Chapter 19

1971 REPLACEMENT PART

Appeals

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19.005 Definitions. As used in this section and in ORS 19.023 to 19.065 and 19.074 to 19.190 unless the context otherwise requires:

(1) "Exhibits" means exhibits offered and received or rejected in the trial court.

(2) "Judgment" means judgment, decree or appealable order, as provided in ORS 19.010.

(3) "Trial court file" means all the original papers filed in the trial court whether before or after judgment, including but not limited to the summons and proof of service thereof, pleadings, demurrers, motions, affidavits, depositions, stipulations, orders, the judgment, the notice of appeal and the undertaking on appeal.

(4) "Transcript" means the transcript of the court reporter's report as provided in ORS 8.340, 8.350 and 8.360.

(5) "Record" or "record of the case" means the trial court file and any transcript, narrative statement and exhibits.

(6) "Clerk" means the county clerk of, and as such ex officio clerk of the trial court for, the county in which the judgment or appealable order is filed and entered, or either.

[1959 c.558 §2]

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 effect 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.

19.023 How appeal taken. (1) An appeal to the Supreme Court or to the Court of Appeals shall be taken in the manner prescribed in ORS 19.023 to 19.065 and 19.074 to 19.190.

(2) A party to a judgment desiring to appeal therefrom, or some specified part thereof, shall cause a notice, signed by himself or his attorney, to be served on such adverse party or parties as have appeared in the action, suit or proceeding and file the original, with proof of service indorsed thereon or affixed thereto, with the clerk.

(3) The notice shall be in the form prescribed in ORS 19.029, shall be filed within the time prescribed in ORS 19.026, and shall be accompanied by the designation required by ORS 19.074.

[Formerly 19.030; 1969 c.198 §37]

19.026 Time for service and filing of notice of appeal. (1) Except as provided in subsections (2) and (3) of this section, the notice of appeal shall be served and filed within 30 days after the entry of the judgment appealed from.

(2) Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days from the earlier of the following dates:

(a) The date of entry of the order disposing of the motion.

(b) The date on which the motion is deemed denied, as provided in ORS 17.615.

(3) Any other party desiring to appeal may serve and file his notice of appeal within 10 days after the expiration of the time allowed by subsections (1) and (2) of this section.

(4) When more than one notice of appeal is filed, the date on which the last such notice was filed shall be used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal.
[1959 c.558 §4]

19.029 Contents of notice of appeal. (1) The notice of appeal shall contain the following:

(a) The title of the cause.

(b) The names of the parties and their attorneys.

(c) A notice to the adverse party or his attorney that an appeal is taken from the judgment or some specified part thereof.

(d) A designation of those portions of the proceedings and exhibits to be included in the record in addition to the trial court file.

(e) A plain and concise statement of the points on which the appellant intends to rely. On appeal, the appellant may rely on no other points than those set forth in such statement. If the appellant has designated for inclusion in the record all the testimony and all the instructions given and requested, no statement of points is necessary.

(2) Within 10 days after the filing of the notice of appeal any other party may serve and file a designation of additional parts of the proceedings and exhibits to be included in the record. If such party also appeals the designation shall be included in his notice of appeal.

(3) The reporter shall prepare a transcript of such parts of the proceedings as are designated pursuant to paragraph (d) of subsection (1) of this section and subsection (2) of this section.
[1959 c.558 §5; 1971 c.565 §6]

19.030 [Amended by 1959 c.558 §3; renumbered 19.023]

19.033 Jurisdictional effect of filing notice; relief from nonjurisdictional errors. (1) When the notice of appeal has been served and filed as provided in ORS 19.023 to 19.029, the Supreme Court or the Court of Appeals shall have jurisdiction of the cause, subject to a determination under ORS 2.520, but the trial court shall have such powers in connection with the appeal as are conferred upon it by law.

(2) The serving and filing of the notice of appeal as provided in ORS 19.023 to 19.029 is jurisdictional and may not be waived or extended.

