NOTICE

September 12, 1979

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

FROM: COUNCIL ON COURT PROCEDURES
University of Oregon Law Center
Eugene, Oregon 97403

The next meeting of the COUNCIL ON COURT PROCEDURES will be held on Saturday, October 27, 1979, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon. At that time, the Council will decide which rules of Oregon pleading, practice, and procedure are to be considered by the Council during the next biennium.

# # # # #

A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, Oct. 27, 1979

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

1. Approval of minutes of meeting held June 22, 1979

2. Election of officers

3. Enforcement of judgments and provisional remedies, Frank R. Lacy, Rules 75-87

4. Judgments, Rules 67-74

5. Educational programs about new rules--staff and member participation

6. Identification of other areas for research and drafting

7. NEW BUSINESS

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held October 27, 1979

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

Present:	Darst B. Atherly	Donald W. McEwen
	John M. Copenhaver	Frank H. Pozzi
	Wm. M. Dale, Jr.	Robert W. Redding
	Wendell E. Gronso	Val D. Sloper
	Hon. Wm. L. Jackson	James C. Tait
	Garr M. King	Wendell H. Tompkins
	Laird Kirkpatrick	Lyle C. Velure
	Hon. Berkeley Lent	William W. Wells
Absent:	Carl Burnham, Jr.	James O. Garrett
	John Buttler	Harriet R. Krauss
	Anthony L. Casciato	Charles P.A. Paulson
	Austin W. Crowe, Jr.	

The meeting was called to order by Chairman Don McEwen at 9:45 a.m. The following guests were in attendance:

Bruce C. Hamlin
Bob Harris
Prof. Frank R. Lacy
Frank M. McCulloch

A motion was made by Judge Sloper, seconded by Wendell Gronso, that the minutes of the meeting held June 22, 1979, be approved. The motion passed unanimously.

The Chairman announced that the Board of Governors had appointed Austin W. Crowe, Jr., Frank H. Pozzi, James C. Tait, and Lyle C. Velure to four-year terms on the Council. Wendell E. Gronso and the Chairman have been reappointed to the Council for a term expiring in 1984. Judge Ross G. Davis, Medford, has resigned from the Council and Judge Robert W. Redding, Portland, has been appointed by the District Judges Association to complete Judge Davis' term.

An election of officers was held. The following were unanimously elected as Council officers for a two-year term, expiring in September 1981:

Donald W. McEwen, Chairman
Wm. H. Dale, Jr., Vice Chairman
Darst B. Atherly, Treasurer

Prof. Frank R. Lacy outlined to the Council the rules which he had prepared relating to enforcement of judgments and provisional remedies. The draft and comments of these rules (Rules 75 - 87) had been mailed to the Council on September 19. Questions were raised by the Council, and Prof. Lacy explained the various aspects of the rules and the reasons for the changes which he has proposed. He suggested that the two most basic changes were: (1) a change in the redemption procedure following execution; and (2) a requirement of more involvement by the trial judge in the enforcement of judgment and provisional remedy procedure. The following were appointed to review as a subcommittee the draft of Rules 75 - 87:

John Buttler, Chairman
Laird Kirkpatrick
Robert W. Redding

The Council discussed proposed areas for its consideration during the next biennium. The Chairman stated that he had directed letters to interested members of the bar, including the Procedure and Practice Committee, Trial Practice Section, Oregon Association of Defense Counsel, and Oregon Trial Lawyers Association, among others, soliciting comments, suggestions, criticism, or opinions. He had directed the attention of the groups to interrogatories, expert witnesses and discovery of expert opinions, summary judgments, and third party practice. The Chairman stated that Walter Cosgrave had responded by suggesting that interrogatories be discretionary upon a showing of good cause. After discussion, it was suggested that subcommittees be directed to examine the areas listed in the Chairman's letter. It was also suggested that the rule relating to admissions be reconsidered.

The following were appointed to the discovery subcommittee:

Garr M. King, Chairman
Donald W. McEwen
Charles P.A. Paulson
Frank H. Pozzi

It was suggested that the expert discovery area and admissions rule be examined by this subcommittee. It was also suggested that the subcommittee consider whether the Council should take up interrogatories again. Garr M. King requested that any correspondence received concerning discovery matters be sent to the discovery subcommittee.

The following were appointed to a subcommittee to study and report upon third party practice and summary judgments:

Frank H. Pozzi, Chairman
Darst B. Atherly
Garr M. King
Donald W. McEwen
Val D. Sloper
James C. Tait
Lyle C. Velure

The following were appointed to a subcommittee to study and report upon class actions:

Austin W. Crowe, Jr., Chairman
Wm. M. Dale, Jr.
Laird Kirkpatrick
Frank H. Pozzi

Justice Lent suggested that a subcommittee be appointed relating to writs of review. He suggested that despite the recent legislative changes in the area, some procedural problems remain. The following were appointed to a subcommittee to study and report upon writ of review procedures:

Berkeley Lent, Chairman
John Buttler
James C. Tait

The draft of Rules 67 - 74, relating to judgments, was discussed briefly. It was suggested that the draft rule relating to attorney fees require that the amount of and the basis for the attorney fee claim appear in the complaint. The following were appointed to a subcommittee to review and report upon Rules 67 - 74:

Wm. L. Jackson, Chairman
Carl Burnham, Jr.
Wendell E. Gronso

Frank Pozzi suggested that a recent decision indicated that juries were having difficulty understanding the correct damage computation in comparative negligence cases and a judge could not reject a verdict even though it appeared the jury had made a mistake in the computation of the damage award. The Chairman suggested that by the time of the next meeting the Council members would have had an opportunity to examine these decisions and then could consider what to do with that problem.

It was pointed out that it had been tentatively decided at the June 22, 1979, meeting that the four public meetings be held in February, March, April, and May, 1980. A discussion followed about whether it would be more appropriate to have the meetings after the Council's drafts of materials covering specific areas were completed, rather than having the meetings for the purpose of soliciting suggestions and comments from interested members of the bar regarding areas to be covered. A suggestion was made that if the first alternative was chosen, the public meetings would then begin in the middle of September 1980, after the Council had accepted tentative rules and amendments. The Council unanimously agreed that the public meetings should not be held until the fall of 1980 and that a decision as to the exact dates of all four meetings be deferred until a later time.

The Council agreed that the next monthly meeting should be held December 8, 1979, at 9:30 a.m., in Judge Dale's Courtroom, by which time the subcommittees will have met and would be able to give reports.

The Executive Director asked subcommittee chairmen to notify him of any research and drafting work required by their subcommittees and of the dates and times of subcommittee meetings.

The meeting adjourned at 11:35 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

M E M O R A N D U M

TO: Fred Merrill

FROM: George Dawson

RE: Proposed Rule 74 A.(2)-- Judgments by Confession in Consumer Transactions

DATE: 10/12/79

The provision in Proposed Rule 74 A.(2) that no judgment by confession may be entered in cases in which the underlying liability arises out of, roughly, a "consumer transaction" can be analyzed on two separate bases:

1. Who is a consumer?

2. To what types of "consumer transactions" will the abolition of judgments by confession apply?

I.

In Proposed Rule 74 A.(2) a "consumer" or "consumer transaction" is defined, basically, as a sale or loan through which an individual obtains goods or services "for personal, family, or household use". The basic source of this language as a definition of a "consumer transaction" is the Uniform Commercial Code (UCC) Section 9-109(1) which provides that "Goods are 'consumer goods' if they are used or bought for use primarily for personal, family, or household purposes;". This basic definition of a "consumer transaction" appears in a wide range of consumer protection statutes and regulations in language identical to that of the UCC (Appendix A contains a selection of these statutes and a quotation of the relevant definition of the "consumer transaction" covered by the particular statute.) I believe that the particular language that you propose in Proposed Rule 74 A.(2) is now so uniformly employed to describe "consumer transactions" that there will be no difficulty in the application of your proposed rule to the full range of "consumer transactions" out of which liability on which one might base a judgment by confession could arise. Thus, I see no need to alter or expand the particular language you have used.

Unlike virtually all other statutes in this field that provide protection for consumers, the Uniform Consumer Credit Code (UCCC) extends its protection, in many cases, not only to one who buys or borrows for "personal, family, or household purposes",

but also to one who engages in a credit transaction for an "agricultural purpose". UCCC Section 1.301(4) defines an "agricultural purpose" as "a purpose related to the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures the agricultural products." Although I am not completely familiar with all of the policies underlying the UCCC, I suspect that that statute recognizes the fact that, even though he or she produces agricultural products for a commercial market, the individual, small farmer probably is no more sophisticated about much of the credit market than is the consumer. Although I am not familiar enough with this field to strongly advocate the following position, it seems to me that if the apparent assumptions underlying the inclusion of credit transactions for agricultural purposes under the UCC is correct, you might consider extending the protection of Proposed Rule 74 A.(2) to judgments by confession that are based upon liability arising out of not only "consumer transactions" but also transactions entered into for "agricultural purposes". (Some of the relevant language from the UCCC is included in Appendix B.)

II.

There are, I think, two observations that might be made about the kinds of transactions to which Proposed Rule 74 A.(2) applies.

First, there is no express statement in the proposed rule indicating that judgment by confession may not be entered upon a security agreement or security interest arising out of a sale or extension of credit related to a "consumer transaction". This may not be a problem, as the language "obligation, or liability" may be broad enough to cover a security interest. Moreover, a judgment by confession entered pursuant to a clause in a security agreement would not be for "money due", but might be only for some sort of summary foreclosure of the security interest. Thus, concerns about confession of judgment clauses in security agreements may be beyond the scope of your proposed rule. I am not certain whether confession of judgment clauses in security agreements (as opposed to the notes that accompany such agreements) are a real problem, but if they do appear in security agreements and if there is a pattern of employing them in some sort of summary foreclosure proceedings, I believe that you should consider extending your proposed rule to prohibit judgement by confession in such situations, as well as in situations in which the creditor seeks only to recover the amount of the debt.

Your proposed rule deals only with the "sale of goods or furnishing of services" and "a loan or other extension of credit" that is related to a "consumer transaction". The UCCC (and, to a lesser extent, some other consumer protection statutes) also cover consumer leases. (The relevant provisions of the UCCC appear in Appendix C.) I don't know how wide-spread the use of relatively long-term consumer leases is, but, particularly to the extent that they are substitutes for credit sales, such leases are likely to contain confession of judgment provisions related to defaults in lease payments. Because these types of leases often are functionally equivalent to credit sales, I believe that you should consider altering the language of Proposed Rule 74 A.(2) to make it clear that no judgment by confession may be entered upon a lease that arises out of the furnishing of goods or services for personal, family, or household use.

APPENDIX A

1. Retail Installment Sales - ORS § 83.010(2): "Goods means all chattels personal, other than motor vehicles as defined in ORS 83.510, when purchased primarily for personal, family or household use and not for commercial or business use. . . .

2. Consumer Loans - ORS § 83.850(2): "Motor vehicle" means a motor vehicle as defined in ORS 83.510 purchased primarily for personal, family or household purposes and not primarily for business or commercial purposes.

3. Debt Collection - Oregon Laws 1977, Chapter 184, Section 2:
   (a) "Consumer" means a natural person who purchases or acquires property, services, or credit for personal, family or household purposes.
   (b) "Consumer transaction" means a transaction between a consumer and a person who sells, leases or provides property, services or credit to consumers.

4. Federal Fair Credit Reporting Act - 15 U.S.C. 1681a:
   (c) The term "consumer" means an individual.
   (d) The term "consumer report" means any written, oral, or other communication of any information by a consumer-reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the

purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes. . . .

5. Federal Debt Collection Practices - 15 U.S.C. 1692a:

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

APPENDIX B

Uniform Consumer Credit Code, Working Redraft No. 6, Final Draft (1974), § 1.301:

(4) "Agricultural purpose" means a purpose related to the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures the agricultural products. "Agricultural products" includes agricultural, horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and products thereof, including processed and manufactured products, and products raised or produced on farms and processed or manufactured products thereof.

(11) "Consumer" means the buyer, lessee, or debtor to whom credit is granted in a consumer credit transaction.

(12) "Consumer credit sale":

(a) Except as provided in paragraph (b), "consumer credit sale" means a sale of goods, services, or an interest in land in which

(i) credit is granted either pursuant to a seller credit card or by a seller who regularly engages as a seller in credit transactions of the same kind;

(ii) the buyer is a person other than an organization;

(iii) the goods, services, or interest in land are purchased primarily for a personal, family, household, or agricultural purpose;

(iv) the debt is payable in instalments or a finance charge is made; and

(v) with respect to a sale of goods or services, the amount financed does not exceed $25,000.

(b) A "consumer credit sale" does not include

(i) a sale in which the seller allows the buyer to purchase goods or services pursuant to a lender credit card, or

(ii) unless the sale is made subject to this Act by agreement (Section 1.109), a sale of an interest in land if the finance charge does not

APPENDIX B con't

exceed 12 per cent per year calculated according to the actuarial method on the assumption that the debt will be paid according to the agreed terms and will not be paid before the end of the agreed term.

(c) The amount of $25,000 in paragraph (a)(v) is subject to change pursuant to the provisions on adjustment of dollar amounts (Section 1.106).

(13) "Consumer credit transaction" means a consumer credit sale or consumer loan or a refinancing or consolidation thereof, or a consumer lease.

(15) "Consumer loan":

(a) Except as provided in paragraph (b), "consumer loan" means a loan made by a creditor regularly engaged in the business of making loans in which

(i) the debtor is a person other than an organization;

(ii) the debt is incurred primarily for a personal, family, household, or agricultural purpose;

(iii) the debt is payable in instalments or a finance charge is made; and

(iv) the amount financed does not exceed $25,000 or the debt, other than one incurred primarily for an agricultural purpose, is secured by an interest in land.

(b) A "consumer loan" does not include

(i) a sale or lease in which the seller or lessor allows the buyer or lessee to purchase or lease pursuant to a seller credit card, or

(ii) unless the loan is made subject to this Act by agreement (Section 1.109), a loan secured by an interest in land if the security interest is bona fide and not for the purpose of circumvention or evasion of this Act and the finance charge does not

APPENDIX B con't

the actuarial method on the assumption that the debt will be paid according to the agreed terms and will not be paid before the end of the agreed term.

(c) A loan that would be a consumer loan if the lender were regularly engaged in the business of making loans is a consumer loan if the loan is arranged for a commission or other compensation by a person regularly engaged in the business of arranging loans and the lender is not regularly engaged in the business of making loans. The arranger is deemed to be the creditor making the loan.

(d) The amount of $25,000 in paragraph (a)(iv) is subject to change pursuant to the provisions on adjustment of dollar amounts (Section 1.107).

APPENDIX C

Uniform Consumer Credit Code, Working Redraft No. 6, Final Draft (1974), § 1.301(14) and Comment Thereto:

(14) "Consumer lease":

(a) "Consumer lease" means a lease of goods

(i) which a lessor regularly engaged in the business of leasing makes to a person, except an organization, who takes under the lease primarily for a personal, family, household, or agricultural purpose;

(ii) in which the amount payable under the lease does not exceed $25,000;

(iii) which is for a term exceeding four months; and

(iv) which is not made pursuant to a lender credit card.

(b) The amount of $25,000 in paragraph (a)(ii) is subject to change pursuant to the provisions on adjustment of dollar amounts (Section 1.106).

Subsection (14):

Leasing has become a popular alternative to credit sales as a means of distributing goods to consumers and merits inclusion in a comprehensive consumer credit code. The four month term requirement in paragraph (a)(iii) excludes from the Act the innumerable hourly, daily, or weekly rental or hire agreements typically involving automobiles, trailers, home repair tools, sick room equipment, and the like. If the transaction, though in form a lease, is in substance a sale within the meaning of Section 1.301(35), it is treated as a sale for all purposes in this Act and the provisions on consumer leases are inapplicable. The Act requires disclosure of the elements of the consumer lease transaction (Section 3.302); places limits on advertising respecting consumer leases (Section 3.209); contains a number of limitations on agreements and practices applicable to consumer leases (Part 3 of Article 3) and on the lessee's liability (Part 4 of Article 3, notably Section 3.401); regulates insurance provided in relation to consumer lease transactions (Article 4); makes provisions for remedies and penalties in consumer lease transactions (Article 5); and gives the Administrator powers over consumer lease transactions (Article 6). Since a finance charge is not made in the usual consumer lease transaction, the rate ceiling provisions of the Act (Article 2) are inapplicable.

M E M O R A N D U M

TO: COUNCIL

FROM: Fred Merrill

RE: Judgment Rules

DATE: October 15, 1979

Enclosed herewith are drafts of Rules 67 through 74 covering judgments, costs, disbursements, attorney fees, default judgments, relief from judgments, stay of judgment, and confessions of judgment. Rule 68 covers the attorney fees problem which we have been asked to solve. A distribution chart showing ORS sections from Chapters 18, 20, and 26 which would be superseded is also included.

The Council is greatly indebted to Bruce Hamlin for excellent research and preliminary drafting for Rules 68, 73, and 74.

I seem to have rashly promised these drafts in the middle of the summer, but they were far more difficult than I had anticipated. These rules, together with Bob Lacy's drafts, leave only a few more areas which could be included in the Oregon Rules of Civil Procedure.

The following rules are in various stages of research and drafting and will be furnished to you before the end of the year:

RULE 65 - REFEREES
RULE 66 - SUBMITTED CONTROVERSIES
RULE 90 - INJUNCTIONS
RULE 91 - RECEIVERS
RULE 92 - DEPOSITS IN COURT
RULE 93 - BONDS AND UNDERTAKINGS

FRM:gh

Enclosures

PROPOSED RULES 67 - 74

Draft

10/15/79

Council on Court Procedures

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RULE 67

JUDGMENTS

A. Definitions. "Judgment" as used in these rules is the final determination of the rights of the parties in an action or special proceeding, and includes a decree as heretofore known and a final judgment entered pursuant to section B. of this rule. "Order" as used in these rules is any other determination by a court or judge which is intermediate in nature.

B. Judgment for less than all causes or parties in action; stay of enforcement. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. The court may also direct entry of a final judgment as to that portion of a claim which exceeds a counterclaim asserted by the party or parties against whom the judgment is entered only upon an express determination that the party or parties against whom such judgment is entered have admitted the claim and asserted a counterclaim amounting to less than the claim and there is no just reason for delay. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other

form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

C. Demand for judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

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

(Alternative 1)

E. Judgments in action against parties jointly indebted on a contract. When a claim is asserted against parties jointly indebted upon a joint obligation, contract, or liability:

E.(1) Where less than all the named parties alleged to be jointly indebted upon a joint obligation, contract, or liability are served with summons in the action, a party asserting the claim may proceed against the party or parties served unless the court otherwise directs. In such case, if the joint obligation, contract, or liability is that of a partnership or other unincorporated association transacting

business under a common name and a judgment is taken, the judgment may be entered against the named parties jointly indebted, and such judgment may be enforced against the joint property of all and the separate property of the party or parties served with summons.

E.(2) In any action against parties jointly indebted upon a joint obligation, contract, or liability, judgment may be taken against less than all such parties and a default, dismissal, or judgment in favor of or against less than all of such parties in an action does not preclude a judgment in the same action in favor of or against the remaining parties jointly indebted.

(Alternative 2)

E.(1) Judgment in an action against a partnership or unincorporated association which is sued in any name which it has assumed or by which it is known may be entered against such partnership or association and shall bind the joint property of all of the partners or associates. If service of process is made upon any member of the partnership or other unincorporated association as an individual, whether or not such partner or associate is also served as a person upon whom service is made on behalf of the partnership or association, a judgment against such partner or associate based upon personal liability may be obtained in the action, whether such liability be joint, joint and several, or several.

E.(2) In any action against parties jointly indebted upon a joint obligation, contract, or liability, judgment may be taken against less than all such parties and a default, dismissal, or judgment in favor of or against less than all of such parties in an action does not preclude a judgment in the same action in favor of or against the remaining parties jointly indebted.

F. Judgment by stipulation.

F.(1) At any time after commencement of an action, a judgment may be given upon stipulation that a judgment for a specified amount or for a specific relief may be entered. The stipulation shall be of the party or parties against whom judgment is to be entered and the party or parties in whose favor judgment is to be entered. If the stipulation provides for attorney fees, costs, and disbursements, they may be entered pursuant to Rule 68.

F.(2) The stipulation for judgment shall be in writing and filed according to Rule 9. The stipulation shall be signed by the parties. If the judgment is to be entered against:

F.(2)(a) An infant or incompetent person, the stipulation shall be signed by a general guardian or other representative as provided in Rule 27.

F.(2)(b) A corporation, the stipulation shall be signed by an officer, director, or managing agent of such corporation.

F.(2)(c) The state or a public body, the stipulation may be signed by any person upon whom summons could be served under Rule 7 D.(3)(c) and 7 D.(3)(d).

F.(2)(d) All named parties jointly indebted upon a joint obligation, contract, or liability of a partnership or unincorporated association under subsection E.(1) of this rule, the stipulation shall be signed by all parties jointly indebted who were served with summons.

COMMENT

Rule 67

A. This definition of judgment comes from ORS 18.010 and is basically the 1862 Field Code definition. The ORS provision gives a definition of a "final" judgment, but there is no necessity for defining "final judgment" as opposed to "judgment" as the appellate statute and execution, etc., rules simply refer to judgment. By the definition, the judgment referred to is final. The definition may not be entirely clear, but it has been applied in a number of cases and there appears to be no necessity to change it. Federal Rule 54(a) defines a judgment as "any order from which an appeal lies." This would be considerably different than the existing definition, as under ORS 19.016 appeal may lie from a number of orders that are not judgments. Other statutes also grant appeals from interlocutory orders, e.g., ORS 13.400. In addition to appeal, the importance of the definition is: (a) for purposes of availability of execution and other means of enforcing judgments, Allen v. Norton, 6 Or. 344 (1877); (b) to decide whether the judgment may be docketed and a lien on real property created, Esselstyn v. Casteel, 205 Or. 344, 286 P.2d 665, 288 P.2d 214 (1955), and State v. Tolls, 160 Or. 317, 85 P.2d 366 (1939); (c) for finality of decision, Portland v. Blue, 87 Or. 271, 170 P. 715 (1948); (d) for application of res judicata, Haney v. Neace-Stark Co., 109 Or. 93, 216 P. 757, 219 P. 190 (1923); and (e) for other miscellaneous procedural provisions such as allowance of attorney fees, Sackett v. Mitchell, 264 Or. 396, 505 P.2d 1136 (1973). Actually, for appeal the matter is controlled by ORS 19.010 and is beyond the rulemaking power of the Council.

The reference to judgments and decrees results from the procedural merger of law and equity. ORCP 1 A. and ORCP 2 probably have already accomplished this, but a specific reference to decrees here will avoid any question. The specific reference to special proceedings is also unnecessary but is consistent with ORS 18.010. The final determination in a special proceedings has always been denominated as a judgment in Oregon practice. See Salem King's Products Co. v. LaFollette, 100 Or. 11, 196 P. 416 (1921).

The inclusion of orders disposing finally of less than all claims or parties under ORS 18.125 (subsection B.(1) of this rule) is taken from ORS 18.010. It was added to ORS 18.010 in 1977 when 18.125 was passed because the literal definition of judgment excludes any decision that does not dispose of all orders and all claims. Note, although 18.125 is commonly viewed as a statute making decision on some claims of parties appealable as judgments, it also makes them enforceable as judgments.

The federal rule states, "A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior pleadings." This was to eliminate some common law rules relating to judgments. No provision appears in ORS and none appears necessary as the Oregon court has held no particular form is required for a judgment, and the substance of the order and intent of the judge are the controlling elements. Esselstyn v. Casteel, supra. Note, some matters as to form are covered under Rule 70 relating to the entry of judgments.

The definition of "order" comes from ORS 18.010(3). It is probably not necessary, but the ORCP do contain a number of references to orders. The definition fits with the definition of "motion" in ORCP 14 A.

B. This is ORCP 18.125(1). It was passed in 1977 (Ch. 208) and was taken from Federal Rule 54(b). The ORS section language had been changed slightly to delete references to decrees, suits, and causes of action. The federal rule language was used as it fits better with the ORCP. See Rule 73 E. for ORS 18.125(2). Note the cross reference in ORS 19.010(2)(c) to 18.125 will be changed. The second sentence does not appear in ORS 18.125. It is taken from ORS 18.080(2) which reads as follows:

> When the defendant has answered, and admits the plaintiff's claim, but sets up a counterclaim amounting to less than the plaintiff's claim, the plaintiff, on motion, shall have judgment for the excess of his claim over such counterclaim, as for want of answer thereto.

The ability to secure an enforceable partial judgment seems desirable in a situation when the parties are disputing a relatively small counterclaim and there is an admitted substantial amount due to the plaintiff. Handling the problem as a default situation is (a) inconsistent with the definition of judgment in 67 A.; (b) inconsistent with default as a party has not defaulted but admitted liability; and (c) undesirable as there should be some court discretion to allow this or not, depending upon the circumstances. It therefore makes more sense to treat this as another form of partial final judgment that can be allowed by the court.

C. This subdivision is crucial to the complete merger of law and equity. Although the Oregon cases appear less than clear in this area, at common law the plaintiff could not receive any relief beyond that specified in the ad damnum clause of the complaint. In equity the general practice was to demand specific relief and then include a general prayer for "such other and further relief" as might be equitable. Under the general prayer the quity court could grant any relief to which the plaintiff was entitled. See Clark, Code Pleading, § 44, p. 266. Most Field Code states enacted a variation of the following provision:

> The relief to be awarded to the plaintiff. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the Court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

The Oregon Code, not merging law and equity, did not contain this provision. There are a number of Oregon cases citing the general prayer for relief and allowing an equity decree to give relief not specifically demanded, e.g., Brooke v. Amuchastegui, 226 Or. 335, 341, 360 P.2d 275 (1961). There is no clear holding that, for a legal action, damages cannot exceed the prayer. Cf. Coleman v. Meyer, 261 Or. 129, 132, 493 P.2d 48 (1972). But see Sparling v. Allstate, 249 Or. 471, 477-479, 439 P.2d 616 (1968), where the court had no trouble finding that a prayer requesting a judgment declaring that defendant was liable for $5,000 allowed the court to enter a judgment for $5,000. The Oregon court also has accepted the general code approach that the prayer is not part of the allegations of the cause of action. Flaherty v. Bookhultz, 207 Or. 462, 291 P.2d 221, 297 P.2d 856 (1956).

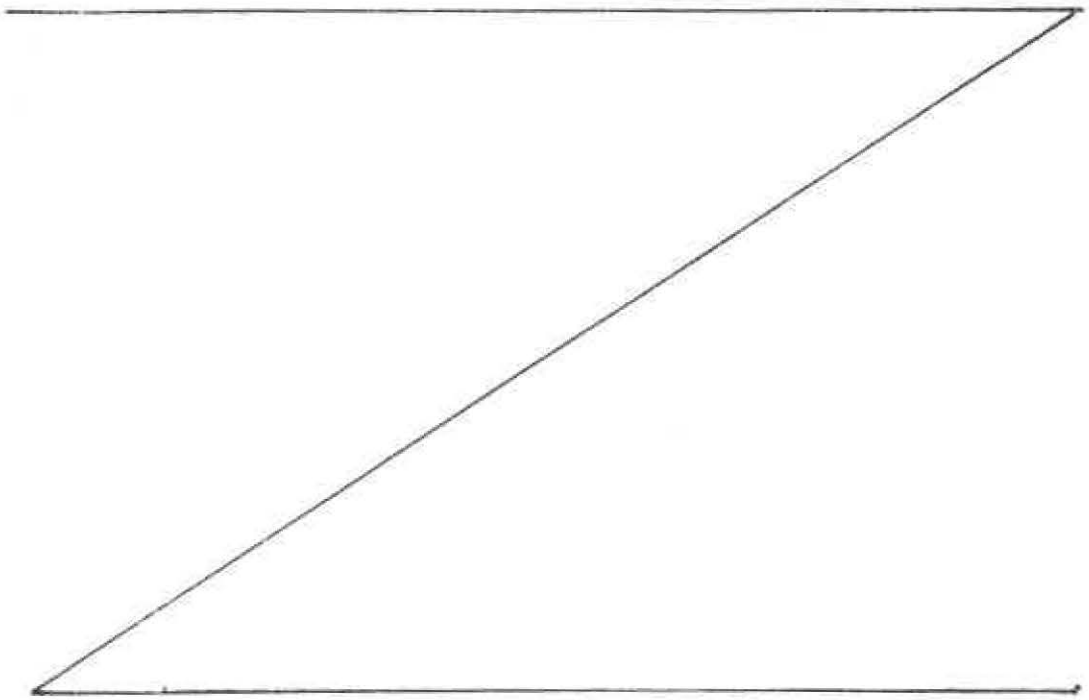
In any case, the Oregon rule on default would appear to be that recovery is limited to the prayer. ORS 18.080(a) and (b) refer to the plaintiff applying for the relief prayed for in the complaint. Cf. Coleman v. Meyer, supra. Apparently, however, in an equity default case the general prayer still allowed any relief. Kerschner v. Smith, 121 Or. 469, 236 P. 272, 256 P. 195 (1927). But if different specific relief is to be awarded, the notice to the defendant and an opportunity to contest relief are required. Leonard v. Bennett, 165 Or. 157, 174, 103 P.2d 732, 106 P.2d 542 (1940). The provision used in section 67 C., which is Federal Rule 54(c), is the only possible approach once law and equity are merged. Any other rule would preserve a distinction between law and equity, be inconsistent with ORCP 23, and retain a theory of the pleadings approach.

Note, this rule does not eliminate a requirement for a prayer or that damages be specifically stated. ORCP 18. These requirements may be enforced by appropriate motion.

One question raised by Federal Rule 54(c) has given the federal courts some difficulty. In default cases, relief is limited to the specific demand in the complaint. The theory is that the defending party should have the choice of accepting the judgment requested rather than spending the time and trouble to defend. The rationale is clearest when a defendant declines to appear at all, but the rule is not limited to complete default. Although there are some federal decisions to the contrary, most federal cases, noting that other federal rules are limited to default for failure to appear (as are the ORCP--see 9 A.), have held the rule applies to a default at any stage. See

Wright and Miller, Federal Practice and Procedure, § 2663. Wright and Miller suggest that the rule might be more properly limited to default for failure to appear, but their argument is unconvincing. They suggest that after initial appearance the defendant must receive notice of the default judgment sought and, if relief beyond the prayer is sought, the defaulting party can object. This ignores the position of a party who decides to default after initial appearance. The defaulting party would have no absolute right to insist that default was only a consent to the specific relief requested in the plaintiff's complaint and would be asking the court to exercise discretion to relieve them of a default or to limit relief. Therefore, the federal rule language was used with the intent that the limit would apply to any default.

D. This section does not appear in the federal rules. It is a specific definition for the form of judgment in a replevin case and fits with ORCP 61 D. It is based on ORS 18.110.



E. This section is intended to solve the problem presented by ORS 15.100, which reads as follows:

> Procedure where part of defendants are served; judgment against one or more of several defendants. (1) When an action is against two or more defendants, and the summons is served on one or more, but not all of them:
>
> (a) If the action is against defendants jointly indebted upon a contract, the plaintiff may proceed against the defendants served, unless the court otherwise directs; and if he recovers judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendant served, and if they are subject to arrest, against the persons of the defendants served; or,
>
> (b) If the action is against defendants severally liable, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.
>
> (2) If all the defendants have been served, judgment may be taken against any of them severally, when the plaintiff would be entitled to judgment against such defendant, or defendants, if the action had been against them, or any of them alone.

This section was considered during the last biennium, but action was postponed until judgments were considered. The section involves an extremely troublesome area of joint and joint and several liabilities and obligations, particularly in the area of partnerships. At common law, concepts of joint and several obligations controlled joinder of parties:

1. To enforce a joint obligation the plaintiff had to sue all, and nothing less than all, obligors.
2. Several obligors could only be sued separately.
3. Joint and several obligors could be proceeded against either together or separately, but either all obligors had to be joined or each proceeded against separately, that is, the action proceeded against all together or one at a time.

In equity, however, no such restrictive rules applied and joinder of parties was controlled by the practical effect of the presence or absence of such parties. See Miller, Civil Procedure in the Trial Courts in Historical Prospective, pp. 98-100.

In addition to the joinder aspects, a number of other procedural considerations would apply to claims against joint obligors.

1. If not all joint obligors can be subject to the jurisdiction of the court and an objection is made to nonjoinder, the action cannot proceed.

2. Under a waiver theory, if no objection is made to failure to join or serve joint obligors, the action may proceed to judgment against those joint obligors who are not parties. See ORS 16.330 (repealed 1979).

3. In any case, for those joint obligors who are defendants, absent some personal defense such as capacity, judgment must be for or against all of them.

4. If judgment is entered for less than all joint obligors (due to waiver of a joinder defense), any claims against the remaining joint obligors are merged into or barred by that judgment.

5. Points 3 and 4 above can be taken to mean that a default against or dismissal of one of the joint obligors releases the rest.

6. If a judgment is taken against less than all joint obligors (by waiver of defense or taking default judgment against less than all), the judgment is not enforceable against jointly held property or the individual property of those joint obligors not named in the judgment.

In England problems described above relating to joint obligations were handled by having unavailable joint obligors declared "outlaws"

and proceeding under the principle described above as if they did not exist. Outlawry was unknown in the United States and in 1756 New York developed a so-called "joint debtor" statute which has descended to us through the Field and Deady Codes almost unchanged as ORS 15.100. Note, subsections 1(b) and (2) of ORS 15.100 merely restate the obvious rule that for several or joint and several obligations the party may proceed to judgment against less than all defendants and are unnecessary. Subsection 1(a) deals with joint obligations which present the problems noted.

In its joinder aspects, subsection 1(a) is unneeded as ORCP 28 - 30 govern permissive and indispensable parties without reference to joint and several liability. (See discussion below relating to ORS 18.120). On the other hand, saying a case may proceed against less than all joint obligors when less then all are served is useful and could be retained.

ORS 15.100 also affects the ability to get an enforceable judgment against, as opposed to joining, less than all joint obligors. The Field Code had developed the concept of waiver of joinder defense (Point 2 above); but before the code, the joinder rule was enforced by saying a judgment against less than all joint obligors was void. Even with waiver making judgment possible against less than all joint obligors, Point 6 above would limit recovery to the individual property of those parties who could be or were served. Although Points 2 through 5 are set out in Oregon cases, they are not addressed by ORS 15.100. Ryckman v. Manerud, 68 Or. 350, 136 P. 826 (1913); Wheatley v. Carl Halvorson, Inc., 213 Or. 228, 323 P.2d 49 (1958).

The ability to subject joint property to a judgment when less than

all joint obligors can be subject to jurisdiction is the critical remaining aspect of ORS 15.100 that must be dealt with in our rules. It is critical because partnerships, joint ventures, and other non-entity business groups are covered by this rule to the extent they incur joint obligations. In Oregon a suit against a partnership must be brought against all individual partners in their own names. Under the Oregon version of the Uniform Partnership Act, ORS 68.270, partners are jointly and severally liable for a partner's wrongful act or breach of trust, if chargeable to the partnership, and jointly liable for all other debts and obligations of the partnership. Roughly, tort liabilities are joint and several and contractual obligations are joint. Therefore, for partnership contractual obligations, if not all partners could be served, and without ORS 15.100, no judgment could be entered binding partnership assets by entry of judgment against the partners who could be served because the obligation is joint. See ORS 68.420 and 68.450 and Ryckman v. Manerud, supra. Actually, the same limitation would apply to tort claims, in the sense the claim would have to be treated as joint and all partners joined and served to bind partnership property and the individual liability of those partners served could not be enforced by levying on those partners' share of the partnership assets, but only a charging order is possible. ORS 68.420 and 68.450. ORS 15.100 allows a plaintiff, who cannot serve all partners, to name all partners, serve less than all, and still secure a judgment that can be satisfied from partnership assets. This seems reasonable and desirable. Inability to serve one partner should not disable anyone from proceeding against a partnership as such. Note, however, the effect of ORS 15.100 is limited

to a partnership's joint, as opposed to a partnership's joint and several, obligations because it applies only to joint obligations "upon a contract."

The problem is substantially diminished by ORCP 4 and the expanded personal jurisdiction possible under that rule. The lack of jurisdiction would only arise where the controversy did not arise out of partnership activities in Oregon but some partners, by presence or domicile, were subject to service here. The problem still exists when for some other reason, such as sheer numbers or lack of knowledge, all partners cannot reasonably be served. For example, to secure a judgment enforceable against partnership assets of a giant national accounting partnership, all partners must be identified, named, and served.

The draft contains two alternative approaches to this problem. Alternative 1 is an attempt to improve the approach of the joint debtor statute. Alternative 2 is the approach of dealing with the problem by making the partnership an entity for procedural purposes.

