Chapter 138

Appeals; Post-conviction Relief

Chapter 138

NOTES OF DECISIONS

1. In general

The requirements of the code in reference to appeals in criminal causes materially differ from those in regard to civil causes. State v. Berger, (1908) 51 Or 166, 94 P 181; State v. Archerd, (1933) 144 Or 309, 24 P2d 5.

Since an appeal is purely statutory, accused must substantially comply with statutory requirements in order to maintain an appeal. State v. Morgan, (1913) 65 Or 314, 132 P 957; State v. Berg, (1931) 138 Or 20, 3 P2d 783, 4 P2d 628.

The only mode of reviewing a judgment or order in a criminal action is that prescribed by this chapter. State v. Rathie, (1921) 101 Or 368, 200 P 790; Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289.

The trial court has the inherent power to correct its own erroneous judgment of conviction upon a motion in the nature of coram nobis. Huffman v. Alexander (concurring opinion), (1953) 197 Or 283, 251 P2d 87, 253 P2d 289; State v. Huffman, (1956) 207 Or 372, 297 P2d 831.

When a party has complied with all necessary provisions of this chapter, he has a right to be heard on appeal. State v. Ellis, (1869) 3 Or 497.

An appeal in a criminal action taken in compliance with this chapter during a term of the Supreme Court may be heard and determined at the same term. State v. Bovee, (1883) 11 Or 57, 4 P 520.

A party to a civil action may appeal from a final determination of his cause unless judgment was given by consent or for want of an answer, but this restriction is not applicable to a conviction in a criminal action based on a plea of guilty. Ex parte Harrell, (1910) 57 Or 95, 110 P 493.

This chapter is not applicable to offenses against city law. Portland v. White, (1923) 106 Or 169, 211 P 798.

A statute which attempted to control the discretion of the circuit court in respect to the issuance of a certificate of probable cause, whether probable cause existed or not, was unconstitutional and void. State v. Ellis, (1937) 156 Or 83, 66 P2d 995.

The provisions of the criminal code for taking an appeal are complete within themselves and the decisions in civil cases in this state throw no light on this subject. State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

Relief from conviction in violation of constitutional right is by coram nobis when habeas corpus does not provide a remedy. State v. Huffman, (1956) 207 Or 372, 297 P2d 831. Overruling State v. Rathie, (1921) 101 Or 368, 200 P 790 and Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289.

Coram nobis will not lie when habeas corpus provides a remedy. State v. Huffman, (1956) 207 Or 372, 297 P2d 831.

Relief from a conviction obtained in violation of constitutional right is by means of a motion in the nature of coram nobis where the moving defendant is not in custody. State v. Huffman, (1956) 207 Or 372, 297 P2d 831. Overruling Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289.

Relief in the nature of coram nobis is not to be obtained by employment of the ancient writ but, when authorized, is to be sought by a motion in the criminal case wherein the conviction was had. State v. Sherwood, (1956) 209 Or 178, 298 P2d 842.

Relief in the nature of coram nobis lies only when no adequate post-conviction procedure and remedy has otherwise been provided and when it appears from petition that facts tendered as basis for new trial would have prevented the judgment entered and were unknown at time of trial. State v. Poierier, (1958) 212 Or 369, 320 P2d 255.

FURTHER CITATIONS: Howell v. Gladden, (1967) 247 Or 138, 427 P2d 978.

138.010

NOTES OF DECISIONS

The sections of the civil code in reference to appeals do not apply to criminal actions. State v. Ellis, (1869) 3 Or 497; State v. Berger, (1908) 51 Or 166, 94 P 181; State v. Archerd, (1933) 144 Or 309, 24 P2d 5; State v. Rosser, (1939) 162 Or 293.

All writs of error and of certiorari are abolished in criminal cases. State v. Rathie, (1921) 101 Or 368, 200 P 790.

A proceeding on writ of review to determine the sufficiency of a judgment in the justice's court convicting accused of an illegal liquor sale is not a criminal action within the intendment of this and following sections. Davenport v. Justice Court, (1921) 101 Or 507, 199 P 621.

The criminal code of this state is complete in itself. State v. Fehl, (1935) 152 Or 104, 52 P2d 1118.

OCLA 28-707 [ORS 157.070] is an exception to this section. Bechtold v. Wilson, (1947) 182 Or 360, 186 P2d 525, 187 P2d 675.

Coram nobis is available for the relief of persons who have suffered conviction in violation of constitutional right but have no remedy in habeas corpus. State v. Huffman, (1956) 207 Or 372, 297 P2d 831.

Except as provided in ORS 157.010, the use of the writ of review in criminal cases has been abolished by this section. State v. Etling, (1970) 256 Or 3, 470 P2d 950.

FURTHER CITATIONS: State v. Bovee, (1883) 11 Or 57, 4 P 520; Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289; State v. Poierier, (1958) 212 Or 369, 320 P2d 255; State v. Endsley, (1958) 214 Or 537, 331 P2d 338.

LAW REVIEW CITATIONS: 2 OLR 30; 38 OLR 162.

138.020

NOTES OF DECISIONS

There must be a substantial compliance with the statutory provisions governing appeals. State v. Horner, (1900) 36 Or 68, 59 P 549; State v. Morgan, (1913) 65 Or 314, 132 P 957.

There is no common-law right of appeal; the right is purely statutory. Portland v. White, (1923) 106 Or 169, 211 P 798; State v. Lewis, (1925) 113 Or 359, 230 P 543, 232 P 1013.

This section constitutes an express limitation upon the right of appeal and precludes the state from resorting to that mode of reviewing judgments and orders of the circuit court, other than those enumerated in H 1430 [ORS 138.060]. State v. Minnick, (1898) 33 Or 158, 54 P 223.

This section limits the right of appeal under this chapter to criminal actions. Portland v. White, (1923) 106 Or 169, 211 P 798.

The violation of a municipal ordinance is not necessarily a crime but a quasi-criminal offense. Id.

Since an appeal by the defendant is a matter of right, a trial fee may not be demanded of him. State v. Way, (1926) 120 Or 134, 249 P 1045, 251 P 761.

All persons who have been convicted of crime which is made punishable by statute are entitled to appeal from the judgment of conviction. State v. Ellis, (1937) 156 Or 83, 66 P2d 995.

FURTHER CITATIONS: Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289; State v. Huffman, (1956) 207 Or 372, 297 P2d 831; State v. Turner, (1967) 247 Or 301, 429 P2d 565; State v. Sieckman, (1968) 251 Or 259, 445 P2d 599; Gortmaker v. Seaton, (1969) 252 Or 440, 450 P2d 547; State v. Rutherford, (1970) 1 Or App 599, 465 P2d 243, Sup Ct **review denied;** State v. Truxall, (1970) 2 Or App 214, 467 P2d 643; State v. Garrett, (1961) 228 Or 1, 363 P2d 762.

LAW REVIEW CITATIONS: 39 OLR 340.

138.040

NOTES OF DECISIONS

1. In general
2. When appeal lies
3. Prior to 1963 amendment

1. In general

An objection, not made below, to the judge's authority to sit cannot be entertained on appeal. State v. Whitney, (1879) 7 Or 386.

This section granting the right of appeal from a judgment on a conviction in a circuit court, refers to a conviction in a criminal action. Portland v. White, (1923) 106 Or 169, 211 P 798.

An appeal taken from an order refusing to dismiss the indictment vests jurisdiction in the appellate court. State v. Jackson, (1961) 228 Or 371, 365 P2d 294, 89 ALR2d 1225.

During an appeal the lower court cannot proceed in any manner so as to affect the jurisdiction acquired by the appellate court or defeat the right of appellants to prosecute the appeal with effect. State v. Jackson, (1961) 228 Or 371, 365 P2d 294; State v. Garner, (1963) 233 Or 252, 377 P2d 919. State v. Jackson, supra, overruling Johnston v. Circuit Court, (1932) 140 Or 100, 12 P2d 1027 and State v. DeGrace, (1933) 144 Or 159, 22 P2d 896, 90 ALR 232.

This section does not apply in cases of conviction based on a plea of guilty. State v. Jairl, (1962) 229 Or 533, 368 P2d 323. Overruling State v. Lewis, (1925) 113 Or 359, 230 P2d 543.

An order denying defendant's motion to dismiss the indictment on the ground he has been once in jeopardy for the same offense is not appealable. State v. Haynes, (1962) 232 Or 330, 375 P2d 550.

Appellate court has no jurisdiction unless appeal conforms to statutory requirements. State v. Goodin, (1970) 1 Or App 559, 465 P2d 487.

Where there was no attempt to review the judgment of conviction, the Supreme Court had no jurisdiction to review the order settling the cost bill. State v. Fehl, (1935) 152 Or 104, 52 P2d 1118.

