# Chapter 140

# Bail; Release on Recognizance

**140.010**

NOTES OF DECISIONS

A statutory undertaking for bail is not a recognizance; it is a simple promise to pay money on certain conditions. State v. Hays, (1868) 2 Or 315.

There is a material difference between an undertaking and a recognizance. The recognizor acknowledges himself indebted in a sum of money to be paid, if he fails to do some act, while in the other case, the party obliged undertakes that he will do one of two things: he will either appear and abide the order of the court; or he will pay the amount in which he is admitted to bail. State v. Crane, (1887) 15 Or 148, 152, 13 P 773.

A bail bond is designed to serve the same purpose as, and is in effect like, a recognizance at common law. (concurring opinion) Colvig v. Klamath County, (1888) 16 Or 244, 19 P 86.

A "bail bond" is a statutory contract to pay money under certain conditions. Malheur County v. Carter, (1908) 52 Or 616, 625, 98 P 489.

FURTHER CITATIONS: Whitney v. Darrow, (1875) 5 Or 442.

**140.020**

NOTES OF DECISIONS

The indictment alone is not the proof contemplated by Ore. Const. Art. I, sec. 14 to establish evident or strong proof or presumption of guilt. State ex rel. Connall v. Roth, (1971) 258 Or 428, 482 P2d 740.

Bail should be denied when the circumstances disclosed indicate a fair likelihood that defendant is in danger of being convicted of murder or treason. (dictum) Id.

In evaluating the proof needed, the trial court has broad discretion. (dictum) Id.

FURTHER CITATIONS: Thomas v. Gladden, (1964) 239 Or 293, 397 P2d 836; Hanson v. Gladden, (1967) 246 Or 494, 426 P2d 465; Sullivan v. Cupp, (1969) 1 Or App 388, 462 P2d 555, Sup Ct review denied.

**140.030**

NOTES OF DECISIONS

It was not necessarily an abuse of trial judge's discretion to set bail at $15,000 pending appeal after conviction of assault with intent to commit rape when before trial bail had been set at $3,000. Delaney v. Shobe, (1959) 218 Or 626, 346 P2d 126.

FURTHER CITATIONS: Thomas v. Gladden, (1964) 239 Or 293, 397 P2d 836; Hanson v. Gladden, (1967) 246 Or 494, 426 P2d 465.

LAW REVIEW CITATIONS: 47 OLR 184.

**140.040**

NOTES OF DECISIONS

The right to take bail from one accused of crime depends upon a valid order having been previously entered by a committing magistrate in the form of ORS 133.820 and this section. Malheur County v. Carter, (1908) 52 Or 616, 98 P 489.

Setting of bail is in the sound discretion of the trial judge and will be disturbed only for an abuse of discretion. State v. Keller, (1965) 240 Or 442, 402 P2d 521.

ATTY. GEN. OPINIONS: Admission to bail when accused arrested in county other than one from which warrant issued, 1958-60, p 378.

**140.050**

NOTES OF DECISIONS

This section does not impair the power of any officer designated by the United States statute to admit a defendant to bail after indictment and before trial. United States v. Dunbar, (1897) 27 CCA 488, 83 Fed 151.

The time when justification of sureties should be made is as prescribed by OCLA 10-803 [ORS 19.023], but the provisions of this section as to the magistrate before whom justification may be made was not changed by OCLA 10-803 [ORS 19.023]. Dodd v. Dodd, (1944) 175 Or 323, 153 P2d 530.

A federal commissioner has no power to admit to bail a defendant adjudged guilty of assault and battery and sentenced to imprisonment by a justice of the peace. (Alaska) Ex parte Martin, (1890) 46 Fed 482.

Under subsection (2) bail on appeal can be fixed either by the appellate court or the circuit court. Umatilla County v. United Bonding Ins. Co., (1967) 248 Or 328, 434 P2d 329.

FURTHER CITATIONS: Williams v. Shelby, (1865) 2 Or 144.

**140.100**

NOTES OF DECISIONS

**1. In general**

In an action upon an undertaking in which the obligors bound themselves in the sum of "five hundred" but omitted to use the word "dollars," it was held that the undertaking must be construed in connection with the statute which authorized it, and that the omitted word might be supplied and the instrument read as though it had been expressed. Whitney v. Darrow, (1875) 5 Or 442.

To be enforceable, the undertaking must comply substantially with the requirements of this section. Malheur County v. Carter, (1908) 52 Or 616, 623, 98 P 489.

The prevailing practice, which had its inception in the form of undertaking suggested by this section, requires bail money deposited prior to the preliminary examination to assure the accused's appearance in whatever court the charge may be prosecuted. Capos v. Clatsop County, (1933) 144 Or 510, 25 P2d 903, 90 ALR 289.

If the offense of which defendant has been convicted is

bailable and a certificate of probable cause has been issued, then, if the defendant desires to secure his release from custody pending the appeal, he must furnish the undertaking provided for in this section. State v. Ellis, (1937) 156 Or 83, 66 P2d 995.