Alternative 1

This approach does not change the rule that a partnership or other joint business activity which is not a corporation may not be named or served as an entity but each individual partner must be named or served. It modifies ORS 15.100 by making the possibility of a judgment binding partnership assets available for any partnership obligations--not just contracts. "Indebted on an obligation, contract or liability" was taken from NY CPLR § 1501.

The provision, however, does have one questionable aspect. It essentially subjects the property of the absent partner, i.e., the absent partner's share of the partnership assets, to jurisdiction of the court when no personal jurisdiction can be secured over the absent partner. The jurisdiction is not in rem as the suit is on a personal contractual obligation. No quasi in rem jurisdiction is involved as the property is not seized at the outset, and in any case under Shaffer v. Heitner this is not a permissible basis of jurisdiction. Generally, there would be no personal jurisdiction under a minimum contacts theory because if summons could be served on all partners, the provision is not used. In other words, ORS 15.100 would only apply where one partner was served or domiciled in this state on a claim not otherwise connected with the state. At least one author has concluded that under such circumstances subjecting partnership property to jurisdiction would violate due process. Werner, Shared Liability, 42 Albany L. Rev. 1, 22-29 (1977). As far as I know, however, no case has directly held this, and a 1945 study of the New York law by the New York Judicial Council reached an opposite conclusion. 11th Annual Report of the New York Judicial Council 231 (145). See Crane and Bromberg, Partnerships, p. 345-346. Because of this problem, no attempt is made to expand the effectiveness of the judgment to the unserved partners' personal assets.

An acceptable explanation is that jurisdiction over one partner allows the court to order that partner to apply partnership property to partnership obligations. The joining of the absent partners merely satisfies the common law rule as to actions on joint obligations. This theory does not work for joint debtors who are not partners or in a business association. See Crane and Bromberg, Partnerships, p. 346.

There is also the possibility that the partner or partners served can be treated as partnership agents for purposes of receiving process and defending claims against the partnership. For a partnership or business association, the agency exists but it is difficult to see how the existence of a joint obligation would make one joint obligor the agent of another for service of process.

Because under either theory the joint property enforcement should be limited to partnerships and business associations, the ability to obtain a judgment enforceable against joint property is limited to partnerships and unincorporated associations transacting business under a common name.

If an agency theory is followed, it might be appropriate to add a provision to Rule 7 making one joint obligor the agent of another for purposes of serving summons binding partnership property.

Some unsolved problems remain which are not addressed by ORS 15.100 or this version of section E.

(A) If a judgment is entered for less than all joint obligors in a case where less than all were served, the effect is apparently a res judicata merger that prevents later suit against the rest of the joint obligors. Ryckman v. Manerud, supra. Also, if it is possible to bring an action against the absent joint obligors at some later time when they could be served, either to enforce the judgment or as a separate proceeding, does collateral estoppel apply? See 11 ALR 2d 847 (1950).

(B) If all obligors are joined and served, the Wheatley v. Halvorson, supra, case says that any judgment must be for or against all. In New York, at various times, this has meant that entry of a default or

dismissal against some partners barred further action against the rest. Wheatley suggests something similar. It also leaves open the question of individual defenses such as capacity and the effect of a judgment order (67 B.)

(C) Under the merger rule in (A) above, plaintiff could not later proceed against the absent joint obligors if jurisdiction can be obtained over them. This might be avoided by making the second suit ancillary to or a continuation of the first.

Problem (A) is perhaps beyond the reach of these rules, which for the most part do not deal with the substance of or bar of merger. Note, this could be done. New York CPLR § 1502 provides:

> Provisional remedies and defenses in subsequent action against co-obligor. A subsequent action against a co-obligor who was not summoned in the original action must be maintained in order to procure a judgment enforceable against his individually held property for the sum remaining unpaid upon the original judgment, and such action shall be regarded as based upon the same obligation, contract or liability as the original judgment for the purpose of obtaining any provisional remedy. The complaint in the subsequent action shall be verified. The defendant in the subsequent action may raise any defenses or counterclaims that he might have raised in the original action if the summons had been served on him when it was first served on a co-obligor, and may raise objections to the original judgment, and defenses or counterclaims that had arisen since it was entered.

The New York approach seems to say NO collateral estoppel. Note, one of the ORCP, the dismissal rule (Rule 50), does explicity deal with res judicata.

Problem (B) is addressed by section E.(2). The Halvorson result, to the extent based upon release by separate judgment in one case, makes no sense and it is a procedural trap. If a plaintiff can

sue less than all joint obligors, why not allow action against all and judgment against less? The Halvorson ruling is inconsistent with 67 B. and generally with free joinder. It is true that the substantive law may prohibit a verdict or result that finds only some joint obligors liable, absent separate defenses, but this is a matter for instructions to the jury and form of the verdict, not preclusion by judgment or release by default or dismissal.

The approach suggested in paragraph (C) seems inconsistent with Oregon practice and judgment rules. The problem is more sensibly dealt with by directly facing res judicata problems under (A).

Alternative 2

This alternative abandons the joint debtor approach and deals with the central question of subjecting partnership assets to partnership debts by making the partnership an entity for procedural purposes. Note, this does not change the general law as to partnerships but only for purposes of suit. Note also this approach does not specifically deal with the question of compulsory joinder. As indicated above, that is already covered by the Rules and that aspect of ORS 15.100 is not needed.

The object of this approach, in addition to solving the judgment problem, is to simplify pleading and serve the convenience of persons having claims against partnerships or associations who might find it difficult or impossible to ascertain the names of all of the partners or associates before suit.

(1) The judgment rule in E.(1) would only be part of the common name scheme. An additional section must be added to ORCP 26 as section B. (plus change the title) as follows:

> B. Partnerships and associations. Any partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name which it has assumed or by which it is known. Any member of the partnership or other unincorporated association may be joined as a party in an action against the unincorporated association.

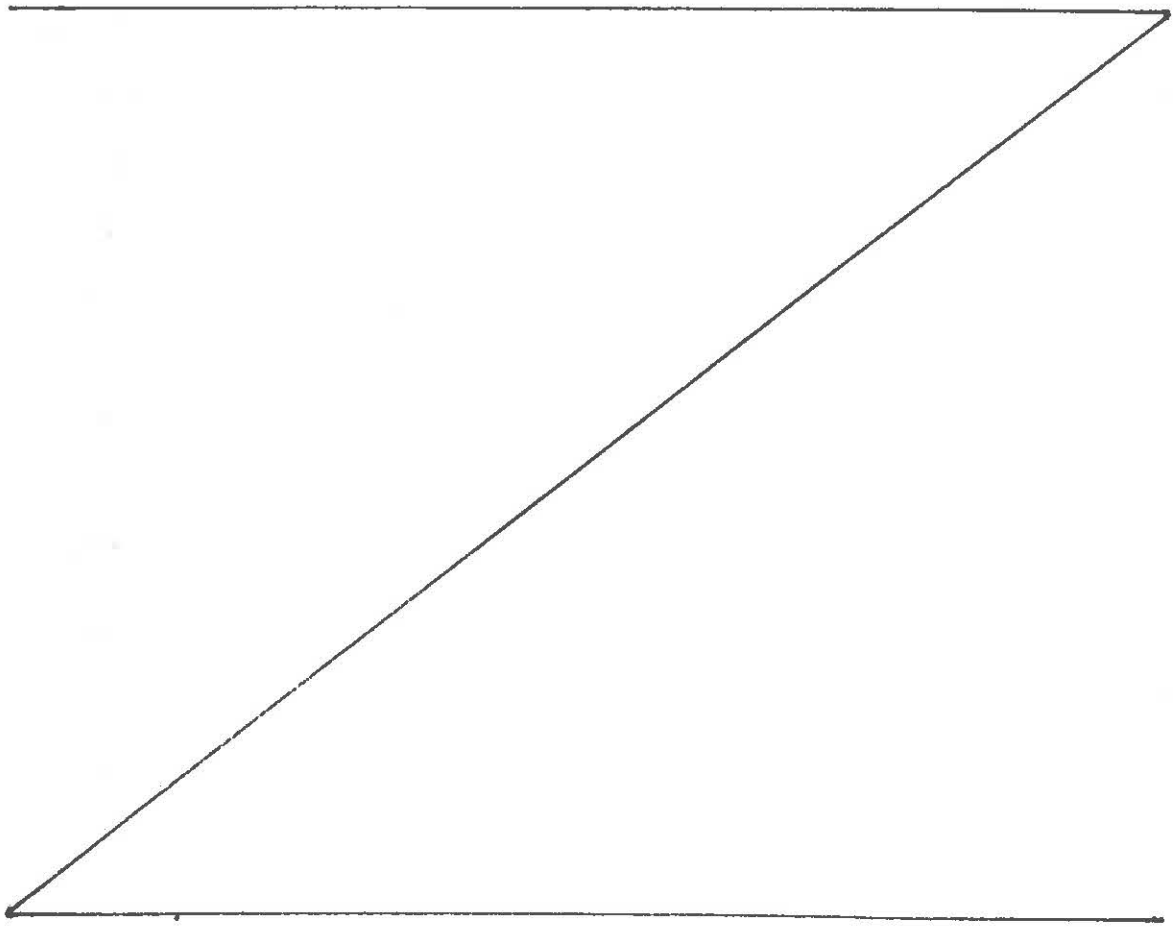
Both 67 E. and 26 B. are taken from § 388 of the California Code of Civil Procedure both before and after a 1967 amendment. The first sentence of E.(1) was in the original § 388 and does not appear in the amended version of the California statute, although that same rule remains. I assume it was considered obvious that a partnership judgment would bind partnership assets, but since this is a substantial change in Oregon, it should perhaps be made explicit. The second sentence of section E.(1) did not appear in the pre-1967 California statute but does appear in the post-1967 statute.

Note, the change of adding 26 B. would automatically invoke the broad service provisions of 7 D.(3)(b) because that service section applies to any "unincorporated association which is subject to suit under a common name." We may not want such broad service on a partnership and a more limited separate partnership service section could be added to Rule 7. As long as the judgment does not subject any absent partner to personal liability, there probably is no constitutional problem. See Crane and Bromberg, Partnerships, §§ 62-63.

(2) The common name statute does not eliminate the Halvorson case so the same new provision discussed above under Alternative 1 to deal with that problem is used as subsection (2) under this alternative. Note also the common name statute does not solve the res judicata problems of later suits against individual partners or the partnership after one judgment.

Section F. is a re-write of the confession of judgment after suit provisions of ORS 26.010 through 26.040. This agreed judgment is very different than the confession of judgment without suit procedure, ORS 26.110 through 26.130, which is covered by Rule 74. No "confession" label is required and to avoid confusion with Rule 74, the procedure is described as a stipulation. No basic change is made. The parties who may stipulate are clarified slightly and no acknowledgment is required.

Note the last sentence of F.(2) provides for stipulation in the partnership situation covered by Alternative 1 of section 67 E. It is the same as ORS 26.030. If Alternative 2 is used, the sentence would not be necessary.



Miscellaneous Sections Eliminated

> 18.100 Judgment for defendant on counterclaim or otherwise. If a counterclaim established at the trial exceeds the plaintiff's demand so established, judgment for the defendant shall be given for the prevailing party, for such amount, or relief, or to such effect, as it appears from the pleadings he is entitled; but, if the cause is otherwise at issue upon a question of fact, the court may order the entry of judgment to be delayed until such issue is tried or otherwise disposed of.

This is the original Field Code provision that extends the counterclaim beyond the common law recoupment and setoff. Since it really is defining the nature of a counterclaim, the subject is best handled under Rule 22. To avoid any question, we should perhaps add Federal Rule 13(c) to Rule 22 A. as follows:

> A. Counterclaims.
>
> A.(1) Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against a plaintiff.
>
> A.(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

> 18.120 Judgment for or against any of several parties. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.

The Field Code provision, together with ORS 15.100, eliminated the common law rule that allowed only one judgment for or against all plaintiffs and defendants in a multiple party case. See Williams v. Pacific Surety Company, 60 Or. 151, 127 P. 145, 131 P. 1021, 132 P. 959,

133 P. 1186 (1913). This is already covered by ORCP 28 A. which says, "Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities." The use of separate judgments for cross-claims, counterclaims, and third-party claims, including parties joined to respond to such claims, is implicit in the rules authorizing such claims and joinder. Finally, ORS 18.125 (ORCP 67 C.) contemplates judgments in less than all claims. ORS 18.120 is no longer necessary and should be eliminated.

> 18.115 Judgment in action or suit on contract. Judgment may be had upon failure to reply against a party joined under ORS 13.180. When it appears that such a party has been duly served with the summons, and has failed to file a reply with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof, the defendant filing a claim against that party shall have judgment against him as follows:
>
> (1) In a claim under subsection (1) of ORS 13.180, as provided for complaints under subsections (1), (3) and (4) of ORS 18.080.
>
> (2) In a claim arising under subsection (2) of ORS 13.180, upon written application of defendant filed with the clerk, and upon the event of defendant's prevailing in the action or suit, the clerk shall enter judgment against the party joined under subsection (2) of ORS 13.180 and in favor of defendant for the amount of reasonable attorney fees as determined under ORS 20.096. The provisions of subsections (3) and (4) of ORS 18.080 shall apply to judgments under this subsection as if judgment were rendered on a complaint.

ORS 13.180 was replaced by ORCP 22 D. allowing joinder of persons to respond to counterclaims and cross-claims. There appears to be no reason for a special rule governing judgments on these claims. All claims are covered by the general judgment rules.

RULE 68

ALLOWANCE AND TAXATION OF ATTORNEY FEES, COSTS, AND DISBURSEMENTS

A. Definitions. As used in this rule:

A.(1) Attorney fees. "Attorney fees" are the reasonable and necessary value of legal services related to the prosecution or defense of an action.

A.(2) Costs. "Costs" are fixed sums provided by statute, intended to indemnify a party.

A.(3) Disbursements. "Disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses, the expenses of taking depositions, publication of summonses or notices, the postage where the same are served by mail, the compensation of referees, the copying of any public record, book, or document used as evidence on the trial, a sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation (not exceeding one percent per annum of the amount of the bond or other obligation), and any other expense specifically allowed by agreement, by these rules, or by other rule or statute.

B. Allowance of costs and disbursements.

B.(1) Generally. In any action, costs and disbursements shall be allowed to the prevailing party, except when express provision therefor is made either in these rules or other rule or statute, or unless the court otherwise directs.

C. Award of and entry of judgment for attorney fees, costs, and disbursements.

C.(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees, costs, and disbursements in all cases, regardless of the source of the right to recovery of such fees, except where:

C.(1)(a) Subsection (2) of ORS 105.405 or paragraph (h) of subsection (1) of ORS 107.105 provide the substantive right to such items;

C.(1)(b) Such items are claimed as damages arising from events prior to the action; or

C.(1)(c) Such items are not granted as an incident to a judgment.

C.(2) Asserting claim for attorney fees, costs, and disbursements.

C.(2)(a) Attorney fees. A party seeking attorney fees shall assert the right to such fees by asserting a demand for attorney fees in the initial pleading filed by that party. A party shall not be required to demand a specific amount of attorney fees or allege facts which entitle that party to attorney fees. A demand for "reasonable attorney fees" is sufficient. Such demand shall be taken as automatically denied unless the party against whom such demand is made fails to object to the entry of an award of attorney fees under paragraph C.(4)(b) of this rule, admits liability for attorney fees under

Rule 45, or affirmatively admits such liability. Attorney fees may be demanded before the substantive right to recover such fees accrues.

Notwithstanding the provisions of Rule 67 C., no attorney fees shall be awarded unless such demand is made. Pleadings may be amended or supplemented to assert such demand before trial, during trial, or prior to entry of a statement allowing attorney fees under paragraph C.(4)(d) of this rule, as provided in Rule 23. Failure to object to an award of attorney fees under paragraph C.(4)(b) on the ground that no demand for attorney fees was asserted in a pleading is a waiver of such objection.

C.(2)(b) Costs and disbursements. No pleading or demand or prayer for costs and disbursements shall be required.

C.(3) Proof. The items of attorney fees, costs, and disbursements shall be submitted in the manner provided by subsection C.(4) of this rule, without proof being offered during the trial.

C.(4) Award of attorney fees, costs, and disbursements; entry and enforcement of judgment. Attorney fees, costs, and disbursements shall be entered as part of the judgment as follows:

C.(4)(a) Entry by clerk. Costs shall be entered as part of a judgment by the clerk of court or person exercising the duties of that office. Attorney fees and disbursements (whether the disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:

C.(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and

the disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and

C.(4)(a)(ii) Files the original statement and proof of service, in accordance with Rule 9 C., with the court.

C.(4)(b) Objections. A party may object to the entry of attorney fees, costs, and disbursements as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the entry of the judgment. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

C.(4)(c) Review by the court; hearing. Upon service and filing of timely objections, the court, without a jury, shall review the action of the clerk and shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.

C.(4)(d) Entry by court. After the hearing the court shall make a statement of the attorney fees, costs, and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary, and the same shall be conclusive as to all questions of fact.

C.(4)(e) Further allowances. There shall be no recovery of attorney fees or disbursements incurred in the course of the review by the court.

C.(5) Enforcement. Attorney fees, costs, and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees, costs, and disbursements as part of a judgment, pursuant to paragraph C.(4)(b) of this section, the court may stay enforcement of that portion of the judgment until the entry of a statement of attorney fees, costs, and disbursements by the court pursuant to paragraph C.(4)(d) of this section.

C.(6) Separate judgments. Where separate judgments are entered under the provisions of Rule 67 B., attorney fees, costs, and disbursements common to more than one of such judgments shall be allowed only once, and the court may direct that the entry of attorney fees, costs, and disbursements as a part of a judgment be postponed until the entry of a subsequent judgment or judgments and may prescribe such condition or conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

COMMENT

Rule 68

This rule (a) provides a uniform method for assessment of attorney fees; (b) adopts the equitable approach of allowance of costs and disbursements to the prevailing party subject to court discretion, and (c) retains the existing method of taxation of costs with some language clarification and minor modification. It is assumed that the amount of costs and fees and the right to attorney fees are not properly subject to Council rulemaking power and will remain as statutes.

A. This section retains the traditional Oregon distinction between costs and disbursements. Since attorney fees will be uniformly taxed as part of the bill of disbursements, a definition of such fees is included. The costs were originally an indemnification for attorney fees. ORS 20.010. Because of passage of time and inflation, costs are so small that they no longer have any reasonable relation to attorney fees. There also is a potential for confusion when there is a right to attorney fees. Therefore, costs are simply identified as a separate statutory indemnity. The "disbursements" definition combines ORS 20.055 and 20.020 and includes a slightly more specific description of disbursements. The definition also recognizes that other statutes or rules may grant a right to additional specific disbursements, e.g., expert witness compensation under ORS 20.098. Note, in a number of other rules, usually taken from the federal rules, the word "costs" is used in a mere inclusive sense as incorporating general expenses. The definition is, therefore, limited to this rule relating to judgments.

B. This section governs allowance of costs and disbursements but

not attorney fees. The right to recover attorney fees is substantive and is covered by a number of separate statutes. This section adopts the equity approach to allowance of costs and disbursements which allows costs to the prevailing party subject to court discretion, i.e., ORS 20.030, rather than the law approach, which made costs mandatory based upon the type of case, e.g., ORS 20.040 and 20.060. The prior equity statute, ORS 20.030, referred to the party in whose favor the decree was entered rather than the prevailing party. The term "prevailing party" is a more common term used in Federal Rule 54(d) and most state rules. The exact language used was taken from Michigan General Court Rule 526.1. The Michigan rule requires that the court direction that costs not be given to the prevailing party be in writing with the reasons stated. This rule does not so require because no such requirement is contained in ORS 20.020 and would be inconsistent with ORS 20.220(2)(now ORCP 68 C.(4)(d)).

Note, the particular limits on costs in de novo appeal to the circuit court in ORS 20.060 are eliminated.

The ORS sections tied disubrsements absolutely to costs. A party with a right to costs had a right to disbursements. Under this rule the court may direct that both or either not be allowed.

The direction of the court might conceivably include assessment of costs against the prevailing party. This is rarely done in the federal system absent a specific statute, e.g., 28 U.S.C.A. §§ 1331 and 1332, but is possible. Note, 54 (roughly the equivalent to Federal Rule 68) identified one situation where costs go to the losing party. This is covered by the first clause of the exception referring to the express provision in these rules or other rule or statute. There may be others. ORS 20.180

was another but is superseded. ORS 20.180 seems to be swallowed by 54 E. ORS 20.180 requires an offer of compromise before action and a tender. It is restricted to a suit for money damages. The same result can be secured by the offer of judgment under ORCP 54 E.

C. This section makes the procedure for assessment of all attorney fees the same as that for costs and disbursements. Rather than refer to assessing attorney fees as part of costs and disbursements, they are treated as a separate item.

There are approximately 150 statutes governing the substantive right to attorney fees. The language of most of them is different, and they have been differently interpreted by the courts as requiring allegation of a right to attorney fees in the complaint and proof of such fees at trial, or as allowing taxation of attorney fees as part of the costs and disbursements. This has created a Grade A procedural trap for a party with a right to attorney fees who makes a mistake as to the proper procedure. It has caused the supreme court and Senate judiciary committee to ask that the Council develop a uniform procedure. Rather than attempt to change the language in all the statutes, this rule simply overrides any other procedural provisions for pleading and assessing attorney fees; hence, the strong language at the beginning of subsection C.(1).

The exceptions specified are necessary because the problem arises with the situation where attorney fee awards are for the fees incurred in prosecution of the action in which they are awarded. In divorce proceedings under Chapter 107 the attorney fees are more properly part of the property settlement. Turner v. Turner, 237 Or. 39, 40, 390 P.2d 360 (1964); Termin v. Termin, 30 Or. App. 1163, 1166, 569 P.2d 673 (1977). The cost bill procedure does not seem appropriate to the sharing of costs involved.

Paragraph C.(1)(b) makes clear that the cost bill procedure would not apply when attorney fees are damages--not costs incurred in the action. Where the attorney fees sought are damages for losses incurred prior to the action based upon a tortious liability or contract obligation, such as breach of warranty, malicious prosecution, professional negligence, etc., the fees should be alleged in the complaint and proved at trial in the same manner as other items of damages.

Paragraph C.(1)(c) recognizes that in some cases a right to costs or attorney fees might arise during the pendency of an action and the court might wish to order payment pendente lite (enforceable by contempt) rather than have such items included in the judgment. For example, the ORCP include provisions for assertion of costs and attorney fees in connection with discovery procedures, for failure to admit, for bad faith affidavits in summary judgment proceedings, etc.

The one troublesome aspect of establishment of a uniform cost bill approach to attorney fees is the question of right to jury trial. The award of attorney fees would be better handled by the trial judge and not a jury. To the extent prior statutes were interpreted as requiring pleading and proof of attorney fees at trial in law cases, the jury assessed attorney fees. If this is purely a matter of procedural rule, the Council could leave this to the trial judge as is done in this rule. If the right is constitutional, however, it is beyond Council rulemaking power.

While the matter is not absolutely free from doubt, there does not seem to be a constitutional right to have a jury award attorney fees. This would only arise if, prior to 1859, such claims were commonly heard

by a jury. In 1859 there appears to have been no attorney fee statutes. They are of later origin and in a number of them the legislature specifically mandated the cost bill procedure which has not been challenged. The Oregon cases referring to right to have a jury trial are interpreting specific statutes. First National Bank v. Mack, 35 Or. 122, 57 P. 329 (1899). There is one case in Oregon that refers to a constitutional right but this may be properly characterized as dicta because the court ruled that a statute required jury trial. Cox v. Alexander, 30 Or. 438, 46 P. 794 (1896). In the recent case of Nicolletti v. Damerow Ford Co., 40 Or. App. 87 (1978), the court's finding of a right to jury trial is based upon a determination that if the statute requires pleading and proof of attorney fees at trial, the matter must be submitted to the trier of fact. If the trier of the fact is the jury, then the issue is submitted to them. There is no suggestion in the Nicolletti case that the submission to the jury is a matter of constitutional right.

The most powerful argument against a constitutional right is the fact that if there was any pattern of awarding attorney fees in 1859, they were actually "costs". The costs were an indemnity for attorney fees under the 1852 Territorial Code and the 1862 Deady Code, and the cost award did not involve the jury. See ORS 20.020. The few cases that do exist in other jurisdictions also find no constitutional right to have the jury assess attorney fees.

Paragraph C.(2) states the basic requirement of notice that attorney fees, costs, and disbrursements are requested. Since costs and disbursements are available of course, no specific prayer seems necessary, particularly in view of 67 C. Attorney fees, however, are only available

in limited cases, and some notice that the opponent will seek attorney fees seems desirable. It could strongly affect the opposing party's evaluation and tactics in a case. Since the fees are a court determination in the cost bill context, formality of pleading seems unnecessary and undesirable. The rule requires only a simple demand and no responsive pleading. To secure fees, a party is required to (a) make a demand and (b) put such fees in the cost bill. The denial of the demand would come in the form of an objection to the cost bill.

Note, in those cases where attorney fees formerly were allowed as part of the cost bill, this rule may add a new requirement of assertion prior to the cost bill. However, failure to make the demand is not irrevocable. Under the specific reference to Rule 23, the party's pleading could be amended as of course or by leave of court prior to the entry of the court's determination of attorney fees. Under the liberal amendment standards of that rule, leave to amend should be granted unless the opponent can show prejudice in some form. Failure to object or objection to the cost bill without raising the question of failure to demand would result in waiver of that objection.

Subsection C.(3) covers proof of objection and makes clear the matter is not handled at trial by the trier of fact but is subject to court determination in the context of assessing costs, disbursements, and attorney fees. The assessment procedure in subsection C.(4) is basically the same as ORS 20.210 and 20.220. Costs, disbursements, and fees may be entered by the clerk and are subject to court review upon objection. Where only costs are sought, no notice is required. The costs are fixed amounts clearly specified by statute and generally are a very limited amount. For disbursements or attorney fees, which would be most subject to controversy,

notice and proof of service is required before the clerk enters these as part of the judgment. The time for objection and filing the cost bill are limited to "not later than" fixed days after "entry" of the judgment of which they are a part, rather than "within" fixed days of entry. The reasoning is the same as similar changes in Rules 63 and 64 relating to time for post trial motions. Paragraphs C.(4)(c) adds a specific requirement of opportunity to present evidence on factual issues heard by the judge.

Subsection C.(5) is based on ORS 20.030. Entry as part of the judgment makes the attorney fees, costs, and disbursements award enforceable. Since the procedure is entry followed by objection, the rule adds a provision allowing a stay if objections are raised. The stay is not automatic but must be granted by the court.

Subsection C.(6) is entirely new and is required by the new procedure that allows more than one judgment in a case, which is 67 B. It avoids multiple court assessments for the same items and makes clear that, even though an appealable and enforceable judgment is entered under 67 B., the court may delay an award of costs, disbursements, and attorney fees until all judgments are entered. This may be either on its initiative or upon objection to a cost bill in the first judgment.

MISCELLANEOUS ORS SECTIONS

Note, ORS 20.050 provided that costs were not available in separate actions against several parties. This has no equivalent in this rule. The problem was limited to costs and seems inconsequential. In any case, it is inconsistent with the other rules.

ORS 20.120 would be eliminated. With the merger of law and equity and elimination of 20.060, it has no function.

Subpart (3) of ORS 20.220 relates to appeal of attorney fees and reamins as a statute in Chapter 19 as follows:

> An appeal may be taken from the decision and judgment on the allowance and taxation of attorney fees, costs and disbursements on questions of law only, as in other cases. On such appeal the statement of attorney fees and disbursements, the objections thereto, the statement of attorney fees, costs, and disbursements as filed by the court or judge, the judgment or decree rendered thereon, and the exceptions, if any, shall constitute the trial court file, as defined in ORS 19.005.

This statute could use some attention:

(1) It would not include the pleading requiring attorney fees in the trial court file.

(2) What about evidence submitted at the hearing?

(3) What exceptions?

The statute is beyond our rulemaking power.

RULE 69

DEFAULT

A. Entry on default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk shall enter the default of that party.

B. Entry of default judgment.

B.(1) By the clerk. The clerk upon written application of the party seeking judgment shall enter judgment when:

B.(1)(a) The action arises upon contract; and

B.(1)(b) A plaintiff's claim against a defendant is for the recovery of a sum certain or for a sum which can by computation be made certain; and

B.(1)(c) The defendant has been defaulted for failure to appear; and

B.(1)(d) The defendant is not an infant or incompetent person and such fact is shown by affidavit; and

B.(1)(e) The party seeking judgment submits an affidavit of the amount due; and

B.(1)(f) An affidavit pursuant to subsection B.(3) of this rule has been submitted.

The judgment entered by the clerk shall be for the amount due as shown by the affidavit, and may include costs, disbursements, and attorney fees entered pursuant to Rule 68.

B.(2) By the court. In all other cases, the party entitled to a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian or other representative as provided in Rule 27 who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, such party (or, if appearing by representative, such party's representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or make an order of reference or order that issues be tried by a jury as it deems necessary and proper. The court shall direct entry of judgment in accordance with its own findings or the verdict of the jury; provided, however, that in all cases where the claim is for unliquidated damages, if a jury is demanded by either party to assess the damage, the court must grant such jury trial. If neither party demands a jury the damage may be assessed by the court.

B.(3) Non-military affidavit required. Notwithstanding subsections B.(1) and B.(2) of this rule, no judgment by default shall be entered until the filing of an affidavit made by some competent person on the affiant's own knowledge, setting forth facts showing that the defendant is not a person in military service as defined in

Article 1 of the "Soldiers' and Sailors' Civil Relief Act" of 1940, as amended, except upon order of the court in accordance with that Act.

C. Setting aside default. For good cause shown the court may set aside an entry of default. If a judgment by default is entered, such judgment may only be set aside in accordance with the procedure and rules governing vacation of judgments not by default.

D. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 67 B.

E. Default judgment after publication. When in any action the service of the summons appears to have been made by publication or other method under Rule 7 D.(6)(a), the court may order the entry of judgment to be delayed until the party seeking the judgment files with the clerk an undertaking, with one or more sureties, to be approved by the clerk, in an amount equal to the sum for which judgment may be given, upon the condition that the party seeking the judgment will abide by and perform any order of the court requiring restitution to be made to the party against whom the judgment is sought or such party's representative in case either of them shall afterwards be admitted to defend against the claim.

COMMENT

Rule 69

The Oregon default statute, ORS 18.080, is almost identical to the 1853 default statute and manifestly unsuited to complex cases with modern joinder of claims and parties. ORS 18.080 refers to failure to answer and to defendants only, but appears to be used for a number of different types of default and against different parties.

The rule drafted uses the basic structure of Federal Rule 55 with a number of modifications. The rule contains a basic distinction between the default and the judgment or default.

Under 69 A. the entry of default is a ministerial act to be performed by the clerk. Anyone who has failed to comply with a time limit for pleading or appearance is technically in default, but until a formal entry of default is made, this can be cured by the necessary pleading or appearance. Reeder v. Marshall, 214 Or. 134, 328 P.2d 773 (1958). After entry, the default can only be cured by the judge vacating the default under section 68 C. Under a similar federal rule it has been held that a default may also be entered by a judge. The rule would clearly apply to the counterclaim, cross-claim, and third party claim situation. ORS 18.080 only referred to default for failure to answer. This rule would apply to anyone required to file a responsive pleading to a claim and to any person who failed to appear and defend at trial. It would also apply when other ORCP provide for default, such as, under ORCP 46, a sanction for failure to comply with discovery rules. The rule would apply when a party against whom a

judgment is sought and who is subject to a motion to dismiss, strike, or change a pleading declines to plead over, as such party would be failing to plead as required by ORCP 15 and 23. The rule would not apply where a motion to dismiss for failure to state a claim or to strike an insufficient defense or for a judgment on the pleadings is granted, and leave to amend is denied under 23 D. These are covered under Rule 70. This rule also does not apply to failure to prosecute or other dismissals of claims against a party seeking judgment. These are covered by ORCP 54.

Rule 69 A. is taken from the federal rule and requires that service must be shown by affidavit or "otherwise" before default can be entered. This would allow use of the record of the case when jurisdiction is by consent and presumably would cover the use of the certificate of service that is in the file with the returned summons to establish service. It would also cover the partnership judgment under ORS 15.100 (see Rule 67 E.).

Rule 69 B. covers the judgment entry after the separate entry of the default. The provision in 69 B.(1) differs from the federal rule in that the authority of the clerk to enter judgment is limited to contract actions. ORS 18.080(a) authorized the clerk to enter judgment in any contract action where money or damages was sought. This would literally include any case where money damages are sought based on contract, including possibly some situations involving unliquidated damages. The "sum certain" language was taken from the federal rule as being more consistent with the role of the clerk,. Note, the rule also is more limited than ORS 18.080 in that the clerk cannot enter judgment when the default is not for failure to appear or when defendant is an infant

or incompetent. The lack of infancy or incompetency should be shown by affidavit before the clerk enters the judgment.

The rule preserves the ORS 18.080(1)(a) requirement of a written application as opposed to the "request" referred to in the federal rules. The language limiting recovery to prayer of ORS 18.080(1)(a) is covered by ORCP 67 D.

Section B.(2) combines ORS 18.080(1)(b) and Federal Rule 55(b)(2). The limit on judgments against infants and incompetents comes from the federal rule. The requirement of a three-day notice for judgments differing from the prayer when there is a default after appearance comes from the federal rule. It seems reasonable that where a party can easily be served under Rule 9, notice of the proposed judgment be given. It is easier to do this than handle problems under a motion to vacate. There also is an Oregon case that seems to say application for a judgment for an amount not specifically pled in the complaint must be upon notice. Leonard v. Bennett, 165 Or. 157, 174, 103 P.2d 732, 106 P.2d 542 (1940). The third sentence comes from Federal Rule 55(b) but is similar to ORS 18.080(1)(b). Under this approach it is sometimes difficult to tell exactly when a hearing is mandatory. The Oregon Supreme Court has said a hearing is mandatory only when evidence "would affect the outcome of the case." State ex rel. Nilson v. Cushing, 253 Or. 262, 266, 453 P.2d 945 (1969). Since all allegations in the complaint are admitted on default, the necessity of a hearing apparently is tied to the adequacy and specificity in pleading the claim. The court has

relatively free discretion to order the hearing, and in case of any default, it probably should. The only alternative would be to require a hearing and evidence in every case which would be unduly burdensome.

The last sentence giving a right to jury trial comes from ORS 18.080 and is different from the federal rule which says there is only a right to jury trial when statutorily granted.

Rule 69 B.(3) does not appear in the federal rule. The obligation to file the non-military affidavit arises from federal statute but it seems reasonable to note the obligation in our rule. The language comes from Rhode Island Rule 55(b)(3).

Rule 69 C. creates a new discretionary power on the part of the trial judge to set aside the default, as opposed to the judgment, without compliance with 18.160 or other requirements for vacating judgments. The judgment can be vacated only under the same conditions as other judgments. The federal rule makes direct reference to Federal Rule 60(b), governing vacation of federal judgments. The Oregon forms for vacation of judgment are more complex (see Rule 71) and in any case an independent suit in equity may be used.

Rule 69 D. makes clear the rule is not limited to plaintiff's claim. It also relates this rule to 67 B., covering judgments involving multiple claims and parties. If some parties default and others do not, in theory judgment can be entered against the defaulting defendants, but unless the defense of other defendants is individual, e.g., capacity, etc., a victory by the remaining defendants inures to the benefit of the defaulting defendants. This would involve vacating the

entered default judgment. See State ex rel. Everett v. Sanders, 274 Or. 75, 544 P.2d 1043. By reference to Rule 67 B., it is now clear that even in default a judgment against less than all defendants is possible only on court order and finding of no just reason for delay. Presumably, if it were possible that the defaulting defendants might be exonerated by a judgment for the appearing defendants, the court would leave the default, but delay entry of judgment until the entire case was finished.

Rule 69 E. does not appear in the federal rule but is ORS 18.030(3). Note the last sentence relating to qualifying and justifying sureties was eliminated, and that will be covered under the general rule for bonds and undertakings.

Federal Rule 55(e) limits default against the U.S. There is no comparable state rule, and none is created here. ORS 18.080(2) is covered in Rule 67 B.

The judgment recitals required by ORS 18.080(4) are unnecessary and incorrect and were eliminated.

RULE 70

FORM AND ENTRY OF JUDGMENT

A. Form. Every judgment shall be in writing and set forth in a separate document. No particular form of words is required but every judgment shall specify clearly the party or parties in whose favor it is given and against whom it is given and the relief granted or other determination of the action. The judgment shall be signed or approved by the court or judge rendering such judgment, or in the case of judgment entered pursuant to ORCP 69 B.(2) by the clerk or person performing the duties of that office.

B. Filing; entry; notice.

B.(1) All judgments shall be filed and shall be entered in the journal by the clerk or the person performing the duties of that office. The clerk or person performing the duties of that office shall, on the date judgment is entered, mail a copy of the judgment and notice of the date of entry of the judgment to each party who is not in default for failure to appear. The clerk also shall make a note in the judgment docket of the mailing. In the entry of all judgments, except a judgment by default under Rule 69 B.(2), the clerk shall be subject to the direction of the court. Entry of judgment shall not be delayed for taxing of costs, disbursements, and attorney fees under Rule 69.

