to entitle the deed to record. *Moore v. Thomas*, (1855) 1 Or 201; *Goodenough v. Warren*, (1879) 5 Sawy 494, Fed Cas No. 5,534; *Eadie v. Chambers*, (1909) 96 CCA 561, 172 Fed 73, 18 Ann Cas 1096, 24 LRA(NS) 879; *Houck v. Darling*, (1964) 238 Or 484, 395 P2d 445; *Barkins v. The Stuyvesant Ins. Co.*, (1970) 255 Or 222, 465 P2d 696.

A purchaser has a right to receive a properly acknowledged deed. *Knolhoff v. Mark*, (1914) 68 Or 437, 444, 136 P 893, Ann Cas 1915D, 1229.

This section does not require that the grantor's name appear in the acknowledgment; hence an erroneous notation as to his name in the acknowledgment does not affect its efficacy. *Coates v. Smith*, (1916) 81 Or 556, 160 P 517.

**FURTHER CITATIONS:** *Marks v. Wilson*, (1914) 72 Or 5, 143 P 906; *Wilcox v. Warren Constr. Co.*, (1920) 95 Or 125, 141, 186 P 13, 13 ALR 211; *Rickey Loan Co. v. Cheldelin*, (1934) 148 Or 170, 34 P2d 646.

**ATTY. GEN. OPINIONS:** Authority of county clerk to acknowledge deeds, 1926-28, p 519.

## 93.415

**CASE CITATIONS:** *Clark v. Clark*, (1888) 16 Or 224, 18 P 1.

## 93.420

**ATTY. GEN. OPINIONS:** Authority of county clerk to acknowledge deeds, 1926-28, p 519.

## 93.430

## NOTES OF DECISIONS

It is presumed that the officer taking the acknowledgment complied with this section. *Coates v. Smith*, (1916) 81 Or 556, 564, 160 P 517.

**FURTHER CITATIONS:** *Houck v. Darling*, (1964) 238 Or 484, 395 P2d 445.

## 93.440

## NOTES OF DECISIONS

In order to prove a deed the witness must testify under oath, and the officer must certify that the statements were made under oath. *McIntyre v. Kamm*, (1885) 12 Or 253, 7 P 27.

Proof of execution is a substitute for acknowledgment and entitles a deed to recordation and admission as evidence without further authentication. *Marks v. Wilson*, (1914) 72 Or 5, 143 P 906.

**FURTHER CITATIONS:** *Wilson & Wakeman v. McEnan*, (1879) 7 Or 87; *Alaskan Exploration Co. v. No. Min. & Trading Co.*, (1907) 81 CCA 363, 152 Fed 145; *In re Lee*, (1965) 242 Or 302, 409 P2d 337; *Barkins v. The Stuyvesant Ins. Co.*, (1970) 255 Or 222, 465 P2d.696.

## 93.470

## NOTES OF DECISIONS

See also cases under ORS 93.440.

**FURTHER CITATIONS:** *In re Lee*, (1965) 242 Or 302, 409 P2d 337.

## 93.480

## NOTES OF DECISIONS

Compliance with this section is not necessary to the validity of the deed as between the parties, but it is a formality necessary to entitle the deed to record. *Houck v. Darling*, (1964) 238 Or 484, 395 P2d 445; *Barkins v. The Stuyvesant Ins. Co.*, (1970) 255 Or 222, 465 P2d 696.

Parol evidence to impeach a certificate of acknowledgment in substantial compliance with this statute is inadmissible, unless there are allegations in the pleadings to warrant it. *Dolph v. Barney*, (1874) 5 Or 191, 205.

The county clerk's certificate as to the time and place of recordation must be identified and offered in evidence in order to be evidence of the time and place of record. *Ayre v. Hixson*, (1909) 53 Or 19, 98 P 515, 133 Am St Rep 819, Ann Cas 1913E, 659.

When a power of attorney is properly acknowledged or proved it may be recorded and read as evidence without further proof. *Marks v. Wilson*, (1914) 72 Or 5, 143 P 906.

The refusal to receive a deed in evidence is not a prejudicial error if there is other testimony regarding the conveyance. *Cole v. Johnson*, (1922) 103 Or 319, 205 P 282.

A record of a deed bearing a false acknowledgment should be stricken. *Houck v. Darling*, (1964) 238 Or 484, 395 P2d 445.

