N O T I C E

June 6, 1978

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

FROM: COUNCIL ON COURT PROCEDURES
UNIVERSITY OF OREGON LAW CENTER
EUGENE, OREGON

The next meeting of the Council on Court Procedures will be held in Salem, Oregon, at the Willamette College of Law, Room F, on Friday, July 28, 1978, commencing at 9:30 a.m. At that time, the Council will discuss and consider various suggested revisions to the Oregon pleading, practice and procedure rules.

FRM:gh

M E E T I N G N O T I C E

The next meeting of the Council will be held Friday, July 28, 1978, at the Willamette College of Law, Room F, at 9:30 a.m. Please arrange your schedule to allow an all-day meeting. Hopefully, we will be considering the following:

1. The discovery committee report on admissions, interrogatories and discovery of insurance limits as discussed at the last meeting

2. The process committee report and suggested rules

3. The trial committee report and suggested rules

4. The revisions to the pleading rules as suggested at the last meeting

5. Further changes to eliminate law-equity distribution.

6. Pleading and proving attorney fees (Hamlin proposal)

7. A meeting schedule that will allow completion of our work by January 1, 1979

FRM:gh
6/6/78

COUNCIL ON COURT PROCEDURES

Agenda

9:30 a.m., July 28, 1978

Room F, Willamette College of Law

Salem, Oregon

(THIS IS AN ALL-DAY MEETING).

1. Process committee report and suggested rules.

2. Trial committee report and suggested rules.

3. Discovery committee report on interrogatories, insurance limits, experts and admissions.

4. Law - equity revisions. Receiving suggested changes.

5. Revisions to the pleading rules as suggested at the last meeting.

6. Pleading and proving attorney fees (Hamlin proposal).

7. Discussion of schedule to complete work and prepare report -- further meetings.

8. NEW BUSINESS.

7/20/78

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of July 28, 1978

Willamette University College of Law

Salem, Oregon

Present:	Anthony L. Casciato	Donald W. McEwen
	John M. Copenhaver	James B. O'Hanlon
	William M. Dale, Jr.	Charles P.A. Paulson
	Wendell E. Gronso	Val D. Sloper
	Lee Johnson	Wendell H. Tompkins
	Garr M. King	William W. Wells
	Berkeley Lent	
Absent:	Darst B. Atherly	James O. Garrett
	E. Richard Bodyfelt	Laird Kirkpatrick
	Sidney A. Brockley	Harriet Meadow Krauss
	Alan F. Davis	Gene C. Rose
	Ross G. Davis	

Chairman Don McEwen called the meeting to order at 9:35 a.m., in Room F, Willamette University College of Law, Salem, Oregon.

The Council approved the minutes of the meeting held June 3, 1978, as submitted.

The Chairman announced that Roger B. Todd had resigned as a Council member and that Randolph Slocum of Roseburg had been appointed to take his place.

The Council then discussed the report of the discovery committee. Committee Chairman Garr King reported that the majority of the committee members present at the committee meeting had voted not have any interrogatories.

A motion was made by Wendell Gronso, seconded by Chuck Paulson, that written interrogatories not be adopted at all. Jim O'Hanlon, Chuck Paulson, Garr King, Judge Casciato, Wendell Gronso, and Judge Dale voted in favor of the motion, and Judge Sloper, Judge Tompkins, Judge Johnson, Judge Copenhaver, Judge Wells and Don McEwen voted against the motion, and Justice Lent abstained. Justice Lent explained that he planned to abstain in all future votes to avoid any questions in the future if the rules should be the subject of litigation before the Oregon Supreme Court. The Chairman then requested that Garr King contact the absent members for their expression in the matter.

Garr King then stated that the committee had decided that if the Council wanted interrogatories, the limited interrogatories rule submitted by the committee should be adopted. After discussion, Judge Johnson made a motion, seconded by Don McEwen, that the word, "facts", be added after the word, "following", in Rule 108 B., to make it clear that interrogatories could only be used to find out facts and not legal theories. The motion passed unanimously. Judge Sloper moved, seconded by Chuck Paulson, that the proposed limited interrogatories rule, as modified, should be adopted if the majority of all Council members favored some interrogatories rule. The motion passed unanimously.

The Council next discussed the proposed committee Rule 101 B.(4), relating to experts. Upon motion made by Judge Sloper, seconded by Chuck Paulson, the Council voted unanimously to insert the word, "immediately," in Rule 101 B.(4)(f) between "duty" and "to supplement." After further discussion of the rule, upon motion made by Judge Sloper and seconded by Judge Casciato, the Council voted to adopt proposed Rule 101 B., as modified. The motion was opposed by Judge Dale and Judge Johnson.

The Council next discussed the proposed changes to Rule 101 B.(2), relating to insurance agreements. Upon motion by Garr King, seconded by Don McEwen, the Council voted unanimously to accept the committee recommendations.

After discussion concerning Rule 111, REQUESTS FOR ADMISSION, upon motion by Garr King, seconded by Judge Sloper, the Council voted unanimously to adopt that rule as modified by the committee.

Judge Sloper presented the report and proposed rules of the process committee. Judge Sloper reported that the process committee had decided the Council probably had the authority to promulgate rules governing proper basis for personal jurisdiction and they had submitted such rules as Rules 4 A. through 4 D. It was suggested that the matter be finally left to the Legislature, which could reject the proposed rules relating to personal jurisdiction if they did not intend to grant rule-making authority in this area. Judge Sloper also reported that the committee favored rules that would reduce technicality in service of process. He called attention to proposed Rules 4 E.(3) and 4 H., and stated the committee recommended that the proposed language at the bottom of Page 1 of the committee memorandum dated July 16, 1978, be added to Rule 4 F.(3). Chuck Paulson moved, seconded by Judge Copenhaver, that such language be added as the introduction ro Rule 4 F.(3), followed by a statement that "service shall be accomplished substantially in the following manner," before the specific methods of service discussed in Rule 4 F.(3)(a) through 4 F.(3)(g).

The Council next considered the proposed rules submitted by the process committee in detail and made the following changes.

Rule 1. After discussion, upon motion by Judge Wells, seconded by Chuck Paulson, the Council voted unanimously that the last sentence of this rule be redrafted to also include actions pending as of the effective date of the rules.

Rule 3. After discussion, upon motion by Don McEwen, seconded by Judge Johnson, the Council voted unanimously to delete the reference to the statutes of limitations being governed by ORS 12.020 in the second sentence and that the rule read, "Other than for purposes of statutes of limitations, an action shall be commenced by filing a complaint with the clerk of the court."

Rule 4. After discussion, upon motion made by Wendell Gronso, seconded by Judge Johnson, the Council voted to change subsection C.(4) to specify that defendants appear and defend within 30 days for all types of service, by publication or otherwise, and wherever process is served. Jim O'Hanlon, Garr King, Judge Dale, Judge Sloper, and Judge Copenhaver opposed the motion.

After discussion, on motion made by Judge Johnson, seconded by Chuck Paulson, the Council voted unanimously to change "shall" to "may" in the next to the last sentence of section 4 D., relating to a reasonable fee being paid for the service. After discussion, on motion by Justice Lent, seconded by Judge Sloper, the Council voted unanimously that a lawyer for a party not be permitted to serve summons. Upon motion made by Judge Sloper, amended by Wendell Gronso, and seconded by Chuck Paulson, the Council voted to change the language in the first sentence of Section 4 D. so that it would read: "...nor an officer, director or employee of any party, corporate or otherwise." Judge Johnson opposed the motion.

It was decided that "promptly" should be inserted between "shall be" and "returned" in the first line of subsection 4 E.(1).

Upon motion by Judge Sloper, seconded by Justice Lent, the Council voted unanimously to change the first line of subparagraph 4 F.(3)(a)(ii), at the bottom of Page 9, to read: "If defendant cannot be found personally at defendant's dwelling house or usual place of abode, then by personal service..." Upon motion by Judge Dale, seconded by Garr King, the Council voted to accept the language of Rule 4 F.(3)(a)(ii) as modified. Jim O'Hanlon and Judge Johnson opposed the motion.

After extensive discussion of Paragraph 4 F.(3)(d), Chuck Paulson moved, seconded by Judge Sloper, that the service by mail specified in subparagraph 4 F.(3)(d)(ii) be changed to a third alternative available under subparagraph 4 F.(d)(iii). The motion passed unanimously. Upon motion by Judge Dale, seconded by Judge Copenhaver, the Council voted unanimously to change the language of subparagraph 4 F.(d)(iii) to make the methods of service provided therein available when a registered agent, officer, director, general partner or managing agent could not be found in or did not have an office in the county of this state where the action was filed and to provide for service on any clerk or agent who could be found in the county where the action was filed and to then accept the language of 4 F.(d) as modified. It was suggested that the language of Paragraph 4 E.(2)(a) be changed to reflect the changes in Paragraphs 4 F.(3)(a) and 4 F.(3)(d).

Judge Dale made a motion, seconded by Judge Johnson, to delete Paragraph 4 F.(3)(e) in its entirety. The motion failed, with Judge Copenhaver, Judge Johnson, Judge Dale, and Jim O'Hanlon voting in favor of the motion. Judge Wells moved to reconsider the motion, seconded by Garr King. The Council then voted to delete the whole subsection. Chuck Paulson, Judge Casciato, Judge Sloper, Judge Tompkins and Don McEwen opposed the motion.

After discussion, upon motion by Judge Johnson, seconded by Don McEwen, the Council voted unanimously to delete the second sentence of Paragraph 4 F.(3)(f), relating to service upon the Adult and Family Services Division.

After discussion, Judge Johnson made a motion, seconded by Judge Wells, to strike the last sentence from Paragraph 4 F.(3)(g), relating to service upon the District Attorney when a county is a party to an action. The motion failed. Judge Johnson, Chuck Paulson, Judge Wells, and Wendell Gronso were in favor of the motion.

After discussion, upon motion by Don McEwen, seconded by Wendell Gronso, the Council voted unanimously to change the last sentence of Section 4 G.(3) to read: "Such publication shall be four times, to be in successive calendar weeks." It was also suggested that the word reference to "due" diligence in subsection 4 G.(1) be changed to "reasonable" diligence and "45 days" be changed to "30 days" in subsection 4 G.(2) to conform to prior Council action.

Upon motion by Chuck Paulson, seconded by Garr King, the Council voted unanimously to delete in the third line of Section 4 H. the words, "and the manner of service of summons."

It was suggested that the cross reference in section 4 I., "Telegraphic transmission," to Rule 5 E. should be to Rule 5 D.

Rule 6. It was suggested, to conform to the language of prior rules, that the word, "apparently," be inserted between "person" and "in charge" in the eighth line of section 6 B. and "over fourteen years of age" be substituted for "of suitable age and discretion" in the eleventh line of section 6 B.

After discussion, upon motion by Judge Tompkins, seconded by Judge Wells, the Council voted unanimously to delete the following from the first sentence of section 6 E.: "except that the judge may permit the papers to be filed with him, in which event the judge will note thereon the filing date and forthwith transmit them to the office of the clerk or the person exercising the duties of that office." It was also suggested that the sentence following should read: "The clerk or the person exercising the duties of that office shall endorse upon such pleading or paper the time of the day, day of the month and the year."

Rule 7. After discussion, upon motion made by Judge Sloper, seconded by Justice Lent, the Council voted unanimously to delete section 7 B.

Rule 4 A. Judge Sloper reported that the process committee recommended changing the proposed draft of subsection 4 A., A.(5) by eliminating the words, "whether by appointment of agent for service of process in this state or otherwise." Upon motion made by Chuck Paulson, seconded by Wendell Gronso, the Council voted unanimously to insert "distributed" between "things" and "processed" in subsection 4 A., D.(2).

The process committee reported that it had voted to adopt the language at the bottom of Page 13 of the commentary to the rules and that it would be inserted in the appropriate place in the rule.

The Executive Director stated the process committee had deleted the last two sentences in Rule 4 D., B., beginning with "The issues..." The following new language would be inserted: "The court shall rule upon the issues raised by this motion before trial. If any motion is made pursuant to Rule K (1), a motion to stay proceedings under this rule shall be joined with such motion. Failure to do so shall constitute a waiver of this motion to stay proceedings."

After further discussion, upon motion by Chuck Paulson, seconded by Justice Lent, the Council voted to delete Rule 4 D. in its entirety.

Judge Dale then submitted the report and proposed rules of the trial committee. He pointed out that the committee had recommended no requirement for a demand for jury trial. The Council then reviewed the proposed rules in detail.

After discussion relating to whether a motion by the parties should be required, upon motion by Judge Dale, seconded by Judge Wells, the Council adopted Rule 53. Garr King and Wendell Gronso opposed the motion.

After discussion concerning the number of peremptory challanges in Rule 57 B.(4), upon motion by Judge Sloper, seconded by Judge Tompkins, the Council voted unanimously to adopt Rule 57 as written.

It was decided to cross out subsection 58 A.(1) and to have subsection 48 A.(2) read: "Trial by the court shall proceed..." After discussion, upon motion by Chuck Paulson, seconded by Don McEwen, the Council voted unanimously to reverse the order of subsections 58 B.(4) and B.(5).

After discussion, upon motion by Lee Johnson, seconded by Judge Sloper, the Council voted to delete the words in the seventh line of section 59 B., "as written, without any oral explanation or addition," and to change the word, "given," to "read." The motion was opposed by Judge Casciato, Wendell Gronso, Judge Dale, and Garr King.

It was agreed that subsections 59 C.(5) would be changed by substituting the word, "shall," for "may either decide in the jury box or" in the second line and the words, "either orally or in writing," would be added to the fourth line of section 59 C. after the word, "given." Upon motion by

Johnson, seconded by Sloper, the Council voted unanimously to delete the last sentence in subsection 59 G.(1) and the last sentence would read: "If the foreperson answers in the affirmative, the verdict shall be read." It was decided that the second sentence of subsection 59 G.(5) would be deleted.

Judge Dale stated he felt that the committee's draft of section H(6), "Requests for finding or objections to findings are not necessary for purposes of appellate review," should be included as part of Rule 62, and upon motion by Don McEwen, seconded by Chuck Paulson, the Council voted unanimously to include it.

After discussion, upon motion by Paulson, seconded by Gronso, the Council voted unanimously to delete section H. of Rule 63, "Remittitur and additur," from this rule. Judge Dale said that the committee's Rule J should be included in the rules.

The Council decided that pleading and proving attorney fees be deferred.

The Executive Director reported that the Oregon State Bar CLE Committee wished to incorporate any new proposed rules in its civil procedure programs scheduled between October 7 and October 27 throughout the state and would print up the proposed rules for distribution to the Bar if they would be available by mid-September. He also reported that the procedure section of the State Bar wished to have proposed rules available by the time of the State Bar Convention.

The next meeting of the Council will be held in Bend, Oregon, at 9:30 a.m., on Friday, August 25, 1978, at the law offices of Panner, Johnson, Marceau, Karnopp and Kennedy, 1026 N.W. Bond Street. A complete set of proposed rules, with suggested comments, will be distributed before the meeting, and the Council will consider this draft of the rules and comments for submission to the Bar and publication as a tentative draft of rules to be adopted.

The meeting was adjourned at 5:10 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

M E M O R A N D U M

TO: PROCESS COMMITTEE

FROM: FRED MERRILL

RE: RULE-MAKING POWER AND PERSONAL JURISDICTION

DATE: June 28, 1978

The Council is authorized to promulgate rules of "pleading, practice and procedure." The question has been raised whether this includes rules relating to personal jurisdiction.

For analysis, it is necessary to separate different aspects of the concept of jurisdiction over the person. Jurisdiction over the person deals with the authority of a court to issue orders and judgments which are binding upon a particular person in a particular case. For a state court to have such authority, the following requirements must be met: (1) the proper formalities provided by state rules must be followed; generally, this involves the proper form of process, served by the proper person in a prescribed way; (2) the defendant must be amenable to the court's authority under state rules defining who shall be subject to a binding order of the court, and (3) the formalities and amenability to authority described by the state rules must meet federal constitutional standards of due process in terms of notice and minimum contacts.

The last aspect of personal jurisdiction is clearly not a matter under the rule-making power. The first is generally regarded as procedural and proper for rule-making and every jurisdiction with procedural rules has rules relating to service of process. The difficult question presented is whether the second aspect of jurisdiction, amenability to process, is substance or procedure. Could the Council promulgate rules that specify amenability to process as well as the manner of service of process? Could the Council promulate a comprehensive long arm statute?

Unfortunately, there is no clear answer to these questions. The problem may result from a lack of separate consideration of the form of process and the amenability aspects of jurisdiction. Amenability is frequently defined by the form of process available. Even where amenability is defined separately, a Legislature often will incidentally make someone amenable to the authority of its courts in a process statute. For example, the non-resident motor vehicle statute in this state not only provides a method of service on a non-resident driver but creates a basis for jurisdiction through use of state highways. Another example in the process chapter is ORS 15.080 which provides a method of service of process on an agent for an individual, whereas ORS 14.020, dealing with amenability, only creates a basis for jurisdiction when a corporation appoints an agent. Since the Legislature is not limited to dealing with procedure this makes little practical difference; but for the Council, distinction may be important.

The failure to separate form of process and amenability to service of process was clearly pointed out in the Lacy article previously furnished to the committee. Lacy dealt with the problem in terms of over-emphasizing process requirements by confusing this with the more basic amenability question. Lacy also strongly suggests that jurisdiction is a matter of procedure. He is primarily advocating a modification in the technicality of the rules for service of process and in that respect, he correctly indicates that the Council could deal with the problem. To the extent the article suggests that amenability also is procedure, the argument is much less persuasive.

Lacy points out that both aspects of personal jurisdiction were codified as part of the original civil procedure section of the Deady Code. The problem is that Deady was simply arranging a set of statutes not distinguishing between substance and procedure for purposes of defining rule-making power. The statutes of limitations were codified in the same procedural section.

Lacy also relies upon the precedent in the federal system. The Federal Rules Enabling Act, 28 USCA 2072, says that the Supreme Court may "prescribe by general rule, the forms of process, writs, pleadings, and motions, and the practice and procedure of the District Courts of the United States in civil actions." Federal Rule 4 is on its face only intended to prescribe the manner and method of service of process. The rule is entitled "Process" and Wright and Miller says that Rule 4 specifically does not deal with jurisdiction over the person and if it did, it would be of doubtful validity under the Rules Enabling Act. See 4 Wright and Miller, Federal Practice and Procedure, § 1063, p. 204. Despite this, Rule 4 does create amenability to service of process beyond the territorial jurisdiction of Federal District Courts and in situations where there is no federal statute creating amenability. Rule 4(d)(7) and Rule 4(e) specifically provide that process may be served under circumstances and in the manner specified by the statutes of the state in which the District Court is located. This includes using any state long arm statute or quasi in rem statute of the state. Rule 4(f) also provides that process can be served outside the district anywhere in the state where the District Court is located. The Advisory Committee drafting the rules never attempted to explain why this does not exceed the rule-making power. The notes to the original version of 4(e) simply say that while this enlarges the area where service may be made, it does not enlarge jurisdiction. The notes to the 1963 revisions to Rule 4(d)(7) and 4(e) show clearly that these rules were intended to incorporate state long arm statutes but never analyzed why this is part of practice and procedure.

The United States Supreme Court, however, has indicated that at least the 4(f) extension is not beyond the rule-making power. In Mississippi Publishing Company v. Murphree, 326 U.S. 438 (1926), a corporation had appointed

a registered agent in Mississippi. Suit was filed in the Northern District of Mississippi but the agent resided in the Southern District and was served there under Rule (f). Service was challenged on the basis that the rule exceeded the powers granted by the Rules Enabling Act, but the court held that the service was proper. The opinion is not completely clear in stating that amenability to service is an aspect of procedure. Basically, the court focused upon the question of whether the substantitve rights involved had been affected and says that all the rule did was to provide a method or manner of service where the court was clearly authorized to determine the rights of the defendant. The opinion never faces the question of how the authority to deal with a person who had appointed a local agent is conferred upon a Federal District Court. The answer perhaps is that this ground of amenability was so obvious and so well accepted that no specific statute or rule was required. Any court could probably deal with the rights of the party voluntarily appearing before it without specific statutory authorization.

Rule 4(d)(7) and 4(e), incorporating state long arm statutes, seem to be on more tenuous ground. The authority of a court to proceed against a person based upon one minimum contact with the state, such as the sale of one life insurance policy, is not automatically assumed. A state court would not assume authority to the full constitutional limits; a long arm statute is required. By incorporating state long arm statutes, Rules 4(d)(7) and 4(e) go beyond manner of service of process for a clearly accepted basis of jurisdiction and create a new amenability to service of process. Nonetheless, on the authority of the Murphree case, challenges to incorporation of state long arm service in federal courts have failed in the lower federal courts. See U.S. v. Montreal Trust, 35 FRD 216, Southern Dist. of N.Y. (1964); Metro Sanitary District of Chicago v. General Electric, 35 FRD 131 (1964).

It may also be dangerous to transfer the meaning of substance and procedure in defining rule-making power from the federal system to the Oregon Council on Court Procedures. The Federal Rules Enabling Act is subject to interpretation based upon the situation existing in federal courts at the time of passage. The Enabling Act for the Council was passed at a different time and place, applies to a state court, and must be interpreted against a statutory back-drop that does draw a distinction between amenability to process and service of process.

From a general analytical standpoint, amenability to service seems to be more than procedure. The one analysis that could be found of the meaning of substance and procedure in relation to jurisdiction is Joiner and Miller, Rules of Practice and Procedure, A Study of Judicial Rule Making, 55 Mich.L.Rev. 623 (1957). They suggest that the distinction between substance and procedure in defining rule-making power depends upon whether an area

relates to the orderly and efficient administration of court business or goes beyond this and brings in other aspects of public policy. See p. 635. Applying this test to the basis for exercising jurisdiction, they say the following:

> "The same can be said of the relationship with the state of the person or property involved in an action as the basis for jurisdiction over that person and property. Whether or not that relationship is sufficiently close to subject the person or property to the jurisdiction of a court of the state is something that involves fundamental policy considerations beyond those matters essential for the orderly dispatch of judicial business. On the other hand, how such persons and property should be brought before the courts clearly is practice and must be so considered. If the legislature makes the determination that a certain class of persons or property should be subjected to the power of the courts of this state, the supreme court has the obligation to establish rules prescribing how and in what manner such persons or property shall be brought before the courts." p. 645-646

Other than the Joiner and Miller article, there has been remarkably little specific discussion of whether amenability to service of process is substance or procedure. As indicated above, Wright and Miller say that the federal rules cannot create jurisdiction over the person, but they do not discuss the issue and Rule 4 does in fact create personal jurisdiction. Other states with procedural rules provide little guidance. A majority have rules regulating manner of service of process but purport to leave jurisdiction to statutes. A substantial minority include bases of jurisdiction as well as process in their rules.

In the final analysis, there was sufficient doubt that it would be dangerous to simply promulgate rules of amenability to process. On the other hand, it is very difficult to make a meaningful change in the process statutes without cleaning up the amenability rules at the same time. The best approach would be to promulgate amenability rules and indicate that such rules are arguably within the rule-making power of the Council, but the Legislature should consider whether it intended to confer power to make rules relating to personal jurisdiction upon the Council in creating the Council. The Legislature could then veto the rules if they either disagreed with the merits or did not intend to include personal jurisdiction within the rule-making power. If the Legislature does nothing under these circumstances, it would be interpreting procedure to include personal jurisdiction. We could also suggest that if the Legislature does not wish to leave personal jurisdiction to the rule-making power of the Council, then it should enact the promulgated rules as a statute.

OREGON RULES OF CIVIL PROCEDURE

RULE 1

SCOPE

These rules govern procedure and practice in all Circuit and District Courts of this state for all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where a different procedure is specified by statute or rule. These rules shall also govern practice and procedure in all civil actions and special proceedings, whether cognizable as cases at law, in equity or of statutory origin, for all other courts of this state to the extent they are made applicable to such courts by rule or statute. These rules shall be construed to secure the just, speedy and inexpensive determination of every action. These Rules, and amendments thereto, shall apply to all actions filed after their effective date.

COMMENT TO RULE 1

In general the Council has been examining rules in terms of utility in Circuit and District Courts in general civil cases. Justice courts may require special treatment. Many of the more elaborate discovery and pleading rules may be unnecessary and beyond reasonable application for minor courts. Until special minor court rules can be promulgated, the question is how to handle these courts. There is also the question of procedure in the tax court, and in original jurisdiction cases in the Supreme Court and in the few remaining County Courts with jurisdiction for preliminary orders and injunctions and probate cases. Finally, there is also the question of application of these procedures to domestic relations, probate, habeas corpus, post conviction and the variety of special proceedings provided in the Oregon statutes.

The approach followed in this Rule is to make these rules specifically applicable to all cases in Circuit and District Courts unless the particular statute or rule regulating the proceeding makes some procedure inapplicable or provides a substitute procedure. For all other courts the approach is reversed with these rules only being applicable to the extent the statutes or rules regulating those courts make general existing civil procedure applicable.

Under the present statute there is no express application of the procedures of ORS Chapters 11 to 45 to Circuit Courts. The procedures are generally specified for actions and suits, and the Circuit Courts possess

complete legal and equitable jurisdiction and this seems to make the general statutes applicable.

For District Courts, the practice and procedure followed in Circuit Courts and for summonses is made specifically applicable by ORS 46.100 and 46.110 unless otherwise specified in Chapter 46. For the time being, these two statutes should be retained. This Rule might be misinterpreted as applying only to new rules promulgated by the Council (although technically all procedural statutes are now rules). These statutes make clear that any procedure, whether specified by the numbered rules or by an ORS numbered provision, would be applicable in District Courts. Of the special procedures specified in Chap. 46, two seem clearly inconsistent with the rules and should be repealed: ORS 46.155 relating to judgment NOV and new trial; and, ORS 46.160, relating to instructions and nonsuits.

For Justice Courts, ORS 52.020 and 52.010 say that the practice in such courts shall be the same as Circuit Courts unless otherwise provided. This statute again should be retained. It would be an example of the specific provision in the second clause making the Oregon Rules of Civil Procedure applicable in a court other than a Circuit or District Court. The reference to "actions at law" in ORS 52.010 should be changed to "actions" and the reference to otherwise provided should include rules as well as statutes.

By virtue of ORS 305.425 (3), the tax court is given authority to promulgate its own rules of practice and procedure where it should conform as far as practicable to equity procedure. This would not be changed, with the Oregon Rules of Civil Procedure applying only to the extent specified in the tax court rules. The statute should be modififed to refer to conforming to actions tried without a jury in the Circuit Courts.

Where a county judge is empowered to grant preliminary injunctions and orders for Circuit Court suits by ORS 5.030, the statute specifies, the procedure in Chapter 32 should be followed. This would be retained, as Chapter 32 will probably reetain its own ORS number for the present.

For original proceedings in Supreme Court, there may be some question of our ability to promulgate anything. The Council has no power in the appeals area but does in all other proceedins in all courts of the state which would include appellate courts. The Supreme Court has original jurisdiction in mandamus, quo warranto and habeas corpus, by virtue of ARticle VII, Section 2, of the Oregon Constitution. The existing statutes provide a procedure for a mandamus and habeas corpus, but ORS 2.130 says the Supreme Court is empowered to make its own rules for original jurisdiction cases. There also are two statutory original jurisdiction references for constitutional challenges of new statutes in ORS 276.890 and 752.190. Those two statutes say the procedure shall be the same as the courts of equity. I assume this means that the Supreme Court could make its own equity rules. In any case, the Supreme Court would be the most appropriate body to make its own rules for original jurisdiction cases and no action in this area seems necessary.

The rules would apply to all types of cases in any court. In probate proceedings the procedure specified is equity procedure except as otherwise provided by the probate statutes. ORS 111.205. This statute should be retained, changing

the reference to "actions in equity" to "actions tried without a jury," and saying "unless otherwise provided by statute or rule." This would cover both the probate procedure in the Circuit Courts and in County Courts retaining probate jurisdiction. For domestic relations cases, there is no specific statute covering procedure; since these proceedings are in Circuit Courts, the rules generally would apply, unless some special provisions are provided in domestic relations statutes. See, for example, ORS 107.085, relating to the contents of a petition in a dissolution. The same analysis would apply to post conviction, habeas corpus and all special proceedings. Since these are in Circuit Courts, the rules would apply to the extent there is no incoonsistent provision within the statute.

The last sentence specifies that the rules apply to all actions filed after they go into effect, not to claims that arise after they go into effect.

RULE 2

ONE FORM OF ACTION

There shall be one form of action known as a civil action. All procedural distinctions between actions at law and suits in equity are herby abolished, except for those distinctions specifically provided for by these rules, by statute or by the Constitution.

COMMENT TO RULE 2

This is revised ORS 11.010 previous approved by the Council.

RULE 3

COMMENCEMENT OF ACTION

An action shall be commenced by filing a complaint with the clerk of the court. Commencement of an action for purposes of statutes of limitations is governed by ORS 12.020.

COMMENT TO RULE 3

The first sentence is the existing first sentence of ORS 15.020. The second sentence is not strictly speaking a procedural rule but merely a warning that this reference to commencement is for procedural purposes not defining the compliance with the statute of limitations. Although there is some argument that the statute of limitations and commencement of an action for the purpose of complying with the statute of limitations are procedural, this is not the case in the federal courts and analytically, the limitation of actions goes beyond the orderly dispatch of court business. See Joiner and Miller, Rules of Practice and Procedure: A Study in Judicial Rule Making, 55 Mich.L.Rev. 623, 645 (1957).

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An action shall be commenced by filing a complaint with the clerk of the court. Commencement of an action for purposes of statutes of limitations is governed by ORS 12.020.

COMMENT TO RULE 3

The first sentence is the existing first sentence of ORS 15.020. The second sentence is not strictly speaking a procedural rule but merely a warning that this reference to commencement is for procedural purposes not defining the compliance with the statute of limitations. Although there is some argument that the statute of limitations and commencement of an action for the purpose of complying with the statute of limitations are procedural, this is not the case in the federal courts and analytically, the limitation of actions goes beyond the orderly dispatch of court business. See Joiner and Miller, Rules of Practice and Procedure: A Study in Judicial Rule Making, 55 Mich.L.Rev. 623, 645 (1957).

RULE 4

SUMMONS

A. Plaintiff and defendant defined. For purposes of issuance and service of summons, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section D. of this Rule.

C. Contents. The summons shall contain:

C.(1) The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(2) A direction to the defendant requiring defendant to appear and defend within the time required by subsection (4) of this section and shall notify defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(2)(a) All summonses other than a summons to join a party pursuant to Rule K.(4) shall contain a notice in a size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer."

This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or his attorney.

If you have questions, you should see an attorney immediately.

C.(2)(b) A summons to join a party pursuant to Rule K.4(a) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CARREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney.

If you have questions, you should see an attorney immediately.

C.(2)(c) A summons to join a party pursuant to Rule K.4(b) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney.

If you have questions, you shoud see an attorney immediately.

C.(3) A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action, may be served by mail.

C.(4) The summons shall require the defendant to appear and defend within the following times:

C.(4)(a) If the summons is served within the state personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 20 days from the date of service.

C.(4)(b) If the summons is served outside this state personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 30 days from the date of service.

C.(4)(c) If the summons is served by publication pursuant to section G. of this Rule, the defendant shall appear and defend within 45 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

D. By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor an officer or director

of a corporate party. Compensation to a sheriff or a sheriff's deputy of the county in this state where the person served is found, or such person's dwelling house or usual place of abode is located, who serves a summons, shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee shall be paid for the service. This compensation shall be part of the disbursements and shall be recovered as provided in ORS 20.020.

E. Return; proof of service. (1) The summons shall be returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. When served out of the county in which the action is commenced, the summons may be returned by mail.

E.(2) Proof of service of summons or mailing may be made as follows:

E.(2)(a) Personal service or mailing shall be proved by (i) the affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer or director of a corporate party to the action, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left and shall state such facts as show reasonable diligence in attempting to effect personal service upon the defendant. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, of the county in this state where the person served was found or such person's dwelling house or usual place of abode is located, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the

E.(2)(b) Service by publication shall be proved by the affidavit of the owner, editor, publisher, manager or advertising manager of the newspaper or the principal clerk of any of them, or the printer or foreman of such newspaper, showing the same and shall be in substantially the following form:

Affidavit of Publication

State of Oregon,)
) ss.
County of _____.)

I, _____, being first duly sworn, depose and say that I am the owner, editor, publisher, manager, advertising manager, principal clerk of the _____, printer or his foreman of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____ in the aforesaid county and state; that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper for _____ successive and consecutive weeks in the following issues (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this _____ day of _____, 19___.

