A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, July 26, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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1. Proposed rules relating to referees, submitted controversies, form of entry, vacation of judgments, and default judgments - JACKSON SUBCOMMITTEE

2. Proposed rules relating to provisional remedies - BUTLER SUBCOMMITTEE

3. Further consideration of possible revisions to ORCP 1-64 (memo dated 6/16/80)

4. Proposed changes in class actions - Rule 32 - CROWE SUBCOMMITTEE

5. Approval of minutes of meeting held June 28, 1980

6. NEW BUSINESS

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held July 26, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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

The meeting was called to order at 9:40 a.m. The public meeting schedule set forth in the minutes of the meeting held June 28, 1980, was approved and the Executive Director was asked to arrange a location for such meetings and for publication of notice.

The Council considered Rules 65 through 72 as recommended by the judgments subcommittee. The following revisions were unanimously accepted.

Rule 65 B.(2). The last sentence of this subsection was changed to read: "In the absence of agreement of the parties, a reference shall be made only upon a showing that some exceptional condition requires it."

Rule 65 D.(2). The words "by the court" were added to line 5 after the word "contempt" to make clear the reference had no power to cite for contempt.

Rule 65 E.(3). The Council decided to retain the existing rule relating to the referee's findings of fact and to have the first sentence of the subsection read: "Unless the parties stipulate to the contrary, the referee's findings of fact shall have the same effect as a jury verdict."

Rule 67 E.(2). The words "jointly indebted" were deleted from the end of the section.

Rule 68 A.(1). The Council directed that the section be revised to separately define attorney fees and costs and not have attorney fees defined as part of costs.

Rule 68 B. The following two sentences were added to this section: "If, under an express provision in these rules or any other rule or statute, a party has a right to recover costs, such party shall also have a right to recover disbursements. If a party is awarded attorney fees, such party shall not also recover the prevailing party fee provided by ORS 20.070."

Rule 68 C.(1)(c). The paragraph was changed to read: "Such items are created by order, rather than entered as part of a judgment."

Rule 68 C.(2). The second sentence of this subsection was eliminated to make clear a claim for attorney fees could be raised by amended pleading.

Rule 68 C.(4)(b). The paragraph was revised to read as follows: "Objections. A party may object to the allowance of attorney fees, costs, and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after service of the statement of the amount of such items upon such party under paragraph C.(4)(a). 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." This changes the date for objections to 15 days from service rather than from filing of the statement.

Rule 68 C.(4)(c). This paragraph was changed by removing the words "review the action of the clerk and shall" from the first sentence.

Rule 68 (COMMENT). The Executive Director was asked to note in the Comment to Rule 68 that the Council had not changed existing practice as to what is recoverable as disbursements, particularly that no change had been made in the rule relating to discovery depositions.

Rule 69 B.(1). The Council discussed the possibility of not having the clerk enter any judgments without court direction but did not change the rule.

Rule 70 A. The Council discussed whether local court rules should be allowed to authorize judgment not in a separate document and did not change the rule.

Rule 71 A. The last two sentences of this section were deleted and the following was substituted: "During the pendency of an appeal, a judgment may be corrected under this section only with leave of the appellate court."

Rule 72 C. This section relating to injunction pending appeal was eliminated.

Rule 26 B. This section was reworded as follows: "Partnerships and associations. Any partnership or other unincorporated association, whether organized for profit or not, may sue in any name which it has assumed and be sued in any 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 partnership or unincorporated association."

The motion proposed by the committee to ask the Commission of the Judicial Branch to consider state funding for referee costs was unanimously defeated.

The enforcement of judgments subcommittee reported that they were still working on Rules 78-85 and were scheduled to meet again after the Council meeting. It was suggested that their final recommendations be submitted for action on September 6, 1980. They asked for comments upon the draft of rules circulated to the Council. It was suggested: (1) that Rule 78 A. should be the same as the existing ORS section; (2) that the committee carefully consider the effect of 79 B. in labor cases and particularly require a showing in 79 B.(1)(b) that the party seeking an ex parte restraining order had attempted to reach the other party or their attorney by telephone, and (3) that the consolidation of the preliminary injunction hearing and trial only be allowed when the parties consent.

The Council considered the four proposed changes to ORCP 1-64 set out in the memo of June 16, 1980. After discussion of the proposed change to the Motor Vehicle Department service provision, ORCP 7 D.(4), it was decided that although there were problems with the section, the proposed change did not solve them. Frank Pozzi suggested that he would submit a redraft. The Council discussed the proposed redraft of ORCP 23 D. and E. and the new 21 H. The Executive Director suggested it might be easier to put these provisions in a separate rule numbered 25. The Council approved the concept of the changes and asked the Executive Director to work with Laird Kirkpatrick on the exact language.

The Council accepted the change to 55 F.(2) which would make clear that the limitation of place of deposition applied to subpoenaed witnesses but not parties. After discussion it was decided not to change Rule 62 A. to require no findings of fact in de novo review cases. It was felt such findings still could be helpful to the appellate court.

It was decided to defer any action on the Class Action Committee Report until September 6, 1980.

The next meeting of the Council is scheduled for Saturday, September 6, 1980, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

The meeting adjourned at 12:30 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

M E M O R A N D U M

TO: COUNCIL

FROM: Fred Merrill

RE: DRAFTS FOR CHANGES IN ORCP 1 - 64
REQUESTED AT MAY 10, 1980, MEETING

ORCP 7 D.(4)(a)

D.(4)(a) Actions arising out of use of roads, highways, and streets; service by mail.

D.(4)(a)(i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf, except a defendant which is a foreign corporation maintaining an attorney in fact within this state, may be served with summons by service upon the Department of Motor Vehicles and mailing a copy of the summons and complaint to the defendant.

D.(4)(a)(ii) Summons may be served by leaving one copy of the summons and complaint with a fee of $2.00 in the hands of the Administrator of the Motor Vehicles Division or in the Administrator's office or at any office the Administrator authorizes to accept summons. The plaintiff shall, as soon as reasonably possible, cause to be mailed a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of

the action, and the most recent address furnished by the defendant to the Administrator of the Motor Vehicles Division, and any other address of the defendant known to the plaintiff, which might result in actual notice. For purposes of computing any period of time prescribed or allowed under these rules, service under this paragraph shall be complete upon such mailing.

D.(4)(a)(iii) The fee of $2.00 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

COMMENT

This version reinstates service on the Motor Vehicles Division. I assume this would have the advantage of creating a record of service for insurance counsel to consult. I also assume this would benefit the plaintiff if serving the Motor Vehicles Division satisfied the statutes of limitations.

This version makes the entire mailing responsibility fall on the plaintiff. The pattern is identical to substituted service or office service under ORCP 7 D.(2)(b) and (c). The last sentence of the proposal follows the pattern of making service complete for the 30-day default period on mailing. As with substituted or office service, the date of service for limitations purposes is not and could not be covered by rules.

The provisions of D.(4)(a)(iii) relating to fees and duty to record may exceed Council rulemaking power, and we probably should ask the legislature to enact this rule section by statute if we want this rule.

I have not submitted this to the Motor Vehicles Division for comment. Perhaps this should be done when there is tentative approval of a draft. This version may raise less objection by the DMV as it does not require them to do anything except receive and record the summons.

ORCP 23 D.

D. Amendment or pleading over after motion; non-waiver of defenses or objections. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule 21 is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. By filing any amended pleading pursuant to this section, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling.

E. Filing of amended pleading; objections to amended pleading not waived. If any amended pleading is filed, whether pursuant to sections A., B., or D. of this rule or pursuant to other rule or statute, a party who has filed a motion to strike, motion to dismiss, or motion for judgment on the pleadings does not waive any defenses or objections asserted against the original pleading by filing a responsive pleading or failing to reassert the defenses or objections.

* * *

ORCP 21 H. (adding section to ORCP 21)

H. Denial of motion; non-waiver by filing responsive pleading. If a motion to dismiss, motion for judgment on the pleadings, or motion to strike is denied, the party making the

21 H. CONTINUED

motion shall not waive any defense or objection asserted therein by filing a responsive pleading.

COMMENT

This is an attempt to clarify the waiver rules of 23 D. and E. and the rule suggested in Item 11, page 7, of the May 5, 1980, staff memorandum. It recognizes that we are dealing with three separate rules. The first two deal with the result of an amended pleading:

(1) 22 D. says that when a motion is made and succeeds and parties plead over rather than standing on their pleadings, they do not waive their position that the judge erred in granting the motion.

(2) 22 E. says that any time an amended pleading is filed, whether voluntarily or as the result of a successful motion, the opposing party does not have to reassert defenses or objections made to matters in the original pleading which are also in the amended pleading.

The last rule (21 H.) has nothing to do with amendments but comes up only when a motion is unsuccessfully made. The pleading attacked stands, and there is no amended pleading. This waiver rule makes clear that by filing a responsive pleading, the party making the unsuccessful motion waives nothing. This waiver rule was added to ORCP 21 rather than to ORCP 23 because it relates to the effect of pleading over after a motion, and not to amendments.

* * *

55 F.(2)

F.(2) Place of exmamination. A resident of this state who is not a party to the action may be required by subpoena to attend an examination only in the county wherein such person resides, is employed, or transacts business in person, or at such other convenient place as is fixed by an order of court.

55 F.(2) CONTINUED

A nonresident of this state who is not a party to the action may be required by subpoena to attend only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

COMMENT

This should make clear that the reference to place of examination is only for non-party witnesses subpoenaed to attend. Under ORCP 46, a party receiving a notice of deposition would have to attend wherever the deposition is set unless a protective order was secured under ORCP 36.

* * *

ORCP 62 A.

A. Necessity. Whenever any party appearing in a civil action tried by the court so demands prior to the commencement of the trial, the court shall make special findings of fact, and shall state separately its conclusions of law thereon. In the absence of such a demand for special findings, the court may make either general or special findings. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact or conclusions of law appear therein. No findings of fact shall be required in cases which are tried anew upon the record upon an appeal.

COMMENT TO ORCP 62 A.

The language in the last sentence was taken from ORS 19.125 (3).

MEMORANDUM

TO: JUDGE BUTTLER
JUDGE REDDING
LAIRD KIRKPATRICK

FROM: Fred Merrill

DATE: 7/21/80

It is my understanding that the subcomittee will meet at 8:30 a.m., on July 26, 1980, before the full Council meeting. We can meet in Judge Dale's Courtroom.

The numbers of the rules in this draft have been changed because they conflicted with the judgment rules. The equivalent numbers are:

7/16/80 Draft	Present Draft
70	81
71	83
72	84
73	Included in 84
74	85
75	79
79	82
90	78
91	80

I made the changes agreed to at the meeting. The following matters are either new, or were not clearly decided at the meeting. We should discuss them on the 26th.

(1) Rule 78. The changes noted in the comment were not specifically discussed.

(2) Rule 80 B. This was redrafted and subsections (1), (4), and (5) were reinserted to make clear that all provisional security devices, except a provisional receivership, are covered by the provisional process rule. See 81 A.(9).

(3) Rule 81 B.(2)(b). The notice requirement of available exemptions and procedure was removed.

(4) Rule 80 C. The basic notice provision was changed from restricted mail to service in the same manner as a summons. The reference to the summons rule allows us to eliminate what was formerly C.(2) relating to sufficient service. The summons rule has its own

standard of sufficient service. Note, I used the simpler return and proof of service provisions from Rule 9.

This changes the general service rule and where we want something less than full summons service, we should suggest service may be as provided in Rule 9 B. The only place I did this was in Rules 81 B.(1) and 84 C.(2)(d). The change also rendered the definition of restricted mail in Rule 81 A. unnecessary, and it was eliminated. Note, I did leave a special reference to service and return for the provisional process order to show cause (83 G.(2)) because I was not sure this was exactly a notice.

(5) Rule 81 D. This section was changed as suggested. You should check to see if it reflects your understanding.

(6) Rule 82 A. This is entirely new and attempts to implement your idea of putting the bond provisions in one rule. I think it works fairly well. You should check A.(3), (4), (5), (6), and (7) carefully.

(7) Rule 83. What appeared as Rule 71 E. of the prior draft relating to waiver of notice and hearing was eliminated. After thinking about it, I see no utility in this provision except to justify waivers in adhesion contracts and I eliminated the provision. If there is an intelligent negotiated waiver, the plaintiff can present proof when applying for the provisional process. There is nothing in the rule that prohibits an actual waiver. I therefore left subsection A.(8). See also section H.

(8) Rule 83 A.(3). This was substantially redrafted by Bob Lacy.

