

## TITLE 18.

- SEC. 59. Judgments in action for the recovery of personal property.  
 60. Clerk to keep "judgment" book.  
 61. Judgment roll, and what constitutes it.  
 62. Judgment when docketed and when a lien on real property.  
 63. Judgment lien docket.  
 64. Satisfaction when to be entered in lien docket.

Judgment in  
in trials by  
jury, when  
entered.

SEC. 56. When a trial by jury has been had, judgment shall be entered by the clerk, in conformity to the verdict, within four days after the rendition thereof, unless an affidavit or statement of grounds for a new trial shall be filed, or unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

When case  
reserved for  
argument to  
be brought  
before court.

SEC. 57. When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument, at the first special term thereafter.

Judgment  
for defend-  
ant.

SEC. 58. If a set-off established at the trial exceed the plaintiff's demand so established, judgment for the defendant shall be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly.

Judgment in  
action for  
the recovery  
of personal  
property.

SEC. 59. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property have been delivered to the plaintiff and the defendant claim a return thereof, judgment, for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

Clerk to keep  
judgment  
book.

SEC. 60. The clerk shall keep among the records of the court a book for the entry of judgments, to be called the "judgment book," in which each judgment shall be entered, and shall specify clearly the relief granted, or other determination of the action.

Judgment  
roll.

SEC. 61. Immediately after entering the judgment, the clerk shall attach together, and file the following papers, which shall constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, with the proof of service, a memorandum, indorsed on the complaint, that the default of the defendant in not answering was entered, and a copy of the judgment.

2. In all other cases, the summons, pleadings or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, bill of exceptions, and all orders relating to a change of parties, or in any way involving the merits and necessarily affecting the judgment.

Judgments,  
in what  
cases and  
how docket-  
ed. 6 Barb.  
368; 7 do.  
341.

SEC. 62. On filing a judgment roll, judgment shall be docketed by the clerk of the court in the county where it shall be rendered, and in any other county, upon filing with the clerk of the district court of such county, a transcript of the original docket, and thereupon it shall become a lien on all the real property of the judgment debtor, not exempt from execution, in any county where it shall be docketed, such lien shall extend to all the real property of the judgment debtor, owned by him at the time of docketing the judgment, or which he may afterwards acquire until the lien ex-

pires, such lien shall continue for five years from the time of the rendition of the judgment, unless it be previously satisfied.

SEC. 63. The docket mentioned in the last section, is a book which the clerk shall keep in his office, to be called the "judgment lien docket," with each page divided into eight columns, and headed as follows: Judgment debtors; judgment creditors; amount of judgment; time of entry; when entered in judgment book; appeals when taken; judgment of appellate court; satisfaction when entered. The names of the judgment debtors shall be entered in the docket in alphabetical order.

TITLE 1  
Judgment  
lien docket.

SEC. 64. Satisfaction of a judgment shall be entered by the clerk in the judgment lien docket, when an execution shall be returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, or made in the presence of the clerk, or within two years after the judgment by the attorney of record, unless a revocation of his authority be previously filed. Whenever a judgment shall be satisfied in fact, otherwise than upon an execution, it shall be the duty of the party or attorney to give such acknowledgment, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it.

Satisfaction  
when to be  
entered in  
lien docket

## CHAPTER III.

## EXECUTIONS.

TITLE I. *The Execution.*TITLE II. *Proceedings Supplementary to the Execution.*

## TITLE I.

*The Execution.*

- SEC. 1. Execution may issue in five years.  
 2. Execution after five years, to be issued on the leave of court.  
 3. Other judgments how enforced.  
 4. Different kinds of executions.  
 5. Writ of execution; to whom directed, what to contain.  
 6. Execution may be issued to any county in territory.  
 7. To be returnable in sixty days.  
 8. Execution against the person, in what cases and when.  
 9. Arrest on execution; plaintiff when liable for costs.  
 10. Property liable to execution.  
 11. Property exempt from execution.  
 12. Sheriff, when to summon jury, to try right of property.  
 13. Verdict, to be in writing, when an indemnity to the sheriff.  
 14. Fees of sheriff jury, and witnesses, by whom paid.  
 15. Withdrawal of claim by claimant before verdict.  
 16. Sheriff may sell, notwithstanding verdict for claimant, if indemnified.  
 17. Return of undertaking and prosecution thereof, by claimant.  
 18. Notice of sale of real and personal property.  
 19. Penalty for selling without, or defacing notice.  
 20. Sales how made.  
 21. When defendant may retain personal property levied on.  
 22. When sheriff may postpone sale.  
 23. Delivery of property to purchaser.  
 24. Real property when and where not subject to redemption.  
 25. Who may redeem.

- TITLE 1.** SEC. 26. When and on what terms, judgment debtor, or lien creditor redeemed.
27. Redemption after redemption.
  28. Purchaser, when entitled to deed; deed to be approved by the court.
  29. Payment for redemption and tender thereof to whom made.
  30. Redemption by lien creditors; mode of procedure.
  31. Order to prevent waste until time of redemption expired.
  32. Purchaser and redemptioner when entitled to rents.
  33. Liability of judgment creditor to purchaser in case of eviction.
  34. Contribution among judgment debtors.

Execution  
within five  
years.

SEC. 1. The party in whose favor judgment is given, may at any time within five years after the entry thereof, issue a writ of execution for its enforcement as prescribed by statute.

After five  
years to be  
issued only  
by leave of  
court.  
How.

SEC. 2. After the lapse of five years from the entry of judgment, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent or non-resident, or cannot be found to make such service, in which case such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof that the judgment, or some part thereof, remains unsatisfied and due. When the judgment shall have been rendered in a justice's court, and docketed in the office of the clerk of the district court, such application for leave to issue an execution shall be to the district court of the county where the judgment was rendered.

Other judg-  
ments how  
enforced.

SEC. 3. When a judgment requires the payment of money or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this chapter. When it requires the performance of any other act, a certified copy of the judgment may be served on the party, against whom it is given, or the person or officer who is required thereby or by law, to obey the same, and his obedience thereto enforced. If he refuse he may be punished by the court as for a contempt.

Three kinds  
of execu-  
tions.

SEC. 4. There shall be three kinds of executions: one against the property of the judgment debtor; another against his person; and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same.

Writ of exe-  
cution.

SEC. 5. The writ of execution shall be issued in the name of the United States, sealed with the seal of the court, and subscribed by the clerk, and shall be directed to the sheriff, or coroner when the sheriff is a party or interested, and shall intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and shall require the sheriff substantially as follows:—

1. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter;

2. If it be against real or personal property, in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees, it shall require the sheriff to satisfy the judgment with interest out of such property;

**TITLE 1.**

3. If it be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor and commit him to the jail of the county until he shall pay the judgment with interest, or be discharged according to law;

4. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, charges, damages or rents and profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered to be specified therein, if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter.

SEC. 6. When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in this territory. When it requires delivery of real or personal property, it shall be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties.

SEC. 7. The sheriff shall indorse upon a writ of execution, the time when he received the same, and such execution shall be returnable, within sixty days after its receipt by the sheriff to the clerk with whom the judgment roll is filed.

SEC. 8. If the action be one in which the defendant might have been arrested as provided by statute, an execution against the person of the judgment debtor, may be issued to any county within the jurisdiction of the court, after the return of the execution against his property, unsatisfied in whole or in part.

SEC. 9. A person arrested on execution shall be imprisoned within the jail or the liberties thereof, and kept at his own expense until satisfaction of the execution, or his legal discharge, but the plaintiff shall be liable, in the first instance, for such expense as in other cases of arrest, in the same manner and to the same extent as prescribed in sections 103 and 104 of chapter one.

SEC. 10. All property, real and personal, of the judgment debtor, not exempt by law, and which is liable to an attachment, shall be liable to execution. Until a levy, property shall not be affected by the execution.

SEC. 11. The following property shall be exempt from execution, except as herein otherwise specially provided:—

1. All wearing apparel of every person or family;

2. The miscellaneous library and school-books of every individual and family, not exceeding in value one hundred and fifty dollars, and all family pictures.

3. To each household, ten sheep with their fleeces and the yarn or cloth manufactured therefrom, two cows, five swine, and provision and fuel for the comfortable subsistence of such householder and family for six months.

4. To each householder all household goods, furniture and utensils, not exceeding in value three hundred dollars;

To what  
counties ex-  
ecutions  
may be is-  
sued.

Returnable  
in 60 days

Execution  
against the  
person, in  
what cases  
and when.

Arrest on  
execution

What prop-  
erty liable.

Property ex-  
empt from  
execution.

11 Wen. 44;  
21 do. 371; 5  
Denio 119.



## TITLE 1.

5. The tools, implements, material, stock, apparatus, team, vehicle, horses, harness, library or other things, to enable any person to carry on the profession, trade, occupation or business in which such person may be wholly or principally engaged, not exceeding in value four hundred dollars; the word team in this subdivision shall be construed to mean either one yoke of oxen, or a pair of horses or mules, as the case may be;

6. A sufficient quantity of hay, grain, and feed for keeping for three months, the animals mentioned in the several subdivisions of this section as exempted from execution. But no article of property mentioned in this section shall be exempt from an execution issued on a judgment, recovered for its price, or upon a mortgage thereon.

Jury to try the right of property, when.  
SEC. 12. When personal property shall be seized by virtue of any execution, and any person other than the defendant, shall claim such property or any part thereof, and shall give notice thereof in writing, the sheriff may summon from his county six persons, qualified as jurors between the parties, to try the validity of the claim, giving five days' notice of the time and place of the trial to the plaintiff in the execution or his attorney.

Written verdict signed by foreman an indemnity to sheriff.  
SEC. 13. The sheriff, at the request of either party, shall summon witnesses and compel them to attend and give testimony, and he shall administer the necessary oaths to the jurors and witnesses. On the trial the defendant and the claimant may be examined by the plaintiff as witnesses, and the verdict of such jury being rendered in writing, and signed by the foreman, shall be a full indemnity to the sheriff, proceeding in accordance therewith.

Fees of sheriff, jury, and witnesses, by whom paid.  
SEC. 14. The sheriff, jury and witnesses shall be allowed the like fees, as for similar cases in the district court, and shall be paid by the claimant if the verdict is against him, otherwise by the plaintiff, and the sheriff may levy all such costs, upon the goods and chattels of the party made liable to pay them, as on execution.

Withdrawal of claim.  
SEC. 15. If at any time before the jury return, the claimant withdraw his claim, the trial shall proceed no further, and the claimant shall pay the costs of such unfinished trial.

Indemnity of sheriff by undertaking.  
SEC. 16. Notwithstanding the verdict of the jury be for the claimant, yet the sheriff shall proceed to sell the property seized in satisfaction of the execution, if the plaintiff tender to him a written undertaking, executed by two or more good and sufficient sureties, residents of the county, in double the value of the property, to the effect that he will indemnify the sheriff against all damages and costs, which he may sustain in consequence of the seizure and sale of such property, and moreover, that he will pay to any person or persons claiming title to such property, all damages which he or they may sustain in consequence of such seizure and sale.

Return of undertaking, prosecution thereon by claimant.  
SEC. 17. If such undertaking be given, it shall be returned by the sheriff, together with the execution, and filed with the clerk who issued the execution, and the claimant may prosecute his suit upon such undertaking, and recover such damages as a jury may assess.

Notice of sale.  
SEC. 18. Before the sale of property on execution, notice thereof shall be given as follows:

1. In case of personal property, by posting written or printed notice of the time and place of sale, in three public places of the

## TITLE 1.

county where the sale is to take place, not less than ten days successively;

2. In case of real property, by posting a similar notice, particularly describing the property, for four weeks successively, in three public places of the county, where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week, for the same period, in a newspaper of the county, if there be one, or if there be none, then in a newspaper published nearest to the place of sale;

SEC. 19. Any officer selling without the notice prescribed by the last section, shall forfeit one hundred dollars to the party aggrieved, in addition to his actual damages, and a person wilfully taking down, or defacing the notice posted, if done before the sale or satisfaction of the execution, and without the consent of the parties, shall forfeit fifty dollars to the party aggrieved, but the validity of the sale shall not be affected by either act.

SEC. 20. All sales of property under execution shall be made by auction, between nine o'clock in the morning and sunset. After sufficient property has been sold to satisfy the execution, no more shall be sold. Neither the officer holding the execution, nor his deputy, shall become a purchaser or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price, and when the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately, or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be thus sold. Sales of real property shall be made on the premises, if occupied by the defendant or any person holding under him, otherwise such sales shall be made at the house door.

SEC. 21. When the sheriff shall levy upon personal property by virtue of an execution, he may permit the defendant to retain the same, or any part thereof in his possession until the day of sale, upon the defendant executing a written undertaking to the sheriff with sufficient surety, in double the value of such property, to the effect that it shall be delivered to the sheriff at the time and place of sale, and for non-delivery thereof, an action may be maintained upon such undertaking by the sheriff or the plaintiff in the execution.

SEC. 22. If at the time appointed for the sale, the sheriff should be prevented from attending at the place appointed, or being present should deem it for the advantage of all concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the sale not exceeding one week, next after the day appointed, and so from time to time for the like cause, giving notice of every adjournment by public proclamation, made at the same time.

SEC. 23. When the purchaser of any personal property capable of manual delivery, shall pay the purchase money, the sheriff shall deliver to him the property, and if desired shall give him a certificate of the sale and payment. When such personal property shall not be capable of manual delivery, the sheriff shall execute and deliver to the purchaser a certificate of sale and payment.

Penalty for selling without or defacing notice.