(3) After the Supreme Court or the Court of Appeals has acquired jurisdiction of the cause, the omission of a party to perform any of the acts required in connection with an appeal, or to perform such acts within the time required, shall be cause for dismissal of the appeal. In the event of such omission, the court, on motion of the respondent or, on its own motion, may dismiss the appeal. An appeal dismissed on the court's own motion may be reinstated upon showing of good cause for such omission.
[1959 c.558 §6; 1969 c.198 §38; 1971 c.565 §7]

19.035 Filing fee for appeal; sending copy of notice of appeal and fee to clerk of appellate court. (1) At the time the notice of appeal is filed with the clerk as provided in ORS 19.023, the appellant shall deposit with the clerk the amount of the appropriate filing fee. The timely deposit of such fee with the clerk is not jurisdictional, but omission to do so shall be cause for dismissal of the appeal, subject to the provisions of subsection (3) of ORS 19.033.

(2) Within 10 days after a notice of appeal has been filed, the clerk shall send a certified copy to the State Court Administrator, at Salem.

(3) Within 10 days after the appellant's filing fee has been deposited, the clerk shall send such filing fee to the State Court Administrator, at Salem.
[1959 c.558 §7; 1963 c.27 §1; 1969 c.198 §39; 1971 c.193 §19]

19.038 Filing of undertaking on appeal; exception to sureties. (1) Except as provided in ORS 19.045, within 10 days after the filing of the notice of the appeal, the appellant shall serve on the adverse party or his attorney an undertaking as provided in ORS 19.040, and within such 10 days shall file with the clerk the original undertaking, with proof of service indorsed thereon.

(2) Within five days after the service of the undertaking, the adverse party or his attorney may except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto.

(3) 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.
[1959 c.558 §8]

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 therein 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.

19.045 Dispensing with undertaking by stipulation. By written stipulation of the parties, the undertaking provided for in ORS 19.040 may be dispensed with. The stipulation shall be filed with the clerk within 10 days after the filing of the notice of appeal. The filing of the stipulation shall, upon approval of the trial court, have such effect with respect to staying the judgment as is provided for in the stipulation.
[1959 c.558 §9]

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.

19.065 Preparation and transmission of record. The record of the case shall be prepared and transmitted to the court to which the appeal is made in the manner provided in ORS 19.074 to 19.098.
[1959 c.558 §10; 1969 c.198 §40]

19.069 Use of audio records; waiver of transcription; certification and filing of audio records on notice. Where the trial proceedings are recorded on audio records, the court to which the appeal is made may waive transcription and provide for hearing of the appeal on the basis of the audio records alone under such rules as the court may prescribe. The reporter shall certify and file the audio recordings with the trial court clerk immediately upon receiving notice that the appeal is to be heard on the basis of the recordings alone.
[1971 c.565 §10]

19.070 [Repealed by 1959 c.558 §51]

19.074 Trial court file part of record. In every case, the trial court file shall be transmitted to the court to which the appeal is made as part of the record. Unless a transcript or narrative statement in lieu of a transcript is prepared as provided in ORS 19.029 and 19.078 to 19.098, the record shall consist of the trial court file alone.
[1959 c.558 §11; 1969 c.198 §41; 1971 c.193 §20; 1971 c.565 §8]

19.078 Certification of transcript; copies required; correction of errors; settlement order. (1) If a transcript is prepared from audio records by a person other than the reporter, then the reporter shall certify the audio records and the transcript shall be certified by the person preparing it. In all other cases the transcript shall be certified by the reporter or the trial judge. The transcript shall be filed by the reporter with the clerk within 30 days after the filing of the notice of appeal. The reporter shall give immediate notice in writing to the parties that the transcript has been filed. Except as provided in subsection (2) of this section the reporter shall serve the respondent with a copy of the transcript and shall, at the time of filing the original transcript, file proof of such service with the trial court clerk, and with the clerk of the court to which the appeal is made.