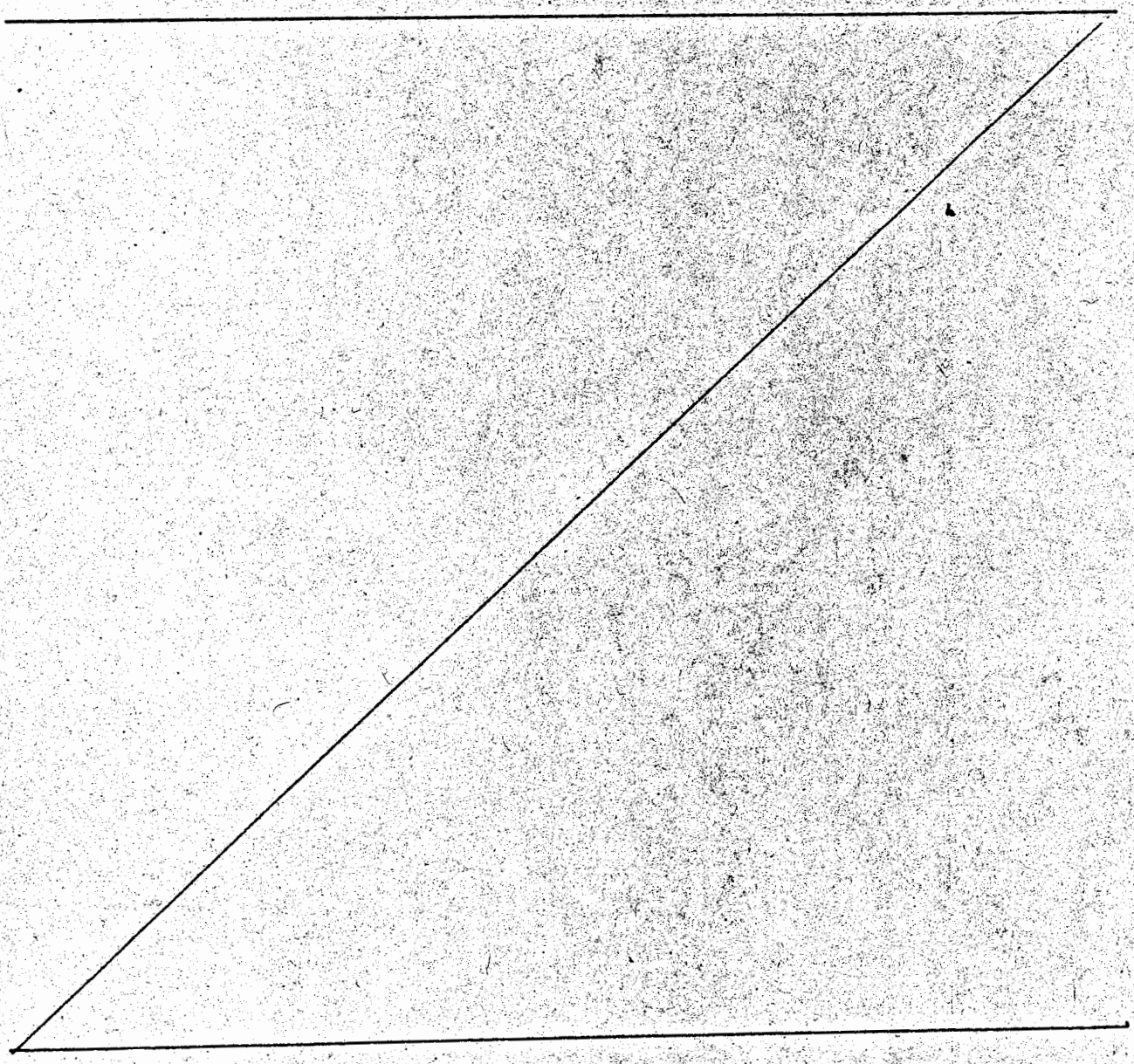
_____
Notary Public of Oregon.

My commission expires
____ day of _____, 19___.

E.(2)(c) In any case proof may be made by written admission of the defendant.

E.(2)(d) The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and his official seal, if he has one, shall be

summons and complaint was left and such facts as show reasonable diligence in attempting to effect personal service on defendant. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (iii) An affidavit or certificate containing proof of service may be made upon the summons or as a separate endorsement.



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Affidavit of Publication

State of Oregon,)
) ss.
County of _____.)

I, _____, being first duly sworn, depose and say that I am the owner, editor, publisher, manager, advertising manager, principal clerk of the _____, printer or his foreman of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____ in the aforesaid county and state; that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper for _____ successive and consecutive weeks in the following issues (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this _____ day of _____, 19___.

_____
Notary Public of Oregon.

My commission expires
____ day of _____, 19____.

E.(2)(c) In any case proof may be made by written admission of the defendant.

E.(2)(d) The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and his official seal, if he has one, shall be

affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of his official seal, if he has one, shall be prima facie evidence of his authority to make and certify such affidavit.

E.(3) Failure to return the summons or make or file proof of service shall not affect the validity of the service.

F. Manner of service. (1) Unless otherwise specified, the methods of service of summons provided in this section shall be used for service of summons either within or without this state.

F.(2) For personal service, the person serving the summons shall deliver a certified copy of the summons and a certified copy of the complaint to the person to be served. For service by mail under paragraph (d) of subsection (3) of this section or subsection (4) of this section or mailing of summons and complaint as otherwise required or allowed by this Rule, the plaintiff shall mail a certified copy of the summons and a certified copy of the complaint to the person to be served by certified or registered mail, return receipt requested, with instructions to deliver to the addressee only. Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

F.(3) Except when service by publication is available pursuant to section G. of this Rule for service pursuant to subsections (4) and (5) of this section, service of summons shall be as follows:

F.(3)(a) Except as provided in paragraphs (b) and (c) of this subsection, upon a natural person:

F.(3)(a)(i) By personally serving the defendant; or,

F.(3)(a)(ii) If with reasonable diligence the defendant cannot be served under subparagraph (i) of this paragraph, then by personal service upon any person over 14 years of age residing in the dwelling house or usual place of abode of defendant, or if defendant maintains a regular place of business or office, by leaving a copy of the summons and complaint at such place of business or office, with the person who is apparently in charge.

Where service under this subparagraph is made on one other than the defendant, the plaintiff shall cause to be mailed a copy of the summons and complaint to the defendant at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made; or,

F.(3)(a)(iii) In any case, by serving the summons in a manner specified in this Rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant.

F.(3)(b) Upon a minor under the age of 14 years, by service in the manner specified in paragraph (a) of this subsection upon such minor, and also upon his father, mother, conservator of his estate or guardian, or if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule V.(1)(b).

F.(3)(c) Upon an incapacitated person, by service in the manner specified in paragraph (a) of this subsection upon such person and also upon the conservator of such person's estate or guardian, or if there be none, upon a guardian ad litem appointed pursuant to Rule V.(2)(b).

F.(3)(d) Upon a domestic or foreign corporation, limited partnership or other unincorporated association which is subject to suit under a common name:

F.(3)(d)(i) By personal service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership or association. In lieu of delivery of a copy of summons and complaint to the registered agent, officer, general partner or managing agent, such copies may be left at the office of such registered agent, officer, general partner or managing agent, with the person who is apparently in charge of the office.

F.(3)(d)(ii) If no registered agent, officer, director, general partner, or managing agent resides in this state or can be found in this state, then plaintiff

may serve such person by mail. Service by mail under this subparagraph shall be fully effective service and permit the entry of a default judgment if defendant fails to appear.

F.(3)(d)(iii) If by reasonable diligence, the defendant cannot be served pursuant to subparagraphs (i) and (ii) of this paragraph, then by personal service upon any person over the age of 14 years who resides at the dwelling house or usual place of abode of any person identified in subparagraph (i) of this paragraph, or by personal service on any clerk or agent of the corporation, limited partnership or association who may be found in the state. Where service is made by leaving a copy of the summons and complaint at the dwelling house or usual place of abode of persons identified in subparagraph (i) of this paragraph, the plaintiff shall immediately cause a copy of the summons and complaint to be mailed to the person to whom the summons is directed, at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made.

F.(3)(d)(iv) In any case, by serving the summons in a manner specified in this Rule or by any other rule or statute upon the defendant or an agent authorized by appointment or law to accept service of summons for the defendant.

F.(3)(e) Upon a partnership or unincorporated association not subject to suit under a common name, relating to partnership or association activities, by personal service individually upon each partner known to the plaintiff, in any manner prescribed in paragraphs (a), (b) or (c) of this subsection. If less than all of the partners are served, the plaintiff may proceed against those partners served and against the partnership and a judgment rendered under such circumstances is a binding adjudication against all partnership members as to partnership assets anywhere.

F.(3)(f) Upon the State, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant or clerk. Service upon the Adult and Family Services

Division shall be by personal service upon the administrator of the Family Services Division or by leaving a copy of the summons and complaint at the office of such administrator with the person apparently in charge.

F.(3)(g) Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service upon an officer, director, managing agent, clerk or secretary thereof. In lieu of delivery of the copy of the summons and complaint personally to such officer, director, managing agent, clerk or secretary, such copies may be left in the office of such officer, director, managing agent, clerk, or secretary with the person who is apparently in charge of the office. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

F.(4) In lieu of service provided above, service upon any defendant of the class referred to in paragraphs (a) and (d) of subsection (3) may be made by mail, but such service shall not permit entry of a judgment by default. If the defendant served fails to appear, supplemental service shall be made as provided in paragraphs (a) and (d) of subsection (3) of this Rule.

F.(5) When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

G. Publication. (1) On motion upon a showing by affidavit that service cannot with due diligence be made by another method described in subsection (3) of section F. of this Rule, the court may order service by publication.

G.(2) In addition to the contents of a summons as described in section C. of this Rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(2) shall state: "This paper must be given to the court within 45 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

G.(3) An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced, or if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication to be not less than once a week for four consecutive weeks.

G.(4) If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at his last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present and last known address of the defendant, mailing a copy of the summons and complaint is not required.

G.(5) If service cannot with due diligence be made by another method described in subsection (3) of section F. of this Rule because defendants are unknown heirs or persons as described in sections (9) and (10) of Rule I, the action shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien or interest in the real property in controversy, at the time of the commencement of the action and served by publication, shall be bound and concluded by the judgment in the action,

if the same is in the favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

G.(6) A defendant against whom publication is ordered or his representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, or the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

G.(7) Service shall be complete at the date of the last publication.

H. Disregard of error; actual notice. Failure to strictly comply with the provisions of this Rule relating to the form of summons, issuance of summons, the person who may serve summons, and the manner of service of summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons or proof of summons and shall disregard any error in service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

I. Telegraphic transmission. A summons and complaint may be transmitted by telegraph as provided in Rule 5 E.

COMMENT TO RULE 4

A. This section does not appear in the Oregon law or in the federal rules but was added to clarify the situation when summons is being used to join a party to respond to a counterclaim and an answer pursuant to ORS 13.180.

B. This is ORS 15.020. The Rule retains the practice of having summons issued by the plaintiff or plaintiff's attorney. Because the summons is issued by a party rather than a court, it is technically not process, and this Rule deals only with service of summons. Process is presentlycovered in ORS Chapter 16 and the references to it are incorporated in Rule 5 which follows. A subpoena is also not process and is covered by Rule 500. See 6 Or. 72 (1876). ORS 15.070 provides that if a defendant is not found, the plaintiff may issue another summons. This probably was necessary prior to 1977 when the summons had to be returned in 60 days, but at the present time the summons does not expire, and therefore no alias summons would be required.

C. This section is the same as ORS 15.040 (1) and (2) with some reorganization and language clarification. The language requiring an appearance and "answer" was changed to appear and "defend." The section continues the requirement of the notices presently specified in ORS 15.040(2) and ORS 15.220 (2) with reference to proof of service eliminated (see Rule 6). The reference to K.(4) is the joinder to respond to a counterclaim rule of ORS 13.080. Special notice is required because the proper response is a reply rather than an answer, as specified in the normal notice. ORS 15.220 deals only with the attorney's fee counterclaim under 18.180(2) but seems seems to require no special notice for 13.180 (1). The Rule covers both.

Under subsection (3) of the section, a summons may be signed by the plaintiff or resident attorney. ORS 15.040 allows only resident plaintffs to sign summons. This would literally force a non-resident plaintiff to retain an attorney and seems unfair and discriminatory. The requirement that the attorney be a resident was retained.

Subsection (4) includes all of the time requirements for response as follows:

(a) This is ORS 15.040 (3) with language changed to indicate that it does not cover personal service outside the state.

(b) This is ORS 15.110 (3). Four weeks was changed to 30 days. It makes more sense to describe all the time periods in the same unit. ORS 15.110 (3) provides 6 weeks for service outside the United States. This Rule simply provides 30 days for any service outside the state.

(c) This modifies the existing time to respond under ORS 15.140, which gives the defendant until the last date of publication (four weeks) to respond. The problem with this is that theoretically a defendant might not see the published notice until the last publication and have no time to respond. See 43 Or. 513 (1903). This Rule gives the defendant an additional 15 days from the last date of publication.

D. This section replaces ORS 15.060 (1) and (2). There seems to be no reason to specify the sheriff specifically as a person to serve. The sheriff would be a competent person over the age of 18. This also takes care of the question of who serves the sheriff when the sheriff is a party. There used to be a provision for service by the coroner under ORS 207.010, but this was repealed with the coroner's statute. Under this Rule, some other person would have to serve the summons because the sheriff would be a party. The return specified below is different when the summons is served by the sheiff ut other than that, ORS 206.030 makes serving a summons part of the duties of the sheriff, and no particular reference seems necessary in this Rule.

This Rule also differs from the statute in:

(a) Allowing an attorney for a party to serve the summons. Given the ethical restrictions on attorneys, it seems useless to eliminate them from serving a summons, especially when they are entitled to serve subpoenas.

(b) Covering out-of-state service and in-state service.

(c) Making clear who is a party when the defendant is a corporation.

The compensation provions in the last two sentences are identical to ORS 15.060 (3) with a slight wording change to clarify out-of-state service. The last sentence perhaps more properly belongs under the fees rule but was left in this Rule for the present.

E. (1) This contains the substance of ORS 15.060 (2). The last sentence of the existing statute was eliminated as it relates to the repealed 60-day return requirement.

(2) This contains the return and proof of service provisions of 15.160 which incorporates 15.110. The existing difference between the sheriff's certificate and affidavit of another person to prove service is retained. The content requirements of the existing statutes are slightly expanded. Since the manner of service provision makes substituted service available only when personal service cannot be effected, the proof of service is required to show due diligence when substituted service is used.

The return for a publication is similar to that of ORS 15.160 (2) except the number of people who can make the affidavit is increased slightly. The writtten admission possibility is preserved exactly as it exists in the existing statutes. The language relating to who may notarize the affidavit comes from ORS 15.110. ORS 45.120, which provides that an affidavit may be used to prove service, is unnecessary and should be eliminated.

Subsection (3) is probably the most imprtant change in this provision. Under the existing law, a defect in the return is jurisdictional. See State ex rel School District #56 vs. Kleckner, 116 Or. 371 (1925). There seems to be no reasonable basis for invalidating a perfectly good service because a mistake is made in the return. The language is taken from the Wisconsin statutes.

F. and G. These sections should be considered together and are the most important in this Rule. Generally, they were drafted with several general objectives in mind:

(a) That the method of service specified be as simple and inexpensive as possible while guaranteeing maximum actual notice to a defendant consistent with maximum flexibility to a plaintiff to effectuate service.

(b) To avoid any distinction between in-state and out-of-state service. This Rule does not cover those circumstances which make a defendant amenable to the court's authority. The amenability rule will provide that a defendant who is served within the state or where substituted service may be effectuated within the state is amenable to the court's authority, and in this sense it makes a difference whether service is in-state or out-of-state. Other than that, with a few exceptions specifically covered in the Rule (for example, corporations), there seems no particular reason to specify different methods for in-state or out-of-state service. The key question is the same in both cases, whether the service is being effectuated in a way that will maximize notice. It should be noted that one of the most important aspects of this is that it makes substituted service available out-of-state as well as in-state where a defendant cannot otherwise be found.

(c) To eliminate service of process on any state official such as the Corporation Commissioner, Insurance Commissioner or the Secretary of State. Such services on state officials are wasteful, burdensome on the state officials involved, and conceptually not required under our present ideas of jurisdiction. Formerly, it was thought conceptually necessary that some service be effectuated within the boundaries of the state. Under the International Shoe case and the present long arm statutes, no such in-state service is required. The Rule totally eliminates any service on state officials. Thus, the entire nonresident motor vehicle statute and all of the foreign and domestic corporation service rules are eliminated.

(2) This specifies the mode of effectuating service and is that of the existing statute, ORS 15.080. The mailing provisions would relate to service of process by mail for a corporation where no one may be found in the state, mailings required supplementary to substituted service, and the alternative of service of process by mail which would not allow a default judgment. The language describing service by mail comes from the Michigan rules.

(3) This subsection brings together all methods of service of process presently specified in the Oregon statutes.

(a) The order of preference for service of process of individuals would be, first, personal service, whenever that can be accomplished, either within or without the state, and then substituted service if personal service is impossible. The provision relating to substituted service was changed from "usual place of abode" to "dwelling house or usual place of abode." This added language comes from the federal rules and would liberalize the use of substituted service. Usual place of abode has been restrictively interpreted in Oregon. See Thoenes v. Tatro, _____ Or. _____ (1974). In any case, if there is a legally appointed or specially appointed agent for an individual for receiving service of process, this would be an alternative.

(b) and (c) These two sections incorporate the existing provisions for service of minors and incapacitated persons from ORS 15.080 (4) and (5). In both cases the possibility of having the plaintiff seek appointment of a guardian ad litem under Rule V. was added to this Rule.

(d) This was one of the most difficult rules to draft. The present law for in-state service of process of ORS 15.080 (1) is basically retained but now applies to both service within or without the state. Personal service is the preferred method of service but if a domestic or foreign corporation does not have a registered agent or any other officer, etc., within the state, then the plaintiff is given a second alternative of service of process by mail. This special service of process by mail was added because under the existing law, in most cases, the statutes specify service upon some state official and the net result is that process is mailed to the defendant anyway. Eliminating the intermediate step of service on the state official, we retain the same type of notice by specifying service of process by mail. The service of process by mail could be eliminated and the same scheme followed as for individuals, but this would perhaps change the existing patterns of service and put burden on plaintiffs to make out-of-state service on domestic and foreign corporations without in-state agents. The third level of preference in service as specified in the Rule is either serving a registered agent, officer, etc., by substituted service, within or without the state, or by serving any agent that can be found within the state. This again differs slightly from the existing system; at the present time, substituted service can only be used against an agent within the state, but it can be used against any agent, not just a registered agent or an officer, provided service is made within the county. (The existing statute under ORS 15.180 (1) is very confusing because it seems to limit some types of service to within the county which is inconsistent with the rest of the statute). This subsection of the Rule also provides that process may be left at the office of a registered agent or officer, etc. Again, the alternative of service upon an appointive agent is preserved.

Note that the Rule applies to limited partnerships and any other business entity that may be sued under a common name. Existing ORS 15.180 (2) refers to limited partnerships and is virtually identical to 15.180 (1) relating to corporations. There seems to be no provision for any other business entity suitable under a common name in Chapter 15. ORS 62.155 requires cooperatives to appoint a registered agent.

(e) At the present time, there is no statute specifically covering service of process on partnerships. A partnership is not suable as an entity, and each person must be served individually. Under ORS 15.100, however, persons jointly liable on a contract can be served individually with only some joint obligors served and any judgment is effective against the joint assets for non-served parties. In other words, the partnership assets are subject to judgment if a claim is contractual, which is a joint obligation, but not for any other claim against the partnership, which is joint and several. See ORS 68.250 - 270. This Rule expands the existing situation. It does not make the partnership suable as an entity, but it

does make the partnership subject to a bind judgment as to partnership assets where only part of the partners are served, whether or not the claim is contractual in nature, providing the claim is related to partnership activities.

The language of ORS 15.100, relating to persons jointly liable, has not been retained in this Rule. That statute is part of the original Deady Code and was passed to reverse the common law rule that plaintiff had to proceed against all joint obligors or none. In that sense, ORS 15.100 (1)(a) and (b) are joinder rules; sort of a special indispensable party rule. That aspect would now be covered by Rule O, relating to indispensable parties, and the necessity of joinder or non-joinder, and proceeding against parties to a contract, would be determined under the factors specified in that rule, rather than any reference to joint or joint and several obligations.

ORS 15.100 (1)(a), however, goes beyond joinder and seems to make joint obligors agents for each other to receive process, at least to the extent of binding joint property. This was not included because it is of doubtful constitutionality. For a partnership or other unincorporated association, there is an agency relationship between the participants. Merely making a joint promise, however, does not imply any agency aspect.

ORS 15.100 (2) seems to state the obvious; if you sue two defendants and prove a case against one, you can recover against one. Apparently, there was a common law rule that if you sued parties jointly, you recovered jointly or not at all, but in light of existing joinder rules and judgment provisions, specific rejection of the common law rule seems unnecessary.

ORS 15.090 relating to serving one defendant in an equity suit is eliminated. The distinction has been abolished and the section was probably unconstitutional anyway.

(f) There is no present provision for service on the state in the Oregon statutes but with increasing waivers of sovereign immunity by the state, such a provision seems necessary. The last specific reference to the Adult and Family Services Division is ORS 15.085.

(g) This is ORS 15.080 (3). The only changes were adding "officer, director, and managing agent" to those persons who may be served and also incorporating the provisions of ORS 16.820 relating to service of summons and the District Attorney when the county is a party.

(4) Although the committee has previously indicated that it did not want to adopt service of process by mail, this Rule comes from the Judicial Conference Committee's recommended changes to Rule 4. It actually is not service in a binding sense but more in the nature of a request to appear voluntarily. Of course, without the default judgment any person anticipating trouble or facing statute of limitations problems would be advised not to use this provision. The one thing that perhaps should be clarified is whether service of process for this purpose is effective to relate back to the commencement of the action for purposes of satisfying the statute of limitations. I am not sure, however, it is within our rule-making power to do so.

(5) This does not appear in Oregon law but was adapted from Federal Rule 4 (i). It provides maximum flexibility for Oregon plaintiffs to conform to peculiarities of foreign law relating to service of summons.

G. This publication statute differs from the existing publication statutes of ORS 15.120 to 15.180 in the circumstances in which it can be used. The existing statutes make publication available under a complex set of conditions which are different for residents, nonresidents, domestic and foreign corporations which apply to different types of cases and to certain equity suits. Many of the situations specified in the Oregon statutes are of doubtful Constitutionality because under the Mullene case, publication may only be used when no better method of giving notice can be used. This Rule literally complies with the Mullene case by making this the ultimate resort when process can be effected by no more reasonable method. It also differs from the Oregon rule by making this available in any case, so there always is a last resort for service of process, which would allow the plaintiff to proceed when the defendant cannot be found or is unknown.

The procedures are not substantially changed from the existing Oregon statutes. A court order is required. The form of the summons published is generally the same. The time for response provided in the summons is changed to 45 days, and the summons must give the first publication date and a clear warning. The place of publication is changed from a newspaper to a newspaper of general circulation. Mailing of the summons and complaint continues to be required. In most cases, if you knew defendant's address, publication could not be used because either personal or substituted service would be more effective; but it is literally possible to have an address for the plaintiff which is not the plaintiff's dwelling house or usual place of abode, so publication still might be used and mailing required.

The specific provisions relating to unknown parties are ORS 15.170 and 15.180. The provision allowing the person to come in and defend after a year comes from ORS 15.150. ORS 18.160 does give a party a year to seek a vacation of any judgment by default. This section does not require vacation of judgment, but allows a defendant to defend.

H. This last section is completely new and does not appear either in the federal rules or any other statutory rule scheme which could be found. It is a response to Bob Lacy's suggestion for de-emphasizing the importance of process. Some of the language referring to amendment comes from Federal Rule 5 (b).

RULE 5

PROCESS - SERVICE OF PROCESS

A. Process. All process authorized to be issued by any court or officer thereof shall run in the name of the State of Oregon and be signed by the officer issuing the same, and if such process is issued by a clerk of court, he shall affix his seal of office to such process. Summons and subpoenas are not process and are covered by Rules 4 and 55.

B. Who may serve. Process may be served by the sheriff of the county where a person upon whom process is to be served or executed may be found, or the sheriff's deputy, unless the sheriff is a party to the action, or by any person specifically appointed by the court for that purpose.

C. County is a party. Process in an action where any county is a party shall be served on the county clerk, and an additional copy shall also be served upon the District Attorney of the county.

D. Service or execution. Any person may serve or execute any civil process on Sunday or any other legal holiday. No limitation or prohibition stated in ORS 1.060 shall apply to such service or execution of any civil process on a Sunday or other legal holiday.

E. Telegraphic transmission of writ, order or paper, for service; procedure. Any writ or order in any civil action, suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy, as defined in ORS 757.631, of such writ, order or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him if any return be requisite, in the same manner and with the same force and effect in all respects as the original might be if delivered to him. The officer or person serving

or executing the same shall have the same authority and be subject to the same liabilities as if the copy were the original. The original, if a writ or order, shall also be filed in the court from which it was issued, and a certified copy thereof shall be preserved in the telegraph office from which it was sent. In sending it, either the original or a certified copy may be used by the operator for that purpose.

F. Proof of service or execution. Proof of service or execution of process shall be made as provided in Rule 4 E.

COMMENT TO RULE 5

This Rule picks up bits and pieces of ORS Chap. 16 relating to service and process. There is no equivalent federal rule as summons is process in federal court and Rule 4 covers all process.

A. This is ORS 16.760. I eliminated the last sentence of the statute, as it does not make sense. I also eliminated ORS 16.765 as it seems unnecessary. The last sentence of the Rule was added to make the application of this particular process rule clear.

B. There is no equivalent provision. Chapter 16 talks about process without ever saying who may serve and how. The sheriff is the logical person to execute court orders and writs, and the Rule retains the sheriff as the person to serve process. The Rule, however, also makes it possible for the court to specially appoint someone to serve process. Since this is possible, the specific elisor provisions of ORS 16.880 are not necessary and have been eliminated. I did not attempt to define how process may be served, as it is unclear exactly what falls within the term, and different forms of process may require different manners of service. This is best left to other statutes or local court rules.

C. This is the second half of ORS 16.820 rleating to serving the District Attorney when process is served on the county. Serving the D.A. when summons is served on the county is covered under Rule 4 above.

D. This is the Bar service of process on Sunday bill which was formerly adopted by the Council. It replaces ORS 16.830.

E. This is ORS 16.840.

RULE 6

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

A. Service; when required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer or judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

B. Same; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

C. Same; numerous defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or

matter constituting an affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

D. Filing; no proof of service required. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Such filing by a party's attorney shall constitute a representation by him that a copy of the paper has been or will be served upon each of the other parties as required by section A. of this Rule. No further proof of service is required unless an adverse party raises a question of notice. In such instance the affidavit of the person making service shall be prima facie evidence.

E. Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court or court administrator, except that the judge may permit the papers to be filed with him, in which event he will note thereon the filing date and forthwith transmit them to the office of the clerk or court administrator. The clerk or court administrator shall endorse upon such pleading or paper the day of the month and the year. The clerk or court administrator is not required to receive for filing any paper unless the name of the court, the title of the cause and the paper, and the names of the parties, and the attorney, if there be one, is intelligibly endorsed on the front of the document, nor unless the contents thereof can be read by a person of ordinary skill.

F. Effect of failure to file. If any party to an action fails to file within five (5) days after the service any of the papers required by this Rule to be filed, the court, on motion of any party or of its own initiative, may

order the papers to be filed forthwith, and if the order be not obeyed, the court may order them to be regarded as stricken and their service to be of no effect.

COMMENT TO RULE 6

This would replace ORS 16.770 to 16.870. It is basically Federal Rule 5, but the exact language comes from the Rhode Island rules of procedure. The practice described is generally that presently followed in Oregon practice, but the federal rule language is much clearer. The two significant differences are that ORS 16.780 requires proof of service of subsequent papers, which is not required by this Rule, and Oregon apparently prohibits a party from personally mailing subsequent papers, which is not included in this Rule. Requiring proof of service of subsequent papers is not necessary unless there is any question of such service, and for attorneys, there would be an ethical obligation to comply with the Rule. Prohibiting a party from himself mailing papers seems ridiculous. The last two sentences of section D. are not in the federal rule and come from the Rhode Island rule. ORS 16.770 and 16.850 and 16.870 have no exact equivalent in the federal rule but none seems required. The last two sentences of section E. do not appear in the federal rule, nor in the Rhode Island rule, but are adapted from ORS 16.860.

The federal rule has a second paragraph in section A. as follows:

> "In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure."

This was not included in the Rhode Island Rule nor in this Rule. I could find no action or proceeding in Oregon where no person need be or is named as a defendant. The procedure referred to apparently is the in rem forfeiture of provisions provided by the federal statute.

The Federal Judicial Conference Committee has recommended that section D. be changed to eliminate filing of discovery papers. The suggested rule change and Advisory Committee note are as follows:

> "(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter~~.~~, but, unless filing is ordered by the court on motion of a party or upon its own motion, depositions upon oral examination and interrogatories and requests for admission and the answers thereto need not be filed unless and until they are used in the proceedings."
>
> ADVISORY COMMITTEE NOTE
>
> Subdivision (d). The rules now require the immediate filing of discovery materials. The cost of providing additional copies of such materials for the purpose of filing can be considerable, and the volume of discovery materials now

being filed presents serious problems of storage in the clerk's office in some districts. This amendment and amendments to the discovery rules permit the materials described to be retained by the parties unless and until they are used for some purpose in the action. But any party may request that designated materials be filed, and the court may require filing on its own motion. It is intended that the court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provisions of Rule 26(c).

This comittee should perhaps consult with the discovery committee on this subject.

RULE 7

TIME

A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 18.020.

B. Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure act was the result of excusable neglect, but it may not extend the time for taking any action to file, object or hear and determine findings of fact or to vacate, set aside, amend or otherwise change a judgment which has been entered, beyond the time specified for taking such action in the applicable rule or statute or the time within which a court has inherent power to take such action.

C. Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continue existence or expiration of a term of court. The continued

existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

D. For motions; affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

E. Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

COMMENT TO RULE 7

This is Federal Rule 6 with several changes.

A. The basic time computation of ORS 174.120, that is, excluding the first day and including the last day, is preserved by this Rule. ORS 174.120 would be unnecessary and eliminated. That statute, however, refers only to excluding the last day if it is a legal holiday or a Saturday, whereas the federal rules says Saturday, Sunday or legal holidays. Under ORS 187.010 (a), Sunday is a legal holiday in Oregon, but a reference was included for clarity. The federal rule also excludes intermediate Saturdays, Sundays and legal holidays when the time period involved is less than 7 days. This would change the rule in Oregon, which has no such provision.

B. This is identical to Federal Rule 6 (b), except for the last sentence. The last clause of Federal Rule 6 (b) reads as follows:

> "...but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them."

The rules referred to are new trial, judgment NOV, amendment of findings of fact and vacation of judgments. The reason for this limitation was explained by the Advisory Committee adding this limitation to the federal rule as follows:

> "The amendment of Rule 6 (b) now proposed is based on the view that there should be a definite point where it can be said a judgment is final; that the right method of dealing with the problem is to list in Rule 6(b) the various other rules whose time limits may not be set aside, and then, if the time limit in any of those other rules is too short, to amend that other rule to give a longer time. The further argument is that Rule 6(c) abolished the long standing device to produce finality in judgments through expiration of the term, and since that limitation on the jurisdiction of courts to set aside their own judgments has been removed by Rule 6(c), some other limitation must be substituted or judgments never can be said to be final."

This reasoning applies to this Rule because, as explained below, we re-insert Rule 6 (c) because Oregon retains terms of court. The common law limitation of tying judgment finality to the expiration of the court term applies in Oregon. See Deering v. Quivy, 26 Or. 566 (1895). Using the federal language, however, is inappropriate, first, because the rule reference is incorrect, and secondly, because it eliminates the inherent power of a court to vacate a judgment during the term of court. This inherent power is well entrenched in Oregon and has been repeatedly emphased in Supreme Court cases. See Smith v. One Super Wild Cat Console, 6 Or. App. 482 (1971). For example, under the federal rule, a court can vacate a judgment and grant a new trial or NOV only where a motion is made within 10 days of the date of the judgment. Oregon has a 10-day limitation for making these motions, but the court has inherent power to grant a new trial or a NOV on its own motion even though the 10 days has expired and the parties cannot make the motion,

as long as this is done within the term of court. The language used retains this by referring to both the limitations in the statutes themselves and the time limitation for the court's inherent power. The reference to the statutory limitation, however, would allow such action to be taken after the court term expired, provided a motion was made by the parties within the time limitation provided in the specific statute, i.e., 10 days under ORS 17.615 and 1 year under ORS 18.160, relating to vacating a judgment for mistake, etc.

C. This was formerly section (c) of Federal Rule 6 which was eliminated in 1968 because federal courts no longer have terms. Oregon courts do have terms as specified in ORS Chap. 4, so the provision was included in the Oregon rule.

D. This is identical to Federal Rule 6 (d), except a reference to Rule 59 was eliminated.

E. This identical to Federal Rule 6 (e). Considering the state of the mails, 5 days might be more reasonable.

The following would either be enacted by the Legislature as a statute or promulgated by the Council as rules. ORS 14.010 to 14.035 would be repealed.

RULE 4 A.

PERSONAL JURISDICTION

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4 (Oregon Rule of Civil Procedure 4) under any of the following circumstances:

A. Local presence or status. In any action whether arising within or without this state, against a defendant who when the action is commenced:

(1) Is a natural person present within this state when served; or

(2) Is a natural person domiciled within this state; or

(3) Is a corporation created by or under the laws of this state; or

(4) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

(5) Has specifically consented to the exercise of personal jurisdiction over such defendant, whether by appointment of agent for service of process in this state or otherwise.

B. Special jurisdiction statutes. In any action which may be brought under statutes of this state that specifically confer grounds for personal jurisdiction over the defendant.

C. Local act or omission. In any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.

D. Local injury; foreign act. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

(1) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

(2) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

E. Local services, goods or contracts. In any action which:

(1) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff or to guarantee payment for such services; or

(2) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant or payment for such services was guaranteed by the defendant; or

(3) Arises out of a promise made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value or to guarantee payment for such goods, documents or things; or

(4) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on the defendant's order or direction or shipped to a third person when payment for such goods, documents or things was guaranteed by defendant; or

(5) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

F. Local property. In any action which arises out of the ownership, use or possession of real property situated in this state or the ownership, use

or possession of other tangible property, assets or things of value which were within this state at the time of such ownership, use or possession; including, but not limited to, actions to recover a deficiency judgment upon any mortgage or trust deed note or conditional sale contract or other security agreement relating to such property, executed by the defendant or predecessor to whose obligation the defendant has succeeded.

G. Director or officer of a domestic corporation. In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer.

H. Taxes or assessments. In any action for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority of this state.

I. Insurance or insurers. In any action which arises out of a promise made anywhere to the plaintiff or some third party by the defendant to insure any person, property or risk and in addition either:

(1) The person, property or risk was located in this state at the time of the promise; or

(2) The person, property or risk insured was located within this state when the event out of which the cause of action is claimed to arise occurred; or

(3) The event out of which the cause of action is claimed to arise occurred within this state, regardless of where the person, property or risk insured was located.

J. Certain marital and domestic relations actions.

(1) In any action to determine a question of status instituted under ORS Chapter 106 or 107 when the plaintiff is a resident of or domiciled in this state; or

(2) In any action to enforce personal obligations arising under ORS Chapter 106 or 107, if the parties to a marriage have concurrently maintained the same or separate residences or domiciles within this state for a period of six months, notwithstanding departure from this state and acquisition of a residence or domicile in another state or country before filing of such action; but if an action to enforce personal obligations arising under ORS Chapter 106 or 107 is not commenced within one year following the date which the party who left the state acquired a residence or domicile in another state or country, no jurisdiction is conferred by this section (subsection) in any such action.

