# Chapter 105

# Actions and Suits Involving Property Rights

**105.005 to 105.080**

LAW REVIEW CITATIONS: 2 WLJ 493.

**105.005**

NOTES OF DECISIONS
1. In general
2. Persons entitled to the remedy
3. Rights of prior possessors
4. Defenses
5. Damages

**1. In general**

The remedy provided by this section differs from common-law ejectment in that it determines title, operates without fictions, and permits recovery of possession and mesne profits as well as damages for injuries to the estate. McCown v. Hannah, (1871) 3 Or 302; Barrell v. Title Guar. Co., (1895) 27 Or 77, 39 P 992; Norton v. Elwert, (1895) 29 Or 583, 592, 41 P 926; Hoover v. King, (1903) 43 Or 281, 72 P 880, 99 Am St Rep 754, 65 LRA 790; Weatherford v. McKay, (1911) 59 Or 558, 117 P 969; Fitch v. Cornell, (1870) 1 Sawy 156, Fed Cas No. 4834; Wythe v. Myers, (1876) 3 Sawy 595, Fed Cas No. 18,119; Wilson v. Fine, (1889) 38 Fed 789.

The legislature did not intend to change the rules of evidence when it enacted this section. McEwen v. Portland, (1860) 1 Or 300.

This statute should not be strictly construed. McCown v. Hannah, (1871) 3 Or 302.

A husband and wife in possession may be joined as defendants, as if they were unmarried. Tilton v. Barrell, (1882) 14 Fed 609, 8 Sawy 412.

An issue of title must be tendered in the complaint. Johnson v. Crookshanks, (1891) 21 Or 339, 28 P 78.

A plaintiff out of possession holding the legal title will be left to his remedy at law. O'Hara v. Parker, (1895) 27 Or 156, 168, 39 P 1004.

Mining claims are real property within the meaning of this statute. Lohmann v. Helmer, (1900) 104 Fed 178, 182.

Under this section a person claiming an interest in realty can settle adverse claims even though the property is uninhabited. Comegys v. Hendricks, (1910) 55 Or 533, 106 P 1016.

Where the complaint contained averments generally employed in ejectment actions and asked for judgment for possession or the reasonable market value of real property, the proceeding was of the kind authorized by this section. Hall v. Pettibone, (1947) 182 Or 334, 187 P2d 166.

**2. Persons entitled to the remedy**

Action cannot be brought unless the plaintiff has the necessary legal estate and right to immediate possession. **Executor or administrator,** Humphreys v. Taylor, (1874) 5 Or 260; **widow under quarantine right,** Aiken v. Aiken, (1885) 12 Or 203, 6 P 682; **tenant in common as against cotenant,** Goldsmith v. Smith, (1884) 21 Fed 611; **owner of incorporeal hereditament,** Coquille Mill & Mercantile Co. v. Johnson, (1908) 52 Or 547, 98 P 132, 132 Am St Rep 716; **mortgagor against a mortgagee he placed in possession,** Coles v. Meskimen, (1906) 48 Or 54, 85 P 67; **settler against railway with prior right of way,** Frizzelle v. Ore. Ry. & Nav. Co., (1892) 22 Or 463, 30 P 313; **life tenant against redeeming remainderman,** Abraham v. Chenoweth, (1881) 9 Or 348.

Any person having a legal estate and a present right to possession of realty claimed or possessed by another can bring an action of ejectment under this section. **Person acquiring title by adverse possession,** Phillippi v. Thompson, (1880) 8 Or 428; Joy v. Stump, (1887) 14 Or 361, 12 P 929; **grantor upon breach of condition subsequent,** Seeck v. Jakel, (1914) 71 Or 35, 47, 141 P 211, LRA 1915A, 679; Wagner v. Wallowa County, (1915) 76 Or 453, 148 P 1149, LRA 1916F, 303; **person holding certificate from land office,** Weatherford v. McKay, (1911) 59 Or 558, 117 P 969; **purchaser of mining land,** Rader v. Allen, (1895) 27 Or 344, 41 P 154; **widow before dower is assigned,** McKay v. Freeman, (1877) 6 Or 449; **tenant in common as against stranger,** Dolph v. Barney, (1874) 5 Or 191, 215; **donee of land claim,** Keith v. Cheeney, (1860) 1 Or 285; **ousted cotenant,** Crane v. Ore. Ry. & Nav. Co., (1913) 66 Or 317, 133 P 810.

The state can bring an action under this section since the words "any person" include artificial as well as natural persons. State v. Duniway, (1912) 63 Or 555, 128 P 853.

A purchaser under a mortgage foreclosure of preempted land for which final certificates were issued may not, without having had possession, maintain ejectment against an intruder. American Mtg. Co. of Scotland v. Hopper, (1891) 48 Fed 47.

**3. Rights of prior possessors**

Prior actual possession of the land is enough to enable the possessor to recover it against a trespasser entering without any title or one not having a better title. Oregon Ry. & Nav. Co. v. Hertzberg, (1894) 26 Or 216, 222, 37 P 1019; Gallagher v. Kelliher, (1911) 58 Or 557, 561, 114 P 943, 115 P 596; Kingsley v. United Rys., (1913) 66 Or 50, 55, 133 P 785; Mickey v. Stratton, 5 Sawy 475, Fed Cas No. 9,530; Wilson v. Fine, (1889) 14 Sawy 38, 38 Fed 789; American Mtg. Co. of Scotland v. Hopper, (1891) 48 Fed 47.

A vendee of an executory contract who has a right to possession can bring ejectment against a trespasser. Kingsley v. United Rys., (1913) 66 Or 50, 133 P 785; Feehely v. Rogers, (1938) 159 Or 361, 76 P2d 287, 80 P2d 717.

**4. Defenses**

Against a mere agent or servant the action is not maintainable. Morrison v. Holladay, (1895) 27 Or 175, 186, 39 P 1100; Thornton v. Hallam, (1913) 64 Or 233, 238, 129 P 1046.

Where the defendant is not in possession of the real property in controversy nor acting as owner thereof, the plaintiff cannot maintain an action in ejectment against him. McLeod v. Lloyd, (1903) 43 Or 260, 275, 71 P 795, 74 P 491; North Star Lbr. Co. v. Johnson, (1912) 196 Fed 56.

The holding of equitable interests in the land by the defendant does not furnish him with a defense to an action in ejectment. Zeuske v. Zeuske, (1909) 55 Or 65, 103 P 648, 105 P 249, Ann Cas 1912A, 557; Hall v. Austin, (1864) 1

Deady 104, Fed Cas No. 5925. **But see** Wood v. Fisk, (1904) 45 Or 276, 77 P 128, 738 and Coles v. Meskimen, (1906) 48 Or 54, 85 P 67.

A purchase of the widow's dower interest before assignment and an entry in possession of the lands by the purchaser constitute no defense to ejectment by the heirs. Neal v. Davis, (1909) 53 Or 423, 99 P 69, 101 P 212.

The defendant in an ejectment action will prevail without submitting any evidence of title if the plaintiff fails to show prior rights based on paper title or prior possession. Carroll v. McLaren, (1911) 60 Or 233, 118 P 1034.

**5. Damages**

This statute combines ejectment with trespass to realty and permits the plaintiff in one action to recover possession, the rents and profits of the adverse possessor, as well as damages for injuries to the plaintiff's possessory rights flowing from the defendant's acts. Starr v. Stark, (1879) 7 Or 500; Trotter v. Stayton, (1904) 45 Or 301, 77 P 395; Yuen Suey v. Fleshman, (1913) 65 Or 606, 615, 133 P 803, Ann Cas 1915A, 1072; Crane v. Ore. Ry. & Nav. Co., (1913) 66 Or 317, 328, 133 P 810.

Punitive damages can be recovered if the trespass is wilful and wanton and affects the personal rights of the owner. Kingsley v. United Rys., (1913) 66 Or 50, 133 P 785; Williams v. Goose Lake Valley Irr. Co., (1917) 83 Or 302, 163 P 81.

The right to damages in ejectment depends upon the determination of the right to possession of the land. Starr v. Stark, (1879) 7 Or 500.

Plaintiff may recover for losses sustained when defendants' acts prevented him from building on the disputed land and denied him free access to other property. Trotter v. Stayton, (1904) 45 Or 301, 77 P 395.

Computation of damages in accordance with information acquired in viewing the premises is not permitted. Crane v. Ore. Ry. & Nav. Co., (1913) 66 Or 317, 329, 133 P 810.

Mesne profits are measured by ascertaining the value of the use of the premises for a given period of time, and cannot be awarded if there is no evidence concerning the length of occupancy. Id.

Evidence concerning the uses to which the property might have been adapted is not relevant on the issue of damages. Id.

If the defendant plants crops the plaintiff will recover the profits realized from the crops or the rental value of the premises, whichever is greater. Irwin v. McElroy, (1919) 91 Or 232, 178 P 791.

A possessor of lands is entitled to prove whatever damages, if any, resulted from trespass and, in a proper case, may recover exemplary damages as well. Brown v. Dorfman, (1968) 251 Or 522, 446 P2d 672.

A landowner seeking damages for trespass is not ordinarily entitled to damages for mental suffering. Id.

The issue of punitive damage is moot when the jury refuses to allow compensatory damages. Krey v. Sarah Land Co., (1970) 256 Or 31, 470 P2d 154.

FURTHER CITATIONS: Moore v. Spellman, (1956) 209 Or 227, 305 P2d 394; Quine v. Sconce, (1957) 209 Or 486, 306 P2d 420; Hojem v. Burres, (1963) 233 Or 300, 378 P2d 286.

## 105.010

NOTES OF DECISIONS

**1. In general**

The defendant waives irregularities in the complaint if he fails to object to its form and substance. McKay v. Freeman, (1877) 6 Or 449; Frizzelle v. Ore. Ry. & Nav. Co., (1892) 22 Or 463, 30 P 313.

The action will be regarded as a forcible entry and detainer proceeding if there is no allegation which raises an issue as to title. Thompson v. Wolf, (1877) 6 Or 308.

Allegations concerning matters not included in this section should, if possible, be excluded from the complaint. Mitchell v. Campbell, (1890) 19 Or 198, 24 P 455.

An issue of title must be tendered in the complaint. Johnson v. Crookshanks, (1891) 21 Or 339, 28 P 78.

Unnecessary averments in the complaint may constitute a defense to the action. Twigger v. Twigger, (1924) 110 Or 520, 223 P 934.

**2. Allegations required**

An allegation of prior possession is a sufficient declaration of an estate to authorize recovery when title is based solely on prior possession. (Alaska) Maloney v. Adsit, (1899) 175 U.S. 281, 20 S Ct 115, 44 L Ed 163; (Alaska) Patterson v. Hamilton, (1921) 274 Fed 363.

Plaintiff's chain of title need not be set out. Pease v. Hannah, (1871) 3 Or 301.

The complaint need not allege a denial by defendant of plaintiff's right, in addition to an allegation of wrongful holding. McKay v. Freeman, (1877) 6 Or 449.

An allegation "that plaintiff is seized of an estate in dower for her own life" is sufficient. Id.

In order to gain possession of land claimed by the plaintiff as an appurtenance to other realty, the complaint must allege ownership of an estate in the disputed land. Little v. Pherson, (1899) 35 Or 51, 56 P 807.

An allegation that the plaintiff is entitled to the possession of the property is necessary to state a cause of action. Richards v. Crews, (1888) 16 Or 58, 18 P 925; Bingham v. Kern, (1889) 18 Or 199, 23 P 182.

An allegation of seisin in fee does not dispense with an averment that plaintiff is entitled to possession. Bingham v. Kern, (1889) 18 Or 199, 23 P 182.

An allegation that plaintiff is the owner of the land sought to be recovered, sufficiently describes the nature of the plaintiff's estate in the absence of a demurrer. Johnson v. Crookshanks, (1891) 21 Or 339, 28 P 78.

Complaint need not negative adverse possession by the defendant. Hewitt v. Thomas, (1957) 210 Or 273, 310 P2d 313. **Distinguished in** Denham v. Cuddeback, (1957) 210 Or 485, 311 P2d 1014.