B.(2) Notwithstanding ORS 3.070 or any other rule or statute, for purposes of these rules, a judgment is effective only when entered as provided in this rule.

B.(3) The clerk, or person exercising the duties of that office, shall enter the judgment within 24 hours, excluding Saturdays and legal holidays, of the time the judgment is filed. When the clerk is unable to or omits to enter judgment within the time presented in this subsection, it may be entered any time thereafter.

C. Submission of forms of judgment. Attorneys shall submit forms of judgment upon the direction of the court or judge rendering the judgment. Any form of judgment submitted shall be served in accordance with ORCP 9 B. and proof of service made in accordance with ORCP 9 C.

COMMENT

Rule 70

This rule attempts to deal with the "old, old question of when is a judgment a judgment." Cedar Creek Oil and Gas Co. v. Fidelity Gas Co., 238 F.2d 298 (9th Cir., 1956). The question is of crucial importance for (a) post trial motions, (b) availability of execution, and (c) appeal.

Section A. deals with one aspect of the problem and would modify Oregon practice. The separate judgment requirement is taken from Federal Rule 58 and is designed to prevent confusion as to whether a form of decision filed is really a judgment or just an opinion or something else. This approach, of course, involves a risk that parties will be appealing or attempting to execute based upon something that does not qualify as a judgment. The loss involved is not terribly serious--at most a remand for entry of a valid judgment. The loss, when judgment is mistaken for simply an opinion or order, involves loss of post trial motions and appeal. The reference to specificity of parties and relief is taken from ORS 18.030. The reference to "form of words" conforms to Oregon case law. Esselstyn v. Casteel, 205 Or. 344, 286 P.2d 665, 228 P.2d 214 (1955). The question is one of intent of the judge. The requirement of a separate document presumably denominated a judgment would be helpful in ascertaining such intent. Note, however, the label is not controlling in the sense that a separate document denominated a judgment which is not a judgment, within the definition of 67 A., would not be a judgment. Leavy v. Leavy, 208 Or. 659, 303 P.2d 952 (1956).

The direction of the court could include direction of entry of judgment following motion to dismiss or to strike or for a judgment on the

pleadings when no leave to plead over is granted. The separate provision in ORS 18.090 is not necessary and is eliminated. Also note that questions as to conformance to verdict, findings, referee reports or opinions are not specifically covered. Presumably these limit the trial judge in rendition of judgment but they are not needed in this rule.

The requirement of a writing clarifies another persistent problem. The oral pronouncement of a court is technically rendition of judgment or direction of entry of judgment but not actually a judgment. It is only when a formal judgment is entered that the consequences incident to a judgment attach. Barone v. Barone, 207 Or. 26, 294 P.2d 609 (1956). Parker v. Parker, 407 P.2d 855 (1965).

The requirement that the document be signed or approved by the judge is consistent with the approach of having the judgment prepared by the judge rather than the clerk. There is one Oregon case saying good practice requires the judge to sign the judgment but "signed or approved" was used because it was more flexible. Neal v. Haight, 187 Or. 13, 27, 206 P.2d 1197 (1949).

At the present time, the only provision requiring a writing and filing is that covering orders in vacation. ORS 18.060. That provision does not make any reference to signing. The vacation provision apparently was necessary because of some question of the ability to vacate a judgment after term or enter a judgment in vacation. Under ORCP 10 B., providing the expiration of a term does not affect the power of a court to take any steps in a civil action pending before it, and the amendment to ORS 1.055(2) (saying "Notwithstanding that an act is authorized or required to be done before, during or after the expiration of a term of court, it may be done within a reasonable period of time."). ORS 18.060 seems useless and would be repealed.

Subsection 70 B.(1) raises another dimension of defining a judgment, i.e., at what point is the judgment effective for various purposes. The law in this state is somewhat confusing. The statutes direct that the clerk maintain a register where apparently a note of all papers filed and all rulings and actions are entered prior to entry of final judgment and a journal where the clerk "shall enter the proceedings of the court during term time, and such proceedings in vacation as the statutes specially direct." There also is a judgment docket related to judgment liens. ORS 7.030 and 18.320. Judgments are docketed immediately after entry. Presumably these records may not exist in the form of separate and discrete elements but may be consolidated under ORS 7.015. Even so, the entry under 18.040, and this rule, is to the journal and is a separate step from rendition, filing, or docketing of the judgment. Rendering the judgment is the act of the judge in deciding the case (which would also include signing a judgment) and filing is leaving the judgment with the clerk with the intention that it be entered into the court files. Under this rule the requirement of having a separate written document would mean that the judgment would be filed in this form. See HIGHWAY COMMISSION v. FISCH-OR, INC ., 241 Or. 412, 399 P.2d 1011, 400 P.2d 539 (1965).

Most of the effective dates in the statutes are keyed to entry. This is the date for purposes of appeal (ORS 19.026) and availability of execution (ORS 23.030). Most of the statutes referring to judgments speak of entry, e.g., default (ORS 18.080), multiple judgments (ORS 18.510), and costs (ORS 202.10). Two exceptions are the motions to vacate under ORS 18.160, which is keyed to notice of judgment and availability of supplementary proceedings in enforcement of judgment which contains a reference to "after judgment."

The time limit for post trial motions for new trial and for judgment notwithstanding the verdict, however, was keyed to the filing of the judgment. See ORS 17.615, 17.630, and 18.140(4). These statutes all said that the post trial motions could be filed up to 10 days after filing of judgment, but they also said that the motions would have to be ruled on within 55 days after the entry of judgment. In Charco, Inc. v. Cohn, 242 Or. 566, 411 P.2d 264 (1966), the court said not only that filing was actually the key date for availability of the motions but that also it was the key date for the 55-day limit on ruling upon the motions. In other words, the court said that under those statutes the use of the word "entry" meant "filing." The court relied upon ORS 3.070 to reach this decision. ORS 3.070 says all "orders, findings, judgments, and decrees" not filed in open court "shall become effective from the date of filing." The Charco case is most confusing. In an earlier case, Clark v. Auto Wholesale Company, 237 Or. 456, 391 P.2d 754 (1964), there was a timely filing of a motion for judgment notwithstanding the verdict and the judge ruled and signed an order granting the judgment NOV within 55 days. The order was not entered until 58 days after judgment. Apparently, the clerk neglected to make a timely entry. The court reversed the entry of the order granting the judgment NOV on the grounds that it had been entered more than 55 days after judgment and was automatically denied under the statute. The defendant then paid the judgment and sued the clerk to recover for the loss on the

theory that failure to enter the judgment was the proximate cause of the loss. The suit to recover from the clerk was the Charco case. In the Charco case evidence was presented that the order had actually been filed within the 55-day period. The court said that the prior decision in the Clark case had been based on the assumption that the order had been filed at the same time that it was entered because the only thing reflected in the record before the appellate court was the entry. The court then in the Charco case upheld a judgment against the clerk under the rather novel proximate cause theory that had the clerk carried out his duty to enter immediately, the supreme court would have correctly decided the Clark case.

The confusing thing about the Charco case is why the court got into the meaning of "entry" in the new trial statute. The court relied upon dicta in the prior case of HIGHWAY COMMISSION v. FISCH-OR, INC. (dealing with when the motion must be filed), supra, to come to the conclusion that entry means filing, but such a decision is absolutely unnecessary to the Charco case. It is unnecessary because the reference in the new trial statute to "entry" is to "entry of the judgment." In the Charco case there was no dispute relating to the date of entry of judgment. The entire dispute turned upon when the order granting judgment notwithstanding the verdict was effective. All ORS 17.615 says in this regard is that the judgment shall be "heard and determined" within 55 days of entry and to decide that under ORS 3.070 "heard and determined" means the date on which an order is filed requires no interpretation of the word "entry" in the statute. It is true that the time limit upon filing the motion began upon "filing" of judgment, but that also was not included in the Charco case.

In any case the court did suggest that "entry" meant "filing" and in reliance upon the case the Council changed the word "entry" to "filing" in ORCP 63 and 64.

For present purposes the main point demonstrated by the Clark case is the needless confusion that can arise from having a judgment effective at one point in time for some purposes and at another point in time for other purposes. Whatever else the Council does, there should be some uniformity.

The period of uniformity could be either "filing" or "entry." The Washington Rules, Rule 58(b), state:

> (b) Effective Time. Judgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing, unless the judge earlier permits the judgment to be filed with him as authorized by Rule 5(e).

I would, however, suggest that the approach should be to make the uniform date "entry" rather than filing. The reason behind this approach would be as follows:

1. Even if we had changed the effective date date to "filing" for all purposes under the rules, the appeal statute, ORS 19.026, still keys the effective date for the running of the time to appeal to "entry." Although the Charco case says "entry" means "filing", given the nature of the case, this does not seem to be strong authority for a change in the appeal statute, and it probably still remains actually "entry." But cf. State v. Delker, 26 Or. App. 497, 503, 552 P.2d 1313 (1976).

2. Entry is a more certain point. Although ORCP 9 requires endorsement of date and time on papers when they are filed, there is no official record when the key date is entered. Ascertainment of the actual date requires looking at the file rather than an official record and availability of the paper in the file for these purposes may be less than certain. Note the problem in the Charco case with the record on appeal not reflecting the actual filing. Also, since filing is "delivery to a clerk", not the actual placing of the papers in the court's official files, confusion may arise when the judge's clerk or secretary is also a deputy clerk. For example, in Vandermeer v. Pacific Northwest Development, 274 Or. 221, 223-224, 545 P.2d 868 (1976), it is almost literally impossible to tell exactly when the motion was filed under these circumstances.

3. The most crucial factor is that there is no certainty of notice as to filing as opposed to entry. ORCP 9 A., relating to service of papers, does not absolutely state that a judgment must be served. Even if a judgment is a "similar paper" under ORCP 9 A. and must be served, it in theory is prepared by the judge, and who is then responsible for the service? In any case, it is the filing--not the service--that is the key date, and the filing comes after service; therefore, the additional step of checking the file periodically to ascertain the actual filing date is required.

"Entry" not only is an ascertainable date, but the notice provisions are very specific in the existing statute and identify the responsibility for notice as the actual entry.

4. The entire statutory (and now rule) judgment and enforcement of judgment scheme is built around the entry of the judgment.

To change to "filing" could be accomplished by the Washington provision but would require a number of other changes and might have some unanticipated result.

5. The failure to enter in a timely fashion also is subject to correction by a nunc pro tunc entry directed by the court. White v. East Side Mill, 84 Or. 224, 161 P.2d 969, 164 P. 736 (1919). There is no way to have a nunc pro tunc filing.

This, however, leaves the problem in ORCP 63 and 64 where the time to file a motion for new trial and judgment NOV and the time to rule upon such motions is keyed to filing of the original judgment. The answer would be to simply change the word "filing" in ORCP 63 D. and F. and 64 F. and G. to "entry." In the Charco and FISCH-OR cases the court said using "filing" was desirable because otherwise effectiveness of the judgment was dependent upon the whim of the clerk--not the intent of the judge. In the same opinions, however, the courts point out that there is a logical presumption that the clerk will carry out his or her duty, and in most cases there is no problem. Certainly, after the Charco case decision any party harmed by a failure to carry out the duty has a perfectly effective remedy in a suit against the clerk.

The use of filing for post trial motions also seems to be not based upon any logical approach but an accident. Such motions were keyed to "entry" in the Deady Code and successive revisions until a 1933 revision of the new trial statute which increased the time for filing of a motion for new trial and judgment NOV. See Oregon Laws, 1933, Chapter 233. Since this revision used "entry" in one place

and "filing" in another, referring to the same judgment, it looks suspiciously like a drafting mistake. We should go back and change ORCP 63 and 64.

Taking this approach, Rule 70 B.(1) retains the present "entry" practice. Aside from the limited default situation, the clerk has no authority to prepare and file a judgment or enter a judgment without a direction from the court. Under the federal practice, in some circumstances the clerk may enter a judgment without involvement of the judge.

The notice requirement of entry of judgment was retained. One aspect of this which may require some further investigation is the reality of the mailing of the notice by the clerks in the state. In the 1979 Legislature the Court Clerks organization submitted a bill which would have eliminated all notice involved here (and in 63 E.). There was some representation made to the legislature that because of expenses, notices were not, in fact, being mailed of entry of judgment filing by the clerks' offices in the state. SEE ATTACHMENT 1.

Rule 70 B.(2) is designed to carry out the idea of having "entry" the uniform effective date. With the continued existence of ORS 3.070, which has a reference to judgments, there still could be some argument that "entry" means "filing." Putting in a provision that overrides that seems easier than trying to change ORS 3.070. ORS 3.070 deals with the problem of effective date of actions taken by judges outside of court and rather sensibly limits effectiveness until a public disclosure. This rule does not derogate from that, but has an additional qualification that a judgment is not effective until the formal disclosure is in the form of entry in the records of the court.

Rule 70 B.(3) makes the clerk's duty to enter the judgment certain as to time. For some judgments ORS 18.040 contained the same requirement ("within the day" has been held to mean 24 hours; see Casker v. Hoskins, 64 Or. 254, 128 P. 841 (1913)). Since the rules now require a separate document signed by the judge and entry only by a direction of the court, the carrying out of the duty should be relatively easy and the requirement of entry clear. One ambiguity might be the clerk's default judgment but that still would have to be in a separate document signed by the clerk under Rule 78. Filing would still be necessary. The setting up of a separate time limit rather than referring to ORCP 10 is necessary because ORCP 10 is keyed more to time limits of days rather than hours, i.e., the first day is excluded. The last sentence of subsection 70 B.(3) is ORS 18.040.

Federal Rule 58 states the following:

> Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

The argument for discouraging the preparation of judgments by the parties is:

(a) To avoid delay, and

(b) To emphasize that the responsibility to prepare the judgment rests with the court and not with the prevailing party.

The approach used in section 70 C., however, is more in line with actual practice in Oregon. It is based on an assumption that there is a substantial value and saving of court time in having participation of the parties and that the trial judge is in the best position to make the determination whether or not they should be involved in the process of preparing the judgment.

Finally, if a form of judgment is being submitted, a special requirement of service of that paper is required here because Rule 9 would not clearly cover such a document. The reason for requiring service of a submitted proposed form of judgment is to avoid problems before the judgment is entered rather than having them come up after the entry of judgment. Some jurisdictions set a fixed time period (two days or five days after service) before judgment can be submitted. Such a time period seems too rigid and has a built-in delay. This rule simply says "before submission."

ATTACHMENT 1

From "Judicial Notices"
September 24, 1979

TRIAL COURT CLERKS PLEASE NOTE

The State Court Administrator wishes to remind court clerks and administrative staff of circuit and district courts of ORS 18.030 which provides, along with other things, that the clerks "shall, on the date the judgment is entered, mail a copy of the judgment and notice of the date of entry of the judgment to each party who is not in default."

This statute is not being complied with in many cases in both district and circuit courts. Attorneys need to have an official copy of the judgment and, if they intend to appeal, they must have the date of entry of the judgment. The judgment itself, including traffic orders, must contain, in a conspicuous place, the date of entry. The date of entry is not always (although it should be) the date the judge signed the judgment order. Compliance with ORS 18.030 and careful recording and labeling on the judgment of the official date of its "entry" will be of great service to the trial bar and the appellate courts.

Also, Circuit and District court clerks are reminded that, pursuant to Rule 6.25, Rules of Appellate Procedure, they are to promptly send to the appellate court a certified copy of each trial court order made after filing of Notice of Appeal. Information contained in these orders is often very important to appellate courts, such as orders appointing counsel, orders dismissing appeals, etc.

# # # #

RULE 71

RELIEF FROM JUDGMENT OR ORDER

A. Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court. Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court.

B. Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F.; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should

have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after receipt of notice by the moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment, order, or proceeding shall be served on all parties as provided in Rule 9, and all other motions filed under this rule shall be served as provided in Rule 7. A motion under this section B. does not affect the finality of a judgment or suspend its operation. With leave of the appellate court, a motion under this section B. may be filed during the time an appeal from a judgment is pending before an appellate court, but no relief may be granted during the pendency of an appeal. Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court. This rule does not limit the inherent power of a court to modify a judgment within a reasonable time, or the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or the power of a court to grant relief to a defendant under Rule 7 D.(6)(f), or the power of a court to set aside a judgment for fraud upon the court, or the power of a court to vacate a judgment under Rule 74. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion or by an independent action.

COMMENT

Rule 71

At the present time a judgment once entered can be modified or vacated in Oregon under the following circumstances:

1. To grant a new trial or judgment notwithstanding the verdict under ORCP 63 and 64.

2. By a nunc pro tunc order to correct a clerical mistake.

3. By the exercise of the inherent power of the court to vacate a judgment within a reasonable time under ORS 1.055. Originally, this power could only be exercised during the same term of court as entry of judgment, but a 1959 amendment to ORS 1.055 changed this. Braat v. Andrews, 266 Or. 537, 514 P.2d 540 (1973). This power is quite broad and may include all of the reasons listed in ORS 18.160 and available under an independent suit in equity.

4. By vacation for mistake, inadvertence, surprise or excusable neglect under ORS 18.160. This order must be entered within one year of notice of judgment.

5. By vacation at any time on the grounds the judgment is void for lack of jurisdiction or possibly totally void for some other reason. State ex rel. Karr v. Shorey, 281 Or. 453, 466 (1978).

6. By enjoining of judgment in an independent suit in equity. The relief is available on any equitable grounds including those covered in ORS 18.160 or for lack of jurisdiction. This remedy requires filing of an entirely separate proceeding and an independent basis of jurisdiction over the defendant. The plaintiff must show no

adequate legal remedy; therefore, if relief under ORS 18.160 is available, the statutory procedure should be used. The plaintiff most show existence of a meritorious claim or defense. Oregon-Washington R. & Navigation Co. v. Ried, 155 Or. 602, 65 P.2d 664 (1937). Laches and the clean hands doctrine apply. Wells, Fargo & Co. v. Wall, 1 Or. 295 (1860). The remedy is less easily secured than vacation of judgment under ORS 18.160. Mattoon v. Cole, 172 Or. 664, 143 P.2d 679 (1943).

There is also some possible availability of collateral attack in some other proceeding not directed to the validity of the judgment, but that is beyond the scope of this rule.

This rule basically preserves these remedies. It makes several modifications in form and one substantial change in the area of fraud. The tension in this area is between a desire to achieve reasonable finality of judgments and a desire to provide adequate remedies to correct injustice. The existing range of available post judgment remedies appears to be reasonably satisfactory and is retained.

The form of the rule is a modification of Federal Rule 60. That rule as amended in 1948 has been characterized as "a carefully drafted, smootherly-operating Rule of Procedure." Note, 25 Temple Law Quarterly 77, 83 (1951). Prior to 1948 the federal rule was similar to ORS 18.160, which is the standard Field Code judgment relief statute. The rule for the most part codifies the existing rules in ORS 18.160 and extensive case law.

Section 71 A. covers nunc pro tunc orders which are not codified in the present statutes. The nunc pro tunc authority conforms to Oregon practice and applies to correction of clerical errors or errors

of oversight or omission rather than substantial error. Note, the rule specifically applies to judgments, orders, and other parts of the record and covers pendency of an appeal. The last sentence in the section is not in the federal rule and was added for consistency with section B. and because two federal cases hold to the contrary. Under existing Oregon law the trial court may modify during the pendency of an appeal with a nunc pro tunc order, but it has no jurisdiction to otherwise vacate or modify the judgment. Caveny v. Asheim, 202 Or. 195, 274 P.2d 281 (1954). The effect of this rule is to require permission of the appellate court during the pendency of an appeal before that power is exercised. The reasoning is that even a nunc pro tunc order may have some effect upon appeal and should be subject to control of the appellate court; this also will avoid entry of an order having substantial effect under a mistaken belief it is merely a correction of a clerical mistake or omission. There is no time limit on the authority to correct by a nunc pro tunc order.

The motion procedure described in section B. is that presently covered by ORS 18.160 and cases covering the motion to vacate a void judgment. Note, the section applies only to judgments. ORS 18.160 applies to "judgments . . . orders or other proceedings." No rule, however, is required to vacate orders or acts before final judgment. A court always has authority to modify an interlocutory order. See explicit provision in last sentence of 67 B.

The rule recognizes that the court may grant relief upon any conditions it chooses to impose. See Higgins v. Seaman, 61 Or. 240, 122 P. 40 (1912).

Subsection (1) is identical to ORS 18.160 except the ORS section refers to "his" mistake, etc. In other words, the moving party himself must make the blunder. This seems overly restrictive, and there may be situations where mistake and neglect of others may be just as material and call for relief. See Advisory Committee Note to 1948 Amendment to Rule 60, 5 FRD, at 479. The Oregon court has had no problem extending this to mistakes of attorneys as opposed to the party. Longyear v. Edwards, 217 Or. 314, 342 P.2d 762 (1959). Note, this might include a mistake by the judge. The federal courts differ on whether the motion can be used as a procedure equivalent to a motion for new trial or appeal to correct an error of law. It is generally agreed that after the time for appeal this is not permissible, and mistake must be read with inadvertence, surprise, and excusable neglect to cover some situations of an extraordinary nature. Some courts have held that during the time for appeal but after the time for new trial has expired the procedure can be used to correct judicial error and save an appeal. See discussion 11 Wright and Miller, § 2859.

Subsection (2) is new. It is consistent with the new trial available for newly discovered evidence and retains the due diligence requirement of Oregon cases decided under the inherent power of a court to vacate a judgment or decree. In any case the statutory grounds of 18.160 have always been held to include newly discovered evidence. Wells, Fargo & Co. v. Wall, supra.

Subsection (3) may change the law in two respects. First, although fraud has been recognized as a ground for attacking a judgment within a

reasonable time under 1.055 and by independent suit in equity, it is not clear whether it may be used for the statutory motion. One 1943 case says "yes" under the theory that the fraud would cause surprise or excusable neglect. Nichols v. Nichols, 174 Or. 390, 143 P.2d 663, 149 P.2d 572 (1944). But a later case without distinguishing Nichols states the opposite. Miller v. Miller, 228 Or. 301, 365 P.2d 86 (1961). There seems no reason to exclude it from the statutory grounds.

However available, the Oregon cases do maintain the distinction between intrinsic and extrinsic fraud. Slate Const. Co. v. Pac. Gen. Con., Inc., 226 Or. 145, 359 P.2d 530 (1961). Friese v. Hummell, 26 Or. 145, 37 Pac. Rep. 458 (1894). The basic distinction is between fraud going to issues actually involved in the first action and collateral issues; this means no relief is available for perjury. This rule follows Federal Rule 60 and eliminates the distinction. The reason for the distinction was to prevent endless retrial of issues actually decided in the first case. The problem is that the cases attempting to apply the distinction are inconsistent, and the definition of intrinsic fraud is incomprehensible. It also seems that in some cases of gross fraudulent presentation of facts or of perjury some relief should be available. As one federal court states in response to the retrial argument, "We believe truth is more important than the trouble it takes to get it." A fraud in the case itself involves a direct fraud on the court and should not be ignored. Publicker v. Shallcross, 106 F.2d 949, 952 (3rd Cir. 1939). It should also be noted that in an actual case of fraud or suborning perjury:

(a) Not all perjured testimony cases would involve a retrial as

the fraud must be material to the result (see Rule 72).

(b) The fraud must be proved by clear and convincing evidence.

(c) Fraud would not cover false evidence but only willful presentation of false evidence.

(d) The rule requires due diligence and in case there is a one-year limit.

See Opinion of Justice Brennan in Shammas v. Shammas, 9 N.J. 321, 88 A.2d 204 (1952). All of the above factors prevent relief in any motion based upon an attempt to relitigate the issues in a case and avoid the necessity of an impossible distinction. The federal courts have not suffered by abandoning the distinction. Note, the subsection includes all party misconduct, not just fraud and duress. See Chaney v. Chaney, 176 Or. 203, 156 P.2d 559 (1945).

Subsection (4) codifies the cases in Oregon allowing clarification of the record by purging a void judgment. Note, the one-year time limit does not apply, which is consistent with the Oregon cases.

Subsection (5) is new. Vacation of a satisfied judgment or reversal of a judgment upon which the judgment is based, formerly available through the common law writ of audita querela, is presently available in Oregon by a motion invoking the inherent power of the court. See Herrick v. Wallace, supra. The last clause relating to "no longer equitable" merely restates the standard rule that a judgment (such as alimony or an injunction) with prospective operation, may be subject to change based upon changed conditions. See Farmers' Loan Co. v. Oregon Pac. R. Co., 28 Or. 44, 40 P. 1089 (1895). Again, no time limit applies, nor would one be desirable.

The federal rules have one final category, ". . . any other reason justifying relief from operation of the judgment." This was not included in this rule. It creates confusion because it is frequently argued that grounds (1), (2), or (3) can be asserted, after the one-year limit, under (6). Other than that, few federal cases have arisen that did not fit categories (1) through (5), and in Oregon relief is available under 1.055 and in an independent suit.

Note, the procedure again is by motion and, although not specifically covered, facts asserted would be supported by affidavits. The reasonable time requirement means due diligence must be exercised as is presently required by Oregon law. In the federal courts the due diligence requirement has been held not applicable to ground (4). This is consistent with present Oregon law. The federal rule states that the motion must be made one year after entry. This rule retains the ORS 18.160 approach of beginning the one-year period at notice of the judgment (which presumably would be by the clerk under ORCP 70 B.) but departs from ORS 18.160 in that the motion need only be "filed", not "granted", within the year. It would seem better to make the time limit applicable to the party seeking relief rather than have it depend upon the promptness of the ruling upon the motion.

This rule specifically requires service of the motion, which is not in the federal rule. The reason for allowing the service under Rule 9 for a motion within one year and service as a summons under Rule 7 after one year, is the court's opinion in Herrick v. Wallace, 114 Or. 520, 236 P. 471 (1925). In that case a motion equivalent to subsection (4) was filed three years after entry of judgment. It was served upon

a party's attorney who had long since ceased to represent the party. The court says in dicta that this was not adequate notice and due process required adequate notice. This rule then assumes service on an attorney is adequate within one year of entry (not notice), but personal service on a party is required after that time. Note, the problem may arise under any subsection because the one-year limit for subsections (1), (2), and (3) is keyed to notice, not entry. The service requirement after one year is necessary only for notice; it is not necessary to serve summons for jurisdictional purposes. The motion is still part of the original case, not an independent proceeding.

The language providing that the motion does not stay the judgment is consistent with Oregon practice and comes from the federal rule.

The next two sentences were not in the federal rule. With leave of the appellate court, a motion under this section B. may be filed during the time an appeal from a judgment is pending before an appellate court, but no relief may be granted during the pendency of an appeal. A party may have notice and the year will have run before the appeal is terminated. The rule allows the motion to be filed, which satisfies the one-year limit, but the trial court cannot rule until after the appeal is finished. Leave to file is required because the case is in the appellate court, and this gives the appellate court notice and perhaps an opportunity to act upon the problem. The second sentence comes from the Alabama rules and rejects some federal case law requiring notice even after pendency of appeal. For an Oregon case discussing this, see Nessley v. Ladd, 30 Or. 564, 48 P. 420 (1897). As pointed out in that case, there seems no practical reason why appellate leave is necessary after an appeal ends.

The rule preserves the inherent power under ORS 1.055 and the separate equity suit as independent procedures, and recognizes the possibility of vacation in a service by publication situation covered by ORCP 7 D.(6)(f). The other remedies listed probably do not exist in Oregon. Coram nobis, coram vobis, and audita querela were the common law procedures for vacating judgments. They are not specifically eliminated anywhere by statute, but there are no cases. Bills of review and bills in the nature of review were the procedure for relief of judgments in courts of equity. ORS 16.150, which we repealed last year, specifically eliminated bills of review. The grounds for relief are fully covered by this rule, ORS 1.055, and the equity suit. The reason for specific elimination is that the nature of these writs and bills is confusing and unclear. Under the original Rule 60, a number of federal courts said the common law procedures continued to exist. The Herrick v. Wallace case, supra, says audita querela is superseded by motion where a judgment is satisfied but does not say the remedy does not exist in Oregon.

RULE 72

HARMLESS ERROR

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

COMMENT

Rule 72

This is Federal Rule 61. There is no specific equivalent provision in the Oregon statutes. The rule is included to carry the general philosophy of liberal construction into the area of new trials under ORCP 64 and vacation of judgments under the preceding rule. It is a reinforcement of similar language in ORCP 1 B. and 12. Rules of procedure are a means to an end, and application should be no more strict then necessary.

The rule deals only with harmless error at the trial level, i.e., motions to vacate judgments and for new trials; it is not a rule of appellate procedure. Although it refers to rulings on the admission or exclusion of evidence, it is not itself a rule of evidence.

RULE 73

STAY OF PROCEEDINGS TO ENFORCE JUDGMENT

A. Immediate execution; discretionary stay. Execution or other proceeding to enforce a judgment may issue immediately upon the entry of the judgment, unless the court directing entry of the judgment in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs. No stay of proceedings to enforce judgment may be entered by the court under this section while an appeal from the judgment is pending before the appellate court.

B. Other stays. This rule does not limit the right of a party to a stay otherwise provided for by these rules or other statute or rule.

C. Injunction pending appeal. When a judgment has been rendered granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of any appeal from such judgment, upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. The power of the trial court to suspend, modify, restore, or grant an injunction during the pendency of appeal is terminated by the taking of the appeal.

D. Stay or injunction in favor of state or municipality thereof. The state, or any county or incorporated city, shall not be required to furnish any bond or other security when a stay is granted by authority of section A. of this rule or an injunction is suspended, modified, restored, or granted pending appeal by authority

of section B. of this rule, in any action or proceeding in which it is a party or interested.

E. Stay of judgment as to multiple claims or multiple parties. When a court has ordered a final judgment under the conditions stated in Rule 67 B., the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

COMMENT

Rule 73

Except for the supersedeas bond stay in ORS 19.056, et seq., the Oregon statutes do not clearly deal with stays of execution or judgments in civil cases. This Rule attempts to restate and clarify Oregon practice as it seems to be specified in applicable Oregon cases. The Rule is necessary as stays of judgment by the trial court, apart from supersedeas bond stays, may be required:

(1) During the pendency of motions under ORCP 63 and 64;

(2) Upon appeal in cases not covered by the supersedeas bond statute;

(3) Upon motion to vacate under Rule 71; and

(4) In other special emergency situations.

It only governs stays by the trial court and does not govern stays of any proceeding except a judgment. These are left to appellate procedure and the inherent power of the courts.

Section A. is taken from Utah Rule of Civil Procedure 62a. and restates existing Oregon practice. There is no automatic stay such as the 10-day stay under Federal Rule 62(a) or the rules in some states which stay judgment until the time to file a notice of appeal has run. The express provision eliminates any doubt about the inherent power of a trial court to stay its own judgment. See Helms Groover & Dubber Co. v. Copenhagen, 93 Or. 410, 177 P. 935 (1919), and discussion in Note, 38 Or. L. Rev. 335, 345-350. The Utah language was changed to make clear this section only refers to the court granting judgment. A separate equitable proceeding to vacate a judgment may involve some stay or temporary

injunction of the judgment, but that is a matter of definition of appropriate equitable remedies. See Butler v. Ungerleider, 199 F.2d 709 (2d Cir. 1952). The last sentence is not in the Utah Rule and was added to conform to State ex rel. Peterkort v. Bohannon, 210 Or. 215, 309 P.2d 800 (1957), which holds that after a notice of appeal is filed, the trial court lacks jurisdiction to stay the judgment. This power would exist before or after the pendency of the appeal. Note, many states allow either the trial court or appellate court to stay while the appeal is pending. Arguably, this is desirable as the trial court may be better able to decide, but under the analysis in Bohannon, the question is one of subject matter jurisdiction and beyond the Council's rulemaking authority.

Section B. makes clear the rules do not affect the right to an automatic stay under ORS 19.040 upon filing of a supersedeas bond.

Section C. explicitly gives the trial court some authority to deal with the problem that a supersedeas bond on appeal does not stay a negative injunction, i.e., a judgment prohibiting action is not affected by the stay of ORS 19.040. If the trial court has enjoined an appropriation of water, the defendant cannot file the supersedeas bond and take the water. See Helms Groover & Dubber Co. v. Copenhagen, supra; Threadgold v. Willard, 81 Or. 658, 160 P. 803 (1916); Note, 38 Or. L. Rev. 335, 345-50 (1959). The statutory stay only suspends a positive injunction; see State ex rel. Small v. Small, 49 Or. 595, 90 P. 1110 (1907). Also, where the trial court denies injunctive relief, a temporary injunction may be necessary during the pendency of appeal to avoid irreparable harm.

Lais v. Silverton, 77 Or. 434, 147 P. 398, 150 P. 269, 151 P. 712 (1915). The appellate court may exercise inherent power to issue an injunction pending appeal. Lais v. Silverton, supra; Livesley v. Krebs Hop Company, 57 Or. 352, 97 P. 718, 107 P. 460, 112 P. 1 (1910). This rule allows the trial judge to stay the negative injunction as well as allow or continue a temporary injunction until or through the appeal. Once jurisdiction is transferred to the appellate court by appeal, the trial court's action would be subject to modification by the appellate court. The provision covers the emergency situation where some protection must exist before the appeal is filed (this can be done before entry or as part of the judgment), and before the appellate court can act. The provision also allows the trial court, which may be in the best position to evaluate the situation, to express its opinion as to the best course of action.

Note, the wording is taken from the Alabama Rules of Procedure, except that the last sentence expressly terminates the trial court power when the appeal is filed, whereas Alabama expressly maintains it. This seems unavoidable under State ex rel. Peterkort v. Bohannon, supra, and Caveny v. Asheim, 202 Or. 195, 274 P.2d 281 (1954). In Oregon, the trial court has no power once the appeal is perfected.

Section D. is in keeping with the principle of ORS 23.010 and 20.140.

Section E. is taken directly from 18.125(2). The provision for a stay in a multiple party judgment logically fits here.

The federal rules have a safety provision to avoid conflict with appellate court stays as follows:

> Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or

> to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

Given the fact that this rule does not authorize trial court stays during appeal and the clear fact that the Council could not make binding rules of appellate procedure, it seems unnecessary.

CONFESSIONS OF JUDGMENT

ALTERNATIVE I:

Repeal ORS 26.110-26.130 and enact no rule.

ALTERNATIVE II:

RULE 74

JUDGMENTS BY CONFESSION

A. Judgments which may be confessed.

A.(1) Subject to the provisions of ORS 83.670(1), 91.745(1)(b), 697.733(3), and 725.050(2), judgment by confession may be entered without action for money due in the manner prescribed by this rule. Such judgment may be entered in any court having jurisdiction over the subject matter. The application to confess judgment shall be made in the county in which the defendants, or one of them, reside or may be found at the time of the application. A judgment entered by any court in any other county has no force or validity, notwithstanding anything in the defendant's statement to the contrary.

A.(2) No judgment by confession may be entered without action upon a contract, obligation, or liability which arises out of the sale of goods or furnishing of services for personal, family, or household use, or out of a loan or other extension of credit for personal, family, or household purposes, or upon a promissory note which is based upon such sale or loan or extension of credit.

B. Statement by defendant. A statement in writing must be made, signed by the defendant or person acting for defendant in the same manner as provided by Rule 67 F.(2), and verified by oath, to the following effect:

B.(1) It must authorize the entry of judgment for a specified sum; and

B.(2) If it be for money due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due.

C. Application by plaintiff. Judgment by confession may be entered by the clerk upon the filing of:

C.(1) The statement required by section B. of this rule, and

C.(2) A certificate of service of summons in the manner required by section D. of this rule.

D. Summons. The plaintiff shall issue a summons to the defendant notifying him of the intended entry of the judgment and requiring him to appear within 30 days after service of summons and show cause, if any, why the judgment should be vacated, opened, or modified. The summons shall be served with a copy of the statement required by section B. of this rule. Except as otherwise provided in this rule, the form of summons, the manner of service, and return of summons shall be as provided in Rule 7. In lieu of the notice required by Rule 7 C.(3)(a), the summons shall contain a notice printed in a type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEBTOR

READ THESE PAPERS

CAREFULLY!

Your creditor has applied for a judgment against you in the amount stated in the attached paper. He claims that you have waived any right to a court trial on the claim by signing that paper.

If you wish to contest the claim, you must file with the court a legal paper called a motion, or the creditor will win automatically. The motion must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the creditor's attorney or, if the creditor does not have an attorney, proof of service on the creditor.

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

E. Motion by defendant. Application to vacate, open, or modify the judgment must be made by motion within 30 days after service of the summons. The motion shall be made on the ground that the defendant did not knowingly and intelligently waive such defendant's constitutional rights concerning the entry of judgment or that the defendant has a meritorious defense to the cause of action. It shall set forth fully the facts relied on for such defense. A copy of the motion shall be served on the plaintiff or his attorney. If no application is made within the time allowed, and the judgment was

entered prior to the expiration of the 30 days, the judgment shall stand to the same extent as a judgment after trial.