(3) In a filiation proceeding under ORS Chapter 109, when the act or acts of sexual intercourse which resulted in the birth of the child are alleged to have taken place in this state and the child resides in this state.

K. Personal representative. In any action against a personal representative to enforce a claim against the deceased person represented where one or more of the grounds stated in sections (subsections) B. to J. would have furnished a basis for jurisdiction over the deceased had he been living and it is immaterial under this subsection whether the action had been commenced during the lifetime of the deceased.

L. Joinder of claims in the same action. In any action brought in reliance upon jurisdictional grounds stated in sections (subsections) C. to J., there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under this section for personal jurisdiction over the defendant as to the claim or cause to be joined.

RULE 4 B.

JURISDICTION IN REM

A court of this state having jurisdiction of the subject matter may exercise jurisdiction in rem on the grounds stated in this section. A judgment in rem may affect the interests of a defendant in the status, property or thing acted upon only if a summons has been served upon the defendant pursuant to Rule 4 (Oregon Rule of Civil Procedure 4). Jurisdiction in rem may be invoked in any of the following cases:

A. When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This subsection shall apply when any such defendant is unknown.

B. When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real estate within this state.

C. When the action is to declare property within this state a public nuisance.

RULE 4 C.

PERSONAL JURISDICTION, WITHOUT SERVICE OF SUMMONS

A court of this state having jurisdiction of the subject matter may, without a summons having been served upon a person, exercise jurisdiction in an action over a person with respect to any counterclaim asserted against that person in an action which the person has commenced in this state and also over any person who appears in the action and waives the defense of lack of jurisdiction over his or her person as provided in Rule J. 7 (Oregon Rule of Civil Procedure J. 7). Where jurisdiction is exercised under Rule 4 B., a defendant may appear in an action and defend on the merits, without being subject to personal jurisdiction by virtue of this Rule (section).

RULE 4 D.

STAY OF PROCEEDING TO PERMIT TRIAL IN A FOREIGN FORUM

A. Stay on initiative of parties. If a court of this state, on motion of any party, finds that trial of an action pending before it should as a matter of substantial justice be tried in a forum outside this state, the court may in conformity with section (subsection) C. enter an order to stay further proceedings on the action in this state. A moving party under this subsection must stipulate consent to suit in the alternative forum and waive right to rely on statutes of limitation which may have run in the alternative forum after commencement of the action in this state. A stay order may be granted although the action could not have been commenced in the alternative forum without consent of the moving party.

B. Time for filing and hearing motion. The motion to stay the proceedings shall be filed prior to or with the answer unless the motion is to stay proceedings on a cause raised by counterclaim, in which instance the motion shall be filed prior to or with the reply. The issues raised by this motion shall be tried to the court in advance of any issue going to the merits of the action and shall be joined with objections, if any, raised by answer or motion pursuant to Rule J. 1 (Oregon Rule of Civil Procedure J. 1). The court shall find separately on each issue so tried and these findings shall be set forth in a single order which is appealable.

C. Scope of trial court discretion on motion to stay proceedings. The decision on any timely motion to stay proceedings pursuant to section (subsection) A. is within the discretion of the court in which the action is pending. In the exercise of that discretion the court may appropriately consider such factors as:

(1) Amenability to personal jurisdiction in this state and in any alternative forum of the parties to the action;

(2) Convenience to the parties and witnesses of trial in this state and in any alternative forum;

(3) Differences in conflict of law rules applicable in this state and in any alternative forum; or

(4) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

D. Subsequent modification of order to stay proceedings. Jurisdiction of the court continues over the parties to a proeeding in which a stay has been ordered under this section until a period of 5 years has elapsed since the last order affecting the stay was entered in the court. At any time during which jurisdiction of the court continues over the parties to the proceedings, the court may, on motion and notice to the parties, subsequently modify the stay order and take any further action in the proceeding as the interests of justice require. When jurisdiction of the court over the parties and the proceeding terminates by reason of the lapse of 5 years following the last court order in the action, the clerk of the court in which the stay was granted shall without notice enter an order dismissing the action.

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COMMENTS TO RULES 4 A. THROUGH 4 D.

The present Oregon definition of amenability to jurisdiction is primarily found in ORS 14.010 to 14.035, but some bases of amenability are scattered throughout the summons provisions of Chapter 15.

The suggested rules are drawn primarily from the Wisconsin statutes. The Wisconsin statutes are among the clearest and most carefully drafted in the country. They draw together all provisions relating to amenability to personal jurisdiction. I would call them an example of third generation long arm statutes. The original long arm statute came from Illinois and was in form close to the existing ORS 14.035. It added jurisdictional bases to existing jurisdictional process statutes. The second generation long arms are presently in force in most of the states. They generally follow the pattern of being an addition to existing jurisdiction statutes, but amplify the grounds for exercising jurisdiction, i.e., covering contracts and tortious activity outside the state which causes injury in the state. See Uniform Laws Annotated, Interstate Procedure Act, § 103, N.Y. CPLR, § 302, Ala. Rule 4 - 2.

One type of third generation long arm statute is the California approach which merely says that the courts have jurisdiction to the extent Constitutionally permissible. The trouble with this approach is that it incorporates the vague Constitutional standard and provides no guidance to the plaintiff.

The Wisconsin statute goes in the opposite direction by specifically describing a number of situations that would fit within a Constitutional standard. The greatest virtue of the Wisconsin statute, in addition to the breadth of activities covered, is that it generally describes activities in fairly specific language, rather than focusing on legal conclusions, such as, committing a tort, contracting, or transacting business. The Oregon court has had substantial difficulty with the Oregon long arm statute because frequently the same conduct is alleged to be tortious and a breach of contract, and different tests have been developed for different sections of the existing long arm statute. In addition, most non-tortious conduct somehow must be fit into the abstraction of "transacting business." Also, the Wisconsin approach integrates all bases for jurisdiction into one rule, which is developed separately from provisions relating to manner of service of summons. Therefore, in general, the Wisconsin statute best conforms to the committee's decision to expand long arm jurisdiction as far as possible, while maintaining a fair amount of predictability and guidance for attorneys.

Rule 4 A.

This is the crucial section of the proposed statute or rules. It brings together in one section all circumstances that will subject a corporate or individual defendant to personal jurisdiction. To some extent, the long arm aspects of the rule overlap, but the intent is to cover all possible Constitutional contacts. The bases described incorporate all aspects of the existing Oregon long arm statute and would cover all the cases that have arisen under that statute.

Rule 4 A.A.

These are the traditional territorial bases of jurisdiction. Subsection (1)

is presently covered by ORS 14.010 if a defendant is "found" in the state. Subsection (2) is presently covered by ORS 14.010 under the concept of residence. Residence in this statute has been defined as domicile. See Fox v. Lafley, 212 Or. 80 (1957). This jurisdiction is usually effectuated by substituted service, but domicile and "dwelling house and usual place of abode" do not mean the same thing. A person has only one domicile, and the mental element of intent to remain permanent is required. Thus, substituted service can be used if a person is domiciled in the state or if there is some other basis for jurisdiction, but maintaining a dwelling house or usual place of abode is not in and of itself a basis for jurisdiction, it is merely a manner of serving process.

Subsection (3) uses the language of ORS 14.020 rather than "domestic corporation", which is used in the Wisconsin statute.

Subsection (4) is intended to describe the situation now covered in a number of general statutes under the phrase, "transacting business." E.g., ORS 73.434, Foreign and Alien Insurers, 74.310, Foreign Industrial Loan Companies, and 62.155, Foreign Corporations. This does not refer to causes of action arising out of the transaction of business in this state, but transacting business in the state to the extent that one is subject to suit for any claim that may be brought against a defendant, irrespective of any connection between the claim and the state. See Perkins v. Benguet Consolidated Mining Corp., 342 U.S. 437 (1952). See Winslow Lumber Company v. Hines, 125 Or. 63 (1928). Out-of-state business entities will still be required to appoint a registered agent in this state by the various separate statutes if they are transacting business, but if they do not appoint an agent, then the question of whether they are liable to service of summons is governed under this subsection. The language used is the generally accepted definition of transacting business.

Subsection (5) does not appear in the Wisconsin statutes but covers the consent by appointment of agent which is presently in ORS 14.020 and 15.080 (6). This would also cover any other manifestation of consent, such as a contractual agreement, to be subject to jurisdiction. See National Equipment Rental, Ltd. vs. Szukhert, 375 U.S. 311 (1964).

This section covers the possibility that separate statutory bases of jurisdiction will continue to exist or be enacted by the Legislature. There is also nothing specific in this Rule dealing with child custody cases. This is such a specialized area that it is better left to statutory or case law development. Amenability and forms of process are covered in the Uniform Child Custody Jurisdiction Act, ORS 109.700, et seq.

Section C. is the first of the minimum contact sections of the statute. This and the remaining bases for jurisiction specified are limited to cases "arising out of" the contact specified. This basically covers any tortious activity in the state but is much broader in the sense that it would cover any action in the state giving rise to liability, whether it be warranty, contract, etc. It would incorporate that aspect of transacting busines which has been applied in the warranty cases and all of 14.035 (b) relating to tortious activity. Generally note that except for Rule J. (1) and (3), there is no requirement that plaintiff be a resident. This is consistent with Meyers vs. Bickwedel, 259 Or. 457 (1971).

Section D. solves the problem of tortious or other activity outside the state causing injury within the state. The Oregon court has interpreted the

commission of a tort language to include this situation and the Rule would be consistent with State ex rel Western Seed Production Corporation v. Campbell, 250 Or. 262 (1968); State ex rel Advance Dictating v. Dale, 269 Or. 242 (1974); BRS, Inc. v. Dickerson, 278 Or. 269 (1977) and State ex rel Academy Press v. Beckett, _____ Or. _____ (June 27, 1977).

It is possible that merely causing injury in the state might be in and of itself sufficient contact, but the Oregon court and most state courts have not gone this far. Hanson v. Denkala, 357 U.S. 235 (1958). Some element of foreseeability or intentional involvement with a state is necessary and arguably, merely manufacturing a product that somehow finds its way into Oregon would not have the necessary foreseeability element. The most recent Supreme Court case on jurisdiction, Kukolo v. Superior Court of California, 46 Law Week 4421 (1971) confirms this by holding that a husband who merely consented to having a child go to California did not intentionally become involved with California to the extent of being subject to personal jurisdiction for a support award. Therefore, subsections (1) and (2) are necessary.

Section E. generally covers the situation described in other states as "entry into a contract to be performed in this state" or "contracting to supply goods and services in the state." This addition is quite important because most of the long arm cases that have come before the Oregon Supreme Court have involved attempts to cram contract situations into a phrase, "transacting business." The language here again avoids any specific reference to the ultimate question of whether there was a contract but focuses only on the acts involved. The section focuses separately on promising to act within the state or somehow related to the state and acting within the state or somehow related to the state, and differentiates between services and goods. Subsection (1) would cover the recent case of State ex rel Academy Press v. Beckett, supra, where the plaintiff contracted with an Illinois book publisher to publish a book. Subsection (4) would cover State ex rel White Lumber Sales, Inc. v. Sulmonetti, _____ Or. _____ (1968). Subsection (5) would cover Neptune Microfloc vs. First National Utility, 261 Or. 494 (1972).

The references to guarantees in subsections (1) to (4) do not appear in the Wisconsin statute. Two Oregon cases have dealt with guarantee agreements involving officers of business entities purchasing or selling goods in Oregon. BRS v. Dickerson, supra, and State ex rel Ware v. Hieber, 267 Or. 124 (1973).

Section F. is one of the most troublesome in the statute. The Oregon statute reads as follows:

> **(6) Local property.** In any action which arises out of:
>
> (a) A promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this state; or
>
> (b) A claim to recover any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this state either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

(c) A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this state at the time the defendant acquired possession or control over it.

(7) Deficiency judgment on local foreclosure or resale. In any action to recover a deficiency judgment upon a mortgage note or conditional sales contract or other security agreement executed by the defendant or predecessor to whose obligation the defendant has succeeded and the deficiency is claimed either:

(a) In an action in this state to foreclose upon real property situated in this state; or

(b) Following sale of real property in this state by the plaintiff under ch. 846; or

(c) Following resale of tangible property in this state by the plaintiff under ch. 409.)

The Wisconsin language was not used for several reasons. First, although the comments to the Wisconsin statutes suggest that this was intended to cover all actions relating to use or possession of property, such as personal injury claims relating to use of property, on its face the Wisconsin statute does not do this and seems to be more limited than the general provisions of 14.035 (c). Secondly, the Wisconsin statute may run into some Constitutional problems after Shaffer v. Heitner, 97 S. Ct. 2569 (1977). The Shaffer case basically holds that simple presence of property in the state is not in and of itself a sufficient minimum contact when the subject of the action is not the status of the property. The actions covered under this section do not relate to title to the property, and under sections 6 (b) and 7 (c) of the Wisconsin statute, the only requirement is that property be in the state at the time of an action. To the extent this would apply to personal property, such property could be in the state without any foreseeability or knowing involvement by the defendant. For real property, presence would always be sufficient because any defendant involved with Oregon real property intentionally is developing a contact with the state.

The language actually used in this section maintains the general coverage of existing ORS 14.035 and extends coverage to personal property, provided the personal property was in the state at the time of ownership, use or possession giving rise to the action.

A specific reference to deficiency claims is also included to avoid any question whether these are claims arising out of use or ownership of property.

G. This is not specifically presently covered under the existing Oregon statute. It describes the situation in Shaffer vs. Heitner, where the court held that seizing stock of the officers in a quasi in rem approach did not provide jurisdiction. It seems clear, however, that knowing involvement with an Oregon corporation is sufficient contact with Oregon to provide a basis for jurisdiction in and of itself if done directly through a long arm statute, and Delaware amended its statutes immediately after the Shaffer decision to this effect.

H. This is the classical International Shoe situation but not presently specifically covered by 14.035. The Wisconsin statute limits this to taxes after July 1, 1960, but I could find no explanation of the limitation.

I. This is an expansion of ORS 14.035 (d). It is broader than the existing statute, incorporating not only a situation where the person or party is located in the state at the time of contract but also incorporating at the time of the happening of the event insured against or when the event insured against happens in the state. The Wisconsin statute refers to insuring a "person" who is a "resident" in the state. The existing statutory language referring to "person, property or risk" located in the state seems broader and was used.

J. The Wisconsin statute provides for marital status determination when either party is a resident and also personal judgments when a defendant resided six consecutive months of the last six years in the state. The language actually incorporated was from ORS 14.035 (2), which is somewhat more limited. Arguably, a broader reach for the statute would be Constitutional, but the area is somewhat specialized, and the existing policy determination in the statute was retained. See Doyle v. Doyle, 17 Or. App. 529 (1974). Section (1) does not appear explicitly in the Oregon statute but is an accepted basis for jurisdiction.

Subsection C. covers the problem presented by State ex rel Poole v. Dorrah, 271 Or. 410 (1975) and State ex rel McKenna v. Bennett, 28 Or. App. 155 (1977). In the McKenna case, the Court of Appeals held that sexual intercourse within this state is not a tort within the meaning of 14.035, and jurisdiction could not be asserted of a defendant in a filiation proceeding by using the long arm statutes. The case suggests there is no Constitutional barrier to such jurisdiction and seven other states have so held. Notice that outside the filiation proceeding, this statute does not give jurisdiction over general support claims or any other claims under Chapter 109. By passing the Uniform Reciprocal Support Act, ORS Chapter 110, the Legislature opted for this approach. Also notice that there is no specific provision for jurisdiction to determine status for anything other than the marital status. Arguably, the same status basis could be used to establish a parent-child status, but there is a basic difference between creating and severing status, and the creation of status would automatically carry inheritance and other financial obligations and is, in effect, a type of personal jurisdiction.

Section K. This section makes clear that when a personal representative is to be sued, it is the contacts of the decedent they are considering, not the contacts of the personal representative.

Section L. This is the equivalent of ORS 14.035 (4).

There was another possible section which I considered adding between existing grounds J. and K. It is not in the Wisconsin statute but comes from Rule 42 of the Alabama rules. It reads as follows:

> "Otherwise having some minimum contacts with this state and, under the circumstances, it is fair and reasonable to require the person to come to this state to defend an action. The minimum contacts referred to in this subdivision (I) shall be deemed sufficient, notwithstanding a failure to satisfy the requirement of subdivisions (A)-(H) of this subsection (2), so long as the prosecution of the action against a person in this state is not inconsistent with the Constitution of this state or the Constitution of the United States."

This would guarantee the broadest possible reach of the long arm statute. It is different than the California approach in that detailed grounds are specified in the statute. One argument for including this section is the repeated statements by the Supreme Court that it interprets the long arm statute as broadly as Constitutional due process will admit. See State ex rel Western Seed v. Campbell supra.

Rule 4 B.

This is Section 80.107 of the Wisconsin statutes. The existing Oregon statutes, ORS 14.010 and 14.020, say the court has jurisdiction when property is located within the state, but only to the extent property is seized. This provides the authority for in rem jurisdiction. The Wisconsin statute was modified to deal only with in rem and not quasi in rem because under Shaffer v. Heitner, merely seizing property is not a sufficient basis for jurisdiction without some other minimum contact. The Shaffer case, however, says that in most situations where a true in rem case is involved, i.e., involving title to the property which is located in the state, this is sufficient minimum contact. It should be noted that to a large extent, this section is now unnecessary because of Rule 4 A., referring to use and possession of property as a minimum contact, but this covers the possibility that title to personal property located in the state but not arising out of use or ownership in the state is involved in an action or somehow title to real property in the state does not fit within Rule 4 A. Oregon never had a true quasi in rem statute. The existing provisions of ORS 29.110, relating to ability to attach to secure judgment, are unchanged. It is possible that someone may wish to use attachment and argue this as at least one element of minimum contacts, but again, there is no specific quasi in rem jurisdiction provided.

Rule 4 C.

This is Section 80.107 of the Wisconsin statute. This covers personal jurisdiction by consent in the sense of utilizing the courts of this state. The existing statutes, ORS 14.010 and 14.020, refer to jurisdiction when a defendant "appears." Since Rule K. eliminates a general or special appearance and governs waiver of personal jurisdiction, the consent jurisdiction here is cross-referenced to that rule. The Wisconsin statute has a last sentence which is somewhat difficult to interpret, dealing with the question of limited appearance. The existing last sentence was drafted to provide a limited appearance in the sense that contesting on the merits in an in rem case, i.e., protecting interest in property that is the subject of the suit, does not generally subject the defendant to personal jurisdiction. This is the approach recommended by the re-statement of judgments. The Oregon rule is unclear. In Belknap v. Charlton, 25 Or. 41 (1873), the court said if a defendant appeared and contested the validity of attachment, this was not a submission to jurisdiction, but contesting the merits was. This was followed in Nelson v. Smith, 157 Or. 292 (1937), which was a quasi-in-rem case. Apparently, in neither case was any judgment given beyond the property attached, and the court was distinguishing between general and special appearance, not between general and limited jurisdiction.

Rule 4 D.

This is an important component of the total approach being recommended for jurisdiction and process. By greatly expanding the basis for personal jurisdiction, the danger that defendants would be subject to trial in a completely inconvenient forum is increased at the same time. Although convenience is an

element of the due process evaluation, in practice it is a minor factor, with primary emphasis upon the quantity and quality of contacts with the forum by the defendant. If such contacts exist, jurisdiction exists whether or not Oregon is a convenient place for trial. Fairness in the jurisdictional sense focuses on fairness to subject a defendant to jurisdiction, not fairness in the sense of the best place to try the case. Fairness in the latter sense can only be applied through a forum non conveniens doctrine or a venue transfer statute, such as USC 1404. The need for such a rule is explained in the following language of the concurring opinion of Justice Linde in State ex rel Academy Press v. Beckett, supra:

> "* * * But when 'fairness' is used to describe the conditions under which the forum state may constitutionally take jurisdiction of a claim against a defendant outside the state, those conditions will necessarily be stated as factors or patterns that make long-arm jurisdiction "fair" and therefore constitutional as a general rule for all similar cases, irrespective of the relative positions of the litigants in the particular case. There may be far less unfairness in asking a defendant in Vancouver, Washington, with full notice of the proceedings, to litigate a case in Multnomah County, Oregon, than to demand this of a defendant in Fort Lauderdale, Florida, as in White Lbr., but territorial notions of a prior 'entry into' or 'presence in' the jurisdiction may allow one and not the other."
>
> * * * * *
>
> "* * *As I have suggested above, however, fairness to particular litigants is often an ad hoc rather than a categorical determination, and one that cannot be properly decided as a matter of Oregon law so long as we treat it as one that must always be litigated as an issue of federal constitutional law. To permit such ad hoc determinations of fairness requires a nonconstitutional element in ORS 14.035 corresponding to the doctrine of forum non conveniens. See Scoles, Oregon Conflicts: Three Cases, 49 Or. L.Rev. 273, 278-280 (1970). It should be possible for an Oregon court to dismiss a case after allowing plaintiff time to obtain jurisdiction in a more appropriate forum (perhaps involving a stipulation by defendant as to service of process, waiver of the statute of limitations, or other safeguards for plaintiff), irrespective of whether the Oregon court believes that its own exercise of jurisdiction would be unconstitutional.
>
> In Illinois, the source of our long-arm statute and the doctrine of its expansive scope, see Western Seed, 250 Or. at 270-271, the state supreme court in fact approves such a dismissal of cases without a conclusion whether the Constitution would permit the state to assert jurisdiction. See, e.g., Adkins v. Chicago, R. I. & P. R.R., 54 Ill. 2d 511, 301 N.E. 2d. 729 (1973), cert. denied, 424 U.S. 943 (1976), cf. Cotton v. Louisville & N. R.R., 14 Ill. 2d 144, 152 N.E. 2d 385 (1958). Elsewhere the procedure has been codified. These solutions, and the underlying distinction between 'fairness' as the presence of constitutional prerequisites and fairness of the choice of forum in the actual

case, are described in Morley, Forum Non Conveniens: Restraining Long-Arm Jurisdiction, 68 N.W. U. L. Rev. 24 (1973). Once it is recognized that fairness is properly a matter of Oregon law before it becomes, in a different sense, a synonym for federal constitutional limits, a procedure to assure fairness can be provided by a statute or perhaps a rule of the Council on Judicial Procedure, or possibly by further consideration of the standards implicit in ORS 14.035."

Justice Linde suggests that Oregon courts do have forum non conveniens power but, if so, it is little recognized and a rule is necessary to encourage use. This rule is Wisconsin statute, section 80.163. It is not, strictly speaking, a forum non conveniens statute but more of a transfer statute accompanied by use of stays of action. The Wisconsin approach is preferable because it is designed to work with the other Wisconsin statutes used, and it provides a procedure to be followed and criterion for the trial judge in deciding when to grant a stay. Use of a stay rather than a dismissal also is desirable to avoid any harsh consequences. Other states allow this forum non conveniens rule to be made on the court's own motion; the Wisconsin statute is limited to motion of the parties; if both sides want to litigate in Oregon, it is not then truly an inconvenient forum.

REVISIONS TO PLEADING RULES

Page 1

B(2) Pleadings allowed. Amended this section so that there would be no optional reply.

Page 2

D(2) Pleading after motion. Deleted clause, "or postpones its disposition until trial on the merits."

Page 3

E(1) Captions, names of parties. Changed cross reference to Rule B(1) to Rule B(2).

Page 3a

E(4) Adoption by reference; exhibits. Deleted the words, "or in any motion," from first sentence and deleted second sentence in its entirety.

Page 4

F(1) Subscription by party or attorney, certificate. Deleted sentence, "When a corporation, including a public corporation, is a party, and if the attorney does not sign the pleading, the subscription may be made by an officer thereof upon whom service of summons might be made."

Page 5

G. COMPLAINT, COUNTERCLAIM, CROSS-CLAIM AND THIRD PARTY CLAIM. Deleted (3) which read, "a statement specifying whether the party asserts that the claim, or any part thereof, is triable of right by a jury."

Page 6

H(3) Assertion of right to jury trial. Deleted this paragraph in its entirety.

H(4) - changed to H(3) - Effect of failure to deny. Amended to say that all affirmative matter in an answer would be taken as denied without a reply, but not "avoided."

Page 9

I(10) Designation of unknown claimants. "Claimants" changed to "persons."

Page 12

J(7)(b) Inserted "or insufficiency of new matter in a reply to avoid a defense" after "to a claim" in the fifth line. This was not covered at the meeting, but having a reply for new matter requires modification of the motion and waiver rules. The proper way to attack new matter in a reply would be by motion to strike and failure to make such motion would not waive the right to assert insufficiency to avoid a defense at trial. No change was necessary in J(5) on Page 11 because this would be covered by the last clause in J(5)(B) as "sham, frivolous, irrelevant or redundant matter inserted in a pleading."

Page 15

K(4) Joinder of additional parties. Deleted former wording of the draft and substituted for it the language of existing ORS 13.180.

Page 15a. New page because substituted language of K(4) required more space.

Page 20

O(3) Pleading reasons for nonjoinder. This was deleted, thus changing the numbering of Exception of class actions and State agencies, etc.

OREGON RULES OF CIVIL PROCEDURE

A. PLEADINGS LIBERALLY CONSTRUED - DISREGARD OF ERROR

A(1) Liberal Construction. All pleadings shall be liberally construed with a view of substantial justice between the parties.

A(2) Disregard of error or defect not affecting substantial right. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.

B. KINDS OF PLEADINGS ALLOWED - FORMER PLEADINGS ABOLISHED

B(1) Pleadings. The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses.

B(2) Pleadings allowed. There shall be a complaint and an answer. An answer may include a counterclaim against a plaintiff including a party joined under Rule K(4) and a cross-claim against a defendant including a party joined under Rule K(4). A pleading against any person joined under Rule K(3) is a third-party complaint. There shall be an answer to a cross-claim and a third party complaint. There shall be a reply to a counterclaim denominated as such and a reply to assert any affirmative allegations. There shall be no other pleading unless the court orders otherwise.

B(3) Pleadings abolished. Demurrers and pleas shall not be used.

C. MOTIONS

C(1) Motions, in writing, grounds. (1) An application for an order is a motion. Every motion, unless made during trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

(2) Form. The rules applicable to captions, signing and other matters or form of pleadings apply to all motions and other papers provided for by these rules.

D. TIME FOR FILING PLEADINGS OR MOTIONS - NOTICE OF APPEARANCE

D(1) Time for filing motions and pleadings. A motion or answer to the complaint or third party complaint or the answer to a cross-claim or reply to a counterclaim of a party summoned under the provisions of Rule K(4) shall be filed with the clerk by the time required by Rule _____ to appear and answer. A motion or answer by any other party to a cross-claim shall be filed within 10 days after the service of an answer containing such cross-claim, but in any case, no defendant shall be required to file a motion or an answer to a cross-claim before the time required by Rule _____ to appear and respond to a complaint or third-party complaint served upon such party. A motion or reply to an answer shall be filed within 10 days after the service of the answer.

D(2) Pleading after motion. (a) If the court denies a motion, any responsive pleading required shall be filed within 10 days after service of the order, unless the order otherwise directs.

(b) If the court grants a motion and an amended pleading is allowed or required, such pleading shall be filed within 10 days after service of the order, unless the order otherwise directs.

(c) A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

D(3) Enlarging time to plead or do other act. The court may, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by the procedural rules, or by an order enlarge such time.

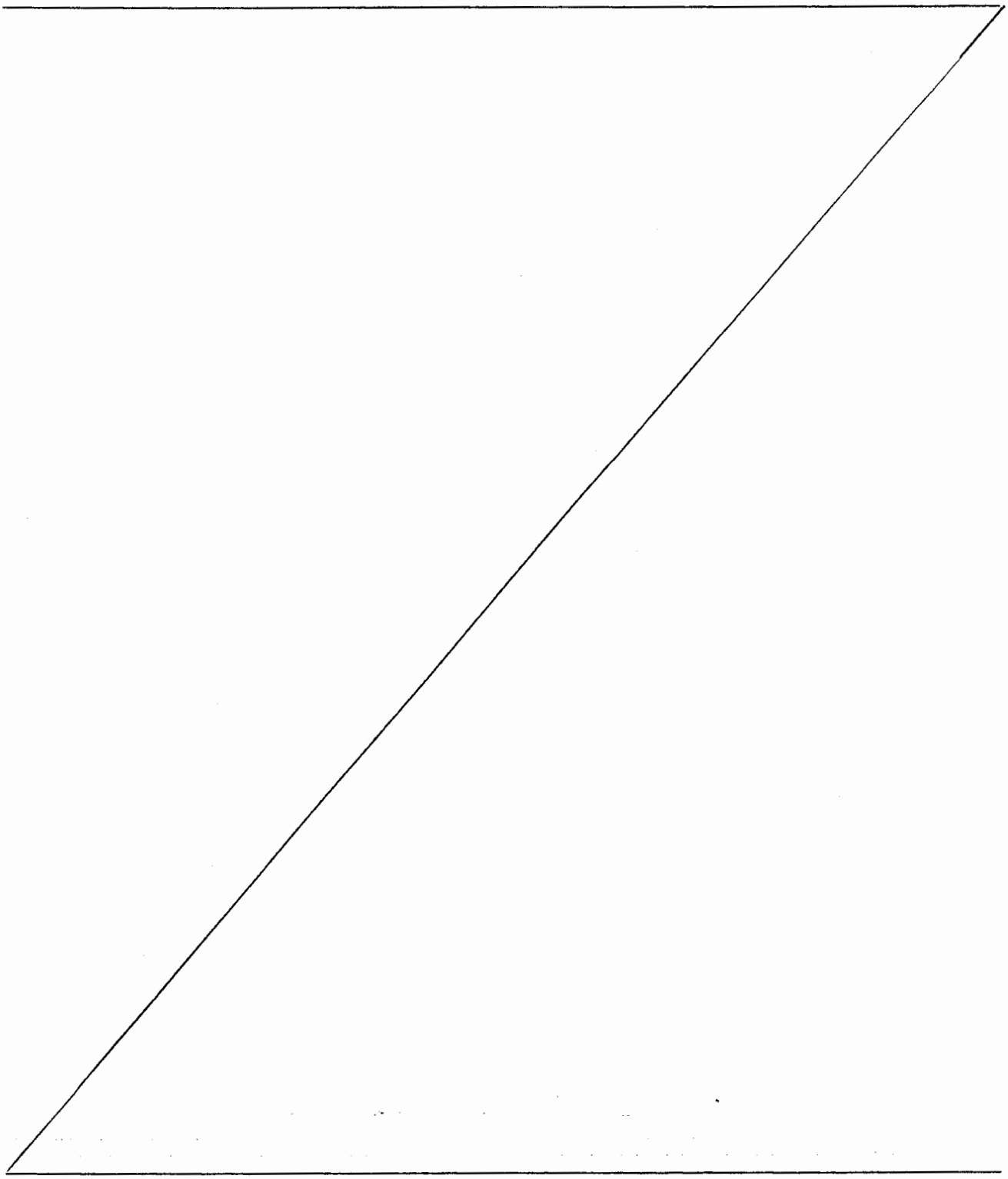
E. PLEADINGS - FORM

E(1) Captions, names of parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the register number of the cause and a designation in accordance with Rule B(2). In the complaint the title of the action shall include the names of all the parties, but in such other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

E(2) Concise and direct statement; paragraphs; statement of claims or defenses. Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs, the contents of which shall be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all succeeding pleadings. Separate claims or defenses shall be separately stated and numbered.

E(3) Consistency in pleading alternative statements. Inconsistent claims or defenses are not objectionable, and when a party is in doubt as to which of two or more statements of fact is true, the party may allege them in the alternative. A party may also state as many separate claims or defenses as the party has, regardless of consistency and whether based upon legal or equitable grounds or upon both. All statements shall be made subject to the obligation set forth in Rule J.

E(4) Adoption by reference; exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading.



F. SUBSCRIPTION OF PLEADINGS

F(1) Subscription by party or attorney, certificate. Every pleading shall be subscribed by the party or by a resident attorney of the state, except that if there are several parties united in interest and pleading together, the pleading must be subscribed by at least one of such parties or his resident attorney. If any party is represented by an attorney, every pleading shall be signed by at least one attorney in such attorney's individual name. Verification of pleadings shall not be required unless otherwise required by rule or statute. The subscription of a pleading constitutes a certificate by the person signing that such person has read the pleading, that to the best of the person's knowledge, information and belief there is a good ground to support it and that it is not interposed for harrassment or delay.

F(2) Pleadings not subscribed. Any pleading not duly subscibed may, on motion of the adverse party, be stricken out of the case.

G. COMPLAINT, COUNTERCLAIM, CROSS-CLAIM AND THIRD PARTY CLAIM

A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim, shall contain: (1) a plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition; (2) a demand of the relief which the party claims; if recovery of

money or damages is demanded, the amount thereof shall be stated; relief in the alternative or of several different types may be demanded.

H. RESPONSIVE PLEADINGS

H(1) Defenses; form of denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the allegations upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. When a pleader intends in good faith to deny only a part or a qualification of an allegation, the pleader shall admit so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the allegations of the preceding pleading, the denials may be made as specific denials of designated allegations or paragraphs, or the pleader may generally deny all the allegations except such designated allegations or paragraphs as he expressly admits; but, when the pleader does so intend to controvert all its allegations, the pleader may do so by general denial subject to the obligations set forth in Rule F.