(9) Rule 84 A.(2)(a). I took out the last clause, "or when the defendant is a non resident of the state." Laird suggested this was already covered by subparagraph A.(2)(b).

(10) Rule 84 B.(2) and (3). All of the material in subsection B.(2) after the comma was added. I took it from Lacy's Rule.82 as more correctly reflecting existing ORS 29.140 and 29.170.

(11) Rule 84 C. I took what was formerly the garnishment rule and split it up between a notice of levy on a debt, C.(2), and writ of attachment, C.(4). Actually, for a debt the plaintiff could serve the notice or have the sheriff serve it under a writ of attachment. See 84 C.(2)(b), C.(4)(g), and C.(4)(b)(vii). This would allow a plaintiff who is unsure whether a third party is indebted or has

property to use one notice through the sheriff.

Section C.(5) was not in the prior draft.

(12) 84 F. This appeared in the prior draft of the attachment rule. Laird had some problems with this, but I was not sure what to change. We should discuss this. Note, in 85 E. I made this applicable in claim and delivery. Do we want that?

(13) Rule 85 F. As discussed, we did not change the language of the consumer transaction exception in 83 but I added this provision to protect against a routine dismissal once the property was seized. As drafted, it would prohibit a voluntary dismissal by notice but not a dismissal with leave of court.

(14) Rules 85 and 82. In line with our discussion on claim and delivery and bonds, I put the exception to the bond requirement as 82 A.(4)(c). This language was tricky and needs to be carefully examined.

cc: Bob Lacy

Adopted July 25, 1980

The problem does not seem to exist.

Randall Vogt
Attorney At Law
1410 N.E. 106th Avenue
Portland, Oregon 97220

Telephone (503) 256-2350

June 27, 1980

Professor Frederick R. Merrill
% University of Oregon Law School
Eugene, OR 97403

Dear Professor Merrill:

I am writing to you about a problem with the new Oregon Rules and Civil Procedure which I do not believe was raised in class this Spring in Oregon Practice and Procedures. One of the secretaries at the law firm where I clerk is having fits because the District Court of Multnomah County refuses to comply with ORCP 7D(2)(b) which provides that substituted service is completed upon delivery of "a true copy of the summons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age" where "the plaintiff, as soon as reasonably possible", causes "to be mailed a true copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made."

The District Court in Multnomah County has imposed an additional requirement that an affidavit of mailing be filed with the court clerk upon mailing of the complaint and summons. I might note that there is nothing in ORCP 7D(2)(b) requiring anything to be filed with the court to enforce compliance of this rule. Also, District Court states if you insert in your affidavit that you mailed the true copy of summons and complaint on a certain day, the 30 day period begins on that date; however, they have stated if you merely state that compliance was made, the 30 day period runs from the date substituted service was made.

We are complying with the court's order but are unclear as to its authority in enacting it, and whether it supersedes the ORCP, which we had understood required statewide compliance. We thought you should be aware of this problem and would like to know what you and the Council on Court Procedures are going to do about it. Please advise.

Best regards for a pleasant summer.

Perry Buck

PERRY BUCK,
for Randall Vogt, Attorney

PB:yf

School of Law
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3857

June 30, 1980

Mr. Wendell E. Gronso
765 Ponderosa Village
Burns, OR 97720

Dear Pinky:

As I indicated at the meeting, the federal government has already suggested that unclaimed class actions funds be used for future cases. I am enclosing a copy of the Act they are proposing. This procedure would only apply to cases where the claims of the class were less than $300.

Very truly yours,

Fredric R. Merrill
Executive Director, Council on
Court Procedures

FRM:gh

Encl.

on behalf of the United States relator or other private counsel—

(i) on an hourly basis to the extent funds are authorized by section 3005(c)(2); or

(ii) on a contingent fee basis.

(2) To the extent taxable costs and reasonable expenses are paid by the United States or a State under this subsection, the defendant shall pay costs and expenses provided in subsection (a)(1) to the Department of Justice, a State, or an agency.

§3004. Public recovery; judgment

(a) In a public action in which the defendant is found liable, the judgment shall include a public recovery in an amount to be determined under this section.

(b)(1) Except as provided in subsection (d), the public recovery shall be in an amount equal to—

(A) the monetary benefit or profit realized by the defendant from conduct injuring persons not in excess of $300 each; or

(B) the aggregate damage to persons injured not in excess of $300 each.

(2) If a judgment includes a public recovery, the court may also include in the judgment appropriate equitable or declaratory relief. Any person prosecuting a public action in the name of the United States shall have standing to enforce such relief.

(c)(1) In electing the measure of public recovery to be applied under subsection (b), the court shall consider among other relevant factors—

(A) the intent of Congress embodied in the statute giving rise to the public action under section 3001(a)(1);

(B) the relative expeditiousness of proof; and

(C) The degree of uncertainty in the law upon which liability is based prior to the filing of the complaint.

(2) This determination shall be based upon any reasonable means of ascertaining benefit, profit, or damage provided by law and by section 3022(f). Separate proof of damage to persons injured not in excess of $300 each shall not be required except as necessary to conduct any sampling that the court may direct.

(d) If the statute under which the action was brought provides for—

(1) an award of a multiple of the damage or the recovery, the multiple shall be applied to the public recovery;

(2) a limitation on aggregate liability, that limitation shall apply to the public recovery; and

(3) punitive damages, such damages shall, if awarded, be added to the public recovery.

(e) Within sixty days after entry of judgment against the defendant, or within such time as the court may otherwise order, the defendant shall pay to the clerk of the court the amount of the judgment, which shall be used to establish a public recovery fund under the supervision of the court.

§3005. Public recovery fund; payments to injured persons

(a) The public recovery fund established under section 3004(e) shall be used for—

(1) payments to persons injured in an amount not exceeding $300 by conduct giving rise to the public action;

(2) administrative expenses incurred in carrying out the provisions of this section; and

(3) reasonable expenses provided in subsection (c).

(b) The court shall determine whether the court or the Director of the Administrative Office of the United States Courts shall administer the payment of claims. If the court determines that the Director shall administer the payment of claims, the amount of the public recovery shall be transmitted to the Administrative Office, where it shall be deposited in a public recovery fund. The Director shall administer such claims according to any condition and direction the court may provide. Claims shall be paid within one year from the date of notice. If the public recovery is adjusted as described in section 3004(d), claim payments shall be proportionately adjusted. Notice may be by publication and such other means as the court or Director determines are reasonably likely to inform persons eligible to file claims. The court or Administrative Office may utilize a payment procedure which will distribute payments in a reasonably accurate manner without requiring submission of claims. If the court or Administrative Office finds that it is impracticable to determine with reasonable accuracy the identities of all or some of the injured persons, or the amount of all or some of the individual damages, the court may order that payments not be made to such persons for such damages.

(c)(1) If the public recovery is greater than the administrative expenses and payments referred to in subsection (a), the clerk of the court shall pay the excess amount to the Treasury of the United States. The Treasury shall pay such amount to

(A) a fund established under the direction and control of—

(i) the Department of Justice or the agency conducting the action, if it has been initiated or assumed by the United States; or

(ii) The Department of Justice, or other executive or independent agency authorized pursuant to section 3001(c) to bring the action in which the public recovery was obtained, if there has been no assumption by the United States or a State; or

(B) a State, if the State has initiated the action and it is not assumed, or prosecuted the action by reference.

(2) Payments under paragraph (A), as appropriated, and paragraph (B), and any funds that Congress or a State may authorize, shall be used to pay the reasonable expenses provided in section 3003(b). Payments not applied to these reasonable expenses after three years from the date of deposit may be employed by the Department of Justice or agency, as appropriated, or by the State for the enforcement of any statute within its responsibility.

(d) The Director shall issue such regulations as are necessary and appropriate to assure the prompt, fair, and inexpensive claim administration by the Administrative Office pursuant to subsection (b). The court or Director may compensate a relator or other private counsel for assistance in claim administration.

SUBCHAPTER B—CLASS COMPENSATORY ACTION

§3011. Class compensatory action; prerequisites; district court jurisdiction

(a) A person whose conduct gives rise to a civil right of action for damages under a statute of the United States shall be liable individually or as a member of a class to the injured persons in a civil class compensatory action if—

(1) such conduct injures forty or more named or unnamed persons each in an amount exceeding $300, or creates liabilities for forty or more persons, each in an amount exceeding $300;

(2) the injuries or liabilities arise out of the same transaction or occurrence or series of transactions or occurrences; and

(3) the action presents a substantial question of law or fact common to the injured or sued persons.

(b) The district courts of the United States shall have jurisdiction, exclusive of the courts of the States, of actions brought under this section. A State court in the exercise of its concurrent jurisdiction expressly conferred by any statute of the United

INDEMNIFICATION FOR WRONGFUL LEVY; ADVERSE CLAIMS TO PROPERTY

23.310 Indemnity to sheriff or constable. (1) Subject to subsections (2) and (3) of this section, whenever a writ of [attachment or] execution is delivered into the hands of any sheriff or constable, under which the personal property of any person, firm or corporation is to be held or sold for the satisfaction of any judgment or costs of action or suit, if the sheriff or constable has actual notice of any third-party claim to the personal property, or is in doubt as to ownership of the property, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff or constable may require the [plaintiff or] judgment creditor to file with the sheriff or constable a good and sufficient bond, having the same qualifications as a bail bond, indemnifying the sheriff or constable and his bondsmen against any loss or damage by reason of the illegality of any such holding or sale on execution, or by reason of damage to any personal property held under [attachment or] execution, which bond shall be in double the amount of the claim or judgment by which the personal property is either held or to be sold.

(2) At the request of the plaintiff the sheriff may accept a bond less than double the amount of the judgment but in no event will the sheriff or constable approve a bond less than double the estimated value of the property to be seized.

(3) When the property or the value of a third party interest exceeds the value of the judgment, the sheriff or constable may require an indemnity bond of double the estimated value of the property to be seized.

29.190 Filing sheriff's certificate on attachment of real property; lien. Upon receiving the sheriff's certificate as provided in ORS 29.170, the county clerk shall immediately file such certificate in his office, and record it in a book to be kept for that purpose. When the certificate is so filed for record, the lien in favor of the plaintiff attaches to the real property described in the certificate. Whenever such lien is discharged, the county clerk shall enter upon the margin of the page on which the certificate is recorded a minute of the discharge.

29.270 Liability of garnishee; delivery of attached property to sheriff by garnishee. Any person, association or corporation mentioned in subsection (3) of ORS 29.170 from the time of the service of a copy of the writ and notice as therein provided, shall, unless the attached property is delivered or attached debt is paid to the sheriff, be liable to the plaintiff for the amount thereof until the attachment is discharged or any judgment recovered by him is satisfied. Such property may be delivered or debt paid to the sheriff without suit, or at any time before a judgment against the garnishee, and the sheriff's receipt shall be a sufficient discharge.

29.280 Certificate of garnishee; order for examination of garnishee. Whenever the sheriff, with a writ of attachment against the defendant, shall apply to any person or officer mentioned in subsection (3) of ORS 29.170 for the purpose of attaching any property mentioned therein, such person or officer shall furnish him with a certificate, designating the amount and description of any property in his possession belonging to the defendant, or any debt owing to the defendant, or the number of rights or shares of the defendant in the stock of the association or corporation, with any interest or profits or encumbrance thereon. The certificate shall be furnished to the sheriff within five days from the date of service of the writ, when service is made within the county in which the action is pending, and within 10 days when service is made in any other county. If such person or officer fails to do so within the time stated, or if the certificate, when given, is unsatisfactory to the plaintiff, he may be required by the court, or judge thereof, where the action is pending, to appear and be examined on oath concerning the same, and disobedience to such order may be punished as a contempt.

execution

23.410(4) of execution

29.170 Manner of executing writ. The sheriff to whom the writ is directed and delivered shall note upon the writ the date of such delivery, and shall execute the writ without delay, as follows:

(1) To attach (levy upon) real property, he shall make a certificate containing the title of the cause, the names of the parties to the action, a description of such real property, and a statement that the same has been attached at the suit of the plaintiff, and deliver the certificate to the county clerk of the county in which the attached real estate is situated. The county clerk shall certify upon every certificate so delivered the time when it was received, and the certificate shall be effective from the time of its receipt by the county clerk.

