Chapter 29

1969 REPLACEMENT PART

(1971 reprint)

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DEFINITIONS

29.010 Provisional remedies. The proceedings provided for in this chapter shall be known as provisional remedies.

ATTACHMENT AND GARNISHMENT

29.110 When attachment lies. (1) The plaintiff, at the time of issuing the summons or any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as provided in ORS 29.120 to 29.400, in the following cases:

(a) An action upon a contract, expressed or implied, for the direct payment of money, when the contract is not secured by mortgage, lien or pledge, or when it is so secured but such security has been rendered nugatory by act of the defendant, or when the defendant is a nonresident of this state.

(b) An action against a defendant not residing in this state to recover a sum of money as damages for breach of any contract, expressed or implied, other than a contract of marriage.

(c) An action against a defendant not residing in this state to recover a sum of money as damages for injury to property in this state.

(2) The provisions of ORS 29.110 to 29.400 shall apply with equal effect to all cases where a defendant pleads a counterclaim arising out of any cause entitling a plaintiff to attach the property of a defendant.

29.120 Issuance of writ; affidavit of plaintiff. A writ of attachment shall be issued by the clerk of the court in which the action is pending whenever the plaintiff, or anyone in his behalf, files the undertaking specified in ORS 29.130, and makes and files an affidavit stating:

(1) In every case, facts which bring the case within one of the classes of cases specified in ORS 29.110.

(2) In an action upon a contract, that the sum for which the attachment is asked is a bona fide, existing debt, due and owing from the defendant to the plaintiff, and specifying the amount of such indebtedness above all legal setoffs and counterclaims.

(3) In an action for damages, the amount of damages.

(4) In every case, that the attachment is not sought nor the action prosecuted to hinder, delay or defraud any creditor of the defendant.

29.130 Undertaking of plaintiff. The plaintiff shall file with the clerk his undertaking, with one or more sureties, in a sum not less than $100, and equal to the amount for which the plaintiff demands judgment, and to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking. With the undertaking the plaintiff shall also file the affidavits of the sureties, from which affidavits it must appear that such sureties are qualified, and that taken together they are worth double the amount of the sum specified in the undertaking, over all debts and liabilities, and property exempt from execution. Any person not qualified to become bail upon an arrest, is not qualified to become surety in an undertaking for an attachment.

29.140 Property attachable. The rights or shares which the defendant may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property in this state of the defendant, not exempt from execution, shall be liable to be attached.

29.150 Plaintiff deemed purchaser in good faith. From the date of the attachment, until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property attached, subject to the conditions prescribed in ORS 29.190 as to real property.

29.160 Contents of writ; to whom writ directed; issuance of several writs. The writ shall be directed to the sheriff of any county in which property of the defendant may be, and shall require him to attach and safely keep all the property of the defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. Several writs may be issued at the same time to the sheriffs of different counties.

29.170 Manner of executing writ. The sheriff to whom the writ is directed and delivered shall note upon the writ the date of such delivery, and shall execute the writ without delay, as follows:

(1) To attach real property, he shall make

a certificate containing the title of the cause, the names of the parties to the action, a description of such real property, and a statement that the same has been attached at the suit of the plaintiff, and deliver the certificate to the county clerk of the county in which the attached real estate is situated. The county clerk shall certify upon every certificate so delivered the time when it was received, and the certificate shall be effective from the time of its receipt by the county clerk.

(2) Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody.

(3) Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having possession of the same, or if it be a debt, then with the individual debtor, and if such debt arises out of a wage or salary claim against a corporate debtor then with the registered agent of the corporation, the president or other head of the corporation, vice president, secretary, cashier, assistant cashier or managing agent or such other person designated by the corporation to accept the writ and notice, or if it be rights or shares in the stock of an association or corporation, or interests or profits thereon, then with such person or officer of the association or corporation as a summons is authorized to be served upon; provided that if it be a security, as defined in ORS 78.1020 or a share or any other interest for which a certificate is outstanding, the requirements of ORS 78.3170 must be satisfied. However, debts owing to the defendant by a bank or trust company or savings and loan association maintaining branch offices, or credits or other personal property whether or not capable of manual delivery, belonging to the defendant and in the possession of or under the control of such a bank or trust company or savings and loan association, shall be attached by leaving a certified copy of the writ and the notice with the president, vice president, treasurer, secretary, cashier or assistant cashier of the bank or trust company or savings and loan association at the office or branch thereof at which the account evidencing such indebtedness is carried or at which the bank or trust company or savings and loan association has credits or other personal property belonging to the defendant in its possession or under its control, or, if no such officers be found at such office or branch, by leaving a certified copy of the writ and the notice with the manager or assistant manager of such office or branch; and no attachment shall be effective as to any debt owing by such bank or trust company or savings and loan association if the account evidencing such indebtedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served, except that such service on the head office of any such institution shall be effective service upon all offices or branches thereof located in the same city as the head office.

