

## Chapter 19

### 1955 REPLACEMENT PART

## Appeals

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**19.100**

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Whole testimony, instructions, and other matter  
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**19.120**

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**19.130**

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**19.150**

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**19.010 Appealable judgments, decrees and orders; amount in controversy; appeals in special proceedings.** (1) A judgment or decree may be reviewed on appeal as prescribed in this chapter.

(2) For the purpose of being reviewed on appeal the following shall be deemed a judgment or decree:

(a) An order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein.

(b) An interlocutory decree in a suit for the partition of real property, defining the rights of the parties to the suit and directing sale or partition.

(c) A final order affecting a substantial right, and made in a proceeding after judgment or decree.

(d) An order setting aside a judgment and granting a new trial.

(3) No appeal to the Supreme Court shall be taken or allowed in any action for the recovery of money or damages only unless it appears from the pleadings that the amount in controversy exceeds \$250.

(4) An appeal may be taken from the circuit court to the Supreme Court in any special statutory proceeding under the same conditions, in the same manner and with like affect as from a judgment, decree or order entered in an action or suit, unless such appeal is expressly prohibited by the law authorizing such special statutory proceeding.

**19.020 Who may appeal; designation of parties.** Any party to a judgment or decree, other than a judgment or decree given by confession or for want of an answer, may appeal therefrom. The plaintiff may appeal from a judgment or decree given by confession or for want of an answer where such judgment or decree is not in accordance with the relief demanded in the complaint. The party appealing is known as the appellant, and the adverse party as the respondent; but the title of the action or suit is not changed in consequence of the appeals.

**19.030 How appeal is taken and perfected; time to appeal; dismissal for non-compliance with appeal requirements; relief from noncompliance; filing of undertaking; exceptions to sureties.** An appeal shall be taken and perfected in the manner prescribed in this section and not otherwise:

(1) A party to a judgment, decree or ap-

pealable order, desiring to appeal therefrom, or some specified part thereof, may by himself or attorney give notice in open court, or before the judge if the judgment, decree or order is rendered or made at chambers, at the time the judgment, decree or order is made, that he appeals from such judgment, decree or order, or from some specified part thereof, to the court to which the appeal is sought to be taken; and such notice thereupon shall, by order of the court or judge thereof, be entered in the journal of the court.

(2) If not taken at the time of the rendition of the judgment or decree appealed from, or at the time of making the order appealed from, an appeal to the Supreme Court shall be taken within 60 days from the entry of the judgment, order or decree appealed from, and an appeal from the county court to the circuit court shall be taken within 30 days after such entry, and not otherwise. In such case, the party desiring to appeal shall, within the prescribed period, cause a notice, signed by himself or attorney, to be served on such adverse party or parties as have appeared in the action or suit, or upon his or their attorney, at any place where he or they may be found, and file the original, with proof of service indorsed thereon, with the clerk of the court in which the judgment, decree or order is entered. Such notice shall be sufficient if it contains the title of the cause, the names of the parties, and notifies the adverse party or his attorney that an appeal is taken to the appellate court from the judgment, order or decree, or some specified part thereof.

(3) Upon notice of appeal being given, and entered in the journal of the court or filed with the clerk, as the case may be, the appellate court shall have jurisdiction of the cause and not otherwise. After the appellate court has acquired jurisdiction of the appeal, the omission of a party to perform any of the acts required in this section or in ORS 19.070 or within the time required shall be a cause for dismissal of the appeal, and the appellate court may, on motion of the respondent, dismiss the appeal; provided, however, the appellate court shall, upon good cause shown, relieve a party from his failure to comply with any of such provisions and may permit an amendment or performance of such act on such terms as may be just; provided further, that failure of appellant to perform any act required in this

section or in ORS 19.070 within the time required shall constitute an abandonment of the appeal, unless the appellant shall, with the consent of the appellate court or a judge thereof for good cause shown, within 30 days after service of notice of such failure, perform such act.