F. Disposition of defendant's motion. If the evidence presented at a hearing establishes that the defendant could have resisted a motion for a directed verdict if the case were tried on the merits, the court shall order the judgment by confession vacated, opened, or modified with leave to file a pleading and the case shall stand for trial. If the evidence does not establish that the defendant could have resisted a motion for directed verdict if the case was tried on the merits, the motion shall be denied and the judgment shall stand to the same extent as a final judgment after trial.

G. Use of discovery. The court may, for good cause shown, permit the use of any discovery device prior to the hearing on defendant's motion.

H. Other cases. Except as authorized by this rule, judgment by confession shall be entered only upon order of court, after such notice and upon such terms as the court may direct.

I. Enforcement of judgment. Unless otherwise ordered by the court, a judgment by confession may not be enforced until either the expiration of 30 days after service of summons on the defendant or disposition of any motion filed under section E. of this rule, whichever occurs later.

J. Extensions of time. The court may, for good cause shown, extend the time for responding to any summons or notice pursuant to this Rule.

K. Judgments by confession entered prior to the effective date of this rule.

K.(1) Application for enforcement by judgment creditor. A judgment entered prior to the effective date of this rule by a court of this state by authority of ORS 26.110 to 26.130 or any prior statute and which has not been enforced by execution or otherwise may not be so enforced until the judgment creditor shall notify the judgment debtor. The judgment creditor shall issue a summons to the defendant notifying him of the intended enforcement of the judgment and requiring him to appear within 30 days after service of summons and show cause, if any, why the judgment should not be enforced. The summons shall be served with a copy of the judgment. Except as otherwise provided in this rule, the form of summons, the manner of service, and return of summons shall be as provided in Rule 7. In lieu of the notice required by Rule 7 C.(3)(a), the summons shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEBTOR

READ THESE PAPERS

CAREFULLY!

Your creditor obtained the attached judgment against you without notice to you and without a court trial. He claims that you waived any right to a court trial on the claim by signing a paper.

If you wish to prevent your creditor from enforcing that judgment against your property, you must file with the court a legal paper called a motion, or the creditor will win automatically. The

motion must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the creditor's attorney or, if the creditor does not have an attorney, proof of service on the creditor.

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

K.(2) Motion by judgment debtor. The judgment debtor may make a motion within the time and in the manner permitted by section E. of this rule. The provisions of sections F., G., and J. of this rule apply to such motions.

K.(3) Enforcement of judgment. Unless otherwise ordered by the court, a judgment by confession governed by this section may not be enforced until either the expiration of 30 days after service of summons on the defendant or the disposition of any motion filed under section E. of this rule, whichever shall occur later.

K.(4) When judgment creditor takes no action. Even though the judgment creditor takes no action to enforce the judgment by execution or otherwise, the judgment debtor may nonetheless move the court for an order in the manner permitted by section E. of this rule. This motion may be made at any time. The provisions of sections F. and G. of this rule apply to such motions.

L. Judgments entered by other jurisdictions. A judgment entered by another jurisdiction, whether prior to or after the effective date of this rule, by authority of any statute or procedure which permits judgments by confession, which does not provide due process safeguards shall not be enforced.

COMMENT

Rule 74

This proposed rule deals with confessions of judgment without action. Confessions of judgment after action have been covered by the stipulated judgment provision of Rule 67 F.

The use of the confession of judgment based upon authorization of power signed by a debtor (usually when the obligation is created) is a controversial issue in the area of consumer protection and creditors rights. The device is a procedure, however, that authorizes use of judgment collection power of the state as provided by the procedural rules.

Confessed judgments are not per se unconstitutional. Compare D.H. Overmyer Co., Inc. v. Frick Co., 92 S.Ct. 775, 405 U.S. 174 (1972), with Swarb v. Lennox, 92 S.Ct. 767, 405 U.S. 191 (1972). However, some states have gone further than the U.S. Supreme Court. New York's Court of Appeals critized them as "the loosest way of binding a man's property that was ever devised in any civilized country," and refused to accord them full faith and credit. Atlas Credit Corp. v. Ezrine, 25 N.Y.2d 219, 250 N.E.2d 474, 478 (1969), quoting Alderman v. Diament, 7 NJL 197, 198 (1828). A number of states have outlawed them entirely, or in certain transactions (see, e.g., ORS 83.670(1), ORS 91.745(1)(b), ORS 697.733(4), and ORS 725.050(2).

ALTERNATIVE I

The complete repeal of ORS Chapter 26 could not be based on the unconstitutionality of consent judgments in all forms. If proper notice is given, the procedure is constitutional. But the Council may conclude that the inherent unfairness of depriving a debtor of a hearing so far

outweighs the commercial advantage of such judgments as to make the adoption of a rule on the subject imprudent. Granted, the repeal of Chapter 26 might be seen as substantive consumer protection, but there is clearly a legitimate interest in a rule which protects the dignity of the judicial system to the end that the word "judgment" truly does mean "a final determination of the rights of the parties." ORS 18.010 (1). This sort of action is not unprecedented. After the Overmyer decision, the Circuit Court of Cook County, Illinois stopped executing judgments by confession until they were confirmed after notice to the debtor. Supplement to Historical and Practice Notes, Ill. Ann. Stat. ch. 110 § 50(3)(1979 Pocket Part).

ALTERNATIVE II

This alternative retains confession of judgments but severely curtails their use: (1) confessions of judgment would no longer be available in consumer credit transactions, and (2) pre-judgment notice and pre-enforcement opportunity for hearing are required.

The consumer credit situation is the area of most serious abuse on the confession of judgment procedure. The rule would merely complete the legislative piecemeal action of abolishing confessions of judgment by debt consolidation agencies, ORS 697.733(4), by licensed consumer finance entities, ORS 725.050(2), for rental agreements, ORS 91.745, and in retail installment sale contracts, ORS 83.670(1).

There is a great deal of dispute as to whether due process requires a pre-judgment notice to the debtor of a confession of judgment, or whether an ability to reopen or vacate the judgment on the part of the debtor is sufficient. The cases holding the former include: Isbell v. County of Sonoma, 21 Cal.2d 61, 145 Cal. Rptr. 368, 577 P.2d 188 (1978),

cert. den. 99 S.Ct. 597 (1978); Virgin Islands Nat. Bank v. Tropical Ventures, Inc., 358 F. Supp. 1203 (D. St. Croix (1973); Osmond v. Spence, 359 F. Supp. 124 (D. Del. 1972). The cases holding contra include: Star Finance Corp. v. McGee, 27 Ill. App.3d 421, 326 N.E.2d 518 (1975); Irmco Hotels Corp. v. Solomon, 27 Ill. App. 3d 225, 326 N.E.2d 542 (1975); Tunheim v. Bowman, 366 F. Supp. 1392 (D. Nev. 1973). The U.S. Supreme Court has not decided the issue, but there are several policies to consider:

(1) The mere existence of a judgment even unexecuted may cast a cloud over the debtor's financial dealings, whether he is aware of it or not;

(2) If no pre-judgment notice is given, the debtor may not challenge the judgment until some later time when execution is sought. That puts the burden on the debtor to hurry into court to stop a sale. Creditors apparently don't always execute until months or even years after getting their judgment. By then, evidence may be stale or the debtor may be faced in court with an assignee of the judgment, rather than the original creditor;

(3) The standards for upsetting a judgment by other means may be stricter than that provided by this rule (see Rule 71).

Once the pre-judgment notice is given, the judgment may not be enforced (section J.) until the debtor has had a 30-day opportunity to challenge the entry of judgment. The grounds for the challenge are ineffective waiver or the existence of a meritorious defense. Probably the only constitutionally required ground is the effectiveness of the waiver,

but the modern rule allows any defense to be raised. If the challenge fails, or if no motion is filed within 30 days, the judgment is final, constitutionally enforceable, and non-appealable.

Section A.

The reference to the statutory prohibitions is desirable. They are broader than the consumer credit limit in subsection (2).

While debts "to become due", Green v. Green, 34 Md. App. 350, 367 A.2d 102 (1976), and contingent liabilities, Allen v. Norton, 6 Or. 345 (1866), have traditionally been eligible for confession (see ORS 26.110 superseded by this rule), the rule makes only debts actually due eligible for judgment by confession. Creditors seeking security should look to UCC Art. 9, indemnity agreements, or other arrangements.

The last three sentences of section A. are designed to prohibit the sort of forum shopping encountered when the plaintiff is authorized to confess judgment anywhere in the world. The provision is patterned on Ill. Ann. Stat. ch. 110, § 50(3)(1968), and uses the venue rules of ORS 14.080.

Note, these provisions are in the nature of venue rules but are not ordinary venue provisions controlling case flow but more in the nature of a due process protection granting the defendant a local court for this unusual procedure. The effect of failure to comply is an invalid judgment where a venue defect does not invalidate judgment.

ORS 26.120 (superseded by this rule) permitted confessions by warrant. The substituted language from Cal. CCP § 1132 requires the confession to be signed "by the defendant." Because the confession must be made by the defendant and not by power of attorney or warrant, Barnes v. Hilton, 118 Cal. App. 2d 108, 257 P.2d 98 (1953), and

because of the detail required in the statement, it would ordinarily have to be prepared after default on the obligation. In any event, no judgment may be entered until the debt is due. Note, the rule continues the ORS scheme of specifying who actually may sign by reference to judgments confessed after action (now stipuated judgments).

This rule does not govern the effect of a confession by one defendant or a co-defendant. See Richardson v. Fuller, 2 Or. 179 (1866); ORS 68.210(3)(d); ORS 69.350(i)(c).

Subsection A.(2) prohibits use of the confession of judgment in consumer transactions. The language defining the prohibited transaction was adapted from California Code of Civil Procedure § 1132.

Section B.

For the amount of detail needed in the statement of the debtor required by section B., see Richardson v. Fuller, supra; Princeton Bank and Trust Co. v. Barley, 57 A.D.2d 348, 394 N.Y.S.2d 714, 717-18 (1977). "It is sufficient that there appears to be an honest recital of enough detail to permit a check of its genuineness and to simplify an investigation of the underlying facts [by other creditors of the debtor]." Id. at 718.

The burden of serving summons is on the creditor. No judgment can be entered until the certificate of service is filed with the clerk. The creditor waits to file the certificate at his peril, since the debtor might file a motion to vacate on the 31st day and the creditor would then have to prove service of process. Also, the creditor would be gambling with his priority over other creditors.

Section D.

The notice required by section D. is designed to satisfy due

process requirements. D.H. Overmyer Co. v. Frick Co., 92 S.Ct. 775, 405 U.S. 174 (1972); Isbell v. County of Sonoma, 121 Cal.3d 61, 145 Cal. Rptr. 368, 577 P.2d 188 (1978). Basically, it is the same as commencing an action.

Section E.

Due process requires an opportunity to vacate the judgment on some grounds. The modern practice is to permit a reopening on a showing of any meritorious defense. Maryland Rules of Procedure 645 c. Some states limit the grounds to a showing of ineffective waiver. Del. Code Ann., tit. 10, § 2306(h)(1974). Compare State ex rel. Karr v. Shorey, 281 Or. 453, 466-67 (1978). Section E. permits a challenge on either ground.

Section F.

Section F. is derived from Maryland Rules of Procedure 645 d. The original version, as in several states, referred to "substantial and sufficient grounds for an actual controversy on the merits." Such language has been interpreted as posing the directed verdict test stated in section F. See D.H. Overmyer Co. v. Frick Co., supra, at 188-90 (1972) (Douglas, J concurring).

The resulting judgment, if the debtor makes no motion, or does not prevail on it, is final and non-appealable. ORS 19.020.

Section G.

Section G. is an attempt to balance the need for discovery against the cumbersome process which would result if all discovery procedures applied automatically. See Goldstein v. Peninsula Bank, 41 Md. App. 224, 396 A.2d 542 (1979).

Sections H., I., and J.

Section H. is derived from Maryland Rules of Procedure 645 i. Sections I. and J. are derived from Maryland Rules 645 j and h, respectively. Section J. is simply a repetition of ORCP Rule 15 D.

Section K.

This section and section L. were the trickiest sections to draft. Only one state has a procedure like section K., and none has a provision like section L. Section K. is designed to give debtors who already have a judgment against them a chance to challenge its enforcement if it wasn't entered in a manner in accordance with due process. The standards are the same as the pre-judgment challenge. This section is based on the procedure of Del. Superior Ct. Rule 58c. Note that sections K. and L. apply only where no attempt has previously been made to execute. Presumably, an attempt to execute would provide the judgment debtor with sufficient notice to satisfy due process.

Section K.(4) is a codification of First Mercantile Bank Co. v. Bittner, 337 A.2d 321 (Del. Super. 1975), which expanded the rights of a debtor on the theory that a judgment, even unexecuted, casts a cloud on the debtor's financial dealings.

Section L.

Section A. should stand up to a constitutional challenge based on full faith and credit. Atlas Credit Corp. v. Ezrine, supra, even though not overruled, is wrong in holding that confessed judgments are not judicial proceedings within the full faith and credit clause. Id. at 476. But a judgment entered in a manner which violates due process is void and thus not entitled to full faith and credit.

See "Confession of Judgment in California," 8 Pac. L.J. 99, 110-114 (1977). Basically, the section only restates an existing constitutional limitation but is useful to warn persons faced with enforcement of a foreign confessed judgment of the due process defense.

Miscellaneous Sections

This rule does not deal with the burden of proof in the hearing. That is a rule of evidence outside the Council's authority. On the burden of proof, compare Virgin Islands Nat. Bank v. Tropical Ventures, Inc., 358 F. Supp. 1203, 1207 (D. St. Croix 1973), with Swarb v. Lennox, 314 F. Supp. 1091, 1103 (E.D. Pa. 1970).

ORS 26.110, 26.120, and 26.130 would be superseded by this rule. The first two are incorporated in this rule. ORS 26.130 is not needed if the Council agrees that confessed judgments should not be permitted in cases of contingent and unmatured liability. If the Council does not agree, the last sentence of ORS 26.130 should be added at the end of section J. The first sentence should be incorporated by adding a section B. (3) which reads:

> If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and show that the sum confessed does not exceed the same.

PROPOSED

DISTRIBUTION OF ORS SECTIONS

ORS		Rule
15.100	Superseded	67 E.
18.010	Superseded	67 A.
18.020	(Repealed in 1979)	67 A.
18.030	Superseded	70 B.(1)
18.040	Superseded	70 B.(2)
18.050	Superseded	70 B.(2)
18.060	Superseded	No equivalent provision
18.070	Superseded	No equivalent provision
18.080(1)	Superseded	69 A. and B.
18.080(2)	Superseded	67 B.
18.080(3)	Superseded	67 D.
18.080(4)	Superseded	No equivalent provision
18.090	Superseded	70 B.(1)
18.100	Superseded	No equivalent provision - see ORCP 22 A.
18.105	(Repealed in 1979)	ORCP 46
18.110	Superseded	67 D.
18.115	Superseded	No equivalent provision
18.120	Superseded	No equivalent provision
18.125(1)	Superseded	67 B.
18.125(2)	Superseded	73 E.
18.140	(Repealed in 1979)	ORCP 63
18.160	Superseded	71
18.210 through 18.260	(Repealed in 1979)	ORCP 54
18.310	(Repealed in 1979)	ORCP 2
18.320 through 18.420		Lacy Material

ORS		Rule
18.430 through 18.460	Remain as statutes	
18.470 through 18.490	Remain as statutes	
18.510		Lacy Material
20.010	Superseded	68 A.
20.020	Superseded	68 A.
20.030	(Repealed in 1979)	68 B.
20.040	Superseded	68 B.
20.050	Superseded	No equivalent provision
20.055	Superseded	68 A.
20.060	Superseded	68 B.
20.070 through 20.110	Remain as statutes	
20.120	Superseded	No equivalent provision
20.130 through 20.170	Remain as statutes	
20.180	Superseded	See ORCP 54 E. (amended)
20.210	Superseded	68 C.
20.220(1) and (2)	Superseded	68 C.
20.220(3)(amended)	Remains as statute	
20.230	Superseded	68 C.
20.310 through 20.330	Remain as statutes	
26.010	Superseded	67 F.(1)
26.020	Superseded	67 F.(2)
26.030	Superseded	67 F.(2)
26.040	Superseded	67 F.
26.110	Superseded	74 A.
26.120	Superseded	74 B. through J.
26.130	Superseded	No equivalent provision

M E M O R A N D U M

TO: COUNCIL

FROM: Fred Merrill

RE: ENFORCEMENT OF JUDGMENTS AND PROVISIONAL REMEDIES

Enclosed is the draft by Bob Lacy of Oregon Rules of Civil Procedure 75 through 87 covering enforcement of judgments and provisional remedies, together with comments. Mr. Lacy will attend the October meeting. In addition, ORCP 67 through 74 covering judgments, defaults, entry and vacation of judgments, stay of judgments, and confessions of judgments (which I rashly promised by mid-summer) are in semi-final draft form and will be mailed to you before the October meeting.

I also am enclosing copies of two letters from attorneys containing comments and suggestions.

FRM:gh

Enclosures: Draft of ORCP 75 - 87
Comments
Letter from Burl L. Green dated 9/11/79
Letter from Thomas V. Bryant, Jr., dated 9/11/79
ORCP 1 - 64

9/19/79

OREGON RULES OF CIVIL PROCEDURE

Rules 75 - 87

Draft

9/18/79

Professor Frank Lacy

TABLE OF CONTENTS

RULE 75

SCOPE; GENERAL PRINCIPLES; DEFINITIONS

A. Scope of Rules 75-87. Rules 75-87 govern the procedure for obtaining provisional security while an action is pending and for the enforcement of final judgments. They apply to proceedings in both circuit and district courts unless otherwise expressly stated. Rules 75-86 relate to the enforcement of money judgments; Rule 87 relates to judgments for the possession of specific property or requiring specific acts.

B. General principles. Rules 75-87 shall be construed and applied in accordance with Rule 1 B. and so as to give effect to the following general principles:

B.(1) Anything of value owned by a judgment debtor should be available to satisfy the judgment unless expressly made exempt by state or federal law.

B.(2) Proceedings to force liquidation of a debtor's assets should be administered, in so far as consistent with reasonably prompt satisfaction of the creditor's claim, so as to avoid sacrifice of values and to minimize hardship to the debtor.

B.(3) Interference with a defendant's possession and enjoyment of property prior to judgment should be regarded as a last resort.

B.(4) Only the debtor's actual, beneficial interest in property may be taken to secure or satisfy a judgment. Equities of third persons, interests of co-owners, and liens senior to the lien of the judgment creditor must be protected.

C. Definitions for Rules 75-87. As used in Rules 75-87, unless the context requires otherwise:

C.(1) "After hearing" means after such notice as is required by statute or rule or order of court has been given and an opportunity for a hearing provided but does not require an actual hearing if none is requested by an interested party or if the party whose interests are to be affected does not appear at a scheduled hearing;

C.(2) "Assets", or "property", include interests, whether legal or equitable, fixed or contingent, liquidated or unliquidated, joint or several, in realty and personalty, tangibles and intangibles, claims, rights of action, franchises, and anything else of material value;

C.(3) "Bank" includes commercial and savings banks, trust companies, savings and loan associations, and credit unions;

C.(4) "Clerk" means clerk of the court;

C.(5) "Court" means the circuit or district court in which a judgment was recovered or in which proceedings to enforce a claim or judgment are pending;

C.(6) A debtor's "equity" in an item of property means the value of the property less the amount of any security interests of other persons therein.

C.(7) "Execution"; "attachment"; "writ". "Execution" is the procedure for enforcing a judgment; "attachment" is the procedure by which an unsecured creditor obtains a judicial lien on a

debtor's property while an action is pending; a "writ" is an order by a court to a sheriff or other official to aid a creditor in execution or attachment.

C.(8) "Levy" means to create a lien upon property under any judicial writ or process or by any of the procedures provided by Rules 75-87.

C.(9) "Lien" means a charge on an item of property entitling the lienholder to compel the item to be applied to satisfaction of a claim and, ordinarily, determining the priority of the lienholder's interest among other interests in the property. A judicial lien is a lien created by judgment, levy, garnishment, sequestration, or other legal or equitable process or proceeding.

C.(10) "Restricted mail" means mail which carries on its face the endorsements "return receipt requested showing address where delivered" and "deliver to addressee only"; provided that on mail on which the addressee is not a natural person the endorsement "deliver to addressee only" may be omitted.

C.(11) "Security interest" means a lien created by agreement, as opposed to a judicial or statutory lien.

C.(12) "Sheriff" includes constable where Rules 75-87 apply to district court proceedings in counties having such an officer.

RULE 76

EXEMPTIONS

A. Substantive nature of exemptions. Provisions that certain kinds of property belonging to a debtor may not be applied to compulsory satisfaction of a creditor's claim are matters of substantive law and outside the scope of these Rules. For convenience, sections 76 B., C., and D. provide a catalog of such provisions, but presence or absence from this list is not conclusive as to the existence or non-existence of an exemption.

B. State statutory exemptions.

B.(1) Homesteads. ORS 23.240

B.(2) Mobile homes. ORS 23.164, .168

B.(3) Houseboats. ORS 23.164

B.(4) Condominiums. ORS 91.581

B.(5) Earnings from personal services. ORS 23.185

B.(6) Motor vehicles. ORS 23.160

B.(7) Tools, etc., necessary to earn living. ORS 23.160

B.(8) Household goods, provisions, fuel. ORS 23.160

B.(9) Clothing, jewelry, personal items. ORS 23.160

B.(10) Books, pictures, musical instruments. ORS 23.160

B.(11) Domestic animals, poultry. ORS 23.160

B.(12) Firearms. ORS 23.200

B.(13) Life insurance proceeds. ORS 743.099

B.(14) Group life insurance proceeds. ORS 743.102

B.(15) Annuity policies. ORS 743.105

B.(16) Health insurance proceeds. ORS 743.108

B.(17) Insurance company security deposits. ORS 731.644

B.(18) Credit union shares. ORS 743.192

B.(19) War savings acounts. ORS 29.070

B.(20) Servicemen's property. ORS 408.440

B.(21) Burial lots. ORS 61.770

B.(22) Cemeteries, crematoriums. ORS 61.755

B.(23) Bank deposits. ORS 23.166 exempts bank deposits of personal earnings, social security payments, and disabled veterans benefits exempted by federal law, and the exempt funds listed in sub-sections 24 to 37.

B.(24) Pensions. ORS 23.170

B.(25) Public employee retirement payments. ORS 237.201

B.(26) School district retirement payments. ORS 239.261

B.(27) Vocational rehabilitation payments. ORS 344.580

B.(28) Civil defense injury benefits. ORS 401.840

B.(29) Veterans' loans. ORS 407.110

B.(30) General assistance grants. ORS 411.760

B.(31) Aid to blind and disabled persons. ORS 412.115, .610

B.(32) Old age assistance. ORS 413.130

B.(33) Medical assistance. ORS 414.095

B.(34) Benefits for injured trainees and inmates. ORS 655.530

B.(35) Workers' compensation payments. ORS 656.234

B.(36) Unemployment compensation. ORS 657.855

B.(37) Fraternal Benefit society payments. ORS 748.225

C. Federal statutory exemptions.

C.(1) Earnings from personal services. 15 U.S.C. § 1673

C.(2) Social security payments. 42 U.S.C. § 407

C.(3) Veterans' benefits. 38 U.S.C. § 3101

C.(4) Medal of honor holders' pensions. 38 U.S.C. § 502

C.(5) Civil service employees' retirement benefits. 5 U.S.C. § 775

C.(6) Armed forces retirement benefits. 10 U.S.C. § 1440

C.(7) Foreign service retirement and disability benefits. 22 U.S.C. § 1104

C.(8) Justices' and judges' annuities. 28 U.S.C. § 376

C.(9) Lighthouse service employees' benefits. 333 U.S.C. § 775

C.(10) Longshoremen's and harbor workers' compensation payments. 33 U.S.C. § 916

C.(11) Railroad employees' annuities. 45 U.S.C. § 231

C.(12) CIA employees' retirement and disability payments. 50 U.S.C. § 403

C.(13) Seamen's wages and clothing. 46 U.S.C. §§ 503, 601

C.(14) Public land settlers homesteads. 43 U.S.C. § 175

D. Common law exemptions.

D.(1) Claims to recover compensatory damages for personal injuries, injuries to reputation or invasion of privacy of a natural person, or for invasions of dignitary interests.

D.(2) Claims to recover compensation for taking or injuring exempt property.

D.(3) Judgments on, or direct proceeds of, claims within subsections D.(1) or D.(2).

D.(4) With some exceptions, a beneficial interest in a spendthrift trust.

E. Notice to debtor respecting exemptions. As a part of the notice required by Rule 77 A., the creditor shall serve on a debtor who is a natural person a notice containing:

E.(1) A statement that a debtor may be entitled to claim that the property levied on is exempt from the claims of the creditor.

E.(2) A list of all property and funds declared exempt under state or federal law, drawing attention to those that may be applicable to the instant situation.

E.(3) An explanation of the procedure by which the judgment debtor may claim an exemption;

E.(4) A statement that the forms necessary to claim an exemption are available at the county courthouse at no cost to the judgment debtor.

F. Claim of exemptions.

F.(1) Any time after property has been levied on and before it is transferred from the debtor, the debtor or someone on his behalf may file a Claim of Exemption with the clerk of the court in which the judgment or order for provisional process underlying the levy was made. The claim may be made on a form supplied by the clerk and shall:

F.(1)(a) Identify the judgment sought to be enforced or the action in which the proprty was attached.

F.(1)(b) Describe the property claimed as exempt.

F.(1)(c) Estimate the total value of the property.

F.(1)(d) List the names and addesses of any third persons having interests in the property, such as co-owners and lienors. If there are liens on the property senior to that of the levying creditor, the nature of the lien and the amount presently secured thereby shall be stated.

F.(1)(e) State the debtor's name and address.

F.(2) The Claim of Exemption shall be filed in duplicate, one copy to be mailed by the clerk promptly to the creditor. Thereupon all enforcement proceedings respecting the property claimed as exempt shall be suspended.

G. Determination of right to exemptions. If the creditor disputes the debtor's right to a claimed exemption, he may move within 10 days of the mailing of the notice for an adjudication thereon under Rule 77 E. If no such motion is made the debtor's claim establishes the exemption; the creditor's lien on the property shall be discharged of record and, if the property has been seized, it shall be returned to debtor.

H. Discharge of lien on homestead in connection with sale by judgment debtor or after discharge in bankruptcy.

H.(1) A debtor against whom a judgment has been docketed

may transfer real property in which he has a homestead exemption free of the lien of such judgment by proceeding under Rule 77 F.(2).

H.(2) If no such proceeding was instituted by the debtor, or was instituted but terminated without decision on the merits, the transferee of the property may apply to the court at any time after the transfer in a manner analogous to that provided in Rule 77 F.(2) and obtain an order discharging the property from the liens of any judgments docketed against the debtor-transferor by showing that the debtor's equity at the time of transfer did not exceed the sum of $12,000 or by tendering to the court the amount by which the debtor's equity exceeded $12,000 at the time of transfer.

H.(3) If a debtor has been discharged in bankruptcy and property was set apart to him as a homestead in the bankruptcy but a creditor claims that a pre-bankruptcy judgment is still a lien on the property, the debtor or a transferee of the property may apply to the court in a manner analogous to that provided in Rule 77 F.(2) and obtain an order discharging the claimed lien by showing that the debtor's equity on the date of the petition in bankruptcy did not exceed $12,000 or by tendering to the court the amount by which the debtor's equity exceeded $12,000 on that date.

I. Escrowing proceeds of homestead sale. If funds are claimed as exempt under ORS 23.240(2), a creditor otherwise entitled

to levy thereon may obtain, ex parte, an order requiring the debtor to deposit the funds on condition that they may be withdrawn only: (a) by the debtor to pay the price of a new homestead or, (b) by the creditor after one year from the date of sale of the former homestead.

RULES OF GENERAL APPLICATION

A. Notice to debtor following levy.

A.(1) Whenever a creditor levies on property of a debtor, other than a levy on real property or garnishment of an employer, the creditor must promptly serve on the debtor a notice in substantially the following form:

IN THE _____ COURT OF THE STATE OF OREGON FOR _____ COUNTY

_____ Plaintiff	No. _____
v.	Notice of Levy of Execution (Attachment)
_____ Defendant	

TO: (Debtor) IMPORTANT NOTICE. READ CAREFULLY. IT CONCERNS YOUR PROPERTY.

1. A judgment was recovered (action was commenced) against you on _____ for $_____.

2. To enforce (secure) payment the following has been levied on:

(E.g.: 1979 Wombat, License # ABC 123
Savings account in Fiduciary Trust & Savings Co.
Etc.)

3. (Execution) On or about (date) this property will be

(E.g.: sold by the sheriff at public sale,
paid over to the creditor etc.)

You will be notified of the exact date.

3. (Attachment) This property will (be held by the court) (remain subject to a lien) while the action is pending and may be taken from you permanently if judgment is entered against you.

4. You may release the property from the levy by paying the judgment (delivering a bond) to the clerk of the court.

5. If you have any questions about this matter, you should consult an attorney.

IF YOU DO NOTHING ABOUT THIS, YOU MAY LOSE THIS PROPERTY PERMANENTLY.

Name and address of creditor or creditor's attorney

A.(2) If the debtor is a natural person, the notice required by Rule 76 E. shall be attached to the notice described in subsection (1).

A.(3) When a levy is made by garnishing a bank the notices required by subsections (1) and (2) shall be delivered to the bank with the Notice of Garnishment. If the bank has property of, or is obligated to, the debtor it shall promptly forward the notices to the debtor.

B. Effect of enforcement proceedings on interests of third persons in debtor's property; protective measures.

B.(1) Definitions. In this section B., "creditor" means the execution or judgment creditor who is enforcing a lien against an item of a debtor's property. "Property" means the item of property affected by the enforcement proceedings. "Transfer" includes transfers by the sheriff or the creditor at public or private sale and transfers to the creditor, and sales by the debtor under Rule 77 F.(2). Where notice is required to be given to a lienor, this means lienors whose liens are matters of public record or perfected under ORS 79.3030.

B.(2) Senior liens. Liens senior to a lien enforced by a transfer of property under Rules 75-87 are not affected by the transfer. Such senior lien is enforceable against the transferred property and the transferee is personally and primarily liable to pay the obligation secured thereby. In order to protect these rights:

B.(2)(a) Not less than five days before the date of any public sale of a debtor's property the creditor shall serve on each senior lienor notice of the time and place of the sale.

B.(2)(b) Each senior lienor shall be given an opportunity at a public sale to make an announcement respecting his interest.

B.(2)(c) A sheriff, creditor, or debtor making a transfer shall notify each senior lienor of the name and address of a transferee of the property.

B.(3) Junior liens. Liens junior to a lien enforced by a transfer of property under Rules 75-87 are extinguished by the transfer. A junior lienor may acquire the rights of the creditor by paying the amount of the judgment and, subject to the requirements of Rule 80 respecting transfers of real property, is entitled to payment, in order of priority, out of any proceeds of a sale of property remaining after satisfying the creditor's claim. In order to protect these rights, the notice required by Rule 80 C.(2) must be given when real property is transferred and in all other cases:

B.(3)(a) Not less than 15 days before the date of any public sale or any proposed transfer of the property by the creditor or debtor, the creditor (or, in case of a proposed transfer by the debtor, the debtor) shall serve on each junior lienor notice of the time and place of public sale or the terms of the proposed private transfer.

B.(3)(b) Not less than 10 days before a public sale or proposed transfer of property, a junior lienor may move for an order

forbidding or imposing coditions on the sale or transfer.

B.(4) Co-tenants. The transferee of a debtor's interest as a tenant in common becomes a tenant in common with the debtor's co-tenant. The transferee of a debtor's interest as a joint tenant or tenant by the entireties succeeds to the debtor's right of survivorship and to share in the rents and profits of the property, but acquires no right to possession or to restrict the possession of the debtor's co-tenant.

B.(5) Adverse claimants. A person other than the debtor claiming to be the actual owner of property levied on may move the court for an order establishing the claimant's title, enjoining a sale or transfer, dissolving the creditor's lien, or other appropriate relief. After hearing, the court may:

B.(5)(a) In a case where summary judgment would be allowed by Rule 47, make an order conclusive on the parties as to the ownership of the property.

B.(5)(b) Summarily order that the property may be sold or transferred. Such order protects the sheriff and a third person transferee but is not an adjudication between the claimant and the creditor.

B.(5)(c) Enjoin sale or transfer until the dispute is formally adjudicated.

C. Service of notices; proof of service.

C.(1) Save where some other method is expressly required or permitted, any notice required to be served by Rules 75-87 may be sent by restricted mail or served in the manner of a summons.

C.(2) Before making any order that will materially affect a person's interests, the court must be satisfied that the person actually received any notice required to be given, or that the creditor has made a good faith effort and employed the best available means under the circumstances to give actual notice.

D. Discovery.

D.(1) A judgment creditor may use the discovery devices of Rules 36, 38-43, 45, and 46 in aid of enforcing a judgment. An action is pending for purposes of Rule 55 as long as a judgment therein remains unsatisfied.

D.(2)(a) A judgment creditor may serve on the debtor written interrogatories concerning the debtor's property and financial affairs. Said interrogatories shall notify the debtor that his failure to answer truthfully shall subject him to the penalties for false swearing contained in ORS 162.075.

D.(2)(b) Within 20 days after receipt of said interrogatories, the judgment debtor shall answer all questions under oath and return the original interrogatories to the judgment creditor or the judgment creditor's attorney, and shall retain a copy for himself.

E. Supervision of enforcement proceedings; show cause hearings; venue; unified records.

E.(1) The court shall make any orders necessary to the administration of Rules 75-87 and, where promotive of the general principles stated in Rule 75 B., may authorize variance from the procedure prescribed by the Rules.

E.(2) Save as otherwise expressly provided, applications for orders and hearings under Rules 75-87 shall conform to local practice respecting show cause orders.

E.(3) Applications for orders under Rules 75-87 will ordinarily be addressed to the court in which the judgment sought to be enforced was recovered or has been registered under ORS Chapter 24. However:

E.(3)(a) Orders respecting real property located in another county must be obtained in the circuit court for that county;

E.(3)(b) When personal property has been levied on in another county, the court on its own initiative or on motion by a party may transfer proceedings respecting such property to a court in the other county;

E.(3)(c) When a proceeding to enforce a circuit court judgment involves personal property estimated by the court to be worth less than $3000, the proceeding may be transferred to the district court.

E.(4) All notices, motions, orders, and other papers in proceedings under Rules 75-87 shall be styled as proceedings in the case in which the judgment was recovered and filed with the records of that case. When proceedings are conducted in another court, copies of all papers filed therein shall be sent to the court in which the judgment was recovered.

F. Redelivery of attached property; release of liens.

F.(1)(a) If an attachment deprives the debtor of the possession or use of property, he may obtain redelivery thereof by filing with the court a corporate surety bond undertaking to pay the value of the property, as stated in the bond, if the same is not returned to the sheriff upon entry of judgment against the debtor. The property shall be released to the debtor upon the filing of the bond and notice thereof sent by ordinary mail by the court to the attaching creditor. If the creditor contends that the bond undervalues the property or for some other reason does not provide adequate security the court, after hearing, may order that the debtor return the property or provide additional security. Delivery of property to the debtor under subsection F.(1) does not affect the attaching creditor's lien.

F.(1)(b) In an action bought upon such undertaking against the principal or his sureties, it shall be a defense that the property for which the undertaking was given did not, at the execution of the writ of attachment, belong to the defendant against whom the writ was issued.

F.(2)(a) A debtor desiring to sell property that is subject to a judgment lien or lien of attachment may apply at any time for an order discharging the lien and all liens junior thereto.

F.(2)(b) At least 15 days in advance of applying for such order, the debtor shall serve notice on each person whose lien will be affected. The notice shall:

F.(2)(b)(i) Describe the property;

F.(2)(b)(ii) State the price for which it will be sold;

F.(2)(b)(iii) State whether the debtor claims an exemption for the proceeds of sale or any part thereof;

F.(2)(b)(iv) List the liens against the property showing order of priority and amount.

F.(2)(b)(v) State that, unless a creditor objects before a specified date, the court may make an order discharging liens.

F.(2)(c) The court shall grant the application if:

F.(2)(c)(i) The proceeds of sale will satisfy the claim of the attachment or judgment creditor and all liens junior thereto; or

F.(2)(c)(ii) No creditors have objected; or

F.(2)(c)(i) It finds, after hearing, that the proposed sale price is not less than the fair value of the property.

F.(2)(d) If sale is permitted, the proceeds shall be distributed:

F.(2)(d)(i) To the debtor in the amount of any exemption to which he is entitled.

F.(2)d)(ii) To the lienors according to priority (or, in the case of an attachment lien, to the court to be held pending judgment).