2. When appeal lies

A defendant who has paid a fine, though under protest and to avoid going to jail, has satisfied the judgment and cannot appeal. Washington v. Cleland, (1907) 49 Or 12, 88 P 305, 124 Am St Rep 1013.

No appeal may be taken from an order of the circuit court denying a motion in the nature of coram nobis, although such order may be reviewed when an appeal is properly taken. State v. Endsley, (1958) 214 Or 537, 331 P2d 338.

Defendants had no ground for an appeal from an order denying a motion to dismiss where they failed to move to dismiss before entering a plea of not guilty, moving for a change of venue and announcing they were ready for trial. Johnston v. Circuit Court, (1932) 140 Or 100, 12 P2d 1027.

3. Prior to 1963 amendment

An appeal may lie from an order refusing to dismiss an indictment because not brought to trial within the time required by law. State v. Rosenberg, (1914) 71 Or 389, 142 P 624; State v. Hellala, (1914) 71 Or 391, 142 P 624; State v. Chapin, (1915) 74 Or 346, 144 P 1187; State v. Kuhnhausen, (1954) 201 Or 478, 266 P2d 698, 272 P2d 225.

The restriction in the civil code that one cannot appeal from a judgment given by consent or for want of an answer is not applicable to a conviction in a criminal action based on a plea of guilty. Ex Parte Harrell, (1910) 57 Or 95, 110 P 493.

An appeal may be taken from an order refusing to dismiss an indictment. In re Von Klein, (1913) 67 Or 298, 135 P 870.

A defendant whose trial under an indictment has resulted in a mistrial and who has not again been brought to trial, has a plain remedy by appeal. In re Clark, (1916) 79 Or 325, 154 P 748, 155 P 187.

Appeals should seasonably be taken from the original denial of a motion for an immediate trial rather than from the second denial upon a renewal of the motion at the beginning of the next term. State v. Clark, (1917) 86 Or 464, 168 P 944.

FURTHER CITATIONS: State v. Way, (1926) 120 Or 134, 249 P 1045, 251 P 761; Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289; State v. Gates, (1962) 230 Or 84, 368 P2d 605; State v. Hedrick, (1962) 233 Or 76, 377 P2d 23; Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614; State v. Cartwright, (1966) 246 Or 120, 418 P2d 822; State v. Long, (1967) 246 Or 394, 425 P2d 528; Sullivan v. Cupp, (1969) 1 Or App 388, 462 P2d 455, Sup Ct **review denied.**

LAW REVIEW CITATIONS: 2 OLR 30; 3 OLR 185; 14 OLR 420; 39 OLR 340, 365; 4 WLJ 170.

138.050

NOTES OF DECISIONS

On appeal under this section the only question is whether the sentence is excessive. State v. Ridder, (1949) 185 Or 134, 202 P2d 482; State v. Clark, (1964) 237 Or 596, 392 P2d 643; State v. Montgomery, (1964) 237 Or 593, 392 P2d 642; State v. Gressinger, (1964) 238 Or 490, 395 P2d 441.

This section prohibits appellate review of convictions based upon a plea of guilty except to a limited extent. State v. Jairl, (1962) 229 Or 533, 368 P2d 323; State v. Gidley, (1962) 231 Or 89, 371 P2d 992; State v. Hedrick, (1962) 233 Or 135, 377 P2d 323; State v. Lammon, (1970) 2 Or App 205, 465 P2d 490; State v. Kabachenko, (1970) 2 Or App 202, 465 P2d 891, Sup Ct **review denied;** State v. Wickenheiser, (1970) 3 Or App 509, 475 P2d 422; State v. Slopak, (1970) 3 Or App 532, 475 P2d 421.

On appeal, the court will not modify a sentence, unless

the sentence imposed was the result of improper motives, or was so disproportionate to the offense as to shock the conscience of fair-minded men. State v. Shannon, (1965) 242 Or 404, 409 P2d 911; State v. Scharbrough, (1966) 245 Or 328, 421 P2d 976; State v. Gabie, (1970) 1 Or App 576, 463 P2d 595, Sup Ct **review denied**; State v. Chilton, (1970) 1 Or App 593, 465 P2d 495.

The right of appeal of a person convicted on a guilty plea is restricted to the grounds specified in this section. State v. Cornelius, (1968) 249 Or 454, 438 P2d 1020; State v. Mathewson, (1970) 4 Or App 104, 477 P2d 222.

The purpose of this section is to empower the appellate court to review discretion of lower court in passing sentence after plea of guilty and in event of excessive, cruel or unusual punishment to direct lower court to change sentence to what is determined should have been imposed. State v. Ridder, (1949) 185 Or 134, 202 P2d 482.

Normally, the remedy of habeas corpus is not available to those who neglect to appeal. Barber v. Gladden (dictum), (1957) 210 Or 46, 298 P2d 986, 309 P2d 192.

Appeal in both civil and criminal cases is not a constitutional right but a legislative grant. State v. Jairl, (1962) 229 Or 533, 368 P2d 323.

An order of the court suspending the imposition of sentence and releasing the defendant on probation was not an order from which defendant could appeal, except for excessiveness. State v. Gates, (1962) 230 Or 84, 368 P2d 605.

The court must have before it the record upon which the circuit court acted. State v. Clark, (1964) 237 Or 596, 392 P2d 643.

Delay in resentencing is not a grounds for appeal. State v. Froembling, (1964) 237 Or 616, 391 P2d 390, cert denied, 379 US 937, 85 S Ct 339, 13 L Ed 2d 347.

It is an inherent power of the court to impose sentences, including the choice of concurrent or consecutive terms when the occasion demands it. State v. Jones, (1968) 250 Or 59, 440 P2d 371.

Where defendant was sentenced to serve a term of not to exceed 10 years on a plea of guilty to a crime which carried a minimum of two years and a maximum of 20 years, the sentence was not disturbed. State v. Ridder, (1949) 185 Or 134, 202 P2d 482.

A consecutive sentence was not excessive. State v. Jones, (1968) 250 Or 59, 440 P2d 371.

Concurrent sentences of life imprisonment for armed robbery and 10 years for assault with a dangerous weapon did not constitute cruel and unusual punishment. State v. Hecket, (1970) 2 Or App 273, 467 P2d 122, Sup Ct **review denied.**

FURTHER CITATIONS: Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289; State v. Peddicord, (1957) 209 Or 360, 306 P2d 416; State v. Gust, (1959) 218 Or 498, 345 P2d 808; State v. Dixon, (1964) 238 Or 121, 393 P2d 204; State v. Cotton, (1965) 240 Or 252, 400 P2d 1022; Richardson v. Williard, (1965) 241 Or 37, 406 P2d 156; State v. Thornton, (1966) 244 Or 104, 416 P2d 1; State v. Cartwright, (1966) 246 Or 120, 418 P2d 822; State v. Miller, (1967) 247 Or 348, 430 P2d 985; State v. Weeks, (1968) 249 Or 638, 439 P2d 1009; Hammon v. Gladden, (1968) 250 Or 174, 441 P2d 241; State v. Cunningham, (1969) 252 Or 654, 452 P2d 315; State v. Middleton, (1970) 2 Or App 70, 465 P2d 913; State v. Evans, (1970) 2 Or App 441, 468 P2d 657, rev'd, 258 Or 439, 483 P2d 1300; State v. Gardner, (1970) 3 Or App 486, 475 P2d 92; State v. Jones, (1970) 4 Or App 170, 477 P2d 914; State v. Wallace, (1970) 4 Or App 362, 477 P2d 907, Sup Ct **review denied**; State v. Brudos, (1970) 3 Or App 289, 471 P2d 861, Sup Ct **review denied**; State v. Ferren, (1970) 3 Or App 224, 473 P2d 165; State v. Wolberg, (1971) 5 Or App 295, 483 P2d 104, US appeal pending.

ATTY. GEN. OPINIONS: Right of lower court to recommend suspension of motor vehicle operator's license when the appellate court on appeal under this section did not so recommend, 1946-48, p 420.

LAW REVIEW CITATIONS: 7 WLJ 50.

138.060

NOTES OF DECISIONS

The state cannot appeal from any orders or judgments in a criminal case except those mentioned in this section. State v. Ellis, (1869) 3 Or 497; State v. Minnick, (1898) 33 Or 158, 54 P 223.

There must be a judgment in the technical sense of the word on the demurrer before the state may appeal. State v. Brown, (1873) 5 Or 119.

The state has no appeal from a judgment of acquittal entered on a verdict ordered by the trial judge. State v. Minnick, (1898) 33 Or 158, 54 P 223.

This section does not extend to appeals from the justice's court. Portland v. Erickson, (1900) 39 Or 1, 62 P 753.

