Chapter 105

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Actions and Suits Involving Property Rights

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ACTIONS FOR RECOVERY OF REAL PROPERTY

105.005 Right of action. Any person who has a legal estate in real property and a present right to the possession thereof, may recover possession of the property, with damages for withholding possession, by an action at law. The action shall be commenced against the person in the actual possession of the property at the time, or if the property is not in the actual possession of anyone, then against the person acting as the owner thereof.

105.010 Contents of complaint. The plaintiff in his complaint shall set forth:

(1) The nature of his estate in the property, whether it be in fee, for life, or for a term of years; including, when necessary, for whose life and the duration of the term.

(2) That he is entitled to the possession thereof.

(3) That the defendant wrongfully withholds the property from him to his damage for such sum as is therein claimed.

(4) A description of the property with such certainty as to enable the possession thereof to be delivered if there is recovery.

105.015 Answer. The defendant shall not be allowed to give in evidence any estate, license or right of possession in the property in himself or another, unless the same is pleaded in his answer. If pleaded, the nature and duration of the estate, license or right of possession shall be set forth with the certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend.

105.020 Substitution of landlord for tenant. A defendant who is in actual possession may, for answer, plead that he is in possession only as tenant of another; naming his landlord and his place of residence. Thereupon the landlord, if he applies therefor, shall be made defendant in place of the tenant and the action shall proceed in all respects as if originally commenced against him. If the landlord does not apply to be made defendant within the day the tenant is allowed to answer, he shall not be allowed to, but shall be made defendant if the plaintiff requires it. If the landlord is made defendant on motion of the plaintiff he shall be required to appear and answer within 10 days from notice of the pendency of the action and the order making him defendant, or such further notice as the court or judge thereof may prescribe.

105.025 Verdict. The jury by their verdict shall find as follows:

(1) If the verdict is for the plaintiff, that he is entitled to the possession of all or a part of the property described in the complaint, or that he owns an undivided share or interest in all or a part of the property; including the nature and duration of his estate in such property.

(2) If the verdict is for the defendant, that the plaintiff is not entitled to the possession of the property described in the complaint, or the part that the defendant defends, and the estate, license or right to possession in such property established on the trial by the defendant, if any, as the same is required to be pleaded.

105.030 Damages for withholding; setoff for improvements. The plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and for any period that may elapse from the commencement to the time of giving a verdict, excluding the value of the use of permanent improvements made by the defendant. When permanent improvements have been made upon the property by the defendant, or those under whom he claims, while holding under color of title in good faith and adverse to the claim of the plaintiff, the value of the improvements at the time of trial shall be allowed as a setoff against such damages.

105.035 Judgment when plaintiff's right to possession expires. If the right of the plaintiff to the possession of the property expires after the commencement of the action and before the trial, the verdict shall be given according to the fact and judgment shall be given only for the damages.

105.040 Order to make survey. (1) The court or judge thereof may, on motion, and after notice to the adverse party, or cause shown, grant an order allowing the party applying therefor to enter upon the property in controversy and make survey and admeasurement thereof for the purposes of the action.

(2) The order shall describe the property. A copy of the order shall be served upon the defendant, and thereupon the party

may enter upon the property, and make the survey and admeasurement. If any unnecessary injury is done to the premises, the applying party is liable therefor.

105.045 Action not prejudiced by alienation by person in possession. An action for the recovery of the possession of real property against a person in possession is not prejudiced by any alienation made by such person, either before or after the commencement of the action. If the alienation is made after the commencement of the action, and the defendant does not satisfy the judgment recovered for damages for withholding the possession, the damages may be recovered by action against the purchaser.

105.050 Widow and cotenant shall prove ouster. In an action for the recovery of dower before admeasurement or by a tenant in common of real property against a cotenant, the plaintiff shall show, in addition to the evidence of his right of possession, that the defendant either denied the plaintiff's right or did some act amounting to a denial.

105.055 Conclusiveness of judgment. (1) Except as provided in subsection (2), the judgment in an action to recover the possession of real property is conclusive as to the estate in the property and the right to the possession thereof, so far as the same is thereby determined, upon the party against whom the judgment is given, and against all persons claiming from, through or under such party, after the commencement of the action.

(2) When service of the summons is made by publication and judgment is given for want of an answer, at any time within two years from the entry thereof the defendant or his successor in interest as to the whole or any part of the property, shall, upon application to the court or judge thereof, be entitled to an order vacating the judgment and granting him a new trial upon the payment of the costs of the action.

(3) In an action against a tenant the judgment is conclusive against a landlord, who has been made defendant in place of the tenant, to the same extent as if the action had been originally commenced against him.

105.060 Effect of new trial on plaintiff's possession. If the plaintiff has taken possession of the property before the judgment is set aside and a new trial granted as provided in subsection (2) of ORS 105.055, the possession is not thereby affected in any way. If judgment is given for the defendant in the new trial, he is entitled to restitution by execution in the same manner as if he were plaintiff.