F.(2)(d)(iii) To the debtor.

F.(2)(e) Notwithstanding the provisions of paragraphs (a) to

(d), an application to sell real property after Notice of Foreclosure has been given under Rule 80 C. may be made only at the time provided in Rule 80 C.(4) and notices need be served on and proceeds distributed only to junior lienors who have filed claims under Rule 80 C.(3).

G. Indemnity to sheriff. Whenever a writ of attachment or execution is delivered to the sheriff, if the sheriff has actual notice of any third party claim to the personal property to be levied on or is in doubt as to ownership of the property, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff may require the plaintiff or judgment creditor to file with the sheriff or constable a corporate surety bond, indemnifying the sheriff and his bondsmen against any loss or damage by reason of the illegality of any holding or sale on execution, or by reason of damage to any personal property held under attachment or execution. Unless a lesser amount is acceptable to the sheriff, the bond shall be in double the amount of the estimated value of the property to be seized.

H. Satisfaction, assignment, and discharge of judgments and liens.

H.(1) Payment of judgment to court. Any person, against whom exists a judgment for the payment of money or who is interested in any property upon which any such judgment is a lien, may pay the amount due on such judgment to the clerk of the court in which the

judgment was rendered, and the clerk shall thereupon satisfy the judgment upon the records of the court. If such judgment has been entered in the records or docketed in the judgment lien docket of any other county than the county in which it was rendered, then a certified copy of the satisfaction may be recorded in the journal of the circuit court of such other county and the clerk of that court shall thereupon satisfy the judgment upon the records of that court. Unless the clerk of the court in which the judgment was rendered sooner turns over the money paid to him on the judgment to the person determined by such court to be entitled thereto, he shall turn the money over to the county treasurer of his county, who shall give the clerk duplicate receipts therefor. One of the receipts shall be filed with the papers in the case in which such judgment was rendered, and the other shall be retained by the clerk. The county treasurer shall at any time pay the money over to the person who shall be determined to be entitled thereto by the order of the court in which the judgment was rendered.

H.(2) Satisfaction by docket entry. When any judgment is paid or satisfied, that fact may noted upon the judgment docket of original entry over the signature of the officer having the official custody of such docket, or of the party entitled to receive and receiving payment or satisfaction, or of the attorney or attorneys representing the judgment creditor in the action in which the judgment was rendered; provided, such satisfaction shall not be

made by an attorney whose authority over the judgment has expired. Upon annulment or payment or satisfaction and entry thereof being so made, the officer having the official custody of the judgment docket of original entry shall, upon request of any person and payment of a fee of 60 cents for the benefit of the county, issue a certificate showing the fact of satisfaction of such judgment, or annulment of the lien thereof, describing the same sufficiently for identification; and such certificate shall, upon presentation to the officer having official custody of the judgment docket in any county in which a transcript of such judgment may have been docketed, be entered upon such docket for the purpose of making the satisfaction of judgment a matter of record in such county.

H.(3) Satisfaction, release or assignment by creditor's certificate.

H.(3)(a) Evidence of the satisfaction of any judgment may also be perpetuated by the execution and acknowledgment by the judgment creditor, his assignee, or personal representative, of a certificate describing the judgment with convenient certainty, and specifying that the judgment has been paid or otherwise satisfied or discharged. Such certificate shall be acknowledged or proved and certified in the manner provided by law for conveyances of real property, and may be recorded in the record of deeds of any county or counties, upon payment of the same fees as for recording a deed. In case such judgment has been entered in the judgment lien docket of any such county, the official custodian of such lien

docket shall, upon presentation and recording of such certificate of annulment or satisfaction, make notation of the recording thereof, with reference to the book and page of the record.

H.(3)(b) An assignment of any judgment executed in like manner shall be entitled to record in the deed records of any county, and, upon recording, the fact thereof, with reference to book and page, shall be noted opposite the judgment on the judgment lien docket of such county.

I. Proceedings after discharge in bankruptcy.

I.(1) A discharge in bankruptcy bars all further proceedings to establish or enforce a discharged claim or judgment, except that where a lien has been obtained on the debtor's property and has not been discharged in the bankruptcy proceedings such lien remains enforceable notwithstanding the discharge of the debtor's personal liability. If such lien was obtained by attachment, the action may be continued after the discharge and a judgment enforceable only against the attached property rendered.

I.(2) If the dischargeability of a claim has been expressly adjudicated in the bankruptcy court, a transcript of the bankruptcy court order may be filed in the appropriate state court whereupon, save as provided in subsection (1), any action or enforcement proceedings pending thereon shall be dismissed and any judgment thereon discharged.

I.(3) If the dischargeability of a claim has not been expressly adjudicated in the bankruptcy court, a discharged debtor

may file in any court or tribunal in which a judgment has at any time been rendered or a transcript thereof filed against that person, either before or after such discharge, a motion in the action for the discharge of the judgment from the record. Notice of such motion shall be served on all parties having recorded interests in the judgment. If it appears to the court that the person has been discharged from the payment of the judgment or the claim upon which the judgment was based, the court shall order that the judgment be discharged and satisfied of record, and thereupon the clerk of the court shall enter a satisfaction thereof; however, no such order shall be granted except upon such notice to the parties interested as the court or judge thereof may by order prescribe.

J. Certificate of release of levy. Whenever a judgment has been satisfied or discharged, or the holder of a judgment asserts thereto in writing, the clerk, at the request of the debtor, shall issue certificates to the effect that any property levied on under the judgment is released from lien. Such a certificate shall be full authority to any person holding property of the debtor to deliver the same to the debtor or his order.

K. Effect of advance payment; payment as satisfaction of judgment.

K.(1) If judgment is entered against a party on whose behalf an advance payment referred to in ORS 41.960 or 41.970 has been made and in favor of a party for whose benefit any such advance payment has been received, the amount of the judgment shall be reduced by the amount of any such payments in the manner provided in subsection

(3) of this section. However, nothing in ORS 12.155, 41.950 to 41.980 and this section authorizes the person making such payments to recover such advance payment if no damages are awarded or to recover any amount by which the advance payment exceeds the award of damages.

K.(2) If judgment is entered against a party who is insured under a policy of liability insurance against such judgment and in favor of a party who has received benefits that have been the basis for a reimbursement payment by such insurer under ORS 743.825, the amount of the judgment shall be reduced by reason of such benefits in the manner provided in subsection (3) of this section.

K.(3)(a) The amount of any advance payment referred to in subsection (1) of this section may be submitted by the party making the payment, in the manner provided in ORS 20.210 and 20.220 for the submission of disbursements.

K.(3)(b) The amount of any benefits referred to in subsection (2) of this section, diminished in proportion to the amount of negligence attributable to the party in favor of whom the judgment was entered and diminished to an amount no greater than the reimbursement payment made by the insurer under ORS 743.825, may be submitted by the insurer which has made the reimbursement payment, in the manner provided in ORS 20.210 and 20.220 for the submission of disbursements.

K.(3)(c) Unless timely objections are filed as provided in ORS 20.210, the court clerk shall apply the amounts claimed pursuant to this subsection in partial satisfaction of the judgment.

Such partial satisfaction shall be allowed without regard to whether the party claiming the reduction is otherwise entitled to costs and disbursements in the action.

RULE 78

ATTACHMENT

A. Actions in which attachment allowed; procedural prerequisite.

A.(1) The plaintiff, at the time of issuing the summons or any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, in the following cases:

A.(1)(a) An action upon a contract, expressed or implied, for the direct payment of money, when the contract is not secured by mortgage, lien or pledge, or when it is so secured but such security has been rendered nugatory by act of the defendants, or when the defendant is a nonresident of this state.

A.(1)(b) An action against a defendant not residing in this state to recover a sum of money as damages for breach of any contract, expressed or implied, other than a contract of marriage.

A.(1)(c) An action against a defendant not residing in this state to recover a sum of money as damages for injury to property in this state.

A.(1)(d) The defendant may have the property of the plaintiff attached upon filing a counterclaim within paragraphs (a), (b), or (c). References to plaintiff in Rule 78 include a counterclaiming defendant.

A.(2) Notwithstanding subsection (1), no attachment, injunction, or execution shall be issued against any bank or its property before final judgment.

A.(3) Before a writ of attachment may be issued or any property attached, the plaintiff must obtain an order under Rule 79 that provisional process may issue.

B. Attachment bond.

B.(1) Before any property is attached, the plaintiff must file with the clerk a corporate surety bond in a sum not less than $100, and equal to the amount for which the plaintiff demands judgment, and to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which the defendant may sustain by reason of the attachment, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the bond.

B.(2) Upon motion by the defendant and a showing that defendant's potential costs or damages exceed the amount of the bond, the court may require the plaintiff to give additional security.

C. Property that may be attached. Only the following kinds of property are subject to lien or levy before final judgment:

C.(1) In actions in circuit court, real property within Rule 80 A.;

C.(2) Tangible personal property;

C.(3) Liquidated, non-contingent, uncontested debts.

C.(4) The interest of a distributee of a decedent's estate.

D. How property is attached.

D.(1) Real property. Any time after an order that provisional process may issue has been made under Rule 79 in a circuit

court action, the plaintiff may obtain a lien on the defendant's real property by filing with the county clerk a Claim of Lien. Such Claim must identify the action by names of parties, docket number, and judgment demand, describe the real property, state that an attachment lien is claimed thereon, and be signed by the plaintiff or the plaintiff's attorney. The clerk shall verify that a provisional process order has been made by countersigning the Claim and note thereon and the date and time it was received. The lien arises at the time the claim is delivered to the clerk.

D.(2) Debts. Any time after an order that provisional process may issue has been made, the plaintiff may serve a notice of garnishment under Rule 83 A. The notice shall state that it is issued by way of attachment and not execution and the date on which the order allowing provisional process was made.

D.(3)(a) Chattels in which security interests may be recorded. If a consensual security interest within ORS Chapter 79.1020 on a chattel would be required by ORS Chapter 79.3020 to be perfected by filing a financing statement, the plaintiff may obtain an attachment lien on such chattel at any time after an order that provisional process may issue has been made by filing a Claim of Lien with the clerk of the court that issued the writ and in the same office or offices that a financing statement would be required to be filed. Such claim shall identify the action by names of parties, court and docket number, and judgment demand, describe the property sufficiently to identify it, state that a provisional process order has been made with the

date thereof, and state that an attachment lien is claimed on the property.

D.(3)(b) On motion by the plaintiff and showing that a lien obtained under paragraph (a) will not provide adequate security, the court may authorize levy by seizure under subsection (4).

D.(4) Other chattels. A plaintiff desiring to attach an item of tangible personal property not covered by paragraph (3)(a), or having obtained authorization under paragraph (3)(b), may require the clerk to issue a writ of attachment. The writ shall be directed to the sheriff of any county in which property of the defendant may be, and shall require him to attach and safely keep certain described property of the defendant, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. The writ may issue to the sheriff of any county in the state and several writs may be issued at the same time to the sheriffs of different counties. Levy and return shall be made as provided in Rule 82 D. and C.(5).

E. Disposition of attached property after judgment. If property other than real property has been attached it shall be applied to satisfaction of any judgment recovered by the plaintiff. If judgment is entered for the defendant the lien of any attachment shall be discharged and any property that has been seized returned to the defendant.

RULE 79

PROVISIONAL PROCESS

A. Definitions for Rule 79. As used in Rule 79, unless the context requires otherwise:

A.(1) "Consumer goods" means consumer goods as defined in ORS 79.1090.

A.(2) "Consumer transaction" means a transaction in which the defendant obligates himself to pay for goods sold or leased, services rendered or monies loaned, primarily for purposes of the defendant's personal, family, or household use.

A.(3) "Issuing officer" means any person who on behalf of the court is authorized to issue provisional process.

A.(4) "Provisional process" means attachment under Rule 78, replevin, or claim and delivery under Rule 87, or any other legal or equitable judicial process or remedy which before final judgment enables a plaintiff, or the court on behalf of the plaintiff, to take possession or control of, or to restrain use or disposition of, or fix a lien on property in which the defendant claims an interest.

B. Requirements for issuance. To obtain an order for issuance of provisional process the plaintiff shall file with the clerk of the court from which such process is sought an affidavit or sworn petitiion requesting specific provisional process and showing, to the best knowledge, information and belief of the plaintiff:

B.(1) The name and residence or place of business of the defendant;

B.(2) Whether the underlying claim is based on a consumer transaction and whether provisional process in a consumer good is sought;

B.(3) Description of the claimed property in particularity sufficient to make possible its identification, and the plaintiff's estimate of the value and location of the property;

B.(4) Whether the plaintiff's claim to provisional process is based upon ownership, entitlement to possession, a security interest or otherwise;

B.(5) A copy or verbatim recital of any writing or portion of a writing which evidences the origin or source of the plaintiff's claim to provisional process;

B.(6) Whether the claimed property is wrongfully detained by the defendant or another person;

B.(7) Whether the claimed property has been taken by public authority for a tax, assessment, or fine;

B.(8) Whether the claimed property is held under execution, garnishment, or other legal or equitable process or, if it is so held, either that the plaintiff has a superior right to provisional process in the property or that the property is exempt from such execution, garnishment, or process.

B.(9) If the plaintiff claims that the defendant has waived his right to be heard, a copy of the writing evidencing such

waiver and a statement of when and in what manner the waiver occurred;

B.(10) If provisional process is based on notice of a bulk transfer under ORS chapter 76 or a similar statute or provision of law, a copy of the notice;

B.(11) Facts, if any, which tend to establish that there is a substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser.

B.(12) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

B.(13) Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

B.(14) That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

C. Provisional process prohibited in certain consumer transactions.

C.(1) No court shall order issuance of provisional process to effect attachment of a consumer good or to effect attachment of any property if the underlying claim is based on a consumer transaction.

C.(2) In absence of the finding described in subsection (2) of section D., the court shall not order issuance of provisional process.

C.(3) In absence of specific application by the plaintiff, the court shall not order issuance of provisional process.

D. Evidence admissible; choice of remedies available to court.

D.(1) The court shall consider the affidavit or petition filed under section B. and may consider other evidence, including, but not limited to, an affidavit, deposition, exhibit, or oral testimony.

D.(2) If from the affidavit or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider whether it shall order issuance of provisional process, a restraining order, or a show cause order. The finding under this subsection is subject to dissolution upon hearing.

E. Effect of notice of bulk transfer. Subject to section C., if the court finds that with respect to property of the defendant notice of bulk transfer under ORS chapter 76 or a similar statute or provision of law has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.

F. Effect of waiver of right to notice and hearing. Subject to section C., the court finds:

F.(1) That the defendant, by conspicuous words in a writing executed by or on behalf of the defendant before filing of the affidavit or petition under section B. or by handwriting of the defendant or the defendant's agent executed before filing of the affidavit or petition under section B. has declared substantially that he is aware of his right to notice and hearing on the question of the probable validity of the underlying claim before he can be deprived of his property in his possession or control or in the possession or control or in the possession or control of another and that he waives that right and agrees that the creditor, or one acting on behalf of the creditor, may employ provisional process to take possession or control of the property without first obtaining a final judgment or giving notice and opportunity for hearing on the probable validity of the underlying claim.

F.(2) That there is no reason to believe that the waiver or agreement is invalid, and

F.(3) That the defendant has voluntarily, intelligently and knowingly waived that right, the court shall order issuance of provisional process in property to which the waiver and agreement apply.

G. Issuance of provisional process where damage to property threatened. Subject to section C., if the court finds that before hearing on a show cause order the defendant or other person in

possession or control of the claimed property is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser or that the defendant or other person in possession or control of the claimed property would not comply with a temporary restraining order, the court shall order issuance of provisional process in property which probably would be the subject of such destruction, harm, concealment, removal, transfer, or violation.

H. Retraining order to protect property. Subject to section C., where hearing on a show cause order is pending or where the court finds that because of impending injury, destruction, transfer, removal, or concealment of the property in which provisional process is sought there is probable cause to believe that immediate and irreparable injury, damage, or loss to the plaintiff is imminent, if an undertaking has been filed by the plaintiff in accordance with ORS chapter 32, the court, in its discretion, may issue a temporary order directed to the defendant and each other person in possession or control of the claimed property restraining the defendant and each such other person from injuring, destroying, transferring, removing, or otherwise disposing of property and requiring the defendant and each such other person to appear at a time and place fixed by the court and show cause why such restraint should not continue during pendency of the proceeding on the underlying claim.

I. Appearance; hearing; service of show cause order; content; effect of service on person in possession of property.

I.(1) Subject to section C., the court shall issue an order directed to the defendant and each person having posession or control of the claimed property requiring the defendant and each such other person to appear for hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue.

I.(2) The show cause order issued under subsection (1) of this section shall be served personally on the defendant and on each other person to whom the order is directed.

I.(3) The order shall:

I.(3)(a) State that the defendant may file affidavits with the court and may present testimony at the hearing; and

I.(3)(b) State that if the defendant fails to appear at the hearing the court will order issuance of the specific provisional process sought.

I.(4) If at the time fixed for hearing the show cause order under subsection (1) of this section has not been served on the defendant but has been served on a person in possession or control of the property, the court may restrain the person so served from injuring, destroying, transferring, removing, or concealing the property pending further order of the court.

J. Waiver; order without hearing. If after service of the order issued under subsection (1) of section I. the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that he is aware that he has the right to be heard, that he does not want to be heard, that he expressly waives his right to be heard, that he understands that upon his signing the writing the court will order issuance of the provisional process sought so that the possession or control of the claimed property will be taken from the defendant or another person, the court, subject to section C., without hearing shall order issuance of provisional process.

K. Authority of court on sustaining validity of underlying claim.

K.(1) Subject to section C., if the court on hearing on a show cause order issued under section I. finds that there is probable cause for sustaining the validity of the underlying claim, the court shall order issuance of provisional process.

K.(2) Subject to section C., if the court on hearing on a show cause order issued under section C. finds that there is probable cause for sustaining the validity of the underlying claim but that the provisional process sought cannot properly be ordered, the court in its discretion may continue or issue a restraining order.

RULE 80

ENFORCING JUDGMENT AGAINST INTERESTS IN REAL PROPERTY

A. Scope. For purposes of this rule, real property means vested legal interests in real property greater than a leasehold of two years unexpired term including unit ownership interests as defined in ORS 91.539. Land sale contract interests are covered in Rule 81 and contingent and equitable interests and short term leaseholds in Rule 83 C.

B. Judgment liens.

B.(1) Necessity; priority. As a prerequisite to enforcement of a judgment against a specific piece of real property the creditor must hold a presently valid judgment lien thereon. The order of priority of judgment liens is determined by the time of docketing judgment in the county in which the land lies, except that:

B.(1)(a) When real property has been attached and judgment is subsequently recovered the lien of such judgment retains the priority of the attachment lien; and

B.(1)(b) When several creditors have docketed judgments against a debtor who subsequently acquires real property, the liens of such creditors rank, as against each other, according to the time of docketing the original judgments.

B.(2) How lien obtained.

B.(2)(a) Original docketing; docketing of transcript in other counties.

B.(2)(a)(i) Immediately after the entry of judgment in any action the clerk shall docket the same in the judgment docket,

noting thereon the day, hour, and minute of each docketing. At any time thereafter, so long as the original judgment remains in force under section B.(3), a certified transcript of the original docket may be filed in the office of the county clerk of any county in this state. Upon the filing of such transcript the clerk shall docket the same in the judgment docket of his office, noting thereon the day, hour, and minute of such docketing. A certified transscript of the new docket entry of a judgment renewed under section B.(3) may likewise be filed in another county.

B.(2)(a)(ii) From the time of docketing an original or renewed judgment of a circuit court or the transcript thereof, as provided in subparagraph (i), such judgment shall be a lien upon all the real property of the defendant within the county or counties where the same is docketed, or which the defendant may acquire therein, during the time prescribed in section B.(3).

B.(2)(b) A certified transcript of a district court judgment may be filed in the office of the county clerk of any county in this state and thereupon shall be a lien on all the real property of the defendant in such county.

B.(2)(c) A judgment of the federal district court for the District of Oregon when entered in the docket of that court shall be a lien on all the real property of the defendant located in the county in which that court is located and its judgment docket kept. As long as such judgment or a renewal thereof remains in force, a

certified transcript of the federal docket may be filed with the county clerk of any county in this state in the same manner and with the same effect as a judgment of a state court.

B.(3) Duration and renewal of liens. Whenever, after the entry of a judgment, a period of 10 years shall elapse, the judgment and the lien thereof shall expire. However, before the expiration of 10 years the circuit court in which such judgment was docketed, on motion, may renew such judgment and cause a new entry of the same to be made in the judgment docket, after which entry the lien of the judgment shall continue for another 10 years unless sooner satisfied, and after which entry execution may issue upon such judgment for another 10 years. This subsection also limits the time during which a judgment of the federal district court shall be a lien on land in this state.

B.(4) Discharge of liens.

B.(4)(a) A judgment lien on property is discharged by satisfaction or discharge of the judgment under Rule 77 H.

B.(4)(b) When an appeal is taken from any judgment and an understaking on appeal is filed, with a surety corporation licensed to do business in Oregon as surety on such undertaking, to the effect that if the judgment or any part thereof shall be affirmed the appellant will satisfy it so far as affirmed, the lien of the judgment shall cease and be annulled upon the expiration of the time allowed to except to the surety in the undertaking or upon the justification thereof, if excepted to, and that fact shall be noted upon the judgment lien docket over the signature of the officer having custody of such docket.

B.(4)(c) When the lien of a judgment ceases in the county in which the judgment was originally entered, it shall cease in every county in which a transcript thereof has been filed.

C. Foreclosure of judgment liens. A creditor holding a judgment lien may compel the transfer of the property at any time after the judgment has been finally affirmed on appeal or the time for taking an appeal has expired by proceeding as follows:

C.(1) Notice to debtor. The creditor shall file with the circuit court for the county in which the land lies and serve on the debtor in the manner of a summons a Notice of Foreclosure in substantially the following form:

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR _____COUNTY

_____

Plaintiff No. _____

v. NOTICE OF FORECLOSURE

_____

Defendant

TO (debtor):

READ CAREFULLY. THIS NOTICE CONCERNS YOUR PROPERTY.

1. Judgment was entered against you in the above named lawsuit for $_____. $_____ is now owed by you on this judgment.

2. On (date, at least six months in future) the real property owned by you at

(Post office address) *

will be taken by the court in order to pay this judgment.

3. You can prevent this by PROMPTLY:

a) paying the judgment;

or b) claiming an exemption, if the property is your homestead;

or c) arranging with the court to sell the property yourself and pay the judgment out of the proceeds.

IF YOU DO NOTHING BEFORE (date) YOU WILL LOSE THE PROPERTY WITHOUT POSSIBILITY OF REDEMPTION.

4. Information about your eligibility for a homestead exemption, and the forms for claiming it, are available without charge at the county courthouse.

5. If you have any questions about this matter, you should consult an attorney.

(creditor's name, address, and telephone number)

(date of notice)

*The legal description of the property to be taken is:

_____

_____

_____

(There shall be attached to the notice, or printed on the back, copies of Rule 80 C. (introductory clause), C.(1)(omitting the form), and C.(4)), and ORS 23.240.)

C.(2) Notice to junior lienors. Promptly after serving the Notice of Foreclosure, the creditor shall serve on each holder of an interest in the property junior to his own whose interest was of record at least one week before the date of the Notice:

C.(2)(a) A copy of the Notice of Foreclosure;

C.(2)(b) A listing of all the interests in the property in order of priority. This requirement may be satisfied by a copy of a title insurer's report respecting the property dated not more than one week before the date of the Notice;

C.(2)(c) A notice which shall state that:

C.(2)(c)(i) Written claims showing the amount presently secured by the claimant's junior interest in the property may be filed with the court within 30 days of the notice date;

C.(2)(c)(ii) All junior interests will be extinguished by a transfer of the property to the creditor or by the debtor, whether or not claims are filed under subpararaph (i);

C.(2)(c)(iii) If the debtor sells the property, the proceeds will be applied to payment of claims that have been filed in order of priority;

C.(2)(c)(iv) At any time after 40 days after the notice date and before a transfer of the property, a holder of a junior interest may redeem by proceeding under Rule 80 C.(3)(c).

C.(3) Claims of junior lienors.

C.(3)(a) Not later than 30 days after the date of the notice described in subsection (2), any holder of an interest in the property junior to that of the foreclosing creditor may file with the court a written Statement of Claim. Such Statement shall refer to the judgment of the foreclosing creditor by names of parties and docket number and to the Notice of Foreclosure by date and name of foreclosing creditor and shall state the amount presently due the junior claimant and secured by an interest in the the property and the nature of the interest and the date on which it attached to the property.

C.(3)(b) The debtor, or a lienor junior to a filed claim, may request a hearing on the validity or amount of any filed claim. The court shall set a date for such hearing and direct notice thereof to be served on the filer of the disputed claim. At such hearing the filer of the disputed claim has the burden of proving that his, her, or its lien initially attached and the disputant has the burden of proving payment.

C.(3)(c) At any time after 40 days from the date of Notice of Foreclosure and before a sale by the debtor or transfer to the creditor has been authorized or ordered, the holder of a junior

interest may acquire all the rights of the foreclosing creditor, including the right to acquire the property under the original Notice of Foreclosure, by paying to the court the amount presently due the creditor and all filed claims senior to his own. Holders of interests junior to that of such redeeming creditor may similarly redeem from him. Amounts paid in order to redeem shall be added to the judgment of the redeeming creditor.

C.(4) Order for sale by debtor or transfer to creditor.

C.(4)(a) Any time after 40 days from the date of the Notice of Foreclosure, the debtor may apply to the court under Rule 77 F.(2).

C.(4)(b)(i) Any time after six months from the date of the Notice of Foreclosure, the foreclosing creditor, or a junior lienor who has acquired the rights of the foreclosing creditor under paragraph C.(3)(c), may apply for an order transferring ownership of the property to him, or a person designated by him, and discharging all junior interests therein.

C.(4)(b)(ii) Notice of hearing on such application shall be served on the debtor and all holders of junior interests who have filed claims.

C.(4)(b)(iii) If, at the hearing, it appears that the applying creditor is, or has acquired the rights of, the original foreclosing creditor and that all the notices required by this section C. have been duly served, the court may grant the application; provided that if the debtor does not appear, or if the

appraised value of the property significantly exceeds the amount due the applicant, the court, on its own initiative or on motion of a party, may direct some further notice to be given to the debtor, or extend the time within which the debtor may pay the judgment, or order a public sale of the property.

C.(4)(b)(iv). An order of transfer made under this paragraph (b) shall: direct the transferee to pay $12,000 to the debtor if a homestead exemption has been claimed in the property; shall vest title in the transferee free and clear of all claims of the debtor and of holders of junior interests who were duly served with notice or whose interests attached later than one week before the date of the Notice of Foreclosure; shall provide that the transferee is personally and primarily liable to pay any obligation secured by a lien on the property senior to that of the foreclosing creditor; and shall order that the applicant's judgment against the debtor is satisfied wholly or in the amount of the tax assessor's appraised value of the property, whichever is less, provided that the amount paid in compensation for the debtor's homestead and the amount of any of the debtor's obligations assumed by the transferee shall be deducted from the appraised value in determining the amount in which the judgment is satisfied.

RULE 81

ENFORCING JUDGMENTS AGAINST INTERESTS IN LAND SALE CONTRACTS

A. Scope. Rule 81 applies to all interests created by a contract for the sale of an interest in real property including an earnest money receipt.

B. Purchaser's interest.

B.(1) A creditor who has docketed a judgment in the county in which the land that is the subject of an executory land sale contract is situated may apply to the circuit court of such county for an order applying the purchaser's interest under the contract to satisfaction of the judgment. The application must:

B.(1)(a) Identify the judgment and state the amount presently due thereon;

B.(1)(b) Identify the contract by parties, date, and land description;

B.(1)(c) State the contract price, terms of payment, and unpaid balance.

B.(1)(d) Propose the relief that the court should grant.

B.(2) A copy of the contract shall be attached to the application, or, if the creditor has not been able to obtain a copy, the reason therefor stated.

B.(3) A copy of the application may be filed with the county clerk and, if so filed, shall be recorded in the same manner as other

instruments affecting title to the land described and indexed under the names of both the purchaser and the contract vendor. Upon such filing the creditor acquires a lien on the land described in the application in the nature of the lis pendens lien provided for in ORS 93.740.

B.(4) A copy of the application and a notice stating the date set for hearing thereon shall be served on the purchaser and the vendor. The notice served on the purchaser must contain a statement respecting homestead exemption similar to that required by Rule 76 E.

B.(5) The purchaser or vendor may file an answer to the application controverting facts stated therein, alleging additional relevant facts, or proposing some other form of relief.

B.(6) At any time before the date set for hearing on the application, other judgment creditors of the purchaser may intervene in the proceedings. The priority of such intervenors shall be determined by time of intervention.

B.(7) After hearing, the court may dismiss the application or grant such relief as appears fair under the circumstances, for example:

B.(7)(a) An immediate transfer of the purchaser's interest to the creditor;

B.(7)(b) Transfer of the purchaser's interest to the creditor if the purchaser fails to sell it himself within a stated period;

B.(7)(c) Public sale of the purchaser's interest;

B.(7)(d) Assignment of all or part of the rents and profits produced by the contract property to the creditor for a stated period.

The court is not limited to giving the relief suggested by the parties, except that if the purchaser fails to appear in the proceedings, only the relief proposed in the creditor's application may be given.

C. Vendor's interest.

C.(1)(a) Except as provided in this subsection a judgment against a vendor is not a lien on real property that is the subject of an executory contract of sale entered into before the judgment was docketed. In the event that such a contract is terminated without conveyance to the purchaser and the vendor reassumes general ownership of the property the lien of a judgment against the vendor shall attach as in the case of after acquired property.

C.(1)(b) If a contract for the sale of real property has not been recorded and the purchaser is not in possession thereunder, a judgment against the vendor, docketed in the county where the real property is located, is a lien on the vendor's right to receive payments under the contract and on the vendor's title reserved as security for such payments. Such a lien may be perfected by serving on the purchaser a copy of the judgment and a notice that future contract payments must be made to the judgment creditor. The purchaser's contract obligation is satisfied, and the lien is extinguished, to the extent that payment

is made to the vendor prior to such service or to the creditor after such service. In case of dispute the burden is on the creditor to prove that service was made.

C.(1)(c) If a contract for the sale of real property has been recorded, or if the purchaser is in possession thereunder, a judgment against the vendor is not a lien on the real property and does not affect the purchaser's rights under the contract or his obligation to pay the price in accordance with its terms.

C.(2) A judgment creditor of a vendor may compel sale of the vendor's contract interest, including conveyance of the vendor's reserved title to the real property, or obtain other suitable relief in satisfaction of his judgment, by proceeding under Rule 83 C.

C.(3) With the exception of liens for taxes levied on the real property that is the subject of the contract and liens for services or materials supplied in improving the property, statutory liens securing obligations of the vendor do not attach to real property that is the subject of a land sale contract. A holder of an obligation that would be a lien on the vendor's property but for this subsection is a judgment creditor for purposes of subsection (2) of this section.

RULE 82

ENFORCING JUDGMENTS AGAINST TANGIBLE PERSONAL PROPERTY

A. Scope. Rule 82 applies to chattels, securities as defined in ORS 78.1020 except a certificate of an account or obligation or interest therein of a savings and loan institution, and negotiable instruments. As used in this rule "personal property" refers to any such assets owned by the debtor.

B. Lien of execution or attachment. A creditor obtains a lien on personal property by levy under a writ of attachment or execution.

C. Issuance of writ of execution; contents; duration; return.

C.(1) The party in whose favor a judgment is entered, which requires the payment of money, may at any time after the entry thereof, and so long as the judgment remains valid under Rule 80 B.(3), have a writ of execution issued for its enforcement.

C.(2) Upon receiving a written request from the creditor a writ shall be issued by the clerk and directed to the sheriff. It shall contain the name of the court, the names of the parties to the action, and the title thereof; it shall substantially describe the judgment, state the amount actually due thereon, and shall require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor.

C.(3) A writ may be issued to the sheriff of any county in this state. Writs may be issued at the same time, or at different times, to different counties. Successive levies may be made under a single writ.

C.(4) A writ remains valid for 60 days after its receipt by the sheriff and levies may be made thereunder only during such period. The sheriff shall endorse on the writ the time when he received it.

C.(5) Promptly after the expiration of the period of validity of the writ or after the completion of any sale held thereunder, the sheriff shall return the same to the clerk's office from whence it issued endorsing thereon a statement of the sheriff's proceedings thereunder with an inventory of any property levied upon and an accounting respecting the proceeds of any sales.

D. Manner of levying under writ of execution.

D.(1) Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be levied on by taking it into his custody.

D.(2) When, in the judgment of the sheriff, the cost of removal, transport, or storage of an item of property relative to the amount of the judgment makes physical seizure impractical, an effective levy may be made by inventorying the property and delivering to the debtor a copy of the inventory, a copy of the writ, and a notice signed by the sheriff stating that the property is levied on and directing the debtor to hold the same subject to further order. The sheriff may appoint some person as keeper in connection with such a levy.

E. Multiple writs against the same debtor.

E.(1) If several writs of execution or attachment against the same debtor have been delivered to a sheriff, a single levy creates a lien in favor of each creditor. Such liens rank in the order in which the several writs were delivered to the sheriff.

E.(2) If a writ against a debtor is delivered to a sheriff who has already levied upon an item of property of such debtor, a further levy thereon is not necessary and a lien in favor of the creditor for whom the writ was issued attaches to the item at the time the writ is delivered to the sheriff.

F. Liquidation and distribution.

F.(1) Unless otherwise provided by rule, or specially ordered by the court, the sheriff shall sell personal property he has levied upon at public auction not sooner than 15 days and not later than 30 days after it has been levied on under a writ of execution or after he is notified of entry of judgment by the creditor if the property is held by the sheriff under a writ of attachment.

F.(2) The auction may be conducted by any person and at any time and place designated by the sheriff that, in the sheriff's judgment, will be conducive to a favorable sale. Property held under several writs against the same, or different, debtors may be sold at a single auction and a sheriff may join with other sheriffs or public officials and conduct a joint auction.

F.(3) Not later than 10 days before the auction the sheriff shall publish an advertisement thereof in a newspaper published in the community in which the sale will be held or, if there is none, then in the community nearest thereto. Any person may, at his own expense, publish additional advertisements respecting the sale.

F.(4) The creditor must serve on the debtor notice of the time and place of sale not later than 7 days before the auction and must serve on senior and junior encumbrancers the notices required by Rule 77 B.(2) and (3).

F.(5) If, at the time appointed for the sale, the sheriff is prevented from attending at the place appointed, or being present deems it for the advantage of all concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the sale not exceeding one week, next after the day appointed, and so from time to time for like cause, giving notice of every adjournment by public proclamation, made at the same time and by readvertisement.

F.(6) When the purchaser of any personal property capable of manual delivery, and not in the possession of a third person, shall pay the purchase money, the sheriff shall deliver to him the property, and if desired, shall give him a bill of sale containing an acknowledgment of the payment. In all other sales of personal property, the sheriff shall give the purchaser a bill of sale with like acknowledgment.

F.(7) Securities, whether listed or unlisted, for which a regular market exists, shall be sold through a registered broker-dealer in the usual commercial manner. The debtor shall be notified of the broker's name and address and the time at which the securities will be delivered to him for sale, but no other notices or advertisement is required. The court may order the debtor to make any endorsements necessary to the sale of the shares, or may authorize the sheriff to make such endorsement on the debtor's behalf.

F.(8) Perishable property shall be sold promptly after levy in a commercially reasonable manner. The notices referred to in subsection F.(4) may be given by telephone and may be omitted, with the sheriff's approval, if delay would prevent a favorable sale.

F.(9) The proceeds of any sale shall be paid by the sheriff to the clerk and applied by the clerk first to payment of the expenses of the sale, then to creditors who held liens of the property in order of priority, and any surplus remaining to the debtor. Any unsold property shall be returned to the debtor.

G. Special rules for levy on chattels in which third persons have possessory rights.

G.(1) Personal property of the debtor in the possession of a pledgee may be levied on by serving on the pledgee a notice signed by the sheriff, stating that certain described property is levied on under a writ identified in the notice, and directing the pledgee to deliver the goods to the sheriff when the terms of the pledge have been satisfied. The creditor may redeem the property from the pledge

and add the expense of such redemption to the amount secured by the lien of execution or attachment under which the levy was made.

G.(2) Personal property of the debtor in the possession of a lessee may be similarly levied on except that the notice shall direct delivery to the sheriff at the termination of the lease and shall further direct the lessee to make any rental payments due or coming due under the lease to the sheriff.

G.(3) Personal property covered by a negotiable document of title may be levied on only in compliance with ORS 77.6020.

G.(4) If personal property of the debtor is in the possession of a third person but a creditor seeking to levy thereon contests the right of such person to retain possession, the creditor may institute proceedings analogous to those authorized by Rule 77 B.(5).