A complaint which complies with this section is sufficient, in the absence of facts appearing on its face which invoke the bar of limitations. Id.

**3. Description**

A description is adequate if the location and boundaries of the land in question can be ascertained with the aid of a surveyor, court records or other reliable media. Security Sav. & Trust Co. v. Ogden, (1927) 123 Or 370, 261 P 69; Steele v. Preble, (1938) 158 Or 641, 77 P2d 418; Griffith v. Hanford, (1942) 169 Or 351, 128 P2d 947.

The description of the land should be so definite and certain that the sheriff can identify it and enforce a writ of restitution. Security Sav. & Trust Co. v. Ogden, (1927) 123 Or 370, 261 P 69; Young v. Papst, (1934) 148 Or 678, 37 P2d 359; Steele v. Preble, (1938) 158 Or 641, 77 P2d 418.

FURTHER CITATIONS: Chance v. Carter, (1916) 81 Or 229, 158 P 947; Du Val v. Miller, (1948) 183 Or 287, 192 P2d 249, 192 P2d 992; Witherell v. Wiberg, (1877) 4 Sawy 232, Fed Cas No. 17,917; Hughes v. Flier, (1955) 203 Or 612, 280 P2d 992.

## 105.015

NOTES OF DECISIONS

1. In general
2. Particularity required
3. Effect of faulty pleading

**1. In general**

Matters constituting an equitable estoppel are not available as a defense. Newby v. Rowland, (1883) 11 Or 133, 1 P 708; Zeuske v. Zeuske, (1909) 55 Or 65, 103 P 648, 105 P 249, Ann Cas 1912A, 557.

The common-law rule of pleading is changed by this provision. Hall v. Austin, (1864) Deady 104, Fed Cas No. 5,925.

Defendant's ownership, and also ownership in some person other than himself or the plaintiff may be pleaded. Moore v. Willamette Trans. Co., (1879) 7 Or 355.

Allegations concerning matters not included in this section should, if possible, be excluded from the answer. Mitchell v. Campbell, (1890) 19 Or 198, 24 P 455.

An answer filed in accordance with this section is not a counterclaim. Chance v. Carter, (1916) 81 Or 229, 238, 158 P 947.

It is assumed, where the defendant does not specify for what particular part he defends, that the claims of the parties conflict. Young v. Papst, (1934) 148 Or 678, 37 P2d 359.

**2. Particularity required**

To have a sufficient pleading for an affirmative defense the defendant should specifically allege the nature and duration of an estate that he has in the land whether it be a fee, life estate, leasehold, or license. Hall v. Austin, (1864) Deady 104, Fed Cas No. 5925; Moreland v. Marion County, (1875) Fed Cas No. 9725; Witherell v. Wiberg, (1877) 4 Sawy 232, Fed Cas No. 17,917.

The defendant must allege that he has a license or right of possession in the land before he can offer proof of such interest. Oregon Ry. & Nav. Co. v. Hertzbert, (1894) 26 Or 216, 37 P 1019; Witherell v. Wiberg, (1877) 4 Sawy 232, Fed Cas No. 17,917.

Title acquired by adverse possession is available as a defense under an allegation of title or ownership. Neal v. Davis, (1909) 53 Or 423, 435, 99 P 69, 101 P 212; Stephenson v. Van Blockland, (1911) 60 Or 247, 255, 118 P 1026.

An answer which merely contains a detail of facts which tend to show an estate in the defendant is insufficient and amounts to an attempt to convert the action into a suit in equity. Hall v. Austin, (1864) Deady 104, Fed Cas No. 5925.

An allegation of ownership is adequate but when accompanied with a statement of facts which indicate a lack of ownership it becomes insufficient. Wythe v. Myers, (1876) 3 Sawy 595, Fed Cas No. 18,119.

For a defense of right to possession as assignee of an unsatisfied mortgage, the answer should state that the mortgage or debt secured thereby was duly assigned to defendant. Witherell v. Wiberg, (1877) 4 Sawy 232, Fed Cas No. 17,917.

If the defendant seeks to defend a part of the land described in the complaint, he must clearly set out the boundaries of that part or his answer will be held insufficient upon proper objection. Hemenway v. Francis, (1891) 20 Or 455, 26 P 301.

An averment of title is sufficiently certain. Neal v. Davis, (1909) 53 Or 423, 435, 99 P 69, 101 P 212.

Merely pleading that the defendant has a fee is not sufficient if the defendant must rely on the argument that he merely gave plaintiff an equitable mortgage. Hughes v. Flier, (1955) 203 Or 612, 280 P2d 992. **Overruled in part by** Head v. Lawrence, (1965) 240 Or 572, 403 P2d 17.

An answer averring plaintiff's and his grantor's lack of seizin and possession for the statutory period prior to the commencement of the action and defendant's exclusive possession during that period was, in the absence of objection thereto, sufficient to admit evidence of adverse possession. Zeilin v. Rogers, (1884) 21 Fed 103.

**3. Effect of faulty pleading**

Variance between pleading and proof as to the derivation of defendant's title is not material since the answer need not contain a statement regarding the source of ownership and such an averment, if present, may be stricken as irrelevant. Moore v. Frazier, (1888) 15 Or 635, 16 P 869; Hall v. Austin, (1864) Deady 104, Fed Cas No. 5925; Wythe v. Myers, (1876) 3 Sawy. 595, Fed Cas No. 18,119.

A defendant may not offer evidence of title where he neither pleads right nor title. Gallagher v. Kelliher, (1911) 58 Or 557, 561, 114 P 943, 115 P 596; Richards v. Page Inv. Co., (1924) 112 Or 507, 509, 228 P 937.

Where the defendant merely traverses the allegations in the complaint, he will be confined in his testimony to facts that tend to show the weakness of the plaintiff's title. Phillippi v. Thompson, (1880) 8 Or 428.

When the defendant admits title a verdict should be directed for the plaintiff unless the answer alleges a right of possession in the defendant. Pacific Livestock Co. v. Portland Lbr. Co., (1920) 96 Or 567, 189 P 893.

FURTHER CITATIONS: Fitch v. Cornell, (1870) 1 Sawy 156, Fed Cas No. 4834; Advance Thresher Co. v. Esteb, (1902) 41 Or 469, 478, 69 P 447; Hoover v. King, (1903) 43 Or 281, 72 P 880, 99 Am St Rep 754, 65 LRA 790; Schultz v. Selberg, (1916) 80 Or 668, 157 P 1114; Sertic v. Roberts, (1943) 171 Or 121, 136 P2d 248; Denham v. Cuddeback, (1957) 210 Or 485, 311 P2d 1014.

**105.020**

NOTES OF DECISIONS

Where several tenants possessing different portions of the premises in controversy are sued in different actions, the landlord may appear in their stead and the actions will be consolidated. Stark v. Starr, (1870) 1 Sawy 15, Fed Cas No. 13,307.

Cotenants of the possessor can be made defendants at the plaintiff's option since a cotenant in possession is a tenant within the meaning of this section. McCown v. Hannah, (1871) 3 Or 302.

This section does not authorize the tenant to ask that his landlord be substituted as defendant, but if he does set out the tenancy in his answer the landlord may request the substitution. McDonald v. Cooper, (1887) 32 Fed 745, 13 Sawy 86.

A landlord cannot apply to be made a defendant until the tenant files his answer. Fitch v. Cornell, (1870) 1 Sawy 156, Fed Cas No. 4,834.

FURTHER CITATIONS: MacMahon v. Hull, (1912) 63 Or 133, 119 P 348, 124 P 474, 126 P 3.

**105.025**

NOTES OF DECISIONS

The findings and judgment must include the nature of the estate. Collins v. Goldsmith, (1896) 71 Fed 580.

A verdict "for the plaintiff" may be amended to comply with this statute when it is clear that the jury has passed on all issues, including the plaintiff's title. Osborne v. Altschul, (1899) 35 CCA 354, 93 Fed 381.

Plaintiff cannot complain that the verdict for defendant did not determine the question of title. Marquam v. Ray, (1913) 65 Or 41, 45, 131 P 523.

FURTHER CITATIONS: Hoover v. King, (1903) 43 Or 281, 72 P 880, 99 Am St. Rep 754, 65 LRA 790; Carroll v. McLaren, (1911) 60 Or 233, 118 P 1034; Fitch v. Cornell. (1870) 1 Sawy 156, Fed Cas No. 4,834.

105.030

NOTES OF DECISIONS

**1. Damages for withholding**

The measure of damages for withholding the premises is the value of the use and occupation of the same, exclusive of the value of the use of permanent improvements made in good faith by the defendant. Rafferty v. Davis, (1909) 54 Or 77, 102 P 305; Stark v. Starr, (1870) 1 Sawy 15, Fed Cas No. 13,307.

Damages recoverable include damages for waste as well as the value of the use and occupation. Wythe v. Myers, (1876) 3 Sawy 595, Fed Cas No. 18,119.

After he has established his equitable interest, a cestui que trust can recover any mesne profits he has paid to the trustee in satisfaction of the latter's judgment in ejectment. Starr v. Stark, (1879) 7 Or 500.

Evidence concerning the uses to which the property might have been adapted is not relevant on the issue of damages. Crane v. Ore. Ry. & Nav. Co., (1913) 66 Or 317, 328, 133 P 810.

**2. Set-off**

When the defendant in good faith makes permanent improvements upon the property, he is allowed to set-off the value thereof as against the damages. **Bona fide purchaser of defective title**, Hatcher v. Briggs, (1876) 6 Or 31; **defaulting vendee**, Hawkins v. Rodgers, (1919) 91 Or 483, 499, 179 P2d 563, 905; **defendant with color of title**, Wythe v. Myers, (1876) 3 Sawy 595, Fed Cas No. 18,119.

Equity will follow the law in permitting the defendant to set-off the value of any permanent improvements he has made in good faith as against the damages. Hatcher v. Briggs, (1876) 6 Or 31; Watson v. Hagen, (1913) 65 Or 569, 133 P 66; Jensen v. Probert, (1944) 174 Or 143, 148 P2d 248.

A person is presumed to be in good faith when he makes permanent improvements while in possession under color of title. Stark v. Starr, (1870) 1 Sawy 15, Fed Cas No. 13,307.

To be an improvement the addition must add to the value of the premises, and to be considered permanent it must qualify as a fixture or be physically immovable. Id.

A counterclaim for permanent improvements is confined to their value at the time of trial, and to merely allege the cost of the improvements is insufficient. Wythe v. Myers, (1876) 3 Sawy 595, Fed Cas No. 18,119.

A distinct cause of action equivalent to common-law trespass for mesne profits is given by this section, and if the defendant seeks a set-off he should expressly refer to that part of the complaint containing this cause. Id.

Taxes paid are a proper subject of counterclaim. Neff v. Pennoyer, (1876) 3 Sawy 495, Fed Cas No. 10,085.

If, in an action in ejectment the plaintiff fails to claim damages, the defendant cannot recover for permanent improvements. Hicklin v. Marco, (1891) 46 Fed 424.

If the defendant was in bad faith when he made the improvements, a set-off will not be allowed. Bank of Calif. Nat. Assn. v. McBride, (1943) 132 F2d 769.

LAW REVIEW CITATIONS: 18 OLR 149.

105.050

NOTES OF DECISIONS

An answer by a tenant in possession which alleges adverse possession for the statutory period is a denial of his cotenant's right of entry and constitutes an ouster. Grant v. Paddock, (1897) 30 Or 312, 47 P 712; Crane v. Ore. Ry. & Nav. Co., (1913) 66 Or 317, 324, 133 P 810.

Ejectment can only be initiated by one cotenant as against another when one of the tenants is completely excluded from possession and his right to enter has been denied by the other. Goldsmith v. Smith, (1884) 10 Sawy 294, 21 Fed 611.

FURTHER CITATIONS: McKay v. Freeman, (1877) 6 Or 449; Neal v. Davis, (1909) 53 Or 423, 435, 99 P 69, 101 P 212; In re Going's Estate, (1948) 183 Or 346, 193 P2d 529.