105.065 Admeasurement of dower after judgment. In an action to recover the possession of real property by a tenant in dower or her successor in interest when the estate in dower has not been admeasured before the commencement of the action, the plaintiff shall not have execution to deliver the possession thereof until it is admeasured, as follows:

(1) At any time after the entry of judgment in favor of the plaintiff, he may, upon notice to the adverse party, move the court for the appointment of referees to admeasure the dower out of the real property recovered by the action. The court shall allow the motion unless it appears probable on the hearing that a partition of the property cannot be made without prejudice to the interests of the other owners. In the latter case the court shall disallow the motion, and thereafter the plaintiff shall only proceed for partition or sale of the real property as provided in ORS 105.205 to 105.405.

(2) If the court allows the motion the proceedings shall be conducted as provided in ORS 105.205 to 105.405. At any time after the confirmation of the report of the referees the plaintiff may have execution for the delivery of the possession of the property according to the admeasurement thereof and for any damages recovered for withholding the property, if the damages remain unsatisfied.

(3) If the motion for admeasurement is made during the term in which judgment was given, the notice thereof shall be served on the adverse party at such time as the court by general rule or special order may prescribe.

105.070 Rights of donee under Donation Law. In an action at law for the recovery of the possession of real property, if either party claims the property as a donee of the United States under the Act of Congress approved September 27, 1850, commonly called the Donation Law, or the Acts amendatory thereto, such party from the date of his settlement on the property, as provided in said Acts, is deemed to have a legal estate in fee in the property. The estate shall continue upon the condition that he performs the conditions required by such Acts, and is unconditional and indefeasible after the

performance of such condition. If both plaintiff and defendant claim title to the same real property by virtue of settlement under such Acts, the settlement and the performance of the subsequent conditions shall be conclusively presumed in favor of the party having, or claiming under, the elder patent certificate or patent, unless it appears upon the face of such certificate or patent that it is absolutely void.

105.075 Notice to quit; action to recover possession not affected by forcible entry or wrongful detainer. In any action to recover the possession of real property, as provided for in ORS 105.005, notice to quit, when necessary, may be given as prescribed in ORS 91.050 to 91.110 and ORS 105.120. Nothing in ORS 105.105 to 105.160 prevents such action from being maintained for the recovery of the possession of real property although the entry of the defendant is forcible or the holding is unlawful and with force as defined in ORS 105.105.

105.080 Reimbursement of tenants in common obtaining possession; lien. In all cases where property in this state is or has been claimed or owned by residents of this state in common with others, and such residents have obtained or shall obtain the possession of the property at their own cost, expense or labor, they are entitled to reimbursement from the remaining claimant in common of the property, according to their proportionate interest therein. Residents so obtaining possession of such property have a lien upon it until the remaining claimant has paid or tendered such proportionate share of the reasonable costs, expenses or labor aforesaid.

105.085 to 105.100 [Reserved for expansion]

FORCIBLE ENTRY AND WRONGFUL DETAINER

105.105 Entry to be lawful and peaceable only. No person shall enter upon any land, tenement or other real property unless the right of entry is given by law. When the right of entry is given by law the entry shall be made in a peaceable manner and without force.

105.110 Action for forcible entry or wrongful detainer. When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and possession is held by force, the person entitled to the premises may maintain in the county where the property is situated an action to recover the possession thereof in the circuit court, district court or before any justice of the peace of the county.

105.115 Causes of unlawful holding by force. The following are causes of unlawful holding by force within the meaning of ORS 105.110 and 105.125:

(1) When the tenant or person in possession of any premises fails or refuses to pay rent within 10 days after it is due under the lease or agreement under which he holds, or to deliver possession of the premises after being in default on payment of rent for 10 days.

(2) When the lease by its terms has expired and has not been renewed, or when the tenant or person in possession is holding from month to month, or year to year, and remains in possession after notice to quit as provided in ORS 105.120, or is holding contrary to any condition or covenant of the lease or is holding possession without any written lease or agreement.

105.120 Notice necessary to maintain action in certain cases; waiver of notice; effect of advance payments of rent. (1) An action for the recovery of the possession of the premises may be maintained in cases provided in subsection (2) of ORS 105.115, when the notice to terminate the tenancy or to quit has been served upon the tenant or person in possession in the manner prescribed by ORS 91.110 and for the period prescribed by ORS 91.060 to 91.080 before the commencement of the action, unless the leasing or occupation is for the purpose of farming or agriculture, in which case such notice must be served for a period of 90 days before the commencement of the action.

(2) Any person entering into the possession of real estate under written lease as the tenant of another may, by the terms of his lease, waive the giving of any notice required by this section.

(3) The service of a notice to quit upon a tenant or person in possession does not authorize an action to be maintained against him for the possession of premises before the expiration of any period for which the tenant or person has paid the rent of the premises in advance.