(4) For purposes of this section, a savings and loan association, including such an association doing business in this state and organized under the laws of another state or of the United States, shall be deemed the debtor of a defendant to whom a certificate, account or obligation, or an interest therein, of the association has been issued, established or transferred and in such case the provisions of ORS 78.3170 shall not apply; provided, however, ownership by a defendant of reserve fund capital stock, or comparable equity stock, or of an interest therein, of any such association shall not be deemed to create such a relationship.

[Amended by 1961 c.726 §398; 1965 c.108 §1; 1969 c.95 §1; 1969 c.576 §1]

29.175 Attachment or levy upon interest of heir or legatee in personalty of decedent's estate, prior to distribution. (1) Except as provided in subsections (2) and (3) of this section, the interest of any person in personal property belonging to the estate of a decedent, whether as heir or legatee, may be attached or levied upon by serving the personal representative of the decedent with a copy of the writ of attachment or execution and a notice that said interest is attached or levied upon. Such attachment or levy shall not impair the powers of the personal representative over such personal property for the purposes of administration. A copy of the writ and notice shall also be filed in the office of the clerk of the court in which the estate is being administered. The personal representative shall report such attachment or levy to the court when any petition for distribution is filed; and, in the decree made upon such petition, distribution shall be ordered to the heir or legatee, but delivery of such personal property shall be ordered to the officer making

the attachment or levy, whose receipt shall be a sufficient release for the personal representative. The officer making the attachment or levy shall treat such personal property when the same comes into his hands in the same manner as other personal property attached or levied upon by him, and capable of manual delivery. The personal property so attached or levied upon shall not be delivered to the officer making the levy until the decree distributing such interest has become final.

(2) This section shall not apply to or affect any moneys, rights or properties constituting the subject-matter of any trust contained in a duly probated will of a decedent, but shall only apply to personal properties, moneys and assets that would, but for the attachment or execution, be paid or delivered directly to the heir, legatee or devisee.

(3) If, by virtue of an order of court, or otherwise, a partial distribution has been made by the personal representative of decedent to the heir, legatee or devisee prior to the service of such attachment or execution, only the remainder of the personal estate going to such heir, legatee or devisee shall be affected by the attachment or execution.

29.180 Return of writ; inventory. When the writ of attachment has been fully executed or discharged, the sheriff shall return the same, with his proceedings indorsed thereon, to the clerk of the court where the action was commenced, and the sheriff shall make a full inventory of the property attached, and return the same with the writ.

29.190 Filing sheriff's certificate on attachment of real property; lien. Upon receiving the sheriff's certificate as provided in ORS 29.170, the county clerk shall immediately file such certificate in his office, and record it in a book to be kept for that purpose. When the certificate is so filed for record, the lien in favor of the plaintiff attaches to the real property described in the certificate. Whenever such lien is discharged, the county clerk shall enter upon the margin of the page on which the certificate is recorded a minute of the discharge.

29.200 Sale of perishables or livestock; custody of property. If any property attached is perishable, or livestock, where the cost of keeping is great, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof and other property attached shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment.

29.210 Adverse claims to attached personal property. If any personal property attached is claimed by a third person as his property, the sheriff may summon a jury to try the validity of such claim, or at the option of the adverse claimant the court out of which the attachment issued shall try the adverse claim in a summary manner, and the same proceedings shall be had thereon with like effect as in case of seizure upon execution.

29.220 Redelivery bond. The sheriff shall deliver any of the attached property to the defendant, or to any other person claiming it, upon his giving a written undertaking, executed by two or more sufficient sureties, engaging to redeliver it, or pay the value thereof to the sheriff to whom execution upon a judgment obtained by the plaintiff in that action may be issued.