105.055

NOTES OF DECISIONS

So far as the title to the land is tried and determined, the judgment is conclusive upon the party against whom it is given. Barrell v. Title Guar. Co., (1895) 27 Or 77, 39 P 992; Moores v. Moores, (1899) 36 Or 261, 59 P 327; Hoover v. King, (1903) 43 Or 281, 284, 72 P 880, 99 Am St Rep 754, 65 LRA 790; Weatherford v. McKay, (1911) 59 Or 558, 560, 117 P 969.

Persons not parties nor privies to the judgment for possession are not concluded by it. Fitch v. Cornell, (1870) 1 Sawy 156, Fed Cas No. 4,834.

A judgment for defendant conclusively establishes that his entry on the land was lawful. Hill v. Cooper, (1880) 8 Or 254.

A tenant in common in possession is not affected by a judgment in an action of ejectment against his cotenant. (Alaska) Miller v. Blackett, (1891) 47 Fed 547.

The estoppel created dates from the rendition of the judgment. Barrell v. Title Guar. Co., (1895) 27 Or 77, 84, 39 P 992.

Only when it appears from the judgment that the title has in fact been tried and determined, is the judgment conclusive. Hoover v. King, (1903) 43 Or 281, 284, 72 P 880, 99 Am St Rep 754, 65 LRA 790.

A judgment rendered on a directed verdict for failure of plaintiff to prove title is conclusive on the question of title. Carroll v. McLaren, (1911) 60 Or 233, 237, 118 P 1034.

Plaintiff cannot complain that the verdict for defendant did not determine the question of title. Marquam v. Ray, (1913) 65 Or 41, 45, 131 P 523.

105.070

NOTES OF DECISIONS

Legal title does not pass to the donee until he has fulfilled all of the conditions of the grant. Quinn v. Ladd, (1899) 37 Or 261, 59 P 457. **Contra**, Lee v. Summers, (1868) 2 Or 260.

This statute is not in contravention of any federal law but is declaratory of the law as previously established by the federal decisions. Groslouis v. Northcut, (1872) 3 Or 394, 399.

This section contains a legislative construction of the 1850 Donation Act. McKay v. Freeman, (1877) 6 Or 449.

FURTHER CITATIONS: Delay v. Chapman, (1867) 2 Or 242.

105.080

NOTES OF DECISIONS

As against a stranger, one tenant in common may bring an action to recover possession of all the land owned by the cotenants. Le Vee v. Le Vee, (1919) 93 Or 370, 181 P 351, 183 P 773; National Sur. Corp. v. Smith, (1941) 168 Or 265, 114 P2d 118, 123 P2d 203.

FURTHER CITATIONS: Myers v. Reed, (1883) 17 Fed 401.

105.105 to 105.160

ATTY. GEN. OPINIONS: Eviction of a mobile home park tenant and trailer, (1970) Vol 35, p 150.

LAW REVIEW CITATIONS: 2 WLJ 490-492.

**105.105**

NOTES OF DECISIONS

There is no forcible entry when a person entitled to possession enters the premises in a peaceful manner. **Moving a house on the premises**, Harrington v. Watson, (1883) 11 Or 143, 3 P 173, 50 Am Rep 475; **forcing open a door of a dwelling**, Smith v. Reeder, (1892) 21 Or 541, 547, 28 P 890, 15 LRA 172; **taking down a fence**, Sommer v. Compton, (1908) 52 Or 173, 96 P 124, 1065.

This statute prohibits the use of actual force which tends to excite terror in a person in possession or is riotous in nature and endangers public peace. Smith v. Reeder, (1892) 21 Or 541, 28 P 890, 15 LRA 172.

A person out of possession is criminally liable if he enters the premises with force as against the person of the actual occupant, even though he is entitled to possession. Coghlan v. Miller, (1922) 106 Or 46, 211 P 163.

FURTHER CITATIONS: Hislop v. Moldenhauer, (1891) 21 Or 208, 27 P 1052.

**105.110**

NOTES OF DECISIONS

An action of forcible entry and detainer is a special proceeding which is unlike ejectment in that title is not in issue. Thompson v. Wolf, (1877) 6 Or 308; Zelig v. Blue Point Oyster Co., (1909) 54 Or 543, 104 P 193; Schroeder v. Woody, (1941) 166 Or 93, 109 P2d 597.

Actual or constructive force must be present in the taking or detention of realty before this action is available. Taylor v. Scott, (1883) 10 Or 483; Harrington v. Watson, (1883) 11 Or 143, 3 P 173, 50 Am St Rep 465; Hislop v. Moldenhauer, (1891) 21 Or 208, 27 P 1052; Twiss v. Boehmer, (1901) 39 Or 359, 65 P 18.

The purpose of this statute is to provide a person entitled to possession an adequate and summary remedy as against one acquiring or holding possession with force. Taylor v. Scott, (1883) 10 Or 483; Hislop v. Moldenhauer, 21 Or 208, 27 P 1052; Menefee Lbr. Co. v. Abrams, (1932) 138 Or 263, 5 P2d 709.

A landlord does not forfeit his right to maintain the action against a tenant wrongfully holding over by entering into a lease with another. Twiss v. Boehmer, (1901) 39 Or 359, 65 P 18; Obermeier v. Mattison, (1920) 98 Or 195, 206, 192 P 283, 193 P 915.

Evidence of title is not admissible in a forcible entry and detainer action. Twiss v. Boehmer, (1901) 39 Or 359, 65 P 18; Schroeder v. Woody, (1941) 166 Or 93, 109 P2d 597.

This action is always available when an entry is by force but is limited to the situations outlined in ORS 105.115 when there is merely a forcible retention of the premises. Schroeder v. Woody, (1941) 166 Or 93, 109 P2d 597; Purcell v. Edmunds, (1944) 175 Or 68, 151 P2d 629.

The action will not lie to enforce a widow's right of quarantine, since such right involves a matter of title. Aiken v. Aiken, (1885) 12 Or 203, 6 P 682.

An action will not lie under this section to oust a person in possession under a land sale contract. Aldrich v. Forbes, (1964) 237 Or 559, 391 P2d 748.

FURTHER CITATIONS: Smith v. Reeder, (1892) 21 Or 541, 28 P 890, 15 LRA 172; McAnish v. Grant, (1903) 44 Or 57, 74 P 396; Wolfer v. Hurst, (1905) 47 Or 156, 80 P 419, 82 P 20; Hostetler v. Eccles, (1924) 112 Or 572, 230 P 549.

**105.115**

NOTES OF DECISIONS

**1. In general**

An unlawful holding by force refers only to cases where the relation of landlord and tenant exists, not to a vendor and vendee relationship under a contract to purchase. Schroeder v. Woody, (1941) 166 Or 93, 109 P2d 597; Purcell v. Edmunds, (1944) 175 Or 68, 151 P2d 629.

**2. Under former similar statute**

The notice to quit required under prior similar legislation was provable by oral evidence. Chung Yow v. Hop Chong, (1884) 11 Or 220, 4 P 326.

A tenant from year to year could not be ejected even though he was holding without a "written lease or agreement." Rosenblat v. Perkins, (1889) 18 Or 156, 160, 22 P 598, 6 LRA 257.

Prior similar legislation was held to list the situations in which constructive force was present and actual force was not required. Hislop v. Moldenhauer, (1891) 21 Or 208, 27 P 1052.

The parties were permitted to waive the notice to quit since it was considered a step toward the termination of the tenancy rather than part of the remedy. Wolfer v. Hurst, (1905) 47 Or 156, 169, 80 P 419, 82 P 20, 8 Ann Cas 725.

The statute recites all situations in which an action of forcible detainer may be brought. Schroeder v. Woody, (1941) 166 Or 93, 109 P2d 597.

FURTHER CITATIONS: Smith v. Reeder, (1892) 21 Or 541, 28 P 890, 15 LRA 172; Cook v. Howard, (1911) 59 Or 372, 117 P 320; Weddle v. Parrish, (1931) 135 Or 345, 295 P 454.

**105.120**

NOTES OF DECISIONS

Pasturing of sheep is assumed to be "farming or agriculture" within the meaning of this section. Weddle v. Parrish, (1931) 135 Or 345, 295 P 454.

FURTHER CITATIONS: Garrett v. Clark, (1875) 5 Or 464; Neppach v. Jordan, (1887) 15 Or 308, 14 P 353; McAnish v. Grant, (1903) 44 Or 57, 74 P 396.

**105.125**

NOTES OF DECISIONS

A complaint must contain the allegations prescribed by this statute but need not include an allegation of ownership. Chung Yow v. Hop Chong, (1884) 11 Or 220, 4 P 326; Heiney v. Heiney, (1903) 43 Or 577, 73 P 1038.

A complaint is insufficient if it does not contain the terms of the lease and the date the notice to quit was served on the tenant. Cook v. Howard, (1911) 59 Or 372, 117 P 320.

The premises must be described with convenient certainty. Simmons v. Zarthas, (1921) 99 Or 476, 195 P 157.

The complaint must tender the issue of the defendant's right to remove his crops if the judgment is to determine the matter. Hostetler v. Eccles, (1924) 112 Or 572, 230 P 549.

FURTHER CITATIONS: Thompson v. Wolf, (1877) 6 Or 308; Menefee Lbr. Co. v. Abrams, (1932) 138 Or 263, 5 P2d 709.

**105.130**

NOTES OF DECISIONS

Evidence of title is not admissible in a forcible entry and detainer action. Twiss v. Boehmer, (1901) 39 Or 359, 65 P 18; Schroeder v. Woody, (1941) 166 Or 93, 109 P2d 597.

The special procedure provided must be followed whether the action be brought in the circuit court or before a justice. Zelig v. Blue Point Oyster Co., (1909) 54 Or 543, 104 P 193.

The fact that the landlord breached a covenant against leasing to others engaged in the same business as the tenant constitutes no defense. Menefee Lbr. Co. v. Abrams, (1932) 138 Or 263, 5 P2d 709.

An equitable defense may be interposed if the action is in the circuit court, but such a defense does not of itself stay the action. Friedenthal v. Thompson, (1934) 146 Or 640, 31 P2d 643.

In a special proceeding, forcible entry and detainer, where an equitable defense was interposed by answer, and the hearing was considered both by the parties and the court as a proceeding in equity, the controversy should be fully determined by a final decree adjusting the rights and equities of the parties. Leathers v. Peterson, (1952) 195 Or 62, 244 P2d 619.

**105.135**

NOTES OF DECISIONS

The time for service in forcible entry and detainer actions is less than that allowed in ordinary cases in the justice court. Belfils v. Flint, (1887) 15 Or 158, 14 P 295; Wolfer v. Hurst, (1905) 47 Or 156, 80 P 419, 82 P 20, 8 Ann Cas 725.

A return which fails to show proper certification of the copy of the complaint is insufficient to sustain a judgment by default. Belfils v. Flint, (1887) 15 Or 158, 14 P 295.

The appearance of defendant by an answer to the merits gives the court complete jurisdiction. McAnish v. Grant, (1903) 44 Or 57, 74 P 396.

FURTHER CITATIONS: Friedenthal v. Thompson, (1934) 146 Or 640, 31 P2d 643.

**105.140**

NOTES OF DECISIONS

A continuance because of a defective service in order to permit another service is not within the statute. Belfils v. Flint, (1887) 15 Or 158, 14 P 295.

Unless the undertaking is filed, a motion for a continuance for more than two days will be denied. Friedenthal v. Thompson, (1934) 146 Or 640, 31 P2d 643.

**105.145**

NOTES OF DECISIONS

Defendant need not plead a right to access for the removal of crops in order to preserve it. Hostetler v. Eccles, (1924) 112 Or 572, 230 P 549.

The judgment must conform to statutory requirements, if no equitable issues arise in the cause. Reckard v. Ryan, (1930) 133 Or 108, 288 P 1053.

The court may direct restitution at a future date when an appropriate equitable defense has been set up. Hopka v. Forbes, (1933) 142 Or 684, 21 P2d 218.