The objection to the introduction of further evidence on the grounds that the statute on which the prosecution was based is unconstitutional and that the indictment does not state facts sufficient to constitute a crime is in effect a demurrer upon the latter ground. State v. Berry and Walker, (1954) 204 Or 69, 267 P2d 993, 995, 282 P2d 344, 347.

Neither verbal nor written order sustaining demurrer constituted a "judgment." State v. Davis, (1956) 207 Or 525, 296 P2d 240.

Prior to the 1971 amendment, the state could not appeal a judgment for defendant on a motion to dismiss an indictment. State v. Hopkins, (1961) 227 Or 395, 362 P2d 378.

Prior to the 1971 amendment, there was no right of the state to appeal from a judgment sustaining a plea of former jeopardy. State v. Garrett, (1961) 228 Or 1, 363 P2d 762.

A judgment vacating a verdict and sentence and dismissing the indictment is not an order arresting judgment. State v. Foster, (1961) 229 Or 293, 366 P2d 896.

The grounds for appeal by the state are limited to the causes specified. Id.

An order in arrest of judgment is in the nature of a judgment. State v. Cloran, (1962) 233 Or 400, 374 P2d 748.

The order, though erroneous, was not one specified from which an appeal can be taken by the state. State v. Sieckman, (1968) 251 Or 259, 445 P2d 599.

For the purposes of subsection (4), the trial has not commenced when the hearing on the motions is held. State v. Robinson, (1970) 3 Or App 200, 473 P2d 152.

Confessions and admissions are evidence under subsection (4). Id.

FURTHER CITATIONS: State v. Way, (1926) 120 Or 134, 249 P 1045, 251 P 761; State v. Fowler, (1960) 225 Or 201, 357 P2d 279; State v. Mims, (1963) 235 Or 540, 385 P2d 1002; State v. Stuart, (1968) 250 Or 303, 442 P2d 231; State v. Tucker, (1969) 252 Or 597, 451 P2d 471; State v. Fisher, (1971) 5 Or App 483, 484 P2d 864; State v. Miller, (1971) 5 Or App 501, 484 P2d 1132; State v. Elliott, (1971) 92 Or App Adv Sh 1812, 486 P2d 1296, Sup Ct **review denied.**

138.071

NOTES OF DECISIONS

1. Under former similar statute

The specified period not having elapsed since the rendition of judgment, an appeal therefrom could be taken. Hayes v. Clifford, (1903) 42 Or 568, 72 P 1.

Neither verbal nor written order sustaining demurrer constituted a "judgment." State v. Davis, (1956) 207 Or 525, 296 P2d 240.

Time allowed to appeal ran from entry of the judgment

imposed upon revocation of probation, not from entry of the order releasing defendant on probation. State v. Gates, (1962) 230 Or 84, 368 P2d 605.

The code provision for appeal in criminal cases was complete in itself and had to be complied with to confer jurisdiction on the Supreme Court. Welch v. Gladden, (1969) 253 Or 228, 453 P2d 907.

Notice of appeal filed after the expiration of the time allowed was a nullity. State v. Goodin, (1970) 1 Or App 559, 465 P2d 487.

FURTHER CITATIONS: State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295; Thomas v. Gladden, (1964) 239 Or 293, 397 P2d 836; Shipman v. Gladden, (1969) 253 Or 192, 453 P2d 921; State v. Frye, (1970) 2 Or App 192, 465 P2d 736; City of Portland v. Olson, (1971) 4 Or App 380, 481 P2d 641.

LAW REVIEW CITATIONS: 39 OLR 365; 6 WLJ 487.

138.081

NOTES OF DECISIONS

1. Under former similar statute

A notice of appeal which states the nature of the action, the parties, the title of the court and the sentence pronounced, was sufficient to confer jurisdiction though it failed to designate the time when said judgment was rendered. State v. Hanlon, (1897) 32 Or 95, 98, 48 P 353; State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

The appeal was perfected by serving and filing with the clerk the notice of appeal. State v. Keeney, (1916) 81 Or 478, 159 P 1165; State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

The provisions of the statute were jurisdictional. State v. Berg, (1931) 138 Or 20, 3 P2d 783, 4 P2d 628; State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

(1) Prior to 1947 amendment. The appeal was dismissed for failure to comply with the statute. State v. Horner, (1900) 36 Or 68, 59 P 549; State v. Berger, (1908) 51 Or 166, 94 P 181; State v. Mageske, (1926) 119 Or 312, 227 P 1065, 249 P 364; State v. Berg, (1931) 138 Or 20, 3 P2d 783, 4 P2d 628; State v. Archerd, (1933) 144 Or 309, 24 P2d 5.

It was not sufficient in a criminal case to give notice of appeal in open court as provided in the civil code. State v. Berger, (1908) 51 Or 166, 94 P 181.

The appellate court in determining whether or not the statute had been complied with could look only to the record. State v. Berg, (1931) 138 Or 20, 3 P2d 783, 4 P2d 628.

Filing the original notice with the clerk did not constitute service on him. State v. Archerd, (1933) 144 Or 309, 24 P2d 5.

FURTHER CITATIONS: State v. Blazier, (1900) 36 Or 97, 60 P 203; State v. Williams, (1909) 55 Or 143, 105 P 716; Portland v. White, (1923) 106 Or 169, 174, 211 P 798; State v. Hedrick, (1962) 233 Or 76, 377 P2d 23; Bryan v. Cupp, (1969) 1 Or App 52, 458 P2d 697.

138.090

CASE CITATIONS: State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

138.110

NOTES OF DECISIONS

The statutory requirements of service of notice must be followed strictly. State v. Garrett, (1961) 228 Or 1, 363 P2d 762.

FURTHER CITATIONS: State v. Brown, (1873) 5 Or 119; Holland v. Gladden, (1962) 229 Or 573, 368 P2d 331; State v. Gould, (1966) 244 Or 354, 418 P2d 262.

138.120

CASE CITATIONS: State v. Kerekes, (1960) 225 Or 352, 357 P2d 413, 358 P2d 523.

138.135

NOTES OF DECISIONS

1. In general

Prisoner does not waive his right to bail by electing, at time of appeal, to make time in custody count toward the sentence. Thomas v. Gladden, (1964) 239 Or 293, 397 P2d 836.

It was not a denial of equal protection under U.S. Const. Am. 14, §1 to deny defendant credit on his sentence for time spent in the county jail while waiting for the disposition of his appeal. Sullivan v. Cupp, (1969) 1 Or App 388, 462 P2d 455, Sup Ct review denied.

2. Under former similar statute

An appeal did not vacate the judgment or the warrant issued thereon. Whitley v. Murphy, (1874) 5 Or 328, 20 Am Rep 741; State v. Armstrong, (1904) 45 Or 25, 27, 74 P 1025.

When the execution of the judgment was stayed, the sheriff having custody of defendant was required to keep him to abide the judgment on appeal. State v. Armstrong, (1904) 45 Or 25, 74 P 1025.

A writ of supersedeas was unknown to Oregon practice, but prior to the 1947 amendment a certificate of probable cause was tantamount thereto. State v. Small, (1907) 49 Or 585, 90 P 1110.

FURTHER CITATIONS: Smith v. Gladden, (1959) 219 Or 369, 345 P2d 398; State v. Haynes, (1962) 232 Or 330, 375 P2d 550.

ATTY. GEN. OPINIONS: Warden's duty to return a defendant to the sheriff when an appeal is filed, 1952-54, p 239.

LAW REVIEW CITATIONS: 45 OLR 23.

138.145

CASE CITATIONS: State v. Ellis, (1937) 156 Or 83, 66 P2d 995.

ATTY. GEN. OPINIONS: Detention of defendant by sheriff upon appeal where defendant had already been taken to state penitentiary, 1926-28, p 568.

138.160

NOTES OF DECISIONS

An appeal in a criminal case does not vacate the judgment appealed from in the court below. Whitley v. Murphy, (1874) 5 Or 328, 20 Am Rep. 741; State v. Armstrong, (1904) 45 Or 25, 27, 74 P 1025.

FURTHER CITATIONS: State v. Robinson, (1970) 3 Or App 200, 473 P2d 152.

138.185

NOTES OF DECISIONS

1. Under former similar statute

(1) Necessity of transmission. Where the transcript was not filed within the time allowed, the appeal would be dismissed unless the failure of the clerk to file same was not in any way due to the negligence of the appellant. State v. Williams, (1909) 55 Or 143, 105 P 716; State v. Dickerson, (1910) 55 Or 390, 106 P 790; State v. Webb, (1911) 59 Or 235, 117 P 272; State v. Keeney, (1916) 81 Or 478, 159 P 1165; State v. Fehl, (1934) 147 Or 290, 32 P2d 1013; State v. Stone, (1946) 178 Or 268, 166 P2d 980.