Sales how made.

When personal property levied on may be retained by defendant.

Postponement of sale by sheriff.

Delivery of property to purchaser.

## TITLE 1.

When, and when not subject to redemption. Certificate.

SEC. 24. Upon a sale of real property, when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases the real property shall be subject to redemption, as provided in this chapter. The sheriff shall give to the purchaser a certificate of the sale, containing:

1. A particular description of the property sold;
2. The price bid for each distinct lot or parcel;
3. The whole price paid;

4. When subject to redemption, it shall be so stated, a duplicate of which certificate shall be filed by the sheriff with the recorder of deeds of the county.

By whom property may be redeemed.

SEC. 25. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole, or any part of the property; [1]

2. A creditor having a lien by judgment, mortgage or otherwise in the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

The persons mentioned in the second subdivision of this section, after having redeemed the property, are termed redemptioners.

Judgment debtor or lien creditor may redeem.

SEC. 26. The judgment debtor or lien creditor may redeem the property from the purchaser within three months after the day of sale, on paying him the amount of his purchase with ten per cent. thereon in addition, together with the amount of any taxes which the purchaser may have paid thereon after the purchase, and if the purchaser be also a creditor, having a lien prior to that of the redemptioner, the amount of such lien with interest.

Redemption after redemption.

SEC. 27. If the property be so redeemed by a redemptioner, either the judgment debtor or any other lien creditor may within sixty days after the last redemption, again redeem it on paying the sum paid on the last redemption with interest, and the amount of taxes which the last redemptioner may have paid thereon, and unless his lien be prior to that of such last redemptioner, the amount of such lien with interest. The property may be again, and as often as the judgment debtor, or any lien creditor or redemptioner is disposed, redeemed from the last previous redemptioner, within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with interest, and the amount of any taxes paid thereon by such last redemptioner, and the amount of any liens held by such last redemptioner, prior to his own, with interest. Notice of redemption shall in all cases be given to the sheriff.

Sheriff's deed to be approved by the district court.

SEC. 28. If no redemption be made within three months after the sale, the purchaser shall be entitled to a conveyance; or if so redeemed, whenever sixty days shall have elapsed, and no other redemption has been made, and notice thereof given, the time for redemption shall have expired, and the last redemptioner shall be entitled to a sheriff's deed. If the judgment debtor redeem, at any time before the time for redemption expires, the effects of the sale

## TITLE 1.

shall be terminated, and he be restored to his estate. The sheriff before delivering a deed to any purchaser or redemptioner, shall submit the same to the district court for the county in which they lie, for its approval, and if there be no irregularity in the proceeding, concerning the sale, such court shall indorse thereon its approval, and thereupon the sheriff shall deliver such, and to the person entitled to the same.

SEC. 29. The payment for the redemption of property may be made to the purchaser or redemptioner, as the case may be, or for him to the officer who made the sale; and the tender of the money shall be equivalent to payment.

Payment for redemption and tender thereof to whom made.

SEC. 30. A lien creditor, seeking to redeem property, shall produce to the officer or person from whom he seeks to redeem, and serve with his notice to the sheriff:

Redemption by lien creditors.

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court of the county where the judgment is docketed; if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the recorder;

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto; and

3. An affidavit by himself, or his agent, showing the amount then actually due on the lien.

SEC. 31. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or judgment creditor, but it shall not be deemed waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs to buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family while he occupies the property.

Order to stay waste till time of redemption expires.

SEC. 32. The purchaser from the time of sale until a redemption, and a redemptioner from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof.

Purchaser and redemptioner when entitled to rents.

SEC. 33. If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularity in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid with interest, from the judgment creditor. If the recovery be in consequence of the irregularity of the proceedings concerning the sale, the judgment may, by order of the court, upon notice to the debtor, be revived, and a new execution issued for the price paid on the sale with interest. Such judgment shall be a lien on the real estate of a judgment debtor, only from the time of its revival.

Liability of judgment creditor to purchaser in case of eviction.

SEC. 34. When property liable to an execution against several persons is sold thereon, and more than a due proportion of the

Contribution among judgment debtors.



**TITLE 2.** judgment is levied upon the property of one of them, or one of them pays without a sale, more than his proportion, he may compel contributions from the others; and when a judgment is against several, and is upon an obligation or contract of one of them as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel re-payment from the principal. In such cases, the person so paying or contributing, shall be entitled to the benefit of the judgment to enforce contribution or re-payment, if within thirty days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or re-payment; upon filing such notice, the clerk shall make an entry thereof in the margin of the docket where the judgment is entered.

## TITLE II.

### *Proceedings Supplementary to the Execution.*

- SEC. 35. Order to examine judgment debtor.  
 36. Examination of judgment debtor.  
 37. When judge may issue warrant to arrest debtor.  
 38. Sheriff's receipt, when a discharge to debtor of judgment debtor.  
 39. When garnishee may be summoned to appear and answer.  
 40. Creditor may exhibit allegations to garnishee.  
 41. Answer of garnishee, consequence of default.  
 42. Judgment against garnishee.  
 43. When creditor may except to garnishee's answer.  
 44. Creditor may deny such answer, and issue thereon.  
 45. Judgment against garnishee: his allowance for trouble.  
 46. When garnishee may discharge himself.  
 47. Examination of judgment debtor or claimant.  
 48. Costs of judgment creditor and garnishee.  
 49. Execution, how issued against garnishee.  
 50. Certain earnings of judgment debtor exempt.  
 51. Public officers not liable to answer as garnishee.

Order to examine judgment debtor. SEC. 35. After the issuing of an execution against property, and upon proof by affidavit of a party, or otherwise, to the satisfaction of the district court, or any judge thereof, that the judgment debtor has property or effects which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear and answer under oath concerning the same, before such court or judge, or before a referee appointed by such court or judge, at the time and place specified in the order, the place to be within the county in which the judgment debtor resides, and disobedience to such order may be punished as for a contempt.

Examination SEC. 36. The judgment debtor on his appearance, may be examined on oath concerning his property, and his answers reduced to writing, and filed with the clerk of the court, by whom the execution was issued. Either party may also examine witnesses in his behalf, and if during such examination, any property, rights or credits of such judgment debtor, not exempt by law be discovered, they may be levied upon by execution.

Judge may issue warrant to arrest debtor. SEC. 37. Instead of the order requiring the attendance of the judgment debtor, as provided in the last two sections, the court or judge may, upon proof by affidavit of a party or otherwise, to his satisfaction, that there is danger of the debtor leaving the

**TITLE 2.** territory, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before the court or judge; upon being brought before the court or judge, he may be examined on oath, and if it then appear that there is danger of the debtor leaving the territory, and that he has property which he has unjustly refused to apply to such judgment, he may be ordered to enter into an undertaking with one or more sureties, that he will from time to time attend before the court or judge as may be directed, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the judge.

SEC. 38. After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

SEC. 39. After the issuing or return of an execution against property of a judgment debtor, or of any one of several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding twenty-five dollars, the district court, or any judge thereof, may by an order require such person or corporation, or any officer or member thereof to appear at a specified time and place, before such court or judge, or a referee appointed by such court or judge, and answer concerning the same. If before a referee, the examination shall be taken by the referee and certified to the court or judge. The court or judge may, also, in their discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him proper.

SEC. 40. At any time after the making of such order, the judgment creditor may exhibit written allegations and interrogatories touching the property, stock or credits of the judgment debtor in the possession of, or held by such person or corporation as garnishee, or debts owing to the judgment debtor by him or it, and such garnishee shall be required to make full, direct and true answers to the same on oath.

SEC. 41. On the day when the garnishee shall be required to attend before the court, judge or referee, he shall exhibit on oath his answer to the allegations and interrogatories of the judgment creditor, unless for cause shown a further time shall be allowed; in default of such answer the judgment creditor may take judgment by default against him, or the court or judge may punish him as for contempt.

SEC. 42. Such judgment by default may be proceeded on to final judgment, in like manner as actions against defendants, but no final judgment shall be rendered against the garnishee for a greater amount than that specified in the execution.

SEC. 43. The judgment creditor may except to the answer of any garnishee for insufficiency, and if the same shall be judged

Sheriff's receipt, when a discharge.

Examination of persons, &c., indebted to judgment debtor. When garnishee may be summoned to answer, &c.

Allegations, &c., of creditor to garnishee.

Answer garnishee.

Judgment.

Creditor may except

**TITLE 2.** insufficient, the court or judge may allow the garnishee to amend his answer, in such time and upon such terms as shall be just, or the judgment creditor may take judgment by default, or move the court or judge to attach the body of the garnishee to compel a sufficient answer.

**Denial of answer.** SEC. 44. The judgment creditor may deny the answer of the garnishee in whole or in part, and the issue shall be tried as ordinary issues between plaintiff and defendant. If the answer of the garnishee be not excepted to or denied in such time as the court or judge may deem proper, it shall be taken to be true and sufficient.

**Judgment against garnishee; his allowance for trouble.** SEC. 45. If by the answer not excepted to nor denied, or if upon trial it shall appear that the garnishee is possessed of property or effects of the judgment debtor, or is indebted to him, the value of such property or effects, or of the debt, being ascertained, judgment may be rendered against the garnishee for the proper amount in money, but if such debt be not yet due, execution shall not be awarded against the garnishee until it becomes due; and in such cases the court may make him a reasonable allowance for his trouble in answering, to be paid out of the fund in his hands.

**How garnishee may discharge himself.** SEC. 46. Whenever any property, effects, money or debts belonging or owing to the judgment debtor, shall be confessed or found by the court, judge, referee or jury, to be in the possession of the garnishee, he may at any time before final judgment, discharge himself by delivering the same to the sheriff.

**Examination of debtor.** SEC. 47. The judgment debtor or claimant may be required to attend before the court, judge or jury, for the purpose of giving any necessary information respecting the property or effects alleged to be in the possession of the garnishee, and may be thereupon examined on oath concerning the same.

**Costs of creditor and garnishee.** SEC. 48. In all cases of controversy between the judgment creditor and garnishee, the parties may be adjudged to pay or recover costs as in ordinary cases between plaintiff and defendant.

**Execution against garnishee.** SEC. 49. Execution may be issued to collect any judgment rendered against a garnishee, as in ordinary cases of judgment against defendants.

**Certain earnings of judgment debtor, exempt.** SEC. 50. The earnings of a judgment debtor for personal services, at any time within sixty days next preceding the judgment against a garnishee, shall not be included in such judgment, when it shall be made to appear by the affidavit of the judgment debtor, or otherwise, that such earnings are necessary for the use of a family, supported wholly or partly by his labor.

**Public officers not liable to answer as garnishee.** SEC. 51. No territorial or county treasurer, sheriff, constable, or other public officer, shall be liable to answer as garnishee for moneys in his possession as such public officer, belonging to, or claimed by any judgment debtor.

## CHAPTER IV.

## OF EVIDENCE.

- TITLE I.** *Of the Competency of Witnesses.*  
**TITLE II.** *Of the Manner of Compelling the Attendance of Witnesses.*  
**TITLE III.** *Of Examination of Witnesses.*  
**TITLE IV.** *Of Depositions taken in the Territory.*  
**TITLE V.** *Of Depositions taken out of Territory.*  
**TITLE VI.** *Of Proceedings to Perpetuate Testimony.*  
**TITLE VII.** *Of Provisions Relating to Records, Documents and other Writings.*

## TITLE I.

*Of the Competency of Witnesses.*

- SEC. 1.** Want of religious belief not to disqualify.  
 2. But belief in Supreme Being, who will punish perjury, necessary.  
 3. No person to be excluded on account of interest.  
 4. To whom last section inapplicable.  
 5. Conviction for crime to affect credibility only.  
 6. Persons incompetent to testify.  
 7. Certain persons not to be examined.

**SEC. 1.** No person if otherwise competent, shall be disqualified from being a witness on account of the want of religious belief.

**SEC. 2.** Every person believing in the existence of a Supreme Being, who will punish false swearing, if otherwise competent, may be a witness in any action or proceeding.

**SEC. 3.** No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action.

**SEC. 4.** The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended. When an assignor of a thing in action or contract is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and he shall be so received. But such assignor shall not be admitted to be examined in behalf of any person deriving title through or from him, against any executor or administrator.

**SEC. 5.** No person offered as a witness shall be excluded from giving evidence, by reason of conviction for crime, but such conviction may be shown to affect his credibility.

**SEC. 6.** The following persons shall not be competent to testify:  
 1. Those who are of unsound mind, or intoxicated at the time of their production for examination;

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly;

3. Negroes, mulattoes and Indians, or persons one half or more of Indian blood, in an action or proceeding to which a white person is a party.

**SEC. 7.** In order to encourage confidence, and to preserve it inviolate, the following persons shall not be examined as witnesses:

What religious belief necessary.

Competency of witness.

7 Barb. 120;  
2 East, 856;  
792; 14 Barb. 637.

Conviction for crime affects witness' credibility.

Persons incompetent to testify.

Persons not to be examined.



## TITLE 2.

1. A husband shall not be examined for or against his wife, nor a wife for or against her husband; nor can either, during marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other; nor to a criminal action or proceeding for a crime committed by one against the other;

2. An attorney or counsellor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment;

3. A clergyman or priest shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs;

4. A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient;

5. A public officer shall not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

## TITLE II.

*Manner of Compelling the Attendance of Witnesses.*

SEC. 8. Witnesses not compelled to attend.

9. Subpoena, its requisites.

10. Subpoena, how issued.

11. Subpoena, how served.

12 & 13. Persons in court may be compelled to testify.