RULE 83

ENFORCING JUDGMENTS AGAINST INTANGIBLE PROPERTY AND MISCELLANEOUS INTERESTS

A. Debts; choses in action; claims and causes of action against third parties.

A.(1)(a) At any time after entry of judgment or after an order that provisional process may issue has been made the creditor may serve a notice of garnishment on any person believed to be obligated or liable to the debtor or to have possession of property belonging to the debtor.

A.(1)(b) If the garnishee is a bank maintaining branch offices, the notice must be served on the manager or assistant manager of the branch at which the debtor has an account, and is effective only with respect to such account, except that service on the president, vice-president, treasurer, secretary, cashier, or assistant cashier at the head office of the bank is effective with respect to accounts in any branch located in the same city as the head office.

A.(2) The notice of garnishment shall be prepared and signed by the creditor or his attorney and must:

A.(2)(a) Identify the action in connection with which it is served by names of parties, court, and docket number;

A.(2)(b) State that a judgment has been recovered against the debtor on which a stated amount is presently due, or that an order for provisional process has been made in an action in which a stated amount

is claimed. This statement must be verified by the signature of the clerk;

A.(2)(c) Require the garnishee to return a written answer to the creditor within a stated time (not less than five days) stating the amount and nature of any obligation or liability to the debtor, and the identity of any property of the debtor in the garnishee's possession, or that no such obligation or liability or property exists. The notice may describe the specific obligation or property that the creditor believes to exist;

A.(2)(d) Order the garnishee not to pay or deliver to the debtor, or any other person, any money owed to or property owned by the debtor (save payments of any excess above the sum claimed by the creditor in the notice) or to settle any claim or cause of action asserted by the debtor against the garnishee;

A.(2)(e) Warn that payment, delivery, or settlement in violation of the order may make the garnishee personally liable to the creditor and that failure to answer, or answer accurately, may result in personal liability for any amount that the creditor can prove was owed when the notice was served.

A.(2)(f) Have attached thereto a copy of the provisions of ORS 23.170 and 23.185.

A.(3) Notice of garnishment shall be served in the manner of a summons and may be served by anyone eligible to make service of

summons. Proof of service shall be returned to the creditor and a copy of the notice and proof of service shall be filed with the clerk when the garnishee's answer is filed.

A.(4)(a) If the garnishee's answer states that the garnishee has possession of property of the debtor the creditor may proceed under Rule 82 G. The creditor's lien in such case attaches at the time the notice of garnishment is served.

A.(4)(b) If the creditor files a garnishee's answer which states that a sum of money is owed and presently payable to the debtor, or if the garnishee's obligation to the debtor has been established by judgment, the clerk, at the creditor's request, shall order the garnishee to pay such sum to the clerk up to the amount necessary to satisfy or secure the creditor's judgment or claim and notify the garnishee that as to any excess the garnishment is released. Upon receipt of such payment the clerk shall remit the same to the judgment creditor or hold it pending judgment in the action in which provisional process was authorized. If the garnishee under a provisional process is a bank, the clerk, instead of ordering immediate payment, may direct that the money be held by the bank in a restricted, interest bearing, account pending judgment in the action.

A.(5)(a) If the garnishee's answer states that money is presently owed to the debtor but is not payable until some future time, the creditor may apply to the court for an order directing the garnishee to pay the money to the clerk when it becomes payable, or requiring the debtor to transfer ownership of his claim against the

garnishee to the creditor, either immediately or if the debtor fails to sell the claim within some stated time. If such claim is secured the debtor may be ordered to transfer the collateral to the creditor. If money owed by the garnishee is payable in instalments, the order may be to pay all, or a part of, future instalments to the clerk for a specified time.

A.(5)(b) The debtor and the garnishee shall be served notice of an application under paragraph (a) and given an opportunity to make alternative proposals and to be heard thereon.

A.(6) If the garnishee admits obligation to the debtor, or if such obligation has been established by judgment, but the garnishee fails to pay the clerk when ordered to do so under section A.(4) or (5) a judgment creditor may apply to the court for judgment against the garnishee in the amount admitted or established or the amount of the creditor's judgment against the debtor, whichever is less. Such a judgment against a garnishee may be enforced in the same manner as any other judgment. If the garnishment was under provisional process judgment shall not be entered against the garnishee before judgment is entered against the debtor.

A.(7) If the garnishee fails to answer, or denies any obligation or liability to the debtor, or admits owing an amount less than that believed by the creditor to be owing, a judgment creditor may apply to the court for an order authorizing the creditor to institute an action, in his own name or in the debtor's

name, on the debtor's alleged cause of action. Authorization may be given either unconditionally or on condition that the debtor does not himself institute an action within a specified time. If the creditor is authorized and commences an action, the debtor may intervene under Rule 33 B. Whether or not the debtor intervenes, a judgment on the merits in the action between the creditor and the garnishee bars a subsequent action by the debtor.

A.(8) Any amounts paid by or collected from garnishee, exclusive of amounts applied to costs assessed against the garnishee in connection with the garnishment, correspondingly extinguish the debtor's claim against the garnishee. The clerk shall give the garnishee a receipt identifying a payment as money paid under a designated garnishment and, if judgment has been entered in favor of the debtor against the garnishee, record total or partial satisfaction thereof.

B. Pending actions.

B.(1) If a debtor is a plaintiff, or counterclaiming defendant, in an action pending in a court of this state, a creditor holding a judgment against such debtor may file with the clerk of the court in which the action is pending a claim of lien against such cause of action. From the time of such filing the creditor shall have a lien for the amount of his judgment on the cause of action and on any judgment recovered by the debtor therein and, provided notice of said lien has been served on the parties

to the action, no compromise or settlement of the action or satisfaction of the judgment shall be made without the consent of the creditor unless his lien has been satisfied or discharged.

B.(2) The claim of lien shall be styled as a paper in the action in which the debtor is asserting a right to recover and shall identify the creditor's judgment by names of parties, court, and docket number, state the amount presently due on the creditor's judgment, and state that a lien is claimed for such amount on the debtor's cause of action and any judgment recovered thereon. If the claim of lien is filed in a court other than the court in which the creditor's judgment was recovered, it must be verified by the signature of the clerk of such court.

B.(3) A creditor who has filed a claim of lien on a debtor's cause of action may intervene in such action by leave of court under Rule 33 C.

B.(4) After a judgment has been entered in favor of the debtor in an action in which the creditor has filed a claim of lien, the creditor may enforce the lien by garnishing the judgment debtor of the debtor under section A. The priority of such garnishment is determined by the time the claim of lien was filed rather than by the time that notice of garnishment was served.

C. Other intangibles; miscellaneous interests.

C.(1) This section applies to corporate shares not evidenced by securities as defined in ORS 78.1020, equities, franchises, patents, licenses, and similar incorporeal rights other than claims

against specific persons; also to contingent interests in real or personal property and leaseholds in personal property and of less than two years unexpired term in real property.

C.(2) Upon ex parte application by a judgment creditor, the court may, in its discretion, authorize the creditor to institute proceedings to enforce the judgment against interests of the debtor of the kind described in subsection (1). In deciding whether or not to authorize proceedings the court should consider the availability of other methods of satisfying the judgment and the likelihood that the proceeding will produce a substantial return to the creditor without disproportionate loss to the debtor.

C.(3) If the court decides to authorize proceedings, it shall direct notice to be served on the debtor enjoining transfer of the interest in question and setting a date for a hearing at which the debtor may show cause why the interest should not be sold or its transfer to the debtor compelled. The court may also direct notice to be served on, or otherwise communicated to, the franchiser, licensor, or other person from whom the debtor's interest is derived or any other person whose interests may be affected. If the debtor's interest is a matter of public record, a copy of the notice shall be filed with the appropriate registrar.

C.(4) The creditor has a lien on the interest described in the notice from the time of its service on the debtor and filing with the registrar if such filing is required by subsection (3).

C.(5) After hearing, the court shall make a final order directing a public sale of the interest, or authorizing public or

private sale by the creditor, or directing that the interest be transferred to the creditor, or assigning all or part of the income from the property to the creditor for a stated period, or setting a time within which the debtor must sell the interest, or dismissing the creditor's application and discharging the lien on the interest, or making any other order that will effectuate the principles of Rule 75 B. If a sale or transfer of the interest is ordered, the debtor shall be required to cooperate therein.

C.(6) If the final order is that the interest be transferred to the creditor, the court shall take evidence respecting the value of the interest and set the amount to be credited on the judgment.

D. Partnership interests. The right of a creditor to reach his debtor's interest in a partnership is defined in, and the procedure provided by, ORS 68.420 and..450.

E. Levy on bank account or contents of safe deposit box not wholly in name of judgment debtor.

E.(1) If the debt, credit, or other personal property sought to be levied upon is any bank account, or interest therein, not standing in the name of the debtor or standing in the name of the debtor and one or more other persons, or property in a safe deposit box maintained by a bank and rented by it to a person other than the debtor or to the debtor and one or more other persons, the provisions of this section must be complied with; otherwise the levy shall not be effective for any purpose. The plaintiff shall deliver to such bank a corporate surety bond in an amount not less than

twice the amount of the judgment (or prayer of the complaint in case of attachment) indemnifying the persons, other than the debtor whose interest is sought to be levied upon, rightfully entitled to such debt, credit, or other personal property (which persons need not be named specifically in said bond but may be referred to generally in the same manner as in this sentence), against actual damage by reason of the taking of such debt, credit, or other personal property and assuring to such persons the return thereof upon proof of their right thereto.

E.(2) Upon delivery to it of the aforesaid bond the bank shall immediately notify the person in whose name such account stands, other than the debtor, or the person to whom such safe deposit box is rented, other than the debtor, by restricted mail, of the service of said writ and of the delivery to it of said bond.

E.(3) From the time of said levy and the delivery to it of said bond the bank shall not honor a check or other order for the payment of money drawn against the account or other credit levied upon or permit the removal of any of the contents of the safe deposit box for a period of fifteen (15) days from the mailing of said notice or until the levy is sooner released.

E.(4) Any person claiming an interest in the account or safe deposit box contents so levied on may institute proceedings under Rule 77 B.(5). An order under Rule 77 B.(5)(b) or (c) shall be without prejudice to a subsequent action on the surety bond.

E.(5) After fifteen (15) days from the making of the levy and the delivery of said bond, if no proceedings under Rule 77 B.(5) have been commenced, the bank shall comply with the levy, unless it has been sooner released, and shall not be liable to any person by reason of such compliance or by reason of the non-payment of any check or other order for the payment of money drawn against the account or other credit so levied upon and presented while the levy is in force or by reason of the removal, pursuant to the levy, of any of the contents of such safe deposit box or by reason of the refusal of such bank to permit access to such safe deposit box by the renter thereof.

E.(6) Before giving access to any safe deposit vault or box, the bank may demand payment to it of all costs and expenses of opening the safe deposit box and all costs and expenses of repairing any damage to the safe deposit box caused by the opening thereof.

RULE 84

CREDITORS OF DECEDENTS AND DISTRIBUTEES OF DECEDENTS' ESTATES

A. Creditors of Decedents. The procedure for establishing and paying claims against a decedent's estate is provided in ORS ch. 115.

B. Survival of liens. A judicial lien that has attached to an asset of a debtor is not affected by the debtor's subsequent death; the debtor's personal representative and distributees and transferees of such asset acquire it encumbered by the lien. Proceedings to enforce such liens may not be instituted without leave of the probate court within six months after the grant of letters testamentary or of administration.

C. Levy on interest of distributee.

C.(1) Specific items of personal property in the possession of a personal representative but bequeathed or ordered to be distributed to a debtor may be levied upon by a creditor of such debtor under a writ of attachment or execution by proceeding in a manner analogous to that described in Rule 82 G.(1). Such levy shall not impair the powers of the personal representative over the property for purposes of administration. The personal representative shall deliver it to the sheriff at such time as an order of the probate court distributing it to the debtor becomes final and such delivery shall be deemed compliance with the order of distribution.

C.(2) The interest of a debtor who is a distributee of the general assets of a decedent's estate may be levied upon by serving notice of garnishment on the personal representative under Rule 83 A. If the personal representative's answer shows that the debtor is a potential distributee, but that the form and amount of such distribution have not yet been determined by the probate court, the creditor shall nevertheless have a lien from the time of service of the notice of garnishment on the debtor's contingent right to distribution, and the clerk, at the request of the creditor, shall order the personal representative to pay or deliver to the clerk any money or property that the probate court may order distributed to the debtor. Such payment or delivery shall be deemed compliance with the order of distribution.

RULE 85

ENFORCEMENT OF JUDGMENTS AGAINST PUBLIC CORPORATIONS; PROPERTY IN CUSTODY OF PUBLIC OFFICERS

A. Enforcement of judgment against public corporation.

If judgment is given for the recovery of money or damages against a public corporation mentioned in ORS 30.310, no execution shall issue thereon for the collection of such money or damages, but the judgment shall be satisfied as follows:

A.(1) The party in whose favor the judgment is given may, at any time thereafter, when an execution might issue on a like judgment against a private person, present a certified transcript of the docket thereof, to the officer of the public corporation who is authorized to draw orders on the treasurer thereof.

A.(2) On the presentation of the transcript, the officer shall draw an order on the treasurer for the amount of the judgment, in favor of the party for whom the judgment was given. Thereafter, the order shall be presented for payment, and paid, with like effect and in like manner as other orders upon the treasurer of the public corporation.

A.(3) The certified transcript provided for in subsection (1) of this section shall not be furnished by the clerk, unless at the time an execution might issue on the judgment if the same

was against a private person, nor until satisfaction of the judgment in respect to such money or damages is acknowledged as in ordinary cases. The clerk shall include in the transcript a memorandum of such acknowledgment of satisfaction and the entry thereof. Unless the transcript contains such a memorandum, no order upon the treasurer shall issue thereon.

B. Levy on debtor's assets in custody of public officer.

Any salary, wages, credits, or other personal property in the possession or under the control of the state or of any county, city, school district, or other political subdivision therein, or any board, institution, commission, or officer of the same, belonging or owed to any person, firm, or corporation, shall be subject to levy under Rules 83 A. or 82 G. in the same manner and with the same effect as property in the possession of individuals. However, the notices required by those Rules may be served only on the board, department, institution, commission, agency, or officer charged with the duty of approving a voucher or claim for such salary, wages, credits, or other property. No clerk or officer of any court shall be required to answer as garnishee or bailee as to any moneys or property in that clerk's or officer's possession in the custody of the law.

RULE 86

ENFORCEMENT OF ORDERS FOR SUPPORT PAYMENTS

A. Definitions applicable to support payments. As used in Rule 86 and in statutes providing for support payments or support enforcement procedures:

A.(1) "Obligor" means any person who has been ordered by a court to make payments for the support of a child or a caretaker parent or other dependent person pursuant to ORS chapter 107, 108, 109, 110, or 419.

A.(2) "Obligee" means a child or caretaker parent or other dependent person for whose benefit a court has ordered a payment of support pursuant to subsection (1) of this section.

B. When support payments payable to Department of Human Resources; fee.

B.(1)(a) Subject to section 86 C., after January 1, 1976, when any court decrees, orders, or modifies any preexisting order for support of any person under ORS chapter 107, 108, 109, 110, or 419, the obligor shall make payment thereof to the Department of Human Resources which shall transmit the payment to the obligee except that when the obligee is receiving general or public assistance, as defined by ORS 411.010, or care, support, or services pursuant to ORS 418.015, the Department of Human Resources shall, except for amounts required by federal law or regulation to be paid to the obligee, retain either all of the support money or the amount equal to the general or public assistance or care, support, or services being paid, whichever is less.

B.(1)(b) Except as provided in this paragraph, the department shall not transmit any payment to an obligee until and unless the check or other instrument tendered by the obligor has cleared or has been paid. For a three-month period beginning on January 1, 1976, the department may immediately transmit payments received from any obligor who has not previously tendered any payment by a check or instrument which was not paid or was dishonored, to the obligee, without waiting for payment or clearance of the check or instrument received. The department shall no later than March 15, 1976, report its collection experience for such checks and instruments to the Emergency Board, which may then or at a later time authorize continuation of the practice, subject to any conditions which it may then or later impose, until adjournment of the next succeeding legislative session or until the authorization is terminated.

B.(2) The decree or order shall contain the home address and Social Security number of the obligee and the home, business address and Social Security number of the obligor. Each person shall inform the court and the Department of Human Resources in writing of any change in his home or business address within 10 days after such change. The Department of Human Resources may also require of the parties any additional information which is authorized by law and is necessary for the operation of support enforcement and collection activities.

B.(3) Notwithstanding the provisions of subsection (1) of this section, the Department of Human Resources shall withhold from every nonpublic assistance support payment it receives pursuant to chapter 458, Oregon Laws 1975, a fee not to exceed $1 to reimburse the department for the cost of processing.

B.(4) When a support payment is delinquent, the Department of Human Resources or the clerk of the court out of which the order is issued, whichever is appropriate, shall promptly send notice by certififed mail to the defaulting party of the amount due. If payment is not made to the Department of Human Resources or the clerk of the court out of which the order is issued, whichever is appropriate, within 10 days after the notice is sent, the Department of Human Resources or the clerk of the court out of which the order is issued, whichever is appropriate, shall send to the Support Enforcment Division of the Department of Justice or to the district attorney, whichever is appropriate, a copy of the statement of the delinquent amount. Upon receipt of a copy of the statement of the delinquent amount, the district attorney or the Support Enforcement Division may, in their discretion, institute contempt proceedings under ORS 33.010 to 33.150 or other enforcement action against the person ordered to pay the money, or, when requested by the obligee, shall institute such proceedings. A statement of the amount due may be used in lieu of the affidavit required under ORS 33.040.

B.(5)(a) In addition to support enforcement service fees established under subsection (3) of this section, a support enforcement service fee of $10 may automatically be imposed upon the

obligor in any case in which the Department of Human Resources does not receive payment from the defaulting obligor before the department sends a copy of the statement of the delinquent amount to the Support Enforcement Division of the district attorney pursuant to subsection (4) of this section, 10 days after the notice required by subsection (4) of this section is sent to the obligor. The notice sent pursuant to subsection (4) of this section shall inform the obligor that such fee will automatically be imposed upon failure to pay in accordance with the notice.

B.(5)(b) Any $10 support enforcement service fee imposed pursuant to this section shall when collected be paid over to the Support Enforcement Division or the district attorney, whichever is appropriate.

B.(6) Whether or not any payments by an obligor are delinquent, payment of any money by an obligor direct to an obligee or on behalf of an obligee to a person other than the Department of Human Resources or the clerk of the court out of which the order is issued, whichever is appropriate, shall not be credited against his support obligation.

B.(7) Subject to section 86 C., this section, to the extent it imposes any duty or function upon the Department of Human Resources, shall be deemed to supersede any provisions of ORS chapters 107, 108, 109, 110, an 419 which would otherwise impose the same duties or functions upon the county clerk.

B.(8) Before enforcing collection of the additional fee provided in paragraph (a) of subsection (5) of this section, the court out of which the order to pay support was issued may by rule provide to the obligor such hearing as it deems appropriate to meet the requirements of due process provided such hearing is requested by prompt application of the obligor.

C. Payment to clerk of court or bank account; discontinuance of payment to clerk.

C.(1) Notwithstanding section 86 B., support orders in respect of obligees none of whom are recipients of general or public assistance or former recipients with unreimbursed past assistance may provide for payment under the order:

C.(1)(a) To the clerk of the court in any county in which the governing body by resolution or ordinance elects to maintain support collection, accounting, and disbursement services for those persons not receiving general or public assistance; or

C.(1)(b) To a checking or savings account established pursuant to sections N. or O. of Rule 86, if the obligor and obligee have so elected.

C.(2) The governing body of a county providing child support collection, accounting, and disbursement services under subsection (1) of this section may by resolution or ordinance discontinue such service. Immediately upon such discontinuance, the support due under orders of the court of record in such county shall become payable to the Department of Human Resources and subject to all provisions relating to such payments.

D. When support payments payable to clerk of court.

D.(1) When any court decrees or orders the payment of money for the support of any person under ORS 107.095, 107.105, 108.120, 109.155, or 419.513, the person ordered to pay the money shall make payment thereof to the clerk of the court, who shall transmit the payment to the person for whose benefit the decree or order was made.

D.(2) The decree or order shall contain the home address of the person for whose benefit the decree or order was made and the home and business address of the person against whom the decree or order is directed. Each person shall inform the clerk in writing of any change in his home or business address within 10 days after such change.

D.(3) Within 10 days after the second payment is delinquent, the clerk shall send notice by certified mail to the defaulting party of the amount due and an explanation of the procedure for collection under this section D. and sections J. through M.

E. Alternative procedure when payments delinquent.

E.(1) In addition to any other remedy provided in law for the enforcement of support, the court, upon notice that support payments or any fees provided for in chapter 458, Oregon Laws 1975, are delinquent and application by the obligee or by the district attorney or Support Enforcement Divison of the Department of Justice, shall issue an order directing any employer or trustee,

including but not limited to a conservator, of the obligor to withhold and pay over to the Department of Humnan Resources or the clerk of the court out of which the order is issued, whichever is appropriate, money due or to become due such obligor in an amount not to exceed:

E.(1)(a) One-fourth of the disposable earnings as defined in ORS 23.175 due or becoming due the obligor at each pay period, until all delinquent amounts due together with interest are paid in full, plus all further amounts coming due before the delinquent amounts are paid in full.

E.(1)(b) Thereafter at each pay period, the amount ordered to be paid for support, but not more than one-fourth of the disposable earnings as defined in ORS 23.175 due or becoming due the obligor at each pay period.

E.(2)(a) An order entered pursuant to this section shall recite the amount of all delinquent support amounts due, together with interest, and the amount required to be paid as continuing support.

E.(2)(b) Effective January 1, 1976, the Department of Human resources or the clerk of the court out of which the order is issued, whichever is appropriate, shall notify any employer or trustee upon whom such an order has been served whenever all delinquent support payments and interest have been paid in full, and whenever for any other reason the amount required to be withheld and paid over to the department under the order as to future pay periods is to be reduced. Prior to January 1, 1976, the

the district attorney or the Support Enforcement Division shall provide such notification.

E.(2)(c) If the obligor's support obligation is required to be paid monthly and his pay periods are at more frequent intervals, the employer or trustee may at the request of the obligor and with the consent of the department withhold and pay over to the department, after all delinquent amounts together with interest have been paid in full, an equal amount at each pay period cumulatively sufficient to pay the monthly support obligation; otherwise the full amount of the support obligation (but not more than onefourth, or such larger proportion as the court may have ordered pursuant to subsection (3) of this section, of the disposable earnings coming due) shall be withheld and paid from the obligor's first pay periods each month.

E.(3) Subject to the provisions of subsections (1) and (2) of this section, the court may in its discretion order the payment of a percentage or gross amount per pay period which is more than one-fourth of the disposable earnings due or becoming due the obligor at each pay period, if so requested in the application filed under subsection (1) of this section, and after citation and opportunity for hearing being accorded to the obligor and the employer or trustee. Upon application of the obligor, the court out of which the order was issued may provide for a hearing based upon affidavits and exhibits and such testimony as the court may find necessary to determine whether to

continue the order of the court as it affects future earnings and future, unaccrued support obligations.

E.(4) An order issued under subsection (1) or (3) of this section shall be a continuing order and shall remain in effect and be binding upon any employer or trustee upon whom it is served until further order of the court.

E.(5) An order to withhold issued and served pursuant to this section shall have priority over any notice of garnishment subsequently served upon any employer or trustee of an obligor.

E.(6) No employer or trustee who complies according to its terms with an order under this section or the notice provided for in paragraph (b) of subsection (2) of this section shall be liable to the obligor or to any other person claiming rights derived from the obligor for wrongful withholding.

E.(7) An employer or trustee described in subsection (1) of this section who wilfully fails or refuses to withhold or pay the amounts as ordered shall be deemed to be in contempt of the authority of the court and may be held personally liable.

E.(8) No employer shall discharge or refuse to hire an employe because of the entry or service of an order of withholding under this section. Any person who violates this subsection shall be deemed to be in contempt of the authority of the court.

F. Clerk of court to notify district attorney of continued delinquencies; when other agencies to be notified.

F.(1) If payment is not made within 10 days after the notice is sent, the clerk shall send to the district attorney a copy of the

support decree or order and a statement of the delinquent amount. If the person for whose benefit a payment described in section 86 D. is decreed or ordered is a person to whom or for whom general assistance or public assistance, as the terms are defined n ORS 411.010, is granted, the clerk, if he has notice thereof, or the district attorney, if he has notice thereof, shall send the notice of default to the Support Enforcement Division if such a division is functioning in that county; otherwise the district attorney shall proceed as he would in any other case under this section.

F.(2) If the Adult and Family Services Division is required to grant or increase assistance for the benefit of any child because support payments under a court decree or order are not being paid when due, the division shall cause notice to be sent to the district attorney or to the Support Enforcement Division if such a division is functioning in that county.

G. Order to employer or trustee to withhold deliinquent payments from money otherwise due.

G.(1) Any decree, judgment, or order for the payment of support for the benefit of a spouse and child may in the discretion of the court include an order directing any employer or trustee, including but not limited to a conservator, of the obligor to withhold and pay over to the Department of Human Resources or the clerk of the court out of which the order is issued, whichever is appropriate, out of money due or to become

due such obligor at each pay period, an amount ordered to be paid for support.

G.(2)(a) The order shall recite the amount of the obligor's continuing support obligation and shall require withholding from the gross amounts due or becoming due to the obligor at each pay period and payment to the Department of Human Resources or the clerk of the court out of which the order is issued, whichever is appropriate, of the amount of the support obligation.

G.(2)(b) If the obligor's support obligation is required to be paid monthly and his pay periods are at more frequent intervals, the employer or trustee may at the request of the obligor and with the consent of the Department of Human Resources or the clerk of the court out of which the order is issued, whichever is appropriate, withhold and pay over to the department or clerk an equal amount at each pay period cumulatively sufficient to pay the monthly support obligation.

G.(3) An order issued under this section shall be a continuing order and shall remain in effect and be binding upon any employer or trustee upon whom it is served until further order of the court.

G.(4) An order to withhold issued and served pursuant to this section shall have priority over any notice of garnishment subsequently served upon any employer or trustee of an obligor.

G.(5) No employer or trustee who complies according to its terms with an order under this section served upon him shall be liable to the obligor or to any other person claiming rights

derived from the obligor for wrongful withholding.

G.(6) An employer or trustee described in subsection (1) of this section who wilfully fails or refuses to withhold or pay the amounts as ordered shall be deemed to be in contempt of the authority of the court and may be held personally liable.

G.(7) No employer shall discharge an employe or refuse to hire a person because of the entry or service of an order of withholding under this section. Any person who violates this subsection shall be deemed to be in contempt of the authority of the court.

H. Order may include payment of support enforcement fees; limitation; use. Any decree, judgment, or order entered in a proceeding for the enforcement of any delinquent support obligation, including an order entered under section E., shall include, on the motion of the Support Enforcement Division of the Department of Justice or the district attorney, if either has appeared in the case, an order for payment of support enforcement fees established by subsection (3) of section 86 B., in addition to any other costs chargeable to the obligor, and in addition to his support obligation. The Department of Human Resources or the clerk of the court out of which the order is issued, whichever is appropriate, shall deduct the amount of any previously imposed support enforcement fees from any payment subsequently made by the obligor but the amount of the deduction shall not exceed 25 percent of any payment. The support enforcement fee, when collected, shall be paid to the Support Enforcement Division of the

Department of Justice or the district attorney whichever appeared in the case.

I. When district attorney or Support Enforcement Division to represent obligee; application fee.

I.(1) Except as provided in subsections (3) and (4) of this section, in any case in which the obligee is not a recipient of public assistance or care, support, or services, the district attorney when requested shall represent the obligee for the purpose of seeking enforcement through contempt proceedings, garnishment, an order for assignment of wages under section E. or section G., or through the Uniform Reciprocal Enforcement of Support Act, of any order of decree entered under ORS chapter 107, 108, 109, 110, or 419, and may when requested initiate proceedings for issuance or modification of orders of support under those chapters.

I.(2) In any case involving a child or custodial parent or other dependent person who is a recipient of public assistance or care, support, or services, the Support Enforcement Division of the Department of Justice shall represent such child or children, caretaker parent, other dependent person, or the Department of Human Resources for the purpose of seeking modification, or enforcement through contempt proceedings, garnishment, an order for assignment of wages under sections E. or G. of Rule 86 or the Uniform Reciprocal Enforcement of Support Act, of any order or decree entered under ORS chapter 107, 108, 109, 110, or 419. The Support Enforcement Division shall also move to initiate proceedings for orders of support under those chapters.

I.(3) The district attorney of any county, the Department of Human Resources, and the Support Enforcement Division of the Department of Justice may provide by agreement for assumption by the Support Enforcement Division of the functions of the district attorney under subsection (1) of this section.

I.(4) The Department of Human Resources may direct the Support Enforcement Division to assume all functions of the district attorney of any county under subsection (1) of this section, if the department finds that the level of support enforcement in such county is insufficient to a degree incurring a risk of imposition of a penalty or loss of federal matching funds to the department or otherwise deemed by the department to be insufficient.

I.(5) The district attorney or the Support Enforcement Division, whichever is appropriate, shall provide the services specified in subsections (1) and (2) of this section to any person requesting them, but may in their discretion, upon a determination and notice to the person requesting the service that prospect of successful recovery from the obligor of a portion of the delinqency or future payment is remote, require payment to the district attorney or the Support Enforcement Division of an application fee, in accordance with an application fee schedule established by rule by the Department of Human Resources. If service performed results in the district attorney or the Support Enforcement Division recovering any support enforcement fees, such fees shall be paid to the applicant in an amount equal to the amount of the application fee.

J. Compelling payment to clerk of court for transmission to beneficiary. Any court which has decreed or ordered support payments paid directly to the person for whose benefit such payments are made may, upon notice that such payments are two months delinquent, order future payments to be made to the clerk of the court for transmission to the person for whose benefit the decree or order was made.

K. Transfer of files in support payment cases to county where party resides or property located. With respect to any order or decree entered pursuant to ORS 107.095, 107.105, 108.120, 109.155, or 419.513, if the party in whose favor such order or decree for the payment of money has been made files an affidavit to the effect that the party ordered to make such payments is in default in the payment of monies due under such order or decree and is presently in another county of this state, the court may, upon motion of the party entitled to such support payments, order that certified copies of the files, records, and transcripts of testimony in the original proceeding be transmitted to the county clerk of the county in which the moving party or the defaulting party resides or in which property fo the defaulting party is located.

L. Jurisdiction of circuit court in county to which files transferred. Upon receipt of such certified copies referred to in section K., the circuit court of the county to which such certified copies have been transmitted shall have jurisdiction to compel compliance with such order or decree, under ORS 33.010 to 33.150,

the same as if it were the court which made and entered the original order or decree for the payment of support. However, no court shall have jurisdiction to modify any provision of the original order or decree except the court having original jurisdiction of the cause in which such order or decree was entered and the circuit court of the county in which the moving party or defaulting party resides if that court has received the certified copies referred to in ORS 23.795.

M. Transfer of files when party or child is recipient of public assistance. The transmittal of such certified copies referred to in secion K. may be made upon motion of the district attorney or of the Support Enforcement Division of the Department of Justice with respect to any suit or proceedings in which a party thereto, or a child of such party, is a recipient of public assistance, and with respect to an order made pursuant to ORS 419.513.

N. Election of support payment method.

N.(1) Whenever the obligee is not a recipient of public assistance or is not a former recipient with unreimbursed past assistance, the obligee and obligor may elect not to transfer payments in the manner described in section B. or paragraph (a) of subsection (1) of section C., but may, instead elect to make payments directly into a checking or savings account established in the obligee's name. The election shall be in writing

and filed either with the court that entered the support order if that county has elected to maintain support collections or with the Department of Human Resources, whichever is appropriate. The election must be signed by both the obligor and the obligee and must specify the amount of the support payment, the date payment is due, the court order number, and the account number of the checking or savings account that is to be used.

N.(2) The checking or savings account election does not alter the requirement set out in pararaph (a) of subsection (1) of section B. that all new or modified orders or decrees must provide for payments to the Department of Human Resources. The election may be filed subsequent to or contemporaneously with the order or decree.

O. Payment of support by alternative method; notice to county or Department of Human Resources; termination of alternative method.

O.(1) The obligor shall deposit an amount equal to the support payment ordered by the court on or before the due date in the checking or savings account. A receipt for the deposit acknowledged by the accepting financial institution shall be sent by the obligor within 10 days of the due date to either the county, if the county has elected to maintain support collections, or to the Department of Human Resources, whichever is appropriate. The receipt may be transmitted electronically by the financial institution if it uses such methods and if the department is equipped to

receive the receipt by that method. The receipt shall be in a form prescribed by the departent after consultation with accepting financial institutions and shall specify the court order number, the obligor's and obligee's names, the amount of the deposit, and the date thereof.

O.(2) The election authorized by section N. is terminated by operation of law if:

O.(2)(a) The obligor is late in making the required deposit on three or more occasions in any 12-month period;

O.(2)(b) The obligor fails on any occasion to make the required deposit that results in payment to the obligee within 30 days after the due date. However, termination shall not be effective if, within 60 days after the due date the obligor makes a showing to the county or to the Department of Human Resources, whichever is appropriate, that failure to make the payment was for good cause;

O.(2)(c) The obligor fails to provide a receipt to either the court or the Department of Human Resources within 10 days of the due date on three or more occasions in any 12-month period; or

O.(2)(d) The obligee becomes a recipient of general or public assistance, as defined by ORS 411.010, or care, support, or sevices pursuant to ORS 418.015.

O.(3) In the event of termination, all subsequent payments shall be made either to the court if that county has elected to maintain support collections or to the Department of Human Resources. Notice of termination and payment requirement shall

be sent by either the court or the Department of Human Resources to the oligor's last-known address.

RULE 87

ENFORCEMENT OF JUDGMENTS AND ORDERS RESPECTING POSSESSION OF SPECIFIC PROPERTY OR REQUIRING OR FORBIDDING ACTS

A. Claim and delivery.

A.(1) In an action to recover the possession of personal property, the plaintiff, at any time after the action is commenced and before judgment, may claim the immediate delivery of such property, as provided in Rule 79.

A.(2) Delivery by sheriff under provisional process order. The order of provisional process issued by the court as provided in Rule 79 may require the sheriff of the county where the property claimed may be to take the property from the defendant or another person and deliver it to the plaintiff.

A.(3) Concealed property. If the property or any part thereof is concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it is not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

A.(4) Custody and delivery of property. Upon receipt of the order of provisional process issued by the court as provided in Rule 79, the sheriff shall forthwith take the property described

in the order, if it be in the possession of the defendant or another person, and retain it in his custody. He shall keep it in a secure place, and deliver it to to the party entitled thereto upon receiving his lawful fees for taking, and his necessary expenses for keeping the same. The court may waive the payment of such fees and expenses upon a showing of indigency.

A.(5) Filing of order by sheriff. The sheriff shall file the order, with the sheriff's proceedings thereon, including an inventory of the property taken, with the clerk of the court in which the action is pending, within 10 days after taking the property; or, if the clerk resides in another county, shall mail or forward the same within that time.

B. Judgment for delivery of possession of property.

B.(1) At any time after a judgment requiring a party to deliver, or entitling a party to possession, of specific real or personal property has been docketed the clerk, on request, shall issue to the sheriff of the county in which the property is situated a writ of execution requiring the sheriff to deliver possession of the same, particularly describing it, to the party entitled.

B.(2) If such judgment also awards damages for withholding the property, or for the value of the property in case it cannot be delivered, that part of the judgment may be enforced under Rules 75-86.

C. Forcible entry and detainer. The manner of enforcing a judgment in a summary proceeding to recover possession of real property is provided in ORS 105.155.

D. Abating nuisance. The procedure for abating a nuisance is provided in ORS 105.505-.520.

E. Judgments in actions in equity.

E.(1) A judgment requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party does not comply therewith, be deemed to be equivalent thereto.

E.(2) The court or judge thereof may enforce an order or judgment in an equitable action by punishing the party refusing or neglecting to comply therewith, as for a contempt.

E.(3) Subsection (2) of this section does not apply to an order or judgment for the payment of money, except orders and judgments for the payment of suit money, alimony, and money for support, maintenance, nurture, education, or attorney's fees pendente lite, or by final decree, in:

E.(3)(a) Actions for dissolution of marriages.

E.(3)(b) Actions for separation from bed and board.

E.(3)(c) Proceedings under ORS 108.110 and 108.120.

E.(4) As an alternative to the independent proceeding contemplated by ORS 33.010-.150, when a contempt consists of disobedience of an injunction or other judgment or order of court in a civil action, citation for contempt may be by motion in the action in which such order was made and the determination respecting punishment made after a show cause hearing. Provided however:

E.(4)(a) Notice of the show cause hearing shall be served in the manner of a summons;

E.(4)(b) Punishment for contempt shall be limited as provided in ORS 33.020.