105.125 Complaint. In an action pursuant to ORS 105.110 it is sufficient to state in the complaint:

(1) A description of the premises with convenient certainty;

(2) That the defendant is in possession of the premises;

(3) That he entered upon the premises with force or unlawfully holds the premises with force; and

(4) That the plaintiff is entitled to the possession of the premises.

105.130 How action conducted. Except as provided in ORS 105.135 to 105.160, an action pursuant to ORS 105.110 shall be conducted in all respects as other actions in courts of this state.

105.135 Service and return of summons. The summons shall be served and returned as in other actions. The service shall be not less than two or more than four days before the day of trial appointed by the court.

105.140 Continuance. No continuance shall be granted for a longer period than two days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant.

105.145 Judgment on trial by court. If the action is tried by the court without a jury, and after hearing the evidence it concludes that the complaint is not true, it shall enter judgment against the plaintiff for costs and disbursements. If the court finds the complaint true or if judgment is rendered by default, it shall render a general judgment against the defendant and in favor of the plaintiff, for restitution of the premises and the costs and disbursements of the action. If the court finds the complaint true in part, it shall render judgment for the restitution of such part only, and the costs and disbursements shall be taxed as the court deems just and equitable.

105.150 Verdict and judgment on trial by jury. If the action is tried by a jury and they find the complaint true, they shall render a general verdict of guilty against the defendant; if not true, they shall render a general verdict of not guilty; if true in part, they shall render a verdict setting forth the facts they find, and the court shall render judgment according to the verdict.

105.155 Form of execution. The execution, should judgment of restitution be rendered, may be in the following form:

State of Oregon, }
County of ——— } ss.

To the sheriff or any constable of the county:

Whereas, a certain action for the forcible entry and detention, (or the forcible detention) of the following described premises, to wit: ————————, lately tried before the above entitled court, wherein ——— was plaintiff and ——— was defendant, judgment was rendered on the —— day of ———, A. D., ——, that the plaintiff ——— have restitution of the premises, and also that he recover the costs and disbursements in the sum of $———;

In the name of the State of Oregon, you are, therefore, hereby commanded to cause the defendant and his goods and chattels to be forthwith removed from the premises and the plaintiff is to have restitution of the same. In the event the goods and chattels are not promptly removed thereafter by the defendant you are authorized and empowered to cause the same to be removed to a safe place for storage. You are also commanded to levy on the goods and chattels of the defendant, and make the costs and disbursements, aforesaid, and all accruing costs, and to make legal service and due return of this writ.

Witness my hand and official seal (if issued out of a court of record) this ——— day of ———, A. D., ———.

———————

Justice of the peace, or clerk of the district or circuit court.

105.160 Additional undertaking on appeal. If judgment is rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from the judgment until he gives, in addition to the undertaking now required by law upon appeal, an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff if the judgment is affirmed on appeal of twice the rental value of the real property of which restitution is adjudged from the commencement of the action in which the judgment was rendered until final judgment in the action.

105.165 to 105.200 [Reserved for expansion]

PARTITION

105.205 Who may maintain partition. When several persons hold real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, or when several persons hold as tenants in common a vested remainder or reversion in any real property, any one or more of them may maintain a suit for the partition of the real property according to the respective rights of the persons interested therein, and for a sale of all or a part of the property if it appears that a partition cannot be had without great prejudice to the owner.

105.210 When and how partition prevented. If the court finds that the property can neither be partitioned nor sold without great prejudice to the owners, the court may receive evidence as to the value of the respective interests, fix the value thereof, and make an order permitting the owners, objecting to the partition or sale, to borrow money upon the property with which to pay off the claims, as so fixed, of the persons demanding a partition or sale. Upon payment of the amount in court, as so fixed, for the satisfaction of the claims of those demanding partition or sale, all right and interest in the property of the parties so demanding partition or sale is satisfied fully and discharged and the property is free and clear of all claims of any such parties.

105.215 Complaint. The interest of all known and unknown persons in the property shall be specifically and particularly set forth in the complaint for partition, as far as known to the plaintiff. If one or more of the parties, or the share or quantity of interest of any of the parties, is unknown to the plaintiff or is uncertain or contingent, or if the ownership of the inheritance depends upon an executory devise, or the remainder is a contingent remainder, so that the parties cannot be named, that fact shall be set forth in the complaint.

105.220 Tenants and lien creditors as defendants; liens on undivided interests. The plaintiff shall make a tenant in dower, by the curtesy, for life or for years of any portion of the entire property and creditors having a lien upon any portion of the property defendants in the suit. When the lien is upon an undivided interest or estate of any of the parties and a partition is made, it is thenceforth a lien only upon the share assigned to such party; but such share shall be first charged with its just proportion of the cost of the partition in preference to such lien.

105.225 Summons; to whom directed. The summons shall be directed by name to all the tenants in common who are known, to all lien creditors who are made parties to the suit and generally to all persons unknown having or claiming an interest or estate in the property.