29.230 Defense to action upon redelivery bond. In an action brought upon such undertaking against the principal or his sureties, it shall be a defense that the property for which the undertaking was given did not, at the execution of the writ of attachment, belong to the defendant against whom the writ was issued.

29.240 Undertaking to discharge attachment. Whenever the defendant shall have appeared in the action, he may apply, upon notice to the plaintiff, to the court where the action is pending, or to the judge or clerk of such court, for an order to discharge the attachment upon the execution of the undertaking mentioned in ORS 29.250; and if the application be allowed, all the proceeds of sales and property remaining in the hands of the sheriff shall be released from the attachment and delivered to the defendant, upon his serving a certified copy of the order on the sheriff.

29.250 Form of undertaking. Upon such application, the defendant shall deliver to the court or judge to whom the application is made an undertaking, executed by one or more sureties, resident householders or freeholders of this state, to the effect that the sureties will pay to the plaintiff the amount

of the judgment that may be recovered against the defendant in the action. If the plaintiff demands it, the sureties shall be required to justify in the same manner as bail upon an arrest.

29.260 Motion to discharge attachment; amendment of affidavit or undertaking. The defendant may, at any time before judgment, apply to the court or judge thereof, where the action is pending, to discharge the attachment in the manner and with the effect provided in ORS 29.540 and 29.550 for the discharge of a defendant from arrest. However, no attachment shall be discharged on account of any defect in the affidavit if, before the determination of a motion to discharge said attachment, the plaintiff shall file an amended affidavit substantially complying with the requirements of ORS 29.120. The amended affidavit must show that the grounds for issuing the writ of attachment as prescribed in ORS 29.110 existed at the date the writ was issued. No attachment shall be discharged on account of any defect in the undertaking therefor if, before the determination of a motion to discharge said attachment, or within such further time as the court may allow, the plaintiff shall file an amended undertaking substantially complying with the requirements of ORS 29.130.

29.270 Liability of garnishee; delivery of attached property to sheriff by garnishee. Any person, association or corporation mentioned in subsection (3) of ORS 29.170, from the time of the service of a copy of the writ and notice as therein provided, shall, unless the attached property is delivered or attached debt is paid to the sheriff, be liable to the plaintiff for the amount thereof until the attachment is discharged or any judgment recovered by him is satisfied. Such property may be delivered or debt paid to the sheriff without suit, or at any time before a judgment against the garnishee, and the sheriff's receipt shall be a sufficient discharge.

29.280 Certificate of garnishee; order for examination of garnishee. Whenever the sheriff, with a writ of attachment against the defendant, shall apply to any person or officer mentioned in subsection (3) of ORS 29.170, for the purpose of attaching any property mentioned therein, such person or officer shall furnish him with a certificate, designating the amount and description of any property in his possession belonging to the defendant, or any debt owing to the defendant, or the number of rights or shares of the defendant in the stock of the association or corporation, with any interest or profits or encumbrance thereon. The certificate shall be furnished to the sheriff within five days from the date of service of the writ, when service is made within the county in which the action is pending, and within 10 days when service is made in any other county. If such person or officer fails to do so within the time stated, or if the certificate, when given, is unsatisfactory to the plaintiff, he may be required by the court, or judge thereof, where the action is pending, to appear and be examined on oath concerning the same, and disobedience to such order may be punished as a contempt.

29.290 Contents of order; designation of parties. The order provided for in ORS 29.280 shall require such person or officer to appear before the court or judge at a time and place therein stated. In the proceedings thereafter upon the order, such person or the association or corporation represented by such officer shall be known as the garnishee.

29.300 Restraining order against garnishee. The court or judge thereof may, at the time of the application of the plaintiff for the order provided for in ORS 29.280, and at any time thereafter before judgment against the garnishee, by order restrain the garnishee from in any manner disposing of or injuring any of the property of the defendant, alleged by the plaintiff to be in the garnishee's possession, control, or owing by him to the defendant, and disobedience to such order may be punished as a contempt.

29.310 Allegations and interrogatories to garnishee. After the allowance of the order provided for in ORS 29.280, and before the garnishee or officer thereof shall be required to appear, or within a time to be specified in the order, the plaintiff shall serve upon the garnishee or officer thereof written allegations, and may serve written interrogatories, touching any of the property as to which the garnishee or officer thereof is required to give a certificate as provided in ORS 29.280.

