N O T I C E

January 29, 1980

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 Saturday, February 16, 1980, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland. At that time, the Council will decide which rules of Oregon pleading, practice, and procedure are to be considered by the Council during the 1979-81 biennium.

# # # #

A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, February 16, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

1. Approval of minutes of meeting held January 19, 1980
2. Expert witness Rule - Rule 36 B.(4)
3. Letter from Judge Musick re Rule 23
4. Revised Rules 67 - 73
5. Rule 42 (Account)
6. Subcommittee reports
7. Expense statements - mileage costs
8. NEW BUSINESS

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held February 16, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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

The meeting was called to order by Judge William M. Dale, Jr., Vice Chairman, at 9:30 a.m., in Judge Dale's Courtroom in the Multnomah County Courthouse, Portland, Oregon.

The following guests were in attendance:

Hon. Albert R. Musick
Bruce C. Hamlin
Robert Harris
Jerry LaBarre (representing OTLA)
William E. Rosell

The minutes of the meeting held January 19, 1980, as modified by the inclusion of Judge Wells in the absent category, were unanimously approved.

Garr M. King suggested that the draft of 36 B.(4), submitted to the Council as requested at the last meeting, be sent to the Oregon State Bar Procedure and Practice Committee, the Oregon Trial Lawyers Association, and the Oregon Association of Defense Counsel before further consideration by the Council. The Executive Director was asked to do this and to request that a response be given in 30 days.

The Council next discussed ORCP 23 B. and the comments of Judge Musick in relation to that rule. A letter from Circuit Judge Edward Allen on the same subject was distributed to the Council. Garr King moved, seconded by Wendell Gronso, to amend Rule 23 B. by removing "and shall do so freely" from the section. The motion passed, with Charles Paulson, Darst Atherly, Lyle Velure, and David Vandenberg opposing it.

The Council next considered revised Rules 67 - 73. Fred Merrill stated that copies of those rules, and also Rules 75 - 87, had been furnished to various State Bar committees and other groups. The only written response has been from Legal Aid. The State Procedure and Practice Committee has been given copies of the revised rules. It was suggested that any further action be deferred until they have an opportunity to respond. The Executive Director suggested that the revised rules include several matters where the Council had requested further information or drafting as follows:

68 C.(2) Asserting claim for attorney fees, costs, and disbursements. The language was designed to include all matters suggested by the Council at the last meeting. The Council discussed whether consideration of attorney fees arising from a contractual right would violate the constitutional right to jury trial. Austin Crowe moved, seconded by Garr King, that Rule 68 C.(2) be redrafted in order to protect the right to jury trial when the claim for fees is based upon a contractual right. The motion passed, with Lyle Velure opposing it.

71 B. The Executive Director pointed out that in the second draft of Rule 71, the word "fraud" had been eliminated from section B. Examination of Oregon cases has revealed that there is some question if fraud could provide a ground for motion to vacate judgment. The Executive Director suggested that, even if there was no desire to expand fraud beyond extrinsic fraud, extrinsic fraud should be raisable by motion as well as by independent equity suit. After discussion, a motion was made by Austin Crowe, seconded by Charles Paulson, to include "fraud" as a subsection under 71 B. The motion passed, with Wendell Gronso and Carl Burnham opposing it.

The Council discussed proposed Rule 42 (account). Wendell Gronso moved, seconded by Carl Burnham, to change Rule 42 so that 30 days would be allowed within which to furnish a copy of an account unless motion for extension of time was filed within 30 days and that if the account were not furnished, no evidence of the account could be submitted at trial. The motion failed, with Judge Wells and Wendell Gronso voting in favor of the motion.

David Vandenberg moved, seconded by Carl Burnham, to leave the matter of furnishing an account to notice of production and inspection and other discovery devices and that no request for account procedure be retained. The motion passed unanimously.

The Council received reports of subcommittees as follows:

For the subcommittee considering Rules 75 - 87, the Executive Director reported that they were examining the rules and soliciting comments.

For the discovery subcommittee, Garr King stated a letter had been received suggesting that additional requests for admission should be allowed in multiple count cases. The subcommittee will report back further on this matter at a later time.

Darst Atherly reported that the subcommittee assigned to study third party practice and summary judgments had not had an opportunity to meet.

Austin Crowe stated that the class actions subcommittee would be meeting in March. He said they were awaiting a memo from the Executive Director and comments by some attorneys who had indicated an interest.

Justice Lent stated that the writs of review subcommittee had decided to defer action until the Bar's Administrative Law Committee had completed its study of writs of review.

Judge Jackson said that his subcommittee had not had an opportunity to meet prior to the meeting.

A discussion followed about expense statements and mileage costs. It was decided that the Executive Director would check with the State Court Administrator's Office regarding the guidelines the Council should follow when submitting expense statements.

The next meeting of the Council is scheduled to be held Saturday, March 8, 1980, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

The meeting adjourned at 10:40 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

MEMO February 6, 1980

TO: Hon. Robert W. Redding
328 Multnomah County Courthouse
1021 SW 4th Avenue
Portland, Oregon 97204

Mr. Laird Kirkpatrick
U. S. Attorney's Office
204 Federal Building
211 E. 7th Avenue
Eugene, Oregon 97401

Mr. Frederick R. Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

FROM: John H. Buttler

The following are my preliminary comments relating to Rules 80 through 83 of the preliminary draft of the Oregon Rules of Civil Procedure prepared by Professor Lacy.

RULE 80

B(1)(a) -- I would suggest rewording the sentence to read: "When real property has been attached, the lien of a judgment subsequently obtained relates back to the time of the attachment lien; and "

B(1)(b) -- needs clarification. Presumably a judgment lien on after acquired real property would only attach with respect to a judgment docketed in the county in which the after acquired real property is located. As the rule now reads it would seem to give all judgment creditors a lien on any after acquired real property, regardless of what county the property is in, and give priority according to the time of docketing of the original judgments.

B(2)(b) -- relating to district court judgments, presumably

should have added to it the right to renew as in the case of circuit court judgments; or, if that is not intended, it should so state.

C -- apparently is intended to preclude enforcing a judgment lien on real property pending any appeal. This is a significant change from existing law, and is not entirely consistent with Rule B(4)(b) which provides for the extinguishment of a judgment lien on real property pending appeal if a supersedeas bond (corporate) is posted. Under subsection C a judgment creditor might be prejudiced by the occurrence of an uninsured casualty loss while the debtor takes an appeal, which may or may not be meritorious. If this radical a change is to be made, it would seem to me that it ought to apply to the enforcement of any judgment against any property pending appeal. If this were done, an insurer, for example, who wished to appeal a judgment in excess of its policy limits could do so without posting a supersedeas bond for the full amount of the judgment, and thereby gain the use of its money at a low interest rate without any risk of paying more than the policy limits. I doubt if this solution is an acceptable one.

The remaining portions of subsection C relate to what is characterized as a "foreclosure" of judgment liens. Under the provisions as proposed, as I understand them, the debtor's right of redemption is extinguished, although Professor Lacy's comments state that it has been shortened to six months. The fact is that the debtor has no right to redeem under the proposed rules; the debtor only has the right to hold off the forced sale or transfer of the property for six months. I think this change is a change in substantive law because the right of redemption is a

property right, and therefore the type of change proposed is beyond the authority of this Council.

Assuming that the Council has authority to eliminate the debtor's right of redemption, I am not sure that I would be in favor of it. I don't know whether there are any statistics indicating how frequently statutory redemption rights are exercised, but I suspect Professor Lacy is correct in stating that it is not very often. However, I know from my own practice that there are many instances when the rights are exercised; the rights may be sold, and during the inflationary period we have been undergoing, they may be sold at times to great advantage to the debtor. I suspect that the real problem with the existing system is that only the more sophisticated debtors know what their redemption rights are, and that the system would be improved by requiring notice to the debtor advising him that he has such rights, that they may be sold, and how they must be exercised and within what period of time.

It is true, as Professor Lacy points out, that the existence of statutory redemption rights may discourage bidding at an execution sale. However, the other side of the coin is that anyone bidding on property at an execution sale who really wants the property will try to bid close to what the bidder believes to be the fair market value. The purpose in bidding in that manner is to effectively eliminate the risk of redemption.

Because I would not eliminate statutory redemption rights, and because I assume that eliminating them is an essential ingredient to the procedure set up in the proposed rule, I am not particular inclined to spend much time attempting to work out what appear

to me to be problems in the system proposed. For example, subsection C(2)(b) requires the foreclosing creditor to include in his notice of foreclosure a list of all interest in the property in the order of priority. Apparently, this requirement puts the burden on the creditor to determine the order of priority, and while the rule says that the requirement may be satisfied by a copy of a title insurer's report, a preliminary foreclosure report does not insure anybody of anthing; under the present system it is intended only to advise the foreclosing party who must be joined as parties to the foreclosure proceeding, with the priorities to be determined in the proceeding. As I understand the proposed procedure, it would be necessary to add provisions for the determination of priorities, rather than to put the burden on the creditor to do so in his notice. This would have to be done early in the game because of the rights of various lien holders, depending on their respective priority.

Under subsection C(4)(b)(iii) there is a reference to the "appraised value of the property," but no provision for appraisal is included. Presumably, although I am not sure, the reference is to the tax assessor's appraised value, which is referred to in subsequent subsections. I question the fairness to the debtor of permitting the creditor to take the real property at the tax assessor's appraised value.

Subsection C(4)(b)(iv) -- The order directing the transferee to pay $12,000 to the debtor if a homestead exemption has been claimed in the property, should be modified to state that the exemption has been claimed and allowed. Further on in the same subparagraph, the provision of the transferee is "personally and primarily liable to pay any obligations secured by a lien on the property senior to that of the foreclosing creditor"

is also, I think, a change in existing law to the extent that it imposes personal liability on the transferee. It is one thing to take property subject to an existing lien, recognizing that the lien must be paid in accordance with its terms or the property may be foreclosed in order to pay the lien, and another thing to impose personal liability on the transferee. The latter would mean that the obligee could sue the transferee directly on the obligation, or could foreclose against the property, and to the extent that there is any deficiency hold the transferee liable.

Over all, the entire "foreclosure procedure" seems dubious to me. I would like to hear more about the specific problems which exist under present law, and address those problems rather than create a complicated, somewhat fuzzy, new mechanism which will undoubtedly result in more litigation, which we certainly do not need.

RULE 81

Basically, the proposed rule is a good effort at dealing with a complicated problem. Normally, I would want to do a little more study of the problem before making any final determination, but generally it seems to me that the rule makes sense. There may well be problems, such as a contract which prohibits the vendee from selling or assigning his interest without the consent of the vendor. There are times when such a provision is quite legitimate from the standpoint of the vendor, particularly with respect to contracts for the sale of a ranch or farm. It may also be a valid restriction with respect to a sale of other property where the vendor may be willing to sell to one person with a low down payment because the vendor knows that the

vendee will take good care of the property. I am not sure how such problems would be handled under the proposed rule.

RULE 82

Under subsection A, it is not clear to me whether negotiable instruments are excepted from the rule along with certificates of accounts, etc., of a savings and loan institution. This should be clarified.

Under subsection E(1) I think the language needs to be clarified to indicate that a writ of attachment issued in a lawsuit which ripens into a judgment for the creditor has priority as of the date the writ of attachment was issued, but if no judgment for the creditor results, there is no lien. This may well follow from other rules, but as now stated, I think it is confusing.

Under subsection F, particularly F(2), I am not sure that it is wise to leave it up to the sheriff's judgment as to the best manner of selling the property. It might be that if the property is to be sold other than at public auction as provided in F(1), the court ought to determine how it is to be sold after hearing.

Subsection F(4) seems to put a difficult burden on the creditor of determining, at his peril, who all of the senior and junior encumbrancers are. I will want to check existing law before commenting further; it may be all right.

Subsection F(5) -- The provision that if the sheriff "is prevented from attending" seems overly strong, I would suggest to state that if the sheriff is unable to attend.

RULE 83

Subsection A(1)(b), under the latter portion, should include service on a registered agent for the bank, if one

has been designated, to make the garnishment effective with respect to accounts in any branch of the bank. There may be reasons why service on an officer at the head office of a bank should not be effective with respect to any branch of the bank located anywhere in the state, but I would want to know what those reasons are before limiting the service provisions as they are now proposed. Offhand, I can't see any reason why service on the head office ought not to be effective with respect to any branch anywhere in the state, but this may require giving more than five days in which to respond.

