

Chapter 138

1955 REPLACEMENT PART

Appeal

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CROSS REFERENCES

Appeals from justices' and district courts in criminal actions, Ch. 157
Appeals from municipal courts, 221.390
Appellate jurisdiction of circuit courts, Const. Art. VII (O), § 9

138.010

Writ of review in justice's court, 157.070

138.180

Costs of transcript when defendant is pauper, payment of, 21.470

Record on appeal that is transmitted to Supreme Court, Const. Art. VII (A), § 3

138.230

Affirmance notwithstanding errors, Const. Art. VII (A), § 3

138.260

County to which papers are returned when county to which they are returnable is divided, 202.320

138.010 Mode of review; abolition of writs of error and certiorari. Writs of error and of certiorari in criminal actions are abolished. The only mode of reviewing a judgment or order in a criminal action is that prescribed by this chapter.

138.020 Who may appeal. Either the state or the defendant may as a matter of right appeal from a judgment in a criminal action in the cases prescribed in this chapter, and not otherwise.

138.030 Parties designated "appellant" and "respondent"; title of action. The party appealing is known as the appellant and the adverse party as the respondent; but the title of the action is not changed in consequence of the appeal.

138.040 Appeal by defendant generally; reviewable matters. The defendant may take an appeal to the Supreme Court from a judgment on a conviction in a circuit court or from an order refusing to dismiss the indictment, as provided in ORS 134.120; and upon an appeal, any decision of the court in an intermediate order or proceeding forming a part of the judgment roll, as prescribed in ORS 137.190, may be reviewed.

138.050 Appeal from sentence on plea of guilty where fine or punishment is excessive. A defendant who has plead guilty may take an appeal from a judgment on conviction where it imposes an excessive fine or excessive, cruel or unusual punishment. If the judgment of conviction is in the circuit court, the appeal shall be taken to the Supreme Court; if it is in the district court, justice of the peace court or municipal court or city recorder's court, the appeal shall be taken to the circuit court of the county in which such court is located. On such appeal, the appellate court shall only consider the question whether an excessive fine or excessive, cruel or unusual punishment not proportionate to the offense has been imposed. If in the judgment of the appellate court the fine imposed is excessive or the punishment imposed is excessive, unusual or cruel and not proportionate to the offense, it shall direct the court from which the appeal is taken to impose the punishment which should be administered.

138.060 Appeal by state. The state may take an appeal to the Supreme Court from a judgment for the defendant on a demurrer

to the indictment or from an order of the court arresting the judgment.

138.070 Time within which appeal must be taken. An appeal must be taken within 60 days after the judgment or order appealed from was given or made.

138.080 Manner of taking appeal; notice. An appeal shall be taken by filing a notice in writing with the clerk of the court where the judgment roll is filed, stating substantially that the appellant appeals from the judgment.

138.090 Signature to notice of appeal. When the state takes an appeal, the notice of appeal shall be signed by the district attorney for the county. When the defendant takes an appeal, the notice of appeal shall be signed by him or an attorney of the court for him.

138.100 Service of notice of appeal on district attorney. When the defendant takes an appeal, a notice similar to the one mentioned in ORS 138.080 shall be served on the district attorney for the county in which the judgment roll is filed.

138.110 Service of notice of appeal on defendant; publication in certain cases. When the state takes an appeal, a notice similar to the one mentioned in ORS 138.080 shall be served on the defendant if he is a resident of or imprisoned in the county, or, if not, on the counsel, if any, who appeared for him on the trial if he resides or has an office for the transaction of business in the county. If, after due diligence, the service cannot be made as in this section directed, the court or judge thereof from which the appeal is sought to be taken, upon proof thereof, may make an order for the publication of the notice of appeal in such newspaper and for such time as the court or judge deems proper.

138.120 When appeal is perfected in case of service of notice of appeal by publication. At the expiration of the time appointed for the publication, on filing an affidavit thereof with the clerk, the appeal becomes perfected.

138.130 Defendant's appeal as stay of execution; waiver. An appeal from a judgment on a conviction stays the execution of the judgment unless the defendant, at the time of giving notice of appeal, either orally

in open court or in writing, requests that the execution not be stayed.