105.230 Service by publication. If a party having a share or interest in or lien upon the property is unknown, or any of the known parties reside out of the state or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on the absent or unknown party by publication, directed by the court or judge, as in ordinary cases. When service of the summons is made by publication it must be accompanied by a brief description of the property which is the subject of the suit.

105.235 Answer. The defendant shall set forth in his answer the nature and extent of his interest in the property. If he is a lien creditor he shall set forth how the lien was created, the amount of the debt secured thereby and remaining due, and whether such debt is secured in any other way, and if so, the nature of the other security.

105.240 Rights determinable; ascertainment of title where defendant defaults or sale is necessary. The rights of the plaintiffs and defendants may be put in issue, tried and determined in the suit. If a defendant fails to answer, or if a sale of the property is necessary, the title shall be ascertained by proof to the satisfaction of the court before the decree for partition or sale is given.

105.245 Sale or partition ordered by court. If it is alleged in the complaint and established by evidence, or if it appears by the evidence to the satisfaction of the court without an allegation in the complaint, that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale of the property, and for that purpose

may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall decree a partition according to the respective rights of the parties, as ascertained by the court. The court shall appoint three referees to partition the property and shall designate the portion to remain undivided for the owners whose interest remain unknown or not ascertained.

105.250 Compensation when equal partition cannot be made. When it appears that partition cannot be made without prejudice to the rights and interests of some of the parties, the court may adjudge compensation to be made by one party to another on account of the inequality of partition. Compensation shall not be required to be paid to others by owners unknown, nor by infants unless it appears that an infant has personal property sufficient for that purpose, and that his interest will be promoted thereby.

105.255 How referees make partition; report. In making the partition the referees shall divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court. They shall designate the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them. The referees shall make a report of their proceedings, specifying therein the manner of executing their trust and describing the property divided and the shares allotted to each party with a particular description of each share.

105.260 Power of court over report; final decree. The court may confirm or set aside the report in whole or in part and if necessary appoint new referees. Upon the report being confirmed, a decree shall be given stating that the partition shall be effectual forever. Except as provided in ORS 105.265, the decree is binding and conclusive:

(1) On all parties named therein, and their legal representatives, who have at the time any interest in any part of the property divided as owners in fee or as tenants for life or for years.

(2) On all parties named therein, and their legal representatives, entitled to the reversion, remainder or inheritance of the property or any part thereof after the termination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest in the property.

(3) On all parties named therein, or their legal representatives, who have an interest in any undivided share of the property as tenants for years or for life.

(4) On all persons interested in the property who are unknown, to whom notice was given of the application for partition by publication, as directed by ORS 105.230.

(5) On all persons claiming from parties or persons listed in subsections (1) to (4) of this section.

105.265 Persons not affected by decree. The decree provided for in ORS 105.260 shall not affect tenants for years or for life of the whole of the property which is the subject of partition. Except as provided in ORS 105.260, the decree and partition shall not preclude any person from claiming title to the property in question, or from controverting the title of the parties between whom the partition was made.

105.270 Order of sale on referees' report. If the referees report to the court that the property for which partition has been decreed, or any separate portion thereof, is so situated that a partition thereof cannot be made without great prejudice to the owners, and the court is satisfied that the report is correct, it may, by an order, direct the referees to sell the property or separate portion thereof so situated.

105.275 Conclusiveness of order confirming report. If the report of the referee is confirmed the order of confirmation is binding and conclusive upon all parties to the suit.

105.280 How sale made; notice of sale. All sales of real property made by the referees shall be made by public auction to the highest bidder in the manner required for the sale of real property on execution. The notice shall state the terms of sale. If the property or any part of it is to be sold subject to a prior estate, charge or lien, that fact shall be stated in the notice.

105.285 Distribution of proceeds of sale. The proceeds of the sale of encumbered property shall be distributed by the decree of the court as follows:

(1) To pay the property's just proportion of the general costs of the suit.

(2) To pay the costs of the reference.

(3) To satisfy the several liens in their order of priority, by payment of the sums due and to become due, according to the decree.

(4) The residue among the owners of the property sold, according to their respective shares.

105.290 Distribution of proceeds by referee or payment into court. The proceeds of sale and the securities taken by the referees, or any part thereof, shall be distributed by them to the persons entitled thereto whenever the court so directs. If no such direction is given, all proceeds and securities shall be paid into court or deposited as directed by the court.

105.295 Continuance of suit after proceeds paid into court. When the proceeds of sales of any shares or parcel belonging to known persons who are parties to the suit are paid into court, the suit may be continued as between such parties for the determination by the court of their respective claims thereto. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require the parties to present the facts or law in controversy by pleadings as in an original suit.

105.300 When lienholder has other securities. Whenever any party to the suit, who holds a lien upon any part of the property has other securities for the payment of the amount of the lien, the court may, in its discretion, order the securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property.