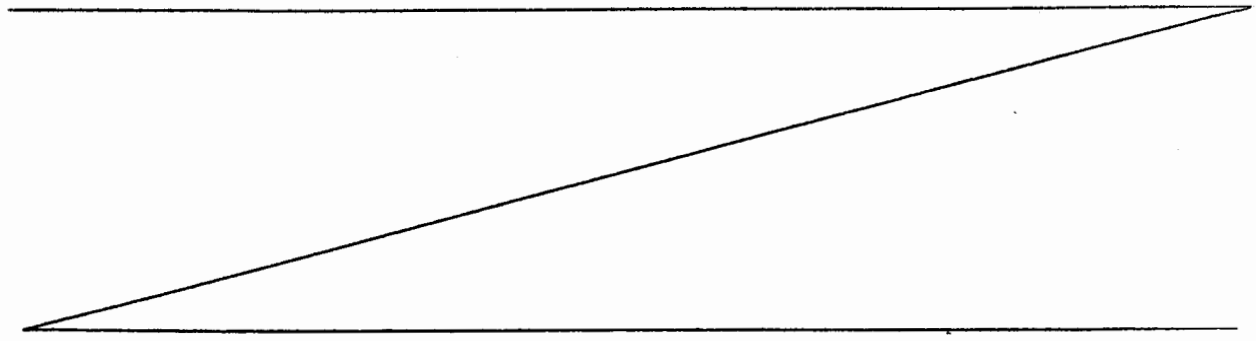
H(2) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, comparative or contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute

of limitations, unconstitutionality, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

H.(3) Effect of failure to deny. Allegations in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Allegations in a pleading to which no responsive pleading is required or permitted shall be taken as denied.

I. SPECIAL PLEADING RULES

I(1) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.



I(2) Judgment or other determination of court or officer, how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

I(3) Private statute, how pleaded. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

I(4) Corporate existence of city or county and of ordinances or comprehensive plans generally, how pleaded. (a) In pleading the corporate existence of any city, it shall be sufficient to state in the pleading that the city is existing and duly incorporated and organized under the laws of the state of its incorporation. In pleading the existence of any county, it shall be sufficient to state in the pleading that the county is existing and was formed under the laws of the state in which it is located.

(b) In pleading an ordinance, comprehensive plan or enactment of any county or incorporated city, or a right derived therefrom, in any court, it shall be sufficient to refer to the ordinance, comprehensive plan or enactment by its title, if any, otherwise by its commonly accepted name, and the date of its passage or the date of its approval when approval is necessary to render it effective, and the court shall thereupon take judicial notice thereof. As used

party may be designated by any name, and when his true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

I(9) Designation of unknown heirs in actions relating to real property. When the heirs of any deceased person are proper parties defendant to any action relating to real property in this state, and the names and residences of such heirs are unknown, they may be proceeded against under the name and title of the "unknown heirs" of the deceased.

I(10) Designation of unknown persons. In any action to determine any adverse claim, estate, lien or interest in real property, or to quiet title to real property, the plaintiff may include as a defendant in such action, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien or interest in the real property in controversy, the following: "Also all other persons or parties unknown claiming any right, title, estate, lien or interest in the real property described in the complaint herein."

J. DEFENSES AND OBJECTIONS - HOW PRESENTED - BY PLEADING OR MOTION - MOTION FOR JUDGMENT ON THE PLEADINGS

J(1) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion: (A) lack of jurisdiction over the subject matter, (B) lack of jurisdiction over the person,

by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision 7(b) of this Rule on any of the grounds there stated.

J(7) Waiver. (a) A defense of lack of jurisdiction over the person, that a plaintiff has not legal capacity to sue, that there is another action pending between the same parties for the same cause, insufficiency of process, or insufficiency of service of process, is waived (i) if omitted from a motion in the circumstances described in subdivision (6) of this Rule, or (ii) if it is neither made by motion under this Rule not included in a responsive pleading or an amendment thereof permitted by Rule L(1) to be made as a matter of course; provided, however, the defenses enumerated in subdivision (1) (B) and (E) of this Rule shall not be raised by amendment.

(b) A defense of failure to state ultimate facts constituting a claim, a defense that the action has not been commenced within the time limited by statute, a defense of failure to join a party indispensable under Rule O, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule B(2) or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule L(2) in light of any evidence that may have been received.

(c) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.

K(4) Joinder of persons in contract actions. (a) As used in this section of this Rule:

(1) "Maker" means the original party to the contract which is the subject of the action who is the predecesssor in interest of the plaintiff under the contract; and

(2) "Contract" includes any instrument or document evidencing a debt.

(b) The defendant may, in an action on a contract brought by an assignee of rights under that contract, join as a party to the action the maker of that contract if the defendant has a claim against the maker of the contract arising out of that contract.

(c) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097.

(d) In any action against a party joined under this section of this Rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 4.

K(5) Separate trial. Upon motion of any party or upon the court's own motion, the court may order a separate trial of any counterclaim, cross-claim or third-party claim so alleged if to do so would: (a) be more convenient; (b) avoid prejudice; or (c) be more economical and expedite the matter.

L. AMENDED AND SUPPLEMENTAL PLEADINGS

L(1) Amendments. A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may so amend it at any time within 20 days

after it is served. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Whenever an amended pleading is filed, it shall be served upon all parties who are not in default, but as to all parties who are in default or against whom a default previously has been entered, judgment may be rendered in accordance with the prayer of the original pleading served upon them; and neither the amended pleading nor the process thereon need be served upon such parties in default unless the amended pleading asks for additional relief against the parties in default.

L(2) Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of

(New page because of additional space required under K(4) on Page 15).

L(4) Amendment or pleading over after motion. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule J is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. If any motion is disallowed, and it appears to have been made in good faith, the party filing the motion shall file a responsive pleading if any is required.

L(5) Amended pleading where part of pleading stricken. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. By complying with the court's order, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling upon the motion to strike.

L(6) How amendment made. When any pleading or proceeding is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended complaint, or by interlineation, deletion or otherwise. Such amended pleading shall be complete in itself, without reference to the original or any preceding amended one.

L(7) Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its

a person as described in subdivision (1) (a) and (b) of this Rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include; first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

O(3) Exception of class actions. This Rule is subject to the provisions of Rule _____ (class action rule).

O(4) State agencies as parties in governmental administration proceedings. In any action or proceeding arising out of county administration of functions delegated or contracted to the county by a state agency, the state agency must be made a party to the action or proceeding.

P. MISJOINDER AND NONJOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of

M E M O R A N D U M

TO: DISCOVERY COMMITTEE

FROM: LAIRD KIRKPATRICK AND FRED MERRILL

RE: LIMITED INTERROGATORIES RULE

DATE: July 11, 1978

Enclosed is the limited interrogatories rule for your consideration at the July 19th committee meeting.

RULE 108

INTERROGATORIES

A. Availability; procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reaons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 112 A. with respect to any objection to or other failure to answer an interrogatory.

B. Use at trial; scope. Answers to interrogatories may be used to the extent permitted by rules of evidence. Within the scope of discovery under Rule 101 B. and subject to Rule 101 C., interrogatories may only be used to obtain the following:

(1) The names, residence and business addesses, telephone numbers, and details of employment, business or occupation of persons or entities having knowledge and the source of such knowledge.

(2) The existence, identity, description, nature, custody, and location of documents (including writings, drawings, graphs, charts, photographs, motion pictures, phono-records, and other data compilations from which information can be obtained), tangible things and real property.

(3) The name, address, subject matter of testimony and qualifications of expert witnesses to be called at trial.

(4) (Insurance limits should go here).

(5) The nature and extent of any damages or monetary amounts claimed by a party in the action; the nature, extent and permanency of any mental or physical condition forming the basis of such claim; all treatments for such physical condition; all tests and examinations relating to such condition; and, all pre-existing mental, physical and organic conditions bearing upon such claims.

(6) The addresses, registered agents, offices, places of business, activities, names and addresses of board of directors and officers, names and addresses and job classifications and duties of agents and employees, names and addresses of stockholders or partners and dates and places of incorporation or organization of any corporation or business entity.

(7) The present and prior addresses, business addresses, present whereabouts, telephone numbers, aliases, age or date and place of birth, race, national origin, sex, social security number, nature and status of driver's license, education, degrees, special training, nature and duration of present and prior employment or occupation or business, present and prior marital status, number and description of children and other dependents, nature and duration of service in the armed forces, nature and extent of present and prior indebtedness and assets, nature of prior criminal convictions and criminal charges, nature and extent of prior imprisonment, nature of prior traffic violations, nature of prior involvement in legal actions, and nature and extent of prior institutional commitments of any party or the employees, agents, or persons under the control of a party.

(8) The location, legal description, present and prior ownership, occupation and use, purchase or sale price, value, nature of improvements, interests affecting title, and record of deeds and instruments relating to title of any real property involved in an action.

(9) The custody, use, location, descripition, present and prior ownership, purchase or sale price, value, recording of instruments relating to title and security interests, interests claimed in such property, license numbers, registration numbers, model numbers, serial numbers, make, model, delivery and place of manufacture, and manufacturer of any tangible property involved in an action.

C. Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the buden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

D. Form of response. Answers and objections to interrogatories shall identify and quote each interrogatory in full immediately preceding the statement of any answer or objection.

E. Limitations.

(1) Duty of attorney. It is the duty of an attorney directing interrogatories to avoid undue detail, and to avoid the imposition of any unnecessary burden

or expense on the answering party.

(2) Number. A party may file more than one set of interrogatories to an adverse party, but the total number of interrogatories shall not exceed thirty, unless the court otherwise orders for good cause shown after the proposed additional interrogatories have been filed. In determining what constitutes an interrogatory for the purpose of applying this limitation in number, it is intended that each question be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined or arranged.

M E M O R A N D U M

TO: COUNCIL July 14, 1978

FROM: FRED MERRILL

RE: LAW - EQUITY REVISIONS OUTSIDE ORS CHAPTERS 11 - 45

One hundred and twenty-five years of careful statutory drafting has resulted in a staggering number of references to suits and actions, suits in equity, judgments and decrees, etc., in the Oregon statutes. You previously received the changes for Chapters 11 through 45. Using the OLIS computer system, we checked for the occurrence of the words, equity, decree, suit, chancellor, and chancery elsewhere in the statutes. The computer gave us 1131 statutory references. These were all checked and separate law-equity references were eliminated where necessary as shown in the appendices to this memorandum. Not all of these changes could be classed as procedural, and we will have to sort the procedural rules out from substantive rules and recommend statutory amendment for the latter.

Not all references to equity, decree and suit were changed. The following were retained:

1. References to substantive law or remedies, i.e., do equity, equitable powers, or equitable principles.

2. References to procedure and jurisdiction of appellate courts. If the reference occurred in an administrative or other appeal to a circuit court, however, the language was changed. ORS 536.560 presented a special problem as it covers both Supreme Court procedure and circuit court procedure by a single reference to "suits in equity." The terminology was changed for circuit court but not for the Supreme Court. See Appendix 4.

3. References to procedure in ORS Chapters 106-110 and elsewhere relating to domestic relations cases. Because suits and decrees will still appear in these statutes, and there probably will be some inadvertent references elsewhere, it is recommended that the following language be added to Rule 1 of the Oregon Rules of Civil Procedure: "Where appearing in rules of pleading, practice and procedure, the word, suit, shall mean action, and the word, decree, shall mean judgment."

4. General references to powers and duties of courts, judges, officials, entities, clerks and attorneys relating to filing decrees, prosecuting suits, etc.

5. Miscellaneous references to suit and decree in the sense of being sued, cause of suit, and costs of suit.

6. Uniform acts or interstate compacts.

7. Statutes relating to prior procedure or acts of courts in other jurisdictions.

Most of the changes are simple changes in terminology to conform to "action" and "judgment" as the descriptive terms for cases and the final order of the court. These changes are shown in Appendix 1. There were several categories, however, that were more difficult and should be specially considered by the Council:

1. Where equity is used to describe jurisdiction or power of a court. This includes references to "a court of law" or "a court of equity." These statutes are set out in Appendix 2. Generally, a court of equity was changed to "court with jurisdiction to grant equitable remedies."

2. Where equity is used to describe remedies available. This would include a reference to maintaining a suit in equity to enforce a statutory right or maintaining a suit in equity for specific types of relief. If the reference was to maintaining a suit in equity for some specified remedy or at law and equity for specified remedies, the reference to equity or to law and equity was simply eliminated. If the reference was to maintaining a suit in equity or in equity or at law, without any specified remedy, this was changed to an action for equitable remedies, or for legal and equitable remedies. These statutes are set out in Appendix 3.

3. Where the reference to equity is used to describe procedures to be followed. This includes a general reference to mode of procedure for a statutory proceeding as a case "in equity" or "equitable." Since the only remaining difference in procedure is the existence of jury trial, this ws changed to the same procedure as "in actions tried without a jury." These statutes are set out in Appendix 4.

4. Other miscellaneous changes. See Appendix 5 and Comments.

NOTE: Because of their voluminous and repetitive nature, Appendices 1 through 4 are not attached but are on file in the office of the Council on Court Procedures in Eugene, Oregon.

82.120 Jury trial where usury is involved; burden of proof; who may plead usury; inapplicability of provisions to sales or resales of securities or commercial paper; forfeiture. (]) In the trial of any cause involving the defense of usury either party thereto shall be accorded a jury trial [in actions at law] if the remedy sought by the plaintiff was legal in nature, and at the discretion of the court[,in suits in equity] if the remedy sought by the plaintiff was equitable in nature, upon making timely request therefor to the court or judge thereof wherein the cause is pending.

(2) The burden of proof to establish usury is upon the party interposing that defense, but the question of whether the usurious contract had been made or usury exacted is for determination by the jury [in law actions] in cases where the remedy sought by the plaintiff is legal in nature, and [in suits in equity] by the court or by a jury in cases where the remedy sought by the plaintiff is equitable in nature, and in the discretion of the court. In either case the verdict of the jury shall have the same force and effect as in other [law] actions, and said defense shall be deemed to have been established as in other civil actions when sustained by the preponderance of the evidence in the cases. If upon such trial evidence is introduced with respect to the subject matter of the litigation showing the payment of any commission, bonus, fee, premium, penalty or other charge, compensation or gratuity by the borrower to any officer, director or agent of the lender, knowledge thereof is, prima facie, imputed to the lender.

(3) The defense of usury may be interposed not only by the borrower, but by his accommodation indorser, guarantor or surety; the vendee or grantee of any property involved in, or pledged or mortgaged as security for the alleged usurious loan. Deductions shall be made from the amount actually received by the borrower of all usurious payments made by him or for his account.

(4) This chapter does not apply to bona fide sales or resales of securities or commercial paper, nor does it apply to interest charges by broker-dealers registered under the Securities Exchange Act of 1934 for carrying a debit balance is payable on demand and secured by stocks or bonds.

(5) If it is ascertained in any action [or suit] brought on any contract that a rate of interest has been contracted for greater than is authorized by this chapter in money, property or other valuable thing, or that any gift or donation of money, property or other valuable thing has been made or promised to be made to a lender or creditor, or to any person for him, either by the borrower or debtor, or by any person for him, the design of which is to obtain for money so loaned or for debts due or to become due a rate of interest greater than that specified by the provisions of this chapter, it shall be deemed usurious, and shall work a forfeiture of the entire debt so contracted to the county school fund of the county wherein such action is brought. The court in which such [suit] action is proxecuted shall render judgment for the amount of the original sum loaned or the debt contracted, without interest, less all payments made by or for account of the borrower, ag ainst the defendant and in favor of the state for the use of the county school fund of said county, and against the plaintiff for cost of suit.

COMMENT: The changes shown maintain the intent of the statute. The references to jury trial and burden of proof were enacted in 1925, but I could find no Oregon case on this subject. Historically, usury was a defense that could only be asserted in equity. A defendant faced with an action at law to recover a usurious debt would file a suit in equity and, if the suit was successful, the equity court would enjoin the law action. Thus, the usury defense would never be heard before a jury, and there is no constitutional right to jury trial. This statute gives a statutory right to jury trial where the plaintiff's original suit is one for legal relief, i.e., an action at law.

88.080 Sale and redemption; effect of sheriff's deed. A judgment of foreclosure shall order the mortgaged property sold. Property sold on execution issued upon such judgment may be redeemed in like manner and with like effect as property sold on an execution [issued on a judgment] pursuant to ORS 23.410 to 23.600, and not otherwise. A sheriff's deed for property sold on execution issued upon [a decree] such judgment shall have the same force and effect as a sheriff's deed issued for property sold on an execution issued on a judgment pursuant to Chapter 23.

COMMENT: The intent here is to have a redemption from a foreclosure sale and a sheriff's deed pursuant to such sale treated the same as an execution sale. The operative words, on a judgment, would no longer clearly have that effect and specific reference to the execution rules are made.

547.030 Evidence at hearing; findings; appeal. (1) At the hearing the court shall hear and consider any evidence that may be presented for or against the petition or any objection thereteo.

(2) Thereupon the court shall make its findings upon the facts alleged in the petition or objections and any other facts necessary and proper for the determination of the propriety of the organization of the district, which findings shall be entered on the journal of the court.

(3) If it appears to the court that the prayer of the petition should be granted, the court shall, by its order entered of record, declare and decree the drainage district organized.

(4) If it appears to the court that the prayer of the petition should not be granted, the proceedings shall be dismissed and the costs adjudged against the signers of the petition in proportion to the acreage represented by each.

(5) In making such findings and decree, the court shall disregard any error, irregularity or omission which does not affect substantial rights, and no such error, irregularity or omission shall affect the validity of the organization or any proceedings taken thereon.

(6) Appeal may be taken de novo from the decision of the court to the circuit court [in the same manner as appeals are taken in equity cases].

COMMENT: This statute governs appeals from county courts to circuit courts in contested hearings relating to establishing drainage districts. I assume the reference to appeals in equity means de novo appeal and the statute was changed to this effect.

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: PROCESS COMMITTEE

RE: SUMMONS AND PROCESS RULES

DATE: July 16, 1978

The process committee has met and considered in detail the specific rules relating to the form and manner of service of summons and process, as well as general introductory rules covering application of the rules, commencement of actions, service and filing of papers subsequent to the summons and computation of time. A copy of these rules, numbered 1 through 7, as approved by the committee, is attached. Those portions of the rules marked with an asterisk involve issues which the committee felt should be considered by the full Council, as discussed below. A staff commentary on each of these rules was furnished to the committee and is available to Council members upon request.

The committee is also considering rules governing bases for personal jurisdiction. A copy of a memorandum furnished to the committee, relating to rule-making authority in this area and jurisdictional rules numbered 4 A. through D., with staff commentary, is attached. The committee will report its recommendations on these rules at the meeting to be held July 28, 1978.

1. BASIC ISSUES

The committee considered the question of whether the Council has rule-making authority in the area of specifying the basis for jurisdiction. It was decided that, although the issue is not free from doubt, rules should be promulgated governing bases for personal jurisdiction. It is extremely difficult to make extensive revisions in the rules governing service of process without complementary changes relating to jurisdiction. The ultimate question should be left to the Legislature, as recommended on the last page of the staff memorandum.

Secondly, in the area of service of process under Rule 4, the committee felt that the present approach to service of summons was over-technical and placed too much emphasis on correctness of form. The basic question is whether the service of summons and complaint provides notice to the defendant. In an attempt to avoid over-technical interpretation of summons statutes, the draft accepted by the committee includes provisions 4 E.(3) and 4 H. which should be carefully examined by the Council. The committee also discussed the possibility of going even further in replacing the detailed provisions of Rule 4 F.(3), relating to the manner of service, with the following provisions:

> 4 F.(3) Summons shall be served in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.

The language used is the constitutional standard of Mullane v. Hanover Trust Company, 339 U.S. 306 (1950. If this approach is adopted, the following changes would also be necessary:

1. Add, "or serve in any manner other than publication," before the last clause of Paragraphs 4 C.(4)(a) and (b) and add a new subsection, 4 C.(5) as follows:

"For paragraphs (a) and (b) of subsection (4) of this section, the date of service shall be the date when summons was personally delivered to defendant or some person on defendant's behalf; the date of service by mail shall be as provided in subsection (2), section F., of this Rule; and the date of service by any other method shall be the date upon which the final step is taken to provide notice of the existence and pendency of the action to the defendant."

2. Change section E.(2)(a) as follows:

"Personal service or mailing or service by any other method than publication shall be proved by (i) the affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer or director of a corporate party to the action, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. If the summons is served in any other manner, the affidavit shall describe in detail the manner and circumstances of service. (ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, of the county in this state where the person served was found or such person's dwelling house or usual place of abode is located, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the summons and complaint was left. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. If the summons is served in any other manner, the affidavit shall describe in detail the manner and circumstances of service.

3. Change 4 G.(1) to say:

"On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action, the court may order..."

2. OTHER QUESTIONS

4 F.(3)(a). There is no present Oregon statute covering service of process on partnerships and unincorporated associations. This paragraph fills that gap. The issue is whether to include the existing language of ORS 15.100 relating to joint obligors. Although they are made so by existing statute, there may be some question whether one joint obligor should be the agent for service of process upon another.

4 G.(3). The language in the last sentence is designed to avoid a possible interpretation of the existing statutory language, "not less than once a week for four consecutive weeks," to require five publications.

7 B. At common law, a judgment could be modified by a court within the same term of court but not beyond that time. It is unclear whether this common law rule still applies in Oregon, but subsection (2) of this section reciting an ability of the court to relieve someone of a mistake due to excusable neglect would literally allow a judge to vacate a judgment long after it was entered by allowing late filings of motions for NOV and new trial, etc. Federal rules prohibit this by making the subsection inapplicable to those post judgment motions described in this rule. The issue is whether the Council wishes to follow the same pattern or further limit a judge's ability to allow an untimely act based on excusable neglect.

OREGON RULES OF CIVIL PROCEDURE

RULE 1

SCOPE

These rules govern procedure and practice in all circuit and district courts of this state for all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where a different procedure is specified by statute or rule. These rules shall also govern practice and procedure in all civil actions and special proceedings, whether cognizable as cases at law, in equity or of statutory origin, for all other courts of this state to the extent they are made applicable to such courts by rule or statute. These rules shall be construed to secure the just, speedy and inexpensive determination of every action. These Rules, and amendments thereto, shall apply to all actions filed after their effective date.

RULE 2

ONE FORM OF ACTION

There shall be one form of action known as a civil action. All procedural distinctions between actions at law and suits in equity are hereby abolished, except for those distinctions specifically provided for by these rules, by statute or by the Constitution.

RULE 3

An action shall be commenced by filing a complaint with the clerk of the court. Commencement of an action for purposes of statutes of limitations is governed by ORS 12.020.

RULE 4

SUMMONS

A. Plaintiff and defendant defined. For purposes of issuance and service of summons, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section D. of this Rule.

C. Contents. The summons shall contain:

C.(1) The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(2) A direction to the defendant requiring defendant to appear and defend within the time required by subsection (4) of this section and shall notify defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(2)(a) All summonses other than a summons to join a party pursuant to Rule K.(4) shall contain a notice in a size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer."

This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or his attorney.

If you have questions, you should see an attorney immediately.

C.(2)(b) A summons to join a party pursuant to Rule K.4(a) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CARREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney.

If you have questions, you should see an attorney immediately.

C.(2)(c) A summons to join a party pursuant to Rule K.4(b) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney.

If you have questions, you shoud see an attorney immediately.

C.(3) A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action, may be served by mail.

C.(4) The summons shall require the defendant to appear and defend within the following times:

C.(4)(a) If the summons is served within the state personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 20 days from the date of service.

C.(4)(b) If the summons is served outside this state personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 30 days from the date of service.

C.(4)(c) If the summons is served by publication pursuant to section G. of this Rule, the defendant shall appear and defend within 45 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

D. By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor an officer or director

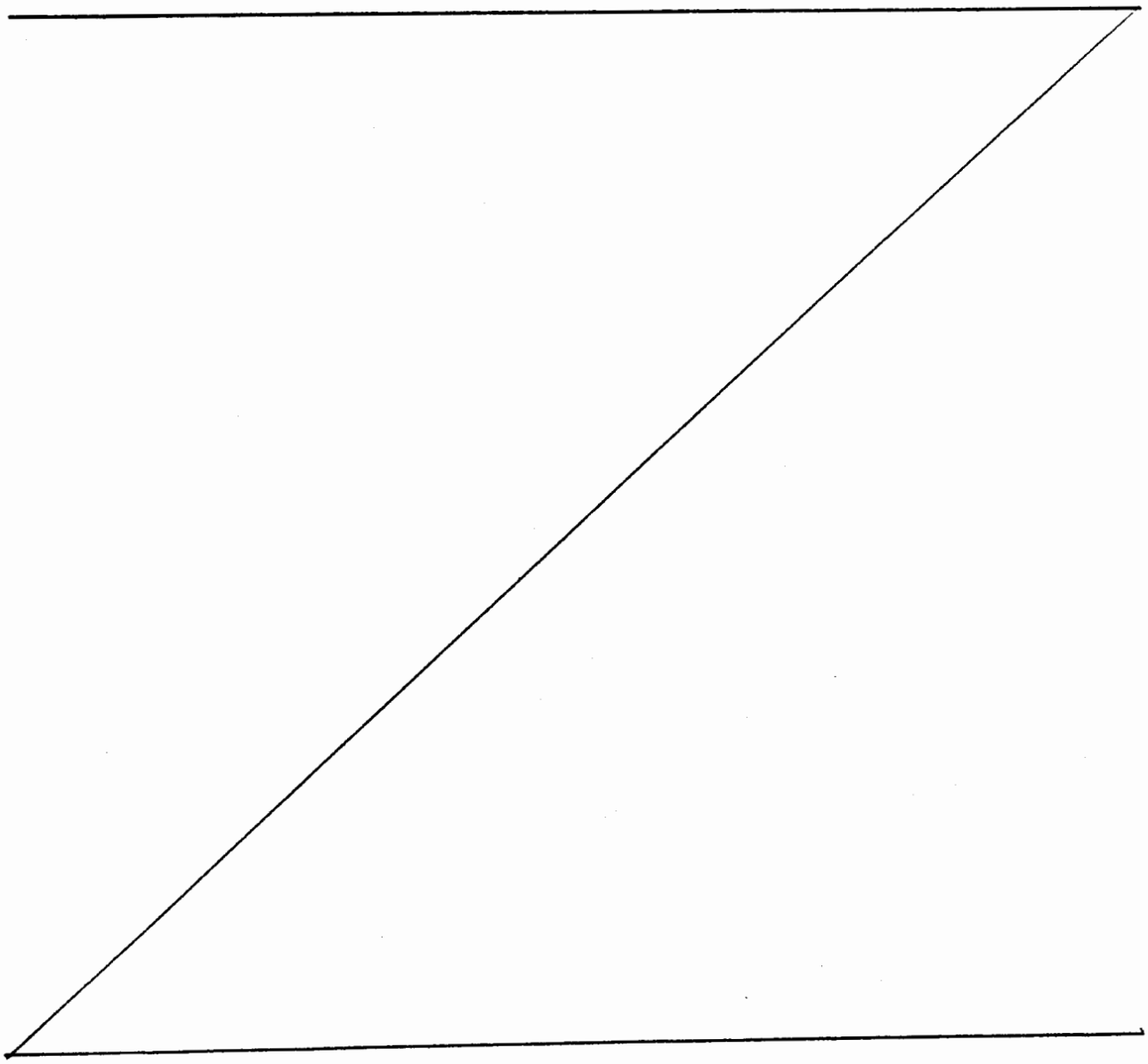
of a corporate party. Compensation to a sheriff or a sheriff's deputy of the county in this state where the person served is found, or such person's dwelling house or usual place of abode is located, who serves a summons, shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee shall be paid for the service. This compensation shall be part of the disbursements and shall be recovered as provided in ORS 20.020.

E. Return; proof of service. (1) The summons shall be returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. When served out of the county in which the action is commenced, the summons may be returned by mail.

E.(2) Proof of service of summons or mailing may be made as follows:

E.(2)(a) Personal service or mailing shall be proved by (i) the affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer or director of a corporate party to the action, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left and shall state such facts as show reasonable diligence in attempting to effect personal service upon the defendant. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, of the county in this state where the person served was found or such person's dwelling house or usual place of abode is located, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the

summons and complaint was left and such facts as show reasonable diligence in attempting to effect personal service on defendant. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (iii) An affidavit or certificate containing proof of service may be made upon the summons or as a separate endorsement.



E.(2)(b) Service by publication shall be proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon,)
) ss.
County of _____.)

I, _____, being first duly sworn, depose and say that I am the _____(here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this _____ day of _____, 19__.

_____
Notary Public of Oregon.

My commission expires
_____ day of _____, 19 __.

E.(2)(c) In any case proof may be made by written admission of the defendant.

E.(2)(d) The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and his official seal, if he has one, shall be

affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of his official seal, if he has one, shall be prima facie evidence of his authority to make and certify such affidavit.

*E.(3) If summons has been properly served, failure to return the summons or make or file a proper proof of service shall not affect the validity of the service.

*F. Manner of service. (1) Unless otherwise specified, the methods of service of summons provided in this section shall be used for service of summons either within or without this state.

F.(2) For personal service, the person serving the summons shall deliver a certified copy of the summons and a certified copy of the complaint to the person to be served. For service by mail under paragraph (d) of subsection (3) of this section or subsection (4) of this section or mailing of summons and complaint as otherwise required or allowed by this Rule, the plaintiff shall mail a certified copy of the summons and a certified copy of the complaint to the person to be served by certified or registered mail, return receipt requested. Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

F.(3) Except when service by publication is available pursuant to section G. of this Rule and service pursuant to subsection (4) of this section, service of summons shall be as follows:

F.(3)(a) Except as provided in paragraphs (b) and (c) of this subsection, upon a natural person:

F.(3)(a)(i) By personally serving the defendant; or,

F.(3)(a)(ii) If with reasonable diligence the defendant cannot be served under subparagraph (i) of this paragraph, then by personal service upon any person

over 14 years of age residing in the dwelling house or usual place of abode of defendant, or if defendant maintains a regular place of business or office, by leaving a copy of the summons and complaint at such place of business or office, with the person who is apparently in charge. Where service under this subparagraph is made on one other than the defendant, the plaintiff shall cause to be mailed a copy of the summons and complaint to the defendant at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made; or,

F.(3)(a)(iii) In any case, by serving the summons in a manner specified in this Rule or by any other rule or statute on the defendant or upon an agent authorized by law to accept service of summons for the defendant.

F.(3)(b) Upon a minor under the age of 14 years, by service in the manner specified in paragraph (a) of this subsection upon such minor, and also upon his father, mother, conservator of his estate or guardian, or if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule V.(1)(b).

F.(3)(c) Upon an incapacitated person, by service in the manner specified in paragraph (a) of this subsection upon such person and also upon the conservator of such person's estate or guardian, or if there be none, upon a guardian ad litem appointed pursuant to Rule V.(2)(b).

F.(3)(d) Upon a domestic or foreign corporation, limited partnership or other unincorporated association which is subject to suit under a common name:

F.(3)(d)(i) By personal service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership or association. In lieu of delivery of a copy of summons and complaint to the registered agent, officer, general partner or managing agent, such copies may be left at the office of such registered agent, officer, general partner or managing agent,

with the person who is apparently in charge of the office.

F.(3)(d)(ii) If no registered agent, officer, director, general partner, or managing agent resides in this state or can be found in this state, then plaintiff may serve such person by mail. Service by mail under this subparagraph shall be fully effective service and permit the entry of a default judgment if defendant fails to appear.

F.(3)(d)(iii) If by reasonable diligence, the defendant cannot be served pursuant to subparagraphs (i) and (ii) of this paragraph, then by personal service upon any person over the age of 14 years who resides at the dwelling house or usual place of abode of any person identified in subparagraph (i) of this paragraph, or by personal service on any claerk or agent of the corporation, limited partnership or association who may be found in the state. Where service is made by leaving a copy of the summons and complaint at the dwelling house or usual place of abode of persons identified in subparagraph (i) of this paragraph, the plaintiff shall immediately cause a copy of the summons and complaint to be mailed to the person to whom the summons is directed, at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made.

F.(3)(d)(iv) In any case, by serving the summons in a manner specified in this Rule or by any other rule or statute upon the defendant or an agent authorized by appointment or law to accept service of summons for the defendant.

F.(3)(e) Upon a partnership or unincorporated association not subject to suit under a common name or persons jointly indebted on a contract, relating to partnership or association activities or the joint contract, by personal service individually upon each partner, association member or joint obligor known to the plaintiff, in any manner prescribed in paragraphs (a), (b) or (c) of this subsection. If less than all of the defendants are served, the plaintiff may proceed against those defendants served and against the partnership, association or joint obligors and a judgment rendered under such circumstances is a binding adjudication against all partnership or association members or joint obligors

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as to partnership or association assets or joint property, wherever such assets or property may be located.

F.(3)(f) Upon the State, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant or clerk. Service upon the Adult and Family Services Division shall be by personal service upon the administrator of the Family Services Division or by leaving a copy of the summons and complaint at the office of such administsrator with the person apparently in charge.

F.(3)(g) Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service upon an officer, director, managing agent, clerk or secretary thereof. In lieu of delivery of the copy of the summons and complaint personally to such officer, director, managing agent, clerk or secretary, such copies may be left in the office of such officer, director, managing agent, clerk, or secretary with the person who is apparently in charge of the office. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

F.(4) When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

G. Publication. (1) On motion upon a showing by affidavit that service cannot with due diligence be made by another method described in subsection (3) of section F. of this Rule, the court may order service by publication.

G.(2) In addition to the contents of a summons as described in section C. of this Rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(2) shall state: "This paper must be given to the court within 45 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

*G.(3) An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced, or if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times, with intervals of at least 7 days between each successive publication.

G.(4) If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at his last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present and last known address of the defendant, mailing a copy of the summons and complaint is not required.

G.(5) If service cannot with due diligence be made by another method described in subsection (3) of section F. of this Rule because defendants are unknown heirs or persons as described in sections (9) and (10) of Rule I, the action shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien or interest in

the real property in controversy, at the time of the commencement of the action and served by publication, shall be bound and concluded by the judgment in the action, if the same is in the favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

G.(6) A defendant against whom publication is ordered or his representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, or the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

G.(7) Service shall be complete at the date of the last publication.

*H. Disregard of error; actual notice. Failure to strictly comply with provisions of this Rule relating to the form of summons, issuance of summons, the person who may serve summons and the manner of service of summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action and had a reasonable opportunity to appear and defend. The court may allow amendment to a summons or proof of summons and shall disregard any error in service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

I. Telegraphic transmission. A summons and complaint may be transmitted by telegraph as provided in Rule 5 E.

RULE 5

PROCESS - SERVICE OF PROCESS

A. Process. All process authorized to be issued by any court or officer thereof shall run in the name of the State of Oregon and be signed by the officer issuing the same, and if such process is issued by a clerk of court, he shall affix his seal of office to such process. Summons and subpoenas are not process and are covered by Rules 4 and 55, respectively.