**2. Form of undertaking**

The form of the instrument prescribed by this section shows that what is intended is a simple promise for the payment of money upon certain conditions. State v. Hays, (1868) 2 Or 314.

**3. Designation of crime**

If the crime charged has a technical name as arson, murder, burglary, rape, larceny, and the like it will be sufficient to indicate the charge by such general name; if not, enough must be stated in the undertaking to describe briefly some crime made punishable by the laws of this state. Belt v. Spaulding, (1888) 17 Or 130, 20 P 827.

A statement that the defendant "conspired to defraud the United States," is a sufficient statement of the crime to satisfy the statute, as to undertaking of bail. United States v. Dunbar, (1897) 27 CCA 488, 83 Fed 151.

**4. Conditions of bond**

The surety is not required to admit or confess that he owes the state a certain sum of money upon the conditions specified. State v. Hays, (1868) 2 Or 314.

A bail bond in the form provided by this section does not require defendant to appear before such magistrate for examination at the time to which an adjournment is taken, and failure to do so is not a breach. State v. Gardner, (1896) 29 Or 254, 257, 45 P 753.

Undertaking conditioned as one for bail according to the provisions of this section was not sufficient as an undertaking on appeal. Davenport v. Justice Court, (1921) 101 Or 507, 199 P 621.

Bond given for appeal could not be forfeited for failure of bondsman to appear in trial court with appellant and show cause why the amount of bond should not be increased. Umatilla County v. United Bonding Ins. Co., (1967) 248 Or 328, 434 P2d 329.

FURTHER CITATIONS: Clifford v. Marston, (1887) 14 Or 426, 13 P 62.

ATTY. GEN. OPINIONS: Disposition of fines and forfeited bail, 1958-60, p 22.

**140.110**

NOTES OF DECISIONS

All that the section requires of the surety is that he shall sign the undertaking in the presence of the magistrate, and the magistrate is not required to certify to any particular mode of acknowledgment. State v. Hays, (1868) 2 Or 315.

An undertaking is valid although justification of sureties was before the clerk. Clatsop County v. Wuopio, (1920) 95 Or 30, 186 P 547.

**140.120**

NOTES OF DECISIONS

A United States Commissioner is an officer of a court under the laws of the United States, and therefore disqualified to become a surety on an appeal bond, under this section. Paxton v. Lively, (1906) 48 Or 135, 85 P 501.

LAW REVIEW CITATIONS: 13 OLR 189.

**140.130**

NOTES OF DECISIONS

This section positively requires a justification by affidavit before the defendant has a strict right to his discharge, but want of the affidavit cannot be set up as a defense to an action on the undertaking. State v. Hays, (1868) 2 Or 314.

Affidavit omitting, "That I am not a counselor or attorney at law, clerk of any court, or any other officer of any court," is insufficient. Sutton v. Sutton, (1915) 78 Or 9, 150 P 1025, 152 P 271.

**140.140**

CASE CITATIONS: Rogers v. Day, (1962) 232 Or 185, 375 P2d 63.

**140.150**

NOTES OF DECISIONS

Until the undertaking is filed with the clerk of the proper court, judgment of forfeiture cannot be given by such court. Belt v. Spaulding, (1888) 17 Or 130, 138, 20 P 827.

**140.160**

NOTES OF DECISIONS

The object of the order is to secure the discharge of the defendant, but the production of the order in an action for violation of the undertaking will not prove the discharge of defendant. State v. Hays, (1868) 2 Or 314.

Upon the filing of an undertaking and having the court indorse an order thereon allowing bail, upon filing the same with the clerk of the court and obtaining an order of the court, the defendant may be discharged from custody pending appeal. State v. Ellis, (1937) 156 Or 83, 66 P2d 995.

FURTHER CITATIONS: State ex rel. Hemphill v. Rafferty, (1967) 247 Or 475, 430 P2d 1017.

**140.310**

NOTES OF DECISIONS

Bail furnished for release of defendant charged with specific offense was not subject to use in case of dismissal of charge and filing of another charge against the defendant. Erickson v. Marshfield, (1920) 94 Or 705, 186 P 556.

The statutory procedure must be conformed to by one who deposits money in behalf of the accused in lieu of bail. Rosentreter v. Clackamas County, (1928) 127 Or 531, 273 P 326.

The justice of the peace was required to remit bail money to the circuit court after the defendant had been indicted upon the charge which was pending against him in the justice court at the time when he made the bail deposit. Capos v. Clatsop County, (1933) 144 Or 510, 25 P2d 903, 90 ALR 289.

ATTY. GEN. OPINIONS: Admission to bail when accused arrested in county other than one from which warrant issued, 1958-60, p 378.

**140.320**

NOTES OF DECISIONS

Officers authorized to take money in lieu of bail must follow the statute. Rosentreter v. Clackamas County, (1928) 127 Or 531, 273 P 326.

Plaintiffs were entitled to return of money which had been given by them to clerk of court after forfeiture of their undertaking. Taggart v. Linn County, (1959) 218 Or 94, 343 P2d 115.

**140.330**

NOTES OF DECISIONS

A defendant who has deposited money in lieu of bail and desires to substitute bail must follow the statute. Rosentreter v. Clackamas County (1928) 127 Or 531, 273 P 326.