Subsection A(2) requires that the notice "be prepared" by the creditor or his attorney. I see no reason why we should be concerned with who prepares the notice, so long as it is signed either by the creditor or his attorney.

Subsection A(2)(c) does not seem specific enough to advise the garnishee what he must state in his answer to the notice of garnishment. I believe that under existing law, the answer must state only what funds are presently held by the garnishee which belong to or are then owing to the debtor; the date the notice is served is the determinative date, I think. I think there is justification for making the garnishee say more than that, and perhaps this subsection does that, although I am not sure. For example, in subsection A(2)(e) reference is made to the amount that the creditor can prove was "owed when the notice was served."

Subsection A(4)(a) appears to provide that a creditor's lien only attaches at the time the notice of garnishment is served if the garnishee's answer states that the garnishee has certain property of the debtor in his possession; presumably even if the garnishee erroneously or falsely states that he has nothing of

debtor's in his possesion, the lien should, nevertheless, attach at the time the notice of garnishment is served once it is determined that there is property of the debtor in the garnishee's possession.

Subsection A(5)(a), last sentence, provides that if money owed by the garnishee is payable in installments, the order may be to pay all, or a part of, future installments to the clerk for a specified time. This provision sounds like the court has discretion to require the garnishee to pay only a part of future installments, but unless creditor's claim would be satisfied by only a part of the installment, or unless the money owed is subject to an exemption, it would seem that the creditor is entitled to all of the payments until the judgment is paid in full.

Subsection A(6), second line, should read: "* * * if such obligation has been established by final judgment, from which no appeal is pending, * * *"

Subsection C(6) permits the court to determine the value of the interest and set the amount to be credited on the creditor's judgment. It is at least conceivable that the creditor may decide that the amount so determined is wholly inadequate, and therefore should be entitled to reject a transfer of that interest to him in partial satisfaction of the judgment.

(This memo has been dictated but not read.)

MEMORANDUM

TO: ENFORCEMENT OF JUDGMENT AND PROVISIONAL REMEDIES SUBCOMMITTEE

FROM: Fred Merrill

RE: RULEMAKING POWER OF THE COUNCIL RELATING TO ENFORCEMENT OF JUDGMENTS AND PROVISIONAL REMEDIES

DATE: February 7, 1980

I was asked to examine the practice in other jurisdictions and literature and cases relating to whether proposed ORCP 75-87 would fall within the procedural rulemaking power of the Council. ORS 1.735 contains the following language:

> The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure.

This language is substantially similar to the federal grant, 28 USCA 2072, and to many state statutes where rulemaking is authorized by the legislature. The problem is to draw a line between rules of procedure, which are appropriate for court control, and rules of substance, which should be controlled by the legislature.

DEFINING SUBSTANCE AND PROCEDURE

Judicial opinions are not particularly helpful in defining substance and procedure in the context of judicial rulemaking. There are, of course, no cases in Oregon. I did not examine the cases in all jurisdictions, but there are no leading cases or federal cases dealing precisely with the material encompassed by proposed Rules 75-87. There seems to be no reasonable rationale in the opinions for classification of particular rules as substantive or procedural; "Rationale separation is well nigh impossible." Cohen

v. Beneficial Loan Corp., 337 U.S. 541, 559 (Rutledge dissent) (1949).

The commentators on the subject have never been particularly successful in definition. The most heroic attempt has been Joiner and Miller, Rules of Practice and Procedure: A Study of Judicial Rulemaking, 55 Mich. L. Rev. 623, 635 (1957). They suggest the test is whether a rule "is a device with which to promote the adequate, simple, prompt, and inexpensive administration of justice" or involves "a general declaration of public policy" that goes beyond procedure. See also Riedel, To What Extent May Courts Under Rulemaking Power Prescribe Rules of Evidence, 26 A.B.A.J. 601, 604 (1940). The problem, however, is that all procedural rules to some extent have policy implications beyond expeditious conduct of litigation. See Levin and Amsterdam, Legislative Control Over Judicial Rulemaking, 107 U. Pa. L. Rev. 1, 23-24 (19). Most procedural rules have some collateral effect on substantive law. Fehrenbach v. Fehrenbach, 421 Wis. 410, 413 (1969).

The Levin and Amsterdam approach is the most reasonable. They suggest that there are many areas where there is substantial agreement that the policy implications of a particular rule relating to the conduct of court business are so minimal that this is procedure, e.g., pleading. There is also general agreement in other areas that a rule is substantive, e.g., subject matter jurisdiction. There also, however, is a substantial gray area or twilight zone which could be either, depending upon the particular balance struck in a jurisdiction between legislative and judicial power. They finally suggest that where there is legislative review of rules promulgated by the judicial branch there is a reasonable mechanism for adjustment

of this balance through legislative acceptance of or objection to rules in particular areas. See also Curd, "Substance and Procedure in Rulemaking," 51 West Va. L. Qu. 34, 43 (1949); Note, "Rulemaking Powers of the Illinois Supreme Court," 1965 U. of Ill. L. F. 903, 904 (1965).

On this basis it is suggested the problem can only be answered on the basis of:

(1) Evidence that the areas covered by ORCP 75-87 are generally accepted as procedure or substance by other rulemaking bodies or commentators, and

(2) If some aspects fall in the gray area, by submission to the legislature.

FEDERAL RULES - OTHER STATES - COMMENTATORS

The federal rules do, in fact, cover the areas of judgments, enforcement of judgments, and provisional remedies:

(a) Judgments. FRCP 54-62 cover judgments (basically equivalent to proposed Rules 67-73).

(b) Provisional remedies. FRCP 64 covers provisional remedies. It provides that "all remedies for securing satisfaction of the judgment to be entered are available under the circumstances and in the manner provided by the law of the state in which the district court is held." The rule specifically mentions "arrest, attachment, garnishment, replevin, sequestration and other corresponding or equivalent remedies." In addition, FRCP 65 has specific procedures relating to preliminary injunctions, and FRCP covers receivers.

(c) Enforcement of judgment. FRCP 69 covers execution and provides that "process to enforce a judgment for the payment of money shall be

by execution. The procedure of execution, in proceedings supplementary to and in aid of execution, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held." The rule also provides for discovery in aid of the judgment on execution. FRCP 70 covers enforcement of equitable remedies in judgments and provides for contempt, attachment, and sequestration, and a judgment transferring title to real and personal property in lieu of a court order directing conveyance.

Although the rules do not contain detailed procedure in the areas covered, there seems a clear recognition that these are matters of procedure. There are no general federal statutes which provide for provisional remedies and enforcement of judgments. There are only a few special provisions relating to a few types of actions based on federal law. See Advisory Committee Notes to FRCP cited above. The FRCP basically incorporate state procedure in the same manner they incorporate state bases of personal jurisdiction and methods of process in FRCP 7. The point is that the power to enforce judgments and grant provisional remedies and the procedure to be followed is given by the FRCP, not by federal statute. The lack of detailed procedures is the result of deference to state procedures rather than any doubt about the scope of rulemaking power. The only problem with the scope of rulemaking power indicated by the Advisory Committee was lis pendens, which was deemed to be substantive. See Advisory Committee Note to FRCP 64.

The states roughly can be divided into the following categories in terms of location of rules relating to procedural remedies and enforcement of judgments:

1. NO GENERAL RULEMAKING POWER - RULES ARE STATUTORY: California, Georgia, Louisiana, Mississippi, and North Carolina. (Five)

2. STATES WITH COURT RULES WHICH HAVE COMPREHENSIVE PROVISIONS RELATING TO PROVISIONAL REMEDIES AND ENFORCING JUDGMENTS: Colorado and Pennsylvania. (Two)

3. STATES WHICH COVER PART OF AREA BY RULES AND PART BY STATUTE: remaining forty-two states.

States falling in the third category are difficult to classify. They include states which appear to have decided to leave this area mainly in statutory form, e.g., New York, and states where it is difficult to tell what the situation is, e.g., Kansas, where the legislature enacted a complete procedural code but gave the court power to modify any rules relating to pleading, practice and procedure. The majority of these states simply have adopted the federal rules and followed the format of FRCP 64-71.

The only two law review comments which I could find were as follows:

> The ultimate effect of a judgment as a means of collecting a debt may involve other policy considerations and may be proper matters for legislative action. The procedures by which such a judgment is enforced may involve the orderly dispatch of judicial business and at least in part should be subject to rulemaking power. 55 Mich. L. Rev. 651 (1957).

> Another instance is the following: The plaintiff recovers a judgment, which the statute makes a lien on the real estate of the defendant, but provides that, before enforcing such a right, the plaintiff must have an execution issued and returned nulla bona after which the plaintiff may then proceed in equity to enforce the lien against the real estate. After the judgment has been obtained, all the other steps are procedural; but it is not likely the supreme court would undertake to state a rule making unnecessary the use of an execution before proceeding to sell the real estate. Again there

> is a right or policy involved within the method of procedure. Or take the case of an attachment. Here the plaintiff has a substantive right at law to enforce his claim against the defendant. After that, it would seem that everything else involved is the method of procedure to enforce such a claim but, in doing so, there would seem to be involved some rights of a substantive nature. 51 W. Va. L. Qu. 46 (1948).

The distinctions drawn by these comments are not clear, but they do suggest that some aspects of the proposed rules fall in the twilight zone. The proposed rules do recognize that the nature of exemptions is substantive. 76 A. Most of the rules deal with forms of papers, procedure, hearings and due process elements in enforcement of provisional remedies and judgment. Based upon similarity to forms of papers, procedure, trials and due process elements in general and the fact that the FRCP and most of the states include this area (even though not prescribing details), these elements of the proposed rules seem to be reasonably within the rulemaking power of the Council.

The gray area seems to be: (a) those areas that describe the nature of property interests created by the procedures, such as the implicit definition of property rights in a land sale contract arising from Rule 81 or the elimination of the equity of redemption; and (b) those aspects of the rules that define priority and relationship of judgment liens to other competing property interests. These are not clearly covered by most other jurisdictions in judicial rules. These seem capable of being categorized as either substance or procedure. An equity of redemption can be viewed as a substantive property right or a procedural element related to judicial sales. Rule 81 can be viewed as defining the nature of interests under a

land sale contract or simply providing a procedure consistent with enforcing a judgment against those interests. Priority of liens can be viewed as defining ownership or prescribing conditions when a valid judgment sale is possible.

SUBMISSION TO LEGISLATURE

The question ultimately is one of legislative intent in adopting ORS 1.735. Following the Levin and Amsterdam approach, ORS 1.735 has a built-in mechanism to clarify rulemaking power in the gray areas, i.e., the requirement of legislative review before the rules become effective. If the legislature concurs that a rule promulgated by the Council is within the rulemaking power, the appropriate role of the two bodies is defined. The legislature, as the dominant body creating the Council and defining its power, has the ultimate veto if the Council goes too far. This is not to suggest that the Council purposely seek acceptance of rules that clearly involve substantive rights; only that this is the only reasonable way to resolve questions in an area that could be either substantive and procedural.

To clearly define the issue for the legislature, we should follow the approach used in the last legislative session relating to summons and personal jurisdiction. For ORCP 4 through 7, there was some doubt as to limits of rulemaking power. The submission to the legislature asked them to address the question. See Exhibit A. The legislature chose, not only to allow the ORCP 4-7 to go into effect, but specifically amended 1.735 to clarify its meaning.

Excerpt of submission to the Legislature

EXHIBIT A

I particularly call to your attention Rules 4, 5, and 6 of the submitted Oregon Rules of Civil Procedure. These rules deal with the subject of the exercise of jurisdiction over the person by courts. ORS 1.735 provides that the Council may promulgate rules "governing pleading, practice, and procedure in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant." In the course of preparing these rules, the Council carefully researched the question of whether the rule-making power granted by ORS 1.735 included power to make rules governing jurisdiction over the person. From interpretation of similar language in other jurisdictions, the Council decided that a grant of rule-making power in terms of pleading, practice, and procedure included power to make rules relating to jurisdiction over the person. Rules 4, 5, and 6 are, therefore, submitted to you as promulgated rules of the Council.