138.140 Notice to sheriff, superintendent or warden to retain defendant without executing judgment. Upon notice of appeal being given, as in this chapter provided, the clerk of the court shall at once notify the sheriff and the Warden of the State Penitentiary or the Superintendent of the Oregon State Correctional Institution of such fact. Without executing the judgment, the sheriff, Warden of the State Penitentiary or Superintendent of the Oregon State Correctional Institution shall retain the custody of the defendant until otherwise ordered by the court. If the defendant has requested that execution not be stayed, as provided by ORS 138.130, the court forthwith shall order the execution of the judgment. [Amended by 1953 c.99 §2; 1955 c.660 §19]

138.150 Disposition of defendant if execution of judgment has commenced. If before the giving of a notice of appeal the execution of the judgment has commenced, the further execution thereof is suspended and the defendant shall be restored by the officer in whose custody he is to his original custody unless the defendant, upon the giving of a notice of appeal, requested that execution of the judgment not be stayed, as provided in ORS 138.130.

138.160 Appeal by state as stay of judgment or order; bail. An appeal taken by the state, if taken within the term at which the judgment or order appealed from is given or made, stays the effect of such judgment or order in favor of the defendant, so that his bail or money deposited in lieu thereof is holden for the appearance and surrender of the defendant until the final determination of the appeal and the proceedings consequent thereon, if any; but if the defendant is in custody, he may, in the discretion of the court, be admitted to bail, pending the appeal, on his own undertaking.

138.170 Effect of appeal by state on judgment or order in favor of defendant. An appeal taken by the state does not stay or affect the operation of the judgment or order in favor of the defendant until the judgment is reversed, except as provided in ORS 138.160.

138.180 Transmission of record to Supreme Court. Upon appeal being taken, the clerk of the court where the notice of appeal

is filed shall within 30 days thereafter, or such further time as such court or the judge thereof may allow, transmit a certified copy of the notice of appeal and judgment roll to the Clerk of the Supreme Court.

138.190 Dismissal of appeal when transmission of record is not made within time allowed. If the return is not made as provided in ORS 138.180, the appellate court may, on motion of the respondent and notice to the defendant, order the appeal to be dismissed unless for good cause it retains the appeal and requires the clerk of the court below to make a further return as to any matter affecting the merits that appears or is alleged to be omitted from the transcript.

138.200 Dismissal of appeal for irregularity. If the appeal is irregular in a substantial particular, but not otherwise, the appellate court may, on motion of the respondent and notice to the defendant, order it to be dismissed.

138.210 Necessity of appearance of appellant. If the appellant fails to appear in the appellate court, judgment of affirmance shall be given as a matter of course; but the defendant need not personally appear in the appellate court.

138.220 Scope of review. Upon an appeal, the judgment or order appealed from can only be reviewed as to questions of law appearing upon the transcript.

138.230 Rulings in discretion of court and technical defects as grounds for reversal. After hearing the appeal, the court shall give judgment, without regard to the decision of questions which were in the discretion of the court below or to technical errors, defects or exceptions which do not affect the substantial rights of the parties.

138.240 Judgments appellate court may give. The appellate court may reverse, affirm or modify the judgment or order appealed from and shall, if necessary or proper, order a new trial.

138.250 New trial to be in court below; reversal without new trial. When a new trial is ordered, it shall be directed to be had in the court below; and if a judgment against a defendant is reversed without ordering a new trial, the appellate court shall direct, if he is in custody, that he be discharged therefrom, or if he has been admitted to bail, that his bail be exonerated, or if money has

been deposited instead of bail, that it be refunded to the defendant.

138.260 Entry of judgment in journal; transmission to court below. When the judgment of the appellate court is given, it shall be entered in its journal, and a certified copy of the entry shall be forthwith remitted to the clerk of the court below.

138.270 Proceedings in court below; enforcement of judgment; new trial. (1) Upon the receipt of the certified copy of the entry of judgment mentioned in ORS 138.260, the clerk shall enter the same in the journal of the court below and thereafter the judgment shall be enforced without any further proceedings, unless the appellate court so directs, as a judgment of the court below.