29.320 Answer of garnishee. On the day when the garnishee or officer thereof is required to appear, he shall return the allegations and interrogatories of the plaintiff to the court or judge, with his written answer thereto, unless for good cause shown a further

time is allowed. The answer shall be on oath, and shall contain a full and direct response to all the allegations and interrogatories.

29.330 Compelling garnishee to answer; judgment for want of answer. If the garnishee or officer thereof fails to answer, the court or judge thereof, on motion of the plaintiff, may compel him to do so, or the plaintiff may, at any time after the entry of judgment against the defendant, have judgment against the garnishee for want of answer. In no case shall judgment be given against the garnishee for a greater amount than the judgment against the defendant.

29.340 Exception or reply to answer. Plaintiff may except to the answer of the garnishee or officer thereof for insufficiency, within such time as may be prescribed or allowed, and if the answer is adjudged insufficient, the garnishee or officer may be allowed to amend his answer, on such terms as may be proper, or judgment may be given for the plaintiff as for want of answer, or such garnishee or officer may be compelled to make a sufficient answer. The plaintiff may reply to the whole or a part of the answer within such time as may be prescribed or allowed. If the answer is not excepted or replied to within the time prescribed or allowed, it shall be taken to be true and sufficient.

29.350 Trial. Witnesses, including the defendant and garnishee or officer thereof, may be required to appear and testify, and the issues shall be tried, upon proceedings against a garnishee, as upon the trial of an issue of fact between a plaintiff and defendant.

29.360 Judgment against garnishee. If by the answer it shall appear, or if upon trial it shall be found, that the garnishee, at the time of the service of the copy of the writ of attachment and notice, had any property as to which such garnishee or officer thereof is required to give a certificate, as provided in ORS 29.280, beyond the amount admitted in the certificate, or in any amount if the certificate was refused, judgment may be given against the garnishee for the value thereof in money.

29.370 Execution against garnishee. Executions may issue upon judgments against a garnishee as upon ordinary judgments between plaintiff and defendant, and costs and disbursements shall be allowed and recovered in like manner; provided, however, when judgment is rendered against any garnishee, and the debt from him to the defendant is not yet due, execution shall not issue until the debt is due.

29.380 Sale after judgment against defendant; judgment on undertaking for discharge of attachment. If judgment is recovered by the plaintiff against the defendant, and it shall appear that property has been attached in the action, and has not been sold as perishable property or discharged from the attachment, the court shall order the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by him or the proceeds thereof, upon the execution, and if any such property or proceeds remain after satisfying such execution, he shall, upon demand, deliver the same to the defendant; or if the property attached has been released from attachment by reason of the giving of the undertaking by the defendant, as provided by ORS 29.250, the court shall upon giving judgment against the defendant also give judgment in like manner and with like effect against the surety in such undertaking.

29.390 Judgment for defendant. If judgment is not recovered by the plaintiff, all the property attached, or the proceeds thereof, or the undertaking therefor, shall be returned to the defendant upon his serving upon the sheriff a certified copy of the order discharging the attachment.

29.400 Release of garnishment. The clerk of any court in whom is vested authority to issue writs of attachment may issue releases of garnishments based upon writs of attachment issued by such clerk, whenever the plaintiff by his attorney of record, or the plaintiff in person if there is no attorney, shall file with the clerk a written request therefor. Such release shall be executed in duplicate, under the seal of the court or the stamp of the clerk, and may cover all or any portion of the funds or property held under garnishment. One duplicate original of the release shall be delivered to the garnishee and the other duplicate original, together with the written request therefor, indorsed on the face thereof by the attorney of record, if there be an attorney, shall be attached to the original writ of attachment in the same manner as the return of the sheriff or constable; and any pending proceedings in such case for the sale

upon execution of any property so garnished shall, as to all property covered by the release, thereupon be terminated and be considered of no effect; all costs to be paid by the plaintiff. Upon receipt by the garnishee of the duplicate original release, the garnishee, and all funds or property subject to such garnishment, shall, to the extent stated in the release, be released from all liability arising by reason of the issuance and service of the writ of attachment and notice of garnishment, or by reason of his return thereon, as though the writ of attachment and notice of garnishment had not been served. The garnishee may rely upon any such release so received by him without any obligation on his part to inquire into the authority therefor. The authority vested by this section in the clerk of the court to issue releases is not exclusive but is in addition to the authority of the court having jurisdiction of the cause to release, discharge or dissolve attachments and garnishments.