Where the court finds against an equitable defense, a decree may be entered accordingly and the case be allowed to proceed at law. Friedenthal v. Thompson, (1934) 146 Or 640, 31 P2d 643.

FURTHER CITATIONS: Share v. Williams, (1955) 204 Or 664, 277 P2d 775, 285 P2d 523.

**105.160**

NOTES OF DECISIONS

This section impliedly authorizes an appeal from a justice court to the circuit court. Thompson v. Wolf, (1877) 6 Or 308; Wolfer v. Hurst, (1905) 47 Or 156, 80 P 419, 82 P 20, 8 Ann Cas 725.

Giving of the required undertaking is a prerequisite to the right of appeal. Danvers v. Durkin, (1886) 14 Or 37, 12 P 60; Heiney v. Heiney, (1904) 43 Or 577, 73 P 1038; Zelig v. Blue Point Oyster Co., (1909) 54 Or 543, 104 P 193.

The phrase "final judgment" means the last judgment that may be entered in any court to which the appeal may be prosecuted. Wolfer v. Hurst, (1905) 47 Or 156, 80 P 419, 82 P 20, 8 Ann Cas 725.

This section covers appeals from the circuit court as well as the justices' court. Zelig v. Blue Point Oyster Co., (1909) 54 Or 543, 104 P 193.

This section is not applicable in an action to rescind a lease and recover possession since forcible entry and detainer is not involved. Peck v. Ross, (1932) 139 Or 323, 3 P2d 126, 8 P2d 780.

A defendant will not be heard to say that his bond is a nullity after having retained possession under it for a period of several months. Hopka v. Forbes, (1933) 142 Or 684, 21 P2d 218.

Defendant is not released from his obligation under the bond when he permits the plaintiff to use part of the premises during the pendency of appeal. Northwest Oil Co. v. Haslett Whse. Co., (1942) 168 Or 570, 123 P2d 985.

This section provides for a stay of the proceedings notwithstanding result adverse to defendant, and therefore has no effect where the defendant promptly vacates premises after adverse result. Priester v. Thrall, (1961) 229 Or 184, 349 P2d 866, 365 P2d 1050.

This section is not a violation of Ore. Const. Art. I, §1, 10 or 20. Scales v. Spencer, (1967) 246 Or 111, 424 P2d 242.

FURTHER CITATIONS: Aldrich v. Forbes, (1963) 237 Or 559, 385 P2d 618.

LAW REVIEW CITATIONS: 40 OLR 238.

**105.205 to 105.405**

CASE CITATIONS: Killam v. Killam, (1968) 251 Or 59, 444 P2d 479.

**105.205**

NOTES OF DECISIONS

Prior to 1891 a cotenant out of possession could not maintain a partition suit, and prior to 1909 a tenant in common with present possessory rights who was out of possession did not have this remedy. **Prior to 1891,** Savage v. Savage, (1890) 19 Or 112, 23 P 890, 20 Am St Rep 795; Windsor v. Simpkins, (1890) 19 Or 117, 23 P 669; **1891 to 1909,** Marx v. La Rocque, (1895) 27 Or 45, 39 P 401; Sterling v. Sterling, (1903) 43 Or 200, 72 P 741; Frye v. Moffet, (1908) 50 Or 495, 93 P 353; Mansfield v. Hill, (1910) 56 Or 400, 413, 107 P 471, 108 P 1007; Chauncey v. Wollenberg, (1911) 59 Or 214, 115 P 419; **rule in federal court prior to 1909,** Lamb v. Starr, (1868) Deady 350, Fed Cas No. 8,021.

Partition will not be granted if it is prejudicial as against certain tenants or conflicts with the intent of the person who created the tenancy. Harris v. Harris, (1931) 138 Or 243, 6 P2d 230, 85 ALR 1318; Craig v. Maher, (1937) 158 Or 40, 74 P2d 396. **But see** Michael v. Sphier, (1929) 129 Or 413, 272 P 902, 73 ALR 1.

A mere lienholder, such as a mortgagee, has no right to maintain a partition suit. Marx v. La Rocque, (1895) 27 Or 45, 39 P 401; Ukase Inv. Co. v. Smith, (1919) 92 Or 337, 181 P 7.

The administrator of a partnership cannot partition the real estate of the partnership. Burnside v. Savier, (1876) 6 Or 154.

If the court ever permits an accounting in a partition suit,

it will only be after proper allegations have indicated the necessity of such remedy. Jacobs v. Jacobs, (1919) 92 Or 255, 180 P 515.

Partition is a statutory remedy available to co-tenants having an estate of inheritance, or for life, or years, or a vested remainder or reversion in real property. Ukase Inv. Co. v. Smith, (1919) 92 Or 337, 181 P 7.

Tenancy by entirety is not subject of partition. Schafer v. Schafer, (1927) 122 Or 620, 260 P 206, 59 ALR 707.

Partition is an equitable remedy. Brogoitti v. Brown, (1962) 231 Or 309, 372 P2d 773.

FURTHER CITATIONS: Marquam v. Ross, (1904) 47 Or 374, 78 P 698, 83 P 852, 86 P 1; Thompson Estate Co. v. Kamm, (1923) 107 Or 61, 213 P 417; Stanley v. Mueller, (1960) 222 Or 194, 350 P2d 880; Haggerty v. Nobles, (1966) 244 Or 428, 419 P2d 9; Deardorff v. Neilson, (1968) 249 Or 440, 438 P2d 981.

**105.210**

NOTES OF DECISIONS

It is not necessary to plead facts which justify application of this section. Doan v. Doan, (1956) 208 Or 508, 302 P2d 565.

**105.215**

NOTES OF DECISIONS

The plaintiff must set forth in the complaint all persons known to him to have an interest in the property. Hanner v. Silver, (1868) 2 Or 336; Ukase Inv. Co. v. Smith, (1919) 92 Or 337, 181 P 7.

If the court ever permits an accounting in a partition suit, it will only be after proper allegations have indicated the necessity of such remedy. Jacobs v. Jacobs, (1919) 92 Or 255, 180 P 515.

It is not necessary to plead facts which justify application of this section. Doan v. Doan, (1965) 208 Or 508, 302 P2d 565.

**105.220**

NOTES OF DECISIONS

A cotenant's mortgage of his undivided part of land is unaffected by partition. Board of Sch. Land Commrs. v. Wiley, (1881) 10 Or 86, 90.

Nonresident wives of owners of land involved in a partition suit are not necessary parties. Cunningham v. Friendly, (1914) 70 Or 222, 139 P 928, 140 P 989.

The court may declare the amount of the lien which thenceforth attaches to the portion of the land set apart to the lien debtor. Ukase Inv. Co. v. Smith, (1919) 92 Or 337, 181 P 7.

FURTHER CITATIONS: Doan v. Doan, (1956) 208 Or 508, 302 P2d 565.

**105.235**

NOTES OF DECISIONS

Details concerning liens are required so that the court will be able to declare the amount and nature of the lien that attaches to the land set aside for the debtor. Ukase Inv. Co. v. Smith, (1919) 92 Or 337, 181 P 7.

If the court ever permits an accounting in a partition suit, it will only be after proper allegations have indicated the necessity of such remedy. Jacobs v. Jacobs, (1919) 92 Or 255, 180 P 515.

A deed to plaintiff and a divorce decree confirming her title may be impeached by allegations in defendant's answer. Murray v. Murray, (1923) 107 Or 121, 213 P 409.

FURTHER CITATIONS: Doan v. Doan, (1956) 208 Or 508, 302 P2d 565.

**105.240**

NOTES OF DECISIONS

Only on issues joined may fact questions be tried in partition, and the allegations and proofs must agree in this class of suits, the same as in others. Walker v. Goldsmith, (1886) 14 Or 125, 146, 12 P 537.

In partition the court of equity may require a descendant to account for advancements. Belle v. Brown, (1900) 37 Or 588, 61 P 1024.

Both title and possession may be adjudged in partition under the present statutes. French v. Goin, (1915) 75 Or 255, 264, 146 P 91, 94.

If the court ever permits an accounting in a partition suit, it will only be after proper allegations have indicated the necessity of such remedy. Jacobs v. Jacobs, (1919) 92 Or 255, 180 P 515.

General equitable relief may be awarded in partition in accordance with the demands of the pleadings. Murray v. Murray, (1923) 107 Or 121, 213 P 409.

A deed to plaintiff and a divorce decree confirming her title may be impeached in a partition suit. Id.

A suit for partition is an appropriate proceeding in which to make an assignment of dower. Haggerty v. Nobles, (1966) 244 Or 428, 419 P2d 9.

The equities of the respective parties arising out of the marital relationship are not relevant in making allocation of the interests in the property or its proceeds. Palmer v. Protrka, (1970) 257 Or 23, 476 P2d 185.

A suit for partition of property should be limited to an adjustment of the interests of the parties as cotenants. Id.

**105.245**

NOTES OF DECISIONS

Division of the property is the normal and favored remedy in partition, but the court has power to sell the realty and divide the proceeds if it can not be equitably distributed in specie. French v. Goin, (1915) 75 Or 255, 146 P 91; Ukase Inv. Co. v. Smith, (1919) 92 Or 337, 181 P 7; Thompson Estate Co. v. Kamm, (1923) 107 Or 61, 213 P 417, 28 ALR 722; Miller v. Plein, (1951) 191 Or 223, 227 P2d 823.

A decree in partition is not subject to collateral attack merely because one referee made the division rather than three. Morrill v. Morrill, (1890) 20 Or 96, 25 P 362, 23 Am St Rep 95, 11 LRA 155.

The financial interests of the parties should be kept in mind by the court in determining whether to order a division or a sale. Thompson Estate Co. v. Kamm, (1923) 107 Or 61, 213 P 417, 28 ALR 722.

It is not necessary to plead facts which justify finding that property cannot be sold without great prejudice to owners. Doan v. Doan, (1956) 208 Or 508, 302 P2d 565.

The referees' report is advisory, and the court may modify it as the evidence warrants. Brogoitti v. Brown, (1962) 231 Or 309, 372 P2d 773.

The fact that the judge visited the premises at the request of the parties does not make his decree for sale and division of the proceeds conclusive on review. Thompson Estate Co. v. Kamm, (1923) 107 Or 61, 213 P 417, 28 ALR 722.

FURTHER CITATIONS: Haggerty v. Nobles, (1966) 244 Or 428, 419 P2d 9.

**105.250**

NOTES OF DECISIONS

When equal partition or sale would create a hardship, the court may make an unequal division with compensa-

tion. Thompson Estate Co. v. Kamm, (1923) 107 Or 61, 213 P 417.

If a cotenant makes substantial improvements in good faith, equity will generally find a way to give him the benefit of the improvements. Miller v. Plein, (1951) 191 Or 223, 227 P2d 823.

**105.255**

NOTES OF DECISIONS

The land should be divided with reference to value rather than acreage. Leonard v. Walker, (1914) 70 Or 170, 140 P 755.

**105.260**

NOTES OF DECISIONS

All decrees in partition are interlocutory and unappealable except the decree confirming the referee's report. Bybee v. Summers, (1873) 4 Or 354; Sterling v. Sterling, (1903) 43 Or 200, 72 P 741; Kesler v. Nice, (1909) 54 Or 585, 104 P 2. **But see** Walker v. Goldsmith, (1886) 14 Or 125, 12 P 537.

A decree affirming a partition affects title as well as possession and if rendered by a court having jurisdiction it is not subject to collateral attack. Morrill v. Morrill, (1890) 20 Or 96, 25 P 362, 23 Am St Rep 95, 11 LRA 155; French v. Goin, (1915) 75 Or 255, 146 P 91, 94.

In the absence of fraud or mutual mistake, a partition in accordance with a family settlement is binding on all parties involved as provided in this section. French v. Goin, (1915) 75 Or 255, 264, 146 P 91, 94; Howell v. Howell, (1915) 77 Or 539, 152 P 217.

Objections to the report should be made when it is filed and not when the decree affirming the report is appealed. Reeder v. Reeder, (1913) 68 Or 163, 135 P 176, 137 P 191.

The land should be divided with reference to value rather than acreage. Leonard v. Walker, (1914) 70 Or 170, 140 P 755.