(2) Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody. executed upon

(3) Other personal property shall be attached by leaving a certified copy of the writ and a notice with the person having possession of the same, or if it be a debt, then with the individual debtor, and if such debt arises out of a wage or salary claim against a corporate debtor then with the registered agent of the corporation, the president or other head of the corporation, vice president, secretary, cashier, assistant cashier or managing agent or such other person designated by the corporation to accept the writ and notice, or if it be rights or shares in the stock of an association or corporation, or interests or profits thereon, then with such person or officer of the association or corporation as a summons is authorized to be served upon; provided that if it be a security, as defined in ORS 78.1020 or a share or any other interest for which a certificate is outstanding, the requirements of ORS 78.3170 must be satisfied. However, debts owing to the defendant by a bank or trust company or savings and loan association maintaining branch offices, or credits or other personal property whether or not capable of manual delivery, belonging to the defendant and in the possession of or under the control of such a bank or trust company or savings and loan association, shall be attached by leaving a certified copy of the writ and the notice with the president, vice president, treasurer, secretary, cashier or assistant cashier of the bank or trust company or savings and loan association at the office or branch thereof at which the account evidencing such indebtedness is carried or at which the bank or trust company or savings and loan association has credits or other personal property belonging to the defendant in its possession or under its control, or, if no such officers be found at such office or branch, by leaving a certified copy of the writ and the notice with the manager or assistant manager of such office or branch; and no attachment shall be effective as to any debt owing by such bank or trust company or savings and loan association if the account evidencing such indebtedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served, except that such service on the head office of any such institution shall be effective service upon all offices or branches thereof located in the same city as the head office. executed upon

(4) For purposes of this section, a savings and loan association, including such an association doing business in this state and organized under the laws of another state or of the United States, shall be deemed the debtor of a defendant to whom a certificate, account or obligation, or an interest therein, of the association has been issued, established or transferred and in such case the provisions of ORS 78.3170 shall not apply; provided, however, ownership by a defendant of reserve fund capital stock, or comparable equity stock, or of an interest therein, of any such association shall not be deemed to create such a relationship.

(5) The notice referred to in subsection (3) of this section shall contain the name of the court, the names of the parties to the action, clearly specify name of the party or parties whose property is being garnished, provide the last address, if known, of each party whose property is being garnished, be directed to the garnishee, specify the property attached, whenever possible, and comply with the requirements of ORS 23.185. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished.

DISTRIBUTION CHART

ORS to Oregon Rules of Civil Procedure

ORS	ORCP
CHAPTER 23	
23.020	78
23.040(2)	None
23.040(1) and (3)	Remain in ORS
23.050(3)	None
23.050(1), (2), and (4)	Remain in ORS
23.060-23.070	Remain in ORS
23.080-23.090	None
23.100	Amend
23.160-23.730	Remain in ORS
23.740	None
23.750-23.809	Remain in ORS
23.810-23.930	None
CHAPTER 29	
29.010	None
29.020	81 A.
29.025	83 A.
29.030	83 B.
29.035	83 C.
29.045	83 D.
29.050	None
29.055	83 E.
29.060	83 F.
29.065	83 G.
29.070	83 H.
29.075	83 I.

ORS		ORCP
29.080		85 A.
29.085		85 B.
29.087		Remains as statute
29.090		85 C.
29.095		85 D.
29.110		84 A.
29.120		None
29.130		82 A.
29.140		84 B.
29.150		84 C.
29.160		84 C.
29.170	(For attachment)	84 C.
	(For execution)	Amend and put in as 23.410(4)
29.175-29.180		Remain in ORS
29.190		Amend
29.200-29.210		Remain in ORS
29.220-29.250		84 F.
29.260		None
29.270		Amend
29.280		Amend
29.290		Remains in ORS
29.300		83 F.
29.310-29.370		Remain in ORS
29.380		84 D.
29.400		Remains as statute
29.410		84 A.
29.520-.740		None

ORS	ORCP
CHAPTER 31	
31.010	80 A.
31.020	80 B.
31.030	82 A.
31.040(1)	80 E.
31.040(2)	None
31.040(3)	80 F.
31.050	Remains as statute
CHAPTER 32	
32.010	None
32.020	79 A. and 82
32.030	82 A.
32.040	79 A.
32.050	79 B. and C.
32.060	79 B. and C.

RECOMMENDED FORM OF RULES ON JUDGMENTS

submitted by

JUDGMENTS SUBCOMMITTEE

(TOGETHER WITH PROPOSED COMMENTS, CONFORMING CHANGES TO ORS AND ORCP AND DISTRIBUTION OF STATUTES SUPERSEDED)

July 16, 1980

TABLE OF CONTENTS

RULE 65

REFEREES

A. In general.

A.(1) Appointment. A court in which an action is pending may appoint a referee who shall have such qualifications as the court deems appropriate.

A.(2) Compensation. The fees to be allowed to a referee shall be fixed by the court and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court, as the court may direct.

A.(3) Delinquent fees. The referee shall not retain the referee's report as security for compensation; but if the party ordered to pay the fee allowed by the court does not pay it after notice and within the time prescribed by the court, the referee is entitled to a writ of execution against the delinquent party.

B. Reference.

B.(1) Reference by agreement. The court may make a reference upon the written consent of the parties. In any case triable by right to a jury, consent to reference for decision upon issues of fact shall be a waiver of right to jury trial.

B.(2) Reference without agreement. Reference may be made in actions to be tried without a jury upon motion by any party or upon the court's own initiative. In absence of agreement of the parties, reference shall be the exception and not the rule. Except in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

C. Powers.

C.(1) Order of reference. The order of reference to a referee may specify or limit the referee's powers and may direct the referee to report only upon particular issues, or to do or perform particular acts, or to receive and report evidence only. The order may fix the time and place for beginning and closing the hearings and for the filing of the referee's report.

C.(2) Power under order of reference. Subject to the specifications and limitations stated in the order, the referee has and shall exercise the power to regulate all proceedings in every hearing before the referee and to do all acts and take all measures necessary or proper for the efficient performance of duties under the order. The referee may require the production of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. Unless otherwise directed by the order of reference, the referee may rule upon

the admissibility of evidence. The referee has the authority to put witnesses on oath and may personally examine such witnesses upon oath.

C.(3) Record. When a party so requests, the referee shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as a court sitting without a jury.

D. Proceedings.

D.(1) Meetings. When a reference is made, the clerk or person performing the duties of that office shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof, unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys of such meeting date.

D.(1)(b) It is the duty of the referee to proceed with all reasonable diligence. Any party, on notice to the parties and the referee, may apply to the court for an order requiring the referee to speed the proceedings and to make the report.

D.(1)(c) If a party fails to appear at the time and place appointed, the referee may proceed ex parte or may adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

D.(2) Witnesses. The parties may procure the attendance of witnesses before the referee by the issuance and service of

subpoenas as provided in Rule 55. If without adequate excuse a witness fails to appear or give evidence, that witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rule 55 G.

D.(3) Statement of accounts. When matters of accounting are in issue, the referee may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or in such other manner as the referee directs.

E. Report.

E.(1) Contents. The referee shall without delay prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law, the referee shall set them forth in the report.

E.(2) Filing. Unless otherwise directed by the order of reference, the referee shall file the report with the clerk of the court or person performing the duties of that office and shall file a transcript of the proceedings and of the evidence and the original exhibits with the report. The referee shall forthwith mail a copy of the report to all parties.

E.(3) Effect. Unless the parties stipulate to the contrary, the referee's findings of fact shall have the same effect as a decision of an advisory jury under Rule 51 D. Within 10 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections to the report shall be by motion and upon notice. The court after hearing may affirm or set aside the report, in whole or in part.

E.(4) Stipulation by parties. In any case, the parties may stipulate that a referee's findings of fact shall be binding or shall be binding unless clearly erroneous.

COMMENT

This rule supersedes the existing sections in ORS Chapter 17 relating to reference. The rule is intended to provide more flexibility in use of referees, but to avoid abuse of the procedure. It was adapted from Federal Rule 53 with substantial changes.

Section A. was taken from Wisconsin statutes 805.06(1) which is the Wisconsin version of the federal rule. It contemplates a single referee and leaves the qualifications to the court, rather than requiring that the referee have the same qualifications as the juror.

Section B. contains the most important change in the procedure. Subsection B.(1) does not appear in the federal rule and was taken from ORS 17.720. It makes clear that such agreement is possible in any type of case, but if the case involves a right to jury trial, this is waived by stipulating to a referee. ORS 17.725, covering the availability of a referee upon motion, was restricted to rather narrow categories. This rule allows the court to utilize a reference in any type of case. It should however be noted that:

(1) The procedure is only available in cases being tried to the court, that is, where there is no right to jury

trial. This differs from the federal rule. The procedure however would be available in any non-jury case, whether formerely equitable or legal.

(2) The use of referees cannot be adopted by the court as a routine matter. Except for long account cases and difficult damage computations, the court must make a finding of unusual circumstances. The last two sentences of 65 B.(2) are taken from Federal Rule 53 (b) and have been strictly applied. LaBuy v. Howes Leather Co., 352 U.S. 249 (1937). Note that long account cases are almost the only cases referable under ORS 17.725 and do not involves a right to jury trial. Tribou v. Strowbridge, 7 Or. 156 (1879).

The provisions relating to order of reference, power of the referee, proceedings, and the form and filing of the report (C. through E.(2)) are taken from the federal rule and are more detailed than the ORS sections. They give the court a great deal of flexibility in utilization of the referee. The provisions of ORS 45.050 for deposition reference are unnecessary and would be superseded. The rule attempts to avoid delay, which is one of the principal difficulties with reference. The referee is required to begin meeting with the parties in 20 days, 65 D.(1)(a), and to act with all reasonable diligence. If the referee delays the proceeding, any party may go to the judge for an order requiring the referee to move faster. 65 D.(1)(b). Also, the referee cannot hold his or her report to force payment of fees. 65 A.(2).

Subsection E.(3) is new and differs both from existing Oregon practice and the federal rule. Under ORS 17.765 the referee's report is to be treated as a jury verdict upon a motion to set aside. The federal rule says the court may not accept the master's findings of fact "unless clearly erroneous." This rule makes the referee's findings of fact advisory; that is, the court would treat such findings as the equivalent of an advisory jury verdict. The court could accept the findings of fact, but would not be bound. After examination of the report and the transcript and evidence submitted, the court could disagree with the referee. The reason for this approach is to leave ultimate responsibility for decisions of fact with the trial judge. One criticism of the reference procedure is that it deprives the litigants of the decision by a judge. Of course, either in a stipulated or court-ordered reference situation, the parties can stipulate to a different treatment of the referee's findings of fact. 65 E.(4).

RULE 66

SUBMITTED CONTROVERSY

A. Submission without action. Parties to a question in controversy, which might have been the subject of an action with such parties plaintiff and defendant, may submit the question to the determination of a court having subject matter jurisdiction.

A.(1) Contents of submission. The written submission shall consist of an agreed statement of facts upon which the controversy depends, a certificate that the controversy is real and that the submission is made in good faith for the purpose of determining the rights of the parties, and a request for relief.

A.(2) Who must sign the submission. The submission must be signed by all parties or their attorneys as provided in Rule 17.

A.(3) Effect of the submission. From the moment the submission is filed, the court shall treat the controversy as if it is an action pending after a special verdict found. The controversy shall be determined on the agreed case alone, but the court may find facts by inference from the facts agreed to. If the statement of facts in the case is not sufficient to enable the court to enter judgment, the submission shall be dismissed or the court shall allow the filing of an additional statement.

B. Submission of pending case. An action may be submitted at any time before trial, subject to the same requirements and attended by the same results as in a submission without action, and in addition:

B.(1) Pleadings deemed abandoned. Submission shall be an abandonment by all parties of all prior pleadings, and the casue shall stand on the agreed case alone; and

B.(2) Provisional remedies. The submission must provide for any provisional remedy which is to be continued or such remedy shall be deemed waived.

COMMENT

This rule covers the submitted controversies in ORS Chapter 27. Although the procedure overlaps stipulation, admissions, declaratory judgment, and summary judgment in some respects, it provides for entry of judgment (a) without pleading or summons, and (b) with no trial or submission of evidence. The procedure did not exist at common law and a rule is required.

The procedure is the same as ORS Chapter 27. The only changes are: (a) the submission is not verified (this conforms to ORCP 17), and (b) the second sentence of A.(3) was added. This is a clarification taken from N.Y. C.P.L.R. § 2222 (b)4.

Subsection B. was taken from Iowa Code Ann. § 678. The submission after suit differs from a stipulated judgment of dismissal because the parties agree to the facts but leave the decision to the court. For stipulated judgments and dismissals, see ORCP 54 and 67 F.

RULE 67

JUDGMENTS

A. Definitions. "Judgment" as used in these rules is the final determination of the rights of the parties in an action; judgment includes a decree 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. 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 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 maybe 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, in case a return cannot be had, and damages for taking and withholding the same.