(4) Within 10 days from the giving of notice or service of notice of the appeal, the appellant shall cause to be served on the adverse party or his attorney an undertaking as provided in ORS 19.040, and within said 10 days shall file with the clerk the original undertaking, with proof of service indorsed thereon. Within five days after the service of the undertaking the adverse party or his attorney shall except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto. The qualifications of sureties in the undertaking on appeal shall be the same as in bail on arrest, and, if excepted to, they shall justify in like manner. From the expiration of the time allowed to except to the sureties in the undertaking, or from the justification thereof if excepted to, the appeal shall be deemed perfected.

**19.040 Form of undertaking on appeal; conditions for stay of proceedings; enforcement against sureties on dismissal of appeal.**

(1) The undertaking of the appellant shall be given with one or more sureties, to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal; but such undertaking does not stay the proceedings, unless the undertaking further provides to the effect following:

(a) If the judgment or decree appealed from is for the recovery of money, or of personal property or the value thereof, that if the same or any part thereof is affirmed, the appellant will satisfy it so far as affirmed.

(b) If the judgment or decree appealed from is for the recovery of the possession of real property, for a partition thereof, or the foreclosure of a lien thereon, that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if such judgment or decree or any part thereof is affirmed, the appellant will pay the value of the use and occupation of such property, so far as affirmed, from the time of the appeal until the delivery of the possession thereof, not exceeding the sum there-

in specified, to be ascertained and tried by the court or judge thereof.

(c) If the decree appealed from requires the transfer or delivery of any personal property, unless the things required to be transferred or delivered are brought into court, or placed in the custody of such officer or receiver as the court may appoint, that the appellant will obey the decree of the appellate court. The amount of such undertaking shall be specified therein, and be fixed by the court or judge thereof.

(d) When the decree appealed from is for the foreclosure of a lien, and also against the person for the amount of the debt secured thereby, the undertaking shall also be to the effect that the appellant will pay any portion of such decree remaining unsatisfied after the sale of the property upon which the lien is foreclosed.

(2) When the decree appealed from requires the execution of a conveyance or other instrument, execution of the decree is not stayed by the appeal, unless the instrument is executed and deposited with the clerk within the time allowed to file the undertaking, to abide the decree of the appellate court.

(3) If the appeal is dismissed, the judgment or decree, so far as it is for the recovery of money, may, by the appellate court, be enforced against the sureties in the undertaking for a stay of proceedings, as if they were parties to the judgment or decree.

**19.050 Sale of perishable property when proceedings stayed; stay without further undertaking when appellant is a fiduciary, and in certain other cases.** When the proceedings are stayed, if perishable property has been seized to satisfy or secure the judgment or decree, or has been directed to be sold thereby, the trial court or judge thereof may order the property to be sold as if the proceedings were not stayed, and the proceeds thereof to be deposited or invested to abide the decision of the appellate court. The court or judge thereof, in its discretion, may dispense with or limit the further undertaking required by paragraphs (a) to (d) of subsection (1) of ORS 19.040, when the appellant is an executor, administrator, trustee, or other person acting in another's right. In cases not provided for in such paragraphs, when an appeal is perfected, with an undertaking for the appeal only, proceedings shall be stayed as if the further undertaking thereof had been given.

**19.060 Restitution bond for enforcement of judgment or decree on contract, notwithstanding stay.** If the judgment or decree has been given in an action or suit upon a contract, notwithstanding an appeal and undertaking for the stay of proceedings, the respondent may proceed to enforce such judgment or decree, if within 10 days from the time the appeal is perfected he files with the clerk an undertaking, with one or more sureties, to the effect that if the judgment or decree is reversed or modified the respondent will make such restitution as the appellate court may direct. Such undertaking may be excepted to by the appellant in like manner and with like effect as the undertaking of an appellant, and the sureties therein shall have the same qualifications.

**19.070 Transcript on appeal; to include evidence in equity cases; extension of time for filing.** (1) Within 30 days after the appeal is perfected, the appellant shall file with the clerk of the appellate court a transcript, which shall consist of a copy of the judgment or decree appealed from, of the notice of appeal, with proof of service thereof, and of the undertaking on appeal, with proof of service thereof, and a copy of any orders extending time for filing the transcript, all duly certified by the clerk of the county from which the appeal is taken, and such other papers as shall be required by the rules of the Supreme Court. If the cause is one on appeal to the Supreme Court, which it is provided by law or rules of the court shall be submitted at Pendleton, the transcript shall be filed within the time and in the manner provided in this section with the deputy clerk of the court at Pendleton; otherwise with the clerk of the court at Salem.