14. Penalty for disregarding subpoena.

15. Attachment, when to issue.

16. Order to examine a prisoner.

17. Order, how obtained.

When compelled to attend.

SEC. 8. No person shall be obliged to attend as a witness before any court of record, judge, justice of the peace, commissioner, referee, or other officer, in any civil action out of the county in which he resides, unless his residence be within twenty miles of such court, judge, justice of the peace, commissioner, referee or other officer. And no person shall be compelled to attend as a witness in any civil action or proceeding, unless the fees be paid or tendered to him, which are allowed by law for one day's attendance as a witness, and for travelling to and returning from the place where he is required to attend, provided such fees be demanded by him at the time of service of the subpoena.

Subpoena.

SEC. 9. The subpoena may require not only the personal attendance of the person to whom it is directed, at a particular time and place to testify as a witness, but may also require him to bring with him any books, documents, or other things under his control.

How issued.

SEC. 10. The subpoena shall be issued as follows:

1. To require attendance before a court of record, or at the trial of an issue therein, it shall be issued in the name of the United

## TITLE 3.

States, and be under the seal of the court, before which the attendance is required, or in which the issue is pending.

2. To require attendance out of such a court, before a judge, justice of the peace, commissioner, referee, or other officer, authorized to administer oaths, or take testimony in any matter under the laws of this territory, it shall be issued by such judge, justice of the peace, commissioner, referee, or other officer before whom the attendance is required:

3. To require attendance before a commissioner appointed to take testimony by a court of any other state, territory or country, it may be issued by any judge, or justice of the peace, in places within their respective jurisdictions.

SEC. 10. Such subpoena may be served by any white person over eighteen years of age, by exhibiting and reading it to the witness, or by giving him a copy thereof, or by leaving such copy at the place of his abode.

SEC. 11. A person present in court or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer.

SEC. 12. If any person duly served with a subpoena, and obliged to attend as a witness shall fail so to do, without any reasonable excuse, he shall be liable to the aggrieved party for all damages occasioned by such failure, to be recovered in a civil action.

SEC. 13. Such failure to attend, as required by the subpoena, shall also be considered a contempt, and upon due proof of the service thereof, the witness may be punished by a fine not exceeding fifty dollars.

SEC. 14. The court, judge, justice of the peace or other officer, in such case, may issue an attachment to bring such witness before them, to answer for the contempt, and also to testify as a witness in the cause in which he was subpoenaed.

SEC. 15. If the witness be a prisoner confined in a jail or prison within this territory, an order for his examination in prison, upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be issued.

SEC. 16. Such order can only be made upon affidavit, showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

## TITLE III.

*Examination of Parties.*

SEC. 17. A party may examine his adversary.

18. Plaintiff may file interrogatories for discovery.

19. Answer to interrogatories to be filed.

20. Interrogator may examine adverse party.

21. Rebutting testimony.

22. Effect of refusal to testify.

23. Testimony by a party not responsive to the inquiries, may be rebutted by the oath of the party calling him.

24. Person for whom action is brought or defended, may be examined.

SEC. 17. A party to an action or proceeding, may be examined as a witness, at the instance of the adverse party, or of one of several

A party may examine his adversary. §

**TITLE 4.** adverse parties, and for that purpose may be compelled in the same manner, and subject to the same rules of examination as any other witness, to testify at the trial, or he may be examined on a commission.

**Sanf. 718.; 8 Const. 450.** **Interrogatories for discovery.** SEC. 18. Instead of the examination being had at the trial as provided by the last section, the plaintiff at the time of filing his complaint or afterwards, and the defendant at the time of filing his answer, or afterwards, may file in the clerk's office, interrogatories for the discovery of facts and documents material to the support or defence of the action, to be answered on oath by the adverse party.

**Answer to interrogatories.** SEC. 19. Such interrogatories shall be answered, and such answers filed in the clerk's office, within twenty days after the same are served on the party interrogated, unless for cause shown a further time be allowed by the court, or judge thereof.

**Interrogator may examine adverse party.** SEC. 20. A party to an action having filed interrogatories to be answered by the adverse party, as prescribed by the last two sections, shall not thereby be precluded from examining such adverse party as a witness at the trial.

**Rebutting testimony.** SEC. 21. The testimony of a party either upon an examination at the trial, or upon interrogatories filed, may be rebutted by adverse testimony.

**Effect of refusal to testify.** SEC. 22. If a party refuse to attend, and testify at the trial, or to be examined upon a commission, or to answer any interrogatories filed, his complaint, answer or reply, may be stricken out and judgment taken against him, and he may also in the discretion of the court, be proceeded against as in other cases for a contempt.

**Testimony by a party not responsive to the inquiries, may be rebutted by the oath of the party calling him. 2 Sanf. 890.** SEC. 23. A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf in respect to any matter pertinent to the issue. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answer thereto; or to discharge when his answer would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, and shall be received.

**Person for whom action is brought or defended, may be examined.** SEC. 24. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness in the same manner, and subject to the same rules of examination as if he were named as a party.

#### TITLE IV.

##### *Of Depositions taken in the Territory.*

- SEC. 25. Depositions when taken.
26. Depositions before whom taken; notice to be given.
27. Oath and examination of witnesses.
28. Deposition how taken.
29. Deposition to whom sent.
30. Deposition how received in evidence.
31. Deposition when not to be used.
32. When deposition taken in one action may be used in another action.
33. Deposition in court below, may be used in appellate court.
34. When person may be compelled to give deposition.

**Depositions when taken.** SEC. 25. The testimony of a witness in this territory, may be taken by deposition, to be read in evidence in any action, suit or

proceeding commenced and pending in any court in this territory, **TITLE 4.** in the following cases:

1. When the witness resides out of the county, and more than twenty miles from the place of trial;

2. When the witness is about to leave the county and go more than twenty miles from the place of trial, and there is a probability that he will continue absent when the testimony is required;

3. When the witness is sick, infirm or aged, as to make it probable that he will not be able to attend at the trial.

**SEC. 26.** Either party may have the deposition of a witness taken in this territory, before any judge of the district court, justice of the peace, clerk of the supreme or district courts, master in chancery, mayor of a city or notary public, on serving upon the adverse party, or his attorney of record, previous notice of the time and place of examination. Such notice shall be at least three days, and in addition one day, Sundays excepted, for every twenty miles of the distance of the place of examination, from the residence of the person to whom notice is given, unless for a cause shown, a judge of the district court prescribe a shorter time. When a shorter time is prescribed, a copy of the order shall be served with the notice.

**SEC. 27.** Before proceeding to the examination, the witness shall be sworn by the officer taking the deposition, to testify the truth, the whole truth, and nothing but the truth, relating to the cause for which such deposition is taken; he shall then be examined by the parties, or their attorneys, if they shall think fit, or by the officer, either upon verbal or written interrogatories, on all the points which they shall deem material.

**SEC. 28.** The deposition shall be written by the officer taking the same, or by the witness, or by some disinterested person in the presence and under the direction of such officer. When completed it shall be carefully read to, or by the witness, corrected if desired, and subscribed by him, and certified by the officer substantially as follows:

*Territory of Oregon,* } ss.  
*County of \_\_\_\_\_*

I, A. B., justice of the peace, in and for the said county, (or judge, clerk, &c., as the case may be,) do hereby certify that the above deposition was taken before me, and reduced to writing by myself (or witness, &c., as the case may be,) at \_\_\_\_\_ in said county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock, in pursuance of notice, that the above-named witness, before examination, was sworn (or affirmed) to testify the truth, the whole truth, and nothing but the truth, and that the said deposition was carefully read to (or by) said witness, and then subscribed by him.

Dated at \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

A. B., *Justice of the Peace.*

**SEC. 29.** The deposition shall be enclosed and sealed by the officer taking the same, and directed to the clerk of the court, arbitrators, referees, or justice of the peace, before whom the action is pending, or to such person as the parties in writing may agree



**TITLE 5.** upon, and either delivered to the clerk of the court, or other person, or transmitted through the mail or by some private opportunity.

**How received in evidence.** SEC. 30. Such deposition may be used by either party, upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions, to the competency or credibility of the witness, or the manner of taking the deposition. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was taken at the time of the examination.

**When not be used.** SEC. 31. No deposition shall be used if it shall appear that the reason for taking it no longer exists; *provided however*, that if the party producing the deposition in such case, shall show any sufficient cause then existing for using such deposition, it may be admitted.

**When depositions may be used in another action.** SEC. 32. When the plaintiff in any action shall discontinue it, or when it shall be dismissed for any cause, and another action shall afterwards be commenced for the same cause, between the same parties or their respective representatives, all depositions lawfully taken in the first action, may be used in the other, in the same manner and subject to the same conditions and objections as if originally taken for such action; provided, that the deposition shall have been duly filed in the court where the first action was pending, and shall remain in the custody of the court, from the termination of the first action until the commencement of the other.

**Ib. when in appellate court.** SEC. 33. When an action shall have been appealed from one court to another, all depositions lawfully taken to be used in the court below, may be used in the appellate court in the same manner, and subject to such exceptions for informality or irregularity, and none other, as were taken to such depositions in writing in the court below.

**Witnesses how compelled, &c.** SEC. 34. Any witness may be subpoenaed and compelled by any officer authorized to take depositions, to appear and give his deposition at any place within twenty miles of the abode of such witness, in like manner and under the same penalties as he may be subpoenaed and compelled to attend as a witness in any court.

## TITLE V.

### *Of Depositions taken out of the Territory.*

SEC. 35. Depositions may be taken out of Territory.

36. Commission how to issue.

37. Interrogatories, how settled.

38. Authority of commissioner.

39. Trial not to be postponed by reason of commission not returned, except, &c.

**Depositions.** SEC. 35. The testimony of a witness out of this territory may be taken by deposition, to be read in evidence in any action, suit or proceeding pending in any court in this territory.

**Commission how to issue.** SEC. 36. The deposition of a witness out of the territory, shall be taken upon a commission issued by the clerk under the seal of the court, upon an order of the court, or a judge thereof, which order may be made on the application of either party, upon giving

to the adverse party ten days' previous notice in writing, together with a copy of the interrogatories intended to be put to such witness. It shall be issued to a person or persons, not exceeding three in number, agreed upon by the parties, or if they do not agree, to any judge, justice of the peace, notary public, or other competent person selected by the court or judge granting the order for the commission.

SEC. 37. Such proper interrogatories, as well on part of the plaintiff as on part of the defendant, as the respective parties may prepare, to be settled if they disagree as to form, by the court or judge thereof, granting the order for the commission, shall be annexed to the commission; or where the parties agree to that mode, the examination may be without written interrogatories.

SEC. 38. The commission shall authorize the commissioner or commissioners to administer an oath to the witness, and to take his deposition in answer to the several interrogatories annexed to such commission, or when the examination is to be without interrogatories in respect to the question in dispute; to certify the deposition to the court; and to direct it to the clerk of the court, or such other person designated or agreed upon, and forward it to him by mail or other usual channel of conveyance.

SEC. 39. A trial or other proceeding shall not be postponed by reason of a commission not returned, except upon affidavit or other evidence satisfactory to the court, that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

Interrogatories, how settled.

Authority of commissioner.

Trial not to be postponed by reason of commission not returned.

## TITLE VI.

### *Of Proceedings to Perpetuate Testimony.*

SEC. 40. Testimony how perpetuated.

41. Proceedings of court preparatory to hearing application.

42. Commission, when to issue.

43. Deposition, how taken.

44. Deposition, where filed, where used.

SEC. 40. When any person shall be desirous to perpetuate the testimony of any witness, he shall make a statement in writing, setting forth briefly and substantially his title, claim, or interest in or to the subject concerning which he desires to perpetuate the evidence, and the names of all persons interested or supposed to be interested therein; and also the name of the witness proposed to be examined, which statement shall be under oath and filed in the district court. If the subject of the proposed deposition relate to real estate within this territory, the statement shall be filed in the county where the lands, or any part thereof lie, otherwise in the county where the parties, or some of them, reside. Upon such statement, an application may be made to such court, or a judge thereof, to allow the examination of such witness.

SEC. 41. The court or judge shall appoint a time and place for hearing such application, and shall order notice thereof, and of the statement to be served on all persons mentioned therein, as adversely interested in the matter. The notice shall be served personally on all those living in the territory, at least twenty days before the time of hearing the application. Upon those who are not

Testimony how perpetuated.

Proceedings preparatory to hearing application.

**TITLE 7.** residents of the territory, it shall be served by publication, or otherwise, in the same manner as a summons is served upon a non-resident.

**Commission when issue.** **to** SEC. 42. If upon such hearing of the parties, or of the applicant alone, should no adverse party appear, the court or judge shall be satisfied that there is sufficient cause for taking the deposition, an order shall be made, allowing the examination of the witness; and such court or judge shall direct a commission to issue therefor, in like manner as a commission to take the testimony of witnesses in other cases.

**Depositions, how taken.** SEC. 43. The deposition of such witness, whether residing in this territory or not, shall be taken upon written interrogatories, filed by the applicant, and cross interrogatories filed by any party adversely interested, if he shall think fit; and it shall be taken and returned substantially in the same manner as if taken upon commission, to be used in any cause pending in the same court.

**To be filed when used.** SEC. 44. The deposition, when returned, shall be filed in the office of the clerk of the court by whom the commission was issued, and if a trial be had between the person at whose request the deposition was taken, and the persons named in the statement, or any of them, or their successors in interest, upon proof of the death or insanity of the witness, or of his inability to attend the trial, by reason of age, sickness or settled infirmity, the deposition, or a certified copy thereof, may be used by either party, subject to all legal objections. But if the parties attend at the examination, no objection to the form of the interrogatory shall be made at the trial, unless the same were taken at the time of the examination.