E. Judgments in action against parties jointly indebted. 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 aginst 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 indetbted.

F. Judgment by stipulation.

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

F.(2) The stipulation for judgment shall be in writing and filed according to Rule 9 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.

COMMENT

The definition of judgment in 67 A. is taken from ORS 18.010. Under ORCP 1 and 2 the reference to decree is probably unnecessary but is included here for clarity. The separate reference to special proceedings of ORS 18.010 is eliminated, as statutory proceedings are "actions" under ORCP 1. The definition of "order" comes from ORS 18.010(3). See ORCP 14 A. for a definition of "motion."

Section 67 B. is a combination of ORS 18.125(1) and 18.080(2). ORS 18.080(2), which covered the possibility of judgment for admitted amounts exceeding a counterclaim, was previously included with default judgment provisions. The judgment involved is a form of special final judgment not a default judgment, and should be consistent with 67 A.

The procedural merger of law and equity presents the problem of whether the unified procedure follows the former equity or legal rule relating to limitation of relief by the prayer of the complaint. Section 67 C. preserves the essential elements of the prior Oregon practice without reference to law or equity. The general rule, however, is that of equity, where

the relief accorded is not limited by the prayer. Recovery on default is limited to the prayer (ORS 18.080(a) and (b)), except for cases seeking equitable remedies (Kerschner v. Smith, 121 Or. 469, 236 P. 272, 256 P. 195 (1927)), if reasonable notice and opportunity to be heard are given (Leonard v. Bennett, 165 Or. 157, 113 P.2d 732, 106 P.2d 542 (1940)). Note, the limit of relief to the prayer applies for every default, not just defaults for failure to appear. In a case where money damages are claimed, the damages recoverable are limited to the prayer. Note that ORCP 18 B. requires a statement in the prayer of the amount of damages claimed.

Section 67 C. is ORS 18.110. See ORCP 61 D.

Section 67 D. addresses the problem of enforceability of judgments against assets held by a partnership or unincorporated association. Present Oregon rules address this problem through the device of a "joint debtor." Statute, ORS 18.135. Partnerships and associations cannot be sued as entities, but suit must be brought against individual partners or members. To subject partnership or association assets to a judgment, the judgment must be against all partners or association members. ORS 18.135 allows an action to recover for a joint debt upon a contract to proceed to judgment even though not all joint debtors are served; the judgment is enforceable against joint property. In other words, a judgment enforceable against partnership assets can be secured by naming all partners but serving less than all.

This rule addresses the problem by the much simpler and more modern approach of making a partnership or unincorporated association suable in its own name and subject to entry of a judgment against the entity. Note, to accomplish this a new rule defining capacity of partnerships or associations to be sued is added to Rule 26 as section B. and a new service of summons category is added to Rule 7. The rule allows individual partners to be named in addition to the partnership and for the entry of a judgment enforceable against the personal assets of any partner actually served with summons.

The entity approach has a number of advantages. The approach:

(a) avoids the necessity of difficult distinctions between joint and several obligations; in fact, the joint debtor statute did not apply to some joint partnership obligations because it was limited to actions based on contract. ORS 68.270.

(b) simplifies naming of defendants and service of process for partnerships and unincorporated associations with large membership. In some cases a defendant would find it difficult, if not impossible, to ascertain the names and locations of thousands of members of a multi-state partnership or association. Although in most cases the members would be subject to service of summons under ORCP 4, the difficulty and expense of serving such large numbers of people could be prohibitive.

(c) Litigation and judgment in the name of the partnership or association is more consistent with other treatment of such groups. If a partnership can own property and have bank accounts in its own name, it is simpler to have judgments entered against that partnership in its name.

The language used in 67 E.(1) and 26 B. was adapted from section 388 of the California Code of Civil Procedure.

ORS 18.135 referred to action against any joint obligors, not just partnerships or associations. This rule covers only the ability to create judgments enforceable against partnerships or associations. ORS 18.135 subjected a person, who was never actually served and perhaps not aware of a suit, to the effect of a judgment where another joint obligor was served. From a due process standpoint, this is defensible for partnerships and associations from an agency theory. That would not apply to other joint obligation situations.

Rule 67 E.(2) addresses a problem not specifically covered under ORS 18.135. Under the common law theories of joint obligations of any type, including those of partnerships and associations, there was a requirement that judgment must be against all persons jointly obligated. Therefore, any suit or recovery against less than all joint obligors extinguished the claim against the other joint obligors. See Ryckman v. Manerud, 68 Or. 350, 136 P. 826 (1913); Wheatley v. Halvorson, 215 Or. 396, 333 P.2d 739, 335 P.2d 398 (1959). The same reasoning could be extended to say a default or dismissal against less than all partners or joint debtors extinguished the obligation. This is inconsistent with modern concepts of joinder and judgments and could be an unnecessary procedural trap. The rule does not affect the substantive nature of the joint obligation but merely says there is no procedural rule that prohibits separate judgment. Note, E.(2) is not limited to partnerships or joint ventures but covers any joint obligation.

ORS 18.135 also dealt with whether joint debtors could be joined and proceeded against in a case. ORCP 28 and 29 governing permissive and compulsory joinder of parties already cover this and should be the applicable rules. The joinder aspects of ORS 18.136 are unnecessary and are eliminated.

Section F. provides the procedure for specific submission to a judgment formerly referred to as confession of judgment after suit. ORS 26.010 through 26.040. The procedure is basically stipulation to an agreed judgment. Note, this is not a confession of judgment based upon prior contractual agreement, which is eliminated, but an actual stipulation to judgment after action.

RULE 68

ALLOWANCE AND TAXATION OF ATTORNEY FEES, COSTS, AND DISBURSEMENTS

A. Definitions. As used in this rule:

A.(1) Costs and attorney fees. "Costs" are fixed sums provided by statute, intended to indemnify a party, and include attorney fees, where payment of such fees is provided by agreement, rule, or law. "Attorney fees" are the reasonable and necessary value of legal services related to the prosecution or defense of an action.

A.(2) 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. 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. 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 allegation shall be taken as substantially denied and no responsive pleading shall be necessary. The party against whom the award of attorney fees is sought may admit liability for attorney fees under Rule 45, may affirmatively admit liability, or may object to the entry of attorney fees under paragraph C.(4)(b) of this rule. 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.(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) Costs, except for attorney fees, shall be entered as part of a judgment by the clerk of court or person exercising the duties of that office. Attorney fees and disbursements (whether the disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:

C.(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and the disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and

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

C.(4)(b) Objections. A party may object to the entry of attorney fees, costs, and disbursements as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the filing of the statement of the amount of such items under paragraph C.(4)(a). 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

This rule is designed to create a uniform procedure for determining the existence of a right to attorney fees. There has been substantial confusion in Oregon whether particular kinds of attorney fee claims must be pleaded and proved at trial, or could be submitted after trial. The Senate Judiciary Committee of the 1979 Legislative Assembly asked the Council to review the matter and to develop a uniform method of handling attorney fees.

This rule uses the bill of disbursements method for almost all attorney fee claims. The Council adopted the post trial procedure because it is the simplest and separates a collateral controversy from the main trial. It also makes sense to deal with attorney fees after the case is tried.

The rule also develops a uniform provision for entitlement to costs and disbursements. This is necessary because of the procedural merger of law and equity. The rule is the prior rule in equity and for special proceedings. The rule does not deal with right to receive attorney fees. This was felt to be a substantive rather than a procedural matter. For the same reason, the rule does not cover the amount of costs or fees.

Section A. of the rule retains the existing Oregon distinction between costs and disbursements. It also defines attorney fees. The costs definition of ORS 20.010 is changed slightly to clarify the relationship to attorney fees. The disbursement definition combines ORS 20.020 and 20.055.

Section B. would supersede ORS 20.040, 20.060, and the last sentence of 20.100. The rule is the flexible standard formerly applied to equity cases. The language used was adapted from Michigan General Court Rule 526.1.

Section C.(1) makes almost all claims for attorney fees subject to this rule. There are more than 150 statutes governing right to attorney fees. Rather than attempt to change the language of all the statutes, the rule simply provides a procedure for assessing such fees no matter what source is relied upon as providing the right to such fees. There are a few specific exceptions where the rule procedure would not be appropriate. Note, the rule is designed to provide a procedure for claiming and proving attorney fees which are an incident of the action; therefore, pre-existing attorney fees which are actually claimed as damages are excluded. 68 C.(1)(b). The rule also applies only to costs and fees which are included in the judgment. Other fees and costs, such as, discovery sanctions, which are part of a court order and enforceable by contempt, would not be covered by the rule.

The Council felt that a party should receive some warning of a potential claim for attorney fees prior to trial, even though the decision on amount and entitlement to these fees is postponed until a bill of disbursements is filed. Requiring a pleading allegation of a right to attorney fees in 68 C.(2) also allows the opponent to test the right to such fees by a pretrial motion.

C.(4) and (5) preserves the existing costs and disbursements procedure from ORS 20.210 through 20.030. The specific claim for attorney fees is included in the bill of disbursements. The Council increased the time for objection to the bill of disbursements from five days after expiration of the time to file the bill of disbursements to 15 days after filing of a bill of disbursements. The last sentence of C.(4)(c) requiring an opportunity to present evidence on affidavits was added. The provision for stay of enforcement upon objection in C.(5) is new.

C.(6) is new and provides for costs and disbursement assessment in cases where multiple judgments are entered under 67 B.

RULE 69

DEFAULT

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

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.

B.(3) Non-military affidavit required. 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 provisions 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

This rule is a combination of ORS 18.080 and Federal Rule 55. Under section 69 A. all defaults by a party against whom judgment is sought would be covered by this rule. ORS 18.080 referred only to failure to answer. A failure to file responsive pleading, or failure to appear and defend at trial, or an ordered default under Rule 46, would be regulated by this rule. Judgments of dismissal against a party seeking judgment are regulated by Rule 54.

Section 67 B. regulates entry of judgment after default. Subsection B.(1) is more restrictive, in allowing entry by the clerk, than was ORS 18.080(a). The requirements of claim for a sum certain and jurisdiction based upon personal service within the state were added. The rule was drafted to avoid asking the clerk to make any decisions about the existence of jurisdiction or amount of the judgment.

In all other cases the court must order the entry of a default judgment. Subsection 69 B.(2) is a modified form of

Federal Rule 55 (b)(2). The limitation on judgments against infants and incompetents is new. The section requires 10 days' notice for any default other than failure to appear. The third sentence of subsection 69 B.(2) was intended to preserve the existing Oregon requirement for hearing before entry of a default judgment. See State ex rel Nilsen v. Cushing, 253 Or. 262, 453 P.2d 945 (1969). The fourth sentence specifically allows a court to use affidavits rather than require testimony. Finally, the rule allows the court to have a jury decide factual issues related to the default judgment, but does not require a jury in any case. ORS 18.080 did require a jury, upon demand, in some circumstances. There is no constitutional right to a jury trial after default, and the Council changed the rule. Deane v. Willamette Bridge Co., 22 Or. 167 (1892).

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, except judgments need not be set forth in a separate document if the local rules of a court so provide. 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 perfroming the duties of that office.

B. Entry of judgments.

B.(1) Filing; entry; notice. All judgments shall be filed and shall be entered by the clerk. The clerk 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) Judgment effective upon entry. 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) Time for entry. The clerk 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.

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

This rule deals with several aspects of the crucial question of identification of a judgment and its effective date. Rule 70 A. defines "judgment" as a written document signed by the judge, or in the limited default area under 69 B.(1), by the clerk. The rule also directs, as a general rule, that the judgment document be separate and plainly labelled as such. This is the approach of Federal Rule 58 and is designed to avoid any question whether a written opinion or order of a court is or is not a judgment. The specificity of parties and relief language comes from ORS 18.030 and the statement that no particular form of words is required conforms to Oregon case law. Esselstyn v. Casteel, 205 Or. 344, 228 P.2d 214 (1955).

Under section 70 B. the important question addressed is exactly when the judgment becomes effective. Practically,

the choice is between entry (which is a formal entry in the court records by the clerk, ORS 7.030) and filing (which is "delivery of the document to the clerk of the court with the intent that it be filed.") Charco, Inc. v. Cohn, 242 Or. 566, 571, 411 P.2d 264 (1966). See Washington Rules, 58 (b). There has been some confusion in the past over the effective date of a judgment for default purposes. Most provisions in ORS refer to entry as the key date, e.g., ORS 23.030, 18.080, 18.510, 202.10. On several occasions, however, the Oregon Supreme Court has interpreted "entry" to mean filing. Charco, Inc. v. Cohn, supra; Highway Commission v. Fisch-Or, Inc., 241 Or. 412, 399 P.2d 1011, 406 P.2d 539 (1965). Because of this, the Council used "filing" as the point when the time limit for filing or action upon motion for new trial or judgment notwithstanding the verdict begins to run. ORCP 63 D.; 64 F. and G.