Compliance with the statute relative to filing transcript on appeal was essential to confer jurisdiction on Supreme Court. State v. Dickerson, (1910) 55 Or 390, 106 P 790; State v. Douglas, (1910) 56 Or 20, 107 P 957; State v. Morgan, (1913) 65 Or 314, 132 P 957; State v. Fehl, (1934) 147 Or 290, 32 P2d 1013; State v. Stone, (1946) 178 Or 268, 166 P2d 980.

It was not necessary to procure an order of the Supreme Court dismissing without prejudice an abandoned appeal in a criminal case before taking a second appeal. State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

Although defendant's first appeal was defective due to failure to file transcript within required time, appeal was not dismissed where a second notice of appeal was seasonably given and transcript was filed within time. State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

(2) Duty to transmit. Although the duty of transmitting the transcript on appeal was upon the clerk of the trial court, the determination of when it should be sent up was within the professional responsibility of appellant's attorney. State v. Tucker, (1910) 57 Or 59, 110 P 392; State v. Stone, (1946) 178 Or 268, 166 P2d 980.

Alleged delay in settlement of bill of exceptions did not excuse failure to file transcript in time. State v. Dickerson, (1910) 55 Or 390, 106 P 790; State v. Stone, (1946) 178 Or 268, 166 P2d 980.

The statute did not relieve the appellant from the necessity of showing that the failure of the clerk to file the transcript within the time prescribed was not imputable to him. State v. Foster, (1932) 140 Or 200, 13 P2d 609; State v. Rosser, (1939) 162 Or 293, 86 P2d 441, 87 P2d 783, 91 P2d 295.

If the appellant was not responsible for the failure of the clerk to file the transcript, the appellate court would order the transcript sent up after expiration of the time allowed. State v. Dickerson, (1910) 55 Or 390, 106 P 790.

(3) Extension of time. After the expiration of the statutory time for filing copies of the transcript, neither the trial court nor the appellate court could extend the time by an order nunc pro tunc. State v. Morgan, (1913) 65 Or 314, 132 P 957; State v. Keeney, (1916) 82 Or 400, 161 P 701.

Any order enlarging the time within which the clerk of the circuit court had to prepare and transmit the transcript on appeal had to be made by the court where the notice of appeal was filed. State v. Bovee, (1883) 11 Or 57, 4 P 520.

The parties could not by a stipulation effect an extension without an order of the court. State v. Keeney, (1916) 82 Or 400, 161 P 701.

All orders made subsequent to time for filing transcript purporting to extend time for such filing were void. State v. Fehl, (1934) 147 Or 290, 32 P2d 1013.

FURTHER CITATIONS: State v. Abrams, (1883) 11 Or 169, 171, 8 P 327; State v. Reinhart, (1894) 26 Or 466, 38 P 822; State v. Laundy, (1922) 103 Or 443, 507, 204 P 958, 206 P 290; State v. Berg, (1931) 138 Or 20, 23, 3 P2d 783, 4 P2d 628; Bryan v. Cupp. (1969) 1 Or App 52, 458 P2d 697; State v. Woodward, (1969) 1 Or App 338, 462 P2d 685; State v. Leaton, (1970) 3 Or App 475, 474 P2d 768.

138.210

NOTES OF DECISIONS

The appeal upon the death of defendant cannot be prosecuted to final determination by his personal representative, even though the abatement leaves in force a judgment for costs enforceable against his estate. Whitley v. Murphy, (1874) 5 Or 328, 20 Am Rep 741; State v. Martin, (1896) 30 Or 108, 47 P 196.

138.220

NOTES OF DECISIONS

The judgment or order appealed from can only be reviewed as to questions of law appearing on the transcript. State v. Wilson, (1877) 6 Or 428; State v. Laundy, (1922) 103 Or 443, 450, 204 P 958, 206 P 290; State v. Kingsley, (1931) 137 Or 305, 2 P2d 3, 3 P2d 113; State v. Reynolds, (1939) 160 Or 445, 86 P2d 413.

The findings of the trial court on issues of fact are conclusive. Alcorn v. Gladden, (1964) 237 Or 106, 390 P2d 625; Endsley v. Cupp, (1969) 1 Or App 169, 459 P2d 448, Sup Ct **review denied;** State v. Fisher, (1971) 5 Or App 483, 484 P2d 864.

The scope of review of the appellate court on questions of voluntariness of admissions and confessions is this: What actually transpired is a question of fact for the trial court or jury. Whether the historical facts found are sufficient to sustain a finding of voluntariness under state and federal constitutional concepts of due process are questions which properly fall within the scope of appellate review. State v. Fisher, (1971) 5 Or App 483, 484 P2d 864; State v. Regan, (1971) 5 Or App 491, 484 P2d 861.

It is presumed that the rulings of the trial judge in receiving or rejecting evidence is proper unless the record shows otherwise. State v. Morrow, (1938) 158 Or 412, 75 P2d 737, 76 P2d 971.

A point not raised in the trial court was not properly before the Supreme Court on appeal. State v. Layne, (1966) 244 Or 510, 419 P2d 35; State v. Skinner, (1969) 254 Or 447, 461 P2d 62; State v. Cameron, (1969) 1 Or App 247, 461 P2d 529; State v. Brotherton, (1970) 2 Or App 157, 465 P2d 749, Sup Ct **review denied.**

Question not raised below as to the right of the trial judge to hold office was not reviewable on appeal. State v. Whitney, (1879) 7 Or 386.

Decision overruling a motion for new trial based on matters dehors the record was not reviewable on appeal. State v. McDonald, (1879) 8 Or 113.

A motion for an order quashing the indictment was not reviewable on appeal where it had not been filed in the court below. State v. McAllister, (1913) 67 Or 480, 136 P 354.

Where search warrant, affidavits therefor, and motion to suppress evidence were not in record, a question as to whether evidence was obtained by illegal search could not be considered. State v. Walker, (1926) 119 Or 618, 249 P 635.

Assertion of incompetence of trial counsel, being based upon evidence outside the record, was not within the jurisdiction of the appellate court to review. State v. Rutledge, (1970) 2 Or App 374, 468 P2d 913.

FURTHER CITATIONS: Moitke v. Gladden, (1968) 250 Or 466, 443 P2d 617; Turner v. Cupp, (1970) 1 Or App 596, 465 P2d 249.

138.230

NOTES OF DECISIONS

1. Constitutionality

This section was not unconstitutional as depriving the defendant of a jury trial under U.S. Const. Am. 14. State v. Burke, (1928) 126 Or 651, 269 P 869, 270 P 756.

Ore. Const. Art. VII (A), §3, broadens the provisions of this section. State v. Cahill, (1956) 208 Or 538, 293 P2d 169, 298 P2d 214.

2. In general

Before a court of last resort affirms a judgment of conviction of an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken. State v. Walton, (1907) 50 Or 142, 153, 91 P 490, 13 LRA(NS) 811.

When on appeal it is manifest that error has been committed, prejudice will be presumed unless it affirmatively appears from the record that no prejudice could have resulted. State v. Goodager, (1910) 56 Or 198, 106 P 638, 108 P 185.

Where the Supreme Court was of opinion after consideration of all matters submitted that judgment was such as should have been rendered, it could be affirmed notwithstanding error. State v. Folkes, (1944) 174 Or 568, 150 P2d 17.

3. Rulings involving discretion

The power to grant or refuse a motion for a new trial is to be exercised in the discretion of the lower court, and the appellate court cannot review its action thereon. State v. Wilson, (1877) 6 Or 428; State v. Pender, (1914) 72 Or 94, 142 P 615.

Rulings involving an exercise of discretion on the part of the trial judge are not grounds for reversal unless an abuse of discretion is established. State v. Lee Ping Bow, (1881) 10 Or 27; State v. O'Neil, (1886) 13 Or 183, 9 P 284; State v. Robinson, (1897) 32 Or 43, 48 P 357; State v. Goff, (1914) 71 Or 352, 142 P 564; State v. Putney, (1924) 110 Or 634, 224 P 279.

The postponement of a trial like that of a change of venue rests in the discretion of the trial court, and its ruling will only be reviewed for abuse. State v. Mizis, (1906) 48 Or 165, 85 P 611, 86 P 361; State v. Hale, (1933) 141 Or 332, 18 P2d 219; State v. Nelson, (1939) 162 Or 430, 92 P2d 182.

Error, even in a criminal case, in order to demand reversal, must be prejudicial. State v. Murray, (1964) 238 Or 567, 395 P2d 780; Ginger v. Campbell, (1970) 256 Or 67, 469 P2d 776; State v. McLean, (1969) 1 Or App 147, 459 P2d 559, aff'd, 255 Or 464, 468 P2d 521; State v. McIntire, (1970) 2 Or App 429, 468 P2d 536, Sup Ct **review denied.**

On a challenge of a juror for actual bias, the determination of his competency is discretionary with the trial judge, reviewable for abuse. State v. Armstrong, (1903) 43 Or 207, 73 P 1022.