## TITLE VII.

### *Provisions relating to Records, Documents, and other Writings.*

SEC. 45. Inspection of documents how obtained.

46. Alterations in written instruments to be explained.

47. Records of foreign courts how to be authenticated.

48. Certified copies of deeds, &c., when received in evidence.

49. Copies of papers in certain territorial offices, when evidence.

50. Certificate of residence, when evidence.

51. Seal of office how affixed.

52. Foreign Statutes when evidence.

**Inspection of documents, &c., how obtained.** **Sanf. 693.** SEC. 45. Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other within a specified time, an inspection and copy, or permission to take a copy of any book, document or paper in his possession, or under his control, containing evidence relating to the merits of the action or the defence therein. If compliance with the order be refused, the court may exclude the book, document, or paper from being given in evidence; or if wanted as evidence, by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing as for a contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers or documents, when he is examined as a witness.

**Alterations in writings.** SEC. 46. Any party producing a writing as genuine, which has been altered or appears to have been altered after its execution, in

a part material to the question in dispute, and such alteration is not noted in the writing, shall account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made. If he do that, he may give the writing in evidence, but not otherwise.

**Records of foreign courts.** SEC. 47. The records and proceedings of any court of the United States, or of any state or territory, shall be admissible in evidence, in all cases in this territory, when authenticated by the attestation of the clerk, prothonotary or other officer having charge of the records of such court, with the seal of such court annexed.

**Certified copies of deeds, &c.** SEC. 48. Whenever any deed, conveyance, mortgage, bond or other writing, shall have been recorded or filed in pursuance of law, copies of such deed, conveyance, mortgage, bond or other writing, duly certified by the officer having the lawful custody thereof, with the seal of office annexed, shall be received in evidence to all intents and purposes, as the originals themselves.

**Copies of papers in certain territorial offices.** SEC. 49. Copies of all papers on file in the offices of the surveyor-general of Oregon, secretary of Oregon territory, territorial treasurer, territorial auditor, and any county treasurer, or any matter recorded in either of the said offices, duly certified by the respective officers, with the respective seals of office annexed, shall be evidence in all the courts of this territory.

**Certificate of residence.** SEC. 50. Any certificate of residence and cultivation upon the public lands, issued by the surveyor-general of Oregon in pursuance of law, shall be evidence in all courts in this territory.

**Seal of office how affixed.** SEC. 51. A seal of a court or public office, when required to any writ, process or proceeding, or to authenticate a copy of any record, or document, may be affixed by making an impression directly on the paper, which shall be as valid as if made upon a wafer or on wax.

**Foreign statutes when admitted.** SEC. 52. Printed copies of the statute laws of any state, territory, or foreign government, if purporting to have been published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts, shall be admitted in all courts in this territory, and on all other occasions as presumptive evidence of such laws.

## CHAPTER V.

### WRITS OF ERROR.

- SEC. 1. What judgments re-examinable on writs of error.  
 2. Time for prosecuting such writ.  
 3. Writ of error when deemed to have been issued.  
 4. Notice by clerk to defendant.  
 5. Notice how served.  
 6. Transcript, what to contain.  
 7. Time of assigning errors, and filing joinders.  
 8. Judgment may be set aside, reversed, affirmed, or modified.  
 9. Additional undertaking to pay judgment damages, &c.  
 10. Form of undertaking.  
 11. Proceedings in case of death, &c., of parties, after filing undertaking.  
 12. Persons who may prosecute writ of error.  
 13. Sale of land in certain cases, not to be affected by reversal, &c.  
 14. Supreme court when equally divided, cause to stand over.  
 15. Special verdict when directed.



## CHAPTER 5.

Judgments re-examinable on writ of error.

Time for prosecuting such writ.

When deemed to have been issued.

Notice by clerk to defendant.

Form of notice.

Service of notice.

By publication.

SEC. 1. Every final judgment, order or decision of a district court, except in chancery, may be re-examined upon a writ of error; in the same court for error in fact, and in the supreme court for error in law.

SEC. 2. Every such writ shall be prosecuted within two years and not after. But if the party entitled to have such writ, shall be absent from the territory, and shall not have been personally served with process, nor appeared to the action, or if such party be an infant, married woman or imprisoned or insane, then such writ may be prosecuted within two years from the removal of such disability and not after; provided that the absence from the territory shall not entitle the party to a longer time than five years; the time limited shall include the day on which the judgment is rendered or the order or decision is made, or on which the disability ceases.

SEC. 3. A writ of error shall be deemed to have issued on the day on which the plaintiff in error shall file in the office of the clerk, of the district court, when the record is a written undertaking, executed by two sureties, to be approved by the clerk for the payment of all the costs of such proceeding; and it shall not be necessary in any stage of the proceedings, actually to sue out the writ of error.

SEC. 4. On the filing of such undertaking, the clerk shall issue a notice to the defendant in error, under the seal of the court, specifying the court in which, and the time when he is to appear to protect his interests: and if the præcipe direct the writ of error to be made returnable to the supreme court, he shall send thither a transcript of the record under the seal of the court. Such notice may be as nearly as applicable, in the following form:

Territory of Oregon, } ss.  
County of \_\_\_\_\_

To C — D —

You are hereby notified that A. B. has sued out a writ of error from the supreme court, to recover the judgment of the district court of said county, given in your favor against the said A. B., at the \_\_\_\_\_ term of 18—; and unless you appear in the said supreme court on the \_\_\_\_\_ Monday of \_\_\_\_\_, 18—, the cause will be heard in your absence.

[SEAL.] Witness the seal of the said district court, the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

E. F., Clerk.

SEC. 5. The notice may be served on the defendant in error or his attorney of record, by any sheriff within his county, and shall be by delivering him a copy thereof, or it may be served by any other disinterested person; and the return of the sheriff indorsed thereon, or the affidavit of such other disinterested person shall be evidence thereof, and if served ten days before the return day, the cause may be heard at that term. If returned not found, the court of error may make such order for the service or publication of notice, as shall appear most likely in the particular case, to convey a knowledge of the proceeding to the defendant in error, and may then proceed as if the notice had been personally served.

## CHAPTER 5.

Transcript.

Certiorari.

Assigning of errors and filing joinders.

Judgment may be reversed or affirmed, &amp;c.

Additional undertaking &amp;c.

Damages to defendant.

Judgment against sureties.

Form of undertaking.

Death, &amp;c., of parties.

Who may prosecute writ.

SEC. 6. The transcript shall contain a copy of the writ, and return, the pleadings, the journal entries and bills of exception, the execution and return, and such other matters as the court or judge shall have ordered to be made part of the record. Either party may have a *certiorari* to supply any diminution of the record.

SEC. 7. The court of error may affix the time for assigning errors and filing joinders. If errors in law be assigned, no joinder shall be necessary. One or more errors in fact may be assigned, and the defendant may put in the common joinder as a demurrer thereto, or may traverse or confess, and avoid the facts assigned for error, and a separate issue shall be made on each.

SEC. 8. The judgment, or other matter complained of, may be affirmed, or may be reversed or set aside in whole or in part, or may be modified, or a different judgment or order may be substituted for that complained of, and the cause may be remitted to the district court, for such further proceedings as the supreme court by mandate shall direct. Execution may issue from the supreme court, or its judgments may be executed by the district court on a mandate for that purpose.

SEC. 9. If the undertaking for costs contain an additional undertaking to pay the judgment, if affirmed, and damages, or any new or modified judgment that may be given against the plaintiff in error, then all further proceedings by way of executing the judgment, shall forthwith cease until the further order of the court of error. In such case, if the judgment be affirmed or modified, or any new judgment be given against the plaintiff in error, damages may be awarded to the defendant in error, not exceeding ten per cent., upon the amount of the judgment, exclusive of interest and costs, if it manifestly appears that the proceeding was without probable cause, and merely for delay. And in cases where judgment is rendered against the plaintiff in error, judgment shall also be rendered against the sureties in the undertaking, to the extent of their liability, and execution shall issue against them accordingly.

SEC. 10. The undertaking for a writ of error may be in the following form:

A. B. } District Court, County of \_\_\_\_\_. Judgment  
vs. } at \_\_\_\_\_ term, 18—.  
C. D. }

We promise to pay all costs that may be awarded against A. B. on his writ of error in this cause, (and also the judgment if affirmed, and the damages, or any new or modified judgment that may be given against him.)

E. F.  
G. H.

SEC. 11. If after the undertaking be filed, either party shall die, or being a single woman shall marry, the proper persons may on motion be made parties, and the cause shall proceed to judgment.

SEC. 12. Any person who may be a party or privy in any judgment, order or decision, may prosecute a writ of error to reverse the same, and the reversal shall inure to the benefit of all parties and privies therein; and no other party or privy shall afterwards prosecute a writ of error for the same cause.

## CHAPTER 6.

Sale of land, when not to be affected by reversal of judgment.

When cause to stand over

Special verdict when directed.

SEC. 13. The reversal of a judgment, order or decision shall not affect the title of property sold upon an execution issued upon such judgment, order or decision, if such property be purchased at the sale by a stranger, but if purchased by the judgment creditor, the plaintiff in error may bring an action for the recovery thereof, and the court may award restitution or render such other judgment as justice shall require.

SEC. 14. When the supreme court shall be equally divided in opinion, the cause shall stand continued until all the judges are present.

SEC. 15. Whenever on the trial of an action at law in the district court, it shall be found to turn on important or doubtful principles of law, the court may direct a special verdict to be found; and in all cases the parties may agree upon the facts, and such agreement in writing, signed by the parties or their attorneys, shall be made part of the record; and all questions of law arising on special verdicts, agreed cases, motions for new trials, and all others in any manner arising in the district courts, in law or equity, may be adjourned into the supreme court for decision; and the supreme court may give judgment, or remand the cause, or make any order according to the law and justice of the case.

## CHAPTER VI.

## OF MISCELLANEOUS PROVISIONS IN ACTIONS AT LAW.

- SEC. 1. Definition of an order and motion.  
 2 & 3. Motions and orders how and when made.  
 4. When notice is necessary it must be ten days before hearing.  
 5 & 6. Notice and other papers how served.  
 7 & 8. Service by mail, how made.  
 9. When papers need not be served on defendant.  
 10. Service when party resides out of territory.  
 11. Party, under this chapter not liable to contempt.  
 12. Affidavits, &c., defectively entitled, valid.  
 13. Time how computed.  
 14. Debts barred by lapse of time in other states.

Definition of an order and motion.

Motion how made.

5 How. 205;  
2 Sanf. 793.

Of notice of motion.

Notice, &c., how served.

SEC. 1. Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

SEC. 2. Motions may be made to the court at term, or to a judge in vacation, unless otherwise provided by statute.

SEC. 3. Motions shall be made within the district in which the action is triable. Orders made out of court, without notice, may be made by a judge of the court in which the action is brought in any part of the territory. No order to stay proceedings for a longer time than twenty days, shall be granted by a judge out of court, except upon previous notice to the adverse party.

SEC. 4. When a notice of a motion is necessary, it shall be served ten days before the time appointed for hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

SEC. 5. Notice shall be in writing, and notices and other papers

may be served on the party or attorney, in the manner prescribed in the next three sections, where not otherwise provided by statute.

SEC. 6. The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or where there is no person in the office, by leaving them between the hours of six in the morning and nine in the evening, in a conspicuous place in the office, or if it be not open, so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion;

2. If upon a party, it may be made, by leaving the notice or other papers at his residence, between the hours of six in the morning, and nine in the evening, with some person of suitable age and discretion.

SEC. 7. Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside in different places between which there is a regular communication by mail.

SEC. 8. In case of service by mail, the notice or other paper shall be deposited in the post office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid; and in such case, the time of service shall be double that required in case of personal service.

SEC. 9. Where a defendant shall not have demurred, answered, or given the plaintiff or his attorney written notice of his appearance, service of notice or papers in the ordinary proceedings in an action, need not be made upon him, unless he be imprisoned for want of bail.

SEC. 10. Where a plaintiff or a defendant who has demurred, answered, or given notice of his appearance, resides out of the territory, and has no attorney in the action, the service may be made by mail, if his residence be known, if not known, on the clerk for the party.

SEC. 11. The provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

SEC. 12. An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, shall be as valid and effectual for every purpose as if duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

SEC. 13. The time within which an act is to be done, as provided in this chapter, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

SEC. 14. When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof, an action thereon cannot there be maintained against a person, by reason of lapse of time, an action shall not be maintained against him in this territory, except in favor of a citizen thereof, who has held the cause of action from the time it accrued.

CHAPTER 6.  
Ib. 7 Cow.  
416.

3 Cat. 89.

20 John.  
140.

Service by mail.

Ib. 4 How.  
246.

When papers need not be served on defendant.

Service where party resides out of territory.

Party not liable for contempt.

Affidavits defectively entitled, valid.

Time how computed.

Debts barred by lapse of time in other states.



## CHAPTER VII.

## OF SET-OFF IN ACTIONS AT LAW.

- SEC. 1. Set-offs, when allowed.
2. Against plaintiff or assignor of contract.
  3. Against assignor of bills of exchange.
  4. Against persons beneficially interested.
  5. Set-off in actions brought by executors, &c.
  6. Proceedings when balance is found for defendant.
  7. Set-offs by trustees, &c.
  8. Defendant must plead set-off.
  9. When set-offs equal or exceed plaintiff's demand.
  10. Judgment when to be rendered against plaintiff.