The Council felt that it was extremely important that the effective date of a judgment be the same for all purposes. The Council believed that entry was a better choice for several reasons:

(1) The time for appeal beings to run at entry. ORS 69.029. Change of the appeal statute would be beyond Council rulemaking authority.

(2) Entry is a far more certain point. The entry is part of an official record, whereas filing is not itself a record. If the date of filing is not stamped on the document, the filing date may be difficult to determine. There can be considerable confusion when filing takes place. See Vandermeer v. Pacific Northwest Development, 274 Or. 221, 223-224, 543 P.2d 868 (1976).

(3) There is a notice provision for entry. ORS 18.030 requires notice by the clerk to all parties not in default of the entry; that is retained in this rule as subsection B.(1). There is no requirement of notice of the exact date of filing a judgment.

Therefore, subsection B.(2) states generally that a judgment is only effective when entered. Note, the entry approach will require the modification of ORCP 63 D. and 64 F. and G. from filing to entry. The reference to ORS 3.070 is necessary because the Charco, Inc. v. Cohn opinion refers to that statute as a basis for interpreting entry to mean filing.

Subsection 70 B.(3) is based on ORS 18.040 and 18.050. The ORS section referred to entry "within the day," which was interpreted to mean 24 hours. Casner v. Hoskins, 64 Or. 254, 128 P. 841 (1913).

Section 70 C. is new but reflects existing practice. It was felt that who would prepare the judgment form should be up to the court, but if an attorney is submitting a form of judgment to the court, it should be served on other parties.

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 pending 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.

B.(1) By motion. 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: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F.; (~~d~~ c) fraud, misrepresentation, or other misconduct of an adverse party; (d) the judgment is void; or (e) 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 (a), (b), and (c) not more than 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 does not affect the finality of a judgment or suspend its operation.

B.(2) When appeal pending. With leave of the appellate court, a motion under this section 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.

C. Relief from judgment by other means. 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.

D. Writs and bills abolished. 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

This rule is intended to provide a comprehensive procedure for vacating a judgment by motion to replace ORS 18.160. The rule also regulates nunc pro tunc entry of judgments, which are not covered by existing ORS sections. The rule is a modified form of Federal Rule 60, adapted to Oregon cases and practice.

Section A. codifies existing Oregon practice and was taken from Federal Rule 60 (a). The last sentence is not in the federal rule. Under existing Oregon law, a trial court may change a judgment during the pendency of an appeal to correct the record. Caveny v. Asheim, 202 Or. 195, 274 P.2d 281 (1954). The appellate court should be aware of any change in the judgment order, particularly if there is a question whether the change is clerical or substantive.

Section B.(1) uses the same motion procedure as ORS 18.160. Paragraph B.(1)(a) eliminates the requirement in ORS 18.160 that the mistake be that of the moving party. This would allow vacation based upon error by the trial judge, at least of an unusual nature, after the time for a motion for new trial has elapsed. Paragraph B.(1)(b) explicitly authorizes a motion based upon newly discovered evidence. Wells, Fargo & Co. v. Wall, 1 Or. 295 (1860). Paragraph (c) clarifies that fraud can be used as a basis for a motion to vacate. Compare Nichols v. Nichols, 174 Or. 390, 396, 143 P.2d 663, 149 P.2d 572 (1944); Miller v. Miller, 228 Or. 301, 307, 365 P.2d 86 (1961). Note, the provision differs from the federal rule and does not eliminate the distinction between extrinsic and intrinsic fraud. Paragraph (d) codifies cases allowing motion to vacate a void judgment. State ex rel Karr v. Shorey, 281 Or. 453, 466, 575 P.2d 981 (1978). Paragraph (e) is new but simply codifies the common law remedy of audita querela (available in Oregon by motion invoking the inherent power of the court). Herrick v. Wallace, 114 Or. 520, 236 P.2d 471 (1925). The reference to "no longer equitable" restates the rule that a judgment with prospective operation may be subject to change based upon changed conditions. Farmers' Loan Co. v. Oregon Pac. R. Co., 28 Or. 44, 40 P. 1089 (1895).

The one-year time limit of ORS 18.160 is retained for paragraphs (a), (b), and (c). The time limit is neither necessary nor desirable for paragraphs (d) and (e). The rule also requires that any motion be made in a reasonable time, which would be the same as the existing due diligence requirement in Oregon. This would not apply to ground (d). The most important change in the time limits is the reference to "filing," instead of granting the motion.

The provisions relating to service of the motion are not in the federal rule and were drafted to conform to Herrick v. Wallace, supra.

Under Oregon case law, during the pendency of an appeal the trial judge could not vacate a judgment for the reasons covered in section B. Caveny v. Asheim, supra. Since there is a one-year time limit upon filing the motion, it should be possible to file such a motion to await disposition of the appeal; this is provided by subsection B.(2). Since the motion might affect the appellate court's consideration of the case, the rule requires notice and leave from the appellate court. After the termination of the appeal there is no reason to require permission of the appellate court. See Nessley v. Ladd, 30 Or. 564, 48 P. 420 (1897).

Subsection B.(3) simply recognizes the other existing methods of seeking vacation of judgment, e.g., separate suit for equitable relief, Oregon-Washington R. & Navigation Co. v. Reid, 155 Or. 602, 65 P.2d 664 (1937), and a motion invoking the inherent power of a court to vacate a judgment within a reasonable time. ORS 1.055; Braat v. Andrews, 266 Or. 537, 514 P.2d 540 (1973).

Coram nobis, coram vobis, and audita querela were common law procedures for vacating judgments. Bills of review and bills in the nature of review were used by the courts of equity. The same grounds for vacation are covered by this rule and the earlier procedures are specifically eliminated to avoid confusion.

RULE 72

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 and during the pendency of such appeal.

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 to which it is a party or is responsible for payment or performance of the judgment.

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 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

Existing ORS sections do not clearly cover stay of enforcement of judgment, other than providing for an automatic stay by the supersedeas bond. ORS 19.056, et seq. This rule does not change the supersedeas bond provisions or affect the power of the appellate court to grant a stay pending appeal, but deals with the power of the trial court to stay enforcement of judgment.

Section A. is taken from Utah Rule of Civil Procedure 62(c) and restates existing Oregon law. Helms Groover & Dubber Co. v. Copenhagen, 93 Or. 410, 177 P. 935 (1919), 38 Or. L. Rev. 335 (1939). Note, this only applies to the court granting judgment. In a separate suit to enjoin enforcement of judgment, another court could issue a temporary or permanent injunction prohibiting enforcement. The last sentence is not in the Utah rule but states the existing Oregon rule. State ex rel. Peterkort v. Bohannon, 210 Or. 215, 309 P.2d 800 (1957).

Section C. gives the trial court some authority to deal with the situation involving a negative injunction which cannot be suspended by a supersedeas bond. Helms Groover & Dubber Co. v. Copenhagen, supra. Treadgold v. Willard, 81 Or. 658, 160 P. 803 (1916). Also, where the trial judge denies injunctive relief, a temporary injunction may still be appropriate

pending appeal to preserve the status quo. This section allows the trial judge to act after judgment but before the filing of the notice of appeal. After appeal, the trial judge's action granting a stay would be subject to modification by the appellate court.

Section D. is new. A bond is only necessary where the party against whom judgment is entered might not perform. Where a public body would be responsible, no bond is needed. See ORS 23.010 and 20.140.

Section E. is taken from ORS 18.125(2).

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.

* * *

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

This provides a way of serving summons on a partnership consistent with ORCP 26 B. and 67 E.

RULE 22

COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS

A. Counterclaims.

A.(1) Each defendant may set forth as many counterclaims, both legal and equitable, as such defendant may have against a plaintiff.

A.(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

COMMENT

The new rules supersede ORS 18.100 as unnecessary in view of ORCP 22 A. This language is implicit in the existing rule but is taken from Federal Rule 13(c) to avoid any problem with elimination of ORS 18.100.

Rule 26

REAL PARTY IN INTEREST AND ACTIONS AGAINST PARTNERSHIPS AND ASSOCIATIONS

* * *

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.

COMMENT

This provides the basis for suit of a partnership in its own name. See ORCP 67 E.

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 of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

* * *

COMMENT

See discussion in Comment to proposed Rule 70.

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 concousively 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

See discussion in Comment to proposed Rule 70.

20.100 Costs on motion, and in cases not otherwise provided for. A sum not exceeding $5 as costs may be allowed to the prevailing party on a motion, in the discretion of the court, and may be absolute or directed to abide the event of the action or suit. [In any action, suit or proceeding as to which the allowance and recovery of costs may not be provided for by statute, costs may be allowed or not, according to the measure prescribed in this chapter, and apportioned among the parties, in the discretion of the court.]

20.220 [Hearing and determination of objections; appeal. (1) As soon as convenient after objections are filed against a statement of disbursements, the court or judge thereof in which the action, suit or proceeding is pending shall, without a jury, proceed to hear and determine all the issues involved by the statement and objections. At such hearing the court or judge may examine any record or paper on file in the cause, and either party may produce relevant or competent testimony, orally or by deposition, or otherwise, to sustain the issues on his behalf. Either party may except to a ruling upon any question of law made at such hearing as in other cases.

(2) As soon as convenient after the hearing, the court or judge shall make and file with the clerk of the court an itemized statement of the costs and disbursements as allowed, and shall render judgment thereon accordingly for the party in whose favor allowed. No other finding or conclusion of law or fact shall be necessary, and the same shall be final and conclusive as to all questions of fact. The issues arising on the statement of disbursements and the objections thereto shall be heard and determined without either party recovering further costs or disbursements from the other, except that in the discretion of the court or judge a sum not exceeding $5 as costs, but without further disbursements, may be allowed to the party prevailing on the issues arising on the statement and objections thereto.]

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

20.220 Appeal of judgment on the allowance of taxation of costs and disbursements.

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

MOTION

The subcommittee moves that the Council on Court Procedures recommend that the Oregon Commission of the Judicial Branch prepare and submit a bill to the 1981 Legislative Assembly which would provide state funds to pay referees appointed in civil cases pursuant to proposed ORCP 65.

COMMENT

This motion would suggest that the state pay referees rather than have them be paid by litigants as provided in proposed Rule 65 A.(2). The reason for this recommendation is that in some cases referees can save substantial judicial time, and compensation of referees should be less expensive than having additional judges. The financing is outside the rulemaking power of the Council. We have been informed that the Commission will be submitting a number of bills dealing with state financing of the court system to the 1981 Legislature. The Commission would be the appropriate agency to consider the matter.

DISTRIBUTION CHART

ORS to Oregon Rules of Civil Procedure

ORS CHAPTER 17	ORCP
17.003	None
17.705	65 C.
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18.320-.510	Remain as statutes
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20.070	Remains as statute
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20.096	" " "
20.097	" " "
20.098	" " "
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PROPOSED FORM OF RULES

FOR

PROVISIONAL REMEDIES

submitted by

ENFORCEMENT OF JUDGMENTS SUBCOMMITTEE

(Together with proposed comments, conforming changes to ORS and distribution of statutes superseded)

July 21, 1980

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RULE 78

ORDER OR JUDGMENTS FOR SPECIFIC ACTS

A. Judgment requiring act. If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law.

B. Enforcement; contempt. The court or judge thereof may enforce an order or judgment directing a party to perform a specific act by punishing the party refusing or neglecting to comply therewith, as for a contempt as provided in ORS 33.010 through 33.050.

C. Application. Section B. of this rule does not apply to a judgment for the payment of money, except orders and judgments for the payment of suit money, alimony, and money for support, maintenance, nurture, education, or attorney fees, in:

C.(1) Actions for dissolutions of marriages.

C.(2) Actions for separation from bed and board.

C.(3) Proceedings under ORS 108.110 and 108.1]0.

D. Contempt proceeding. As an alternative to the independent proceeding contemplated by ORS 33.010 through 33.150, when a contempt consists of disobedience of an injunction or other judgment or order of court in a civil action, citation for contempt may be by motion in the action in which such order was made and the determination respecting punishment made after a show cause hearing. Provided however:

D.(1) Notice of the show cause hearing shall be served in the manner of a summons;

D.(2) Punishment for contempt shall be limited as provided in ORS 33.020.