The preliminary inquiry into whether the surrounding circumstances constitute sufficient predicate for the admission of dying declarations is solely within the province of the trial court, and reviewable only for an abuse of discretion. State v. Doris, (1908) 51 Or 136, 94 P 44, 16 LRA(NS) 660.

The overruling of a motion for a new trial founded on an affidavit disclosing irregularities in the conduct of the jury after retiring, was not reviewable. State v. Fitzhugh, (1867) 2 Or 227.

Motion for a new trial based on matters dehors the record was addressed to the sound discretion of the lower court and could not be reviewed on appeal. State v. McDonald, (1879) 8 Or 113.

Where the trial required three days during which 20 witnesses had been examined and 50 exhibits had been introduced and the evidence was circumstantial and conflicting, it was reversible error to limit defendant's counsel to only one hour in argument. State v. Rogoway, (1904) 45 Or 601, 78 P 987, 81 P 234, 2 Ann Cas 431.

4. Nonprejudicial errors

Errors which have not affected substantial rights of the defendant are not grounds for reversal. State v. Norton, (1888) 16 Or 105, 17 P 744; State v. Ching Ling, (1888) 16 Or 419, 18 P 844; State v. Hatcher, (1896) 29 Or 309, 44 P 584; State v. Moore, (1897) 32 Or 65, 48 P 468; State v. Selby, (1914) 73 Or 378, 144 P 657; State v. Yee Guck, (1921) 99 Or 231, 195 P 363; State v. Young, (1927) 122 Or 257, 257 P 806; State v. Shull, (1929) 131 Or 224, 282 P 237, 71 ALR 1498.

Where the error is an infraction of a constitutional guaranty, the law will presume an injury and the court has no alternative but to adjudge accordingly. State v. Lurch, (1885) 12 Or 99, 103, 6 P 408.

A judgment can be reversed only for errors that are prejudicial to appellant. State v. Leonard, (1914) 73 Or 451, 144 P 113, 144 P 681.

The Supreme Court has no right to reverse a case for errors that do not affect the substantial rights of the appellant. State v. Garrett, (1914) 71 Or 298, 141 P 1123.

5. Indictment

Unless the defendant is injured by the indictment being more specific than required by law, he has no ground for complaint. State v. Cooke, (1929) 130 Or 552, 278 P 936.

Where the indictment was entirely sufficient, the failure of the court to formally pass upon the demurrer could not possibly prejudice defendant. State v. Butler, (1920) 96 Or 219, 186 P 55.

6. Evidence

The determination of the court that a confession was obtained without influence of hope or fear will not be disturbed on review unless there is a clear and manifest error. State v. Blodgett, (1907) 50 Or 329, 92 P 820.

Abuse of discretion in permitting or excluding cross-examination is not shown unless ruling results in injury. State v. Cook, (1936) 154 Or 62, 58 P2d 249.

Error in excluding testimony was not harmless merely because the witness had already testified to substantially the same thing without objection, as the jury might have understood that the court considered the testimony immaterial. State v. Marco, (1897) 32 Or 175, 50 P 799.

A case was not reversed where properly and fairly submitted to the jury, merely because the court alluded to a statutory rule of evidence not applicable to the case. State v. Gray, (1905) 46 Or 24, 79 P 53.

Any error in receiving testimony as to the accused's age was harmless where he admitted he had reached the age of discretion. State v. Walton, (1909) 53 Or 557, 566, 99 P 431, 101 P 389, 102 P 173.

Defendant's substantial rights were not affected where the lower court permitted leading questions to be asked on direct examination. State v. Merlo, (1919) 92 Or 678, 173 P 317, 182 P 153.

Admission of evidence which was not relevant did not affect the substantial rights of defendant. State v. Coleman, (1926) 119 Or 430, 249 P 1049.

Admission of evidence of general reputation of one of defendant's witnesses as a law abiding citizen was harmless where witness had already admitted conviction of crimes. State v. Cameron, (1940) 165 Or 176, 106 P2d 563.

Defendant's substantive rights were affected where lower court refused to allow cross-examination as to whether criminal charges had been filed against a prosecution witness who was an accomplice. State v. Bailey, (1956) 208 Or 321, 300 P2d 975, 301 P2d 545.

Error in admission of evidence did not prejudice the defendant in criminal case. State v. Story, (1956) 208 Or 441, 301 P2d 1043.

7. Conduct of judge and attorney

A case should not be reversed because of improper argument of counsel unless it appears that injury to the rights of accused resulted. State v. Blodgett, (1907) 50 Or 329, 92 P 820.

Where the facts constituting a violation of a statute were not only established by the state but conceded by the accused, expressions of the trial judge as to the guilt of accused did not constitute reversible error. State v. Reed, (1908) 52 Or 377, 97 P 627.

Where remarks made by the district attorney were improper but not prejudicial to defendant, the judgment was not reversed. State v. Pender, (1914) 72 Or 94, 142 P 615.

District attorney's statement outside evidence in murder case that average imprisonment under life sentence was only six and one-half years did not affect the substantial rights of defendant. State v. Kingsley, (1931) 137 Or 305, 2 P2d 3, 3 P2d 113.

8. Instructions

Failure of the trial judge to write down the entire charge and file it was not reversible error. State v. Armstrong, (1903) 43 Or 207, 73 P 1022.

An instruction that flight and concealment might be taken into consideration on the question of guilt while erroneous was harmless in view of other evidence showing defendant's guilt. State v. Chin Ping, (1918) 91 Or 593, 176 P 188.

In view of this section, judgment was not reversed merely because an instruction contained a statement which was not a matter for comment by the court. State v. Burke, (1928) 126 Or 651, 269 P 869, 270 P 756.

FURTHER CITATIONS: State v. Goddard, (1914) 69 Or 73, 133 P 90, 138 P 243; State v. Dennis, (1945) 177 Or 73, 159 P2d 838, 161 P2d 670; State v. Newburn, (1946) 178 Or 238, 166 P2d 470; State v. Wederski, (1962) 230 Or 57, 368 P2d 393; State v. Nelson, (1962) 233 Or 56, 377 P2d 29; State v. Hedrick, (1962) 233 Or 131, 377 P2d 323; State v. Kristich, (1963) 235 Or 1, 383 P2d 380; State v. Herrera, (1963) 236 Or 1, 386 P2d 448; State v. Gibson, (1968) 252 Or 241, 448 P2d 534.

LAW REVIEW CITATIONS: 5 OLR 1.

138.240

CASE CITATIONS: State v. Armstrong, (1904) 45 Or 25, 27, 74 P 1025; State v. Eddy, (1905) 46 Or 625, 81 P 941, 82 P 707.

138.250

NOTES OF DECISIONS

When a criminal case is reversed for error in considering a demurrer to an indictment, it is the duty of the Supreme Court to order a new trial subject to the discretion of the trial court in resubmitting the case to another grand jury. State v. Eddy, (1905) 46 Or 625, 81 P 941, 82 P 707.

It is incumbent upon the appellate court, unless a new trial is ordered, to direct that the defendant if in custody be discharged. State v. Smith, (1910) 56 Or 21, 107 P 980.

FURTHER CITATIONS: State v. Armstrong, (1904) 45 Or 25, 74 P 1025.

138.260

NOTES OF DECISIONS

Save for this and the following section there is no special provision as to the procedure in case of the affirmance of the judgment. State v. Armstrong, (1904) 45 Or 25, 74 P 1025.

Though a defendant before a second trial may insist upon the entering of the mandate of the Supreme Court reversing a prior conviction, such action is not jurisdictional and the defendant waives it if the retrial proceeds without the point being urged. State v. Houghton, (1904) 45 Or 110, 75 P 887.

138.270

NOTES OF DECISIONS

See also cases under ORS 138.260.

1. Enforcement of judgment

Upon affirmance of a conviction of murder, the trial court need not resentence the defendant but may fix another day for the execution and such execution may take place under the warrant issued prior to the appeal. State v. Armstrong, (1904) 45 Or 25, 74 P 1025.

2. New trial

It is the judgment reversing the cause and ordering a new trial which gives the trial court authority to proceed, and not the certified copy required to be remitted to the clerk of the court below. State v. Houghton, (1904) 45 Or 110, 75 P 887.

After an appeal has resulted in the ordering of a retrial for errors other than an erroneous sentence, and the defendant has again been convicted, no harsher sentence can be given than that initially imposed. State v. Turner, (1967) 247 Or 301, 429 P2d 565.

It was the duty of the Supreme Court to direct the mode of retrial upon remanding the cause. State v. Steeves, (1896) 29 Or 85, 43 P 947.