Set-offs.

SEC. 1. In the following cases, and under the following circumstances, a defendant, in an action at law, may set off demands which he has against the plaintiff:

Must be a demand on contract. 15 Wen. 539; 15 Wen. 54, 63; 6 Barb. 28.

Due to defendant in his own right. 10 Wen. 399; 1 Hill 164. Must be liquidated or for property.

When it must have existed.

In what actions allowed.

Several defendants.

Must be against plaintiff. 7 Wen. 327; 15 do. 625.

Assignor of contract.

Or assignor of notes or bills.

1. It must be a demand arising upon judgment, or upon contract, express or implied, whether such contract be written or unwritten, sealed or without seal; and if it be founded upon a bond or other contract having a penalty, the sum equitably due, by virtue of its condition only shall be set off;

2. It must be due to him in his own right, either as being the original creditor or payee, or as being the assignee or owner of the demand;

3. It must be a demand for property sold, for money paid, or for services done; or if it be not such a demand, the amount must be liquidated, or be capable of being ascertained by calculation;

4. It must have existed at the time of the commencement of the action, and must then have belonged to the defendant;

5. It shall be allowed only in actions founded upon demands which could themselves be the subject of set-off, according to law;

6. If there be several defendants, the demands set off must be due to all of them jointly;

7. It must be a demand existing against the plaintiff in the action, unless the action be brought in the name of a plaintiff who has no real interest in the contract upon which the action is founded; in which case no set-off of a demand against the plaintiff shall be allowed, unless as hereinafter specified.

SEC. 2. If the action be founded upon a contract, other than a negotiable promissory note, or bill of exchange which has been assigned to the plaintiff, a demand existing against such plaintiff, or any assignor of such contract at the time of the assignment thereof, and belonging to the defendant in good faith before notice of such assignment, may be set off to the amount of the plaintiff's debt, if the demand be such as might have been set off against such assignor, while the contract belonged to him.

SEC. 3. If the action be upon a negotiable promissory note, or bill of exchange assigned to the plaintiff after it became due, a set-off to the amount of the plaintiff's debt may be made of a demand existing against any person or persons who shall have assigned or transferred such note or bill after it became due, if the demand be such as might have been set off against the assignor while the note or bill belonged to him.

SEC. 4. If the plaintiff be a trustee for any other, or if the action be in the name of a plaintiff who has no real interest in the contract upon which the action is founded, so much of a demand existing against those whom the plaintiff represents, or for whose benefit the action is brought, may be set off, as will satisfy the plaintiff's debt, if the same might have been set off in an action brought by those beneficially interested.

Or person beneficially interested in suit.

SEC. 5. In actions brought by executors and administrators, demands against their testators or intestates, and belonging to defendant at the time of their death, may be set off by the defendant, in the same manner as if the action had been brought by, and in the name of the deceased.

In actions by executors. 8 Wen. 530; 21 do. 675; 2 Hill 212; 6 Barb. 330.

SEC. 6. When a set-off shall be established in an action brought by executors or administrators, and a balance found due to the defendant, the judgment rendered therefor against the plaintiffs, shall have the same effect as if the action had been originally commenced by the defendant.

Balance found for defendant.

SEC. 7. In actions against executors and administrators, and against trustees and others sued in their representative character, the defendants may set off demands belonging to their testators or intestates, or those whom they represent, in the same manner as the persons so represented would have been entitled to set off the same, in an action against them.

Set-offs by executors, trustees, &c.

SEC. 8. To entitle a defendant to a set-off, he must set the same forth in his answer.

Defendant must plead set-off.

SEC. 9. If the amount of the set-off, duly established, be equal to the plaintiff's debt or demand, judgment shall be entered that the plaintiff take nothing by his action: if it be less than the plaintiff's debt or demand, the plaintiff shall have judgment for the residue only.

When set-off equals or exceeds plaintiff's demand.

SEC. 10. If there be found a balance due from the plaintiff in the action, to the defendant, judgment shall be rendered in favor of the defendant for the amount thereof; but no such judgment shall be rendered against the plaintiff, when the contract which is the subject of the action, shall have been assigned before the commencement of such action, nor for any balance due from any other person than the plaintiff in the action.

Judgment against plaintiff.

## CHAPTER VIII.

## OF COSTS IN ACTIONS AT LAW.

- SEC. 1. Allowance, when termed costs.
2. Costs, when allowed of course to plaintiff.
  3. Costs, when several actions are brought on one contract.
  4. Costs, when allowed defendant.
  5. When to one or more of several defendants.
  6. Amount of costs allowed to either party.
  7. Disbursements, in addition to costs.
  8. Referee's fees.
  9. Costs on postponement of trial.
  10. Costs not allowed when tender has been made.
  11. Plaintiff, when to pay costs from time of deposit, &c., by defendant.
  12. Appellant from decision of a justice, when to pay costs.

- CHAPTER 8. SEC. 13. Guardian responsible for costs.
14. Costs by and against executors, &c.
  15. Costs against assignee.
  16. Costs against territory or county.
  17. Costs on appeal in special pleading.
  - 18 & 19. Costs, when in discretion of court.
  20. Costs may be re-taxed on application.
  21. When security for costs may be required by defendant.
  22. Affidavit by sureties on undertaking.
  23. Time this act takes effect.

Allowance when termed costs. 5 How. 839; 3 Sanf. 696, 762.

SEC. 1. The measure and mode of compensation of attorneys and counsellors shall be left to the agreement, express or implied, of the parties; but there may be allowed to the prevailing party upon the judgment, certain sums by way of indemnity for his expenses in the action, which allowances are termed costs.

When allowed of course to plaintiff. Barb. 567.

SEC. 2. Costs shall be allowed of course to the plaintiff upon a judgment in his favor, in the following cases:

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial;

2. In an action to recover the possession of personal property, when the value of the property amounts to fifty dollars or more; such value shall be determined by the jury, court or referee by whom the action is tried;

3. In an action for the recovery of money or damages, when the plaintiff shall recover fifty dollars or more;

4. In the actions of which a justice of the peace has not jurisdiction; but in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, in which a justice of the peace has not jurisdiction, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages.

Costs when several actions are brought on one contract, &c.

SEC. 3. When several actions are brought on one bond, undertaking, promissory note, bill of exchange or other instrument in writing, or in any other case for the same cause of action against several parties who might have been joined as defendants in the same action, no costs shall be allowed to the plaintiff in more than one of such actions, which may be at his election, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within this territory; but the disbursements of the plaintiff shall be allowed in each action.

Costs when allowed defendant. 2 Sanf. 622, 670.

SEC. 4. Costs shall be allowed of course to the defendant in the actions mentioned in the second section, unless the plaintiff be entitled to costs therein.

When allowed to one or more of several defendants.

SEC. 5. In all actions where there are several defendants not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them.

Amount of costs allowed to either party.

SEC. 6. When allowed to either party, costs shall be as follows:

1. In all actions settled before issue is joined, five dollars;
2. In all actions when judgment is rendered without a jury, ten dollars;
3. In all actions when judgment is rendered after empanneling a jury, fifteen dollars;

- CHAPTER 8.
4. In all actions removed to the supreme court, and settled before argument, ten dollars;
  5. In all actions when judgment is rendered in the supreme court, after argument, fifteen dollars.

SEC. 7. The prevailing party, in addition to the allowances for costs, as provided in the last section, shall also be allowed for all necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the necessary expenses of taking depositions by commission or otherwise, the compensation of referees, and the expense of printing the papers upon an appeal. The disbursements shall be stated in detail, and verified by affidavit, which shall be filed with the clerk of the court.

Referee's fees.

SEC. 8. The fees of referees shall be four dollars to each for every day spent in the business of the reference, but the parties may agree in writing upon any other rate of compensation, and thereupon such rate shall be allowed.

Cost on postponement of trial.

SEC. 9. When an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed as the condition of granting the postponement.

Costs not allowed after tender.

SEC. 10. When in an action for the recovery of money only, the defendant alleges in his answer that, before the commencement of the action, he tendered to the plaintiff the full amount to which he was entitled, in such specie as by agreement ought to be tendered, and thereupon brings into court for the plaintiff, if in money, the amount so tendered, and the allegation be found true, the plaintiff shall not recover costs, but shall pay them to the defendant.

Plaintiff when to pay costs from time of deposit.

SEC. 11. If the defendant in any action pending, shall at any time deposit with the clerk of the court for the plaintiff the amount which he admits to be due, together with all costs that have accrued, and notify the plaintiff thereof, and such plaintiff shall refuse to accept the same in discharge of the action, and shall not afterwards recover a larger amount than that deposited with the clerk, exclusive of interest and cost, he shall pay all costs that may accrue from the time such money was so deposited.

Appellant from decision of justice when to pay costs.

SEC. 12. In all civil actions tried before a justice of the peace, in which an appeal shall be taken to the district court, and the party appellant shall not recover a more favorable judgment in the district court, than before the justice of the peace, such appellant shall pay all costs accruing after the appeal.

Guardian when responsible.

SEC. 13. When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action, shall be responsible therefor, and payment thereof may be enforced by attachment.

Costs by and against executors, &c.

SEC. 14. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by or against a person prosecuting or defending in his own right, but such costs shall be chargeable only upon, or collected off the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defence.

Against assignee.

SEC. 15. When the cause of action after the commencement of



**CHAPTER 8.** the action by assignment, or in any other manner, becomes the property of a person not a party thereto, and the prosecution or defence is thereafter continued, such person shall be liable for the costs, in the same manner as if he were a party, and payment thereof may be enforced by attachment.

**Against territory or county.** SEC. 16. In all actions prosecuted in the name, and for the use of the territory, or in the name and for the use of any county, the territory or county shall be liable for costs in the same cases and to the same extent as private parties.

**On appeal in a special proceeding.** SEC. 17. When the decision of a court of inferior jurisdiction in an action of special proceeding, is brought before the supreme court, or a district court for review, such proceedings shall, for purposes of costs, be deemed an action at issue upon a question of law, from the time the same is brought into the supreme court or district court, and costs thereon may be awarded and collected in such manner as the court shall direct according to the nature of the case.

**When in discretion of court.** SEC. 18. In the following cases the costs of an appeal to the supreme court, shall be in the discretion of the court:

1. When a new trial shall be ordered;
2. When a judgment shall be affirmed in part and reversed in part.

**Id.; apportionment of costs.** SEC. 19. In all other actions and proceedings than those mentioned in this chapter, where no provision is made for the recovery of costs, they may be allowed or not, and if allowed may be apportioned between the parties, in the discretion of the court.

**Costs may be re-taxed on application.** SEC. 20. Any party aggrieved by the taxation of costs by the clerk of the court, may, upon application, have the same re-taxed by the court in which the action or proceeding is had.

**When security for costs may be required by defendant.** SEC. 21. When the plaintiff in an action resides out of the territory, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action shall be stayed, until an undertaking, executed by two or more persons be filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of two hundred dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking be executed and filed.

**Affidavit by sureties, &c.** SEC. 22. Each of the sureties on the undertaking mentioned in the last section, shall annex to the same an affidavit that he is a resident of the county, and worth double the amount specified in the undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution. The plaintiff may deposit with the clerk the sum of two hundred dollars in lieu of an undertaking, as required by the last section.

**When this act takes effect.** SEC. 23. This act shall take effect, and be in force from and after the first day of May next. Passed Jan. 7th, 1854.

## AN ACT TO REGULATE ACTIONS RELATING TO REAL PROPERTY.

## CHAPTER I.

## ACTIONS TO RECOVER THE POSSESSION OF REAL PROPERTY.

**TITLE I.** *Of Actions to Recover the Possession of Real Property.*

**TITLE II.** *Of Actions for Nuisances, Waste and Trespasses on Real Property.*

## TITLE I.

*Of Actions to Recover the Possession of Real Property.*

- SEC.**
1. Who may be plaintiffs for the recovery of real property.
  2. Substitution of landlord for tenant.
  3. Proceedings against a non-resident.
  4. Complaint, what to contain.
  5. Answer, what to contain.
  6. Judgment against tenant, when conclusive against landlord.
  7. When plaintiff entitled to damages.
  8. Judgment when plaintiff's right of property expires before trial.
  9. When improvements may be set off against damages.
  10. Order to survey property.
  11. Order, what to contain.
  12. Alienations by defendant not to prejudice action.
  13. Mortgage not conveyance.
  14. Stay of proceedings on payment of rent, &c., by tenant.

**SEC. 1.** *Be it enacted by the Legislative Assembly of the Territory of Oregon,* Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action, which may be brought against any person acting as owner, landlord or tenant of the property claimed.

**SEC. 2.** Whenever it appears that the defendant is only a tenant, the landlord may be substituted after ten days' notice to him that such action is pending, or upon such further notice as the court or judge thereof may think proper.

**SEC. 3.** When the defendant is a non-resident, service of the summons may be made upon his agent for the property residing in this territory, with the like effect as though made upon the principal, or service may be made by publication as in other cases.

**SEC. 4.** The plaintiff in his complaint shall state that he is entitled to the possession of the property, particularly describing it; the interest he claims therein; and that the defendant unlawfully keeps him out of the possession, and the damages, if any, which he claims for withholding the property.

**SEC. 5.** The answer of the defendant shall set forth under what claim of right, if any, he holds possession, and if as tenant, the name and residence of his landlord shall be given, and if he does not defend for the whole of the property, he shall specify for what particular part he does defend.

**SEC. 6.** In an action against a tenant, the judgment shall be conclusive against a landlord who has received notice as hereinbefore provided.