The division by the referees is disputable, presumed to be equitable and their report will not be set aside in the absence of clear evidence to the contrary. Gillard v. Gillard, (1918) 88 Or 95, 171 P 557. **But see** Brogoitti v. Brown, (1962) 231 Or 309, 372 P2d 773.

Lienholders, such as mortgagees, are not affected by the provisions of this section. Ukase Inv. Co. v. Smith, (1919) 92 Or 337, 181 P 7.

The referees' report is advisory, and the court may modify it as the evidence warrants. Brogoitti v. Brown, (1962) 231 Or 309, 372 P2d 773.

**105.265**

NOTES OF DECISIONS

Lienholders, such as mortgagees, are not affected by the decree. Board of Sch. Land Commrs. v. Wiley, (1881) 10 Or 86; Ukase Inv. Co. v. Smith, (1919) 92 Or 337, 181 P 7.

**105.270**

NOTES OF DECISIONS

The court may direct a sale even though one of the referees finds that partition would not be prejudicial. Gillard v. Gillard, (1918) 88 Or 95, 171 P 557.

FURTHER CITATIONS: Haggerty v. Nobles, (1966) 244 Or 428, 419 P2d 9.

**105.280**

CASE CITATIONS: Doan v. Doan, (1956) 208 Or 508, 302 P2d 565.

**105.285**

NOTES OF DECISIONS

The liens mentioned in this section refer to those already adjudicated by a judgment or decree. Ukase Inv. Co. v. Smith, (1919) 92 Or 337, 181 P 7.

FURTHER CITATIONS: Brusco v. Brusco, (1965) 241 Or 550, 407 P2d 645.

**105.295**

CASE CITATIONS: Doty v. Edmison, (1968) 251 Or 281, 445 P2d 133.

**105.300**

NOTES OF DECISIONS

The reason for requiring a lien creditor to declare the amount of his lien and the nature of other security is found in this section. Ukase Inv. Co. v. Smith, (1919) 92 Or 337, 181 P 7.

**105.310**

CASE CITATIONS: Haggerty v. Nobles, (1966) 244 Or 428, 419 P2d 9.

**105.400**

ATTY. GEN. OPINIONS: Authority of general guardian to file answer in a partition suit, 1920-22, p 41.

**105.405**

NOTES OF DECISIONS

Costs of partition, including the fees of referees and other disbursements, must be paid by the parties in proportion to their respective interests. Reeder v. Reeder, (1913) 68 Or 163, 170, 135 P 176, 137 P 191; Meyer v. Eichler, (1919) 92 Or 1, 179 P 659.

Before an attorney's fees are included in costs of partition, his services must inure to the common benefit of all parties. Michael v. Sphier, (1929) 129 Or 413, 272 P 902, 73 ALR 1; Brusco v. Brusco, (1965) 241 Or 550, 407 P2d 645.

FURTHER CITATIONS: Haggerty v. Nobles, (1966) 244 Or 428, 419 P2d 9.

**105.505**

NOTES OF DECISIONS

1. In general
2. When public nuisances are "private"
3. Warrant to abate
4. Authority to designate
5. Equitable relief
6. Persons liable for nuisances

**1. In general**

A dam will not be held to be a nuisance unless it appears that it is inundating land that would not otherwise be submerged. Esson v. Wattier, (1893) 25 Or 7, 34 P 756; Turner v. Locy, (1900) 37 Or 158, 61 P 342; Kane v. Littlefield, (1906) 48 Or 299, 86 P 544.

The right to maintain a public nuisance cannot be acquired by prescription. Ulmen v. Town of Mt. Angel, (1911) 57 Or 547, 112 P 529, 36 LRA(NS) 140; Gatt v. Hurlburt, (1930) 132 Or 415, 286 P 151; Laurance v. Tucker, (1939) 160 Or 474, 85 P2d 374.

Presence of a railway switch in a public street does not

constitute a nuisance per se if its use is open to all shippers. Wolfard v. Fisher, (1906) 48 Or 479, 482, 84 P 850, 87 P 530, 7 LRA(NS) 991.

Interference with access to property on a street need not be continuous to entitle the owner to abate it as a nuisance. Baines v. Marshfield & Suburban R. Co., (1912) 62 Or 510, 124 P 672.

A purpresture may be enjoined by a person injured by its presence even though it is not a public nuisance. Wessinger v. Mische, (1914) 71 Or 239, 142 P 612.

Discharge of dairy refuse into a swale where it decomposes and causes noxious smells constitutes a nuisance from which relief may be obtained. Adams v. Clover Hill Farms, (1917) 86 Or 140, 167 P 1015.

One seeking relief against a private nuisance must minimize his damages. Id.

**2. When public nuisances are "private"**

A person can get either legal or equitable relief from a public nuisance, depending on the adequacy of the former remedy, if he can prove that he has sustained damage other than that suffered by the public in general. **Erection of buildings**, Parrish v. Stephens, 1 Or 73; **obstructing a public street**, Milarkey v. Foster, (1877) 6 Or 378, 25 Am Rep 531; City of Roseberg v. Abraham, (1880) 8 Or 509; Luhrs v. Sturtevant, (1882) 10 Or 170; Van Buskirk v. Bond, (1908) 52 Or 234, 96 P 1103; Moore v. Fowler, (1911) 58 Or 292, 114 P 472; Bernard v. Willamette Box & Lbr. Co., (1913) 64 Or 223, 129 P 1039; Duester v. Alvin, (1915) 74 Or 544, 145 P 660; **damming a river**, Esson v. Wattier, (1893) 25 Or 7, 34 P 756; Turner v. Locy, (1900) 37 Or 158, 61 P 342; Kane v. Littlefield, (1906) 48 Or 299, 86 P 544; **operation of bawdy house**, Blagen v. Smith, (1899) 34 Or 394, 56 P 292, 44 LRA 522; **obstructions in navigable streams**, Oliver v. Klamath Lake Nav. Co., (1909) 54 Or 95, 102 P 786; Johnson v. Jeldness, (1917) 85 Or 657, 167 P 798, LRA 1918A, 1074; **operation of a sawmill**, Bourne v. Wilson-Case Lbr. Co., (1911) 58 Or 48, 113 P 52, Ann Cas 1913A, 245; **barn located in city**, Templeton v. Williams, (1911) 59 Or 160, 116 P 1062, 35 LRA(NS) 468; **excavation**, Sandstrom v. Ore-Wash. Ry. & Nav. Co., (1915) 75 Or 159, 146 P 803; Kurtz v. So. Pac. Co., (1916) 80 Or 213, 155 P 367, 156 P 794; **operation of tramway in street**, Baines v. Marshfield & Suburban Ry., (1912) 62 Or 510, 124 P 672; **undertaking establishment in residential area**, Stoddard v. Snodgrass, (1926) 117 Or 262, 241 P 73, 43 ALR 1160; **using street to repair vehicles**, Lowell v. Pendleton Auto Co., (1927) 123 Or 383, 261 P 415; **dumping garbage near homes**, Wilson v. Portland (1936) 153 Or 679, 58 P2d 257; **pollution of river**, Columbia R. Fishermen's Protective Union v. City of St. Helens, (1939) 160 Or 654, 87 P2d 195.

The statute makes no direct provision for relief of an injury occasioned by a public nuisance. Blagen v. Smith, (1899) 34 Or 394, 56 P 292, 44 LRA 522.

The fact that the maintenance of the public nuisance is a criminal offence will not prevent the giving of injunctive relief to a person peculiarly injured by the nuisance. Bernard v. Willamette Box & Lbr. Co., (1913) 64 Or 223, 129 P 1039.

A private party is estopped to sue a municipality for damages arising out of a public nuisance having its origin in the operation of a recognized governmental function for the general public good, when the operation with its attendant nuisance existed prior to the party's acquisition of property in its vicinity, and the nuisance was not thereafter augmented beyond what might have been reasonably anticipated by the party at the time he made his acquisition. East St. Johns Shingle Co. v. Portland, (1952) 195 Or 505, 246 P2d 554.

Hearing obscene words directed at plaintiff's conduct is a different harm from hearing or seeing vile words or acts in general by a member of the public not personally defamed thereby. Wilson v. Parent, (1961) 228 Or 354, 365 P2d 72.

Obscenity may consitute a private nuisance or a public nuisance. Id.

The right of action on account of a public nuisance is not limited to a landowner who suffers injury to his use and enjoyment of the land. Id.

**3. Warrant to abate**

Although the complaint contains no prayer for abatement, a warrant will issue once the nuisance is established unless such remedy is inadequate or the nuisance has ceased. Marsh v. Trullinger, (1877) 6 Or 356; Kothenberthal v. Salem, (1886) 13 Or 604, 11 P 287; Porges v. Jacobs, (1915) 75 Or 488, 494, 147 P 396.

The hearing of the motion is for the purpose of determining whether the nuisance has ceased and, if not, whether abatement would be an adequate remedy. Ankeny v. Fairview Milling Co., (1882) 10 Or 390; Kothenberthal v. Salem, (1886) 13 Or 604, 11 P 287.

If a person has a cause of action under this section he also has a right to personally abate the nuisance. Turner v. Locy, (1900) 37 Or 158, 61 P 342; Moore v. Fowler, (1911) 58 Or 292, 114 P 472.

The court has no authority to prescribe the manner of abatement. Ankeny v. Fairview Milling Co., (1882) 10 Or 390.

The court making the order allowing a warrant may identify the nuisance by means of its own knowledge of the evidence. Id.

The nuisance must be abated with as little injury to the defendant as possible. Ankeny v. Fairview Milling Co., (1882) 10 Or 390.

If the nuisance is temporary and can be abated, the measure of damages is the depreciation in the rental value of the plaintiff's property, plus compensation for discomfort and injury to health. Porges v. Jacobs, (1915) 75 Or 488, 147 P 396.

**4. Authority to designate**

A city can acquire from the state the power to declare what constitutes a nuisance, but that portion of an ordinance bearing arbitrary and erroneous declaration concerning nuisance will be deemed void. **Building a fence erroneously declared a nuisance**, Grossman v. Oakland, (1897) 30 Or 478, 41 P 5, 60 Am St Rep 832, 36 LRA 593; **arbitrary designation of burials as nuisance**, Ex parte Wygant, (1901) 39 Or 429, 64 P 867, 87 Am St Rep 673, 54 LRA 636; **slaughterhouse called a nuisance**, Portland v. Cook, (1906) 48 Or 550, 87 P 772, 9 LRA(NS) 733; **liquor store declared a nuisance**, Mayhew v. Eugene, (1910) 56 Or 102, 104 P 727, Ann Cas 1912C, 33.

**5. Equitable relief**

The remedy provided herein is not exclusive and whenever a nuisance will cause irreparable injury or result in numerous damage actions equity may issue an injunction. Kothenberthal v. Salem, (1886) 13 Or 604, 11 P 287; Fleischner v. Citizens' Inv. Co., (1893) 25 Or 119, 129, 35 P 174; Blagen v. Smith, (1899) 34 Or 394, 402, 56 P 292, 44 LRA 522; Union Power Co. v. Lichty, (1903) 42 Or 563, 566, 71 P 1044; Oliver v. Klamath Lake Nav. Co., (1909) 54 Or 95, 102 P 786, 787; Bourne v. Wilson-Case Lbr. Co., (1911) 58 Or 48, 113 P 52, Ann Cas 1913A, 245; Eugene v. Garrett, (1918) 87 Or 435, 444, 169 P 649, 170 P 731.

Apprehended conditions and imaginary dangers are not proper subjects for injunctive relief. Esson v. Wattier, (1893) 25 Or 7, 34 P 756; Phipps v. Rogue R. Valley Canal Co., (1916) 80 Or 175, 156 P 794.

Equity will not intervene when there is doubt as to the right of the plaintiff to maintain his suit. Van Buskirk v. Bond, (1908) 52 Or 234, 96 P 1103.

Suits in equity to enjoin a nuisance may not be brought in the county where the nuisance exists by reason of any application of this section, but must be brought in the county where defendants resided or may be found. State v. Peters, (1949) 185 Or 350, 203 P2d 299, 7 ALR2d 473.