The Council recognizes that there has been no court interpretation of the language of ORS 1.735, and the question of scope of the rule-making power is ultimately one of legislative intent. If the legislature did not intend, by the language of ORS 1.735, to grant power to make rules relating to personal jurisdiction, this should be clarified by having the legislature take action to amend or repeal Rules 4, 5, and 6 or enact the substance of Rules 4, 5, and 6 as a statute.

MEMORANDUM

TO: PROVISIONAL REMEDIES AND ENFORCEMENT OF JUDGMENTS SUBCOMMITTEE

FROM: Fred Merrill

RE: RULEMAKING POWER

DATE: 2/8/80

Bob Lacy has suggested a possible guide to the extent of rulemaking power not mentioned in my previous memo. The U.S. Supreme Court has recently promulgated bankruptcy rules which apparently contain some provisions similar to those in question in Bob's rules. I am attaching a copy of the Enabling Act covering those rules and the Advisory Committee Note relating to scope of the bankruptcy rules. The Advisory Committee does not attempt to define substance or procedure but seems to evaluate the propriety of promulgating rules in terms of "relevance of competing considerations more appropriate for legislative assessment than resolution by the rulemaking process."

FRM:gh

Encl.

trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

(b) Cross Reference.

For provisions relating to return, see section 141.

(Internal Revenue Code, § 52, 53 Stat. 57, as amended, 26 U.S.C. § 52.)

g. Bankruptcy Rules

Title 28, U.S.C., Chap. 131, § 2075

§ 2075. Bankruptcy rules. The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act.

Such rules shall not abridge, enlarge, or modify any substantive right.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

COMMENT

Section 30 of the Bankruptcy Act was repealed by Public Law 88–623, which became effective on October 3, 1964.

Section 30 authorized the Supreme Court of the United States to prescribe all necessary rules, forms, and orders as to procedure in bankruptcy. Rules, forms, and orders promulgated under § 30 had to be consistent with the provisions of the Bankruptcy Act. In view of the fact that the Act itself describes in great detail the procedures to be followed in bankruptcy cases under § 30, it was necessary for Congress to act upon many bills which were concerned with no more than procedural changes.

In order to relieve Congress of this burden, Public Law 88–623 gives to the Supreme Court of the United States the same general

dispersion pending the qualification and assumption of responsibility by a receiver or trustee.

IMPACT OF THE RULES ON PROVISIONS OF THE BANKRUPTCY ACT

Rules promulgated pursuant to 28 U.S.C. § 2075 supersede laws, including provisions of the Bankruptcy Act, in conflict with such rules after they take effect. Like other rules of court authorized to be prescribed by the Supreme Court under the enabling provisions of Chapter 131 of the Judicial Code, however, they "shall not abridge, enlarge, or modify any substantive right." The Advisory Committee has sought to deal comprehensively in this Preliminary Draft with the subject of practice and procedure in straight bankruptcy cases, and the table of cross references in Appendix II indicates the considerable number of provisions of the Act that would be superseded or affected in some degree by the proposed rules. Because it has not been necessary heretofore in the drafting of bankruptcy legislation to distinguish between substantive and procedural provisions, they are interwoven throughout the Act. The appearance of a reference to a section of the Bankruptcy Act in a position of correspondence to a proposed Bankruptcy Rule in the tables of cross references does not therefore indicate that the statutory section would necessarily be superseded, though language therein would likely be affected. In numerous instances adoption of the rules may not modify the language of a statutory provision but its application may thereafter be affected in some degree. To indicate this kind of relationship and the appropriateness of reading the provision of existing law together with the proposed rule or form, the signal "*Cf.*" has been used in the tables. The revision of the Act necessary after promulgation of the Bankruptcy Rules and Official Forms in Bankruptcy is, of course, a responsibility not assigned the Judicial Conference, but it is one that should be undertaken as soon as feasible after the rules and forms go into effect, to mitigate the task of judges, counsel, and the public in reading and applying the Act with the rules and forms. The Advisory Committee's Notes and the cross-reference tables have been prepared with a view to providing assistance in understanding the relationship of the proposed rules and forms to existing law.

In addition to the substantive provisions of the Act, those defining the jurisdiction of the court and establishing its structure and personnel are outside the proper concern of the rule-making authority. See, *e.g.*, many of the clauses of § 2 and §§ 4, 23, 24, 33, 34, and 35. Jurisdictional terminology in the Act has, however, not been regarded as conclusive on the Committee. See, *e.g.*, Rule 116, which prescribes venue provisions that would supersede § 2a(1) of the Act notwithstanding the jurisdictional cast of the language of this provision. *Cf. Bass v. Hutchins,* 417 F.2d 692, 694 (5th Cir. 1969). In § 37 of the Act Congress has delegated important responsibilities to the Judicial Conference respecting the number and territories of referees, and by § 43 of the Act the Director of the Administrative Office and the judges are authorized to make assignments to fill vacancies. Except as provided in Rule 102, these matters have all appeared to the Advisory Committee as appropriate to leave for Congressional prescription.

Rules 219 and 220, as explained in the Note accompanying the former rule, would continue the tradition of close regulation of the compensation of officers, attorneys, and accountants in bankruptcy cases by court rules. The financing of the costs of bankruptcy administration, the prescription of ceilings on officers' compensation, and the designation of expenses properly allocable to bankrupt estates, would remain, as they should, the province of Congress. See §§ 5f, 47c (last sentence), 48, 52, 62a & b, 64a(1), and 72 (2d paragraph) of the Act. See also 28 U.S.C. § 1914. Congress has assigned an important role to the Judicial Conference by §§ 37b and 40c of the Act in connection with the fees and charges, but the function so assigned is to be differentiated from that of rule-making under enabling legislation. Except as provided in Rules 107 and 507, the duties of clerks prescribed by § 51 of the Act should be a matter for Congress and the Director of the Administrative Office of the United States Courts. *Cf.* 28 U.S.C. §§ 604, 751. The Director's duty to report to Congress imposed by § 53 should of course remain a matter of statutory regulation.

There are other matters arguably within the bounds of procedure but viewed by the Committee as properly left for Congress to regulate because of the relevance of competing

considerations more appropriate for legislative assessment than resolution by the rule-making process. *Cf.* Wright, *Procedural Reform: Its Limitations and Its Future,* 1 Ga.L.Rev. 563, 569–71 (1967). Thus the Committee would leave intact the provisions of § 59b and e of the Act respecting the number and qualifications of petitioning creditors in involuntary bankruptcy. For an account of Congressional concern with this subject matter, see Warren, *Bankruptcy in United States History* 114–17 (1935). *Cf. In re Gibraltor Amusements, Ltd.,* 291 F.2d 22, 26 (2d Cir. 1961), cert. denied, 368 U.S. 925 (1962). Deference to Congressional concern also underlies the Committee's decision to leave substantially undisturbed the provisions of § 11b and c governing the periods of limitations applicable to actions by trustees and receivers and the provisions of § 19a and c for jury trials in bankruptcy cases.

The provisions of § 9 of the Act and General Order 30 for protection and release of a bankrupt from imprisonment are carried into the rules only to the limited extent the bankruptcy judge is authorized to issue a writ of habeas corpus under Rule 913. As indicated in the Note accompanying this rule, this subject matter is a sensitive one that has been one of traditional concern for Congress. See 28 U.S.C. §§ 2254, 2255. Rule 913 recognizes authority in the bankruptcy judge to order a release only for a purpose incident to the administration of a bankrupt estate.

The presumption created by § 221 of the Act that property sold by the bankrupt was disposed of at a price not less than his cost was regarded by the Committee as having a doubtful justification. Its retention in the law would therefore be left to Congress and the courts.

A number of provisions of the Act deal with subjects that for one reason or another fall outside the scope of rules of procedure but include incidental language with a procedural effect. It has seemed unwise to overlap or suggest the fragmentation of every statutory provision having a procedural content. See, *e.g.*, § 5h, authorizing the proof of claims of partnership estates against individual estates and the marshalling of assets of partnership and individual estates; § 14d, authorizing examination by the United States attorney into

the acts and conduct of a bankrupt on request of the court; § 15, authorizing revocation of discharges.

A few provisions of a procedural nature in the Act seemed to the Committee to be unnecessary for inclusion in the rules. These include § 19b, prescribing alternatives when no jury is in attendance on the court; § 55c, authoriizng creditors to take steps at creditors' meetings to promote the interests of the estate and to enforce the Act; and § 57m, authorizing a receiver or trustee to file a claim of a bankrupt estate against another bankrupt estate. Omission of any corresponding provision in the rules involves no intent to change the law since no proposed rule conflicts with the statutory provision.

Several provisions in Chapters I–VII concerned with cases arising under Chapters VIII–XIII are not touched by these rules and forms. These include §§ 2a(9) & (21), 21h, 48g, and 58a(2) of the Act.

Disposition of General Orders and Official Forms

The Preliminary Draft does not touch the subject matter of the General Orders and Official Forms of Bankruptcy prescribed by the Supreme Court for proceedings under Chapters VIII–XIII of the Act. These include General Orders 5(4) (except for a two-word reference to proceedings "In Bankruptcy"), 5(5), 41, 48, 49, 52, 54, and 55, and Official Forms No. 48–No. 62. The Advisory Committee expects to recommend that the order promulgating the rules and forms proposed in the Preliminary Draft be accompanied by an order repealing the general orders and official forms other than those mentioned in the preceding sentence.

The table of cross references in Appendix II indicates the rules and forms of the Preliminary Draft which deal with the subject matter of the several general orders and official forms to be superseded. The following general orders, paragraphs of general orders, and official forms do not appear in this table, however, because there are no corresponding rules or forms in the Preliminary Draft: General Orders 12(2), 35(1), 35(2), and 50, and Official Forms Nos. 4, 7, 8, 9, 10, 12, 13, 15, 16, 26, 32, 33, 35, 36, 37, 38, 41, 44, 46, 47, 70, 71, and 72. These omissions signify the judgment of the Advisory Committee that there is no continuing need for any rule or form dealing

DISTRICT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
1021 SOUTHWEST FOURTH AVENUE
PORTLAND, OREGON 97204

DEPARTMENT NUMBER 1
(503) 248-3954

ROBERT W. REDDING
JUDGE

February 14, 1980

MEMORANDUM

TO : Hon. John H. Buttler
Court of Appeals
State Office Building
Salem, OR 97310

Mr. Laird Kirkpatrick
U.S. Attorney's Office
204 Federal Building
211 E. 7th Avenue
Eugene, OR 97401

Mr. Frederick R. Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

RE: PROPOSED RULES 75 - 79

RULE 75. Scope; General Principals; Definitions.

Generally doesn't need much comment.

Rule 75C(10) defines "restricted mail" as "mail which carries on its face the endorsement 'Return Receipt Requested Showing Address Where Delivered' and 'Deliver to Addressee Only'. It has been my practical experience that this restricted delivery simply prevents people from receiving mail, and that all restricted delivery should also require a duplicate or copy to be sent by regular first class mail.

RULE 76.

76A-D simply catalogs existing exemptions.

76E(2), page 7. Adds the requirement that the "notice to debtor following levy"

(Rule 77A) must list all exemptions "drawing attention to those that may be applicable". There is a substantial question as to the appropriateness and practicality of this requirement.

76F(1)(C)(D), page 8. The debtor's claim of exemption requires that the debtor estimate the total value of the property and list senior liens, the nature of the lien and its amount. I question whether as a practical matter these requirements did anything, because of their inherent unreliability. Their presence may be a discouragement to the debtor to file an exemption.

76H(2), page 9. Allows a judgment debtor to sell homestead property for fair market value when his equity does not exceed $12,000 or where he tenders into court any amount in excess of $12,000. This provision is frought with all the problems related to the proposed foreclosure of real property, and also seem to invite collusive sales at less than fair market value.

76I. Provides for the escrow of proceeds of a homestead sale to assure that the proceeds are either applied to a new homestead property or released after one year for the benefit of creditors. This seems to be an excellent provision.

RULE 77 - Rules of Application.

77A(3). Requires that when levy is made by garnisheeing a bank the notice to debtor following levy (Rule 77A(1), page 11) and notice of exemptions (Rule 76E, page 7) shall also be delivered to the bank, and that the bank forward the notices to the debtor. Perhaps in all garnishments, or at least wage garnishments because of their prevalence, the creditor or garnishee shall have to send the notices on to the debtor.