105.305 Credit allowed. The court shall, in the order of sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises which it may direct to be sold on credit; and for that portion of which the purchase money is required by ORS 105.370 to be invested for the benefit of unknown owners, infants or parties out of the state. The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase money of such parts of the property as are directed by the court to be sold on credit, in the name of the clerk of the court and his successor in office. When there is a known owner of full age, the security for his share shall be executed in his name.

105.310 Setting off estate for life or years in part not sold. When only a part of the property is ordered to be sold, the whole of an estate for life or years in an undivided share of the property may be set off in any part of the property not ordered to be sold.

105.315 Disposition of life estate or leasehold. When the estate of any tenant for life or years in any undivided part of the property in question was admitted by the parties or ascertained by the court to be existing at the time of the order of sale, and the person entitled to such estate was made a party to the suit, the estate may be first set off out of any part of the property and a sale made of such parcel subject to the tenants prior unsold estate; but if in the judgment of the court a due regard to the interest of all the parties requires that such estate should also be sold, the sale of the estate may be ordered.

105.320 Compensation of tenants in case of sale. Any person entitled to an estate for life or years in any undivided part of the property, whose estate has been sold, shall be entitled to receive such sum in gross as is, deemed, upon principles of law applicable to annuities, a reasonable satisfaction for the estate. If the person so entitled consents to that sum, he shall accept it by executing an instrument that is duly acknowledged or proved in the same manner as deeds for the purpose of record, and filed with the clerk.

105.325 When court determines value of tenancy. If a tenant does not consent pursuant to ORS 105.320, before the report of sale, the court shall ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be invested for the tenant's benefit, and shall order that sum to be deposited in court for that purpose.

105.330 Rules for determining value of certain estates. The proportion of the proceeds of the sale to be invested, as provided in ORS 105.325, shall be ascertained and determined as follows:

(1) If an estate in dower or curtesy is included in the order of sale its proportion shall be one-half of the proceeds of the sale of the property, or of the sale of the undi-

vided share in the property upon which the claim or dower existed.

(2) If any other estate for life or years is included in the order of sale its proportion shall be the whole proceeds of the sale of the property, or of the sale of an undivided share of the property in which the estate existed.

105.335 Protection of unknown tenants. If any person entitled to an estate for life or years is unknown, the court shall provide for the protection of his rights in the same manner, as far as possible, as if he were known and had appeared.

105.340 Provision for inchoate or future rights or interests. In all cases of sales in partition when it appears that a married woman has an inchoate right of dower in any of the property sold, or that any person has a vested or contingent future right or estate therein, the court shall ascertain and settle the proportional value of the inchoate, contingent or vested right or estate according to the principles of law applicable to annuities and survivorship, and shall direct such proportion of the proceeds of sale to be invested, secured or paid over in such manner as to protect the rights and interests of the parties.

105.345 Notice of terms of sale; separate sale of distinct parcels. In all cases of sales of property, the terms shall be made known at the time. If the premises consist of distinct farms or lots they shall be sold separately, or otherwise if the court so directs.

105.350 Purchase by referee or guardian forbidden. Neither of the referees, nor any person for the benefit of either of them, shall be interested in any purchase at a partition sale; nor shall the guardian of an infant party be interested in the purchase of any real property that is the subject of the suit, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

105.355 Report of sale. After completing the sale the referees shall report it to the court with the description of the different parcels of land sold to each purchaser, the name of the purchaser, the price paid or secured, the terms and conditions of the sale and the securities, if any, taken. The report shall be filed with the clerk.

105.360 Exception to report; confirmation of sale. The report of sale may be excepted to by any party entitled to a share of the proceeds in like manner and with like effect as in ordinary cases. If the sale is confirmed the order of confirmation shall direct the referees to execute conveyances and take securities pursuant to the sale, which acts they are hereby authorized to do. The order shall discharge the property of the estate or interest of every person mentioned in ORS 105.260 and of tenants for life or years of the property sold. The order shall be binding and conclusive upon all such persons as if it were a decree for the partition of such property and except as provided in ORS 105.350, upon all persons whomsoever as to the regularity of the proceedings concerning such sale.

105.365 Purchase by encumbrancer or party entitled to share. When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

105.370 Investment of proceeds for certain parties. When there are proceeds of sale belonging to an unknown owner, or to a person without the state who has no legal representative within it, or when there are proceeds arising from the sale of an estate subject to the prior estate of a tenant for life or years, which are paid into court or otherwise deposited by order of the court, such proceeds shall be invested in securities on interest for the benefit of the persons entitled thereto.

105.375 In whose name securities taken or investments made. Except as provided in ORS 105.380, security for the proceeds of sale shall be taken or investments of the proceeds shall be made in the name of the clerk of the court and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the court.