B. County is a party. Process in an action where any county is a party shall be served on the county clerk or the person exercising the duties of that office, or if the office is vacant, upon the chairman of the governing body of the county, or in the absence of the chairman, any member thereof.

C. Service or execution. Any person may serve or execute any civil process on Sunday or any other legal holiday. No limitation or prohibition stated in ORS 1.060 shall apply to such service or execution of any civil process on a Sunday or other legal holiday.

D. Telegraphic transmission of writ, order or paper, for service; procedure. Any writ or order in any civil action, suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy, as defined in ORS 757.631, of such writ, order or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him if any return be requisite, in the same manner and with the same force and effect in all respects as the original might be if delivered to him. The officer or person serving or executing the same shall have the same authority and be subject to the same liabilities as if the copy were the original. The original, if a writ or order, shall also be filed in the court from which it was issued, and a certified copy thereof shall be preserved in the telegraph office from which it was sent. In sending it, either the original or a certified copy may be used by the operator for that purpose.

E. Proof of service or execution. Proof of service or execution of process shall be made as provided in Rule 4 E.

RULE 6

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

A. Service; when required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer or judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

B. Same; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

C. Same; numerous defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or

matter constituting an affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereupon upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

D. Filing; no proof of service required. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Such filing by a party or a party's attorney shall constitute a representation that a copy of the paper has been served upon each of the other parties as required by section A. of this Rule. No further proof of service is required unless an adverse party raises a question of notice. In such instance the affidavit of the person making service shall be prima facie evidence.

E. Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office, except that the judge may permit the papers to be filed with him, in which event the judge will note thereon the filing date and forthwith transmit them to the office of the clerk or the person exercising the duties of that office. The clerk or the person exercising the duties of that office shall endorse upon such pleading or paper the day of the month and the year. The clerk or person exercising the duties of that office is not required to receive for filing any paper unless the name of the court, the title of the cause and the paper, and the names of the parties, and the attorney, if there be one, is legibly endorsed on the front of the document, nor unless the contents thereof can be read by a person of ordinary skill.

F. Effect of failure to file. If any party to an action fails to file within five (5) days after the service any of the papers required by this Rule to be filed, the court, on motion of any party or of its own motion, may

order the papers to be filed forthwith, and if the order be not obeyed, the court may order them to be regarded as stricken and their service to be of no effect.

RULE 7

TIME

A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 18.020.

* B. Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure act was the result of excusable neglect, but it may not extend the time for taking any action to file, object or hear and determine findings of fact or to vacate, set aside, amend or otherwise change a judgment which has been entered, beyond the time specified for taking such action in the applicable rule or statute.

C. Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continue existence or expiration of a term of court. The continued

existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

D. For motions; affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

E. Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

The following would either be enacted by the Legislature as a statute or promulgated by the Council as rules. ORS 14.010 to 14.035 would be repealed.

RULE 4 A.

PERSONAL JURISDICTION

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4 (Oregon Rule of Civil Procedure 4) under any of the following circumstances:

A. Local presence or status. In any action whether arising within or without this state, against a defendant who when the action is commenced:

(1) Is a natural person present within this state when served; or

(2) Is a natural person domiciled within this state; or

(3) Is a corporation created by or under the laws of this state; or

(4) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

(5) Has specifically consented to the exercise of personal jurisdiction over such defendant, whether by appointment of agent for service of process in this state or otherwise.

B. Special jurisdiction statutes. In any action which may be brought under statutes of this state that specifically confer grounds for personal jurisdiction over the defendant.

C. Local act or omission. In any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.

D. Local injury; foreign act. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

(1) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

(2) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

E. Local services, goods or contracts. In any action which:

(1) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff or to guarantee payment for such services; or

(2) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant or payment for such services was guaranteed by the defendant; or

(3) Arises out of a promise made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value or to guarantee payment for such goods, documents or things; or

(4) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on the defendant's order or direction or shipped to a third person when payment for such goods, documents or things was guaranteed by defendant; or

(5) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

F. Local property. In any action which arises out of the ownership, use or possession of real property situated in this state or the ownership, use

or possession of other tangible property, assets or things of value which were within this state at the time of such ownership, use or possession; including, but not limited to, actions to recover a deficiency judgment upon any mortgage or trust deed note or conditional sale contract or other security agreement relating to such property, executed by the defendant or predecessor to whose obligation the defendant has succeeded.

G. Director or officer of a domestic corporation. In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer.

H. Taxes or assessments. In any action for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority of this state.

I. Insurance or insurers. In any action which arises out of a promise made anywhere to the plaintiff or some third party by the defendant to insure any person, property or risk and in addition either:

(1) The person, property or risk was located in this state at the time of the promise; or

(2) The person, property or risk insured was located within this state when the event out of which the cause of action is claimed to arise occurred; or

(3) The event out of which the cause of action is claimed to arise occurred within this state, regardless of where the person, property or risk insured was located.

J. Certain marital and domestic relations actions.

(1) In any action to determine a question of status instituted under ORS Chapter 106 or 107 when the plaintiff is a resident of or domiciled in this state; or

(2) In any action to enforce personal obligations arising under ORS Chapter 106 or 107, if the parties to a marriage have concurrently maintained the same or separate residences or domiciles within this state for a period of six months, notwithstanding departure from this state and acquisition of a residence or domicile in another state or country before filing of such action; but if an action to enforce personal obligations arising under ORS Chapter 106 or 107 is not commenced within one year following the date which the party who left the state acquired a residence or domicile in another state or country, no jurisdiction is conferred by this section (subsection) in any such action.

(3) In a filiation proceeding under ORS Chapter 109, when the act or acts of sexual intercourse which resulted in the birth of the child are alleged to have taken place in this state and the child resides in this state.

K. Personal representative. In any action against a personal representative to enforce a claim against the deceased person represented where one or more of the grounds stated in sections (subsections) B. to J. would have furnished a basis for jurisdiction over the deceased had he been living and it is immaterial under this subsection whether the action had been commenced during the lifetime of the deceased.

L. Joinder of claims in the same action. In any action brought in reliance upon jurisdictional grounds stated in sections (subsections) C. to J., there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under this section for personal jurisdiction over the defendant as to the claim or cause to be joined.

RULE 4 B.

JURISDICTION IN REM

A court of this state having jurisdiction of the subject matter may exercise jurisdiction in rem on the grounds stated in this section. A judgment in rem may affect the interests of a defendant in the status, property or thing acted upon only if a summons has been served upon the defendant pursuant to Rule 4 (Oregon Rule of Civil Procedure 4). Jurisdiction in rem may be invoked in any of the following cases:

A. When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This subsection shall apply when any such defendant is unknown.

B. When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real estate within this state.

C. When the action is to declare property within this state a public nuisance.

RULE 4 C.

PERSONAL JURISDICTION, WITHOUT SERVICE OF SUMMONS

A court of this state having jurisdiction of the subject matter may, without a summons having been served upon a person, exercise jurisdiction in an action over a person with respect to any counterclaim asserted against that person in an action which the person has commenced in this state and also over any person who appears in the action and waives the defense of lack of jurisdiction over his or her person as provided in Rule J. 7 (Oregon Rule of Civil Procedure J. 7). Where jurisdiction is exercised under Rule 4 B., a defendant may appear in an action and defend on the merits, without being subject to personal jurisdiction by virtue of this Rule (section).

RULE 4 D.

STAY OF PROCEEDING TO PERMIT TRIAL IN A FOREIGN FORUM

A. Stay on initiative of parties. If a court of this state, on motion of any party, finds that trial of an action pending before it should as a matter of substantial justice be tried in a forum outside this state, the court may in conformity with section (subsection) C. enter an order to stay further proceedings on the action in this state. A moving party under this subsection must stipulate consent to suit in the alternative forum and waive right to rely on statutes of limitation which may have run in the alternative forum after commencement of the action in this state. A stay order may be granted although the action could not have been commenced in the alternative forum without consent of the moving party.

B. Time for filing and hearing motion. The motion to stay the proceedings shall be filed prior to or with the answer unless the motion is to stay proceedings on a cause raised by counterclaim, in which instance the motion shall be filed prior to or with the reply. The issues raised by this motion shall be tried to the court in advance of any issue going to the merits of the action and shall be joined with objections, if any, raised by answer or motion pursuant to Rule J. 1 (Oregon Rule of Civil Procedure J. 1). The court shall find separately on each issue so tried and these findings shall be set forth in a single order which is appealable.

C. Scope of trial court discretion on motion to stay proceedings. The decision on any timely motion to stay proceedings pursuant to section (subsection) A. is within the discretion of the court in which the action is pending. In the exercise of that discretion the court may appropriately consider such factors as:

(1) Amenability to personal jurisdiction in this state and in any alternative forum of the parties to the action;

(2) Convenience to the parties and witnesses of trial in this state and in any alternative forum;

(3) Differences in conflict of law rules applicable in this state and in any alternative forum; or

(4) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

D. Subsequent modification of order to stay proceedings. Jurisdiction of the court continues over the parties to a proeeding in which a stay has been ordered under this section until a period of 5 years has elapsed since the last order affecting the stay was entered in the court. At any time during which jurisdiction of the court continues over the parties to the proceedings, the court may, on motion and notice to the parties, subsequently modify the stay order and take any further action in the proceeding as the interests of justice require. When jurisdiction of the court over the parties and the proceeding terminates by reason of the lapse of 5 years following the last court order in the action, the clerk of the court in which the stay was granted shall without notice enter an order dismissing the action.

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COMMENTS TO RULES 4 A. THROUGH 4 D.

The present Oregon definition of amenability to jurisdiction is primarily found in ORS 14.010 to 14.035, but some bases of amenability are scattered throughout the summons provisions of Chapter 15.

The suggested rules are drawn primarily from the Wisconsin statutes. The Wisconsin statutes are among the clearest and most carefully drafted in the country. They draw together all provisions relating to amenability to personal jurisdiction. I would call them an example of third generation long arm statutes. The original long arm statute came from Illinois and was in form close to the existing ORS 14.035. It added jurisdictional bases to existing jurisdictional process statutes. The second generation long arms are presently in force in most of the states. They generally follow the pattern of being an addition to existing jurisdiction statutes, but amplify the grounds for exercising jurisdiction, i.e., covering contracts and tortious activity outside the state which causes injury in the state. See Uniform Laws Annotated, Interstate Procedure Act, § 103, N.Y. CPLR, § 302, Ala. Rule 4 - 2.

One type of third generation long arm statute is the California approach which merely says that the courts have jurisdiction to the extent Constitutionally permissible. The trouble with this approach is that it incorporates the vague Constitutional standard and provides no guidance to the plaintiff.

The Wisconsin statute goes in the opposite direction by specifically describing a number of situations that would fit within a Constitutional standard. The greatest virtue of the Wisconsin statute, in addition to the breadth of activities covered, is that it generally describes activities in fairly specific language, rather than focusing on legal conclusions, such as, committing a tort, contracting, or transacting business. The Oregon court has had substantial difficulty with the Oregon long arm statute because frequently the same conduct is alleged to be tortious and a breach of contract, and different tests have been developed for different sections of the existing long arm statute. In addition, most non-tortious conduct somehow must be fit into the abstraction of "transacting business." Also, the Wisconsin approach integrates all bases for jurisdiction into one rule, which is developed separately from provisions relating to manner of service of summons. Therefore, in general, the Wisconsin statute best conforms to the committee's decision to expand long arm jurisdiction as far as possible, while maintaining a fair amount of predictability and guidance for attorneys.

Rule 4 A.

This is the crucial section of the proposed statute or rules. It brings together in one section all circumstances that will subject a corporate or individual defendant to personal jurisdiction. To some extent, the long arm aspects of the rule overlap, but the intent is to cover all possible Constitutional contacts. The bases described incorporate all aspects of the existing Oregon long arm statute and would cover all the cases that have arisen under that statute.

Rule 4 A.A.

These are the traditional territorial bases of jurisdiction. Subsection (1)

is presently covered by ORS 14.010 if a defendant is "found" in the state. Subsection (2) is presently covered by ORS 14.010 under the concept of residence. Residence in this statute has been defined as domicile. See Fox v. Lafley, 212 Or. 80 (1957). This jurisdiction is usually effectuated by substituted service, but domicile and "dwelling house and usual place of abode" do not mean the same thing. A person has only one domicile, and the mental element of intent to remain permanent is required. Thus, substituted service can be used if a person is domiciled in the state or if there is some other basis for jurisdiction, but maintaining a dwelling house or usual place of abode is not in and of itself a basis for jurisdiction, it is merely a manner of serving process.

Subsection (3) uses the language of ORS 14.020 rather than "domestic corporation", which is used in the Wisconsin statute.

Subsection (4) is intended to describe the situation now covered in a number of general statutes under the phrase, "transacting business." E.g., ORS 73.434, Foreign and Alien Insurers, 74.310, Foreign Industrial Loan Companies, and 62.155, Foreign Corporations. This does not refer to causes of action arising out of the transaction of business in this state, but transacting business in the state to the extent that one is subject to suit for any claim that may be brought against a defendant, irrespective of any connection between the claim and the state. See Perkins v. Benguet Consolidated Mining Corp., 342 U.S. 437 (1952). See Winslow Lumber Company v. Hines, 125 Or. 63 (1928). Out-of-state business entities will still be required to appoint a registered agent in this state by the various separate statutes if they are transacting business, but if they do not appoint an agent, then the question of whether they are liable to service of summons is governed under this subsection. The language used is the generally accepted definition of transacting business.

Subsection (5) does not appear in the Wisconsin statutes but covers the consent by appointment of agent which is presently in ORS 14.020 and 15.080 (6). This would also cover any other manifestation of consent, such as a contractual agreement, to be subject to jurisdiction. See National Equipment Rental, Ltd. vs. Szukhert, 375 U.S. 311 (1964).

This section covers the possibility that separate statutory bases of jurisdiction will continue to exist or be enacted by the Legislature. There is also nothing specific in this Rule dealing with child custody cases. This is such a specialized area that it is better left to statutory or case law development. Amenability and forms of process are covered in the Uniform Child Custody Jurisdiction Act, ORS 109.700, et seq.

Section C. is the first of the minimum contact sections of the statute. This and the remaining bases for jurisiction specified are limited to cases "arising out of" the contact specified. This basically covers any tortious activity in the state but is much broader in the sense that it would cover any action in the state giving rise to liability, whether it be warranty, contract, etc. It would incorporate that aspect of transacting busines which has been applied in the warranty cases and all of 14.035 (b) relating to tortious activity. Generally note that except for Rule J. (1) and (3), there is no requirement that plaintiff be a resident. This is consistent with Meyers vs. Bickwedel, 259 Or. 457 (1971).

Section D. solves the problem of tortious or other activity outside the state causing injury within the state. The Oregon court has interpreted the

commission of a tort language to include this situation and the Rule would be consistent with State ex rel Western Seed Production Corporation v. Campbell, 250 Or. 262 (1968); State ex rel Advance Dictating v. Dale, 269 Or. 242 (1974); BRS, Inc. v. Dickerson, 278 Or. 269 (1977) and State ex rel Academy Press v. Beckett, _____ Or. _____ (June 27, 1977).

It is possible that merely causing injury in the state might be in and of itself sufficient contact, but the Oregon court and most state courts have not gone this far. Hanson v. Denkala, 357 U.S. 235 (1958). Some element of foreseeability or intentional involvement with a state is necessary and arguably, merely manufacturing a product that somehow finds its way into Oregon would not have the necessary foreseeability element. The most recent Supreme Court case on jurisdiction, Kukolo v. Superior Court of California, 46 Law Week 4421 (1971) confirms this by holding that a husband who merely consented to having a child go to California did not intentionally become involved with California to the extent of being subject to personal jurisdiction for a support award. Therefore, subsections (1) and (2) are necessary.

Section E. generally covers the situation described in other states as "entry into a contract to be performed in this state" or "contracting to supply goods and services in the state." This addition is quite important because most of the long arm cases that have come before the Oregon Supreme Court have involved attempts to cram contract situations into a phrase, "transacting business." The language here again avoids any specific reference to the ultimate question of whether there was a contract but focuses only on the acts involved. The section focuses separately on promising to act within the state or somehow related to the state and acting within the state or somehow related to the state, and differentiates between services and goods. Subsection (1) would cover the recent case of State ex rel Academy Press v. Beckett, supra, where the plaintiff contracted with an Illinois book publisher to publish a book. Subsection (4) would cover State ex rel White Lumber Sales, Inc. v. Sulmonetti, _____ Or. _____ (1968). Subsection (5) would cover Neptune Microfloc vs. First National Utility, 261 Or. 494 (1972).

The references to guarantees in subsections (1) to (4) do not appear in the Wisconsin statute. Two Oregon cases have dealt with guarantee agreements involving officers of business entities purchasing or selling goods in Oregon. BRS v. Dickerson, supra, and State ex rel Ware v. Hieber, 267 Or. 124 (1973).

Section F. is one of the most troublesome in the statute. The Oregon statute reads as follows:

> (6) **Local property.** In any action which arises out of:
>
> (a) A promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this state; or
>
> (b) A claim to recover any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this state either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

(c) A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this state at the time the defendant acquired possession or control over it.

(7) **Deficiency judgment on local foreclosure or resale.** In any action to recover a deficiency judgment upon a mortgage note or conditional sales contract or other security agreement executed by the defendant or predecessor to whose obligation the defendant has succeeded and the deficiency is claimed either:

(a) In an action in this state to foreclose upon real property situated in this state; or

(b) Following sale of real property in this state by the plaintiff under ch. 846; or

(c) Following resale of tangible property in this state by the plaintiff under ch. 409.)

The Wisconsin language was not used for several reasons. First, although the comments to the Wisconsin statutes suggest that this was intended to cover all actions relating to use or possession of property, such as personal injury claims relating to use of property, on its face the Wisconsin statute does not do this and seems to be more limited than the general provisions of 14.035 (c). Secondly, the Wisconsin statute may run into some Constitutional problems after Shaffer v. Heitner, 97 S. Ct. 2569 (1977). The Shaffer case basically holds that simple presence of property in the state is not in and of itself a sufficient minimum contact when the subject of the action is not the status of the property. The actions covered under this section do not relate to title to the property, and under sections 6 (b) and 7 (c) of the Wisconsin statute, the only requirement is that property be in the state at the time of an action. To the extent this would apply to personal property, such property could be in the state without any foreseeability or knowing involvement by the defendant. For real property, presence would always be sufficient because any defendant involved with Oregon real property intentionally is developing a contact with the state.

The language actually used in this section maintains the general coverage of existing ORS 14.035 and extends coverage to personal property, provided the personal property was in the state at the time of ownership, use or possession giving rise to the action.

A specific reference to deficiency claims is also included to avoid any question whether these are claims arising out of use or ownership of property.

G. This is not specifically presently covered under the existing Oregon statute. It describes the situation in Shaffer vs. Heitner, where the court held that seizing stock of the officers in a quasi in rem approach did not provide jurisdiction. It seems clear, however, that knowing involvement with an Oregon corporation is sufficient contact with Oregon to provide a basis for jurisdiction in and of itself if done directly through a long arm statute, and Delaware amended its statutes immediately after the Shaffer decision to this effect.

H. This is the classical International Shoe situation but not presently specifically covered by 14.035. The Wisconsin statute limits this to taxes after July 1, 1960, but I could find no explanation of the limitation.

I. This is an expansion of ORS 14.035 (d). It is broader than the existing statute, incorporating not only a situation where the person or party is located in the state at the time of contract but also incorporating at the time of the happening of the event insured against or when the event insured against happens in the state. The Wisconsin statute refers to insuring a "person" who is a "resident" in the state. The existing statutory language referring to "person, property or risk" located in the state seems broader and was used.

J. The Wisconsin statute provides for marital status determination when either party is a resident and also personal judgments when a defendant resided six consecutive months of the last six years in the state. The language actually incorporated was from ORS 14.035 (2), which is somewhat more limited. Arguably, a broader reach for the statute would be Constitutional, but the area is somewhat specialized, and the existing policy determination in the statute was retained. See Doyle v. Doyle, 17 Or. App. 529 (1974). Section (1) does not appear explicitly in the Oregon statute but is an accepted basis for jurisdiction.

Subsection C. covers the problem presented by State ex rel Poole v. Dorrah, 271 Or. 410 (1975) and State ex rel McKenna v. Bennett, 28 Or. App. 155 (1977). In the McKenna case, the Court of Appeals held that sexual intercourse within this state is not a tort within the meaning of 14.035, and jurisdiction could not be asserted of a defendant in a filiation proceeding by using the long arm statutes. The case suggests there is no Constitutional barrier to such jurisdiction and seven other states have so held. Notice that outside the filiation proceeding, this statute does not give jurisdiction over general support claims or any other claims under Chapter 109. By passing the Uniform Reciprocal Support Act, ORS Chapter 110, the Legislature opted for this approach. Also notice that there is no specific provision for jurisdiction to determine status for anything other than the marital status. Arguably, the same status basis could be used to establish a parent-child status, but there is a basic difference between creating and severing status, and the creation of status would automatically carry inheritance and other financial obligations and is, in effect, a type of personal jurisdiction.

Section K. This section makes clear that when a personal representative is to be sued, it is the contacts of the decedent they are considering, not the contacts of the personal representative.

Section L. This is the equivalent of ORS 14.035 (4).

There was another possible section which I considered adding between existing grounds J. and K. It is not in the Wisconsin statute but comes from Rule 42 of the Alabama rules. It reads as follows:

> "Otherwise having some minimum contacts with this state and, under the circumstances, it is fair and reasonable to require the person to come to this state to defend an action. The minimum contacts referred to in this subdivision (I) shall be deemed sufficient, notwithstanding a failure to satisfy the requirement of subdivisions (A)-(H) of this subsection (2), so long as the prosecution of the action against a person in this state is not inconsistent with the Constitution of this state or the Constitution of the United States."

This would guarantee the broadest possible reach of the long arm statute. It is different than the California approach in that detailed grounds are specified in the statute. One argument for including this section is the repeated statements by the Supreme Court that it interprets the long arm statute as broadly as Constitutional due process will admit. See State ex rel Western Seed v. Campbell supra.

Rule 4 B.

This is Section 80.107 of the Wisconsin statutes. The existing Oregon statutes, ORS 14.010 and 14.020, say the court has jurisdiction when property is located within the state, but only to the extent property is seized. This provides the authority for in rem jurisdiction. The Wisconsin statute was modified to deal only with in rem and not quasi in rem because under Shaffer v. Heitner, merely seizing property is not a sufficient basis for jurisdiction without some other minimum contact. The Shaffer case, however, says that in most situations where a true in rem case is involved, i.e., involving title to the property which is located in the state, this is sufficient minimum contact. It should be noted that to a large extent, this section is now unnecessary because of Rule 4 A., referring to use and possession of property as a minimum contact, but this covers the possibility that title to personal property located in the state but not arising out of use or ownership in the state is involved in an action or somehow title to real property in the state does not fit within Rule 4 A. Oregon never had a true quasi in rem statute. The existing provisions of ORS 29.110, relating to ability to attach to secure judgment, are unchanged. It is possible that someone may wish to use attachment and argue this as at least one element of minimum contacts, but again, there is no specific quasi in rem jurisdiction provided.

Rule 4 C.

This is Section 80.107 of the Wisconsin statute. This covers personal jurisdiction by consent in the sense of utilizing the courts of this state. The existing statutes, ORS 14.010 and 14.020, refer to jurisdiction when a defendant "appears." Since Rule K. eliminates a general or special appearance and governs waiver of personal jurisdiction, the consent jurisdiction here is cross-referenced to that rule. The Wisconsin statute has a last sentence which is somewhat difficult to interpret, dealing with the question of limited appearance. The existing last sentence was drafted to provide a limited appearance in the sense that contesting on the merits in an in rem case, i.e., protecting interest in property that is the subject of the suit, does not generally subject the defendant to personal jurisdiction. This is the approach recommended by the re-statement of judgments. The Oregon rule is unclear. In Belknap v. Charlton, 25 Or. 41 (1873), the court said if a defendant appeared and contested the validity of attachment, this was not a submission to jurisdiction, but contesting the merits was. This was followed in Nelson v. Smith, 157 Or. 292 (1937), which was a quasi-in-rem case. Apparently, in neither case was any judgment given beyond the property attached, and the court was distinguishing between general and special appearance, not between general and limited jurisdiction.

Rule 4 D.

This is an important component of the total approach being recommended for jurisdiction and process. By greatly expanding the basis for personal jurisdiction, the danger that defendants would be subject to trial in a completely inconvenient forum is increased at the same time. Although convenience is an

element of the due process evaluation, in practice it is a minor factor, with primary emphasis upon the quantity and quality of contacts with the forum by the defendant. If such contacts exist, jurisdiction exists whether or not Oregon is a convenient place for trial. Fairness in the jurisdictional sense focuses on fairness to subject a defendant to jurisdiction, not fairness in the sense of the best place to try the case. Fairness in the latter sense can only be applied through a forum non conveniens doctrine or a venue transfer statute, such as USC 1404. The need for such a rule is explained in the following language of the concurring opinion of Justice Linde in State ex rel Academy Press v. Beckett, supra:

> "* * * But when 'fairness' is used to describe the conditions under which the forum state may constitutionally take jurisdiction of a claim against a defendant outside the state, those conditions will necessarily be stated as factors or patterns that make long-arm jurisdiction "fair" and therefore constitutional as a general rule for all similar cases, irrespective of the relative positions of the litigants in the particular case. There may be far less unfairness in asking a defendant in Vancouver, Washington, with full notice of the proceedings, to litigate a case in Multnomah County, Oregon, than to demand this of a defendant in Fort Lauderdale, Florida, as in White Lbr., but territorial notions of a prior 'entry into' or 'presence in' the jurisdiction may allow one and not the other."
>
> * * * * *
>
> "* * *As I have suggested above, however, fairness to particular litigants is often an ad hoc rather than a categorical determination, and one that cannot be properly decided as a matter of Oregon law so long as we treat it as one that must always be litigated as an issue of federal constitutional law. To permit such ad hoc determinations of fairness requires a nonconstitutional element in ORS 14.035 corresponding to the doctrine of forum non conveniens. See Scoles, Oregon Conflicts: Three Cases, 49 Or. L.Rev. 273, 278-280 (1970). It should be possible for an Oregon court to dismiss a case after allowing plaintiff time to obtain jurisdiction in a more appropriate forum (perhaps involving a stipulation by defendant as to service of process, waiver of the statute of limitations, or other safeguards for plaintiff), irrespective of whether the Oregon court believes that its own exercise of jurisdiction would be unconstitutional.
>
> In Illinois, the source of our long-arm statute and the doctrine of its expansive scope, see Western Seed, 250 Or. at 270-271, the state supreme court in fact approves such a dismissal of cases without a conclusion whether the Constitution would permit the state to assert jurisdiction. See, e.g., Adkins v. Chicago, R. I. & P. R.R., 54 Ill. 2d 511, 301 N.E. 2d. 729 (1973), cert. denied, 424 U.S. 943 (1976), cf. Cotton v. Louisville & N. R.R., 14 Ill. 2d 144, 152 N.E. 2d 385 (1958). Elsewhere the procedure has been codified. These solutions, and the underlying distinction between 'fairness' as the presence of constitutional prerequisites and fairness of the choice of forum in the actual

case, are described in Morley, Forum Non Conveniens: Restraining Long-Arm Jurisdiction, 68 N.W. U. L. Rev. 24 (1973). Once it is recognized that fairness is properly a matter of Oregon law before it becomes, in a different sense, a synonym for federal constitutional limits, a procedure to assure fairness can be provided by a statute or perhaps a rule of the Council on Judicial Procedure, or possibly by further consideration of the standards implicit in ORS 14.035."

Justice Linde suggests that Oregon courts do have forum non conveniens power but, if so, it is little recognized and a rule is necessary to encourage use. This rule is Wisconsin statute, section 80.163. It is not, strictly speaking, a forum non conveniens statute but more of a transfer statute accompanied by use of stays of action. The Wisconsin approach is preferable because it is designed to work with the other Wisconsin statutes used, and it provides a procedure to be followed and criterion for the trial judge in deciding when to grant a stay. Use of a stay rather than a dismissal also is desirable to avoid any harsh consequences. Other states allow this forum non conveniens rule to be made on the court's own motion; the Wisconsin statute is limited to motion of the parties; if both sides want to litigate in Oregon, it is not then truly an inconvenient forum.

PERSONAL JURISDICTION AND SERVICE OF SUMMONS AFTER SHAFFER v. HEITNER

Doctor: What grows out of the barrel of a gun?
Student: Why, power, as our Chairman Mao has taught us.
Doctor: And what grows out of service of summons?
Student: Jurisdiction over the person, naturally!
Doctor: And is it important that the summons be served in strict compliance with the law?
Student: Of course, for to subject a person to jurisdiction is no light matter.
Doctor: And besides, the summons gives the defendant notice he is being sued and that is due him under the constitution.[2]

Doctor and Student are dead wrong on both points. There is no necessary relationship between jurisdiction and service and the tradition of requiring meticulous observance of service formalities has obstructed decision on the merits without discernibly increasing the protection of defendant's legitimate interests.[3] These are not new ideas[4] although perhaps considered somewhat academic heretofore. A recent decision of the United States Supreme Court suggests that they may soon have have substantial practical impact. The purpose of this article is to explain the origin and lack of modern justification for the views of the doctor and student, especially in the wake of the case referred to (Shaffer v. Heitner[5]), and to outline a revision of the pertinent Oregon statutes conforming them to the concept of jurisdiction implicit in that case.

Shaffer v. Heitner was an action in a Delaware state court against a non-resident. Quasi in rem jurisdiction was asserted on the

basis of sequestration of defendnat's shares in a Delaware corporation which, by statute, had their situs in Delaware. The state courts allowed the action to proceed, over defendant's motion to quash, but the Supreme Court reversed on 14th Amendment due-process grounds. Quasi in rem jurisdiction has been recognized at least since Pennoyer v. Neff[6] on the theory that the court was exercising jurisdiction only over property within the state, and therefore subject to state power, and only indirectly affecting the interests of the absent owner. Notwithstanding the ancient lineage of this doctrine the Court concluded that actions of this sort are in truth proceedings against the person and cannot be reconciled with the concept of state court jurisdiction expressed in International Shoe Co. v. Washington[7] and implicit in the widespread adoption and acceptance of long arm statutes.

> ...The overwhelming majority of commentators have also rejected *Pennoyer*'s premise that a proceeding "against" property is not a proceeding against the owners of that property. Accordingly, they urge that the "traditional notions of fair play and substantial justice" that govern a State's power to adjudicate *in personam* should also govern its power to adjudicate personal rights to property located in the State. See, *e. g.*, Hazard, *supra;* Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121 (1966); Traynor, Is This Conflict Really Necessary?, 37 Tex. L. Rev. 657 (1959); Ehrenzweig, The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens, 65 Yale L. J. 289 (1956); Developments, *supra*.
>
> Although this Court has not addressed this argument directly, we have held that property cannot be subjected to a court's judgment unless reasonable and appropriate efforts have been made to give the property owners actual notice of the action. *Schroeder* v. *City of New York*, 371 U. S. 208 (1962); *Walker* v. *City of Hutchinson*, 352 U. S. 112 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). This conclusion recognizes, contrary to *Pennoyer*, that an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court.

> . . . We are left, then, to consider the significance of the long history of jurisdiction based solely on the presence of property in a State. Although the theory that territorial power is both essential to and sufficient for jurisdiction has been undermined, we have never held that the presence of property in a State does not automatically confer jurisdiction over the owner's interest in that property." This history must be considered as supporting the proposition that jurisdiction based solely on the presence of property satisfies the demands of due process, cf. *Ownbey* v. *Morgan*, *supra*, at 111 (1921), but it is not decisive. "[T]raditional notions of fair play and substantial justice" can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage. Cf. *Sniadach* v. *Family Finance Corp.*, *supra*, at 340; *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949). The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant.
>
> We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."

> . . . The Due Process Clause
>
> "does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co.* v. *Washington*, *supra*, at 319.
>
> Delaware's assertion of jurisdiction over appellants in this case is inconsistent with that constitutional limitation on state power. The judgment of the Delaware Supreme Court must, therefore, be reversed. [8]

It is very easy to read this opinion as saying: (1) all legal proceedings, when you get right down to it, are in personam--whatever the subject matter of the action the purpose is to affect some person's rights; (2) a state court may assert jurisdiction over a person's rights only if he has sufficient contacts with that state to make it fair to compel him to litigate there[9]; and (3) more ownership of property in a state is not a sufficient contact to support jurisdiciton over a claim not connected with that property.[10]

It remains to be seen whether the various state courts will so read the opinion and abolish quasi in rem jurisdiction outright. I have encountered some skepticism among my colleagues on this score. Two Justices (Powell and Stevens) concurred in the result, on the ground that the Delaware situs of defendant's stock was a transparent fiction, but reserved judgment about the case where land or other tangible property was in the forum state. However, four (Burger, Blackmun, White and Stewart) joined in Justice Marshall's opinion. Justice Brennan agreed with Marshall's conceptual rationale but dissented from the result on the ground that the defendant in this case (a director of a Delaware corporation) had sufficient contacts with the state to warrant subjecting him to jurisdiction in this action--a shareholders derivative suit.[11] Justice Rehnquist did not participate in the case. Apart from the concurrence of six members of the Supreme Court, Justice Marshall's view accords with the great weight of scholarly opinion.[12] And apart from this, once one absorbs the shock of the overruling of a century old landmark and the jettisoning of a venerable institution, the opinion makes excellent sense. The distinction between in rem and in personam has always been hard to explain or understand--a good sign that it may not really exist. As for quasi in rem jurisdiction, the initial reaction of students has always been disbelief, and the second, that it was a mean trick.

What are the implications of Shaffer respecting personal jurisdiction and service of summons? First of all, if a defendant's ownership of

property in a state is not, as a matter of due process, a sufficient contact to subject him to the jurisdiction of its courts it is doubtful that his mere presence should be. That is, an Iowan should be able to fly over Oregon enroute to Hawaii,[13] or visit friends in Roseburg for a few days, without subjecting himself to suit in an Oregon court on a claim arising out of an accident in Cleveland, Ohio. If anything, transient presence is less an invoking of the protection of the laws of a state than is acquiring property therein. Thus Shaffer heralds the demise of ideas even more familiar and deeply entrenched than the concept of quasi in rem jurisdiction--the idea that a state may exercise jurisdiction over any defendant "found" in the state[14] and the closely related idea that service of summons inside the state is sufficient to establish jurisdiction, this being the standard method of "finding" a defendant.