(2) If there are two or more parties in addition to the appellant who have appeared in the trial court and who are represented by different attorneys, the reporter shall at the time of filing the original transcript deposit a copy thereof with the clerk for use by all such other parties. The reporter shall serve notice of such deposit upon all such parties and file proof of such service with the trial court clerk and with the clerk of the court to which the appeal is made.

(3) Within 15 days after the transcript is filed, any party may move the trial court for an order to correct any errors appearing in the transcript or, where the interests of justice require, to have additional parts of the proceedings included in the transcript. A copy of any such motion shall be filed with the court to which the appeal is made. The trial court shall direct the making of such corrections and the adding of such matter as may be appropriate and shall fix the time within which such corrections or additions shall be made.

(4) Upon the denial of a motion to correct or add to the transcript, or upon the making of such corrections or additions as may be ordered, whichever last occurs, the trial court shall enter an order settling the transcript and send copies thereof to each of the parties or their attorneys and to the State Court Administrator. In the absence of a motion to correct or add to the transcript, the transcript shall be deemed automatically settled 15 days after it is filed.
[1959 c.558 §12; 1971 c.193 §21; 1971 c.565 §11]

19.080 [Amended by 1959 c.558 §18; renumbered 19.118]

19.084 One original transcript required; cost of preparation. (1) Where more than one appeal is taken from the same judgment, only one original transcript shall be filed.

(2) The cost of preparing the transcript and copy shall be paid by the party designating it to be made, except that where a party has designated additional parts of the proceedings to be included in the transcript as provided in subsection (3) of ORS 19.074, the trial court on motion of such party may direct that the cost of preparing all or part of the additional parts of the transcript be paid by the appellant if it appears that such additional parts are necessary to the determination of the appeal. The cost of preparing the original and copy of the transcript shall be

taxable as part of the costs on appeal.
[1959 c.558 §13]

19.088 Agreed narrative statement. In lieu of or in addition to a transcript, the parties may prepare an agreed narrative statement of the proceedings below or parts thereof. The narrative statement shall be signed by the parties or their attorneys and shall be filed with the clerk within 30 days after the filing of the notice of appeal. When such a statement is filed, the appellant shall promptly notify the State Court Administrator, at Salem.
[1959 c.558 §14; 1969 c.198 §42; 1971 c.193 §22]

19.090 [Repealed by 1959 c.558 §51]

19.094 [1959 c.558 §15; 1963 c.372 §1; 1969 c.198 §43; repealed by 1971 c.565 §12 (19.095 enacted in lieu of 19.094)]

19.095 Time extensions. Extensions of time for the performance of any act in connection with the preparation of the record may be granted only by the court to which the appeal is made and under such rules as that court may prescribe.
[1971 c. 565 §13 (19.095 enacted in lieu of 19.094)]

19.098 Delivery of record to appellate court; when returned. (1) The trial court clerk shall, upon request of the State Court Administrator, deliver the record of the case.

(2) Unless otherwise ordered by the court to which the appeal is made, the trial court file and the exhibits shall be returned to the clerk after the appeal has been disposed of.
[1959 c.558 §16; 1969 c.198 §44; 1971 c.193 §23; 1971 c.565 §14]

19.100 [Repealed by 1959 c.558 §51]

19.104 Service of papers. Except as otherwise provided in ORS 19.023 to 19.190, where ORS 19.023 to 19.190 require any paper to be served and filed, the paper shall be served in the manner provided in ORS 16.780 to 16.800 on all other parties who have appeared in the action, suit or proceeding and who are not represented by the same counsel as the party serving the paper, and shall be filed, with proof of service indorsed thereon, with the trial court clerk.
[1959 c.558 §27]

19.108 Defective record; dismissal of appeal. (1) When it appears to the court to which the appeal is made that the record is erroneous or incomplete in any particular substantially affecting the merits of the appeal, on motion of a party or on its own motion the court may make such order to correct or supplement the record as may be just or may dismiss the appeal if the error or omission is without reasonable excuse.