105.380 When securities are payable to parties. When security is taken by the referees on a sale, and the parties interested in the security, by an instrument in writing under their hands delivered to the referees, agree upon the shares and proportions to which they are entitled, or when shares and proportions have been previously adjudged

by the court, the securities shall be taken in the names of and payable to the parties entitled thereto, and shall be delivered to such parties upon their receipt therefor. Such agreement and receipt shall be returned and filed with the clerk.

105.385 Clerk's treatment of securities and investments. The clerk in whose name a security is taken or by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due and apply and invest it as the court may direct. He shall file in his office all securities taken, and keep an account in a book provided and kept for that purpose in his office, free for inspection by all persons, of investments and moneys received and disposed of by him.

105.390 When proceeds paid to guardian of infant. When the share of an infant is sold, the proceeds of the sale may be paid by the referees making the sale to his general guardian or the special guardian appointed for him in the suit, upon the guardian giving the security required by law or ordered by the court.

105.395 Payment of proceeds to guardian of incompetent. When the interest in real property of an insane person, or other person adjudged incapable of conducting his own affairs, has been sold, his share of the proceeds shall be given, on his behalf, to the guardian who is entitled to the custody and management of his estate if the guardian executes, with sufficient sureties, an undertaking approved by the judge of the court, that he will faithfully discharge the trust reposed in him and will render a true and just account to the person entitled to the proceeds or to his legal representative.

105.400 When guardian may consent to partition. When an infant, insane person or other person adjudged incapable of conducting his own affairs, is interested in real estate held in common or in any other manner so as to authorize his being made a party to an action for the partition thereof, the general guardian of the infant or the guardian entitled to the custody and management of the estate of insane or other incapable person may consent to a partition without suit and agree upon the share to be set off to such infant or other incapable person. When the court so orders, such guardian may execute a release on behalf of such infant or other incapable person to the owners of the other shares of the parts to which they are respectively entitled.

105.405 Costs and expenses of partition. (1) The expenses of the referees, including those of a surveyor and his assistants when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, shall be paid by the plaintiff, and may be allowed as part of the charges.

(2) The costs of partition, including fees of referees, reasonable attorney fees to be determined by the court for services performed for the common benefit of all parties and other disbursements, shall be paid by the parties entitled to share in the lands divided in proportion to their respective interests therein, and shall be included and specified in the decree. They shall be a lien on the several shares, and the decree may be enforced by execution against the parties separately. When, however, a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by any or all of the litigating parties.

105.410 to 105.500 [Reserved for expansion]

ACTIONS AND SUITS FOR NUISANCES

105.505 Remedies available for private nuisance. Any person whose property or personal enjoyment thereof is affected by a private nuisance, may maintain an action at law for damages therefor. If judgment is given for the plaintiff in the action, he may, on motion, in addition to the execution to enforce the judgment, obtain an order allowing a warrant to issue to the sheriff to abate the nuisance. The motion must be made at the term at which judgment is given, and shall be allowed of course, unless it appears on the hearing that the nuisance has ceased or that such remedy is inadequate to abate or prevent the continuance of the nuisance, in which latter case the plaintiff may proceed in equity to have the defendant enjoined.

105.510 Procedure for abating a nuisance. If the order to abate provided for in ORS 105.505 is made, the clerk shall when requested by the plaintiff within six months after the order is made, issue a warrant

directed to the sheriff, requiring him forthwith to abate the nuisance at the expense of the defendant and to return the warrant as soon thereafter as possible, with his proceedings indorsed thereon. The expense of abating the nuisance may be levied by the sheriff on the property of the defendant and in this respect the warrant is to be deemed an execution against property.

105.515 Stay of issuance of warrant to abate. At any time before an order to abate is made or a warrant to abate is issued, the defendant may, on motion to the court or judge thereof, have an order to stay the issuing of the warrant for such period as may be necessary, not exceeding six months, to allow the defendant to abate the nuisance himself, upon his giving an undertaking to the plaintiff in a sufficient amount, with one or more sureties, to the satisfaction of the court or judge thereof, that he will abate the nuisance within the time and in the manner specified in the order.

105.520 Justification of sureties; proceedings when nuisance is not abated. If the plaintiff is not notified of the time and place of the application for the order provided for in ORS 105.515, the sureties therein provided for shall justify as bail upon arrest, otherwise the justification may be omitted unless the plaintiff requires it. If the order is made and undertaking given, and the defendant fails to abate the nuisance within the time specified in the order, at any time within six months thereafter, the warrant for the abatement of the nuisance may issue as if the warrant had not been stayed.