Who may be plaintiffs for the recovery of real property. 5 Denio, 121, 477; 3 Barb. 555.

Substitution of landlord for tenant.

Proceedings against a non-resident

Complaint.

Answer.

Judgment against tenant.

## TITLE 2.

Damages to plaintiff.

When plaintiff's right of property expires before trial.

Set-off of improvements.

Order to survey.

Alienations not to pro-  
judice.

Stay of proceedings on payment of rent, &amp;c.

SEC. 7. If the plaintiff prevail in an action for the recovery of real property, he shall also in the same action be entitled to recover damages for withholding the property.

SEC. 8. If the right of the plaintiff to the possession of the property expire after the commencement of the action, and before the trial, the verdict shall be returned according to the fact, and judgment shall be entered only for the damages and costs.

SEC. 9. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by the defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff in good faith, the value of such improvements shall be allowed as a set-off against such damages.

SEC. 10. The court or judge thereof, on motion, and after notice to the opposite party, may, for cause shown, grant an order allowing the party applying therefor to enter upon the property in controversy, and make survey and admeasurement thereof, for the purposes of the action.

SEC. 11. The order shall describe the property, and a copy thereof shall be served upon the owner or occupant, and thereupon the party may enter upon the property, and make such survey and admeasurement, but if any unnecessary injury be done to the premises, he shall be liable therefor.

SEC. 12. An action for the recovery of real property against a person in possession, cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

SEC. 13. A mortgage of real property shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law.

SEC. 14. When in case of a lease of real property, and the failure of the tenant to pay rent, the landlord has a right to re-enter for such failure, he may bring an action to recover possession of the property, but if at any time before judgment in such action, the lessee or his successor in interest pay to the plaintiff, or bring into court the amount of rent then in arrear with interest, and the costs of the action, and perform the other covenants or agreements on the part of the lessee, he shall be entitled to the possession, according to the terms of the lease.

## TITLE II.

*Actions for Nuisances, Waste and Trespasses on Real Property.*

SEC. 15. Actions for nuisance, by whom brought.

16. Triple damages when in certain cases of waste.

17. Triple damages in certain cases of trespass.

18. Exceptions of certain cases.

19. Liability of tenant in possession to purchaser on execution.

Action for nuisance.

SEC. 15. Anything which is injurious to health or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may

be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

SEC. 16. If a guardian, tenant for life or years, joint tenant or tenant in common of real property, commit waste thereon, any person injured by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

SEC. 17. Every person who shall wilfully cut down, girdle, or otherwise injure any tree, timber or shrub on the land of another person, or in the street or highway in front of any person's house, village or city lot, or cultivated grounds, or on the commons or public grounds of any city, or town, or on the street or highway thereof, without lawful authority, shall be liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in an action in any court having jurisdiction.

SEC. 18. If upon the trial of such action, it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed, was his own, or that of the person in whose service, or by whose direction the act was done, or that such tree or timber was taken for the purpose of making or repairing any public highway or bridge, judgment shall be given for only the single damages assessed in the action.

SEC. 19. When real property shall have been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after the sale, and before possession is delivered under the conveyance.

## CHAPTER 2.

Triple damages in certain cases of waste.

1h. In certain cases of trespass. 8 J. R. 844; 8 Cow. 115; 2 Wen. 247; 4 Denio. 422.

Exception of certain cases.

Liability of tenant in possession to purchaser on execution.

## CHAPTER II.

## ACTIONS FOR THE PARTITION OF REAL PROPERTY.

- SEC. 1. Who may apply for partition and to what court.  
 2. Complaint, what to contain.  
 3. Persons having liens, when to be parties.  
 4. Summons, how directed.  
 5. Publication of summons to unknown or absent parties.  
 6. Answer of defendant, what to contain.  
 7. Rights of the several parties in issue: ascertainment of title in case of sale.  
 8. Plaintiff to produce certificate of recorder, and clerk of district court.  
 9. Persons having liens, &c., to be made parties.  
 10. Service of notice on persons holding liens, not parties.  
 11. Order of sale, when made; when partition ordered.  
 12. Oath of referees to be filed.  
 13. Partition, how made.  
 14. Report of referees.  
 15. Setting aside report, &c. Judgment on report.  
 16. Persons and cases not affected.  
 17. Expenses of referees.  
 18. Liens, on an undivided interest, how assigned.  
 19. Set-off of estate for life, &c., in case of partial sale.



## CHAPTER 2. SEC. 20. Proceeds of incumbered property, how applied.

21. Marshalling securities of lien creditors.
22. Proceeds of sale, how distributed.
23. Proceeds if paid into court, action to continue.
24. Sale by referees, how made.
25. Sale may be on credit.
26. Mortgages, &c., how to be taken.
27. Estate for life or years, how disposed of.
28. Compensation to tenant in case of sale.
29. Investment when no consent is given.
30. Rights of unknown tenants how protected.
31. Contingent and future rights how provided for.
32. Terms of sale to be made known.
33. Referees not to purchase.
34. Referees to report sale.
35. Order to convey.
36. Receipt of incumbrancer, &c., to referees.
37. Conveyances when recorded, a bar to, &c.
38. Proceeds of sale for unknown non-residents, when invested.
39. Security for proceeds, &c., how taken.
40. Security, to be taken in name of parties and filed with clerk.
41. Clerk, to collect interest on securities, &c.
42. Partition made equal, by compensation.
43. Proceeds when paid guardian of infant.
44. Shares of insane, &c., person.
45. Consent to partition by guardian.
46. Costs of partition how allowed.
47. When court may appoint one referee.
48. This Act when to take effect.

Who may apply and to what courts.  
2 Page 357;  
3 do. 245; 4 J. Ch. 271;  
19 Wen. 367; 5 Denio 385; 2 Barb. 599; 3 do. 576.  
8 Cow. 363.

Complaint, what to contain.

Persons having liens when to be parties.

Summons how directed  
11 Wen. 647; 17 do. 488; 1 Hill 141; 2 do. 267.

Publication of summons.

SEC. 1. When several persons hold and are in possession of real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be brought by one or more of such persons, in the district court of the proper county, for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

SEC. 2. The interest of all persons in the property, whether such persons be known or unknown, shall be set forth in the complaint, specifically and particularly as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint.

SEC. 3. No persons who have or claim any liens upon the property, by mortgage, judgment or otherwise, need be made parties to the action, unless such liens be matters of record.

SEC. 4. The summons shall be directed to all the joint tenants and tenants in common, and all persons having any liens of record, by mortgage, judgment or otherwise, upon the property or upon any particular portion thereof, and generally to all persons unknown, who have or claim any interest in the property.

SEC. 5. If a party having a share or interest be unknown, or any of the known parties reside out of the territory, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such unknown or absent party, by publication as in other cases. When publication is made, the summons as pub-

lished, shall be accompanied by a brief description of the property, which is the subject of the action. CHAPTER 2.

SEC. 6. The defendants shall set forth in their answers, fully and particularly, the nature and extent of their interest in the property, and if such defendants claim a lien upon the property by mortgage, judgment or otherwise, they shall state the date of the same, and the amount remaining due thereon, and whether the amount has been secured in any other way or not, and if so secured, the nature and extent of the security, or they shall be deemed to have waived their rights to such lien. Answer of defendants.

SEC. 7. The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined by such action, and where a sale of the premises is necessary, the title shall be ascertained by proof to the satisfaction of the court, before the judgment of sale shall be made, and when service of the complaint shall have been made by publication, like proof shall be required of the rights of the absent or unknown parties, before such judgment shall be rendered, except that when there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves. Right of the parties in issue.

SEC. 8. The plaintiff shall produce to the court on the hearing of the case, the certificates of the recorder and the clerk of the district court, where the property is situated, showing whether there were or were not any liens of record upon the property or any part thereof, at the time of the commencement of the action. Certificate of recorder.

SEC. 9. If it appear by the certificate of the recorder or the clerk, that there were liens of record at the time of the commencement of the action, and the persons holding or claiming such liens, be not made parties to the action, the court shall either order such parties to be brought in by an amendment or supplemental complaint, or appoint a referee to ascertain whether their liens have been paid, or if not paid what amount remains due, and the date of their liens, and whether the amount remaining due thereon has been secured in any way, and if secured, the nature and extent of the security. Persons having lien to be made parties.

SEC. 10. The plaintiff shall cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed, as provided in the last section, on each person having liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof by his own affidavit or otherwise of the true amount due, or to become due contingently or absolutely thereon. In case such person be absent or his residence be unknown, service may be made by publication or notice to his agents, under the direction of the court or judge thereof, in such manner as may be proper. The report of the referee thereon shall be made to the court, and shall be confirmed, modified or set aside, and a new reference ordered as the justice of the case may require. Tb. Service of notice.

SEC. 11. If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise Order of sale. 19 Wen. 226.

**CHAPTER 2.** upon the requisite proofs being made, it shall order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and shall designate the portion to remain undivided, for the owners whose interests remain unknown or not ascertained.

**Oath of referees.** SEC. 12. The referees before proceeding to the discharge of their duties, shall be sworn or affirmed before some officer competent to administer oaths, honestly and impartially to execute the trust reposed in them, which oath or affirmation shall be filed with the clerk of the court.

**Partition.** SEC. 13. In making the partition, the referees shall divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions by proper land marks, and may employ a surveyor with the necessary assistants to aid them therein.

**Report referees.** SEC. 14. The referees or a majority of them shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided and the shares allotted to each party, with a particular description of each share.

**Setting aside report, &c.** SEC. 15. The court may confirm or set aside the report, and if necessary appoint new referees. Upon the report being confirmed, judgment shall be rendered that such partition be effectual forever, which judgment shall be binding and conclusive:

**Judgment on report.** 11  
Wen. 647; 1  
Hill 141; 1  
do. 625. 2

1. On all parties named therein, and their legal representatives who have at the time any interest in the property divided, or any part thereof as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder or the inheritance of such property or any part thereof, after the termination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons interested in the property, who may be unknown, to whom notice shall have been given of the application for partition by publication, as directed by section five; and

3. On all other persons claiming from such parties or persons, or either of them.

**Persons and cases not affected.** 1  
Barb. 560.

SEC. 16. But such judgment and partition shall not affect any tenants for years or for life to the whole of the property which is the subject of partition; nor shall such judgment and partition preclude any person, except such as are specified in the last section, from claiming title to the property in question, or from controverting the title of the parties between whom the partition shall have been made.

**Expenses of Referees.** SEC. 17. The expenses of the referees, including those of a surveyor and his assistants, when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, shall be paid by the plaintiff, and may be allowed as part of the charges.

**Lien on an undivided interest.** SEC. 18. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thereafter be a charge only on the share assigned to such party; but such

share shall be first charged with its just proportion of the costs of the partition in preference to such lien. **CHAPTER 2.**

SEC. 19. When a part of the property only is ordered to be sold, if there be an estate for life, or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold. **Set-off of estate for life, &c., in case of partial sale.**

SEC. 20. The proceeds of the sale of the incumbered property, shall be applied under the direction of the court, as follows: **Proceeds of incumbered property how applied.**

1. To pay its just proportion of the general costs of the action:

2. To pay the costs of the reference;

3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due, and to become due; the amount remaining due to be verified by affidavit at the time of payment:

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

SEC. 21. Whenever any party to the action who holds a lien upon the property or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof. **Marshalling securities.**

SEC. 22. The proceeds of sale, and the securities taken by the referees, or any part thereof, shall be distributed by them to the persons entitled thereto, whenever the court so directs. But if no direction be given, all such proceeds and securities shall be paid into court, or deposited therein, or as directed by the court. **Proceeds of sale, &c. how distributed.**

SEC. 23. When the proceeds of sales of any shares or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings as in original actions. **Id. if p'd into court action to continue.**

SEC. 24. All sales of real property made by referees under this chapter, shall be made by public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice shall state the terms of sale, and if the property, or any part of it is to be sold, subject to a prior estate, charge or lien, that shall be stated in the notice. **Sale made. how.**

SEC. 25. The court shall, in the order of sale, direct the terms of credit which may be allowed for the purchase-money of any portion of the premises, of which it may direct a sale on credit; and for that portion of which the purchase-money is required by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the territory. **Id., may be on credit.**

SEC. 26. The referees may take separate mortgages, and other securities for the whole, or convenient portions of the purchase-money, on such parts of the property as are directed by the court to be sold on credit, in the name of the clerk of the district court, and his successor in office; and for the shares of any known owner of **Mortgages &c., how to be taken.**



CHAPTER 2. full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant.

Estate of tenant, how disposed of. SEC. 27. When the estate of any tenant for life or years, in any undivided part of the property in question, shall have been admitted by the parties, or ascertained by the court to be existing at the time of the order of sale, and the person entitled to such estate shall have been made a party to the action, such estate may be first set off out of any part of the property, and a sale made of such parcel, subject to the prior unsold estate of such tenant therein; but if in the judgment of the court, a due regard to the interest of all the parties require that such estate be also sold, the sale may be so ordered.

Compensation to tenant in case of sale. SEC. 28. Any person entitled to an estate for life or years in any undivided part of the property, whose estate shall have been sold, shall be entitled to receive such sum in gross as may be deemed upon principles of law applicable to annuities, a reasonable satisfaction for such estate, and which the person so entitled shall consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk shall enter the same in the minutes of the court.

Investments if no consent given. SEC. 29. If such consent be not given, filed and entered, as provided in the last section, before the report of sale by the referees, the court shall ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate for life or years, and shall order the same to be paid to such party or deposited in court for him as the case may require.