Furthermore, if it is true that the fact of service is not sufficient to confer jurisdiction, and if it is true (as it undoubtedly is, in view of long arm statutes) that service is not necessary to jurisdiction, one may well ask if service of summons has anything to do with jurisdiction at all. And, if it doesn't, is there any justification for requiring strict compliance with the formalities of issuing and serving summons?

Such a challenge to what have long been regarded as self-evident first principles requires further explanation.

ORIGIN OF THE IDEA THAT SERVICE CREATES JURISDICTION AND THE REQUIREMENT OF STRICT COMPLIANCE

Long ago, in England, a civil action was commenced by actually arresting the defendant. The theory was that the court could not act unless

the defendant was literally and physically subject to the power of the court.[15] In time the physical seizure of the defendant gave way to service of summons and probably, at first, the service was regarded as a symbolic arrest--a demonstration that the officer could arrest the defendant, that the defendant was subject to the power of the state. If service is so regarded it makes sense to require that service be made by personal, "in hand", delivery, that it be made by an officer, and that it be at a time and place where the officer might have lawfully arrested the person. Also the fact that a symbol was replacing an actual arrest may explain the insistence on strict observation of prescribed formalities.[16] But, as explained in the preceding section, it is not possible to argue, today, that the jurisdiction of an American state court is a product of the power of the state. Accordingly there is no longer any justification for the idea that service of summons creates jurisdiction because it is a symbolic, or substitute for, arrest. Of course there is, at present, an Oregon statute expressly relating the acquisition of jurisdiction to service of summons.[17] My point is that this statute is not a matter of constitutional necessity or inevitable natural law[18] but rather reflects an outmoded concept of the source of state court jurisdiction.

I think there is another reason for the inveterate association of jurisdiction with service of summons.

From Pennoyer v. Neff through International Shoe and Hanson v. Denckla[19] to Shaffer v. Heitner the Supreme Court has consistently regarded jurisdiction as an aspect of due process. If a court presumes

to adjudicate a person's rights without an adequate basis for exercising jurisdiction over him (i.e. in the absence of minimum contacts) it is a denial of due process. Call this Due Process I. The Supreme Court has also consistently maintained that due process requires that a person be given fair notice of the proceedings against him. Mullane v. Central Hanover Bank and Trust [20] is the most frequently cited case but the idea is much older. Call this Due Process II. Both I and II are required for a valid judgment but it is important to recognize that they are not the same and have no necessary relationships. [21] Fair notice doesn't supply minimum contacts and minimum contacts don't give notice.

Nowadays the main function of service of summons is seen to be the giving of notice. Then, because notice is a requirement of due process (Due Process II), and because jurisdiction is also required by due process (Due Process I), there may be an unconscious tendency to blur the distinction and assume that summons is necessary to create jurisdiction. [22] And perhaps there is a further assumption that as service has something to do with due process, and as due process is very important, therefore service must be strictly regulated--like police interrogation. Two errors are involved here. First, as explained above jurisdiction and notice are distinct and unrelated aspects of due process. Second, while fair notice is of the highest importance, it is not particularly important how notice is given; due process does not require service of summons. [23]

THE MISCHIEF RESULTING FROM THE ASSOCIATION OF JURISDICTION WITH SERVICE OF SUMMONS

The ideas that service is necessary and sufficient to create jurisdiction, and that service formalities must be strictly complied with, are not doctrinal impurities. They produce the following practical injustice and diseconomy in the administration of justice.

1. In Grace v. MacArthur[24] a defendant resident of Tennessee was required to defend an action in Arkansas as a result of summons served on him while in the air over Pine Bluff, Arkansas on a non-stop flight from Memphis to Dallas. The opinion considers at length the question of whether, in view of federal enactments regulating air commerce, the air over Pine Bluff is part of Arkansas, and how high; apparently no question was even raised as to justice of basing jurisdiction on such a fleeting contact between the defendant and the state. Probably there are not a great many gross instances of jurisdictions based solely on service during transient presence in the state.[25] One cannot get very indignant on behalf of ~~about~~ a resident of Vancouver served while across the river shopping in Portland. Nonetheless as long as the rule endures that service within the state creates jurisdiction there is a possibility of serious injustice. It was suggested earlier in this article that Shaffer v. Heitner presages judicial abrogation of the rule.

2. More common and more pernicious than the transient presence rule are cases like Ter Har v. Backus.[26] Plaintiff was injured in an

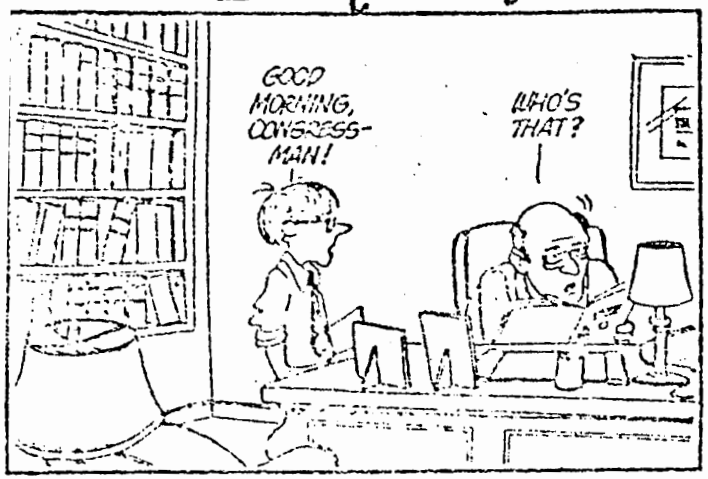
accident in Oregon. He was told that the defendant, an Oregonian, was presently in the army in Maryland. Service was attempted under the non-resident motorist statute. The defendant appeared and moved to quash service. He succeeded, the court finding that the plaintiff had been too quick to accept the apparently correct information about the defendant's whereabouts. More precisely, the plaintiff's affidavit failed to explain in sufficient detail why he had been justified in concluding that defendant was not in Oregon--it recited that one G. R. Backus had provided the information but failed to add that G. R. was a relative of the defendant.

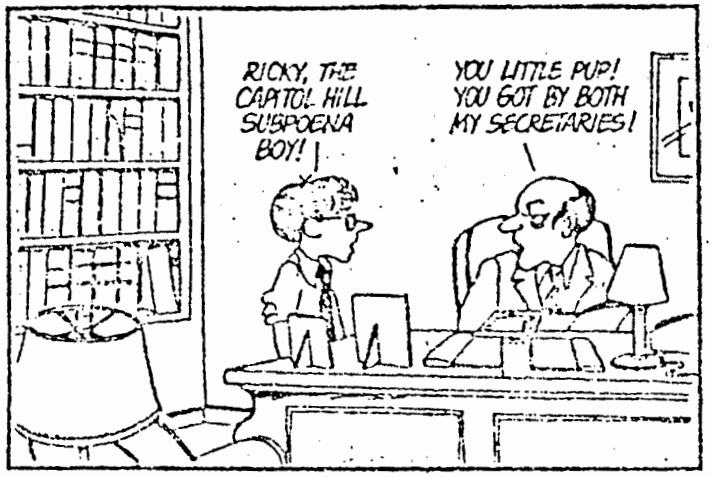
In Moser v. Greyhound Lines, Inc.[27] plaintiff's lawyer mailed the complaint to Salem and the summons to Portland where it was promptly served on defendant's registered agent. Unfortunately the mail was delivered earlier in Portland so that the summons was "issued" before the complaint was filed[28] and therefore was a legal nullity. The court was able to save the day for the plaintiff only because a second, valid, summons had been served a few weeks later and the defective service was held to be an "attempt to commence" the action within the period of the statute of limitations.[29]

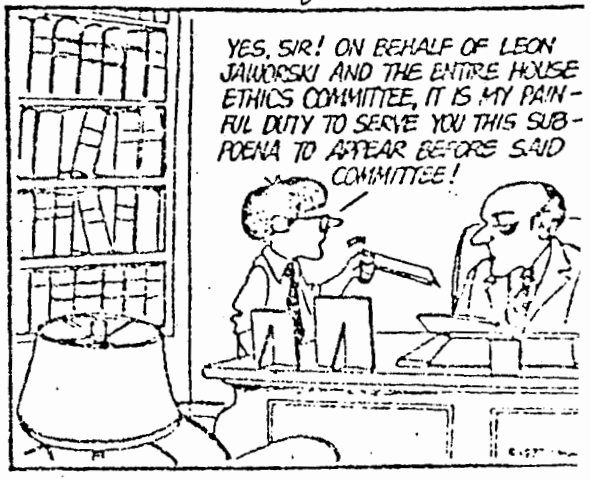
Observe that in both these cases the defendants were unquestionably properly suable in an Oregon court (ample contacts) and had timely actual knowledge that they were being sued, yet jurisdiction was denied in one and seriously questioned in the other because of errors in the service of summons that had no possible effect on defendant's substantive

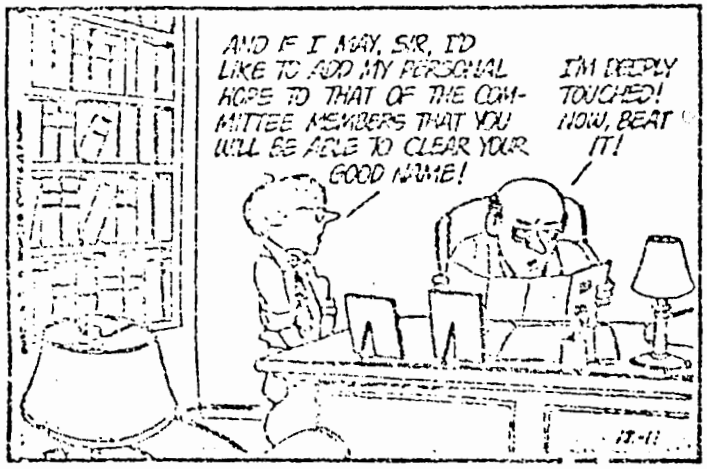
Doonesbury

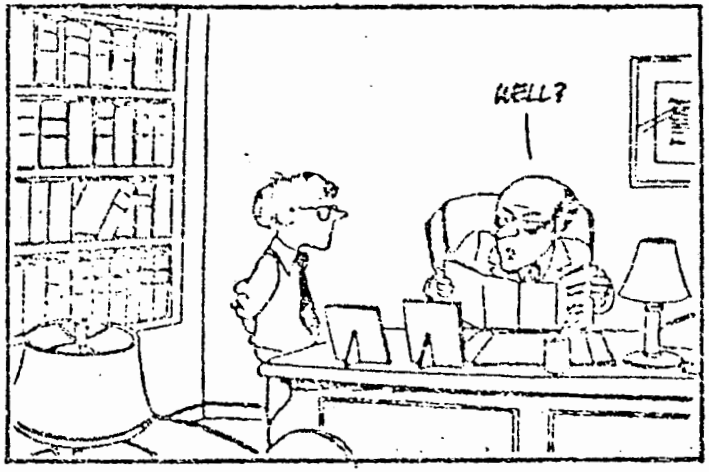
by GB Trudeau

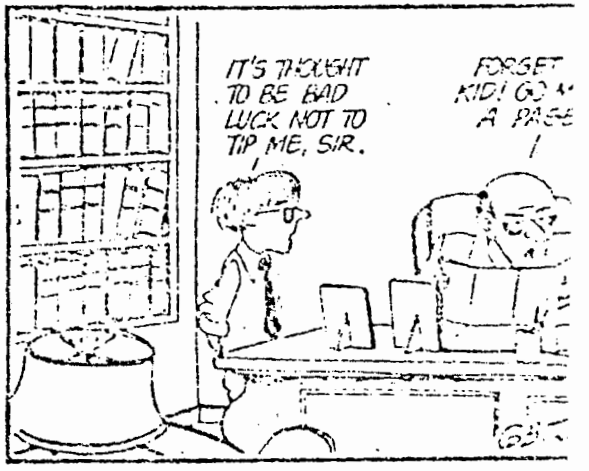












rights or his ability to defend the action.[30]

3. American courts decline to exercise jurisdiction over defendants who have been served after being tricked or coerced into entering the state.[31] A related rule immunizes persons from service while they are in the state in connection with anothers action.[32] These rules are desirable palliatives to the transient persence doctrine but, like many rules, they occasionally generate close cases requiring time and money and judicial energies. None of this would be necessary if the place of service was recognized as being irrelevant to the issue of jurisdiction. If there are minimum contacts the court should have jurisdiction wherever defendant is served so no need to entice him into the state. If there are no minimum contacts the court should not have jurisdiction, so nothing is gained by enticing him in.

4. The dogma that jurisdiction is dependent on service of summons within the state is reflected in statutes requiring the appointment of resident agents for service, particularly in ones like the non-resident motorist statute that, without the assent of the party, appoint a state official as agent for certain kinds of out-of-state defendants.[33] When inclusion in the class of defendants affected by such statutes is dependent on facts amounting to minimum contacts with the state, as is typically the case, such statutes do not offend due process I. However, it is plain that service on a state official does little to give the actual defendant notice of the litigation and so, to satisfy due process II, these statutes always require that a copy of the summons and complaint be mailed to the

defendant. The question immediately arises: what is the point of the service on the state official? The expense of this service, and the additional paper work required in the state office are relatively minor, but real injustice can result from the requirement that the ritual service of the official be flawlessly executed. In Grabner v. Willy's Motors, Inc.[34] plaintiff's action against a non-resident corporation doing business in Oregon failed because the original summons had been mailed to the Corporation Commissioner rather than handed to him personally. As in Ter Har, it counted for nothing that the defendant was unquestionably fairly suable in Oregon and had actual knowledge that the complaint had been filed. To make matters worse, because service on the state official is a form of "substituted" service, this essentially pointless proceeding will be examined even more strictly than service on the actual defendant.[34]

5. Occasionally a defendant who is plainly subject to suit in the courts of the state (because he is a resident or there are other sufficient minimum contacts), and who is well-aware that a complaint has been filed, may attempt to defeat the plaintiff by artful dodging of the process server. Such a "defense" is possible only because the requirement of a ritual tagging has been added, for no functional reason, to the due process requirements of an adequate basis for exercising jurisdiction and fair notice. Even if we assume that most such defendants are eventually served, the plaintiff may be put to substantial expense. Moreover, the kind of hide and seek game recounted in the margin[36] and satirized in the Doonesbury episode breed disrespect for the law.

Nowhere is it written that a court must allow itself to be made a fool of.

THE DIRECTION IN WHICH THE LAW SHOULD MOVE

It follows from the foregoing that, in the opinion of the present author, the law respecting personal jurisdiction should be like this:

I. A defendant is subject to the jurisdiction of an Oregon court whenever, but only when, he has had sufficient contacts with the state to satisfy the requirements of due process.[37] This would include the cases mentioned in ORS 14.010 (voluntary appearance and residence, but not merely being "found" in the state) and those enumerated in 14.035, the long arm statute.

II. As a prerequisite to the valid exercise of jurisdiction it must appear that the defendant had fair notice of the proceedings. This requirement is satisfied by showing:

A. that the defendant had actual knowledge of the proceedings; or

B. that the plaintiff made a good faith, reasonable-under-the-circumstances, effort to communicate actual knowledge to him.[38] And, service of summons in substantial compliance with the relevant statutes[39] is prima facie evidence that the defendant had knowledge or that the plaintiff made the requisite effort.

Practice under the outlined regime would not differ greatly from what now prevails. Careful plaintiffs' lawyers would continue to prepare and serve summons in compliance with the statutes in order to arm themselves with strong evidence of fair notice. The principal changes would be:

1. There could be no more motions to quash service based on defects in the method of giving notice. Defendants could still appear specially and argue the minimum contacts issue but any objection that fair notice had not been given would be precluded by the appearance itself.

2. Collateral attacks on, and motions to vacate, default judgments on the ground that the defendant had not been given fair notice would still be possible but the issue would be "did the defendant have actual knowledge?" or "did the plaintiff make a good faith, reasonable effort?" rather than "does it appear from the record that the service statutes were exactly complied with?" [40]

   It would be possible, for example, for the plaintiff in a case like Ter Har v. Backus to ask the defendant, "Didn't you get my letter?" and to show that the mysterious G.R. Backus was the defendant's father, even though this had not been recited in the affidavit. It would also be possible on the facts described in the "man on ledge" account in note 36 (except involving a summons rather than a subpoena) to rule that the agile bureacrat had actual knowledge of the proceedings and was therefor subject to the jurisdiction of the court even though the paper was not put in his hands. [41]

   While it is true that concentration on exact performance of the ritual of service has usually led to denying plaintiffs an opportunity to litigate the merits it should not be assumed that the proposed rule would invariably favor plaintiffs. Compliance with service statutes is to become merely prima facie evidence that fair notice had been given and conceivably a case might arise in which the court would find that defendant had no actual knowledge and that plaintiff, although he had complied with the statutes, had not made a good faith effort to communicate. [42] In fact the Oregon court has already taken an approach closely resembling that suggested here. In Thoenes v. Tatro [43] the summons was delivered to defendant's mother at his residence in Portland. This was held insufficient because service at his college dormitory in Colorado would have been more likely to actually reach him.

3. A statute of limitations is often the factor motivating a defendant's efforts to obtain a ruling that jurisdiction was not obtained over him. In keeping with the spirit of the reform advocated herein the statute should have the following influence:

   a. If defendant appears after default but before the limitation period has expired, claims that he has just learned of the action, and tenders a credible

defense the court should vacate the default judgment if there is any reasonable doubt that the defendant had notice.[44]

b. If the defendant first appears after the limitation period has expired he should not be given the benefit of a reasonable doubt rule, but the burden should be on the plaintiff to prove by a preponderance of the evidence that defendant had fair notice before his default. As a special case within situation b), if it appears that defendant did not have notice before his default but learned of the default judgment before the limitation period expired, and this delayed his motion to vacate until after the period expired, he might properly be stopped to claim the benefit of the statute.[45]

The would-be law reformer must always heed John Frank's admonition to be wary of changes that increase the courts' adjudicative burdens by adding or complicating "decision points."[46] It may be charged that the changes suggested offend in this direction by requiring the resolution of such an elusive fact issue as what knowledge the defendant had at some past time whereas at present disputed jurisdiction cases can be resolved more or less mechanically by comparing the summons and return with the statutorily prescribed ritual. To this charge I would answer that the proposed test (fair notice) is probably no easier, and sometimes will be harder, to apply than the present test (compliance with statute) but "at least it puts the real question."[47] Further, any additional judicial load may be more than offset by the fact it will no longer be necessary to spend any time on motions to quash raising purely formal objections. More important we should not yield too much to judicial economy; speedy injustice is scarcely a defensible goal.[48]

It may also be objected that judges are fallible; a default judgment may sometimes be entered and upheld against a defendant who is erroneously found to have had actual knowledge of the proceedings. Of course this is possible but so, under the present regime, may a judge erroneously resolve an issue of fact about the truth of a process server's return.

MAKING IT HAPPEN

If reform along the lines suggested above is considered desirable, how is it to be brought about? Legislation is an obvious avenue, but may not be necessary. This concluding section considers the possibilities of accomplishing the change by judicial decision or by rules promulgated by the new Council on Court Procedures.

> ORS 15.030 provides from the time of the service of the summons, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction...

Presumably this requires some service of summons and so would bar judicial adoption of the proposal in toto. However, cases in which there has been nothing identifiable as service and plaintiff relies solely on defendants knowledge of the proceedings acquired from other sources will probably always be rare. The more important and far more frequently applicable reform advocated herein is abandonment of the rule that the summons and service must be in flawless accord with the statutory prescription. This is a wholly judicially created rule and therefore subject to judicial change.

The sections in ORS chapter 15 requiring service and prescribing its form and manner contain no more mandatory language than does ORS 16.210, the section requiring the complaint to state the facts constituting the cause of action. Indeed, the provision in section 16.330 that a failure to state a cause of action may be objected to at any time, whereas lack of jurisdiction over the defendant is preeminently waivable, [49] suggests that the legislature regarded compliance with 16.210 as the more important requirement. Yet the Oregon court has not felt compelled to exact literal compliance with 16.210 or to apply 16.330 relentlessly. Instead the court has looked to the underlying purpose of these statutes--to assure that defendants are given fair notice of what will be asserted at the trial--and has been willing to tolerate fairly serious omissions from the complaint when satisfied that there has been no surprise. [50]

Similarly, and in a context quite close to the service statutes, ORS 12.150 provided, until 1973, that the statute of limitation did not run against the plaintiff during the period that the defendant was out of the state. Notwithstanding this perfectly clear language, the court perceived that the purpose of the statute was to avoid penalizing a plaintiff who was powerless to commence an action within the time limited and so held that the statute did run against a plaintiff who could have served an out-of-state defendant under the non-resident motorist statute. [51]

The liberal, look-to-the-purpose-of-the-statute, approach of the cases construing 16.210 and 12.150 rather than the strict, a-rule-is-a-rule, approach of the cases applying the service statutes would seem to be

required by ORS 16.660.

> The court shall, in very stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.

I do not intend to suggest than an appellate court is free to overrule old decisions whenever its members consider themselves wiser than their predecessors. Stability and predictability are important values in a legal system. However, as Cardozo aptly put it, "We may not suffer /them/ to petrify at the cost of /their/ animating principle."[52] A definitive statement of the limits of stare decisis would be a hazardous undertaking; but probably most jurists would agree that judicial emedation is appropriate when the conditions and concepts underlying a rule have changed[53] or when the application of a rule is perceived to produce demonstrably unfair results. I submit that the rule requiring strict compliance with service statutes satisfies both these conditions. As long as jurisdiction was conceived of as a product of the physical power of the state, and service of summons as a symbolic exercise of that power, it made some sense to emphasize the form and manner of service. But after International Shoe, and the long arm statutes, and now Shaffer v. Heitner it is impossible not to recognize that state power has almost nothing to do with jurisdiction (neither necessary nor sufficient) and the only function of service of summons is to give notice. If this is accepted, the Oregon court has already recognized that notice is but a means to the end of knowledge and that if the end is shown to have been achieved the means becomes unimportant.[54]

Thus much of the proposed reform could be achieved by judicial decision. However the method of reform depends on the happen stance of the cases that come before the court. Also, in the present context, the problem is more one of a general attitude than some specific rule and general attitudes are hard to turn around with a single opinion.[55] Under these circumstances the legislative route is definitely preferable. This could take the form of conventional legislation but the creation by the 1977 legislature of the Council on Court Procedures provides a method that will ensure less hurried and more informed considrration of such a technical matter.

> The new Council is directed to promulgate rules giverning pleading, practice and procedure in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure.[56]

Does this language authorize rules along the lines suggested herein? Specifically, is there any merit to an objection that may conceivably be raised that questions of "pleading, practice and procedure" do not arise until the court obtains jurisdiction in the case and, therefore, that matters respecting jurisdiction are outside the Council's assigned sphere? That the answer to the first of these questions is yes, such rules are authorized, and to the second, no, the objection is without merit, is strongly suggested by the following:

1. Chapter 890 of Oregon Laws 1977 (the act creating the Council) refers to the need for continuing review of "the Oregon laws relating to

civil procedure." This must refer, at the very least, to Chapters 11 - 35 of ORS which are lineal descendants of the Code of Civil Procedure enacted in 1862.[57] The present statutes respecting jurisdiction and commencement of actions appear in Chapter 14 and 15 of ORS and, with changes not to the present inquiry, are the original code sections.[58]

2. Chapter 890 resembles in purpose and form the Federal Rules Enabling Act.

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts...
>
> Such rules shall not abridge, enlarge or modify any substantive right...[59]

Whether certain Federal Rules were within the Courts rulemaking power has been considered in a number of Supreme Court cases. Sibbach v. Wilson, the first of these, pronounced a general definition.

> The test must be whether a rule really regulates procedure, --the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or in fraction of them.[60]

The Rules Advisory Committee and the Supreme Court have regarded rules respecting jurisdiction and service as within their bailiwick. Rule 4(d) specifies the manner of service in much the same style as ORS 15.080. In Hanna v. Plumer[61] the defendant argued that as 4(d) provided an easier method of service than the Massachusetts statute; his substantive rights were affected and therefore, in a diversity case, the federal court must apply the state rule. The Supreme Court rejected this saying that

the rule "clearly passed muster"[62] as a rule regulating procedure within the Enabling Act.

It is true that the Rules Enabling Act expressly refers to "the forms of process". But extending the territorial limits of effective service. Power to do this by rule is found in the Enabling Acts reference to practice and procedure--the identical works used by the Oregon Legislature in Chapter 890. In Mississippi Publishing Co. v. Murphree[63] the defendant residing in the Southern District of Mississippi had been served in the Northern District. This was allowed by Rule 4(f) but not by any statute. The Court said

> We think that Rule 4(f) is in harmony with the Enabling Act * * * Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. * * * The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules decision by which that court will adjudicate its rights.[64]

The 1963 amendment to Rule 4(e0 goes considerably farther than 4(f) amounting, in effect, to a federal long arm statute. The Notes of the Advisory Committee printed in the United States Code following Rule 4 are illuminating.

Provident Tradesmen's Bank & Trust Co. v. Lumbermen's Mutual Casualty Co.[65] is also worth mentioning. The 1966 amendment

to Rule 19 made significant changes in the test for identifying an indispensable party and abrogated the idea that failure to join such a party was a jurisdictional error. The Third Circuit had refused to apply the amended rule believing that it trod on substantive ground. The Supreme Court held the amendment valid. The significance of this case in the present connection is as an a fortiori argument as indispensability, like subject matter jurisdiction, has been regarded as even more of a sacred cow than jurisdiction over the person.

The argument of this article has been that Oregon law respecting the commencement of a suit or action is flawed in two ways. Jurisdiction over the defendant is regarded as flowing from the act of service and the technicalities of service have been enforced with a strictness unrelated to any concern for fairness or substantive rights. The former flaw is irreconcilable with modern concepts of jurisdiction and the latter may lead to the denial of meritorious claims.[66] Most of this is judge made law and could be corrected by court decisions. Some is based on statutes and in any event legislation is a more appropriate reform device. Rules on this subject are within the intended sphere of operations of the Council on Court Procedures.

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1. Cf. State ex rel Kalich v. Bryson, 253 Or 418, 453 P.2d 659 (1969), "It is elementary that a legally sufficient summons is essential to the acquisition of jurisdiction over the person."

2. Cf. Peterson, The Summons--A Slippery Threshold, 46 Or. L. Rev. 188, 198 (1967), "In this modern era of liberalized pleadings and procedures, with the emphasis on substance rather than form, it seems remote that the failure to dot an "i" or cross a "t" would affect the jurisdiction of a court. This may be true, but woe unto the modern-day lawyer who permits liberality in pleading to slop over into the preparation or service of his summonses. He may well find himself with a judgment which is without value, a client without humor, and a malpractice insurer without a valid defense.

3. E.g. Ter Har v. Backus, 259 Or. 478, 487 P.2d. 660 (1971), discussed in text infra at note 26; Grabner v. Willy's Motor, Inc., 282 F.2d. 644 (9th Cir. 1960), discussed in text infra at note 34.

4. Cf. Hazard, A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Fev. 241, 281; Ehrenzweig & Louisell, Jurisdiction in a Nutshell, 1, 19 (3d. ed. 1973).

5. 97 S.Ct. 2569 (1977).

6. 95 U.S. 714 (1877).

7. 326 U.S. 310 (1945).

8. 97 S.Ct. at 2581, 2584, 2587. The entire opinion, including footnotes is well worth reading.

9. This is the formulation of International Shoe, 326 U.S. at 317. Hanson v. Denckla, 357 U.S. 235, (1958) stressed, "some act by which the defendant purposefully avails itself of the privileges of conducting activities within the forum state, thus invoking the benefits and protections of its laws."

10. Distinguish suits to forclose liens, quiet title, etc. The quasi in rem judgment authorized by ORS 24.120 (1977) in aid of enforcement of a foreign judgment also apparently continues to be valid. See 97 S.Ct. at 2583.

11. Perhaps the majority of Justices did not disagree with this. Justice Marshall explained that the Delaware legislature had not provided for asserting jurisdiction on this basis and that the statute was not limited to use in actions having some connection with the requestered property. 97 S.Ct at 2585-86. However this part of the opinion also noted that Shaffer had never set foot in Delaware which casts some doubt on the matter. See extended discussion of this ambiguity in Casad, Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory, 26 Kan. L. Rev. 61, 73 - 77 (1977).

The Deleware corporation law amended to supply the lack noted by the opinion within two weeks after Shaffer came down. An Act to Amend Chapter 31, Telle 10, Deleware Code (July 7, 1977) (adding a new section 3114).

12. See the many law review articles cited in the opinion and compare Restatement Conflict of Laws § 106 with Restatement (Second)

Conflict of Laws § 59, comment a.

13. Cf. Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) discussed in text infra at note 24. See Reporters Note to Restatement (Second) Conflict of Laws § 28.

14. ORS 14.010 (1977)

15. 2 Holdsworth, A History of English Law 104-06 (4th ed. 1931).

16. I describe this to my classes as the magic wand theory of service. We start, with Pennoyer v. Neff, assuming that physical power is the source of jurisdiction. Yet when a defendant is served as he passes through the state he is plainly not really within the state's power when judgment is entered. Apparently state power is not a matter of physical reality but is produced by touching the defendant in accordance with prescribed ritual. Compare: we have learned to open a certain door by saying, "Open Seasame." Naturally it will not open if we say, "Open Ry-Krisp," or even, "Open Sesamoid." But in the real world, where a door is opened by turning the knob and pushing, we would be surprised if it made a difference whether we turned with bare hand or gloved hand or a large monkey wrench or whether we pushed with hadn or foot or shoulder. By the same token, when we recognize that a states authority to adjudicate is not a matter of physical power but of minimum contacts and fair notice shouldn't it become immaterial how the notice is given?

17. ORS 15.030 (1977).

18. See Restatement (Second) Conflict of Laws, Introductory Note to Chapter 3. Contrast with ORS 14.010 and 15.030 (reflecting the concept that jurisdiction is created by service) with the much more recent long-arm statute, 14.035 (jurisdiction created by minimum contacts, service necessary only to give notice).

19. 357 U.S. 235 (1958).

20. 339 U.S. 306 (1950). Cf. Thoenes v. Tatro, 270 Or. 775, 529 P.2d 912 (1974).

21. Thoenes v. Tatro, supra note 20 at 786, 529 P.2d at 918.

22. Like this:

    1. Due process requires jurisdiction

    2. Due process requires notice

        2a. Notice is given by service of summons

    ∴ Service of summons is essential to jurisdiction

    The same argument and example appear in Lacy, Chief Justice O'Connell's Contribution to the Law of Civil Procedure, 56 Or. L. Rev. 191, 194 (1977). I stoutly maintain the right of an author to plagiarize his own works, especially an author with a limited store of ideas.

23. Cf. Restatement (Second) Conflict of Laws, § 28, comment b; National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 315 (1964), "Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made."

24. 170 F. Supp. 442 (E.D. Ark. 1959).

25. Actually the opinion in Grace v. MacArthur suggests that the defendant had had some business dealings connected with the litigation in Arkansas. Perhaps the real criticism of that decision should be that plaintiff had to incur the considerable trouble and expense of making service in the airplane. And that judicial energy was expended on the question of the impact of federal regulations of air commerce on state sovreignty rather than on the question of the fairness of requiring this defendant to appear in this case.

26. 259 Or. 478, 487 P.2d 660 (1971). Also State ex rel Handly v. Hieber, 256 Or. 93, 471 P.2d 790 (1970).

27. 267 Or. 282, 516 P.2d 1285 (1973).

28. See ORS 15.020

29. Per ORS 12.030 (1971). This statute was repealed by the 1973 legislature and replaced by 12.020 (2).

30. Cf. Dixie Meadows Independence Mines Co. v. Kight, 150 Or. 395, 45 P.2d 909 (1935), "The trial court apparently was of the opinion that these plaintiffs had actual knowledge of the suit against them and that they should have appeared and answered. However actual knowledge of a suit against a party is not equivalent to statutory notice."

31. James & Hazard, Civil Procedure, 654-55, (2d. ed. 1977).

32. Id. 651-54.

33. E.g., so-called non-resident motorist statutes like ORS 15.190 (1977). The Deleware statute enacted after the decision in Shaffer is in this form. Contrast the concept impleat in long-arm statutes like ORS 14.035 (1977).

34. 282 F.2d 644 (9th Cir. 1960) (appeal from D. Or.).

35. Peterson, supra note 2 at 196-98. Or. L. Rev. 1973, c. 60 amended ORS 15.190 so as to dispense with any requirement of an affidavit of diligent search in cases where the defendant's return receipt shows that he got the registered letter. This gives some relief from the strict construction rule that filled the plaintiff in Ter Har and suggests legislative recognition that the object is to give notice to the defendant and not to test plaintiff's attorney's ability to negotiate an obstacle course.

36. The following item appeared in the Portland, Oregonian of September 24, 1977:

Crawls out office window

Official ~~Critical~~ reportedly takes ledge, not subpoena

The administrator of the state's Civil Rights Division apparently eluded a man who was attempting to serve him with a subpoena this week by crawling out the window of his office in the State Office Building.

Although state Bureau of Labor officials declined comment on the matter Friday, the superintendent of the office building at 1400 SW 5th Ave. said he saw Malcolm H. Cross, superintendent of the Civil Rights Division leave his second floor office by the window Monday afternoon.

"There were several people who saw him," said Jim Gleason, the

Roosevelt Robinson, a Portland lawyer who said he attempted to serve Cross with a subpoena Monday, afternoon, said he was told by Cross' secretary that Cross was on a long-distance telephone call to New York and would not be available for at least 30 minutes.

"I left and went downstairs," said Robinson. "When I returned an hour later, the secretary said he'd left for the day and wouldn't return."

Robinson said he was attempting to serve Cross for a hearing to certify a class action suit brought against the Civil Rights Division and the Bureau of Labor last year that alleges the agency uses discriminatory employment practices.