CIVIL ARREST

29.510 Civil arrest in law and equity. The provisions of ORS 29.520 to 29.740 apply to suits the same as they apply to actions.

29.520 When civil arrest lies. (1) No male person shall be arrested in an action, except:

(a) In an action for the recovery of money or damages on a cause of action arising out of contract, when the defendant is not a resident of the state, or is about to remove therefrom, or when the action is for an injury to person or character, or for injuring or wrongfully taking, detaining or converting property.

(b) In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or by an attorney, or by an officer or agent of a corporation in the course of his employment as such, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

(c) In an action to recover the possession of personal property unjustly detained, when the property or any part thereof has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

(d) When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought.

(e) When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

(2) No female shall be arrested in any action, except for an injury to person, character or property.

29.530 Proceeding to obtain arrest. The mode of proceeding to obtain the arrest of a defendant is as follows:

(1) At any time after the commencement of an action, and before judgment, the plaintiff shall be entitled to a writ of arrest for the defendant whenever he shall make and file with the clerk of the court in which the action is commenced, or is at the time pending, an affidavit that the plaintiff has a sufficient cause of action therein, and that the case is one of those mentioned in ORS 29.520, and shall also make and file with the clerk an undertaking, with one or more sureties, in a sum not less than $100, and equal to the amount for which plaintiff prays judgment. Such undertaking shall be conditioned that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the amount specified in the undertaking.

(2) The affidavit may be either positive or upon information and belief; but, if the latter, it shall state the nature and sources of the information upon which the belief is founded. The plaintiff shall also file with his undertaking the affidavits of the sureties therein, from which it must appear that the sureties are residents of the state, and that they are, taken together, worth double the amount specified in the undertaking over all debts and liabilities and property exempt from execution. Any person not qualified to become bail upon arrest is not qualified to become surety in an undertaking for an arrest.

(3) The writ of arrest shall be issued by the clerk, and shall require the sheriff of any county where the defendant may be found, forthwith to arrest him and hold him to bail in the amount specified in the undertaking, and in default thereof, to keep him in custody until discharged by law, and to return the writ to the clerk from whom it issued, with his doings indorsed thereon, when required

by the plaintiff at any time before the defendant may be arrested, or afterwards whenever the defendant shall have been discharged from the arrest.

(4) The plaintiff shall deliver or cause to be delivered to the sheriff, with the writ, a copy of the affidavit upon which the writ was issued, subscribed by himself or attorney. The sheriff, upon delivery of the writ, shall indorse thereon the date of receipt, and upon the arrest of the defendant, shall deliver to him a copy of the writ, and such copy of the affidavit. The sheriff shall execute the writ by arresting the defendant and keeping him in custody, until discharged by law.

29.540 Motion to vacate writ of arrest. A defendant arrested may, at any time before judgment, apply on motion to the court or the judge thereof, in which the action is pending, upon notice to the plaintiff, to vacate the writ of arrest, except where the cause of arrest and the cause of action are the same.

29.550 Proceedings on motion to vacate. If a motion is made upon affidavits or other proofs by the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those upon which the writ was issued. If, upon the hearing of the motion, it satisfactorily appears that there was not sufficient cause to allow the writ, the writ shall be vacated.

29.560 Discharge on bail; undertaking. The defendant, at any time before execution, shall be discharged from the arrest upon giving bail. He may give bail by causing a written undertaking to be executed in favor of the plaintiff by two or more sufficient sureties, stating their places of residence, to the effect that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or if he has been arrested for the cause mentioned in paragraph (c) of subsection (1) of ORS 29.520, an undertaking to the same effect as that provided by ORS 29.860.

29.570 Delivery of copy of undertaking to plaintiff; acceptance or rejection of bail. Within five days from the execution of the undertaking of the bail, the sheriff shall deliver to the plaintiff or his attorney, if either of them reside within the county where the arrest was made, or otherwise to such person within the county as the plaintiff may direct, a certified copy of the undertaking, with the date of the arrest indorsed thereon. In any other case the sheriff may mail such copy, within the same time, to the plaintiff or his attorney, within the state, or to either of them, as the plaintiff may direct. The plaintiff, within ten days from the delivery of the copy, or 15 days from its mailing, if sent by mail, may serve upon the sheriff a notice that he does not accept the bail; otherwise he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability. If no notice is served within ten days, the original undertaking shall be filed with the clerk of the court where the action is pending.