**FURTHER CITATIONS:** *Watson v. Dundee Mtg. & Trust Inv. Co.*, (1885) 12 Or 474, 8 P 548; *Bamberger v. Geiser*, (1893) 24 Or 203, 212, 33 P 609; *Oregon & Wash. Trust Inv. Co. v. Shaw*, (1878) 5 Sawy 336, Fed Cas No. 10,556; *Marx v. Hanthorn*, (1887) 30 Fed 579.

## 93.490

**CASE CITATIONS:** *Houck v. Darling*, (1964) 238 Or 484, 395 P2d 445.

## 93.500

## NOTES OF DECISIONS

See cases under ORS 93.510.

## 93.510

## NOTES OF DECISIONS

Under a prior similar statute a deed that lacked the required certificate was not entitled to record, and if recorded was not constructive notice of its existence. *Musgrove v. Bonser*, (1874) 5 Or 313, 20 Am Rep 737; *Fleschner v. Sumpter*, (1885) 12 Or 161, 6 P 506.

Under a former similar statute the failure to certify that the deed was executed and acknowledged according to the law of the state was deemed fatal. *Knolhoff v. Mark*, (1914) 68 Or 437, 136 P 893, Ann Cas 1915D, 1229.

**FURTHER CITATIONS:** *Knighton v. Smith*, (1859) 1 Or 276; *Goodenough v. Warren*, (1879) 5 Sawy 494, Fed Cas No. 5534.

**ATTY. GEN. OPINIONS:** Sufficiency of foreign assignment, 1924-26, p 184; acknowledgment of deed in another state, 1930-32, p 104; form of acknowledgments, 1940-42, p 414.

## 93.530

## NOTES OF DECISIONS

An assignment which has not been witnessed and acknowledged as required by the statute is binding as between the parties, though it is not entitled to record. *Bliss v. Miller*, (1926) 119 Or 573, 250 P 218, 763.

FURTHER CITATIONS: *Watt v. Reeves*, (1918) 89 Or 151, 173 P 463.

ATTY. GEN. OPINIONS: Recordation when certificates issued, 1930-32, p 616.

## 93.610

## NOTES OF DECISIONS

The record of deeds and mortgages is not one record, and so an entry in either cannot be qualified or affected by an entry in the other. *Oregon & Wash. Trust Inv. Co. v. Shaw*, (1878) 5 Sawy 336, Fed Cas No. 10,556.

ATTY. GEN. OPINIONS: Indexing trust deeds, 1960-62, p 288; recording a "Notice of Sale," (1968) Vol 34, p 172, recording a memorandum of land sale contract, (1971) Vol 35, p 694.

## 93.620

## NOTES OF DECISIONS

The statutory certificate must be identified and offered in evidence in order to be evident of the time and place of record. *Ayre v. Hixson*, (1909) 53 Or 19, 98 P 515, 133 Am St Rep 819, Ann Cas 1913E, 659.

## 93.630

## NOTES OF DECISIONS

The index is not part of the record and subsequent purchasers who suffer due to an error in the index must look to the clerk and his sureties for redress. *Board of Commissioners v. Babcock*, (1875) 5 Or 472.

Third parties have constructive notice of a properly recorded chattel mortgage even though it is not indexed among chattel mortgages. *Nichlin v. Betts Springs Co.*, (1884) 11 Or 406, 5 P 51, 50 Am Rep 477.

ATTY. GEN. OPINIONS: Recording a "Notice of Sale," (1968) Vol 34, p 172.

## 93.640

## NOTES OF DECISIONS

## 1. Scope and effect in general

A conveyance is void as against a judgment lien unless it is recorded at the time the judgment is docketed or the lienor has knowledge of its existence. *United States v. Griswold*, (1881) 8 Fed 556; *Baker v. Woodward*, (1884) 12 Or 3, 6 P 173.

Under a former provision requiring recordation within a specified time after execution, the first to record prevailed when neither party recorded within the time allowed. *Fleschner v. Sumpster*, (1885) 12 Or 161, 6 P 506; *McLeod v. Lloyd*, (1903) 43 Or 260, 71 P 795, 74 P 491; *Mertens v. No. State Bank*, (1913) 68 Or 273, 135 P 885.

The assignment of a mortgage does not fall within the purview of this section. *Watson v. Dundee Mtg. & Trust Inv. Co.*, (1885) 12 Or 474, 8 P 548; *Oregon & Wash. Trust Inv. Co. v. Shaw*, (1878) 5 Sawy 336, Fed Cas No. 10,556.

A recorded conveyance of realty will have priority in all cases over a conveyance not recorded. *Moore v. Thomas*, (1855) 1 Or 201.