D.(3) The party cited for contempt shall have right to counsel as provided in ORS 33.095.

COMMENT

Although the ORCP do not cover enforcement of money judgments, this provision is included because it involves enforcement of all court orders, not only final judgment. See ORCP 67 A.

Section A. is the equivalent of ORS 23.020(1), but language adapted from Federal Rule 70 was used. The ORS provision said that after a specified time the "judgment" was "deemed to be equivalent" to the act. That seems confusing and could produce an ambiguous record. The federal approach requires the court to have the act done or actually do it in the judgment.

Section B. is ORS 23.020(2) with the specific reference to ORS Chapter 33 added.

Section C. was taken from ORS 23.020. The ORS language forbidding punishment by contempt for failure to obey a court "order" was eliminated. If taken literally, it would prohibit enforcement of any interlocutory order for payment of money by contempt, e.g., discovery sanctions under Rule 46 or orders under Rule 36 C. Since such orders are not judgments, they are not enforceable by execution. See ORCP 67 A.

Section D. is new and authorizes citation for contempt by motion, as an alternative to an independent proceeding under ORS chapter 33. The motion practice was the traditional chancery procedure.

RULE 79

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 83.

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 atttorney can be heard in opposition, and

B.(1)(b) The applicant or applicant's attorney submits an affidavit setting forth 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. 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.

E. Scope of rule.

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

E.(2) This rule does not apply to temporary restraining orders or preliminary injunctions granted pursuant to ORCP 83 except for the application of section D. of this rule.

E.(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.

F. The writ of ne exeat is abolished.

COMMENT

This rule replaces ORS Chapter 32. The existing ORS provisions are not complete, do not adequately distinguish between temporary restraining orders and preliminary injunctions, and have never been integrated with the provisional remedies procedure of ORS Chapter 29 (now ORCP 83).

Subsection A.(1) was taken from ORS 32.020(1). The grounds spelled out in subsection A.(2) are identical to ORS 32.040, except reference to a restraining order where a defendant threatens to remove or dispose of property has been eliminated. This change, and the last sentence of paragraph A.(2)(b), make clear that restraining orders to prevent a defendant from frustrating enforcement of a future judgment by disposition of property are covered under the provisional remedies procedure of ORCP 83. See Huntington v. Coffee Associates, 43 Or. App. 595, 603 P.2d 1183 (1979). The procedure in this rule applies principally to the situation where the ultimate remedy sought in the case is a permanent injunction and the plaintiff needs immediate relief.

Note, the definition of ORS 32.010 has been eliminated in an attempt to avoid the impossible task of distinguishing between negative and positive injunctions. Dobbs, Remedies, § 210, pp. 105-106 (1973). See State ex rel Duncan, 191 Or. 475, 497, 230 P.2d 773 (1951).

Sections B. and C. are adapted from Federal Rule 65 (a) and (b). An ex parte restraining order is authorized but only for 10 days. Under Rule 17, a complaint need not be verified, but it could be verified to provide a basis for an order under 79 B.(1)(a). Paragraph B.(2)(b) makes clear that the 10-day limit does not apply in domestic relations cases.

Subsection B.(5) is not in the federal rule and was drafted to avoid the confusion discussed in Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 432 n.7 (1974).

Section D. is taken from Federal Rule 65 (d). Note, the bond requirements are found in ORCP 82.

Section E. covers those types of preliminary injunctions to which the rule has no application at all. Subsection E.(1) covers the Family Abuse Prevention Act. Subsection E.(2) carries out the distinction in section A., between preliminary accelerated injunctive relief and restraining orders designed to preserve a defendant's property to satisfy judgment. Subsection E.(3) is taken out of Federal Rule 65 (e) and is designed to avoid conflict with state and federal acts limiting injunctions in labor relations matters.

The writ of ne exeat was a common law form of restraining order that prevented a person from leaving the jurisdiction. It was explicitly abolished by ORS 34.820, which was repealed in 1979.

RULE 80

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 a circuit court in the following cases:

B.(1) Provisionally, before judgment, on the application of either party, when such person's 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 the 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.

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 dili-

gence, 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 two 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 implica- 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 D.(1) of this rule, the temporary receiver is not thereby converted into a receiver. If a party moves to dissolve or modify the temporary receivership as permitted by subsection C.(6) of this section, 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 C. of this rule, 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 79 C.(2) are also applicable to hearings for appointment of receivers prior to trial.

E. Form of order appointing receivers. Except for an order appointing a temporary receiver, every order or judgment appointing a receiver:

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

E.(2) Time for report. 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) Time to file claims. Shall set a time within which creditors and claimants shall file their claims or be barred; and

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

F. Notice to persons interested in receivership. A receiver appointed after notice and hearing 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.

G. Special notices.

G.(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.

G.(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.

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

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

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

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

G.(3) Form of notices. Notice of any of the proceedings set out in subsections (1) and (2) of this section (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 five 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 five 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.

H. 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.

COMMENT

This rule clarifies the procedure for a receivership now covered by ORS Chapter 31. It adds necessary provisions for notice and hearing. Although some receiverships are post judgment, the rule is included with provisional remedies because of the provisions covering pre-judgment receivership.

Section A. is taken from ORS 31.010. The specific reference to circuit court was added because under ORS 46.060(1)(H), district courts cannot appoint receivers.

Section B. is exactly the same as ORS 31.020. Note, temporary receiverships to preserve a defendant's property are governed here and not under Rule 83 provisional process. See ORCP 81 A.(9). It was felt that a receivership was such a specialized provisional remedy that it should be kept separate.

The present ORS sections do not provide for notice to the defendant and hearing relating to setting up a receivership. Such procedure is required by case law. Anderson v. Robinson, 63 Or. 228, 233, 126 P. 988, 127 P. 546 (1912); Stacy v. McNichols, 76 Or. 167, 144 P. 96, 148 P. 67 (1915). The notice and hearing problems are analogous to temporary injunctions, and sections C. and D. follow a pattern similar to the injunction rule (ORCP 79 B. and C.). The bond requirements for a receivership appear in ORCP 82.

Section E. was adapted from Pennsylvania Rule of Civil Procedure 1533(g) and Rhode Island Rule of Civil Procedure 66 D. Section F. is taken from Washington Superior Court Rule 66(c).

Subsection G.(1) is required by Pacific Lumber Co. v. Prescott, 40 Or. 374, 384, 67 P.2d 207 (1902). Subsections G.(2) and (3) were taken from Washington Superior Court Rules 66 D. and E. Section H. is not covered by ORS and was taken

from Arizona Rule of Civil Procedure 66 C.(3). Note, termination may be controlled by statute. See ORS 311.415 and 652.550.

ORS 31.040(2) was eliminated as unnecessary, and ORS 31.050 would remain as a statute.

RULE 81

DEFINITIONS; NOTICE OF LEVY; SERVICE

A. Definitions. As used in Rules 81-85, unless the context otherwise requires:

A.(1) Attachment. "Attachment" is the procedure by which an unsecured plaintiff obtains a judicial lien on defendant's property prior to judgment.

A.(2) Bank. "Bank" includes commercial and savings banks, trust companies, savings and loan associations, and credit unions.

A.(3) Clerk. "Clerk" means clerk of the court or any person performing the duties of that office.

A.(4) Consumer goods. "Consumer goods" means consumer goods as defined in ORS 79.1090.

A.(5) Consumer transaction. "Consumer transaction" means a transaction in which the defendant obligates himself to pay for goods sold or leased, services rendered or monies loaned, primarily for purposes of the defendant's personal, family, or household use.

A.(6) Issuing officer. "Issuing officer" means any person who on behalf of the court is authorized to issue provisional process.

A.(7) Levy. "Levy" means to create a lien upon property under any judicial writ or process or by any of the

procedures provided by Rules 81-85.

A.(8) Plaintiff and defendant. "Plaintiff" includes any party asserting a claim for relief whether by way of claim, third party claim, cross-claim or counterclaim, and "defendant" includes any person against whom such claim is asserted.

A.(9) Provisional process. "Provisional process" means attachment under Rule 84, claim and delivery under Rule 85, temporary restraining orders, preliminary injunctions, or any other legal or equitable judicial process or remedy which before final judgment enables a plaintiff, or the court on behalf of the plaintiff, to take possession or control of, or to restrain use or disposition of, or fix a lien on property in which the defendant claims an interest, except an order appointing a provisional receiver.

A.(10) Security interest. "Security interest" means a lien created by agreement, as opposed to a judicial or statutory lien.

A.(11) Sheriff. "Sheriff" includes constable where Rules 81-85 apply to district court proceedings in counties having such an officer.

A.(12) Writ. A "writ" is an order by a court to a sheriff or other official to aid a creditor in attachment.

B. Notice to defendant following levy.

B.(1) Form of notice. Whenever a plaintiff levies on property of a defendant, other than wages held by an employer,

the plaintiff must promptly serve on the defendant, in the manner provided in Rule 9 B., a notice in substantially the following form:

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

_____

Plaintiff	)	No. _____
v.	)	Notice of Levy
_____	)	
Defendant	)	

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

1. Action was commenced against you on _____ for $_____.

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

(E.g.: 1979 Wombat, License #ABC 123

Savings account in Fiduciary Trust &

Savings Co.

Etc.)

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

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

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

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

Name and address of plaintiff or plaintiff's attorney

B.(2) Notice of exemption. If the defendant is a natural person, the notice served shall also contain the following:

B.(2)(a) A statement that a defendant may be entitled to claim that the property levied on is exempt from the claims of the plaintiff;

B.(2)(b) A statement that the forms necessary to claim an exemption are available at the county courthouse at no cost to the defendant.

B.(3) Address of defendant unknown. Where a plaintiff cannot find defendant and knows of no address or office of defendant and with reasonable diligence cannot discover any address or office of defendant, plaintiff shall file an affidavit to that effect.

C. Service of notices; proof of service.

C.(1) Service. Save where some other method is expressly permitted, any notice required to be served by Rules 81-85 may be served in the manner in which a summons may be served.

C.(2) Proof of service. Copies of all notices shall be filed together with proof of service as provided in Rule 9 C.

D. Adverse claimants. A person other than the defendant claiming to be the actual owner of property levied on may move the court for an order establishing the claimant's title, dissolving the plaintiff's lien, or other appropriate relief. After hearing, the court may:

D.(1) Summary release of attachment. In a case where there is no genuine issue as to any material fact and the claimant is entitled to judgment as a matter of law, the court may make an order establishing claimant's title, dissolving the plaintiff's lien, or granting other appropriate relief.

D.(2) Continuation of attachment. In any other case, the court shall order the attachment continued pending judgment. Such order protects the sheriff but is not an adjudication between the claimant and the plaintiff.

COMMENT

This rule provides the general principles applicable to all provisional process covered in Rules 81 through 85.

Subsections A.(1), (2), (3), (8), (11), and (12) are new. Subsections A.(4), (5), and (6) were taken from ORS 29.020. Subsection A.(7) is based on ORS 24.010(3), and subsection A.(10) is based on 11 U.S.C. § 101 (37). The most important definition is A.(9) which was adapted from ORS 29.025(5) and clarifies the relationship between provisional process and other temporary restraining orders or provisional receiverships.

Section B. is taken from ORS 29.178. ORS 29.178(2)(b) and (c) were eliminated. It is extremely difficult to give notice of all possible exemptions and specify a procedure for claiming exemptions; such notices would generally be inaccurate.

Sections C. and D. are new. Section D. is designed to provide at least some summary procedure for release of attachment which did not infringe upon jury trial rights in the dispute between the attaching plaintiff and a claimant. Although the claimant of the property would have a right to a separate suit to determine title and right to possession, that might not be sufficient when immediate action is needed. Section D. allows the court, which authorized the provisional process, to act after summary hearing, if there are no facts in dispute and claimant is clearly entitled to relief. See ORCP 47. This is a more reasonable approach than the seldom used sheriff's jury provided in ORS 23.320 and 23.330.

RULE 82

SECURITY; BONDS AND UNDERTAKINGS; JUSTIFICATION OF SURETIES

A.(1) Restraining orders; preliminary injunctions. 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.

A.(2) When no security required. No security will be required under this section where:

A.(2)(a) A restraining order or preliminary injunction is sought to protect a person from violent or threatening behavior; or

A.(2)(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; or

A.(2)(c) ORS 22.010 does not require it.

A.(3) Receivers. No receiver shall be appointed except upon the giving of security by the receiver in such sum as the court deems proper for the payment of any costs, damages, and attorney fees as may be sustained or suffered by any party due to the wrongful act of the receiver.