29.580 Notice of justification of bail; new undertaking. On the receipt of the notice by the plaintiff that he does not accept the bail, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or his attorney notice of the justification of the same, or other bail, specifying the places of residence and occupation of the latter, before a judge of the circuit court, or county court, or clerk of the court where the action is pending, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case neither the plaintiff nor his attorney reside within the county where the arrest is made, the notice may be served upon the person and in the manner provided in ORS 29.570 for serving the copy of the undertaking. In case other bail is given there shall be a new undertaking, in the form and to the effect prescribed in ORS 29.560.

29.590 Procedure of justification. For the purpose of justification, each of the bail shall attend before the judge or clerk, at the time and place mentioned in the notice, and may be examined on oath, touching his sufficiency, by the plaintiff, in such manner as the judge or clerk may think proper. The examination shall be reduced to writing and subscribed by the bail, if required by the plaintiff.

29.600 Determination of sufficiency of bail. If the judge or clerk finds the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk of the court in which the action is pending; and the sheriff shall thereupon be exonerated from liability.

29.610 Qualifications of bail. The qualifications of bail are as follows:

(1) Each of them shall be a resident and householder or freeholder within the state; but no attorney, sheriff, clerk of any court, or other officer of any court may become bail.

(2) Each of them shall be worth the amount specified in the writ of arrest, over and above all debts and liabilities, and exclusive of property exempt from execution; but the judge or clerk on justification may allow more than two sureties to justify severally in amounts less than that expressed in the writ, if the whole justification is equivalent to that of two sufficient bail.

29.620 Surrender of defendant. At any time before a failure to comply with the undertaking, the bail may surrender the defendant in their exoneration, or the defendant may surrender himself to the sheriff of the county where he was arrested, in the following manner:

(1) A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon as upon a writ of arrest, and shall by a certificate in writing acknowledge the surrender.

(2) Upon the production of a copy of the undertaking and sheriff's certificate, the judge of the court may upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and the papers used on said application with the clerk of the court where the action is pending, they shall be exonerated accordingly; but this section shall not apply to an arrest for the cause mentioned in paragraph (c) of subsection (1) of ORS 29.520, so as to discharge the bail from an undertaking given to the effect provided by ORS 29.860.

29.630 Arrest of defendant by bail. For the purpose of surrendering the defendant, the bail at any time and place, before they are finally charged, may themselves arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower the sheriff or any other person of suitable age and discretion to do so.

29.640 Manner of proceeding against bail. For failure to comply with the undertaking, the bail may be proceeded against by action only.

29.650 Exoneration of bail. The bail may be exonerated either by the death of the defendant, or his imprisonment in the penitentiary, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

29.660 Discharge on deposit of money. The defendant may, at any time before execution, deposit with the sheriff the amount mentioned in the writ. Thereupon, the sheriff shall give the defendant a certificate of the deposit made, and the defendant shall be discharged from the arrest.

29.670 Payment of deposit by sheriff into court. The sheriff shall within four days after the deposit pay the same into court, and take from the clerk receiving the payment two certificates of payment, one of which he shall deliver to the plaintiff or his attorney, and the other to the defendant. For any default in making such payment the same proceedings may be had on the official bond of the sheriff to collect the sum deposited, as in other cases of delinquency.

29.680 Substituting bail for deposit. If money is deposited, as provided in ORS 29.660 and 29.670, bail may be given and justified upon notice, as prescribed in ORS 29.560, at any time before judgment, and on the filing of the undertaking and justification with the clerk, the money deposited shall be refunded by such clerk to the defendant.

29.690 Disposition of money deposited. At the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply any money remaining on deposit in satisfaction thereof, and after satisfying the judgment, shall refund any surplus to the defendant. If the judgment is in favor of the defendant, the clerk shall refund to him all money remaining on deposit.

29.700 Liability of sheriff. If, after being arrested, the defendant escapes, or is rescued, or bail is not given, or justified, or a deposit is not made instead thereof, the sheriff himself shall be liable as bail; but he may discharge himself from such liability by the giving and justification of bail, as provided in

ORS 29.580 to 29.610, at any time before process against the person of the defendant to enforce an order or judgment in the action.