77B(2), page 13-14. Relates to senior liens where property is transferred pursuant to the rules for fair market value and free of junior liens. The whole process of transferring the debtors "equity" subject to senior liens and free from junior liens should be scrutinized. I question its practicality and the ability of the courts to

assess the fair market value, and feel it invites collusive transfers for less than fair market value. This subsection also provides that the transferee of such property is "personally and primarily liable" on the secured obligation. This seems irrational and would effectively prevent transfers.

77D(4), page 15. Restates present law on the transfer of the debtors interest in real property as a joint tenant or tenant by the entirety. Perhaps the thorny survivorship problems existing under present law might be addressed by rule, but again this appears to be a substantive real property right.

77C(2), page 16. Provides that before making any order that will materially effect a person's interests, the court must find the person had actual notice or that the creditor made a good faith effort employing the "best available means under the circumstances to give actual notice". Notice is at the very heart of any meaningful rights, but is this subjective standard workable?

77D, page 16. Adds all discovery methods plus written interrogatories to the enforcement of judgments. This is sound, and I doubt that interrogatories in this situation would draw much opposition.

77E(3)(C). Provides enforcement of a circuit court judgment against personal property worth less than $3,000 may be transferred to the district court. I question the policy on this as characterizing the district court as a " collection company court" without seeing any practical advantage to it.

77F(2), pages 18-19. Provides for the sale of attached property by the debtor for fair market value free of liens. Again, this is part of a major policy change. It involves the same questions as to the practicality of the judicial determination of fair market value and the invitation to collusive sales.

77G, page 20. Changes the attachment or execution bond requirements to relate to the value of the property seized rather than the amount of judgment. This seems reasonable, but again gets the courts involved in setting fair market value.

77H, page 21-23. A statement of current statutes on satisfaction, assignment, and discharge of judgments and liens.

77I-K. Proceedings after discharge and bankruptcy, certificate of release of levy, and effective advance payment. These don't make any great changes in the law or present policy questions.

RULE 78 - Attachment.

78B. Requires the plaintiff post an attachment bond equal to the plaintiff's prayer, but allows the court to require additional security if defendant's potential costs or damages exceed that amount.

78C, page 26. States a restriction of property subject to attachment. The comments (page 10) point out the restriction is largely illusory in that most assets not specified would be reachable only by a creditors suit, which does not ordinarily lie before a 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. Summary judgment procedures ease the problem.

78D(1)(2), pages 26-27. Streamline the procedures for attachment by eliminating the necessity of issuing a writ to the sheriff and the sheriff then delivering a certificate to the clerk. Subject to closer scrutiny, it is probably beneficial.

78D(3), pages 27-28. New provisions allowing a non-possessory attachment lien on personal property through filing after obtaining an order that provisional process may issue. On further showing that this does not provide adequate security, the court may authorize possession to the creditor. This seems an excellent idea worth looking into.

RULE 79 - Provisional Process.

Basically a restatement of the existing law on provisional process.

79C, page 31. States that provisional process is prohibited to attach consumer goods if the underlying transaction was a consumer transaction. While this statement has

been made in several Continuing Legal Education publications, I am uncertain as to its accuracy and think the policy should be reviewed.

ROBERT W. REDDING

QUESTIONS

1. Is the basic idea of debtor or junior lienor sales for fair market value and free of junior liens sound? The only way the fair market value will be challenged is by a creditor, and experience shows a general lack of involvement. Does this situation in fact invite collusive sales? Are these things offset by allowing the person in the best position, i.e. the debtor, to make the sale? Perhaps the standard would more reasonably be a sale for fair market value or in a commercially reasonable manner?

2. In judicial sales, are debtors losing value from personal property? If so, is this because of present sales procedures, inadequate notice or something else?

3. What are creditors feelings now as to levying on personal property?

4. Is there a distinction between commercial and non-commercial or consumer transactions? Should it call for different handling?

5. Do the clerks, sheriffs, collection companies and attorneys have ideas on how the paper work involved in pre and post judgment enforcement should be simplified?

6. Are debtors losing exempt property to creditors? Would better notices help? Something else?

7. Is the judicial sale process too cumbersome? Does it fail to yield a reasonable return on personal property? What would work better?

8. Are bonding provisions adequate? Particularly, should private sureties be allowed? Is there a need for more flexibility in the size of bonds; both for execution and for surety?

9. Does the idea of a non-possessory prejudgment lien have merit?

10. Should consumer goods be exempt from provisional process in consumer transaction cases?

Albert R. Musick
Judge

Circuit Court of Oregon

Washington County
Twentieth Judicial District
HILLSBORO, OREGON 97123

December 14, 1979

Professor Fredric R. Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Re: Civil Rules of Procedure
Rule 23 B

Dear Professor Merrill:

The Oregon Law Institute is to be complimented upon the high quality of the two-day seminar held on the subject of the new Civil Rules of Procedure. The presentation was excellent and thorough and by reason thereof I may feel a little more comfortable on motion day when I have to rule upon motions which come before me.

However, the subject of this letter pertains only to one portion of one of the rules, namely, the last two sentences of Rule 23 B, which read as follows:

> "If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining an action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

As a trial judge, I read this portion of the rule with astonishment and dismay. I assure you that my church affiliations leave a great deal to be desired and that I am inclined to look with askance when a party attempts to inject religious subjects into a hearing, nevertheless, somewhere from my early training came the quotation "Forgive them for they know not what they do".

At the outset, a trial judge has enough difficulty under the complicated third-party practice of trying the issues which are set forth by the pleadings. I have no objection to the amendment of pleadings to conform to the evidence which has come in without objection, as it is up to the trial attorney to protect his record.

However, to allow a party to inject new issues into the case over the objection of the opposing party after the trial has started and a jury has been empaneled, with the further admonition that the court shall "freely" allow such amendment, seems to me to be extremely undesirable for the following reasons:

(1) It undermines and to a great extent renders Rule 18 a nullity. The comment under Rule 18 states: "The Council decided to retain fact pleading as opposed to notice pleading * * * ". The purpose being of course that each party and the court shall be apprised of the issues which shall be tried.

(2) It is a back-door method of adopting the Federal notice pleading without a protective pretrial order setting forth and limiting the issues to be tried.

(3) It awards the lazy or inept lawyer for his lack of effort to properly set forth in his pleadings the issues to be tried and, on the other hand, it can be used by crafty lawyers as a trap to ensnare their opponents, who were entitled to believe that the issues to be tried were set forth by the pleadings.

(4) It places the court in the unpleasant position of delaying the trial, while the jury cools their heels in the jury room, to listen to heated assertions of counsel that the new issue contained in the Pandora's box presented to the court will or will not be prejudicial, followed by additional delay to allow offer of proof to determine the scope and nature of the evidence to be presented. If the court allows an offer of proof and feels compelled by reason of the statute to allow the amendment, but also feels that in order to avoid

error the opposing counsel should be allowed a continuance to produce evidence to rebut the surprise evidence admitted, raises the additional practical questions of (a) how long shall the continuance be allowed (a day or week, etc)? (b) will the jury be allowed to be called in to sit on other cases in the meantime? (c) the courtroom must be used for other cases in the meantime and, in view of the priority of criminal cases already set on the docket and the uncertainty of the length of other trials, how will the court set a definite date for reconvening the trial and recalling the jury in the event that even more than one day is allowed for the continuance? (d) how about the rescheduling of witnesses, particularly expert witnesses and witnesses that may be recalled from out of state, etc., under the circumstances of uncertainty of date of continuance?

(5) Finally, the matter of preparation of instructions. Unfortunately, not many of our appellate judges, nor law professors, nor practicing attorneys, have gone through or appreciate the pressure of the tight-rope walk of composing and formulating instructions in complicated cases and meeting the deadline of having them ready and completed when the last closing argument is finished. This task must be undertaken at the earliest possible time and that is why the court rules require that attorneys must present requested instructions at the beginning of the trial. The pleadings are the road map for the preparation thereof. It is true that we have uniform instructions and, indeed, they are very helpful, however, the manner in which they are fitted together in order that they have some chronological and understandable content aided by some explanation of their relation to each other, as well as their sequence of consideration by the jury, are matters of no small importance. The more the issues, particularly where different theories of law are involved, the more difficult it becomes to simplify and explain what the case is all about. This

> task cannot be undertaken ordinarily during the taking of testimony, and it is very dangerous to ad lib without some painstaking care and preparation. Even the dropping of an issue may materially affect the entire composition. The last minute adding of a new issue, particularly if it is a new theory of law, may also result in the complete revamping of the instructions after they have been materially completed. As a trial judge, I naturally resent the pressure and danger inherent in such last-minute changes.

With reference to item (4) above, our court is a busy court. The business of administration of the docket and the myriad of difficulties in the setting of cases and disposing of the same, are very real and substantial in nature and cannot be lightly ignored. The resetting of a case for continuation of testimony at a subsequent date (with an interval of time in between) is extremely difficult, as it may (and usually does) interrupt other litigation then in process. This is extremely unfair to other litigants and must be avoided.

This court, and most all courts that I know of, have little patience with the lazy or dilatory attorney who will not properly prepare his case for trial, and in view of our very liberal rules of discovery and amendment of pleadings prior to trial, there is no reason to allow counsel to change horses in the midst of a trial.

The portion of Rule 23 B above quoted is not only a booby trap for both the court and the litigants, but is completely unnecessary and inconsistent with the fundamental concept that code pleadings shall be retained. I urge that the commission consider presenting a change in the rules in the next legislation striking the above-quoted language from Rule 23.

Very truly yours,

Albert R. Musick

ALBERT R. MUSICK
Presiding Circuit Judge

ARM:so

MULTNOMAH BAR ASSOCIATION

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J.R. Forester, Director
Gary Roberts, Deputy Director
Michael H. Marcus, Director of Litigation

January 18, 1980

Frederic R. Merrill
Executive Director
Council on Court Procedures
School of Law
University of Oregon
Eugene, Oregon 97403

Dear Mr. Merrill:

This letter is in response to your letter to Richard Forester, Director of this program, dated November 13, 1979. We have several preliminary comments on proposed Rules 67 through 77, but wish to emphasize that this letter represents our preliminary thoughts, and that we may wish to offer further comments - or expand upon these - in the future.

Rule 68C.(2)(a): This section commendably discards the distinction between attorneys fees which are, and those which are not, part of costs, and we applaud the later provisions removing the issue of the amount of fees from the jury. We suggest, however, that "asserting a demand" be clarified to specify whether the demand should be only in the prayer or only in the body of the complaint or in both.

Rule 68A.(3): If this rule is intended to expand recoverability of deposition expenses beyond the relatively narrow definition of "necessary" depositions under current law, it should do so expressly.

Rule 68B.(1): "Unless the court otherwise directs" implies a discretion which currently exists only in equity. If such a discretion is intended, standards ought to be prescribed.

Rule 68C.(4)(e): This limitation is at cross purposes with contractual attorneys fees which are intended to make the prevailing party whole and statutory provisions seeking the same objective or designed to encourage "private attorney general" enforcement of public policy.

Rule 75C.(2): Seems to alter settled existing law to the effect that equitable interests are not reachable by a judgment creditor.

Is such a change within the scope of the Council's powers?

Rule 75C.(6): Conceding that the rules' definition of assets may adequately deal with limited or divided ownership situations, this definition of "equity" is too expansive in that encumbrances other than security interests operate to reduce the debtor's equity. For example, a resulting trust may substantially reduce a debtor's equity below that which the formula in 75C.(6) would yield.

Rule 76D.: Although we have had no recent occasion to research the issue, child support and perhaps spousal support obligations may be exempt as a matter of common law - at least from garnishment in the hands of the obligor.

Rule 79H.: The language cross referring to ORS Chapter 32 is unfortunately subject to the interpretation that an undertaking must be filed to support any provisional process. Since Chapter 32 expressly waives the requirement of undertaking in some cases, and permits waiver or reduction of the undertaking under circumstances such as indigency, the cross reference should be reworded. Perhaps the clause "if an undertaking has been filed by the plaintiff in accordance with ORS Chapter 32" should be replaced by "if the plaintiff has complied with any undertaking requirements of ORS Chapter 32."