The extraordinary relief of injunction rests in the sound discretion of the court. Wilson v. Parent, (1961) 228 Or 354, 365 P2d 72.

**6. Persons liable for nuisance**

A landlord is not liable for the existence of a nuisance which was not on the land at the execution or renewal of the lease, unless he was personally involved in its creation. Fleischner v. Citizens' Inv. Co., (1893) 25 Or 119, 35 P 174.

An action may be maintained against a city which, in improving a street, dumps earth upon adjoining lots. Reiff v. Portland, (1914) 71 Or 421, 141 P 167, 142 P 827, LRA 1915D, 772.

A municipal corporation that creates a nuisance on its own property is subject to the same liability as an individual. Wilson v. Portland, (1936) 153 Or 679, 58 P2d 257.

LAW REVIEW CITATIONS: 1 WLJ 308; 1 EL 80, 84.

**105.515**

NOTES OF DECISIONS

The court has no authority to direct the defendant to abate the nuisance, or to stay the issuance of the warrant except upon the conditions prescribed in the statute. Ankeny v. Fairview Milling Co., (1882) 10 Or 390.

FURTHER CITATIONS: Blagen v. Smith, (1899) 34 Or 394, 403, 56 P 292, 44 LRA 522.

**105.605**

NOTES OF DECISIONS

1. Constitutionality
2. Purpose and effect
3. Persons entitled to this remedy
4. "Adverse claim"
5. Quiet title v. removal of cloud
6. What constitutes a cloud
7. Possession necessary
8. Pleading and proof
9. Evidence of title
10. Federal courts

**1. Constitutionality**

The provisions of this section did not violate Ore. Const. Art. I, §17, preserving the right of trial by jury in civil cases. McLeod v. Lloyd, (1903) 43 Or 260, 275, 71 P 795, 74 P 491.

**2. Purpose and effect**

The purpose of this statute is to enlarge rather than impair the jurisdiction of the court of equity. Coolidge & McClaine v. Forward & Keneky, (1883) 11 Or 118, 2 P 292; Hodgkin v. Boswell, (1910) 57 Or 88, 110 P 487; Holmes v. Ore. & Calif. Ry., (1880) 6 Sawy 262, 5 Fed 75, 84.

In the absence of this statute equitable relief would not be granted to a person owning an interest in land unless the possession of the plaintiff had been disturbed by legal proceedings initiated by the defendant resulting in judgment for plaintiff. Stark v. Starr, (1867) 73 US 402, 18 L Ed 925.

All grounds of controversy between the parties as to title of the premises are determinable under this section. Starr v. Stark, (1870) 1 Sawy 270, Fed Cas No. 13,316.

The remedy given by this section is not barred by the running of the statute of limitations. Meier v. Kelly, (1892) 22 Or 136, 29 P 265.

This section gives equitable relief to a person who cannot settle issues of title in a legal action since the adverse claimant does not possess the disputed land. Savage v. Savage, (1908) 51 Or 167, 94 P 182.

If necessary the court may construe either a deed or a will in a quiet title suit. Id.

Service by publication is sufficient to give the court jurisdiction to affect the interests of a nonresident in a quiet title action. Kieffer v. Victor Land Co., (1909) 53 Or 174, 90 P 582, 98 P 877.

Only the defendants and their privies are barred by a decree which states that plaintiff has good title. Elwert v. Reid, (1914) 70 Or 318, 328, 139 P 918, 141 P 540.

The taxes and accruals due should be tendered by a plaintiff suing to quiet title against a county holding delinquent tax sale certificates. Bagley v Bloch, (1917) 83 Or 607, 621, 163 P 425.

Foreclosure of mortgage may be decreed on defendant's cross-bill or counterclaim in suit to quiet title. Hanna v. Hope, (1917) 86 Or 303, 307, 168 P 618.

Dismissal of suit to quiet title brought before the plaintiff acquired rights by adverse possession does not bar a subsequent action based on subsequent adverse holding. Bessler v. Powder R. Gold Dredging Co., (1919) 90 Or 663, 176 P 791, 178 P 237.

Nothing in this section authorizes bringing a suit to quiet title against a county. Kern County Land Co. v. Lake County, (1962) 232 Or 405, 375 P2d 817.

**3. Persons entitled to this remedy**

The vendor's right to foreclose as against a defaulting vendee is not given by this statute. Security Sav. & Trust Co. v. Mackenzie, (1898) 33 Or 209, 52 P 1046; Williams v. Barbee, (1940) 165 Or 92, 106 P2d 1033.

Any person claiming a substantial interest in real property can bring a suit under this section as against others who assert adverse interests in the same realty. **Miner with claim**, Crown Point Min. Co. v. Crismon, (1901) 39 Or 364, 65 P 87; **administrator**, Ladd v. Mills, (1904) 44 Or 224, 75 P 141; Butts v. Purdy, (1912) 63 Or 150, 170, 125 P 313, 127 P 25; Brown v. Laird, (1930) 134 Or 150, 291 P 352, 73 ALR 877; **cotenants with adverse claims**, Goldsmith v. Smith, (1884) 21 Fed 611; **remainderman**, Calvary Baptist Church v. Sexton, (1926) 117 Or 125, 242 P 616; **holder of equitable interest**, Holmes v. Wolfard, (1905) 47 Or 93, 81 P 819; Mascall v. Murray, (1915) 76 Or 637, 149 P 517.

Mere possession by the plaintiff is not necessarily equivalent to "claiming an interest or estate" within the meaning of this statute. Goldsmith v. Gilliland, (1885) 10 Sawy 606, 22 Fed 865.

A plaintiff can sue under this section even though he obtained a quitclaim deed immediately preceding the action in order to bring a quiet title suit. McLeod v. Lloyd, (1903) 43 Or 260, 278, 71 P 795, 74 P 491.

Defendant has no standing to challenge plaintiff's claim on the basis that plaintiff's deed did not grant interest of predecessor acquired by adverse possession. Rohner v. Neville, (1961) 230 Or 31, 365 P2d 614, 368 P2d 391. **Distinguishing** DuVal v. Miller, (1948) 183 Or 287, 192 P2d 249, 192 P2d 992 and DuVal v. Miller, (1956) 208 Or 176, 300 P2d 416.

The court has no jurisdiction of a marriage as such and accordingly it has no incidental power to divide property between cotenants, either during marriage or after they become tenants in common by reason of a divorce. Protrka v. Palmer, (1967) 246 Or 467, 423 P2d 514.

**4. "Adverse claim"**

Any claim which creates doubt and uncertainty in respect to the title of the plaintiff is "adverse" within the meaning of this statute. **Claims of judgment creditors**, Murphy v. Sears, (1883) 11 Or 127, 4 P 471; Lovelady v. Burgess, (1898)

32 Or 418, 52 P 25; **claim of interest as remainderman,** Winchester v. Hoover, (1902) 42 Or 310, 70 P 1035; **infant who asserts claim,** Harding v. Harding, (1905) 46 Or 178, 80 P 97; **claimant under warranty deed from plaintiff's grantor,** McLeod v. Lloyd, (1903) 43 Or 260, 71 P 795, 74 P 491.

Possession under a mistaken belief of ownership satisfies the element of hostility or adverseness in the application of the doctrine of adverse possession. Norgard v. Busher, (1960) 220 Or 297, 349 P2d 490; Brooke v. Amuchastegui, (1961) 226 Or 335, 360 P2d 275; Rider v. Pottratz, (1967) 246 Or 454, 425 P2d 766.

An action was not available under this section against a person who had not manifested an adverse claim to an irrigation franchise. Umatilla Irr. Co. v. Umatilla Imp. Co., (1892) 22 Or 366, 30 P 30.

A railroad which claimed no interest in the tract was not a proper party, even though the defendant had claims which might conflict with those of the railway company. Flanagan Estate v. Marshfield Trading Co., (1913) 65 Or 311, 313, 130 P 1133.

A grant of leave to sue the state to determine its interest in a congressional land grant does not support a suit where it does not appear that the state was claiming adversely. Altschul v. State, (1914) 72 Or 591, 597, 144 P 124.

This section requires an allegation that defendant claims an interest adverse to the plaintiff. Rohner v. Neville, (1961) 230 Or 31, 365 P2d 614, 368 P2d 391.

Where the occupant of the land has a "conscious doubt" as to whether his deed description includes the land but intends to occupy the land regardless, possession is sufficiently adverse to continue the running of the statute. Grimstad v. Dordan, (1970) 256 Or 135, 471 P2d 778.

**5. Quiet title v. removal of cloud**

In a suit to remove a cloud, the plaintiff must plead specific facts concerning the outstanding claim or incumbrance which constitutes a cloud rather than general allegations that an outstanding void instrument exists. King v. Higgins, (1872) 3 Or 406; Teal v. Collins, (1881) 9 Or 89; Shannon v. Portland, (1900) 38 Or 382, 388, 62 P 50; Richards v. Mohr, (1914) 73 Or 57, 143 P 1102.

In a suit to remove a cloud the adverse claim must be described while in a suit to quiet title the plaintiff merely alleges the existence of an adverse claim; but despite the difference in pleading the relief sought is identical in accordance with this section. O'Hara v. Parker, (1895) 27 Or 156, 39 P 1004; Moores v. Clackamas County, (1902) 40 Or 536, 67 P 662; McLeod v. Lloyd, (1903) 43 Or 260, 273, 71 P 795, 74 P 491.

In a suit to quiet title, a complaint is sufficient when it avers ownership by the plaintiff, possession in no person other than the plaintiff and the claim of an adverse interest in the property by the defendant. Moores v. Clackamas County, (1902) 40 Or 536, 67 P 662; Savage v. Savage, (1908) 51 Or 167, 94 P 182; Fildew v. Milner, (1910) 57 Or 16, 109 P 1092; Harma v. Hope, (1917) 86 Or 303, 168 P 618.

If plaintiff sues under this section on theory of quiet title, he need not identify the basis of defendant's claim even though such claim arises out of a writing. Goldsmith v. Gilliland, (1885) 10 Sawy 606, 22 Fed 865.

In a suit to remove a cloud, the plaintiff must plead facts which show the apparent validity of an outstanding title as well as facts indicating its invalidity. Day v. Schnider, (1896) 28 Or 457, 43 P 650.

This section regulates the mode of removing a cloud as well as determining adverse claims, though those suits differ essentially. McLeod v. Lloyd, (1903) 43 Or 260, 273, 71 P 795, 74 P 491.

A decree cancelling a deed did not bar a suit to quiet title even though a decree quieting title was requested in the first suit. Harvey v. Getchell, (1950) 190 Or 205, 225 P2d 391.

**6. What constitutes a cloud**

Suit to remove a cloud lies against a county holding tax-sale certificates based on a void assessment. Moores v. Clackamas County, (1902) 40 Or 536, 539, 67 P 662.

An administrator's deed issued in lieu of a lost deed was sufficient evidence of title as against a defendant who did not claim valid title in himself. Ladd v. Mills, (1904) 44 Or 224, 75 P 141.

When defendant admits title in plaintiff the latter need not prove his title unless defendant is successful in showing that plaintiff's title has since been defeated. Sears v. Murdock, (1911) 59 Or 211, 117 P 305.

A claim by right of eminent domain under an illegal judgment is a cloud removable in equity. Skelton v. City of Newberg, (1915) 76 Or 126, 131, 148 P 53.

If an assessment ordinance utterly fails to describe one's property, it does not constitute a cloud on his title. Klovdahl v. Town of Springfield, (1916) 81 Or 168, 158 P 668.

An attempt to inclose the land after the commencement of a suit to quiet title is evidence of lack of possession. McCully v. Heaverne, (1917) 82 Or 650, 160 P 1166, 162 P 863.

A default by a city in a quiet title suit merely admits that the city has no interest in the property, but does not preclude the city from acquiring an interest subsequent to the suit. Beezley v. City of Astoria, (1928) 126 Or 177, 269 P 216, 60 ALR 504.