29.710 Proceedings against sheriff. If a judgment is recovered against the sheriff upon his liability as bail, and an execution thereon is returned unsatisfied, in whole or in part, the same proceedings may be had on his official bond as in other cases of delinquency.

29.720 Liability of bail to sheriff. The bail taken upon the arrest shall, unless they justify, or other bail is given or justified, be liable to the sheriff by action for any damages he may sustain by reason of such omission.

29.730 Maintenance of arrested defendant. There shall be allowed to the sheriff for the food and maintenance of any defendant arrested under the provisions of ORS 29.510 to 29.740, the fees provided by law. The plaintiff shall be liable in the first instance for such fees, and if required by the sheriff, shall pay them weekly, in advance. The fees so paid shall be added to the disbursements taxed or accruing in the case, and be collected as other disbursements.

29.740 Discharge of defendant for nonpayment of maintenance. If the plaintiff neglects to pay such fees for three days after a demand of payment, the sheriff may discharge the defendant out of custody.

CLAIM AND DELIVERY (REPLEVIN)

29.810 Nature of the remedy. In an action to recover the possession of personal property, the plaintiff, at any time after the action is commenced and before judgment, may claim the immediate delivery of such property, as provided in ORS 29.820 to 29.910.

29.820 Affidavit. When a delivery is claimed, an affidavit shall be made by the plaintiff, or by someone in his behalf, showing:

(1) That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth;

(2) That the property is wrongfully detained by the defendant;

(3) The alleged cause of the detention, according to his best knowledge, information and belief;

(4) That the property has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure; and,

(5) The actual value of the property.

29.830 Requisition to sheriff. The plaintiff may, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be to take the property from the defendant and deliver it to the plaintiff.

29.840 Undertaking of plaintiff; proceedings of sheriff. Upon the receipt of the affidavit and indorsement thereon, with a written undertaking executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof is adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, indorsement thereon, and undertaking, by delivering them to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or, if neither have any known place of abode, by putting them in the post office, directed to the defendant at the post office nearest to him.

29.850 Exception to and justification of plaintiff's sureties; qualifications. (1) The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he waives all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner provided in ORS 29.590 for as bail on arrest. The sheriff is responsible for the sufficiency of the sureties until the objection to them is waived, or until they justify, or new sureties

are substituted and justify. If the defendant excepts to the sureties, he cannot reclaim the property as provided in ORS 29.860.

(2) The qualifications of the sureties shall be as provided in ORS 29.610 for bail on civil arrest.

29.860 Defendant's undertaking for return of property; when property to be delivered to plaintiff. At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to be approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property is not so required within three days after the taking and service of a copy of the affidavit and undertaking on the defendant, it shall be delivered to the plaintiff, except as provided in ORS 29.900.

29.870 Justification of defendant's sureties; qualifications. (1) The defendant's sureties, upon notice to the plaintiff or his attorney of not less than two nor more than six days, shall justify before a judge of the circuit or county court, or the clerk of the court in which the action is pending, in the same manner as provided in ORS 29.590 for bail on arrest; and upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until justification is completed or expressly waived, and may retain the property until that time; but if justification is not completed at the time and place appointed, he shall deliver the property to the plaintiff.

(2) The qualifications of the sureties shall be as provided in ORS 29.610 for bail on civil arrest.

29.880 Claim of property by third person. If the property taken is claimed by any other person than the defendant or his agent, and such person makes affidavit of his title or his right to possession, stating the grounds of such title or right, and serves the same upon the sheriff before the delivery of the property to the plaintiff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim by an undertaking, executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders of the county. No claim to such property by any other person than the defendant or his agent shall be valid against the sheriff unless made as aforesaid; and, notwithstanding any such claim, he may retain the property a reasonable time to demand such indemnity.

29.890 Concealed property. If the property or any part thereof is concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it is not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

29.900 Custody and delivery of property. When the sheriff has taken property, as provided in ORS 29.810 to 29.890, he shall keep it in a secure place, and deliver it to the party entitled thereto upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

29.910 Return of proceedings by sheriff. The sheriff shall file the affidavit, with his proceedings thereon, including an inventory of the property taken, with the clerk of the court in which the action is pending, within 20 days after taking the property; or, if the clerk resides in another county, shall mail or forward the same within that time.

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, 1969.

Robert W. Lundy
Legislative Counsel