A.(4) Attachment or claim and delivery bond.

A.(4)(a) Before any property is attached or taken by the sheriff under Rule 85, the plaintiff must file with the clerk a surety bond in a sum not less than $100, and equal to the amount for which the plaintiff demands judgment, and to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which the defendant may sustain by reason of the attachment or taking, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the bond.

A.(4)(b) Upon motion by the defendant and a showing that defendant's potential costs or damages exceed the amount of the bond, the court may require the plaintiff to give additional security.

A.(4)(c) No bond shall be required before property is taken by the sheriff under Rule 85, if the court, in the order authorizing issuance of provisional process finds, that there is probable cause for sustaining an underlying claim and such claim is that defendant acquired the property contrary to law.

A.(5) Other provisional process. No other provisional process shall issue except upon the giving of security by the plaintiff in such sum as the court deems proper, for payment of such costs, damages, and attorney fees as may be incurred or suffered by any party who is wrongfully damages by such prorivional process.

A.(6) Form of security or bond. Unless otherwise ordered by the court under subsection (6) of this section, any

security or bond provided for by these rules shall be in the form of a security bond issued by a corporate surety qualified by law to issue surety insurance as defined in ORS 731.186.

A.(7) Modification of security requirements by court. The court may waive, reduce, or limit any security or bond provided by these rules, or may authorize a non-corporate surety bond or deposit in lieu of bond or require other security, upon a showing of good cause, including indigency, and on such terms as may be just and equitable.

B. Security; proceedings against sureties. Whenever these rules or other rule or statute require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as such surety's agent upon whom any papers affecting his liability on the bond or undertaking may be served. Any surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

C. Approval by clerk. Except where approval by a judge is otherwise required, the clerk is authorized to approve all undertakings, bonds, and stipulations of security given in the form and amount prescribed by statute, rule, or order of the court, where the same are executed by a corporate surety under D.(2) of this rule.

D. Qualifications of sureties.

D.(1) Individuals. Each individual surety must be a resident of the state. Each must be worth the sum specified in the undertaking, exclusive of property exempt from execution, and over and above all just debts and liabilities, except that where there are more than two sureties, each may be worth a lesser amount if the total net worth of all of them is equal to twice the sum specified in the undertaking. No attorney at law, peace officer, clerk of any court, or other officer of any court is qualified to be surety on the undertaking.

D.(2) Corporations. A corporate surety must be qualified by law to issue surety insurance as defined in ORS 731.186.

E. Affidavits of sureties.

E.(1) Individuals. The bond or undertaking must contain an affidavit of each surety which shall state that such surety possesses the qualifications prescribed by section D. of this rule.

E.(2) Corporations. The bond or undertaking of a corporate surety must contain affidavits showing the authority of the agent to act for the corporation and swearing that the

corporation is qualified to issue surety insurance as defined in ORS 731.186.

E.(3) Service. When a bond or undertaking is given for the benefit of a party, a copy of such bond or undertaking shall be served on that party promptly in the manner prescribed in Rule 9. Proof of service thereof shall thereupon be filed promptly in the court in which the bond or undertaking has been filed.

F. Objections to sureties. If the party for whose benefit a bond or undertaking is taken is not satisfied with the sufficiency of the sureties, that party may, within 10 days after the receipt of a copy of the bond, serve upon the officer taking the bond and the party giving the bond, or the attorney for the party giving the bond, a notice that the party for whose benefit the bond is taken objects to the sufficiency of such sureties. If the party for whose benefit the bond is taken fails to do so, that party is deemed to have waived all objection to the sureties.

G. Hearing on objections to sureties.

G.(1) Request for hearing. Notice of objections to a surety as provided in section F. shall be filed in the form of a motion for hearing on objections to the bond. Upon demand of the objecting party, each surety shall appear at the hearing of

such motion and be subject to examination as to such surety's pecuniary responsibility or the validity of the execution of the bond. Upon hearing of such motion, the court may approve or reject the bond as filed or require such amendment, substitute or additional bond as the circumstances shall warrant.

G.(2) Information to be furnished. Sureties on any bond or undertaking shall furnish such information as may be required by the judge approving the same.

G.(3) Surety insurers. It shall be sufficient justification for a surety insurer when examined as to its qualifications to exhibit the certificate of authority issued to it by the Insurance Commissioner or a certified copy thereof.

COMMENT

This rule has most of the bond requirements for provisional remedies in ORCP 79-85. It also contains some general rules on the form of security when required, and general rules for justification of sureties.

Subsections A.(1) through A.(5) state when bonds will be required for various provisional remedies. Subsections A.(1) was taken from Federal Rule 65 (c). The exceptions in A.(2) are those in ORS 32.020(3). Note, this bond requirement would apply to injunctions and restraining orders both under ORCP 79 and 83. Subsection A.(3) is adapted from ORS 31.030. Paragraph A.(4)(a) is taken from ORS 29.130. Paragraph A.(4)(b) recognizes that potential damage to a defendant is not necessarily related to the size of plaintiff's claim. Note, under this section the bond requirement applies to claim and delivery as well as attachment. The existing provisions for claim and delivery do not require a bond. Paragraph A.(4)(c) is new and recognizes that a bond should not be required in claim and delivery when the underlying claim is a wrongful taking. No bond should be necessary to recover stolen property. See paragraph A.(2)(b). Since under ORCP 83 the court must determine that there is probable cause the underlying claim has validity before claim and delivery is possible, the basis of the claim can be easily determined. Subsection A.(5)

is new and makes clear that a bond is required for all provisional process no matter how labelled. The definition of provisional process is found in ORCP 83 A.(9).

Subsections A.(6) and A.(7) apply to all bonds required by the ORCP, not simply to those required by subsections A.(1) through A.(5) of this rule. Subsection A.(6) is new. Subsection A.(7) was adapted from ORS 32.020(2). Note, ORS Chapter 22 allows deposit in lieu of bond without court order in some circumstances.

Sections B. through G. apply to all bonds in trial level civil proceedings, whether required by ORCP or ORS. Section B. was adapted from Federal Rule 65.1 and authorizes a supplementary procedure to enforce the bond. The procedure is analogous to that provided for undertakings on appeal. ORS 19.040(3) and ORS 19.190(2). This would not prohibit an independent action on the bond. Lonogan v. Jackson, 229 Or. 205, 366 P.2d 723 (1961). Sections C. through G. were adapted from Alaska Rules of Civil Procedure 80 and Michigan General Court Rule 763.4.

RULE 83

PROVISIONAL PROCESS

A. Requirements for issuance. To obtain an order for issuance of provisional process the plaintiff shall file with the clerk of the court from which such process is sought an affidavit or sworn petition requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff that the action is one in which provisional process may issue, and

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

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

A.(3) A designation of the particular provisional process for which an order is sought; if it is claim and delivery, a description of the claimed property in particularity sufficient to make possible its identification, and the plaintiff's estimate of the value and location of the property; if is a restraining order, a statement of the particular acts sought to be restrained.

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

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

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

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

A.(8) If the plaintiff claims that the defendant has waived his right to be heard, a copy of the writing evidencing such waiver and a statement of when and in what manner the waiver occurred;

A.(9) If provisional process is based on notice of a bulk transfer under ORS chapter 76 or a similar statute or provision of law, a copy of the notice;

A.(10) Facts, if any, which tend to establish that there is a substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser.

A.(11) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

A.(12) Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

A.(13) That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

B. Provisional process prohibited in certain consumer transactions.

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

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

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

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

D. Effect of notice of bulk transfer. Subject to section B., if the court finds that with respect to property of the defendant notice of bulk transfer under ORS chapter 76 or a similar statute or provision of law has been given and that the

(Page 35 omitted)

time for possession by the transferee has not passed, the court shall order issuance of provisional process.

E. Issuance of provisional process where damage to proeprty threatened. Subject to section B., if the court finds that before hearing on a show cause order the defendant or other person in possession or control of the claimed property is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser or that the defendant or other person in possession or control of the claimed property would not comply with a temporary restraining order, and if Rule 82 A. has been complied with, the court shall order issuance of provisional process in property which probably would be the subject of such destruction, harm, concealment, removal, transfer, or violation.

F. Restraining order to protect property. Subject to section B., 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 Rule 82 A. has been complied with, 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. Such order shall conform to the requirements of Rule 79 D.

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

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

G.(2) The show cause order issued under subsection (1) of this section shall be served on the defendant and on each other person to whom the order is directed in the manner of a summons. A copy of the order and return shall be filed and proof of service made in accordance with Rule 9 C.

G.(3) The order shall:

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

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

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

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

I. Authority of court on sustaining validity of underlying claim; provisional process; restraining order.

I.(1) Subject to section B., if the court on hearing on a show cause order issued under section G. finds that there is probable cause for sustaining the validity of the underlying claim and if Rule 82 A. has been complied with, the court shall order issuance of provisional process. The order shall describe

with particularity the provisional process which may be issued.

I.(2) Subject to section B., if the court on hearing on a show cause order issued under section H. finds that there is probable cause for sustaining the valicity of the underlying claim but that the provisional process sought cannot properly be ordered, and if Rule 82 A. has been complied with, the court in its discretion may continue or issue a restraining order of the nature described in section F. of this rule. If a restraining order issued, it shall conform to the requirements of Rule 79 D.

COMMENT

This rule was taken almost verbatim from ORS 29.025 through 29.075. All provisional remedies intended to preserve a defendant's assets to satisfy an eventual judgment, except provisional receiverships covered by ORCP 80, would require an order by the court conforming to the procedure in this rule. This procedure was developed by a substantial legislative revision of ORS Chapter 29 in 1973 to conform to current constitutional requirements.

For clarity, the first clause was added to A.(3). ORS 29.025(8) and 29.030(2) and (3) were eliminated because they were confusing and not very useful. The rule specifically requires an application by plaintiff, and the court could not issue a provisional process order on its own motion. The language of C.(2) was changed slightly for clarity.

The Council eliminated ORS 29.050. The waiver authorized could still be no more than a printed sale contract or loan agreement. If there is an actual negotiated consensual waiver between freely contracting parties, nothing would prohibit the plaintiff from proving that waiver in an application for a provisional process order. The cross reference to the security requirements of Rule 82 was added to sections F., G., and I. The last sentences of section F. and subsection I.(2) are new. The service requirement for the show cause order in

subsection G.(2) was changed from personal service to a more flexible reference to service in the manner of a summons. The last sentence of I.(1) was added.

RULE 84

ATTACHMENT

A. Actions in which attachment allowed.

A.(1) Order for provisional process. Before a writ of attachment may be issued or any property attached by any means provided by this rule, the plaintiff must obtain an order under Rule 83 that provisional process may issue.

A.(2) Actions in which attachment allowed. The plaintiff, at the time of issuing the summons or any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, in the following cases:

A.(2)(a) An action upon a contract, expressed or implied, for the direct payment of money, when the contract is not secured by mortgage, lien or pledge, or when it is so secured but such security has been rendered nugatory by act of the defendants.

A.(2)(b) An action against a defendant not residing in this state to recover a sum of money as damages for breach of any contract, expressed or implied, other than a contract of marriage.

A.(2)(c) An action against a defendant not residing in this state to recover a sum of money as damages for injury to property in this state.

A.(3) Exception for bank. Notwithstanding subsection (2), no attachment shall be issued against any bank or its property before final judgment as security for the satisfaction of

any judgment that may be recovered against such bank.

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

B.(1) In actions in cirtuic court, real property;

B.(2) Tangible personal property, including negotiable instruments and securities as defined in ORS 78.1020 except a certificate of an account or obligation or interest therein of a savings and loan institution;

B.(3) Debts.

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

C. How property is attached.

C.(1) Real property. Any time after an order that provisional process may issue has been made under Rule 83 in a circuit court action, the plaintiff may obtain a lien on the defendant's real property by filing with the county clerk a claim of lien. Such claim must identify the action by names of parties, docket number, and judgment demand, describe the real property, state that an attachment lien is claimed thereon, and be signed by the plaintiff or the plaintiff's attorney. The clerk shall verify that a provisional process order has been made by countersigning the claim and note thereon and the date and time it was received. The lien arises at the time the claim is delivered to the clerk.

C.(2) Debts.

C.(2)(a) Notice of levy; service on bank. Plaintiff may serve a notice of levy on any person or entity (hereinafter denominated debtor) believed to be obligated or liable to the defendant. Plaintiff's lien shall attach to any obligation or

liability to defendant at the time the notice of levy is served.

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

The plaintiff may also have the sheriff levy by notice of attachment under subparagraph (vii) of paragraph (b) of subsection (4) of this section.