Rights of unknown tenants. SEC. 30. If the persons entitled to such estate for life or years be unknown, the court shall provide for the protection of their rights, in the same manner as far as may be, as if they were known and had appeared.

Contingent and future rights how provided for. SEC. 31. In all cases of sales in partition, when it shall appear that any person has a vested or contingent future right, or estate in any part of the property sold, the court shall ascertain and settle the proportional value of such contingent or vested right or estate, according to the principles of law applicable to annuities and survivorship, and shall direct such proportion of the proceeds of sale to be invested, secured or paid over in such manner, as to protect the rights and interests of the parties.

Terms of sales to be made known. SEC. 32. In all cases of sales of property, the terms shall be made known at the time; and if the premises consist of distinct farms or lots, they shall be sold separately.

Referees not to purchase. SEC. 33. Neither of the referees, nor any person for the benefit of either of them, shall be interested in any purchase; nor shall the guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section, shall be void.

Report of. SEC. 34. After completing a sale of the property, or any part thereof ordered to be sold, the referees shall report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale; and the securities, if any taken.

CHAPTER 2. The report shall be filed in the office of the clerk of the district court, in the county where the property is situated.

Order to convey. SEC. 35. If the sale be confirmed by the court, an order shall be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

Receipt of incumbrancer. SEC. 36. When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

Conveyance recorded, a bar to, &c. SEC. 37. The conveyances shall be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons have been served by publication, and against all persons claiming from them or either of them.

Proceeds of sale invested. SEC. 38. When there are proceeds of a sale belonging to an unknown owner, or to a person without the territory, who has no legal representative within it, the same shall be invested in securities on interest, for the benefit of the persons entitled thereto.

Security for proceeds how taken. SEC. 39. When the security for the proceeds of sale is taken, or when an investment of any such proceeds is made, it shall be done, except as herein otherwise provided, in the name of the clerk of the district court of the county where the papers are filed, and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the court.

Security to be in name of parties and filed. SEC. 40. When security is taken by the referees on a sale, and the parties interested in such security by an instrument in writing under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled; or when shares and proportions have been previously adjudged by the court, such securities shall be taken in the names of, and payable to the parties respectively entitled thereto; and shall be delivered to such parties upon their receipt therefor. Such agreement and receipt shall be returned and filed with the clerk.

Clerk to collect interest. SEC. 41. The clerk, in whose name a security is taken, or by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and shall file in his office all securities taken, and keep an account in a book provided and kept for that purpose in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

Partition made equal by compensation. SEC. 42. When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, the court may adjudge compensation to be made by one party to another, on account of the inequality of partition; but such compensation shall not be required to be made to others by owners unknown, nor by infants, unless in case of an infant it appear that he has personal property sufficient for that purpose, and that his interest will be promoted thereby.

## CHAPTER 2.

Infants' shares.

SEC. 43. When the share of an infant is sold, the proceeds of the sale may be paid by the referees making the sale to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law, or directed by order of the court.

Shares of insane persons

SEC. 44. The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive, in behalf of such person, his share of the proceeds of such real property from the referees, on executing with sufficient sureties, an undertaking, approved by a judge of the district court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

Consent to partition by guardian.

SEC. 45. The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner, so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares of the parts to which they may respectively be entitled, upon an order of the court.

Costs of partition how allowed.

SEC. 46. The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When however a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

When court may appoint one referee.

SEC. 47. The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter; and the single referee when thus appointed, shall have all the powers, and perform all the duties required of the three referees.

SEC. 48. This act shall take effect and be in force from and after the first day of May next.

*Passed, December 22d, 1853.*

## CHAPTER 1.

AN ACT REGULATING PROCEEDINGS TO VACATE CHARTERS AND LETTERS PATENT, AND TO PREVENT THE USURPATION OF AN OFFICE OR FRANCHISE.

## CHAPTER I.

ACTIONS IN PLACE OF SCIRE FACIAS, QUO WARRANTO, AND OF INFORMATIONS IN THE NATURE OF QUO WARRANTO.

- SEC. 1. *Scire facias* and *quo warranto* abolished.
2. Action by prosecuting attorney to vacate charter.
  3. Action to annul a corporation.
  4. Leave how obtained.
  5. Action upon information or complaint.
  6. Action to vacate letters patent.
  7. Relator, when to be joined as plaintiff.
  8. Complaint and action for usurping office.
  9. Judgment in such action.
  10. Assumption of office, &c., by relator.
  11. Damages how recovered.
  12. Action against several persons claiming office.
  13. Penalty for usurping office.
  14. Judgment of forfeiture against a corporation.
  15. Costs against corporation.
  16. Appointment of a receiver.
  17. Copy of judgment roll where to be filed.
  18. Act when to take effect.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon*, That the writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto* are abolished, and the remedies heretofore obtainable in those forms, may be obtained by actions at law under the provisions of this chapter.

*Scire facias and quo warranto abolished.*

SEC. 2. An action may be brought into the district court by the prosecuting attorney of the district, in the name of the territory, whenever the legislative assembly shall so direct, against a corporation, for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some fraudulent suggestion, or concealment of a material fact, by the persons incorporated or some of them, or with their knowledge and consent.

Action to vacate charter.

SEC. 3. An action may be brought by such prosecuting attorney, in the name of the territory, on leave granted by the district court or a judge thereof, for the purpose of vacating the charter or annulling the existence of a corporation other than municipal, whenever such corporation shall:

Action to annul a corporation. Wen. 204, 223.

1. Offend against any of the provisions of the act or acts creating, altering or renewing such corporation; or
2. Violate the provisions of any law by which such corporation shall have forfeited its charter by abuse of its powers; or
3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or
4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises; or



## CHAPTER I.

5. Whenever it shall exercise a franchise or privilege not conferred upon it by law. And it shall be the duty of such prosecuting attorney, whenever he shall have reason to believe that any of these acts or commissions can be established by proof, to apply for leave, and upon leave granted, to bring the action in every case of public interest, and also in every other case, in which satisfactory security shall be given to indemnify the territory against the costs and expenses to be incurred thereby.

Leave how obtained.

SEC. 4. Leave to bring the action may be granted upon the application of the prosecuting attorney; and the district court or judge may, in their discretion, direct notice of such application to be given to the corporation or its officers, previous to granting such leave, and may hear the corporation in opposition thereto.

Action upon information or complaint. 16 Wen. 656; 20 do. 18; 21 do. 235; 23 do. 193, 223, 550; 2 Barb. 513.

SEC. 5. An action may be brought by the prosecuting attorney of the district in the name of the territory, upon his own information, or upon the complaint of a private party against the party offending, in the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold, or exercise any public office, civil or military, or any franchise within this territory, or any office in a corporation created by the authority of this territory; or

2. When any public officer, civil or military, has done or suffered an act, which by the provisions of the law makes a forfeiture of his office; or

3. When any association or number of persons act within this territory as a corporation, without being duly incorporated. And it shall be the duty of the prosecuting attorney to bring the action, whenever he shall have reason to believe that any of these acts can be proven, or when he shall have been directed to do so by a judge of the district court.

Action to vacate letters patent.

SEC. 6. An action may be brought by the prosecuting attorney of the district in the name of the territory, for the purpose of vacating or annulling letters patent, granted by the territory, in the following cases:

1. When he shall have reason to believe that such letters patent were obtained by means of some fraudulent suggestion or concealment of a material fact, made by a person to whom the same were issued or made, or with his consent or knowledge; or

2. When he shall have reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact; or

3. When he shall have reason to believe that the patentee or those claiming under him have done, or omitted an act in violation of the terms and conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.

Relator when to be joined.

SEC. 7. When an action shall be brought by the prosecuting attorney by virtue of this chapter, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the territory as plaintiff.

Complaint and action for usurping office.

SEC. 8. Whenever such action shall be brought against a person for usurping an office, the prosecuting attorney, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a state-

## CHAPTER I.

ment of his right thereto, and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a judge of the district court for the arrest of such defendant and holding him to bail, and thereupon he shall be arrested and held to bail in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other actions at law where the defendant is subject to arrest.

Judgment in such action.

SEC. 9. In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant as justice shall require.

Assumption of office, &c., by relator.

SEC. 10. If judgment shall be rendered upon the right of the person so alleged to be entitled, in favor of such person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office.

SEC. 11. If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover by action the damages which he may have sustained by reason of the usurpation of the office by the defendant.

Damages how recovered.

SEC. 12. When several persons claim to be entitled to the same office or franchise, an action may be brought against all such persons, in order to try their respective rights to such office or franchise.

Action against several persons claiming office.

SEC. 13. When a defendant, whether a natural person or a corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding one thousand dollars, which fine when collected shall be paid into the territorial treasury.

Penalty for usurping office.

SEC. 14. If it shall be adjudged that a corporation, against which an action shall have been brought, pursuant to this chapter, has by neglect, abuse, or surrender, forfeited its corporate rights, privileges and franchises, judgment shall be rendered that the corporation be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved.

Judgment of forfeiture against a corporation.

SEC. 15. If judgment be rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs therein to be collected, by execution, against the persons claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

Costs against corporation.

SEC. 16. When such judgment shall be rendered against a corporation, the court shall have the same power to restrain the corporation, to appoint a receiver of its property, and take an account, and make distribution thereof among its creditors, as a court of chancery possesses, and it shall be the duty of the prosecuting attorney, immediately after the rendition of such judgment, to institute proceedings for that purpose.

Appointment of receiver.

SEC. 17. Upon the rendition of such judgment against a corpora-

**TITLE I.** tion, or for the vacating or annulling of letters patent, it shall be the duty of the prosecuting attorney, to cause a copy of the judgment roll to be forthwith filed in the office of the secretary of the territory.

Copy of judgment roll where to be filed.

SEC. 18. This act shall take effect and be in force, from and after the first day of May next.

Passed December 22d, 1854.

## AN ACT RELATING TO WRITS OF MANDAMUS AND PROHIBITION

### CHAPTER I.

#### OF THE WRIT OF MANDAMUS.

**TITLE I.** *Writs of Mandamus.*

**TITLE II.** *Writs of Prohibition.*

#### **TITLE I.**

##### *Writs of Mandamus.*

- SEC. 1. Writ of mandamus to whom issued.  
 2. When to issue.  
 3. Nature of mandamus.  
 4. When peremptory mandamus may be allowed.  
 5. Proceedings.  
 6. Answer on return of writ.  
 7. If no answer, peremptory writ allowed.  
 8. Pleadings.  
 9. Issue when tried.  
 10. Issue where tried.  
 11. Trial, as in civil action.  
 12. Damages for plaintiff.  
 13. Court may fine or imprison.  
 14. Jurisdiction of district court.

To whom to issue.  
 2 J. Cas. 217.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon,* That the writ of mandamus may be issued to any inferior tribunal, corporation, board or person to compel the performance of an act, which the law specially enjoins, as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right, or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

When to issue.  
 1 Barb. 84.

SEC. 2. This writ shall only be issued in cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit on the application of the party beneficially interested.

Nature of mandamus.

SEC. 3. The writ shall be either alternative or peremptory. The alternative writ shall state concisely the facts, showing the obligation of the party to whom it is directed to perform the act, and his omission to perform it, and command him that immediately after the receipt of the writ, or some other specified time, he do the act

required to be performed, or show cause before the court out of which the writ issued, at a specified time and place, why he has not done so, and that he then and there return the writ with his certificate of what he has done. The peremptory writ shall be in a similar form, except that the words, requiring the party to show cause why he has not done as commanded, shall be omitted.

SEC. 4. When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance; in all other cases the alternative writ shall be first issued.

SEC. 5. The motion for the writ, the allowance and the service thereof and the enforcement of obedience thereto, shall be such as the court may direct.

SEC. 6. On the return day of the alternative writ or such further day as the court may allow, the party on whom the writ shall have been served, may show cause by answer under oath, made in the same manner as an answer to a complaint in an action at law.

SEC. 7. If no answer be made, a peremptory mandate shall be allowed against the party on whom the writ shall have been served. If an answer be made containing new matter, the same shall not conclude the applicant, who may on the trial or other proceedings avail himself of any valid objection to its sufficiency, or may countervail it by proof, either in direct denial or by way of avoidance.

SEC. 8. No other pleading or written allegation, shall be allowed than the writ and answer, and these pleadings shall have the same effect, and be construed and amended in the same manner, as proceedings in an action at law; and the issues thereby joined shall be tried, and the further proceedings had in the same manner as in an action at law.

SEC. 9. Issues of fact joined in the case of a writ of mandamus issued out of the supreme court, shall be tried as provided in the next section.

SEC. 10. When the parties consent thereto, the court may try the issues of fact arising upon the pleadings of the parties, or the same may be referred as in actions at law in the district court; but when either party shall refuse to consent to a trial, other than a trial by jury, the supreme court may order a jury of twelve men, possessing the qualifications for jurors, in the district court, to be summoned to appear forthwith before the court to try such issue; and in case any of the jurors so summoned, should for any cause be rejected or be disqualified to act as a juror in the case, the court may order others to be summoned until a jury shall be obtained.

SEC. 11. When a jury shall be impaneled, the same proceedings shall be had as in the trial of an action at law in the district court.

SEC. 12. If judgment be given for the applicant, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in an action at law, together with his costs and charges: and for such damages, costs and

**TITLE I.**

When peremptory.

Power of court.

Answer on return of writ.

If no answer, peremptory writ allowed.  
 1 Barb. 84.

Pleadings.

Issue when tried.

ib.

Trial as in civil action.

Damages for plaintiff.



**TITLE 2.** charges an execution may be issued; and a peremptory mandamus shall also be awarded without delay.

Court may  
fine or im-  
prison.