37. Cf. International Shoe, Hanson v. Denckla, Shaffer v. Heitner.

38. Cf. Mullane and Thoenes v. Tatro, supra note 20.

39. E.g., ORS ch. 15.

40. Cf. The approach of Fed. R. Civ. P. 15c to the situation where the "wrong defendant" is mistakenly sued but the right one is aware, before the statute of limitations runs, that the action is pending and should be against him.

Of course the form of the summons, or other notice, may be relevant to the issue of whether defendant was given fair notice he was being sued. Cf. Scoggin v. Schrunk, 344 F. Supp. 463 (D. Or. 1971). But it should be immaterial when defendant concedes actual knowledge, as by appearing, and should not be conclusive when the fair notice issue is in dispute. What if Mrs. Scoggin had herself been a lawyer?

41. At present a plaintiff may get an order for service by publication on proof that the defendant is hiding in order to avoid service, ORS 15.110(1)(b). The suggested change avoids the delay and expense involved in a form of service that is highly unlikely to give defendant any more notice than he has already.

42. Suppose plaintiff makes a really diligent search, obtains and complies with an order for publication, (or makes personal service on the Administration of the Motor Vehicles Division) sends a registered letter which is returned, "Moved-left no forwarding address" thus complying with 15.110 or 15.190. It also appears he saw defendant on the street in San Francisco and didn't mention the action to him.

43. 270 Or. 775, 579 P.2d 912 (1974). Cf. also Dickenson v. Babich, 213 Or. 472, 326 P.2d 446 (1958).

44. This suggests the same result as was reached in Kintigh v. Elliott, 280 Or. 265 (1977). Vendor sued to foreclose a land sale contract and got a decree by default after service by publication. Six months later moved to set aside the decree and the Supreme Court held that the affidavit if diligent search was insufficient. Taking the approach suggested in the article the decree would have been set aside, without regard to the sufficiency of the affidavit, because there was no statute of limitations problem, there was reason to doubt defendant had gotten actual notice, and, while no defense was suggested, defendant would have been given a redemption period had he appeared.

Cf. also Thoenes v. Tatro, 270 Or. 775, 529 P.2d 912 (1974). Service made on defendant's mother in Portland was quashed after a default

judgment and after the statute of limitations had run. The court observed that service on defendant at his college residence in Colorado would have been more likely to have actually reached defendant and that the record did not reveal when defendant became aware of the action. Significantly the opinion expressly reserved judgment on whether there might be an estoppel to raise the statute of limitations as a defense in subsequent proceedings and, perhaps even more significantly, I am informed that the court was advised that defendant had stipulated it would not.

And cf. ORS 15.150 (1977).

45. Cf. St. Arnold v. Star Expansion Industries, 268 Or. 640, 521 P.2d 526 (1974), and Koukal v. Coy, 219 Or. 414, 347 P.2d 602 (1959).

46. Frank, American Law: The Case for Radical Reform, 68-69, 85-110 (1969).

47. L. Hand, J. in Hutchinson v. Gilbert, 45 F.2d 139, 141 (2d Cir. 1930). Oregon courts have also, on occasion, expended a great deal of effort on the wrong question, see, e.g., Lane v. Ball, 83 Or. 405, 163 Pac. 975 (1917).

48. Compare the revision of appellate procedure by Or. Laws 1959, c. 558 which reduced to one (1) the number of steps required in taking an appeal that was to be regarded as "jurisdictional" (ORS 19.033 (2)) gave the Court discretion to relieve from all other procedural errors (19.033 (3)). See argument for this reform in Report of Legislative Interim Committee on Judicial Administration 77 (January 1959).

49. The fact that the defendant may only raise the defense of lack of jurisdiction by special appearance might suggest that this is a disfavored defense.

50. E.g. Fulton Ins. Co. v. White Motor Corp., 261 Or. 206, 493 P.2d 138 (1972); Miller v. Lillard, 228 Or. 202, 364 P.2d 766 (1961).

51. Whittington v. Davis, 221 Or. 209, (1960). The result was codified in ORS 12.150 by Or. L. 1973, c. 206.

52. In Epstein v. Gluckin, 233 N.Y. 490, 494, 135 N.E. 861, 862 (1922). He was speaking of the mutuality as a requirement for specific performance but the warning applies to any rule.

53. E.g. Hungerfard v. Portland Sanitorium & Benevolent Ass'n., 235 Or. 412, 384 P.2d 1009 (1963).

54. Stroh v. State Accident Insurance Fund, 261 Or. 117, 492 P.2d 472 (1972) (fact that notice of appeal sent by regular mail, rather than by registered or certified mail as required by ORS 656.298, immaterial when letter actually received. In State ex rel Kalich v. Bryson, 253 Or. 418, 453 P.2d 659 (1969), Moser v. Greyhound Lines, Inc., 267 Or. 282, 516 P.2d 1285 (1973), and St. Arnold v. Star Expansion Industries, 268 Or. 640, 521 P.2d 526 (1974) the court has come close to applying the same logic to service of summons.

55. For example, Kalich, supra note 54, reflects an approach quite similar to that advocated herein but two years later in Ter Har, text at note 26, the court reverted to the tradition magic wand approach.

56. Or. Laws 1977, c. 890, sec. 3.

57. Deady, The General Laws of Oregon, p. 139. The Code enacted in 1862 was derived, largely verbatim, from the famous Field Code. The latter was adopted in the New York legislature in 1848 as "An Act to simplify and abridge the practice, pleadings and proceedings of courts of this state." 1 Wait, Law and Practice 1 (1867). The history of the Oregon Code is recounted in Harris, History of the Oregon Code, 1 Or. L. Rev. 129, 184 (1972) (see especially pp. 197 and 214-15).

58. The parallel citations are:

ORS 14.010	=	Deady 506
12.020		14
15.030		61
15.040		51
15.080		54

59. 28 U.S.C. § 2072 (1970).

60. 312 U.S. 1, 14 (1941).

61. 380 U.S. 460 (1965).

62. Id. at 464

63. 326 U.S. 438 (1946).

64. Id. at 445-46.

65. 390 U.S. 102 (1968).

66. Before wages of law gave way to the new-fangled institution of trial by jury cases were decided by seeing whether a party could make a letter perfect recitation of a latin oath. We smile today at such archaic methods but should take care lest future generations find 20th century decisions on service of summons equally visible.

M E M O R A N D U M

TO: COUNCIL

FROM: FRED MERRILL

RE: TRIAL RULES

DATE: July 19, 1978

The attached draft of trial rules incorporates the revisions to Chapter 17 made by the trial committee into a rule format with some changes of order. They should be read with the minutes of the trial procedure committee dated April 16, 1978, prepared by Judge Dale. The first section of those minutes were previously distributed; the last section is attached. The minutes contain explanatory comment and some questions for consideration by the full Council.

RULE 50

JURY TRIAL OF RIGHT

The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate.

COMMENT: This is Committee Rule A.

RULE 51

ISSUES; TRIAL BY JURY OR BY THE COURT

A. Issues. Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other.

A.(1) An issue of law arises upon a motion to dismiss a complaint or some part thereof for failure to state a claim, upon a motion to strike a defense or new matter in a reply, or some part thereof, upon a motion for judgment on the pleadings or upon a motion for summary judgment.

A.(2) An issue of fact arises:

A.(2)(a) Upon a material allegation in the complaint controverted by the answer.

A.(2)(b) Upon new matter in the answer.

A.(2)(c) Upon new matter in the reply.

B. Issues of law; how tried. An issue of law shall be tried by the court.

C. Issues of fact; how tried.

C.(1) By jury. (If jury demand is required, then use appropriate language). The trial of all issues of fact shall be by jury unless:

C.(1)(a) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial without a jury, or

C.(1)(b) The court upon motion of its own initiate finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the State.

C.(2) By the court. (If demand is required, then need rule giving court discretioin to try case to jury even though demand not filed.

D. Advisory jury and trial by consent. In all actions not triable by right by a jury the court, upon motion or of its own initiative, may try an issue with an advisory jury or it may, with the consent of both parties, order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

COMMENT: Section A. is ORS 17.005 to 17.015. ORS 17.020 is dropped. The rest of the Rule is Committee Rule B.

RULE 52

ASSIGNMENT OF CASES

A. Methods. Each circuit and district court shall provide by local rule for the placing of actions upon the trial calendar (1) without request of the parties, or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deems appropriate.

B. Continuances. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance. The court may in a proper case, and upon terms, reset the same.

COMMENT: This is Committee Rule C.

RULE 53

CONSOLIDATION; SEPARATE TRIALS

A. Joint hearing or trial; consolidation of actions or suits. When more than one action involving a common question of law or fact is pending before the court, the court may order a joint hearing or trial of any or all of the matters in issue in such actions or suits; the court may order all such actions or suits consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

B. Separate trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim or of any separate issue or of any number of claims, cross-claims, counterclaims or issues, always preserving inviolate the right of trial by jury as declared by the Oregon Constitution or as given by statute.

COMMENT: This is ORS 11.050 and 11.060. Logically, they belong here. The only changes are:

(1) Striking the words, upon motion of any party, from both A. and B.; this would allow separate trials on a court's own motion.

(2) Adding the reference to jury trial at the end of B., using language from Federal Rule 42 (b).

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE; SETTLEMENT

A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule R.(5), and of any statute of this state, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim.

A.(2) By order of court. Except as provided in paragraph (1) of this subdivision of this Rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

B. Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the

ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in ORS 17.431 (Rule ___). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision operates as an adjudication upon the merits.

C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this Rule apply to the dismissal of any counterclaim, cross-claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this Rule shall be made before a responsive pleading or a motion for summary judgment by an opponent is served or, if there is none, before the introduction of evidence at the trial or hearing.

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 to 17.085, the defendant may, at any time before trial, serve upon the plaintiff an offer to allow judgment to be given against him for the sum, or the property, or to the effect therein specified. If the plaintiff accepts the offer, he shall by himself or attorney endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon him; and thereupon judgment shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time

prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the plaintiff fails to obtain a more favorable judgment or decree, he shall not recover costs, but the defendant shall recover of him costs and disbursements from the time of the service of the offer.

COMMENT: Sections A. through D. are Rule 41 previously approved by the Council. See minutes of meeting held April 1, 1978. Section E. is ORS 17.055. ORS 17.065 through 17.085 were left as a statute. They really do not relate to any procedure but embody a legislative policy determination relating to employer-employee relations, and criminal penalties are provided by ORS 17.990.

RULE 55

SUBPOENA

A. Defined; form. The process by which attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. Every subpoena shall state the name of the court and the title of the action.

B. For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C. Issuance. (1) A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein: (i) it may be issued by the clerk of the court in which the action or proceeding is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by the attorney of record of the party to the action or proceeding in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 103 D.(1), or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of the circuit court in the judicial district in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a)

of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice or other officer before whom the attendance is required.

(2) Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall fill it in before service.

D. Service; service on law enforcement agency; proof of service. (1) Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person over 18 years of age. The service shall be made by delivering a copy to the witness personally and giving or offering to him at the same time the fees to which he is entitled for travel to and from the place designated and one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

(2)(a) Every law enforcement agency shall designate an individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

(b) If a peace officer's attendance at trial is required as a result of his employment as a peace officer, a subpoena may be served on him by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to actually notify the officer whose attendance is sought of the date, time and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall contact the court and a continuance may be granted to allow the officer to be personally served.

(d) As used in this subsection, "law enforcement aency" means the Oregon State Police, a county sheriff's department or a municipal police department.

(3) Proof of service of a subpoena is made in the same manner as in the service of a summons.

E. Subpoena for hearing or trial; witness' obligation to attend; prisoners. (1) A witness is not obliged to attend for trial or hearing at a place outside the county in which he resides or is served with subpoena unless his residence is within 100 miles of such place, or, if his residence is not within 100 miles of such place, unless there is paid or tendered to him upon service of the subpoena: (a) double attendance fee, if his residence is not more than 200 miles from the place of examination; or (b) triple attendance fee, if his residence is more than 200 miles and not more than 300 miles from such place; or (c) quadruple attendance fee, if his residence is more than 300 miles from such place; and (d) single mileage to and from such place.

(2) If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for purposes of testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F. Subpoena for taking depositions; place of examination. (1) Proof of service of a notice to take a deposition as provided in Rules 105 C. and 106 A. constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitiute or contain matters within the scope of the examination permitted by Rule 101 B., but in that event the subpoena will be subject to the provisions of Rule 101 C. and section B. of this Rule.

(2) A resident of this state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state may be required to attend only in the county wherein he is served with a subpoena, or at such other convenient place as is fixed by an order of court.

G. Disobedience of subpoena; refusal to be sworn or answer as a witness. Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action or proceeding is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, his complaint, answer or reply may be stricken.

H. Hospital records.

(1) Hospital. As used in this section, unless the context requires otherwise, "hospital" means a hospital licensed under ORS 441.015 to 441.087, 441.525 to 441.595, 441.810 to 441.820, 441.990, 442.300, 442.320, 442.330 and 442-340 to 442.450.

(2) Mode of compliance with subpoena of hospital records. (a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

(b) The copy of the records shall be separately enclosed in a sealed evenloep or wrapper on which the title and number of the action, name of the witness and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases, to the officer or body conducting the hearing at the official place of business.

(c) After filing, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition or other hearing, at the direction of the judge, officer or body conducting the proceeding. The records shall be opened in the presence of all

parties who have appeared in person or by counsel at the trial, deposition or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

(3) Affidavit of custodian of records. (a) The records described in section (2) of this Rule shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition or event described or referred to therein.

(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which he has custody.

(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

(4) Personal attendance of custodian of records may be required. (a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

(5) Tender and payment of fees. Nothing in this Rule requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

COMMENT: This is the subpoena rule previously accepted by the Council as part of the discovery rules.

RULE 56

TRIAL BY JURY DEFINED; NUMBER OF JURORS

A trial jury in the circuit court is a body of persons drawn as provided in Rule 57. The jury shall consist of 12 persons. The parties may stipulate that a jury shall consist of any number less than 12 or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

COMMENT: This is Committee Rule D.

RULE 57

JURORS

A. Jury; how drawn. Trial juries shall be formed as follows: When the action is called for trial the clerk shall draw from the trial jury box of the court, one by one, the ballots containing the names of the jurors until the jury is completed or the ballots are exhausted. If the ballots become exhausted before the jury is complete, the sheriff, under the direction of the court, shall summon from the bystanders, or the body of the county, so many qualified persons as may be necessary to complete the jury. Whenever the sheriff shall summon more than one person at a time from the bystanders or the body of the county, he shall return a list of the persons so summoned to the clerk. The clerk shall write the names of such persons upon separate ballots, and deposit the same in the trial jury box, and then draw such ballots therefrom, as in the case of the panel of trial jurors for the term.

B. Challenges; examination of jurors.

B.(1) Types of challenges. No challenge shall be made or allowed to the panel. A challenge to a particular juror may be either peremptory or for cause.

B.(2) Challenge for cause; grounds.

B.(2)(a) Challenge for cause may be either general; that the juror is disqualified from serving in any action; or particular, that the juror is disqualified from serving in the action on trial.

B.(2)(b) General causes of challenges are:

B.(2)(b)(i) A want of any of the qualifications prescribed by law for a juror.

B.(2)(b)(ii) Unsoundness of mind.

B.(2)(b)(iii) Such defect in the faculties of the mind, or organs of the body, as renders him incapable of performing the duties of a juror in the action on trial.

B.(2)(b)(iv) That such person has been summoned and attended said court as a juror at any term of court held within one year prior to the time of such challenge; or that such person has been summoned from the bystanders or body of the county, and has served as a juror in any cause upon such summons within one year prior to the time of such challenge.

An exemption from service on a jury shall not be cause of challenge, but the privilege of the person exempted.

B.(2)(c) A particular challenge may be for implied bias, which is such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror. A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

B.(2)(c)(i) Consanguinity or affinity within the fourth degree to either party.

B.(2)(c)(ii) Standing in the relation of guardian and ward, attorney and client, physician and patient, master and servant, landlord and tenant, or debtor and creditor, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

B.(2)(c)(iii) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, upon substantially the same facts or transaction.

B.(2)(c)(iv) Interest on the part of the juror in the event of the action, or the principal question involved therein.

B.(2)(d) A particular challenge may be for actual bias, which is the existence of a state of mind on the part of the juror, in reference to the action,

or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging. A challenge for actual bias may be taken for the causes mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

B.(3) Challenge for cause; procedure.

B.(3)(a) The challenges for cause of either party shall be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:

B.(3)(a)(i) For general disqualification.

B.(3)(a)(ii) For implied bias.

B.(3)(a)(iii) For actual bias.

B.(3)(b) The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall try the issue and determine the law and the fact.

B.(3)(c) Upon the trial of a challenge, the rules of evidence applicable to testimony offred upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge is determined to be sufficient,

or found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; otherwise, it shall be disallowed.

B.(3)(d) The challenge, the exception and the denial may be made orally. The judge shall note the same upon his minutes, and the substance of the testimony on either side.

B.(4) Peremptory challenges. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him. Either party shall be entitled to three peremptory challenges, and no more. Where there are multiple parties plaintiff or defendant in the case, or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to a total of three peremptory challenges.

B.(5) Order of examining jurors; conduct of peremptory challenges.

B.(5)(a) The full number of jurors having been called shall thereupon be examined as to their qualifications, and having been passed for cause, peremptory challenges shall be conducted as follows: The plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors are in the jury box at the time. The refusal to challenge by either party in the said order of alternation shall not defeat the adverse party of his full number of challenges, and such refusal by a party to exercise his challenge in proper turn shall conclude him as to the jurors once accepted by him, and if his right of peremptory challenge be not exhausted, his further challenges shall be confined, in his proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit

a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted, but nothing herein shall be construed to increase the number of peremptory challenges allowed.

B.(5)(b) The court may examine the prospective jurors to the extent it deems appropriate, and shall permit the parties or their attorneys to ask reasonable questions.

C. Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict give according to the law and evidence as given them on the trial.

D. Alternate jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retired to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examintion and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged as the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

COMMENT TO RULE 57: This Rule basically contains the material in ORS 17.105 through 17.190, with the only substantive changes being those recommended by the Committee, i.e., to 57 B.(4), B.(5) and D. The Committee's recommended Rule E is split between 57 B.(5) and 57 D. The statutory order was put into a more logical sequence as follows:

17.110	=	57 A.
17.115	=	57 B.
17.120	=	57 B.(4)
17.125	=	57 B.(2)(a)
17.130	=	57 B.(2)(b)
17.135	=	57 B.(2)(c) and 57 B.(2)(d)
17.140	=	57 B.(2)(c)
17.145	=	57 B.(2)(d)
17.150	=	57 B.(2)(b)
17.155	=	57 B.(4)
17.160	=	57 B.(4)
17.165	=	57 B.(3)
17.170	=	57 B.(3)
17.175	=	57 B.(3)
17.180	=	57 B.(3)
17.185	=	57 D.

The statutes apparently govern both civil and criminal cases, and the statutes may have to be retained for criminal cases. For these rules applying to civil cases, references to "bail" and "serving as a juror in a criminal action" in 17.140 were deleted from 57 B.(2)(c).

RULE 58

TRIAL PROCEDURE

A. Order of proceedings on trial by the court and in suits. (1) The order of proceedings on a trial by the court shall be the same as provided in trials by jury.

A.(2) When a suit is called for trial, the trial shall proceed in the order prescribed in subsections (1) to (5) of section B. of this Rule, unless the court, for special reasons, otherwise directs.

B. Order of proceedings on jury trial. When the jury has been selected and sworn, the trial, unless the court for good and sufficient reason otherwise directs, shall proceed in the following order:

B.(1) The plaintiff shall concisely state his cause of action and the issues to be tried; the defendant then in like manner shall state his defense or counterclaim or both.

B.(2) The plaintiff then shall introduce the evidence on his case in chief, and when he has concluded, the defendant shall do likewise.

B.(3) The parties respectively then may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense or counterclaim.

B.(4) Not more than two counsel shall address the jury in behalf of the plaintiff or defendant; the whole time occupied in behalf of either shall not be limited to less than two hours; and the court may extend such time beyond two hours.

B.(5) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive the opening argument, and if the defendant then argues the case to the jury, the plaintiff

shall have the right to reply to the argument of the defendant, but not otherwise.

B.(6) The court then shall charge the jury.

C. Separation of jury before submission of cause; admonition. The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

D. Proceedings if juror becomes sick. If, after the formation of the jury, and before verdict, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case, unless an alternate juror, seated under ORS 17.190, is available to replace the discharged juror or unless the parties agree to proceed with the remaining jurors, a new juror may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards formed.

COMMENT: Section A. is ORS 17.205; section B. is 17.210; section C. is 17.220; section D. is 17.225. ORS 17.230 was not included in this Rule as it is a rule of evidence and should be left as a statute. ORS 17.250 was also not included; although it relates to instructions about evidence rather than rule of evidence, it probably should be left to action by the Legislature in their consideration of the rules of evidence.

The Committee recommended deletion of all of ORS 17.245; the last sentence of that statute covers an instruction and should be incorporated in the instruction rule. The Committee referred to ORS 17.235 as superseded by Rule B (Rule 51 herein); this appears to be a typographical error as 17.240 is superseded by Rule 51. I did not, however, include ORS 17.235 in these rules, as I am unsure what this procedure is, unless it refers to findings of fact and conclusions of law in non-jury trials, which is already covered by ORS 17.431.

RULE 59

INSTRUCTIONS TO JURY AND DELIBERATION

A. Proposed instructions. Unless otherwise requested by the trial judge on timely notice to counsel, proposed instructions shall be submitted at the commencement of the trial. Proposed instructions upon questions of law developed by the evidence, which could not be reasonably anticipated, may be submitted at any time before the court has instructed the jury. The number of copies of proposed instructions and their form shall be governed by local court rule.

B. Charging the jury. In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict. Whenever the knowledge of the court is by statute made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it as conclusive. If in the opinion of the court it is desirable, the charge shall be reduced to writing, and then given to the jury by the court, as written, without any oral explanation or addition. The jury shall take such written instructions with it while deliberating upon the verdict, and then return them to the clerk immediately upon conclusion of its deliberations. The clerk shall file the instructions in the court file of the case.

C. Deliberation.

C.(1) Exhibits. Upon retiring for deliberation the jury may take with them all exhibits received in evidence, except depositions. Pleadings shall not go to the jury room.

C.(2) Written statement of issues. The court may, in its discretion, submit to the jury an impartial written statement summarizing the issues to be decided by the jury.

C.(3) Copies of documents. Copies may be substituted for any parts of

public records of private documents as ought not, in the opinion of the court, to be taken from the person having them in possession.

C.(4) Notes. Jurors who have taken notes of the testimony or other proceeding on the trial may take such notes into the jury room.

C.(5) Custody of and communications with jury. After hearing the charge, the jury may either decide in the jury box or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer shall, to the utmost of such officer's ability, keep the jury together, separate from other persons, without drink, except water, and without food, except ordered by the court. The officer must not suffer any communication to be made to them, nor make any personally, unless by the order of the court, except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on. Before any officer takes charge of a jury, this section shall be read to the officer who shall be then sworn to conduct himself according to its provisions to the utmost of his ability.

C.(6) Juror's use of private knowledge or information. A juror shall not communicate any private knowledge or information that the juror may have of the matter in controversy to fellow-jurors, except when called as a witness, nor shall the juror be governed by the same in giving his or her verdict.

C.(7) Food and lodging for jurors. If, while the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court orders them to be provided with suitable and sufficient food and lodging, they shall be so provided by the sheriff, at the expense of the county.

D. Further instructions. After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given in the presence of, or after notice to, the parties or their counsel.

E. Comments upon evidence. Judge shall not instruct with respect to matters of fact, nor comment thereon.

F. Discharge of jury without verdict.

F.(1) The jury shall not be discharged after the cause is submitted to them until they have agreed upon a verdict and given it in open court unless:

F.(1)(a) At the expiration of such period as the court deems proper, it satisfactorily appears that there is no probability of an agreement; or

F.(1)(b) An accident or calamity requires their discharge;

F.(1)(c) A juror becomes ill as provided in Rule 58 D.

F.(2) Where jury is discharged without giving a verdict, either during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court directs.

G. Return of jury verdict.

G.(1) Declaration of verdict. When the jury have agreed upon their verdict, they shall be conducted into court by the officer having them in charge. The court shall inquire whether they have agreed upon their verdict. If the foreperson answers in the affirmative, he or she shall, on being required, declare the same. The verdict shall be in writing.

G.(2) Number of jurors concurring. In civil cases three-fourths of the jury may render a verdict.

G.(3) Polling the jury. When the verdict is given and before it is

filed, the jury may be polled on the request of a party, for which purpose each juror shall be asked whether it is his or her verdict. If a less number of jurors answer in the affirmative than the number required to render a verdict, the jury shall be sent out for further deliberations.

G.(4) Informal or insufficient verdict. If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be required to deliberate further.

G.(5) Completion of verdict, form and entry. When a verdict is given and is such as the court may receive, the clerk shall file the verdict. Then the jury shall be discharged from the case. The verdict, under direction of the court, shall be substantially entered in the journal as of the day's proceedings on which it was given.

COMMENT

This is Committee Rule F. The second section of section B. was inserted. It is the second sentence of ORS 17.245. See comment to Rule 58. ORS 17.305, 17.310 and 17.315 were inserted in section C. as subsections (5), (6) and (7). ORS 17.340 was dropped. ORS 17.355(3), which was Committee Rule F(g)(3)(a), will have to remain as a statute as it relates to criminal procedure. One thing not covered by this Rule which was suggested at the public hearing is whether the judge should settle the instructions before the jury argument. See Federal Rule 51, second sentence.

RULE 60

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT

NOTWITHSTANDING THE VERDICT

A. Motion for directed verdict; when made; effect. Any party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

B. Judgment notwithstanding the verdict.

B.(1) Grounds. When a motion for a directed verdict which should have been granted has been refused and a verdict is rendered against the applicant, the court may, on motion, render a judgment notwithstanding the verdict, or set aside any judgment which may have been entered and render another judgment, as the case may require.

B.(2) Reserving ruling on directed verdict motion. In any case where, in the opinion of the court, a motion for a directed verdict ought to be granted, it may nevertheless, at the request of the adverse party, submit the case to the jury with leave to the moving party to move for judgment in his favor if the verdict is otherwise than as would have been directed.

B.(3) Alternative motion for new trial. A motion in the alternative for a new trial may be joined with a motion for judgment notwithstanding the

verdict, and unless so joined shall, in the event that a motion for judgment notwithstanding the verdict is filed, be deemed waived. When both motions are filed, the motion for judgment notwithstanding the verdict shall have precedence over the motion for a new trial, and if granted the court shall, nevertheless, rule on the motion for a new trial and assign such reasons therefor as would apply had the motion for judgment notwithstanding the verdict been denied, and shall make and file an order in accordance with said ruling.

B.(4) Time for motion and ruling. A motion for judgment notwithstanding the verdict shall be filed within ten (10) days after the filing of the judgment sought to be set aside, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days of the time of the entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

B.(5) Duties of the clerk. The clerk shall, on the date an order made pursuant to this section is entered or on the date a motion is deemed denied pursuant to subsection (4) of this section, whichever is earlier, mail a copy of the order and notice of the date of entry of the order or denial of the motion to each party who is not in default for failure to appear. The clerk also shall make a note in the docket of the mailing.

B.(6) Motion for new trial after judgment notwithstanding the verdict. The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 63 not later than 10 days after entry of the judgment notwithstanding the verdict.

COMMENT: Section A. is the modified form of Federal Rule 50 (a)

previously approved by the Council. See minutes of April 1, 1978. Section B. is ORS 18.140. The first clause of subsection (1) relating to pleading defects was deleted as unnecessary and inconsistent with the pleading rules. Subsection (4) was changed to specify time for motion and ruling rather than referring to ORS 17.615. The references to affidavits of ORS 17.615 were deleted as inappropriate for this type of motion. Note that the motion to extend the time must be made within the 10-day period for filing the motion under proposed Rule 7 submitted by the process committee. Perhaps this should be clarified here and a time set for the ruling. Compare Rule 62 D.

Subsection (6) was added from the federal rules to cover a situation not presently covered by the Oregon statutes.

RULE 61

VERDICTS, GENERAL AND SPECIAL

A. General verdict. A general verdict is that by which the jury pronounces generally upon all or any of the issues either in favor of the plaintiff or defendant.

B. Special verdict. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his rights to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

C. General verdict accompanied by answer to interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers

to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and the answers shall be entered. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

D. Action for specific personal property. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict is in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding of such property.

E. Assessment of amount of recovery. When a verdict is found for the plaintiff in an action for recovery of money, or for the defendant when a counterclaim for the amount of the plaintiff's claim as established, the jury shall also assess the amount of recovery; they may also, under the direction of the court assess the amount of the recovery when the court gives judgment for the plaintiff on the answer.

COMMENT: This is Committee Rule G. What does the last sentence of section E. (ORS 17.425) mean?

RULE 62

FINDINGS OF FACT

A. Necessity. Whenever any party appearing in a civil proceeding tried by the court so demands prior to the commencement of the trial, the court shall make special findings of fact, and shall state separately its conclusions of law thereon. In the absence of such a demand for special findings, the court may make either general or special findings. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact or conclusiuons of law appear therein.

B. Proposed findings; objections. Within 10 days after the court has made its decision, any special findings requested by any party, or proposed by the court, shall be served upon all other parties who have appeared in the case and shall be filed with the clerk; and any such other party may, within 10 days after such service object to such proposed findings or any part thereof, and request other, different or additional special findings, whether or not such party has previously requested special findings. Any such objections or requests for other, different or additional special findings shall be heard and determined by the court within 30 days after the date of the filing thereof; and, if not so heard and determined, any such objections and requests for such other, different or additional special findings shall conclusively be deemed denied.

C. Entry of judgment. Upon (1) the determination of any objections to proposed special findings and of any requests for other different or additional special findings, or (2) the expiration of the time for filing such objections and requests if none is filed, or (3) the expiration of the time at which such objections or requests are deemed denied, the court shall enter the appropriate order or judgment. Any such judgment or order filed

prior to the expiration of the periods above set forth shall be deemed not entered until the expiration of said periods.

D. Extending or lessening time. Prior to the expiration of the times provided in subsections (3) and (4) of this section, the time for serving and filing special findings, or for objecting to and requesting other, different or additional special findings may be extended or lessened by the trial court upon the stipulation of the parties or for good cause shown; but in no event shall the time be extended more than 30 days.

E. Effect of findings of fact. In an action tried without a jury, except as provided in ORS 19.125, the findings of the court upon the facts shall have the same force and effect, and be equally conclusive, as the verdict of a jury.

COMMENT: This is Committee Rule H. The second sentence was added to section A. It comes from Federal Rule 52 (a). Section (6) of the committee's draft rules was eliminated because it appears to be a rule of appellate procedure. The committee's section (7) was replaced by the modified form of ORS 17.441 previously submitted to the Council as part of the law-equity revisions. ORS 17.435, which is the language used by the committee, appears in Rule 63.

RULE 63

NEW TRIALS

A. New trial defined. A new trial is a re-examination of an issue of fact in the same court after judgment.

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

B.(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.

B.(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B.(7) Error in law occurring at the trial and objected to by the party making the application.

C. New trial in case tried without a jury. In an action tried without a jury, a former judgment may be set aside and a new trial granted on motion of the party aggrieved on any grounds set forth in subsections (1), (2), (3), (4) or (7) of section B. of this Rule where applicable. On a motion for a new trial in an action tried without a jury, the court may

be heard and determined by the court within 55 days from the time of the entry of judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

G. New trial on court's own motion; review. If a new trial is granted by the court on its own motion, the order shall so state and shall be made within 30 days after the filing of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

H. Remittitur and additur. When a finding is made that the only error in the trial is the inadequacy or excessiveness of the verdict, the court may deny a motion for new trial on conditon that within 10 days the non-moving party consents in writing to the entry of judgment of an amount found by the judge to be the lowest or highest amount respectively which the evidence will support.

COMMENT:

A. This is ORS 17.605.

B. This is ORS 17.610 with the language changed as submitted in the prior law - equity revisions. The grounds for new trial are unchanged but "and excepted to" is changed to "objected to" in ground (7).

C. This is the modified version of 17.435 previously submitted to the Council as part of the law - equity revisions. The last sentence comes from Federal Rule 59 (a).

D. This is ORS 17.620.

E. This is ORS 17.625.

F. This is ORS 17.615.

G. This is ORS 17.630. The last sentence of that statute, however, will have to remain as a statute as it relates to appellate procedure.

It should read as follows:

> In the event a new trial is granted by the court on its own motion, the order shall be affirmed only on the grounds set forth in the order or because of reversible error affirmatively appearing in the record.

H. This would be a new provision. It comes from the Michigan court rules. Giving trial courts remittitur and additur authority may save some useless appeals where there is a grossly inadequate or excessive verdict and the parties appeal, hoping this will serve to grant a reversal where one ordinarily would not be given.

Note that Rule J of the committee rules was not included in the draft. This rule incorporated ORS 17.505 to 17.515, relating to exceptions and is basically a rule of appellate procedure.

COUNCIL ON COURT PROCEDURES

Minutes of Meeting April 16, 1978

Subcommittee on Trial Procedures, ORS Chapter 17

Present: William M. Dale
Alan F. Davis
John M. Copenhaver
William M. Wells
Val Sloper
Anthony L. Casciato

Absent: Wendell H. Tompkins
Ross G. Davis

Chairman Bill Dale called the meeting to order at 1:00 p.m. in the Council Room of Salishan Lodge.

The subcommittee then proceeded to review ORS Chapter 17, which was our assignment, and to consider various amendments to the existing code sections and the adoption of new rules.

The matters considered and the action taken by the subcommittee at this meeting are reviewed in Exhibit "A" which is attached hereto.

The meeting was adjourned at approximately 3:30 p.m.

Respectfully submitted,

William M. Dale, Chairman

EXHIBIT "A"

CHAPTER 17

[Language in brackets is presently in statute and to be deleted]

(Underlined language is new)

17.005: Remain unchanged ✓

17.010: Remain unchanged ✓

17.015: Remain as amended ✓

17.015 WHEN ISSUE OF FACT ARISES. An issue of fact arises:

(1) Upon a material allegation in the complaint, controverted by the answer.