When defendant's title was based on a certain deed, he was required to prove that the deed was valid and subsisting and was not a forgery as claimed by plaintiff. Durkin v. Ward, (1913) 66 Or 335, 133 P 345.

Where a purchaser of land agreed to convey a house and lot in satisfaction of one of the instalments but did not, the vendor was entitled to a recission of the contract and to its cancellation as a cloud on his title. Beno v. Norris, (1915) 77 Or 506, 510, 151 P 731.

**7. Possession necessary**

Prior to 1899, lawful possession by the plaintiff was necessary to bring an action under this section. Tichenor v. Knapp, (1876) 6 Or 205; Silver v. Lee, (1901) 38 Or 508, 63 P 882; Comegys v. Hendricks, (1910) 55 Or 533, 106 P 1016; East Marshfield Land Co. v. Werley, (1913) 67 Or 57, 135 P 315.

Plaintiff need not be in possession to bring a suit to remove a cloud or to quiet title. McLeod v. Lloyd, (1903) 43 Or 260, 273, 71 P 795, 74 P 491; Johnson v. North Star Lbr. Co., (1913) 125 CCA 118, 206 Fed 624. **But see** Hodgkin v. Boswell, (1910) 57 Or 88, 110 P 487.

If the defendant is not in possession the remedy of ejectment is inadequate and the plaintiff can bring suit to quiet title in equity even though he is not in possession. State v. Warner Valley Stock Co., (1910) 56 Or 283, 309, 106 P 780, 108 P 861; Kingsley v. Kressly, (1911) 60 Or 167, 111 P 385, 118 P 678, Ann Cas 1913E, 746.

A suit to cancel a void deed procured by fraud can be maintained in equity regardless of the possessory status of the land, since the remedy at law is always inadequate. State v. Warner Valley Stock Co., (1910) 56 Or 283, 309, 106 P 780, 108 P 861; Hodgkin v. Boswell, (1910) 57 Or 88, 110 P 487.

Possession by a third person will not bar an action to remove a cloud if the remedy at law is inadequate. Kingsley v. Kressly, (1911) 60 Or 167, 176, 111 P 385, 118 P 678, Ann Cas 1913E, 746.

The possession which another holds to deprive a plaintiff of his suit under this statute must be actual, as distinguished from constructive. United States v. Ore. & Calif. R. Co., (1911) 186 Fed 861.

The remedy by ejectment is not adequate to determine the rights of a riparian owner to land under water adjoining his upland. Rasmussen v. Walker Whse. Co., (1913) 68 Or 316, 330, 136 P 661.

Averments regarding possession are not necessary in a suit to remove a cloud if title is not disputed. East Marshfield Land Co. v. Werley, (1913) 67 Or 57, 135 P 315.

When the defendant's tenant attorns to the plaintiff the latter becomes possessed of the premises and can bring a suit to quiet title. Stanley v. Topping, (1914) 71 Or 590, 599, 143 P 632.

Absence of actual possession in any other party than plaintiff himself is jurisdictional, and if it is established upon the trial that the property is in the actual possession of the defendant the suit must fail. Portland v. Hurst, (1934) 145 Or 415, 28 P2d 217.

Where plaintiff pleads an equitable estate the possessory status of the property is immaterial since the remedy at law is never adequate. Oliver v. Burg, (1936) 154 Or 1, 58 P2d 245.

Although sounding like a request for equitable relief, a complaint will initiate an ejectment action if the defendant is in possession of the realty in question. National Sur. Corp. v. Smith, (1942) 168 Or 265, 114 P2d 118, 123 P2d 203.

Where disputed area was in part in actual possession of plaintiff, defendant was not entitled to decree of ownership. Du Val v. Miller, (1948) 183 Or 287, 192 P2d 249, 192 P2d 992.

**8. Pleading and proof**

Lack of possession by any party other than plaintiff must be alleged and proved before relief will be granted under this section. Moore v. Shofner, (1902) 40 Or 488, 67 P 511; Hendershott v. Sagsvold, (1907) 49 Or 592, 90 P 1104; Stanley v. Topping, (1914) 71 Or 590, 143 P 632; Chord v. Huber, (1915) 76 Or 306, 148 P 1128; Hardy v. Calif. Trojan Powder Co., (1923) 109 Or 76, 219 P 197; Richey v. Haley, (1935) 113 P 612, 233 P 567; Portland v. Hurst, (1934) 145 Or 415, 28 P2d 217; United States v. Ore. & Calif. R. Co., (1911) 186 Fed 861.

In actions brought under this section, the burden of proof follows the burden of pleading. McLeod v. Lloyd, (1903) 43 Or 260, 277, 71 P 795, 74 P 491; Murphy v. Bjelik, (1918) 87 Or 329, 345, 169 P 520, 170 P 723.

The complaint in a quiet title suit or suit to remove a cloud must adequately describe the property involved. Kadderly v. Frazier, (1900) 38 Or 273, 63 P 487.

A reply alleging ownership acquired by adverse possession is not a departure from a complaint which merely avers possession in plaintiff and an adverse interest claimed by defendant. Cooper v. Blair, (1907) 50 Or 394, 92 P 1074.

The better practice is for the court to decline to determine the validity of defendant's claim, even if plaintiff has assumed to set it out in the complaint, until defendant has disclosed it by answer. Savage v. Savage, (1908) 51 Or 167, 171, 94 P 182.

The burden, where each party claims to be the owner, is on each to establish by evidence his affirmative averments touching his own title. Durkin v. Ward, (1913) 66 Or 335, 338, 133 P 345.

When the plaintiff offers prima facie evidence of his title the defendant has the burden of producing evidence establishing his claim. Evans v. Marvin, (1915) 76 Or 540, 148 P 1119.

It is a fatal variance to allege a legal title and prove an equitable title. Mascall v. Murray, (1915) 76 Or 637, 646, 149 P 517, 521.

An allegation of ownership in fee is sufficient to admit proof of title by adverse possession. Id.

An answer, setting forth any description by which the property may be identified by a competent surveyor with reasonable certainty, is sufficient. McMaster v. Ruby, (1916) 80 Or 476, 157 P 782.

Where defendant seeks to foreclose mortgage on real estate in question by counterclaim, plaintiff may set up in reply any defensive matter he could have pleaded to complaint for foreclosure of mortgage. Hanna v. Hope, (1917) 86 Or 303, 307, 168 P 618.

When the plaintiff seeks equitable relief in a quiet title suit, the defendant can obtain relief from forfeiture without requesting it in his pleadings. Williams v. Barbee, (1940) 165 Or 260, 106 P2d 1033.

Variance between pleading and proof is not material if both are of sufficient accuracy and clarity to enable the property to be readily identified and the boundary determined beyond possibility of future controversy. Brooke v. Amuchastegui, (1961) 226 Or 335, 360 P2d 275.

Record title to land resected by a river follows the boundaries established by the official survey rather than the migratory channel of the river. Rohner v. Neville, (1961) 230 Or 31, 365 P2d 614, 368 P2d 391.

Where there is a close family relationship between the owner of the property and the adverse claimant the courts have required a greater showing that the possession was hostile or adverse. Fehl v. Horst, (1970) 256 Or 518, 474 P2d 525.

In a suit to quiet title the burden is on plaintiff to establish his title and he must do so on the strength of his own title and not on the weakness of defendant's title. O'Hara v. Brace, (1971) 258 Or 416, 482 P2d 726.

Allegations, that plaintiff has an interest in and possession of the disputed property and that defendant has an adverse claim, are sufficient for a suit to quiet title. City of North Bend v. County of Coos, (1971) 259 Or 147, 485 P2d 1226.

**9. Evidence of title**

An instrument that is void on its face is not a "cloud on title." State v. Warner Valley Stock Co., (1910) 56 Or 283, 310, 106 P 780, 108 P 861; Deckenbach v. Deckenbach, (1913) 65 Or 160, 130 P 729. **Contra,** Mount v. McAulay, (1906) 47 Or 444, 83 P 529.

Filing an application to purchase land as swamp and overflow with the state did not cast a cloud on the title of the riparian owner. Minto v. Delaney, (1879) 7 Or 337.

Evidence by defendant to establish her ownership by common reputation, referring principally to discussion among her neighbors, is inadmissible. Cooper v. Blair, (1907) 50 Or 394, 92 P 1074.

The fraud of plaintiff's grantor is not a defense to removal of a cloud created by a judgment when plaintiff was not a party to the action. Temple v. Osburn, (1910) 55 Or 506, 106 P 16.

A cloud is created by an apparent lien on the realty or an attempted conveyance of the real property by a stranger. Richards v. Mohr, (1914) 73 Or 57, 143 P 1102.

If the city in good faith accepts a street improvement made by a private contractor, a lien placed on realty as a result of the improvement is not a removable cloud. McClane v. Silverton, (1917) 83 Or 26, 162 P 496.

A lien for street improvement is a removable cloud if placed on realty not benefited by the improvements. Hagenberger v. Town of Milwaukie, (1917) 83 Or 298, 163 P 595.

If plaintiff offers evidence of his alleged title which is admitted on the pleadings, he is bound thereby and must recover on its strength. Murphy v. Bjelik, (1918) 87 Or 329, 343, 169 P 520, 170 P 723.

Plaintiff need not show title good against all the world, but only a title superior to that of the defendant who has asserted an adverse claim. Rohner v. Neville, (1961) 230 Or 31, 365 P2d 614, 368 P2d 391.

**10. Federal courts**

Where there is diversity of citizenships an action to recover realty not in the possession of any one may be maintained in the federal courts. Stark v. Starr, (1867) 73 US 402, 410, 18 L Ed 925; King v. French, (1873) 2 Sawy 441, Fed Cas No. 7,793; North Star Lbr. Co. v. Johnson, (1912) 196 Fed 56.

FURTHER CITATIONS: Calderwood v. Young, (1957) 212 Or 197, 315 P2d 561, 319 P2d 184; Foss v. Paulson, (1970) 255 Or 167, 465 P2d 221.

ATTY. GEN. OPINIONS: Availability of suit to remove cloud after tax sale, 1930-32, p 598.

LAW REVIEW CITATIONS: 2 WLJ 492.

**105.610**

NOTES OF DECISIONS

Actions brought under this section are limited by the provisions of ORS 12.040. Baker v. Woodward, (1884) 12 Or 3, 18, 6 P 173; State v. Warner Valley Stock Co., (1910) 56 Or 283, 299, 106 P 780, 108 P 861.

The remedy defined by this section has always been available to the Federal Government and persons claiming under it. Lee v. Summers, (1868) 2 Or 260.

**105.705**

NOTES OF DECISIONS

The remedy provided by this section is not available when title to the disputed area is claimed by adverse possession. Love v. Morrill, (1890) 19 Or 545, 24 P 916; School Dist. 70 v. Price, (1892) 23 Or 294, 31 P 657.

Title to land cannot be determined in an action brought under this section. School Dist. 70 v. Price, (1892) 23 Or 303, 31 P 657; Miner v. Caples, (1892) 23 Or 303, 31 P 655; Smith v. Cain, (1913) 69 Or 479, 139 P 566.

This Act does not unconstitutionally deny trial by jury. King v. Brigham, (1892) 23 Or 262, 271, 275, 31 P 601, 18 LRA 361; Smith v. Cain, (1914) 69 Or 479, 139 P 566.

The purpose of this Act is to ascertain the boundary line between adjacent parcels of land and not to try title. King v. Brigham, (1892) 23 Or 262, 275, 31 P 601, 18 LRA 361; Fulton v. Kuck, (1938) 159 Or 412, 79 P2d 647.

When title is not disputed equity has jurisdiction under this section to determine a disputed boundary line. Columbia City Land Co. v. Ruhl, (1914) 70 Or 246, 261, 134 P 1035, 141 P 208; McDowell v. Carothers, (1915) 75 Or 126, 146 P 800.

In the absence of statute this remedy is limited to controversies where the parties have grounds for general equitable relief. Love v. Morrill, (1890) 19 Or 545, 24 P 916.

In suit to restrain trespassing, boundary lines will not be established. Hume v. Burns, (1907) 50 Or 124, 90 P 1009.