(2) If by the judgment of the appellate court a new trial is ordered from the entry of the judgment in the court below, the action is to be deemed pending and for trial in such court, according to the directions of the appellate court.

138.280 Retention of transcript in appellate court; annexation of copy of judgment to original judgment roll. The transcript returned to the appellate court shall there remain of record and shall not be remitted to the court below. After entry thereof, the certified copy of the judgment of the appellate court shall be annexed to the original judgment roll.

138.290 Termination of appellate jurisdiction; orders giving effect to judgment. After the certified copy of the judgment has been remitted, as provided in ORS 138.260, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon; and all orders which may be necessary to carry the judgment into effect shall be made by the court to which the certified copy is remitted.

138.300 County's liability for costs on appeal in criminal action. Upon reversal of the judgment of the lower court in a criminal action, the county shall be liable for costs on appeal to the Supreme Court and with like effect as in the case of natural persons; and such costs shall be paid in the first instance by the county from which the appeal is taken.

138.310 to 138.800 [Reserved for expansion]

138.810 Automatic appeal to Supreme Court from judgment of death. (1) When any judgment of death is rendered and no appeal to the Supreme Court has been taken, an appeal to the Supreme Court is automatically taken by the defendant without any action by him or his counsel 65 days after the filing of the judgment.

(2) When an automatic appeal to the Supreme Court is taken as provided in subsection (1) of this section, the clerk of the court in which the judgment was rendered shall:

(a) Within 70 days after the filing of the judgment, file with the Clerk of the Supreme Court the judgment roll and the transcript consisting of a copy of the judgment and such other papers as may be required by the Supreme Court.

(b) Within 90 days after the filing of the judgment, transmit the transcript of testimony, depositions, exhibits and other papers containing the evidence heard or offered to the Clerk of the Supreme Court. [1955 c.662 §2]

138.820 Appointment of counsel; service of notice of appeal. Within five days after the transcript has been filed as required by paragraph (a) of subsection (2) of ORS 138.810:

(1) The Supreme Court shall appoint counsel to represent the defendant if he is not already represented by counsel.

(2) The Clerk of the Supreme Court shall serve notice of the appeal on:

(a) The defendant.

(b) Counsel for the defendant.

(c) The district attorney of the county in which the judgment was rendered. [1955 c.662 §3]

138.830 Prosecution of appeal. Except as otherwise provided in ORS 137.400 and 138.810 to 138.840, an automatic appeal to the Supreme Court pursuant to ORS 138.810 shall be prosecuted in the same manner as an appeal to the Supreme Court by a defendant in any other criminal case. [1955 c.662 §4]

138.840 Payment of cost of appeal when defendant without funds. When an automatic appeal to the Supreme Court from a judgment of death is taken as provided in ORS 138.810 and there is a showing to the Supreme Court that the defendant is without funds:

(1) The county in which the judgment

of death was entered shall pay the expense of preparing the transcript of testimony and printing the abstract of record and briefs of the defendant and costs assessed by the Supreme Court.

(2) The fees of the official reporter of the court in which the judgment was rendered for making the transcript required by subsection (2) of ORS 138.810 shall be in the amount prescribed in ORS 21.470 and

shall be paid out of the county treasury in the same manner as provided in ORS 8.390 for the payment of per diem compensation.

(3) Counsel appointed pursuant to subsection (1) of ORS 138.820 shall be granted reasonable attorney's fees in an amount fixed and approved by the Supreme Court. Such fees shall be paid by the county in which the judgment of death was entered. [1955 c.662 §5]

CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173.170, I, Sam R. Haley, Legislative Counsel, do hereby certify that I have compared each section printed in this chapter with the original section in the enrolled bill, and that the sections in this chapter are correct copies of the enrolled sections, with the exception of the changes in form permitted by ORS 173.160 and other changes specifically authorized by law.
Done at Salem, Oregon,
on October 15, 1955.

Sam R. Haley
Legislative Counsel