Where judgment was reversed on appeal and a new trial ordered, the action was pending in the lower court from the entry of the judgment of the appellate court notwithstanding the former verdict and judgment. State v. Walton, (1909) 53 Or 557, 99 P 431, 101 P 389.

138.280

CASE CITATIONS: Founts v. Gladden, (1964) 237 Or 473, 391 P2d 629.

138.300

NOTES OF DECISIONS

This section does not authorize rendition of a judgment for costs against the county; but it does permit the successful defendant to recover such charges as the court may tax against the county in his favor. State v. Keelen, (1922) 103 Or 172, 203 P 306, 204 P 162, 164.

The county, and not the state, is liable for the costs referred to in this section. State v. Way, (1926) 120 Or 134, 249 P 1045, 251 P 761.

It is no objection to a cost bill of the defendant that it was not filed before the mandate was sent down. Id.

Since under ORS 138.040 defendant may take an appeal, which by ORS 138.020 he may take as a "matter of right,"

no trial fee can be demanded of him and therefore he cannot recover it as a disbursement. Id.

This section has no application to contempt proceedings. State v. Hubble, (1929) 128 Or 667, 275 P 679.

138.480

LAW REVIEW CITATIONS: 6 WLJ 9.

138.500

NOTES OF DECISIONS

Factors to be considered in fixing a reasonable fee are the time required for preparation, complexity of the legal question presented and the merit of the proposition of law asserted upon appeal. Spencer v. Gladden, (1962) 230 Or 162, 365 P2d 621, 369 P2d 129.

Counsel may be permitted to withdraw, and no other need be appointed if counsel and the court find the record discloses no prejudicial error or substantial question to be raised on appeal. Speers v. Gladden, (1964) 237 Or 100, 390 P2d 635.

FURTHER CITATIONS: State v. Anderson, (1964) 239 Or 362, 397 P2d 838; State v. Jamison, (1968) 251 Or 114, 444 P2d 15, 444 P2d 1005; State v. Lemon, (1968) 251 Or 606, 447 P2d 394.

ATTY. GEN. OPINIONS: County public defender office, (1970) Vol 34, p 1157.

LAW REVIEW CITATIONS: 39 OLR 340, 364-366; 5 WLJ 8.

138.510 to 138.680

NOTES OF DECISIONS

When these sections provided petitioner with a means of relief of which he had not availed himself, the federal court was without jurisdiction to take his appeal. Ex parte Sherwood, (1960) 177 F Supp 411, cert denied, 368 US 851, 80 S Ct 1631; 4 L Ed 2d 1734; Carpenter v. Gladden, (1963) 223 F Supp 612; Delaney v. Gladden, (1965) 237 F Supp 1010; Gidley v. Gladden, (1965) 237 F Supp 477; Ervin v. Cupp, (1969) 411 F 2d 990.

This Act was enacted to eliminate confusion of common-law remedies and to provide a single and exclusive proceeding whereby a convicted person might challenge the lawfulness of the proceedings which lead to the judgment of the trial court. Strong v. Gladden, (1961) 225 Or 345, 358 P2d 520; Benson v. Gladden, (1965) 242 Or 132, 407 P2d 634, cert denied, 384 US 908.

It was the deliberate purpose of this Act to provide relief upon grounds which would be sufficient to support discharge of a state prisoner in a federal habeas corpus proceeding. Macomber v. Gladden, (1962) 304 F2d 487.

When petitioner claims denial of due process, federal court may examine a transcript of the state court record or hold an evidentiary hearing to determine the right to a writ. Thomaston v. Gladden, (1964) 326 F2d 305.

Since the state prisoner is required to exhaust his remedies in the state courts before seeking federal habeas relief, so the state should in defending the judgment. Gidley v. Gladden, (1965) 237 F Supp 477.

Habeas corpus is available in Oregon to test the constitutionality of treatment afforded an inmate of a penal institution. Newton v. Cupp (1970) 3 Or App 434, 474 P2d 532.

Defendant who had state post-conviction hearing was not entitled to federal habeas corpus and new hearing for repetition of testimony. Davis v. Cupp, (1969) 411 F2d 1018.

FURTHER CITATIONS: Bevel v. Gladden, (1962) 232 Or 578, 376 P2d 117; State v. Froembling, (1964) 237 Or 616, 391 P2d 390; Founts v. Gladden, (1964) 237 Or 473, 391 P2d 629; Freeman v. Gladden, (1964) 239 Or 144, 396 P2d 779; Breier v. Gladden, (1964) 229 F Supp 823; Case v. Nebraska, (1964) 381 US 336, 85 S Ct 1486, 14 L Ed 2d 422; Avent v. Gladden, (1966) 243 Or 594, 415 P2d 164; Froembling v. Gladden, (1966) 244 Or 314, 417 P2d 1020; Haynes v. Gladden, (1967) 245 Or 487, 422 P2d 678; Lawson v. Gladden, (1967) 245 Or 492, 422 P2d 681; Gairson v. Gladden, (1967) 247 Or 88, 425 P2d 761; Rose v. Gladden, (1967) 248 Or 520, 433 P2d 612; Mansfield v. Gladden, (1968) 249 Or 504, 439 P2d 611; State v. Cunningham, (1969) 252 Or 654, 452 P2d 315; Shipman v. Gladden, (1969) 253 Or 192, 453 P2d 921; Rupp v. State, (1970) 1 Or App 521, 463 P2d 604, Sup Ct **review denied**; Blakely v. Cupp, (1970) 2 Or App 110, 467 P2d 138; Cole v. Cupp, (1970) 3 Or App 616, 475 P2d 428, Sup Ct **review denied**; Jellum v. Cupp, (1970) 4 Or App 210, 476 P2d 205, Sup Ct **review denied**; State v. Van Tassel, (1971) 5 Or App 376, 484 P2d 1117.

LAW REVIEW CITATIONS: 39 OLR 337-367.

138.510

CASE CITATIONS: Syphers v. Gladden, (1962) 230 Or 148, 368 P2d 942; Reynolds v. Shobe, (1967) 245 Or 578, 423 P2d 182; Haynes v. Cupp, (1969) 253 Or 566, 456 P2d 490; State v. Goodin, (1970) 1 Or App 559, 465 P2d 487; State v. Goddard, (1971) 5 Or App 454, 485 P2d 650.

LAW REVIEW CITATIONS: 38 OLR 172; 6 WLJ 485.

138.520

NOTES OF DECISIONS

The provisions of this section do not expand the grounds for relief specified in ORS 138.530. Brooks v. Gladden, (1961) 226 Or 191, 358 P2d 1055, cert denied, 366 US 974, 81 S Ct 1942, 6 L Ed 1263; Parker v. Gladden, (1965) 245 Or 426, 407 P2d 246, rev'd on other grounds, 385 US 363, 87 S Ct 468, 17 L Ed 2d 420.

When a post-conviction proceeding is remanded for resentencing, a motion in arrest of judgment to reexamine the proceedings prior to verdict is not in order. State v. Cloran, (1963) 233 Or 400, 377 P2d 911; Bryant v. State, (1963) 233 Or 459, 378 P2d 951.

This section modifies paragraph (b) of subsection (1) of ORS 14.210. Eubanks v. Gladden, (1964) 236 F Supp 129.

The phrase "such other relief as may be proper and just" should be construed broadly to achieve the remedial purpose of the statutes. Shipman v. Gladden, (1969) 253 Or 192, 453 P2d 921; Welch v. Gladden, (1969) 253 Or 228, 453 P2d 907.

Vacation of a guilty plea was appropriate when the plea was made without full knowledge of the consequences of the plea. Nealy v. Cupp, (1970) 2 Or App 240, 467 P2d 649.

FURTHER CITATIONS: Chase v. Gladden, (1962) 231 Or 469, 372 P2d 972; Doolin v. Gladden, (1962) 231 Or 352, 373 P2d 610; Kloss v. Gladden, (1962) 233 Or 98, 377 P2d 146; Good v. Gladden, (1963) 233 Or 437, 378 P2d 994.

138.530

NOTES OF DECISIONS

1. In general
2. Substantial denial of constitutional rights
   (1) Right to counsel
3. Lack of jurisdiction
4. Excessive or unconstitutional sentence
5. Unconstitutional statute

1. In general

Failure of an indictment to allege facts sufficient to constitute a crime cannot be raised in post-conviction proceedings. State v. Cloran, (1963) 233 Or 400, 374 P2d 748, 377 P2d 911, 378 P2d 961, 98 ALR 2d 732; Tuel v. Gladden, (1963) 234 Or 1, 379 P2d 553; Bonnie v. Gladden, (1965) 240 Or 462, 402 P2d 237.

Habeas corpus is specifically retained in criminal cases where the prisoner challenges his restraint upon grounds that do not challenge the lawfulness of the proceedings upon which the judgment of conviction rests. Strong v. Gladden, (1961) 225 Or 345, 358 P2d 520.