Thank you for this opportunity to express our views on proposed Rules 67 through 77. We would appreciate being apprised of any hearings or proceedings which may follow.

Sincerely,

MICHAEL H. MARCUS
Director of Litigation

MHM:bw

GARY ROBERTS
Deputy Director

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Mr. Fred Merrill
Council on Court Procedures
c/o University of Oregon School of Law
University of Oregon
Eugene, Oregon 97403

Re: Oregon Rule of Civil Procedure 45F

Dear Fred:

As we discussed in our telephone conversation of January 16, 1980, this letter examines the limitation of thirty requests for admission imposed by ORCP 45F.

Our office is presently involved in litigation involving numerous claims for relief in a single complaint. Prior to January 1, 1980 we repeatedly served requests for admission on opposing parties which consisted of more than thirty requests. We felt we were not abusing the requests for admission procedure or placing too great a burden on the opposing party due to the complexity of the litigation. Upon the implementation of Rule 45F we find that in the situation where more than one claim for relief is joined in a single complaint we are not able to adequately cover the issues involved.

We realize the reason for the limitation and agree that a reasonable limitation is beneficial.

We understand that in a situation as outlined above, the court, upon petition by the person requiring more than thirty requests, should have no difficulty finding good cause shown and allowing additional requests. It is our concern that this is perhaps an unnecessary cost to the client in what is already a costly process.

It is our suggestion that because each claim for relief necessarily consists of one count and in many instances, involves more than one count, this limitation be placed on each count of the pleading. This allows a litigant to cover all issues involved in a simple proceeding as well as the most complex

without requiring the additional expense of a petition to the court.

It is our feeling that thirty requests would more than adequately cover a single count and perhaps the actual number limitation may be reduced from the thirty figure.

We realize the logistical problems you encountered in your discussion of this problem and also are sure you discussed this at great length in the past. We offer this as merely a suggestion to the Council and are certain you will give it the attention it deserves.

Yours truly,

THOMAS H. HOYT, P.C.

Donald J. Churnside

Donald J. Churnside

DJC:l

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HAROLD V. JOHNSON (1920-1975)

ORVAL ETTER
OF COUNSEL

January 25, 1980

Frederic R. Merrill
Executive Director
Council on Court Procedures
School of Law
University of Oregon
Eugene, Oregon 97403

Dear Professor Merrill:

In ordering new subpoenae for our law firm, we noticed an inconsistency in the Oregon Rules of Civil Procedure, and would like to point it out in case it was unintentional. Rule 55 allows the subpoena to be served by a party or any other person over 18 years of age. Rule 7F(2)(a)(i) dealing with the certificate of service of summons requires a server to certify that he or she is a competent person 18 years of age or older. It would be easy to remember if the rules were consistent as to whether an 18-year-old person could serve subpoenae and summonses.

If I have misunderstood the rules, please let me know.

Sincerely,

Martha L. Walters

Martha L. Walters

MaLW:pjh

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3837

January 30, 1980

Donald J. Churnside
THOMAS H. HOYT, P.C.
Law Offices
The Citizens Building
975 Oak Street, Suite 910
Eugene, OR 97401

Dear Don:

The Council has a subcommittee on discovery. At the last meeting they reported that they had reviewed Rule 55 and saw no problems. I reported your telephone call, and the subcommittee chairman suggested I submit the letter to them. I have done so and will keep you informed.

Very truly yours,

Fredric R. Merrill
Executive Director, Council on
Court Procedures

FRM:gh

cc: Garr M. King (Encl.)
Donald W. McEwen (Encl.)
Charles P.A. Paulson (Encl.)
Frank H. Pozzi (Encl.)

School of Law
UNIVERSITY OF OREGON
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January 30, 1980

Martha L. Walters
JOHNSON, HARRANG, SWANSON & LONG
Attorneys and Counselors at Law
400 South Park Building
101 East Broadway
Eugene, OR 97401

Dear Ms. Walters:

Thank you for your letter of January 25, 1980. The reason that Rule 7 F.(2)(a)(i) refers to a certificate that the server is "18 years of age or older" is that it is the precise age standard for serving summons (7 E.), and the certificate involved is for summons. Rule 55 D.(3) merely requires proof of service "in the same manner" as a summons. I take this to mean a certificate of service is required but relating to a subpoena, not summons. Thus, the subpoena certificate should say "over 18 years of age."

The question remains whether there is any reason to have a different age standard for service of subpoena or summons. I think not and none was intended. Whether there is depends upon the interpretation of "over 18 years of age" in Rule 55. This could mean anyone who has reached their 18th birthday. "Age" may be defined as the length of time a being has lived, and on the 18th birthday a person has lived 18 years and thereafter has lived over 18 years. Unfortunately, "age" could also mean age in the sense of a cumulative total of years that could be applied to a person; until the 19th birthday a person is always referred to as 18 years of age and is not "over" 18 years of age. There are some cases on this (usually involving insurance contracts), but they reach conflicting results.

The phrase, "18 years of age or older," is a more precise term and perhaps 55 D.(1) should be amended to say this. I will submit the question to the Council. Thank you for your interest.

Very truly yours,

Fredric R. Merrill
Executive Director, Council on
Court Procedures

FRM:gh

CIRCUIT COURT OF OREGON
SECOND JUDICIAL DISTRICT
EUGENE

EDWIN E. ALLEN
JUDGE

January 31, 1980

Professor Fredrick R. Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Re: Civil Rules of Procedure
Rule 23 B

Dear Professor Merrill:

I had brought to my attention this week Judge Albert R. Musick's letter to you of December 14, 1979, concerning Rule 23 B. Coincidentally, it also happened this week that I had my first real-life experience with Rule 23 B. I will only say that I concur wholeheartedly with the comments in Judge Musick's letter, and the sooner we are rid of Rule 23 B, the better off all of us will be; except, of course, for the lazy, the incompetent, and the unscrupulous.

Sincerely yours,

Edwin E. Allen
Presiding Judge
Lane County Circuit Court

EEA:rem
cc: Hon. Albert R. Musick
Presiding Circuit Judge
Washington County Circuit Court

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February 1, 1980

Hon. John Buttler
Court of Appeals
State Office Building
Salem, OR 97310

Hon. Robert W. Redding
328 Multnomah County Courthouse
1021 S.W. 4th Avenue
Portland, OR 97204

Dear Judges Buttler and Redding:

My assignment was to review and comment on Rules 84-87, pp. 66-92. I drew the easy assignment because these rules are taken almost verbatim from existing statutes. The minor modifications made in converting these statutes to rules are primarily improvements in language rather than changes in substance. Because these rules are based on existing law, I doubt they would cause much controversy.

I think the organization of these rules, and the other rules as well, could be improved. I would suggest that pre-judgment remedies be separated from post-judgment remedies and that an arrangement be adopted that would have the greatest clarity and utility to practitioners. There will need to be cross references to related statutes that are remaining as statutes.

Very truly yours,

Laird Kirkpatrick

LK:gh

cc: Fredric R. Merrill

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February 11, 1980

Professor Fred Merrill
Council on Court Procedures
University of Oregon Law Center
Eugene, Oregon 97403

Dear Fred:

In the area of special proceedings, I suggest that the Council review ORS 126.157 - ORS 126.227 (Protection of Property of Minors and Incapacitated Persons).

These provisions came to my attention when the Circuit Court in Marion County entered a "protective order" directing our client, a credit union, to turn over the proceeds of a joint account for the benefit of one of the joint owners. Our client was not given notice of the pendency of the proceedings. The petitioner's lawyer advises that he mailed a copy of the petition to the out of state joint tenant. The other joint owner lives in California and apparently can be deprived of any property rights in the joint account. See ORS 126.163(3).

When a joint tenant becomes incompetent, the status of a joint account becomes confused. See Mowrey v. Jarvy, 228 Or 96, 363 P2d 733 (1961).

Under the former statutes, the probate court was a court of limited jurisdiction. See Jaureguy & Love, Oregon Probate And Practice §513 (1958). This apparently has changed, but I do not believe adequate due process provisions have been incorporated into the statutes.

Very truly yours,

Lloyd

Lloyd W. Weisensee

LWW:jb

PROPOSED RULES 67 - 73

Second Draft

2/4/80

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. Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief has not been demanded in the pleadings, except:

C.(1) A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.

C.(2) Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.

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.

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) 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.

67 F.(2) The stipulation for judgment shall be in writing and filed according to Rule 9 or, if not, shall be assented to in open court. The stipulation shall be signed by the parties or by a person authorized to bind the parties.

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.

RULE 7

SUMMONS

D.(3)(b) Corporations[;] and limited partnerships. [unincorporated associations subject to suit under a common name.] Upon a domestic or foreign corporation[,] or limited partnership [, or other unincorporated association which is subject to suit under a common name]:

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation[,] or limited partnership, [or association] or by personal service upon any clerk on duty in the office of a registered agent.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found in the county where the action is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or by personal service on any clerk or agent of the corporation[,] or limited partnership[, or association] who may be found in the county where the action is filed; or by mailing a copy of the summons and complaint to the last registered office of

the corporation[,] or limited partnership[, or association], if any, as shown by the records on file in the office of the Corporation Commissioner or, if the corporation[,] or limited partnership[, or association] is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation [,] or limited partnership[, or association], and in any case to any address the use of which the plaintiff knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

(The following would be new paragraphs under Rule 7.)

D.(3)(e) General partnerships. Upon any general partnership by personal service upon a general partner or any agent authorized by appointment or law to receive service of summons for the partnership.

D.(3)(f) Other unincorporated association subject to suit under a common name. Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service of summons for the unincorporated association.

COMMENT

Rule 67

Section C. contains the changes relating to the relationship between "prayer" and "judgment" suggested by the subcommittee. Most jurisdictions, either from the Field Code or federal rules, follow the rule in the original draft. A small minority of jurisdictions limit the judgment to the prayer in all cases. I could find no jurisdiction that has a rule precisely like this. The subcommittee, however, correctly identified the problem that has arisen in limiting relief in default dissolutions. See Annotation, 12 ALR 2d 340, and Note 4, Stanford L. Rev. 278.

Rule 67 E. now uses the entity approach to corporations. Note the suggested changes to Rule 7 to provide a special service method for partnerships and other associations. Two questions should be considered:

1) Should the partnership rule provide for service of summons on a "managing agent" and by mail to "any usual place of business of the partnerships" as an alternative to serving a partner. This might be desirable to cover a situation where no partner can be found.

2) Should the association service rule allow service on "any member." This probably is not a good idea since a member is arguably not an agent for an association in the same sense as a partner, and serving one member of an association does not seem reasonably calculated to give notice.

67 F. Note that in addition to the change directed by the subcommittee I made a change in the first sentence to preserve the possibility of stipulation to judgment on the record rather than a written stipulation.

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 necessary 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 recover such fees by alleging the facts, statute, or rule which provides a basis for the award of such fees in the initial pleading filed by that party. If a party did not know and reasonably could not have known of the existence of a basis for the award of attorney fees, such allegations may be made in a subsequent or supplemental pleading by that party. A party shall not be required to allege a right

to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in substantially similar form to the allegations required by this subsection. Such allegations or demand shall be taken as substantially denied unless the party against whom the award of attorney fees is sought 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 sought before the substantive right to recover such fees accrues. Notwithstanding the provisions of Rule 67 C., no attorney fees shall be awarded unless a right to recover such fee is asserted as provided in this subsection.

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 disburse-

ment 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 30 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.

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, enforcement of that portion of the judgment shall be stayed 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

A.(3). In comparing ORS 20.020 and this subsection I find that we had changed "the necessary expenses of taking depositions" by taking out the word "necessary." I put it back in to conform to Council intent not to change the rule relating to discovery depositions.

C.(2). I think this redraft reflects the suggestion of the subcommittee and the Council. The effect of making the standard form of assertion of right to attorney fees an allegation would be that specificity could be tested by motion to make more definite and certain and existence of a right to recover tested at a pretrial stage by motion to dismiss or partial summary judgment.

Paragraph C.(4)(b) contains the changed time for filing objections. The time was simply changed to 30 days rather than 30 days or 15 days after filing the cost bill. Since the cost bill must be filed within 10 days after entry, 15 days after filing the cost bill would always be less than 30 days after entry.

The subcommittee asked for clarification of the relationship between the procedure for determining costs bills and the rule that the trial court loses jurisdiction and cannot modify a judgment once a notice of appeal is filed.