FURTHER CITATIONS: Bewley v. Chapman, (1888) 16 Or 402, 18 P 849; Dice v. McCauley, (1892) 22 Or 456, 30 P 160; Trinwith v. Smith, (1902) 42 Or 239, 70 P 816; Robinson v. Leverenz, (1949) 185 Or 262, 202 P2d 517; Drury v. Pekar, (1960) 224 Or 37, 355 P2d 598; Purvine v. Hathaway, (1964) 238 Or 60, 393 P2d 181.

**105.710**

NOTES OF DECISIONS

The defendant cannot deny the jurisdiction of equity to settle a boundary dispute after he has in his answer asked the court to establish the boundary at a certain place. Killgore v. Carmichael, (1903) 42 Or 618, 72 P 637; McDowell v. Carothers, (1915) 75 Or 126, 146 P 800; Muck v. Weyerhaeuser Tbr. Co., (1921) 273 Fed 469.

Testimony of witnesses familiar with the history of the boundary line will have great weight in the determination of the location of the dividing line. Bewley v. Chapman, (1888) 16 Or 402, 18 P 849.

Where the facts necessary to jurisdiction are stated in the complaint and are denied by the answer, the question of jurisdiction becomes one of fact to be determined on the hearing. Love v. Morrill, (1890) 19 Or 545, 24 P 916.

When the defendant denies any dispute as to original boundaries and asserts rights to a new line based on adverse possession, equity will not take jurisdiction. Andrews v. Brown, (1910) 56 Or 253, 108 P 184.

Equity can determine plaintiff's title in land adjacent to the disputed boundary in order to find whether or not he is entitled to equitable relief. Nolan v. Cook, (1916) 81 Or 287, 158 P 810.

The expense of the survey should be charged equally to the litigants, but the defendant should pay all other charges when he fails to consent to a private survey. Newton v. McKeel, (1933) 142 Or 674, 21 P2d 206.

**105.715**

NOTES OF DECISIONS

It is error not to appoint a commission, though the evidence showed that the boundary was already plainly indicated by a fence. Robinson v. Laurer, (1895) 27 Or 315, 40 P 1012.

Boundaries may be proved by every kind of evidence admissible to establish any controverted fact, and a description may be rejected from a deed when it is manifest from all the circumstances that it was inadvertently inserted. McDowell v. Carothers, (1915) 75 Or 126, 130, 146 P 800.

The expense of surveying the boundary and marking it on the ground should be charged equally to the plaintiff and defendant. Jensen v. Westenskow, (1960) 225 Or 189, 357 P2d 383.

When there were no reliable monuments, the field notes of the county surveyor were the best evidence of the location of a former county road. Id.

**105.722**

LAW REVIEW CITATIONS: 48 OLR 117.

**105.755**

CASE CITATIONS: Larson v. State Hwy. Comm., (1969) 253 Or 287, 453 P2d 941.

LAW REVIEW CITATIONS: 46 OLR 307.

**105.760**

NOTES OF DECISIONS

This section does not apply to unincorporated towns. DePhillips v. State Hwy. Comm., (1955) 203 Or 561, 280 P2d 763.

Where a statute creates a special liability and no reference is made therein to interest, interest is not recoverable. Northwestern Ice & Cold Storage Co. v. Multnomah County, (1961) 228 Or 507, 365 P2d 876.

LAW REVIEW CITATIONS: 46 OLR 307.

**105.805**

NOTES OF DECISIONS

The injury must be of a permanent character in order

to amount to waste. Davenport v. Magoon, (1884) 13 Or 3, 4 P 299, 57 Am Rep 1.

The unauthorized cutting of timber is waste. Sheridan v. McMullen, (1885) 12 Or 150, 153, 6 P 497.

When a lessee holds under a lease containing an option to purchase, he is liable for waste committed during his possession if he fails to exercise the option, and the statute of limitation does not commence to run on the cause of action until the option has expired. Powell v. Dayton, Sheridan & Grand Ronde R. Co., (1888) 16 Or 33, 16 P 863, 8 Am St Rep 251.

Refusal of life tenant to pay current taxes constitutes waste, if the rental value of the property is sufficient for that purpose. Abernethy v. Orton, (1903) 42 Or 437, 442, 71 P 327, 95 Am St Rep 774.

The measure of damages for waste is the diminution of the market value of the property caused by the injury. Winans v. Valentine, (1936) 152 Or 462, 54 P2d 106.

The legislature intended to permit the court to allow treble damages only when the waste was wilfully, wantonly or maliciously committed. Wilson v. Kruse, (1953) 199 Or 1, 258 P2d 112.

Where waste was committed solely by the sublessee of lessee, the lessee would not be subject to treble damages to owners. Id.

FURTHER CITATIONS: Kinzua Lbr. Co. v. Daggett, (1955) 203 Or 585, 281 P2d 221.

LAW REVIEW CITATIONS: 30 OLR 1.

**105.810**

NOTES OF DECISIONS

**1. Wilful trespass**

In order to obtain treble damages the plaintiff must plead and prove wilfulness in the trespass. McHargue v. Calchina, (1915) 78 Or 327, 153 P 99; Siuslaw Timber Co. v. Russell, (1919) 91 Or 6, 178 P 214; Moss v. People's Calif. Hydro-Elec. Co., (1930) 134 Or 227, 293 P 606.

If a wilful trespass is pleaded and proved the plaintiff will receive treble damages even though they are not demanded in the complaint. Stott v. Pattison Lbr. Co., (1920) 95 Or 604, 188 P 414. **But see** Neff v. Pennoyer, (1876) 3 Sawy 495, Fed Cas No. 10,085.

When a trespasser wilfully cuts timber and enhances its value by his own labor, the injured party can either recover the value of the timber after the increment or three times the amount of damage sustained by the freehold. Oregon & Calif. R. Co. v. Jackson, (1891) 21 Or 360, 28 P 74.

The unlawful taking of timber comes within this section, even though the trespasser believes in good faith that his acts are authorized by the plaintiff. Loewenberg v. Rosenthal, (1889) 18 Or 178, 187, 22 P 601. **Distinguished in** United States v. Firchau, (1963) 234 Or 241, 380 P2d 800. **But see** McHargue v. Calchina, (1915) 78 Or 326, 153 P 99.

Actions essentially for penalties do not survive. Ashcraft v. Saunders, (1968) 251 Or 139, 444 P2d 924.

"Wilfully" is synonymous with "knowingly." Brown v. Johnston, (1971) 258 Or 284, 482 P2d 712.

Although the operation of defendant's factory with knowledge that it cast liquids and solids upon plaintiff's land was an intentional tort, it was not an evil tort so as to come within the provisions of this section. Fairview Farms, Inc. v. Reynolds Metals Co., (1959) 176 F Supp 178.

**2. Damages**

To establish the damage, it is necessary to prove ownership of land from which timber is severed. Kline v. Elkins, (1956) 207 Or 179, 294 P2d 1118.

Actual damages suffered as the result of the trespass are to be computed and multiplied by the statutory factor before allowance is made for such salvage as the plaintiff, by its own diligence, realized, or could have realized. United States v. Firchau, (1963) 234 Or 241, 380 P2d 800.

Any award beyond double damages must be punative or penal in character. Ashcraft v. Saunders, (1968) 251 Or 139, 444 P2d 924.

FURTHER CITATIONS: Roots v. Boring Junction Lbr. Co., (1907) 50 Or 298, 92 P 811, 94 P 182; Eastman v. Jennings-McRae Logging Co., (1914) 69 Or 1, 12, 138 P 216, Ann Cas 1916A, 185; Southern Ore. Co. v. Kight, (1924) 112 Or 66, 228 P 132, 832; Nordling v. Johnson, (1955) 205 Or 315, 283 P2d 994, 287 P2d 420; Seaver v. United States Plywood Corp., (1959) 273 F2d 36; Gordon Creek Tree Farms, Inc. v. Layne, (1962) 230 Or 204, 358 P2d 1062, 368 P2d 737; Ferguson v. Birmingham Fire Ins. Co., (1969) 254 Or 496, 460 P2d 342.

LAW REVIEW CITATIONS: 44 OLR 227; 47 OLR 260-281; 1 WLJ 304.

**105.815**

NOTES OF DECISIONS

1. In general
2. The trespass
3. Damages
4. Prior to the 1923 amendment

**1. In general**

An employer who orders work performed from which injurious consequences must be expected to arise unless means are adopted to prevent such consequences, is bound to see that such precautions are taken. Gordon Creek Tree Farms, Inc. v. Layne, (1962) 230 Or 204, 358 P2d 1062, 368 P2d 737.

By proceeding against all wrongdoers, plaintiff waives his right to exemplary damages, if some are not subject thereto. Id.

**2. The trespass**

Neither mistake of law nor one of fact constitutes an entry any less a trespass, nor does ignorance. Gordon Creek Tree Farms, Inc. v. Layne, (1962) 230 Or 204, 358 P2d 1062, 368 P2d 737.

The burden is on all to avoid trespassing upon the property of others. Id.

The general rule that an employer is not liable for the torts of an independent contractor or his servants is subject to numerous qualifications and exceptions. Id.

Although the operation of defendant's factory with knowledge that it cast liquids and solids upon plaintiff's land was an intentional tort, it was not an evil tort so as to come within the provisions of this section. Fairview Farms, Inc. v. Reynolds Metals Co., (1959) 176 F Supp 178.

**3. Damages**

This section is not designed to punish an offender but rather to assure adequate damages to the landowner. Kinzua Lbr. Co. v. Daggett, (1955) 203 Or 585, 281 P2d 221. **Distinguished in** United States v. Firchau, (1963) 234 Or 241, 380 P2d 800.

Plaintiff may not recover against defendants in different amounts. Gordon Creek Tree Farms, Inc. v. Layne, (1962) 230 Or 204, 358 P2d 1062, 368 P2d 737.

Considerable latitude should be allowed in the admission of evidence to prove the value of a crop injured or destroyed. Cross v. Harris, (1962) 230 Or 398, 370 P2d 703.

The fact damages may not be exactly calculated is not sufficient reason for disallowing them. Id.

The measure of damages is the difference between the

value of the crop immediately before and immediately after the injury. Id.

**4. Prior to the 1923 amendment**

It was the rule that only actual damages could be recovered for an accidental or casual cutting or removal. Loewenberg v. Rosenthal, (1889) 18 Or 178, 187, 22 P 601; Oregon & Calif. R. Co. v. Jackson, (1891) 21 Or 360, 28 P 74; McHargue v. Calchina, (1915) 78 Or 326, 153 P 99; Siuslaw Timber Co. v. Russell, (1919) 91 Or 6, 178 P 214.

A deliberate cutting of timber did not come within this statute, even though the trespasser had good reason to believe his acts were authorized by the plaintiff. Loewenberg v. Rosenthal, (1889) 18 Or 178, 22 P 601. **But see** McHargue v. Calchina, (1915) 78 Or 326, 153 P 99.

This section contained all the situations in which treble damages would not be awarded for a trespass to realty. Loewenberg v. Rosenthal, (1889) 18 Or 178, 187, 22 P 601.

FURTHER CITATIONS: Kinqua Pine Mills Co. v. Daggett, (1955) 203 Or 581, 281 P2d 231; Nordling v. Johnson, (1955) 205 Or 315, 283 P2d 994, 287 P2d 420; Loe v. Lenhardt, (1961) 227 Or 242, 362 P2d 312; United States v. Firchau, (1963) 234 Or 241, 380 P2d 800; Cascadia Lbr. Co. v. Stout, (1968) 249 Or 232, 436 P2d 111; Ashcraft v. Saunders, (1968) 251 Or 139, 444 P2d 924; Ferguson v. Birmingham Fire Ins. Co., (1969) 254 Or 496, 460 P2d 342.

LAW REVIEW CITATIONS: 44 OLR 228; 47 OLR 260-281; 1 WLJ 304.

**105.820**

NOTES OF DECISIONS

Cotenancy in a mining claim does not make the tenants joint venturers. Suitter v. Thompson, (1960) 225 Or 614, 358 P2d 267.