A deed does not have to be indexed to be recorded within the meaning of this section. *Board of Commissioners v. Babcock*, (1887) 5 Or 472.

Where the statute applying in terms to state deeds or patents expressly provides that the effect of recording them shall be the same as other deeds, priority of record confers superiority of title to a subsequent bona fide purchaser of the same lands from the state. *Meacham v. Stewart*, (1890) 19 Or 285, 24 P 241.

The transferee under a quit claim deed, which recites a nominal consideration and does not purport to convey any certain estate in the land, is not protected by the provisions of this section. *American Mtg. Co. v. Hutchinson*, (1890) 19 Or 334, 24 P 515. But see *Raymond v. Flavel*, (1895) 27 Or 219, 244, 40 P 158.

## 2. In good faith

A purchaser is not in "good faith" within the meaning of this section if he has knowledge of an outstanding unrecorded deed. *Musgrove v. Bonser*, (1874) 5 Or 313, 20 Am Rep 737; *Jennings v. Kieman*, (1899) 35 Or 349, 361, 55 P 443, 56 P 72.

Actual notice of an unrecorded deed includes the knowledge of facts which would put a reasonable person on inquiry; such as possession of the premises by the grantee of a prior conveyance. *Manaudas v. Mann*, (1887) 14 Or 450, 13 P 449; *Goodenough v. Warren*, (1879) 5 Sawy 494, Fed Cas No. 5, 534.

An attaching creditor must prove that he is a bona fide purchaser to prevail over a prior unrecorded deed. *Haines v. Connell*, (1906) 48 Or 469, 87 P 265, 88 P 872, 120 Am St Rep 835; *Jennings v. Lentz*, (1908) 50 Or 483, 93 P 327, 29 LRA(NS) 584; *Bailey v. Hickey*, (1921) 99 Or 251, 185 P 372.

A subsequent purchaser does not have constructive notice of a recorded mortgage which was placed on the land by the grantee of an unrecorded deed. *Advance Thresher Co. v. Esteb*, (1902) 41 Or 469, 69 P 447.

A mortgagee who has recorded his mortgage is not on constructive notice of a subsequent transfer by the mortgagor. *Kaiser v. Idleman*, (1910) 57 Or 224, 108 P 193, 28 LRA(NS) 169.

The recording of a deed gives subsequent purchasers constructive notice of its existence. *Bradtl v. Sharkey*, (1911) 58 Or 153, 113 P 653.

A trustee in bankruptcy is not ipso facto a bona fide purchaser for value. *Coates v. Smith*, (1916) 81 Or 556, 160 P 517.

Where the holder of a purchase money lien fails to allege that the payments under which he claims were made prior to the mortgage, the mortgagee need not show that the mortgage was acquired in good faith. *First Sav. Bank v. Linn-Haven Orchard Co.*, (1918) 89 Or 354, 174 P 614.

An unrecorded trust instrument is constructively fraudulent as to prior and subsequent creditors where the settlor retains indicia of ownership. *Coston v. Portland Trust Co.*, (1929) 131 Or 71, 278 P 586, 282 P 442.

A subsequent purchaser has ample notice of a prior deed when his inquiries elicit conflicting statement. *Paris v. Smith*, (1960) 224 Or 95, 355 P2d 635.

Actual notice from the record owner that she did not claim to be the owner was sufficient to charge purchasers with the duty of diligent inquiry either to determine the name of the actual owner or to show that his name could not have been discovered by reasonable diligence. *Willis v. Stager*, (1971) 257 Or 608, 481 P2d 78.

FURTHER CITATIONS: *Riddle v. Miller*, (1890) 19 Or 468, 23 P 807; *Temple v. Osbum*, (1909) 55 Or 506, 106 P 16; *Metropolitan Inv. Co. v. Schouweiler*, (1917) 83 Or 695, 163 P 599, 164 P 370.

ATTY. GEN. OPINIONS: Recordation of conveyances of land registered in Torrens system, 1942-44, p 171; indexing trust deeds, 1960-62, p 288; timber reservation, 1962-64, p 44.

LAW REVIEW CITATIONS: 15 OLR 66; 17 OLR 83; 24 OLR 290; 28 OLR 258; 34 OLR 120; 44 OLR 155; 2 WLJ 468.