105.525 Abatement of public nuisances in certain counties. Whenever it appears to the county court or the board of county commissioners of any county in this state having more than 50,000 inhabitants, from the petition of 10 residents of the county residing in any one voting precinct of the county, no part of which is within the corporate limits of a city or town, that a nuisance exists in the precinct by reason of the maintenance on property therein of refuse dumps, junk yards, incinerators or stable, or the operation of any business which by reason of smoke, dust, noise or noisome odors interferes with the peace and quiet of the residents in the vicinity, or with the quiet enjoyment of residence property within the vicinity, the county court or board of county commissioners may order that a notice be issued and served upon the owner and occupant of the property where the nuisance is alleged to be maintained, requiring the owner and occupant to appear before it at a time and place named in the notice, to show cause why a nuisance should not be declared to exist. The time for appearance shall not be less than 10 days from the service of the notice. The notice shall be served in the manner provided by law for the service of summons. Such a cause of action shall not be maintained against any city, county or other municipal corporation or agencies thereof.

105.530 Hearing and suit to abate. At the time and place fixed in the notice provided for in ORS 105.525, the county court or the board of county commissioners shall hold a hearing on the question of the existence of the nuisance and shall have power to subpena witnesses and to compel their attendance. If, after the hearing, the county court or the board of county commissioners finds that a nuisance exists, it shall declare the existence of a nuisance by order entered in its journal, and shall order a suit to be brought in the name of the county for its abatement.

105.535 to 105.600 [Reserved for expansion]

SUITS TO QUIET TITLE AND REMOVE CLOUD

105.605 Suits to determine adverse claims when claimant not in possession. Any person claiming an interest or estate in real property not in the actual possession of another may maintain a suit in equity against another who claims an adverse interest or estate therein for the purpose of determining such conflicting or adverse claims, interests or estates. Any municipal corporation or county of this state claiming any interest or estate in real property which is not in the actual possession of another, including real property acquired by foreclosure of delinquent tax liens situated in the same county, may maintain a suit in equity against all persons who claim an adverse interest or estate in all or any part of the property for the purpose of determining the conflicting or adverse claims, interests or estates. One or more parcels may be included in one suit and the issue made by the pleadings in any suit by a municipality or county relating only to a certain parcel

or part of the real property, shall be separately tried and determined upon motion of any interested party.

105.610 Suit to cancel patent of donee under Donation Law. Whenever any person claims real property as a donee of the United States by virtue of a settlement thereon under the Act of Congress approved September 27, 1850, commonly called the Donation Law, or the Acts amendatory thereto, and the patent for such property, or any portion thereof, was wrongfully issued to another, the person may maintain a suit in equity against the person to whom the patent was issued, or those claiming under him, for the purpose of having the patent canceled, and the estate or interest of the plaintiff in the property ascertained and established. In such suit, the party entitled to and making the settlement under such Acts of Congress, and complying with the subsequent conditions thereby required, is deemed to have a legal estate in fee in the property although the patent therefor was issued to another.

105.615 to 105.700 [Reserved for expansion]

SUIT TO ESTABLISH BOUNDARY

105.705 Right to bring suit. When any dispute or controversy exists between owners of adjacent or contiguous lands in this state, concerning the boundary lines thereof, or the location of the line dividing such lands, any party to the dispute or controversy may bring a suit in equity in the circuit court in the county where all or part of the lands are situated, for the purpose of having the controversy or dispute determined, and the boundary line or dividing line ascertained and marked by proper monuments upon the ground where such line is ascertained.

105.710 Pleadings. The complaint in a boundary suit is sufficient if it appears therefrom that the plaintiff and defendant are owners of adjacent lands, some part of which is in the county in which the suit is brought and that there is a controversy or dispute between the parties concerning their boundary or dividing line. It shall not be necessary to set forth the nature of the dispute or controversy except that the plaintiff shall describe the boundary or dividing line as he claims it to be. The defendant in his answer shall set forth the nature of his claim with reference to the location of the line in controversy.

105.715 Mode of proceeding. The mode of proceeding in a boundary suit is analogous to that of other suits in equity. At the time of entering the decree fixing the true location of the disputed boundary or dividing line the court shall appoint three disinterested commissioners, one of whom shall be a practical surveyor, and shall direct the commissioners to go upon the land of the parties and establish and mark out upon the grounds, by proper marks and monuments, the boundary or dividing line as ascertained and determined by the court in its decree.

105.720 Oath and report of commissioners. Before entering upon the discharge of their duties, the commissioners shall make and file their oath in writing to faithfully and impartially perform their duties as commissioners. After designating the boundary or dividing line by proper marks and monuments they shall file in the court a report of their doings as commissioners, and the report shall be, when approved or confirmed by the court, a part of the judgment roll in the cause.

105.725 Proceedings on motion to confirm report. The report of the commissioners may be confirmed by the court upon written motion of either party to the suit whenever it appears to the court that the motion was served upon the adverse party two days before the presentation thereof and no exceptions have been filed to the report within two days after the service. If exceptions are filed to the report, they may be heard with the motion to confirm, and the court may confirm, modify or set aside the report as is just, and in the latter case may appoint a new commission or refer the matter to the same commissioners with appropriate instructions.