**SEC. 13.** Whenever a peremptory mandamus has been issued and directed to any inferior tribunal, corporation, board or person commanding the performance of any public duty, specially enjoined by law, if it appear to the court that any member of such inferior tribunal, corporation, or board, or such person upon whom the writ has been personally served, has without just excuse refused or neglected to perform the duty so enjoined, the court may impose on him a fine not exceeding five hundred dollars. Such fine when collected, shall be paid into the territorial treasury. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned for a period not exceeding three months, and may take any orders necessary and proper for the complete enforcement of the writ.

Jurisdiction  
of district  
courts.

**SEC. 14.** The several district courts of this territory shall have original jurisdiction in cases of mandamus, except in cases when such writ is directed to one of the judges of the district court, in his official capacity, and the said court shall proceed upon all such cases in the same manner as in an action at law, unless otherwise provided by statute.

## TITLE II.

### *Writs of Prohibition.*

**SEC. 15.** Writs of prohibition to be issued from supreme court only.

16. Service and return of writ.

17. Proceedings upon return of writ.

18. Judgment when and how rendered by court.

19. Act when to take effect.

To be issued  
only from su-  
preme court.

**SEC. 15.** Writs of prohibition shall only be issued out of the supreme court, and such writs shall be applied for, upon affidavits, by motion to the court or a judge thereof in vacation, in the same manner as writs of mandamus; and if the cause shown shall appear to the court or judge to be sufficient, a writ shall be thereupon issued, which shall command the court and party, or officer to whom it shall be directed, to desist, and refrain from any further proceedings in the suit, or matter specified therein, until the next term of the supreme court, or the further order of the court thereon; and to show cause at the next term of the said court, or some day to be named in the same term, at the option of the court, if issued in term time, why they should not be absolutely restrained from any further proceeding in such action or matter.

Service and  
return.

**SEC. 16.** Such writ shall be served upon the court and party, or officer to whom it shall be directed, in the same manner as a writ of mandamus; and a return shall in like manner be made thereto by such court or officer, which may be enforced by attachment.

Proceedings  
on return of  
writ.

**SEC. 17.** The court and party or officer on whom the writ shall have been served, may by the return or answer under oath, show cause why they should not be restrained as mentioned in the writ of prohibition; and the person prosecuting such writ may take issue or demur to the matters relied on in the return or answer by such court and party or officer; and the like proceedings shall be

had for the trial of such issues of law or fact, joined between the parties, and for the rendering of judgment thereon as in a mandamus. **CHAPTER 1.**

**SEC. 18.** The court after hearing the proofs and allegations of the parties, shall render judgment, either that a prohibition absolute restraining the said court and party or officer from proceeding in such action or matter, do issue, or authorizing the court and party or officer to proceed in such action or matter in question; and may make and enforce such order in relation to costs and charges, and the amount thereof as may be deemed just.

Judgment  
rendered by  
court.  
Barb. 146.

**SEC. 19.** This act shall take effect and be in force from and after the first day of May next.

*Passed January, 5th, 1854.*

AN ACT RELATING TO ACTIONS ON OFFICIAL SECURITIES FOR FINES AND FORFEITURES, TO ACTIONS BY AND AGAINST PUBLIC OFFICERS AND PUBLIC BODIES.

## CHAPTER I.

ACTIONS ON OFFICIAL SECURITIES, AND FOR FINES AND FORFEITURES.

**SEC. 1.** Official bond how construed.

2. Who may bring an action thereon.

3. Leave how granted.

4. One judgment not to preclude a second action, on other delinquencies.

5. Amount recovered not to exceed undertaking.

6. Execution to be first enforced against principal.

7. Securities when and how apportioned.

8. Actions for fines and forfeitures, who may prosecute.

9. Amount recovered when penalty is limited.

10. Effects of recovery by collusion.

11. Certain fines to be paid into the treasury.

**SEC. 1.** *Be it enacted by the Legislative Assembly of the Territory of Oregon,* That the official bond or other security of a public officer to the territory, whether with or without securities, shall be construed as security to the territory, and also to all persons severally for the official delinquencies, against which it is intended to provide. If it be to a county, city, village or other municipal body, it shall, in like manner, be construed severally to all persons intended to be secured, as well as to the body politic named therein.

Official bond.

**SEC. 2.** When a public officer, by official misconduct or neglect of duty shall forfeit his official bond, or render his sureties liable upon an official security, any person injured thereby, or who is by law entitled to the benefit of the security, may bring an action thereon, in his own name, against the officer and his sureties to recover the amount to which he may be entitled by reason of the delinquency.

Who may  
bring an ac-  
tion thereon.

**SEC. 3.** Before an action can be brought by the plaintiff, other than the territory or body politic named in the security, leave

Leave how  
granted.

**CHAPTER I.** shall be obtained of the district court, or a judge thereof, within the district or county where the action is triable; and leave shall only be granted on a production of a copy of the bond, and an affidavit showing the delinquency, and if the delinquency be such as that if established on the trial, it would entitle the party applying to recover in the action, leave shall be granted.

**SEC. 4.** A judgment in favor of a party for one delinquency, shall not preclude the same or another party from an action on the same security for another delinquency.

**SEC. 5.** If it appear in an action against a surety in an official security, that he has already been obliged, by reason of prior recoveries against him on the same, to pay amounts which, in the aggregate, are equal to the extent of his undertaking, or that by reason of the insolvency of his principal he will be obliged to pay to that extent on judgments already recovered against the surety, the recovery against a surety shall in all such cases, be limited by the amount of his undertaking, except as otherwise provided by law.

**SEC. 6.** Upon the execution issued on a judgment recovered upon the official security of a public officer against him and a surety, there shall be indorsed a direction to the officer to whom the execution shall be delivered, to collect the same out of the property of the principal, if sufficient can be found, and if not, then to collect it out of the property of the surety.

**SEC. 7.** If there be several judgments on which executions are at the same time in the sheriff's hands against a public officer and his sureties, amounting in the aggregate to a sum greater than that for which the sureties are liable, the court shall on their application, limit the amount to be collected from them to the amount of their respective liabilities, and may cause the same to be applied on the judgments or executions in proportion to their amounts.

**SEC. 8.** Actions for fines and forfeitures may be prosecuted by the officers or persons to whom they are by law given, or those who by special provision of law are authorized to recover them; and whether prosecuted by public officers or private persons, shall be governed by the same rules as other civil actions, except as otherwise specified in this chapter.

**SEC. 9.** When an action shall be brought for a penalty, which is limited by law not to exceed a certain amount, the action may be brought for that amount, and upon the trial, the amount recovered shall be determined in proportion to the offence.

**SEC. 10.** A recovery of a judgment for a penalty or forfeiture by collusion between the parties, with intent to save the defendant from the consequences contemplated by law, in case where the penalty or forfeiture is given wholly or partly to the prosecutor, shall not prevent the recovery of the same by another person.

**SEC. 11.** Fines and forfeitures not specially granted or appropriated by law, shall be paid into the territorial treasury; and whenever by the provision of law any property, real or personal, shall be forfeited to the territory, or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in the district court of any county where such property may be.

## CHAPTER II.

### ACTIONS BY AND AGAINST CERTAIN PUBLIC OFFICERS, AND PUBLIC BODIES.

- SEC. 1.** Who may sue in official capacity.  
 2. In what cases official persons may sue.  
 3. When special department of corporation sues.  
 4 & 5. How actions may be brought.  
 6 & 7. When judgment against county to be presented to commissioners, and how satisfied.  
 8. Payment of judgment by county treasurer.  
 9. Execution not to issue, except on leave.  
 10. Act when to take effect.

**SEC. 1.** The following officers may prosecute actions in their official capacity:

1. The board of county commissioners of a county;
2. The directors of a school district;
3. Any organized department of a municipal corporation, having a board of officers in charge of a particular branch of public service, and specially authorized by statute to prosecute. In such action the plaintiffs may be designated by their official name, or the action may be brought in the name of the body in whose behalf the action is brought.

**SEC. 2.** Every such action shall be either:

1. On a contract made with such officers in their official capacity; or
2. To enforce a liability or a duty enjoined by law in favor of such officers, or the body represented by them; or
3. To recover a penalty or forfeiture given to such officers or body; or
4. To recover damages for an injury to their official rights or property.

**SEC. 3.** When an organized department of a municipal corporation is authorized by statute to sue, it shall, for purposes of the action, be deemed the real party in interest, though the corporation, of which it is the department, be the party to be ultimately benefitted by the action, or responsible for any costs incurred therein.

**SEC. 4.** An action may be brought against the officers, mentioned in section one, in their official capacity, or against the body they represent, either upon a contract made by such officers in their official capacity, and within the scope of their authority; or for an injury to the rights of the plaintiff, arising from some act or omission of such officers, or of the body represented by them.

**SEC. 5.** The actions authorized by this chapter, may be brought by or against the officers mentioned in section one, upon a cause of action which accrued during the term of their predecessors, as well as during their own term of office, and when brought may be continued by, or against their successors in office, whose names may for that purpose be substituted in the action.

### CHAPTER 2.

Who may prosecute in official capacity.

For what actions.

When special department sues.

Action how brought.



## TITLE 1.

Judgment when presented to commissioners.

SEC. 6. If judgment for the recovery of money be rendered against a county, or the board of commissioners of a county, on account of the liability of such county, and the judgment be not satisfied, or proceedings thereon stayed by appeal or otherwise, before the next regular meeting of the board of commissioners of the county, a certified copy of the docket of the judgment may be presented to the board of commissioners at such, or at any subsequent regular meeting.

How satisfied.

SEC. 7. The board of commissioners shall thereupon cause the amount due on the judgment, with interest from the time of the recovery, to be added to the tax of the county for whose liability the same was recovered, and the same shall be collected as other contingent charges of the county.

Payment of judgment by county treasurer.

SEC. 8. The treasurer of a county against which, or against whose officers a judgment has been recovered for a liability of the county, the execution of which has not been stayed upon appeal, shall upon demand and delivery to him of a certified copy of the docket of the judgment, pay the amount due thereon, if there be sufficient money of the county in his hands not otherwise specifically appropriated. If he fail to do so, he shall be personally liable for the amount, unless the collection thereof be afterwards stayed upon appeal.

Leave to issue execution.

SEC. 9. Execution shall not be issued on a judgment rendered against a county or its officers, without leave of the court; nor shall leave be granted until the court is satisfied that payment has been demanded of the proper county officers, as provided in the last two sections, and that the board of commissioners have wrongfully omitted to include the amount in the tax list, as provided in section seven; when execution is issued, the property of the county only is liable thereon.

SEC. 10. This act shall take effect and be in force, from and after the first day of May next.

*Passed, Jan. 7th, 1854.*

AN ACT CONCERNING THE LIENS OF MECHANICS, LABORERS AND OTHER PERSONS.

CHAPTER I.

MECHANICS AND LABORERS' LIENS.

TITLE I. *Lien on Buildings.*

TITLE II. *Liens on Personal Property.*

TITLE I.

*Lien on Buildings.*

- SEC. 1. Lien on buildings.  
2. Notice of lien to be filed.  
3. How long such lien exists.  
4. Complaint what to contain.  
5. Summons how served.

## TITLE 1.

## SEC. 6. Proceedings to enforce lien.

7. Mechanics' liens, when preferred to other liens.  
8. Lien against buildings, when to extend to lot.  
9. Several may join: claims how stated.  
10. Satisfaction of lien must be entered.  
11. Notice of sub-contractor's claim.  
12. Claim recovered by sub-contractor may be set off against contractor's demand.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon,* That any person who shall hereafter by virtue of any contract with the owner of any building, or with the agent of such owner, perform any labor upon, or furnish any materials, engine or machinery for the construction or repairing of such building, shall, upon filing the notice prescribed in the next section, have a lien upon such building, and the lot of ground upon which the same is situated, for such labor done; or materials, engine or machinery furnished, when the amount shall exceed twenty dollars.

SEC. 2. Any person wishing to avail himself of the provisions of this chapter, whether his claim be due or not, shall file in the recorder's office of the county in which such building is situated, at any time within three months after the completion of such building or repairs, a notice of his intention to hold a lien upon such building for the amount due, or to become due, specifically setting forth such amount, and containing a description of the building upon which the labor was performed, or for which the materials, engine or machinery were furnished; which notice shall be recorded by the recorder in a book to be kept for that purpose.

SEC. 3. Such lien shall cease to exist at the expiration of one year after the completion of the building or repairs, unless before that time an action to enforce the same shall have been commenced in the district court of the county in which the premises are situated, by the person having such lien against the owner with whom or with whose agent the contract was made, unless such claim be not due at the expiration of one year after such completion, in which case the action shall be commenced within three months after the same shall have become due.

SEC. 4. The complaint of the plaintiff shall contain a brief statement of the contract on which the claim is founded, the amount due thereon, the time when the notice was filed with the recorder, the time when the building was completed, if it be completed, with a description of the premises, and any other material facts, and shall pray that the premises may be sold, and the proceeds of the sale be applied to the discharge of the lien.

SEC. 5. The summons shall be served as in other cases, or instead of service by publication, it may be made by delivering a copy thereof to the person in possession of the premises. If the defendant shall have sold or disposed of the premises before the service of the summons, the court shall direct notice of the proceedings to be served on the purchaser or his agent for the premises, who may thereupon, if he desire it, be made a party defendant in the action.

SEC. 6. The proceedings in an action to enforce such lien, shall be the same as in other actions, except as otherwise provided in this chapter; and if judgment be rendered for the plaintiff, he may