The provisions of ORS 138.520 do not expand the grounds for relief specified in this section. Brooks v. Gladden, (1961) 226 Or 191, 358 P2d 1055, cert. denied, 366 US 974, 81 S Ct 1942, 6 L Ed 1263.

Extradition proceedings may be attacked by habeas corpus only in the asylum state. Knowles v. Gladden, (1961) 227 Or 408, 362 P2d 763, cert. denied, 368 US 999, 82 S Ct 627, 7 L Ed 537.

A post-conviction proceeding that is a nullity does not stand in the way of a new proceeding under the Post Conviction Hearing Act. Alcorn v. Gladden, (1961) 286 F2d 689.

Failure to comply with a criminal procedural statute is not a ground for relief unless such failure creates a condition specified as a ground. Tuel v. Gladden, (1963) 234 Or 1, 379 P2d 553.

A lapse of 30 years is no bar to relief. Id.

2. Substantial denial of constitutional rights

It is not a denial of due process for a trial judge to inform himself of matters connected with the commission of a crime that were not developed in the course of a trial. Admire v. Gladden, (1961) 227 Or 370, 362 P2d 380, cert denied, 368 US 971, 82 S Ct 449; 7 L Ed 400; Barber v. Gladden, (1961) 228 Or 140, 363 P2d 771, cert. denied, 369 US 838, 82 S Ct 869, 7 L Ed 2d 843.

In determining whether the defendant waives a constitutional right, the trial court is guided by the principals that (1) the individual must have the mental capacity to understand fully the nature of the right he is waiving, and (2) his choice must be free of oppressive tactics to induce that choice. McWilliams v. Gladden, (1965) 242 Or 333, 407 P2d 833; Lasley v. Gladden, (1966) 244 Or 349, 418 P2d 256; Tucker v. Gladden, (1966) 245 Or 109, 420 P2d 625; Ortega v. Williard, (1966) 245 Or 331, 421 P2d 966. **But see** Schildan v. Gladden, (1967) 246 Or 326, 424 P2d 240.

Denial by a trial judge of a request to poll the jury is not a "substantial denial" of a fundamental right protected by the Constitution of Oregon or of the United States. Brooks v. Gladden, (1961) 226 Or 191, 358 P2d 1055, cert. denied, 366 US 974, 81 S Ct 1942, 6 L Ed 1263.

No constitutional right is invaded by the trial judge considering defendant's juvenile record for the purpose of fixing sentence. Mitchell v. Gladden, (1961) 229 Or 192, 366 P2d 907.

An erroneous instruction is not grounds for relief. Otten v. Gladden, (1966) 244 Or 327, 417 P2d 1017.

Improper remarks of bailiff to three jurors that defendant was a wicked fellow, that he was guilty, and that if there was anything wrong in finding him guilty, the Supreme Court would correct it constituted a substantial denial of due process under the U. S. Const. Parker v. Gladden, (1966) 385 US 363, 87 S Ct 468, 17 L Ed 2d 420, rev'g 245 Or 426, 407 P2d 246.

The duty to inform defendant of the consequences of a guilty plea, including the maximum sentence, includes the duty to be accurate. Nealy v. Cupp, (1970) 2 Or App 240, 467 P2d 649.

A motion to dismiss based upon fear of enhanced penalty is not coerced if the motion is "a genuine one" made by a defendant "who understands his situation, his rights, and the consequences" of the motion. Wheeler v. Cupp, (1970) 3 Or App 1, 470 P2d 957, Sup Ct **review denied.**

Suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is of substantial significance to the defense, irrespective of whether the evidence is negligently, accidentally or maliciously withheld. Hanson v. Cupp, (1971) 5 Or App 312, 484 P2d 847.

Even though the statute was mandatory, failure of the court to have defendant examined by a psychiatrist and otherwise to comply with the sexual psychopath statutes was not a denial of due process. Kloss v. Gladden, (1962) 233 Or 98, 377 P2d 146; Enyart v. Gladden, (1962) 233 Or 37, 377 P2d 25.

The prisoner waived his right to challenge the confession on the ground that it was not voluntary when counsel failed to object to its introduction. Schildan v. Gladden, (1967) 246 Or 326, 424 P2d 240.

Petitioner knowingly and understandingly entered his plea of guilty. Mora v. Cupp, (1970) 3 Or App 583, 475 P2d 985.

Voluntary review of pre-sentence report by trial judge, in the course of the trial and in the absence of and without the knowledge of petitioner and his counsel, denied petitioner his right of confrontation guaranteed by the U. S. Const., Am 6 and Ore. Const. Art. I, §11. Hurt v. Cupp, (1971) 5 Or App 89, 482 P2d 759. **Distinguished in** State v. Burgess, (1971) 5 Or App 164, 483 P2d 101.

Failure of the trial court to submit alternative verdicts on lesser included offenses, along with guilty and not guilty verdict forms, was not a substantial denial of petitioner's rights. Patton v. Cupp, (1971) 92 Or App Adv Sh 1272, 485 P2d 644, Sup Ct **review denied.**

(1) Right to counsel. The burden is on plaintiff to show by a preponderance of evidence that he did not knowingly waive his right to counsel. Bloor v. Gladden, (1961) 227 Or 600, 363 P2d 57.

Petitioner was not prejudiced by failure to have advice of counsel when he waived indictment. State v. Goddard, (1971) 5 Or App 454, 485 P2d 650.

Allegations of improper conduct of counsel at a prior conviction, if true and if more than mere errors of judgment, are a substantial denial of counsel and such allegation state a cause of action for post-conviction relief. Clark v. Gladden, (1967) 247 Or 629, 432 P2d 182; Turner v. Cupp, (1970) 1 Or App 596, 465 P2d 249. Clark v. Gladden, supra, **distinguished in** North v. Cupp, (1969) 254 Or 451, 461 P2d 271, cert. denied, 397 US 1054.

Culpable negligence of counsel in failing to file notice of appeal was substantial denial of defendants rights under the U. S. Const., Am. 14. Shipman v. Gladden, (1969) 253 Or 192, 453 P2d 921; Welch v. Gladden, (1969) 253 Or 228, 453 P2d 907.

Failure of counsel to inform indigent defendant of his right to appeal in forma pauperis deprives defendant of his constitutional right to counsel. Gairson v. Cupp, (1969) 415 F2d 352. Superseding Gairson v. Gladden, (1967) 247 Or 88, 425 P2d 761.

3. Lack of jurisdiction

Only the juvenile court had jurisdiction to consider the case against a defendant under 18 years of age. Brady v. Gladden, (1962) 232 Or 165, 374 P2d 452.

4. Excessive or unconstitutional sentence

Defendant was not prejudiced in pleading guilty where the term of his sentence was no longer than his incorrect information of the maximum sentence. Proffitt v. Cupp, (1970) 2 Or App 527, 468 P2d 912, Sup Ct **review denied.**

Petitioner was not entitled to relief on the grounds that the sentence was excessive or unconstitutional. O'Neal v. Cupp, (1971) 92 Or App Adv Sh 1401, 485 P2d 1119.

5. Unconstitutional statute

Paragraph (d) of subsection (1) commands the court to set aside the conviction of petitioners who were convicted under a portion of the contributing statute later held unconstitutional. Blakely v. Cupp, (1970) 2 Or App 110, 467 P2d 138; Coon v. Cupp, (1970) 2 Or App 114, 467 P2d 140.

FURTHER CITATIONS: Spencer v. Gladden, (1961) 228 Or 522, 365 P2d 171, 369 P2d 129; Coffman v. Gladden, (1961) 229 Or 99, 366 P2d 621; Spencer v. Gladden, (1962) 230 Or 162, 369 P2d 129; Broome v. Gladden, (1962) 231 Or 502, 373 P2d 611; Good v. Gladden, (1963) 233 Or 437, 378 P2d 994; Jensen v. Gladden, (1963) 233 Or 439, 378 P2d 950; Womack v. Kremen, (1963) 234 Or 170, 380 P2d 815; Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614; Speers v. Gladden, (1964) 237 Or 100, 390 P2d 635; Shannon v. Gladden, (1966) 243 Or 334, 413 P2d 418; Hintz v. Gladden, (1968) 249 Or 569, 439 P2d 884; State v. Saunders, (1970) 1 Or App 620, 464 P2d 712, Sup Ct **review denied.**

138.540

NOTES OF DECISIONS

Habeas corpus is specifically retained in criminal cases where the prisoner challenges his restraint upon grounds that do not challenge the lawfulness of the proceedings upon which the judgment of conviction rests. Strong v. Gladden, (1961) 225 Or 345, 358 P2d 520.