105.730 to 105.750 [Reserved for expansion]

ACTIONS BASED ON CHANGE OF GRADE

105.755 State liability for damages resulting from change of grade of roads other than city streets; proceedings on cause of action; limitation. (1) As used in this section, "public road" means a road used by the general public, whether designated as a state highway, county or district road or otherwise, but does not include city streets under ORS 105.760.

(2) Whenever the State Highway Commission changes the grade of any public road from a previously established or maintained grade, the state shall be liable for and shall pay just and reasonable compensation for any legal damage or injury to any real property abutting upon the public road affected by the grade change; except that the state shall not be liable for any damage or injury for any such change whenever the county has requested the State Highway Commission to make such change.

(3) Any person having any right, title or interest in any such real property has a cause of action against the state to enforce payment of the compensation. Any such action may be commenced and maintained in the circuit court for the county in which the real property is situated. Any party to any such action has the right to appeal from the final judgment of any circuit court to the Supreme Court. Any person having or claiming any right, title or interest in such real property may join as party plaintiff or may intervene in any action involving the real property in which the interest is claimed.

(4) The trial circuit court shall, in its final judgment, apportion such just compensation as it may award among the various persons found by it to own or have some right, title or interest in such real property. The awarded compensation shall be apportioned according to the rules of law governing the distribution of awards made when real property is taken under the power of eminent domain.

(5) The liability of the state terminates wholly when it pays into court the sums determined by the circuit court to be just compensation. Any cause of action granted by this section is barred unless such action is commenced within six months after the change of grade is physically completed and accepted by the State Highway Commission.
[1961 c.510 §1]

105.760 State or county liability for damages resulting from change of grade of streets; proceedings on cause of action. (1) If consent is given by the governing body of any city to change any grade of any street as such grade has been established or maintained by the consenting city and pursuant thereto the State Highway Commission or a county changes the grade, the state or the county, whichever makes such change of grade, shall be liable for and shall pay just and reasonable compensation for any damage or injury to any real property abutting upon the road or street affected by the grade change.

(2) Any person having any right, title or interest in any such real property has a cause of action against the state or against the county to enforce payment of the compensation. Any such action may be commenced and maintained in the circuit court for the county in which the real property is situated. Any party to any such action has the right to appeal from the final judgment of any circuit court to the Supreme Court. Any person having or claiming any right, title or interest in such real property may join as party plaintiff or may intervene in any action involving the real property in which the interest is claimed.

(3) The trial circuit court shall, in its final judgment, apportion such just compensation as it may award among the various persons found by it to own or have some right, title or interest in such real property. The awarded compensation shall be apportioned according to the rules of law governing the distribution of awards made when real property is taken under the power of eminent domain.

(4) The liability of the state or the liability of the county, as the case may be, terminates wholly when it pays into court the sums determined by the circuit court to be just compensation. Any cause of action granted by this section is barred unless such action is commenced within six months after the change of grade is physically completed and accepted by the State Highway Commission or the county.
[Formerly 373.040]

105.765 to 105.800 [Reserved for expansion]

MISCELLANEOUS ACTIONS

105.805 Action for waste. If a guardian or tenant in severalty, or in common, for life or for years of real property commits waste thereon, any person injured thereby may maintain an action at law for damages against the guardian or tenant. In the action there may be judgment for treble damages, forfeiture of the estate of the party committing or permitting the waste and eviction from the property. Forfeiture and eviction shall only be given in favor of the person entitled to a reversion against the tenant in possession, when the injury to the estate in reversion is determined in the action to be equal to the value of the tenant's estate or

unexpired term, or when the waste was committed with malice.

105.810 Treble damages for injury to or removal of produce, trees or shrubs. Except as provided in ORS 477.310, whenever any person, without lawful authority, wilfully injures or severs from the land of another any produce thereof or cuts down, girdles or otherwise injures or carries off any tree, timber or shrub on the land of another person, or of the state, county, United States or any public corporation, or on the street or highway in front of any person's house, or in any village, town or city lot, or cultivated grounds, or on the common or public grounds of any village, town or city, or on the street or highway in front thereof, in an action by such person, village, town, city, the United States, state, county, or public corporation, against the person committing such trespasses if judgment is given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed for the trespass. In any such action, upon plaintiff's proof of his ownership of the premises and the commission by the defendant of any of the acts mentioned in this section, it is prima facie evidence that the acts were committed by the defendant wilfully, intentionally and without plaintiff's consent.

105.815 When double damages are awarded for trespass. If, upon the trial of an action included in ORS 105.810, it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, or that the tree or timber was taken from uninclosed woodland for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall be given for double damages.

105.820 Remedy of tenants in common. A tenant in common may maintain any proper action, suit or proceeding against his cotenant for receiving more than his just proportion of the rents or profits of the estate owned by them in common.

105.825 Action for injury to inheritance. A person seised of an estate in remainder or reversion may maintain a civil action for any injury to the inheritance, notwithstanding the presence of an intervening estate for life or years.

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 December 1, 1961.

Sam R. Haley
Legislative Counsel