(2) Upon new matter in the answer [controverted by the reply].

(3) Upon new matter in the reply, except an issue of law is joined thereon.

QUERY: What does last clause of subsection 3 mean?

Should it be retained?

17.020: Remain unchanged ✓

QUERY: Since it appears innocuous and unnecessary,

should it be repealed?

17.025: Superseded by Rule B infra. ✓

17.030: Superseded by Rule B infra. ✓

17.033: Superseded by Rule A infra. ✓

17.035: Superseded by Rule B infra. ✓

17.040: Superseded by Rule B infra. ✓

Subcommittee approved following rule:

Rule A - Jury trial of right. ✓

The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate.

QUERY: Should we include a requirement for a jury demand?

Subcommittee took no definite action - Equivocal.

Following rule approved:

Rule B - Trial by jury or by the court. ✓

(a) Issues of Law - How Tried. An issue of law shall be tried by the Court.

(b) Issues of Fact - How tried.

(1) By jury. (If jury demand is required, then use appropriate language).

The trial of all issues of fact shall be by jury unless:

(A) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial without a jury, or

(B) the court upon motion of its own initiate finds that a right of trial by jury of some or all of those issues does not exist under the constitution or statute of the State.

(2) By the Court. (If demand is required, then

need rule giving court discretion to try case to jury even though demand not filed.)

(3) Advisory Jury and Trial by Consent. In all actions not triable by right by a jury the court, upon motion or of its own initiative, may try an issue with an advisory jury or it may, with the consent of both parties, order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Following rule approved:

Rule C - Assignment of Cases.

(a) Methods. Each circuit and district court shall provide by local rule for the placing of actions upon the trial calendar (1) without request of the parties, or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deems appropriate.

QUERY: Should we adopt a motion to set?

(b) Continuances.

(1) When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance. The court may in a proper case, and upon terms, reset the same.

17.045: Repeal. ✓

Subsection (1) is covered by ORS 8.340

Subsection (2) applies only to suits in equity and if law and equity is merged would be covered by an offer of proof.

17.050: Repeal. ✓

Never used.

17.055-17.085 Remain unchanged

Rule D. Trial Jury Defined; Number of Jurors.

A trial jury in the circuit court is a body of persons drawn as provided in ORS 17.110 [and sworn to try and determine a question of fact]. The jury shall consist of 12 persons, [unless the parties consent to a less number. Such consent shall be entered in the journal.] The parties may stipulate that a jury shall consist of any number less than 12 or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

17.105: Superseded

17.110: Remain unchanged.

17.115: Remain unchanged.

17.120: Remain unchanged.

17.125: Remain unchanged.

17.130: Remain unchanged.

17.135: Remain unchanged.

17.145: Remain unchanged.

17.150: Remain unchanged.

17.155:

QUERY: Should the rule clearly state that the parties are limited to three chalenges where cases are consolidated for trial?

Thus changing ORS 17.155 to something like this: "Either party shall be entitled to three peremptory challenges, and no more. Where there are multiple parties plaintiff or defendant in the case, or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to a total of three peremptory challenges."

17.160: Amend first sentence -- balance unchanged.

"The full number of jurors having been called shall thereupon be examined as to their qualifications [first by the plaintiff, and then by the defendant] and having been passed for cause, peremptory challenges shall be conducted as follows:

Rule E - Jurors

(a) Examination of Jurors. The Court may examine the prospective jurors to the extent it deems appropriate, and shall permit the parties or their attorneys to ask reasonable questions.

(b) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retired to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged as the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be

impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

17.165: Remain unchanged.

17.170: Remain unchanged.

17.175: Remain unchanged.

17.180: Remain unchanged.

17.185: Remain unchanged.

17.190: Superseded by Rule E(b) supra.

17.205(1) Remain unchanged.

17.205(2) Repeal.

17.210: Remain unchanged.

17.215: Repeal - superfluous - See ORS 17.210.

17.220: Remain unchanged.

17.225: Remain unchanged.

17.230: Remain unchanged. Out

17.235: Repeal - superseded by Rule B, supra.

246 Supplem. (If this deals with motions for directed verdict, recommend separate rule on directed verdicts, NOV, etc.

17.245: Repeal - superseded by Rule B, supra.

(If this deals with motions for directed verdict, recommend separate rule on directed verdicts, NOV, etc.)

17.250: ~~Remain unchanged.~~ Sht 4.

17.255: Superseded by Rule F, infra.

17.305:- Remain unchanged.

17.310: Remain unchanged.

17.315: Remain unchanged.

17.320: Superseded by Rule F, infra

17.325: Superseded by Rule F, infra

17.330: Superseded by Rule F, infra.

17.335: Superseded by Rule F, infra

17.340: Remain unchanged.

QUERY: Do we need such a rule? If so, should it be restated?

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: FRED MERRILL

RE: DISCOVERY RULES

DATE: July 20, 1978

Attached are modifications of various rules discussed at the last Council meeting.

1. Limited Interrogatories - Exhibit A. The committee voted against having any interrogatories at all; O'Hanlon, Paulson and King voting in favor of the motion, and McEwen voting against the motion. The committee also voted unanimously that if the Council voted to have interrogatories, the limited version of Rule 109, which is attached, should be adopted. The limitations sections are (b) and (e).

2. Insurance Agreements - Exhibit B. The committee suggests that the language of Rule 101 B. be changed to the attached version. A reference to the request for the insurance policy was added to Rule 112 A.(2) as shown to provide a sanction for failure to comply with the request.

3. Experts - Exhibit C. The committee recommends that the attached rule be adopted as Rule 101 B.(4) relating to discovery of trial experts.

4. Admissions - Exhibit D. The committee recommends that the attached revision of the Admissions Rule, 111, be adopted. The main changes are sections (b), (e) and (f).

Council members should also carefully consider the changes from present Oregon law discussed in the last two pages of the staff memorandum relating to Rule 111 which was previously furnished to the Council.

EXHIBIT A

RULE 108

LIMITED INTERROGATORIES

A. Availability; procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 112 A. with respect to any objection to or other failure to answer an interrogatory.

B. Use at trial; scope. Answers to interrogatories may be used to the extent permitted by rules of evidence. Within the scope of discovery under Rule 101 B. and subject to Rule 101 C., interrogatories may only be used to obtain the following:

(1) The names, residence and business addesses, telephone numbers, and nature of employment, business or occupation of persons or entities having knowledge and the source of such knowledge.

(2) The existence, identity, description, nature, custody, and location of documents (including writings, drawings, graphs, charts, photographs, motion pictures, phono-records, and other data compilations from which information can be obtained), tangible things and real property.

(3) The name, address, subject matter of testimony and qualifications of expert witnesses to be called at trial.

(4) The existence and limits of liability of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy all or part of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(5) The nature and extent of any damages or monetary amounts claimed by a party in the action; the nature, extent and permanency of any mental or physical condition forming the basis of such claim; all treatments for such physical condition; all tests and examinations relating to such condition; and, all pre-existing mental, physical and organic conditions bearing upon such claims.

(6) The addresses, registered agents, offices, places of business, nature of business, names and addresses of board of directors and officers, names and addresses and job classifications and duties of agents and employees, names and addresses of stockholders or partners and dates and places of incorporation or organization of any corporation or business entity.

(7) The date of birth, and the present addresses, business addresses, telephone numbers, employment or occupation or business, and marital status of any party or the employees, agents, or persons under the control of a party.

(8) The location, legal description, present and prior ownership, occupation and use, purchase or sale price, value, nature of improvements, interests affecting title, and recods of deeds and instruments relating to title of any real property involved in an action.

(9) The custody, use, location, descripition, present and prior ownership, purchase or sale price, value, recording of instruments relating to title and security interests, interests claimed in such property, license numbers, registration numbers, model numbers, serial numbers, make, model, delivery and place of manufacture, and manufacturer of any tangible property involved in an action.

C. Option to produce business records or experts' reports. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, or from examination of reports prepared by experts in the possession of a party upon whom the interrogatory has been served, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records or reports from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records or reports and to make copies, compilations, abstracts or summaries. The specification provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

D. Form of Response. The interrogatories shall be so arranged that a blank space shall be provided after each separately numbered interrogatory. The space shall be reasonably calculated to enable the answering party to insert the answer or objections within the space. If sufficient space is not provided, the answering party may attach additional papers with the answers and refer to them in the space provided in the interrogatories.

E. Limitations.

(1) Duty of attorney. It is the duty of an attorney directing interrogatories to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.

(2) Number. A party may serve more than one set of interrogatories upon an adverse party, but the total number of interrogatories shall not exceed thirty, unless the court otherwise orders for good cause shown after the proposed additional interrogatories have been filed. In determining what constitutes an interrogatory for the purpose of applying this limitation in number, it is intended that each question be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined or arranged.

EXHIBIT B

101 B.(2) Insurance agreements. (a) A party may obtain discovery of the existence and limits of liability of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserted in the action. In such case, the party seeking discovery shall be advised of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.

112 A.(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 105 or 106, or a corporation or other entity fails to make a designation under Rule 105 C.(6) or Rule 106, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 101 B.(2), or a party fails to answer an interrogatory submitted under Rule 108, or if a party in response to a request for inspection submitted under Rule 109, fails to permit inspection as requested, the discovering party may move for an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 101 C.

EXHIBIT C

Rule 101 B.(4)

(a) Subject to the provisions of Rule 110, upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney, giving the name of any person the other party reasonably expects to call as an expert witness at trial, and stating the areas in which it is claimed the witness is qualified to testify as an expert, the facts by reason of which it is claimed the witness is an expert, and the subject matter upon which the expert is expected to testify. The statement shall be accompanied by a written report prepared by the expert which shall set forth the substance of the facts and opinions to which the expert will testify and a summary of the grounds for each opinion. If such expert witness relies in forming his opinion, in whole or in part, upon facts, data or opinions contained in a document or made known to him by or through another person, the party may also discover with respect thereto as provided in this subsection. The report and statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days prior to trial.

(b) A party may only obtain further discovery of information acquired or developed in anticipation of litigation or for trial by experts expected to be called at trial upon motion for a court order allowing such discovery, subject to such restrictions as to scope and such provisions, pursuant to subsection (c) of this section concerning fees and expenses, as the court may deem appropriate. The provisions of Rule 112 A. apply to the award of

expenses incurred in relation to the motion.

(c) Unless the court upon motion finds that manifest injustice would result, the party requesting a report under subsection (a) of this section shall pay the reasonable costs and expenses, including expert witness fees, necessary to prepare the expert's report, and shall pay expert witness fees for time spent responding to discovery under subsection (b) of this section.

(d) If a party fails to timely comply with the request for experts' reports, or if the expert fails or refuses to make a report, and unless the court finds that manifest injustice would result, the court shall require the expert to appear for a deposition or exclude the expert's testimony if offered at trial. If an expert witness is deposed under this subsection of this section, the party requesting the expert's report shall not be required to pay expert witness fees for the expert witness' attendance at or preparation for the deposition.

(e) As used herein, the terms "expert" and "expert witness" include any person who is expected to testify at trial in an expert capacity, and regardless of whether the witness is also a party, an employee, agent or representative of the party, or has been specifically retained or employed.

(f) A party who has furnished a statement in response to subsection (a) of this rule is under a duty to supplement such response by additional statement and report of any expert witness that such party decides to call as an expert witness after the time of furnishing the statement.

(g) Nothing contained in this rule shall be deemed to be a limitation of one party's right to obtain discovery of another party's expert not covered under this rule, if otherwise authorized by law.

EXHIBIT D

RULE 111

REQUESTS FOR ADMISSION

A. Request for admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 101 B. set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

B. Response. Within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed shall serve upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which

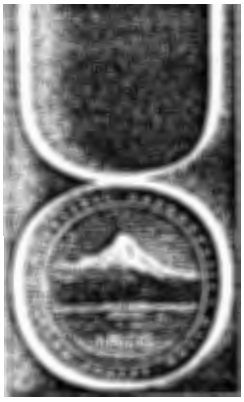
an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 112 C., deny the matter or set forth reasons why he cannot admit or deny it. If a written answer or objection is not served within the time specified above, the party requesting the admission may apply to the court for an order that the matter requested shall be deemed admitted. The order shall be granted unless the party to whom the request is directed establishes that the failure to respond was due to mistake, inadvertence or excusable neglect. The provisions of Rule 112 A. apply to the award of expenses incurred in relation to the motion.

C. Motion to determine sufficiency. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this Rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a designated time prior to trial. The provisions of Rule 112 A. apply to the award of expenses incurred in relation to the motion.

D. Effect of admission. Any matter admitted pursuant to this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the case will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his case or his defense on the merits. Any admission made by a party pursuant to this Rule is for the purpose of the pending proceeding only, and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

E. Form of reponse. The request for admissions shall be so arranged that a blank space shall be provided after each separately numbered request. The space shall be reasonably calculated to enable the answering party to insert the admissions, denials or objections within the space. If sufficient space is not provided, the answering party may attach additional papers with the admissions, denials or objections and refer to them in the space provided in the request.

F. Number. A party may serve more than one set of requested admission upon an adverse party, but the total number of requests shall not exceed thirty, unless the court otherwise orders for good cause shown after the proposed additional requests have been filed. In determining what constitutes a request for admission for the purpose of applying this limitation in number, it is intended that each request be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another request, and however the requests may be grouped, combined or arranged.



School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

June 6, 1978

Mr. Peter H. Wells
Attorney at Law
222 S. E. Dorion Avenue
P. O. Box 218
Pendleton, Oregon 97801

Dear Mr. Wells:

The subcommittee has met and tentatively rejected service of process by mail. The principal objection raised was the uncertainty that attends use of the mails in this day and age.

I recently found a suggestion for the federal courts being proposed to the Federal Judicial Conference along the same line. I am enclosing a copy of the proposed draft and comments, which I will bring to the subcommittee's attention, and they may reconsider the matter.

Very truly yours,

Fredric R. Merrill
Executive Director
COUNCIL ON COURT PROCEDURES

FRM:gh

Encl.

COREY, BYLER & REW
ATTORNEYS AT LAW
222 S. E. DORION AVE.
P. O. BOX 218
PENDLETON, OREGON 97801

GEORGE H. COREY
ALEX M. BYLER
LAWRENCE B. REW
STEVEN H. COREY

TELEPHONE
AREA CODE 503
276-3331

June 14, 1978

Mr. Fredric R. Merrill
Executive Director
Council on Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403

Re: Trial Practice Section

Dear Fred:

Thanks for your letter of June 6 which was discussed at the meeting of the Trial Practice Executive Committee in Portland last week.

I had first understood that a tentative draft of the Council would be available at the time of the Bar Convention. Your letter would indicate however that you do not expect that a draft will be available to circulate before October 1.

Our Executive Committee would like to have you appear at the annual meeting of the Section which is scheduled for Wednesday afternoon, September 20, at the Convention headquarters in Portland, to give us a report on the activities of the Section even though the draft of the rules will not be available. Would this be possible?

We will be appointing a committee to study the tentative draft as soon as it is completed.

Thank you for your cooperation.

Sincerely yours,

COREY, BYLER & REW

By

GHC:mf

cc: Mr. Tom Sponsler
Mr. Donald W. McEwen

THE SUPREME COURT
ARNO H. DENECKE
CHIEF JUSTICE

SALEM, OREGON 97310

27 June 1978

Professor Fredric R. Merrill
School of Law
University of Oregon
Eugene, OR 97403

Dear Fred:

Enclosed is a copy of an opinion in Rhone v. Louis. As indicated on the last page, we need a uniform statute governing the allowance of attorney fees.

Sincerely,

Arno H. Denecke

AHD:rm
Enclosures: 1

27 June 1978

___ Or ___

___ P2d ___

IN THE SUPREME COURT OF THE STATE OF OREGON

Department 2

Theodore R. Rhone,

Respondent,

v.

Johnny E. Louis,

Defendant,

Guaranty National Insurance Co.,

Appellant.

No. A7601-00618
SC 25458

Appeal from Circuit Court, Multnomah County.

Phillip Roth, Judge.

Argued and submitted March 9, 1978.

Gerald R. Pullen, Portland, argued the cause and filed the brief for appellant.

John F. Reynolds, of McCormick & Reynolds, Portland, argued the cause and filed the brief for respondent.

Before Denecke, Chief Justice, Bryson, Linde, Justices, and Thornton, Justice Pro Tempore.

DENECKE, C. J.

Affirmed in part; reversed in part.

DENECKE, C. J.

The principal question concerns the coverage of the garnishee-insurance company's liability policy.

Plaintiff sustained injuries in an automobile accident while riding as a passenger in an automobile driven by defendant. Plaintiff obtained a judgment against defendant for $49,717.97. The automobile had been rented by plaintiff from Parquit Corporation. Parquit had a liability insurance policy issued by garnishee-Guaranty National Insurance Co. After obtaining judgment, plaintiff garnished Guaranty National seeking to recover under the liability insurance issued to Parquit. Guaranty National raised as a defense in its answer to plaintiff's allegations that the policy provided coverage on rented automobiles only when they were being driven by the rentee, i.e., plaintiff. The plaintiff filed exceptions to the answer and this defense was held inadequate by the trial court. Garnishee refused to plead further, and judgment was entered for plaintiff.

Garnishee raises numerous "questions on appeal," but assigns only two errors. Garnishee first contends there was no coverage for the driver because he was not the rentee.

Plaintiff relies upon Portland City Ordinance No. 139316 which regulates businesses providing motor vehicles for hire. One portion of the ordinance requires such businesses to obtain liability insurance. It further provides that:

> "* * * Where the insurance covers a drive-yourself vehicle, it shall expressly provide coverage during the time such vehicle is rented out and shall cover the liability of the driver of such vehicle whether or not such vehicle is retained beyond the expected time of return to the licensee." Portland City Ordinance No. 139-316, § 16.48.090.

In a number of circumstances the requirements of statutes and ordinances have been deemed covered by insurance policies that were procured for the purpose of complying with those requirements, adding to or displacing contrary provisions of the policy itself. N.W. Amusement Co. v. Aetna Co., 165 Or 284, 288, 107 P2d 110, 132 ALR 118 (1940). See, also, Couch, Cyclopedia of Insurance Law, § 45.673 (2d ed 1964); ORS 743.-759. We need not here examine how far this rule extends, because garnishee concedes both in its brief and on oral argument that it applies to its situation.

Garnishee's contention is that we should interpret the portion of the ordinance which requires the insurance to cover "the driver of such vehicle" to mean "the rentee-driver of such vehicle." Garnishee relies in part upon the definition of drive-yourself vehicle which provides that it applies to a business "hiring out vehicles for the use of a person to whom such vehicles are hired." Portland City Ordinance No. 139316, § 16.48.060(5). However, we find nothing inconsistent between this definition and a requirement that insurance be provided for the driver of the vehicle regardless of whether the driver is the rentee.

Garnishee also argues that the purpose of the ordinance

is to place responsibility on the renter of the vehicle, thereby providing incentive for the renter to evaluate the driving ability of potential rentees. Thus, garnishee argues, renters will not do business with drivers who would endanger the safety of the public. In support of this position, garnishee cites Covey Garage v. Portland, 157 Or 117, 70 P2d 566 (1937). Covey involved the constitutionality of a 1936 Portland ordinance regulating rental car companies. That ordinance also required the companies to procure liability insurance for drivers of rented vehicles. We explained the purpose of that ordinance as follows:

> "* * * The primary purpose of the ordinance is not to render damages collectible, but to induce the owner to refrain from renting his cars to the irresponsible and negligent. * * *." 157 Or at 129.

That may have been the purpose for the 1936 Portland ordinance at issue in Covey Garage; however, we are of the opinion that the purpose for the Portland ordinance we are construing as well as the purpose for various, more recent ordinances and statutes requiring insurance for car renting concerns as well as other types of businesses is different. In State Farm Ins. v. Farmers Ins. Exch., 238 Or 285, 292-293, 387 P2d 825, 393 P2d 768 (1964), after referring to the Financial Responsibility Act and the uninsured motorist statute we stated: "* * * These legislative declarations reflect a governmental

policy in favor of protecting the innocent victims of vehicular accidents * * *." 238 Or at 293. We conclude the primary purpose of Portland's requiring liability insurance with coverage for "the driver" was for the protection of injured persons.

We are fortified in this opinion by the language of the ordinance that the insurance shall cover the driver "whether or not such vehicle is retained beyond the expected time of return." This provision would not cause the rental concern to rent only to responsible drivers. It is to protect persons injured by drivers who possibly are irresponsible by failing to return the vehicle within the expected time.

We interpret the ordinance to mean what it says: that the liability insurance shall cover the driver of the vehicle.

Garnishee contends that this interpretation leads to an absurd result because the insurer cannot control the risks it insures, and might be liable if the car were stolen, or driven by a child. Whether this result would necessarily follow is not involved in this case. The defendant driver was not in one of these categories.

The case was decided upon exceptions to the answer which is, in effect, a demurrer. ORS 29.340. Guaranty National contends it was entitled to an evidentiary hearing. We find the

ordinance requires coverage for the driver, as a matter of law, and evidence was unnecessary.

The judgment for the amount of plaintiff's judgment against defendant is affirmed.

The trial court also awarded plaintiff attorney fees in the amount of $10,000. National Guaranty assigns the award as error.

Plaintiff seeks attorney fees pursuant to ORS 743.114 which provides for attorney fees to be awarded as costs in actions on insurance policies. Plaintiff asked for attorney fees in his allegations. After the trial court sustained plaintiff's exceptions to National Guaranty's answer National Guaranty elected not to plead further. Plaintiff moved in writing for judgment "for $49,717.97 [the principal sum] plus interest * * *." However, attorney fees were not mentioned. Judgment was entered for the principal sum "plus an attorney fee of $10,000.00 and for costs and disbursements taxed at $25.00." A cost bill had been served on National Guaranty the day before the judgment was entered. The cost bill was on the usual printed form which had printed, among other items, "Attorney's Fees," but nothing was filled in the blank. The parties had no stipulation on attorney fees.

Plaintiff contends the trial court acted pursuant to ORS 18.080(1)(a) concerning default judgments in contract

cases. ORS 18.090 concerns judgments "upon failure to answer." National Guaranty answered and the section does not apply.

Plaintiff relies upon three cases to support the award of attorney fees. Tiano v. Elsensohn, 268 Or 166, 520 P2d 358 (1974), does not assist plaintiff. We held that the party claiming to be entitled to an attorney fee should insert a specific amount in the cost bill and if the other party was dissatisfied it should file an objection. The party claiming the fee then has the burden of proving the reasonableness of the fee. As stated, no claim for a fee was inserted in the cost bill.

Hillsboro v. Maint. & Const. Serv., 269 Or 169, 523 P2d 1036 (1974), likewise is of no aid to plaintiff. Plaintiff sought attorney fees, although not in proper form. The defendant filed objections, a hearing was held, but plaintiff did not put on evidence to support its claim. We affirmed the trial court's denial of fees upon the ground there was no supporting evidence.

Reeder v. Kay, 276 Or 1111, 557 P2d 673 (1976), while not as clearly unhelpful to plaintiff, nevertheless does not support plaintiff. Two defendants, the Tabers, were dismissed as parties by plaintiff. The Tabers filed a cost bill in which they claimed attorney fees but did not specify an amount. Apparently, no objection was filed but a hearing was held and on the same

day a judgment entered for attorney fees. The plaintiff-appellant did not bring to this court a record of any of the proceedings. Under these circumstances we affirmed the award of attorney fees.

In the present case National Guaranty never had an opportunity to object. Neither the motion for judgment nor the cost bill gave it notice that plaintiff was going to ask the trial court for attorney fees when the judgment was entered. That the judgment recites a hearing was held, plaintiff was present and the court found the attorney fees were reasonable does not cure the defect because the defendant was not apprised any hearing was to be held on attorney fees.

The procedure for awarding attorney fees has caused considerable appeals which would have been unnecessary if there was a comprehensive statute governing the procedure.

The judgment for attorney fees is reversed.

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

July 5, 1978

Chief Justice Arno H. Denecke
The Supreme Court
Salem, Oregon 97310

Dear Justice Denecke:

The Rhone v. Louis problem to which you refer in your letter of June 27, 1978, will be before the Council on July 28, 1978, in the form of a proposed revision to ORS Chapter 20, as developed in the enclosed memorandum.

I will keep you informed of the Council's action.

Very truly yours,

Fredric R. Merrill
Executive Director

COUNCIL ON COURT PROCEDURES

FRM:gh

Enclosure

KENNEDY, KING & MCCLURG
ATTORNEYS AT LAW
1402 STANDARD PLAZA
PORTLAND, OREGON 97204

AREA CODE 503
TELEPHONE 228-6191

JACK L. KENNEDY
GARR M. KING
JAMES W. MCCLURG
ALLEN REEL
GARY J. ZIMMER

July 10, 1978

Mr. Don McEwen
Attorney at Law
1408 Standard Plaza
Portland, OR 97204

Mr. Jim O'Hanlon
Attorney at Law
1200 Standard Plaza
Portland, OR 97204

Mr. Dick Bodyfelt
Attorney at Law
229 Mohawk Building
Portland, OR 97204

Mr. Chuck Paulson
Attorney at Law
12th Floor Standard Plaza
Portland, OR 97204

Mr. Laird Kirkpatrick
Attorney at Law
University of Oregon
School of Law
Eugene, OR 97403

Re: Subcommittee of Council
on Court Procedures

Gentlemen:

As discussed by phone, the Subcommittee on Discovery will meet Wednesday, July 19, at 12:00 noon in my office to consider the following remaining items:

1. Report and recommendation to the Council on the latest version of an interrogatory rule (to be mailed directly to you by Mr. Merrill).

2. Consideration of whether the existing request for admission rule needs to be revised.

3. Review and report to the Council on discovery from experts. (I understand Mr. Bodyfelt is to submit a revised draft of a rule.)

4. Review of revision to the language of rule on discovery of insurance policies and limits.

I will arrange for lunch. If anyone cannot make this meeting, please let me know.

Very truly yours,

Garr M. King

GMK:sm
cc: Mr. Fred Merrill
Executive Director
Council on Court Procedures

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
DEPARTMENT NO. 13
PORTLAND, OREGON 97204

WILLIAM M. DALE
JUDGE

July 14, 1978

Mr. Fredric R. Merrill
Executive Director
Council on Court Procedures
School of Law
University of Oregon
Eugene, Oregon 97403

Dear Fred:

I am enclosing additional material with respect to civil procedure rules to be adopted with reference to the present Chapter 17 of ORS. I believe I have now covered the entire chapter except for two topics: one, motions for new trial and, two, referees. I would think that for the moment we could leave the subject of referees to a later date.

As far as the motions for new trial are concerned, I would think that the same subcommittee that is considering other post-trial motions should take this on. The subject requires some thought since the present statute limits motions for new trial to actions at law.

Sorry to be so late but I did my best.

Yours very truly,

Bill

WILLIAM M. DALE
Circuit Judge

WMD/fl
Enclosure

ORS 17.345 Repeal. Unnecessary except as provided in Rule F(b).

17.350 Superseded by Rule F.

17.355 Superseded by Rule F

17.360

RULE F - INSTRUCTIONS TO JURY AND DELIBERATION.

(a) Proposed. Unless otherwise requested by the trial judge on timely notice to counsel, proposed instructions shall be submitted at the commencement of the trial. Proposed instructions upon questions of law developed by the evidence, which could not be reasonably anticipated, may be submitted at any time before the court has instructed the jury.

(1) Submission. The number of copies of proposed instructions and their form shall be governed by local court rule.

(b) Charging the jury.

In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict.

(1) When charge to be in writing. If in the opinion of the court it is desirable, the charge shall be reduced to writing, and then given to the jury by the court, as written, without any oral explanation or addition. The jury shall take such written instructions with it while deliberating upon the verdict, and then return them to the clerk immediately upon conclusion of its deliberations

The clerk shall file the instructions in the court file of the case.

(c) Deliberation.

Upon retiring for deliberation the jury may take with them all exhibits received in evidence, except depositions. Pleadings shall not go to the jury room.

The court may, in its discretion, submit to the jury an impartial written statement summarizing the issues to be decided by the jury.

(1) Copies may be substituted for any parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession.

(2) Jurors who have taken notes of the testimony or other proceeding on the trial may take such notes into the jury room.

(d) Further Instructions.

After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given in the presence of, or after notice to, the parties or their counsel.

Probably supersedes 17.325 but note some change in language.

(e) Comments upon Evidence.

Judge shall not instruct with respect to matters of fact, nor comment thereon.

(f) Discharge of jury without verdict.

The jury

(1) shall not be discharged after the cause is submitted to them until they have agreed upon a verdict and given it in open court unless:

(a) At the expiration of such period as the court deems proper, it satisfactorily appears that there is no probability of an agreement; or

(b) An accident or calamity requires their discharge;

(c) A juror becomes ill as provided in ORS 17.225.

(2) Where jury is discharged without giving a verdict, either during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the Court directs.

(g) Return of Jury Verdict.

(1) When the jury have agreed upon their verdict, they shall be conducted into court by the officer having them in charge. The court shall inquire whether they have agreed upon their verdict. If the foreperson answers in the affirmative, he or she shall, on being required, declare the same. The verdict shall be in writing.

(2) In civil cases three-fourths of the jury may render a verdict.

(3) Polling the jury.

When the verdict is given and before it is filed, the jury may be polled on the request of a party, for which purpose each juror shall be asked whether it is his or her verdict. If a less number of jurors answer in the affirmative than the number required to render a verdict, the jury shall be sent out for further deliberations.

(a) The jury in a criminal action may, in the discretion of the court, be polled in writing. If the jury is polled in writing the written results shall be sealed and placed in the court record.

(4) Informal or Insufficient Verdict.

If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be required to deliberate further.

(5) Completion of Verdict, Form and Entry.

When a verdict is given and is such as the court may receive, the clerk shall file the verdict. Then the jury shall be discharged from the case. The verdict, under direction of the court shall be substantially entered in the journal as of the day's proceedings on which it was given.

ORS 17.405 Superseded by Rule G infra

17.410 Superseded by Rule G infra

17.415 Superseded by Rule G infra

17.420 Superseded by Rule G infra

17.425 Superseded by Rule G infra

RULE G - VERDICTS, GENERAL AND SPECIAL

(1) General Verdict. A general verdict is that by which the jury pronounces generally upon all or any of the issues either in favor of the plaintiff or defendant.

(2) Special Verdict. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his rights to a trial by

jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(3) General Verdict Accompanies by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered,

but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(4) Action for Specific Personal Property.

In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict is in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding of such property.

(5) Assessment of Amount of Recovery.

When a verdict is found for the plaintiff in an action for recovery of money, or for the derfendant when a counterclaim for the amount of the plaintiff's claim as established, the jury shall also assess the amount of recovery; they may also, under the direction of the court assess the amount of the recovery when the court gives judgment for the plaintiff on the answer.

ORS 17.431 - 17.441 inclusive - Superseded by Rule H

Rule H. - FINDINGS OF COURT.

(1) Whenever any party appearing in a civil proceeding tried by the court, whether at law, in equity or otherwise, so demands prior to the commencement of the trial, the court shall make special findings of fact, and shall state separately its conclusions of law thereon.

(2) In the absence of such a demand for special findings, the court may make either general or special findings.

(3) Within 10 days after the court has made its decision, any special findings requested by any party, or proposed by the court, shall be served upon all other parties who have appeared in the case and shall be filed with the clerk; and any such other party may, within 10 days after such service object to such proposed findings or any part thereof, and request other, different or additional special findings, whether or not such party has previously requested special findings. Any such objections or requests for other, different or additional special findings shall be heard and determined by the court within 30 days after the date of the filing thereof; and, if not so heard and determined, any such objections and requests for such other, different or additional special findings shall conclusively be deemed denied.

(4) Upon (a) the determination of any objections to proposed special findings and of any requests for other

different or additional special findings, or (b) the expiration of the time for filing such objections and requests if none is filed, or (c) the expiration of the time at which such objections or requests are deemed denied, the court shall enter the appropriate order, judgment or decree. Any such judgment or decree filed prior to the expiration of the periods above set forth shall be deemed not entered until the expiration of said periods.

(5) Prior to the expiration of the times provided in subsections (3) and (4) of this section, the time for serving and filing special findings, or for objecting to and requesting other, different or additional special findings, may be enlarged or shortened by the trial court upon the stipulation of the parties or for good cause shown; but in no event shall the time be extended more than 30 days.

(6) Requests for findings or objections to findings are not necessary for purposes of appellate review.

(7) Findings of fact in action at law as verdict; new trial. In an action at law, the findings of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reasons, as far as applicable, and a new trial granted.

ORS 17.505 - 17.515 -- Superseded by Rule J.

RULE J - EXCEPTIONS.

(1) Definition. An exception is an objection taken at the trial to a decision upon a matter of law.

(2) Necessity of Noting Exception. No party may assign as error the statement of issues submitted to the jury pursuant to Rule ____ (now ORS 17.320), the giving or the failure to give an instruction unless he excepts thereto before the jury retires to consider the verdict, stating distinctly the matter to which he excepts and the grounds of the exception. Opportunity shall be given to take the exception out of the hearing of the jury.

(3) Notation of Exception. Any point of exception of which a notation is required by ORS L7.510 shall be particularly stated, and shall be delivered, in writing, to the judge, or entered in his minutes, or taken down by an official reporter, or by any pro tem reporter at the time it is made, and at the time or afterwards, be corrected until made conformable to the truth.

(4) Proceedings where statement is not agreed on. If, at the time the exception is made, the truth of the statement thereof is not agreed upon between the counsel and the court, and the court refuses the exception, the counsel may verify his statement of the point of exception by his own oath and that of two respectable and

disinterested persons, or by his own oath and that of the reporter who took the same down, and file the same as an exception to the ruling objected to. Such statement must be filed within 10 days of the time that the objection is made. Within 10 days thereafter the adverse party may file a statement of objection as prepared or approved by the court, together with the affidavits of not more than three respectable and disinterested persons, or the affidavits of himself and the reporter who took the same down, concerning the truth or falsity of the statement of the exception as filed by the counsel, and prepared or approved by the court. The court must allow the counsel a reasonable time to procure the verification of his statement as required in this subsection; and all affidavits shall be taken by the clerk of the court, who must certify thereon, if he is satisfied of the fact that the person is respectable and disinterested.