(2) If the appeal is from a decree and the cause is to be tried anew on the testimony, the clerk shall attach together the testimony, depositions and other papers on file in his office containing the evidence heard or offered on trial in the court below, and deliver the same to the appellant, taking therefor his receipt in duplicate, one of which receipts he shall file in his office and the other deliver to the respondent when so requested. Such evidence shall be deemed a part of the transcript, and shall be filed therewith.

(3) The trial court or the judge thereof, or the Supreme Court or a justice thereof,

may, upon such terms as may be just, by order, enlarge the time for filing the transcript, but the application for such order shall be served and filed within the time allowed to file transcripts, and the order shall be made within 10 days thereafter. Nothing contained in this section shall prevent the trial court or a justice of the Supreme Court from permitting an extension of time for the filing of a transcript in any appeal at any time in accordance with and upon written stipulation and agreement of the attorneys for all of the parties in interest.

**19.080 When transcript to be filed and appeal heard at Pendleton.** The transcripts in all appeals taken from any circuit court in any county lying east of the Cascade Mountains, except Klamath and Lake, shall be forwarded to the Clerk of the Supreme Court at Pendleton, and said causes shall be heard there, unless otherwise stipulated between the parties. Appeals taken from the circuit courts in all other parts of the state shall be heard at the capital, unless otherwise stipulated between the parties or ordered by the court.

**19.090 Original pleadings and bill of exceptions part of transcript; return to trial court.** When an appeal is perfected the original pleadings and the original bill of exceptions shall be sent by the clerk, or other proper officer of the trial court, to the Clerk of the Supreme Court or appellate court, and shall be a part of the transcript in the Supreme Court or appellate court so long as needed there. If the papers are later required for use in the trial court, they shall be returned to the trial court and kept of record therein, the object being to require one original record to answer the purpose in each court. The Supreme Court or appellate court is instructed to promulgate the necessary rules for the custody of the original record to accomplish this purpose.

**19.100 Bill of exceptions; time for presenting; form; settlement and signing; statements and affidavits in case of dispute.** (1) A proposed bill of exceptions may be tendered by presenting it to the clerk of the court within 60 days after the entry of the judgment, or within such further time as may be granted by order of the court if application is made during the said period of 60 days or within any extension that may be granted.

(2) No particular form of bill of exceptions shall be required. The rulings excepted to shall be stated, with as much evidence, or other matter, as is necessary to explain them, but no more; provided, however, that the bill of exceptions may consist of a transcript of the whole testimony and all of the proceedings had at the trial, including the exhibits offered and received or rejected, the instructions of the court to the jury and any other matter material to the decision of the appeal.

(3) The bill of exceptions, when settled and allowed, shall be signed by the judge and filed with the clerk, and thereafter it shall be deemed to be a part of the record of the cause.

(4) In case of death, resignation, expiration of the term of office, or vacancy in the office from any other cause of the judge before whom the matter was tried, the bill of exceptions may be settled and signed by the successor in office of such judge or by any judge authorized in such cases to perform the general duties of the judge of such court. In case the judge before whom the matter was tried is outside the county, or is otherwise not available, and there is no dispute in relation to the bill of exceptions, it may be settled and signed by any judge authorized in such cases to perform the general duties of the judge of the court.

(5) If, at the time of settling the bill of exceptions, a disagreement arises between counsel and the court as to the truth of any statement of a point of exception, counsel may, within 10 days, file a verified statement with affidavits, the same as provided in subsection (2) of ORS 17.515, and within 10 days thereafter the adverse party may file a statement with affidavits as provided for the adverse party in subsection (2) of ORS 17.515. Any statements and affidavits filed under this subsection, or under subsection (2) of ORS 17.515, shall be deemed a part of the record of the cause, and upon appeal or review, the Supreme Court must first ascertain therefrom the truth of the matter as far as possible, and then determine the law arising thereon.