ORS 19.033(1) states:

> (1) When the notice of appeal has been served and filed as provided in ORS 19.023 to 19.029, the Supreme Court or the Court of Appeals shall have jurisdiction of the cause, subject to a determination under ORS 2.520, but the trial court shall have such powers in connection with the appeal as are conferred upon it by law.

The vesting of jurisdiction in the appellate court takes place upon the filing and serving of the notice of appeal, and the appeal is pending from that time rather than the completion of any other steps in the appeal. This was the result of the 1959 Revision of the appellate statutes. Puhrman v. Klamath Co. Comm., 272 Or. 390, 392-393 (1975). The reference to "as conferred upon it by law" is to steps which the trial court is statutorily required to take in relation to the appeal. Gorden Creek Tree Farms v. Layne, 230 Or. 204, 209 (1962)

Correctly speaking, the trial court does not "lose jurisdiction" completely upon the vesting of jurisdiction in the appellate court; the trial court only is prohibited from acting in any manner "so as to affect the jurisdiction acquired by the appellate court or defeat the right of the appellants to prosecute their appeal with effect." State v. Jackson, 228 Or. 371, 382 (1961). Thus the trial court may vacate a judgment to correct the record but cannot modify its prior judgment. Caveny v. Asheim, 202 Or. 195, 208-212 (1954). This would prohibit a trial court from vacating a judgment for new trial or NOV if a notice of appeal were filed prior to moving for the new trial or NOV. C.f. Tomasek v. Oregon Highway Com'n., 196 Or. 120, 134 (1952). The appellate statutes recognize this by extending the time for appeal when post trial motions are filed. ORS 19.026(2).

The limitation on the trial judge's authority does not then prevent any action relating to a case that is collateral or incidental to the matter appealed which does not directly affect the appeal. 4 Am. Jur. 2d Appeal and Error § 555. The trial court is not prohibited from entering a cost judgment or passing on objections to costs once

the notice of appeal is filed. 4 Am. Jur. 2d Appeal and Error § 618, n.29 at p. 413. In Lemmons v. Huber, 45 Or. 282, 284 (1904), the Oregon court held that entry of a cost judgment after the main judgment did not extend the time for appeal, but the cost judgment could be separately appealed. The court said:

> The controversy over the disbursements did not delay the entry of the judgment, nor did the final decision of that question amount to a modification of the judgment, or extend the time in which to appeal. * * * The costs were but a mere incident to the judgment. The proceedings subsequent to its rendition were merely for the purpose of ascertaining the amount of the disbursements to which the defendant was entitled, and they did not alter, modify, or affect the judgment in any way.

See also Lyon v. Mazeris, 170 Or. 222 (1943), and cases cited at p. 232.

The Oregon statutes recognize the cost bill is a separate judgment, and ORS 20.220(3) (which remains as a statute) provides for a separate appeal from the cost and disbursements judgment. It is possible and customary to appeal both the main judgment and entry of costs at the same time. Wade v. Amalgamated Sugar, 71 Or. 75 (1914). The costs judgment, however, can be appealed separately if there is no desire to appeal the main judgment. Presumably if the main judgment were appealed before the costs were entered, a separate appeal would be used.

Increasing the time to object to a cost bill would not then affect the trial court's authority to direct entry of costs in response to the objection. It may increase the number of cases where the notice of appeal is filed before the cost judgment is finalized. This situation requires more care in determining whether the appeal filed is directed to the cost judgment, whether the designation of record is complete, and whether a separate notice of appeal is required. This frequently would

be a consideration anyway since there is no limited time for the judge to rule on objections to the cost bill.

Rule 68 C.(4)(d) was changed to eliminate the language referring to conclusiveness of findings of fact, and 68 C.(4)(e) (which prohibited recovery of further costs in the objection proceeding) was eliminated. Subsection 68 C.(5) was changed to provide the automatic stay.

RULE 69

DEFAULT

69 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 or court 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) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain; and

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to appear; and

B.(1)(d) The party against whom judgment is sought 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; and

B.(1)(g) Summons was personally served within the State of Oregon upon the party against whom judgment is sought pursuant to Rule 7 D.(3)(a)(i) or 7 D.(3)(b)(i).

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.

69 B.(2) By the court. In all other cases, the party seeking 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 they have a general guardian or they are represented in the action by another representative as provided in Rule 27. 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 10 days, unless shortened by the court, 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 may determine the truth of any matter upon affidavits. The court shall direct entry of judgment in accordance with its own findings or the verdict of the jury.

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. 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.

D. "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

COMMENT

Rule 69

Rule 69 A. was changed to add "court", and the limitation to personal service cases was added to 69 B.(1). The requirement of appearance by a guardian before default was eliminated from 69 B.(2), and the three-day notice period was changed to 10 days. The reference to court decision on affidavits was added, and the mandatory jury trial was eliminated. There is no constitutional right to jury trial upon default, and the Council is free to change the rule. Deane v. Willamette Bridge Co., 22 Or. 167 (1892), is directly in point and holds that the then existing statute, which did not give any right to jury trial, was constitutional.

After reviewing section 69 C. in the first draft relating to vacating defaults and judgments, it was felt that the best approach was to eliminate it. The present ORS sections have no equivalent section. Presently, a default, as any other order short of a final judgment, may always be revised by the court. The default judgment would be simply another judgment subject to vacation under the standards of Rule 71. Section E., relating to defaults after publication, was also eliminated as directed by the subcommittee.

New section D. relating to the definition of "clerk" was added for clarity. Some references to plaintiff or defendant or person entitled to judgment in sections B. and C. were also changed to "a person seeking judgment" and "person against whom judgment is sought."

RULE 70

FORM AND ENTRY OF JUDGMENT

A. Form. Every judgment shall be in writing plainly labelled as a judgment 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 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 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 proposed forms for judgment at the direction of the court rendering the judgment. Unless otherwise ordered by the court, any proposed form of judgment shall be served in accordance with Rule 9 B. five days prior to the submission of judgment and proof of service made in accordance with Rule 9 C.

RULE 63

JUDGMENT NOTWITHSTANDING THE VERDICT

D. Time for motion and ruling. A motion for judgment notwithstanding the verdict shall be filed not later than 10 days after the [filing] entry of the judgment sought to be set aside, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days of the time of the [filing] entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

RULE 64

NEW TRIALS

F. Time of motion; counteraffidavits; hearing and determination. A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed not later than 10 days after the [filing] entry of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits, such party shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the [filing] entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

G. New trial on court's own initiative. If a new trial is granted by the court on its own initiative, the order shall so state and shall be made within 30 days after the [filing] entry of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

COMMENT

Rule 70

The word changes requiring labelling of judgments and eliminating reference to approval by the judge and the journal were made in sections A. and B.

Rule 70 C. was changed to require service five days prior to submission to the court. The reference to the court ordering otherwise would take care of any emergency or prority problem.

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 to all parties who have appeared, 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, 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) the judgment is void; or (4) 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) and (2) 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

The reference to service on parties who have appeared was added to 71 A., and fraud (subsection (3)) was eliminated from 71 B.

An examination of cases relating to fraud as a basis for vacating judgment shows that it is raisable in a separate equity suit to vacate judgment and by a motion invoking the court's power to vacate a judgment within a reasonable time. Slate Constr. Co. v. Pac. Gen. Con., Inc., 226 Or. 145 (1961); Harder v. Harder, 26 Or. App. 337 (1976). Fraud may be asserted under the statutory grounds for new trial as mistake or newly discovered evidence. Larson v. Heintz Construction Company, 219 Or. 25 (1959). Whether fraud may be asserted under ORS 18.160 by a motion for vacation of judgment, as surprise, mistake, or excusable neglect, is less clear. In 1943 the Oregon Supreme Court held that the language of ORS 18.160 would include fraud. Nichols v. Nichols, 174 Or. 390, 396 (1943). However, in 1961 they held directly contrary without distinguishing or even citing the Nichols case. Miller v. Miller, 228 Or. 301, 307 (1961). The Miller case, to the extent that it suggests that an independent suit in equity is the only way fraud may be used to vacate a judgment, has been criticized. Harder v. Harder, supra.

It would be desirable to allow fraud, to the extent it allows relief from a judgment, to be asserted by the relatively simple motion practice rather than require an elaborate separate equity suit. The rule should at least list fraud as a ground.

Whether the language relating to both extrinsic or intrinsic

fraud is necessary depends upon whether the Council wishes to make perjury a basis for vacation of judgment. The distinction between extrinsic and intrinsic fraud in Oregon goes back to 1894 and Friese v. Hummel, 26 Or. 145 (1894). The distinction is described as follows in Slate Construction Co. v. Pac. Gen. Con., Inc., supra, at pp. 151-152:

> In order to set aside a judgment for fraud it must appear the fraud was practiced in the very act of obtaining the judgment, and such fraud must be extrinsic or collateral as distinguished from intrinsic. * * *
>
> Fraud is regarded as intrinsic where the fraudulent acts pertain to an issue involved in the original action.

Basically, the rule prohibits vacation of judgment for perjury, presentation of false or forged evidence, and false allegations in a pleading. Larson v. Heintz Construction Company, supra, Lothstein v. Fitzpatrick, 171 Or. 648, 658 (1943), O.-W.R. & N. Co. v. Reid, 155 Or. 602, 610 (1937); Dixon v. Simpson, 130 Or. 211, 221-222, Windsor v. Holloway, 84 Or. 303, 306 (1917); Wallace v. Portland Ry., L. & P. Co., 88 Or. 219, 224 (1916); Friese v. Hummel, supra.

There are two arguments for abandoning the distinction. The first is set out in the comment to the first draft; perjury is a fraud on the court and should lead to vacation of the judgment. Perjury and false evidence are different from simply relitigating issues decided in a case. A second argument is that the distinction is not clear. Whether the fraud pertains to an issue in the case depends on how you look at it. For example, in O.-W.R. & N. Co. v. Reid, supra, a judgment in a completely false personal injury case brought by a professional plaintiff under a false name was vacated. The court said the false evidence and pleading in the case did not provide grounds for vacation, but filing

suit under a false name was extrinsic fraud as it prevented the defendant from learning of plaintiff's prior activities. This would suggest that in any case a party could argue that perjury or false evidence prevented him from learning and presenting the true facts.

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 after the notice of appeal has been served and filed as provided in ORS 19.023 to 19.029.

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 in which it is a party or is 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

73 A. Since, as indicated in the comment to Rule 68, the power to grant a stay terminates upon filing of the notice of appeal and service, ORS 19.033, the language relating to pending was modified for clarity. The words used were taken directly from ORS 19.033.

73 C. Since here the reference is to duration, not commencement, of appeal, a reference to filing notice would not be appropriate.

73 D. Note the reference to "or is interested" is retained in this section. That language makes the rule applicable to the common case where a state board, agency, or official is a named party as well as the rare case where the state is the named party. Miller v. State Industrial Accident Commission, 84 Or. 507, 509 (1917), Attorney Generals Opinions 1920-22, p. 419, 1922-24; p. 815, 1930-32, pp. 760, 790, 792, 1934-36, p. 82. The test of interest apparently is not whether the state has a financial interest but whether the case is actually prosecuted by a public official or agency. Attorney General Opinions 132-34, p. 408, and 1936-38, p. 598. (State is "interested" in action prosecuted by State Labor Commissioner to recover wages and overtime on behalf of a private party.) When the state is merely a nominal party, as in a mandamus proceeding, the provision would not apply.

RULE 90

TEMPORARY RESTRAINING ORDERS AND
PRELIMINARY INJUNCTIONS

A. Availability generally.

A.(1) Time. A temporary restraining order or preliminary injunction may be allowed by the court, or judge thereof, at any time after commencement of the action and before judgment.

A.(2) Grounds and notice of relief. A temporary restraining order or preliminary injunction may be allowed:

A.(2)(a) When it appears that a party is entitled to relief demanded in a pleading, and such relief, or any part thereof, consists of restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the party seeking the relief, or

A.(2)(b) When it appears that the party against whom a judgment is sought is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of a party seeking judgment concerning the subject matter of the action, and tending to render the judgment ineffectual. This paragraph shall not apply when relief is available by a restraining order under Rule 79.