E.(4)(c) The party cited for contempt shall have right to counsel as provided in ORS 33.095.

COMMENTS

to

RULES 75 THROUGH 87

(9/18/79 Draft)

Professor Frank Lacy

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to

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INTRODUCTORY COMMENT TO RULES 75-87

This group of Rules covers the procedure for enforcing judgments (attachment, execution, garnishment, etc.) and replaces the part of chapter 18 of ORS dealing with judgment liens, all of chapters 23 and chapter 29, and a few miscellaneous sections relating to the collection process. See Conversion Table on Pages 25-28 of these Comments. The overall design of these chapters, and many individual sections, date unchanged from 1862.

Concluding his article, Collection of Money Judgments in American Law, 42 Iowa L. Rev. 155, 181 (1957), Stefan Riesenfeld wrote:

> True, creditors have gained a vast arsenal of remedies but the procedures are often cumbersome, clumsy, inequitable and overly technical. Moreover, the field everywhere bristles with discrepancies and contradictory provisions and is full of pitfalls threatening the unwary. Only the dishonest debtor or the collection agency stands to gain from the present condition. A complete overhauling and streamlining of the whole collection devices [sic] is long overdue.

These rules attempt to provide such streamlining (see, e.g., Rule 78 D.(1)), and also to take cognizance of developments in related fields such as the Uniform Commercial Code and the new Bankruptcy Code (see, e.g., Rules 78 D.(3), 77 I.), procedural innovations such as discovery and summary judgment (see, e.g., Rules 77 D., 77 B.(5)), the emergence of new forms of property such as condominiums and franchises (see, e.g., Rule 83 C.), and the recent emphasis on due process in the debt collection process.

The over-technicality and pitfalls for the unwary, noted by Professor Riesenfeld, are largely attributable to the system of delegating the operation of the judgment enforcement process to clerks and sheriffs, providing detailed regulations for the conduct of these officials, and insisting (whenever their conduct comes before the courts) on strict, literal compliance with the regulations. A major, pervasive, change in these Rules is to move away from this system in the direction of a system relying on ongoing judicial oversight and more flexible ad hoc application of general principles. (See Rule 77 E. and compare Rule 7 D.(6)(a)).

This change may somewhat increase the workload of the courts, and that demands justification. It is submitted, first, that the increase is to some extent illusory. While there will be more numerous applications for adjudication they will generally be of narrow compass and disposed of in the relatively informal setting of a show cause hearing. Offsetting this will be a reduction in the number of plenary actions to review judgment enforcement proceedings after the fact. Second, and more important, there is a strong due process argument for ongoing judicial oversight. We attach great importance to giving notice to parties and opportunity to be heard in the proceedings leading up to judgment. In the typical debt collection setting, where judgment is inevitable, it may be questioned whether this is of real importance to the debtor. But in the post-judgment, enforcement phase, where a debtor or

third persons may actually have interests that can be protected, there has historically been much less concern for due process. The Rules try to correct this by stressing timely and intelligible notice to persons likely to be affected and providing judicial scrutiny when it is most likely to do some good.

Another major change made by the Rules concerns the method of enforcing judgment against a debtor's real property. This is explained in the Comment to Rule 80 C.

All provisions for body attachment and body execution (ORS 23.080, .090, .740, .810-.930; 29.510-.740) have been eliminated.

COMMENT

Rule 75

The general principles stated in subsections B.(1), (2), and (4) have long been recognized. Subsection B.(1) is derived from ORS 23.160 and 29.140. Subsection B.(2) is the presumable motivation for the system of public sale and redemption from execution. Subsection B.(4) is seemingly contrary to ORS 18.370 and 29.150 but is believed to accurately reflect the supreme court's construction and application of those sections; see Thompson v. Hendricks, 118 Or. 39, 345 P. 724 (1926); Chaffin v. Solomon, 255 Or. 141, 465 P.2d 217 (1970); Wilson v. Willamette Industries, 280 Or. 45, 569 P.2d 609 (1977); Jennings v. Lentz, 50 Or. 483, 93 P. 327 (1908). Subsection B.(4) is, of course, a generalization and yields to a specific statute like ORS 79.3010. Nor would it affect application of the law of fraudulent conveyances where a creditor has been prejudicially misled by a debtor's apparent ownership. Cf. ORS 41.360 (39).

Subsection B.(3) is a newer concept reflecting the expansion of due process in the area of debt collection. Cf. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972).

It is worthwhile to provide a succinct statement of these general principles to serve as guidelines for the discretionary rulings required of the judge by a number of the rules. (E.g., Rule 83 C.(5))

Of the definitions in section C.: subsection C.(1) is based on sec. 102(1) of the new Bankruptcy Code, 11 U.S.C. § 102(1); subsection C.(8) is based on ORS 24.010(3); subsection C.(9) is based on 11 U.S.C. § 101(27); subsection C.(10) is a slightly revised version of Kans. C.C.P. sec. 60-103; and subsection C.(11) is based on 11 U.S.C. § 101 (37).

ORS sections superseded: 18.370, 29.150.

COMMENT

Rule 76

While ORS 23.160 and 29.140 state that all non-exempt property is subject to levy, the case law does not quite bear this out. For example, see Pringle v. Robertson, 258 Or. 309, 465 P.2d 223 (1970) (debtor's claim against liability insurer for wrongful failure to settle not garnishable); Atty. Gen. Op. 1948-50, p 377 (judgment not garnishable). It is submitted that the creditors were denied access to their debtor's assets in those cases because of perceived deficiencies in the machinery for reaching them. Rules 75-87 attempt to remedy these deficiencies. In other cases, however, it is believed that the court's refusal to let a creditor reach a certain asset is based on a belief that policy considerations require that the debtor be allowed to retain it. These are best regarded as judicially created exemptions and identified in D.(1)-(4). D.(1) is very widely recognized. For D.(2) and D.(3), see C.J.S. 2d Exemptions §§ 60, 61; 31 Am. Jur. 2d 119. Oregon's recognition of spendthrift trusts, and the limitation thereon, is explained in 40 Or. L. Rev. 243.

Subsection E.(2) is derived from ORS 29.178(2) adding the requirement that the creditor identify possibly applicable exemptions.

Sections F. and G. provide a procedure for claiming and resolving disputes regarding exemptions. Section F. is similar to 23.270(2). Section G. is essentially identical in effect to ORS 23.168 as regards personal property. With respect to real property, it replaces the appraisal procedure of 23.270(1). If the dispute is about the existence

or amount of a senior security interest or whether the property is the debtor's home, these are fact issues appropriately triable by the court. If the dispute is about the value of the property, the court need do nothing. If after six months the creditor assumes ownership and pays the debtor $12,000 (Rule 80 C.(4)(b)(iv)), the debtor who claimed his equity was worth less than $12,000 cannot complain; if the creditor does not take the property, the debtor's possession of the property will not have been disturbed. If the debtor wants to sell his home during the six-month period for less than $12,000 and free of the creditor's lien, he may proceed under Rule 77 F.(2).

Section H. replaces ORS 23.280-.300. Subsection H.(2) makes it clear that a transferee of a homestead may clear his title of a purported lien by proving that the property was wholly exempt at the time of transfer. Cf. Credit Service Co. v. Cameron, 41 Or. App. 57 (1979).

Subsection H.(3) will become obsolete as the new Bankruptcy Code becomes fully effective.

Section I. is explained in CLE, Real Property 30-19.

ORS sections superseded: 23.168, 23.270-.300, 29.178(2).

COMMENT

Rule 77

Section A. is derived from ORS 29.178. ORS 29.178(4) is made unnecessary by Rule 77 C.

Subsection B.(2) provides for sale of a debtor's equity notwithstanding the existence of liens senior to the levying creditor's. Cf. ORS 79.3110, Kans. C.C.P. § 60-2409, Mich. Comp. Laws § 600.6034. As the creditor acquires title to the entire property for the amount of the debtor's equity (see Rule 80 C.(4)(b)(iv)), it would be unfair to make the debtor exonerate it from senior encumbrances. Cf. Me. R.S. § 14-4251.

Subsection B.(3) requires notice to junior lienors whose interests will necessarily be cut off. See Call v. Jeremiah, 246 Or. 568, 452 P.2d 502 (1967). The failure of ORS to provide for any notice to junior lienors in connection with execution sales (in contrast to the requirement that they be joined in a foreclosure suit) is a serious omission.

Subsection B.(4) states existing law, Ganoe v. Ohmart, 121 Or. 116, 254 P. 203 (1927).

Subsection B.(5) eliminates the sheriff's jury option of ORS 23.320-.350. Subparagraph B.(5)(a) permits final adjudication of clear cases. The choice between subparagraphs B.(5)(b) and B.(5)(c) turns on the judge's estimate as to the probable ultimate winner. Cf. New York C.P.L.R. 5239.

Subsection C.(1) is similar to Rule 9 B. Service in the manner of a summons is required for notices of foreclosure (Rule 80 C.(1) and

garnishment (Rule 83 A.(1)(a)). Restricted mail is defined in Rule 75 C. Subsection C.(2) may require brief interrogation of a party or his attorney by the judge, in addition to examining affidavits and written returns. The "good faith . . . best available means" language is suggested by Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950), and Thoenes v. Tatro, 270 Or. 775, 529 P.2d 912 (1975).

Section D. recognizes that discovery may be as useful in collecting a judgment as in obtaining one. Subsection D.(1) is similar to New York C.P.L.R. 5223. It substitutes a deposition for the debtor's examination of ORS 23.710 and .720(1) and also permits deposing non-parties. Subsection D.(2) is taken from ORS 23.720. It should be remembered that garnishment also serves an important discovery function.

Subsections E.(1) and (2) implement the concept, explained in the Introductory Note to Rules 75-87, of substituting ongoing discretionary, and relatively informal, control by the judge for the traditional system of detailed regulations for the conduct of subordinate officials whose strict compliance therewith could be tested only long after the event in a plenary action. The "authorize variance" language is taken from New York C.P.L.R. 5240.

Subsection F.(1) is derived from ORS 29.220 and .230. The requirement of a corporate surety bond here and throughout Rules 75-87 reflects belief that undertakings by the parties' friends frequently do not provide adequate security and avoids the necessity of justifaction hearings. A similar requirement appears in ORS 18.350(2). ORS 23.440 provided for redelivery of property taken on execution. This is omitted. The interval between levy and sale is brief (Rule 82 F.); the cost of a redelivery bond would be high; the debtor might better ransom his property by paying the judgment.

Subsection F.(2) is a version of ORS 23.280-.300 considerably shortened, because many of the provisions of those sections now appear elsewhere in the Rules, and made applicable to non-exempt property as well as homesteads. An argument for this extension is made in 8 Will. L.J. 327, 334 (1972). The distinctive treatment of real property lienors in subsection F.(2)(e) is by analogy to the rule in mortgage foreclosures. See Call v. Jeremiah, 246 Or. 568, 572, 425 P. 2d 502 (1967). Subsection F.(2) also replaces ORS 29.240 and .250.

Section G. is derived from ORS 23.310 with the difference that the amount of the bond is to be determined by the value of the property rather than the amount of the plaintiff's claim which seems irrelevant to the third parties' potential injury.

Subsection H.(1) is ORS 18.410; subsection H.(2) is ORS 18.400(1); and subsection H.(3) is ORS 18.400(2) and (3).

Subsection I.(3) is essentially ORS 18.420. Subsection I.(1) is a statement of substantive law clarifying the exact effect of bankruptcy on liens. Subsection I.(2) and the first clause of subsection I.(3) take account of the 1970 amendment to § 17 of the Bankruptcy Act and 11 U.S.C. § 523(c) of the new Bankruptcy Code.

ORS sections superseded: 18.400, 18.410, 18.420, 23.310-.350, 23.440, 23.580, 23.720, 29.178, 29.220-.250.

COMMENT

Rule 78

Subsection A.(1) is ORS 29.110; subsection A.(2) is 29.410; subsection A.(3) replaces ORS 29.120 in view of ORS 29.020(5) and ORS 29.025.

Subsection B.(1) is derived from ORS 29.130. The requirement of a corporate surety is explained in the Comment to Rule 77 F.(1). Subsection B.(2) recognizes that the potential damage to the defendant from an attachment is not necessarily related to the size of the plaintiff's claim.

Section C. replaces ORS 29.140, which authorized attachment of all non-exempt property. The apparent constriction is largely illusory: subsection C.(1) forbidding attachment of real property in district court actions continues the rule of ORS 46.082; most assets not falling within subsections C.(2), (3) or (4) would be reachable only by a creditor's suit which does not ordinarily lie before judgment. The policy argument is that a plaintiff should not be allowed to invoke the more complex procedures for levying on non-garden variety assets when it is not certain that he will win the case. Note that the availability of summary judgment enables a creditor to get judgment without great delay when the debtor is merely stalling. Cf. Cal. C.C.P. 487.010 and .020 which also put restrictions on what may be attached, as opposed to taken, on execution.

Subsection D.(1) replaces ORS 29.170(1). It eliminates the necessity of issuing a writ to the sheriff and the sheriff delivering a certificate (presumably prepared by the creditor) to the clerk. Subsection D.(2) also eliminates the necessity of a writ. As under ORS 23.670 (2)

notice of garnishment need not be served by the sheriff. Subsection D.(3) is new and reflects the principle stated in Rule 75 B.(3). Comparable provisions are: Cal. C.C.P. 488.340-.360; Me. R.S. 14-4154; Minn. Stats. Ann. 550.13. Note that this subsection merely puts a burden on the attaching plaintiff to show that immediate dispossession of the defendant is justified. Cf. Rule 79 H. Subsection D.(4) is derived from ORS 29.160 and .170(2).

Section E. is derived from 29.380 and .390.

ORS sections superseded: 29.110-.140, 29.160, 29.170, 29.380, 29.390, 29.410, 46.082.

COMMENT

Rule 79

Rule 79 is ORS 29.020-.075. ORS 29.040 providing for attachment to obtain quasi in rem jurisdiction was repealed by Or. L. 1979 c. 284, § 199. See Comment to Rule 5.

ORS sections superseded: 29.020-.075.

COMMENT

Rule 80

The two-year qualification in section A. is suggested by ORS 23.520. The limitation to legal interests reflects First Bank of Juntura v. Sitz, 1 P.2d 126, 6 P.2d 242 (1938), and the legislatures repeated, recent rejection of bills designed to extend judgment liens to equitable interests.

Paragraph B.(1)(b) states the rule of Creighton v. Leeds, Palmer & Co., 9 Or. 215 (1881).

Paragraph B.(2)(a) is ORS 18.320 and 18.350(1). Paragraph B.(2)(b) is ORS 46.276. Paragraph B.(2)(c) is derived from ORS 18.380 and .390.

Section B.(3) is ORS 18.360 plus the reference thereto in ORS 18.390.

Paragraphs B.(4)(b) and (c) are ORS 18.350(2) and (3).

Section C. effects a major change in the procedure for reaching a debtor's real property, abandoning the system of sale at public auction followed by judicial confirmation and a one-year period of redemption (ORS 23.490-.600). This system is an attempt to implement the principle stated in Rule 75 B.(2), but it has not been notably successful. Redemptions are of rare occurrence, yet the possibility of redemption discourages bidding at the sale. A common result is that the judgment creditor is the only bidder and bids the amount of his judgment. Inadequacy of price is not ordinarily grounds for refusing confirmation. There have been instances of debtors forfeiting a substantial equity above what was necessary to pay the judgment, though this is usually avoided by the debtor refinancing or arranging a private sale when execution is threatened. The point of Rule 80 C. is to institutionalize this de facto solution by requiring timely and intelligible notice to

the debtor (80 C.(1)) and enabling the debtor to give clear title to a buyer even when the property is encumbered beyond its value (80 C.(4)(a)). In the latter case, of course, there will be no surplus payment to the debtor, but the full value of the property will be applied to reduction of his debts (cf. 77 F.(2)). The redemption period is shortened to six months and made to precede the transfer of the property. If the debtor does not act within this period, the property is transferred outright to the judgment creditor or a redeeming junior lienor, the assumption being that the debtor's failure to act indicates that the property is worth no more than the claims against it. Enforcing judgments by transferring the debtor's land to the creditor at an appraised value is the traditional method in Maine (Me. R.S. 14-2001 ff) and Massachusetts (Mass. Ann. Laws, c. 236 § 1). A system somewhat similar to Rule 80 C. is provided by the Uniform Land Transactions Act, sec. 3-507.
A good discussion of the shortcomings of the traditional redemption system and a proposal for a system resembling Rule 80 C. may be found in 14 Business Lawyer 132 (1958). Comments on specific provisions follow.

Subsection C.(1). It seems reasonable to require the creditor to wait until his judgment is really final before initiating this drastic procedure. This provision makes ORS 23.500 unnecessary. Note that the Notice must be served in the manner of a summons; the idea is to hit the debtor between the eyes. Filing of a copy with the circuit court is required to give persons who subsequently acquire liens (not entitled to notice by subsection C.(2) but foreclosed by subparagraph C.(4)(b)(iv)) a chance to learn of the proceedings and redeem. Cf. a lis pendens notice.

Subsection C.(2). See comment to Rule 77 B.(3). Paragraph C.(2)(b) suggests that the creditor will have to obtain a title report before initiating foreclosure. This is essential to assuring that whoever gets the property at the end of the proceeding gets clear title and this is essential to realizing the full value of the property. Cf. Indiana Rule C.P. 69 F.

Paragraph C.(3)(c). The 40-day wait here, and in paragraph C.(4)(a), is to give junior lienors a chance to file claims.

Subparagraphs C.(4)(b)(i)-(iii). This is similar in purpose to the confirmation requirement of ORS 23.490. An important difference is that judicial scrutiny of the proceedings is required even if the debtor does not appear.

Subparagraph C.(4)(b)(iv). The personal liability of the transferee is explained in the Comment to Rule 77 B.(2). It is believed that, at the present time, tax appraisals are reasonably related to fair value. Note that the order is, in effect, a quiet title decree avoiding the necessity of post-execution lawsuits.

ORS sections superseded: 18.320, 18.350, 18.360, 18.380, 18.390, 23.450(2), 23.460, 23.490-.600, 46.276.

COMMENT

Rule 81

The procedure outlined in section B. is essentially a streamlined creditor's suit. See comment to Rule 83 C. The contract copy required by subsection B.(2) may be obtained from the debtor under Rule 43 or the vendor under Rule 55 B.

Section C. recognizes that the principal thing that is of interest to a vendor's creditors is the right to receive the payments to be made by the purchaser under the contract. Paragraph C.(1)(b) reinstates the procedure of May v. Emerson, 52 Or. 262, 96 P. 454 (1908), and Heider v. Dietz, 234 Or. 105, 380 P.2d 619 (1963), for short term contracts. Paragraph C.(1)(c) deals with long-term instalment contracts. Subsection C.(2) is applicable in either case but would ordinarily be used only in the long-term situation. Section C. is adapted from a proposed statute appearing, and explained in detail, in an article in 55 Or. L. Rev. 227.

ORS sections superseded: 93.645.

COMMENT

Rule 82

The treatment of securities as chattels in section A. is required by ORS 78.3170, the exception for savings and loan certificates by ORS 29.170(4).

Section B. is derived from ORS 23.410(5).

Subsection C.(1) is ORS 23.030 limited to money judgments. Subsection C.(2) is derived from ORS 23.050(1). Subsection C.(3) is derived from ORS 23.070. It contemplates that the clerk of a district court may issue writs to other counties without the necessity of filing a transcript of the judgment in the circuit court as seemingly required by ORS 46.275. Subsection C.(4) is derived from ORS 23.060. Subsection C.(5) is derived from ORS 23.060 and 29.180.

Section D. is derived from ORS 29.170(2) and the first four lines of ORS 29.170(3). It makes the sheriff's determination about "manual delivery" conclusive.

Section E. is suggested by New York C.P.L.R. 5234(b).

Subsections F.(1) and (2) are new. The idea is to allow some leeway but to require reasonably prompt sale. The 15-day minimum in subsection F.(1) is to allow the notices required by subsection F.(4) to be sent and reacted to. Subsection F.(2) is an effort to improve the chances of a remunerative sale by enlarging the sheriff's options. He may, e.g., hire a professional auctioneer or have levied on property sold in connection with one of the periodic auctions of surplus state property. Subsections F.(3) and (4) are derived from ORS 23.450(1) with the change that the responsibility for serving notice of the sale is put

on the creditor. Subsection F.(5) is ORS 23.470. Subsection F.(6) is ORS 23.480. Subsection F.(7) is new; ORS 23.420(2) was probably repealed by implication by 78.3170, at least where a share certificate is outstanding, and a sheriff's auction of this kind of property makes little sense. Subsection F.(8) is new. If the property is really perishable (less common today than in the unrefrigerated past), the 48-hour delay required by ORS 23.450(1) may be too long. The "commercially reasonable manner" language comes from ORS 79.5040. Subsection F.(9) is derived from ORS 23.410(5) and (6).

Subsections G.(1) and (2) are derived from ORS 29.170(3), in so far as that subsection applied to chattels in the garnishee's possession, and spells out more clearly that a levy does not disturb the rights of third persons. Subsection G.(2) conveniently combines a levy on a leased chattel with garnishment of accruing rent payments. Subsection G.(4) provides an alternate to the indemnity-to-the-sheriff procedure of Rule 77 G. when the third party is in actual possession of the property and not merely suspected of having a claim.

ORS sections superseded: 23.030-.070, 23.410, 23.420(2)(3), 23.450(1), 23.460-.480, 29.170(3)(4), 29.180, 29.200, 29.210, 46.275.

COMMENT

Rule 83

Subsections A.(1)-(3) use the "writ of garnishment" procedure of ORS 23.650-.670, rather than the ORS 29.170(3) procedure, with the difference that there is no writ and the creditor issues the notice. Paragraph A.(1)(b) comes from ORS 29.170(3). Subsection A.(4) is derived from ORS 29.270 and 23.430. Subsection A.(5) is derived from the last sentence of ORS 23.420(1) but adds some flexibility respecting payments due in the future. Subsection A.(6) is derived from ORS 29.360 and .370 and eliminates the procedure of ORS 23.420(1) which has proven a trap for the unwary. See Murphy v. Bjelik, 87 Or. 329, 169 P. 520, 170 P. 723 (1918). Postponement of judgment against the garnishee in attachment situations is mandated by Union Oil Co. v. Pacific Whaling Co., 240 Or. 151, 400 P.2d 509 (1965). Subsection A.(7) replaces the suit-within-a-suit procedure of 29.310-.370. This avoids possible harassment of the garnishee by splitting a cause of action against him and also meets the objection implicit in Pringle v. Robertson, 258 Or. 369, 465 P.2d 223 (1970); if the court senses unfairness in letting a creditor (e.g., an uncompensated accident victim) sue a garnishee (e.g., tort feasor's liability insurer) in his own name, it can deny authorization or require suit in the debtor's name. Ky. R.S. 425.526 is a similar provision authorizing direct action by a garnishee against a creditor who gives an unsatisfactory answer. Subsection A.(8) provides machinery to assure the garnishee proper credit for any payment. Cf. ORS 23.430.

Section B. is based on Cal. C.C.P. 688.1 with the difference that the California statute requires the creditor to apply to the court for a discretionary ruling. Rule 83 B. makes the lien a matter of right, assuming the cause of action is not exempt (cf. Rule 76 D.). Whether or not the creditor should be allowed to participate in the action should be a discretionary matter but this is best handled under Rule 33.

Section C. combines the common law creditor's suit and supplementary proceedings (ORS 23.710-.730). The principal change is the elimination of an independent, formal suit and the hard and fast requirement of return of execution nulla bona. The latter is seen as a time consuming gesture. The creditor's self-interest will normally counsel against using more elaborate remedies when simpler ones will avail. If a creditor should seek to invoke section C. out of caprice or malice when conventional property was available, the court can refuse authorization under C.(2) or the debtor can use the conventional property to pay off the judgment. The point of the initial ex parte application is to allow the court to screen out an occasional wholly inappropriate application and, more importantly, to set a date for the hearing and determine who must be given what kind of notice.

Section E. is based on Cal. C.C.P. 682a.

ORS sections superseded: 23.420(1)(2), 23.430, 23.650-.670, 23.710-.730, 29.170(3), 29.270, 29.310-.370.

COMMENT

Rule 84

Section B. restates ORS 23.100 as construed in Barrett v. Furnish, 21 Or. 17 (1891), and Petke v. Pratt, 168 Or. 425, 123 P.2d 797 (1942). Cf. also ORS 114.345, 115.065, .255, and .275.

Section C. is ORS 29.175 revised to make clear that it applies to the interest of a distributee from the general assets of the estate. The priority of creditors of distributees of real property is governed by Rule 80 B.(1)(b).

ORS sections superseded: 23.100, 29.175.

COMMENT

Rule 85

Section A. is ORS 30.390.

Section B. is ORS 23.190 modified to apply to attachment as well as execution and to adjust to the coverage of bailees in Rule 82 and garnishees in Rule 83.

ORS sections superseded: 23.190, 30.390.

COMMENT

Rule 86

This is ORS 23.760-.809.

ORS sections superseded: 23.760-.809.

COMMENT

Rule 87

Section A. is ORS 29.080-.095.

Section B. is derived from ORS 23.030, .040(3), and .050(4).

Subsections E.(1)-(3) are ORS 23.020; subsection E.(4) is new and provides for citation for contempt by motion "at the foot of the judgment" as an alternative to an independent "State ex rel." action. The motion procedure was the traditional chancery practice and is believed to be customary in some Oregon counties.

ORS sections superseded: 23.020, 23.030, 23.040(3), 23.040(5), 29.080-.095.

CONVERSION TABLE (ORS - ORCP)
WITH PROPOSED DISPOSITION OF ORS SECTIONS

This Table indicates the ORS antecedents of Rules 75-87 and suggests what disposition should be made of the ORS sections if these rules are adopted. The symbol (u) in the third column means that the rule carries forward the statute section essentially unchanged. The absence of (u) means that the rule is derived from, or serves the same function as, the statute but with more or less substantial change in wording and, in some cases, legal effect.

ORS	ORCP	Proposed Disposition
18.310	2	Repeal
18.320	80 B.(2)(a)(1)	Repeal (u)
18.335		Retain as statute
18.310	2	Repeal
18.320	80 B.(2)(a)(i)	Repeal (u)
18.335		Retain as statute
18.350(1)	80 B.(2)(a)(ii)	Repeal (u)
(2)	80 B.(4)(b)	Repeal (u)
(3)	80 B.(4)(c)	Repeal (u)
18.360	80 B.(3)	Repeal (u)
18.370	75 B.(4)	Repeal
18.380	80 B.(2)(c)	Repeal
18.390	80 B.(2)(c)	Repeal
18.400(1)	77 H.(2)	Repeal (u)
(2)	77 H.(3)(a)	Repeal (u)
(3)	77 H.(3)(b)	Repeal
18.410	77 H.(1)	Repeal (u)
18.420	77 I.(3)	Repeal
18.510	77 K.	Repeal (u)
23.010	2	Repeal
23.020	87 E.(1)-(3)	Repeal
23.030	82 C.(1), 87 B.(1)	Repeal
23.040(1)	82 C.	Repeal
(2)	Omit - body execution	Repeal
(3)	87 B.(1)	Repeal
23.050(1)(2)	82 E.(2)	Repeal
(3)	Omit	Repeal
(4)	87 B.(2)	Repeal

ORS	ORCP	Proposed Disposition
23.060	82 C.(4)	Repeal
23.070	82 C.(3)	Repeal
23.080	Omit - body execution	Repeal
23.090	Omit - body execution	Repeal
23.100	84 B.	Repeal
23.160-.166	(Except first two sentences - Rules 75 B.(1) and 76 F.)	Retain as statutes
23.168	76 G.	Repeal
23.170-.260	(Except 23.190 - Rule 85 B.)	Retain as statutes
23.270	76 G.	Repeal
23.280-.300	76 H., 77 F.(2)	Repeal
23.310	77 G.	Repeal
23.320-.350	77 B.(5)	Repeal
23.410(1)	78 E.	Repeal
(2)	78 E.	Repeal
(3)	82 C.(2)	Repeal
(4)	78 D.	Repeal
(5)	82 B., 82 F.(9)	Repeal
(6)	82 F.(9)	Repeal
23.420(1)	83 A.(5)(6)	Repeal
(2)	82 F.(7)	Repeal
(3)	82 G.(1)(2)	Repeal
23.430	83 A.(5)(8)	Repeal
23.440	77 F.(1)	Repeal
23.450(1)	82 F.(3)(4)(8)	Repeal
(2)	80 C.(1)	Repeal
23.460	80 C.(4), 82 F.(2)	Repeal
23.470	82 F.(5)	Repeal (u)
23.480	82 F.(6)	Repeal (u)
23.490-.600	80 C.	Retain as statutes but move to ORS ch. 88 and remove all references to judgment debtors and execution sales

ORS	ORCP	Proposed Disposition
23.650	83 A.	Repeal
23.655	83 A.(1)(a)	Repeal
23.660	83 A.(2)(4)-(7)	Repeal
23.665	83 A.(2)	Repeal
23.670	83 A.(3)	Repeal
23.710	83 C.	Repeal
23.720(1)	77 D.(1)	Repeal
(2)	77 D.(2)	Repeal (u)
23.730	77 E.	Repeal
23.740	Omit - body execution	Repeal
23.750	83 A.	Repeal
23.760-.809	84	Repeal (u)
23.810-.930	Omit - body execution	Repeal
29.010	79 A.(5)	Repeal (u)
29.020-.075	79, 78 A.(3)	Repeal (u)
29.080-.095	87 A.	Repeal (u)
29.110	78 A.(1)	Repeal (u)
29.120	Omit - superseded by 29.020-.075	Repeal
29.130	78 B.	Repeal
29.140	78 C.	Repeal
29.150	75 B.(4)	Repeal
29.160	78 D.(4)	Repeal
29.170(1)	78 D.(1)	Repeal
(2)	78 D.(3)(4), 82 D.	Repeal
(3) generally	83 A.	Repeal
corp. shares	82 A.	Repeal
branch bank	83 A.(1)(b)	Repeal
(4) S & L cert.	82 A.	Repeal
(5)	83 A.(2)	Repeal
29.175	84 C.	Repeal
29.178	76 E., 77 A.	Repeal

ORS	ORCP	Proposed Disposition
29.180	82 C.(5)	Repeal
29.190	78 D.(1)	Repeal
29.200	82 F.(8)	Repeal
29.210	77 B.(5), 82 G.(4)	Repeal
29.220	77 F.(1)(a)	Repeal
29.230	77 F.(1)(b)	Repeal (u)
29.240	77 F.(2)	Repeal
29.250	77 F.(2)	Repeal
29.260	Omit - unnecessary in view of Rule 79 safeguards	Repeal
29.270	83 A.(4)	Repeal
29.280	83 A.(2)(c), 83 A.(7)	Repeal
29.290	83 A.(7)	Repeal
29.300	77 E.	Repeal
29.310	83 A.(7)	Repeal
29.320	83 A.(7)	Repeal
29.330	83 A.(7)	Repeal
29.340	83 A.(7)	Repeal
29.350	83 A.(7)	Repeal
29.360	83 A.(6)(7)	Repeal
29.370	83 A.(6)	Repeal
29.380	78 E.	Repeal
29.390	78 E.	Repeal
29.400	77 J.	Repeal
29.410	78 A.(2)	Repeal (u)
29.510-.740	Omit - body attachment	Repeal
30.390	85 A.	Repeal
46.082	78 C.(1)	Repeal
46.100	75 C.(5), 77 E.(3), 82 C.(5)	Also retain as statute
46.274	80 B.(2)(b)	Repeal
46.276	80 B.(2)(b)	Repeal
46.278	80 B.(1)	Repeal
93.645	81 C.	Repeal

KAUFMAN & STEWART
ATTORNEYS AT LAW

June 21, 1979

Professor Fred Merrill
University of Oregon
School of Law
Eugene, Oregon 97401

Dear Professor Merrill:

An interesting situation with regard to costs occurred in a case I tried last week and, after discussing its implications with Laird Kirkpatrick, he suggested I write to you so that you could take it into consideration in rewriting ORS Chapter 20.

What occurred is this: Plaintiff sought $1,200 in property damages from defendant as a result of an automobile accident. Defendant counterclaimed for $800. Defendant also sought attorney fees pursuant to ORS 20.080. The jury returned a verdict that each party was fifty percent negligent. Plaintiff was awarded judgment for $200, representing the difference between damages after reducing each party's prayer by fifty percent.

The issue is whether or not either party is entitled to costs, and the defendant to attorney fees pursuant to ORS 20.080.

McDonald v. Evans, 3 Or 474 (1869) would seem to say that neither party is entitled to costs. Johnson v. White, 249 Or 461 (1968) would seem to argue that, as a matter of policy, defendant should be entitled to attorney fees. The language of ORS 20.040 and 20.060, as presently written, does not help the defendant at all.

Laird suggested that, in light of the comparative negligence statute, the legislature needs to make a policy decision as to whether or not claimants and/or counter-claimants should be entitled to costs and/or attorney fees in situations such as this.

Very truly yours,

KAUFMAN & STEWART

Dean S. Kaufman

DSK:js

cc: Mr. Laird Kirkpatrick

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

June 29, 1979

Dean S. Kaufman
KAUFMAN & STEWART
1590 High Street
Eugene, OR 97401

Dear Dean:

Thank you for your letter of June 21, 1979. I am presently doing preliminary work in the area of assessments of costs. My initial reaction is that the problem you describe relates to the availability of costs as opposed to the procedure for assessing costs and may be beyond the rule making power of the Council. I have not progressed far enough in my research to be certain how much ORS Chapter 20 falls into rules of "pleading, practice, and procedure" which is the definition of rule making power of the Council in ORS 1.735.

I will contact you when I have a better idea.

Very truly yours,

Fredric R. Merrill
Executive Director, Council on
Court Procedures

FRM:gh

cc: Laird Kirkpatrick

SUPREME COURT

from the chambers of . . . .

JUSTICE HANS A. LINDE

1.7.19

Fred —

another worthy project for the Council — ORS ch. 20. Attorney fee disputes occupy a surprising amount of our time, and the procedure for setting them could be made clearer. Also, talk with me about conditioning postponements on the mover's agreement to pay fees. I am queasy about this & consider the client's ability to do so.

Merrill

Dear Fred — read this and see why we need a special subcommittee study by the Council! (Pg 4-9, 19-23, and note 7.) Best — Hans

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

Strawberry Hill 4 Wheelers, a non-profit corporation, and Pacific Northwest 4-Wheel-Drive Association, a non-profit corporation,

Petitioners,

v.

The Board of Commissioners for the County of Benton, State of Oregon: Dale Schrock, Barbara Ross and Larry Callahan,

Respondents.

* * * * *

TC 33160
CA 11086
SC 26015

On Review from the Court of Appeals.*

Argued and submitted July 2, 1979.

Lynn H. Heusinkveld, Coos Bay, argued the cause and filed briefs for petitioners.

Todd G. Brown, of McClain and Brown, Corvallis, argued the cause and filed a brief for respondents.

LINDE, J.

Reversed and remanded.

*Appeal from Circuit Court, Benton County. Richard Mengler, Judge. 37 Or App 575, 588 P2d 65 (1978).

LINDE, J.

Plaintiffs' effort to challenge the vacation of a county road by means of a writ of review, ORS 34.010 - 34.100, once again brings to this court the recurring problem of the use of the writ for judicial review of the actions of local governments.

Defendants, the Board of Commissioners of Benton County, conducted statutory procedures under ORS 368.565 - 368.582 on a resolution proposing to vacate a portion of County Road No. 26460, known as Old Peak Road. Spokesmen for the complaining associations appeared at the hearing and presented testimony in opposition to the proposal. After the board nevertheless decided to vacate the stretch of road in question, plaintiffs filed a petition for a writ of review attacking the legality of the board's order in substance and procedure. The circuit court granted defendants' motion to quash the writ on the ground that road vacation procedures are legislative and not judicial or "quasi-judicial" and therefore are not reviewable by writ of review under ORS 34.040.[1]

The circuit court's order was affirmed by a divided Court of Appeals, sitting in banc. Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm., 37 Or App 575, 588 P2d 65 (1978). The majority, in an opinion by Judge Johnson, found that the county's action in vacating the road had the characteristics of legislative rather than adjudicative action. Judge Thornton's dissent for three members of the court maintained that the majority's decision

departed from the established statutory scheme for the review of county decisions in road matters. Having allowed review to examine these competing positions, we conclude that notwithstanding the legislative elements in the county's decision to vacate the road, the writ of review should not have been quashed.

The sources of the problem and of our conclusion take us back to the earliest years of the state's history.

The writ of review and "county business."