**140.410**

NOTES OF DECISIONS

Since the statute provides the manner in which a defendant may be surrendered and bail exonerated, that is the rule to be observed. Cameron v. Burger, (1912) 60 Or 458, 120 P 10; Rosentreter v. Clackamas County, (1928) 127 Or 531, 273 P 326.

The authority to excuse sureties from the enforcement of their undertaking is vested in the court, and as a matter of law the authority of every other officer to do the same thing is excluded. Id.

An allegation by the sureties that they believed defendant had been surrendered and they were no longer liable on their undertaking for her appearance does not show an exoneration of bail under this section. Cameron v. Burger, (1912) 60 Or 458, 120 P 10.

**140.420**

ATTY. GEN. OPINIONS: When bail has power to take principal in another state and surrender him to court having jurisdiction of original matter, 1934-36, p 523.

**140.510**

CASE CITATIONS: State v. Smith, (1970) 3 Or App 606, 475 P2d 433, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Compelling appearance in inferior courts of traffic offender released without bail, 1954-56, p 10.

**140.520**

ATTY. GEN. OPINIONS: Compelling appearance in inferior courts of traffic offender released without bail, 1954-56, p 10.

**140.530**

ATTY. GEN. OPINIONS: Compelling appearance in inferior courts of traffic offender released without bail, 1954-56, p 10.

**140.610**

NOTES OF DECISIONS

Failure of the principal to comply with the conditions of the undertaking by appearing for trial can be proved only by the journal of the court. Clifford v. Marston, (1887) 14 Or 426, 13 P 62; Malheur County v. Carter, (1908) 52 Or 616, 621, 98 P 489.

Compliance with the statute authorizing a bail bond is essential to render the bond enforceable. Malheur County v. Carter, (1908) 52 Or 616, 625, 98 P 489.

The forfeiture must not only be alleged to have been judicially declared, but also that it was duly entered of record. Id.

In an action against sureties who have given bail for a defendant, held to answer by a court of limited jurisdiction, the facts conferring jurisdiction upon the court should be alleged in the complaint. Cameron v. Burger, (1912) 60 Or 458, 464, 120 P 10.

The complaint should show that the prisoner was charged with a crime, and it is not sufficient to state that he was charged with "shooting and killing" another. Hannah v. Wells, (1872) 4 Or 249.

Plaintiffs were entitled to return of money which had been given by them to clerk of court after forfeiture of their undertaking. Taggart v. Linn County, (1959) 218 Or 94, 343 P2d 1115.

**140.620**

NOTES OF DECISIONS

A purported release by the district attorney is without effect. Cameron v. Burger, (1912) 60 Or 458, 462, 120 P 10.

**140.630**

NOTES OF DECISIONS

**1. In general**

The county has no way of collecting bail money declared forfeited except as herein provided. Colvig v. Klamath County, (1888) 16 Or 244, 19 P 86.

This section makes it the duty of the district attorney to proceed by action against the bail upon their undertaking. Colvig v. Klamath County, (1888) 16 Or 244, 19 P 86; Cameron v. Burger, (1912) 60 Or 458, 120 P 10.

The action may be brought in the name of the county. The practice has been to sue in the name of the state or the district attorney. Malheur County v. Carter, (1908) 52 Or 616, 98 P 489.

**2. Allegations of complaint**

The complaint should show that the defendant was charged with a crime, that an examination was had, and that he was held to answer. Hannah v. Wells, (1872) 4 Or 249; Malheur County v. Carter, (1908) 52 Or 616, 621, 98 P 489.

In a complaint against sureties for defendant held to answer, the facts conferring jurisdiction on the court must be alleged. Malheur County v. Carter, (1908) 52 Or 616, 621, 98 P 489; Cameron v. Burger, (1912) 60 Or 458, 464, 120 P 10.

Recitals in the undertaking attached to the complaint cannot supply necessary allegations in the complaint. Malheur County v. Carter, (1908) 52 Or 616, 618, 98 P 489.

The complaint must allege the judicial declaration of forfeiture and the due entry of record. Id.

That the undertaking was filed with the clerk must be alleged. Malheur County v. Carter, (1908) 52 Or 616, 618, 98P 489.

An allegation that the district attorney obtained leave of court to arraign defendant, and that he failed to appear, but made default, and that by an order of court the undertaking was forfeited fails to show that accused was called for arraignment. Id.

**140.640**

NOTES OF DECISIONS

The authority to excuse sureties from the enforcement of their undertaking is vested in the court. Cameron v. Burger, (1912) 60 Or 458, 120 P 10.

**140.670**

NOTES OF DECISIONS

This provision seems to imply that money received or collected on an undertaking of bail in a criminal action becomes part of the general assets of the county. Metschan v. Grant County, (1899) 36 Or 117, 58 P 80.

ATTY. GEN. OPINIONS: "Final adjournment" of justice courts as used in this section, 1944-46, p 78; disposition of

money when undertaking for bail is given and forfeited for violation of ORS 483.992, 1954-56, p 142.