B. Temporary restraining order.

B.(1) Notice. A temporary restraining order may be granted without written or oral notice to the adverse party or to such party's attorney only if:

B.(1)(a) It clearly appears from specific facts shown by

affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the adverse party's attorney can be heard in opposition, and

B.(1)(b) The applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

B.(2) Contents of order. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith; shall define the injury and state why it is irreparable and why the order was granted without notice.

B.(2)(a) Duration. Every temporary restraining order shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

B.(2)(b) When 10-day limit does not apply. The 10-day limit of Section B.(2)(a) does not apply to orders granted by authority of paragraph (c), (d), (e), (f) or (g) of subsection (1) of ORS 107.095.

B.(3) Hearing on preliminary injunction. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for

hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if such party does not do so, the court shall dissolve the temporary restraining order.

B.(4) Adverse party's motion to dissolve or modify. On two days' notice (or on shorter notice if the court so orders) to the party who obtained the temporary restraining order without notice, the adverse party may appear and move its dissolution or modification. In that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

B.(5) Temporary restraining orders not extended by implication. If the adverse party actually appears at the time of the granting of the restraining order, but notice to the adverse party is not in accord with section C.(1), the restraining order is not thereby converted into a preliminary injunction. If a party moves to dissolve or modify the temporary restraining order as permitted by section B.(4), and such motion is denied, the temporary restraining order is not thereby converted into a preliminary injunction.

C. Preliminary injunction.

C.(1) Notice. No preliminary injunction shall be issued without notice to the adverse party at least five days before the time specified for the hearing, unless a different period is

fixed by order of the court.

C.(2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for preliminary injunction and upon motion of a party, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on trial and need not be repeated upon the trial. This subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

D. Security.

D.(1) General rule. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and attorney fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

D.(2) Waiver or reduction. The court may waive, reduce, or limit the security provided for in subsection (1) of this section upon a showing of good cause, including indigency, and on such terms as shall be just and equitable.

D.(3) When no security required. No security will be required under this section where:

D.(3)(a) A restraining order or preliminary injunction is sought to protect a person from violent or threatening behavior; or

D.(3)(b) A restraining order or preliminary injunction is sought to prevent unlawful conduct when the effect of the injunction is to restrict the enjoined party to available judicial remedies.

D.(3)(c) ORS 32.010 does not require it.

D.(4) Liability of sureties. The provisions of Rule 92 apply to a surety upon a bond or undertaking under this rule. The liability of the surety shall be limited to the amount specified in the undertaking.

E. Form and scope of injunction or restraining order. Every order granting a preliminary injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

F. Scope of rule.

F.(1) This rule does not apply to a temporary restraining order issued by authority of ORS 107.700 to 107.720.

F.(2) This rule does not apply to temporary restraining orders or preliminary injunctions granted pursuant to ORCP 79 except for the application of section E. of this rule as required by Rule 79 H.

F.(3) These rules do not modify any statute or rule of this state relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee.

G. The writ of ne exeat is abolished.

RULE 90

COMMENT

This rule is a combination of ORS Chapter 32 and FRCP 65. The rule attempts to: (a) clarify procedure in this area; (b) separate the concepts of temporary restraining orders and preliminary injunctions and limit the temporary restraining order; (c) clarify who is bound by a temporary restraining order and preliminary injunction; (d) accommodate the procedure to the merger of law and equity; and (e) harmonize the relief available to other provisional process and restraining orders appearing elsewhere.

Section A.

This rule covers only provisional orders, not permanent injunctions. The time availability is that described by ORS 32.020.

The availability of an order under this rule is a reduced version of ORS 32.040. ORS 32.040 was the Field Code restatement of the traditional equitable power to issue provisional injunctions. When the legislature modified ORS Chapter 29 in 1973, it modified the definition of provisional process in that chapter so that it literally included pendente lite injunctions. ORS 29.020(5) includes

> "* * * 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, property in which the defendant claims an interest."

ORS 29.060 (79 H.) provides:

> Restraining order to protect property. Subject to ORS 29.030, 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.

This created some confusion because there apparently was no consideration of the relationship between Chapters 29 and 32. The court of appeals has recently held that:

> In summary, we hold that ORS 29.060 authorizes a restraining order as provisional process under the circumstances described in that statute whether the underlying action is one at law or in equity, and that issuance of such an order is not dependent upon the requirement of an undertaking complying with chapter 32. Huntington v. Coffee Associates, 43 Or. App. 595, 609 (1979).

The grounds for injunction are set out as follows in ORS 32.040:

> Grounds for preliminary injunction. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists of restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff; or when it appears by affidavit that the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights concerning the subject of the suit, and tending to render the decree ineffectual; or when it appears by affidavit that the defendant threatens or is about to remove or dispose of his property, or any part thereof, with intent to delay or defraud his creditors, an injunction may be allowed to restrain such act, removal, or disposition.

Of the three grounds covered by ORS 32.040:

(1) The first, allowing a temporary injunction when a permanent injunction is sought, is retained. This would be the primary area

for injunctions not covered by Chapter 29. The particular requirements of Chapter 29 would not seem appropriate to this type of injunction. Note, the rule, in conformance with Rule 2, would apply to any actions which include equity and law. However, Chapter 32 has always applied in any case where the ultimate relief sought was a restraining order. Temporary injunctions seem to have been granted without question in mandamus cases. State ex rel. v. Duncan, 191 Or. 475 (1951).

(2) The second ground, to avoid frustration of judgment, is retained because ORS 29.060 (79 H.) only covers situations relating to loss of property. There are other possible actions by a party that could frustrate an ultimate judgment which would not fall within Chapter 29 but might require some immediate action. Again, the particular provisions of Chapter 29 do not seem applicable. This section, however, is subject to Rule 79 to avoid overlap. Note, it is conceivable that the need for temporary injunctions may arise in a case not involving equitable relief. The rule then would extend the availability of the provisional injunction. If this is not thought desirable, it could be avoided by adding the quotation, "judgment granting an equitable remedy." Since presumably a separate equitable suit could be maintained to secure an injunction to avoid frustration of a judgment in a legal action, it makes more sense to allow the court flexibility to give a preliminary injunction in any action.

(3) The third ground, protecting property, seemed completely swallowed by Chapter 29 and was eliminated. The particular provisions in Chapter 29 are better designed to deal with the situation.

Finally, the constitutionality of the procedures must be considered. ORS Chapter 29 was changed in 1973 to meet the requirements of the due process cases relating to provisional remedies. The Huntington

case, at least in dicta, says the procedures now would be constitutional. The key elements appear to be: (1) findings must be based upon specific facts; (2) the provisional remedy is granted after examination of the facts by the judge; (3) a bond or undertaking is required; and (4) there is prompt opportunity for adversary hearing. The rule as drafted meets all these conditions.

The last sentence of the rule is designed to meet the difficulty faced in attempting to distinguish affirmative injunctions from negative injunctions. ORS Chapter 32 was phrased in such a way in which it seemed to authorize only negative provisional injunctions. American Life Ins. Co. v. Ferguson, 66 Or. 417, 420, 134 P. 1029 (1913). Actually, the limitation is that the remedy may only be used to preserve the status quo. State ex rel. v. Duncan, supra at 497. State ex rel. v. Mart, 135 Or. 603, 613 (1931). The negative-positive distinction is a verbal trap. J. F. Dobbyn, Injunctions in a Nutshell, 162-170 (1974); D. B. Dobbs, Remedies § 210, at pp. 105-06 (1973). For example, in the Duncan case, supra, the plaintiff sought a temporary injunction restraining the public utility commissioner from suspending operation of a new rate tariff. The requested injunction was in negative form but would result in a change in rates pending outcome of the suit. The court in that case suggests, at 497, that injunctions which did more than maintain the status quo might be possible upon an especially strong showing of need. The court, however, held that the requested provisional injunction was correctly denied.

Section B.

ORS Chapter 32 does not adequately distinguish between ex parte temporary restraining orders and preliminary injunctions. No special

protections granting prompt hearing are provided, and no time limit is imposed upon the temporary restraining order. This section is taken from section B. of the Alabama Rules of Civil Procedure, which is modelled upon FRCP 65. Note, under B.(1)(b) the factual showing may be by affidavit or verified complaint. ORS 32.040 required a complaint in some cases and affidavits in others.

Paragraph B.(2)(b) makes clear that the 10-day limit does not apply to temporary restraining orders in domestic relations cases. Specific provisions in ORS would override the general procedure here by virtue of ORCP 1 A., but ORS 107.095 prescribes no specific time limit.

Subsection B.(5) is totally new and is designed to prevent the confusion discussed in Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 432, n.7 (1974). An adequate adversary hearing for a preliminary injunction requires adequate notice. See C.(1) below.

Section C.

C.(1) is taken from F.R.C.P. 65. The existing statutes just refer to notice. C.(2) is also from the federal rule. This was a result of a 1966 amendment to the federal rules. The reasoning behind the rule is stated in Wright and Miller, Federal Practice and Procedure, § 2950, p. 484 (1973), as follows:

> It long has been recognized that an accelerated trial on the merits often is appropriate when a preliminary injunction has been requested. If a Rule 65(a) injunction is granted, a speedy trial minimizes the potential adverse effect of what may prove to be an unjustified restraint on defendant; if relief under Rule 65(a) is denied, a quick disposition of the merits shortens the period in which plaintiff may be threatened by irreparable harm. In either situation the urgency that is characteristic of cases involving preliminary injunction applications makes a rapid determination of the merits especially important.

The federal rules allow consolidation on the court's own motion. Note, however, consolidation is possible after commencement of the hearing. This would present some danger of unfairness if done without motion. Therefore, the words "upon motion of a party" were added.

The second sentence of C.(2) is not a rule of evidence but a rule allowing a type of qualified consolidation that avoids having exactly the same evidence repeated a second time. For purposes of the record, the trial includes the preliminary hearing. The parties may present any additional evidence they wish at the trial and no final order is entered until trial. The rule simply avoids haivng identical testimony given in two proceedings.

The last sentence of C.(2) recognizes that in some instances at least part of the ultimate relief sought is legal and would involve a right to jury trial. In such case consolidation could not be used and the evidence at the preliminary hearing would have to be repeated to the jury.

Section D.

Section D. is taken from FRCP 65(c) as adopted in Alabama Rules of Civil Procedure 65 C. The mention of attorney fees is in accord with Olds v. Carey, 13 Or. 362 (1886). Sections E.(2) and E.(3)(a) and (b) are taken from ORS 32.020(2) and (3). They were part of a comprehensive package adopted by the 1977 Legislature dealing with waiver of security. E.(4) is a combination of FRCP 65(c) (last sentence) and ORS 32.020(4).

Section E.

Section E. is taken from Federal Rule 65(d). The rule requires a desirable specificity in the restraining order or preliminary injunction which is not required by ORS Chapter 32. The last clause indicates who is bound by the restraining order. It is probably an accurate recitation of

limits that exist anyway, but have never been spelled out adequately in Oregon. Injunctions that bind the whole world are prohibited. The language is a restatement of the standard equitable doctrine limiting injunctions to parties and persons in "privity" with parties. See Old Mill Ditch & Irr. Co. v. Breeding, 65 Or. 581, 586 (1913) (injunction could properly bind employees and successors in interest of a corporation but not stockholders). For a detailed discussion, see 11 Wright and Miller, Federal Practice and Procedure § 2956 (1973).

The rule ties binding effect to notice. ORS 32.010 says that when an order is given, it is effective on a defendant without other proceeding or process. ORS 32.030 refers to personal service on a defendant. The question is not one of jurisdiction but one of notice. A party participating in a hearing on a temporary injunction has notice; for a temporary restraining order or to bind a non-party, however, some notice is required. Personal service is desirable but not absolutely essential in an emergency situation or when in fact there is notice.

Section F.

The first limitation makes this rule inapplicable to the Family Abuse Prevention Act.

The second limitation is consistent with the harmonization or provisional remedies and preliminary injunctions discussed above under the comment to section A. The cross reference in ORCP 79 H. should be changed from "ORS Chapter 32" to Rule 90 E. Also, the words in 79 H.(4), "any other legal or equitable judicial process or remedy," should be modified by "except temporary restraining orders and temporary injunctions under Rule 90."

The last limitation is taken from FRCP 65(e) and prevents conflict

with legislation limiting injunctions in labor relations cases.