The functions of county government and of the writ of review have been intertwined from the beginning. County "courts" were known in England as early as the 11th century and in the colonies during the 18th century.[2] Historically, the use of the term "court" implied no distinction of adjudicative from lawmaking or executive functions, as is evident from its use to describe both the court surrounding a monarch and also a legislature like the "General Court" of Massachusetts.[3] When county government was established in the Oregon territory in 1854, the statute assigned the management of county business but no judicial powers to three county commissioners. Statutes of Oregon, An Act Relating to County Commissioners, Jan. 24, 1854. The state constitution, prepared in 1857 and effective in 1859, authorized county courts as part of the state's judicial system, to be conducted by an elected county

judge. Or Const art VII (orig) §§ 1, 11-14. Section 12 authorized the Legislative Assembly to provide for the election of two county commissioners "to sit with the County Judge whilst transacting County business." The General Laws of 1859 provided for the election of a county judge who would exercise the powers of the county court. The statute was almost entirely concerned with proceedings within the court's judicial jurisdiction, except for one section that provided that the county court "shall have the cognizance of all county business, and perform the same duties that the board of county commissioners of the several counties were required heretofore to perform," governed by the laws previously governing the county commissioners. Review from the county judge's decisions was by appeal to the circuit court. General Laws 1859, An Act to Organize County Courts, §§ 11, 12, 17. June 4, 1859.

The state's original Code of Civil Procedure, enacted in 1862, set forth the provisions for judicial proceedings, including the several writs, and also the powers of the county courts. General Laws 1862, §§ 572-639, 867-878. Our continuing difficulties with the method of review of county action date from these initial acts, which continue essentially unchanged while modern ideas of the "jurisdiction" of local government and its lawmaking powers have undergone substantial reconsideration. See, e.g., Nyman v. City of Eugene, 286 Or 47, 57-58, 593 P2d 515 (1979).

The 1862 code listed the powers of the county courts under two heads. The county court had jurisdiction of actions at law involving claims up to $500 and exclusive jurisdiction in actions for forcible entry and detainer and in probate matters. General Laws 1862, §§ 868, 869.[4] With the participation of the two nonjudicial commissioners, the county court had the "authority and powers pertaining to county commissioners, to transact county business." (Emphasis added.) County business was specified to include construction of county buildings, to provide offices and supplies for county officials, and to establish, vacate or alter county roads and bridges, to grant licenses, to levy county taxes, to look after paupers, to care for county property, and to settle contract claims against the county.[5] Gen Laws § 870. This list of "county business" still constitutes the first ten items of ORS 203.120. The law distinguished clearly between the county court's judicial jurisdiction and its conduct of county business. Section 876 prescribed that the court was to dispose first of its cases at law, second of its probate business (these by the county judge alone) and third of county business, with the participation of the commissioners.

The 1862 code was equally explicit on the mode of reviewing the actions of county courts. Section 875 provided that the code's provisions for appeals to the circuit court were to apply "to judgments and decrees of the county court in all cases, but

not to its decisions given or made in the transaction of county business. In the latter case, the decisions of the court shall only be reviewed upon the writ of review provided by this code." Again, ORS 203.200 still continues this provision: "The decisions of the county court made in the transaction of county business shall be reviewed only upon the Writ of Review provided by the civil procedure statutes." However, the code's writ of review was provided only to review "judicial functions" or acts exceeding the "jurisdiction" of an inferior "court, officer or tribunal." Section 575 of the 1862 act, much like ORS 34.040, supra note 1, read:

> "The writ shall be allowed in all cases, where there is no appeal or other plain, speedy and adequate remedy, and where the inferior court, officer or tribunal in the exercise of judicial functions, appears to have exercised such functions erroneously, or to have exceeded it or his jurisdiction, to the injury of some substantial right of the plaintiff, and not otherwise."

From the distance of more than a century, the 1862 code seems self-contradictory. It restricts the writ of review to the review of decisions in the exercise of "judicial functions" and "jurisdiction." It carefully divides the functions of county courts between a judicial jurisdiction, exercised by the county judge alone, and the transaction of county business by the three-member county commission, which is not an exercise of "jurisdiction." Then the writ of review is expressly made the exclusive means to

review the transaction of county business, while the judicial acts of the county court are made reviewable by appeal to the circuit court and consequently not by writ of review.

It is not surprising that this arrangement has occasionally confounded courts and counsel for a hundred years. While no resolution of the dilemma is wholly logical, it could be dealt with in one of two ways. Section 875, now ORS 203.200, could be read literally to place review of all transactions of county business under the writ of review, regardless whether they otherwise fit either the writ's "judicial function" criterion or the procedure of review on a record brought up from the county court. Judicial review of all county transactions would then be forced to fit this Procrustean bed of review upon whatever documentary record bearing on the transaction could be produced. The establishment or vacation of a county road is expressly made an item of county business, as stated above. Alternatively, the section could be read to apply the writ of review only to such "decisions" of a county court as might be described as "judicial functions" or the exercise of "jurisdiction," though occurring in the transaction of county business rather than in the judicial work of the county court.

Review of county road decisions.

This court early adopted the second approach, on the

characteristic premise that the statutes were intended only to codify the reach of the preceding writ of certiorari in similar matters. ORS 34.010 itself states that "[t]he writ heretofore known as the writ of certiorari is known in these statutes as the writ of review." Courts of the period also saw nothing strange in regarding the location of roads as the exercise of the county court's "jurisdiction," in part because it involved taking privately owned land and assessing benefits and damages to the landowners concerned. See, e.g., Elliott & Elliott, Roads and Streets 212, 218, 232 (1890). Thus in Thompson v. Multnomah County, 2 Or 34 (1861), decided the year before the code was enacted, the court followed English, Massachusetts, and New York precedents to hold that the proceedings of county commissioners to lay out or vacate public roads were "judicial proceedings" subject to examination by writ of certiorari, except for the assessment of damages, for which an appeal was available. 2 Or at 38-39. After the enactment of the statutory writ of review, the court in Burnett v. Douglas County, 4 Or 388 (1873), still following certiorari cases from eastern states, denied its use to review a county court's cancellation of a tax levy because it was a "general order" not affecting particular taxpayers, without noting that the estimate and determination of the rate of county taxes appeared on the statutory list of county transactions which were to be reviewed only by writ of review. But it reviewed the "jurisdiction" of a

county court to vacate an old road and open a new one upon a writ of review, Johns v. Marion County, 4 Or 46 (1870). Again, C. & G. Road Co. v. Douglas County, 5 Or 280 (1874) affirmed that the writ of review would lie to challenge the "jurisdiction" or the procedures of the county court in a proceeding to locate a road.

The struggle to fit review limited to "judicial functions" to the "transaction of county business" continued to cause trouble apart from road cases. In Mountain v. Multnomah County, 8 Or 470 (1880), the court saved a claim for payment pressed by means of a writ of review, over the county's objection that the claimant had a common law action, by holding that the county court "had no jurisdiction to disallow" plaintiff's claim; but when a sheriff chose an action at law to recover fees from a county over that county's objection that a writ of review was the only remedy, the court saved his claim in turn on the ground that no audit was needed and thus no "jurisdiction" was exercised. Crossen v. Wasco County, 10 Or 111 (1882). That opinion found a basis for the second of the alternative statutory constructions mentioned above in the word "decisions": "The 'decisions' given or made in the transaction of county business, referred to in section 875, which can only be reexamined by writ of review under the subdivisions of section 870, are judicial in their nature or character, and concern public affairs." 10 Or at 114. See also Pruden v. Grant County, 12 Or 308 (1885), Frankl v. Bailey, 31 Or 285 (1897). Oregon City

in 1898 was able to use the writ of review to make Clackamas County turn over the city's share of county road taxes, because the apportionment of the amount by the county court was a "judicial act," Oregon City v. Clackamas County, 32 Or 491, 52 P 310 (1898), following Oregon City v. Moore, 30 Or 215, 220, 46 P 1017 (1896), but the city failed in the same attempt in 1926 because the apportionment did not require the county court "to exercise any judicial function." Oregon City v. Clackamas County, 118 Or 546, 552-553, 247 P 772 (1926).

In road cases, the writ of review remained the proper procedure to test the "jurisdictional" prerequisites for a county court's decisions. Ames v. Union County, 17 Or 600 (1889); Roe v. Union County, 19 Or 315 (1890); Gaines v. Linn County, 21 Or 425 (1891); Latimer v. Tillamook County, 22 Or 291 (1892); Vedder v. Marion County, 22 Or 264 (1892). In that year, also, Leader v. Multnomah County, 23 Or 213, 31 P 481 (1892), held that an appeal to the circuit court was limited to the county court's assessment of damages; the underlying decision on locating the road could be reviewed only by writ of review.

In the second appeal in Vedder v. Marion County, 28 Or 77 (1895), however, the court stated that review under the writ did not extend to the county court's conclusions about the utility of a road, which the court characterized as a "legislative question." 28 Or at 84. Justice Moore's discussion of this point

in Vedder comes close to the contemporary view expressed in Judge Johnson's majority opinion of the Court of Appeals. We return to it below. But this did not prevent the continued use of the writ of review to challenge a county's procedures in matters of road locations. See, e.g., Jones v. Polk County, 36 Or 539, 60 P 204 (1900), also written by Justice Moore; Palmer Lumber Co. v. Wallowa County, 60 Or 342, 118 P 1013 (1911); Heuel v. Wallowa County, 76 Or 354, 149 P 77 (1915); Giesy v. Marion County, 91 Or 450, 178 P 598 (1919). The statutory command that the writ of review is the "only" mode of review seems at times to have been ignored, see Sime v. Spencer, 30 Or 340, 47 P 919 (1897) (injunction); Lauderback v. Multnomah County, 111 Or 681, 226 P 697 (1924) (injunction); but in Holmes v. Graham, 159 Or 466, 80 P2d 870 (1938), the court rejected a suit in equity to set aside a resolution vacating a road on the ground that the writ of review was the proper remedy. See also Re Petition of Reeder, 110 Or 484, 222 P 724 (1924) ("jurisdictional" defects in road proceedings not reviewable on appeal from assessment of damages.)

In summary, from the beginning of statehood the county courts, when transacting "county business" rather than adjudicating cases as part of the state's judicial system, were regarded more as administrative tribunals than as local legislatures. While all their "decisions . . . in the transaction of county business" were made reviewable "only upon the writ of review," see ORS 203.200,

the court understood "decisions" to mean what would today be called administrative adjudications, but not "ministerial" actions or the kind of discretionary choices of policy that could be described as "legislative." This view of the use and limits of the writ of review was applied in judicial review of county road controversies for at least 75 years. The statutory framework remains essentially unchanged. Thus we agree with the dissenters in the Court of Appeals that the writ of review remains the proper means of testing compliance with the procedures required for county decisions to locate, relocate, or vacate a county road. The problem, identified in the second Vedder case, supra, concerns not so much the availability of the writ of review as its scope: Whether or how far a court may reexamine those components of a county's decision in a road matter that represent policy choices and might therefore be described as "legislative" in character.

Policy choices in local administration of state laws.

When a governmental action is characterized as "legislative" or "adjudicative," there is the risk that the characterization will be carried beyond the specific issue being decided. The distinction between rulemaking and adjudication is not always easy even when applied to an executive agency administering only delegated authority. It becomes doubly difficult

when applied to action by elected local boards, not organized on the principle of separation of powers, which administer state laws but are also the politically accountable policymakers of local government. See, e.g., Fifth Avenue Corp. v. Washington County, 282 Or 591, 598-605, 615-621, 581 P2d 50 (1978), Anderson v. Peden, 284 Or 313, 325, 587 P2d 59 (1978).

Generally, to characterize a process as an adjudication presupposes that the process is bound to result in a decision and that the decision is bound to apply preexisting criteria to concrete facts. The latter test alone proves too much; there are many laws that authorize the pursuit of one or more objectives stated in general terms without turning the choice of action into an adjudication. Thus a further consideration has been whether the action, even when the governing criteria leave much room for policy discretion, is directed at a closely circumscribed factual situation or a relatively small number of persons. The coincidence both of this factor and of preexisting criteria of judgment has led the court to conclude that some land use laws and similar laws imply quasijudicial procedures for certain local government decisions, as in Fasano v. Washington County Comm., 264 Or 574, 507 P2d 23 (1973) and Peterson v. Klamath Falls, 279 Or 249, 566 P2d 1193 (1977), thereby bringing them also within review by writ of review. Cf. Brooks v. Dierker, 275 Or 619, 552 P2d 533 (1976).

Such determinations imply no constitutional or other

generalizations about such decisions being either legislative or adjudicative for all purposes. See, e.g., Western Amusement v. Springfield, 274 Or 37, 42, 545 P2d 592 (1976). The separate reasons for implying procedural safeguards modeled on adjudications must be kept in sight. One reason is to help assure that the decision is correct as to facts, another is to help assure fair attention to individuals particularly affected. When the preexisting criteria governing a factual situation are quite exact and designed to leave little room for unguided policy choice, and the decision depends on disputed facts, inferences, or predictions, quasijudicial procedures can allow those most concerned to participate in establishing the pertinent factual premises even when the decision concerns many people in a wide area. On the other hand, when the criteria applied in a decision of small compass allow wide discretionary choice, a formal hearing procedure is not designed to "judicialize" factfinding, which may not be at issue. Rather it is designed to provide the safeguards of fair and open procedures for the relatively few individuals adversely affected, in lieu of the political safeguards on which our system relies in large scale policy choices affecting many persons.

Of course, nothing prevents a law or a charter from imposing detailed procedural safeguards such as notice, prior inquiries and reports, and public hearings on a process of legislative policymaking. This may often seem appropriate when

important individual or community interests are at stake, as shown by common provisions governing the adoption of ordinances, budgets, and the like. See, e.g., Fifth Avenue Corp. v. Washington County, supra. So it was provided in the statutes governing the location, alteration, and vacation of county roads. See ORS 368.405 - 368.620. The fact that a policymaking process is circumscribed by such procedural requirements does not alone turn it into an adjudication. We have referred above to the general characteristics of adjudications that the process, once begun, calls for reaching a decision and that the decision is confined by preexisting criteria rather than a wide discretionary choice of action or inaction. The question for present purposes is how far ORS 368.405 - 368.620 made the defendants' decision to vacate a stretch of Old Peak Road a "judicial or quasijudicial function" within the meaning of ORS 34.040.

Road vacation procedure.

The statutes provide that proceedings to vacate a road may be begun upon a petition or upon the county court's own motion, ORS 368.565; that the county court may reject the petition or order the county surveyor or roadmaster to make a report, which shall include his "opinion" on the benefits of the road and the advisability of the proposed action, ORS 368.570; and that if such

a report is ordered, the county "governing body" (apparently used synonymously with "county court" in adjoining sections) shall conduct a public hearing thereon after giving both public notice and notice by certified mail to specially interested landowners. ORS 368.575. So far the prescribed procedures do not necessarily show the process to be a "judicial function." The key to its character lies in ORS 368.580. That section provides:

> "(1) On the day set for hearing the report mentioned in ORS 368.570, the county court shall consider the report, together with the petition or resolution and any objection that is made to reducing the road in width or vacating the road.
>
> "(2) If the road may be useful as a part of the general road system not reduced in width, the petition for reduction in width shall be denied, but if the public will be benefited by the reduction in width of the road then the county court may order the reduction in width of the road or any part thereof.
>
> "(3) If the road may be useful as a part of the general road system it shall not be vacated, but if the public will be benefited by the vacation then the county court may vacate the road or any portion thereof.
>
> "(4) If the county court finds that the road or any portion thereof is burdensome to maintain, is not needed as a part of the county road system but should continue to be a public road, and the public will be benefited thereby, and if no person residing on said road and depending thereon for access appears in protest, the county court may by order declare the said road or portion thereof to be a road of public easement and no longer a county road.
>
> "(5) If the county court determines to reduce the width of the road or any part thereof, or to vacate the road or any part thereof, it shall declare the road to be reduced in width or vacated as the case may be and file the order with the county clerk. Thereafter the road shall be reduced in width or vacated as the case may be."

Does this statute require the county court to reach a decision after the hearing, as in an adjudication, or may it indefinitely postpone or abandon the issue like a legislative proposal? And is the decision confined by preexisting standards to be applied to the facts, or is it largely a discretionary choice?

The statutory scheme appears to be a hybrid. Evidently the county court is not compelled to go forward with proceedings upon every petition; it may reject the petition. ORS 368.570. Although the question is not now at issue, it appears as if the county court may at any time withdraw a proposal made on its own motion but perhaps must decide for or against a proposal initiated by petition once the report and hearing are completed. After the hearing, if certain stated criteria are satisfied the court "may" order the road reduced in width or vacated, but if the road may be generally useful it "shall" not be vacated or reduced. ORS 368.580. Although affirmative action is optional, the statute appears to contemplate that the county court will eventually reach and pronounce some decision whether to act or not.

As stated above, we conclude that although the county court's action may eventually turn on a discretionary choice, the statutory design sufficiently channels discretion by factfinding procedures and broadly stated criteria to qualify as a "judicial" or, since 1973, a "quasi-judicial" function for purposes of the

writ of review under ORS 34.040. That was the original understanding, as the long line of earlier decisions shows. Compliance with the statutory procedures is subject to judicial examination under ORS 34.040(2). However, as held in the second Vedder decision, this examination does not extend to that element of the county court's decision which is an exercise of discretionary policy judgment. That case involved the issue of discretion whether to establish a road after a favorable report of the viewers as well as to vacate one. The court stated:

> "The legislature has delegated to the county court the authority to establish, alter, and vacate county roads, and as the legislature may determine when the necessity for a public road exists, so the same authority may be exercised by the county court; and if there were no statute vesting it with this discretion, the court, by implication, could exercise such discretion, unless prohibited by statute. Whether a proposed road will subserve the public need or convenience is a question for the legislature, and not for the judiciary: Sherman v. Buick, 32 Cal. 241 (91 Am. Dec. 577); Commonwealth v. Roxbury, 8 Mass. 457; and hence the county court, in determining its utility, acts in a legislative capacity. The authority is not only given by implication, but the statute, section 4065, in positive terms grants this power to the county court, and authorizes it to exercise a discretion in the matter; and hence the conclusion reached by the county court upon these legislative questions is not subject to review: State v. Bergen, 24 N.J.L. 548. . . ."

28 Or at 83-84.[6] The court affirmed the circuit court's dismissal of the writ of review.[7]

Thus, if the present plaintiffs' petition had been limited to allegations that defendants' decision was wrong on the merits because the road "may be useful as part of the general road system"

or because "the public [would not] be benefited by the vacation," ORS 368.580, the petition should have been dismissed. Dismissal would be proper, not because the writ was the wrong choice of remedy, but because these are value judgments entrusted to the county court, at least unless it is alleged that the county court has made or adopted findings that are inconsistent with its conclusion. However, plaintiffs' petition also alleged that "the Board of Commissioners erroneously proceeded in exercise of its road vacation function without jurisdiction." While this allegation does not specify what procedural failure, if any, undermined the regularity of the proceedings, this lack of specificity was not the stated ground of the motion to quash nor of the circuit court's dismissal of the writ. Since we have held that, contrary to the circuit court's assumption, the writ of review is still a proper means of challenging road vacation proceedings, the decision below will have to be reversed and the case returned to that court.

Petitioners' right to the writ.

Defendants also questioned petitioners' "standing" to pursue a remedy by writ of review.[8] This issue, like the foregoing, has long been complicated by the extension of the writ to local government actions that combine some adjudicatory elements with

policy-making for a large number of affected persons. See, e.g., Duddles v. City Council of West Linn, 21 Or App 310, 535 P2d 583 (1975).

ORS 34.020 provides that "[a]ny party to any process or proceeding before or by any inferior court, officer, or tribunal may have the decision or determination thereof reviewed for errors, as provided in ORS 34.010 to 34.100, and not otherwise." Who is a "party" to a "process or proceeding" may be apparent when the "inferior court, officer, or tribunal" performs a conventional adjudication to determine the rights or privileges of one or more named parties, but it is not so apparent when a local government performs a "judicial or quasijudicial function" in transacting such business as, for instance, the location or vacation of a county road. Neither chapter 34 itself nor the statutes governing the "county business" here in question, ORS 203.110 - 203.120, 203.170 - 203.200, ORS 368.565 - 368.582, define who is a "party" to the transaction of such county business.

ORS 368.575 provides that notice of hearing the report on a proposal to vacate a road shall be mailed to property owners adjoining the road, and this requirement no doubt makes them statutory "parties" for purposes of the writ of review. So, we assume, are the petitioners when a proposal began by a petition under ORS 368.565. But those are not necessarily the only "parties." The decision to vacate a road is not a private dispute

between petitioning freeholders and abutting landowners. Many other users or nonusers will often be just as interested in the beneficial or harmful consequences of a road decision; indeed, an adjoining landowner's particular interest merely reflects his actual or potential use and the resulting value of his land, or perhaps his exposure to the adverse impact of an unwanted road. Thus the statute also requires public notice at the county seat and in the vicinity of the road in question, and it directs the county court to consider the report "together with the petition or resolution and any objection that is made to . . . vacating the road." ORS 368.575(1)(b), 368.580(1). Together, these provisions contemplate that objections may be received before or at the hearing by some persons who were entitled to public notice rather than notice by mail.

If no one other than petitioning freeholders and adjoining landowners could become "parties" for purposes of ORS 34.040, the remainder of the affected community arguably might have no means to obtain review at all, as long as ORS 203.200 makes the writ the "only" mode of review. But we think that other interested persons can become "parties" to the proceeding before the county court. Since none of the statutes deals with such matters as "intervention" in proceedings for the transaction of county business, such procedural rulings are necessarily left to the county court in the first instance, subject to review of a claim that recognition as

a party was unlawfully denied.

True, local policymakers are likely to be more concerned with giving those who appear at hearings a chance to speak than about distinguishing witnesses from "parties" with an eye toward possible judicial review. That distinction is more familiar to judicial tribunals than to local governments when instructed to act "quasijudicially." However, mere participation as a witness at the hearing alone does not entitle one to relief by writ of review. ORS 34.040 states that the writ shall be allowed when the inferior tribunal appears to have committed one of four specified kinds of error "to the injury of some substantial right of the plaintiff, and not otherwise."[9] As a result, a plaintiff seeking relief against a "transaction of county business" must show (1) that he suffered an identifiable injury to an interest of some substance, and (2) either that he participated in some form in the proceeding before the county court or that he was entitled to participate but failed to do so for lack of proper notice or other reasons beyond his control. This court early held that the facts asserted to qualify the petitioner as a party must be alleged in the petition. Raper v. Dunn, 53 Or 203, 99 P 889 (1909), Castel v. Klamath County, 56 Or 188, 108 P 129 (1910). These decisions also assumed that these facts bearing on a petitioner's right to relief by the writ would appear in the record of the inferior tribunal. But under modern conditions that may often not be true

in some of the governmental proceedings to which review under chapter 34 has been extended. Thus the Court of Appeals has held that a circuit court may have to take evidence to decide the issue, and the propriety of such a procedure has not been argued in this case. See Duddles v. City Council of West Linn, supra at 328-331. Cf. also Clark v. Dagg, 38 Or App 71, 588 P2d 1298 (1979); Johns v. Marion County, 4 Or 46, 49 (1870).

In this case, plaintiffs' petition alleged that the Strawberry Hill 4 Wheelers had communicated their interest in continued use of the Old Peak Road to the defendant county commissioners in a number of ways, including an offer to contract for the maintenance of the road. Plaintiffs also attached to the petition a copy of the minutes of the county board's meeting at which members of the organization testified to their past and intended use of the road in question. This sufficed as an allegation of plaintiffs' interest. Defendants moved to quash the writ on the ground that the circuit court lacked jurisdiction to review road vacation proceedings by writ of review because such proceedings are solely legislative in nature, and the circuit court quashed the writ on that ground. That reason was erroneous, in view of the history of the writ reviewed above. The circuit court did not address the question whether plaintiffs have shown an injury to an interest sufficient to satisfy ORS 34.040 and heard no evidence or argument on that issue.

For the foregoing reasons, the court's judgment following the order quashing the writ must be reversed and the case remanded to determine, first, whether plaintiffs in fact had an interest in the maintenance of the disputed road sufficient to entitle them to relief under ORS 34.040 if defendants' decision to vacate the road was legally vulnerable, and if the answer is affirmative, then to determine whether the decision was vulnerable on any of the grounds stated in ORS 34.040 short of substituting its view for that of the commissioners on the policy judgment of the public need, convenience, or utility of the road.

Reversed and remanded.

[1] ORS 34.040:

"The writ shall be allowed in all cases where the inferior court, officer, or tribunal other than an agency as defined in subsection (1) of ORS 183.310 in the exercise of judicial or quasi-judicial functions appears to have:

"(1) Exceeded its or his jurisdiction;

"(2) Failed to follow the procedure applicable to the matter before it or him;

"(3) Made a finding or order not supported by reliable, probative and substantial evidence; or

"(4) Improperly construed the applicable law;

to the injury of some substantial right of the plaintiff, and not otherwise. The fact that the right of appeal exists is no bar to the issuance of the writ."

[2] For a description of the English county courts, see 1 W. Holdsworth, A History of English Law 64-75 (1922); H. Potter, An Historical Introduction to English Law and its Institutions 72-77 (1932). County courts sat in the American Colonies during the 18th century, see R. Pound, Organization of Courts 83-89 (1940), and in the states during the 19th century, see J. Works, Courts and Their Jurisdiction 360-365 (1894), to the present.

[3] Mass Const, Pt 2, ch 1, § 1 (1780). Indeed, the word "court" is sometimes used to describe an assembly of the entire membership of a community, such as a religious congregation, see Jones v. Wolf, ___ US ___, 99 S Ct ___, 61 L Ed 2d 775 (1979).

[4] General Laws, 1862:

"§ 868. The county court has jurisdiction, but not exclusive, of actions at law and all proceedings therein, and connected therewith, where the claim or subject of the controversy does not exceed the value of five hundred dollars, and exclusive jurisdiction of actions for forcible entry and detainer, without reference to the value of the property.

"§ 869. The county court has the exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is:

"1. To take proof of wills;

"2. To grant and revoke letters testamentary, of administration, and of guardianship;

"3. To direct and control the conduct, and settle the accounts of executors, administrators and guardians;

"4. To direct the payment of debts and legacies, and the distribution of the estates of intestates;

"5. To order the sale and disposal of the real and personal property of deceased persons;

"6. To order the renting, sale or other disposal of the real and personal property of minors;

"7. To take the care and custody of the person and estate of a lunatic or habitual drunkard, and to appoint and remove guardians therefor, to direct and control the conduct of such guardians, and to settle their accounts;

"8. To direct the admeasurement of dower."

[5] General Laws, 1862:

"§ 870. The county court has the authority and powers pertaining to county commissioners, to transact county

business; that is:

"1. To provide for the erection and repairing of court-houses, jails, and other necessary public buildings for the use of the county;

"2. To provide offices and furniture, books, stationery, fuel and light therefor, for the sheriff, county clerk and treasurer, or other county officers;

"3. To establish, vacate or alter county roads or highways within the county, or any other necessary act relating thereto, in the manner provided by law;

"4. To provide for the erection and repairing within the county, of public bridges upon any road or highway, established by public authority;

"5. To license ferries, and fix the rates of ferriage;

"6. To grant grocery and all other licenses authorized by law; where the authority to do so, is not expressly given to some other tribunal;

"7. To estimate and determine the amount of revenue to be raised for county purposes, and to levy the rate necessary therefor, together with the rate required by law for any other purpose, and cause the same to be placed in the hands of the proper officer for collection;

"8. To provide for the maintenance and employment of the county or transient paupers, in the manner provided by law;

"9. To have the general care and management of the county property, funds and business, where the law does not otherwise expressly provide;

"10. To compound for or release in whole or in part any debt or damages arising out of contract due the county, and for the sole use thereof, upon such terms as may be just and equitable."

Footnotes, p. 3

[6] Preceding the quoted sentences, the court quoted from Commissioners v. Bowie, 34 Ala 464 (1859):

> "'Upon the question of the expediency of opening or altering a public road, that court exercises a quasi legislative authority, and its decision is not revisable. In the exercise of that authority, it does not act alone upon evidence produced according to legal rules, but is guided, to some extent, by its knowledge of the geography of the country, the wants and wishes of the people, and the ability of the neighborhood to keep the road in repair.'"

28 Or at 83. This court similarly described a city's authority in road vacations as legislative, in Portland Baseball Club v. Portland, 142 Or 13, 18 P2d 811 (1933). Since ORS 203.200 does not apply to cities, the choice between the remedy of injunction and of a writ of review was not the issue.

[7] The opinion implies that the dismissal was proper because the county court's action was within its discretion and not unlawful, rather than that it should properly have been challenged by some proceeding other than a writ of review.

Much procedural confusion can be attributed to the fact that the legal characterization of the governmental action involved, for instance as "legislative," "ministerial," "discretionary," or "judicial or quasi-judicial," decides not only the merits of the challenge but at the same time the propriety of the petitioner's choice of a remedy and procedure. The statutes and past decisions discussed in this case illustrate the pitfalls of proceeding by such characterizations. Here, for instance, the Court of Appeals defined the issue on which it divided to be not whether defendants were free to make the choice they did but whether the choice could be challenged by writ of review; yet the majority decided the latter issue by deciding the former. The same characteristically happens with respect to the remedy of mandamus.

The system of separate writs to review separate kinds of governmental action was criticized more than 20 years ago in these terms:

"An imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between remedies would be complex and shifting, the principal concepts confusing the boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generalities, and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system.

"The system of extrardinary remedies is brimming over with these qualities. . . .

. . . .

"The fountainhead of evils in state systems for review of administrative action is the plurality of remedies. The needless plurality is complicated to an unbelievable extent by uncertainties about each of the extraordinary remedies. The cure for plurality is a single remedy. The cure for the extraordinary remedies is complete abolition, both in form and in substance. All reviewable administrative action should be reviewable by petition for review, whether the action is judicial, legislative, executive, or something else, . . .

" . . . The manner of review and the relief afforded may depend upon the nature of the administrative action, but the form of proceeding should not.

"Legislation should provide for a single form of proceeding for review of administrative action in the courts of each state. . . ."

K. C. Davis, Administrative Law Treatise, §§ 24,01, 24.07 (1958). However, this court can do little to simplify the system unless and until statutes such as ORS 203.200 and others governing review of local governmental actions are absorbed, by rules of the Council on Court Procedures or by legislation, into a single, comprehensive form of judicial review of all such governmental actions regardless of characterization and of the ultimate remedy. See also Gruber v. Lincoln Hospital District, 285 Or 3, note 2 at 8, 588 P2d 1281 (1979).

[8] References to "standing," without more, risk treating this term as a generic concept whose contours may be drawn indiscriminately from decisions interpreting diverse statutes or U S Const art III, § 2, or from the academic literature. But statutes often provide differentiated requirements for "standing" before an agency or to obtain different judicial remedies. See, e.g., Gruber v. Lincoln Hosp. Dist. 285 Or 3, 588 P2d 1281 (1979) (declaratory judgment); Marbet v. PGE 277 Or 447, 561 P2d 154 (1977) (administrative procedure act).

[9] The potential pitfalls of review by writ of review are multiplied by ORS 34.080, which directs service of the writ "by delivery to the opposite party in the suit or proceeding sought to be reviewed," thus requiring identification of one or more "opposite" parties. See A & X, Inc. v. Common Council of the City of Eugene, Dahl, 41 Or App 171 and cases cited at 174-175, 597 P2d 851 (1979).

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August 17, 1979

Council on Court Procedures
University of Oregon
School of Law
Eugene, OR 97403

RE: Rules for Civil Procedure.

Gentlemen:

In the advance sheets, Volume 79 No. 26, issued August 13, 1979, the rules for civil procedure are set forth, and questions regarding them directed to this address.

In commencing my review of these rules, I note under Rule 4, subparagraph K (1), reference made to "Plaintiff" in line 3. I respectfully submit that in view of the wording, in Chapter 107, which defines the "moving party" in a petition for dissolution as "Petitioner" that it would be appropriate to rephrase subparagraph K (1) to read " . . . when the Plaintiff or Petitioner is a resident . . ."

Very truly yours,

Thomas V. Bryant Jr.

THOMAS V. BRYANT, JR.

TVB/ch

BARRY L. ADAMSON
Associate

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967 Boise Cascade Building
Portland, Oregon 97201
Telephone (503) 221-0575

August 28, 1979

Council on Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403

To Whom It May Concern:

Regarding the new Rules of Civil Procedure to go into effect on January 1, 1980, and in particular Rule 7 F(1), providing for the return of summons, and the relationship of that to Rule 4, regarding the commencement of an action by the filing of a complaint. My confusion is whether or not these two rules do away with the current ORS 12.020(2), providing that a summons must be served within 60 days after the filing of the complaint in order to have the commencement relate back to the filing of the complaint. Or, in the alternative, do the two rules merely supplement ORS 12.020(2)?

Very truly yours,

Barry L. Adamson

BLA jml

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

September 5, 1979

Barry L. Adamson
Attorney at Law
967 Boise Cascade Building
Portland, OR 97201

Dear Mr. Adamson:

The new Rules of Procedure have no effect on ORS 12.020(2). That statute was not repealed and would continue to govern commencement of actions for limitations purposes. ORCP 3 has always beeen part of the Oregon procedural rules as ORS 15.020 and means commencement of actions for other procedural purposes such as availability of discovery, etc. To make this clear, the Council added the first clause to the Rule.

Paragraphs 7 D.(2)(b), (c), and (d), and D.(6)(g) all refer to completion of various types of service. This again is not completion for limitations purposes but only to establish default time and other procedural periods covered by the ORCP. The language, "For the purpose of computing any period of time prescribed or allowed by these rules," is used in all cases.

If you have any further questions, please contact me.

Very truly yours,

Fredric R. Merrill
Executive Director, Council on
Court Procedures

FRM:gh

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September 11, 1979

Fredric R. Merrill, Executive Director
Council on Court Procedures
School of Law
University of Oregon
Eugene, Oregon 97403

Dear Fred:

I appreciate your letter of August 13, 1979, and the enclosed minutes and am grateful to be on the receiving end of the minutes of the council.

I would like to be present at the meetings for third-party practice and summary judgments.

I would also suggest that contact be made with the Presiding Judges concerning their views and suggestions on third-party practice and summary judgement, particularly Judge Olsen, past Presiding Judge in Multnomah County, Judge Roth and, currently Judge Crookham.

Very truly yours,

GREEN & GRISWOLD

Burl L. Green

e

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Telephone (503) 244-1181

Lewis and Clark College
Northwestern School of Law

October 10, 1979

Professor Frederic Merrill
University of Oregon School of Law
Eugene, Oregon 97403

Dear Fred:

After looking in vain in the new Oregon Rules for a provision on (1) discovery with respect to expert witnesses, and (2) pre-trial conferences I have decided to "go to the source" for help. Also, can you tell me if you expect to draft an index for the Rules during the next year?

Best regards.

Sincerely yours,

Bill

William J. Knudsen, Jr.
Professor of Law

WJK/vm

P.S. Dick Nahstoll said some very nice things about you recently while having dinner with us.

B.

School of Law
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October 12, 1979

William J. Knudsen, Jr.
Professor of Law
Lewis and Clark College
Northwestern School of Law
10015 S.W. Terwilliger Boulevard
Portland, Oregon 97219

Dear Bill:

You looked in vain for expert witnesses, discovery, or pretrial conferences because they simply aren't in the rules. The explanation for the pretrial conference omission is simple. The Council did not wish to have a rule on pretrial conferences. I am going to make another try in this direction using the argument that the rule does not mandate pretrial conferences but simply authorizes them and would allow a court to use them if they wished. I understand Judge Beatty in Portland does use pretrial conferences.

The explanation for discovery of experts is a bit more complex. The original rule defining scope of discovery, Rule 36, had a detailed provision on discovery of expert witnesses and would have essentially allowed parties to take depositions of an oponent's expert witnesses. This was in the September 2nd tentative draft of the rules and drew so many screams from the Bar that the Council backed off, and on December 2, 1978, only promulgated a rule which would require discovery of the names of expert witnesses. This appeared in the rules as 36 B.(4). The legislature removed even this in HB 3131. Most of the complaints came from attorneys in malpractice and products liability cases who felt that a rule authorizing any kind of expert discovery would deter expert witnesses from testifying. The problem with this is that it is based on an assumption that there is no discovery from expert witnesses when, in fact, the two cases in Oregon do not say that. As I understand it, your ability to discover from experts depends on whose circuit court you are in. For example, in Coos Bay they have relatively free discovery but in Portland under the "Crookham Rule" apparently there is no discovery. At any rate, it seems unfortunate to have the lack of clarity that

we are experiencing in this area. I am not sure the Council will do anything in the face of the legislative rejection of the very limited approach made during the last biennium. I have some fairly detailed memos and information in this area relating to both the federal rule and the Oregon cases. If you are interested in this, let me know, and I can furnish them to you.

Finally, regarding the index, the Legislative Counsel is directed by statute to take charge of the printing and dissemination of the rules and thus that is entirely out of my hands. As I understand it, it will appear as a chapter in ORS, and I assume it will be indexed as part of the ORS index.

Very truly yours,

Fredric R. Merrill
Executive Director

FRM:gh