C.(2)(b) Form of notice. The notice of levy shall be prpared and signed by the plaintiff or plaintiff's attorney.

C.(2)(c) Payment to clerk of admitted liability. If the debtor's answer states that a sum of money is owed and presently payable to the defendant, or if the debtor's obligation to the defendant has been established by judgment, the clerk, at the plaintiff's request, shall order the debtor to pay such sum to the clerk up to the amount necessary to secure the plaintiff's claim and notify the debtor that as to any excess the the defendant is released. Upon receipt of such payment the clerk shall hold it pending judgment in the action in which provisional process was authorized. If the debtor under a provisional process is a bank, the clerk, instead of ordering

immediate payment, may direct that the money be held by the bank in a restricted, interest bearing, account pending judgment in the action.

C.(2)(d) Money payable in future. If the debtor's answer states that money is presently owed to the defendant but is not payable until some future time, the plaintiff may apply to the court for an order directing the debtor to pay the money to the clerk when it becomes payable. If money owed by the debtor is payable in instalments, the order may be to pay all, or a part of, future instalments to the clerk for a specified time. The plaintiff and the debtor shall be served, as provided in Rule 9 B., with a notice of an application under this paragraph and given an opportunity to make alternative proposals and to be heard thereon.

C.(2)(e) Effect of payment by debtor. Any amounts paid by or collected from debtor, exclusive of amounts applied to costs assessed against the debgor in connection with the levy, correspondingly extinguish the defendant's claim against the debtor. The clerk shall give the debtor a receipt identifying a payment as money paid under a designated levy.

C.(3) Chattels in which security interests may be recorded.

C.(3)(a) If a consensual security interest within ORS chapter 79.1020 on a chattel would be required by ORS chapter 79.3020 to be perfected by filing a financing statement,

the plaintiff may obtain an attachment lien on such chattel at any time after an order that provisional process may issue has been made by filing a Claim of Lien with the clerk of the court that issued the writ and in the same office or offices that a financing statement would be required to be filed. Such claim shall identify the action by names of parties, court and docket number, and judgment demand, describe the property sufficiently to identify it, state that a provisional process order has been made with the date thereof, and state that an attachment lien is claimed on the property.

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

C.(4) Other personal property.

C.(4)(a) Writ of attachment. A plaintiff desiring to attach an item of tangible personal property not covered by paragraph D.(3)(a), or having obtained authorization under paragraph D.(3)(b), or wishing to have the sheriff serve a notice of levy on a defendant, may require the clerk to issue a writ of attachment. The writ shall be directed to the sheriff of any county in which property of the defendant may be, and shall require the sheriff to attach and safely keep certain described property of the defendant, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with

costs and expenses. The writ may issue to the sheriff of any county in the state and several writs may be issued at the same time to the sheriffs of different counties.

C.(4)(b) Execution of writ.

C.(4)(b)(i) Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be levied on by taking it into the sheriff's custody.

C.(4)(b)(ii) Personal property in the possession of a third person may be attached by service by the sheriff of a notice of attachment upon such third person. Plaintiff's lien shall attach to any property of defendant held by a third person at the time of service of such notice.

C.(4)(b)(iii) If the third party's answer states that property of the defendant is held by the third party, the sheriff at the plaintiff's request shall order the third party to deliver the property into the custody of the sheriff and the sheriff shall hold such property pending judgment in the action in which provisional process was authorized.

C.(4)(b)(iv) If the third party's answer states that the third party has possession of the property of the defendant and the third party is a pledgee, the notice may direct the pledgee to deliver the goods to the plaintiff when the terms of the pledge have been satisfied. The plaintiff may redeem the property from the pledge and add the expense of such redemption to the amount secured by the lien of attachment under which levy was made.

C.(4)(b)(v) If the third party's answer states the third party has possession of the property of defendant and the third party is a lessee, the notice may direct delivery to the sheriff at the termination of the lease and may further direct the lessee to make any rental payments due or coming due under the lease to the sheriff.

C.(4)(b)(vi) When, in the judgment of the sheriff, the cost of removal, transport, or storage of an item of property relative to the amount of the judgment makes physical seizure impractical, an effective levy may be made by inventorying the property and delivering to the defendant or third party in possession of such property a copy of the inventory, a copy of the writ, and a notice signed by the sheriff stating that the property is levied on and directing the defendant or third party in possession of such property to hold the same subject to further order. The sheriff may appoint some person as keeper in connection with such a levy.

C.(4)(b)(vii) Personal property covered by a negotiable document of title may be levied on only in compliance with ORS 77.6020. Debts may also be attached by service by the sheriff of a notice of levy as provided in subsection (2) of this section.

C.(4)(c) Indemnity to sheriff. Whenever a writ of attachment is delivered to the sheriff, if the sheriff has actual notice of any third party claim to the personal property to be levied on or is in doubt as to ownership of the property, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff may

require the plaintiff to file with the sheriff a surety bond, indemnifying the sheriff and the sheriff's bondsmen against any loss or damage by reason of the illegality of any holding or sale on execution, or by reason of damage to any personal property held under attachment. Unless a lesser amount is acceptable to the sheriff, the bond shall be in doubit the amount of the estimated value of the property to be seized.

C.(4)(d) Return. When the writ of attachment has been fully executed or discharged, the sheriff shall return the same, with his proceedings indorsed thereon, to the clerk of the court where the action was commenced, and the sheriff shall make a full inventory of the property attached, and return the same with the writ.

C.(5) Interests in estates. The interest of a distributee in an estate may be attached as provided in ORS 29.175.

C.(6) Form of notice or levy or attachment. Any notice of levy or attachment authorized by this section must:

C.(6)(b) State that an order for provisional process has been made in an action in which a stated amount is claimed. The date on which the order was made allowing provisional process shall be included. This statement must be verified by the signature of the clerk;

C.(6)(c) Require the debtor or third party to return a written answer to the plaintiff within a stated time (not

less than five days) stating the amount and nature of any obligation or liability to the defendant, and the identity of any property of the defendant in the third party's possession, or that no such obligation or liability or property exists. The notice may describe the specific obligation or property that the plaintiff believes to exist;

C.(6)(d) Order the debtor or third party not to pay or deliver to the defendant, or any other person, any money owed to or property owned by the defendant (save payments of any excess above the sum claimed by the plaintiff in the notice) or to settle any claim or cause of action asserted by the defendant against the debtor or third party.

C.(6)(e) Warn that payment, delivery, or settlement in violation of the order may make the debtor or third party personally liable to the plaintiff and that failure to answer, or answer accurately, may result in personal liability for any amount that the plaintiff can prove was owed when the notice was served.

C.(6)(f) Have attached thereto a copy of the provisions of ORS 23.170 and 23.185.

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

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

E.(1) If the debt, credit, or other personal property sought to be levied upon is any bank account, or interest therein, not standing in the name of the defendant or standing in the name of the defendant and one or more other persons, or property in a safe deposit box maintained by a bank and rented by it to a person other than the defendant or to the defendant and one or more other persons, the provisions of this section must be complied with; otherwise the levy shall not be effective for any purpose. The plaintiff shall deliver to such bank a surety bond in an amount not less than twice the amount of the judgment (or prayer of the complaint in case of attachment) indemnifying the persons, other than the defendant whose interest is sought to be levied upon, rightfully entitled to such debt, credit, or other personal property (which persons need not be named specifically in said bond but may be referred to generally in the same manner as in this sentence), against actual damage by reason of the taking of such debt, credit, or other personal property and assuring to such persons the return thereof upon proof of their right thereto.

E.(2) Upon delivery to it of the aforesaid bond the bank shall immediately notify the person in whose name such account stands, other than the defendant, or the person to whom such safe deposit box is rented, other than the defendant, by restricted mail, or the service of said writ and of the delivery to it of said bond.

E.(3) From the time of said levy and the delivery to it of said bond the bank shall not honor a check or other order for the payment of money drawn against the account or other credit levied upon or permit the removal of any of the contents of the safe deposit box for a period of fifteen (15) days from the mailing of said notice or until the levy is sooner released.

E.(4) Any person claiming an interest in the account or safe deposit box contents so levied on may institute proceedings under Rule 70 D. An order under Rule 70 D.(2) or (3) shall be without prejudice to a subsequent action on the surety bond.

E.(5) After fifteen (15) days from the making of the levy and the delivery of said bond, if no proceedings under Rule 70 B. have been commenced, the bank shall comply with the levy, unless it has been sooner released, and shall not be liable to any person by reason of such compliance or by reason of the non-payment of any check or other order for the payment of money drawn against the account or other credit so levied upon and presented while the levy is in force or by reason of the removal, pursuant to the levy, of any of the contents of such safe deposit box or by reason of the refusal of such bank to permit access to such safe deposit box by the renter thereof.

E.(6) Before giving access to any safe deposit vault or box, the bank may demand payment to it of all costs and expenses of opening the safe deposit box and all costs and expenses of repairing any damage to the safe deposit box caused by the opening thereof.

F. Redelivery of attached property; release of liens.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F.(2)(d)(ii) To the court to be held pending judgment.

COMMENT

This rule covers attachment. Section A.(2) was taken from ORS 29.110. The reference to non-residents in paragraph A.(2)(a) was removed as this is already covered by paragraph A.(2)(b). Subsection A.(3) is a revised form of ORS 29.410.

Section B. is new but recites the existing rule. Attachment of real property in a district court remains unavailable. ORS 46.082.

Subsection C.(1) replaces ORS 29.170(1). It eliminates the necessity of issuing a writ to the sheriff and having the sheriff deliver a certificate (presumably prepared by the plaintiff) to the clerk. Subsection C.(2) is also new and also creates a procedure for attaching debts that does not involve a writ and the sheriff. Since the procedure is merely a notice of claim and lien and any property involved is money, the intervention of the sheriff would not be required. If the plaintiff wishes to use the sheriff, that can be done under C.(4). Note that both under this paragraph and under C.(4) there is no procedure for trying a disputed claim or ordering a third party who claims he or she is not indebted to defendant, or does not have defendant's property, to pay or deliver. It was felt that settling the collateral controversy before a judgment actually establishing plaintiff's claim was unnecessary and wasteful. The attachment creates a lien, and it can be enforced after judgment by execution.

Subsection D.(3) is new. Comparable provisions are: California Code of Procedure 48:340-360; Maine R.S. 14.4154, and Minn. Stats. Ann. 550.13. Subsection D.(4) is an expanded version of ORS 29.160-.180. It was easier to refer to ORS 29.175 in subsection D.(5) than to incorporate it entirely in the rule. Subsection D.(6) is derived from ORS 29.380 and 29.390.

Section E. is new and was taken from California Code of Civil Procedure 682(a). Section F. is a revised form of the redelivery provision in ORS 29.220 through 29.230.

RULE 85

CLAIM AND DELIVERY

A. Claim and delivery. In an action to recover the possession of personal property, the plaintiff, at any time after the action is commenced and before judgment, may claim the immediate delivery of such property, as provided in Rule 83.

B. Delivery by sheriff under provisional process order. The order of provisional process issued by the court as provided in Rule 83 may require the sheriff of the county where the property claimed may be to take the property from the defendant or another person and eliver it to the plaintiff.

C. Custody and delivery of property. Upon receipt of the order of provisional process issued by the court as provided in Rule 83, the sheriff shall forthwith take the property described in the order, if it be in the possession of the defendant or another person, and retain it in the sheriff's custody. The sheriff shall keep it in a secure place, and deliver it to the party entitled thereto upon receiving the lawful fees for taking, and the necessary expenses for keeping the same. The court may waive the payment of such fees and expenses upon a showing of indigency.

D. Filing of order by sheriff. The sheriff shall file the order, with the sheriff's proceedings thereon, including an inventory of the property taken, with the clerk

of the court in which the action is pending, within 10 days after taking the property; or, if the clerk resides in another county, shall mail or forward the same within that time.

E. Redelivery. The provisions of Rule84 providing for redelivery of property apply to property seized under this rule.

F. Dismissal prohibited. If property is taken by the sheriff pursuant to this rule, the plaintiff shall not dismiss the action under ORCP 54 A.(1) until 30 days after such taking.

COMMENT

The requirement of a bond before taking is covered in Rule 82. ORS 29.087 is substantive and would remain as a statute.

Section F. is new. Section G. is also new. After securing the property by claim and delivery, if the plaintiff immediately dismisses the action, the defendant must go to the expense of filing a separate action to recover possession even though defendant has a right to possession. Prohibiting dismissal gives the defendant sufficient time to secure an attorney.