Section G.

A writ of ne exeat was a form of restraining order that prevented a person from leaving the jurisdiction. It was abolished by ORS 34.820, which was superseded by the ORCP. The abolition should perhaps remain in explicit language and logically fits here.

RULE 91

RECEIVERS

A. Receiver defined. A receiver is a person appointed by a circuit court, or judge thereof, to take charge of property during the pendency of a civil action or upon a judgment or order therein, and to manage and dispose of it as the court may direct.

B. When appointment of receiver authorized. A receiver may be appointed by the court in the following cases:

B.(1) Provisionally, before judgment, on the application of either party, when his right to the property, which is the subject of the action, and which is in the possession of an adverse party, is probable, and the property or its rents or profits are in danger of being lost or materially injured or impaired.

B.(2) After judgment to carry the same into effect.

B.(3) To dispose of the property according to the judgment, or to preserve it during the pendency of an appeal or when an execution has been returned unsatisfied, and the debtor refuses to apply his property in satisfaction of the judgment.

B.(4) In an action brought by a creditor to set aside a transfer, mortgage or conveyance of property on the

ground of fraud or to subject property or a fund to the payment of a debt.

B.(5) At the instance of an attaching creditor when the property attached is of a perishable nature or is otherwise in danger of waste, impairment or destruction or where the debtor has absconded or abandoned the property and it is necessary to conserve or protect it, or to dispose of it immediately.

B.(6) At the instance of a judgment creditor either before or after the issuance of an execution to preserve, protect or prevent the transfer of property liable to execution and sale thereunder.

B.(7) In cases provided by statute, when a corporation or cooperative association has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

B.(8) When a corporation or cooperative association has been dissolved or is insolvent or in imminent danger of insolvency and it is necessary to protect the property of the corporation or cooperative association, or to conserve or protect the interests of the stockholders or creditors.

B.(9) When a statute or rule provides for the appointment of a receiver.

C. Temporary ex parte receivership.

C.(1) Notice. A temporary receiver may be appointed without written or oral notice to the adverse party or his attorney only if the applicant shows in detail by verified complaint or affidavit the matters required by paragraphs (a) to (d) of this subsection. If any of those matters are unknown to the applicant and cannot be ascertained by the exercise of due diligence, the applicant may be excused from setting them forth. In such case the affidavit or complaint shall fully state the matters unknown and the efforts made to acquire such information.

C.(1)(a) The nature of the emergency existing and the reasons why irreparable injury would be suffered by the applicant during the time necessary for a hearing on notice;

C.(1)(b) The names, addresses and telephone numbers of the persons then in actual possession of the property for which a receiver is requested, or of the president, manager or principal agent of any corporation in possession of said property;

C.(1)(c) The use then being made of the property by the persons in possession thereof;

C.(1)(d) If the property is a part of the plant, equipment, or stock in trade of any business, the nature and approximate size or extent of the business, and facts sufficient to show whether or not the taking of the property by a receiver would stop or seriously interfere with the operation of the business.

C.(2) Attorney's certificate. The applicant's attorney shall certify to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

C.(3) Contents of order. Every order appointing a temporary receiver without notice shall (a) be endorsed with the date and hour of issuance; (b) be filed forthwith in the clerk's office and entered of record; (c) define the injury and state why it is irreparable and why the order was granted without notice; and (d) describe the property as required by Section F.(1).

C.(4) Duration. Every order appointing a temporary receiver without notice shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

C.(5) Hearing on receivership. In the case of an order appointing a temporary receiver without notice, the motion for appointment of a receiver shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion comes on for hearing, the party who obtained the temporary receiver shall proceed with the application for a receiver and, if he does not do so, the court shall dissolve the temporary receivership.

C.(6) Adverse party's motion to dissolve or modify. On 2 days' notice (or on shorter notice if the court so orders) to the party who obtained the temporary receiver without notice, the adverse party may appear and move its dissolution or modification. In that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

C.(7) Temporary receiverships not extended by implication. If the adverse party actually appears at the time of the appointment of the temporary receiver, but notice to the adverse party is not in accord with Section E.(1), the temporary receiver is not thereby converted into a receiver. If a party moves to dissolve or modify the temporary receivership as permitted by Section .(6), and such motion is denied, the temporary receiver is not thereby converted into a receiver.

D. Appointment of receivers on notice.

D.(1) Notice. Except as permitted by section D., no receiver shall be appointed without notice to the adverse party at least 10 days before the time specified for the hearing, unless a different period is fixed by order of the court.

D.(2) Consolidation of hearing with trial on merits. The provisions of Rule 90 D.(2) are also applicable to hearings for appointment of receivers prior to trial.

E. Form of order appointing receivers. Except for an order entered pursuant to section D., every order or judgment appointing a receiver:

E.(1) Shall contain a reasonable description of the property included in the receivership;

E.(2) Shall fix the time within which the receiver shall file a report setting forth (a) the property of the debtor in greater detail, (b) the interests in and claims against it, (c) its income-producing capacity and recommendations as to the best method of realizing its value for the benefit of those entitled;

E.(3) Shall set a time within which creditors and claimants shall file their claims or be barred; and

E.(4) May require periodic reports from the receiver.

F. Oath and security. A receiver, before entering upon his duties, shall be sworn faithfully to perform his trust to the best of his ability. The provisions of Rule 90 E.(1), (2) and (4), relating to security, are also applicable to receivers appointed under this rule.

G. Notice to persons interested in receivership. A receiver appointed under section D. shall, under the direction of the court, give notice to the creditors of the corporation, of the copartnership, or of the individual, by publication or otherwise, requiring such creditors to file their claims, duly verified, with the receiver, his attorney, or the clerk of the court, within such time as the court directs.

H. Special notices.

H.(1) Required notice. Creditors filing claims with the receiver, all persons making contracts with a receiver, all persons having claims against the receiver or any interests in receivership property, and all persons against whom the receiver asserts claims shall receive notice of any proposed action by the court affecting their rights.

H.(2) Request for special notice. At any time after a receiver is appointed, any person interested in said receivership as a party, creditor, or otherwise, may serve upon the receiver (or upon the attorney for such receiver) and file with the clerk a written request stating that he desires special notice of any and all of the following named steps in the administration of said receivership. A request

shall state the post office address of the person, or his attorney.

H.(2)(a) Filing of motions for sales, leases, or mortgages of any property in the receivership.

H.(2)(b) Filing of accounts.

H.(2)(c) Filing of motions for removal or discharge of the receiver.

H.(2)(d) Such other matters as are officially requested and approved by the court.

H.(3) Form of notices. Notice of any of the proceedings set out in subsections H.(1) and (2) of this rule (except) petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss) shall be addressed to such person, or his attorney, at his stated post office address, and deposited in the United States Post Office, with the postage thereon prepaid, at least 5 days before the hearing on any of the matters above described; or personal service of such notice may be made on such person or his attorney not less than 5 days before such hearing; and proof of mailing or personal service must be filed with the clerk before the hearing. If upon the hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order and such shall be final and conclusive order.

I. Termination of receiverships. A receivership may be terminated only upon motion served with at least ten days' notice upon all parties who have appeared in the proceedings. The court may require that a final account and report be filed and served, and may require the filing of written objections thereto. In the termination proceedings, the court shall take such evidence as is appropriate and shall make such order as is just concernings its termination, including all necessary orders on the fees and costs of the receivership.

RULE 91

COMMENT

The purpose of this revision of ORS Chapter 31 is to: (a) clarify the relationship to provisional remedies in ORS Chapter 29; (b) provide constitutionally necessary notice and opportunity to be heard requirements, and (c) make some specific provisions for content of orders appointing receivers and termination of receiverships.

As was the case with preliminary injunctions, the 1973 revisions to Chapter 29 fail to adequately take account of Chapter 31 and receiverships as a provisional remedy. ORS 29.020(5) would literally include pendente lite injunctions in the definition of provisional process. The requirements for issuance of provisional process do not appear particularly suited to the receivership situations.

The rule would apply to all actions at law or in equity. This works no change as Chapter 31 applied to "suits, actions, and proceedings."

Section A.

This is ORS 31.010. The only change is the insertion of the word "circuit" before court. Under ORS 46.060(1)(h), district courts cannot appoint receivers.

Section B.

This is ORS 31.020. The only change is the addition of B.(9), which recognizes that there may be situations which authorize appointment of receivers in specific situations. Note, the listing is not exclusive as courts have some inherent authority to appoint receivers in other circumstances. Cf. Grayson v. Grayson, 222 Or. 507 (1960).

Sections C. and D.

The most serious defect in the existing statutes is that they do

not provide any due process elements before appointment of a receiver. There is, however, a judicially created requirement of notice and an opportunity for hearing. Anderson v. Robinson, 63 Or. 228, 233 (1912). Stacy v. McNicholas, 76 Or. 167, 182 (1915). In an emergency situation the temporary appointment of a receiver is possible until a hearing can be had. Facts constituting such emergency must be shown to the court. Stacy v. McNicholas, supra, pp. 236-239. Notice and hearing would also be constitutionally required.

The notice and hearing problems presented are almost identical to injunctions, and sections C. and D. follow exactly the same pattern presented in Rule 90. Again, this should meet due process requirements for ex parte orders. Huntington v. Coffee Associates, 43 Or. App. 595, 607 (1979). The factual matters which must be demonstrated in C.(1)(a)-(d) are more detailed, reflecting the different nature of the receivership. The last sentence of C.(1) provides for the contingency that all detailed facts cannot be shown because of lack of knowledge. It is taken from California Rules for Superior Courts 238.

Note, in some cases the receivership may not be a provisional remedy or ancillary to judgment but may be the ultimate remedy sought in the case. In such situations, section C. would not apply as there is notice in the complaint and section D. would be satisfied. Ten days' notice, rather than five days' notice, is required as receiverships would be a relatively more drastic remedy than injunction.

Section E.

Section E.(1) is meant to incorporate the specificity test of ORS 79.110. This is the modern rule applied to real property descriptions in deeds as well. The remainder of section E. is taken from Pennsylvania Rules of Civil Procedure 1533(g) and Rhode Island Rules of Civil Procedure 66(d).

Section F.

Section F. is based on ORS 31.030 and is a new provision which simply cross-refers to Rule 91, rather than repeating the requirements for security.

Section G.

Section G. is based on Washington Rules for Superior Court 66(c). See also Pennsylvania Rules of Civil Procedure 1533(g).

Section H.

Section H.(1) is required by Pacific Lumber Co. v. Prescott, 40 Or. 374, 384 (1902). Sections C. and D. deal only with notices of appointment of receiver to parties. The Prescott case says that persons contracting with or buying property from a receiver become parties to the proceeding and must have notice.

Section H.(2) is based on Washington Rules for Superior Court 66(d).

Section H.(3) is based on id., 66(e).

Section K.

Section K. is based on Arizona Rules of Civil Procedure 66(c)(3). A similar provision is contained in FRCP 66 (first sentence). The federal provision on voluntary dismissals, FRCP 41(a)(1), is expressly made subject to the receivership rule. It is expected that section K. and ORCP 54 A.(1) would be so construed. Note that other provisions may prevent or delay termination. See, e.g., ORS 311.415 (payment of taxes) and ORS 652.550 (satisfaction of wage claims).

One remaining problem is what to do with ORS 31.040(2) and (3):

> (2) When a receiver is appointed in attachment or execution proceedings, the receiver shall take possession of all evidences of indebtedness which have been attached or levied upon as the property of the defendant, and after judgment shall have the power to settle and collect them and for that purpose may commence and maintain actions in his own name as receiver.
>
> (3) The receiver shall immediately after taking the same into his possession give written or printed notices of his appointment to the persons indebted to the defendant in the attachment or execution, which notices must be served upon the debtor by copy personally, by a copy left at his residence, or by mail. From the date of such service the debtor shall be liable to the plaintiff in the action for the amount of money or credits due defendant in the attachment or execution in his hands and shall account therefor to the receiver.

To some extent this would be covered by section H. above. But there is specific reference to powers of and duties to the receiver which would not be covered. I cannot understand the language and have not decided what would be lost by simply eliminating the language.

SECTIONS SUPERSEDED

ORS 31.010 - 30.040 would be superseded. ORS 31.050 would remain as a statute.