**19.110 Omissions in transcript; dismissal of appeal.** When it appears by affidavit to the satisfaction of the court that the part of the transcript provided for in ORS 19.090 is incomplete in any particular, substantially affecting the merits of the judgment or decree appealed from, on motion of the re-

spondent the court shall make a rule upon the clerk of the court below, requiring him to certify as to such alleged omission, and if true, to transmit to the appellate court the paper omitted in the transcript; or, in such case, the respondent may move to dismiss the appeal, and the court shall allow such motion unless, on the cross-motion of the appellant, it makes a rule upon the clerk concerning such omission, as provided above, upon such terms as may be just. At any time before the hearing or trial, the court, on motion of the appellant, may dismiss the appeal; and thereupon the court shall affirm the judgment or decree appealed from, as a matter of course.

**19.120 Scope of review of judgment or decree.** Upon an appeal from a judgment of the circuit court, the same shall only be reviewed as to questions of law appearing upon the transcript, and shall only be reversed or modified for errors substantially affecting the rights of the appellant; but upon an appeal from the judgment of a county court the action shall be tried anew, upon substantially the issues tried in the court below. Upon an appeal from a decree given in any court the suit shall be tried anew upon the transcript and evidence accompanying it.

**19.130 Powers of appellate court; new trial; reversal upon loss or destruction of reporter's notes, tapes or audio records.** Upon an appeal, the Supreme Court may affirm, reverse or modify the judgment or decree appealed from in the respect mentioned in the notice, and not otherwise, as to any or all of the parties joining in the appeal, and may include in such decision any or all of the parties not joining in the appeal, except a codefendant of the appellant against whom a several judgment or decree might have been given in the court below; and may, if necessary and proper, order a new trial. Also, upon an appeal from a judgment notwithstanding the verdict, the Supreme Court may consider the correctness of the ruling of the circuit court on a motion for a new trial when joined with a motion for judgment notwithstanding the verdict, if such ruling is assigned as erroneous in the brief of any party affected by the appeal. Whenever it appears that an appeal cannot be prosecuted, by reason of the loss or destruction, through no fault of the appellant, of the reporter's notes,

tapes or audio records, or of the exhibits or other matter necessary to the prosecution of the appeal, the judgment or decree appealed from may be reversed and a new trial ordered as justice may require. [Amended by 1955 c.497 §6]

**19.140 Review of intermediate orders; directing restitution.** Upon an appeal, the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment or decree appealed from; and when it reverses or modifies such judgment or decree, may direct complete restitution of all property and rights lost thereby.

**19.150 How decision of appellate court given and enforced; effect as to lien of judgment or decree.** (1) The decision of the appellate court shall be given and enforced as follows:

(a) Upon an appeal to the Supreme Court, its decisions shall be entered in the journal, and the cause remitted by mandate to the court below for further proceedings as therein directed. If a new trial is ordered, upon the receipt of the mandate by the clerk of the court below, the decision and order shall be entered in the journal and thereafter the cause shall be deemed pending and for trial in such court, according to the directions of the appellate court. If a new trial is not ordered, upon the receipt of the mandate by such clerk, a judgment or decree shall be entered in the journal and docketed in pursuance of the direction of the appel-

late court, in like manner and with like effect as if the same was given in the court below.

(b) Upon an appeal to the circuit court, the manner of proceeding thereafter is the same as if the action or suit had been commenced in such court; but if the appeal is from a decree of the county court, the appellate court may give a final decree in the cause or matter, to be enforced as a decree of such court, or such decree as may be proper, and direct that the cause or matter be remitted to the court below for further proceedings in accordance therewith.

(c) If judgment or decree is given against the appellant, it shall be entered against his sureties also, in like manner and with like effect, according to the nature and extent of their undertaking.

(2) An appeal shall not discharge the lien of a judgment or decree, and unless the same is reversed, the lien thereof shall be merged and continue in the affirmed or modified judgment or decree given on appeal, from the time of the entry and docketing of the same in the court below.

**19.160 Damages upon affirmance of judgment.** Whenever a judgment or decree is affirmed on appeal, and it is for recovery of money, or personal property or the value thereof, the judgment or decree shall be given for 10 percent of the amount thereof, for damages for the delay, unless it appears evident to the appellate court that there was probable cause for taking the appeal.

#### 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