Having failed to appeal an adverse ruling in the trial court as to the matter of prior jeopardy, the defense is waived and cannot be considered in habeas corpus. Barnett v. Gladden, (1964) 237 Or 76, 390 P2d 614, cert. denied, 379 US 947.

FURTHER CITATIONS: Hintz v. Gladden, (1968) 249 Or 569, 349 P2d 884; Welch v. Gladden, (1969) 253 Or 228, 453 P2d 907; Haynes v. Cupp, (1969) 253 Or 566, 456 P2d 490; Wheeler v. Cupp, (1970) 3 Or App 1, 470 P2d 957, Sup Ct **review denied.**

138.550

NOTES OF DECISIONS

This Act was not intended to provide a second appeal. Delaney v. Gladden, (1962) 232 Or 306, 374 P2d 746, cert. denied, 372 US 945, 83 S Ct 940, 9 L Ed 2d 970; Benson v. Gladden, (1965) 242 Or 132, 407 P2d 634, cert. denied, 384 US 908; Howell v. Gladden, (1967) 247 Or 138, 427 P2d 978.

A contemporaneous objection to the introduction of constitutionally inadmissible evidence is prerequsite to the raising of constitutional issue unless (1) the right subsequently sought to be asserted was not recognized at time of trial; (2) counsel was excusably unaware of facts on which right was based; (3) duress or coercion prevented assertion of the right; or (4) counsel was incompetent or guilty of bad faith. North v. Cupp, (1969) 254 Or 451, 461 P2d 271, cert. denied, 397 US 1054; Lundgren v. Cupp, (1969) 1 Or App 334, 462 P2d 447.

In post-conviction proceeding after appellant's dismissal of his direct appeal, petition must allege in addition to questions of constitutional dimension, fraud, coercion or gross incompetence of counsel amounting to denial of counsel. Wheeler v. Cupp, (1970) 3 Or App 1, 470 P2d 957, Sup Ct **review denied**; Parks v. Cupp, (1971) 5 Or App 51, 481 P2d 372.

Failure of county officials to comply with statutes in selecting jury panels does not amount to denial of equal protection of the laws. Anderson v. Gladden, (1963) 234 Or 614, 383 P2d 986, cert. denied, 375 US 975, 84 S Ct 485, 11 L Ed 2d 420.

Systematic exclusion from the jury of members of a defendant's race, if proven, would be a denial of equal protection of the laws. Id.

Additional evidence is not adequate to supply additional grounds for relief. Freeman v. Gladden, (1963) 236 Or 137, 387 P2d 360, cert. denied, 373 US 919, 83 S Ct 1310, 10 L Ed 2d 418.

Subsection (2) is intended to state the principle of res judicata in post conviction appeals. Id.

The requirement that all grounds for relief must be asserted in the original or amended petition, or they are waived, refers to relief from a particular judgment of conviction. Haynes v. Cupp, (1969) 253 Or 566, 456 P2d 490.

Petitioner had not alleged sufficient reasons to escape the application of the res judicata provisions of this section. Church v. Gladden, (1966) 244 Or 308, 417 P2d 993; Bias v. Cupp, (1969) 1 Or App 510, 462 P2d 684, 464 P2d 721, Sup Ct **review denied.**

FURTHER CITATIONS: Barber v. Gladden, (1961) 228 Or 140, 363 P2d 771; Macomber v. Gladden, (1962) 304 F2d 487; Poe v. Gladden, (1963) 233 Or 324, 378 P2d 276; Anderson v. Gladden, (1963) 234 Or 614, 383 P2d 986; Hirte v. Gladden, (1963) 235 Or 45, 383 P2d 993; Parker v. Gladden, (1965) 245 Or 426, 407 P2d 246, rev'd, 385 US 363, 87 S Ct 468, 17 L Ed 2d 420; Delaney v. Gladden, (1965) 237 F Supp 1010; Parker v. Gladden, (1966) 385 US 363, 87 S Ct 468, 17 L Ed 2d 420; Cain v. Gladden, (1967) 247 Or 462, 430 P2d 1015; Clark v. Gladden, (1967) 247 Or 629, 432 P2d 182; Jensen v. Gladden, (1969) 253 Or 649, 456 P2d 487; Turner v. Cupp, (1970) 1 Or App 596, 465 P2d 249; Colsen v. Cupp, (1970) 318 F Supp 1381; Patton v. Cupp, (1971) 92 Or App Adv Sh 1272, 485 P2d 644, Sup Ct **review denied**; State v. Goddard, (1971) 5 Or App 454, 485 P2d 650.

138.560

NOTES OF DECISIONS

Proceedings were within the exception in this section where petitioner was convicted of violating a municipal ordinance and sentence of probation had expired. Rupp v. State, (1970) 1 Or App 521, 463 P2d 604, Sup Ct **review denied.**

138.580

NOTES OF DECISIONS

A defendant accused of a crime has a constitutional right to be advised before a guilty plea of the basic legal consequences of the plea, including the maximum penalty assessable. Lay v. Cupp, (1969) 1 Or App 296, 462 P2d 443; Fletcher v. Cupp, (1969) 1 Or App 467, 463 P2d 365, Sup Ct **review denied.**

It is not important how an accused learns of the consequences of his guilty plea if he does in fact know and understand. Fletcher v. Cupp, (1969) 1 Or App 467, 463 P2d 365, Sup Ct **review denied.**

The petition was sufficient to allege failure of counsel. Herron v. Cupp, (1969) 1 Or App 300, 462 P2d 444; Parks v. Cupp, (1971) 5 Or App 51, 481 P2d 372.

FURTHER CITATIONS: Lundgren v. Cupp, (1969) 1 Or App 334, 462 P2d 447; Syphers v. Gladden, (1962) 230 Or 148, 368 P2d 942.

138.590

ATTY. GEN. OPINIONS: Venue for prosecution of escapee from forest work camp, (1969) Vol 34, p 540; county public defender office, (1970) Vol 34, p 1157.

LAW REVIEW CITATIONS: 6 WLJ 9.

138.610

NOTES OF DECISIONS

A demurrer is improper where the facts material to a cause are stated, even though not with the clearness necessary to a good pleading. Bryan v. Cupp, (1969) 1 Or App 52, 458 P2d 697.

138.620

NOTES OF DECISIONS

Since the burden of proof is on the petitioner, he must allege and prove a failure of his counsel during the prior trial and conviction to justify relief. Lay v. Cupp, (1969) 1 Or App 296, 462 P2d 443.

FURTHER CITATIONS: Miller v. Gladden, (1968) 249 Or 51, 436 P2d 119; Erickson v. Reed, (1969) 1 Or App 251, 461 P2d 839; Fletcher v. Cupp, (1969) 1 Or App 467, 463 P2d 365, Sup Ct **review denied**; James v. Cupp, (1971) 5 Or App 181, 482 P2d 543; Patton v. Cupp, (1971) 92 Or App Adv Sh 1272, 485 P2d 644, Sup Ct **review denied.**

138.630

LAW REVIEW CITATIONS: 6 WLJ 487.

138.640

NOTES OF DECISIONS

This section modifies paragraph (b) of subsection (1) of ORS 14.210. Eubanks v. Gladden, (1964) 236 F Supp 129.

138.650

NOTES OF DECISIONS

The findings of the trial court on issues of fact are conclusive where there is evidence to support the findings. Alcorn v. Gladden, (1964) 237 Or 106, 390 P2d 625; Endsley v. Cupp, (1969) 1 Or App 169, 459 P2d 448, Sup Ct **review denied**; Proffitt v. Cupp, (1970) 2 Or App 527, 468 P2d 912, Sup Ct **review denied**; Patton v. Cupp, (1971) 92 Or App Adv Sh 1272, 485 P2d 644, Sup Ct **review denied.**

The "manner of taking appeals" includes the service of notice of appeal. Holland v. Gladden, (1962) 229 Or 573, 368 P2d 331.

The only method of obtaining review of an order issued under ORS 138.640 is appeal under this section. State v. Rout, (1970) 4 Or App 99, 477 P2d 230.

There was substantial evidence to support the finding of the trial court. Miotke v. Gladden, (1968) 250 Or 466, 443 P2d 617; State v. Schrager, (1968) 250 Or 597, 443 P2d 630; Erickson v. Reed, (1969) 1 Or App 251, 461 P2d 839.

FURTHER CITATIONS: McWilliams v. Gladden, (1965) 242 Or 333, 407 P2d 833; Ball v. Gladden, (1968) 250 Or 485, 443 P2d 621.

138.660

CASE CITATIONS: Maxwell v. Gladden, (1961) 227 Or 633, 358 P2d 719; Eubanks v. Gladden, (1964) 236 F Supp 129; Miotke v. Gladden, (1968) 250 Or 466, 443 P2d 617; Losey v. Cupp, (1971) 4 Or App 454, 479 P2d 1023.