(2) The court to which the appeal is made at any time, or the trial court at any time before the record has been delivered to the court to which the appeal is made as provided in ORS 19.098, may dismiss the appeal on motion based upon stipulation of the parties.

(3) Where such a dismissal is made by the trial court, the clerk shall send a certified copy of the order to the State Court Administrator.

(4) The dismissal shall operate as an affirmance of the judgment appealed from.
[1959 c.558 §20 (enacted in lieu of 19.110); 1969 c.198 §45; 1971 c.193 §24]

19.110 [Repealed by 1959 c.558 §19 (ORS 19.108 enacted in lieu of ORS 19.110)]

19.114 Bill of exceptions not required. A bill of exceptions is not required. For the purposes of section 3, Article VII (Amended) of the Oregon Constitution, the transcript, as defined in ORS 19.005, is the bill of exceptions.
[1959 c.558 §22]

19.118 When appeal heard at Pendleton. An appeal taken from any circuit court in any county lying east of the Cascade Mountains, except Klamath and Lake, shall be heard at Pendleton, unless otherwise ordered by the Court of Appeals if it has jurisdiction of the cause or if the cause is before the Supreme Court unless otherwise stipulated between the parties. All other appeals to the Supreme Court or to the Court of Appeals shall be heard at Salem, unless otherwise ordered by the court.
[Formerly 19.080; 1969 c.198 §46]

19.120 [Repealed by 1959 c.558 §51]

19.125 Scope of review by Supreme Court. (1) Upon an appeal from a judgment in an action at law, the scope of review shall be as provided in section 3, Article VII (Amended) of the Oregon Constitution.

(2) No judgment shall be reversed or modified except for error substantially affecting the rights of a party.

(3) Upon an appeal from a decree in a suit in equity, the cause shall be tried anew upon the record.
[1959 c.558 §21; 1965 c.177 §6]

19.130 Action by appellate court on appeal; new trial; reversal upon loss or destruction of reporter's notes, tapes or audio records. (1) Upon an appeal, the court to which the appeal is made may affirm, reverse or modify the judgment or part thereof appealed from 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 might have been given in the court below; and may, if necessary and proper, order a new trial.

(2) Where in the trial court a motion for judgment notwithstanding the verdict and a motion for a new trial were made in the alternative, and an appeal is taken from a judgment notwithstanding the verdict or an order granting a new trial, the court to which the appeal is made may consider the correctness of the ruling of the trial court on either or both motions if such ruling is assigned as erroneous in the brief of any party affected by the appeal, without the necessity of a cross-appeal.

(3) 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 appealed from may be reversed and a new trial ordered as justice may require.

[Amended by 1955 c.497 §6; 1959 c.558 §24; 1969 c.198 §47]

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 [Amended by 1959 c.33 §1; repealed by 1959 c.558 §25 (ORS 19.190 enacted in lieu of ORS 19.150)]

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.

19.170 Powers of successor judge in regard to appeal. In case of death, resignation, expiration of the term of office or vacancy in office for any other cause of the judge before whom the matter was tried, or in case illness or other cause prevents him from performing his duties, his successor in office or any other judge assigned to perform his duties, may take any action with respect to the appeal which the judge who tried it could take.

[1959 c.558 §17]

19.180 Memorandum decisions. The Supreme Court or the Court of Appeals may decide cases before it by means of memorandum decisions and shall prepare full opinions only in such cases as it deems proper.

[1959 c.558 §23; 1969 c.198 §48]

19.190 How decision of appellate court given and enforced; effect as to lien of judgment. (1) The decision of the court to which the appeal is made 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 court to which the appeal is made. 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 court to which the appeal is made, in like manner and with like effect as if the same was given in the court below.

(2) If judgment 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.

(3) Except as provided in ORS 18.350, an appeal shall not discharge the lien of a judgment 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.

[1959 c.558 §26 (enacted in lieu of 19.150; 1969 c.198 §49]

CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173.170, I, Robert W. Lundy, 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 December 1, 1971.

Robert W. Lundy
Legislative Counsel