93.650

## NOTES OF DECISIONS

A conveyance can be proven by admitting into evidence a transcript of a deed properly executed and acknowledged taken from the record. *Stanley v. Smith*, (1887) 15 Or 505, 16 P 174; *State v. Rowen*, (1922) 104 Or 1, 200 P 901; *Marx v. Hawthorn*, (1887) 30 Fed 579.

The record of a deed is admissible to show title even though there is no evidence of its delivery. *Serles v. Serles*, (1899) 35 Or 289, 57 P 634.

Prima facie title shown by a transcript of the record of the deed can be rebutted by other evidence. *Durkin v. Ward*, (1913) 66 Or 335, 133 P 345.

In a prosecution for forgery of a deed, it was proper to admit in evidence certified copies of the record of the deed, without accounting for the original instrument or giving notice to the defendant to produce it. *State v. Rowen*, (1922) 104 Or 1, 200 P 901.

LAW REVIEW CITATIONS: 42 OLR 233, 261.

93.660

LAW REVIEW CITATIONS: 42 OLR 246.

93.670

## NOTES OF DECISIONS

A power of attorney must be acknowledged or proven before its record is admissible as evidence. *Marks v. Wilson*, (1914) 72 Or 5, 143 P 906.

ATTY. GEN. OPINIONS: When seal is required, 1932-34, p 122.

LAW REVIEW CITATIONS: 24 OLR 289.

93.680

## NOTES OF DECISIONS

This section gives priority to the patentee who is first to record his patent. *Meacham v. Stewart*, (1890) 19 Or 285, 24 P 241.

A person asserting title under an unrecorded decree affecting land cannot successfully dispute the title of another holding under a prior unrecorded deed. *Temple v. Osburn*, (1910) 55 Or 506, 106 P 16.

The court of equity may by its decree convey title to real property. *Anderson v. Morse*, (1924) 110 Or 39, 222 P 1083.

93.710

ATTY. GEN. OPINIONS: Oil and gas leases, 1944-46, p 294.

93.750

LAW REVIEW CITATIONS: 12 OLR 68.

93.810

## NOTES OF DECISIONS

## 1. Subsection (4)

Subsection (4) applies to powers of attorney executed in a foreign country, but does not apply to a power executed in a sister state. *Marks v. Wilson*, (1914) 72 Or 5, 143 P 906.

## 2. Subsection (8)

Under former similar legislation defects in execution were corrected by operation of the statute. **Lack of acknowledgment**, *Baker v. Woodward*, (1884) 12 Or 3, 6 P 173; *Clark v. Latourette*, (1913) 64 Or 412, 129 P 1043; **failure to seal**, *Stanley v. Smith*, (1887) 15 Or 505, 16 P 174; *Barnes v. Multnomah County*, (1906) 145 Fed 695; **defect in duly confirmed execution sale**, *Davis v. Magnes*, (1911) 58 Or 69, 113 P 1.

Curative acts can correct all defects in proceedings held to approve sales by executors, administrators and guardians so long as the court has jurisdiction. *Mitchell v. Campbell*, (1890) 19 Or 198, 24 P 455; *McCulloch v. Estes*, (1891) 20 Or 349, 25 P 724; *Fuller v. Hager*, (1905) 47 Or 242, 83 P 782; *Browne v. Coleman*, (1912) 62 Or 454, 125 P 278; *Stadelman v. Miner*, (1917) 83 Or 348, 155 P 708, 163 P 585, 163 P 983; *Gregory v. Keenan*, (1919) 256 Fed 949.

Curative acts cannot validate proceedings that are void for want of jurisdiction. *Fuller v. Hager*, (1905) 47 Or 242, 83 P 782; *Stadelman v. Miner*, (1917) 83 Or 348, 155 P 708, 163 P 585, 163 P 983.

Curative statutes are remedial and should be liberally construed. *Stanley v. Smith*, (1887) 15 Or 505, 16 P 174.

Deed signed by minors, lunatics and other persons with disabilities are not validated by curative legislation. *Collins v. Goldsmith*, (1896) 71 Fed 580.

Under a former similar statute the curative provisions did not convert a writing into a conveyance of an interest in land when the writing did not clearly manifest an intent to transfer an estate in realty. *Baum v. Rainbow Smelting Co.*, (1903) 42 Or 453, 71 P 538.

Curative statutes do not operate to give the purchaser a deed free from defect when there is fraud perpetrated at the execution sale and confirmation. *Arnold v. Ness*, (1914) 212 Fed 290.

ATTY. GEN. OPINIONS: Effect of confirmation, 1934-36, p 121; effect on judicial sales, 1942-44, p 330.